

SUPREME COURT OF NIGERIA

MONDAY 15TH FEBRUARY, 2016. SC.24/16, SC.25/16 & 26/16

**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. GREAT OVEDJE OGBORU APPELLANTS

2. LABOUR PARTY (LP)

AND

1. SENATOR (DR.) IFEANYI

ARTHUR OKOWA

2. PEOPLES DEMOCRATIC PARTY RESPONDENTS

3. INDEPENDENT NATIONAL

ELECTORAL COMMISSION

AND

SENATOR (DR) IFEANYI

ARTHUR OKOWA

AND

1. GREAT OVEDJE OGBORU

2. LABOUR PARTY

3. INDEPENDENT NATIONAL

ELECTORAL COMMISSION

4. PEOPLES DEMOCRATIC PARTY

APPEALS - Grounds - Validity - Once a ground gives respondent the necessary notice of grudges - Appellant has against the decision on appeal - The ground is competent (H1)

JUDICIAL PRECEDENTS - Principle of - Supreme Court and other courts are bound by earlier decisions of the apex court - Where the law and facts in contention are similar (H2)

ELECTION PETITIONS - Over voting - Proof - Is not done by reference to card reader - But by reference to the voters register - Which provide the number of accredited voters (H3)

ELECTION PETITIONS - Declaratory reliefs - Proof - Appellants who sought for the reliefs from the Tribunal - Must succeed only on the

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strength of their case - And not on weakness of respondents' case
(H4)

ELECTION PETITIONS - Documents - Contradictions - Having failed
to establish the difference in figures in the exhibits - Appellant cannot
seek for annulment of the election on basis of wrong dates (H5)

ELECTION PETITIONS - Forgery - Proof - Appellant's allegation on
the difference in the Exhibits raises issue of forgery - Which is re-
quired to be proved beyond reasonable doubt (H6)

FACTS

At the Delta State Governorship Election Petition Tribunal, petitioners/appellants brought this petition challenging the election of 1st respondent. The gubernatorial election for the State and other States of the Federation was conducted on the 11th April 2015 by 3rd respondent. 1st appellant and 1st respondent contested for the election under the sponsorship of the Labour party and Peoples Democratic Party, respectively. At the end of the exercise, 3rd respondent declared 1st respondent as the winner thereof, having secured the majority of the valid votes cast at the election. 1st respondent was in the circumstance returned elected as the State Governor.

Dissatisfied, appellants filed the petition. They sought for the nullification of 1st respondent's election and return as well as the conduct of a fresh election for the same office by 3rd respondent. At the hearing, 1st respondent filed his brief and incorporated therein, a notice of preliminary objection challenging the competence of the petition. At the end of hearing in the matter, the Tribunal in its final judgment dismissed the petition. Dissatisfied, appellants appealed to the Court of Appeal Benin Division. The Court dismissed the appeal and upheld the judgment of the trial Tribunal. Not satisfied yet, appellant have approached the Supreme Court on an appeal.

ISSUES FOR DETERMINATION

1. Whether or not the lower court was right in affirming the decision of the trial tribunal to strike out some paragraphs of the appellants/petitioners' replies as well as the further witness statement on Oath and Exhibits P31-P41 which were hinged on the said replies.

2. Whether or not the lower court was right in affirming the decision of the trial tribunal to Dismiss the Appellants/Petitioners' Petition having regard to the failure of the Appellants/Petitioners to prove their petition.

3. Whether the lower court's purported failure to pronounce on issues 4 and 7 submitted to it occasioned a miscarriage of justice.

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

APPEALS - Grounds - Validity

1. I agree entirely with learned senior appellants' counsel Dele Adesina that the true function of a ground of appeal is indeed to give the respondent the necessary notice of the grudges the appellant has against the judgment he appeals against. The particulars of the ground of appeal, learned senior counsel is also right, only provide specific details to fill in the yearning gaps in the inexplicit ground. It is long settled that once a ground of appeal gives the respondent the necessary notice of the grudges the appellant has against the decision on appeal and leaves no room for any surprise to be thrust on the respondent on the issues to be raised in the appeal, the ground is valid and competent. Whether or not the grounds of appeal in contention herein are valid depends on their meeting the foregoing enabling principles.

My perusal of all the grounds leaves me in no doubt that they all arise from the judgment appealed against and even if some are verbose, none in the entire grounds attacks the obiter dicta in the decision appealed against. Each of the grounds raise a distinct complaint and specifies the portion of the judgment to which the complaint relates. The law allows the appellants to raise these questions and it would be unjust to deny them the right of ventilating their grief. In sum, I find no merit in the application and same is accordingly dismissed.

(p. 1762 A)

JUDICIAL PRECEDENTS - Principle of

2. My lords, it is still the principle that whenever this Court is subsequently asked to apply a legislation to ascertained facts which same legislation the apex court had earlier applied to same or similar facts, the court and of course the lower courts must, in the performance of the task, proceed in exactly the very manner the apex court proceeded in its earlier task. Put differently, this Court and other courts are subsequently bound by the earlier decisions of the apex court where the law and facts in contention are same or similar. (p. 1770 E)

ELECTION PETITIONS - Over voting - Proof

3. Learned senior Counsel for all the three respondents are absolutely right in their submissions that in spite of its introduction and the requirement by the 3rd respondent that the card reader be mandatorily used in the April 2015 Governorship Election in Delta State, the proof of over-voting which appellants allege has marred the election cannot and is not by reference to the card reader vis-à-vis the actual votes cast at the election. Rather, the proof of the fact of over-voting still remains by reference to the voters register, which provide the number of accredited voters, Vis-à-vis the number of votes actually cast as recorded in the Form EC8 series. In affirming its earlier decisions on the proof of substantial non-compliance with the Electoral Act as a result of over-voting, this Court in one of its most recent and yet to be reported decision, Appeal No. SC. 907/2015, Mahmud Aliyu Shinkafi and anor V. Abdulazeez Abubakar Yari delivered on January 2016, restated the position of the law in spite of the advent of the card reader thus:-

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

- 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.***
- 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. (p. 1770 G)

ELECTION PETITIONS - Declaratory reliefs - Proof

4. One agrees with learned senior counsel for the respondents' that expunging RWI's evidence, if ever same is inadmissible, would not have any effect on appellants' fortunes in the petition. The truth remains that the appellants who sought declaratory reliefs from the tribunal succeed only on the strength of their case and not on the weakness of the respondents' case. (p. 1773 G)

Documents - Contradictions

5. Let me invoke Section 22 of the Supreme Court Act to do what the appellants assert the lower court did not. In that task, appellants must be reminded that election is a drawn out process which does not start and end with the making of Exhibits P28 and P29. If the defect in these two documents are to lead to the nullification of the entire election and return of the 1st respondent, beyond appellants' ipsi dixit on the disparity between the date the signatures on the documents were appended and the date the elections were concluded, appellants must further establish the difference in the figures in the exhibits and the figures in the Forms EC8A, EC8A and EC8C they drew from. Having failed to demonstrate this, it is absurd for the appellants to press that the entire April Governorship Election in Delta State be annulled because of the wrong dates on Exhibits P28 and P29. (p. 1774 C)

ELECTION PETITIONS - Forgery - Proof

6. Finally, appellants' allegation on the difference between the Exhibits P28 and P29 were signed and when the elections were concluded smirks of forgery. The crime requires proof beyond reasonable doubt not only as to the fact of its occurrence but as to the involvement of the 1st respondent. (p. 1774 G)

REPRESENTATION

SC.24/2016

Dele Adesina SAN, Robert Emukpoeruo, Uzo Onwukwe Esq., Ezekiel Afolayan Esq., Adernola Adesina Esq., Victor Okotie Esq., and E. I. Asuzu Esq., for the Appellants

B Dr. Alex A. Izinyon, SAN, Mr. Ken Mozia, SAN, Chief A. K. Osawota, Prof. A. Ekpu, B.K. Abu, Esq., C.S. Ekeocha, Esq., Victor Ebonka, Esq., Bekederemo Dickson, Esq., Isiah Bozimo, Esq., L.O. Fagbemi, Esq., Josephine Majebi, (Miss), and C.D. Adah, (Miss) for the 1st Respondent

C Kehinde Ogunwumiju Esq., Bamikole Aduloju Esq., Nneka Inogbo (Miss), Queenette Agbe (Miss), Ademola Abinlola Esq., Adaeze Anah (Miss), B.O. Arnawu Esq., A.O. Ashiru (Miss), Frances Nwokolo (Miss), Aminat Adams (Miss), Chinyere Ofoegbu (Miss), Oluwaseye Kolawole (Miss), Collins Ekpenisi Esq., Pela Omofe and Mr. E.A. Ibrahim Effiong for the 2nd Respondent

D Dr. Onyechi Ikpeazu OON, SAN, Alex Ejiesieme Esq., Onyinye Anumonye Esq., R.N. Ossai Esq., Nwachukwu Ibegbu Esq., Obinna Onya Esq., Julius Mba Esq., and Nwamaka Ofoegbu (Miss) for the 3rd Respondent

SC. 25/2016

Eoro Emukpoeruo, Uzo Onwukwe for the Appellant

Dr. Alex A. Izinyon, SAN. Mr. Ken Mozia, SAN, Chief A. K. Osawoya, Prof. A. Ekpu, B.K. Abu, Esq., C.S. Ekeocha, Esq.,

F Victor Ebonka, Esq., Bekederemo Dickson, Esq., Isaiah Bozimo, Esq., L.O. Fagbemi, Esq., Josephine Majebi, (Miss), C.D. Adah, (Miss) for the 1st Respondent

G 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), Frances Nwokolo (Miss), Aminat Adams (Miss), Chinyere Ofoegbu (Miss), Oluwaseye Kolawole (Miss), Collins Ekpenisi Esq., for the 2nd Respondent

Fred Onuobia Ogechi Ogbonna for 3rd Respondent

H SC. 26/2016

Dr. Alex A. Izinyon, SAN. Mr. Ken Mozia, SAN, Chief A.K. Osawoya, Prof. A. Ekpu, B.K. Abu, Esq., C.S. Ekeocha, Esq., Victor Ebonka, Esq., Bekederemo Dickson, Esq., I. Bozimo, Esq., L.O. Fagbemi, Esq., Josephine Majebi, (Miss), C.U. Adah, (Miss) for Cross Appellant.

Dele Adesina (SAN), Robert Ernukpoeruo, Uzo Onwukwe, Ezekiel Afolayan, Ademola Adesina, Victor Okotie and E.I. Asuzu for 1st and 2nd Cross Respondent

Dr. Onyechi Ikpeazu OON, SAN, Alex Ejiesieme Esq., Onyinye Anumonye Esq., R.N. Ossai Esq., Nwachukwu Ibegbu Esq., Obinna Onya Esq., Julius Mba Esq., and Nwamaka Ofoegbu (Miss) for the B 3rd Respondent

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), Frances Nwokolo (Miss), Aminat Adams (Miss), Chinyere Ofoegbu (Miss), Oluwaseye Kolawole (Miss), Collins Ekpenisi Esq., for the 4th Respondent C

CASES REFERRED TO

Kachia v. Vazid (2001) 17 NWLR (pt. 742) 431

APC v. PDP (2015) 15 NWLR (pt. 1481) 1

Akeredolu v. Mimiko (2014) 1 NWLR (pt. 1388) 402

Iwuoha v. Nipost Ltd (2003) 8 NWLR (pt. 822) 308

Ogunbiyi v. Ishola (1996) 6 NWLR (pt. 452) 12

Saude v. Abduilahi (1989) 4 NWLR (pt. 116) 389

Ali v. Alensinloye (2000) 6 NWLR (pt. 660) 213

Ngige v. Obi (2006) 14 NWLR (pt. 999) 1

Woluchem v. Gudi (1981) 5 SC 291

Atolagbe v. Shorun (1985) 1 NWLR (pt. 2) 360

Omoworare v. INEC (2010) 3 NWLR (pt. 1180) 58

Terab v. Lawan (1992) 2 LREC 563

Nwakwo v. Yar'adua (2010) 12 NWLR (pt. 1209) 518

STATUTE & RULES REFERRED TO

Electoral Act 2010 (as amended), s. 49(1)(2)

Supreme Court Rules, O. 8 r. 2(3)

LEAD JUDGMENT BY MUHAMMAD JSC

On the 2nd day of February 2016 when we heard the three H appeals, I dismissed appeal No. SC. 24/2016 and discountenanced appeal SC. 25/2016, and cross appeal No. SC. 26/2016 and deferred reasons for my judgment to today which reasons are hereinunder given.

The two appeals and the cross appeal are against the judgment of the Court of Appeal sitting in Benin, hereinafter referred to as the lower court. In Appeal No. CA/B/EPT /359/2015 delivered on 24th December 2015 dismissing appellants' appeal against and sustaining the decision of the Delta State Governorship Election Petition Tribunal. The latter is hereinafter referred to as the tribunal. The facts that brought about the appeals and the cross appeal are briefly stated below.

The appellants/cross respondents being dissatisfied with the return of the 1st respondent/cross appellant at the end of the election for the office of the Governor of Delta State conducted on Saturday, 11th April 2015 by the 3rd respondent, filed a petition at the tribunal challenging the election and return. The appellants/cross respondents, by their petition, sought the nullification of the 1st respondent's election and return as well as the conduct of a fresh election for the same office by the 3rd respondent.

On their being served, the respondents in appeals SC. 24/2016 and SC. 25/2016 filed their respective replies to the petition. Embedded in the 1st respondent's reply to the petition is a Notice of Preliminary objection challenging the competence of the petition. The Petitioners at the tribunal, the appellants at the lower court and herein, filed a reply to each of the replies of the respondents. Each of the respondents filed an application urging the tribunal to strike out certain paragraphs of the appellants' reply to their respective replies to the petition. 1st respondent's objection on the competence of the petition and the three applications of the respondents urging that certain paragraphs of appellants' replies to their respective replies be struck out were taken alongside the petition.

In its judgment after a full trial delivered on 26th October 2015, the tribunal struck out some paragraphs of appellants' replies to the respondents' replies and dismissed the petition. Aggrieved, the appellants appealed against the tribunal's judgment to the lower court which judgment, delivered on 24th December 2015, in dismissing the appeal sustained the tribunal's earlier judgment. Appeals No. SC. 24/2016 and SC. 25/2016 were filed by the petitioners while the cross appeal NO. SC. 26/2016 was filed by the 1st respondent at the tribunal.

APPEAL NO. SC. 24/2016

Parties have filed and exchanged their respective briefs and, at the hearing of the appeal, adopted and relied on same as their arguments for or against the appeal. It is pertinent to note that the 2nd respondent by a motion on notice challenges the competence of grounds 2, 6, 12, 13, 14, 16, 17, 22 and 23 of the appellants' Notice of Appeal, the issues distilled from them and the arguments proffered thereon. The appellants have joined issues with the 2nd respondent. The merit of the said motion is considered at once. B

The applicant argues that the particulars to ground 2 of the appellants' Notice of Appeal are at variance with the ground they are supposed to support. Grounds 6 and 17, it is contended, are complaints against the obiter dictum instead of the ratio in the decision appealed against, grounds 12, 13 and 14 do not arise from the judgment appealed against, while grounds 16, 22 and 23 being argumentative, verbose are in breach of Order 8 rule 2(3) of the Supreme Court rules. Concluding, it is contended that since the three issues the appellants distilled variously rest on these incompetent grounds as well, the issues cannot survive on the basis of the other competent grounds. Learned senior counsel relies inter-alia on *Kachia V. Vazid* (2001) 17 NWLR (Pt 742) 431 at 448, *APC V. PDP* (2015) 15 NWLR (Pt 1481) 1 and *Akeredolu V. Mimiko* (2014) 1 NWLR (Pt 1388) 402 and urges that the grounds and issues be struck out for their incompetence. C
D
E

Learned senior counsel for the 1st and 3rd respondents associated themselves with the foregoing submissions and prayers of learned senior counsel for the 2nd respondent/applicant. F

Responding, learned senior counsel for the appellants submits that all their grounds of appeal clearly give notice to the respondent of appellant's complaints so as to enable him know what to contend with at the appeal. The grounds of appeal have satisfied this overriding requirement. All the grounds clearly arise from the lower court's decision and none of them attack the obiter part of the lower court's judgment. Having been left in no doubt as to the matter all the grounds raise, 1st respondent's objection, lacks merit. G
H

Learned senior counsel relies inter-alia on *Iwuoha v. Nipost Ltd* (2003) 8 NWLR (Pt 822) 308 at 337, *Ogunbiyi v. Ishola* (1996) 6 NWLR (Pt 452) 12 at 22-23 and *Saude V. Abduilahi* (1989) 4 NWLR (Pt. 116) 389 at 431 and submits that the unmeritorious ap-

plication be dismissed.

I agree entirely with learned senior appellants' counsel Dele Adesina that the true function of a ground of appeal is indeed to give the respondent the necessary notice of the grudges the appellant has against the judgment he appeals against. The particulars of the ground of appeal, learned senior counsel is also right, only provide specific details to fill in the yearning gaps in the inexplicit ground. It is long settled that once a ground of appeal gives the respondent the necessary notice of the grudges the appellant has against the decision on appeal and leaves no room for any surprise to be thrust on the respondent on the issues to be raised in the appeal, the ground is valid and competent. Learned senior counsel's reference to and reliance on the decisions of this Court in *Iwuoha V. Nipost Ltd* (supra) and *Osasona V. Ajayi* (supra) on the point is apposite. ***Whether or not the grounds of appeal in contention herein are valid depends on their meeting the foregoing enabling principles.***

My perusal of all the grounds leaves me in no doubt that they all arise from the judgment appealed against and even if some are verbose, none in the entire grounds attacks the obiter dicta in the decision appealed against. Each of the grounds raise a distinct complaint and specifies the portion of the judgment to which the complaint relates. The law allows the appellants to raise these questions and it would be unjust to deny them the right of ventilating their grief. In sum, I find no merit in the application and same is accordingly dismissed.

Now, the issues distilled in the respondents' briefs are more suitable for the determination of the appeal. The three issues formulated by the 2nd respondent on the basis of which the appeal will be determined are hereinunder particularly reproduced:-

1. Whether or not the lower court was right in affirming the decision of the trial tribunal to strike out some paragraphs of the appellants/petitioners' replies as well as the further witness statement on Oath and Exhibits P31-P41 which were hinged on the said replies. (Grounds 1, 2 and 3)

2. Whether or not the lower court was right in affirming the decision of the trial tribunal to Dismiss the Appellants/Petitioners' Pe-

tition having regard to the failure of the Appellants/Petitioners to prove their petition. (Grounds 4,5,6,7,8,9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22 and 24)

3. Whether the lower court's purported failure to pronounce on issues 4 and 7 submitted to it occasioned a miscarriage of justice.

While the 1st and 3rd of the foregoing issues are materially the same with appellants' 1st and 8th issues, the 2nd issue clearly subsumes appellants' 2nd, 3rd, 4th, 5th, 6th, and 7th issues.

On the 1st issue, appellants contend paragraph 16(1) of the first schedule of the Electoral Act as well as decided authorities, the two courts based their decisions on permit the petitioners to respond to new issues raised by the respondents in their replies to the petition. Failure of the appellants to reply to the new issues the respondents raised in their replies to the petition would have constituted an admission of those new Issues.

Accordingly, the lower court's affirmation of the tribunal's decision on appellants' replies to the respondents' replies and, consequentially, PW15's further sworn statement and Exhibits P31-P41 held to have been anchored on appellants' struck out replies, has no legal basis. Relying on *Nigergate Ltd V. Niger State Government* (2008) 13 NWLR (Pt 1103) III at 145, *Daggash V. Bulama* (2004) 14 NWLR (Pt 892) 144 at 233 and *Ali v. Alensinloye* (2000) 6 NWLR (Pt 660) at 213, learned senior counsel submits that the issue be resolved in appellants' favour. Responding under their 2nd issue, learned senior counsel Dr. Alex. A. Izinyon for the 1st respondent submits that the lower court's affirmation of the decision of the tribunal on appellants' replies to the respondents' replies to the petition, PW15 further sworn statement and Exhibits P31-P41 cannot be faulted. The three processes, it is contended, offend paragraph 16(1) of the 1st schedule to the Electoral Act 2010 (as amended) which gives the appellants right of reply only where the respondents raise new issues and appellants reply thereto must be restricted to the new issues raised. A critical appraisal of appellants' replies to respondents' replies show very clearly that beyond being replies in respect of averments which do not raise new issues, appellants replies raise new facts which tend to amend or add to their petition against what the law and judicial decisions permit. Learned senior counsel relies on *APC v. PDP* (2015) 15 NWLR (Pt 1481) Mr. G.A. Adepoju V. Chief Folorunsho Awoduyilemi (1999)

5 NWLR (Pt 603) 364 at pages 381-383, Ogbutebe V. Shonowo (2004) 16 NWLR (Pt 899) 300 at 317, in urging that the lower court's position on the appellants' replies to the respondents' replies and the other processes be sustained.

Learned senior counsel A.T. Kehinde for the 2nd respondent B and Dr. Onyechi Ikpeazu SAN for the 3rd respondent made submissions similar to 1st respondent's foregoing arguments. As forceful as their submissions are too, being repetitive their reproduction would serve no useful purpose.

C I agree with learned senior counsel to the respondents that paragraph 16(1) of the first schedule to the Electoral Act 2010 (as amended) provides for what a competent petitioner's Reply is. The paragraph provides:-

D *"16(1) a person in his reply to the election petition raises new issues of fact 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 fact, so however that*

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

(b) The petitioner's reply does not run counter to the provision of sub paragraph (1) of paragraph 14 of this schedule."

F By the foregoing, the appellants as petitioners are not entitled to set up in their reply to the respondents' replies to their petition either a new cause of action, ground, or new facts outside or inconsistent with their petition. Thus, their reply must not depart or contradict their petition and where it does the tribunal will be justified on an application to strike out their reply in which the defect has occurred. G In APC V. PDP (supra) a case counsel on both sides alluded to, this Court restated the principle thus:-

H *"...The appellant did not have the lee-way to aver new facts which ought to be in the original petition... The court below was right in affirming the striking out of the said paragraph 13 which tried to overreach the 2nd respondent as no new facts should feature in a petitioner's reply: See Adepoju V. Awoduyilemi (1999) 5 NWLR (Pt 603) 364 at 382. It is clear that restoring the paragraph would have occasioned a great miscarriage of justice on the respondent.*

Learned senior appellants counsel insists that appellants' replies to the respondents replies to their petition do not contain new facts and if they do the lower court is wrong in its affirmation of the tribunal's finding on the replies which failed to state the new facts on the basis of which it struck out the replies. To say the least, the record does not support this contention. My perusal of, inter-alia, paragraphs 15 and 16 of the appellants reply to the 1st respondent at pages 980-981, 6 (I) and (II) of their reply to 2nd respondents reply at pages 996-997 and paragraph 9 of the appellants reply to the 3rd respondent's reply at page 963 of the record reveals that beyond restating facts contained in their petition, the appellants have averred to new facts, causes and grounds not originally in the petition. Before striking out appellants' replies the tribunal, it is evident from the record, adequately considered them against the background of the averments in the reply of each of the respondents to the petition. At pages 2427 to 2428 of the record is the tribunal's the exercise:-

"We have in the examination of the highlighted paragraphs of the Petitioners' reply to the 3rd Respondents reply juxtaposed both sides to enable us determine the effect of paragraph 16(1) of the 1st Schedule to the Electoral Act (as amended).

In paragraph 1 of the Petitioners' reply to the 3rd Respondent's reply they have averred that same is in answer to paragraph 3 of the 3rd Respondent's reply. Paragraph 3 of the 3rd Respondent's reply to the Petition was a response to paragraphs 9 and 13 of the Petition. Paragraph 2 of the Petitioners' reply to the 3rd Respondent's reply; averred that the Petitioners' agents did not sign and date the final collated result (Form ECBDD) '11th day of April 2015 as alleged by the 3rd Respondent or at all. This averment in paragraph 2 is not linked to any averment by the s" Respondent in their reply to the petition. In paragraph 4 of the Petitioners' reply to the 3rd Respondent's reply they have averred that in answer to paragraph 9, 10, 11 and 12 of the 3rd Respondent's reply, In paragraph 4A the Petitioners in their reply to the 3rd Respondent's reply to the Petition have stated that they are making further response to paragraphs 9, 10, 11 and 12 of the reply by setting out sub paragraphs 4 (i) (ii) (iii) and (iv). Paragraph 6 is a further answer to paragraph 14 of the reply.

We have examined the 28 paragraphs of the Petitioners' reply

to the s^o respondent's reply to the petition and we agree with the learned counsel to the 3^d Respondent that the Petitioners' reply to the 3^d Respondent's reply are in some parts a repetition of the contents of their petition while in many parts contained new facts that tend to amend the content of the Petition. In fact all the highlighted paragraphs are in contravention of the provision of paragraph 16 (I) (a) of the 1st Schedule to the Electoral act in that they raised new issues or amend the Petition. In view of this the paragraphs are struck out. They are paragraphs 1" 2, 4" 4A" (i)(ii)(iii)(iv)" 6" 7" 8" 9" 10" 11" 12" 13" 14" 15" 16" 17" 18" 19" 20" 21" 22" 23" 24" 25 and 26 of the Petitioners' reply to the 3^d Respondent's reply to the Petition.

The further written statement on oath of Mr. Turner Ogboru which is attached to the reply would have to be struck out since the paragraphs that anchored it have been struck out; the averments in the written statement on oath have nothing to anchor to. They are equally struck out as prayed by the s^o Respondent."

The lower court cannot be faulted in its affirmation of the tribunal's foregoing reasoning and conclusion. Certainly, with appellants' replies this flawed, PW15's further sworn statement as well as Exhibits P31-P41 intended to prove the struck out averments in the flawed replies go to no issue. Having no pleadings on which to foist the further Sworn statement and the exhibits, the two are unavailing. See Buhari V. Obasanjo (supra) and Ezeanah V. Attah (2004) 2 SCNJ 200 at 235.

The 1st issue, for all that the foregoing entails, is resolved against the appellants.

In arguing the 2nd preferred issue which subsumes appellants 2, 3, 4, 5, 6 and 7, learned senior appellants' counsel submits that the lower court's judgment does not draw from the evidence on record. Appellants' case as contained in paragraphs 16.15 to 16.35 of their petition is that there was over-voting in the April 2015 governorship Election in Delta State. In proof of their case, it is submitted, appellants led oral and documentary evidence particularly through PW1, PW15 and PW16. The documents tendered by the appellants as petitioners include Exhibit P2, the certificate of authentication of Exhibit P2A. The latter is the Delta State card reader polling unit by polling unit comprehensive INEC report of accreditation in the April Governorship Election. Other documents the appellants tendered,

learned senior counsel submits, include Exhibit P4, INEC press statement dated 2nd May 2015 directing mandatory use of card readers for accreditation in the April Election; Exhibit PS and PSA the INEC manual for Election officials 2015 and the INEC Approved Guidelines and Regulations for the conduct of the 2015 Election respectively; Exhibits P30A-P41k the voters Registers. Exhibit P2A, submits learned senior counsel, puts the number of accredited voters at the governorship Election at a total of 715/392. B

Notwithstanding the respondents' admission of the results of the Election as declared by the 3rd respondent, it is contended, the appellants submitted Exhibits P6A-P26A, the polling unit by polling unit results in respect of the disputed Local Government Areas. Exhibits P6C-P26C, the ward by ward results and Exhibit P29, 1st respondent's certificate of the turn, all having been pleaded in the sworn statements of PW1, PW2, PW15 and PW16, were also tendered by the appellants. PWI an INEC staff on a subpoena, stood her grounds under cross examination. Her evidence, learned senior counsel submits, show clearly that while manual accreditation of voters using the voters register was in place, for the governorship election, INEC had directed that only card readers were to be used for the accreditation of voters. The same witness, it is submitted, testified that the card readers had completely uploaded accreditation data to their server at the INEC headquarters. - Against all known principles, the tribunal relying on the inadmissible oral evidence of RWI and Exhibit R2, it is submitted, both courts discountenanced the oral and documentary evidence led by the petitioners. Concurrent as the decisions of the tribunal and the lower court are, on this note, learned counsel submits, are perverse. Learned senior counsel relies on *Ngige V. Obi* (2006) 14 NWLR (Pt 999) 1 at 208, *Woluchem V. Gudi* (1981) 5 SC 291, *Atolagbe V. Shorun* (1985) 1 NWLR (Pt 2) 360 at 365 and *Omoworare V. INEC* (2010) 3 NWLR (Pt 1180) 58 at 116. E

The lower court's affirmation of the tribunal's finding that the evidence led in proof of appellants' case is contradictory, it is further argued, is not traceable to the record. There is nothing contradictory in the evidence of PWI, PW2, PW15 and PW16 either in themselves or in relation to any documentary evidence. F

At page 2743 of the record, it is submitted, is the lower court's conclusion that the appellants did not demonstrate how the over- G

voting on the basis of which they challenge 1st respondent's election and return occurred. The appellants, the lower court further held, only dumped documents on the tribunal and expected it to consider on its own the unspecified documents thrown at it in sealed envelopes. The record of appeal at pages 1880-1883, submits learned senior counsel, however shows how the documents were tendered and the tribunal on receipt of same in evidence serially and painstakingly marked them as such. Certainly, it is submitted, an unspecified number of documents in sealed envelopes could not have been so marked. The record of appeal at pages 1963-1967 further shows how the documents were tendered through PW15 in whose sworn statement the Exhibits had been pleaded. All the form EC8 series, Exhibits P6A-P26A, P6B-P26B and P6C-P26C, were tendered and admitted through PW15 as well. At page 1883-1884 of the record, like PW15, PW3 was equally cross-examined on the form EC8 series. The tribunal as well as the lower court seem to be oblivious of the fact that petitions these days by virtue of paragraph 41(3) of the 1st schedule to the Electoral Act 2010 (as amended) are established by way of front loaded depositions as the appellants have done and no longer by oral evidence in examination in chief. Learned senior counsel relies on *Uzu & anor V. Ogbu & ors* (2012) LPELR 9775, *Terab V. Lawan & ors* (1992) 2 LREC 563 at 591-592, *Nwakwo V. Yar'adua* (2010) 12 NWLR (Pt 1209) 518 and *Alao v. ACB* (2000). The lower court's judgment ignoring the new trend and which stands in conflict with the court's very decision in *APC V. Agbaje & ors* (supra), learned senior counsel urges, has to be set-aside. Further relying inter-alia on the decisions of this Court in *Achilihu & ors V. Anyatonwu* (2013) LPELR 20622 SC, *Ajagbe V. Idowu* (2011) 17 NWLR (Pt 1276) 422 at 448-449, *Chiwendu V. Mbamali* (1980) 3-4 SC 31; and *Amadi V. Orisakwe* (2005) 7 NWLR (Pt 924) 385, learned counsel concludes that their issues be resolved in their favour and the appeal allowed.

Responding under the 2nd preferred issue for the determination of the appeal, Dr. Alex Iziyon contends that the thrust of the appellants' case is that the election and return of the 1st respondent is marred by the fact of over-voting as the votes returned had exceeded the number of accredited voters recorded by the card reader mandatorily deployed for the conduct of the Governorship Election in

Delta State. The appellants wrongly relied on Exhibit P2A, the INEC unit by unit card reader accreditation report, tendered through PWI; to make out their case of over-voting. For them, since what Exhibit P2A indicates as the number of total accredited voters is much less than the valid votes recorded as cast in the Form EC8A series in the disputed units, appellants have proved their allegations of over-voting as averred in paragraphs 16.12 to 16.35 of their petition. It is not simply the law, learned senior counsel further submits, that over-voting is proved in the manner the appellants believe they did. Learned senior counsel relies on the recent decisions of this Court in Appeal No. SC. 907/2015 Mahmud Aliyu Shinkaf & anor V. Abdulazeez Abubakar Yari & 2 ors delivered on 8th January 2016, and Appeal No. SC. 979/2015 Alhaji Muhammad Inuwa Yahaya & anor V. Alhaji Ibrahim Hassan Dankwanbo & ors delivered on 20th January 2016. The lower court's affirmation of the tribunal's decision dismissing appellants' petition that has not been proved in the manner known to law is unassailable.

It is the law, learned senior counsel further contends, that a party must not only disclose the purpose for which he relies on a document but link the particular document tendered to the said purpose. The appellants, it is submitted, neither pleaded nor tendered the voters' registers in proof of their case. Rather, it is further submitted, they relied wholly on the card readers to prove their case. At page 1968 of Vol. III of the record, it is submitted, PWI eloquently admitted the fact that she had no resort to the voters registers in the preparation of Exhibit P2A. Exhibits P34-P41 the voters' registers for the disputed twelve Local Government Areas tendered through PW15, against the extant principles, were dumped on the tribunal. In support of the submissions learned senior counsel refers to *Omisore V. Aregbesola* (2015) 15 NWLR (Pt 1482) 205 at 299; *Awuse V. Odili* (2008) 16 NWLR (Pt 952) 416. The critical documents for the proof of over-voting, the voters registers and the Form EC8A series in respect of the disputed units and Local Government Areas, learned senior counsel submits, were tendered through PW3 and PW15 none of whom is either the maker of the documents or an agent in any of the polling units. This made the attachment of any probative value to the documents impossible. Even Exhibit P2A tendered by the appellants through PWI, given the evidence of PW15 at page 1968, it is

contended, makes document evidentially worthless. Under cross examination, PW15 had put the total number of accredited voters uploaded from the card reader report at the time of filing appellants' petition at 709,700. In his sworn statement however, he puts the total at 726,746 and asserted under cross examination that the latter figure is erroneous. Even PW1, it is further contended, was not certain of the final figure uploaded by the card readers as the total number of persons who voted in the disputed areas. With appellants' pleadings and the quality of evidence led in proof of same, learned senior counsel submits, the lower court's affirmation of the tribunal's dismissal of appellants' petition after their woeful failure at proving same cannot be faulted.

Similar submissions have been made on behalf of the 2nd and 3rd respondents by their respective senior counsel.

The issue in contention under this Issue is whether the introduction of the card reader as an integral part of the accreditation process has necessitated a shift in the procedure this Court, in very many cases, some earlier alluded to in this judgment, decided how over-voting in an election petition may be established.

My lords, it is still the principle that whenever this Court is subsequently asked to apply a legislation to ascertained facts which same legislation the apex court had earlier applied to same or similar facts, the court and of course the lower courts must, in the performance of the task, proceed in exactly the very manner the apex court proceeded in its earlier task. Put differently, this Court and other courts are subsequently bound by the earlier decisions of the apex court where the law and facts in contention are same or similar. See University of Lagos 7 ors V. Olaniyan (1985) 1 NWLR (Pt 1) 156, Ardo V. Nyako (2014) 10 NWLR (Pt 1416) 591 and Wambai V. Donatus (2014) 14 NWLR (Pt 1427) 223.

Learned senior Counsel for all the three respondents are absolutely right in their submissions that in spite of its introduction and the requirement by the 3rd respondent that the card reader be mandatorily used in the April 2015 Governorship Election in Delta State, the proof of over-voting which appellants allege has marred the election cannot and is not by reference to the card reader vis-à-vis the actual votes cast at

the election. Rather, the proof of the fact of over-voting still remains by reference to the voters register, which provide the number of accredited voters, Vis-a-vis the number of votes actually cast as recorded in the Form EC8 series. In affirming its earlier decisions on the proof of substantial non-compliance with the Electoral Act as a result of over-voting, this Court in one of its most recent and yet to be reported decision, Appeal No. SC. 907/2015, Mahmud Aliyu Shinkafi and anor V. Abdulazeez Abubakar Yari delivered on January 2016, restated the position of the law in spite of the advent of the card reader thus:-

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

- 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.***
- 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.***

... There is no doubt that a Petitioner is entitled to contend that an election or return in an election be invalidated by reason of non-compliance with the provisions of the Electoral Act. For a Petitioner to succeed on this ground, he has to prove-

- 1. that the non-compliance took place;*
- 2. that the..... non-compliance substantially affected the result of the election...”*

In the case at hand, the abiding ground the appellants’ anchored their petition on is that of non compliance with the provisions of the Electoral Act arising from over-voting. The appellants’ relied on the unit by unit card reader report on accreditation, Exhibit P2.

It is significant to recall that with the resolution of the 1st preferred issue for the determination of the appeal against the appellants this Court has further affirmed the tribunal’s striking out of not only the appellants’ replies to respondents’ replies to the petition but PW15’s sworn statement and Exhibits P31-P41 as well. It follows from that resolve that Exhibits P31-P41 had ceased to be available for the

appellants' use in proving their case. With the non-availability of Exhibits P31-P41, the voters registers, resort to which this Court has, in a plethora of authorities, held to be a necessity in proving the fact of over-voting, it means that the discharge of the burden by and in the manner the law requires the appellants to is impracticable. Not surprisingly, the tribunal's finding is that appellants' case founded on over-voting has remained unproved. The lower court is right in its affirmation of the tribunal's decision dismissing appellants' petition that had not been proved.

Notwithstanding their non resort to, nay, inability to rely on the voters registers to prove their case, appellants still insist that they have made out their case and that they were only wrongly denied the reliefs they urged on the tribunal and the lower court as well. It cannot be.

In addition to the voters' registers, the appellants required the Form EC8 series, the result sheets containing the number of votes actually cast at the election. These were tendered, see page 1880 of vol. 3 of the record, in 21 sealed envelopes and marked Exhibits P7-P26. Nowhere in the record has it been shown that the appellants have tied these vital documents to the specific aspects of their case. Though the documents have validly been admitted in evidence, they were never demonstrated in the open court to enable the court assess and assign appropriate probative value to each. The appellants contend that the law allows them to front load these documents, tender same from the bar and also absolves them from tying the Exhibits to specific aspects of their case. This is certainly a fallacy! In *ACN v. Lamido* (2012) 8 NWLR (Pt. 1303) 560 at 592 reiterated as follows:-

"It is not in doubt that the stated exhibits were not demonstrated in the open court..."

The basic aim of tendering documents in bulk was to ensure speedy trial and hearing of election petition. But that does not exclude proper evidence to prop such dormant documents.

*It is not the duty of a court or tribunal to embark upon cloistered justice by making enquiry into the case outside the open court not even by examination of documents which were in evidence but not examined in the open court. A judge is an adjudicator; not an investigator. See: *Duriminiya v. Commissioner of Police* (1961) NRNL*

70; *Wilcox v. Queen* (1961) 2 SCNLR 296; *Ivienagbor v. Bazuaye* (1999) 6 SCNJ 235 at 243; (1999) 9 NWLR (620) 552; *Onibudo v. Akibu* (1982) 7 SC 60." See also *Omisore V. Aregbesola* (2015) 15 NLRR (Pt 1482) 205 at 333.

Lastly, even if it were possible to prove over-voting by reference to the card reader data, both courts below are concurrent in their findings that appellants have not proved that fact. Exhibit P2A prepared by and tendered through PW1 turned out to be seriously at variance with appellants' pleadings in support of their petition. PW2 a Delta State based staff of INEC, not only testified to the effect that the conduct of the election and return of 1st respondent was conducted in line with the Electoral Act and Election Guidelines issued by INEC but that Exhibit P2A is not reliable. The appellants are bound both by their pleadings and the evidence of PW2 given at their instance. See *Abaye V. Ofili* (1986) 1 NWLR (Pt 15) 134 and *Yusuf V. Obasanjo* (2005) 18 NWLR (Pt 956) 96 at 204 respectively on the two principles.

From all the foregoing, it is evident that the appellants chose not to and indeed did not prove their case of non compliance arising from over-voting in the manner this Court reiterated in *Shinkafi's* case (supra) they must. Accordingly the 2nd issue in the appeal is equally resolved against the appellants.

Under the 3rd issue, appellants insist that the lower court's failure to consider and pronounce on the 4th and 7th issues they submitted in their appeal thereat is fatal to the court's judgment. Their 4th issue required the lower court to expunge the evidence of RWI the tribunal drew from in dismissing their petition. RWI, is an INEC staff subpoenaed on behalf of the 1st respondent. Her evidence further discredited Exhibit P2A. Appellants' complaint at the lower court is that RWI's testimony is hearsay.

One agrees with learned senior counsel for the respondents' that expunging RWI's evidence, if ever same is inadmissible, would not have any effect on appellants' fortunes in the petition. The truth remains that the appellants who sought declaratory reliefs from the tribunal succeed only on the strength of their case and not on the weakness of the respondents' case. Reliance of learned senior respondents' counsel on *Grosvenor Casinos Ltd V. Halaoui* SC (2009) 10 NWLR (Pt 1149)

309 at 351-352 and C.P.C. V. INEC (2011) 12 SC (Pt v) 80 at 128 in support of these principle is every miscarriage of justice to the appellants will not entitle them to the reversal of the court's judgment.

Appellants' further grouse under the last issue is that the lower court's non-consideration of their 7th issue is equally fatal. Appellants' argument in respect of the very issue at the lower court is that because Exhibits P28 and P29, Forms EC8D and EC8E, bear a date earlier than the date the Elections they challenge were concluded, they cannot be in respect of the same Election. The respondents had cross examined appellants' witnesses at the tribunal to establish that the said Exhibits P28 and P29 were wrongly dated as collation and computation of scores were duly completed on the 13th rather than the date reflected on the said Exhibits.

Let me invoke Section 22 of the Supreme Court Act to do what the appellants assert the lower court did not. In that task, appellants must be reminded that election is a drawn out process which does not start and end with the making of Exhibits P28 and P29. If the defect in these two documents are to lead to the nullification of the entire election and return of the 1st respondent, beyond appellants' ipsi dixit on the disparity between the date the signatures on the documents were appended and the date the elections were concluded, appellants must further establish the difference in the figures in the exhibits and the figures in the Forms EC8A, EC8A and EC8C they drew from. Having failed to demonstrate this, it is absurd for the appellants to press that the entire April Governorship Election in Delta State be annulled because of the wrong dates on Exhibits P28 and P29.

Finally, appellants' allegation on the difference between the Exhibits P28 and P29 were signed and when the elections were concluded smirks of forgery. The crime requires proof beyond reasonable doubt not only as to the fact of its occurrence but as to the involvement of the 1st respondent.

In sum, this appeal lacks merit and it is hereby dismissed. Appeal No. SC. 26/2016 And Cross Appeal No. SC. 25/2016

The merit of appellants' petition having been determined in our consideration of appeal No. SC. 24/2016, to further determine appeal No. SC. 25/2016 and the cross appeal No. SC. 26/2016, in

my firm and considered view becomes an academic exercise. The two are accordingly discountenanced.

The judgment of the lower court returning the 1st Respondent as the duly elected Governor of Delta State is hereby affirmed. Parties are to bear their respective costs.

B

ONNOGHEN JSC

On the 2nd day of February, 2016, this Court entered Judgment in this appeal in which same was dismissed in a lead Judgment delivered by my learned brother MUSA DATTIJO MUHAMMAD JSC. The reasons for the decision was, however, adjourned to today. Below are therefore, my reasons for agreeing that the appeal, lacks merit and should be dismissed. My learned brother MUHAMMAD JSC has stated tile relevant facts in detail in the lead Judgment so I have no intention of repeating them herein except be needed for the point(s) being considered by me.

The grounds on which appellants challenged the election/return of the 1st respondent, as Governor of Delta State following the governorship election held on the 11th day of April, 2015 are stated in paragraph 15 of the petition filed on 2nd May, 2015 where the petitioners, now appellants before this court pleaded thus -

“15. Your petitioners aver that the grounds of the petition are as follows:-

15. GROUND I: That the election to the office of Governor of Delta State conducted on the 11th April, 2015 was invalid by reason of non-compliance with the provisions of the electoral Act 20’0 (as amended).

15.2 GROUND II: That the election conducted on the of April, 2015 was invalid by reason of corrupt practices.

15.3 GROUND III: That the 1st respondent, Senator (Dr.) Okowa Ifeanyi Arthur, was not duly elected by majority of lawful votes cast at the election to the office of Governor of Delta State conducted on the 11th April, 2015”

The supporting grounds of non-compliance with the Electoral Act, 2010, as amended are pleaded in paragraphs 16.11-16.14 as follows:- *“16.11 In consequence of the aforesaid, the scores written on substantially all polling unit result sheets (Form EG. BA) in the*

Local Governments or places where the election is being challenged in this Petition exceeded the number of accredited voters on the Card Readers. This incidence of alleged total valid votes or total votes casts exceeding or not being equal to the actual accreditation on the Card Readers affected all the Local Government Areas or places where the purported gubernatorial election of 11th April, 2015 conducted by the 3rd respondent is being challenged in this petition.

16.12 Your petitioners state that only 7226,745 (seven Hundred and Twenty Six Thousand seven Hundred and Forty-Five) alleged voters were accredited on the Card Readers in the whole of Delta State but an alleged total valid votes of 931, 808 (Nine Hundred and Thirty Six Thousand Eight Hundred and Eight) with 24,913 (Twenty-Four Thousand Nine Hundred and Thirteen) rejected votes was announced by the Returning Officer, Curiously on the 11th April, 2015" for the April, 11, 2015 gubernatorial election. There was thus over-voting in Delta State during the April 11, 2015 gubernatorial election by over 205,000 (Two Hundred and Five Thousand) votes.

16.13

16.13 The entry of 1,017,796 (One Million Seventeen Thousand Seven Hundred and Ninety Six) on the Form EC8D as the number of accredited voters for the aforesaid election is inconsistent with (and or exceeded) the 726,745) (Seven Hundred and Twenty-Six Thousand Seven Hundred and Forty Five) alleged voters accredited on the Card Readers in the whole of Delta State.

16.14 Your petitioners aver that the 1st and 2nd respondents' alleged total votes of 724,680 (Seven Hundred and Twenty Four Thousand, Six Hundred and Eighty) recorded on the Form EC8D and Form EC8E are substantially invalid votes being the product of over-voting from 21 (Twenty One) out of the 25 (Twenty Five) Local Government Areas of Delta State in that votes returned exceeded the number of alleged accredited voters as recorded by the Card Readers compulsorily deployed for the conduct of the gubernatorial election in Delta State on the 11th of April, 2015".

H It is very clear from the above that the foundation of the complaint of appellants in the petition is in respect of the alleged over-voting. It is the case of appellant that with the introduction of the Card Reader concept in the process of election in Nigeria by 3rd respondent, over-voting can only be determined by reference to the

data derived from the Card Readers up loaded into the Data Base of the 3rd respondent; that having regard to the total number of voters accredited by the use of Card Readers in Delta State, over-voting occurred in the State, the effect of which is that the election in question should be nullified - See the evidence of pw15. The lower courts, however, did not agreed with appellants. B

No where in the pleadings did appellants plead the register of voters in respect of the polling units etc complained of neither did they produce evidence of same at the trial. This is so, because, as stated earlier, appellants' case on over-voting does not take into consideration the register of voters as constituting a platform for accreditation of voters and by which the total number of accredited voters for the election; polling unit by polling unit; can be ascertained and/or determined. The yardstick of appellants' process of accreditation is the data generated by the Card Readers with no reference to the register of voters. C D

I have to point out that even though the voters register was later tendered and admitted in evidence as exhibits P31 and P41 they were never pleaded as being part of the case of appellants and consequently grounded to no issue. In any event, the said exhibit P31 and P4-1 were rightly struck out by the tribunal along with the appellants' Reply, which action was affirmed; also rightly in my view; by the lower court. E

It is settled law that the issue of accreditation of voters is governed by the provisions of section 49(1) and (2) of the Electoral Act, 2010, as amended. The said section 49 of the Electoral Act, supra, has not been amended to accommodate the very recently introduced Card Reader as conclusive on accreditation. The said section 49 provides as follows:- F

"(1) A person intending to vote with his voters card, shall present himself to a Presiding Officer at the polling unit in the constituency in which his name is registered with his voters card G

(2) The Presiding Officer, on being satisfied that the name of the person is on the register of voters, issue him a ballot paper and indicate on th9 Register that the person has voted". H

It is therefore clear that it is with the voters register that one can prove over-voting - See Buhari Vs Obasanjo (2005) 13 NWLR. (Pt. 941 1; SC/907/2015; Shinkafir & Ors decided on 8th January, 2016

at 29-30; S.C/982/2015 Maku Vs Almakura & Ors. Delivered on the 25th day of January, 2016 at page 5; S.C./979/2015: Yahaya & Anor. Vs Dankwanbo delivered also on 25th January, 2016.

At pages 29-30 of the Judgment in Shinkafi & Anor. Vs Yari supra, this court held, inter alia, on over-voting etc. as follows:

B “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:-

C 1. Tender the voters’ register.
 2. Tender the statement of result in the appropriate forms which would show the number of the number of registered accredited voters and number of actual votes.

 3. Relate each of the documents to the specific area of his case
 D 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 Vs Modibo (2004) 16 NWLR (Pt. 950) 487. Kajgo Vs Kalgo (1999) 6 NWLR (Pt. 606) 639 and Audu Vs INEC (No. 2) (2010) 13 NWLR
 E (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
 F be necessary to tender the voters’ register and other steps set out earlier. He went on to say that Haruna Vs. Modibo (supra); Kalgo Vs Kalgo (supra), Iniama Vs Akpabio (supra) and Audit Vs INEC No. 2 (supra) are no more good law.

G My view on this is that a principle of law that 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 machines is to authenticate the owner of a voter’s card and to prevent multi-voting by a voter. I am not aware
 H that the Card Reader machine has replaced the voters’ register or taken the place of Statement of result in appropriate terms. As it stands, it appears that the Appellants did not lead evidence to prove over-voting.

This court has stated, over and over, that the above represents

the law on the issue of accreditation, over-voting etc. In relation to accreditation in an election, I am of the view that the Card Reader machine is an administrative procedure designed to aid accreditation and the election process. It has no statutory foundation in the election process as at now.

The issue of over-voting being the main plank in the case of appellants and having found that it was not made out, having regard to the pleadings and evidence, it is clear that the tribunal was right in dismissing the petition of appellants on the ground, inter alia, that the allegation of over-voting was not proved and the lower court is equally right in affirming that decision.

It is for the above reasons and the more detailed reasons assigned in the lead reasons for judgment delivered by my learned brother MUHAMMAD JSC, that I too dismissed appeal S.C/24/2016 for lack of merit.

Having regard to my reasons supra, it is clear that appeal Nos. S.C 25/2016 and SC/26/2016 have been over-taken by events, and consequently discountenanced by me.

NGWUTA JSC

On the 2nd day of February, 2016 the Court heard the three appeals and after the hearing, my learned brother, M. D. Muhammad, JSC delivered the lead judgment dismissing the appeals. His Lordship reserved the reasons for the judgment to Monday, 15th February, 2016.

I also delivered my concurring judgment and reserved my reasons for agreeing with the lead judgment for today, 15th Feb, 2016.

I have read in draft the reasons adduced by my learned brother for dismissing the appeal. I adopt the said reasons for also dismissing the appeal No. SC.24/2016.

APPEALS NOS 25/2016 & 5(,26/2016:

These appeals emanate from the same election petition. The Appeal No. SC.24/2016 having been determined, it is now academic exercise to deal with the issues in Appeal No. 38/2016 and Appeal No. SC.26/2016. There are no live issues to be decided and the cross-appeal and appeal are discountenanced.

Parties to bear their costs.

PETER-ODILI JSC

I am in total agreement with the reasons just delivered by my learned brother, Musa Dattijo Muhammad JSC explaining the decision upon which the appeal was dismissed. I shall make some remarks in support.

This is an appeal against the judgment of the Court of Appeal, Benin Division wherein Appellants' appeal was dismissed.

The background facts leading to this appeal are well set out in the lead judgment and I shall not repeat them.

On the 2nd day of February 2016 date of hearing, Dele Adesina SAN of counsel for the Appellants adopted the Brief of Argument of the Appellants filed on the 22/1/2016. In it, learned Senior Counsel framed eight issues for determination which are thus:-

1. Whether the Lower Court was not wrong when it affirmed the striking out of paragraphs of the Appellants' Replies to the Respondents' Replies to the Petition, Further Written Statement on Oath of PW15 (Mr. Turner - Ogboru) and in particular, Exhibits P31-P41, on the basis that the Replies were contrary to the provisions of Paragraph 16(1) of the First Schedule to the Electoral Act 2010 (as amended). (Grounds 1, 2 and 3)

2. Whether the Lower Court was not in grave error to have held that the Appellants presented conflicting documents and contradictory testimonies of material nature in proof of over-voting. (Grounds 10, 11, 12 and 16)

3. Whether the Lower Court have the jurisdictional competence to reverse specific findings of the Trial Tribunal in the absence of any appeal against such findings or any Respondent's notice filed by the Respondents, when such findings of fact were supported by admissible and credible evidence on record. (Ground 17)

4. Having regard to the duty of the Court to confine itself to the evidence borne out of pleadings, whether the Lower Court was not wrong in relying on the unpleaded and legally inadmissible testimony of RW1 and Exhibit R3. (Grounds 13 and 14)

5. Whether the Lower Court was not wrong when it failed to properly evaluate the documentary evidence presented by the Appellants in proof of over-voting. (Grounds 4, 5, 8, 9, 15 and 18).

6. Having regards to the pleadings and the legally admissible,

credible, cogent, believable, oral and documentary evidence presented by the Appellants, whether the Lower Court was not wrong in holding that the Appellants are yet to prove that they are entitled to the reliefs sought. (Grounds 6, 7, 24, 19, 21, 22 and 24)

7. Whether it was not wrong for the Lower Court to go outside the evidence before the Court and embarked on a voyage of discovery in search of other evidence in favour of the Respondents. (Ground 20) B

8. Whether the Lower Court, not being a final Court, was not in error and/ or did not fall into the same error as the trial Tribunal, when it failed, refused and/or neglected to adjudicate on and resolve Issues 4 and 7 properly submitted to it for determination by the Appellants in their Brief. (Ground 23) C

Learned Senior Advocate also adopted Appellants' Reply Briefs in response to each of the Respondents filed 1/2/2016. D

Dr. Alex A. Izinyon SAN, learned counsel for the 1st Respondent adopted his Brief of Argument filed on 29/1/2016. He distilled three issues for determination which are, viz:-

The 1st Respondent respectfully submits the following issues for determination as flowing from the Grounds of Appeal: E

1. Whether the Court Below was not right in law in affirming the trial tribunal's decision dismissing the Appellants' petition. (Encompassing Grounds 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, and 24 of the Notice of Appeal).

2. Whether the Court Below was not right in law in affirming the trial tribunal's decision striking out some paragraphs of Appellants' replies to the Respondent's Reply to their petition, Further Written Statement on oath of PW15 (Mr. Turner Ogboru) and Exhibits P31-P41 on the basis that the Appellants' Replies were contrary to the provisions of paragraph 16(1)(a) of the 1st Schedule to the Electoral Act, 2010 (as amended). (Encompassing Grounds 1, 2 and 3 of the Notice of Appeal) F

3. Whether the Appellants suffered any miscarriage of justice by the alleged failure of the Court Below to pronounce on issues 4 and 7 submitted to it. (Encompassing Ground 23 of the Notice of Appeal) H

Kehinde Ogunwumiju Esq., learned counsel for the 2nd Respondent adopted the Brief of Argument settled by A. T. Kehinde

SAN and filed on the 28/1/2010.

1. WHETHER OR NOT THE LOWER COURT WAS RIGHT IN AFFIRMING THE DECISION OF THE TRIAL TRIBUNAL TO STRIKE OUT SOME PARAGRAPHS OF THE -APPELLANTS/PETITIONERS' REPLIES AS WELL AS THE FURTHER WITNESS STATEMENT ON OATH AND EXHIBITS P31-P41 WHICH WERE HINGED ON THE SAID REPLIES. (GROUNDS 1, 2 AND 3)

2. WHETHER OR NOT THE LOWER COURT WAS RIGHT IN AFFIRMING THE DECISION OF THE TRIAL TRIBUNAL TO DISMISS THE APPELLANTS/PETITIONERS' PETITION HAVING REGARD TO THE FAILURE OF THE APPELLANTS/PETITIONERS TO PROVE THEIR PETITION. (GROUNDS 5, 4, 6, 7, 8, 9, 10,11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22 AND 24)

3. WHETHER THE LOWER COURT'S PURPORTED FAILURE TO PRONOUNCE ON ISSUES 4 & 7 SUBMITTED TO IT OCCASIONED A MISCARRIAGE OF JUSTICE. (GROUND 23)

The Brief of Argument of the 3rd Respondent settled by Dr. Onyechi Ikpeazu SAN was filed on 29/1/2016. In it were crafted three issues for determination, which are thus:-

1. Whether their Lordships of the Court of Appeal were correct when they struck out paragraphs of the "Petitioners' Replies" to the Reply of the Respondents to the Petition, the statement on oath of PW15 and Exhibits P31-P41 anchored on the said Petitioners' Replies. (Grounds 1, 2 & 3)

2. Whether their Lordships of the Court of Appeal were correct when they held that the Appellants failed to prove that the election of the 1st Respondent was marred by over-voting. (Grounds 4 - 20)

3. Whether their Lordships of the Court of Appeal were correct when they held that the Appellants failed to prove that their alleged acts of non-compliance and corrupt practices substantially affected the result of the election. (Grounds 21. 22 and 23)

I shall utilise issue No. 1 of the 1st Respondent as it seems to me wide enough though compressed to answer the main questions in the determination of the appeal.

ISSUE ONE:

Whether the Court Below was not right in law in affirming the trial Tribunal decision dismissing the Appellants' Petition?

For the Appellants was submitted that the Appellants never presented conflicting documents to prove over-voting as wrongly found by the Court of Appeal as the Court failed to identify the conflicting documents presented by the Appellants. That there is nothing in PW1's evidence that contradicts any of the documents presented by the Appellants in proof of over-voting. That contrary to the finding of the Lower Court in this regard, the evidence of PW3 and PW15 in their witness statements on oath adequately and effectively linked the documents to their evidence. B

Learned counsel for the Appellants stated that there was no part of the trial Tribunal's judgment where the court held that the appellants' documents were dumped on the Tribunal, neither was it part of the issues submitted to the Court of Appeal in the Notice of Appeal nor was there any Respondent's Notice filed by any of the Respondents on the issue of dumping. This, counsel said, produced D perversion leading to a miscarriage of justice. He cited numerous judicial authorities such as *Chinwendu v Mbamali* (1980) 3 - 4 SC 31; *Lamai v Orbih* (1980) 5 - 7 SC 28; *Woluchem v Gudi* (1981) 5 SC 291.

It was further stated for the Appellants that they had discharged E the burden of proof placed upon them to prove over-voting on balance of probabilities having placed before the Court unchallenged and uncontradicted evidence demonstrating that the votes cast in each of the polling units complained against exceeded the number of accredited voters. That the oral and documentary evidence proffered F by the Appellants pre-eminently established over-voting and thereby proved non-compliance with the Electoral Act, the Approved Guidelines and Regulations for the conduct of 2015 General Elections and Manual for Election Officials 2015. He referred to *Ucha v Elechi* G (2012) 3 SC (Pt. 1) 26 at 69 etc.

Learned counsel for the Appellants contended that the lower Court failed to adjudicate on all issues submitted to it for determination and so the Court Below failing to do so, this Court should rectify the anomaly by setting aside what that Court did. He cited *Ikechukwu v FRN* (2015) 7 NWLR (Pt. 1457) 1 at 21; *Federal Ministry of Health v Comet Shipping Agencies Ltd* (2009) 9 NWLR (Pt. 1145) 193 at 220 - 221, etc. H

Learned counsel for the 1st Respondent contended that it is

now trite that proof of over-voting is not by card reader report but by voters' registers. He cited the judgment of this Court (unreported) SC.907/2015; Mahmud Aliyu Shinkafi & Anor v Abdulazeez Yari & Ors delivered on 8th January, 2016 at pages 19-31; SC. 979/2015 BETWEEN Alhaji Muhammed Inuwa Yahaya & Anor v Alhaji Ibrahim Hassan Dankwanbo & Ors. Judgment delivered on 20th day of January, 2016 pages 23- 24.

Also, for the 1st Respondent was contended that Exhibits P30-P41 which are voters registers for 12 Local Government Areas of Delta State tendered through PW15 were clearly dumped on the trial Tribunal as they were not tied to any specific purpose in the pleadings in support of Appellants' petition at the tribunal and that it is now trite that parties must not dump documents on a" Court of law. He cited Omisore v Aregbesola (2015) 15 NWLR (Pt. 1482) 205 at 299; Awuse v Odili (2008) 16 NWLR (Pt. 952) 416 at 510-551, etc.

That the Appellants cannot rely on the weakness of the Respondent's case to prove their case which is predicated on election petition but must rely on the strength of their case. He relied on CPC v INEC (2011) 18 NWLR (Pt.1279) 493 at 542 -543.

For the 2nd Respondent, it was submitted that the Appellants' Replies to the Respondents' Replies, Further witness Statements on Oath and Exhibits P31-P41 were rightly struck out by the Courts Below. That the Appellants failed to prove their petition and that the purported omission of the Lower Court to resolve some points taken by the Appellants did not lead to any miscarriage of justice. He cited APC v PDP (2015) 15 NWLR (Pt. 1481) 1; Adepoju v Awoduyilemi (1999) 5 NWLR (Pt. 603) 364; Oke v Mimiko (2014) 1 NWLR (Pt. 1388) 225.

That it is trite law that it is not every error that will lead to setting aside of a decision as only that error which occasioned a miscarriage of justice can so justify such a reversal on appeal. He cited Grosvenor Casinos Ltd v Halaoui (2009) 10 NWLR (Pt. 1149) 309 at 351-352.

For the 3rd Respondent, it was canvassed that the witness statement filed along with the flawed petitioners' Reply were moribund as the statement was evidence led in support of the pleadings in the petitioners' Reply which were invalid and so evidence without the

support of pleading goes to no issue. He cited *Buhari v Obasanjo* (2005) 13 NWLR (Pt.941) 1; *New Bread Organization Ltd v Erhomosele* (2006) 5 NWLR (Pt. 974) 497; *Ezeanah v Alhaji Attah* (2004) 2 SCNJ 200 at 235.

That the Electoral Manual is not superior to the Electoral Act. He referred to *Buhari v Obasanjo* (2005) 13 NWLR (Pt. 941) 1 at B 316 - 317.

The grouse of the Appellants are gleaned from paragraphs 16, 12, 16 and 13 of the Appellant's petition and I shall restate them thus:-

16.12 Your Petitioners stated that only 726,745 (Seven Hundred and Twenty Six Thousand, Seven Hundred and Five) alleged voters were accredited on the card readers in the whole of Delta State but an alleged total votes of 931,808 (Nine Hundred & Thirty-One Thousand, Eight Hundred & Eight) with 24,913 (Twenty Four Thousand, Nine Hundred & Thirteen) rejected votes was announced by the Returning Officer, curiously on 11th April, 2015, for the April, 2015 gubernatorial election. There was thus over voting in Delta State during the April 11, 2015 gubernatorial election by over 205,000 (Two Hundred & Five Thousand votes. C D E

16.13 The entry of 1,017,796 (One Million, Seventeen Thousand, Seven Hundred & Ninety Six) on the Form EC8D as the number of accredited voters for the aforesaid election is inconsistent with (and or exceeded) the 726,745 (Seven Hundred and Twenty Six Thousand, Seven Hundred and Forty Five) alleged votes accredited on the card readers in the whole of Delta State. F

16.14 Your Petitioners aver that the 1st and 2nd Respondents' alleged total votes of 726,680 (Seven Hundred & Twenty-Six Thousand, Six Hundred & Eighty) recorded on the Form CE8D and Form EC8E are substantially invalid voters being the product of over voting from 21 (Twenty One) out of the 25 (Twenty Five) Local Government Areas of Delta State in that votes as recorded by the card reader compulsory deployed for the conduct of the gubernatorial election in Delta State on the 11th of April, 2015. G H

The position of the Appellants in short is that there is nothing in PW1's evidence that contradicts any of the documents presented by the Appellants in proof of over-voting.

To substantiate that positive, the Appellants tendered the Card

Reader Accreditation Report such as Exhibit P2A therein contained the total number of accredited voters. The voters register was not filed as part of the petition, but had them tendered through PW15 even though no specific part of the pleadings covered them.

The attack from the Respondents is that the voters register were merely dumped and unsupported by the pleadings and so went to no issue. Also, that without the necessary back-up of the voters register properly pleaded and tendered with the possible cross-examination, the card reader report cannot stand alone and on its own cannot sustain an allegation of over-voting. In this regard, I shall refer to the recently decided case of this Court in the unreported SC.907/2015, Mahmud Aliyu Shinkafi & Anor v Abdulazeez Abubakar Yari & 2 Ors, Judgment delivered on the 8th January, 2016 and at pages 29 - 31 of the said decision on matter of how over-voting is to be established, it was held thus:- “The grouse of the Appellants in this issue, basically, is that there was over-voting and cause 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:-

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.
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 General 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) Iniama 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 that 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". Per Okoro JSC anchoring the position of this Court. B

The Supreme Court not letting anyone remain in doubt as to what is expected to prove over-voting, this Court in *Labaran Maku v Alhaji Umaru Tanko Al-Makura & 3 Ors* (Unreported) in SC.982/201? Delivered on 25/1/2016 by Onnoghen JSC at page 5 stated as follows:- C

"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". E
F
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Again, on the same principle, the Supreme Court in SC.979/2015: *ALHAJI MUHAMMED INUWA YAHAYA & AN OR v ALHAJI IBRAHIM HASSAN DANKWAMBO* (unreported) delivered on 25th January, 2016 per Onnoghen JSC at pages 24 - 25 of the judgment, H 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 that responsibility, the law requires the petitioner 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 number of actual votes;

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

(d) 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; C *Kalgo v Kalgo* (1999) 6 NWLR (Pt. 606) 639; *Audu v INEC (NO.2)* (2010) 13 NWLR (Pt. 1212) 456; *Iniaya v Akpabio* (2008) 17 NWLR (Pt. 116) 225.

On the other hand, when the ground for challenging the return of a candidate in an election petition is by reason of corrupt D 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

(b) That the corrupt practice or non-compliance substantially affected the result of the election.

E See Sections 138(1) b) and 139(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* (2005) 2 NWLR (Pt. 910) 241, etc.

F 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 enured to the winner of the election in particular as the over-voting can be for any of the" candidates in the election, respondent or any of the other contestants in the election in ques- G tion. The Court must also be satisfied that it was due to the over-voting traceable to respondent that the respondent won the election.

The Appellants case did not seem to have had any need to bring in the matter of the Register Voters as the foundation upon which to build their case and the Court of Appeal had no difficulty in H holding that an attempt to establish over-voting without the Register of Voters is a moribund project which just will not hold. This vacuum led to there not being a linkage between the result sheets to the voters register for each Polling Unit which is the battle ground and the primary stage in the quest for a party relying on improper accredita-

tion culminating in over-voting to scale through. This fundamental hurdle not having been overcome the Appellants' case is clearly standing on nothing.

What I am trying to say finds relevance under Section 49 (1) and (2) of the Electoral Act, 2010 (as amended) which has prescribed as follows:- Section 49 (1) and (2) of the Electoral Act, 2010 (as amended):-

“49 (1) Any person intending to vote with his voter's card shall present himself to a Presiding Officer at the polling unit in the constituency in which his name is registered with his voter's card.

(2) The Presiding Officer shall, on being satisfied that the name of the person is on the Register of Voters, issue him a ballot paper and indicate on the Register that the person has voted”.

It can be seen from the above statutory provision that the Card Reader was not contained therein. Again, Section 53 of the same Electoral Act elaborated model provisions in the matter of over-voting in the course of an election and I shall quote it thus:-

“53. (1) No voter shall vote for more than one candidate or record more than one vote in favour of any candidate at anyone election.

(2) Where the votes cast at an election in any polling unit exceed the number of registered voters in that polling units, the result of the election for that polling unit shall be declared null and void by the Commission and another election may be conducted at a date to be fixed by the Commission where the result at that polling unit may affect the overall result in the Constituency.

(3) Where an election is nullified in accordance with subsection (2) of this section, there shall be no return for the election until another poll has taken place in the affected area.

(4) Notwithstanding the provisions of subsections (2) (3) of this Section, the Commission may, if satisfied that the result of the election will not substantially be affected by voting in the area where the election is cancelled, direct that a return of the election be made”.

The Appellants case was founded on the Card Reader Report Exhibit P2A which the trial Tribunal found inadequate and inconclusive on proof of accreditation. The Court of Appeal considered the Card Reader alone as incapable of establishing over-voting in the absence of the Voters Register as is the case in the instant appeal.

see no way out of going along with the concurrent findings of the two Courts below, as the Approved Guidelines and Regulations for the Conduct of 2015 General Election Officials 2015 under which the Card Reader and Report are covered cannot take a pride of place above the Electoral Act and so one is to be properly guided as to what occupies a superior placement. This is in keeping with the local saying of the tail not wagging the dog. In other words, the Manual is a guide, a subsidiary legislation which is not on the same pedestal as the statutory provisions of the Electoral Act. The interpretation in this regard is well captured by this Court in the recent case albeit unreported in Mahmud Aliyu Shinkafi & Anor v Abdulazeez Abubakar Yari & Ors (supra).

Again, Appellants had taken umbrage over the trial Tribunal striking out some paragraphs of Appellants' Reply to their petition. The Appellants' taking the view that the Tribunal acted in error and the Court of Appeal should have rectified the anomaly. Disagreeing, the Respondents contend the Appellants were out of time in filing the said Replies and they had nothing on which to hang such defectively filed processes. A recourse to Paragraph 16 (1) of the 1st Schedule to the Electoral Act, 2010 (as amended) would assist, I believe and it is as follows:-

Paragraph 16(1) of the 1st Schedule to the Electoral Act, 2010 (as amended) stipulates as follows:-

"16 -(1) If a person in his reply to the election petition raises new issues 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 fact, so however that -

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

It is to be noted that in an election petition, a procedure unique in itself and as said to be 'sui generis,' a Reply to Respondent's Reply cannot be filed as a matter of course as Section 16(1) (a) of the 1st Schedule of the Electoral Act has stipulated and the question that must be answered is if the Appellants met the condition upon which their seeking a Reply would be allowed.

In this, earlier similar cases are at hand to assist and so, I cite the

following:-

In the case of APC v POP (2015) 15 NWLR (Pt.1481) 1, it was held as follows at page 81, paras B-E:

“I think that I should repeat it that proceedings in election petitions are sui generis. They are in a class of their own. They are made to fast-track the hearing of petitions. B

They are, however, not designed to spring surprise on parties.

In respect of this issue, the appellant in its petition maintained that the 2nd respondent presented forged certificate to the 3rd respondent. The 2nd respondent denied same and maintained that the certificate was not forged but earned by him in 1987. By paragraph 13 of its reply, the appellant then brought in the fresh issue of impersonation. Same was not proper. It should have come in by way of a due amendment of the petition which can be done within 21 days after result of the election was declared. The appellant did not have a leeway to aver new facts which ought to be in the original petition held. D
The Court below was right when it found as follows:-

“It is trite that the petitioner cannot introduce new facts not contained in the petition in his reply as in the instant case because as at the time of filing his petition, that fact is within his knowledge and if he did not adequately include it in his petition, the proper thing to do will be to amend petition.” E

I support the stance of the Court below in not allowing the Appellant the chance of springing surprise on the 2nd Respondent as no new facts should feature in a petitioner’s reply. See Adepoju v Awoduyilemi (1999) 5 NWLR (Pt. 603) 364 at 382. It is clear that restoring the paragraph would have occasioned a great miscarriage of justice on the 2nd respondent at all to the weighty but belated allegation of impersonation which forms the bed-rock of paragraph 13 of the said reply. F G

See also the case of Mr. G.A. Adepoju v Chief Folorunsho Awoduyilemi (1999) 5 NWLR (Pt. 603) 364 at pages 381-383, paras G-A, where the Court held as follows:-

“I have carefully perused the paragraphs of the petition, reply and petitioner’s reply which I have extensively reproduced and I am of the view that propriety of the petitioner’s reply calls for consideration. I shall accordingly invoke Section 16 of the Court of Appeal Rules 1981 as amended to make necessary order as to high light if H

- the real question in controversy in the appeal has been brought to the fore by amending any defect of error in the record of appeal. It appears the petitioner's reply was not properly couched. I am mindful that the trial tribunal had ruled on the propriety of that pleading and the learned Judges saw wrong with it and they relied on their*
- B *own interpretation of paragraph 17 of Schedule 5 to the Local Government (Basic Constitutional and Transitional Provisions) Decree 36). What in effect, the learned trial Judges did was to hold that the petitioner's reply to the 1st respondent's amended reply does not*
- C *contain new issue. This opinion, with due regard, is not a correct of paragraph 17..... I have already reproduced paragraphs- 4 and 5 of the petitioner's reply. In essence, the petitioner/ appellant in paragraph 4 of the petitioner's referred to paragraph 9 of the petition and went on to aver:*
- D *"...and further states that any votes scored accredited to the 1st respondent's (sic) in Lerutu unit are voided because the election at Lerutu polling unit was marred by substantial electoral irregularity". (italics mine)".*

E Paragraph 5 of the petitioner's reply (already reproduced) was couched with similar intendment of providing particulars of irregularity to wit: Inconclusive voting, attempted manipulation of figures by one Joshua and attempt to found that EC8A which the petitioner/ respondent averred came to being during controversy over accreditation.

F A critical appraisal of these averments are new that they are new facts which were available when the petition was filed but have been surreptitiously brought into the petitioner's reply. This is quite irregular:

G Paragraph 17 of Schedule 5 to Decree 36 of 1998 which provides on petitioner's reply reads: *"17(1) if a person in his reply to the election petition raises new issues 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 three (3) days from the receipt of the respondent's*

H *reply, a petitioner's reply in answer to the new issues of fact, so however that-*

(a) the petitioner shall not at this stage be entitled to bring in new facts, ground or prayers tending to amend or add to the contents of the petition filed by him; and

(b) the petitioner's reply does not run counter to the provisions of sub paragraph (1) of paragraph 15 of this Schedule."

It is apparent from the above provisions on petitioner's reply that no new facts which ought to be in the original petition filed should feature in the petitioner's reply.

"The law is clear that if such new facts shall be introduced, they should be done by way of amendment of the original petition provided such application is made within fourteen days from the date on which the result of the election is declared... Since the petitioner/respondent did not avail himself of these provisions, the trial tribunal misdirected itself that the petitioner's reply is competent. It is settled law that a plaintiff/petitioner cannot raise in his reply to a statement of defence or reply to respondent's reply a new issue which was not raised in his statement of claim/petition as by so doing it will amount to a departure and such averment will take the defendant by surprise as he will no longer be in a position to react to the new issue..."

At pages 2726-2727 Vol. 3 of the record, the Court below held as follows:

"It is the Appellants' argument" that the Tribunal struck out some paragraphs of the Appellants' Replies when they did not raise new issues. This is however contrary to what the pleadings of the Appellants reveal at the Tribunal. The new issues raised in the Appellants' Replies could not be hidden from the eyes of the Respondents and the Tribunal alike. The Tribunal at page 2422 of the records spotted this out when it held at the 1st paragraph "There is no doubt that the petitioners' reply at the 1st Respondent's reply to the petition amounts to an attempt to introduce new facts to the petition, which will amount to an attempt to introduce new facts to the petition, which will amount to an amendment of the petition, "New facts in an election petition can only be allowed by an application for amendment within the statutory time allowed and not in Reply by the Petitioner. See Mr. G.A. Adepoju v Chief Folorunso Awoduyilemi (1999) 5 NWLR (Pt. 603) 364. A reply is usually not necessary where there is no new case put up or where there is no counter-claim. In Ishola v Societe Generale Bank (Nigeria) Ltd (1997) LPELR - 1547 (SC), it was held that where, however, as in the present case, no counter claim is filed, further pleadings by way of a reply to the statement of defence is generally unnecessary if the sole purpose is to deny the

averment contained in the Statement of Defence. See also Azeez Akeredolu v Lasisi Akinremi (1983) 3 NWLR (Pt. 108) 164 at 172. In the present appeal, there was no such (sic) a new case or counter-reply, if any, presented by the Respondents at the Tribunal. Besides, if the sole purpose of the Appellants was to deny the averments of the Respondents in their respective Replies, even the Appellants' Reply is unnecessary. The Tribunal was therefore right to hold that the said paragraphs 5, 6(i) (ii), 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21 (i), (ii), (iii), (iv), 22, 23, 24, 25, 26 and 27 of the Appellants' Reply raised new issues contrary to paragraph 16(a) and (b) of the First Schedule to the Electoral Act, 2010".

I am clearly of the firm belief that the Court below did not go outside the provisions of the law in striking out the said Reply, and the copiously quoted findings and decisions above show why and how that Court came by their decision.

In all, the Appellants were far off the mark to either prove over-voting or non-compliance with the Electoral Act during the Governorship Election of Delta State to which the 1st Appellant aspired. From the above and the fuller reasoning in the Lead Judgment, I see no reason to interfere with what the two Courts did, and why this appeal was also dismissed by me.

OGUNBIYI JSC

On the 2nd February, 2016 the three appeals were heard and the lead judgment was delivered by my learned brother Musa Dattijo Muhammad, JSC in a unanimous decision, this court dismissed appeals No. SC. 24/2016 and SC. 25/2016 and discountenanced the cross appeal No. SC. 26/2016 accordingly. In my concurring judgment I deferred reasons for my decision and which I now proffer hereunder.

The facts originating the appeals and the cross appeal have been spelt out in the erudite lead judgment of my learned brother Musa Dattijo Muhammad, JSC.

Appeal SC.24/2016

Briefly on the preliminary objections raised by 2nd respondent challenging the competence of certain paragraph, of the grounds of appeal, it is my view that elegance and/or proficiency are not the

deciding consideration of the competence of a ground of appeal. By its very nature of the use of the word “appeal” it signifies dissatisfaction, unhappiness and protest against a decision and seeking for reconsideration. It is important that the dissatisfaction _arises from within the decision originating the complaint. Once it is established that all parties are seized of the knowledge of the substance, an objection of incompetence will not be necessary. On that note, the objection raised by the 2nd respondent in reply to the petition is hereby overruled to allow the merit of the appeal be heard. B

The three issues formulated by the 2nd respondent upon which this appeal is to be determined are spelt out clearly in the lead judgment. I will only reproduce the 2nd issue on which I intend to make my contribution in support of the lead judgment of my learned brother. C

ISSUE 2

Whether or not the lower court was right in affirming the decision of the trial tribunal to dismiss the appellants’/ petitioners’ petition having regard to the failure of the appellants’/ petitioners’ to prove their petition. D

It is obvious as shown on record that the reliefs sought by the appellants/petitioners are declaratory in nature. Paragraphs 18.1 - 18.4 of the petition are in reference. E

The law is also trite and well settled that election petition cases are *sui generis* and where a petitioner seeks declaratory reliefs the burden is upon him to prove his case by adducing cogent and compelling evidence. See the decision of this court in Gundiri V. Nyako (2014) 2 NWLR (Pt.1391) 211 at 246-247. See again the case of Ucha Anor V. Elechi & 1774 Ors, (2012) 3 SC (Pt. 1) P26. (2012) 13 NWLR (Pt 1317) 330. F

Also in a recent decision of this court in an unreported judgment of Mahmud Aliyu Shinkafi & Anor. V. Abdulazeez Abubakar Yari SC. 907/2015 delivered on the 8th day of January, 2016, the court affirmed all its earlier decisions on the proof of substantial non-compliance with the Electoral Act occasioned by over-voting even with the existence of the card reader machine. Appellant’s argument in that case was to elevate the position of the card reader machine to the status that the report of its contents alone was sufficient to prove substantial non-compliance bothering on over-voting. The view was however rejected by this court which authoritatively proffered and G
H

laid down as yardstick, the steps necessary and which must be followed in order to prove over-voting alleged. Where however the petitioner contends that an election or return in an election should be invalidated by reason of corrupt practices or non-compliance, the proof must be shown forth: - (i) that the corrupt practice or non-compliance took place and (ii) that the corrupt practice or non-compliance substantially affected the result of the election.

The quantum of measurement and consideration is not to show that there was a proof of non-compliance, as it is almost impossible to have a perfect election anywhere in the world. The measure however, is whether the degree of non-compliance is sufficient enough so as to vitiate the credibility of the election held. The reason for the proof on the balance of probability is not farfetched therefore.

Where the petitioner alleges over-voting, the onus is on him to show that there was indeed an over-voting and that it inured to the winner of either the appellant, the respondent or other contestants who participated and lost out at the election but are not parties to the petition. The law therefore requires the petitioner to lead evidence right from the polling unit in order to show that the alleged over-voting was solely to the advantage of the respondent.

It is conclusive from the decision of this court that Proof of substantial non-compliance arising from over-voting will only be discharged by the petitioner who must tender the following: voters registers, the statement of results forms, relate the voters registers and result forms to their case and show that the figure representing the over-voting, if removed, would result in victory for the *petitioner*.

It is in evidence that the voters registers were tendered through the bar and not the makers. This did not afford the opportunity to cross examine thereon. See the decision of this Court in *Buhari V. Obasanjo* (2005) 13 NWLR (Pt 941) 1 at 316. By tendering voters registers from 11 local government areas as against the 21 local government areas disputed, is to defeat the credibility sought to establish through the voters registers. The proportion is far below adequate when regard is had of the ratio of 11 to 21.

It is unfortunate and the appellants have themselves to blame when the 21 envelopes containing forms EC8A, EC8B and EC8C from the 21 local governments of Delta State were admitted and marked by the tribunal. What were admitted were 21 sealed enve-

lopes and which content was not before the tribunal. The appellants were not availed the benefit of the documents in proof of their petition.

The inability of the appellants to link any of the documents with the result from each specific unit had occasioned a dumping of same on the tribunal which earns no probative value as it was held in *Omisore V. Aregbesola* (2015) 15 NWLR (Pt 1482) 205 at 333. B

It is also settled that a party must disclose the specific purpose or objective for which a document is being tendered and consequently link the document so tendered to the said purpose. As rightly submitted by the senior counsel for the 1st respondent, throughout the length and breadth of the appellants pleading they did not state in their petition, the purpose for which a voters register would be used. What was clearly stated and used for accreditation was the card reader. There was no mention that voters register was used for that purpose. C
D With reference to the evidence of PW15 under cross examination at page 1968 of Vol. III of the record he said:-

"I did not use voters register when I filed the petition because INEC refused to give the voters register."

It follows in the circumstance therefore that Exhibits P30 - P41 E
 which are voters registers for 12 LGAs in Delta State tendered through PW15 were clearly dumped on the tribunal as they were not tied to any specific purpose in the pleadings in support of appellants' petition at the trial tribunal. The duty is not on the judge to retreat to his hallowed chambers and engage in examining documents that were F
 dumped before him in the open court. See again *Omisore V. Aregbesola* (supra). Exhibits P30 - P41 dumped on the court are therefore lacking in probative value. PW15 was not the maker of the said Exhibits, he was also not a polling unit agent of the 2nd appellant as well as not G
 being an INEC official; he was therefore not the appropriate person through whom the registers Exhibits P30 - P41 should have been tendered and admitted.

Under cross examination PW15 had this to say for instance:-

"We have polling unit agents for all the polling units in Delta." H
 See page 1976 of Vol.3 of the record.

None of the officials came to tender the said exhibits P30 - P41.

For all intents and purposes, the appellants/petitioners had failed woefully to prove the allegation of over-voting as rightly held by the

lower court which affirmed the decision of the trial tribunal when it dismissed the entire petition. The decision of the two lower courts is concurrent and the appellants have not advanced any special circumstance why that decision should be interfered with. I also affirm the judgment of the lower court and hereby dismiss the appeal as
B lacking in merit.

My learned brother has dealt adequately with all the issues raised herein. I adopt all his reasoning and conclusions as mine in dismissing appeals SC.24/2016 and 5C.25/2016 as unmeritorious.

C Having regard to my reasons supra, it is obvious that appeal No. 5C.26/2016 has been overtaken by events.

OKORO JSC

D Judgment in this appeal was delivered by my learned brother Musa Dattijo Muhammad, JSC on 2nd February, 2016 wherein this appeal was adjudged devoid of merit and dismissed. I also agreed with the said judgment and reserved reasons till today. I shall now give the reasons for the decision.

E The facts of this case have been ably and succinctly laid out in the lead reasons for judgment just delivered by my learned brother, Muhammad, JSC. I need not repeat the exercise. My Lords, permit me to just make a few comments and adopt the reasons admirably
F adumbrated in the lead judgment.

The appellants herein anchored their complaint on over-voting and solely sought to prove same by tendering the card reader report without regard to the traditional and well settled principle of law in this regard. To make matters worse, the appellants failed to
G even plead the register of voters in respect of the polling units they complained of. It is trite that civil cases and indeed election matters are won and lost on the pleadings. This is so because facts not pleaded cannot be put in evidence before the court. Such evidence, if led, would be discountenanced. Parties are bound by their pleadings. See
H *AMERICAN CYANAMID COMPANY V. VITALITY PHARMACEUTICALS LTD* (1991) 2 NWLR (pt. 171) 15, *OSHO V. FOREIGN FINANCE CORPORATION & ANOR.* (1991) 4 NWLR (pt. 184) 157.

Therefore, Exhibits P31 and P41 the purported voters register that Were admitted in evidence, Were lawfully struck out by the trial

Tribunal.

This court has in quite a plethora of decisions made it clear that in order to prove over voting, a petitioner must tender the voters register, the scores at the election in appropriate forms and relate them to the specific areas complained of. See *HARUNA v. MODIBO* (2004) 16 NWLR (pt 950) 487, *KALGO V. KALGO* (1999) 6 NWLR (pt. 606) 639, *AUDU V. INEC (NO. 2)* (2010) 12 NWLR (pt. 1212) 456 and *SHINKAFI 7 ORS V. YARI & ORS* (unreported) Appeal No. Se. 907/2015 delivered on 8th January, 2016.

Let me reiterate my views In many other decisions rendered in this Court in the recent past that the introduction of the Card Reader Machine into election process in this Country does not amend, set aside or abolish Section 49 of the Electoral Act, 2010, (as amended). It is meant to complement the provision. Section 49 of the Act provides that a person intending to vote with his voters' card, shall present himself to a presiding officer at the polling unit in the constituency in which his name is registered with his voters' card. Secondly, the presiding officer, on being satisfied that the name of the person is on the register of voters, shall issue him a ballot paper and indicate on the register that the person has voted. This remains the law until the National Assembly amends the procedure for accreditation and voting provided in Section 49 (supra). As I said, the appellants herein lost sight of this important provision. This is the bane of their case.

In the circumstance, the appellants were unable to prove over voting with the card reader only. For the above and the more elaborate reasons contained in the judgment of my learned brother Muhammad, JSC that I also dismiss appeal Nos. SC. 24/2016 and SC. 25/2016 for being unmeritorious.

In view of the reasons I have given in the two appeals, Appeal No. SC. 26/2016 is thus overtaken by events.

SANUSI JSC

These appeals were heard on 2nd February 2016 entered dismissing the two appeals. I promised to deliver the reasons for the Judgment today, the 15th of February, 2016, I had the advantage of reading before now, the lead reasons for Judgment prepared by my learned brother Musa Dattijo Muhammad JSC. I agree with the rea-

sons he advanced justifying the dismissal of the two appeals. I adopt hem as mine.

My noble lord has ably summarised the facts of these appeals, hence there is no n d to set them out here again. It is clear from the facts of the case that the grounds of petition before the trial tribunal
B by the present appellant include allegations of:

1. Corrupt practice
2. Non- compliance with the provisions of the Electoral Act;
3. Over voting.

C My lords, permit e to say a word or two on issues of over voting the petitioners alleged. The Law is trite that over voting can only occur where total number votes cast in a polling exceeds the total number of registered votes for he polling booth. To put it in another way, over voting can not arise when more voting then the
D registered number of electorate are cast in a constituency because polling stations and not constituency are the foundation on which election process can be faulted

This presupposes that Voter register must be pleaded and tendered. In this instant case, although the voter register was tendered
E in evidence, was however not pleaded hence same could not be properly admitted in it evidence. Without leading and tendering a voters register, over voting can not therefore e proved. See Buhari vs Obasanjo (2005) 13 NWLR (pt 941) 31 at 317; Shinkafi & ors vs Yari SC. 907/2015
F

Thus, with these w comments and for the fuller reasons given in the lead reasons for Judgment ably and painstakingly marshalled in the lead Judgment of Musa Dattijo Muhammad JSC which I adopts as mine, I also see no merit in appeals Nos. SC 24/2016 and SC 25/
G 2016 and I dismiss them accordingly. With this stance of mine, appeal No SC. 26/20016 is therefore of no moment hence it is herby discountenances by me, as it is no more alive. I abide by the consequential orders made in the Lead reasons for judgment.

H