

SUPREME COURT OF NIGERIA
FRIDAY 12TH JULY, 2013. SC. 279/2012
**CORAM:- W. S. N. ONNOGHEN, C. M. CHUKWUMA-
ENEH, B. RHODES-VIVOUR, C. B. OGUNBIYI,
K. B. AKA'AH, JJSC**

BARRISTER ISMAEL AHMED APPELLANT
AND
1. ALHAJI NASIRU AHMED
2. CONGRESS FOR
PROGRESSIVE CHANGE
3. CHAIRMAN CONGRESS FOR
PROGRESSIVE CHANGE
KANO STATE CHAPTER RESPONDENTS
4. INDEPENDENT NATIONAL
ELECTORAL COMMISSION

APPEALS - Reply brief - Purpose - Reply brief deals on points of law
- Addressing only new issue(s) raised in respondent's brief - But does
not re argue or analyze appellant's case (H1)

LEGAL PRACTITIONERS - Error - Effect on litigant - Principle of
not visiting litigant with sins of counsel is not absolute - As litigant is
supposed not to be indifferent - To his counsel's conduct of his case
(H2)

COURTS - Jurisdiction - Preliminary finding - Court can inquire
whether it has jurisdiction over matter before it - Prior to dealing with
the main matter - And such finding does not mean it has assumed
jurisdiction over the matter (H3)

CONSTITUTIONAL LAW - Jurisdiction - 1999 Constitution 5th schdl
- Breach of - Para.12 gives exclusive jurisdiction to Code of Conduct
Tribunal - Powers of regular courts are thereby ousted (H4)

APPEALS - Notice of appeal - Validity - Cross appellants having failed
to refer the matter to Code of Conduct Tribunal - Alleged violations
of the code by counsel - Have not been established as to affect com-

petence of the processes (H5)

JURISDICTION - Source - Jurisdiction is a matter that is statutorily based - As provided in the Constitution or Acts - And can only be removed or whittled down by express statutory provisions (H6)

JURISDICTION - Determination - Basis - To ascertain jurisdiction of court in a matter - Writ of summons and statement of claim - Are the most crucial processes to be examined (H7)

CONSTITUTIONAL LAW - Federal HC - Jurisdiction - 1999 Constitution s. 251(1)(p)(q)(r) - Applicability - To determine application of the provisions - Subject matter and parties in the action must be examined (H8)

JURISDICTION - Election - Nomination - The matter is not within exclusive jurisdiction of Federal HC - As relief 7 cannot be construed as challenging the decision of 4th respondent - In recognizing 1st respondent as candidate of CPC (H9)

COURT PROCESSES - Service - Fair hearing - Appellant having been duly served the originating process - But chose to ignore same - Should not complain but take the consequences (H10)

COURT PROCESSES - Service - Proof - As appellant filed no process to controvert proper service on him - Nothing exists in the record precluding trial court - From proceeding with the case (H11)

FAIR HEARING - Breach - Allegation of - The principle cannot avail appellant - As he was properly served with the process - And it is not for court to compel him to act on the opportunity presented (H12)

ACTIONS - Technicality - Effect - The Procedural irregularities in the matter - Did not adversely affect appellant - Nor occasioned any miscarriage of justice (H13)

FACTS

Before the High Court of Kano State, plaintiff/1st respondent

commenced this action against 1st defendant/appellant by originating summons, challenging the submission of name of appellant to 4th defendant/4th respondent by 2nd and 3rd defendants/2nd and 3rd respondents as their candidate for the April 2011 general election to represent the Nassarawa Local Government of the Federal Constituency of Kano State in the House of Representatives. Appellant was served with the originating process and an affidavit to that effect was duly sworn to and filed in the record of the court. On the hearing date, 2nd and 3rd respondent were represented in court, while appellant was neither around nor represented.

Notwithstanding appellant's absence, the court proceeded with the matter. Judgment was subsequently delivered in the matter in favour of 1st respondent. On his receipt of the judgment of the court, appellant quickly brought a motion seeking the court to set aside its judgment for non service of hearing notice. 1st respondent filed a counter affidavit against the application. The court heard and dismissed the motion. Aggrieved, appellant appealed to the Court of Appeal, Kaduna Division. 2nd and 3rd respondents cross-appealed on the validity or otherwise of appellant's amended Notice of Appeal and brief of argument. 2nd and 3rd respondents argued that the said Notice and brief of argument are incompetent as having been signed and filed by one M. K. Dabo Esq., an employee of the Nigerian Law school, Kano campus so long as such employment has been subsisting at all material times to the action. The court dismissed the appeal and cross-appeal. Dissatisfied, appellant appealed to Supreme Court, wherein he contends inter alia that the trial court lacked jurisdiction to entertain the action. 2nd 3rd respondents cross-appealed on the competence of appellant's Notice of Appeal and brief of argument.

ISSUES FOR DETERMINATION

Main Appeal

"(1) Whether the trial court was vested with jurisdiction to entertain the reliefs sought in the 1st respondent's Originating Summons.

(2) Whether the Appellant is entitled ex debito justitiae to have the judgment of the trial court on 3rd March set aside as a nullity?

Cross-Appeal

"Whether the court below was right when it held that it was not a proper forum to determine infraction of paragraphs 1 and 2 of

the 5th schedule of the constitution of the Federal Republic of Nigeria 1999 (as amended) and that it will be unfair to shut out the Appellant (1st Respondent)."

B HELD (Unanimously dismissing the appeal and cross-appeal per **CHUKWUMA-ENEH JSC**)

APPEALS - Reply brief - Purpose

1. I have at great pains endeavoured to capture to a large extent all the above issues re-argued and re-analysed in the appellant's reply brief notwithstanding that they have been dealt with in extenso in the main brief by the appellant. This is greatly deprecated and unacceptable. The position of a reply brief as provided in our Rules arises for the purpose of dealing with only new issues raised in the respondent's brief of argument and not otherwise. A reply brief is at its best when it deals with issues of law to rap up the issues so raised in the respondent's case vis-a-vis the appellant's case.

If I may emphasise the appellant's case in his reply brief is to react to any new issues particularly those that have been raised in the respondent's brief of argument but certainly not to re-argue and re-analyse the appellant's case all over again as that is what the appellant has done here. In such situations, the court's reaction is to ignore, indeed to discountenance such a reply brief. This court condemns the instant manner by which the appellant herein, has gone back to re-argue and re-analyse its case as extensively done in the main brief; indeed it is a replica so to speak of the main brief - thus putting the court to a most unnecessary strain. A reply brief if I may repeat is at its best when it deals on points of law. Therefore, I have decided to discountenance the instant appellant's reply brief in this appeal as repetitive of the main brief. (p. 3584 G)

H LEGAL PRACTITIONERS - Error - Effect on litigant

2. Let me say here that I do not however agree with the appellant's submission to the effect that in the event that Mr. Dabo's employment disqualifies him from preparing and sign-

ing court processes that the appellant Counsel's sin should not be visited on him. This clearly is a misconception of the principle of not visiting litigants with the sins of their Counsel. I find the cases such as Enyibros Food Processing v. NDIC & Anor. (2007) 9 NWLR (Pt.1039) 216 at 258H; Mains Ventures Ltd. v. Petroplast Industries Ltd. (2000) 4 NWLR (Pt.651) 151, referred to and relied on by the appellant as being incongruous in expatiation of his skewed perception of the foregoing principle and so have been wrongly applied in the circumstances. In regard to this principle each case has to be construed on its peculiar facts as a litigant is supposed not to be indifferent and indolent to his Counsel's conduct of his case. I say no more. (p. 3588 H)

Jurisdiction - Preliminary finding

3. The cross-appellants have charged the lower court of not having acted according to the law indeed of having chickened out from performing its judicial duty at voiding the said processes in the circumstances out of sheer sentiment or emotion in the matter. I can find no legitimate grounds for so holding. What the respondents seem to have overlooked is that the trial court has the power to make a preliminary finding to ascertain whether it has jurisdiction over a matter before it, that is before going into the main matter itself, such threshold proceeding does not ipso facto mean that the court has thus assumed jurisdiction over the cause. (p. 3593 B)

Jurisdiction - 1999 Constitution 5th schdl - Breach of

4. However I agree with the submission by the appellant/cross-respondent that the said 5th Schedule has by its paragraph 12 provided for what would otherwise occur in the event of any violations of the provisions of the said 5th Schedule by public officers that is to say, as a pre-condition to a follow-up of any breaches of the code; the said paragraph 12 provides as follows:

"Any allegation that a public officer has committed a breach of or has not complied with the provisions of this code shall be made to the code of conduct Bureau".

The foregoing provisions are clearly unambiguous and so construed literally mean that any breaches of any provisions of the said 5th schedule or matters of noncompliance with any provisions of the Code shall, (meaning that it is mandatory i.e. must) be made to the Code of Conduct Bureau that
B has established its Tribunal with the exclusive jurisdiction to deal with any violations of any provisions under the Code. If I may emphasise any violations shall be made to Code of Conduct Bureau. The provisions have made it mandatory to take
C any matters so covered by the 5th schedule (supra) to the code of conduct Bureau and not to any ordinary regular courts as has been done in this instance. If I may repeat the Code of Conduct Tribunal has been established with the exclusive jurisdiction to deal with all violations contravening any of the
D provisions of the Code as per paragraph 15(1). This provision has expressly ousted the powers of ordinary regular courts in respect of such violations. The Tribunal to the exclusion of other courts is also empowered to impose any punishments as specified under sub-paragraphs (2) (a), (b) & (c) of paragraph
E 18 as provided in sub-paragraphs 3 and 4 of paragraph 18 while appeals shall lie as of right from such decisions to the Court of Appeal. Simply put to tackle any violation of the code starts before the code of Conduct Bureau Tribunal to the court below on appeal and on a further appeal therefrom
F to this court. As can be seen the lower court exercises appellate jurisdiction over the Code of Conduct Tribunal and no more. (p. 3594 B)

G APPEALS - Notice of appeal - Validity

5. In sum the cross-appellants upon whom rests the burden to refer this matter to the Code of conduct Bureau have failed to discharge the same and in that regard have failed to make out any case of violations of the Code of Conduct by Mr. Dabo
H in the strict sense of the provisions of the 5th Schedule (supra). It follows therefore that the alleged violations of the Code of conduct by Mr. Dabo in so far as have not been so established as provided under the Code have no invalidating effect on the competency of the said processes and consequently

on this appeal before this court. For all this, therefore, there are no grounds to void or treat as voided the Amended Notice of Appeal and the appellant's brief of argument in this matter. Meaning that there is before this court a competent appeal as founded on the instant amended notice of appeal and the appellant's brief of argument hereof. Sequel to the above reasoning and conclusion I hereby dismiss the cross-appeals. B
(p. 3596 C)

JURISDICTION - Source

6. Before going any further in the discourse of this question of jurisdiction, I must reiterate that it is settled law that jurisdiction is the power from which courts do derive their authority to entertain matters placed before them for adjudication. It is a matter that is statutorily based; usually jurisdiction of courts of record is as provided in the constitution or Acts of the National Assembly and the jurisdiction of courts can only be removed or whittled down by express statutory provisions. D
(p. 3596 H)

JURISDICTION - Determination - Basis

7. To ascertain the jurisdiction of courts the facts of the case have to be examined and this leads to scrutinizing the pleadings filed by the parties particularly by the plaintiff in the case. In this respect as in the instant case the writ of summons and the statement of claim are the most crucial processes to be so examined. The Statement of Defence is not important in this regard. F
(p. 3597 B)

Federal HC - Jurisdiction

8. The poser that has arisen in the circumstances is whether it is enough as submitted by the appellant that once the action connects the Federal Government or any of its agencies such a matter without more falls within the purview of the Federal High Court to deal with. Respectfully, I hold the view also as observed in the above cited case that the provisions of Section 251(1) (p), (q) and (r) raise the consideration of both subject-matter of the cause of action and the parties in the ac- H

tion. In my view it is not just enough to identify and rely on such proposition of the law as per the appellant's case that the sole fact of the 4th respondent being an agency of the Federal Government as sued is conclusive of the issue; in other words without adverting to whether the subject-matter of the cause of action in the matter also comes within the exclusive purview of the Federal High Court to deal with. It would be wrong to proceed on that basis alone to hold in conclusion that the instant matter is completely within the exclusive ambit of the Federal High Court to deal with. What I am otherwise saying here is that to determine the applicability of the provisions of the said sub-sections 1(p), (q) and (r) of section 251 to an action, the subject-matter of the cause of action in the matter as well as the parties so sued in the action must be examined to ascertain, whether both factors which must co-exist have been so connected to the action as to bring the action within the purview of the provisions of the said section (i.e. section 251(1) (supra) for the action to come within the exclusive jurisdiction of the Federal High Court. I think the appellant has misconstrued the decision in NEPA v. Edegero (supra); and I hope that this short observation has corrected the misconception. (p. 3600 F)

Election - Nomination

9. In sum therefore there is no way Relief 7 can be construed as challenging the executive or administrative action or decision of the 4th respondent in performing an innocuous act of recognizing the 1st respondent as the candidate of the C.P.C. Meaning that the court below rightly has come to the conclusion that the instant action is not within the exclusive jurisdiction of Federal High Court but that both the Federal and State High Courts have concurrent jurisdictional competence to determine all the reliefs as claimed as per the instant Originating Summons and even moreso under section 87(10) (supra) which conferred on both Federal and State High Courts a concurrent jurisdiction in matter of nomination of candidates of a political party for elective offices. And so I resolve issue one against the appellant. (p. 3602 C)

COURT PROCESSES - Service - Fair hearing

10. On the accepted facts of this matter the appellant has been duly served the originating process but the appellant having chosen to ignore it, he has done so to his detriment and should not complain and has to take the consequences. B
(p. 3602 H)

COURT PROCESSES - Service - Proof

11. The proof of service in this regard is in the court file even though that evidence is rebuttable and not having been rebutted it has all the same spoken so eloquently of proper service on him. There is no countervailing evidence controverting the prima facie fact that court processes including the initiating process have been duly served on the appellant. That is, no counter-affidavit has been filed to controvert proper service. On the state of the law on the question, the burden is on the appellant to rebut the principle of regularity that attaches to the said document; it has not been discharged by the appellant. I am of the firm view that the action is valid as it has been properly constituted. The appellant has filed no processes after being properly served the affidavits in this case and so there is nothing in the court file to preclude the trial court from rightly proceeding with the case particularly in the absence of the appellant and any controverting further affidavits and even then on fast tracking the case. His right to fair hearing in the circumstances has not been breached. The mere fact of fast tracking the matter (i.e. in a speedy manner) does not necessarily affect the appellant's right to fair hearing. He has not showed how he has been adversely affected or has prejudiced his case. He has not showed how any miscarriage of justice in the matter has affected him. C
D
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F
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(p. 3603 A)

FAIR HEARING - Breach - Allegation of

12. Secondly the appellant has challenged the judgment of 3/3/2011 on the grounds of want of fair hearing. He has relied on section 36 of the 1999 constitution that has enshrined that principle into the Constitution. The principle of fair hearing H

demands that a party is afforded the opportunity to present his case in a trial and no more. Once the opportunity has been given to a party it does not lie in a court to compel the party to grab the opportunity and act on it. The facts of this case show precisely that the appellant has not availed himself of the opportunity to defend the action. After all he has been properly served with the originating process. There can be no doubt that any infraction of this principle (i.e. of fair hearing) vitiates the decision no matter how brilliantly conducted. It does not matter that the same conclusion would have been reached otherwise. As I said above the appellant has been duly put on due notice of the action. His application to set aside to the instant decision has not showed any inadequacies or omissions in the trial of the matter, nor any breaches as to his right to fair hearing or that any miscarriage of justice has been occasioned to him. I am of the view that the appellant has not made out any grounds under this head to warrant this court interfering with the concurrent finding of the two lower courts. That principle does not avail him. (p. 3603 F)

ACTIONS - Technicality - Effect

13. I do not think that minor irregularities as to abridgment of the period for entry of appearance has affected the decision so also his contention of hearing of the case on 3/3/2011 speedily to a conclusion. This is a quasi election matter that deserves expeditious disposition. These irregularities have not done any specific damage to the decisions of the two lower courts as I have said they have not adversely affect him nor prejudiced his case. In respect of these complaints of procedural irregularities by the appellant they have not affected the merits of the matter and so it is my view that they have not occasioned any miscarriage of justice either, in this matter. (p. 3604 C)

NOTABLE POINT OF INTEREST

RHODES-VIVOUR JSC

1. Affidavit of service – Prove of service by

An affidavit of service is not conclusive proof of service of process. The burden of proving service rest on the person asserting that there was service. An affidavit of service must contain details on the following, when, who, what, and where. The affidavit of service deposed to on the 25th of February 2011 contained depositions and details thus:

- (a) When was service - On the 25th February at 2.30 p.m. B
- (b) Who was served - Barrister Ismael Ahmed.
- (c) What was served - The originating process.
- (d) Where - at No 5 Gidado Road, Kano. (p. 3614 G)

REPRESENTATION

Oyetola Oshobi Esq. with him B.B. Lawal, D.J. Arasi, E.U. Pila (Mrs.); A.O. Utake and O.C. Obayuwana (Miss), for Appellant
Asamu Abubakar Esq., for 1st respondent with Lamu Bala, Esq
Christopher Oshomegie Esq., for 2nd and 3rd respondents with him D
Chief O.O. Obono-Obla; J.O. Obono-Obla; Stanley Ogbuokiri and Francollins Ugwu
Basher Isa Esq., for 4th respondent

CASES REFERRED TO

- Okesuyi v. Lawal (1991) 1 NWLR (pt. 661) 678
- Okafor v. Nweke (2007) All FWLR (pt. 368) 1016
- Obiweubi v. C.B.N. (2011) All FWLR (pt. 321) 208
- Abdulhamid v. Akar (2006) All FWLR (pt. 321) 1191
- Adeyemi v. Opeyori (1976) 9-10 SC 31
- Opili v. Ogbevu (1992) 4 NWLR (pt. 234) 184
- Ekulo Farms Ltd. v. U.B.N. Plc (2006) All FWLR (pt. 319) 895
- Skenconsult (Nig) Ltd. v. Ukey (1981) 1 SC 4
- NEPA v. Edeghero (2002) 18 NWLR (pt. 798) 79
- Ohakim v. Agbaso (2010) 19 NWLR (pt. 1226) 172
- Ibaku v. Ebini (2010) 17 NWLR (pt. 1222) 286
- Kwentoh v. Kwentoh (2010) 5 NWLR (pt. 188) 543
- Katto v. CBN (1991) 9 NWLR (pt. 214) 126
- Madukolu v. Nkemdilim (1962) 2 SCNL 341
- Eke v. Ogbonda (2006) 11-12 SC 31

STATUTES & RULES REFERRED TO

Constitution of Federal Republic of Nigeria 1999, ss. 6(6),

251(1)(p)(q)(r)

Electoral Act 2010 (as amended), s. 87(10)

Evidence Act 2011, ss. 113, 116

Legal Practitioners Act LFN 2004, s. 8(1)

Kano State High Court (Civil Procedure Rules 1988), O. 12 r. 2, O.
B 13 r. 1(2)

LEAD JUDGMENT BY CHUKWUMA-ENEH JSC

C This appeal is against the decision of the Kaduna Division of the Court of Appeal dismissing the decision of the Kano State High Court as that court also earlier on has dismissed the appellant's application to set aside its proceedings on the grounds that they are a nullity.

D Aggrieved by the decision the appellant has appealed to this court predicated his grounds of appeal as per the Amended Notice of Appeal deemed properly so filed and served on 13/11/2012. The appellant has filed a brief of argument and therein has raised two issues for determination as follows:

E *"(1) Whether the trial court was vested with jurisdiction to entertain the reliefs sought in the 1st respondent's Originating Summons (distilled from grounds 1 and 2 of the Amended Notice of Appeal).*

F *(2) Whether the Appellant is entitled ex debito justitiae to have the judgment of the trial court on 3rd March set aside as a nullity? (Distilled from grounds 3, 4, 5 and 6 of the Amended Notice of Appeal)."*

G From the manner the parties have reacted to the main appeal and the cross-appeals filed in this matter, I think I should firstly identify all briefs of argument as exchanged between the parties particularly so as the respondents have broken themselves into three sets of respondents.

H The 1st respondent's brief of argument deemed filed on 13/11/2012 has raised two identical issues as the ones raised by the appellant in his brief of argument. I do not therefore, see the need of replicating the same all over again here. The 2nd and 3rd respondents have also filed a joint respondent's brief of argument and have therein raised one issue for determination, which incidentally is also identical to issue one as raised by the appellant in his main brief. The

4th respondent in its brief of argument filed in this appeal has also raised a sole issue for determination; it is identical to issue one as in the appellant's main brief of argument; again, I do not see the need to replicate the same here. The appellant's reply brief of argument to the 1st, 2nd and 3rd respondents' briefs of argument is filed on 11/12/2012, so also filed is the appellant's reply brief to the 4th respondents brief of argument. B

Alhaji Nasiru Ahmed as a cross-appellant in this matter otherwise known as the 1st Respondent/cross-Appellant has filed a brief of argument in the cross-appeal and is deemed properly filed and served on 13/11/2012. His counsel - Adamu Abubakar Esq. has raised a sole issue for determination in the cross-appeal as follows: C

"Whether the court below was right when it held that it was not a proper forum to determine infraction of paragraphs 1 and 2 of the 5th schedule of the constitution of the Federal Republic of Nigeria 1999 (as amended) and that it will be unfair to shut out the Appellant (1st Respondent)."

The 2nd and 3rd respondents also as cross-appellants have also filed a joint cross-appeal in this matter; consequently they have filed a joint 2nd and 3rd respondents/cross-Appellants' brief of Argument deemed properly filed and served on 13/11/2012 and have therein raised a sole issue for determination as follows: E

Whether the court below having held that *"All that I can say on the issue is that schedule to the Constitution is an integral part of the Constitution and any law or Act in consistence with its provision is null and void to the extent of its inconsistency"* can be heard to say, *"it will be most unfair to the Appellant to be shut out of these proceedings by holding that both the Amended Notice of Appeal and the Brief of Argument filed on his behalf are incompetent simply because the Counsel who filed them is in full salaried employment"* simply because the lower court felt it was not the proper forum. F

The 4th respondent has not cross-appealed and so has filed no brief of argument in regard to that cause.

The Appellant/1st cross-respondent has filed and served his brief of argument to take care of the briefs severally filed by the 1st respondent/cross-appellant on the one hand and the 2nd and 3rd cross-appellants on the other hand. In the said brief of argument has been raised a sole issue for determination as follows: H

“Whether the 1st cross-respondent’s appeal the court below was incompetent by virtue of paragraphs 1 and 2 of the code of conduct for public officers as contained in the 5th Schedule to the Constitution of the Federal Republic of Nigeria 1999 (as amended).”

The 1st respondent’s (as the plaintiff) claim at the trial court as
B contained in pages 3-4 of the Record of Appeal are as follows:

“(1) Declaration that the plaintiff is the duly elected flag bearer of the 2nd Defendant for the April 2011 general election into the House of Representatives to represent Nasarawa Federal Constituency of Kano State having polled the majority of the lawful votes cast at the primary election conducted by the 2nd Defendant on the 9th day of January 2011, and was so declared the winner.”
C

“(2) Declaration that the nomination of the 1st Defendant as 2nd Defendant candidate or flag bearer for the April 2011 general election for the seat of member of the House of State Representative to represent Nasarawa Federal Constituency is ultra vires, null and void same not being in accordance with the declared results at the primary election conducted on the 9th day of January 2011 in which the plaintiff polled 8,653 votes while the 1st Defendant scored 1,888 votes respectfully.”
D
E

“(3) AN ORDER nullifying the nomination of the 1st Defendant and the substitution of the plaintiff by the 2nd Defendant as its candidate for the election into the National Assembly for the seat of Member of the House of Representatives representing Nasarawa Federal constituency of Kano State.”
F

“(4) AN ORDER directing the 2nd and 3rd Defendants to forthwith accord the plaintiff his due recognizing as their flag bearer for the April 2011 general election into the National Assembly for the seat of Member of House Representatives to represent Nasarawa Federal Constituency of Kano State.”
G

“(5) AN ORDER OF PERPETUAL INJUNCTION restraining the 2nd and 3rd Defendants from recognizing, acting or doing anything in recognition of the nomination and selection of the 1st Defendant as the 2nd Defendant’s candidate for the forthcoming April general election into the National Assembly for the seat of member of House of Representatives, to represent Nasarawa Federal constituency of Kano State in the National Assembly.”
H

“(6) AN ORDER nullifying the purported nomination of the 1st

Defendant as its flag bearer to contest for the seat of the House of Representatives representing Nasarawa Federal constituency of Kano State in forthcoming general elections scheduled to hold in April 2011.

(7) DECLARATION that the 4th defendant should not recognize or accord any recognition to the name of Barrister Ismael Ahmed or any name other than that of NASIRU ALI AHMED as the C.P.C. candidate for the House of Representatives to represent Nasarawa Federal constituency of Kano state.”

It is on the basis of the foregoing reliefs that the matter has been heard before the trial court on 3/3/2011. The trial court having heard the matter granted all the reliefs that have been sought by the plaintiff/1st respondent in this court including relief 7 in the storm’s eye in this appeal; and he has accordingly been declared the winner of the election into the House of Representatives to, represent Nasarawa Federal Constituency. This is so even as it is contended by the Appellant that the entire proceeding at the trial court is a nullity in that he has not been served the initiating process i.e. the originating Summons and/or any hearing notice to inform him of the date fixed for hearing of the matter at the trial court. Consequently, the appellant by an application filed before the trial court has applied to set aside the said decision of the trial court *ex debito justitiae* on the grounds of nullity of the action - for non service of the aforesaid processes on him. The trial court on having heard the application to set aside its decision has dismissed the same hence the appeal to the court below against the Ruling of the trial court on the said application; on its part the court below has also dismissed the appeal.

Aggrieved by the said decision the appellant has appealed to this court upon the aforesaid Amended Notice of Appeal as argued in his aforementioned brief of argument.

For non service on him of the originating summons and the hearing notice in this case the appellant in his main brief of argument has raised the absence of jurisdiction of the trial court also that the action has not been competently initiated. And has rightly submitted that in determining a court’s jurisdiction, it is only the plaintiff’s claim that has to be considered. See: *Tukur v. Government of Gongola State* (1989) 4 NWLR (pt. 117) 517 at 549B, *Adetona v. Igele General Enterprises Ltd.* (2011) 7 NWLR (Pt.1247) 535 at 551, *Obiweubi v. C.B.N.* (2011) All FWLR (Pt.321) 208 at 241D,

Abdulhamid v. Akar (2006) All FWLR (Pt.321) 1191 at 1204E, Adeyemi v. Opeyori (1976) 9-10 SC 31 at 49, and Opili v. Ogbeivu (1992) 4 NWLR (Pt.234) 184 at 185. He also has contended that in view of the 4th respondent being an agency of the Federal Government, as sued, that the trial court being a State High Court cannot by virtue of the provisions of section 251 (1) (p), (q) and (r) of the 1999 Constitution (as amended) notwithstanding its proviso (conferring jurisdiction to the State High Courts under certain conditions provided therein) exercise any jurisdiction over the case. That is to say, on the facts that the Federal High Court has exclusive jurisdiction in this matter and clearly moreso in the light of Relief 7 of the claim alone; on it having been raised against the 4th respondent as an agency of the Federal Government; that is considering the question as regards the 4th respondent particularly on the background of the clear provisions of Section 251(1) (p) and (r) (supra) albeit to wit:

“(p) the administration or the management and control of the Federal Government or any of its agencies.

(r) any action or proceedings for a declaration or injunction (underlining for emphasis only)”.

He has contended that Relief 7 being the principal claim that the 1st respondent as the plaintiff in the suit has thus challenged the executive as well as the administrative action/decision of the 4th respondent in recognizing the 1st respondent as the candidate of the 2nd respondent in this appeal. In furtherance of this argument the appellant has denounced the contention that section 87(10) of the Electoral Act 2010 (as amended) an extant Act of the National Assembly has apparently vested in both Federal and State High Courts with a concurrent jurisdiction in this matter; furthermore that the provisions of Section 87(10) (supra) being inconsistent with the Constitution by virtue of Section 1 (3) of the 1999 Constitution (as amended) are void to the extent of their inconsistency with the Constitution. See Ekulo Farms Ltd. v. U.B.N. Plc (2006) All FWLR (Pt.319) 895 at 918F and Fasakin Foods Nig. Ltd. v. Shosanya (2006) All FWLR (Pt.320) 1059 at 1076-1077.

He has also submitted that the Federal High Court has jurisdictional competence to entertain all the reliefs as sought in this claim including Relief 7 as against the State High Court that has no jurisdiction over Relief 7 which is clear when considered on a community

reading of the provisions of section 87(10) and section 251(1) (p) and (r) (supra) thus bringing to bear on this matter the principle established in the case of Tukur v. Government of Gongola State (supra) i.e. to the effect that as between the two sets of courts a matter as this case should be heard by a court with jurisdiction over all the reliefs as sought in the substantive claim. And that it is improper for the trial court as a State High Court to have exercised jurisdiction over the matter as it has no vires in regard to relief 7 involving the 4th respondent - an agency of the Federal Government. See: NEPA v. Edegero (2002) 18 NWLR (Pt.798) 79. He makes the point that the issue of jurisdiction being so fundamental can be taken at any stage of the proceedings even at the apex court hence it has been so raised here on the ground of the critical subject-matter in this case. See: Nwankwo v. Yar'Adua All FWLR (Pt.534) 1 at 28 A-C; Ohakim v. Agbaso (2010) 19 NWLR (Pt.1226) 172; Ibaku v. Ebini (2010) 17 NWLR (pt.1222) 286 at 315 B-D; Kwentoh v. Kwentoh (2010) 5 NWLR (Pt.188) 543 at 567, Katto v. CBN (1991) 9 NWLR (Pt.214) 126 at 149 D and Madukolu v. Nkemdilim (1962) 2 SCNLR 341. He has urged that issue one be resolved against the respondents.

On Issue 2:

Whether the appellant is entitled *ex debito justitiae* to have the judgment of the trial court on 3rd March 2011 set aside as a nullity.

In answering this poser in the affirmative the appellant has submitted that the decision of the trial court has breached the appellant's right to fair hearing by non-service of the originating summons and the hearing Notice on the Appellant personally amounting as he contends to failing to afford the appellant the opportunity of being heard in the case at the trial and he refers to personal service as required under order 12 Rule 2 of the Kano State High Court (Civil Procedure Rules 1988). He has queried the validity of the proceedings of 3/3/2011 on the grounds of non service of the initiating processes and hearing Notice and has submitted that the instant proceedings having been so afflicted by these vices and are therefore null and void and of no effect. See: Eke v. Ogbonda (2006) 11-12 SC 31 at 53, Tsokwa Motors (Nig) Ltd. v. U.B.A. (2008) 1 SC (pt.1) 1 at 15, Skenconsult (Nig) Ltd. v. Ukey (1981) 1 SC 4 at 15. And again, that a person who asserts service of a process as here bears the burden of

proof and that on the facts of this matter that the burden in this regard rests squarely on the 1st respondent who has asserted service of the said processes on him; and that burden he contends has remained undercharged. See: *Imana v. Robinson* (1979) 3-4 SC (Re-print) at 6-7. He has charged the trial court of having failed to make
B a specific finding of whether or not the defendant has been so served the aforesaid processes. And has submitted that failing to do so as enjoined by law and decided authorities has rendered its subsequent decision in the matter a nullity.

C He has challenged the finding of the court below that he should have sought leave to raise and argue fresh issues in the appeal and has decried the fact that the court below has raised the question suo motu, even when his complaints have attacked the authenticity of the affidavit of service based on the valid grounds of appeal raised in
D the Amended Notice of Appeal, which have emanated from the final judgment of the court below. In other words, that his complaints are founded on valid grounds of appeal emanating from the ratio decidendi of the final judgment of the trial court and they relate to patent and latent deficiencies, omissions and inconsistencies in the said affidavit of service and do not require any further evidence to sustain
E them and so require no leave for appealing in the cause. And that all the furore raised by the respondents in this regard have been so taken without the appellant's attention having been firstly drawn to the contentions before the findings. Nonetheless that all the grounds
F of appeal in this matter have all the same attacked the ratio decidendi of the Ruling and therefore are competent. On the question of affidavit of service and with regard to the crucial averments as contained in the affidavit supporting the Originating Summons vis-a-vis the concurrent findings on the said affidavit of service as prima facie proof of
G service on him, he has posited that there is nothing in the said affidavit of service to show that a hearing notice has also been served along with originating process on the appellant so as to notify the appellant of the hearing date of 3/3/2011. And that failing to serve the Appellant the aforesaid two processes has denied him of his right to fair
H hearing at the trial court as the proceedings have been carried out in absolute defiance of his constitutional right to fair hearing and so the findings are perverse. He submits that it is most expedient for this court in the light of the foregoing breaches of his rights to fair hearing

to intervene to set aside the concurrent findings of the two lower courts *ex debito justitiae*. The court is urged to so intervene.

The appellant has also highlighted on the other omissions and blunders by trial court that have culminated to deny the appellant the opportunity to be heard at the trial; and they include the finding by the court below that failure to adhere to the eight days period for entry of appearance as allowed to the appellant under the Rules on the facts of this matter is a mere irregularity. Again, the appellant has castigated the foregoing finding as untenable on a proper construction of the provisions of order 13 Rule 1(2) of the Kano State High Court Rules; and has submitted therefore that the court below wrongly on the foregoing flawed premise has affirmed the trial court's decision in this matter. He has maintained as an unsustainable proposition of the law the trial court finding as affirmed by the lower court to the effect that the proceedings to enter final judgment on the same day the matter has first come for hearing at the trial court even when the period for entry of appearance by the appellant has not expired is also a mere irregularity. Thus the appellant has challenged the unwarranted fast tracking of the instant proceedings as not justifying conducting and concluding of the proceedings in this case before the trial court within the time frame stipulated under the Rules for the appellant to enter appearance in the case. In this regard he has distinguished the instant case from the case of *Duke v. Akpabayo Local Government* (2005) 12 SCNJ 280; (2005) 19 NWLR (pt.959) 130. See also *Inakoju v. Adeleke* (2007) All FWLR (pt.333) 2 at 302. The appellant therefore has submitted that the cumulative effect of the foregoing submissions if I may come again, is that the appellant has inter alia been denied his right to fair hearing, as he has not been allowed the 8 days after the alleged service of the originating summons on him to enter appearance according to the Rules, which event has vitiated the entire proceedings at the trial and lower courts thus rendering their respective decisions null and void and of no effect and should be set aside *ex debito justitiae* and the appellant has so urged the court.

The 1st respondent responding in his brief of argument on the question of jurisdiction of the Federal and State High Courts in this matter has rightly submitted that the court must carefully examine the pleadings filed by the parties in the cause or matter and in this

matter that the originating Summons and the affidavit in support thereof are materials to be scrutinized to ascertain and determine the question of jurisdiction. See: *Adeyemi v. Opeyori* (1976) 9-10 SC 31

Having referred to the facts as per paragraphs 16, 17, 18 and 19 of the supporting affidavit, he has opined that section 251(1) (supra) does not confer on the Federal High Court a blanket exclusive jurisdiction in all cases involving the Federal Government and its agencies and that the court in determining the question particularly as the provisions of the section have been itemized in other words showing that the section is a clear instance when jurisdiction of a court is not completely exclusive, albeit that against such backgrounds a court in determining its jurisdiction must consider not only the parties to the suit but also the subject-matter of litigation and so should not limit itself to the reliefs alone as claimed in an action. And that having on the facts of this matter examined the sub-sections 1(p) and 1(r) of section 251(1) (supra) that the 4th respondent (a Federal Government Agency) on the facts of this matter has neither taken nor made any act in exercise of any executive or administrative action or decision in the scenario that has emerged from the facts of this matter and so has submitted that the plaintiff has rightly instituted the action by way of Originating Summons supported by an affidavit. See: *Tukur v. Government of Gongola State* (supra) at p.549. Furthermore that the trial court and court below have rightly held that the action is not directly against the 4th respondent; and so that both Federal and State High Courts have concurrent jurisdiction to entertain all the reliefs as per the instant claim upon a community construction of sec. 87(10) of Electoral Act and section 251(1) (p), (q) and (r) (supra). In that event that the trial court has rightly assumed jurisdiction in the matter. The court is urged to hold accordingly.

On Issue 2:

The 1st respondent has submitted that non service of processes does not automatically per se render a proceeding a nullity unless it is showed that the principle of fair hearing as enshrined in Section 36 of the 1999 Constitution as amended has also been breached. See: *Ramon v. Jinadu* (1986) 5 NWLR (Pt.39) 100. The 1st respondent has strongly contended that it arises where there is no service of the process at all but not where as in this case there is a dispute as to service or manner of service as what is required in that event is evi-

dence to prove service of the processes. And even though the same is rebuttable that it is a question of fact that the affidavit of service has been filed in the court file and that by section 168 of the Evidence Act it is presumed to be regular and a prima facie proof of the facts contained therein. See: Okesuyi v. Lawal (1991) 1 NWLR (Pt.661) at 678. Furthermore, that there is no Counter Affidavit by the appellant controverting the affidavit of service specifically. Meaning that the appellant has not discharged the evidential burden of proof on the question. See: Attorney General of Anambra State & ors. v. Ephraim Okeke & Ors. as per: SC.102/997 delivered on 27/5/2002.

The 1st respondent has contended that the appellant's attempt to disparage the authenticity of the affidavit of service based on the grounds of appeal being of mixed law and facts requiring leave of court has not taken off at all and even then that a defective affidavit in form may be used under section 113 of the Evidence Act where the court is satisfied that it has been sworn before a person duly authorize to do so as in this case; and that the trial court rightly has relied on the said affidavit of service to reach its decision. On the conflicts between the affidavits in support vis-à-vis the affidavit of service that the same is denied but if at all there have been any conflicts in the said affidavits that the same are resolvable on grounds of law or on the available documentary evidence before the trial court. Therefore he submits that there are no deficiencies diminishing the probative value of the said affidavit of service as the deficiencies omissions and conflicts raised against the affidavits have not been established by fresh evidence and so that all the same it constitutes a prima facie evidence of proper service on the appellant. See Nwosu v. Imo State Environ. Sanitation Authority (1990) 1 NWLR (Pt.135) 688.

The appellant has also raised the question of fast tracking the proceedings to his detriment even then within the time frame allowed him to enter appearance in the matter. In that regard the respondent has charged the appellant of indifference and indolence hence his absence at the hearing on 3/3/2011 and that the matter being a pre-action matter requires timeous and expeditious disposition of the same as it would have otherwise occasioned gross injustice to the 1st respondent. On the question of hearing notice and its non-service on the appellant, the respondent has said in reply that it is not resorted to in all cases and that it so on the facts of this matter. See:

Nirchandani v. Pinheiro (2001) All FWLR (Pt.48) 1307. He has castigated the appellant's case for obvious inadequacies including non-filing of further affidavits to challenge the respondent's supporting and further affidavits on the alleged irregularities as they have not occasioned any miscarriage of justice. See Maja v. Samouris (2002) 3 B SCNJ 29 at 45.

On the entry of appearance of 8 days as allowed by the Rules as well as speeding of hearing of the matter within the time frame of 8 days allowed the appellant to enter appearance on 3/3/2011 and having cut short the appellant's time frame to react to the alleged service of the originating summons vis-a-vis his right to fair hearing; the 1st respondent has replied that the cumulative effects of all these short-comings as irregularities are not capable of vitiating the instant proceedings without more. The case of Duke v. Akpabuyo L. C. D (2005) 12 SCNJ 280 at 293 has been contrasted with the case of Pam v. Mohammed (2008) 16 NWLR (Pt.1112). It is submitted by the 1st respondent that the principle laid down in the latter cited case does not apply here as the significance of hearing notice has not arisen in the matter. The court is urged to dismiss the appeal.

E In setting out the issues for determination in this appeal I have underscored the same by observing that the respondents have opted to adopt the issues as raised by the appellant.

The 2nd and 3rd respondents in their joint brief of argument as well as the 4th respondent in its brief of argument have raised F therein two similar issues for determination which are in pari materia with the 1st respondent's issue for determination. They have also pursued and proffered similar reasoning and inferences in response thereof and in view of the treatment of the two issues raised by the G appellant as per the discourse in the 1st respondent's brief of argument herein, which I have examined and dealt with in-depth as per the foregoing resume I do not think it serves any useful purpose traversing the respective briefs of these two sets of respondents in any repetitive details and moreso on grounds of undue prolixity. H Therefore for purposes of complementing my review of their respective cases, I have simply listed their conclusions as per their respective briefs of argument in this appeal as representing the pillars of their arguments in their respective cases in opposition to the appellant's case in this appeal and moreso as their stance as well as that of the 1st

respondent on these issues is ad idem.

The 2nd and 3rd respondents in their joint brief of argument have urged this court to affirm the lower court's decision which also has affirmed the trial court's decision for the following reasons:

(a) That the trial court has jurisdiction to have entertained the suit. B

(b) That the appellant was duly served but choose to evade the court.

(c) That the appellant was afforded adequate opportunity to put forward his defence which he failed to do. C

(d) That the appellant's case is unsupportable being a case founded on unjust and inequitable claim.

(e) That it is only 2nd respondent and the court that can determine its candidate which they have done in this appeal.

(f) That the courts do not interfere in the internal matter of nomination of candidate by political parties. D

Having rested their case on the foregoing reasons as adumbrated in their joint brief of argument, the court is urged to dismiss the appeal and affirm the concurrent finding of the two lower courts in this matter. E

The 4th respondent in support of its case that the judgment of 3/3/2011 is not a nullity but is valid has premised its reasons for so submitting on the following reasons:

(a) That the trial court had jurisdiction to hear all the reliefs sought on the originating summons. F

(b) The hearing and determination of the originating Summons before the expiration of 14 days allowed by the Rules of court to enter appearance is a mere irregularity.

(c) The appellant did not suffer injustice by the non compliance with the 14 days allowed by the Rules as he had ample opportunity to defend the suit but failed to do so.

(d) The appellant's right to fair hearing was not breached in the circumstances of the suit.

Having so submitted as per its brief of argument the 4th respondent has urged the court to dismiss the appeal and affirm the judgments of the trial court and the lower court in this matter.

The appellant has on 11/12/2012 filed a reply brief in response to the respective briefs of argument filed by the 1st respondent on

the one hand and the 2nd and 3rd respondents on the other hand. The appellant in the reply brief has proceeded to proffer submissions to the respondents' arguments under the said two issues formulated by the appellant in his main brief of argument. The appellant has in his brief dwelt on the questions of whether the appellant has been
 B served with the originating process and/or a hearing notice in this matter at the trial court, the affidavit of service and the question of its authenticity on the backdrop of the principle of prima facie proof of service on him vis-a-vis there being no counter-affidavit controverting the further affidavits filed by the appellant in regard to the affida-
 C vit of service and the supporting affidavit; on the question of having raised fresh issues without leave and the appellant's reply to the effect that all the grounds of Appeal in the Amended Notice of Appeal have emanated from the judgment of the court below and that not
 D being outside it, he does not require leave of court; indeed that they, each of them, have attacked the ratio decidendi of the decision; and that sections 113 and 116 of the Evidence Act 2011 are inapplicable to the case. He has adverted to the question that pre-election matters as the instant one have to be expeditiously and timeously disposed of
 E which do not justify the unwarranted speed of the proceedings at the trial court, otherwise amounting to breaching of his right to fair hearing.

On the question that the proceedings are liable ex debito justitiae to be set aside as a nullity for the following grounds: non-service
 F of the originating process and/or a hearing notice and not having been given 8 days according to the Rules of court to enter appearance and the abridgment of the time of hearing the instant matter by the trial court and so culminating in depleting the period for entry of
 G appearance - all these alleged postulations he has contended have led to a denial of fair hearing in the matter. He has relied on these grounds to submit that the two lower courts have erred in not having given judgment to him ex debito justitiae.

***I have at great pains endeavoured to capture to a large
 H extent all the above issues re-argued and re-analysed in the appellant's reply brief notwithstanding that they have been dealt with in extenso in the main brief by the appellant. This is greatly deprecated and unacceptable. The position of a reply brief as provided in our Rules arises for the purpose of deal-***

ing with only new issues raised in the respondent's brief of argument and not otherwise. A reply brief is at its best when it deals with issues of law to rap up the issues so raised in the respondent's case vis-a-vis the appellant's case.

If I may emphasise the appellant's case in his reply brief is to react to any new issues particularly those that have been raised in the respondent's brief of argument but certainly not to re-argue and re-analyse the appellant's case all over again as that is what the appellant has done here. In such situations, the court's reaction is to ignore, indeed to discountenance such a reply brief. This court condemns the instant manner by which the appellant herein, has gone back to re-argue and re-analyse its case as extensively done in the main brief; indeed it is a replica so to speak of the main brief - thus putting the court to a most unnecessary strain. A reply brief if I may repeat is at its best when it deals on points of law. Therefore, I have decided to discountenance the instant appellant's reply brief in this appeal as repetitive of the main brief.

The 1st respondent as well as the 2nd and 3rd respondents have raised cross-appeals on identical subject-matters in this appeal. The cross-appellants by notices of appeal filed in this matter have challenged the competence of both the Amended Notice of Appeal and the brief of argument filed by the appellant as having been signed and filed by one M. K. Dabo Esq., an employee of the Nigerian Law school, Kano campus as being incompetent so long as such employment has been subsisting at all material times to this action. The lower court in its judgment has inter alia said:

"I agree with the learned counsel to the Appellant that these are not the issues to be appropriately decided in this appeal. They happen to be issues that should be raised separately in a different forum. It cannot be decided within an appeal. Apart from this, it will be most unfair to the appellant to be shut out of these proceedings by holding that both the amended Notice of Appeal and the Brief of Argument filed on his behalf are incompetent simply because the Counsel who filed them is in full salaried employment".

Sequel to the foregoing the lower court has not rejected the said processes but has relied upon them in coming to a decision that the appellant's appeal has no merit. Aggrieved by this finding the 1st

respondent/cross appellant and the 2nd and 3rd joint respondents/cross appellants have appealed the finding to this court. The respondents have filed two separate briefs. The 1st respondent/cross-appellant in its brief of argument deemed filed on 13/1/2012 has formulated a sole issue for determination as follows:-

B *“Whether the court below was right when it held that it was not a proper forum to determine infraction of paragraph 1 and 2 of the 5th Schedule of the Constitution of the Federal Republic of Nigeria 1999 (as amended) and that it will be unfair to shut out the Appellant (1st Respondent).”*

C It is submitted that the courts is vested with the power to give effect to any law or legislation and to interpret and apply all provisions of the Constitution and that the instant matter has raised a constitutional question which the court established under s. 6 (6) of the D 1999 constitution (as amended) as the trial court is bound to interpret and enforce. See: Attorney General of Bendel State v. Attorney General of the Federation (1982) 2 NCLR 1. And that the rights accorded Mr. Dabo (Appellant’s Counsel) by Section 8(1) of the Legal Practitioners Act, Laws of the Federation of Nigeria 2004 is not at E large as the same are subject to certain limitations and that he is bound by Section 172 of the Constitution that *“a person in the Public Service of the Federation shall observe and conform to the code of conduct”* as per the 5th schedule to the 1999 Constitution (as amended); F while S.318 of the said Constitution has defined the phrase, *“Public Service of the Federation”* to mean *“the service of the Federation in any capacity in respect of the Government of the Federation”* and includes as (a), (b), (c), (d), (e) and (f):- Staff of any Educational G the Federation”. He refers to and relies on the 5th schedule of the constitution paragraphs (1) and (2) to submit that a public officer should not put himself in a position where his personal interest conflicts with his duties and responsibilities. Again he also refers particularly to paragraph 2(b) of Part 1 of the 5th Schedule to submit that it H must be construed to forbid a person called to bar with its constitutional restriction from maintaining a private office, signing and filing legal processes. See: F.R.N. v. Osahon (2006) 5 NWLR (Pt.973) 361 and Fawehinmi v. N.B.A. (1984) 4 SCNJ. It is observed that paragraph 18(6) of the 5th schedule has given to the Code of conduct

Tribunal exclusive jurisdiction in such matters and that it does not matter at what forum the breach has occurred. See: Attorney General Abia State v. Attorney General of the Federation (2002) All FWLR (Pt.101) 1419 and F.R.N. v. Osahon (2006) All FWLR (Pt.312) 1975 at 2001. The 1st respondent/cross-appellant relying on Shettima v. Goni (2012) All FWLR (pt.609) 1007 has admonished that the law courts are no places for emotion or sentiment in discharging their duty. See: Okafor & ors. v. Nweke & Ors (2007) All FWLR (Pt. 368) 1016. And so that the appellant should bear the consequences of having to retain an incompetent counsel to do his case. Also he has relied on Rule 8 of Professional Conduct for Legal Practitioners 2004 forbidding lawyers from preparing and signing documents for their employers as pertinent to this matter. And that the appellant's Counsel being knee-deep in these violations has rendered the Amended Notice of Appeal along with the appellant's purported brief of argument signed by Mr. Dabo incompetent and liable to be struck out. The court is urged to allow the cross-appeal and set aside the decision of the court below accordingly.

The 2nd and 3rd respondent have also filed a joint respondent/cross appellant's brief here and have therein formulated a sole issue for determination although differently couched all the same is in pari materia with the said issue as formulated by the 1st respondent/cross appellant.

The arguments submitted on their behalf fall in line and in tandem with the above arguments as rendered on behalf of the 1st respondent. I do not therefore see in that regard the necessity of repeating myself all over again as it has covered their case hereof. It has been urged for the 2nd and 3rd respondents/cross-appellants to allow the appeal, set aside the Amended Notice of Appeal and the appellant's brief of argument in this appeal as prepared and signed by Mr. Dabo being incompetent and to hold that there is no competent appeal after all before the lower court.

The Appellant/1st Cross-Respondent has filed a composite brief of argument in response to the 1st, 2nd and 3rd Respondents/cross-Appellants' briefs of argument in this appeal and has also distilled a sole issue for determination as follows:

"Whether the 1st Cross-Respondent's appeal before the court below was incompetent by virtue of paragraphs 1 and 2 of the code

of conduct for Public officers as contained in the 5th schedule to the constitution of the Federal Republic of Nigeria (as amended)”.

Having set out the provisions of paragraphs 1 and 2 of the 5th schedule (supra) he submits that their consideration holds the key to resolving this matter as to whether the said provisions in the circumstances have been breached by Mr. Dabo. He interpolated that no provisions of the aforesaid provisions have been breached by Mr. Dabo by preparing and/or signing the said processes. It is contended that Mr. Dabo is not precluded from practicing his profession by any of the aforesaid provisions. See: F.R.N. v. Osahon (supra); and referring to Okafor & Ors. (supra) it is submitted as inapplicable to the facts of this case as neither of the aforesaid processes has been signed in the name of a law firm. It has been contested whether by preparing and signing of these processes do amount albeit to violating of the said provisions so as to have rendered the said processes incompetent. He has submitted that the said violations have not rendered the said processes incompetent. He makes the point that by the provisions of paragraph 12 of Part 1 of the said 5th Schedule (supra) that any violations of the said provisions shall be made to the Code of conduct Bureau; moreover that the cross-appellants ought to have acted in the manner so prescribed in the said paragraph where they have perceived any violations of the code as is being alleged here. And that failing to do so has maximally faulted their case in that regard. And so, the court below is right in holding that it is not the proper forum to entertain issues relating to the violations of the said provisions of the 5th schedule (supra). In this regard he has relied on paragraphs 15 & 18 of the 5th schedule (supra). And furthermore that the lower court has an appellate jurisdiction over the decisions of the code of conduct Tribunal as an appellate Tribunal thereof but no original jurisdiction in matters conferred on code of Conduct Bureau per se. And that the appellant cannot be made to suffer for Mr. Dabo's violation of the said provisions as the proper forum where to lodge the complaint is with code of conduct Bureau.

Let me say here that I do not however agree with the appellant's submission to the effect that in the event that Mr. Dabo's employment disqualifies him from preparing and signing court processes that the appellant Counsel's sin should not be visited on him. This clearly is a misconception of the

principle of not visiting litigants with the sins of their Counsel. I find the cases such as Enyibros Food Processing v. NDIC & Anor. (2007) 9 NWLR (Pt.1039) 216 at 258H; Mains Ventures Ltd. v. Petroplast Industries Ltd. (2000) 4 NWLR (Pt.651) 151, Nwani v. Bakari (2007) 1 NWLR (pt.1015) 335 at 346 B-C and Doherty v. Doherty (1964) 1 NWLR 144, referred to and relied on by the appellant as being incongruous in expatiation of his skewed perception of the foregoing principle and so have been wrongly applied in the circumstances. In regard to this principle each case has to be construed on its peculiar facts as a litigant is supposed not to be indifferent and indolent to his Counsel's conduct of his case. I say no more.

Coming back to this matter there is no doubt that if Mr. Dabo has signed the processes when incompetent to do so, the incompetency robs the processes of any validity. The court is urged to discountenance the citation of Rule 9 of the Rules of Professional conduct for Legal Practitioners 2007 as inapplicable and irrelevant in this matter. And finally it is contended that there is nothing in the 5th schedule (supra) to render incompetent the aforesaid processes filed by the appellant thus rendering the instant cross-appeals frivolous, vexatious and oppressive and there is much sense in this submission based on the facts of this case. The court is urged to dismiss the respondents' cross-appeals with heavy costs as an abuse of the court's process.

I have painstakingly set out most comprehensively the respective cases as per the parties' briefs of argument and oral submissions before us in open court. The scenarios that have emerged in this matter have resulted in the substantive appeal vis-à-vis the cross-appeals as I have set out herein as having clearly dictated upon their peculiar facts that the proper starting point to unraveling this matter is firstly to consider the cross-appeals which have challenged the competency of the Amended Notice of Appeal (i.e. an initiating process) and the appellant's brief of argument in the substantive appeal. Without these two processes there cannot be a valid subsisting appeal in this matter. It would be inconceivable to contemplate discussing the substantive appeal in this matter in the face of the alleged incompetent Amended Notice of Appeal and the appellant's brief of argument.

It would therefore be most incongruous to start my discourse of this appeal firstly with the substantive appeal as the processes to be relied on in dealing with the same may turn out after all to be invalid and incompetent. The issues raised in the cross-appeal are more than mere irregularities and so can be raised at any time and must be tackled firstly. In other words I am to treat the questions as constituting a preliminary objection to the hearing of the appeal and so deal with the cross-appeals first. It begs the question whether there could arise an appeal without being founded on a notice of appeal as its initiating process nor could an appeal be properly constituted without the appellant's brief of argument. In this regard I take it that the critical object of the cross-appeals is to terminate forthwith the proceeding in the substantive appeal at this stage. There can be no question of the point being decisive in the matter. It all comes down to the fact that the amended Notice of Appeal and the appellant brief of argument must be valid and competent processes in order to sustain an appeal as the instant substantive appeal as otherwise however brilliantly the appeal is decided, the decision cannot stand where in the end the Amended Notice of Appeal and the appellant's brief of argument are found to be invalid and incompetent and liable to be struck out. It is most reasonable in such circumstances that an appellate court as this court when so challenged should proceed firstly to decide on the competency of the said processes that form the fundamental parts of the record of the appeal so as to constitute a valid appeal before the court as their incompetency without more robs the court of the jurisdictional competence to deal with such an appeal and in this matter the instant substantive appeal. See: *Madukolu v. Nkemdilim* (1962) SCNJ.

The fulcrum of the issues in the cross-appeals in this matter is as regards to the poser of whether the 1st cross-respondent/appellant's appeal before the court below is rendered incompetent by virtue of the provisions of paragraphs 1 and 2 (part 1) of the 5th schedule of the code of Conduct to the 1999 Constitution as amended as they affect public officers. The cross-appellants have premised their cross-appeals on the complaint that the court below has shirked its judicial duty of interpreting and enforcing a relevant provision of the constitution that is to say as it relates to paragraphs 1 and 2 of part 1 of the 5th Schedule (*supra*) in regard to this matter as the respondents have

argued as per the inherent power conferred on courts as per section 6(6) of the 1999 constitution (as amended). See: Attorney General of Bendel State v. Attorney General of the Federal (supra) and that the trial court ought not to have been deterred in this regard howbeit by any technicality from making the vital pronouncement on this issue properly placed before it and particularly so upon the trial court's having reached the finding in its decision that Mr. Dabo is a public officer in the employ of the Nigerian Law School and has apparently acted contrary to the 5th Schedule (supra). B

The respondents are dissatisfied with the trial court's reaction that has culminated in a mere comment to the effect that the said processes do not by that fact alone become incompetent; as the trial court ought to have gone even further to enforce the said provisions of the 5th Schedule (supra) by declaring the processes invalid and the appeal as incompetent. It is my observation on the foregoing premises that the appellant be labours in vain under a serious misapprehension as to the respective jurisdiction and judicial powers of the two lower courts in regard to the issue which has emanated from violations of the provisions of the 5th Schedule (supra). I think that the situation here is totally at variance with the situation where a question as to the interpretation or application of a constitutional provision is being dealt by a court of record. What seems to be the issue in this case is the ouster of the jurisdiction of ordinary regular courts in regard to the jurisdictional competent given on matters itemized in the Code as exclusively vested in the Code of Conduct Tribunal by the 5th Schedule (supra) to deal with. Thus ousting the powers of the ordinary regular courts. A court of record must have jurisdiction to enable it exercise its judicial powers as per Section 6(6) of the Constitution. See: NDIC v. CBN (2002) 7 NWLR (pt.766) 272 at 296-297; Arjay Ltd. v. AMS Ltd. (2003) 7 NWLR (pt.820) 577 and Oyo v. Akniyeru (2008) 15 NWLR (pt.1109) 21. I think I should end that discussion so far as it is not directly in issue here. Already, I have set forth in extenso the respective stance taken by the appellant and each the respondents as per their respective briefs filed in this appeal that I need not go over that here. C
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Therefore, for the treatment of this question the provisions of paragraphs 1 and 2 of the 5th schedule to the 1999 Constitution have to be closely examined so as to determine how the said two

processes have violated if at all the said provisions thus rendering them incompetent as contended by the respondents. The said provisions of paragraph 1 and 2 are as follows:

“1. A public officer shall not put himself in a position where his personal interest conflicts with his duties and responsibilities.

B *2. Without prejudice to the generality of the foregoing paragraph, a public officer shall not-*

(a) Receive or be paid the emolument of any public office at the same time as he receives or is paid the emoluments of any other public office; or

C *(b) Except where he is not employed on full times basis, engage or participate in the management or running of any private business, profession or trade but nothing in this sub-paragraph shall prevent a public officer from engaging in farming.”*

D The provisions of the above abstract are plain and unambiguous. No doubt on the peculiar facts of this matter paragraph 2(b) above has been rightly invoked as directly applicable to the question raised here but before scrutinizing it any further, it is crucial to settle the meaning of public officer so as to see if in the context of this case

E Mr. Dabo comes within its purview as otherwise the said provisions of paragraphs 1 and 2 (above) may not come into play. The provisions of paragraphs 1 and 2 are applicable to public officers only and no other persons. This takes me to section 318 of the 1999 constitution (as amended). By section 318 (supra) the phrase *“Public Service”*

F has been defined to mean *“the service of the Federation in any capacity in respect of the Government of the Federation and includes services as in (a), (b), (c), (d), (e) & (f): - Staff of any Educational Institution established or financed principally by the government of the Federation”*.

G It is therefore clear from a community construction of the provisions of paragraph 2(b) of the 5th Schedule (supra) and the meaning of *“public service”* as defined by Section 318 of the 1999 Constitution above that Mr. Dabo is a public officer in the public service of H the Government of Federation as Lecturer in the Nigerian Law School, Kano Campus. Mr. Dabo to put is simply is without more caught by the provisions of the 5th Schedule (supra).

That said, it is contended that Mr. Dabo has thereby violated the Constitution as per the said 5th Schedule (supra) and that the

lower court ought to have consummated its duty by interpreting and enforcing the said provisions of the Constitution as enjoined by Section 6(6) of the 1999 Constitution as amended by declaring the said two processes i.e. the Amended Notice of Appeal and the appellant's brief filed in this appeal having been prepared and signed by Mr. Dabo, a public officer as null and void being inconsistent with the said provisions of paragraph 2(b) (supra) of the constitution - (see paragraph 2(b) of the 5th Schedule to 1999 Constitution) and so incompetent. In other words, these provisions rob the said processes of their respective competency. ***The cross-appellants have charged the lower court of not having acted according to the law indeed of having chickened out from performing its judicial duty at voiding the said processes in the circumstances out of sheer sentiment or emotion in the matter. I can find no legitimate grounds for so holding. What the respondents seem to have overlooked is that the trial court has the power to make a preliminary finding to ascertain whether it has jurisdiction over a matter before it, that is before going into the main matter itself, such threshold proceeding does not ipso facto mean that the court has thus assumed jurisdiction over the cause.*** See: NDIC v. CBN (2002) 7 NWLR (pt.766) 272 at 296. I do not see how any ordinary regular courts save the Tribunal established under the code could have assumed the power to interpret and enforce these provisions albeit in furtherance of its (i.e. the regular court) duty to interpret and enforce the provisions of the Constitution in regard to a matter placed before it. I think in this regard that the cross-appellants must have totally misconceived the import and purport of the said provisions of paragraphs 1 and 2 Part 1) of the 5th schedule (supra) as regards its ouster clause and the forum that has been endowed with the exclusive powers to adjudicate on all matters of violations of its provisions. The judicial power of the trial court under section 6(6) of the 1999 constitution does not avail it to do so. This is so even as I am not prepared to be drawn rather pre-emptorily into the controversy posed by the appellant/cross-respondent that there is no provisions in the entire 5th schedule to the 1999 Constitution as amended that operates to nullify or invalidate any acts which are carried out in violation of the provisions of the said 5th Schedule. In other words, that the actions carried out by a public officer for that

matter in the course of managing or running any private business, profession or trade are not invalidated, nor become null and void on the sole ground that they have been carried out in contravention of the provisions of 5th schedule of the 1999 Constitution (as amended). This proposition apart from being diversionary has to wait when that issue has come frontally for construction before this court. Even moreso no authorities have been provided to back such boundless proposition.

However I agree with the submission by the appellant/ cross-respondent that the said 5th Schedule has by its paragraph 12 provided for what would otherwise occur in the event of any violations of the provisions of the said 5th Schedule by public officers that is to say, as a pre-condition to a follow-up of any breaches of the code; the said paragraph 12 provides as follows:

“Any allegation that a public officer has committed a breach of or has not complied with the provisions of this code shall be made to the code of conduct Bureau”.

The foregoing provisions are clearly unambiguous and so construed literarily mean that any breaches of any provisions of the said 5th schedule or matters of noncompliance with any provisions of the Code shall, (meaning that it is mandatory i.e. must) be made to the Code of Conduct Bureau that has established its Tribunal with the exclusive jurisdiction to deal with any violations of any provisions under the Code. If I may emphasise any violations shall be made to Code of Conduct Bureau. The provisions have made it mandatory to take any matters so covered by the 5th schedule (supra) to the code of conduct Bureau and not to any ordinary regular courts as has been done in this instance. If I may repeat the Code of Conduct Tribunal has been established with the exclusive jurisdiction to deal with all violations contravening any of the provisions of the Code as per paragraph 15(1). This provision has expressly ousted the powers of ordinary regular courts in respect of such violations. The Tribunal to the exclusion of other courts is also empowered to impose any punishments as specified under sub-paragraphs (2) (a), (b) & (c) of paragraph 18 as provided in sub-paragraphs 3 and 4 of paragraph

18 while appeals shall lie as of right from such decisions to the Court of Appeal. Simply put to tackle any violation of the code starts before the code of Conduct Bureau Tribunal to the court below on appeal and on a further appeal therefrom to this court. As can be seen the lower court exercises appellate jurisdiction over the Code of Conduct Tribunal and no more. B

Before coming to how the foregoing surmises have impacted the instant matter let me say quickly that neither the trial court nor the lower court has original jurisdiction in respect of any violation or non-compliance as covered by the provisions of the Code. And so no appeals from the trial court on matters so covered by the 5th schedule (supra) lie to the lower court nor to this court. It is therefore conclusive to hold that no ordinary regular Tribunal or Court for that matter has been expressly or impliedly conferred with the power to deal with any violations and/or non-compliance with the provisions of the Code. For any other court or Tribunal to do so in the face of these express and unambiguous provisions will render such decisions null and void ab initio and liable to be set aside. In this regard any decisions of this court not being a Tribunal established under the Code excepting sitting in exercise of its appellate jurisdiction as provided under paragraph 18 (4) (supra) will also be rendered null and void. C D E

From the facts of this matter it is clear therefore, that the alleged incidences of violation of the provisions of the Code with regard to this matter as alleged by the cross-appellants have not been made to the Code of Conduct Bureau and so the cross-appellants must be taken as having failed to do so, thus amounting to not having any violations to take to the said Tribunal and its implication as it affects the propriety of having raised the instant cross-appeals on the facts of this matter is very fundamental. It is also clear that the cross-appellants have misconceived their case. In this matter even as it has been established that Mr. Dabo is a public officer in the employ of the Federal Government and has engaged in legal practice for a reward, that is, by acting as a Legal practitioner for the appellant/cross-respondent and specifically by preparing and signing the Amended Notice of Appeal and the Appellant's brief of argument filed in this appeal, even although these matters are matters apparently that have F G H

arisen from violations of the code, the trial court is not empowered to deal with any of those issues and so to pronounce on the incompetency of the processes. There can be no faulting of the fact that they are otherwise within the exclusive jurisdictional competence of the Code of Conduct Tribunal to entertain vis-a-vis other ordinary regular courts. And so this court as well as the two lower courts has no powers to deal with them except under the circumstances as provided by paragraph 18(4) (supra). In other words this court is precluded without more from assuming that the processes are otherwise incompetent on the absence of having been so found by the Code of Conduct Tribunal.

In sum the cross-appellants upon whom rests the burden to refer this matter to the Code of conduct Bureau have failed to discharge the same and in that regard have failed to make out any case of violations of the Code of Conduct by Mr. Dabo in the strict sense of the provisions of the 5th Schedule (supra). It follows therefore that the alleged violations of the Code of conduct by Mr. Dabo in so far as have not been so established as provided under the Code have no invalidating effect on the competency of the said processes and consequently on this appeal before this court. For all this, therefore, there are no grounds to void or treat as voided the Amended Notice of Appeal and the appellant's brief of argument in this matter. Meaning that there is before this court a competent appeal as founded on the instant amended notice of appeal and the appellant's brief of argument hereof. Sequel to the above reasoning and conclusion I hereby dismiss the cross-appeals.

Coming to the main Appeal itself I must observe that the arguments of the parties have already been set out above in the body of this judgment. Issue one has provoked in this context: - discussing whether the trial court's jurisdiction to entertain this suit is properly founded upon the premise that the State High Court and the Federal High Court have concurrent jurisdiction by a community construction of the provisions of section 251(1), (p), and (r) of the 1999 constitution as amended and the provisions of Section 87(10) of the Electoral Act 2010 (as amended).

Before going any further in the discourse of this ques-

tion of jurisdiction, I must reiterate that it is settled law that jurisdiction is the power from which courts do derive their authority to entertain matters placed before them for adjudication. It is a matter that is statutorily based; usually jurisdiction of courts of record is as provided in the constitution or Acts of the National Assembly and the jurisdiction of courts can only be removed or whittled down by express statutory provisions. To ascertain the jurisdiction of courts the facts of the case have to be examined and this leads to scrutinizing the pleadings filed by the parties particularly by the plaintiff in the case. In this respect as in the instant case the writ of summons and the statement of claim are the most crucial processes to be so examined. The Statement of Defence is not important in this regard. See: Adeyemi v. Opeyori (supra). In a case as the instant one in which the action has been constituted by originating Summons coupled with a verifying affidavit it is incumbent in examining the issue of jurisdiction of courts in that regard to examine the originating summons and the facts as deposed to in the supporting affidavit that have related to the issue of jurisdiction of the court. In this instance I have to refer to and rely on paragraphs 16, 17, 18 & 19 of the supporting affidavit as set out above.

Having examined the supporting affidavit to the Originating Summons I think that paragraphs 16, 17, 18 and 19 have made out facts upon which to ascertain the jurisdiction of the trial court in this matter. See: Tukur v. Government of Gongola State (supra) where this court has held that “...it is the claim before the court that has to be looked at or examined to ascertain whether it comes within the jurisdiction conferred on the court.”

The appellant’s case is that having looked at or examined the facts in the supporting affidavit to the originating process that paragraphs 16, 17, 18 and 19 amongst other paragraphs of the supporting affidavit have brought the matter within the exclusive jurisdiction conferred on the Federal High Court. Even then that it is more so that the 4th respondent is an agency of the Government of the Federation. However having looked at the said paragraphs of the affidavit and taking an overview of the case I have no difficulty in finding that the State High Court vis-a-vis the proviso to Section 251(1) (supra) considered on the backdrop of section 87(10) (supra) has been

given the concurrent jurisdiction with Federal High Court to deal with such matters as the instant one and I go on to expatiate on this assertion, even although it has to relate to actions for damages, injunction and specific performance and which actions must be based on any enactment, law or equity.

B But before then I have to advert to paragraphs 16, 17, 18 and 19 of the plaintiff's supporting affidavit and for ease of reference they are as follows:

C *"16. That both the cumulative summary result and the ward by ward result sheets were duly forwarded to the 4th defendant and the Headquarters of the 2nd Defendant.*

17. That to my surprise the 2nd Defendant against all democratic norms substituted my name with that of the 1st Defendant who came third in the 9th January 2011 Primary election to be its candidate in the forth coming general election schedule to hold on April 2011".

E 18. That the 2nd Defendant manipulated the exercise in such a way that I could not know the position until the 4th defendant released the list of the candidates to contest election on the 7th February 2011.

F 19. That upon noticing that my name was mischievously removed from the list I rushed to the State Headquarters of the 2nd Defendant to complain against it there the official of the part wrote a letter addressed to the 4th defendant notifying it of the anomaly as it affects Nasarawa Federal constituency. The letter dated 8th January, 2011 to the chairman of the 4th defendant is hereby attached and marked as Exhibit "C".

G The above averments as per the foregoing paragraphs of the plaintiff's supporting affidavit speak for themselves. They have identified the cause of action as contemplated under section 87(10) as well as the parties as to the proper constitution of the instant action in which Relief 7 has been directed at the 4th Respondent an agency of the Federal Government. It is settled that by the numerous decisions H of this court that the provisions of Section 251(1) (supra) subject to its proviso have conferred exclusive jurisdiction on the Federal High Court in all matters within their purview and to do so the facts of the case must involve the Federal Government or any of its agencies. See also the case Edeghero v. NEPA (supra).

This is perhaps an appropriate stage to set out the provisions of Section 251(1), (p), (q) and (r) (supra) as follows:

“Notwithstanding anything to the contrary contained in this Constitution and in addition to such other jurisdiction as may be conferred upon it by an Act of the National Assembly, the Federal High Court shall have and exercise jurisdiction to the exclusion of any other court in civil causes and matters”.

(p) The administration or the management and control of the Federal Government or any of its agencies.

(q) Subject to the provisions of the Constitution, the operation and interpretation of this Constitution in so far it affects the Federal Government or any of its agencies.

(r) Any action or proceeding for a declaration or injunction affecting the validity of any executive or administrative action or decision by the Federal Government or any of its agencies; and

(s) Such other jurisdiction civil or criminal and whether to the exclusive of any other court or not as may be conferred upon it by an Act of the National Assembly:

Provided that nothing in the provisions of paragraphs (p), (q) and (r) of this subsection shall prevent a person from seeking redress against the Federal Government or any of its agencies in an action for damages, injunction or specific performance where the action is based on any enactment, law or equity.

The appellant has on this issue submitted that the trial court has no jurisdiction to deal with this matter as the 4th respondent is an agency of the Federal Government and that by section 251(1) the instant matter as constituted with particular reference to Relief 7 of the substantive claim is within the exclusive jurisdiction of the Federal High Court.

Relief 7 the bone of contention in this matter although set out above is for ease of reference reads as follows:

“7. Declaration that the 4th defendant should not recognize or accord any recognition to the name of Barrister Ismael Ahmed or any name other than that of Nasiru Ali Ahmed as the C.P.C. candidate for the House of representative to represent Nasarawa Federal Constituency of Kano State.”

This is the only relief of the seven Reliefs as per the claim directly connecting the 4th respondent to this matter as the other six

Reliefs have been directed against the 2nd and 3rd respondents. Before now in the body of this judgment I have set out the provisions of Section 251(1) (p), (q) and (r) which have conferred on the Federal High Court the exclusive jurisdiction in all matters caught within the said provisions of the section and according to the Appellant including the instant action by reason only of relief 7 having been sought against the 4th respondent an agency of the Federal Government. It seems to me that to resolve the question of jurisdiction in this matter otherwise the bedrock of the court's power to entertain any matter as the instant one that one has to have recourse to the facts contained in the plaintiff's claim particularly in addition in this instance to the averments as contained in the plaintiff's supporting affidavit in this matter, the instant action having been commenced by way of originating summons. In other words this issue has to be considered on the facts constituting the subject matter of the cause of action and the parties in this matter. Again it simply means examining the facts of the case to see if they justify the application of the provisions of Section 251(1)(p)(q) (r) which expressly have given to the Federal High Court exclusive jurisdiction. Such considerations the appellant has submitted ought not to be limited to the reliefs sought in the claim alone but must include whether the reliefs connect the Federal Government or any of its agencies as a party to the action. The appellant has referred to and relied on the case of NEPA v. Edeghero (2003) FWLR (pt.159) 1556 at 1569C for contending that the provisions of section 251(1), (p) and (r) have to be so narrowly construed.

The poser that has arisen in the circumstances is whether it is enough as submitted by the appellant that once the action connects the Federal Government or any of its agencies such a matter without more falls within the purview of the Federal High Court to deal with. Respectfully, I hold the view also as observed in the above cited case that the provisions of Section 251(1) (p), (q) and (r) raise the consideration of both subject-matter of the cause of action and the parties in the action. In my view it is not just enough to identify and rely on such proposition of the law as per the appellant's case that the sole fact of the 4th respondent being an agency of the Federal Government as sued is conclusive of the issue; in other words without adverting to whether the subject-matter of the

cause of action in the matter also comes within the exclusive purview of the Federal High Court to deal with. It would be wrong to proceed on that basis alone to hold in conclusion that the instant matter is completely within the exclusive ambit of the Federal High Court to deal with. What I am otherwise saying here is that to determine the applicability of the provisions of the said sub-sections 1(p), (q) and (r) of section 251 to an action, the subject-matter of the cause of action in the matter as well as the parties so sued in the action must be examined to ascertain, whether both factors which must co-exist have been so connected to the action as to bring the action within the purview of the provisions of the said section (i.e. section 251(1) (supra) for the action to come within the exclusive jurisdiction of the Federal High Court. I think the appellant has misconstrued the decision in NEPA v. Edeghero (supra); and I hope that this short observation has corrected the misconception.

And so I go on to scrutinise the provisions of the subsections (p) and (r) very relevant here and which for ease of reference read:

“(p) the administration or the management and central of the Federal Government or any of its agencies.

(r) any action or proceeding for declaration or injunction affecting the validity of any executive or administrative action or decision by the Federal Government or any of its agencies”

The above provisions are plain and clear and have to be interpreted literally; that is to say, to settle the question one way or the other of whether the subject-matter of the cause of action in this matter is also within or outside the said provisions. Thus pre-supposing that to answer the question has to involve deciding whether the subject matter of the cause of action as per Relief 7 as constituted is questioning the validity of any executive or administrative action or decision by the Federal Government or any agency of the Federal Government in the instant case by INEC. One cannot on the facts of this case come to that conclusion from construing Relief 7 in isolation per se. Clearly Relief 7 is not challenging the validity of any executive or administrative action or decision of Federal Government or the 4th respondent in this matter. A notification per se (as in this case) of nomination of a candidate for an elective office to INEC by a political

party (as the C.P.C. in this case) does not by that fact alone involve making or taking any executive or administrative decision on the part of INEC in the nomination exercise. As the Electoral Law stands today INEC has no part to play in nominating a political party's candidate for an elective office. It is an exclusive party affair as INEC is not even empowered to query such nomination in any manner whatsoever. The power to do so is vested in the courts and so there is no way the instant notification of nomination of the 1st respondent simpliciter to INEC can come within the provision of the said subsections (p), and (r) (supra) as to confer on the Federal High Court the exclusive jurisdiction to entertain the matter. It is an exercise in which INEC has not taken any action or made any decision in furtherance of the political party's nomination of its candidate.

In sum therefore there is no way Relief 7 can be construed as challenging the executive or administrative action or decision of the 4th respondent in performing an innocuous act of recognizing the 1st respondent as the candidate of the C.P.C. Meaning that the court below rightly has come to the conclusion that the instant action is not within the exclusive jurisdiction of Federal High Court but that both the Federal and State High Courts have concurrent jurisdictional competence to determine all the reliefs as claimed as per the instant Originating Summons and even moreso under section 87(10) (supra) which conferred on both Federal and State High Courts a concurrent jurisdiction in matter of nomination of candidates of a political party for elective offices. And so I resolve issue one against the appellant.

On Issue 2:

I think I should take the questions arising from this issue orderly firstly on the issue of proof of service. I have gone through the submissions of both counsel and it seems to me that the appellant has misconceived that what is in issue here is not want of service of process per se in this matter but that service of the said processes is disputed as well as the manner of service on him. In that scenario the foundation therefore upon which to erect the denial of fair hearing on the facts of the case seems not to be there at all.

On the accepted facts of this matter the appellant has been duly served the originating process but the appellant

having chosen to ignore it, he has done so to his detriment and should not complain and has to take the consequences. The proof of service in this regard is in the court file even though that evidence is rebuttable and not having been rebutted it has all the same spoken so eloquently of proper service on him. There is no countervailing evidence controverting the prima facie fact that court processes including the initiating process have been duly served on the appellant. See: Okesuyi v. Lawal (1991) 1 NWLR (Pt.661) 678. That is, no counter-affidavit has been filed to controvert proper service. On the state of the law on the question, the burden is on the appellant to rebut the principle of regularity that attaches to the said document; it has not been discharged by the appellant. I am of the firm view that the action is valid as it has been properly constituted. The appellant has filed no processes after being properly served the affidavits in this case and so there is nothing in the court file to preclude the trial court from rightly proceeding with the case particularly in the absence of the appellant and any controverting further affidavits and even then on fast tracking the case. His right to fair hearing in the circumstances has not been breached. See: Ramon v. Jinadu (supra). The mere fact of fast tracking the matter (i.e. in a speedy manner) does not necessarily affect the appellant's right to fair hearing. He has not showed how he has been adversely affected or has prejudiced his case. He has not showed how any miscarriage of justice in the matter has affected him. See: Oyakhire v. State (2006) All FWLR (Pt.305) 703 at 717.

Secondly the appellant has challenged the judgment of 3/3/2011 on the grounds of want of fair hearing. He has relied on section 36 of the 1999 constitution that has enshrined that principle into the Constitution. The principle of fair hearing demands that a party is afforded the opportunity to present his case in a trial and no more. Once the opportunity has been given to a party it does not lie in a court to compel the party to grab the opportunity and act on it. The facts of this case show precisely that the appellant has not availed himself of the opportunity to defend the action. After all he has been properly served with the originating process. There can be no

doubt that any infraction of this principle (i.e. of fair hearing) vitiates the decision no matter how brilliantly conducted. It does not matter that the same conclusion would have been reached otherwise. As I said above the appellant has been duly put on due notice of the action. His application to set aside to the instant decision has not showed any inadequacies or omissions in the trial of the matter, nor any breaches as to his right to fair hearing or that any miscarriage of justice has been occasioned to him. I am of the view that the appellant has not made out any grounds under this head to warrant this court interfering with the concurrent finding of the two lower courts. That principle does not avail him. I do not think that minor irregularities as to abridgment of the period for entry of appearance has affected the decision so also his contention of hearing of the case on 3/3/2011 speedily to a conclusion. This is a quasi election matter that deserves expeditious disposition. These irregularities have not done any specific damage to the decisions of the two lower courts as I have said they have not adversely affect him nor prejudiced his case. In respect of these complaints of procedural irregularities by the appellant they have not affected the merits of the matter and so it is my view that they have not occasioned any miscarriage of justice either, in this matter and so I will adopt this court's pronouncement on such a question as in the case of *Maja v. Samouris* (2002) 3 SCNJ 29 at 45 - wherefore it stated:

"Rules of court as far as the conduct of proceeding is concerned, are generally binding on the parties and the court and a party would be allowed to complain of procedural irregularity on appeal if inter alia it can be shown that it materially affected the merit of the case or that he suffered a miscarriage of justice by reason of such irregularity in the proceeding."

The pronouncement has settled the question of procedural irregularities taken in this matter which as I have found have neither affected the merits of this matter nor that the appellant has showed that he has suffered any miscarriage of justice by reason of the irregularities. Therefore, there are no basis for the decisions of the two lower courts to be set aside ex debito justitiae. Besides, the appellant has not made out any grounds to enable the court to intervene in the

concurrent decisions of the two lower courts. I resolve issue two against the appellant.

For these reasons the appeal is devoid of any merits and it is hereby dismissed in its entirety; the decisions of the two lower courts are hereby affirmed. I think that this is a case in which parties should bear their respective costs. The appellant in the main has lost the appeal and 1st, 2nd and 3rd respondents but 4th respondent have lost in their cross-appeals. B

I make no order as to costs. Appeal dismissed.

C

ONNOGHEN JSC

This is an appeal against the judgment of the Court of Appeal, holden at Kaduna in appeal No. CA/K/127/2011 delivered on the 18th day of April, 2012 in which the court dismissed the appeal of appellant against the judgment of the High Court of Kano State, Holden at Kano in Suit No. K/101/2011 delivered on 21st day of March, 2011. D

On the 16th day of February, 2011 the 1st respondent in this appeal filed an Originating Summons in the High Court of Kano State, Kano challenging the submission of the name of appellant to the 4th respondent by the 2nd and 3rd respondents as their candidate for the April, 2011 general election to represent the Nasarawa Local Government of the Federal Constituency of Kano State in the House of Representatives. Appellant was the 1st defendant at the trial court. E F

It is the case of the respondents, particularly 1st, 2nd and 3rd respondents that appellant was served with the originating processes on the 25th day of February, 2011 but failed and/or neglected to appear in court on the date fixed for hearing: the 3rd March, 2011. However, appellant contends that he was never served with the originating processes nor was he aware of the hearing date. G

Following the judgment of the trial court on 3rd March, 2011, appellant filed a motion on 7th March, 2011 at the court seeking an order setting aside the said judgment for failure to serve the originating processes on the appellant which motion was dismissed on the 21st day of March, 2011 on the ground that appellant was duly served with the necessary processes. In the circumstance, it was rather the H

1st respondent who contested and was declared the winner of the election of April, 2011 into the Federal Constituency in issue.

Being dissatisfied with the decision of the trial court, appellant appealed against same to the Court of Appeal which appeal was dismissed on the 18th day of April, 2012 giving rise to the instant further appeal, the issues for the determination of which have been identified in the appellant's brief prepared by OLAWALE AKONI, SAN and deemed filed on 13th November, 2012 as follows:-

“1. *Whether the trial court was vested with jurisdiction to entertain the reliefs in the 1st respondent's Originating Summons? (Distilled from Grounds 1 and 2 of the amended Notice of appeal).*

2. *Whether the Appellant is entitled ex debito justitiae to have the judgment of the trial court on 3rd March 2011 set aside as a nullity? (Distilled from Grounds 3, 4, 5, and 6 of the amended Notice of Appeal)* “

It should be pointed out that the 1st, 2nd, and 3rd respondents have filed a cross appeal in which the issue for determination, as identified by learned Counsel for the cross appellants, C.A.S. OSHOMEGIE ESQ, in the brief deemed filed and served on 13/11/12 is as follows:-

“*Whether the court below having held that “All that I can say on the issues is that schedule to the Constitution is an integral part of the Constitution and any law or Act inconsistent with its provision is null and void to the extent of its inconsistency” can be heard to say it will be most unfair to the Appellant to be shut out of these proceedings by holding that both the Amended Notice of Appeal and the Brief of argument filed on his behalf are incompetent simply because the Counsel who filed them is in full salaried employment” simply because the lower court felt it was not the proper forum.*”

From the above reproduction of the issues in the main appeal and cross appeal, it is obvious that both deal with the competence of the action at the trial court and the appeal before the lower court. Whereas the main appeal attacks the competence of the action before the court of trial, the cross appeal focuses its attention on the competence of the appeal filed at the lower court. It is therefore my considered view that in the circumstances prevailing herein, the proper thing to do is to start with a consideration of the cross appeal since a resolution of the issue as raised in favour of the cross appellant will

rob this Court of any jurisdiction to hear and determine the main appeal on the merit. If there was no valid appeal before the lower court, there can, legally speaking, be no valid judgment of that court to ground the instant main appeal.

It is for the above reason that I proceed to resolve the issue raised in the cross appeal. B

It is the submission of learned Counsel for cross appellants that it is trite law that the Constitution of Nigeria is Supreme and that any law or Act or section thereof which is inconsistent with any provision of the Constitution is null and void to the extent of the inconsistency: that it is not disputed that M.K. DABO ESQ who prepared and filed the amended notice of appeal of the appellant in the lower court is a public officer in full and salaried employment of the Nigerian Law School, Kano Campus. Learned Counsel then referred the court to the definition of “*public service*” in section 318 of the 1999 Constitution as amended and schedule 5 paragraphs 1 and 2 of the said 1999 Constitution as amended and submitted that the said M.K. DABO ESQ is prohibited from engaging in any other vocation, business, profession except farming. C
D

It is the further submission of Counsel that the lower court having found and held that the said M.K. DABO ESQ is in full employment with the Nigerian Law School and that by the provisions of the 5th schedule supra he is barred from engaging in private legal practice, the lower court ought to have proceeded to hold that the amended notice of appeal and the brief of argument so filed by the said legal practitioner are null and void for being inconsistent with the said provisions of the 1999 Constitution as amended. E
F

On his part, learned Senior Counsel for the appellant/1st cross respondent O. AKONI SAN in the 1st cross respondent’s brief filed on 21/12/12 referred to the provisions of paragraphs 1 and 2 of part 1 of the 5th schedule to the 1999 Constitution and submitted that the cross appellants have failed to point out the particular specific portion of the provisions allegedly violated by Mr. M.K. DABO in signing and filing the notice of appeal and brief of argument before the lower court; that there is nothing in the said provisions preventing DABO ESQ from signing and filing the documents. The act of signing and filing of the documents does not amount to an engagement or participation in the management or running of any private G
H

business, profession or trade; that the case of Okafor v. Nweke (2007) All FWLR (Pt. 368) 1016 cited and relied upon by learned Counsel does not support their case, as the processes involved in this case were not signed by a firm of solicitors but by a legal practitioner on the roll of the Supreme Court.

B In the alternative, learned Senior Counsel submitted that the alleged violation by Mr. Dabo has not been shown to have affected the competence of the appeal filed, before the lower court, because there is no provision in the relevant paragraphs or schedule invalidating any act by a public officer in the course of management or
C running of a private business; that the 5th schedule provides in paragraph 12 of part 1 for complaint of any violation to be made to the Code of Conduct Bureau; that the lower court was in the circumstance right in holding that the lower court, indeed this Court is not
D the proper venue for such complaint; that the violation has no bearing with the competence of the processes filed in the lower court and urged the court to dismiss the cross appeals.

I have carefully gone through the arguments of both Counsel and the authorities cited in support of their contentions in the Cross
E appeal.

Paragraphs 1 and 2 of part 1 of the 5th schedule to the 1999 Constitution provides as follows:-

*"1. A public officer shall not put himself in a position where his
F personal interest conflicts with his duties and responsibilities.*

2. Without prejudice to the generality of the foregoing paragraph, a public officer shall not-

*(a) receive or be paid the emoluments of any public office at the same time as he receives or is paid the emoluments of any other
G public office, or*

(b) except where he is not employed on full time basis, engage or participate in the management or running of any private business, profession or trade but nothing in this sub-paragraph shall prevent a public officer from engaging in farming."

H It is not disputed that M.K. DABO ESQ is in full employment of the Nigerian Law School, Kano campus and that he signed and filed the notice of appeal and jointly signed appellant's brief of argument at the lower court. Also not disputed is the fact that M.K. DABO ESQ is a qualified legal practitioner haven been called to the Nigerian

Bar and enrolled at the Supreme Court of Nigeria. What is being contended is that M.K. DABO ESQ being in full employment with the said Nigerian Law School is by virtue of the paragraphs of the 5th schedule earlier reproduced in this judgment incompetent to sign and file any legal process particularly the processes filed in the lower court which initiated and sustained the appeal thereat. It is the contention of the cross appellants that the initiation of the appeal process etc. by M.K. DABO ESQ is in violation of the paragraphs of the 5th schedule thereby rendering the actions so taken and the processes null and void.

The real important question to ask at this stage is what is the consequences of the violation of the aforesaid paragraphs of the 5th schedule to the 1999 Constitution? The answer to the above question is to be found in paragraph 12 of the said Part 1 of the 5th schedule which enacts as follows:-

“Any allegation that a public officer has committed a breach of provisions of this code shall be made to the code of conduct Bureau.”

It is my considered view that the above provision is very clear and unambiguous. It provides a remedy in the event of any alleged breach of the provisions. The remedy lies with the Code of Conduct Bureau which has been clothed with the requisite jurisdiction to handle such matters. The matter before the lower court was an appeal arising from the decision of the trial court. The lower court was not exercising an original jurisdiction, neither has it such a matter under the code of conduct or 5th schedule to the 1999 Constitution except an appellate jurisdiction arising from a determination of the Code of Conduct Tribunal.

How then did the lower court handle the issue? At page 495 of the record, the court had this to say:

“I agree with learned Counsel for appellant that these are not the issues to be appropriately decided in the appeal. They happen to be issues that should be raised separately in the different forum It cannot be decided within an appeal. All I can say on the issue is that schedule to the Constitution is an integral part of the Constitution and any Law or Act inconsistent with it provision is null and void to the extent of its inconsistency. I should also state that it is undesirable to change Counsel without notice to the Court. Apart from this, it will

be most unfair to the Appellant to be shut out of these proceedings by holding that both the Amended Notice of Appeal and the Brief of Argument filed on his behalf are incompetent simply because the Counsel who filed them is in full salaried employment and because there is no notice to the court of the change of Counsel.

B *I will discountenanced (sic) the preliminary objection by the 1st Respondent and decide this appeal on its merit.”*

I hold the considered view that the above is correct and cannot be faulted. The cross appellants are in the wrong venue/court for the ventilation of their grievances. By paragraph 12 supra, they ought to approach the Code of Conduct Bureau with their complaints.

C I therefore find no merit in the cross appeal which is accordingly dismissed by me. Parties are, however, to bear their costs.

On the main appeal, learned Senior Counsel for appellant has identified the following two issues for determination to wit:

“1. Whether the trial court was vested with jurisdiction to entertain the reliefs sought in the 1st respondent’s Originating Summons? (Distilled from Grounds 1 and 2 of the amended Notice of Appeal).

E *2. Whether the Appellant is entitled ex debito justitiare to have the judgment of the trial court on 3rd March, 2011 set aside as a nullity? (Distilled from Grounds 3, 4, 5 and 6 of the amended Notice of Appeal)”*

F With regards to issue 1, learned Senior Counsel contended that by virtue of the provisions of section 251(1) (p), (q) and (r) of the Constitution of the Federal Republic of Nigeria 1999 as amended, the trial court had no jurisdiction to hear and determine the action having regards to the fact that the 4th respondent is an agency of the Federal Government of Nigeria; that the lower court was in error when it held otherwise as the action does not fall within the class of actions forming an exception to the said section 251(1)(p) (9) and (r) and that the action is not for “damages, injunction or specific performance”; that the instant action sought, inter alia, declaration in relief No. 7 thereby bringing it within the exclusive jurisdiction of the Federal High Court.

H For the respondents, it is argued that it is the case of the plaintiff as stated in the writ of summons and pleadings that determines the jurisdiction of the court; that reliefs 1 - 7 on the Originating Sum-

mons challenge the acts of the 2nd and 3rd respondents in recognising the appellant as the flag bearer and candidate of the 2nd respondent for the April, 2011 general elections, instead of the 1st respondent who won the primary election; that the claims fall within the provisions of section 87(4)(c) (ii) of the Electoral Act, 2010 as amended and that by the provisions of section 87(10) of the said Electoral Act 2010 as amended, the trial High Court has the jurisdiction to hear the matter; that relief 7 does not challenge the administrative action/ decision of the 4th respondent at all and as such the provisions of section 251(1) (p) and (r) of the 1999 Constitution do not apply. B C

What is the case of the 1st respondent as disclosed in the Originating Summons? The answer is clearly contained in the reliefs claimed, which are stated as follows:-

1. DECLARATION that the plaintiff is the only elected flag bearer of the 2nd Defendant for the April, 2011 general election into the D House (sic) Representatives to represent Nasarawa Federal Constituency of Kano State having polled the majority of the lawful votes cast at the primary election conducted by the 2nd Defendant on the 9th day of January 2011, and was so declared the winner.

2. DECLARATION that the nomination of the 1st Defendant E as 2nd Defendant candidate or flag bearer for the April, 2011 general election for the seat of member of the House of Representatives to represent Nasarawa Federal Constituency is ultra vires, null and void same not being in accordance with the declared results at the primary election conducted on the 9th day of January, 2011 in which F the plaintiff polled 8,653 votes while the 1st Defendant scored 1,888 votes respectively.

3. AN ORDER nullifying the nomination of the 1st Defendant and the submission of the plaintiff by the 2nd Defendant as its candidate for the election into the National Assembly for the seat of Member of the House of Representatives representing Nasarawa Federal Constituency of Kano State. G

4. AN ORDER directing the 2nd and 3rd Defendants to forthwith accord the plaintiff his due recognizing as their flag bearer for the April, 2011 general election into the National Assembly for the seat of member of House of Representatives to represent Nasarawa Federal Constituency of Kano State. H

5. AN ORDER OF PERPETUAL INJUNCTION restraining the

2nd and 3rd Defendants from recognizing, acting or doing anything in recognition of the nomination and selection of the 1st Defendant as the 2nd Defendant's candidate for the forth coming April general election into the National Assembly for the seat of member of House of Representative, to represent Nasarawa Federal Constituency of Kano State in the National Assembly.

6. AN ORDER nullifying the purported nomination of the 1st Defendant as its flag bearer to contest for the seat of the House of Representatives representing Nasarawa Federal Constituency of Kano State in forth coming general elections scheduled to hold in April. 2011.

7. DECLARATION that the 4th defendant should not recognize or accord any recognition to the name of Barrister Ismael Ahmed or ay name other than that of NASIRU ALI AHMED as the C.P.C. candidate for the House of Representatives to represent Nasarawa Federal Constituency of Kano State.

Now section 251(1)(p)(q) and (r) which appellant contends robs the trial court of the jurisdiction to hear and determine the case of 1st respondent as encapsulated in the seven (7) reliefs reproduced supra, provide as follows:-

"(1) Notwithstanding anything to the contrary contained in this Constitution and in addition to such other jurisdiction as may be conferred upon it by an Act of the National Assembly, the Federal High Court shall have and exercise jurisdiction to the exclusion of any other court in civil cases and matters...

(p) the administration or the management and control of the Federal Government or any of its agencies

(q) subject to the provisions of this Constitution, the operation and interpretation of this Constitution in so far as it affects the Federal Government or any of its agencies.

(r) any action or proceeding for a declaration or injunction affecting the validity of any executive or administrative action or decision by the Federal Government or any of its agencies...

Provided that nothing in the provisions of paragraphs (p), (q) and (r) of this subsection shall prevent a person from seeking redress against the Federal Government or any of its agencies in an action for damages, injunction or specific performance where the action is based on any enactment, law or equity."

There is no doubt that the 4th respondent is a Federal Government agency. Equally true is the fact that the only relief out of the seven reliefs reproduced supra touching and concerning the 4th respondent is relief No. 7. All the other six reliefs, which constitute the main claim of the 1st respondent before the court challenged the actions of the 2nd and 3rd respondents in recognizing appellant as the candidate of the 2nd respondent for the general election of April, 2011. Looking closely at the claims, it is clear that the main claims are against the appellant, 2nd and 3rd respondents. B

I hold the considered view that claim 7 which is against the 4th respondent does not challenge the act of the 4th respondent either in its administrative or executive context. I agree with learned Counsel for the 4th respondent that relief 7 challenges the act that the 4th respondent might take - a pre-emptive claim. The above being the case, it does not come within the purview of section 251(1) (q) and (r) supra, of the 1999 Constitution, as amended. For the said provisions to prevail, the relief/action must challenge the validity of the act, administrative or executive, that the 4th respondent carried out constituting the cause of action. C D

I must point out that it is not every action for declaration against the Federal Government or any of its agencies that must be filed exclusively in the Federal High Court, as contended by learned Counsel for appellant. For the claim for declaration to come under the purview of the provisions of sub-section (r) of section 251(1) of the 1999 Constitution, as amended, supra, the declaration or injunction must *"affect the validity of any executive or administrative action or decision by the Federal Government or any of its agencies"*. E F

I am of the firm view that claim 7 supra is completely outside that provision and the lower court is right in holding that the trial court has jurisdiction to hear and determine the Originating Summons in question. G

It is for the above reasons and the more detailed reasons contained in the lead judgment of my learned brother CHUKWUMANEH, JSC that I too find no merit in the appeal and consequently dismiss same. I abide by the consequential orders made in the lead judgment including the order as to costs. Appeal dismissed. H

RHODES-VIVOUR JSC

I have read in draft the leading judgment prepared by my learned brother Chukwuma-Eneh, JSC. I agree with his lordships reasoning and conclusions. I propose to add only a few observations on service of process, and reply brief.

B The issue as to whether a party was served the originating process in a proceeding where service is mandatory is one of constitutional and fundamental significance with serious consequences if found that there was no service before proceedings commenced and were subsequently concluded.

C There is a good deal of authority on the importance of service. Reference to a few of them is appropriate. See *Obimonure v. Erinsho* 1966 1 ANLR P250, *Haruna v. Ladeinde* 1987 4 NWLR pt. 67 p. 941, *Okesiji v. Lawal* 1991 1 NWLR pt. 170 p. 661. Learned counsel D for the 1st defendant/appellant contends that his client was not served originating processes in this suit.

The Trial High Court was satisfied that the 1st defendant/appellant was duly served with the originating processes. This fact was affirmed by the Court of Appeal when it said:

E “...*The failure by the appellant to challenge the germane depositions contained in the affidavit of service has rendered the affidavit of service to become a conclusive evidence that the appellant was actually served with the originating summons and I so hold...*”

F In proceedings where service of process is required, failure to serve Process on the other party is fatal to subsequent proceedings. The court would have no jurisdiction to hear the case in the absence of service. Consequently proceedings conducted in the absence of service on the opposing party is a nullity.

G An affidavit of service is for the defendant to be aware of the suit against him. Once received the defendant is expected to proceed to arrange a defence.

H An affidavit of service is not conclusive proof of service of process. The burden of proving service rest on the person asserting that there was service. An affidavit of service must contain details on the following, when, who, what, and where. The affidavit of service deposed to on the 25th of February 2011 contained depositions and details thus:

(a) When was service - On the 25th February at 2.30 p.m.

(b) Who was served - Barrister Ismael Ahmed.

(c) What was served - The originating process.

(d) Where - at No 5 Gidado Road, Kano.

This is prima facie proof of the facts deposed to. There is no counter-affidavit or affidavit to controvert the affidavit of service. The 1st defendant/appellant simply says he was not served. B

If the deponent to an affidavit of service alleges that he served process on the defendant at his residence and states therein the time and place as in this case and the defendant denies it in an affidavit or counter-affidavit, a bare denial will not amount to a good denial. C Such a denial would have no weight whatsoever. The defendant is expected to file an affidavit denying service and giving a truthful rebuttal to the depositions in the affidavit of service. For example he must depose that:

(a) His residence is not where it is alleged he was served. D

(b) The Bailiff never served him any process.

(c) At the time it is alleged he was served he was not at home, or not in the country, (with proof of his whereabouts).

In view of the fact that material depositions in the affidavit of service have not been controverted the burden of proving service E has been discharged and the affidavit of service which initially was prima facie proof of service is now conclusive proof that the originating process was indeed served on the 1st defendant/appellant. Both courts below were in the circumstances correct in their findings. F

REPLY BRIEF

A reply brief is filed by an appellant only when the respondent raises in his respondent's brief new questions/argument, or an issue of law. When the need arises for a reply brief to be filed it should be limited to answering the new questions, and issues of law. A reply G brief should on no account be used by the appellant to raise new issues or to reargue his case on appeal. Where this is done the reply brief would be discountenanced.

In this appeal the reply brief was discountenanced and that was the correct thing to do in view of the fact that the reply brief was H used to reargue the appellant's case.

For this, and the comprehensive reasoning in the leading judgment the appeal is dismissed. No order on costs.

OGUNBIYI JSC

I read in draft the lead judgment just delivered by my learned brother Chukwuma-Eneh, JSC and I agree that the appeal and cross appeal are devoid of any merit and ought to be dismissed.

The genesis of this appeal stemmed from the judgment of the Kaduna Division of the Court of Appeal delivered on 18/4/2012 wherein the court below dismissed the appellant's appeal against the decision of the Kano State High Court. The trial court had dismissed the appellant's application to set aside its proceedings and judgment of 3rd March, 2011, on the grounds that they were a nullity.

The instant appeal was initiated vide a notice of appeal dated 4th May, 2012 and an amended notice of appeal on mixed law and facts dated 31st July, 2012.

The brief facts of this case are that the 1st respondent had by an originating summons dated 10th February, 2011 and filed on same day, challenged the submission of the name of the appellant to the 4th respondent by 2nd and 3rd respondents as their candidate for the April 2011 general election to represent the Nassarawa Local Government of the Federal Constituency of Kano State in the House of Representatives.

The appellant as the 1st Defendant before the trial court was served with the originating summons on the 25th February, 2011 and an affidavit indicating such service was dully sworn to and filed in the court record by the bailiff at page 120 of the record of appeal as evidence.

On the 3rd March, 2011 when the case came up for hearing, while the 2nd and 3rd respondents were represented in court, the appellant was neither in court nor was he represented by any counsel. The trial court nevertheless proceeded to hear the case and following which judgment was delivered on the 3rd March, 2011. The appellant on receipt of the trial court's order, brought a motion on notice dated and filed 7th March, 2011 and prayed the court to set aside its judgment delivered on 3rd March, 2011 for non service of the hearing notice. The 1st respondent filed a counter affidavit and raised some fundamental factual issues against the application which the appellant neglected to counter same or file a better and further affidavit. The motion was heard on the 15th March, 2011 and a refusal order of the application dismissing same was entered on the

21st March, 2011. It is evident to state that the appeal was also dismissed by the Court of Appeal.

On a further appeal to this court, the two issues formulated for determination are as follows:-

1) Whether the trial court was vested with the jurisdiction to entertain the reliefs sought in the 1st respondent's originating summons? B

2) Whether the Appellant is entitled ex debito justitiae to have the judgment of the trial court on 3rd March 2011 set aside as a nullity? C

1st Issue:

The law is elementary and trite that jurisdiction is always determined by the plaintiff's claim which must be the basis for purpose of examining whether the subject matter comes within the powers of the court before which the case is filed. The appellant's grouse in this appeal is challenging the competence of the trial court to entertain the suit against the 4th Respondent (INEC) in view of section 251(1) (p), (q) and (r) of the Constitution of the Federal Republic of Nigeria 1999 (as amended). On a community reading of the subsection supra the exclusive jurisdiction vested in the Federal High Court envisages handling of civil causes or matters pertaining to:- E

"(p) the administration or the management and control of the Federal Government or any of its agencies,

(r) any action or proceeding for a declaration or injunction affecting the validity of any executive or administrative action or decision by the Federal Government or any of its agencies." F

The Federal Government agency to fall within the subsection, must, in other words, have carried out an executive or administrative action or decision. With reference to paragraphs 16, 17, 18 and 19 G of the affidavit in support of the originating summons, it is obvious as rightly submitted on behalf of the 1st respondent that the 4th respondent did not exercise any executive or administrative action or took any decision which was challenged by the 1st respondent. The court in the situation at hand is enjoined to consider not only the parties to the suit but most importantly the subject matter of the claim before it. While the provision of section 251(1) of the Constitution is restrictive in its application, I hasten to say however that it does not confer a blanket exclusive jurisdiction in cases involving the Federal H

Government and its agencies; hence the subject matter consideration which must serve as a guiding principle.

In *Tukur V. Government of Gongola State* (1989) 4 NWLR (Pt.117) 517 at 549, Obaseki JSC for instance held and said:-

B *“It is a fundamental principle that jurisdiction is determined by the plaintiff’s claim. In other words, it is the claim before the court that has to be looked at or examined to ascertain whether it comes within the jurisdiction conferred on the court.”*

C From the spirit of the foregoing paragraphs 16, 17, 18 and 19 of the affidavit, it is my considered opinion that the 4th respondent, though an agent of the Federal Government, cannot be brought within the ambit of section 251(1) sub paragraphs (p) and (r). The lower court at page 506 of the record therefore correctly held in my view when it said thus:-

D *“The case before the lower court is not directly against the 4th Respondent, it is a claim principally against the Appellant on the one hand, and the 2nd and 3rd Respondents on the other. Indeed the case was a challenge to the 2nd and 3rd Respondents’ action and the Appellant is the victim of the consequence of their action as contained in the judgment of the lower court”*

A reproduction of relief 7 of the 1st Respondent’s originating summons at page 4 of the record of appeal for instance seeks as follows:-

F *“A DECLARATION that the 4th defendant should not recognize or accord any recognition to the name of Barrister Ismael Ahmed or any name other than that of NASIRU ALI AHMED as the C.P.C. candidate for the House of Representative to represent Nassarawa Federal Constituency of Kano State.”*

G It is to be noted that the foregoing, being the only relief sought against the 4th respondent should not, as earlier concluded, be used as a blanket covering, especially when regard is had to the Constitutional provision which has whittled down, through a proviso, any attempt on strict adherence to the sub paragraphs (p) and (r); the proviso in other words says:-

H *“Provided that nothing in the provisions of paragraphs (p) (q) and (r) of this subsection shall prevent a person from seeking redress against the Federal Government or any of its agencies in an action for damages, injunction or specific performance where the action is based on any enactment, law or equity,”*

The court below therefore correctly held when it said thus at pages 506 - 507 of the record:-

“The proviso to section 25(1), (p), (q) and (r) allows a State High Court to have concurrent jurisdiction with the Federal High Court where the action is based on any enactment, law or equity. The right to institute this action is granted by section 87(10) of the Electoral Act 2010 (as amended).” B

By the proviso supra and also the provision of section 87(10) of the Electoral Act, 2010 (as amended), both the Federal High Court and the State High Court have concurrent jurisdiction and competence to determine the reliefs contained in the 1st respondent’s originating summons; hence, the lower court cannot be faulted in upholding the jurisdiction and competence of the trial court to hear the case as it did. The issue is resolved against the appellant and in favour of the respondents. C D

Briefly on the 2nd issue, the two lower courts have held concurrently against the appellant; there is no reason advanced by the appellant that the decision was perverse and occasioned miscarriage of justice. That decision cannot in the circumstance be disturbed but must be allowed to stand. See the case of ACN Vs. Lamido (2012) E All FWLR (Pt. 630) 1316 at 1340.

The main appeal in the circumstance is lacking in merit and is hereby dismissed.

In respect of the cross appeal, the only issue raised is:

“Whether the court below was right when it held that it was not a proper forum to determine infraction of paragraphs 1 and 2 of the 5th schedule of the Constitution of the Federal republic of Nigeria 1999 (as amended) and that it will be unfair to shut out the appellant (1st Respondent).” F G

The issue simply put is boarded on whether a legal practitioner is competent to maintain an office, prepare, sign and file processes of court while in full salaried employment in the light of paragraphs 1 and 2 of the Code of Conduct for public officers as contained in the 5th schedule to the Constitution of the Federal Republic of Nigeria H 1999 (as amended)

The contention of the cross-appellants’ is to the effect that the 1st cross -Respondent’s appeal at the court below was incompetent as a result of the alleged non compliance with paragraphs 1 and 2 of

the 5th schedule to the Constitution by the learned counsel to the 1st cross - Respondent at the court below - Mr. M. K. Dabo, Paragraphs 1 and 2 of Part 1 of the 5th schedule provide as follows:-

“1. A public officer shall not put himself in a position where his personal interest conflicts with his duties and responsibilities,

B *2. Without prejudice to the generality of the foregoing paragraph, a public officer shall not -*

(a) Receive or be paid the emoluments of any public officer at the same time as he receives or is paid the emoluments of any other public office; or

C *(b) except where he is not employed on full time basis, engage or participate in the management or running of any private business, profession or trade but nothing in this sub-paragraph shall prevent a public officer from engaging in farming”.*

D It is the submission by the cross appellants that from the definition of section 318 of the 1999 Constitution, M. K. Dabo, a full salaried employee of Nigerian Law School, owned by the Federal Government, is a public officer; that by the said Constitution vide schedule 5, paragraphs 1 and 2 prohibits a public officer from engaging in
E any other vocation, business, profession except farming. It follows therefore, learned counsel submitted, that such an officer cannot and should not as a full salaried employee of the Nigerian Law School be engaged in private legal practice as he had done in the court below
F by preparing, signing and filing the 1st Respondent’s amended notice of Appeal and brief of argument at the lower court.

On behalf of the 1st cross-respondent the learned counsel in response dealt on the failure of the cross appellants to direct the court to any provision of the 1999 Constitution which forbids Mr. M. K. Dabo from signing and/or filing court processes as well as appearing
G in court; that the contention is a gross misconception and should be discountenanced; that contrary to the decision in Okafor & Ors. V. Nweke & Ors. (2007) All FWLR (Pt. 368) 1016, in the instant case Mr. M. K. Dabo is entitled to practice as a legal practitioner who is
H duly registered. The learned counsel further submitted that the actions carried out by a public officer in the course of managing or running any private business, profession or trade are not invalid, null and void on the sole ground that they were carried out in contravention of the 5th schedule to the 1999 Constitution.

At page 495 of the record of appeal, the lower court was very specific in its judgment wherein it held that the issue at hand was wrongly raised before it but should have been at a different forum. In other words and as rightly submitted on behalf of the 1st cross-respondent, the case at hand is not on all fours with the decision in the case of Okafor & Ors V. Nweke & Ors supra. In the instant case for instance, the entitlement of Mr. M. K. Dabo to practice as a legal practitioner has not been disputed by the cross-appellants. The lower court could not therefore be faulted when it said thus at page 495 of the record.

"I agree with learned counsel for the appellant that these are not the issues to be appropriately decided in this appeal. They happen to be issues that should be raised separately in a different forum. It cannot be decided within an appeal."

As rightly submitted on behalf of the 1st cross-respondent, there is no gain - saying the fact that the cross-appellants are at liberty to lodge their allegations with the Code of Conduct Bureau in accordance with paragraph 12 of part 1 of the 5th schedule.

The cross appeal in the circumstance is devoid of any merit and I also dismiss same in terms of the lead judgment of my learned brother, Chukwuma-Eneh, JSC.

In the result both the main and cross appeal are dismissed as lacking in merit. I also abide by the orders made in the lead judgment inclusive of costs.

AKA'AHS JSC

I was obliged with a copy of the judgment just delivered by my learned brother, CHUKWUMA-ENEH JSC and I agree that both the appeal and cross-appeal lack merit and they are accordingly dismissed. I adopt the reasoning and conclusions reached in respect of the main appeal as well as the cross-appeal as mine. Appeal and Cross-Appeal are dismissed. I abide by the orders made on costs.