

SUPREME COURT OF NIGERIA
FRIDAY 24TH JANUARY, 2014. SC. 445/2012
CORAM:- J. A. FABIYI, S. GALADIMA, N. S. NGWUTA,
O. ARIWOOLA, M. D. MUHAMMAD, C. B. OGUNBIYI,
K. M. O. KEKERE-EKUN, JJSC

OWELLE ROCHAS ANAYO OKOROCHA APPELLANT
AND
1. PEOPLES DEMOCRATIC PARTY
2. ACTION CONGRESS OF NIGERIA
3. SENATOR IFEANYI ARARUME RESPONDENTS
4. INDEPENDENT NATIONAL
ELECTORAL COMMISSION
5. ALL PROGRESSIVE GRAND ALLIANCE

APPEALS - Preliminary objection - Determination - The objection must first be considered and resolved once raised - As it could either end proceeding - Or streamline it down by excluding factors which may not be legitimately accommodated (H1)

APPEALS - Right of appeal - Grounds of law - Appeal from final or interlocutory decision of CA to SC is as of right - Where the ground involves question of law alone (H2)

APPEALS - Grounds - Objection - The preliminary objection is mis-conceived - As the grounds having raised the issue of jurisdiction of court - Is purely of law and competent (H3)

APPEALS - Preliminary objection - Filing - By SC Rules O. 2 r. 9(1) respondent relying on the objection - Shall give appellant three clear days notice - Setting out the grounds of objection - And shall file such notice together with ten copies thereof (H4)

APPEALS - Courts - Facts - Consideration - Court has duty to holistically consider all relevant facts presented before it - As revealed on the records of appeal (H5)

APPEALS - Objection - Unchallenged - Facts on which objections

were based in CA were not controverted - Being unchallenged evidence - They constitute sufficient proof (H6)

APPEALS - Election petitions - Gubernatorial - Final court - By 1999 Constitution s. 235 - Decision of SC is final in such election matters - And CA is duty bound by s. 287 to give effect to judgments of SC (H7)

SUPREME COURT - Judgment - Supremacy of - By 1999 Constitution s. 287(1) - All subordinate courts in Nigeria are enjoined to enforce all decisions of SC - Otherwise it will amount to constitutional breach (H8)

APPEALS - Right of appeal - Election petitions - Estoppel - The appeal is caught by lapse of time under 1999 Constitution s. 285(7) - As 1st respondent who had challenged the election up to SC - Can no longer re-litigate his case as pre-election matter at CA (H9)

APPEALS - Election petitions - Court of Appeal - Jurisdiction - By the nature of relief (b) on Exhibit E - CA ought to be put on guard that the subject matter of the appeal - Was not within its jurisdiction (H10)

JURISDICTION - Fundamentality of - Absence of jurisdiction robs court of power to adjudicate on a case - And exercise arising from such will be in futility (H11)

APPEALS - Court - Abuse of process - Leave granted 1st respondent to appeal against decision of FHC - On subject matter that has been dismissed by SC - Is gross abuse of process (H12)

COURTS - Abuse of process - Prevention - To ensure the authority and dignity of court - Court is imbued with power and duty to prevent action - Which constitutes abuse of its process (H13)

ELECTION PETITIONS - Party - Joinder of - Interested party may be joined very early or midstream in suit - But 1st respondent who knew of the concluded petition by SC - Is estopped from initiating fresh appeal in respect of the supplementary governorship election

APPEALS - Court - Discretion - Interference - For appellate court to interfere with exercise of discretion - It must be shown that the discretion was based on wrong principles of law - Or that miscarriage of justice resulted (H15)

FACTS

Before the Imo State Governorship Election Petition, petitioner/ 1st respondent filed petition against the result declared after the governorship election in the State, wherein appellant emerged as the winner. 1st respondent contended that it won the election and pursued same through the Court of Appeal right up to the Supreme Court. The apex court ruled against 1st respondent. 2nd and 3rd respondents had equally gone to the Federal High Court to challenge the emergence of appellant as the winner of the election. The court ruled against 2nd and 3rd respondents on the ground that the subject matter of the suit was a post election matter.

Aggrieved with the stance of the court, 2nd and 3rd respondents appealed to the Court of Appeal Owerri Division in Appeal No.CA/OW/101/2012. 4th and 5th respondents as well as appellant herein were all respondents in the appeal. During the pendency of the appeal, 1st respondent brought an application before the appeal court praying for leave to appeal as an interested party, against the judgment of the Federal High Court. Appellant in response filed a notice of preliminary objection and counter affidavit to the hearing of 1st respondent's application on the ground that the same constitutes an abuse of court process seeing that the Supreme Court had finally ruled on the matter. However, the court ruled against the objection and went ahead to grant 1st respondent's application. Aggrieved, appellant lodged appeal in Supreme Court.

ISSUES FOR DETERMINATION

1. Whether by the combined effect of S. 233(1), S. 285(1), (2) and (7) of the 1999 Constitution of the Federal Republic of Nigeria (as amended) and S. 133(1) of the Electoral Act, 2010 (as amended) as well as the relief sought at the lower court by the 1st Respondent in his notice of appeal, the lower court has jurisdiction to entertain the appeal of the 1st respondent and grant the relief sought

while not sitting as an election petition appellate court.

2. Whether the lower court has jurisdiction to hear the appeal of the 1st respondent, the subject matter and the relief being sought having been heard and determined by this honourable court on 2nd March, 2012 in an election Appeal No: SC/17/2072 - P.D.P. V.

B Okorochoa & Ors.

HELD (Unanimously allowing the appeal per

C **OGUNBIYI JSC)**

APPEALS - Preliminary objection - Determination

1. It is long settled that once a preliminary objection is raised, it must first be considered and resolved as it can make or un-

D **prompt action is obvious because of the effect of its outcome.**

In other words, it could either bring a proceeding to an abrupt end at the preliminary stage or streamline it down by excluding factors which may not legitimately or otherwise be accommodated. (p. 374 F)

E

APPEALS - Right of appeal - Grounds of law

2. The Constitutional provision governing appeal as of right from the decision of the Court of Appeal to this court is well

F **specified in section 233 (2). In other words, an appeal from a final or interlocutory decision of the Court of Appeal to this**

court is as of right, where the ground of appeal involves question of law alone. The right which does not require any leave extends to the Court of Appeal's decision in any civil or criminal

G **proceedings.** (p. 379 C)

APPEALS - Grounds - Objection

3. On a careful perusal of the appellant's two grounds of appeal and issues formulated therefrom, his grouse or complaint

H **is not limited to an exercise of discretion simpliciter but goes further to question the legality of re-litigation on an issue and subject matter which had long been disposed of by a court of competent jurisdiction. In other words, the complaint alleges**

an abuse of court process and therefore challenges the jurisdictional competence of the court; these are issues which turn on the application and appreciation of law. An appeal therefore arising from a jurisdictional consideration cannot by any reason be described as anything outside a ground of law. On a closer examination of the grounds of appeal vis-à-vis the decided cases by this court (supra) wherein classifications were made for purpose of identifying grounds of pure law, it is obvious that both the grounds in question are pure grounds of law. The cases under reference go to show that misapplication of law to undisputed facts is a ground of law.

Issue of jurisdiction of court and competence of an application involve threshold and fundamental questions of law. Contrary to the submission by the learned 1st respondent's counsel, the grounds of appeal herein are not complaining about or alleging an injudicious exercise of mere judicial discretion. Thus, the counsel by viewing the application simply as one seeking leave to appeal as an interested party without more, he did not, I hold, appear to have appreciated the purport of raising the preliminary objection in the first place.

The preliminary objection having been grossly misconceived is hereby overruled. The grounds of appeal are in the circumstance, both competent. (pp. 380 C/381 C)

APPEALS - Preliminary objection - Filing

4. Essentially and without having to consider the seemingly and supposedly preliminary objection raised by the 4th respondent's counsel, I quickly wish to state the legal position of the law relating to the raising of a preliminary objection. Order 2 rule 9(1) of the Rules of this court is clear and unambiguous and it states as follows:-

"9. (1) A respondent intending to rely upon a preliminary objection to the hearing of the appeal shall give the appellant three clear days notice thereof before the hearing, setting out the grounds of objection, and shall file such notice together with ten copies thereof with the Registrar within the same time."

I seek to add also that by the use of the word shall within

the phrase “shall give the appellant three clear days notice thereof before the hearing,” it denotes the stipulation therein as mandatory and the compliance therewith cannot be waived. For a preliminary objection to be competent, it must be raised formally. The failure to comply with the requirement is detrimental because it renders the entire move of no effect and liable to be discountenanced.

From all indications, there is no evidence to show that the 4th respondent either gave three clear days notice to the appellant, of the intention to raise a preliminary objection, or filed any such notice together with ten copies thereof with the register in compliance with rule 9(1) supra. The use of the word shall was twice emphasized in the sub-section and this should not be taken lightly. The rules of court are meant to be obeyed for purpose of protecting the sanctity and dignity of the law and court. He who comes to equity must come with clean hands and which presupposes diligence and care. The counsel, who had the duty to file the notice of preliminary objection and to inform the court timeously at the hearing of the appeal, did not deem it necessary. The court is an adjudicator and should not be seen to conduct a party’s case. The just and appropriate line of action under sub rule 9(2) of order 2 is to discountenance the seemingly preliminary objection upon which the 4th respondent’s brief of argument is predicated.

(pp. 388 H/389 E 390 E)

Courts - Facts - Consideration

5. The merit of the application birthing the ruling subject of this appeal cannot be taken in isolation, but ought to be read within the context of the reliefs sought and the facts deposed to on the affidavits of parties. It is an elementary principle of law that a court has a duty to holistically take into consideration all the relevant facts presented before it as revealed on the records of appeal, which in this case is not limited to the main record but also the supplementary record of Appeal.

(p. 391 F)

APPEALS - Objection - Unchallenged

6. Furthermore, by the nature of the objection raising factual issues, it could only be controverted by further and more tangible facts and not by mere wave of hand as it is done by the lower court in the case at hand. The learned senior counsel Chief Olanipekun expressed his satisfaction and applauded the lower court for having well considered the preliminary objection raised. There is nowhere on record that the facts raised as objections were either controverted by the 1st respondent or at all considered by the lower court. For all intent and purpose, they remain unchallenged against the 1st respondent herein. The law is trite and well settled on unchallenged evidence which without more can constitute sufficient proof. Plethora of authorities are all settled. (p. 397 A)

Election petitions - Gubernatorial - Final court

7. By the provision of section 235 of our 1999 Constitution, the decision of the Supreme Court is final in Gubernatorial Election matters. The Court of Appeal is, therefore, without any stretch of imagination, duty bound by section 287 of the same Constitution to give effect to judgments of this court. The Court of Appeal, by granting the leave in the circumstance at hand with the subject matter having been dealt with finally by this court, had overreached the Constitutional finality inherent in the decision of the Supreme Court and thus also breaching section 235 of the Constitution on the finality of the Supreme Court judgment. (pp. 398 H/401 C)

SUPREME COURT - Judgment - Supremacy of

8. I wish to restate that the purport of section 235 is to put a final seal to the powers of the Supreme Court in governorship election cases. Any attempt to circumvent this provision would tantamount to bulldozing into and through a hard and stony wall. The saying is true that "one cannot hit against the brick." The attempt will surely be met with an uphill task. The court must do all it can to jealously guard its powers and the supremacy of our Constitution as the grundnum, which is, and above all other authorities. The court, as the custodian of the

Constitution must not therefore be seen to ridicule the very institution that puts it in place. Section 287(1) reproduced supra, enjoins all subordinate courts in our land, indeed all parts of the Federal Republic of Nigeria (that is to say every nook and corner) to enforce all decisions of the Supreme Court; thus making all other courts, without any exception, as subordinate courts of jurisdiction. Therefore, any attempt by a subordinate court to either side track, ignore or overlook a fact which is placed before it and tending to cause a likely breach of the provision of section 287(1) of the Constitution supra, ought to be viewed with all seriousness as it is a sabotage seeking to breach the sacred Constitutional grundnum. (p. 399 D)

D APPEALS - Right of appeal - Election petitions - Estoppel

9. Also by Sections 233(3) and 285(7) of the Constitution, with the appeal being outside the time allowed by law, it no longer falls within appeal as of right under section 233(2) but ought to be with leave of the Court of Appeal or this court; the 60 days period within which to appeal had also elapsed. Without mincing words, I will hasten to say, loud and clear, that the 1st respondent in the circumstance of this case is in serious breach of both the Electoral laws as well as the Constitution. Put differently, the 1st respondent, having elected to challenge the election through the Tribunal and right up to this court, can no longer re-litigate his case as a pre-election matter at the Court of Appeal. He cannot exercise both rights. He had already had the bite at one side of the cherry and cannot again have a second bite at the other side. (p. 401 D)

Election petitions - Court of Appeal - Jurisdiction

10. The lower court at the time of considering the application was not constituted to hear an appeal emanating from an election petition. The prayer on relief (b) sought from the Court of Appeal by the 1st Respondent, per the proposed notice and grounds of appeal attached as Exhibit 'E' supra, is not one therefore within the purview of the jurisdiction of the lower court as an intermediate court in pre-election litigation. The

law is well settled that it is the relief or the claim in originating process that determines the jurisdiction of the court. By the very nature of relief (b) on Exhibit E, the lower court ought to have been put on the guard that the subject matter of the appeal was not within its jurisdiction. (p. 403 G)

B

JURISDICTION - Fundamentality of

11. It is very elementary and trite that the question of jurisdiction is very fundamental. The absence of jurisdiction robs a court of any power to adjudicate on a case and the exercise will be in futility. This age long principle had been well pronounced and enunciated in the locus classicus case of Madukolu V. Nkemdilim (1962) 2 NSCC (Vol. 2) 374.

(p. 404 B)

D

Court - Abuse of process

12. The learned appellant's counsel had passionately and persistently echoed that the leave to appeal against the decision of the Federal high Court granted the 1st Respondent herein, on the same subject matter which formed the basis of the election petition of the 1st Respondent, and which petition was pursued up to the Supreme Court and dismissed, is a gross abuse of process. I cannot but totally agree with that submission.

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With reference made to the decision in the case of Dingyadi Vs. INEC No. 2 (2010) 18 NWLR (pt. 1224) SC at 154 the terminology, abuse of court process, was held by this court at page 195 in the following connotation per Chukwuma-Eneh, JSC:-

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"The term abuse of process connotes simply the misuse of court's process and it includes acts which otherwise interfere with the course of justice. Clearly, the acts include where without reasonable ground a party institutes frivolous and also by instituting of multiplicity of actions or is on a frolic act of forum shopping i.e. seeking for favourable court to entertain a matter. It also includes depriving the court of jurisdiction." (p. 405 G)

H

COURTS - Abuse of process - Prevention

13. It cannot be different with the case at hand, wherein parties and subject matter are also the same in the two cases, i.e. to say the one earlier dismissed by this court and the one sought to appeal by order of the ruling now subject matter of appeal. The drastic measure is needful to ensure the authority and dignity of the court which is imbued with the power and duty to prevent action which constitutes abuse of its process. (p. 406 F)

ELECTION PETITIONS - Party - Joinder of

14. The 1st respondent at the time of application for joinder, was very much aware, also very well with the knowledge of the concluded petition by this court in SC.17/2012 (supra) on the 2nd March, 2012. He cannot therefore feign ignorance at the time he filed the offending application on the 18th May, 2012, which was a period of over two months when the final seal was put on his case by this court. The principle of law is well settled that a party may be joined as a person interested in a suit very early or midstream depending on when he knew of the proceedings. In the case before us and under consideration however, the 1st respondent as the applicant was very much aware of the concluded suit involving his interest.

The saying is apt, that Equity aids the vigilant and not the indolent. The 1st respondent, and also his comrades/those in his camp have themselves to blame and must not escape the wrath of the hammer for being in utter abuse of court process.

On the authority of Re: Yar'adua supra, the 1st respondent is, by reason of the subject matter having earlier been litigated, estopped from acting or taking further steps by way of fresh appeal in respect of the supplementary governorship election held on 6th May, 2011. (p. 406 H)

Court - Discretion - Interference

15. The conditions upon which an appellate court is to interfere with the exercise of the discretionary power vested in the court below have been set out in plethora of authorities and

rightly submitted upon by the learned senior counsel representing the 1st respondent, Chief Wole Olanipekun, SAN. In other words, for the interference to hold, it must be shown that the lower court exercised its discretion upon wrong principles of law or improperly or that a miscarriage of justice resulted or will result there from. (p. 407 H)

NOTABLE POINTS OF INTEREST

OGUNBIYI JSC

1. Determination of grounds of appeal – Principles

The question, what is a ground of law, has been a subject of controversy and discussion in numerous cases. This court had, for instance, laid down the general principles in making the distinction between different types of grounds of appeal. Some of these principles have been elucidated in the case of Calabar Co-op. Ltd. & 2 Ors. V. Ekpo (2008) 1 - 2 SC 229 at 273 - 275 where the following instances were held as grounds of pure law:

a. Where a ground complains of misunderstanding by the lower court of the law or a misapplication of the law to the facts already proved or admitted, it is a ground of law.

b. Where the lower court or tribunal applying the law to the facts in a process which requires the skill of a trained lawyer, this is a question of law.

c. Where the lower court reaches a conclusion which cannot reasonably be drawn from the facts as found, the appeal court will assume that there has been a misconception of the law. This is a ground of law.

d. Where a trial court fails to apply the facts which it has found correctly to the circumstance of the case before it and there is an appeal to Court of Appeal which alleges misdirection in the exercise of the application by the trial court, the ground of appeal alleging the misdirection is a ground of law not of fact.

e. Where the appeal court interferes in such a case and there is a further appeal to a higher Court of Appeal on the application of the facts, the grounds of appeal alleging such misdirection by the lower Court of Appeal is a ground of law not of fact. (p. 379 D)

2. *There should be an end to litigation*

The quest for power and governance should not be without end. The courts, in particular the apex court, which has the duty to give example to all subordinate courts, should be wary against accommodating situations where litigations subsist without end under the guise of do or die attitude which effect would only make nonsense of our entire judiciary and legal system which had specifically put in place measures to check on the unending lethargy of our political ambition. The slogan, there must be an end to litigation, should persistently sound loud and clear in our polity. This is a matter of public policy which should not create a societal gangrene. The maxim, *interest republicae ut sit finis litium*, is a cardinal principle of the administration of justice. (p. 409 D)

3. *Abuse of court process should be prevented by the law*

The purpose and effect of the law will be lost if it acts only as a toothless bulldog. It should not be seen as a white elephant, but should be a fearful wolf in a sheep's skin. Its effect should be so pronounced and felt especially at times like this where the abuse of the court process is so imminent. (p. 409 G)

REPRESENTATION

Chief Adeniyi Akintola, SAN, appearing with Chief A. J. Owonikoko, SAN, Folasade Aofolaju Esq., Yemi George Ojo, Esq., Oladele Oyelami, Esq., C. O. C. Emeka-Izima, Esq., J. O. Aigbokhaevbolo (Miss), Eniye Edonwonyi (Miss), F. U. Adejoh, Esq., Teddy O. Akwari, Amagwula Obinna, Chief Nelson Ezeriola, E. I. Nnoaham, Jude C. Okafor, Mbachu H. I., Uche Konkwo, Obinna Etukemka, Alaeto Maxwell (KSM), Nwosu Nnaemeka O., Nnabugwu Oluchukwu G. I., Ikeme Ify (Miss), Uba Chinwa (Miss), Ejiogu Ify (Miss), Ugochi Igboananwa (Miss), Obiohu Paschal, Maureen Onyiuke Ms, Patience N. Ume (Mrs), Igiriogu Francis, Stephen C. Nzenwa, M. A. Dunion, and Adam Ogechi Linda (Miss), for the Appellant

Chief Wole Olanipekun, SAN appearing with Joe Agi, SAN, K. C. Njemanze, SAN, Chief Jerry Egemba, Chief C. O. C. Akaolisa, Sylvester Eigbedion, Olugbenga Adeyemi, Adedayo Adesina, Aisha Ali (Miss), Venessa Onyemawa (Miss) and P. C. Ezegamba, for the 1st Respondent

Chief U. M. Udechukwu, SAN with Anita Otubu Esq., for the 2nd respondent

Mr. Awa Kalu, SAN with D. O. Madu, Esq., E. S. Osige, E. C. Ani, Esq. and I. Graham-Douglas, for the 3rd respondent

Chief A. S. Awomolo, SAN appearing with K. Bawa, Esq., Dr. Abdul Muyassir Ladan Esq, Ebuka Nwaeze, Esq. and O. Olaleye Kumuyi Esq., for the 4th respondent

Ahmed Raji, SAN appearing with Adeola Adedipe, A. A. Usman and Chief Oba Maduabuchi Esq., for the 5th respondent

CASES REFERRED TO

Calabar Co-op. Ltd. v. Ekpo (2008) 1 - 2 SC 229

FB.N. v. Isa Ind. Ltd. (2010) 15 NWLR (pt. 1216) 247

Comex Ltd. v. N.A.B. Ltd. (1997) 3 NWLR (pt. 496) 643

Ajuwa v. S.P.D.C.N. Ltd (2011) 18 NWLR (pt. 1279) 822

Hassan v. Aliyu (2010) 7 NWLR (pt. 1223) SC 547

Madukolu v. Nkemdilim (1962) 2 NSCC (vol. 2) 374

Rossek v. A.C.B. Ltd (1993) 10 SCNJ 20

WAEC v. Adeyanju (2008) 35 WRN 1

Sani v. Okene L.G. Traditional Council (2008) 50 WRN 149

Ariori v. Elemo (1985) 1 SC 14

Ojokoloko v. Alamu (1937) 7 SC (pt. 1) 24

Ikenya v. P.D.P (2012) 12 NWLR (pt. 1315) 493

Ceekay Traders Ltd. v. Gen Motors Co. Ltd (1992) 2 NWLR (pt. 222) 132

Salu v. Egeibon (1994) 6 NWLR (pt. 348) 29

Alsthom S. A. v. Saraki (2005) All FWLR (pt. 246) 1385

STATUTES & RULES REFERRED TO

Electoral Act 2010 (as amended), ss. 26(1)(2)(3), 133(1), 134(3)

Constitution of the Federal Republic of Nigeria 1999 (as amended), ss. 233, 235, 285(1)(2)(7), 287(1)

Supreme Court Rules, O. 2 rr. 9(1)(2)

LEAD JUDGMENT BY OGUNBIYI JSC

This is an appeal against the Ruling of the Court of Appeal, Owerri judicial Division delivered on the 19th October, 2012 wherein the court granted the 1st Respondent leave to appeal against the

judgment of the Federal High Court, Owerri in Suit No. FHC/OW/CS/133/2011 A.C.N. V. I.N.E.C. & Ors, delivered on 3rd February, 2012.

The judgment dismissed the suit filed by the 2nd and 3rd Respondents on the ground that the subject matter of the said suit was a post election matter. See pages 277 - 297 of the record of Appeal in evidence.

Dissatisfied with the judgment of the Federal High Court, the 2nd and 3rd Respondents lodged an appeal at the Court of Appeal, Owerri Judicial Division vide a Notice of Appeal dated 28th March, 2012 and filed on 30th March, 2012 - pages 323 - 332 of the record of appeal is also in evidence. The said appeal was subsequently given a number, CA/OW/101/2012.

The Briefs of argument were filed and exchanged in respect of the appeal as between the 2nd and 3rd Respondents on the one hand, who were appellants at the Court of Appeal, while the 4th and 5th Respondents as well as the appellant herein are, on the other hand, all respondents at the lower court. Pages 340 - 470 of the record of appeal is evidencing the respective briefs of arguments filed by all the parties herein, except the 1st Respondent. While the foregoing appeal was pending, on the 18th May, 2012 the 1st Respondent herein brought an application in the said Appeal No. CA/OW/101/2012, praying the court for leave to appeal, as an interested party, against the judgment of the Federal High Court, Owerri Judicial Division in Suit No. FHC/OW/CS/133/2011. The application is at pages 537 - 573 of the record.

Upon service of the foregoing application on the Appellant herein, he promptly filed a notice of preliminary objection and a counter affidavit challenging the 1st Respondent's application as evidenced at pages 608 - 890 of the record of Appeal.

Notwithstanding the Notice of preliminary Objection and the counter affidavit, the Court of Appeal on the 19th of October, 2012 delivered its Ruling on the said Application, and granted the 1st Respondent leave to appeal against the judgment of the Federal High Court, Owerri delivered on 3rd February, 2012. Pages 1- 14 of the supplementary record are in evidence.

It is against the ruling delivered by the lower court on the 19th of October, 2012 therefore that the appellant has lodged this

appeal vide a Notice and Grounds of Appeal filed on 24th October, 2012. The brief statement of facts that gave rise to this appeal are very intriguing and as follows:

Prior to the General Elections conducted by the 4th Respondent (INEC) herein, into the office of the Governor of the various states of the Federal Republic of Nigeria in April, 2011, the 4th respondent had fixed the 26th day of April, 2011, as the date wherein election would be conducted into the office of the Governor of Imo State. That date was in compliance with the provision of section 178(2) of the Constitution of the Federal Republic of Nigeria 1999 (as amended).

On the said 26th April, 2011, election held as scheduled successfully in 23 local Government Areas of Imo State; the uncontrollable violence, however marred and made it impossible for the 4th respondent to conduct election in the 4 local Government Areas of: Ohaji/Egbena, Mbaitoli, Oguta, Ngor-okpala as well as Orji Ward in Owerri North Local Government Area.

Following the provision of section 26(1), (2) and (3) of the Electoral Act, 2010 (as amended) the 4th Respondent postponed election in the said affected areas of the state and declared the Governorship Election in Imo State inconclusive. It subsequently appointed the 6th of May, 2011 as a date for supplementary election to hold into the affected Areas.

On the 3rd of May, 2011, the 2nd and 3rd Respondents filed an action challenging the constitutionality of the decision of the 4th Respondent to conduct the supplementary election. However, the originating processes in that suit could not be issued and served on the 4th Respondent herein, until about 10th of May, 2011 after the 4th Respondent had concluded the supplementary election and declaring the appellant herein as the winner of the said election, and returning him as duly elected Governor of Imo State.

For purpose of emphasis, the 4th Respondent herein held the supplementary Election on 6th May, 2011, in conclusion of the Governorship Election which was kick started on 26th April, 2011 in accordance with section 26(1) and (2) of the Electoral Act, 2010 (as amended); the Originating processes in the suit of the 3rd Respondent having not been issued or served on it.

On the record and worthy of note is the fact that the Consti-

tutionality/legality of the supplementary Election was challenged by the 1st Respondent herein i.e. the Peoples Democratic Party (P.D.P.) at the Election Petition Tribunal in Petition No. EPT/IM/GOV/04/2011: Peoples Democratic Party V. Owele Rochas Anayo Okorocha & Ors. The tribunal's judgment is contained at pages 621 - 670 of the record of appeal, specifically at page 668 at the last paragraph, the trial Tribunal held and said:-

"Having held that the supplementary election conducted by the 3rd respondent on 6th May, 2011, was validly conducted, the votes generated thereat were therefore valid votes."

I need to add at this juncture that the 3rd respondent in the petition was INEC who is the 4th respondent herein, this appeal. Being dissatisfied with the judgment of the Election Petition Tribunal, the 1st respondent herein appealed unsuccessfully to the Court of Appeal, as well as to this court which both dismissed its appeal. While the judgment of the lower court is contained at pages 671 - 738 of the record of appeal, that of this court in SC. 17/2012 - P.D.P. VS. INEC & Ors. was delivered on 2nd day of March, 2012.

It is also of note to further state that on the 6th May, 2011, the 2nd and 3rd Respondents herein on their own part brought an action in Suit No. FHC/OW/CS/133/2011 between them and INEC challenging the constitutionality or validity of the supplementary Election conducted by the 4th Respondent. The said action was dismissed at the Federal High Court on the 3rd day of February, 2012 and on the 30th day of March, 2012 an appeal was lodged at the Court of Appeal vide a Notice and Grounds of Appeal dated 28th March, 2012.

On the 18th May, 2012 the 1st Respondent, by way of motion on Notice, brought in the pending Appeal No. CA/OW/101/2012, and after parties have filed their respective Briefs of Arguments, sought the leave of the Court to Appeal to appeal against the judgment of the Federal High Court, Owerri, delivered on 3rd February, 2012 in Suit No. FHC/OW/CS/133/2011 claiming that he was not aware of the pendency of the said suit at the Federal High Court, Owerri while it lasted. Pages 537 - 542 of the record of appeal are in reference.

It is also on record that the appellant and the 5th Respondent herein challenged the said application for leave to appeal by raising a preliminary objection and also filing a 26 paragraph counter

- affidavit against same. Notwithstanding the Notice of preliminary Objection raised, the lower court, on the 19th day of October, 2012 delivered the ruling in favour of the 1st Respondent. Pages 1 - 14 of the supplementary record are in evidence.

It is against the said ruling that the appellant herein has brought this appeal and urging that this court should set it aside. The Notice of appeal dated 23rd October, 2012 and filed on 24th October, 2012 is contained at pages 956 - 960 of the record of appeal and raises two grounds of appeal. On behalf of the appellant, two issues were identified in his brief of argument filed on the 14th of December, 2012. Briefs were also filed on behalf of the 1st, 3rd and 4th respondents respectively. While that of the 1st respondent was duly filed on the 16th January, 2013 and incorporating a preliminary objection, the 3rd respondent's brief was filed on the 13th May, 2013 and that of the 4th respondent was deemed filed on 7th May, 2013. The appellant in response to the 1st, 3rd and 4th respondents' briefs also filed replies on the 29th January, 2013 and on 20th May, 2013 for 3rd and 4th respondents respectively. The appellant also responded to the preliminary objection raised by the 1st respondent.

For purpose of putting the record straight, it is pertinent at this point to state the position of the 2nd and 5th respondents. On the 31st October, 2013 at the point when the appeal was to be heard, the senior counsel, Chief U. M. Udechukwu represented the 2nd respondent. On application of the said counsel, which was not opposed by any of counsel appearing in the case, the court struck out the name of the respondent, Action Congress of Nigeria, (ACN), having ceased to exist as a Party.

Also and on a further application by the learned senior counsel, Ahmed Raji SAN, the briefs filed on behalf of their client the 5th respondent, in Appeals SC/445/2012 and SC/446/2012 were withdrawn and accordingly struck out. The two issues identified by the appellant for the determination of this appeal are:

1. Whether by the combined effect of S. 233(1), S. 285(1), (2) and (7) of the 1999 Constitution of the Federal Republic of Nigeria (as amended) and S. 133(1) of the Electoral Act, 2010 (as amended) as well as the relief sought at the lower court by the 1st Respondent in his notice of appeal, the lower court has jurisdiction to entertain the appeal of the 1st respondent and grant the relief sought

while not sitting as an election petition appellate court. (Distilled from ground 1).

2. Whether the lower court has jurisdiction to hear the appeal of the 1st respondent, the subject matter and the relief being sought having been heard and determined by this honourable court on 2nd March, 2012 in an election Appeal No: SC/17/2072 - P.D.P. V. Okorocha & Ors. (Distilled from ground 2).

Chief Olanipekun, the lead counsel, representing the 1st respondent expressed his inability to adopt the two issues formulated by the appellant on the ground that they have no relationship whatsoever with the two grounds of appeal raised. The learned senior counsel argued that the issues are formulated in nubibus and therefore incompetent; hence the reason for filing the notice of the preliminary objection which will be considered in due course.

On the part of the 3rd respondent however, the appellant's two issues were adopted while the 4th respondent raised a lone issue in the following terms:-

Whether in the light of the facts, circumstances and the laws applicable to these, it can be said that the court below had exercised its discretion rightly, judicially and judiciously within its powers, its jurisdiction and the governing principles in granting leave to the 1st respondent to appeal as an interested party against the decision of the trial court.

At the hearing of this appeal on the 31st October, 2013, the respective briefs of argument were adopted adumbrated thereon by all counsel. The appeal and the preliminary objection raised by the 1st respondent were taken together.

It is long settled that once a preliminary objection is raised, it must first be considered and resolved as it can make or unmake the outcome of a proceeding. The justification for the prompt action is obvious because of the effect of its outcome. In otherwords, it could either bring a proceeding to an abrupt end at the preliminary stage or streamline it down by excluding factors which may not legitimately or otherwise be accommodated.

On this note, the notice of preliminary objection filed by the 1st respondent will now be considered. The objection seeks for an order of this court to strike out the entire Notice and grounds of

Appeal dated 23rd October, 2012 but filed on 24th October, 2012, as well as the Brief of argument filed thereon. The six grounds predicated the objection are also as follows:-

- i. Being an appeal against the exercise of the lower court's discretionary power, leave of either the said lower court or this court is mandatorily required before filing the appeal; B
- ii. The appellant did not seek nor obtain the required leave, either from this court or from the lower court prior or subsequent to the filing of the Notice of Appeal;
- iii. By reason of (i) and (ii) supra, the Notice of Appeal dated 23-10-12 but filed on 24 - 10 - 12 and the Appellant's Brief of argument dated 13-12-12 predicated thereon are incompetent; C
- iv. In addition or alternative to iii supra, the entire appeal is incompetent in that:
 - a. It does not arise from the decision of the lower court. D
 - b. Further or alternative to (a) supra, it seeks to pre-empt the yet-to-be argued appeal at the Court of Appeal.
 - c. Further to (b) supra, the Supreme Court does not have the jurisdiction to entertain this purported appeal.
 - v. The appeal constitutes an abuse of the processes of court; E
 - vi. The two issues formulated by the Appellant have no relationship with his two grounds of Appeal, as can be seen in paragraph 3.00 of Appellant's Brief. With respect to Appellant's counsel, the two issues have been formulated in nubibus. Both the issues and the Brief grounded thereon are also incompetent. F

In a nutshell, the sum total of the preliminary objection raised by the 1st respondent is challenging the competence of the notice of appeal filed by the appellant, which learned counsel for the 1st respondent submits is incompetent and or defective and therefore renders this court without any jurisdiction to entertain same. Counsel submits that by the very nature of the application which gave birth to the ruling sought to appeal, same calls for the exercise of discretionary power by the lower court; that any decision of the court in respect of, or in relation to such application therefore is an exercise of the court's discretion, which of necessity, will require that leave of the lower court be sought and/or obtained. In further submission, the learned senior counsel maintains that where a ground of appeal complains about, or alleges an injudicious exercise of judicial discretion, H

the said ground, will at best be a ground of mixed law and fact which will require leave.

In otherwords, that the 1st respondent's application did not only involve a resort to principles of law, but also a factual position of the matter as borne out in the competing affidavits of parties; any
B ground of appeal against that determination, counsel submits, is one of mixed law and fact which requires the leave of court. Put differently, it is the counsel's firm contention that the notice of appeal is fundamentally defective, incompetent and without any foundation;
C hence there is therefore no appeal before the court; that the appellant is left in no doubt but with the full understanding of the nature of the lower court's ruling.

On a closer look at the grounds of appeal and their particulars, it is the counsel's submission that they are not related to or arise
D from the simple ruling of the lower court, the subject matter of this appeal, wherein leave was granted the 1st Respondent to appeal as an interested party against the judgment of the Federal High Court. Counsel related copiously to the provision of section 233 of the Constitution of the Federal Republic of Nigeria 1999 (as amended), and
E re-affirmed that this purported appeal does not fit into any of those circumstances or situations which are regimented by the Constitution; that the filing of this appeal was merely to waste time as it is based on recklessness, frivolity and amounts to a gross abuse of the process of court; that assuming without conceding that there is a live
F issue in this appeal, the learned counsel maintains that it will not be within the jurisdiction of this court to entertain same, as the said issue would be contingent on the decision of the lower court thereon. In otherwords, that this court will not have jurisdiction to determine
G issues in an appeal which have not been determined by the lower court; that the purported appeal is pre-emptive of any decision which the lower court would give, based on its granting leave to the 1st Respondent to appeal.

The learned senior counsel in grounding his submission cited a
H number of decided authorities in support. Counsel also related to the accepted principle that the Supreme Court or any appellate court cannot exercise its appellate jurisdiction in vacuo, unless and until a lower court gives a decision and proper appeal is submitted to the appellate court from that decision. In the quest to drive his point

straight home and for emphasis, the learned counsel urged that in the absence of any nexus between the two issues formulated for determination with the grounds of appeal of the appellant, both should be discountenanced and struck out; that issues for determination must flow from and/or be rooted in the grounds of appeal. Where however the issues do not have any bearing with the grounds of appeal, they should be disregarded; that the ruling sought to appeal is not an enforceable ruling or a ruling that can be enforced against the appellant. In other words, that the appellant cannot be a person aggrieved by the said ruling or a person who has suffered a legal grievance as a result of the ruling. It follows therefore that any right of appeal to this court cannot be exercised by a party who has not been wrongfully deprived of any entitlement from the decision complained against, otherwise the entire exercise would become academic. The court is therefore called upon to strike out the entire appeal for incompetence.

In response to the preliminary objection raised by the 1st respondent, the appellant's counsel, Chief Akintola, SAN submits that leave is not required to file the grounds of appeal on which the instant appeal is predicated; that, contrary to the wrong contention held by the 1st respondent's counsel, the grounds do not constitute an abuse of court process. Specific reference was made to section 233 (1) and (2) of the 1999 Constitution of the Federal Republic of Nigeria, (as amended).

In further submission, the learned counsel posited that in determining whether an appeal is of right or requires leave, the grounds of appeal must be thoroughly examined; that the case of the appellant against the grant of leave was not about a discretionary issue.

Rather it was to the effect that granting leave to the 1st respondent to join as an interested party in this appeal, will amount to opening the floodgate of re-litigation on an issue and subject matter which had been disposed of by a competent court of record.

It is instructive, counsel maintained, that the genesis of this instant appeal was that 1st respondent sought to appeal against a judgment of the trial court in a pre-election matter; that the subject matter of the pre-election suit incidentally was the same as the post election petition which had been tried on the merit and resolved

against the 1st respondent right from the Election Petition Tribunal, also the Court of Appeal and finally by the Supreme Court; that issue of jurisdiction and competence of an application involve threshold and fundamental questions of law; that contrary to the position held by the 1st Respondent, the issue of whether or not the grounds of
B appeal are only of law is aptly amplified in the particulars in respect of the two grounds.

In the course of asserting his position further, it was also submitted by the appellant's counsel that grounds of appeal do not cease
C to be grounds of law simply because the complaints were adumbrated in the supporting particulars; that they remain grounds of law, for which no leave of court is required pursuant to S. 233 (2)(a) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended).

D Submitting on the question, whether relationship exists between the grounds of appeal and the ruling sought to appeal, the senior counsel maintains that, contrary to the position taken by the 1st respondent, the grounds of appeal herein are manifestly borne out of the ruling being appealed against.

E On the 1st respondent's allegation that the entire particulars contradict the main ground, the appellant's counsel rejected the viewpoint and argued vehemently that the particulars merely outline the undisputed facts of the conclusion of an earlier case at the apex court,
F as between the same parties, and their privies; that the law therefore does not permit a relitigation of the same issue under the guise of appealing as an interested party; that the presumptuous blanket statements on the absence of nexus between the issues formulated and the grounds of appeal, is grossly misconceived and this court is called
G upon to discountenance the argument and dismiss the preliminary objection as lacking in merit.

The 3rd and 4th respondents are not concerned with the preliminary objection, which was an issue only between the 1st respondent and the appellant.

H For the determination of the preliminary objection raised, it would be pertinent to reproduce the two grounds of appeal, the subject of controversy, without their particulars as follows:-

"GROUND 1.

The learned justices of the Court of Appeal erred in law when

they joined the respondent herein as an Appellant in a pre-election suit, and when the proposed grounds of appeal and the reliefs being sought therein relate to a post - election matter, the subject matter of which has been heard and determined by the Supreme Court.

GROUND 2.

The learned justices of the Court of Appeal erred in law when they dismissed the preliminary objection of the appellant and held that the 1st respondent is an interested party and has a right to appeal against the decision of the lower court in Suit No: FHC/CS/133/2011."

The Constitutional provision governing appeal as of right from the decision of the Court of Appeal to this court is well specified in section 233 (2). In other words, an appeal from a final or interlocutory decision of the Court of Appeal to this court is as of right, where the ground of appeal involves question of law alone. The right which does not require any leave extends to the Court of Appeal's decision in any civil or criminal proceedings.

The question, what is a ground of law, has been a subject of controversy and discussion in numerous cases. This court had, for instance, laid down the general principles in making the distinction between different types of grounds of appeal. Some of these principles have been elucidated in the case of Calabar Co-op. Ltd. & 2 Ors. V. Ekpo (2008) 1 - 2 SC 229 at 273 - 275 where the following instances were held as grounds of pure law:

- a. Where a ground complains of misunderstanding by the lower court of the law or a misapplication of the law to the facts already proved or admitted, it is a ground of law.
- b. Where the lower court or tribunal applying the law to the facts in a process which requires the skill of a trained lawyer, this is a question of law.
- c. Where the lower court reaches a conclusion which cannot reasonably be drawn from the facts as found, the appeal court will assume that there has been a misconception of the law. This is a ground of law.
- d. Where a trial court fails to apply the facts which it has found correctly to the circumstance of the case before it and there is an appeal to Court of Appeal which alleges misdirection in the exercise

of the application by the trial court, the ground of appeal alleging the misdirection is a ground of law not of fact.

e. Where the appeal court interferes in such a case and there is a further appeal to a higher Court of Appeal on the application of the facts, the grounds of appeal alleging such misdirection by the lower Court of Appeal is a ground of law not of fact.

For purpose of further reinforcement, more classifications were identified in the cases of *F.B.N. v. Isa Ind. Ltd.* (2010) 15 NWLR (pt. 1216) 247 at 291 - 292, *Comex Ltd. V. N.A.B. Ltd.* (1997) 3 NWLR (pt. 496) 643 at 656 - 657 and *Ajuwa v. S.P.D.C.N. Ltd* (2011) 18 NWLR (pt. 1279) p. 822-823.

On a careful perusal of the appellant's two grounds of appeal and issues formulated there from, his grouse or complaint is not limited to an exercise of discretion simpliciter but goes further to question the legality of re-litigation on an issue and subject matter which had long been disposed of by a court of competent jurisdiction. In otherwords, the complaint alleges an abuse of court process and therefore challenges the jurisdictional competence of the court; these are issues which turn on the application and appreciation of law. An appeal therefore arising from a jurisdictional consideration cannot by any reason be described as anything outside a ground of law. On a closer examination of the grounds of appeal vis-à-vis the decided cases by this court (supra) wherein classifications were made for purpose of identifying grounds of pure law, it is obvious that both the grounds in question are pure grounds of law. The cases under reference go to show that misapplication of law to undisputed facts is a ground of law.

Put differently, the appellant's grounds of appeal and the particulars allege or complain of undisputed facts between the parties, to which the lower court misapplied the law. In otherwords, that the subject matter of the election appeal which was decided upon by this court in SC. 17/2012 on 2nd March, 2012 is the same complaint that was the subject matter of the judgment from the Federal High Court, Owerri, and which is again sought to appeal.

As rightly submitted by the appellant's learned counsel, the appellant, having painstakingly shown that his appeal is challenging the misapplication of the law by the lower court to facts which are

accepted and undisputed by parties, especially the 1st respondent, it is my humble view therefore that the two objected grounds in the instant appeal do not require the leave either of the lower court or this court, to be competent.

In the grounds of appear under attack, there is no dispute that the interlocutory ruling of the Court of Appeal was in respect of two sets of applications, namely:- (1) the 1st respondent's motion for leave to appeal as an interested party against the final judgment of the trial Federal High Court and (2) preliminary objection of the appellant against the application on grounds of lack of jurisdiction of the court below to entertain same and incompetence of the leave sought in the peculiar circumstance of the case.

Issue of jurisdiction of court and competence of an application involve threshold and fundamental questions of law. Contrary to the submission by the learned 1st respondent's counsel, the grounds of appeal herein are not complaining about or alleging an injudicious exercise of mere judicial discretion. Thus, the counsel by viewing the application simply as one seeking leave to appeal as an interested party without more, he did not, I hold, appear to have appreciated the purport of raising the preliminary objection in the first place.

The preliminary objection having been grossly misconceived is hereby overruled. The grounds of appeal are in the circumstance, both competent.

On the merit of the appeal, I will adopt the two issues formulated by the appellant and which have been reproduced earlier. The two issues were taken and argued together by the appellant's counsel. In his submission he argued that leave to appeal as an interested party is not a right open to litigant, who had previously litigated an issue unsuccessfully on the merit, only to have a second bite at the cherry through the suit of another aggrieved party. In maintaining his stance the learned counsel posited that a controlling premise lies in the fact that, in gubernatorial election, a candidate always has the option to ventilate his right for redress against alleged breach of the process in two alternative but mutually exclusive ways; first is by filing a pre-election suit where the claim is amenable to being resolved in the normal civil court; or secondly, to opt for participating in the election, and if still dissatisfied, take up any complaint by way of elec-

tion petition; that a candidate cannot pursue the two remedies against the same infraction in two courts at the same time. Reliance was anchored on the case of *Hassan v. Aliyu* (2010) 7 NWLR (pt. 1223) SC 547 at 599, where it was held that the court lacks the power to entertain a belated challenge of a concluded gubernatorial election by way of subsequent pre-election proceedings; that the jurisprudential premise of the foregoing scenario is anchored, deeply in the combined judicial interpretation of the provisions of sections 233(1), 235, 285(1), (2) and (7) and 287(1) of the 1999 Constitution of the Federal Republic of Nigeria (as amended) as well as the provisions of section 133 (1) & 134(3) of the Electoral Act, 2010 (as amended). The counsel in further submission is vehemently challenging the jurisdiction of the lower court over the appeal of 1st respondent in the light of the reliefs sought by the 1st Respondent in his proposed Notice and Grounds of Appeal attached to the application filed before the lower court on the 3rd May, 2012. Regrettably, the learned counsel echoed in strong terms the absence of jurisdiction on the lower court to sit on the 1st respondent's appeal. This, counsel maintains in view of the Notice and Grounds of Appeal of the 1st Respondent herein which relate to post election matter and not within the purview of the jurisdiction of the Court of Appeal, not sitting as an appellate court over an election petition. It is the counsel's further submission that only an Election petition Tribunal or the Court of Appeal sitting as an appellate court over an election petition judgment can hear and determine the appeal sought to be filed by the 1st Respondent.

The proposed grounds of appeal having been litigated to finality by this court, same, counsel argued cannot again be subjected for the same purpose before the Court of Appeal; that appeal, counsel argued had, for this reason become academic.

The learned counsel in the circumstance urged that the appeal be allowed as meritorious and, predicated his contention on the following given reasons:-

i) That the 1st respondent herein, at the Imo State Governorship Election Tribunal challenged the election on the subject matter of the Notice and grounds of appeal and lost. He unsuccessfully appealed against the decision, before the Court of Appeal and the Supreme Court.

ii) That leave to appeal against the decision of the Federal

High Court, granted the 1st Respondent herein on the same subject matter which formed the basis of its election petition and which petition was pursued up to the Supreme Court and dismissed, is an abuse of court process.

iii) That the leave to appeal, granted the 1st Respondent herein, is tantamount to the Court of Appeal overreaching the Constitutional finality inherent in the decision of the Supreme Court in Gubernatorial Election Tribunal under section 235 of the 1999 Constitution, and thereby breaching the Constitutionally mandated duty of the Court of Appeal to give effect to judgments of the Supreme Court pursuant to section 287 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended). B
C

iv) That the proposed appeal is an indirect way of challenging the election of the appellant herein outside the time limited for filing a petition or appeal against the decision of the Election Petition Tribunal contrary to section 134 of the Electoral Act, 2010 (as amended) sections 233(3) and 285(7) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended). D

v) That the said judgments of the Election Petition Tribunal, Court of Appeal and Supreme Court over which the 1st Respondent herein had litigated are judgments in-rem. E

vi) That the 1st Respondent which had elected to challenge the election through the Tribunal and ultimately to the Supreme Court, has lost the right to re-litigate same as a pre-election matter before the Court of Appeal. F

In buttress of his submission, the learned counsel for the appellant cited a number of decided authorities by this court, amongst which are the following:- *Re: Yar-Adu'a* (2011) 17 NWLR (pt. 1277) p. 567 at 599; *Hassan V. Aliyu* (2010) 7 NWLR (pt. 1223) p. 547 at 599; *Madukolu V. Nkemdilim* (1962) 2 NSCC (vol. 2) 374, (1962) 1 All NLR (pt. 4) 587 per Bairamian F.J.; *Rossek V. A. C. B. Ltd* (1993) 10 SCNJ 20; *WAEC V. Adeyanju* (2008) 35 WRN pg 1 at 26 and *Sani V. Okene L. G. Traditional Council* (2008) 50 WRN Pg. 149 at 159. G
H

The learned appellant's counsel, in further submission maintained that the Court of Appeal has no jurisdiction whatsoever over the appeal of the 1st Respondent with the 60 days period, allowed by the Constitution, having elapsed; that the appeal, in other words,

had been caught up by section 285(7) of the 1999 Constitution of the Federal Republic of Nigeria (as amended). The following cases were also cited in support as relevant: *Ariori & Ors. Vs. Elemo* (1985) 1 SC 14; *Ojokoloko & Ors. v. Alamu & Ors.* (1937) 7 SC (pt. 1) p. 24; the consolidated cases of SC/141/2011, SC/76/2011, SC/267/2011, SC/282/2011, SC/356/2011 and SC/357/2011 in which judgment was given on 27th January, 2012 as well as the consolidated cases of SC/14A/2012, SC/14B/2012 and SC/14C/2012 which judgment was also delivered on 24th February, 2012; that the 1st Respondent chose to pursue its course through an election petition.

On the totality of the foregoing submission, the counsel passionately urged that the appeal be allowed, while the ruling of the lower court should be overturned. The justification, he argued, is to uphold the hallowed principles of law on the doctrine of, the operative ambit of judgment in - *rem* as *res judicata*, estoppel, and also the provisions of Sections 233(1), 235, 287(1) and 285(7) of the 1999 Constitution of the Federal Republic of Nigeria (as amended).

Further still and as an addendum, the learned counsel informed that leave to appeal granted the 1st Respondent herein, will involve the lower court overreaching the Constitutional finality inherent in the decision of this court in gubernatorial election matters, and indeed all matters, civil or criminal under section 233 and 235 of the 1999 Constitution of the Federal Republic of Nigeria (as amended). The learned counsel in conclusion related copiously to the decision of this court in the case of *Ikenya V. P.D.P* (2012) 12 NWLR (pt. 1315) 493 at 508 - 509, where it was held that the nullity of the decision of the Court of Appeal in a gubernatorial election petition automatically restored any judgment of the trial Tribunal upholding the challenged election. In otherwords and by implication, the judgment of the lower court, having been declared a nullity, the effect is to uphold and restore that of the trial Tribunal. The two issues, counsel argued, should be resolved in favour of the appellant.

On the part of the 1st respondent, its learned counsel, Chief Olanipekun, SAN, expressed in clear terms and without mincing words that he was unable to formulate any logical and viable issue from the appellant's two grounds of appeal; that the grounds, being incompetent, there cannot therefore arise therefrom, any competent issue; that however, and after much stress and energy dissipation, one sole

issue was distilled as follows:-

“Having regard to the proceedings before the Federal High Court in Owerri, in Suit No. FHC/OW/CS/133/2011 which gave rise to Appeal No. CA/OW/101/2012 pending before the Court of Appeal in Owerri and the decision of this Honourable Court in P.D.P. V. Okorocha (2012) 15 NWLR (Pt. 1323) 205, whether, based on the materials submitted before the lower court, the said court was not right in granting the 1st Respondent’s application under and by virtue of the powers/jurisdiction conferred on the lower court by section 243 of the Constitution.”

Submitting to substantiate the 1st Respondent’s stance, the learned counsel, Chief Olanipekun, revisited the thrust of this appeal, which he argues is a product of the exercise of the lower court’s discretion upon a consideration of the factual situation of the case, juxtaposed with the prevailing position of the law.

The senior counsel in re-iterating the position of the law, correctly, I would say, positioned that, for an appellate court to interfere with the exercise of the discretionary power vested in the court below, it must be shown that the lower court exercised its discretion upon wrong principles of law or improperly, or that a miscarriage of justice resulted or will result there from. Plethora of decided authorities cited by the senior counsel include the following: - Ceekay Traders Ltd. V. Gen Motors Co. Ltd (1992) 2 NWLR (pt.222) 132, Salu V. Egeibon (1994) 6 NWLR (pt. 348) 29, Alsthom S. A. V. Saraki (2005) All FWLR (pt.246) 1385 at 1399.

The law is also trite and well settled as rightly submitted by the learned counsel that in an exercise of discretion, it is expected of the court to act judicially by being guided by available relevant facts and within the precincts of law in doing what is just and proper. See the dictum of Uwaifo, JSC in C.B.N. v. Okojie (2002) 8 NWLR (pt. 768) 48 at 61.

In further argument, the learned senior counsel vehemently submitted by going down the memory lane and extensively reviewed the entire proceedings of the lower court pertaining the application, inclusive of all the facts deposed to on the affidavits of parties. The counsel, in the result applauded the conclusion arrived at by the lower court and related same to the decisions of this court in similar circumstances as encapsulated in several decisions, including but not limited

to C.P.C. V. Nyako (2011) 17 NWLR (pt. 1277) 451 and Nwora V. Nwabueze (2011) 15 NWLR (pt. 1271) 467. Counsel, submitted further that the nature of this application is squarely within the province of the lower court to grant same, in the exercise of its own discretionary powers provided, (and it has not been shown or demonstrated), that the discretion was not wrongly or illegally exercised. Further authorities cited were: *Salu v. Egeibon* (1994) 6 NWLR (Pt. 348) 23 at 41 and *Ceekay Traders Ltd. V. Gen. Motors C. Ltd.* (supra) at 147; that the appellant's appeal seeks to frustrate the hearing of the 1st respondent's appeal on the merits; also that the decision of this court in *P.D.P. V. Okorocha supra* was not an issue in the application before the lower court. Hence, that it was therefore erroneous for the appellant to have made it the thrust of his appeal; that the said decision was/is not a decision on merit, but a decision in which the Supreme Court merely struck out that of the Court of Appeal on the ground that it was given in violation of Section 285(7) and (8) of the Constitution; that the said judgment decided in *Okorocha's case* (supra) does not have any relevance to the proceedings before the lower court. In otherwords, it cannot obliterate or eclipse the Constitutional right of appeal now vested in the 1st Respondent under Section 243 of the Constitution.

Submitting on the various authorities cited by the appellant's counsel, Chief Olanipekun maintained that a case is only an authority for what it decides. See *Dingyadi V. INEC* (2011) All FWLR (pt. 581) 1426 at 1457 and *Okafor V. Nnaife* (1981) 4 NWLR (pt. 64) 129 at 137.

Submitting further on the reference made to the provisions of Sections 233, 235, 285 and 287 of the Constitution, as well as Sections 133 and 134 of the Electoral Act, the counsel bemoaned as irrelevant the reference made to the Constitutional and statutory provisions as they have no nexus with the simple application submitted to the lower court by the 1st Respondent; that the submissions and citations made to cases bordering on jurisdiction are most irrelevant and made in vacuo.

Premised on the foregoing submissions, the counsel therefore, urged that the sole issue be resolved against the appellant by dismissing the appeal which counsel submits, is, from every angle and consideration unmeritorious.

On behalf of the 3rd respondent the two issues raised by the appellant were also argued together. As a preamble, the 3rd respondent's counsel, Kalu, SAN, reproduced the two grounds of appeal, without their particulars, and adopted the submissions advanced on behalf of the 1st respondent. In further submission however, the senior counsel, posited that, being a challenge to the discretion of the court below in granting leave to the 1st Respondent to appeal against the judgment of the Federal High Court, any ground of appeal as well as the issue distilled therefrom, must refer or be referable to a wrongful exercise of such discretion. Accordingly, that, if as in this case, the grounds of appeal, the issues for determination distilled therefrom, as well as the submissions have demonstrably not shown that such exercise of discretion was neither judicious nor judicial, then the appeal, counsel submits, must fail. Counsel cites in support the decision of this court in the case of *Waziri V. Gumel* (2012) 9 NWLR (Pt. 1304) 185 at 204. Counsel further submits that for all intent and purpose, the snippets of arguments which fasten on the jurisdiction of the court below to grant leave to appeal from the judgment of the Federal High Court, ought to be discountenanced in that such argument arise from a faulty premise; that with the substantive appeal still pending before the Court of Appeal, it cannot ripen for hearing in this court until conclusion of the said substantive appeal; that in otherwords, the instant appeal relates merely to whether or not the court below acted properly when it allowed the 1st respondent the leeway to appeal. See also the case of *Waziri V. Gumel*, supra and *ACME Builders Ltd. v. K.S.W.B* (1999) 2 NWLR (Pt. 509) 288.

The learned counsel, in further submission re-established the main thrust of this appeal, which is questioning the propriety or not, of the exercise of discretion by the lower court; that the issue whether or not the court, in granting leave to the 1st Respondent to appeal against a pre or post election matter is, as submitted by counsel, premature to come to this court at this stage; hence, the appeal is therefore brought in error since the court below did not have the opportunity to decide the issue of estoppel. Counsel cited the cases of *Ogunbiyi V. Ishola* (1996) 6 NWLR (pt. 452) 12 and *Oredoyin & Ors. V. Aromolo & Others* (1989) 4 NWLR (Pt. 114) 172.

Finally, the counsel in conclusion summed up the submission

which is an attempt to examine the propriety of the appeal having regard to the Notice and grounds of appeal, the issue for determination and the Brief of argument filed; that the appeal, in the circumstances is totally misconceived and ought to be dismissed.

The lone issue raised on behalf of the 4th respondent is patently not too different from the issues formulated by the appellant. The reproduction of the issue is as follows:-

Whether in the light of the facts, circumstances and the laws applicable to these, it can be said that the court below had exercised its discretion rightly, judicially and judiciously within its powers, its jurisdiction and the governing principles in granting leave to the 1st respondent to appeal as an interested party against the decision of the trial court.

It is pertinent to state at this point that the line of submission and arguments by the 4th respondent's counsel, Dr. Abdul Muyassi Ladan, on the brief is fathomed on a preliminary objection waged against the entire appeal on the ground that the appellant had failed to obtain the requisite leave from either the lower court or this court before introducing a new issue that did not feature before the trial court. Counsel, in the circumstance submits that the appeal is incompetent. The totality of this appeal, counsel restates, falls, swims or sinks with the decision of this court one way or the other on the effect and/or interpretation of the unreported case No. SC.17/2012 between PDP V. Okorocha and 10 Ors. supra; that the substantive appeal before the court stands in the same stead and the decision of this court would be binding on the court below as a *fait accompli*. Furthermore, that this court would then have heard an appeal, contrary to section 240 of the Constitution of the Federal Republic of Nigeria, 1999, directly from the trial court without the intervention of the court below. In summary, that the totality of the appellant's action at hand is incompetent for having ignored innumerable relevant laws applicable to the facts and circumstances of this matter. Counsel in the result urged for the dismissal of the appeal as lacking in merit.

Essentially and without having to consider the seemingly and supposedly preliminary objection raised by the 4th respondent's counsel, I quickly wish to state the legal position of the law relating to the raising of a preliminary objection. Order 2 rule 9(1) of the Rules of this court is clear and

unambiguous and it states as follows:-

“9. (1) A respondent intending to rely upon a preliminary objection to the hearing of the appeal shall give the appellant three clear days notice thereof before the hearing, setting out the grounds of objection, and shall file such notice together with ten copies thereof with the Registrar within the same time.” B

I seek to add also that by the use of the word shall within the phrase “shall give the appellant three clear days notice thereof before the hearing,” it denotes the stipulation therein as mandatory and the compliance therewith cannot be waived. C

On a communal reading of the entire brief of argument or response by the 4th respondent’s counsel, there is no indication that the 4th respondent either gave any notice of preliminary objection against the competence of the appeal filed by the appellant or gave three clear days notice thereof before the hearing of the appeal. I further wish to state as a matter of fact that the raising of such preliminary objection was never at anytime considered as a point of argument by the 4th respondent’s counsel at the hearing of the appeal. A preliminary objection of the nature in issue is surely surreptitious, and tending to throw a surprise at the appellant. This is not allowed by law, as it is coming through the back door. This is notwithstanding that the appellant filed a response. D

For a preliminary objection to be competent, it must be raised formally. The failure to comply with the requirement is detrimental because it renders the entire move of no effect and liable to be discountenanced. Decided cases by this court are well pronounced and settled on this point. In the case of Mrs. Sinmisola Carew V. Mrs. Iyabo Omolara & 3 others NSCQLR Vol. 45 (2011) 1254, for instance, this court per Aloma Mukhtar, JSC (as she then was) at pages 1283 - 1284 restated that a Notice of preliminary objection must be formally moved, otherwise it will be deemed abandoned. This is what His Lordship had to say:- E

“Authorities abound that make the formal moving of preliminary objections by parties at the hearing of appeals necessary, as required by the law. I however wish to re-echo the words of Obaseki JSC in Nsirim’s case:- F

...the objection should have been by way of motion or notice

before the hearing of the appeal so that arguments on it can be heard by the court. While notice of objection may be given in the brief, it does not dispense with the need for the respondent to move the court at the oral hearing of the relief prayed for.

This preliminary objection not having been raised and argued at the oral hearing the Court of Appeal cannot be condemned as having erred in allowing the then appellant (now respondent) to argue his appeal.” (emphasis are mine).

The 4th respondent’s position in the case at hand is worse than the non compliance as specified under order 2 rules 9(1) and (2) of the Rules of this court. This I say because the notice of preliminary objection sought to raise was smuggled in through the back door. The provision of order 2 rule 9(1) was reproduced earlier in course of the judgment. I therefore need to reproduce subsection 9(2) only of order 2 which states as follows:-

“9 (2) If the respondent fails to comply with this rule the court may refuse to entertain the objection or may adjourn the hearing thereof at the cost of the respondent or may make such order as it thinks fit.”

From all indications, there is no evidence to show that the 4th respondent either gave three clear days notice to the appellant, of the intention to raise a preliminary objection, or filed any such notice together with ten copies thereof with the register in compliance with rule 9(1) supra. The use of the word shall was twice emphasized in the sub-section and this should not be taken lightly. The rules of court are meant to be obeyed for purpose of protecting the sanctity and dignity of the law and court. He who comes to equity must come with clean hands and which presupposes diligence and care. The counsel, who had the duty to file the notice of preliminary objection and to inform the court timeously at the hearing of the appeal, did not deem it necessary. The court is an adjudicator and should not be seen to conduct a party’s case. The just and appropriate line of action under sub rule 9(2) of order 2 is to discountenance the seemingly preliminary objection upon which the 4th respondent’s brief of argument is predicated.

For purpose of further confirmation, reference can also be made to the cases of *S. O. Utuks & Others V. Nigeria ports Authority*

NSCQLR volume 22 (2005) 778 and Uwazuruike & Others V. Attorney-General of the Federation NSCQLR vol. 29 (2007) 489.

The failure of the 4th respondent to comply with the Rules of court in terms of Order 2 rule 9(1) supra, had, in consequence rendered its brief of argument incompetent for purpose of defending this appeal. The appeal, in the circumstance will therefore be determined only on the briefs filed by the appellant, 1st respondent and also that of the 3rd respondent. B

On the merit of the appeal, it is intriguing to state that, while the 1st and 3rd respondents' line of arguments are totally anchored on the judicial and judicious exercise of discretion by the lower court in granting the relief sought on the 1st respondent's application, the appellant is challenging the assumption of jurisdiction by the lower court to entertain the application filed by the 1st Respondent herein, which eventually led to the exercise of the discretion of the lower court. The appellant in otherwords, contends that the leave granted the 1st Respondent to appeal, as an interested party, will amount to re-litigating an issue and subject matter which had been disposed of by this court, being the apex and final court in the land. C D

The appeal at hand therefore, is against the ruling of the lower court delivered on 19th October, 2012 wherein the court granted the application filed by the 1st respondent seeking the order of court for leave to appeal as an interested party against the judgment of the Federal High Court delivered on 3rd February 2012. E

The merit of the application birthing the ruling subject of this appeal cannot be taken in isolation, but ought to be read within the context of the reliefs sought and the facts deposed to on the affidavits of parties. It is an elementary principle of law that a court has a duty to holistically take into consideration all the relevant facts presented before it as revealed on the records of appeal, which in this case is not limited to the main record but also the supplementary record of Appeal. F G

In order to give a very comprehensive and clear picture of the background history of this appeal before us, I deem it pertinent to reproduce the reliefs sought on the application resulting the ruling subject of contention. The reproduction of the four fold reliefs are as follows:- H

“1. An order granting leave to the Applicant/party interested to appeal against the judgment of Honourable Justice F. A. Olubanjo delivered on the 3rd February 2012 in suit No. FHC/OW/CS/433/2011 sitting at the Federal High Court Owerri.

B 2. An order enlarging time within which the Applicant will seek leave to appeal against the judgment of Justice F. A. Olubanjo delivered on the 3rd February, 2012 in suit No. FHC/OW/CS/133/2011 sitting at the Federal High Court Owerri.

C 3. An order granting leave to the Applicant to appeal against the judgment of Honourable Justice F. A. Olubanjo of the Federal High Court in suit No. FHC/OWC5/133/2011 delivered on the 3rd February, 2012.

D 4. An order extending the time for the Applicant to appeal against the judgment of Honourable Justice F. A. Olubanjo of the Federal High Court Owerri in suit No. FHC/OW/CS/133/2011 delivered on the 3rd February, 2012.”

The application, which was predicated on twelve grounds, is supported by a fifteen paragraph affidavit. The 4th and 5th respondents to the motion, who are the appellant at hand and the then 5th respondent who withdrew, filed a 26 paragraph counter affidavit and also a Notice of Preliminary Objection simultaneously with the counter affidavit, challenging the competence of the motion on notice. The following are the grounds of the objection as set out in the Notice of the Preliminary Objection:-

F “(1) The Suit at the lower court was instituted on 3rd of May, 2011 whereas the questioned Gubernatorial Election commenced on 26th April, 2011 which makes the complaint a post election matter justiciable only before an election Tribunal as a court of first instance, on the authority of *OHAKIM & ANOR. v. AGBASO & 4 ORS.* (2010) 6 - 7 SC 86 AT 137 LINES 9, *PER ONNOGHEN JSC.*

G (2) The present applicant/party interested challenged the election on the same issue and subject matter of the proposed grounds of appeal and unsuccessfully appealed against the decision both to the Court of Appeal (sic), and to the Supreme Court which was dismissed all through the three courts of competent jurisdiction.

H (3) The instant application to appeal against the decision of the Federal high Court on the same subject matter of the Applicant’s dismissed election petition is an abuse of court process vide *DINGYADI*

v. INEC NO. 2 (2010) 18 NWLR (PT. 1224) SC 154.

(4) *The proposed grounds of appeal having been litigated up to the Supreme Court are no longer arguable grounds of appeal before this court for being academic. NATIONAL INSURANCE CORP. OF NIGERIA v. POEER & IND. LTD. (1986) 1 NWLR (PT. 14) SC IV (sic) AT 22 PARAS D-E. PER OBASEKI JSC.* B

(5) *The applicant/party interested being a privy to the Peoples Democratic Party, which sponsored him at the election and which had elected to challenge the election through the Tribunal and ultimately to the Supreme Court has lost the right to re-litigate same as a pre-election matter before this Honourable Court.* C

(6) *The Applicant/Party Interested is by reason of ground 5 estopped from acting or taking further steps by way of fresh appeal in respect of the supplementary governorship election held on 7th May, 2011 in Imo State on the authority of INRE: YAR'ADUA (2011) D 17 NWLR (PT. 1277B) SC, 567 AT 599-600.* D

(7) *The application for leave to appeal by the Applicant/Party interested will involve the Honourble Court overreaching the constitutional finality inherent in the decision of the Supreme Court in Gubernatorial election Tribunal under section 235 of the 1999 Constitution, and thereby breach the constitutionally mandated duty of the Court of appeal (sic) to give effect to judgment of the Supreme Court pursuant to section 287 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended).* E

(8) *The application is an indirect way of challenging the election outside of the time limited for filing a petition or appealing against the decision of the Tribunal contrary to section 134 of the Electoral Act, 2012 (as amended), section (sic) 233(3) and 285(7) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended). See G OCHEJA EMMANUEL DANGANA v. HON. ATTAI AIDOKO ALI USMAN & ORS (UNREPORTED JUDGMENT IN CONSOLIDATED APPEALS NOS. SC/4480/2011 AND SC/11/2011) DELIVERED ON 24TH FEBRUARY, 2012.* F

(9) *The said election petition judgments of the Election petition Tribunal, Court of Appeal and Supreme Court over which the Applicant/party interested had litigated are judgments in rem-see CHIEF GREAT OUDGE (sic) OGBORU V. CHIEF JAMES IBORI (2004) 7 NWLR (PT. 871 PG. 192 AT PGS. 215-216."* H

In further support of the preliminary objection is a 24 paragraph affidavit deposed to by one Emeka Izima.

On a communal reading of the grounds predicated the preliminary objection, the totality has been summarized in the two grounds of appeal which were reproduced earlier in the course of this judgment. In other words, that the grounds of appeal as well as the reliefs sought therein before the Court of Appeal relate to a post election matter, the subject which has been litigated and determined by this court. Furthermore, that the dismissal of the preliminary objection against the competence of the application for a joinder was grossly misconceived. It is also the argument of the appellant that the subject matter of the appeal by the 1st respondent before the Court of Appeal has been determined by this court in SC/17/2012 delivered on 2nd March, 2012; as a consequence, that there is no longer any live issue to be determined in that appeal.

On a careful consideration of the preliminary objection against the application, it is obvious that the grounds are too weighty and call for a closer examination. I must say at this juncture that the 1st respondent's lone issue is solely predicated on the question of exercise of discretion simpliciter and also the exercise of power/jurisdiction conferred on the lower court by section 243 of the Constitution. The section relates to exercise of right of appeal from the Federal High Court or a High Court in civil and criminal matters. The totality as submitted in the words of the senior counsel to the 1st respondent therefore, *"hinges on the product of the exercise of the court's discretion upon a consideration of the factual situation of the case juxtaposed with the prevailing position of the law."* The counsel, in submission reiterated the legal position governing the appellate court's extent in interfering with the exercise of discretion by the court below. The condition for interference, as rightly submitted by senior counsel, must show that the lower court exercised its discretion upon wrong principle of law or improperly or that a miscarriage of justice resulted or will result there from. The authorities in point are *Ceekay Traders Ltd. V. Gen Motors Go. Ltd.* (1992) 2 NWLR (pt. 222) 132, *Salu V. Egerbon* (1994) 6 NWLR (pt. 348) 23, *Alsthom S. A. V. Saraki* (2005) All FWLR (Pt.246) 1385 at 1399.

It is a fact on the record that the Constitutionality/legality of the supplementary Election was challenged by the 1st Respondent

herein i.e. the Peoples Democratic Party (PDP) at the Election petition Tribunal in Petition No: EPT/IM/GOV/04/2011; Peoples Democratic Party V. Owelle Rochas Anayo Okorocha & Ors. The tribunal in its considered judgment at page 668 of the record of appeal held thus and said:-

“Having held that the supplementary election conducted by the 3rd respondent on 6th May, 2011, was validly conducted, the votes generated thereat were therefore valid votes.”

Being dissatisfied with the judgment of the Election Petition Tribunal supra, the 1st Respondent herein appealed to the Court of Appeal Owerri judicial Division per CA/OW/EPT/52/2011 wherein it was unsuccessful and its appeal was dismissed. A further appeal to this court in SC.17/2012 was also dismissed and the judgment of the Court of Appeal upholding that of the Trial Tribunal subsists. It is note worthy to state that the election petition which crystallized into SC/ 17/2012 was filed by (PDP) being the party interested. Reference can be made to page 538 of the record wherein ground no. 2 upon which the application as an interested party is predicated states thus:-

“2. The Applicant/interested party was a candidate for the Peoples Democratic Party for the Imo State Governorship election held on the 26th April, 2011.”

It is also intriguing to state that the preliminary objection lodged against the application for leave to appeal as an interested party was vehemently raised by the present appellant, as one of the objectors therein. The grounds predicating the objection are very revealing with same having been reproduced earlier in the course of this judgment.

As rightly stated by the lower court, the preliminary objection was first appropriately taken care of at the stage it did. See the case of ANPP v. INEC (2005) ALL FWLR (pt 254) 971 and Okoi V. Ibiang (2002) 20 WRN 146.

From the objectors point of view, the summary of their argument was unequivocal that the validity or otherwise of the Imo State Gubernatorial supplementary election of 7/5/2011 is the subject matter of the appeal which made them the Respondents. They also hold the view that the applicant chose to pursue his course in respect of the said election by filing an election petition to challenge its validity; that the Election Petition Tribunal affirmed the validity of the supplemen-

tary election, which same was upheld by the lower court and further affirmed by this court in the case SC/77/2012 PDP V. INEC & Ors, which judgment was delivered on 2/3/2012 and declared the judgment of the tribunal as still subsisting.

It was the submission of the objectors therefore that the subject matter of the appeal in which the applicant sought to become an appellant by means of an interested party had finally been pronounced upon by this court.

On behalf of the applicant, now 1st respondent, herein, it was submitted that the contention as submitted by the objectors was premature and should be discountenanced. It is the applicant's stance that the application before the lower court was a mere and simple interlocutory application for leave to appeal and not the substantive appeal. As a result, counsel submitted, that the court could not delve into the numerous issues raised in the preliminary objection.

The lower court, having summarized the submission of counsel in the application before it had the following to say:-

"Having regard to the grounds of objection and arguments proffered in support, the objectors have derailed from challenging the competence of the Applicant's application. The objectors have rather delved into issues in the appeal in which they are Respondents in challenging the competence of the instant application ... whether or not the Applicant qualifies as a person interested in the matter decided by the learned trial judge, cannot be properly pronounced upon by the court in a preliminary objection, the purpose of which, as earlier stated, is to preclude or prevent the process objected to, from being entertained on the merit. It is therefore self defeating for the objectors in the bid to sustain their PRELIMINARY OBJECTION to have embarked on arguing issues which go to show why the Applicant cannot be said to be a person interested in the subject matter of the case decided by the learned trial judge on 3/2/2012. Against the back drop of all that has been said, the court finds, the preliminary objection of the objectors to be completely misconceived, and totally lacking in merit. The preliminary objection is hereby overruled."

With all respect to the view held by their Lordships of the lower court supra, I hold a contrary opinion and would give my reasons in the following terms. In the first place I wish to relate to the

weighty grounds upon which the preliminary objection was predicated. In other words, the objection raised very serious legal issues which touch on the foundational competence of any subsisting ground of appeal.

Furthermore, by the nature of the objection raising factual issues, it could only be controverted by further and more tangible facts and not by mere wave of hand as it is done by the lower court in the case at hand. The learned senior counsel Chief Olanipekun expressed his satisfaction and applauded the lower court for having well considered the preliminary objection raised. There is nowhere on record that the facts raised as objections were either controverted by the 1st respondent or at all considered by the lower court. For all intent and purpose, they remain unchallenged against the 1st respondent herein. The law is trite and well settled on unchallenged evidence which without more can constitute sufficient proof. Plethora of authorities are all settled.

As stated earlier, even at the risk of repeating myself, the preliminary objection raised by the appellant against the application by the 1st respondent to appeal as an interested party was predicated on nine grounds supra and which could succinctly be summarized into the following four points, observation:-

1) That the subject matter of the appeal at the lower court having been litigated and decided upon by this court in SC/17/2012, it is no longer open for any party to re-litigate same as a pre-election matter before the Court of Appeal.

2) That the judgment in SC.17/2012 PDP V. INEC & Ors. is a judgment in rem, which binds the whole world especially the party interested, who was also a party in that appeal.

3) That the applicant/party interested is estopped from acting or taking further steps by way of a fresh appeal of the supplementary governorship election held on 7th May, 2011.

4) That the application to appeal against the decision of the Federal High Court on the same subject matter of applicant's dismissed election petition is an abuse of court process.

The totality of the preliminary objection raised is centred on the legality of a candidate seeking to appeal as interested party, a judgment in an election matter after the election in which he was a

candidate had held and the time to file petition against same had also lapsed, and where the subject matter sought to appeal is practically the same as that which had been finally determined by way of an election petition. In the case of *Re: Yar'Adua* (2011) 17 NWLR pt. 1277 SC.567 at 599, this court was faced with a similar application
 B for joinder and leave to appeal as interested party and it held thus:-

*“Assuming that the applicants are the winners of the authentic primary election in Katsina State in the CPC as they claimed, were they not aware that the matter in which they had so much at stake
 C was the subject matter in a suit in the Federal High Court, Katsina? If they were not aware of the suit, at the trial court, did they not know that the matter was taken up on appeal to the lower court? It is not disputed that the applicants filed a suit in the Federal High Court Katsina during the pendency of which they filed another one at the
 D Federal high Court Abuja and since the two suits before the two Divisions of the Federal High Court are substantially based on the same set of facts, the Federal High Court Abuja struck out the latter case as abuse of process of court. In the circumstances, I am satisfied that the applicants were aware of the case in the trial court and in the court
 E below. In fact, it is the decision of the Court of Appeal, Abuja Division. It was setting aside the judgment of the trial court that prompted this application for joinder.”*

His Lordship Onnoghen, JSC also in a related pronouncement on the lack of the power of a court to entertain a belated challenge of a concluded gubernatorial election, by way of subsequent pre-election proceedings, had this to say in the case of *Hassan V. Aliyu* (2010) 7 NWLR (Pt. 1223) SC 547 at 599:
 F

*“If the situation in this case is encouraged, it will breed uncertainty in the polity when a person may wake up a year or more after an election and swearing in of a president or governor to challenge his nomination by way of substitution for election that brought him to power. Or he may even do so after the tenure of office of the official concerned which attitude ought not to be encouraged by the
 G law. It should be noted that appellant has the right to waive his right to the nomination by way of substitution which by his inordinate delay he appears to have projected. Everyone must be watchful of his legal rights and be vigilant...”*
 H

By the provision of section 235 of our 1999 Constitu-

tion, the decision of the Supreme Court is final in Gubernatorial Election matters. The Court of Appeal is, therefore, without any stretch of imagination, duty bound by section 287 of the same Constitution to give effect to judgments of this court.

The reproduction of the two foregoing provisions, which are clear cut and unambiguous state thus:-

“235. Without prejudice to the powers of the President or of the Governor of a state with respect to prerogative of mercy, no appeal shall lie to any other body or person from any determination of the Supreme Court.”

“Section 287(1)

The decisions of the Supreme Court shall be enforced in any part of the Federation by all authorities and persons, and by court with subordinate jurisdiction to that of, the Supreme Court.”

I wish to restate that the purport of section 235 is to put a final seal to the powers of the Supreme Court in governorship election cases. Any attempt to circumvent this provision would tantamount to bulldozing into and through a hard and stony wall. The saying is true that “one cannot hit against the brick.” The attempt will surely be met with an uphill task. The court must do all it can to jealously guard its powers and the supremacy of our Constitution as the grundnum, which is, and above all other authorities. The court, as the custodian of the Constitution must not therefore be seen to ridicule the very institution that puts it in place. Section 287(1) reproduced supra, enjoins all subordinate courts in our land, indeed all parts of the Federal Republic of Nigeria (that is to say every nook and corner) to enforce all decisions of the Supreme Court; thus making all other courts, without any exception, as subordinate courts of jurisdiction. Therefore, any attempt by a subordinate court to either side track, ignore or overlook a fact which is placed before it and tending to cause a likely breach of the provision of section 287(1) of the Constitution supra, ought to be viewed with all seriousness as it is a sabotage seeking to breach the sacred Constitutional grundnum.

This court in the case of Dalhatu V. Turaki (2003) 15 NWLR (pt. 843) 310 at page 336; also (2003) 42 WRN 15 at 30 had this to

say on the Constitutional finality of the judgments of this court.

“This court is the highest and final Court of Appeal in Nigeria. Its decisions bind every court, authority or person in Nigeria.”

From the facts revealed on the grounds supporting the appellant’s preliminary objection in the application at the lower court, there are sufficient materials which ought to have put the Court of Appeal on the guard that there was more to the application before it than that which met the bird’s eye. In otherwords, the revelation was that the 1st respondent, having taken the steps and petitioned against the result declared after the gubernatorial election, contending that the party (whose candidate/flag bearer the 1st Respondent was at the said election) won the election, could not, after having lost the petition right up to this court again be allowed to re-litigate the matter through the normal course of litigation. The implication of the lower court having obliged the application are far reaching, very detrimental and damaging for breaching section 235 of the Constitution on finality of the judgment of this court, as well as Sections 133(1) and 134(3) of the Electoral Act, 2010 (as amended). The Sections of the Act are as follows:-

“133(1)

No election and return at an election under this Act shall be questioned in any manner other than by a petition complaining of an undue election or undue return (in this Act referred to as an “election petition”) presented to the competent tribunal or court in accordance with the provisions of the Constitution or of this Act, and in which the person elected or returned is joined as a party.”

“134(3)

An appeal from a decision of an election tribunal or court shall be heard and disposed of within 60 days from the date of the delivery of judgment of the tribunal or court.”

The foregoing two provisions of the Electoral Act should not be read in isolation but within the context of the reliefs sought by the 1st Respondent from the Court of Appeal. In other words, the reliefs being sought by the 1st respondent in his proposed Notice and Grounds of appeal attached as Exhibit ‘E’ to his application filed before the lower court on 18th May, 2012 as revealed and evidenced on the record of appeal at page 571 are:

(a) An order allowing the appeal and to set aside the judg-

ment of the Federal High Court dated 3rd February, 2012.

(b) An order directing the 1st Respondent to collate and announce the result of the Election to the office of Governor of Imo State held on the 26th April, 2011."

As rightly submitted by the learned counsel for the appellant, the proposed grounds of appeal, Exhibit E, is an indirect way of challenging the election of the appellant herein outside of the time allowed the Election Petition Tribunal. This is contrary to section 134 of the Electoral Act, 2010 *supra*; also section 133(1) which prescribed the modality of challenging an election petition.

The Court of Appeal, by granting the leave in the circumstance at hand with the subject matter having been dealt with finally by this court, had overreached the Constitutional finality inherent in the decision of the Supreme Court and thus also breaching section 235 of the Constitution on the finality of the Supreme Court judgment. Also by Sections 233(3) and 285(7) of the Constitution, with the appeal being outside the time allowed by law, it no longer falls within appeal as of right under section 233(2) but ought to be with leave of the Court of Appeal or this court; the 60 days period within which to appeal had also elapsed. Without mincing words, I will hasten to say, loud and clear, that the 1st respondent in the circumstance of this case is in serious breach of both the Electoral laws as well as the Constitution. Put differently, the 1st respondent, having elected to challenge the election through the Tribunal and right up to this court, can no longer re-litigate his case as a pre-election matter at the Court of Appeal. He cannot exercise both rights. He had already had the bite at one side of the cherry and cannot again have a second bite at the other side.

By the very nature of relief (b) sought on the proposed Notice and grounds of appeal, *supra*, the 1st respondent's complaint is directed against the outcome of the election to the office of Governor of Imo State held on the 26th April, 2011 which the 1st respondent wanted the court to affirm as conclusive without taking into consideration the subsequent supplementary election held on 6th May, 2011. The said relief, contrary to the contention held out by the learned counsel representing the 1st and 3rd respondents, had

clearly taken the subject matter of the proposed grounds of appeal away from the realm of pre-election and into that of a post election.

The learned senior counsel representing the 1st respondent for instance extensively applauded the lower court's ruling, wherein copious reference was made on section 243(a) of the Constitution and order 7 rule 10 of the Rules of that Court, also the affidavit in support of the application and concluded that it was within the province of the lower court to grant the application before it as it did. The counsel cited the cases of *Salu V. Egeibon* (1994) 6 NWLR (pt. 348) 23 and *Ceekay Traders Ltd. V. Gen. Motors Co. Ltd.* (1992) 2 NWLR (pt 222) 132; that the case of *PDP V. Okorocha* in SC/17/2012 delivered on 2nd March, 2012 is not relevant to this case, since the application of 1st respondent was not premised on it; that assuming but without conceding that it had relevance to the proceeding before the lower court, counsel submits that it cannot obliterate or eclipse the Constitutional right of appeal now vested in 1st respondent under section 243 of the Constitution. The learned senior counsel further submitted the irrelevance of the case of *Re: Yar'Adua and Hassan V. Aliyu* cited by the appellant's counsel (*supra*) and also the constitutional provisions as well as the sections of the Electoral Act referred to by the appellant's counsel. It is the counsel's submission that the provisions do not have any nexus with the simple application submitted to the lower court by the 1st respondent.

With all respect to the contention held by the learned counsel to both the 1st as well as the 3rd respondents, I will state as merely unfortunate that the application lodged before the lower court is perceived from a simplistic view point. The nature of the application, if taken in isolation of the realities of the context within which it was made, it will give a total misconception of the Constitutional framework upon which it is anchored. For instance, if the totality of the application is taken together with the preliminary objection and also the reliefs sought as well as the proposed grounds of appeal, the relevance and applicability of the authorities as well as the legal authorities cited by the appellant's counsel would best be appreciated. This has earlier been spelt out in the course of this judgment. I hold therefore that an attempt to sustain the submission by the learned counsel for the 1st respondent would totally negate and/or undermine the undisputed facts deposed to as the basis of the preliminary

objection.

For purpose of recapitulation, the subject matter of the appeal of the 1st Respondent at the lower court, which questions the legality or otherwise of the supplementary election of 6th May, 2011 into the office of the Governor of Imo State is not contradicted but settled on the facts of the preliminary objection. It is a fact also that the validity of the election had since been pronounced upon by this court in SC/17/2012 P.D.P Vs. Okorocha & Ors., in its judgment delivered on 2nd March, 2012. It is intriguing also to restate that the election petition which crystallized into SC.17/2012 was filed by the 1st respondent. In the judgment of 2nd March, 2012, this court per His Lordship Nwali Sylvester Ngwuta, JSC in delivering the lead judgment said thus at page 890 of the record:-

“...I hasten to add that the judgment of election petition tribunal in Imo State delivered on 12th November, 2012 is subsisting....”

As rightly submitted by the appellant’s learned counsel therefore, the validity or otherwise of 6th May, 2011 supplementary election, which is the subject matter of the appeal of the 1st Respondent at the lower court had already been dealt with by this court. On the authority of the case of Ohakim & Anor. Vs. Agbaso & 4 Ors. (2010) 6 - 7 SC 86 at 137 per Onnoghen JSC, it is apt that the subject matter of the appeal of the 1st respondent at the lower court is a post election matter which is justiciable only before an election tribunal, as a court of 1st instance. It was no longer a matter within the jurisdiction of the Federal High Court with same having been determined to finality. All relevant materials opposing the attempt to re-litigate were placed before the lower court on the preliminary objection raised before it.

The lower court at the time of considering the application was not constituted to hear an appeal emanating from an election petition. The prayer on relief (b) sought from the Court of Appeal by the 1st Respondent, per the proposed notice and grounds of appeal attached as Exhibit ‘E’ supra, is not one therefore within the purview of the jurisdiction of the lower court as an intermediate court in pre-election litigation. The law is well settled that it is the relief or the claim in originating process that determines the jurisdiction of the court. By the

very nature of relief (b) on Exhibit E, the lower court ought to have been put on the guard that the subject matter of the appeal was not within its jurisdiction. The following authorities by

this court are clear and in support of the settled principle of law:-
 B Gafor V. Governor Kwara State (2007) 20 WRN page 170; Osun
 State Government V. Danlami Nigeria Ltd. (2007) 17 WRN page 1
 at 18; Adeyemi Vs. Opeyori (1976) 6 - 10 SC 31, Tukur V. Govern-
 ment of Gongola State (1989) 4 NWLR (pt. 117) 517 and Magaji V.
 Matari (2000) 1 WRN (Vol. 2) 75; (2000) 5 SC 57.

It is very elementary and trite that the question of juris-
 C **isdiction is very fundamental. The absence of jurisdiction robs a**
court of any power to adjudicate on a case and the exercise
will be in futility. This age long principle had been well pro-
nounced and enunciated in the locus classicus case of

D **Madukolu V. Nkemdilim (1962) 2 NSCC (Vol. 2) 374;** (1962) 1
 All NLR (pt.4) 587 wherein the learned jurist Bairamian F. J. said:-

“Put briefly, a court is competent when -

1. it is properly Constituted as regard numbers and qualifica-
tions of the members of the bench, and no member is disqualified
 E *for one reason or another; and*

2. the subject matter of the case is within its jurisdiction, and
there is no feature in the case which prevents the court from exercis-
ing its jurisdiction; and

3. the case comes before the court initiated by due process
 F *of law, and upon fulfillment of any condition precedent to the exer-*
cise of jurisdiction.”

The lower court in the case in point is therefore totally bereft
 of any jurisdiction to entertain the application in issue. It had in
 G otherwords, not met up with any of the three requisite and manda-
 tory conditions laid down in Madukolu’s case supra. The lower court
 was not empanelled for purpose of hearing an appeal from the judg-
 ment of an Election Petition Tribunal, which is empowered by the
 Constitution to hear and determine post election matters. The Con-
 H stitutional provisions per sections 285(1), (2) and (7) and section
 133(1) of Electoral Act 2010 are very explicit, clear and unambigu-
 ous as to which court shall hear election petitions. The lower court
 therefore was in great error in assuming jurisdiction over the appeal
 of the 1st respondent. At page 13 of the authority in the case of

Madukolu V. Nkemdilim it was held thus:-

“Any defect in competence is fatal, for the proceedings are a nullity, however well conducted and decided; the defect is extrinsic to the adjudication.”

This court also per Onnoghen JSC in Gafar Vs. Governor Kwara State (supra) held thus:-

“Jurisdiction is a radical or crucial question of competence since if a court has no jurisdiction to entertain a matter, the proceeding is a nullity however well conducted and brilliantly decided as the defect in competence is not intrinsic, but extrinsic to the adjudication. It is for this reason that jurisdiction is described variously as the life wire, blood, bedrock and/or foundation of adjudication and that once it is challenged, the issue must be settled first before taking any further step in the matter.”

As rightly also submitted by the learned senior counsel representing the appellant, the preliminary objection raised by the appellant herein at the lower court, ought to have terminated the appeal of the 1st respondent on the authority of the case of Sani Vs. Okene L. G. Traditional Council (2008) 50 W.R.N. page 149 wherein Tobi, JSC at page 157 said:-

“There are instances where it is permissible to raise a preliminary objection that can terminate a case at the threshold; the competence of which is where the competence of an action is called into question. In a case where the competence of the action is in issue, the court not only has the authority but also the duty to determine the action in limine, as in this appeal, where lack of competence of an action robs on the jurisdiction of the court to hear it within the classification of the elements that makes jurisdiction as expounded in Madukolu V. Nkemdilim.”

The learned appellant’s counsel had passionately and persistently echoed that the leave to appeal against the decision of the Federal high Court granted the 1st Respondent herein, on the same subject matter which formed the basis of the election petition of the 1st Respondent, and which petition was pursued up to the Supreme Court and dismissed, is a gross abuse of process. I cannot but totally agree with that submission.

With reference made to the decision in the case of

Dingyadi Vs. INEC No. 2 (2010) 18 NWLR (pt. 1224) SC at 154 the terminology, abuse of court process, was held by this court at page 195 in the following connotation per Chukwuma-Eneh, JSC:-

B *“The term abuse of process connotes simply the misuse of court’s process and it includes acts which otherwise interfere with the course of justice. Clearly, the acts include where without reasonable ground a party institutes frivolous and also by instituting of multiplicity of actions or is on a frolic act of forum shopping i.e. seeking for favourable court to entertain a matter. It also includes depriving the court of jurisdiction.”*

Also at pages 207 - 208 in the same decision, their Lordships per Adekeye, JSC proceeded and said:-

D *“...the court has discretionary jurisdiction to undo what has been done by a party in abuse of the court process...”*

An appellate court in the circumstance has the jurisdiction to restore the parties to the position they would have been before the offending application.”

E Fabiyi, JSC at page 201 of the said report and on the treatment of action which constitutes an abuse of court process did not also in any way mince his words when he said:-

F *“I need to express it in unmistakable terms that in considering the point relating to abuse of process, there is no case which constitutes an abuse that is sacrosanct or immutable. It must go under the hammer so as to halt the drift created by the abuse. Such is clearly warranted herein as an incidental order. See Nanji V. Chukwu (1988) 3 NWLR (pt. 81) 184 at 208.”*

G ***It cannot be different with the case at hand, wherein parties and subject matter are also the same in the two cases, i.e. to say the one earlier dismissed by this court and the one sought to appeal by order of the ruling now subject matter of appeal. The drastic measure is needful to ensure the authority and dignity of the court which is imbued with the power and duty to prevent action which constitutes abuse of its process.***

H ***The 1st respondent at the time of application for joiner, was very much aware, also very well with the knowledge of the concluded petition by this court in SC.17/2012 (supra) on the 2nd March, 2012. He cannot therefore feign ignorance***

at the time he filed the offending application on the 18th May, 2012, which was a period of over two months when the final seal was put on his case by this court. The principle of law is well settled that a party may be joined as a person interested in a suit very early or midstream depending on when he knew of the proceedings. See In Re: Arowolo (1993) 2 NWLR (pt.275) 317 at 331. **In the case before us and under consideration however, the 1st respondent as the applicant was very much aware of the concluded suit involving his interest.** See again the case of Re: Yar'adua (supra) at pages 599 - 600 on the principles governing joinder of parties to a pending suit.

The saying is apt, that Equity aids the vigilant and not the indolent. The 1st respondent, and also his comrades/those in his camp have themselves to blame and must not escape the wrath of the hammer for being in utter abuse of court process.

On the authority of Re: Yar'adua supra, the 1st respondent is, by reason of the subject matter having earlier been litigated, estopped from acting or taking further steps by way of fresh appeal in respect of the supplementary governorship election held on 6th May, 2011.

In otherwords, with the 1st respondent having pursued the petition tooth and nail and lost from the inception at the trial Tribunal right through the Court of Appeal and to this court, he cannot surreptitiously through the back door by reason of the ruling obtained from the lower court, again have a second revisit to his concluded case which had been done and finished with. It is best to be forgotten. This is more so especially where the time prescribed by law and mandating him within which to conduct his case had elapsed; providence expects him to abide by his fate and hope for a better political future. The Court of Appeal was clearly wrong by raising the hope of resuscitating the belated case. Put differently, the discretion exercised by the lower court in that behalf was certainly not judicial and judicious.

The conditions upon which an appellate court is to interfere with the exercise of the discretionary power vested in the court below have been set out in plethora of authorities and rightly submitted upon by the learned senior counsel representing the 1st respondent, Chief Wole Olanipekun, SAN.

In other words, for the interference to hold, it must be shown that the lower court exercised its discretion upon wrong principles of law or improperly or that a miscarriage of justice resulted or will result there from. The cases of Ceekay Traders Ltd. V. Gen Motors Co. Ltd; Salu V. Egeibon and Atsthom S. A. V. Saraki (supra) which were cited by the Senior Counsel, Chief Olanipekun, are all in support of the appellant's case against the respondents. This court will be striking or abdicating its responsibility if it fails to interfere with the wrong exercise of discretion. Put differently, the consequential effect of obliging the 1st respondent leave to appeal had, I would repeat, overreached the Constitutional finality inherent in the decision of the Supreme Court in gubernatorial election matters and indeed all matters, civil or criminal under sections 233 and 235 of the 1999 of the Constitution (as amended). As a further effect, the Court of Appeal had also breached the constitutionally mandated duty placed on it to give effect to judgments of this court. Where this court, as in this case, had affirmed the validity of the election in SC.17/2012 as borne out on the record, it is more the reason why the lower court ought to have warned itself by carefully and dutifully considering the preliminary objection raised against the application before it made the erroneous ruling. In the case of Ikenya V. P.D.P. (2012) 12 NWLR (pt. 1315) 493 it was held that the provision of section 285(8) of the Constitution can only be exercised by this court, wherein judgment can be pronounced and the reason would be reserved to a later date. The section is not however open to the Court of Appeal. The relevant and applicable portion of the judgment in Ikenya's case is where it was held that the nullity of the decision of the lower court in gubernatorial election petition automatically restored any judgment of the trial tribunal upholding the challenged election. His Lordship Fabiyi (JSC) again in his contribution for instance had this to say at page 514 of the report:-

"The judgment of the Court of Appeal is declared a nullity. The effect is that the judgment of the trial Election Tribunal remains intact and inviolate."

The analogy also holds and is applicable to the case in issue because, with the judgment of this court in SC.77/2012, it served a confirmation of the lower court's decision and hence that of the tribunal's. The sounding alarm was the preliminary objection raised

against the application which had further confirmed SC.17/2012. The lower court did not heed the warning bell and therefore fell into serious error when it failed to uphold the argument put forth by the appellant, that the 1st Respondent was in fact and indeed estopped from taking further steps as it did.

Contrary to the submission and contention held by the learned senior counsel for the 1st respondent and also the counsel representing the 3rd respondent, the successive judgments of the three courts over which the 1st Respondent herein had litigated, are judgments in - rem. The Blacks' law Dictionary, Ninth Edition defined judgment in rem as a phrase which -

“denotes a judgment that affects not only interests in a thing but also all persons, interest in the thing.”

The effect of the ruling by the court below to re-litigate an existing judgment in rem is tantamount to a breach of the principle of res-judicata which should operate as an estoppel. Such gross abuse of court process will certainly subject our judicial system to ridicule.

The quest for power and governance should not be without end. The courts, in particular the apex court, which has the duty to give example to all subordinate courts, should be wary against accommodating situations where litigations subsist without end under the guise of do or die attitude which effect would only make nonsense of our entire judiciary and legal system which had specifically put in place measures to check on the unending lethargy of our political ambition. The slogan, there must be an end to litigation, should persistently sound loud and clear in our polity. This is a matter of public policy which should not create a societal gangrene. The maxim, interest republicae ut sit finis litium, is a cardinal principle of the administration of justice. See *Ezomo v. A. G. Bendel State* (1986) 4 G NWLR (Pt. 36) 488. See also *Dingyadi v. INEC* (No.2) supra at page 194 - 195. The purpose and effect of the law will be lost if it acts only as a toothless bulldog. It should not be seen as a white elephant, but should be a fearful wolf in a sheep's skin. Its effect should be so pronounced and felt especially at times like this where the abuse of the court process is so imminent.

In the result, the two issues are both resolved in favour of the appellant while the ruling of the Court of Appeal, Owerri judicial Division delivered on the 19th October, 2012 is hereby set aside as

an abuse of court process. The appeal in the circumstance is allowed and I make an order of N100,000.00k in favour of the appellant against each of the 1st, 3rd and 4th respondents.

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FABIYI JSC

I had the advantage of a preview of the judgment just delivered by my learned brother - Ogunbiyi, JSC. I agree with the reasons therein advanced to arrive at the conclusion that the appeal is meritorious and should be allowed.

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I only wish to chip in a few words of my own in support. It is not in contention that the 1st respondent herein at the Imo State Governorship Election Petition Tribunal filed a Petition against the result declared after the election. It contended that it won the election and pursued same through the Court of Appeal right up to this court and lost on 2nd March, 2012. Same, no doubt, binds the 1st respondent. It lacks the warrant to re-litigate the matter on the same subject matter outside the prescribed time, as the lower court's Ruling portends.

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There is no gainsaying the fact that the Ruling of the Court of Appeal which gave a lee-way to the 1st respondent to re-litigate the same subject matter of supplementary election through the back door; as it were, engendered abuse of court process. No court of record should tolerate or encourage abuse of court process. See *Dingyadi v.*

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INEC & Ors No. 2 (2010) 18 NWLR (pt. 1224) 154. Having protected its interest through the Trial Tribunal, the court below, up to this court and lost, it was wrong for the court below to allow it to have a second bite at the cherry to the detriment of the appellant. After all,

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it is often said that there must be an end to litigation in respect of the same subject matter by the same parties.

It appears that the court below ignored the purport of the judgment of this court which was delivered on 2nd March, 2012 on the same subject matter. If it had acted in the right direction, the court below would have appreciated that it could no longer assume jurisdiction on the same subject matter over which this court had finally determined.

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The court below felt that it exercised discretion in this matter. It must be stressed that exercise of discretion should be done judi-

cially and judiciously as well. Discretion is the art of being discrete. See: *University of Lagos v. Olaniyan* (1985) 16 NSCC (pt. 1) 98; 113; *Enonini v. Iheuko* (1989) 2 NSCC (pt. 503) at 513; (1989) 3 SC (Pt. 1) 30. The order of the court below which facilitate abuse of court process was not properly done judicially. Further the discretion was not judiciously carried out since same over-reached appellant. B

Finally, let me observe the point that it was suggested that as the leave to appeal involves the exercise of judicial discretion, therefore same must be with leave of court. In this matter, leave of court was not required since the appeal had questioned the grant only on grounds of law or legal misdirection. This is in tune with the dictate of section 233 (2) (a) of the 1999 Constitution of the Federal Republic of Nigeria (as amended). See *Ogbechie v. Onochie* (1986) 2 NWLR (Pt. 23) 484. C

For the above reasons and the detailed ones adumbrated in D the lead judgment, I too feel that the appeal is meritorious and should be allowed. I set aside the decision of the court below and accordingly dismiss the application of the 1st respondent for leave to appeal as an interested party. I endorse all the other consequential orders contained in the lead judgment; that relating to costs inclusive. E

ARIWOOLA JSC

I had the opportunity of reading in draft the lead judgment F of my learned brother, Ogunbiyi, JSC, just delivered. I agree with the reasoning therein and the conclusion arrived thereat in allowing the appeal. I too allow the appeal.

I abide by the consequential orders in the said lead judgment. G

KEKERE-EKUN JSC

I have had the benefit of reading before now the judgment H of my learned brother, OGUNBIYI, JSC just delivered. His Lordship has painstakingly considered and exhaustively resolved the issues in contention in this appeal.

I agree with the reasoning and conclusion that the preliminary objection is misconceived and should be overruled. It is hereby

overruled, I also agree for the reasons well articulated in the lead judgment that the appeal is meritorious and should be allowed. I also allow it.

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

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