

SUPREME COURT OF NIGERIA
FRIDAY 20TH FEBRUARY, 2015. SC. 395/2013
CORAM:- J. A. FABIYI, O. RHODES-VIVOUR,
M. D. MUHAMMAD, C. B. OGUNBIYI,
K. B. AKA'AH, JJSC

- | | |
|--|-------------------|
| 1. MR. IBIBIAMA F. G. ODOM | |
| 2. MR. INNOCENT IBOROMA | APPELLANTS |
| 3. HON. EMILY SOLOMON | |
| (Suing for themselves individually
and jointly as aspirants to the Bonny
Federal Constituency Election of the
Peoples Democratic Party) | |
| AND | |
| 1. PEOPLES DEMOCRATIC PARTY | |
| 2. HON. SEKONTE DAVIES | RESPONDENTS |
| 3. MR. NTOBARI OGOSU | |

APPEALS - Purpose of - It is to find out whether on the state of pleadings, evidence and applicable law - The lower court came to right decision - In relation to reliefs canvassed in the matter (H1)

APPEALS - Fresh issue - Leave - Having neither canvassed the relief at CA - Nor sought and obtained leave to raise same in SC - Appellant cannot be heard on the issue (H2)

JURISDICTION - Rules of court - Non compliance with - Court will not abandon its jurisdiction because of non compliance - As the rules should not be means of compromising right of appeal (H3)

PLEADINGS - Brevity of - Averred facts in pleadings relied on by parties - Should be concise and unambiguous - In order to avoid element of surprise in litigation (H4)

PLEADINGS - Binding nature of - Evidence led by a party which conflicts with his pleadings - Goes to no issue and should be discountenanced - As court and parties are bound by the pleadings (H5)

APPEALS - Evidence - Evaluation - Having lawfully excluded the inadmissible evidence - CA review of evidence due to failure of the trial court in that regard - Cannot be said to be perverse (H6)

JURISDICTION - Sources of - Jurisdiction is a matter of law and is statutorily conferred - And neither the court nor parties can confer jurisdiction (H7)

ACTIONS - Injunction - Academic issue - Injunction is granted to restrain a threatened wrong to a right - But cannot be granted in the circumstance - As what is urged to be preserved no longer exist (H8)

FACTS

Plaintiffs/appellants instituted this action against defendants/respondents at the Rivers State High Court, seeking certain declaratory and injunctive reliefs. Appellants' contention is that appellants and 2nd respondent aspired for 1st respondent's primary election for the Bonny/Degema Federal Constituency seat. As a result of the distress witnessed during the conduct of the election, the election was terminated and neither the result nor the winner was declared. On the contrary, respondent claimed that the election was conclusive and that 2nd respondent was declared winner. At the end of trial, the court held that on the pleadings, the law places the burden of proof on appellants. Having not discharged the burden, the court dismissed appellants' case.

Dissatisfied, appellants appealed to Court of Appeal Port Harcourt Division. Appellants inter alia urged the court to set aside the trial court's judgment and the purported result of the said primary election. In its judgment, the court reversed the judgment on whom the burden of proof rested. The court set aside the trial court's judgment, having concluded that the findings of the court (trial court) are perverse. Although the appeal was allowed, two of appellants' reliefs were refused on the ground that what appellants urged the court to preserve no longer existed. Aggrieved, appellants have appealed to the Supreme Court.

ISSUES FOR DETERMINATION

(Cross-appeal) *"(1) Whether the Court below was right in holding that the learned trial Judge misplaced the burden of proof on the*

pleadings by placing it on the Appellants/Cross-Respondents instead of the Respondents/Cross-Appellant/Cross-Respondent?

(2) Whether the Court below rightly expunged the testimonies of DW3, DW 5 and DW6 on the grounds that they were either not pleaded or at variance with the pleadings of the Respondents.

(3) Did the Court below in excluding the testimony of DW3, DW5 and DW6 rightly evaluate (re-evaluate) the evidence on which the trial Court relied to dismiss the Appellants/Cross-Respondents' claimed and come to a just decision?

(4) Whether the Court below ought to have declined jurisdiction to hear the appeal having come to the conclusion that the appeal is academic?

HELD (Unanimously striking out the main appeal and

dismissing the cross appeal per **MUHAMMAD JSC**)

APPEALS - Purpose of

1. Learned appellants' counsel it seems to me, needs to be reminded what in essence an appeal is. The purpose of an appeal, learned counsel to the 2nd respondent/objector is right, is to find out whether on the state of pleadings, evidence and applicable law the Lower Court had come to the right decision in relation to the reliefs canvassed in the matter the court's intervention is sought. Indeed, it is not a new action but a continuation of the very dispute in the original action. An appeal, therefore, remains a complaint against a decision arising from the matter in dispute. This explains why a party is not permitted on appeal to change the case he made right from the trial court otherwise the party would be allowed to appeal against what had not been decided against him. This Court is only empowered to deal with matters duly canvassed at and determined by the court from which the appeal arises. It follows from the principle that an appellate court, not also being a charitable institution, should never award what is neither claimed nor pleaded. (p. 688 H)

APPEALS - Fresh issue - Leave

2. It is very glaring that item (III) of the foregoing relief, the appellant seeks in this court does not arise from the decision appealed against. The conduct of a fresh primary election for the 1st respondent and another general election thereafter is a fresh relief the appellants is canvassing for the first time in this Court. Having neither canvassed the relief in their notice of appeal at the court below nor sought and obtained leave to raise the fresh issue in this Court, the appellant cannot therefore be heard on the fresh issue.

This court lacks the jurisdiction to proceed on the appeal which is manifestly incompetent.

2nd respondent's preliminary objection having succeeded is hereby upheld and appellants' incompetent appeal accordingly struck out. (p. 691 G)

APPEALS - Right

3. It must out rightly be stressed that a party's right of appeal is constitutionally guaranteed. Learned appellants/cross respondents counsel must be reminded that though it is of utmost importance to comply with rules of court, the fact remains that being Rules of Procedure, they do not themselves and of themselves alone confer jurisdiction on a court. They merely regulate the exercise of the jurisdiction the constitution or the statute vests in the court. Unless it is expressly stated that non compliance with the rules particularly renders a cause incompetent, the court's pre-occupation must be the doing of substantial justice between the parties in respect of the dispute the court is asked to resolve.

In the case at hand, appellants/cross respondents' preliminary objection, given the fundamentality of the cross appellant's right of appeal as guaranteed by the constitution, cannot be given the effect the appellants/cross respondents urge on us. The filing of this appeal at this Court's registry instead of the Lower Court's registry should not, by itself alone, make us jettison the cross appellants' right of appeal. After all, Rules of court have never been the source of the court's jurisdiction. This court will not abandon its jurisdiction be-

cause of the cross appellant's non-compliance with the rules which require that appeals be filed at the Lower Court. The Rules are in place to regulate practice of the court in the exercise of the jurisdiction the constitution confers on it. These Rules should not provide the means of compromising the appellant's right of appeal as conferred by the constitution. Drawing from the foregoing facility, the attitude of this Court has always been that whenever it is possible to determine a case on the merit, the court does so by refusing to cling to technicalities. The court would rather give the aggrieved party the opportunity of being heard. (pp. 693 B/694 B)

PLEADINGS - Brevity of

4. I am unable to agree with learned 2nd respondent/cross appellant counsel that the foregoing paragraphs convey the fact of the presence of the Police, the SSS and INEC officials at the venue of the primary election, which pleaded fact must abound, to enable the Lower Court admit and rely on the testimonies of DW3, DW5 and DW6 in arriving at its decision. The need for facts in pleadings to be concise and unambiguous cannot be over-emphasized. Pleadings are averred facts numbered in paragraphs which parties rely on to present their case. Their essence is to forestall surprise thrust on the adverse party. The facts in the pleadings, if this element of surprise in litigation is to be avoided, therefore, must be unequivocal. The cross appellants foregoing pleadings being ambivalent cannot be said to have passed that test. (p. 703 A)

PLEADINGS - Binding nature of

5. Any evidence led by a party which is in conflict with the party's pleadings, the lower Court is right, goes to no issue and should either be discountenanced or expunged by the trial court.

It is elementary yet a fundamental principle of pleading that both the court and parties to a case are tied and bound by the pleadings filed in the suit. They cannot go outside the pleadings either to introduce evidence or decide the issues in controversy. The Lower Court's finding that cross appellant's

pleading does not contain facts on the presence of INEC, Police and SSS officials at the venue of the election to justify the reception of the testimonies of DW3, DW5 and DW6, is therefore impeccable. (p. 703 E)

B Evidence - Evaluation

6. Having rightly discountenanced the testimonies of DW3, DW5 and DW6 the Lower Court's evaluation of evidence, an exercise it embarked upon because of the trial court's failure to correctly discharge its primary duty in that regard, cannot be said to be perverse on the basis of the court's lawful exclusion of the inadmissible evidence. Indeed, further examination of the record of appeal does not disclose any fault with the review of the evidence carried out by the Lower Court to justify this Court's interference with its judgment. Resultantly, cross appellant's 2nd and 3rd issues are resolved in favour of the cross appellants/cross respondents. (p. 703 H)

JURISDICTION - Sources of

E 7. Finally it must be said that neither the court nor the parties before it confer the court the jurisdiction to entertain and determine a cause. Jurisdiction is statutorily conferred. In relation to courts, the issue of jurisdiction is constitutional and so a matter of law. Once it is constitutionally conferred and thereby assumed, the power of the court is not vitiated merely because of the litigant's inability to draw any benefit from the resolution of the dispute in respect of which the jurisdiction of the court had been invoked. It is up to the plaintiffs to ask from the court such reliefs that are beneficial to him and lawful to extract from the court. (p. 704 B)

ACTIONS - Injunction - Academic issue

H 8. Learned cross appellant's counsel appears not to have read the foregoing holding of the lower Court wholesomely. The holding of the lower Court which learned cross appellant counsel seems to be obsessed with must be read along with the orders made by the court in respect of the other reliefs to appreciate the Lower Court's strictures on the plaintiffs' case.

He was at the court of trial and thence to the lower Court over an event, the 1st respondent's primaries for the Federal Constituency seat. The evidence on record shows that the event in respect of which he claims a right to the reliefs after all, did not occur! The ratio in the court's finding is to the effect that what the appellants urged the court to preserve no longer existed. The law is that an injunction is only issued to restrain a threatened wrong to a right and not to restrain the lawful enjoyment of a legal right. B

The lower Court's jurisdiction on the facts of the instant case which is rightfully invoked and lawfully assumed has been fully exercised and consummated. It persists even though the court which has not been asked the appropriate reliefs is unable in any other manner to be of help to the plaintiffs' cause. C

Finally, a court must not act in vain. The Lower Court in describing appellant's cause as being academic is only stating the obvious that at that point in time with the live issue in the cause having been extinguished and spent, their case does not ensure any right or benefit on the claimant in spite of the success of the appeal. (p. 704 H) D E

NOTABLE POINTS OF INTEREST

MUHAMMAD JSC

1. Jurisdiction – Fundamental nature of F

The fundamental nature of jurisdiction in the adjudication process can never be over-emphasized. A court that proceeds with a matter in respect of which it lacks jurisdiction wastes everybody's time since the proceedings, no matter how well conducted will come to naught. (p. 686 G) G

2. Perverse decision – Meaning of

Now, in a seemingly endless chain of its decisions, this Court has held that decisions of a Lower Court being reviewed on appeal are interfered with only where the appellate court finds they are perverse. H

A finding of fact or decision is said to be perverse when it runs counter to pleadings and evidence on record or where the court which findings or decision are/is being reviewed is shown to have

taken into account irrelevant matters or shut its eyes to the obvious and by its very nature the finding or decision has occasioned a miscarriage of Justice. A decision being reviewed may as well be found to be perverse on account of the trial court's wrongful application of the law to correctly ascertained facts. (p. 698 B)

B

3. Legal and evidential burden of proof – Distinction of

The trial court failed to accept the distinction which this Court in a plethora of its decisions held exists, and which the Lower Court in the foregoing clearly imbibed, between legal burden of proof and evidential burden of proof. Whereas legal burden of proof remains throughout on the claimant to establish his case otherwise he loses his claim, the evidential burden of proof in a case fought on the pleadings rests on the party who asserts in the affirmative and shifts depending on the pleadings of the parties at each turn. (p. 700 E)

C

D

REPRESENTATION

E. Alikor Esq., for the Appellants

E. C. Aguma, for 2nd Respondent/Cross Appellant

E M. U. S. Amadi Opara, for the 1st and 3rd Respondent

CASES REFERRED TO

Aladegbemi v. Fasanmade (1988) 3 NWLR (pt. 81) 129

F Alao v. Akano (1988) 1 NWLR (pt. 71) 431

Orioro v. Osain (2012) All FWLR (pt. 636) 437

Adeogun v. Fasogbon (2011) 1 NWLR (pt. 1250) 427

NEPA v. Auwal (2011) 5 NWLR (pt. 1241) 571

Okorochoa v. PDP (2014) 7 NWLR (pt. 1406) 213

G Ekpenyong v. Nyong (1975) 2 SC 71

Abang v. Effiom (1976) 1 SC

Obioma v. Olomo (1978) 3 SC 1

Amaechi v. INEC (2008) 5 NWLR (pt. 1080) 227

Emordi v. Igbokwe (2011) All FWLR (pt. 580) 1262

H C.P.C. v. Ombugadu (2013) 18 NWLR (pt. 1385) 66

Opia v. INEC (2014) 7 NWLR (pt. 1407) 431

Ogundare v. Ogunlawo (1997) 5 SCNJ 281

Edebiri v. Edebiri (1997) 4 NWLR (pt. 498) 165

STATUTES & RULES REFERRED TO

Constitution of the Federal Republic of Nigeria 1999, s. 285(1)

Electoral Act 2010, ss. 140, 68(1)

Evidence Act Cap E14 LFN 2004, ss. 131, 132

Supreme Court Rules, O. 2 r. 30, O. 6 r. 4, O. 8 r. 11, O. 10 r. 1(1)(2)

B

LEAD JUDGMENT BY MUHAMMAD JSC

This is an appeal against the decision of the Court of Appeal sitting at Port Harcourt delivered on the 12th February, 2013. The facts of the case that brought about the appeal are immediately stated below.

C

The appellants took out a writ on the 25th January, 2011 at the Port Harcourt Division of the Rivers State High Court against the respondents seeking certain declaratory and injunctive reliefs. Their case as pleaded and supported by evidence is that the appellants and the 2nd respondent were aspirants for the 1st respondent's primary election for the Bonny/Degema Federal Constituency seat. The primary election took place on 6th January 2011 at the Degema Local Government Council Headquarters. Using the appropriate list of and the delegates, on being accredited, voted. Ballot papers of each of the aspirants having been sorted out were placed in separate baskets. The counting which immediately commenced was disrupted. The election was terminated. Neither the result nor the winner of the election was declared.

E

On the other hand, respondents' case is that with the votes counted and the 2nd respondent declared the winner, the primary election was conclusive.

F

At the end of trial, the court held that on the pleadings, the law places the burden of proof on the appellants. Having not discharged the burden, the court dismissed appellants' case. Aggrieved, they appealed to Court of Appeal, hereinafter referred to as the Lower Court, sitting at Port Harcourt on a notice filed on the 18th August 2011 containing six grounds. The appellants urged the Lower Court inter-alia for an order setting aside the trial court's judgment and the purported result of 1st respondent's 6th January 2011 primary election which declared the 2nd respondent winner and candidate of the 1st respondent for the Bonny/Degema Federal Constituency April 2011 general election.

G

H

In its judgment delivered on 12/2/2013, having reversed the trial court's finding on whom the burden of proof on the pleadings of the parties rested, the Lower Court evaluated the evidence on record and on concluding that the findings of the trial judge are perverse, set aside his judgment.

B Even though the court allowed the appeal, it all the same refused the appellants two of their reliefs: the return of the first appellant as the winner of the 1st respondent's primary election and candidate for the April 2011 election on the ground that the primary election was not conclusive and the injunctive order to restrain 1st
C respondent from submitting 2nd respondent's name as its candidate the general election having already been conducted.

D Dissatisfied with the decision, the appellants have further appealed to this Court on a notice consisting of two grounds notice filed on 3rd May 2013 urging this Court to set-aside the Lower Court's decision and "*order a fresh primary election of the 1st respondent for the Rivers State Bonny/Degema Federal Constituency, and another general election.*"

E At the hearing of the appeal, the appellants and the 1st and 3rd respondents' briefs that had earlier been filed and exchanged were adopted by their respective counsel as their arguments for and against the appeal. The 2nd respondent did not file any brief in answer to appellants' arguments. Rather, learned 2nd respondent counsel adopted and relied on their brief of argument in support of the
F preliminary objection appellants' brief in response to which preliminary objection latter's counsel adopted and relied upon as well.

G It is incumbent to consider 2nd respondent's preliminary objection to the competence of the appeal first. It was filed on 2/9/2014.

H The fundamental nature of jurisdiction in the adjudication process can never be over-emphasized. A court that proceeds with a matter in respect of which it lacks jurisdiction wastes everybody's time since the proceedings, no matter how well conducted will come to naught. See *Aladegbemi v. Fasanmade* (1988) 3 NWLR (Pt. 81) 129 and *Alao v. Akano* (1988) 1 NWLR (Pt. 71) 431.

The 2nd respondent/objector has distilled a single issue for the determination of the objection. The issue reads:-

"Whether in the peculiar circumstances of this case this

Honourable Court has the jurisdiction to entertain the Appellants/ Cross Respondents/Respondents appeal.”

In arguing their objection, learned counsel submits that the appeal is incompetent. Not being a new suit but a continuation of the original suit at the court of trial, an appeal involves a review of the decision of a Lower Court by a higher one. The instant appeal, it is contended, must not only be a continuation of the case the appellants made at the Lower Court but a continuation of the very suit the appellants filed at the trial court. Appellants’ learned counsel submits, must be consistent in the presentation of their case and the reliefs they seek right through. This Court, it is argued, cannot go outside the issues raised and settled at the lower Court. Learned counsel relies on *Orioro v. Osain* (2012) ALL FWLR (Pt. 636) 437 at 451, *Adeogun V. Fasogbon* (2011) 1 NWLR (Pt. 1250) 427 at 454 and *National Electric Power Authority V. Auwal* (2011) 5 NWLR (Pt. 1241) 571.

In the instant appeal, learned 2nd respondent counsel further argues the appellants are seeking totally new reliefs. Neither at the court of trial nor at the Lower Court did the appellants challenge the outcome of the general election wherein the 2nd respondent was returned the winner. The new reliefs have removed the subject matter of the appeal from the pre-election cause that was pursued at the two courts below to a post election matter thereby taking it away from the jurisdiction of this Court. By the combined operation of Section 285(1) of the 1999 Constitution as (amended) Section 140(2) and 68(1) of the Electoral Act 2010 as (amended) only the Election Petition tribunal has jurisdiction over the reliefs the appellants now seek.

This Court cannot grant them the reliefs. By their writ and statement of claim, appellants’ suit was commenced as an intra-party dispute. It cannot be transformed into an election petition on appeal. Appellants’ contention in paragraph 4.8 at page 8 of their brief that a fresh primary election be conducted and the winner thereof be ordered to be sworn in as the true occupant of the seat in the House of Representative since it is their party that won the election must have to be discountenanced. Learned counsel supports his submissions with *Okorocha V. PDP* (2014) 7 NWLR (Pt. 1406) 213, *Akinbobola v. Plisson Fisko Nigeria Limited* (1991) 1 NWLR (Pt. 167) 270,

Amaechi v. INEC (2008) 5 NWLR (Pt. 1080) 227 at 422. Further relying on Emordi v. Igbokwe (2011) ALL FWLR (Pt. 580) 1262 at 1270 - 1271, C.P.C. v. Ombugadu (2013) 18 NWLR (Pt. 1385) 66 at 119 and Opia v. INEC (2014) 7 NWLR (Pt. 1407) 431 at 469, learned counsel submits that even at that the court by virtue of Section 141 of the Electoral Act cannot grant the reliefs the appellants seek in this Court. In the premises learned counsel prays, the appeal which has become academic be struck out.

The not dissimilar issue identified by the appellants for the determination of 2nd respondent's preliminary objection reads:-

"Whether this Honourable Court has the jurisdiction to entertain the Appellants appeal as constituted."

In arguing the lone issue, learned counsel to the appellants/respondents submits that a preliminary objection is an opposition to the appeal which seeks to terminate the appeal in limine either in part or in whole.

He submits that there is no inconsistency in the presentation of their case and the reliefs the appellants seek right through the three courts. The relief for the conduct of fresh primary election of the 1st respondent, submits learned counsel, is not a fresh issue as it is necessitated by the Lower Court's refusal to grant any consequential orders following the court's grant of appellants' reliefs (a) and (b). By the principle of ubi jus ibi remedium, since appellants are aggrieved, having established that grief, they are entitled to some remedy even if appellants did not pray for the reliefs.

The case of Amaechi V. INEC (2008) 5 NWLR (Pt 1080) 227, further argues learned appellants' counsel, gives the appellants some succor and the decision therein binds the lower Court. There is nothing in Section 285(1) of the 1999 Constitution (as amended) and Section 140(2) and 33 of the Electoral Act which precludes the appellants seek of this Court. Concluding, learned counsel submits that 2nd respondent's objection is limited to the features on the Notice of Appeal so 2nd respondent cannot rely on the preliminary objection to scuttle the appeal. Really?

Learned appellants' counsel it seems to me, needs to be reminded what in essence an appeal is. The purpose of an appeal, learned counsel to the 2nd respondent/objector is right, see Amaechi V. INEC (supra) cited by both counsel, is to find

out whether on the state of pleadings, evidence and applicable law the Lower Court had come to the right decision in relation to the reliefs canvassed in the matter the court's intervention is sought. Indeed, it is not a new action but a continuation of the very dispute in the original action. An appeal, therefore, remains a complaint against a decision arising from the matter in dispute. This explains why a party is not permitted on appeal to change the case he made right from the trial court otherwise the party would be allowed to appeal against what had not been decided against him. This Court is only empowered to deal with matters duly canvassed at and determined by the court from which the appeal arises. See Prince Oyesule Alabi Ogundare & anor V. Shittu Ladokun Ogunlawo & 3 Ors (1997) 5 SCNJ 281, Edebiri V. Edebiri (1997) 4 NWLR (Pt 498) 165 at 174, International Messengers Nig v. Pegofor Industries (2005) 15 NWLR (pt. 947) 1 at 19.

It follows from the principle that an appellate court, not also being a charitable institution, should never award what is neither claimed or pleaded. See Ekpenyong V. Nyong (1975) 2 SC 71, Abang V. Effiom (1976) 1 SC, Obioma V. Olomo (1978) 3 SC 1 and Union Beverages Ltd V. Owolabi (1988) 1 NWLR (Pt. 68) 128.

From the foregoing, learned 2nd respondent/objector's counsel is right in urging us not to proceed with the instant appeal very different reliefs from what the appellants pleaded and claimed at the trial court and the Lower Court as well. Their appeal must remain a complaint against the decision of the Lower Court. See Lawrence Adebola Oredoyin & Ors V. Chief Axala Arowolo & Ors (1989) 7 SC (Pt. 11) 1, Xtoudus Services Ltd V. Taisei (WA) Ltd (2006) 6 SC 200 and Ndulue & anor Ojiakor & 2 ors (2013) 1-2 SC (pt. 11) 91.

In the case at hand, the determination of 2nd respondent's objection to the competence of the appeal invariably depends on the outcome of our examination of the grounds of appeal in relation to the decision appealed against. It is well settled that grounds of appeal must arise, flow or relate to the judgment of the court appealed from. See Veepee Ind Ltd V. Coca Ind Ltd (2008) 4-5 SC (Pt 1) 116 and Lasisi Ogbe v. Sule Asade (2009) 12 SC (Pt 111) 37.

In the case at hand, the lower Court in concluding its deci-

sion against which the instant appeal has been brought held at pages 620-622 of the record thus:-

"I will now go to the reliefs the Appellants stated in paragraph 22 of their statement of Claim at page 9 of the record. Appellants seek:

- B (a) *A declaration that the purported result and or result sheet put forward by the Defendants and their officials (the returning officers) which is before the Appeal panel purportedly in favour of and or declaring Dr. Sekonte Davies as the winner of the Bonny/Degema Federal Constituency party election is defective, null and void for non compliance with the Electoral Act.*

C This relief is granted because the result sheet was not tendered. The reason given by the Respondents that they found it difficult to retrieve the Result Sheet from the INEC's office in Abuja is D unacceptable. It will be difficult to know the winner without the result.

- (b) *A declaration that the 2nd Defendant did not pool (sic) the majority of the votes cast in the Bonny/Degema Federal Constituency party primary election i.e. the House of Representatives on E 6/1/2011.*

This relief is granted because the election was not conclusive.

- (c) *A declaration that Mr. Bibiana F. G. Odom, the 1st claimant pooled (sic) the majority of the votes cast after sorting of the ballot papers and confirmed by the delegates and eye witnesses and F be accordingly returned and or declared as the winner of the Bonny/Degema Federal Constituency in the party primary election of the 1st Defendant on 6/1/2011.*

This relief is refused. The available evidence shows that the G counting of the votes was disrupted. The election was therefore not conclusive.

- (d) *An order of injunction restraining the 1st Respondent from presenting the 2nd Respondent as its candidate to run the 2011 general election into the House of Representatives for the Bonny/H Degema Federal Constituency.*

To me, this relief has become academic. A court cannot restrain an action which has been concluded. Besides, the issue of primary election is a domestic affair of the party concerned. We cannot use this to inflict inconvenience on the other parties by ordering an-

other primary election with a view to having another general election.

Finally the appeal succeeds in part. Parties are to bear their respective costs.”

The two grounds of appeal and the relief sought in appellants notice against the foregoing decision at pages 628 and 628 are here-
under reproduced shorn of their particulars:-

“1 GROUND ONE: ERROR IN LAW

The learned Justices of the Court of Appeal erred in Law in holding that “the issue of primary election is a domestic affair of the party concerned” and that they cannot use it “to inflict inconvenience on the other parties by ordering another primary election with a view to having another general election” and relying on the perceived inconvenience refused to order a fresh primary election of the 1st Respondent for the Bonny/Degema Federal Constituency of Rivers State.

2. GROUND TWO: ERROR IN LAW

The learned justices of the Court of Appeal erred in law when they failed to make a consequential order for fresh primary election to be conducted for Bonny/Degema Federal Constituency of Rivers State.

After setting aside the judgment of the trial court and after declaring as null and void the result of the primary election that gave the 2nd Respondent the party ticket in the general election.

RELIEFS SOUGHT FROM THE SUPREME COURT OF NIGERIA

(i) Allow the appeal.

(ii) Set aside the part of the decision of the Court of Appeal complained about.

(iii) Order a fresh primary election of the 1st Respondent for the Rivers State Bonny/Degema Federal Constituency and another general election.”

It is very glaring that item (III) of the foregoing relief, the appellant seeks in this court does not arise from the decision appealed against. The conduct of a fresh primary election for the 1st respondent and another general election thereafter is a fresh relief the appellants is canvassing for the first time in this Court. Having neither canvassed the relief in their notice of appeal at the court below nor sought and obtained leave to

raise the fresh issue in this Court, the appellant cannot therefore be heard on the fresh issue.

In *Ajide v. Kelani* (1985) 3 NWLR (Pt. 12) 248 at 269, this Court per Oputa JSC held:-

B *“A party should be consistent in stating his case and consistent in proving it... Justice is much more than a game of hide and seek. It is an attempt, our human imperfections notwithstanding, to discover the truth. Justice will never decree anything in favour of so slippery a customer as the present defendant/appellant.”*

C **This court lacks the jurisdiction to proceed on the appeal which is manifestly incompetent.** See *Lasisi Ogbе v. Sule Asade* (supra) and *Military Administrator for Ekiti State & ors v. Prince Benjamin Adeniyi Aladeyelu & 3 Ors* (2007) 5 SCNJ 1.

D **2nd respondent’s preliminary objection having succeeded is hereby upheld and appellants’ incompetent appeal according struck out.**

THE CROSS APPEAL

E It is pertinent to recall that the appellants/cross respondents have filed a notice of preliminary objection to the cross appeal. Same has been argued in their brief of argument which has been adopted at the hearing of the two appeals.

F In arguing their preliminary objection to the cross appeal, learned appellants/cross respondents counsel submits that the Notice of Cross appeal filed on 25-04-2014 at the Supreme Court’s registry instead of the registry of the Court of Appeal, on the authority of *Korede V. Adedokun* (2001) 15 NWLR (Pt. 736) 483 at 495 is incompetent in spite of this Court’s order of 26-05-2014 deeming the Notice as duly filed. The Notice having been filed in contravention of G Order 2 Rules 30 of the Supreme Court’s rules remains incompetent. It follows also that the cross appellant’s brief that is filed pursuant to the incompetent Notice of Appeal is also incompetent. Further relying on *Ogbeche V. Onochie* (1988) 1 NWLR (Pt. 70) 370 at 402, learned Appellants/Cross respondents’ counsel submits that the cross H appeal be struck out.

Replying, learned cross appellant’s counsel contends that the appellants/cross respondents’ preliminary objection to the competence of the cross appeal is misconceived. The objection, it is submitted, having failed to take account of Order 6 Rule 4, Order 8 rule 11

and Order 10 rule 1 sub-rules (1) and (2) of the Supreme Court Rules cannot be taken seriously. Supporting his submission with the decision in *Obi V INEC in Re: Dr. Andy Uba* (2008) 7 NWLR (Pt 1085) 68 at 78 learned counsel urges that the objection be overruled.

It must out rightly be stressed that a party's right of appeal is constitutionally guaranteed. Learned appellants/cross respondents counsel must be reminded that though it is of utmost importance to comply with rules of court, the fact remains that being Rules of Procedure, they do not themselves and of themselves alone confer jurisdiction on a court. They merely regulate the exercise of the jurisdiction the constitution or the statute vests in the court. Unless it is expressly stated that non compliance with the rules particularly renders a cause incompetent, the court's pre-occupation must be the doing of substantial justice between the parties in respect of the dispute the court is asked to resolve.

In the case at hand, appellants/cross respondents' preliminary objection, given the fundamentality of the cross appellant's right of appeal as guaranteed by the constitution, cannot be given the effect the appellants/cross respondents urge on us. The filing of this appeal at this Court's registry instead of the Lower Court's registry should not, by itself alone, make us jettison the cross appellants' right of appeal. After all, Rules of court have never been the source of the court's jurisdiction. This court will not abandon its jurisdiction because of the cross appellant's non-compliance with the rules which require that appeals be filed at the Lower Court. The Rules are in place to regulate practice of the court in the exercise of the jurisdiction the constitution confers on it. These Rules should not provide the means of compromising the appellant's right of appeal as conferred by the constitution. See *Ogunremi V. Dada* (1962) 1 ALL NLR 663 at 671.

Now, Order 10 rule 1 (1) and (2) of the rules of this Court provide as follows:-

"(1) The court may, where it considers it is in the interest of justice to do, waive compliance by the parties with these Rules or any part thereof.

(2) *Where there is such waiver of compliance with these Rules the court may, in such manners as it thinks right, direct the appellant or the respondent, as the case may be, to remedy such non-compliance or not but may, notwithstanding, order the appeal to proceed or give such directions as it considers necessary in the circumstance.*”

B **Drawing from the foregoing facility, the attitude of this Court has always been that whenever it is possible to determine a case on the merit, the court does so by refusing to cling to technicalities. The court would rather give the aggrieved party the opportunity of being heard.** See Dr. Okonjo V. Mudiaga Odje & ors (1985) 10 SC 267 and Joseph Afolabi & Ors V. John Adekunle & ors (1983) 8 SC 98.

C In waiving the requirement of Order 2 rules 30 of the rules of this Court, the Court per Irikefe CJN in Obadiaru V. Grace Uyigule D & anor (1986) 3 SC 39 at page 40 held thus:-

“However in the interest of justice and in order to save such time as would have been wasted by striking this appeal out hereby, we have decided to deem this as an application for leave to file the notice and grounds, again out of time and this time before us so that this appeal may be properly pending before us. We have accordingly waived the requirement that the notice be filed in the court below, that is, at the Court of Appeal. By doing this, we now have a situation where this appeal is now before us.”

F It is for all the foregoing reasons that one hereby discounts Appellants/cross respondents’ preliminary objection and with a view to doing substantial justice in the circumstance of the instant matter, consider the merit or otherwise of the cross appeal.

G The four issues distilled in the cross appellants brief as having arisen for the determination of the cross-appeal are:-

H *“(1) Whether the Court below was right in holding that the learned trial Judge misplaced the burden of proof on the pleadings by placing it on the Appellants/Cross-Respondents instead of the Respondents/Cross-Appellant/Cross-Respondent? This issue arises from grounds 1 and 2 of the grounds of appeal.*

(2) Whether the Court below rightly expunged the testimonies of DW3, DW 5 and DW6 on the grounds that they were either not pleaded or at variance with the pleadings of the Respondents. This issue arises from ground 4 of the ground of appeal.

(3) Did the Court below in excluding the testimony of DW3, DW5 and DW6 rightly evaluate (re-evaluate) the evidence on which the trial Court relied to dismiss the Appellants/Cross-Respondents' claimed and come to a just decision? This issue arises from grounds 3 and 5 of the grounds of appeal.

(4) Whether the Court below ought to have declined jurisdiction to hear the appeal having come to the conclusion that the appeal is academic? This issue arises from ground 6 of the grounds of appeal."

On the 1st issue, learned cross appellant's counsel submits that the Lower Court's finding that the trial court has wrongly placed the burden of proof on the Appellants/Cross respondents, is a clear misapplication, inter-alia, of the decisions in *Ogboru V. Uduaghan* (2011) NWLR (Pt.1232) 538 at 598; *Igbeke V. Emordi* (2010) 11 NWLR (Pt. 1204) 1, *Ukpo V. Imoke* (2009) 1 NWLR (Pt. 1121) 90, *Agagu V. Mimiko* (2009) 7 NWLR (Pt.1140) 342 and *Fayemi v. Oni* (2010) 17 NWLR (Pt.1222) 326. Given paragraphs 12 and 14 vis-à-vis the reliefs appellants/cross respondents seek in their statement of claim, learned cross appellant's counsel contends, it is out of place to insist that the appellants/cross respondents as plaintiffs have made negative assertions which in the face of the positive assertions in the cross appellant/2nd respondent's pleadings situate the burden of proof on the latter rather than the former. Otherwise, the Cross respondents as claimants would not have served the notice to reproduce the defective result sheets on the respondents, including the cross appellant/2nd respondent. Furthermore, the failure of the respondents to produce the said defective result sheets, on the authority of *Buhari V. Obasanjo* (2005) 12 NWLR (Pt.941) 1 at 146, does not entitle the appellants/cross respondents to the finding of the Lower Court that they have made out their case. Virtually all the authorities the Lower Court relies on to find for the appellants/cross respondents, contends learned cross appellant/2nd respondent's counsel, place the initial burden of proof squarely on the appellants/cross respondents being the plaintiffs and thereafter the burden shifts unto the person against whom judgment would be entered if no further evidence is led. No burden of proof, be it legal as pursuant to Section 131 or evidential as required under Section 132 of the Evidence Act CAP E14 LFN 2004 or even on the pleadings, contends learned

cross appellant/2nd respondent counsel, rest on the Cross appellant being defendant to appellant's action.

The issue at the trial of this case, it is further argued, is not as to the non-conduct of the primary election. Both sides, it is submitted, agree to the fact that the election has taken place. The appellants/
B cross respondents are not absolved from proving their case simply because they have made a negative assertion as to the conclusiveness of the election. The law, learned counsel submits, requires the appellants to prove their case and having failed to, it is wrong for the
C Lower Court to have found for them. Learned counsel urges that the issue be resolved in cross-appellants failure.

Under the Cross appellant's 2nd and 3rd issues, learned counsel urges that we answer the question the issue raises in the negative. The testimonies of DW3, DW5 and DW6 it is contended, has also
D been discountenanced by the Lower Court. The exclusion of the testimonies of these witnesses who collated and counted the votes cannot be it is submitted, be said to be just and fair. And all the more so as same have been pleaded. Learned cross appellant counsel relies on the decisions in INEC V. Anthony (2011) 7 NWLR (Pt. 1245)
E 1 at 21 and Agagu V Mimiko (supra), Okagbue & 2 others V. Romaine (1982) 5 SC and Agboola V. United Bank for Africa Plc. (2011) ALL FWLR (Pt 574) 74 at 91.

Particularly in relation to their 3rd issue, learned cross appellant's
F counsel submits that the Lower Court has failed to abide by the correct principles courts evolved pertaining evaluation of evidence. The trial court, it is contended, has the primary duty of evaluating evidence. The appellate court interferes only if the exercise is wrongly done or completely ignored by the trial court. Having demonstrated
G that the testimonies of DW3, DW5, and DW6 have been pleaded by the cross appellant, their exclusion and non consideration in the determination of the dispute between the parties by the Lower Court is equally perverse. In support of his submissions learned counsel further relies on Abisi Ekwealor (1993) 6 NWLR (Pt. 302) 543 at 688,
H Okeowo V. AG Ogun State (2010) 16 NLR (Pt. 1279) 327 at 345 and insists that the Lower Court's judgment which has failed to abide by the well established principles of law while evaluating the evidence led and subsequently interfering wrongly with the trial court's findings should be set-aside. The respondents who by their pleadings

and evidence had put the delegates' lists as well as the result sheets in respect of 1st respondent's primary election should have succeeded at the Lower Court. The Lower Court's contrary decision, urges learned counsel, should, on the authorities, be interfered with.

On the 4th issue, learned cross appellant counsel submits that the Lower Court should have declined jurisdiction having found the issues the appeal raised have become academic. After all, it is argued, the court has found that it was, particularly in respect of appellant's 4th relief, incapable of granting any enforceable order that will give effect to its judgment. In that vein, learned counsel submits the proper order to make is to decline jurisdiction. The order the Lower Court made in spite of its conclusion that the issue before it is moot, academic and hypothetical turns out to be detrimental to the 2nd respondent/cross appellant. Relying on Section 141 of the Electoral Act 2010 (as amended), CPC V. Ombugadu (2013) 18 NWLR (Pt. D 1385) 66 and Asafa Foods Factory V. Alrairie (Nig) Ltd (2002) 12 NWLR (Pt. 781) 353 at 368, learned counsel urges us to resolve the issue in cross appellant's favour and for all the reasons articulated under their four issues allow the appeal.

Arguing the cross appellants 1st issue, learned counsel for the Appellants/Cross respondent urges that the court answers the question the issue raises in the affirmative. The question to answer which the Lower Court rightly answered, contends learned counsel to the appellants/cross respondents, is on whom, between the two sides, the burden of proof given the state of their pleadings, lie? The burden of proof on the pleadings, it is argued, differs from the general burden which the law puts on the plaintiff to prove his case. This question was rightly raised by the appellants at the trial court but sadly, submits learned counsel, the trial judge confused the issue of the burden of proof on the pleadings with evidential burden. An unsuccessful attempt, submits learned counsel, has been made in the cross appellants brief to show that appellants/cross respondents did not make any negative assertions that needed no documents to prove. A careful reading of Appellants/Cross respondents' pleadings however shows the contrary. The inference one makes from their pleadings is that the primary election of the 1st respondent for the Bonny/Degema Federal Constituency fixed for 6/01/2011 was inconclusive.

Learned counsel who relies on virtually the same authorities

alluded to by learned cross appellant counsel however insists that the cases of *Buhari V. Obasanjo* (supra), *Fayemi V. Oni* (supra) are particularly distinguishable from the facts of the instant case. He urges the resolution of the four issues for the determination of the cross-appeal against the cross appellant/2nd respondent.

B Now, in a seemingly endless chain of its decisions, this Court has held that decisions of a Lower Court being reviewed on appeal are interfered with only where the appellate court finds they are perverse.

C A finding of fact or decision is said to be perverse when it runs counter to pleadings and evidence on record or where the court which findings or decision are/is being reviewed is shown to have taken into account irrelevant matters or shut its eyes to the obvious and by its very nature the finding or decision has occasioned a miscarriage of Justice. A decision being reviewed may as well be found to be perverse on account of the trial court's wrongful application of the law to correctly ascertained facts. See *Yaro V. Arewa Construction Ltd & ors* (2007) 16 NWLR (Pt.1063) 333 at 374 and *Olaniyan & ors v. Fatoki* (2013) LPELR - 20936 (SC).

E The task at hand, therefore, is to decide if, as contended by the cross appellants, the Lower Court's judgment manifests such lapses that will justify this Court's interference.

F Learned cross appellant's counsel has argued that the Lower Court's error of wrongly placing the initial burden of proof on the respondents having caused such miscarriage of justice warrants allowing their appeal. It is also contended that excluding the evidence led by any of the parties to the proceedings is equally fatal to the court's decision. The court's refusal to grant a successful claimant the relief he established or wrongly assuming jurisdiction over the matter, G it is further asserted, all provide the justification for interfering with the Lower Court's decision.

H I am unable to agree with learned counsel to the cross-appellant that the Lower Court is wrong in its finding that the initial burden of proof on the pleadings is in the case at hand, on the respondents who have asserted the positive.

Learned appellant/cross respondent's counsel is indeed on a firm terrain to insist otherwise. Whereas learned cross appellant counsel chose to misconstrue the authorities on the point, the reliance of the

learned appellants/cross respondents counsel on these same authorities cannot be faulted.

A scrutiny of the record of this appeal clearly shows that the case that brought about the appeal is being fought on the pleadings of parties. Whereas the legal burden of proving the claim lies and remains fixed on the plaintiffs, for our purposes the appellants/cross respondents, evidential burden of proving a fact asserted in the affirmative in his pleadings would lie on the party who so asserts. See *Agbakoba V. INEC* (2009) ALL FWLR (PT.462) 1037; *Nwuye V. Okoye* (2009) ALL FWLR (Pt.451) 815.

The appellants/cross respondents case, as contained in paragraphs 3(b), 6, 8, 9, 10 and 14 of their statement of claim and paragraph 4 of their reply to the 1st and 3rd respondents statement of defence, is to the effect that the primary election was inconclusive since the votes cast at the election were neither counted nor were the result of the election declared and entered in the result sheet as required by 1st respondent's electoral guidelines.

The case of the respondents as defendants on the other hand, as averred in paragraphs 8, 9, 10 of the joint statement of defence of 1st and 3rd respondents and paragraphs 5 and 10 of the 2nd respondent/cross appellant's statement of defence, is that the primary election was conclusive, votes having been counted and result entered in the result sheets and announced at the venue of the primary election.

Confronted with this state of pleadings, and the submission of learned counsel to the appellants/cross respondents who were the plaintiffs that the defendants who had positively asserted that with votes having been counted and scores recorded should, rather than the plaintiffs, discharge the particular evidential burden of proof in the case, the trial judge at pages 477 - 478 of the record of appeal held wrongly thus:-

"I think that positive or negative assertions have nothing to do with burden of proof in avail cases... I therefore most respectfully hold that the burden of proving facts in this case whether the facts are in existence or not in existence as where in this case it is alleged by the claimant that the 2nd defendant did not score the facts credited to him lies on the claimants for it is they the claimants that judgment will go against if no evidence were produced on either side."

The Lower Court at pages 604 - 605 of the record differed and rightly so thus:-

“Section 137 (1) of the Evidence Act now Section 133 (1) of the Evidence Act 2011 depends on the contents of pleading of each case. The onus was therefore on the Respondents who asserted the positive in the case at hand. This is because the burden of introducing evidence otherwise known as evidential burden squarely rests on the party who substantially asserts the positive before the evidence is adduced thereafter the burden of proof rests on the party who will fail if no further evidence is produced. Where this is done, the burden of proof will shift on the either party to introduce evidence which if accepted, will then defeat the claim of the Appellants...”

The learned trial Judge with respect did not properly appreciate the purport of Section 137 (1) of the Evidence Act which is now Section 133 (1) of the Evidence Act 2011. Judgments are always given against the person on whom the burden of proof lies and has failed to discharge same. See *Atone v. Amu* (1974) 10 S. C. AT 237... The findings of the learned trial Judge is with respect not correct because the allegation of the Appellants was not just that the 2nd Respondent did not score the votes accredited to him hut that the election was not conclusive.”

The trial court failed to accept the distinction which this Court in a plethora of its decisions held exists, and which the Lower Court in the foregoing clearly imbibed, between legal burden of proof and evidential burden of proof. Whereas legal burden of proof remains throughout on the claimant to establish his case otherwise he loses his claim, the evidential burden of proof in a case fought on the pleadings rests on the party who asserts in the affirmative and shifts depending on the pleadings of the parties at each turn. In *Imana V. Robinson* (1979) 3 - 4 SC 1 at 9, a case learned appellants/cross-respondents justifiably relies on, this Court has held as follows:-

“The burden of proof in this case, rests upon the party, whether plaintiff or defendant, who substantially asserts the affirmative of the issue. It is fixed at the beginning of the trial by the state of the pleadings, and it is settled as a question of law, remaining unchanged throughout the trial exactly where the pleading placed it and never shifting in any circumstances whatever. If when all the evidence, by whomsoever introduced, is in, the party who has the

burden has not discharged it, the decision must be against him.”

The Lower Court’s finding against the defendants, including the cross-appellant herein who, having asserted affirmatively as to the conclusiveness of the conduct of the primary election, and failed at the end of the trial to discharge the burden of proving what they so asserted, is unassailable. B

Cross appellant’s 1st issue for the determination of the appeal, it follows, must be and is accordingly resolved against him.

And this brings us to cross appellant’s 2nd and 3rd issues for the determination of the cross appeal: were the testimonies of DW3, DWs and DW6 wrongly expunged by the Lower Court and if so is the Lower Court’s decision in spite of the wrongful exclusion of their testimonies just? C

At the trial court and more so the Lower Court, the appellants/cross respondent’s, see pages 367, 368 and 510 of the record of appeal, had questioned the admissibility of the testimonies of DW3, DW5 and DW6 who had testified for the 2nd respondent/cross appellant. It was urged on the two courts below that since their evidence stood at variance with 2nd respondents/cross appellants pleadings, same is inadmissible. D E

Appellants/cross respondents still contend in this Court that the testimonies of these witnesses remain inadmissible and unavailing to the cross appellant.

The averments in paragraphs 9 and 10 of the appellants/cross respondents statement of claim, it is submitted, is to the effect that the Police, INEC and SSS officials were present when the thugs violently disrupted the primary election process. The 2nd respondent/cross appellant in paragraph 10 of his statement of defence, clearly denied the averments in paragraphs 9 and 10 of the statement of claim. So did the 1st and 3rd respondents too in their joint statement of defence. They aver that these officials were never present at the venue of the primary election. It is this evidence of DW3, DW5 and DW6 stating that these very officials, contrary to facts averred in the pleadings, were present at the venue of the election, which the appellants/cross respondents challenge. They further challenge the admissibility of the testimonies under Order 3 rule 2(1)(c)(i) and (ii) and Order 31 rule 10 of the Rivers State High Court (Civil Procedure) Rules 2011. F G H

The record of this appeal shows that the appellants/cross respondents' had raised the issue of the admissibility the testimonies of DW3, DW5 and DW6 for being at variance with the pleadings they are meant to substantiate. The trial judge in his judgment, see page 474 of the record, did nothing beyond noting the issue so raised by the appellants/cross respondents thus:-

"The learned senior advocates submitted that the evidence of DW3, DW5, DW6 about the presence of INEC the Police and the SSS at the venue of the election should be discountenanced because the defendants failed to plead that those officials were present at the election venue. With reference in particular to DW6, the learned SAN urged the court to discountenance his evidence as no witness summary was filed as required by... Order 37 rule 10 and Order 3 rule 2 (1) (c)(i) and (ii) of the rules of the High Court."

The Lower Court held on the issue at 618 of the record thus:-

"I am unable to find on the record where the Respondents plead the presence of the officials of the INEC, Police, SSS. Any evidence led orally in court of the presence of these officials or evidence emanating from DW3, DW5 and DW 6 are at variance with the pleadings of the Respondents. The evidence goes to no issue and it is hereby discountenanced."

The contention of the learned counsel for the 2nd respondent/cross appellant's is that since the fact of the presence of the officials of the INEC, Police and the SSS have specifically been pleaded in paragraphs 11, 12 and 13 of their statement of defence, the testimonies of DW3, DW5, and DW6 have been rightly excluded by the Lower Court. Learned counsel cannot be right.

I hasten to reproduce paragraphs 11 and 12 of the 2nd respondent/cross appellant's statement of defence which, counsel submits, assert the fact of the presence of these witnesses and by virtue of which averments insists their testimonies have wrongly been excluded by the Lower Court:-

"11. The 2nd Defendant further avers that the representatives of the State Security Service (SSS), Independent National Electoral Commission (INEC) and the police had no reason to fault the election as it was conducted in on orderly and peaceful manner and the results declared.

12. The 2nd Defendant further avers that no Divisional Po-

lice Officer (DPO) (Mr. Ukam inclusive) or any other person addressed the delegates as alleged.”

I am unable to agree with learned 2nd respondent/cross appellant counsel that the foregoing paragraphs convey the fact of the presence of the Police, the SSS and INEC officials at the venue of the primary election, which pleaded fact must abound, to enable the Lower Court admit and rely on the testimonies of DW3, DW5 and DW6 in arriving at its decision. The need for facts in pleadings to be concise and unambiguous cannot be over-emphasized. Pleadings are averred facts numbered in paragraphs which parties rely on to present their case. Their essence is to forestall surprise thrust on the adverse party. The facts in the pleadings, if this element of surprise in litigation is to be avoided, therefore, must be unequivocal. The cross appellants foregoing pleadings being ambivalent cannot be said to have passed that test. See Salami V. Oke (1987) 9 - 11 - SC, Sodipo V. Lemminkainen OY (1985) 7 SC, PDP V. INEC & 3 Ors (2012) 2 SC (Pt.111) 1 and Okolo v. Union Bank (2014) 1 SC (Pt.1) 1.

Any evidence led by a party which is in conflict with the party's pleadings, the lower Court is right, goes to no issue and should either be discountenanced or expunged by the trial court.

It is elementary yet a fundamental principle of pleading that both the court and parties to a case are tied and bound by the pleadings filed in the suit. They cannot go outside the pleadings either to introduce evidence or decide the issues in controversy. The Lower Court's finding that cross appellant's pleading does not contain facts on the presence of INEC, Police and SSS officials at the venue of the election to justify the reception of the testimonies of DW3, DW5 and DW6, is therefore impeccable. See Congress for Progressive Change & anor V. INEC & 4 others (2012) 2 - 3 SC 1, Mrs. Vidah C. Ohochukwu V. Attorney General Rivers State & 2 Ors (2012) 2 SC (Pt 11) 103 and Mr. David I. Karinga Stowe and anor V. Godswill T. Benstone & anor (2012) 1 SC (Pt 11) 86.

Having rightly discountenanced the testimonies of DW3, DW5 and DW6 the Lower Court's evaluation of evidence, an

exercise it embarked upon because of the trial court's failure to correctly discharge its primary duty in that regard, cannot be said to be perverse on the basis of the court's lawful exclusion of the inadmissible evidence. Indeed, further examination of the record of appeal does not disclose any fault with the review of the evidence carried out by the Lower Court to justify this Court's interference with its judgment. Resultantly, cross appellant's 2nd and 3rd issues are resolved in favour of the cross appellants/cross respondents.

Finally it must be said that neither the court nor the parties before it confer the court the jurisdiction to entertain and determine a cause. Jurisdiction is statutorily conferred. In relation to courts, the issue of jurisdiction is constitutional and so a matter of law. See *Tukur V. Govt of Gongola State* (1989) 9 SC 1 and *Agbule V. Warri Refinery and Petro Chemical Co Ltd* (2012) 12 SC 1. ***Once it is constitutionally conferred and thereby assumed, the power of the court is not vitiated merely because of the litigant's inability to draw any benefit from the resolution of the dispute in respect of which the jurisdiction of the court had been invoked.*** See *Abdulsalam V. Salawu* (2002) 6 SC (Pt 11) 196. ***It is up to the plaintiffs to ask from the court such reliefs that are beneficial to him and lawful to extract from the court.***

In the case at hand, the appellants had sought for an order of injunction to restrain the 1st respondent from presenting the respondent as its candidate to run for the 2011 general election for the Bonny/Degema Federal Constituency seat. The Lower Court held in respect of this relief as follows:-

"To me, this relief has become academic. A court cannot restrain an action which has been concluded. Besides, the issue of primary election is a domestic affair of the party concerned. We cannot use this to inflict inconvenience on the other parties by ordering another primary election with a view to having another general election. Finally the appeal succeeds in part. Parties are to bear their respective costs."

Learned cross appellant's counsel appears not to have read the foregoing holding of the lower Court wholesomely. The holding of the lower Court which learned cross appellant

counsel seems to be obsessed with must be read along with the orders made by the court in respect of the other reliefs to appreciate the Lower Court's strictures on the plaintiffs' case. He was at the court of trial and thence to the lower Court over an event, the 1st respondent's primaries for the Federal Constituency seat. The evidence on record shows that the event in respect of which he claims a right to the reliefs after all, did not occur! The ratio in the court's finding is to the effect that what the appellants urged the court to preserve no longer existed. The law is that an injunction is only issued to restrain a threatened wrong to a right and not to restrain the lawful enjoyment of a legal right. See Alhaji A. W. Akibu & 4 Ors V. Alhaja Munirat Oduntan. B C

The lower Court's jurisdiction on the facts of the instant case which is rightfully invoked and lawfully assumed has been fully exercised and consummated. It persists even though the court which has not been asked the appropriate reliefs is unable in any other manner to be of help to the plaintiffs' cause. D

Finally, a court must not act in vain. The Lower Court in describing appellant's cause as being academic is only stating the obvious that at that point in time with the live issue in the cause having been extinguished and spent, their case does not ensure any right or benefit on the claimant in spite of the success of the appeal. See Odedo V. INEC & 2 ors (2008) 7 SC 25. Cross Appellants 4th issue is also resolved against him. E F

I find no merit in the cross appeal. It is dismissed. Parties are to bear their respective costs.

FABIYI JSC

I have had a preview of the judgment just delivered by my learned brother - M. D. Muhammad, JSC. I agree with the reasons therein advanced to arrive at the conclusions that the main appeal should be struck out on ground of incompetence while the cross-appeal should be dismissed for want of merit. H

The brief facts leading to this appeal have been clearly set out in the lead judgment. I shall not repeat same.

The 2nd respondent filed a Notice of preliminary objection

wherein he contended that this court lacks the jurisdiction to hear and determine this appeal. It is now settled that jurisdiction is very fundamental and should be determined at the earliest opportunity. If a court has no jurisdiction to hear and determine a case, the proceedings remain a nullity ab initio no matter how well conducted and decided. A defect in competence is not only intrinsic, but extrinsic to the entire process of adjudication. See *Madukolu v. Nkemdilim* (1962) 2 SCNLR 341; *Oloba v. Akereja* (1988) 3 NWLR (Pt. 84) 508.

It hardly needs any gain-saying that the jurisdiction of an appellate court is derived from the claim at the trial court. The appellants cannot be heard to change their claim midstream. They have to be consistent in the presentation of their case and the reliefs they seek both at the trial court and on appeal. There should be no somersault. See *Ajide v. Kelani* (1985) 3 NWLR (Pt.12) 248.

It is not extant in the record that the trial court dealt with the issue of the conduct of fresh general election for the Degema/Bonny Federal Constituency by the Independent National Electoral Commission (INEC) that is not even a party to the suit. The new issue of the conduct of a fresh general election can only be properly raised with the leave of this court first sought and obtained. No such leave of this court was sought and obtained. The new issue hangs in the air; as it were. See *Orioro v. Osain* (2012) All FWLR (Pt.636) 437; *Adeogun v. Fasogbon* (2011) 8 NWLR (Pt.1250) 427 at 454.

It goes without any further much ado, that the appeal is clearly incompetent. The preliminary objection raised by the 2nd respondent is hereby sustained. I join my brother in striking out the main appeal.

With the above, I hereby keep my peace; as I have nothing new to advance in respect of the cross-appeal. I too feel that parties should bear their respective costs.

RHODES-VIVOUR JSC

I had the benefit of reading in draft the leading judgment of my learned brother, M. D. Muhammad, JSC. I agree with his lordships reasoning and conclusions.

This is a pre-election matter. It arose from primary elections which took place on the 6th of January 2011. I cannot agree more

with his lordships conclusions when he said:

“Finally a court must not act in vain. The Lower Court in describing appellants cause as being academic is only stating the obvious that at that point in time with the live issue in the cause having been extinguished and spent their case does not ensure any right or benefit on the claimant in spite of the success of the appeal...” B

If I may add, I think it is a bit too late in the day for the courts to spend precious judicial time considering and deciding who won a party’s primaries to choose its candidates for the 2011 General Elections, at a time the courts are preparing to start considering similar causes of action for the 2015 General Elections. A favourable decision will forever be a pyrrhic victory. C

For this and the very detailed reasoning in the leading judgment. I am once again in full agreement with this lordship conclusions. D

OGUNBIYI JSC

I read in draft the lead judgment just delivered by my learned brother Dattijo Muhammad, JSC and I agree that, while the main appeal is incompetent and should be struck out, the cross appeal is however devoid of any merit and ought to be dismissed. E

On the main appeal and relating the preliminary objection raised, the law is well settled that no party can raise a fresh issue on appeal without first obtaining the leave of court. To do so will amount to surcharging or over reaching the opponent. A party on appeal is expected to be consistent in pursuing the same case presented at the trial court which should in no way be different from the original and initial suit as instituted. In otherwords, no party is allowed to change the course of his case on appeal. The purpose of this is to ensure that justice is applied even handedly to all parties before the court. Therefore, any ground of appeal predicated on issues not canvassed at the trial court would be rendered as incompetent and robs the court of jurisdiction to entertain same. The unlimited jurisdiction of this court does not extend to accommodating incompetent process which has no root or foundation under our legal system as it does not exist. In the same vein as my learned brother Dattijo Muhammad, JSC therefore, the preliminary objection raised by the 2nd respondent against F G H

the competence of the ground of appeal is sustained and I also strike out the appeal for being incompetent.

On the cross appeal, the preliminary objection is also challenging its competence on the ground that it was wrongly filed in this court as against the registry of the lower Court as provided by Order B 2 rule 30 of the rules of this Court. The said rule of court provides as follows:-

“An appeal shall be deemed to have been brought when the notice of appeal has been filed in the Registry of the court below.”

C For further reference, Order 10 rule 1 (1) and (2) of the rules of court also deals with the waiver of compliance with the rules in the event of non-compliance.

In otherwords, where an irregularity is substantive in nature, it renders a process incompetent; where however it is procedural, the D effect is not to operate for purpose of defeating the course of justice, because the court is set out to do justice.

Put differently, by merely filing of the cross appeal in contra-vention to Order 2 rule 30 of the rules of this court, the effect should not operate and render the process filed as incompetent. It is within E the competence of this court by way of exercising its discretion under Order 10 rule 1(1) and (2) of the rules of this court to waive such non-compliance. The purpose and effect of this rule is to forestall the injustice that may occasion as a result of strict adherence to the rules of technicality. I will also in the result overrule the preliminary objec- F tion raised in the cross appeal.

On the merit of the cross appeal, my learned brother has adequately considered and resolved all the issues raised therein and I adopt his conclusions as mine. I will however state and emphasize G that the act sought to complain of has become academic. When a particular point is said to be academic, it principally means that it has no real relevance or effect. In otherwords, the act has been spent and is no longer of any benefit or value and it is therefore not worth spending precious time or dissipating energy thereon. It is a matter of H common knowledge that in the case at hand, time is of essence with the 2015 election now in progress. It is out of reason that an election which was long conducted in 2011 should still be a subject of discussion in 2015. The issue at hand is challenging the primary election to the election.

There is the need to forget the past years gone for purpose of moving forward and also live in the now and future. A victory that does not bring any benefit is worthless and good for nothing. I will also wish to add that the cross appellant has not shown any reason as to whether the concurrent decisions of the two Lower Courts are perverse. I do not therefore consider it appropriate to interfere there-
with and I cite in support the following cases:- Akpagbue V. Ogu (1976) 6 SC 53; Woluchem V. Gudi (1981) 5 SC 291 Enang V. Adu (1981) 11-12 SC 25. Amadi v. Nwosu (1992) 5 NWLR (Pt.241) 273.

In the final result, the cross appeal is devoid of any merit and I agree with my learned brother in his lead judgment and dismiss same with no order as to costs.

AKA'AH S JSC

I was privileged with a preview of the judgment of my learned brother, Musa Dattijo Muhammad JSC. For the reasons which have been well articulated in the judgment, I too agree that the main appeal is incompetent and it is accordingly struck out. The cross - appeal is for an order to conduct fresh primaries for the election which was conducted in 2011. Such an order cannot be made now. There is no merit in the cross - appeal and it is dismissed.