

COURT OF APPEAL PORT - HARCOURT DIVISION
FRIDAY 31ST AUGUST, 2012. CA/PH/EPT/10/2012
CORAM:- M. L. TSAMIYA, P. A. GALINJE, J. I. OKORO,
M. A. DANJUMA, T. O. AWOTOYE, JJCA

DR. IMORO KUBOR & ANOR APPELLANTS
AND
HON. SERIAKE HENRY DICKSON
& 2 ORS RESPONDENTS

APPEALS - Filing - Necessity of - Appeal arises where appellant who is dissatisfied with decision of lower court - Files notice of appeal stating inter alia the grounds of appeal (H1)

APPEALS - Ground - Purpose - Ground is the error of law or fact alleged by appellant - Which attacks basis of reasoning of the decision challenged (H2)

APPEALS - Ground - Vagueness - Ground notifies the other side of the case to meet on appeal - Hence no ground which is vague - Or incapable of conveying any specific complaint is permitted (H3)

APPEALS - Ground - Particular - Sustainability - Particular (i) is in harmony with ground 3 and capable of sustaining it - As it shows in what respect the Tribunal committed wrong (H4)

APPEALS - Ground 4 - Validity - The ground did not challenge the Tribunal's rejection of Exhibits D & L - Thus objection that it relates to pre election matters is unsustainable (H5)

APPEALS - Ground - Error of law & misdirection - Jointly framed - SC stated in Aderounmu's case that such framing does not invalidate a ground - Provided the complaint in each particular is clearly shown (H6)

APPEALS - Ground - Incorporation of particulars - Where ground has furnished the particulars needed - There will be no need for separate paragraph - Stating particulars of error alleged (H7)

APPEALS - Grounds 1 to 7 - Issue - Competence - Appellant's complaint on the grounds and issue 1 are not new - Because issue of discontinuance of suit no. FHC/ABJ/CS/3/2012 - Was borne out in record of the Tribunal (H8)

APPEALS - Fresh issue - Raising of - Although such is not allowed on appeal - But where subject to demand of justice - And there is serious question of law - Court may by discretion entertain the issue (H9)

APPEALS - Issues - Binding nature - The parties did not join issue on discontinuance of motion and suit no. FHC/ABJ/CS/3/2012 - Hence they are forbidden to go outside issues joined between them (H10)

ELECTION PETITIONS - Tribunal - Order - Exhibit N directed at 3rd respondent was executory order - And it remains extant as no appeal was filed by the respondent (H11)

ELECTION PETITIONS - Evidence - Electronic document - Admissibility - Party who seeks to tender such document - Must call evidence in relation to use of the computer - To establish conditions under Evidence Act s. 84(2) (H12)

ELECTION PETITIONS - Appeal - Abandoned ground - Effect - Exhibit D that was produced in support of abandoned ground 2 is irrelevant - As such the tribunal rightly struck them out (H13)

DOCUMENTS - Public document - Certification - Under Evidence Act s. 102(a)(ii) - Request must be made to use Exhibit L in litigation - But where the request is refused - Resort can be had to computer print out under Evidence Act s. 97 (H14)

COURTS - Evidence - Inadmissible evidence - Where court finds that certain documents were admitted in evidence in error - It has power to expunge such from its records (H15)

APPEALS - Election - Qualification - As there is no evidence of conduct of the primary away from INEC - And as 1st respondent was not

disqualified by FHC - He cannot be stopped from contesting the gubernatorial election (H16)

ELECTIONS - Qualification - Constitution - Supremacy of - Provision of Electoral Act that runs contrary to the Constitution - Is null and void to the extent of its inconsistency (H17)

ELECTIONS - Candidates - Publication of names - Power - Is in the domestic domain of INEC - And no one should be punished if the names have been properly forwarded to INEC (H18)

FACTS

Petitioners/appellants filed this election petition before the Governorship Election Tribunal Holden at Yenogoa, Bayelsa State. Appellants by their petition are challenging the declaration of 1st defendant/1st respondent as the winner of the gubernatorial election conducted in the State on the 11th February 2012. 1st appellant was sponsored by 2nd defendant/2nd appellant as a candidate in the election, while 1st respondent was sponsored by 2nd respondent. The election was conducted by 3rd defendant/3rd respondent.

At the end of the election, 1st respondent was declared winner and returned elected. Hearing commenced before the Tribunal wherein the parties made their presentations and submissions. At the end of hearing, the court in its judgment dismissed the petition in its entirety. Dissatisfied, appellants appealed to the Port Harcourt Division of the Court of Appeal, while respondents filed several preliminary objections to the hearing of the appeal.

ISSUES FOR DETERMINATION

"1. Whether the Trial Tribunal rightly countenanced Exhibit 'N' and ignored the fact of the discontinuance of suit No. FHC/ABJ/CS/3/2012 on the qualification of the 1st Respondent to contest the Bayelsa State gubernatorial election.

2. Whether the Trial Tribunal was wrong in rejection of Exhibit 'D' and 'L' tendered from the bar and admitted in evidence by the Appellants' counsel.

3. Whether the 1st Respondent was validly sponsored by the 2nd Respondent to render him qualified to contest at the 11th February 2012 Governorship Election having regard to section 177 of

the Constitution and extant provisions of the Electoral Act.

4. *If this court resolves all the previous issues in favour of the Appellants, whether the consequential order to make in this case is one for a fresh election.”*

B HELD (Unanimously dismissing the appeal per TSAMIYA JCA)

APPEALS - Filing - Necessity of

C 1. It is worth noting that, an appeal arises when an appellant (or appellants) is dissatisfied with the decision of a lower court. The appeal is brought by the appellant filing a notice of appeal. The notice of appeal shall, inter-alia, state the grounds of appeal.

D The rationale for these is, as I said above, that an appeal arises when an appellant is dissatisfied with the decision of a lower court and as such is complaining to an appellate court of a misdirection or error in law on the part of the lower court or that the weight of evidence before the lower court did not support the decision appealed against. (pp. 2347 F/2348 B)

APPEALS - Ground - Purpose

F 2. A ground of appeal is the error of law or fact alleged by an appellant as the defect in the judgment appealed against and relied upon to set it aside. The ground of appeal is thus the reasons why the decision on appeal is considered by the aggrieved to be wrong.

G The purpose of the ground of appeal is to isolate and accentuate for attack the basis of the reasoning of the decision challenged. Ground of appeal either must allege misdirection or an error in law, or be an omnibus ground, i.e. a ground alleging that the judgment of the lower court is against the weight of the evidence before the lower court. (p. 2347 G)

APPEALS - Ground - Vagueness

H 3. The purpose of ground of appeal is to give notice to the other side of the case they have to meet in the appellate court.

No ground of appeal which is vague or discloses no reasonable ground of appeal is permitted. That “a vague” ground of appeal is a ground of appeal which does not demonstrate any bearing and is consequently incapable of conveying any specific complaint.

I have read these grounds 3-9. Upon my perusal and consideration of the preliminary objection on them, the grounds of the objection and the arguments in support, I am of the firm view that the objection is misconceived. These grounds are not vague or disclose no reasonable ground of appeal, rather they are valid in the sense that each deals with the real complaint each ground is supposed to highlight. Each ground, in my view, gave to the respondents notice of the case to be faced and at the same time narrows the issues on the appeal. Therefore the objections against these grounds are not sustainable, and over-ruled in favour of the appellants. (p. 2348 F)

APPEALS - Ground - Particular - Sustainability

4. The combined reading of ground 3 and its three particulars, I am of the view that the 1st particular is in harmony with the said ground of appeal. Therefore, from the 3 particulars in support of the said ground 3, there is one other particular to support it. Since one other particular among the particulars, to my view, supports the ground, the 1st respondent’s objection is ineffective as it cannot adversely affect the validity of the said ground 3 if particulars (ii) and (iii) are struck out. I would like to state that this particular (i) shows in what respect the Tribunal committed wrong i.e. incorrectly made mistake. This particular (i) is enough to sustain ground 3 and I so hold. Consequently, the objection against it is unsustainable and over-ruled. (p. 2349 H)

APPEALS - Ground 4 - Validity

5. The 1st respondent also specifically challenged the competence of ground 4 because it alleges matters relating to pre-election affairs of the 2nd respondent.

It is true that, challenging nomination and sponsorship

of a candidate to contest an election by a political party are pre-election matters which are non-justifiable. Similarly, nomination and sponsorship are pre-election matters and that the Election Tribunal has no power to investigate such matters that took place before the conduct of the election.

B I have read ground 4 but I am not able to find how it challenges/complains against the Tribunals rejection of Exhibit 'D' and "L".

C With due respect, it is important to note that, for a counsel to say that ground 4 alleges matter related to a pre-election matters without going further to show to the court how the ground complained against matters related to pre-election matters is not enough. Similarly, the said ground did not complain against the Tribunal's rejection of Exhibits 'D' and 'L'.

D Looking, at the above ground, there is nowhere it complains against the rejection of Exhibit 'D' and 'L'. Consequently, the objection is unsustainable and this objection is over-ruled in favour of the appellants. (p. 2350 C)

E APPEALS - Ground - Error of law & misdirection

6. It is true that some legal authorities decided that a ground of appeal cannot be an error in law and misdirection at the same time. By their nature one ground of appeal cannot be the two. But considering the new decision in Aderounmu vs. Olowu (2000) 2 SCNJ 180 at 190- 191, the Supreme Court held that the mere fact that a ground of appeal framed as an "error at law" and a "misdirection" at the same time does not make it incompetent and that what is important in a ground of appeal and the test the court should apply is whether or not the impugned ground shows clearly what is complained of as 'error of law' or what is complained of as 'misdirection' or as the case may be 'error of fact'. What makes a ground incompetent, according to the court, is not whether it is framed as an 'error' or 'misdirection', but whether by stating it, the other side is left in doubt as to what the complaint of the appellant actually is. Once there is this requisite preciseness and specificity in the ground and compliance with the rules of court in

its formulation, the ground cannot be described as bad and incompetent, stated the court. The error and misdirection should be stated in distinct and separate particulars under the ground. (p. 2351 C)

APPEALS - Ground - Incorporation of particulars

7. A perusal of the above two grounds of appeal will show that none of the grounds stated, in a separate paragraph and under different heading, the particulars in support. Does this omission make the two grounds of appeal incompetent? The answer, in my view is in NEGATIVE. This is because where the ground of appeal in itself has furnished the particulars needed, there will be no further need for a separate paragraph stating the particulars of the error alleged. In other words, where the particulars have been incorporated in the ground of appeal, i.e. where a ground of appeal does not stop at saying that an error in law was committed, but goes on to say why the allegation of error has been made, the ground of appeal has incorporated the particulars and there was therefore, no further need for these to be stated in a separate paragraph. So apart from the foregoing exception, once an “error in law” or “misdirection” is alleged in a ground of appeal, the particulars of the error or misdirection must be given.

From the above two grounds of appeal it is evident that they are grounds of law, although they do not contain particulars of error under a separate heading. But the appellants have incorporated in the grounds of appeal reasons for saying that the “error of law” alleged have been committed. They also went on to say why the allegations have been made. In the circumstance, I cannot see how it can be said that each of the grounds of appeal does not contain particulars. (p. 2354 E)

APPEALS - Grounds 1 to 7 - Issue - Competence

8. In the instant appeal, it is not true that the complaint of the appellants on grounds 1 - 7 and issue 1 are new. They are not new because issue of discontinuance of suit No. FHC/ABJ/CS/3/2012 was borne out in the record of the Tribunal. Under this circumstance it cannot be said that the issue is a fresh

issue. See paragraph 9 of the 3rd respondent's brief at page 43 of vol. 1 of the record filed on 24/3/2012 and paragraph 4 (c) of the petitioners' (appellants') reply to the 1st, 2nd and 3rd respondents brief on page 189 of vol.1 filed on 31/3/2012. Since the complaint of the appellants is not new, issue No.1
B therefore is competent. Consequently, I too hold that ground 1 and 7 are competent and the objection of the respondents over-ruled in favour of appellants. (p. 2357 A/E)

APPEALS - Fresh issue - Raising of
C 9. I wish to point out that the rule which says, generally appellant is not allowed to raise on appeal an issue which has not been canvassed, raised or argued at the trial court, is however subject to the demand of justice, thus, where the question involves a serious question of law, for instance, want of
D fair hearing guaranteed by the constitution, the court in its discretion is competent to entertain the issue especially where it is plain that no further evidence could have been adduced which would affect the decision and thus prevent an obvious
E miscarriage of justice. (p. 2357 C)

APPEALS - Issues - Binding nature
10. However, before this court the appellant admitted that the order contained on exhibit N was a valid order made in the
F interim pending the determination of the motion on notice and the substantive suit which were subsequently discontinued at the instance of the 1st respondent. The issue of discontinuing with the motion on notice and the suit no FHC/ABJ/CS/3/2012
G was never raised and dealt with at the lower court, and so the contention that the tribunal could have taken into account the termination of the suit in treating the order made on exhibit 'N' as having been spent is not supported by the judgment of the lower court. There was clearly no issue joined on this score
H by the parties, as such they are forbidden to go out of the issues joined between them. (p. 2360 H)

ELECTION PETITIONS - Tribunal - Order

11. From the passage of the brief of the appellants above

quoted, an interim order is usually made to maintain the status quo and thereby preserve the subject matter of the litigation. The question now is/was the order on exhibit N made to preserve the status quo or it is an executory order. The enrolment order at pages 204 - 205, no. 2 and 4 direct the 3rd respondent, INEC to restore the name of the 1st respondent. Clearly this is an executory order as opposed to an order made to preserve the status quo. As at the date the order was made the 1st respondent's name had been removed as a candidate of the 2nd respondent in this appeal. In Nigeria a final or interlocutory decision is determined by the nature of the order made and not the type of application.

This order was consummated by the 3rd respondent in this appeal without any complaint. Having therefore consummated the order without an appeal that order remains extant. The Tribunal was therefore right to have countenanced Exhibit N which was clearly a valid and subsisting decision of a court of competent jurisdiction. I therefore agree with the common submission by all the learned silk for the respondents that the appellants have not shown that INEC did not comply substantially with the provision of the Electoral Act 2010 (as amended) nor have they proved that there was an application by INEC against whom Exhibit N was made to vary or discharge the order as provided for by order 26 Rules 7(3) 11 and 12(1) and (2) of the Federal High Court Civil Procedure Rules 2009.

(p. 2361 E)

Electronic document - Admissibility

12. Section 84(2) provides for the conditions to be satisfied in relation to the statement and computer from which the documents sought to be admitted were produced.

A party that seeks to tender in evidence a computer generated document needs to do more than just tendering same from the bar. Evidence in relation to the use of the computer must be called to establish the conditions set out under section 84(2) of the Evidence Act.

Similarly exhibit L is a computer generated document allegedly printed out from the website of the 3rd respondent, show-

ing the list of qualified candidates published by the 3rd respondent for the Bayelsa State Governorship election of 11th February, 2012. Being a computer generated document, a party seeking to tender same in evidence must comply strictly with section 84(2) and (3) of the Evidence Act, which I have alluded to earlier. Evidence must be given about the frequency of the use of the computer to store or process information and the condition of the computer as well as ascertainment of the authenticity of the information contained in the document. A party who seeks to tender computer generated evidence needs to do more than mere tendering the document from the bar without more. (pp. 2363 F/2364 E)

Appeal - Abandoned ground - Effect

D 13. The finding of the Tribunal on this ground has not been challenged by the Appellant. Having abandoned ground two, Exhibit D which was produced in support of the ground had ipso facto become irrelevant even though it was admitted. I therefore agree with learned counsel for the 1st and 2nd respondents who submitted that the tribunal was right in striking them out for being irrelevant. (p. 2364 D)

Public document - Certification

F 14. Exhibit L is a document forming the official record of an official body. By section 102 (a) (ii) of the Evidence Act it is a public document that requires certification on payment of prescribed fees as provided for under section 104(1) of the Evidence Act. It is therefore not a licence to go to the website of official bodies to print out information in the custody of such official bodies for purposes of litigation without requesting for such documents in the first place from the officials of those official bodies. Where a request is made and such officials refuse to produce such documents, then a party who desires H to use such document in litigation can resort to the use of computer print out being secondary evidence under section 97 of the Evidence Act 2011. (p. 2364 H)

Evidence - Inadmissible evidence

15. Clearly by the provision of the Evidence Act which I have reproduced above, the Appellant did not lay sound foundation for the admissibility of Exhibit L. Where a court finds that certain documents were admitted in evidence in error, such court has absolute power to expunge such exhibits from its records. B

For all I have said, the tribunal was therefore right in expunging Exhibits D and L tendered from the bar and admitted in evidence. This issue is accordingly resolved in favour of the Respondents and the ground 2 from which it is formulated is hereby dismissed. (pp. 2365 G/2366 D) C

Election - Qualification

16. In the instant appeal, there is no evidence that the 2nd Respondent conducted its primary that is under scrutiny away from INEC. The only evidence of disqualification the appellant is relying on are the challenge in court of the primary in which the first respondent emerged as candidate of the 2nd respondent by Chief Timipre Sylva, the former Governor of Bayelsa State who also contested the primary and the failure of the 3rd respondent to publish the name of the 1st Respondent. D E

In the instant case, Chief Timipre Sylva had rightly taken the right step by seeking redress at the Federal High Court. It is therefore the prerogative of the Federal High Court seized with the issue of the qualification of the 1st Respondent to pronounce on his qualification. Where there is no evidence that the 1st respondent has been disqualified by the Order of the Federal High Court, this Court cannot on the basis of the challenge of the qualification of the 1st respondent at the Federal High Court, declare that the 1st respondent was not qualified to contest the Bayelsa State Governorship Election that was held on 11th February, 2012. This is so because the powers that were vested on INEC under section 87(9) of the Electoral Act 2006 has been effectively repealed. The power is now vested on the court by reason of the provisions of section 87(10) of the Electoral Act 2010 (as amended). F G H

(p. 2367 C)

ELECTIONS - Qualification - Constitution - Supremacy of

17. The Electoral Act is subordinate to the constitution which has made provision for qualification and disqualification of aspirants willing to contest an election into the office of a Governor of a State. Any provision of the Electoral Act that runs contrary to the provision of the constitution is therefore null and void to the extent of its inconsistency. Qualification to contest an election into the office of Governor of a state is provided for under section 177 of the constitution while section 182 of the same constitution provides an exhaustive list of conditions that may disqualify a candidate from contesting the election. Any disability outside the provision of the Constitution cannot constitute a bar for an aspirant to contest election. (p. 2368 A)

ELECTIONS - Candidates - Publication of names - Power

18. The question of publication of names of candidates in an election is in the domestic domain of INEC and no one therefore should be punished if the names have been properly forwarded to INEC, the 3rd respondent in the appeal. The controversies surrounding the PDP primary that produced the 1st respondent was resolved by the Federal High Court who initially restrained INEC from publishing the name of the 1st respondent in accordance with section 87(10) of the Electoral Act 2010 (as amended), when the same Federal High Court ruled that the 1st respondent's name be restored on the list of the candidates for the election. (p. 2368 F)

NOTABLE POINT OF INTEREST

TSAMIYA JCA

1. Appeals – Preliminary objection – Fundamentality of

The parties to this appeal filed and exchanged their briefs of argument. The 1st and 2nd respondents respectively filed a notice of preliminary objections against some aspects of the appeal. Before dealing with the issues raised by the respective parties in this appeal, I shall first consider the preliminary objections raised by the respon-

dents. This is because these are threshold issues. A challenge to the competence of a ground of appeal is a fundamental point of law. If the ground of appeal is incompetent then the court has no jurisdiction to entertain it and as such it will be struck out. (p. 2342 E)

REPRESENTATION

B

A. J. Owonikoko (SAN) with Inibie Awoikiegha Esq., K. S. Elenwo Esq. and Adebola Olukosi Esq., for the Appellants
 Tayo Oyetibo (SAN), O. O Fakunle (SAN) with Preye Agedah, Alex Nnorum, Donald Atogbo Esq., Olamida Akinla Esq., John Aga Esq., E. M. Figilo Esq., for the 1st Respondent
 G. I. Abibo (SAN) with Dr. A. E. Okorodas, Wilson Ajuwa Esq., F. N. Nwosu Esq., B. A. Azebi Esq., S. Johnbull of Chief J. K. Gadzama (SAN), for the 2nd Respondent
 Chief Adegboyega Awomolo (SAN) with S. A. Somiari Esq., Samuel D Brusibe Esq., Doutimi Ayabowei Esq., and Henry Otobo Esq., for the 3rd Respondent

CASES REFERRED TO

Galandu v. Kamba (2004) 15 NWLR (pt. 895) 31 E
 Saraki v. Kotoye (1992) 11/12 S.C.N.J 26
 Metal Const. (W.A.) Ltd. v. Migiliore (1990) 1 NWLR (pt. 126) 299
 National Investment v. Thompson organization (1969) 1 NWLR 99
 Alade v. Alemuloke (1988) 1 NWLR (pt. 207) F
 Adekeye v. Adesina (2010) 18 NWLR (pt. 1225) 450
 Ibrahim v. INEC (1999) 1 L.R.E.C.N 154
 Dalhatu v. Turaki (2003) 15 NWLR (pt. 843) 310
 Aderounmu v. Olowu (2000) 2 SCNJ 180
 Sosanya v. Onadeko (2005) 8 NWLR (pt. 926) 185 G
 Obala v. Adesina (1999) 2 S.C.N.J. 1
 Adeniji v. Disu (1958) 3 F.S. 104
 Atuyeye v. Ashamu (1987) 1 NWLR (pt. 49) 7
 Yusuf v. U.B.N. (1996) 6 NWLR (pt. 457) 632
 Abatan v. Awudu (2003) 10 NWLR (pt. 829) 451 H

STATUTES & RULES REFERRED TO

Electoral Act 2010 (as Amended), ss. 34, 87(10)
 Electoral Act 2006, s. 87(9)

Electoral Act 2006, ss. 85(1), 87(9)

Evidence Act 2011, ss. 84(2), 97, 102, 104(1)

Constitution of the Federal Republic of Nigeria 1999, ss. 177, 182

Court of Appeal Rules 2011, O. 6 r. 2(2)(3)

Federal High Court Civil Procedure Rules 2009, O. 26 rr. 7(3), 11,
B 12(1)(2)

LEAD JUDGMENT BY TSAMIYA JCA

On February 11, 2012, the Independent National Electoral
C Commission (INEC) (herein referred to as the 3rd Respondent) conducted the election for the office of Governor of Bayelsa State. The 1st Respondent was sponsored by the 2nd respondent as its candidate at the said election while the 1st appellant was sponsored by the 2nd appellant. Other political parties also fielded their respective
D candidates in the election. At the end of the election the 1st respondent was declared winner and returned elected. The appellants being not satisfied with declaration and return of the 1st respondent, filed their petition challenging the said declaration and return of the 1st respondent by the 3rd respondent. The Governorship Election Tribunal
E (herein referred to as the Tribunal) heard the petition and in its judgment, delivered on July 11th 2012, dismissed the petition in its entirety. This appeal is against the judgment of the Tribunal.

The parties to this appeal filed and exchanged their briefs of
F argument. The 1st and 2nd respondents respectively filed a notice of preliminary objections against some aspects of the appeal. Before dealing with the issues raised by the respective parties in this appeal, I shall first consider the preliminary objections raised by the respondents. This is because these are threshold issues. A challenge to the
G competence of a ground of appeal is a fundamental point of law. If the ground of appeal is incompetent then the court has no jurisdiction to entertain it and as such it will be struck out.

Having made the above statement, I shall now take the liberty
H to state down the submissions of the 1st and 2nd respondents relating to each of the grounds challenged with a view to demonstrating the reason or reasons why they should be or not struck out. First the 1st respondent, in his written address accompanying his preliminary objection contended that by a community reading of the provisions of order 6 rule 2 (2) and (3) of the Court of Appeal Rules 2011, a

ground of appeal must be one of the three categories, namely, alleging a misdirection or error in law or an omnibus ground i.e. alleging that the judgment of the lower court is against the weight of evidence. He further submitted that grounds 3-9 of the appellants, notice of appeal filed on 28/7/2012 do not allege a misdirection or error in law, and that non of these grounds is an omnibus/general ground. Therefore, these grounds are contrary to Order 6 rule 2 (2) and (3) of the Court of Appeal Rules 2011, and are vague and disclose no reasonable ground of appeal. That having failed to allege a misdirection or error in law and are vague they ought to be struck out, for being incompetent. In support of this submission some legal authorities were referred to, and he urged us to strike out the said grounds of appeal. B

Also challenged are the particulars of ground 3 to the effect that they are not related to the ground of appeal. He submitted that the particulars of the said ground 3 bear no harmony and are not complementary to the ground of appeal and that being so, he urged this court to strike out the said ground 3 for being incompetent. C

The 1st respondent also challenged ground 4 of the Notice of appeal. His main contention is that, the said ground 4 relates to a pre-election affair of 2nd respondent because it complains against the nomination and sponsorship of the 1st respondent by his party, 2nd respondent. He further contended that nomination and sponsorship of a candidate to contest an election are matters over which the tribunal has no jurisdiction and as this appellate court exercises jurisdiction over the decision of the lower tribunal, this court therefore can only exercise its jurisdiction over matters on which the tribunal has jurisdiction. That since the election tribunal had no jurisdiction over pre-election matters, moreso, an intra-party dispute; this court cannot exercise its jurisdiction over such matters because they are not justifiable. He urged this court to strike out that ground 4 of the notice of appeal. He cited also some legal authorities to support his contention on this issue. D

On ground 7 of the notice of appeal, the 1st respondent's objection against it is that it alleges an error in law and misdirection on facts at the same time. He submitted that for a ground of appeal to allege error in law and misdirection on facts at the same time such ground is incompetent and he urged the court to hold so and strike it E

out.

On ground 8 and 9 of the notice of appeal, the 1st respondent's objection is that the two grounds lacked particulars to support them, and this is in violation of Order 6 rule 2(2) of the Court of Appeal Rules 2011. He also alleged that the two grounds are narrative and contain arguments, which, so doing is contrary to the provisions of Order 6 rule 2 (3) of same. He urged this court to strike out the said two grounds for being incompetent and cited legal decision to support his contention on this point.

In the final, and in the light of the foregoing; he urged this court to strike out the said grounds 3-9 of the notice of appeal.

The preliminary objection of the 2nd respondent as it relates to grounds 1 and 7 of the notice of appeal. The objection was predicated on three (3) grounds as follows:

(a) That grounds 1 and 7 of the notice of appeal do not arise from the judgment appealed against and therefore cannot be raised and argued without the prior leave of this Honourable Court;

(b) That the said grounds 1 and 7 constitute a fresh point and are incompetent having been raised without the prior leave of this court;

(c) That issue one (1) of the appellants' Brief of Argument is incompetent being an issue distilled from both incompetent and competent grounds and ought to be struck out.

The argument of the 2nd respondent relating to the preliminary objection is contained on pages 5-9 of his Brief of Argument. It was on the premise of the submission made that this court was urged to strike out the said grounds 1 and 7 and issue one (1) distilled therefrom.

The appellants, in response to the preliminary objections filed "Appellants Reply Brief "to the respondents' Brief of Argument" in which at pages 3-13 therefrom, they replied the 1st and 2nd respondents' preliminary objections.

On grounds 3-9 of the Notice of Appeal, the appellants submitted that the objections of the 1st and 2nd respondents as highlighted above, ?sound in taking technical umbrage at perceived inelegance in the drafting of the objected grounds of appeal or some of the adjunct particulars thereof. It was further argued that a ground of appeal which lends itself to reason and merit raises argument? ?can-

not be defended as incompetent. And where, apart from the specific particulars of grounds of appeal objected to, there are other particulars to support the grounds of appeal, the success of the objection is rendered ineffectual as it cannot adversely affect the validity of the grounds of appeal if the offending particulars are struck out. Furthermore, the appellants argued that it is the duty of the counsel who objects to the competence of a ground of appeal to establish clearly and succinctly the basis of his attack but not to shift his responsibility to the bench. Some authorities to support this were cited to this court. B

Specifically on grounds 3-9, the appellants submitted that the 1st respondent's objection cannot be sustained even though so much score was placed on order 6 rule (2) (2) of this court's Rules 2011 in advancing the argument on the objection. It was submitted that the Rule is a re-enactment *impissisima verba* of order 3 rule 2 of this court Rules, 2002 upon which the decision in the case of *Galandu v. D Kamba*, (2004) 15 NWLR (PT. 895) 31, at 46-47 and 49 is pertinent. C

On the 1st respondent's objection that grounds 3-9 do not allege misdirection or error in law and this are in flagrant violation of order 6 rule 6 (2) and (3) of this court's Rules 2011, after restating what the Rules said, the appellants submitted that the application of same to the said grounds 3-9 of the notice of Appeal is grossly misconceived by the 1st respondent, because the said grounds of appeal sufficiently complied with the provisions of order 6 Rule 2 of this court Rules 2011. Being that the complaints in the said grounds of appeal relate to the judgment of the Tribunal. It was further submitted that the particulars supplied in respect of grounds 3-6 relate to and better explains the three grounds of appeal. D E F

On the issue of matters relating to pre-election affairs, which ground 4 was alleged to complain against, the appellants conceded that nomination and sponsorship of a candidate for election is a political matter solely within the discretion of the party, but submitted that the relevant mandatory laws is not a matter for discretion of a party. G H

Therefore a decision of the lower court on the point is appealable as it is not the argument of the 1st respondent that the issue was not agitated or pronounced upon by the Tribunal. They also submitted that the issue centered on the qualification of the 1st respondent

to contest Governorship election but not on his party's right to present him as its candidate in the Governorship election. That the issue falls within the ground of non-qualification of the 1st respondent which is cognizable under the Electoral Act 2010 (as Amended) and therefore is not a pre-election matter.

B On the 1st respondent's objection that grounds 8 and 9 be struck out for lack of particulars, the appellants submitted that Rules of appellate procedure relating to formulation of ground of appeals are primarily designed to ensure fairness to the other side; That the application of such rules should not be reduced to a matter of mere technicality whereby the court will look at the form rather than the substance; That the core essence of notice of appeal is to give sufficient notice and information to the other side of the precise nature of the complaint of the appellant and consequently the issues that are likely to arise on the appeal. Consequently, any ground or appeal that satisfies that purpose should not be struck out notwithstanding that it did not conform to a particular form. Similarly the appellants submitted it is not mandatory to state particularly in a separate paragraph in the main ground since it may be included in the main ground.

E With regards to the 2nd respondent's objection on grounds 1 and 7 that the complaints in them did not arise from the judgment, the appellants submitted that they form part of the case at the Tribunal and the Tribunal made selective pronouncement on the issue. In support of this submission we are referred to pages 11 of the records at par, 7(g), and the 1st and 2nd respondents reply contain at pages 11 and 40 of the records respectively; That the Tribunal treated the issue extensively in its judgment. In support of this we are referred to page 602 thereof.

G Furthermore, it was submitted that the complaints in the two grounds, according to the appellants, relate to the failure of the tribunal to approach the evaluation and construction of the Exhibits in a proper manner having regard to the judicially noticeable facts on its records, and without appreciating the purpose of tendering that exhibits and submission made by the appellants in respect thereof.

H They also submitted that their complain in the two ground is by way or omission of the tribunal to direct itself properly and that an omission is equally a ground for appeal as expressed in various legal authorities which they referred us to in their brief.

On the issue that grounds 1 and 7, alleged misdirection in law and on the facts at the same time and so incompetent, the appellants replied that some confusion crept into this issue, but replied that the confusion has been cleared by the principle of law which states that, such a ground is not ipso-facto invalid. If despite its language the ground is clearly arguable and has not misled the other side, the use of the expression itself is not enough to render the ground of appeal invalid or incompetent. They stated that it is not fatal if the expression “error in law” and “misdirection” are not in watertight compartments or closets which must not be contained in a ground. The accepted approach, according to their submission, in such a case is for the court to examine the totality of the ground of appeal to see whether apart from or outside the meeting of the two expressions the grounds of appeal contains sufficient complaint about the judgment of the adverse party to the extent that the adverse party is not put in speculation or conjecture about what he is going to meet in the appellate court. Finally and on the strength of the legal authorities referred to us in their brief in response to the 1st and 2nd respondents’ preliminary objections, the appellants urged this court to dismiss same and that the issues raised therein be resolved in the appellants favour, the 1st and 2nd respondents having not made out a valid objection to the said grounds 1, 3-9 of the Notice of Appeal.

Having stated the submissions of the parties to this appeal, I will now examine on merit each of the grounds challenged with a view to demonstrating in this judgment the reasons why each should be struck out or not struck out.

It is worth noting that, an appeal arises when an appellant (or appellants) is dissatisfied with the decision of a lower court. The appeal is brought by the appellant filing a notice of appeal. The notice of appeal shall, inter-alia, state the grounds of appeal.

A ground of appeal is the error of law or fact alleged by an appellant as the defect in the judgment appealed against and relied upon to set it aside. The ground of appeal is thus the reasons why the decision on appeal is considered by the aggrieved to be wrong. See Saraki v. Kotoye (1992) 11/12 S.C.N.J 26 at 42.

The purpose of the ground of appeal is to isolate and

accentuate for attack the basis of the reasoning of the decision challenged. See *Ejowhomu vs. Edok-Eter Ltd.* (1986) 5 NWLR. **Ground of appeal either must allege misdirection or an error in law, or be an omnibus ground, i.e. a ground alleging that the judgment of the lower court is against the weight of the evidence before the lower court.**

The rationale for these is, as I said above, that an appeal arises when an appellant is dissatisfied with the decision of a lower court and as such is complaining to an appellate court of a misdirection or error in law on the part of the lower court or that the weight of evidence before the lower court did not support the decision appealed against. See *Metal Const. (W.A.) Ltd. vs. Migiliore* (1990) 1 NWLR (PT. 126) 299 at 311, where the Supreme Court held:

“What is then a ground of appeal? I considered it presumptuous, but will still venture to define a ground of appeal as consisting of the error of law or fact alleged by an appellant as the defect in the judgment appealed against and relied upon to set it aside. It is true that all questions which arises for consideration and determination before the court fall within two broad categories of questions of law and questions of fact.” See also order 6 rule 2 (2) and (3) of the Court of Appeal Rules 2011.

The 1st respondent’s attack was on ground 3-9 of the Notice of Appeal. His reason was that, they neither alleged misdirection nor error in law and non of them is an omnibus ground of appeal, therefore they are vague and disclose no reasonable ground of appeal, and therefore they should be struck out.

The purpose of ground of appeal is to give notice to the other side of the case they have to meet in the appellate court. See *National Investment vs. Thompson organization & Or.* (1969) 1 NWLR 99. **No ground of appeal which is vague or discloses no reasonable ground of appeal is permitted. That “a vague” ground of appeal is a ground of appeal which does not demonstrate any bearing and is consequently incapable of conveying any specific complaint.**

I have read these grounds 3-9. Upon my perusal and consideration of the preliminary objection on them, the grounds of the objection and the arguments in support, I am

of the firm view that the objection is misconceived. These grounds are not vague or disclose no reasonable ground of appeal, rather they are valid in the sense that each deals with the real complaint each ground is supposed to highlight. See Alade vs. Alemuloke (1988) 1 NWLR pt. 207. **Each ground, in my view, gave to the respondents notice of the case to be faced and at the same time narrows the issues on the appeal. Therefore the objections against these grounds are not sustainable, and over-ruled in favour of the appellants.** B

The next objection is specifically on grounds 3 which was alleged to lack particulars related to it. The 1st respondent contended that ground of appeal and the particular in support are intended to give an adverse party notice of the case he is to face, and as such they must be in harmony and complementary of each other, otherwise the ground of appeal would be incompetent and liable to be struck out. C D

Ground 3 of the Notice of Appeal reads:

“3 The learned Justices of the Tribunal after rejecting Exhibits ‘D’ and ‘L’ made a wrong evaluation of facts and came to a wrong finding that the 1st respondent was validly nominated and sponsored by the 2nd respondent to contest as a candidate at the 11th February, 2012 Gubernatorial election in Bayelsa State notwithstanding that he was not among the candidates who stood nominated by the electoral Act 2010 (as Amended), and who thus had their names published as contestants.” E F

PARTICULARS

(i) Rejection of Exhibits ‘D’ and ‘L’ did not preclude the learned justices of the Tribunal from acting and relying on the admission by respondents of the facts which the rejected documentary evidence were tendered to prove. G

(ii) Facts admitted constitute part of the evidence which the Tribunal had a duty to evaluate in coming to a decision on qualification of the 1st respondent to contest the election.

(iii) Failure of the Tribunal to take the admission into consideration occasioned a miscarriage of justice to the prejudice of the appellants. H

The combined reading of ground 3 and its three particulars, I am of the view that the 1st particular is in harmony with

the said ground of appeal. Therefore, from the 3 particulars in support of the said ground 3, there is one other particular to support it. Since one other particular among the particulars, to my view, supports the ground, the 1st respondent's objection is ineffective as it cannot adversely affect the validity of the said ground 3 if particulars (ii) and (iii) are struck out. See Adekeye vs. Adesina (2010) 18 NWLR (PT.1225) 450 at 472 para. E-F.

I would like to state that this particular (i) shows in what respect the Tribunal committed wrong i.e. incorrectly made mistake. This particular (i) is enough to sustain ground 3 and I so hold. Consequently, the objection against it is unsustainable and over-ruled.

The 1st respondent also specifically challenged the competence of ground 4 because it alleges matters relating to pre-election affairs of the 2nd respondent.

It is true that, challenging nomination and sponsorship of a candidate to contest an election by a political party are pre-election matters which are non-justifiable. See PD.P vs. Sylva (appeals Nos SC/28/2013 and SC/9/202) (unreported). **Similarly, nomination and sponsorship are pre-election matters and that the Election Tribunal has no power to investigate such matters that took place before the conduct of the election.** See Ibrahim vs. INEC (1999) 1 L.R.E.C.N 154 at 180, and Dalhatu vs. Turaki (2003) 15 NWLR (pt.843) 310 at 347.

I have read ground 4 but I am not able to find how it challenges/complains against the Tribunals rejection of Exhibit 'D' and 'L'.

With due respect, it is important to note that, for a counsel to say that ground 4 alleges matter related to a pre-election matters without going further to show to the court how the ground complained against matters related to pre-election matters is not enough. Similarly, the said ground did not complain against the Tribunal's rejection of Exhibits 'D' and 'L'. For the purpose of clarity ground 4 of the Notice of Appeal reads, without particulars:

"Ground 4: The learned Justices of the Tribunal erred in law and come to a wrong finding when their lordship held at page 26 of

the cyclostyled judgment that:” in the exercise of its right under section 31 of the Electoral Act the 2nd Respondent submitted to the 3rd respondent, the name of the 1st respondent as it’s candidate for the 11/02/2012 Governorship election in Bayelsa State. Exhibits ‘Q’ and ‘R’ which remained un-challenged attest to this fact.”

Looking, at the above ground, there is nowhere it complains against the rejection of Exhibit ‘D’ and ‘L’. Consequently, the objection is unsustainable and this objection is over-ruled in favour of the appellants.

The other objection of the 1st respondent also was on ground 7 of the Notice of Appeal. He contended that the ground alleges both error in law and misdirection on facts at the same time and as such it is incompetent and liable to be struck out.

It is true that some legal authorities decided that a ground of appeal cannot be an error in law and misdirection at the same time. By their nature one ground of appeal cannot be the two. But considering the new decision in Aderounmu vs. Olowu (2000) 2 SCNJ 180 at 190- 191, the Supreme Court held that the mere fact that a ground of appeal framed as an “error at law” and a “misdirection” at the same time does not make it incompetent and that what is important in a ground of appeal and the test the court should apply is whether or not the impugned ground shows clearly what is complained of as ‘error of law’ or what is complained of as ‘misdirection’ or as the case may be ‘error of fact’. What makes a ground incompetent, according to the court, is not whether it is framed as an ‘error’ or ‘misdirection’, but whether by stating it, the other side is left in doubt as to what the complaint of the appellant actually is. Once there is this requisite preciseness and specificity in the ground and compliance with the rules of court in its formulation, the ground cannot be described as bad and incompetent, stated the court. The error and misdirection should be stated in distinct and separate particulars under the ground.

In the case of *Sosanya vs. Onadeko* (2005) 8 NWLR (PT. 926) 185 at 214 - 215 par. g-c of the report, the Supreme Court, per Ejiunmi (J.S.C. of Blessed Memory) held thus:

“The issue of whether a ground of appeal alleging misdirection

in fact and error in law is incongruous, defective and incompetent seems to have some mix-up and confusion trailing it, This issue has its taproot in the dictum of Nnaemaka - Agu (J.S.C) in the case of Nwadike vs. Ibekwe (1987) 4 NWLR (pt 67) 718, where his lordship stated that a ground of appeal Cannot be an error in law and misdirection at the same time. His lordship went on to distinguish between misdirection and error in law...

However, what the learned Justice was saying was that such approach in framing a ground of appeal is not very elegant.

Unfortunately that harmless and prudent observation has been misconstrued and blown out of context by both the Bar and the Bench. The result is that once a ground of appeal is concluded in that rather inelegant form, the adverse party has always invariably urged the appellate court to strike it out on the ground of incompetence. This ought not to be the case."

From the foregoing, one may say that the expressions "error in law" and "misdirection" are not in watertight compartments or closets which must not be contained in a ground. The approach in such a case therefore, is for the court to examine the totality of the ground of appeal to see whether apart from or outside the meeting of the two expression, the ground of appeal contains sufficient complaint about the judgment to the adverse party to the extent that the adverse party is not put in speculation or conjecture about what he is going to meet in the appellate court. See *Sosanya vs. Onadeko* (supra).

I wish to point out that the rules of appellate procedure relating to formulation of grounds of appeal are primarily designed to ensure fairness to the other side. The application of such rules should not be reduced to a matter of mere technicality, whereby the court will look at the form rather than the substance. The prime purpose of the rules of appellate procedure, in this court, that the appellant shall file a notice of appeal which shall set forth concisely the grounds which he intends to rely upon on the appeal; and that such grounds should not be vague or general in terms and must disclose a reasonable ground of appeal; is to give sufficient notice and information to the other side of the precise nature of the complaint of the appellant and consequently of the issues that are likely to arise on the appeal. Any ground of appeal that satisfies that purpose should not be struck

out notwithstanding that it did not conform to a particular form. What is important in a ground of appeal, and the test the court should apply, is whether or not an impugned ground shows clearly what is complained of as error in law and what is complained of as misdirection or as the case may be, error of fact see *Aderounmu vs. Olowu* (2000) (supra) B

The ground objected to, in my view, contains sufficient complaint about the judgment to the respondents to the extent that they are not left in doubt as to what the complaint of the appellants actually is, and notwithstanding the formation of ground 7 of the appeal the detailed statement of the particular, and the clear statement of what the appellants conceived to be errors in law and misdirection in fact in the judgment of the Tribunal satisfied the requirement of the rule as to formulation of ground of appeal. To hold otherwise will tantamount to insistence on form rather than on substance. C D

Having decided the above, the 1st respondent's objection on ground 7 is over-ruled in favour of the appellants.

The last objection from the 1st respondent is on grounds 8 and 9.

His contention was that the two grounds do not contain particulars and that the said grounds are narrative and contain argument which contravened the provision of order 6 rule 2 (3) of the Court of Appeal Rules. E

It is true that if a ground of appeal alleges "misdirection" or "error in law" the particulars and the nature of the misdirection or error should be clearly stated. See order 6 rule 2 (2) of the Court of Appeal Rules 2011. The particulars and the nature of the 'error' or 'misdirection' alleged, to be remembered, in relation, to a ground of appeal, should be the specific reasoning, findings or observation in the judgment or ruling in question relating to the error or misdirection complained of. Therefore, this requirement as to particulars of misdirection or error in law in a ground of appeal may be satisfied by showing in what respect the lower court misdirected itself or erred in law. See *Obala vs Adesina* (1999) 2 S.C.N.J. 1 at 23. The ground of appeal and its particulars are stated in separate paragraphs and under different headings. Did the appellants comply with the requirement in their grounds 8 and 9 of their Notice of Appeal? If the answer is no, then why? F G H

GROUND 8 READS:

“Ground 8. The learned Justices of the Tribunal erred in law and came to wrong decision when their lordships dismissed the appellants, sole ground of petition to wit: that at the time of the election, 1st respondent was not qualified to contest the Gubernatorial Election held in Bayelsa State on 11th February, 2012 notwithstanding that the only proof of sponsorship and nomination pleaded and relied upon by the 1st respondent to contest in the election - Exhibits ‘Q’ and ‘R’ were predicated for their validity on an interim order of court in an intra-party pre-election suit commences by 1st respondent after the time allowed under the Electoral Act, 2010 (as Amended) for nomination had lapsed.”

While ground 9 of the appeal reads thus:

“Ground 9. The learned Justices of the Tribunal having wrongly dismissed the appellants, petition further failed to make appropriate consequential order in respect of the result of the election and return of candidate when the result of the which was admitted in evidence sufficiently provides relevant material to support consequential orders upon non-qualification of 1st respondent to contest the election in line with the decision in DANGANA’S case.”

A perusal of the above two grounds of appeal will show that none of the grounds stated, in a separate paragraph and under different heading, the particulars in support. Does this omission make the two grounds of appeal incompetent? The answer, in my view is in NEGATIVE. This is because where the ground of appeal in itself has furnished the particulars needed, there will be no further need for a separate paragraph stating the particulars of the error alleged. In otherwords, where the particulars have been incorporated in the ground of appeal, i.e. where a ground of appeal does not stop at saying that an error in law was committed, but goes on to say why the allegation of error has been made, the ground of appeal has incorporated the particulars and there was therefore, no further need for these to be stated in a separate paragraph. See Lauwers Import Export vs. Jozebson Industry Ltd (1988) 3 NWLR (PT 83) 429 at 443. So apart from the foregoing exception, once an “error in law” or “misdirection” is alleged in a ground of appeal, the particulars of the error or misdirection must be

given. See Adeniji & Anor. vs. Disu (1958) 3 F.S. 104.

From the above two grounds of appeal it is evident that they are grounds of law, although they do not contain particulars of error under a separate heading. But the appellants have incorporated in the grounds of appeal reasons for saying that the “error of law” alleged have been committed. They also went on to say why the allegations have been made. In the circumstance, I cannot see how it can be said that each of the grounds of appeal does not contain particulars. So as His lordship, Oputa, J.S.C. (as he then was) said in Saka Atuyeye & ors. Vs. Emmanuel O. Ashamu (1987) 1 NWLR (pt. 49) 7 at 282-283, where a ground of appeal in itself has furnished the particulars needed there will not be a further need for a separate paragraph stating the particulars of the error alleged.

Because of what I said above, I refuse to uphold the objections of the 1st respondent on grounds 8 and 9 that they contain no particulars.

On the 2nd arm of the objection i.e. that the grounds are narrative and contain argument contrary to order 6 rule 2 (3) of this court’s Rules 2011.

The aim or purpose of a ground of appeal is to give the adverse party notice of the case it has to meet at the appellate court. It is a complaint against the decision or part of the decision of the trial court to the appellate court, as such the ground of appeal should be set-forth concisely and under distinct head without any argument or narrative. See order 6 rule 2 (3) of the court of Appeal Rules 2011 otherwise the ground of appeal is incompetent and is liable to be struck out.

I have read over again the two grounds of appeal and find that the grounds are not narrative or argumentative. It is clear, with due respect that the 1st respondent does not wish the issue in the appeal to proceed. I am not of the view that even if the two grounds are argumentative it is sufficient to deny a right of appeal to the appellants when on the two grounds, issues of law arise for consideration. The modern approach to adjudication is to avoid preference of technicality to the principal duty of court to do justice. The objections on grounds 8 and 9 that they are narrative and argumentative have no merit and are refused and over-ruled. I hold that grounds 8 and 9 of

appeal are valid. Each ground is concise and clear with the precise complaints they supposed to highlight.

In the light of the foregoing, I hold that grounds 3-9 of the Notice of appeal are competent and valid. The 1st respondent's objections relating to them are overruled and dismissed.

B As for the 2nd and 3rd respondent's objection namely: That grounds 1 and 7 of the Notice of Appeal do not arise from the judgment of the Tribunal. The matter was introduced for the first time in this appeal as a fresh point, and a fresh point can only be raised and
C argued on appeal with leave of the trial court or that of the appellate court. Since no leave of either was obtained before filing grounds 1 and 7, the said grounds were incompetent and should therefore be struck out.

D Grounds 1 and 7 of the Notice of Appeal read without particulars:

*"Ground 1. The learned Justice of the Tribunal erred in law and came to a wrong decision thereby occasioning a miscarriage of justice when their lordships accepted the contention of respondents that Exhibit 'N' is a judgment capable of conforming substantive favour
E on the 1st respondent whereas same is an expert interim order made by the Federal High court sitting at Abuja in suit No FHC/AB/CS/3/2012."*

Ground 7 reads:

F *"7. The learned Justice of the Tribunal misdirected themselves in law and on the facts and thereby occasioned miscarriage of justice when in their final judgment they failed to take judicial notice of the fact that suit No. FHC/ABJ/CS/3/2012 was discontinued by the 1st respondent and thus struck out before the petition was filed, although
G the ruling of the Federal High Court in that civil suit, allowing the discontinuance was on the record before the Tribunal."*

H I have carefully looked into this complaint of the 2nd and 3rd respondents, and while I agree that as a general rule, a fresh point which was not canvassed at the court below cannot be entertained by an appellate court without leave first sought and obtained. In Ezekwash vs. Onwuagbu (1998) 3 NWLR (PT. 541) 217 at 238 par. B, Tobi J.C.A (as he then was) observed as follows:

"Parties do not have the freedom of the air to make a fresh case on appeal. They are bound by the case already made at the trial

court and present same on appeal as there will be no end to litigation if parties are allowed to raise fresh issues on appeal at will."

In the instant appeal, it is not true that the complaint of the appellants on grounds 1 - 7 and issue 1 are new. They are not new because issue of discontinuance of suit No. FHC/ABJ/CS/3/2012 was borne out in the record of the Tribunal. Under this circumstance it cannot be said that the issue is a fresh issue. See paragraph 9 of the 3rd respondent's brief at page 43 of vol. 1 of the record filed on 24/3/2012 and paragraph 4 (c) of the petitioners' (appellants') reply to the 1st, 2nd and 3rd respondents brief on page 189 of vol.1 filed on 31/3/2012.

I wish to point out that the rule which says, generally appellant is not allowed to raise on appeal an issue which has not been canvassed, raised or argued at the trial court, is however subject to the demand of justice, thus, where the question involves a serious question of law, for instance, want of fair hearing guaranteed by the constitution, the court in its discretion is competent to entertain the issue especially where it is plain that no further evidence could have been adduced which would affect the decision and thus prevent an obvious miscarriage of justice. See Yusuf vs. U.B.N. (1996) 6 NWLR (pt.457) 632.

Since the complaint of the appellants is not new, issue No.1 therefore is competent. Consequently, I too hold that ground 1 and 7 are competent and the objection of the respondents over-ruled in favour of appellants.

On the totality of the foregoing, therefore, the preliminary objections of the respondents fail in their entirety and all are hereby overruled in favour of the appellants.

I shall now proceed to consider the main appeal on its merit. As for the main appeal, the appellants at page 2 of their joint brief of argument filed on the 2nd of August 2012 formulated four issues for determination of this appeal.

I find the issues formulated by the Appellants comprehensive enough and I will adopt them in the determination of their appeal since the issues formulated by the other parties are similar to those formulated by the appellants. They read as follows:-

"1. Whether the Trial Tribunal rightly countenanced Exhibit

'N' and ignored the fact of the discontinuance of suit No. FHC/ABJ/CS/3/2012 on the qualification of the 1st Respondent to contest the Bayelsa State gubernatorial election.

2. *Whether the Trial Tribunal was wrong in rejection Exhibit 'D' and 'L' tendered from the bar and admitted in evidence by the Appellants' counsel.*

3. *Whether the 1st Respondent was validly sponsored by the 2nd Respondent to render him qualified to contest at the 11th February 2012 Governorship Election having regard to section 177 of the Constitution and extant provisions of the Electoral Act.*

4. *If this court resolves all the previous issues in favour of the Appellants, whether the consequential order to make in this case is one for a fresh election."*

In arguing issue one, Mr. A. J. Owonikoko, learned senior counsel for the appellants made extensive submission on the distinction between a final and interlocutory order of a court. He cited *BOLZSIN V. ALTRINCHAM* U.D.C. (1903) 1. K. B. 547, *CHIEF JOSEPH OKON EDEM V. AKANKPA LOCAL GOVERNMENT* (2004) 4 NWLR (pt. 651) 70 at 78 paragraph D - *HNZEOKE V. NWAGBO* (1998) 1 NWLR (pt. 72) 617, *KOTOYE v. CBN* (1989) 1 NWLR (pt. 98) 419 at 440 paragraph C - *H* in support of the distinction so made and contended that Exhibit 'N' in the instant case, is an interim order of Hon. Justice G.K. Olotu which was made in favour of the 1st Respondent pending the determination of the motion on notice and the substantive suit.

In a further argument, learned senior counsel submitted that an interim order made ex-parte is temporary and shall not last for more than 14 days as provided for by the Federal High court civil Procedure Rules. In aid learned counsel cited *OLIVER V. DANGOTE IND. LTD.* (2009) 10 NWLR (pt. 1150) 467 at 489 - 490, *A.I.C. LTD V. NNPC* (2005) 1 NWLR (PT. 937) 563 paragraph D - E, *NNPC V. A.I.C* (2003) 2 NWLR (PT. 805) 560 at 588 paragraphs C-E.

According to the learned counsel, after obtaining the said order Ex-parte, the 1st respondent proceeded to file a notice of discontinuance which the court erroneously granted and struck out the suit No. FHC/ABJ/CS/3/2012. By the striking out of the suit, learned senior counsel contended that Exhibit 'N' became extinguished and thus a null order of court. Still in argument, learned counsel submit-

ted that the ex-parte order on Exhibit “N” became extinguished on 29th February 2012 as such the continued recognition of the 1st respondent’s name as a candidate for the election runs foul of section 34 of the Electoral Act 2010 (as amended).

In reply to the argument of the learned counsel for the Appellant on issue one Mr. Tayo Oyetibo, learned senior counsel for the 1st respondent, submitted that the tribunal was right when it countenanced Exhibit ‘N’ because Exhibit ‘N’ though an Ex-parte order is a valid decision of the court that made it, and unless there is an application in accordance with the relevant rules to set such order aside it remains valid and enforceable irrespective of any vice that might have afflicted the judgment. Learned senior counsel cited section 318(1) of the Constitution of the Federal Republic of Nigeria 1999 and the authorities in *UDOETE V. HEIL* (2002) 13 NWLR (PT. 783) 64 at 84 A-B, *UMAR V. ONWUDIWE* (2002) 10 NWLR (PT. 774) 129, *ABATAN V. AWUDU* (2003) 10 NWLR (pt.829) 451 at 462.

In a further argument, learned senior counsel submitted that there is no evidence before the Tribunal that there was an application by INEC against whom Exhibit N was made to vary or discharge the order, as such the order remains binding on INEC and the subsequent Order of discontinuance of the suit did not affect the order. Learned senior counsel found fault with the submission of the learned counsel for the Appellants on the discontinuance of suit No. FHC.ABJ/CS/3/2012 as same did not form part of the grounds of appeal and so should be struck out.

On the issue of whether the non inclusion of the name of the 1st respondent at certain stage offends section 34 of the Electoral Act, learned senior counsel submitted that the Appellants have not shown that it was a substantial non-compliance with the provisions of the Electoral Act and that the outcome of the non-compliance affected the election.

Finally, learned senior counsel urged the court to resolve this issue in favour of the 1st respondent.

In his argument in reply to the first issue, Chief J. K. Gadzama, learned senior counsel for the 2nd respondent, submitted that Exhibit ‘N’ is an order of court and that the tribunal was bound in law to countenance same as its efficacy is not determined by whether it was interim or interlocutory or even final as an order of court is valid and

binding until it is set aside.

In aid learned senior counsel cited A.G. ANAMBRA STATE v. A.G. FED. (2005) 9 NWLR (pt. 931) 572. In a further argument learned senior counsel submitted that publication of the names of candidates in an election is not a condition precedent for a valid nomination. In aid, learned senior counsel cited OSAKWE v. INEC (2005) 13 NWLR (PT. 942) 447, RIMI V. INEC (2005) 6 NWLR (PT. 920) 56, KOLAWOLA V. FOLUSHO (2009) 8 NWLR (pt. 1143) 338.

According to the learned senior counsel, Exhibits Q and R were clear evidence of nomination and sponsorship of the 1st respondent by the 2nd respondent, and the Tribunal would have committed error if it had discountenanced Exhibit 'N'. Finally, learned senior counsel urged this court to resolve this issue in favour of the Respondents. Chief Awomolo, learned senior counsel for the 3rd respondent did not join issues with the appellants on the appellants' first issue which challenges the tribunal's judgment where it refused to discountenance Exhibit 'N'. The 3rd Respondents first issue amounts to a preliminary objection, which has been adequately tackled elsewhere in this judgment. The 3rd issue deals with the tribunal's rejection of Exhibits D and L. Issue three and four are replies to other issues formulated by the appellants, I will therefore consider the appellants' first issue in the light of the argument put forward by 1st and 2nd respondents.

In the judgment of the lower court, at page 24, learned counsel for the appellants is quoted as having made the following submissions thus: -

"He submitted that as at 11th February, 2012 when the Governorship election in Bayelsa state took place, only the supreme court which was seized of the dispute had the power to give a decision as to who the candidate of the second respondent was and not the Federal High court as it did in exhibit "N". He urged the Tribunal not to rely on exhibit "N" as the Federal High court which made that order has no judicial power to decide on an issue pending before the Supreme Court."

However, before this court the appellant admitted that the order contained on exhibit N was a valid order made in the interim pending the determination of the motion on notice and the substantive suit which were subsequently discontinued at

the instance of the 1st respondent. The issue of discontinuing with the motion on notice and the suit no FHC/ABJ/CS/3/2012 was never raised and dealt with at the lower court, and so the contention that the tribunal could have taken into account the termination of the suit in treating the order made on exhibit 'N' as having been spent is not supported by the judgment of the lower court. There was clearly no issue joined on this score by the parties, as such they are forbidden to go out of the issues joined between them. See ONYENWEUZOR V. OPUSUNJU (2002) 6 NWLR (Pt. 762) 1 where it was held:

"...all parties including a trial judge are bound by the pleadings settled before the court and the court must keep strictly to the pleadings of the parties and issues joined and must not go outside the pleadings in giving judgment."

At page 7 paragraph 4.08, learned counsel for the appellant stated thus:-

"Thus an interim order is usually made to maintain the status quo and thereby preserve the subject matter of the litigation from being wasted or damaged in a case where the urgency of the situation will not enable the defendants to be put on notice. We refer to (4) KOTOYE V. CBN (1989) 1 NWLR (Pt.98) 419 at 440 paragraphs C - 4."

From the passage of the brief of the appellants above quoted, an interim order is usually made to maintain the status quo and thereby preserve the subject matter of the litigation. The question now is/was the order on exhibit N made to preserve the status quo or it is an executory order. The enrolment order at pages 204 - 205, no. 2 and 4 direct the 3rd respondent, INEC to restore the name of the 1st respondent. Clearly this is an executory order as opposed to an order made to preserve the status quo. As at the date the order was made the 1st respondent's name had been removed as a candidate of the 2nd respondent in this appeal. In Nigeria a final or interlocutory decision is determined by the nature of the order made and not the type of application.

The 4th order on Exhibit N reads thus:

"An Order that the leave of this Honourable court so granted shall operate as an order of INTERIM INJUNCTION restraining the

respondent from further removing or excluding the name of the Applicant and his running mate as the duly nominated candidates of the Peoples Democratic party in the 2012 Gubernatorial Election in Bayelsa State schedule to hold on the 11th day of February 2012, pending the determination of the motion on notice.”

B This order was consummated by the 3rd respondent in this appeal without any complaint. Having therefore consummated the order without an appeal that order remains extant. The Tribunal was therefore right to have countenanced Exhibit N which was clearly a valid and subsisting decision of a court of competent jurisdiction. I therefore agree with the common submission by all the learned silk for the respondents that the appellants have not shown that INEC did not comply substantially with the provision of the Electoral Act 2010 (as amended) nor have they proved that there was an application by INEC against whom Exhibit N was made to vary or discharge the order as provided for by order 26 Rules 7(3) 11 and 12(1) and (2) of the Federal High Court Civil Procedure Rules 2009.

E For avoidance of doubt, Order 26 Rule 12(1) provides as follows:- *“26(12(1) No order made on motion ex-parte, shall last for more than fourteen days after the party or person affected by the order has applied for the order to be varied or discharged or last for another fourteen days after application to vary or discharge it has been argued.”*

F This issue is therefore resolved against the appellant and the ground of appeal upon which it is formulated is hereby dismissed.

G On the 2nd issue, it was argued for the appellants that exhibits D and L which were tendered from the bar are not public documents as such the tribunal was wrong in its decision to expunge them from the record of that tribunal on the ground that they were not certified since they are public documents. In a further argument, learned senior counsel for the appellants submitted that the failure of the respondents to object to the tendering of the two exhibits from the bar amounted to a waiver and the tribunal was wrong in expunging a document admitted without objection from opposing parties. In aid learned counsel cited OBEMBE V. EKEKE (2001) 10 NWLR (pt. 722) AT 692 paragraph C -O.

Exhibit 'D' is an internet print out of the punch Newspaper of 13th February, 2012 where scores of some of the candidates at the election were published. It is therefore a computer print out, and it falls under section 84(1) and 2 of the Evidence Act 2011.

"84(1) In any proceeding a statement contained in a document produced by a computer shall be admissible as evidence of any fact stated in it of which direct oral evidence would be admissible, if it is shown that the conditions in subsection (2) of this section are satisfied in relation to the statement and computer in question.

(2) The conditions referred to in subsection (1) of this section are-

(a) That the document containing the statement was produced by the computer during a period over which the computer was used regularly to carry on over that period, whether for profit or not, by any body, whether corporate or not, or by any individual;

(b) That over that period there was regularly supplied to the computer in the ordinary course of those activities information of the kind contained in the statement or of the kind from which the information so contained is derived;

(c) That throughout the material part of that period the computer was operating properly or, if not, that in any respect in which it was not operating properly or was out of operation during that part of that period was not such as to affect the production of the document or the accuracy of its contents; and

(d) That the information contained in the statement reproduces or is derived from information supplied to the computer in the ordinary course of those activities."

Section 84(2) provides for the conditions to be satisfied in relation to the statement and computer from which the documents sought to be admitted were produced.

A party that seeks to tender in evidence a computer generated document needs to do more than just tendering same from the bar. Evidence in relation to the use of the computer must be called to establish the conditions set out under section 84(2) of the Evidence Act.

However, Exhibit D is meant to show that the appellants scored the highest number of votes cast at the election in the event that the 1st respondent was held to have been disqualified.

Ground 2 of the petition which supported this contention was abandoned by the Appellants. At page 595 paragraph 1 of the record, the tribunal said:-

B *“Before going into the issues for determination, permit us to point out at the onset that on the 13th June, 2012 while adopting his written final address, S.A. Alali Esq. informed the tribunal that he has abandoned the second ground of the petition.*

With this the necessity of addressing the issues covered by that ground is obviated.”

C At the risk of repetition, the 2nd ground which was abandoned read thus:-

“(b) That the first petitioner scored the majority of lawful votes cast at the said election into the office of Governor of Baylesa State conducted by the third respondent on 11th February, 2012.”

D ***The finding of the Tribunal on this ground has not been challenged by the Appellant. Having abandoned ground two, Exhibit D which was produced in support of the ground had ipso facto become irrelevant even though it was admitted. See***
 E ***AGUNBIADE V. SASEGBON (1968) NSCC 147, SADAU V. THE STATE (1968) 1 ALL NLR 124 at 128. I therefore agree with learned counsel for the 1st and 2nd respondents who submitted that the tribunal was right in striking them out for being irrelevant.***

F ***Similarly exhibit L is a computer generated document allegedly printed out from the website of the 3rd respondent, showing the list of qualified candidates published by the 3rd respondent for the Bayelsa State Governorship election of 11th February, 2012. Being a computer generated document,***
 G ***a party seeking to tender same in evidence must comply strictly with section 84(2) and (3) of the Evidence Act, which I have alluded to earlier. Evidence must be given about the frequency of the use of the computer to store or process information and the condition of the computer as well as ascertainment of***
 H ***the authenticity of the information contained in the document. A party who seeks to tender computer generated evidence needs to do more than mere tendering the document from the bar without more.***

Exhibit L is a document forming the official record of an

official body. By section 102 (a)(ii) of the Evidence Act it is a public document that requires certification on payment of prescribed fees as provided for under section 104(1) of the Evidence Act. It is therefore not a licence to go to the website of official bodies to print out information in the custody of such official bodies for purposes of litigation without requesting for such documents in the first place from the officials of those official bodies. Where a request is made and such officials refuse to produce such documents, then a party who desires to use such document in litigation can resort to the use of computer print out being secondary evidence under section 97 of the Evidence Act 2011] which provides as follows:-

“secondary evidence of the contents of the documents referred to in paragraph (a) of section 89 shall not be given unless the party proposing to give such secondary evidence has previously given to the party in whose possession or power the document is or to a legal practitioner employed by such party, such notice to produce it as is prescribed by law and if no notice to produce is prescribed by law then such notice as the court considers reasonable in the circumstances of the case.”

Section 89(a) of the same Act provides as follows:-

“Secondary evidence may be given of the existence condition or contents of a document in the following cases.

(a) When the original is shown or appears to be in the possession or power.

(i) of the person against whom the document is sought to be proved, or

(ii) of any person legally bound to produce it, and when after the notice mentioned in section 91 such person does not produce it.”

Clearly by the provision of the Evidence Act which I have reproduced above, the Appellant did not lay sound foundation for the admissibility of Exhibit L. Where a court finds that certain documents were admitted in evidence in error, such court has absolute power to expunge such exhibits from its records. In the case of *N.I.P.C. LTD V. THOMPSON ORGANISATION LTD* (1966) 1 NMLR 99 at 104, which was cited and relied upon by learned senior counsel for the 1st respondent, Lewis JSC held as follows:-

"It is of course the duty of counsel to object to inadmissible evidence and the duty of trial court any way to refuse to admit inadmissible evidence, but if notwithstanding this evidence is still through oversight or otherwise admitted, then it is the duty of the court to when it comes to give judgment to treat the inadmissible evidence as if it had never been admitted." See also KAUKIA V. MAIGEMU (2003) 6 NWLR (PT, 817) 496, ONWONIYI V. OMOTOSHO (1961) 2 SCNLR 3.

In Kankia V. MAIGEMU (Supra) at page 518 paragraph H, this court held:-

"It is equally trite that where inadmissible evidence had been inadvertently or improperly received in evidence in the court below even when no objection had been raised, it is the duty of court when considering its judgment to expunge such evidence."

For all I have said, the tribunal was therefore right in expunging Exhibits D and L tendered from the bar and admitted in evidence. This issue is accordingly resolved in favour of the Respondents and the ground 2 from which it is formulated is hereby dismissed.

On the 3rd issue formulated by the Appellants, Mr. Owonikoko, learned senior counsel for the appellants argued forcefully that the 1st Respondent is not qualified to contest the, governorship election which was conducted by the 3rd respondent in Bayelsa State on 11th February 2012, by reason of his invalid nomination that fails to satisfy the requirement of the relevant provisions of the Constitution and the Electoral Act and the pending cases in court challenging the nomination and sponsorship of the 1st respondent.

Learned senior counsel placed reliance on the provision of section 87(9) of the Electoral Act 2005 which provides as follows:-

"Where a political party fails to comply with the provisions of this Act in the conduct of its primaries, its candidate for election shall not be included in election for the particular position in issue."

The authority in DANGANA V. USMAN & ORS unreported decision of this court in Appeal No CA/A/EPT/582/2011 was also cited and heavily relied upon by the appellants. I wish to distinguish the case of Dangana with the instant case.

In Dangana's case there was evidence that the PDP primary that was held at Ayingba in Kogi State was shrouded in secrecy.

INEC was not given sufficient notice and was therefore not present contrary to the mandatory provision of section 85(1) of the Electoral Act 2006. The Court of Appeal at page 16 of its judgment held:- *“The letter dated 24th January, 2011 (Exh. p. 21) founded on newspaper reports confirms that the PDP, in holding the primary election on 28th January, 2011 did not give INEC the mandatory “pre-action” Notice of at least 21 days before the exercise. It also confirms and reminded the PDP “that the time for conduct of party primaries had since elapsed on 15th January 2011 and has not been extended by INEC.”* B

In the instant appeal, there is no evidence that the 2nd Respondent conducted its primary that is under scrutiny away from INEC. The only evidence of disqualification the appellant is relying on are the challenge in court of the primary in which the first respondent emerged as candidate of the 2nd respondent by Chief Timipre Sylva, the former Governor of Bayelsa State who also contested the primary and the failure of the 3rd respondent to publish the name of the 1st Respondent. C D

Section 87(10) of the Electoral Act 2010 (as amended) provides as follows:- E

“Notwithstanding the provisions of the Act or rules of a political party, an aspirant who complains that any of the provisions of this Act and the guidelines of a political party has not been complied with in the selection or nomination of a candidate of a political party for election may apply to the Federal High Court or the High Court of a state, for redress.” F

In the instant case, Chief Timipre Sylva had rightly taken the right step by seeking redress at the Federal High Court. It is therefore the prerogative of the Federal High Court seized with the issue of the qualification of the 1st Respondent to pronounce on his qualification. Where there is no evidence that the 1st respondent has been disqualified by the Order of the Federal High Court, this Court cannot on the basis of the challenge of the qualification of the 1st respondent at the Federal High Court, declare that the 1st respondent was not qualified to contest the Bayelsa State Governorship Election that was held on 11th February, 2012. This is so because the powers that were vested on INEC under section 87(9) of the Elec- G H

toral Act 2006 has been effectively repealed. The power is now vested on the court by reason of the provisions of section 87(10) of the Electoral Act 2010 (as amended).

The Electoral Act is subordinate to the constitution which has made provision for qualification and disqualification of aspirants willing to contest an election into the office of a Governor of a State. Any provision of the Electoral Act that runs contrary to the provision of the constitution is therefore null and void to the extent of its inconsistency. Qualification to contest an election into the office of Governor of a state is provided for under section 177 of the constitution while section 182 of the same constitution provides an exhaustive list of conditions that may disqualify a candidate from contesting the election. Any disability outside the provision of the Constitution cannot constitute a bar for an aspirant to contest election. In the case of *A.N.P.P. v. USMAN* (2008) 12 NWLR (PT. 1100) 1 at 54 which was cited and relied upon by the learned senior counsel for the 1st respondent, this court had this to say:-

“From the provision of section 177 of the Constitution of the Federal Republic of Nigeria 1999, if a candidate wishing to contest the office of governor of a state satisfies all the constitutional requirements for the election into the office then he is qualified to contest the election.”

The Constitutional provisions are very clear and admit of no ambiguity. The issue of publication of names of candidates and cases pending in court are alien to the provision of section 177 and 182 of the Constitution of the Federal Republic of Nigeria 1999.

The question of publication of names of candidates in an election is in the domestic domain of INEC and no one therefore should be punished if the names have been properly forwarded to INEC, the 3rd respondent in the appeal. The controversies surrounding the PDP primary that produced the 1st respondent was resolved by the Federal High Court who initially restrained INEC from publishing the name of the 1st respondent in accordance with section 87(10) of the Electoral Act 2010 (as amended), when the same Federal High Court ruled that the 1st respondent’s name be restored on the list of the candidates for the election. The cases of *EHINLAWO*

V. OKE (2008) 16 NWLR (PT. 1113) 357, UZODIMMA v. OSITA ISUNASO (No.2) (2011) 17 NWLR (PT. 1275) 30 and AMAECHI V. INEC (2008)5 NWLR (PT.1080) 227 had to do with wrongful substitution which is not the case in this appeal. By exhibits Q at page 1- 7 and R at pages 18- 20, of the record of this appeal, it is crystal clear that the 1st respondent was duly nominated by the 2nd respondent to contest the governorship election in Bayelsa State. The Tribunal was therefore right when the 1st respondent was adjudged qualified to contest the gubernatorial election which was conducted on the 11th February 2012. On the reasons I have set out hereinabove, this issue is resolved in favour of the respondents and all the grounds from which the issue is formulated are accordingly dismissed.

The 4th issue in this appeal is predicated on the success of the previous issues formulated by the Appellants. Since all the previous issues have been resolved in favour of the respondents the consequential Order to make in this appeal is one of dismissal of the appeal. Accordingly, this appeal is hereby dismissed in its entirety.

The 1st respondent is entitled to the cost of this appeal which I assess at N50,000.00 in favour of the 1st Respondent and against the Appellants.

GALINJE JCA

I agree.

F

OKORO JCA

I agree.

G

DANJUMA JCA

I agree.

H

AWOTOYE JCA

I agree.