

SUPREME COURT OF NIGERIA
FRIDAY 24TH OCTOBER, 2014. SC. 255/2013
CORAM:- W. S. N. ONNOGHEN, S. GALADIMA,
M. U. PETER-ODILI, K. B. AKA'AH, S,
K. M. O. KEKERE-EKUN, JJSC

JENKINS GIANE DUVIE GWEDE APPELLANT
AND

1. INDEPENDENT NATIONAL
ELECTORAL COMMISSION (INEC)
2. EDOJA RUFUS AKPODIETE
3. JULIUS OGHENEVWEGBA BOBI
4. DEMOCRATIC PEOPLES PARTY (DPP) RESPONDENTS

APPEALS - Fresh issue - Leave - It is against the law to raise for the first time such issue - Without first seeking and obtaining leave of the appellate court (H1)

APPEALS - Issue - Validity of - Where an issue does not arise from any of the grounds of appeal - The issue is incompetent and liable to be struck out (H2)

ELECTIONS - Substitution - CA wrongfully dismissed appellant's suit at trial court - There being no claim before the court - Challenging the validity of nomination by substitution of appellant (H3)

ELECTIONS - Nomination - Appellant from the records was the nominated candidate of 4th respondent - Who participated in the election - And ought to have been issued a certificate of return (H4)

ELECTIONS - List of candidates - Publication of - Status - Publication of such list for election by INEC - Does not confer or take away validity from a duly nominated or substituted candidate (H5)

APPEALS - Issues - Suo motu raising - CA wrongfully raised the issue of irregular nomination of appellant - Without calling for addresses of counsel on the matter - And proceeding to arrive at a decision on same (H6)

ELECTIONS - Nomination - Right of political party - Nomination of candidate for election - Remains within the domestic affairs of political party - And courts have no jurisdiction over same (H7)

APPEALS - Grounds of law - The ground being on jurisdiction of trial court to hear and determine the matter - Is a ground of law for which leave of court is not required before it is filed (H8)

APPEALS - Grounds - Obiter dictum - Objection on ground 3 is sustained - As it is clear that the ground challenges obiter dictum of the Court of Appeal (H9)

ELECTIONS - Hearing - Limit - Time is of essence in election matters - And where a party is guilty of undue delay in instituting pre election matter - Court will decline jurisdiction to entertain same (H10)

ELECTIONS - Result - Challenge - Proper court - Where cause of action in pre election matter - Constitutes one of the grounds to challenge the result - The proper venue is the Election Petition Tribunal (H11)

ELECTIONS - Pre election - Jurisdiction - Such matter instituted prior to election subsists - And the HC where it was instituted - Continues to have jurisdiction over same - Even after election (H12)

ELECTIONS - Participation - Basis - No one contests election in the country - Without first being member of a registered political party - And being sponsored by that party as candidate for the election (H13)

ELECTIONS - Pre election - Justice - Where such matter is instituted timeously in HC - But cause of action cannot be accommodated within Electoral Act s. 138(1) - HC still has jurisdiction - Otherwise party is left without a remedy (H14)

ELECTIONS - Pre election - Judgment - Appellant is declared to be the duly nominated candidate of 4th respondent - And is to be issued with certificate of return forthwith (H15)

FACTS

By an originating summons filed before the Federal High Court Asaba, 1st plaintiff/appellant along with 2nd plaintiff/4th respondent jointly commenced this action seeking the determination of the following questions inter alia, whether appellant who having been duly nominated as the candidate of 4th respondent for the election into the Delta State House of Assembly to represent Ughelli North Constituency II, is not entitled to be issued with a certificate of return in respect of the said election and whether 2nd defendant/2nd respondent who personally signed a letter withdrawing from the election and was validly substituted can validly contend that he is still the candidate of 4th respondent in respect of the election. The following reliefs inter alia were therefore sought from the court to wit: a declaration that appellant being the validly nominated candidate of 4th respondent is entitled to be issued with a certificate of return in respect of the said election and an order directing 1st defendant/1st respondent to issue appellant with a certificate of return.

Appellant's case was that following the withdrawal of 2nd respondent from the election, he (appellant) lawfully substituted the latter as the candidate of 4th respondent for the election. However, 1st respondent eventually made a u-turn by publishing the names of 2nd respondent as candidate of 4th respondent for the same election. On his part, 2nd respondent denied that he withdrew from the election and also contended that the trial court had no jurisdiction to entertain the action, as the matter being pre election was instituted after the conduct of the main election. At the end of trial and the addresses, the court held that it lacked jurisdiction and dismissed the action. Aggrieved, appellant appealed to the Court of Appeal Benin City Division. The court allowed the appeal in part. Although the court found as a fact that 2nd respondent withdrew from contesting the election and that appellant substituted him, yet it refused to grant the reliefs claimed by appellant. Not satisfied, appellant has now appealed to Supreme Court.

ISSUES FOR DETERMINATION

(Main appeal) "1. *Whether the learned Justices of the Court of Appeal were right when after holding that the appellant was used by the political party to substitute the 2nd respondent they refused to*

make consequential orders directing that the appellant be issued with a certificate of return for the Ughelli North II Constituency for the Delta State House of Assembly.

2. Whether the learned Justices of the Court of Appeal were right to have dismissed the suit of the plaintiff before the trial court
B when the Court of Appeal actually resolved the two issues submitted for determination in favour of the appellant.

3. Whether the learned Justices of the Court of Appeal were right when being fully aware that the case of the appellant was based
C on substitution to have gone ahead to invoke Section 32 of the Electoral Act, 2010 to deny the appellant the victory of the Democratic Peoples Party in the election into the seat of Ughelli North Constituency II in the Delta State House of Assembly.

4. Whether the learned Justices of the Court of Appeal did not
D err in failing to acknowledge and accept the appellant as the candidate of the Democratic Peoples Party.

(Cross appeal) ”(1) Whether the Court of Appeal in its majority decision was right to have set aside the decision of the trial Federal High Court declining jurisdiction to hear or try or determine a pre-
E election matter commenced and/or instituted after the actual or main election.

(2) Whether the Court of Appeal was right when it reproached
F the 1st respondent/cross appellant for failing to act on an irregular substitution of candidate made by the 4th respondent.

HELD (Unanimously allowing the appeal per
ONNOGHEN JSC)

G APPEALS - Fresh issue - Leave

1. It is not against the law to raise fresh issue(s) for the first
H time on appeal. What is against the law is to raise such an issue without first seeking and obtaining the leave of the appellate court. This principle is trite law. I have gone through the record and can confirm that the 1st and 2nd respondents neither sought nor were they granted leave of court to raise and argue the said issue before this court. In the circumstance the sole issues as raised by 1st and 2nd respondents are in-

competent and liable to be struck out. (p. 3409 F)

APPEALS - Issue - Validity of

2. Secondly, the 1st and 2nd respondents filed cross appeals but, the sole issues they formulated are not supported by the grounds of the cross appeals they filed. In any event, even if there are grounds or ground to support the issue, the ground(s) would still be incompetent as the same do(es) not arise from the Judgment of the lower court on appeal before us.

In any event the law is settled that for an issue to be valid and competent for consideration by the court, it must arise from a complaint against the decision/Judgment on appeal. Where an issue raised in a brief of argument of either the appellant or respondent(s) does not arise from any of the grounds of appeal, as in the instant case, the issue is incompetent and liable to be struck out.

In consequence I agree with the submission of learned counsel for appellant that the sole issue raised for consideration in the respective brief of 1st and 2nd respondents, haven not arisen from the grounds of appeal filed nor from the grounds of their cross appeals nor even from the Judgment of the lower court on appeal are grossly incompetent and are hereby struck out. (pp. 3409 H/3410 D)

ELECTIONS - Substitution

3. I am of the considered view that the lower court haven made the above findings cannot later be heard to say that the substitution of appellant for the 2nd respondent by the 4th respondent was de facto and not de jure. It must be noted that 2nd respondent did not counter claim as the duly nominated candidate of the 4th respondent for the election in issue. That being the case there was no legal basis for the challenge of the validity of the nomination by substitution of the appellant by the 4th respondent.

Having regards to the facts of this case as found by the lower court and the applicable law on the issue of nomination and/or substitution of a candidate by a political party, I hold the view that the lower court was in error in dismissing the suit of

appellant at the trial court, there being no claim before the court challenging the validity of the nomination by substitution of appellant for the 2nd respondent. The lower court was therefore in error in regarding the substitution of appellant as defective or irregular. (p. 3412 A)

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ELECTIONS - Nomination

4. Going by the record, it is clear that appellant was the nominated candidate of the 4th respondent who participated at the election of 26th April, 2011 and ought to have been issued a certificate of return there being no other candidate of the 4th respondent. (p. 3412 G)

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ELECTIONS - List of candidates - Publication of - Status

5. This court has held that publication of the list of candidates to contest an election by INEC (1st respondent) is an administrative act which does not confer or take away validity from a duly nominated or substituted candidate. Nomination or substitution of a candidate is complete the moment INEC/1st respondent receives the necessary documents effecting same from the political party within the stipulated time.

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(p. 3412 H)

APPEALS - Issues - Suo motu raising

6. Not only was the substitution not challenged or contested by anyone, the issue does not form part of the action before the court as evidenced in questions for determination and the reliefs sought both of which had earlier been reproduced in this Judgment. It follows therefore that the trial court had no opportunity to pronounce on it. It was also not part of the grounds of appeal before the lower court neither was the issue raised properly as arising from the said grounds of appeal for determination as required by law.

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In the circumstance I agree with the submission of counsel for appellant that the issue was raised suo motu by the lower court and without opportunity for the parties, particularly the appellants to address the court on it.

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Though it is settled law that a court may raise an issue

suo motu but where it decides to base its decision on the matter on the issue so raised, the court is duty bound to invite counsel for the parties to address on it, particularly the party who would be adversely affected by the result of the exercise. In the instant case, the lower court raised the issue of irregular nomination of appellant when the issue before the court was substitution and when the court did not call for addresses of counsel on the matter before proceeding to use same in coming to the conclusion that the nomination by substitution of appellant was irregular and consequently unenforceable. The lower court was clearly in error when after holding that 2nd respondent withdrew his candidature for the election and thereby ceased to be the candidate of the 4th respondent and that the said 2nd respondent was subsequently substituted by the 4th respondent with appellant as its sponsored candidate for the election in question, it proceeded to consider the issue as to whether the nomination of the said appellant was regular particularly as the same was never challenged or contested before the court. In the circumstance, I hold the considered view that issues 3 and 4 be and are hereby resolved in favour of appellant. (p. 3415 A/G)

ELECTIONS - Nomination - Right of political party

7. However, the law is settled that the issue of nomination or sponsorship of an election candidate, which includes substitution of such a candidate, remains within the domestic affairs of the political party and the courts have no jurisdiction to nominate a candidate for any political party. (p. 3415 F)

APPEALS - Grounds of law

8. From the facts of the case and the decision of the lower court, there is no dispute as to the relevant facts of the above ground of appeal. The date of the filing of the action, the date of the election in question and the fact that the action as constituted is a pre-election matter are all not in dispute. The question sought to be answered is whether when the relevant principles of law are applied to the undisputed facts the trial court had jurisdiction to entertain the matter as decided by the lower

court or not. I do not agree with the submission of learned counsel for appellant that the ground under consideration deals with limitation and statute bar. It is clearly a ground which challenges the holding of the lower court that the trial court had jurisdiction in the matter. It is a ground on the jurisdiction of the trial court to hear and determine the matter and since it also challenges the application of the relevant principles of law to the established facts it is clearly a ground of law for which leave of the court is not required before it is filed. The objection on that ground is therefore overruled. (p. 3419 H)

APPEALS - Grounds - Obiter dictum

9. On the second arm of the objection, it is clearly a waste of time to reproduce the ground and particulars thereby as it is very clear that the said ground 3 challenges an obiter dictum of the lower court on the attitude and/or conduct of 1st respondent/cross appellant upon being served with the necessary documents substituting appellant for 2nd respondent and its failure and/or neglect to effect same. If the comments of the court in the circumstance is not obiter dictum was the attitude of 1st respondent/cross appellant in the circumstances, the subject of the litigation or does it form an issue before that court? Even if it did, how does a decision thereon, one way or the other, affect the fortune of the case?

In conclusion I hold that there is merit in the objection relating to ground 3 of the grounds of the cross appeal of 1st respondent and the issue formulated there from which objection is hereby sustained as a result of which the said ground 3 and issue 2 formulated there from are hereby struck out. (p. 3420 D)

ELECTIONS - Hearing - Limit

10. It has been held by this Court that in an election or related matter, such as pre-election matter, time is of the essence and that as a general rule where a party is guilty of undue delay in instituting a pre-election matter in the High Court, particularly after the conduct of the election in issue, the court will decline jurisdiction to hear and determine same.

This means that where the cause of action in a pre-election case arose before the conduct of the election but the party failed and or neglected to institute his action in the High Court for redress he may lose his right of action. (p. 3423 B)

ELECTIONS - Result - Challenge - Proper court

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11. Where, however, the cause of action in the pre-election matter also constitutes one of the grounds on which to challenge the result of the election in question, the proper venue for ventilating a party's grievances after the conduct of the election and declaration of result is the Election Petition Tribunal, not the High Court.

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It is clear that there are pre-election matters which can come within the grounds for challenging an election under section 138(1) of the Electoral Act, 2010 as amended and others that may not. Where a pre-election matter is one which can be dealt with under Section 138(1) supra, the proper venue, after election, is the tribunal. (pp. 3423 D/3425 D)

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ELECTIONS - Pre election - Jurisdiction

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12. It is settled law that a pre-election matter instituted prior to the conduct of an election subsists and the High Court in which it was instituted continues to have jurisdiction to hear and determine same even after the conduct of the election.

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The above principle is founded on the principle of lis pendens which prevents any transfer of right or the taking of any step capable of foisting a state of complete helplessness/hopelessness on the parties or the court during the pendency of an action in a court of law. (p. 3423 F)

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ELECTIONS - Participation - Basis

13. The action of appellant is not grounded on the qualification of 2nd respondent/cross appellant to contest the election in question as he never contested the election - he was never a candidate at the election neither has he claimed by an action or counter claim that he was. Secondly, it is settled law that in this country no one can contest an election without first and foremost being a member of a registered political

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party and, secondly, being sponsored by that party as a candidate for the election.

In the instant case, though the 2nd respondent is a member of the 4th respondent it is not in dispute that the 4th respondent did not sponsor him for the election in question but
B the appellant. (p. 3424 E)

ELECTIONS - Pre election - Justice

14. It follows therefore that where a cause of action in a pre-election matter, of the nature of the facts of this case, arising
C from the declaration of results is instituted timeously in the High Court and the cause of action cannot be accommodated within the grounds of challenging an election stated in Section 138(1) of the Electoral Act, 2010 (as amended), the High
D Court will have jurisdiction to hear and determine the matter otherwise the party will be left without a remedy which will result in injustice.

Where, however the pre-election matter cannot so be accommodated after an election and the cause of action arose in the
E election or declaration of results and action is instituted timeously, the proper venue remains the High Court. In other words, an issue of qualification to contest an election under the Electoral Act, 2010, as amended, is both pre-election and
F an election matter which both the High Court and the relevant Election Tribunals have jurisdiction to hear and determine. However, the pre-election matter must be filed in the High Court timeously. (p. 3425 A/E)

ELECTIONS - Pre election - Judgment

15. In consequence, I enter judgment in favour of appellant in the following terms:

1. Appellant, JENKINS GIANE DUVIE GWEDE is hereby declared to be the duly nominated candidate by substitution of the 4th respondent for the election in respect of
H Ughelli North Constituency II of the Delta State House of Assembly and is entitled to be issued with a certificate of return in respect of same.

2. The 1st respondent is hereby ordered to issue the

said appellant with a certificate of return in respect of the said House of Assembly election held on 26th April, 2011, forthwith.

3. The 2nd respondent EDOJA RUFUS AKPODIETE is hereby ordered to vacate the seat of Ughelli North Constituency II in the Delta State House of Assembly forthwith. B

4. It is further ordered that the said 2nd respondent EDOJA RUFUS AKPODIETE refunds to the coffers of the Delta State House of Assembly all moneys/sums of money he collected by way of salary, allowances whatsoever and howsoever described since he took his seat in the said House of Assembly under the pretext of being the duly elected candidate of the 4th respondent representing Ughelli North Constituency II, within ninety (90) days of this order. C

(p. 3427 C)

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NOTABLE POINTS OF INTEREST

ONNOGHEN JSC

1. Respondent's notice – Purpose of

In the instant case, neither the 1st nor 2nd respondent filed a respondent's notice. In any event, even if they had filed one, the purpose/subject/intention of a respondent notice is that the Judgment of the lower court be affirmed on grounds other than those relied upon by that court in reaching the decision on appeal. The ground(s) relied upon in the respondent notice must be apparent on the record having regards to the facts of the case, the law applicable thereto and the Judgment on appeal. A respondent notice is therefore not an open cheque. (p. 3410 B)

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2. INEC to do more in strengthening our democracy

In respect of the main appeal I have to observe that the attitude of the 1st respondent/cross appellant in the facts leading to this case is very much worrisome. It has been said time and again by this court that the issue of nomination and substitution of candidate for any election remains the absolute preserve of the registered political party over which the court has no jurisdiction, including the 1st respondent. In the instant case 1st respondent acted outside this principle

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when it issued a certificate of return to the 2nd respondent despite the fact that 1st respondent knew that 2nd respondent had ceased, more than 45 days to the election in question to be the sponsored candidate of the 4th respondent. To adopt the 2nd respondent as a ‘candidate’ of the 4th respondent in the circumstance is very unfortunate and send wrong signals to the polity. It is a very bad wind which blows no one any good, and ought not to be encouraged in any democracy. The action of 1st respondent has foisted on the electorate of Ughelli North Constituency II of Delta State House of Assembly a pretender to the seat who not only withdrew from the election in writing but collected the deposit he paid to the 4th respondent for the said election. He was clearly not a candidate for the election, let alone a candidate sponsored by a political party as required by the law. The 1st respondent has been doing much for democracy but from the facts of this case it needs to do much more. To overcome the present culture of impunity in the political environment all hands must be on deck particularly the hands of those entrusted with the responsibility of ensuring an even playing field for the political actors/ gladiators, otherwise the future of our democracy is very bleak indeed! (p. 3426 E)

REPRESENTATION

Ikhide Ehiguelua, Esq. with Messrs Gospel Odunna and A.E. Alagun, for appellant/cross respondent
 Ibrahim K. Bawa, Esq. with Messrs A.B. Umar, Alhassah A. Umar and I.S. Mohammed, for 1st respondent
 M.E. Oruma, Esq. for 2nd respondent/cross appellant
 Joe Agi SAN with Messrs Suleiman Usman, K.E.A. Akonjom and Asah Usman, for 4th respondent/cross appellant
 3rd respondent Julius O. Bobi not represented

CASES REFERRED TO

Amaechi v. INEC (2008) IMJSC 1
 Peretu v. Gariga (2013) 5 NWLR (pt. 1348) 415
 Uzodinma v. Izunaso (No.2) (2011) 17 NWLR (pt. 1275) 30
 Olufu v. Itodo (2010) 18 NWLR (pt. 1225) 545
 Igwege v. Ezeugo (1992) 6 NWLR (pt. 249) 561
 Chikwendu v. Mbamah (1980) 3 SC 31

Ojomu v. Ajao (1983) 9 SC 22

Lokoyi v. Olojo (1983) 8 SC 61

CHAMI v. UBA Plc (2010) 6 NWLR (pt. 1191) 474

Ezukwu v. Ukadukaru (2004) All FWLR (pt. 224) 2137

Gabo v. Inland Bank Nig. Plc (1998) 11 NWLR (pt. 574) 433

Kubor v. Dickson (2013) All FWLR (pt. 676) 392

Onuoha v. Okafor (1983) SCNLR 244

Dalhatu v. Turaki (2003) 15 NWLR (pt. 843) 310

Justice Party v. INEC (2006) All FWLR (pt. 339) 907

STATUTES REFERRED TO

Electoral Act 2010 (as amended), s. 32(4), 33, 35, 87(10), 138(1), 141

Supreme Court Act, s. 22

LEAD JUDGMENT BY ONNOGHEN JSC

This is an appeal against the judgment of the Court of Appeal Holden at Benin City in appeal No. - CA/B/237/2012 delivered on the 22nd day of May, 2013 in which the court resolved the two issues calling for determination in favour of appellant but concluded by allowing the appeal in part and dismissed the claims of the appellant who was the 1st plaintiff at the trial court in suit No. FHC/ASB/CS/110/2011.

The facts of the case include the following:

The 2nd respondent, together with the present appellant are members of the 4th respondent, Democratic Peoples Party (DPP), a registered political party, the 2nd plaintiff in the suit. The 1st plaintiff is the present appellant, while the 2nd plaintiff is the 4th respondent in this court.

The present 2nd respondent contested and won the primary election of the 4th respondent for the election into Ughelli North Constituency II for the Delta State House of Assembly. Later on, the 2nd respondent, by notice in writing to the 4th respondent withdrew from contesting the said election, collected his deposit of N2 million paid to the 4th respondent for the purpose of contesting the election as a result of which appellant was used by the 4th respondent to substitute the 2nd respondent. The documents used in effecting the substitution were tendered and admitted as exhibit P1 at the court of

trial. After the substitution, the 1st respondent, INEC published a list of candidates for the said election which list included the name of appellant as the candidate of the 4th respondent. However, without any further instruction or input from the 4th respondent, the 1st respondent released another list in which the 1st respondent put in the name of 2nd respondent instead of that of appellant, as the candidate of the 4th respondent.

On his part, 2nd respondent denied that he withdrew from the election and also contended that the trial court had no jurisdiction to entertain the action, an election haven taken place as the matter is a pre-election matter. The election in issue was conducted on the 26th day of April, 2011 while the action was instituted on the 29th day of April, 2011.

The claim of appellant at the trial court was for the determination of the following questions:-

(a) Whether the 1st plaintiff who having been duly nominated as the candidate of the 2nd plaintiff for the election into the Delta State House of Assembly to represent Ughelli North Constituency II in the Delta State House of Assembly and the 2nd plaintiff having won the election whether the 1st plaintiff is not entitled to be issued with a certificate of return in respect of the said election.

(b) Whether the 2nd Defendant who personally signed a letter withdrawing from the election and was validly substituted by the 1st plaintiff as the candidate can validly contest that he is still the candidate of the 1st plaintiff in respect of the material election.

(c) Whether the 1st defendant can pick and choose candidate for the 2nd plaintiff, a political party.

The plaintiffs then sought the following reliefs:

(a) A declaration that the 1st plaintiff being the validly nominated candidate of the 2nd plaintiff is the person entitled to be issued with a certificate of return in respect of the House of Assembly election in Ughelli North II Constituency of Delta State.

(b) An order of the Honourable Court directing the 1st defendant to issue the 1st plaintiff with a certificate of return in respect of the House of Assembly for Ughelli North II Constituency of Delta State.

(c) An order restraining the 1st defendant from recognizing the 2nd defendant as the candidate of the 2nd plaintiff and also from

issuing any certificate of return in the name of the 2nd defendant.

In the course of trial and following the conflicts that arose concerning the issue of withdrawal of candidacy for the election by the 2nd respondent and other incidentals, the trial court ordered oral evidence to be taken which was done. At the conclusion of hearing, the trial court not only concluded that it has no jurisdiction to hear and determine the matter but dismissed same in a judgment delivered on the 27th day of June, 2012. B

Being dissatisfied with the decision of the trial Judge, the 1st plaintiff appealed to the lower court in appeal No. CA/B/237/2012 in which appellant raised two issues for determination to wit: C

“(1) Whether the lower court was right in declining jurisdiction over the suit before it (Ground 1) and,

(2) Whether the lower court was right when it concluded that the 2nd respondent did not withdraw from contesting the material election and was not substituted by the political party (Grounds 2, 3, 4, 5, 6 and 7)”.

In a judgment delivered on 22nd day of May, 2013, the lower court resolved the above issues in favour of appellant though the 2nd issue was so resolved in part leading to the court refusing to grant any of the reliefs sought by the appellant, which reliefs, the court consequently dismissed. The instant appeal is against the above judgment of the lower court. E

Though, as stated earlier, only two issues were submitted to the lower court for determination and which were accordingly so determined, the present appeal has generated four issues by the appellant in the appellant’s brief filed on 5/6/13 and adopted in the argument of the appeal on 30th day of September, 2014. The issues are as follows: F

“1. Whether the learned Justices of the Court of Appeal were right when after holding that the appellant was used by the political party to substitute the 2nd respondent they refused to make consequential orders directing that the appellant be issued with a certificate of return for the Ughelli North II Constituency for the Delta State House of Assembly. (Ground 1) G

2. Whether the learned Justices of the Court of Appeal were right to have dismissed the suit of the plaintiff before the trial court when the Court of Appeal actually resolved the two issues submitted H

for determination in favour of the appellant. (Ground 2)

3. *Whether the learned Justices of the Court of Appeal were right when being fully aware that the case of the appellant was based on substitution to have gone ahead to invoke Section 32 of the Electoral Act, 2010 to deny the appellant the victory of the Democratic Peoples Party in the election into the seat of Ughelli North Constituency II in the Delta State House of Assembly. (Ground 3)*

4. *Whether the learned Justices of the Court of Appeal did not err in failing to acknowledge and accept the appellant as the candidate of the Democratic Peoples Party. (Ground 4)”*

It is important, at this stage, to state that there are three cross appeals in this appeal. The cross appellants are the 1st respondent, 2nd respondent and 4th respondent.

In respect of the cross appeal of the 1st respondent, the issues, as identified for determination by IBRAHIM K. BAWA ESQ in the brief deemed filed and served on 30/9/14 are as follows:-

“(1) *Whether the Court of Appeal in its majority decision was right to have set aside the decision of the trial Federal High Court declining jurisdiction to hear or try or determine a pre-election matter commenced and/or instituted after the actual or main election. (Distilled from grounds 1 and 2 of the grounds of cross appeal)*

(2) *Whether the Court of Appeal was right when it reproached the 1st respondent/cross appellant for failing to act on an irregular substitution of candidate made by the 4th respondent. (Distilled from ground 3 of the grounds of cross-appeal)”*

In respect of the cross-appeal of the 2nd respondent, the following three issues have been identified for determination by learned counsel for 2nd respondent/cross appellant, CHIEF P.O. WANOGHO in the brief of argument filed on 30th July, 2013:

“(1) *Whether or not the court below was right in law when the court below (in the majority judgment) held that it is “my firm humble view on the issues that if a litigant is not guilty of inordinate delay as happened in Hassan vs Aliyu, he may file the action against his unlawful nomination or substitution within a reasonable time even after the election” and proceeded to hold that the trial court had jurisdiction to entertain and/or adjudicate over this pre-election dispute or matter instituted or commenced in the trial court after the main or actual election, thereby reversing the decision of the trial*

court, which declined jurisdiction in respect of a pre-election matter instituted and/or commenced after the actual or main election.

(2) Whether the court below was right in reversing the findings of fact of the trial court which held that the appellant did not prove that the 2nd respondent/cross appellant withdrew his candidature from the election, the subject matter of this appeal, and the court below proceeded to hold that the 2nd respondent/cross appellant withdrew his candidature from the election, the subject matter of this appeal. ^B

(3) Whether the court below was right in law when the court below held that a counsel who represented a party in trial court, could file an appeal and conduct the appeal against the party, the said counsel represented as joint plaintiff in the trial court.” ^C

On the other hand, a single issue has been submitted for determination of the 4th respondent's cross appeal by learned counsel ^D for 4th respondent, SULEIMAN USMAN ESQ in the 4th Respondent's/ Cross Appellant Brief filed on 7th June. 2013. The issue is as follows:-

“Whether in the circumstances of this Appeal, the lower court was right when it concluded that the substitution of the Appellant and his nomination are irregular and therefore not entitled to the reliefs sought in his originating summons. (Ground 2, 3 and 4 of the Notice of Cross Appeal)” ^E

From the above issues, it is clear that the issues submitted for determination or the substance of the cross appeals of 1st and 2nd ^F respondents are/is the same while that of the 4th respondent is akin to the main appeal. In determining the appeals, I will keep the above observation constantly in mind.

Learned Counsel for appellant argued issues 1 & 2 together ^G and submitted that there is no doubt at all that the lower court, in resolving the two issues before it, found as a fact that the 2nd respondent withdrew from the election contest and that the political party forwarded the name of the appellant to INEC as the person used to substitute the 2nd respondent more than 45 days before the holding ^H of the election; that there is no suit challenging the substitution of the 2nd respondent with appellant as such at all material times appellant was the candidate of the 4th respondent for the election in question.

It is also the submission of Counsel that it is settled law that the

nomination of candidate by a political party is within the domestic/ internal affairs of the political party concerned; that the 4th respondent and INEC/1st respondent did not complain of the nomination of appellant and that the lower court was therefore in error in holding that the nomination of appellant was impaired or irregular, that
 B the lower court having agreed that the 2nd respondent withdrew from the election and that appellant was substituted in his stead by 4th respondent without challenge, appellant remained the candidate of the party concerned.

C It is the further contention of learned counsel that granted, without conceding, that the reliefs claimed in the Originating Summons cannot be granted, the court has the powers to grant consequential orders to give effect to its judgment, relying on Amaechi vs INEC (2008) IMJSC 1; that the lower court having found that the
 D 2nd respondent withdrew from the election long before the holding of the election it ought to have granted the reliefs sought and ordered the withdrawal of the certificate of return issued to the 2nd respondent during the pendency of the suit - relying on Peretu vs Gariga (2013) 5 NWLR (Pt.1348) 415.

E It is also the further contention of learned counsel that the labeling of appellant as a “de facto” candidate of the 4th respondent and not a “de jure” does not arise as no other member of the 4th respondent was in contest with the appellant over the issue of substitution: that once a political party puts forward a person as its candidate for an election, the electoral body or the court cannot reject that
 F candidate; that where there is a problem with the nomination of a candidate, it remains the internal affair of the party which is not justiciable, relying on Uzodinma vs Izunaso (No.2) (2011) 17 NWLR (Pt.1275) 30; Olufu vs Itodo (2010) 18 NWLR (Pt. 1225) 545; that
 G even if the nomination of appellant was irregular, which counsel does not concede, it only makes same voidable and not void which makes same good until avoided; that no steps have been taken to avoid the alleged irregular nomination.

H Finally counsel urged the court to resolve the issues in favour of appellant.

On his part, learned counsel for the 1st respondent argued all the issues raised by appellant under a single issue which had earlier been reproduced in this judgment. It is the contention of learned

counsel that the lower courts found as a fact that appellant was not validly nominated to contest the election in question; that the said finding is concurrent which this Court should not disturb particularly as same have not been shown to have been perverse or resulted in a miscarriage of justice etc, relying on *Igwege vs. Ezeugo* (1992) 6 NWLR (Pt.249) 561; *Mogo Chikwendu vs. Mbamah* (1980) 3 SC 31; *Ojomu vs. Ajao* (1983) 9 S.C. 22 at 53; *Lokoyi vs. Olojo* (1983) 8 S.C. 61 at 68; etc.

It is the further contention of counsel that since appellant did not participate in the election of 26th April, 2011 he cannot be declared the winner of that election to be entitled to the certificate of return, relying on section 141 of the Electoral Act, 2010 (as amended) and the decision of this Court in appeal No. SC/281/2012 between Congress for Progressive Change & Anor vs Hon. E.D. Ombugado & Anor (unreported) delivered on Friday, 19th July, 2013 at page 40. Learned Counsel then urged the court to dismiss the appeal.

In the reply brief to the 1st respondent's above submission filed on 16/12/13, counsel for appellant referred to the sole issue argued supra and submitted that it does not arise from the grounds of appeal filed in this appeal neither does it arise from the judgment of the lower court on appeal; that 1st respondent cannot go outside the grounds of appeal and the judgment of the lower court to formulate issue(s), relying on *Union Bank of Nigeria Plc vs Astra Builders W.A.) Ltd* (2010) 5 NWLR (Pt.1181) 1 at 21; *CHAMI vs U.B.A. Plc* (2010) 6 NWLR (Pt.1191) 474 at 496. *Ezukwu vs Ukadukaru* (2004) All FWLR (Pt. 224) 2137 at 2148, (2004) 17 NWLR (Pt 902) 227, *Gabo vs. Inland Bank Nig. Plc* (1998) 11 NWLR (Pt. 574) 433 at 438.

It is the further contention of learned counsel that though 1st respondent cross appealed, he did not file a respondent's notice in the main appeal and that the sole issue does not relate to the grounds of the cross appeal and that the issue being incompetent, it should be struck out, as well as the arguments proffered thereon.

There is also the submission by learned Counsel that the 1st respondent's brief was filed out of time which submission has been overtaken by events as the said 1st respondent's brief was, by orders of this Court, deemed filed and served, as earlier stated in this judgment, on the 30th day of September, 2014.

By way of an alternative, learned counsel submitted that the finding of fact by the lower court that 2nd respondent withdrew his candidacy and that appellant was used to substitute him mean clearly that appellant was the duly nominated candidate of the 4th respondent and that he took part fully in all the stages of the election and did win the election; that the lower court did not hold that the nomination of appellant was void but that it was irregular; that the issue of Section 141 of the Electoral Act 2010, *supra*, does not arise neither has 1st respondent sought leave to raise the fresh issue before this Court; that once nomination is done, publication of the list of candidates is not fundamental or condition precedent to the validity of the nomination, relying on *Kubor vs Dickson (2013) All FWLR (Pt.676) 392 at 426 - 427; 434 - 435*; that the case of *Congress for Progressive Change vs Ombugadu supra* has no relevance to the facts of this case and urged the Court to resolve the issue against 1st respondent.

As regards the 2nd respondent, the issue formulated by Counsel for 2nd respondent in respect of the main appeal is very much like the above sole issue of the 1st respondent. The issue formulated by counsel for 2nd respondent reads:

“Whether or not by virtue of the provision of Section 141 of the Electoral Act, 2010 (as amended, a person who was not nominated to contest and or who did not participate in the main or actual election as a candidate, could be declared under any circumstance as the “winner at an election in which such a person has not fully participated in all the stages of the said election.”

I make haste to note that the argument of learned counsel for 2nd respondent on the above issue is very similar to that presented by counsel for 1st respondent which I had earlier reproduced in this Judgment and therefore deserves no further repetition herein. The observation applies to the argument in reply to the 2nd respondent’s said sole issue as contained in the reply brief filed on 16/08/13.

In respect of the 3rd respondent it is necessary to note that by a declaration filed on 19/5/14 under Order 2 Rule 1 of the Rules of this Court, the 3rd respondent declared his intention not to be present in court nor be represented at the hearing of the appeal neither did he intend to submit any argument thereat.

On behalf of the 4th respondent, it is submitted that the lower

court haven found as a fact that 2nd respondent withdrew his candidature and that appellant was substituted for 2nd respondent, it follows that for all intents and purposes, appellant was the candidate of the 4th respondent; that a political party has unfettered right to nominate and sponsor a candidate of its choice for any election, rely on Onuoha Vs Okafor (1983) SCNLR 244; Dalhatu Vs Turaki (2003) 15 NWLR (Pt.843) 310; Justice Party Vs INEC (2006) All FWLR (Pt.339) 907 at 916. Uzodinma Vs Izunaso (No.2) (2011) 17 NWLR (Pt.1275) 30; that it is only a political party that can nominate and sponsor a candidate for an election and urged the court to resolve the issue in favour of appellant.

To begin with, I have carefully gone through the grounds of appeal filed in this case. After going through the record of proceedings and Judgment of the trial Judge, the two issues submitted to the lower court for determination and earlier reproduced in this Judgment and have come to the irresistible conclusion that the sole issues submitted for determination by the respective counsel for 1st and 2nd respondents do not arise from the grounds of appeal filed by appellant neither do they arise from the Judgment of the lower court on appeal before this court. The issue of applicability or effect of Section 141 of the Electoral Act 2010 as amended, to the facts of this case was neither raised nor considered in the Judgment of the lower courts. The record also confirms the fact that the said issue, under the circumstance, is a fresh issue raised by the 1st and 2nd respondents for the first time in this court.

It is not against the law to raise fresh issue(s) for the first time on appeal. What is against the law is to raise such an issue without first seeking and obtaining the leave of the appellate court. This principle is trite law. I have gone through the record and can confirm that the 1st and 2nd respondents neither sought nor were they granted leave of court to raise and argue the said issue before this court. In the circumstance the sole issues as raised by 1st and 2nd respondents are incompetent and liable to be struck out.

Secondly, the 1st and 2nd respondents filed cross appeals but, the sole issues they formulated are not supported by the grounds of the cross appeals they filed. In any event, even if there are grounds or ground to support the issue, the

ground(s) would still be incompetent as the same do(es) not arise from the Judgment of the lower court on appeal before us. In the case of Chomi Vs U.B.A. PLC (2010) 6 NWLR (Pt.1191) 474 at 496, I stated the position of the law, inter alia:

“It is settled law that where a respondent filed neither a cross appeal nor respondents notice, he does not have an unbridled freedom to raise issues for determination which have no bearing or relevance to the ground(s) of appeal filed”

In the instant case, neither the 1st nor 2nd respondent filed a respondent’s notice. In any event, even if they had filed one, the purpose/subject/intention of a respondent notice is that the Judgment of the lower court be affirmed on grounds other than those relied upon by that court in reaching the decision on appeal. The ground(s) relied upon in the respondent notice must be apparent on the record having regards to the facts of the case, the law applicable thereto and the Judgment on appeal. A respondent notice is therefore not an open cheque.

In any event the law is settled that for an issue to be valid and competent for consideration by the court, it must arise from a complaint against the decision/Judgment on appeal. Where an issue raised in a brief of argument of either the appellant or respondent(s) does not arise from any of the grounds of appeal, as in the instant case, the issue is incompetent and liable to be struck out. See Seagull Oil Ltd. Vs. Mom Pulo Ltd. (2011) 5 NWLR (Pt.525 at 540). **In consequence I agree with the submission of learned counsel for appellant that the sole issue raised for consideration in the respective brief of 1st and 2nd respondents, haven not arisen from the grounds of appeal filed nor from the grounds of their cross appeals nor even from the Judgment of the lower court on appeal are grossly incompetent and are hereby struck out.**

I now proceed to consider issues 1 and 2 as argued together by counsel for appellant.

It is not in doubt that the lower court considered the two issues submitted by appellant to it for determination. At the risk of repetition I reproduce the issues here below -

“1. Whether the lower court was right in declining jurisdiction over the suit before it. (Ground 1)

2. Whether the lower court was right when it concluded that the 2nd respondent did not withdraw from contesting the material election and was not substituted by the political party”.

Also not in doubt is the fact that at page 1252 of the record, which is part of the Judgment of the lower court, the lower court held thus -

“In the circumstances, I resolve the first issue in favour of the appellant.”

In respect of the 2nd issue, the court held, inter alia at pages 1265 - 1266 of the record, also part of the Judgment on appeal thus:

“The answer to the issue of substitution is clear. Page 3 of the Exhibit P1 submitted and addressed to INEC shows that the 4th de facto substituted the Appellant for the 2nd respondent, whether there was a de jure substitution in law is another matter which I will explain anon. I have to arrive at the conclusion in this case the learned trial Judge with the greatest respect shut his eyes to the obvious, on the issue of withdrawal and de-facto substitution of the appellant.” See page 1265 - 1266.

Prior to the above, the lower court had held, at page 1264, on whether 2nd respondent withdrew his candidacy stated, inter alia as follows:

“The fact that the nomination papers of the appellant got to Abuja before the date the 2nd respondent withdrew his candidature in writing is in my humble view of no moment. What is important to establish and what was established during the cross examination of the 2nd respondent was that he at a point wrote a letter to withdraw his candidature and also took back his nomination deposit from the party. From that day he was no longer a candidate of the party... I agree that the learned trial Judge shut its (sic) eyes to the first four pages of Exhibit P1 which show that the 2nd respondent withdrew from the election and was substituted by the political party.”

With the above findings by the lower court one wonders the basis on which the 2nd respondent was allowed by the lower court to continue to function in an office he never contested nor was ever elected to. If the lower court found from the evidence on record that 2nd respondent did not only withdraw his candidature but collected his deposit for the nomination from the 4th respondent and that

from that day, the 2nd respondent was no longer a candidate of the party “...and was substituted by the political party” then that, to my mind is the end of the matter.

I am of the considered view that the lower court haven made the above findings cannot later be heard to say that the substitution of appellant for the 2nd respondent by the 4th respondent was de facto and not de jure. It must be noted that 2nd respondent did not counter claim as the duly nominated candidate of the 4th respondent for the election in issue. That being the case there was no legal basis for the challenge of the validity of the nomination by substitution of the appellant by the 4th respondent. The lower court agreed that:

“There is no doubt that as far as sponsorship, nomination and substitution are concerned. the position of the political party is of paramount importance and it is the right of the party to nominate sponsor and/or substitute a candidate and as long as the political party complied with the legal procedure for the exercise neither INEC nor the courts can tamper with or question the rights or duty of the political party to do so” See page 1264 of the record.

Having regards to the facts of this case as found by the lower court and the applicable law on the issue of nomination and/or substitution of a candidate by a political party, I hold the view that the lower court was in error in dismissing the suit of appellant at the trial court, there being no claim before the court challenging the validity of the nomination by substitution of appellant for the 2nd respondent. The lower court was therefore in error in regarding the substitution of appellant as defective or irregular.

Going by the record, it is clear that appellant was the nominated candidate of the 4th respondent who participated at the election of 26th April, 2011 and ought to have been issued a certificate of return there being no other candidate of the 4th respondent.

This court has held that publication of the list of candidates to contest an election by INEC (1st respondent) is an administrative act which does not confer or take away validity from a duly nominated or substituted candidate. Nomination or substitution of a candidate is complete the moment INEC/

1st respondent receives the necessary documents effecting same from the political party within the stipulated time. See Kubor Vs Dickson (2013) All FWLR (Pt 676) 392 at 426 - 427.

I therefore resolve issues 1 and 2 in favour of appellant.

On the 3rd and 4th issues which learned counsel for appellant also argued together, it is the submission of counsel that the basis for substitution of a candidate at an election is as stated in Sections 33 and 35 of the Electoral Act, 2010 (as amended) and that once there is evidence of withdrawal of a candidate followed by the act of forwarding another name to INEC by the political party concerned, the substitution is completed and consummated; that no one has challenged the substitution made by the 4th respondent in this case and as such the process of substitution was complete; that the issue of nomination or sponsorship in an election of candidate is within the domestic affairs of the political party and that the courts have no jurisdiction to nominate, for a political party its candidate for any election, relying on Ugwu Vs Ararume (2007) All FWLR (Pt. 477) 807 at 896 - 897; Emeka Vs Okadigbo (2012) 18 NWLR (Pt.1331) 55 at 108, Dalhatu Vs Turaki (2003) 15 NWLR (Pt.843) 310 etc, etc; that assuming without conceding that the same persons who nominated the withdrawn candidate, the 2nd respondent in this case, were also the same persons who nominated the appellant, the same is not sufficient reason not to recognize the substitution. It is the further submission of counsel and rightly too, that once a candidate has withdrawn, the person who nominated him and their nomination, cannot be reckoned with again, relying on Section 32(4) of the Electoral Act, 2010, as amended.; that haven found that the 2nd respondent had withdrawn from the contest the issue of nomination of the said 2nd respondent ceased to be of any relevance; that the issue of irregularity of the nomination of appellant was raised suo motu by the lower court as it never arose from the decision of the trial court nor on appeal or cross appeal before the lower court; that the lower court was therefore in error in using the issue so raised suo motu in deciding the matter particularly as the issue of nomination form is not relevant in the determination of the issue as to whether or not there had been a substitution pursuant to Sections 33 and 35 of the Electoral Act 2010 (as amended). Finally counsel urged the court to resolve the issues in favour of appellant.

It is the contention of learned counsel that this is a proper case for the court to invoke its power under Section 22 of the Supreme Court Act to grant the reliefs claimed by appellant at the court of first instance, relying on Amaechi Vs. INEC (2008) All FWLR (Pt.407) 1, Inakoju Vs. Adeleke (2007) 4 NWLR (Pt.1025) 1423; B Obi Vs. INEC (2007) All FWLR (Pt.378) 1116; Alawe Vs. Ogunsanya (2013) 5 NWLR (Pt.1348) 570 etc.

I had already stated/held that the 1st and 2nd respondents, sole issues which they formulated and argued in their respective briefs of arguments did not arise from the grounds of appeal or the decision on appeal or the grounds of their respective cross appeals; that the issue is a fresh issue which was raised and argued in the briefs without prior leave of the court and consequently struck out. In respect of the 4th respondent, it is its contention that the appeal be D allowed.

I had dealt much with the present issues while resolving issues 1 and 2 earlier in this Judgment.

Sections 33 and 35 of the Electoral Act, 2010, as amended provide as follows:

E *“33. A political party shall not be allowed to change or substitute its candidate whose name has been submitted pursuant to section 32 of this Act except in the case of death or withdrawal in writing by the candidate.*

F *35. A candidate may withdraw his candidature by notice in writing signed by him and delivered by him to the political party that nominated him for the election and the political party shall convey such withdrawal to the commission not later than 45 days to the election.”*

G The lower court did find/hold that the 2nd respondent withdrew his candidature for the election in issue in writing which withdrawal was conveyed by the 4th respondent as required by law more than 45 days before the election. As earlier held by me, the withdrawal of the candidature of the 2nd respondent was valid and complete as well as the substitution of appellant for the 2nd respondent H as the candidate for the said election. As evidenced on record the withdrawal and substitution exercise was never challenged by any member of the party concerned (the 4th respondent) including the 2nd respondent who was substituted. There being no challenge of

the said substitution the issue of the validity or regularity of the substitution never arose for determination.

Not only was the substitution not challenged or contested by anyone, the issue does not form part of the action before the court as evidenced in questions for determination and the reliefs sought both of which had earlier been reproduced in this Judgment. It follows therefore that the trial court had no opportunity to pronounce on it. It was also not part of the grounds of appeal before the lower court neither was the issue raised properly as arising from the said grounds of appeal for determination as required by law.

In the circumstance I agree with the submission of counsel for appellant that the issue was raised suo motu by the lower court and without opportunity for the parties, particularly the appellants to address the court on it.

Though it is settled law that a court may raise an issue suo motu but where it decides to base its decision on the matter on the issue so raised, the court is duty bound to invite counsel for the parties to address on it, particularly the party who would be adversely affected by the result of the exercise. In the instant case, the lower court raised the issue of irregular nomination of appellant when the issue before the court was substitution and when the court did not call for addresses of counsel on the matter before proceeding to use same in coming to the conclusion that the nomination by substitution of appellant was irregular and consequently unenforceable.

However, the law is settled that the issue of nomination or sponsorship of an election candidate, which includes substitution of such a candidate, remains within the domestic affairs of the political party and the courts have no jurisdiction to nominate a candidate for any political party.

The lower court was clearly in error when after holding that 2nd respondent withdrew his candidature for the election and thereby ceased to be the candidate of the 4th respondent and that the said 2nd respondent was subsequently substituted by the 4th respondent with appellant as its sponsored candidate for the election in question, it proceeded to consider the issue as to whether the nomination of the said appel-

lant was regular particularly as the same was never challenged or contested before the court. In the circumstance, I hold the considered view that issues 3 and 4 be and are hereby resolved in favour of appellant.

I will proceed to consider the cross appeals.

B Learned counsel for the 1st respondent/cross appellant has submitted two issues for the determination of the cross appeal. These are:

C *“(1) Whether the Court of Appeal in its majority decision was right to have set aside the decision of the trial Federal High Court declining jurisdiction to hear or determine a pre-election matter commenced and/or instituted after the actual or main election. (Distilled from grounds 1 and 2 of the grounds of cross-appeal)*

D *“(2) Whether the Court of Appeal was right when it reproached the 1st respondent/cross appellant for failing to act on an irregular substitution of candidate made by the 4th respondent (Distilled from ground 3 of the grounds of cross-appeal)”*

In respect of the 2nd respondent’s cross appeal, the following three issues have been submitted for determination to wit:

E *“(1) Whether or not the court below was right in law when the court below (in the majority judgment) held that it is “my firm but humble view on this issue that if a litigant is not guilty of inordinate delay as happened in Hassan v. Aliyu, he may file the action against his unlawful nomination or substitution within a reasonable time even after the election”, and proceeded to hold that the trial court had jurisdiction to entertain and/or adjudicate over this pre-election dispute or matter instituted or commenced in the trial court after the main or actual election, thereby reversing the decision of the trial court, which declined jurisdiction in respect of a pre-election matter instituted and/or commenced after the actual or main election.*

H *“(2) Whether the court below was right in reversing the findings of fact of the trial court which held that the appellant did not prove that the 2nd respondent/cross appellant withdrew his candidature from the election, the subject matter of this appeal, and the court below proceeded to hold that the 2nd respondent/cross appellant withdrew his candidature from the election, the subject matter of this appeal.*

“(3) Whether the court below was right in law when the court

below held that a counsel who represented a party in trial court, could file an appeal and conduct the appeal against the party, the said counsel represented as joint plaintiff in the trial court."

The third and final cross appeal is that filed by the 4th respondent the issue for the determination of which has been identified as follows:- B

"Whether in the circumstances of this appeal, the lower court was right when it concluded that the substitution of the appellant and his nomination are irregular and therefore not entitled to the reliefs sought in his originating summons. (Ground 2, 3 and 4 of the Notice of Cross Appeal)" C

I have to observe that 1st and 2nd respondent/cross appellants' issue 1 are the same in that they attack the holding by the lower court that the trial court had jurisdiction to hear and determine the suit as constituted and thereby set aside the decision of that court on the issue. The above being the case, I intend to treat both issues together. D

Before proceeding to do so, however, there is a preliminary objection raised by learned counsel for appellant/1st cross respondent attacking grounds 1 and 2 of the grounds of 2nd respondent's cross appeal and issues 1 and 2 formulated therefrom. E

The grounds of the objection are said to be that the said grounds 1 and 2 of the notice of cross appeal of the 2nd respondent are grounds of fact or at best grounds of mixed fact and law in respect of which no leave was sought and obtained and that issues 1 and 2 arising from the said incompetent grounds are in consequence incompetent. F

Learned counsel for appellant also raised objection to grounds 1 and 3 of the 1st respondent's cross appeal and the issues formulated therefrom. G

The grounds of the objection are that ground 1 of the grounds of cross appeal is on mixed law and fact in respect of which no leave was sought while ground 3 is said to be a challenge to an obiter dictum as against the ratio decidendi of the lower court. It is the further contention of counsel that issue 1 formulated from the incompetent ground 1 is incompetent and liable to be struck out as well as the issue which derives from ground 3. H

I will take the objection in relation to 1st respondent's cross

appeal first.

It is the submission of counsel for appellant that ground 1 of the grounds or cross appeal raises the question of limitation and whether the action before the trial court was not statute barred; that to determine the matter this court has to carry out investigation as to certain issues of fact thereby making ground 1 a ground of mixed law and fact, relying on *Bast Nigeria Ltd v. Faith Ent. Ltd* (2010) 1 SCNJ 247; *Nwadike v. Ibekwe* (1987) 4 NWLR (pt. 67) 718; *Agoghalu v. Orealosi* (1999) 13 NWLR (pt. 634) 297; *Akinyemi v. Odua Inv. Co Ltd* (2012) 17 NWLR (pt. 1329); that a ground of appeal which raises issues of limitation and statute bar is a ground of mixed law and fact as decided in the case of *Nwosu v. Offor* (1997) 2 NWLR (pt. 487) 274; that an issue formulated from an incompetent ground is incompetent and liable to be struck out, relying on *Abubakar v. Joseph* (2008) 13 NWLR (pt. 1104) 307; *LSWC v. Sakiamori Construction Nigeria Ltd* (2011) 12 NWLR (pt. 1262) 569.

It is the further submission of learned counsel that a ground of appeal can only challenge the ratio decidendi of a decision and not an obiter dictum, that ground 3 of the grounds of cross appeal does not attack the ratio decidendi but the obiter dictum of the lower court and as such both the ground and the issue arising there from are liable to be struck out, relying on *Nwankwo v. E.D.C.S.U.A* (2007) 5 NWLR (pt. 1027) 377; *Ntor v. Ashaka Cement Co. Ltd* (1994) 1 NWLR (pt. 319) 222 and *Akan v. The State* (1994) 9 NWLR (pt. 368) 347.

In his reaction, learned counsel for 1st respondent/cross appellant submitted, in his reply brief filed on 30/9/14, in respect of ground 1 of the grounds of objection that the facts relevant to the determination of the ground and the issue arising there from are not disputed; that the ground challenges the holding by the lower court that the trial court had jurisdiction to hear and determine the suit contrary to what was decided by the trial court; that ground 1 attacks the application of law to the undisputed facts by the lower court, relying on *FBN v. Isa Ind. Ltd* (2010) 15 NWLR (pt. 1213) 247, that in the circumstance the ground complained of is a ground of law for which 1st respondent/cross appellant needs no leave of court to file.

On the second arm of the objection, learned counsel stated that ground 3 attacks what the lower court said in the process of

resolution of issue 2 formulated for the determination of the appeal; that the objection is on technicalities which should not be encouraged and urged the court to overrule same.

I have carefully gone through the objections raised and the arguments thereon by both counsel. I agree with learned counsel for the 1st respondent/cross appellant that ground 1 of the grounds of cross appeal attacks the decision of the lower court setting aside the judgment of the trial court which held that the trial court has no jurisdiction to hear and determine the action of appellant in view of the fact that the action is a pre-election matter which was instituted in the court after the holding of an election and declaration of the result thereof. The lower court held that the trial court has jurisdiction in the matter.

“GROUND I

The learned Justices of the Court of Appeal in their majority judgment erred in law when they held that the trial Federal High Court, Asaba Judicial Division had jurisdiction to hear and determine the suit of the Appellant/1st respondent which is a pre-election on nomination and substitution of candidate filed after the conduct of the main election.

PARTICULARS OF ERROR

(i) The suit before the trial Federal High Court Asaba on appeal is a pre-election matter filed on 29th day of April, 2011 by the Appellant/1st cross respondent after the cross appellant herein conducted the main election on the 26th day of April, 2011.

(ii) A pre-election matter under whatever circumstances must be filed prior to the conduct of the main election.

The regular courts do not have jurisdiction to hear and determine a pre-election matter filed after the conduct of the main election.

(iii) It is only an Election Tribunal established under Section 285 of the constitution of the Federal Republic of Nigeria 1999 (as amended) that has the jurisdiction to question the election and return of a candidate after election has been conducted and return made.”

From the facts of the case and the decision of the lower court, there is no dispute as to the relevant facts of the above ground of appeal. The date of the filing of the action, the date

of the election in question and the fact that the action as constituted is a pre-election matter are all not in dispute. The question sought to be answered is whether when the relevant principles of law are applied to the undisputed facts the trial court had jurisdiction to entertain the matter as decided by the lower court or not. I do not agree with the submission of learned counsel for appellant that the ground under consideration deals with limitation and statute bar. It is clearly a ground which challenges the holding of the lower court that the trial court had jurisdiction in the matter. It is a ground on the jurisdiction of the trial court to hear and determine the matter and since it also challenges the application of the relevant principles of law to the established facts it is clearly a ground of law for which leave of the court is not required before it is filed. The objection on that ground is therefore overruled.

On the second arm of the objection, it is clearly a waste of time to reproduce the ground and particulars thereby as it is very clear that the said ground 3 challenges an obiter dictum of the lower court on the attitude and/or conduct of 1st respondent/cross appellant upon being served with the necessary documents substituting appellant for 2nd respondent and its failure and/or neglect to effect same. If the comments of the court in the circumstance is not obiter dictum was the attitude of 1st respondent/cross appellant in the circumstances, the subject of the litigation or does it form an issue before that court? Even if it did, how does a decision thereon, one way or the other, affect the fortune of the case?

In conclusion I hold that there is merit in the objection relating to ground 3 of the grounds of the cross appeal of 1st respondent and the issue formulated there from which objection is hereby sustained as a result of which the said ground 3 and issue 2 formulated there from are hereby struck out.

In respect of the objection to grounds 1 and 2 of the cross appeal of the 2nd respondent, and the issues arising there from, I had earlier stated that ground 1 in both appeals and the issue 1 arising there from are the same as they complain of the same thing. In that case, my earlier ruling in relation to the 1st respondent/cross appellant's ground 1 and the issue derived there from apply to the

ground of objection herein which is accordingly overruled.

With respect to ground 2 of the grounds of cross appeal I also find nothing wrong with same and consequently overrule the objection.

On issue 1 of the cross appeals it is the submission of both counsel that the lower court was in error in failing to apply the decision of this court in the case of Hassan V. Aliyu (2010) 17 NWLR (pt. 1223) 452 and Salim v. CPC (2013) 6 NWLR (pt. 1351) 501; that the court ought to have taken into consideration when the cause of action arose rather than when the election was held; that the election was held on 26/4/11 while the action was filed on 29/4/11 - three days after the election in question; that the length of time after the election is immaterial to the lack of jurisdiction of a trial court in respect of a pre-election matter filed after the conduct of the election as in this case; that the court has held that pre-election matters must be filed at the appropriate High Court before, and not after the holding of an election, relying on Hassan V. Aliyu supra, at 599 & 604; Salim V. 1351) CPC (2013) 6 NWLR (pt. 507 at 527; that since an election took place and 2nd respondent was declared the winner the complaint of appellant is in the realm of undue return and that it is only the Election Tribunal that is clothed with the jurisdiction to hear and determine same, relying on Olofu V. Itodo (2010) 18 NWLR (pt. 1225) 545; that the jurisdiction to grant the reliefs claimed by appellant resides in the Election Tribunal pursuant to section 285 (1)(b) of the constitution.

Finally the court is urged to resolve the issue in favour of cross appellants and affirm the minority decision on the issue.

On his part, learned counsel for appellant submitted that the cause of action in the case arose on 26/4/2011 when 1st respondent/ cross appellant put the name of 2nd respondent/cross appellant on the result sheet as the candidate of the respondent despite the fact that 2nd respondent had long been substituted; that the facts of this case is different from the facts in Salim v. CPC supra, and that the lower court was right in distinguishing the case from the facts of the instant case.

It is the further contention of learned counsel that Election Petition Tribunal is not the appropriate venue for the reliefs sought, neither does the claim fall within section 138 of the Electoral Act,

2010 as amended: that 2nd respondent was never sponsored by the 4th respondent for the election in issue and consequently could not have been declared the winner of an election he never contested. Counsel urged the court to resolve the issue in favour of appellant/1st respondent to the cross appeals.

B On his part, learned counsel for the 4th respondent submitted that the lower court was right in holding that the trial court had jurisdiction to hear the matter and generally made submission in line with those of counsel for appellant and urged the court to resolve the issue against the cross appellants.

C The issue is simply whether having regards to the established facts of the case, the Federal High Court has jurisdiction to hear and determine the suit of appellant being founded on pre-election matter and instituted after the conduct of the election and declaration of D results. What are the undisputed facts of the case? They include the following: that both appellant and 2nd respondent/cross appellant are members of the 4th respondent/cross appellant.

2nd respondent was initially nominated by the 4th respondent to contest the election as a candidate of the said 4th respondent. Later on 2nd respondent withdrew his candidacy in writing E and also collected his N2 million deposit paid to the 4th respondent for the purpose of the sponsorship for the election; appellant was, as a result substituted for 2nd respondent after appellant paid the deposit of N2 million; with the substitution 2nd respondent ceased to F be the candidate of 4th respondent for the election in issue; at the conclusion of the election 1st respondent rather than issue the certificate of return to appellant issued same to the 2nd respondent who was never a candidate at the election and has consequently been G parading as a legislator in Delta State House of Assembly purportedly representing the people of Ughelli North Constituency II thereat; appellant instituted an action in the Federal High Court for the reliefs earlier reproduced in this judgment; 2nd cross appellant has filed no claim or counter claim to claim that he was the duly nominated and H sponsored candidate of the 4th respondent for that election; the substitution was effected on 9/2/2011 when 1st respondent received the notification of change of candidate for the election which took place on 26th April, 2011; the action was instituted on 29/4/11. The cause of action arose on 26/4/2011 when 1st respondent issued the certifi-

cate of return for the election to 2nd cross appellant instead of the appellant.

From the above facts, it is not disputed that the action is a pre-election action which was instituted after the conduct of the election or declaration of results, though the cause of action arose following the declaration of the result of the election. B

It has been held by this Court that in an election or related matter, such as pre-election matter, time is of the essence and that as a general rule where a party is guilty of undue delay in instituting a pre-election matter in the High Court, particularly after the conduct of the election in issue, the court will decline jurisdiction to hear and determine same. See Hassan v. Aliyu supra. ***This means that where the cause of action in a pre-election case arose before the conduct of the election but the party failed and or neglected to institute his action in the High Court for redress he may lose his right of action. Where, however, the cause of action in the pre-election matter also constitutes one of the grounds on which to challenge the result of the election in question, the proper venue for ventilating a party's grievances after the conduct of the election and declaration of result is the Election Petition Tribunal, not the High Court.*** See the recent decision of this Court in appeal No. SC/44/2013 between Wambai v. Donatus & ors delivered on the 11th day of July, 2014. C D E

It is settled law that a pre-election matter instituted prior to the conduct of an election subsists and the High Court in which it was instituted continues to have jurisdiction to hear and determine same even after the conduct of the election. See Amaechi v. INEC (2008) All FWLR (pt. 407) 1; Odedo v. INEC (2008) 17 NWLR (pt. 1117) 554 at 622 - 623. ***The above principle is founded on the principle of lis pendens which prevents any transfer of right or the taking of any step capable of foisting a state of complete helplessness/hopelessness on the parties or the court during the pendency of an action in a court of law.*** See Dan-Jumbo v. Dan-Jumbo (1999) 11 NWLR (pt. 622) 445. F G H

I had earlier reproduced the reliefs sought in the suit. The question is whether the claim of appellant can be entertained within

the jurisdiction of the Election Petition Tribunal if the High Court is said not to have jurisdiction to entertain the matter, election to which the pre-election matter relates haven been held and decided? The answer to the above question is to be found in Section 138(1) of the Electoral Act, 2010 (as amended). It regulates the grounds on which one may challenge an election in the Election Petition Tribunal by providing as follows:-

“(1) An election may be Questioned on any of the following grounds that is to say -

(a) that the person whose election is questioned was, at the time of the election, not qualified to contest the election:

(b) that the election was invalid by reason of corrupt practices or non-compliance with the provisions of the Act;

(c) that the respondent was not duly elected by majority of lawful votes cast at the election or;

(d) that the petitioner or its candidate was validly nominated but was unlawfully excluded from the election.”

Can it be said that the case of appellant falls under any of the above grounds for questioning an election? The answer is clearly in the negative.

The action of appellant is not grounded on the qualification of 2nd respondent/cross appellant to contest the election in question as he never contested the election - he was never a candidate at the election neither has he claimed by an action or counter claim that he was. Secondly, it is settled law that in this country no one can contest an election without first and foremost being a member of a registered political party and, secondly, being sponsored by that party as a candidate for the election.

In the instant case, though the 2nd respondent is a member of the 4th respondent it is not in dispute that the 4th respondent did not sponsor him for the election in question but the appellant.

The contention that the proper venue for the institution of a pre-election matter after the conduct of an election and declaration of result is the Election Petition Tribunal is a recognition of the cause of action of the party concerned where it can be entertained by the Tribunal, which has not been demonstrated to be the case here. In

other words, appellant was wronged for which he has to have a remedy.

It follows therefore that where a cause of action in a pre-election matter, of the nature of the facts of this case, arising from the declaration of results is instituted timeously in the High Court and the cause of action cannot be accommodated within the grounds for challenging an election stated in Section 138(1) of the Electoral Act, 2010 (as amended), the High Court will have jurisdiction to hear and determine the matter otherwise the party will be left without a remedy which will result in injustice.

The case of Hassan v. Aliyu supra is clearly not on all fours with this case, in fact, none of the earlier cases decided by this Court is.

It is clear that there are pre-election matters which can come within the grounds for challenging an election under section 138(1) of the Electoral Act, 2010 as amended and others that may not. Where a pre-election matter is one which can be dealt with under Section 138(1) supra, the proper venue, after election, is the tribunal. Where, however the pre-election matter cannot so be accommodated after an election and the cause of action arose in the election or declaration of results and action is instituted timeously, the proper venue remains the High Court. In other words, an issue of qualification to contest an election under the Electoral Act, 2010, as amended, is both pre-election and an election matter which both the High Court and the relevant Election Tribunals have jurisdiction to hear and determine. See Dangana v. Usman (2013) 6 NWLR (pt. 1349) at 89 - 90. ***However, the pre-election matter must be filed in the High Court timeously.*** See Hassan V. Aliyu supra.

I therefore resolve the issue against the cross appellants.

It is my considered view that 2nd respondent's 2nd and 3rd issues are really not relevant to the determination of the cross appeal having regards to the decision of the lower court and the resolution of the issues in the main appeal I therefore consider it a waste of time to go into them. The crucial issue in the cross appeals remain the issue of jurisdiction of the trial court to hear and determine the suit,

which has just been resolved.

I now proceed to consider the issue raised by the 4th respondent in the cross appeal. The issue is repeated hereunder:

“Whether the learned Justices of the Court of Appeal were right in dismissing the suit of the plaintiff before the trial court despite resolving the two issues formulated for the determination in favour of the appellant and when there was withdrawal of the candidacy of 2nd respondent and substitution of the appellant in his stead.”

It is clear that this issue had been treated fully during the consideration of the issues canvassed in the main appeal and resolved in favour of the appellant. The above being the case I hold the view that no useful purpose will be served for me to go into a reconsideration of the issue herein.

In conclusion I find no merit in the cross appeals of the 1st respondent and 2nd respondent which cross appeals are accordingly dismissed.

With respect to the cross appeal of the 4th respondent, I hold the view that haven resolved the issue in favour of the appellant in the main appeal, the cross appeal of the 4th respondent has merit and is accordingly, allowed.

In respect of the main appeal I have to observe that the attitude of the 1st respondent/cross appellant in the facts leading to this case is very much worrisome. It has been said time and again by this court that the issue of nomination and substitution of candidate for any election remains the absolute preserve of the registered political party over which the court has no jurisdiction, including the 1st respondent. In the instant case 1st respondent acted outside this principle when it issued a certificate of return to the 2nd respondent despite the fact that 1st respondent knew that 2nd respondent had ceased, more than 45 days to the election in question to be the sponsored candidate of the 4th respondent. To adopt the 2nd respondent as a ‘candidate’ of the 4th respondent in the circumstance is very unfortunate and send wrong signals to the polity. It is a very bad wind which blows no one any good, and ought not to be encouraged in any democracy. The action of 1st respondent has foisted on the electorate of Ughelli North Constituency II of Delta State House of Assembly a pretender to the seat who not only withdrew from the election in writing but collected the deposit he paid to the 4th re-

spondent for the said election. He was clearly not a candidate for the election, let alone a candidate sponsored by a political party as required by the law. The 1st respondent has been doing much for democracy but from the facts of this case it needs to do much more. To overcome the present culture of impunity in the political environment all hands must be on deck particularly the hands of those entrusted with the responsibility of ensuring an even playing field for the political actors/gladiators, otherwise the future of our democracy is very bleak indeed

In conclusion and having resolved the issues raised by appellant in his favour and dismissed the cross appeals of the 1st and 2nd respondents, I hold that the appeal has merit and is accordingly allowed by me.

In consequence, I enter judgment in favour of appellant in the following terms:

1. Appellant, JENKINS GIANE DUVIE GWEDE is hereby declared to be the duly nominated candidate by substitution of the 4th respondent for the election in respect of Ughelli North Constituency II of the Delta State House of Assembly and is entitled to be issued with a certificate of return in respect of same.

2. The 1st respondent is hereby ordered to issue the said appellant with a certificate of return in respect of the said House of Assembly election held on 26th April, 2011, forthwith.

3. The 2nd respondent EDOJA RUFUS AKPODIETE is hereby ordered to vacate the seat of Ughelli North Constituency II in the Delta State House of Assembly forthwith.

4. It is further ordered that the said 2nd respondent EDOJA RUFUS AKPODIETE refunds to the coffers of the Delta State House of Assembly all moneys/sums of money he collected by way of salary, allowances whatsoever and howsoever described since he took his seat in the said House of Assembly under the pretext of being the duly elected candidate of the 4th respondent representing Ughelli North Constituency II, within ninety (90) days of this order.

I award the sum of N50,000.00 costs at the High Court; N100,000 in the court below and N500,000.00 in this court all in

favour of appellant and against the 1st and 2nd respondents each, Appeal and cross appeal of 4th respondent allowed Cross appeals of 1st and 2nd respondents dismissed.

B

GALADIMA JSC

This is an appeal against the judgment of the Court of Appeal, Benin Division delivered on 22/5/2013, wherein the court set aside the decision of the trial Federal High Court that it lacked jurisdiction to hear and determine the matter instituted after the conduct of the main election as well as the finding of that court that the 2nd respondent did not withdraw his candidature from the election conducted by the 1st respondent for Ughelli North Constituency II on 26/4/2011. Accordingly the 2nd respondent was returned the winner of the election and was issued with a certificate of return.

At the trial Court appellant and the 4th respondent herein sought the resolution of the following 3 questions:

“(a) Whether the 1st plaintiff who having been duly nominated as the candidate of the 2nd Plaintiff for the election into the Delta State House of Assembly to represent Ughelli North Constituency II in the Delta State House of Assembly and the 2nd Plaintiff having won the election whether the 1st Plaintiff is not entitled to be issued with a certificate of return in respect of the said election.

(b) Whether the 2nd Defendant who personally signed a letter withdrawing from the election and was validly substituted by 1st Plaintiff as its candidate can validly contend that he is still the candidate of the 1st Plaintiff in respect of the material election.

(c) Whether the 1st Defendant can pick and chose candidates for the 2nd Plaintiff a Political Party.”

They also sought the following reliefs:

“(a) A DECLARATION that the 1st plaintiff being the validly nominated candidate of the 2nd Plaintiff is the person entitled to be issued with a Certificate of return in respect of the House of Assembly election in Ughelli North 2 Constituency of Delta State.

(b) An ORDER of this Honourable Court directing the 1st Defendant to issue the 1st Plaintiff faith a certificate of return in respect of the House of Assembly election into the House of Assembly for Ughelli North 2 Constituency of Delta State.

(c) AN ORDER restraining the 1st Defendant from recognizing the 2nd Defendant as the candidate of the 2nd Plaintiff and also from issuing and certificate of return in the name of the 2nd Defendant.”

The plaintiffs before the trial court only sued the 1st respondent herein and the 2nd respondent. The 3rd respondent brought an application to be joined as a defendant in the suit, and the court granted same. B

The case for the plaintiffs was that although the 2nd respondent contested and won the primary election of the 4th respondent into Ughelli North Constituency II for the Delta State House of Assembly, the 2nd respondent, subsequently by notice given in writing to the 4th respondent voluntarily withdrew from contesting the election and thereafter the appellant was lawfully used to substitute him. The letter and the document effecting the substitution were admitted as Exhibit P1 at the trial court. After effecting substitution the 1st respondent published a list of candidates for the election and the name of the appellant was included as the candidate. C

Curiously, another list emerged, without further instruction from the 4th respondent in which the 1st respondent put in the name of the 2nd respondent instead of the appellant as the candidate of the 4th respondent. E

In the circumstance the 2nd respondent reacted. He denied that he forwarded a letter of withdrawal of his candidature of the election. He also contended that the trial court had no jurisdiction to entertain the action on an election that has taken place at best the matter is a pre-election. It is noted that the said election was conducted on 26/4/2011, while the appellant, instituted his action on 29/4/2011. F

The interesting aspects of this case are some startling revelations made by the song-bird dramatis personae witnesses at the trial court. The suit was duly defended by all the defendants. It is instructive, to note as I have earlier observed that the plaintiffs before that court only sued the 1st respondent herein and the 2nd respondents, but the 3rd respondent on his own brought an application to be joined as a defendant in the suit. Although the plaintiffs opposed the application, the learned trial judge granted same and the 3rd respondent become the 3rd defendant in the suit. G

The 1st respondent (INEC) who is usually at the centre of such conflicts as this, filed counter-affidavits in defence of the case of the plaintiffs at the trial court. It originally maintained that no substitution took place and all the documents being relied upon by the plaintiff had no probative value because they were not duly certified.

B In view of this deposition, the plaintiffs applied to the 1st respondent and duly obtained certified true copies of the relevant INEC forms, submitted in the process of substituting the 2nd respondent. When the true copies were filed the 1st respondent now changed its position by deposing to another affidavit titled “Reply to Further Affidavit” in which it was stated as follows:

“4 (1) *I have read the further affidavit in support of the originating summons deposed to by the 1st plaintiff and in response thereto I stated as follows:*

D (a) *I know as a fact that the 1st defendant received the documents collectively annexed as Exhibit ‘A’ from the 2nd plaintiff which were aimed at substituting the 2nd defendant with the 1st plaintiff.”*

The said documents were admitted at the oral hearing as Exhibit P1. Curious enough the 2nd respondent tried to make a feeble attempt to deny the fact of his withdrawal from contesting the election. He contended that when it came to his knowledge that there was an attempt to substitute him, he personally wrote a letter of protest to the 1st respondent.

F During the hearing the trial courts directed that the Acting National Secretary of Democratic People’s Party (DPD) should appear in court, and try to clarify by sworn testimony the position of two separate letters or credited to him as the author. The said Acting National Secretary was also directed by the court to come to court and give oral evidence.

On 15/6/2012, the Secretary in court was sworn on the Holy Quran. He testified and stated as follows:

H “*Apart from Exhibit P1, there was no other form filed and sent to INEC. There was never a time we received a letter from INEC that they would not accede to our request. The letter Exhibit P5 of 11/5/2011, which is the last letter I wrote to the INEC by Exhibit P5 I confirmed that the 1st plaintiff is candidate of the party.”*

In his testimony the 2nd respondent testified to the effect that although his present passport photograph appears in Exhibit P1,

he did not sign Exhibit P1. Under cross-examination Exhibits P6 and P7 were tendered through him, he admitted signing Exhibits P6 and P7 to show that they were identical and signed by the same person. He further testified that even though he had alleged forgery he did not make any report to the Police or law enforcement agencies and that no prosecution was initiated against any person in connection with the alleged forgery. He admitted however, that he retrieved the sum of N2,000,000 (Two Million Naira) which he paid to the 4th respondent as mandatory deposit to contest the election as candidate of the 4th respondent. In effect this fact terminates the sponsorship relationship between the 4th respondent and the 2nd respondent. It is clear that 2nd respondent was never sponsored by any political party into the Delta State House of Assembly. He maintained that the appellant and himself were nominated by the same Political Party. He called DW2 and DW3 to testify that they did not nominate the appellant. It is noted that the 2nd respondent never tendered before the trial court any documentary evidence and he did not produce his own form which the signatures were allegedly lifted.

At the conclusion of the trial the parties addressed the court and in its decision the suit of the plaintiffs was dismissed.

Aggrieved by the dismissal of his suit, the appellant, appealed to the court of Appeal, Benin Division on 7 grounds of appeal and two issues were distilled there from.

On 22/5/2013, the court of Appeal in its judgment resolved the two issues raised for determination in favour of the appellant but corollary raised issue which was not submitted from the grounds of appeal to determine whether the appellant who based his case solely on the issue of “substitution” was properly nominated as a substitute. Consequently appeal was allowed in part but the court went ahead to dismiss the plaintiffs’ claim before the trial court.

Hence, this appeal is against the judgment of the Lower Court.

The appellant raised 4 issues for determination in his brief filed on 5/6/2013. It was adopted on 30/9/2014. The 4 issues are as follows:

“1. Whether the learned Justices of the court of appeal were right when after holding that appellant was used by the Political Party to substitute the 2nd respondent they refused to make consequential orders directing that the appellant be issued with a certificate of re-

turn for the Ughelli North II constituency for the Delta State House of Assembly. (Grounds 1)

2. *Whether the learned Justices of the court of appeal were right to have dismissed the suit of plaintiff before the trial court when the court of appeal actually resolved the two issues submitted for determination in favour of the appellant. (Ground 2)*

3. *Whether the learned Justices of the court of Appeal were right when being fully aware that the case of the appellant was BASED ON SUBSTITUTION to have gone ahead to invoke SECTION 32 of the ELECTORAL ACT 2010 to deny the appellant the victory of the Democratic people’s Party in the Election into the seat for Ughelli North Constituency II in the Delta State House of Assembly. (Ground 3)*

4. *Whether the learned Justices of the court of Appeal did not err in failing to acknowledge and accept the appellant as the candidate of the Democratic Peoples Party (Ground 4). ”*

On its part the 1st respondent cross-appealed and identified two issues in the brief filed on 30/9/2014 as follows:

“1. *Whether the court of Appeal in its majority decision was right to have set aside the decision of the trial Federal High Court declining jurisdiction to hear or try or determine a pre-election matter commenced and/ or instituted after the actual election. (Distilled from grounds 1 and 2 of the grounds of cross appeal).*

2. *Whether the court of Appeal was right when it reproached the 1st respondent/cross-appellant for failing to act on an irregular substitution of candidate made by the 4th respondent. (Distilled from ground 3 of the grounds of cross-appeal) ”*

In the cross- appeal of the 2nd respondent, the following three issues have been set out for determination as follows:

“1. *Whether or not the court below was right in law when the court below (in the majority judgment) held that it is “my firm humble view on the issues that if a litigant is not guilty of inordinate delay as happened in Hassan v. Aliyu, he may file the action against his unlawful nomination or substitution within a reasonable time even after the election” and proceeded to hold that the trial court had jurisdiction to entertain and/ or adjudicate over this pre-election dispute or matter instituted or commenced in the trial court after the main or actual election, thereby reversing the decision of the trial court, which*

declined jurisdiction in respect of a pre-election matter instituted and/or commenced after the actual or main election.

2. *Whether the court below was right in reversing the findings of fact of the trial court which held that the appellant did not prove that the 2nd respondent/ cross-appellant withdraw his candidature from the election, the subject matter of this appeal, and the court below proceeded to hold that the 2nd respondent/ cross appellant withdraw his candidature from the election, the subject matter of this appeal.* ^B

3. *Whether the court below was right in law when the court below held that a counsel who represented a party in trial court, could file an appeal and conduct the appeal against the party, the said counsel represented as joint plaintiff in the trial court.* ^C

In respect of the 4th respondent/cross-appellant brief of argument his counsel has submitted sole issue for determination. This ^D reads as follows:

“Whether in the circumstances of this Appeal, the Lower Court was right when it conducted that the substitution of the appellant and his nomination are irregular and therefore not entitled to the reliefs sought in his originating summons.” ^E

I have made similar observations as have been done by my learned brother in the lead judgment to the effect that the careful reading of the issues for determination raised in the cross-appeals of the 1st and 2nd respondents are substantially the same; but clearly ^F that of the 4th respondent is similar to the main appeal.

I shall now consider in summary the arguments of the various learned counsel in their briefs of argument.

Learned Counsel for the appellant has correctly submitted that in resolution of the two issues before the Lower Court, it found ^G as a fact on PP 1265-1266 of the record thus:

“Page 3 of Exhibit P1 submitted and addressed to INEC shows that the 4th respondent de facto submitted the appellant for the 2nd respondent, whether there was a de jure substitution recognizable in law is another matter which I will explain anon. I have to arrive at the conclusion in this case, the learned trial judge with greatest respect ^H shut his eyes to the obvious on the issue of withdrawal and de facto substitution of the appellant.”

From the above passage the Lower Court found as a fact that

the 2nd respondent withdrew his candidature for the election into the House of Assembly for Ughelli North II Constituency of Delta State Nigeria, and that the Political Party (4th respondent DPP), forwarded the name of the appellant to the 1st respondent (INEC) as the person duly substituting the 2nd respondent more than 45 days before the holding of the election. There was no suit challenging the substitution of the 2nd respondent with the appellant herein, as such at all material times, appellant was the candidate for the said 4th respondent (DPP).

At PP 909-910 of the record, 1st respondent deposed in his “Reply to Further Affidavit” thus:

“(1) I have read further affidavit in support of the originating summons deposed to by the 1st plaintiff and in response thereto state as follows:

(a) I, know as a fact that the 1st defendant received the documents collectively annexed as Exhibit; ‘A’ from the 2nd plaintiff which were aimed at substituting the 2nd defendant with the 1st plaintiff.”

To this extent, the 1st respondent admitted receiving the substitution documents Exhibit P1 from the 4th respondents.

On whether 2nd respondent indeed, withdrew his candidacy the Lower Court held as follows:

“The fact that the nomination papers of the appellant go to (SIC) Abuja before the date the 2nd respondent withdrew his candidature in writing in my humble view is of moment, what is important to establish and what was established during cross-examination of the 2nd respondent was that he at a point wrote a letter to withdraw his candidature and also took back his nomination deposit from the Party. From that day, he was no longer a candidate of the Party. I agree that the learned trial judge shut its eyes to the fact that four pages of Exhibit Pi show that 2nd respondent withdrew from the election and was substituted by the Political Party.”

The Lower Court having made the above findings cannot later be heard to say that the substitution of the appellant for the 2nd respondent by the 4th respondent was de facto and not de jure. I cannot see the basis on which the 2nd respondent was allowed by the Lower Court to continue to function in the office he himself knows he neither contested nor was ever elected to.

The findings of the Lower Court from the evidence on record

was that 2nd respondent did not only withdraw his candidature but undeniably collected his deposit for the nomination from the 4th respondent and that from that day the 2nd respondent ceased to be a candidate of the Party. I cannot fathom then the reason why the matter has to be dragged on to an embarrassing situation, such we are witnessing. A case of eating one's cake and wishing to have it at all cost. B

The publication of the list of candidates to contest an election by INEC is an administrative act. Nomination or substitution of a candidate is complete the moment INEC (1st respondent) herein receives the necessary documents effecting same from the Political Party; as long as it is within the stipulated time. In the circumstance the 1st and 2nd issues must be resolved in favour of the appellant. C

The 3rd and 4th issues were argued together by the appellant. The pith and substance of his submission is that the basis for substitution of a candidate at an election is as provided in SS. 33 and 35 of the Electoral Act 2011 (as amended). That once there is evidence of withdrawal of a candidate and this followed by the act of forwarding same to INEC by the Political Party concerned the substitution is completed and effective. It has been quite settled that the nomination or sponsorship of a candidate is within the domestic affairs of a political party, the courts do not interfere readily. See EMEKA v. OKADIGBO (2012) 18 NWLR (Pt.1331) 55 at 108. DALHATU v. TURAKI (2003) 15 NWLR (Pt 843) 310. Learned counsel for the appellant has rightly submitted that once a candidate has withdrawn his candidature, the person who nominated him and their nomination cannot be reckoned with any more. See Section 32(4) of the Electoral Act, 2010 (as amended), I agree too that having found that the 2nd respondent had withdrawn from the contest the issue of nomination of the 2nd respondent ceased to be of any relevance and/or consequence see further Section 33 and 35 of the Electoral Act 2010 (as amended) F

I shall also comment briefly on the submission of the learned Counsel for the appellant that the issue of irregularity of the nomination of appellant was raised suo motu by the Lower Court as it never arose from the decision of the court nor on appeal or cross-appeal before that court, and therefore the court was in error in considering the issue so raised suo motu in deciding the matter, so much so when H

the issue of nomination form is not relevant in determination of the issue as to whether or not there had been a substitution pursuant to Sections 33 and 35 of the Electoral Act 2010 (Supra).

It is clear that nobody challenged the substitution of the 2nd respondent with the appellant. The trial court did not hold that those
 B who nominated the 2nd respondent were the same persons that nominated the appellant. The decision of the Lower Court was to the effect that the appellant did not prove that the 2nd respondent withdrew from contesting the election. I agree with the learned counsel
 C that the Lower Court erred in raising suo motu the issue or of the nomination form which is not an issue for consideration in determining whether or not there had been a substitution pursuant to Sections 33 and 35 of the Electoral Act (Supra). The issue having been so raised suo motu, parties should have been afforded opportunity,
 D particularly the appellant to address the court on it.

In the light of the above, I am also of the view that issues 3 and 4 should be and are accordingly resolved in favour of the appellant.

On the cross-appeals, I have set out earlier the two issues
 E raised by the 1st respondent/cross-appellant and the three raised by the 2nd respondents respectively. In the 4th respondent/cross-appeal, a single issue was identified.

1st and 2nd respondent/cross-appellants' issue 1 are similar,
 F as the complaint is against the holding of Lower Court that the trial court had jurisdiction to hear and determine a pre-election matter.

I have noted, however that there has been a preliminary objection raised by learned counsel for appellant/1st cross-respondent attacking grounds 1 and 2 of 2nd respondent's cross-appeal
 G and issues 1 and, 2 distilled therefrom. It is contended that ground 1 and 2 are grounds of fact or mixed fact and law requiring leave of the court and failure to seek and obtain such leave rendered the issues arising from the said grounds incompetent. Learned counsel also raised similar objection to grounds 1 and 3 of the 1st respondent's cross-
 H appeal and the issues identified therefrom. The grounds are that ground 1 is of mixed law and fact in respect of which no leave of court was sought, and that ground 3 is said to be a challenge to an obiter dictum as against the ratio decidendi of the Lower Court. He further contended that issue 1 formulated from the incompetent

ground 1 is incompetent and should be struck out as well as the issue formulated there from. In consideration of the objection in respect to 1st respondent's cross-appeal, I have carefully considered the submissions of counsel for appellant that ground I of the cross-appeal raises the question of limitation and that the action was statute barred since to effectively determining the matter this court has to embark on investigation so as to fully ascertain issues and fact therefore, making Ground 1 a ground of mixed law and fact. He relied on a number of decisions of this court on the issue. B

Ground 1 of the grounds of cross-appeal clearly complains against the decision of the Lower Court setting aside the judgment of the trial court which decided that the trial court has no jurisdiction to hear and determine the action of the appellant in view of the fact that the action is a pre-election matter which was instituted in the court after the holding of an election and declaration of the result. In other words the court held that the trial court has jurisdiction to hear and determine the matter brought before it by the appellant. C D

My understanding of this ground which I have carefully taken time to read shows clearly that it is a ground challenging the decision of the Lower Court which held that it had jurisdiction in the matter before it. It is a ground on the jurisdiction of the trial court to hear and determine the matter. It challenges also the application of the relevant principals of law to the established facts. To my mind it is a ground of law for which leave of the court is not required before it is instituted. For this reason, the objection of the appellant herein is overruled. Again, on the second arm of the objection, careful reading of ground 3 will show that the ground challenges an obiter dictum of the Lower Court on the conduct of 1st respondent/cross-appellant after being served with the necessary documents substituting appellant for 2nd respondent and failure to affect same. In the circumstance, the objection is sustained. Consequently, ground 3 and issue 2 distilled there from are both struck out. E F G

As earlier observed, ground 1 in 1st respondent's and 2nd respondent's cross-appeals are similar. Having sustained the objection raised by the appellant in respect of 1st respondent's ground 1, same ruling should apply to the first ground of the 2nd respondent. H

On the issues raised in the cross-appeal of both respondents, I have carefully considered the submissions of the both counsel. Both

submitted that the Lower Court was in error when it failed to apply the decision of this Court in *HASSAN v. ALIYU* (2010) 17 NWLR (Pt 1223) 457, *SALIM v. CPC* (2013) 6 NWLR (Pt.1351) 501 etc. In effect it is their submission that the Lower Court ought to have taken into consideration when the cause of action arose and not when the election was held. The suit was filed on 29/4/2011, within 3 days of appearance of the name of the 2nd respondent/cross-appellant on the result sheet which, at page 735 of the records, is dated 26/4/2011.

Learned counsel for the 4th respondent submitted that the Lower Court was right in holding that the trial court had jurisdiction to hear the matter. He made his submission in line with those of counsel for appellant. The issue is whether having regards to the facts of this case, the trial Federal High Court had jurisdiction to hear and determine the suit of appellant which was founded on pre-election matter and instituted after the conduct of the election and declaration of results based on that election. It is not disputed that both the appellant and 2nd respondent/cross-appellant herein are members of the 4th respondent/cross-appellant Political Party. As it has been observed the 2nd respondent who was initially nominated by the 4th respondent later on voluntarily withdrew his candidature in writing and he collected the nomination fees of N2 Million. Appellant, as a result was substituted for 2nd respondent after the appellant had to pay a deposit of N2 Million. It becomes clear that with this substitution 2nd respondent ceased to be 4th respondent's candidate. In the Federal High Court where the appellant instituted an action 2nd cross-appellant did not file any claim or counter claim that he was the rightful candidate duly nominated and sponsored by the 4th respondent for the election. On records the substitution was effected on 9/2/2011 that is when 1st respondent got the notice of change of candidate for the election which took place on 26/4/2011

The action was instituted on 29/4/2011. It is clear therefore that the cause of action arose on 26/4/2011 when 1st respondent issued the certificate of return to 2nd cross-appellant. No doubt from these facts the action instituted by the appellant was a pre-election action but it was instituted after the conduct of the election. Going by a number of decisions of this court, time is of essence, in an election matter such as pre-election matter.

Delay in instituting a pre-election matter in the High Court, after conduct of the election where a party is guilty of undue delay, the court will decline jurisdiction to hear and determine the action. A point has been made here, and I agree that where the cause of action in the pre-election matter also constitutes one of the grounds on which to challenge the result of the election the proper venue to seek a redress in the Election Petition Tribunal established for that purpose not the High Court. See *WAMBAI v. DONATUS & ORS* (unreported) SC/44/2013 delivered on 11/7/2014. See further *UWAZURUIKE v. NWACHUKWU* (2013) 3 NWLR (Pt.1345).

However in the instant case the stand of the 4th respondent (DPP) has been clear. It is to the effect it did not sponsor the 2nd respondent/cross-appellant; as the candidate sponsored was the appellant. By mere dint of subverting the position of the political party, the 1st respondent has indeed inflicted continuing damage or injury on the appellant and the 4th respondent/cross-respondent and his cause of action will not “abate” or become time barred until the injury which is of continuing nature completely stops or abates see *AREMO II v. ADEKANYE* (2004) AFWLR (PT.224) 2113; *CBN v. AMAO* (2010) 6 NWLR (Pt.1219) 271 at 295-296; *UWAZURUIKE v. NWACHUKWU* (2013) 3 NWLR (Pt.1345) 503 at 528. *ATOGO v. NWUCHE* (2013) 3 NWLR (Pt.1341) 337 at 355.

Learned counsel for the 4th respondent is right in his submission that the facts and circumstances of this case are totally different from the facts and circumstances in the cases of *HASSAN ALIYU* (2010) 17 NWLR (Pt.1223) 547. *OLOPU v. ITODO* (2010) 18 NWLR (Pt 1225) 545 and *SALIM v. CPC* (2013) 6 NWLR (Pt 1351) 501 etc. I have read all. The Lower Court correctly distinguished the instant case from those cases above.

For all intents and purposes the appellant’s cause of action accrued on 26/4/2011 when the result of the election was released and not earlier. The suit was filed on 29/4/2011, within 3 days of the accrual of the cause of action. In the circumstance, I hold that the suit was properly instituted/commenced at the Federal High Court which had the requisite jurisdiction to hear and determine the said suit. This is the clear and crucial issue in the cross-appeals. It is all about the jurisdiction of the trial court to hear and determine the suit. The issue having been resolved in favour of the appellant in the main appeal, it

needless recapitulating same as raised by the 4th respondent in the cross-appeal.

In the circumstance, I do not intend to consider the sole issue raised by the 4th respondent for determination in the cross-appeal. It has been set out and dealt with fully in the main appeal of the appellant.

In conclusion based on the above and the more detailed reasons set out in the lead judgment of my learned brother ONNOGHEN JSC, I agree that this appeal has merit and I too allow it. I abide entirely by the consequential orders made in the lead judgment including costs.

PETER-ODILI JSC

I agree with the judgment just delivered by my learned brother, W.S.N. Onnoghen JSC. I shall make some comments in support.

The appellant herein along with the Democratic Peoples Party (DPP) which is herein the 4th Respondent jointly commenced a suit at the Federal High Court sitting at Asaba seeking the determination of the following questions which are stated thus:

(a) Whether the 1st plaintiff who having been duly nominated as the candidate of the 2nd plaintiff for the election into the Delta State House of Assembly to represent Ughelli North Constituency II in the Delta State House of Assembly and the 2nd plaintiff is not entitled to be issued with a certificate of return in respect of the said election.

(b) Whether the 2nd defendant who personally signed a letter withdrawing from the election and was validly substituted by the 1st plaintiff as its candidate can validly contend that he is still the candidate of the 1st plaintiff in respect of the material election.

(c) Whether the 1st defendant can pick and chose candidates for the 2nd plaintiff, a political party.

The questions above stated were followed by the reliefs sought by the plaintiffs to wit:

(a) A declaration that the 1st plaintiff being the validly nominated candidate of the 2nd plaintiff is the person entitled to be issued with a certificate of return in respect of the House of Assembly elec-

tion in Ughelli North II constituency of Delta State.

(b) An order of this Honourable Court directing the 1st defendant to issue the 1st plaintiff with a certificate of return in respect of the House of assembly election into the House of Assembly for Ughelli North II constituency of Delta State.

(c) An order restraining the 1st defendant from recognizing the 2nd defendant as the candidate of the 2nd plaintiff and also from issuing any certificate of return in the name of the 2nd defendant. B

The plaintiffs before the Federal High Court only sued the 1st respondent herein and the 2nd respondent, but the 3rd respondent in this appeal on his own brought an application to be joined as a defendant in this suit. Although that application was opposed by the plaintiffs, the trial Federal High Court granted same and the 3rd respondent became the 3rd defendant in the suit. C

The case as put forward by the plaintiffs was that although the 2nd respondent contested and won the primary election of the Democratic Peoples Party (DPP) (4th respondent herein) for the election into Ughelli North constituency II for the Delta State House of Assembly, the 2nd respondent subsequently by notice given in writing by him to the political party voluntarily withdraw from contesting the election and thereafter the appellant was lawfully used to substitute him. The said letter of substitution and other documents filed with INEC (1st respondent) to the effect of the substitution were attached as Exhibits to the affidavits filed before the trial court and collectively marked as Exhibit P1 at the hearing on admission by the trial court. D E F

The evidence proffered in the trial court showed the substitution of the 2nd respondent with the appellant and the 1st respondent published the list of candidates for the general election in which the name of the appellant duly appeared as candidate of the 4th respondent. Thereafter the respondent released another list with the name of the 2nd respondent as candidate. G

The version as put across by the defendants now respondents are as follows: H

The 1st respondent who was 1st defendant at the trial court opted not to call any oral evidence and also did not cross-examine the PW1. The 2nd respondent testified that although his passport photograph appeared as Exhibit P1, that he did not sign P1 and that

his signature had been forged. He admitted under cross-examination that he retrieved the sum of N2,000,00.00 (Two Million naira) which he paid to the 4th respondent (2nd plaintiff) as mandatory deposit to qualify as candidate of the 4th respondent which in effect translated to the termination of the sponsorship relationship between
B the 4th respondent and the 2nd respondent.

2nd respondent maintained that it was the same persons who nominated him that were used by the same political party to nominate the appellant. He called DW2 and DW3 to testify that they did
C not nominate the appellant rather that it was the 2nd respondent they nominated. There were documentary evidence to these assertions. At the end of trial after the addresses of counsel the trial court delivered judgment dismissing the suit of the plaintiff.

Aggrieved by the judgment of the court, the appellant appealed to the Court of Appeal, Benin Division on seven grounds of appeal and on the 22/5/2013 the Court of Appeal or court below delivered judgment allowing the appeal in part raising an issue whether the appellant based his case solely on the issue of substitution was properly nominated as a substitute. The court below had however
E found as a fact that the 2nd respondent withdrew from contesting the election and that the appellant was used to substitute him but after agreeing that the trial court erred, refused to grant the reliefs claimed from the trial court and the lower court also refused to grant
F the consequential orders.

Not satisfied with the final conclusion of the court below the appellant has now appealed to this court on four grounds complaining against that part of the judgment of the lower court they had reservations about.

G All the respondents save the 3rd respondent, Julius Oghenevwegba Bobi Cross-Appealed.

MAIN APPEAL

On the 30th day of September, 2014 date of hearing, Mr. Ikhide Ehighelua, learned counsel for the appellant adopted the
H appellant's Brief filed on the 5/6/13, an appellant's Reply Brief filed on 16/8/13, the appellant as 1st cross-respondent's Brief to the Cross appeal of the 1st respondent's of 16/12/13, also the Brief in reaction to the 2nd respondent's Brief which was filed on 16/8/13. Further adopted is the appellant/1st cross-appellant's Notice of Preliminary

Objection to cross-appeal of the 2nd respondent/cross-appellant filed on 20/11/13 in which the arguments in respect thereof were made.

In the appellants Brief were raised four issues for determination which are stated as follows:

1. Whether the learned justices of the Court of Appeal were right when after holding that the appellant was used by the political party to substitute the 2nd respondent, they refused to make consequential orders directing that the appellant be issued with a certificate of return for the Ughelli North II Constituency for the Delta State House of Assembly. (Ground 1) B

2. Whether the learned Justices of the Court of Appeal were right to have dismissed the suit of the plaintiff before the trial court when the Court of Appeal actually resolved the two issues submitted for determination in favour of the appellant. (Ground 2) C

3. Whether the learned Justices of the Court of Appeal were right when being fully aware that the case of the appellant was based on substitution to have gone ahead to invoke Section 32 of the Electoral Act 2010 to deny the appellant the victory for the Democratic Peoples Party in the election into the seat for Ughelli North Constituency II in the Delta State House of Assembly. (Ground 3) D

4. Whether the learned Justices of the Court of Appeal did not err in failing to acknowledge and accept the appellant as the candidate of the Democratic Peoples Party (Ground 4). E

Mr. Ibrahim Bawa, learned counsel for the 1st respondent adopted their Brief of 6/12/13 and deemed on 30/8/14 and raised a sole issue which is thus: F

Whether or not the appellant who was not nominated to contest and who did not contest the election to the membership of the Delta State House of Assembly for member representing Ughelli North II State Constituency conducted on 26th April, 2011 is entitled to the reliefs sought in the Amended Originating Summons including the relief to be issued a Certificate of Return for the election. (Grounds 1, 2, 3, & 4) G

For the 2nd respondent, learned counsel on his behalf, M.E. Oruma Esq. adopted and relied on their Brief of Argument filed on 30/7/13 in which was crafted a single issue, viz: H

“Whether or not by virtue of the provisions of section 141 of the Electoral Act, 2010 (as amended), a person who was not nomi-

nated to contest and/or who did not participate in the main or actual election as a candidate, could be declared under any circumstance as the winner of an election in which such a person has not fully participated in all the stages of the said election”.

B The 3rd respondent, Julius Oghenevwegba Bobi wrote to court stating he was not contesting the appeal, was not getting any legal representation either. He underscored that stance by appearing physically to further reiterate his position and that he had not filed any process in reaction to the appeal.

C For the 4th respondent, Mr. Joe Agi SAN adopted their Brief settled by Suleiman Usman and filed on 7/6/13 and in it was drafted a sole issue which is as follows:

D Whether the learned Justices of the Court of Appeal were right in dismissing the suit of the plaintiff/appellant before the trial court despite resolving the two issues formulated for the determination in favour of the appellant and when there was withdrawal of the candidacy of 2nd respondent and substitution of the appellant in his stead. (Grounds 1, 2, & 4 of the Notice of Appeal)

E The sole issues 1 and 2 identified by the appellant seem to me to be apt in settling of the crucial question raised in this appeal. These being whether the Court of Appeal was right in not making the consequential orders directing that the appellant be issued with the certificate of return for the Ughelli North II State Constituency for the Delta State House of Assembly when the court resolved the issues in
F favour of the appellant.

Learned counsel for the Appellant, Mr. Ehighelua submitted that the court below found as a fact that the 2nd respondent withdrew from the election contest and that the political party forwarded
G the name of the appellant to INEC as the person used to substitute the 2nd respondent, more than 45 days before the holding of the general election. That the candidate of the 4th respondent (DPP) was at all material times the appellant and none other. This is in keeping with the position of this court that the rights of a political party to
H sponsor or nominate a candidate for an election cannot be questioned by INEC or the court. He cited: Justice Party v INEC (2006) ALL FWLR (Pt. 339) 907 at 916; UBA v Enemuo (2006) ALL FWLR (Pt.311) 1951 at 1963; Davies v Mendas (2007) ALL FWLR (Pt.348) 883 at 909; Fashogbon v Adeogun (No 2) (2007) ALL FWLR (Pt.

396) 661 at 681 - 682; Uzodinma v Izunaso (No 2) (2011) 17 NWLR (Pt. 1275) 30.

Also contended for the appellant is that the suit before the trial court was initiated after which the 1st respondent issued out the Certificate of Return to the 2nd respondent. That the situation rendered the issuance of the certificate of return a nullity. He cited *Military Governor of Lagos State v Ojukwu* (2006) NWLR (Pt.18) 621. B

Mr. Ehiguelua of counsel stated that once the political party puts forward a person as its candidate, the electoral body or the court cannot reject that candidate even if there were problems with that nomination. He referred to *Uzodinma v Izunaso* (No 2) (2011) 17 C NWLR (Pt.1275) 30, *Olofin v Itodo* (2010) 18 NWLR (Pt.1225) 545.

Learned counsel for the appellant submitted that the legal basis for substitution of candidates for elections under the Electoral Act 2010 is to be found in section 33 and 35 of that Act. That once there had been a withdrawal followed by the act of forwarding another name to INEC by the political party, the substitution is complete and consummated. He cited *Adeogun v Fashogbon* (2011) 8 D NWLR (Pt. 1250) 427 at 454; *Emeka v Okadigbo* (2012) 18 NWLR (Pt.1331) 55 at 108; *Ugwu v Ararume* (2007) ALL FWLR (Pt.377) E 807 at 896 - 897 etc.

It was further canvassed for the appellant that the court below having found as a fact that the 2nd respondent had withdrawn from contesting the election, the issue of the nomination of the 2nd F respondent ceased to be of any relevance and it no longer mattered that the same persons who nominated the 2nd respondent were the same persons who also nominated the appellant because of the very clear wordings of Section 32(4) of the Electoral Act 2010. That there being no cross-action by the 2nd respondent challenging the said G nomination and there being no cross-appeal before the lower court, the court below was wrong to have raised the issue of nomination forms when the case of the appellant was based solely and strictly on the issue of substitution. That the lower court therefore erred to have H raised and resolved the issue suo motu on the nomination of the appellant which did not arise from the Notice and grounds of appeal.

The appellant urges the court to invoke Section 22 of the Supreme Court Act to grant the reliefs sought as if the suit had been initiated in this court as a court of first instance.

Learned counsel for the 1st respondent, Mr. Ibrahim K. Bawa contended that the appellant was never validly nominated to contest the election of Ughelli North II Constituency of Delta State conducted on 26th April, 2011 and referred to the findings of the trial court. That Exhibit P1 was the set of documents forwarded by the 4th respondent to the 1st respondent aimed at substituting the 2nd respondent for the appellant and which the court of trial collectively marked as Exhibit P1.

Mr. Bawa of counsel went on to contend that the appellant in fact did not participate in the election of 26th April 2011 and so could not be declared the winner thereof and is not entitled to the certificate of return. He cited Section 141 of the Electoral Act, 2010: *CPC & Anor. v. Emmanuel David Ombugado & Anor* (Unreported) delivered by this court on 19th July, 2013.

Mr. M. E. Oruma, learned counsel for the 2nd respondent stated that the concurrent findings by the two courts below that appellant was never validly nominated to contest the general election should not be tampered with by this Apex Court. He referred to the cases of: *Ihunwo v Ihunwo* (2013) 18 NWLR (Pt.1357) 50 at 576, *Eta v Dozie* (2013) 9 NWLR (Pt.1359) 248 or 274, *Ajayi v State* (2013) 9 NWLR (Pt.1360) 589 at 613.

For the 4th respondent, learned Senior Advocate Joe Agi submitted that the substitution of the 2nd respondent with the appellant following the withdrawal of the 2nd respondent thereby produced appellant as the candidate of the Democratic Peoples Party (DPP), 4th respondent. That this is in keeping with the settled law that a political party has the unfettered right to nominate and sponsor its candidate for any election. He anchored on numerous authorities including *Onuoha v Okafor* (1983) SCNLR 244; *Dalhatu v Turaki* (2003) 15; *UBA v Enemuho* (2006) ALL FWLR (Pt.311) 1951 at 1963 etc.

Mr. Agi stated that assuming without conceding that the relief in originating summons were not to be granted by the court, the court still had ample powers to grant consequential orders that will make the judgment of the court to have the necessary bite and efficacy.

In reply on points of law, learned counsel for the appellant contended that the name of the appellant having been submitted to

the 1st respondent (INEC) on 9/2/2011, more than two months before the election he was from 9/2/2011 till 26/4/2011 when the elections took place the validly nominated candidate of the party whether or not INEC refused to publish his name or erroneously put the name of the 2nd respondent in the result sheet. He relied on the case of *Kubor v Dickson* (2013) ALL FWLR (Pt. 676) 362. B

A summary of the various standpoints of the respective parties have been stated above and briefly those positions can be restated as briefly as possible hereunder as thus:

For the appellant are that he was able to establish that the 2nd respondent was not sponsored by the 4th respondent Political Party, DPP for the House of Assembly Election of 2011 as appellant was effectively and properly used as a substitute by the political party to replace the 2nd respondent who had withdrawn from the contest in keeping with the provisions of the relevant Electoral Act specific section of the law. This being a situation in consonance with the inalienable right of the political party to nominate and sponsor a candidate for an election, which power is not for dispute by anyone or body or the court. The conclusion as forwarded by the appellant being for the invocation of the powers of the Supreme Court under Section 22 of the Supreme Court Act to emphasize that correct position. C D E

The Independent National Electoral Commission (INEC) as 1st respondent takes the position that the appellant was not nominated to contest and did not participate in the election to the membership of the Delta State House of Assembly for Ughelli North II State Constituency conducted on 26th April, 2011 and so not entitled to the reliefs claimed in the Originating summons. F

Also that since the action of the appellant before the trial court was initiated after the general election, the suit was outside the ambit of the jurisdiction of the trial court and should have been a dispute for the Electoral Tribunal. G

The 2nd respondent went along the same line of thinking of the 1st respondent in respect of the lack of jurisdiction of the trial court being a pre-election matter commenced after the general election. Again along the same viewpoint, that the substitution was not made and so appellant having no leg to stand in the reliefs sought. H

The 4th respondent, Democratic Peoples Party (DPP) an-

chored its arguments as those of the appellant, insisting it was appellant the political party sponsored and not 2nd respondent.

From the above, it can be seen, two main questions thrown up seeking answers thereto. Firstly what powers in the prevailing circumstances existing does the political party possess in its quest to sponsor its candidates within the preview of the Electoral Act 2011. The second poser after the answer to the first question being what forum for the ventilation of a grievance arising from the nomination of such a candidate.

To tackle these questions, I would first state that it is now a settled matter made crystal clear from various decisions of this court that the rights of any political party to sponsor or nominate a candidate for an election cannot be questioned by INEC, 1st respondent or even the court.

In line with that position an appellant can only be sponsored by a political party which must nominate him as a candidate. He cannot nominate himself since that is the prerogative of the political party being a process which is domestic internal affair of that political party stated differently is the fact that the matter of choosing a candidate is within the exclusive preserve of the political party to nominate and change a candidate nominated. With that notion in view as to whose responsibility it is to nominate a candidate to contest an election the court's jurisdiction in that regard is non existent and as for the INEC or 1st respondent its role is that of a neutral umpire without a stake. I rely on the cases of Justice Party v INEC (2006) ALL FWLR (Pt. 339) 907 at 916; UBA v Enemuoh (2006) ALL FWLR (Pt.311) 1951 at 1963; Davies v Mendes (2007) ALL FWLR (Pt. 348) 883 at 903; Uzodinna v Izunaso (No 2) (2011) 17 NWLR (Pt. 1275) 30.

A point of note is that by the provisions of Section 221 of the 1999 constitution as amended, it is only a registered political party that can sponsor and canvass for votes for a candidate in an election. See Adegoroye v. Alliance for Democracy (2003) 46 WRN 47 at 65 - 65.

My learned brother Onnoghen JSC captured the scene succinctly in the case of Olofin v Itodo (2010) 18 NWLR (pt.1225) 545 thus:

"It is not disputed that a political party has the power to nominate a candidate for an election without interference from court. The

matter being strictly within the domestic jurisdiction of the political party. That has now been recognised as the position of the law as recognised in the cases of Onuoha v. Okafor (2003) 15 NWLR (pt. 843) 310, Jang v. INEC (2004) 12 NWLR (pt. 886) 146 etc.”

For what we are here for, being the issue of the substitution of candidates for the election in keeping with sections 33 and 35 of the Electoral Act 2010 as amended which sections provide thus:

“33. A Political Party shall not be allowed to change or substitute its candidate whose name has been submitted pursuant to section 32 of this Act except in the case of death or withdrawal in writing by the candidate.

35. A candidate may withdraw his candidature, by notice in writing signed by him and delivered by him to the political party that nominated him for the election and the political party shall convey such withdrawal to the commission not later than 45 days to the election.”

From the facts well established in the pleadings and documents proffered, the DPP or 4th respondent complied with the above statutory provisions of the Electoral Act consequent upon the withdrawal by himself from further contest the candidature of the 2nd respondent, who not only did so in writing, but also collected back the two million naira deposit he earlier paid, all within the knowledge of 1st respondent to whom the necessary evidencing documents had been sent by the 4th respondent and who also when later required made available certified copies of those salient documents thereby making it curious that the same establishment would turn round to declare the now extinct candidate of the political party which did not sponsor him and which party had been declared winner. The case of Kubor v Dickson (2013) ALL FWLR (pt. 676) 392, a case of this court which pronouncement of Onnoghen JSC has been a guide and I will quote:

“Finally there is the sub-issue of publication of the names of candidates for election by 3rd respondent as a condition precedent for valid nomination.

I have pondered over the submissions of this sub-issue and have not clearly seen the connection between publication of the names of the candidates by the 3rd respondent and the qualification to contest any election to which the publication or non publication relates.

I hold the view that publication of names of candidates by 3rd respondent is not evidence of sponsorship by a political party which nominated candidates. Evidence of nomination and sponsorship of a candidate by a political party lies in the declaration of the winner of the party's primary election conducted for the general election in question complied with the political party forwarding the names of the said elected candidate to the 3rd respondent as its nominated candidate for the election." Onnoghen JSC held at 427 (D - E).

"In a situation where the 3rd respondent fails or neglects to publish the names of an otherwise validly nominated candidate of a political party for an election, failure cannot be visited on the candidate of the right conferred on him by the nomination to contest the election in question. Once a candidate has been nominated and his name sent by his political party to the 3rd respondent as its candidate for the election the candidate remains a candidate and cannot be changed or substituted as long as he remains alive after the submission of his name, unless the candidate voluntarily withdraws from the race - See section 33 of the Electoral Act, 2010, as amended.

Publication by 3rd respondent therefore is truly an administrative act with no serious legal consequences on the nominated and sponsored candidate in the case of failure to publish the name.

To my mind what is crucial in this case is the issues of nomination and sponsorships envisaged under section 31 of the Electoral Act, 2010 (as amended) not publication of the names of candidates under section 34 of the said Act. Once it has been established exhibits "Q" and "R" that 1st respondent was nominated and sponsored by 2nd respondent for the election in issue and contested same, the issue of nomination and sponsorship has been established."

From the foregoing it is clear that the withdrawal of the candidature of the 2nd respondent was completely and with finality done alongside the substitution with the name of the appellant by the 4th respondent to the appropriate authority INEC or the 1st respondent. All processes were in order and along the prescribed provisions of Sections 32 and 33 of the Electoral Act 2010. It become too late in the day for any of the parties to resile from what had been done according to law.

The next knot to untie is if the appellant had approached the correct forum for redress. The appellant said he was in order at the

Federal High Court but the 1st and 2nd respondents disagree on the ground that the general election having taken place and a winner declared the next step was a cry to the Election Tribunal, the jurisdiction of the High Court having been ousted by the happening of that concluded election. That argument of the 1st and 2nd respondents is indeed seductive and persuasive being taken in context with the provisions of Section 87(10) of the Electoral Act, 2010 same as Section 87 (a) of the Electoral Act, 2010 as amended which was well x-rayed by this count in *Hassan v Aliyu* (2010) 17 NWLR (Pt. 1223) 547 at 599. B

The redress must be sought in either the Federal or State High Court prior to the holding of the election. Where the election has taken place, any grievance arising from the nomination exercise can only be entertained by the Election Tribunal on the ground that the petitioner or its candidate was validly nominated but was unlawfully excluded from the election (Section 138 (1) (d) of the Electoral Act, 2010 as amended). C D

My learned brother Onnoghen JSC in the *Hassan v Aliyu* case (supra) explained that stand in the following words:

"It is settled law that in on election or election related matter, time is of the essence. I will add that the same applies to pre-election matters." E

*Election matters are sui generic, very much unlike ordinary civil or criminal proceedings. Appellant ought to have instituted the action soon after the substitution to keep his interest in the political contest alive but he did not. If he had, but the election went on and the 1st respondent sworn in as the governor, by the authority of the decision in *Amaechi v INEC* supra, section 308 of the 1999 Constitution would have been rendered a toothless bull dog.* F G

I hold the view that of the time appellant decided to go to court in the circumstances of this case, the question of nomination by way of substitution which is a pre-election proper had ceased to exist leaving only the election proper to be questioned and the proper place to do so is the election tribunal. H

If the situation in this case is encouraged, it will breed uncertainty in the polity when a person may wake up a year or more after an election and swearing-in of a president or governor to challenge his nomination by way of substitution for the election that brought

him to power. Or he may even do so after the tenure of office of the official concerned which attitude ought not be encouraged by the law.”

Having stated the above and contextualizing in the space created by the facts of this case, it is glaring that the authority is not applicable for our purpose here. The reasons being that the cause of action could not have arisen before the general election as it matured with the declaration of 2nd respondent as winner of the election which occurred with the conclusion of the general election. Also since both disputants in this case are of the same party and the election Tribunal cleared for opponents inter partes then no room exists for the resolution of what is at stake being, who really was the candidate of the DPP or 4th respondent at the time of the election, a situation intra parties. Therefore there is a clear distinction with facts upon which the case of Hassan v Aliyu (supra) would be applied and facts such as we have here and now with its unique features whereby the authority of Hassan v Aliyu (supra) cannot be applicable. It falls to reason that indeed, the appellant heading to the Federal High Court for redress was where he rightly ought to go and he did go and the Court of Appeal was on course in holding that the trial court ought not to have declined jurisdiction as the necessary vires existed.

In the light of the foregoing the issue is resolved in favour of the appellant and against the 1st and 2nd respondent, therefore the appeal is allowed and the decision of the court below set aside which did not do what the trial High Court should have done by declaring the substitution well effected and concluded with the result that the 2nd respondent did not contest the election and the 1st respondent had no business declaring him as winner when 4th respondent as the vehicle for the election was found to have won.

CROSS-APPEAL

The 1st respondent/cross-appellant in the Brief deemed filed on 30/9/14 identified two issues for determination in this cross-appeal which are thus:

1. Whether the Court of Appeal in its majority decision was right to have set aside the decision of the trial Federal High Court declining jurisdiction to hear or try or determine a pre-election matter commended and/or instituted after the actual or main election. (From grounds 1 & 2 of the grounds of cross-appeal)

2. Whether the court of appeal was right when it reproached the 1st respondent/cross-appellant for failing to act on an irregular substitution of candidate made by the 4th respondent. (From Ground 3)

The 2nd respondent/cross-appellant did not craft any issues for determination, rather utilized those questions raised by the 1st respondent/cross-appellant. B

The 4th respondent/cross appellant drafted a single issue stated as follows:

Whether in the circumstances of this appeal, the Lower Court was right when it concluded that the substitution of the appellant and his nomination are irregular and therefore not entitled to the reliefs sought in his Originating Summons. (Grounds 2, 3, & 4 of the Notice of Cross-appeal) C

The appellant/cross-respondent raised a preliminary objection filed on 20/11/13 and had the arguments incorporated in their Brief filed on 16/12/13. D

NOTICE OF PRELIMINARY OBJECTION

TAKE NOTICE: That at the hearing of the main appeal and cross-appeal, the appellant/cross respondent shall raise a preliminary objection and urge this Honourable Court to strike out the cross-appeal of the 1st respondent/cross appellant in its entirety. E

GROUND OF THE OBJECTION

(i) Ground 1 of the notice and grounds of cross-appeal is a ground of mixed law and fact, in respect of which no leave was sought before same was filed. F

(ii) Ground 3 of the notice and grounds of cross-appeal is a challenge to an obiter dictum and not the ratio decidendi of the Court of Appeal. G

(iii) Issue No 1 as formulated and argued by the respondent/cross appellant encompasses argument in respect of Ground 1 of the notice and grounds of Cross-Appeal which is incompetent, thereby rendering Issue No 1 as argued by the 1st respondent/cross appellant to be incompetent. H

(iv) Issue No 2 as formulated and argued by the 1st respondent/cross appellant from Ground 3 which is based on an obiter dictum which is incompetent renders the said Issue No 2 incompetent.

Learned counsel for the Respondent/Objector, Mr. Ehiguelua

contended that Ground 1 of the Notice of Appeal brought up the question of limitation and whether the suit was not statute barred when first instituted thus raising issues of fact or mixed law and fact and so rendering that fact and issue raised therefrom incompetent and liable to striking out.

B He relied on: *BASF Nig. Ltd v. Faith Ent. Ltd* (2010) 1 SCNJ 247; *Nwadike v. Ibekwe* (1987) 4 NWLR (Pt.67) 718; *Agoghalu v Orealosi* (1999) 13 NWLR (Pt.634) 297; *Akinyemi v Odua Inv. Co. Ltd* (2012) 17 NWLR (Pt.1329); *Nwosu v. Offor* (1997) 2 NWLR (Pt.487) 274.

C For the objector was submitted that Ground 3 did not challenge the ratio decidendi of the judgment and so was an obiter dictum and so was on incompetent ground liable to be struck out. He cited *Nwankwo v. E.D.C.S.U.A* (2007) 5 NWLR (Pt.1027) 377; *Nfor D v Ashaka Cement Co. Ltd* (1994) 1 NWLR (Pt.319) 222; *Akpan v. The State* (1994) 9 NWLR (Pt. 368) 347 etc.

Mr. Ibrahim Bawa for the 1st cross-appellant in response submitted that the particulars of Ground 1 of the cross-appeal reveal that the conclusion reached by the majority decision of the court below on settled facts was wrong and thus a ground of law. Also that the ground challenges the finding of the court below on 1st cross-respondent's claim falls within the jurisdiction of the trial Federal High Court which is a ground of pure law. He cited Section 233(2) (a) of the 1999 Constitution as amended.

F That from Ground 3 is deducible a competent ground and the cross-appellant did not need to quote the whole gamut of the judgment for that to be elicited as flowing from the ratio decidendi of the case. He cited *Akpan v Bob* (2010) 17 NWLR (Pt.1223) 421 at G 463 - 465; *Mba v. Agu* (1999) 12 NWLR (Pt.628) 1 at 12.

Mr. Bawa concluded by saying that the appellant/cross respondent is only hanging onto technicalities in order to obscure the real issues for determination on cross-appeal. He referred to *Odonigi v. Oyeleke* (2001) 6 NWLR (Pt.708) 12 at 23 - 24.

H The cross-respondent's reply is a reiteration of the arguments in the preliminary Objection raised and stated further that issue No 2 is only axiomatic in the circumstance and that once Ground 1 and 2 of the Notice of Cross appeal are incompetence then the issues therefrom suffer the same a fate. He cited *Ekunola v. CBN* (2013) 15

NWLR (Pt.1377) 324 etc.

By the Notice of preliminary Objection, the appellant/1st cross respondent raised 4 (four) grounds of objection to the cross-appellant's appeal. The grounds of objection as stated on page 8 of the appellant's/ 1st cross-respondent's Reply Brief of Argument are:

“(i) Ground 1 of the notice and grounds of cross-appeal is a ground of mixed law and fact, in respect of which no leave was sought before same was filed. B

“(ii) Ground 3 of the notice and grounds of cross-appeal is a challenge to an obiter dictum and not the ratio decidendi of the Court of Appeal. C

“(iii) Issue No 1 as formulated and argued by the respondent/ cross appellant encompasses argument in respect of Ground I of the notice and grounds of Cross-Appeal which is incompetent, thereby rendering Issue No 1 as argued by the 1st respondent/cross appellant to be incompetent. D

“(iv) Issue No 2 as formulated and argued by the 1st respondent/cross appellant from Ground 3 which is based on an obiter dictum which is incompetent renders the said Issue No 2 incompetent.” E

With particular reference to the first leg of the preliminary objection, it is necessary for clarity to reproduce the Ground 1 of the Cross-Appeal and particulars complained about, to wit:

“GROUND 1:

The learned Justices of the Court of Appeal in their majority judgment erred in law when they held that the trial Federal High Court, Asaba Judicial Division had jurisdiction to hear and determine the suit of the appellant/1st cross-respondent which is a pre-election on nomination and substitution of candidate filed after the conduct of the main election.” F G

PARTICULARS OF ERROR

“(i) The suit before the trial Federal High Court, Asaba on appeal is a pre-election matter filed on 29th day of April, 2011 by the appellant/1st cross respondent offer the cross appellant herein conducted the main election on the 26th day of April, 2011. H

“(ii) A pre-election matter under whatever circumstance must be filed prior to the conduct of the main election. The regular Courts do not have jurisdiction to hear and determine a pre-election matter filed after the conduct of the main election.

(iii) *It is only on election Tribunal established under Section 285 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) that has the jurisdiction to question the election and return of a candidate after election has been conducted and return made."*

B The Preliminary Objection needs no splitting of hairs in that Grounds 1 and 2 indeed are competent being grounds clearly of law relating to jurisdiction and so can be properly raised herein.

C The same as above cannot be said for Ground 3 which is incompetent and in that regard I do agree with learned counsel for the 1st respondent/cross appellant that what had been crafted in the Ground is outside the complaint before court of trial and not within the decision of the court below. In that regard the competent only surviving Grounds 1 and 2 can sustain the cross-appeal. I rely on the D cases of Akpan v Bob (2010) 17 NWLR (Pt.1223) 421 at 463: Mba v Agu (1999) 12 NWLR (Pt.629) 1 at 12.

CROSS APPEAL ARGUMENTS

ISSUE ONE

E In this, the issue is raised the question whether the Court of appeal was right to set aside the decision of the trial Federal High Court declining jurisdiction to hear and determine a pre-election matter commenced after the general election.

F Mr. Ibrahim K. Bawo contended that once the actual election has been conducted, a High Court or Federal High Court as in the instant case ceases to have jurisdiction to entertain and/or determine a pre-election matter filed after the conduct of the election. That the Supreme Court has restated the law that pre-election matters must be filed at the appropriate High Court before and not after G the main election. He cited Hassan v Aliyu (2010) 17 NWLR (Pt.1223) 54 - 599; Salim v. CPC (2013) 6 NWLR (Pt.1351) 501 at 527.

H It was further submitted for the 1st cross-appellant that once an election had been conducted as in this instance and a winner declared with the presentation of the Certificate of Return in respect of the election, the only court with jurisdiction to entertain any complaints from the aggrieved over the candidacy is the Election Tribunal and not the regular High Court. The case of Olofin v. Itodo (2010) 18 NWLR (Pt. 1225) 545.

Mr. Oruma, learned counsel for the 2nd cross-appellant sub-

mitted that once the actual election has been held, even one day after the election the trial court ceases to have jurisdiction to entertain and/ or determine the pre-election matter filed after the election. He cited *Hassan v Aliyu* (2010) 17 NWLR (Pt.1223) 547 at 599: Section 87 (9) (10) of the Electoral Act, 2010; *Salim v CPC* (2013) 6 NWLR (Pt.1351) 501 at 527. B

Learned counsel for the 2nd respondent/cross appellant contended that the court below embarked on the re-evaluation of the evidence before the lower court without taking into consideration the totality of the evidence, both documentary and oral, placed before the trial court by the parties on which the trial court arrived at its findings of fact. That this evaluation was faulty since it was within the exclusive domain of the trial court that had the advantage of seeing and watching the witnesses as they testified. That the appellate court could only interfere with such findings when the trial court failed to do its duty which is not the case herein. He cited *Lasisi v State* (2013) 9 NWLR (Pt.1358) 74 at 95 - 96. That the withdrawal necessitating a substitution of candidate did not take place. C D

In argument to push across their cross-appeal, learned counsel for the 4th respondent/cross-appellant submitted that the 2nd respondent properly and voluntarily withdrew his candidature and was duly substituted with the appellant who contested the election and convincingly won. Also that the 2nd respondent collected back his nomination fees he paid to the party only to turn around in line with INEC to have the certificate of return issued to him at the end of the election he did not contest. He referred to *AD v Fayose* (No.2) (2004) 26 WRN 51 at 76 -77. That by Section 221 of the Constitution it is only a registered political party that can sponsor and canvass for votes for a candidate in an election. He cited *Adegoroye v AD* G (2003) 46 WRN 47 at 65 - 66: Sections 33, 35 of the Electoral Act, 2010; *Adeogun v. Fashogon* (2011) 8 NWLR (Pt.1250) 427 at 454. F

In reply, Mr. Ehiguelua for the cross respondent said that an election petition on any of the grounds contained in Section 138 of the Electoral Act, 2011 (as amended) cannot exist or be filed between persons who claim to belong to the same political party. That the Lower Court was right when it held that the trial court had jurisdiction to entertain the suit of the 2nd appellant/cross respondent. He referred to *Atago v. Nwuche* (2013) 3 NWLR (Pt.1341) 337 at H

355; *Uwazurike v Nwachukwu* (2013) 3 NWLR (Pt.1345) 503.

Learned counsel for the 1st cross-respondent however conceded the cross-appeal of the 4th respondent/cross appellant. These cross-appeals seem in substance to have been answered in the main appeal, however at the risk of verbosity I would like to reiterate that there was overwhelming evidence including those from 1st and 2nd respondent that 2nd respondent had withdrawn his nomination deposit and withdrawn his candidature in writing, he therefore lacked the basis for the later day claim as the candidate of DPP or 4th respondent and the victory of the general election ensued to him by the declaration of INEC. This is because that declaration as winner by INEC had no foundation, the position having been lost to 2nd respondent when the withdrawal and substitution were completed with INEC participating within the powers granted it. Therefore whether INEC had published another name other than that of appellant at the completion of the substitution really changed nothing as something cannot be placed on nothing. The paramount of the political party to nominate and/or substitute within the time frame granted it cannot be whittled down or down played. See *Kubor v. Dickson* (supra) at 426, 427, 434 - 435.

In the light of the above I agree with the 1st cross-respondent that the cross-appeals of 1st and 2nd cross-appellants lack merit and should be dismissed as I hereby dismiss them.

However the cross-appeal of the 4th cross-appellant to which the 1st cross-respondent concedes flowing from the same source and anchored on the unchallengeable facts available is allowed with this court invoking its powers under Section 22 of the Supreme Court Act. In that vein and for the fuller reasoning in the lead judgment of my learned brother, Walter Onnoghen JSC I too order that 2nd Respondent vacate the seat of the Ughelli North II State Constituency of Delta State House of Assembly forthwith and the appellant be issued with the Certificate of Return and assume membership of the House of Assembly representing Ughelli North Constituency.

Also for full measure the 2nd respondent is to refund all salaries and allowances collected so far to Delta State House of Assembly within 90 days.

I abide by the consequential orders as earlier made in the lead judgment.

AKA'AH'S JSC

I had the privilege of a preview of the leading judgment of my learned brother, Onnoghen, JSC. I am in complete agreement with this reasoning and conclusion the appellant's appeal as well as the cross - appeal filed by the 4th respondent are meritorious and should be allowed while the cross - appeals of the 1st and 2nd respondents are completely devoid of merit and are hereby dismissed. I wish to add a few comments in support of the leading judgment. B

The central issue in this appeal relates to the powers of the 1st respondent on the substitution of a candidate nominated by a political party to contest an election. Sections 33 and 35 of the Electoral Act 2010 (as amended) provide as follows:- C

"33. A political party shall not be allowed to change or substitute its candidate whose name has been submitted pursuant to section 32 of this Act, except in the case of death or withdrawal by the candidate."

35. A candidate may withdraw his candidature by notice in writing signed by him and delivered by himself to the political party that nominated him for the election and the political party shall convey such withdrawal to the Commission not later than 45 days to the election" E

Both the appellant and 4th respondent took the necessary steps to effect the substitution. The 1st respondent duly acknowledged receipt of Form CF 001 from DPP (4th respondent) in favour of the appellant on 9th February, 2011. The withdrawal of the 2nd respondent's name was conveyed to the Commission well beyond the 45 days to the election. The purported action by the Legal Department of INEC to amend the published list of candidates to contest the election is to say the least fraudulent as INEC had no discretion in the matter. F G

It is the duty of a party to nominate their candidate for election and the party is at liberty to substitute the name of any candidate it had earlier forwarded to INEC provided the withdrawal is done within the stipulated period prior to the election. A candidate who is wrongly substituted can approach the courts for redress. The Commission cannot impose a candidate on the party. H

The conduct of public affairs and this includes holding a po-

litical office either through appointment or election should be done with a measure of decorum and decency. It was confirmed that the 2nd respondent collected the N2,000,000.00 (Two Million Naira) deposit he paid to the party to enable him contest for the nomination. Even if the 2nd respondent was prevailed upon to withdraw from contesting because it was discovered he did not resign from his civil service employment, he could not parade himself as the person who won the election for Ughelli North II Constituency in the Delta State House of Assembly. His return as the winner of the election was a complete nullity; so also the issuance to him of the certificate of Return as winner of the election. Consequently at the salaries and allowances and other perquisites of office which he had enjoyed were done under false pretences and he should be made to disgorge all that has accrued to him within 90 days from the date of this judgment.

The case was properly instituted before the Federal High Court since the appellant could not complain that the 1st respondent was not qualified to contest the election as envisaged in Section 138 (1) (a) of the Electoral Act so as to bring the action under the ambit of the Election Tribunal.

The main appeal by the appellant as well as the cross-appeal by the 4th respondent therefore succeed and they are hereby allowed while the cross-appeals of the 1st and 2nd respondents fail and are accordingly dismissed.

I abide by all consequential orders made against the 1st and 2nd respondents including costs.

G **KEKERE-EKUN JSC**

This is an appeal against the judgment of the Court of Appeal, Benin Division delivered on 22nd May 2013 setting aside in part the judgment of the Federal High Court, Asaba which held that it lacked jurisdiction to entertain the appellant's suit on the ground that it was a pre-election matter instituted after the conduct of the general elections into the Delta State House of Assembly.

The facts that gave rise to this appeal are as follows: The 2nd respondent herein contested and won the primaries of the 4th respondent, Democratic Peoples Party (DPP) to represent the party in

the general election into the Ughelli North Constituency II of the Delta State House of Assembly. Subsequently, by notice in writing dated 9/2/2011 addressed to the 4th respondent (DPP), he (2nd respondent) voluntarily withdrew his candidature. The 4th respondent acknowledged receipt of the letter of withdrawal. The appellant was duly substituted for the 2nd respondent and the 1st respondent (INEC) was officially notified in writing. The 2nd respondent upon the withdrawal of his candidature collected the mandatory deposit of N2 million he had paid to the 4th respondent in compliance with its conditions for sponsorship. Thereafter the 1st respondent published a list of candidates for the election, which it titled "State Assembly 2011 Final List", which featured the appellant's name. Subsequently however another list surfaced featuring the name of the 2nd respondent. The 4th respondent wrote to the 1st respondent reiterating that the appellant was its candidate. The election took place on 26/4/2011 and the 4th respondent (DPP) was declared the winner. However the 1st respondent issued a certificate of return to the 2nd respondent who had earlier withdrawn his candidature rather than the appellant, the actual flag bearer of the party.

Being dissatisfied with the turn of events, the appellant and the 4th respondent as 1st and 2nd plaintiffs respectively took out an originating summons at the Federal High Court, Asaba on 29/4/2011 against the 1st and 2nd respondents as defendants seeking the determination of the following questions:

a) WHETHER the 1st plaintiff who having been duly nominated as the candidate of the 2nd plaintiff for the election into the Delta State House of Assembly to represent Ughelli North Constituency II in the Delta State House of Assembly and the 2nd plaintiff having won the election whether the 1st Plaintiff is not entitled to be issued with a certificate of return in respect of the said election.

b) WHETHER the 2nd Defendant who personally signed a letter withdrawing from the election and was validly substituted by the 1st plaintiff as its candidate can validly contend that he is still the candidate of the 1st Plaintiff in respect of the material election.

c) WHETHER the 1st Defendant can pick and choose candidates for the 2nd Plaintiff a political party.

In the event that the questions were answered in the affirmative, they sought the following declarations:

a) A DECLARATION that the 1st plaintiff being the validly nominated candidate of the 2nd plaintiff is the person entitled to be issued with a certificate of return in respect of the House of Assembly election in Ughelli North 2 Constituency of Delta State.

b) AN ORDER of this Honourable Court directing the 1st Defendant to issue the 1st plaintiff with a certificate of return in respect of the House of Assembly election into the House of Assembly for Ughelli North 2 Constituency of Delta State.

c) AN ORDER restraining the 1st Defendant from recognizing the 2nd Defendant as the candidate of the 2nd plaintiff and also from issuing any certificate of return in the name of the 2nd Defendant.

In the course of proceedings the 3rd respondent applied and was granted leave to join the suit as the 3rd defendant. It was the 2nd Respondent's contention that he did not withdraw from the race and that the alleged letter of withdrawal was fake.

All the defendants filed counter affidavits and raised preliminary objections to the jurisdiction of the Federal High court to hear and determine the suit. The preliminary objections were heard along with the originating summons.

The trial court in a considered judgment dated 27/6/2012 upheld the objections and held that it lacked jurisdiction to entertain the suit on the ground that being a pre-election matter, the Federal High Court ceased to have jurisdiction once the election had been conducted and that the proper venue to articulate the appellant's grievances was the Election Tribunal. The court nevertheless went further to determine the originating summons on its merit in the event that this court overruled the decision on the preliminary objections. On the merits the court held that the 2nd respondent did not withdraw his candidature and that the appellant was never a nominated candidate of the 4th respondent.

On appeal to the Court of Appeal, Benin Division (the lower court) the court, by a majority of 2:1, allowed the appeal in part. It held that the trial court had jurisdiction to entertain the suit and found as a fact that the 2nd respondent did in indeed withdraw his candidature. The court however herd that the 4th respondent failed to comply with Section 32 (1) of the Electoral Act 2010 (as amended) with regard to the appellant's nomination and therefore found itself un-

able to grant the appellant's reliefs as contained in the originating summons, Not surprisingly the appellant was dissatisfied with the latter part of the decision and filed a notice of appeal containing four grounds of appeal. The 1st, 2nd and 4th respondents were also dissatisfied with different aspects of the judgment and respectively filed cross appeals. B

The appellant formulated the following issues for determination of the main appeal:

1. Whether the learned Justices of the Court of Appeal were right when after holding that the Appellant was used by the Political Party to substitute the 2nd Respondent they refused to make consequential orders directing that the Appellant be issued with a certificate of return for the Ughelli North II Constituency for the Delta State House of Assembly. (Ground 1) C

2. Whether the learned Justices of the Court of Appeal were right to have dismissed the suit of the plaintiff before the trial court when the Court of Appeal actually resolved the two issues submitted for determination in favour of the Appellant. (Ground 2) D

3. Whether the learned Justices of the Court of Appeal were right when being fully aware that the case of the Appellant was based on substitution to have gone ahead to invoke Section 32 of the Electoral Act 2010 to deny the Appellant the victory of the Democratic Peoples Party in the election into the seat for Ughelli North Constituency II in the Delta State House of Assembly. (Ground 3) E

4. Whether the learned Justices of the Court of Appeal did not err in failing to acknowledge and accept the Appellant as the candidate of the Democratic Peoples Party. (Ground 4) F

I have had the privilege of reading in draft the lead judgment of my learned brother, Onnoghen, JSC. I agree entirely with his reasoning and conclusion that the appeal is meritorious and ought to be allowed. I also allow it. G

The cross appeals of the 1st and 2nd respondents raise the very important issue of jurisdiction. While agreeing with the well considered judgment of my learned brother dismissing the cross appeals, H I wish to add a few comments of my own in support of the reasoning and conclusion that the cross appeals lack merit and should be dismissed.

The 1st respondent (INEC) filed a notice of cross appeal con-

taining 3 grounds of appeal. The grounds shorn of their particulars are as follows:

1. The learned Justices of the Court of Appeal in their majority judgment erred in law when they held that the trial Federal High Court, Asaba Judicial Division had jurisdiction to hear and determine the suit of the Appellant/1st Cross Respondent which is a pre-election matter on nomination and substitution of candidate filed after the conduct of the main election.

2. The learned Justices of the Court of Appeal in their majority judgment erred in law when they held that the trial Federal High Court had jurisdiction to hear the pre-ejection matter and thereby failed to apply and be bound by the Supreme Court decision in Hassan V. Aliyu (2010) 17 NWLR (Pt.1223) 547 and Salim V. CPC (2013) 6 NWLR (pt. 1351) 501, on the mandatoriness of filing a pre-election matter prior to the conduct of any election.

3. The learned Justices of the Court of Appeal in their unanimous decision erred in law when they held as follows:

“the whole confusion in this case has been caused by the stand of the 1st Respondent that they are empowered to “allow” or “not to allow” any substitution. It was the duty of the 2nd respondent (sic) to act upon the request of the 4th respondent made to them within the time provided by law since the 2nd Respondent had withdrawn.”

The 1st respondent/Cross Appellant distilled the following two issues for determination therefrom:

1. Whether the Court of Appeal in its majority decision was right to have set aside the decision of the trial Federal High Court declining jurisdiction to hear or try or determine a pre-election matter commenced and/or instituted after the actual or main election. (Grounds 1 & 2)

2. Whether the Court of Appeal was right when it reproached the 1st Respondent/Cross Appellant for failing to act on an irregular substitution of candidate made by the 4th Respondent. (Ground 3)

The 2nd Respondent/Cross Appellant’s notice of cross appeal contains four grounds of appeal. The four grounds without their particulars are:

1. The Judgment is against the weight of evidence.

2. The Learned Justices of the Honourable Court of Appeal

erred in the law and thereby occasioned miscarriage of justice when they held as follows-

“The persons whose nomination forms were attached to his party’s nomination forms swore on oath that they never nominated him. It was the forms used to nominate the 2nd Respondent that were attached by the party to the papers submitted for the Appellant. The purported substitution of the Appellant cannot thus be recognised in law since it was not properly done.” B

3. The Learned Justices of the Honourable Court of appeal erred in the law and thereby occasioned miscarriage of justice when they held as follows- C

“I have to agree with the learned counsel for the 2nd Respondent that a person not nominated as a candidate for an election cannot claim to be returned in respect of an election in which he was not at first instance nominated by some party members in accordance with Section 32(1) of the Electoral Act 2010. Any decision by this court to the contrary would be in violation of Section 32(1) and (2) of the Electoral Act 2010 as amended “...In substituting the Appellant for the 2nd Respondent it was the duty of the party members to nominate him again and for the party to agree to the nomination and then forward same to INEC to effect the substitution.” E

4. The Learned Justices of the Honourable Court of Appeal erred in the law and thereby occasioned miscarriage of justice when they held as follows-

“In substituting the Appellant for the 2nd Respondent it was the duty of the party members to nominate him again and for the party to agree to the nomination and then forward same to INEC to effect the substitution. Rather in this case the party used party members who had nominated the candidate who had withdrawn. I have to say that even though the 2nd Respondent had withdrawn his candidacy and the party had tried to substitute the Appellant, the Appellant’s nomination being irregular made the substitution also irregular.” F G

The following issues were distilled therefrom: H

1. Whether or not the court below was right in law when the court below (in the majority judgment) held that it is “my firm but humble view on this issue that if a litigant is not guilty of inordinate delay as happened in Hassan V. Aliyu, he may file the action against

his unlawful nomination or substitution within a reasonable time even after the election,” and proceeded to hold that the trial court had jurisdiction to entertain and/or adjudicate over this pre-election dispute or matter instituted or commenced in the trial court after the main or actual election, thereby reversing the decision of the trial court, which declined jurisdiction in respect of a pre-election matter instituted and/or commenced after the actual or main election.

2. Whether the court below was right in reversing the findings of fact of the trial court which held that the Appellant did not prove that the 2nd Respondent/Cross-Appellant withdrew his candidature from the election, the subject matter of this appeal, and the court below proceeded to hold that the 2nd Respondent/Cross-Appellant withdrew his candidature from the election, the subject matter of this appeal.

3. Whether the court below was right in law when the court below held that a counsel who represented a party in trial court, could file an appeal and conduct the appeal against the party the said counsel represented as joint plaintiff in the trial court.

The appellant/cross respondent filed preliminary objections to the 1st and 2nd cross appeals. I agree entirely with the resolution of the preliminary objections as ably done by my learned brother in the lead judgment. With regard to the 1st cross appeal, I agree that Ground 1 of the notice and grounds of cross appeal is competent because it raises the issue of jurisdiction. It is a ground of law as it is a complaint about the application of the law to undisputed facts. See: Shanu V. Afribank (2000) 13 NWLR (pt. 684) 392 @ 402 A-C; Ogbachie v. Onochie (1986) 2 NWLR (pt. 23) 484 @ 491. I also agree that ground 3 is a challenge to an obiter dictum of the lower court and is therefore incompetent.

Consequently, ground 1 and issue 1 formulated thereon are competent while Ground 3 and Issue 2 formulated thereon are incompetent and are hereby struck out.

I shall consider the 1st cross appeal on the surviving issue which encompasses grounds 1 and 2 of the notice of cross appeal viz.

“Whether the Court of Appeal in its majority decision was right to have set aside the decision of the trial Federal High Court declining jurisdiction to hear or try or determine a pre-election matter commenced and/or instituted after the actual or main election.”

As this court has held on many occasions, jurisdiction is the lifeblood of any adjudication. Where a court lacks jurisdiction to entertain a cause or matter, its proceedings would amount to a nullity, no matter how well conducted. See: *Akere & Ors. v. Governor of Oyo State* (2012) 12 NWLR (PT.1314) 240 @ 267 B-D; *Madukolu v. Nkemdilim* (1962) 1 ANLR (pt. IV) 587; *Obiweubi v. CBN* (2011) B 7 NWLR (pt. 1247) 465 @ 506 C-D.

In its cross appeal, the 1st respondent/cross appellant takes issue with the following finding of the lower court:

“My firm but humble view on this issue is that if a litigant is not guilty of inordinate delay as happened in Hassan V. Aliyu, he may file an action against his unlawful nomination or substitution within a reasonable time even after the election. However where there is proof that the litigant had knowingly slept on his rights for a considerable amount of time that can be labeled “inordinate” he should not have recourse to any relief in any court of law since time is of essence in election matters.”

It is the contention of learned counsel for the 1st respondent/cross appellant that the length of time after the conduct of the election is immaterial in the determination of whether the court has jurisdiction to entertain a pre-election matter. Learned counsel submitted that a High Court or Federal High Court ceases to have jurisdiction to entertain a pre-election matter once the election to which it relates has taken place and results declared. Relying on the decisions of this court in *Hassan v. Aliyu* (2010) 17 NWLR (pt. 1223) 547 @ 599 B-F and *Salim V. CPC* (2013) 6 NWLR (Pt.1351) 501 @ 527, he submitted that pre-election matters must be filed at the appropriate High Court before the material election. He contended that the appellant’s complaint amount, to an allegation of “undue return”, which can only be ventilated before an Election Tribunal. He referred to: *Olofu V. Itodo* (2010) 18 NWLR (Pt.1225) 545 @ 594-595 H - A. Learned counsel also argued that the reliefs being sought by the appellant can only be granted by an Election Tribunal pursuant to its powers as conferred by Section 285 (1) (b) of the 1999 Constitution (as amended).

In reaction to this issue, learned counsel for the appellant/cross respondent reviewed the sequence of events that led to the institution of the suit before the trial court. He submitted that as at 9/2/

2011 when the appellant notified the 1st respondent of the 2nd respondent's withdrawal and his substitution thereafter, the 2nd respondent had effectively ceased to be a candidate for the election on the platform of the 4th respondent. He also noted the fact that the 2nd respondent withdrew the mandatory deposit of N2 million he had paid to the 4th respondent as a condition for his sponsorship and that after the substitution the appellant duly made his own deposit in the same amount. He noted also that the Acting National Secretary of the 4th respondent who was invited to testify to clarify certain facts before the trial court stated thus at page 1042 of the record:

"Apart from Exhibit P1 there is no other form filled and sent to INEC.

There was never a time we received a letter from INEC that they would not accede to our request. The letter Exhibit P5 of 11/5/11, which is the last letter I wrote to INEC. By Exhibit P5 confirmed that the 1st Plaintiff is the candidate of the party."

He also argued that the 1st respondent having received the notification of change of candidate more than two months before the date of the election (in compliance with Section 35 of the Electoral Act 2010, as amended), the issue of substitution was sealed. He stressed the fact that the situation in the instant case is not one where two different persons are competing for the party's ticket but one where the 1st respondent, INEC, after being duly notified 'of and acknowledging the withdrawal of the 2nd respondent and his substitution by the appellant, turned around and imposed the 2nd respondent on the party. He noted that the suit before the trial court was instituted on 29/4/2011, within three days of the appearance of the 2nd respondent's name on the result sheet, while the certificate of return issued to him is dated 3rd May, 2011, after the suit was filed in court and after the 1st respondent had been served with the processes.

Learned counsel contended that the lower court was right to have distinguished the cases cited by the 1st respondent/cross appellant.

On the proper court to approach in the circumstances of this case he submitted that an election petition on any of the grounds contained in Section 138 of the Electoral Act 2010 (as amended)

cannot exist or be filed between persons who belong to the same party. He submitted that the lower court was right when it held that the trial court had jurisdiction to entertain the appellant's suit.

Now, there is no doubt that the issue of substitution, which was in contention between the parties at the trial court, is a pre election issue. By the combined effect of Section 251 of the 1999 Constitution (as amended) and Section 87 (9) of the Electoral Act 2010 (as amended) the jurisdiction to hear and determine pre-election disputes is vested in both the Federal High Court and the State High Courts. See: *Salim V. CPC & Ors.* (2013) 6 NWLR (1351) 501 @ 520 - 521 H - C; 527 D - F. It is well settled that in a pre-election dispute, time is of the essence. The suit must be instituted in the appropriate court before the conduct of the general election. The general rule is that once the election has taken place, the High Court or Federal High Court would cease to have jurisdiction. Where the complaint of the aggrieved party is cognisable under Section 138 of the Electoral Act, the appropriate venue to ventilate his grievance after the conduct of the election would be the Election Tribunal. Indeed in the case of *Hassan V. Aliyu* (2010) 17 NWLR (Pt. 1223) 547 @ 599 B - F, quoted extensively by learned counsel for the 1st respondent/ cross appellant in his brief of argument, this Court held that the appellant in that case ought to have instituted his action soon after the substitution to keep his interest in the political contest alive. In that case the appellant failed to challenge his substitution by the 1st respondent until more than nine months after the election and the swearing in of the 1st respondent who was the person who actually contested the election. This court, per Onnoghen, JSC, held that in the circumstances of that case, the question of nomination by way of substitution, which is a pre-election matter, had ceased to exist, leaving only the election proper to be questioned and that the proper venue was the Election Tribunal.

The fact that time is of the essence in such matters was emphasised.

In the instant case, all the necessary steps to give effect to the substitution of the 2nd respondent by the appellant had been concluded more than 2 months to the holding of the election. The 1st respondent acknowledged receipt of the notice of substitution and accordingly published what it described as the "final list" of candi-

dates, which featured the appellant's name. The appellant contested the election on the platform of the 4th respondent. Up till the conduct of the election there was no dispute. The dispute arose on 26/4/2011 after the 1st respondent declared the 2nd respondent, who did not participate in the election, as having won as the candidate of the
 B 4th respondent. The appellant promptly instituted his suit before the Federal High Court on 29/4/2011, three days later.

With due respect to learned counsel for the 1st respondent/cross appellant the case of Hassan v. Aliyu (supra) cannot be said to
 C be on all fours with the instant case. The issue in this case is not about wrongful substitution, as there was no dispute arising from the substitution of the 2nd respondent by the appellant. As stated by the Acting National Secretary of the 4th respondent in his testimony before the trial court, there was no challenge to the substitution.

D Furthermore, the 4th respondent reiterated its position to INEC that the appellant was its candidate for the election.

The situation in this case is rather unique in that notwithstanding the firm assertion by the 4th respondent, and acknowledgment by the 1st respondent, that the appellant was its candidate, the
 E 1st respondent went ahead and declared a party who had withdrawn his candidature and withdrawn his sponsorship deposit and who did not contest the election, as the winner. The law is well settled that the determination of who the candidate of a political party is, is the sole
 F prerogative of the party. So long as the party's rules, regulations and constitution have been complied with in the selection of a candidate, not even the courts would interfere. See: Olofu V. Itodo (2010) 18 NWLR (pt. 1225) 545 @ 575 B-C; Onuoha V. Okafor (2003) 15 NWLR (pt. 843) 310; Jano V. INEC (2004) 12 NWLR (Pt. 886) 145.

G Our attention has also been drawn to the recent unreported decision of this court in SC.44/2013: Abubakar Mahmud Wambai V. Dr. Kizaya Donatus & Ors. delivered on 11th July 2014. That case is also not on all fours with the instant case. In that case it was the contention of the 1st respondent that he was the duly nominated
 H candidate and flagbearer of the Congress for progressive Change (CPC) for election into the Federal House of Representatives held on 9/4/2011 for Mubi North/Mubi South/Maiha Federal Constituency of Adamawa State and that in spite of the 1st respondent's full participation in the April 9th election, INEC returned the appellant as

the winner on the ground that he had been substituted as candidate of the CPC on 3/4/2011 (i.e. six days to the election). Ruling on a preliminary objection filed by the appellant to the jurisdiction of the court to entertain the suit, the trial court held that the complaint of wrongful substitution or replacement was a pre-election matter, but having been filed after the conduct of the election, the court ceased to have jurisdiction to entertain the complaint. The Court of Appeal set aside the decision on the ground that there was no time limit provided under the 1999 Constitution or the Federal High Court Act for the initiation of pre-election matters. In setting aside the decision of the Court of Appeal and allowing the appeal, this court per Onnoghen, JSC, while agreeing that time is of the essence in pre-election matters and that a High Court ceases to have jurisdiction unless the suit relating thereto was initiated prior to the holding of the election or declaration of result, held that where the pre-election matter is filed after the conduct and conclusion of an election, it is the relevant election tribunal that has jurisdiction to hear and determine it.

What is the relevant election tribunal in the instant case? This question requires the consideration of those grievances that may be ventilated before an election tribunal. Section 138 (1) of the Electoral Act 2010 (as amended) provides:

“138 (1) An election may be questioned on any of the following grounds, that is to say,

(a) that a person whose election is questioned was at the time of the election not qualified to contest the election;

(b) that the election was invalid by reason of corrupt practices or non-compliance with the provisions of the Act;

(c) that the respondent was not duly elected by majority of lawful votes cast at the election; or

(d) that the petitioner or its candidate was validly nominated but was unlawfully excluded from the election.”

Now, in the context of the instant case, the appellant's grievance does not fall within any of the four grounds for contesting an election listed above. In the first place, I am inclined to agree with learned counsel for the appellant/cross respondent that Section 138 (1) of the Electoral Act 2010 (as amended) does not envisage a situation where one member of a political party would challenge the return of a member of the same party in the same election. Section

139 (1) presupposes that each individual political party has one contestant in a particular election and the provisions of the law are for the benefit of a candidate or a political party who is challenging the return of a candidate from a rival political party. In the instant case the 2nd respondent ceased to be a candidate for the election with effect from 9th February 2011. His withdrawal was acknowledged and accepted by the 4th respondent, who then substituted the appellant in his place and completed all formalities with the 1st respondent by forwarding to it notice of the substitution. Thus, as observed earlier, there was no dispute regarding the substitution. The election proceeded accordingly and yet surprisingly the 1st respondent, INEC, returned the 2nd respondent as having won and issued him with a certificate of return. The conduct of INEC in the circumstances of this case leaves much to be desired. This situation clearly placed the appellant in a dilemma. As observed earlier, he could not approach the Election Tribunal, as his complaint did not fall within any of the provisions of Section 138 (1) of the Electoral Act. In the case of Hassan V. Aliyu (supra), this court held that the appellant ought to have instituted his action soon after the substitution to keep his interest in the political contest alive. In the present case, it is clear from the record that the appellant acted timeously. He filed his action three days after INEC declared the 2nd respondent the winner of the election. He could not have instituted any action prior the conduct of the election because there was no dispute regarding his substitution. His party maintained throughout that he was their candidate. And yet, he has clearly suffered a wrong for which he is entitled to a remedy. The legal maxim: “Ubi jus ibi remedium,” meaning, “where there is a wrong there is a remedy”, must be called in his aid.

In the words of my learned brother, Onnoghen, JSC in Hassan V. Aliyu (supra) at 599 G - H, “everyone must be watchful of his legal rights and be vigilant.” The appellant did not go to sleep. He acted swiftly. For this reason, I agree with my learned brother in the lead Judgment that the situation in which the appellant found himself was unique and having acted promptly the only court where he could seek redress was the ordinary court, in this case the Federal High Court. I therefore resolve the sole issue in the 1st respondent/cross appellant’s appeal in favour of the appellant/cross respondent and against the 1st respondent/cross appellant.

The 2nd respondent/cross appellant's appeal is on substantially the same grounds as that of the 1st respondent/cross appellant. I agree and adopt the resolution of this cross appeal as contained in the lead judgment. I have nothing useful to add. I also dismiss this cross appeal.

The 4th respondent/cross appellant filed a notice of cross appeal containing four grounds. The single issue distilled for determination in the said cross appeal is:

“whether the learned Justices of the Court of Appeal were right in dismissing the suit of the plaintiff/appellant before the trial court despite resolving the two issues formulated for determination in favour of the Appellant and when there was withdrawal of the candidacy of 2nd respondent and substitution of the appellant in his stead.”

The 4th respondent's cross appeal is in support of the main appeal. At the hearing of the appeal on 30th September 2014 learned counsel for the appellant/cross respondent informed the court that his client was not contesting the cross appeal of the 4th Respondent. Having resolved the main appeal in the appellant's favour, the 4th respondent's cross appeal also succeeds.

In conclusion the main appeal and the 4th respondent/cross appellant's cross appeal succeed and are accordingly allowed. The cross appeals of the 1st and 2nd respondents fail and are hereby dismissed. I abide by all the consequential orders as elaborately set out in the lead judgment including the order as to costs.

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