

SUPREME COURT OF NIGERIA
FRIDAY 19TH JULY, 2013. SC. 281/2012
**CORAM:- M. MOHAMMED, M. S. MUNTAKA-
COOMASSIE, N. S. NGWUTA, M. U. PETER-ODILI,
O. ARIWOOLA, JJSC**

1. CONGRESS FOR
PROGRESSIVE CHANGE

2. IDRIS YAHUZA YAKUBU APPELLANTS
AND

1. HON. EMMANUEL DAVID
OMBUGADU

2. INDEPENDENT NATIONAL
ELECTORAL COMMISSIONRESPONDENTS

JURISDICTION - Elections - Pre election - Electoral Act s. 87(9) & Lado's case - Are not applicable to this case - As 2nd appellant is not aspirant - And his complaint is not founded on nomination (H1)

ELECTIONS - Declaration of winner - Electoral Act 2010 s. 141 - The section implies that before a person is returned as elected by tribunal or court - That person must have fully participated in all stages of the election (H2)

APPEALS - Ground 5 - Competence - Any issue formulated from the ground is incompetent - As the ground has been struck out - Since incompetence of issue argued together with competent issues - Affects all issue argued with it (H3)

APPEALS - Fresh evidence - Admission - Leave is granted to adduce such evidence - Where inter alia the evidence could not have with reasonable diligence - Been obtained for use at trial (H4)

ACTIONS - Evidence - Evidence Act s. 83(3) - Application - The section is not applicable to Exhibit CA1 - As 2nd respondent who made same - Was performing official assignment - Without direct personal interest in the result of litigation (H5)

3402 CPC v. Ombugadu (2013) 7 KLR (pt. 334) 3401; (2013)

COURT PROCESSES - Abuse - Concept - This means that process of court has not been used properly - But process not filed in court - Cannot constitute abuse of process (H6)

APPEALS - Documentary evidence - Evaluation - Where findings of trial Judge on document are perverse - Appellate court will employ its appellate power - To correct the perversity (H7)

APPEALS - Issue - “Attempted substitution” - This phrase used by 1st respondent is not a relief - Rather it is definition and substance of the processes - That brought the parties to the trial Court (H8)

FACTS

Before the Federal High Court Lafia Judicial Division, plaintiffs/appellants commenced this action by way of originating summons, seeking inter alia for the following reliefs - a declaration that nomination, sponsorship and substitution of candidates for an election is the exclusive preserve of the political party concerned under the law. Appellants averred in their affidavit evidence in support of the originating motions that 1st appellant conducted its primaries on 11th January 2011 to nominate its candidates for the House of Representatives general election for Akwanga/Wamba/Nasarawa Eggon Federal Constituency of Nasarawa State. Appellants further stated that the said primary election was inconclusive as no winner emerged therefrom. As a result, 2nd appellant conducted a second primary on 15th January 2011 wherein 2nd appellant won and his name was submitted to 2nd respondent.

Notice of preliminary objection was filed by 1st respondent on the jurisdiction of the court to entertain the originating summons on the ground that the matter being pre-election is not justiciable in court. In his counter-affidavit, 2nd respondent contended that there was no primary election of 1st appellant on 15th January 2011 in which 2nd appellant emerged as the winner. 2nd respondent stated that it was on 11th January 2011 that the primaries of 1st appellant was conducted which 1st respondent won pursuant to which his name and particulars were forwarded to 2nd respondent as candidate of 1st appellant. The court heard the objection, dismissed same and assumed jurisdiction in the matter. The court eventually delivered its judgment in the

action and granted the reliefs sought by appellants. Aggrieved, 1st respondent appealed to the Court of Appeal Makurdi Division. The court allowed the appeal and held that the trial court lacked jurisdiction to hear and determine the matter. Appellants not satisfied have lodged appeal in Supreme Court.

ISSUES FOR DETERMINATION

“(i) Were the learned Justices right in law in holding that the trial Court has no jurisdiction to entertain Appellants’ case and make the consequential orders made in this case?”

“(ii) Issue No. 2 - Were the learned Justices right to entertain and determine issues No. 3 and 4 in the appeal before them when Ground 5 held to be incompetent was argued under issue No. 3 and together with issue No. 4.

“(iii) Were the learned Justices right in law in admitting as fresh evidence on appeal, Exhibit CA1 and ascribing probative value to it and or using Exhibit CA1 for the view that the learned trial Judge did not evaluate the evidence before him correctly or at all?”

“(iv) Were the learned Justices right in law in embarking on fresh evaluation of evidence and interfering with the definite findings of fact made by the learned trial Judge or put in another way, had the learned Justices valid legal basis for interfering with the trial Judge’s findings of fact?”

“(v) Were the learned Justices right in their view that 1st respondent’s name was submitted to INEC having regard to:

A: Their Lordships’ affirmation of the findings of the learned trial Judge as to 1st Appellant’s primary elections of 11th and 15th January, 2011;

B: The affidavit evidence and the relevant exhibits in Court and the findings of the learned trial Judge?”

“(vi) Were the learned Justices right in interfering with the finding of the trial Judge on Exhibit F, O, G and G1 and affidavit evidence of Appellants on the basis of Exhibits OM5 and or CA1 as credible documentary evidence proving that 2nd Respondent was the candidate CPC submitted to INEC?”

“(vii) Were the learned Justices right in law in holding that the issue in the case was one of substitution of candidate by 1st Appellant even after affirming in the judgment, the issue identified by the trial Judge and in themselves stating the correct issue in the same judgment?”

HELD (Unanimously dismissing the appeal in part per

NGWUTA JSC)

B *ELECTIONS - Nomination*

1. The Section of the Electoral Act is hereunder reproduced:

C *“S.87(9): Notwithstanding the provisions of the Act or rules of a political party, an aspirant who claims that any of the provisions of this Act and the guidelines of 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.”*

D **Two conditions must be satisfied before the jurisdiction donated by the section reproduced above can be ignited:**

1) The plaintiff is not at large; he/she must be an aspirant.

E **2) In the same vein, the complaint is not at large; it must be founded “in the selection or nomination of a candidate for an election.”**

F **From the claim and the affidavit evidence of both sides, it is not in doubt that the 2nd plaintiff/appellant is not an aspirant. His case is that he is a candidate for the election which leads to the conclusion that the process of selection or nomination of a candidate has been completed. Secondly, since the process of selection or nomination has been completed and the 2nd plaintiff/appellant is no longer an aspirant but a candidate he cannot be said to have complained about the process of nomination or selection which he claims has produced him as a candidate of his party for the election.**

G **It is my view, therefore, that this case is outside the ambit of Section 87(9) of the Electoral Act (supra) and that the decision of this Court in Lado’s case (supra) and other similar decisions do not apply to the facts of this case. (p. 3435 D)**

H

ELECTIONS - Declaration of winner

2. Section 141 of the Electoral Act 2010 (as amended) provides in unmistakable terms:

“An election tribunal or Court shall not under any circumstance declare any person Winner of an election in which such a person has not fully participated in all the stages of the said election.” B

By the above provision, the National Assembly has set aside the decision of this court in *Amaechi v. INEC* (2008) 5 NWLR (Pt. 1080) page 227 at 296. Contrary to the decision of this Court in *Amaechi’s* case, the implication of Section 141 of the Electoral Act, 2010 (as amended) is that while a candidate at an election must be sponsored by a political party, the candidate who stands to win or lose the election is the candidate and not the political party that sponsored him. D

In other words, parties do not contest, win or lose election directly; they do so by the candidates they sponsored and before a person can be returned as elected by a tribunal or Court, that person must have fully participated in all the stages of the election, starting from nomination to the actual voting. E
(p. 3436 G)

APPEALS - Ground 5 - Competence

3. To meet the appellants’ case that the lower Court was in error to have determined issues arising from ground 5 already struck out as incompetent, learned Counsel for the 1st respondent said that the insertion that the issues were “distilled from grounds 3-9” was made in error. This is not the type of error, if in fact it is an error, which can be waived aside as typographical error, or correct in the ipse dext of learned Counsel in his brief. F G

If it was an error, it cannot be correct by learned Counsel in his address. That the issues were distilled from grounds 3-9 means that the issues were distilled from each of grounds 3, 4, 5, 6, 7, 8 and 9 whereas ground 5 had been struck out as incompetent. No Court is going to do a surgical operation to determine and expunge from the record, the part of the issues arising from the incompetent ground 5. Any issue formulated H

from ground 5 is incompetent and liable to be struck out.

The incompetence of an issue argued together with otherwise competent issues affects all issue argued with it.

(p. 3437 F)

B *APPEALS - Fresh evidence - Admission*

4. The factors to be considered in granting or refusing leave to adduce fresh evidence on appeal are:

(a) **Evidence sought to be adduced could not have with reasonable diligence been obtained for use at the trial;**

(b) **Evidence should if admitted have an important, not necessarily crucial effect on the whole case, and**

(c) **The evidence must be such as is apparently credible in the sense that it is capable of being believed.**

D **Exhibit CA1 could not have been obtained with reasonable diligence for use at the trial for the simple reason that it was not in existence at the trial. Evidence that the appellant's name was submitted earlier in time by the respondent to the 3rd respondent has an important, if not necessarily, crucial effect on the whole case and the evidence is capable of being believed.**

E **I find and hold that the Court below was right to have admitted Exhibit CA1 as fresh evidence on appeal and having admitted it the lower Court rightly ascribed probative value thereto. I resolve issue 3 against the appellants and in favour of the respondents.** (pp. 3441 B/3442 E)

Evidence - Evidence Act s. 83(3) - Application

G **5. It was strenuously argued on behalf of the appellants that Exhibit CA1 was made at a time when proceedings were pending contrary to Section 91(3) of the Evidence Act, 2011 by the 2nd respondent who has an interest in the proceeding contrary to Section 83(3) of the Evidence Act (supra).**

H **The interest of the 2nd respondent as the maker of Exhibit CA1 is purely official or as servant or employee having no personal interest in the litigation. The provisions of the Evidence Act relied on by the appellants do not apply to Exhibit CA1. In making Exhibit CA1, the 2nd respondent was**

performing an official assignment without direct personal interest in the result of litigation and cannot therefore be considered as a person interested in the suit. (p. 3441 E)

COURT PROCESSES - Abuse - Concept

6. Briefly stated, an abuse of the judicial process means that the process of the Court has not been used bona fide and properly.

The legal concept of the abuse of the judicial process or the abuse of the proceedings of the Court is very wide. It is of infinite variety and it does not appear that the category can be closed. Be that as it may, a process not meant to be filed, and was in fact not filed in Court is not a process of Court and can therefore never constitute abuse of process of Court. Only a process filed in Court can constitute abuse of Court process. Exhibit CA1 is not a process of Court. It is a letter written by the Chairman of INEC to the Police. It found its way into the proceedings as evidence and not as a process of Court.

(p. 3442 B)

APPEALS - Documentary evidence - Evaluation

7. In my humble view, the lower Court was justified in its re-evaluation of the documentary evidence before the trial Court and evaluation of the Exhibit CA1 which it admitted as fresh evidence on appeal. The trial Court did not evaluate or properly evaluate the evidence before it which was merely documentary. An appellate Court enjoys the same position as the trial Court in evaluation of documentary evidence as in this case where the controversy is limited to the interpretation of the documents. Where the findings of the trial Judge on documentary evidence are perverse, an appellate Court will employ its appellate power to correct the perversity. And it follows that on the facts of this case, the interference by the lower Court with the finding of fact of the trial Court and the substitution of its view for the view of the trial Court are the necessary and logical consequence of the re-evaluation of the documentary evidence before the trial Court and the evaluation of the fresh evidence on appeal, Exhibit CA1. I

resolve issues 4, 5 and 6 argued together in the appellants' brief against the appellants and in favour of the respondents.
(p. 3444 H)

APPEALS - Issue - "Attempted substitution"

- B 8. With profound respect to Learned Senior Counsel, the issue of attempted substitution allegedly raked up in the middle of the appeal by the 1st respondent is not a relief. In my humble view, what the 1st respondent meant by raking up attempted substitution is that if the totality of materials presented by both parties is examined, the case between them is one of attempt at substitution of candidate. It is not a relief.**

The words "attempted substitution" need not be stated at all. This Court could arrive at a conclusion justified by the facts irrespective of the words used by either party to the appeal.

I hold the same view in this case. Attempted substitution is the definition and substance of the processes that brought the parties to the trial Court.

- E On the facts before this Court, the words "attempted substitution" is the same as one dozen in place of 12, as it were. If plaintiff makes a claim for 12 items and his opponent in his defence refers to the claim as one for one dozen items, the defendant has not raised a new issue and has not asked for a relief. I resolve issue 7 against the appellant and in favour of the respondents.** (p. 3445 H)

NOTABLE POINTS OF INTEREST

G NGWUTA JSC

1. Counsel should not mislead the court

- H In view of the dates above, how can a legal practitioner state on his solemn Oath that Exhibit CA1 has been with the 3rd Respondent since the commencement of the action or that with reasonable diligence the appellant could have obtained the document for use at trial? Learned Counsel may not help the Court but he cannot afford to distort the fact on Oath to mislead and misdirect the Court. True, he owes a duty to his client but that duty must be performed within**

the ambit of the law and its rules, bearing in mind that he owes a duty higher than that he owes his client to the higher case - the cause of justice. The facts learned Counsel distorted in his affidavit are within his knowledge from the record to which he had access. By his deposition, he lays himself open to citation for contempt and could in addition be prosecuted for perjury. (p. 3440 B) B

2. Primary election is held to produce candidate at election

With profound respect to their Lordships, the learned Justices of the Court of Appeal, the sole purpose of a party's primary election is the emergence of one of the contestants as the party's candidate at the election. An inconclusive primary election cannot produce a candidate and if it is immaterial that the primary election is inconclusive, the party might as well forgo the primary election and simply pick one of its members to bear its flag at the election. (p. 3443 A) C D

3. Politics to be played in accordance with the rules

An army is greater than the numerical strength of its soldiers. In the same vein, a political party is greater than the numerical strength of its membership just like a country, for instance, Nigeria, is greater than the totality of its citizens. It follows that in the case of a political party, such as the 1st appellant herein, the interest of an individual member or a group of members within the party, irrespective of the place of such member or group in the hierarchy of the party, must yield place to the interest of the party. It is the greed, borne of inordinate ambition to own, control and manipulate their own political parties by individuals and groups therein and the expected reaction by other party members that result to the internal wrangling and want of internal democracy that constitute the bane of political parties in Nigeria. E F G

If the party primary that produced the 1st respondent whose name and particulars were duly sent to INEC by the party that conducted it was not conclusive, it could not have produced a candidate. The second primary election conducted by the 1st appellant was a farce, subterfuge to accommodate a new entrant and a late comer to the party to the detriment of the party and its duly nominated candidate. May be if another higher bidder had come up before the election, the purported second primaries would have been discarded in H

favour of a third one to accommodate the later comer.

This shows lack of principle, sincerity of purpose and patriotism dictated by excessive materialism. It is apparent that a few powerful elements therein hijack the parties and arrogated to themselves the right to sell elective and appointive positions to the party member
B who can afford same. The 2nd appellant was not even in the party until 12/1/2011 when he got waiver to participate in the make-believe primary of 15/1/2011. This is a betrayal of the collective trust of the members of the party and in appropriate case such as this; the
C Court will rise to the occasion.

There is a popular saying that politics is a dirty game. I do not share this view. It is the players who are dirty and they inflict their filth on their members and, by implication, on the society. Politicians must learn to play the game of politics in strict compliance with its rules and
D the rules of organized society. (p. 3446 G)

REPRESENTATION

Chief T.J.O. Okpoko, SAN (leading Chief Duro Adeyele SAN, Pius Akubo SAN, B.O. Igwe Esq. Akinolu Kehinde Esq., M.E. Oru Esq.,
E Sola Ephraim-Oluwanuga Esq., Mohammed Monguno Esq., Chief Okoi Obono-Obla Esq., Edwin Anikwem Esq., Terry Okpoko Esq., Edafe Akpor Esq. Stanley Dien Ugwuanyim Esq., N. Nwaiwu Esq., C. Aranisola (Miss), D.H. Bwala Esq., Theophilus Okwute Esq., Z.Z. Allumaga Esq., O. A. Ogunbiyi (Miss), K. O. Ijatuyi Esq., Ola
F Olanipekun Esq., Uradu Ngozi (Miss), B. Amawu Esq., and Y. Savage), for Appellants

D.D. Dodo, SAN (leading S.I. Ameh, SAN, J.S. Okutepe, SAN, A.A. Ibrahim Esq., Audu Anuga Esq., Terhembra Gbasima Esq., Ifeanyi O. Odom Esq., S.I. Abu Esq., Hokaha Hope Bassey (Mrs.) Samson A. Eigege Esq., Luter Atagher Esq., Victoria Oguine (Mrs.), Nanyak Janfa Esq. and Amina Umaru Miango (Miss), for the 1st Respondent

H Ibrahim K. Bawa Esq., (leading Alhassan A. Umar Esq., Rahima Aminu (Mrs.), Linda Utuk (Miss) and Olawale Dawodu), for the 2nd Respondent

CASES REFERRED TO

- PDP v. Sylva (2012) 13 NWLR (pt. 1316) 127
 XS (Nig) Ltd v. Taisei (WA) Ltd (2006) 13 NWLR (pt. 1003) 535
 Amaechi v. INEC (2008) 5 NWLR (pt. 1080) 227
 NEPA v. Edegbero (2002) 18 NWLR (pt. 798) 19
 Abdulraheem v. Oduleye (2005) 8 NWLR (pt. 928) 144 B
 Oloba v. Akereja (1988) 3 NWLR (pt. 84) 509
 Lado v. CPC (2011) 18 NWLR (pt. 1278) 18
 Emeka v. Okadigbo (2012) 7 SC (pt. 1) 1
 Babatunde v. PAS & TA Ltd. (2007) 13 NWLR (pt. 1050) 112 C
 Okafor v. Nnaife (1987) 4 NWLR (pt. 64) 129
 Khali v. Yar'adua (2003) 16 NWLR (pt. 847) 446
 Bereyin v. Gbodo (1989) 1 NWLR (pt. 97) 372
 Anyalogu v. Agu (1998) 11 NWLR (pt. 532) 129
 Honika Saw-Mill Nig. Ltd v. Okojie (1994) 2 NWLR (pt. 326) 252 D
 Nwadike v. Ibekwe (1989) 4 NWLR (pt. 67) 718

STATUTES & RULES REFERRED TO

- Electoral Act 2010 (as amended), ss. 31(1)(3), 33, 35, 87(4)(c)(i)(ii), 87(9), 118, 141 E
 Constitution of the Federal Republic of Nigeria 1999 (as amended), ss. 6(1)(2), 251(1)(r)
 Evidence Act, ss. 83(3), 91(3)
 Court of Appeal Rules, O. 4 r. 2 F

LEAD JUDGMENT BY NGWUTA JSC

This appeal arose from the dispute as to who, the 2nd Appellant or the 1st Respondent, was the duly nominated and sponsored candidate of the 1st Appellant, the Congress for Progressive Change and elected in the April, 2011 general election to represent the Akwanga/Wamba/Nasarawa-Eggon Federal Constituency of Nasarawa State in the lower chamber of the National Assembly.

In the Amended Originating Summons filed on 10/5/2011 in the Lafia Judicial Division of the Federal High Court, the Plaintiffs/ Appellants raised the following questions for determination:

“1. Having regard to the clear and unambiguous provision of Section 87 of the Electoral Act, 2010 as well as the provision of Article 25 of the 1st Plaintiff’s Constitution, particularly judicial pro-

nouncement on the supremacy of a political party's decision in respect of nomination of candidates; whether the Court or any other authority at all can compel a party to nominate or dictate a particular candidate it must sponsor for an election.

2. *Considering the elaborate provision of Section 83(1)(4)(c)(ii) of the Electoral Act, 2010, as amended as well as the provision of the 1st Plaintiff's Manual and Guidelines for Primaries, whether the 2nd Plaintiff was not validly nominated and sponsored as the candidate of the 1st Plaintiff for the Akwanga/Wamba/Nasarawa-Eggon Federal Constituency of Nasarawa State for the April 2011 General Election.*

3. *Having regard to the clear provision of the Electoral Act, 2010 as amended, particularly Section 87 and the provision of the 1st plaintiff's Constitution with regard to holding of primaries, whether the 1st defendant can recognize the name of a person who did not win his party's primaries as a candidate in the election and who was not sponsored by his political party as its candidate for the elective position.*

4. *Considering the facts and circumstances of this case especially the supremacy of political party's decision on sponsorship of candidates and the fact that the 2nd Plaintiff had acquired a vested interest in the election, whether his candidature can be voided, cancelled or nullified by the 1st defendant."*

In anticipation of answers favourable to the Plaintiffs/Appellants, they prayed the Court for the following:

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

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

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

4. *A declaration that the 2nd Plaintiff having won the primaries of the 1st Plaintiff pursuant to which his name has been submitted to the 1st Defendant as the sponsored candidate of the 1st Plaintiff for the Akwanga/Wamba/Nasarawa-Eggon Federal Constituency*

of Nasarawa State, is the 1st Plaintiff's candidate for the Akwanga/Wamba/Nasarawa-Eggon Federal Constituency of Nasarawa State in the April, 2011 general elections.

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

6. An order of the Honourable Court compelling/directing the 1st Defendant to recognize and accept the 2nd Plaintiff as the duly nominated/sponsored candidate of the 1st Plaintiff for the seat of member of House of Representatives for the Akwanga/Wamba/Nasarawa-Eggon Federal Constituency of Nasarawa State in the April, 2011 general election.

7. An order of this Honourable Court that the 2nd Defendant having lost in the primary election of the 1st Plaintiff conducted on 15th January, 2011 and not having been sponsored by the 1st Plaintiff to be its candidate in the April, 2011 general election into the seat of member of House of Representatives for the Akwanga/Wamba/Nasarawa-Eggon Federal Constituency of Nasarawa State cannot be recognized by the 1st defendant as the 1st Plaintiff's candidate for aforesaid election.

8. An order of this Honourable Court that the sponsorship/nomination of the 2nd Plaintiff by the 1st Plaintiff having been done in accordance with the law cannot be invalidated in law.

9. An order declaring the 2nd Plaintiff as the sponsored candidate of the 1st Plaintiff for the House of Representatives election for Akwanga/Wamba/Nasarawa-Eggon Federal Constituency of Nasarawa State in the April, 2011 general election.

10. An order of perpetual injunction restraining the 1st Defendant, its agents, servants or privies from recognizing the 2nd Defendant as the sponsored candidate of the 1st Plaintiff for House of Representative election for Akwanga/Wamba/Nasarawa-Eggon Federal Constituency of Nasarawa State." (See pages 307 to 309 of the transcripts).

A 46-paragraph affidavit in support of the originating process was also filed on 10/5/2011 along with a written address.

On the same date, 10/5/2011, the 2nd Defendant/Respondent filed a Notice of Preliminary Objection predicated on five grounds. A 21-

paragraph affidavit in support of the notice of preliminary objection was filed on 9/5/2011. A written address in support of same was filed on 10/5/2011. The 2nd Defendant's/Respondent's 42-paragraph counter-affidavit in opposition to the affidavit in support of the Originating Summons was filed, within the time extended for same by the trial Court, on 10/5/2011.

The 2nd Defendant/Respondent also filed his written address opposing the Originating Summons on 10/5/2011. On 20/5/2011, the Plaintiffs/Appellants filed a written address in opposition to the 2nd Defendant's/Respondent's preliminary objection. They filed a 3-paragraph further affidavit in support of their Originating Summons on 25/5/2011. On the same date (25/5/2011) they filed a written address *"in support of further and better affidavit to the Originating Summons"*.

A search in the two volumes of the records and one volume of supplementary record shows that the only process filed by the 1st Defendant/Respondent in the proceedings in the trial Court is a written address on point of law to the Originating Summons. (See pages 740 - 744 of the record).

On 10/6/2011, learned Counsel for the parties adopted and relied on their written addresses in the preliminary objection and their briefs in the Originating Summons. At the conclusion of the proceedings for the day (10/6/2011), the record showed:

"Court: Ruling on the preliminary objection is reserved till the 4th of July, 2011 while judgment in the substantive suit is reserved till 2pm of the same date." (See page 748 of the record).

On the preliminary objection, the trial Court had held:
"In the circumstances, I hold that the action was properly commenced by Originating Summons. The sum total of all I have been saying is that this Court has jurisdiction to entertain and determine this action and hereby assumes same. The preliminary objection dated and filed on 10/5/2011 lacks merit, fails and is therefore hereby dismissed. There shall be no order as to costs. That is the ruling of this Court." (See page 837 of the record).

In its judgment running from page 250 to page 286 of the record, the trial Court concluded and ordered as follows:

"In the eyes of the law, Mr. Emmanuel David Ombugadu was never a candidate in the election much less the winner. It is therefore

hereby ordered that the 1st defendant returns the 2nd Plaintiff as the winner of the April 9, 2011. National Assembly Election into the House of Representatives of the Federal Republic of Nigeria, representing Akwanga/Wamba/Nasarawa-Eggon Federal Constituency. Prayers/reliefs 1, 2, 3, 4, 5, 6, 7, 8, 9 and 10 as contained in the body of the amended Originating Summons are hereby granted as prayed. I shall make no order as to costs. That is the judgment of this Court.” (See page 786 of the record). ^B

Aggrieved by the judgment of the trial Court, 1st Appellant appealed to the Court of Appeal, Makurdi Judicial Division on five (5) grounds. The lower Court, in its judgment of 25/5/2012 allowed the appeal and struck out Suit No. FHC/LF/CS/13/2011 for want of jurisdiction. (See page 1248 of the record). ^C

Not satisfied with the judgment of the lower Court, appellant filed a notice of appeal subsequently amended, containing 21 grounds on 29/1/2013. Learned Counsel for the parties filed and exchanged briefs of arguments in accordance with the rules of this Court. ^D

In the Appellants’ brief of argument filed on 29/1/2013, the following seven (7) issues were distilled for determination:

“(i) Were the learned Justices right in law in holding that the trial Court has no jurisdiction to entertain Appellants’ case and make the consequential orders made in this case? (Based on Grounds 1, 2 and 6). ^E

(ii) Issue No. 2 - Were the learned Justices right to entertain and determine issues No. 3 and 4 in the appeal before them when Ground 5 held to be incompetent was argued under issue No. 3 and together with issue No. 4 (is based on Ground 4). ^F

(iii) Were the learned Justices right in law in admitting as fresh evidence on appeal, Exhibit CA1 and ascribing probative value to it and or using Exhibit CA1 for the view that the learned trial Judge did not evaluate the evidence before him correctly or at all? (Based on Grounds 7, 8, 9 and 15). ^G

(iv) Were the learned Justices right in law in embarking on fresh evaluation of evidence and interfering with the definite findings of fact made by the learned trial Judge or put in another way, had the learned Justices valid legal basis for interfering with the trial Judge’s findings of fact? (Based on original grounds 10 and 18). ^H

(v) Were the learned Justices right in their view that 1st

respondent's name was submitted to INEC having regard to:

A: Their Lordships' affirmation of the findings of the learned trial Judge as to 1st Appellant's primary elections of 11th and 15th January, 2011;

B: The affidavit evidence and the relevant exhibits in Court and the findings of the learned trial Judge? (Based on Ground 11 and 13).

C: (vi) Were the learned Justices right in interfering with the finding of the trial Judge on Exhibit F, O, G and G1 and affidavit evidence of Appellants on the basis of Exhibits OM5 and or CA1 as credible documentary evidence proving that 2nd Respondent was the candidate CPC submitted to INEC? (Based on Grounds 14 & 21).

D: (vii) Were the learned Justices right in law in holding that the issue in the case was one of substitution of candidate by 1st Appellant even after affirming in the judgment, the issue identified by the trial Judge and in themselves stating the correct issue in the same judgment?" (Based on original Grounds 16, 19 and 20).

E: In the 1st Respondent's brief filed on 26/3/2013, the following five issues were identified and slated for determination:

"1. Whether from the nature of the claim extant position of the law and evidence adduced, the trial Court had jurisdiction to entertain the matter? (Grounds 1 and 2 of the notice of appeal).

F: 2. Whether the learned Justices of the Court below were in error when they granted leave to the 1st Respondent to adduce fresh evidence and to have admitted and ascribed probative value to Exhibit CA1 (Grounds 7, 8, 9 and 14 of the notice of appeal).

G: 3. Whether the learned Justices of the Court below erred in law in their review and re-evaluation of the evidence adduced before the trial Court before setting aside the judgment?

H: 4. Whether from the facts and circumstances of this case the lower Court was in error to hold that the case was one of attempt to substitute? (Grounds 5, 6, 11, 14, 15, 16, 19 and 20 of the notice of appeal).

5. Whether the learned Justices of the lower Court actually entertained issues 3 and 4 in the lower Court when Ground 5 was struck out?"

On its own part, the 2nd Respondent submitted the following

three issues for the Court to resolve:

“1. Whether having regard to the entire circumstances of this case the lower Court was right in its decision that the trial Court lacked jurisdiction to hear and determine the matter? (Ground 1, 2 and 3).

2. Whether the lower Court was right in receiving, admitting and ascribing probative value to Exhibit CAL. (Grounds 7, 8, 9 and 14).

3. Whether the lower Court was right when it re-evaluated the evidence adduced before the trial Court and concluded that the name of the 1st Respondent was submitted to the 2nd Respondent and that the case of the Appellants was one of an attempted substitution of candidate. (Grounds 10-13 and 15-201).”

In his argument in issue one in his brief, learned Counsel for the Appellant said that Grounds 1, 2 and 6 of his Grounds of Appeal from which issue one is framed has to do with the conclusion of the lower Court that:

“I hold that neither the trial Court nor this Court has the jurisdiction to entertain the matter in dispute. Again by virtue of Section 141 of the Act, the Courts cannot make the consequential orders made by the Court below.” (See page 1248 of the record).

Learned Counsel for the Appellant impugned the conclusion of the lower Court, arguing that the matter submitted for adjudication and the reliefs sought are cognizable in law and are within the jurisdiction of the Court. He said that the jurisdiction of a Court to entertain a suit is determined from the Writ of Summons, the Statement of Claim and the relief claimed; adding that in the case of originating summons, jurisdiction is determined by its content, the reliefs claimed therein and the supporting affidavit which serve as the Plaintiff’s pleading. He relied on *PDP & Anor v. Timipere Sylva & Ors* (2012) 13 NWLR (Pt. 1316) at page 127; *XS (Nig) Ltd v. Taisei (WA) Ltd* (2006) 13 NWLR (Pt. 1003); page 535; *Metal Construction (WA) Ltd v Aboderin* (1998) 8 NWLR (Pt. 563) page 538.

Learned Counsel referred to the claim in the Originating Summons and the affidavit in support and said that the complaint of the Appellants is that the CPC successfully conducted its primary election of 15th January, 2012 and that the 2nd Appellant having won the primary election his name was submitted to INEC by the party CPC as its sponsored candidate for the election to the Lower Chambers of

the National Assembly for the Akwanga/Wamba/Nasarawa-Eggon Federal Constituency of Nasarawa State. He further stated that rather than publish the name of the 2nd Appellant as the party's sponsored candidate for the election, INEC published the name of the 1st Respondent who did not win the party's primary election of 15/1/2011 and whose name the party, CPC never sent to INEC. This, learned Counsel said, is the fundamental issue in dispute. He referred to and relied on paragraphs 6 to 25 of the supporting affidavit at pages 312 to 315 of the further affidavit in support of the originating summons at page 539 of Volume 1 of the record.

Learned Counsel emphasized that INEC against whom the substantive claims were made did not file any counter-affidavit and did not controvert the factual situation constituting the cause of action as deposed by the Appellants. He said that the uncontroverted facts deposed to by the Appellants constitute a cause of action and that the case made by Appellants shows (a) A challenge of the validity of executive or administrative action or decision of INEC, an agency of the Federal Government, and (b) A valid legal justiciable dispute within the ambit of Sections 31(1)(3) and 87(4)(c)(i) and (ii) of the Electoral Act 2010 as amended.

He referred to and relied on Section 251(1)(r) of the Constitution of the Federal Republic of Nigeria, 1999, as amended and contended that under the said provision, the Federal High Court has jurisdiction to hear and determine the dispute. He relied on *NEPA v Edegbero* (2002) 18 NWLR (Pt.798) 19; *Abdulraheem v. Oduleye* (2005) 8 NWLR (Pt 928) 144 at 129. He argued that the judgment of the lower Court was given without due consideration of Section 251(1)(r) of the Constitution (*supra*).

He relied on *Chief Daniel Awodele Oloba v. Isaac Olubokun Akereja* (1988) 3 NWLR (Pt.84) 509 at page 520 on the need to examine the many facts of jurisdiction and pronounce upon same by the Court faced with the issue of jurisdiction to determine a matter before it. He said that the failure of the Court to consider the issue of jurisdiction under the Constitution was the reason for the wrong decision that the Court has no jurisdiction in the matter. He referred to the finding of fact by the trial Judge at page 784 of the record that:

"I am of the view that sufficient materials have been placed before this Court to the effect that the primary election held on 11/1/

2011 was inconclusive and came to the conclusion that the authentic primary election of the 1st plaintiff for the.. House of Representative.. was held on 15/1/2011” and said that there was no appeal against the said finding by the trial Court.

He referred to page 1240 of the record and said that the finding of the trial Court was affirmed by the lower Court when it held: *“established at the trial is the fact that CPC conducted two primaries for the selection or nomination of its candidates for the House of Representative (sic) for Akwanga/Wamba/Nasarawa-Eggon Federal Constituency. See the finding of the trial Court at page 780 of the record. The finding of the learned trial Judge was not appealed against. There was therefore no dispute that there were two primaries by CPC for the seat under reference.”*

Learned Counsel contended that based on the finding of the trial Court against which there was no appeal and the affirmation of same by the lower Court, the issue as to who emerged from the conclusive party primary of 15/1/2011 is resolved and the issue of the CPC submitting the name of the 1st Respondent who admitted he did not take part in the primary of 15/1/2011 and the question of any dispute between two contestants did not arise.

Learned Counsel said that the CPC through its Nasarawa State Chairman and Secretary deposed that the primary election was inconclusive and did not produce a winner and that the secondary primary election of 15/1/2011 did produce a winner in the person of the 2nd Appellant for which he relied on paragraphs 8, 9, 10 and 11, 17, 22, 34 and 35 of their affidavit in support of the Originating Summons and Exhibits F, G, G1 and N1 at pages 381, 415 of the record, respectively.

He said that the facts of this case and the circumstances are different from the facts that formed the basis of this Court’s decision in Garba Lado & Ors. v. CPC & Ors. (2011) 18 NWLR (pt. 1278) 18. He said that an inconclusive primary election as in Lado’s case is in law not a valid primary election and that there was only one valid primary election held on 15/1/2011 and that there was no parallel party primaries as was the case in Lado’s case.

He argued that in Lado’s case, there were claims and counter-claims and the reliefs were directed against the CPC. He referred to this Court’s decision in Emeka v. Okadigbo (2012) 7 SC (Pt.1) 1 and

said that the lower Court was wrong in applying Lado's case to the present case. He relied in Babatunde v. PAS & TA Ltd. (2007) 13 NWLR (Pt.1050) 112 at 157 and Okafor v. Nnaife (1987) 4 NWLR (Pt.64) 129 in his argument that the lower Court erred to go outside the facts of the case to decide the issue in dispute. He urged the Court to resolve issue one in favour of the Appellants.

In issue 2, learned Counsel referred to page 1207 of the records where the lower Court held:

"As for Ground 5 of the grounds of appeal, I had earlier in the course of determining this preliminary objection analyzed it. I will simply add that I agree with the 1st and 2nd Respondents that the ground is not appealable not being a ratio of the case. I also hold that ground 5 of the Appellant's ground of appeal is incompetent. It is hereby struck out."

He referred to page 1235 of the record and said that issues 2 and 3 were argued together and considered by the lower Court. He referred to page 1067 of the record and said issue 3 which was argued together with issue 2 was distilled from grounds 3-9 which included ground 5 already struck out by the lower Court. He contended that an issue distilled from a number of grounds of appeal, one of which is incompetent, is incompetent.

He relied on Khali v. Yar'adua (2003) 16 NWLR (Pt.847) 446 at 481; Chief Bereyin v. Gbodo (1989) 1 NWLR (Pt.97) 372; Anyalogu v. Agu (1998) 11 NWLR (pt. 532) 129; Honika Saw-Mill (Nigeria Limited) v. Hary Okojie (1994) 2 NWLR (pt. 326) 252; Nwadike v. Ibekwe (1989) 4 NWLR (pt. 67) 718. He urged the Court to resolve the issue in favour of Appellants and allow the appeal.

Issue 3 is on the lower Court's admission of fresh evidence, Exhibit CA1, on appeal. Learned Counsel referred to page 1091 of the record for the 2nd Respondent's motion to admit as fresh evidence on appeal a letter written by INEC, 60 days after the trial Court delivered its judgment, and page 1100 for the Appellant's counter-affidavit opposing the application.

He referred to the ruling at page 1152 which he said was delivered on the same day the judgment on the appeal was delivered and where the lower Court held:

"In all, I hold that the Applicant has satisfied the conditions for this Court to grant this application. Application is therefore granted. I

make order granting leave to the Appellant/Applicant to adduce and tender fresh documentary evidence which was not tendered at the trial Court, to wit: A letter from the Office of the Chairman, Independent National Electoral Commission (INEC) to the Inspector-General of Police (IGP), Nigeria Police Force”

Learned Counsel said that the judgment of the trial Court was delivered on 18th July, 2011 and the letter was written on 8th September, 2011, 60 days after the judgment of the trial Court. He concluded from the above that Exhibit CA1 admitted as fresh evidence on appeal was not in existence at any time before the trial Court delivered its judgment on 18/7/2011.

He argued that INEC as a party cannot, by its own letter written after the judgment was delivered, set aside or alter the judgment of the Court. He referred to Order 4 of the Court of Appeal Rules and contended that the said order did not contemplate manufacturing evidence after judgment had been delivered as “*further evidence*”.

He referred to *Ladd v. Marshall* (1954) 3 All ER 745-748 where Denning, LJ (as he then was) set three conditions for admission of facts on appeal as:

(1) It must be shown that the evidence could not have been obtained with reasonable diligence for use at trial;

(2) The evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive, and

(3) The evidence must be such as is presumably to be believed or in other words, it must be apparently credible, although it need not be incontrovertible.

He relied on *Amaechi v. INEC* (2008) 5 NWLR (Pt.1080) 227 at 301; *UBA Plc. v. Btl Ind. Ltd.* (2005) 10 NWLR (Pt.933) 356 at 371; *Braithwaite v. M.S.A.* (1999) 12 NWLR (Pt 636) 611 at 617 and contended that the evidence envisaged by law and the rules of evidence is evidence of what is or was in existence at the time of the trial which the party could not reasonably obtain from one at the trial.

He referred to page 1160 of the record and said it was unfortunate that the lower Court held it did not have to examine the document sought to be admitted as fresh evidence to ascertain its probative value before granting leave to adduce it as fresh evidence. He

said the lower Court violated the principle in *Ladd. v. Marshall* (supra). He relied also on *Hip Foong Hong. v. Neotia & Co.* (1918) AC 888. He submitted that Exhibit CA1 did not satisfy the conditions for its being adduced as fresh evidence on appeal.

B He relied on *Adegoke Motors v. Adesanya* (1989) 3 NWLR (Pt.108) 250 and *Ngige v. Obi* (2006) 14 NWLR (Pt.999) 1 at pages 108 - 109 and argued that appeal is regarded as continuation of the original suit rather than initiation of a new suit and what was not in existence during the time of trial and judgment cannot be adduced as fresh evidence on appeal. He relied on *Ugwu v. Ararume* (2007) C 12 NWLR (Pt.1048) and Section 91(3) of the Evidence Act and argued that Exhibit CA1, having been made by INEC, a party during the pendency of the appeal, is inadmissible in evidence.

D Contrary to the decision of the lower Court page 1234 of the record that Exhibit CA1 has probative value and weight, learned Counsel argued that asking for investigation of allegation of forgery is no proof of any offence. He relied on *Amaechi v. INEC* (2008) 5 NWLR (Pt. 1080) 227 at 414. He urged the Court to resolve the issue in favour of the Appellants.

E Issues 4, 5 and 6 were argued together in the Appellants' brief. Issue 4 questions the legal basis for the lower Court to interfere with the findings of facts of the trial Court. Issue 5 questions the view of the lower Court that the 1st Respondent's name was submitted to INEC and Issue 6 questions the lower Court's interference with the F findings of the trial Court on Exhibits F, O, G and G1 and affidavit evidence of the Appellants on the basis of Exhibit OM5 and/or CA1 to prove that the 1st Respondent's name was submitted by the CPC to INEC.

G Learned Counsel argued that the learned Justices of the Court Appeal were in error when they embarked on re-evaluation of evidence and substituted their views on the evidence for the view of the learned trial Judge. He said that the case in the originating summons was mostly complaints as to what INEC did or did not do and that H the Appellants' case remained unchallenged in so far as INEC filed no counter-affidavit, adding that INEC is deemed to have admitted the facts which Appellants deposed in their affidavit in support of the originating summons.

He relied on *Ajomale v. Yaduat* (1991) 5 NWLR (Pt. 191) 257

at 283-3. He referred to the case of each party before the trial Court and the following three issues formulated and resolved by the learned trial Judge:

“1. Whether the 2nd Plaintiff was eligible to contest as an aspirant in the 1st Plaintiff’s primary election?”

2. When was the authentic primary election held?

3. Who amongst the two contestants (i.e. 2nd Plaintiff and 2nd Respondent) won the primary election?”

He referred to page 1206 of the record and said that the lower Court agreed that the judgment of the trial Court was based on the three issues above. Learned Counsel referred to pages 772 to 782 of the record and contended that the trial Court resolved the issue of eligibility of the 2nd Appellant on which the 2nd Respondent predicated his case against the 2nd Respondent in favour of the 2nd Appellant.

He said that none of the seven grounds of appeal filed by the 1st Defendant in the Court below complained against any of the following specific findings of the trial Court:

“(i) 2nd Appellant was eligible to seek CPC’s sponsorship and nomination for the election;

(ii) that Exhibit E proved conclusively that 2nd Appellant’s name was duly submitted to INEC and; that

(iii) 1st Respondent’s case was not predicated on an alleged attempted substitution of candidate.”

He referred to Ebbah v. Ogodo (1984) NSCC Vol.15 at 255 and argued that the Court of Appeal erred by revisiting findings of the trial Court against which there was no appeal. He referred to page 1239 of the record where the lower Court held:

“There is no dispute from the records that 2nd respondent G was an aspirant.”

It was for this reason that their Lordships held that 2nd Respondent as an aspirant of the CPC can maintain an action for redress under Section 87(9) of the Electoral Act.

He argued that having arrived at the above conclusion, the lower Court ought to have rested the matter. He said that the trial Court found that the authentic primary election was the one held on 15/1/2011 and that there was no appeal against the said finding. With reference to pages 1240-1241 of the record, he argued that

the Court of Appeal affirmed that there were two primaries conducted by the CPC for the elections, and that the Court of Appeal also affirmed the finding of the trial Court that the primary election of 15/1/2011 which produced the 2nd Appellant was the authentic one.

B He contended that having affirmed the findings of fact made by the trial Court, there was no reason for the lower Court to re-evaluate the evidence upon which the findings were made. He said that the lower Court was in grave error in their view at page 1211 of the record that *“on party’s nomination and substitution of a candidate, it is immaterial that the primary is inconclusive.”* He urged the C Court to resolve the issues in favour of the appellants.

Issue 7 is on whether or not the lower Court was right in its view that the issue in the case was one of substitution of candidate by the 1st Appellant. He impugned this view of the lower Court in the D light of the fact that the same Court affirmed the findings of the trial Court in the resolution of the three issues identified by the trial Court in the resolution of the three issues identified by the trial Court. He said that the question of attempted substitution brought up by the lower Court did not arise from any of the three issues identified and E resolved by the trial Court and with which the lower Court agreed.

Relying on *Emefuma v. Ngwuomhaike* (1993) 3 NWLR (Pt.283) 612 at 620 para. A-G, he said that the lower Court had no business raising issue outside the grounds of appeal in absence of cross-action or cross-appeal. He referred to and relied on Dr. Yesuf F Nagogo v. CPC (Unreported) Suit No. SC. 55/2012 of 6th July, 2012 which he said is a sister case to this appeal. He urged the Court to resolve the issue in favour of the Appellants. Having summarized his argument learned Senior Counsel submitted that the appeal be allowed. G

In his issue 1 on whether the trial Court had jurisdiction to entertain the matter, learned Senior Counsel for the 1st Respondent relied on *Madukolu v. Nkemdilim* (1962) NSCC 734, *Emeka v. Okadigbo & 4 Ors.* (2012) 7 SC 1 in his submission that any proceeding conducted without jurisdiction is a nullity. He contended that H the issue of jurisdiction can be raised at any stage of the proceedings and even on appeal with or without leave. He cited the case of *Fundale Engineering Limited v. McArthur & 4 Ors.* (1995 - 1996) All NLR 157. He contended that Exhibit OM3 presented to the 1st Respon-

dent after he won the primaries of 11/1/2011 and which the 1st Respondent filed on the same day 14/1/2011 established the conclusiveness of the primary election of 11/1/2011.

He said that there was evidence that the 1st Appellant after submitting the name of the 1st Respondent to 2nd Respondent made unsuccessful attempt to substitute the 1st Respondent. He referred to paragraphs 26, 27, 28 29 and 39 of the 1st Respondent's counter-affidavit to the affidavit in support of the Appellants' originating summons. B

Learned Senior Counsel contended that having submitted the name of the 1st Respondent to INEC as its candidate in compliance with the requirement of the law, the 1st Appellant is stopped from asserting that the primary election of 11/1/2011 was inconclusive. Relying on estoppel by conduct, he cited the case of A.G. Nasarawa State v. A.G. Plateau State (2012) NWLR (Pt.1309) 419 at 470 and Chukwuma v. Ifeloye (2008) 18 NWLR (Pt.1118) 204 at 237 - 238 paras E - B. C D

The 2nd Appellant, learned Senior Counsel argued, cannot be described as an aspirant within the purview of Section 87(9) of the Electoral Act, 2010 (as amended) because he did not participate in the primaries of 11th January, 2011. He cited the case of PDP v. Sylva (2012) 13 NWLR (Pt.1316) 85 at 126 para B - E and 148 para C. Learned Senior Counsel relied on Exhibit Q, a waiver granted the 2nd Appellant and dated 12th January, 2011 in the following terms: E F

"Thereby wish to notify that his application for waiver to contest under our great party has been approved."

He said that the waiver was granted prospectively and has no retrospective effect and therefore did not relate to the primary election of the 1st Appellant of 11/1/2011. It was further submitted that the 2nd Appellant, not having obtained a waiver before 11/1/2011, cannot be said to be an aspirant and cannot litigate the alleged inconclusiveness of primary election conducted by the 1st Appellant on 11/1/2011 a day prior to the waiver Exhibit Q. G H

Learned Senior Counsel submitted that the trial Court had no jurisdiction to inquire into a dispute as to which of the candidates from the two primary elections was the candidate of 1st Appellant.

It was conceded that the 2nd Respondent did not counter the

deposition in the affidavit of the 1st Appellant but it was stated that INEC also did not dispute the facts in the counter-affidavit or the documents exhibited by the 1st Respondent to show that his name has been validly submitted to it (INEC) by the 1st Appellant as its candidate for the election.

B It was conceded on behalf of the 1st Respondent that under Section 251 of the 1999 Constitution (as amended), the 2nd Respondent can only be sued in the Federal High Court but that the case of the Appellants was hinged on Sections 87(4)(c)(1) & (11), 31, 33 and 35 of the Electoral Act, 2010 (as amended).

C Learned Senior Counsel argued that there is no provision either in the Electoral Act or the Constitution of the Federal Republic of Nigeria for 1st Appellant to approach the Court to select any candidate to represent it in any election, which is what the 1st Appellant, D in concert with the 2nd Appellant, did in the trial Court. He re-emphasized that the trial Court had no jurisdiction in the matter.

E He referred to the finding of the lower Court at pages 1240 - 1241 of the record he said which remained unchallenged and said the issue is who, between the 1st Respondent and 2nd Appellant, is the candidate of the 1st Appellant. He relied on *Garba Lado v. CPC* (2011) 12 SC (Pt.111) 113 at 140. He said it is now settled that a person who did not win the primary election of the party can still be the candidate of the party if the party submits his name to INEC, and the party has got no right to withdraw his candidature. He relied on F *Ehinlanwo v. Oke* (2008) 16 NWLR (Pt. 113) 357 at 411 paras. C - F.

Learned Senior Counsel contended that it is not in dispute that the 1st Appellant submitted the name of the 1st Respondent to G INEC on 31/1/2011. He urged the Court to disregard the argument that the lower Court confirmed that the conclusive primary was that of 15th January, 2011, adding that what was established is that the CPC had two primaries and the Federal High Court had no jurisdiction to decide who was the duly nominated candidate from the party's H two primaries.

He referred to Exhibit OM3 sworn to on 14/1/2011 and the Form CF 001 issued by the 1st Appellant to 1st Respondent as evidence that the primary election the 1st Appellant conducted on 11/1/2011 was conclusive, and urged the Court to so hold.

It was argued for the 1st Respondent that the 1st Appellant having duly submitted his name to the INEC, cannot, for any reason withdraw, cancel, substitute or nullify his nomination since the candidate is not dead and did not withdraw his candidature. Reliance was placed on Section 33 of the Electoral Act, 2010.

Relying on Section 87 of the Electoral Act as interpreted by this Court in Garba Lado v. CPC (supra), learned Senior Counsel submitted that the lower Court was right in its determination that neither the trial Court nor the Court of Appeal had jurisdiction in the matter. He re-emphasized the dictum of Onnoghen, JSC in Lado's case (supra) that:

"Once there arises a dispute as to which of the two primaries conferred a right of candidate on the parties to represent a political party in an election, the matter is taken outside the preview of Section 87(4)(b)(ii), (c)(ii) and (9) of the Electoral Act, 2010 (as amended)."

He urged the Court to discountenance the argument of the Appellants that Lado's case and the present are not on all fours. He referred to Exhibit 7 and said that the 1st Appellant had already submitted the 1st Respondent's name and Exhibits OM3 and OM5 to the 2nd Respondent before the name of the 2nd Appellant was sent to 2nd Respondent.

Learned Senior Counsel referred to page 853 of the record and contended that the affidavit of one Mohammed Abubakar, particularly paragraph 5 thereof, shows that one of the two primaries was conducted by the State Chapter of the party which had no powers to do so but that if the two primaries were conducted by the National body then the name of the 1st Respondent was the first to be forwarded to 2nd Respondent and that the subsequent submission of the name of the 2nd Appellant was an attempt at substitution, contrary to Sections 87(4) and 33 of the Electoral Act, 2010.

He referred to page 860 of the record and said that the name of Dr. Solomon Ewuga did not appear on the executive summary of candidates for the election. He prayed the Court to affirm the decision of the Court below as the subject of the suit is not justiceable. He urged the Court to resolve the issue in favour of the 1st Respondent.

In Issue 2, learned Senior Counsel relied on Okpanum v. SGE (Nig.) Ltd. (1998) 7 NWLR (Pt.559) p.537 at 546 in his submission

that the lower Court rightly admitted Exhibit CA1 which was evidence as to matters that occurred after the judgment of the trial Court, adding that Exhibit CA1 is a piece of evidence which could not have been, with reasonable diligence, obtained for use at the trial. He relied on *Ladd v. Marshall* (1954) 3 ER 745, *Asaboro v. Aruwaji & Anor.* (1974) NSCC page 211 at 214, *Amaechi v. INEC* (2008) 1 SC (Pt.1) 36 at 86.

Reference was made to the argument that the author of Exhibit CA1 is an interested party under Sections 83(3) of the Evidence Act and it was argued that Exhibit CA1 is admissible because it was made in the discharge of a statutory duty. Reference was placed on *HMS Ltd. v. First Bank* (2001) NWLR (Pt. 167) at 312 and *NSITFMB v. KLIFC (Nig.) Ltd.* (2010) All FWLR (Pt.534) page 73 at 88 in support of the argument that the 2nd Respondent who made Exhibit CA1 has no personal interest in any of the litigants before the Court. Learned Senior Counsel urged the Court to hold that Exhibit CA1 is fresh evidence admissible in law and was accorded its necessary probative value and weight.

In issue 3 on review and re-evaluation of evidence before the trial Court, it was stated for the 1st Respondent that the cases of the parties were fought on affidavit and documentary evidence and that the lower Court was in a good position from the printed records to review the case for the parties and evaluate the evidence and ascribe probative value to same. Learned Counsel relied on *Pavex Co. (Nig.) Ltd. v. IBWA Ltd.* (2000) FWLR (Pt.26) P.1891 at 1912.

Learned Counsel referred to *Onuoha v. Okafor & Ors.* (1983) 14 NSCC page 494, *PDP v. Sylva* (2012) All FWLR (Pt.637) P.606 and submitted that if the trial Court had appreciated the principle in the said cases in the light of Section 87(4) of the Electoral Act, it would have been clear to it that the dispute as to when the authentic primary was held was not justiceable. He argued that while trying to authenticate the candidature of one party against the other, the trial Court failed to consider the fact that the Appellants never stated when the name of the 2nd Appellant was submitted to INEC.

He referred to Exhibits OM12 and OM12B and said they were made the same day to dethrone the 1st Respondent, a fact the trial Court failed to appreciate and evaluate, nor did the Court consider Exhibit CF002 which was not denied by the Appellants as showing

the name of the 1st Respondent and other winners of the primary election submitted to INEC by their party CPC. He said that the signatures of the National Chairman and Secretary of CPC on exhibit OM5 (Form CF 002) were not disputed by the Appellants. He argued that in view of the conclusion reached by the trial Court, the evidence was not evaluated or properly evaluated and the lower Court was right to have re-evaluated same. B

He relied on *Adebayo v. Adusei* (2004) 4 NWLR (Pt.862) p.44 at 77; *Narumal & Sons Nig. Ltd. v. Niger Benue Trans Co. Ltd.* (1989) 2 NSCC (Pt.11) p.147 at 161. He urged the Court to resolve issue 3 against the Appellants in favour of the 1st Respondent. C

In issue 4, learned Counsel referred to the 1st Respondent's case that there was an attempt to substitute him as well as the two issues the 2nd Respondent submitted for determination and observation of the Court below at page 1211 of the record and submitted that they justified a finding of fact that there was an attempt to substitute a candidate and the trial Court erred in its failure to reach that conclusion. He urged the Court to resolve the issue against the Appellants. D

Issue 5 is whether or not the lower Court actually entertained issues 3 and 4 when ground 5 of the grounds of appeal was struck out. Learned Counsel referred to the record and stated that the words "*distilled from ground 3-9*" were inserted in error, adding that a holistic review of issues formulated for determination will reveal that argument on issue 3 which he said was numbered as issue 2 was not anchored on grounds 3 and 9. E F

He said that the re-framed issue 1 was based on grounds 2, 6 and 7, issue 3 was formulated from grounds 4 and 8 while issue 2 was framed from grounds 3 and 9. He said that no issue was formulated from ground 5 which was struck out. He referred to issues 2 and 3 which he said formed the basis of the Appellants' complaint and said the issues had to do with the jurisdiction of the trial Court while the issue 1 had to do with whether there was no need for ordering parties to file pleadings in spite of irreconcilable conflicting evidence and whether the case can be determined by way of originating summons. G H

He referred to pages 1067 and 1082 of the record and paragraph 6.1 page 1082 of the record and maintained that issues 3 and

4 were distilled from grounds 3, 4, 8 and 9. He said that Counsel and Court are bound by the record of proceedings for which he relied on *Garuba & 8 Ors. v. Omokhodion & 13 Ors.* (2011) 6-7 SC (pt. 2) 89 at 130. He urged the Court to resolve issue 2 as formulated against the Appellants. Learned Senior Counsel summarized his argument and urged the Court to dismiss the appeal and affirm the judgment of the lower Court. He asked for substantial costs.

In issue 1 of his three issues for determination, learned Counsel for the 2nd respondent contended that it is the claim of the plaintiffs that determines whether or not the Court has jurisdiction in the matter. However, he relied on *Lado v. C.P.C.* (2011) 48 NSCQR 501 and submitted that the Court can only rely on the totality of pleadings of both parties and evidence adduced to settle the question of jurisdiction, in which case the question is whether or not, from the issues joined, the Court has jurisdiction in the matter in dispute.

He referred to the findings of fact made by the trial Court at pages 1240 - 1241 of the record and submitted that the said findings show that this case is on all fours with *Lado's* case (*supra*). He said that the lower Court considered *Lado's* case as well as Section 87(4)(b)(ii)(c) and (9) of the Electoral Act, 2010 (as amended) and contended that since the issue relates to the dispute as to which of the two primaries conferred a right of candidature to represent the party in an election, the lower Court came to the right conclusion that the Courts have no jurisdiction in the matter. He urged the Court to resolve the issue in favour of the 2nd respondent.

In issue 2 on whether the lower Court was right to receive in evidence Exhibit CA1 and ascribe probative value thereto, he relied on Order 4(2) of the Court of Appeal Rules. He said the document is relevant and that facts relating to, and making the document admissible, were pleaded, that is; the submission of the name of the 1st respondent to the 2nd respondent. He said that Exhibit CA1 satisfied the condition for its admission as additional evidence as set up in *Asobor v. Aruwaji* (1974) 1 All NLR (Pt.1) 140; *Owata v. Anyigor* (1993) 2 SCNJ at pages 12 - 13; *Obasi v. Onwuka* (1987) 2 NSCC 981. He relied on *Uzodinma v. Izunaso* (2011) 17 NWLR (Pt. 1275) 30 in his argument that the paramount consideration for the exercise of discretion to admit or reject additional, new or fresh evidence is for the furtherance of justice.

He referred to the argument of the appellants that CA1 was made by an interested party but said that the appellant failed to show in what manner the 2nd respondent can be said to be interested in the matter in dispute. He said Exhibit CA1 showed that the name of 1st respondent was submitted by the CPC to the 2nd respondent and called on the Police to investigate the signature on the letter of purported withdrawal of the 1st respondent. B

He argued that the forged nomination papers which warranted Exhibit CA1 is an electoral offence and the 2nd respondent has statutory duty to prosecute electoral offences under Section 150(2) of the Electoral Act. He relied on *HMS Ltd. v. First Bank* (2001) 7 NWLR (Pt.167) P312; *NSITFMB v. Klife (Nig.) Ltd.* (2010) All FWLR (Pt.534) 73 and 88 and contended that a person discharging a statutory duty in his official capacity cannot be said to be a person interested under Section 83(3) of the Evidence Act. C

Learned Counsel contended that Exhibit CA1 is a public document and has been duly certified by the 2nd respondent and having satisfied the conditions for admissibility as fresh evidence, was admitted and given probative value and weight by the Court below. He relied on *Agbakoba v. INEC* (2009) All FWLR (Pt.462) at 1073. He urged the Court to resolve issue 2 against the appellants. D

In issue 3, learned Counsel submitted that the lower Court was correct when it re-appraised the evidence before the trial Court and arrived at the conclusion that the case of the appellants was that of a failed attempt at substitution of candidate. He pointed out that the evidence was basically documentary and the appellate Court is in as good a position as the trial Court to draw inference from the documents admitted by the trial Court. E

He relied on *Agbakoba v. INEC* (supra); *Oduwole v. Aina* (2001) 17 NWLR (Pt.741) at 47; *FATB v. Partnership Investment & Co. Ltd.* (2003) 18 NWLR (Pt.851) 35 at 65 - 66. He referred to Sections 31(1) 33 and 35 of the Electoral Act, 2010 (as amended) and said that the three Sections constitute the legal basis for nomination and substitution of candidates by political parties. F

He argued that the 1st responded having been nominated and his name sent to the 2nd respondent and not having withdrawn his candidature and still alive, the 1st appellant's action in purporting to remove his name was in violation of Section 33 of the Act. He re- H

ferred to Exhibit OM12 at page 621 of the record as well as Exhibit OM12B and Exhibits N and F and argued that the only inference to be drawn from scrutinizing the exhibits is that the appellants attempted to substitute the 1st respondent whose name was submitted to the 2nd respondent pursuant to Section 31 of the Act.

B Learned Counsel argued further that even if it is assumed, without conceding it, that the 1st respondent's name was never submitted to the 2nd respondent as argued by the appellants, the name of the 2nd respondent was submitted after the expiration of the time-frame in Section 31 of the Act. He contended that the lower Court was right in re-evaluating the evidence received by the trial Court. C He urged the Court to dismiss the appeal and affirm the decision of the Court below.

In his reply brief, learned Senior Counsel for the appellants D referred to the record (pages 784 and 1240 - 1241) for the finding of the trial Court and the affirmation of the said finding by the Court below that appellants conducted two primaries - the inconclusive one of 11/1/2011 and the conclusive one of 15/1/2011 and argued that the respondents who did not appeal the concurrent findings of fact E of the two Courts below cannot reopen the issue of fact in the Supreme Court.

It was submitted that estoppels was not in issue in either of the two Courts below and as such the 1st respondent cannot be heard to argue the issue in the Supreme Court. Learned Senior Counsel referred to pages 772-782 of the record and contended that the issue F of the appellant's eligibility raised as the main defence by the 1st respondent was resolved against the 1st respondent. The finding in favour of the 2nd appellant was affirmed by the Court of Appeal at G page 1239 of the record, learned Senior Counsel stated, adding that the respondents did not appeal the concurrent finding of facts of the two Courts below.

On the issue of jurisdiction, he argued that the 1st respondent's reference to, and reliance on the case of Garba Lado v. CPC (supra) H was completely misplaced. He said that the matter was not one of the court choosing a candidate for a political party but one seeking a declaration that the 2nd appellant is the sponsored candidate, having won the authentic primary election of 15/1/2011. He contended that the 1st respondent conceded the concurrent findings of facts as

to the authenticity of the party's primaries which produced the 2nd appellant. He relied on *Emeka v. Okadigbo* (2012) 18 NWLR (Pt.1331) 55.

On fresh evidence on appeal, he referred to *Ladd v. Marshall* (supra) and the Nigerian cases following it and contended that the respondents' reliance on *Okpanum v. SGE (Nig.) Ltd.* (supra) is erroneous and untenable in law. He relied on Order 4 Rule 2 of the Court of Appeal Rules and said the evidence referred to in the rule is evidence "*as to question of fact*" and contended that by its nature, a state of facts or affairs is presently occurring or have occurred, and that there is nothing like a future "fact" in law.

He said that the fact in Order 4 Rule 2 is either existing fact or past fact or event. He argued that the rule does not permit admission of a letter written 60 days after the judgment of the trial Court as fresh evidence. He said that the record at page 1160 showed that Exhibit CA1 was admitted without examination of its contents to determine whether it satisfied the prescribed conditions. He said that Exhibit CA1 was written by INEC, a party to the case.

He referred to pages 1159-60 of the record for the finding of the Court below that Exhibit CA1 was made by an adverse party and argued that INEC is an interested party within the meaning of Section 83(3) of the Evidence Act and therefore Exhibit CA1 made by it is inadmissible either in the discretion of the Court or in the interest of justice. On review of evidence, learned Counsel referred to the three issues formulated by the trial Court and affirmed by the Court below and said that the issues were resolved in favour of the appellants and that the resolution was affirmed by the Court below.

He referred to *Ebba v. Ogodo* (supra) in his argument that an appellate Court is not entitled to embark on re-evaluation of evidence when the material findings of fact made by the trial Court is affirmed as shown in the appellant's brief. He referred to Exhibit N, personal particulars of the 2nd appellant compared with Exhibit OM3, the personal details of the 1st respondent and said on the evaluation of the two exhibits and another Exhibit OM5 the trial Court made a finding at page 782 of the record and neither the Court below nor the 1st respondent faulted the finding which is fatal to the 1st respondent's case. He maintained that the Court below was wrong to re-evaluate the evidence.

On the issue of substitution, learned Senior Counsel said that issue in an appeal is a form of art and that a party cannot by his pleading alone raise an issue for determination. He relied on *Lewis Peat (NRI) Ltd. v. Akhimien* (1976) NSCC 360 at 363. He said that the Court below agreed with the three issues on which the trial Court predicated its judgment and that the issue of substitution was not one of them; as it did not arise from the pleadings. He said that the 1st respondent has no answer to the appeal and urged the Court to allow same as the judgment of the Court below was totally flawed.

I have critically examined the seven, five and three issues raised and argued on behalf of the appellants, 1st respondent and 2nd respondent, respectively. In my view, the five issues submitted by the 1st respondent and the three issues presented by the 2nd respondent are subsumed in the seven issues presented for determination by the appellants.

Appellants' issue 1 is in substance the same as issue 1 in each of the 1st respondent and 2nd respondents' briefs of argument. Appellants' issue 2 corresponds with 1st respondent's issue 5 while the 2nd respondent had no corresponding issue. Appellants' issue 3 is the same as the 1st and 2nd respondents' issue 2.

Issue 4 in appellants' brief is the same in substance as the 1st respondent's issues 3 and 4 and 2nd respondent's issue 3. None of the 1st and 2nd respondents had issue corresponding to appellants' issues 5 and 6. Issue 7 in the appellants' brief is similar to the 1st respondent's issue 3 and 4 and the 2nd respondent's issue 3.

In view of the above, I will determine the appeal on the seven issues formulated by the appellants in their joint brief of argument. I intend to deal with the issues seriatim.

Issue 1 in the set of three briefs in this appeal challenges the conclusion of the Court below at page 1247 - 8 of Vol II of the record to the effect that:

"From the totality of all I have said in the course of resolving this issue, particularly as it relates to Section 87 of the Electoral Act (supra) and the decision of the Supreme Court in Garba Lado & Ors. v. CPC (supra); I hold that neither the trial Court nor this Court has the jurisdiction to entertain the matter in dispute. Again by virtue of Section 141 of the Act, the Court cannot make the consequential order made by the Court below."

As a result of the above conclusion, the Court below struck out Suit No. FHC/LF/CS/18/2011 for want of jurisdiction. The issue is a two pronged attack on the judgment of the Court below that the trial Court had no jurisdiction in the matter. The sub-issues are:

(1) Whether or not the trial Court had jurisdiction in the matter, and

(2) Was the trial Court competent to make the consequential order it made?

Appellants argued that the case is outside the provision of Section 87(9) of the Electoral Act, 2010 (as amended) and that the decisions in the case of Lado & Ors v. CPC (supra) and similar cases in which the above provision was applied do not apply to this case. On the contrary, the respondents contend that this case falls within the same provision of the Electoral Act (as amended).

The Section of the Electoral Act is hereunder reproduced:

“S.87(9): Notwithstanding the provisions of the Act or rules of a political party, an aspirant who claims that any of the provisions of this Act and the guidelines of 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.”

Two conditions must be satisfied before the jurisdiction donated by the section reproduced above can be ignited:

1) The plaintiff is not at large; he/she must be an aspirant.

2) In the same vein, the complaint is not at large; it must be founded “in the selection or nomination of a candidate for an election.”

From the claim and the affidavit evidence of both sides, it is not in doubt that the 2nd plaintiff/appellant is not an aspirant. His case is that he is a candidate for the election which leads to the conclusion that the process of selection or nomination of a candidate has been completed. Secondly, since the process of selection or nomination has been completed and the 2nd plaintiff/appellant is no longer an aspirant but a candidate he cannot be said to have complained about the

process of nomination or selection which he claims has produced him as a candidate of his party for the election.

It is my view, therefore, that this case is outside the ambit of Section 87(9) of the Electoral Act (supra) and that the decision of this Court in Lado's case (supra) and other similar decisions do not apply to the facts of this case.

In any case, the special jurisdiction vested in the High Court (Federal, State or FCT) does not derogate from the general jurisdiction of the High Court, being one of the Courts established for the Federation. See Section 6 (1) & (2) of the Constitution of the Federal Republic of Nigeria 1999 (as amended).

Without attempting to derogate from this Court's decision in Lado's case and similar case on section 87(9) of the Electoral Act (supra), a particular matter falls either within the special and specific jurisdiction under Section 87(9) of the Act or the general jurisdiction of the Court. In my view, the import of the decision in Lado's case is that the special jurisdiction of the High Court is circumscribed by the provision of Section 87(9) of the Act.

In the case at hand, the facts are completely outside the purview of Section 87(9) of the Act. The Court below was in error when it relied on Lado's case in its decision that *"neither the trial Court nor this Court has the jurisdiction to entertain the matter in dispute."*

The second arm of the issue is the propriety vel non of the consequential order made by the trial Court in view of Section 141 of the Electoral Act (supra). The consequential order reads:

"It is therefore hereby ordered that the 1st defendant returns the 2nd plaintiff as the Winner of the April 9, 2011 National Assembly Election into the House of Representatives of the Federal Republic of Nigeria representing Akwanga/Wamba/Nasarawa-Eggon Federal Constituency." (See page 1056 of the record).

Section 141 of the Electoral Act 2010 (as amended) provides in unmistakable terms:

"An election tribunal or Court shall not under any circumstance declare any person Winner of an election in which such a person has not fully participated in all the stages of the said election."

By the above provision, the National Assembly has set aside the decision of this court in Amaechi v. INEC (2008) 5

NWLR (Pt 1080) page 227 at 296. Contrary to the decision of this Court in Amaechi's case, the implication of Section 141 of the Electoral Act, 2010 (as amended) is that while a candidate at an election must be sponsored by a political party, the candidate who stands to win or lose the election is the candidate and not the political party that sponsored him. B

In other words, parties do not contest, win or lose election directly; they do so by the candidates they sponsored and before a person can be returned as elected by a tribunal or Court, that person must have fully participated in all the stages of the election, starting from nomination to the actual voting. C

In view of the above, the 1st part of issue 1 on the jurisdiction of the trial Court or the Court below to hear and determine the suit is resolved in favour of the appellants. On the other hand, the second arm on the propriety of the consequential order is resolved against the appellants in favour of the respondents. D

Issue 2 is whether the lower Court was right to have determined issue 3 and 4 (renumbered 2 and 3) after striking out ground 5 of the grounds of appeal. Issue 3 which was renumbered issue 2 was said to have been framed from grounds 3-9 of the grounds of appeal. Appellants in the Court below argued issues 2 and 3 together. E

At page 1207 of the record, the Court below held:

"Grounds 1 and 5 of the grounds of appeal and issue 1 arising therefrom are struck out."

To meet the appellants' case that the lower Court was in error to have determined issues arising from ground 5 already struck out as incompetent, learned Counsel for the 1st respondent said that the insertion that the issues were "distilled from grounds 3-9" was made in error. This is not the type of error, if in fact it is an error, which can be waived aside as typographical error, or correct in the ipse dextit of learned Counsel in his brief. F G

If it was an error, it cannot be correct by learned Counsel in his address. That the issues were distilled from grounds 3-9 means that the issues were distilled from each of grounds 3, 4, 5, 6, 7, 8 and 9 whereas ground 5 had been struck out as incompetent. No Court is going to do a surgical operation to determine and expunge from the record, the part of the issues H

arising from the incompetent ground 5. Any issue formulated from ground 5 is incompetent and liable to be struck out.

The incompetence of an issue argued together with otherwise competent issues affects all issue argued with it.] See Khali v. Yar'Adua (2003) 16 NWLR (Pt. 847) 446 at 481 relied on by learned Senior Counsel for the appellants. Issue 2 is therefore resolved in favour of the appellant. However, that is a pyrrhic victory as I have already determined that the consequential order made by the trial Court with which the lower Court disagreed, was made in violation of Section 141 of the Electoral Act 2010 (as amended).

Issue 3 queries the admission of Exhibit CA1 as fresh evidence on appeal and ascription of probative value thereto. In the affidavit in support of the motion for leave to adduce additional evidence on appeal, it was averred in paragraph 4 as follows:

"4. I was informed by Hon. Emmanuel David Ombugadu, the appellant in our chambers on the 10/12/2011 and I verily believe him as follows:

(a) At the trial Court, the 2nd Defendant, now appellant in this Court had in his counter-affidavit in opposition to the Respondents' Amended Originating Summons, deposed that the 1st Respondent had submitted his name as a candidate for the Akwanga/Wamba/Nasarawa-Eggon Federal Constituency in Nasarawa State, to the 3rd Respondent herein.

(b) That it was only on the 7/12/2011 that it came to his knowledge that 3rd Respondent's Chairman had earlier written to the Inspector General of Police to investigate the forged signature.

(c) That the document under reference INEC/CH/LC/004/V.1 dated 3/9/2011 and signed by the Chairman of the 3rd Respondent was made after the judgment of the trial Court.

(d) That the document sought to be tendered was never tendered during the trial because it was not available then.

(e) That the documentary evidence is to establish that the appellant's name was submitted earlier in time by the 1st respondent to the 3rd Respondent.

(f) That materials necessary for tendering and admission of the letter are present in the Records of Appeal filed in the Court."

The affidavit was deposed to by Omale Mike Ajonge, a legal practitioner in the law firm of J. S. Okutepa SAN & Co. who autho-

rized him in that behalf.

The relevant depositions in the five paragraph counter-affidavit deposed to by Mohammed Abubakar who described himself as the legal Adviser of the 1st Respondent are contained in paragraph 5 hereunder reproduced:

“5. That I was informed by Edwin Anikwem of Counsel and I verily believe him that:

(a) The evidence sought to be adduced at the Court of Appeal could have been obtained with reasonable diligence for use of the trial as has been with the 3rd Respondent since the commencement of the action.

(b) That the evidence will not have an important influence on the result of the case.

(c) That the evidence is not credible.

(d) That the appellant in his counter-affidavit raised the issue and the same was considered and discountenanced by the Court in the judgment.

(e) That the petition written by INEC was an abuse of Court process.

(f) That the 1st and 2nd Respondents stated this position to the Police through the Counsel. Attached as Exhibit A is a copy of the said letter.

(g) That the Appellant will not be prejudiced if the application is dismissed.” (See pages 1100 - 1101 of the record).

In paragraph 4(c) of the supporting affidavit, it was sworn that:

“the document under reference INEC/CH/LC/004/V.1 dated 8/9/2011 and signed by the chairman of the 3rd Respondent was made after the judgment of the trial Court.” (See page 1095).

In opposition to the above averment, it was deposed to on behalf of the 1st Respondent in paragraph 5(a):

“The evidence sought to be adduced at the Court of Appeal could have been obtained with reasonable diligence for use at the trial as has been with the 3rd Respondent since the commencement of this action.” (See page 1100 of the record).

My noble Lords, I have reproduced once more, at risk of being boring, the averments in paragraphs 4(c) and 5(a) of the supporting affidavit and counter-affidavit, respectively, to demonstrate to what depth of recklessness and or deliberate dishonesty one who

calls himself a legal practitioner can descend. The dates of the commencement of the Suit No. FHC/LF/CS/18/11, the judgment in the matter and the date on which Exhibit CA1 came into existence, are empirical facts which can be verified, even by a layman, by reference to the record. The Originating Summons was filed on 1/4/2011; the
 B judgment of the trial Court was delivered on 18th July, 2011. See pages 3 and 786 of the record. Exhibit CA1, the document admitted as fresh evidence on appeal was dated 8th September, 2011.

In view of the dates above, how can a legal practitioner state
 C on his solemn Oath that Exhibit CA1 has been with the 3rd Respondent since the commencement of the action or that with reasonable diligence the appellant could have obtained the document for use at trial? Learned Counsel may not help the Court but he cannot afford to distort the fact on Oath to mislead and misdirect the Court. True,
 D he owes a duty to his client but that duty must be performed within the ambit of the law and its rules, bearing in mind that he owes a duty higher than that he owes his client to the higher case - the cause of justice. The facts learned Counsel distorted in his affidavit are within his knowledge from the record to which he had access. By his depo-
 E sition, he lays himself open to citation for contempt and could in addition be prosecuted for perjury.

Now to the resolution of issue 3. In paragraph 4(d) of the affidavit in support of the application, it was deposed for the appli-
 F cant that the document sought to be tendered was needed to establish the fact pleaded that the appellant's name was submitted earlier in time by the 1st Respondent to the 3rd Respondent. This averment was not contested in the counter-affidavit save for the averment that the issue was raised, considered and rejected by the trial court.

G But if the trial court had not rejected the appellant's case that his name was earlier submitted to INEC, appellant would have had no need to appeal against the judgment of the trial Court. Order 4 Rule 2 of the Court of Appeal Rules on Further Evidence provides:

H *"Ord. 4 r. 2: The Court shall have power to receive further evidence on questions of fact, either by oral examination in Court, by affidavit or by deposition taken before an examiner or Commissioner as the Court may direct, but in the case of an appeal from a judgment after trial or hearing of any case or matter on the merit no such further evidence (other than evidence as to matters which have*

occurred after the date of the trial or hearing) shall be admitted except on special grounds.”

Exhibit CA1 falls within the portion in brackets and underlined the provision reproduced above and by the rules the applicant did not have to show special grounds for its admission.

The factors to be considered in granting or refusing leave to adduce fresh evidence on appeal are: B

(a) Evidence sought to be adduced could not have with reasonable diligence been obtained for use at the trial;

(b) Evidence should if admitted have an important, not necessarily crucial effect on the whole case, and C

(c) The evidence must be such as is apparently credible in the sense that it is capable of being believed. (See Jadesimi v. Okotie-Eboh (No. 2) (1986) 1 NWLR (Pt. 16) 264 at 275, Esangbedo v. State (1989) 7 SCNJ 16). D

Exhibit CA1 could not have been obtained with reasonable diligence for use at the trial for the simple reason that it was not in existence at the trial. Evidence that the appellant’s name was submitted earlier in time by the respondent to the 3rd respondent has an important, if not necessarily, crucial effect on the whole case and the evidence is capable of being believed. E

It was strenuously argued on behalf of the appellants that Exhibit CA1 was made at a time when proceedings were pending contrary to Section 91(3) of the Evidence Act, 2011 by the 2nd respondent who has an interest in the proceeding contrary to Section 83(3) of the Evidence Act (supra). F

The interest of the 2nd respondent as the maker of Exhibit CA1 is purely official or as servant or employee having no personal interest in the litigation. The provisions of the Evidence Act relied on by the appellants do not apply to Exhibit CA1. (See High Grade Maritime Services Ltd v. First Bank of Nigeria Ltd (1991) 1 NWLR (Pt. 167) 290 at 307. ***In making Exhibit CA1, the 2nd respondent was performing an official assignment without direct personal interest in the result of litigation and cannot therefore be considered as a person interested in the suit.*** See Alhaji Ya’u v. Dikwa (2001) FWLR (Pt. 62) 1987. G
H

It was also averred in the counter-affidavit that Exhibit CA1 was an abuse of Court process. See paragraph 5(e) of the appellants' counter-affidavit in opposition to the motion for leave to adduce fresh evidence on appeal wherein it was averred that: *"That the petition written by INEC was an abuse of Court process."*

B ***Briefly stated, an abuse of the judicial process means that the process of the Court has not been used bona fide and properly.*** See Okorodudu v. Okoromadu (1977) SC 21, Ikine v. Edjenode (2001) 92 LRCN 3288 at 3307.

C ***The legal concept of the abuse of the judicial process or the abuse of the proceedings of the Court is very wide. It is of infinite variety and it does not appear that the category can be closed. Be that as it may, a process not meant to be filed, and was in fact not filed in Court is not a process of Court and can therefore never constitute abuse of process of Court. Only a process filed in Court can constitute abuse of Court process. Exhibit CA1 is not a process of Court. It is a letter written by the Chairman of INEC to the Police. It found its way into the proceedings as evidence and not as a process of Court.***

E ***I find and hold that the Court below was right to have admitted Exhibit CA1 as fresh evidence on appeal and having admitted it the lower Court rightly ascribed probative value thereto. I resolve issue 3 against the appellants and in favour of the respondents.***

F Issues 4, 5 and 6 are complaints of impropriety of the Court below embarking on re-evaluation of the evidence before the trial Court, interfering with the findings of fact made by the trial Judge and substitution of the view of the Court below for the view of the trial Court. Once an appellate Court embarks on re-evaluation of the evidence before the Court below, the necessary and in fact, intended consequence is interference with the findings of fact based on the evidence and a view different from the view of the trial Court or the Court below, the appellate Court.

H It is appropriate to determine whether or not the re-evaluation embarked upon by the Court below is justified. At page 1211 of the record, the lower Court held that:

"On a party's nomination and substitution of a candidate, it is immaterial that the primary election was inconclusive. What is rel-

evant is the nomination of a candidate and submission of his name by the party to INEC within the prescribed period.”

With profound respect to their Lordships, the learned Justices of the Court of Appeal, the sole purpose of a party’s primary election is the emergence of one of the contestants as the party’s candidate at the election. An inconclusive primary election cannot produce a candidate and if it is immaterial that the primary election is inconclusive, the party might as well forgo the primary election and simply pick one of its members to bear its flag at the election. B

The next view expressed by the lower Court at the same page of the record appears to conflict with the earlier view reproduced supra. It reads: C

“It does greatly appear that the concurrent position of the law does not take lightly the inviolability of nomination and the vested interest acquired thereunder by a candidate of a political party.” D

I subscribe to the above view and I wish to add that there can be no nomination of a candidate and acquisition of vested interest in an inconclusive party primary election. Be that as it may, their Lordships of the Court below posed the crucial question in the matter thus: E

“The simple question that requires an answer in the resolution of this issue is from the totality of the Exhibits before the trial Court, was the decision of the learned trial Judge perverse when it did not arrive at a conclusion that there was an attempt to substitute a candidate?” F

And as the lower Court rightly pointed out, the respondents failed to address the issue but preferred to stress the well established principle of law that the choice and sponsorship of a candidate is an unfettered right of a political party over which the Court cannot interfere. May be the respondents did not appreciate the mode of making the choice of its candidate by a political party which is by conclusive primary election. G

The Court below painstakingly reproduced not only Exhibits OM3, OM5, OM7, OM8, OM9, OM10, OM11, OM12, 12b and CA1 tendered by the appellants (now respondents) and Exhibits C, D, F, I, K, M and N tendered by the respondents (now appellants) which both parties invited the court to examine but also the totality of the documentary evidence received by the trial Court. It has to be H

noted that Exhibit CA1 was not tendered in the trial Court but was admitted as fresh evidence in the lower Court.

It's evaluation by the lower Court was therefore imperative. Having considered all the exhibits listed, the lower Court came to the conclusion that:

B *"I hold that the lower Court both failed to evaluate and to properly evaluate all the material evidence put forth before it."* (See page 1215 of the record).

C From the documentary evidence, it is beyond dispute that the name of the 1st respondent was first submitted by the 1st appellant to the 2nd respondent as its candidate in the election. Also submitted to the 2nd respondent was Form C.F001 - affidavit in support of personal particulars of the 1st respondent sworn to on 14/1/2011 before the primaries of 15/1/2011.

D Exhibit OM7 is *"Withdrawal of Candidate Form"* and Exhibit OM9 is a protest letter against the purported withdrawal in Exhibit OM7. There is unchallenged evidence that the 1st respondent did not withdraw from the race and Exhibit CA1 was written by the 2nd respondent on account of forgery committed in the attempt to effect
E the withdrawal of 1st respondent.

The question is; if the primary election in which the 1st respondent was nominated was not conclusive, could the 1st respondent have emerged as a candidate and his name and particulars sent to the electoral umpire, the 2nd respondent? If he was not nominated,
F could he or another person make the attempt herein made in Exhibit OM7 to withdraw his candidature? The answer to the above poses is in the negative.

G Exhibit CA1 which could not have been evaluated by the trial Court and which was evaluated by the lower Court supports the conclusion that the 1st respondent was nominated and there was an attempt to force a withdrawal of his candidature. The trial Court could have come to the conclusion even without Exhibit CA1, if it had properly evaluated the documentary evidence and ascribed proba-
H tive value thereto.

In my humble view, the lower Court was justified in its re-evaluation of the documentary evidence before the trial Court and evaluation of the Exhibit CA1 which it admitted as fresh evidence on appeal. The trial Court did not evaluate or

properly evaluate the evidence before it which was merely documentary. An appellate Court enjoys the same position as the trial Court in evaluation of documentary evidence as in this case where the controversy is limited to the interpretation of the documents. Where the findings of the trial Judge on documentary evidence are perverse, an appellate Court will employ its appellate power to correct the perversity. See *Iwuoha v. Nipost* (2003) 4 SC (Pt 11) p. 37; *Egba v. Ogodo* (1984) 1 SCNLR 372; *Whyte v. Jack* (1991) 2 NWLR (Pt. 431) 407; *Audu v. Okeke* (1998) 3 NWLR (Pt. 542) 373.

And it follows that on the facts of this case, the interference by the lower Court with the finding of fact of the trial Court and the substitution of its view for the view of the trial Court are the necessary and logical consequence of the re-evaluation of the documentary evidence before the trial Court and the evaluation of the fresh evidence on appeal, Exhibit CA1. I resolve issues 4, 5 and 6 argued together in the appellants' brief against the appellants and in favour of the respondents.

Issue 7 is hereunder reproduced for ease of reference:

"Issue No. 7: Were the learned Justices right in law in holding that the issue in the case was one of substitution of candidate by 1st appellant even after affirming in the judgment, the issue identified by the trial Judge and in themselves stating the correct issue in the same judgment. (Based on grounds 16, 19 and 20)."

Learned Counsel for the appellants did not expatiate on the alleged adoption by the lower Court of the issues framed by the trial Court. May be it was left for this Court to find same in the record. I will limit the issue to attempted substitution as argued on behalf of the appellants and, of course, disputed by the respondents.

It was argued for the appellants that the issue of attempted substitution was raked up in the middle of the appeal by the 1st respondent who did not counter-claim. Reliance was placed on *Emetuma v. Ngwuomhaike* (1999) 3 NWLR (Pt.283) 612 at 620 for the principle.

"that in civil matters, in absence of cross-action or counter-claim, no relief can be granted in favour of defendant."

With profound respect to Learned Senior Counsel, the

issue of attempted substitution allegedly raked up in the middle of the appeal by the 1st respondent is not a relief. In my humble view, what the 1st respondent meant by raking up attempted substitution is that if the totality of materials presented by both parties is examined, the case between them is one of attempt
 B **at substitution of candidate. It is not a relief.**

The words “attempted substitution” need not be stated at all. This Court could arrive at a conclusion justified by the facts irrespective of the words used by either party to the ap-
 C **peal.** See Mr. Peres Peretor & 4 Ors v. Chief Koko Gariga & 4 Ors (2013) 5 NWLR (Pt. 1348) 415 at 436 where I expressed the view in paras. E-F that:

“Substitution is the direct meaning of the entire process of the PDP for which the respondents complained to the Court, even if the
 D *word did not appear in the proceedings. From the record, the Court did not raise the issue of substitution suo motu. It was there in substance from all who care to see”*

I hold the same view in this case. Attempted substitution is the definition and substance of the processes that
 E **brought the parties to the trial Court.**

On the facts before this Court, the words “attempted substitution” is the same as one dozen in place of 12, as it were. If plaintiff makes a claim for 12 items and his opponent
 F **in his defence refers to the claim as one for one dozen items, the defendant has not raised a new issue and has not asked for a relief. I resolve issue 7 against the appellant and in favour of the respondents.**

Before I conclude this matter, permit me, My Noble Lords, to
 G emphasize a point I made in a similar case before us. (See Mr. Peres Peretu & 4 Ors. v. Chief Koko Gariga & 4 Ors. (2013) 5 NWLR (Pt. 1348) 514 at 420).

An army is greater than the numerical strength of its soldiers.
 H In the same vein, a political party is greater than the numerical strength of its membership just like a country, for instance, Nigeria, is greater than the totality of its citizens. It follows that in the case of a political party, such as the 1st appellant herein, the interest of an individual member or a group of members within the party, irrespective of the place of such member or group in the hierarchy of the party, must

yield place to the interest of the party. It is the greed, borne of inordinate ambition to own, control and manipulate their own political parties by individuals and groups therein and the expected reaction by other party members that result to the internal wrangling and want of internal democracy that constitute the bane of political parties in Nigeria. B

If the party primary that produced the 1st respondent whose name and particulars were duly sent to INEC by the party that conducted it was not conclusive, it could not have produced a candidate. The second primary election conducted by the 1st appellant was a farce, subterfuge to accommodate a new entrant and a late comer to the party to the detriment of the party and its duly nominated candidate. May be if another higher bidder had come up before the election, the purported second primaries would have been discarded in favour of a third one to accommodate the later comer. C D

This shows lack of principle, sincerity of purpose and patriotism dictated by excessive materialism. It is apparent that a few powerful elements therein hijack the parties and arrogated to themselves the right to sell elective and appointive positions to the party member who can afford same. The 2nd appellant was not even in the party until 12/1/2011 when he got waiver to participate in the make-believe primary of 15/1/2011. This is a betrayal of the collective trust of the members of the party and in appropriate case such as this; the Court will rise to the occasion. E F

There is a popular saying that politics is a dirty game. I do not share this view. It is the players who are dirty and they inflict their filth on their members and, by implication, on the society. Politicians must learn to play the game of politics in strict compliance with its rules and the rules of organized society. G

It is for the avoidance of doubt that I proceeded to resolve the rest of the issues after dealing with issue 1 in which I set aside the order of the lower Court that neither that Court nor the trial Court had jurisdiction in the matter, and the order of the trial Court in favour of the 2nd appellant. H

In conclusion; the first sub-issue in issue one and issue 2 are resolved in favour of the appellant while issues 3-7 are resolved against the appellants in favour of the respondents. Based essentially on second sub-issue 1 and issues 3-7 resolved against the appellants in favour

of the respondents, I dismiss the appeal as devoid of merit.

I set aside the order of the lower Court striking out Suit No. FHC/LF/CS/18/2011; dismiss the suit and set aside the order made therein in favour of the 2nd appellant.

The appellants shall pay costs of N100, 000.00 each to the 1st respondent. The nominal party, 2nd respondent, shall bear its own costs. Appeal dismissed.

MOHAMMED JSC

I have had the privilege before today of reading the judgment of my learned brother Ngwuta, JSC which has just been delivered. I entirely agree with the manner he handled and resolved all the 7 issues for determination as formulated in the Appellants' brief of argument. Consequently, I am also fully with my learned brother in the ultimate conclusion he arrived at in allowing the appeal on the issue of jurisdiction and dismissing the appeal on the remaining issues for determination.

On the issue of jurisdiction, the dispute between the parties in the present case being a pre-election matter, the provisions of Section 87(4)(c)(ii) and (9) of the Electoral Act 2010 as amended had given the 1st Appellant, C.P.C. the right to conduct primaries to choose its candidate and forward the name of the candidate who scored the highest votes cast at the primaries to INEC as its candidate to contest the election. This is exactly what the 1st Appellant did on 11th January, 2011 when the first primaries was conducted in which the 2nd Appellant was not even a participant not having been given a waiver and in which the 1st Respondent emerged the winner resulting in his name being forwarded to INEC by the 1st Appellant as its candidate to contest the election for the House of Representatives to represent the Akwanga/Wamba/Nasarawa-Eggon Federal Constituency of Nasarawa State. Although a second primaries for the C.P.C. was conducted on 15th January, 2011 apparently by the Nasarawa State Chapter of the C.P.C. specifically to give the 2nd Appellant who was given a waiver to contest the nomination after 11th January, 2011 when the first primaries was conducted, the situation, in my view does not bring the present case within the scope of the case of Garba Lado v. C.P.C. (2011) 12 S.C. (Pt.111) 11 relied upon by the Court

below to say that both itself and the trial Court lacked jurisdiction to hear the case. In otherwords, the circumstances in the present case are virtually the same as those in the case of Peoples Democratic Party (P.D.P) v. Sylva (2012) 13 N.W.L.R. (Pt.1316) 85 at 126 and 148 where this Court affirmed the jurisdiction of the Federal High Court and the Court of Appeal to hear and determine similar pre-election dispute between the parties in the case. The decision of the Court below on the issue of jurisdiction was therefore wrong and ought to be set aside and I accordingly also hereby set it aside. B

On the issue of whether or not the learned Justices of the Court of Appeal were right in law in admitting as fresh evidence on appeal, Exhibit CA1 and ascribing probative value to it, the answer lies in the general powers of the Court of Appeal contained in its rules where specific provisions have been made on receipt of further evidence on appeal in Order 4 Rule 2 which states- C

“2. The Court shall have power to receive further evidence on questions of fact, either by oral examination in Court, by affidavit or by deposition taken before an examiner or Commissioner as the Court may direct, but, in the case of an appeal from a judgment after trial or hearing of any cause or matter on merits, no such further evidence (other than evidence as to matters which have occurred after the date of the trial or hearing) shall be admitted except on special grounds.” D

There is no doubt whatsoever that the underlined part of Rule 2 of Order 4 of the Court of Appeal Rules above gives the Court below the power to do what it did in admitting Exhibit CA1 in evidence and in giving it its probative value in support of the case of the 1st Respondent that his name was the first to be forwarded to INEC, the 2nd Respondent by no party other than the 1st Appellant itself in a correspondence signed by the 1st Appellant’s Chairman and Secretary as required by the Electoral Act 2010 (as amended) in Section 87(4)(c)(ii). F

Looking at Exhibit CA1 from other aspects of the requirements of the law for conditions to be met by such documents before being admitted on appeal, the document had plainly met the requirements laid down in several cases such as Ladd v. Marshall (1954) 3 All ER 745; Asaboro v. Aruwaji & Anor. (1974) 9 N.S.C.C. 211 at 214 and Okpanum v. S.G.E. Nig. Ltd. (1998) 7 NWLR (Pt.559) 537 at 546. H

The principles or requirements which time-honoured practice has established and the matters which the Courts have always taken into consideration in the judicious exercise of powers to grant application to adduce new evidence on appeal are; that the evidence sought to be adduced must be such as could not have been with reasonable
B diligence obtained for use at the trial; the evidence should be such as if admitted, it would have an important, not necessarily crucial effect on the whole case and that the evidence must be such as apparently credible in the sense that it is capable of being believed and it need
C not be incontrovertible. All these requirements having been satisfied in the present case, the Court below was on very strong grounds in admitting Exhibit CA1 in evidence and in relying on it in its judgment.

The Appellants main complaint in their issue (iv) is whether the
D learned Justices of the Court of Appeal were right in law in embarking on fresh evaluation of evidence and in interfering with the findings of the trial Court.

The law is well settled that evaluation of evidence is primarily the function of trial Court. See *Egonu v. Egonu* (1978) 11 - 12 S.C.
E 111 and *Agbouijo v. Aiwerioba* (1988) 1 N.W.L.R. (Pt.70) 325. However, where the trial Court fails to evaluate such evidence properly or at all, as happened in the present case, the appellate Court can intervene and itself re-evaluate the evidence particularly where the bulk of the evidence is documentary as was the situation in this case. See
F *Nurumal & Sons. Nig. Ltd. v. Niger Benue Trans. Co. Ltd.* (1989) 20 N.S.C.C. (Pt.11) 147 and *Iwuoha v. NIPOST Ltd.* (2003) 8 N.W.L.R. (Pt.82) 308 at 337. In the present case the trial Court did not consider Exhibit OM5 which is Form CF002(i) 2011, House of Representative Elections submission of names of candidates by C.P.C. duly
G signed by the Chairman and Secretary of the party C.P.C. submitting the name of the 1st Respondent to contest the election as candidate of the 1st Appellant. This is because the 1st Appellant having completed the processes under Section 87(4)(c)(ii) of the Electoral Act,
H 2010 as amended, in choosing its own candidate following the results of the primaries conducted by it on 11th January, 2011, which saw the emergence of the 1st Respondent as the candidate of the 1st Appellant, whose name was also submitted to the 2nd Respondent as the 1st Appellant's candidate to contest the April, 2011 election,

the processes of nomination of candidate for the election had been concluded. This conclusion of the exercise for the choice of its own candidate for the election had, in my view, deprived the 1st Appellant of its right under Section 87(4)(c)(ii) to conduct another exercise in the primaries conducted on 15th January, 2011. Failure to consider this piece of evidence by the trial Court clearly made the decision of the trial Court perverse justifying the intervention of the Court below. Equally justifying the intervention of the Court below in the judgment of the trial Court is the failure of that trial Court to consider Exhibit OM12 and OM12B which were duly completed Forms for withdrawal of candidate and Notice of Change of candidate submitted to INEC by the 1st Appellant on the same date. The fact that the 1st Respondent was the one who contested the 9th April, 2011 election on the ticket of the C.P.C. was returned elected and issued with a certificate of return Exhibit OM13, was not adequately treated by the trial Court either. Also as against the contents of Exhibit OM10 the results of the 1st Appellant's C.P.C. primaries conducted on 11th January, 2011, the result of the primaries conducted on 15th January, 2011 tendered by the 1st Appellant and received in evidence as Exhibit E, was the evidence relied upon by the trial Court to declare the 2nd Appellant as duly elected. For the forgoing reasons, I also agree that the Court below was perfectly justified in re-evaluating the evidence to make proper findings in line with the evidence on record.

In the final result, I also allow the appeal in part on the issue of jurisdiction. The decision of the Court below in this regard is hereby set aside resulting in the restoration of the Appellants suit No. FHC/LF/CS/18/2011 earlier struck out by the Court below for alleged absence of jurisdiction. On the remaining issues resolved against the Appellants, the appeal is hereby dismissed with N100,000.00 costs to be paid by the 1st and 2nd Appellants each to the 1st Respondent while the 2nd Respondent is to bear its own costs.

MUNTAKA-COOMASSIE JSC

This is a political matter emanating from the disputes on whether the 2nd appellant, Idris Yahuza Yakubu or the 1st respondent was the duly nominated or sponsored candidate of the 1st appellant, the Congress for Progressive Change (C.P.C), and elected in the last gen-

H

eral election to represent the Akwanga/Wamba Nasarawa-Eggon Federal Constituency of Nasarawa State of Nigeria.

In amended originating summons filed by the plaintiffs, now appellants, they raised four questions for determination, and thereafter they prayed the Federal High Court Lafia, Judicial Division of the Federal High Court for a number of Declarations. They were all supplied in the lead judgment of my learned brother Sylvester Ngwuta JSC, which I had earlier on previewed. There is no need for me to reproduce them here. The plaintiffs filed a 46 paragraph affidavit in support of the amended originating summons and a written address was also filed with it on 10/5/11.

The 2nd defendant, INEC, now the 2nd respondent, on the same 10/5/11 also filed a Notice of preliminary objection predicated on five grounds. The preliminary objection was supported by a 21 paragraph affidavit and filed on 9/5/2011. It was followed by a written address. The 2nd defendant filed a 42 paragraph counter-affidavit in opposition to the affidavit in support of the originating summons and, filed within time. A written address was also filed opposing the originating summons by 2nd defendant/respondent on 10/5/2011.

The trial Federal High court held that the action was properly commenced by filing an originating summons. The trial court has this to say: - on page 837 of the record.

“In the circumstances, I hold that the action was properly commenced by originating summons. The sum total of all I have been saying is that this court has jurisdiction to entertain and determine this action and hereby assumes same. The preliminary objection dated and filed on 10/5/2011 lacks merit, fails and is therefore hereby dismissed. There shall be no order as to costs. That is the ruling of this court”. It continues and states:-

In the eyes of the law, Mr. Emmanuel David Ombugadu was never a candidate in the election much less the winner. It is therefore hereby ordered that the 1st defendant returns the 2nd plaintiff as the winner of the April 9, 2011 National Assembly Election into the House of Representatives of the Federal Republic of Nigeria representing Akwanga/Wamba Nasarawa-Eggon, Federal Constituency. Prayers/reliefs 1, 2, 3, 4, 5, 6, 7, 8, 9 and 10 as contained in the body of the amended originating summons are hereby granted as prayed. I shall make no order as to costs. That is the judgment of this court”.

Dissatisfied by the above judgment of the trial court the 1st appellant, CPC, successfully appealed to the Court of Appeal, Makurdi Judicial Division on five (5) grounds of appeal. The lower court in its unanimous judgment on 25/5/2012 allowed the appeal by the 1st appellant and struck out suit No. FHCLF/CS/13/2011 for lack of jurisdiction. B

Aggrieved by the judgment of the lower court, appellant filed an amended notice of appeal containing 21 grounds of appeal on 29/1/2013. Both learned counsel filed and exchanged briefs of arguments before us. The appellants brief contained seven (7) issues while the 1st respondent distilled five (5) issues for our determination of the appeal. He urged this court to resolve the five issues in favour of the appellants, he then urged the Supreme Court to allow this appeal. C

The learned counsel to the respondents argued that the lower court was perfectly right in its judgment and urged us to discountenance the submissions of the appellant over Lado's case. He then urged this court to disagree with the trial judge's decision. D

I had an opportunity of reading in draft the lead judgment of my learned brother Sylvester Ngwuta JSC, I endorse the reasons and difficult, but correct, conclusion he reached in setting aside the judgment of the lower court on issue of jurisdiction to entertain the suit and dismissing the appellant's suit in the trial court. E

I also endorse the order as to costs of N100, 000 each to the 1st respondent. I also agreed that 2nd respondent herein shall bear its own costs. F

PETER-ODILI JSC

I agree completely with the reasoning of the judgment just delivered by my learned brother, Nwali Sylvester Ngwuta JSC. To underscore that support I shall make some comments. G

This is an appeal against the judgment of the Court of Appeal, Makurdi Division (Coram: Uchechukwu Onyemenam, Mohammed Ladan Tsamiya and Ali Abubakar Babandi Gumel JJCA) delivered on the 25th May, 2012 which set aside the judgment of the Federal High Court sitting at Lafia Per M. I. Awokulehin J. in favour of the 1st respondent who was the appellant at the lower court. H

FACTS BRIEFLY STATED

The 1st appellant submitted the name of the 1st respondent to the 2nd respondent on the 31st day of January, 2011 as its nominated candidate for election to the House of Representatives as member representing Akwanga/Wamba/Nasarawa-Eggon Federal Constituency of Nasarawa State which was originally scheduled to hold on the 2nd day of April, 2011 but later shifted and conducted on the 9th day of April, 2011. On the 14th day of February, 2011 the 1st appellant submitted to the 2nd respondent a letter of withdrawal from the election purportedly signed by the 1st respondent, Notice of Change of candidate (Form CF004) signed by the 2nd appellant as the new candidate, Form CF002 conveying the name of 2nd appellant as well as 2nd appellant's Form CF001 (personal particulars).

Meanwhile the 2nd respondent had received a letter of complaint alleging that the 1st respondent did not withdraw from the contest and had neither written nor signed the letter of withdrawal. The documents submitted in favour of the 2nd appellant were in essence a substitution 1st respondent did not give effect to, on the ground that the substitution had not satisfied the legal requirements.

Sequel to that refusal for the substitution, on the 1st April 2011, the appellants caused an originating summons to be issued against the present respondents in which he sought the following reliefs:

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

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

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

4. A declaration that the 2nd plaintiff having won the primaries of the 1st plaintiff (1st Appellant herein) pursuant to which his name has been submitted to the 1st defendant as the sponsored candidate of the 1st Plaintiff for the Akwanga/Wamba/Nasarawa Eggon Federal Constituency of Nasarawa State, is the 1st plaintiff's candi-

date for the Akwanga/Wamba/Nasarawa Eggon Federal Constituency of Nasarawa State in the April, 2011 general elections.

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

6. An order of the Honourable Court compelling/directing the 1st defendant to recognize and accept the 2nd plaintiff as the duly nominated/sponsored candidate of the 1st plaintiff for the seat of member of House of Representatives for Akwanga/Wamba/Nasarawa Eggon Federal Constituency of Nasarawa State in the April, 2011 general elections C

7. An order of this Honourable Court that the 2nd defendant having lost in the primary election of the 1st plaintiff conducted on 15th January, 2011 and not having been sponsored by the 1st plaintiff to be its candidate in the April, 2011 general election into the seat of member of House of Representatives for the Akwanga/Wamba/Nasarawa Eggon Federal Constituency of Nasarawa State cannot be recognized by the 1st defendant as the 1st plaintiff's candidate for aforesaid election. D E

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

9. An order declaring the 2nd plaintiff as the sponsored candidate of the 1st plaintiff for the House of Representatives election for Akwanga/Wamba/Nasarawa Eggon Federal Constituency of Nasarawa State in the April, 2011 general elections. F

10. An order of perpetual injunction restraining the 1st defendant, its agents, servants or privies from recognizing the 2nd defendant as the sponsored candidate of the plaintiff for House of Representatives election for Akwanga/Wamba/Nasarawa Eggon Federal Constituency of Nasarawa State. G

11. Such further or other orders as this Honourable Court may deem fit and just to make in the circumstance of this case. H

From the affidavit evidence, the version of the appellants is that the 1st appellant conducted its primaries on the 11th January, 2011 for the purpose of nominating its candidate for the House of Representatives election for Akwanga/Wamba/Nasarawa Eggon Fed-

eral Constituency of Nasarawa State in the April, 2011 general elections. That the primaries of the 11th January 2011 was inconclusive and no winner emerged therefrom and so 2nd appellant had conducted a second primary on the 15th January, 2011 which the 2nd appellant won and his name was submitted to the 1st respondent on
B 14th February 2011.

The position as stated by the 2nd respondent is that there was no primaries of the 1st Appellant on the 15th of January, 2011 in which the 2nd appellant emerged as the nominated candidate of the
C 1st appellant and that it was on the 11th day of January, 2011 that the primaries of the 1st appellant was conducted which 1st respondent won pursuant to which his name and particulars were forwarded to the 2nd respondent on the 31st of January, 2011 in compliance with the law.

The trial court heard the originating summons and the preliminary objection to the competence of the suit filed by the 1st respondent. That court delivered its judgment on the 18th July, 2011 and granted all the reliefs sought by the appellants. The trial court in a separate Ruling dismissed the preliminary objection. Being dissatisfied, the 1st respondent appealed to the Court of Appeal which on
E 25th of May, 2012 allowed the appeal and set aside the judgment of the Federal High Court. It held, inter alia, that the trial court lacked jurisdiction to hear and determine the matter.

The appellants not satisfied have come before the Supreme
F Court on appeal.

On the 29th day of April, 2013 date of hearing, Chief T.J. Okpoko SAN, senior learned counsel for the appellants adopted their Amended Brief of Argument filed on 29/1/13 which learned Senior
G Advocate had settled. In the brief were distilled seven issues for determination which are as follows:

1. Were the learned Justices right in law in holding that the trial court has no jurisdiction to entertain appellants' case and make the consequential orders made in this case? (Based on grounds 1, 2 and
H 6).

2. Were learned justices right to entertain and determine issues No. 3 and 4 in the appeal before them when ground 5 held to be incompetent was argued under issue No.3 and together with issue No.4 (is based on Ground 4)

3. Were the learned justices right in law in admitting as fresh evidence on appeal, Exhibit CA1, and ascribing probative value to it and or using exhibit CA1 for the view that the learned trial judge did not evaluate the evidence before him correctly or at all? (Based on Grounds 7, 8, 9 and 15).

4. Were the learned justices right in law in embarking on fresh evaluation of evidence and interfering with the definite findings of fact made by the learned trial judge or put in another way, had the learned justices valid legal basis for interfering with the trial judge's findings of fact. (Based on Original Grounds 10 and 18).

5. Were the learned justices right in their view that 1st respondent name was submitted to INEC having regard to:

(a) Their Lordships affirmation of the findings of the learned trial judge as to 1st appellant's primary elections of 11th and 15th January, 2011.

(b) The affidavit evidence and the relevant exhibits in court and the finding of the learned judge? (Based on Ground 11 and 13).

6. Were the learned justices right in interfering with the finding of the trial judge on Exhibits F, O, G, and G1 and Affidavit evidence of appellants on the basis of Exhibits OM5 and or CA1 as credible documentary evidence proving that 2nd respondent was the candidate CPC submitted to INEC? (Based on Grounds 14 and 21)

7. Were the learned justices right in law in holding that the issue in the case was one of substituting of candidate by 1st appellant even after affirming in the judgment, the issue identified by the trial judge and in themselves stating the correct issue in the same judgment. (Based on Original Grounds 16, 19 and 20).

Learned senior counsel for the 1st respondent, D. D. Dodo SAN adopted their brief of argument settled by himself and other counsel and filed on 26/3/13. He crafted five issues for determination which are stated thus:

1. Whether from the nature of the claim, extant position of the law, and evidence adduced, the trial court had jurisdiction to entertain the matter? (Grounds 1 and 2 of the Notice of Appeal).

2. Whether the learned Justices of the court below were in error when they granted leave to the 1st respondent to adduce fresh evidence and to have admitted and accorded probative value to

Exhibit CA1? (Grounds 7, 8, 9, and 14 of the notice and grounds of appeal).

3. Whether the learned Justices of the court below erred in law in their review and re-evaluation of the evidence adduced before the trial court before setting aside the judgment?

B 4. Whether from the facts and circumstances of this case, the lower court was in error to hold that the case was one of attempt to substitute?

C 5. Whether the learned Justices of the lower court actually entertained issues 3 and 4 in the Appeal at the lower court when Ground 5 was struck out?

Learned counsel for the 2nd respondent, Ibrahim K. Bawa Esq. adopted the brief of argument filed on 25/4/13 and deemed filed on 29th April, 2013. The brief had been settled by learned counsel D aforesaid and other counsel. In the brief of argument were raised three issues for determination, viz:

E 1. Whether having regard to the entire circumstances of this case the lower court was right in its decision that the trial court lacked the jurisdiction to hear and determine the matter. (Grounds 1, 2, and 3).

2. Whether the lower was right in receiving, admitting and ascribing probative value to Exhibit CA1. (Grounds 7, 8, 9 and 14).

F 3. Whether the lower court was right when it re-evaluated the evidence adduced before the trial court and concluded that the name of the 1st respondent was submitted to the 2nd respondent and that the case of the appellants was one of an attempted substitution of candidate. (Grounds 10 - 13 and 15 - 21).

G Clearly, the three issues crafted by the 2nd respondent seem simpler and easier to follow in the determination of this appeal and I shall use them as framed.

ISSUE 1

H Whether having regard to the entire circumstances of this case the lower court was right in its decision that the trial court lacked the jurisdiction to hear and determine the matter.

Learned counsel for the appellant submitted that the Court of Appeal was wrong in holding that the matter was not within the jurisdiction of the trial court. That jurisdiction being ascertained in a suit from the writ of summons, the statement of claim and the relief

claimed. He cited PDP & Anor. Timipre Silva & Ors. (2012) 13 NWLR (Pt. 1315) 127; XS (Nig.) Limited v. Taisei (W.A.) Ltd. (2006) 15 NWLR (Pt.1003) 533; Metal Construction (W.A) Ltd v Aboderin (1998) 8 NWLR (Pt. 563) 538.

Chief Okpoko SAN stated that from the supporting affidavit of the originating summons, the complaint of the appellants is that the CPC having successfully conducted its primary election of 15th January 2011 which the 2nd appellant won and his name submitted to INEC by the party as the sponsored candidate which submission INEC ignored. That the cause of action therefore is the failure of INEC to publish the name of the sponsored candidate of CPC for the general election of 9th April, 2011 and instead INEC published the name of 1st respondent and so arose this dispute. In the circumstance, learned counsel said the court cannot properly decline jurisdiction as the dispute was within its powers of adjudication. He pointed out that INEC had not filed a counter-affidavit to controvert those facts which are material.

For the appellant, it was also submitted that INEC being a Federal Government Agency, the action against it was within the ambit of Section 251(1)(r) of the Constitution. He referred to NEPA v Edegbenro (2002) 18 NWLR (Pt.798) 79; Abdulraheem v Oduleye (2005) 8 NWLR (Pt.928) 144 at 179; Oloba v Akereja (1988) 3 NWLR (Pt.84) 509 at 520.

Learned senior counsel stated further that the facts and circumstances of this case are totally different from and are not on all fours with the situation that formed the basis of this court's decision in the case of Garba Lado & Ors. v. CPC & Ors. (2011) 18 NWLR (Pt. 1278) 18.

Learned senior counsel for the appellant said the situation herein are more in tune with this court's position in Nagogo v CPC (2013) 2 NWLR (Pt. 1339) 48.

Going, on Chief Okpoko SAN said the Court of Appeal was wrong to entertain arguments put forward by 1st respondent under issue 2 because that issue and issue 3 were predicated on grounds 3 - 19 which include ground 5 and issue 3(2) is rendered incompetent and the Court of Appeal had no jurisdiction to entertain it. He cited Khalil v Yar'Adua (2003) 16 NWLR (Pt.847) 446 at 481 ; Bereyin v Gbodo (1989) 1 NWLR (Pt. 97) 372 at 380; Ayalogu v. Agu (1998)

1 NWLR (Pt. 532) 129.

Mr. Dodo SAN for the 1st respondent submitted that jurisdiction being fundamental can be raised at any time. He cited *Madukolu v Nkemdilim* (1962) NSCC 374; *Emeka v Okadigbo & Ors* (2012) 7 SC (Pt.1); *Funduk Engr. Ltd v Mcarthur & Ors* (1995 - 1996) All B NLR 154.

It was further stated for the 1st respondent that the 1st appellant in nominating the 1st respondent and submitting his name to the 2nd respondent as its candidate asserted by its conduct that its primary election conducted on 11th January, 2011 was conclusive, a state of affairs which the respondents believed and acted upon and so 1st appellant is stopped from reversing that situation which it put in place and the other party acted upon. He cited *A. G. Nasarawa State v A.G. Plateau State* (2012) NWLR (Pt.1309) 419 at 470; *Chukwuma v. Ifeloye* (2008) 18 NWLR (Pt.1118) 204 at 237 - 238; *Koiki v Magnusson* (1999) 8 NWLR (Pt. 615) 492 at 510.

Learned senior counsel for the 1st respondent submitted that 2nd appellant cannot be described as an aspirant within the purview of Section 87(9) of the Electoral Act, 2010 (as amended) because he did not participate in the primaries of the 11th day of January, 2011. He cited *PDP v. Silva* (2012) 13 NWLR (Pt. 1316) 85 at 126 & 148. That the Court of Appeal lacked jurisdiction to inquire into a dispute as to which of the two candidates arising from the two primary elections was the candidate of the 1st appellant and that is the kernel of the dispute between 1st respondent and 2nd appellant. He cited *Garba Lado v CPC* (2011) 12 SC (Pt. 111) 113.

That law is now settled that a person who did not win the primary of the party can still be the candidate of the party if the party submits his name to INEC, and the party has got no right to withdraw his candidature. He referred to *Ehinlanwo v. Oke* (2008) 16 NWLR (Pt. 1113) 357 at 411.

Mr. Dodo SAN concluded by saying that under Section 87(9) a party is not given the statutory mandate to approach the court and conversely, by virtue of judicial decisions and common law principles, it is no longer legally justifiable for a court to choose a political party's candidate. He cited *Dalhatu v Turaki* (2003) 15 NWLR (Pt. 843) 310 and *Ehinlanwo v Oke* (supra).

Mr. Bawa, learned counsel for the 2nd respondent firstly de-

fined jurisdiction in its majesty stating that without it, an adjudication is futile. He cited *Uti v Onoyiuwe* (1991) 1 SCNJ 25 at 49; *Odofoin v Agu* (1992) 3 NWLR (Pt. 229) 350; *A.G. Federation v Shode* (1990) 1 NWLR (Pt. 128) 500 at 542, *NDIC v CBN* (2002) 7 NWLR (Pt. 766) 272 at 294 - 295.

That this court should affirm the decision of the court holding B that the courts lack jurisdiction to entertain the same as the matter is not justiciable. He anchored the submission on *Lado v CPC* (supra).

The question to be answered here is whether or not the dispute between the parties being an argument as to which between C 2nd appellant and the 1st respondent is the right candidate of the 1st appellant, CPC and if such a dispute is justiciable thus endowing the court with jurisdiction to adjudicate. Several divergent views or shades of opinion exist as to the justiciability or otherwise of such a dispute while those of the view that there is no jurisdiction in the court as the D matter is squarely within the domestic purview of the political party who can make and unmake a candidate. The opposing view is that it cannot be the law as presently existing on the ground that once a candidate who has been subjected to the contest in the nature of a primary election of the party and the outcome gives that aggrieved E party victory or perceived victory which is being denied him then there should be a remedy for which the duty of the court to hear him and determine in whom the justice of the day resides cannot be jettisoned.

The need to settle this matter of jurisdiction is because without F it the court acts in vain and the court does not set out to act in that manner of futility. Jurisdiction has been variously defined or described in words such as, jurisdiction being the blood that gives life to the survival of an action in a court of law, without which the action like a G living being is drained of its blood and consequently cease to have life and resuscitation becomes a futile exercise. Jurisdiction is so fundamental or basic while also being radical that it cannot be ignored or run away from since any decision reached in its absence is a nullity. I rely on *Madukolu v. Nkemdilim* (1962) NSCC 374; *Emeka v H Okadigbo & Ors* (2012) 7 SC Pt.1.

It is this pivot position of jurisdiction that gives it such a peculiar status which makes it possible to raise at any point in the litigation whether at the very beginning, in the middle of the trial and even at

the Supreme Court for the very first time. It is for that reason that this court per Rhodes-Vivour JSC said, *“it is the heart and soul of a suit.”* See Emeka v. Okadigbo (supra); Funduk Engineering Limited v Mcarthur & Ors (1995 - 1996) All NLR 157.

In this case in hand, while the appellant’s take is that there was jurisdiction in the trial High Court to entertain the suit, the position of the respondents is that there is no jurisdiction, the reason being that the 1st appellant did not have the right to challenge the primary of 11th January, 2011 having not being an aspirant in the process sequel to Section 87(9) of the Electoral Act, 2010. The position of the appellants on the other hand is that they are qualified to contest the process since the primary of the 11th January, 2011 was not conclusive and another to which the 2nd appellant was a party was held on the 15th January, 2011 and that being the acceptable primary of the party, 1st appellant within its supreme power was the valid one and this court should give effect to that.

I would like to refer to the case of PDP v Sylva (2012) 13 NWLR (Pt. 1316) 85 at 126 & 148 in circumstances similar to the present. This court had this to say:

“Section 87(9) of the Electoral Act confers jurisdiction on the courts to hear complaints from a candidate who participated in a party’s primaries and the conduct of the party’s primaries. The facts in this case are conclusive that the 1st respondent did not participate as a candidate in the PDP primaries which held on 19/11/11 to choose the party candidate for general elections for Governor of Bayelsa State which was fixed for 12/2/12. The 1st respondent, not being a candidate at the primaries cannot be heard to complain about the conduct of the primaries. Section 87(9) of the Electoral Act is thus not applicable”.

The court went on to emphasize thus:

“...for any member of a political party to question any results of party primaries conducted under the Act of 2010 (as amended) he must bring himself within the ambit of an aspirant i.e. a member who has participated in the said party primaries otherwise his action is not maintainable for want of locus standi”

The above quote from this court really says it all, however there would be a follow-up question as to how the matter of the valid primary is to be ascertained. The answer is not far-fetched, in that

there has been an adjudicating forum in the name of court to sort out that poser. The materials to be used in that solution is nothing other than the statement of claim or the Originating Summons with the reliefs therein sought. The judgment of this court in *Dr. Yusuf Musa Nagogo v Congress for Progressive Change* (2013) 2 NWLR (Pt. 1339) 48 which also arose from the same facts and circumstances as the current one and that is to say very helpful in that it shows quite clearly that there is to say very helpful in that it shows quite clearly that there is jurisdiction in a dispute as to which of the two primaries is the correct one and who the actual victor is. I would need to quickly add that the case of *Garba Lado v CPC* (2011) 12 SC (Pt.111) 11 cited by either side for their purpose is not useful herein. B C

The conclusion of all I have been going on and on about is that there is jurisdiction in the trial High Court which implies that the Court of Appeal and this present one deriving its jurisdiction from the High Court of trial in this appeal have the vires to adjudicate. The issue is therefore resolved in favour of the appellants. D

ISSUE 2

Whether the lower court was right in receiving, admitting and ascribing probative value to Exhibit CA1. E

Chief Okpoko SAN for the appellants said the Court of Appeal received the fresh evidence, Exhibit CA1 as fresh evidence which was a letter from the chairman of INEC to the Inspector General of Police dated 8th of September 2011, while the judgment of the trial court was delivered on 18th July, 2011, a period of 60 days in between. That its admittance was wrong of the Court of Appeal. He referred to *Ladd v Marshall* (1954) 3 All ER 745 at 748; *UBA Plc v BTL Ind. Ltd* (2005) 10 NWLR (Pt.933) 356 at 371. F

He said INEC was a party to this case and did not file a counter-affidavit challenging appellant's averments in the court of trial and so it was unimaginable that an unsuccessful litigant could by a letter written 60 days after judgment get the Court of Appeal to set aside a judgment based on the facts not in existence at the time of trial. That an appeal is generally regarded as a continuation of the original suit rather than an initiation of a new suit. He relied on *Adegoke Motors v Adesanya* (1989) 3 NWLR (Pt. 108) 250, *Ngige v Obi* (2006) 14 NWLR (Pt. 999) 1 at 108 - 109. G H

For the appellants, it was contended that the document Ex-

hibit CA1 was bereft of probative value and the Court of Appeal was not entitled to ascribe any probative value to it. He cited *Njoku v Dikibo* (1998) 1 NWLR (Pt. 534) 1196.

Mr. Dodo SAN for the 1st respondent said the court below was duly empowered to admit fresh evidence in respect of matters which occurred after the proceedings and judgment of the trial court. He cited *Okpanum v S.G.E. (Nig.) Ltd* (1998) 7 NWLR (Pt.559) 537 at 546; *Ladd v Marshall* (1954) 3 ALL ER 745; *Asaboro v Aruwaji & Anor.* (1974) NSCC 211 at 214.

That Exhibit CA1 is admissible because it was made in the course of discharging a statutory duty since the maker had no personal interest, bias or likelihood of bias in the discharge of that duty. He cited *HMS Ltd. v. First Bank* (2001) NWLR (Pt. 167) 312; *N.S.I.T.F.M.B. v. Klifco (Nig.) Ltd.* (2010) All FWLR (Pt.534) 73 at 88.

It was further canvassed for the 1st respondent that Exhibit CA1 was consistent with the Record of Appeal in reference to a document at page 437 of Vol. 1 and therefore has a very high probative value and the weight the lower court attached to it should not be tampered with. He cited *Ogbechie v Onochie* (1988) 1 NWLR (Pt. 70); *Oju Local Government Area v INEC* (2007) 14 NWLR (Pt. 1054) 242 at 272 - 273 (CA).

Learned counsel for 2nd respondent stated on that it is now trite that for an appeal court to admit additional evidence of facts on appeal, there must exist special grounds which grounds the respondents herein met. He cited *Asaboro v Aruwaji* (1974) 1 All NLR (Pt. 1) 140; *Uzodinma v Izunaso* (2011) 17 NWLR (Pt.1275) 30.

The appellant's grouse herein is that the document Exhibit CA1, written by the INEC Chairman on the 8th of September, 2011 when the judgment of the trial court was delivered on 18th July 2011 a period of 60 days ought not to have been admitted as fresh evidence.

Learned counsel for the 1st respondent disagrees with the stance of the appellants stating that the evidence was made and got to the knowledge of the 1st respondent after the judgment of the trial court was delivered. That the purport of tendering Exhibit CA1 was to belie the contention of the appellants that they never forwarded/ submitted the name of the 1st respondent. He stated that the fact of 1st respondent's name was sent by the same 1st appellant had all

along been in existence but that piece of evidence or document was not available all through the trial.

The learned counsel for the 2nd respondent, INEC contended that it cannot be properly put forward that Exhibit CA1 was a document that came into existence after the trial court had delivered its judgment and that the document was not only relevant but was a follow up to the facts already pleaded that is the fact of the submission of the name of the 1st respondent to the 2nd respondent. B

To further explore the question it must be stated that the lower court is duly empowered to admit fresh evidence in respect of matters which occurred after the proceedings and judgment of the trial court so long as the guidelines for such admission are met. I would in that regard cite the case of Okpanum v S.G.E. (Nig.) Ltd (1998) 7 NWLR (Pt. 559) 537 at 546 per Onu JSC: C

“For a clearer appraisal of the treatment of the lone issue, it is pertinent firstly to consider what additional evidence is all about and when it is receivable by an appellate court. Undoubtedly, the Court of Appeal has power to receive further evidence on questions of fact, either by oral examination in court, by affidavit or by deposition taken before an examiner or commissioner. See Order 1, rule 20(3) Court of Appeal Rules, 1981 (as amended) and the Court of Appeal decision in Michael Odiase v Vincent Omele (1985) 3 NWLR (Pt. 11) 82 at 85. See also Enekebe v Enekebe (1964) NMLR 42. However, the conditions for admitting such fresh evidence on appeal are so stringent that there are very few cases if any, in our courts where such evidence was admitted. But see the English cases of Ladd v. Marshall (1954) 1 WLR 1489 at 1491; Skone v Skone (1971) 1 WLR 812; (1971) 2 All ER 582. The principles which an appellate court must take into consideration in the judicious exercise of its power to grant leave to adduce new evidence are: D

(a) The evidence sought to be adduced must be such as could not have been, with reasonable diligence, obtained for use at the trial, or are matters which have occurred after judgment in the trial court. F

(b) In respect of other evidence other than in (a) above, as for instance in respect of an appeal from a judgment after a hearing on the merits, the court will admit such fresh evidence only on special grounds as provided for in Order 1, Rule 20(3) of the Court of Ap- H

peal Rules (*ibid*).

(c) *The evidence to be adduced should be such as if admitted, it would have an important not necessarily crucial effect on the whole case; and*

B (d) *The evidence must be such as apparently credible in the sense that it is capable of being believed and it need not be incontrovertible.*”

C The principles above enunciated in Okpanum v. SGE Ltd. (*supra*) flows from the locus classicus on the point being Ladd v. Marshall (1954) 3 All ER 745 and orchestrated by Coker JSC in Asaboro v. Aruwaji & Anor. (1974) NSCC 211 at 214.

D The admissibility of the document is also well supported by the fact that the chairman of the 2nd respondent had no personal interest and was merely carrying out his statutory duty of putting the records straight. I would refer to the case of: HMS Ltd. v. First Bank (2001) NWLR (Pt. 167) 312; N.S.I.T.F.M.B. v. Klifco (Nig.) (2010) All FWLR (Pt.534) 73 at 88 para D where the Court held:

E *“in the circumstances of this question, I think that in resolving this matter, one has to examine the provision of Section 91(3) in the context of two crucial phrases, i.e. who is “a person interested” and “when proceedings were pending or anticipated” as regards the phrases person interested. I agree with the respondent that the phrase has been examined in the case of Even v Noble (1949) 1 KB 222 at 225, where a person not interested in the outcome of an action has*
F *been described as, “a person who has no temptation to depart from the truth on one side or the other, a person not swayed by personal interest but completely detached, judicial, impartial, independent.”*”

G In other words, it contemplates that the person must be detached, independent and non-partisan and really not interested which way in the contest, the case goes. Normally, a person who is performing an act in his official capacity cannot be a person interested under Section 91(3). I think the phrase “a person interested” ever
H *moreso, has quite definitively put in the case of Holton v Holton (1946) 2 All ER 534 @ 535 to mean “a person who has a pecuniary or other material interest is affected by the result of the proceedings, and therefore, would have a temptation to pervert the truth to serve his personal or private ends. It does not mean an interest in the sense of intellectual observation or an interest purely due to sympathy. It*

means an interest in the legal sense which imports something to be gained or lost.”

In the light of what this court had stated in N.S.I.T.F.M.B. V Klifco (Nig.) Ltd (supra), the appellants have not shown how, in which way or manner the chairman of 2nd respondent can be said to be an interested party. This is because all the document has established is that the name of 1st respondent was received by the 2nd respondent from the 1st appellant on the 31st of January, 2013 and so the purported letter of withdrawal of candidature and notice of change of candidate were not signed by the 1st respondent as put out. Also the 2nd respondent had a statutory duty under Section 150(2) of the Electoral Act to prosecute electoral offences which can only be carried out after investigation hence Exhibit CA1 to the police in view of the submission of forged nomination papers which are offences contrary to Section 118 of the Electoral Act, 2010 as amended.

It is clear that this issue is resolved in favour of the respondents as the Court of Appeal was not only right in receiving the document aforesaid but in admitting and ascribing probative value to it.

ISSUE 3

Whether the lower court was right when it re-evaluated the evidence adduced before the trial court and concluded that the name of the 1st respondent was submitted to the 2nd respondent and that the case of the appellants was one of an attempted substitution of candidate.

Learned senior counsel, Chief Okpoko for the appellants said the trial court considered the case made by the parties and formulated the issues for determination of the case and respondents did not complain about those three issues as crafted by the trial court. That on appeal the court below agreed that the judgment of the trial court was determined on the three issues which therefore defined the scope of the appeal before the court below. That the trial court made the findings:

1. That 2nd appellant was eligible to seek CPC's sponsorship and nomination for the elections.
2. That exhibit E proved conclusively that 2nd appellant's name was duly submitted to INEC and that;
3. 1st respondent's case was not predicated on an alleged attempted substitution of candidate.

Chief Okpoko said 2nd respondent did not file any ground of appeal complaining against the specific findings of fact of the learned trial judge, therefore the Court of Appeal had no business considering or revisiting such a question or finding. He referred to *Ebba v Ogodo* (1984) NSCC Vol.15 at 255.

B That where the trial court unquestionably evaluates the evidence and appraises the facts as done in this case, the Court of Appeal cannot re-evaluate the evidence and substitute its own views with the views of the trial court. He cited *Fagbenro v Arobadi* (2006) 7 NWLR (Pt. 978) 172; *Nagogo v CPC* (supra).

C For the 1st respondent was that the fact that 1st respondent did not file any appeal against the finding that there were two primaries conducted by the 1st appellant is not in any way fatal. That nothing precluded the 1st and 2nd respondents now appellants from cross-D appealing against that finding and the state of affairs now is that the two parties have accepted that the trial court lacked jurisdiction in the light of *Lado v CPC* (supra).

Mr. Dodo SAN went on to state that the lower court was in a good position from the printed records to review the cases of the parties, evaluate the evidence and give adequate consideration to the totality of the evidence on the issue of fact in the circumstance. He cited *Pavex Co. (Nig.) Ltd v I.B.W.A. Ltd* (2000) FWLR (Pt. 26) 1891 at 1912.

F That the lower court was right to have re-evaluated the evidence since the trial court did not evaluate the evidence before it. He cited *Adebayo v Adusei* (2004) 4 NWLR (Pt. 862) 44 at 77; *Narumal & Sons (Nig.) Ltd v Niger Benue Trans Co. Ltd* (1989) 2 NSCC (Pt. II) 147 at 165.

G Mr. Ibrahim Bawa of counsel for the 2nd respondent said the lower court was right to re-appraise the case presented to it on appeal since the trial court had not properly evaluated the evidence. He referred to *Agbakoba v INEC* (2009) All FWLR (Pt.462) 1037.

H He stated also that the lower court was right to have treated the case as the appellant's attempt at substitution in a manner contrary to Sections 31, 33 and 35 Electoral Act, 2010 (as amended).

On this matter of the rightness or not of the re-appraisal by the Court of Appeal of the evidence that was before the trial court and thereby arrived at the conclusion that the case of the appellants was

that of an attempted and failed substitution of candidate. In this I am guided by the principle reiterated by this court in *Agbakoba v INEC* (2009) ALL FWLR (Pt.462) 1037 at 1088 per Chukwuma-Eneh JSC when he stated thus:

“...I must as a follow up to my reasoning above say that although evaluation of evidence as well as ascription of probative value to evidence of the parties before the court is the primary function of the trial court, this court has to intervene here to avert an obvious miscarriage of justice and even so as the evidence in question is mainly documentary this court is not in any way disadvantaged, it is in a vantage position as the trial court; it can interfere in the circumstances to draw the correct inferences from the facts and circumstances as per exhibits 1 of the 3rd respondent and Exhibits 1 and 3 of the appellant.”

On the issue under discourse it is germane to take another look at Sections 31, 33 and 35 of the Electoral Act, 2010 as amended in context of the evidence on record and those sections provide as follows:

“31 - (1) Every political party shall not later than 60 days before the date appointed for a general election under the provisions of this Act, submit to the commission in the prescribed forms the list of the candidates the party proposes to sponsor for the election, provided that the commission shall not reject or disqualify candidate(s) for any reason whatsoever.”

“33 - a political party shall not be allowed to change or replace its candidate whose name has been submitted pursuant to Section 31 of this Act, Except in the case of death or withdrawal by the candidate.”

“35- A candidate may withdraw his candidate by notice in writing signed by him and delivered by himself to the political party that nominated him for the election and the political party shall convey such withdrawal to the commission not later than 45 days to the election.”

With those statutory provisions in view and taking them along the evidence available to the trial court, it is clear that the learned trial judge did not evaluate the totality of the evidence proffered which now made it mandatory for the re-evaluation of the totality of the evidence by the Court of Appeal which court rightly did. I place reli-

ance on *Basil v. Fajebe* (2001) 4 SC (Pt. II) 119 at 125.

From what the Court of Appeal did in its re-appraisal, it came out that the attempt by the 1st appellant to submit the name of 2nd appellant to the 2nd respondent was outside the period of 60 days allowed by Section 31 of the Electoral Act, 2010 as amended. Also of note is that the condition precedent for the replacement of the name of an earlier submitted candidate was not in place since the 1st respondent had neither died or withdrawn as candidate nor did the 1st respondent write about a withdrawal which letter was to be delivered by himself to the 1st appellant none of which events applied in this instance.

The reason for the situation is anchored on the legal principle of estoppel by conduct. From the record it can be seen that the 1st appellant in nominating the 1st respondent and submitting his name to the 2nd respondent as its candidate was asserting by that act that its primary election conducted on 11th January, 2011 was conclusive, a state of affairs which the respondents believed in and acted upon. The 1st appellant therefore is precluded from going back on the established state of affairs brought about by its conduct or representation to produce something contrary to the earlier assertion. A back and forth movement not allowed is the implication. See *A.G. Nasarawa State v A.G. Plateau State* (2012) NWLR (Pt.1309) 419 at 470, *Chukwuma v Ifeloye* (2008) 18 NWLR (Pt.1118) 204 at 237 - 238; *Koiki v Magnusson* (1999) 8 NWLR (Pt.615) 492.

The point has to be made that the present leaning is to produce some level of certainty in the polity vis- a-vis- electoral processes and their outcome. That aspect settled, the issue of the re-evaluation by the Court of Appeal of the materials available is adjudged in order and the decision which arose from that re-appraisal process is equally without fault except that the lower court erred in holding that the trial Court had no jurisdiction. This is because the court of trial had the necessary vires to adjudicate.

From the above and the better reasoning in the lead judgment this appeal is allowed in part, that is with respect to the decision of the Court of Appeal that there was no jurisdiction. That said, the appeal lacks merit and is dismissed. I abide by the consequential orders made in the lead judgment.

ARIWOOLA JSC

I had the opportunity to have read before now the lead judgment of my learned brother, Ngwuta, JSC just delivered and I am in agreement with the reasoning therein and the conclusion arrived thereat.

The appeal is against the judgment of Court of Appeal. Makurdi Division delivered on 25th May, 2012. The appellants were the plaintiffs before the trial Federal High Court. The appellants had, by their Originating Summons sought the following reliefs:

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

2. A declaration that the 1st Defendant (INEC) has no vires or statutory power to reject the name of any candidate, including the 2nd plaintiff, sponsored by a political party for an elective position or compel any political party to sponsor a particular candidate for an election.

3. A declaration that the 1st Defendant (INEC) has no statutory power to recognize or accept any person not submitted or sponsored by his political party.

4. A declaration that the 2nd plaintiff having won the primaries of the 1st plaintiff, pursuant to which his name has been submitted to the 1st Defendant as the sponsored candidate of the 1st plaintiff for Akwanga/Wamba/Nasarawa Eggon Federal Constituency of Nasarawa State, in the April 2011 General Election.

5. A declaration that under the provisions of the Electoral Act 2010 (as amended) the only way the 1st Defendant can change, reject or substitute a duly sponsored/nominated candidate of a political party is through a court order.

6. An order of the Honourable Court compelling/directing the 1st Defendant to recognize and accept the 2nd Plaintiff as the duly nominated/sponsored candidate of the 1st Plaintiff for the seat of member of House of Representatives for Akwanga/Wamba/Nasarawa Eggon Federal Constituency of Nasarawa State, in the April 2011 general election.

7. An order of this Honourable Court that the 2nd Defendant (Emmanuel David Ombugadu), having lost in the primary election of the 1st plaintiff conducted on 15th January 2011 and not having

been sponsored by the 1st Plaintiff (CPC) to be its candidate in the April 2011 general election into the seat of member of House of Representatives for Akwanga/Wamba/Nasarawa Eggon Federal Constituency of Nasarawa State cannot be recognized by the 1st Defendant as the 1st Plaintiff's candidate for the aforesaid election.

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

C 9. *An order declaring the 2nd plaintiff as the sponsored candidate of the 1st plaintiff for the House of Representatives for Akwanga/Wamba/Nasarawa Eggon Federal Constituency of Nasarawa State in the April 2011 general election.*

D 10. *An order of perpetual injunction restraining the 1st Defendant, its agents, servants or privies from recognizing the 2nd Defendant as the sponsored candidate of the 1st plaintiff for House of Representatives election for Akwanga/Wamba/Nasarawa Eggon Federal Constituency of Nasarawa State”.*

E However, notwithstanding the Preliminary objection against the action on jurisdiction, the trial court went ahead with the matter and gave judgment for the appellants' as claimed.

F Dissatisfaction with the decision of the trial High court led to the appeal to the Court below, which allowed the appeal and held that, both the trial court and the court below had no jurisdiction to entertain the matter. That decision led to the further appeal to this court on 21 grounds of appeal.

Upon settlement of records and pursuant to the Rules of this court, parties filed and exchanged briefs of argument.

G When on 29th April, 2013 the appeal came up for hearing, both counsel identified their respective brief of argument. They adopted and relied on same to urge the court to allow the appeal and dismiss it respectively.

H In the appellants brief of argument seven issues were distilled from the twenty -one grounds of appeal filed. The 1st respondent formulated five (5) issues while the 2nd respondent distilled only three (3) issues for determination.

The respective issues are as follows:

The issues for determination by the appellants are as follows:

i. Were the learned Justices right in law in holding that the trial

court has no jurisdiction to entertain appellants' case and make the consequential orders made in this case? (based on grounds 1, 2 & 6).

ii. Issue No. 2 - were the learned Justices right to entertain and determine issues No.3 and 4 in the appeal before them when ground 5 held to be incompetent was argued under issue No. 3 and together with issue No.4 (is based on ground 4). B

iii. Were the learned Justices right in law in admitting as fresh evidence on appeal, Exhibit CA1, and ascribing probative value to it and or using Exhibit CA1 for the view that the learned trial judge did not evaluate the evidence before him correctly or at all? (based on grounds 7, 8, 9 and 15). C

iv. Were the learned Justices right in law in embarking on fresh evaluation of evidence and interfering with the definite findings of fact made by the learned trial Judge or put in another way, had the learned Justices valid legal basis for interfering with the trial Judge's findings of fact. (Based on original grounds 10 and 18)

v. Were the learned Justices right in their view that 1st respondent name was submitted to INEC having regard to:

(A) their lordships affirmation of the findings of the learned trial judge as to 1st appellant's primary elections of 11th and 15th January, 2011. E

(B) the affidavit evidence and the relevant exhibits in court and the finding of the learned Judge? (based on ground 11 and 13) F

vi. Were the learned Justices right in interfering with the finding of the trial Judge on Exhibit F, O, G and G1 and affidavit evidence of appellants on the basis of Exhibits OM5 and or CA1 as credible documentary evidence proving that 2nd respondent was the candidate CPC submitted to INEC? (based on grounds 14 and 21) G

vii. Were the learned justices right in law in holding that the issue in the case was one of substitution of candidate by 1st appellant even after affirming in the judgment, the issue identified by the trial Judge and in themselves stating the correct issue in the same judgment. (Based on original grounds 16, 19 and 20) H

Issues for determination as formulated by 1st respondent are:

i. Whether from the nature of the claim, extant position of the law, and evidence adduced, the trial court had jurisdiction to enter-

tain the matter? (Grounds 1 and 2 of the notice of appeal)

ii. Whether the learned Justices of the court below were in error when they granted leave to the 1st respondent to adduce fresh evidence and to have admitted and accorded probative value to Exhibit CA1? (Grounds 7, 8, 9 and 14 of the notice and grounds of appeal)

iii. Whether the learned Justices of the court below erred in law in their review and re-evaluation of the evidence adduced before the trial court before setting aside the judgment?

iv. Whether from the facts and circumstance of this case, the lower court was in error to hold that the case was one of attempt to substitute? (Grounds 5, 6, 11, 14, 15, 16, 19 and 20)

v. Whether the learned Justices of the lower court actually entertained issues 3 & 4 in the lower court when ground 5 was struck out?

2nd Respondents issues for determination are:

1. Whether having regard to the entire circumstances of this case the lower court was right in its decision that the trial court lacked the jurisdiction to hear and determine the matter (Grounds 1, 2 and 3).

2. Whether the lower court was right in receiving, admitting and ascribing probative value to Exhibit CA1, (Grounds 7, 8, 9 and 14).

3. Whether the lower court was right when it re-evaluated the evidence adduced before the trial court and concluded that the name of the 1st respondent was submitted to the 2nd respondent and that the case of the appellants was one of an attempted substitution of candidate. (Grounds 10-13 and 15-21).

There is no doubt, my learned brother Ngwuta, JSC had admirably dealt with all the seven (7) issues raised by the appellants in their brief of argument. I therefore agree entirely with the lead judgment that the appeal has merit on the issue of jurisdiction alone and it should be allowed while on all other issues, the appeal is unmeritorious and the issues were rightly resolved against the appellants but in favour of the respondents.

On the issue of jurisdiction, it is crystal clear from the records that the dispute that led to the matter before the trial court was a pre-election matter which the provisions of the Electoral Act, 2010 (as

amended) make adequate provisions for. For ease of reference, Section 87 sub-sections (4)(c) and (9) of the said Electoral Act provide as follows:

S.87(1) *“A political party seeking to nominate candidates for elections under this Act shall hold primaries for aspirants to all elective positions.* B

(4) A political party that adopts the system of indirect primaries for the choice of its candidates shall adopt the procedure outlined below.

(c) in the case of nominations to the position of a senatorial candidate, House of Representatives and State House of Assembly, a political party shall, where intend to sponsor candidates - C

(i) hold special congress in the senatorial district, federal constituency and the state assembly constituency, respectively, with delegates voting for each of aspirant in designated centre or centres on D specified dates.

(ii) the aspirant with the highest number of votes at the end of voting shall be declared the winner of the primaries of the party and the aspirant’s name shall be forwarded to the Independent National Electoral Commission as the candidate of the party.. E

(9) 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 F of a State of FCT for redress.”

As clear from the record in the instant case, the 1st appellant, i.e. Congress for Progressive Change, (CPC) as a political party exercised that right to hold its primaries, to choose its candidate in the instant circumstance. It conducted its primaries on 11th January, 2011. It is interesting to note that in this first primary of the 1st appellant, the 2nd appellant was not in any way a participant and was not shown to have been given a waiver. In the said primaries of 11th January, 2011, the 1st respondent clearly emerged the winner having scored the highest number of votes cast at the end of voting. His name was then accordingly forwarded to the 2nd respondent as the commission to finally conduct the general election. At that stage, the 1st respondent became the candidate of the 1st appellant to contest with H

other candidates of other political parties, if any, for the election for the House of Representatives to represent the Akwanga/Wamba/Nasarawa-Eggon Federal Constituency of Nasarawa State.

However, subsequently, the Nasarawa State Chapter of the 1st appellant seemed to have conducted yet another primaries on 15th January, 2011 specifically to give the 2nd appellant a waiver to now contest. The 2nd respondent relied on the first name of 1st respondent first forwarded to it by the 1st appellant as its candidate. That led to the action instituted by the appellants by the originating summons earlier referred to.

Upon a preliminary objection to the jurisdiction of the trial court by the respondents who were defendants, the trial court had held that it has jurisdiction to entertain and determine the matter before it. On appeal to the court below, the court had inter-alia held as follows:

"From the totality of all I have said in the course, of resolving this issue particularly as it relates to Section 87 of the Electoral Act (supra) and the decision of the Supreme Court in Garba Lado & Ors. Vs. CPC (supra). I hold that neither the trial Court nor this court has the jurisdiction to entertain the matter in dispute."

The above led to the instant appeal to this court.

I must say that I have no slightest doubt in my mind and without any fear of contradiction, that the instant case, is not and should not be likened to the case of Garba Lado vs. CPC (2011) 12 SC (Pt 111) 11 which was relied upon by the Court below to arrive at the decision above to decline jurisdiction to entertain the matter. In Lado's case (supra) this court opined as follows:

"Once there arises a dispute as to which of the two primaries conferred a right of candidate on the parties to represent a political party in an election, the matter is taken outside the purview of Section 87(4)(b)(ii), (c)(ii) and (9) of the Electoral Act, 2010 (as amended)."

The matter in the instant is beyond a party's two primaries of a political party producing two candidates. It is noteworthy that this court already held that pursuant to Section 87(a) of the Electoral Act (supra) the Federal High Court or the High Court of a State or FCT has jurisdiction to hear the complaint of an aspirant in the selection or nomination process in choosing a candidate by a political party for election in a general election. See: PDP & Anor. Vs. Sylva & Ors.

(2012) 13 NWLR (Pt.1316) 85 at 127 & 148 (2012) 8 SCM 200 at 221 - 222, 233 - 234. The trial court therefore was right to have held that it has jurisdiction to entertain and determine the complaint of the appellants, being a pre-election dispute between the parties.

Accordingly, the court below was wrong on the issue of jurisdiction and misconceived the provisions of Section 87 of the Electoral Act, 2010 (as amended) and the decision of this court in Garba Lado Vs. CPC (supra). The wrong decision is liable to being set aside and it is hereby set aside.

Another important issue is whether the learned Justices of the court below were right in law in admitting as fresh evidence on appeal, Exhibit CA1, and ascribing probative value to it, and or using the Exhibit for the view that the learned trial Judge did not evaluate the evidence before him correctly or at all.

It is noteworthy that Exhibit CA1 is the letter from the Chairman of the 2nd Respondent - INEC, written to Inspector General of Police headed - Report on Forgery of Documents to INEC dated 8th September, 2011. This was clearly after the decision of the trial High court on the appellants complaint.

On the receipt of further or fresh evidence by the Court of Appeal the rules of the court, Order 4 rule 2, Court of Appeal Rules, 2007 provides as follows:

“The Court shall have power to receive further evidence on question of fact, either by oral examination in court, by affidavit, or by deposition taken before an examiner or commissioner as the court may direct, but, in the case of an appeal from a judgment after trial or hearing of any cause or matter on the merits, no such further evidence (other than evidence as to matters which have occurred after the date of the trial or hearing shall be admitted except on special grounds.”

From the record, it is clear that the court below admitted Exhibit CA1 as further evidence and gave probative value to it in support of the 1st respondent's case that his name as the winner of the primaries conducted on 11th January, 2011 was the one duly forwarded by the 1st appellant to the 2nd respondent.

It is trite law, that in civil cases and in furtherance of justice, the Court of Appeal will permit fresh evidence, only in the following circumstances:

(a) Where the evidence sought to be adduced is such as could not have been obtained with reasonable care and diligence for use at the trial.

(b) Where the evidence sought to be tendered on appeal is such as is apparently credible in the sense that it is capable of being believed. It needs not necessarily be incontrovertible. See Attorney-General of the Federation vs. Mallam Modu Alkali (1972) 12 SC 20; Ukariwo Obasi & Anor. vs. Eke Onwuka & Ors. (1987) NWLR (Pt.61) 364, (1987) 7 SC (Pt.1) 233; Amaechi vs. INEC & Ors. (2008) 5 NWLR (Pt.1080) 227; (2008) 1 SCM, 26; (2008) 33 NSCQR (Pt.1) 332 Adeyefa & Ors. Vs. Bamgboye (2013) 2 SCNJ (Pt.1) 198 at 217; (2013) 2 SCM 1 at 17.

There is no doubt, the above conditions were met by the document, Exhibit CA1 when it was admitted by the court below. The court also properly evaluated the evidence and other documents not evaluated at all by the trial court. The court below was therefore justified in its intervention in the evaluation of those documents that were not evaluated by the trial court.

My Lords, permit me to say that if in a situation as in the instant case the court will not have jurisdiction to entertain the complaint of an aggrieved person, in a pre-election dispute between parties, it will amount to injustice, and we will be asking for trouble and a state of anarchy where there will be confusion and lacking of order.

Without any further ado, this appeal succeeds on the issue of jurisdiction in that the trial court has jurisdiction to entertain and determine the action instituted by the appellants. Accordingly, that part of the judgment of the court below is set aside and the action that was struck out is ordered restored.

In the final analysis, the other issues having been properly resolved against the appellants render the appeal liable to dismissal.

For the above reason and the fuller reasoning in the lead judgment, I dismiss the appeal and abide by the consequential order in the said leading judgment including that on costs.