

**SUPREME COURT OF NIGERIA**  
FRIDAY 12TH APRIL, 2013. SC. 238/2012 (CONS.)  
**CORAM:- W. S. N. ONNOGHEN, M. S. MUNTAKA-  
COOMASSIE, N. S. NGWUTA, O. ARIWOOLA,  
M. D. MUHAMMAD, JJSC**

MRS. SUSAN OLAPEJU  
SINMISOLA OLLEY - SC.238/2012  
ACTION CONGRESS  
OF NIGERIA - SC.326/2012 ..... APPELLANTS  
MRS. SUSAN OLAPEJU  
SINMISOLA OLLEY - SC.350/2012  
(CONSOLIDATED)

AND

1. HON. OLUKOLU GANIYU TUNJI  
2. ACTION CONGRESS  
OF NIGERIA - SC.238/2012  
3. INDEPENDENT NATIONAL  
ELECTORAL COMMISSION

AND

1. HON. OLUKOLU GANIYU TUNJI  
2. MRS. SUSAN OLAPEJU  
SINMISOLA OLLEY - SC.326/2012 ..... RESPONDENTS  
3. INDEPENDENT NATIONAL  
ELECTORAL COMMISSION

AND

1. HON. OLUKOLU GANIYU TUNJI  
2. INDEPENDENT NATIONAL  
ELECTORAL COMMISSION - SC.350/2012  
3. ACTION CONGRESS OF NIGERIA  
(CONSOLIDATED)

---

COURT PROCESSES - Originating summons - Validity - Application made by this procedure without questions for determination - Is incompetent and as such court cannot validly exercise its jurisdiction under Electoral Act s. 87(9) (H1)

COURT PROCESSES - Originating summons - Irregularity in - Absence of question for determination in the application - Is fundamental error - Which trial court ought not to have treated as mere irregularity (H2)

APPEALS - Concurrent findings - As there are irreconcilable conflicts with the affidavit upon which lower court made findings - Supreme Court has duty to interfere - And set aside the findings (H3)

### ***FACTS***

2<sup>nd</sup> defendant/2<sup>nd</sup> respondent i.e. Action Congress of Nigeria conducted primary election to nominate its candidate for general election into the Federal House of Representatives. 1<sup>st</sup> defendant/appellant i.e. Mrs. Susan Olley was declared winner of the primary election. Appellant's name was therefore forwarded to 3<sup>rd</sup> defendant/3<sup>rd</sup> respondent i.e. Independent National Electoral Commission (INEC) as 2<sup>nd</sup> respondent's candidate for the said general election. The election for which 2<sup>nd</sup> respondent nominated appellant was for the Amuwo-Odofin Federal Constituency of Lagos State. Dissatisfied with the result of the primary election, plaintiff/1<sup>st</sup> respondent (who also participated in the primary election) commenced this action at the Federal High Court Abuja (suit later transferred to the Lagos Division) by way of originating summons supported by two affidavits, challenging the nomination of appellant by 2<sup>nd</sup> respondent.

1<sup>st</sup> respondent claimed to be the rightful candidate of 2<sup>nd</sup> respondent and should therefore be so recognized by 2<sup>nd</sup> and 3<sup>rd</sup> respondents. 1<sup>st</sup> respondent did not raise any question for determination in the originating summons. The court however viewed the omission as mere irregularity that should not affect the substance of the matter. On the basis of the error made by 1<sup>st</sup> respondent, 2<sup>nd</sup> respondent filed notice of preliminary objection to the hearing of the originating summons. In its judgment, the court dismissed the objection and considered the case on merit. Judgment was thus given in favour of 1<sup>st</sup> respondent. Aggrieved, appellant and 2<sup>nd</sup> respondent filed separate notices of appeal at the Court of Appeal, Lagos Division. The appeals were dismissed by the court. Aggrieved further, appellant and 2<sup>nd</sup> respondent filed two notices of appeal and one

notice of appeal, respectively at Supreme Court. The appeals were consolidated by the court.

### **ISSUES FOR DETERMINATION**

*“(i) Whether the Originating Summons as couched without any questions for determination is competent and/or vests any jurisdiction in the lower Court to adjudicate on any purported claim of the 1st plaintiff/Respondent.*

*“(ii) Even if question (i) is answered in the positive whether the Plaintiff’s action was properly commenced by way of Originating Summons.”*

## **HELD** (Unanimously allowing the appeal per **NGWUTA**

**JSC)**

*Originating summons - Validity*

**1. A common feature present in the reference to originating summons reproduced above and many similar references cited by learned senior counsel for the appellant is the need to formulate and present question or questions for the court to determine based on statutes, will, etc. The grant of the reliefs sought in the originating summons is preceded by, and predicated upon the court’s answer to the question or questions for determination.**

**In the definition of originating summons at page 339 of Advanced Law Lexicon (supra), I deliberately underlined the expression therein: “or statement of remedy to which the court can declare.” This tends to convey the impression that the requirement of questions for determination and statement of remedy may be disjunctive and not conjunctive as is apparent in case law.**

**By the clear and unambiguous words in Order 3 Rule 6 reproduced above, there are two component parts of the application envisaged therein:**

**(1) Questions for construction.**

**(b) Declaration of rights.**

**In other words, the application by originating summons must contain question or questions of construction arising**

*under the instrument involved and a declaration of rights of a person's interest. The declaration of rights depends on the answers to the questions formulated for determination in the application by way of originating summons.*

*A plaintiff intending to benefit from the time and effort saving procedure of originating summons in order 3 of the Federal High Court (Civil Procedure) Rules 2009 must raise the question or questions for determination on the instrument in question and ask for declaration of rights based on the answers to the question. In my view, the plaintiff cannot properly raise that question without seeking a declaration of right nor can he simply seek declaration of rights without the questions for determination. It will be a mere academic exercise for the court to determine the questions without a prayer for declaration of rights, and declaratory rights without question for determination should be brought by writ of summons.*

*The 1st Respondent shot himself in the foot by failure to predicate his declaratory and injunctive reliefs on answers to questions for determination. The said question would have shed light on the provisions of the Act and/or guidelines allegedly breached by the 2nd Respondent for the proper invocation of the jurisdiction of the Court. Under section 87 (9) of the Act the relief sought must relate to and be limited to specific provisions of the Act and for party guidelines.*

*The court cannot exercise its general jurisdiction in a claim brought pursuant to section 37 (9) of the Electoral Act 2010 (as amended). It follows that in the peculiar circumstances of this case, the application by way of originating summons without questions for determination is incompetent and the Court cannot competently exercise its restricted jurisdiction under section 87 (9) of the Act.*

*Having resolved the two threshold issues against the 1st Respondent as plaintiff, I declare that the originating summons was dead on arrival. On the facts presented before us, 1st Respondent cannot resort to originating summons to seek redress pursuant to Section 87 (9) of the Electoral Act, 2010 (as amended). The lower courts should have converted the process to a writ of summons for the parties to file and ex-*

**change pleadings.** (p. 1932 E)

*Originating summons - Irregularity in*

**2. The learned trial Judge was of the opinion that he could either treat the omission of questions for determination as an irregularity or convert the process into a writ of summons or call for pleadings. With due respect to His Lordship, the facts and circumstances of the case clearly justify a choice of the latter in place of the former option he stated in the judgment.** B

**I cannot but commend His Lordship for a painstaking research. However, the issue before the trial Court - the competency vel non of the originating summons devoid of question or questions for determination and ipso facto the jurisdiction of the Court to entertain same - hardly requires a voyage across the ocean to dig into the dust bin of English legal history for its solution. The words of the rule in questions are clear and ought to have been given effect.** C D

**The Court had no business editing the clear provision of the rule in the pretext of abandoning technicality in preference to substantial justice. By treating it as mere irregularity, the trial court tried to edit out of the rule its component part which is a sine qua non to the competence of originating summons, that is, the question for determination on which answer the relief sought depends.** (p. 1935 C) E F

*APPEALS - Concurrent findings*

**3. The law on this point is clear. The inviolability of concurrent findings of fact of the two lower courts to interference by the apex court is not cast in stone or concrete. As argued by the appellant, it is not absolute. This court will disturb concurrent findings of the two courts below if the findings are perverse or based on wrong premises, in which case the court has a right, and indeed, a duty to set aside such findings.** G H

**The affidavit evidence based on which the trial court made the finding of fact which was affirmed by the Court below is riddled with irreconcilable conflicts and contradictions on material facts. This was not denied by the 1st Respondent who merely urged the Court to treat the matter as mere tech-**

**nality. The matter involved is too serious for the two courts below to found a decision on a choice made by 1st Respondent between the two sets of figures he stated in his submissions - one by voters who voted for 1st Respondent and the other by INEC's officials who observed the primaries.**

B (p. 1941 G)

## NOTABLE POINTS OF INTEREST

### **NGWUTA JSC**

#### **C 1. *Reply brief is not for improving argument in the brief***

On the improper commencement and constitution of the 1st Respondent's case at the trial court, the second part of the reply brief seems to me an improved version of the argument in the brief. Strictly, it is not a reply to the 1st Respondent's brief. I will discountenance this portion of the reply brief. A reply brief is not meant to improve the argument in the brief. (p. 1930 G)

#### **2. *Originating summons – Concept of***

E Let me briefly state and examine some authoritative pronouncements on the concept of originating summons. The learned authors of "Odger's Principles of Pleading and Practice in civil actions in the High court of Justice, 21st Edition at 314 said of originating summons:

F *"Where the main point, at issue is one of construction of a document or statute or is one of pure law, then this is the appropriate procedure. It is not, however, appropriate where there is likely to be any substantial dispute of fact."*

Originating summons has been described as:

G *"An originating process in the High Court to determine an issue of law or the interpretation of document by means of submitting affidavit as evidence. A part from providing sufficient particulars to identify the cause of action, the originating summons must include statement of the question to enable the Court to determine or state-*  
H *ment of remedy to which the Court can declare."* See Advanced Law Lexicon, 3rd Edition Reprint, 2009 at 3391.

In B. A Alegbe, Speaker Bendel State House of Assembly v M.O. Oloyo (1983) 2 SC 85 at pages 215-216, this Court, per Eso,

JSC (May his soul rest in peace) said that:

*“Originating summons is reserved for issues like the determination of short questions of construction and not matters of such controversy that the justice of the case would demand the settling of pleadings.”* (p. 1931 H)

B

### **3. “Technicality” – Meaning of**

The word “technicality” has been elevated to the status of a mantra. It has become the escape goat on which to blame any defect in procedural or substantive law in a process filed in Court. If one may ask, what is technicality? Perhaps, the phrases such as technical defect; technical error or simply the word “technical” from which it is derived will provide insight into the import of the word “technicality”. C

A “technical defect” is one which may come within the four corners of it but in fact, it does not affect the merit of the case. It is a mistake which does not go to the bone of the matter. “Technical error” means merely abstract and practically harmless error. The word “technical” from which “technicality” is derived means immaterial, not affecting substantial right without substance. (p. 1936 B)

E

### **REPRESENTATION**

SC.238/2012

Chief Wole Olanipekun (SAN) with Gbenga Adeyemi; Bukola Araromi, Dayo Adesina and Bala Aidi

F

SC.326/2012

Dr. Muiz Banire with A. Ali (Miss)

SC.350/2012

Dr. Oladayo Olanipekun with A. Ali, for the Appellants

G

SC.238/2012

O. Soforowo with E. E. Ikolode, for 1st Respondent

Dr. Muiz Banire, for 2nd Respondent

O. Osaze Uzzi, for 3rd Respondent

H

SC.326/2012

O. Soforowo with E. E. Ikolodo, for 1st Respondent

Dr. Muiz Banire with Tayo Olatubosin, for 2nd Respondent  
O. Osare-Uzzi, for 3rd Respondent

SC.350/2012

O. Soforowo with E. E. Ikolodo, for 1st Respondent

<sup>B</sup> Dr. Muiz Banire, for 3rd Respondent

**CASES REFERRED TO**

Madukolu v. Nkemdilim (1962) 2 SCNLR 341

<sup>C</sup> Skenconsult v. Ukey (1981) 1 SC 6

Agbakoba v. INEC (2008) 18 NWLR (pt. 1119) 489

Ogunbade v. Oyewunmi (2007) 30 NSQLR 434

Obasanya v. Babafemi (2000) 15 NWLR (pt. 699) 1

Atolagbe v. Awuni (1997) 9 NWLR (pt. 422) 536

<sup>D</sup> Anyankwo v. Okoye (2010) 5 NWLR (pt. 1188) 497

Oyeyemi v. Commissioner for L. G. (1992) 2 NWLR (pt. 226) 661

Olutola Holdings v. Ladejobi (2006) 12 NWLR (pt. 994) 321

Okonkwo v. Kpajie (1992) 2 NWLR (pt. 226) 633

Eronini v. Ihiuko (1989) 2 NWLR (pt. 101) 46

<sup>E</sup> NBN v. Alakija (1978) 9 - 10 SC 59

Oloyo v. Alegbe (1983) 2 SCNLR 67

Ossai v. Wakwah (2006) 4 NWLR (pt. 969) 908

M.V. Arabella v. Naje (2008) 11 NWLR (pt. 1097) 182

<sup>F</sup> **STATUTES & RULES REFERRED TO**

Sheriffs & Civil Process Act Cap. 86 LFN 2007, ss. 96, 97

Electoral Act 2010 (as amended), ss. 33, 87(9)(10)

Constitution of Federal Republic of Nigeria 1999, s. 36(1)

<sup>G</sup> Federal High Court (Civil procedure) Rules 2009, O. 3 rr. 6, 7, 8

**BOOKS REFERRED TO**

Mozley & Whiteley's Law Dictionary 10th Ed. p. 323

Jowiti's Dictionary of English Law 2<sup>nd</sup> Ed. p. 1294

<sup>H</sup> Odger's Principles of Pleading & Practice in civil actions in the High Court of Justice, 21st Ed. p. 314

**LEAD JUDGMENT BY NGWUTA JSC**

In the primary election conducted by 2nd Respondent, Ac-

tion Congress of Nigeria, to elect its flag bearer in the House of Representatives Election held in April 2012, the appellant was declared winner.

The primary election was monitored by the electoral umpire, the Independent National Electoral commission, the 3rd Respondent in this appeal. Appellant's name was forwarded to the 3rd Respondent by the 2nd Respondent as the 2nd Respondent's candidate in the April 2011 elections of members of the Lower chamber of the National Assembly. The election for which the 2nd Respondent nominated the Appellant was for the Amuwo-Odofin Federal Constituency of Lagos State.

The 1st Respondent who took part in the primary election challenged the nomination of the Appellant in the Federal High court, Abuja, by way of originating summons which was subsequently amended by order of the trial court. The suit was transferred to Ikeja Lagos Division of the Federal High Court. It retained the No.FHC/ABJ/CS/217/2011.

In the amended originating summons filed on 9th March, 2011 the 1st Respondent as plaintiff claimed against the appellant and 2nd and 3rd Respondents as defendants as follows:

*"1. A declaration that the plaintiff is the winner of the 2nd defendant primary election for Amuwo-Odofin Federal Constituency, Lagos State, conducted on the 12th day of January 2011 to the Federal House of Representatives having scored the highest number of votes.*

*2. A declaration that the plaintiff is the candidate of the 2nd defendant in the April 2011 General Elections for the Amuwo-Odofin Federal Constituency, Lagos State, to the Federal House of Representatives.*

*3. A declaration that the 1st defendant having lost the primary election lost Amuwo-Odofin Federal Constituency, Lagos State to the Federal House of Representatives is not, and cannot be the candidate of the 2nd defendant in the April 2011 General Election. Plaintiff is the candidate of the 2nd defendant in the April 2011 General Elections.*

*4. Declaration that the 1st defendant is not eligible and or qualified to contest the 2nd defendant primary elections and or general election for Amuwo-Odofin Federal Constituency, Lagos State*

to the Federal House of Representatives, being a person employed in the public Service of Lagos State.

4. An order directing the 2nd and 3rd defendants to recognize the plaintiff as the candidate of the 2nd defendant in the April 2011 General Elections for Amuwo-Odofin Federal Constituency, Lagos State.

6. An order of perpetual injunction restraining the 2nd and 3rd defendants, their servants, privies, agents or howsoever from recognizing, holding out and dealing with or howsoever relating with the 1st defendant as the candidate of the 2nd defendant for the April General Elections for Amuwo-Odofin Federal Constituency, Lagos State to the Federal House of Representatives.

7. An order of perpetual injunction restraining the 1st defendant from parading herself or howsoever holding out herself as the candidate of the 2nd defendant in April 2011 General elections for Amuwo-Odofin Federal Constituency, Lagos State to the Federal House of Representatives.”

The claims in the Originating Summons was predicated on the following grounds:

“(a) The applicant is the winner of the primary election conducted on Wednesday, the 12th of January 2011 for the Amuwo-Odofin Federal Constituency, securing 61 votes against the defendant/Respondent who got 4 votes.

(b) The name of the applicant was illegally substituted for the 1st Respondent who secured the least votes.

(c) The action of the defendant/Respondent in substituting the name of the applicant for the 1st defendant and subsequently forwarding the 1st defendant’s name to the 3rd defendant as its candidate for Amuwo-Odofin Federal Constituency contravenes the provisions of Section 97 and other relevant sections of the Electoral Act, 2010 as amended, including the 1999 Constitution of the Federal Republic of Nigeria as amended.

(d) The 1st defendant will retire from Public Service of Lagos State as a Principal of Lagos State Senior Model College, Kankon-Badagry on 31st March 2011.”

The amended Originating Summons is supported by a 20-paragraph affidavit and a 27-paragraph better and further affidavit. Documents were exhibited to each of the two affidavits.

The 1st defendant filed a 30-paragraph counter-affidavit to which some documents were exhibited. Learned Counsel for the 1st defendant filed a written address. The 2nd Respondent filed a notice of preliminary objection which was taken along with the substantive matter. The 2nd Respondent also filed a 12-paragraph counter-affidavit and a written address. The 3rd defendant did not react to the amended Originating Summons. B

The learned trial Judge, in his judgment, dismissed the preliminary objection and having considered the case on its merit, he concluded:

*“The plaintiff is entitled to judgment having won the primary election conducted by the 2nd defendant on 12th of January, 2011 Judgment is therefore entered for the plaintiff and I grant all the reliefs of the plaintiff in this case.”* See page 490 of the record. C

Dissatisfied with the judgment, the 1st and 2nd defendants filed separate notices of appeal at the Lagos Division of the court of Appeal. Each of the two appeals was heard and dismissed by a different Panel of the Court below. D

Against the two judgments of the Court below, appellants filed three separate appeals to this court. Thus, from the suit before the trial court arose two separate appeals and against the judgment in the two appeals, three separate appeals Nos. 238/2012, SC.326/2012 and SC.350/2012 were filed in this court. The three appeals were consolidated and so were heard simultaneously by this Court on 7/2/2013. E  
F

The three appeals are based on the same set of facts. Substantially, similar issues were raised and substantially, similar arguments were advanced in the briefs filed in each appeal. In the circumstances, I will determine the first of the three appeals No. SC.238/2012 and the decision reached therein will be applied to the two other appeals Nos. SC.326/2012 and SC.350/2012 G

SC.238/2012:

On 27th April, 2012 appellant filed a notice of appeal containing 6 grounds of appeal. However, on 11th July, 2012 appellant filed a second notice of appeal containing 12 grounds of appeal. Both notices were filed within time. Appellant abandoned the first notice of appeal on 6 grounds and relied on the second notice on 12 grounds of appeal. H

Learned counsel for the parties filed and exchanged briefs of argument. From the appellant's twelve grounds of appeal, the following four issues were distilled for determination in the appellant's brief of argument:

B “(i) *Whether the Originating Summons as couched without any questions for determination is competent and/or vests any jurisdiction in the lower Court to adjudicate on any purported claim of the 1st plaintiff/Respondent. Grounds 1 and 2*

C (ii) *Even if question (i) is answered in the positive whether the Plaintiff's action was properly commenced by way of Originating Summons. Grounds 3, 9, 10 and 11*

D (iii) *Having regards to the mandatory provisions of Sections 96 and 97 of the Sheriffs and Civil Process Act Cap. 86 LFN 2007, whether the plaintiff's action was properly commenced and service of the initiating processes properly effected on the appellant? Ground 4*

E (iv) *Having regard to the clear wordings of Sections 33 and 87 (10) of the Electoral Act 2010 (as amended) and the binding decision of the Supreme Court in respect of the right of a political party to nominate and sponsor candidates for any elective political office, whether the lower Court was not in grave error in its decision imposing the 1st Respondent as the candidate of the 2nd Respondent in the Amuwo-Odofin Federal Constituency election? Grounds 5, 6, 7, 8 and 12”*

F In his brief of argument, the 1st Respondent adopted, and relied on, the four issues framed by the appellant.

G In issue 1, the learned Silk leading for the appellant, referred to the amended originating summons at pages 300 to 306 of Volume 1 of the record. Learned senior counsel argued that it is the question for determination that will invite the court to look at the declaratory reliefs in the originating summons. It is his case that in the absence of question or questions to resolve the jurisdiction of the court was not invoked.

H He referred to Osborn's concise Law Dictionary 9th Edition at page 274 for the definition of originating summons. He referred also to Mozley & Whiteley's Law Dictionary 10th Edition, page 323 and Jowiti's Dictionary of English Law, Second Edition at page 1294 for more definitions of originating summons. He submitted that one

central and recurring issue or point running through the various definitions of originating summons is the formulation of question for determination.

According to the learned Silk, it is the question for determination that breathes life into the originating summons. He likened the questions to the life-wire and/or oxygen that supplies the process B  
breath, and concluded that there cannot be originating summons without questions for determination. He relied on *Madukolu v. Nkemdilim* (1962) 2 SCNLR 341 and *Skenconsult v. Ukey* (1981) 1 SC 6 in his submission that without questions for resolution an originating summons is not properly constituted and ipso facto the court C  
has no jurisdiction to determine it.

Relying on *Agbakoba v. INEC* (2008) 18 NWLR (pt.1119) 489 at 587; *Oba Ogunbade v. Oba Oyewunmi* (2007) 30 NSQLR 434 at 449 and *Obasanya v. Babafemi* (2000) 15 NWLR (pt.699) 1 D  
at 17, the learned Silk submitted that where a case is commenced by means of originating summons, it is the questions presented by the plaintiff for determination that constitute the issues for determination.

He submitted further that in originating summons, a declaration E  
of the rights claimed by the plaintiff is only predicated on or derivable from the determination of the questions arising for construction under an enactment or a written instrument. He relied on *Diapalong & Ors. v. Dariye & Ors.* (2007) 3 NSCQLR 1022 at 1080 and Order 3 Rule 7 of the Federal High Court (Civil procedure) F  
Rules, 2009.

Learned counsel further submitted that the questions for determination in an originating summons constitute the conditions G  
precedent for a court to assume jurisdiction in any matter commenced by originating summons. He relied on *Atolagbe v. Awuni* (1997) 9 NWLR (Pt.422) 536. He referred to page 481 of the record where the trial Court held inter alia:

*“There is no gainsaying the fact that the hallmark of an originating summons is the determination of question of construction arising under a deed...”* H

He argued that the trial court appreciated the fundamental essence of questions for determination to an originating summons but trivialized same with talk of substantial justice.

He said that the trial Court in its judgment reproduced Order 3 Rules 6, 7, 8 and 9 of the Federal High court (civil procedure) Rules 2009 but failed to appreciate the operative words “determination of any questions”. He referred to *Anyankwo v. Okoye* (2010) 5 NWLR (Pt.1188) 497 and submitted that contrary to the views of the trial Court, this court did not hold that an originating summons cannot be faulted for absence of questions for determination. He referred to Form 3 and argued that the question for determination must be stated in an originating summons. He relied on order 3 Rule 6 for his submission that questions for construction form fundamental part of originating summons.

He referred to section 36 (1) of the Constitution and argued that the appellant’s right to a fair hearing was breached when the trial Court decided against the appellant though the originating summons was bereft of questions for determination.

Relying on Section 36 (2) (a) of the Constitution, he submitted that in absence of questions for determination, the appellant was denied opportunity of knowing and preparing to meet the allegations made against him. Contrary to the finding of the lower Court, he contended, the issue involved went beyond form but relates to the substantive law, the constitution as well as jurisdiction of the trial Court.

He relied on *Oyeyemi v. Commissioner for Local Government* (1992) 2 NWLR (pt. 226) 661 and argued that the appellant who complained he was denied fair hearing did not have to prove that he suffered any damage resulting from the denial he complained of. Based on the above, he urged this court to resolve the issue in favour of the appellant and to allow the appeal on issue 1.

In issue 2, the learned silk made reference to order 3 Rule 6 of the Federal High court (civil procedure) Rules, 2009 for proceedings which may be commenced by originating summons, and contended that without questions for determination the action was not properly commenced by way of originating summons and if the court would take cognizance of it at all under the guise of doing substantial justice, the best the court could have done was to transfer the matter to the general cause list for evidence to be led.

He submitted that the action relates to hostile proceedings and that the dispute can best be resolved by oral evidence. He re-

ferred to page 488 of the record and said that the trial court admitted that there were discrepancies in the figures brought by the plaintiff before the amendment of the originating summons. He referred to pages 755 to 756 and items 1-4, items 5 and 6 for the discrepancies in 1st Respondent's case.

He referred specifically to item 6, the list of delegates who purportedly voted for the 1st Respondent whose list indicates 71 delegates while the official figure is 61. He said there are conflicts in the affidavits wherein the plaintiff, under the pretence of replying to a counter-affidavit, brought forth the key evidence he relies on - Exhibits B and B1 which the lower Court described as the "smoking gun".

He referred to page 750 of the record and contended that the lower court mixed up issues of the originating summons as originally filed with the amended originating summons when the latter did not in any way incorporate the former. Learned Counsel referred to pages 756 to 757 for the mixed up of the originating summons with the amended originating summons where the lower Court held:

*"Appellant joined issues on this point in paragraphs 21 and 22 of the counter-affidavit to the originating summons. He said that since the lower court found that issues were joined by the parties and affidavits, counter-affidavits and reply to counter-affidavits filed all contradicting themselves ab initio, the proceedings were very hostile. He referred to pages 759 to 760 where the lower Court held thus:*

*"It is my humble view that the learned 1st Respondent's Counsel did not take advantage of the proviso to Section 132 (1) (a) of the Evidence Act and to ensure that the makers of the document - the INEC officials should have sworn to a further affidavit to correct the date on the document - Exhibit B1. This is because there is a presumption as to the date a document was made in accordance with Section 125 of the Evidence Act. This presumption was not rebutted by the 1st Respondent."*

He argued based on the above, that the lower Court came to a damning conclusion against the 1st Respondent in respect of his own exhibit (Exhibit B1) which was referred to as "smoking gun" by the court below to the effect that the court cannot presume its regularity and genuineness. He said that the court also admitted there was oath against oath and two different results in respect of the same

election.

B He argued that the court did not resolve the conflicts but rather made a turn-around approbating and reprobating when it said that the issue of date on Exhibit B1 was not raised at the trial and that all arguments on it would go to no issue even though it had made a finding in which it condemned Exhibit B1. He cited the case of Olutola Holdings v. Ladejobi (2006) 12 NWLR (pt.994) 321 at 360 in support of his contention that it was wrong for the court to approve and reprobate on the same point.

C He said the court raised the issue suo motu and failed to invite counsel to address on it, and even if the parties had raised the issue, the court had reached findings on Exhibit B1 and cannot overrule itself on it. He said that the position of the law on joinder of issues as found by the lower court is captured in the case of Okonkwo D v. Kpajie (1992) 2 NWLR (Pt.226) 633 at 657 where this Court held thus:

*“Issues emerge in a civil suit where the plaintiff asserts a fact and the defendant denies traverses or refuses to admit the fact.”*

E He relied on Edjekipo v. Osia (2007) 8 NWLR (pt.1037) 635 at 667 where His Lordship Onnoghen, JSC held that:

*“Issues are joined by the parties in their pleadings and that an issue for trial arises when a material averment by a party is positively denied by the other party.”*

F Learned counsel concluded from the above that findings and conclusion of the lower court which did not arise from any questions for determination, show clearly that the matter was not suitable for originating summons as it was hostile, the parties having reached a stage of litis contestatio. He relied on Eronini v. Ihiuko (1989) 2 NWLR G (Pt.101) 46 at 61.

H The learned silk cited the case of NBN v. Alakija (1978) 9-10 SC 59 at 71 wherein the supreme court warned that originating summons is a method or procedure and not meant to enlarge the jurisdiction of the Court, that all facts which are within the peculiar knowledge of the plaintiff must be ventilated by evidence and should not be presumed, that the findings and conclusions reached could only have been reached if evidence had been adduced and that in view of the affidavit of the plaintiff both parties should have been allowed to call oral evidence.

He said that in the case at hand, the findings of the court below are without substratum, evidential, factual or legal. He argued that the Court below erred by contradicting itself and even overruling its own findings and conclusions within the same judgment. He cited and relied on *Oloyo v. Alegbe* (1983) 2 SCNLR 67 where this court ruled that in a situation where it was alleged that a member of the House of Assembly had been absent for more than an aggregate of one-third of the total number of days the House had met, it was not a matter resolvable by originating summons. B

Relying on *Ossai v. Wakwah* (2006) 4 NWLR (Pt.969) 908 at 228, he contended that originating summons should be limited to those situations specified in the Rules. Learned counsel submitted that this case is the first of its kind in the history of election jurisprudence in Nigeria where a member of a political party relies on INEC's observatory documents in a political party's primary election to ground his purported winning of the primary election, contrary to the position of the political party that he did not win, and said that the matter is not contemplated to be initiated by way of originating summons as it is complex. He urged us to resolve the issue against the 1st Respondent. C D E

In issue 3, learned counsel argued that the 1st Respondent failed to comply with sections 90-97 of the Sheriffs and civil process Act. He relied on *M.V. Arabella v. Naje* (2008) 11 NWLR (pt.1097) 182 at 208 where this court made compliance with the provisions of the Act mandatory. F

He said that the originating summons was filed in Abuja Judicial Division where all the injunctive reliefs were granted before the matter was transferred to Lagos, noting that the plaintiff's address for service was put at Lagos, the number at the time the judgment was delivered still bore the Abuja number but there was no special endorsement as required by the Act. He urged the court to resolve the issue against the 1st Respondent. G

In issue 4, learned senior counsel argued that the court below misconstrued section 87 (10) of the Electoral Act 2010 (as amended) and the Supreme Court decision in *Amaechi v. INEC* (2008) 5 NWLR (Pt.1080) 227 and came to the wrong conclusion on pages 764 to 768 of the record. He said section 87 (10) of the Electoral Act (supra) did not give the court unrestricted jurisdiction in the internal H

affairs of a political party in its choice of a candidate to fry its flag at any election.

He described what happened in this case as jurisprudentially unprecedented as the lower court substituted INEC's observatory documents, with their controversial and irreconcilable figures, with the authentic figures and result of the ACN or with ACN sworn depositions. He referred to section 33 of the Electoral Act and argued that the appellant whose name had been submitted to INEC cannot be withdrawn except as provided by the Electoral Act. He referred to section 87 (10) of the Electoral Act and submitted that the jurisdiction of the court in a political party's choice of candidate for any election is narrow, restricted and delineated rather than the wide interpretation and assumption given to it by the Court below.

He said that an aspirant can challenge his political party for violation of the provision of Electoral Act or the guidelines of a political party and not to rely on INEC's monitoring documents. He said that the 1st Respondent did not show any provision of the Act or the guidelines of ACN violated in the choice of appellant as the ACN candidate.

Learned counsel argued that neither of the lower courts had jurisdiction to make order against the appellant, particularly to make the far-reaching declaratory and injunctive orders contained in the judgment of the two courts below. He referred to *Lado & Ors v. CPC & Ors*. SC.157/2011 and SC.334/2011 (unreported) delivered on 2nd December 2011; *Uzodinma v. Izunaso (No.2)* (2011) 17 NWLR (pt.1275) 30; *Akpan v. Bob* (2010) 17 NWLR (pt.1223) 421; *Ehinlawon v. Oke* (2008) 16 NWLR (pt.1113) 357, *Eyiboh v. Dan Abia*. SC.381/2012 (unreported) delivered on 6th July, 2012; *Igbeke v. Lady Margery Okadigbo*, SC.179/2011 (unreported) delivered on 6th July, 2012 and submitted that the jurisdiction of the court in a dispute arising from a political party's choice of candidate is restricted and not omnibus.

He said that the cases of *Amaechi v. INEC* (supra) and *Ugwu v. Ararume* (2007) 12 NWLR (pt.1048) 367 related to substitution of candidates without giving cogent and verifiable reasons, which was not the case herein. Reference was made to the counter-affidavit of the 2nd Respondent, ACN, on pages 926-327 particularly paragraph 8 to the effect that the results of INEC, Exhibits B, B1 and were

strange and fictitious and paragraph 9 to the effect that the name of 1st Respondent was never forwarded to the 3rd Respondent as its candidate.

Placing reliance on section 33 of the Electoral Act, 2010 (as amended), learned counsel argued that the name of the appellant cannot be changed or substituted except in case of death and that it was wrong for the court below to have substituted the name of the 1st Respondent for that of the appellant as the candidate of the 2nd Respondent. B

Learned Senior Counsel then contended that the lower Court's apprehension of the nature of the case before it led the lower court to a perverse decision, for which he relied on *Udengwu v. Uzegbu* (2003) 13 NWLR (Pt.836) 136 at 152 where it was held inter alia: C

*"Once a Court has misapprehended the nature of a case in respect of which it is required to give a dispassionate and rational decision, the chances are that decisions otherwise will be perverse... The hallmark is invariably (sic) a miscarriage of justice and the decision must be set aside on appeal."*

With reference to Exhibits B and B1 described by the lower court as "smoking gun", he argued that in so far as the exhibits con- E note the core evidence or the main plank of the plaintiff's case, the lower court had dismantled it in its decision and conclusion that the figures which constitute the "smoking gun" or the main plank of the plaintiff's case are irreconcilable and conflicting and that the 1st Re- F spondent did not make the slightest of attempts to reconcile them by way of a further affidavit.

He argued that the above decision of the lower court on the so-called "smoking gun" should have been the end of the case. Against the 1st Respondent's affidavit evidence in support of the originating G summons and exhibits attached thereto, learned Senior Counsel referred to page 312 of the record for a letter dated January 17, 2011 addressed to the appellant, and signed by Senator Lawal Shuaibu informing the appellant that she won the nomination, having polled H 82 out of a total of 110 votes.

Reference was made to "the plaintiff's reply affidavit to the 1st and 2nd defendants' counter-affidavit. Learned Senior Counsel said the same is not a reply affidavit known to law as it did not counter anything or reply to any issue raised by the appellant in her counter-

affidavit. It was argued further that the alleged inadvertence of the 1st Respondent to attach Exhibits B, B1 and C do not counter any deposition in the appellant's counter-affidavit.

It was submitted that the reply affidavit did not refer to the appellant's counter-affidavit which it was meant to deny or reply but rather raised a fresh issue suo motu. It was contended for the appellant that the position of the law is that it is not the function of a reply, whether on pleading or in counsel's oral address, for a plaintiff or party to set up a new case or cushion the effect of a new case but only to specifically answer any new issue raised by the opponent.

Learned senior counsel relied on *Okpala v. Ibema* (1989) 2 NWLR (Pt.102) 208 at 220 and *Olutade v. Olayiwola* (1990) 7 NWLR (pt.161) 230 at 157 and urged us to discountenance the purported reply affidavit which he said should have been struck out by the trial court or the Court below.

After a review of the 1st Respondent's affidavit evidence, learned counsel argued that the documents attached to the affidavit of the 1st Respondent on 9/3/2011 had been certified on 14/3/2011, five days after the documents were attached to the 1st Respondent's affidavit filed on 9/3/2011. He relied on *Ajide v. Kelani* (1985) 3 NWLR (pt.12) 248 at 271 in his contention that justice will never decree anything in favour of a slippery party.

It was further argued that the documents presented by the 1st Respondent speak lies about and against themselves and that each set of documents conceals the other. He impugned the judgments of the two courts below for ignoring the compelling document at page 312 (that is the letter addressed to the appellant by Senator Lawal Shuaibu, the National Secretary of the 2nd Respondent) in preference to what the learned Senior Counsel described as suspicious, fake and self contradictory documents.

He urged us to reverse the judgment as perverse in material particular. He relied on *Dantubu v. Adene* (1987) 4 NWLR (pt.65) 314; *Fagbenro v. Orogun* (1993) 3 NWLR (pt.284) 662 at 670-671. He referred to pages 769 to 770 of the record where the court below resolved issue 3 in favour of the appellant. He argued that the parity of reasoning the court below should have concluded that it was not its business or the business of any court to inquire into the qualification of the appellant as the candidate of the 2nd Respondent.

He added that it was not the business of the court to dictate who the 2nd Respondent fielded as its candidate for the election. He reproduced page 261 of the record where the lower court held, *inter alia*:

*“We have a case of oath against oath and two different election scores from the same primary election, one authenticated by INEC and the other by the averment of the party...”*

and impugned the decision of the lower court in accepting the result of an observer in place of the result submitted by the 2nd Respondent - the party that conducted the primary elections. Learned Senior Counsel urged us to resolve this issue in favour of the appellant. In conclusion, he urged us to allow the appeal and set aside the judgment of the lower court which affirmed the judgment of the trial High Court.

In his brief the learned Silk leading for the 1st Respondent, said he would argue the first three issues in the appellant’s brief together. However, he chose to argue issue 4 first.

In the said issue 4, learned senior counsel submitted that both parties realized that the main issue in the case was to determine who actually scored the highest votes at the primaries, adding that all other issues are sheer technicalities. He argued that the appellant gave a convoluted interpretation to the relevant provisions of sections 33 and 87 of the Electoral Act, 2010 (as amended) and that the said section have overridden or overruled the decision in *Onuoha v. Okafor* (supra) and *Dalhatu v. Kuraki* (supra) relied on by the appellant when it comes to determining the candidates who can represent a political party through direct or indirect primaries.

He reproduced the relevant provisions of Section 87 of the Act and submitted that it is erroneous to argue, in reliance upon the cases of *Onuoha* and *Dalhatu*, “that a Court of law has no jurisdiction to interfere in the internal affairs of a political party, particularly in the choice of its candidates.” He reproduced section 87 of the Electoral Act, 2010 (as amended) and submitted that a political party which fails to comply with the procedure laid down in the said section of the Act invites the intervention not interference, of the Court.

He argued that the 1st Respondent sought the intervention of the court for the failure of the 2nd Respondent to comply with the provisions of section 87 of the Act. Learned Senior Counsel said that

the 1st Respondent scored the highest number of votes of 61 at the end of voting and that it was fraudulent not to submit his name to the 3rd Respondent as its candidate for the election. He said the 2nd Respondent put forward the name of the appellant who scored only 4 votes on the pretext that she scored 82 votes.

B He referred to section 85 of the Electoral Act (supra) and said that the 3rd Respondent was represented at the congress organized by the 2nd Respondent in compliance with the said section of the Act. Learned Senior Counsel relied on *Amaechi v. INEC* (2008) 5 NWLR (pt.1080) 227 where this Court said inter alia:

C “... it seems that the obligation on the parties to inform INEC of such Congress was to ensure INEC would know and keep a record of candidates who won at the primaries.”

D Counsel argued that contrary to the law as decided by this Court in the cases of *Onuoha* and *Dalhatu*, the law now applies to instill the practice of democracy in the country’s democratic system and to defeat any plan to circumvent the process of nominating a candidate for a political party.

E It was contended on behalf of the 1st Respondent that contrary to the report that the appellant won 82 votes out of 110 votes as stated in Exhibit SOS1 written by the National Secretary of the 2nd Respondent, the authentic results of the primaries were as recorded by INEC’s representatives and supported by Exhibit B and B1 wherein the 1st Respondent is recorded as having scored 61 votes  
F as against 4 votes scored by the appellant.

Learned Senior Counsel described the figures in Exhibit SOS1 as sham which could not mislead the trial court in view of the observation of the learned trial Judge at pages 485-486 of the records.  
G He submitted that the role of INEC, which indeed it played through its representatives, is to ensure the validation and implementation of the results of party primaries. Learned counsel pointed out that the document relied on earlier by the 1st Respondent is the list of candidates who actually voted for him at the primaries and recorded and  
H signed by them and had their addresses and telephone numbers.

He referred to pages 73-77 of the record and said that the candidates (should be the voters) who signed the document were 71 and that when INEC’s representatives brought their own results as recorded by them in Exhibits B and B1, the 1st Respondent was

obliged to accept, and be bound by them. Reference was made to page 762 of the record where the court below held that the writing in Exhibit B1 confirmed the accuracy of Exhibit B.

Learned counsel urged us not to disturb the concurrent findings of fact by the courts below to the effect that the 1st Respondent was the candidate who scored the highest votes at the primaries. He relied on *Igweso v. Ezeugo* (1992) 6 NWLR (Pt.249) 561 and *Kareem v. Mosaku* (2007) 17 NWLR (pt.1064) 523 at 536 and urged the court not to disturb the concurrent findings of the two courts not shown to be perverse.

On issue 1 on the failure of the 1st Respondent as plaintiff in the originating summons to state questions for determination, learned Senior Counsel submitted that it is not apparent from the Federal High Court (civil Procedure) Rules 2009 that questions for determination must be so stated qua question for determination. He referred to Order 3 Rules 6, 7 or 8 of the Rules and argued that a close reading of same does not show as a matter of practice that issues or questions for determination must be spelt out. According to the learned silk, it suffices that there is an endorsement showing the grounds upon which the action was brought. He said that it is enough that grounds upon which the originating summon is brought discloses the question or questions that the Court will have to decide.

He said that it is stated in the Originating Summons that the appellant was illegally substituted in place of the 1st Respondent in contravention of section 87 of the Electoral Act, 2010 (as amended) and the 1999 constitution (as amended). This, learned counsel contended, was the question or issue the trial Court had to resolve upon the only authentic evidence before it.

On issue 2, on the propriety vel non of commencing the matter by way of originating summons, it was submitted that what the Court has to focus on is whether, on the whole, substantial justice has been done rather be concerned to see that mere technicality prevail. He relied on the dictum of Nnaemeka-Agu, JSC (May his soul find rest in his Maker) in *Attorney-General Bendel State v. Aideyan* (1989) 4 NWLR (Pt.118) 656. He relied also on *Nwosu v. Imo State Environmental Authority* (1990) 2 NWLR (pt.135) 688 at 717; *Ogba v. The State* (1992) 2 NWLR (Pt.222) 164 at 190; *Consortium M.C. v. NEPA* (1992) 6 NWLR (pt.246) 132 at 142; *Michael Okwo v. The*

State (1988) 3 NWLR (pt.81) 214 at 220. He made particular reference to Attorney-General of the Federation v. Attorney-General Abia State (2001) 11 NWLR (Pt.725) 689 where the objection was that the plaintiff who commenced his suit by way of writ of summons and statement of claims should have come by way of originating summons and the objection was overruled as mere technicality.

He invoked the saving provision of Order 51, Rule 1(1) of the Federal High Court (Civil Procedure) Rules, 2009. He referred to Rule 1 (2) to the effect that the Court may, under certain circumstances, set aside proceedings or judgment for non-compliance with the rules and contended that “Court” in the said rules means the Federal High Court as defined by Order 1 Rule 5 of the Rules (supra). He contended that since the learned trial Judge did not act under Rule 1 (2) of the rules, whatever complaint the appellant has about the originating summons remains a mere irregularity which will not nullify the proceedings or the judgment thereunder. He urged us to resolve issues 1 and 2 against the appellant.

In issue 3, the appellant had argued that the originating summons issued in Abuja required leave of Court before it can be effectively served on the appellant in Lagos. Learned Counsel argued that the reliance on the case of Skenconsult v. Ukey (1931) 1 SC 5 in urging the court to set aside the originating summons for non-compliance with Sections 96, 97, 98 and 99 of the Sheriff’s and Civil Process Act is based on what he described as ultra-technicality.

He noted that the action was filed in Abuja, but the court transferred it to Lagos where the appellant resides, and the appellant was served and she participated fully in the proceedings. Learned Counsel distinguished Skenconsult v. Ukey (supra) and other similar cases from the case at hand. The observation of Ogundare, JSC in Odu’a Investment Co. Ltd. v. Talabi (1997) 10 NWLR (Pt.523) 1 at pages 51-52 was quoted in extenso and relied on, on behalf of the 1st Respondent.

Based on the said observation, it was contended that the appellant who did not raise objection to the question of service out of jurisdiction had waived the irregularity in the service out of jurisdiction. Learned Counsel urged us to resolve issue 3 against the appellant. In conclusion, the learned Silk urged us to dismiss the appeal as lacking in merit. He also urged us to discountenance the 2nd

Respondent's brief of argument for the following reasons:

(1) The 2nd Respondent acted as a busy body as if it is the appellant when it is not, and

(2) in any case, the 2nd Respondent's brief of argument lacks substance and merit.

I pause here to note that the brief of argument filed on behalf of the 2nd Respondent on 16/8/2012 was withdrawn with leave of Court and struck out on 7/2/2013. The 3rd Respondent filed no brief.

The learned Silk for the appellant filed a reply brief on 19th November, 2011. It is composed of two parts:

(1) Reply on points of law; and

(2) On the improper commencement and constitution of the 1st Respondent's case at the trial Court.

(1) Learned Senior Counsel referred to paragraph 4.6 of the 1<sup>st</sup> Respondent's brief wherein it was contended that:

*"Section 33 and 97 of the Electoral Act, 2010 (as amended) have overridden or overruled the raison d'eter of Onuoho v. Okafor (supra) and Dalhatu v. Ruraki (sic)..."*

He said that the learned Senior Counsel for the 1st Respondent merely reproduced the provisions of section 33 and 87 of the Act and did not make any legal argument to support his postulation. He noted that his brother Silk overlooked the decision of this Court in Lado v. CPC (2010) All FWLR (Pt.607) 598 wherein the apex Court reiterated and reaffirmed the position of the law as set out in Onuoha v. Okafor (1993) 2 SCNLR 244 to the effect that a Court of law has no jurisdiction to adjudicate on the issue of which candidate a political party should sponsor for an election as there are no judicial criteria or yardstick to determine which candidate a political party ought to choose or present for an election.

He referred to PDP v. Sylva (2012) 13 NWLR (pt.1316) 85 where the Supreme Court followed the dictum of Obaseki, JSC in the case of Onuoha v. Okafor (supra) at page 261, paragraphs F-H. He also relied on Lord Denning's dictum in Institution of Mechanical Engineers v. Cane (1961) AC 696 at 724 wherein the distinguished Law Lord expressed the opinion:

*"But when you are dealing with voluntary associations of individuals, the doctrine of ultra vires has no place."*

Section 33 of the Act (*supra*), it was argued, relates to a candidate “whose name has been submitted” to INEC. In the instant case, it was further argued; the 1st Respondent’s name was never submitted by the 2nd Respondent to the 3rd Respondent so that section 33 of the Electoral Act (*supra*) has no bearing to the case of  
 B the 1st Respondent at the trial Court.

Learned counsel reproduced section 87 (10) of the Electoral Act and argued that the effect of the provision is that an action can only be brought to challenge a primary election on grounds of non-compliance with the provisions of section 87 (1) and (4) in particular  
 C and the guidelines of the political party.

It was emphasised that the 1st Respondent’s case at the trial court was predicated solely on Exhibits B and B1, based on which it was argued that there is no provision of the Electoral Act or the party  
 D guidelines of the 2nd Respondent that authorises that the result of party’s primary election be determined by such documents as Exhibits B and B1, adding that it is not the constitutional or statutory duty of INEC to conduct or declare the results of primary elections.

It was contended for the appellant that section 80 (10) of the  
 E Electoral Act (*supra*) or *Amaechi v. INEC* referred to in paragraph 4.12 of the 1st Respondent’s brief is irrelevant in the determination of the appeal.

In response to the 1st Respondent’s submission that the court  
 F should affirm the decisions of the two lower courts because they involved concurrent findings, it was submitted for the appellant that the rule relating to concurrent findings of two courts below is not absolute, in that where the findings are perverse or involve an error in procedure or substantive law, occasioning a miscarriage of justice,  
 G the court would interfere and set aside the concurrent findings. Reliance was placed on *Adekeye v. Adeshina* (2010) 44 NSLQR 456 at 495-496 and *Udengwu v. Uzegbu* (2003) 13 NWLR (pt.836) 136 at 152, A-D.

On the improper commencement and constitution of the 1st  
 H Respondent’s case at the trial court, the second part of the reply brief seems to me an improved version of the argument in the brief. Strictly, it is not a reply to the 1st Respondent’s brief. I will discountenance this portion of the reply brief. A reply brief is not meant to improve the argument in the brief.

In conclusion, learned Senior Counsel urged the court not to be swayed by what he described as unnecessary sentiments whipped up by the 1st Respondent's argument on the concept of substantial justice over technicality. He relied on *Abubakar v. Yar'Adua* (2008) 12 SC (Pt.11) 1 at 150; *Adekeye v. Adeshina* (2010) 44 NSCQLR 456 at 513; *NACCEN Nig. Ltd. v. BEWAC Automotive Producers Ltd.* (2011) 46 NSCQLR 230 at 248. Based on his submission in the reply brief, learned Senior Counsel urged us to discountenance the arguments in the 1st Respondent's brief and based on his arguments in the appellant's brief, he urged us to allow the appeal. B

There is only one set of issues for determination in this appeal. I have indicated that the brief filed by the 2nd Respondent was withdrawn and struck out. The 3rd Respondent filed no brief. Based on the peculiar facts and circumstances of the case, the 1st Respondent, rightly in my humble view, adopted the four issues D presented by the appellant.

I have considered the issues for determination as well as the erudite submissions made by the learned silk on each side, as well as the authorities, case law and statutes, relied on. I will now determine the issues seriatim. E

Issue 1: Whether the originating summons as couched without any questions for determination is competent and/or vests any jurisdiction in the lower court to adjudicate on any purported claim of the 1st plaintiff/1st respondent. The issue is distilled from grounds F 1 and 2 of the grounds of appeal.

The gravamen of appellant's case is that the originating summons was not commenced by due process in that it contained no questions for the court to determine. Based on the above, it was submitted that the trial Court lacked jurisdiction to entertain the case. G

Contrary to the above position of the appellant, it was argued on behalf of the 1st Respondent that Order 3 Rules 6, 7 or 8 of the Federal High court (Civil Procedure) Rules 2009 does not show that as a matter of practice, issues or questions for determination must be spelt out in the originating summons. From the 1st Respondent's point of view, it is enough compliance with the rules if the grounds upon which the originating summons is brought disclose the question or questions the court will have to decide. H

Let me briefly state and examine some authoritative pro-

nouncements on the concept of originating summons. The learned authors of “Odger’s Principles of Pleading and Practice in civil actions in the High court of Justice, 21st Edition at 314 said of originating summons:

B *“Where the main point, at issue is one of construction of a document or statute or is one of pure law, then this is the appropriate procedure. It is not, however, appropriate where there is likely to be any substantial dispute of fact.”*

Originating summons has been described as:

C *“An originating process in the High Court to determine an issue of law or the interpretation of document by means of submitting affidavit as evidence. A part from providing sufficient particulars to identify the cause of action, the originating summons must include statement of the question to enable the Court to determine or state-*  
D *ment of remedy to which the Court can declare.”* See Advanced Law Lexicon, 3rd Edition Reprint, 2009 at 3391.

In B. A Alegbe, Speaker Bendel State House of Assembly v M.O. Oloyo (1983) 2 SC 85 at pages 215-216, this Court, per Eso, JSC (May his soul rest in peace) said that:

E *“Originating summons is reserved for issues like the determination of short questions of construction and not matters of such controversy that the justice of the case would demand the settling of pleadings.”*

F ***A common feature present in the reference to originating summons reproduced above and many similar references cited by learned senior counsel for the appellant is the need to formulate and present question or questions for the court to determine based on statutes, will, etc. The grant of***  
G ***the reliefs sought in the originating summons is preceded by, and predicated upon the court’s answer to the question or questions for determination.***

H ***In the definition of originating summons at page 339 of Advanced Law Lexicon (supra), I deliberately underlined the expression therein: “or statement of remedy to which the court can declare.” This tends to convey the impression that the requirement of questions for determination and statement of remedy may be disjunctive and not conjunctive as is apparent in case law.*** See Re King Mellor v. South Australian Land Mort-

gage & Agency Coy (1907) 1 Ch 72.

Be that as it may, originating summons procedure is provided for in order 3 of the Federal High Court (Civil Procedure) Rules 2009. The relevant rules of the order pursuant to which the originating summons was filed are hereunder reproduced for ease of reference:

Order 3 Rule 6:

*“Any person claiming to be interested under a deed, will, enactment or other written instrument may apply by originating summons for the determination of any question of construction arising under the instrument and for of declaration of rights of the person interested.”*

Order 3 Rule 9(1):

*“An originating summons should be in the Forms 3, 4 or 5 to these Rules, with such variations as the circumstances may require.”*

**By the clear and unambiguous words in Order 3 Rule 6 reproduced above, there are two component parts of the application envisaged therein:**

**(1) Questions for construction.**

**(b) Declaration of rights.**

**In other words, the application by originating summons must contain question or questions of construction arising under the instrument involved and a declaration of rights of a person’s interest. The declaration of rights depends on the answers to the questions formulated for determination in the application by way of originating summons.**

**A plaintiff intending to benefit from the time and effort saving procedure of originating summons in order 3 of the Federal High Court (Civil Procedure) Rules 2009 must raise the question or questions for determination on the instrument in question and ask for declaration of rights based on the answers to the question. In my view, the plaintiff cannot properly raise that question without seeking a declaration of right nor can he simply seek declaration of rights without the questions for determination. It will be a mere academic exercise for the court to determine the questions without a prayer for declaration of rights, and declaratory rights without question for determination should be brought by writ of summons.**

Declarations sought in this case under the guise of originating

summons are in consonance with a suit commenced by a writ of summons and instead of proceeding to determine the matter by way of originating summons, the Court should have converted same to a writ of summons and ordered parties to file and exchange pleadings accordingly.

B It has been emphasised that *“originating summons is reserved for issues like the determination of short questions of construction...”* See B. A. Alegbe, Speaker, Bendel State House of Assembly v. M. O. Ologo (1983) 7 SC 85 at pages 215 - 216.

C Permit me to reproduce section 87 (9) of the Electoral Act 2010 (as amended). It provides:

*“Notwithstanding the provisions of the Act or rules of a political party, an aspirant who complains that any of the provisions of this Act and the guidelines of a political party has not been complied with in the selection or nomination of a candidate of a political party for election, may apply to the Federal High Court, or the High Court of a State or FCT for redress.”*

The jurisdiction vested by the above provision is circumscribed, so as to shield the court from being enmeshed in the murky waters of politics. On the other hand, it is meant to ensure that in the selection of a candidate for election, a political party complies with the provision of the Electoral Act as well as its own guidelines in primary election.

F There is no clue as to what section of the Act or party guidelines the 2nd Respondent did not comply with in the nomination of its candidate.

***The 1st Respondent shot himself in the foot by failure to predicate his declaratory and injunctive reliefs on answers to questions for determination. The said question would have shed light on the provisions of the Act and/or guidelines allegedly breached by the 2nd Respondent for the proper invocation of the jurisdiction of the Court. Under section 87 (9) of the Act the relief sought must relate to and be limited to specific provisions of the Act and for party guidelines.***

H ***The court cannot exercise its general jurisdiction in a claim brought pursuant to section 37 (9) of the Electoral Act 2010 (as amended). It follows that in the peculiar circumstances of this case, the application by way of originating summons without questions for determination is incompetent and***

***the Court cannot competently exercise its restricted jurisdiction under section 87 (9) of the Act.***

In its judgment, running from pages 476 to 490 of the record, the trial Court appreciated that the appropriate format for commencing originating summon is Form 3. It was conceded by the trial court that if counsel had used Form 3 as he should have done, he would have submitted questions for determination. The trial Court said:

*“In the instant case, the originating summons did not generate questions for answer. This truly is a deficiency in form and not in substance. Under the Rules such a deficiency cannot defeat the substance as the new spirit in jurisprudence is in favour of substantial justice and not technicalities.”* See page 481.

***The learned trial Judge was of the opinion that he could either treat the omission of questions for determination as an irregularity or convert the process into a writ of summons or call for pleadings*** as was the case in *Olujimi v. Esha* (2009) 11 NWLR (Pt.1153) 464. ***With due respect to His Lordship, the facts and circumstances of the case clearly justify a choice of the latter in place of the former option he stated in the judgment.***

At page 482, the learned trial Judge held, inter alia:

*“After all, formalism or legalism is relic of the tradition and ceremonies of religious rituals of yore.”*

He relied on H. J. S. Maine’s *Early Law and Custom* at page 26 for the explanation that *“formalism of the early lawyers could hardly be divorced from the circumstances of its roots to the pontiff or priest”*.

***I cannot but commend His Lordship for a painstaking research. However, the issue before the trial Court - the competency vel non of the originating summons devoid of question or questions for determination and ipso facto the jurisdiction of the Court to entertain same - hardly requires a voyage across the ocean to dig into the dust bin of English legal history for its solution. The words of the rule in questions are clear and ought to have been given effect.*** See *Okumagba v. Egbe* (1965) 1 All NLR 62; *Maizabo v. Sokoto* NA (1957) 2 JSC 13.

***The Court had no business editing the clear provision***

**of the rule in the pretext of abandoning technicality in preference to substantial justice. By treating it as mere irregularity, the trial court tried to edit out of the rule its component part which is a sine qua non to the competence of originating summons, that is, the question for determination on which answer the relief sought depends.**

The word “technicality” has been elevated to the status of a mantra. It has become the escape goat on which to blame any defect in procedural or substantive law in a process filed in Court. If one may ask, what is technicality? Perhaps, the phrases such as technical defect; technical error or simply the word “technical” from which it is derived will provide insight into the import of the word “technicality”.

A “technical defect” is one which may come within the four corners of it but in fact, it does not affect the merit of the case. It is a mistake which does not go to the bone of the matter. See *Gansadhar Dandhware v. Premchand Kashyap* AIR 1958 MP 182, 184. “Technical error” means merely abstract and practically harmless error. See *Advanced Law Lexicon*, 3rd Edition Reprint 2009 at page 4531. The word “technical” from which “technicality” is derived means immaterial, not affecting substantial right without substance. See *Atunda v. Ajani* (1989) 3 NWLR (Pt.111) 51. It is in the sense illustrated above that the eminent jurist, Oputa, JSC warned that:

*“The Court will not endure that mere form or fiction of law, introduced for the sake of justice, shall work a wrong, contrary to the real truth and substance of the case before it.”* See *Aliu Bello & 13 Ors. v. Attorney-General Oyo State & Ors.* (1986) 15 NWLR (pt.45) 828.

Of technicalities as described above, in the immortal words of a mortal being, Eso, JSC (May God rests his soul) directed that:

*“When these ghost of the past (technicalities) stand in the path of justice clanking their medieval chains, the proper course for the Judge is to pass through them undeterred.”* (See *The State v. Gwanto* (1983) 1 SCNLR 142 at 160).

Perhaps, the learned trial Judge in his extensive research into English legal history of old, mistook the question or questions for determination in originating summons for the “ghosts of the past”.

Let me contrast the facts of the case at hand with those of

Mogo Chinwendu v. Nwanegbo Mbamali & Anor. (1980) 3 SC 31 at pages 81-82. It was a land suit. The plaintiffs/respondents had pleaded in their statement of claim a previous suit in respect of part of the land in dispute and the trial court considered the effect of the previous suit in its judgment. The defendants/appellants contended on appeal that the issue of estoppel was not pleaded but the court regarded the point as based on technicality. It is a different matter in this case. The issue the trial court regarded as technicality is the substance of the case. B

Based on the rules upon which the originating summons was brought, questions for determination are indispensable to the validity thereof and ipso facto, the jurisdiction of the court to hear and determine the suit by way of originating summons. C

Appellant's issue 1 under consideration was presented as issue 4 before the court below. The lower court held inter alia, at page 776 of the record: D

*"I am of the view that the 1st Respondent brought the action pursuant to section 87 (4) (c) & (ii) of the amended Electoral Act 2010 and section 66 (i) (f) of 1999 Constitution thereby seeking the interpretation of these provisions of laws. These are the provisions of the enactment the 1st Respondent prayed the lower court to interpret vis-a-vis the Exhibits listed above as required by Order 3 Rule 6 of the Federal High Court (Civil Procedure) Rules, 2009.* E

*I have to agree with learned 1st Respondent's Counsel that where total reliance for the reliefs sought from the court is placed on the provisions of the law and written instruments or documents, the appropriate procedure to ventilate such claim is by originating summons as contained in order 3 Rule (sic) 6 & 7 of the Federal High Court (Civil Procedure) Rules 2009."* F

The process from which this appeal arose reads:

**"AMENDED ORIGINATING SUMMONS BROUGHT PURSUANT TO:**

**i. ORDER 3 RULE 9 OF THE FEDERAL HIGH COURT CIVIL PROCEDURE RULES 2009.** H

**ii. SECTION 87 OF THE ELECTORAL ACT, 2010 (AS AMENDED).**

**iii. SECTION 66 (1) (f) OF THE AMENDED CONSTITUTION OF THE FEDERAL REPUBLIC OF NIGERIA 2011.**

*iv. UNDER THE INHERENT JURISDICTION OF THE HONORABLE COURT.*" See page 300 of the record.

With profound respect, the lower Court grossly erred in its assumption that the mere indication that the originating summons was brought pursuant to named legislations ipso facto raised question or questions on the cited legislations for the Court to interpret. If by mere bringing the originating summons pursuant to Order 3 of the Federal High Court (Civil Procedure) Rules, Section 87 of the Electoral Act, Section 66 of the Constitution and the inherent jurisdiction of the Court, 1st Respondent had ignited the interpretative jurisdiction of the Court, how would the trial Court interpret its inherent jurisdiction?

The position of the lower Court is tantamount to reading into the process filed before the trial Court what was not contained therein. The trial Court and the Court of Appeal went their different, but wrong, ways - the trial Court treated the non-inclusion of questions for determination in the originating summons as mere irregularity whereas the lower Court treated the questions for determination as inherent in the indication of the rules and statutes pursuant to which the originating summons was brought.

With respect, each of the lower Courts was wrong for a different reason. As for the trial Court, the questions for construction of the instrument in question is an integral part, a sine qua non, of the originating summons without which the process is incurably defective and not merely irregular. See *B. A. Alegbe, Speaker, Bendel State House of Assembly v. M. O. Oloyo* (supra).

On the other hand, the finding of the Court below that the questions for construction are inherent in the rules and statutes cited cannot be substantiated. For instance, no interpretation of order 3 of the Federal High court Rules can afford a relief to the 1st Respondent or any party for that matter. The Order simply affords the plaintiff a right to approach the High Court by way of originating summons.

Section 37 (9) of the Electoral Act 2010 (as amended) pursuant to which the originating summons was brought provides:

*"S.87 (9): Notwithstanding the provisions of the Act or rules of a political party an aspirant who complains that any provisions of this Act and guidelines of a political party have not been complied with in the selection or nomination of a candidate of a political party*

*for election, may apply to the Federal High Court or the High Court of a State or FCT, for redress.”*

The provision reproduced above is a slight departure from, or a modification of the court’s traditional judicial avoidance of political questions. Its interpretation cannot ground the declarations and orders sought by the 1st Respondent in the originating summons. It is intended to grant an aspirant the right to seek redress in the courts specified therein. Contrary to the view of the lower court, even if its interpretation is inherent in its citation it does not support the reliefs sought by the 1st Respondent in the originating summons.

By the authorities, see Alegbe’s case (supra) and the wording of Order 3, the questions for determination have to be specifically formulated and in the case at hand, the questions cannot be inferred from the order and statutes cited.

In my humble view, the originating summons without the questions, the answers on which to predicate the declarations sought is incompetent and by extension the lower court had no jurisdiction in the matter. The originating summons was not commenced by due process of law. The issue of question or questions for determination in an originating summons is a question of substance in which order 51 Rule 1 of the Federal High court (civil procedure) Rules 2009 is of no avail.

The lower Court relied on Anyanwoko v. Okoye (2010) 1 - 2 MJSC 51. It is trite law that a case is authority only for what it decided. In the case above, this court interpreted Order 6 Rule 3 (1) of the Federal Capital Territory High Court Rules. It was not shown in the judgment of the court below that the provisions of order 6 Rule 3 (1) of the Federal Capital Territory High Court Rules are in pari materia with the provisions of order 3 Rules 6 - 9 of the Federal High Court (Civil Procedure) Rules 2009. It therefore follows that the interpretation of the former cannot be imported into the latter.

Issue 1 is resolved against the 1st Respondent in favour of the appellant.

The resolution of issue 1 should dispose of the appeal, but issue 2 is so closely related to it that it has to be resolved also. I proceed to do so.

*“Issue (ii): Even if question (i) is answered in the positive whether the plaintiff’s action was properly commenced by way of*

*originating summons - Grounds 3, 9, 10 and 11.”*

Learned Silk for the appellant reproduced Order 3, Rule 6 of the Federal High Court (Civil Procedure) Rules, 2009 for the type of proceedings which may be commenced by originating summons.

B Learned Senior Counsel made generous references to the affidavit evidence in the matter and the documents exhibited thereto. Appellant’s case is that since the affidavit evidence contain disputed facts, the matter is not suitable for originating summons procedure. Learned Silk for the 1st Respondent did not respond to the issue of C disputed facts and/or hostility arising therefrom. He is deemed to have conceded the point made by learned Senior Counsel for the appellant.

D Learned Senior Counsel, however, sought refuge in the purported universal remedy for all procedural and substantial defects in any proceeding: prevalence of substantial justice over mere technicalities, for which numerous cases were cited. It is not necessary to cite specific disputed facts in the affidavits since the issue of disputed fact is deemed admitted by the 1st Respondent.

E I will, however, note the internal conflict in the 1st Respondent’s case. At page 12, paragraph 4.17 of the 1st Respondent’s brief, it was conceded that the 1st Respondent had two different results of the same primary election in the following terms:

F *“The candidates who signed amounted to 71. (See pages 73 - 77 of the Records of Proceedings). But when INEC’s representatives brought their own results as recorded by them (Exhibits B and B1), the 1st Respondent felt obliged to be bound by them.”* (See also documents certified on 14/3/2011 but attached to affidavit filed on G 9/3/2011 about 5 days before the certification).

H Cases involving disputed issues of facts and therefore, hostile are not appropriate for the originating summons procedure. From its origin, the originating summons proceeding had been sparingly entertained by the English Courts. In *Re Power, Lindsell v. Philips* (1995) 30 Ch.D 291, Lotton, L.J. said, inter alia:

*“... it is true that it is not a right course to take out an originating summons to obtain payment of a disputed debt, where the dispute turns on matters of facts...”*

In *Re King, Mellor v. South Australian Land Mortgage &*

Agency Coy (1907) 1 Ch 72 at 75, Neville, J held, inter alia:

*“... it is our considered view that originating summons should only be applicable in such circumstances as where there is no dispute on questions of facts or the likelihood of such dispute.”*

Back home, our courts have shown the same reticence as their English counterparts with regards to application by way of originating summons. In Doherty (1968) NMLR 241, Ademola, CJN, issued the warning that the use of originating summons is not suitable in hostile proceedings. See also National Bank of Nigeria Ltd & Anor. v. Lady Ayodele Alakija & Anor. (1978) 9 - 10 SC 59 at pages 71 - 73 and 74 - 75 wherein this Court traced and reviewed the history of originating summons and held thus at page 86 of the report:

*“Originating summons should only be applicable in such circumstances as where there is no dispute on questions of facts or (even) the likelihood of such dispute.”*

In the matter before us, there is, from the record, not only a mere likelihood of dispute on facts, there is actual dispute on material facts. The 1st Respondent cannot invoke the concept of technicalities yielding place to substantial justice to rewrite or truncate the provisions of Order 3 of the Federal High Court (civil procedure) Rules 2009, particularly Rule 6 thereof.

Learned Senior Counsel for the 1st Respondent urged us not to disturb the concurrent findings of fact of the two courts below to the effect that the 1st Respondent scored the highest votes at the primaries as the said findings are not perverse. He did not state the total votes cast out of which the 1st Respondent scored the highest.

In reply, it was submitted on behalf of the appellant that the rule relating to concurrent findings of two lower courts is not absolute. Learned senior counsel for the appellant argued that the court ought to interfere as the findings were perverse and involved error in both substantive and procedural law.

***The law on this point is clear. The inviolability of concurrent findings of fact of the two lower courts to interference by the apex court is not cast in stone or concrete. As argued by the appellant, it is not absolute. This court will disturb concurrent findings of the two courts below if the findings are perverse or based on wrong premises, in which case the court has a right, and indeed, a duty to set aside such findings. See***

Ebba v. Egode (1984) 4 SC 84; Njoku & Ors. v. Eme & Ors. (1973) 5 SC 293 at 306; Kale v. Coker (1982) 12 SC 262 at 271.

***The affidavit evidence based on which the trial court made the finding of fact which was affirmed by the Court below is riddled with irreconcilable conflicts and contradictions on material facts. This was not denied by the 1st Respondent who merely urged the Court to treat the matter as mere technicality. The matter involved is too serious for the two courts below to found a decision on a choice made by 1st Respondent between the two sets of figures he stated in his submissions - one by voters who voted for 1st Respondent and the other by INEC's officials who observed the primaries.***

There appears to be a new trend in the application by way of originating summons in our electoral jurisprudence, often sought to be justified on the ground that time is of the essence in electoral matters. In electoral matters, the stakes are high, so high that in cases of disputed nomination or actual election, the parties can hardly agree on such innocuous issues of facts as the time of day or day of the week. In such cases as the one before us, the plaintiff discovers belatedly to his dismay that his short course has suddenly become the longest route. Issue 2 is also resolved against the 1st Respondent in favour of the appellant.

***Having resolved the two threshold issues against the 1st Respondent as plaintiff, I declare that the originating summons was dead on arrival. On the facts presented before us, 1st Respondent cannot resort to originating summons to seek redress pursuant to Section 87 (9) of the Electoral Act, 2010 (as amended). The lower courts should have converted the process to a writ of summons for the parties to file and exchange pleadings.***

I consider it a mere academic exercise to resolve issues 3 and 4 and I skip them.

In conclusion, it is my view that the appeal be, and is hereby allowed. The judgment of the Court below and that of the trial court which it affirmed, are hereby set aside. I order that the Originating Summons before the trial Federal High Court, sitting at Ikeja, Lagos, be and is hereby sent back to the trial court for the parties to file pleadings. The 1st Respondent shall pay costs assessed and fixed at

N100,000 to the appellant.

SC.326/2012:

This appeal and Appeal No.238/2011 with which it was heard together on 7/2/2013 arose from the same Suit No.FHC/ABJ/CS/217/2011 originally filed in the Abuja Division of the Federal High Court. The Suit was later transferred to and determined by the Ikeja Division of the Federal High Court. B

The appeal is against the judgment of the Lagos Division of the Court of Appeal in Appeal No.CA/L/166/2012 in which the lower court affirmed the decision of the trial Court. The parties and the facts are the same in both appeals. C

In the circumstances, the judgment rendered in SC.238/2012 applies with equal force to the present appeal. I therefore allow the appeal and set aside the judgment of the lower Court which affirmed the judgment of the trial court. D

It is ordered that the originating summons before the Ikeja Division of the Federal High Court be, and is hereby sent back to the trial court for the parties to file pleadings. Appellant is entitled to costs assessed and fixed at N100,000.00 against the 1st Respondent. Appeal allowed. E

SC.350/2012:

This appeal and Appeal No.SC.238/2012 with which it was heard together on 7/2/2013 arose from the same Suit No.FHC/ABJ/CS/217/2011 originally filed in the Abuja Division of the Federal High Court. The suit was later transferred to, and determined in the Ikeja Division of the Federal High Court. F

The appeal is against the judgment of the Lagos Division of the Court of Appeal in Appeal No.CA/L/118/2012 in which the lower court affirmed the decision of the trial court. The parties and the facts are the same in both appeals. In the circumstances, the judgment rendered in SC.238/2012 applies with equal force to the present appeal. G

I, therefore, allow the appeal and set aside the judgment of the lower court which affirmed the judgment of the trial Court. It is ordered that the Originating Summons before the Ikeja Division of the Federal High Court be and is hereby sent back to the trial court for the parties to file pleadings. H

Appellant is entitled to costs assessed and fixed at

N100,000.00 against the 1st Respondent. Appeal allowed.

---

### ONNOGHEN JSC

This judgment relates to the consolidated appeals numbered B supra and they relate to the primary election conducted by Action Congress of Nigeria for the purpose of electing its flag bearer for the AMUWO-ODOFIN FEDERAL CONSTITUENCY in the House of Representatives election scheduled for April, 2012, which was won C by appellant in SC/350/2012 and whose name was sent to INEC as the duly nominated candidate of the said party for the said election.

However, the 1st respondent in SC/350/2012 also claims to be the winner of the very same primary election haven contested with appellant for the same slot and consequently instituted an action D by way of an Originating Summons in which he claimed the reliefs reproduced in the lead judgment but formulated no questions for determination/resolution by the trial court.

Two main issues call for determination in these appeals to wit:

E (a) Whether the Originating Summons without any questions for determination, is competent and/or vests any jurisdiction in the High Court to grant any relief(s) which can be affirmed by the lower court, and,

F (b) Whether the lower court was not in grave error in holding that the suit was commenced properly by way of an Originating Summons in view of contentious and hostile state of facts before the trial court.

The fundamental nature of the above issues lies in the competence G of the action having regards to the procedure adopted in seeking redress and the competence of the trial court to entertain the said action as constituted.

It is not in dispute that the plaintiff did not formulate any question(s) for determination by the court before claiming the reliefs H he sought. The question is therefore the legal effect of the omission or neglect to formulate questions for determination.

Order 3 Rules 6 and 7 of the Federal High Court (Civil Procedure) Rules, 2009, Provides as follows:-

*“(6.) Any person claiming to be interested under a deed,*

*will, enactment or other written instrument may apply by Originating Summons for the determination of any question of construction arising under the instrument and for a declaration of the rights of the persons interested -*

*(7.) Any person claiming any legal or equitable right in a case where the determination of the question whether such a person is entitled to the right depends upon a question of construction of an enactment, may apply by Originating Summons for the determination of such question of construction and for a declaration as to the right claimed.”*

I agree with learned senior Counsel for appellant in S.C/350/2012, CHIEF WOLE OLANIPEKUN, SAN that the above provisions of the Rules mean that:

i. an Originating Summons can only be employed for the determination of any question or construction under a deed, will, enactment or other written instrument.

ii. it is only a person claiming to be interested or to have a legal or equitable right under a deed, will, enactment or other written instrument, may apply by Originating Summons for the determination of any question there under, and,

iii. a declaration of the right/interest claimed by the person is predicated only on or desirable from the determination of the question(s) arising for construction under a deed, will, enactment or other written instrument.

In short, the procedure of Originating Summons is not designed to deal with resolution of disputed facts, but where the questions in controversy calling for determination lie(s) on simple question or issues of construction of a deed, will, legal instruments or enactments or written instrument. See *Obasanya v. Babafemi* (2000) 15 NWLR (Pt.689) 1 at 17.

In the instant case, as pointed out earlier, there is/are no question(s) formulated by the plaintiff for determination by the court, let alone questions of construction of a written law, will, deed etc, calling for determination before the lower courts. What the plaintiff presented before the court are simply his prayers/reliefs. The question then is how is the court to determine whether the plaintiff is entitled to the reliefs claimed and whether the procedure adopted is suitable for the reliefs claimed. Originating Summons Procedure is

very suitable for proceedings in which questions of law rather than disputed facts are involved or call for determination. The above is so because pleadings are not usually filed neither are witnesses usually called and examined thereby resulting in expeditious determination of the issues in controversy between the parties- See Inokoju v. Adeleke B (2007) 4 NWLR (pt.1025) 428 at 684.

From the reliefs claimed it is very clear that the plaintiff seeks to be declared the winner of the primary election instead of the appellant. Though the political party concern contends that it is the C appellant that won the said election, the plaintiff/1st respondent claims victory of the election. Clearly both of them cannot be speaking the truth. One of them must be telling us a lie. It is the duty of the court to decide between the parties, as to which of them is probably telling the truth.

D However, the issue is which of the processes is most suitable to the resolution of the issues presented in this case? Is it an ordinary writ of summons or Originating Summons? We have already noted the proceedings in which Originating Summons is most suited, which excludes the facts leading to the instant case. It follows that the procedure best designed for the resolution of the plaintiff's dispute in this E case is that of writ of summons where pleadings are filed and witnesses called and examined to enable the court watch their demeanour and decide the matter on the principle of balance of probability.

F The power of a plaintiff to approach the court in an election matter on nomination of candidates for election is grounded on section 87(10) of the Electoral Act, 2011 as amended which provides as follows:-

G *"Notwithstanding the provisions of the Act or rules of a political party an aspirant who complains that any of the provisions of this Act and the guidelines of a political party has not been complied with in the selection or nomination of a candidate of a political party for election may apply to the Federal High Court or the High Court of a State, for redress."*

H I hold the considered view that it is also the very same section 87(10) of the Electoral Act, supra, that confers jurisdiction on the court to hear and determine cases arising from political party nomination of candidates for election.

It follows therefore that for a plaintiff to successfully approach

the court and for the court to hear him and determine his complaint by way of Originating Summons procedure under the said section 87(10) of the Electoral Act *supra*, he must seek the determination of a question of construction which relates to or arises from the provisions of the Electoral Act or the relevant political party guidelines relating to nomination of candidates. In short, his relief(s) claimed must be predicated on a determination of any question relating to the Electoral Act and/or relevant party guidelines on nomination of political party candidates for elections. B

I, however have to comment on an emerging trend which is very disturbing. It is now common to see two parties who were aspirants at a single political party primary election duly conducted by the political party concerned both claiming to be the winners of the same primary election. It is strange because a primary election has only one venue and at the conclusion of the voting and counting of the valid votes cast there could be only a winner and a loser or a tie, as two aspirants cannot claim to be the winner. Where such a claim is made, as in the instant case, I hold the considered view that the proper procedure to be adopted in determining the dispute is that of a full trial involving pleadings etc. C  
D  
E

Politicians should note that it is not the duty of the court to nominate candidates for the political parties but to see to it that in the process of nominating a candidate for an election, the political parties comply with the provisions of the Electoral Act and/or their party constitution and/or guidelines relevant to the nomination process. F

Once again it is important that political parties must do everything possible to entrench internal democracy in their dealings with their members and also strive very hard to earn credibility in the conduct of their primary elections so that the court can believe and rely on the result declared by the party following nomination exercise. G

In conclusion, I agree with my learned brother, NGWUTA, JSC that the appeal has merit and should be allowed. I hereby order accordingly and set aside the decision of the lower courts and in their place remit the matter to the trial court for hearing under the general cause list in the interest of justice. H

It is further ordered as follows:

(a) SC/238/2012: Appeal is allowed as per the decision in

SC/350/2012:

(b) SC/326/2012: Appeal is allowed as per the decision in SC/350/2012.

I abide by the order as to costs made in the said lead judgment. Appeals allowed.

B

---

**MUNTAKA-COOMASSIE JSC**

C The Action Congress of Nigeria, (ACN), conducted a primary election in order to nominate its flag bearer in the House of Representatives Election held in April, 2012. At the conclusion of that election Mrs. Susan Olapeju Sinmisola Olley emerged the winner and was so declared.

D It was the Independent National Electoral Commission that monitored the said primary. The appellant's name was duly forwarded to the INEC by the Action Congress of Nigeria hereinafter referred to as the party as the party's candidate in the April, 2011 elections of members of the lower chamber of the National Assembly - for the AMUWO-ODOFIN FEDERAL CONSTITUENCY OF LAGOS STATE.

E The 1st respondent, Hon. Olukolu Ganiyu, was not happy with the declaration of the Appellant by INEC, and has taken part in the party's primary election, challenged the said nomination of the Appellant in the Federal High Court Abuja by way of Originating  
F summons which was later amended by the order of that court. The suit was then transferred to the Ikeja Division of the Federal High Court which retained the No.FHC/ABJ/CS/217/2001.

In the amended originating summons filed on 9th March, 2011 the 1st respondent as plaintiff claimed against the appellant  
G and 2nd and 3rd respondents as defendants. The seven reliefs of the plaintiff in the amended originating summons were predicated on four (4) grounds. I do not think I should reproduce the claims and the grounds here, other than to state that the amended originating summons was supported by a 20 - paragraph - affidavit and a 27  
H paragraph further and better - affidavit. Some documents were exhibited to each of the two Affidavits.

The 1st defendant filed a 30 - paragraph counter - affidavit to which some documents were exhibited.

Learned counsel for the 1st defendant, in addition, filed a

written address. The 2nd respondent also filed a 12 - paragraph counter - affidavit. They then filed a preliminary objection which was taken along with the substantive matter and also filed a written address.

After considering all the issues and the addresses of the learned counsel in the matter the learned trial Judge, in a well considered judgment dismissed the preliminary objection and held that: B

*“The plaintiff is entitled to judgment having won the primary election conducted by the 2nd defendant on 12th of January, 2011. Judgment is therefore entered for the plaintiff and I grant ail the C*  
*reliefs of the plaintiff in this case”*. See page 90 of the record.

The 1st and 2nd defendants were aggrieved and unsuccessfully filed separate Notices of Appeal at the Court of Appeal Lagos Division. Each of the two appeals was heard and dismissed by a different panel of the Court of Appeal hereinafter referred to as court D below.

The two appellants were dissatisfied and as a result filed three separate appeals namely: SC.238/2012, SC.326/2012 and lastly SC.350/2012 all were filed in this court. It is correct to state here that all the three (3) appeals were consolidated and were heard one after E  
the other by this court on 7/2/2013. One thing is clear that all the appeals are based on the same facts, similar issues were formulated and similar arguments were advanced in each of the briefs of argument filed. I shall determine the appeal No.SC.238/2012 and the F  
decision I reached therein will be applied to the other two appeals.

Learned counsel for the parties filed and exchanged their respective briefs of argument. The appellant filed and exchanged their briefs and issues were distilled by each of the appellant and respondents. Arguments on the issues were stated. G

The 1st respondent adopted and relied on the four (4) issues formulated by the appellant.

I was opportune to have read before now the lead judgment of my learned brother Ngwuta JSC, who meticulously analysed the two live issues and resolved same against the 1st respondent who H  
was the plaintiff. The appeal therefore succeeds and same is allowed. The originating summons was therefore a dead horse. The 1st respondent cannot correctly seek redress by employing the originating summons proceedings. I entirely agree with my Lord Ngwuta in al-

lowing the appeal. The judgment of the court below and that of the trial court are hereby set aside. The order of my learned brother that the originating summons before the trial Federal High Court, sitting at Ikeja, Lagos, be and is hereby struck-out. I agree with his Lordship that issues 3 and 4 are mere academic exercise which Supreme Court should not delve into. The order of costs in the leading judgment is agreeable to me. This decision in SC.238/2012 shall apply to the other two appeals.

C

### **ARIWOOLA JSC**

I was privileged to have read in draft, the lead judgment of my learned brother, Ngwuta, JSC just delivered in the consolidated cases. He has meticulously dealt with the principles guiding the use and applicability of Originating Summons proceedings in litigation.

I am in total agreement with the reasoning and the conclusion arrived thereat in the said lead judgment that the appeal in SC.238/2012 is unmeritorious. It is liable to dismissal.

Ordinarily, Originating Summons is merely a method of procedure but not one that is meant to enlarge or expand the jurisdiction of the court. See *National Bank of Nigeria & Anor v. Lady Ayodele Alakija & Anor.* (1978) 9 - 10 SC (Reprint) 42; (1978) LPELR 1949.

Generally, and it is no longer in controversy or dispute that an Originating Summons is used only when the facts of a case or matter is not likely to be or in fact are not disputed. In other words, it is to be used for non contentious action, or not hostile proceedings. See *Osuagwu v. Emez* (1998) 12 NWLR (Pt.579) 640; *Director of SSS & Anor v. Agbakoba* (199) 3 NWLR (Pt.545) 425; (1999) SCNJ 1; *Amasike v. Registrar General CAC & Anor* (2010) 13 NWLR (Pt.1211) 337 (2010) LPELR 456.

Therefore, whenever or wherever there is a dispute or likelihood of a dispute on the facts, an Originating Summons procedure is not appropriate and should not be used to commence a civil action. See; *Doherty v. Doherty* (1968) NMLR 241 at 242 *Ossai v. Wakwah & Ors.* (2006) 4 NWLR (Pt.969) 208; (2006) LPELR 281; *Elelu Habeeb & Anor. v. A.G. Federal & Ors.* (2012) 13 NWLR (Pt.1318) 423.

In the circumstance I adopt the reasoning of my learned

brother in the lead judgment and will hereby also allow the appeal, set aside the judgment of the court below.

I abide by the consequential orders in the said lead judgment including that on costs.

SC.326/2012

In view of the peculiarity of the appeal in SC.238/2012 and the fact that appeal in SC.326/2012 is against the judgment of the Lagos Division of the court below in CA/L/166/2012 where the facts and parties are the same with appeal No.SC.238/2012, the judgment earlier rendered applies to the instant. The appeal is allowed also by me.

I abide by the consequential orders in the lead judgment including that on costs. Appeal is allowed.

SC.350/2012

This appeal and the one in SC.238/2012 earlier treated in great detail by me learned brother, Ngwuta, JSC arose from the same suit which originally commenced in Abuja but later transferred to Lagos Federal High Court, Ikeja.

The judgment in SC.238/2012 applies to the instant appeal and I abide by the consequential orders including that on costs as they apply to this appeal. Appeal is allowed.

F

G

H