

SUPREME COURT OF NIGERIA
FRIDAY 30TH SEPTEMBER, 2016. SC. 648/2016
CORAM:- N. S. NGWUTA, O. ARIWOOLA,
M. D. MUHAMMAD, C. B. OGUNBIYI, K. M. O. KEKERE-
EKUN, J. I. OKORO, A. SANUSI, JJSC

HON. JAMES ABIODUN FALEKE APPELLANT

AND

1. INDEPENDENT NATIONAL ELECTORAL
COMMISSION (INEC)

2. YAHAYA BELLO RESPONDENTS

APPEALS - Reply brief - Purpose - It is to address fresh points raised in respondent's brief - As it is not for appellant to raise fresh issues - Or to re argue the appeal (H1)

STATUTES - Constitution - Interpretation - Principle - Constitutional provisions must be considered as a whole - The language is to be given a reasonable construction - And absurd consequences are to be avoided (H2)

ELECTIONS - Process - Conclusion of - Culmination of election process is declaration of winner by Returning Officer - After all votes have been counted - Thus confirming that legal requirements have been met (H3)

ELECTIONS - Conduct of - Powers of INEC - Constitution 1999 s. 160(1) empowers INEC to regulate its own procedure - And impose duties on its officers - For purpose of discharging its functions (H4)

ELECTIONS - Substitution - Constitution s. 181(1) - Application of - As the election held on 21/11/2015 was inconclusive - There was no basis for application of the provision in favour of appellant (H5)

ELECTIONS - Substitution - Right of a political party - Votes gar-

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nered by Audu/Faleke on 21/11/2015 - Were garnered on behalf of APC - Which is entitled to substitute a candidate to contest the election to conclusion (H6)

ELECTIONS - Nomination - Powers of political party - Choice of a candidate in election is within exclusive preserve of a political party - And it is non-justiciable provided that party acts within its guidelines (H7)

ELECTIONS - Governorship - Participation in - Conditions - Person seeking to contest the election must be member of a political party - Sponsored by that party - And must have participated in the primaries (H8)

JUSTICE - Election petitions - Tribunal - Limited jurisdiction - Appellant did not suffer miscarriage of justice - By failure of trial Tribunal to pronounce on the issue estoppel - As it is outside its jurisdiction (H9)

ELECTION PETITIONS - Tribunal - Jurisdiction - Constitution 1999 s. 285(2) provides that Tribunal shall have jurisdiction - To hear petitions as to whether or not a person has been validly elected to office of Governor (H10)

ACTIONS - Necessary party - Meaning of - Necessary party is one who is not only interested in subject matter of proceedings - But also one in whose absence the proceedings could not be fairly dealt with (H11)

ELECTION PETITIONS - Political party - Joinder of - Naming of political party as statutory respondent in Electoral Act s. 137(2) - Is not a bar to joining the party as respondent - Where its interest is involved (H12)

ELECTION PETITIONS - Cause of action - Basis - Appellant failed to disclose a cause of action - Having based his claim on pre election matters - And on the premise that the election held on 21/11/15 was conclusive (H13)

ACTIONS - Issues - Competence of - Locus standi to institute action does not mean that the action is competent - As its competence depends on issues raised - Reliefs sought - And the applicable laws (H14)

ACTIONS - Proof - Declaration of right - Appellant seeking declaratory reliefs must establish his case by his pleadings and evidence led in support - On a preponderance of evidence (H15)

ELECTION PETITIONS - Proof - Misappropriation of votes - Where contention is on inability to secure majority votes cast - Petitioner must plead scores announced by INEC - And scores he considers to be correct (H16)

FACTS

This action was instituted by petitioner/appellant at the Governorship Election Petition Tribunal of Kogi State, against the declaration and return of 2nd respondent as the Governor of Kogi State. The genesis of the matter is that one late Abubakar Audu was nominated as the candidate of the All Progressives Congress to contest in the governorship election conducted for Kogi State on the 21st November, 2015. The late Audu nominated appellant (Faleke) as his running mate for the election. The election was held as scheduled and late Audu/Faleke scored 240,867 votes as against the 199,248 votes scored by Peoples Democratic Party candidate. However, as a result of certain electoral malpractices in 91 polling units, 1st respondent, relying on its Manual for Election Officials(updated version) declared the results of the election inconclusive. 1st respondent therefore scheduled a supplementary election on 5th December, 2015. Shortly thereafter, Abubakar Audu died. The All Progressives Congress promptly informed 1st respondent of the latest development and requested that 2nd respondent should substitute the late Audu. The request was granted and the supplementary election held as scheduled.

At the end of the supplementary election, 2nd respondent scored 6,885 votes as against 5,363 votes scored by the candidate of Peoples Democratic Party. The votes were added to the votes earlier scored by the respective political parties on 21st November 2015 and 2nd

respondent was declared the winner of the election and returned as the duly elected Governor of Kogi State. Being dissatisfied, appellant filed the petition. Appellant anchored the petition mainly on the construction of sections 179(2) and 181(1) of the Constitution, contending that he is entitled to step into the shoes of the late Abubakar Audu, following the latter's demise. Respondents raised preliminary objections to the competence of the petition. The lower Tribunal took the objections along with the petition. In its ruling, the Tribunal upheld the objections but nevertheless proceeded with the hearing of the petition. At the end of the hearing, the petition was dismissed for want of merit. Dissatisfied, appellant appealed to the Court of Appeal Abuja Division. The Court dismissed the appeal. Aggrieved further, appellant has appealed to the Supreme Court.

ISSUES FOR DETERMINATION

1. Whether the court below was right when it held that the 1st respondent acted correctly in applying the guidelines in the Manual for Electoral Officers (updated version) to resolve the conundrum that had arisen on the 21st of November 2015 and in holding that the announcement of the election as inconclusive is not contrary to Sections 179(2) and 181(1) of the 1999 Constitution.

2. Whether the court below was right when it affirmed the decision of the trial Governorship Tribunal on the validity of the respondents' preliminary objections as it relates to the issues of subject matter, jurisdiction, cause of action and non-joinder of the appellant's political party.

3. Whether the court below was right in affirming the trial Tribunal's decision that votes cast for the late Prince Audu and the appellant in the Governorship Election of November 21, 2015 were transferable to the 2nd respondent.

4. Whether, from the entire facts and circumstances leading to this appeal, the court below rightly affirmed the decision of the trial Tribunal to the effect that the petition was incompetent ab initio.

HELD (Unanimously dismissing the appeal per

KEKERE-EKUN JSC)

APPEALS - Reply brief - Purpose

1. As noted in the introductory part of this judgment, learned senior counsel for the appellant filed Reply Briefs in respect of the 1st and 2nd respondents' briefs respectively. However it must be reiterated here that the purpose of a Reply brief is to address fresh points raised in a respondent's brief of argument. It is not for the appellant to raise fresh issues or to re-argue the appeal. I have considered the appellant's replies to the arguments of learned senior counsel for the 1st and 2nd respondents. The replies in my view have largely re-canvassed the arguments in' the appellant's brief. No new issue raised by the respondents has been brought to the court's attention. The copious submissions therein are accordingly discounted. (p. 4142 D) B
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Constitution - Interpretation - Principle D

2. The settled canons of construction of constitutional provisions are, inter alia, that the instrument must be considered as a whole, that the language is to be given a reasonable construction and absurd consequences are to be avoided. It is equally well settled that where words used in the Constitution or in a Statute are clear and unambiguous, they must be given their natural and ordinary meaning, unless to do so would lead to absurdity or inconsistency with the rest of the statute. (p. 4144 H) E
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ELECTIONS - Process - Conclusion of

3. The Electoral Act 2010 (as amended), which is an Act of the National Assembly makes elaborate provisions not only for the manner in which elections shall be conducted by INEC right from the pre-election stage to conclusion but also for the manner in which disputes arising therefrom should be ventilated. The culmination of the election process is the declaration of a winner after all the votes have been counted. In Section 156 of the Electoral Act, "Return" is defined as "the declaration by a Returning Officer of a candidate in an election under this Act as being the winner of that election." In other words the Returning Officer makes a declaration on G
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behalf of the Electoral body of the final outcome of the election it conducted, which is in effect a confirmation that the legal requirements for that particular election have been met. I agree with learned senior counsel for the two respondents that there must be a declaration or a return made by INEC before a candidate could be deemed to have been duly elected under Sections 179(2) and 181 of the Constitution.

In effect, I agree with the finding of the court below that contrary to the submission of learned senior counsel for the appellant, Sections 179(2) and 181(1) of the Constitution are not self-executing. There must be a declaration or return of a candidate as the winner of an election before the sections become applicable. I agree entirely with learned senior counsel for the 1st respondent that to hold otherwise would lead to a situation where anyone could declare himself as the deemed winner of an election, which would certainly lead to anarchy. The electorate is also entitled to have the results of the election formally declared by an unbiased umpire. (pp. 4145 H/4147C)

ELECTIONS - Conduct of - Powers of INEC

4. That declaration was made based on the provisions of Chapter 3 paragraph 3.11, step 14 of INEC’s Manual for Election Officials. The argument of learned senior counsel for the appellant is that the provisions of the Manual cannot be employed to amend or augment the provisions of the Constitution. It is not disputed that pursuant to Section 160(1) of the Constitution, INEC has the constitutional power to regulate its own procedure or confer powers and impose duties on its Officers for the purpose of discharging its functions. Sections 73 and 153 of the Electoral Act contain similar provisions to ensure the proper discharge of its functions. Section 73 empowers the Commission to publish in the Gazette, guidelines for elections “which shall make provisions for the step by step recording of the poll in the electoral forms as may be prescribed....” while Section 153 empowers the Commission to issue regulations, guidelines or manuals for the purpose of

giving effect to the provisions of the Electoral Act and for its administration. I agree with the finding of the lower court at page 1608 of the record that the above provisions give statutory backing to the Manual as a subsidiary legislation and that where it is found to be relevant, its provisions must be invoked, applied and enforced. B

Having discovered electoral malpractices in 91 polling units in the State, it was proper for the 1st respondent to consult and apply the provisions of its Manual to determine the next course of action in the circumstances. I do not agree with Chief Olanipekun, SAN, with due respect that resort to its manual in the circumstances amounted to a flagrant disregard of the supremacy of the constitutional provisions as contained in Section 179(2). (pp. 4147 G/4148 F) C

ELECTIONS - Substitution - Constitution s. 181(1) - Application of 5. The effect of all that I have said above, is that the 1st respondent was correct when it declared the election of 21/11/2015 inconclusive on the ground that the margin of win between the two front-runners at the election was less than the total number of registered voters in the 91 affected polling units where elections were cancelled. I agree with the finding of the court below, which affirmed the finding of the trial Tribunal that in the circumstances there was no declaration or return at the election of 21/11/2015. I also hold that the court below was right when it held that in the absence of a return by the 1st respondent declaring the appellant and the late Prince Audu as the duly elected Governor and Deputy Governor respectively, neither of them could be deemed to have been duly elected on 21/11/ 2015 as required by Section 179(2) of the Constitution. The election conducted on 21/11/2015 was inchoate until after the conduct of the supplementary election on 5/12/2015 which brought the entire process to conclusion. D E F G

It follows therefore, that as the appellant and Prince Audu were not returned as duly elected, there was no basis for the application of Section 181(1) of the Constitution, which allows a Deputy Governor elected with a duly elected Gover- H

nor to step into the Governor's shoes in the event of death or any other factor leading to his inability to subscribe to the Oath of Allegiance and Oath of Office. (p. 4150 G)

ELECTIONS - Substitution - Right of political party

B 6. It must be remembered that the appellant and the 2nd respondent are both members of the APC. I agree with the concurrent findings of the two lower courts that by virtue of Section 221 of the Constitution and Section 137(1) of the Electoral Act, the APC being the party that sponsored the appellant and Prince Audu for the election and being the party which would be declared the winner in the event of their success at the polls as per Amaechi Vs INEC (supra), the said APC had a legal interest in the votes cast on 21/11/2015 and was entitled to substitute a candidate of its choice to contest the election to conclusion. I agree with J B. Daudu, SAN that the votes garnered by the Prince Audu/Hon. Faleke ticket on 21/11/2015 were votes garnered on behalf of the political party and therefore the issue of transfer of votes did not strictly arise. (p. 4153 B)

ELECTIONS - Nomination - Powers of political party

F 7. It is settled law that the choice of a candidate in an election is within the exclusive preserve of a political party and non-justiciable, so long as the party acts within its guidelines. The law is quite settled that the nomination and sponsorship of a candidate at an election is within the internal affairs of a political party and therefore not justiciable, except in the limited circumstances set out in Section 87(9) of the Electoral Act where a co-aspirant alleges that the relevant guidelines of the political party or the provisions of the Electoral Act were not followed, in which case, it is the Federal High Court or the High Court of a State or Federal Capital Territory that would have the necessary jurisdiction to entertain the matter. In other words, they are pre-election issues. They are issues outside the purview of an Election Tribunal because the nomination and sponsorship of a candidate by

his political party must take place before an election can be held. Similarly, where as in this case, a candidate died before the election was concluded, the nomination and sponsorship of a suitable candidate to take his place must also occur before the election can proceed. (p. 4153 F/4162 G)

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ELECTIONS - Governorship - Participation in - Conditions

8. By virtue of Section 177(c) of the 1999 Constitution, a person seeking to contest an election into the office of Governor of a State must be a member of a political party and must be sponsored by that party. Furthermore, he must have participated in the party's primary elections. The evidence before the court was that the 2nd respondent participated in the primary election conducted by the APC and came second behind Prince Audu. The conduct of the said primary is not in dispute. It is also not disputed that the appellant did not participate in his party's primary.

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I am of the view that the above analysis represents the correct position of the law. No doubt the situation would have been different if the election conducted on 21/11/2015 was conclusive and the joint ticket of Prince Audu and the appellant declared and returned as the winner of the election. The provisions of Section 181(1) of the Constitution would have become applicable. However, in the circumstances of this case, with the election held on 21/11/2015 being declared inconclusive and the Governorship candidate having died, the appellant could not metamorphose into the Governorship candidate. His status remained that of a Deputy Governorship candidate to a deceased Governorship candidate, particularly as he did not participate in the party's primaries, which is a pre-condition for anyone seeking elective office.

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On the whole, I find no merit in this issue. It is accordingly resolved against the appellant. (pp. 4153 G/4154 F)

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Election petitions - Tribunal - Limited jurisdiction

9. I am of the view that this portion of the judgment fully answered the appellant's complaint. It cannot be said that the

appellant was denied fair hearing in the instance. The court held that since by virtue of Section 285(2) of the Constitution, the jurisdiction of the Tribunal is not at large but limited to the determination of petitions relating to whether any person has been validly elected to the position of Governor of a State or not. The appellant did not suffer any miscarriage of justice by the failure of the trial court to pronounce on the issue, being outside its jurisdiction to do so.

I agree with the court below that in view of the very limited jurisdiction of the election Tribunal, it was not a matter it could have considered in any event and the appellant did not suffer any miscarriage of justice in the circumstance. I refer to *Kraus Thompson Org. Ltd. Vs UNICAL 39 (2004) 9 NWLR (Pt.879) 631 @ 657 F - G* where this court, while acknowledging the duty of a court to determine all issues raised before it and the fact that failure to deal with such issues may lead to an order of rehearing, held that such an order would be inappropriate where it is clear that no miscarriage of justice has been occasioned by the failure to deal with the issue canvassed or that the irregularity is not that of a substantial nature so as to prejudice any of the parties. (pp. 4160 H/4161 E)

ELECTION PETITIONS - Tribunal - Jurisdiction

10. The jurisdiction of Election Tribunals, as held by the court below is clearly provided for in Section 285(2) to the effect that a Governorship Election Tribunal shall have original jurisdiction, to the exclusion of any other court or Tribunal, to hear and determine petitions as to whether any person has been validly elected to the office of Governor or Deputy Governor of a State. Thus, it is the enabling statute that determines the jurisdiction of the Tribunal and not any pronouncement by a court of coordinate jurisdiction. (p. 4161 H)

ACTIONS - Necessary party - Meaning of

11. On the issue of non-joinder of the All Progressives Congress as a party before the Tribunal, it is apposite to consider the factors that make a person a necessary party to an action.

The position of the law was eruditely stated in the well-known case of Green Vs Green (1987) 3 NWLR (Pt.51) 481 where this court held that it is necessary to make a person a party to an action so that he should be bound by the result. It also held that a necessary party is one who is not only interested in the subject matter of the proceedings but also one in whose absence, the proceedings could not be fairly dealt with. The question of proper parties has been held to affect the jurisdiction of the court as it goes to the foundation of the suit in limine, in which case the court would lack jurisdiction to hear the suit. (p. 4163 F)

ELECTION PETITIONS - Political party - Joinder of

12. The trial Tribunal at pages 1280 - 1281 of the record came to the conclusion that the APC was a necessary party to the petition on the following grounds: (a) that the APC is the political party that sponsored both the petitioner (appellant) and the 2nd respondent; (b) that although the petitioner contends that he has sought no relief or complained against the said political party (APC), he has however urged the Tribunal to declare that the return of the 2nd respondent is unconstitutional, illegal, undemocratic, arbitrary, null and void and ultra vires the powers of the 1st respondent, which relief, is indirectly sought against the political party (APC); (c) that the APC is a necessary party being a person likely to be affected by a decision in the matter and whose presence would assist the Tribunal in effectively determining the dispute between the petitioner (appellant) and the 2nd respondent.

The lower court agreed with this finding at page 1631 of the record. I am of the view that the concurrent findings accord with the justice of the case and are not perverse. This is because the reliefs in paragraphs 56(viii) & (xi) of the petition which pray “that it may be determined and thus declared that the return of the 2nd respondent by the 1st respondent in December 5, 2015 is unconstitutional, illegal, unlawful, undemocratic, arbitrary null and void and also ultra vires the powers of the 1st respondent” and for “an order mandating

directing the 1st respondent to issue forthwith to the petitioner a Certificate of Return as the person duly elected as Governor of Kogi State pursuant to the election held in November 21, 2015,” although do not specifically seek reliefs against the APC, are certainly matters in which the interest of the party is involved, as its right to nominate and sponsor a candidate at the election is being questioned. This is moreso, as on the authority of Amaechi vs INEC (supra) and Section 221 of the Constitution, it is the political party that contests elections even though through its candidates and there no provision in our law for independent candidates. I see no reason to interfere with the concurrent findings the two lower courts in this regard. The fact that a political party is a named as a statutory respondent in Section 137(2) of the Electoral Act cannot be a bar to joining a political party as a respondent where its interest is involved and where it would be bound by the result of the action. (p. 4164 A)

ELECTION PETITIONS - Cause of action - Basis

13. On the issue of cause of action, I agree with the finding of the court below, which affirmed the decision of the trial Tribunal that the appellant failed to disclose a cause of action having based his claim substantially on pre- election matters and on the premise that the election which took place on 21/11/2015 was conclusive and that by virtue of Section 179(2) of the Constitution he was entitled to be declared Governor elect. Earlier in this judgment, I held that there was no return made by INEC declaring a winner at the election on 21/11/2015. The election was not concluded until 5th December 2015. The substratum of the appellant’s complaint was non-existent. On the whole, I find no merit in this issue. It is accordingly resolved against the appellant. (p. 4165 B)

ACTIONS - Issues - Competence of

14. I observe that in commencing his submissions under this issue, learned senior counsel for the appellant has again raised the issue of the competence of the appellant to file his peti-

tion at the court below, having met all the requirements under Sections 133(1) and 137(2) of the Electoral Act. This issue was resolved in his favour by the lower court when it overruled the trial Tribunal and held that he had the locus standi to file the petition. However, the fact that a party has the locus standi to institute an action does not mean that the action itself is competent. Its competence will depend on the issues raised, the reliefs sought and the applicable laws. (p. 4174 D)

ACTIONS - Proof - Declaration of right

15. Indeed I have perused the entire petition. I agree entirely with the court below that none of the pleadings relate to the grounds for qualification or disqualification of a candidate for election into office as Governor as provided for in Sections 177 and 182 of the Constitution.

The onus was on the appellant seeking declaratory reliefs to establish his case by his pleadings and by evidence led in support thereof on a preponderance of evidence. Even though the court below proceeded to examine the oral and documentary evidence led by the appellant and concluded that he failed to prove that the 2nd respondent was not qualified or was disqualified from contesting the election in accordance with Sections 177 and 182 of the Constitution, I am of the view that the exercise was done out of an abundance of caution. This is so because evidence led on facts not pleaded goes to no issue. (p. 4178 E)

ELECTION PETITIONS - Proof - Misappropriation of votes

16. By these provisions it is clear that in relation to election petitions the Electoral Act envisages a dispute between candidates of different political parties. This explains the requirement that where an election is questioned on the ground that the respondent was not duly elected by majority of lawful votes cast under Section 138(1) of the Act, the petitioner is required to plead two sets of figures: the scores announced by INEC and the scores he considers to be correct.

Where appropriate he is expected to call witnesses to testify

as to the misapplication of the votes. The appellant based his claim of scoring a majority of the votes cast at the election on the figure of 240,867 votes announced by INEC on 21-11-2015 at a stage when the election was inconclusive. He did not plead two sets of results. (p. 4180 C)

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REPRESENTATION

Chief Wole Olanipekun, SAN for the Appellant with him Chief Bolaji Ayorinde SAN, Dele Adesina, SAN, A.J. Owonikoko SAN, S.I. Ibrahim Esq., Olabode Olanipekun, Oladele Oyelami, Esq., Aisha Aliyu (Mrs.), Bolarinwa Awujoola, Ojonimi Apeh, Vanessa Onyemauwa (Miss), Joy E. Adah (Miss), Oguche Ilemona Godson, Adebayo Majekolagbe, M.O. Idam, Arowosebe A. Oluwaseyi, Madu Gadzama, Olajide A. Omosebi.

D Dr. Alex Izinyon, SAN for the 1st Respondent with him Ahmed Raji SAN, Ehi Uwaifor Esq., B.K.Abu Esq., C.S. Ekeocha Esq., K.O. Omoruan Esq., P.O. Izinyon Esq., H. Abdurrahman (Mrs.), E. Oghojafor Esq., C.N. Atalor (Mrs.), L.O. Fagbemi Esq., M.A. Bawa Esq., Victor Okwudiri Esq., Alex Izinyon II Esq., Zekeri Garuba Esq., O. E Omo Egharevba (Miss), J.A. Majebi (Miss), C.U. Adah (Miss), Esther Ajoge (Miss), W.A. Adeniran, Esq., Dolapo Kehinde, Esq., Titilayo Ajao (Miss), Geraldine Oba (Miss).

J.B. Daudu, SAN for the 2nd Respondent with him A.M. Aliyu SAN, Chief A.A. Adeniyi Esq., Anozie Obi MNI, M.A. Abass Esq., M.Y. Abdullahi Esq., Chief R.O. Balogun Esq., Kelechi Chris Udeoyibo, Amina Zukogi (Miss) P.B. Daudu Esq., E.U. Kitchener (Mrs.), A.T. Ahmed Esq., Muzzammil Yahaya Esq., S.A. Abass Esq., S.O. Alhassan Esq., E.A. Osayomi Esq., K.C. Wisdom Esq., H.O. Umar (Miss), N.O. Isah (Miss), H.M. Ibega Esq., C.E. Ogbozor (Miss), C.C. Oyere (Miss), S.P. Ashiekaa Esq., Adekola Isaac Olawoye Esq., L.S. Mamman (Miss), Fatima Al-Mustapha (Miss), O.J. Wada Esq., Arome Abu Esq., Aminatu Ali Mustapha, Ibraheem Bashir B.

H CASES REFERRED TO

Marwa v. Nyako (2012) 6 NWLR (pt. 1296) 199
 Omoboriowo v. Ajasin (1984) 1 SCNLR 108
 Ngige v. Obi (2006) 14 NWLR (pt. 999) 1

Agagu v. Mimiko (2009) 7 NWLR (pt. 1140) 342
 INEC v. Oshiomole (2009) 4 NWLR (pt. 1132) 611
 Fayemi v. Oni (2010) 7 NWLR (pt. 1222) 326
 Aregbesola v. Oyinlola (2011) 9 NWLR (pt. 1253) 458
 PDP v. INEC (1999) 11 NWLR (pt. 626) 200
 A-G Federation v. Abubakar (2007) 10 NWLR (pt. 1041) 1 B
 INEC v. Musa (2003) 3 NWLR (pt. 806) 72
 Agbaje v. Fashola (2008) 6 NWLR (pt. 1082) 90
 Olofu v. Itodo (2010) 18 NWLR (pt. 1225) 545
 Agbaso v. Ohakim (2008) 1 LRECN 317 C
 Enemu v. Duru (2004) 2 LRECN 1
 Ibrahim v. Shagari (1983) 1 NSCC 34

STATUTES REFERRED TO

Electoral Act 2010 (as amended), ss. 33, 53(2)(4), 68(1)(c), 137(1), D
 156
 Constitution of the Federal Republic of Nigeria 1999, ss. 1(2),
 179(2)(a)(b), 181, 221

LEAD JUDGMENT BY KEKERE-EKUN JSC

This appeal was heard on Tuesday 20th September 2016. On that day I dismissed the appeal and promised to give my reasons for doing so today. Facts: In preparation for the Kogi State Governorship Election scheduled for 21st November 2015, the All Progressives Congress (APC) held primary elections on 29th August 2015 to choose its flag bearer. Several members of the party, including the late Prince Abubakar Audu and the 2nd respondent, Yahaya Bello contested the said primary whereat the late Prince Audu emerged the winner while the 2nd respondent came second. The appellant herein did not take part in the primary election. F G

Having won the primary election, the late Prince Audu nominated the appellant, Hon. Abiodun Faleke as his running mate and both names were submitted to the Independent National Electoral Commission (INEC), the 1st respondent herein, by the APC as its candidates for the Governorship Election. The election was held as scheduled on 21/11/2015. At the close of the polls, the late Prince Audu/Faleke ticket was leading with 240,867 votes, while the Peoples H

Democratic Party (PDP) was in second place with 199,248 votes. However, as a result of certain electoral malpractices discovered to have occurred in 91 polling units, the 1st respondent, relying on its Manual for Election Officials (updated version) by a Public Notice issued on 22nd November 2016 declared the results of the election inconclusive on the ground that the total number of registered voters in the disputed 91 polling units where elections had been cancelled, which was 49,953, exceeded the margin of votes between the APC and the PDP, which was 41,353 votes and could therefore affect the final outcome of the election.

Unfortunately, Prince Abubakar Audu passed on, on 22nd November 2015 before the conduct of the supplementary election. The news of his demise was communicated to the 1st respondent (INEC) vide a letter dated 23rd November 2015 (Exhibit R2-(4)). By a letter dated 24th November 2015 (Exhibit R1-5), the 1st respondent requested the APC to substitute the deceased with a suitably qualified candidate. The APC substituted the deceased with the 2nd respondent, Yahaya Bello, who had come second in the party's primaries and notified the 1st respondent accordingly.

The supplementary election took place on 5th December 2015 in the 91 polling units. The APC, with the 2nd respondent as its new candidate, scored 6,885 votes as against 5,363 votes scored by the PDP, its closest rival. The votes were added to the votes earlier scored by the respective parties on 21st November 2015 and the 2nd respondent was declared the winner of the election and returned as the duly elected Governor of Kogi State.

However, before the conduct of the supplementary election and upon the declaration by the 1st respondent that the election was inconclusive, followed by the death of Prince Audu, the appellant instituted an action before the Federal High Court in Suit No. FHC/ABJ/CS/977 72015 vide an originating summons seeking an interpretation of Sections 1(2), 179(2) (a) & (b) and 181 of the 1999 Constitution (as amended). He also sought the setting aside of the declaration of the 1st respondent that the election of 21st November 2015 was inconclusive and an order directing the 1st respondent to make a return on the already concluded Governorship Election. His contention was that the joint ticket of late Prince Audu and himself

having scored 240,867 votes, which constituted a majority of the lawful votes cast and also constituted one quarter of the votes cast in each of the 21 Local Government Areas of the State, by virtue of Section 179(2) (a) & (b) of the 1999 Constitution (as amended), the election was concluded and the late Prince Audu and himself were deemed to have been duly elected. It was also his contention that by virtue of Section 181 (1) of the Constitution, he was entitled to step into the shoes of late Prince Audu as the Governor elect. The suit was however struck out upon successful objections thereto by the respondents on the ground that by virtue of Section 285 of the Constitution, only an Election Petition Tribunal had the jurisdiction to look into his complaints. B
C

As stated above, the supplementary election subsequently took place on 5th December 2015 and the 2nd respondent was declared the winner. He was accordingly issued with a certificate of return on 7th December 2015. D

Being dissatisfied with the return of the 2nd respondent by the 1st respondent, the appellant filed a petition before the Kogi State Governorship and State Houses of Assembly Election Tribunal on 21st December 2015. The petition was anchored mainly on the construction of Sections 179(2) and 181(1) of the Constitution. The respondents again raised preliminary objections to the competence of the petition. The lower Tribunal took the objections along with the petition. E

At the conclusion of the trial, and after considering the respective written addresses of learned counsel, the Tribunal in a considered judgment delivered on 6th June 2016 upheld the preliminary objections. However, not being the final court and in accordance with established practice, the Tribunal proceeded to consider the petition on its merits in the event that it was found to have erred in sustaining the objections. It found that the petition lacked merit and dismissed it accordingly. F
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Being dissatisfied with the judgment, the appellant appealed to the Court of Appeal, Abuja Division. In a considered judgment delivered on 4th August 2016, the lower court dismissed the appeal. The appellant is still dissatisfied and has further appealed to this court vide his Notice of Appeal dated 8th August 2016. The part of the H

decision of the lower court complained of is as follows:

“The entire decision of the lower court except the portions where it found that:

a. The appellant had the locus standi to file the petition;

b. The petition was not statute barred;

B *c. Where any candidate meets with the requirements of Section 3 179 (2) of the Constitution of the Federal Republic of Nigeria (1999) (as amended) (1999 Constitution), he should be declared winner and returned as duly elected;*

C *d. The appellant and Prince Abubakar Audu won one-quarter of votes cast in each of the Local Government Areas of Kogi State and also led the nearest contender, Captain Inuwa Wada;*

D *e. For the purpose of nomination and contest at an election into the office of Governor of a State in Nigeria, there can be no validly nominated Governorship candidate without a Deputy Governorship candidate; and*

f. Late Prince Abubakar Audu nominated the appellant as Deputy Governor pursuant to Section 187 of the 1999 Constitution in order to validate the former’s candidacy.”

E In compliance with the Rules of this court, the parties duly filed and exchanged their respective briefs of argument. At the hearing of the appeal on 20th September 2016, Chief Wole Olanipekun, SAN, Chief Bolaji Ayorinde, SAN, Dele Adesina, SAN and A. J. Owonikoko, SAN leading a retinue of other learned counsel adopted
F and relied on the appellant’s brief filed on 18/8/2016, the appellant’s Reply Brief to 1st respondent’s brief filed on 01 /09/2016 and the appellant’s Reply Brief to 2nd respondent’s brief filed on 07/09/2016 and urged the court to allow the appeal. He also made oral submissions
G in further adumbration of the arguments in the said briefs.

Learned senior counsel for the 1st respondent, Dr. Alex Izinyon, SAN and Ahmed Raji, SAN leading a team of other learned counsel adopted and relied on the 1st respondent’s brief filed on 26/8/2016 and a separate list of authorities filed the same day. He also
H addressed the court in oral amplification of the submissions therein.

Learned senior counsel, J.B. Daudu, SAN and A.M. Aliyu, SAN leading other learned counsel on behalf of the 2nd respondent adopted and relied on the 2nd respondent’s brief filed on 02/09/ 2016

in urging the court to dismiss the appeal. He also adopted the arguments of Dr. Izinyon, SAN for the 1st respondent and made same submissions in further adumbration of his brief.

The appellant had distilled 10 issues for determination in this appeal. The 1st respondent formulated 4 issues while the 2nd respondent also formulated 4 issues. B

Appellant's issues:

1. Having regard to the specific provisions of Sections 179(2) and 181(1) of the Constitution, relevant provisions of the Electoral Act, 2010, as well as the facts and circumstances of this case, whether the lower court did not fall into serious error by dismissing appellant's case on the ground that the 1st respondent never made a return at the election of 21/11/15, as a result of which it agreed that the said election was inconclusive. (Grounds 9 and 10) C

2. Having regard to the fact that the joint ticket of the late Prince Abubakar Audu and the appellant garnered 240,867 votes at the Kogi Governorship election of November 21, 2015 and also complied with the constitutional requirements of Section 179(2) of the Constitution, whether the said joint ticket was not deemed to have been duly elected as Governor and Deputy Governor respectively. (Grounds 1, 3 and 4) D

3. Considering the facts and circumstances of this case, whether Section 181 of the Constitution does not enure in favour of the appellant. (Ground 2) E

4. Considering the clear constitutional provisions relating to the due election of a Governor and Deputy Governor, whether the lower court did not fall into serious error by relying on an isolated provision of INEC's Manual for Election Officials (updated) to affirm and approve of both the 1st respondent and trial tribunal's declaration of the Governorship election of 21/11/15 as inconclusive. (Grounds 5, 6, 7 and 8) F

5. Having regard to the narrow constitutional and legal issues, in the petition, as well as the lower court's finding that appellant's case was/is straightforward and undisputed, whether the lower court did not fall into very serious error by later holding that the pleadings of the appellant could not sustain the petition. (Grounds 15, 31, 34 and 36) G

6. Was the lower court not in error by holding that the 2nd respondent could rightly appropriate the votes cast for the joint ticket of the late Prince Abubakar Audu and the appellant at the Governorship election of 21/11/15. (Grounds 11, 12 and 13)

B 7. Having regard to the very clear provisions of Sections 177,182 and 187 of the Constitution, read together with relevant provisions of the Electoral Act, as well as the evidence on record, whether the lower court was not wrong in holding that the 2nd respondent was qualified to contest the Governorship election in Kogi State and be returned as Governor of Kogi State. (Grounds 27, 28, C 29, 30, 32, 33, 35, 37 and 39)

8. Considering the judgment of the Federal High Court (per Kolawole, J) in Suit No. FHC/ ABJ/CS/977 /2015 delivered on 4/12/ 15, the clear constitutional and legal issues involved in the petition D and the circumstances of the petition, whether the lower court was not wrong by affirming the trial Tribunal's decision which allowed the respondents' preliminary objections and further holding that the trial Tribunal lacked jurisdiction to entertain the action. (Grounds 14, 22, 23, 24, 25, 26 and 38) 1st Respondent's issues:

E 1. Whether considering the peculiar facts and circumstances surrounding this case, the lower court was not right in refusing to hold that the appellant was elected the Governor of Kogi State on the basis of Sections 179(2) (a) and (b) and 181(1) of the 1999 F Constitution (as amended) and affirming the decision of the trial Tribunal which affirmed the 1st respondent's decision declaring the 2nd respondent the elected Governor of Kogi State. (Grounds 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11-12,13 and 16 of the Notice of Appeal)

G 2. Whether the court below was not right in its decision on appellant's complaint that the trial Tribunal failed to resolve and determine the alleged weighty Constitutional and Statutory issues raised by him before the trial Tribunal (Grounds 17, 18, 19, 20, 21 and 22 of the Notice of Appeal)

H 3. Whether the court below was not right in affirming the decision of the trial Tribunal allowing Respondents' Preliminary Objection on Grounds/Issues of subject matter jurisdiction, cause of action and non joinder of APC. (Grounds 23, 24, 25, 26 and 30 of the Notice of Appeal)

4. Whether the court below was not right in its decision that the 2nd respondent was not qualified to be returned as the Governor of Kogi State and affirmed the trial Tribunal's decision that the grounds and reliefs in the appellant's petition were incompetent at variance with and unsupported by the pleadings.

(Grounds 14, 15, 27, 28, 29, 31, 32, 33, 34, 35, 36, 37 and 38 of the Notice of Appeal) B

2nd Respondent's Issues:

1. Whether the court below can be faulted when it held that the 1st respondent acted rightly in applying the guidelines 39 in the Manual to resolve the conundrum that had arisen on the 21st of November, 2015 and that the announcement of the election as inconclusive is not contrary to the Constitutional provisions of Section 179(2) and 181(1) of the 1999 Constitution upon which the appellant has hinged his entire case? (Grounds 1,2,3,4, 5,6, 7, 8,9,10, 12 and 15) C
D

2. Whether the court below could be faulted when it affirmed the decision of the trial Governorship Tribunal on the validity of the respondents' preliminary objections as it relates to the issues of subject matter of jurisdiction, cause of action and nonjoinder of the appellant's political party? (Grounds 22, 23, 24 and 25) E

3. Whether the court below could be faulted for affirming the trial Tribunal's decision votes cast for the joint ticket of the late Prince Abubakar Audu and the appellant in the Governorship Election of November 21, 2015 was transferable to the 2nd respondent as held by the Trial Tribunal? (Grounds 18, 26, 29, 30, 31, 33, 34 and 35) F

4. From the entire facts and circumstances leading to this appeal whether the court below can be faulted when it affirmed the position of the trial Tribunal that the petition was incompetent ab initio especially when the facts in support of the 2 grounds propping up the petition were - unsupportable in law and in fact? (Issue No.4) G

Having carefully examined all the issues, I am of the view that the 4 issues formulated by the 2nd respondent are adequate to fully resolve all the issues in contention in this appeal Accordingly, I adopt the said issues with slight variations in phraseology. The issues are as follows: H

1. Whether the court below was right when it held that the 1st respondent acted correctly in applying the guidelines in the Manual for Electoral Officers (updated version) to resolve the conundrum that had arisen on the 21st of November 2015 and in holding that the announcement of the election as in conclusive is not contrary to
B Sections 179(2) and 181(1) of the 1999 Constitution.

2. Whether the court below was right when it affirmed the decision of the trial Governorship Tribunal on the validity of the respondents' preliminary objections as it relates to the issues of subject
C matter, jurisdiction, cause of action and non-joinder of the appellant's political party.

3. Whether the court below was right in affirming the trial Tribunal's decision that votes cast for the late Prince Audu and the appellant in the Governorship Election of November 21, 2015 were
D transferable to the 2nd respondent.

4. Whether, from the entire facts and circumstances leading to this appeal, the court below rightly affirmed the decision of the trial Tribunal to the effect that the petition was incompetent ab initio.

Issue 1

E This issue covers the appellant's issues 1, 2, 3, 4, 6 and 10 and the 1st and 2nd respondents' issue 1 respectively.

In order to put the submissions of learned senior counsel for the appellant in proper context, it must be re-iterated that it is the appellant's contention that the election into the office of Governor of
F Kogi State held on 21st November 2015 was conclusive with the ticket of the late Prince Abubakar Audu and himself scoring a majority of the votes cast in one quarter of all the Local Government Areas in the State. That by virtue of Section 179(2) of the 1999 Constitution
G (as amended), the said joint ticket was deemed to have been duly elected. That having regard to the unfortunate demise of the Governorship candidate, Prince Audu, by operation of section 181 of the Constitution, he ought to have been sworn in as the Governor elect.

Appellant's submissions:

H The appellant's first challenge against the judgment of the court below is its finding that Sections 179(2) and 181 of the Constitution are inapplicable in the circumstances of this case because INEC (1st respondent) did not make a declaration or return of a winner at

the 2015 Kogi Governorship election. Chief Wole Olanipekun, SAN submitted that there is nothing in Sections 179 or 181(1) of the Constitution that makes a declaration or return a condition precedent to the application of those sections. He contended that by reading the word “*return*” into Section 181 the lower court read into the section what is not contained therein and thereby defeated the purpose of its express provisions. B

Relying on *Marwa Vs Nyako* (2012) 6 NWLR (Pt. 1296) 199 @ 279 he submitted that a constitutional provision must not be interpreted in such a way as to defeat its purpose. C

In his view, the operative part of the provisions is the phrase “*duly elected*” which refers to the act of the electorate casting their votes. He opined further that the interpretation given to the Sections by the two lower courts has the effect of subjecting the franchise of the electorate to the administrative action or inaction of the returning officer. Relying on the canon of interpretation of constitutional provisions which requires that similar provisions must be construed together, he submitted that Section 181 of the Constitution should be construed in the light of Section 179(2), thereof, which both deal with “*due election*” and not Section 156 of the Electoral Act 2010 (as amended), which is a general definition section. D

Learned senior counsel argued that having regard to the jurisdiction conferred in Election Tribunals pursuant to Section 285(2) of the Constitution to hear and determine questions as to whether any person has been validly elected to the office of Governor or Deputy Governor of a state, it is clear that a declaration by INEC cannot assume the status of finality or being sacrosanct. He cited the following cases to buttress his contention that in appropriate cases, the courts have discountenanced the action or inaction of INEC in respect of its declaration after a Governorship election to pronounce the persons validly elected pursuant to Section 179 of the Constitution: *Omoboriowo Vs Ajasin* (1984) 1 SCNLR 108; *Ngige Vs Obi* (2006) 14 NWLR (Pt.999) 1; *Agagu Vs Mimiko* (2009) 7 NWLR (Pt.1140) 342; *INEC Vs Oshiomole* (2009) 4 NWLR (Pt 1132) 611; *Fayemi Vs Oni* (2010) 7 NWLR (Pt.1222) 326 and *Aregbesola Vs Oyinlola* (2011) 9 NWLR(Pt.1253) 458. E

Learned senior counsel argued that Section 69 rather than F

Section 156 of the Electoral Act is more apposite in relation to Section 179 of the Constitution as, it is specifically confined to and relates to declaration of results and is subject to Section 179 of the Constitution, whereas Section 156 is a general definition section. He also referred to Section 68(1)(c) of the Electoral Act, which makes the declaration of scores and return of a candidate by a returning officer subject to review by a Tribunal or Court in an election petition. Reference was also made to Sections 133(1), 133(2) and 138(1)(c) of the Electoral Act to buttress the point that the declaration or return of a candidate is not a condition precedent to due election under Sections 179(2) and 181(1) of the Constitution but rather what is to be considered in determining due election are the votes cast by the electorate.

It is Chief Olanipekun SAN's position that the lower court having held at pages 1605 - 1606 of the record that the joint ticket of the late Prince Audu and the appellant met the requirements of Section 179(2) and that where any candidate for the office of the Governor meets the said requirements, he should be declared winner and returned as duly elected, the said finding, not having been appealed against constitutes *res judicata* and is binding on all the parties; that in the circumstances the lower court ought to have determined the appeal in the appellant's favour. He referred to the announcement by INEC of the votes scored by the respective parties at the close of polls on 21/11/ 2015 as found by the lower court at pages 1603 - 1604 of the record and submitted that Section 179(2) of the Constitution having been fully satisfied, the lower court ought to have granted the appellant's reliefs 56(i), (ii), (iii), (iv), (vii), (viii), (ix), (x), (xi) and (xii) of the petition. He maintained that the provisions of Section 179(2) of the Constitution were fully satisfied at the election of 21 /11 /2015 and that the appellant and Prince Audu were therefore deemed duly elected.

On the applicability of Section 181(1) of the Constitution to the facts of this case, learned senior counsel premised his argument on the contention that the appellant and Prince Audu, were already duly elected at the election that took place on 21/11/2015. On the relationship between a Gubernatorial candidate and his running mate, PDP Vs INEC (1999) 11 NWLR (Pt.626) 200 @ 240 - 241 was

referred to. He submitted that the ticket of The Governorship candidate and his running mate is a joint ticket and remains so up till the conclusion of the election A-G. Federation Vs Abubakar (2007) 10 NWLR (Pt.1041) 1 referred to.

It is also learned senior counsel's contention that in affirming the 1st respondent's declaration that the election was inconclusive based on its guidelines, the two lower courts were wrong as the due election of a Governor and Deputy Governor of a state is exclusively provided for under the Constitution, such that the Constitution does not allow expressly or impliedly for any extra-constitutional legislation in the determination of the "*due election*" of a Governor. He argued that the Electoral Manual for the training of INEC staff cannot add to, subtract from or defer or regulate the application of the provisions of Section 179(2) of the Constitution in respect of the due election of the Governor of Kogi State, after elections had already held across all the 21 Local Government Areas of the State on 21/11/2015.

Chief Olanipekun, SAN submitted further that contrary to the finding of the court below, a conundrum could not have arisen on 21/11/2015 because the provisions of section 179(2) of the Constitution had already been satisfied. Relying on Section (2) of the Constitution with emphasis on the word "*shall*" used therein, he submitted that it means in effect that only the Constitution can determine how control of government in any part of Nigeria can be done and to that extent Sections 179 and 181, 191, 191(2) and 305 of the Constitution provide for the four scenarios in which a person can assume the office of Governor of a state. He argued that having regard to the provisions of Section 179 of the Constitution it was wrong for the lower court to have resorted to any other instrument and document in determining whether a candidate was duly elected as Governor on 21/11/2015. Reliance was placed on the case of INEC Vs Musa (2003) 3 NWLR (Pt.806) 72 @ 157 for the principle that "*where the constitution sets the condition for doing a thing, no legislation of the National Assembly or of a State House of Assembly can alter those conditions in any way unless the Constitution itself as an attribute of its supremacy so allowed.*"

He rejected the contention of the 1st respondent at the court below that there was a lacuna in the law as regards Section 179(2)(a) of the Constitution and that in any event INEC's guidelines cannot

amend or augment the provisions of the Constitution.

He submitted that in interpreting and applying the provisions of the Constitution resort can only be made to the express content of the Constitution itself. *A.C. & Anor. Vs INEC (2007) 12 NWLR (Pt.1048) 220 @ 318* referred to. On the limited scope and application of the Manual for Election 30 Officials reliance was placed on *Agbaje Vs Fashola (2008) 6 NWLR (Pt.1082) 90 @ 127 - 128*.

Alternatively, it is contended that even if the Manual could have been relied upon, it ought to have been read and applied in conjunction with the Electoral Act, which stipulates that only a person with a voter's card can vote. He noted that the Manual contains provisions relating to Permanent Voters Card (PVC) and the disenfranchisement of any person to vote without a permanent voters card. He referred to paragraph 2.0 at page 8 of the Manual on page 271 of the record and other relevant paragraphs. He argued that Chapter 3 paragraph 3.11 step 14 of INEC's Manual ought not to have been read in isolation of its other provisions and the Electoral Act. He noted that INEC declared the election inconclusive for the reason that the margin of win between the two leading candidates was less than the total number of registered voters in the 91 polling units where supplementary elections were scheduled to hold on 5/12/2015. In his view, since only registered voters with PVCs were eligible to vote, the proper construction of the provisions of the Manual is that it is the total number of registered voters who had collected their PVCs in the disputed 91 polling units that should have been considered in reaching a determination as to the margin of win between the two leading candidates. Reference was also made to Sections 53(2) and (4) of the Electoral Act to the effect that where cancelled results (for whatever reason) would not have an impact on the overall results, a return is to be made without a fresh poll. He contended that this was the situation in this case and that the supplementary election was unwarranted.

On the finding of the lower court that the substitution of the 2nd respondent was done pursuant to Section 33 of the Electoral Act and his entitlement to the votes cast on 21/11/2015, Chief Olanipekun, SAN argued that the election of 21/11/2015 had already been concluded and under Section 33 of the Electoral Act, the substitution of a candidate can only arise before an election and not

after it has been concluded. Olofu Vs Itodo (2010) 18 NWLR (Pt.1225) 545 @ 587 referred to. He submitted that if, as held by the lower court, the appellant's right expired with that of Prince Audu upon his demise, Section 181(2) of the Constitution compels a fresh election and in the same vein votes garnered by Prince Audu expired with their candidacies and could not be appropriated by the 2nd respondent. He submitted that under Section 221 of the Constitution, it is the candidate for whom a political party canvasses votes that is eligible to benefit from the said votes and no other person. Relying on the case of Amaechi Vs INEC (supra), he contended that it is the winner of the primary election that should remain as the political party's candidate and that since the 2nd respondent did not win the primary election nor participate in the election of 21 /11/2015, he could not appropriate the votes won by the Audu/Faleke ticket. The appellant's issue 10 which is subsumed under this issue 1, seeks to advance further reasons based on mathematical calculation of the geographical spread of the votes garnered on 21/11/2015, which constituted results from 96.4% of all the polling units in the state, to contend that the said supplementary election was unnecessary.

1st Respondent's submissions:

In reaction to the above submissions, Dr. Alex A. Izinyon, SAN disagreed with Chief Olanipekun, SAN's contention that a return by a Returning Officer at an election is a merely administrative action. He contended that it represents the climax of the exercise of the constitutional powers of INEC to conduct elections. He agreed with the learned senior counsel that the provisions of the Constitution must be read as a whole to determine the intention of the lawmakers. He referred to Section 153(l)(f) thereof which establishes INEC and Section 153(2) which states that the composition and powers of the electoral body are as contained in Part 1 of the Third Schedule to the Constitution. He referred to Section 15(a) and (i) paragraph F of Part 1 thereof and submitted that by its constitutional powers to "*organise, undertake and supervise all election to the offices of the President, Vice President, Governor and Deputy Governor of a State...*", INEC is the only body to determine when the requirements of Section 179(2) have been met and that it is only after such determination that the said decision can be questioned in an election peti-

tion. In other words, that there must be a return or declaration of a winner by INEC before such return can be questioned. *Agbaso Vs Ohakim* (2008) 1 LREC 317 @ 359 F - H referred to. That to do otherwise would curtail and interfere with INEC's constitutional powers, thereby eroding its independence. He submitted that a return or
 B declaration of a winner by INEC is fundamental and that the lower court was right when it held that there being no return or declaration of a winner by INEC in this case, the appellant cannot claim to have won the election on 21/11/2015 along with Prince Audu. On Chief
 C Olanipekun, SAN's contention that a "return" cannot be the same as "duly elected" as contained in Section 181(1) of the Constitution, he referred to Section 156 of the Electoral Act which defines "return" to mean "the declaration of a Returning Officer of a candidate in an election under this Act as being the winner of that election". He
 D reiterated that for a person to be duly elected there must have been a declaration by a Returning Officer that the said person was the winner of an election. He submitted further that the casting of votes by the electorate, does not in itself translate to a person being duly
 E elected, as an independent umpire must count the votes cast for each candidate in the election and declare the winner based on the votes cast. He submitted that this is where the Returning Officer comes in and that the declaration of a winner by the said Returning Officer is mandatory. He submitted that the line of cases beginning with
 F *Omaboriwo Vs Ajasin* (supra) relied upon by Chief Olanipekun, SAN are inapplicable to the circumstances of this case.

With regard to learned senior counsel's contention regarding Section 179(2) of the Constitution, Dr. Izinyon, SAN argued that the provision only states what should guide a Returning Officer when
 G making a return. He submitted further that Sections 68(1)(c) and 69 of the Electoral Act buttress the fact that the declaration of a winner in an election is what gives the legal authority to an Election Tribunal to hear and determine an election petition. *Enemuo Vs Duru* (2004) 2 LREC 1 @ 27 D - A. He argued that Sections 133 and 137(2) of
 H the Electoral Act also do not do away with the need for a return in an election but rather that Section 133 emphasises the need for a return before a petition could be filed. He also rejected the contention that Section 133(1)(c) of the Electoral Act could be interpreted

to mean that in determining the number of votes cast and who is deemed to have been duly elected under Section 179(2) of the Constitution, a declaration or return by INEC is not a condition precedent. Learned senior counsel argued further that the finding of the two lower courts that a declaration or return of a candidate as winner of an election is a condition precedent to due election under Sections 179(2) and 181 of the Constitution does not amount to subjugation of the said constitutional provisions to a declaration or return by an INEC Returning Officer, as claimed by the appellant but rather that there must first be a declaration and in the process of making a declaration, the provisions of Section 179(2) of the Constitution would be considered. B
C

On the submission that the lower court at pages 1605 - 1606 of the record made findings against the respondents, which have not been appealed against, he submitted that the relevant portion of the judgment was not quoted in full and that what the court held was that the application of the provisions of Section 179(2) of the Constitution turns on the peculiar facts and circumstances of this case. He also contended that other portions of the judgment referred to as findings that were not appealed against (pages 1603 - 1604) of the record were in fact narrations of the facts of this case. In paragraph 4, 58 page 13 of his brief he reproduced the summation of the lower court and submitted that there was no finding that the appellant and Prince Audu scored the highest number of votes cast and one quarter of all the votes cast in all the Local Government Areas of the State. That the finding of the court was that the conditions in Section 179(2)(a) of the Constitution had not been met because when elections are conducted in the 91 polling units where elections were cancelled, any of the two leading political parties could score the highest number of votes cast. D
E
F
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On the appellant's contention that having scored the highest number of votes at the election held on 21/11/2015, the joint ticket was deemed to have won the election and upon the demise of Prince Audu the provision of Section 181 of the Constitution became effective, learned senior counsel submitted that as there was no return based solely on the election conducted on 21/11/2015, the contention is misconceived. He submitted that Section 181(1) of the Con- H

stitution and the cases of P.D.P. Vs INEC (supra) and A-G. Federation Vs Abubakar (supra) are inapplicable to the facts and circumstances of this case.

B On whether the finding of the lower court was contradictory as argued by Chief Olanipekun, SAN when on the one hand it stated that the appellant and the late Prince Audu scored the highest number of votes in the election of 21/11/2015 and on the other hand referred to a conundrum thrown up by the said election, learned senior counsel argued that what the court did was merely to state the C political party and its candidates who scored the highest number of votes cast in the areas where elections were conducted on 21/11/2015 and emphasised the fact that the court did not at any point hold that the votes cast were final or that they were in respect of a concluded election. He submitted that a conundrum did arise in respect of the election of 21st November 2015 because the provisions of the Constitution were not satisfied having regard to the fact that the results in 91 polling units were not part of the results declared and the number of registered voters in the said polling units could affect the final outcome of the election as between the two contend- E ing political parties. He submitted that Section 1(2) of the Constitution was not violated in the circumstance.

He submitted further that the provisions of the INEC Manual relied upon by the lower court which provided specifically for the F situation that arose in this case have not been shown to be inconsistent with the provisions of Section 179(2) of the Constitution. He distinguished the cases cited by learned senior counsel for the appellant in support of his contention that the INEC Manual lacked binding force on the ground that in those cases the petitioners sought to G rely on the provisions of the Manual as ground for nullifying the elections they participated in, contrary to the provisions of the Electoral Act.

H Learned senior counsel for the 1st respondent submitted that the alternative submission of learned senior counsel for the appellant that the lower court should have been guided by the total number of voters with PVCs rather than the total number of registered voters is misconceived, as it is contrary to the “provisions of the Manual. He submitted further that Chapter 3 paragraph 3.11 step 14 of the

Manual had adequately provided for the situation that arose in this case and there was therefore no need for recourse to other provisions of the Manual.

With regard to the submission that the 2nd respondent could not have been substituted for the deceased Prince Audu having regard to the provisions of Section 33 of the Electoral Act and the appellant's contention that the election had been concluded 30 on 21/11/2015, learned senior counsel in paragraph 4.42 at pages 10-11 of his brief, submitted that by virtue of the said Section 33, the APC had a right to substitute its deceased candidate as a result of-
 C
 fereee majeure. He noted that the section creates an exceptional circumstance where a candidate dies before the election is concluded. He noted that in the instant case, the substitution of the 2nd respondent took place after the election held on 21/11/2015 was declared inconclusive. That the APC had a legal interest in the 240,867 votes D won before its Governorship candidate died.

He referred to the judgment of the lower court at page 1614 of the record to the effect that by a combined reading of Section 221 of the Constitution and Section 137(1) of the Electoral Act, the APC had a right to substitute the deceased candidate by virtue of Section E 33 of the Electoral Act and that having made the substitution, the votes cast were rightly appropriated to both the substitute candidate and the APC and further that the 2nd respondent adopted the appellant to remain as his associate and Deputy Governorship candidate, F thereby doing away with the need to nominate another. In answer to the contention of learned senior counsel for the appellant that the lower court by its findings imposed the appellant on the 2nd respondent as his Deputy Governorship candidate, Dr. Izinyon, SAN submitted that the findings were supported by the evidence of the 2nd G respondent as contained in his witness deposition at pages 243, 244 and 246 of volume 1 of the record, which show that this position was endorsed by the APC and further confirmed at pages 107 -110 of volume 1 of the record, which reflect the names of the parties' candidates at the supplementary election with the name of the appellant H as the Deputy Governorship candidate of the 2nd respondent. Furthermore that Exhibits PI 4, P15 and P16 written directly to the 1st respondent by the appellant are to the effect that he could not be the

Deputy Governorship candidate of the 2nd respondent having won the election of 21st November 2015 and that Prince Audu having died, he ought to be declared the Governor elect. Relying on the authorities of Amaechi Vs INEC (supra) and Agbaje Vs INEC (supra), he submitted that the votes won in an election belong to a political party and not the candidate.

On the issue of geographical spread and percentage of votes won in the election conducted on 21/11/2015, learned senior counsel submitted that the lower court was right when it affirmed the judgment of the court below to the effect that the outcome of the supplementary election could affect the party with the highest number of votes cast at the election held on 21/ 11/2015 and thus affect the volume of the entire election. He argued that the eventual outcome of the supplementary election could not be a ground for contending that it ought not to have been held in the first place.

2nd Respondent's submissions

In reply to the submissions of Chief Olanipekun, SAN on the issue of return and due election, within the meaning of Sections 179(2) and 181 (1) of the Constitution, J.B. Daudu, SAN, learned senior counsel for the 2nd respondent, submitted that the trial Tribunal whose decision was affirmed by the court below, was right when it held that Section 187(1) of the Constitution did not confer on the appellant the status of a “*candidate*”, as being the late Prince Audu’s running mate, he was inextricably tied to Prince Audu’s umbilical cord. He submitted that in the absence of the Governorship candidate, the Deputy Governorship candidate had no rights to enforce. He premised his contention on the fact that no return or election had been determined in favour of the duo before the demise of Prince Audu. He maintained that unless and until there is a return, the candidacy of the appellant is inchoate and cannot crystallise into a right to contest the election. That he could not in the circumstances have been duly elected in fulfilment of Section 179(2) of the Constitution. Ibrahim Vs Shagari (1983) 1 NSCC 34 referred to.

In addressing the various contentions of the appellant on the implication of the volume and geographical spread of the 240,867 votes scored at the election of 21/11/2015 by the joint ticket of Prince Audu/Appellant; the exclusivity of the provisions of the 1999

Constitution in determining the due election of a Governor, the fact that only voters with Permanent Voters Cards could cast their votes and the fact that the total number of voters with PVCs was less than the margin of victory, he made copious references to the judgment of the Tribunal in paragraph 3.6 at pages 18 - 19 of his brief and the various finding of the lower court in respect thereof, which are reproduced in paragraph 3.7 of the brief at pages 19-21 thereof. He submitted that the findings of the two lower courts to the effect that (a) at no point in time was the appellant the Gubernatorial candidate for the office of Governor; (b) that sections 179(2)(a) & (b) only apply when the election has been concluded and a winner declared; (c) that the Governorship election of Kogi State was not concluded as at 21/11/2015 and (d) that the issue of the highest scores between APC & PDP will only come into play when the election has been concluded and a winner declared constitute concurrent findings of fact of the two lower courts, which this court would not lightly interfere with. Evelyn Ehwrudje Vs Warri Local Government & Anor. (2016) LPELR - 40052 referred to.

He submitted that the provisions of the Election Manual are not only made pursuant to the Constitution, they are also made to fulfil the requirements provided in the Constitution. He submitted that the effect of Section 179(2) of the Constitution is that no candidate shall be declared the winner of a gubernatorial election unless he has fulfilled the two conditions stipulated therein, to wit: that he has the majority of the votes cast at the election and that he has not less than one quarter of the votes cast in each of at least two-thirds of all the local government areas in the state. He submitted that in this case the requirements were not met.

Relying on the case of Hon. Ihuema Vs. Hon. Azubuike & Ors. (2015) LPELR- 25977 he submitted that the provisions of chapter 3 paragraph 3.11, step 14 of the 1st respondent's Manual is for the purpose of accomplishing the conditions stipulated in Section 179(2) and 181 of the Constitution. He submitted further that in the conduct of an election, it is the responsibility of the 1st respondent to declare it conclusive or inconclusive depending on the circumstances of the election. Dibiagwu Vs INEC (2012) LPELR - 9831 (CA) referred to. He therefore submitted that the 1st respondent acted within

its powers when it declared the elections held on 21st November 2015 inconclusive based on ₁₀ the guidelines in the election manual.

Learned senior counsel submitted further that the key words in Sections 179(2) and 181 of the Constitution is the phrase “*duly elected*”, which means that due election is a condition precedent to the operation of the section. He did not agree with Chief Olanipekun’s contention that the courts below, by importing a ‘return’ as a condition precedent to the operation of Sections 179(2) and 181 of the Constitution had supplanted the operative parts of the provisions.

He submitted that a candidate cannot be returned unless he has been duly elected in an election declared conclusive by the 1st respondent. On the meaning of a return in an election, he referred to Ibrahim Vs Shagari (supra). He also referred to Fayemi & Anor. Vs Oni (2010) LPELR - 4145 (CA).

As noted in the introductory part of this judgment, learned senior counsel for the appellant filed Reply Briefs in respect of the 1st and 2nd respondents’ briefs respectively. However it must be reiterated here that the purpose of a Reply brief is to address fresh points raised in a respondent’s brief of argument. It is not for the appellant to raise fresh issues or to re-argue the appeal. See: S.M. Ltd. Vs Woermann-line (2009) 13 NWLR (Pt.1 157) 149; Harka Air Services (Nig.) Ltd Vs Keazor Esq. (2011) LPELR - 1353 (SC). I have considered the appellant’s replies to the arguments of learned senior counsel for the 1st and 2nd respondents. The replies in my view have largely re-canvassed the arguments in’ the appellant’s brief. No new issue raised by the respondents has been brought to the court’s attention. The copious submissions therein are accordingly discountenanced.

RESOLUTION OF ISSUE 1

The gravamen of all the sub-issues canvassed under this issue and indeed the crux of this appeal lies in the following questions:

(i) Whether the late Prince Abubakar Audu and the appellant, Hon. James Abiodun Faleke met the requirements of section 179(2)(a) and (b) of the 1999 Constitution (as amended) and thus entitled to be deemed the duly elected Governor and Deputy Governor of Kogi State in the Governorship election that was conducted

on 21st November 2015;

(ii) Whether the election conducted by the 1st respondent on 21/11/2015 was rightly declared inconclusive;

(iii) Whether the appellant, pursuant to section 181(1) of the Constitution was entitled to step into the shoes of the deceased Governorship candidate as the Governor-elect; B

(iv) Whether, on the other hand, the 2nd respondent was entitled to be substituted for the late Prince Audu as Governorship candidate having regard to the provisions of section 33 of the Electoral Act, and finally C

(v) Whether the 2nd respondent was entitled to appropriate the votes garnered by the Audu/Faleke ticket at the 21/11/2015 election.

I have at the beginning of the judgment summarised the salient facts that gave rise to this appeal. The parties are all ad idem that the facts are not in dispute. What is in issue is the proper application of the law to these facts. It would be safe to say that the two major factors that have led to the dispute between the parties are the declaration by the 1st respondent that the election conducted on 21/11/2015 was inconclusive and the unfortunate demise of the Governorship candidate, Prince Audu on 22nd November 2015. E

The first issue to resolve, in my considered view is the status of the election that took place on 21st November 2015. The appellant contends that the entire election to the office of Governor of Kogi State was concluded on that day with the late Prince Audu and the appellant emerging as the clear winners, while the respondents contend that the election was inconclusive having regard to the cancellation of votes in 91 polling units and the fact that the margin of win between the parties was less than the total number of registered voters in the affected units. It is the respondents' further contention that the election was concluded on 5th December 2015 after the conduct of the supplementary election wherein the 2nd respondent emerged victorious, having been substituted by his party, the APC for the late Prince Audu. F G H

It was argued on behalf of the appellant that it is an affront to the supremacy of the Constitution for the 1st respondent to have applied provisions of its Manual for Election Officials to circumvent

the provisions of Section 179(2) of the Constitution.

I deem it appropriate at this stage to reproduce some of the salient provisions of the Constitution of the Federal Republic of Nigeria 1999 (as amended) that have been referred to in the resolution of this issue. Sections 1(2), 179(2) (a) and (b) and 181 provide as follows:

Section 1(2):

“The Federal Republic of Nigeria shall not be governed nor shall any person or group of persons take control of the government of Nigeria or any part thereof, except in accordance with the provisions of this Constitution.

Section 179(2):

(2) A candidate for an election to the office of Governor of a State shall be deemed to have been duly elected where, there being two or more candidates -

(a) he has the highest number of votes cast at the election; and

(b) he has not less than one-quarter of all the votes cast in each of at least two-thirds of all the local government areas in the State.

Section 181(1):

If the person duly elected as Governor dies before taking and subscribing the Oath of Allegiance and Oath of Office, or is unable for any reason whatsoever to be sworn in, the person elected with him as Deputy Governor shall be sworn in as Governor and he shall nominate a new Deputy-Governor who shall be appointed by the Governor with the approval of a simple Majority of the House of Assembly of the State.”

There is no doubt, as rightly submitted by learned senior counsel for the appellant, with reference to Section 1(2) of the Constitution quoted above, that no-one can become the Governor of a State in this country without complying with the relevant Constitutional provisions. The fundamental question is: what do the words “duly elected” mean in the context of Sections 179(2) and 181(1) of the Constitution?

The settled canons of construction of constitutional provisions are, inter alia, that the instrument must be consid-

ered as a whole, that the language is to be given a reasonable construction and absurd consequences are to be avoided. See: A.G. Bendel State Vs. A-G. Federation (1981) 10 SC 132-134; Ishola Vs Ajiboye (1995) 1 NWLR (Pt.352) 506. **It is equally well settled that where words used in the Constitution or in a Statute are clear and unambiguous, they must be given their natural and ordinary meaning, unless to do so would lead to absurdity or inconsistency with the rest of the statute.** See: Ojokolobo Vs Alamu (1987) 3 NWLR (Pt.61) 377 @ 402 F-H; Adisa Vs Oyinlofa & Ors (2000) 6 SC 5 (Pt. II) 47; Saraki Vs F.R.N. (2016) LPELR - 40013 SC.

The word “*duly*” is defined in Black’s Law Dictionary, 8th Edition at page 540 as follows:

“In a proper manner, in accordance with legal requirements.”

A person “*duly elected*” within the meaning of Sections 179(2) and 181(1) of the Constitution would therefore mean a person elected in accordance with applicable legal requirements. The legal requirements for due election into the Office of Governor of a State have been clearly stated in Section 179(2) reproduced above. The question then arises as to how it can be determined that the said legal requirements have been met?

The Constitution in Section 153(1)(f) & (i) provides for the establishment of the Independent National Electoral Commission (INEC), which, pursuant to paragraph 15 of Part 1 of the Third Schedule thereto, has power inter alia to “(a) *organise, undertake and supervise all elections to the offices of the President and Vice President the Governor and Deputy Governor of a State and the membership of the Senate, the House of Representatives and the House of Assembly of each State of the Federation and (i) to carry out such other functions as be conferred upon it by an Act of the National Assembly.*” Pursuant to Section 160(1) of the Constitution, INEC has the power, by rules or otherwise to regulate its own procedure or confer powers and impose duties on any officer or authority for the purpose of discharging its function.

The Electoral Act 2010 (as amended), which is an Act of the National Assembly makes elaborate provisions not only for the manner in which elections shall be conducted by INEC

right from the pre-election stage to conclusion but also for the manner in which disputes arising therefrom should be ventilated. The culmination of the election process is the declaration of a winner after all the votes have been counted. In Section 156 of the Electoral Act, “Return” is defined as “the declaration by a Returning Officer of a candidate in an election under this Act as being the winner of that election.” In other words the Returning Officer makes a declaration on behalf of the Electoral body of the final outcome of the election it conducted, which is in effect a confirmation that the legal requirements for that particular election have been met. I agree with learned senior counsel for the two respondents that there must be a declaration or a return made by INEC before a candidate could be deemed to have been duly elected under Sections 179(2) and 181 of the Constitution.

I have considered Sections 68(c) and 69 of the Electoral Act, which learned senior counsel for the appellant contends is more relevant to Section 179(2) of the Constitution than the general interpretation Section 156 of the Act. Section 68(c) of the Act does not advance the appellant’s case. It provides that the decision of any Returning Officer on any question arising from or relating to... “(c) declaration of scores of candidates and the return of a candidate shall be final, subject to review by a Tribunal or Court in an election petition proceeding under the Act. “It refers to “declaration of scores of candidates”, which accords with the definition of “return” in Section 156. As rightly submitted by learned senior counsel for the respondents, it is the declaration or return that becomes the subject of an election petition. With regard to the reliance on cases such as *Omoboriowo Vs Ajasin* (1984) 1 SCNLR 108; *Ngige Vs Obi* (2006) 14 NWLR (Pt.999) 1 and others, I am of the view that the fact that declarations or returns made by INEC were discountenanced in those cases is not a ground for contending that a declaration or return is not a condition precedent to the invocation of Sections 179(2) and 181(1) of the Constitution.

Section 69 of the Constitution provides that:

“In an election to the office of the President or Governor whether or not contested and in any contested election to any other

elective office, the result shall be ascertained by counting the votes cast for each candidate and subject to the provisions of Sections 133, 134 and 179 of the Constitution, the candidate that receives the highest number of votes shall be declared elected by the appropriate Returning Officer.”

It is evident that a declaration as to who received the highest number of votes cast and who should be declared elected is to be made by the appropriate Returning Officer after the results have been ascertained by counting the votes cast for each candidate. B

Section 133(1) of the Electoral Act also provides that the only venue to ventilate a complaint of undue election or undue return at an election is before a competent Court or Tribunal in accordance with the provisions of the Constitution or Act. C

In effect, I agree with the finding of the court below that contrary to the submission of learned senior counsel for the appellant, Sections 179(2) and 181(1) of the Constitution are not self-executing. There must be a declaration or return of a candidate as the winner of an election before the sections become applicable. I agree entirely with learned senior counsel for the 1st respondent that to hold otherwise would lead to a situation where anyone could declare himself as the deemed winner of an election, which would certainly lead to anarchy. The electorate is also entitled to have the results of the election formally declared by an unbiased umpire. D
E

This brings me to the next consideration, which is, whether the appellant and the late Prince Audu met the requirements of Section 179(2) of the Constitution. The lower court found, and I entirely agree that there was no declaration or return of any of the candidates who participated in the election of 21/11/2015 as winners having regard to the declaration of INEC that the election was inconclusive. F
G

That declaration was made based on the provisions of Chapter 3 paragraph 3.11, step 14 of INEC’s Manual for Election Officials. The argument of learned senior counsel for the appellant is that the provisions of the Manual cannot be employed to amend or augment the provisions of the Constitution. It is not disputed that pursuant to Section 160(1) of the H

Constitution, INEC has the constitutional power to regulate its own procedure or confer powers and impose duties on its Officers for the purpose of discharging its functions. Sections 73 and 153 of the Electoral Act contain similar provisions to ensure the proper discharge of its functions. Section 73 empowers the Commission to publish in the Gazette, guidelines for elections “which shall make provisions for the step by step recording of the poll in the electoral forms as may be prescribed....” while Section 153 empowers the Commission to issue regulations, guidelines or manuals for the purpose of giving effect to the provisions of the Electoral Act and for its administration. I agree with the finding of the lower court at page 1608 of the record that the above provisions give statutory backing to the Manual as a subsidiary legislation and that where it is found to be relevant, its provisions must be invoked, applied and enforced.

The relevance of INEC’s Manual for Electoral Officers in the proper conduct of elections was acknowledged by this Court in the case of C.P.C. Vs INEC (2011) LPELR - 8257 (SC) at pages 54 - 55
E F - B per Adekeye, JSC thus:

“By force of law the Independent National Electoral Commission has the duty of conducting elections. Besides the constitutional provisions, it is guided by the Electoral Act 2010 (as amended) and the Election Guidelines and Manual issued for its officials in accordance with the Act. These documents embody all steps to comply with in the conduct of a free, fair and hitch free election.”(Emphasis mine)

Having discovered electoral malpractices in 91 polling units in the State, it was proper for the 1st respondent to consult and apply the provisions of its Manual to determine the next course of action in the circumstances. I do not agree with Chief Olanipekun, SAN, with due respect that resort to its manual in the circumstances amounted to a flagrant disregard of the supremacy of the constitutional provisions as contained in Section 179(2).

Chapter 3 paragraph 3.11, step 14 of the Manual for Election Officials (updated version) at page 325 of Volume 1 of the record

provides:

3.11: Final Collation and Declaration of Governorship Election Results at State Level:

The State Collation/Returning Officer for the Governorship shall:

Step 14: *“Where the margin of win between the two leading candidates is not in excess of the total number of registered voters of the polling units) where elections were cancelled or not held, decline to make a return until another poll has taken place in the affected polling unit(s) and the results incorporated into a new Form EC8D and subsequently recorded into a new form EC8E for Declaration and Return.”* (Emphasis mine) ^B ^C

The provision is clear and straightforward and did not require a foray into any other provisions in the Manual for it to be effected. There is no dispute as to the fact that the margin between the votes scored by the late Prince Audu and the appellant on the one hand and Capt. Wada and Arch. Awoniyi, on the other was 41,619, which was less than the total number of registered voters in the 91 polling units where votes were cancelled. I therefore agree with the court below that the 1st respondent was correct to have declared the election inconclusive on the basis of the number of registered voters in the 91 affected polling units. Having regard to the clear provisions of the Election Manual, it would have been wrong for any electoral official to base his decision on any other consideration, such as the number of registered voters who had collected their PVCs or the geographical spread of the votes already cast. Clear and unambiguous provisions must be given their natural and ordinary meaning. Neither the court nor learned counsel is entitled to read into a provision what it does not contain. ^E ^F ^G

I must at this stage make a brief reference to Chief Olanipekun’s contention that the lower court made a finding that the appellant and the late Prince Audu met the requirements of Section 179(2) but failed to give the proper legal effect to such finding and that there is no appeal against the said finding. I have carefully examined the portion the judgment referred to at pages 1605 - 1606 of Volume 3 of the record, which reads: ^H

“In the light of the facts and circumstances of this case, the

appellant has contended that the failure of INEC to apply Section 181(1) of the Constitution in declaring the appellant as the duly elected Governor as at 21-11-2015 is an affront to and a disregard of the Constitution. The question which logically arises from Section 179(2) is whether, as at 21 -11 -2015 the joint ticket of Prince Audu and the appellant met the requirements of the provision. The application of this provision turns on the peculiar facts and circumstances of the instant case. The law is trite that where any candidate to the office of a Governor meets with these requirements/ he should be declared winner and returned as the duly elected Governor. This much has been held in a plethora of decided cases such as: *Ngige V Obi* (2006) 14 NWLR (pt. 999) 1 (pt. 999) 1; *Agagu v. Mimiko* [2009] 7 NWLR (pt. 1140); *INEC v. Oshiomole* [2009] 4 NWLR (pt. 1232) 611; *Fayemi v. Oni* [2010] 7 NWLR (pt. 1253) 326; & *Aregbesola v. Oyinlola* [2011] 9 NWLR (pt. 1153) 458. Thus, it is not so much a question of the interpretation of the constitutional provision, (which is not a function of an Election Petition Tribunal), but that of its application. Can it be said that the joint ticket of the appellant and late Prince Audu met the criteria to be declared and returned winners of the election of 21- 30 11-2015?" (Emphasis mine)

It is evident that His Lordship was giving a review of the contentions arising from the interpretation of sections 1(2), 179(2) and 181(1) of the Constitution, which had been reproduced earlier. The court then proceeded to consider the facts against the background of the submissions made on either side before concluding at page 1610 of the record that the 1st respondent was right in declaring the election of 21/11/2015 inconclusive and upholding the finding of the trial tribunal in this respect. The underlined portion above shows clearly that no finding was made at that stage as the court proceeded to determine whether indeed the appellant and Prince Audu met the criteria to be declared and returned winner of that election.

The effect of all that I have said above, is that the 1st respondent was correct when it declared the election of 21/ 11/2015 inconclusive on the ground that the margin of win between the two front-runners at the election was less than the total number of registered voters in the 91 affected polling units where elections were cancelled. I agree with the find-

ing of the court below, which affirmed the finding of the trial Tribunal that in the circumstances there was no declaration or return at the election of 21/11/2015. I also hold that the court below was right when it held that in the absence of a return by the 1st respondent declaring the appellant and the late Prince Audu as the duly elected Governor and Deputy Governor respectively, neither of them could be deemed to have been duly elected on 21/11/ 2015 as required by Section 179(2) of the Constitution. The election conducted on 21/11/ 2015 was inchoate until after the conduct of the supplementary election on 5/12/2015 which brought the entire process to conclusion.

It follows therefore, that as the appellant and Prince Audu were not returned as duly elected, there was no basis for the application of Section 181(1) of the Constitution, which allows a Deputy Governor elected with a duly elected Governor to step into the Governor's shoes in the event of death or any other factor leading to his inability to subscribe to the Oath of Allegiance and Oath of Office.

Finally, under this issue is the contention of the appellant, that having regard to the provisions of Section 33 of the Electoral Act, the APC was not entitled to substitute its deceased Governorship candidate, as the election had already been concluded on 21/11/ 2015 and also that the 2nd respondent was not entitled to appropriate the votes garnered at the election held on 21/11/2015.

Section 33 of the Electoral Act 2010 (as amended) provides thus:

“33. A political party shall not be allowed to change or substitute its candidate whose name has been submitted pursuant to Section 31 of this Act, except in the case of death or withdrawal by the candidate.”

From my earlier findings in the course of this judgment, it must be stated that the election of 21/11/2015 having rightly been declared inconclusive, a consideration of Section 33 cannot commence on the premise that the election was concluded. Therefore, as stated earlier, as at the time of Prince Audu's demise the election into the Governorship of Kogi State was inchoate. Section 33 of the Electoral

Act clearly provides an exception to the provisions of Section 31 of the Act in the case of death or withdrawal by the candidate. In the instant case, the death of the Governorship candidate before the conclusion of the election necessitated his being substituted by another candidate.

B The bone of contention therefore is, who, as between the appellant and the 2nd respondent was entitled to step into those shoes? While the appellant contends that the votes cast on 21/11/2015 are attributable to the candidates who participated in the election, it is the contention of the respondents that the votes enure in C favour of the political party on whose platform the candidates contested.

Section 221 of the Constitution provides:

D *“S.221. No association other than a political party, shall canvass for votes for any candidate at any election or contribute to the funds of any political party or to the election expenses of any candidate at an election.”*

S.137(1) (a) and (b) of the Electoral Act provide:

E *137. (1) An election petition may be presented by one or more of the following persons -*

(a) a candidate in an election;

(b) a political party which participated in an election.”

F This court in Amaechi Vs INEC (2008) 5 NWLR (Pt.1080) 227 @ 317 - 318 F - B per Oguntade, JSC interpreted Section 221 of the Constitution as follows:

G *“The above provision effectually removes the possibility of independent candidacy in our elections; and places emphasis and responsibility in elections on political parties. Without a political party a candidate cannot contest. The primary method of contest for elective offices is therefore between the parties. If, as provided in Section 221 above, it is only a party that canvasses for votes, it follows that it is a party that wins an election. A good or bad candidate may enhance or diminish the prospect of his party in winning, but at the end H of the day it is the party that wins or loses an election. I think that the failure of respondents’ counsel to appreciate the overriding importance of the political party rather than the candidate that has made them lose sight of the fact that whereas candidates may change in an*

election but the parties do not. In mundane or colloquial terms, we say that a candidate has won an election in a particular constituency but in reality and in consonance with Section 221 of the Constitution it is his party that has won the election.”

Interestingly, even though learned senior counsel for the appellant also relied on Amaechi’s case, he is of the view that it is the candidate for whom the party canvasses votes that is eligible to benefit from the votes and no other person. B

It must be remembered that the appellant and the 2nd respondent are both members of the APC. I agree with the concurrent findings of the two lower courts that by virtue of Section 221 of the Constitution and Section 137(1) of the Electoral Act, the APC being the party that sponsored the appellant and Prince Audu for the election and being the party which would be declared the winner in the event of their success at the polls as per Amaechi Vs INEC (supra), the said APC had a legal interest in the votes cast on 21/11/2015 and was entitled to substitute a candidate of its choice to contest the election to conclusion. I agree with J B. Daudu, SAN that the votes garnered by the Prince Audu/Hon. Faleke ticket on 21/11/2015 were votes garnered on behalf of the political party and therefore the issue of transfer of votes did not strictly arise. C D E

It is settled law that the choice of a candidate in an election is within the exclusive preserve of a political party and non-justiciable, so long as the party acts within its guidelines. See: P.D.P. & Anor Vs Sylva (2012) LPELR - 7814 (SC) at 64 - 66 F - B: Onuoha Vs Okafor (1983) 2 SCNLR 244; Dalhatu Vs Turaki (2003) 15 NWLR (Pt.843) 310; Ukachukwu Vs PDP (2014) 4 G SCNJ (Pt. II) 477 @ 522. F

By virtue of Section 177(c) of the 1999 Constitution, a person seeking to contest an election into the office of Governor of a State must be a member of a political party and must be sponsored by that party. Furthermore, he must have participated in the party’s primary elections. See: Section 87(1) of the Electoral Act; Onubuoadu Vs C.P.C. (2012) LPELR - 8606 (CA). ***The evidence before the court was that the 2nd respon-*** H

dent participated in the primary election conducted by the APC and came second behind Prince Audu. The conduct of the said primary is not in dispute. It is also not disputed that the appellant did not participate in his party's primary.

B At pages 1613 -14 of the record, the lower court found as follows:

C *"...with the death of Prince Audu before the election could be completed and a due return made therein, the candidates' status radically changed. Prince Audu's right to contest the election as the Governorship candidate of the APC naturally expired upon his demise and by the same token, the appellant's legal right as the Deputy Governorship candidate of the deceased also followed suit. He was the nominee of the deceased and as a result of the inconclusive election coupled with the sudden and unexpected exit of Prince Audu,*
D *he acquired no legal rights under Section 181(1) of the Constitution. That being the case, by a combination reading of Section 221 of the Constitution and Section 137(1) of the Electoral Act, 25 the law recognises that the APC has a legal right/ interest in the votes cast and as a juristic person, it became "the last man standing" as it were. It*
E *therefore had a right to substitute the deceased Governorship 30 candidate by virtue of Section 33 of the Electoral Act. This it subsequently did upon the express invitation to do so by the 1st respondent in its Public Notice, Exhibits P27 and R5."*

F **I am of the view that the above analysis represents the correct position of the law. No doubt the situation would have been different if the election conducted on 21/11/2015 was conclusive and the joint ticket of Prince Audu and the appellant declared and returned as the winner of the election. The**
G **provisions of Section 181(1) of the Constitution would have become applicable. However, in the circumstances of this case, with the election held on 21/11/2015 being declared inconclusive and the Governorship candidate having died, the appellant could not metamorphose into the Governorship candidate. His status remained that of a Deputy Governorship**
H **candidate to a deceased Governorship candidate, particularly as he did not participate in the party's primaries, which is a pre-condition for anyone seeking elective office.**

On the whole, I find no merit in this issue. It is accordingly resolved against the appellant.

ISSUE 2

Whether the court below was right when it affirmed the decision of the trial Governorship Tribunal on the validity of the respondents' preliminary objections as it relates to the issues of subject matter, jurisdiction, cause of action and non-joinder of the appellant's political party, B

This issue covers the appellant's issue 8 and the 1st respondent's issue 3. I shall also consider the appellant's issue 9 (1st respondent's issue 2) on whether the appellant's right to fair hearing was breached by failure of the lower court to properly resolve issue 1 placed before it. C

Appellant's submissions:

It is the appellant's contention that having successfully challenged the jurisdiction of the Federal High Court in Suit FHC/ ABJ/ CS/977/2015 on the ground that the complaints therein relate to matters within the exclusive jurisdiction of Election Tribunal, it was inappropriate for the respondents to have then proceeded to raise objections to the jurisdiction of the Tribunal. D E

Chief Olanipekun, SAN relied on the doctrines of issue estoppel and estoppel per rem judicatam. He also relied on the case of ADH Ltd. Vs A.T. Ltd. (2006) 10 NWLR (Pt.989) 635 @ 647. He argued that the lower court having found that the trial Tribunal ignored his submissions on issue estoppel and res judicata ought to have set aside the judgment of the trial Tribunal for breach of the appellant's right to fair hearing. He submitted further that the lower court raised the issue that estoppel is outside the jurisdiction of the Tribunal suo mom and resolved same without hearing the parties, G Relying on Onyebuchi Vs INEC (2002) 8 NWLR (Ft.769) 417 @ 438 - 440 he argued that an interlocutory decision striking out a case, which is not appealed against operates as estoppel between the same parties if the same issues are re-litigated before a court of competent jurisdiction. He also relied on Ohakim Vs Agbaso(2010) 19 NWLR H (Pt. 122 6) 172@232-233.

He submitted that the lower court erred in holding that the trial Tribunal lacked jurisdiction. He submitted that every cause of

action giving rise to the petition occurred after the election commenced on 21/11/2015 and the 1st respondent declared the election inconclusive, including the substitution of the 2nd respondent for the deceased candidate.

B He argued further that this is not an intra-party dispute necessitating the joinder of the APC but an issue of law as to whether the 2nd respondent, satisfied the constitutional requirement to hold office as Governor of Kogi State. That the issue having arisen after the commencement of polls, it became a post-election matter properly suited for the Tribunal.

C On whether the APC was a necessary party, learned senior counsel submitted that from the record, in spite of its holding that it was not possible to explore the reasons for the substitution of the 2nd respondent without the APC being a party, it nevertheless was able D to determine how and why the substitution occurred even though the APC was not joined in the suit. He contended that the petition ought to have been sustained on the basis that there was a cause of action in respect of Section 179 of the Constitution even if the issue of substitution was found not to constitute a cause of action. He submitted further, on the 5 issue of joinder, that a political party is not a statutory respondent to an Election petition. He referred to Sections E 137(1) and 137(2) of the Electoral Act and submitted that since a political party, mentioned in Section 137(1) as one of the parties who could file a petition, is not mentioned in Section 137(2) as a F statutory respondent, the law is that the express mention of one thing is to the exclusion of the other. *Obi Vs INEC (2007) 1 NWLR (Pt.1046) 436 @ 458*; *Omoboriowo Vs Ajasin (supra)*; *Buhari Vs Yusuf (2003) 14 NWLR (Pt. 841) 446 @ 499* referred to. He argued G that there was no allegation against the APC to warrant its joinder.

Learned senior counsel submitted that the court below was wrong to lay emphasis on the fact that the appellant did not participate in the primaries of the APC. He submitted that nomination of a Governorship candidate is covered by Section 87 of the Electoral Act H while nomination of a Deputy Governorship candidate is regulated by Section 187(1) of the Constitution and therefore a Deputy Governorship candidate need not participate in a primary before being qualified as a Deputy Governor and entitled to take benefits of the

opportunity to be governor under Section 181 of the Constitution. He submitted that the appellant became a candidate at the election by operation of the Constitution and not on the basis of the holding of primaries.

On the failure of the lower court to properly resolve issue 1 argued in the appellant's brief at pages 1402 - 1405 of the record on alleged breach of his right to fair hearing, Chief Olanipekun, SAN in addition to his earlier submission on the effect of the failure of the trial Tribunal to consider the issue of estoppel and the attitude of the lower court thereto, contended that even though the lower court reproduced the seven legal issues, which the appellant complained about, in affirming the decision of the Tribunal, it failed to specify where the Tribunal resolved the issues. B
C

He was of the view that the holding of the lower court that the trial Tribunal affirmed the constitutionality of the INEC Manual in response to the appellant's contention that the Constitution is exclusive in determining the due election of a Governor was erroneous and did not properly deal with the issue raised. D

1st Respondent's Submissions:

In response to the above submissions, Dr. Alex Izinyon, SAN, submitted on behalf of the 1st respondent that the issue of estoppel did not arise, as in the suit before the Federal High Court the appellant was seeking to be declared "governor elect" while the reliefs claimed in the petition before the Tribunal centred on pre-election matters, to wit: the nomination and sponsorship of the 2nd respondent by the APC in substitution for its deceased Governorship candidate. In other words, that the petition before the Tribunal was based on a different set of facts, issues and reliefs from those before the Federal High Court. He submitted further that the appellant's right to fair hearing was not breached because the lower court dealt with all the issues raised by him. He submitted that in any event jurisdiction of a Court or Tribunal is determined by the enabling statute and cannot be based on the comment of a Judge that the petitioner's suit is best suited for a particular Court or Tribunal. He also placed reliance on AOH Ltd. Vs A.T. Ltd. (supra) @ 6510. He distinguished this case from the case of Ohakim Vs Agbaso (supra) cited by Chief Olanipekun, SAN on the ground that the pre-election issues relating E
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to the nomination and sponsorship of a co-party member by one who did not participate in the party's primaries, did not arise at any level of the courts in Ohakim's case. Relying on the decisions of this court in *Shinkafi Vs Yari* (2016) 7 NWLR (Pt. 1511) 340 @ 375 - 376 G - H and *Alhassan Vs Ishaku* (2016) 10 NWLR (Pt.1520) 230 @ 301 E - N, he submitted that even though the substitution of the 2nd respondent occurred in the course of the election, it still falls within the realm of a pre- election matter and is an intra-party dispute, which the appellant was not entitled to question.

C On the issue of non-joinder of the APC, learned senior counsel submitted that having regard to the fact that both the appellant and the 2nd respondent belong to the APC and the fact of the appellant's contention that having contested the election as the party's Deputy Governorship candidate, he was entitled to step into the shoes D of the deceased Governorship candidate, the APC was in the best position to inform the Tribunal who its candidate was. He noted that in paragraph 56(viii) of the petition, the appellant sought to nullify the victory of his political party without making it a party. He argued that this makes the APC a necessary party. He referred to: *Azubuike E Vs PDP* (2014) 7 NWLR (Pt.1406) 292 @ 316 E; 313 D - E and *Green Vs Green* (2001) FWLR (Pt.76) 795 @ 814 G - H. On the superiority of a political party over a candidate in an election, he relied on *Amaechi Vs INEC* (supra).

F On whether there was a cause of action, learned senior counsel submitted that the appellant's claim before the lower Tribunal was predicated on the premise that he won the election on 21/11/2015, when in fact no declaration to that effect had been made. He argued that Section 179 of the Constitution could not come into play as the G cancellation of election in 91 polling units of the State could not be a reflection of the election conducted throughout the State.

He submitted that the lower court was right when it held that, although the appellant was held to have the locus standi to ventilate his grievances before the Tribunal, the said locus was not H sufficient to confer a right on him to pursue pre-election matters before the Trial Tribunal. He contended further that the appellant failed to bring his petition within the purview of Sections 177 and 182 of the Constitution.

In response to the appellant's contention that his issue 1 was not properly resolved by the lower court, learned senior counsel for the 1st respondent referred to pages 1580- 1584 and pages 1584 - 1589 of Volume 3 of the record wherein the court below fully considered the various complaints. He submitted that, in any event, when an issue is not expressly determined but is subsumed in an issue that has been determined, it need not be determined again. He relied on *Adebajo Vs A-G. Ogun State* (2008) 7 NWLR (Pt.1055) 201 @ 205 F - H. He maintained the position he took at the lower court to the effect that even if all the issues are not pronounced upon, the appellant did not suffer any miscarriage of justice and there was no basis for setting aside the decision. *Kraus Thompson Org. Ltd. Vs UNICAL* (2004) 9 NWLR (Pt.879) 631 @ 657 F - G; *Amadi Vs N.N.P.C.* (2000) 25 10 NWLR (Pt.674) 76 @ 112 B - E.

2nd Respondent's Submissions:

J. B. Daudu, SAN on behalf of the 2nd respondent argued that the lower court was right in affirming the decision of the trial Tribunal on the preliminary objections because the appellant's complaints regarding the disqualification of the 2nd respondent were not based on any aspect of Section 182(2)(a), (b), (c) or (d) of the Constitution, which sets out the grounds upon which a governorship candidate may be disqualified. He relied on several authorities, including *Tarzor Vs Ioraer*(2006) 3 NWLR (Pt.1500) 463 @ 498; *Ukachukwu Vs P.O.P.* (2014) 17 NWLR (Pt. 143 5) 134 @ 203 A- D and *Uzodinma Vs Izunaso* (No.2)(2011) 17 NWLR (Pt. 1275) 30.

He submitted that the court below was right in affirming the trial Tribunal's finding that the APC was a necessary party because by virtue of Section 221 of the Constitution, there can be no independent candidate at an election in Nigeria.

Resolution of Issue 2:

As rightly submitted by learned senior counsel for the 1st respondent, there are concurrent findings of fact by the two lower courts on the merit of the preliminary objections raised by the respondents on the issue of jurisdiction, subject matter, joinder and cause of action. It is settled law that this court will not readily interfere with concurrent findings of fact by the two lower court unless such findings are inter alia perverse, not supported by the evidence on record, or

where there is a substantial error on the face of the record or some miscarriage of justice has occurred. See: Tarzoor Vs loraer (2016) 3 NWLR (Pt.1500) 463 @ 522 A - D; Akeredolu Vs Akinremi (No.3) (1989) 3 NWLR (Pt. 108) 164; Gbadamosi Vs Dairo (2007) 3 NWLR (Pt.1021) 282. It is therefore incumbent on the appellant to satisfy
B this court that the findings are perverse.

I have given careful consideration to the finding of the court below on the issue of estoppel. At pages 1584 to 1589 of Volume 3 of the record, the lower court - considered the issues which the ap-
C appellant contended were not addressed by the lower Tribunal one after the other. At pages 1586 -1587, it dealt with the failure of the lower Tribunal to consider the issue of estoppel raised before it. The lower court held as follows:

*"It goes without saying that the jurisdiction of any Court or
D Election Tribunal is circumscribed by the enabling statute creating such Court or Tribunal. The jurisdiction of Election Tribunals in Governorship elections is circumscribed by Section 285(2) of the Constitution which provides: "2. There shall be established in each
E State of the Federation one or more election tribunals to be known as the Governorship and legislative Houses Election Tribunal which shall, court or tribunal, have original jurisdiction to hear and deter-
mine petitions as to whether any person has been validly elected to the office of Governor or Deputy Governor or as a member of any
F legislative house. In the light of this Provision, the Tribunal would be over-stepping its bounds of jurisdiction and acting ultra vires in enter-
taining any other issue not within these limited jurisdictions. An Elec-
G tion Petition Tribunal is clearly not vested with the power to embark on any collateral proceedings. Rather the subject-matter of the Peti-
tion must complain about the election or conduct of elections. The purport of Section 285(2) of the Constitution is that the jurisdiction of the Tribunal is not at large, but specific and limited to the hearing and determination of petitions relating to whether any person has
H been validly elected to the position of Governor. It is not an inquisito-
rial Tribunal."*

I am of the view that this portion of the judgment fully answered the appellant's complaint. It cannot be said that the appellant was denied fair hearing in the instance. The court

held that since by virtue of Section 285(2) of the Constitution, the jurisdiction of the Tribunal is not at large but limited to the determination of petitions relating to whether any person has been validly elected to the position of Governor of a State or not. The appellant did not suffer any miscarriage of justice by the failure of the trial court to pronounce on the issue, being outside its jurisdiction to do so. As rightly submitted by learned senior counsel for the 1st respondent, the claims and reliefs sought in the two matters were not the same. In the suit before the Federal High Court, the appellant sought to pre-empt the substitution of the 2nd respondent for the late Prince Audu pursuant to the 1st respondent's Public Notice declaring the election inconclusive on the basis that the election held on 21/1/172015 was concluded on that day and that a winner emerged who ought to have been returned by the 1st respondent as duly elected. On the other hand, in the petition filed before the Tribunal, it was the contention of the appellant inter alia that the 2nd respondent was, at the time of the election on 21/11/2015 not qualified to contest the election, that he was not elected by a majority of lawful votes cast, that the return of the 2nd respondent as Governor on 5/12/16 was unconstitutional, illegal, null and void and should be set aside and that he be issued with a certificate of return as the person duly elected as Governor of the State pursuant to the election held on 21/11/2015.

I agree with the court below that in view of the very limited jurisdiction of the election Tribunal, it was not a matter it could have considered in any event and the appellant did not suffer any miscarriage of justice in the circumstance. I refer to Kraus Thompson Org. Ltd. Vs UNICAL (2004) 9 NWLR (Pt.879) 631 @ 657 F - G where this court, while acknowledging the duty of a court to determine all issues raised before it and the fact that failure to deal with such issues may lead to an order of rehearing, held that such an order would be inappropriate where it is clear that no miscarriage of justice has been occasioned by the failure to deal with the issue canvassed or that the irregularity is not that of a substantial nature so as to prejudice any of the parties.

The jurisdiction of Election Tribunals, as held by the

court below is clearly provided for in Section 285(2) to the effect that a Governorship Election Tribunal shall have original jurisdiction, to the exclusion of any other court or Tribunal, to hear and determine petitions as to whether any person has been validly elected to the office of Governor or Deputy Governor of a State. Thus, it is the enabling statute that determines the jurisdiction of the Tribunal and not any pronouncement by a court of coordinate jurisdiction.

Having regard to the nature of the petition before the lower Tribunal, I am of the view and I hold that the finding of the court below was apt and adequately addressed the issue raised as issue 1 by the appellant before it.

On the issue of subject matter, the lower court upheld the finding of the trial Tribunal to the effect that the issues of nomination and sponsorship of candidates are outside the jurisdiction of the Election Tribunal, while it is contended on behalf of the appellant that the circumstances that gave rise to the petition occurred after the election commenced and were therefore cognisable by the Tribunal.

The issue that arises here is whether the two lower courts were right in holding that the appellant's issues before the Tribunal centred around the sponsorship and nomination of the 2nd respondent to contest the election as substituted by his party, the APC. A careful reading of paragraph 56(1) to (xii) of the petition at page 18 of the record shows that all the appellant's grievances stem from the nomination and sponsorship of the 2nd respondent by the APC to replace the late Prince Audu on the premise that the 1st respondent acted ultra vires in declaring the election of 21/11/2015 inconclusive when, in the appellant's opinion, the election was concluded on that day and a winner had emerged. It is however relevant to reiterate the fact that both the appellant and 2nd respondent are members of the same political party.

The law is quite settled that the nomination and sponsorship of a candidate at an election is within the internal affairs of a political party and therefore not justiciable, except in the limited circumstances set out in Section 87(9) of the Electoral Act where a co-aspirant alleges that the relevant guidelines of the political party or the provisions of the Elec-

toral Act were not followed, in which case, it is the Federal High Court or the High Court of a State or Federal Capital Territory that would have the necessary jurisdiction to entertain the matter. In other words, they are pre-election issues.

See: Ukachukwu Vs P.D.P. (supra) at 522 - 523; P.D.P Vs Onwe (2011) 4 NWLR (Pt. 1230) 166 @ 172 - 173 F - B; Amaechi Vs INEC (2007) 18 NWLR (Pt.1065) 170 @ 203 A-C. ***They are issues outside the purview of an Election Tribunal because the nomination and sponsorship of a candidate by his political party must take place before an election can be held. Similarly, where as in this case, a candidate died before the election was concluded, the nomination and sponsorship of a suitable candidate to take his place must also occur before the election can proceed.*** I am of the view that the case of Ohakim Vs Agbaso (supra) cited by learned senior counsel for the appellant is not applicable to this case. In Ohakim's case, the 1st respondent, by way of an application for judicial review before the Federal High Court, sought to be returned as the duly elected Governor of Imo State in the election held on 14th April 2007. This court held that pursuant to Section 285(2) of the Constitution, the matter fell within the exclusive jurisdiction of the Governorship and Legislative Houses Election Tribunal. The finding of the lower court in the circumstances has not been shown to be perverse.

On the issue of non-joinder of the All Progressives Congress as a party before the Tribunal, it is apposite to consider the factors that make a person a necessary party to an action. The position of the law was eruditely stated in the well-known case of Green Vs Green (1987) 3 NWLR(Pt.51) 481 where this court held that it is necessary to make a person a party to an action so that he should be bound by the result. It also held that a necessary party is one who is not only interested in the subject matter of the proceedings but also one in whose absence, the proceedings could not be fairly dealt with. See also: Azubuike Vs P.D.P. (2014) 7NWLR (Pt. 1406) 292 @316E-Fand313 D-E. ***The question of proper parties has been held to affect the jurisdiction of the court as it goes to the foundation of the suit in limine, in which case the court would lack juris-***

diction to hear the suit. See: *G. & T. Investment Ltd. Vs Witt & Bush Ltd.* (2011) 8 NWLR (Pt.1250) 500 @ 538 F - H.

The trial Tribunal at pages 1280 - 1281 of the record came to the conclusion that the APC was a necessary party to the petition on the following grounds: (a) that the APC is the political party that sponsored both the petitioner (appellant) and the 2nd respondent; (b) that although the petitioner contends that he has sought no relief or complained against the said political party (APC), he has however urged the Tribunal to declare that the return of the 2nd respondent is unconstitutional, illegal, undemocratic, arbitrary, null and void and ultra vires the powers of the 1st respondent, which relief, is indirectly sought against the political party (APC); (c) that the APC is a necessary party being a person likely to be affected by a decision in the matter and whose presence would assist the Tribunal in effectively determining the dispute between the petitioner (appellant) and the 2nd respondent.

The lower court agreed with this finding at page 1631 of the record. I am of the view that the concurrent findings accord with the justice of the case and are not perverse. This is because the reliefs in paragraphs 56(viii) & (xi) of the petition which pray “that it may be determined and thus declared that the return of the 2nd respondent by the 1st respondent in December 5, 2015 is unconstitutional, illegal, unlawful, undemocratic, arbitrary null and void and also ultra vires the powers of the 1st respondent” and for “an order mandating directing the 1st respondent to issue forthwith to the petitioner a Certificate of Return as the person duly elected as Governor of Kogi State pursuant to the election held in November 21, 2015,” although do not specifically seek reliefs against the APC, are certainly matters in which the interest of the party is involved, as its right to nominate and sponsor a candidate at the election is being questioned. This is moreso, as on the authority of *Amaechi vs INEC* (supra) and Section 221 of the Constitution, it is the political party that contests elections even though through its candidates and there no provision in our law for independent candidates. I see no reason to inter-

fere with the concurrent findings the two lower courts in this regard. The fact that a political party is a named as a statutory respondent in Section 137(2) of the Electoral Act cannot be a bar to joining a political party as a respondent where its interest is involved and where it would be bound by the result of the action. B

On the issue of cause of action, I agree with the finding of the court below, which affirmed the decision of the trial Tribunal that the appellant failed to disclose a cause of action having based his claim substantially on pre- election matters and on the premise that the election which took place on 21/11/2015 was conclusive and that by virtue of Section 179(2) of the Constitution he was entitled to be declared Governor elect. Earlier in this judgment, I held that there was no return made by INEC declaring a winner at the election on 21/11/2015. The election was not concluded until 5th December 2015. The substratum of the appellant's complaint was non-existent. On the whole, I find no merit in this issue. It is accordingly resolved against the appellant. C D E

Issue 3

Whether the court below was right in affirming the trial Tribunal's decision that votes cast for the late Prince Audu and the appellant in the Governorship election of November 21 2015 were transferable to the 2nd respondent. F

This issue was dealt with in the course of resolving issue 2. It was answered in the affirmative to the effect that the All Progressives Congress, being the party that canvassed for votes in consonance with Section 221 of the Constitution had a legal interest in the votes cast on 21/11/2015 and its nominated and sponsored candidate was entitled to the benefit of those votes at the conclusion of the election process on 5th December 2015. This issue is accordingly resolved against the appellant. G

Issue 4

Whether from the entire facts and circumstances leading to this appeal, the court below rightly affirmed the decision of the trial Tribunal to the effect that the petition was incompetent ab initio. H

This issue covers the appellant's issues 5 and 7 and the 1st

respondent's issue 4.

Appellant's submissions:

It is contended on behalf of the appellant that the court below erred when it held that although the appellant had the locus standi to file the petition he could not claim any remedy. Chief
 B Olanipekun, SAN submitted that all the necessary requirements to ground a petition under Section 138(l) (c) of the Electoral Act based on Sections 179(2) and 181(1) of the Constitution were met. That the appellant was a candidate at the election pursuant to Section
 C 187(1) of the Constitution and therefore satisfied the condition for eligibility to present a petition under Section 137(2) of the Electoral Act; that the person returned by INEC was made a respondent in compliance with Sections 133 and 137(2) of the Act. He submitted that the appellant was entitled to bring the petition notwithstanding
 D the fact that he and the 2nd respondent were from the same political party as both were asserting competing rights to the office of Governor of Kogi State. He also relied on Section 285(2) of the Constitution. Relying on *Okotie-Eboh Vs Manager* (2004) 18 NWLR (Pt.904) 242 @ 243, he submitted that any legislation that would take away a
 E party's right of action must do so explicitly. He submitted that there is nothing in Section 138(l)(c) of the Electoral Act that precludes a member of the same party from bringing a petition. He submitted that what is not expressly prohibited is allowed. *A-G Ondo State Vs A-G Ekiti State* (2001) 17 NWLR (Pt.743) 706 @ 770 referred to.
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He submitted that contrary to the finding of the lower court, there was no need for the appellant to prove that the votes cast in favour of the winning candidate were tainted with illegality. He submitted that once the court finds that the election was concluded on
 G 21/11/2015, that requirement would have been satisfied. In support of the contention that electoral malpractices need not be proved, he relied on *Omoboriowo Vs Ajasin* (supra) where severance of pleading was allowed and the appeal determined on the computation of undisputed votes to sustain the ground of due election. That the complaint of the appellant is that the undisputed 240,867 votes garnered
 H at the election of 21/11/2015 at which the 2nd respondent did not participate constituted the majority of lawful votes that returned him and the late Prince Audu as winners of the election.

Referring to Sections 140(3) and 138(l) (c) of the Electoral Act, learned senior counsel submitted that contrary to the finding of the court below, the Sections do not imply that “*majority of lawful votes*” must succeed only on proof of unlawful votes. He submitted that what was required of the appellant was to state the score with which he claimed to have won the majority of lawful votes cast. He B relied on *Mu’azu Vs El-Yakub* (2011) 7 NWLR (Pt.1245) 181 @ 198 and submitted that the appellant was able to show that by the 240,867 votes which he scored on 21/11/2015, he was already deemed by the Constitution to have won the election, against 6,885 votes scored C by the 2nd respondent who was not a candidate at the election and did not satisfy the necessary requirements to contest and assume office as Governor.

Learned senior counsel urged the court to set aside the finding that there was only one election and that the votes at the D election of 21/11/2015 cannot be attributable to the appellant, as by virtue of Sections 179 and 181(1) of the Constitution, the votes were in fact attributable to the appellant.

The other complaint of the appellant is that the court below erred when it held that there was no pleading in proof of the 2nd E respondent’s disqualification. He contended that the petition is replete with proven allegations that the 2nd respondent did not nominate a Deputy Governorship candidate. Relying on “*P.D.P. Vs INEC* (1999) 11 NWLR (Pt.626) 200 @ 239 - 240 (also relied on by the F lower court), he submitted that since a Governorship candidate cannot be validly nominated without a Deputy Governorship candidate, it goes without saying that a Governorship candidate has failed to satisfy the provisions of Section 177(c) of the Constitution if he fails to nominate a deputy. He submitted that Sections 177, 182 and 187 G of the Constitution are to be jointly interpreted and applied in the determination of a qualified candidate. He submitted that Section 187(2) of the Constitution incorporates Sections 177 & 182.

He contended that the record does not support the finding H of the court below that the 2nd respondent adopted the appellant, as Deputy Governorship candidate. He reproduced relevant portions of the record to buttress his submission on this point. He submitted that findings not based on the evidence on record are perverse and

urged this court to so find. On the holding of the court below that the appellant did not withdraw his candidacy in line with Section 33 of the Electoral Act, he submitted that withdrawal of candidature will not arise where there has not been a valid nomination as required under Section 187(1) of the Constitution. He argued that the court below was wrong when it held that the appellant remained the Deputy Governorship candidate throughout the election from 21/11/2015 up to 5/12/ 2015 and the declaration of result on 7/12/2015. He referred to Exhibits P14, P15 and P16 tendered by the appellant at the Tribunal to the effect that the election was concluded on 21/11/2015 and that having regard to the death of Prince Audu, he was entitled, to be sworn in as Governor and that he would not participate in any supplementary election, to buttress the submission that he was never nominated as the Deputy Governorship candidate of the 2nd respondent. He argued further that the appellant could not have been the running mate in the supplementary election of 5/12/2015 having been found by the court below not to have participated therein.

It is contended that the 2nd respondent did not participate in all the stages of the election and that the lower court's finding that he voted at the election is not supported by the record particularly as he was not shown to be a registered voter in Kogi State.

Referring to paragraphs 8, 12, 14, 15, 18 and 49 of the petition, he submitted that the appellant's pleading fully met the conditions for alleging disqualification under Section 177 of the Constitution.

1st Respondent's submissions:

In reply to the above submissions, Dr. Alex Izinyon, SAN submitted that in determining the issue of qualification or disqualification of a candidate for election to the office of Governor or Deputy Governor of a State, this court has held in cases such as *Tarזור Vs Ioraer* (supra); *ANPP Vs Usman* (supra); *PDP Vs INEC* (supra); *Shinkafi Vs Yari* (supra) and *Kubir Vs Dickson* (supra) that the election Tribunal is limited to the provisions of Sections 177 and 182 of the 1999 Constitution.

He submitted that the lower court was right in holding that there was no aspect of the appellant's pleading or evidence before

the Tribunal to establish that any provision of Sections 177 or 182 of the Constitution had been violated by the 2nd respondent. He referred to paragraphs 8, 9, 18, 21 and 23 to support the contention that the ground of disqualification is not premised on any of the provisions of Sections 177 and 182 of the Constitution. He submitted that not only did the appellant's pleadings not support the ground of disqualification, the appellant's witness statement on oath did not advance his case either, while there was documentary evidence before the court which clearly establishes that the 2nd respondent was a candidate at the election and also explained the circumstances that brought him in as a candidate. B
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In paragraph 4.179 of his brief, Dr. Izinyon, SAN traced the facts and circumstances that led to the substitution of the 2nd respondent and submitted that the 2nd respondent's nomination was a contingency brought about by the death of the former governorship candidate of the APC before the election was concluded. He submitted that the replacement was valid in law and there is nothing before the court to show that due process was not followed by the 1st respondent in allowing the APC to replace its deceased candidate. He submitted further that it does not lie in the mouth of the appellant, a member of the same political party to question the qualification of the 2nd respondent, which is a matter within the domestic affairs of the APC and in respect of which the Tribunal lacks jurisdiction. He referred to *Gwede Vs INEC (2014) 18 NWLR (Pt.1438) 56 @ 126 C - F*. He noted that vide the evidence of RW1 and Exhibit P2 (8), it was established that the 2nd respondent was the person who came second in the primaries whereas the appellant did not participate therein. He maintained that the appellant was a candidate at the election, duly nominated by his party and that the lower court rightly affirmed the decision of the trial Tribunal. D
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On the contention that the 2nd respondent was not qualified to contest the election because he did not nominate a running mate, he submitted that the issue does not flow from any of the grounds for qualification of a candidate for the office of Governor as provided for in Sections 177 or 182 of the Constitution nor is it contemplated under Section 138(l)(a) of the Electoral Act. H

Learned senior counsel distinguished the case of *Balewa Vs*

Muazu (1999) 5 NWLR (Pt.604) 638 @ 647 - 648 G - B wherein a full panel of the Court of Appeal construed the provisions of Section 98(1)(k) of the State Government (Basic Constitutional and Transitional Provisions) Decree No.3 of 1999 and held that a governorship candidate was disqualified for failure to nominate a running mate, as
 B inapplicable to the facts and circumstances of this case, as Section 91(l)(k) of Decree No.3 of 1999 has no equivalent provision in Sections 177 and 182 of the Constitution. He noted that while adopting Section 96(1)(a) - (j) in Section 182 of the 1999 Constitution, sub-
 C paragraph (k) was deliberately omitted which is a clear indication that there was no intention for it to continue to apply under the 1999 Constitution. He maintained that there is no disqualifying provision in Sections 177 and 182 of the Constitution akin to that found in Section 91(I) (k) of Decree No.3 of 1999. He submitted further that
 D Section 187(1) of the 1999 Constitution is not a ground for the disqualification of a candidate under Section 138(l) (a) of the Electoral Act, as it deals with nomination and sponsorship of a candidate for the office of Governor and Deputy Governor, which is outside the purview of the jurisdiction conferred
 E on the Election Tribunal under Section 285 of the Constitution. He submitted that Section 187 relates to pre-election issues. He referred to *Shinkaf Vs Yari* (supra) @ 18-21.

He submitted that not having participated in the primaries
 F the appellant could not seek to bring a petition on the issue of nomination and sponsorship. He argued further that Section 187(1) of the Constitution is outside the purview of Section 138(1)(a) of the Electoral Act. He submitted that Ground 1 of the petition which is anchored on Section 138(l)(a) is bereft of any fact in support of the
 G petition based .on Sections 177 and 182 of the Constitution.

He submitted that the appellant did not lead any evidence to prove that the appellant did not vote at the election. He submitted that the 2nd respondent led evidence vide RW1 that he was registered and voted at the election and tendered his voter's card Exhibit R2-1.
 H He submitted that where no evidence is led by a plaintiff, a defendant is not obliged to call any evidence in rebuttal.

On the averments in paragraphs 16 and 21 of the 1st respondent's reply on the status of the 2nd respondent's eligibility to

vote in Kogi State, he submitted that the pleadings are deemed abandoned since no evidence was led thereon. He contended that since the appellant seeks declaratory reliefs, his reliefs could not be granted on the basis of admission. He referred to several authorities, including CPC Vs INEC (2012) All FWLR (Pt.617) 5 605 @ 640- 641; Doma & Anor. Vs INEC & Anor. (2012) LREC 398 @ 415; Yusuf Vs Obasanjo (2003) 16 NWLR (Pt.847) 554. B

Learned senior counsel maintained that failure to nominate a Deputy Governorship candidate is not a ground for disqualification of a candidate for the office of Governor.

Referring to pages 243, 244 and 246 of Volume 1 of the record, he submitted that there were pleadings and evidence before the Tribunal that the appellant remained the running mate of the 2nd respondent at the election. He noted that it was the appellant who attempted to prove the fact of his withdrawal at the trial Tribunal through Exhibits P14, PI 5 and PI 6 and that he was not entitled at this stage to argue that the issue of withdrawal does not arise. He submitted that the appellant remained the Deputy Governorship candidate throughout the election as the said election was not concluded on 21/11/2015. C D E

He submitted that the appellant did not produce any evidence to show that the respondents voted at Abuja and cannot rely on any evidence not pleaded.

In reference to the case of Yusuf Vs Obasanjo (supra) he maintained that failure to vote at election is not one of the grounds contemplated under Sections 177 and 182 of the Constitution. He submitted further that the court below was right in holding that the reason the 2nd respondent could not participate in the election of 21/11/2015 was because Prince Audu was still alive. He submitted that this finding is subsisting and not appealed against and therefore 2nd respondent's non- participation on 21/ 11/2015 cannot be a ground for disqualification under Section 177 of the Constitution. He submitted that Section 141 of the Electoral Act and the case of CPC Vs Ombugadu (supra) are not applicable, as the 2nd respondent took part in all the stages of the election. F G H

Learned senior counsel considered the grounds of the petition separately as to whether the lower court was right in holding

that the facts pleaded in support of the ground under Section 138(1)(a) of the Electoral Act were at variance with Sections 177 and 182 of the Constitution. He reiterated his earlier position that qualification for the office of Governor could only be challenged with reference to Sections 177 and 182 of the Constitution. He referred
 B to *Shinkafi Vs Yari* (supra) and *Alhassan Vs Ishaku* (supra).

On ground 2 he agreed with the court below that where a petition is predicated in Section 138(l)(c) of the Constitution, two sets of results must be pleaded as emanating from the same election.
 C He relied on: *Nwobodo Vs Onoh* (1984) 1 SCNLR 1 @ 34, *Abubakar Vs Yar'Adua* (2008) 19 NWLR (Ft. 1120) 1 @ 155U. He submitted that failure to plead two sets of results renders the petition incompetent. He referred the court to paragraphs 47 - 52 of the petition at page 16 Volume 1 of the 15 record to substantiate the point that
 D there is no such pleading.

Learned senior counsel submitted that the finding of the court below that Section 138(1)(c) of the Constitution does not envisage a situation where candidates from the same party would be questioning the outcome of the election is in full alignment with the meaning
 E of the section and does not amount to the court reading into the section what it does not contain. He submitted that by a combined reading of Sections 31(1) and 32(2) of the Electoral Act, no political party is permitted by law to nominate two persons for the same political office and therefore it is a correct interpretation of the law to
 F hold that only a member of a different political party is contemplated as being entitled to challenge the return of the winner. He relied on *Gwede Vs INEC*(2014) 18NWLR (Pt. 1438) 56@126 C- F.

He argued that there is no inconsistency in the court's finding that the appellant had locus standi to institute the action but did not have pleadings that supported his case, as the issue of locus standi was tied to his nomination as Deputy Governorship candidate in accordance with Section 187 of the 1999 Constitution, which qualified him to participate as such in the election and the eventual
 H finding that his petition could not be sustained under Section 138(l)(c) of the Electoral Act having regard to his pleadings.

Learned senior counsel argued that in the absence of any pleading that he contested the election as a Governorship candidate

of his party, by virtue of Sections 31(1), 32(2), 137(2) and 138(1)(c) of the Electoral Act, the appellant was foreclosed from grounding a petition under Section 138(1)(c) of the Act. He argued that contrary to the submission of learned senior counsel for the appellant, even if the election held on 21/11/2015 were concluded, it would not be a ground for holding that the votes cast at the supplementary election held on 5/12/2015 were unlawful. B

He distinguished Omoboriowo's case from the facts of this case on the ground that the parties belonged to two different parties and that the appellant in that case was a Governorship candidate and not a Deputy Governorship candidate; and further that the case did not decide that two sets of votes are not necessary to prove the existence of unlawful votes. C

On reliance by learned senior counsel for the respondent on Section 140(3) of the Electoral Act, he submitted that the provision can only come into play where there is proper pleading and evidence led on two sets of results at the same election and the candidate claim to have won based on the fact that unlawful votes were given to the respondent. He distinguished the case of *Muazu Vs El-Yakubu* (supra) on the ground that the provisions of Section 138(1)(c) of the Electoral Act were not considered in that case. E

2nd Respondent's submissions:

Like his brother silk, for the 1st respondent, J. B. Daudu, SAN submitted it is not enough for a petitioner to ground his petition under Section 138 of the Electoral Act without pleading facts in support of the ground. He submitted that further particulars cannot amend a pleading to create a cause of action where none existed. He referred to *Ojukwu Vs Yar'Adua & Ors* (2009) 12 NWLR (Pt. 1154) 50. F

He submitted that the burden of proving that the 2nd respondent did not fulfil the requirement of the law in Sections 177 and 182 of the Constitution lay on the appellant. He submitted that rather than plead facts to support the grounds of the petition, the appellant's case is that as at 21st November 2015 he had won the election having scored 240,687 votes as opposed to the 2nd respondent who was substituted as a result of the death of Prince Audu, scored 6,885 votes. In his view, this is akin to contending that two elections were G

held in respect of the Kogi State Governorship election. He submitted that these facts cannot sustain the petition. On the authority that pleaded facts must have a nexus to the grounds of the petition, he relied on *Oshiomole Vs Airihiarvbere & Ors* (2013) LPELR - 1975 2 (SC). Relying on *Kubir Vs Dickson* (2013) 4 NWLR (Pt. 1345) 534 B @ 589, he submitted that parties are bound by their pleadings and cannot lead evidence at variance with their pleading.

He submitted that not only did the appellant fail to plead facts in support of his pleadings, he failed to plead facts upon which the court would determine who scored the majority of lawful votes cast at the election. He submitted that stating the scores recorded for the candidates without more does not meet the requirement because there is no second set of figures with which to compare what the appellant considers to be lawful votes. On the need to plead two sets D of results, he referred to *Awuse Vs Odili* (2005) 16 NWLR (Pt.952) 416 @ 482 G - 485 B; *Nwobodo Vs Onoh* (1984) 1 SCNLR 1.
RESOLUTION OF ISSUE 4:

I observe that in commencing his submissions under this issue, learned senior counsel for the appellant has again raised the issue of the competence of the appellant to file his petition at the court below, having met all the requirements under Sections 133(1) and 137(2) of the Electoral Act. This issue was resolved in his favour by the lower court when it overruled the trial Tribunal and held that he had the locus standi to file the petition. However, the fact that a party has the locus standi to institute an action does not mean that the action itself is competent. Its competence will depend on the issues raised, the reliefs sought and the applicable laws.

Section 138 of the Electoral Act provides for the grounds upon which an election may be questioned as follows:

“138(1) An election may be questioned on any of the following grounds, that is to say:

(a) that a person whose election is questioned was at the time of the election, not qualified to contest the election;

(b) that the election was invalid by reason of corrupt practices or non-compliance with the provisions of this Act;

(c) that the respondent was not duly elected by majority 35

of lawful votes cast at the election; or

(d) that the petitioner or its candidate was validly nominated but was unlawfully excluded from the election.”

The appellant predicated his petition in sub-sections (a) and (c). The two lower courts were of the view that where the qualification of a candidate to contest election into the office of Governor of a State is one of the grounds of a petition, the only relevant provisions to be considered are Sections 177 and 182 of the Constitution. The appellant on the other hand contends that Section 187 of the Constitution must also be considered. For ease of reference the said sections are reproduced below:

“Section 177: A person shall be qualified for election to the office of Governor of a State if:

(a) he is a citizen of Nigeria by birth;

(b) he has attained the age of thirty five years;

(c) he is a member of a political party; and

(d) he has been educated up to at least School Certificate level or its equivalent.

Section 182(1): No person shall be qualified for election to the office of Governor of a State if-

(a) subject to the provisions of section 28 of this Constitution, he has voluntarily acquired the citizenship of a country other than Nigeria or, except in such cases as may be prescribed by the National Assembly, he has made a declaration of allegiance to such other country; or

(b) he has been elected to such office at any two previous elections; or

(c) under the law in any part of Nigeria, he is adjudged to be a lunatic or otherwise declared to be of unsound mind; or

(d) he is under a sentence of death imposed by any competent court of law or tribunal in Nigeria or a sentence of imprisonment for any offence involving dishonesty or fraud (by whatever name called) or any other offence imposed on him by any court or tribunal or substituted by a competent authority for any other sentence imposed on him by such a court or tribunal;

or

(e) within a period of less than ten years before the date of

election to the office of Governor of a State he has been convicted and sentenced for an offence involving dishonesty or he has been found guilty of the contravention of the Code of Conduct; or

(f) he is an undischarged bankrupt, having been adjudged or otherwise declared bankrupt under any law in force in Nigeria; or

(g) being a person employed in the public service of the Federation or of any State, he has not resigned, withdrawn or retired from the employment at least thirty days to the date of the election; or

(h) he is a member of any secret society; or

(i) deleted (2010, No. 1)

(j) he has presented a forged certificate to the Independent National Electoral Commission.

Section 187(1): In any election to which the foregoing provisions of this part of this Chapter relate, a candidate for the office of Governor of a State shall not be deemed to have been validly nominated for such office unless he nominates another candidate as his associate for his running for the office of Governor, who is to occupy the office of Deputy Governor; and that the candidate shall be deemed to have been duly elected to the office of Deputy Governor if the candidate who nominated him is duly elected Governor in accordance with the said provisions."

The first issue to consider is whether Section 187(1) of the Constitution can be construed as a provision relating to the qualification of a Governor. As alluded to earlier in this judgment, provisions of the Constitution must be given their natural and ordinary meaning where the words used are clear and unambiguous. See: *Ojokolobo Vs Alamu* (supra); *Saraki Vs F.R.N.* (supra).

Section 187(1) specifically deals with the issue of nomination. A Governorship candidate will not be deemed to have been validly nominated if he fails to nominate a running mate. The nomination and sponsorship of a candidate, as consistently held in a plethora of decisions by this court, is a matter within the domestic affairs of a political party over which the courts have no jurisdiction except as provided for in Section 87(9) of the Constitution.

See: *Onuoha Vs Okafor* (supra); *Daniel Vs INEC* (2015) 9 NWLR (1463) 113 @ 155 - 157; *PD.P Vs Sylva* (2012) 13 NWLR

(Pt.1316) 85.

The qualification of a candidate on the other hand is within the jurisdiction of the Election Tribunal to determine whether, at the time of the election the candidate was qualified to contest the election. This court in Tarzoor Vs loraer (supra) at 498 - 499 F - B held that in order to determine whether a person is qualified or disqualified to contest an election in terms of Section 138(l)(a) of the Electoral Act, resort must be had to Sections 177 and 182 of the Constitution. It was therefore incumbent upon the appellant through his pleadings and by evidence to prove that the 2nd respondent was either not qualified to contest, having not fulfilled one of the requirements of Section 177 or that he was disqualified from contesting having fallen foul of one of the provisions of Section 182(1) of the Constitution. See also: P.D.P Vs INEC (2014) LPELR- 23808 (SC); (2014) 9 SC 141. In Shinkafi & Anor. Vs Yari & 2 Ors (2016) 1 SC D (Pt.II) 1 @ 35 - 36, this court per Okoro, JSC, held:

“Taking the above provisions together i.e. Sections 177 and 182(1) of the 1999 Constitution (as amended) it is seen that both the provision for qualification and that for disqualification are so comprehensive, which makes them exhaustive. Thus the Constitution as the grundnorm (supreme law of the land) having made such elaborate and all encompassing provisions for qualification and disqualification of persons seeking the office of Governor of a State does not leave room for any addition to those conditions already set out.”

This no doubt represents the correct position of the law.

Ground 1 of the petition states that the 2nd respondent was at the time of the election not qualified to contest the election.

Paragraphs 8, 9, 18, 21 and 23 of the petition at pages 2, 10 and 11 of Volume 1 of the record pleaded in support of ground 1 read as follows:

“8. Your Petitioner states that the 2nd respondent was not a candidate at the governorship election conducted and concluded by the 1st respondent on Saturday, November 21, 2015.

9. Despite paragraphs 7 and 8, the 2nd respondent was allowed by the 1st respondent to participate in the supplementary election held on 5th December, 2015, to the office of Governor of Kogi State, and at the end of the supplementary election, was unduly re-

turned as Governor of Kogi State.

18. Your Petitioner states that the 2nd respondent, Yàhaya Bello, who did not register as a voter, who did not vote at the election, who did not present himself to the electorate for votes at the election of November 21, 2015 and who did not nominate another candidate as his associate for his running for the office of Governor, who is to occupy the office of Deputy Governor, was declared the winner of the election by the 1st respondent on December 5, 2015. The Voters Registers used at the 2nd respondent's ward in the election are hereby pleaded.

21. Your Petitioner states that, apart from the fact that the 2nd respondent did not register, vote or seek to be voted for at 5 the election, he did not nominate or submit to the 1st respondent any candidate as his associate for his running [mate] for the office of Governor of Kogi State as mandated by the Constitution.

23. Your Petitioner states further that the Form CF0028 submitted to the 1st respondent in respect of the 2nd respondent on or about November 27, 2015 has no deputy governorship candidate who was to contest along with him. The said Form shall be founded upon at the Trial."

Indeed I have perused the entire petition. I agree entirely with the court below that none of the pleadings relate to the grounds for qualification or disqualification of a candidate for election into office as Governor as provided for in Sections 177 and 182 of the Constitution.

The onus was on the appellant seeking declaratory reliefs to establish his case by his pleadings and by evidence led in support thereof on a preponderance of evidence. Even though the court below proceeded to examine the oral and documentary evidence led by the appellant and concluded that he failed to prove that the 2nd respondent was not qualified or was disqualified from contesting the election in accordance with Sections 177 and 182 of the Constitution, I am of the view that the exercise was done out of an abundance of caution. This is so because evidence led on facts not pleaded goes to no issue. See: Anyafalu Vs Meka & Ors (2014) LPELR - 22336 (SC); Aminu & Ors Vs Hassan & Ors (2014) LPELR-22008 (SC);

Adimora Vs. Ajufo (1988) 3 NWLR (Pt.80) 1.

On the other hand, the lower court at pages 1641 -1643 of the record gave a detailed review of the facts and circumstances that led to the 2nd respondent being substituted for the late Prince Audu, as garnered from the record, including the fact that he participated in his party's primaries whereas the appellant did not, and came to the conclusion, rightly in my view, that there was no feature of the case that established non-qualification or disqualification under Sections 177 and 182 of the Constitution. B

I therefore agree with the lower court, which affirmed the decision of the court below that there were no pleadings to support Ground 1 of the petition which complained of the non-qualification of the 2nd respondent to contest the election. C

The second ground of the petition is that “*the 2nd respondent was not duly elected by majority of lawful votes cast at the election.*” D

It is important to observe at this stage that the appellant's contention all along has been that the election was concluded on 21/11/2015 and that he and the late Prince Audu having garnered 240,867 votes were deemed to have won the election by operation of Section 177(2) of the Constitution. Indeed on this basis he refused to participate in the supplementary election that took place on 5/12/2015. As rightly observed by J.B. Daudu, SAN for the 2nd respondent, the appellant's stance has been to regard the election conducted on 21/11/2015 and the supplementary election conducted on 5/1/2015 as two separate elections where he and the late Prince Audu won by 240,867 votes and the 2nd respondent won 6,885 votes respectively. E F

In the course of this judgment, I have held that the 1st respondent was right when it declared the election conducted on 21/11/2015 inconclusive having regard to the margin of votes of the winning candidates being less than the total number of registered voters in the 91 polling units where election was cancelled. I have also held that the supplementary election conducted on 5/12/2015 was proper and that the APC and its sponsored candidate, the 2nd respondent, was entitled to all the votes cast in its favour at the conclusion of the election on 5/12/2015. G H

I also agree with the court below and with learned senior

counsel for the 1st respondent that Section 138(1)(c) of the Electoral Act does not envisage a situation where a member of the same party would challenge the winner of an election. See: *Gwede Vs INEC (2014) 18 NWLR (Pt. 1438) 56 @138.*

Section 31(1) of the Electoral Act provides:

B *“31(1) Every political party shall not later than 60 days before the date appointed for a general election under the provisions of this Act, submit to the Commission in the prescribed forms, the candidates the party proposes to sponsor at the elections...”*

Section 32(2) of the Act also provides:

C *32(2) “No person shall nominate more than one person for an election to the same office,”*

By these provisions it is clear that in relation to election petitions the Electoral Act envisages a dispute between candidates of different political parties. This explains the requirement that where an election is questioned on the ground that the respondent was not duly elected by majority of lawful votes cast under Section 138(1) of the Act, the petitioner is required to plead two sets of figures: the scores announced by INEC and the scores he considers to be correct. See: Awuse Vs Odili (2005) 16 NWLR (952) 416 @ 482 G - B; Nwobodo Vs Onoh (1984) 1 SCNLR 1. Where appropriate he is expected to call witnesses to testify as to the misapplication of the votes. The appellant based his claim of scoring a majority of the votes cast at the election on the figure of 240,867 votes announced by INEC on 21-11-2015 at a stage when the election was inconclusive. He did not plead two sets of results.

G On this issue the court below opined thus atpage 1656 – 1658 of the record:

H *“Certainly, from the evidence before the Tribunal, only one election was held for the office of the Governor of Kogi State. Polling commenced on 21-11-2015 and, owing to the declaration of the umpire INEC, that it was inconclusive for reasons which it clearly articulated both to the candidates at the election and the electorate, a supplementary election was subsequently held in order for a clear winner to emerge amongst the different Political Parties sponsoring candidates in the election. The election was concluded on 05-12-*

2015. It is therefore manifestly incorrect and patently inaccurate to give the impression, as the Appellant has sought to do, that of the two phases/stages of the election, the first set of scores is attributed to him personally as the Deputy Governorship candidate upon the death of the Governorship candidate, and the second is personal to the 2nd respondent. That therefore, from a comparison of the two sets of scores, he (the Appellant) scored majority of the lawful votes cast at the election. This, to say the least, is a creative and ingenious spin on the interpretation of Section 138(1)(c) of the Electoral Act, which however, with the greatest respect to the Appellant, is fallacious and not in tandem with the judicial interpretation of the law as laid down in a host of decisions of Courts issued down the line. For all these reasons, I resolve issue six against the Appellant.”

I am entirely in agreement with the lower court in this regard.

On the whole I resolve this issue against the appellant.

Having resolved all the issues in this appeal against the appellant, I hold that the appeal lacks merit. It was for this reason that I dismissed it on 20th September 2016 and affirmed the judgment of the lower court delivered on 4/8/2016 which upheld the judgment of the Kogi State Governorship Election Tribunal delivered on 6/6/2016 affirming the return of the 2nd respondent, Yahaya Bello as the duly elected Governor of Kogi State.

Appeal dismissed. Parties to bear their respective costs.

ARIWOOLA JSC

I had the opportunity of reading before now the lead reasons for the judgment of my learned brother, Kekere-Ekun, J.S.C.

On the 20th September, 2016 when we had taken the appeal, having considered all processes including the briefs of argument, and respective oral submissions, of counsel, statutes and case laws, we considered the appeal lacking in merit and dismissed same. The court then reserved to give our reasons today 30th September, 2016.

Having read the reasons contained in the lead of my learned brother, I am in complete agreement with the reasoning and I adopt

same as mine, in also arriving at the conclusion that the appeal is unmeritorious and was rightly dismissed.

I have nothing more to add as my learned brother has meticulously dealt with all the issues raised in the appeal.

I abide by the consequential orders in the lead judgment including the order on costs that parties are to bear their respective costs.

MUHAMMAD JSC

Having read the elaborate and comprehensive reasons for the judgment of my learned brother, Kekere-Ekun, JSC, in this appeal before now and found myself agreeable to the reasons, I adopt them as mine in adjudging the appeal unmeritorious. I abide by the consequential orders made consequent upon the reasons for the lead judgment.

OGUNBIYI JSC

The appeal at hand was heard and judgment pronounced thereon and dismissed the same day, on 20th September 2016. The court thereupon adjourned to the 30th September, 2016 to give its reasons for the dismissal and which I will now proceed to give.

My learned brother, Kekere-Ekun, JSC read the lead reasons why the appeal was dismissed. The same was well researched and the issues meticulously considered. I am in complete agreement with the judgment and for the reasons so given, I also dismissed the appeal as lacking in merit.

The facts of the case leading to the appeal as well as the issues raised in all briefs of arguments are well spelt out in the lead judgment. I do not consider it necessary to repeat same.

While I adopt in full the judgment of my learned brother as mine, I will however wish to say a few words on the 1st issue raised by the appellant wherein he questions whether the lower court did not fall into serious error by dismissing appellant's case on the ground that the 1st respondent never made a return at the election of 21/11/15, as a result of which it agreed that the said election was inconclu-

sive - Grounds 9 and 10.

The petitioner/ appellant in this court anchored his entire case on his own construction and or interpretation of the provisions of sections 179(2) and 181 (1) of the 1999 Constitution (as amended). Two prominent and clear cut questions are, whether pursuant to the provisions of sections 179(2) and 181(1) supra and despite INEC's declaration that the said election was inconclusive, could the 1st respondent have declared the appellant the Governor-elect of Kogi State; also and closely following is whether the 2nd respondent could inherit the votes cast for the APC in the election of November 21st 2015?

Central to the resolution of the 1st issue therefore are sections 179(2) and 181(1) of the 1999 Constitution (as amended). The reproduction of the former states as follows:-

"A candidate for an election to the office of Governor of a state shall be deemed to have been duly elected where there being two or more candidates

(a) he has the highest number of votes cast at the election: and

(b) he has not less than one quarter of all the votes cast in each of at least two thirds of all the local government areas in the state."

Section 181(1) also provides thus and said:-

"If a person duly elected as Governor dies before taking and subscribing the oath of Allegiance and oath of office, or is unable for any reason whatsoever to be sworn in, the person elected with him as Deputy Governor shall be sworn in as Governor and he shall nominate a new Deputy Governor who shall be appointed by the Governor....."

At page 1611 of the record of Appeal, the lower court in affirming the decision of the trial Tribunal had this to say:-

"In respect of the election held on 21/11/2015, which election was declared inconclusive no return was made.

By section 156 of the Electoral Act and the decision in Ohakim V. Agbaso (2010) 19NWLR (Pt 1226) 172 at 239 para. G, a return in the context of an election is defined to mean the declaration by returning officer of a candidate in an election under the Act as being the winner of the election

..... *It therefore follows that at no time was Prince Abubakar Audu returned as duly elected Governor of Kogi State pursuant to the election prior to his death. Given this scenario, there was absolutely no basis for the invocation and application of section 181 of the Constitution, the condition precedent to his application having*
 B *not been fulfilled.*" (Emphasis supplied).

The counsel for the appellant vehemently disagreed with the foregoing findings by the two lower courts and submits that the administrative action of a returning officer, by verbally making a declaration or return, cannot be a 'Condition precedent' to the application of sections 181(1) or 179 of the Constitution. This, learned counsel argues because the provision of section 181(1) does not remotely or proximately make any reference to return; that by reading the word return into the said section to be a condition precedent for its
 C invocation and application, the lower courts did err and defeated the purpose of its express provisions.
 D

Learned counsel cited the decision of this court in the case of Abioye V. Yakubu (1991) 5 NWLR(Pt. 190) 130 at 231 wherein it was held that where the words of a statute accurately express the
 E intention of the lawmaker, effect must be given to it. See also Amadi V. INEC (2013) 4 NWLR (Pt. 1345) 595 at 632.

The appellant's counsel submits further that section 181(1) of the Constitution makes both legal and logical sense, considering the fact that, a Deputy Governorship candidate, is not cognizable
 F only under section 187 of the Constitution, but that the Governorship ticket is a joint ticket of both the Governorship candidate and his deputy and that in the absence of , the latter the former is declared by the Constitution as invalidly nominated; that the ticket is joint and
 G inseparable both during and up till the completion of elections.

The 1st respondent's counsel in response to the submission on behalf of the appellant took a critical appraisal of section 179(2)(0) of the Constitution (as amended) and his interpretation of same is to the effect that a candidate of a political party must have the highest
 H number of votes in the election conducted and concluded in the entire state. This contention in my view is reasonable because, it is conceded by all parties and their counsel as borne out on the record that the election of 21st November, 2015 was not a reflection of the

election in the entire Kogi State in view of the elections which were cancelled in 91 polling units. This, as rightly postulated, can affect the political party with the highest number of votes cast. It is also correct to say as submitted by 1st respondent's counsel that the said section 179(2)(0) is not concerned with the mechanism on how the highest number of votes by a candidate of a political party is attained. The section is obviously silent on this point. B

By the provision of section 153(4) of the Constitution, the Independent National Electoral Commission (INEC) is a creation of the Constitution of the Federal Republic of Nigeria, 1999 (as mended). Also, section 160 of the same Constitution gives the bodies created under section 153 the power to make rules for the purpose of regulating the procedure for the discharge of their functions. The reproduction of section 160(1) states thus:- C

“Subject to subsection (2) of this section, any of the bodies may, with the approval of the President, by rules or otherwise regulate its own procedure or confer powers and impose duties on any officer or authority for the purpose of discharging its functions; provided that in the case of the Independent National Electoral Commission its powers to make its own rules or otherwise regulate its own procedure shall not be subject to the approval or control of the President” (Emphasis provided). D E

Isolated and special recognition is indulged the INEC specifically. Also and following from the foregoing provision, it is not out of place to say authoritatively therefore that the Manuals for election officials 2015 (updated version) issued by INEC are not mere instructions or directions; rather, they are subsidiary legislations which have the force of law. They have their origin from the Constitution and the Electoral Act. F G

The powers of INEC by section 15(a) under Paragraph F of Part I, Third schedule to the 1999 Constitution are explicitly spelt out as follows:-

“(a) organise, undertake and supervise all elections to the offices of the President and Vice President, the Governor and Deputy Governor of a state etc.

(i) carry out such other functions as may be conferred upon it by an Act of the National Assembly.”

In further confirmation of the effect of Manuals for election officials supra, sections 73 and 153 of the Electoral Act 2010 (as amended) being Acts of the National Assembly provide thus:-

Section 73 -

B *“Subject to the provisions of this Act, the Commission shall issue and publish, in the Gazette, guidelines for the elections which shall make provisions, among other things, for the step by step recording of the poll in the electoral forms as may be prescribed beginning from the polling units to the last collation centre for the ward or constituency where the result of the election shall be declared.”*

C Section 153 -

“The Commission may subject to the provisions of this Act, issue regulations, guidelines, or manuals for the purpose of giving effect to the provisions of this Act and for its administration thereof.”

D It is within reason to say therefore that the two lower courts were on the right track when they took judicial notice of the Manuals being subsidiary legislation. Judicial decisions in reference include:- Yusuf V. Obasanjo (2003) 16 NWLR (Pt. 84) 554 also Adene V. Dantubu (1994) 2 NWLR (Pt. 328) 509 at 532. I agree with the senior counsel for the 1st respondent that INEC’s Manuals are very consistent with and not contradictory to section 179(2)(a) of the 1999 Constitution (as amended).

F As rightly held by the lower courts, section 181 of the 1999 Constitution is unambiguous and clear that for the Deputy Governorship candidate to be entitled to the benefit under the section, he must have been duly elected and the return made thereof in respect of the Kogi State Governorship Election held on 21st November, 2015. There was no such return in this case because the election was declared as inconclusive. The appellant and the late Prince Audu were not duly elected. The appellant does not come within the benefit of section 181 of the Constitution as claimed.

H At page 964 of Volume 2 of the record for instance, the appellant under cross examination by 1st respondent conceded the absence of return wherein he replied:-

“the presiding officer refused to make a return.”

In my view, the two lower courts held rightly therefore that upon the declaration of the Kogi State Governorship election as in-

conclusive there was no return made; also with the death of Prince Abubakar Audu, being the All Progressives Congress Governorship candidate for Kogi State, the outcome did not render the 240,867 votes cast in favour of the Party wasted votes nor did it make the vote accrue to the appellant and thus making him the Governor-elect in the absence of any return made in respect of the election held on 21st November 2015. For all intents and purposes, the APC, also by extension the 2 respondents both have an unimpeded legal interest in the said 240,867 votes. See the cases of Agbaje V. INEC 4 NWLR (Pt. 1501) page 157 at 165 -166; Agbakoba V. INEC (2008) 18 NWLR (Pt. 1119) 489 at 558 - 559; also Gwede V. INEC (2014) 18 NWLR (Pt. 1438) 56 at 126. B
C

With the declaration of the election as inconclusive, and the consequent death of Prince Abubakar Audu, the appellant can no longer lay any legal right in the said votes. This is sequel to Section 187(1) of the Constitution 1999, which states that a Deputy Governorship candidate shall: D

“be deemed to have been validly elected to the office of the, Deputy Governor if the candidate who nominated him is duly elected as Governor in accordance with the said provision.” E

With the nomination of the 2nd Respondent, who came second in APC’s Gubernatorial Primary Election, he automatically takes the benefit of the said 240,867 votes on behalf of the Party.

Furthermore and contrary to the submission by the senior counsel for the appellant, his client and the late Prince Audu could not in the circumstance of this case be deemed to have been duly elected as Deputy Governor and Governor of Kogi State by virtue of the Kogi State Governorship election conducted on 21st November, 2015. It is not in contention however that the appellant has remained Prince Audu’s Deputy Governorship candidate and continued right through and was inherited subsequently by the 2nd respondent as his running mate for his Governorship candidature. F
G

The findings of the Court of Appeal and the trial Tribunal were concurrent in their determination of this case. The appellant in this appeal has failed to show any reason why this court should disturb the unanimity of the two lower courts both on facts and issues of law. H

In other words, the appellant has not shown that the concurrent findings on the interpretation and application of the Constitution and the Electoral Act are perverse and has occasioned any miscarriage of justice. I cannot also interfere with same.

With this few words of mine, I seek to adopt the fuller and well researched reasonings in the judgment of my learned brother, Kekere-Ekun, JSC and in total also dismiss this appeal as lacking in merit. I abide by the order made as to costs.

C

OKORO JSC

On 20th September, 2016, this appeal was heard and reserved by this court. Judgment was also pronounced shortly thereafter on the same date wherein the appeal was found to be unmeritorious and an order of dismissal made. The matter was then adjourned till today 30th September, 2016 for reasons backing up the order of dismissal. The reasons for judgment are now ready and I shall proceed to state them.

I read in advance the lead reasons for judgment ably marshaled and just delivered by my learned brother, Kekere-Ekun, JSC. I agree entirely with those reasons and I beg to adopt them as mine. I shall make a few comments in support. Since my learned brother has set out the facts and all the issues in the lead judgment, I need not repeat the exercise here. Issues 1, 2, 3 and 4 are interrelated and I intend to resolve them together. The issues state as follows:

1. Having regard to the specific provisions of Sections 179(2) and 181 (1) of the Constitution, relevant provisions of the Electoral Act, 2010, as well as the facts and circumstances of this case, whether the lower court did not fall into serious error by dismissing appellant's case on the ground that the 1st respondent never made a return at the election of 21/11/15, as a result of which it agreed that the said election was inconclusive.

2. Having regard to the fact that the joint ticket of the late Prince Abubakar Audu and the appellant garnered 240,867 votes at the Kogi Governorship election of November, 21, 2015, and also complied with the constitutional requirements of Section 179(2) of the Constitution, whether the said joint ticket was not deemed to

have been duly elected as Governor and Deputy Governor respectively.

3. Considering the facts and circumstances of this case whether Section 181 of the Constitution does not inure in favour of the appellant.

4. Considering the clear constitutional provisions relating to the due election of a Governor and Deputy Governor, whether the lower court did not fall into serious error by relying on an isolated provisions of INEC's Manual for Election Officials (updated) to affirm and approve of both the 1st respondent and the trial Tribunal's declaration of the Governorship election of 21/11/15 as inconclusive.

In resolving the four issues listed above, two sections of the 1999 Constitution of the Federal Republic of Nigeria (as amended) call for construction. These are Sections 179(2) and 183 (1). Also to be considered is Chapter 3 paragraph 3. 11 Step 14 of INEC's Manual for Election Officials 2015 (updated Version).

The main argument of the learned senior counsel for the appellant is that by Sections 179(2) and 181(1) of the Constitution, the late Prince Abubakar Audu and the appellant, having scored majority of lawful votes in the election held on 21/11/15 and having obtained one quarter of the votes in more than two thirds of the Local Government Areas of the state, they were deemed to have been elected Governor and Deputy Governor respectively. He contended that the recourse to the INEC's Election Manual to its officials to declare the election inconclusive was unconstitutional. Citing the cases of *Emerhor V. Okowa* (2016) 11 NWLR (pt. 1522) 1 at 30 - 31 and *Nyesom V. Peterside* (2016) 1 NWTLR (pt. 1492) 71, learned senior counsel contended that non-compliance with INEC's Manual, Guideline cannot be a ground to question an election. He further argued that even if the Manual was to be used, only the number of registered voters who actually collected their Permanent Voters Cards (PVCs) should be considered which would have made the number less than the winning margin between the Peoples Democratic Party and the All Progressives Congress.

The respondents, as would be expected have argued otherwise. According to their senior counsel, it is not automatic that whenever a person scores majority of lawful votes and makes $\frac{1}{4}$ of

votes in two thirds of the Local Governments, a person is deemed elected Governor. It is their contention that there must be a formal return and a declaration made before a person is taken to have won, else there would be anarchy. As regards the Manual for Election Officials, it was argued that reference is made to registered voters and not voters who had collected their permanent voters' cards.

At this point, it is necessary to reproduce the Sections of the Constitution in issue for ease of reference. Section 179(2) of the Constitution provides:

"179(2) - A candidate for an election to the office of Governor of a state shall be deemed to have been duly elected where, there being two or more candidates -
(a) he has the highest number of votes cast at the election; and
(b) he has not less than one-quarter of all the votes cast in each of at least two-thirds of all the local government areas in the state."

Again, Section 181(1) of the Constitution provides:

"181(1) If a person duly elected as Governor dies before taking and subscribing the Oath of Allegiance and oath of office, or is unable for any reason whatsoever to be sworn in, the person elected with him as Deputy Governor shall be sworn in as Governor and shall nominate a new Deputy Governor who shall be appointed by the Governor with the approval of the simple majority of the House of Assembly of the state."

By Section 179(2) of the Constitution (supra), for a person to be validly elected Governor of a state, he must have scored the highest number of votes cast at the election and must have not less than one-quarter of all the votes cast in each of at least two-thirds of all the local government areas in the state. When the section says *"shall be deemed to have been duly elected"*, does it mean there is no need for a formal declaration and/or return? Can it be said that whenever the two conditions above are met, even if the election is still in progress, a person is deemed elected? In answering the two questions I have posed above, reference has to be made to Section 15(a), paragraph F of Part I, Third Schedule to the 1999 Constitution. It states:

"The Commission shall have power to:-(a) 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 House of Representatives and the House of Assembly of each state of the Federation.”

In view of the above function ascribed to INEC by the constitution, I agree with the respondents that INEC is the only body in the Position to determine or decide during an election when Section 179(2) of the Constitution 1999 (as amended) has been met. To hold otherwise would lead to anarchy as all participants in the election may each claim to be deemed elected. It is also my view that elections in all the units in the state must be concluded before anybody can be deemed to have been elected. Thus even if one of the candidates meets the constitutional requirement in the middle of the process, he cannot be deemed to have been duly elected because anything can happen after elections are held in all the remaining voting units. There must be a formal declaration or Return by the Electoral body before a person can claim to have been duly elected. See Ohakim V. Agbaso (2010) 19 NWLR (pt. 1226) 172 at 239 para. G. By Section 156 of the Electoral Act, 2010 (as amended), “Return” means the declaration by a Returning Officer of a candidate in an election under the Act as being the winner of that election.

To further buttress the position taken above, paragraph 3.11, Step 14 of Chapter 3 of INEC’s Manual for Election Officials 2015 (updated version) provides as follows:-

“Where the margin of win between the two leading candidates is not in excess of the total number of registered voters of the polling units) where elections were cancelled or not held, decline to make a return until another poll has taken place in the affected polling unit(s) and the results incorporated into a new form EC8D, subsequently recorded into form EC8E for Declaration and Return.”

It was argued by the learned senior counsel for the appellant that the above provision is against the spirit and tenor of Section 179(2) of the Constitution. I do not think so. The facts of this case show that results released by the Electoral body (INEC) in respect of the election conducted on 21/11/2015 did not cover the totality of votes cast in all the designated polling units in the state. In fact elections in 91 polling units were cancelled. The result of the election of

that date did not include the 91 polling units. It is also in evidence that the number of registered voters in the 91 polling units is more than the winning margin by the APC over the PDP. In other words, should the number of voters in the 91 units vote for a particular candidate, the result would be affected. This, to my mind, is common sense. I think INEC was right to put on hold the result of the election until elections were held in the 91 polling units. The argument by the appellant that only registered voters with permanent voter's cards in the 91 polling units should be considered did not fly at all because the paragraph refers to "*all the registered voters*" and not "*registered voters with 3, Permanent Registered Voters Cards.*" It is trite that in interpreting statutes, the primary rule of construction is the literal construction which requires that we give the words used in a statute their ordinary and natural meaning,, omitting no words and adding none. See *Egbe V. Yusuf* (1992) LPELR - 1035 (SC), *Okumagba V. Egbe* (1965) 1 All NLR 62.

The two courts below held that the election of 21/11/2015 were inconclusive because election in the 91 polling units were yet to be conducted. I agree. Thus, Section 181(1) of the Constitution could not have been activated as polling was still in progress and declaration and return not having been made. Since the election was inconclusive, the late Prince Audu was never declared winner before he died. Having not been so declared, the appellant had no right to be sworn in as Governor of Kogi State. The four issues I listed above are accordingly resolved against the appellant.

In view of the reasons I have stated above and the fuller ones adumbrated in the lead reasons for judgment of my learned brother, Kekere-Ekun, JSC that I agreed on 20th September, 2016 that this appeal lacks merit and deserves an order of dismissal. The appeal is accordingly dismissed. I affirm the judgment of the Court of Appeal which upheld the decision of the trial Tribunal that the 2nd respondent Yahaya Bello was duly elected Governor of Kogi State. Parties to bear their respective costs.

SANUSI JSC

This appeal was heard by us on 20th of September, 2016.

After considering the briefs of arguments and the issues raised by learned senior counsel to the parties and the oral submissions made by them, I dismissed the appeal for being devoid of any merit. I there upon fixed today to give my reasons for my judgment dismissing the appeal. I will now proceed to give my reasons for dismissing this appeal hereunder. B

This instant appeal is against the judgment of the Court of Appeal (the lower court) delivered on the 4th of August, 2016 which had affirmed the decision of the Governorship Election Tribunal of Kogi State of Nigeria, albeit, with slight variation. The Kogi State Governorship Election Tribunal (hereinafter simply called “*the tribunal*”), had earlier dismissed the appellant’s petition filed before it. C

The facts of the case leading to the determination of the appellant’s election petition by the tribunal which later culminated into the judgment of the lower court now being appealed against. D are simple and straightforward. At the tribunal, the appellant herein, filed an election petition against the 2nd respondent who incidentally is a member of the same political party with him i.e the All Progressive Congress (APC), challenging the declaration and return of the second respondent by the first respondent (INEC) as winner of the said election. E

The first respondent herein, informed the parties of its willingness to conduct a governorship supplementary election and urged the APC to produce a candidate to step into the shoes of its former governorship candidate Prince Abubakar Audu, who passed on during the election (but before results were declared) in which the present appellant was late Prince Abubakar Audu’s running mate. His name was presented to the 1st Respondent INEC as its candidate. F

During the election held on 21/11/2015 in Kogi State, late Prince Abubakar Audu scored the highest number of votes cast along with the appellant who was his running mate. However, the election held on 21/11/2015 in ninety-one wards in Kogi State which had over forty-nine thousand votes, were cancelled by the first respondent INEC, which consequently declared that the election in the state was inconclusive and therefore refused to declare and return any winner at the said election. Thereafter, the death of Prince Abubakar came as a surprise. The first respondent thereupon fixed a date for H

the conduct of Supplementary election in the 91 wards/polling stations and asked the APC to present its governorship candidate for the supplementary election to replace late Prince Audu. The said party, the APC thereafter presented to INEC, the name of the 2nd Respondent as its candidate who incidentally had earlier come second in score of votes, in the primary election conducted earlier by it, in which late Prince Audu emerged winner and was presented as its governorship candidate. It is pertinent to state here, that the APC did not conduct any new primary election before the presentation of the name of the 2nd Respondent as its new candidate because he became second in score of vote when he contested in the primary election along with Prince Abubakar Audu as the latter's running mate.

After the 1st respondent conducted the supplementary election on 5/12/2015 in the 91 wards in which the earlier election held on 21/11/2015 was cancelled, new votes scored by the new candidate were announced by the 1st respondent wherein, the 2nd Respondent cores in the supplementary election were merged with the earlier votes scored by the APC in favour of late Prince Audu in the whole state and it ultimately declared and returned the 2nd respondent as the winner of the election and by extension it declared him the elected governor of Kogi State.

Aggrieved by the said declaration and return of the 2nd respondent by 1st Respondent (INEC), the present appellant filed a petition before the Kogi State governorship election tribunal and prayed the tribunal to, inter alia, declare him the winner of the said election. Some preliminary objections were filed by respondents which were sustained by the tribunal which had also struck out the petition but still the tribunal proceeded to determine the petition on the merit and it ultimately dismissed same for being meritless. Piqued by the decision of the tribunal, he appellant/petitioner appealed unsuccessfully to the lower court which also dismissed his appeal and affirmed the decision of the tribunal dismissing the petition, hence the appellant further appealed to this court.

Before this court, parties' learned counsel filed and exchanged briefs of argument. In his brief of argument filed on 18/8/2016, the learned senior counsel for the appellant raised ten issues for determination. The appellant also filed Appellant's Reply briefs to 1st and

2nd respondents' briefs of argument on 1st September 2016 and 7th September respectively.

On his part, the learned senior counsel for the 1st respondent formulated four issues for the determination of the appeal. The 2nd Respondent filed his brief of argument on 2/9/2016, wherein four issues were also formulated, for the determination of this appeal. B

Presently, intend to consider the Issues for determination and render summary of the submissions of learned senior counsel on each of the issues raised by them beginning with the ten issues raised and argued by the appellant. C

The first issue for determination raised in the appellant's brief of argument relates to inconclusiveness of the election of 21st November 2015. On this issue, the learned senior counsel for the appellant referred to the judgment of the tribunal where it found that Section 179(2) and Section 181(2) of the Constitution of the Federal Republic of Nigeria 1999 (as amended) were inapplicable, for the simple reason that the 1st Respondent (INEC) did not make a declaration or return of the winner of the 2015 Kogi Governorship election. E

It is the learned senior counsel's argument that the votes cast by the electorate could not be subjected to administrative machination of the returning officer. He added that a declaration or return cannot be a condition precedent or superior to the actual votes cast by the electorate. It is his contention also, that it was mandatory and logical that Section 181 of the 1999 Constitution be construed in the light of Section 179(2) thereof and NOT Section 156 of the Electorate Act 2010 (as amended). He cited and relied on the authority of *Omoboriowo v Ajasin* (1984) 1 SCNLR 108. In that case this court did not affirm Omoboriowo as governor merely because the then Electoral Commission had declared him or declined Ajasin because he was not declared or returned, the Supreme Court found that after recomputing the votes it was petitioner/respondent who scored the majority of lawful votes. F G H

With regard to issues Nos. 2 and 3 raised by him, I am of the view that they are mere amplification of the first issue for determination discussed supra relating to the applicability of Section 179 and

181 of the 1999 Constitution. Issue No. 4 relates to the reliance on INEC's Manual for Election Officials to affirm the election of the 1st Respondent and approve the trial tribunal is declaration of the election as inconclusive. He contended that the Manual for Election Officials, could not add, subtract, vary or regulate the application of Section 179 of the 1999 Constitution in respect of the election of the Governor of Kogi State.

As regards Issue NO.5 which relates to pleading, that could sustain the election petition as held by the lower court. The learned silk for the appellant submitted further, that Sections 133 and 132 (2) of the Electoral Act 2010 as amended, stipulate that person returned should be made the respondent. He argued therefore, that the fact and circumstances of this case have shown that there was a candidate who could present a petition and as such, which could be grounded under Section 138(1)(c) of the Electoral Act 2010 (as amended). It was further argued on behalf of the appellant, that by the operation of Sections 179(2) and 181 of the Constitution, the appellant is entitled to make a claim to the seat of the Governor of Kogi State. According to the learned senior counsel, a statute which denies a party the opportunity to exercise his fundamental right must do so expressly since such foreclosure is an expropriatory act. He urged this court to resolve this issue in favour of the appellant.

Issue NO.6 in the Appellants brief of argument queries the propriety of INEC to appropriate the votes cast for Prince Audu and the appellant at the election held on the 21/11/2015. The learned silk for the appellant submitted that it was the appellant's right as the candidate had vanished on the demise of Prince Abubakar Audu, it then means that the votes cast for them also expired with the sudden death of Prince Audu. He argued that the 2nd Respondent can not be a substitute for the expired candidate and in the same vein can not inherit the votes of an expired candidate. On issue No.7 which questions the decision of the lower court that the second respondent was qualified to contest the governorship election, and contended that a governorship candidate cannot be validly nominated without a deputy governorship candidate. He then remarked that the 2nd respondent had failed to satisfy the provisions of Section 179(c). He further stated that Sections 177, 182 and 187 of the 1999 Constitution as amended,

should be jointly interpreted and applied in the determination of a qualification of a candidate. He added that there was nowhere in the record where the alleged adoption of the appellant, as deputy governorship candidate, can be located. He then accused the lower court as making case of adoption instead of nomination as well as when the lower court held that the appellant did not withdraw his candidature in line with Section 35 of the Electoral Act. He submitted that withdrawal presupposes that there must have been a valid nomination and as such, withdrawal will not arise if there had been no valid nomination. He urged this court to resolve this issue against the appellant.

ISSUE NO.8

This issue relates to the decision of the tribunal in upholding the preliminary objections of the Respondents. The learned senior counsel to the Appellant stated that the lower court was right when it held that the Appellant had locus standi and that the petition was not statute barred, but he disagreed when he went on to hold that the Appellant had no reasonable cause of action. He submitted that since the finding on pre-election matter was in respect of ground 1 challenging the qualification of the 2nd Respondent in which case ground 2 could have sustained the petition to grant the reliefs sought therein.

He contended that when the election was declared inconclusive, the appellant took out an originating summon at the Federal High Court. The respondent raised objections to the effect that only an election petition tribunal could entertain this claim. The Federal High Court thereupon struck out the suit and upheld the objection. He submitted therefore, that it was inappropriate for the tribunal after successfully challenging the jurisdiction of the Federal High Court. He urged the court to resolve this issue in favour of the Appellant.

ISSUE NO. 9

This issue relates to the alleged failure of the lower court to properly resolve issue 1 placed before it. He stated that the lower court found that the tribunal failed to consider the issue of estoppel arising from the decision of the Federal High Court in determine the objection of the Respondent, he argued that having so found, the lower court should have set aside the tribunal's decision on the

respondent's objection having been tainted by lack of fair hearing which vitiates any proceeding irrespective of the correctness of the decision. He urged the court to resolve this issue in favour of the Appellant.

B ISSUE NO. 10

This issue deals with the cancellation of election in 91 polling units and the 1st Respondent declaring the said election inconclusive. He argued that since election was successfully held in 2015, 91 polling units in Kogi State, and the result collated across the 21 local governments, he urged that this then means that this represent 94% of all the polling units in Kogi State. He submitted further that the requirement of Section 179(a) and (10) of the Constitution has been met and therefore, the supplementary election conducted thereafter was unnecessary. He urged the court to allow the appeal.

D The 1st Respondent's counsel formulated 4 issues for determination.

1st Respondent's issue No.1 relates to the decision of the lower court refusing to hold that the Appellant was elected the Governor of Kogi State.

E The learned Respondent's counsel argued that since there were still 91 polling units in which elections were cancelled and because of the accusation on the results of fresh election in the said 91 polling units, the Appellant could not have been automatically declared as the Governor. He submitted that the decision of INEC declaring the Kogi State Governorship Election held on 21st November, 2015 inconclusive and its subsequent return of the Respondent as the Governor Elect of Kogi State were not inconsistent with the provisions of Section 179(2) of the 1999 Constitution.

G He submitted further, that the basis of declaring an election inconclusive is where the number of registered voters in the polling units where election were cancelled, are more than the margin of win between the two leading candidates and not where the number of registered voters with permanent voters cards in the polling units where election were cancelled were in excess of the margin of win between the two leading candidates. He pointed out that if the APC was represented by late Prince, margin of win was in excess of the registered voters in the polling units where elections were cancelled,

the Appellant and the late Audu would have been declared the winners. He submitted that for a Deputy Governorship candidate to be entitled to the benefit under Section 181 of the Constitution, the Governorship candidate must have been duly elected. He urged the court affirm the decision of the court below and resolve this issue in favour of the Respondents. B

The 1st Respondent's issue No.2 relates to the alleged failure of the tribunal to resolve and determine constitutional and statutory issues. He argued that the Court below rightly captured the submission of the 1st Respondent on the Appellant's alleged fundamental and weighty constitutional issues raised by him. He submitted that there was no miscarriage of justice done to Appellant even if the tribunal failed to consider the said issue. C

On the 1st Respondent's issue No .3 which relates to the lower courts affirming the decision of the tribunal allowing or upholding the Respondent's Preliminary Objections; the learned counsel for the 1st Respondent sought to determine the jurisdiction of the tribunal based on the petition predicated on different reliefs, facts and issues from those of the Appellant. He submitted that the 1st Respondent was at liberty to raise and rightly did raise the preliminary objection against the Appellant's petition which is based on a different or new set of facts, issues and had sought reliefs other than those in suit FHC/ABJ/CS/977/2015. He urged the court to resolve this issue in favour of the 1st Respondent. D E F

On issue No.4 of the 1st Respondent is to the effect that the lower court was right in its decision that 2nd Respondent was qualified to be returned as the Governor of Kogi State and as affirmed by the tribunal's decision, that the grounds and reliefs in the Appellant's petition were incompetent and at variance with and unsupported by the pleadings. He referred to the case of *Shinkafi V Yari* (2016)7 NWLR (pt. 1511) 340 at 377 - 379 among others, where the Supreme Court held that in determining the issue of qualification or disqualification of a candidate for election into the office of a Governor, the Election Tribunal or the court is limited to the provisions of Sections 177 and 182 of the 1999 Constitution. He stated that he was not unmindful of provision of Section 187(1) of the Constitution, and also submitted that that Section is not a ground for disquali- G H

fication under Section 138(l)(a) of the Electoral Act 2010 (as amended) and therefore not applicable. He urged the court to affirm the entire findings of the two courts below that the 2nd Respondent was qualified to contest the election for the governorship of Kogi State.

The 2nd Respondent on the other hand also formulated 4 issues for determination.

ISSUES Nos. 2,3 and 4 in the 2nd Respondent's brief of argument are similar in context when compared with the issues formulated by the 1st Respondent. The arguments and submissions canvassed therein, are not in any way different from those of the 1st Respondent. It will therefore not be necessary to repeat here, what has been argued or submitted by the 1st Respondent. But on Issue No. 1 of the 2nd Respondent's brief of argument which relates to the application of guidelines in the Manual, to resolve the conundrum that had arisen and the pronouncement the election inconclusive. He submitted that Election Manual was not only made pursuant to the Constitution but they are also made to fulfil the requirement provided in the Constitution. He submitted that the effect of Section 179(2) is that no candidate shall be declared the winner of governorship election until and unless:-

- (i) The candidate has the majority of votes cast at the election.
- (ii) The candidate has not less than one quarter of the votes cast at the election in each of at least two-third of all the local government areas in the state.

He argued that the requirement has not been met by the late Audu. He argued further that the rationale behind chapter 3, paragraph 3,11 step 14 of the 1st Respondent Manual, is that a return shall not be made where the margin of win between the two leading candidates is in excess of the total number registered voters of the polling units where election were cancelled or not held. He therefore submitted that the provisions of the Manual are made for the purpose of accomplishing the conditions stipulated in Section 179(2) of the Constitution and that the 1st Respondent acted within its powers by declaring the election inconclusive based on the guidelines in the election Manual. He then urged this court to resolve this issue in favour of the Respondents.

I think the main bone of contention by parties' learned counsel centres on whether the election held on 21/11/2015 was inconclusive or whether it became conclusive only after the supplementary election was held on 5th December, 2015. Learned Senior counsel for the appellant felt that the election held on 21/11/2015 concluded the election process of governorship of Kogi State while on the other hand, the respondents held a contrary view and felt that it was the latter election i.e the supplementary election of 5th December 2015, that had concluded the election wherein the 2nd respondent emerged winner and was declared and returned the governor of Kogi State by INEC.

It is pertinent to note, that from the record of proceedings, the initial stage of the proceedings of the tribunal the competence of the petition by the petitioner/ appellant the petition was challenged for being statute barred because it was alleged that it was not filed timeously. The defence posed by the appellant as petitioner, was that it was not statute barred because the election of 21/11/2015 was inconclusive since the supplementary election was held on 5th December 2015 and that was the conclusive election which he was challenging. Now for the appellant to later say that the election held on 21/11/2015 was conclusive I think one can say that he was blowing cold and hot at the same time. I share the views of both the tribunal and the lower court that the election held on 21/11/2015 was inconclusive as rightly declared by INEC because it had cancelled the elections held in over 91 polling units. It would therefore be pre-mature then, for INEC to declare a winner at that stage as it rightly decided to hold a supplementary election on 5/12/2015 which it has power to so do under Section 160(1) of the Constitution and Sections 73 and 153 of the Electoral Act 2010(as amended) and also under the Manual for Electoral Officers. See CPC vs INEC (2011) LPELR - 8257 at 54-55. The cancellation of election held in the 91 wards by INEC on 21/11/2015 was therefore in order and lawfully made since it had cause to believe that there were malpractices hence it rightly cancelled the election in those affected voting units. The two lower courts also rightly held that and I affirm the finding of the lower court on that point.

In the light of the situation that arose from the election held

on 21/11/2015, I hold the view that INEC could not have declared or returned any winning candidate at that stage, until after holding the supplementary election and declaring result of same after merging the votes scored by contestants of the election held 5/12/2015 with those scored in the first election held on 21/11/2015.

Now coming to the issue of substitution, or in other words who between the appellant and 2nd respondent should step into the shoes of late Prince Abubakar Audu, the appellant's contention is that he should be the rightful person/candidate since himself along with late Audu scored the votes cast in the election held on 21/11/2015 before Audu's death as he participated fully in that election. Conversely, the respondent's stance was that the votes were cast for and only in favour of the party APC on which sponsorship or ticket the candidate contested. I think this issue had since been settled in *Amaechi vs INEC (2008) 5 NWLR (pt. 1080) 227 at 317/318* where this court interpreted the meaning and purport of Section 221 of the Constitution, where it held that independent candidature in election is not applicable in Nigeria and stated that although ordinarily it can be said that a candidate wins an election, but in reality and in keeping with that provision, it is his party that wins the election since a candidate cannot contest an election without being sponsored by a party. This, in my view underscores the supremacy of the political party over and above individual candidate and it, ipso facto, means that votes are cast for the party. To my mind, votes are garnered on behalf of the political party and as such the issue of transferring votes as argued by the appellant does not arise as it is of no moment. Again, choice of a candidate to contest an election is within the precinct and preserve of a political party. This court had in numerous decided authorities held that and also it decided that the choice of candidate by a political party cannot be challenged. See *PDP & Anor vs Sylva (2012) LPELR 7 814 at 64 to 66*; *Dalhatu vs Turaki (2003) 15 NWLR (pt.843) 310*. On the issue of primary election, evidence abound from the record, that the 2nd Respondent had prior to the conduct of the election held on 21/11/2015, taken part in his party's primary election and came second in votes scores to late Prince Audu. It was sequel to that, that his party the APC decided to field him as its candidate to replace late Prince Audu. Also it has not been shown by

evidence, that the appellant had resigned from the party or that he informed his party that he was resigning or withdrawing his candidature as deputy governorship candidate of his party the APC or that he communicated of his unwillingness to remain the deputy governorship candidate. The party on the other hand, did not choose or present any running mate to the 2nd Respondent since the appellant did not inform it that he was no longer interested in retaining his post before the supplementary election was held on 5th December, 2015. It will therefore be bizarre to say that the 2nd Respondent contested the election without a running mate.

On the provisions of Sections 179(1) and 181(2) of the Constitution, I endorse the finding of the lower court that those provisions are not applicable in the instant situation in which there was no conclusive election or declaration and return of winner of the election made by INEC. Those provisions, in my view, are only applicable or apt in situation where results of election were declared and return made after conclusive election which is not the position here.

Thus, for these few reasons and the more detailed elaborate and fuller ones ably advanced in the lead judgment just delivered by my learned brother Kudirat Motonmori Olatokunbo Kekere-Ekun JSC which I entirely agree with and adopt as mine, I also see no merit in this appeal. It is therefore hereby accordingly dismissed. I affirm the judgment of the lower court which had earlier also affirmed the judgment of the trial tribunal upholding the election and return of the 2nd respondent as duly elected Governor of Kogi State. The appeal is dismissed accordingly. Parties should bear their respective costs.

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