

SUPREME COURT OF NIGERIA

FRIDAY 15TH FEBRUARY, 2016. SC. 23/16, 27/16, 28/2016

**CORAM:- W. S. N. ONNOGHEN, N. S. NGWUTA,
M. U. PETER-ODILI, M. D. MUHAMMAD,
C. B. OGUNBIYI, J. I. OKORO, A. SANUSI, JJSC**

1. OGHENETEGA GERMANSON
EMERHOR

2. ALL PROGRESSIVES CONGRESS APPELLANTS
AND

1. SENATOR (DR) IFEANYI ARTHUR
OKOWA

2. PEOPLES DEMOCRATIC PARTY

3. INDEPENDENT NATIONAL

ELECTORAL COMMISSION RESPONDENTS

4. RESIDENT ELECTORAL
COMMISSIONER, DELTA STATE

5. PROF. BIO NYANANYO (Collation
Officer, Delta State Governorship Election)

ELECTION PETITIONS - Appeals - Brief - No of pages - The fact that appellant's brief comprises 41 pages instead of 40 as prescribed by the law - Is not enough to strike out the brief (H1)

ELECTION PETITIONS - Over voting - Proof - Petitioner must inter alia tender the voters' register - Statement of result - And relate each document to specific area of his case (H2)

ELECTIONS - INEC - Powers - Limit - Notwithstanding Electoral Act s. 153 empowering INEC to issue guidelines for election - INEC is not authorized to amend provisions of the Act (H3)

ELECTIONS PETITIONS - Reply - Filing - Right to file a reply by petitioner - Is when respondent raises new issues - Hence appellants' Exhibits 34, 35 & 36 not being reply to new issues - Was rightly struck out (H4)

ELECTIONS PETITIONS - Unlawful votes - Proof - Appellants failed

1588 Emerhor v. Okowa (2016) 2 KLR (pt. 382) 1587; (2016) 11
to lead credible evidence - To prove unlawful votes allegedly credited
to 1st respondent (H5)

ELECTIONS - Annulment of - Fresh election - Where court annuls
election and there is need to conduct fresh one - Order for fresh
election ought to be made - Whether or not it was asked for (H6)

FACTS

Petitioners/appellants filed this action at the Delta State Governorship Election Petition Tribunal, challenging the election and return of 1st respondent as the Executive Governor of Delta State. On the 11th of April 2015, 3rd respondent conducted gubernatorial election in the State. 2nd appellant sponsored 1st appellant, while 2nd respondent sponsored 1st respondent for the election. At the end of the exercise, 3rd respondent declared 1st respondent as the winner, having polled the majority of the lawful votes cast at the election.

Appellants were not satisfied with this declaration. Hence, they brought the petition, alleging widespread malpractices and non-compliance with the provisions of the Electoral Act. Hearing commenced in the matter and at the conclusion of which the Tribunal dismissed the petition. Aggrieved, appellants approached the Court of Appeal on an appeal questioning the decision of the trial Tribunal, dismissing their petition. The appellate Court heard the appeal and dismissed same in its judgment. Appellants being further aggrieved have appealed to the Supreme Court.

ISSUES FOR DETERMINATION

“3.1 WHETHER the Learned Justices of the Court of Appeal erred in law and occasioned a gross miscarriage of justice when their Lordships resolved issues 2 and 3 for determination against the appellants and upheld as not perverse the decision of the trial tribunal that the appellants did not prove by concrete evidence their allegations of improper accreditation and over-voting.

3.2 WHETHER or not the learned justices of the Court of Appeal erred in law in applying section 49 or 149 of the Electoral Act, 2010 (as amended) and the case of Awuse V. Odili (2005) ALL FWLR (pt. 261) 248 to hold that appellants are not allowed to prove accreditation of voters by reliance on the card reader reports - exhibits PI and PIA without tendering or relying on the voters registers.

3.3 WHETHER the learned justices of the Court of Appeal erred in law when their Lordships held that exhibits P34, P35 and P36 struck out by the trial Tribunal were of no material assistance to the case of the appellants.

3.4. WHETHER the Learned justices of the Court of Appeal erred in law and occasioned a gross miscarriage of justice in resolving Issue 6 for determination against the appellants and holding that the appellants failed to adduce credible evidence to prove toxic-votes.

3.5 WHETHER the Learned Justices of the Court of Appeal erred in law in upholding the preliminary objection of 1st respondent and discountenancing the consequential relief for fresh election.

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

Appeals - Brief - No of pages

1. The 1st respondent's grouse with the brief of argument of the appellants is that it runs foul of paragraph 9(a) of the Practice Direction on Election Appeals to the Supreme Court, 2011 in that instead of 40 pages prescribed, the brief is more by one page. Secondly, that there was no relief for an order directing the 3rd respondent to conduct fresh Governorship election in Delta State in the petition before the trial Tribunal. The learned senior counsel had urged this court to strike out the appellants' brief and hold that there is no argument of the appeal before this court. I have no reason to do that. The fact that the brief of the appellant comprises 41 pages instead of the maximum of 40 pages prescribed by paragraph 9(a) of Practice Direction on Election Appeals to the Supreme Court is not enough reason to strike out the brief. I can only admonish counsel and parties to try and limit the length of their briefs to 40 pages as directed by the Practice Direction aforesaid.
(p. 1597 E)

ELECTION PETITIONS - Over voting - Proof

2. In a plethora of decisions of this court, we have made it abundantly clear that a petitioner seeking to prove over-vot-

ing in an election, must do the following:

1. Tender the voters' register to show the total number of registered voters in each unit.

2. Tender the statement of result in the appropriate forms which would show the total number of votes cast.

B 3. Relate each of the documents to the specific area of his case in respect of which the documents are tendered.

4. Show that the figure representing the over-voting if removed would result in victory for the petitioner.

C 5. In view of the introduction of card reader machines in elections, I will add that the petitioner should tender the card reader report if it did not fail to function.

D So, when the appellants herein proposed to prove over-voting by means of the card reader report only, it was a non-starter. The introduction of the card reader device does not suddenly wipe out and obliterate the traditional and age long method of proving over-voting. Rather, it complements and strengthens the process. I think this was the bane of the appellants' case at the trial Tribunal. The provisions of Section E 53(2) of the Electoral Act 2010 (as amended) places the burden of proof on the appellants as petitioners to show that the number of votes cast at the election exceed the number of registered voters for the election and the number of accredited voters as ticked in the voters' register and not the accreditation by the card reader only as submitted by the appellants. (p. 1602 C)

ELECTIONS - INEC - Powers - Limit

G 3. Let me say it for the umpteenth time that notwithstanding the provision in Section 153 of the Electoral Act 2010 (as amended) which donates power to the INEC to issue regulations, guidelines or manuals for the purpose of giving effect to the provisions of the Act and for its administration, the powers so conferred do not authorize the Commission to amend any of the provisions of the principal Act. It follows, therefore, that if any of the provisions of the regulation, guideline or manual is in conflict with the mandatory provisions of the Electoral Act, such provision will be ultra vires, null and void

and may be so declared being outside the powers so conferred.

Thus, where INEC officials comply with Section 49 of the Electoral Act (supra) on procedure for accreditation but breaches any directive of INEC on the same issue, it cannot be said that these officials failed to comply with the provisions of the Electoral Act.

At best, they may have disobeyed a mere directive of the Commission. A directive of INEC cannot supersede or amend the provisions of the Electoral Act. I need not say more on this.

(p. 1603 E)

ELECTIONS PETITIONS - Reply - Filing

4. By the above provision, the right to file a reply by a petitioner is when a respondent raises new issues in his reply. The appellants admitted that exhibits 34, 35 and 36 were not attached to their reply based on new issues raised by the respondent in their replies but because the said exhibits were pleaded in the main petition. They went on to submit that Exhibits 34, 35 and 36 were not new facts, grounds or prayers tending to amend or add to the contents of the petition.

I agree with the submission of the respondents that for Exhibits 34, 35 and 36 to validly be in a petitioner's reply, it must be in response to new facts in respondent's replies pursuant to paragraph 16 (1) of the First Schedule to the Electoral Act, 2010 (as amended). It is my view that since this is not the case here, the appellants cannot through their reply bring in Exhibits 34, 35 and 36 not being a reply to new issues by the respondents.

It is not in doubt from the facts available that Exhibits 34, 35 and 36 were clearly an attempt to amend appellants' petition by means of the petitioners' replies. It is not true that the exhibits did not accompany the petitioners' replies because they made reference to those exhibits in the said reply. I hold the view that the court below was right when it affirmed the decision of the trial Tribunal striking out appellants' Exhibits 34, 35 and 36 respectively. This issue is also resolved 'against the appellants. (p. 1605 F)

ELECTIONS PETITIONS - Unlawful votes - Proof

5. Earlier in this judgment, I had examined Exhibits P1 and P1A carrying two different figures of 709,700 and 715,392 votes respectively. By these two figures, the appellants were unable to show exactly what was the toxic votes he was alleging. As was rightly submitted by the learned senior counsel for the 1st respondent, the appellant should have produced before the trial Tribunal clear evidence of unlawful or toxic votes credited to the 1st respondent which if they are deducted, the 1st respondent could not win the election by the remaining lawful votes.

As was observed by the learned Justice Tobi, JSC in ABUBAKAR V. YAR' ADUA, (supra) at 174, a court of law can only pronounce judgment in the light of evidence presented and proved before it. A court of law cannot go outside the evidence presented and proved before it by embarking on a voyage of discovery in search of other evidence in favour of the parties. I agree with the two courts below that the appellants failed woefully to lead concrete and credible evidence to prove toxic votes. In the circumstance, this issue is also resolved against the appellants. (p. 1607 A/F)

ELECTIONS - Annulment of - Fresh election

6. I am now left with issue 5 as the last Issue for consideration. In circumstance of this case, I shall make a few comments and then bring this judgment to an end. It is trite law that an appellant cannot present a case on appeal different from the case he presented at the trial court. However, an appellate court has the right and in fact the duty and obligation to make any consequential order in the interest of justice and it is irrelevant that that particular order was not specifically asked for by either party to the appeal.

There is no doubt that where a court annuls an election and there is need to conduct a fresh one, an order for fresh election ought to be made whether it was specifically asked for or not except the court is to entrench anarchy in the polity. I do not think any court will allow this to happen. After all, a consequential order is one giving effect to a judgment or order to

which it is consequential.

I hold the view that there was really no overbearing need for the appellants to insert a relief for fresh elections as a consequential order, and, having asked for it at the court below, the Court of Appeal ought not to have discountenanced it, after all it has the power to make the order in deserving cases whether specifically asked for or not. I resolve this issue in favour of the appellants. (p. 1607 H)

REPRESENTATION

Adewole Adebayo, Esq., for the appellants in SC. 23/2016, SC. 27/2016 and 2nd respondent in SC. 28/2016, with him are Ebenezer Akinbuli, Esq., Dotun Moses, Esq., Omolara Sodeinde, (Miss), Blossom Lawson Jack, (Mrs.) and Sandra Martins Agba, (Miss).

Alex Izinyon, SAN, for 1st respondent in SC. 23/2016, 4th respondent in SC. 27/2016 and Cross Appeal in SC. 28/2016, with him are, Ken Mosia, SAN, Chief A. K. Osawota, Prof. A. Ekpu, B. K. Abu, Esq., C. S. Ekeocha, Esq., Victor Ebonka, Esq., Bekederemo Dickson, Esq., Isaiah Bozimo, Esq., L. O. Fagbemi, Esq., Josephine Majebi, (Miss) and C. U. Adah, (Miss).

A. T. Kehinde, SAN, for the 2nd respondent in SC. 23/2016, 5th respondent in SC. 27/2016 and 6th cross respondent in SC. 28/2016, with him are Kehinde Ogunwumiju, Esq., Bamikole Aduloju, Esq., Nneka Inogbo, (Miss), Queenette Agbe, (Miss), Ademola Abimbola Esq., Adaeze Anah, (Miss), B. O. Amawu, Esq., A. O. Ashiru, (Miss), Aminat Adams, (Miss), Chinyere Ofoegbu, (Miss), Oluwaseye Kolawole, (Miss), Colins Ekpenisi, Esq., Pela Omoefe, (Miss) and E. A. Ibrahim-Effiong, Esq.,

D. D. Dodo, SAN, for the 3rd and 4th respondents in SC. 23/2016 and 3rd and 4th cross respondents in SC. 28/2016, with him are Audu Anuga, Esq., Rita Ossai, (Miss), Terhembra Gbashima, Esq., Festus umbo, Esq., A. A. Dodo, Esq., Patrick Okoh, Esq., S. A. Aigege, Esq., Luter Atagher, Esq., Ginika Ezeoke, (Miss) and Yunusa Umaru, Esq., Nasiru Dangiri, Esq., for the 1st and 2nd respondents in SC. 27/2016, with him are Audu Anuga Esq., Rita Ossai, (Miss) Terhembra Cbashima, Esq., Festus Jumbo, Esq., A. A. Dodo, Esq., Patrick Okoh, Esq., S. A. Aigege, Esq., Luter Atagher, Esq., Ginika Ezeoke, (Miss), Yunusa Umaru Esq., and A. L. Leko, Esq.,

Onyinye Anunonye Esq., for the 5th respondent in SC. 23/2016, 3rd respondent in SC. 27/2016 and 5th respondent in SC. 28/2016

CASES REFERRED TO

- Awuse v. Odili (2005) All FWLR (pt. 261) 248
B Abubakar v. Yar’adua (2004) 4 NWLR (pt. 1078) 465
Udengwu v. Uzuegbu (2003) 13 NWLR (pt. 836) 136
Momoh v. Umoru (2011) 15 NWLR (pt. 1270) 217
Fayemi v. Oni (2009) 7 NWLR (pt. 1140) 223
Uba v. Ajabule (2012) All FWLR (pt. 610) 1415
C AGIP Nig. Ltd. v. AGIP Petrol Int’l (2010) NWLR (pt. 1187) 348
Haruna v. Modibbo (2004) 16 NWLR (pt. 900) 487
Kalgo v. Kalgo (1999) 6 NWLR (pt. 606) 639
Audu v. INEC (No.2) (2010) 13 NWLR (pt. 116) 225
D Awolowo v. Shagari (1979) All NLR 120
Ibrahim v. Shagari (1983) 2 SCNLR 176
Buhari v. Obasanjo (2005) 2 NWLR (pt. 910) 241
Agbaje v. Fashola (2008) 6 NWLR (pt. 1082) 90
Emenike v. PDP (2012) 12 NWLR (pt. 1315) 556
E

STATUTES REFERRED TO

Electoral Act 2010 (as amended), ss. 49, 138(1)

LEAD JUDGMENT BY OKORO JSC

- F This appeal was heard on the 2nd day of February, 2016 and judgment delivered on the same date. In the said judgment, this appeal was adjudged unmeritorious and was accordingly dismissed. I promised to give reasons for the stance of the court on 15th February, 2016. I shall proceed to give the said reasons.
G

- On the 11th day of April, 2015, the 3rd respondent herein (INEC) conducted election into the office of Governor of Delta State. In the said election, the 1st appellant and the 1st respondent were sponsored by the 2nd appellant and 2nd respondent respectively.
H Sixteen other candidates also contested for the same office.

At the conclusion of the election, the 3rd respondent declared the 1st respondent as having been duly elected as Governor of Delta State with 724,680 votes out of 956,721 as total number of votes cast.

The appellants alleging widespread malpractices and non-compliance with the provisions of the Electoral Act and Guidelines and Manuals published by the 3rd respondent, including improper accreditation and voting without accreditation and over-voting, brought before the Governorship Election Tribunal a petition dated 30th day of April, 2015. B

The Tribunal heard the petition and dismissed same in a judgment delivered on 26th October, 2015. Then appellants, being dissatisfied with the judgment of the Tribunal filed Notice of Appeal on 13th November, 2015 to the Court of Appeal. On its part, the Court of Appeal also dismissed the appeal as contained in its judgment delivered on 24th December, 2015. C

Dissatisfied with the judgment of the Court of Appeal, the appellants have appealed to this court via notice of appeal filed on 5th January, 2016 containing seven grounds of appeal. Out of the seven grounds, the learned counsel for the appellants, Adewole Adebayo, Esq., distilled five issues for the determination of this appeal. The five issues are as follows:- D

“3.1 WHETHER the Learned Justices of the Court of Appeal erred in law and occasioned a gross miscarriage of justice when their Lordships resolved issues 2 and 3 for determination against the appellants and upheld as not perverse the decision of the trial tribunal that the appellants did not prove by concrete evidence their allegations of improper accreditation and over-voting. (Grounds 1 and 7) E

3.2 WHETHER or not the learned justices of the Court of Appeal erred in law in applying section 49 or 149 of the Electoral Act, 2010 (as amended) and the case of Awuse V. Odili (2005) ALL FWLR (pt. 261) 248 to hold that appellants are not allowed to prove accreditation of voters by reliance on the card reader reports - exhibits PI and PIA without tendering or relying on the voters registers. (Grounds 2 and 3); F

3.3 WHETHER the learned justices of the Court of Appeal erred in law when their Lordships held that exhibits P34, P35 and P36 struck out by the trial Tribunal were of no material assistance to the case of the appellants. (Ground 4) H

3.4. WHETHER the Learned justices of the Court of Appeal erred in law and occasioned a gross miscarriage of justice in resolving Issue 6 for determination against the appellants and holding that the

appellants failed to adduce credible evidence to prove toxic-votes. (Ground 5)

3.5 WHETHER the Learned Justices of the Court of Appeal erred in law in upholding the preliminary objection of 1st respondent and discountenancing the consequential relief for fresh election.

B *(Ground 6)”*

The learned Senior Counsel for the 1st respondent, Dr. Alex Izinyon, SAN, leading other counsel formulated four issues which may be stated thus:

C 1. Whether the court below was right in law in dismissing the appellants’ appeal before it on the ground that the appellants failed to prove over voting. (Encompassing Grounds 1, 2, 3 and 7 of the Notice of Appeal)

D 2. Whether the learned Justices of the Court of Appeal were right in law in affirming the decision of the trial Tribunal striking out the Appellants’ Exhibits P34, P35 and P36. (Encompassing Ground 4 of the Notice of Appeal)

E 3. Whether the learned Justices of the Court of Appeal were right in law when they affirmed the decision of the trial tribunal that the appellants have a duty to prove the toxic votes that accrued to the 1st respondent. (Encompassing Ground 5 of the Notice of Appeal)

F 4. Whether the court below was right in law in upholding the 1st respondent’s preliminary objection (Encompassing Ground of the Notice of Appeal).

In the brief of argument settled by A. T. Kehinde, SAN on behalf of the 2nd respondent, two issues only are nominated for the determination of this appeal. The issues are:

G 1. Whether the Court of Appeal has right when it affirmed the decision of the trial Tribunal that the appellants failed to prove their case of non-compliance having regard to their sole reliance all card reader report.

H 2. Whether the Court of Appeal was right in upholding the preliminary objection of the 1st respondent and struck out the relief for fresh election sought for the first time by the appellants at the lower court.

Learned Senior Counsel, D. D. Dodo, SAN who settled the brief of 3rd & 4th respondents also distilled two issues as follows:-

1. Whether the Court of Appeal was not right when it upheld the preliminary objection against the relief for fresh election claimed for the first time on appeal.

2. Whether the Court of Appeal has not right to have dismissed the appeal.

And finally, Mr. Onyinye Anumonye, Esq., of counsel for the B 5th respondent also distilled two issues for determination. The issues are:

1. Whether the Court of Appeal was not right when it held that the appellants cannot claim a relief for fresh election claimed for the first time on appeal: C

2. Whether the Court of Appeal was not right to have dismissed the appeal.

Before considering the issues submitted by the parties which I have set out above, let me dispose of some preliminary issues thrown up in this appeal. The 1st respondent filed notice of preliminary objection on 26/1/2016. That of 2nd respondent was filed on the same date. The 3rd and 4th respondents filed theirs on 29/1/2016. D

Basically, the issues raised in the three preliminary objections are substantially the same. ***The 1st respondent's grouse with the brief of argument of the appellants is that it runs foul of paragraph 9(a) of the Practice Direction on Election Appeals to the Supreme Court, 2011 in that instead of 40 pages prescribed, the brief is more by one page. Secondly, that there was no relief for an order directing the 3rd respondent to conduct fresh Governorship election in Delta State in the petition before the trial Tribunal. The learned senior counsel had urged this court to strike out the appellants' brief and hold that there is no argument of the appeal before this court. I have no reason to do that. The fact that the brief of the appellant comprises 41 pages instead of the maximum of 40 pages prescribed by paragraph 9(a) of Practice Direction on Election Appeals to the Supreme Court is not enough reason to strike out the brief. I can only admonish counsel and parties to try and limit the length of their briefs to 40 pages as directed by the Practice Direction aforesaid.*** E F G H

The other ground of objection is already an issue for determination in this appeal i.e. issue 5 and as such I do not want to deter-

mine it twice. It shall be considered in the main appeal. It is my view that the preliminary objection lacks merit and is accordingly overruled.

At this stage, I wish to state that this appeal is time bound and as such parties should refrain 'from unnecessary preliminary objections in order to allow time for the court to determine the real issues in controversy between' the parties, In the circumstance, the other two preliminary objections which do not appear to raise any serious issues are overruled and the appeal shall be heard on the merit. See ABUBAKAR V. YAR'ADUA (2004) 4 NWLR (pt. 1078) 465. This is informed by the need to do substantial justice.

I intend to determine this appeal on the five issues distilled by the appellants in order to decide on all the issues agitating their mind in this appeal. I shall first take issues one and two together since they are substantially the same. The two issues have to do with accreditation and/ or improper accreditation.

On the 1st issue, learned counsel for the appellants submitted that the justices of the Court of Appeal misconceived the thrust of the case presented by the appellants. That the case of the appellants is that there was non-compliance with the Electoral Law and regulations because over-voting occurred; and. that over-voting occurred because a look at the polling unit by polling unit accreditation report shown in Exhibit PI and PIA and Form EC8 in majority of the polling units all across the state show' that the number of votes recorded is over and above the number of accredited voters in most polling units.

Learned counsel submitted that the court below took into consideration irrelevant" matters and these irrelevant matters relate to the supposed problem of incomplete upload of card readers. That the issue of failure of card reader to upload was not an issue joined by the parties. According to him, this made the judgment of the court below perverse which should persuade the court to set it aside, relying on the cases of UDENGWU V. UZUEGBU (2003) 13 NWLR (pt. 836) 136 at 152, MOMOH V. UMORU (2011) 15 NWLR (pt. 1270) H 217 at 245.

Learned counsel further submitted that the record shows that the number of voters manually recorded as accredited in the election being 1,017,796 as shown in Forms EC8A, EC8D, EC8E exceeded the total number of voters that were actually accredited with the use

of card readers being initially 709,700 (Exhibit PI) and finally 715,392 as shown in card readers report (Exhibit PIA). That the said manual accreditation was in breach of INEC approved Guidelines and Manual for Election officials. It is his submission that no lawful election can take place without proper accreditation, citing the case of *FAYEMI V. ONI* (2009) 7 NWLR (PT. 1140) 223 at 287. B

He further contended that none of the parties contended that data in any unit of the card readers used failed to be uploaded to INEC server. That parties are bound by their pleadings and that no court should decide cases on mere conjecture or speculation, relying on the cases of *UBA V. AJABULE* (2012) ALL FWLR (pt. 610) 1415 at 1426 and *AGIP NIC. LTD. V. AGIP PETROL INT'L* (2010) NWLR (pt. 1187) 348 at 413. C

On issue two, learned counsel for the appellants submitted that there is no legal basis for the Tribunal having found that the card reader electronic accreditation is more reliable than human manual accreditation, to summersault and say, that Exhibit PI and PIA were insufficient proof of total number of accredited voters and that voters' register should have been used. That the Court of Appeal failed to follow its decision in *WIKE NYESOM EZENWO V. HON. DR. DAKUKU ADOL PETERSIDE & ORS* (Unreported) Appeal No. CA/A/CPT/G9V/659/2015 delivered on 15/12/15 on the legal status of the card reader in voter accreditation. According to him, any accreditation figure not consistent with or is not validated by a card reader is prima facie a breach of the Act. He urged the court to resolve the two issues in favour of the appellants. D E F

In response, the learned senior counsel for the 1st respondent, Dr. Alex Izinyon, SAN submitted that the court below acted rightly in law and was on a strong wicket when it dismissed the appellants' appeal before it on the ground that the appellants failed to prove over-voting at the trial Tribunal. G

On the pleading as regards over-voting, learned senior counsel drew the attention of the court to the fact that appellants pleaded a figure of 709,700 votes as the total number of accredited voters H but that the ICT Department of INEC Headquarters through PW1 tendered two documents viz, Exhibits P1 with 709,700 accredited voters and Exhibit PIA with 715,392 accredited voters.

The learned senior counsel submitted that since what was

pleaded was 709,700 and the evidence adduced is 715,392, there is undoubtedly a strong doubt as to the exact figures from INEC card reader report and as such there is no reliable evidence in proof of the pleaded facts of 709,700. According to him, the figure of 709,700 is deemed abandoned relying on these cases: *BUHARI V. OBASANJO* B (2005) FWLR (pt. 273) 1 at 170, *DBN V. AYODARE & SONS NIG. LTD.* (2007) ALL FWLR (pt 383) 1 at 42.

The learned senior counsel further opined that since what was tendered by the PW1 as evidence of the purported accredited voters by card readers in Delta State is 715,392 i.e. Exhibit PIA and the said figure is not pleaded anywhere in the petition, it is submitted that the purported total number of accredited voters goes to no issue as it is not supported by any pleadings, relying on *CHUKWUMA V. NWORJI & ORS* (2011) 1 LRCN 529 at 545, *AKINTOLAMI V. AKINOLA* D (1994) 3 NWLR (pt. 335) 59, *ETO V. EKPE* (2000) 3 NWLR (pt. 650) 678.

It was his further contention that Exhibits PI and PIA are not reliable means to conclusively prove over-voting by card readers. That PW1 admitted that 1,939,952 PVCs (Permanent Voters Card) were collected by voters in Delta -State. He asserted that Exhibit PI and PIA cannot be relied upon as constituting the total accredited voters in the state which constitutes about just 45 of persons who collected the PVCs. He submitted that appellants failed woefully to rely on voters register to prove over-voting and that the failure was fatal to their case, relying on the case of *MAHMUD ALIYU SHINKAFI & ANOR, V. ABDULAZEEZ ABUBAKAR YARI & 2 ORS* (unreported) Appeal No. SC. 907/2015 delivered on 8th January, 2016. He argued that the case of *WIKE EZENWO NYESOM V. HON. DR. DAKUKU ADOL PETERSIDE* (supra) cited by the appellants is not the position of the law. He urged the court to resolve the issues against the appellant.

In their responses, A. T. Kehinde, SAN, D. D. Dodo, SAN and Anumonye, Esq., representing the 2nd, 3rd, and 4th and 5th respondents respectively, submitted substantially the same arguments as done by the learned senior counsel for the 1st respondent. I shall resist the temptation of summarizing, their arguments here except as may be necessary to refer to them in the course of this judgment.

The arguments in issues 1 and 2 which I have summarized

above clearly show that the contention of the appellants is that there was over-voting at the election which produced the 1st respondent as Governor of Delta State. It is also their case that there was improper accreditation of voters for the election. To prove their allegation, the appellants, as petitioners at the trial Tribunal built their case on the claim that the total number of votes cast in the election exceeded the total number of accredited voters in the election. As was submitted by the learned senior counsel for the 3rd and 4th respondents, “unfortunately, in proof of this assertion, instead of adducing and relying on the voters registers of each polling unit in issue to establish their claim of over-voting, the petitioners deliberately chose to prove their case solely the data purportedly garnered from inconclusive card readers’ report (Exhibits PI and PIA.)”

To further demonstrate the futility of the appellants’ case right from the trial Tribunal, they stated at page 1181 of the record, particularly paragraph 4.02 that:

“Petitioners submit that their case is based on card reader accreditation as a condition for voting. Petitioners case is not based on any voters register as the election conducted on 11/04/2015 in which they participated ums predicated on valid card reader accreditation...”

The above submission by the appellants at the trial Tribunal captures their entire case because, although their petition was predicated on two grounds namely:

“(a). Corrupt practices/electoral fraud, rigging and violence, and

(b) non-compliance with Electoral Law, Regulations and Directives issued by INEC”, the appellants later abandoned their grounds on corrupt practices, electoral fraud, rigging and violence and the said ground was consequently dismissed by the trial Tribunal on page 1295 of Vol. 2 of the record.

Delivering judgment on the sole ground left in the petition, the trial Tribunal held on page 1580 of Vol.2 of the record as follows:-

“The matter or process of accreditation in an election is provided for in Section 149(sic) of the Electoral Act 2010 (as amended) and it is by a prospective ‘voter presenting his voters’ card (or PVC) to the presiding officer who on being satisfied issues him with a ballot paper and marks his name in the voters register. The most authentic means of proving accreditation of ‘voters is to produce the voters

register. See *Awuse Vs Odili (2005) ALL FWLR (pt. 261) 284*. The appellants in this case did not tender the voters register nor did they rely thereon; they rather relied on the card reader reports which they tendered as Exhibits PI and P1A. ”

In the same vein, the Court of Appeal held concurrently with the trial Tribunal on the futility of the evidence adduced by the appellants to prove their petition. Hear the lower court on page 1582 of Vol. 2 of the record: “*I had already found and held that what the Electoral Act 2010 (as amended) has provided for in Section 49 for accreditation of ‘voters is the voters register and it is quite erroneous for the appellants to have attempted to establish the issue of accreditation based solely on card reader without any allusion to the voters register.*”

In a plethora of decisions of this court, we have made it abundantly clear that a petitioner seeking to prove over-voting in an election, must do the following:

1. Tender the voters’ register to show the total number of registered voters in each unit.

2. Tender the statement of result in the appropriate forms which would show the total number of votes cast.

3. Relate each of the documents to the specific area of his case in respect of which the documents are tendered.

4. Show that the figure representing the over-voting if removed would result in victory for the petitioner.

5. In view of the introduction of card reader machines in elections, I will add that the petitioner should tender the card reader report if it did not fail to function. See *HARUNA V. MODIBO (2004) 16 NWLR (pt. 900) 487*, *KALCO V. KALGO (1999) 6 NWLR (pt. 639) 456*, *MAHMUD ALIYU SHINKAFI & ANOR V. ABDULAZEEZ ABUBAKAR YARI & 2 ORS (unreported) Appeal No. SC. 907/2015 delivered on 8th January, 2016* and *EDWARD NKWEGU OKEREKE V. NWEZE DAVID UMAHI & 2 ORS (unreported) Appeal No. SC. 1004/2015 delivered on 5th February, 2016*. **So, when the appellants herein proposed to prove over-voting by means of the card reader report only, it was a non-starter. The introduction of the card reader device does not suddenly wipe out and obliterate the traditional and age long method of proving over-**

voting. Rather, it complements and strengthens the process. I think this was the bane of the appellants' case at the trial Tribunal. The provisions of Section 53(2) of the Electoral Act 2010 (as amended) places the burden of proof on the appellants as petitioners to show that the number of votes cast at the election exceed the number of registered voters for the election and the number of accredited voters as ticked in the voters' register and not the accreditation by the card reader only as submitted by the appellants. B

The learned senior counsel for the 2nd respondent, A. T. Kehinde, SAN, submitted that *"the use, non-use or misuse of card readers in the conduct of the 2015 governorship election in Delta State cannot be a ground upon which the election can be invalidated because the Guidelines, Regulations or Directive of INEC cannot be the reason to invalidate an election."* I agree with this submission D because of the provision in Section 138 (2) of the Electoral Act 2010 (as amended) which provides:

"An act or omission which may be contrary to an instruction or directive of the Commission or of an officer appointed for the purpose of the election but which is not contrary to the provisions of this Act shall not of itself be a ground for questioning the election." E

Let me say it for the umpteenth time that notwithstanding the provision in Section 153 of the Electoral Act 2010 (as amended) which donates power to the INEC to issue regulations, guidelines or manuals for the purpose of giving effect to the provisions of the Act and for its administration, the powers so conferred do not authorize the Commission to amend any of the provisions of the principal Act. It follows, therefore, that if any of the provisions of the regulation, guideline or manual is in conflict with the mandatory provisions of the Electoral Act, such provision will be ultra vires, null and void and may be so declared being outside the powers so conferred. F G

Thus, where INEC officials comply with Section 49 of the Electoral Act (supra) on procedure for accreditation but breaches any directive of INEC on the same issue, it cannot be said that these officials failed to comply with the provisions of the Electoral Act. See BUHARI V. OBASANJO (2005) 13 NWLR (pt. 941) 1, AGBAJE v. FASHOLA (2008) 6 NWLR (pt. 1082) H

90, SHINKAFI v. YARI (supra). ***At best, they may have disobeyed a mere directive of the Commission. A directive of INEC cannot supersede or amend the provisions of the Electoral Act. I need not say more on this.***

On Exhibits PI and PIA, two figures were touted by the appellants viz - 709,721 and 715,392. These were figures allegedly captured by the card reader at various times. The assertion that the recording by the card reader to the server in Abuja was automatic was completely demolished by PW1 who testified that the first report generated and certified on 29/4/15 comprised 709,700 accredited voters which formed the basis of appellants' petition and admitted as Exhibit PI.

Again, she testified that on 13/8/2015, another report was generated comprising 715,392 accredited voters and admitted as Exhibit PIA. It follows that what was pleaded was 709,700 but PW1 gave evidence of 715,392 as the number of accredited voters. It seems to me that if the server was not shut down as testified by the PW1, may be a higher figure would have emerged. Be that as it may, what emerges in this issue is that opinion cannot be a reliable procedure. I agree with the respondents that Exhibits PI and PIA are not reliable means of conclusively proving over voting by card readers. In this circumstance, the register of voters could have been of assistance. That is not the case here. As it stands, issues 1 and 2 are hereby resolved against the appellants.

On issue 3, the learned counsel for the appellants submitted that the Court of Appeal erred in law when it held that exhibits P34, P35 and P36 struck out by the trial Tribunal were of no material assistance to the case of the appellants. He argued as regards whether such documents should have been attached to the petition rather than in reply, that paragraph 16 of the First Schedule to the Electoral Act, 2010 (as amended) did not prescribe time within which a pleaded and a listed document is to be frontloaded.

Learned counsel further argued that Exhibits P34, P35 and P36 are relevant to the appellants' (as petitioners) case and were properly admitted in evidence but later wrongfully expunged. He urged the court to resolve this issue in favour of the appellants.

In response, the learned senior counsel for the 1st respondent submitted that the court below was right in law in affirming the trial

Tribunal's decision in striking out appellants' Exhibits 34," 35 and 36 for infringing on paragraph 16 (1) of the First Schedule to the Electoral Act, 2010 (as amended). Although the other senior counsel and counsel representing the other respondents did not respond to issue 3 specifically, they however agree with the submission of the 1st respondent's senior counsel in their respective issue 1. B

The background fact to the complaint in this issue is that after the filing of the Petition, the respondents filed their respective replies to the petition. Thereafter, the appellants filed reply to the said replies wherein they used the opportunity to bring in Exhibits 34, 35 and 36. The respondents herein, who were also respondents at the trial Tribunal, filed motions for the striking out of those exhibits alleging that they offended paragraph 16 (1) of the First Schedule to the Electoral Act, 2010 (as amended). The trial Tribunal acceded to the prayers of the respondents and expunged those exhibits from the record. This decision was affirmed by the court below. This is what has given birth to this issue. C D

Now, paragraph 16 (1) of the First Schedule to the Electoral Act, 2010 (as amended) states:

"16 (1) If a person in his reply to the petition raises new issue of facts in defence of his case which the petition has not dealt with, the petitioner shall be entitled to file in the Registry within five (5) days from the receipt of the respondent's reply, a petitioner's reply in answer to the new issues of facts, so however that:- E

(a) The petitioner shall not at this stage be entitled to bring new facts, grounds or prayers tending to amend or add to the contents of the petition filed by him. F

By the above provision, the right to file a reply by a petitioner is when a respondent raises new issues in his reply. The appellants admitted that exhibits 34, 35 and 36 were not attached to their reply based on new issues raised by the respondent in their replies but because the said exhibits were pleaded in the main petition. They went on to submit that Exhibits 34, 35 and 36 were not new facts, grounds or prayers tending to amend or add to the contents of the petition. G H

I agree with the submission of the respondents that for Exhibits 34, 35 and 36 to validly be in a petitioner's reply, it must be in response to new facts in respondent's replies pur-

suant to paragraph 16 (1) of the First Schedule to the Electoral Act, 2010 (as amended). It is my view that since this is not the case here, the appellants cannot through their reply bring in Exhibits 34, 35 and 36 not being a reply to new issues by the respondents.

- B It is not in doubt from the facts available that Exhibits 34, 35 and 36 were clearly an attempt to amend appellants' petition by means of the petitioners' replies. It is not true that the exhibits did not accompany the petitioners' replies because they made reference to those exhibits in the said reply.**
- C I hold the view that the court below was right when it affirmed the decision of the trial Tribunal striking out appellants' Exhibits 34, 35 and 36 respectively.** See MADUABUM V. NWOSU (2010) 13 NWLR (pt. 1212) 623 at 645 paras F-H, ADEPOJU V. CHIEF FOLORUNSHO AWOOKIYILEMI (1998) 5 NWLR (pt. 603) 364 at 381 - 383 paras G - A. **This issue is also resolved 'against the appellants.**

On issue 4, it was submitted for the appellants that proof of toxic votes as stated by the Tribunal is not required for the success of the petition based on paragraph 28 of Exhibit P3 which the Tribunal found was valid and binding. He contended that the Court of Appeal wrongly upheld the trial Tribunal's decision without a just analysis of the issue. He urged the court to resolve this issue in favour of the appellants. In his argument, the learned senior counsel for the 1st respondent submitted that - the learned Justices of the Court of Appeal were right in law when they affirmed the decision of the trial Tribunal that the appellants have a duty to prove the toxic votes that accrued to the 1st respondent. That to prove this fact, the appellants should have proved before the trial Tribunal clear evidence of unlawful votes credited to the 1st respondent and that if these votes are deducted, the 1st respondent cannot win by lawful majority votes cast. It is his submission that the appellants should prove by credible evidence that the 724,680 credited to the 1st respondent are unlawful votes. That they have to tender the result in Form EC8A where these votes are shown, the voters register in each polling units etc, relying on the case of AWUSE V. ODILI (2005) ALL FWLR (pt. 261) 248, INIAMA V. AKPABIO (2005) 17 NWLR (pt. 1116) 226. He urged the court to resolve the issue against the appellants.

Earlier in this judgment, I had examined Exhibits P1 and P1A carrying two different figures of 709,700 and 715,392 votes respectively. By these two figures, the appellants were unable to show exactly what was the toxic votes he was alleging. As was rightly submitted by the learned senior counsel for the 1st respondent, the appellant should have produced before the trial Tribunal clear evidence of unlawful or toxic votes credited to the 1st respondent which if they are deducted, the 1st respondent could not win the election by the remaining lawful votes. B

In ABUBAKAR V. YAR'ADUA (2008) 19 NWLR (pt. 1120) 1 C at 173 - 174 paras D - D, this court, per Tobi, JSC held as follows:

"A petitioner who contests the legality or lawfulness of votes cast in an election and the subsequent result, must tender in evidence all the necessary documents by way of forms and other documents used at the election. He should not stop there. He must call witnesses to testify that the illegality or unlawfulness substantially affects the result of the election. The documents are amongst those in which the results of the votes are recorded. The witnesses are those who saw it all on the day of the election, not those who picked the evidence from an eye-witness. No. They must be eye-witnesses too." E
See also OGUNDERU V. ADEBAYO & ORS (1999) 6 NWLR (pt. 608) 697; YAR'ADUA V. BARDA (1992) 3 NWLR (pt. 231) 638 at 653.

As was observed by the learned Justice Tobi, JSC in ABUBAKAR V. YAR'ADUA, (supra) at 174, a court of law can only pronounce judgment in the light of evidence presented and proved before it. A court of law cannot go outside the evidence presented and proved before it by embarking on a voyage of discovery in search of other evidence in favour of the parties. I agree with the two courts below that the appellants failed woefully to lead concrete and credible evidence to prove toxic votes. In the circumstance, this issue is also resolved against the appellants. F G H

I am now left with issue 5 as the last Issue for consideration. In circumstance of this case, I shall make a few comments and then bring this judgment to an end. It is trite law that an appellant cannot present a case on appeal different

from the case he presented at the trial court. However, an appellate court has the right and in fact the duty and obligation to make any consequential order in the interest of justice and it is irrelevant that that particular order was not specifically asked for by either party to the appeal. See MUSA IYAJI V.

B SULE EYIGBE (1987) LPELP - 571 (SC), (1987) NWLR (pt. 61) 523, PRINCE YAHAYA ADIGUN & ORS V. ATTORNEY GENERAL OF OYO STATE & ORS. (1987) 1 NWLR (pt. 53) 678 at 710, CHIEF EBENEZER AWOTE & ORS V. S. K. OWODUNMI & ANOR (NO.2) (1987) 2 NWLR (pt. 57) 367.

C **There is no doubt that where a court annuls an election and there is need to conduct a fresh one, an order for fresh election ought to be made whether it was specifically asked for or not except the court is to entrench anarchy in the polity. I do not think any court will allow this to happen. After all, a consequential order is one giving effect to a judgment or order to which it is consequential.** See FUNDUK ENGINEERING LTD. V. JAMES MCARTHUR & ORS (1996) LPELR - 1291 (SC), (1996) 7 NWLR (pt. 459) 153, OBAYAGBONA V. OBAZEE
D
E (1972) 5 SC. 247.

I hold the view that there was really no overbearing need for the appellants to insert a relief for fresh elections as a consequential order, and, having asked for it at the court below, the Court of Appeal ought not to have discountenanced it, after all it has the power to make the order in deserving cases whether specifically asked for or not. I resolve this issue in favour of the appellants.
F

Having resolved issues 1 - 4 against the appellants, it is very
G clear that there is no merit in this appeal and is in the circumstance, dismissed. Accordingly, I hereby dismiss it.

ONNOGHEN JSC

H On the 2nd day of February, 2016 we heard the above listed appeals and dismissed appeal No. S.C.123/2016 for lacking of merit while Nos. S.C.127/2016 and S.C.128/2016 were discountenanced as they are offshoots of SC.123/2016, the main appeal against the Judgment of the lower court. Parties were ordered to bear their own

costs while the matter was adjourned to today for reasons for the Judgment to be given. Below, therefore, are my reasons for agreeing with the lead Judgment of my learned brother, JOHN INYANG OKORO J.S.C. that appeal No. S.C.123/2016 should be dismissed while SC.127/2016 and SC.128/2016 should be discountenanced and consequently struck out. B

The facts of the case have been stated in detail in the lead Judgment thereby making it unnecessary for me to repeat them herein except as may be needed for the point(s) being made.

Appellants challenged the return of 1st respondent as Governor of Delta State in the election held on 11th April, 2015 at the tribunal on the following grounds: C

“That the election was invalid by reason of:

(a) Corrupt practices/electoral fraud, rigging and violence, and

(b) non-compliance, with Electoral Law, Regulations and Dire issued by INEC”. D

The reliefs sought by appellants Are:

“WHEREFORE Your petitioners pray that it may be determined that:

(a) the 1st respondent duly sponsored by the 2nd respondent was not duly elected or returned as Governor of Delta State, and

(b) the Governorship election held on 11th April, 2015 in which the 1st respondent was purportedly elected Governor of Delta State is void by reason of corrupt practices involving over-voting, non-compliance with the Electoral Law, Regulations and Directives issued by the 3rd respondent” F

The alleged widespread malpractices and non-compliance with the provisions of the Electoral Act and the Guidance and Manuals by 3rd respondent are said to include improper accreditation and voting without accreditation and over-voting. G

The petition was dismissed on 26th October, 2015 resulting in an appeal to the lower court which appeal was dismissed on the 24th day of December, 2015. The present appeal is a further appeal by appellants against the Judgment of the tribunal. H

My learned brother has dealt exhaustively with the issues relevant for the determination of the appeal leaving me with not much to comment on.

I am however, of the view that appellant's issues 1 and 2 should

be taken together and that they: constitute the main plank in the petition of appellants. The issues are as follows:-

“1. *WHETHER the learned Justices of the Court of Appeal erred in law and occasioned a gross miscarriage of justice when their Lordships resolved issues S2 and 3 for determination against the appellants and upheld as not perverse the decision of the trial tribunal that the appellants did not prove by concrete evidence their allegations of improper accreditation and over-voting.*

2. *WHETHER or not the learned Justices of the Court of Appeal erred in law in applying section 49 or 149 of the Electoral Act, 2010 (as amended) and the case of Awuse Vs Odili (2005) All FWLR (Pt. 261) 248 to hold that appellants are not allowed to print accreditation of voters by reliance on the card reader reports exhibits P1 and P1 A without tending or relying on the voters register.”*

The above two issues are clearly one in substance, dealing with the issue of accreditation of voters and the consequences thereof. They question the issue as to what constitutes accreditation of voters vis-à-vis the voters register and card reader reports and how does a litigant prove over-voting having regard to the provisions of the Electoral Act, 2010, as amended, and the Guidelines and manuals issued by INEC. The totality of the case of appellants hangs on the issue of accreditation of voters by card reader reports - exhibits P1 and P1A. This is borne out by some passages in the appellants’ brief of argument filed on 22/01/2016. At page 6 of the brief, while arguing issue 1, supra, learned counsel stated from line 2 of the last paragraph, thus:

“*The case of appellants is that there was non-compliance with the electoral law and regulations because over-voting occurred, and over-voting occurred because a look at the polling unit by polling unit accreditation report shown in exhibit P1 and P1 A and Form EC8 (declaration of result sheets) in majority of the polling units across the State, shows that the number of votes recorded is over and above the number of accredited voters in most polling units, warranting annulment and voiding of the entirety of votes returned in each of those polling units, one by one in line with paragraph 28 of the 3^d respondents. Approved Guidelines and Regulations”*

At page 14 of the said brief, learned counsel submitted, inter alia:

“My Lords, the main thrust of petitioner’s case is that the accreditation of voters and the votes cast shown in the unit results Form EC8A Exhibit P7 - P31 exceeded the number of accredited voters recorded in Polling Unit by Polling Unit card reader accreditation report as shown in Exhibit P1 and P1A, such wide margin of over-voting being proof that the election was not conducted in compliance with the INEC Approved Guidelines and Manual for Election Officials, Exhibit P3 and P4 respectively. It is beyond the realm of dispute that the purported total votes cast in the election, being 956,721 exceeded the total number of voters that was actually accredited with the use of card readers being 715,392 as shown in Card Readers Report (Exhibit P1 and P1A). It demands nothing more exacting than kindergarten arithmetic to know that the purported total votes recorded in the election [in favour of t” Respondent alone being 724,680 exceeded the total number of voters that was actually accredited with the use of card readers being 715,392...”

I must observe that the figures in exhibits P1 and P1A –card readers reports do not agree. Whereas exhibit P1 stated the figure of accredited voters as 109100, which is the figure pleaded by appellants exhibit P1A recorded 715 292 as the total number of accredited voters by card reader. It is trite law that facts not pleaded ground to no issue. It follows, therefore, that the submission that the total number of accredited voters in Delta State for the gubernatorial election of 11th April, 2015 is 715,392 has no leg to stand on - it grounds to no issue as the figure was not pleaded.

The second point to be noted has to do with the issue of accreditation of voters under the Electoral Act, 2010, as amended. The case of appellants on the issue, as reproduced supra, is based on accreditation by Card Reader, the evidence of which is said to be exhibits P1 and P1A. Appellant’s accreditation, therefore, has nothing to do with the voters’ register for the election in question.

It is now settled law that section 49 of the Electoral Act, 2010, as amended governs the process of accreditation of voters in Nigeria. Under the section, a prospective registered voter presents his voters card or now Permanent voters card (PVC) to the presiding officer, who, upon being satisfied of the details vis-à-vis the information on the voters register, issues the voter with a ballot paper and marks his name in the register. In the circumstance and as provided by law, to

establish accreditation or lack of it, in any election, production of the relevant voters register is a must. It cannot be otherwise. See *Awuse Vs Odili* (2005) All FWLR (Pt. 261) 284. It is true that in the recent general election, the card reader concept was introduced by INEC. I hold the strong view that the card reader as introduced is not a substitute for the voters register particularly as there is no Act of the legislature backing that concept vis-a-vis the voters register. If anything I hold the view that the card reader is introduced as an aid to the process of accreditation of voters in that after the voters card of the prospective voter is verified by the card reader, the presiding officer still has the duty to confirm the name of the said voter in the voters register before proceeding to mark it accredited before issuing the ballot paper to the voter.

The importance of the voters register in an election in Nigeria is not limited to accreditation of voters. It extends to the determination of the question of over-voting when one arises. It is now trite law that where a petitioner relies on the ground of non-compliance with the Electoral Act, 2010, as amended, by way of over-voting in a challenge of the election or return of his opponent, he is duty bound to do the following:

(a) Tender the voters register.

(b) Tender the Statement of Result in the appropriate forms which would show the number of registered accredited voters and numbers of actual voters.

(c) Relate each of the documents to the specific area of his case in respect of which the documents are tendered and admitted, and,

(d) Show that the figure representing the over-voting if removed would result in victory for the petitioner.

It is very clear from the record that appellants did not do any of the above in this case though they relied on accreditation and over-voting as grounds of non-compliance with the Electoral Act, 2010, as amended.

Learned counsel for appellants has argued that appellants did not produce the voters register because parties at the tribunal agreed that INEC mandated the use of Card reader for accreditation and that voters' register was not necessary!

I have to state that the issue of what constitutes accreditation and over-voting are statutorily provided.. They are matters of law,

not discretion, and as such parties cannot, by agreement, waive the law particularly as the burden of proof of over-voting rests squarely on the appellants. As has been demonstrated above, the question of proof of over-voting is not as simple as learned counsel arrogantly and insultingly puts in at page 14 of the appellant brief to wit.

“It demands nothing more exacting than kindergarten arithmetic...” B

With the collapse of the main plank of the case of appellants, it follows that there is no iota of relevant evidence on record to prove the case pleaded by the appellants and as a result, the lower courts were right in dismissing the petition and the appeal arising from that decision. C

It is for the above reasons, and the more detailed reasons contained in the lead reasons for Judgment of my learned brother, Okoro JSC just delivered that I too found no merit in the appeal and consequently dismissed same. D

With regard to appeal Nos. S.C/27/2016 and S.C/28/2016, I hold the view that having dismissed appeal No. SC.123/2016 being the main appeal against the Judgment of the lower court, no useful purpose would be served in considering those appeals. They are consequently discountenanced and struck out. E

NGWUTA JSC

SC.27/2016

The main appeal, SC. 23/2016 has been resolved and there is no live issue in SC.27/2/2016 to be resolved as the substance of this appeal and the issues involved are the same as in SC.23/2016. F

SC. 28/2016

The facts, issues and arguments in SC.28/2016 are the same as in Appeal No. SC.23/2016 already determined. There is, therefore, no live issues to be resolved in this appeal and the appeal is hereby discountenanced. G

PETER-ODILI JSC

I am in total agreement with the reasons just proffered by my learned brother, John Inyang Okoro JSC which reasons explained H

this court's dismissal of the appeal SC.23/2016 delivered on 2nd day of February, 2016. To underscore my support I shall make some remarks.

This is an appeal from the judgment of the Court of Appeal Benin Division dated 24/12/2015 in which the Court of Appeal dismissed the appeal of the appellants herein and upheld the judgment of the Delta State Governorship Election Petition Tribunal dated 26th day of October, 2015.

The full facts leading to this appeal are well set out in the lead judgment and it will serve no purpose repeating them.

Learned counsel for the appellant adopted the Brief of Argument settled by Adewole Adebayo Esq. and filed on the 22/1/2016. In the Brief learned counsel distilled five issues for determination which are the following:

1. Whether the learned Justices of the Court of Appeal erred in law and occasioned a gross miscarriage of justice when their Lordships resolved issues 2 and 3 for determination against the appellants and upheld as not perverse the decision of the trial tribunal that the appellants did not prove by concrete evidence their allegations of improper accreditation and over-voting. (Ground 1 and 7)

2. Whether or not the learned justices of the Court of Appeal erred in law in applying section 49 or 149 of the Electoral Act, 2010 (as amended) and the case of Awuse v Odili (2005) ALL FWLR (Pt. 261 248 to hold that appellants are not allowed to prove accreditation of voters by reliance on the card reader reports exhibits P1 and P1A without tendering or relying on the voters register. (Grounds 2 and 3)

3. Whether the learned justices of Court of Appeal erred in law when their lordships held that exhibits P34, P35 and P36 struck out by the trial tribunal were of no material assistance to the case of the appellants. (Ground 4)

4. Whether the learned justices of the Court of Appeal erred in law and occasioned a gross miscarriage of justice in resolving issue 6 for determination against the appellants and holding that the appellants failed to adduce credible evidence to prove toxic votes. (Ground 5)

5. Whether the learned justices of the Court of Appeal erred in law in upholding the preliminary objection of 1st respondent and

discountenancing the consequential relief of fresh election. (Ground 6)

Learned counsel also adopted appellants Reply Briefs to 1st respondent's Brief filed on 29/1/2016, Reply Brief to 2nd respondent's Brief filed on 28/1/2016 and Reply Brief to 3rd respondent's Brief filed on 30/1/2016. B

Dr. Alex Izinyon SAN, learned counsel for the 1st respondent adopted his Brief of Argument filed on 26/1/2016 in which he crafted four issues for determination which are thus:

1. Whether the court below was right in law in dismissing the appellants appeal before it on the ground that the appellants failed to prove over voting. (Encompassing Grounds 1, 2, 3 and 7 of the Notice of appeal) C

2. Whether the learned justices of the Court of Appeal were right In law in affirming the decision of the trial tribunal striking out the appellants' Exhibits P34, P35, and P36. (Encompassing Ground 4 of the Notice of Appeal) D

3. Whether the learned justices of the Court of Appeal were right in law when they affirmed the decision of the trial tribunal that the appellants have a duty to prove the toxic votes that accrued to the 1st respondent (Encompassing Ground 5 of the Notice of Appeal) E

4. Whether the court below was right in law in upholding the 1st respondent's preliminary objection. (Encompassing Ground 6 of the Notice of Appeal) F

The 1st respondent in the Brief of Argument argued a Preliminary Objection.

The Brief of Argument of the 2nd respondent settled by A. T. Kehinde SAN was adopted by counsel and he identified two issues for determination which are, viz: G

1. Whether the Court of Appeal was right when it affirmed the decision of the trial tribunal that the appellants failed to prove their case of non-compliance having regard to their sole reliance on card reader report. (Distilled from Grounds 1, 2, 3, 4, S, and 7) H

2. Whether the Court of Appeal was right in upholding the preliminary objection of the 1st respondent and struck out the relief for fresh election sought for the first time by the appellant at lower court. (Distilled from Grounds 6)

Learned counsel for the 3rd & 4th respondents, D. D. Dodo SAN adopted their Brief of Argument filed on the 28/1/2016 and in it framed two issues for determination which are stated hereunder, viz:

1. Whether the Court of Appeal was not right when it upheld B the preliminary objection against the relief for fresh election claimed for the first time on appeal. (Ground 6)

2. Whether the Court of Appeal was not right to have dismissed the appeal (Grounds 1, 2, 3, 4 and 5)

C The 3rd and 4th respondents raised a preliminary objection which arguments are contained in their Brief of Argument aforementioned.

D For the 5th respondent, learned counsel adopted his Brief of Argument filed on 29/1/2016 and argued along two issues for the determination of the appeal which are thus:

1. Whether the Court of Appeal was not right when it held that the appellants cannot claim a relief for fresh election claimed for the first time on appeal. (Ground 6)

E 2. Whether the Court of Appeal was not right to have dismissed the appeal. (Grounds 1, 2, 3, 4 and 5)

I would want to deal swiftly with the Preliminary Objections and that of the 1st respondents which contests the competence of the Notice of Appeal on grounds that were not valid and therefore all issues therefrom consequently incompetent.

F That Preliminary Objection of the 3rd and 4th respondent is centred on competency of the appeal, there being no relief in the petition for a fresh election which relief is now being sought in the Notice of Appeal at this stage.

G I see it best to discountenance these preliminary objections which in substance form the gravamen in the arguments of the appeal proper and so I see the objections as distractions which are best kept at bay so the meat of the matter can be well considered. Therefore I strike out the two Preliminary Objections above set out by the 1st H respondent on the one part and that of the 3rd and 4th respondent on the other.

MAIN APPEAL

I shall utilise the two issues as crafted simply by the respective respondents which seem to me easier guides to the determination of

the appeal as the answer thereto would rest the nagging questions in this appeal and even cover effectively the issues as raised by the appellants.

ISSUES 1 & 2

Whether the Court of Appeal was not right when it upheld the preliminary objection against the relief for fresh election claimed for the first time on appeal. Also if the Court of Appeal was not right in dismissing the appeal. B

In urging this court to allow the appeal, learned counsel for the appellants contended that the court below erred in law and occasioned a gross miscarriage of justice when the Court of Appeal of upheld as not perverse the decision trial tribunal that the appellants did not prove by concrete evidence their allegations of improper accreditation and over-voting. Also that the Court of Appeal erred in law in applying section 49 or 149 of the Electoral Act, 2010 (as amended) and the case of *Awuse v Odili* (2005) ALL FWLR (Pt. 261) 248 to hold that appellants are not allowed to prove accreditation of voters by reliance on the card reader reports exhibits P1 and P1A without tendering or relying on the voters register. C

That the court below erred when they held that exhibits P34, P35 and P36 struck out by the trial tribunal were of no material assistance to the case of the appellants and also that appellants failed to adduce credible evidence to prove toxic votes. That the Court of Appeal erred in upholding the preliminary objection of the 1st respondent and discountenancing the consequential relief for fresh election. He cited *Mogaji v Odofin* (1978) 4 SC 91 at 93; *AGIP (Nig.) LTD. v AGIP Petro Int'l* (2010) NWLR (Pt. 1187) 348 at 413; *Udengwu v Uzuegbu* (2003) 13 NWLR (Pt. 836) 136 at 152 etc. F

In response, learned counsel for the 1st respondent contended that the allegations of over voting by the appellants are allegations of crime embedded in facts relating to non-compliance and so the standard of proof envisaged is proof beyond reasonable doubt which the appellants had failed to prove. He cited *Omisore v Aregbesola* (2015) SC 204; *Abubakar v Yar'Adua* (2009) ALL FWLR (PT. 451) 1 etc. G

That what the appellants did in the court below was to present a case in the appeal at the court below different from what they presented at the trial tribunal which is not allowed in law and so the relief claimed by them in their Notice of Appeal was not validly raised H

in law.

For 2nd respondent it was contended that the two lower courts were right when they held that appellants failed woefully to prove their case of non-compliance with the Electoral Act 2010 by way of over-voting. Also the court below right to strike out the application of
B appellants for fresh election for the first time at the lower court.

Learned counsel for the 3rd respondent contended that it is trite that where a party has not claimed a particular relief from the court, the court has no power to grant such a relief to the party. On
C the matter of the non-compliance with the Electoral Act for which the election would be nullified learned counsel for the 3rd respondent argued along the same line as the other respondents and that the appellants had failed to prove non-compliance substantial in content for which the election would be nullified. He cited many judicial au-
D thorities in support such as in *Chima v Nwagu* (2012) 1 LREC 315 at 347, *Ucha v Elechi* (2012) 13 NWLR (Pt. 1317) 330 at 359.

The learned counsel for the 5th respondent made submission which in substance tallied with those of the other respondents.

On the issue of non-compliance with the Electoral Act for which
E this court is called upon to nullify the election, while the appellants contend they are on firm ground in asking for the nullification, the respondents vehemently oppose it on the ground that the appellants in their call were off the mark. It is to be stated that a petitioner such
F as the appellants herein who contests the legality or lawfulness of votes cast in an election and the subsequent result has some impera-
tives to comply with such as tendering in evidence all the necessary documents used at the election. After the hurdle would then come
G along the petitioners calling witnesses to testify that the illegality or unlawfulness alluded to substantially affected the result of the elec-
tion. Then to be shown is that the documents tendered are among those in which the results of the votes are recorded. For effect is to be
H established that the witnesses are eye-witnesses who saw it all on the day of the election and not those who have come to court to report what an eye witness told them. The implication is that the witnesses as eye-witness cannot be substituted for a reporter of what the eye-witness told him. I relied on *Abubakar v Yar'Adua* (2008) 10 NWLR (Pt. 1122) 1 at 173 per Tobi JSC Section 139 (1) of the Electoral Act has provided thus:

“139(1) An election shall not be liable to be invalidated by reason of non-compliance with the provisions of this Act if it appears to the Election Tribunal that the election was conducted substantially in accordance with the principles of this Act and that the non-compliance did not affect substantially the result of the election.”

Section 138 of the Electoral Act which provided the grounds for presentation of an election petition, clearly at one with section 139 of the Act above quoted, applying them this court held in the case of *Oke v Mimiko* (NO. 2) (2014), NWLR (Pt. 1388) 332 at 367 thus:

“Having those two crucial sections of the Electoral Act in focus at all times material by the two courts below and this court being so focused, it would then be said that at the risk of over repetition, a petition can only succeed on non-compliance with the provisions of the Electoral Act, the petitioners must not only prove that there was non-compliance with the provisions of the Electoral Act but that the non-compliance substantially affected the result of the election.”

A two pronged process which are intertwined to such an extent that none can go without the other arm. See *C. P. C. v INEC* (2011) 12 SCNJ 644 at 710, (2011) 18 NWLR (Pt. 1279) 493. A similar interpretation was given earlier in time to sections of the Electoral Act in operation previously with provisions that are in pari materia to the current sections 138 and 139 of the Electoral Act. In *Awolowo v Shagari* (1979) All NLR 120 at 161. The Supreme Court had held in relation to allegations on non-compliance thus:

“If this proposition is closely examined it will be found to be equivalent to this that the non-observation of these Rules or Forms which is to render the election invalid must be so great as to amount to concluding of the election in a manner contrary to the principle of an election by ballot and must be so great as to satisfy the tribunal that it did affect or might have affected the majority of the votes, in other words the result of the election”. See also Buhari v Obasanjo (2005) 13 NWLR (Pt. 941) at 191, paras A-C.

On the importance of establishing the substantiality of the non-compliance the appellants are further expected to prove the effect of the alleged non-compliance polling unit by polling unit and the standard of proof on the balance of probabilities and not just on minimal proof. If the appellants are able to meet up that required standard

then would the respondents be asked to lead evidence in rebuttal. In this regard are the cases of *Ucha v Elechi* (2012) 13 NWLR (Pt. 1317) 330 at 359, *Buhari v Obasanjo* (2005) 13 NWLR (Pt. 941) (Pt. 1); *Awolowo v Shagari* (1979) 6 - 9 SC 51.

B It is now well settled that proof of over-voting can only be made with the tendering of the voters register without which a petitioner has not started the journey of proving over-voting and with is the simultaneous duty of demonstrating and establishing the allegation of over-voting before the tribunal by specifically relating or linking each of the documents to specific parts of his case. Therefore it is clear that merely dumping such documents including the voters register on the tribunal has no added value. See *Awuse v Odili* (2005) 16 NWLR (Pt. 952) 416; *Iniama v Akpabio* (2008) 17 NWLR (Pt. 1116) 225; *Kalgo v Kalgo* (1999) 6 NWLR (Pt. 608) 639 at 646.

D It is on the footsteps of the above restated principles that this court so recently decided the case of SC. 907/2015: *Mahmud Aliyu Shinkafi & Anor. v Abdulazeez Abubakar Yari & Ors* (unreported) delivered on 8th January, 2016, the full court of the Supreme Court on this concept at pages 29 to 30 of the judgment held as follows:

E *“The grouse of the appellants in this issue, basically, is that there was over-voting and because of that, there was substantial non-compliance with the Electoral Act.*

To prove over-voting, the law is trite that the petitioner must do the following:

- F 1. *Tender the voters’ register*
2. *Tender the Statement of Result in the appropriate forms which would show the number of registered accredited voters and number of actual votes.*
- G 3. *Relate each of the documents to the specific area of his case in respect of which the documents are tendered.*
4. *Show that the figure representing the over-voting if removed would result in victory for the petitioner.*

See generally *Haruna v Modibbo* (2004) 16 NWLR (Pt. 900) 487, *Kalgo v Kalgo* (1999) 6 NWLR (Pt. 606) 639 and *Audu v INEC* (No.2) (2010) 13 NWLR (Pt. 1212) 456.

The learned Senior counsel for the appellants at page 28 of their brief of argument agrees that the above steps were necessary in order to prove over-voting. However, the learned Silk opines that

with the introduction of the Card Reader Machines, it would no longer be necessary to tender the voters' register and other steps set out earlier.

He went on to say that Haruna v Modibbo (supra), Kalgo v Kalgo (supra), Iniaya v Akpabio (supra) and Audu v INEC NO.2 (supra) are no more good law. My view on this is that a principle of law is well established, cannot be abolished simply because an appellant failed to prove his case in accordance with those principles. My understanding of the function of the card Reader machine is to authenticate the owner of a voter's card and to prevent multi-voting by a voter. I am not aware that the Card Reader machine has replaced the voter's register or taken the place of statement of result in appropriate forms. As it stands, it appears that the appellants did not lead any evidence to prove over-voting.

To further drive home the point, this court also per Onnoghen JSC in a Judgment delivered on 25th January, 2016 in SC. 982/2015: Mr. Labaran Maku v Alhaji Umaru Tanko Almakura & 3 Ors (Unreported) at page 5 of the judgment held thus:

"It is also settled law that despite the tendering of exhibits in proof of a petition/ case, the onus of proving the case pleaded and for which the documents were tendered in evidence, lies on the petitioner. If the case of the petitioner is that there was no accreditation or over voting, the voters' register is essential and must be pleaded and tendered in evidence as well as the result of the election, polling unit by polling unit, etc. It is the duty of the petitioner to also tender the ballot papers, where necessary and to link these exhibits with the case of the petitioner through the witnesses called to prove the case. Where a petitioner pleads thousands of documents in an election petition, such as ballot papers used in an election which usually amounts to loads of bags of the paper and tendered them, usually in that bulk without linking them individually to the case being made, such as over-voting, wrongful cancellation, inflation of results etc, that is clearly a case of dumping of documents on the court. It is not the duty of the court to sort out the exhibits and relate them to the heads of claim or case of the petitioner."

The same guides re-echoed in the Supreme Court case of SC. 979/2015: Alhaji Muhammed Inuwa Yahaya & Anor v Alhaji Ibrahim Hassan Dankwanbo (unreported) delivered on 25th January, 2016

per Onnoghen JSC at pages 24 - 25 of the Judgment held thus:

"It is not enough for a petitioner in an election petition to allege over voting. He has the duty to prove same. To discharge out responsibility the law requires the petitioner to do the following:

1. Tender the voters' register

B *2. Tender the Statement of Result in the appropriate forms which would show the number of registered accredited voters and number of actual votes.*

3. Relate each of the documents to the specific area of his case in respect of which the documents are tendered.

C *4. Show that the figure representing the over-voting if removed would result in victory for the petitioner."* See *Haruna v Modibbo* (2004) 16 NWLR (Pt. 900) 487, *Kalgo v Kalgo* (1999) 6 NWLR (Pt. 606) 639 and *Audu v INEC (No.2)* (2010) 13 NWLR (Pt.116) 225.

D On the other hand, when the ground for challenging the return of a candidate in an election petition is by reason of corrupt practices or non-compliance with the provisions of the Electoral Act, the petitioner has the duty to prove:

(a) That the corrupt practice or non-compliance took place
E and

(b) That the corrupt practice or non-compliance substantially affected the result of the election. See sections 138(1) of the Electoral Act, 2010 (as amended) *Awolowo v Shagari* (1979) ALL NLR 120; *Ibrahim v Shagari* (1983) 2 SCN LR 176; *Buhari v Obasanjo*
F (2005) 2 NWLR (Pt. 910) 241 etc.

It is not enough for the petitioner to allege and prove over-voting. In addition to the above the petitioner must show that the said over-voting inured to the winner of the election in particular as
G the over-voting can be for any of the candidates in the election, respondent or any of the other contestants in the election in question. The court must also be satisfied that it was due to the over-voting traceable to the respondent that the respondent won the election.

What I am trying to put across though at the risk of repetition
H is to show that the matter of how to go about proving over-voting is something not new and the guidelines well established and no second guessing, leaving no one in doubt as to what the requirements are and no beating about the bush or relying on rumours to do what the law has prescribed as the standard of proof in an allegation of

non-compliance with the Electoral Act for which a court would set aside an election which the electoral body statutorily so empowered has declared as valid. Therefore to seek to use the Card Reader in proof without the voters registers would fall into what may perhaps be categorized as a pipe dream since the Electoral Act has not so provided. B

Therefore I see nothing with which to fault the finding of the court below in that regard and it is in consonance with what this court found in the case of Shinkafi v Yari & Ors (supra) per Okoro JSC.

To conclude on this matter is to state that an election cannot be invalidated for non-compliance with the Electoral Act on the basis of a procedure not contained in the Electoral Act. See Agbaje v Fashola (2008) 6 NWLR (Pt. 1082) 90. C

On the other leg of this appellate contest is whether the Court of Appeal was right in upholding the preliminary objection of the 1st respondent and striking out the relief for fresh election which was raised for the first time on appeal at the Court of Appeal. D

I shall quote what the appellants sought in their relief at the trial tribunal and what they claimed for relief at the appeal court and they are thus: E

“wherefore your petitioner pray that it may be determined that:

(a) The 1st respondent duly sponsored by the 2nd respondent was not duly elected or returned as Governor of Delta State, and F

(b) The Governorship election held on 11th April, 2015 in which 1st respondent was purportedly elected as Governor of Delta State is void by reason of corrupt practice involving over-voting, non-compliance with the Electoral Law, Regulation and Directives issued by the 3^d respondent” (Please see page 7 vol. 1 of the Records). G

In a sudden twist, the appellants on appeal at the lower court sought for the following relief as can be gleaned from page 1332 vol. II of the Records thus:

“To allow the appeal and set aside the judgment of the Governorship Election Petition Tribunal delivered on 26th day of October, 2015 and in its place enter judgment for the petitioners as claimed in the petition, nullify the said election and direct 3^d respondent to order fresh election for the office of Governor of Delta State within the time prescribed by law.” H

The Court of Appeal had this to say at page 5171 of the Record:

“it is generally the law that an appeal does not constitute a new or fresh action; it is rather a continuation of the action commenced and litigated at the trial court, and for this reason the parties are not permitted to alter their claims or reliefs sought by them at stages of the proceedings but must maintain the same reliefs on appeal as claimed at the trial court. See Ngige v Obi (2006) 14 NWLR Pt. 999; Akpa v Itodo (1997) 5 NWLR (Pt. 109) 250. Upon this principle of law, the preliminary objection by the 1st respondent deserves to be upheld and I uphold accordingly. The relief for fresh election sought on appeal by the appellants is accordingly discountenanced.”

This court had in several cases emphasised that no one can shift the goal post from the commencement of the suit to the Court of Appeal and perhaps at this level. This is because a case remains what it is from the initiation stage or from the court of first instance and then consistently up to appeal stage without change of what the basic contest is as a party is bound by the case he made out at the trial court. See Emenike v PDP (2012) 12 NWLR (Pt. 1315) P. 556 at 593 para. G - C. where this court held that:

“This court has stated it in clear terms that a party should be consistent in stating his case and consistent in proving it. Justice is more than a game of hide and seek. It will never decree anything in favour of so slippery a customer as the appellant. See Ajide v Kelani (1985) 3 NWLR (Pt. 12) 248 at 269 C -D.

It is extant in the record of appeal that the 4th respondent was duly screened by the Gubernatorial Screening Panel set up by the 1st respondent's National Executive Committee. He was cleared to contest the valid primary election organized by the 1st respondent.

He won and his name was sent to the 3^d respondent as the respondent's candidate for the Governorship Election of April, 2011.

The appellant realised the futility of his action. He appreciated that he had no chance in respect of his claims touching on declaratory reliefs. He jettisoned the real issue and attempted to hang on straw, as it were. He tried to cling tenaciously to the point relating to the membership of the 4th respondent. The claim of the appellant as set out in the originating summons and reproduced above did not raise any question about the membership of the 4th respondent. No question for determination touched on it. There was no declaratory

relief in that respect. Again, it should be stated that there should be consistency in prosecuting a case by a party. See Kalu v Uzor (2006) 8 NWLR (Pt. 981) 66 at 87.” See also the case of Osuji v Ekeocha (2009) 16 NWLR (Pt. 1166) P. 81 at 111 - 112 paras. H - A. where it was held thus.

By introducing and making an elaborate issue in respect of joint ownership, the learned counsel has now made out a case different from the plaintiff/appellants’ case before the trial court. This runs contrary to the practice and procedure of our civil jurisprudence that you cannot make a case on appeal different to your case before the trial court. Neither is a counsel or litigant permitted to approbate and reprobate in the conduct of a case- Ezomo v A. G. Bendel State (1986) 4 NWLR (Pt. 36) Pg. 448 at Pg. 462; Kayode v Odotola (2001) 11 NWLR (Pt. 725) Pg. 659”

Also Odom v POP (2015) 6 NWLR Pt. 1456 P. 527 at P. 553 paras. E - H. The Supreme Court held thus:

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

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

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

From the reliefs set out in the petition, the appellant had not requested for fresh election and so it is erroneous to have such a relief brought into the appeal at the Court of Appeal. It needs to be said that an appeal is a continuation or rehearing of the original suit and certainly not an inception of a new action and so parties must remain within the confines of their original relief at the court of trial and contend on appeal within those boundaries of reliefs and plead-

ings at the court of first instance. In that the parties and the court on appeal are not allowed to raise or set up a new or different case from the one at the commencement of the trial without the express leave of the court and of course with the knowledge and right of hearing of the other party. See *Adegoke Motors LTD. v Adesanya* (1989) 3 NWLR (Pt. 109) 250 at 266, per the eminent jurist Oputa JSC thus:

“Generally, an appeal is regarded as a continuation of the original suit rather than a new action. Because of this, in an appeal, parties are normally confined to their case as pleaded in the court of first instance. They are not allowed to raise in such appeal new issues without the express leave of the court or proffer new evidence without such leave. An appeal, being a judicial examination by a higher court of decision of an inferior court, it follows that such examination should normally and more appropriately be confined to the facts and issues that came up before the inferior court for decision.”

It is clear that the Court below was on a sound footing when it threw out the relief sought by the appellants or ordering of fresh election since that was completely strange to the case at inception as the appellants are not permitted to take a position in their pleadings and make a turn around at the Court of Appeal to ask for something fresh or novel to the original petition. I rely on *Ajide v Kelani* (1985) 3 NWLR (Pt. 12) 248 at 269.

I see no reason to take a different stand from what the court below did and for effect and in line with the better reasoning in the lead judgment, I also see no merit in this appeal and it was deserving of a dismissal which this court did on the 2/2/2016.

MUHAMMAD JSC

I read in draft the lead reasons of my learned brother Okoro JSC in the appeals and adopt same as mine for the dismissal of Appeal No. SC. 23/2016 and discountenancing appeals No. SC. 27/2016 & No. SC. 28/2016.

OGUNBIYI JSC

On the 2nd February, 2016 the above listed appeals were heard by this court and we dismissed appeal No. SC.23/2016 for lacking in

merit while Nos. SC.27/2016 and SC.28/2016 were discountenanced as they are offshoots of SC.23/2016 which is the main appeal emanating from the judgment of the lower court. There was no order made as to costs. The court however adjourned to give its reasons for the judgment on the 15th February, 2016.

The lead judgment was delivered by my learned brother John B Inyang Okoro, JSC. I agree with my brother that appeal No. SC.23/2016 should be dismissed while SC.27/2016 and SC.28/2016 are to be discountenanced and consequently struck out as serving no useful purpose.

The central focus of the appeal has to do with the issue of accreditation of voters which is given prominence and authentication in the face of voters register and the newly introduced mechanism, the card reader reports which is a supplement to voters register. There is no doubt that the introduction of the new invention is a great improvement on the conventional and orthodox method although is not without its problems of operation and acceptability. However and that notwithstanding, it serves an eye opener into a scientific and efficient system of voting. C D

The lead judgment has comprehensively dealt with all the issues raised in the appeals and I will not wish to over flog same for fear of repetition. I therefore adopt as my own conclusively all the reasons arrived at by my learned brother, Okoro, JSC, and also find no merit in the appeal which is hereby dismissed. E

As a consequence of the dismissal therefore, I also find appeal F No. SC.27/2016 and SC.28/2016 of no useful purpose and are hereby struck out.

SANUSI JSC

The instant appeal was heard by this court on 2nd February, 2016 and judgment was delivered by me immediately after hearing the appeal in which I dismissed the appeal for being devoid of merit. I then promised to give my reasons for the dismissal of the appeal on Monday 15th of February 2016. G H

The third respondent herein, is the statutory body saddled with the responsibility of conducting election to various elective of ices in the country and on 11th April, 2015 it conducted election for the

office of Governor of Delta State among others throughout the country. The first appellant contested such election on the platform of the 2nd Appellant, he All Progressive Congress (APC). The 1st respondent also contested the same election on the ticket of his party, the 2nd Respondent. After the conclusion of the election, the 3rd Respondent B was declared winner of the election having scored highest number of votes by majority of number of votes and returned him as duly elected Governor of Delta State.

Disenchanted with the declaration of such results and return of C 1st respondent as winner of the election the two appellant filed a joint petition at the trial tribunal. The grounds for the petition were principally,

- (a) That the election was characterised with corrupt practices
- (b) Non-compliance with the provisions of Electoral Act 2010 D as (amended).

The trial tribunal heard the petition and in the end dismissed same for want of proof of all the allegation made by the appellant. The Appellants became aggrieved and they jointly appealed to the Court of Appeal i.e. the court below. The court below heard their E appeal and in the end dismissed the appellants' appeal hence they further appealed to this Court on seven grounds of appeal. The appellants however distilled five issues for the determination of the appeal as set out in the lead reasons for judgment prepared by my learned brother John Inyang Okoro JSC. The 1st Respondent in his F brief raised for issues for determination while the 2nd Respondent raised only two issues for determination. Learned counsel for 3rd and 4th Respondent distilled two issues also while the 5th Respondent similarly raised tow issues for determination. These issues are similar and G differ only in wordings.

His lordship John Inyang Okoro JSC dealt with all the salient issues for determination and had given convincing reasons why this appeal should be dismissed for want of merit. I am in entire agreement with such reasons and hereby adopt them as mine I however H wish to emphasise on the issue of over-voting. To my mind, if no person alleges over voting, it be save admitted that there was voting as over voting arises where more votes that the number of registered voters are cast at the polling station. Over voting can not therefore be established without the voters register. This was not done by the pe-

tioners now appellant. They also in order to establish over voting have to tender statement of result in the relevant form and relate each of them to specific and finally present the figures of the alleged over voting. These the appellants have woefully failed to do. I must add that mere relevance on Card Reader reprint will not suffice in proof of over voting because the use of Card Reader is merely complimentary to method of accreditation and amend at facilitating the process of voting. B

Thus, with t se few remarks and for the more detailed reasons for judgment adumbrated on the reasons for judgment of my learned brother John Inyang Okoro JSC, I also a judge this appeal unmeritorious and dismiss it accordingly. C

SC.27/2016

I am fully convinced on perusing the facts of this case and those in SC. 23/2016 are the same and that the issues are also similar D to those in this instant appeal. It will therefore be futile to separately consider this appeal. It is my judgment that the fate of this appeal should abide the fate of the main appeal i.e. No. SC.23/2016. I therefore discountenance it and strike out this appeal.

SC/28/2016 E

The cross appellant in this cross appeal happened to be the 1st respondent in the main appeal i.e. SC.23/2016. Therefore, to embark on considering this cross appeal separately is, in my view, to say the least amount to an exercise in futility or to engage in sheer academic exercise which this court lacks luxury of time to do. I therefore F strike out this cross appeal.

G

H