

SUPREME COURT OF NIGERIA
FRIDAY 6TH JULY, 2012. SC. 38/2012
CORAM:- F. F. TABAI, M. S. MUNTAKA-COOMASSIE,
J. A. FABIYI, B. RHODES-VIVOUR, O. ARIWOOLA, JJSC

HONOURABLE ESEME EYIBOH APPELLANT
AND
1. MR. DAN ABIA
2. INDEPENDENT NATIONAL
ELECTORAL COMMISSION RESPONDENTS
3. PEOPLES DEMOCRATIC
PARTY

APPEALS - Evidence - Reevaluation - Since the matter does not involve assessment of credibility of witnesses - Supreme Court and Court of Appeal are in a position evaluate the evidence (H1)

APPEALS - Action - Need for consistency - Party must be consistent in his case - As it is unstable of 3rd respondent to admit paras 1-17 of supporting affidavit - But denied para 13 of same (H2)

AFFIDAVITS - Deposition - Not denied expressly - Or by necessary implication - Should be deemed to be admitted (H3)

ELECTION PETITIONS - Crime - Proof - Appellant must file further affidavit - Giving particulars of the dead delegates alleged to have died in violence (H4)

JUDGMENTS - Mistake in - Effect - It is not every mistake that vitiates a judgment - As mistake must be substantial - To warrant intervention of appellate court (H5)

FACTS

By originating motion filed in the Federal High Court Abuja Division, applicant/appellant claimed inter alia against respondents, an order setting aside the primaries held at Uyo Township Stadium on 28th and 29th January 2011 at which 1st respondent was elected as candidate of 3rd respondent for election as member of the Federal

House of Representatives for Eket/Ibeno/Esit/Onna Federal constituency for the 2011 general election.

The originating motion was supported by an affidavit of 33 paragraphs deposed to by appellant. Appellant later filed motion for interlocutory injunction and also filed further affidavits. After addresses of counsel for parties, the learned trial Judge gave judgment allowing the claims of appellant. Aggrieved, 1st respondent filed appeal at the Court of Appeal Abuja. The court allowed the appeal. Appellant was not satisfied with the judgment and has come on appeal to Supreme Court.

ISSUES FOR DETERMINATION

“(i) Having regard to the clear provision of section 36(1) of the Constitution of the Federal Republic of Nigeria 1999, as well as the rule of natural justice, whether or not the entire judgment of the lower court is not vitiated by the unusual, harsh and disparaging pronouncements made by the lower court against the appellant.

(ii) Considering the definitive findings made by the lower court at the preliminary stage of its judgment and before considering the briefs of argument filed by the parties, as well as their oral submissions, coupled with the wrong findings made and conclusions drawn at that stage whether the judgment of the lower court is not bound to be set aside.

(iii) Considering the fact that the lower court never found that the trial High Court was wrong in its interpretation and application of the clear and mandatory provisions of section 87(4)(c)(i) of the Electoral Act and Article 17.2(d) of PDP Constitution, coupled with the fact that no counter claim was presented before the trial High Court by the 1st respondent to warrant the lower court exercising jurisdiction on such a counter claim by way of appeal, whether the lower court was not in error and/or did not act in excess of jurisdiction by setting aside the judgment of the trial High Court.

(iv) Whether the lower court was not in grave error in its dismissal of the preliminary objections raised by the appellant to grounds I and 6 of the 1st respondent’s notice of appeal before it and also in its refusal to countenance and/or pronounce on the preliminary objection by the appellant to the brief of argument of the 3^d respondent.

HELD (Unanimously dismissing the appeal per **TABAI****JSC)***Evidence - Reevaluation*

1. I prefer to commence my deliberation of this appeal by first considering the issue of the 1st respondent which in my view is all pervading. The question is whether in view of the materials before the court, which include the depositions in the affidavits and the documents attached thereto, the Court of Appeal was wrong in its decision. A determination of this issue necessarily entails a re-evaluation of the entire affidavit and documentary evidence to ascertain whether the findings and conclusions of the Court of Appeal are supported by the evidence. The case has nothing to do with the assessment of the credibility of witnesses. And having regard to the fact that the evidence is that contained in the depositions in the affidavits and the documents attached thereto, this court as well as the Court of Appeal are in as vantage, a position as the trial court in the appraisal exercise. (p. 4317 G)

Action - Need for consistency

2. The question is which of these versions is more probable on the preponderance of evidence? In this respect, I am persuaded by the submission of Chief Wole Olanipekun SAN about the changing and unstable position of the 3rd respondent. And in this respect I would adopt in its entirety the warning by this court in *Ajide v. Kelani* (supra) of the need for a party to be consistent in putting forth his case. It was for instance, curious, that after admitting paragraphs 1-17 of the supporting affidavit it went on to deny paragraph 13 of the same supporting affidavit. I would in the circumstances, be reluctant to accord probative value to the 3rd respondent's evidence. (p. 4323 C)

AFFIDAVITS - Deposition - Not denied

3. With respect to the competing affidavit evidence of the appellant and the 1st respondent, it is necessary to reiterate the

fundamental principle of law that a specific deposition against an opponent not denied either expressly or by necessary implication should be deemed to be admitted by that opponent.
(p. 4323 E)

B *ELECTION PETITIONS - Crime - Proof*

4. In my humble view, the appellant has a duty to react to this specific allegation of alterations in exhibit “D”. While I have no doubt that the allegation of alterations needed to be proved beyond reasonable doubt. Furthermore, the allegation that two delegates died in the wake of the violence on the 7th/8th is another crucial and material averment. This was again categorically denied by the 1st respondent in paragraph 13 (x) of his counter affidavit. In the face of this averment in paragraph 13 (x) of the counter affidavit the appellant had a duty to file a further or additional further affidavit giving particulars such as the names and other details of the two allegedly dead delegates. In the absence of such further depositions, I am unable to place credence on the appellant’s assertion that the primary election of the 7th /8th January was aborted as a result of violence resulting in the death of two delegates.
(p. 4324 A)

F *JUDGMENTS - Mistake in - Effect*

5. I agree entirely with learned senior counsel for the appellant that the procedure adopted by the Court of Appeal was wrong. But then the issue is that of procedure and style. It was a defect in procedure. It is settled law however that not every mistake or error in a judgment necessarily vitiates that judgment. For a mistake or error in a judgment to warrant the intervention of an appellate court it must be substantial in the sense that it occasioned or likely to have occasioned some miscarriage of justice. (p. 4328 F)

H

NOTABLE POINT OF INTEREST

FABIYI JSC

1. Nomination of candidate – Limit of jurisdiction of court

The courts have no power to compel a political party to sponsor a candidate outside of the thin and limited powers conferred under section 87 of the Electoral Act, 2010 (as amended). The jurisdiction relates to whether complaint is in respect of primary election for nomination of a candidate in line with the provisions of the Electoral Act, 2010 (as amended); the party constitution and the party guidelines. It is a person who took part in a primary organised by the National Executive Committee of the party that can complain. (p. 4332 B)

REPRESENTATION

Chief Wole Olanipekun SAN with P. Erokoro SAN, A. Akeredolu (Mrs.), Olugbenga Adeyemi, F. R. Onoja, Udeoyibo Kelechi, L. Lasaki, A. Ali, E. Ibegbunam, T. S. Adegbite, S. Abba, Okey Uzoho, M. C. Nneji, N. Uzoegbu, B. Amosun, M. Ajara, P. Abang, S. Audu, E. Ekere, S. Obaji and J. Alubo, for appellants
L. O. Fagbemi SAN with J. Ocholi SAN, A. O. Popoola, B. A. Oyin, A. Omoru, Y. Olarinde (Miss) and G. A. Ashaolu, for 1st respondent
A. Raji with Z. Garuba, Ozeigbe, Omo-Egbareuba, A. Bajeh and Oluwatoyin Durosaro, for 2nd respondent
Chief O. Oke with O. Akinbgon and M. Kilani (Mrs.), for 3rd respondent

CASES REFERRED TO

Committee v. Fawehinmi (1985) 2 NWLR (Pt. 7) 300
Denge v. Ndakwoji (1992) 1 NWLR (Pt. 216) 221
Ajiboye v. State (1995) 8 NWLR (Pt. 414) 408
Ajomale v. Yaduat (No.2) (1991) 5 NWLR (Pt. 191) 266
Agbaje v. Ibru Sea Foods Ltd. (1972) 5 SC 50
Inakoju v. Adeleke (2007) 4 NWLR (Pt. 1025) 423
Amaechi v. INEC (2008) 5 NWLR (Pt. 1080) 227
Ugwu v. Ararume (2007) 12 NWLR (Pt. 1048) 365
Gezoji v. Kulere (2012) 4 NWLR (Pt. 1291) 458
Iyaji v. Eyigebe (1987) 3 NWLR (Pt. 61) 523
Fatunmi Family v. Delekan (1965) NMLR 369
Olujinle v. Adeagbo (1988) 2 NWLR (Pt. 75) 238
Onajobi v. Olanipekun (1985) 4 SC (Pt. 2) 156
Gwonto v. State (1983) 1 SCNLR 142

Oje v. Babalola (1991) 4 NWLR (Pt. 185) 267
 Ehinlanwo v. Oke (2008) 16 NWLR (Pt. 1113) 357

STATUTE REFERRED TO

Electoral Act 2010, ss. 87(4)(c)(i)(10), 153

B

LEAD JUDGMENT BY TABAI JSC

The action culminating in this appeal was commenced by way of an originating motion at the Abuja Judicial Division of the Federal High Court. It was dated and filed on the 11th of February, 2011. The appellant herein was the applicant at the trial High Court. The respondents herein were also the respondents therein. However, while the 1st respondent herein was the 3rd respondent at the trial High Court, the 2nd and 3rd respondents herein were therein the 1st and 2nd respondents respectively. Against the respondents, the applicant/ appellant claimed the following four reliefs:

“1. An order setting aside the primaries purportedly held at Uyo Township Stadium on 28th and 29th January, 2011 at which Mr. Dan Abia was purportedly elected as the candidate of the Peoples Democratic Party for election to office as member of the House of Representatives representing Eket/Ibendo/Esit/Onna Federal Constituency for the 2011 general elections.

2. An order setting aside the purported sponsorship of Mr. Dan Abia as the candidate of the Peoples Democratic Party for election to office as member of the House of Representatives representing Eket/Ibendo/Esit/Onna Federal Constituency for the 2011 general elections.

3. An order of injunction restraining the 1st defendant by itself, agents, servants, officers, privies and any person acting through or under them from accepting or otherwise acting on the purported nomination or sponsorship of Mr. Dan Abia by the 2nd defendant to office as member of the House of Representatives representing Eket/Ibendo/Esit/Onna Federal Constituency under the flag of the 2nd defendant.

4. An order directing the 1st respondent to insert the name of the applicant as the PDP candidate for election to office as member of the House of Representatives representing Eket/Ibendo/Esit/Onna Federal Constituency.

5. And for such further or other orders as this Honourable Court may deem fit to make in the circumstances”

The originating motion was supported by an affidavit of 33 paragraphs deposed to by the appellant himself. On the 7th of April 2011, the applicant/appellant filed a motion for an order of interlocutory injunction. On that same 7th of April 2011, the appellant filed an 18 paragraphs further affidavit in support of the originating motion. Again on the 13th of April 2011 the appellant through his counsel deposed to and filed a further affidavit of 8 paragraphs. And still on the 18th April 2011, the appellant deposed to and filed an additional further affidavit of 19 paragraphs. And on the 9th of May 2011 in reaction to all these, the 1st respondent as 3rd respondent filed a counter-affidavit of 36 paragraphs with paragraphs 13 and 15 thereof running into many sub-paragraphs. Attached thereto were 51 exhibits numbered DAN 1 - DAN 51.

After the addresses of counsel for the parties, the learned trial Judge Abdul Kafarati J. gave his judgment in which he allowed the claim. In the concluding paragraphs of the judgment, the trial court reproduced paragraphs 6, 7, 8 and 11 of the further affidavit filed on the 7th of April 2011 and concluded that the depositions therein were neither denied by the 2nd respondent nor by the 3rd respondent. Specifically, the court found and concluded at pages 465-466 of the record as follows:

“This piece of evidence was neither challenged by the 2nd defendant nor the 3rd defendant. Since the failure of the officers of the 2nd defendant to arrive Eket for the primaries as communicated to the parties was not due to the fault of the plaintiff or the delegates present, the justice of the case demands that the plaintiff be returned as the candidate of the 2nd defendant for Eket Federal Constituency. The 2nd defendant having won the seat for Eket Federal Constituency, the plaintiff is to be returned as the winner of the said election and I so order. The plaintiff is to take the place of the 3rd defendant. Prayers 1, 2 and 4 are granted as prayed”

The 1st respondent herein who was the 3rd respondent was aggrieved by the decision and proceeded an appeal to the Court of Appeal. Therein the parties filed and exchanged their briefs of argument. In its judgment delivered on the 27th of January 2012, the appeal was allowed. In the concluding part of the judgment the court

below had this to say:-

“On the whole, issues 1 and 2 of (he appellant as argued by the parties, are hereby resolved in favour of the appellant, and against the 1st respondent. The appeal on those issues is allowed. The judgment and the orders of the learned trial Judge in the suit no FHC/ABJ/CS/177/2011 of 1st June, 2011 are hereby set aside. The justice of the matter, to borrow the phrase of the learned trial Judge, demands that the said suit of the 1st respondent be and it is hereby dismissed in its entirety and that shall be the order of the trial Court. For avoidance of any doubt, and in case the 1st respondent would have, on the authority of the orders in the suit no FHC/ABJ/CS/177/2011 made on 1st June, 2011, sneaked into the hallowed chambers of the House of Representatives purporting to represent Eket/Ibeno/Esit/Onna Federal Constituency, it is hereby ordered that the 1st respondent shall forthwith vacate the seat for the appellant.”

The applicant/appellant was not satisfied with the judgment and has come on appeal to this court by his notice of appeal D filed on the 27th of January, 2012. With the leave of this court, he filed an amended notice of appeal on the 20th of March, 2012. The parties have through their counsel filed and exchanged their briefs of argument. The appellant’s brief was prepared by Chief Wole Olanipekun SAN and same was filed on the 28th March 2012. He also filed appellant’s reply brief on the 11th of April 2012 and appellant’s reply brief to the 3rd respondent’s brief on the 23rd of April, 2012. The 1st respondent’s brief was prepared by Lateef Fagbemi SAN. It was filed on the 3rd of April 2012. Ahmed Raji prepared the 2nd respondent’s brief which was filed on the 30th of March, 2012. And the 3rd respondent’s brief was prepared by Chief Olusola Oke and same was filed on the 19th of April, 2012. On the 26th of April 2012, when this appeal was heard, these briefs were adopted as the arguments of the respective parties.

In the appellant’s brief, the following issues for determination were formulated:

“(i) Having regard to the clear provision of section 36(1) of the Constitution of the Federal Republic of Nigeria 1999, as well as the rule of natural justice, whether or not the entire judgment of the lower court is not vitiated by the unusual, harsh and disparaging pronouncements made by the lower court against the appellant – Ground

8.

(ii) *Considering the definitive findings made by the lower court at the preliminary stage of its judgment and before considering the briefs of argument filed by the parties, as well as their oral submissions, coupled with the wrong findings made and conclusions drawn at that stage whether the judgment of the lower court is not bound to be set aside. Grounds 6 and 7.* B

(iii) *Considering the fact that the lower court never found that the trial High Court was wrong in its interpretation and application of the clear and mandatory provisions of section 87(4)(c)(i) of the Electoral Act and Article 17.2(d) of PDP Constitution, coupled with the fact that no counter claim was presented before the trial High Court by the 1st respondent to warrant the lower court exercising jurisdiction on such a counter claim by way of appeal, whether the lower court was not in error and/or did not act in excess of jurisdiction by setting aside the judgment of the trial High Court. Grounds 1, 2, 3, 4, 5 and 9.* C

(iv) *Whether the lower court was not in grave error in its dismissal of the preliminary objections raised by the appellant to grounds I and 6 of the 1st respondent's notice of appeal before it and also in its refusal to countenance and/or pronounce on the preliminary objection by the appellant to the brief of argument of the 3^d respondent. Ground 10 and 11"* E

The main issues were formulated in the 1st respondent's brief. F
The said issues are:

(i) *Whether in view of the materials before the court, which include affidavit and documentary evidence, the Court of Appeal was wrong in setting aside the decision of the trial court and in dismissing the case of the applicant? Grounds 1, 2, 3, 4, 5 and 9.* G

(ii) *Whether the applicant/appellant's right to fair hearing was breached in the consideration of the appeal? Grounds 8, 6 and 7; and*

(iii) *Whether the preliminary objections filed by the applicant (now appellant herein) before the Court of Appeal was not considered and ought to have been sustained? Grounds 10 and 11."* H

The 2nd respondent formulated no issue for determination. In the 3rd respondent brief, only one issue for determination was formulated and the issue is:

“Was the lower court not right in setting aside the judgment of the trial court and entering judgment in favour of the 1st respondent having regard to the pleadings and evidence on record presented by the parties.”

The following is the substance of the arguments of learned B counsel for the parties as contained in their respective briefs of argument starting with arguments of the appellant.

With respect to the appellant’s first issue, learned senior counsel referred to a portion of the concluding part of the judgment of the court below and contended that the unusual and unexpected harsh C condemnation and deprecation of the appellant leads irresistibly to the conclusion not only on a breach of the appellant’s right of fair hearing but also of the court’s bias and prejudice sufficient for the setting aside of the entire judgment. It was counsel’s further submission D that the appellant does not need to establish actual loss or injury as a result of the breach, and that even the likelihood of same is sufficient to render the entire proceedings null and void. In support of these submission, learned senior counsel relied on Legal Practitioners Disciplinary Committee v. Fawehinmi (1985) 2 NWLR (Part 7) E 300; Denge v. Ndakwoji (1992) 1 NWLR (Part 216) 221; Oyeyemi v. Commissioner for Local Government Kwara State (1992) 2 NWLR (Part 226) 661. Learned senior counsel urged that this issue be resolved in favour of the appellant and that even on this issue alone the appeal ought to be and should be allowed.

F On the appellant’s 2nd issue, the arguments of learned senior counsel in respect thereof, were still focused mainly on the issue of the alleged breach of the appellant’s right of fair hearing and the alleged prejudice and bias of the court below. He referred to the G principle of Mogaji v. Odojin (1978) 4 SC 91 on the duty placed on the court to put the evidence of the contending parties in a case on the imaginary scale of justice and contended that by making the definitive findings against the appellant at the stage of reviewing the evidence and before considering the arguments in the briefs of the H parties, the court below foreclosed the appellant’s right of fair hearing. On the need for court to avoid making findings against a party at the preliminary stage of evaluation, learned counsel relied on Ajiboye v. State (1995) 8 NWLR (Part 414) 408 at 416-417 and contended that the court below prematurely condemned the appellant as guilty.

Still on the 2nd issue, learned senior counsel for appellant contended that the findings and conclusions of the court below were perverse for the following reasons:

The first, according to the appellant, is that the summary of affidavit evidence made by the court below was without reference to the case put forth by the parties. The second is that the appellant emphatically stated of his being nominated at the re-run primary election fixed by the 3rd respondent (PDP) on the 28th of January 2011. It was the appellant's further contention that the further affidavit of Enyina Ukana Enyina filed on the 7th April, 2012 was not countered by any counter-affidavit. It was therefore submitted as settled law that depositions in an affidavit which are not countered are deemed to be admitted. Reliance was placed on *Ajomale v. Yadaut* (No.2) (1991) 5 NWLR (Part 191) 266 at 282-283; *Agbaje v. Ibru Sea Foods Ltd.* (1972) 5 SC 50 at 55; *Inakoju v. Adeleke* (2007) 4 D NWLR (Part 1025) 423 at 665. According to the appellant, the lower court said nothing about the validity of the primary purportedly conducted at Uyo on the 28th/29th of January, 2011 and contended that the findings and conclusions are perverse.

As regards the appellant's 3rd issue, learned senior counsel referred to the provisions of Section 87(4)(c)(i) of the Electoral Act, Article 17.2(d) of the PDP Constitution and directives of the PDP upon the cancellation of the election of the 7th January, 2011 for a re-run primary on the 28th/29th January, 2011 and at which re-run primary election, the appellant's nomination was made through affirmation and contended that the judgment of the trial court was supported by the evidence. Reference was made to the finding of the trial court that:

"A political party does not have the liberty to violate its own constitution at will or violate the provisions of the Electoral Act"

and submitted that the finding was impeccable. It was the appellant's further submission that by virtue of the provisions of Section 87(10) of the Electoral Act, it is only High Court that can set aside a primary election and that no original jurisdiction is vested in the court below to do so. The cancelled primary election of the 7th/8th of January was not an issue placed before the trial court which therefore had no jurisdiction to make any pronouncement or validate it. It was appellant's submission therefore that if the trial court had no jurisdic-

tion to validate the said cancelled primary election, the court below equally had no jurisdiction to do so. Learned senior counsel relied on *Amaechi v. INEC* (2008) 5 NWLR (Part 1080) 227 and *Ugwu v. Ararume* (2007) 12 NWLR (Part 1048) 365 and submitted the trial court had the jurisdiction to make the order relating to the appellant.

B The appellant's 4th issue relates to the preliminary objection which the appellant as 1st respondent at the court below, raised. It challenged the competence of the appeal and in particular grounds 1 and 6 and any issue raised thereunder. In its judgment, the court below held that the preliminary objection was misconceived and same was dismissed. It was the contention of the appellant that the court below did not make any pronouncement at all on the preliminary objection. In conclusion, it was urged that the appeal be allowed, the judgment of the court below set aside and that of the trial Federal C High Court restored. D

The substance of the arguments of learned senior counsel for the 1st respondent is as follows. The 1st respondent's 1st issue is wide and encompassing. The question is whether in view of the affidavit and documentary evidence before the court, the court below was E wrong in setting aside the decision of the trial court and dismissing the applicant/appellant's case.

On the first question of whether issue were joined on the propriety or otherwise of the primary election of the 7th and 8th of F January, 2011, learned senior counsel referred to the reliefs claimed, paragraphs 17, 18, 19, 20 and 21 of the affidavit in support of the originating motion and the reaction of the 1st respondent in paragraphs 12 and 13 of his counter-affidavit and submitted that issue was joined as to whether the primary election of the 7th and 8th Janu- G ary, 2011 was cancelled. It was further submitted that the resolution of the issues relating to the primary election of the 7th and 8th was not contingent upon the filing of a counter-claim since on the pleadings issues were joined. It was the 1st respondent's further submission that an appellate court is empowered to look at the claims and evidence H to determine the real issues in dispute and decide same even if one or other of the parties failed to specifically raise it. In support of this submission, reliance was placed on *Gezaji v. Kulere* (2012) 4 NWLR (Pt. 1291) 458 at 485; *Iyaji v. Eyigebe* (1987) 3 NWLR (Pt. 61) 523; *Fatnmami Family v. Delegan* (1965) NMLR 369 and *Olujinle v.*

Adeagbo (1988) 2 NWLR (Pt. 75)238.

It was emphasized that the sponsorship and nomination of the 1st respondent was predicated on the primary election of 7th and 8th January 2011 and not on the purported primary of the 29th January 2011. Reference was further made to paragraphs 13(i) - (vii), 16 and 17 of the 1st respondent's counter affidavit and it submitted that the depositions not having been denied are deemed to be true and/or admitted. For this submission, 1st respondent relied on a number of authorities amongst which are *Badejo v. Federal Ministry of Education* (1996) 8 NWLR (Pt. 464) 15; *A-G Plateau State v. A-G Nasarawa State* (2005) 9 NWLR (Pt. 930) 421; *Ajomale v. Yaduat* (No. 2) (1991) 5 NWLR (Pt. 191) 266 at 282-283; *Agbaje v. Ibru Sea Foods Ltd.* (supra) and *Inakoju v. Adeleke* (supra). Reference was further made to the decision of the National Working Committee of the PDP on the 25th of January 2011 which according to the respondent, upheld his nomination and which decision was not challenged. The 1st respondent further refer to exhibits DAN 41, DAN 42 and DAN 46 which he contended confirmed his nomination. It was argued that the appellant who alleged cancellation of the 7th and 8th January, primary election failed to produce any evidence of such cancellation. It was submitted that documentary evidence where it exists is the best evidence. He also referred to Section 15 of the Court of Appeal Act which gives the Court of Appeal powers to examine the evidence and give judgment and such other orders which the trial court ought to have given or made.

The 1st respondent further argued that a person cannot emerge as representing a party unless the party had participated in the process. He relied on *Uzodinma v. Izunaso* (No. 2) (2011)17 NWLR (Pt. 1275) 30 at 65. He referred to paragraphs 17, 18 and 19 of the affidavit in support of the originating motion and 10 and of the further affidavit and argued that the PDP never participated in the process in which the appellant claimed to have emerged.

With respect to the provisions of Section 87(ii) of the Electoral Act about the power of the High Court to validate or set aside primary election, it was submitted that the Court of Appeal was in as vantage a position as the trial court to give judgment and make orders which the trial court ought to but failed to make. He tried to distinguish Amaechi's case from the instant case. On this issue, it was

urged that the decision of the court be affirmed.

The 1st respondent's 2nd issue is whether the appellant's rights of fair hearing were breached in the judgment of the court below. ' -
 Learned senior counsel for the 1st respondent reproduced the concluding portion of the judgment of the court below at pages 742 -
 B 743 of the record and submitted that it is not every pronouncement of a court that leads to a reversal of its decision. For this submission, he relied on *Amasike v. Reg. Gen. C.A.C.* (2010) 13 NWLR (Pt.1211) 337 at 375.

C It was 1st respondent's further contention that the statement complained of was made after the court had resolved the issues raised in the pleadings and dismissal of the case of the applicant/ appellant. It was further submitted, that there was no case of bias nor the likelihood of it with respect to the claim by the appellant, that the affidavit
 D of Enyina Ukana Enyina was not countered, it was the submission of the respondent that where an affidavit is worthless there is no need to file a reply to it.

The 1st respondent's 3rd issue relates to the reaction of the Court of Appeal to the preliminary objection raised thereat by the
 E appellant as respondent. Learned senior counsel for the 1st respondent reproduced the relevant aspect in the judgment and submitted that it was duly considered. In conclusion it was urged that the appeal be dismissed.

F Although the 2nd respondent filed a brief of argument, it had nothing to urge either for or against the appeal. It chose to maintain a neutral position as an umpire. As I stated above, Chief Olusola Oke formulated just a single issue for determination. Just like the 1st issue of the 1st respondent, it is wide and encompassing. It is whether in the
 G light of the pleadings and evidence the court below was right in its judgment.

In the 3rd respondent's brief, Chief Olusola Oke submitted that it was a contradiction for the appellant to claim in one breath that the panel appointed by the 2nd respondent from Abuja never
 H came and that no primary election was held at Eket Township Stadium or anywhere in the Eket/Ibeno/Esit/Onna Federal Constituency and to claim in another breath that he was nominated by affirmation by delegates as a consensus candidate. Affirmation, learned counsel submitted, is not a process known to the Electoral Act, the PDP Con-

stitution and the Electoral Guidelines. Learned counsel justified the primary election at Uyo on the 8/1/2011 on the grounds (i) that all the aspirants consented to the choice of the venue and (ii) that the reasons given for the change in paragraphs 7 and 9 of the 3rd respondent's counter affidavit were not challenged or controverted. It was further submitted that the contravention without more does not automatically vitiate an otherwise validly conducted primary election. The appellant having consented to the holding of the primary election at Uyo on the 28/1/2011 was by virtue of the provisions of section 151 of the Evidence Act estopped from turning round to challenge the self same re-run primary election. B
C

It was the further submission, of the 3rd respondent that the word "shall" in section 87(1)(c) of the Electoral Act, 2010; Article 17(1)(2)(e) of the PDP Constitution and Article 28 A (i) and (ii) of the PDP Guidelines is merely directory and not mandatory. For this submission the 3rd respondent relied on the *Amalgamated Trustees Ltd. v. Associated Discount House* (2007) 15 NWLR (Pt. 1056) 118 at 151 and *Uzoma v. Asudike* (2010) All FWLR (Part 548) 853 at 867-868. D

With respect to the findings by the court below and the appellant's complaint about bias and breach of his rights of fair hearing, it was 3rd respondent's contention that the findings were the necessary inferences from the facts on record. It was further submitted that the court was at liberty to determine the rights of the parties without a counter-claim or cross appeal. With respect to the appellant's objection to the 3rd respondent's brief at the court below, it was contended that what the 3rd respondent did was simply to concede the appeal and advance reasons for so doing. It was 3rd respondent's submission that notwithstanding the views of counsel, the law remains what it is. In conclusion, Chief Olusola Oke urged that the appeal be dismissed. E
F
G

The substance of the argument of learned senior counsel in the appellant's reply brief filed on the 11/4/12 is as follows:-

On the authority of *Uzodinma v. Izunaso* (No. 2) (2011) 17 NWLR (Part 1275) 30 learned senior counsel contended that the input of the Political Party (3rd Respondent) is found in its affidavit contained at pages 82-83 of the record wherein it admitted paragraphs 1-17 of the affidavit in support of the originating motion. He H

referred in particular to paragraph 6 of the said affidavit at page 83 of the record. He submitted that parties are bound by their pleadings and in this case the averments in their affidavits. Reliance was placed on *Anyanwu v. Uzowuaku* (2009) 13 NWLR (Part 1159) 445 and *Osuji v. Ekeocha* (2009) 16 NWLR (Pt. 1166) 81. He referred to the
B 3rd respondent's brief of argument at the Court of Appeal where it admitted the cancellation of the result of 8/1/2011 and the order and re-run of the primary election on the 28/1/2011 at page 536 of the record. It was learned senior counsel's contention that the 3rd re-
C spondent admitted that the attempted primary of the 7th and 8th of January, was botched cancelled and annulled. And a re-run took place on the 29/1/2011 at Uyo with the consent of the 1st respondent. In the face of these admissions, counsel submitted, the argu-
D ment of the 1st respondent of there being no evidence of the cancellation of the primary election of the 7th and 8th is untenable. He referred to paragraph 12 of the appellant's further affidavit (page 124 of the record) about the unanimous decision of the delegates to nominate the appellant and the communication of that decision to the party (PDP) and submitted that in the absence of any denial the
E party (PDP) should be estopped from denying the appellant's candidacy. In response to the argument of the 1st respondent that the nomination of the appellant on the 28/1/2011 was invalid because it took place after the deadline for primary elections fixed by the 2nd
F respondent, it was submitted that all the parties including the 2nd respondent had, by their conduct agreed to waive compliance with the date set for the conclusion of primary elections; INEC guidelines are not statutory provisions but are like Rules of court which can therefore be waived. He relied on *Fidelity Bank v. Nonye* (2012) SC. 263/
G 2005 (reported in (2012) 10 NWLR (Pt. 1307) 1); *Chrisdon Ind. Co. Ltd. v. A.I.B. Ltd.* (2002) 8 NWLR (Pt. 768) 152; *Chime v. Chime* (2001) 3 NWLR (Pt. 701) 527 & *Odua Investment Ltd. v. Talabi* (1997) 10 NWLR (Pt. 523) 1.

Learned senior counsel contended that the case at the trial
H court was fought principally on the legality of the primary election of the 28th/29th January 2011. It was his submission therefore that the failure of the court below to deliberate and make pronouncement on the legality of that primary election and its gratuitous conferment of legitimacy on the annulled primary election of the 7th and 8th of

January, 2011 occasioned the appellant a miscarriage of justice. He relied on *Womiloju v. Anibire* (2010) 10 NWLR (Pt. 1203) 545 at 561-562.

In the appellant's reply brief to the 3rd respondent's brief, learned senior counsel argued firstly that the single issue formulated by the 3rd respondent is not lied to any of the 11 grounds of appeal and that it was an issue at large and urged that it be discountenanced. He referred to the depositions in paragraphs 4, 6 and 7 of the 3rd respondent's counter affidavit wherein paragraphs 1-17 of the appellant's affidavit in support of the originating motion were admitted and the submissions in its brief before this court and urged that its changing and unstable positions are misleading and should be condemned. With respect to what the word "shall" conveys, it was the submission of learned senior counsel that where the word is used as in the Electoral Act and the PDP Guidelines, what is directed to be done is mandatory. He relied on *Ugwu v. Ararume* (2007) 12 NWLR (Pt. 1048) 365, *Ogudi v. State* (2005) 5 NWLR (Pt. 918) 286 at 327 and *Nhonye v. Anyichie* (2005) 2 NWLR (Pt. 910) 623 at 649. Learned senior counsel further referred to the decision of the Court of Appeal, Abuja Division in Appeal No. CA/A/226/2011 between Senator Amange Nimi Barigha v. PDP & 2 Ors. delivered on the 22/11/2011 on the use of the word "shall". He referred further to yet another unreported decision of the Court of Appeal on the 13/9/2011 on CA/YL/3 1/2011 PDP v. Senator Dahiru Bako Gassol & 2 Others. In conclusion, learned senior counsel urged that the appeal be allowed.

I have considered the reliefs claimed in the originating motion, the supporting affidavit, the further supporting affidavits, the counter affidavits of the respondents, the judgment of the trial court, that at the Court of Appeal, the appellant's brief and the appellant's reply briefs of argument and the briefs of argument of each of the respondents.

I prefer to commence my deliberation of this appeal by first considering the issue of the 1st respondent which in my view is all pervading. The question is whether in view of the materials before the court, which include the depositions in the affidavits and the documents attached thereto, the Court of Appeal was wrong in its decision. A determination of this issue necessarily entails a re-evaluation of the entire affidavit

and documentary evidence to ascertain whether the findings and conclusions of the Court of Appeal are supported by the evidence. The case has nothing to do with the assessment of the credibility of witnesses. And having regard to the fact that the evidence is that contained in the depositions in the affidavits and the documents attached thereto, this court as well as the Court of Appeal are in as vantage, a position as the trial court in the appraisal exercise.

Let me now examine the affidavit evidence in a chronological order. The first is the affidavit in support of the originating motion. It has 33 paragraphs and was deposed to by the applicant/appellant himself. Attached thereto are exhibits 'A', 'B', 'C' and 'D'. Paragraphs 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19 are crucial and it is necessary therefore to reproduce them. In the said paragraphs, the appellant deposed as follows:

"8. Under our party constitution and guidelines, the primaries must hold at the headquarters of the constituency. Copies of the Party Constitution and Electoral Guidelines are attached and respectively marked as exhibit A and exhibit B.

9. Hence also the designation of Eket as the venue for the primaries.

10. Primaries were initially scheduled for 7th January 2011 at the Eket Township Stadium but were cancelled due to violence and irregularities. The violence claimed the lives of two delegates as attested to in the Thisday, No. 5740.

11. None of the contestants was elected by the delegates in the attempted primaries of 7th January 2011 as same was annulled consequent to the violence and irregularities.

12. Our party and all three contestants agreed to new primaries to be scheduled later.

13. By the guidelines of the 1st respondent, the primaries, including re-run, ought to hold on or before 15th January 2011, and monitored/observed by the 1st respondent. The 1st respondent's instructions to that effect is annexed hereto and marked as exhibit C.

14. Federal Constituency, the 2nd respondent eventually fixed Friday, 28th January 2011 for the primaries at the Eket Township Stadium. A copy of the letter dated 27th January 2011 (12 days after the deadline fixed by INEC for primaries) written by the National

Organizing Secretary of the PDP constituting the Primaries Election Panel is attached and marked as exhibit D. Eket/Ibeno/Esit/Onna Federal Constituency of Akwa Ibom State is listed as No. 8 for the primaries.

“15. As at this date, the 2nd respondent was already out of the time required by the 1st respondent’s guidelines for all political parties to hold primaries. The deadline fixed for all primaries to hold was 15th January 2011.

16. I know that for the non-statutory/automatic delegates numbering about 90 for the constituency, no congresses were held to elect them. They were single handedly simply appointed.

17. On the date fixed for the primaries being 28th January 2011, I was at the Eket Township Stadium along with most of other delegates.

18. We waited all day and all night all through to the following day, 29th January 2011 for the panel conducting the primaries to come.

19. The panel appointed by the 2nd respondent from Abuja never came and no primaries held at the Eket Township Stadium or anywhere in Eket/Ibeno/Esit/Onna Federal Constituency.

20. I was surprised to hear on Nigerian Television Authority and other news media that Eket/Ibeno/Esit/Onna Federal Constituency is one of the constituencies in which the 2nd respondent is sponsoring a candidate. And that this was as a result of primaries that held at Uyo Township Stadium. The 1st respondent has published a list which contains the name of the 3^d respondent as the Hag bearer”.

The substance of the above deposition is that the headquarters of the *Eket/Ibeno/Esit/Onna Federal Constituency of Akwa Ibom State* is Eket Town. That the 2nd respondent (INEC) had initially scheduled the 7/1/2011 for the PDP Primary election at the Eket Township Stadium to elect its Hag bearer to contest the election for the Constituency’s representative in the House of Representatives. That the said primary election of the party was cancelled due to irregularities and violence which caused the death of two delegates. That the Party and all the three contestants agreed to a new date to be rescheduled for or before the 15/1/2011. That the 2nd respondent (INEC) eventually fixed the 28/1/2011 for the re-run primary election at the Eket Township Stadium in through exhibit “D” dated the

27/1/2011 .That the non-statutory and automatic delegates for the constituency numbering about 90 were not elected and that they were single handedly appointed. That from the 28/1/2011 to 29/1/2012 they were at the Eket Township Stadium but the panel of the 2nd respondent assigned with the conduct of the rescheduled primary election never came for the assignment. He was surprised therefore to see publications in the media about the 1st respondent's nomination as the PDP flag bearer in the constituency.

Next is the 12 paragraph counter affidavit of the 2nd respondent (INEC) filed on the 24/3/2011. Paragraphs 4,5,6,7, 8,9 and 11 are material. In the said paragraphs, the deponent averred as follows:

"4. The 2nd defendant admits paragraphs 1-17 of the plaintiffs affidavit in support of the originating summons.

5. That contrary to paragraph 13 of the affidavit in support, a political party has a right to submit the name of its candidates to the 1st defendant and same is bound to accept it provided it is done not less than 60 days to the date of the election.

6. That the new primary or re-run was agreed to by contestants after the botched primary of 7th January 2011. The agreed re-run primary was conducted on 28th January 2011.

7. That the said primary was held in Uyo as the venue is more convenient.

8. That ward congresses held sometime in December, 2010 produced the 3 per ward non-statutory delegates who participated in the primaries.

9. That the Electoral Panel conducted the primary at Uyo being a more central and convenient point which fact the plaintiff also knew.

10. That the 3rd defendant won the primary election and his name was submitted to the 1st defendant as the 2nd defendant's candidate for Eket/Ibeno/Esit/ Onna Federal Constituency in line with provisions of the Electoral Act, 2010 (as amended) and the 2nd defendant's Electoral Guidelines.

11. That the primary election was conducted under a peaceful atmosphere and delegates freely exercised their franchise and the outcome was free and fair."

While in paragraph 4, the 2nd respondent admitted para-

graphs 1-17 of the affidavit in support of the originating motion including paragraph 13, in paragraph 5 thereof it denied the self same paragraph 13. The 18 paragraph further affidavit of Enyina Ukana Enyina filed on the 7/4/2011 comes next. In paragraphs 6-11 thereof, the deponent gave the details of the appellant's purported nomination at the Eket Township Stadium on the 29th of January 2011. 1 B shall come back to this later in this judgment. Then comes the further affidavit in support of the originating motion filed on the 13/4/2011. It only brought in a complete copy of the 3rd respondent's Constitution as exhibit "la".

There is also the additional further affidavit filed on the 18/4/ 2011 containing 19 paragraphs. The deponent is the appellant. The depositions therein are, in my view not quite relevant to the issue under consideration. C

I now come to the 1st respondent's counter affidavit deposed D to by himself as 3rd respondent therein. It contains 36 paragraphs and quite a number of sub paragraphs. Attached thereto are exhibits "DAN 1"- "DAN 51". Many of the paragraphs of the said counter affidavit are quite material to the resolution of the issues in contention/file totality of the depositions is that only the appellant and himself were the contestants for the 3rd respondent's flag bearer in the April 2011 general election for the Eket/Ibendo/Esit/Onna Federal Constituency member in the House of Representatives. That the primary election was initially fixed for the 5th – 6th of January 2011. That E due to the 3rd respondent's inability to meet the logistic demands, the primary election was actually held on the 7th /8th of January. That F the election was held peacefully and in strict compliance with the procedures laid down in the Electoral Act 2010, the PDP Constitution and the Electoral Guidelines. That he scored 586 votes as against the G appellant's score of 179 votes. According to the 1st respondent, exhibits "DAN 44" and "DAN 45" are copies of the reports of the National Assembly Primary Elections in Akwa Ibom State dated 9/1/ 2012 and duly signed by the Electoral Panel.

According to the 1st respondent, there was no report of any H violence and that the primary election was peaceful, transparent, free and fair and that no deaths were recorded or reported.

The 1st respondent was at pains to impugn the authenticity of the appellant's exhibit "D" attached to the affidavit in support of the

originating motion. In paragraphs 14, 15 and 16 of the counter affidavit, he deposed as follows:

“14. That paragraph 14 of the supporting affidavit is false. Exhibit “D” annexed thereto is a forged and seriously mutilated document.

B *15. Particulars of mutilation are as follows:*

(i) The addressee of exhibit “D” was cleverly removed before photo copying same.

C *(ii) The Constituency and State to which the posting was purportedly made, was also surreptitiously erased and a full stop inserted by hand in paragraph 3 of the main body of the letter.*

(iii) The composition of the committee, hand written was fraudulently inserted after the erasure of the original type written names.

D *(iv) The purported annexure to exhibit “D” is obviously not in any way whatsoever/howsoever related thereto by whatever stretch of imagination or ingenious chicanery.*

E *16. That the Eket Federal Constituency was never at any-time whatsoever/howsoever included in the list of constituencies for re-run election primaries as the primary held on the 7th/8th January 2011 was unchallenged subsisting and valid.”*

F The 1st respondent further asserted that on the 25/1/2011, the National Working Committee with the consent and approval of the National Executive Committee of the 3rd respondent ratified his nomination and candidature and consequent there upon issued with the 2nd respondent’s Forms C.F. 001 and E.C. 4B (IV).

G That on the 28/1/2011 at about 5pm, he was informed by Mr. John Peter Enefia of the planned re-run primary election on the 29/1/2011 at the Uyo Township Stadium at 8am. He immediately filed a protest through exhibit “DAN 47”

H That notwithstanding the protest he mobilized his supporters and took part in the re-run primary which he won by 773 votes as against the appellant’s 5 votes and was declared the 3rd respondent’s candidate for the April Election. Exhibit “DAN 48” is the result of the re-run primary election.

As can be seen the controversy involves three alleged primary elections for the choice of the 3rd respondent’s (PDP) candidate for the April 2011, election into the House of Representatives repre-

senting the Eket/Ibeno/Esit/Onna Federal Constituency. While the appellant relies on the allegedly rescheduled and re-run primary election at the Eket Township Stadium on the 28th/29th January 2011 to claim his candidature of the 3rd respondent, the 2nd respondent accords validity to the 1st respondent's candidature from the alleged primary election at the Uyo Township Stadium on the 28th/29th of January 2011. The 1st respondent on the other hand claims his candidature of the 3rd respondent first from the primary election at the Eket Township Stadium on the 7th/8th January, 2011 which he asserted was peaceful free and fair. He relies only in the alternative on the primary election of the 29th January, 2011.

The question is which of these versions is more probable on the preponderance of evidence? In this respect, I am persuaded by the submission of Chief Wole Olanipekun SAN about the changing and unstable position of the 3rd respondent. And in this respect I would adopt in its entirety the warning by this court in Ajide v. Kelani (supra) of the need for a party to be consistent in putting forth his case. It was for instance, curious, that after admitting paragraphs 1-17 of the supporting affidavit it went on to deny paragraph 13 of the same supporting affidavit. I would in the circumstances, be reluctant to accord probative value to the 3rd respondent's evidence.

With respect to the competing affidavit evidence of the appellant and the 1st respondent, it is necessary to reiterate the fundamental principle of law that a specific deposition against an opponent not denied either expressly or by necessary implication should be deemed to be admitted by that opponent. Learned senior counsel for the appellant made this submission and relied on Ajomale v. Yaduat (No. 2) (1991) 5 NWLR (Pt. 191) 266 at 282-283; Inakoju v. Adeleke (2007) 4 NWLR (Pt. 1025) 423 at 665; Ejide v. Ogunyemi (1990) 3 NWLR (Pt. 141) 758 at 762; Alagbe v. Abimbola (1978) 2 SC39.

In this case, paragraph 14 of the affidavit in support of the originating motion is crucial. Therein the nullification or cancellation of the primary election of the 7th/8th of January and the 2nd respondent's fixing of 28/1/2011 for a re-run primary election were alleged. And such nullification and fixing of the 28/1/2011 was allegedly evidenced

in exhibit “D” attached to the supporting affidavit. As I stated earlier, the 1st respondent was at pains to impugn the authenticity of exhibit “D” and in respect thereof it stated four reasons.

In my humble view, the appellant has a duty to react to this specific allegation of alterations in exhibit “D”. While I have no doubt that the allegation of alterations needed to be proved beyond reasonable doubt. I can nevertheless still examine exhibit “D” to assess its probative value. Exhibit “D” is copied at pages 51-52 of the record of appeal. I have examined the said exhibit “D” and I agree with some of the debilitating features highlighted by the 1st respondent. Firstly, the letter is supposed to have been addressed to a person who has been so nominated to serve in the electoral panel to conduct the primaries. The name of the addressee is not there. Secondly, the names of the five members making up the committee or panel appear to have been hand written in place of earlier typed names. That the figures 1, 2, 3, 4, and 5 are typed strongly suggests that the names were also typed. Thirdly the Federal Constituency names were also typed. But the Federal Constituency name in no. 8 E at page 52 is Eket/Ibeno which is not exactly the same as the Eket/Ibeno/Esit/Onna Federal Constituency. In the absence of a denial by way of a still further affidavit. I do not see any reason to accord probative value to exhibit “D”. In addition, the 1st respondent annexed a number of exhibits evidencing the 3rd respondent’s approval and endorsement of his nomination.

Furthermore, the allegation that two delegates died in the wake of the violence on the 7th/8th is another crucial and material averment. This was again categorically denied by the 1st respondent in paragraph 13 (x) of his counter affidavit. In the face of this averment in paragraph 13 (x) of the counter affidavit the appellant had a duty to file a further or additional further affidavit giving particulars such as the names and other details of the two allegedly dead delegates. In the absence of such further depositions, I am unable to place credence on the appellant’s assertion that the primary election of the 7th / 8th January was aborted as a result of violence resulting in the death of two delegates.

Still on the appellant’s claim of his nomination at the re-run primary election held at the Eket Township Stadium on the 28th / 29th

January 2011. The evidence in this respect is contained in the further affidavit of Enyina Ukana Enyina deposed to on the 7/4/2011 and about which I have made references. As I said the material paragraphs are 6, 7, 8, 9, 10 and 11. In these paragraphs, Enyina Ukana Enyina deposed:

“6. I know that following a failed attempt to hold the primary at an earlier date, the 2nd respondent fixed the primary for the 28th January 2011 at the Eket Township Stadium in Eket Town.

7. That on the 28th January 2011, I was at the Eket Township Stadium, Eket along with other delegates for the scheduled primary elections.

8. That while waiting for the officials appointed by the 2nd respondent to conduct the primary to arrive from Abuja. I had a meeting with a caucus of the delegates present who together form a majority of the delegates for the primaries and we all agreed to vote unanimously for the appellant.

9. That because I was present at the meeting, I know that the reason why the delegates agreed to vote overwhelmingly for the applicant is that the applicant is the incumbent member of the House of Representatives representing the Eket Federal Constituency and we all believed that he performed very well and executed his mandate to the best of his ability and satisfaction of the constituents through the execution of the development projects and human capacity development initiatives.

10. That after taking the decision to vote for the applicant, all the delegates as well as myself waited endlessly and even late into the night but the officers from 2nd respondent did not come to Eket or any other place within the Eket Federal Constituency to conduct the scheduled primary election.

11. That the other delegates and myself waited late into the night and eventually having not seen the officers of the 2nd respondent before we dispersed we unanimously resolved through affirmation that the applicant be returned as consensus candidate of the 2nd respondent and same was communicated to 2nd respondent”.

Can the depositions in the foregoing six paragraphs without more be held to be a strong evidence of the appellant's nomination as constituency? With respect, I shall answer this question in the negative. In the first place, these paragraphs were countered by para-

graphs 12, 13, 14, 15 and 16 of the 1st respondent's counter affidavit (see pages 311-313 of the record). Besides that, there is no indication of the number of delegates present at the Eket Township Stadium, let alone those who unanimously so resolved through affirmation of the appellant's candidature. In my assessment, the evidence is
B rather weak to compete with that of the 1st respondent.

As I have stated earlier in this judgment the character of evidence is such that this court as well as the court below are in as good a position as the trial court to evaluate it. The court below embarked
C on its own appraisal exercise and came to the conclusion that the findings of the trial court were perverse and it had to interfere. The court examined paragraphs 17, 18 of the appellant's affidavit in support of the originating motion and paragraphs 7, 8, 9, 10 and 18 of the affidavit of Enyina Ukana Enyina and found that the appellant
D failed to prove his nomination as the 3rd respondent's candidate and gave detailed reasons for that conclusion. And at page 240 of the record it concluded:

*"The 1st respondent did not prove that he won any primary election conducted by the PDP in pursuance of the Electoral Act, the
E PDP Constitution and the PDP Electoral Guidelines that would entitle him to become the PDP candidate or that he was the candidate sponsored by the PDP in the April election: There is no evidence on record that the 1st respondent went through the rigours of satisfying
F or complying with the provisions of the Electoral Act for this formal nomination as a candidate of any political party to entitle him to be placed on the ballot by INEC..."*

And with specific reference to the primaries conducted on the. 7th and 8th of January 2011 the court at page 241 of the record
G said:

"The 1st respondent admitted in paragraph 5.6 of his brief that the lower court did not pronounce on the validity of the primaries conducted on the 7th and 8th January 2011."

The result of that exercise therefore remained extant to vest
H in the appellant some accrued right as the PDP's only candidate for Eket/Ibeno/Esit/Onna Federal Constituency as at the date of the purported primaries on the 28th or 29th January, the date of the general election and the date of the judgment of the lower court.

I agree entirely with the above reasoning and conclusions

which I therefore endorse. The findings and conclusions show the in-depth evaluation embarked upon by the court below.

The result of these findings and my earlier findings articulated above is that I resolve this all pervading issue against the appellant and in favour of the 1st respondent. Because of its wide and all embracing nature the determination of this issue alone is good enough to dispose of this appeal. Let me however comment on the issue of fair hearing. There is no doubt that if the complaint is substantiated and a violation of the appellant's guaranteed rights of fair hearing is manifest in the judgment of the Court of Appeal it can vitiate the entire proceedings including the judgment. In its judgment at pages 742-743 of the record, the Court of Appeal per Ejembi, JCA said:

"For avoidance of any doubt, and in case the 1st respondent would have on the authority of the orders in suit no. FHC/ABJ/CS/177/2011 made on 1st June 2011 sneaked into the hallowed chambers of the House of Representatives purporting to represent Eket/Ibeno/Esit/Onna Federal Constituency, is hereby ordered that the 1st respondent shall vacate the seal for the appellant. The suit is a mere artifice and unfortunately the trial court gave it a stamp of state action contrived or employed by the respondent to undemocratically smuggle himself to the House of Representatives. True democrats should learn to respect the will of the people."

Chief Olanipekun SAN referred to the above passage and submitted very forcefully that by the court's recourse to the very unusual and unexpected harsh condemnation and deprecation of the appellant his right of fair hearing was breached and that same was also evidence of bias and prejudices. I have no doubt that in expressing its disbelief and rejection of the case of the appellant, the Court of Appeal employed a rather harsh and unpalatable language. But that is not the same thing as denying the appellant his right of fair hearing. As I pointed out the court thoroughly deliberated upon the affidavit evidence if reproduced and examined the reliefs claimed and the material averments in the supporting affidavit of the appellant himself and that of Enyina Ukana Enyina and made reasoned findings. The court made copious references to some exhibits produced by the appellant. These include exhibit "c" a letter from INEC to the Chairman of the PDP dated 24/1/2011. Paragraphs 2, 3 and 4 thereof state:

“2. It is important to draw your attention to the time table and schedule of activities for the 2011 Flections issued by the commission pursuant to the powers vested on it by the provisions of section 153 of the Electoral Act.

*3. If the reports are true, you are reminded that the time for
B conduct of party primaries has since elapsed on the 15th January 2011 and it has not been extended by the commission.*

4. Please be guided accordingly.”

The court below noted and 1 have also noted that despite
C this evidence produced by the appellant himself he premised his mandate on the purported primary election at the Eket Township Stadium on the 28th/29th January 2011. Still on this issue of fair hearing, learned senior counsel referred to parts of the judgment of the lower court at pages 719 and 723 of the record and contended that
D the findings were premature since they were made even before the court considered the various arguments of the parties contained in their respective briefs. There is force in this argument. The principles governing the evaluation of evidence have since been settled in *Mogaji v. Odojin* (1978) 4 SC 91 and numerous other cases. The court is
E bound to put the entire evidence on the imaginary scale of justice to determine in whose favour the balance tilts. In this case however, the court below at the early stage of its judgment, reproduced paragraphs of Q the 33 paragraph affidavit of the appellant, filed on the 11/2/2011 and the further affidavit of 18 paragraphs deposed to by Enyina
F Ukana Enyina on the 7/4/2011 and made some findings therefrom.

***I agree entirely with learned senior counsel for the appellant that the procedure adopted by the Court of Appeal was wrong. But then the issue is that of procedure and style. It was a defect in procedure. It is settled law however that not every mistake or error in a judgment necessarily vitiates that judgment. For a mistake or error in a judgment to warrant the intervention of an appellate court it must be substantial in the sense that it occasioned or likely to have occasioned some
H miscarriage of justice.*** See *Onajobi v. Olanipekun* (1985) 4 SC (Part 2) 156 at 163; *Gwonto v. State* (1983) 1 SCNLR 142 at 152-153 and *Oje v. Babalola* (1991) 4 NWLR (Pt. 185) 267 at 282.

The question is whether it would have made any difference if the court had considered the two affidavits much later in the judg-

ment. I do not think so. In the main 33 paragraph affidavit in support of the originating motion, the appellant never mentioned his alleged nomination on the 28th/29th of January by affirmation of the delegates. The pith of the complaint was that himself and other delegates and wailed for the rescheduled primary however which never took place. In paragraph 30 of the affidavit, the appellant deposed: B

“I am confident that if the delegates who waited with me at Eket Township Stadium had participated in the primaries, I would have won by an overwhelming majority.”

The fact of the appellant’s alleged nomination by the unanimous affirmation of delegates was only introduced in the affidavit of Enyina Ukana Enyina filed after about two months of the appellant’s affidavit. By that affidavit of Enyina there was now a shift in the case of the appellant. At pages 719 and 721, the court below formed the impression that the further affidavit of Enyina was only intended to fill a lacuna and that the case presented therein could not be said to be one and the same as that presented by the appellant. It could not therefore place any credibility on that evidence of nomination and rejected same. Can that reasoning and finding of the court below be faulted? I do not fancy any reason to fault the reasoning and conclusion. I have also examined the two affidavits and it is in my firm view that the findings and conclusion are the only natural and reasonable inference from the trend of the appellant’s affidavit evidence. Also at pages 722-723 of me record, the court below reproduced paragraphs 16 22 of the 1st respondent’s counter affidavit and believed the averments therein. C
D
E
F

I have earlier in this judgment also given reasons why the evidence of the 1st respondent should be preferred to that of the appellant. The foundation of the appellant’s case is the alleged cancellation of the primary election held at the Eke Township Stadium on the 7th/8th January 2011 and the re-scheduling of another for 7th/8th January 2011 evidenced in exhibit “D”. As I pointed out, the said exhibit “D” was effectively discredited by the 1st respondent. In my view, the findings and conclusions against the appellant and in favour of the 1st respondent are supported by the trend of affidavit evidence. They are therefore not perverse. G
H

In the light of the foregoing considerations, it is my firm view that, despite the unnecessarily harsh and unpalatable language em-

played by the Court of Appeal and some of its premature findings complained of, the appellant was not denied fair hearing. The court made a painstaking analysis of all the material averments in the affidavits of the appellant and made findings supported by the totality of the evidence. I hold therefore that he was accorded fair hearing. The
 B result is that I resolve the appellant's issues one and two against him.

With respect to the appellant's 3rd issue, it is my view that all weighty arguments about the illegality of the primary election held at the Uyo Township Stadium on the 28th/29th January 2011 would only
 C have been relevant if the 1st respondent had premised the legitimacy of his nomination on that exercise. But he did not. He relied first and foremost on the primary election held at the Eket Township Stadium on the 7th/8th January 2011 which he insisted was peaceful, free and fair. He denied any incident of violence, let alone deaths resulting
 D from any violence. The issue therefore should be discountenanced.

In conclusion, I hold that the totality of the affidavit evidence clearly preponderates in favour of the 1st respondent. The judgment of the Court of Appeal was right and same is hereby affirmed. The result is that the appeal lacks merit and is accordingly dismissed. I
 E make no orders as to costs.

MUNTAKA-COOMASSIE JSC

F It was an appeal which I thought should have commenced by filing a writ of summons. However, fortunately or unfortunately it was in court by way of an originating motion at Abuja Judicial Division of the Federal High Court hereinafter called trial court.

The appellant, Hon. Eseme Eyiboh was the applicant at the
 G trial so also the respondents were the respondents therein. The originating motion was supported by a 33 paragraph affidavit sworn to by the appellant himself. The applicant/appellant further filed another 18 paragraph further affidavit in support of the originating motion. Additional further affidavit of 8 paragraphs and also another further
 H affidavit of 19 paragraphs were also filed by him.

In response to all the above affidavit, The 1st respondent, Mr. Dan Abia as 3rd respondent, filed counter affidavit of 36 paragraphs. Paragraphs 13 and 15 thereof contain many sub- paragraphs culminating in all 51 exhibits admitted as exhibits DAN1 - DAN 51.1 do

not find it necessary to reproduce same here as my learned brother has attached and produced them herein in his lead judgment.

Counsel addressed the court on behalf of their respective clients. The learned trial Judge Abdul-Kafarati J entered judgment in favour of the appellant and allowed the claim of the applicant, see pp. 465 - 466 of the record. B

The 1st respondent who was the 3rd respondent was aggrieved and as a result successfully appealed to the Court of Appeal. Parties filed and exchanged their briefs of argument and on 27th January 2012, the appeal was allowed by the Court of Appeal, Abuja, herein C called court below and ordered the 1st respondent to forthwith vacate the seat in the House of Representative, for the appellant.

The applicant/appellant was not satisfied with the judgment of the court below and filed an appeal to the Supreme Court with the leave of this court on 20/3/2012, he filed an amended notice of appeal. Learned counsel on behalf of their respective clients filed and exchanged their briefs of argument. The appellant's counsel, Wole Olanipekun, SAN filed his appellant's reply brief to the 3rd respondent's brief on the 23/4/2012. The 1st respondent's brief of argument was prepared by Lateef Fagbemi SAN and filed on 3/4/2012. D E

The brief of the 2nd respondent was prepared by Ahmed Raji Esq., and filed on 30/3/2012. The last and not the least is Chief Olusola Oke who filed a brief on behalf of the 3rd respondent on 19/4/2012. This appeal was heard on 26/4/2012 and all the counsel before us F adopted their respective briefs of argument on behalf of their respective clients.

My learned brother, Francis Tabai, JSC has carefully considered all the issues presented to us for our determination and has calmly arrived in my view at a correct decision with which I agreed. I G too dismiss the appeal for lacking in merit. No order as to costs.

FABIYI JSC

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I agree with the reasons advanced by my learned brother, Tabai, JSC in arriving at the conclusion that the appeal is devoid of merit and should be dismissed.

For quite sometime now, it has been held that nomination of

a candidate for an election, as herein, is a political matter which falls within the domain of the political party. The court does not make it a practice to interpolate in such an exercise. This is because it is not the function of the court to impose a candidate on any political party.

See: Onuoha v. Okafor (1983) 2 SCNLR 244; Ehinlanwo v. Oke
B (2008) 16 NWLR (Pt. 1113) 357.

The courts have no power to compel a political party to sponsor a candidate outside of the thin and limited powers conferred under section 87 of the Electoral Act, 2010 (as amended). The jurisdiction relates to whether complaint is in respect of primary election for nomination of a candidate in line with the provisions of the Electoral Act, 2010 (as amended); the party constitution and the party guidelines. It is a person who took part in a primary organised by the National Executive Committee of the party that can complain. See:
C D SC 443/2011 Ikechi Emenike v. PDP & Ors, unreported decision of 25th May, 2011 reported in (2012) 12 NWLR (Pt. 1315) 556.

It is extant in the record of appeal that the primaries conducted by the National Executive Committee of Peoples Democratic Party on 7th and 8th January 2011 was won by the 1st respondent herein.
E The appellant herein ostensibly tried to bank on primaries conducted on 28th/29th January, 2011 clearly out of the time stipulated by Independent National Electoral Commission. Thereat, the officials of the National Working Committee of Peoples Democratic Party were not present and he maintained that members who were present adopted
F him as Peoples Democratic Party Candidate. To my mind, such sounds strange and incredible. I am of the considered view that the court below was on a firm ground in the stance posed by it.

For the above reasons and those contained in the judgment of
G my learned brother, I too, feel that the appeal should be dismissed. I order accordingly and abide by the views relating to costs therein contained.

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RHODES-VIVOUR JSC

I have had the advantage of reading in draft the judgment delivered by my learned brother, Tabai, JSC, I agree with his reasoning and conclusions. I propose, though to add only a few observations. The central issue for determination is who is the PDP's candi-

date for the House of Representatives, representing Eket/Ibeno/Esit/Onna Federal Constituency for the 2011 General Elections?

The trial court held that the appellant (plaintiff) emerged as the duly elected candidate at the PDP primaries held on 28/1/2011 while the Court of Appeal upset that finding and held that the 1st respondent was the duly elected candidate of the PDP, having emerged victorious at the Party primaries held on the 7th and 8th of January 2011. Nomination or sponsorship of a candidate for election is a political matter solely within the discretion of a party. See Onuoha v. Okafor (1983) Vol. 14 NSCC p. 494; (1983) 2 SCNLR 244; PDP v. T. Sylva and 2 Ors Suit No. 28/12 and SC.9/12 consolidated judgment of this court on 20/4/2012 reported in (2012) 13 NWLR (Pt. 1316)85. B
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The interpretation of the above is that a member of a political party cannot compel his political party to nominate or sponsor him for election to elective office. No court has jurisdiction to decide such a matter. A member of a political party who did not take part in the party primaries cannot complain about the conduct of the primaries. He has no locus standi to complain. Only candidates that contested the party primaries can complain about the conduct of the primaries. Section 87(9) of the Electoral Act and P.D.P. v. T. Sylva & Ors (supra) D
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When the Peoples Democratic Party conducts its primaries, there can be only one valid primaries, and that is the primaries conducted by the National Executive Committee of the PDP. Primaries not conducted by the National Executive Committee of the PDP are illegal, null and void, a complete nullity. The learned trial Judge relied on paragraphs 6, 7, 8 and 11 of the further affidavit in support to declare the appellant the candidate of the PDP. Relevant extracts from the further affidavit runs as follows: F
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“6. I know that following a .toiled attempt to hold the primary at an earlier date, the 2nd respondent fixed the primary for the 28th of January 2011 at the Eket Township Stadium in Eket Town.

7. That on the 28th January 2011 was at the Eket Township Stadium along with other delegates for the scheduled primary elections. H

8. While waiting for the officials appointed by the 2nd respondent to conduct the primary to arrive from Abuja, I had a meeting

with a caucus of the delegates present who together form a majority of the delegates for the primaries and we all agreed to vote unanimously for the applicant.

11. *That the other delegates and myself waited into the night and eventually having not seen the officers of the 2nd defendant before we dispersed we unanimously resolved through affirmation that the applicant be returned as consensus candidate of the 2nd respondent and same was communicated to the 2nd respondent."*

As follows:

"Since the failure of the officers of the 2nd defendant to arrive Eket for the primaries as communicated to the parties was not due to the fault of the plaintiff or the delegates present, the justice of the case demands that the plaintiff be returned as the candidate of the 2nd defendant for Eket Federal Constituency..."

The appellant's affidavit had depositions in line with the above. It reads:

"17. On the date fixed for the primaries being 28/1/2011, I was at the Eket Township Stadium along with most of the other delegates.

18. We waited all day and all night all through to the following day 29/1/2011 for the panel conducting the primaries to come.

19. The panel appointed by the 2nd respondent from Abuja never came and no primaries held at the Eket Township Stadium or anywhere in Eket/Ibeno/Esit/Onna Federal Constituency..."

The appellant admits that there were no primaries on 28/1/11. Furthermore, no official of the PDP showed up to conduct primaries on that day. How, may I ask, can the appellant emerge as the PDP candidate from primaries that were never held? The reasoning of the learned trial Judge is interesting. The learned trial Judge was of the view that since the failure of the officers of the PDP to arrive and conduct the primaries was not the fault of the appellant, justice demands that the appellant be returned as the candidate of the PDP for Eket Federal Constituency. It is clear that the learned trial Judge came to a wrong conclusion. There must be primaries before there can be a winner. Since there was no primaries on 28/1/11, the judgment of the trial court was wrong. Nobody emerged from the alleged primaries of 28/1/2011.

The Court of Appeal set aside the findings of the trial court. That court said:

“Exhibit ‘C’ forms part of the case of the 1st respondent. It is the INEC letter of 24/1/2011 which drew the attention of the party to the fact that the time table and schedule of activities for 2011 elections issued by the commission pursuant to the power vested on her by section 153 of the Electoral Act, 2010 as amended had since elapsed on 15th January, 2011 and it has not been extended by the commission. By this letter, Exhibit ‘C’, the 1st respondent has shown not only the illegality of the purported nomination of himself, from the illegal exercise of 28th or 29th January, 2011 at Eket township stadium, but also of the Uyo nomination exercise from which the delegate voted overwhelmingly for the appellant. The unintended consequence of Exhibit C is the inference that the PDP avoided the exercise in Eket township stadium either on 28th or 29th January, 2011 because it was profane and illegal to do so in view of Exhibit ‘C’.”

The above shows the reasoning of the Court of Appeal. Affidavit evidence and documentary evidence shows that at the primaries conducted on 7th and 8th of January, 2011 the 1st respondent (appellant in the Court of Appeal) won convincingly. That primaries was conducted by the National Executive Committee of the PDP. The fact that no primaries were conducted on 28th or 29th of January 2011 is conclusive evidence that the primaries conducted on 7th and 8th of January 2011 were the only primaries conducted by PDF for the House of Representatives scat for the Eket Constituency. The judgment of the Court of Appeal was correct.

What happened on the 28th of January 2011 amounted to the appellant confirming himself as the candidate of the PDP after conducting his own primaries. It is clear that appellant was not sponsored by the PDP and so he could not claim to be the candidate of the Party since he did not emerge from the PDP primaries conducted by the National Executive Committee of the Party. This is premised on facts and law that a candidate that was not sponsored by a political party cannot be said to be the candidate of the party.

On the other hand, the 1st respondent emerged from the only authentic primaries conducted by the National Executive Committee of the PDP on 7th and 8th January 2011, as the duly elected candidate of the PDP and subsequently the party's representative in

the House of Representatives having won the General Election for the Eket Federal Constituency. It is only the candidate who emerged from party primaries that can lay claim to having won a general election and in this case it is the 1st respondent.

B For this, and the detailed evaluation of affidavit and documentary evidence by my learned brother, Tabai. J.S.C, I would dismiss the appeal.

ARIWOOLA JSC

C This is an appeal against the judgment of the Court of Appeal, Abuja Division delivered on 27th January, 2012 whereby the judgment of the trial Federal High Court was set aside and applicants claim dismissed.

D The appellant was the applicant before the Federal High Court, Abuja (hereinafter referred to as trial court). The appellant had approached the trial court by an originating motion to challenge the sponsorship and nomination of the 1st respondent (herein as the candidate of the 3rd respondent herein, for the Eket/Esit/Eket/ Ibeno/ E Onna Federal Constituency to the House of Representatives. In support of the said originating motion was an affidavit, a further affidavit and yet another further affidavit on 7/4/2011 and 13/4/2011 respectively. On 18/4/2011, the appellant filed an additional further affidavit. See pages 363, 123-126, 153-213 and 214-275 respectively. F

The 1st respondent herein who was the 3rd respondent before the trial court opposed the said action and filed a counter affidavit of 36 paragraphs which, with the various exhibits attached thereto G are on pages 310-373.

It is noteworthy that in the affidavit evidence preferred by the applicant, he did not clearly challenge or contest the outcome of the 7th and 8th January, 2011 primary election of the 3rd respondent here - the Peoples Democratic Party, conducted at Eket, the 1st respondent claimed he won convincingly. H

The appellant in his originating motion had sought the following reliefs:

“(1) An order setting aside the primaries purportedly held at Uyo Township on 28th and 29th January, 2011 at which Mr. Dan Abia

was purportedly elected as the candidate of the Peoples Democratic Party for election to office as Member of the House of Representative representing Eket/Ibeno/Esit/Onna Federal Constituency for the 2011 general election.

(2) An order selling aside the purported sponsorship of Mr. Dan Abia was purportedly elected as the candidate of the Peoples Democratic Party for election to office as Member of the House of Representative representing Eket/Ibeno/Esit/Onna Federal Constituency for the 2011 general election.

(3) An order of injunction restraining the 1st defendant by itself, agents, servants, officers privies and any person acting through or under them from accepting or otherwise acting on the purported nominating or sponsorship of Mr. Dan Abia by the 2nd defendant to office as member of the House of Representatives representing Eket/Ibeno/Esit/Onna Federal Constituency under the flag of the 2nd defendant.

(4) An order directing the 1st respondent to insert the name of the applicant as the Peoples Democratic Party for election to office as member of the House of Representatives representing Eket/Ibeno/Esit/Onna Federal Constituency.

(5) And for such further or other orders as this honourable court may deem fit to make in the circumstances. The lend judgment has copiously stated the affidavits and counter affidavit evidence adduced by both parties, hence I need not restate same again. ”

The 1st respondent had contended that at the close of pleadings (affidavit evidence) so to say, the following are the crucial facts to be considered.

(a) That the appellant lost the primary election of 7th & 8th January, 2011 to the 1st respondent.

(b) That the appellant did not fill any form CF001 or nomination for of the party.

(c) That the Peoples Democratic Party (3rd respondent) did not forward appellant's name to INEC as its candidate for any elective post;

(d) The purported primary election rerun of 29th January, 2011 relied on by the appellant was not conducted by Peoples Democratic Party nor was same monitored or supervised, as it should, by INEC;

(e) That the appellant did not contest the April, 2011 general election as candidate of the People Democratic Party. It was however contended by the appellant that apart from specifically stating that he was nominated as the PDP candidate through affirmation by delegates gathered at the primary election at Eket Township Stadium on B 28th/29th January, 2011 through the affidavit evidence of Enyina Ukana Enyina and that his name was forwarded to the PDP a deposition and fact which were not denied and disputed, the trial court was vested with the jurisdiction to make the order it made relating to the appellant. Reliance was placed on Amaechi v. IN EC (2008) 5 C NWLR (Pt. 1080) 277, Ugwu v. Ararume (2007) 12 NWLR (Pt. 1048) 365.

The court below was able to consider the entire facts and affidavit evidence and various documents attached thereto by both parties since the credibility of witnesses did not arise. It found that the trial court was perverse in its decision to grant the appellant's claim. I have also read through the affidavit and documentary evidence placed before the trial court. I am of the firm view that the court below was right in setting aside the decision of the trial court as it failed to properly evaluate and consider the affidavit and documentary evidence placed before it. E

For the above short reason and fuller reasons in the lead judgment of my learned brother, Tabai, JSC, I too found this appeal lacking in merit and substance. It should be dismissed. Accordingly, it F is hereby dismissed. No order as to costs.

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