

SUPREME COURT OF NIGERIA
FRIDAY 11TH JULY, 2014. SC. 236/2013
**CORAM:- W. S. N. ONNOGHEN, M. S. MUNTAKA-
COOMASSIE, S. GALADIMA, B. RHODES-VIVIOUR,
K. B. AKA'AH, JJSC**

TERVER KAKIH AND 1. PEOPLES DEMOCRATIC PARTY 2. INDEPENDENT NATIONAL ELECTORAL COMMISSION 3. THE WEST AFRICAN EXAMINATION COUNCIL 4. GABRIEL TORWUA SUSWAN APPELLANT RESPONDENTS
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APPEALS - Notice of appeal - Mistake in judgment date - Is a mere clerical error and not a fundamental one - That robs CA the jurisdiction to entertain appellant's appeal (H1)

APPEALS - Preliminary objection - Failure to react - *Odunze v. Nwosu* - Does not imply sustaining the objection without more - As court is not precluded from considering merit and demerit therein (H2)

APPEALS - Right of appeal - By 1999 Constitution ss. 241(1) & 242(2) - Party aggrieved with decision of court - Has a right of appeal - Conferred on him by the Constitution (H3)

APPEALS - Grounds - Mixed law & facts - Leave - In other subject matter not covered by 1999 Constitution s. 241(1) - Aggrieved party may have to seek for leave of the HC or CA - To appeal (H4)

APPEALS - Interlocutory & main appeals - Merger of - Procedure - Party who desires to merge the two appeals - Has to obtain leave to appeal out of time - Against the interlocutory ruling (H5)

APPEALS - Fair hearing - Leave - *Salu v. Egeibon* - Ratio in the case is not to the effect that - Where appellant is out of time to appeal on fair hearing matters - He should not obtain leave (H6)

COURTS - Discretion - Correctness of - Fair hearing - Trial Judge's discretion allowing call for additional witnesses is right - As appellant has not shown how the same has occasioned a miscarriage of justice (H7)

FAIR HEARING - Concept of - Right to fair hearing is opportunity of being heard - As it lies in procedure followed in determination of case - And not in correctness of decision arrived at (H8)

FAIR HEARING - Breach - Allegation of - Appellant who was afforded opportunity for his defence - And actually utilized same - Cannot later turn around to complain of denial of fair hearing (H9)

ELECTIONS - Pre election matters - Jurisdiction - Is not conferred on FHC to determine appellant's case - Since his principal reliefs were against 1st & 4th respondents - Who are not agents of FG (H10)

COURTS - FHC - Jurisdiction - Basis - It is not in all cases in which FG or its agency is a party - That FHC assumes jurisdiction - As reliefs must be directed to FG or its agency - Before jurisdiction can be assumed (H11)

ELECTIONS - Pre election - FHC - Jurisdiction - PDP v. Sylva - For the court to assume jurisdiction - Aggrieved party at primary election - Must bring his claim within 1999 Constitution s. 251(1) (H12)

ELECTIONS - Pre election matters - Appellant's claim against 1st respondent is not justiciable - Because nomination of candidate for election - Is within discretion of political party (H13)

APPEALS - Issues - Proliferation of - It is not the number of issues formulated - That determines quality of a brief or success of appeal - As the shorter and precise a brief the better (H14)

EVIDENCE - Hearsay - Weight - Court does not ascribe probative value to hearsay deposition - And no value is placed on admission - Which is not based on personal knowledge of the maker (H15)

EVIDENCE - Hearsay - Admissibility - Hearsay is not admissible and if admitted - It should not be acted upon by trial court - But if it did - Appellate court can overturn the judgment - On ground of inadequate evidence (H16)

ELECTIONS - Pre election - Misconduct - Proof - Appellant's failure to call disenfranchised voter from each of the ward congresses - And not tendering of membership register of 1st respondent - Is fatal to his case (H17)

ELECTIONS - Pre election - Crime - Allegation of - Proof - By Evidence Act s. 135(1) - Appellant who alleged falsification of result - Has the burden to establish same beyond reasonable doubt (H18)

ELECTIONS - Pre election - Falsification of result - Proof - To establish falsity - There must be two sets of results - One considered genuine and the other falsified - For purpose of comparison (H19)

ELECTIONS - Qualification - Forged certificate - Proof - By Penal Code ss. 362 & 363 - Appellant must prove beyond reasonable doubt - That 4th respondent presented such certificate - To 2nd respondent (H20)

ELECTIONS - Gubernatorial - Screening - Requirement - 1999 Constitution s. 177 - Certificate presentation is not a necessity - As candidate is to fill in his qualification - With verifying affidavit that the same is true (H21)

ELECTIONS - Gubernatorial - Qualification - By 1999 Constitution s. 177 - A person shall be qualified for election into office of Governor - If he is educated up to at least school certificate or equivalent (H22)

FACTS

This action was filed before the Federal High Court Makurdi Judicial Division by plaintiff/appellant, challenging among others, the conduct of 1st defendant/1st respondent's gubernatorial primary elec-

tion in Benue State and the qualification of 4th defendant/4th respondent to contest for the said election. Appellant's major contention is that the election was not conducted in accordance with provisions of the Electoral Act 2010 and 1st respondent's constitution and electoral guidelines. Appellant went further to allege that the certificate presented by 4th respondent for the election was a forged one. He therefore sought for several principal and alternative relief.

However, appellant did not seek any principal relief against 2nd and 3rd respondents as agency of the Federal Government. To prove his case, appellant called only three witnesses to give evidence pertaining to non-conduct of ward congresses. On other hand, respondents filed their statement of defence to appellant's claims. In their final addresses, 1st and 4th respondents relying on the case of Peoples Democratic Party v. Sylva raised the issue of jurisdiction of the court to entertain the action. In its judgment, the court upheld the objection. It further held that there was no evidence in support of appellant's claim. The action was thus dismissed. Dissatisfied, appellant unsuccessfully appealed to the Court of Appeal Makurdi Division. Appellant is now on a further appeal to Supreme Court.

ISSUES FOR DETERMINATION

“ISSUE 1

Whether an error in mis-stating the date of the judgment being appealed against in the Notice of Appeal is fundamental or a mere irregularity.

ISSUE 2

Whether there was any denial of fair hearing of the Appellant at the trial that occasioned a miscarriage of Justice and if yes, whether the Court of Appeal was right in holding that the Appellant required the leave of the Court to raise it on appeal.

ISSUE 3

Whether by the provisions of section 87(9) of the Electoral Act, 2010 (as amended) and the Supreme Court decision in PD.P v. Sylva (2010) 13 NWLR (pt.1316) 85 the Court of Appeal was right in holding that the trial Court had no jurisdiction to entertain the Appellant's Suit.

ISSUE 4

Whether or not the Court of Appeal was right in holding that the trial court was right to have demanded from the appellant a higher

burden of proof other than the balance of probabilities.”

ISSUE 5

Whether or not the entire evidence of the Appellant at the trial court concerning the failure of the 1st Respondent to conduct its Ward Congresses and Primaries in accordance with its Constitution/ its Electoral Guidelines and Electoral Act, 2010 (as amended) was hearsay evidence, and if not, whether or not it was necessary for the Appellant to call witnesses from all the 276 Wards of Benue State to prove his case.

ISSUE 6

Whether or not the Court of Appeal was right when in considering the issue of whether or not the 1st Respondent conducted Ward Congresses and its Primaries in accordance with its Constitution, Electoral Guidelines and Electoral Act 2010 (as amended), it failed to consider the evidence of the Appellant in its assessment radar (SIC). ”

ISSUE 7

Whether or not the Court of Appeal was right in requiring the Appellant to prove that the political appointees of the 4th Respondent voted at the congress illegally and to further prove that the political appointees his witnesses saw voting during Gubernatorial Primary of 9th January 2011 at the Aper Aku Stadium were not officers of the 1st Respondent when Exhibit A (the Constitution of the 1st Respondent prohibit political appointees from being delegates and party officials). ”

ISSUE 8

Whether or not the Court of appeal placed the right probative value on the evidence of DW1 and his Exhibit L. ”

ISSUE 9

Whether or not the Court of Appeal was right in holding that the Appellant failed to prove that the Ward Congresses did not hold or that the congresses were manipulated and therefore the trial Court was right when it dismissed the Appellant’s complaint for being frivolous, brought mala fide, vexatious and unmeritorious.

ISSUE 10

Whether on the state of the Pleadings and having regards to the totality of the materials before the lower Court, that court was right in not holding that the 4th Respondent failed to meet the Constitutional requirement to be elected into the office of Governor of

Benue State.

OR AS AN ALTERNATIVE TO ISSUE 2 - 10

ISSUE 11

Whether on the evidence before the court, the appellant was entitled to judgment.

B

HELD (Unanimously dismissing the appeal per **GALADIMA JSC**)

C *APPEALS - Notice of appeal - Mistake in judgment date*

1. I must say from the onset that the fuss of the Respondents herein is all about nothing. No doubt the judgment of trial court in Suit No.FHC/MKD/CS/30/2012 was delivered on 11th July, 2012 (See pages 923 to 1018 of the record). Appellant filed

D **his Notice of Appeal against the said judgment and mis-stated the date of the judgment in the Notice of Appeal as delivered on 11th July, 2011. I agree with the learned counsel for the Appellant that this is a mere clerical error resulting from the mistake or inadvertence of his counsel. It is not a fundamental**
E **error that robs the lower court the jurisdiction to entertain the appellant's appeal. (p. 3059 C)**

APPEALS - Preliminary objection - Failure to react

F **2. It has been held by this court per ONNOGHEN JSC in ODUNZE v. NWOSU (2007) 13 NWLR (pt.1050) 1 at 27 that the fact that an appellant had not reacted to the respondent's Notice of preliminary objection, as in the case at hand, does not ipso facto imply that the objection has to be sustained**
G **without more. Nor is the appellate court precluded from considering the merit and demerit of the objection, for the purpose of sustaining it.**

In view of the foregoing, I am unable to resolve this issue in favour of the respondents. It is accordingly resolved in
H **favour of the appellant. The court below with due respect failed to consider and follow the ratio of the cases of this court aforementioned and was not rightly guided thereby arriving at a decision that does not represent the law on this matter.**

(p. 3061 B)

APPEALS - Right of appeal

3. The provisions of Section 241(1) and 242(2) of the Constitution of Federal Republic of Nigeria 1999 as amended are clear. Where a party to litigation is aggrieved with a decision given by that court, he has a right of appeal conferred on him by the Constitution. (p. 3062 H) B

APPEALS - Grounds - Mixed law & facts - Leave

4. In other subject matter which is not covered by section 241(1) of the Constitution, the aggrieved party may have to seek for leave either from the Federal High Court or Court of Appeal. C

From the foregoing, it is clear that appellant required leave of the Court of appeal to raise issue of fair hearing, which raises in the circumstance of this case, a question of facts or mixed law and facts, having appealed out of time. (p. 3063 A) D

APPEALS - Interlocutory & main appeals - Merger of - Procedure E

5. Although a party can include an appeal against a ruling in an interlocutory application when he comes to appeal against the final judgment, and this is to be encouraged in order to avoid unnecessary delay by appealing separately, there is a procedure to be followed in order to meet the unavoidable technicalities involved. In order to merge the two appeals together, the party has to obtain leave to appeal out of time against the interlocutory ruling. (p. 3063 C) F

APPEALS - Fair hearing - Leave G

6. The contention of the Appellant who has relied heavily on the SALU's case (supra) is to the effect that because the complaint arising from Ground 4 of the Notice, has to do with fair hearing, it can be raised at any time even on appeal. I do not quite agree with the learned counsel for the appellant. That case has to be carefully read with appreciation of its main ratio. I agree with the learned senior counsel for the 1st to 4th respondents that there is nowhere in that case, this court H

stated that where the appellant is out of time to appeal on matters relating to fair hearing, he should not obtain leave of Court. (p. 3063 H)

COURTS - Discretion - Correctness of

- 7. The learned trial judge was right when he exercised his discretion according to the law and rules of the court in favour of the 1st and 4th respondents allowing them to call additional witnesses. That decision was also rightly affirmed by the court below. From the rules of court cited and relied upon by the respondents they satisfied the conditions for the grant. The appellant has failed to show in any way how the 1st and 4th respondents' application to call additional witness, which he personally cross-examined, was meant to "ambush and over-reach" him. Appellant was also heard. His application was also granted. He has not shown how miscarriage of justice had been occasioned in the granting of the 1st and 4th respondents application since the court must hear from both parties to the case and the appellant was allowed to call his 11 witnesses even without front loading two of his witnesses statements.** (p. 3065 C)

FAIR HEARING - Concept of

- 8. The right to fair hearing is substantially a question of opportunity of being heard. The right lies in the procedure followed in the determination of a case and not in the correctness of the decision arrived at in a case.** (p. 3065 G)

FAIR HEARING - Breach - Allegation of

- 9. The appellant has been afforded the opportunity to put across his defence; he took the advantage of such an opportunity; he cannot later turn around to complain that he was denied a right to fair hearing.** (p. 3066 A)

ELECTIONS - Pre election matters - Jurisdiction

- 10. In my view, with due respect, my Lords, the court below correctly construed and applied the ratio in SYLVA's case (*Supra*) to the instant case. It is not in dispute that the complaint**

of the appellant is against the manner in which the 1st respondent [P.D.P] conducted its primaries. It is not in dispute that the principal reliefs [i] - [v] were directed against the 1st and 4th respondents, who are not agents of the Federal Government. The alternative reliefs (vi) - [xiv] were directed against the 1st and 4th respondents. The [xv] - [xvi] reliefs are ancillary to the principal reliefs [i] - [v]. B

As I have earlier on observed by the community reading of sections 31(5) and 87(10) of the Electoral Act 2010 as amended and section 251(1) of the 1999 Constitution [as amended) no jurisdiction is conferred on the Federal High Court to hear and determine the instant case. While the two sections of the Electoral Act vest jurisdiction in the Federal High Court or High Court of a State as regards pre-election complaints, the Act does envisage that the nature of the complaint may determine the jurisdiction of the court. C D

I agree with the learned counsel for the 1st - 4th respondents that the law makers could not have vested the State High Court with the jurisdiction of the Federal High Court if the Federal High Court were to assume jurisdiction for every complaint brought in respect of pre-election matters. The provision of S.251 of the Constitution is clear. Any matter that does not fall within the purview of any of the items listed therein must find jurisdiction in any other court and certainly not in the Federal High Court. (p. 3069 F) E F

COURTS - FHC - Jurisdiction - Basis

11. I emphasize the fact that in so many decisions of this court that it is not in all cases in which the Federal Government of Nigeria or its Agency is a party in the suit that the Federal High Court must willy-nilly, without consideration to the nature of the aggrieved party's claim, then assume jurisdiction. We have said time without number, that the most relevant and important consideration is the plaintiff's claim. G H

It was decided that even where the Federal Government or any of its Agencies is a party the principal reliefs must be directed against the Federal Government or any of its agencies before the Federal High Court can have jurisdiction to enter-

tain the claims or reliefs sought by the party.

When the jurisdiction of the Federal High Court is in issue, the following must co-exist:

(a) The parties or party must be the Federal Government or its agency.

B (b) Subject matter of the litigation.

Satisfying the above is not the end of the matter. The pleadings of the plaintiff must be carefully examined so as to understand the facts and circumstances of the case in order to determine if the claims are within the jurisdiction of the court. It is clearly not enough only to have an agency of the Federal Government as a party before Federal High Court has jurisdiction. (pp. 3070 H/3071 D/3072 D)

D ELECTIONS - Pre election - FHC - Jurisdiction - PDP v. Sylva

12. I must agree with the court below that the argument of the appellant to the contrary is totally flawed when he assumed that because he participated in the Primary conducted by the 1st Respondent, the Federal High Court would have jurisdiction to entertain his case. The case of P.D.P v. SYLVA (supra) relied upon by the parties did not decide that once a person participates in the primary election of a political party and is dissatisfied with the result he can file a suit in the Federal High Court to ventilate his complaints. It rather decided that the claim of the plaintiff and reliefs sought must be within the purview of section 251(1) of the Constitution. Careful reading of pages 137-139 of the judgment of my brother RHODES VIVOUR JSC, will clear the point I am making. (p. 3071 B)

G ELECTIONS - Pre election matters

13. I earlier on made it clear that the 1st respondent's (appellant's) dispute is against the appellant (1st respondent) because the appellant (1st respondent) did not allow him to contest the primaries fixed for 19/11/11. The PDP is not an agency of the Federal Government. It is a political party. The 1st respondent's (appellant's) claims against the appellant (1st respondent) are not justifiable and since the Federal High Court has no jurisdiction to entertain those claims it also has no

jurisdiction to entertain the ancillary claims, and for the avoidance of doubt the courts in Nigeria have no jurisdiction to hear the 1st respondent's (appellant's) claims. This is so because nomination and sponsorship of a candidate for election is a political matter solely within the discretion of the party. The 1st respondent's (appellant's) claim ought not to have been entertained by the Federal High court for the simple reason that it is a pre-primary election matter or affair of the PDP. (p. 3072 G) B

APPEALS - Issues - Proliferation of C

14. This court has consistently frowned upon the proliferation of issues in brief of argument. It is not the number of issues formulated for determination that determines the quality of a brief or the success of an appeal. The shorter, concise and precise the "brief" is, the better. After all that is why it is called a "brief". (p. 3073 G) D

EVIDENCE - Hearsay - Weight

15. I agree with the learned counsel for the 1st and 4th respondents that the contention of the appellant that where a witness includes in his testimony hearsay evidence the court has a duty to ignore that aspect of it that is hearsay and give a probative value to that aspect of it that is not hearsay, cannot be true position of the law on the matter. Once it is found that a deposition is laced with hearsay, the court cannot ascribe probative value to it. To do otherwise is like asking the court to sieve the oral evidence (in form of written statement on oath) of witnesses to determine which part of it is hearsay or not so as to give probative value to the aspect of evidence that is not hearsay. E

In other words where an admission is not based on personal knowledge of the maker of the facts admitted such admission can hardly be of any value. (p. 3975 B/E) F

EVIDENCE - Hearsay - Admissibility

16. Hearsay evidence is not admissible for the purpose of establishing a criminal liability. If such evidence was admitted H

unwittingly, it should not be acted upon by the trial Court; but if it did, an appellate court can overturn the judgment based on the fact that the finding of the trial court was based upon inadequate evidence. (p. 3075 D)

B ELECTIONS - Pre election - Misconduct - Proof

17. The appellant complained that Special Ward Congresses were “doctored” including the list of delegates used at the State Special Congress, but he has failed to call any person who was entitled to vote at any of the ward congresses to testify in support of these allegations. He made non-voting or misconduct or non-conduct of election the pivot of his case. It behooves on him to call at least one disenfranchised voter from each of the polling booths or units or stations in the affected Constituency or district/area as a witness to testify in support of this allegation.

It is rightly submitted that the foregoing cases are by reference applicable to the case at hand, although they are decisions on election petition, as against this case which is a pre-election matter. The relevance of these cases is that the principle therein apply mutatis muntandi to the instant case since the appellant is alleging that special Ward Congresses for Ad-Hoc delegates were not held.

F I agree with the submission of the Senior Learned Counsel that failure on the part of the appellant to tender in evidence, the Membership Register of the 1st Respondent is damaging to his case because that is the basis of proof of accreditation for the special Ward Congresses. (p. 3076 A)

G ELECTIONS - Pre election - Crime - Allegation of - Proof

18. It was the concurrent findings of the courts below that allegation that special Wards Congress were not held but that 1st and 4th respondents conspired and on their instruction, the 4th respondent’s commissioners and Aides took possession of the electoral materials and Forms and doctored them, suggest forgery and or falsification of results which imports criminal element into an otherwise civil matter and such required proof beyond reasonable doubt.

By the clear provision of section 135 (1) of the Evidence Act if the commission of crime by a party to any proceeding is directly in issue of any proceeding in civil or criminal, it must be proved beyond reasonable doubt. The burden of proving that any person has been guilty of a crime or wrongful act is subject to section 139 of the Evidence Act, on the person who asserts, whether the commission of such an act is or is not directly an issue in the action.

In the case at hand, the appellant herein who pleads and asserts the existence of criminal allegations has the burden to prove same, not only on the preponderance of evidence as contended by the appellant but beyond reasonable doubt. It is difficult to fault the concurrent finding of the court below in placing a higher burden of proof than on the preponderance of evidence.

It is trite law that where the commission of the crime is directly in issue whether in Civil or criminal proceedings, the burden of proof is on the plaintiff to prove the commission of the crime, beyond reasonable doubt. See earlier cases on the point above. (pp. 3078 B/E/3079 F)

ELECTIONS - Pre election - Falsification of result - Proof

19. The court below also rightly held that to prove falsification of result, there must be two sets of results, one considered genuine or authentic and the other considered falsified. This will allow the two to be compared to establish falsity. No such results were tendered in this case. (p. 3078 D)

ELECTIONS - Qualification - Forged certificate - Proof

20. Firstly, the court below rightly observed that there is no piece of evidence led by the appellant to prove that the 4th Respondent forged any Certificate or that he presented forged Certificate to either 1st or 2nd respondent or that he swore falsely to an affidavit stating facts relating to his certificate which are false in order to bring his case within the ambit of section 31(5) of the Electoral Act 2010 [as amended]. No forged or authentic/genuine Certificate was tendered in evidence.

From the admitted evidence on record, the appellant has failed to prove the criminal allegations of forgery and or presentation of forged certificate to the 2nd respondent which according to the appellant, disqualified the 4th respondent under S.182 (1)(j) of the Constitution of the Federal Republic of Nigeria 1999 (as amended).
By the provisions of sections 362-363 of the Penal Code, for the appellant to succeed on his case, he must prove beyond reasonable doubt that the 4th respondent presented a forged Certificate to the 2nd respondent knowing that it would be used fraudulently or dishonestly as genuine. (p. 3079 C/G)

ELECTIONS - Gubernatorial - Screening - Requirement

21. The appellant has contended that having regards to section 182(7) (j) of the 1999 Constitution the 4th respondent is necessarily required to present his Certificate to the 1st and 2nd respondent in order to prove his qualification to contest the election, otherwise he is disqualified under S.177 (d) of the Constitution and that by S.167 (d), of the Evidence Act 2011, the failure is fatal, because if produced it would have been unfavourable to him. This contention is misconceived. Submission or presentation of Certificate is not the requirement of s. 177(d) of the Constitution as regards the gubernatorial screening process. The process of screening which the appellant and 4th respondent undertook, with the 1st respondent requires the candidate to fill in his qualification in the form and to swear to a verifying affidavit that the information contained in Form CF001 was true. This takes away the necessity of presentation of the actual certificate to the 1st and 2nd respondents.

In any case it is not a requirement of S.177 (d) of the Constitution for the Candidate to necessarily present the Certificate to qualify for election to the office of Governor of a state.
 H (p. 3080 F)

ELECTIONS - Gubernatorial - Qualification

22. By the provision of S.177 (d) of the Constitution a person shall be qualified for election to the office of Governor of a

state if:

(d) He has been educated up to at least school certificate level or its equivalent.

By section 318 (1) “school Certificate or its equivalent means.”

(b) Educated up to secondary school certificate level. B

In BAYO v. NJIDDA (2004) 8 NWLR 544 at 630; (2004) FWLR (pt.192) 10 at 78, the Court of Appeal then the Apex and final Court on Election petition from National Assembly/ Governorship and Legislative Houses Election Tribunal had this to say on the point: C

“In other words as regards a secondary school certificate examination; it is enough, in my view that one attended School Certificate level i.e. without passing and obtaining the Certificate.” D

By the combined reading of SS.177(d), and 318 (b) of the Constitution is not the only requirement or basis of qualification, but whether the candidate has been educated up to Secondary School Certificate Level.

I am on one and in agreement with the learned counsel for the respondents that it is not only by presentation of Certificate to the respondent that is the only proof that 4th respondent is qualified as the appellant herein who has taken this position did not (by his own showing under cross-examination) present or submit one. (p. 3081 E) F

NOTABLE POINT OF INTEREST

GALADIMA JSC

1. Case is won on evidence presented before the court G

As rightly held by the Court below, by SS.131- 134 of the Evidence Act, it is only by cold facts presented to the law court that civil rights and obligations of the parties are determined.

By dint of these foregoing sections of the Evidence Act learned Counsel would do well for the litigants who will be happier for it if they shun sentiments as these command no place in judicial deliberations. H

A litigant must be able to establish his case on the evidence he pre-

sented before the court or on known or settled principles of law.
(p. 3082 B)

REPRESENTATION

- Sam Kargbo Esq. with Ikhide Ehighewa Esq., Chibuike Ezeokwura
B Esq. and Nduka Okatta Esq., for the Appellant
J. S. Okutepa SAN, with P.D. Abalaka, Esq., Usman O. Sule, Esq., C.
T. Mue, Esq., Oludolapo Ufaruna (Mrs.) Esq., Ocholi O. Okutepa,
Esq., Hokaha H. Bassey (Mrs.) Esq., Ede Uko, Esq., Mustafa A.
C Mairamri, Esq., Ifeoluwa Ogunkanmi (Miss) Esq., S. U. Akoh, Esq.,
G. O. Ifedayo (Mrs.) Esq., O. I. Oladimeji (Miss) Esq., for the 1st and
4th Respondents
N. D. Ter (Mrs.) Esq. with G. O. Ochai Esq. for the 2nd Respondent.
G. I. Enebeli Esq., for the 3rd Respondent

D

CASES REFERRED TO

- PDP v. Sylva (2012) 13 NWLR (pt. 1316) 85
Odunze v. Nwosu (2007) 13 NWLR (pt. 1050) 1
Salu v. Egeibon (1994) 6 NWLR (pt. 348) 23
E Abiegbe v. Ugbo-dume (1973) 1 SC 103
Tanko v. UBA Plc (2007) 17 NWLR (pt. 122) 80
Nwagu v. Chima (2012) 8 NWLR (pt. 1303) 596
Anyansina v. Co-operative Bank Ltd (1994) 5 NWLR (pt. 347) 742
Ogigie v. Obiyan (1997) 10 SCNJ 4
F CBN v. Okojie (2002) 8 NWLR (pt. 768) 488
Bamgboye v. University of Ilorin (1999) 6 SC (pt. II) 72
Araka v. Ejeogwu (2001) 12 SC (pt. 1) 19
FBN Plc v. TSA Ind. Ltd. (2010) 4-7 SC (pt. 1) 242
G Tukur v. Govt. of Gongola State (1989) 4 NWLR (pt. 117) 517
Oliver v. Dangote Ind. Ltd. (2009) 10 NWLR (pt. 1150) 467
Ononuju v. State (2013) 6 SCNJ 458

STATUTES REFERRED TO

- H Electoral Act 2010 (as amended), ss. 31(5), 87(9)
Constitution of the Federal Republic of Nigeria 1999, ss. 241(1),
251(1)(s), 177, 182(1)(j), 318
Evidence Act 2011, ss. 131-134, 167
Penal Code, ss. 362-363

LEAD JUDGMENT BY GALADIMA JSC

This is an appeal against the Judgment of the Court of Appeal Makurdi Division in appeal No.CA/MK/158/2012 delivered on 5/3/2013 affirming the judgment of the Federal High Court Makurdi Division delivered on 11/7/2012. For convenience and easy reference, I shall hereinafter, in the course of my consideration of this appeal, refer to the Court of Appeal and the Federal High Court as “*the Court below*” and “*the Court of first instance*” or “*trial court*” respectively.

The appellant herein, as plaintiff before the trial court challenged, inter alia, the conduct of the 1st respondent’s primary election of its flag bearer for the Gubernatorial Election in Benue State held on 9/1/2011 and the qualification of the 4th Respondent to contest the said election. The appellant claimed both declaratory and injunctive reliefs in paragraph 51 of his statement of claim. In the main, the appellant alleged that the primaries were not conducted in accordance with the provisions of the Electoral Act 2010 (as amended), the Constitution of 1st respondent and its Electoral Guidelines. He also alleged that the 4th respondent presented a forged certificate to the 1st and 2nd respondents and therefore perjured in his INEC FORM CF001.

Processes were filed and exchanged in accordance with the Rules of the court of first instance. It is worthy of note that out of the 18 reliefs sought by the appellant in that court reliefs (i)-(v) are the principal reliefs and are based on the complaint as to the non-conduct of Ward Congresses for the election for the three (3) Ad Hoc delegates and alleged irregularity in the conduct of special State congresses. Whilst reliefs (xi) - (xvii) are ALTERNATIVE RELIEFS and are based on the allegation that the 4th respondent presented a forged Certificate and lied on Oath and is therefore disqualified or ought to have been disqualified from contesting the Gubernatorial Election. No principal relief was sought against the 2nd and 3rd respondents as Agency of the Federal Government.

The 1st and 4th respondents in defence, by the order of the trial court on 24/1/2012, filed their joint statement defence wherein they denied all the claims of the appellant.

Also on their part the 2nd and 3rd respondents filed their state-

ment of defence.

At the close of pleadings, when hearing commenced appellant testified for himself as PW9 and called 9 other witnesses and tendered Exhibits A, B, C, D, E, F, G - I - G 10. Although Exhibits I, J and K were admitted in evidence by the learned trial Judge, after B same were produced vide subpoena duces tecum, at the instance of the appellant, they were later expunged from the record at the point of writing judgment for failing the test of admissibility.

At the close of appellant's case, the 1st and 4th respondents, C on application sought the leave of the trial court to call additional evidence. Appellant however, opposed the application vide a counter affidavit and a written address pursuant to order of trial court made on 3/5/2012. The 1st and 4th respondents called one witness (DW1) and tendered Exhibits L, M, and N.

D It is worth noting that among the witnesses called by the appellant only 3 witnesses gave evidence pertaining to non-conduct of Ward Congresses. I have also observed that the 2nd and 3rd respondents did not call any witness.

E At the conclusion of trial final written addresses were filed and exchanged. The 1st and 4th respondents in their final addresses raised issue of jurisdiction relying on the case of P.D.P v. SYLVA (2012) 13 NWLR (Pt.1316) 85.

F On the 15/6/2012 learned counsel adopted their respective addresses and proffered further adumbration in support.

G On 11/7/2012 delivering his judgment, the learned trial judge upheld the 1st and 4th respondents' objection to the court's jurisdiction to hear and determine appellant's claim. The judge in his further findings held that there was no evidence in support of the claims of the appellant and same were dismissed in their entirety.

Aggrieved by the decision of the trial Court appellant appealed to the Court of Appeal Makurdi Division, which affirmed the judgment of the trial court and accordingly dismissed the appeal.

H This is further appeal by the appellant who is dissatisfied with the judgment of the court below. In his Amended Notice of appeal 15 grounds of appeal are set out, out of which 11 issues were distilled in the brief of argument settled and filed by his counsel SAM KARGO Esq. on 23/7/2013 as follows:

"ISSUE 1

Whether an error in mis-stating the date of the judgment being appealed against in the Notice of Appeal is fundamental or a mere irregularity. Ground 1 and 2

ISSUE 2

Whether there was any denial of fair hearing of the Appellant at the trial that occasioned a miscarriage of Justice and if yes, whether the Court of Appeal was right in holding that the Appellant required the leave of the Court to raise it on appeal. Ground 3

ISSUE 3

Whether by the provisions of section 87(9) of the Electoral Act, 2010 (as amended) and the Supreme Court decision in P.D.P v. Sylva (2010) 13 NWLR (pt.1316) 85 the Court of Appeal was right in holding that the trial Court had no jurisdiction to entertain the Appellant's Suit. Grounds 4 and 5

ISSUE 4

Whether or not the Court of Appeal was right in holding that the trial court was right to have demanded from the appellant a higher burden of proof other than the balance of probabilities." Ground 6

ISSUE 5

Whether or not the entire evidence of the Appellant at the trial court concerning the failure of the 1st Respondent to conduct its Ward Congresses and Primaries in accordance with its Constitution/ its Electoral Guidelines and Electoral Act, 2010 (as amended) was hearsay evidence, and if not, whether or not it was necessary for the Appellant to call witnesses from all the 276 Wards of Benue State to prove his case. Ground 7

ISSUE 6

Whether or not the Court of Appeal was right when in considering the issue of whether or not the 1st Respondent conducted Ward Congresses and its Primaries in accordance with its Constitution, Electoral Guidelines and Electoral Act 2010 (as amended), it failed to consider the evidence of the Appellant in its assessment radar (SIC)." Ground 8

ISSUE 7

Whether or not the Court of Appeal was right in requiring the Appellant to prove that the political appointees of the 4th Respondent voted at the congress illegally and to further prove that the political appointees his witnesses saw voting during Gubernatorial Pri-

mary of 9th January 2011 at the Aper Aku Stadium were not officers of the 1st Respondent when Exhibit A (the Constitution of the 1st Respondent prohibit political appointees from being delegates and party officials).” Ground 9

ISSUE 8

- B *Whether or not the Court of appeal placed the right probative value on the evidence of DW1 and his Exhibit L.” Ground 10*

ISSUE 9

- C *Whether or not the Court of Appeal was right in holding that the Appellant failed to prove that the Ward Congresses did not hold or that the congresses were manipulated and therefore the trial Court was right when it dismissed the Appellant’s complaint for being frivolous, brought malafide, vexatious and unmeritorious. Ground 11, 12 and 15*

- D *ISSUE 10*

Whether on the state of the Pleadings and having regards to the totality of the materials before the lower Court, that court was right in not holding that the 4th Respondent failed to meet the Constitutional requirement to be elected into the office of Governor of

- E *Benue State. Grounds 13, 14 and 15*

OR AS AN ALTERNATIVE TO ISSUE 2 - 10

ISSUE 11

- F *Whether on the evidence before the court, the appellant was entitled to judgment. Grounds 3 - 15”*

It is also noted that the appellant filed a Reply brief to the 1st and 4th Respondent’s brief on points of law.

- G *For the 1st and 4th Respondents brief of argument settled by J. S. OKUTEPA SAN, and filed on 17/12/2014 the following 4 issues are posited for determination in this appeal:*

- H *“(i) Whether having regards to the special circumstances of this case, the learned Justices of the court below were wrong in holding that the error in stating the date of judgment purportedly appealed against vitiates the Notice and grounds of appeal. (Distilled from grounds 1 and 2 of the Notice and Grounds of appeal)*

(ii) Whether the learned Justices of the court below were wrong when they held that the failure of the Appellant to seek and obtain the leave of court to appeal against the interlocutory decision of the court of first instance vitiates ground 4 of the Notice and Grounds of

appeal or Whether the learned Justices of the court below were wrong in striking out ground 4 of the Notice and grounds of appeal for the failure of the Appellant to seek and obtain the requisite leave of court to raise and argue the issue therein which arose from interlocutory decision of the court of first instance out of time and whether there was a breach of the Appellant's right to fair hearing when the learned trial Judge granted leave to the 1st and 4th respondents herein to file additional list of documents, additional witness deposition on oath and to call additional witness. [Distilled from ground 3 of the Notice and Grounds of appeal]

(iii) Whether the learned Justices of the court below were wrong to have relied on the decision of the Supreme Court in PDP v. Sylva, to come to the conclusion that, the Court of first instance has no jurisdiction to hear and determine the claims of the appellant (Distilled from grounds 4 and 5 of the Notice and ground of appeal).

(iv) Whether having regards to the state of pleadings, the reliefs sought by the appellant and evidence led, the learned Justices of the court below were right in upholding the findings of the court of first instance dismissing the claim of the appellant as being frivolous brought mala fide, vexatious and unmeritorious. (Distilled from grounds 6, 7, 8, 9, 10, 11, 12, 13 and 15 of the Notice and Grounds of appeal)"

In the 2nd Respondents' brief settled by N. D. TER [MRS.], their Senior Legal officer filed on 24/9/2013 (5) issues are distilled for determination in this Appeal, as follows:

"3.1 Whether the Appellant's right to fair hearing was breached by the trial court when it granted leave to the 1st and 4th Respondents to file additional list of documents, call additional witness and file the witness disposition on oath.

3.2 Whether the Court of Appeal was correct when it held that the Appellant need leave of Court to appeal against the interlocutory ruling of the trial court of 31/5/2012.

3.3 Whether the Court of Appeal was correct when it held that by virtue of section 87(a) of the Electoral Act 2010 as amended the trial court has no jurisdiction to entertain Suit No.FHC/MKD/CS/30/2011 as it relates to a pre-primary election matters.

3.4 Whether there is any valid Notice of Appeal against the judgment of the Federal High Court, Makurdi in suit No:FHC/MKD/

CS/30/2011 delivered on 11/7/2012 before the Court of Appeal.

3.5 Whether the Court of Appeal rightly held that the trial court was correct when it held that the Appellant did not prove his case before the trial court to be entitled to judgment.”

In the brief of argument prepared by G. I. ENEBELI Esq. and
B filed on 24/9/2013 on behalf of the 3rd Respondent 4 issues are formulated for determination thus:

“2.1a “Whether an error in mis-stating the date of the judgment being appealed against in Notice of Appeal without correction by the Appellant can be taken as fundamental or a mere irregularity.” Grounds 1 and 2

2.1b “Whether the Appellant’s right of fair hearing was breached when the trial court granted leave to the 1st and 4th Respondents to file additional list of documents, call additional witness and file witness deposition on oath and if yes, whether the Court of Appeal was right in holding that the Appellant required leave of court to raise it.”
Ground 3

2.1c Whether the Appellant by virtue of his pleading and evidence has proved his case to be entitled to the reliefs sought in paragraph 51(xv) of the statement of claim among others.” Grounds 3 - 15

2.1d Whether any reasonable cause of action has been disclosed against the 3rd Respondent in the circumstances of this case and therefore a necessary and proper party. Grounds 3 - 15”

On the 14th day of April, 2014, when this appeal was heard counsel for the respective parties adopted their briefs and made no further oral submissions.

Appellant herein adopted and relied mainly on his brief and
G the Reply brief to the 1st and 4th Respondents’ brief. In the 50 - page brief the learned counsel presented copious and detailed argument on the 11 issues submitted for determination. He finally urged this court to resolve all the issues raised in this appeal in favour of the Appellant, allow the appeal and grant the reliefs sought by the appellant in his Notice of Appeal.

On issue No.1 it is submitted that the mis-stating of the actual year of the judgment appealed against was not fatal to the Appellant’s Notice of Appeal, as it was a mere irregularity that did not occasion any miscarriage of justice. That the facts of the appellant’s case are on

all fours with the facts and circumstances in the case of JERIC NIGERIA LTD v. UNION BANK PLC (2000) 14 NWLR (Pt.691) 447, wherein this court held that mis-stating in the Notice of Appeal of the actual year of the judgment appealed against is a mere irregularity which will not vitiate the appeal or cause any miscarriage of justice. That the error is not fatal as to render the appeal incompetent. The 1st and 4th respondents, 2nd and 3rd respondents respectively responded to this issue on their issues No.1; 4 and 2.1a. It is their contention that failure of the appellant's counsel to proffer explanation concerning the error in the date of the judgment in the trial court in the Notice of appeal, elevated that error from a mere irregularity to a fundamental error that robs the lower court the jurisdiction to entertain the appeal.

I must say from the onset that the fuss of the Respondents herein is all about nothing. No doubt the judgment of trial court in Suit No.FHC/MKD/CS/30/2012 was delivered on 11th July, 2012 (See pages 923 to 1018 of the record). Appellant filed his Notice of Appeal against the said judgment and mis-stated the date of the judgment in the Notice of Appeal as delivered on 11th July, 2011. I agree with the learned counsel for the Appellant that this is a mere clerical error resulting from the mistake or inadvertence of his counsel. It is not a fundamental error that robs the lower court the jurisdiction to entertain the appellant's appeal.

Faced with a similar circumstance in JERIC NIGERIA LIMITED v. UNION BANK OF NIGERIA PLC (Supra) (a case that is considered on all fours with the instant case) this court per KALGO JSC at page 458 had this to say:

"I also entirely agree with the submissions of the learned counsel for the respondent that the mis-stating of the actual year of judgment in the circumstances of the case is a mere irregularity which did not vitiate the appeal or cause any miscarriage of justice. The error is as in my respectful view not fatal as to render the appeal incompetent. It is also true as submitted by the learned counsel for the respondent that this court has long moved away from sticking to technicalities as opposed, to the determination of parties rights on merits and substantial justice. See the State v. Gwonto (1983) 1 SCNLR at 160; Amako v. The State (1995) 6 NWLR (Pt.399) 11 at 26; Akpan

v. *The State* (1992) 6 NWLR (Pt. 248) 439.

I am therefore satisfied and hereby find that the putting in of the year “1996 instead of “1997” in referring to the date of the judgment of the trial court appealed against to the Court of Appeal on the Notice of Appeal filed by the respondent, is a mere irregularity in the circumstances and did not vitiate the appeal or render the Court of Appeal incompetent to entertain the appeal.”

Also in *FAMFA OIL LTD v. THE ATTORNEY-GENERAL OF THE FEDERATION & ANOR* (2003) 9 - 10. NSCR 29 at 42 this court, per IGUH JSC stated thus:

“I should perhaps mention in the above regard that this court for quite some time now has consistently shifted away from the narrow technical approach to justice which characterized some earlier decisions of courts on various matters and now pursues instead, the course of substantial justice. Accordingly, Courts of law should not be unduly tied down by technicalities, particularly where no miscarriage of justice would be occasioned. Justice can only be done in substance and not by impeding it with mere technical procedural irregularities that occasion no miscarriage of Justice. See *Consortium M. C. v. N.E.PA* (1992) 5 NWLR (part 246) 132 at 142; *FALOBI v. FALOBI* (1976) 1 NMLR 169, *BELLO v. ATTORNEY-GENENRAL OF OYO STATE* (1986) 6 NWLR (part 828), *OKONJO v. DR. ODJE* (1985) 10 SC 267.”

In line with the reasoning in the foregoing authorities, I am inclined to consider the following circumstances, in the instant case, that:

(a) The decision appealed against was, no doubt, that of Hon. Justice Marcel I. Awokulehin.

(b) It was delivered in the Federal High Court, sitting in Makurdi, Benue State.

(c) The parties were Terver Kakih v. PDP & Ors (same parties).

(d) No any judgment was delivered by the said court on 11th July, 2011.

(e) Like all the respondents herein the court below rightly identified the judgment appealed against by the appellant in the opening paragraph of its judgment.

(f) The Respondents’ counsel responded fully to the appeal.

They were fully aware of what Notice of Appeal in question

was and were not misled, or prejudiced in any way.

I am not swayed, in any way by the reasoning of the lower court that the counsel to the appellant failed to offer any reply or explanation, on what it termed as “*serious lapse*” and counsel’s failure to apply to amend his Notice, made the mis-statement of the year of the judgment more fatal. ***It has been held by this court per ONNOGHEN JSC in ODUNZE v. NWOSU (2007) 13 NWLR (pt.1050) 1 at 27 that the fact that an appellant had not reacted to the respondent’s Notice of preliminary objection, as in the case at hand, does not ipso facto imply that the objection has to be sustained without more. Nor is the appellate court precluded from considering the merit and demerit of the objection, for the purpose of sustaining it.***

In view of the foregoing, I am unable to resolve this issue in favour of the respondents. It is accordingly resolved in favour of the appellant. The court below with due respect failed to consider and follow the ratio of the cases of this court aforementioned and was not rightly guided thereby arriving at a decision that does not represent the law on this matter.

The Appellant ISSUE No. 2 has to do with his allegation of denial of fair hearing at the trial which has thereby, occasioned a miscarriage of justice and the propriety of the Court of Appeal holding that the Appellant required leave of that court to raise an appeal.

It is worthy of note that the appellant herein had in his Ground 4 of his Notice of Appeal challenged the manner in which the learned trial judge granted the 1st and 4th Respondents leave to file additional list of documents, call another witness statement without considering the appellant’s affidavit in opposition to the application and without hearing his counsel before granting the 1st and 4th respondents application.

In sustaining the 1st and 4th respondents’ preliminary objection to the said ground and issue, the Court of Appeal found that Ground 4 related to the decision given on 3/5/2012 and therefore held that it cannot be raised on appeal without leave of court and accordingly struck out both the grounds and the issue raised there from.

Relying on the decision of this court in RASAKI A. SALU v. MADAM TOWURO EGEIGBON (1994) 6 NWLR (Pt.348) 23,

learned counsel for the appellant submitted that the refusal by the Court of Appeal to consider the appellant's affidavit in opposition to the application and without hearing him as a counsel, before granting the 1st and 4th respondent's application, was a breach of the appellant's right to fair hearing and as such, the issue could be raised, notwithstanding the fact that the appellant did not appeal against the ruling of the trial judge within the time prescribed by law for appealing against an interlocutory decision. Learned counsel has argued that there is nowhere in the SALU's case (*supra*) wherein this court held that the respondent needed the leave of the court to raise the issue of fair hearing over an interlocutory decision that touches on the fundamental right of the appellant to fair hearing. That in holding that the appellant needed the leave of court to raise and argue the issue of fair hearing, the Court of Appeal erred in law which error occasioned a grave miscarriage of justice. Further reliance was placed on the case of *ABIEGBE & ORS v. UGBODUME & ORS* (1973) 1 SC. 103: *TANKO v. UBA PLC* (2007) 17 NWLR (pt.122) 80 at 92.

It is in the foregoing circumstances this court is being urged to hold that there was a breach of the appellant's right to fair hearing at the trial court which has occasioned a miscarriage of justice and that he did not require leave of court to raise it on appeal. That it was erroneous for the court below to so hold.

The respondent's have contended in their respective briefs of argument that the Court of Appeal was right when it held that ground 4 of the Notice of Appeal which is related to the decision given on 3/5/2012, filed on 10/9/2012 without leave of Court, is incompetent and accordingly struck it out. Learned counsel for the respective parties cited and relied on the case of *RASAKI A. SALU v. MADAM TOWURO EGEIBON* (*supra*). It is one case, I shall take my time to explain in detail, as it deals with the issue vis-à-vis the relevant provisions of the law and rules.

There is no dispute that the Ground 4 of the Notice and Grounds of Appeal in contention relates to an interlocutory decision of the trial court in the exercise of its discretionary power on 2/5/2012. It is also not in dispute that the Notice of Appeal challenging the said decision was filed on 10/9/2012.

The provisions of Section 241(1) and 242(2) of the Constitution of Federal Republic of Nigeria 1999 as amended are

clear. Where a party to litigation is aggrieved with a decision given by that court, he has a right of appeal conferred on him by the Constitution. In other subject matter which is not covered by section 241(1) of the Constitution, the aggrieved party may have to seek for leave either from the Federal High Court or Court of Appeal. B

From the foregoing, it is clear that appellant required leave of the Court of appeal to raise issue of fair hearing, which raises in the circumstance of this case, a question of facts or mixed law and facts, having appealed out of time. See HON. PAULINUS NWAGU V. HON. I. U. CHIMA & ORS (2012) 8 NWLR (Pt.1303) 596 at 601 - 602; ANYANSINA v. CO-OPERATIVE BANK LTD (1994) 5 NWLR (Pt. 347) 742. C

Although a party can include an appeal against a ruling in an interlocutory application when he comes to appeal against the final judgment, and this is to be encouraged in order to avoid unnecessary delay by appealing separately, there is a procedure to be followed in order to meet the unavoidable technicalities involved. In order to merge the two appeals together, the party has to obtain leave to appeal out of time against the interlocutory ruling. See OGIGIE v. OBIYAN (1997) 10 SCNJ 4. See also the clear provision of S.25 of the Court of Appeal Act which provides that a party has 14 days within which to appeal against an interlocutory ruling of a trial court to the Court of Appeal from the decision of the ruling. See N.L.C. v. PACIFIC MERCHANT BANK LTD (2012) ALL FWLR (Pt.640) 1211 at pp.1222-1223; CBN v. OKOJIE (2002) 8 NWLR (Pt.768) 488. D E F

After careful review of the case of RASAKI .A. SALU v. MADAM TOWURO EGEIBON (supra) in its findings, the Court below rightly held that the case is inapplicable and that Ground 4, which is related to the decision on the 3/5/12 cannot be merged with the Notice and Grounds of Appeal filed on the 10/9/2012, without the leave of Court, and consequently struck out the said ground 4 for want of competence. H

The contention of the Appellant who has relied heavily on the SALU's case (supra) is to the effect that because the complaint arising from Ground 4 of the Notice, has to do with fair hearing, it can be raised at any time even on appeal. I do

not quite agree with the learned counsel for the appellant. That case has to be carefully read with appreciation of its main ratio. I agree with the learned senior counsel for the 1st to 4th respondents that there is nowhere in that case, this court stated that where the appellant is out of time to appeal on matters relating to fair hearing, he should not obtain leave of Court.

Recapitulating the salient facts of that case would make a better appreciation of inapplicability of that case to the instant case. It was a disputed land matter. The parties filed and exchanged their pleadings, on 21/2/1984, hearing commenced, the appellant and one of his witnesses testified. Thereafter the learned counsel for the appellant asked for an adjournment to enable him call more witnesses in support of his case. He was obliged and the learned trial judge adjourned the matter to 16/4/1984. The case came up for hearing on that day and the learned counsel for the appellant abandoned his intention to call additional witnesses and the case was unexpectedly closed, and the learned counsel for the respondent was then asked by the trial Judge to open the case for the respondent. There and then, the learned counsel to the respondent informed the court that the respondent and his witnesses were not in court. He requested for an adjournment to enable him open the case of the respondent.

Curious enough, the learned counsel for the appellant did not oppose the application for an adjournment, yet the learned trial Judge refused the application and closed the case without giving the respondent the opportunity to enter defence. It was against this background that this court held at page 233 of the Report that:

“As rightly argued for the Respondent, what was involved was much more than a mere refusal of an application for an adjournment. It involved the Respondent not being given any chance to present her defence which resulted in her being completely denied the opportunity of a fair hearing under S.33(1) of the Constitution of the Federal Republic of Nigeria, 1979.”

This Court at page 234 of the report considered the refusal of an application for an adjournment as denial of fair hearing, the following reasons were proffered:-

(a) That the fact that the appellant had been granted an adjournment on 21/2/1984 to enable the appellant call his witnesses;

(b) The sudden closure of the appellant's case which was contrary to expectation, the readiness or willingness of the learned counsel for the appellant not to oppose the application for adjournment.

(c) The refusal for adjournment for further hearing of the case to a future date, immediately after the refusal of the application for adjournment; and

(d) The result of the refusal of the application for adjournment, giving the respondent reason to complain that she had no opportunity of presenting her defence, if any, to the appellant's claim.

In the instant case there is a fundamental breach of condition precedent to the competence of ground 4 before the court below which rendered it incompetent to entertain the issue raised therein. The observance of the law and rules, as explained earlier governing the interlocutory appeal is necessary. ***The learned trial judge was right when he exercised his discretion according to the law and rules of the court in favour of the 1st and 4th respondents allowing them to call additional witnesses. That decision was also rightly affirmed by the court below. From the rules of court cited and relied upon by the respondents they satisfied the conditions for the grant. The appellant has failed to show in any way how the 1st and 4th respondents' application to call additional witness, which he personally cross-examined, was meant to "ambush and overreach" him. Appellant was also heard. His application was also granted. He has not shown how miscarriage of justice had been occasioned in the granting of the 1st and 4th respondents application since the court must hear from both parties to the case and the appellant was allowed to call his 11 witnesses even without front loading two of his witnesses statements.*** (See evidence of PW 10 and PW 11)

The right to fair hearing is substantially a question of opportunity of being heard. The right lies in the procedure followed in the determination of a case and not in the correctness of the decision arrived at in a case. See BAMGBOYE v. UNIVERSITY OF ILORIN (1999) 6 SC (pt. II) 72; AWONIYI v. THE REGISTERED TRUSTEES OF THE ROSICRUCIAN ORDER AMORC (NIGERIA) (2000) 6 SC (pt.1) 103; ARAKA v. EJEOGWU (2001) 12 SC (pt.1) page 19; FBN PLC v. TSA IND. LTD. (2010) 4-7 SC

(PT. 1) 242.

The appellant has been afforded the opportunity to put across his defence; he took the advantage of such an opportunity; he cannot later turn around to complain that he was denied a right to fair hearing.

B On issue No.3 learned counsel for the appellant has submitted that the Court of Appeal misconstrued and misapplied the ratio in the case of P.D.P. v. SYLVA (2012) 13 NWLR (Pt.1316) 85 to the case at hand. It is contended the court having rightly held that the
C appellant was by law entitled to seek a redress in the court that had a jurisdiction to hear his complains, but it however, went ahead to consider extraneous factors and wrongly concluded that the Federal High Court at which the appellant sought his redress had no jurisdiction to entertain the appellant's complaints. He submitted that contrary to
D the holding of the Court of Appeal a proper construction or interpretation of the case of P.D.P v. SYLVA (supra) shows that the Federal High Court had the jurisdiction to entertain the appellant's case. That from the facts and circumstances of his case the appellant had an unfettered choice between the Federal High Court and the State High
E Court and this choice is not whittled down by the provisions of section 251(1) of the 1979 Constitution (as amended).

It is further argued that unlike SYLVA case, who complained about party primaries he did not participate in the primaries, the
F appellant herein, participated in the said primaries he complained about and as such he could seek redress either in the Benue State High Court or the Federal High Court in Makurdi.

Citing extensively some relevant passages in SYLVA'S case dealing with section 87(9) of the Electoral Act 2010 (as amended) learned
G counsel concluded on this issue as follows: He contended that by virtue of section 87(9) of the Electoral Act 2010 (as amended) the National Assembly, pursuant to section 251(1)(s) of the 1999 Constitution has clearly and expressly conferred additional jurisdiction on the Federal High Court in respect of complaint by an aspirant about
H the conduct of the party's primaries. It is urged on us to resolve the issue in favour of the appellant.

The arguments put forward by the Respondents, in their respective briefs are that the court below correctly construed and applied the ratio in the case of P.D.P v. SYLVA (supra) to the instant case

in coming to the conclusion that the Federal High Court had no jurisdiction to hear and determine the claims of the appellant. That the complaint of the appellant was against the manner in which the 1st Respondent (PD.P) conducted its primaries. That it is not in dispute that the principal reliefs which are all against the said 1st respondent, a political party. Reference was made to ancillary reliefs (XV - XVI) to the principal reliefs which are against the 2nd and 3rd respondents. B

It is further contended that by the community reading of SS.31(5) and S.87(10) of the Electoral Act (2010) (as amended) and section 251(1) of the 1999 Constitution there is no jurisdiction C vested on the Federal High Court to hear and determine the matter. Learned Senior Counsel for the 1st and 4th Respondents submitted that it has long been settled in a plethora of decided authorities of this court that jurisdiction of a court to entertain a suit is determined by the scrupulous examination of the Writ of Summons, the Statement D of Claim and the reliefs claimed and no more. Reliance was further placed on the cases of PD.P v. SYLVA (supra), and TUKUR v. GOVERNMENT OF GONGOLA STATE (1989) 4 NWLR (Pt.117) 517.

In the Reply Brief of argument, learned counsel for the appellant further opined contrary view, when he submitted that the decision of this court in the case of PD.P. v. SYLVA (supra) did not subject E an aggrieved aspirant under section 87 (9) of the Electoral Act (supra) to a further hurdle of establishing that his case comes under section 251(1) (a) (s) before the Federal High Court can have the F jurisdiction to entertain his suit complaining about non-compliance of the provisions of the Electoral Act and the guideline of his party in the selection or nomination of a party's Gubernatorial candidate. He submitted that the ratio in PD.P v. SYLVA (supra) was that the appellant not being an aspirant under section 87(9) of the Electoral Act G 2010 and the Federal High Court had no jurisdiction to entertain his case.

I must however, notice that the arguments of the learned counsel for the appellant are repetitive, these do not improve his case made in the main brief of argument. The issue here is whether the court below correctly applied the ratio in PD.P v. SYLVA (supra) to the instant case. The Court in construing and applying the ratio in that case concluded that having regards to section 87(9) of the Electoral Act 2010 (as amended) the appellant as contestant at the 1st H

Respondent's Primary in Benue State on 19/1/2011, and having been dissatisfied with the conduct of the said primary was by law entitled to approach the appropriate Court for redress; but which court? The court below held that the choice of court to be approached whether the Federal High Court or High Court of State or Federal Capital Territory depends on the nature of the claims or reliefs and the parties involved as S.31 (5) and S.89 (10) of the Electoral Act (supra) are both subject to the provision of S.251 of the 1999 Constitution.

The 18 Reliefs sought by the appellant in his statement of claim particularly reliefs (1) - (v) are as follows:-

(i) *A declaration that the rights of the Plaintiff as a bona fide member of the 1st Defendant and his constitutional right to contest the forth coming election to the office of Governor of Benue State has been violated and or breached by the 1st Defendant.*

(ii) *A declaration that 1st Defendant breached the duty it owed the Plaintiff under section 87(3) of the Electoral Act, 2010 (as amended), when it failed to ensure that the Plaintiff was given equal opportunity of being voted for by members at the Gubernatorial Primary of the 1st defendant for Benue State held on the 9th of January, 2011 at Aper Aku Stadium, Makurdi.*

(iii) *A declaration that having failed to adhere strictly to the provisions of the Electoral Act, 2010 (as amended) and its own constitution and Electoral Guidelines concerning the Gubernatorial Primary for Benue State, the 1st Defendant could not have validly nominated the 4th Defendant.*

(iv) *An order nullifying the 1st Defendant's Gubernatorial Primary for Benue State held on the 9th of January, 2011 at the Aper Aku Stadium, Makurdi for failure to follow the Electoral Act, 2010 (as amended) and 1st Defendant's Constitution and Electoral Guidelines for Gubernatorial Primaries.*

(v) *An order nullifying the nomination of the 4th Defendant's by the 1st Defendant because the primary conducted by the 1st Defendant on the 9th January, 2011 did not follow the Electoral Guidelines or Constitution of the 1st Defendant and provisions of the Electoral Act, 2010 (as amended) concerning party primaries;"*

Above were the principal reliefs sought by the appellant. After careful and critical analysis, the court below found that these reliefs "were directed" against the 1st and 4th Respondents who are not

agencies of the Federal Government.

I hereby reproduce extensively the relevant passage of the Court below on page 1206 of the Record thus:

“As I can glean from the decision of in P.D.P. v. SYLVA (supra) the Appellant seem (sic) to have fallen into grave misconception when he assumed that, because he participated in the primary election of the 1st respondent, the Federal High Court would have jurisdiction to entertain his case. No, Sylva’s case did not decide that once a person participates in the primary election he can file a suit at the Federal High Court Never. Rather, it decided that the claim of the party and the reliefs sought must be within the provision of Section 251(1) of the Constitution of the Federal Republic of Nigeria 1999 (as amended) before the Federal High Court can assume jurisdiction. The case also decided that even where its agency is a party, the principal reliefs must be directed against the Federal Government or any of its agencies before the Federal High Court can have jurisdiction. Thus, the Appellant who had issues against the 1st and 4th Respondents on the conduct of the gubernatorial primary in Benue State had the right to approach the court for redress in view of the provisions in Sections 31(5) and 87(9) of the Electoral Act 2010 (as amended). However, since his principal reliefs were directed against the Peoples Democratic Party and the 4th Respondent who are not agents of the Federal Government, his matter ought to have been ventilated at the State High Court. Certainly, not at the Federal High Court. I agree with the court below that it lacked the requisite jurisdiction to hear this case, relying on the case of PDP v. SYLVA (supra). This issue, accordingly, is resolved against the appellant.”

In my view, with due respect, my Lords, the court below correctly construed and applied the ratio in SYLVA’s case (Supra) to the instant case. It is not in dispute that the complaint of the appellant is against the manner in which the 1st respondent [P.D.P] conducted its primaries. It is not in dispute that the principal reliefs [i] - [v] were directed against the 1st and 4th respondents, who are not agents of the Federal Government. The alternative reliefs (vi) - [xiv] were directed against the 1st and 4th respondents. The [xv] - [xvi] reliefs are ancillary to the principal reliefs [i] - [v].

As I have earlier on observed by the community reading

of sections 31(5) and 87(10) of the Electoral Act 2010 as amended and section 251(1) of the 1999 Constitution [as amended) no jurisdiction is conferred on the Federal High Court to hear and determine the instant case. While the two sections of the Electoral Act vest jurisdiction in the Federal High Court or High Court of a State as regards pre-election complaints, the Act does envisage that the nature of the complaint may determine the jurisdiction of the court.

I agree with the learned counsel for the 1st - 4th respondents that the law makers could not have vested the State High Court with the jurisdiction of the Federal High Court if the Federal High Court were to assume jurisdiction for every complaint brought in respect of pre-election matters. The provision of S.251 of the Constitution is clear. Any matter that does not fall within the purview of any of the items listed therein must find jurisdiction in any other court and certainly not in the Federal High Court.

I shall explain further. When a claim falls within S.251 of the Constitution, the Federal High Court should assume jurisdiction if it does not, the court with jurisdiction will be the High Court. I recapitulate the grouse of the appellant herein. He is not satisfied with the manner in which the 1st respondent [P.D.P] concluded her primaries that paved way for the election and victory of the 1st respondent at the polls.

He complained against the results of those primaries. The 2nd Respondent (INEC) and 3rd Respondent (WAEC), though agencies of the Federal Government were not alleged to have been involved at all in any wrong doing in the conduct of the said primaries. If the principal reliefs are not directed against the 1st and 4th respondent who are not agencies of the Federal Government, while seeking redress against them in the Federal High Court, simply because of the presence of the 2nd and 3rd respondents. Their mere presence cannot confer jurisdiction in that court.

I emphasize the fact that in so many decisions of this court that it is not in all cases in which the Federal Government of Nigeria or its Agency is a party in the suit that the Federal High Court must willy-nilly, without consideration to the nature of the aggrieved party's claim, then assume juris-

diction. We have said time without number, that the most relevant and important consideration is the plaintiff's claim. FELIX ONUORAH v. K. R. P. C. (2005) 6 NWLR (Pt.9211) 393 at 408; OLIVER v. DANGOTE INDUSTRIES LTD (2009) 10 NWLR (Pt.1150) 467 at 487. TUKUR v. GOVERNMENT OF GONGOLA STATE (1989) 4 NWLR (Pt.117) 592 O.H.M.B. v. GARBA (2002) 14 NWLR (Pt.788) 538. **I must agree with the court below that the argument of the appellant to the contrary is totally flawed when he assumed that because he participated in the Primary conducted by the 1st Respondent, the Federal High Court would have jurisdiction to entertain his case. The case of P.D.P v. SYLVA (supra) relied upon by the parties did not decide that once a person participates in the primary election of a political party and is dissatisfied with the result he can file a suit in the Federal High Court to ventilate his complaints. It rather decided that the claim of the plaintiff and reliefs sought must be within the purview of section 251(1) of the Constitution. Careful reading of pages 137-139 of the judgment of my brother RHODES VIVOUR JSC, will clear the point I am making. It was decided that even where the Federal Government or any of its Agencies is a party the principal reliefs must be directed against the Federal Government or any of its agencies before the Federal High Court can have jurisdiction to entertain the claims or reliefs sought by the party.** The full passage at 137 - 139 of the judgment is reproduced as follows:-

"There are 16 reliefs in the originating summons. Reliefs 1, 2, 3, 4, 5, 6, 7 and 8 are against the Peoples Democratic Party (PDP). Reliefs 3 and 9 are against the Independent National Electoral Commission."

Relief 10 can be said to be against both the PDP and INEC. All the six alternative reliefs are against the PDP. It is clear after reading the 1st respondent's pleading that his dispute is against the appellant for refusing to allow him to contest the party primaries of 19/11/11 for the general elections fixed for 12th February, 2012. Put in another way, his cause of action really is the refusal of the appellant to publish his name as one of the aspirants cleared to contest the primary election fixed for 19/11/11. This is the fundamental issue in the dispute. Reliefs 3 and 9 which are against INEC are not fundamental,

they are ancillary claims.

Reliefs 1, 2, 3, 4, 5, 6, 7, 8 and all the alternative claims questions pre-primary election affairs of the party which no court has jurisdiction to entertain.

Reliefs 3 and 9 are ancillary claims as they are collateral to, dependent, or/and ancillary to claims 1, 2, 4, 5, 6, 7 and all the alternative claims. A court cannot hear and determine ancillary claims if it has no jurisdiction to entertain the main claims and if the ancillary claims will clearly involve substantial discussion of the main claims. *Tukur v. Government of Gongola State (1989) 4 NWLR (Pt.117) p.517* is instructive on this point.

Section 251 of the Constitution confer exclusive jurisdiction on the Federal High Court for the items listed in the section. All items not listed in the section are to be heard and determined by the State High Court.

When the jurisdiction of the Federal High Court is in issue, the following must co-exist:

(a) The parties or party must be the Federal Government or its agency.

(b) Subject matter of the litigation.

Satisfying the above is not the end of the matter. The pleadings of the plaintiff must be carefully examined so as to understand the facts and circumstances of the case in order to determine if the claims are within the jurisdiction of the court. It is clearly not enough only to have an agency of the Federal Government as a party before Federal High Court has jurisdiction. Subsection (r) of section 251(1) of the Constitution states that:

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

I earlier on made it clear that the 1st respondent’s (appellant’s) dispute is against the appellant (1st respondent) because the appellant (1st respondent) did not allow him to contest the primaries fixed for 19/11/11. The PDP is not an agency of the Federal Government. It is a political party. The 1st respondent’s (appellant’s) claims against the appellant (1st respondent) are not justifiable and since the Federal High Court

has no jurisdiction to entertain those claims it also has no jurisdiction to entertain the ancillary claims, and for the avoidance of doubt the courts in Nigeria have no jurisdiction to hear the 1st respondent's (appellant's) claims. This is so because nomination and sponsorship of a candidate for election is a political matter solely within the discretion of the party. The 1st respondent's (appellant's) claim ought not to have been entertained by the Federal High court for the simple reason that it is a pre-primary election matter or affair of the PDP. Onuoha v. Okafor (supra).

By applying the ratio in PDP v. SYLVA (supra) the learned justices of the Court below, in the instant case thoroughly examined the claim and reliefs of the appellant vis-à-vis the parties in line with S. 251(1) of the Constitution and sections 31(5) and 87(10) of the Electoral Act 2010 before coming to the conclusion that the Federal High Court had no jurisdiction to entertain the appellant's complaints. See pp. 1206 - 1207 Vol. II of the record (supra). This decision cannot be faulted. The case of PD.P v. SYLVA and others cited above clearly state the correct position of the law on the entire issue here between the parties. I cannot but uphold the concurrent findings of the two courts below that the trial court lacks jurisdiction to hear and determine the appellants' claim and dismiss the appellant's appeal.

The court below having held that the Federal High Court had no jurisdiction to hear and determine the appellant's claim, that is where the matter should have probably rested. However, having considered the merits of the case to the dissatisfaction of the appellant, there is need for me to as well consider albeit briefly the 4th issue of the 1st and 4th respondents, which is the 5th and 3rd issue of the 2nd and 3rd respondents respectively, which issue the appellant has unnecessarily proliferated in his brief of argument. **This court has consistently frowned upon the proliferation of issues in brief of argument. It is not the number of issues formulated for determination that determines the quality of a brief or the success of an appeal. The shorter, concise and precise the "brief" is, the better. After all that is why it is called a "brief".** See: OMEGA BANK NIGERIA PLC v. O.B.C. LTD. (2005) 8 NWLR (Pt.928) 547, ONONUJU v. the STATE (2013) 6 SCNJ 458 at 477.

The 1st and 4th respondents issue No. 4 reads as follows:

“Whether having regards to the state of pleadings the reliefs sought by the appellant and evidence led, the learned Justices of the Court below were right in upholding the findings of the Court of first instance dismissing the claim of the appellant as being frivolous brought mala fide, vexatious and unmeritorious (Distilled from grounds 6, 7, 8, 9, 10, 11, 12, 13 and 15 of the Notice and Grounds of appeal.)”

The court below has rightly identified that the appellant presented two sets of distinctive cases at the trial court. The first complaint has to do with the failure of the 1st Respondent to conduct special ward Congresses and its primaries in which the 4th respondent emerged as the Gubernatorial Candidate of the 1st respondent for 2011 general elections in compliance with its Constitution; its Electoral Guidelines and Electoral Act 2010 (as amended). The second complaint is the claim by the appellant that the 4th Respondent was constitutionally not qualified for the office of Governor of Benue State on the ground of alleged presentation of forged Certificate to the 2nd Respondent.

In proof of the first allegation, the appellant adopted his witness statement and testified himself and tendered several documents as Exhibits. He called 9 witnesses, all members of his Gubernatorial Campaign Organization who also held position in the Organization. They testified in his favour. PW1 - PW10 at pp.65 -87 of the record merely stated on oath that certain persons told them that special Ward Congress did not hold. In their joint brief 1st and 4th respondents submit copious instances of statements which the two courts below found are hearsay evidence not direct evidence of what those witnesses knew about. In his finding the learned trial judge after a careful evaluation of evidence of PW1 -PW10 held that the appellant's complaint that ward congresses were not held, non-level playing ground for candidates in primary and the hijack of the voting process by the Aides of the 4th Respondents were proto type evidence laced with hearsay. The court below after a careful perusal and analysis of the written statement on oath of the appellants' witnesses vis-à-vis witnesses evidence in chief and under cross - examination; upheld at pp.1216 -1217 of the record, findings of the learned trial judge and held that the 10 witnesses who testified for the appellant could not have been in the 276 Wards in the State and that accounts for their testimonies being predicated on mere hearsay as to what other per-

sons told them. The court below relied on AJADI v. AJIBOLA (2004) 16 NWLR (Pt.898) 91, OJUKWU v. MILITARY GOVERNOR, LAGOS STATE (1985) 2 NWLR (Pt.10) 806, OMOBORIWO v. AJASIN (1984) 1 SCNLR 108; HARUNA v. MODIBO (2004) 16 NWLR (Pt. 900) 487.

I agree with the learned counsel for the 1st and 4th respondents that the contention of the appellant that where a witness includes in his testimony hearsay evidence the court has a duty to ignore that aspect of it that is hearsay and give a probative value to that aspect of it that is not hearsay, cannot be true position of the law on the matter. Once it is found that a deposition is laced with hearsay, the court cannot ascribe probative value to it. To do otherwise is like asking the court to sieve the oral evidence (in form of written statement on oath) of witnesses to determine which part of it is hearsay or not so as to give probative value to the aspect of evidence that is not hearsay. Hearsay evidence is not admissible for the purpose of establishing a criminal liability. If such evidence was admitted unwittingly, it should not be acted upon by the trial Court; but if it did, an appellate court can overturn the judgment based on the fact that the finding of the trial court was based upon inadequate evidence. BUHARI & ANOR v. OBASANJO & ORS (2005) 9 SCN 1. ***In other words where an admission is not based on personal knowledge of the maker of the facts admitted such admission can hardly be of any value.*** SEISMOGRAPH SERVICE (NIG) LTD v. CHIEF KEKE OGBENEGWEKE EYUAFE (1976) 9 - 10 SC 86. The submission of the appellant that the evidence of the witnesses are not hearsay is preposterous. The two courts below in unison chorused that statement on oath of the appellant is “infested” and “laced” with hearsay evidence and there is no evidence on record to show that Special Congresses were not conducted in compliance with the law. That Exhibit “E - G” tendered in evidence by the Appellant are of no assistance to his case because the Exhibits merely go to show that the appellant who contested the said primaries is dissatisfied with the conduct of the primaries and has approached a court for redress of his grievances; the substances of the allegation which the appellant failed to prove before the trial court.

The appellant complained that Special Ward Congresses were “doctored” including the list of delegates used at the State Special Congress, but he has failed to call any person who was entitled to vote at any of the ward congresses to testify in support of these allegations. He made non-voting or misconduct or non-conduct of election the pivot of his case. It behooves on him to call at least one disenfranchised voter from each of the polling booths or units or stations in the affected Constituency or district/area as a witness to testify in support of this allegation. See AUDU v. INEC (No.2) (2010) 13 NWLR (Pt.1212) 456 at 523; CHIME v. ONYIA (2009) 13 NWLR (Pt.1124) AYOGU v. NNAMANI (2006) 8 NWLR (Pt. 981) 160. ***It is rightly submitted that the foregoing cases are by reference applicable to the case at hand, although they are decisions on election petition, as against this case which is a pre-election matter. The relevance of these cases is that the principle therein apply mutatis muntandi to the instant case since the appellant is alleging that special Ward Congresses for Ad-Hoc delegates were not held.***

I agree with the submission of the Senior Learned Counsel that failure on the part of the appellant to tender in evidence, the Membership Register of the 1st Respondent is damaging to his case because that is the basis of proof of accreditation for the special Ward Congresses.

In paragraphs 18(ii) – 30 of the appellants’ statement of claim the appellant alleged that delegates were handpicked and assembled at Aper Aku Stadium in Makurdi the venue of the primary on 9/1/2012. It was alleged that the primary election at the special state congress was marred by gross irregularities as some of the 4th respondent’s State commissioners and Aids were alleged to have hijacked the electoral process by voting and completing ballot papers for other delegates and therefore not in compliance with the provisions of Electoral Guidelines for the P.D.P primary 2010. The trial court reacted to this allegation on page 1007 thus:

“The plaintiffs witnesses in a chorus did nothing more than mentioning the names of the aides of the 4th Defendant they allegedly saw manipulating the voting. It is on this score that I agree with the submission of the learned senior counsel that the failure of the

plaintiffs counsel to cross-examine on Exhibit "L" is most damaging to the plaintiff's case. I am equally in tandem with the learned silk that the 4th Defendant cannot be held responsible for what other people did in form of unsolicited aid of which he or his acknowledged agents were ignorant. See DINA v. DANIEL (supra)".

The Court of Appeal on page 1218 Vol. II of the record put it more succinctly as follows:

"Therefore, for the appellant to prove that any political appointee who at the state Congress voted illegally, he has to first show that he was not so elected at the ward congress. The Appellant herein ought to have led evidence to prove that those political appointees he saw were not officers of the party or that they were not elected as Ward delegates."

On the allegation that the 1st Respondent did not give Appellant Level playing field; the trial court held that the issue of non level playing ground for candidate as provided in S.87 (3) of the Electoral Act does not avail the appellant herein since the 1st respondent adopted indirect primary as opposed to direct primary procedure and that takes the appellant's claim outside the purview of the said section 87(3). In any case, the appellant has failed to lead evidence to show that candidates were not given level playing ground by the 1st Respondent in the conduct of its primaries, because evidence of PW3 at page 561 under cross-examination showed otherwise thus:

"The supporters of the plaintiffs were at the Aper Aku Stadium on that day to vote for him. The delegates and the candidates for the election were allowed to go into the stadium on that day. Results were announced at the end of the delegate conference."

At page 565 lines 1-2, PW7 testified as follows:

"The PDP as a party put up adverts as regards the date when the primaries will take place. That is to give all the aspirants adequate notice for preparation."

See also testimony of PW1 under cross-examination p. 559 lines 73 -79:

"I was admitted into Aper Aku stadium on the date of the Congress to nominate the Governorship Candidate. I know the plaintiff very well. He was also admitted into the stadium. Other delegates entitled to vote were also admitted into the stadium. For that election, there was Electoral Committee Panel made up of 5 members to

conduct same. Before voting proper, there was accreditation of delegates.”

After reviewing the evidence before it, the court below agreed with the finding of the trial court that there was no evidence that parties were not given notice of the primaries and the venue thereof.

B I cannot fault the concurrent finding of the courts below. There is no evidence of lack of level playing ground for both parties in this case.

It was the concurrent findings of the courts below that allegation that special Wards Congress were not held but that 1st and 4th respondents conspired and on their instruction, the 4th respondent’s commissioners and Aides took possession of the electoral materials and Forms and doctored them, suggest forgery and or falsification of results which imports criminal element into an otherwise civil matter and such required proof beyond reasonable doubt. The court below also rightly held that to prove falsification of result, there must be two sets of results, one considered genuine or authentic and the other considered falsified. This will allow the two to be compared to establish falsity. No such results were tendered in this case. See *ATIKPEKPE v. JOE* (1999) 6 NWLR (pt.607) 428; *AWUSE v. ODILI* (2005) 16 NWLR (PT.952) 416.

By the clear provision of section 135 (1) of the Evidence Act if the commission of crime by a party to any proceeding is directly in issue of any proceeding in civil or criminal, it must be proved beyond reasonable doubt. The burden of proving that any person has been guilty of a crime or wrongful act is subject to section 139 of the Evidence Act, on the person who asserts, whether the commission of such an act is or is not directly an issue in the action. See *NWOBODO v. ONOH* (1984) 1 SCNLR p.1; *OMOBORIOWO v. AJASIN* (1984) 1 SCNLR 108. *BUHARI v. OBASANJO* (2005) ALL FWLR (Pt. 273) 1, *ATIKPEKPE v. JOE* (supra).

In the case at hand, the appellant herein who pleads and asserts the existence of criminal allegations has the burden to prove same, not only on the preponderance of evidence as contended by the appellant but beyond reasonable doubt. It is difficult to fault the concurrent finding of the court below in placing a higher burden of proof than on the preponderance

of evidence.

The second limb of this issue is whether the learned justices of the court below were perfectly right when they upheld the finding of the trial court that there was no evidence of disqualification of the 4th Respondent. From the pleading on the record before the trial court the appellant's complaints is that the 4th respondent's is not constitutionally qualified to be elected into the office of Governor of Benue State on the ground that the 4th respondent presented a forged Certificate to the 1st and 2nd respondents. Having so alleged the appellant was expected to lead cogent and credible evidence in proof of his criminal allegations of certificate forgery and presentation of same to the 2nd respondent.

Firstly, the court below rightly observed that there is no piece of evidence led by the appellant to prove that the 4th Respondent forged any Certificate or that he presented forged Certificate to either 1st or 2nd respondent or that he swore falsely to an affidavit stating facts relating to his certificate which are false in order to bring his case within the ambit of section 31(5) of the Electoral Act 2010 [as amended]. No forged or authentic/genuine Certificate was tendered in evidence.

From the admitted evidence on record, the appellant has failed to prove the criminal allegations of forgery and or presentation of forged certificate to the 2nd respondent which according to the appellant, disqualified the 4th respondent under S.182 (1)(j) of the Constitution of the Federal Republic of Nigeria 1999 (as amended). It is trite law that where the commission of the crime is directly in issue whether in Civil or criminal proceedings, the burden of proof is on the plaintiff to prove the commission of the crime, beyond reasonable doubt. See earlier cases on the point above.

By the provisions of sections 362-363 of the Penal Code, for the appellant to succeed on his case, he must prove beyond reasonable doubt that the 4th respondent presented a forged Certificate to the 2nd respondent knowing that it would be used fraudulently or dishonestly as genuine. See ODIAWA v. FRN (2008) ALL FWLR (Pt. 439) 436 at 473, AREBI v. GBABIJO (2010) ALL FWLR (pt.527) 710 at 733.

Having failed to lead credible evidence in proof of his claim on the pleading appellant turned round to raise the issue of non presentation of Certificate contrary to S. 177(d), of the 1999 Constitution, not based on his pleading, but on the general denial of the 1st and 4th respondents in their statement of defence. Referring to the statement of claim of the Appellant at pp.11 - 24 and the 1st and 2nd respondents' statement of Defence at pp.322 - 344 Vol. 1 of the record, there is nothing at all to ground the issue of non presentation of Certificate to the 2nd respondent. It is in this vein the court below had this to say on the point at page 1228 Vol.II of the record thus:

"The appellant appears to have made allegation of forgery against the 4th respondent and then shopped for evidence to support it but found himself in a trouble waters and he abandoned same. I say so because there is no appeal against the decision of the learned trial judge on the issue of forgery which was the main stay of the appellant's complaint of the court below. And in his entire argument on this issue, he never touched on forgery. He actually abandoned the case he brought to court and pursued the 4th respondent based on his averment in paragraph 22 (iii) of the 1st and 4th respondents statement of defence when he said he did not present any certificate to the 1st or 2nd respondents, forged or genuine."

The contention of the appellant is that 4th respondent was not qualified to contest because of non presentation of his certificate. However, the courts below recognized the fact that the issue of non qualification of 4th respondent by virtue of non-presentation of Certificate was never the case of appellant from the beginning as earlier observed.

The appellant has contended that having regards to section 182(7) (j) of the 1999 Constitution the 4th respondent is necessarily required to present his Certificate to the 1st and 2nd respondent in order to prove his qualification to contest the election, otherwise he is disqualified under S.177 (d) of the Constitution and that by S.167 (d), of the Evidence Act 2011, the failure is fatal, because if produced it would have been unfavourable to him. This contention is misconceived. Submission or presentation of Certificate is not the requirement of s. 177(d) of the Constitution as regards the gubernatorial screening process. The process of screening which the

appellant and 4th respondent undertook, with the 1st respondent requires the candidate to fill in his qualification in the form and to swear to a verifying affidavit that the information contained in Form CF001 was true. This takes away the necessity of presentation of the actual certificate to the 1st and 2nd respondents.

When the appellant was confronted under cross-examination, with Exhibit C and D (the nomination Form) which is similar in form with INEC FORM CF001, and which the 1st respondent used in screening the appellant and 4th respondent he stated that he did not attach his certificate to his party nomination Form and that the same procedure of not attaching Certificates to the nomination form applied to all candidates. He admitted that presentation or submission of Certificate was not a requirement for the purpose of screening. See page 711 Vol.1 of the record.

In any case it is not a requirement of S.177 (d) of the Constitution for the Candidate to necessarily present the Certificate to qualify for election to the office of Governor of a state.

By the provision of S.177 (d) of the Constitution a person shall be qualified for election to the office of Governor of a state if:

(d) He has been educated up to at least school certificate level or its equivalent.

By section 318 (1) "school Certificate or its equivalent means."

(b) Educated up to secondary school certificate level.

In BAYO v. NJIDDA (2004) 8 NWLR 544 at 630; (2004) FWLR (pt.192) 10 at 78, the Court of Appeal then the Apex and final Court on Election petition from National Assembly/ Governorship and Legislative Houses Election Tribunal had this to say on the point:

"In other words as regards a secondary school certificate examination; it is enough, in my view that one attended School Certificate level i.e. without passing and obtaining the Certificate."

By the combined reading of SS.177(d), and 318 (b) of the Constitution is not the only requirement or basis of quali-

fication, but whether the candidate has been educated up to Secondary School Certificate Level.

I am on one and in agreement with the learned counsel for the respondents that it is not only by presentation of Certificate to the respondent that is the only proof that 4th respondent is qualified as the appellant herein who has taken this position did not (by his own showing under cross-examination) present or submit one.

As rightly held by the Court below, by SS.131- 134 of the Evidence Act, it is only by cold facts presented to the law court that civil rights and obligations of the parties are determined.

By dint of these foregoing sections of the Evidence Act learned Counsel would do well for the litigants who will be happier for it if they shun sentiments as these command no place in judicial deliberations. See OGBITI v. N.A.O.C. LTD (2010) 14 NWLR (pt.1213) p.208. A litigant must be able to establish his case on the evidence he presented before the court or on known or settled principles of law.

In sum the appellant having failed to show that the concurrent finding of facts by the Lower Court is perverse thereby occasioning miscarriage of justice. I cannot disturb same and the conclusion that the appellant's claim is frivolous, brought mala fide, vexatious and unmeritorious. In the light of all I have been saying, I dismiss this appeal and affirm the decision of the Lower Court.

I award no costs in favour of the respondents in the circumstance of this case.

ONNOGHEN JSC

I have had the benefit of reading in draft the lead judgment of my learned brother, GALADIMA, JSC just delivered.

I agree with his reasoning and conclusion that the appeal has no merit whatsoever and deserves to be dismissed.

My learned brother has dealt exhaustively with the issues raised for determination and I have nothing more to add.

The appeal is dismissed for lack of merit and I abide by the consequential orders made in the lead judgment including the order as to costs. Appeal dismissed.

MUNTAKA-COOMASSIE JSC

This appeal is against the decision of the Court of Appeal Makurdi Division hereinafter called Lower Court. The Lower Court affirmed the judgment of the Federal High Court Makurdi Division delivered on 11/7/2012, hereinafter called trial court.

The appellant herein, Terver Kakih, was the plaintiff at the trial court where he challenged, among others the conduct of the 1st Respondent's primary election of its candidate for the gubernatorial Election for Benue State held on 9/1/2011 and the qualification of the 4th Respondent, Suswan, to contest the said election. The Appellant's claims were clustered in paragraph 51 of his statement of his claim thus:-

51. *"Whereupon the Defendant claims against the defendants jointly and severally.*

i. A Declaration that the rights of the plaintiff as a bona fide member of the 1st Defendant and his constitutional right to contest the forth coming election to the office of Governor of Benue State has been violated and or breached by the 1st Defendant.

ii. A Declaration that 1st Defendant breached the duty it owed the plaintiff under Section 87(3) of the electoral Act 2010 as amended, when it failed to ensure that the plaintiff was given equal opportunity of being voted for by members of the gubernatorial primary of the 1st Defendant for Benue State held on the 9th of January 2011 at the Aper Aku Stadium Makurdi.

iii. A Declaration that having failed to adhere strictly to the provisions of the electoral Act, 2010 as amended and its own Constitution and electoral guidelines concerning the gubernatorial primary for Benue State, the 1st Defendant could not have validly nominated the 4th Defendant.

iv. An Order nullifying the 1st -Defendant's Gubernatorial Primary for Benue State held on the 9th of January, 2011 at the Aper Aku Stadium Makurdi for failure to follow the Electoral Act, 2010 as amended and 1st Defendant's constitution and Electoral Guidelines for Gubernatorial Primaries.

v. An Order nullifying the nomination of the 4th Defendant by the 1st Defendant because the Primary conducted by the 1st Defendant on the 9th January, 2011 did not follow the Electoral Guidelines or Constitution of the 1st Defendant and provisions of the elec-

toral Act, 2010 as amended concerning party primaries”.

In the main, the appellant alleged that the primaries were not conducted in accordance with the provisions of the Electoral Act 2010 (As amended), the constitution of the P.D.P, the 1st Respondent and its electoral Guidelines. I do not think it necessary to reproduce them
B here as they were adequately taken care of in the lead judgment.

Reliefs (xi - xvi) are in the “ALTERNATIVE and the 4th Respondent, the executive Governor of Benue State, presented a forged certificate and lied on oath and is therefore disqualified from contest-
C ing the Gubernatorial Election.

The trial court ordered the defence to open their defence. The 1st and the 4th respondent filed their joint defence on 24/1/2012 in which they denied in toto, all the claims of the appellant. The 2nd and 3rd respondents filed their respective statement of defence.

During the trial the Appellant testified for himself as PW1 and called 9 other witnesses and tendered Exhibits A, B, C, D, E, F, G1 - G10. Exhibits I, J and K already admitted by the trial court were expunged from the record during the judgment of the trial court for failing the test of admissibility. The 1st and 4th Respondents called
D one witness and tendered additional Exhibits L, M and N.
E

Among the witnesses called by the appellant only three (3) witnesses testified vis-a-vis the non-conduct of ward congress. It is also to be noted that the 2nd and 3rd respondents i.e. INEC and the
F West African Examination Council, did not call any witness or witnesses.

At the conclusion of the trial written addresses were filed and exchanged. The 1st and 4th respondents raised the issue of jurisdiction and cited the cases of:- PDP Vs Sylva (2012) 13 NWLR (Pt.1316)
G page 85 learned counsel for the parties on 15/6/2012 adopted their respective addresses.

The learned trial Judge upheld the 1st and 4th respondents, objection to the court’s jurisdiction to hear and determine appellant’s claim. He maintained that there was no evidence to support the
H appellant’s claim and same was dismissed. The trial court Judge has this to say on page 1018 of volume 2;

“Following from all my findings above, I am clear in my mind that the plaintiff’s claims are frivolous, brought malafide, vexatious, unmeritorious, fails and is therefore, hereby dismissed. Per Awokulehin

J”

Dissatisfied by the decision of the trial court, the appellant, Terver Kakih, unsuccessfully appealed to the Court of Appeal i.e. court below per Okoro JCA (as he then was) has this to say on page 1230 - 1231.

“On the whole, having resolved the three issues considered in this appeal against the appellant, I hold that there is no scintilla of merit in this appeal and is hereby dismissed. It follows that whether in considering the notice of preliminary objection or in hearing the entire appeal on the merit, the appeal is doomed to fail. I award costs of N50,000.00 in favour of the 1st and 4th Respondent only, against the Appellant.”

The Court of Appeal unanimously affirmed the decision of the trial court and dismissed the appellant’s appeal. The appellant being aggrieved appealed further to this court on the Notice of appeal containing fifteen (15) grounds of appeal. They are effectively set out in the judgment of Galadima JSC and eleven (11) issues were accurately set out by my learned brother. I do not consider it necessary to reproduce them in this judgment.

I was privileged to have read before now the lead judgment of my learned brother Galadima JSC. On the most important issue of criminal allegation, namely presenting a forged certificate by the 4th respondent. It is clear that in a civil trial the proof is by preponderance of evidence but if a criminal allegation cropped up, the law puts the burden of proof on the person who alleged that criminal allegation, beyond reasonable doubt. This is trite, it does not require citing of any authority. The provision of Section 135(1) of the Evidence Act is quite instructive on this point having discovered that the burden of proving that any person has been guilty of a crime or wrongful act is, subject to Section 139 of the Evidence Act, on the person who asserts, whether the commission of such an act is or is not directly an issue in the action. See *Nwobodo v. Onoh* (1984) 1 SCNLR 108. *Buhari v. Obasanjo* (2005) All FWLR (Pt. 273).

I shall be willing to readily allow this appeal if I discovered that the appellant herein was able to prove by evidence beyond reasonable doubt his allegation. I will then disqualify Suswan. It is quite clear beyond any doubt that the appellant herein pleads and asserts the existence of criminal allegations. The law placed a burden of proof

on him, not only on the preponderance of evidence, but beyond reasonable doubt. Can we therefore fish out from the evidence adduced by the appellant to show that there was evidence of disqualification of the 4th Respondent throughout the proceedings. To appreciate this point further we have to go back to the pleadings on the record before the trial court. The appellant pleads thus:-

“The 4th Respondent presented a forged certificate to the 1st and 2nd respondents”.

Having thus alleged, he was expected to lead credible and cogent evidence in proof of his criminal allegations of certificate forgery and criminal presentation of the certificate to the 2nd respondent, Independent National Electoral commission (INEC).

My lords, the question to be asked and answered here is was there any piece or pieces of evidence led by the appellant to prove beyond reasonable doubt, that the 4th respondent forged any certificate or that he presented forged certificate to the P.D.P or INEC? Better still, was there any evidence that Governor Suswan swore falsely to an affidavit stating facts relating to the alleged forged certificate in order to bring his matter within the ambit of Section 31(5) of the electoral Act 2010 as amended.

It is necessary for the appellant or any other person who asserts that a forged certificate was presented to his party or INEC to prove beyond reasonable doubt. This is because of the demand by both the constitution of the Federal Republic of Nigeria, 1999 as amended and the Electoral Act. Both demands that:-

“Section 182(1) says;

No person shall be qualified for election to the office of Governor of a State if he has presented a forged certificate to the Independent National Electoral commission”.

Section 31(5) of the Electoral Act 2010 as Amended has this to say:-

“A person who has reasonable grounds to believe that any information given by a candidate in the affidavit or any document submitted by that candidate is false may file a suit at the high Court of a state or Federal High court against such person seeking a declaration that the information contained in the affidavit is false”.

Fortunately or unfortunately my lords, from the admitted and reliable evidence there is no cogent evidence to establish allegations

of forgery and or presentation of a forged certificate to the INEC which will disqualify the 4th Respondent under the provisions of the 1999 Constitution supra.

After all the offence of forgery or presentation of forged certificate or document contains a lot of ingredients which must be proved beyond reasonable doubt thus:

Section 362 of the Penal Code defines forgery while Section 363 of the same code define forgery and forged document; lastly punishment for forgery is stated in Section 364 of the Penal Code.

S.364. *“Whoever commits forgery shall be punished with imprisonment for a term which may extend to fourteen years or with fine or with both”.*

Having found that there is no iota of credible evidence to support the criminal allegation against the 4th respondent herein, there is no way I can lawfully disturb the findings of the Lower Court. I too must agree that the court below was correct to have dismissed the appeal before it. Consequently I must accept the position taken by my learned brother Galadima JSC which position I believe is correct in law. I too agree that this appeal lacks merit and deserves to be dismissed. I dismiss this appeal and abide by the consequential orders made in the lead judgment.

RHODES-VIVOUR JSC

I have had the advantage of reading in draft the leading judgment of my learned brother, Galadima, JSC. I agree with his lordship on all points considered in this case, but in view of the importance of jurisdiction to wit: the court to hear the case I shall add few paragraphs of my own.

Both courts below found that the appellant was right to complain about the conduct of the PDP’s primaries in which he was a candidate, but he was wrong to file his action in a Federal High Court. Agreeing with the Federal High Court that it did not have jurisdiction to hear and determine the appellant’s claims the Court of Appeal said:

“...Since his principal reliefs were directed against the Peoples Democratic Party and the 4th Respondent who are not agents of the Federal Government his matter ought to have been ventilated at the

State High Court. Certainly, not at the Federal High Court.”

Section 87(9) of the Electoral Act 2011 reads:

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

By this provision the appellant, being an aspirant has a right to ventilate his grievance, but can it be said that he has a choice of court?

In *PDP v. Sylva & 2 Ors* (2012) ALL FWLR Pt.637 P.606, I said that:

“Section 251 of the Constitution confers exclusive jurisdiction on the Federal High Court for the items listed in the section. All items not listed in the section are to be heard and determined by the State High Court. When the jurisdiction of the Federal High Court is in issue the following must co-exist.

(a) The parties or a party must be the Federal Government or its agency.

(b) Subject matter of the litigation.

Satisfying the above is not the end of the matter. The pleadings of the plaintiff must be carefully examined so as to understand the facts and circumstances of the case in order to determine if the claims are within the jurisdiction of the court. It is clearly not enough only to have an agency of the Federal Government as a party before Federal High Court has jurisdiction...”

The claim of the party and the reliefs sought must be within the provision of section 251(1) of the Constitution before the Federal High Court can have jurisdiction. Furthermore where an agency of the Federal Government is a party the principal reliefs must be directed against the Federal Government or any of its agencies before a Federal High Court can have jurisdiction.

What then are the principal reliefs in this case? They are:

1. A declaration that the rights of the plaintiff as a bonafide member of the 1st defendant and his constitutional right to contest the forthcoming election to the office of Governor of Benue State has been violated and or breached by the 1st defendant.

2. A declaration that the 1st defendant breached the duty it owed the plaintiff under section 87(3) of the Electoral Act, 2010 (as amended), when it failed to ensure that the plaintiff was given equal opportunity of being voted for by members at the Gubernatorial Primary of the 1st defendant for Benue State held on the 9th of January, 2011 at Apex Aku Stadium, Makurdi. B

3. A declaration that having failed to adhere strictly to the provisions of the Electoral Act, 2010 (as amended) and its own constitution and Electoral Guidelines concerning the Gubernatorial Primary for Benue State the 1st defendant could not have validly nominated C the 4th Defendant.

4. An order nullifying the 1st Defendants Gubernatorial primary for Benue State held on the 9th of January, 2011 at the Apex Aku Stadium Makurdi for failure to follow the Electoral Act, 2010 (as amended) and 1st defendants' Constitution and Electoral Guidelines D for Gubernatorial Primaries.

5. An order nullifying the nomination of the 4th Defendant by the 1st defendant because the primary conducted by the 1st defendant on the 9th January, 2011 did not follow the Electoral Guidelines or Constitution of the 1st Defendant and provisions of the Electoral Act, 2010 (as amended) concerning party primaries. E

Selection or nomination of a candidate is done at Party Primaries. So, when a candidate who participated at a Party Primaries complains about the conduct of the Primaries, Section 87(9) of the Electoral Act allows him to apply to the Federal High Court, or State High F Court or a High Court of the Federal Capital Territory for redress. The Choice of court depends on the nature of the claims/reliefs and the parties involved. Claims/reliefs sought must be those that the court can entertain. G

There are five principal reliefs. The rest are alternative and ancillary reliefs. There are four respondents. The 1st respondent is the Peoples Democratic Party (PDP) a Political Party. The 2nd and 3rd respondents are INEC and WAEC, agencies of the Federal Government, while the 4th respondent is an individual, the Governor of H Benue State.

The principal reliefs (1 - 5) are against the 1st and 4th respondents who are not agencies of the Federal Government. The reliefs sought are not within the provision of section 251(1) of the Constitu-

tion. The 2nd and 3rd respondents are agencies of the Federal Government but none of the principal reliefs are directed against them or the Federal Government. Both courts below came to the correct finding that a Federal High Court had no jurisdiction to hear the principal claims. The case ought to have been heard by a State High Court which has unlimited jurisdiction, whittled by section 251 of the Constitution.

A Court cannot hear and determine ancillary claims if it has no jurisdiction to entertain the main/principal claims. See *PDP v. Sylva and 2 Ors* (supra), *Tukur v. Govt of Gongola State* (1989) 4 NWLR (Pt.117) p. 517.

The other claims/reliefs cannot be entertained by a Federal High Court, since that court has no jurisdiction to hear and determine any of the principal claims/reliefs.

For this, and the comprehensive reasoning in the leading judgment, concurrent findings of the two courts below are correct. I, too dismiss the appeal.

AKA'AH S JSC

The main issue in this appeal concerns the conduct of the primary election to nominate the flag bearer of the PDP to contest the Gubernatorial Election in Benue State which held on 9/1/2011. Also the academic qualification of the 4th respondent was also being questioned by the plaintiff.

My learned brother, Suleiman Galadima, JSC made available to me the judgment which has just been delivered. I agree entirely with him that the appeal lacks merit and should be dismissed. The allegation that the 4th respondent presented a forged certificate to satisfy the requirement of academic qualification is criminal and requires proof beyond reasonable doubt. See: section 135(1) Evidence Act. The appellant failed to discharge the burden of proof. It is for this and the more detailed reasons contained in the leading judgment of GALADIMA, JSC that I too dismiss the appeal.