

SUPREME COURT OF NIGERIA
FRIDAY 7TH FEBRUARY, 2014. SC. 21/2013
CORAM:- M. S. MUNTAKA-COOMASSIE,
J. A. FABIYI, S. GALADIMA, N. S. NGWUTA,
K. M. O. KEKERE-EKUN, JJSC

SENATOR CHRISTIANA

N. D. ANYANWU

..... APPELLANT

AND

1. HON. INDEPENDENCE

CHIEDOZIEM OGUNWE

2. ALL PROGRESSIVE GRAND

ALLIANCE

..... RESPONDENTS

3. INDEPENDENT NATIONAL

ELECTORAL COMMISSION

JURISDICTION - Fundamentality of - Jurisdiction can be raised at any time and in any manner even for the first time on appeal - Because if court lacks jurisdiction - Its proceedings are nullity (H1)

COURTS - Jurisdiction - Absence of - Where court lacks jurisdiction - Parties cannot confer it on court by consent or acquiescence (H2)

APPEALS - Judgment - Not challenged - Decision on any point of law or fact not appealed against - Is deemed to have been conceded by party against whom it was decided - And it remains valid and binding on all parties (H3)

POLITICS - Political party - Membership of - Question as to who is candidate of political party for election - Is within the domestic jurisdiction of the party concerned - And consequently not justiciable (H4)

ELECTIONS - Pre election - Jurisdiction - Under Electoral Act s. 87(9) - For complainant to ignite jurisdiction of court - He must be an aspirant who participated in the primary - And his complaint must relate to non compliance with the Act (H5)

ELECTIONS - Pre election - Jurisdiction - Electoral Act s. 138 - Application - Plaintiff's case at trial court was pre election matter - And as such could not be accommodated under the section (H6)

FACTS

By originating summons filed before the Federal High Court Owerri, plaintiff/1st respondent sought the determination of a number of questions and consequential reliefs in respect thereof against 2nd respondent, 3rd respondent and appellant. 1st respondent's contention is that he contested and won the primary election of 2nd respondent for the Imo East Senatorial District to represent the zone in the 2011 general elections. 1st respondent contended further that appellant whose name was although on the ballot paper for the primary election, was not a member of 2nd respondent when the primary election took place. 1st respondent also stated that appellant was in fact a member of the Peoples Democratic Party (PDP) as at the relevant point in time. 2nd respondent filed counter-affidavit to the effect that appellant was already its member as at the day of the primary election, having duly resigned from PDP.

It was also averred by 2nd respondent that appellant was present at the primary election and duly contested and won the election with the highest number of votes cast. In its judgment, the court noted that the originating summons was inappropriate in the circumstance of the contentious nature of the suit. The court however did not order for pleadings to be filed on the ground that the 2011 general election was scheduled to take place in seven days time and that nothing will be gained in the circumstance. On this basis, the court struck out the suit. Appellant felt dissatisfied with the order striking out rather than dismissing the suit. She lodged appeal in the Court of Appeal. 1st respondent who was equally dissatisfied with the judgment of the trial court filed cross-appeal. At the end, the court dismissed the main appeal and resolved issues raised in the cross-appeal on behalf of 1st respondent. Aggrieved, appellant appealed to Supreme Court, contending inter alia that the Court of Appeal failed to consider the issue of jurisdiction of the trial court to entertain the matter.

ISSUES FOR DETERMINATION

1. Whether the Appellant was given a fair hearing by the court

below.

2. Whether the Court of Appeal was right in holding that the issue of jurisdiction by the Federal High Court to hear the case was not properly raised in the Court of Appeal.

3. Whether the Federal High court has jurisdiction to hear the case as to justify the order of the Court of Appeal remitting the case to the Federal High Court for trial on the merit.

HELD (Unanimously allowing the appeal per **KEKERE-EKUN JSC**)

JURISDICTION - Fundamentality of

1. Thus, having sought and obtained leave to raise and argue the issue, it certainly amounted to a denial of fair hearing for the Lower Court to decline to consider it. Apart from this, as has been held in a plethora of cases decided by this and other courts, the issue of jurisdiction is so fundamental to adjudication that it can be raised at any time and in any manner even for the first time on appeal and even viva voce.

For this reason the argument of learned counsel for the 1st respondent to the effect that the appellant ought to have sought leave because the issue raised deals with a matter that has been constitutionally provided for, is misconceived. In so far as the jurisdiction of the court has been challenged in whatever form, the court must consider and resolve it before taking any further step in the matter.

It therefore behoved the Lower Court to consider and determine the issue of jurisdiction raised by the appellant before considering the merit of the cross appeal because if the trial court lack jurisdiction to entertain the case, its proceedings are a nullity and the Lower Court would have no jurisdiction to entertain the appeal arising therefrom. Whether or not the appellant has suffered a miscarriage of justice by the omission of the Lower Court does not arise, the issue of jurisdiction raised in this case being one of substantive law.

I adopt and apply the said reasoning in the instant case. It also follows that whether or not the appellant obtained a deem-

ing order in respect of the leave granted to raise and argue the fresh issue of jurisdiction could not prevent the court from considering it, being a threshold issue. (pp. 806 G/808 D/G)

Jurisdiction - Absence of

- B 2. Where the court lacks jurisdiction parties cannot confer jurisdiction on the court by consent or acquiescence.**
(p. 808 F)

Judgment - Not challenged

- C 3. It is a settled principle of law that a decision on any point of law or fact not appealed against is deemed to have been conceded by the party against whom it was decided and it remains valid and binding on all the parties.** (p. 816 C)

D

POLITICS - Political party - Membership of

- E 4. It is therefore settled beyond any discourse that the cause of action before the trial court related to membership of a political party. There is a plethora of decisions of this court to the effect that membership of a political party is the domestic affair of the party concerned and the courts will not be involved in deciding who the members of a political party are. In Lado Vs C.P.C. (supra), this court observed that with the introduction of Section 34 of the Electoral Act, the absolute powers of political parties had been curtailed slightly but emphasized the fact that the provision did not in any way alter or modify the principle that the question as to who is a candidate of a political party for any election is a political question within the domestic jurisdiction of political parties and consequently not justiciable.**

- H In the Instant case, the plaintiff before the trial court had no complaint about the conduct of the primary. His complaint is that his name ought to have been submitted to the 2nd defendant (3rd respondent herein) as the candidate for the party, APGA because the 3rd defendant (1st respondent herein) was not a member of the party as of the date when the primaries were held. The only way this issue could be resolved at the trial court would be for the court to determine whether or not**

the 1st respondent herein was a member of the appellant. The court has no jurisdiction to do so. It is the prerogative of every political party to determine who its members are. The courts have no business delving into the issue as clearly slated in the authorities of Onuoha Vs Okafor (supra), Lado Vs C.P.C. (supra), P.D.P Vs Sylva (supra) referred to earlier. B
(pp. 816 E/818 H)

ELECTIONS - Pre election - Jurisdiction

5. This brings me to Section 87 (9) of the Act, which provides: C

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

It has been held that the jurisdiction of the court to entertain a complaint under this section is very narrow in scope. A complainant must bring himself squarely within the confines of the provision. He must be an aspirant who participated in the primary and his complaint must relate to non-compliance with the provisions of the Electoral Act or the guidelines of the political party. (p. 818 D) E
F

Jurisdiction - Electoral Act s. 138 - Application

6. The plaintiff’s cause of action at the trial court is a pre-election matter. Section 138 (1) (a) of the Electoral Act 2010 (as amended), which provides that one of the grounds upon which an election may be questioned is that “a person whose election is questioned was, at the time of the election, not qualified to contest the election” is clearly not applicable in this case. Section 138 is contained in Part VIII of the Act, which makes provision for the determination of election petitions arising from elections. G
H

The plaintiff’s case at the trial court was clearly not an election petition. Being a pre-election matter it could not be accommodated under Section 138 (1) of the Electoral Act.

This section is premised on the fact that parties have conducted their primaries and have consequently submitted the names of the candidates they propose to sponsor at the general elections to INEC. The essence of the section is to disallow independent candidates from contesting elections. In the circumstances of the instant case, the 2nd respondent had forwarded the appellant's name to INEC as its candidate for the Imo East Senatorial Zone of Imo State in the 2011 general election. In effect she was sponsored as being a member of a political party, namely, APGA. The 1st respondent's grouse therefore was with his own political party and its internal mechanism for admitting new members. It is a matter to be resolved by the party and not the court.

The question raised is accordingly answered in the negative. Issue 3 is resolved in the appellant's favour. The appeal is thus meritorious and it is hereby allowed. The judgment of the Lower Court delivered on 9/11/2012 is hereby set aside. The originating summons at the trial court is hereby struck out for lack of jurisdiction. (pp. 819 E/820 B/D)

NOTABLE POINT OF INTEREST

NGWUTA JSC

1. Jurisdiction - Definition of

Jurisdiction has been defined as the authority which a Court has to decide a matter before it. It connotes the entire basis of taking cognizance of matters presented to the Court formally for the purpose of adjudication. (p. 824 C)

REPRESENTATION

Emeka Nwagwu Esq. with A. I. Nwachukwu Esq., for the Appellant
 K. C. Nwifo Esq. with N. Nwachukwu Esq., for the 1st Respondent
 Prince Orji Nwafor-Orizu with S. N. Anichebe Esq., Esther Abbey-Ollo (Mrs.), F. N. Oguaju Esq., Nnenna Nwafor-Orizu (Miss), S. N. Obinna Esq., Netochukwu Nzewi (Miss), Eno Etienan (Miss) and U. C. Ndubuisi Esq., for the 2nd Respondent
 G. C. Igbokwe Esq., with Nnamdi Nwagwu Esq., for the 3rd Respondent

CASES REFERRED TO

- Okoroike v. Igbokwe (2001) 14 NWLR (pt. 688) 498
 Peter v. Okoye (2002) FWLR (pt. 110) 1864
 Eshenake v. Gbinije (2005) All FWLR (pt. 289) 1270
 Ito v. Ekpe (2000) 3 NWLR (pt. 650) 678 B
 Enwere v. Commissioner of Police (1993) 6 NWLR (pt. 299) 333
 Ejezie v. Anuwu (2008) All FWLR (pt. 422) 1005
 Elugbe v. Omokhafa (2004) 18 NWLR (pt. 905) 319
 Tony Anthony (Nig.) Ltd. v. N.D.I.C. (2011) 15 NWLR (pt. 1269) 39 C
 Agbiti v. Nigerian Navy (2011) All FWLR (pt. 570) 1223
 Mohammed v. Kayode (1997) 11 NWLR (pt. 530) 584
 Falobi v. Falobi (1976) 1 NMLR 169
 Osunbor v. Oshiomole (2009) ALL FWLR (pt. 463) 1365
 Onibodu v. Akibu (1982) 13 NSCC 199 D
 Anyaduba v. N.R.T.C Ltd (1992) 8 NWLR 535
 Obiweubi v. CBN (2011) 7 NWLR (pt. 1247) 465

STATUTES REFERRED TO

- Electoral Act 2010 (as amended), ss. 31(1)(2)(5), 85(2)(a)(b), 86(1), 87(9)(11) E
 Constitution of Federal Republic of Nigeria 1999, s. 65(2)

LEAD JUDGMENT BY KEKERE-EKUN JSC

This is an appeal against the judgment of the Court of Appeal, Owerri Division delivered on 9th day of November, 2012 dismissing the appellant's appeal against the judgment of the Federal High Court Owerri (the trial court) dated 1st June 2012. F

By an originating summons filed on 11/2/2011 before the trial court, the 1st respondent herein, HON. INDEPENDENCE OGUNEWE sought the determination of a number of questions and consequential reliefs in respect thereof against (i) The All Progressive Grand Alliance (APGA), the 2nd respondent herein, (ii) INEC, the 3rd respondent herein and (iii) SENATOR CHRISTINA N. D. ANYANWU, the present appellant. The thrust of the claim was that the plaintiff, HON. INDEPENDENCE OGUNEWE, is a member of APGA and contested the primary election for the Imo East Senatorial Zone to represent the Zone in the 2011 general elections. That the G H

primary election took place on 14/1/2011 with three names indicated on the ballot but only two candidates, the plaintiff and one Chief Nick Oparandu were present and physically contested the election and that he (plaintiff) won the election. It was his contention that SENATOR CHRISTIANA ANYANWU, whose name was also on the ballot, was not a member of APGA on 14/1/2011 when the primary elections were held, as she was, at the time an active member of the Peoples Democratic Party (PDP) and in fact participated in the presidential primary election of that party held at the Eagle Square, Abuja from 13th - 14th January 2011.

In their counter affidavits, the 2nd respondent (APGA) and the appellant herein averred that the appellant's name was included on the ballot on 14/1/2011 because she had joined the party after duly resigning her membership of the PDP. Her letter of resignation from the PDP and her membership card for APGA were exhibited to their respective counter affidavits. The 2nd respondent also averred that the appellant was present and duly contested the primary and won the election with the highest number of votes.

In determining the originating summons, the learned trial Judge formulated three issues for determination:

1. *"Whether the use of Originating Summons by the Plaintiff is appropriate in the circumstances and on the facts of this case."*
2. *If the answer to issue one is in the affirmative whether the plaintiff has proved this case on the preponderance of evidence; and*
3. *If the answer to issue No. 1 is in the negative, what is the appropriate order to make in the peculiar circumstances of this case".*

In a considered judgment delivered on 29/3/2011, the learned trial Judge held that having regard to the contentious nature of the suit, the originating summons procedure was not the appropriate method of instituting the action. However, rather than order the filing of pleadings, the court upon the consideration of Sections 31(1) and 87(11) of the Electoral Act 2010 (as amended), struck out the suit on the ground that nothing would be gained by ordering pleadings since the general elections were scheduled to take place in 7 days' time. The appellant herein (then 3rd defendant), was dissatisfied with the order striking out rather than dismissing the suit and filed a notice of appeal against it at the Lower Court. The plaintiff (1st respondent herein) was also dissatisfied with the decision and filed a

cross appeal. The two issues raised in the cross appeal were:

1. Whether an order striking out of the suit instead of an order for filing pleadings was proper in the circumstances of the suit?

2. Whether it was proper for the Lower Court to have struck out the suit merely because the National Assembly Elections were scheduled to hold seven days from the delivery of the judgment? B

The main appeal was dismissed while the issues raised in the cross appeal were resolved in the cross appellant's favour. The cross appeal was allowed. The appellant was dissatisfied with the dismissal of her appeal and further appealed to this court. Pursuant to leave granted by this court on 15/1/2013 she filed her notice and grounds of appeal on 17/1/2013. The notice of appeal contains six grounds of appeal. The 1st respondent (who was the 2nd respondent in the cross appeal) was also dissatisfied with the decision allowing the cross appeal on the ground that the Lower Court failed to consider and determine one way or the other the issue of the jurisdiction of the trial court to entertain the suit in the first instance, which had been properly raised before it. He therefore filed a notice of appeal on 14/1/2013 containing 3 grounds of appeal. The 1st respondent's appeal against the judgment in the cross appeal is Appeal No. SC.20/2013: APGA Vs Christiana N. D. Anyanwu & Ors. Judgment in the said appeal was delivered this morning. That appeal and the instant appeal No. SC. 21/2013 arose from the same judgment and on almost identical facts. The parties are the same. As appropriate, in the course of the judgment, reference would be made to and reliance placed upon the judgment of this court in SC. 20/2013. C D E F

In compliance with the rules of this court, the parties duly filed and exchanged their respective briefs of argument. The appellant's brief' settled by EMEKA O. NWAGWU ESQ. was filed on 22/3/2013. He also filed a reply to the 1st respondent's brief on 29/4/2013. At the hearing of the appeal on 14/11/2013 he adopted and relied on both briefs urged the court to allow the appeal. In further submission in support of his brief, he observed that, contrary to the finding of the Lower Court the appellant did in fact seek and was duly granted, leave to raise and argue the issue of jurisdiction of the trial court to entertain the matter before it. G H

The 1st respondents brief was settled by K. C. NWUFO ESQ and filed on 3/4/2013. He adopted and relied on the said brief and

urged the court to dismiss the appeal. In further adumbration of his brief he submitted that the issue before the trial court was not only membership of a political party but that there were other issues, which, in his view were accommodated under Section 87 (9) of the Electoral Act 2010 (as amended) (hereinafter referred to as “the Act”).

B PRINCE ORJI NWAFOR-ORIZU, who settled the 2nd respondent’s brief filed on 10/4/2013 adopted and relied on it as the 2nd respondent’s argument in the appeal and urged the court to allow the appeal.

C The 3rd respondent’s brief filed on 5/10/13 was settled by G. C. IGBOKWE ESQ. He adopted and relied on it and urged the court to “*take the appropriate decision*”, in view of the fact that the Lower Court inadvertently held that no leave was sought to raise the issue of jurisdiction. He argued that the court would have reached a different decision if it had dealt with the issue of jurisdiction first.

D The contest in this appeal is essentially between the appellant and the 1st respondent. The 2nd respondent, APGA which is the party that sponsored the appellant, has urged us to allow the appeal. A respondent is normally expected to defend the judgment appealed against. The peculiar circumstances of this appeal is that the 2nd respondent filed a separate appeal challenging the same judgment. As noted earlier, the judgment in that appeal was delivered this morning in SC.20/2013. It will therefore not be necessary to dwell on the submissions made on behalf of the 2nd respondent, which only go to support the appeal. The fate of the appeal is in the hands of the appellant. If it succeeds it enures to the benefit of the 2nd respondent. If the appellant is unable to satisfy the court on the merits of the appeal, the submissions made on behalf of the 2nd respondent will not save it.

The appellant formulated 3 issues for the determination of this appeal. They are:

1. Whether the Appellant was given a fair hearing by the court below.
- H 2. Whether the Court of Appeal was right in holding that the issue of jurisdiction by the Federal High Court to hear the case was not properly raised in the Court of Appeal.
3. Whether the Federal High court has jurisdiction to hear the case as to justify the order of the Court of Appeal remitting the case

to the Federal High Court for trial on the merit.

The 1st respondent also formulated 3 issues for determination thus:

1. Whether the Appellant was given a fair hearing by the Court below?

2. Whether the Appellant suffered any miscarriage of justice by the holding of the Court of Appeal that the issue of jurisdiction by the Federal High Court to entertain the case was not properly raised in the Court of Appeal?

3. Whether the Federal High Court has jurisdiction to entertain the suit as to justify the order of the Court of Appeal remitting the case to the Federal High Court for trial on the merit?

The issues are virtually identical. The appeal shall be determined on the issues formulated by the appellant. The first two issues shall be taken together.

Issues 1 & 2

In support of the issue of fair hearing, EMEKA O. NWAGWU ESQ., learned counsel for the appellant referred to Section 36 (1) of the Constitution of the Federal Republic of Nigeria 1999 (as amended) and submitted that the right to fair hearing is not only a constitutional issue but also a principle of common law as well as customary law. He submitted that the constitutional provision entrenches the twin pillars of justice, namely-

(i) That a man shall not be condemned unheard or what is commonly known as *audi alteram partem*, and

(ii) That a man shall not be a judge in his own cause or *nemo judex in causa sua*.

He referred to: *Bill Construction Co. Ltd. v. Imani & Sons Ltd.* (2007) CHR 28 @ 35 A-F or (2007) ALL FWLR (Pt.348) 806 @ 815 B-F; *Okoroike vs. Igbokwe* (2001) 14 NWLR (Pt.688) 498 @ 505 D. He submitted that a breach of this fundamental right can take place in a plethora of ways such as where a court fails to pronounce on the issue or issues placed before it. He cited: *Peter Vs Okoye* (2002) FWLR (Pt.110) 1864 @ 1882 A-C; *Eshenake Vs. Gbinije* (2005) All FWLR (Pt.289) 1270 @ 1292 A-E; *Ito v. Ekpe* (2000) 3 NWLR (Pt.650) 678 @ 697 E - F. He argued further that it can also occur where a court raises an issue *suo motu* and goes ahead to pronounce on it without affording the parties or any party an opportunity of

being heard on it. In support of this submission he relied on: Enwere vs. Commissioner of Police (1993) 6 NWLR (Pt.299) 333 @ 341 A; African Continental Seaways Ltd. vs. Nigerian Dredging, Road & General Works Ltd. (1977) 1 ANLR 197 @ 190 - 192; Nigerian Ports Authority Superannuation Fund vs. Fasel Services Limited (2002) FWLR (Pt.97) 719 @ 741 C-E; Ejezie Vs Anuwu (2008) All FWLR (Pt.422) 1005 @ 1049 D - G.

He noted that ground 2 of the grounds of appeal filed at the Lower Court (pages 482 - 485 of the record of appeal) and Issue 2 of the appellant's issues for determination in the appellants brief of argument filed before that court (pages 493 - 507 of the Record of Appeal) show that the issue of want of jurisdiction on the part of the trial court to hear the suit was vigorously canvassed before the Lower Court. He submitted that the Lower Court failed to determine the issue thereby denying the appellant her right to fair hearing.

On the second issue, as to whether the Lower Court was right in holding that the issue of jurisdiction was not properly raised before it, he noted that in compliance with the legal requirement of raising a fresh issue, the appellant duly sought and obtained the leave of the Lower Court to raise the issue of jurisdiction as a fresh issue. He referred to the appellant's motion on notice filed on 25/4/2012 (pages 565 - 569 of the printed record) and the order of the Lower Court granting the order on 31/5/2012 (pages 601 - 602 of the record). He submitted that notwithstanding the grant of leave, the Lower Court held that the issue of jurisdiction was being raised for the first time before that court and consequently held that ground 2 of the notice of appeal and issue 2 predicated thereon were incompetent.

He submitted that not only was the finding erroneous in fact, the position of the law is that the issue of jurisdiction could be raised at any time and even for the first time on appeal with or without leave. He relied on: Elugbe vs Omokhafe (2004) 18 NWLR (Pt.905) 319 @ 334 C & 338 F-G; Tony Anthony (Nig.) Ltd. Vs. N.D.I.C. (2011) 15 NWLR (Pt.1269) 39 @ 62 C-E; Agbiti Vs Nigerian Navy (2011) All FWLR (Pt.570) 1223 @ 1246 E-D. He urged the court to resolve both issues in the appellant's favour.

In reaction to the issue of fair hearing, learned counsel for the 1st respondent, K. C. NWUFO ESQ. argued that the appellant's

assertion that she was denied fair hearing by the failure of the Lower Court to resolve the issue of jurisdiction of the trial court is misconceived. He contended that the appellant's issue 1 in her brief of argument at the Lower Court was predicated on the particulars of error in support of Ground 2 of her notice of appeal, on the issue of the appellant's non-membership of APGA. He submitted that by agreeing in its judgment with the finding of the learned trial Judge that Section 65 (2) of the 1999 Constitution conferred the necessary locus standi on the 1st respondent to institute the action, it had effectively held that the trial court had jurisdiction to entertain the suit.

On whether the Lower Court was right to hold that the appellant did not seek leave to raise the issue of jurisdiction, he submitted that the appellant failed to show that she had suffered a miscarriage of justice. He submitted that Order 10 Rules 1 and 3 of the Court of Appeal Rules 2011 provides the procedure for raising a preliminary objection to the proceedings before the court. He submitted that the appellant as a respondent in the cross appeal did not comply with the provision. He argued that rules of court are meant to be obeyed. He relied on: Mohammed Vs Kayode (1997) 11 NWLR (Pt.530) 584 @ 578; Williams Vs Hope Rising Voluntary Fund Society (1982) 1 ALL NLR (Pt.1) 5. Referring to the application for leave to raise a fresh issue and the order granted, learned counsel contended that in the absence of a prayer seeking a deeming order in respect of ground 2 of the notice of appeal, the appellant, upon being granted leave ought to have filed a new ground 2. He submitted that the leave granted was ineffectual without a deeming order.

While assuming, without conceding, that jurisdiction could be raised at any time, learned counsel submitted that the courts have always examined the issue of jurisdiction sought to be raised to determine whether it has been genuinely raised or merely used as a ruse to hoodwink the court. He referred to: Peter Nwabunike Eze vs A. O. Okolonji (1997) 7 NWLR (Pt.513) 515 @ 529 to 530. Relying on the case of: Joy Vs Dom (1999) 7 SCNJ 27 @ 33, he submitted that since the issue of membership of a political party is constitutionally provided for in Section 65 (2) of the 1999 Constitution (as amended) any issue of jurisdiction raised in respect thereof must be with the prior leave of the court. He referred to the finding of the court below at page 478 of the record and submitted that it showed that the

plaintiff's grouse at the trial court went beyond the issue of membership of APGA. The finding is reproduced hereunder:

"That being the case, the Plaintiff is impliedly saying that the list of information submitted by the 3rd Defendant indicating that she had fulfilled all the constitutional requirements for election into the office to which the primary election was conducted was false. If that be his case, which it is, then the provisions of Section 31(2)(5) of the Electoral Act will enure the Plaintiff and his action can properly be grounded under that provision."

He noted that after considering the finding of the trial court to the effect that the plaintiff's claims could be accommodated under Section 65 (2) of the 1999 Constitution (as amended), or the combined provisions of Section 31 (5) and 87 (9) of the Electoral Act, the Lower Court held thus:

"This pronouncement by the learned trial judge clearly shows that the 1st Respondent has a cause of action and therefore the locus standi to present the Suit. He also found that the 1st Respondent's right of action can be accommodated under Section 65(2) of the Constitution."

He submitted that the appellant did not appeal against the specific finding of the learned trial Judge that the plaintiff's/1st respondent's case was that the list of information submitted by the 3rd defendant indicating that she had fulfilled all the constitutional requirements regarding the office in respect of which the primary election was conducted, was false. He submitted that not having appealed against the specific finding, the appellant is deemed to have conceded it and it remains binding on all the parties. He referred to: *Osunbor Vs Oshiomole (2009) ALL FWLR (Pt.463) 1365 @ 1425*

He submitted further that a party who has not appealed against a finding or decision of the trial Court cannot, on further appeal to the Supreme Court, seek the setting aside of such finding or decision. He relied on the decision of this court in: *Onibodu & Ors Vs Akibu & Ors (1982) 13 NSCC 199; John Anyaduba Vs N.R.T.C Ltd (1992) 8 NWLR 535 @ 553 G-F*. He urged the court to hold that the finding is binding on the parties and to resolve these two issues against the appellant.

As observed earlier, neither the 2nd nor 3rd respondent is opposed to the appeal being allowed. Having regard to the fact that

this appeal is also on all fours with Appeal No. SC.20/2013, which judgment has just been delivered, it would serve no useful purpose to reproduce the submissions. The appeal will succeed or fail on the case made out by the appellant or upon the opposition mounted by the 1st respondent.

In his reply brief, learned counsel for the appellant submitted that with respect to issue 1, learned counsel for the 1st respondent missed the point of the complaint thereunder. He submitted that the appellant's contention is that she was denied fair hearing when the Lower Court failed to consider the issue of jurisdiction properly placed before it. He noted that locus standi is not the substance of the appellants' case under issue 1. With regard to issue 2, he submitted that learned counsel for the 1st respondent also missed the point, as Section 65 (2) of the 1999 Constitution deals with qualification for election into the National Assembly. He contended that it does not provide that the Lower Courts have jurisdiction to determine who the members of a political party are. He submitted that party primary election is governed by the Electoral Act, the Constitution of a political party and the guidelines issued by the party for the primary election and not Section 65 (2) of the Constitution (as amended).

The first two issues herein are covered by issue 1 in Appeal No.SC.20/2013: ALL PROGRESSIVE GRAND ALLIANCE VS SENATOR CHRISTIANA N. D. ANYANWU & ORS. delivered this morning. In the instant case, in determining the substantive appeal before it, the Lower Court, after summarizing the submissions of learned counsel in respect of the issue of jurisdiction held at page 628 - 629 of the record that it had perused all the processes filed in the appeal and did not find any notice of preliminary objection challenging the jurisdiction of the Lower Court or any application for leave to raise and argue it as a fresh issue. Relying on several authorities the court held at page 629:

"In the instant appeal, it is clear that the appellant is raising the said issue of jurisdiction before this court for the first time, without obtaining prior leave of this court. It is trite that an appellant needs the leave of court to raise and canvass a fresh issue for the first time on appeal which was not raised in the trial court. ...I therefore agree with the learned counsel for the 1st respondent that the appellant issue no. 2 formulated from ground two of the Notice of Appeal is

grossly incompetent as the prior leave of this Hon. Court to file the said ground as well as the formulation of the said issue 2 therefrom were not sought and obtained by the appellant before filing and arguing same. In the circumstances the cases of *Olukoya Vs Ashiru* (supra); *Osunbor Vs Oshiomole* (supra) do not avail the appellant. Similarly, the case of *Ezeigwe Vs Nwawulu* (supra); *ANPP Vs Usman* (supra) and *Uzodinma Vs Izunaso (No.2)* (supra) are cited prematurely by the appellant I therefore resolve this issue against the appellant.”

While the principles of law stated above are sound, the position taken by the Lower Court is unfortunate in the circumstances of this case having regard to the appellant’s motion on notice filed on 29/4/2012 seeking “an order of this Honourable Court, granting leave to the appellant/applicant to raise and argue a fresh issue for the first time in this appeal which arose from ground two of the notice and grounds of appeal filed on the 1st day of June, 2011 challenging the judgment of the Lower Court which was delivered on the 29th day of March, 2011, “Grounds (iv), (v) and (vi) of the application read as follows:

(iv) “The ground borders on the jurisdiction of the Lower Court to entertain the originating summons the subject matter of this appeal and no new evidence shall be introduced at the hearing.

(v) The issue of jurisdiction of the Lower Court was not raised at the Lower Court, hence this application.

(vi) The new issue of jurisdiction involves a substantial point of law which needs to be allowed to avoid an obvious miscarriage of justice.”

On 31/5/2012 the application was granted as follows:

“The application is granted as prayed. Leave is hereby granted to the appellant/applicant to raise and argue a fresh issue for the first time in this appeal in terms stated on the face of the motion paper”

Thus, having sought and obtained leave to raise and argue the issue, it certainly amounted to a denial of fair hearing for the Lower Court to decline to consider it. Apart from this, as has been held in a plethora of cases decided by this and other courts, the issue of jurisdiction is so fundamental to adjudication that it can be raised at any time and in any manner even for the first time on appeal and even *viva voce*. See

Petrojessica Enterprises Ltd. vs Leventis Tech. Co. Ltd. (1992) 5 NWLR (Pt. 244) 675; Isaac Obiuewubi Vs CBN (2011) K7 NWLR (Pt. 1247) 465 @ 494 D - F. **For this reason the argument of learned counsel for the 1st respondent to the effect that the appellant ought to have sought leave because the issue raised deals with a matter that has been constitutionally provided for, is misconceived. In so far as the jurisdiction of the court has been challenged in whatever form, the court must consider and resolve it before taking any further step in the matter.**

In the instant case, the complaint was that the trial court lacked jurisdiction to entertain the suit in the first place having regard to the fact that the cause of action concerned membership of a political party, which is not justiciable.

On the importance of resolving this issue before dealing with any other matter, I stated in: SC.20/2012: APGA Vs Senator Christiana N. D. Anyanwu delivered today 7/2/2014 at pages 12 - 14:

“The importance of a resolution of the issue of jurisdiction one way or the other cannot be over emphasised. The jurisdiction of the Lower Court to entertain the appeal was dependent upon the jurisdiction of the trial court to hear and determine the suit before it in the first instance. The importance of this issue was well illustrated in a recent decision of this court in: SLB Consortium LTD. Vs NNPC (2011) 9 NWLR (1252) 317. In that case an objection was raised at the hearing of the appeal before this court that the originating processes at the trial court were incompetent having been signed by a law firm instead of a qualified legal practitioner as required by the Rules of Practice of the Federal High Court and the decision of this court in Okafor vs Nweke (2007) 3 SC (Part II) 55 @ 62 - 63.”

It was argued on behalf of the respondent that the appellant was deemed to have waived his right to complain not having raised the objection before the trial court and having taken steps in the proceeding after becoming aware of the defect. This court held at pages 332 - 333 G-B:

“The argument that the objection ought to have been taken before the trial court and that it is rather too late in the day to raise same in this Court particularly as the respondents had taken steps in the proceedings after becoming aware of the defect or irregularities is erroneous because the issue involved in the objection is not a matter

of irregularity in procedure but of substantive law - an issue of jurisdiction of the courts to hear and determine the matter as constituted and it is settled law, which has been conceded by both counsel in this proceedings - that an issue of jurisdiction is fundamental to adjudication and can be raised at any stage in the proceedings, even for the first time in the Supreme Court.

In the circumstance I find merit in the preliminary objection which is accordingly upheld by me. I hold that the originating processes in this case haven been found to be fundamentally defective are hereby struck out for being incompetent and incapable of initiating the proceedings thereby robbing the courts of the jurisdiction to hear and determine the action as initiated.

In the final analysis, the appeal arising from the proceedings initiated and conducted without jurisdiction is hereby struck out for want of jurisdiction."

Thus, in that case the appeal to this court was struck out on the basis of the incompetence of the originating processes filed at the trial court. **It therefore behoved the Lower Court to consider and determine the issue of jurisdiction raised by the appellant before considering the merit of the cross appeal because if the trial court lack jurisdiction to entertain the case, its proceedings are a nullity and the Lower Court would have no jurisdiction to entertain the appeal arising therefrom. Whether or not the appellant has suffered a miscarriage of justice by the omission of the Lower Court does not arise, the issue of jurisdiction raised in this case being one of substantive law. Where the court lacks jurisdiction parties cannot confer jurisdiction on the court by consent or acquiescence.** See: Adasola vs Abidoye (1999) 14 NWLR (Pt.637) 28; Jadesimi v. Okotie-Eboh (1986) 1 NWLR (Pt.16) 264; Shaaban v. Sambo (2010) 19 NWLR (Pt.1226) 353; Obiuweubi v. CBN (2011) 7 NWLR (Pt.1247) 465.

I adopt and apply the said reasoning in the instant case. It also follows that whether or not the appellant obtained a deeming order in respect of the leave granted to raise and argue the fresh issue of jurisdiction could not prevent the court from considering it, being a threshold issue.

It would also not be correct, as contended by learned counsel for the 1st respondent, that in resolving the appellant's issue 1, the

Lower Court had indirectly resolved the issue of jurisdiction. The specific aspect of jurisdiction that was being challenged was the non-justiciability of the action on the ground that the subject matter of the suit was membership of a political party, raised separately in ground 2 of the notice of appeal. At the court below two issues were formulated for determination:

1. Whether an order of striking out instead of an order of dismissal was appropriate in the circumstances of this case.

2. Whether the Lower Court had jurisdiction to entertain the case. (See page 618 of the record).

Issue 1 was resolved against the appellant. Issue 2 was not considered on its merits but resolved against the appellant on the ground that no leave was sought or obtained to raise the issue. All that the Lower Court did at page 625 of the record, referred to by learned counsel for the 1st respondent, was to interpret the finding of the trial court regarding the locus standi of the appellant. The court was not at that stage endorsing the finding because the issue under consideration was the proper order the trial court ought to have made in the circumstances of the case. The issue of jurisdiction was addressed squarely under issue 2, which the Lower Court failed to consider. In light of the foregoing, Issues 1 and 2 must be and are hereby resolved in favour of the appellant.

Issue 3

This issue is whether the Federal High Court has jurisdiction to entertain the suit as to justify the order of the Court of Appeal in remitting the case to the Federal High Court for trial on the merit.

Arguing in support of this issue, learned counsel for the appellant submitted that the Lower Court not only erred in failing to declare that the trial court lacked jurisdiction to entertain the case but also in ordering the remitting of the case to the said trial court for trial on the merit. He reproduced the questions for determination as set out in the originating summons. He referred to the findings of the two Lower Courts and submitted that there is no appeal against the concurrent findings of the two courts. The portions of the record referred to are reproduced hereunder for ease of reference.

Trial Court at pages 465 - 466 of the record:

"I should now proceed to examine the plaintiff's claim. The totality of the questions put forward for determination in the plaintiffs

Originating Summons bothers on issue of the 3rd Defendants membership of APGA. The main contention of the plaintiff is that the 3rd defendant was not a member of APGA when primary election was held on 14th January, 2011 in that the 3rd Defendant was an active member of PDP and participated in the presidential primary election of PDP held at Eagle Square in Abuja from 13 - 14th of January, 2011".

Lower Court at pages 631 - 632 of the record:

"I just wish to reiterate once again that the Cross/Appellants case before the Trial Court was that the Appellant/Cross Respondent is not a member of the All Progressive Grand Alliance (APGA) and her name should not have been forwarded to Independent National Electoral Commission (INEC) as the candidate for the Imo East Senatorial District Election for April, 2011."

He submitted that, as this court held in *Lado Vs C.P.C. (2012) ALL FWLR (Pt.607) 598 @ 628 - 629 H - C*, the jurisdiction of the courts under Sections 87 (4) (b) (ii), (c) (ii) and (10) of the Electoral Act 2010 (as amended) to inquire into the dispute is limited. He submitted that it is within the exclusive prerogative of a political party to determine whom its members and candidates are and that it is not for the courts to determine. He cited the case of: *Ezeigwe Vs Nwawulu (2010) All FWLR (Pt.518) 794 @ 821 E-F* wherein this court per Onnoghen, JSC stated:

"It is settled law that the question of who is a candidate of any political party for any election remains the exclusive preserver of the political parties and that the court have no jurisdiction to determine the issue".

He also referred to: *ANPP Vs Usman (2009) All FWLR (Pt.463) 1292 @ 1329 F-G*, He submitted that the issue of membership of a political party is a political question, which is not justiciable in a court of law. He referred to: *Onuoha v. Okafor (1983) 2 SCNLR 244: (1983) NSCC 494: Lado v. C.P.C. (2012) All FWLR (pt. 607) 598 @ 622 F - G*.

He submitted that the issue of jurisdiction is so fundamental and being a threshold issue, it is imperative for it to be determined first before proceeding to the substantive matter since lack of it deprives the court the power to pronounce on the main issue. He relied on: *B.A.S.F. Nig. Ltd. Vs Faith Enterprises Ltd. (2010); All FWLR*

(Pt.518) 840 @ 851 D - E; Hassan Vs Aliyu (2010) All FWLR (Pt.539) 1007 @ 1038 - 1039 G - C. He submitted that the issue of jurisdiction was properly raised in the Lower Court both in the notice of appeal and in the appellant's brief of argument. He submitted that the Lower Court did not resolve it before remitting the case to the Federal High Court for trial on the merit. He submitted that the trial court had no jurisdiction to entertain the suit and the Lower Court therefore erred in not so declaring and also erred in ordering the remitting of the case to the trial court to be heard on the merit. He urged the court to resolve this issue in the appellant's favour.

In reply, learned counsel for the 1st respondent considered the provisions of Sections 31 (2) & (5), and 87 (9) of the Electoral Act 2010 (as amended) and Section 65 (2) (b) of the 1999 Constitution (as amended). He contended that the fact that the learned trial Judge held that the plaintiff's main complaint was in respect of membership of a political party did not mean that it was the only basis of the plaintiff's case. He noted that the court held the view, at page 478 of the record, that the implication of the plaintiff's claim is that the averments in the 3rd defendants (appellant's) affidavit submitted in compliance with the provisions of Section 31 (2) & (5) of the Electoral Act to the effect that she has fulfilled all the constitutional requirements for election, are false. He noted the trial court referred to Section 65 (2) of the 1999 Constitution, as amended, which sets out the requirements to be met by a person seeking nomination to contest membership of the National Assembly. In other words, that the plaintiff's case could be accommodated under any of those provisions and is therefore competent. Learned counsel repeated the submission he made in the course of arguing issue 1 above to the effect that there is no appeal against the finding of the Lower Court that the pronouncement of the trial court implied that the case could be accommodated under Sections 31 (2) and (5) and 87 (9) of the Electoral Act and Section 65 (2) of the 1999 Constitution (as amended). He submitted that the appellant is deemed to have conceded the point and it remains binding on the parties.

Learned counsel submitted that assuming, without conceding, that Section 31 (5) does not avail the 2nd respondent, he would not be denied the relief he seeks simply because he applied for it under a wrong law. He relied on: Falobi Vs Falobi (1976) 1 NMLR 169 @

177. Referring to the provisions of Section 87 (1) and 87 (4) (c) (ii) of the Act, he submitted that the issue of primary elections of a political party could not be discussed without determining whether the aspirants are members of the said party. He referred to the definition of primaries as contained in Section 156 of the Act. He noted that
 B Section 65 (2) of the Constitution specifically stipulates that for a person to be qualified for election he must be a member of a political party. He submitted that this means not more than one political party. He also referred to the powers conferred on INEC by Section 15 (c)
 C and (f) of the Third Schedule to the 1999 Constitution to monitor political parties, including their primaries and the provisions of Sections 85 (2) (a) & (b) and 86 (1) of the Act and submitted in paragraph 4.56 of his brief that the following facts emerge therefrom:

1. *“That a primary election is done by members (voters) of a
 D given Political Parties (sic) and not by non members or strangers.*

2. *That both the 1999 Constitution (as amended) and the Electoral Act 2010 (as amended) avails the question of party membership to be an issue in a pre-election suit.*

3. *That the INEC (i.e. 3rd Respondent herein) has both the
 E Constitutional and Statutory powers to monitor a primary Election of a given Political Party and keep records pertaining thereto”.*

He submitted that in view of the facts above stated the 3rd respondent was in order when it monitored the primary elections, subject of this appeal. He submitted that the 3rd respondent kept
 F such a record in this case, which it captioned ‘Executive Summary of Candidates nominated by Political Parties for the 2011 General Elections in Imo State’. He urged the court to presume its authenticity on the ground that it was a document prepared for all the political parties
 G in Imo state and not for the appellant (APGA) alone. He noted that the 3rd respondent had cause to write to the appellant on 1/3/2011 to remind it that only the names of persons who emerged as candidates from validly conducted primaries should be forwarded to the Commission as nominated candidates into the various elective
 H positions. He noted that the letter with its attachment showed the name of the 1st respondent as having won the election (in the Imo East Constituency) as well as the name of one CHUKWUMA UMOJIA as having won the primary election conducted in Aguata Federal Constituency in Anambra State. Learned counsel thereafter proceeded

to examine the fact of the case as deposed to in the affidavits before the trial court. He submitted that the appellant's case before the trial court was replete with falsehood in respect of her alleged resignation from the PDP and subsequent membership of APGA. He argued that it was because of this dishonesty and the 2nd respondents disregard of the provisions of the 1999 constitution (as amended) and the outcome of the primary election, that the appellant and the 2nd respondent did not want the trial court to entertain and determine the suit. He submitted that in a similar case decided by this court: *Uwazurike vs Nwachukwu* (2012) 12 SCNJ 1 @ 18 lines 9 - 12, the appeal was dismissed and the case remitted to the Federal High Court, Owerri for expeditious hearing on the merit. B C

Learned counsel went on to seek some anticipatory reliefs as to the manner in which the proceedings before the trial court should be conducted in the event that the appeal is dismissed and the case remitted for trial. D

He submitted that some of the authorities relied upon by the appellant, such as *PDP vs. Timipre Sylva & 2 Ors* (supra); *Lado v. CPC* (supra); *ANPP Vs. Usman* (supra); *Uzodinma v. Izunaso* (Supra); *Emeka v. Okadigbo* (supra); *Ezeigwe vs. Nwawulu* (supra) & *Onuoha v. Okafor* (supra), were cited out of context. For example, he submitted that in *Uzodinma Vs Izunaso* (supra), His Lordship, Rhodes-Vivour, JSC held that the courts would have jurisdiction to entertain a pre-election dispute where the plaintiff is an aspirant if the political party nominates a candidate for an election contrary to its own constitution and guidelines. He also referred to the views expressed by their Lordships, Chukwuma-Eneh and Ogunbiyi, JJSC in *Uwazurike Vs Nwachukwu* (supra) at pages 20 and 27 of the report and submitted that the appellant's contention that the plaintiff's suit cannot come under Section 31 (5) of the Electoral Act, without considering Section 87 (9) of the Act is grossly misconceived. E F G

Learned counsel submitted further that notwithstanding the concurrent findings of fact of the two Lower Courts that the plaintiff's claim was filed pursuant to Section 31 (5) of the Act, the court should examine the questions for determination and the reliefs as contained in the originating summons, which speak for themselves. He urged the court to resolve this issue against appellant and dismiss the appeal. H

In his reply brief, learned counsel for the appellant submitted that the case of: *Uwazurike Vs Uwachukwu* (supra) is not applicable in this appeal. He submitted that the issue in that case was that the appellant as a defendant in the trial Federal High Court raised a preliminary objection to the hearing of the case on the ground that, B having regard to the fact that the name of the appellant had been submitted to the Independent National Electoral Commission (INEC) as the Peoples Democratic party's candidate for the election into the seat of Okigwe South Federal Constituency, the trial court no longer C had jurisdiction to hear the case. The trial court overruled the objection. The appeal to the Court of Appeal was dismissed. He submitted that on further appeal to this court, the appeal was dismissed and the court ordered a trial of the case on the merits.

He submitted that the issue in the instant case, however, is D whether the Lower Courts have jurisdiction under Section 87 (9) of the Electoral Act, 2010 to determine the issue of the appellant's membership of the All Progressive Grand Alliance (APGA), which is the crux of the 1st Respondent's case as found by the trial court at pages 465 - 466 of the record and by the Lower Court at pages 631 - 632 E of the record. He also submitted that the subtle directive being given to this Honourable Court by the 1st Respondent in paragraph 4.74 of the 1st Respondent's Brief of Argument when he did not file a Cross appeal is uncalled for. He submitted that in the absence of a cross appeal, the 1st respondent's could not urge anything on the F court by way of relief.

He submitted that contrary to the view expressed by learned counsel for the 1st respondent in paragraphs 4.75 - 4.78 of his brief of argument, the appellant is not challenging the jurisdiction of the G Lower Court to hear pre-election matters but the jurisdiction of the Lower Courts to determine for a political party whom it members are, which is the internal affair of the party concerned. He urged the court to allow the appeal.

I had observed much earlier in this judgment that the subject H matter, parties and facts of this case are on all fours with SC.20/2013: *APGA Vs Senator Christiana N. D. Anyanwu & Ors.* delivered today. Issue 2 in that appeal reads: *"Whether the question of membership of a political party is justiciable to invoke the jurisdiction of the court below to determine same under the produce enacted by Section 31*

(5) of the Electoral Act, 2010 or at all?” Though differently worded, it raises the same issue as in issue 3 herein i.e. whether the trial court had jurisdiction to entertain the suit to justify the order made by the Lower Court to remit the case to that court for trial. I reproduce hereunder my finding in SC.20/2013 on the issue:

“The law is settled that in determining the jurisdiction of a court to entertain a cause or matter, the processes to be considered by the court are the processes filed by the plaintiff or applicant i.e. the writ of summons and statement of claim, or as in the present case the originating summons and its supporting affidavit. See: *Inakoju Vs Adeleke* (supra); *Elabanjo Vs Dawodu* (2006) 15 WLR (Pt.1001) 76; *Adeyemi Vs Opeyori* (1976) 9-10 SC 31; *Tukur Vs Governor Gongola State* (1989) 4 NWLR (Pt.117) 517, I have carefully examined the 11 questions submitted to the trial court for determination as contained at pages 1 - 3 of the record. The thread that runs through all the questions is the plaintiffs contention that 1st respondents (then 3rd defendant’s) name ought not to have been submitted to the 3rd respondent (then 2nd defendant) as the appellants (then 1st defendant’s) senatorial candidate for the Imo East Senatorial Zone Election in the 2011 general election because at the time of the primary election which took place on 14th January 2011 she was not a member of the appellant, APGA, but an active member of another party. The general thrust of the 12 reliefs sought is that the plaintiff should be declared the “right, lawful and proper APGA” Senatorial Candidate for Imo East Senatorial Zone in 2011 general election.” In other words, the case was a contest between the plaintiff therein and the 3rd defendant as to who is a member of APGA and therefore entitled to contest the primary election and have his or her name submitted to INEC as the party’s candidate. It is obvious that the entire foundation of the claim as made out in the originating summons is membership of APGA a political party.”

This is the finding of the two Lower Courts. At pages 465 - 466 of the record the trial court held:

“The totality of the questions put forward for determination in the plaintiff’s originating summons bothers (sic) on issue of the 3rd defendant’s membership of APGA. The main contention of the plaintiff is that the 3rd defendant was not a member of APGA when primary election was held on 14th January 2011 in that the 3rd defendant

was an active member of PDP and participated in the presidential primary election of PDP held at Eagle Square in Abuja from 13th - 14th of January 2011."

The Lower Court at page 615 of the record held:

"In a nutshell, the facts of the 1st Respondent's case as can be gleaned from the processes filed are that the Appellant is not a member of All Progressive Grand Alliance (APGA), the 2nd respondent and her name should not have been forwarded to the Independent National Electoral Commission (INEC), the 3rd respondent by the 2nd respondent as the candidate of All Progressive Grand Alliance for the Imo East Senatorial District Election for April 2011"

As rightly observed by learned counsel for the 2nd respondent, there is no appeal against these concurring findings of fact. ***It is a settled principle of law that a decision on any point of law or fact not appealed against is deemed to have been conceded by the party against whom it was decided and it remains valid and binding on all the parties.*** See: *Ogunyade vs Osunkeye* (2007) All FWLR (Pt.389) 1175 @ 1206 - 1207 H - B; *Onibodu & Ors. Vs Akibu & Ors.* (1982) 13 NSCC 199; *Anyaduba & Anor. Vs N.R.T.C. Ltd.* (1992) 5 NWLR (Pt.243) 535 @ 553 G - F; *Unity Bank Nig. Plc. Vs Bouari* (2008) 7 NWLR (Pt.1086) 372 @ 400 B - C.

It is therefore settled beyond any discourse that the cause of action before the trial court related to membership of a political party. There is a plethora of decisions of this court to the effect that membership of a political party is the domestic affair of the party concerned and the courts will not be involved in deciding who the members of a political party are. See: *Onuoha Vs Okafor* (1983) 2 SCNLR 244; (1983) NSCC 494; *Lado Vs C.P.C.* (2012) ALL FWLR (Pt.607) 598 @ 622 - 623 C - D & F - H; (2011) 12 SC (Pt.III) 113 @ 139 - 140; *P.D.P Vs Sylva* (2012) 13 NWLR (Pt.1316) 85. ***In Lado Vs C.P.C. (supra), this court observed that with the introduction of Section 34 of the Electoral Act, the absolute powers of political parties had been curtailed slightly but emphasized the fact that the provision did not in any way alter or modify the principle that the question as to who is a candidate of a political party for any election is a political question within the domestic jurisdiction of political parties and consequently not justiciable.*** In

PD.P Vs Sylva (supra) at 146 B - C. this court per Chukwuma-Eneh, JSC held as follows:

“Furthermore, as a legal proposition also deducible from the case of Onuoha Vs Okafor no member of a political party has the locus standi to question the party’s prerogative right on the issue of its choice of candidate for elective offices not even in the face of breaching of its rules and regulations, I dare say. The redress available to such a member who is so aggrieved and who has suffered any damage as a result of refusing him nomination and sponsorship lies in damages against the political party and subject to the provisions of the party constitution rules and regulations.”

There is thus no doubt that membership of a political party is not justiciable. The appellant has however contended that his claim could be accommodated under Section 31 (5) or 87 (9) of the Electoral Act 2010 (as amended). In order to appreciate the purport of Section 31 (5) of the Electoral Act, it is necessary to reproduce subparagraphs (1) - (4) and (6) also. They provide:

“35.(1) Every political party shall not later than 60 days before the date appointed for a general election under the provision of this Act submit to the Commission in the prescribed forms the list of the candidates the party proposes to sponsor at the elections.

(2) The list or information submitted by each candidate shall be accompanied by an affidavit sworn to by the candidate at the High Court of a State, indicating that he has fulfilled all the constitutional requirements for election into that office.

(3) The Commission shall, within 7 days of the receipt of the personal particulars of the candidate publish same in the constituency where the candidate intends to contest the election.

(4) A person may apply to the Commission for a copy of nomination form, affidavit and any other document submitted by a candidate at an election and the Commission shall upon payment of a prescribed fee, issue such person with a certified copy of the documents within 14 days.

(5) A person who has reasonable grounds to believe that any information contained in the affidavit or any document submitted by that candidate is false may file a suit at the High Court of a State or Federal High Court against such person seeking a declaration that the information contained in affidavit is false.

(6) If the Court determines that any of the information contained in the affidavit or any document submitted by that candidate is false, the Court shall issue an order disqualifying the candidate from contesting the election."

It is clear that the above provisions relate to a "candidate" sponsored for election by a political party after the conduct of party primaries. In other words, it presumes that the political party has made its choice of candidates after employing the direct or indirect method provided for in Section 87 (2), (3) and (4) of the Electoral Act. The relevant political party having submitted the names of the candidates it proposes to sponsor in the election along with the required affidavits, it is the duty of INEC to publish the personal particulars of the candidates in the constituency where they intend to contest the election to afford any opposing party the opportunity to challenge same. Since the sponsorship of candidates is the prerogative of the political party, it would be absurd to interpret the provisions of Section 31 (5) above as permitting members of the same political party to challenge the party's choice in court.

This brings me to Section 87 (9) of the Act, which provides:

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

It has been held that the jurisdiction of the court to entertain a complaint under this section is very narrow in scope. A complainant must bring himself squarely within the confines of the provision. He must be an aspirant who participated in the primary and his complaint must relate to non-compliance with the provisions of the Electoral Act or the guidelines of the political party. See: *Uwazurike Vs Nwachukwu* (2013) 3 NWLR (Pt.1342) 503 @ 526 E - G; *PDP Vs Sylva* (2012) 13 NWLR (Pt 1316) 85 @ 148 C - D; 149 A - E: *Lado Vs C. P. C.* (2012) ALL FWLR (Pt.607) 598 @ 622 - 623 F - H. ***In the Instant case, the plaintiff before the trial court had no complaint about the conduct of the primary. His complaint is that his name***

ought to have been submitted to the 2nd defendant (3rd respondent herein) as the candidate for the party, APGA because the 3rd defendant (1st respondent herein) was not a member of the party as of the date when the primaries were held. The only way this issue could be resolved at the trial court would be for the court to determine whether or not the 1st respondent herein was a member of the appellant. The court has no jurisdiction to do so. It is the prerogative of every political party to determine who its members are. The courts have no business delving into the issue as clearly slated in the authorities of Onuoha Vs Okafor (supra), Lado Vs C.P.C. (supra), P.D.P Vs Sylva (supra) referred to earlier. The case of Uwazurike vs Nwachukwu (supra) referred to by learned counsel for the 2nd respondent does not avail him, having found in the course of this Judgment, that the issue before the trial court was membership of a political party and not the manner in which the appellant's primaries were conducted. Furthermore, the issue in contention in that case was whether there was a time limit within which a complainant could seek redress under the provisions of Section 87 (9) of the Electoral Act in view of the provisions of Section 31 (1) of the Act. It was held that the provisions of Section 87 (9) are independent of any other section of the Electoral Act or any provisions of a political party's guidelines and therefore not circumscribed by time.

The plaintiff's cause of action at the trial court is a pre-election matter. Section 138 (1) (a) of the Electoral Act 2010 (as amended), which provides that one of the grounds upon which an election may be questioned is that "a person whose election is questioned was, at the time of the election, not qualified to contest the election" is clearly not applicable in this case. Section 138 is contained in Part VIII of the Act, which makes provision for the determination of election petitions arising from elections. Section 133 (1) and (2) provides:

"Section 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.

(2) In this part, “tribunal or court” means: -

(a) in the case of Presidential election, the Court of Appeal;
and

B (b) in the case of any other elections under this Act the election tribunal established under the Constitution or this Act.”

The plaintiff’s case at the trial court was clearly not an election petition. Being a pre-election matter it could not be accommodated under Section 138 (1) of the Electoral Act.

C I adopt and abide by the findings above in the resolution of this issue. Section 65 (2) of the 1999 Constitution (as amended) provides thus:

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

D (a) he has been educated up to at least the School Certificate level or its equivalent; and

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

E **This section is premised on the fact that parties have conducted their primaries and have consequently submitted the names of the candidates they propose to sponsor at the general elections to INEC. The essence of the section is to disallow independent candidates from contesting elections.**

F **In the circumstances of the instant case, the 2nd respondent had forwarded the appellant’s name to INEC as its candidate for the Imo East Senatorial Zone of Imo State in the 2011 general election. In effect she was sponsored as being a member of a political party, namely, APGA. The 1st respondent’s**
G **grouse therefore was with his own political party and its internal mechanism for admitting new members. It is a matter to be resolved by the party and not the court.**

H **The question raised is accordingly answered in the negative. Issue 3 is resolved in the appellant’s favour. The appeal is thus meritorious and it is hereby allowed. The judgment of the Lower Court delivered on 9/11/2012 is hereby set aside. The originating summons at the trial court is hereby struck out for lack of jurisdiction.**

The parties shall bear their respective costs in the appeal.

MUNTAKA-COOMASSIE JSC

I have had an opportunity of reading before today the lead judgment of my learned lord Kekere-Ekun, JSC. I read closely the reasons and conclusions ably stated by my learned brother in the lead judgment of which I entirely agree. In fact I adopt same as mine. B

My learned brother has left no stone untouched which made me not to chip in. I entirely agreed that the appeal is pregnant with merit same is therefore allowed by me. I abide by the consequential orders made in the lead judgment. I endorse the orders as to costs. C

FABIYI JSC

I have had a preview of the judgment just delivered by my learned brother - Kekere-Ekun, JSC. I agree with all the reasons clearly adumbrated therein to arrive at the conclusion that the appeal is meritorious and should be allowed. D

I wish to chip in a few words of my own in support. In its real essence, the complaint of the appellant relates to issue of jurisdiction of the trial Federal High Court to try the matter. Same is captured in the appellant's issues 2 and 3 which read as follows:- E

2. Whether the Court of Appeal was right in holding that the issue of jurisdiction by the Federal High Court to hear the case was not properly raised in the Court of Appeal. F

3. Whether the Federal High Court has jurisdiction to hear the case as to justify the order of the Court of Appeal remitting the case to the Federal High Court for trial on the merit.

This court will continue to stress the point when same is required, as herein, that jurisdiction is a very fundamental issue. As a threshold issue, it should be determined at the earliest stage of the proceedings. This is because if a court has no jurisdiction to hear and determine a case, the proceedings remain a nullity ab initio no matter how well conducted and decided. A defect in competence is not only intrinsic, but extrinsic to the entire process of adjudication. See: *Madukolu v. Nkemdilim* (1963) 2 SCNLR 341; *Oloba v. Akereja* (1988) 3 NWLR (Pt.84) 508. H

The appellant duly sought and obtained the leave of the Lower Court to raise the issue of jurisdiction as a fresh issue. The appellant's

motion was filed on 25th April, 2012. As extant on pages 601-602 of the record, the Lower Court granted the order on 31st May, 2012. With due respect to the Lower Court, it goofed when it held that the issue of jurisdiction was being raised for the first time before it and erroneously held that ground 2 of the notice of appeal and issue 2
 B predicated thereon were incompetent. Based on a self induced error, the Lower Court failed to consider the issue of jurisdiction. Same precipitated a denial of fair hearing in the prevailing circumstance.

As issue of jurisdiction is very vital in adjudicatory process, it
 C can be raised at any time in any manner by parties or even by court suo motu, which must, however, give parties chance to address it on same. See *Isaac Obiweubi v. CBN* (2011) 7 NWLR (pt.1267) 465.

Lastly, let me observe it that the complaint of the 1st respondent principally relates to the issue of appellant's membership of the
 D 2nd respondent (APGA). It must be further stressed by this court that it is within the exclusive prerogative of a political party to determine whom its members and candidates are. It is not for the court to dabble into political question which remains the exclusive preserve of political parties. This has been so for quite sometime now. See: *ANPP v. Usman* (2009) All FWLR (Pt.463) 1292 at 1329; *Onuoha v. Okafor* (1983) 2 SCNLR 244.
 E

For the above reasons and more especially the detailed ones carefully adumbrated in the lead judgment, I too feel that the appeal
 F is meritorious and should be allowed. It is hereby allowed. I endorse all the consequential orders contained in the lead judgment inclusive of that relating to costs.

G ***GALADIMA JSC***

I have had the opportunity of reading in draft the lead judgment just delivered by my learned Brother, *KEKERE-EKUN JSC*. I agree with the reasons leading to the conclusion that the appeal has merit and should be allowed.

H The Appellant herein sought for and obtained the leave of the Court below to raise issue of jurisdiction as fresh issue. Jurisdiction of the Court to hear a case is a threshold issue. The Court below was clearly wrong to have held that the issue of jurisdiction was being raised for the first time before it and therefore was in error when it

held that Ground 2 of the Notice of Appeal and issue 2 raised there from were incompetent.

The Lower Court has failed to consider the issue of jurisdiction thereby denying the Appellant the right to be fairly heard. It is now settled law, that issue of jurisdiction can be raised at any time, in any manner, even by the Court suo motu which the parties must be accorded opportunity to address the Court on same. B

The complaint of the 1st Respondent relates to the issue of Appellant's membership of the 2nd Respondent (APGA) as a party.

This Court, has in a number of decisions, held that it is the prerogative of a political party to decide whom its members and Candidates should be. The Court will not bother itself with political decisions which remain the exclusive preserve of political parties. See ONUOHA v. OKAFOR (1983) 2 SCNLR 244 and ANPP v. USMAN (2009) All FWLR (pt 463) 1292 at 1329. All the same this Court will not interfere with any political question which is the exclusive preserve of political parties. C D

In the light of the forgoing reasons and the detailed given in the lead judgment, I too will allow this appeal. Appeal is allowed. I too make no order as to costs. E

NGWUTA JSC

I have read in draft the lead judgment just delivered by my learned brother, Kekere-Ekun, JSC and I entirely agree with the reasoning and conclusion therein. F

The subject matter, parties and facts of this case are the same as the subject matter, parties and facts of appeal No.SC.20/2013. Both appeals are against the judgment of the Court of Appeal, Owerri Judicial Division delivered on 9/11/2012 in which the said Court set aside the judgment delivered by the Federal High Court, Owerri on 1/6/2012. G

A disturbing aspect of this case is that the court below having granted the application to raise and argue an issue not raised in the trial court, failed to resolve the issue raised pursuant to its order. Ground V of the application reads: H

“(V) The issue of jurisdiction of the Lower Court was not raised at the Court below, hence the application”

There is no basis for the Court to hold that the issue of jurisdiction was not properly raised before it. This is contrary to the ruling of the Court granting the application to raise and argue fresh issue Ground (VI) of the application is to the effect that *“the new issue of jurisdiction involves a substantial point of law which needs to be allowed to avoid an obvious miscarriage of justice”*.

Even if it is accepted that the issue of jurisdiction was not properly raised which is not true, the obvious implication is that the issue was raised at all, but not properly. This is contrary to the principle that even the Court itself acting ex proprio motu can raise the issue of jurisdiction. See *Ajayi v. Military Adm. Ondo State* (1999) 5 NWLR (Pt.504) 237.

Jurisdiction has been defined as the authority which a Court has to decide a matter before it. It connotes the entire basis of taking cognizance of matters presented to the Court formally for the purpose of adjudication. See *Military Adm. Borno State v. Abayilo* (2001) FWLR 604 at 605; *Ndaeyo v. Ogunnaya* (1977) 1 SC 11; *National Bank v. Shoyoye* (1977) 5 SC 181; *AG Federation v. AG Abia State & 35 ors* (2001) 7 SC 100.

Because of the fundamental nature of jurisdiction and the fact that any matter done without jurisdiction is a nullity irrespective of how well conducted a Court should, at the threshold, satisfy itself that it has jurisdiction in the matter brought before it. That the issue was not properly raised is no reason for not settling it before any further step in the matter.

In my humble view, not only was the appellant denied the right to fair hearing under section 36 of the Constitution of the Federal Republic of Nigeria 1999 (as amended) but the proceedings amounted to a miscarriage of justice, being a complete departure from rules of judicial procedure. See *Dev v. Roy* (1946) AC 508; *Total (Nig) Ltd v. Wilfred Nwako* (1978) 5 SC 1.

For the above and the fuller reasons in the lead judgment I also allow the appeal, declare the proceedings in the Lower Court conducted without jurisdiction a nullity and strike out the matter in the trial Court for want of jurisdiction.

Parties to bear their respective costs.