

SUPREME COURT OF NIGERIA
FRIDAY 13TH MARCH, 2015. SC. 478/2013
CORAM:- M. MOHAMMED CJN, J. A. FABIYI,
M. D. MUHAMMAD, C. B. OGUNBIYI, K. M. O. KEKERE-
EKUN, J. I. OKORO, C. C. NWEZE, JJSC

OCHOLI ENOJO JAMES, SAN APPELLANT
AND

1. INDEPENDENT NATIONAL
ELECTORAL COMMISSION

2. PEOPLES DEMOCRATIC PARTY

3. CAPTAIN IDRIS ICHALLA WADA RESPONDENTS

4. PRINCE ABUBAKAR AUDU

5. ELDER UBOLO OKPANACHI

JURISDICTION - Fundamentality of - Once raised issue of jurisdiction must be resolved before further step is taken - As any decision reached without jurisdiction is a nullity (H1)

JURISDICTION - Determination - Basis - It is plaintiff's claim that would be considered - And where suit is commenced by originating summons - Averments in affidavit are considered (H2)

ELECTIONS - Gubernatorial - Jurisdiction - Proper forum to determine appellant's challenge of the return of 3rd respondent - Is the Governorship Election Tribunal (H3)

ELECTIONS - Primary election - Where complaint is on non compliance with political party's guidelines in the election - An aspirant may approach FHC or State HC for redress (H4)

ELECTIONS - Time - Sui generis - Time is of essence in election matters - Hence the delay of more than 3 months to raise appellant's complaint - Made the matter a post election one to be determined at the Tribunal (H5)

APPEALS - Issues - Formulation - Basis - Issues must be formulated from grounds - Which in turn must derive from the ratio decidendi

FACTS

This action was commenced at the Federal High Court Lokoja Division by plaintiff/appellant via originating summons, contending that the April 2011 gubernatorial election in Kogi State was not cancelled but merely postponed until 3rd December 2011. Appellant's further contention is that 3rd respondent who was not in the race for the April 2011 election was not qualified for the 3rd December election. Appellant therefore seeks that the victory of 3rd respondent at the 3rd December 2011 election be nullified and that he (appellant) be declared the winner of the said election. The genesis of this matter is that 1st respondent had earlier scheduled a gubernatorial election for the State in April 2011. Ibrahim Idris, the former Governor of the State at that time had in reaction, approached the Federal High Court seeking to complete his tenure of office. Following his success at the trial court, 1st respondent rescheduled the said election to 3rd December 2011. An appeal to the Court of Appeal against the trial court's judgment was unsuccessful. A further appeal was filed at the Supreme Court.

However, the appeal to the apex court was pending when 1st respondent conducted gubernatorial election in the State on the 3rd December 2011. Appellant and others participated in the election. 3rd respondent was declared the winner of the election. Thereafter, the Supreme Court delivered its judgment in consolidated appeals on the tenure of office of the governors of Kogi, Adamawa, Bayelsa, Cross River and Sokoto States in the case of *Marwa v. Nyako & ors* appeal no. SC. 141/2011. The court held that the tenure of office of the affected governors including that of Kogi State had expired in May 2011. They were ordered to vacate the office immediately. Consequently, 3rd respondent who won the 3rd December 2011 election was sworn in as the Governor of the State. Appellant in reaction instituted this action. At the trial, 1st – 3rd respondents filed preliminary objections challenging the suit on the ground that the trial court lacked jurisdiction to entertain it. The preliminary objections were upheld and appellant's case struck out. On appeal to the Court of Appeal, the appeal was dismissed and the decision of the trial court was affirmed. Aggrieved further, appellant appealed to Supreme

Court.

ISSUES FOR DETERMINATION

1. Whether the lower court was right when it failed to consider the issue of whether the election of 26th April, 2011 was a postponed election before it resolved the issue of jurisdiction.

2. Whether the lower court was right in holding that it was the Governorship Election Petition Tribunal that has the jurisdiction to entertain the appellant's claim.

3. Whether the appellant's claim as formulated in the Amended Originating Summons was statute barred so as to warrant the lower court finding that the appellant cannot be heard even if there was no limitation period.

4. Whether this Honourable Court has the power under section 22 of the Supreme Court Act to consider and pronounce on the merit or otherwise of the appellant's claim in this appeal since the lower court failed to exercise its power under section 16 of the Court of Appeal Act.

HELD (Unanimously dismissing the appeal per

KEKERE-EKUN JSC)

JURISDICTION - Fundamentality of

1. Now the law is quite well settled that once the issue of jurisdiction is raised before any court, it must be resolved before any further step is taken in the proceedings. The reason for this is not far-fetched. It is because jurisdiction is fundamental to the competence of the court adjudicating. It is the foundation upon which the entire adjudication process is founded. It has been described as the lifeblood of adjudication, without which a court or tribunal would lack the vires to entertain the proceedings ab initio. The law is trite that any decision reached without jurisdiction, no matter how well conducted, is a nullity and liable to be set aside. The issue of jurisdiction is so fundamental that it can be raised at any stage of the proceedings and even for the first time on appeal to this court.

From the authorities referred to earlier, it is clear that where

a court lacks jurisdiction to entertain a cause or matter, it lacks jurisdiction to determine any issue arising within that cause or matter.

To attempt to do so would amount to delving into the merit of the case, which would amount to a nullity in the event
B that the court lacks jurisdiction to determine the suit.

It would thus be very wrong for the court, in determining the issue of jurisdiction, to delve into one of the issues in controversy in the suit and determine same before deciding whether
C or not it has jurisdiction to entertain the entire proceeding. I therefore hold that the Lower Court was right not to delve into the merit of the case in the process of determining whether or not the trial court had jurisdiction to entertain the suit.
 (pp. 887 B/893 C/894 A)

D
JURISDICTION - Determination - Basis

2. It is a correct statement of the law that in order to determine whether or not the court has jurisdiction to entertain a cause or matter it is the claim of the plaintiff that would be
E considered.

The court must take an overview of the entire case brought before it to determine whether it has jurisdiction or not.
Where the suit is commenced by originating summons, the
F court will also consider the averments in the supporting affidavit to determine the issue of jurisdiction. (pp. 893 E/895 E)

ELECTIONS - Gubernatorial - Jurisdiction

3. Election matters are sui generis with their own constitutional and statutory provisions.
G

By enacting specific provisions in Section 285(2) of the constitution conferring jurisdiction on Election Tribunals, it is clear that it is the intention of the lawmaker to provide a separate forum for the determination of whether any person has been
H validly elected into the office of Governor or Deputy Governor of a state.

The allusion to the 3rd respondent's "purported election" in relief 5(9) of his amended originating summons is a clear indication that what the appellant is challenging is the return of

the 3rd respondent as the winner of the election held on 3rd December 2011. Section 138 (1) (a) of the Electoral Act envisages a situation where, as in the instant 138 (1) (a) case, the election has already taken place and the qualification of the winner is being questioned. For that purpose the proper forum is the Election Tribunal. (p. 898 B/H) B

ELECTIONS - Primary election

4. Section 87(9) of the Electoral Act on the other hand, provides for a situation where an “aspirant” complains that any of the provisions of the Act and/or the guidelines of a political party have not been complied with in the selection or nomination of a political party for election, in which case he may apply to the Federal High Court or the High Court of a State for redress. In the instant case, the appellant is no longer an “aspirant” having emerged from the primaries held in September 2011 as the candidate of his party and having duly contested the election. (p. 899 B) C D

ELECTIONS - Time - Sui generis E

5. However, it is not the position of this court that a pre-election matter may be filed at the whims and caprices of a litigant. It has been emphasised time and again that in an election or election related matter, time is of the essence. The contention of learned counsel for the appellant that his cause of action did not arise until after the judgment of this Court in Marwa’s case (supra) does not hold water. The appellant’s complaint was that the 3rd respondent not being a candidate of his party for the “postponed” election of 26th April 2011 was not qualified to contest the election of 3rd December 2011. It follows that as soon as the 1st respondent published the 3rd respondent’s name as a candidate for the election, the appellant’s cause of action had accrued. He had every opportunity to challenge the steps being taken by the 1st respondent as they were taking place. F G H

Having waited until more than three months after the conduct of the election to raise the issue of qualification of the candidates who participated in the election, it had become

a post election matter that could only be determined by an election tribunal. As observed earlier in this judgment the aim of the appellant's suit was the nullification of the victory of the 3rd respondent at the election held on 3rd December 2011 and a declaration that he is the lawful winner of the election and the person validly entitled to be sworn in as the Governor of Kogi State. The Federal High Court had no jurisdiction to entertain his claims. The concurrent decisions of the two Lower Courts in this regard cannot be faulted. The appellant has not advanced any cogent reasons to warrant interference by this court. In the circumstances, issues 1 and 2 are hereby resolved against the appellant. (pp. 900 C/901 C)

APPEALS - Issues - Formulation - Basis

6. The law is that the issues for determination must be formulated from grounds of appeal which in turn must derive from the ratio decidendi of the judgment appealed against. A careful reading of the above excerpt shows clearly that the issue of the suit being statute barred did not arise. All that the court observed was that in the circumstances of the case the appellant ought to have been vigilant and alive to the seriousness of the situation by filing his action timeously. No reference was made to any limitation law. Even learned counsel for the appellant observed at page 40 paragraph 5.5 of his brief that the Lower Court rightly held that there was no limitation for filing the appellant's claim. The court merely observed that the appellant was tardy in bringing his action more than 90 days after the election and about 40 days after the decision of this court in Marwa's case on 27/1/2012.

I am inclined to agree with learned counsel for the 2nd respondent that issue 3 does not arise from the decision complained of. It is incompetent and accordingly struck out.
(p. 903 D)

NOTABLE POINTS OF INTEREST
KEKERE-EKUN JSC

1. Statutory interpretation - Principle

In interpreting the provisions of the constitution and indeed any statute, one of the important considerations is the intention of the law-maker. In addition to giving the words used their natural and ordinary meaning (unless such construction would lead to absurdity), it is also settled that it is not the duty of the court to construe any of the provisions of the Constitution in such a way as to defeat the obvious ends it was designed to serve where another construction equally in accord and consistent with the words and sense of such provisions will serve to enforce and protect such ends. (p. 897 G)

MOHAMMED CJN

2. Jurisdiction – Sources of

The law is well settled that Courts are creatures of statutes and it is the statute that created a particular Court that will also confer jurisdiction on that Court. It is only the Legislature that may vary or increase the jurisdiction of any Court created by it. (p. 906 C)

REPRESENTATION

J. S. OKUTEPA, SAN with Olumuyiwa Akinboro, Enobong Etteh, Esq., A. A. Malik Esq., George Ibrahim Esq., Mrs. Oludolapo O. Ufaruna, Ocholi O. Okutepa Esq., Ifeanyi O. Odom Esq., Mrs. Hope H. Bassey, A. Ikhuoria Esq., A. Eche Esq., Ojonimi Apeh Esq., Miss Rabi O. Adamu, Enoch U. Ibeh, O. I. Oladunmoye Esq., M. O. Akinsanya Esq. and Miss C. Onumonu, for the Appellant
WITCOX ABERETON ESQ. with Marcus Abu Esq., Ayotunde Ogunleye Esq., Akinyosoye Arosanyin Esq., Jude Daniel Odi Esq., N. I. Harrison Esq. for the 1st Respondent.

CHIEF A. O. AJANA with Oluwaseyi Bamigboye Esq., S. G. Ikuesan Esq. for the 2nd Respondent

CHIEF CHRIS UCHE, SAN, with Pius Akubo, SAN, Wilfred Eneye, Esq., Kanayo Okafor, Esq., Emmanuel Okorie, Esq., Maduka Chukwudi, Esq., Frank Molokwu, Esq., Chinelo Okafor (Mrs), Oluwatoyin Runsewe (Mrs), D. Eziokwu (Mrs) for 3rd Respondent
ISAAC E. EKPA ESQ. for the 4th Respondent

P. D. ABALAKA ESQ., with him, Joe Abah, Esq. Adujo Abah, Esq., Fidelia Osuman (Mrs), Caroline Abah (Mrs), Realwan Okpanachi, Esq. for the 5th Respondent

CASES REFERRED TO

- Marwa v. Nyako (2012) 6 NWLR (pt. 1296) 199
 Ladoja v. INEC (2007) 12 NWLR (pt. 1047) 119
 Umanah v. Attah (2007) All FWLR (pt. 346) 402
 Inakoju v. Adeleke (2007) All FWLR (pt. 353) 3
 B Barclays Bank Ltd. v. C.B.N. (1976) 10 NSCC 291
 ANPP v. Goni (2012) 7 NWLR (pt. 1298) 147
 Obi v. INEC (2007) All FWLR (pt. 378) 1116
 NEPA v. Edeghero (2003) FWLR (pt. 139) 1556
 C Amaechi v. INEC (2007) 18 NWLR (pt. 1066) 42
 PDP v. Usman (2013) 6 NWLR (pt. 1349) 50
 NDIC v. Okem Enterprises (2004) 10 NWLR (pt. 880) 107
 Ahmed v. COP Bauchi State (2012) 9 NWLR (pt. 1304) 104
 NEPA v. Olagunju (2005) 3 NWLR (pt. 913) 602
 D Waghoreghor v. Aghenghen (1974) 1 SC 1
 Akporue v. Okei (1973) 12 SC 111

STATUTES REFERRED TO

- Electoral Act, ss. 26(1)(2), 133
 E Constitution of the Federal Republic of Nigeria 1999, ss. 177, 182, 251(1)(q)(r), 285

LEAD JUDGMENT BY KEKERE-EKUN JSC

- F This is an appeal against the judgment of the Court of Appeal, Abuja Division delivered on 10th July 2013 dismissing the appellant's appeal and affirming the decision of the Federal High Court, Lokoja Division delivered on 24th September 2012.

- G The facts that gave rise to this appeal are as follows: In pursuit of its powers under the Electoral Act, the 1st respondent fixed April 26th 2011 for Governorship elections to take place in most states of the Federation. It fixed 28th February 2011 as the last date for the submission of nomination forms by candidates. The former Governor of Kogi State, Ibrahim Idris instituted an action before the Federal High Court against the 1st respondent claiming that gubernatorial election could not hold in Kogi State in April 2011, as his tenure would subsist until April 2012. The Governors of Adamawa, Bayelsa, Cross River and Sokoto States also instituted actions on similar grounds. The suits were consolidated.

In its judgment delivered on 23/2/2011 in consolidated suits nos: FHC/AB/CS/651/10, FHC/AB/CS/650/2010, FHC/AB/CS/648/2010, FHC/AB/CS/646/2010 and FHC/AB/CS/668/2010, the Federal High Court restrained the 1st respondent *“from conducting any regular election for the office of Governor of Kogi State until the expiration of a period of four (4) years with effect from April 5, 2008^B and/or not earlier than sixty (60) days to the expiration of the plaintiff’s four years tenure on April 5, 2012.”* As a result, the 1st respondent cancelled the election scheduled for 26th April 2011 in Kogi State and fixed 3rd December 2011 as the new date for elections in that state. Accordingly it released a new timetable of events for the conduct of primaries, submission of nomination forms, campaigns, etc. ^C

Meanwhile, dissatisfied with the order of the Federal High Court, the 1st respondent appealed to the Court of Appeal, Abuja Division. In its judgment in the consolidated appeals delivered on 15/4/2011, ^D the lower court affirmed the decision of the trial court. A further appeal to the Supreme Court was pending at the time the election of 3rd December 2011 was conducted.

The appellant and his political party (the now defunct Congress for Progressive Change-CPC) accepted the fresh dates and new timetable for the election as did all other political parties, participated in new primaries and submitted their names to the 1st respondent, who published the list of candidates for the governorship election accordingly. The result of the election was declared on the 4th of December 2011. The appellant lost to the 3rd respondent who, by a majority of votes cast, emerged as the Governor elect of Kogi State. Those candidates who were dissatisfied with the outcome of the election filed their respective petitions before the Election Tribunal. On 17th May 2012, the Tribunal validated the outcome of the election ^E of 3rd December as properly conducted. The Court of Appeal affirmed the decision of the Election Tribunal and upon final appeal, this court, on the 10th September 2012, affirmed the decisions of the two lower courts. ^F

On the 27th January 2012 this court delivered judgment in ^H the consolidated appeals on the tenure of office of the governors of Kogi, Adamawa, Bayelsa, Cross River and Sokoto States reported in: *Marwa Vs Nyako & Ors* (2012) 6 NWLR (Pt.1296) 199 - 387, wherein it held, inter alia, that the term of office of Governor Ibrahim Idris of

Kogi State had indeed lapsed in May 2011. He was ordered to vacate office immediately. The 3rd respondent was accordingly sworn in as Governor of Kogi State on 27th January 2012, having won the election conducted on 3/12/2011.

On 7th March 2012, the appellant herein filed an originating summons (and later an amended originating summons) before the trial court wherein he contended that the April 2011 gubernatorial election was not cancelled but merely postponed until December 3rd 2011 and that the 3rd respondent (amongst others) who was not in the race for the April 2011 election was not qualified for the December 3rd election. He prayed that the victory of the 3rd respondent at the December 3rd 2011 election be nullified and that he be declared the winner of the said election.

The 1st, 2nd and 3rd respondents filed preliminary objections challenging the suit on the ground that the trial court lacked jurisdiction to entertain it. The preliminary objections were upheld and the appellant's case struck out. On appeal to the lower court, the appeal was dismissed and the decision of the trial court was affirmed. The appellant, being dissatisfied with this decision has further appealed to this court on seven grounds of appeal by a notice of appeal filed on 7/8/2013. Pursuant to an order of this court, the appellant filed three additional grounds of appeal on 14/9/2013.

In compliance with the rules of this court, the parties filed and exchanged their respective briefs of argument. In support of the appeal the appellant relies on the following processes:

- i. Appellant's amended brief of argument deemed filed on 9/10/2014.
- ii. Appellant's Reply brief to 1st Respondent's brief filed on 10/12/2013.
- iii. Appellant's Reply brief to 2nd Respondent's brief filed on 10/12/2013.
- iv. Appellant's Reply brief to 3rd Respondent's brief deemed filed on 3/2/2015.

At the hearing of the appeal on 3/2/2015, learned counsel for the Appellant, J.S. OKUTEPA, SAN, adopted and relied on all the briefs referred to above and urged the court to allow the appeal. WILCOX ABERETON ESQ. adopted and relied on the 1st respondent's brief filed on 24/10/2013 and urged the court to dis-

miss the appeal. Similarly, CHIEF A.O. AJANA adopted and relied on the 2nd respondent's brief filed on 15/11/2013 and urged the court to dismiss the appeal. He drew the court's attention to an objection raised and argued at page 30 of his brief against the appellant's issue 3. Finally, CHIEF CHRIS UCHE, SAN adopted and relied on the 3rd respondent's brief deemed filed on 3/2/2015 and urged the court to dismiss the appeal. Counsel representing the 4th and 5th respondents, Messrs. ISAAC E. EKPA and P.D. ABALAKA respectively informed the court that they did not file any briefs in the appeal

The appellant distilled four issues for determination as follows:

1. Whether the lower court was right when it failed to consider the issue of whether the election of 26th April, 2011 was a postponed election before it resolved the issue of jurisdiction. (Ground 6 of the Notice of Appeal and Additional Ground 2)

2. Whether the lower court was right in holding that it was the Governorship Election Petition Tribunal that has the jurisdiction to entertain the appellant's claim. (Ground 1 of the Notice of Appeal)

3. Whether the appellant's claim as formulated in the Amended Originating Summons was statute barred so as to warrant the lower court finding that the appellant cannot be heard even if there was no limitation period. (Grounds 2 and 4 of the Notice of Appeal and Additional Ground 1)

4. Whether this Honourable Court has the power under section 22 of the Supreme Court Act to consider and pronounce on the merit or otherwise of the appellant's claim in this appeal since the lower court failed to exercise its power under section 16 of the Court of Appeal Act. (Additional Ground 3)

The 1st respondent formulated a single issue for determination, viz:

Whether the lower court was right when it affirmed the decision of the trial court that it lacked the jurisdiction to adjudicate on the appellant's case as constituted. (Distilled from Grounds 1, 2, 3, 4, 5, 6 of the Notice of Appeal and Additional grounds 1, 2, 3)

The 2nd respondent formulated two issues for determination thus:

1. Whether the Court of Appeal was justified in upholding the decision of the trial Federal High Court on the ground that the trial court lacked jurisdiction to determine the claim. (Distilled from grounds

1, 2 and 4 of the Notice of Appeal and grounds 1 and 2 of the Additional Grounds of Appeal)

2. Having regard to the clear provisions of Section 22 of the Supreme Court Act vis-à-vis the reliefs sought by the appellant at the trial court, whether this Honourable Court could consider and pronounce on the merit or otherwise of the appellant's claim when the lower court refrained from doing so. (Ground 3 of the Additional Grounds of Appeal).

The 3rd respondent also couched two issues from the grounds of appeal. They are:

1. Whether the learned Justices of the Court of Appeal were right in holding that the Federal High Court lacked jurisdiction to entertain the Appellant's case as constituted. (Grounds 1, 2, 5 and 6 of the Notice of Appeal and Ground 2 of the Additional grounds of appeal).

2. Whether the learned Justices of the Court of Appeal were right in holding that the Appellant slept on his rights by not commencing his action within reasonable time, and cannot be heard to complain after the election of 3rd December 2011 had taken place, (Grounds 3 and 4 of the Notice of Appeal and Ground 1 of the Additional Grounds of Appeal).

A careful reading of the issues formulated by the respective parties reveals that the appellant's issues 1 and 2 are similar to the sole issue formulated by the 1st respondent and Issue 1 formulated by the 2nd and 3rd respondents. The appellant's issue 3 and the 3rd respondent's issue 2 are the same, though couched differently, while the appellant's issue 4 is in pari materia with the 2nd respondent's Issue 2, I shall therefore consider the appellant's issues 1 and 2 together and issues 3 and 4 seriatim, if necessary,

Issues 1 & 2

With regard to the first issue, it is submitted on behalf of the appellant that the law is settled that in order to determine the jurisdiction of the court to entertain a claim it is the claim of the plaintiff that must be examined. Learned Senior Counsel cited a plethora of authorities in support of this statement of the law including: Ladoja vs. INEC (2007) 12 NWLR (Pt.1047) 119 @ 155 D-E; Umanah Vs. Attah (2007) ALL FWLR (Pt.346) 402 @ 434 F - G; Inakoju Vs. Adeleke (2007) ALL FWLR (Pt.353) 3 @ 87 D - F, and contended

that the issue to be determined is whether the lower court considered and examined the issue of the postponement of the 26th April election before it resolved the issue of jurisdiction. It is the appellant's contention that the crux of his case before the trial court is whether the order of the Federal High Court restraining the 1st respondent "from conducting any regular election for the office of Governor of Kogi State until the expiration of a period of four (4) years with effect from April 5, 2008 and/or not earlier than sixty (60) days to the expiration of the plaintiff's four years tenure on April 5, 2012" was an order directing the 1st respondent to cancel or abandon the governorship election, or whether, as he contends, the order merely directed the 1st respondent not to conduct the planned regular election until a particular period described as "sixty (60) days to the expiration of the Plaintiff's four (4) years tenure," in which case Section 26(1) of the Electoral Act would be applicable. The section provides: D

26(1) "Where a date has been appointed for the holding of an election and there is reason to believe that a serious breach of the peace is likely to occur if the election is proceeded with on that date or it is impossible to conduct the elections as a result of natural disasters or other emergencies, the commission may postpone the election and shall in respect of the area or areas concerned, appoint another date for the holding of the postponed election, provided that such reason for the postponement is cogent and verifiable. E

(2) Where an election is postponed under this Act on or after the last date for the delivery of nomination papers, and a poll has to be taken between the candidates nominated, the Electoral Officer shall on a new date being appointed for the election, proceed as if the date appointed were the date for the taking of the poll between the candidates." F

Learned Senior Counsel for the appellant submitted that it is on the basis of this section that the appellant contended before the trial court that the election, which took place on 3rd December 2011 was conducted as the election meant for 26th April 2011 and that consequently, the 3rd, 4th and 5th respondents, who were not candidates of their various political parties whose nomination forms had been submitted to the 1st respondent prior to 26th April, were not qualified to take part in the election of 3rd December 2011. Learned senior counsel submitted further that the consequence of the above G H

is that the appellant becomes the candidate duly elected at the said election of 3rd December 2011. He submitted that all the reliefs sought by the appellant in the Amended Originating Summons flowed directly from this pre-election issue. Based on this premise, learned Senior Counsel submitted that since it is the plaintiff's claim that determines the jurisdiction of the court, the lower court in resolving the issue of jurisdiction ought to have examined and considered the issue of the postponement of the 26th April election first. He cited and relied on: *Barclays Bank Ltd. Vs C.B.N. (1976) 10 NSCC 291 @ 298 lines 45 - 50 and 299 lines 1 - 5*. Learned counsel argued that if the lower court had determined the issue of postponement of election first it would not have reached the conclusion that the trial court lacked jurisdiction to entertain the claim.

With regard to the second issue, learned Senior counsel submitted, relying on the decision of this court in *Arjay Ltd. Vs Airline Management Support Ltd. (2003) FWLR (Pt.156) 943 @ 984 G-H*, that jurisdiction is a matter of law, which is vested in a court by the Constitution and the statute establishing the court. He also referred to: *ANPP Vs Goni (2012) 7 NWLR (Pt.1298) 147 @ 181 C*. He submitted that the statutory provision that donates jurisdiction to the Federal High Court is Section 251(1)(q) and (r) of the 1999 Constitution, which provides as follows:

Section 251(1) Notwithstanding anything to the contrary contained in this Constitution and in addition to such other jurisdiction as may be conferred upon it by an Act of the National Assembly, the Federal High Court shall have and exercise jurisdiction to the exclusion of any other court in civil causes and matters -

(q) Subject to the provisions of this Constitution, the operation and interpretation of this Constitution in so far as it affects the Federal Government or any of its agencies;

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

He submitted that by the above provisions, the Federal High Court, notwithstanding what any other Section of the Constitution may provide, has exclusive jurisdiction to adjudicate over matters specified in the section. He relied on: *Obi Vs INEC (2007) ALL FWLR (Pt.378) 1116 @ 1165 H*; *Ladoja vs. INEC (supra) @ 185 A - C* and

NEPA Vs. Edegerbo (2003) FWLR (Pt.139) 1556 @ 1571. He submitted further that in light of the aforesaid provisions, the Federal High Court has exclusive jurisdiction in any matter involving a declaration or injunction in respect of an administrative decision or action of the Federal Government or any of its agencies. It is the appellant's contention that the 1st respondent took an administrative decision as to whether or not the election of 26th April 2011 should hold and further that the subsequent decision to start a fresh exercise and ignore the pre-April 26th pre-election processes were also administrative decisions. He submitted that the appellant's suit questions the subsequent administrative decision and seeks declaratory reliefs as contained in Relief 2, 5(2), 5(4) and 5(5) of his amended originating summons, He argued that the declaratory reliefs do not fall within the jurisdiction of any Election Tribunal created under Section 285 of the 1999 Constitution (as amended). He examined all the reliefs sought and submitted that the issues before the trial court for adjudication were as follows:

- i) Pre-election administrative decisions of the 1st respondent, a Federal Government Agency relating to postponement of election,
- ii) Pre-election matter on the qualification of a candidate to contest the election of December 2011.
- iii) The propriety of the 1st defendant's administrative decision to direct the swearing-in of the 3rd respondent after the judgment delivered by the Supreme Court and the assumption of office by the defendant [3rd respondent] in line with the directive.

Relying on the decision of this court in: Dangana Vs Usman Appeal No. SC/490/2011 delivered on 24/2/2012, learned Senior Counsel submitted that the complaint of qualification by a candidate to contest an election could be raised at the Election Tribunal or at a State or Federal High Court. He submitted that in the instant case the critical question before the trial court was whether the court, not being an Election Tribunal under Section 285(2) of the Constitution, but being a court of record, created and empowered by Section 251 of the Constitution, could entertain a suit challenging the following:

- (a) The fixing of the election date to 3rd December 2011;
- (b) Declaring the said election to be a postponed election under Section 26(1) and (2) of the Electoral Act 2010 (as amended); and

(c) Whether the Federal High Court can entertain an action challenging the qualification of any of the candidates to contest the said election.

He argued that this court dealt extensively with issue (c) above in *Dangana Vs Usman* (supra) and urged us to be guided accordingly B in the instant case. He submitted further that it is settled law that where a court has jurisdiction to entertain the main question in controversy and the main reliefs sought therein, it also has the inherent powers to grant consequential orders that would give effect to its C powers in the determination of those substantive reliefs. In addition to several authorities cited in support he referred to Order 56 Rule 1 of the Federal High Court (Civil Procedure) Rules 2009, which gives the trial court discretionary powers to make the consequential orders as sought by the appellant.

D Relying on the following cases: *Amaechi Vs INEC & Ors.* (2007) 18 NWLR (Pt.1066) 42; *Dangana Vs. Usman* Appeal No. SC/490/2011 and *P.D.P. Vs. Hon. Atai Aidoko Ali Usman & Ors.* Appeal No. SC.111/2012 now reported in (2013) 6 NWLR (Pt.1349) 50, he submitted that the trial court had jurisdiction to entertain the appellant's E claim, as the issues raised in the amended originating summons are pre-election matters, which are predicated upon statutory and constitutional provisions. He submitted that the phrase "notwithstanding anything to the contrary in this Constitution" used in Section 251 of the Constitution means that despite the provisions of Section 285 of F the constitution, the Federal High Court still has jurisdiction in respect of matters specified in the section. For the meaning and import of the word "notwithstanding" used in Section 251 he referred to: *NDIC Vs Okem Enterprises* (2004) 10 NWLR (Pt.880) 107 @ 182 H; *Ladoja Vs INEC* (supra); *Obi Vs INEC* (2007) ALL FWLR (Pt.378) 1116 @ G 1167 C - E & A - B; *Ahmed Vs C.O.P. Bauchi State* (2012) 9 NWLR (Pt.1304) 104 @125 D-F.

On the whole, he maintained that the suit was properly instituted before the Federal High Court.

H In reply, learned counsel for the 1st respondent reproduced the 5 questions for determination and 9 reliefs sought by the appellant at the trial court and submitted that questions 2, 3, 4 and 6 are aimed at impugning the validity of the return of the 3rd respondent following the governorship election held on 3rd December 2011. He

maintained further that relief 8 seeks an order directing the 1st respondent to issue a certificate of return to the appellant as the winner of the said election. He submitted that in order to do this the return of the 3rd respondent in the election of 3rd December would have to be nullified and declared invalid, and that this is the effect of relief 9 thereof. B

Learned counsel submitted that contrary to the appellant's contention, it was after a careful examination of his amended originating summons and supporting affidavit, that the learned trial Judge concluded that the court lacked jurisdiction to entertain the claim. He also referred to the judgment of the lower court on the issue to the effect that the learned trial Judge fully understood the nature of the appellant's complaint and rightly concluded that it lacked jurisdiction to entertain it. C

On the contention that the lower court ought to have resolved the issue of postponement or cancellation of the election before determining whether or not the trial court had jurisdiction to entertain the claim, he submitted that the position of the law is that when the court's jurisdiction is challenged, it is better for the court to resolve the issue one way or the other before proceeding to hear the case on the merit. He referred to: NEPA Vs Olagunju (2005) 3 NWLR (Pt.913) 602 @ 621 E - F. He submitted that the striking out of the appellant's claim for lack of jurisdiction without looking into the substance of the case, i.e. the postponement and/or validity of the election of 3rd December 2011, is in accordance with sound principles of law. He referred to: Uzoh vs National Council on Privatization & Anor (2007) 10 NWLR (Pt.1042) 320. D E F

On the issue of jurisdiction he submitted that Sections 31(5) and (6) and 87(9) and (10) of the Electoral Act 2010 (as amended) confer jurisdiction on both the State and Federal High Courts to entertain pre-election matters. He submitted that once an election has been conducted and concluded, by virtue of Section 133(1) of the Act, no such election shall be questioned in any manner other than by a petition complaining of undue election or undue return presented before an Election Tribunal or Court. He submitted that an already concluded election could only be validly challenged before the Tribunal set up to look into it. He referred to: Amaechi vs INEC (supra) where it was held that "the issues of disqualification, nomina- G H

tion, substitution and sponsorship of candidates for an election precede the election and are therefore pre-election matters.” He noted that in the instant case, the appellant waited for more than 90 days after the swearing-in of the 3rd respondent before instituting his action at the trial court. He submitted that having regard to the provisions of Section 285(2) of the Constitution, the appellant who did not seek redress at the Election Tribunal, was, by his suit seeking to lure the trial court into exercising supervisory or appellate jurisdiction over the Governorship Election Tribunal, a situation frowned upon by this court. He referred to: *Waghoreghor & 2 Ors. Vs. Aghenghen* (1974) 1 SC 1 @ 4; *Akporue Vs. Okei* (1973) 12 SC 111.

On the appellant’s reliance on *Dangana Vs Usman* (supra), learned counsel submitted that the appellant’s submission to the effect that a pre-election matter is not time bound and could be commenced even after the election has been concluded, does not hold water in the face of the decision of this court in *Hassan vs Aliyu & Ors* (2010) 17 NWLR (Pt. 1223) 547 @ 599 C-G where it was held, *inter alia*, that in an election related matter, time is of the essence.

He submitted that even though Section 251(1) (q), (r) and (s) of the 1999 Constitution (as amended) vests the Federal High Court with jurisdiction to hear and determine matters related to the administrative decisions of the Federal Government or any of its agencies, such jurisdiction is not at large. He submitted that in order for the Federal High Court to assume jurisdiction over a matter, there must be simultaneous existence of both party and subject matter. He urged us to discountenance the appellant’s submissions in this regard. He relied on: *Ohakim Vs Agbaso* (2010) 19 NWLR (Pt.1226) 172.

In agreeing that it is the plaintiff’s claim that determines the court’s jurisdiction, learned counsel for the 2nd respondent referred to several portions of the judgment of the lower court and submitted that the court showed a clear understanding of the essence of the appellant’s claim. He submitted that although reliefs 7 and 8 are couched as consequential reliefs, the real pith of the appellant’s claim is the nullification of the 3rd respondent’s victory at the 3rd December 2011 election and a declaration that he is the winner of the said election. He referred to Section 285(2) of the 1999 Constitution (as amended), Section 133 of the Electoral Act 2010 (as amended) and the case of *ANPP Vs PDP* (2006) 17 NWLR (Pt.1009) 46 @ 486 -

487 H - A, and submitted that the jurisdiction of the Federal High Court could not be enlarged to determine a matter that seeks to question the outcome of an election. He also referred to: *Ohakim Vs Agbaso* (supra) @ 239 C - D; *Amaechi Vs INEC* (supra) @ 320 C.

On the appellant's reliance on the case of: *Dangana Vs Usman* (supra), he critically examined the facts vis a vis the circumstances of the instant case and submitted that the authority is distinguishable both on the facts and on the law. He submitted that the issue in this appeal is not strictly whether qualification is a pre- or post-election issue but rather that by not instituting his action before the conduct of the election on December 3rd and the swearing-in of the 3rd respondent, the appellant's claim had translated into an election matter. He referred to *Salim Vs CPC* (supra). He submitted that a careful examination of the amended originating summons reveals that only reliefs 3 and 4 could be considered as ancillary reliefs, while reliefs 1, 2, 5, 6, 7, 8 and 9 are based on either the processes directly connected with the election of 3rd December or with the actual conduct and result of the said election and therefore are principal reliefs. He submitted that if any of the reliefs is granted it would lead to the nullification of the result of the election. Relying on the authority of *Tukur Vs. Gov. of Gongola State* (1989) 4 NWLR (Pt.117) 517, he submitted that the legal position is that where the jurisdiction of a court covers only the ancillary reliefs, such court ought to decline jurisdiction. He submitted that the Election Tribunal has jurisdiction over all the reliefs sought while the Federal High Court has jurisdiction in respect of reliefs 3 and 4 only.

On the issue as to whether the election of 26th April was postponed or cancelled, learned counsel submitted that the learned trial Judge correctly declined to consider it on the ground that only an Election Tribunal had jurisdiction to entertain the entire suit. He proceeded to advance arguments in support of the contention that the said election was indeed cancelled and not postponed, as argued by the appellant.

Learned Senior counsel for the 3rd respondent argued essentially along the same lines as the 1st and 2nd respondents. He submitted that election matters being *sui generis* and unlike regular civil matters have their own special statutory provisions, which regulate them. He relied on the case of: *Ehuwa Vs O.S.I.E.C.* (2006) 10 NWLR

(Pt.1012) 544. He also considered the provisions of Sections 31(5) & (6), 87(9) & (10) and 133(1) of the Electoral Act to show the distinction between pre-and post-election matters. He submitted that any challenge to an election must be by way of petition before the appropriate Election Tribunal and not by originating summons before the High Court. He referred to *Amaechi Vs INEC* (supra) and submitted that what makes issues of disqualification, nomination, substitution and sponsorship of candidates pre-election matters is that they precede the election. He cited several other authorities in support of this position. He noted that once a pre-election matter is commenced before the election, it is sustainable whether or not the election is later conducted and irrespective of the outcome. He referred to: *Agbakoba Vs INEC* (2008) 18 NWLR (Pt.1119) 489 and submitted that in the circumstances, in determining whether a suit is a pre-election matter, the time of commencement of the suit is relevant. He cited the case of: *Hassan Vs Aliyu* (supra) @ 599 C - G; *Salim Vs CPC* (supra) @ 524 - 525 H - E. He contended further that a matter which, in substance, would have been a pre-election matter would cease to be so if the suit is not commenced before the conduct of the election. He submitted that the appellant failed to challenge the cancellation of the election, the new election time-table, the qualification of the 3rd, 4th and 5th respondents nor did he take any steps to challenge the primaries that produced the 3rd, 4th and 5th respondents between April and December 2011. He noted further that the appellant fully participated in the fresh primaries held in September 2011. He observed that at the conclusion of the election only the now defunct Action Congress of Nigeria (ACN) and All Nigeria Peoples Party (ANPP) challenged the validity of the election, while the appellant and his party, the now defunct Congress for Progressive Change (CPC), stood by.

He reiterated his contention that the lower court properly considered and meticulously examined the appellant's case and rightly concluded that the matter was not a pre-election matter within the jurisdiction of the Federal High Court.

Learned Senior Counsel submitted that if it was really the intention of the appellant to challenge the cancellation or postponement of the 26th April election, or to seek judicial declaration regarding the status or qualification of candidates, he ought to have insti-

tuted his action before the election took place on 3rd December 2011. He submitted further that it would not be correct, as asserted by the appellant, that his cause of action only arose after the judgment of this court in Marwa's case (*supra*). He submitted that since it is the appellant's contention that his claim was questioning the administrative decision taken by INEC in deciding whether or not the election should hold, his cause of action arose pre 26th April 2011. B

He also submitted that there is a world of difference between qualification and disqualification of a candidate on the one hand and valid nomination on the other. On qualification and disqualification of candidates for the office of Governor he referred to Sections 177 and 182 of the Constitution. He submitted that the provisions relate to the candidate and are personal to him and are not related to the process through which he emerged as a candidate. He submitted that these are substantive and not procedural issues and that a ground for qualification, disqualification or non-qualification must come within the constitutionally stipulated grounds. He referred to: ANPP Vs Usman (2008) 12 NWLR (Pt.1100) 1 @ 51 D & 53 G. He observed that the appellant's challenge to the qualification, disqualification or non-qualification of the 3rd respondent or any of the candidates who participated in the 3rd December election is neither predicated on nor located within the ambit of Sections 177 or 182 of the Constitution. He submitted that while it is correct that a challenge to the qualification of a candidate to contest the office of Governor may be both a pre- and post-election matter, for it to qualify as a pre-election matter, it must have been commenced before the election and the appropriate forum would be the Federal or State High Court. He cited the case of: Kubor Vs Dickson (2013) 4 NWLR (Pt.1345) 534. He submitted that a challenge after the conduct of the election can only be made pursuant to Section 138(1)(a) of the Electoral Act 2010 (as amended). He contended further that a challenge to qualification under Section 138(1)(a) of the Electoral Act can only be made with respect to an elected candidate whose election is being questioned, and not in respect of the candidates who lost the election. He argued that the challenge to the qualification of the 4th and 5th respondents exposes the appellant's claim as a suit not genuinely predicated upon qualification of candidates. C D E F G H

He submitted that the thrust of the appellant's complaint is

another variant of “qualification”, which is “valid nomination” of a candidate for election into the office of Governor under the Electoral Act 2010 (as amended). He submitted that this aspect arises not from the constitutional provisions on qualification and disqualification but from the statutory provisions regulating the nomination of candidates
 B such as Sections 31(2), (5) and (6), 33 and 87(9) of the Electoral Act. He argued that the provisions do not create a new specie of grounds for qualification or disqualification but merely enforce compliance with the provisions of Sections 177 and 182 of the 1999
 C Constitution by disqualifying any candidate who supplies false information to avoid the requirements of the sections. He submitted that in the circumstances the regular courts have jurisdiction to disqualify such candidates from contesting the election. He submitted that the jurisdiction of the court in this respect would expire upon the con-
 D duct of the election and that the power to disqualify a candidate after the election (if not commenced before the election) inures to the Election Tribunal under Section 138(1)(a) of the Electoral Act 2010 (as amended).

Referring to Section 87(9) of the Electoral Act, learned Senior
 E Counsel submitted that to competently challenge the nomination of a candidate, the plaintiff must be an aspirant, and must belong to the political party of the nominated candidate and further that the suit must be commenced before the election takes place. He submitted
 F that in the circumstances of this case the appellant who had contested the election is no longer an aspirant. He submitted that any person who is not an aspirant in a nomination process cannot challenge the nomination under any disguise. He referred to: PDP Vs Sylva & Ors. (2012) 13 NWLR (Pt.1316) 85; Emeka Vs Okadigbo
 G (2012) 18 NWLR (Pt.1331) 556; Nwaogu Vs Atuma & Ors. (2013) 9 NWLR (Pt.1358) 113.

He submitted that not being a member of the 3rd respondent’s political party, the appellant is not competent to question the nomination process that produced the 3rd respondent as the candidate of
 H his party. He submitted that in order to have locus standi to challenge the nomination of a party through primary election the challenger must be a person directly affected by being an aspirant. On the issue of locus standi to challenge or question the conduct of primaries or any other method of selection of a candidate of a political party, he

cited the cases of *Nagogo Vs Congress for Progressive Change (CPC)* (2013) 2 NWLR (1339) 448 @ 491 A - C; *Eyiboh Vs Dan Abia & Ors.* (2012) 16 NWLR (Pt.1325) 51; *Emeka Vs Okadigbo* (supra).

On the appellant's contention that the Federal High Court has jurisdiction to entertain the suit, learned senior counsel concurred with the position of learned counsel for the 1st and 2nd respondents that the mere fact that a Federal Government Agency is made a party to a suit is not sufficient without more to confer jurisdiction on the said court. He maintained that the subject matter or cause of action in the suit would also be considered. He relied on the case of *Ohakim Vs Agbaso* (supra) and reiterated the fact that in the instant case the appellant's claim is one complaining of undue return of the 3rd respondent as Governor of Kogi State and seeking a reversal of the return of the 3rd respondent made in the December 3rd 2011 election and praying for the swearing-in of the Appellant as the Governor of Kogi State. He urged the court to resolve this issue of jurisdiction against the appellant.

In reply to the arguments canvassed by the 1st respondent on the issue of jurisdiction, learned counsel for the appellant maintained that what the appellant did was to ask the court below to determine whether having regard to the decision of this court in *Marwa's* case (supra), the administrative decision of the 1st respondent taken after April 26th 2011 that produced the process leading to the election of 3rd December 2011 was valid in light of Section 26 of the Electoral Act. He also maintained his position that the reliefs sought by the appellant arose from the administrative decision of the 1st respondent taken while *Marwa's* case (supra) was pending before this court and after the date set for the April 26th 2011 election. He contends that the appellant never questioned the validity of the December 3, 2011 election but the process leading to the election. He submitted further that the appellant did not delay in filing this suit because his cause of action only became complete after the decision of this court in *Marwa's* case (supra).

In answer to the 2nd respondent's brief, he maintained that the case of *Dangana Vs Usman* (supra) is relevant and that the distinctions pointed out by learned counsel for the 2nd respondent are not apposite. He disagreed with the contention of the 2nd respondent that reliefs 7, 8 and 9 are ancillary claims. He argued that they

are consequential reliefs, which are incidental to and flow naturally from the principal reliefs. He maintained that the trial court had jurisdiction under Section 251(1) of the 1999 Constitution to grant the declaratory reliefs sought. A large portion of the Reply brief is devoted to re-arguing the interpretation of section 26(1) of the Electoral Act already addressed in the main brief. The purpose of a reply brief is not to afford the appellant a second bite at the cherry. The submissions are discountenanced.

In answer to the submissions made on behalf of the 3rd respondent, learned counsel argued that the appellant's suit at the trial court was predicated upon the postponement of election, which is an event that took place before the election. He submitted that the lower court having noted that the appellant was challenging the postponement of the election, ought to have determined the question relating to the postponement of the election before reaching a conclusion on the issue of jurisdiction. He maintained that the appellant's case is unique because his cause of action did not become complete until after the decision of this court in *Marwa's* case delivered on 27/11/2012. He submitted that the cases relied upon by learned senior counsel for the 3rd respondent to the effect that the matter had become a post-election matter since it was filed after the conduct of the election, are inapplicable in the peculiar circumstances of this case. On the same contention that the appellant's cause of action accrued on 27/1/2012 when the judgment of this court was delivered, learned counsel argued that the action was not caught by the limitation provided under the Public Officers Protection Act, as submitted by learned counsel for the 3rd respondent.

Learned counsel submitted that the appellant's challenge to the qualification of the 3rd, 4th and 5th respondents is predicated on Section 26(1) and (2) of the Electoral Act 2010 and that the said section is not inconsistent with Sections 177 and 182 of the 1999 Constitution but rather complimentary thereto. He argued that the provisions did not expand or enlarge the grounds expressly provided by the Constitution.

On the issue of locus standi he referred to the case of *Dangana vs Usman* (supra) and submitted that a litigant can challenge the qualification of another candidate even if they are not of the same party. He argued that the instant case has nothing to do with the nomina-

tion of the candidates but their qualification to participate in the election conducted on 3rd December 2011.

On the whole he argued that most of the authorities relied upon by the 3rd respondent are not applicable to the facts of this case.

Now the law is quite well settled that once the issue of jurisdiction is raised before any court, it must be resolved before any further step is taken in the proceedings. The reason for this is not far-fetched. It is because jurisdiction is fundamental to the competence of the court adjudicating. It is the foundation upon which the entire adjudication process is founded. It has been described as the lifeblood of adjudication, without which a court or tribunal would lack the vires to entertain the proceedings ab initio. See *Kalio Vs Daniel* (1975) 2 SC 15; *A.G. Lagos State Vs. Dosunmu* (1989) 3 NWLR (Pt.111) D 552 @ 567; *Oloriode Vs. Oyebe* (1984) 1 SCNLR 390. ***The law is trite that any decision reached without jurisdiction, no matter how well conducted, is a nullity and liable to be set aside.*** *Madukolu Vs Nkemdilim* (1962) 2 SCNLR 341. ***The issue of jurisdiction is so fundamental that it can be raised at any stage of the proceedings and even for the first time on appeal to this court.*** See *Petrojessica Enterprises Ltd. Vs Leventis Technical Co. Ltd.* (1992) 5 NWLR (Pt.244) 675 @ 693 E - G; *Ogembe Vs. Usman & Ors.* (2011) 17 NWLR (Pt.1277) 638. This court eloquently stated the need for an issue of jurisdiction to be determined once it is raised in the case of: *Isaac Obiweubi Vs Central Bank of Nigeria (CBN)* (2011) 7 NWLR (Pt.1247) 465 @ 494 D - F per Rhodes-Vivour, JSC, where His Lordship stated thus:

"It is thus mandatory that courts decide the issue of jurisdiction before proceeding to consider any other matter. See Bronik Motors Ltd & Anor vs Wema Bank Ltd. (1983) 1 SCNLR P.296; Okoya Vs Santili (1990) 2 NWLR (Pt.131) P.172; Madukolu Vs Nkemdilim (1962) 1 ANLR (Pt.4) 587; (1962) 2 SCNLR 341 ...

Usually where a court's jurisdiction is challenged by the defence, it is better to settle the issue one way or the other before proceeding to hear a case on the merits. Any failure by the court to determine any preliminary objection or any form of challenge to its jurisdiction is a fundamental breach which renders further steps taken

in the proceedings a nullity.” See also: NEPA Vs. Olagunju (2005) 3 NWLR (Pt.913) 602 @ 621 E - G.

B Learned counsel for the appellant has argued very forcefully that the lower court erred in determining the issue of jurisdiction without resolving the nature of the appellant’s complaint i.e. without determining whether or not the election fixed for 26th April 2011 was cancelled or postponed till 3rd December 2011. He is of the view that a determination of this issue would have assisted the court in appreciating the fact that the lower court in fact had jurisdiction to entertain the suit.

C With due respect to learned Senior Counsel, adopting such an approach would no doubt put the cart before the horse. He has premised his submission on the fact that in order to determine whether or not the court has jurisdiction to entertain a cause or matter, it is the claim of the plaintiff that is examined to resolve the issue. He contends that the fulcrum of the appellant’s claim is the purport of the order of injunction made by the trial court in suit no. FHC/ABJ/CS/646/2010 directed at the 1st respondent restraining it “*from conducting any regular election for the office of Governor of Kogi State until the expiration of the period of four (4) years with effect from April 5, 2008 and/or not earlier than sixty (60) days to the expiration of the Plaintiff’s four (4) years tenure on April 5, 2012.*”

F He contends that the court did not direct the 1st respondent to cancel or abandon the election slated for 26th April 2011 but only directed it not to conduct the election until the specified time frame. He argued that in the circumstances the election was not cancelled or abandoned but postponed and that the postponement thus brings the claim within the purview of Section 26(1) and (2) of the Electoral Act 2010 (as amended). He submits that the judgment of the Federal High Court, which was affirmed by the lower court constitutes “other emergencies” referred to in Section 26(2) of the Electoral Act and therefore constitutes cogent and verifiable reasons for the postponement. He argued that once it is accepted that the election of 26th April was postponed and not cancelled or abandoned, it follows that the 3rd, 4th and 5th respondents who were not candidates of their respective political parties at the election of 26th April 2011 were not qualified to take part in the election of 3rd December 2011. On this premise, he argued that the root of the appellant’s claim was the

issue of postponement of the election of 26th April 2011 and therefore in resolving the issue of jurisdiction the lower court ought to have considered the issue of postponement first.

I deem it appropriate at this stage to reproduce in extenso the questions for determination and the reliefs sought in the Amended Originating Summons filed before the Federal High Court on 18/5/2012. The questions for determination are as follows:

"1. Whether having regard to the decision of the Supreme Court in consolidated Appeals No. SC/141/11, SC/266/11, SC/267/11, SC/282/11, SC/356/11, Brig. General Buba Marwa & Anor. Vs. Admiral Murtala Nyako & Ors, delivered on the 27th January 2012 and having regard to the provisions of paragraph 15(a) - (i) of the 3rd schedule of the Constitution of the Federal Republic of Nigeria (as amended), Section 178(2) section 191(2) of the same Constitution and Sections 26, 27 and 51 of the Electoral Act, 2010 (as amended), the decision of the 1st defendant directing, in its statement of 30th January 2012 that the candidate of 2nd defendant be sworn in immediately and assumed office as the Governor of Kogi State, based on an election of 3rd December, 2011 is not unconstitutional, invalid, null and void.

2. Whether having regard to the decision of Supreme Court in the consolidated Appeals No. SC/141/11, SC/266/11, SC/267/11, SC/356/11, Brig. General Buba Marwa & Anor Vs Admiral Murtala Nyako & Ors, delivered on the 27th January 2012 and having regard to the provisions of paragraph 15(1) - (i) of the 3rd schedule of the Constitution of the Federal Republic of Nigeria (as amended), Section 178(2), Section 191(2) of the same Constitution and sections 26, 27 and 31 of the Electoral Act 2010 (as amended), the candidate of the 2nd defendant in the person of Captain Idris Ichalla G Wada (Rtd.) was validly sworn in as Governor of Kogi State, arising from the election conducted on the 3rd of December, 2011.

3. Whether having regard to the decision of the Supreme Court in consolidated Appeals No. SC/141/11, SC/266/11, SC/267/11, SC/356/11, SC/282/11, SC/326/11, Brig. General Buba Marwa & Anor Vs Admiral Murtala Nyako & Ors. delivered on the 27th January 2012 and having regard to the provisions of paragraph 15(a) - (i) of the 3rd schedule of the Constitution of the Federal Republic of Nigeria (as altered), Section 178(2), Section 191(2) of the same

Constitution and Sections 26, 27 and 31 of the Electoral Act, 2010 (as amended) the 1st defendant was deemed to have postponed the date of the Kogi State Governorship Election earlier fixed for April 26, 2011 to December, 3rd, 2011 pursuant to the judgment and orders of the Federal High Court, Abuja in suit No. FHC/ABJ/CS/646/10 delivered on the 23rd of February, 2011 and affirmed by the Court of Appeal on 15th April, 2011.

4. Whether having regard to the decision of the Supreme Court in consolidated Appeals No. SC/141/11, SC/266/11, SC/267/11, SC/356/11, Brig. General Buba Marwa & Anor Vs Admiral Murftala Nyako & Ors delivered on the 27th January, 2012 and having regard to the provisions of paragraph 15(a) of the 3rd schedule of the Constitution of the Federal Republic of Nigeria (as amended), Section 178(2), Section 191(2) of the same Constitution and sections 26, 27 and 31 of the Electoral Act, 2010 (as amended), the 3rd, 4th and 7th defendants were not qualified to contest the said election not being the candidates nominated by their respective political parties for the April 26th 2011 Kogi State Governorship Election.

5. If the answer to Question 3 above is in the affirmative and the answer to Question 4 above is in the negative, whether the 2nd plaintiff upon the invalidation of the candidacy of the 3rd, 5th and 7th defendants, is entitled to be issued the certificate of return as the duly elected Governor of Kogi State at the 3rd December, 2011 Kogi State Governorship election being the candidate nominated and sponsored by the 1st plaintiff for the April 26th, 2011 election and who contested the said election on the 3rd December, 2011 on the same platform and scored the majority of valid votes at the said election.”

Upon raising the above Questions for Determination, the appellant claimed the following Reliefs, namely:

“1. A DECLARATION that only the 2nd plaintiff and those candidates who qualified to contest the April 26th 2011 Kogi State Governorship election prior to the nullified judgment of the Federal High Court in suit no. FHC/ABJ/CS/646/10 delivered on 23rd February 2011 and affirmed by the Court of Appeal on 15th April 2011 and maintained their candidature on the same platform in the 3rd December 2011 Governorship election were qualified to participate in the December 3rd, 2011 Kogi State Governorship election.

2. A DECLARATION that having regard to the effect of the

consolidated judgment of the Supreme Court in SC/141/11, SC/266/11, SC/267/11, SC/282/11, SC/326/11 and SC/356/11 delivered on 27th January 2012 declaring that the tenure of the Governor of Kogi State ended on 28th May 2011 and dismissing the plaintiff's suit in its entirety, the administrative directive of the 1st defendant to all political parties to collect forms for the Governorship election in Kogi State from the 1st defendant's headquarters on the 15th of September 2011 and to carry out all other pre-election steps/actions including the primaries of all political parties carried out between October and November 2011 pursuant to the mid election timetable purportedly in compliance with the judgment of the Federal High Court suit no. FHC/ABJ/CS/646/10 delivered on 23rd February 2011 and affirmed by the Court of Appeal on 15th April 2011 preparatory to the elections fixed for 3rd December 2011 was done in contravention of the mandatory provisions of Section 178(2) of the 1999 Constitution (as amended) and Section 26(1) and (2) of the Electoral Act, 2010 (as amended) and therefore illegal, unconstitutional, null and void.

3. A DECLARATION that the administrative decision or order of the 1st defendant contained in a Press Statement dated 30th January 2012 and read by its National Chairman dictating and directing that .the Governor-elect in the Kogi State Governorship election of 3rd December 2011 be sworn in immediately, which led to the assumption of office by the 3rd defendant, is unconstitutional, ultra vires, overreaching, invalid, null and void.

4. A DECLARATION that the swearing in of the 3rd defendant as the Governor of Kogi State and the eventual assumption of office after the directive of the 1st defendant contrary to the provisions of Section 1(2) of the 1999 Constitution (as amended) is unconstitutional, illegal, null and void and of no effect whatsoever.

5.(1). A DECLARATION that having regard to the effect of the consolidated judgment of the Supreme Court in SC/141/2011, SC/266/2011, SC/267/2011, SC/282/2011, SC/326/2011 and SC/356/2011, DELIVERED ON 27th January 2012, declaring that the tenure of the Governor of Kogi State ended on 28th May 2011 and dismissing the plaintiff's suit in its entirety thereby nullifying the effect of the said judgment, the 1st defendant ought to have reverted to the pre-election processes duly done before 26th April 2011, the

date appointed for the said Kogi State Governorship election.

(2). A DECLARATION that having regard to the effect of the judgment of the Supreme Court in SC/141/2011, SC/266/2011, SC/267/2011, SC/282/2011, SC/326/2011 and SC/356/2011 delivered on 27th January 2012 and Section 26(1) and (2) of the Electoral Act 2010 (as amended), the 1st defendant, having appointed the 26th of April, 2011 for the holding of Kogi State Governorship election, had cogent and verifiable reason not to hold the said election on the said date due to an emergency (unforeseen circumstances) to wit: the restraining orders of the Federal High Court in suit no. FHC/ABJ/CS/646/10 delivered on 23rd February 2011 and confirmed by the Court of Appeal on 19 April, 2011.

(3) A DECLARATION that following the impossibility of the 1st defendant to conduct the Kogi State Governorship election on the 26th April 2011, the 1st defendant's decision not to hold the election constituted a postponement of the said election.

(4). A DECLARATION that having regard to Section 26(1) and (2) of the Electoral Act, 2010 (as amended), where it is impossible to conduct an election on a date appointed and after the last date for the delivery of nomination papers, it is ultra vires the powers of the 1st defendant to do anything other than to postpone the said election and conduct same on a new date between the earlier nominated candidates.

(5). A DECLARATION that by virtue of Section 26(2) of the Electoral Act 2010, where an election (i.e. April 2011 Kogi State Governorship) is postponed on or after the last date for the delivery of nomination papers/ the first defendant shall on a new date being appointed for the election (i.e. 3rd December 2011) proceed as if the new date were the earlier date for the taking of the poll between the nominated candidates for the first scheduled election.

(6). A DECLARATION that in consequence of the non-qualification of the 3rd, 5th and 7th defendants to contest the December 3rd, 2011 Kogi State Governorship Election, the 2nd plaintiff is the lawful winner of the Koai State Governorship election and is the person validly entitled to be sworn in as the Governor of Kogi State.

(7). A consequential order nullifying the swearing in of the 3rd defendant as the Governor of Kogi State and directing the 3rd defendant to vacate office as the Governor of Kogi State forthwith.

(8) *A consequential order directing the Chief Judge of Kogi State to swear in the 2nd plaintiff as the Governor of Kogi State forthwith.*

(9) *An order of perpetual injunction restraining the 3rd defendant and any person deriving authority from his purported election from parading himself or themselves as the Governor of Kogi State having been unlawfully sworn in on the 27th January, 2012 and assumed office on the 30th January, 2012 contrary to the provision of section 1(2) of the 1999 Constitution of the Federal Republic of Nigeria (as contended). ”*

It is important to note that the 5th and 7th defendants referred to above are the 4th and 5th respondents in this appeal.

From the authorities referred to earlier, it is clear that where a court lacks jurisdiction to entertain a cause or matter, it lacks jurisdiction to determine any issue arising within that cause or matter.

To attempt to do so would amount to delving into the merit of the case, which would amount to a nullity in the event that the court lacks jurisdiction to determine the suit.

It is a correct statement of the law that in order to determine whether or not the court has jurisdiction to entertain a cause or matter it is the claim of the plaintiff that would be considered. See: A.G. Federation Vs Guarding Newspapers Ltd. (1999) 9 NWLR (Pt.618) 187; (1989) 5 SC (Pt.III) 59; Uwaifo Vs. A.G. Bendel State (1982) 7 SC 124; Adeyemi v. Opeyori (1976) 6-10 SC 31; Amaechi Vs. INEC (No.2) (2007) 18 NWLR (Pt.1065) 98. ***The court must take an overview of the entire case brought before it to determine whether it has jurisdiction or not.*** See: Gbileve Vs Addingi (2014) 16 NWLR (Pt.1433) 394 @ 431 C - G.

In the instant case, as asserted by learned Senior Counsel for the appellant, one of the issues that the court would be required to determine in the suit is whether the election of 26th April was cancelled, abandoned or postponed. If it is determined that the election was cancelled and a new election scheduled, it would knock the bottom off his case. If, on the other hand, it is determined that the election was postponed, as claimed by the appellant, for cogent and verifiable reasons, then the provisions of Section 26(1) and (2) of the Electoral Act 2010 (as amended) would be invoked as the basis for

the reliefs being sought by him.

It would thus be very wrong for the court, in determining the issue of jurisdiction, to delve into one of the issues in controversy in the suit and determine same before deciding whether or not it has jurisdiction to entertain the entire proceeding. I therefore hold that the Lower Court was right not to delve into the merit of the case in the process of determining whether or not the trial court had jurisdiction to entertain the suit.

The next issue to be determined is whether the Lower Court was right in holding that it is the Governorship Election Petition Tribunal that has the jurisdiction to entertain the appellant's claim. Learned senior counsel for the appellant has argued that the issue of postponement of the election of 26th April 2011 was the root of the appellant's claim, as shown in Questions 1, 2, 3, 4 and 5 and Reliefs 1, 2, 5 and 6 above. He contends that the decision of the 1st respondent regarding the new date for the election and the subsequent decision to start a fresh pre-election exercise were administrative decisions by a Federal Government agency and therefore by virtue of Section 251(1) (q) and (r) of the 1999 Constitution (as amended) it is the Federal High Court that has exclusive jurisdiction to determine same. He argued that the decision to ignore the pre-election processes that took place pre 26th April is actionable and that Reliefs 2, 5 (2), 5 (4) and 5 (5) are predicated upon that subsequent decision. He submitted that the declaratory reliefs do not fall within the jurisdiction of any Election Tribunal created under section 285 of the constitution. He also maintained that the suit questions the qualification of the candidates for the election, which, on the authority of *Dangana Vs Usman* (supra) can be entertained by the State and Federal High Court or by an Election Tribunal.

As observed earlier, in determining whether the trial court has jurisdiction to entertain the appellant's suit, the entirety of the claim must be considered. It is true that the appellant seeks the determination of certain questions arising from the administrative decisions of the 1st respondent viz: the press statement ordering the swearing-in of the 3rd respondent as Governor of Kogi State based on the Governorship election of December 3rd 2011; the decision to reschedule the election from 26th April to 3rd December and whether it was a

postponement or cancellation of the earlier date. He also seeks a determination as to whether the 3rd, 4th and 5th respondents were qualified to contest the December 3rd 2011 election, not being candidates of their respective political parties for the April 26th 2011 election. The question one must ask is this: what would the appellant gain in the event that the questions for determination are answered in his favour? Or is it just an academic exercise? The answer to this question is to be found in the reliefs sought. In my view, reliefs 5 (6), (7), (8) and (9) are very clear as to what the appellant seeks by his suit. He seeks a declaration that he is the lawful winner of the Kogi State Governorship election and the person validly entitled to be sworn in as the Governor of the State; an order nullifying the swearing in of the 3rd respondent as the Governor of Kogi State and an order directing the 3rd respondent to vacate office as the Governor of Kogi State; a consequential order directing the Hon. Chief Judge of Kogi State to swear him in as Governor and an order of perpetual injunction restraining the 3rd defendant and any person deriving authority from his "purported election" from parading himself as Governor, having been unlawfully sworn in on 27th January 2012 and having assumed office on 30th January 2012.

Where the suit is commenced by originating summons, the court will also consider the averments in the supporting affidavit to determine the issue of jurisdiction.

In paragraph 28 of the 2nd affidavit in support of the amended originating summons sworn to by the appellant himself at page 457 of volume I of the record he averred thus:

"28. That of all the candidates cleared to contest the Kogi Governorship election of April 26th 2011 and who actually participated in the December 3rd Governorship election, I am the only candidate qualified to be returned as the winner of the election having scored the majority of lawful votes and the first three candidates not being qualified to participate in the election."

It is clear from the above that although the appellant raised certain questions regarding the postponement of the election and the qualification of the 3rd, 4th and 5th respondents to contest the December 3rd election, the Lower Court correctly captured the aim of the suit at pages 1483 - 1484 of Volume III of the record when it held thus:

“...considering the nature, substance and characteristics of the appellant’s claims or reliefs, the path (sic) of his case is simply one seeking nullification of the victory of the 3rd Respondent in the governorship election held on 3rd December 2011 as well as the declaration and return of the 2nd respondent as the winner of the election... made by the 1st respondent herein.”

Learned senior counsel for the appellant has argued that Section 251(1)(q) and (r) of the 1999 Constitution confers jurisdiction on the Federal High court to entertain the suit. Although reproduced earlier in the judgment, it is repeated hereunder to better appreciate the argument of learned counsel.

The section provides thus:

251 (1) Notwithstanding anything to the contrary contained in this Constitution and in addition to such other jurisdiction as may be conferred upon it by an Act of the National Assembly, the Federal High Court shall have and exercise jurisdiction to the exclusion of any other court in civil causes and matters -

(q) subject to the provision of this Constitution, the operation and interpretation of this Constitution in so far as it affects the Federal Government or any of its agencies;

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

It is not in doubt that the 1st respondent, the Independent National Electoral Commission, is an agency of the Federal Government. However, as rightly submitted by learned counsel for the 1st, 2nd and 3rd respondents, the section does not confer a blanket jurisdiction on the Federal High court in respect of matters in which an agency of the Federal Government is a party.

This court in *Ohakim Vs Agbaso* (2010) 19 NWLR (Pt.1226) 172 @ 236 - 237 G - D per Mohammed, JSC (now CJN) put the matter succinctly when it stated thus:

“...The fact that the action was against the respondents who are no doubt agents of the Federal Government of Nigeria does not ipso facto bring the case within the jurisdiction of the Federal High Court, unless and until the other requirements of the law touching on the subject matter of the claims, is also satisfied. In other words, the subject matter of the action must also fall squarely within the

jurisdiction of the Federal High Court before the court can assume jurisdiction in a case against the Federal Government or any of its agencies.”

His Lordship restated the principles on the issue, as laid down in: *Madukolu Vs Nkemdilim* (1962) 1 All NLR 587 @ 595 and reiterated that one of the conditions to be satisfied is that the subject matter of the case must be within the jurisdiction of the court. See also: *Adetayo Vs Ademola* (2010) 15 NWLR (Pt.1215) 169 @ 190 F - G. I have no doubt in my mind that in the instant case, notwithstanding the ingenious manner in which the questions for determination and reliefs sought in the amended originating summons are couched, the purpose of the entire suit is to nullify the return of the 3rd respondent as Governor of Kogi state and to declare the appellant the lawful winner of the election that took place on 3rd December 2011.

Section 285 (2) of the 1999 Constitution (as amended) provides:

“285 (2) There shall be established in each State of the Federation an Election Tribunal which shall, to the exclusion of any court or tribunal, have original jurisdiction to hear and determine petitions as to whether any person has been lawfully elected to the office of Governor or Deputy Governor”

The provisions of Section 285 (2) are clear and unambiguous and must be given their natural and ordinary meaning, See: *A.G. Bendel State Vs A.G. Federation* (1982) 3 NCLR 1; *Egbe vs Yusuf* (1992) 1 NWLR (Pt.245) 1; *Obomhense Vs Erhahon* (1993) 7 SCNJ 479. Learned Senior counsel for the appellant has however urged the court to construe the words “notwithstanding anything to the contrary contained in this Constitution” used in Section 251 (1) of the Constitution to mean that the exclusive jurisdiction of the Federal High Court in respect of the matters enumerated therein, is irrespective of any other provisions of the constitution.

In interpreting the provisions of the constitution and indeed any statute, one of the important considerations is the intention of the lawmaker. In addition to giving the words used their natural and ordinary meaning (unless such construction would lead to absurdity), it is also settled that it is not the duty of the court to construe any of the provisions of the Constitution in such a way as to defeat the obvious ends it was designed to serve where another construction equally

in accord and consistent with the words and sense of such provisions will serve to enforce and protect such ends. See Mohammed Vs Olawunmi (1990) 2 NWLR (Pt.133) 458; Rabiun Vs The State (1980) 2 NCLR 293; Adetayo Vs Ademola (2010) 15 NWLR (supra) @ 190 - 191 G - A; 205 D - F.

B ***Election matters are sui generis with their own constitutional and statutory provisions.*** See Ehuwa Vs O.S.I.E.C. (2006) 544 @ 590 A - B; Hassan Vs Aliyu (2010) 17 NWLR (Pt.1223) 547 @ 599C. ***By enacting specific provisions in Section 285(2) of the constitution conferring jurisdiction on Election Tribunals,***
 C ***it is clear that it is the intention of the lawmaker to provide a separate forum for the determination of whether any person has been validly elected into the office of Governor or Deputy Governor of a state.***

D Sections 133 (1) and 138 (1) of the Electoral Act 2010 (as amended) provide as follows:

“133 (1) No election and return at an election under this Act shall be questioned in any manner other than by a petition complaining of an undue election or undue return (in this Act referred to as an “election petition) presented to the competent tribunal or court in accordance with the provisions of the Constitution or of this Act, and in which the person elected or returned is joined as a party.

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

F *(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 this Act;

G *(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.” (Emphasis mine)

H Having carefully examined the appellant’s claim and the reliefs sought, it would not be correct to say that he is merely seeking declaratory reliefs and injunction against an agency of the Federal Government arising from its administrative decisions. ***The allusion to the 3rd respondent’s “purported election” in relief 5(9) of his amended originating summons is a clear indication that what***

the appellant is challenging is the return of the 3rd respondent as the winner of the election held on 3rd December 2011. Section 138 (1) (a) of the Electoral Act envisages a situation where, as in the instant 138 (1) (a) case, the election has already taken place and the qualification of the winner is being questioned. For that purpose the proper forum is the Election Tribunal. Section 87(9) of the Electoral Act on the other hand, provides for a situation where an “aspirant” complains that any of the provisions of the Act and/or the guidelines of a political party have not been complied with in the selection or nomination of a political party for election, in which case he may apply to the Federal High Court or the High Court of a State for redress. In the instant case, the appellant is no longer an “aspirant” having emerged from the primaries held in September 2011 as the candidate of his party and having duly contested the election.

It is the appellant’s contention that since he is questioning the qualification of the 3rd, 4th and 5th respondents to participate in the election of 3rd December 2011, it is a pre-election matter that may be determined by either the State or Federal High court or the Election Tribunal. He relied heavily on the case of Dangana Vs Usman (2013) 6 NWLR (Pt.1349) 50. I have critically examined the said judgment. It is pertinent to note, as submitted by learned counsel for the 2nd respondent, that the issue in contention in that case was whether the supreme court had jurisdiction to entertain appeals from senatorial election petitions in view of Sections 246 (3) and 285 of the 1999 constitution (as amended). It was the contention of the appellant in that case that since the case challenged the appellant’s qualification to contest the election on the ground that he was not validly nominated by his party, it was a pre-election matter in respect of which an election tribunal had no jurisdiction. It was his contention that only the state or Federal High Court had jurisdiction to entertain the claim. That in the circumstances of the case, the Court of Appeal was no longer sitting as an appeal Tribunal having delved into a pre-election matter that should have come before it in a regular civil appeal and consequently, by virtue of Section 233 (1) of the Constitution the appellant had an automatic right of appeal to the Supreme Court. It was argued that the Court of Appeal is only a final court

pursuant to Section 246 (3) of the Constitution where the court limits itself to election appeals. It was in this context that His Lordship, Onnoghen, JSC held that the jurisdiction to hear and determine the issue of qualification of a candidate in an election petition is parallel: one through the high courts and one through the election tribunals.

B He held further that where the aggrieved person chooses to initiate his claim at the high court, his right of appeal goes all the way to the Supreme Court but where he challenges the election of a senator on grounds of qualification at the election tribunal, as in the case in question, his journey must terminate at the Court of Appeal.

C **However, it is not the position of this court that a pre-election matter may be filed at the whims and caprices of a litigant. It has been emphasised time and again that in an election or election related matter, time is of the essence.** It was held in the case of Hassan Vs Aliyu (2010) 17 NWLR (Pt.1223) 547 @ 599 D - E per Onnoghen, JSC thus:

E *“It is settled law that in an election or election related matter, time is of the essence. I will add that the same applies to pre-election matters. Election matters are sui generis, 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.*

F *...I hold the view that at the time the 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 matter had ceased to exist, leaving only the election proper to be questioned and the proper place to do so is the election tribunal.*’ See also: Salim Vs C.P.C. (2013) 6 NWLR (Pt.1351) 501 @ 524 - 525 H - C; Wambai Vs Donatus G (2014) ALL FWLR (Pt.752) 1673 @ 1695 - 1696 B - C; (2014) 14 NWLR (Pt.1427) 223; Gwede Vs INEC (2014) 18 NWLR (Pt.1438) 56 @ 100 - 101 G - D; 129 B- H; 147 - 148 F - H.

H In the instant case the appellant filed his suit before the trial court more than 90 days after the conduct of the election and the swearing in of the 3rd respondent as Governor of Kogi State. I agree with learned Senior Counsel for the 3rd respondent that having regard to the facts and circumstances of this case, the appellant had every opportunity to institute his action before the conduct of the election. Not only did he fail to challenge any of the steps taken by

the 1st respondent such as the publication of a new timetable for the conduct of primaries, the new election date and the list of qualified candidates for the December 3rd 2011 election, he fully participated in the new primaries and contested the election, Again, at the conclusion of the election, only the now defunct Action Congress of Nigeria (ACN) and All Nigeria Peoples Party (ANPP) challenged the outcome of the election at the Election Tribunal, which was fought all the way up to this court with the final decision that the election was validly conducted and the 3rd respondent properly returned as the winner.

The appellant and his political party, the now defunct Congress for Progressive Change (CPC) stood by.

The contention of learned counsel for the appellant that his cause of action did not arise until after the judgment of this Court in Marwa's case (supra) does not hold water. The appellant's complaint was that the 3rd respondent not being a candidate of his party for the "postponed" election of 26th April 2011 was not qualified to contest the election of 3rd December 2011. It follows that as soon as the 1st respondent published the 3rd respondent's name as a candidate for the election, the appellant's cause of action had accrued. He had every opportunity to challenge the steps being taken by the 1st respondent as they were taking place.

Having waited until more than three months after the conduct of the election to raise the issue of qualification of the candidates who participated in the election, it had become a post election matter that could only be determined by an election tribunal. As observed earlier in this judgment the aim of the appellant's suit was the nullification of the victory of the 3rd respondent at the election held on 3rd December 2011 and a declaration that he is the lawful winner of the election and the person validly entitled to be sworn in as the Governor of Kogi State. The Federal High Court had no jurisdiction to entertain his claims. The concurrent decisions of the two Lower Courts in this regard cannot be faulted. The appellant has not advanced any cogent reasons to warrant interference by this court. In the circumstances, issues 1 and 2 are hereby resolved against the appellant.

“Whether the appellant’s claim as formulated in the Amended Originating Summons was statute barred so as to warrant the Lower Court finding that the Appellant cannot be heard even if there was no limitation period.”

B Learned counsel for the 2nd Respondent raised an objection to this issue on the ground that the issue of the Appellant’s action being statute barred was never raised by any of the parties or pronounced upon by the Lower Court. He observed that the appellant’s argument under this issue relied heavily on Statute of Limitation, which was never in issue before the Lower Court. He submitted that C the point raised by the 2nd and 3rd Respondents at the Lower Court and which was decided was the forum for commencing the appellant’s claim whereby the court agreed that the appellant’s claim ought to have been initiated at the Election Tribunal and not the Federal High D Court.

Learned counsel for the appellant on the other hand submitted that the issue falls within the scope and ambit of grounds 2 and 4 of the Notice of Appeal along with the Additional Ground 1. He submitted that once the issue for determination is within the scope of E the grounds of appeal it is competent. He submitted that the complaint in those grounds is predicated on the judgment of the Lower Court at page 1488 of Vol. III of the record of appeal.

The portion of the judgment upon which grounds 2 and 4 of the Notice of Appeal and Ground 1 of the Additional Grounds of F Appeal is predicated is at pages 1487 - 1488 of Volume III of the record and reads thus:

“The learned appellant’s senior counsel further argued that it was the judgment of the Supreme Court in the consolidated suits G delivered on 27/1/2012 that gave the appellant the cause of action to go to court as he could not do so before the judgment declaring the vacancy in the government house of Kogi State. Though this stance of his looks attractive, but then the question that can be asked here is why did the appellant not go to the Election Tribunal to try his H luck there? Under the provisions of Section 138(1) (a) of the Electoral Act 2010 (as amended), the appellant failed to do so but he waited until 7 March 2012 to file an action at the Federal High Court, Abuja and simply complained to that court about an election that was held on 3/12/2011 about 90 days and even about 40 days after

the Supreme Court's decision. He definitely slept on his rights and cannot therefore be heard. This is the position of the law as enunciated on the case of Salim Vs CPC (Supra) @ pages 522-523 where Mary Peter-Odili, JSC held thus:-

The appellant left his grievances unventilated... the situation of the appellant show a laxity and a lack of seriousness... he ought without delay to have commenced the process. He failed to do that and waited 38 days after the general election to file what he calls a pre-election process... The trial court was not impressed with the stand of the appellant and the Court of Appeal... holding that after the election this particular case should have been a matter for the Election Tribunal..."

So even if the appellant could only act after the 27/1/12, he needed to be alert and alive to the seriousness of the situation, especially when the election had been conducted and a winner announced about 40 days earlier. His waiting until the 7th of March to file the action, and in a wrong venue, is lackadaisical and lame. He cannot be heard, even if there is no limitation period."

The law is that the issues for determination must be formulated from grounds of appeal which in turn must derive from the ratio decidendi of the judgment appealed against. See: Egbe Vs Alhaji (1990) 3 SC (Pt.III) 63 @ 109: Palek Nig Ltd Vs OMPADEC (2007) ALL FWLR (Pt.364) 204 @ 226 F - H. **A careful reading of the above excerpt shows clearly that the issue of the suit being statute barred did not arise. All that the court observed was that in the circumstances of the case the appellant ought to have been vigilant and alive to the seriousness of the situation by filing his action timeously. No reference was made to any limitation law. Even learned counsel for the appellant observed at page 40 paragraph 5.5 of his brief that the Lower Court rightly held that there was no limitation for filing the appellant's claim. The court merely observed that the appellant was tardy in bringing his action more than 90 days after the election and about 40 days after the decision of this court in Marwa's case on 27/1/2012.**

I am inclined to agree with learned counsel for the 2nd respondent that issue 3 does not arise from the decision complained of. It is incompetent and accordingly struck out.

Having held that the trial court lacked jurisdiction to entertain the appellant's suit, issue 4 which seek to invoke the court's jurisdiction under Section 22 of the Supreme Court Act has become otiose.

In conclusion I hold that this appeal lacks merit and is hereby dismissed. The judgment of the Lower Court delivered on 10/7/2013 B affirming the decision of the Federal High Court delivered on 24/9/2012 is hereby affirmed.

The parties shall bear their respective costs in the appeal.

C

MOHAMMED CJN

On the 3/12/2011, the 1st Respondent conducted election into the office of the Governor of Kogi State. The 3rd Respondent who contested the election on the platform of the 2nd Respondent won D the election against the Appellant and other candidates that participated in the said election. Prior to the election, primaries were conducted by the respective political parties which contested and fielded candidates for the election. Meanwhile, before the election of 3/12/2011, the 1st Respondent had scheduled the gubernatorial elections E for all the States in Nigeria to take place on 26/4/2011. However, following the judgment of the Federal High Court which was affirmed on appeal by the Court of Appeal Abuja holding that the tenure of office of Governors of Adamawa, Bayelsa, Cross River, Kogi and Sokoto States would not expire on 29/5/2011 to require the holding F of election in those States as scheduled on 26/4/2011, the 1st Respondent in compliance with the decision of the Court of Appeal, cancelled the fixtures of the April, 2011 gubernatorial election in those affected five (5) States.

G Subsequently, the 1st Respondent fixed a new date of 3/12/2011 for the gubernatorial election in Kogi State resulting in the release of new time table of events such as primaries, submission of nomination forms, campaign and others to meet the new date for the election. The Appellant and the political Party sponsoring him as H a candidate to contest the election, complied with the new time-table and participated in the 3/12/2011 election with candidates of other political parties. The result of this election declared by the 1st Respondent on 4/12/2011, saw the 3rd Respondent who contested under the platform of the 2nd Respondent emerging as the winner

of the election leading to his being sworn in as the Governor of Kogi State. The aggrieved candidates contested the result of this election at the Election Petition Tribunal which on 17/5/2012 dismissed the petitions. The judgment of the Tribunal was subsequently affirmed by the Court of Appeal and the Supreme Court respectively on 14/7/2012 and 10/9/2012. B

Meanwhile, the judgment of the Court of Appeal on the tenure of the five (5) Governors including that of Kogi State in compliance with which the 1st Respondent conducted the election of 3/12/2011, was set aside on appeal by the Supreme Court in its Judgment of 27/1/2012 and the 3rd Respondent was sworn in as elected Governor of Kogi State on the same date. The Appellant who was aggrieved with the outcome of the election of 3/12/2011 and the declaration and swearing of the 3rd Respondent as the Governor of Kogi State, went to the Federal High Court with an Amended Originating Summons asking for several reliefs including the deeming order that the election of 3/12/2011 as a postponed election of 26/4/2011 which did not hold, that since the 3rd Respondent was not a candidate nominated for the election of 26/4/2011, he was disqualified from contesting the election of 3/12/2011 and consequently, the Appellant should be declared the lawful winner of the election of 3/12/2011. The case of the Appellant was challenged at the Federal High Court by the 1st, 2nd and 3rd Respondents on the main ground that the Federal High Court lacked jurisdiction to entertain the Appellant's case. After hearing the parties on the Preliminary Objection, the trial Federal High Court upheld the objection and struck out the Appellant's case. The Appellant's appeal to the Court of Appeal Abuja Division against the order of the Federal High Court of 24/9/2012 striking out his case, was unanimously dismissed by the Court of Appeal in its judgment delivered on 10/7/2013 which gave rise to the present appeal to this Court by the Appellant. C D E F G

Although the Appellant's brief of argument filed on 26/9/2014 contains as many as four 4 issues formulated from the grounds of appeal filed by the Appellant, taking into consideration that the Judgment of the Court of Appeal being appealed against merely dismissed the Appellant's appeal and affirmed the decision of the trial Federal High Court striking out the Appellant's case for lack of jurisdiction, the only real issue arising for the determination of the appeal, is the H

Appellant's issue two (2) stating:-

"2. Whether the Lower Court was right in holding that it was the Governorship Election Petition Tribunal that has the jurisdiction to entertain the (sic) Appellant claim."

In other words, having regard to the decision of the Federal High Court which came on appeal to the Court of Appeal and which that Court affirmed in its decision that the trial Federal High Court lacked jurisdiction to entertain the claims of the Appellant as constituted before the trial Court, the only real issue for determination in this appeal is the issue of jurisdiction alone that is -

"Whether the learned Justices of the Court of Appeal were right in their Judgment that the Federal High Court lacked jurisdiction to entertain the Appellant's case as constituted."

The law is well settled that Courts are creatures of statutes and it is the statute that created a particular Court that will also confer jurisdiction on that Court. It is only the Legislature that may vary or increase the jurisdiction of any Court created by it. See OKULATE VS AWOSANYA (2000) 1 SC 107.

It is also the law that a Court is competent when –

"(a) It is properly constituted as regards members and qualification of the members of the Bench and no member is disqualified for one reason or the other;

(b) The subject matter of the case is within its jurisdiction and there is no feature in the case which prevents the Court from exercising its jurisdiction; and

(c) The case comes before the Court initiated by due process of law and upon fulfillment of any condition precedent to the exercise of jurisdiction."

All these requirements must co-exist conjunctively before jurisdiction can be exercised by the Court. See MADUKOLU & ORS vs. NKEMDILIM & ORS (1962) 1 All N.L.R. 587, SKEN CONSULT VS. UKEY (1981) 1 SC 6 and BENIN RUBBER PRODUCTS LTD VS. OJO (1997) 9 N.W.L.R. (Pt.521) 388.

It is also necessary to further stress that the jurisdiction of a trial High Court, which was the trial Federal High Court in the present appeal, is determined by the writ of summons and statement of claim of the Plaintiff or where the case was initiated by the Originating Summons process by the questions for determination, the reliefs sought

and affidavit in support the plaintiffs claims. See ADEYEMI VS. OPEYORI (1976) 9- 10 SC 31, TUKUR VS. GOVERNMENT OF GONGOLA STATE (1989) 4 N.W.L.R. (Pt.117) 592, ATTORNEY GENERAL OF KWARA STATE VS. OLAWALE (1993) 1 N.W.L.R. (Pt.272) 645 and ONUORAH VS. KADUNA REFINING & PETRO-CHEMICAL CO. LTD. (2005) 6 N.W.L.R. (Pt.921) 393 at 404 - 405. B

In the instant appeal, a very close examination of the questions for determination, the reliefs sought and the affidavits in support of the Plaintiff's/Appellant's case in the Originating Summons filed at the trial Federal High Court, shows quite clearly the real case of the Plaintiff/Appellant as correctly captured in the lead Judgment of the Court below where it was stated thus at pages 1480 - 1481 of the Record - C

"It can be seen from reliefs sought at the Lower Court by Appellant as Plaintiff thereat that his grouse simply constituted direct attacks or challenges of the election conducted by INEC on 3rd December 2011 and no amount of camouflage could mask that. In his own words the Appellant in paragraph 3.16 of his Brief of Argument (sic) he made a far reaching submission that all the Respondents but him were not qualified to take part in the said election. From what the Appellant sought in his reliefs at the Lower Court, he was simply challenging the election and return and declaration of the 3rd Defendant/Respondent and was thus urging the Lower Court to quash that election and or return and declaration of the 3rd Respondent as Governor of Kogi State." E F

In other words, the Appellants case was a direct challenge of the result of the election of 3/12/2011 conducted by the 1st Respondent into the office of the Governor of Kogi State in which the Appellant and the 3rd Respondent were candidates. Reliefs 6, 7, 8 and 9 sought by the Appellant as Plaintiff at the Federal High Court are very far from the jurisdiction of that Court. All the reliefs could only have been sought before the relevant Election Petition Tribunal charged with the powers and jurisdiction to grant such reliefs in the course of the hearing and determination of Election Petition. G H

In the result, I entirely agree with the Judgment of my learned brother Kekere-Ekun, JSC in the lead Judgment that this appeal must fail. Accordingly, for the reasons I have given in my own Judgment and the more comprehensive reasons given in the lead Judgment

which I have had the opportunity of reading before today and with which I have agreed, I also see no merit in this appeal. The appeal is hereby dismissed with the Parties bearing their respective costs.

B FABIYI JSC

I have had a preview of the judgment just delivered by my learned brother - Kekere-Ekun, JSC. I agree with the reasons ably adumbrated therein to arrive at the conclusion that the appeal lacks merit and warrants an order of dismissal.

The common determinant issue in this appeal, as captured on behalf of the 1st respondent, reads as follows:

“Whether the Lower Court was right when it affirmed the decision of the trial court that it lacked the jurisdiction to adjudicate on the appellants’ case as constituted.”

As issue of jurisdiction is very crucial and fundamental, it should be determined at the earliest opportunity. It is basic that 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 also extrinsic to the entire process of adjudication. See *Madukolu v. Nkemdilim* (1962) 2 SCNLR 341.

As extant from the appellant’s suit, his aim and ultimate desire was the nullification of the 3rd respondent’s victory at the election held on 3rd December, 2011 and a declaration that he was the winner of same and validly entitled to be sworn in as the Governor of Kosi State. The appellant, who participated at the said election as a candidate should have approached the appropriate election tribunal for a determination of his grouse. There is no doubt that the trial Federal High Court had no jurisdiction to entertain his claims.

The court below affirmed the decision of the trial court which resolved that it lacked jurisdiction. The concurrent decisions of the two courts below have not been shown to be perverse in any respect. I cannot interfere with same. To say the least, I pitch my tent with them. See: *Kale v. Coker* (1982) 12 SC 252.

My learned brother said it all in the comprehensive lead judgment. This appeal lacks merit. It is hereby dismissed. I endorse all the consequential orders therein contained.

MUHAMMAD JSC

Having had a preview of the very thorough lead judgment of my learned brother Kekere-Ekun JSC, just delivered, I agree with the reasoning and conclusion therein that being bereft of merit the appeal be dismissed. B

Purely for the sake of emphasis, I shall say it in a few words of mine. I rely on the facts of the case that brought about the appeal which have been comprehensively captured in the lead judgment. At deserving turns, I shall restate some of these facts, though, in facilitating a better grasp of the core issue the appeal raises. C

The appellant, having contested along, inter-alia, with the 3rd, and 4th respondents the Kogi State gubernatorial election conducted on the 3/12/2011 by the 1st Respondent and lost, on the 7th March 2012 by an amended originating summons challenged the qualification of the 3rd respondent to contest the election. He urged the Federal High Court sitting at Abuja to nullify the return of the 3rd respondent and, instead, declare him winner of the election. The trial court, on upholding the preliminary objections of the 1st, 2nd and 3rd respondents regarding its jurisdiction, struck out appellant's suit. D Appellant's appeal against the trial court's decision was dismissed by the Court of Appeal, hereinafter referred to as the lower court. Still aggrieved, the appellant has further appealed to this Court by an amended Notice containing ten grounds of appeal. E

The two courts below in their concurrent decisions have declined jurisdiction over appellant's cause of action because his is a bid to nullify the election and return of the 3rd respondent as the Governor of Kogi State. The lower court's decision on the point at pages 1,483-1,484 reads in part thus:- F

"...Appellant's claims or reliefs ...his case is simply one seeking nullification of the victory of the 3rd respondent in the governorship election held on 3rd December 2011 as well as the winner of the election... by the 1st respondent herein." G

Appellant's real complaint in this appeal is unquestionably as marshaled out in his second issue better conveyed in 1st respondent's sole issue for the determination of the appeal that reads thus:- H

"Whether the lower court was right when it affirmed the decision of the trial court that it lacked the jurisdiction to adjudicate on

the appellant's case as constituted."

Learned senior counsel for the appellant submits that the lower court in its foregoing summation is wrong. Jurisdiction, he argues, has been vested in the trial court by virtue of Section 251(1) (q) and (r) of the 1999 Constitution. Appellant's action which seeks declaratory and injunctive reliefs in relation to the administrative action or decision of the 1st respondent comes squarely within the purview of Section 251(f) (r) of the Constitution. The trial court, to the exclusion of all other courts, has the jurisdiction to hear and determine appellant's claim challenging the 1st respondent's administrative decision of ignoring all the earlier pre-election processes which decision resulted in the shifting of the 26th April 2011 election. The declaratory reliefs the appellant seeks, it is contended, do not fall within the jurisdiction of the Election Petition tribunal as provided for under Section 285 of the 1999 Constitution. Relying inter-alia on *Amaechi v. INEC & Ors* (2007) NWLR (Pt. 1066) 42, *Ladoja v. INEC* (2007) 12 NWLR (Pt. 1047) 119, *Obi v. INEC* (2007) ALL FWLR (Pt. 378) 1116 and *NDIC v. Okem Enterprises*, learned senior counsel insists that the two courts are wrong in declining jurisdiction over appellant's amended originating summons.

Arguing the appeal under their sole issue, learned 1st respondent's counsel submits that taking into account the questions the appellant seeks answers to as well as the reliefs he urges, leads one to the logical conclusion as to the appellant's real grudges. It is clear from these reliefs and the facts the appellant relies to pursue his case that he wants the return of the 3rd respondent as the winner of the Kogi State gubernatorial election conducted by the 1st respondent nullified. All the other content of appellant's amended originating summons, it is submitted, are merely diversionary. Appellant's suit that was filed months after the election cannot be entertained by the trial court as a pre-election cause under Section 31 (5) and (6) and Section 87(9) and (10) of the 2010 Electoral Act as amended. Neither can the trial court assert the jurisdiction donated by the Section 133(1) of the Electoral Act to Election Petition Tribunal only. Relying on *Amaechi v. INEC* (supra), *Hassan v. Aliyu & Ors* (2010) 17 NWLR (Pt. 1223) 547 learned counsel justifies the decisions of the two courts below.

Further arguing the issue, learned counsel urges that the lower

court's judgment which in answer to the question whether or not the trial court has jurisdiction to determine appellant's action limits itself to appellant's amended originating summons is unassailable. Relying on *Ohakim v. Agbaso* (2010) 19 NWLR (Pt 1226) 172, *Amaechi v. INEC* (supra) and *Tukur v. Govt of Gongola State* (1989) 4 NWLR (Pt. 117) 517 learned counsel concludes that the two courts below having rightly declined jurisdiction over appellant's claim, the appeal must fail. B

It is fair to state that the arguments of the other respondents are along the lines proffered by learned senior counsel to the 1st respondent. C

Appellant's appeal in respect of the concurrent findings of the two courts below succeeds only if he shows that the decisions are perverse. See *Ibori v. Agbi* (2004) 6 NWLR (Pt. 868) 78, *Iheanacho v. Chigere* (2004) 17 NWLR (Pt. 901) 130 and *Ifeta v. S.P.D.C. (Nig) Ltd.* (2006) 8 NWLR (Pt. 983) 585. D

In *Atolagbe v. Shorun* (1985) LPELR-SC 14/1984 this court stated a perverse decision as being one that is persistent in error, different from what is reasonable or required and against the weight of evidence. It is also that decision wherein the judge took account of matters which he ought not to have taken into account or where the judge shuts his eyes to the obvious. So, is the appellant right to insist that the decisions of the two courts below being perverse be set-aside? I think not. E

Learned counsel to the respondents are on a firm ground that where a court's jurisdiction is challenged the objection is determined by examining the statement of claim and the reliefs claimed. Where the originating process is an originating summons, jurisdiction of the court is resolved by examining the originating summons, the reliefs therein and the affidavit filed in support. Thus the issue of jurisdiction is determined on the plaintiff's demand and not on the defendant's answer. See *Attorney-General of Anambra State v. Attorney-General of the Federation* (2007) 6 SCNJ 1, *P.D.P v. Timipre Sylva & 2 Ors* (2012) 4-5 SC and *Prince John Okechukwu Emeka v. Lady Margery Okadigbo & 4 Ors* (2012) 7 SC (Pt. 1) 1. F G H

In the case at hand where the respondents' objections to the trial court's assumption of jurisdiction in determining appellant's action are premised on the subject matter of appellant's claim, it is the

reliefs as contained in the amended originating summons and the affidavit in support thereto that will provide the answer to the objection being raised. Jurisdiction would be rightly assumed if the subject matter of the action is provided for by the enabling statute. See *Attorney-General of Kwara State v. Olawale* (1993) 1 SCNJ 208.

B For our purposes, the subject matter of appellant's claim are, inter-alia, the 6th-9th reliefs, both numbers inclusive, in his amended originating summons hereinunder supplied for ease of reference:-

C “(6). A DECLARATION that in consequence of the non-qualification of the 3rd, 5th and 7th defendants to contest the December 3rd, 2011 Kogi State Governorship Election, the 2nd plaintiff is the lawful winner of the Kogi State Governorship election and is the person validly entitled to be sworn in as the Governor of Kogi State.

D (7). A consequential order nullifying the swearing in of the 3rd defendant as the Governor of Kogi State and directing the 3rd defendant to vacate office as the Governor of Kogi State forthwith.

(8). A consequential order directing the Chief Judge of Kogi State to swear in the 2nd plaintiff as the Governor of Kogi State forthwith.

E (9). An order of perpetual injunction restraining the 3rd defendant and any person deriving authority from his purported election from parading himself or themselves as the Governor of Kogi State having been unlawfully sworn in on the 27th January, 2012 and assumed office on the 30th January, 2012 contrary to the provision of section 1(2) of the 1999 Constitution of the Federal Republic of Nigeria (as amended).” (Underlining supplied for emphasis).

F The averment in paragraph 28 of the 2nd affidavit in support of appellant's amended originating summons supplies the crucial facts on which basis he seeks the foregoing reliefs.

The paragraph reads:-

H “28. That of all the candidates cleared to contest the Kogi Governorship election of April 26th 2011 and who actually participated in the December 3rd 2011 Governorship election, I am the only candidate qualified to be returned as the winner of the election having scored the majority of lawful votes and the first three candidates not being qualified to participate in the election.”

The concurrent findings of the two courts consequent upon their examination of appellant's reliefs and the facts deposed to in

the affidavits in support of his claim are unassailable! My scrutiny of both justifies this conclusion. It is beyond any iota of doubt that the real essence of appellant's claim in the originating summons as anchored on the facts in the supporting affidavits is a direct, conscious and deliberate challenge to the return of the 3rd respondent as the winner of the 3/12/2011 governorship election conducted by the 1st respondent in respect of which Section 133(1) and 138(1)(a) and (c) of the Electoral Act 2010 as amended provide:-

"133 (1) No election and return at an election under this Act shall be questioned in any manner other than by a petition complaining of an undue election or undue return (in this Act referred to as an "Election Petition) presented to the competent tribunal or court in accordance with the provisions of the constitution or of this Act, and in which the person elected or returned is joined as a party.

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 respondent was not duly elected by majority of lawful votes cast at the election."

Section 285 (2) & (5) of the 1999 Constitution which creates and donates jurisdiction to the election tribunal in point and circumscribes the time within which the petition must be filed provides:-

"(2) There shall be established in each state of the Federation an election tribunal to be known as the Governorship Election tribunal which shall, to the exclusion of any court or tribunal, have original jurisdiction to hear and determine petitions as to whether any person has been validly elected to the office of Governor of a State.

(5) An election petition shall be filed within 21 days after the date of the declaration of results." (Underlining supplied for emphasis).

I am unable to agree with learned senior counsel to the appellant that, notwithstanding the very clear and unambiguous foregoing provisions of the Constitution and the Electoral Act, it is the trial court by virtue of Section 251(1) (q) and (r) of the 1999 constitution that has the exclusive jurisdiction to determine his claim.

The grounds of appellant's claim gleaned from the relevant

paragraphs of his amended originating summons and supporting affidavits are the facts of 3rd respondent's non qualification to contest the 3/12/2011 gubernatorial election and by extension his failure to secure majority of the lawful votes cast at the election. It is appellant's contention that 3rd respondent not being candidate at the election did not lawfully contest the election. One hastens to state that by the combined effect of Section 285(2) and (5) of the 1999 Constitution, and Sections 133(1) and 138(1)(a) & (c) of the Electoral Act 2010, these are grounds on the basis of which 3rd respondent's election and return may be questioned within twenty one days of the winner's return and only means of an election petition over which the Election Tribunal, to the exclusion of any other, has the jurisdiction to entertain and determine.

Appellant's action filed almost two months after the election and return of the 3rd respondent is certainly not a pre-election matter that could have, for that reason, lawfully been commenced at the trial court. See *Amaechi v. INEC* (supra) and *Hassan v. Aliyu* (supra). Even as an Election Petition, appellant's claim is outrageously belated.

My lords, while interpreting Section 232(1) vis-a-vis Section 251(1) (a) (b) and (q) of the 1999 Constitution as amended in Appeal No. SC 20/2008 between The Attorney-General of Lagos State v. Attorney-General of the Federation and 35 others delivered on the 11th day of April 2014, I relied on the judgment of the West African Court of Appeal in *Mrs. F. Bamgboye v. Administrator-General* 14 WACA 616 at 519 and held thus:-

"Both Sections 232 (1) and 257 (1) (a), (b) and (q) are authored by the same legislators and make up the same 1999 Constitution. It outrightly hits an effective interpreter of these constitutional provisions that Section 251(1) (a), (b) and (q) is not only subsequent in sequence to but more specific and special in tenor than section 232(1) of the Constitution. A reasonable construction of these provisions also admits the finding that the framers of the constitution in providing for the first of the two provisions had contemplated the subsequent provision and in providing the subsequent one had not forgotten that the earlier provision had already been put in place.

The specific jurisdiction vested in the Federal High Court under Section 251 (1) (a), (b) and (q) is exercisable notwithstanding

anything to the contrary in the Constitution including the original jurisdiction conferred on the Supreme Court under the earlier Section 232(1) of the same constitution."

The same principle applies to the instant case as well.

The two courts are correct in their findings that the trial court lacks the jurisdiction of determining appellant's claim which question the election and return of the 3rd respondent by virtue of Section 251 (1) (q) and (r) simply because the return is the administrative decision or action of the 1st respondent, INEC, an agency of the Federal Government. Rather, the Election Petition Tribunal has the exclusive jurisdiction of determining appellant's claim. This must be so because Section 285, being a latter provision to Section 251 in the very same Constitution, addedly creates a special tribunal/court and vests it with specific and exclusive jurisdiction. The latter section must prevail over the earlier provision.

For the foregoing and the more detailed reasons in the lead judgment, I also find no merit in the appeal and dismiss same. I abide by the consequential orders contained in the lead judgment including the one on costs.

OGUNBIYI JSC

I read in draft the lead judgment just delivered by my learned brother Kekere-Ekun, JSC. I am in total agreement that the appeal is devoid of any merit and same should be dismissed.

The appellant before us was a candidate at the primary for Kogi State Governorship which was conducted for the 26/4/2011 general election. The cancellation of the fixture of the said election by INEC, the 1st respondent became imminent as a result of the judgment of the lower court which affected the office of Governors of five States, Kogi State inclusive.

The appellant through his political party, the defunct congress for progressive change (CPC) did not raise any objection challenging the cancellation of the initial date which was 26/4/2011, but like his counterparts, the other candidates and their political parties, the appellant did embrace the new date being 3/12/2011, and hence participated in the processes of all stages of the election inclusive of the primary entitling him to contest on the 3/12/2011.

At the final election, the 3rd respondent, under the platform of Peoples Democratic Party (PDP) was successful and declared the duly elected Governor of Kogi State. He was subsequently sworn in accordingly. It is pertinent to state further that in spite of the stiff opposition waged against the 3rd respondent's election, his victory at the poll was finally confirmed successively by a concurrent decision of the tribunal, Court of Appeal and this on the 10th September, 2012.

It is obvious that the appellant's grouse was against the election held on the 3/12/2011 and the reason why he took out an amended originating summons before the Federal High Court which competence was vehemently challenged by the 1st, 2nd and 3rd respondents on the ground of jurisdiction. The preliminary objection raised was upheld by the trial court and also affirmed by the lower court. The crux of the appeal now before us, succinctly put raises the question as to the propriety of the lower court in holding that the nature of the appellant's claim falls within the jurisdiction of the Governorship Election Petition Tribunal.

The reliefs claimed at the trial court are very much explicit and revealing of the claim which are squarely and rightly out of the ambit and the jurisdiction of the Federal High Court.

The law is trite that it is the claim of the plaintiff or the subject matter of the claim that determines the jurisdiction of a court. I seek to add further that the claim can easily be fathomed from the reliefs sought from the court. In particular, it is not difficult to deduce that by the very nature of reliefs 6, 7, 8 and 9 of the claim, the appellant is seeking a declaration as the lawful winner of the Kogi State Governorship Election and should have been the person validly entitled to be sworn in as the Governor elect.

The Federal High Court, by Constitution is not invested with the power and jurisdiction to grant such reliefs. This is a post election matter & not pre-election as is sought to be portrayed by appellant.

The trial court at pages 1151-1152 volume II of the record of appeal for instance said:-

"I have set out the said entire reliefs in the preceding pages of this judgment. Even though I disagree with the submission with due respect to the learned plaintiff's counsel, the question that comes up at this point is, have the plaintiffs abandoned their claims in reliefs 7,

8 and 9? Or are they not simply approbating and reprobating at the same time by making claims in their Originating processes and denying part of the claims in their submissions? I have perused the entire reliefs sought and as stated before, I find myself holding a contrary opinion to the submission of the plaintiffs on what is and what is not their claim. The processes are clear and definite on these. It is my finding that on so doing that reliefs nos. 1, 2, 3, 4, 5, (1), (2), (3), (4) and (5), 6, 7, 8 and 9 sought by the plaintiffs touch on, relate to and are founded on the concluded election of 3rd December, 2011 which the 3rd Defendant emerged as winner and was sworn in a governor on 27th January 2012 upon the result of that election. The plaintiffs are challenging the validity of the candidature of the 3rd, 5th and 7th Defendants at the election of 3rd December, 2011. This is therefore a clear situation where the address of counsel is in contradiction with the substance of the case....”

The court below found that the trial court was on a firm ground and endorsed its findings in the following terms:-

“The above quoted findings by the lower Court are in my view unimpeachable and they clearly show an appreciable understanding of the nature and eminence of the suit filed before the lower court by the plaintiff now appellant contrary to the assertion by the appellant’s senior counsel that the trial court failed completely to appreciate or understand the plaintiff’s case.....”

I agree with the two lower courts on their concurrent findings that the subject matter is totally outside the jurisdiction of the Federal High Court.

The lead judgment of my learned brother is very conclusive and in the same view, I also dismiss this appeal as lacking in merit.

Parties are to bear their respective costs.

OKORO JSC

I read in advance the illuminating judgment of my learned brother, Kekere-Ekun, JSC just delivered. I am in total agreement with the reasons advanced to reach the conclusion that this appeal is unmeritorious and that it be dismissed. I shall make a few comments in support of the judgment.

The appellant in his first issue, had contended that the lower

court erred when it failed to consider the issue of whether the election of 26th April, 2011 was a postponed election before it resolved the issue of jurisdiction. There is no modicum of doubt that the issue of jurisdiction is a threshold issue. It is so fundamental and touches on the competence of the court to adjudicate on the particular issue placed before it. It has been held severally in this court that once issue of jurisdiction is raised, it must be determined first before any other step is taken in the proceedings. The reason is that where a court lacks jurisdiction to entertain a matter and it goes ahead to undertake a hearing, that hearing no matter how well conducted, is a nullity and the judgment generated therefrom cannot stand. And that is why issue of jurisdiction can be raised at any stage of the trial. It can even be raised for the first time at the Apex Court by any of the parties or even by the court suo motu. See *Petrojessica Enterprises Ltd & Anor. v. Leventis Technical Company Ltd.* (1992) NWLR (Pt. 244) 675, *Osadebey v. Attorney-General, Bendel State* (1991) 1 NWLR (Pt. 169) 525; *Owoniboys Tech. Services Ltd v. John Holt Ltd.* (1991) 6 NWLR (Pt. 199) 550.

The learned counsel for the appellant argued that the lower court ought to have determined whether the election of 26th April, 2011, was a postponed election before resolving the issue of jurisdiction. However, the learned senior counsel for the 3rd respondent submitted that shorn of its legalese, verbiage, phraseology and terminology, the crux of the appellant's case is simply a declaration of who is the winner of the 3rd December, 2011 general election into office of Governor of Kogi State between the appellant and the 3rd respondent both of who contested the said 3rd December, 2011 general election conducted by the 1st respondent, and sponsored by their respective political parties. It was his contention that the appellant founded his claim to be declared the winner of the said election on the premise that he was nominated as a gubernatorial candidate of his parry, the Congress for Progressive Change (now defunct) for a general election scheduled for 26th April, 2011, but which according to him, later held on 3rd December, 2011, and claims that since the 3rd respondent was not a candidate in the 26th April, 2011, as well as the 4th and 5th respondents, they were disqualified on that ground and he, the appellant, as the sole surviving candidate, would be declared the winner of the election of 3rd December, 2011, which

he contested and lost.

There is no doubt that the election of 26th April, 2011 i.e. whether it was a postponed election or not was central to the appellant's case at the trial court. For the court to have considered it at that stage would have amounted to deciding the main issue in controversy just like that. B

It is trite that courts are not allowed to delve into or decide the main issue at an interlocutory stage. In the instant case, I hold that the learned trial judge was right when he refused to consider the status of the election slated for 26th April, 2011 when determining C issue of jurisdiction.

Secondly, the appellant was alive when the Governorship Election Petition Tribunal was set up to hear complaints arising from the election of the 3rd respondent. He did not do anything but waited for over 90 days after the result was announced and a winner declared and sworn-in. He then woke up from slumber and filed the suit giving birth to this appeal. Having stated in paragraph 28 of his second affidavit in support of the amended originating summons that he was the only candidate qualified to be returned as the winner of the election having scored the majority of lawful votes, the appellant was indeed challenging the election of the 3rd respondent at the Federal high Court. Also having brought the issue of disqualification of the 3rd respondent before the said court at that stage, it is crystal clear that he came too late in the day. All the pre-election features of his suit ought to have been filed at the High Court before the holding of the election. And also, all the features of the suit relating to post election matters ought to have been ventilated at the election tribunal. The appellant's suit filed at the Federal High Court at the time it was done clearly deprived the trial court of jurisdiction to hear the case. See Hassan v. Aliyu (2010) 17 NWLR (Pt. 1223) 547, Salim v. C.P.C. (2013) 5 NWLR (Pt. 135) 501. E F G

With what I have tried to say above, it is my view that the court below was right to uphold the decision of the Federal High Court that it lacked the jurisdiction to entertain the appellant's suit. It is on this note that I agree with my learned brother, Kekere-Ekun, JSC that this appeal lacks merit in its entirety. I also dismiss it and abide by all consequential orders made in the lead judgment, that relating to costs, inclusive. H

NWEZE JSC

My distinguished Lord, Kekere-Ekun, JSC, obliged me with the draft of the leading judgment just delivered now. I am persuaded by His Lordship’s taut reasoning and compelling conclusion.

B From my painstaking and intimate reading of the entreaties in reliefs 5(6), (7), (8) and (9) in his Originating Summons, I entertain no doubt that the appellant, craftily, tabled those reliefs before the trial court in the vain hope that the said court would be decoyed into
C arrogating to itself a jurisdiction which it, clearly, did not possess.

Happily, that court saw through his [the appellant’s] disingenuous ploy and declined to entertain the matter.

The appellant, if he so desired, had the opportunity to approach the proper forum, the Election Tribunal, by virtue of Sections
D 133 (1) and 138 (1) of the Electoral Act, 2010 (as amended). However, he squandered that opportunity on the altar of procrastination, even when, decidedly, time was of the essence, *Gwede v. INEC* (2014) 18 NWLR (Pt. 1438) 56, 129; 147-148; *Wambai v. Danatus* (2014) 14 NWLR (Pt. 1427) 223; *Salim v. C.P.C.* (2013) 6 NWLR (Pt. 1351)
E 501, 524-525; *Hassan v. Aliyu* (2010) 17 NWLR (Pt. 1223) 547.

I, entirely, agree with the leading judgment that he [the appellant] failed to pitch-fork his case within the ambit of the impressive logic in the charming reasoning of this court in *Dangana v. Usman* [2013] 6 NWLR (Pt. 1349) 50. As the circumstances of the two cases
F are, totally, dissimilar, its beneficent conclusion does not avail him.

It is for these, and the detailed, reasons in the leading that I, too, shall enter an order dismissing this appeal as unmeritorious. I abide by the consequential orders in the leading judgment.

G

H