

**SUPREME COURT OF NIGERIA**  
FRIDAY 30TH MAY, 2014. SC. 164/2012  
**CORAM:- W. S. N. ONNOGHEN, S. GALADIMA,**  
**B. RHODES-VIVOUR, K. B. AKA'AH, J. I. OKORO, JJSC**

1. BARRISTER ORKER JEV  
2. ACTION CONGRESS OF NIGERIA ..... APPELLANTS  
(NOW ALL PROGRESSIVES CONGRESS)

AND

1. SEKAV DZUA IYORTYOM  
2. INDEPENDENT NATIONAL ..... RESPONDENTS  
ELECTORAL COMMISSION (INEC)  
3. ENGR. STEVE MOZEH

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APPEALS - Court - Issue - Suo motu raising - Court is not permitted to so raise issue without hearing from parties - As such runs counter to the impartial status expected of a Judge (H1)

APPEALS - Issue - Fair hearing - Breach - Allegation - CA did not raise the issue suo motu in view of evidence in the record - Hence appellants' right to fair hearing was never breached (H2)

JURISDICTION - Issue - Raising of - Objection on jurisdiction must be considered by court - Regardless of the manner it was raised - And such issue can be raised for the first time in Supreme Court (H3)

APPEALS - Issue - Formulation - Issue must arise from competent ground(s) - And any issue arising from combination of competent and incompetent ground(s) - Is liable to be struck out (H4)

APPEALS - Interlocutory decision - Leave - Appellants' failure to obtain leave to appeal the decision - Did not only render the appeal incompetent - But also robbed the court of jurisdiction (H5)

JURISDICTION - Fundamental nature - Court cannot entertain matter in absence of jurisdiction - And such cannot be assumed where it is not endowed - Otherwise judgment therefrom is a nullity (H6)

ELECTIONS - Nomination - Political party - Power of - Sponsorship of candidate for election is within the domestic affairs of a party - Being a pre-primary duty of the party (H7)

ELECTIONS - Pre election - Jurisdiction - Dissatisfied party who participated at primary election is empowered by Electoral Act s. 87(9) - To ventilate his complaint before FHC or State/FCT HC (H8)

STATUTES - Interpretation - Principle - Where the words of a statute are unambiguous - Courts are enjoined to give them their ordinary grammatical meaning (H9)

COURTS - FHC - Jurisdiction - Although Constitution 1999 s. 251 confers exclusive jurisdiction - In respect of matters listed therein - It does not create exhaustive list (H10)

ELECTIONS - Actions - Expeditious hearing - Counsel in election matters which are sui generis - Should allow the matters to be decided speedily (H11)

ELECTIONS - Action - Commencement - Originating summons - It is one of the ways of commencing action in the courts - Especially where the issue is that of construction of documents (H12)

ORIGINATING SUMMONS - Affidavits - Conflict in - Resolution - Where there is such conflict - Court should order for pleadings - But where vital documents are annexed - Pleadings are not needed (H13)

ELECTIONS - Appeals - Issue - Finding - Correctness of - As appellants' grounds 2 & 5 did not challenge the finding of trial court - The observation of CA on the issue is unassailable (H14)

APPEALS - Preliminary objection - Notice of - Respondent sufficiently gave notice of the objection in his brief - Which was served on appellants - Hence appellants' complaint is untenable (H15)

APPEALS - Concurrent findings - Elections - Votes - Appellants have

no case as regards discrepancy in the votes - Hence SC cannot disagree with findings of the lower courts on the issue (H16)

ORDERS OF COURT - Contempt of - Weight - A person in contempt of a subsisting order - Is not entitled to be granted the court's discretion - To enable him continue with the breach (H17)

ELECTIONS - Winner - Declaration of - Condition - By Electoral Act s. 141 - A person must participate in all the stages of an election - Before he can be declared the winner thereof (H18)

### **FACTS**

This action was commenced by plaintiff/1<sup>st</sup> respondent at the Federal High Court Makurdi Division, praying inter alia for a declaration that 2<sup>nd</sup> defendant/2<sup>nd</sup> appellant unjustly forwarded the names of 1<sup>st</sup> defendant/1<sup>st</sup> appellant to 3<sup>rd</sup> defendant/2<sup>nd</sup> respondent as its candidate for the April 2011 House of Representatives General election in Buruku Federal Constituency of Benue State, when he (1<sup>st</sup> respondent) won the primary election of the party for the seat. The Action Congress of Nigeria (now All Progressives Congress) conducted its primary election for the above stated Federal Constituency to nominate its flag bearer for the April 2011 general election in the country. At the end of the said primary election, 3<sup>rd</sup> respondent declared 1<sup>st</sup> respondent as the winner thereof.

Notwithstanding the result, 2<sup>nd</sup> appellant declared 1<sup>st</sup> appellant as the winner and forwarded his names to 2<sup>nd</sup> respondent as its candidate for the general election. As a result of this development, 1<sup>st</sup> respondent initiated the action. Upon being served with the originating process, appellants filed their defence in the matter. Hearing commenced and at the end of which the court declared 1<sup>st</sup> respondent as the winner of the primary election and directed that his names should be forwarded to 2<sup>nd</sup> respondent as the candidate of 2<sup>nd</sup> appellant for the general election. Dissatisfied with this directive, appellants appealed to the Court of Appeal Makurdi Division. The appeal was heard and dismissed. The trial court's judgment was affirmed. Still not satisfied, appellants have approached the Supreme Court on an appeal.

### **ISSUES FOR DETERMINATION**

1. Was the Court of Appeal right when it struck out Appellants'

Grounds 1, 3 and 4 and issue No. 1 for the reason that competent and incompetent Grounds of Appeal were argued together?

2. Was the Court of Appeal right in affirming the trial Court's jurisdiction, given that the main Relief of the 1<sup>st</sup> Respondent at the trial Court was not against an agency of the Federal Government?
- B 3. Was the Court of Appeal right to have affirmed the decision of the trial Court to determine the matter upon the 1<sup>st</sup> respondent's originating summons in spite of the highly contentious affidavit and documentary evidence tendered by the parties?
- C 4. Did the Appellants Appeal against the findings made by the Trial Court on Exhibits A, B and C?
5. Was the 1<sup>st</sup> Respondent's Notice of Preliminary objection competent before the Court of Appeal?
6. Was the judgment of the Court of Appeal affirming the trial Court's judgment not against the weight of evidence Adduced at the trial?

**HELD** (Unanimously dismissing the appeal per **OKORO**

E **JSC**)

*Court - Issue - Suo motu raising*

- 1. The first port of call relates to the argument, or an allegation by the learned senior counsel for the Appellants that the learned justices of the Court of Appeal suo motu raised an issue and resolved same without calling on the parties to address the court. I agree and it is trite that our system of appeals in our adversary system does not allow or permit a court to dig into the records and fetch issues no matter how patently obvious, and without hearing the parties, use it to decide an issue in controversy between the parties to the appeal. It runs counter to the impartial status and stance expected of a judge in the system. It is better that the parties raise and argue it by themselves. But if it is so fundamental that it goes to the jurisdiction or vires of the court, then it must be brought to the notice of the parties to the appeal and argument received on it before it is decided.**
- By raising an issue suo motu by a court and basing a decision**

**on it without arguments from both parties, the party affected is denied the opportunity of being heard and this is a breach of his right to fair hearing entrenched in Section 36 of the Constitution of the Federal republic of Nigeria 1999 (as amended). Where a court fails to bring an issue raised suo motu to the attention of the parties and argument taken on it before deciding on it, such a decision is liable to be set aside.** (p. 3008 C) B

*APPEALS - Issue - Fair hearing - Breach - Allegation* C

**2. It is very clear from extracts from the record of appeal that this issue and the argument thereof stem from the imagination of counsel for the appellants. There is no doubt that this issue of combining both competent and incompetent grounds in one issue was appropriately raised and argued by the parties before the lower court. The judgment of the lower court was properly based on these arguments. It is therefore not only erroneous but also puerile for the learned senior counsel to allege and argue that the court below raised the issue suo motu and decided it without allowing the Appellants to proffer any argument.** D

**I am strongly persuaded to hold and I hereby hold that the court below did not raise the issue suo motu in view of the avalanche of evidence to the contrary in the record of appeal. It follows therefore that the appellants' right to fair hearing was never breached in any way whatsoever.** (p. 3009 F) E

*JURISDICTION - Issue - Raising of*

**3. Let me quickly add here that a preliminary objection which borders on jurisdiction cannot be brushed aside by the court but must be considered by the court regardless of the manner in which it was raised. Such issue, I must say can be raised for the first time in this court with or without leave.** (p. 3010 B) G

*APPEALS - Issue - Formulation* H

**4. On the other submission which stretched argument in this issue much longer, I wish to say that this court has in a plethora of decisions held that though one can validly lump several re-**

**lated grounds of appeal into one issue and argue same together, if any of the grounds so lumped together is found to be incompetent then it contaminates the whole issue and renders it incompetent as the court cannot delve into the said issue on behalf of the litigant and excise the argument in respect of the competent grounds from those of the incompetent grounds in the issue. The law is no doubt settled that any issue or issues formulated for the determination of an appeal must be distilled from or must arise or flow from a competent ground or grounds of appeal. Again, issues distilled from either incompetent grounds of appeal or a combination of competent and incompetent grounds of appeal are in themselves not competent and are liable to be struck out. An incompetent ground of appeal cannot give birth to a competent issue for determination.** (p. 3010 D)

*APPEALS - Interlocutory decision - Leave*

**5. In the instant case, there is no doubt that the interlocutory decision on the issue of abridgment of time was decided in the course of the proceedings. Under Section 24 (2) of the Court of Appeal Act, the appellants had 14 days within which to appeal the said interlocutory decision. The Appellants did not appeal within the 14 days allowed but lumped the appeal on the main decision with the interlocutory decision. This, in itself, is not a bad practice but is always encouraged. However, the appellants did not obtain the leave of court with regards to the appeal on the interlocutory decision that was filed outside the 14 days period. It is trite that where leave is required before an appeal could be filed; failure to obtain the leave would not only render the appeal incompetent but also rob the court of its jurisdiction.** (p. 3010 H)

*JURISDICTION - Fundamental nature*

**6. It is now well settled that jurisdiction is the life wire of a court as no court can entertain a matter where it lacks the jurisdiction. It is also well settled that the jurisdiction of courts in this country is derived from the Constitution and statutes. No court is permitted to grant itself power to hear a matter**

**where it is not so endowed and if it does, the entire proceedings and the judgment derived therefrom, no matter how well conducted, is a nullity. Therefore, every court must ensure that it is well endowed with the jurisdiction to hear a matter before embarking on the exercise else it would be wasting precious judicial time.** (p. 3013 A) B

*ELECTIONS - Nomination - Political party - Power of*

**7. It is now well settled that issue of nomination and/or sponsorship of a candidate for an election falls within the domestic affairs of a political party being a pre-primary duty of the party.** (p. 3013 E) C

*ELECTIONS - Pre election - Jurisdiction*

**8. However, where the political party decides to conduct primary election to choose its flag bearer, any dissatisfied contestant at the primary is now empowered by section 87 (9) of the Electoral Act 2010 (as amended) to ventilate his complaint before the Federal High Court or High Court of a State or of the Federal Capital Territory.** D

**By inserting this new provision into the Electoral Act, the legislature has made its intention very clear as to the reason, and purport, that a member of a political party who contested the party primary election is entitled to challenge a breach of the party Constitution or Guidelines and the Electoral Act, by filing an action at the Federal High Court or State High Court or the FCT High Court simpliciter.** (p. 3013 F/H) E

*STATUTES - Interpretation - Principle*

**9. The said section 87 (9) is clear and unambiguous and does not need any cannon of interpretation. It means what it says. It is trite that where the words of a statute are clear and unambiguous, the courts are enjoined to give them their ordinary grammatical meaning.** (p. 3013 G) F

*COURTS - FHC - Jurisdiction*

**10. I wish to state further that although section 251 of the Constitution of the Federal Republic of Nigeria, 1999 confers** G

**exclusive jurisdiction on the Federal High Court in respect of matters listed in the paragraphs of the section, it does not create an exhaustive item/list or subject matters upon which that court may exercise jurisdiction. Section 251 of the Constitution does not foreclose the conferment of jurisdiction of a matter not listed under that section of the constitution on the Federal High Court by an Act of the National Assembly.**  
(p. 3014 E)

*Actions - Expeditious hearing*  
**11. I think, counsel, especially in election matters which are sui generis, should allow these matters to be decided speedily and not unnecessary prolonging them on such matters like jurisdiction which the law is clear on. I say no more. The lower court, in my opinion was right to hold that the Federal High Court had jurisdiction to hear and determine this matter. This issue, as it stands does not avail the appellants at all.**  
(p. 3015 D)

*ACTIONS - Commencement - Originating summons*  
**12. There is no doubt that originating summons is one of the ways of commencing action in our courts. It is provided for in the various High Court Rules.**  
**The above provision clearly states the type of actions that may be commenced by way of Originating Summons, Where the issue is that of construction of documents or interpretation of statutory provisions, it is safe and prudent to approach the court by Originating Summons.**  
**A close look at the facts deposed to in the affidavit of both parties and the documents annexed will disclose that the parties do not agree on all issues and that is not strange, else, the Appellants would have conceded to the claim of the 1<sup>st</sup> Respondent in the first place. I agree that the procedure by originating summons ensures a quick disposal of a suit especially an election matter which requires some measure of urgency. However where the proceedings are hostile, originating summons should not be used.** (pp. 3016 B/3017 D)



*Affidavits - Conflict in - Resolution*

**13. The general principle of law regarding conflict in affidavit in an originating summons procedure is that where this is the case, the court should order for pleadings in order for the parties to lead evidence to resolve such conflicts. However, where there are documents annexed to the affidavit of the parties which can be effectively used to resolve the seemingly conflicts, there would be no need to order for pleading and this is exactly what the learned trial judge did which was affirmed by the Court of Appeal.**

**The above exposition by the learned trial judge was upheld by the court below. This was a far reaching decision by the learned trial judge but, as was noted by the court below, the Appellants have not appealed against it. In view of how the learned trial judge used the Exhibits to resolve the seeming conflicts in the affidavit, what exactly were pleadings meant to do had it been ordered? For me, there was nothing pleadings could have done. The 1st Appellant who scored 2,000 votes in a ward which had 601 voters in the register knows that he is just playing games and that his appeal is an exercise in futility. In the circumstance of this issue, I hold that the Appellants have failed to show why it should be resolved in their favour. I resolve it in favour of the Respondents.** (pp. 3017 F/3019 A)

*Appeals - Issue - Finding - Correctness of*

**14. I make a few remarks on issue 4. The learned trial judge had found that the 1st appellant's score of 2000 votes in Mbaade ward was far above the number of voters in the register which stands at 601 and because of that he held that the votes were allocated and not earned. Now the court below observed that the Appellants failed to appeal against crucial findings of the trial court. The Appellants herein are saying in issue 4 that they had appealed against the finding in grounds 2 and 5 of the notice of appeal used at the Court of Appeal. Again the two grounds of appeal have not challenged the crucial finding of the learned trial judge on the scores of the 1<sup>st</sup> Appellant vis-à-vis the number of members on the register which made the Appellants' result and victory improbable. It**

**is my view that the observation by the court below on the issue is unassailable. Accordingly, I resolve this issue against the Appellants.** (pp. 3019 D/3020 D)

*APPEALS - Preliminary objection - Notice of*

**B 15. By that Rule, the method of raising a preliminary objection apart from giving the appellant three clear days notice before the date of hearing may be in the Respondent's brief, by a formal separate notice of objection or both. However, there is the need for the Respondent or his counsel, with the leave of the court to move the objection before the hearing of the substantive appeal.**

**D In the instant case, the Respondent at the court below gave notice of the preliminary objection in his brief as attested to by the Appellants and this court is satisfied that it was a sufficient notice, the said brief having been adequately served on the appellants. The complaint by the appellants in this respect is untenable. As to whether the Respondent filed 20 copies or not or whether he raised the objection before the appeal was heard or not is a question of fact and not just for legal argument. The Appellants' senior counsel has not provided any evidence that the Respondent did not file 20 copies or that he did not seek leave to argue same. The argument of counsel, no matter how brilliant cannot take the place of evidence. In any case, these are issues which ought to have been raised at the court below to be determined before an appeal is made to this court. As it stands, this issue does not avail the appellants.** (p. A)

**G** *APPEALS - Concurrent findings - Elections - Votes*

**H 16. In the course of evaluating the evidence, the learned trial judge noted that in Exhibits A, B and C (the Party Registers for Mbatyough, Mbaade and Mbaazager wards) the number of voters are 410, 601 and 761 respectively. However, in Exhibits c7, c3 and c9 (the scores exhibited by the Appellants) votes cast were 612, 2,005 and 725 respectively while the 1<sup>st</sup> Appellant scored 608, 2,000 and 721 respectively. The court found that the total number of votes cast and the number of**

scores declared by the Appellants were far in excess of the total number of members in those wards. The learned trial judge then held as follows:

*“In Mbaade for example 1<sup>st</sup> defendant declared 2,000 votes to himself, this is far and over the total number in the register which is 601. These scores definitely cannot stand.”* B

On the other hand, the respondents tendered results in these wards as 310, 500 and 628 respectively. The learned trial judge believed this later result and held that of the Appellants as being “allocated”. Based on the above, the learned trial judge entered judgment for the 1<sup>st</sup> Respondent and this was affirmed by the court below. I have no reason to disagree with these findings of the two courts below. This was the crux of the matter. How did the appellants’ score of 2,000 fit into a register of voters of only 601 members? The appellants ought to have focused their energy and eloquence on this aspect. For me, the appellants have no case as far as this issue is concerned. C D

On the whole, having resolved all the issues against the Appellants, the inevitable outcome is that this appeal is devoid of merit and is accordingly dismissed. (p. 3022 E) E

#### *ORDERS OF COURT - Contempt of - Weight*

17. The outcome of this appeal from the trial court, of Appeal to the Supreme Court is that the 1<sup>st</sup> Respondent was the candidate of the 2<sup>nd</sup> Appellant at the April 2011 election into the House of Representatives seat for the Buruku Federal Constituency of Benue state. This was the position as early as 21<sup>st</sup> March, 2011 when the Federal High Court ordered that his name be placed on the ballot. Both the 1<sup>st</sup> and 2<sup>nd</sup> Appellants ignored this order and put forward the 1<sup>st</sup> Appellant for the election. Now that the Appellants have lost their appeal in this court, it should dawn on them that the 1<sup>st</sup> Appellant’s name was placed on the ballot unlawfully, illegally and in utter disobedience to the order of the Federal High Court. It is now well settled that a person who is in contempt of a subsisting court order is not entitled to be granted the court’s discretion to enable him continue with the breach. F G H

***The truth of the matter is that the 1<sup>st</sup> Appellant cannot continue to maintain his seat at the House of Representatives, having found his way into the House unlawfully. I shall make the appropriate orders anon.*** (p. 3023 G)

***B ELECTIONS - Winner - Declaration of - Condition***

***18. At the same time, the 1<sup>st</sup> Respondent cannot be ordered to be sworn in immediately because section 141 of the Electoral Act 2010 (as amended) forbids such an order since the 1<sup>st</sup> Respondent did not participate in all stages of the election. Section 141 of the said Electoral Act (supra) states:-***

***“An election tribunal or court shall not under any circumstances declare any person a winner at an election in which such a person has not fully participated in all the stages of the said election,”***

***D By section 141 of the Electoral Act (supra), the 1<sup>st</sup> Respondent cannot be declared the winner of the election as was done in Amaechi V INEC (2008) All FWLR (pt.407) 1. The clear position of the law now is that a person must participate in all the stages of an election before he can be declared the winner of the said election. In this case, although the Federal High Court held that the 1<sup>st</sup> Respondent was the candidate of the 2<sup>nd</sup> Appellant, the 2<sup>nd</sup> Appellant and the 2<sup>nd</sup> Respondent herein refused to place his name on the ballot. The inevitable outcome of this appeal is that there must be fresh election with the name of the 1<sup>st</sup> Respondent as the candidate of the 2<sup>nd</sup> Appellant in its new name, All Progressives Congress.*** (p. 3024 C)

***G REPRESENTATION***

S. T. Hon., SAN for the Appellants with him are Messrs A. Akaanger Esq., J.S. Awinde, Esq., D.O. Penda Esq., E.S. Njoka, T. Azoom, G.T. Iorver and S.T. Udu Esq.

***H Yusuf Ali, SAN for the 1<sup>st</sup> Respondent with him are S.A. Oke Esq., E.C. Teeve Esq., Wahab Ismail Esq., Alex Akoja Esq., N.N. Adegboye Esq., K.T. Usman (Miss), Mohammed Shehu Esq., P.I. Ikegbu (Mrs), Safinat Lamidi (Miss), H.Y. Seikh (Miss), Y.R. Waziri Esq. M. A. Mogaji, SAN for the 2<sup>nd</sup> Respondent with him are Olusegun***

Jolaawo Esq., Uche V. Obi Esq., K.N. Azie Esq., Daniel Ibegbu Esq., and Folu Adedeji (Miss)  
 Olufunke Adeboyade (Miss), SAN with Boma Ozobia (Mrs.) for the  
 3<sup>rd</sup> Respondent

**CASES REFERRED TO**

Oyewole v. Akande (2009) All FWLR (pt. 491) 813  
 Ogimyade v. Oshunkeye (2007) All FWLR (pt. 389) 1178  
 Etajata v. Ologbo (2007) All FWLR (pt. 386) 584  
 Abdullahi v. Tasha (2001) FWLR (pt. 2001) 1807  
 Nwadike v. Ibekwe (1987) 4 NWLR (pt. 67) 718  
 Konedo v. Adedokun (2001) FWLR (pt. 65) 421  
 Ebolor v. Osayande (1992) NWLR (pt. 249) 524  
 Ndiwe v. Okocha (1992) 7 SCNJ 355  
 Kuti v. Balogun (1978) 1 SC 53  
 Iriri v. Erhurhobara (1991) 2 NWLR (pt. 173) 252  
 Ibori v. Agbi (2004) All FWLR (pt. 202) 1799  
 Nnonyen v. Anyiechie (2005) All FWLR CPL 253 604  
 Akpan v. Bob (2010) 17 NWLR (pt. 1223) 421  
 Amadi v. Orisakwe (1997) 7 NWLR (pt. 511) 161  
 Fagunwa v. Adibi (2004) 7 SCNJ 322

**STATUTES & RULES REFERRED TO**

Court of Appeal Act, s. 24(2)  
 Electoral Act 2010 (as amended), ss. 87(9), 141  
 Constitution of the Federal Republic of Nigeria 1999, ss. 36(1), 87(4)(9)  
 Federal High Court (civil procedure) Rules 2009, O. 3 rr. 6 & 7  
 Court of Appeal Rules 2011, O. 10 r. 1

**LEAD JUDGMENT BY OKORO JSC**

This appeal is against the decision of the Court of Appeal, Makurdi Division delivered on 7th March, 2012 which affirmed the judgment of the Federal High Court, Makurdi which had found in favour of the plaintiff/1<sup>st</sup> Respondent and granted the reliefs sought by him.

The facts of the case giving birth to this appeal may be summarized as follows: On 12<sup>th</sup> January, 2011, the 2<sup>nd</sup> Appellant conducted

the primary elections to choose its candidates for various elective offices in Nigeria at the general elections scheduled for April, 2011. On that same day, the Action Congress of Nigeria (now All Progressive Congress (APC 2<sup>nd</sup> Appellant) conducted its primary election in Buruku Federal Constituency of Benue State to choose its House of Representatives candidate for that constituency. The primary election was contested amongst the 1<sup>st</sup> Appellant, the 1<sup>st</sup> Respondent and one John Tine.

At the end of the primary election, the 3<sup>rd</sup> Respondent, Engr. Mozeh as head of the Electoral Committee of the 2<sup>nd</sup> Appellant, declared the 1<sup>st</sup> Respondent as the winner having polled 8,030 against the 1<sup>st</sup> Appellant and John Tine who scored 1,316 and 494 votes respectively,

In spite of the result of the primary election, the 2<sup>nd</sup> Appellant declared the 1<sup>st</sup> Appellant as the winner. The 1<sup>st</sup> Respondent being dissatisfied with the conduct of the primary election, filed suit No. FHC/CS/19/2011 at the Federal High Court, Makurdi challenging the nomination of the 1<sup>st</sup> Appellant and the subsequent submission of his name to the 2<sup>nd</sup> Respondent wherein he prayed for the following reliefs:-

1. Declaration that the 2<sup>nd</sup> defendant has breached Article 21.3,b, of the Constitution of the 2<sup>nd</sup> defendant in that the 2<sup>nd</sup> defendant has forwarded the name of the 1<sup>st</sup> defendant as candidate of the 2<sup>nd</sup> defendant for the April 2011 general elections for the House of Representatives to the 3<sup>rd</sup> defendant whereas, the plaintiff won the primaries for the said office as conducted by the 2<sup>nd</sup> defendant.

2. A declaration that the forwarding of the name of 1<sup>st</sup> defendant to 3<sup>rd</sup> defendant by the 2<sup>nd</sup> defendant as the candidate for the House of Representative for Buruku Federal Constituency for the forthcoming General elections and the corresponding Act of 3<sup>rd</sup> defendant by accepting, listing and publishing the 1<sup>st</sup> defendant as the 2<sup>nd</sup> defendant's candidate for the Federal House of Representatives Buruku Federal Constituency is illegal; unconstitutional null and void and of no effect.

3. An order of perpetual injunction restraining 1<sup>st</sup> defendant from parading himself as the 2<sup>nd</sup> defendant's candidate for the Federal House of Representative Buruku Federal Constituency in respect of the forthcoming election into the Federal House of Representa-

tive.

4. An order of perpetual injunction restraining the 2<sup>nd</sup> and 3<sup>rd</sup> defendants from recognizing and dealing with the 1<sup>st</sup> defendant as the 2<sup>nd</sup> defendant's candidate for the House of Representative Buruku Federal Constituency in respect of the forthcoming Election into the Federal House of Representative, B

5. An order directing the 2<sup>nd</sup> and 3<sup>rd</sup> defendants to take all steps, actions including listing the name of the plaintiff as the 2<sup>nd</sup> defendant's candidate for the House of Representative Buruku Federal Constituency in respect of the forthcoming elections into the Federal House of Representative and to allow the plaintiff contest the election into the House of Representative Buruku Federal Constituency in the forthcoming General elections on the Party platform of 2<sup>nd</sup> defendant. C

Upon being served with the 1<sup>st</sup> Respondent's originating process, the appellant filed their defence at the Federal High Court which heard the suit on its merit and gave judgment on 21<sup>st</sup> March, 2011, declaring the 1<sup>st</sup> Respondent as the winner of the said primary election and directing the 2<sup>nd</sup> Appellant to forward the name of the 1<sup>st</sup> Respondent to the 2<sup>nd</sup> Respondent as its candidate for the general election. D E

The Appellants, being dissatisfied with the judgment of the Trial Court, appealed to the Court of Appeal which dismissed the said appeal, and unanimously affirmed the judgment of the Federal High Court. F

Again, the Appellants are not satisfied with the judgment of the lower court. They filed Notice of Appeal on 24<sup>th</sup> May, 2012 containing seven grounds of appeal.

With the leave of this court, the Appellants filed two additional grounds of appeal on 6<sup>th</sup> July, 2013. Both the original notice of appeal and the additional grounds of appeal were amended on 9<sup>th</sup> October, 2013 to correct the name of the 2<sup>nd</sup> Appellant. From these grounds of appeal, the Appellants have formulated six issues for the determination of this appeal. On 3<sup>rd</sup> March, 2014 when this appeal was heard, counsel for both parties adopted their respective briefs. In the brief of the Appellants, which was settled by Sebastine T. Hon, SAN, leading other counsel, the six issues for determination are as follows:- G H

1. Was the Court of Appeal right when it struck out Appellants' Grounds 1, 3 and 4 and issue No. 1 for the reason that competent and incompetent Grounds of Appeal were argued together? (Grounds 3 and 4)

B 2. Was the Court of Appeal right in affirming the trial Court's jurisdiction, given that the main Relief of the 1<sup>st</sup> Respondent at the trial Court was not against an agency of the Federal Government? (Grounds 6 and 7)

C 3. Was the Court of Appeal right to have affirmed the decision of the trial Court to determine the matter upon the 1<sup>st</sup> respondent's originating summons in spite of the highly contentious affidavit and documentary evidence tendered by the parties? (Ground 1)

4. Did the Appellants Appeal against the findings made by the Trial Court on Exhibits A, B and C? (Grounds 2)

D 5. Was the 1<sup>st</sup> Respondent's Notice of Preliminary objection competent before the Court of Appeal? (Grounds 5)

6. Was the judgment of the Court of Appeal affirming the trial Court's judgment not against the weight of evidence Adduced at the trial? (Additional Ground 1)

E Learned counsel for the 1<sup>st</sup> Respondent, Yusuf Ali Esq. SAN, also leading other counsel, has distilled five issues, short of one by the appellants. The five issues are reproduced hereunder:-

*Issue 1*

F *Whether the lower Court was not right in affirming the decision of the Trial court assuming jurisdiction in the matter when the complaint of the 1<sup>st</sup> respondent as disclosed in the originating summons was for the interpretation of the provisions of law and constitution of the 2<sup>nd</sup> appellant, and when section 87 (9) of the Electoral Act, 2010 (as amended) specifically confers jurisdiction on the Trial Federal High Court in this case. (Grounds 6 and 7 of the Grounds of Appeal)*

*Issue 2*

H *Whether the lower Court was not right in affirming the decision of the Trial Court that the affidavit evidence of the parties were not in conflict such that calling oral evidence or ordering pleadings may be required and that the issues in controversy between the parties may be properly resolved by the available documentary evidence relied upon by the parties. (Grounds 1 of the Grounds of Appeal)*



Issue 3

*Whether the lower court was not right in holding that the Appellants did not challenge or appeal against the crucial findings of the Trial Court that disbelieved the scores of the 1<sup>st</sup> appellant as doubtful, fake and irreconcilable, and which accredited the result presented by the Plaintiff/1<sup>st</sup> Respondent as genuine, credible and authentic.* B  
(Grounds 2 of the Grounds of Appeal)

Issue 4

*Whether on the preliminary objection of the 1<sup>st</sup> respondent as incorporated in the 1<sup>st</sup> respondent's brief of argument served on appellant, the lower court was not right in striking out issue No. 1 of the issues formulated for determination by the appellants at the lower court when both incompetent and competent grounds of Appeal and issues were argued and lumped together by the appellants, under one issue. (Grounds 3, 4 and 5 of the Notice of Appeal)* C D

Issue 5

*Whether the judgment of the lower court affirming the decision of the trial Court was against the weight of evidence adduced at the trial. (Additional Ground one of the Additional Amended Notice of Appeal)* E

In the 2<sup>nd</sup> amended brief of argument of the 2<sup>nd</sup> Respondent three issues have been distilled by Mahmud Abubakar Magaji, SAN and other counsel with him. The three issues are:-

a. Whether the learned Justices of the Lower Court were right in affirming the decision of the trial Court regarding its evaluation of the affidavit evidence of the respective parties to the suit commenced by way of originating summons before it? (Grounds 1 & 2) F

b. Whether the learned Justices of the Lower Court were right in affirming the decision of the trial Court wherein it assumed jurisdiction to hear the suit, and granted the reliefs sought by the 1<sup>st</sup> Respondent vis-a vis section 87(9) of the electoral Act, 2010 (as amended). (Grounds 6 & 7) G

c. Whether the lower Court was not right in striking out issue No 1 formulated for determination before it by the Appellants on the basis that arguments on same incorporated both competent and incompetent ground of Appeal. (Grounds 3, 4 and 5) H

Ms. Funke Aboyade, SAN settled the brief of the 3<sup>rd</sup> Respondent wherein she adopted the five issues distilled by the 1<sup>st</sup> Respondent

dent. There is no need to reproduce them here having earlier done so. I intend to determine this appeal based on the six issues formulated by the appellants.

The Appellants' first issue, which is the 1<sup>st</sup> Respondent's 4<sup>th</sup> issue, is whether the Court of Appeal was right when it struck out Appellants' ground 1, 3 and 4 and issue No 1 for the reason that competent and incompetent grounds of appeal were argued together. This issue is also issue No (c) of the 2<sup>nd</sup> Respondent's brief of argument.

In his argument on this issue, the learned senior counsel for the Appellants submitted that the Court of Appeal was in grave error of law, occasioning negative consequences on the constitutional rights of the Appellants when they suo motu struck out appellants' Grounds 1, 3 and 4 and issue No 1 on the excuse that Appellants had combined under issue 1 competent and incompetent grounds of appeal. That none of the parties before the lower Court raised the issue of the appellants combining arguments on both competent and incompetent grounds of appeal. Learned senior counsel submitted that by raising the issue suo motu without inviting the parties to address it and going further to suo motu strike out appellants' grounds 1, 3 and 4 and issue 1 thereof the lower Court infringed on Appellant's constitutional right of fair hearing as enshrined in section 36 (1) of the constitution of the Federal Republic of Nigeria 1999. It is his contention that the lower Court's failure to hear them on this issue is fatal. He referred to the following cases:- *Oyewole V Akande* (2009) All FWLR (pt 491) 813 - 83b F - G, *Olufeagba V Abdur Raheem* (2008) All FWLR (pt 512) 1033, *Ukpong V Commissioner of Finance and Economic Development AKS* (2007) All FWLR (pt 350) 1246. It is his further argument that breach of fair hearing by a court results in the entire proceedings being nullified, no matter how well conducted, relying on *Pan African Int. Inc. V Shoreline Lifeboats Ltd* (2010) All FWLR (pt 524) 56 at 65 B - E.

Stretching the argument further, the learned silk opined that right of appeal is constitutional and should not be truncated on flimsy or technical grounds. That although it is true that for an issue to be competent, it must be based on a competent ground of appeal, the situation in this appeal is different because some of the grounds of appeal struck out were competent. According to him, this means that issue No 1 formulated by the Appellants in the court below can, un-

der the doctrine of severance, be competently determined based on the remaining competent grounds of appeal. It is his view that substantial justice would have been done devoid of technicality. He cited the case of *Ogimiyade V Oshunkeye* (2007) all FWLR (pt 389) 1178 at 1196 E.

Relying also on the case of *Etajata V Ologbo* (2007) All FWLR B (pt 386) 584 at 605 - D, he submitted that no matter how bad or inelegant the art of combining competent and incompetent grounds of appeal under issue one, the lower court was bound to consider the said issue. Citing a litany of cases on the same matter, he urged C this court to resolve this issue in favour of the Appellants.

In response, the learned senior counsel for the 1<sup>st</sup> Respondent submitted that the lower court was right in considering and upholding the objection of the 1<sup>st</sup> Respondent by striking out issue No 1 of the issues formulated by the Appellants at the lower court. D Noting that issue 1 by the Appellants is segmented into three limbs and distilled from grounds 1, 3 and 4 of the grounds of Appeal, and being that sub issue one is incompetent they were however argued and lumped up together under issue one. That the incompetency of the first limb stems from the fact that the trial courts' order of abridgment of time challenged under sub issue one is an interlocutory decision of the trial court made on 21/3/11 and that by Section 24(2) of the Court of Appeal Act, the appellants had 14 days within which to appeal. That having not done so within the time prescribed, they E needed leave to do so. He pointed out that issue one, as argued by F the appellants was a hybrid of both competent and incompetent sub issues. It was his contention that contrary to Appellants argument that the lower court suo motu struck out their grounds 1, 3 and 4 and issue 1, the said decision was sequel to the preliminary objection G of the 1<sup>st</sup> Respondent at the lower court challenging the competency of the said issue and grounds. He referred to pages 893 - 913 of the record of appeal, particularly at page 897.

It was his submission that an objection challenging the competence of an interlocutory appeal filed without leave and in express H violation of Section 24 (2) of the Court of Appeal Act would still be considered by the court even though no formal notice of objection was filed so long as same is incorporated in the Respondent's brief of argument and served on the Appellants. He cited the case of *Abdullahi*

V. Tasha (2001) FWLR (pt 2001) 1807 at 1821. It is his conclusion that this court has no power to separate argument in respect of competent grounds of appeal from incompetent ones. He cited the cases of Nwadike V Ibekwe (1987) 4 NWLR (pt 67) 718, Kadu Int'l Ltd. V. Kano Tanneng Co. Ltd. (2003) FWLR (pt 184) 255 Konedé V Adedokun (2001) FWLR (pt. 65) 421. He urged this court to resolve this issue against the Appellants.

The learned senior counsel for the 2<sup>nd</sup> Respondent also made arguments on this issue. It is contained in their issue No 3. His argument and submissions are in all fours with that of the 1<sup>st</sup> Respondents' senior counsel and I do not intend to reproduce them again. So also the learned silk for the 3<sup>rd</sup> Respondent. I shall now proceed to resolve this issue.

***The first port of call relates to the argument, or an allegation by the learned senior counsel for the Appellants that the learned justices of the Court of Appeal suo motu raised an issue and resolved same without calling on the parties to address the court. I agree and it is trite that our system of appeals in our adversary system does not allow or permit a court to dig into the records and fetch issues no matter how patently obvious, and, without hearing the parties, use it to decide an issue in controversy between the parties to the appeal. It runs counter to the impartial status and stance expected of a judge in the system. It is better that the parties raise and argue it by themselves. But if it is so fundamental that it goes to the jurisdiction or vires of the court, then it must be brought to the notice of the parties to the appeal and argument received on it before it is decided.*** See Ojo Ogbemudia Ebolor V Felicia Osayande (1992) NWLR (pt. 249) 524 or (1992) 7 SCNJ 217, Ndiwe V Okocha (1992) 7 SCNJ 355 Kuti V Balogun (1978) 1 SC 53 at 60, Iriri V. Erhurhobara (1991) 2 NWLR (pt 173) 252 at 265. ***By raising an issue suo motu by a court and basing a decision on it without arguments from both parties, the party affected is denied the opportunity of being heard and this is a breach of his right to fair hearing entrenched in Section 36 of the Constitution of the Federal republic of Nigeria 1999 (as amended). Where a court fails to bring an issue raised suo motu to the attention of the parties and argument taken on it***

***before deciding on it, such a decision is liable to be set aside.***

See Ibori V Agbi (2004) All FWLR (pt 202) 1799 at 1835. Pan African Int. Inc. V Shoreline Lifeboats Ltd (2010) All FWLR (pt 524) 56 at 65. That is the position of the law as regards raising issue suo motu. But was the issue raised suo motu by the lower court as alleged by the learned senior counsel for the Appellants? The record of appeal will certainly bear this out. B

On pages 893 to 913 of the record of appeal is the brief of argument of the 1<sup>st</sup> Respondent herein (at the lower court). Specifically at page 897 thereof, the 1<sup>st</sup> Respondent's counsel argued as follows:- C

*"Rather, the appellant merged the interlocutory appeal with the substantive appeal and filed same on 30<sup>th</sup> March, 2011. We submit that, an interlocutory appeal may be merged with a final appeal. However, the appellants must apply for leave and extension of time to appeal; especially where time within which to file the interlocutory appeal has lapsed. Ogigie V Obiyan (1997) 10 SCNJ 1 at 15."* D

Also, on pages 946 - 947 of the record, the lower court appreciated this point in its judgment as follows:-

*"The appellant had sufficient notice of the grounds of objection in the 1<sup>st</sup> Respondent's brief which obviously was served on him and he reacted to same in his reply brief. The nature of the objections is not such that can be ignored. The competence of an appeal touches on the jurisdiction of the court and once raised must be taken first and decided before any other issue. The rational is that any defect in competence is fatal, it is extrinsic to adjudication and any proceedings arising there from amounts to a nullity."* E F

***It is very clear from extracts from the record of appeal that this issue and the argument thereof stem from the imagination of counsel for the appellants. There is no doubt that this issue of combining both competent and incompetent grounds in one issue was appropriately raised and argued by the parties before the lower court. The judgment of the lower court was properly based on these arguments. It is therefore not only erroneous but also puerile for the learned senior counsel to allege and argue that the court below raised the issue suo motu and decided it without allowing the Appellants to proffer any argument.*** G H

The Appellants' counsel has not challenged the decision of the court below that the 1<sup>st</sup> Respondent's brief containing the objection was served on them and that they made a reply to it in their reply brief.

***I am strongly persuaded to hold and I hereby hold that the court below did not raise the issue suo motu in view of the avalanche of evidence to the contrary in the record of appeal. It follows therefore that the appellants' right to fair hearing was never breached in any way whatsoever.***

***Let me quickly add here that a preliminary objection which borders on jurisdiction cannot be brushed aside by the court but must be considered by the court regardless of the manner in which it was raised. Such issue, I must say can be raised for the first time in this court with or without leave.*** See *Nnonyen V. Anyiechie* (2005) All FWLR CPL 253 604.

***On the other submission which stretched argument in this issue much longer, I wish to say that this court has in a plethora of decisions held that though one can validly lump several related grounds of appeal into one issue and argue same together, if any of the grounds so lumped together is found to be incompetent then it contaminates the whole issue and renders it incompetent as the court cannot delve into the said issue on behalf of the litigant and excise the argument in respect of the competent grounds from those of the incompetent grounds in the issue. The law is no doubt settled that any issue or issues formulated for the determination of an appeal must be distilled from or must arise or flow from a competent ground or grounds of appeal. Again, issues distilled from either incompetent grounds of appeal or a combination of competent and incompetent grounds of appeal are in themselves not competent and are liable to be struck out. An incompetent ground of appeal cannot give birth to a competent issue for determination.*** See *Akpan V Bob* (2010) 17 NWLR (pt 1223) 421, *Amadi V Orisakwe* (1997) 7 NWLR (pt 511) 161, *Fagunwa & anor V Adibi & ors* (2004) 7 SCNJ 322.

***In the instant case, there is no doubt that the interlocutory decision on the issue of abridgment of time was decided in the course of the proceedings. Under Section 24 (2) of the***

**Court of Appeal Act, the appellants had 14 days within which to appeal the said interlocutory decision. The Appellants did not appeal within the 14 days allowed but lumped the appeal on the main decision with the interlocutory decision. This, in itself, is not a bad practice but is always encouraged. However, the appellants did not obtain the leave of court with regards to the appeal on the interlocutory decision that was filed outside the 14 days period. It is trite that where leave is required before an appeal could be filed; failure to obtain the leave would not only render the appeal incompetent but also rob the court of its jurisdiction.** The court below captures the matter as follows on page 947 of the record of appeal:-

*“Under section 24 (2) of the Court of Appeal Act, the period for the giving of notice of appeal or notice of application for leave to appeal in an interlocutory decision is fourteen days. Section 24 (4) of the Court of Appeal Act vest the power on the court to extend the period prescribed in sub sections 2 and 3 of the section. It is crystal clear that the Appellant’s Ground one is on an interlocutory decision of the court below, it did not arise from the judgment of the court below delivered on 21<sup>st</sup> of March, 2011 which is the subject of this appeal as glaringly set out in the Notice of Appeal. The appellant did not seek extension of time nor leave to appeal against the interlocutory order of the court below. Ground one in the notice of appeal is incompetent and is hereby struck out.”*

The court below concluded thus on page 949 of the record:-

*“The position of the law is that issues distilled from other incompetent grounds or from a combination of competent grounds and incompetent grounds of appeal are in themselves not competent and liable to be struck out. See Ogundipe v. Adenuga (2006) All FWLR (pt 330) 206.”*

I agree completely with this conclusion. The doctrine of severance argued by the learned senior counsel for the Appellants has no place here. Accordingly, I agree with the court below which struck out the incompetent issue which derived its life from a combination of incompetent and competent grounds of appeal. Having struck out the said issue, the three grounds of appeal ie 1, 3 and 4 had no issue distilled from them and I agree that the court below was right to strike them out. On the whole, this issue does not avail the appellants as it

is resolved against them.

The 2<sup>nd</sup> issue in the Appellants' brief is the first issue in the 1<sup>st</sup> Respondent's brief. For the 2<sup>nd</sup> Respondent, it is issue 'c' in its brief. The 3<sup>rd</sup> Respondent abides the issues of the 1<sup>st</sup> Respondent. It has to do with the assumption of jurisdiction in this matter by the trial court B which was affirmed by the court below.

Learned senior counsel for the Appellants submitted that the main relief at the trial court was the challenge of the primary election conducted by the Action Congress of Nigeria - the 2<sup>nd</sup> Appellant herein C wherein the 1<sup>st</sup> Appellant was returned as the winner of the election instead of the 1<sup>st</sup> Respondent who is alleged to have won the primary election. It was his contention that it was wrong for the trial court to assume jurisdiction based on relief B which, according to him is an ancillary relief. Relying on the case of PDP V Sylva (supra) he submitted D that where a court has no jurisdiction to entertain the main claim, it cannot hear the ancillary claim. He urged this court to hold that the lower court was wrong to affirm the assumption of jurisdiction by the trial court.

In his response, the learned counsel for the 1<sup>st</sup> Respondent submitted E that given the complaint/claims of the Plaintiff/1<sup>st</sup> Respondent as disclosed in the originating summons, and in view of the clear provisions of section 87(9) of the Electoral Act 2010 (as amended), the lower court was right in holding that the Trial Court has jurisdiction in the matter. Learned senior counsel opined that the decision of F this court in PDF V Sylva (supra) which has exhaustively examined and interpreted the provision of section 87 (9) of the Electoral Act, 2010 (as amended) has put paid to, and rendered otiose the complaint of the appellants that the trial court had no jurisdiction in the G matter. He urged this court to resolve this issue against the Appellants.

Learned silk for the 2<sup>nd</sup> Respondent submitted that based on section 87 (9) of the Electoral act 2010 (as amended), an aggrieved person may now approach the Federal High Court or High Court of H a State or the FCT to ventilate his grievance with respect to the conduct of primary election.

Also, the learned senior counsel for the 3<sup>rd</sup> Respondent apart from adopting the submission of the 1<sup>st</sup> Respondent also submitted that in view of section 87 (9) of the Electoral Act 2010, the trial court



was right in assuming jurisdiction in this matter.

***It is now well settled that jurisdiction is the life wire of a court as no court can entertain a matter where it lacks the jurisdiction. It is also well settled that the jurisdiction of courts in this country is derived from the Constitution and statutes. No court is permitted to grant itself power to hear a matter where it is not so endowed and if it does, the entire proceedings and the judgment derived therefrom, no matter how well conducted, is a nullity. Therefore, every court must ensure that it is well endowed with the jurisdiction to hear a matter before embarking on the exercise else it would be wasting precious judicial time.*** See *Utih V Onoyivwe* (1991) 1 NWLR (pt 166) 166, (1991) 1 SCNJ 25, *Madukolu V Nkemdilig* (1962) 2 All NLR (pt 11) 5. B  
C

Having said that, let me consider the provision of section 87 (9) of the Electoral Act 2010 (as amended). It provides:- D

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

***It is now well settled that issue of nomination and/or sponsorship of a candidate for an election falls within the domestic affairs of a political party being a pre-primary duty of the party. However, where the political party decides to conduct primary election to choose its flag bearer, any dissatisfied contestant at the primary is now empowered by section 87 (9) of the Electoral Act 2010 (as amended) to ventilate his complaint before the Federal High Court or High Court of a State or of the Federal Capital Territory.*** See *Peoples Democratic Party V Timipre Sylva* (supra). ***The said section 87 (9) is clear and unambiguous and does not need any cannon of interpretation. It means what it says. It is trite that where the words of a statute are clear and unambiguous, the courts are enjoined to give them their ordinary grammatical meaning.*** See *Egbe V. Yusuf* (1992) NWLR (pt. 245) 1. F  
G  
H

***By inserting this new provision into the Electoral Act,***

***the legislature has made its intention very clear as to the reason, and purport, that a member of a political party who contested the party primary election is entitled to challenge a breach of the party Constitution or Guidelines and the Electoral Act, by filing an action at the Federal High Court or State High Court or the FCT High Court simpliciter.***

In Ugwu V Ararume (2007) 12 NWLR (pt 1048) 367, this court stated clearly that a statute, like the Electoral Act is the will of the legislature and that any document which is presented to it as a statute is an authentic expression of the legislative will. The function of the court is to interpret that document according to the intent of those who made it. Thus the court declares the intention of the legislature. For me, I think the legislative intent of inserting S. 87 (9) into the Electoral Act is to give an aggrieved party the flexibility of ventilating his grievance in any of the courts listed therein, depending on where it is most convenient to the parties. That in my opinion is to make things easier for the parties. To impute any other intention to the section would be to radically violate the intention of the legislature.

***I wish to state further that although section 251 of the Constitution of the Federal Republic of Nigeria, 1999 confers exclusive jurisdiction on the Federal High Court in respect of matters listed in the paragraphs of the section, it does not create an exhaustive item/list or subject matters upon which that court may exercise jurisdiction. Section 251 of the Constitution does not foreclose the conferment of jurisdiction of a matter not listed under that section of the constitution on the Federal High Court by an Act of the National Assembly.***

The opening paragraph of the section states:-

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

As was rightly submitted by the learned senior counsel for the 1<sup>st</sup> Respondent, beyond the items in section 251 of the Constitution upon which the Federal High Court exercises exclusive jurisdiction; section 87 (9) of the Electoral Act 2010 (as amended), an Act of the

National Assembly, confers additional jurisdiction on the Federal High Court to hear and determine disputes, complaints and grievances arising from the conduct of a primary election of a political party. This special jurisdiction so conferred is, by law, to be exercised concurrently with the State High Court and the FCT High Court. For me, all the arguments of the learned senior counsel for the Appellants as to “main relief”, “ancillary relief” are not part of section 87 (9) of the Electoral Act. B

It does not in the circumstance leave room for argument on whether or not the parties or any of the parties is an agency of the Federal Government. And in any case, if one should take the argument further as the appellants would want to, is INEC not an agency of the Federal Government? And if we are to go by section 251 of the Constitution, does the Federal High Court not have competence to hear the matter where INEC is a party? C D

***I think, counsel, especially in election matters which are sui generis, should allow these matters to be decided speedily and not unnecessary prolonging them on such matters like jurisdiction which the law is clear on. I say no more. The lower court, in my opinion was right to hold that the Federal High Court had jurisdiction to hear and determine this matter. This issue, as it stands does not avail the appellants at all.*** E

I now consider issue No 3 which is the same as issue No 2 in the 1<sup>st</sup> respondent’s brief. Issue No 1 by the 2<sup>nd</sup> Respondent is also in tandem with this issue. After a lengthy run down of the affidavit evidence filed by both parties at the trial court, the learned senior counsel for the Appellants submitted that there were conflicts in the affidavit filed by the parties and as such originating summons was not suitable for the commencement of this matter. Citing the case of Amesike V The Registrar General CAC (2010) All FWLR (pt 541) 1406, learned silk contended that originating summons is not suitable for hostile or even likely hostile proceedings. He also cited these cases - Keyamo V House of Assembly Lagos State (2003) FWLR (pt 146) 925, National Bank of Nigeria V Alakija (1978) 9 -10 & 11 -12 SC, 42. F G H

The learned senior counsel further submitted that in such situations, pleadings must be ordered and that in the instant case, the court below was wrong to affirm the decision of the trial court not to order pleadings.

In response, the learned senior counsel for the first Respondent submitted that the lower court was right in affirming the decision of the learned trial judge that resolved the issue in dispute between the parties by relying essentially on the documents produced by the appellants and the 1<sup>st</sup> Respondent. Both the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents' senior counsel agree with the learned silk for the 1<sup>st</sup> Respondent that the lower court was right to affirm the trial court's decision to hear the matter based on originating summons process.

**There is no doubt that originating summons is one of the ways of commencing action in our courts. It is provided for in the various High Court Rules.** For the Federal High Court (civil procedure) Rules 2009, Order 3 Rules 6 and 7 thereof provide:-

*"6 Any person claiming to be interested under a deed, will, enactment or other written instrument may apply by Originating Summons for the determination of any question of construction arising under the instrument and for a declaration of the rights of the persons interested"*

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

**The above provision clearly states the type of actions that may be commenced by way of Originating Summons, Where the issue is that of construction of documents or interpretation of statutory provisions, it is safe and prudent to approach the court by Originating Summons.**

The record of appeal shows that the 1<sup>st</sup> Respondent herein commenced this matter at the Federal High Court by an Originating Summons. Essentially, the action was for the interpretation of the provisions of the Constitution of the 2<sup>nd</sup> Appellant, which said Constitution was said to have been breached by the Appellants in the aftermath of the conduct of primary election to Buruku Federal Constituency of Benue State held on the 12<sup>th</sup> April, 2011 for which the Plaintiff/1<sup>st</sup> Respondent says he was the winner.

The 1<sup>st</sup> Respondent deposed to an affidavit of 28 paragraphs and exhibited several documents as follows:-

1. The result of the ACN primary election for Buruku Federal Constituency which shows that the 1<sup>st</sup> Respondent won the said primary election with 8,030 votes. It is Exhibit F at page 83 of the record.

2. Action Congress of Nigeria Guideline for the Nomination of candidates for Public Offices in Nigeria. This is contained on pp 38 - 44 of the Constitution of the Action Congress of Nigeria (Exhibit 1) at pp 45 - 64 of the Record.

4. Result of screening - Exhibit J at page 65 of the Record

5. Membership Registration Form at page 23 of the Record.

6. Report of Primary Election of the 2<sup>nd</sup> Appellant in Benue State Exhibit U

7. Register of members of Action Congress of Nigeria for the wards in Buruku Local government-Exhibit A, B & C. The Appellants also annexed some exhibits to their counter affidavit. They are:-

1. Ward Result of primary election Exhibit C 1 - C 12

2. Summary of the Result - Exhibit D

***A close look at the facts deposed to in the affidavit of both parties and the documents annexed will disclose that the parties do not agree on all issues and that is not strange, else, the Appellants would have conceded to the claim of the 1<sup>st</sup> Respondent in the first place. I agree that the procedure by originating summons ensures a quick disposal of a suit especially an election matter which requires some measure of urgency. However where the proceedings are hostile, originating summons should not be used.*** See National Bank of Nigeria V Alakija (supra). ***The general principle of law regarding conflict in affidavit in an originating summons procedure is that where this is the case, the court should order for pleadings in order for the parties to lead evidence to resolve such conflicts. However, where there are documents annexed to the affidavit of the parties which can be effectively used to resolve the seemingly conflicts, there would be no need to order for pleading and this is exactly what the learned trial judge did which was affirmed by the Court of Appeal.*** See Nwosu V. Imo State Environmental Sanitation Authority (1990) 2 NWLR (pt 135) 688, Kimday V. Military Governor of Gongola State (1988) 5 SCNJ 28 at 56. Fashanu V. Adekoya (1974) 1 All NLR (pt 1) 35 at 91 - 92.

At this stage I shall refer to the judgment of the learned trial judge and see how he effectively and quite admirably resolved the seeming conflict in the affidavit using the documents annexed by the parties. I refer to page 383 of the record where the learned judge states:-

B *“I shall reproduce the total numbers in the membership register for the three wards respectively, the membership register is prima facie of proof of membership in a ward, against it reflects total no, of registered members.”*

C     Exhibit A - Mbatyough - 410  
       Exhibit B - Mbaade - 601  
       Exhibit C - Mbaazager – 761

The total no. of votes and scores by the exhibited by 1<sup>st</sup> and 2<sup>nd</sup> defendants for those wards are:-

D	Votes cast	Scores of 1 <sup>st</sup> defendant
Exhibit c7 - Mbatyough	612	608
Exhibit c3 - Maade	2005	2000
Exhibit c9 - Mbaazager	725	721

E     It is observed that the total number of votes cast and the no of scores declared by 1<sup>st</sup> defendant is far excess of the total no of members in the ward.

In Mbaade for example, 1<sup>st</sup> defendant declared 2000 to himself this is far and over the total number in the register which is 601.

F     These scores definitely cannot stand.

A glance through Exhibit 1A - 1L Result of 1<sup>st</sup> Defendant, the figures are just too good on paper.

On part of the plaintiff, scores are

G     Mbatyough - 310  
       Mbaade - 500  
       Mbaazager - 628”

On page 384 of the Record, the learned trial judge concluded as follows:-

H *“It is trite that the total scores of a candidate in any election where it exceeds the total no of voters in the register of the place where the election held, it amounts to anomaly and it’s a symptom of manipulated result. It is not legal, credible and cannot stand in a democratic setting. It is not a reflection of a fair election exercise. Assuming all the members in the register voted for one candidate, in*

*a place of 601 people, it can never translate to 2,000 scores no matter the chemistry by mathematics or algebra. It means only one tiling: Scores were allocated."*

**The above exposition by the learned trial judge was upheld by the court below. This was a far reaching decision by the learned trial judge but, as was noted by the court below, the Appellants have not appealed against it. In view of how the learned trial judge used the Exhibits to resolve the seeming conflicts in the affidavit, what exactly were pleadings meant to do had it been ordered? For me, there was nothing pleadings could have done. The 1st Appellant who scored 2,000 votes in a ward which had 601 voters in the register knows that he is just playing games and that his appeal is an exercise in futility. In the circumstance of this issue, I hold that the Appellants have failed to show why it should be resolved in their favour. I resolve it in favour of the Respondents.**

**I make a few remarks on issue 4. The learned trial judge had found that the 1st appellant's score of 2000 votes in Mbaade ward was far above the number of voters in the register which stands at 601 and because of that he held that the votes were allocated and not earned. Now the court below observed that the Appellants failed to appeal against crucial findings of the trial court. The Appellants herein are saying in issue 4 that they had appealed against the finding in grounds 2 and 5 of the notice of appeal used at the Court of Appeal.** The said notice of appeal is on pages 395 to 398 of the record of appeal. I shall reproduce the two grounds of appeal referred to by the appellant;

#### **"GROUND 2**

*The learned trial judge fell in a grave error of law when she ascribed a different meaning to Exhibit D of the Appellant's counter affidavit, and thereafter proceeded to attach weight to Exhibit E and F authored by the 4<sup>th</sup> Respondent in favour of 1<sup>st</sup> Respondent and this occasioned a miscarriage of justice.*

#### **GROUND 5**

*The trial court lacked the jurisdiction to try the suit"*

This is the notice of appeal referred to by the 1<sup>st</sup> Respondent in his brief. The two grounds quoted above have nothing to do with the

said finding of the learned trial judge on the issue of allocation of votes.

The learned senior counsel for the appellants also referred to another notice of appeal on pp 414 - 419. Grounds two and five also state as follows:

B *‘2. The learned trial judge erred in law in proceeding to judgment against the 1<sup>st</sup> & 2<sup>nd</sup> defendants in the place of violent conflicts in the parties’ affidavits pertaining to the originating summons instead of ordering pleadings or taking oral evidence to resolve the obvious material conflicts and this occasioned a grave miscarriage of justice to the appellants.*

C *5. The learned trial judge erred in law in referring, failing or neglecting to act on the unchallenged and uncontroverted evidence - the certificate of return dated 15<sup>th</sup> January, 2011. (Exh. A to 1<sup>st</sup> Defendants counter affidavit and Exh. 3 to 2<sup>nd</sup> Defendants, counter affidavit) in finding for the 1<sup>st</sup> and 2<sup>nd</sup> defendants and this occasioned a gross miscarriage of justice to the Appellants.*

***Again the two grounds of appeal have not challenged the crucial finding of the learned trial judge on the scores of the 1<sup>st</sup> Appellant vis-à-vis the number of members on the register which made the Appellants’ result and victory improbable. It is my view that the observation by the court below on the issue is unassailable. Accordingly, I resolve this issue against the Appellants.***

F The Appellants’ complaint in issue 5 is that the 1<sup>st</sup> Respondent herein failed to file notice of preliminary objection as required by Order 10 Rule 1 of the Court of Appeal Rules, 2011 but embodied same in the Respondent’s brief which he also argued. Also, that he failed to file twenty copies as prescribed in the Rules. He also complained that the 1<sup>st</sup> Respondent failed to seek leave to argue the preliminary objection before the appeal was heard. Neither the 1<sup>st</sup> Respondent nor any of the other Respondents made any argument on this issue.

H Order 10 Rule 1 of the Court of Appeal Rules, 2011 states:

*“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 twenty copies thereof*



*with the registry within the same time.”*

The above provision is clear and unambiguous. This court is enjoined to give it its ordinary grammatical meaning. ***By that Rule, the method of raising a preliminary objection apart from giving the appellant three clear days notice before the date of hearing may be in the Respondent’s brief, by a formal separate notice of objection or both. However, there is the need for the Respondent or his counsel, with the leave of the court to move the objection before the hearing of the substantive appeal.*** See Magit V. University of Agriculture, Makurdi (2005) 19 NWLR (pt 959) 211, Tiza & anor V. Begha (2005) 15 NWLR (pt 949) 616, (2005) 5 SCNJ 168, Nsirim V. Nsirim (1990) 5 SCNJ 174, Okolo V. Union Bank Nig., Ltd. (1998) 2 NWLR (pt. 539) 618, Arewa Textile Plc. V. Abdullahi & anor (1998) 6 NWLR (pt. 554) 508.

***In the instant case, the Respondent at the court below gave notice of the preliminary objection in his brief as attested to by the Appellants and this court is satisfied that it was a sufficient notice, the said brief having been adequately served on the appellants. The complaint by the appellants in this respect is untenable. As to whether the Respondent filed 20 copies or not or whether he raised the objection before the appeal was heard or not is a question of fact and not just for legal argument. The Appellants’ senior counsel has not provided any evidence that the Respondent did not file 20 copies or that he did not seek leave to argue same. The argument of counsel, no matter how brilliant cannot take the place of evidence. In any case, these are issues which ought to have been raised at the court below to be determined before an appeal is made to this court. As it stands, this issue does not avail the appellants.***

The 6<sup>th</sup> and last issue is whether the judgment of the Court of Appeal affirming the trial court’s judgment was not against the weight of evidence adduced at the trial. The learned senior counsel for the Appellants argued that the weight of evidence clearly tilted in favour of the Appellants as against the Respondents, especially the 1<sup>st</sup> Respondent and that the judgment of the Court of Appeal ought to have been in favour of the Appellants.

The learned silk for the 1<sup>st</sup> Respondent submitted that the judg-

ment of the trial court as affirmed by the court below is sound in law being a product of sound thorough appraisal and dispassionate assessment of the affidavit and documentary evidence produced by the parties at the trial.

While considering issue three in this appeal, I touched on the evidence which the learned trial judge relied upon to give judgment for the 1<sup>st</sup> Respondent. It should be noted that this suit was commenced by an originating summons procedure wherein both parties filed their respective affidavits with documents attached. It was noted by the learned trial judge which the court below affirmed, that from the affidavit as well as documentary evidence of the parties, the main issue in contention between the Appellants and the 1<sup>st</sup> Respondent touches on the ACN primary election of 12<sup>th</sup> January, 2011 for Buruku Federal Constituency of Benue State. Both parties produced and relied on the results of the election. While the appellants produced Exhibits c1 - c 12 as results of the election the 1<sup>st</sup> Respondent produced Exhibit F as his own result. Exhibits A. B. C are the ACN register of members of the party who were eligible to vote in the election.

***In the course of evaluating the evidence, the learned trial judge noted that in Exhibits A, B and C (the Party Registers for Mbatyough, Mbaade and Mbaazager wards) the number of voters are 410, 601 and 761 respectively. However, in Exhibits c7, c8 and c9 (the scores exhibited by the Appellants) votes cast were 612, 2,005 and 725 respectively while the 1<sup>st</sup> Appellant scored 608, 2,000 and 721 respectively. The court found that the total number of votes cast and the number of scores declared by the Appellants were far in excess of the total number of members in those wards. The learned trial judge then held as follows:***

***“In Mbaade for example 1<sup>st</sup> defendant declared 2,000 votes to himself, this is far and over the total number in the register which is 601. These scores definitely cannot stand.”***

***On the other hand, the respondents tendered results in these wards as 310, 500 and 628 respectively. The learned trial judge believed this later result and held that of the Appellants as being “allocated”. Based on the above, the learned trial judge entered judgment for the 1<sup>st</sup> Respondent and this***

***was affirmed by the court below. I have no reason to disagree with these findings of the two courts below. This was the crux of the matter. How did the appellants' score of 2,000 fit into a register of voters of only 601 members? The appellants ought to have focused their energy and eloquence on this aspect. For me, the appellants have no case as far as this issue is concerned.*** B

***On the whole, having resolved all the issues against the Appellants, the inevitable outcome is that this appeal is devoid of merit and is accordingly dismissed.*** C

On the consequential orders to be made as a result of the outcome of this appeal, the learned senior counsel for the 1<sup>st</sup> Respondent submitted that since the Federal High Court and the Court below held that the 1<sup>st</sup> Respondent was the sponsored candidate of the 2<sup>nd</sup> Appellant for the election into the House of Representatives seat of Buruku Federal Constituency of Benue State, this court should order the immediate vacation of the seat by the 1<sup>st</sup> Appellant and that the 1<sup>st</sup> Respondent be sworn in immediately. It is his view that this order would meet the justice of the case and to do otherwise would leave the 1<sup>st</sup> Respondent without a remedy. D E

In his reply brief, the learned senior counsel for the Appellants opposed any order directing his client to vacate the seat. He opined that neither the Federal High Court nor the Court of Appeal ordered his client to vacate the seat. Also that issue of vacation of seat was not part of the case at the lower court. It was his further submission that section 141 of the Electoral Act has forbidden all courts from ordering any person to assume an electable seat if that person did not go through all the stages of the election. F

***The outcome of this appeal from the trial court, Court of Appeal to the Supreme Court is that the 1<sup>st</sup> Respondent was the candidate of the 2<sup>nd</sup> Appellant at the April 2011 election into the House of Representatives seat for the Buruku Federal Constituency of Benue state. This was the position as early as 21<sup>st</sup> March, 2011 when the Federal High Court ordered that his name be placed on the ballot. Both the 1<sup>st</sup> and 2<sup>nd</sup> Appellants ignored this order and put forward the 1<sup>st</sup> Appellant for the election. Now that the Appellants have lost their appeal in this court, it should dawn on them that the 1<sup>st</sup>*** G H

**Appellant's name was placed on the ballot unlawfully, illegally and in utter disobedience to the order of the Federal High Court. It is now well settled that a person who is in contempt of a subsisting court order is not entitled to be granted the court's discretion to enable him continue with the breach.** See Shugaba B V Union Bank of Nigeria Plc (1999) 11 NWLR (pt 627) 459, Governor of Lagos State V Ojukwu (1986) 1 NWLR (pt 18) 621. **The truth of the matter is that the 1<sup>st</sup> Appellant cannot continue to maintain his seat at the House of Representatives, having found his way into the House unlawfully. I shall make the appropriate orders anon.** C

**At the same time, the 1<sup>st</sup> Respondent cannot be ordered to be sworn in immediately because section 141 of the Electoral Act 2010 (as amended) forbids such an order since the 1<sup>st</sup> Respondent did not participate in all stages of the election. Section 141 of the said Electoral Act (supra) states:-** D

**"An election tribunal or court shall not under any circumstances declare any person a winner at an election in which such a person has not fully participated in all the stages of the said election."** E

**By section 141 of the Electoral Act (supra), the 1<sup>st</sup> Respondent cannot be declared the winner of the election as was done in Amaechi V INEC (2008) All FWLR (pt407) 1. The clear position of the law now is that a person must participate in all the stages of an election before he can be declared the winner of the said election. In this case, although the Federal High Court held that the 1<sup>st</sup> Respondent was the candidate of the 2<sup>nd</sup> Appellant, the 2<sup>nd</sup> Appellant and the 2<sup>nd</sup> Respondent herein refused to place his name on the ballot. The inevitable outcome of this appeal is that there must be fresh election with the name of the 1<sup>st</sup> Respondent as the candidate of the 2<sup>nd</sup> Appellant in its new name, All Progressives Congress.** F G

H In sum, I make the following consequential orders:-

1. The 1<sup>st</sup> Appellant Barrister Orker Jev is hereby ordered to vacate the seat of Buruku Federal Constituency of Benue state in the House of Representatives immediately.

2. The 2<sup>nd</sup> Respondent, Independent National Electoral Com-

mission (INEC) is hereby ordered to conduct election into the vacant seat of Buruku Federal Constituency of Benue State in the House of Representatives within three months (90 days) with the 1<sup>st</sup> Respondent, Sekav Dzua Iyortyom as candidate of the Action Congress of Nigeria (now All Progressives Congress.)

3. The Appellants shall pay N500,000.00 costs to each set of Respondents except the 2<sup>nd</sup> Respondent.

### ***ONNOGHEN JSC***

This appeal is against the judgment of the Makurdi Division of the Court of Appeal in appeal No. CA/MK/136/2011 delivered on the 7<sup>th</sup> day of March, 2012 in which the court dismissed the appeal of appellants against the decision of the Federal High Court Holden at Makurdi in suit No. FHC/MKD/CS/19/2011 delivered on the 21<sup>st</sup> day of March, 2011 in favour of the instant 1<sup>st</sup> respondent.

The facts of the case have been stated in the lead judgment of my learned brother OKORO, JSC and may be summarized as follows:-

On the 12<sup>th</sup> day of January, 2011 the 2<sup>nd</sup> appellant conducted the primary elections to choose its candidates for the various elective offices in Nigeria including the Buruku Federal Constituency of Benue State's representative in the Federal House of Representatives, in the general election scheduled for April, 2011. The 1<sup>st</sup> appellant, 1<sup>st</sup> respondent and one John Tine contested the primary election which was won by the 1<sup>st</sup> respondent with 8030 votes. 1<sup>st</sup> appellant scored 1316 votes while John Tine got 494 votes. The 3<sup>rd</sup> respondent was the head of the electoral committee that supervised the primary election and submitted a comprehensive report to the 2<sup>nd</sup> appellant. The said report is exhibit 'G'.

However, rather than submit the name of the 1<sup>st</sup> respondent to the 2<sup>nd</sup> respondent as the winner of the primary election and therefore the sponsored candidate of 2<sup>nd</sup> appellant for the election into the House of Representatives for Buruku Federal constituency as required by the Electoral Act, 2010, as amended, and the Constitution of 2<sup>nd</sup> appellant, the 2<sup>nd</sup> appellant rather submitted the name of the 1<sup>st</sup> appellant, as its candidate for the said election resulting in the 1<sup>st</sup> respondent instituting action at the Federal High Court, Makurdi claim-

ing the following reliefs:-

- “1. A declaration that the 2<sup>nd</sup> defendant has breached Article 21.3.6 of the Constitution of the 2<sup>nd</sup> defendant in that the 2<sup>nd</sup> defendant has forwarded the name of the 1<sup>st</sup> defendant as candidate of the 2<sup>nd</sup> defendant for the April, 2011 general elections for the House of Representatives to the 3<sup>d</sup> defendant whereas, the plaintiff won the primaries for the said office as conducted by the 2<sup>nd</sup> defendant,
2. A declaration that the forwarding of the name of 1<sup>st</sup> defendant by the 2<sup>nd</sup> defendant as the candidate for the House of Representatives for Buruku Federal Constituency for the forthcoming General elections and the corresponding act of 3<sup>d</sup> defendant by accepting, listing and publishing the 1<sup>st</sup> defendant as defendants candidate for the Federal House of representatives, Buruku Federal Constituency is illegal, unconstitutional and of no effect.
3. An order of perpetual injunction restraining 1<sup>st</sup> defendant from parading himself as the 2<sup>nd</sup> defendant’s candidate for the Federal House of Representatives, Buruku Federal Constituency in respect of the forthcoming election into the Federal House of Representatives.
4. An order of perpetual injunction restraining the 2<sup>nd</sup> and 3<sup>d</sup> defendants from recognizing and dealing with the 1<sup>st</sup> defendant as the 2<sup>nd</sup> defendant’s candidate for the House of Representatives Buruku Federal Constituency in respect of the forthcoming election into the Federal House of Representatives.
5. An order directing the 2<sup>nd</sup> and 3<sup>d</sup> defendants to take all steps, action including listing the name of the plaintiff as the 2<sup>nd</sup> defendant’s candidate for the House of Representatives Buruku Federal Constituency in respect of the forthcoming elections into the Federal House of Representatives and to allow the plaintiff contest the election into the House of Representatives Buruku Federal Constituency in the forthcoming General elections on the platform of 2<sup>nd</sup> defendant”

As stated earlier in this judgment, the trial judge entered judgment for the plaintiff/1<sup>st</sup> respondent in this appeal and granted all the reliefs reproduced supra. An appeal against that judgment was dismissed by the lower court giving rise to the instant further appeal, the issues for the determination of which have been identified by learned senior counsel for appellants, SEBASTINE T. HON., SAN., in the Fur-

ther Amended Appellants' Brief deemed filed and served on 3/3/14 as follows:-

*"1. Was the Court of Appeal right when it struck out Appellants' Grounds 1, 3 and 4 and issue No. 1 for the reason that competent and incompetent Grounds of Appeal were argued together? (Grounds 3 and 4)."* B

*2. Was the Court of Appeal right in affirming the trial court's jurisdiction, given that the main relief of the 1<sup>st</sup> respondent at the trial court was not against an agency of the Federal Government? (Grounds 6 and 7)."* C

*3. Was the Court of Appeal right to have affirmed the decision of the trial court to determine the matter upon the 1<sup>st</sup> respondent's originating summons in spite of the highly contentious affidavit and documentary evidence tendered by the parties? (Ground 1)."*

*4. Did the appellants' appeal against the findings made by the trial court on Exhibits A, B and C? (Ground 2)."* D

*5. Was the 1<sup>st</sup> respondent's notice of preliminary objection competent before the Court of Appeal? (Ground 5)."*

*6. Was the judgment of the Court of Appeal affirming the trial court's judgment not against the weight of evidence adduced at the trial? (Additional Ground 1)."* E

In arguing issue 1 learned senior counsel submitted that the lower court was in grave error of law which adversely affected the appellants' constitutional right to fair hearing when it, suo motu, struck out appellants grounds 1, 3 and 4 and issue 1 formulated there from on the ground that competent and incompetent grounds of appeal were combined to form issue No. 1 when the lower court did not invite any of the parties to address it on the matter; that the judgment of the lower court based on the issues raised suo motu amounts to a *"determination"* of the appellants' *"civil rights and obligations"* by which appellants were mandatory, under section 36(1) of the 1999 Constitution required to be given *"a fair hearing"* by the lower court. F G

However, it is not correct to say that the matter was raised suo motu by the lower court and without calling on counsel for appellants to address the court thereon before deciding the matter. The issue of the competence of issue 1 arising from grounds 1, 3 and 4 of the grounds of appeal before the lower court was raised by way of preliminary objection incorporated in the 1<sup>st</sup> respondent's brief of H

argument and duly argued therein. That brief was served on the appellants as a result of which they filed a reply brief of argument. It is therefore very strange that learned senior counsel now submits that the issue was raised suo motu by the lower court and without calling for address by counsel for appellants.

B *The appellant had sufficient notice of the ground of the objection in the 1<sup>st</sup> respondent's brief which obviously was served on him and he reacted to same in his reply brief.*

*The nature of the objection is not such that can be ignored.*

C *The competence of an appeal touches on the jurisdiction of court and once raised must be taken first and decided before any other issue. The rationale is that any defect in competence is fatal, it is extrinsic to adjudication and any proceedings arising there from amounts to a nullity."*

D To demonstrate the uselessness of appellants' issue 1 and the submissions thereon, learned senior counsel for appellants contradicted seriously, the legal consequences of the court's breach of appellants' right to fair hearing as guaranteed under section 36(1) of the 1999 Constitution by conceding, in no uncertain terms, that the  
E lower court actually considered the merit of the said issue 1 earlier struck out by the court for being incompetent in its judgment before arriving at its decision in the appeal. At page 17, paragraph 4.31 of the appellants' further amended brief of argument supra, the learned senior counsel stated as follows:-

F *In the present case, we concede that after striking out the Appellants' grounds 1, 3 and 4 and issue No. 1 and all the arguments thereon, the lower court gave an alternative judgment on the merits on issue No. 1 on pages 950 - 956 of vol. 2 of the MROA....."*

G In any event, it is very much untrue that the lower court raised the issue of competence of issue No, 1 suo motu and without giving appellants the opportunity to address it thereon.

On appellants' issue No. 2, I had earlier reproduced, in extensor, the reliefs claimed by 1st respondent at the trial court. It is settled  
H law that it is the claim of the plaintiff as disclosed in the statement of claim that determines the jurisdiction of the court. Going through the reliefs claimed by the 1<sup>st</sup> respondent I find it very difficult to agree with learned senior counsel for appellants that the trial court had no jurisdiction to hear and determine the suit as constituted. The con-



tention of appellants on the issue is clearly without foundation whatsoever. The matter before the trial court originates from a primary election conducted by the 2<sup>nd</sup> appellant to choose its candidates for a general election, as earlier stated, which particular primary election was won by 1<sup>st</sup> respondent who was denied the right of sponsorship by the appellants. He instituted the action calling for interpretation of the provisions of the Constitution of the 2<sup>nd</sup> appellant relating to the nomination exercise. B

Secondly, the 2<sup>nd</sup> respondent is an agency of the Federal Government of Nigeria which also makes the Federal High Court the appropriate venue for the ventilation of the grievances of the 1<sup>st</sup> respondent against the parties concerned. C

Thirdly, by the provisions of section 87(9) of the Electoral Act, 2010, as amended, the Federal High Court is one of the High Courts clothed with jurisdiction to hear and determine actions such as the one instituted in this case; it provides thus:- D

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

The complaint of 1<sup>st</sup> respondent, apart from being said to be a violation of the provisions of the Constitution of 2<sup>nd</sup> appellant, is also a violation of the provisions of section 87(4) (c) (ii) of the Electoral Act, 2010 as amended which provides as follows:- F

*The aspirant with the highest number of votes at the end of voting shall be declared the winner of the primaries of the party and the aspirant's name shall be forwarded to the Commission as the candidate for the party....”* (The underlined are mine). G

From the underlined word, shall, it is clear that the provision is mandatory and leaves no discretion for the political party to exercise in the matter.

So where 1<sup>st</sup> respondent's name was not sent to the 2<sup>nd</sup> respondent as required supra, the 1<sup>st</sup> respondent has the right and duty under section 87(9) of the Electoral Act, 2010 as amended, to institute the action in the Federal High Court which court undoubtedly has the jurisdiction to hear and determine same. H

On the issue as to whether originating summons process is the appropriate procedure for the determination of the case of 1<sup>st</sup> respondent, the answer is clearly in the affirmative as there is no dispute on the relevant/essential facts grounding the claims of 1<sup>st</sup> respondent, which is anchored on the interpretation of the relevant provisions of the constitution of the 2<sup>nd</sup> appellant relating to nomination of its candidates for election. Secondly there is the finding of fact, which is also borne out by exhibit 'G', that 1<sup>st</sup> respondent was the winner of the primary election in question haven scored the highest number of votes cast at the election. The question to be decided by the court in the circumstance is therefore whether in the circumstances of the facts and constitutional provisions of 2<sup>nd</sup> appellant, and the Electoral Act 2010, as amended, 1<sup>st</sup> respondent is not the proper candidate of 2<sup>nd</sup> appellant for the election in issue. Of course parties can seek to raise disputes where none exists or irrelevant to the determination of the issue(s) in controversy between the parties. In such a case, it is the duty of the court not to allow its eyes to be blinded by irrelevancies and smoke screen. The primary issue therefore is the consequences of the finding, as supported by Exhibit 'G' that 1<sup>st</sup> respondent was the winner of the said primary election and by the provisions of section 87(4) (c) (ii) his name **MUST** be sent to 2<sup>nd</sup> respondent as the candidate for the election in issue.

From the exhibits before the court, the court had no doubt as to who scored the highest number of votes cast in more than half of the wards within the constituency in question, which is the main issue calling for determination in the case.

It is clear from the record and very much unfortunate that 1<sup>st</sup> appellant has glued himself to the seat of Buruku Federal Constituency of Benue State in the House of Representatives following an election in which he was adjudged by a court of competent jurisdiction not to be a candidate, which decision was affirmed by the lower court, and despite the injunctions ordered by that court. This is, to say the least, a very worrisome development which constitutes a danger to the growth of the Rule of law in this country. What has happened in this case is a negation of justice, equity and good conscience.

A situation where a court order/decision/judgment is rendered ineffective or nugatory by the acts or inaction of a party (ies) in the suit should not by any means be encouraged as same would result in

chaos and anarchy and self help. This court will therefore not fold its hands and watch the judgment of a court of law being trivialized and/or rendered nugatory without doing something to give effect to same. What then is the proper consequential order to be made to meet the justice of the case?

The provisions of section 141 of the Electoral Act, 2010, as amended, prevents this court from declaring a person who has not participated in all the processes of an election a winner of the said election contrary to the earlier decisions of this court as evidenced in *Amaechi vs INEC* (2008) ALL FWLR (pt. 407) 1; *Odedo vs INEC* (2009) All FWLR (pt.449) 844 etc, etc. it is in the light of the above provision of the Electoral Act 2010, as amended, and to give effect to the extant decision of the trial court in this matter that the consequential orders made in the lead judgment of my learned brother OKORO, JSC is necessary.

May be this case points to the need to amend the law - Electoral Act - to make it possible for the courts, in circumstances of this case, to make an order that the party who has benefited from an illegality, as the 1<sup>st</sup> appellant in the instant case, refunds all public funds he collected while the illegality lasted; to discourage others.

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

Appeal dismissed.

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### ***GALADIMA JSC***

I have had the opportunity of reading the judgment of my learned brother OKORO, JSC. I am in complete agreement with him in the manner he meticulously considered and resolved the multiple issues arising for determination in this appeal particularly on the question of whether or not the trial court had jurisdiction to hear and determine complaints on the conduct of Political Party primaries.

The question of jurisdiction is predicated on the interpretation of Section 87 [9] of the Electoral Act 2010 [as amended]. It provides as follows:

“87 (9) *Notwithstanding the provision of this Act or rules of a Political Party, an Aspirant who complains that any of the provisions of this Act and the guidelines of a Political Party has not been complied with, in the selection or nomination of a candidate of a Political Party for election, may apply to the Federal High Court or the High Court of a State or FCT for redress.*”

It is now trite that the issue of selection/nomination and or sponsorship of a candidate for an election falls squarely within the ambit of domestic affairs and decision of a Political Party. It is basic and a pre-primary duty of a Political Party. A rider has been provided in the foregoing section 87 (9) (supra). It says clearly that a flag bearer of a Political Party who contested at the primary who is dissatisfied can resort to the Federal High Court or High Court of a State or FCT to redress or ventilate his complaint This section is clear and unambiguous. See PDF v. TIMIPRE SYLVA (2012) ALL FWLR [pt 637] at 606.

The finding of the trial Federal High Court Makurdi, which was affirmed by the Court of Appeal, Makurdi Division is that it was the 1<sup>st</sup> Respondent and not the 1<sup>st</sup> appellant that won the APC Primary conducted on 12/1/2011 to nominate its candidate to represent the BURUKU FEDERAL CONSTITUENCY of Benue State in the General Elections for the House of Representatives,

The 1<sup>st</sup> respondent no doubt had a cause of action when his party APC submitted the name of the 1<sup>st</sup> appellant and not his own name. By virtue of S. 87 [9] of the Electoral Act [supra], the 1<sup>st</sup> respondent, who had complained could apply to the Federal High Court or High Court of a State or FCT for redress. In this case he chose the Federal High Court. He was right. The subject matter in this case is within the jurisdiction of that court.

In view of the foregoing reasons and those adumbrated by my learned brother aforementioned. I too agree that there is no merit whatsoever in the appeal and consequently it is dismissed. I abide by the orders made therein as to costs.

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### **RHODES-VIVOUR JSC**

I have had the privilege of reading in draft the leading judgment of my learned brother, Okoro, JSC, I agree with his lordship on

the points which arise in this case, but in view of the fundamental nature of the jurisdiction issue in particular I express my view.

The full history and circumstances have already been set out in the leading judgment, and need, not be repeated.

The question on jurisdiction is:

Whether the trial court had jurisdiction to hear and determine complaints on the conduct of Political Party Primaries. B

In *Madukolu & Ors. V. Nkemdilim* (1962) 2 NSCC p. 374 *Bairamian*, JSC made some observations on jurisdiction and the competence of a court. His lordship said that a court is competent when C

1. It is properly constituted as regards members and qualifications of the members of the bench, and no member is disqualified 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 exercising its jurisdiction; and D

3. the case comes before the court initiated by due process of law, and upon fulfillment of any condition precedent to the exercise of jurisdiction.

The question on jurisdiction turns on the interpretation of section 87(9) of the Electoral Act which states that: E

*87(9). Notwithstanding the provision of this 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, nomination of a candidate of a Political Party for election, may apply to the Federal High Court or the High Court of a State or FCT for redress".* F

Section 87(9) of the Electoral Act confers jurisdiction on the Federal High Court, or High Court of a State, or High Court of the Federal Capital Territory to examine the conduct of primary elections and see if the primary elections were conducted in accordance with the parties constitution and guidelines, only when a dissatisfied contestant at the primaries complains about the conduct of the primaries. See *PDP v. T. Sylva & 2 ors* (2012) ALL FWLR pt.637 p.606, *Hope Uzodinma v. Senator O, Izunaso* (2011) vol. 5 (pt.i) MJSC p. 27 G

The finding of the trial court, affirmed by the Court of Appeal is that it was the 1<sup>st</sup> respondent and not the 1<sup>st</sup> appellant that won the H

APC primaries conducted on 12/1/2011 to choose its candidate to represent the Buruku Federal Constituency of Benue State in General Elections for the Federal House of Representatives, The 1<sup>st</sup> respondent had a cause of action when his party, the APC rather than submit his name to INEC for the General Elections, submitted the name of the 1<sup>st</sup> appellant as the APC's candidate. The 1<sup>st</sup> respondent by virtue of section 87(9) of the Electoral Act was entitled to sue in the Federal High Court, or a State High Court, or a High Court of the Federal Capital Territory. He was right to file his action in the Federal High court since the subject matter of the case is within the jurisdiction of that court.

For this brief reasons as well as those comprehensively given by my learned brother, Okoro, JSC I find no merit in the appeal. The appeal is hereby dismissed.

I endorse the consequential orders given in the leading judgment together with costs.

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### **AKA'AH'S JSC**

On 12<sup>th</sup> January, 2011, the 2<sup>nd</sup> appellant conducted primary elections to choose its candidates for various elective offices to be contested for in the general elections which were scheduled for April, 2011 throughout the country. This included the primary election for the Buruku Federal Constituency of Benue State which was Between the 1st appellant, 1<sup>st</sup> respondent and one John Tine. At the conclusion of the said primary election, the 3<sup>rd</sup> respondent. Engr Mozeh, who headed the Electoral Committee of the 2<sup>nd</sup> appellant declared the 1<sup>st</sup> respondent as winner having polled 8,030 votes as against the appellant who garnered 1,316 votes and John Tine who came 3<sup>rd</sup> with 494 votes. But in spite of the result of the primary election, the 2<sup>nd</sup> appellant declared the 1<sup>st</sup> appellant as the winner. The 1<sup>st</sup> respondent being dissatisfied with the declaration filed Suit No, FHC/CS/19 2011 at the Federal High Court Makurdi challenging the nomination of the 1<sup>st</sup> appellant whose name was submitted to INEC to contest the general election. The Federal High Court gave judgment in favour of the 1<sup>st</sup> respondent on 21/3/2011 and declared him the winner of the said primary. It directed the 2<sup>nd</sup> appellant to forward the name of the 1<sup>st</sup> respondent to INEC as the candidate sponsored by the party

for the general election. The appellants appealed against the judgment and so did not comply with the order of the court to send the 1<sup>st</sup> respondent's name to be included in the ballot for the election. The election was conducted in April 2011 with the 1<sup>st</sup> appellant's name reflected on the ballot as the candidate sponsored by the 2<sup>nd</sup> appellant. The appellants' appeal to the Court of Appeal failed. The lower court affirmed the judgment of the Federal High Court. Again the appellants were dissatisfied and have appealed to this court. B

My learned brother, Okoro JSC dealt in an admirable way with the issues arising in the appeal. I agree entirely with his resolution of the issues. My Lord however could not order the immediate swearing in of the 1<sup>st</sup> respondent as the member elected to represent the Buruku Federal Constituency in the House of Representatives because of section 141 of the Electoral Act 2011 (as amended) which provides that- C

*"An election tribunal shall not under any circumstance declare any person a winner at an election in which such a person has not fully participated in all the stages of the said election"* D

The provision to my mind is an unnecessary interference by the Legislature with the discretion of the court to do substantial justice to the respondent who was clearly wronged by the action of the appellants to deny him the opportunity to contest the election. The 2<sup>nd</sup> appellant is culpably guilty for its failure to send the 1<sup>st</sup> respondent's name to INEC after the Federal High Court had delivered its judgment a month before the election. For democracy to thrive all the adherents of the political parties and especially the party officials must allow the will of the electorate to prevail and not display overt preference of one candidate over another. E F

I therefore find no merit in the appeal and it is hereby dismissed. I endorse the orders made on costs. G