

SUPREME COURT OF NIGERIA
FRIDAY, 6TH JULY, 2012. SC. 55/2012
CORAM:- F. F. TABAI, C. M. CHUKWUMA-ENEH,
M. S. MUNTAKA-COOMASSIE, M. U. PETER-ODILI,
O. ARIWOOLA, JJSC

DR. YUSUF MUSA NAGOGO APPELLANT
AND
1. CONGRESS FOR PROGRESSIVE
CHANGE
2. SOLOMON EWUGA RESPONDENTS
3. INDEPENDENT NATIONAL
ELECTORAL COMMISSION

ACTIONS - Commencement - Manner - Form of commencement is not enough to vitiate an action - If the ends of justice would be compromised - By such technical application of rules (H1)

ACTIONS - Jurisdiction - Waiver - Instance of - Waiver of procedural jurisdiction occurs - When a litigant submits to jurisdiction of court - In spite of his misgiving of initiating process (H2)

ELECTION PETITIONS - Hearing - Applicable process - Because of the need for expeditious handling of election matter - Originating summons is most appropriate (H3)

AFFIDAVITS - Conflicts - Resolution - It is not only from oral evidence that conflicts in affidavits would be resolved - As there are enough materials on which court could resolve conflict (H4)

COURTS - Evidence - Evaluation - Ascription of probative value to evidence - Is the primary function of trial court - And appellate court does not intervene - Even if it would have held otherwise (H5)

APPEALS - Evidence - Evaluation - Interference - If Supreme Court finds dereliction of duty in evaluation - It can interfere to do what lower court should have done (H6)

4442 Nagogo v. CPC (2012) 12 KLR (pt. 321) 4441; (2013) 2

ELECTIONS - Affidavits - Depositions - Failure to deny - In absence of specific denial of a paragraph of the affidavit - 2nd plaintiff being a financial member of 1st plaintiff - Is eligible to contest the primary election (H7)

ELECTIONS - Primary election - Validity of - Since there is evidence that the primary of 11/01/2011 was inconclusive - The authentic primary was the one of 15/01/2011 (H8)

FACTS

Plaintiffs/respondents' commenced this action at the Federal High Court by way of originating summons, claiming the following reliefs inter alia, a declaration that nomination and sponsorship of candidate for an election, is the exclusive preserve of political party concerned. The court in its judgment granted the reliefs of appellant. Appellant being aggrieved, filed appeal at the Court of Appeal.

Appellant file a notice of appeal containing seven grounds of appeal. But appellant argued grounds one and six which were the propriety of instituting this action by originating summons. The rest of the grounds were thus struck out having been abandoned. At the end, the court dismissed the appeal on the ground that it was too late in the day for appellant to raise the issue. Consequently, appellant filed appeal in Supreme Court.

ISSUES FOR DETERMINATION

1. Whether the Federal High Court had jurisdiction to entertain the matter in view of the averments of the 1st and 2nd respondents in paragraphs 9-10 and 23-25 of their affidavit in support of their originating summons wherein they deposed that there were 2 primaries.

2. Whether the learned Justices of the Court of Appeal could countenance arguments on issues on which no issues for determination were formulated.

3. Whether it was proper for the learned Justices of Court of Appeal to review the evidence of the 1st and 2nd respondents without reviewing the evidence of the appellant.

HELD (Unanimously dismissing the appeal per **PETER-ODILI JSC**)

ACTIONS - Commencement - Manner

1. I would have to say without hesitation that the manner or form of commencement of an action is not by itself enough to vitiate an action if the ends of justice would be compromised on account of such a blind technical application of the rules. (p. 4459 E)

ACTIONS - Jurisdiction - Waiver - Instance of

2. The situation is the more covered where in this instance the appellant who has woken up to contest the viability of the suit at the trial court because it was commenced by originating summons instead of by a writ of summons had himself filed a counter affidavit and a written address. The Supreme Court had put paid to such late “sleep-in” when it held that a waiver of a procedural jurisdiction occurs when a litigant submits to the jurisdiction of the court in spite of his misgiving of the initiating process. Also, it has to be emphasised that there is jurisdiction as a matter of substantive law. While procedural jurisdiction as in the case in hand can be waived by a litigant such cannot be waived where it is a contention against jurisdiction as a matter of substantive law. That distinction has to be made since admittedly a thin line between the two may appear and sometimes seem opaque; however the distinguishing mark is still available. (p. 4459 G)

ELECTION PETITIONS - Hearing - Applicable process

3. As a recap, the grievance of the 1st and 2nd respondents in their claims before the general election are well situated in the interpretation of the provisions of section 87 of the Electoral Act, 2010. The claim based on the view point of 1st and 2nd respondents that the 2nd respondent was the winner of the 1st respondent’s primaries for Nasarawa North Senatorial District of Nasarawa State and his name submitted to the 3rd respondent as the nominated and sponsored candidate of the

1st respondent for the Senatorial Election slated and indeed conducted on April 2011. However the 3rd respondent failed to publish the name of 2nd appellant. That bearing in mind the supporting documents to the originating summons all that was required of court was the determination of whom between appellant and 2nd respondent was the duly elected candidate from the primaries and if the 3rd respondent was at liberty to change reject or substitute the duly sponsored/nominated candidate of the 1st respondent or in fact any political party considering the relevant provisions of the Electoral Act. That in this matter of interpretation of the Electoral Act and the need for expeditious handling that should be tackled with dispatch of which the best vehicle is originating summons.
(p. 4460 C)

AFFIDAVITS - Conflicts - Resolution
4. From the above and the materials made available to the court of first instance there were enough from which that court could resolve the conflicts existing between the contending positions of the parties as shown in their affidavits for and against. At the risk of repetition, it is not only from oral evidence that conflicts in affidavit; evidence would be settled. This is a point severally reiterated by this court. (p. 4461 D)

Evidence - Evaluation
5. Of essence is the basic principle that the evaluation and the ascription of probative value to such evidence are the primary function of a trial court. Therefore, where such a trial court has properly evaluated the evidence, it is not the business of the appeal court to substitute its own views for those of that court of trial. The duty of the appeal court thereafter being of a secondary nature is to ascertain whether or not there is evidence on which that court of trial acted and when that has been done the Court of Appeal does riot intervene even if it would have handled the situation differently.
(p. 4464 B)

Evidence - Evaluation - Interference

6. However, if the appellate court finds dereliction of duty in the evaluation of evidence, then it must step in or interfere to do what the trial court should have done. This is also applicable where, in evaluating, a wrong conclusion is reached by the trial court. I must quickly add, that if there is a lapse in the evaluation of evidence by the trial court or a reaching of a wrong conclusion after an evaluation and the Court of Appeal failed to set things right by carrying out the evaluation then it behoves the Supreme Court to rectify the anomaly by carrying out the evaluation which ab initio was not done or not effected as the occasion warranted by the court below. (p. 4464 D) B
C

Affidavits - Depositions - Failure to deny

7. In the absence of any specific and/or sufficient denial of the above paragraph in the-affidavit in support, I am inclined to follow the decision in Hope Uzodinma v. Senator Osita Izunaso (supra) to hold that the 2nd plaintiff was as at the time of the primary election a financial member of the 1st plaintiff and therefore eligible to contest the primary election. With this holding, it is safe/to say that the 2nd plaintiff fulfilled all the constitutional requirements under section 65 for the purpose of contesting the primary election conducted by the 1st plaintiff either on 11th or 15th of January, 2011. (p. 4469 H) D
E
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Primary election - Validity of

8. It is clear that both parties are agreed that there was a primary election held on 11/1/2011. However, while the plaintiffs have documentary evidence to buttress their assertion, the 2nd defendant has none. It is trite that he who asserts must prove. I am of the view that there is overwhelming evidence or materials placed before the court to the effect that the primary election held on 11/1/2011 was inconclusive; hence the 2nd defendant did not exhibit whatever the outcome of the exercise of 11/1/2011 was to his counter affidavit in opposition to the amended originating summons. I hold that the authentic primary election of the 1st plaintiff for the Nasarawa North G
H

Senatorial Zone was held on 15/1/2011. I therefore resolve issue 2 in favour of the plaintiffs. (p. 4473 D)

NOTABLE POINT OF INTEREST

CHUKWUMA-ENEH JSC

B *1. Right to file election petition*

For a member to effectively challenge the party's choice of a candidate for an elective office, he must have been an aspirant in the party's primaries and thus bring himself within the definition of an aspirant as per section 87(9) of the Electoral Act 2010. Invariably he would have contested in the primaries. (p. 4478 C)

REPRESENTATION

D M. M. Nurudeen with A. B. Tase, T. J. Aondo, Bilikisu Mohammed and K. U. Usoro, for appellant

Dr. Alex Izinyon SAN with D. Mando, S. A. Ayiwulu, E. Anikwem, A. A. Janta, Z. Z. Alumugu, H. Abdurrahman (Mrs.), F. O. Izinyon, M. O. Abubakar, E. O. Oguejafor, S. Dien, L. O. Fagbemi (Jnr), A. Alumugu, E. A. Attah, C. C. Agu (Miss), J. Ovie, O. Ibori (Mrs.) and E A. Izinyon (Jnr), for 1st and 2nd respondents

I. M. Dikko with A. J. Auta, for 3rd respondent

CASES REFERRED TO

- F Ehinlanwo v. Oke (2008) 16 NWLR (Pt. 1113) 357
 Military Governor Imo State v. Nwauwa (1997) 2 NWLR (Pt. 490) 675
 Ogunyade v. Oshunkeye (2007) 15 NWLR (Pt. 1057) 218
 C. C. & Ind. S.P.R. Ltd. v. Ogun State Water Corp. (2002) 4 SC (Pt. 11) 86
 G Oseni v. Bajulu (2009) 18 NWLR (Pt. 1172) 164
 S.P.D.C. Nig Ltd v. Edamkue (2009) 14 NWLR (Pt. 1160) 1
 Alli v. Aleshinloye (2000) 6 NWLR (Pt. 660) 177
 Balonwu v. Governor of Anambra State (2009) 18 NWLR (Pt. 1172) H 13
 Oredoyin v. Arowolo (1989) 4 NWLR (Pt. 114) 172
 Ogbe v. Asada (2009) 18 NWLR (Pt. 1172) 106
 Akinpelu v. Adegboire (2008) 4-5 SC 11
 Shittu v. Fashumit (2005) 7 SC (Pt. 11) 107

Lado v. C.P.C. (2011) 12 SC (Pt. III) 113

A-G Anambra State v. A-G Federation (1993) 6 NWLR (Pt. 302) 692

A.C.B. v. Gwagwada (1994) 5 NWLR (Pt. 342) 25

STATUTES REFERRED TO

Constitution of Federal Republic of Nigeria, ss. 65(2), 233(1)-(6)

Electoral Act 2010, s. 87(4)(b)(ii)(c)(9)

Evidence Act Cap. E14 LFN 2004, s. 131

LEAD JUDGMENT BY PETER-ODILI JSC

This is an appeal against the decision of the lower court dated 14th December 2011 dismissing the appellant's sole ground of appeal to wit the propriety of commencing the action in the trial court of originating summons (having abandoned the other grounds of appeal) on the ground that it was too late in the day for the appellant to do so.

The declaratory reliefs in the originating summons are reproduced verbatim hereunder thus:

"1. A declaration that nomination, sponsorship and substitution of candidates for an election, is the exclusive preserve of that political party concerned under the law.

2. A declaration that the 1st defendant has no vires or statutory power to reject the name of any candidate sponsored by a political party for elective position or compel any political party to sponsor a particular candidate for an election.

3. A declaration that the 1st defendant has no statutory power to recognize or accept as candidate the name of any person not submitted or sponsored by his political party.

4. A declaration that the 2nd plaintiff having won the primaries of the 1st plaintiff pursuant to which his name has been submitted to the 1st defendant as the nominated and sponsored candidate of the 1st plaintiff for the Nasarawa North Senatorial District in the National Assembly Election in the April, 2011 general election.

5. A declaration that under the provisions of the Electoral Act 2011, the only way the 1st defendant can change, reject, substitute a duly sponsored/nominated candidate of a political party is through a court order.

6. *An order of the honourable court compelling/directing the 1st defendant to recognize and accept the 2nd plaintiff as the (sic) for the Nasarawa North Senatorial District in the National Assembly Election in the April, 2011 general election.*

B 7. *An order of this honourable court that the 2nd defendant having lost in the primary election of the 1st plaintiff conducted on 15th January, 2011 and not having been sponsored by the 1st plaintiff to be its candidate in the April 2011 general election into the Nasarawa North Senatorial District in the National Assembly Election in the April, 2011 general election.*

C 8. *An order of this honourable court that the sponsorship/nomination of the 2nd plaintiff by the 1st plaintiff having been done in accordance with the law cannot be invalidated in law.*

D 9. *An order of this honourable court declaring the 2nd plaintiff as the sponsored candidate of the 1st plaintiff for Nasarawa North Senatorial District of Nasarawa State in the April 2011 general election.*

E 10. *An order of perpetual injunction restraining the 1st defendant, its agents, servants or privies from recognizing the 2nd defendant as the sponsored candidate of the plaintiff for Nasarawa North Senatorial District for April, 2011 general elections."*

The High Court granted the reliefs in a considered judgment. The appellant appealed to the Court of Appeal by notice of appeal dated 28th June, 2011 containing seven grounds of appeal. The appellant only argued grounds one and six which were the propriety of instituting the action by originating summons of the grounds of appeal having abandoned in his brief the other grounds which grounds were struck out by the court below. The Court of Appeal dismissed the appeal on 14th December, 2011 and in consequence the appellant has appealed to this court *vide* two notices of appeal dated 14th December, 2011 and 14th February, 2011.

H On the 7th May 2012 date of hearing, learned counsel for the appellant, Mr. M. M. Nurudeen adopted their brief filed on 10/4/12 and a reply brief filed on 25/4/12. The appellant distilled three issues for determination, *viz.*

1. Whether the Federal High Court had jurisdiction to entertain the matter in view of the averments of the 1st and 2nd respondents in paragraphs 9-10 and 23-25 of their affidavit in support of their

originating summons wherein they deposed that there were 2 primaries.

2. Whether the learned Justices of the Court of Appeal could countenance arguments on issues on which no issues for determination were formulated.

3. Whether it was proper for the learned Justices of Court of Appeal to review the evidence of the 1st and 2nd respondents without reviewing the evidence of the appellant.

Dr. Alex Izinyon SAN learned counsel for the 1st and 2nd respondents adopted their brief on 23/4/12 in which was argued their preliminary objection. He however submitted that in the event the appeal was not dismissed on account of the preliminary objection, they formulated three issues for determination which are as follows:-

1. Given the facts and circumstances of this case whether the lower court was right when it held that the action was properly commenced by originating summons.

2. Whether the learned Justice of the Court of Appeal could countenance arguments on issues on which no issues for determination were formulated.

3. Considering the fact that the action was commenced by an origination summons, whether the lower court did not properly evaluate the evidence placed before it.

Mr. Dikko, learned counsel for the 3rd respondent adopted their brief filed on 23/4/12 and in it was argued their preliminary objection minus matter of grounds 1 and 5 of the grounds of appeal leaving ground 3 argument valid. He stated that in the event that the court is so minded to go into the merits their sole issue is:

Whether the Court of Appeal was right when it held F that the Federal High Court has jurisdiction to entertain the mailer and to consequently grant the reliefs sought before it.

There is no dispute as to the fact that the two preliminary objections would be tackled to enable the court know if it can enter into the merits of the appeal in the first place and if not to dismiss the appeal in limine.

Preliminary Objections:

Dr. Izinyon SAN stated by the notice of preliminary objection dated 23rd April 2012, the 1st and 2nd respondents challenged issues

one and five grounds contained in the amended notice and grounds of appeal dated 17th April and filed on the 18th April 2012 by the appellant. He contended that issue one of the appellant's issues for determination is incompetent as it relates to a complaint against the judgment of the Federal High Court and is totally unconnected with
 B the decision of the lower court. That the Supreme Court has no jurisdiction to entertain direct appeals against the judgment of the trial Federal High Court. He cited Section 233(1) of the 1999 Constitution (as amended). That issue one should be struck out as incompetent.

C The learned Senior Advocate for the 1st and 2nd respondents further stated that grounds 1,3,4 and 5 of the appellant's amended notice of appeal are incompetent based on section 233(3) of the 1999 Constitution. That ground in the grounds of appeal is a call on
 D this court to evaluate the evidence and this without leave as required by section 233(3) of the Constitution as amended being a ground of mixed law and fact. He cited *Ehinlanwo v. Oke* (2008) 16 NWLR (Pt. 1113) 357 at 396; *Military Governor, Imo State v. Nwauwa* (1997) 2 NWLR (Pt. 490) 675 at 692.

E The grounds 1 and 3 of the appellant's notice of appeal border on the mode of commencement of the action at the trial court that is on the propriety or otherwise of commencing the action by way of originating summons. He stated on that these grounds of
 F appeal as well as the issues and arguments canvassed on them are wholly incompetent. That the reason for this is that the issue of mode of commencement of this action by originating summons was thoroughly and brilliantly dealt with and treated by the lower court which held that the complaint was a fresh issue raised before it by the ap-
 G pellant for the first time on appeal and could not be entertained.

Dr. Izinyon SAN said these findings of the lower court were not appealed against by the appellant in any of the grounds of appeal filed before this court and he is thus deemed to have conceded the findings of the lower court on the issue. He cited *Ogunyade v. Oshunkeye* (2007) 15 NWLR (Pt. 1057) 218 at 257; *C. C. & Ind. S.P.R. Ltd. v. Ogun State Water Corp.* (2002) 4 SC (Pt. 11) 86 at 92; (2002) 9 NWLR (Pt. 773) 629.

Senior counsel, Dr. Izinyon further stated that the above being the case, grounds 1, 2, and 3 of the notice of appeal are incom-

petent and should be struck out as this court cannot pronounce on them. He referred to *Oseni v. Bajulu* (2009) 18 NWLR (Pt. 1172) 164 at 183 - 184; *S.P.D.C. Nigeria Ltd. v. Edamkue* (2009) 14 NWLR (Pt. 1160) 1 at 27; *Alli v. Aleshinloye* (2000) 6 NWLR (Pt. 660) 177 at 213.

On grounds 4 and 5 of the notice of appeal, Dr. Izinyon said those grounds are incompetent as the essence of the grounds did not arise from a ratio in the judgment appealed against. He cited *Balonwu v. Governor of Anambra State* (2009) 18 NWLR (Pt. 1172) 13 at 44; *Oredoyin v. Arowolo* (1989) 4 NWLR (Pt. 114) 172; *Ogbe v. Asada* (2009) 18 NWLR (Pt. 1172) 106 at 126.

He went on to say that ground 2 does not arise from the decision appealed against and that being so, that ground is incompetent. He referred to *Balonwu v. Governor of Anambra State* (2009) 18 NWLR (Pt. 1172) 13 at 44.

Mr. Dikko learned counsel for the 3rd respondent referred to their preliminary objection dated 23rd April 2012. His grouse was with issue one of the appellant's brief which touched on the decision of the Federal High Court and not that of the Court of Appeal in clear infraction of section 233(1), (2), (3), (4), (5) and (6) of the Constitution of 1999 as amended. That gleaning at the originating processes filed at the Federal High Court and the decision of the Court of Appeal which gave rise to this appeal, it would be revealed that the issue submitted for consideration and determination was never on the dispute of two primary elections. He cited *Akinpelu v. Adegboire & Ors.* (2008) 4-5 SC 11 page 75 at 80; (2008) 10 NWLR (Pt. 1096) 531; *Shittu v. Faslumit* (2005) 7 SC (Pt. 11) 107 at 115; (2005) 14 NWLR (Pt. 946) 67 1. That the case of *Lado & Ors. v. C.P.C. & Ors.* (2011) 12 SC (Pt. III) 113 at 147; (2011) 18 NWLR (Pt. 1279) 689 did not apply.

Learned counsel for the appellant, Mr. Nurudeen informed the court of his desire to abandon grounds I and 5 of the grounds of appeal which were accordingly struck out. Arguing sequel to his reply brief, learned counsel for the appellant said grounds 2, 3 and 4 which are relevant for the purpose of this appeal bear testimony to the falsity of the assertion by the respondent counsel. That the complaints are against the decision of the Court of Appeal and not the Federal High Court. That it is not true that appellant's issue one is incompe-

tent because it complains of the judgment of the trial court. That ground 3 which relates to that first issue aforesaid is a ground challenging jurisdiction and there is no way to find out whether a court has competence or not other than by looking at the initiating processes and these are always filed at the trial court. He said in the determination therefore, this court is to look at the affidavits initiating the process. He cited *Lado v. C.P.C. & Ors.* (2011) 12 SC, A-G Anambra State v. Attorney General of the Federation (1993) 6 NWLR (Pt. 302) 692 at 742.

Mr. Nurudeen went on to canvass that in their affidavit evidence, 1st and 2nd respondents had admitted the issue of two primaries. He referred to *A.C.B. v. Gwagwada* (1994) 5 NWLR (Pt. 342) 25 at 42.

That this objection is not preliminary as it was not raised at the first hearing of the case and so cannot be taken now. He referred to Order 2 rule 9(1) and (2) of the Supreme Court Rules. That the preliminary objection is objectionable because counsel subsumed his arguments into his brief of argument mindless of the need for 3 clear days notice as required by Order 2 rule 9(1) and the necessity of an order of this court allowing him to argue the preliminary objection in the brief of argument. It is clear that the preliminary objection of the 3rd respondent based on the ground that had been abandoned and struck out has been over taken by events. Therefore the valid objection for our consideration is that of 1st and 2nd respondents based on grounds 2, 3 and 4 which are still alive and valid.

I would restate hereunder the grounds of appeal 2, 3, 4 subsisting:

“Ground Two:

2. The learned Justices of the Court of Appeal erred in law when they accepted arguments of the 1st and 2nd, respondents on ‘Distinction between jurisdiction as a matter of procedural law and jurisdiction as a matter of substantive law.’

Particulars of Error:

- i. Counsel to the 1st and 2nd respondents formulated no issue for determination on that point and since there was no such issue for determination, there was no peg on which to hang those arguments,*
- ii. In the absence of such issue for the determination, the court should have struck out the arguments on arguments at large.*

Ground Three:

The learned Justices of the Court of Appeal erred in law when they held that the Federal High Court had jurisdiction to entertain the matter.

Particulars of Error:

i. The 1st and 2nd respondents deposed in paragraphs 9-10^B and 23-25 of their supporting affidavit dated 1st April 2011 that there were two primaries conducted on 6th and 15th of January 2011 owing to the fact that the first primary was inconclusive.

ii. Such a case as depicted by the 1st and 2nd respondents^C does not come under the purview of section 87(4)(b) (ii), and (c) ii of the Electoral Act 2010 and is therefore not justiciable and the trial court had no jurisdiction to entertain the matter.

Ground Four:

The learned Justices of the Court of Appeal erred in law when^D they reviewed the evidence of the 1st and 2nd respondents and ignored that of the appellant and thereby occasioned a miscarriage of justice.

Particulars of Error:

i. Instead of putting the two contending sides on an imaginary scale to see which outweighs the other, the learned justices of the Court of Appeal reviewed only the evidence of the 1st and 2nd respondents and completely ignored the evidence of the appellant as if what the respondents said was true and there was no need to turn^F to the evidence of the appellant.

ii. Having reviewed and accepted the evidence of the respondents alone, the Court of Appeal paid no attention to the evidence of the appellant especially exhibit "B, C, D & H" which showed that the appellant was the candidate duly nominated and whose name^G was sent to the 3rd respondent.

iii. Having accepted the facts as presented by the 1st and 2nd respondents, the learned Justices of the Court of Appeal ignored the overwhelming conflict in the contending affidavit.

iv. Such a one-sided review of the evidence suggests that the learned and respected Justices of the Court of Appeal had made up their minds and were not interested in the case of the appellant.

v. In such a one-sided review only the 1st and 2nd respondents evidence was put on the imaginary scale of justice, the appellant's evi-

dence was completely ignored.”

It seems to me best to have the preliminary objection dismissed to clear the way for the issues formulated in the appeal since the points raised in the preliminary objection especially that of jurisdiction, form the fulcrum of the arguments in the appeal proper.

B Preliminary objection dismissed so the merits of the appeal can be properly articulated. *Main Appeal:*

For ease of reference I shall utilize the issues as couched by the appellant.

C Issue No. I

Whether the Federal High Court had jurisdiction to entertain the matter in view of the averments of the 1st and 2nd respondents in paragraphs 9-10 and 23-25 of their affidavit in support of their originating summons wherein they deposed that there were 2 primaries.

D Mr. Nurudeen, learned counsel for the appellant contended that the court below erred when they said that the Federal High Court had jurisdiction to entertain the matter. He referred to the affidavits of 1st and 2nd respondents in support of the origination summons and said the deposition showed there were 2 primaries conducted on 6th
E and 15th January 2011 because the first primary was inconclusive. Learned counsel also referred to the counter affidavit of the appellant dated 13th May 2011 which showed only one primary was conducted at which appellant was returned unopposed. That from the
F contending affidavits, it is clear there were no less than two issues which are, the number of primaries and which candidate emerged in which primary. That in view of these disputed facts, the matter at the Federal High Court was not justiciable and the Federal High Court had no jurisdiction to entertain the case and the Court of Appeal was
G in error to say the Federal High Court had jurisdiction to so entertain. He cited the case of this court in Senator Yakubu Garba Lado & 42 Ors. v. Congress for Progressive Change & 5 Ors. Dr. Yusha’u Armiyau v. C.P.C. & 48 Ors. (Consolidated) (2011) 12 SC (Pt. III) 113 at 147, reported as Lado v. C.P.C. (2011) 18 NWLR (Pt. 1279) 689.

H Mr. Nurudeen further submitted that it is the claim of the plaintiff that determines jurisdiction and in this instance since the matter was not justiciable, there was no jurisdiction in the court to go forth in the adjudication. He cited A.-G., Anambra State v. A.-G., Federation & Ors. (1993) 6 NWLR (Pt. 302) 692 at 742; Madukolu v. Nkemdilim

(1962) NSCC P. 374; (1962) 2 SCNLR 341; Rossek v. A.C.B. Ltd. (1993) 8 NWLR (Pt. 312) 382 at 438 -439; Okoye v. Nigerian Construction & Furniture Co. Ltd. (1991) 6 NWLR (Pt. 199) 501 at 528; Western Steel Works Ltd. v. Iron & Steel Workers Union (1986) 3 NWLR (Pt. 30) 617 at 625; Onyema v. Oputa (1987) 3 NWLR (Pt. 60) 259 at 293. B

That this court should declare those proceedings as null and void and to set aside the judgments of the two courts below.

Arguing against the assertions of the appellant, Dr. Alex Izinyon SAN for the 1st and 2nd respondents contended that jurisdiction in any suit is determined by the nature of the plaintiff's claim and in the case at hand it is that of the 1st and 2nd respondents appropriately taken by the originating summons. That it is not the non filing of a counter affidavit per se that makes the claim hostile. He referred to Etim v. Obot (2010) 12 NWLR (Pt. 1207) 108 at 156. C D

He stated on that the facts in the affidavit were not in conflict warranting the calling of oral evidence. That even if those facts were in conflict there was enough documentary evidence to assist the court in resolving the issue in favour of the 1st and 2nd respondents.

Dr. Izinyon said it is not only by calling oral evidence that conflict in affidavit evidence may be resolved since those conflicts could be resolved by reference to documents attached to the affidavit. He cited Nwosu v. Imo State Environmental Sanitation Authority (1990) 2 NWLR (Pt. 135) 688 at 718; Kimdey v. Military Governor of Gongola State (1988) 2 NWLR (Pt. 77) 445; Hope Uzodinma v. Senator Osita Izunaso (No.2) (2011) 17 NWLR (Pt. 1275) 30 at 82. E F

He went on to submit for the 1st and 2nd respondents that it is CPC that has the authority to say whom between the 2nd respondent and the appellant they sponsored as candidate and once they said so that should be the end of the matter. That the trial court made findings that 2nd respondent is a member of the 1st respondent and that he was eligible to contest the primary election and these findings were not appealed against. Therefore the appellant cannot now question those findings which were not subject of his appeal in the Court of Appeal. That the case of C.P.C. (supra) is distinguishable having different facts from the present case. G H

Mr. Dikko, learned counsel for the 3rd respondent submitted that the Federal High Court had jurisdiction to entertain the suit and

the Court of Appeal correct in affirming same.

The above being the summary of the submissions of the appellant and on the other side the respondents 1st – 3rd. In issue no. 1 was posed the competency of the suit at the very beginning having been initiated by originating summons instead of by a writ of summons since the version proffered by the appellant the, suit should have been commenced by writ of summons since oral evidence was necessary in view of the conflicts thrown up by the affidavit evidence from either side. The respondents 1st and 2nd disagree contending that the conflicts alluded to by the appellant were not of a nature that nothing else other than oral evidence would resolve them. That in fact the documents that were annexure or exhibits which were part of the supporting and counter affidavits were sufficient to resolve such conflicts. It is therefore necessary to recapture some of these salient evidential materials in the affidavits and I would start with the affidavit of the 1st respondent through its State Chairman, Alhaji Hamidu Haruna in paragraphs 8,9, 10, 12, 13,14 and 16 in support of the originating summons, viz:

8. That pursuant to paragraph 7 above a primary election was partly conducted in one Local Government out of the three that makeup the Nasarawa North Senatorial District by the 1st plaintiff on the 11th January 2011 for the Senatorial Seat of Nasarawa North Senatorial District of Nasarawa State for the April, 2011 general election only.

9. That on the said day meant for the nomination of the candidate, the 1st plaintiff would sponsor as its candidate for the Senatorial Seat of Nasarawa North Senatorial District of Nasarawa State in the April, 2011 (i.e. 1st plaintiff primary election), there was no election in Akwanga and substantial parts of Nasarawa Eggon where the majority of the plaintiff's members in the Nasarawa North Senatorial District reside.

10. That there was no result declared by the 1st plaintiff's for the primary election fixed on the 11th January 2011 for Nasarawa North Senatorial District as the primary election fixed on the 11th January 2011.

12. That due to the inconclusive 1st plaintiff's primary election fixed on the 11th January 2011, a re-run primary election was conducted by the 1st plaintiff on the 15th January 2011.

13. That three aspirants to wit: Dr. Yusuf Musa Nagogo, Samuel E. Aliu and Solomon Ewuga contested the inconclusive 1st plaintiff's primary election of 11th January 2011 for Nasarawa North Senatorial District of Nasarawa State.

14. That pursuant to the facts in paragraphs 9 and 10 above the State Executives of the 1st plaintiff complained to the National Executive Committee of the 1st plaintiff of non holding of election in Akwanga and substantial parts of Nasarawa Eggon and its effect on the 1st plaintiff's chances at the on-coming Nasarawa North Senatorial District of Nasarawa State in the April, 2011 general elections. Attached as exhibit "C" is a copy of the said letter.

16. That on the said 15th day of January 2011, the rescheduled primary election for the nomination of the senatorial candidate, the 1st plaintiff would sponsor for the seat of Nasarawa North Senatorial District of Nasarawa State was conducted and concluded and at the end, the 2nd plaintiff scored the highest number of votes cast by scoring 9,709 votes while the 2nd defendant scored a total number of 1,098 votes cast at the election. Attached as exhibit "E" is the result of the primary election.

The 2nd respondent also deposed in paragraphs 9-10 and 23-25 of affidavit in support of the originating summons as follows:

9. That pursuant to paragraph 9 above, a primary election was conducted by the plaintiff on 6th January 2011 for the Senatorial seat of Nasarawa North Senatorial District of Nasarawa State in the April, 2011 general election wherein the 2nd defendant contested the said election.

10. That I know as a fact that the said election conducted on 6th January 2011 for the Senatorial seat of Nasarawa North Senatorial District of Nasarawa State in the April 2011 general election wherein the 2nd defendant contested was inconclusive.

23. That I know as a fact that in the said rescheduled primary election for the Senatorial seat of Nasarawa North Senatorial District of Nasarawa State, I won the said primary election having defeated the 2nd defendant with the majority of votes cast at the said election.

24. That after the conduct of the said rescheduled election I scored the total number of 9,709 votes while the 2nd defendant (Dr. Yusuf Musa Nagogo) scored a total number of 1,098 votes. The copy of the result of the said rescheduled primary election which was con-

ducted on the said 15th day of January 2011 for the Nasarawa North Senatorial seat of Nasarawa State is hereto attached and marked as exhibit “AA10A”, “AA10B”, “AA10C” respectively.

25. That pursuant to the rescheduled election conducted on the 15th day of January, 2011 which I won, the 1st plaintiff issued me with form for members of Senatorial seat together with affidavit in support of personal particulars of person seeking election to the office/ membership of senate Form CF001 of the (defendant - INEC) which I filled and submitted same to the 1st plaintiff. A copy of the said form is hereto attached and marked as exhibit “AA11”. Further depositions are as follows:

1. That the only primary election conducted by the 1st plaintiff was that of 11th January 2011 wherein I was elected and returned unopposed. The 1st plaintiff’s notice of convention containing the time table for special congress is herewith annexed as exhibit “A”.

2. That the organisation and conduct of primary election is the exclusive duty/function of the national headquarters of the 1st plaintiff and not that of the State Executives/Chapter.

3. That based on my victory aforesaid the 1st plaintiff gave me Form CF001 which was completed and submitted to the 1st defendant, thereby forwarding my name to the 1st defendant as the 1st plaintiff’s candidate for the constituency. The said form is herewith annexed as exhibit “B”.

4. That to beat the said deadline the said form (i.e. exhibit B) was submitted to the first defendant by the 1st plaintiff on 3 1st January 2011 and same was duly acknowledged.

The supporting affidavit of the 2nd respondent as plaintiff was amended sequel to an application to court and an order accordingly. Therefore, the valid supporting affidavit of the 2nd respondent is that after the amendment of the originating summons, which stated fuller facts but not substantially different from the earlier supporting affidavit, and to be relied upon I hereby refer to the guide provided by this court per Adekeye, J.S.C. in *Anambra State Environmental Sanitation Authority v. Ekwem* (2009) 13 NWLR (Pt. 1158) 410 at 435-436 which decision adopted and applied the earlier position of this court in *Agbahomovo v. Eduyegbe* (1999) 3 NWLR (Pt. 594) 170 at 186-187 paras. H-C wherein it was stated by Iguh, J.S.C. as follows:

“There can be no doubt that once pleadings are duly amended by the order of court, what stood before amendment is no longer material before the court and no longer defines the issues to be tried before the court. See Warner v. Sampson (1959) 1 Q.B. 297. This, however, is as far as this proposition of law goes. It does not and has not laid down any such principle that an original pleading which has been duly amended by an order of court automatically ceases to exist for all purposes and must be deemed to have been expunged or struck out of the proceedings. The clear principle of law established is that such original pleading which has been duly amended is no longer material before the court in the sense that it no longer determines or defines the live issues to be tried before the court, not that it no longer exists. It does certainly exist and is before the court. It is however totally immaterial in the determination of the issues to be tried in the proceedings. It thus cannot be considered as the basis of one’s case in any action. Nor may a court of law rely on any such original pleading which has been duly amended as the basis for its judgment in the suit. The issues to be tried will depend on the state of the final or amended pleadings. See Salami v. Oke (1987) 4 NWLR (Pt. 63) 1 at 9 and 12 and Agbaisi and Others v. Ebikorefe and Others (1997) 4 NWLR (Pt. 502) 630 at 647 -649”.

I would have to say without hesitation that the manner or form of commencement of an action is not by itself enough to vitiate an action if the ends of justice would be compromised on account of such a blind technical application of the rules. In this regard I have sought refuge in the cases of Wilson v. Okeke (2011) 3 NWLR (Pt. 1235) 456 at 473-474; Famfa Oil Ltd. v. A.-G., Federation (2003) 18 NWLR (Pt. 852) 453.

The situation is the more covered where in this instance the appellant who has woken up to contest the viability of the suit at the trial court because it was commenced by originating summons instead of by a writ of summons had himself filed a counter affidavit and a written address. The Supreme Court had put paid to such late “sleep-in” when it held that a waiver of a procedural jurisdiction occurs when a litigant submits to the jurisdiction of the court in spite of his misgiving of the initiating process. Also, it has to be emphasised that there is jurisdiction as a matter of substantive law. While procedural

jurisdiction as in the case in hand can be waived by a litigant such cannot be waived where it is a contention against jurisdiction as a matter of substantive law. That distinction has to be made since admittedly a thin line between the two may appear and sometimes seem opaque; however the distinguishing mark is still available. I place reliance on *Jikantoro v. Dantoro* (2004) All FWLR (Pt. 216) 390 or reported as *Ndayako v. Dantoro* (2004) 13 NWLR (Pt. 889) 187; *Mobil Unlimited v. L.A.S.E.P.A.* (2002) 18 NWLR (Pt. 798) I at 33; *Etim v. Obot* (2010) 12 NWLR (Pt. 1207) 108.

As a recap, the grievance of the 1st and 2nd respondents in their claims before the general election are well situated in the interpretation of the provisions of section 87 of the Electoral Act, 2010. The claim based on the view point of 1st and 2nd respondents that the 2nd respondent was the winner of the 1st respondent's primaries for Nasarawa North Senatorial District of Nasarawa State and his name submitted to the 3rd respondent as the nominated and sponsored candidate of the 1st respondent for the Senatorial Election slated and indeed conducted on April 2011. However the 3rd respondent failed to publish the name of 2nd appellant. That bearing in mind the supporting documents to the originating summons all that was required of court was the determination of whom between appellant and 2nd respondent was the duly elected candidate from the primaries and if the 3rd respondent was at liberty to change reject or substitute the duly sponsored/nominated candidate of the 1st respondent or in fact any political party considering the relevant provisions of the Electoral Act. That in this matter of interpretation of the Electoral Act and the need for expeditious handling that should be tackled with dispatch of which the best vehicle is originating summons. This method was very well articulated by my learned brother, Chukwuma-Eneh, J.S.C. in *Agbakoba v. I.N.E.C.* (2008) 18 NWLR (Pt. 1119) 489 at 538, paras. C-E wherein he stated in these terms as follows:

"Instituting this action by way of originating summons appears to me all said, to be most appropriate form of action to speedily resolve in the context of sections, 32 and 34 of the Electoral Act,

2006, that is to say, the controversy surrounding the nomination and substitution of the appellant by the 2nd respondent in this case. It is significant that the materials by way of facts deposed to and documents exhibited to the said affidavits of the parties and the ones tendered from the bar provide more than sufficient materials to deal with the issue of whether the appellant has been properly substituted in the circumstances. As they have not been challenged, they constituted admissible evidence. See *Shitta-Bey v. Attorney General of the Federation* (1998) 10 NWLR (Pt. 570) 392. And again, the applicable law in this instance is not being contested.”

In *Agbakoba v. I.N.E.C.* (supra) Chukwuma-Eneh, J.S.C. at page 539 paras. G-H stated as follows:

“In the end, I have no doubt in my mind that the instant procedure by way of originating summons avails the appellant of a proper way of initiating this action in seeking a quick and ready resolution of his grievances as per his claim.”

From the above and the materials made available to the court of first instance there were enough from which that court could resolve the conflicts existing between the contending positions of the parties as shown in their affidavits for and against. At the risk of repetition, it is not only from oral evidence that conflicts in affidavit; evidence would be settled. This is a point severally reiterated by this court. See *Nwosu v. Imo State Environmental Sanitation Authority* (1990) 2 NWLR (Pt. 135) 688 at 718; *Kimdey v. Military Governor Gongola* (1988) 2 NWLR (Pt. 77) 445. I cannot resist putting forward the finding of the learned trial Judge at page 875-876 of the volume 2 of the record, viz

“It is based on the above that the 2nd defendant is challenging the eligibility of the 2nd plaintiff in his counter affidavit and written address. On evidence, the 2nd defendant in paragraph 4 of his counter affidavit; merely stated that all the exhibits put before this court by the 2nd plaintiff to prove his qualification for the Primary Election were fraudulently procured and no more like I said earlier, somewhere in the body of this judgment, this averment does not sufficiently discredit the exhibits aforementioned. Paragraph ‘S’ of the counter affidavit reproduced earlier, is a general statement which does not specifically attack the exhibits. Again, paragraph 7 is a gen-

eral statement which also does not attack the exhibits produced in evidence by the 2nd plaintiff to prove his eligibility. Paragraph 8 follows the footstep of paragraphs 5 and 7. Paragraph 10 and 13 of the 2nd defendant's counter affidavit are to the effect that as at the time the primary election was held and up till the time this suit was filed, the 2nd plaintiff was still a member of the PDP. But before me is exhibit (sic) by which the 2nd plaintiff resigned his membership of the PDP on 10/1/2011 which has not been specifically challenged other than that it is fraudulently procured under paragraph 4 of ; the counter affidavit without stating the particulars of the fraud."

It is therefore curious that in the light of that finding the appellant still would want to be heard that he needed oral testimony to provide what he failed to controvert in his counter affidavit when he had the opportunity to do so.

No doubt this issue has been resolved by me in favour of the respondents and against the appellant. That is to say that, yes the Federal High Court had the jurisdiction to enter into the matter before it from the facts available and which facts are different from those of Lado (*supra*) as appellant would want.

Issue No. 2

Whether the learned Justices of the Court of Appeal could countenance arguments on issues in which no issues for determination were formulated.

Mr. Nurudeen of counsel said the sole issues raised by the 1st and 2nd respondents at the Court of Appeal was whether the action was properly commenced by originating summons and appellant can now challenge the mode of the commencement of this action if so, whether the action is not properly commenced by originating summons.

He said the issue referred to above is not only unwieldy, chaotic but downright ungrammatical and confusing. That the issue so couched was to be discountenanced since the arguments that proceeded did not hang on that issue. That the arguments ought to have been struck out. He cited *Shell Petroleum Dev. Co. (Nig.) Ltd. v. Federal Board of Internal Revenue* (1996) 8 NWLR (Pt. 466) 256 at 294; *Ogunye & 4 Ors. v. State* (1999) 5 NWLR (Pt. 604) 548 at 562-563; *Agbakoba v. I. N.E.C. & Ors.* (2008) 18 NWLR (Pt. 1119) 489 at 537-538.

Dr. Izinyon for 1st and 2nd respondents countered by saying that the 1st and 2nd respondents' argument on their issue bordered on G the propriety of commencing this suit by originating summons and so were at large. That it was the appellant who made jurisdiction an issue at the lower court and the respondents 1st and 2nd were obliged to react to it and they did. That since the respondents' submission did not fall outside the issue formulated from the ground of appeal, it is proper and regular. He referred to *Okelola v. Boyle* (1998) 2 NWLR (Pt. 539) 533 at 546. B

Thus, issue 2 has in a way been answered by the answer in issue 1 since the poser here is neither here nor there and not based on what was on ground. The answer straight away is that the Court of Appeal did not deviate from what was before it and made the appropriate consideration and conclusion. C

Issue No.3

Whether it was proper for the learned Justices of the Court of Appeal to review the evidence of the 1st and 2nd respondents without reviewing the evidence of the appellant? D

It was canvassed for the appellant that the Court of Appeal reviewed the evidence of the 1st and 2nd respondents without reviewing that of the appellant. That if the court below had looked at the evidence of the appellant they would have found that the counter affidavit of the appellant was articulately substantial. That the one sided review occasioned a miscarriage of justice. He referred to *Abisi v. Ekwealor* (1993) 6 NWLR (Pt. 302) 643 at 673; *Amokomowo v. Andu* (1985) 1 NSCC 16; (1985) 1 NWLR (Pt. 3) 530; *Odojin v. Mogaji* (1978) 3 SC 91 at 94; *Woluchem v. Gudi* (1981) 5 SC 291. E F

Senior counsel for 1st and 2nd respondents said the court of trial made specific findings which the appellant failed to challenge in G his appeal to the Court of Appeal and so those positive findings stand and cannot be challenged by the appellant at this point in time. That the appeal lacking in merit and substance, should be dismissed. He cited *Elias v. Omo-Bare* (1982) 1 NLR 75 at 87-88.

The appellant through learned counsel raised a lot of dust on H the fact in their view that the Court of Appeal had reviewed the evidence of 1st and 2nd respondent without taking a review of the appellant alongside. Their contention is that the one sided review occasioned a miscarriage of justice to the detriment of the appellant. The

respondents. 1st and 2nd disagreed with that viewpoint, therefore it is necessary to go back and see if the assertion of the appellant is correct or not. In doing so, the necessary materials are to be found especially in the affidavit evidence and cited exhibits at the trial court. This is because it is at that scene of the articulation of the grievances and defences that it can be seen whether the principles guiding evidence and its evaluation are met.

Of essence is the basic principle that the evaluation and the ascription of probative value to such evidence are the primary function of a trial court. Therefore, where such a trial court has properly evaluated the evidence, it is not the business of the appeal court to substitute its own views for those of that court of trial. The duty of the appeal court thereafter being of a secondary nature is to ascertain whether or not there is evidence on which that court of trial acted and when that has been done the Court of Appeal does not intervene even if it would have handled the situation differently.

However, if the appellate court finds dereliction of duty in the evaluation of evidence, then it must step in or interfere to do what the trial court should have done. This is also applicable where, in evaluating, a wrong conclusion is reached by the trial court. I must quickly add, that if there is a lapse in the evaluation of evidence by the trial court or a reaching of a wrong conclusion after an evaluation and the Court of Appeal failed to set things right by carrying out the evaluation then it behoves the Supreme Court to rectify the anomaly by carrying out the evaluation which ab initio was not done or not effected as the occasion warranted by the court below. In this wise is a surfeit of judicial authorities and I shall refer to a few, viz: Akinloye v. Eyiola (1968) NMLR 92 at 95; Enang v. Adu (1981) 11 -12 SC 25 at 19; Woluchem v. Gudi (1981) 5 SC 291 at 326; Adebayo v. Adusei (2004) 4 NWLR (Pt. 862) 44 at 77; Oyedele v. Akinyele (2002) 3 NWLR (Pt. 755) 586 at 616-617; N.E.P.A. v. Arobieke (2006) 7 NWLR (Pt. 979) 245 at 272; Alabi v. Doherty (2005) 18 NWLR (Pt.957) 411 at 432.

The position of the law or practice of it having been stated above, the next stage is to get into the facts as existing to see which aspect of the principles apply. I would first quote aspects of the rel-

evant part of the judgment of the Court of Appeal per Itsamiya, J.C.A. and it is hereunder:

“I have meticulously, perused the records and examined both the 1st and 2nd respondents’ affidavit in support of the amended originating summons on the hand and on the other hand, the counter-affidavit of the appellant. I am unable to see any dispute/conflicts substantially, of issues of fact, rather, that the 1st and 2nd respondents’ sole or principle question earmarked for determination in this suit is one of construction of a written law, i.e. whether the 3^d respondent had power to annul, rescind or substitute duly, the nomination and sponsorship of the 1st respondent’s candidate into the elective office in dispute and puts the appellant, who was not nominated and sponsored by the 1st respondent for the office. What was required of the trial to do was to determine whether the 3^d respondent under the provisions of the Electoral Act, Constitution or any other enactment, can change/substitute or reject a duly nominated and sponsored candidate of a political party without a court order.

None of the paragraphs of the appellant’s counter-affidavit contradicts or comes in conflict with the documentary evidence because the appellant in countering the named exhibits averred that, “they were fraudulently procured, concocted and manufactured by the deponent thereof to mislead the trial court.”

This is a general statement which, in my view does not specifically counter the said exhibits. Paragraphs 5, 7 and 8 of the appellant’s counter-affidavit are also general statements which in my view, do not specifically counter those exhibits, paragraphs 9, 10 and 13 of the appellant’s counter-affidavit, however, were to the fact that 2nd respondent did not resign his PDP membership at the material time, but exhibit J was tendered, and in my view, it was sufficient material to deal with the issue of whether the 2nd respondent had resigned his PDP membership.

As the above mentioned exhibits have not been challenged, they constituted admissible and reliable evidence. It is the effect of these documents and exhibits and failure on the part of the 3rd respondent on the matter in controversy, i.e. the rejection/substitution of the 2nd respondent that the trial court is called to adjudicate upon. By contending that the action should have been commenced by writs as there are apparently conflicting facts, the appellant is missing the

point.

I wish to point out that it is not the filing of counter-affidavit *per se* that makes the claim hostile. See *Etim v. Obot* (2010) 12 NWLR (Pt. 1207) 108 at 156 G-H when this court decided that:

“It is not the filing of the counter-affidavit to oppose the claims
 B in the originating summons that makes such proceedings to be contentious or to result in substantial disputed facts. Indeed, the nature of the claim(s) and fact(s) deposed to in the affidavit in support of the prayers in originating summons can by themselves disclose disputed
 C facts and hostile nature of the proceedings.”

Assuming I am wrong in my conclusion, and that there are facts that are in conflict, I am to say that there is enough documentary evidence that assisted the trial court in resolving the issues in favour of the 1st and 2nd respondents, e.g. On issue of who won the
 D primary election of 15/1/2011, exhibit ‘E’ is the result which was attached to the amended originating summons and it proves clearly it emanated from the 1st respondent, and that the 2nd respondent won the said primary election. See pages 596-634 of volume I of the records. See pages 596 -634 of volume 1 of the records.

On issue of primaries and their numbers. Exhibit “E” afore-said confirmed the date of the primaries, which exhibit C is the request for a date of the said re-run primary election. See pages 595 of volume 1 of the records. This exhibit clearly shows how many primary elections.

On 2nd respondent’s candidature in CPC (1st respondent) and his membership in PDP, exhibit I is the membership of 2nd respondent as a member of the 1st respondent. See page 639 of volume 1. By this exhibit I it is proved that 2nd respondent is a fully Hedged member of the 1st respondent.”

The Court of Appeal from the excerpts above showed it was satisfied with the Federal High Court of first instance in its use of the evidence before it as far as evaluation of the evidence and the accompanying conclusion that court arrived at Part of the findings and
 H conclusions of the trial court would be restated as follows:

“Having painstakingly reproduced the relevant paragraphs of the affidavit in support and counter affidavit, the next step is to test the depositions in the affidavit in support against the requirements of the 1999 Constitution, the Electoral Act, the 1st plaintiff’s guidelines

and the counter-affidavit to see whether they can establish the eligibility or otherwise of the 2nd plaintiff. This approach is in recognition of the fact that the 2nd plaintiff's claim is essentially declaratory which he must prove by credible evidence."

For the requirement/qualifications for elections under the 1999 Constitution, the provisions of section 65 is hereby reproduced: B

"S 65(1) Subject to the provisions of section 66 of this Constitution, a person shall be qualified for election as a member of:

(a) the Senate, if he is a citizen of Nigeria and has attained the age of thirty five years; and C

(2) A person shall be qualified for election under subsection (1) of this section if-

(a) he has been educated up to at least school certificate level or its equivalent; and

(b) he is a member of a political party and is sponsored by D that party.

For the requirement of being a Nigerian of age thirty five years and educational qualification of School Certificate, I have scrutinized exhibit M and seen that the 2nd plaintiff met those requirements. E

Further, that the deposition of the 2nd defendant in paragraph 6 of the counter affidavit to the effect that exhibit "M" was procured fraudulently, without more, did not sufficiently discredit exhibit "M"

On the requirement of being a member of a political party to be eligible to contest election, the 2nd plaintiff annexed his membership card as exhibit "I" in the affidavit in support of the amended originating summons. Again, merely stating in paragraph 4 of the counter affidavit without more that the exhibit "I" was fraudulently procured did not sufficiently discredit exhibit "I" and that exhibit "I" G meets the requirement of section 65(2)(b) of the 1999 Constitution.

What is now left is the requirement of sponsorship by the 1st plaintiff (CPC) under section 65(2) of the 1999 Constitution. As the requirement of sponsorship of the 2nd plaintiff is also seriously questioned under the 1st plaintiff's guidelines and copious submissions made thereon, it is prudent, in my view, to consider sponsorship under the 1999 Constitution and the 1st plaintiff's guidelines together. H

As an interlude however, I wish to observe that I am unable to see any direct provisions on the eligibility of aspirants under the

Electoral Act and since the 2nd defendant did not allege the breach of any provisions of the Electoral Act on the issue of eligibility, I have refrained from dissipating valuable time and energy considering the Electoral Act under issue 1.

To justify his sponsorship and nomination under the 1999 Constitution by the 1st plaintiff, the 2nd plaintiff attached the following exhibits to the affidavit in support of the amended originating summons:

- Exhibit H - copy of voter's registration card.
- Exhibit I - copy of membership card
- Exhibit J - copy of letter of resignation to which is attached acceptance of the said letter of resignation by PDP dated 11/1/2011.
- Exhibits K, L and M - copies of receipt for payment, expression of interest form and nomination form respectively.
- Exhibit N - copy of personal particulars form of the 1st plaintiff.

Submitting on the relevant paragraphs of the affidavit in support of the amended originating summons and the aforementioned exhibits, learned counsel for the 2nd plaintiff 4.17 and 4.19 of his written address filed on 10/5/2011 opined that the 2nd plaintiff has acquired vested interest in the candidature of the Senatorial District of Nasarawa North Senatorial Constituency, that he cannot just be stripped or denied the eligibility of the 2nd plaintiff. In doing so, I shall here reproduce paragraph 2 thereof which provides as follows:

"An aspirant shall be qualified for election into the elective offices provided in the Constitution of the Federal Republic of Nigeria;

- (a) *He is a citizen of Nigeria*
- (b) *He has attained -*
 - (i) *The age of 30 years for member of House of Representatives,*
 - (ii) *The age of 35 years for Senator and Governor*
 - (c) *He is educated up to at least the school certificate level or its equivalent.*
 - (d) *He is a registered voter.*
 - (e) *He shows evidence of being a financial member of the party.*
 - (f) *He has been cleared by the Screening Committee of*

the party.”

It is based on the above that the 2nd defendant is challenging the eligibility of the 2nd plaintiff in his counter affidavit and written address.

On the evidence, the 2nd defendant in paragraph 4 of his counter affidavit, merely stated that all the exhibits put before this court by the 2nd plaintiff to prove his qualification for the primary election were fraudulently procured and more. Like I said earlier, somewhere in the body of this judgment, this does not sufficiently discredit the exhibits aforementioned.

Paragraph 5 of the counter affidavit reproduced earlier, is a general statement which does not specifically attack the exhibits.

“Provided that in an election year, only members who had paid their subscription 3 months before primaries shall be eligible to vote and be voted for.”

Relying on the above provision, learned counsel for the 2nd defendant devoted the 1st - 4th pages of his un-paginated written address to the argument that the 2nd plaintiff did not pay his subscription for 3 months before the primary election hence he was not eligible to contest same and cited the case of Labour Party v. I.N.E.C. (2009) 6 NWLR (Pt. 1137) at page 315. He also referred to the case Macfoy v. U.A.C. (1962) AC 152 and Aro v. Lagos Island Local Government Council (2002) 4 NWLR (Pt. 757) at page 385 on the principle that you cannot put something on nothing and expect it to stand.

Granted that learned counsel’s argument is hinged on the provisions of the guidelines, but the question remains, who, as between the 2nd defendant and the State Chairman of the 1st plaintiff is in a better position to know and state whether or not the 2nd plaintiff is a financial member of the 1st plaintiff. It must be noted here that the 1st plaintiff (CPC) through its State Chairman deposed to the affidavit in support of the amended originating summons and in paragraph 28 stated thus:

“That I know from our records that the 2nd plaintiff is registered and up-to date, a financial member of the 1st plaintiff...”

In the absence of any specific and/or sufficient denial of the above paragraph in the-affidavit in support, I am inclined to follow the decision in Hope Uzodinma v. Senator

Osita Izunaso (*supra*) to hold that the 2nd plaintiff was as at the time of the primary election a financial member of the 1st plaintiff and therefore eligible to contest the primary election. With this holding, it is safe/to say that the 2nd plaintiff fulfilled all the constitutional requirements under section 65 for the purpose of contesting the primary election conducted by the 1st plaintiff either on 11th or 15th of January, 2011.

Further arguing the ineligibility of the 2nd plaintiff to contest the primary, learned counsel for the 2nd defendant reproduced yet another provision of the guidelines thus:

“All duly completed nomination forms for the gubernatorial, Senatorial, House of Representatives and House of Assembly aspirants are to be submitted to the State Secretariat of the party at least one week before the relevant special congress for the Election of the party candidate.”

This provision of the guidelines together with the one on 3 months subscription formed the bedrock of the 2nd defendant’s k argument already dealt with in this judgment.

On this provision of the guidelines, I am in total agreement with the submission of learned counsel for 2nd plaintiff at page 14 of his written address to the effect that the absence of the word “shall” in the provision renders it permissive and compliance is not mandatory the operative words being *“are to be submitted to the State Secretariat of the party at least one week before the relevant congress.”* I am of view that if the guidelines provides for 7 days and the 1st plaintiff deemed it fit to accept the nomination a day to the primary election, it is entirely its business, after all the right to accept or reject the nomination form is entirely its.

Lastly, on the eligibility of the 2nd plaintiff, learned counsel for the 2nd defendant yet reproduced another provision of the guidelines thus:

“A person shall not be deemed qualified for H nomination as the party candidate if... he belongs to, or operates in any parallel organization to the party”.

The issue raised by this provision has been dealt with earlier in this judgment when I expressed my preference for exhibit “J”, the letter of resignation of the 2nd plaintiff from PDP to the deposition of the 2nd defendant that the 2nd plaintiff was still a member of the PDP

when he contested the primary election.

Lest am wrong in all the findings above on the eligibility (sic) of the 2nd plaintiff to contest the 1st plaintiff's primary election, I take solace (sic) in some other affidavit and documentary evidence placed as materials before this court.

The first has to do with paragraph 4 of the 1st and 2nd plaintiff's reply to 2nd defendant's counter affidavit with exhibit "P" dealing with application for waiver. The said exhibit is an application by the 2nd plaintiff to the 1st plaintiff's state chairman asking for a waiver of all conditions as to the Party's Constitution and Electoral guidelines for the election particularly paragraph 7 of the Electoral Guidelines. B
C

The exhibit "Q" is communication to the National Chairman of the 1st plaintiff where in the State Chairman said the State Executive Committee sat and considered the request for waiver and recommended it to the National Executive Committee of the party for approval. Exhibit "R" is the approval of the waiver by National Executive Committee. The effect of that is a dispensation or abandonment by the party waiving its rights and privilege which it had the option to insist upon. See *Odu'a Investment & Co. Ltd. v. Talabi* (1997) 10 NWLR (Pt. 523) p.l at 51 paragraph F and *Olufeagba v. Abdul-Raheem* (2010) All FWLR (Pt. 512) page 1038 particularly at pages 1072 -1073, paragraphs G-A; (2009) 18 NWLR (Pt. 1173)384. D
E

Secondly, it is safe to deem the 2nd defendant as having accepted the decision of the 1st plaintiff to sell the nomination forms to the 2nd plaintiff less than one week to the party primary. That position is in consonance with article 6(ii)(b) of the 1st plaintiff's constitution to the effect that upon registration as a member, all members are deemed to have accepted to abide by all lawful rules, regulations and decisions of the party or any of its organs. Therefore, it can be concluded that having allowed the 2nd plaintiff to purchase and submit the nomination forms less than one week to the primaries to the extent of victory on the 15th January 2011, then the 1st plaintiff, its privies including the members such as the 2nd defendant are stopped from contending that the 2nd plaintiff did not submit the form timely. See *Obafemi Awolowo University v. Onabanjo* (1991) 5 NWLR (Pt. 193) at page 549 and also the case of *Onamade v. A.C.B. Ltd.* (1997) 1 NWLR (Pt. 480) page 123 at 141-142 paragraph H-A. F
G
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Having painstakingly evaluated the evidence by both parties

on the eligibility of the 2nd plaintiff under the 1999 Constitution and the 1st plaintiff's guidelines and having also considered the submissions of learned counsel for the parties and the authorities cited, I am of the view that the 2nd plaintiff was eligible to contest the Primary Election in question and so hold. I therefore resolve issue 1 in favour of the 2nd plaintiff. Nominated and sponsored by the 1st plaintiff, whereas the defence of the 2nd defendant as evident from the two issues he formulated is that the 2nd plaintiff was not eligible or qualified to stand for the primary election. It is, thus clear that what the 2nd defendant set out to defend in the instant originating summons is different from the case of the 2nd plaintiff and that in the absence of a counter claim, he has shifted the goal post. In the circumstance, the case of the 2nd plaintiff remains unchallenged.

Having resolved the issue of eligibility, I shall now proceed to consider issue 2 which bothers on when the authentic primary election held. While it is the assertion of the 2nd defendant that the primary election took place on 11/1/2011, the plaintiffs vehemently argued that the 1st plaintiff's primary election took place on 15/1/2011. In resolving which of the two dated primary election for the nomination of candidates actually took place, recourse must be had to the affidavit evidence and exhibits placed before this court.

In paragraph 7 of the affidavit in support of their amended originating summons, the deponent, Alhaji Hamidu Haruna who is the Chairman of Congress for Progressive Change in Nasarawa State, stated that in November, 2010 the plaintiff gave notice to all interested and qualified persons wishing to participate in the primary election.

Paragraph 8, that as a result, a primary election was partly conducted in one Local Government out of the three that make up the Nasarawa North Senatorial District on 11/1/2011, he went further to aver in paragraph 10 of the said affidavit in support that no result was declared by the 1st plaintiff for the primary election held on 11/1/2011 because same was inconclusive, a re-run primary election was conducted by the 1st plaintiff on 15/1/2011. He further averred that the 1st plaintiff normally collates its primary election results in the prescribed 1st plaintiff's result form. Exhibits "C" and "D" were annexed to buttress the above assertions contrariwise, the 2nd defendant averred in paragraph 14 of the counter affidavit in opposition

to the amended originating summons that there was no primary election on 6th January, 2011 or re-run primary election, on 15/1/2011. He attached exhibit 'A' to drive home his point. I have carefully gone through all the exhibits mentioned above and found that exhibit 'A' attached to the 2nd defendant's counter affidavit is a letter to the 1st defendant by the 1st plaintiff stating its intention to hold its primaries on certain dates and for the purpose of the instant case, to hold the primary elections to elect members of State and National Assembly on 6/1/2011. On the other hand, exhibit "C" is a letter from the 1st plaintiff signed by the Nasarawa State Chairman, Alhaji Hamidu Haruna, to the National Chairman of the 1st plaintiff requesting for a date for re-run Primary Election for the Senate and House of Representatives due to the inconclusive primary election held on 11/1/2011. Exhibit "D" is another letter by the Chairman of Nasarawa State CPC addressed to the resident Electoral Commission, Nasarawa State intimating him of the grant of its request by the CPC National to hold a re-run election on 15/1/2011 due to the inconclusive primary election in the entire Akwanga Local Government Area and some wards in Nasarawa Eggon Local Government Area of the Zone. ***It is clear that both parties are agreed that there was a primary election held on 11/1/2011. However, while the plaintiffs have documentary evidence to buttress their assertion, the 2nd defendant has none. It is trite that he who asserts must prove.*** See Section 131 of the Evidence Act, Cap. E1 4, Laws of the Federation of Nigeria, 2004 as amended and the case of Network Security Ltd. v. Dahiru (2008) All FWLR (Pt. 419) at page 475. ***I am of the view that there is overwhelming evidence or materials placed before the court to the effect that the primary election held on 11/1/2011 was inconclusive; hence the 2nd defendant did not exhibit whatever the outcome of the exercise of 11/1/2011 was to his counter affidavit in opposition to the amended originating summons. I hold that the authentic primary election of the 1st plaintiff for the Nasarawa North Senatorial Zone was held on 15/1/2011. I therefore resolve issue 2 in favour of the plaintiffs.***

Coming now to issue 3 which relates to the winner of the Primary Election for Nasarawa North Senatorial District, I shall again fall back on the affidavit evidence and exhibits thereto attached for

the resolution of this issue. Both the 2nd plaintiff and the 2nd defendant lay claim to having won the election. In paragraph 13 of the plaintiff's affidavit in support, the deponent Alhaji Hamidu Haruna Chairman of the Nasarawa State of the 1st plaintiff averred that Dr. Musa Nagogo, Samuel E. Aliu and Solomon Ewuga contested the
B inconclusive 1st plaintiff Primary Election on 11/1/2011 for Nasarawa North Senatorial District of Nasarawa State. He went further to state in paragraph 16 that when the rescheduled Primary Election was conducted on 15/1/2011, the 2nd plaintiff scored the highest number
C of votes cast by scoring 9,709 while the 2nd defendant scored a total number of 1,098 votes. Exhibit "E" was attached as the result of the primary election. It should be recalled that the said deponent had earlier stated in paragraph 5 of the support (sic) affidavit that the 1st plaintiff normally collates its primary election results in the prescribed
D 1st plaintiff's result form. On his part, the 2nd defendant in paragraph 15 of the counter affidavit averred that the primary election held on 11/1/2011 returned him unopposed. The exhibit 'A' attached, as mentioned earlier somewhere in the body of this judgment is not a collation of election results, but timetable for special congresses of the
E CPC. It must be noted here that the 2nd defendant who purports to have won the primary election did not exhibit any result. However, the plaintiffs by exhibit 'O' attached a certified true copy of the 2nd defendant's amended originating summons. Now, I have had a hard
F look at the 2nd defendant's originating summons in suit No.FHC/LF/CS/16/2011 referred to in paragraph 40 of the affidavit in support of the amended originating summons in the case in hand. Now, going through paragraph 23 of the 2nd defendant's amended originating summons, I found reference made to exhibit "H", which the 2nd de-
G defendant exhibited as a copy of the result of the primary election held on 11/1/2011.

It should be noted here that it is settled that a court cannot pretend not to see a document before it, particularly when such document is germane to the justiciable resolution of the issue in contention). The exhibit "H" is not on any letter headed paper. It is hand
H written on a mere plain sheet of paper without the signature of any officer neither did it have any insignia as emanating from one of the front runners of our political parties. That to me is a novelty. I shall say no more on exhibit "H".

On the other hand, exhibit “I:” attached to the affidavit of the plaintiffs, shows the names of the parties or persons that took part in the primary election, is on CPC letter headed paper, the votes scored by each person, the stamp and date of the State Secretary of the CPC, name of agents of both the 2nd plaintiff and 2nd defendant. All the contents of exhibit “E” corroborated the averments of Alhaji Hamidu Haruna as spelt out in paragraphs 11 and 16 of the affidavit in support of the amended originating summons. B

I have no doubts in my mind that going by the affidavit evidence and exhibits placed before the court in the instant case, the 2nd plaintiff was the winner of the primary election of the 1st plaintiff conducted on 15/1/2011 for Nasarawa North Senatorial District of Nasarawa State. C

Granted, for purpose of argument that this court finds irreconcilable conflicting affidavit evidence in both the affidavit in support of the amended originating summons and the counter affidavit and in consequence orders parties to file their pleading, can it be expected that the National Chairman, National Secretary, State Chairman and State Secretary of the Congress for Progressive Change come forward to give evidence contrary to the depositions of the State Chairman as contained in the affidavit in support of the amended originating summons? I think not, for to do so means that the State Chairman of the 1st plaintiff has perjured. Here the case of Uzodinma, is not only instructive, but sufficient to put to rest the contention that the 2nd plaintiff is not eligible to contest the primary election. E
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Having found as I did that the 2nd plaintiff is eligible to contest the primary election of the 1st plaintiff, that the authentic primary election was held on 15/1/2011 and that indeed the 2nd plaintiff won the primary election, what remains is the consequential order to be made by this court. The consequence of my findings is that Mr. Solomon Ewuga was the candidate of the 1st plaintiff, CPC, for whom the party campaigned prior to the April 9, 2011 elections and not Dr. Yusuf Musa Nagogo and since the CPC was declared to have won the said election, Mr. Solomon Ewuga must be deemed the candidate that won the election for CPC. In the eyes of the law, Dr. Yusuf Musa Nagogo was never a candidate in election much less the winner. It is therefore hereby ordered that the 1st defendant returns the G
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2nd plaintiff as the winner of the April 9th National Assembly Election.

I have quoted the learned trial Judge, M. I. Awokulehin J. copiously for the avoidance of doubt and to bring everything into the open and see the validity of the assertion of the appellant that his version of the story was not considered when that of the 1st and 2nd respondents were evaluated in a one-sided arrangement particularly by the Court of Appeal. Clearly, that assertion is not borne out by the record and of note is that this is definitely not one of the instances where the appellate court including the present can interfere and do its own thing in the name of evaluation since there was a thorough and lawful evaluation by the trial court and accepted by the Court of Appeal. See *Ezeoke v. Nwagbo* (1988) 1 NWLR (Pt. 72) 616; *Akeredolu v. Akinremi* (No. 3) (1988) 3 NWLR (Pt. 108) 164 all decisions of this court.

In this respect, the appellant has not shown how what they put forward was not considered by the Court of Appeal or how a miscarriage of justice had been occasioned. A question was put forward to the Court of Appeal and it went into it, and answered it fully from what was available. In a situation where the appellant had failed to counter specific issues raised in supporting affidavits instead made general denials or talked of fraudulent procurements without flesh being added to those bare assertions, he has nobody to blame but himself if there was nothing on which he could hang his views or assertions. The court below did well to utilize the properly articulated position of the 1st and 2nd respondents and so not finding their assertions in the written comments of the court did not mean they were not taken in the course of the deliberation since nothing has been brought on to show otherwise. Also, it is not for the Court of Appeal to bring out materials on behalf of the appellant not before it to show that a balancing act was in progress. See *Elias v. Omo-bare* (1982) 1 NLR 75 at 87-88 per Udo Udoma J.S.C.

This third issue is safely resolved in favour of the 1st and 2nd respondents since the appellant failed woefully to shake their position, the appeal is therefore dismissed. I affirm the findings and decision of the Court of Appeal which affirmed in turn the judgment and orders of the trial federal High Court which found for the 1st and 2nd respondents ordering that among other reliefs the 2nd respondent, Solomon Ewuga, take the place of appellant as the lawfully recog-

nized Senator representing the Nasarawa North of the Federal Republic of Nigeria.

I award costs of N 100.000 to the 1st and 2nd respondents to be paid by the appellant.

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CHUKWUMA-ENEH JSC

I have had a preview of the judgment in this matter prepared by my learned brother Peter-Odili J.S.C. and I cannot agree more that this appeal is devoid of any merit and should be dismissed.

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I must however add that on the facts and circumstances of this matter, the appellant's contention that the instant action as constituted has not been properly initiated by wrongly using the form of originating summons being misconceived has no basis as I shall show anon. The appellant has submitted that the action should have been commenced by writ of summons as there is the need to resolve conflicting questions of facts arising from the parties' affidavits that is to say the supporting affidavit vis-a-vis the counter-affidavit filed in this matter. He has also followed it up by contending that the trial court having failed to do so has erred and which failure is fatal to the action. In that wise, that the proceeding should be declared null and void and to set aside the decisions of the two courts below on that ground alone.

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The question whether or not there is any conflict in the affidavits has to be circumscribed round, indeed narrowed down to what is substantially the core issue in the matter between the parties, as the facts cannot in that regard be at large, which in this case even on the appellant's own contention, are as to the number of primaries and which candidate has emerged in which primary. In other words, the question is on party sponsorship of a candidate of its choice for the instant elective office.

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The lower courts have found that whatever apparent conflicting facts there are in the said two issues above can be resolved and have been resolved based on the documents exhibited to the said affidavits without more. Therefore I do not see the grounds to differ. See *Agbakoba v. I.N.E.C.* (2008) 18 NWLR (Pt. 1119) 489 at 538. I think the point has to be made here that a party in an action as the instant one excepting within the limited scope of the power allowed

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the court under Section 87(9) of the Electoral Act, 2010 cannot invoke the court's jurisdiction to challenge a political party's (as CPC here) choice of candidates for elective offices in the exercise of its discretionary powers in selecting, nominating and adopting of candidates of its choice as the 2nd respondent in this appeal. It is settled that
 B the court has no jurisdiction to intervene in what constitutes an internal affair of a political party's choice of its candidates for elective offices. See *Onuoha v. Okafor* (1985) NSCC 494; (1983) 2 SCNLR 244 per Obaseki; *Dalhatu v. Turaki* (2003) 15 NWLR (Pt. 843) 310;
 C *Lado & Ors. v. C.P.C.* (2011) 18 NWLR (Pt. 1279) 689

For a member to effectively challenge the party's choice of a candidate for an elective office, he must have been an aspirant in the party's primaries and thus bring himself within the definition of an aspirant as per section 87(9) of the Electoral Act 2010. Invariably he
 D would have contested in the primaries.

Coming back as to the propriety or not of having initiated this action by originating summons, it is my view that for the appellant to urge solely on that ground as outlined above, to have the action declared null and void and to set aside the decisions of the two
 E lower courts is based on a total misconception of the distinction between jurisdiction as a matter of procedural law and jurisdiction as a matter of substantive law. It is settled law that jurisdiction as a substantive law is not amenable to be waived as is the case with procedural jurisdiction which can be waived. It is clear that procedural
 F jurisdiction does not go to root of the action. Normally the litigant is allowed to cure the defect in the form of action by amendments with regard to the form of action, provided there is no misleading of the other party to the action by the mistake. Whereas here the defendant/appellant has not been misled he ought not to be allowed to
 G take the point of defective form of action when he has filed all his papers and he is not misled as in this matter. In short, I can find no justification for challenging the question of the form of action by which the instant action has been commenced at the trial court. On the
 H facts of this matter to have commenced this action by originating summons is proper. And the appellant's submission to contrary is rejected.

The age of raw technicality is over and the court is more interested in seeing to the ultimate resolution of the matter in contro-

versy between the parties on the merits. I think that our courts should follow the trail blazed in similar circumstances as in the case of *Hannigan v. Hannigan* (2000) 2 FCR 656. In the cited case, a wrong form of initiating the action has been used. Nonetheless it is not struck out as the other party to the suit has not been misled as to the claim despite the defective form. The courts should no longer allow parties to indulge in frivolous taking of technical points to frustrate the hearing of a matter particularly so where the objection does not go to the jurisdiction as a substantive law. B

In the circumstance of the above reasons and the fuller reasons in the lead judgment, I find no merit in the appeal. I too dismiss the appeal and affirm the decisions of the two lower courts even moreso on the concurrent findings of facts and law. I endorse all orders contained in the lead judgment. Appeal dismissed. C

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MUNTAKA-COOMASSIE JSC

I have had the privilege of reading in draft the lead judgment just delivered by my learned brother, Mary Peter-Odili, J.S.C. in this appeal. I agree. I endorse the orders as to costs. E

ARIWOOLA JSC

I had the opportunity of reading the draft of the judgment just delivered by my learned brother, Mary Peter-Odili, J.S.C. I am in total agreement with the reasoning and conclusion arrived thereat in the said lead judgment. I therefore adopt them as my own. The appeal surely lacks merit and substance. It deserves to be dismissed. Accordingly, it is hereby dismissed by me too. F

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I abide by all the consequential orders in the said lead judgment, including the order on costs. Appeal dismissed.

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