

SUPREME COURT OF NIGERIA
TUESDAY 27TH OCTOBER, 2015. SC.718/2015
**CORAM:- J. A. FABIYI, S. GALADIMA, M. U. PETER-
ODILI, O. ARIWOOLA, K. M. O. KEKERE-EKUN,
J. I. OKORO, A. SANUSI, JJSC**

WIKE EZENWO NYESOM APPELLANT
AND

1. HON (DR.) DAKUKU ADOL

PETERSIDE

2. ALL PROGRESSIVE CONGRESS RESPONDENTS

3. INDEPENDENT NATIONAL

ELECTORAL COMMISSION

4. PEOPLES DEMOCRATIC PARTY

APPEALS - Reply brief - Purpose - The brief is filed as a reply to new points raised by respondent - And is not meant to fill lacuna or error in appellant's brief (H1)

ELECTION PETITIONS - Tribunal - Establishment of - The Tribunal having been established under Constitution 1999 s. 285(2) - The act of its establishment cannot be said to be a futuristic event (H2)

ELECTION PETITIONS - Tribunal - Composition - Consultation with the State CJ and President CCA by PCA - Is not pre condition for constituting tribunal - Rather it is aimed at getting eligible members (H3)

WORDS & PHRASES - Shall - Interpretation of - Use of "shall" in statutes does not always mean mandatory order - As it may in some situations have the permissive meaning of "may" (H4)

STATUTES - Interpretation - Principle - Provisions of statute is not construed in a way as to defeat intention of legislature - Or to defeat the ends it was meant to serve (H5)

ELECTION PETITIONS - Tribunal - Relocation of - In view of security challenges in the State - PCA rightly applied doctrine of necessity

- To relocate the Tribunal from the State to Abuja (H6)

APPEALS - Court - Findings - Failure of appellant to raise ground against CA's reliance on doctrine of necessity - In relocating the Tribunal - Is deemed to be an endorsement of stance of the court (H7)

JUDICIAL PRECEDENTS - Case law - Distinction - CA rightly refused to be bound by decision in Ibori v. Ogboru and Ogboru v. PCA - In view of disparities in their facts with that of present case (H8)

FACTS

Before the Rivers State Governorship Election Petition Tribunal, petitioner/1st respondent filed this action praying for the nullification of the gubernatorial election that took place in the State on the 11th and 12th of April 2015. Appellant who was sponsored by 4th respondent emerged as the winner of the election. 1st respondent was sponsored for the election by 2nd respondent. 1st respondent was not happy with the emergence and return of appellant as the Governor of the State. Hence, he brought the petition. When served with the petition, appellant filed preliminary objection challenging the competence of the petition and the jurisdiction of the Tribunal to entertain the matter. Thereafter appellant formally brought an application, urging the Tribunal to strike out the petition for want of jurisdiction or in the alternative to dismiss same for being incompetent.

Appellant's main contention is that the Tribunal was not duly constituted. Opposing the application, 1st and 2nd respondents filed their counter-affidavit. The Tribunal heard arguments for and against the applications. In its ruling, the Tribunal held that it was duly constituted by the President of the Court of Appeal and therefore had jurisdiction to sit in Abuja to hear and determine the petition. Not satisfied, appellant appealed to the Court of Appeal. The Court in its judgment held that the Constitutional requirement of prior consultation with the Chief Judge of a State or President of the Customary Court of Appeal of a State before the appointment of the Chairman and Members of the Tribunal can be waived and dispensed with in the absence of the two functionaries in the State. The Court concluded that the Tribunal was entitled to sit in Abuja outside the Rivers State territory. Aggrieved, appellant appealed to the Supreme Court.

ISSUE FOR DETERMINATION

“Whether upon a proper interpretation of the provisions of Section 285(2) of the 1999 Constitution as amended, paragraph 1(1) & (3) of the sixth schedule thereto and paragraph 20(2) of the first schedule to the Electoral Act 2010 as amended and the decisions in Ibori vs Ogboru (2005) 6 NWLR (pt. 920) and Ogboru vs President Court of Appeal (2007) All FWLR (pt. 369) 1221, the Court of Appeal was justified in its conclusion that the Rivers State Governorship Election Petition Tribunal sitting in Abuja was properly constituted and had jurisdiction to entertain the Governorship election petition emanating from Rivers State.”

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

APPEALS - Reply brief - Purpose

1. I have closely studied the Appellant’s Reply Brief. I share the view of the learned silk for the 1st and 2nd Respondents that large portion of the Appellants Reply brief contains repetition of submissions and arguments earlier advanced by the appellant in his main Brief. The learned silk for the Appellant merely succeeded in amplifying or fine-tuning them. It therefore does not qualify as what a Reply brief should contain. It is trite law that the purpose of filing a Reply brief to respondent’s brief by an appellant is simply to reply to new points which were raised or canvassed in the respondent’s brief of argument. It is therefore not meant to be used to put right or fill any lacuna or error in the appellant’s brief or to fine tune, repeat or amplify arguments proffered by the Respondent in the Respondents brief of argument. The instant Appellant’s Reply brief is therefore unnecessary, since it is largely a repetition of the arguments or submissions earlier made or provided in the Appellant’s main brief of argument. I therefore for that reason, hereby discountenance the repetitive portions of Appellant’s Reply brief and shall refuse to consider them.

(p. 3376 G)

ELECTION PETITIONS - Tribunal - Establishment of

2. The wordings of Section 285(2) are:-

“There shall be established in each state of the Federation an election tribunal to be known as Governorship Election Tribunal”

B By the use of the word “established” it could be taken to mean that the tribunal had already been established by the Constitution itself. This interpretation can be further fortified by Sub-Section (4) of the same provision dealing with quorum which also provides thus:-

C “The quorum of an election tribunal established under this section shall be the chairman and one other member”

D It would therefore seem to me, that the learned senior counsel for the appellant missed the point or misunderstood the law, when he submitted that the act of establishment of the tribunal was a futuristic event. My considered view in that regard is that, it is not a futuristic event because the Constitution had already established the tribunal by its provisions in Section 285(2) and having done so, all that the President of the Court of Appeal is empowered to do, is to empanel the composition or appoint the Chairman and members of the already established tribunal whenever she/he deems it necessary to do so. There is world of difference between establishment of a statutory body and appointment of members to man such body. Looking closely at the provisions of Paragraphs A(1)(3) and B2(3) of Sixth Schedule to the 1999 constitution makes the position clearer, in that, they give the President of the Court of Appeal unfettered statutory power to the exclusion of anybody, to constitute election tribunals by appointing their chairmen and members. (p. 3382 H)

ELECTION PETITIONS - Tribunal - Composition

H 3. The question that may be asked is, is consultation with either of the two functionaries by the President of Court of Appeal a pre-condition for constituting, appointing or empanelling the tribunal? I do not think so. In the first place, in the present scenario, the said two functionaries were not available in Rivers State. Is it wise or proper for the President of

the Court of Appeal to refuse or neglect to appoint any Judge from Rivers State to serve in any election tribunals? It is noted by me, that in his brief of argument, the appellant's senior counsel expressed the view that for proper constitution of the tribunal, the Chief Judge of Rivers State or the President of Customary Court of Appeal ought to have been consulted. I think the learned silk for the appellant missed the point or has misconstrued the provisions of Paragraph 1(3) of the Sixth Schedule to the 1999 Constitution. As I understand it, the purpose of consultation with the two functionaries was/is not to appoint this particular tribunal whose jurisdiction he is challenging. Rather, the consultation with either of the two functionaries by the President of Court of Appeal was simply to get some eligible Justices/Chief Magistrates who are fit and proper from Rivers State and who are indigenes of that State, to serve in election tribunals any where in the country and NOT necessarily in Rivers State. After all, it may not even be feasible that Judges (who are indigenes) of Rivers States would be appointed by the President of the Court of Appeal and be deployed to serve in Rivers State, their State of origin to determine election petitions filed from Rivers State. Even in the absence of the Chief Judge or President of Customary Court of Appeal, for her to consult, that will not prevent the President of Court of Appeal from appointing suitable and competent Justices/Chief Magistrates from that State to serve in tribunals in the country, as it will amount to injustice to exempt or exclude indigenes of Rivers State from participating in on going petition hearing exercise which is a national service. It will therefore be absurd if she excluded them. (p. 3385 A)

WORDS & PHRASES - Shall - Interpretation of

4. It is not always correct to say that where the word "shall" is used in a statute, it imports a mandatory order or a command. In some situations, a statute may use the word "shall" but the use of that word may import permissive or directory meaning of "MAY". The use of "shall" may have mandatory or directory import depending on the circumstances of a given case.

It is therefore my humble view that the use of the word “SHALL” may sometimes be assumed as conveying a permissive or directory meaning of “May”. In fact, whether the word “shall” is used in a mandatory or directory sense, would depend on the circumstance of a given case, depending also, on the context in which it is used. In the light of the circumstances of this instant case, I am of the firm view that the use of the word “shall” in Paragraph B(3) of Sixth Schedule to the 1999 Constitution as amended, was not meant by the legislature to have mandatory force but rather it is merely permissive or directory. Therefore, I hold that it is not a pre-condition that the president of the Court of Appeal must consult the Chief Judge or President of Customary Court of Appeal before appointing or empanelling the election tribunal as rightly held by the court below. This is moreso, if one considers the fact that election petition hearing is time bound, because by the provisions of Section 285(5) of the 1999 Constitution (supra), such petition must be filed within 21 days from the date the election result is declared. If the suggestion given by the learned appellant’s senior counsel is accepted, it will, in my view, be absurd, especially if one takes into account that there was no Chief Judge or Customary Court of Appeal President in Rivers State as at the time of constituting the tribunal.
 (p. 3387 C/F)

STATUTES - Interpretation - Principle

5. It is trite law that provisions of statutes should not be construed in a way as would defeat the intention of the legislature or to defeat the ends it was meant to serve or where it will cause injustice. The law is well settled too, that where interpretation of a word in a statute, is capable of being given two meanings, the court saddled with the responsibility of interpreting such word shall, adopt and use the interpretation which would not defeat the intention of the law makers.
 (p. 3388 C)

ELECTION PETITIONS - Tribunal - Relocation of

6. Still on the relocation or location of the tribunal to Abuja,

I have closely studied Section 285(2) of the 1999 Constitution and unable to see anywhere in the said provisions where it was stated that election tribunal for each State shall or must sit in the State, to the exclusion of the possibility of it sitting anywhere or somewhere else, especially in a situation where there are compelling or apparent reasons of evidence of serious insecurity which could compel it to relocate to another venue outside the State it was established for. In the instant case, the counter affidavit filed by the 1st and 2nd Respondents gave an insight and compelling reasons in paragraphs 8, 9 and 10 (supra) bordering on impending insecurity prevailing in Rivers State as at the time the tribunal was empanelled or constituted by the President of the Court of Appeal. Certainly such is the “compelling circumstance” that led the Court of Appeal President to issue Exhibit DPI directing the tribunal to relocate to Abuja. The counter affidavit further revealed that it is not Rivers State Election Tribunal alone that was relocated to Abuja because other election tribunals of Borno, Adamawa, Akwa-Ibom and Gombe States were similarly relocated to Abuja on the directive of the President of Court of Appeal for similar reason of insecurity of the chairmen and members of the tribunals and their supporting staffs.

I strongly hold the view that the lower court was right in relying on, accepting and applying the doctrine of necessity to bear as one of the grounds, for relocating the tribunal by the President of the Court of Appeal to Abuja, in view of serious security challenges prevailing in Rivers State when the tribunal was constituted. I accordingly so hold.

(pp. 3395 H/3397 G)

Court - Findings

7. There is no gainsaying that the above finding of the lower court is far reaching as it touches deeply on one of the main grouses in the appellant’s application at the tribunal regarding relocation. It is in fact the gravamen of his application and by extension, of his appeal to the lower court and even in this court. In a nutshell, the lower court by the above finding accepted and relied on doctrine of necessity as one of the

grounds leading to the relocation of the tribunal. It is rather surprising that appellant did not deem it expedient and proper to raise a ground of appeal against the lower court's reliance and acceptance of the doctrine of necessity as a reason to justify the relocation of the tribunal to Abuja. I do not want to say more on that point. Suffice it to say however, that he could be deemed to have also endorsed the stance of the lower court on that, and is therefore deemed to have accepted it.
(p. 3397 B)

C JUDICIAL PRECEDENTS - Case law - Distinction

8. As I said supra, the grouse of the appellant's senior counsel is the failure or refusal of the lower court to be bound by the decision in Ibori v Ogboru (supra). I have closely read the said decision. It is noted by me, that the facts in that decision are distinguishable from the facts in this instant case. For instance, in Ibori's case the tribunal on its own volition decided to relocate to Abuja and sit there, while in the instant case it was the Court of Appeal President who gave directive in Exhibit DPI to relocate to Abuja. Also, unlike in this instant case where there were security challenges in Rivers State before the tribunal was constituted as evidenced in petitioners' counter affidavit, there were no such security challenges in Ibori v Ogboru (supra) before the tribunal decided to relocate itself to Abuja on its own. More importantly, evidence abound in this instant case, that there were serious insecurity challenges prevailing in Rivers State which therefore called for the application of doctrine of necessity to bear in this instant case which was accepted by the tribunal and later endorsed by the lower court in this instant case, whereas such security challenges were completely absent in Ibori's case. Based on ground of doctrine of necessity, the President of the lower court deemed it proper and expedient to move the already established and constituted tribunal to relocate to Abuja to entertain and hear the petition and that was done to safeguard the lives of the chairman, members of the tribunal and other supporting staff. As I said above, there was no any evidence of security challenges adduced before the Court of Appeal in Ibori v Ogboru

(*supra*).

Similarly, the cases of *Ogboru v the President of Court of Appeal* (*supra*) and *Dalhatu v Turaki* (*supra*) are irrelevant and not applicable to the instant appeal in view of disparities in their facts with the facts in this case at hand.

(pp. 3399 D/3400 D)

B

REPRESENTATION

E.C. Ukala SAN, with him Okey Wali SAN, J.O. Iheko (Miss) Dike Udenna Esq., and Daopu Somoni Esq. for the Appellant.

C

Yusuf Ali, SAN with him K.K. Eleja, SAN, Prof. Wahab Egbewole, S.A. Oke, Esq., I.O. Atofarati Esq., A.O. Usman Esq. and Ifedolapo Yejide Esan (Ms) D.A. Mas'ud Alabelewe for 1st and 2nd Respondents.

Alex Ejiesieme, Esq., for 3rd Respondent

D

Chief Chris Uche, SAN, with him James Odibah, Esq., Angela Uche (Miss) Olakunle Lawal, Esq. and Chukwudubem Chukwumerije, Esq., for the 4th Respondent.

CASES REFERRED TO

E

Ibori v. Ogboru (2005) 6 NWLR (pt. 920)

Ogboru v. President Court of Appeal (2007) All FWLR (pt. 369) 1221

Dalhatu v. Turaki (2003) 15 NWLR (pt. 843) 300

F

Ayeni v. University of Ilorin (2000) 2 NWLR (pt. 644) 290

Governor of Lagos State v. Ojukwu (1968) All NLR 233

AG Abia State v. AG of the Federation (2006) All FWLR (pt. 338) 604

Ebe v. Commissioner of Police (2008) I SC (pt 11) 194

G

Popoola v. Adeyemo (1992) 8 NWLR (pt. 254) 1

Shuabu v. Maihodu (1993) NWLR (pt. 284) 784

Chukwuogor v A-G of Cross Rivers State (1998) 1 NWLR (pt. 534) 375

Usman v. Umaru (1992) 7 NWLR (pt. 254) 377

H

Atingwu v Ochekwu (2013) LPECR in 20935

Amadi v NNPC (2000) 10 NWLR (pt. 674) 76

STATUTES REFERRED TO

Constitution of the Federal Republic of Nigeria 1999, ss. 285(2)(4)
Electoral Act 2010 (as amended), para. 20(2) of the 1st Schd., s. 146

LEAD JUDGMENT BY SANUSI JSC

B This is an appeal against the judgement of Court of Appeal,
Abuja Division (“the lower court “for short) delivered on 5th day of
September 2015. (Coram Hon. Justice Abubakar Datti Yahaya, JCA,
Hon. Justice Tani Y. Hassan, JCA and Hon. Justice M. Mustapha,
C JCA) which dismissed the appeal filed before it by the present appel-
lant and affirmed the decision of Rivers State Governorship Election
Tribunal sitting in Abuja. The facts which gave rise to this appeal, as
could be gathered from the Record of Appeal, can be summarised as
follows:

D The appellant herein, contested election into the office of Gov-
ernor of Rivers State held on 11th and 12th of April, 2015 having
been sponsored by his party, the Peoples Democratic Party (PDP)
which is the 4th Respondent in this appeal. The 1st Respondent herein,
also contested election for the same office on the platform of his
E party, the All Progressive Congress (APC) which is the 2nd Respond-
ent in this appeal. After the election, the 3rd Respondent, INEC,
which is the statutory body saddled with the responsibility of con-
ducting the same election in Rivers State and in some states in Ni-
geria, returned and declared the appellant winner of the election,
F having scored the highest number of votes cast at the said election
over and above the scores of the other contestants. Aggrieved by the
declaration of result and return of the appellant as winner of the
election, the first and second respondents herein, jointly filed an elec-
G tion petition on 3rd May 2015 at the Rivers State Governorship Elec-
tion Tribunal (hereinafter referred to as “the tribunal”) sitting in Abuja,
praying for the nullification of the election and urged it to order the
conduct of fresh election into the said office.

On being served with the petitioners’ petition 1st and 2nd
H Respondents), the appellant, as 2nd Respondent at the tribunal, filed
a Notice of Preliminary Objection on 4th June 2015 challenging the
competence of the tribunal and its jurisdiction to entertain same and
at the same time, he filed his Reply to the petitioners’ petition.

The preliminary objection filed by the appellant was premised

on six grounds which are listed hereunder:-

(1) The Honourable Tribunal was not established or set up in accordance with the provisions of Section 285 (2) and Paragraph 1(3) of the 6th schedule to the Constitution of Federal Republic of Nigeria 1999.

(ii) The Petitioners lack the requisite locus standi and right to institute the election petition. B

(iii) The three grounds of the petition are defective and incompetent for not being in conformity with the known grounds for questioning an election under the Electoral Act 2010 (as amended) and also for consisting of an unlawful amalgamation of two alternative grounds or reasons, which can not stand together. C

(iv) The reliefs sought by the Petitions are defective and incompetent for being contradictory and inconsistent with the grounds of the petition. D

(v) The petition fails to disclose any reasonable cause of action against the Respondents.

(vi) The issuance and service of the originating process do not comply with the mandatory provisions of Sections 96, 97 and 98 of the Sheriffs and Civil Process Act. E

Again, the appellant on 30th June 2015 filed a motion on notice wherein, he formally raised the above listed six grounds in his preliminary objection in the said motion wherein he prayed the Tribunal to strike out the petition for want of jurisdiction or in the alternative, to dismiss the same for being incompetent, The first and second respondents, as petitioners at the Tribunal, upon being served with the Preliminary objection, and later with the motion on notice, filed a joint counter affidavit and written address on 7th July 2015. And also on being served with the latters' processes, the appellant filed a Further Affidavit and Reply Address on 11/7/2015. F

On 22-7-2015, the Tribunal took arguments of learned senior counsel to the parties on the Preliminary Objection and the motion and later on 29th July 2015, it delivered its considered ruling in which it held, inter-alia, that it (Tribunal) was properly constituted by the Hon. President of Court of Appeal even without her having consultation with the Chief Judge of Rivers State or the President of Customary Court of Appeal of Rivers State. It further held that it had jurisdiction to sit, hear and determine the election petition relating to H

Rivers State governorship election in Abuja.

The Appellant became disenchanted with the ruling of the Tribunal, hence he decided to appeal to the Court of Appeal (the lower court or “court below”) vide a Notice of Appeal dated 1st August 2015 containing eleven (11) grounds of appeal. Briefs of argument were filed and exchanged by parties’ learned counsel at the lower court in accordance with the rules and practice of that court. The Appellant filed his brief on 14-8-2015 while the 1st and 2nd Respondents upon being served with the appellant’s brief, also filed their Joint Brief of argument on 18th August 2015. It is worthy of note, that in their Joint Brief of Argument filed at the lower court, the 1st and 2nd Respondents herein also argued a Preliminary Objection to the hearing of the appeal. Upon being served with the 1st and 2nd Respondents’ joint brief of argument containing the Preliminary Objection, the Appellant decided to file an Appellant’s Reply Brief on 24th August 2015.

On 24-8-2015, the learned Justices of the Court of Appeal heard the appeal and the Preliminary Objection argued in the two respondents joint brief together and later on Saturday the 5th day of September 2015, delivered their considered judgment dismissing the Preliminary Objection of the 1st and 2nd Respondents. With regard to the appeal before it, the lower court allowed it in part, to the extent that the requirement by Section 285 (2) and Paragraph 3 of Sixth Schedule to the 1999 Constitution (as mended), for consultation with the Chief Judge or President of Customary Court of Appeal by the Honourable President of the Court of Appeal before appointing chairman and members of the Tribunal to hear and determine governorship election could be waived and/or dispensed with where the two functionaries were absent or inexistent. It also held that the Governorship Election Tribunal of Rivers State was validly constituted even without such consultation and that it was entitled to sit in Abuja outside the territorial enclave of Rivers State to exercise its function. To further buttress its stance on this, the lower court also stated thus:

“The wording of Section 285(2) of the 1999 Constitution, as stated above has established the election petition tribunal. Nowhere in that Section, is the word “location in the state” was used.

Piqued by the decision of the lower court, the appellant ap-

pealed to this court. The Notice of Appeal he filed contains five grounds of appeal. In compliance with the practice and rules of this court, the appellant filed his brief of Argument on 30th September 2015, in which he distilled a lone issue for the determination of the appeal from the five grounds of appeal in the Notice of Appeal which said lone issue for determination reads thus:- B

“Whether upon a proper interpretation of the provisions of Section 285(2) of the 1999 Constitution as amended, paragraph 1(1) & (3) of the sixth schedule thereto and paragraph 20(2) of the first schedule to the Electoral Act 2010 as amended and the decisions in Ibori vs Ogboru (2005) 6 NWLR (pt. 920) and Ogboru vs President Court of Appeal (2007) All FWLR (pt. 369) 1221, the Court of Appeal was justified in its conclusion that the Rivers State Governorship Election Petition Tribunal sitting in Abuja was properly constituted and had jurisdiction to entertain the Governorship election petition emanating from Rivers State” C
(Distilled from Grounds 1,2,3,4 and 5) D

On their part, the 1st and 2nd Respondents filed their Joint brief of argument on 2nd October 2015, wherein, they also raised lone issue for the determination of the appeal as reproduced hereunder:- E

“Whether the Tribunal has jurisdiction to entertain this petition. “(covers guides 1,2,3,4 and 5).

It seems to me that, the issue raised in the appellant’s brief, though a little bit verbose, is more elegant and had also captured all the salient points raised and canvassed by learned senior counsel to the parties in this appeal. It will therefore be apt to be guided by it in determining this appeal and I shall accordingly do same, but before doing that it needs to be put on record, that the 3rd and 4th Respondents did not file any brief in this appeal. F G

In urging this court to resolve this issue in the Appellant’s favour, the learned senior counsel for the appellant submitted that he challenged the competence and jurisdiction of the Tribunal to entertain the petition of 1st and 2nd Respondents on grounds of improper constitution, at both the tribunal and/ the lower court without success, even though according to him, non consultation with the Chief Judge of Rivers State or President of Customary Court of Appeal has offended the provisions of Section 285(2) and (3) of the 1999 Con- H

stitution (as amended) and Paragraph 1(ii) & (3) of the 6th Schedule to the same Constitution. He argued that the lower court opted to refuse to follow its previous decisions in the cases of *Ibori vs Ogboru* (2005) 6 NWLR (pt. 920) 102 and *Ogboru vs President*, Court of Appeal (2007) All FWLR (pt. 369) 1221, wherein it was held (in the two cases) that consultation with state Chief Judge or President of Customary Court of Appeal of the State by the President of Court of Appeal before appointing chairman and members of Governorship Election Petition Tribunal was mandatory and that the said tribunal must be located in Rivers state and also sit within Rivers state for which it was appointed or constituted, to exercise its jurisdiction. Learned senior counsel for the appellant submitted also, that he was wrongly overruled by the tribunal and also the lower court refused to intervene. The learned silk for the appellant further submitted that the conclusion of the lower court is unsupportable in law. He remarked that the conclusion of the court below that Section 285 (2) of the 1999 Constitution (as amended) did not require that the tribunal “must be located within the territorial enclave of Rivers State to hear and determine election petition”, was erroneous. Learned senior counsel extensively quoted excerpts from the judgment of the court below in his Brief which he filed appeal against and further submits that the lower court was wrong to have declined to be bound by or to follow its earlier decision in *Ibori v Ogboru* (supra). He further argued that the meaning of the provisions of Section 285 (2) of the Constitution is clear when read in contra distinction with the provisions of Section 285(1) of the same Constitution, which states that “there shall be established for each state of the Federation” an election tribunal...”

He added that to establish a thing in each state presupposes setting up by physical presence inside the state and that such tribunal established shall sit in the state where it has jurisdiction and not to sit in exile elsewhere. He insisted that court/tribunal must sit in the territorial enclave over which it exercises jurisdiction and not elsewhere. See *Dalhatu vs Turaki* (2003) 15 NWLR (pt. 843) 300 at 339 on the alleged refusal by the lower court to follow its earlier decision in *Ibori vs Ogboru* (supra) on its interpretation of Section 285(2) of the 1999 Constitution. The learned appellant’s senior counsel argued further, that by according or proffering another or different interpretation or

meaning to the said constitutional provisions, adding that the lower court was wrong to have done that. He urged this court to intervene.

In a further submission, the learned senior counsel to the appellant posited that the finding of the lower court that the appointment and constitution of the chairman and members of the tribunal without consultation with the Chief Judge or President of Customary Court of Appeal of Rivers State was excusable under the law, was influenced by considerations of expediency and exigencies, adding that such reason or conclusion is not backed by any law and therefore, such conclusion amounted to departure from the clear and unambiguous meaning or purport of the said provisions. He posited that a court can not import into the provisions an extraneous meaning which is not contained in the statute. See *Ayeni vs University of Ilorin* (2000) 2 NWLR (pt. 644) 290 at 305 para A-B.

On the relocation of the tribunal by the President of Court of Appeal to Abuja, the learned senior counsel for the appellant submitted that the power vested in the President of the Court of Appeal by Paragraph 3 of the sixth schedule to the 1999 Constitution as amended, is simply limited to constituting the tribunal by appointing tribunal's chairman and members and his powers do not extend to "administering the Tribunal" as suggested by the court below. He said the President of the Court of Appeal therefore cannot legally exercise discretion to relocate the tribunal or to determine the venue and place of its sitting. It is the view of the learned silk that it is only the Tribunal itself that has statutory power or authority to determine and fix place to hold its sitting/hearing under the provisions of Paragraph 20(2) of First Schedule to the Electoral Act 2010 (as amended) and even in doing so, it must have regard to the proximity to and accessibility from the place where the election was held. He added that the President of the Court of Appeal has therefore no power to determine the venue of sitting of the tribunal which must be within the territory of the state as close as possible to where the election was held. See *Ibori v Ogboru* (supra).

By way of further submission, the learned Appellant's senior counsel remarked that the lower court noted the allegations of facts put forward by the 1st and 2nd Respondents before it in their counter affidavit and it allowed itself to be influenced by it in arriving at the conclusion that there was "insecure atmosphere pervading in Rivers

State at the material times” without considering the Appellant’s further affidavit at pages 651 to 654 of the Records. According to him, if it had so considered their further affidavit, it would have had a balanced view of the facts and the situation in Rivers State. He posited that the action of the Court of Appeal President was an interference with the process of law which is unjustifiable, since there was no security challenge in Rivers State capable of affecting the tribunal or its officials.

Learned counsel for the Appellant also submitted that the requirement of consultation with the Chief Judge or President of Customary Court of Appeal by President of Court of Appeal in constituting and appointing the chairman and members of the tribunal is mandatory. See *Ogboru v President of Court of Appeal* (2007) All FWLR (pt 369) 1221 at 1268/1269 Para G-C. He added that the absence of these two functionaries at that time is not excusable, as it would tantamount to breach of the constitutional provisions. See *Gov. of Lagos State vs Ojukwu* (1968) All NLR 233; *AG Abia State vs AG of the Federation* (2006) All FWLR (pt - 338) 604 at 736; *Okon Bassey and Ebe vs Commissioner of Police* (2008) I SC (pt 11) 194. The learned silk finally urged us to resolve his sole issue in favour of the appellant and allow the appeal.

As I said earlier, the Appellant filed Appellants’ Reply Brief to the 1st and 2nd Respondents Brief which was filed on 5/10/2015. At the hearing of this appeal on 19-10-2015, the learned senior counsel to the 1st and 2nd Respondents urged us to discountenance it as it was in contrast with what a Reply brief is supposed to contain and he therefore urged us to discountenance it in his response, the learned senior counsel for the appellant felt otherwise and had explained that his Reply brief is competent and should not be discountenanced.

I have closely studied the Appellant’s Reply Brief. I share the view of the learned silk for the 1st and 2nd Respondents that large portion of the Appellants Reply brief contains repetition of submissions and arguments earlier advanced by the appellant in his main Brief. The learned silk for the Appellant merely succeeded in amplifying or fine-tuning them. It therefore does not qualify as what a Reply brief should contain. It is trite law that the purpose of filing a Reply brief to respondent’s brief by an appellant is simply to reply to new points

which were raised or canvassed in the respondent's brief of argument. It is therefore not meant to be used to put right or fill any lacuna or error in the appellant's brief or to fine tune, repeat or amplify arguments proffered by the Respondent in the Respondents brief of argument. The instant Appellant's Reply brief is therefore unnecessary, since it is largely a repetition of the arguments or submissions earlier made or provided in the Appellant's main brief of argument. I therefore for that reason, hereby discountenance the repetitive portions of Appellant's Reply brief and shall refuse to consider them. See *Popoola v Adeyemo* (1992) 8 NWLR (pt 254) 1, *Shuabu v Maihodu* (1993) NWLR (pt. 284) 784; *Chukwuogor v Attorney General of Cross Rivers State* (1998) 1 NWLR (pt 534) 375; *Ojiogu v Ojiogu & Anor* (2010) 1 SC 13.

In his response to the arguments proffered by the learned appellant's senior counsel in his main brief, the learned senior counsel representing the 1st and 2nd respondents referred us to the wordings of Section 285{2} of the 1999 Constitution where it says "there shall be established..." presupposes that the body to which it relates in this case, the tribunal had already been established by the Constitution itself and that all that was left for the appropriate authority to do, is to constitute the tribunal and appoint personnel when necessary.

The learned senior counsel for 1st and 2nd Respondents submitted that the provisions of Section 285{4} of the 1999 Constitution as amended which provides for the quorum of an election tribunal established under that provisions suggest that the tribunal had already been established as rightly held by the lower court and it is therefore not a futuristic event as argued by the Appellant's senior counsel. Learned senior counsel for the two respondents further argued that since the Constitution had already established the tribunal, what remained for the President of Court of Appeal to do where necessary, was to simply empanel the tribunals. On this submission, the senior counsel relied on the provisions of Paragraph A 1{3} and B2 {3} of the Sixth Schedule to the 1999 Constitution, as amended, which clearly provides that it is the President of Court of Appeal that has the power to constitute the election tribunal by appointing its chairman and other members. The learned silk opined that the lower court was correct in its reasoning in that regard. Learned

senior counsel for the 1st and 2nd Respondents again submitted that the tribunal had properly been constituted by the President of the Court of Appeal and therefore it had jurisdiction to hear and determine the petition even though there had not been in existence in Rivers State, the Chief Judge or Customary Court of Appeal President to be consulted before the tribunal was constituted as rightly held by the lower court. He suggested that the purpose of consultation with the two functionaries in Rivers State was to appoint indigenes of the state to serve in election tribunals in the country, but not to recruit judicial officers to serve in Rivers State Governorship Election Tribunal. Learned silk for the respondents also argued that consultation with the two functionaries of Rivers States as contemplated in Paragraph 3 of the sixth Schedule to the 1999 Constitution as amended is not a condition precedent or mandatory in appointing members of tribunal notwithstanding the use of “shall” in the said provisions. The use of the word shall in the provisions according to the learned senior counsel, is not meant to have mandatory force but is merely directory, depending on the circumstance of each case. He referred to the case of *ATUNGWU & ANOR V OCHEKWU* (2013) LPECR 209 35 (SC). He stated further that if, the provisions of Paragraph (3) of the Sixth Schedule to the 1999 Constitution is to be interpreted in the manner suggested by the learned appellant’s senior counsel, it would will not be possible to empanel it in Rivers State as there would be no consultation with the Chief Judge or President of Customary Court of Appeal since neither of them exists and such tribunal must be constituted 21 days after the election, according to Section 285(3) of the Constitution. Such interpretation will therefore be absurd and would cause injustice. See *LAWAL V G B. OLLIVANT* (1972) 1 SC 124 or NSCC 99, *BRONIK MOTORS LTD. & ANOR v WEMA BANK LTD.* (1983) LPELR 808 (SC), *JAMES V INEC & ors* (2015) SC in SC 478/2013.

Also on the issue of relocation of the tribunal to Abuja, the learned senior counsel for the 1st and 2nd respondents submits that the facts in the cases of *Ibori v Ogboru* (supra), *Dalhatu v Turaki* (supra) and *Usman v. Umaru* (1992) 7 NWLR (pt 254) 377 relied on by the appellant are distinguishable from the facts in this instant case and are therefore not relevant hence the lower court is not bound to follow those previous decisions. He added that the lower court will

not ordinarily follow its previous decisions if the facts in those previous decisions differ from the facts in the instant case before it. See *Obiuweubi vs CBN* (2011) 7 NWLR (pt 1247) 465.

The learned silk for the 1st and 2nd Respondents proceeded to argue that as respondents at the tribunal, they filed counter affidavit as shown on page 696, Paragraph 2 of the Record of Appeal, which the tribunal made use of on which they gave compelling reasons why the tribunal had to relocate its sitting to Abuja to hear the petition and that the reasons given for such relocation had to do with the security of Chairman and members of the tribunal. In further submission, the learned senior counsel for 1st and 2nd respondents gave elaborate distinctive features and different facts in *Ibori v. Ogboru* (supra) which were also accepted and relied on by the appellant vis-à-vis, the facts in the case at hand which informed the lower court to depart from them. Prominent among those distinctive features or facts according to the respondents counsel, are that in *Ibori v Ogboru* (supra) the tribunal decided to relocate to Abuja on its own volition, while in the instant case, it was the President of the Court of Appeal that moved it to Abuja pursuant to her powers to empanel the tribunal and issue practice directions for the functions of tribunals. Still on the issue of relocation of the tribunal, the learned respondents' senior counsel argued that nowhere in Section 285(2) of the 1999 Constitution, as amended, was it stated that election tribunal for each state 'shall be located in the state'. He argued that the relocation of the tribunal to Abuja was necessary and expedient in view of the compelling circumstances such as, what he called, "huge and pervasive insecurity plaguing Rivers State" as deposed in Paragraphs 8,9 and 10 of the joint counter affidavit of the two respondents contained on page 616 of the printed record which led to the issuance of Exhibit DPI by the President of the Court of Appeal directing the relocation of the tribunal to Abuja, as it also happened to similar tribunals of Borno, Adamawa, Akwa-Ibom and Gombe States which are now also sitting in Abuja. He stated that such relocation was done for the safety of members of the tribunal, their officials and its other users. Learned senior counsel to the respondents posited that by the provisions of Section 145 of the Electoral Act, 2010, as amended, the President of the lower court has power to issue Practice Directions to election tribunals to sit in a place free of violence. He said in

the case of *Ibori v Ogboru* (supra) there was no reference to any practice direction and none was therefore considered by the lower court but rather, it was the tribunal on its own that relocated itself to Abuja.

To further buttress his argument on the legality of the relocation of the tribunal to Abuja by the Court of Appeal President, learned senior counsel for the two respondents on page 627 of the Record, relied on the Doctrine of Necessity as a ground to defeat the appellant's objection to jurisdiction of the tribunal. He also referred to page 748 of the Record, where he also made such reliance on Doctrine of Necessity and concluded that, the doctrine, justifies the relocation of the tribunal by the lower court's President. He referred to page 616 of the record containing the counter affidavit he filed and Exhibit DPI attached to it where he raised the ground of insecurity relied upon in relocating the tribunal to Abuja. He again urged this court to discountenance the appeal because the appellant did not file any ground of appeal on the lower court's acceptance of the respondents reliance on doctrine of necessity they raised at both the tribunal as well as at the lower court as the reason, or one of the reasons that informed the Court of Appeal President to relocate the tribunal to Abuja. He said by not appealing against the lower court's reliance on and acceptance of doctrine of necessity raised by them, it means that he also accepted the decision and he is therefore bound by it Resting his case, he finally urged the court to dismiss this appeal.

At this stage I think it will be apposite to reproduce below, some provisions of the 1999 Constitution and Electoral Act 2010 as amended, cited and relied on by learned senior counsel for the parties on which also the arguments canvassed by them, are centred for ease of reference and purpose of clarity, Prominent among them are, Section 285 (2) (3) and (4) (5) of the 1999 Constitution as amended, Paragraph 2(3) of Sixth Schedule to the Constitution and Paragraph 20(1) of the First Schedule to the Electoral Act, 2010 as amended.

Section 285 of the Constitution of the Federal Republic of Nigeria 1999 states thus:-

“(1) Not relevant

(2) There shall be established in each State of the Federation an election tribunal to be known as the Governorship Election Tribu-

nal which shall, to the exclusion of any court or tribunal, have original jurisdiction to hear and determine petitions as whether any person has been validly elected to the office of Governor or Deputy Governor of a State.

(3) - *The composition of the National and State Houses of Assembly Election Tribunal, and the Governorship Election Tribunal respectively shall be as set out in the sixth schedule to this Constitution.*

(4) - *The quorum of an election tribunal established under this section shall be the Chairman and one other member.*

(5) - *An election petition shall be filed within 21 days after the date of declaration of results of the election.*

(6) - *Not relevant*

(7) - *Not relevant*

(8) - *Not relevant.* “

Paragraph B of Sixth Schedule to the Constitution 1999 provides as follows:-

Paragraph B

“(1) *Not relevant*

(2) *The Chairman who shall be a Judge of a High Court and two other members shall be appointed from among Judges of a High Court, Khadis of Sharia Court of Appeal, Judges of a Customary Court of Appeal or other members of the Judiciary not below the rank of a Chief Magistrate.*

(3) *The Chairman and other members shall be appointed by the President of the Court of Appeal in consultation with the Chief Judge of the State, the Grand Kadi of the Sharia Court of Appeal of the State or the President of the Customary Court of Appeal of the State, as the case may be.*”(Emphasis supplied by me).

Also Paragraph 20(2) of the First Schedule to the (2) of the Electoral Act 2010, as amended, provides as below:-

Time and place of hearing petition

Paragraph 20(1) -

“Subject to the provisions of sub-paragraph (2) of this paragraph, the time and place of the hearing of an election petition shall be fixed by the Tribunal or court and notice of the time and place of the hearing, which may be as in form TFOO5 set out in Second Schedule to this Act, shall be given by the Secretary at least five days

before the day fixed for the hearing by -

(a) Posting the notice on the tribunal notice board; and

(b) Sending a copy of the notice by registered post or through a messenger to -

(i) The petitioners address for service

B (ii) The respondents' address for service, if any.

(iii) The Respondent Electoral Commissioner or the Commission as the case may be,

(2) In fixing the place of hearing, the Tribunal shall have due regard to the proximity to and accessibility from the place where the election was held."

From the submissions of learned senior counsel to the parties in this Appeal, one can comfortably state that the grouse of the appellant are basically centred on three folds namely:-

D 1. Whether the tribunal was properly constituted and had jurisdiction to entertain the Governorship petition when there was no consultation by the President of Court of Appeal with Chief Judge or President of Customary Court of Appeal of Rivers State.

E 2. Whether the Hon. President of the Court of Appeal (lower court) had power to locate the tribunal to sit in Abuja.

3. Whether the lower court was right not to follow its earlier decision in Ibori v Ogboru (supra)

F There is however a subsidiary grouse of the appellant that had to do with the lower court's alleged refusal to follow its previous decisions in Ibori v Ogboru (supra) and Ogboru vs President of the Court of Appeal (supra), I intend to consider these points together.

G It is the contention of the learned senior counsel for the appellant, that the tribunal was constituted to sit in Abuja to determine the petition filed by the 1st and 2nd Respondents, by the President of the Court of Appeal without consultation with the Chief Judge of Rivers State or President of Customary Court of Appeal, contrary to the provisions of Section 285(2) and (3) of the Constitution of the Federal Republic of Nigeria 1999, as amended.

H ***The wordings of Section 285(2) are:-***

"There shall be established in each state of the Federation an election tribunal to be known as Governorship Election Tribunal"

By the use of the word "established" it could be taken to

mean that the tribunal had already been established by the Constitution itself. This interpretation can be further fortified by Sub-Section (4) of the same provision dealing with quorum which also provides thus:-

“The quorum of an election tribunal established under this section shall be the chairman and one other member” B

It would therefore seem to me, that the learned senior counsel for the appellant missed the point or misunderstood the law, when he submitted that the act of establishment of the tribunal was a futuristic event. My considered view in that regard is that, it is not a futuristic event because the Constitution had already established the tribunal by its provisions in Section 285(2) and having done so, all that the President of the Court of Appeal is empowered to do, is to empanel the composition or appoint the Chairman and members of the already established tribunal whenever she/he deems it necessary to do so. There is world of difference between establishment of a statutory body and appointment of members to man such body. Looking closely at the provisions of Paragraphs A(1)(3) and B2(3) of Sixth Schedule to the 1999 constitution makes the position clearer, in that, they give the President of the Court of Appeal unfettered statutory power to the exclusion of anybody, to constitute election tribunals by appointing their chairmen and members. C D E

Provisions similar to Section 285(2) of the Constitution was interpreted in the case of GOVERNOR OF BENDEL STATE & ANOR VS IGBE (1982) 3 NCLR 273. For instance, the provisions of Section 178 of 1999 Constitution state thus:- F

“There shall be established for each State of the Federation the following bodies, namely:- G

(a) State Civil Service Commission...”

The full court of Court of Appeal held at page 287 para 6-7 that the Commission had already been established by the Constitution and that what was left was the appointment of chairman and members of the Commission in accordance with Sections 179 and 180 of the Constitution. H

The lower court in its wisdom, having been confronted with interpretation of Section 285(2) of the 1999 Constitution which is

similar to the provisions of Section 179 of the 1979 constitution, held at page 797 of the Record as follows:-

“Now Section 285(2) of the Constitution 1999 as amended states:-

“...The Constitution in Section 285(2) as above has already provided and established the election petition tribunals for each state and so no law, is required to be enacted to establish the tribunals. It is not a futuristic provision. It is only the chairman and members of the Tribunals who would adjudicate, that are to be appointed by the President of the Court of Appeal as provided in paragraph A1(3) of the Sixth Schedule to 1999 Constitution as amended. That is the futuristic event aiming after the establishment of the tribunals by the Constitution”

...The Tribunal has been established and no future act is required to establish it, we hold therefore that the election petition tribunals had been established by the Constitution. The president of the Court of Appeal did not establish them and can not also do away with them”.

I think this is a sound and far reaching finding by the lower court which cannot be faulted or assailed I entirely agree with the lower court in that regard.

Coming to the issue of non-consultation with the Chief Judge of Rivers State or the President of Customary Court of Appeal of Rivers State by the President of the Court of Appeal, the appellant’s learned senior counsel challenged the jurisdiction of the tribunal because non consultation with any of the two functionaries by the President of Court of Appeal before constituting the tribunal as required by Paragraph 3 of the Sixth Schedule to the 1999 Constitution as amended, even though none of the two functionaries occupying such office was in existence as at the time of constituting the tribunal. Here, the appellant conceded rightly too, that the offices of the Chief Judge and President of Customary Court of Appeal were vacant in Rivers State or to put it in another way, none of them was in existence as at the time the Court of Appeal President constituted or empanelled the tribunal and therefore there was no how the requirement of consultation contemplated by Paragraph (3) of the Sixth Schedule to the 1999 constitution could be met.

The question that may be asked is, is consultation with either of the two functionaries by the President of Court of Appeal a pre-condition for constituting, appointing or empanelling the tribunal? I do not think so. In the first place, in the present scenario, the said two functionaries were not available in Rivers State. Is it wise or proper for the President of the Court of Appeal to refuse or neglect to appoint any Judge from Rivers State to serve in any election tribunals? It is noted by me, that in his brief of argument, the appellant's senior counsel expressed the view that for proper constitution of the tribunal, the Chief Judge of Rivers State or the President of Customary Court of Appeal ought to have been consulted. I think the learned silk for the appellant missed the point or has misconstrued the provisions of Paragraph 1(3) of the Sixth Schedule to the 1999 Constitution. As I understand it, the purpose of consultation with the two functionaries was/is not to appoint this particular tribunal whose jurisdiction he is challenging. Rather, the consultation with either of the two functionaries by the President of Court of Appeal was simply to get some eligible Justices/Chief Magistrates who are fit and proper from Rivers State and who are indigenes of that State, to serve in election tribunals any where in the country and NOT necessarily in Rivers State. After all, it may not even be feasible that Judges (who are indigenes) of Rivers States would be appointed by the President of the Court of Appeal and be deployed to serve in Rivers State, their State of origin to determine election petitions filed from Rivers State. Even in the absence of the Chief Judge or President of Customary Court of Appeal, for her to consult, that will not prevent the President of Court of Appeal from appointing suitable and competent Justices/Chief Magistrates from that State to serve in tribunals in the country, as it will amount to injustice to exempt or exclude indigenes of Rivers State from participating in on going petition hearing exercise which is a national service. It will therefore be absurd if she excluded them. I will not hesitate to endorse the following findings made by the lower court at page 801 of the Record where it rightly held as below:-

"The same reasoning also applies to the issue of the alleged

non-consultation with the Chief Judge or President of the Customary Court of Rivers State. If the two functionaries were not available, the President of the Court of Appeal could not conceivably fold arms and lament the situation. Acting and constituting the tribunal was the only available and responsible option. At any rate, I agree with the

B *1st and 2nd respondents, that the requirement of consultation is to get persons from Rivers State to have opportunity to serve in Tribunals, like their counterparts in every State of the Federation. Once appointed from Rivers State, they could be posted anywhere to sit.*

C *So the consultation to be made by the President of the Court of Appeal, with the Chief Judge or President of Customary Court of Rivers State is not for the purpose of appointing Chairmen and members who would serve in the Governorship Election Tribunal for Rivers State. So the complaint of the appellant can only be geared to-*

D *wards the appointment of the Chairman and members who are from Rivers State, serving in Tribunals in some other States of the Federation and not as Chairman and members from other States of the Federation, serving in the Rivers State Governorship Tribunal who were appointed in consultation with their Chief Judges or Presidents*

E *of the Customary Courts or Grand Khadis, since these heads of courts are on ground in those states."*

To my mind, the lower court got it rightly in its above findings and I can not agree more. It is my humble view also, that the require-

F *ment of consultation with the Chief Judge or President of Customary Court of Appeal is not a pre-condition for appointing Chairmen and members who would serve in tribunals. Such consultation contemplated by the provisions of Paragraph 3 of the Sixth Schedule for the 1999 Constitution as amended, in my view, is aimed at facilitating*

G *nomination or identifying judicial official members from the State to serve in tribunals in the country established by the 1999 Constitution to hear and determine election petition matters. It is my view also, that the President of the Court of Appeal even where she/he made such consultation, is not bound to accept the particular names of*

H *candidate he receives from the Chief Judge or President of the Customary Court of Appeal, as the case may be. Even in a State where the post of Chief Judge or President of Customary Court of Appeal is vacant such as Rivers State, that will not deter the President of Court of Appeal from appointing Judges/Chief Magistrates from that State,*

as he can always call for names of serving Judges or Chief Magistrates from the Chief Registrar of the affected state and could select from the list and appoint them to serve in election tribunals.

Admittedly, the provisions of Paragraph B(3) of the Sixth Schedule to the 1999 Constitution as amended, used the word “shall” when it provides.

“The Chairman and other members shall be appointed by the President of the Court of Appeal in consultation”

Contrary to the submissions made by the learned silk for the appellant to the effect that the use of the word “shall” in that provisions had mandatory force, I think I have a different view with him.

It is not always correct to say that where there the word “shall” is used in a statute, it imports a mandatory order or a command. In some situations, a statute may use the word “shall” but the use of that word may import permissive or directory meaning of “MAY”. The use of “shall” may have mandatory or directory import depending on the circumstances of a given case.

This court in *Atingwu & Anor v Ochekwu* (2013) LPECR in 20935 while interpreting the provisions of Section 294(1) of the 1999 Constitution as amended, which used the word “shall”, even took into consideration the peculiar circumstances of the case and at pages 47-48, Paragraphs F to C held that it is not in every case that the word “shall” imports mandatory meaning into its use. See also *Amadi v NNPC* (2000) 10 NWLR (pt. 674) 76; *Abdullahi v The Military Administrator & Ors* (2009) 15 NWLR (pt. 1165) 417.

It is therefore my humble view that the use of the word “SHALL” may sometimes be assumed as conveying a permissive or directory meaning of “May”. In fact, whether the word “shall” is used in a mandatory or directory sense, would depend on the circumstance of a given case, depending also, on the context in which it is used. In the light of the circumstances of this instant case, I am of the firm view that the use of the word “shall” in Paragraph B(3) of Sixth Schedule to the 1999 Constitution as amended, was not meant by the legislature to have mandatory force but rather it is merely permissive or directory. Therefore, I hold that it is not a pre-condition that the president of the Court of Appeal must consult the Chief Judge or President of Customary Court of Appeal before ap-

pointing or empanelling the election tribunal as rightly held by the court below. This is moreso, if one considers the fact that election petition hearing is time bound, because by the provisions of Section 285(5) of the 1999 Constitution (supra), such petition must be filed within 21 days from the date the election result is declared. If the suggestion given by the learned appellant's senior counsel is accepted, it will, in my view, be absurd, especially if one takes into account that there was no Chief Judge or Customary Court of Appeal President in Rivers State as at the time of constituting the tribunal.

It is trite law that provisions of statutes should not be construed in a way as would defeat the intention of the legislature or to defeat the ends it was meant to serve or where it will cause injustice. The law is well settled too, that where interpretation of a word in a statute, is capable of being given two meanings, the court saddled with the responsibility of interpreting such word shall, adopt and use the interpretation which would not defeat the intention of the law makers. See Yabugbe vs Cop (1992) 4 SCNJ 116; Lawal vs GB Ollivant (1972) SC 124.

Now, I shall come to the issue of relocation of the tribunal to Abuja by the President of the Court of Appeal. The learned silk representing the appellant unsuccessfully raised complaint at both the tribunal and the lower court against or on such relocation to Abuja. He argued that the action of the President of the court below, in relocating the tribunal to Abuja runs riot and violent to the provisions of Section 285(2) of the Constitution. The learned silk argued that despite the fact that the decisions of Ibori vs Ogboru (2005) 6 NWLR (pt 920) 102 was cited and commended to it, the lower court refused to follow its previous decision in Ibori's case when on page 298 to 301 of the record it held as follows:-

"The wording of section 285(2) of the 1999 Constitution as stated above, has established the election petition tribunals. Nowhere in that section, is the word "Location in the State" used. The fact that there is the governorship Election tribunal for Rivers State, means that section 285 is operational, and the President of the Court of Appeal has appointed its Chairman and members. The power under the Sixth Schedule to the 1999 Constitution has therefore been ex-

exercised by the President of the Court of Appeal. There is no requirement therein, that the Rivers State Governorship Tribunal for Rivers, must be located within the territorial enclave of Rivers State. Once a Tribunal is established for Rivers State Chairman and members duly constituted/ the constitutional provision is satisfied...

The President of the Court of Appeal being the custodian of the powers of constituting the tribunals and administering them, exercised discretion to relocate the Tribunals to Abuja, to safeguard the members and other administrative staff of the Tribunal. It was an act that was not only responsible, but is full of the milk of human kindness for the health, welfare and sanctity of life and limbs. It is an act that should be greeted with applause not condemnation. Since the issue of security of the members of the Tribunal and the intervention of the president of the Court of Appeal via the directive to relocate, did not come to play in the case of Ibori vs. Ogboru (supra), the facts in the two cases are different and Ibori vs Ogboru cannot be a precedent requiring application in this instance. The motivational factors for the relocation of the Tribunals are as wide and varied as can never be imagined. “

The appellant’s senior counsel extensively quoted and relied on the findings in the previous decision of the court below Ibori v Ogboru (supra) where the learned Justices of the Court of Appeal when interpreting the provisions of Section 285(2) of the 1999 Constitution held as below:-

“By the express provisions of section 285(2) of the Constitution of the Federal Republic of Nigeria 1999 which created Election Tribunals for each state and which as we have discussed is to be located in each State and in this particular case in Delta State and which provision is mandatory by use of the word shall, the decision of the Tribunal to sit in Abuja instead of in Asaba Delta State could not be said to be discretionary but mandatory. The only discretion exercisable by the tribunal is with respect to paragraph 19(2) of the 1st Schedule to the Electoral Act 2002, which states that:

“In fixing the place of hearing, the tribunal or court shall have due regard to the proximity to and accessibility from the place where the election was held”

This provision which as has been seen is complementary to section 285(2) of the Constitution of the Federal Republic of Nigeria

1999 is only exercisable by the tribunal when it has to do so within the borders of the state where the election was held and in this case Delta State and not as it has done, in Abuja. By some judicial rascality which the tribunal tried to clothe in legality albeit in vain, it caused to be issued, hearing notices that its sitting to determine the Governorship seat of Delta State would be at Abuja.

The Tribunal simply had no discretion to do what it did or perhaps one could say that whatever discretion the tribunal purportedly exercised in accordance with the law. The tribunal's decision to sit in Abuja instead of Delta State was not in accordance with the provision of section 285(2) of the Constitution of the Federal Republic of Nigeria 1999 read side by side with paragraph 19(2) of the 1st Schedule to the Electoral Act, 2002.

My noble lords, before delving into the question whether the lower court was right in its refusal to be bound by or follow its previous decision in Ibori's case as queried by the appellant's senior counsel, please permit me to digress a little and make the following observation. At the tribunal, the appellant filed a motion on notice on 30th June, 2015 raising some challenges on the jurisdiction of the tribunal urging it to strike out the petition or in the alternative to dismiss the petition for being incompetent. The 1st and 2nd Respondents as petitioners at the tribunal decided to oppose the appellant's (as respondent at the tribunal) application and filed a Counter Affidavit of eighteen paragraphs. See pages 615-617 of the Records. The averments in the 1st and 2nd Respondents' Counter Affidavit are extensively reproduced below for ease of reference.

Joint Counter Affidavit: of 1st and 2nd Respondents

Paragraphs:-

"1. I am one of the solicitors assisting Chief Akin Olujinmi, CON, SAN, the leading counsel to the petitioners in this petition.

2. By reason of the foregoing. I know the facts of this case and I have the authority of the petitioners to swear to this affidavit.

3. I have read jointly with the 1st petitioner, the affidavit in support of the 2nd respondent's motion.

4. Paragraphs 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18(i) to (x), 19(a) (b) (c), 20, 21, and 22 of the affidavit in support of the motion are false, diversionary and grand standing.

5. With further reference to paragraphs 9 and 10 of the affida-

vit, the 1st petitioner told me in our office at the 5th floor of NICON Plaza, Central Area, Abuja, on July 4th, 2015 at 11a.m and I verily believe him, as follows:

(i) That he was properly nominated in accordance with the law and sponsored by the 2nd petitioner for the election.

(ii) That the 2nd petitioner is a registered political party and that it sponsored him for the election. ^B

6. It is a matter of common knowledge that the President of the Court of appeal is the one given power by the Constitution to appoint the Chairman and members of this election tribunal and she appointed the Chairman and members of this election tribunal. ^C

7. It is also a matter of common knowledge that the President of the Court of Appeal has power to make practice directions for the election tribunals.

8. Prior to and during the election of 11th April, 2015 and up till now, Rivers State has been engulfed in a series of political crisis and violence to the extent that several people have been maimed, killed, some kidnapped and properties destroyed. ^D

9. I know as a fact that the struggle for political power and ascendancy in Rivers State has created a level of insecurity therein such that it will be extremely unsafe for any election tribunal to sit in Rivers State. ^E

10. I know as a fact that it was in realisation of the need to ensure proper and fair adjudication of election petitions, away from the pervasive violence in Rivers State, Akwa-Ibom, Borno, Bauchi, Taraba, Adamawa and Yobe that the President of the Court of Appeal issued a direction to the Election Tribunal of the States to hear petitions before them in Abuja. ^F

11. The motion alone and the affidavit in support together run into nineteen odd pages while the written address covers 32 pages.

12. Apart from asking this tribunal to strike out several paragraphs of the petition, the applicant also strangely specifically wants the court to strike out wards and polling units.

13. In view of the time limitation for the trial of petitions, I verily believe that the notice of motion of preliminary objection has been filed to delay the trial of this petition and cause the same to expire by effluxion of time. ^H

14. We are already two months into the statutory 180 days of

this petition.

15. *I know as a fact that most of the issues raised in the objection have been canvassed in the past in some cases and rejected by the courts but they are now being raised again.*

16. *It is now a matter of common knowledge that the Supreme Court and the Court of Appeal have held in several cases that preliminary objection be taken along with the petition so as not to delay the trial of the petition.*

17. *Besides, I am aware that the issue whether this election tribunal can sit in Abuja is already pending before the Court of Appeal for resolution based on a reference of the point to the Court of Appeal by Hon. Justice Kolawole of the Federal High Court, Abuja. The petitioners will at the hearing rely on a copy of the ruling of Kolawole J issued in the case of Kemka Stanley Elenwo v.*

The President, Court of Appeal, Hon. Justice A. M. Pindiga, and 5 others.

18. *I swear to this counter-affidavit in good faith conscientiously believing the contents to be true and correct in accordance with the Oaths Act."*

Upon being served with the petitioners (1st & 2nd Respondents) counter affidavit, the Appellant (as respondent at the tribunal) filed a Further Affidavit and Reply Address as shown on pages 651 to 654 of the Records. The averments in that Further Affidavit are also reproduced hereunder:-

"1. *That I am the State Legal Adviser of the Peoples Democratic Party (PDP) Rivers State and by virtue of my position and office I am a member of the Rivers State Executive Committee of the 3rd Respondent; the political party that sponsored the 2nd Respondent for the April 11th and 12th Governorship election in Rivers State.*

2. *That by virtue of my aforesaid position and official duties I am conversant with the facts of this case and have the consent of the 2nd Respondent/Applicant to depose to this affidavit on his behalf*

3. *That I have seen and perused a copy of the 18 paragraphs Counter Affidavit by the Petitioners as deposed by one Wole Ilori Esq., a Legal Practitioner said to be assisting Chief Akin Olujinmi SAN, and except as I may hereinafter expressly admit, all the paragraphs of the said affidavit are denied as blatant falsehood.*

4. *That the Allegations of fact as contained in paragraphs 4,5,*

(i)-(ii), 8,9,10,13,15,16 and 17 of the said affidavit of Wole Ilori Esq., are false and misleading and in specific response to those paragraphs I depose as follow:

i. That the deponent; Wole Ilori Esq., legal practitioner of 5th Floor, NICON Plaza, Central Area, Abuja does not live in Rivers State and has no personal knowledge of the facts of this case. B

ii. That the 2nd Respondent duly gave Notice of his intention to rely on a Preliminary Objection, to challenge the competence of this election petition and the jurisdiction of the Tribunal to entertain same, independently before his Reply to the Petition. C

III. That pre-hearing has not commenced in this matter as no pre-hearing session has yet been held.

IV. That the deponent; Wole Ilori Esq., has not denied that Hon. Justice P. N. C. Agumagu was purportedly sworn into office as a Chief Judge of Rivers State without any recommendation from the D National Judicial Council in his favour and that he was suspended from office as a Judicial Officer.

v. That the deponent: Wole Ilori Esq., has not denied the fact that the President of the Court of Appeal appointed the Chairman and Members of this Tribunal without constitution with any Chief Judge (or Acting Chief Judge) of Rivers State or President (or acting President) of the Customary Court of Appeal of Rivers State. E

VI. That the deponent: Wole Ilori Esq., has not denied the fact that at all times material to the constitution and composition of this Honourable Tribunal there was no functional Chief Judge for Rivers State and no functional President of the Customary Court of Appeal of Rivers State. F

VII. That I know as a fact that 2nd Petitioner did not give the requisite 21 days notice to the 1st Respondent to notify it of the G holding of the primary election of the 2nd Petitioner for nomination of its candidate for the Governorship election.

VIII. That the Petitioners have not tendered any such notice before this Tribunal.

5. That in further answer to the false and misleading allegations of fact as contained in paragraphs 4, 5(i)-(ii), 8,9,10,13,15, 16 and 17 of the said affidavit of Wole Ilori Esq., I depose as follows: H

i. That it is not true that there is a security challenge or situation in Rivers State to necessitate the establishment, location and sitting of

this Honourable Tribunal in Abuja outside the territory jurisdiction of Rivers State.

ii. That I know as a fact that other regular courts, including the Port Harcourt Judicial Division, of the Court of Appeal, the Port Harcourt Judicial Division of the Federal High Court and the High Court of Rivers State.

III. That the security of the said regular courts are being taken care of and preserved by the Rivers State police command.

IV. That it is not true that the safety of this Honourable Tribunal and its officers, including litigants and their Counsel cannot be guaranteed if the Tribunal were to sit in Rivers State.

v. That there was never a time this Honourable Tribunal sat and entered an order or a directive, to bind the parties herein that it will sit in the Federal Capital Territory Abuja due to insecurity in Rivers State or any other reason.

6. That the case of Kemka Stanley Elenwo vs. President, Court of Appeal, Hon. Justice A.M. Pindiga, and 5 others had since been discontinued by the Plaintiff and there is no pending issue before the Court of Appeal relating to the validity of this Tribunal or its sitting in Abuja. A Certified True Copy of the Notice of Discontinuance is tendered herewith and marked Exhibit C.

7. That the same Kenka Stanley Elenwo who was also the Petitioner in Petition No. EPT/RV/GOV/05/2015 Mr. Kemka Stanley Elenwo v. Nyesom Ezenwo Wike has since, out of frustration resulting from the huge cost he has been put to in maintaining his election Petition in Abuja, withdrawn his petition and the same was struck out on the 6th day of July 2015 by this Hon. Tribunal.

8. That I am informed by Dike Udenna Esq., of Counsel in the firm of E. C. Ukala & Co., solicitor to the 2nd Respondent/Appellant, sometime on Friday the 10th day of July 2015 at about 2pm during a review session in their Chambers at No.18 Thomas Sankara Street, Asokoro, Abuja and I verily believe him as follows:

i. That the territory jurisdiction of this Honourable Tribunal is Rivers State of Nigeria and not the Federal Capital Territory, Abuja where it presently sits.

ii. That election petition being sui generis means that strict compliance with all laws and procedural rules are mandatory.

III. That all the persons against whom the several allegations of

crime were levelled have not been joined as parties to this election petition and there can be no agency relation in criminal liability or conduct.

IV. That by reason of the rule of law entrenched in Nigeria, breaches or non-compliance with the mandatory provisions of the Constitution of the Federal Republic of Nigeria 1999 as amended, are illegal and unlawful and cannot be justified because no personal damage is occasioned to an individual. B

v. That the several allegations of crime against persons who are not parties to this election petition cannot go to trial in their absence as they are constitutionally entitled to be heard in their defence. C

VI. That the Respondents herein cannot be vicariously liable for the criminal actions or inactions of the several persons accused in the paragraphs of the petition but who have not been made parties to defend themselves. D

VII. That unless this application is urgently taken outside the pre-hearing session and determined, this Honourable Tribunal runs the risk of embarking on the exercise of judicial powers in futility without the requisite jurisdiction.

9. That the grant of this application will meet the ends of justice. E

10. That I swear to this affidavit in good faith, conscientiously believing the contents to be true and correct and in accordance with the provisions of the Oaths Act."

It is noted by me, that the 1st and 2nd Respondents in their 18 paragraph joint counter affidavit which is copiously reproduced above revealed in paragraphs 8, 9 and 10 and Exhibit DI attached to it that there were compelling reasons why the tribunal had to be relocated to Abuja to hear and determine the pending petitions. At page 691 of the Record, the tribunal alluded to Exhibit DPI attached to the said counter affidavit and used it to arrive at its conclusion in its ruling. The said exhibit was also attached to the Further Affidavit filed by the appellant, but it is bizarre however, to note that the appellant failed to include it in the record for reason best known to him. F

Still on the relocation or location of the tribunal to Abuja, I have closely studied Section 285(2) of the 1999 Constitution and unable to see anywhere in the said provisions where it was stated that election tribunal for each State shall or must H

sit in the State, to the exclusion of the possibility of it sitting anywhere or somewhere else, especially in a situation where there are compelling or apparent reasons of evidence of serious insecurity which could compel it to relocate to another venue outside the State it was established for. In the instant case, the counter affidavit filed by the 1st and 2nd Respondents gave an insight and compelling reasons in paragraphs 8, 9 and 10 (supra) bordering on impending insecurity prevailing in Rivers State as at the time the tribunal was empanelled or constitute by the President of the Court of Appeal. Certainly such is the “compelling circumstance” that led the Court of Appeal President to issue Exhibit DPI directing the tribunal to relocate to Abuja. The counter affidavit further revealed that it is not Rivers State Election Tribunal alone that was relocated to Abuja because other election tribunals of Borno, Adamawa, Akwa-Ibom and Gombe States were similarly relocated to Abuja on the directive of the President of Court of Appeal for similar reason of insecurity of the chairmen and members of the tribunals and their supporting staffs.

It is noteworthy, that at the tribunal, the present respondents relied on Doctrine of Necessity while opposing the application by the appellant, especially, on the relocation of the tribunal to Abuja. The 1st and 2nd Respondents relied on the said doctrine, as a ground of objection of the appellants to challenging the jurisdiction of the tribunal (see page 627 of the Record). The learned silk for the two respondents also specifically relied on and argued that the doctrine of necessity is applicable in this instant case and stated that doctrine was not raised by learned counsel in Ibori’s case and he therefore cited that reason as another distinguishing factor between the cases of Ibori vs Ogboru (supra) and Ogboru vs President of Court of Appeal (supra) with regard to the issue of relocation of the tribunal to Abuja. Apparently, the tribunal had alluded to the issue of insecurity or even the doctrine of necessity as a ground or one of the grounds that informed the President of the Court of Appeal to relocate the tribunal to Abuja. Similarly, the court below had also accepted and relied on doctrine of necessity as a ground to justify the relocation of the tribunal to Abuja when on page 801 of the Record it held in its judgment as follows:-

“The respondents have referred to the doctrine of necessity as the justification for the relocation of the Tribunals to Abuja to sit. We agree. It is surprising to say the least, to argue that since there was a security situation in Rivers State, the President of the court of Appeal should not have constituted the Tribunal. If that scenario had been followed by the President of the Court of Appeal, where would those aggrieved by the result of the election ventilate their grouse?” B

There is no gainsaying that the above finding of the lower court is far reaching as it touches deeply on one of the main grouses in the appellant’s application at the tribunal regarding relocation. It is in fact the gravamen of his application and by extension, of his appeal to the lower court and even in this court. In a nutshell, the lower court by the above finding accepted and relied on doctrine of necessity as one of the grounds leading to the relocation of the tribunal. It is rather surprising that appellant did not deem it expedient and proper to raise a ground of appeal against the lower court’s reliance and acceptance of the doctrine of necessity as a reason to justify the relocation of the tribunal to Abuja. I do not want to say more on that point. Suffice it to say however, that he could be deemed to have also endorsed the stance of the lower court on that, and is therefore deemed to have accepted it. C
D
E

As a corollary, it is my view that doctrine of necessity is applicable in this instant case and it was rightly applied by the tribunal and the lower court to justify the resolve by the President of the Court of Appeal to relocate the tribunal to Abuja to hear and determine the petition instead of in Rivers State, in view of the impending insecurity prevailing there in order to save the lives of the judges of the tribunal and its supporting staff. See the case of LAKANMI & ANOR VS ATTORNEY GENERAL WEST (1970) NSCC 143 and the recent case of OGUEBIE & ANOR VS CHUKWUDILE & 2 OTHERS (1979) ALL NLR 38 at 52-53. F
G

I strongly hold the view that the lower court was right in relying on, accepting and applying the doctrine of necessity to bear as one of the grounds, for relocating the tribunal by the President of the Court of Appeal to Abuja, in view of serious security challenges prevailing in Rivers State when the tribunal was constituted. I accordingly so hold. H

It is clear from the wordings of the sole issue raised for the determination of this appeal that the appellant bitterly complained of the refusal/failure of the lower court to be bound by its earlier decisions in *Ibori vs Ogboru* (supra) and *Ogboru v President of Court of Appeal* (supra) with regard to the constitution of the tribunal and against its jurisdiction to entertain and hear the petition in Abuja instead of Rivers State. I have in the fore paragraphs of this judgment, held that the tribunal was properly constituted by the Court of Appeal President and also held that in the light of the impending security challenges then prevailing in Rivers State, the relocation of the tribunal to Abuja was necessary and in order, as it was meant to safeguard the lives of Chairman and members of the tribunal and its supporting staff. What remains for me to address now is, whether the lower court was justified in not following its two previous decisions mentioned supra. Earlier in this judgement, I reproduced excerpt from the judgment of Court of Appeal in *Ibori v Ogboru*, where it interpreted the provisions of Section 285(2) of the 1999 Constitution as amended on which said provisions, this appeal revolved. Learned appellant's senior counsel argued that the lower court attempting to distinguish the facts of *Ibori's v Ogboru* (supra) from those in the instant case. He stated that the decision in *Ibori vs Ogboru* basically touches on the interpretation of Section 285(2) of 1999 Constitution which said provisions remain the same and was also relied on by the lower court also for interpretation. He posited that the lower court should not have allowed itself to be influenced by peculiar facts of the case or the convenience of the parties contrary to the earlier interpretation it gave in *Ibori v Ogboru*. See the Hon. Justice E.O. Araka vs The Hon. Justice Don Egbue LER (2003) SC 167 at 199. He said the meaning and intendment of the constitutional provisions are constant and do not change with changing facts and circumstance of each case. The lower court according to the learned silk ought to give effect to constitutional prior issues, as they stand and not to adopt an interpretation to suit the changing facts and circumstances of any case or of this instance case. See *PDP vs INEC* (1999) SC 66 at 199 or (1999) 11 NWLR (pt. 626) 200 or (1999) 77 SC (pt. 11) 30.

In yet another submission, the learned silk for the appellant argued that the new interpretation of Section 285(2) of the 1999

Constitution as amended given by the lower court tantamount to giving or creating an exception that consultation could be dispensed with and that by so doing, it is changing the law which it has no power so to do. See *AYENI vs UNIVERSITY OF ILORIN* (2000) 2 NWLR (pt 644) 290 at 305.

On his own part, the learned silk for the 1st and 2nd Respondents expressed an opinion different from the one submitted above by the learned silk for the appellant. He opined that the decision of *Ibori vs Ogboru* is completely irrelevant. He said the complaint of the learned silk for appellant is that the lower court refused to follow its earlier decision in *Ibori's* case and as well as in the cases of *Dalhatu vs Turaki* (2003) 15 NWLR (pt. 843) 310 at 3390 and *Usman v. Umaru* (1992) 7 NWLR (pt. 254) 377. He said the learned appellant's senior counsel did not reveal his position on whether the lower court was still bound to follow its earlier decisions even where the facts of those earlier decisions differ from those in case at hand. He submits that the lower court is not bound to do so. See *OBIUWEUBI VS CBN* (2011) 7 NWLR (pt 1247) 465 at 497 G.

As I said supra, the grouse of the appellant's senior counsel is the failure or refusal of the lower court to be bound by the decision in Ibori v Ogboru (supra). I have closely read the said decision. It is noted by me, that the facts in that decision are distinguishable from the facts in this instant case. For instance, in Ibori's case the tribunal on its own volition decided to relocate to Abuja and sit there, while in the instant case it was the Court of Appeal President who gave directive it in Exhibit DPI to relocate to Abuja. Also, unlike in this instant case where there were security challenges in Rivers State before the tribunal was constituted as evidenced in petitioners' counter affidavit, there were no such security challenges in Ibori v Ogboru (supra) before the tribunal decided to relocate itself to Abuja on its own. More importantly, evidence abound in this instant case, that there were serious insecurity challenges prevailing in Rivers State which therefore called for the application of doctrine of necessity to bear in this instant case which was accepted by the tribunal and later endorsed by the lower court in this instant case, whereas such security challenges were completely absent in Ibori's case.

Based on ground of doctrine of necessity, the President of the lower court deemed it proper and expedient to move the already established and constituted tribunal to relocate to Abuja to entertain and hear the petition and that was done to safeguard the lives of the chairman, members of the tribunal and other supporting staff. As I said above, there was no any evidence of security challenges adduced before the Court of Appeal in Ibori v Ogboru (supra). I am therefore in agreement with the lower court's finding where it held thus:-

"Since the issue of security of the members of the tribunal and the intervention of the President of Court of Appeal in the directive to relocate, did not come to play in the case of Ibori v Ogboru (supra) the facts of the two cases different (sic) and Ibori vs Ogboru cannot be a precedent requiring application in this instance. The motivational factors for the relocation of the tribunal are as wide and varied as can never be imagined".

Similarly, the cases of Ogboru v the President of Court of Appeal (supra) and Dalhatu v Turaki (supra) are irrelevant and not applicable to the instant appeal in view of disparities in their facts with the facts in this case at hand.

On the whole, in view of my discourse above, I hold that the tribunal had been properly constituted by the President of the Court of Appeal even without consultation with Chief Judge of Rivers State or President of Customary Court of Appeal who in any case, were even non-existent at the time of constituting the tribunal. Again, it is my judgment that the President of the Court of Appeal had the power and had rightly exercised such power to relocate the tribunal to Abuja, to entertain, hear and determine the petition in view of security challenges prevailing in Rivers State when the tribunal was empanelled. Therefore, the tribunal was properly constituted and it is thus NOT bereft of jurisdiction to entertain, hear and determine the petition in Abuja in view of the adduced evidence of insecurity prevailing in Rivers State then.

Thus, in the light of what I have said above, I am unable to see any merit in this appeal. It is therefore hereby dismissed with no order on costs.

FABIYI JSC

I have had a preview of the judgment just delivered by my learned brother - Sanusi, JSC. I agree with the reasons therein advanced to arrive at the conclusion that the appeal lacks merit and should be dismissed,

Let me make some remarks In support of the comprehensive judgment. Basically, the issue herein centres on the unalloyed construction to be placed on the provision of Section 285(2) of the Constitution of the Federal Republic of Nigeria, 1999, as emended. It is not in dispute that at the material time, the Chief Judge as well as the President of the Customary Court of Appeal were not on ground in Rivers State. It was then not feasible for the President of the Court of Appeal to have consultation with them in a bid to constitute the Tribunal Chairman/Members. This position makes the use of the word shall in the law discretionary; not mandatory. It will be absurd to find otherwise.

From the affidavit filed by the 1st and 2nd respondents, there is no doubt that the atmosphere in Rivers State at the material time was tense. I strongly feel that the Doctrine of Necessity, as canvassed on behalf of the stated respondents by learned Senior Counsel, is in point. It was for the protection of the Tribunal Chairman/Members as well as Tribunal Officials and witnesses. The President of the Court of Appeal was in order in relocating the venue of the hearing of the Petition to a serene place. In the realm of medical science, it is often said that 'prevention is better than cure'. In a state of insecurity, pre-emptive action is far Superior to in-action which can produce negative result. The decision in the case of Oguebie & Anor. v. Chukwudile & Ors. (1979) All NLR 38 at 52-53 is in point. The court below was on a firm stand in affirming the position taken by the Tribunal in this regard.

For the above reasons and those carefully set out in the lead judgment, I too feel that the appeal is devoid of merit and should be dismissed. I order accordingly.

I make no order on costs.

GALADIMA JSC

This is an appeal against the decision of the Court of Appeal,

Abuja Division delivered on the 5th day of September, 2015. In his appeal to the Court of Appeal, the Appellant had sought to nullify the decision of the Rivers State Governorship Election Tribunal which had ruled on 29th day of July, 2015 that it could competently sit in Abuja to adjudicate on the petition brought by the 1st Respondent
B herein.

In its considered Ruling the lower court held that the requirement of consultation with the Chief Judge of a State or President of the Customary Court of Appeal of a state before the appointment of the chairman and members of the Election Tribunal for that state can
C be dispensed with in the absence of the aforementioned two functionaries.

The court concluded that the Tribunal was validly constituted and it was entitled to sit in Abuja to hear and determine this election
D petition.

The Appellant, dissatisfied with the said decision, filed his Notice of Appeal on the 18th day of September, 2015 containing 4 grounds of Appeal.

Briefly, some material facts giving rise to this Appeal are as
E follows: On the 11th and 12th of April 2015 the 3rd Respondent (INEC) conducted Election to the office of Governor of Rivers State. The Appellant who was sponsored by the 4th Respondent emerged winner of the Election. The 1st Respondent who was candidate of
F the 2nd Respondent aggrieved by the result of the Election, filed a Petition for Rivers State Governorship Election Tribunal sitting in Abuja, praying for the nullification of the said Election and to conduct a fresh election.

When the Appellant, as 2nd Respondent at the Tribunal, was
G served with the Petition, he filed a Notice of Preliminary Objection challenging the competence of the Election Petition and the jurisdiction of the Tribunal to entertain same together with his Reply to the Petition. He set out the grounds of the Preliminary Objection as follows:

H *"i. The Honourable Tribunal was not established and set up in accordance with the provisions of section 285(2) and paragraph 1(3) of the 6th Schedule to the 1999 Constitution, as amended.*

ii. The Petitioner lacks the requisite locus standi and right to institute the election petition.

III. The 3 grounds of the petition are defective and incompetent for not being in conformity with the known grounds for questioning an election under the Electoral Act 2010 and also for consisting of an unlawful amalgamation of two alternative grounds or reasons, which cannot stand together.

IV. The reliefs sought by the Petitioners are defective and incompetent for being contradictory and inconsistent with the grounds of the petition

v. The petition fails to disclose any reasonable cause of action against the Respondents.

VI. The issuance and service of the originating process did not comply with the mandatory provisions of section 96, 97 and 98 of the Sheriffs and Civil Process Act. ”

Thereafter the Appellant filed a Motion on Notice on 30th June 2015, now formally raising these issues and urging the Tribunal to strike out the petition for want of jurisdiction or in the alternative to dismiss same for being incompetent. Opposing the application, the 1st and 2nd Respondents as Petitioners filed their Counter-Affidavit and written address on 7th July, 2015. The Counter-Affidavit of 18 paragraphs copied on pp.615 - 617 of the Records read as follows:

1. I am one of the solicitors assisting Chief Akin Olujinmi, CON, SAN, the leading counsel to the petitioners in this petition.

2. By reason of the foregoing, I know the facts of this case and I have the authority of the petitioners to swear to this counter-affidavit.

3. I have read jointly with the 1st petitioner, the affidavit in support of the 2nd respondent's motion.

4. Paragraphs 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18(i) to (x), 19(a) (b) (c), 20, 21, and 22 of the affidavit in support of the motion are false, diversionary and grand standing.

5. With further reference to paragraphs 9 and 10 of the affidavit, the 1st petitioner told me in our office at the 5th floor of NICON Plaza, Central Area, Abuja, on July 4th, 2015 at 11 a.m. and I verily believe him, as follows:

(i) That he was properly nominated in accordance with the law and sponsored by the 2nd petitioner for the election.

[ii] That the 2nd petitioner is a registered political party and that it sponsored him for the election.

6. *It is a matter of common knowledge that the President of the Court of Appeal is the one given power by the Constitution to appoint the Chairman and members of this election tribunal and she appointed the Chairman and members of this election tribunal.*

B 7. *It is also a matter of common knowledge that the President of the Court of Appeal has power to make practice directions for the election tribunals.*

C 8. *Prior to and during the election of 11th April, 2015 and up till now, Rivers State has been engulfed in a series of political crisis and violence to the extent that several people have been maimed killed, some kidnapped and properties destroyed.*

D 9. *I know as a fact that the struggle for political power and ascendancy in Rivers State has created a level of insecurity therein such that it will be extremely unsafe for any election tribunal to sit in Rivers State.*

E 10. *I know as a fact that it was in realization of the need to ensure proper and fair adjudication of election petitions, away from the pervasive violence in Rivers, Akwa Ibom, Borno, Bauchi, Taraba, Adamawa and Yobe that the President of the Court of Appeal issued a direction to the Election Tribunal of the States to hear petitions before them In Abuja.*

11. *The motion alone and the affidavit in support together run into nineteen odd pages while the written address covers 32 pages.*

F 12. *Apart from asking this tribunal to strike out several paragraphs of the petition, the applicant also strangely specifically wants the court to strike out wards and polling units.*

G 13. *In view of the time limitation for the trial of petitions, I verily believe that the notice of motion of preliminary objection has been filed to delay the trial of this petition and cause the same to expire by affluxion of time.*

14. *We are already two months into the statutory 180 days of this petition.*

H 15. *I know as a fact that most of the issues raised in the objection have been canvassed in the past in some cases and rejected by the courts but they are now being raised again.*

16. *It is now a matter of common knowledge that the Supreme Court and the Court of Appeal have held in several cases that preliminary objection be taken along with the petition so as not to*

delay the trial of the petition.

17. Besides, I am aware that the issue whether this election tribunal can sit in Abuja is already pending before the Court of Appeal for resolution based on a reference of the point to the Court of Appeal by hon. Justice Kolawole of the Federal High Court, Abuja. The petitioners will at the hearing rely on a copy of the ruling of Kolawole J issued in the case of *Kemka Stanley Elenwo v. The President, Court of Appeal, Hon. Justice A. M. Pindiga, and 5 others*.^B

18. I swear to this counter-affidavit in good faith conscientiously believing the contents to be true and correct in accordance with the Oaths Act.^C

The Appellant also filed a further affidavit and Reply address copied at pages 651 to 683. The Appellant further Affidavit copied at pages 651 - 654 of the Records read as follows:

"1. That I am the State Legal Adviser of the Peoples Democratic Party (PDP) Rivers State and by virtue of my position and office I am a member of the Rivers State Executive Committee of the 3rd Respondent; the political party that sponsored the 2nd Respondent for the April 11th and 12th Governorship election in Rivers State. D

2. That by virtue of my aforesaid position and official duties I am conversant with the facts of this case and have the consent of the 2nd Respondent/Applicant to depose to this affidavit on his behalf^E

3. That I have seen and perused a copy of the 18 paragraphs Counter Affidavit filed by the Petitioners as deposed by one Wole llori Esq., a Legal Practitioner said to be assisting Chief Akin Olujinmi SAN, and except as I may hereinafter expressly admit, all the paragraphs of the said affidavit are denied as blatant falsehood. F

4. That the Allegations of fact as contained in paragraphs 4, 5(i)-(ii), 8, 9, 10, 13, 15, 16 and 17 of the said affidavit of Wale llori G Esq., are false and misleading and in specific response to those paragraphs I depose as follows:

i. That the deponent; Wale llori Esq., legal practitioner of 5th Floor, NICON Plaza, Central Area, Abuja does not live in Rivers State and has no personal knowledge of the facts of this case. H

ii. That the 2nd Respondent duly gave Notice of his intention to rely on a Preliminary Objection, to challenge the competence of this election petition and the jurisdiction of the Tribunal to entertain same, independently before his Reply to the Petition.

III. That pre-hearing has not commenced in this matter as no pre-hearing session has yet been held.

IV. That the deponent; Wale Ilori Esq., has not denied that Hon. Justice P. N. C. Agumagu was purportedly sworn into office as a Chief Judge of Rivers State without any recommendation from the National judicial Council in his favour and that he was suspended from office as a judicial Officer.

v. That the deponent: Wole Ilori Esq., has not denied the fact that the President of the Court of Appeal appointed the Chairman and Members of this Tribunal without constitution with any Chief judge (or Acting Chief judge) of Rivers State or President (or acting President) of the Customary Court of Appeal of Rivers State.

VI. That the deponent: Wole Ilori Esq., has not denied the fact that at all times material to the constitution and composition of this Honourable Tribunal there was no functional Chief judge for Rivers State and no functional President of the Customary Court of Appeal of Rivers State.

vii. That I know as a fact that the 2nd Petitioner did not give the requisite 21 days notice to the 1st Respondent to notify it of the holding of the primary election of the 2nd Petitioner for nomination of its candidate for the Governorship election.

VIII. That the Petitioners have not tendered any such notice before this Tribunal.

5. That in further answer to the false and misleading allegations of fact as contained in paragraphs 4, 5(i)-(ii), 8, 9, 10, 13, 15, 16 and 17 of the said affidavit of Wole Ilori Esq., I depose as follows:

i. That it is not true that there is a security challenge or situation - in Rivers State to necessitate the establishment, location and sitting of this Honourable Tribunal in Abuja outside the territory jurisdiction of Rivers State.

ii. That I know as a fact that other regular courts, including the Port Harcourt judicial Division, of the Court of Appeal, the Port Harcourt judicial Division of the Federal High Court and the High Court of Rivers State.

iii. That the security of the said regular courts are being taken care of and preserved by the Rivers State police command.

IV. That it is not true that the safety of this Honourable Tribunal and its officers, including litigants and their Counsel cannot be

guaranteed if the Tribunal were to sit in Rivers State.

v. That there was never a time this Honourable Tribunal sat and entered an order or a directive, to bind the parties herein, that it will sit in the Federal Capital Territory Abuja due to insecurity in Rivers State or any other reason.

6. That the case of Kemka Stanley Elenwo vs. President, Court of Appeal, Hon. justice A. M. Pindiga, and 5 others had since been discontinued by the Plaintiff and there is no pending issue before the Court of Appeal relating to the validity of this Tribunal or its sitting in Abuja. A Certified True Copy of the Notice of Discontinuance is tendered herewith and marked Exhibit C.

7. That the same Kenka Stanley Elenwo who was also the Petitioner in Petition No. EPT/RV/GOV/05/2015, Mr. Kemka Stanley Elenwo v. Nyesom Ezenwo Wike has since, out of frustration resulting from the huge cost he has been put to in maintaining his election Petition in Abuja, withdrawn his petition and the same was struck out on the 6th day of July 2015 by this Hon. Tribunal.

8. That I am informed by Dike Udenna Esq., of Counsel in the firm of E. C. Ukala & Co., solicitor to the 2nd Respondent/Applicant, sometime on Friday the 10th day of July 2015 at about 2pm during a review session in their Chambers at No. 18 Thomas Sankara Street, Asokoro, Abuja and I verily believe him as follows:

i. That the territory jurisdiction of this Honourable Tribunal is Rivers State of Nigeria and not the Federal Capital Territory, Abuja where it presently sits.

ii. That election petition being sui generis means that strict compliance with all laws and procedural rules are mandatory.

III. That all the persons against whom the several allegations of crime were levelled have not been joined as parties to this election petition and there can be no agency relation in criminal liability or conduct.

IV. That by reason of the rule of law entrenched in Nigeria, breaches or non-compliance with the mandatory provisions of the Constitution of the Federal Republic of Nigeria 1999, as amended, are illegal and unlawful and cannot be justified because no personal damage is occasioned to an individual.

v. That the several allegations of crime against persons who are not parties to this election petition cannot go to trial in their absence

as they are constitutionally entitled to be heard in their defence.

VIII. That the Respondents herein cannot be vicariously liable for the criminal actions or inactions of the several persons accused in the paragraphs of the petition but who have not been made parties to defend themselves.

B *IX. That unless this application is urgently taken outside the pre-hearing session and determined, this Honourable Tribunal runs the risk of embarking on the exercise of judicial powers in futility without the requisite jurisdiction.*

C *9. That the grant of this application will meet the ends of justice.*

10. That I swear to this affidavit in good faith, conscientiously believing the contents to be true and correct and in accordance with the provisions of the Oaths Act. “

D The Tribunal heard the application and took extensive arguments and submissions of the learned counsel to the parties and in its Ruling of 29th July 2015, held and concluded that it was properly and duly constituted by the President of the Court of Appeal and therefore had jurisdiction to sit in Abuja to hear and determine the
E election petition.

Dissatisfied with the said Ruling, the Appellant appealed to the Court of Appeal which heard the Appeal together with the 1st and 2nd Respondents Preliminary Objection. It dismissed the Preliminary
F Objection and allowed the appeal in part, holding that, the Constitutional requirement of prior consultation with the Chief Judge of a State or President of the Customary Court of Appeal of a State before the appointment of the Chairman and Member of the Governorship Election Tribunal for that state as required by paragraph 1
G (3) of the 6th schedule to the 1999 Constitution, as amended can be waived and disposed with in the absence of the two functionaries in the state and concluded that the Tribunal was entitled to sit in Abuja outside the Territorial enclave of Rivers State.

The Court below held thus:

H *“The wording of section 285(2) of the 1999 Constitution as stated above established the election Petition tribunals. Nowhere, in that section is the word “location in the state” used.*

The instant appeal is against the foregoing decision of the court below. Based on 4 grounds of Appeal, a sole issue raised by the

Appellant for determination in this appeal reads.

“Whether upon proper interpretation of the provisions of section 285(2) of the 1999 Constitution, as amended, paragraph 20(2) of the First Schedule to the Electoral Act 2010, as amended and the decisions in Ibori vs. Ogboru (2005) 6 NWLR (Pt.920) 102 and Ogboru vs. President, Court of Appeal (2007) All FWLR (Pt.369) 1221, the Court of Appeal was justified in its conclusion that the Rivers State Governorship Election Petition Tribunal sitting in Abuja was properly constituted and had the jurisdiction to entertain the Governorship election petition emanating from Rivers State?” (Distilled from grounds 1, 2, 3, 4, 5 of the grounds of Appeal) B
C

In urging this court to resolve the sole issue in favour of the Appellant, his learned silk Emmanuel C. Ukala SAN drew our attention to the fact that the Election Petition instituted by the 1st Respondent, subject matter of this case relates to the election to the office of Governor of Rivers State, held on 11/12/2015. D

It is contended, that the Tribunal was constituted to sit by the President of the Court of Appeal to sit in Abuja to determine petitions without consultation with any Chief Judge or President of the Customary Court of Appeal of Rivers State contrary to the provisions of section 285 (2) and (3) of the Constitution of the Federal Republic of Nigeria, 1999 as amended and paragraph 1 (1) and (3) of the Sixth Schedule thereto. E

By this act of the President, the learned silk contended that the appellant rightly challenged the jurisdiction and competence of the Tribunal to sit and determine the petition of the 1st and 2nd Respondents herein. Reliance was placed on the two cases of IBORI v. OGBORU (2006) 6 NWLR (pt.920) 102 and OGBORU v. PRESIDENT COURT OF APPEAL (2007) ALL FWLR. (pt.369) 1221 respectively, wherein it is submitted that the requirement of prior consultation with the State Chief Judge or President of the Customary Court of Appeal of the State before appointing the chairman and members of the Tribunal is mandatory. That the absence of sitting Chief Judge or President of the Customary Court of Appeal for Rivers State at the material time cannot justify derogation from express and mandatory provisions of the constitution because to do this will be tantamount to enthrone arbitrariness in derogation from the entrenched principles of the rule of law; cited GOVERNOR OF LA- F
G
H

GOS STATE v. OJUKWU (1986) ALL NLR 233. A.G. ABIA STATE v. A.G. FEDERATION (2006) ALL FWLR (pt. 338) 604 at 736.

It was further contended that the President of the Court of Appeal was duty bound to comply with the mandatory provisions relating to prior consultation and where it was impossible for him to do so, due to no fault of his, he was entitled to refrain from making the appointment in breach of the Constitutional provision and that the action would have been justified: Cited OKON BASSEY EBE v. COMMISSIONER OF POLICE (2008) 1 SC (pt. II) 194. That impossibility of performance of an obligation due to no fault of him affords good exercise.

On the relocation of the Tribunal to Abuja by the President (supra) learned silk has contended that he was not entitled to do so, as this was in breach or violation of express provisions of the Constitution.

It is posited that the powers of the President pursuant to paragraphs 1(1) and (3) of the SIXTH schedule to the Constitution is limited to appointing the chairman and members to sit within the geographical territory of where the election was conducted. Relies on RODA v. FRN (2015) 10 NWLR (pt.1468) 427 at 482.

Learned Silk, YUSUF ALI, SAN in his brief filed on behalf of the 1st and 2nd Respondents formulated only one issue thus:

“Whether the Tribunal has jurisdiction to entertain this petition, (Covers grounds I, 2, 3, 4, and 5).”

It is submitted that the views expressed by the appellant from the wordings of the provisions, the act of establishment of the Tribunals was a futuristic event to happen at the appropriate time in future shows clearly that the appellant does not appreciate the meaning and purport of S.289(2) of the Constitution. That particularly the phrase therein which says:

“There shall be established, “Whereso provided in any enactment or constitution, has the effect or force of either the body, to which it relates has been established by law of the Constitution itself That there is nothing more to do by the person or authority thereat. Submitted that by the force of Section 285 (2) of the Constitution, the Tribunals had been established.”

It is submitted that one consideration, why the requirement of consultation must be given a directory meaning is the

fact that pursuant to section 134 (1) of the Electoral Act 2010 and section 285 (2) of the 1999 Constitution, an election petition shall be filed within 21 days after the declaration of petition result. It is argued that the President of the Court of Appeal in complying with the provisions of paragraph 1 (3) of the Sixth Schedule to the Constitution would have in mind the provisions relating to the time for filing election petitions. B

That the interpretation of paragraph 1 (3) (supra) urged by the Appellant to adopt would result in the most bizarre and absurd situation. It would mean that the absence of the two key judicial functionaries in the state would stultify the constitution of the panel to sit and hear the petitions in the state. That in interpreting a statute, where the language of the legislation admits of two possible constructions and if construed in one way, would lead to absurdity or injustice, the courts will act upon the view that such a result could not have been intended; unless the intention to bring it about has been manifested in plain words. Reference to *LAWAL v.* C

G.B. OLLIVANT (1972) 3 se. 124; *BRONIK MOTORS LTD. & ANOR v. WEMA BANK LTD* (1983) LPELP 808. Learned Silk has submitted that the counter-affidavit of the Respondents at page 616 paragraphs 8, 9 and 10 and Exhibit DP. 1 attended to the further affidavit of the Appellant, which the Tribunal had used in its ruling disclose compelling reasons justifying the decision of the President of the Court of Appeal. That she was faced with huge compelling circumstances in form of pervasive insecurity in Rivers State and other states like Borno, Adamawa, Akwa Ibom and Gombe, which had their Tribunal relocated to Abuja to sit. D E F

Learned Silk viewing the circumstances generally and specifically as it affects Rivers State, justifies the decision of the Court of Appeal President and as it has been done elsewhere by reading the doctrine of necessity into the situation. He placed reliance on the old cases of *LAKANMI & ANOR v. ATTORNEY GENERAL (WEST)* (1970) NSCC 1143; *ATT- GENERAL OF THE REPUBLIC v. MUSTAFIT IBRAHIM & ORS* (1964) CYPRUS LAW REPORTS 95. G H

In his Reply Brief of Argument filed on 5/10/2015, learned silk has pointed out that - the totality of the arguments of the 1st and 2nd Respondents in paragraphs 4.1 to 4.7 at pp 3 - 5 of their Brief of argument relating to the establishment of the Tribunal by the Consti-

tution are misconceived and totally irrelevant and do not arise for consideration in this appeal. The reason being that there is no ground of appeal on those issues before this court and the appellants did address any argument on the points in his Brief of argument nor did the 1st and 2nd Respondents filed any Respondent's Notice or Cross -
 B Appeal on the point. It is urged that the arguments be discounted as these go to no issue. Relies on J. A. ADERIBIGBE v. TIAMIYU ABIDOYE LER (2009) SC. 27. ONIFADE v. OLAYIWOLA (1990) 118 12 SC 1 at 40.

C Other points such as the clear intention of the legislature the need to consult the Chief Judge or President of the Customary Court of Appeal or the most Senior Judge of the High Court has been well taken.

D It is contended by the learned silk that the President acted in excess of the powers conferred on him by the Constitution and the reliance on the doctrine of necessity is irrelevant and unavailing.

I must observe that learned counsel for the 3rd and 4th Respondents did not file any briefs in this appeal. At the hearing of the appeal, they indicated that they had nothing to urge.

E In the case of GOVERNOR OF BENDEL & ANOR v. EGBE (1982) 3 NCLR 273 at 287 reference was made to sections 178 of the 1979 Constitution, which provided in similar in terms as section 285(2) of the 1999 Constitution. It reads thus:

F *"There shall be established for each states of the Federation the following bodies, namely (a) State Civil Service Commission.*

At page 287 paragraphs 6-7, the full court of the Court of Appeal held that the Commission had already been established by the Constitution and that what was left was the appointment of chair-
 G man and members of the Commission in accordance with the provision of section 179 and 180 of the Constitution which set down the qualifications for membership and mode of appointment. The decisions of the two lower courts in that case referred to the above are further reinforced by the provisions of section 285 (4) of the 1999
 H Constitution. It reads:

"The quorum of an election tribunal established under this section shall be the chairman and one other member."

I agree that the provision shows that the tribunal has already been established. This is the position of the law. Appellant's argu-

ment that the act of establishment of the tribunal was a futuristic event, missed the point. The Constitution has by its own force established the Election Tribunal. All that the President of the Court of Appeal does as and when deemed necessary is to empanel the Tribunal. This is not the same thing as establishing tribunal. By paragraphs, 1 (3) and 2 (3) of the Sixth Schedule to the 1999 Constitution, as amended show that it is the president of the Court of Appeal that has the power to Constitute the Election Tribunal by appointing the chairman and other members. B

It is in the light of the foregoing that the lower court agreed C with the Respondents and held at page 796 of the records thus:

“Now section 285 (2 of the Constitution 1999 as amended provide that:

“...The Constitution in Section 285(2) as above, has already provided and established the election petition tribunals for each State, D and so no law, is required to be enacted to establish the tribunals. It is not a futuristic provision. It is only the Chairman and members of the Tribunals who would adjudicate, that are to be appointed by the President of the Court of Appeal as provided in paragraph A1(3) and B2(3) of the Sixth Schedule to the 1999 Constitution as amended. E That is the futuristic event coming after the establishment of the tribunals by the Constitution.”

The lower court continued at page 797 of the records that:

“The Tribunal has been established, and no future act is required to establish it. We hold therefore that the election petition tribunals had been established by the Constitution. The President of the Court of Appeal did not establish them and cannot also do away with them.” F

The Appellant in his brief has queried the constitution of the Tribunal and its jurisdiction to hear the petition. The basis for his complaint is that at the time the tribunals were constituted, there was no Chief Judge or President of Customary Court of Appeal in place in Rivers State. Therefore compliance with the requirement of paragraph 3 of sixth schedule to the Constitution which prescribes consultation by the President of the Court of Appeal with the Chief Judge or the President of Customary Court of Appeal of the state was not made. H

On this contention, the lower Court at page 801 of the records

rightly held as follows:

“The same reasoning also applies to the issue of the alleged non-consultation with the Chief Judge or President of the Customary Court of Rivers State. If the two functionaries were not available, the President of the Court of Appeal could not conceivably fold arms and lament the situation. Acting and constituting the tribunal was the only available and responsible option. At any rate, I agree with the 1st and 2nd respondents, that the requirement of consultation is to get persons from Rivers State to have the opportunity to serve in Tribunals, like their counterparts in every State of the Federation. Once appointed from Rivers State, they could be posted anywhere to sit. So the consultation to be made by the President of the Court of Appeal, with the Chief Judge or President of Customary Court of Rivers State is not for the purpose of appointing Chairmen and members who would serve in the Governor Election Tribunal for Rivers State. So the complaint of the appellant can only be geared towards the appointment of the Chairman and members who are from Rivers State, serving in Tribunals in some other States of the Federation and not as Chairman and members from other States of the Federation, serving in the Rivers State Governorship Tribunal who were appointed in consultation with their Chief Judges or Presidents of the Customary Courts or Grand Khadis, since these heads of courts are on ground in those States.”

I must observe that the requirement for consultation with the Chief Judge or President of the Customary Court of Appeal of a State is not a condition for the appointment of members of the Tribunal. Consultation in the context of paragraph 3 of the Sixth schedule is and at facilitating nomination of members to the President of the Court of Appeal. The President is not bound to accept any name that may be nominated by a Chief Judge, where the position of the Chief Judge is vacant and there is no President of the Customary Court of Appeal in place, the President of the Court of Appeal can call for the names of serving judges from the Chief Registrar of the court of the particular state concerned from which the president can pick those to be appointed to a tribunal.

It would appear to me too that the word “shall” as used in paragraph 1 (3) of the sixth schedule (supra) governs the “power to appoint” and not the requirement for consultation. It is not to be

construed as a command or mandatory. It is not in every situation that the word imports a mandatory usage. It does not always necessarily follow that where the word “shall” is used it is limited to that meaning only. It can be interpreted as “may” See *UDE v. C. NWARA* (1993) 2 SCNJ 47. *ATUNGWU & ANOR v. OCHEKWU* (2013) LPELR 209. ENGR. CHARLES UGWU & ANOR v. SENATOR IFEANYI ARARUME & ANOR (2007) 6 SCNJ 316. *AMADI v. NNPC* (2000) 10 NWLR (pt. 674) 76. B

The interpretation of paragraph 1(3) of the sixth schedule (supra) the way the appellant would want it, would result in the most absurd situation. It would mean that as a result of the vacancy in the office of Chief Judge and President of Customary Court of Appeal of Rivers State no tribunal would be in place to hear and determine petitions of the 1st Respondents and so many others in their petitions in the National Assembly. To my mind such interpretation will only serve to defeat express provisions of S. 285 (3) of the Constitution (supra) and section 134(1) of the Electoral Act; and this will lead to manifest injustice. C

It is settled that where in the interpretation of a word appearing in a particular piece of legislation, such word is capable of two meanings, the court has a duty to adopt an interpretation which would not defeat the intention of the law maker. See *MANDARA v. ATTORNEY-GENERAL OF THE FEDERATION*, 1984 NSCC 221 *YABUGBE v. C.O.P* (1992) 4 SCN 116; *LAWAL v. G. B. OLLIVANT* (1972) SC 124. E

Reference has been made to the two cases of *IBORI v. OGBORU* (2005) 6 NWLR (pt. 920) 102 and *OGBORU v. PRESIDENT OF THE COURT OF APPEAL* (supra), The Respondents deposed at page 616 that there were very serious security challenges which was not in issue in *IBORI*’s case. It was the President of the Court of Appeal who for security reasons directed that the Tribunal should sit in Abuja in the instant case, where the Tribunal on its own resolved to relocate to Abuja in *BORI v. OGBORU* (supra). There was no reference to practice Direction and none was constituted. The facts and circumstance are different. That case cannot be said to have set a precedent. F

The 1st and 2nd Respondents herein in their counter Affidavit of 18 paragraphs (reproduced above) reveal in paragraphs 8, 9, and 10 and Exhibit DP 1 attached, to the Appellant’s further affidavit H

compelling reasons why the Tribunal had to be located to Abuja to hear pending petitions. At page 691 the Tribunal alluded to this Exhibit and used it in its Ruling. It was attached to the further affidavit of the Appellants. It is however not included in the record by the Appellant who attached it to their further affidavit. The facts in the instant case had to do strictly with security of members of the Tribunal generally. I do not think the facts of the case of *IBORI v. OGBORU* (supra) had any similarity to what led to the Tribunal being relocated to Abuja. There is nowhere in section 285(2) (supra) in which it is stated that the election Tribunal for each state shall be located in the state such that it cannot sit anywhere else even when the situation on ground compels it to relocate. The compelling circumstances, the 1st and 2nd Respondents deposed to in paragraphs 8, 9, and 10 were said to be grievous and “huge and pervasive insecurity plaguing Rivers State” generally and this led to issuance of Exhibit DPl by the President of the Court of Appeal. The same scenario informed her taking similar steps in Adamawa, Akwa Ibom, Borno and Gombe States which tribunals are also currently sitting in Abuja. I agree absolutely that the President of the Court of Appeal who rightly constituted the Election Tribunals can also exercise that power under section 145 (2) of the Electoral Act 2010 (as amended) to issue Practice Directions to Election Tribunals to sit in a place free of violence.

Now to the consideration of the Doctrine of Necessity or implied mandate relied specifically on by the 1st and 2nd Respondents as a ground to defeat the objection of the Appellant to the jurisdiction of the Tribunal. Also at the lower court, the Respondents at page 748 relied on the Doctrine as a distinct ground to deplete the Appellant’s appeal.

It is applied to justify the sitting of the Tribunal in Abuja instead of Rivers State. The case of *LAKANIMI & ANOR v. ATTORNEY GENERAL WEST* (1970) NSCC 143 is the one of the early cases in which reference was made to the doctrine and applied recently in the case of *OGUEBIE & ANOR v. CHUKWUDILE & 2 ORS.* (1979) ALL NLR 38 at 52 - 53(1979)

As I have stated in paragraphs 8, 9, and 10 of the counter-affidavit of the 1st and 2nd Respondent herein and Exhibit DPl clearly indicated that security reasons were the grounds relied upon by the President of Court of Appeal. The case at hand, no doubt calls for

the applicability, in the light of very serious security challenges not only in Rivers but elsewhere in the country. To my mind the doctrine will operate in circumstances where the constitution itself cannot measure up to a situation which has arisen and where an organ set up under the constitution is bereft of its power to function. The lower court rightly held that there was need to issue practice Direction to tribunal to enable it function without hindrance in an environment with minimum guarantee of security of lives. B

In the light of the foregoing reasons and those given in more details in the Lead Judgment of my learned brother, AMIRU SANUSI, JSC which I have endorsed as mine, I too dismiss this appeal without costs. C

PETER-ODILI JSC

I have had the privilege of reading in draft the judgment of my learned brother, Amiru Sanusi, JSC; I agree with the decision and the reasoning therefrom and there is nothing more to add. D

ARIWOOLA JSC

I had the opportunity of reading in draft the lead judgment of my learned brother, Amiru Sanusi, JSC. I am in agreement with the reasoning therein and the conclusion arrived thereat. There is no doubt that the lead judgment dealt with all the issues involved exhaustively and I have nothing new to add. F

The President of the Court of Appeal who is saddled with the responsibility was right in constituting the Rivers State Election Tribunal without consultation with the Chief Judge or President of the Customary Court of Appeal of Rivers State as neither was in office. In the same vein, the President of the Court of Appeal was in order in fixing Abuja as the venue of sitting of the said Tribunal in view of the well established security situation in Rivers State as at the time the Tribunal was constituted. His Lordship was, no doubt, duty bound to ensure adequate security for the Chairman and Members of the Election Tribunal and their staff. In the result, I too consider the appeal unmeritorious and liable to dismissal. Accordingly, I dismiss same. I also make no order as to costs. H

KEKERE-EKUN JSC

I have had the privilege of reading before now the judgment of my learned brother, AMIRU SANUSI, JSC just delivered.

I agree with the reasoning and conclusion that the appeal lacks merit and ought to be dismissed. I shall add a few words in support of the judgment.

It is the contention of learned senior counsel for the appellant that the actions of the President of the Court of Appeal in appointing and constituting the chairman and members of the Tribunal for Rivers State without consultation with the Chief Judge of the State or with the President of the Customary Court of Appeal as required by paragraph A1(1) & 3 and B2(1) & (3) of the 6th Schedule to the 1999 Constitution (as amended) was inexcusable and improper under the Law. He argued that the provisions are mandatory constitutional provisions which cannot be dispensed with or derogated from where there is no Chief Judge or President of the Customary Court of Appeal to be consulted.

Paragraph B (1) & (3) of the 6th Schedule to the 1999 Constitution (as amended) provides thus:

2 (1). *“A Governorship Election Tribunal shall consist of a Chairman and two other members.*

(3). Chairman and other members shall be appointed by the President of the Court of Appeal in consultation with the Chief Judge of the State, the Grand Kadi of the Sharia Court of Appeal of the State or the President of the Customary Court of Appeal of the State, as the case may be.”

In BRONIK MOTORS Vs WEMA BANK (1983) ALL NLR 272 @ 291 - 292 this court, per NNAMANI, JSC (of blessed memory) reiterated the principles of construction of constitutions to the effect that a constitution is a living document (not just a statute) providing a framework for the governance of a country not only for the present but for generations yet unborn. It was held that in construing the Constitution undue regard must not be paid to merely technical rules because in doing so the objects of its provisions as well as the intention of the framers of the Constitution would be frustrated.

Courts have always been encouraged to adopt a broad and liberal spirit in interpreting the provisions of the Constitution while

constantly bearing in mind the object which such provisions were meant to serve. See: MINISTER OF HOME AFFAIRS Vs FISHER (1980) A.C. 319 @ 328; NAFIU RABIU Vs THE STATE (1980) 8 - 11 SC 130 @ 148; ISHOLA Vs AJIBOYE (1995) 1 NWLR (Pt.352) 506.

What is the object of the provisions of paragraph A(l) & (3) B and B(1) and (3) of the 6th Schedule to the 1999 Constitution (as amended)? It is to enable the President of the Court of Appeal who has the power to appoint the chairmen and members of the Tribunals throughout the Federation to have the input of the Chief Judge C of a State or the President of the Customary Court of Appeal on suitable Judges and Magistrates to be appointed to those Tribunals. I agree with learned counsel for the 1st and 2nd respondents that while the consultation would facilitate the nomination of suitable members of the Tribunal, the wording of the provision does not suggest that D the consultation is a condition precedent for the appointment of members. It is not in every case that the word “shall” must be interpreted as mandatory. It is accepted that where the context so admits, the word “shall” can mean “may”. See: FIDELITY BANK PLC Vs MONYE (2012) LPELR - 7819 (SC); AMADI Vs N.N.P.C. (2000) 10 E NWLR (Pt.674) 76 @ 97; UMEANADU Vs ATTORNEY GENERAL ANAMBRA STATE (2008) 9 NWLR (Pt.1091) 175. I am of the view and I do hold that the word “shall” as used in paragraphs A(3) and B(3) of the 6th Schedule to the Constitution are directory and not F mandatory.

Furthermore, in the circumstance of this case where there was neither a Chief Judge nor President of the Customary Court of Appeal in existence and having regard to the fact that election petitions are sui generis and time bound by virtue of Section 134(1) of the Electoral Act (as amended) and Section 285(5) of the 1999 Constitution (as amended), the President of the Court of Appeal had a duty to take such steps as were necessary to ensure that all those qualified to be appointed as Tribunal members, including persons from Rivers State had the opportunity of serving as members of election H Tribunals, which is a national duty.

The other serious issue raised by the appellants is that having regard to the provisions of Section 285(2) of the 1999 Constitution (as amended) and paragraph 20(1) and (2) of the 1st Schedule to

the Electoral Act 2010 (as amended), the President of the Court of Appeal had no power to direct the sitting of the Tribunal outside the territorial jurisdiction of Rivers State and the said Tribunal therefore lacked jurisdiction to hear and determine the petition.

My learned brother, SANUSI, JSC has dealt extensively with this issue in the lead judgment. I agree with him and with the court below that having regard to the security challenges copiously alluded to in the respondents' counter affidavit before the Tribunal, the President of the Court of Appeal who has jurisdiction to constitute election tribunals and issue Practice Directions had a responsibility to ensure the safety of the members of the Tribunal as well as parties and staff by directing them to sit in Abuja instead of Rivers State, in line with the doctrine of necessity as expounded in the case of *LAKANMI Vs ATTORNEY GENERAL (WEST) & ORS (1970) NSCC 143*. A situation not contemplated by the Constitution having arisen, the President of the Court of Appeal had to rise to the occasion and do what was necessary to enable the Tribunals discharge their duties in a safe and secure environment and in order not to leave anyone dissatisfied with the outcome of the election without a venue in which to seek redress..

For these and the elaborate reasons ably marshalled in the lead judgment I also dismiss the appeal. I make no order for costs.

F

OKORO JSC

I read in advance the judgment of my learned brother, Sanusi, JSC just delivered. I am in agreement with the lucid reasons marshalled to reach the conclusion that this appeal lacks merit and deserves an order of dismissal. The issues submitted for the determination of this appeal have been ably resolved in the lead judgment. I adopt the said reasons and conclusion as mine. Appeal lacks merit and is hereby dismissed. I abide by the consequential orders made in the lead judgment, that relating to costs, inclusive.

H