

SUPREME COURT OF NIGERIA

FRIDAY 30TH SEPTEMBER, 2016. SC. 687/2016

**CORAM:- N. S. NGWUTA, O. ARIWOOLA,
M. D. MUHAMMAD, C. B. OGUNBIYI,
K. M. O. KEKERE-EKUN, J. I. OKORO, A. SANUSI, JJSC**

AFRICAN DEMOCRATIC CONGRESS (ADC) APPELLANT
AND
ALHAJI YAHAYA BELLO RESPONDENT

PARTIES - Necessary party - Meaning of - He is one whose presence is crucial for the effective adjudication of all questions - Raised in a cause or matter (H1)

ELECTION PETITIONS - Pleadings - Binding nature of - It is wrong for appellant to contend that INEC is not a necessary party - As he is bound by his pleadings - Where he made allegations against INEC (H2)

ELECTION PETITIONS - Necessary party - Joinder of INEC - Electoral Act s. 137(3) makes it mandatory for INEC to be made a party - Where complaints are made against it or its officials (H3)

APPEALS - Issues - Failure to challenge - Where a party fails to respond to an issue - He is deemed to have admitted all that his adversary has stated (H4)

FACTS

This action was commenced at the Governorship Election Petition Tribunal of Kogi State sitting at Lokoja. Petitioner/appellant brought the petition wherein it challenged the declaration and return of respondent as the Governor of the State, following the supplementary election held in the State on the 5th December, 2015. Appellant sponsored one Usman Zainab to contest for gubernatorial election conducted in Kogi State on the 21st November, 2015. The All Progressives Congress (APC a registered political party) sponsored late Prince Abubakar Audu in the Election. There were other politi-

cal parties that participated in the election. After the election, the Independent National Electoral Commission (INEC) declared the election inconclusive on the ground that the number of registered voters in 91 polling units, infested with electoral malpractices, exceeded the total number of registered voters in the vote margin between the leading party APC and the Peoples Democratic Party, its closest rival in the election.

Soon after declaring the election inconclusive, the candidate of the APC, Prince Abubakar Audu died. The APC immediately notified INEC of his demise and requested for his substitution with respondent. INEC granted the request and fixed 5th December, 2015 for the conduct of a supplementary election in the 91 polling units. Appellant's candidate participated in the supplementary election. At the end of the supplementary election, INEC added the votes garnered by the APC in the 21st November, 2015 election to those earned by respondent and declared respondent the winner of the governorship election having scored majority of lawful votes. Dissatisfied with the declaration, appellant filed the petition at the Tribunal. Respondent raised objection to the competence of the petition and sought for a dismissal of same. At the end of the hearing, the Tribunal dismissed the petition for lacking in merit. Still dissatisfied, appellant appealed to the Court of Appeal. The Court heard the appeal and dismissed same for being unmeritorious. Further aggrieved, appellant has appealed to the Supreme Court.

ISSUES FOR DETERMINATION

1. Whether the Court of Appeal was justified in affirming the trial tribunal's decision that INEC was a necessary party to the appellant's petition.

2. Whether having regard to the facts and circumstances of this appeal, the Court of Appeal can be faulted in the way and manner it affirmed the trial tribunal's decision to dismiss the appellant's petition for failure to establish that the 1st respondent did not win the election by a majority of lawful votes.

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

PARTIES - Necessary party - Meaning of

1. In this case, both the trial tribunal and the Court of Appeal held that INEC was a necessary party to the petition giving birth to this appeal. The two courts below also held that the failure to make INEC a party in this case is fatal to the petition. But who is a necessary party in a case? A necessary party in a case is one whose presence or involvement in the matter is not only necessary but crucial and unavoidable for the effective, effectual, exhaustive, complete and comprehensive adjudication of all questions raised in a cause or matter. Such a party is one who is not only interested in the subject matter of the proceedings but also who in his absence, the proceeding cannot be fairly dealt with. In other words, the question to be settled in the action between the existing parties in the suit must be a question which cannot be properly settled unless they are parties to the action instituted by the plaintiff.

It is imperative that a person whose presence in a suit is necessary ought to be joined so that he would be bound by the result of the action. Where the issues or questions raised in the action cannot be effectually and completely settled unless a person is a party to the suit, then he is a necessary party.
(p. 3947 B)

Pleadings - Binding nature of

2. The above acts of INEC complained of by the appellant could not have been carried out by INEC itself but through its electoral officials and returning officers. It is therefore patently wrong for the appellant to argue that it did not make any complaint against INEC officials or INEC itself so as to make it a necessary party. The law is trite that parties are bound by their pleadings. It is too late in the day for appellant to abandon the specific pleadings in the paragraphs of his petition.

I hold a strong view that the appellant made allegations and complaints against INEC in conducting supplementary election, adding late Audu's votes to the respondent's score at the supplementary election and declaring the respon-

dent as winner of the election. Appellant had alleged that the respondent did not win the election by majority of lawful votes. The question is: Who compiled and computed the result? Who decided that the respondent scored majority of lawful votes? Is it not INEC? I still wonder how the appellant intended that the petition be determined without the presence of INEC. Would it have been a fair hearing with regard to Section 36 (1) of the Constitution of the Federal Republic of Nigeria 1999 (as amended)? I do not think so. (p. 3948 C)

ELECTION PETITIONS - Necessary party - Joinder of INEC

3. Moreover, the use of the word “shall” in Section 137 (3) of the Electoral Act makes it mandatory for INEC to be made a party where complaints are made against it or its officials in an election petition. That section is a mandatory provision because the operative word there is “shall”. The word “shall” when used in a statutory provision imports that a thing must be done. It is a form of a command or mandate. It is not permissive, it is mandatory. (p. 3949 D)

APPEALS - Issues - Failure to challenge

4. I am now left with issue number 2 in the respondent’s brief which, unfortunately, the appellant did not proffer any argument on it. It is settled law that where a party fails to respond to a point or an issue, either in the brief of argument or oral presentation, the opposing party is deemed to have admitted all that his adversary has stated.

In circumstance of this case, since the appellant has not proffered any argument in respect of this issue, it seems to me that the argument of the respondent becomes unnecessary as there is nothing to respond to. Secondly, the appellant has no complaint or challenge against the issues so raised. It is his appeal and whatever he does not challenge is deemed admitted. To consider this issue without any complaint by the appellant amounts to an academic exercise. There is no time for such an exercise in this court. Accordingly, this issue is deemed abandoned. (p. 3950 G)

NOTABLE POINTS OF INTEREST

OKORO JSC

1. Preparation of documents – Counsel to cross check

Before I consider the second issue adopted for the determination of this appeal, I observe that the learned counsel for the appellant has imported a fake issue No.2 into his brief on page 4 of its brief of argument. Argument on the said strange issue spans pages 4-13 i.e. paragraphs 4.07 to 4.29 thereof. The said issue is said to be predicated on grounds 3, 4, 5, 6, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 27, 28, 29, 30, 31, 32 and 33 of the notice of appeal. This issue is not for this court for the following reasons:

1. It is an appeal against the judgment of the trial tribunal and this court has no jurisdiction to hear appeals directly from the judgment of the tribunal.

2. The said issue is said to be predicated on 22 grounds of appeal listed above whereas the notice of appeal challenging the judgment of the Court of Appeal to this court has only 12 grounds of appeal.

A scrutiny of the record of appeal reveals that the appellant's counsel just lifted the said issue with arguments in support from his brief to the Court of Appeal into the present brief of argument. I will regard this as a serious oversight by counsel. I charge counsel to always read and cross check his documents before signing them and sending them for filing. The inclusion of the issue in appellant's brief to this court has exposed the tardiness of counsel in handling his brief. Be that as it may, the said issue 2 contained on pages 4-5 of the brief of argument and the arguments in support thereof spanning pages 5 - 13 of the same brief are hereby discountenanced.

OGUNBIYI JSC

2. Parties – Joinder of – Conditions

The learned jurist proceeded further and re-iterated that the deciding factors determining the effect of non-joinder or misjoinder of a party lie in the following questions:-

(1) Whether the cause or matter is liable to be defeated by

non-joinder.

(2) Whether the matter can be adjudicated without the 3rd party, added a Defendant?

(3) Is the 3rd party a person who should have been joined in the first place?

B (4) Is the 3rd party a person whose presence before the court as a defendant will be necessary in order to enable the court to effectually and completely adjudicate or settle all the questions involved in the cause or matter? (p. 3953 E)

C **REPRESENTATION**

Oba Maduabuchi Esq., with Godwin Omagbogu Esq., for the appellant

P. B. Daudu Esq., with A. T. Ahmed Esq., H. M. Ibega, C. C. Oyere (Miss), L.S. Mamman (Miss), Arome Abu Esq., and E. Omotayo-Ojo, (Mrs.) for the respondent

CASES REFERRED TO

- Dangana v. Usman (2013) 6 NWLR (pt. 134) 50
- E Ugwuanyi v. NICON Ins. Plc (2013) 11 NWLR (pt. 1366) 546
- Kubor v. Dickson (2013) 4 NWLR (pt. 1345) 534
- Tafida v. Bafarawa (1999) 4 NWLR (pt. 597) 70
- Green v. Green (1987) NWLR (pt. 61) 481
- A-G Federation v. A-G Abia State (2001) 11 NWLR (pt. 725) 689
- F Guda v. Kitta (1999) 12 NWLR (pt. 629) 21
- Babayeju v. Ashamu (1998) 9 NWLR (pt. 25 567) 546
- Nwankwo v. Yar'adua (2010) 12 NWLR (pt. 1209) 518
- Bamaiyi v. A-G Federation (2010) 12 NWLR (pt. 727) 468
- G Ngige v. Obi (2006) 14 NWLR (pt. 991) 1
- Ifezue v. Mbadugha (1984) 1 SCNJ 427
- Okongwu v. NNPC (1989) 4 NWLR (pt. 115) 296
- Fagbenro v. Arobadi (2006) 7 NWLR (pt. 978) 172
- Ojo v. Adejobi (1978) 3 SC 65

H **STATUTES REFERRED TO**

Electoral Act 2010 (as amended), ss. 69, 137(2)(3)
 Constitution of the Federal Republic of Nigeria (as amended) 1999,

ss. 153(1)(f), 287(2)(3)

LEAD REASONS FOR JUDGMENT BY OKORO JSC

On Tuesday, the 20th day of September, 2016, this appeal was heard by the panel listed above. On that date, I adjudged this appeal unmeritorious and it was accordingly dismissed. In addition to the order dismissing the appeal, I also promised to give reasons for dismissing the appeal on Friday, the 30th day of September, 2016. I shall therefore proceed to state the reasons why the appeal was dismissed.

This appeal is against the judgment of the Court of Appeal delivered on 4th August, 2016 in Appeal No. CA/A/ET/3 84/2016 which affirmed the decision of the Kogi State Governorship Election Tribunal delivered on the 9th of June, 2016 dismissing the petition filed by the appellant challenging the return of the respondent as the winner of the election conducted on the 21st of November, 2015 and 5th December, 2015 to the office of Governor of Kogi State. A synopsis of the facts leading to this appeal will suffice.

The appellant was one of the twenty-two (22) political parties which fielded candidates for the election into the office of Governor of Kogi State conducted by the Independent National Electoral Commission on 21st November, 2015 and a supplementary one on 5th December, 2015. Its flag bearer was Usman Zainab. The All Progressives Congress, another registered political party sponsored late Prince Abubakar Audu in the Election. The other political party which made a great showing at the election was the Peoples Democratic Party (PDP) with Capt. Idris Ichalla Wada as its candidate.

At the end of the polls of 21st November, 2015, the Independent National Electoral Commission declared it inconclusive because, according to it, the number of registered voters in 91 polling units, infested with electoral malpractices, exceeded the total number of registered voters in the vote margin between the leading party APC and the PDP, its closest rival. Soon after the declaration of the election inconclusive, the candidate of the APC, Prince Abubakar Audu died. The APC notified INEC of his demise on 23rd November, 2015 and requested for his substitution. The Independent National Electoral Commission granted the request and fixed 5th December, 2015

for the conduct of a supplementary election in the 91 polling units that were tainted with electoral malpractices.

Sequel to the grant, the APC substituted its deceased candidate, Prince Abubakar Audu with the respondent herein. At the end of the supplementary election, INEC added the votes garnered by the APC in the 21st November, 2015 election to those earned by the respondent and declared the respondent the winner of the governorship election having scored majority of lawful votes.

The appellant was piqued by the declaration and return of the respondent as the winner of the election. Consequently, the appellant, on 24th December, 2015, filed a petition at the Election Petition Tribunal. The said petition was later amended.

As would be expected, the respondent joined issues with the appellant by filing a reply wherein he raised objections to the competence of the petition. In proof of the petition, the appellant subpoenaed one INEC staff who tendered some electoral documents and called one witness i.e. PW1. In his defence, the respondent fielded one witness as PW1 and tendered some electoral documents.

At the end of the trial, both counsel addressed the tribunal. In a considered judgment delivered on the 9th June, 2016, the trial tribunal declared the petition incompetent and dismissed it for lacking in merit.

Appellant was dissatisfied with the decision. Hence, on 22nd June, 2016, it lodged an appeal at the Court of Appeal. On 4th August, 2016, the lower court delivered its judgment dismissing the appeal for being unmeritorious. On 12th August 2016, the appellant filed a notice of appeal containing twelve grounds of appeal to challenge the said decision. Briefs were filed and exchanged in accordance with the rules of court.

On the 20th of September, 2016 when this appeal was heard, parties, through their respective counsel, adopted their briefs of argument and also made oral adumbration of some salient points in the briefs. In the appellant's brief settled by its counsel, A. O. Maduabuchi, Esq., leading another, three issues were distilled for the determination of this appeal. The three issues are:-

1. What is the effect of a court not resolving all the principal issues submitted to it for resolution?

2. Whether a fact which has been admitted needs any further proof?

3. Who is a necessary party in any proceedings?

On the other hand, P. B. Daudu, Esq., leading other counsel submitted two issues on behalf of the respondent. The two issues are stated thus:

1. Whether the Court of Appeal was justified in affirming the trial tribunal's decision that INEC was a necessary party to the appellant's petition.

2. Whether having regard to the facts and circumstances of this appeal, the Court of Appeal can be faulted in the way and manner it affirmed the trial tribunal's decision to dismiss the appellant's petition for failure to establish that the 1st respondent did not win the election by a majority of lawful votes.

Having regard to the complaint of the appellant as evinced in the paragraphs of its petition and moreso, the judgment of the court below appealed against, it is my well considered opinion that the two issues nominated by the respondent are more apt and germane for the determination of this appeal than the issues thrown up by the appellant. I shall accordingly determine this appeal based on the two issues as couched by the learned counsel for the respondent.

Although the respondent has numbered his two issues as numbers 3 and 4, I think it is a typographical error. I hereby renumber them as 1 and 2. The respondent's first issue is the same as the appellant's issue 3 and is asking the question whether INEC was a necessary party to this petition?

In his argument in respect of issue 1, learned counsel for the appellant referred to Section 137(2) of the Electoral Act; 2010 (as amended) and the case of Dangana V. Usman (2013) 6 NWLR (pt. G 134) 50 at 80 on rules of interpretation of statutes, and submitted that the intendment of the legislature was that the only necessary party to an election petition is the person whose election is being challenged. According to him, no other person is a necessary party to an election petition except the person whose election is being challenged.

Again, learned counsel relies on Section 137(3) of the Electoral Act, 2010 (as amended) and submitted that where the law makes

an event a condition precedent for its coming into effect, the law does not come into effect unless that event has occurred, citing the case of *Ugwuanyi V. NICON Ins. Plc* (2013) 11 NWLR (pt. 1366) 546. According to learned counsel, the condition precedent to the inclusion of INEC as a party in any election petition is that there must
 B have been a complaint regarding the ‘conduct’ of either an Electoral Officer, a Presiding Officer or a Returning Officer.

It is a further submission of the appellant that by Section 133(1) of the Electoral Act (supra), the person elected or returned shall be a party to the petition. That the law did not state that INEC
 C should be a party.

Finally, learned counsel opined that INEC does not need to be a party to the petition for it to implement the decision of the Tribunal or Court of Appeal. It is his view that Section 287(2) & (3)
 D of the 1999 Constitution of the Federal Republic of Nigeria (as amended) enjoins all authorities and persons and other courts that are subordinate to them to implement and enforce such decisions. Learned counsel submitted that INEC was not a necessary party to this petition and urged this court to resolve this issue in favour of the
 E appellant.

Contrary to the position adopted by the appellant above, the learned counsel for the respondent submitted that INEC was and still is a necessary party to this petition. He opined that the appellant, in making his submission, had forgotten his case at the tribunal.

Referring to paragraphs 11-16, 17, 18 and 19-25 of the petition, learned counsel submitted that the appellant was challenging the legality of INEC’s decision to add the votes garnered by Prince Abubakar Audu to those garnered by the respondent, the decision
 G of INEC to conduct supplementary election and its decision to return the respondent as governor of Kogi State. Learned counsel submitted that these acts were done by officials of INEC and by Section 137 (3) of the Electoral Act “(supra), INEC was not only a necessary party but also a statutory party. He submitted that parties are bound by
 H their pleadings, relying on the case of *Kubor V. Dickson* (2013) 4 NWLR (pt. 1345) 534 at 589. He urged the court to discountenance the attempt by the appellant to surreptitiously jettison its case at the trial tribunal via its submission in its brief. Learned counsel submitted

that by the wording of Section 137(3) (a) of the Electoral Act (supra), the petition as presently constituted, without INEC as a necessary party, is grossly incompetent. Contrary to the position adopted by the appellant in its brief, the respondent submits that where a necessary party is not joined in the case, the court or tribunal lacks jurisdiction to entertain and determine the matter, citing and relying on the case of *Tafida V Bafarawa* (1999) 4 NWLR (pt. 597) 70. He urged this court to resolve this issue against the appellant. B

In this case, both the trial tribunal and the Court of Appeal held that INEC was a necessary party to the petition giving birth to this appeal. The two courts below also held that the failure to make INEC a party in this case is fatal to the petition. But who is a necessary party in a case? A necessary party in a case is one whose presence or involvement in the matter is not only necessary but crucial and unavoidable for the effective, effectual, exhaustive, complete and comprehensive adjudication of all questions raised in a cause or matter. Such a party is one who is not only interested in the subject matter of the proceedings but also who in his absence, the proceeding cannot be fairly dealt with. In other words, the question to be settled in the action between the existing parties in the suit must be a question which cannot be properly settled unless they are parties to the action instituted by the plaintiff. See *Chief Abusi David Green V. Chief Dr. E. T. Dublin Green* (1987) NWLR (pt. 61) 481, (1987) LPELR - 1338 (SC), *Attorney-General of the Federation V. Attorney General of Abia State* (2001) 11 NWLR (pt. 725) 689, (2001) LPELR - 631 (SC), *Guda V. Kitta* (1999) 12 NWLR (pt. 629) 21. D

It is imperative that a person whose presence in a suit is necessary ought to be joined so that he would be bound by the result of the action. Where the issues or questions raised in the action cannot be effectually and completely settled unless a person is a party to the suit, then he is a necessary party. See *Babayehu V. Ashamu* (1998) 9 NWLR (pt. 25567) 546, *H Panalpina World Transport Nig. Ltd. V. J. B. Olandeen Int'l & Ors* (2010) LPELR - 2902 (SC). E

In the instant appeal, I agree with the submission of the

learned counsel for the respondent that the appellant in its petition was indeed challenging the acts of INEC which it did not make a party to its petition. The paragraphs of the petition do certainly disclose the following grouse against INEC by the appellant:

1. INEC's decision to add the votes garnered by Prince
B Abubakar Audu (deceased) to those of the respondent as candidate of the APC.

2. The conduct of supplementary election with the respondent as candidate of APC.

3. INEC's decision to return the respondent as duly elected
C Governor of Kogi State. Paragraph 21 of the petition before the Tribunal clearly seeks a relief specifically directing INEC to conduct fresh elections.

The above acts of INEC complained of by the appellant could not have been carried out by INEC itself but through its electoral officials and returning officers. It is therefore patently wrong for the appellant to argue that it did not make any complaint against INEC officials or INEC itself so as to make it a necessary party. The law is trite that parties are bound by their pleadings. It is too late in the day for appellant to abandon the specific pleadings in the paragraphs of his petition. See Kubor v. Dickson (2013) 4 NWLR (pt. 1345) 534 at 589.

I hold a strong view that the appellant made allegations and complaints against INEC in conducting supplementary election, adding late Audu's votes to the respondent's score at the supplementary election and declaring the respondent as winner of the election. Appellant had alleged that the respondent did not win the election by majority of lawful votes. The question is: Who compiled and computed the result? Who decided that the respondent scored majority of lawful votes? Is it not INEC? I still wonder how the appellant intended that the petition be determined without the presence of INEC.
H ***Would it have been a fair hearing with regard to Section 36 (1) of the Constitution of the Federal Republic of Nigeria 1999 (as amended)? I do not think so.*** Section 137 (3) of the Electoral Act 2010 (as amended) states thus:

“137(3) If the petitioner complains of the conduct of an Electoral Officer, a Presiding Officer or Returning Officer, it shall not be necessary to join such officers or persons notwithstanding the nature of the complaint and the Commission shall, in this instance, 5 be:-

(a) made a respondent, and

(b) deemed to be defending the petition for itself and on behalf of its officers or such other persons.” B

By the above provision of the Electoral Act (supra), INEC is not only a necessary party but a statutory party. Having agreed with the two courts below on the issue, all the flamboyant arguments of counsel for the appellant on this Issue are of no moment. Having challenged the actions/decision of INEC in the Kogi State Governorship election held on 21st November, 2015 and 5th December, 2015, it was necessary to make the Commission a party to the petition as it would have been unfair and impossible to determine the Issues raised by the appellant in the absence of INEC. C D

Moreover, the use of the word “shall” in Section 137 (3) of the Electoral Act makes it mandatory for INEC to be made a party where complaints are made against it or its officials in an election petition. That section is a mandatory provision because the operative word there is “shall”. The word “shall” when used in a statutory provision imports that a thing must be done. It is a form of a command or mandate. It is not permissive, it is mandatory. See Nwankwo V. Yar’adua (2010) 12 NWLR (pt. 1209) 518, Bamaïyi V. Attorney General of the Federation (2010) 12 NWLR (pt. 727) 468; Ngige V. Obi (2006) 14 NWLR (pt. 991) 1, Ifezue V. Mbadugha (1984) 1 SCNJ p. 427. E F

On the whole, it is my view that the two courts below were right in holding that INEC was a necessary party in this petition before the trial Tribunal. Issue one, as it turns out, is resolved against the appellant. G

Before I consider the second issue adopted for the determination of this appeal, I observe that the learned counsel for the appellant has imported a fake issue No.2 into his brief on page 4 of his brief of argument. Argument on the said strange issue spans pages 4-13 i.e. paragraphs 4.07 to 4.29 thereof. The said issue is said to be predicated on grounds 3, 4, 5, 6, 14, 15, 16, 17, 18, 19, 20, 21, 22, H

23, 24, 27, 28, 29, 30, 31, 32 and 33 of the notice of appeal. This issue is not for this court for the following reasons:

1. It is an appeal against the judgment of the trial tribunal and this court has no jurisdiction to hear appeals directly from the judgment of the tribunal.

B 2. The said issue is said to be predicated on 22 grounds of appeal listed above whereas the notice of appeal challenging the judgment of the Court of Appeal to this court has only 12 grounds of appeal.

C A scrutiny of the record of appeal reveals that the appellant's counsel just lifted the said issue with arguments in support from his brief to the Court of Appeal into the present brief of argument. I will regard this as a serious oversight by counsel. I charge counsel to always read and cross check his documents before signing them and
D sending them for filing. The inclusion of the issue in appellant's brief to this court has exposed the tardiness of counsel in handling his brief. Be that as it may, the said issue 2 contained on pages 4-5 of the brief of argument and the arguments in support thereof spanning pages 5 - 13 of the same brief are hereby discountenanced.

E There is yet another issue 2 on page 13 of the brief of argument. It states:

"Whether a fact which has been admitted needs any further proof."

F This issue, to say the least, has no relevance to this appeal. It is not only academic but self-serving. There is nowhere in the judgment of the lower court or even at the trial tribunal where the respondent admitted that he did not score majority of lawful votes. The said issue is also discountenanced.

G ***I am now left with issue number 2 in the respondent's brief which, unfortunately, the appellant did not proffer any argument on it. It is settled law that where a party fails to respond to a point or an issue, either in the brief of argument or oral presentation, the opposing party is deemed to have***
H ***admitted all that his adversary has stated.*** See Okongwu V. NNPC (1989) 4 NWLR (pt. 115) 296, Nwankwo V. Yar'adua (2010) 12 NWLR (pt. 1209) 518.

In circumstance of this case, since the appellant has

not proffered any argument in respect of this issue, it seems to me that the argument of the respondent becomes unnecessary as there is nothing to respond to. Secondly, the appellant has no complaint or challenge against the issues so raised. It is his appeal and whatever he does not challenge is deemed admitted. To consider this issue without any complaint by the appellant amounts to an academic exercise. There is no time for such an exercise in this court. Accordingly, this issue is deemed abandoned. B

Having resolved the only issue on which both parties exchanged arguments in favour of the respondent, the only thing remaining for me to say is that this appeal is devoid of merit and is accordingly dismissed. The judgment of the Court of Appeal which upheld the judgment of the trial tribunal is hereby affirmed. Parties shall bear their respective costs. It is based on the above reasons that I dismissed this appeal on 20th September, 2016. C D

ARIWOOLA JSC

The appeal on this matter was heard on 20th September, 2016 and judgment was given on the same day. I agree with the lead judgment delivered by my learned brother, Okoro, J.S.C. that the said appeal lacks merit and was liable to dismissal. I too dismissed the appeal and reserved to give reasons today 30th September, 2016. E F

I had been obliged with the lead reasons of the lead judgment, by my learned brother, and having dealt with the salient issue adequately, I adopt the said reasoning as mine and I have nothing more to add. The appeal was properly and rightly dismissed.

I abide by the consequential orders in the said lead judgment including the order on costs. G

MUHAMMAD JSC

My brother, Inyang Okoro, JSC had obliged me the draft of his reasons for finding appeal No. 687/2016 unmeritorious. I agree entirely that given those reasons the *appeal* stands dismissed. I also abide by the consequential orders reflected by his lordship. H

OGUNBIYI JSC

This appeal was heard and dismissed as lacking in merit on the 20th September, 2016. The reason for the dismissal was however
B adjourned for the 30th September, 2016 and I now give same.

I have read in draft the lead judgment of my learned brother, John Inyang Okoro, JSC. I have no reason to disagree with the comprehensive and thorough research made by the learned jurist. In
C other words, I adopt the judgment as mine and in the same terms also dismiss the totality of the appeal.

The facts and the background history of the case are all spelt out clearly in the lead judgment. The issues set out as contained in the appellant's brief of argument are threefold while the respondent
D formulated two. They are also contained in the lead judgment and I do not wish to reproduce same.

The only relevant issue central to this appeal is whether INEC was and is a necessary party to the petition culminating into this appeal now before us.

E While the appellant's counsel answers in the negative, it was argued vehemently to the contrary by the respondent's counsel.

The learned counsel for the appellant relates copiously to section 137(2) of the Electoral Act 2010 (as amended) and re-iterates the intention of the legislature; that the only necessary party to
F an election petition is the person whose election is being challenged. This, counsel submits is the strict interpretation of section 137(2) of the Electoral Act supra; that section 137(3) gives a conditional provision as to when INEC may be made a party; that INEC is not there-
G fore a necessary party in every election petition. Further, that the condition precedent to the inclusion of INEC as a party in any election petition is where there is a complaint regarding the conduct of either an Electoral officer, a Presiding officer or a Returning officer; in the absence of such complaint, as is the case at hand, counsel sub-
H mits, INEC will not be joined as a party; that with reference to section 133 (1) of the Electoral Act, the law did not provide that INEC should be made a party. Counsel contends on the totality that both the two lower courts erred in law in holding the contrary.

The sole issue for determination is whether the matter in this appeal is competent in the absence of joining INEC as a Respondent?

The reproduction of section 137(3) of the Electoral Act states thus:-

"If the petitioner complains of the conduct of an electoral officer, presiding officer or returning officer, it shall not be necessary to join such officers or persons notwithstanding the nature of the complaint and the commission shall in this instance be,

(a) Made a respondent, and

(b) Deemed to be defending the petition for itself and on behalf of its officers."

For the definition of a necessary party, this court in the case of *Green v. Green* (1987) 3 NWLR (Pt 61) 480 at 493 had this to say per Oputa, JSC:-

"A necessary party is one who is not only interested in the subject matter of the proceedings but whom in his absence of proceedings cannot be fairly and judiciously decided. In other words, the questions to be settled in the action between the existing parties must be a question which cannot be properly settled unless the necessary party to the particular claim is joined in the action."

The learned jurist proceeded further and re-iterated that the deciding factors determining the effect of non-joinder or misjoinder of a party lie in the following questions:-

(1) Whether the cause or matter is liable to be defeated by non-joinder.

(2) Whether the matter can be adjudicated without the 3rd party, added a Defendant?

(3) Is the 3rd party a person who should have been joined in the first place?

(4) Is the 3rd party a person whose presence before the court as a defendant will be necessary in order to enable the court to effectually and completely adjudicate or settle all the questions involved in the cause or matter?

On the communal reading of section 137(3) and taken together with the definition of a necessary party per Oputa, JSC supra, it is correct to say that the interpretation given by the appellant's

counsel is grossly misconceived as rightly submitted by the learned counsel for the respondent.

In other words, it is a misconception of the law for the appellant's counsel to contend that *"it is only when you complain specifically about the bad conduct of an Electoral officer, a Presiding officer or a Returning officer that it becomes necessary to join INEC...."*

I further wish to add that the argument put forward by the appellant's counsel is completely at variance with the facts pleaded in its pleadings and also a radical distortion of the petition. For instance, a critical appraisal of paragraphs 11-16 of the petition (contained at page 4 of the record) reveals that the appellant is specifically challenging the legality of INEC's decision to add the votes garnered by Prince Abubakar Audu to those by Alhaji Yahaya Bello as candidates of APC. Also paragraphs 17 and 18 of the said petition at pages 4-5 of the record question why INEC conducted supplementary election upon becoming aware of Prince Abubakar Audu's demise. Further still paragraphs 19 - 25 of the said petition are all challenging the decision of INEC in returning the Respondent as duly elected. It is clear on the printed record that paragraph 27 of the petition seeks a relief from the Tribunal to direct INEC to specifically conduct fresh elections. The appellant cannot now change the character of his pleadings. It is too late in the day. The law is well settled that parties are bound by their pleadings and the appellant will not be allowed to abandon its pleadings, after having made express complaints against INEC who, acting via its various officials returned the Respondent as the duly elected Governor of Kogi State in the same pleadings. See the decision of this court in *Kubor V. Dickson* (2013) 4 NWLR (pt. 1345) 534 at 589 where it was held that parties in election petition are bound by their pleadings and cannot jettison them by address of counsel. See also *Fagbenro V. Arobadi* (2006) 7 NWLR (Pt. 978) 172 at 194, *Ojo V. Adejobi* (1978) 3 SC 65 and *Olatunji V. Adisa* (1995) 2 NWLR (Pt. 376) 167. The appellant at hand has been most inconsistent in its pleadings.

A necessary party to a case has been defined as a person or party whose presence or involvement in the matter is not only mandatory but is crucial and unavoidable for the effective, effectual, exhaustive, complete and comprehensive adjudication of all

questions raised in a cause or matter and in due deference to the principles of fair hearing. See *O. K. Contact Point Ltd. V. Progress Bank Plc* (1999) 5 NWLR (Pt. 604) 631; *B.O.N. Ltd. V. Saleh* (1999) 9 NWLR (Pt. 618).

Appellants as petitioners sued everybody sueable but conveniently forgot, omitted or refused to join the one party that was most important i.e. to say - INEC being the body constitutionally and statutorily charged with the conduct and organization of the election. It is legally incorrect for the appellant to have therefore left out INEC in the scheme of things in the instant case. For all intents and purposes, the petition as presently constituted without INEC as a necessary party is grossly incompetent. The law is trite that where a necessary party is not joined in a case, the court or tribunal lacks jurisdiction to entertain and determine it. See *Tafida V. Bafarawa* (1999) 4 NWLR (Pt. 597) 70. The exclusion of INEC will occasion a serious miscarriage of justice against the principle of *audi alterem partem*. It would result in the election petition being heard and determined *ex parte* INEC.

The case of *Fayemi V. Oni* (2007) 7 NWLR (Pt. 1140) 223 at 255 - 256 is in point where a court will not make an order that will affect the interest or right of a person that is not a party to the case and who was never heard in the matter. Persons whose rights or interests are to be affected by the decision of a court must be made parties. As rightly submitted by the learned counsel for the respondent, this petition (and by extension this appeal) died on the day the Honourable Tribunal struck out INEC as a party in the petition and same cannot in the circumstance be revived by way of the instant appeal.

My learned brother, Okoro, JSC has dealt with the issues exhaustively and I also agree and hold that the lower court was right in law when it affirmed the decision of the tribunal dismissing the appellant's petition as incompetent in the absence of INEC. On the totality, the appeal is also dismissed by me in terms of the lead judgment and parties are to bear their respective costs.

H

KEKERE-EKUN JSC

On Tuesday 20th September, 2016 when we heard this ap-

peal, I dismissed it as lacking in merit and promised to give my reasons for doing so today, 30th September 2016.

I have had the benefit of reading in draft, the lead reasons for judgment just delivered by my learned brother, Okoro, JSC. He has ably captured and admirably resolved the issues in contention in this appeal.

I agree entirely with the reasons stated. In further support I wish to comment briefly on issue 1 formulated by the, respondent and adopted in the lead judgment, which challenged the findings of the two lower courts on the incompetence of the petition in the absence of INEC as a party.

The sole ground for the petition is:

“That 2nd respondent was not duly elected by a majority of lawful votes cast at the election and was therefore not duly returned as validly elected.”

While the main relief sought, which is contained in paragraph 27(a) of the petition is as follows:

(a) That it be determined that the 2nd respondent was not only duly elected or returned duly elected not having scored the majority of the valid votes cast at the election not having contested into the whole polling units of Kogi State and a fresh election be ordered to be held in the whole state consequent upon the death of Prince Abubakar Audu, the candidate of APC.”

The Independent National Electoral Commission is established pursuant to Section 153(1)(f) of the 1999 Constitution. Its duties and powers are as contained in paragraph 15(a) - (i) of Part I of the Third Schedule to the Constitution. By paragraph 15(a), the Commission shall have power to “organize, undertake and supervise all elections to the offices of the President and Vice-President; the Governor and Deputy Governor of a state and to the membership of the Senate, the 25 House of Representatives and the House of Assembly of each State of the Federation.”

Section 69 of the Electoral Act provides for the declaration and return of a duly elected candidate by the Returning Officer after the counting of votes cast for each candidate.

It is therefore quite clear without any equivocation that the Electoral Body is an integral part of the entire election process. A

complaint that a person was not duly elected by a majority of lawful votes cast is an indictment on the body that carried out the election.

A necessary party has been held to be one who has an interest in the outcome of the litigation, a person who will be bound by the decision reached and in whose absence the issue in contention cannot be fairly and effectively dealt with. See: *Green Vs Green* (1987) 3 NWLR (Pt.61) 481; *Azubuike Vs PDP* (2014) 7 NWLR (Pt.1406) 292 @ 316 E and 313 D-E; *APC Vs P.D.P* (2015) LPELR-SC 113/2015. B

There is no doubt that the Commission was a necessary party to the petition as it would have been afforded the opportunity to defend the election it conducted. Apart from the fact that by virtue of Section 137(3) of the Electoral Act 2010 (as amended), INEC is a statutory respondent, there is no doubt that it would be bound by the result of the petition. C

The petition against the Independent National Electoral Commission (INEC) having been dismissed by the Trial Tribunal on 11th March 2016 upon an application by its counsel for failure of the petitioner to apply for the issuance of pre-hearing notice on it, the petition as constituted thereafter, between the appellant and the respondent alone was incompetent, as the Tribunal lacked jurisdiction to entertain it. In effect the rug had been pulled from under the appellant's feet. D

The Commission would have been in the best position to defend the election it conducted and to give effect to the judgment of the Tribunal if in favour of the appellant. F

It was for these and the more detailed reasons set out in the lead judgment that I dismissed the appeal.

The judgment of the lower court affirming the decision of the Kogi State Governorship Election Tribunal delivered on 9/6/2016, which dismissed the appellant's petition challenging the return of the respondent as the duly elected Governor of Kogi State is hereby affirmed. I agree with the order that parties shall bear their respective costs. G

Appeal dismissed. H

SANUSI JSC

This appeal was heard by us on Tuesday 20th day of September 2016. After reading and considering the briefs of argument and the oral submissions of learned senior and other counsel for the parties. I held that the appeal was devoid of merit and accordingly
 B dismissed same. I then undertook to advance my reasons for judgment dismissing the appeal today, the 30th day of September, 2016. My reasons are given hereunder:

This appeal was filed by the appellant in this court against the
 C judgment of the Court of Appeal (lower court) delivered on 4th August, 2016 which had earlier affirmed the decision of Kogi State Governorship Election Tribunal delivered on 9th June, 2016 dismissing the petition filed by the petitioner/appellant, challenging the declaration/return by INEC, of the respondent, as winner of the election
 D conducted on 21/11/2015 and the supplementary election held on 5th December, 2015. The facts giving rise to this appeal had been ably and admirably summarised in the lead reasons for judgment of my learned brother, John Inyang Okoro, JSC, which need not be restated here.

E The appellant became disenchanted with the judgment of the lower court, hence he appealed to this court. Parties, learned senior and other counsel in obedience to the rules and procedure of this court, filed and exchanged briefs of argument. In its brief of
 F argument, the appellant raised three issues for determination as follows :-

(a) What is the effect of a court not resolving all the principal issues submitted for resolution?

(b) Whether a fact which has been admitted needs any further proof; and

(c) Who is a necessary party in any proceedings?

The Respondent on the other part, formulated two issues for determination in his brief of argument which read thus:-

(1) Whether the Court of Appeal was justified in affirming
 H the trial tribunal's decision that INEC was a necessary party in the Appellant's petition.

(2) Whether having regard to the facts and circumstances of this appeal, the Court of Appeal can be faulted in the way and man-

ner it affirmed the trial tribunals decision to dismiss the appellant's petition for failure to establish that the 1st respondent did not win the election by a majority of lawful votes? It appears to me that issue No.3 in the Appellant's brief of argument is the same with issue No. 1 in the Respondent's brief of argument and it will therefore be convenient to take them together. B

ISSUE NO.3

Who is a necessary party in any proceeding? (Grounds 2, 3, 4, 5 & 6 of the notice of appeal).

The learned counsel to the Appellant submitted that an election petition proceedings are sui generis. He contended that the choice of parties to be joined is not at large as in ordinary civil cases. He anchored his argument on Section 137(2) of the Electoral Act 2010 (as amended) and argued that the intendment of the legislature was that the only necessary party to an election petition, is the person whose election is being challenged and that is the respondent. He argued further, that the provision of. Section 137(3) (a) and (b) is deliberate, in that it underlines how necessary it is, to make INEC a party in any election petition. D

The learned counsel for the Respondent in reaction to his argued that the Appellant has read a different meaning to the provisions of Section 137(3) of the Electoral Act. He contended that the contrary position was taken by the Appellant in his brief of -argument. E

Where a necessary party is not joined in a case, the court or tribunal lacks jurisdiction to entertain and determine it. He referred to the case of *Tafida V Bafarawa* (1999) 4 NWLR (pt.597) 70. He urged the court not be lured into conceding that INEC is not a necessary party. F

On issue No. 1 of the Appellant brief of argument which relates to a court not resolving all the principal issues submitted to it for resolution, the learned respondent's counsel submitted that a court is bound to resolve all the principal issue submitted to it for determination. He referred to the case of *Onoche V Odogwu* (2006) 6 NWLR (pt.975) 65 at 90-91. He contended that the Court of Appeal failed to make a pronouncement on the issue whether a person who has not satisfied the provision of Sections 178(4) and 179 (2) of the G

1999 Constitution (as amended) can be declared as duly-elected and the issue whether a person who did not participate in all stages of election can as well, be declared Governor, considering the provision of Section 141 of the Electoral Act 2010 as amended. He argued that it was wrong to have returned the Respondent as duly elected
B governor, when Sections 178(4) and 179(2) of the 1999 Constitution was not complied with.

Issue No.2 in the Respondent's brief of argument relates to the failure to establish that the 1st Respondent did not win the election by a majority lawful vote cast. The learned counsel to the Respondent submitted that it is trite law, that a petitioner who is challenging the validity of the votes declared in favour of a declared winner of any election, must furnish the trial tribunal with principal evidence and not hearsay evidence. He referred to the case of Buhari V
D Obasanjo (2005) 13 NWLR (pt. 941) 1 at 315. He stated that it is not in dispute, that the PW2 who testified as to the validity of votes in the said election was purportedly based on what he was told by agents appointed by the petitioner. From the foregoing, he submitted that the evidence of PW.2 was rightly rejected by the tribunal being hear-
E say evidence.

He further contended that the Respondent is actually the beneficiary of votes scored by APC. He argued further, that both Prince Abubakar Audu and the Respondent were mere beneficiaries of the votes cast for the A.P.C. by the electorate. He submitted that
F this issue is in any event, merely academic given the fact that the Appellant presented no iota of evidence to substantiate its claim since it presented hearsay evidence which was rightly treated as such by the two lower courts. He urged 'this court to also resolve this issue in
G favour of the Respondent and to dismiss the appeal in its entirety. The appellant's second issue deals with whether facts which have been admitted need further proof. The learned counsel to the Appellant dwelt extensively on this issue but the Respondent did not put up any response, Perhaps the Respondent felt that this issue has no
H bearing in this appeal. And to my mind this issue, truly speaking, has no link with this appeal. It will therefore not be necessary to: summarize or dissipate energy in analyzing what has no bearing to the appeal.

The Appellant's learned senior counsel in his Reply brief, referred to the submission of Respondent where he stated that the Appellant did not appreciate the import of Section 137(3) of the Electoral Act 2010 (as amended). He remarked that the law did not state that INEC will be made a party, if there is a complaint against the act or action of those officials, but rather against their conduct. B He submitted that conduct and act or action are not the same. He argued that Section 137(3) of the Act determines when INEC will be made a party. He argued that Section 144(2) of the same Electoral Act 2010 (as amended) and the case of ANPP & Ors. V Faruk & 4 C Ors relied upon by the Respondent are not applicable. He argued that Section 144(2) of the Electoral Act 2010 as amended, is not the same with Section 132(3) of the 5 Electoral Act 2006 and therefore is not applicable.

He submitted further, that INEC needs not be made a party D under the 2010 Electoral Act unless, there were complaints against the conduct of the named officers. He contended that under the 2006 Act, INEC could be made a party but that condition precedent must be satisfied before INEC could be made a party under the 2010 Electoral Act as amended. E

He argued further, that it is not their case whether it was proper for INEC to have declared the election inconclusive but that the election should have been conducted freshly in the whole of Kogi State and not just in some polling units. He then urged the court to F allow this appeal.

I am of the view that the gravamen of this appeal largely revolves on issue No.3 raised in the appellant's brief of argument which also tallies with Issue No. 1 raised in the Respondent's brief of argument. It suffice to say, that the appellant as petitioner at the trial G tribunal, failed to include the Independent National Electoral Commission (INEC) which is a statutory body saddled with the responsibility of conducting the elections one of which he challenged at the trial tribunal as one of the respondents. There is no gainsaying that H some of the grounds of the petition filed 0 challenged the conduct of the election, return and declaration of the respondent as winner in those two elections held on 21/11/ 2015 and 5/12/2015 which INEC conducted and upon which the respondent herein, was declared winner and returned by it.

It is the appellant's learned senior counsel's contention, that it was not necessary to include INEC as party in his petition since it was not challenging the conduct of any electoral officer that they were challenging. He added that the only necessary party which he should include as respondent in his petition, was the person whose election
 B was challenged. He also placed reliance on 137(3) of Electoral Act 2010 as amended and the cases of *Dangana V Umar* (2013) 6 NWLR (pt. 134) 50 at 50 and *Ugwuanyi VS NICON Ins. Plc* (2013) 11 NWLR (pt. 1366) 546. Curiously enough, the learned appellant's
 C counsel proceeded to argue in his brief of argument that INEC needed not be joined or made a party to the petition challenging the decision of the tribunal or the lower court. He finally concluded that INEC was therefore not a necessary party.

Conversely, the respondent's learned counsel naturally took
 D an entirely contrary view. His stance is that INEC was a necessary party to the appellant's petition at the trial tribunal, especially in view of his claim that INEC was faulty in garnering the votes cast for Prince Audu with those scored by the respondent at the supplementary election held on 5th December 2015 and even the INEC's decision to
 E conduct the supplementary election of 5th December 2015. He therefore argued that the failure on the part of appellant to include INEC as respondent in his petition had rendered the petition incompetent ab initio and therefore the tribunal lacked jurisdiction to adjudicate on or determine the petition right from the outset. He relied on the
 F case of *Tafida vs Bafarawa* (1999) 4 NWLR (pt.597) 70.

With due deference to the learned senior counsel for the appellant, the age long rule is that no allegation can be allowed to be pleaded or made against a person, if that person accused, is not a
 G necessary party to the petition or is someone who will need to be called as a witness, But where he is a necessary party, it would be against the rule of natural justice to dispose of the question or allegation involved in a manner to affect his interest without giving him an opportunity of being heard. Looking at the ground of the petition, it
 H is clear that there were wide range of allegations targeted at or made against INEC especially on the way or manner it conducted the elections, and also on the merger of the votes scored at the 5th December 2015 election by the respondent with those previously scored by Prince Audu Abubakar on the 21st of November 2015.

I have given an insight on who a “*Necessary Party*” is in an election petition supra. It is therefore incumbent upon the petitioner to join in its petition, any necessary party or parties as respondent or one of the respondents. Failure to do so, in my humble view, will spell doom and would cause a fatal or catastrophic consequence to his petition depending on the vitality of the role played, or neglected to be done by such party regarding the allegations leveled against such party because such failure to join such necessary party, could touch on the competence of the petition and would lead to outright dismissal or striking out of the petition. As I stated earlier, serious allegations against INEC featured prominently in the petition which required INEC to answer or respond to. Since it was not so joined as party, how could it have responded or defend itself or in the event that the tribunal or court finds INEC culpable, it may warrant the court giving directorate reliefs against it. Then what would be the propriety of such relief without giving it opportunity to respond or defend itself?

For these reasons, I am in entire agreement with the two courts below, that INEC is a necessary party which should have been joined in the appellant’s petition but unfortunately was not so joined. This is very fatal. See *Babayeju vs Ashaumu* (1998) 9 NWLR (pt.567)546; *Buhari vs Yusuf* (2003) LPELR 812. Thus, the failure on the part of the appellant to join the INEC in its petition, in my view, runs riot and violent to the provisions of Section 137(3) of the Electoral Act 2010 (as amended). Those provisions of the Act read thus:-

S.137(3) - if the petitioner complains of the conduct of an Election Officer; a Presiding officer or Returning Officer, it shall not be necessary to join such officers or persons notwithstanding the nature of the complaint and the Commission shall in this instance be:-

- (a) made a respondent, and
- (b) deemed to be defending the petition for itself and on behalf of its officers or such other person”

The wordings of the above provisions are plain, clear and unambiguous and therefore in view of the surrounding circumstance of this instant case, such failure by the petitioner/appellant to join INEC in its petition was fatal and renders its petition incompetent, as

rightly held by the two lower courts.

Thus, with these few reasons I advanced above and for the fuller and more detailed reasons given in the leading judgment of my learned brother, John Inyang Okoro, JSC, I also hereby adjudge this appeal unmeritorious. It deserves to be and is hereby accordingly dismissed by me for being devoid of any merit. While dismissing it, I affirm the judgment of the Court of Appeal, Abuja division, which had earlier affirmed the judgment of the Kogi State Governorship Election tribunal. I make no order as to costs.

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