

SUPREME COURT OF NIGERIA
FRIDAY 11TH NOVEMBER, 2016. SC. 843/2016
CORAM:- I. T. MUHAMMAD, O. ARIWOOLA,
C. B. OGUNBIYI, K. B. AKA'AH, K. O. M. KEKERE-EKUN,
C. C. NWEZE, A. SANUSI, JJSC

1. CHIEF TIMIPRE MARTIN SYLVA
 2. ALL PROGRESSIVE CONGRESS APPELLANTS
AND
 1. THE INDEPENDENT NATIONAL
ELECTORAL COMMISSION (INEC)
 2. HON. HENRY SERIAKE DICKSON RESPONDENTS
 3. PEOPLES DEMOCRATIC PARTY (PDP)
-

APPEALS - Grounds - Purpose of - Is to isolate and accentuate for attack - The basis of the reasoning of the decision challenged (H1)

APPEALS - Grounds - Drafting - Manner of - Provided that a ground misleads no one - Any defect in the form or elegance of how it is couched is immaterial (H2)

APPEALS - Concurrent findings - Rescheduled election - Decisions that election held on 06/12/2015 was inconclusive - Haven been marred by serious irregularities - Are faultlessly unassailable (H3)

ELECTIONS - Postponement - Validity - Action of 1st respondent was perfectly in order - As unforeseen emergencies on the election day of 06/12/2015 - Necessitated postponement of the election (H4)

ELECTIONS - Rescheduled election - Validity of - Appellants having participated in rescheduled election - Have by so doing accepted the said election - And hence are estopped from complaining (H5)

ELECTIONS - Nullified votes - Proof - Appellants having failed to lead evidence as to number of cancelled votes at the election - Their claim as pleaded goes to no issue (H6)

EVIDENCE - Evaluation - Where trial Court unquestionably evaluates evidence - Appellate Court should not substitute its own views for that of the trial court (H7)

ELECTION PETITIONS - Reply - Filing of - Petitioner may only file reply to the reply of respondent - Where new issues of facts are raised by respondent (H8)

JUDGMENTS - Mistake in - Effect - It is not every error in judgment - That leads to the judgment being set aside - More so when no injustice was caused (H9)

FACTS

Petitioners/appellants filed this election petition before the Bayelsa State Governorship Election Tribunal, challenging the election and declaration of 2nd respondent (Hon. Henry Seriake Dickson) as the Governor of Bayelsa State. Appellants equally challenged the nullification of the election of the 6th December 2015, held in Southern Ijaw Local Government Area of the State. Respondents filed replies to the petition and also raised preliminary objections to the hearing of same. At the hearing, appellants called 75 witnesses and tendered several documents (which were admitted in evidence as Exhibits P1 to P100).

Each of the respondents called some number of witnesses and tendered documents (which were admitted in evidence) given various Exhibit numbers. At the conclusion of full hearing, the Tribunal dismissed the petition and upheld the cancellation of the election of 6th December 2015 as same was marred by serious irregularities. Dissatisfied with the dismissal of their petition, appellants appealed to the Court of Appeal Abuja Division. The Court heard the appeal, dismissed same and affirmed the decisions of the trial Tribunal. Aggrieved further, appellants appealed to the Supreme Court challenging the judgment of the Court of Appeal.

ISSUES FOR DETERMINATION

1. *“Was the court of Appeal correct in its interpretation of section 26 of the Electoral Act, 2010 as amended, with respect to the issue of election/cancellation of election/postponement of election in*

Southern Ijaw Local Government Area held on 6/12/2015, having regard to the state of the pleadings and the admissible evidence?

2. Was the Court of Appeal right in its decision that the appellants having participated in the election of 9/1/2016, they had waived/acquiesced their right to protest against the cancellation or that they were estopped from so protesting?

3. Having regard to the state of the pleadings and especially the evidence led, including formal admissions on the pleadings and valid submissions of counsel, was the Court of Appeal right to affirm the judgment of the trial Tribunal, and by extension, the return of the 2nd respondent as the Governor of Bayelsa State?

4. Was the Court of Appeal correct in its judgment with respect to admissibility and weight of evidence and the correctness of the trial Tribunal's decision striking out some of the Appellants' pleadings?

HELD (Unanimously dismissing the appeal per

MUHAMMAD JSC)

APPEALS - Grounds - Purpose of

1. It is elementary that a ground of appeal constitutes the reason(s) why the decisions on appeal is considered by the aggrieved party to be wrong. It is an error of law or fact alleged by an appellant as the defect in the decision appealed against and relied upon to set that decision aside. The purpose of a ground of appeal is to isolate and accentuate for attack the basis of the reasoning of the decision challenged. In *Saraki v. Kotoye* (supra), this court stated that an appeal against a decision resolving the issue one way must necessarily deal with the issues in controversy. Thus, a ground of appeal should be based on an issue in controversy arising from the judgment/decision or appeal constituting a challenge to the *RATIO* of the decision. There can, therefore, be no appeal against an *OBITER DICTUM*, and neither can there be an appeal on a finding made by a court which has no bearing on the final order made by that court. (p. 4829 G)

APPEALS - Grounds - Drafting - Manner of

2. Thus, from the said grounds of appeal and their particulars as set out above, it is clear to me that in each ground, both the main ground and its particulars have clearly explained the grouse of the appellants against the decision of the court below which this court is entitled to consider, once they are not abandoned and are properly covered by issues formulated in that regard. It is the general law, again, for the sake of emphasis, that in determining whether a ground of appeal contains a genuine complaint which arises from the decision complained of, substantiality of the complaint is what matters most. Any defect in the form or elegance of how the ground is couched is immaterial so long as the ground misleads no one. With this, I find no merit in the Preliminary Objections raised by the 1st and 3rd respondents. Both are hereby dismissed for want of merit. (p. 4834 A/4835 B)

APPEALS - Concurrent findings - Rescheduled election

3. I have myself, carefully, reviewed the pleadings, evidence and views expressed by both the Tribunal and the court below. I cannot agree more. Their decisions on this issue are not only based on concurrent findings of fact but are faultlessly unasailable. Perhaps, I only need to remind ourselves that the settled principle of the law is that parties are bound by their pleadings. This principle of law is rightly supported by plethora of decided cases, for instance, this court held in *Mogaji v. Cadbury Nig. Ltd* that in such an instance, the compound conflict can result in nothing less than the breakdown of the case for the plaintiff as set out in the pleading.

My lords, from the excepts as above, it is now beyond any peradventure that even if there was an election on 06/12/15, in (jaw Southern Local Government Area, that election was found to be inconclusive as it was also found to be marred by widespread violence, high scale malpractices and other serious irregularities, which rendered the process inconclusive and unacceptable. There was therefore no election known to law that took place in the whole of Southern Ijaw Local

Government Area. That of course, was the reason why security operatives and political parties made the reports that the election did not take place in Ijaw Southern Local Government Area on the 6/12/2015. The election being inconclusive was thus re-scheduled/postponed to the 9th of January, 2016. (p. 4848 A) B

ELECTIONS - Postponement - Validity

4. In Collins COBUILD Learners Dictionary (Latest Reprint, 2001), ‘emergency’ is described as an unexpected and difficult or dangerous situation, especially an accident, which occurs suddenly and which must be dealt with quickly and an emergency action is one that is done or arranged quickly and not in the normal way, because an emergency has occurred. As a legal doctrine, it is a legal principle exempting a person from the ordinary standard of reasonable care if that person acted instinctively to meet a sudden and urgent need for aid. (Blacks Law Dictionary, Eighth ed, p.82). The framers of the Act anticipated that there might arise natural disasters or other “emergencies”, such as snatching of ballot boxes, violence, other election malpractices or irregularities that could make the holding of an election (or better, free and fair election) possible. Evidence upon which the Tribunal and the court below reviewed, recorded that there were such unforeseen emergencies on the election day 06/12/15 in Ijaw Southern Local Government area which necessitated the postponement of the scheduled election to the 9th of January, 2016. I am in agreement that what the 1st respondent did through the Resident Electoral Commissioner was perfectly in order. Appellants issue No.1 is resolved in favour of the respondents and against the appellants. (p. 4850 C) C
D
E
F
G

ELECTIONS - Rescheduled election - Validity of

5. There is also a finding by the court below in confirmation of the trial court’s finding that, evidence was proffered by PW1 (page 11038 of Vol. 11 of the record of appeal) and PW23 (page 11118, Vol. 11 of the Record of Appeal) to the effect H

that the appellants duly participated in the election of 9/1/2016 in respect of the re-scheduled Southern Ijaw Local Government Area election. If, as indeed found by the Tribunal and the court below, the appellants fully participated in the rescheduled election of 9/1/2016, one is poised to ask: Why

B did the appellants take part in the rescheduled election for the Southern Ijaw Local Government Area election of 9/1/2016? Wouldn't that suggest that they had by their conduct withdrawn their protest as indicated in Exhibit P55? Can the

C appellants be permitted by law to resile? The answer is in the negative as one cannot eat one's cake and have it and as one cannot approbate and reprobate. Their participation in the re-scheduled election has shown that by their conduct, they had waived their right to protest any longer and are caught up

D by the cob-webs of both waiver and estoppels. Thus, the appellants, willy-nilly, are deemed or taken to have accepted the cancellation (if at all) or rescheduling of the Southern Ijaw Local Government Area election of 6/12/15 and by their conduct and active participation in the election

E of 9/1/2016, they are consequently estopped from disowning or distancing themselves from that election, as they were, by so doing, no longer pursuing Exhibit P55 and cannot lay any claim to the election of 6/12/2015. They are, on the other

F hand, taken to have voluntarily and fully acquiesced to the election of 9/1/2016 by participating in the exercise which was declared conclusive by the 1st respondent. Issue No.2 is resolved against the appellants and in favour of the respondents.

(p. 4851 E/4852 H)

G ELECTIONS - Nullified votes - Proof

6. It is clear from this piece of evidence that the appellants did not themselves know the number of votes alleged by them to have been cancelled by the 1st respondent. It is known to

H all that a court of law is not a magician who would begin to allocate votes and or reduce votes arbitrarily. It relies and makes its decision upon tested evidence placed before it. So, as the appellants have failed to lead evidence as to the actual

number of votes alleged to be cancelled at the Bayelsa State Government election held on 5th and 6th of December, 2015 and the 9th of January, 2016, their claim as pleaded goes to no issue at all. (p. 4855 A)

EVIDENCE - Evaluation

B

7. It is to be noted again, that the law has for long been settled that the primary function of evaluation of evidence and ascription of probative value belongs to the trial court which observed the witnesses and where a trial court unquestionably evaluates the evidence and appraises the facts, it is not the business of the Court of Appeal or this court to substitute its own views for that of the trial court. (p. 4855 D)

C

ELECTION PETITIONS - Reply - Filing of

D

8. It is clear from the above quoted provisions of the Act, that one can easily conclude that a petitioner may only file a reply to the reply of a respondent where new issues of facts are raised by the respondent. Where a respondent raises no new issue of fact in his reply but simply answers the facts in the petition, the petitioner does not have a right to file a reply to the same. (p. 4856 G)

E

JUDGMENTS - Mistake in - Effect

F

9. I agree with the submissions of respective learned senior counsel for each of the respondents that the appellants failed to show the injury they suffered by the Tribunals striking out of their paragraphs 8 and 11. At no point did the appellants refer the lower court to the injury caused them by the striking out of the said paragraphs. In any event, the principle of the law is well settled that it is not every error in a judgment (if any) that will lead to that judgment or decision being set aside, more so, when no injustice was caused thereby. (p. 4857 B)

G

H

REPRESENTATION

Sebastine T. Hon. SAN, FCIArb for the Appellants with him: D.W. Wuku, Esq., G.D. Otioio Esq., Chief (Dr.) O.K. Derri, F.T. Okorotie

Esq., Chief Dennis Otio, N. Uja (Miss), E.S. Njoka Esq., T. Azoom Esq., G.T. Iorver, Esq., Chief S.T. Yenge, E.N. Agoh (Mrs.), J.J. Dabo Esq., F.I. Jacob Esq., O. Sorgwe Esq., D.A. Ane Esq. and T.M. Ageba Esq.

^B Dr. Onyechi Ikpeazu OON, SAN for 1st Respondent with him: Alex Ejiesieme Esq., Nwachukwu Ibegbu Esq., Akinyosoye Arosanyin Esq., Obinna Onya Esq., Jude Daniel Odi Esq.

^C Tayo Oyetibo SAN, for the 2nd Respondent with him: Aliyu Umar, SAN, Emeka Etiaba SAN, F.N. Nwosu Esq., Wilson Ajuwa Esq., Marvel Akpoyibo Esq., B.C. Nwosu Esq., B.A. Azebi Esq, Ngozi Ufele Esq., A. Oruakpo Esq., Samuel Brisibe Esq., Olubukola T. Ojuri (Mrs.) D. Sofiyegha Esq., M.J. Numa Esq., Mofesomo Tayo-Oyetibo Esq.,
^D Mesuabari Mene-Josiah Esq., I.J. Akpolu Esq., Goodness J. Odoi Esq., T. Iboroma Esq., 1. Okoye (Miss), K Azie (Mrs.) Nancy Shikaan (Miss) Obinna Okonkwo Esq., Nancy Okoli (Miss) and Maxwell Ezunzu

Chief Wole Olanipekun, SAN for the 3rd Respondent with him: Nicholas Obhiseh, Olabode Oanipekun, Amazuo Bereprebofa, Soala Jumbo, C.B. Kekemeke, Bolarinwa Awujoola, Corinthians Duodo, E.I. Erebi, Vanessa Onyemauwa (Miss) Ayuba E. Abang, Adebayo Majekolagbe

^F **CASES REFERRED TO**

APC v. PDP (2015) 15 NWLR (pt. 1481) 1
 CCB Plc v. Ekperi (2007) 3 NWLR (pt. 1022) 293
 Adeleke v. Eculine NV (2006) 12 NWLR (pt. 993) 33
^G Niger Construction Ltd. v. Okugbeni (1987) 4 NWLR (pt. 67) 787
 Nigeria - Arab Bank Ltd. v. Comex (1999) 6 NWLR (pt. 688) 648
 Olufeagba v. Abdul-Raheem (2009) 12 SC (pt. 11) 1
 Ejowhomu v. Edok-Eter Ltd. (1936) 5 NWLR (pt. 39) 1
 Aqua Ltd v. Ondo State Sports Council (1988) 4 NWLR (pt. 91) 622
^H Ogunbiyi v. Ishola (1996) 5 SCNJ 143
 Egbe v. Adefarasin (1987) 1 NWLR (pt. 47) 1
 Yakubu v. Kuppes International (1996) 4 SCNJ 40
 Atoyebi v. Governor Oyo State (1994) 5 SCNJ 62

Abiodun v. FRN (2009) 7 NWLR (pt. 1141) 489

Ladoja v. Ajimobi (2016) All FWLR (pt. 703) 1861

Military Administrator of Benue State v. Ulegede (2001) 17 NWLR (pt. 741) 194

STATUTES REFERRED TO

Evidence Act 2011, s. 131(1)

Electoral Act 2010 (as amended), s. 26

BOOKS REFERRED TO

Collins COBUILD Learners Dictionary (Latest Reprint, 2001)

Blacks Law Dictionary, Eighth ed, p. 82

LEAD JUDGMENT BY MUHAMMAD JSC

This court heard this appeal on Tuesday, the 8th day of November, 2016. I read in open court, after holding conference on the appeal with my brother Justices on the panel as constituted above, that the appeal be dismissed for want of merit. I undertook to give my reasons for dismissing the appeal, today. Below is the reasoning process I adopted in arriving at my conclusion:

The appellants, herein, were the petitioners at the Bayelsa State Governorship Election Tribunal (the Tribunal for short). The appellants filed their petition (numbered as) No. EPT/BY/GOV/002/2016 on the 3rd day of January, 2016, challenging the election and declaration of the 2nd respondent (Hon. Henry Seriake Dickson) as the Governor of Bayelsa State. They challenged as well, the cancellation of the election of the 6th day of December, 2015, held in Southern Ijaw Local Government Area. Each of the respondents filed his response (reply) to the petition. Each of the respondents raised a Preliminary Objections.

At the Tribunal, the appellants called a total of 75 witnesses and tendered several documents (which were admitted in evidence as Exhibits P1 to P100). Each of the respondents called some number of witnesses and tendered documents (which were admitted in evidence) given various Exhibit numbers.

At the conclusion of full hearing, the Tribunal dismissed the petition.

On appeal to the Court of Appeal, Holden at Abuja (court below), the court below delivered its judgment on the 22nd day of September, 2016, dismissing the appellants' appeal and affirming the Tribunal's decision which returned 2nd respondent as the Governor of Bayelsa State. This gave rise to the appeal to this court.

B In this court, briefs of arguments (as required by the Court's Rules), were filed and exchanged. The various briefs settled by learned senior counsel for the respective parties were duly adopted and relied upon on the hearing date (08-11-2016). Learned SAN for the appellants, Mr. S. T. Hon. formulated the following issues:

C 1. *"Was the court of Appeal correct in its interpretation of section 26 of the Electoral Act, 2010 as amended, with respect to the issue of election/cancellation of election/postponement of election In Southern Ijaw Local Government Area held on 6/12/2015, having*
D *regard to the state of the pleadings and the admissible evidence? (Grounds 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14 and 15 of the Grounds of Appeal)*

E 2. *Was the Court of Appeal right in its decision that the appellants having participated in the election of 9/1/2016, they had waived/acquiesced their right to protest against the cancellation or that they were estopped from so protesting? (Ground 16 of the Grounds of Appeal)*

F 3. *Having regard to the state of the pleadings and especially the evidence led, including formal admissions on the pleadings and valid submissions of counsel, was the Court of Appeal right to affirm the judgment of the trial Tribunal, and by extension, the return of the 2nd respondent as the Governor of Bayelsa State? (Grounds 17, 18, 19, 25 and 26)*

G 4. *Was the Court of Appeal correct in its judgment with respect to admissibility and weight of evidence and the correctness of the trial Tribunal's decision striking out some of the Appellants' pleadings? (Grounds 20, 21, 22, 23, 24 and 27 of the Grounds of Appeal)"*

H In his 1st respondent's brief, Asiwaju A. S. Awomolo, SAN, set out a Preliminary Objection and its arguments are contained on pages 2 - 3 of the brief. Learned senior counsel for the appellants reacted against the Preliminary Objection by relying on points of law

in his reply brief. Learned SAN for the 1st respondent then formulated issues for the determination of the appeal as follows:

1) *“Whether the learned Justices of the Court of Appeal were correct when they held that based on the admissible evidence before the court, the appellants who had the burden of proof, failed to establish that there was a duly conducted election in Southern Ijaw Local Government Area of Bayelsa State on 6/12/2015 which was wrongfully and unilaterally cancelled by the Resident Electoral Commissioner of the 1st respondent. (Ground 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 21, 22, 25 and 26).*

2) *Whether having regard to the evidence led in all the Local Government Areas as well as the state of the law, the Learned Justices of the Court of Appeal were correct when they held that the appellants failed to prove that the election was marred by substantial non-compliance, irregularities and corrupt practices and equally failed to prove that the 2nd respondent was not elected by majority of the lawful votes cast at the election (Grounds 20 and 27).*

3) *Whether the learned Justices of the Court of Appeal were correct when they held that the Tribunal was correct in disregarding the allegations of commission of crimes made against persons who were not joined in the petition. (Ground 23)*

4) *Whether the learned Justices of the Court of Appeal were correct when they held that the appellants failed to establish how they were affected by the decision of the Tribunal striking out paragraphs 8 and 11 of the appellants’ replies to the replies of the 1st and 2nd respondents. (Ground 24)*

Learned SAN for the 2nd respondent, Mr. Tayo Oyetibo, SAN; settled out his issues for determination as follows:

i. *“Whether the Court of Appeal was not correct in its application of section 26 of the Electoral Act, 2010 (as amended) in confirming the decision of the Election Tribunal that the election of 6th December, 2015 in Southern Ijaw Local Government Area was inconclusive and rightly jettisoned by the 1st respondent by reason of which the 1st respondent rescheduled the election to 9th January, 2016. Grounds 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14 and 15.*

ii. *Whether the Court of Appeal was not correct in law in holding that the appellants waived their right to rely on the election*

of 6th December, 2015 in Southern Ijaw Local Government Area having participated in the rescheduled election held on 9th January, 2016 in the Local Government Area. Ground 16.

B *iii. Whether having regard to the pleadings and evidence adduced by the parties, the Court of Appeal was not right in law in affirming the judgment of the Election Tribunal and the return of the 2nd respondent as the Governor of Bayelsa State. Grounds 17, 18, 19, 25 and 26.*

C *iv. Was the Court of Appeal correct in its judgment with respect to admissibility and weight of evidence and the correctness of the Tribunal's decision striking out some of the appellants' pleadings? Grounds 20, 21, 22, 23, 24 and 27."*

D Replies were filed by the learned SAN for the appellants in respect of the Preliminary Objection raised by the 2nd respondent as well as to new points raised in each of the respective respondent's brief.

E Learned senior counsel for the 3rd respondent, Chief Wole Olanipekun, put his Preliminary Objection across to the appellant vire a Motion on Notice, and arguments in respect thereof are contained on pages 4 - 8 of his brief of argument, in response to the Preliminary Objection raised by the 3rd respondent as above, the appellants' filed a counter affidavit of five paragraphs. The learned SAN for 3rd respondent then settled his issues for the determination of the appeal on pages 8 - 9 of the brief of argument which read as follows:

G *i. "Having regard to the state of the pleadings of the parties, evidence led vis-à-vis settled case law and statutory provisions, whether lower court was not correct in refusing appellants' case that elections known to law held and were concluded in Southern Ijaw Local Government Area on December 6 -Grounds 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14 and 15.*

H *ii. Considering the pleadings averred and evidence adduced by parties, was the lower court wrong to have held that appellants conceded and/or acquired to the January 9, 2016 election? Ground 16*

iii. Considering the facts of the petition, evidence adduced and settled decisions of this Honourable Court, whether the Tribunal

was not right in its decision that the appellants failed to prove the various allegations contained in the petition, thereby affirming the return of the 2nd respondent - Grounds 17, 18, 19, 20, 25 and 26.

iv. Having regard to the extant position of the law, whether the lower court was not correct in its decision on the invalidity of various paragraphs of the appellants' petition, reply to respondents' reply to the petition and the inadmissibility and/or weightlessness of various pieces of evidence adduced by the appellants. - Grounds 21, 22, 23, 24 and 27."

Now starting with the two Preliminary Objections raised by the 1st and 3rd respondents, I find the two knittly interrelated (both on grounds of appeal). So, I shall consider both simultaneously.

In the motion on notice filed by the 1st respondent on 24/10/16, the 1st respondent/objector is praying for an order of this court striking out ground 23 of the grounds of appeal filed by the appellants as well as the issue distilled therefrom and argument thereon in appellants' brief on the ground that the complaint in the ground does not arise from the decision of the court below. All the five grounds in support of the motion challenged the 3 particulars for the ground in which reference and reliance were made exclusively to the decision of APC v. PDP (2015) 15 NWLR (Pt.1481) 1 to sustain the decision of the Tribunal. In the affidavit supporting the motion, the following depositions were made by one Julius Mba, a legal practitioner in Dr. Onyechi Ikpeazu, SAN's chambers that:

I. "The particulars there when read together with the ground itself is explicit that the complaint was founded on the alleged reliance by the Court of Appeal on APC v. PDF (supra) to sustain the decision of the Tribunal.

II. The Court of Appeal in its decision placed no reliance on the case of APC v. PDP whatsoever.

III. The complaint in ground 23 misrepresented the decision of the Court of Appeal and, therefore, did not arise therefrom.

IV. The incompetent ground 23 as well as the issue distilled therefrom and argument advanced in substantiation thereof in the appellants' brief of argument are liable to be struck out."

It is the submissions of learned SAN for the 1st respondent that the court below in its decision placed no reliance on the case of

APC v. PDP (supra) whatsoever. The law is trite that parties are not at liberty to impute to a court of law that which it did not decide and then turn round to argue same as error committed by the arbiter. It is wrong to contend that the court below erred by placing reliance on APC v. PDP (supra) when in fact that court relied on two decisions, none of which is the contested case of APC v. PDP (supra).

As the alleged error did not arise from the *RATIO DECIDENDI* of the court below, this court is urged to strike out *ground 23; issue 4 distilled therefrom*” and its ensuing” arguments. Reliance was placed on CCB Plc v. Ekperi (2007) 3 NWLR (Pt.1022) 293 at 509. E - F; Adeleke v. Eculine NV (2006) 12 NWLR (Pt. 993) 33.

In his reply brief the learned SAN for the appellants made submissions on points of law that the 1st respondent’s intention as above is misplaced in law. That it is trite law that a ground of appeal must be raised only with respect to matters arising from the proceedings before the court whose decision is being challenged and that a ground of appeal must be based on issues in controversy between the parties.

Several cases were cited in support including; Niger Construction Ltd. v. Okugbeni (1987) 4 NWLR (Pt.67) 787; Nigeria - Arab Bank Ltd. v. Comex (1999) 6 NWLR (Pt.688) 648 at 668. He argued that one live issue that was presented to the lower court for determination was the wrongful striking out of names of persons who either participated or abetted the commission of crimes or the non-compliance with the Electoral Act, 2011 as amended. And, in arguing for and against the above issue, both the appellants and the respondents relied on the case of APC v. PDP (supra) in resolving the issue is immaterial. Learned counsel cited the case of Olufeagba & 4 Ors v. Abdul-Raheem & 3 Ors. (2009) 12 SC (Pt.11) 1 at 23.

The counter affidavit sworn to by one Mischael Msenge, in response to the 3rd respondent’s objection, the deponent stated, inter alia:

“3) (a) paragraphs 5 and 6 of the affidavit in support of the Motion on Notice are not true.

(b) Grounds 1, 2 and 5 of the appellants’/respondents’ Notice and Grounds of appeal attacked the findings/decisions of the Court of Appeal.

(c) *Grounds 17 and 23 of the appellants/respondents Notice and Grounds of Appeal also attacked the findings/decisions of the Court of Appeal. Ground 23 thereof did not misrepresent the judgment of the Court of Appeal as alleged.*

(d) *Ground 17 was argued in the appellants' brief of arguments.* B

(e) *Issues 1, 3 and 4 distilled from Grounds 1, 2, 5, 17 and 23 of the appellants/respondents Notice and Grounds of Appeal are competent.*

(f) *The 3rd respondent/applicants Motion on Notice is brought MALA FIDE to mislead this court.* C

Making submissions on the objection, the learned SAN for the appellants, in his reply brief, stated that ground No.1 is an appeal against the lower court's judgment particularly where it relates to the comment by the lower court in relation to the trial court's rejection of the appellants' case in preference to that of the respondent on the matter of "wrongful cancellation" or "postponement/inconclusiveness" of the election of 6/12/15 held in SILGA. Learned SAN argued that Grounds 1, 2, 17 and 23, are appeals on findings of fact by the court below, and are valid and competent. So also all the issues formulated thereon. He urged that the 3rd respondents' motion on Notice seeking to strike out these grounds and their issues should be dismissed. D

My lords, I have meticulously gone through the objections raised by the 1st and 3rd respondents. I have also gone through the grounds and affidavit evidence in support of the motions moved by the 1st and 3rd respondents. I considered all the submissions made in respect of the objections. I find it pertinent at this juncture, my lords, to reiterate some of the trite position of the law regarding formulation of grounds of appeal. E

It is elementary that a ground of appeal constitutes the reason(s) why the decision(s) on appeal is considered by the aggrieved party to be wrong. It is an error of law or fact alleged by an appellant as the defect in the decision appealed against and relied upon to set that decision aside. See: Metal Const. (W.A.) Ltd. v. Miglore (1990) 1 NWLR (Pt.126) 299 at 311, Saraki v. Kotoye (1992) 11/12 SCNJ 26 at 42. ***The purpose of a ground of appeal is to isolate and accentuate for attack the*** F G H

basis of the reasoning of the decision challenged. Ejowhomu v. Edok-Eter Ltd. (1936) 5 NWLR (Pt.39) p.1; Aqua Ltd, v. Ondo State Sports Council (1988) 4 NWLR (Pt.91) 622. **In Saraki v. Kotoye (supra), this court stated that an appeal against a decision resolving the issue one way must necessarily deal with the issues in controversy. Thus, a ground of appeal should be based on an issue in controversy arising from the judgment/decision or appeal constituting a challenge to the *RATIO* of the decision. There can, therefore, be no appeal against an *OBITER DICTUM*, and neither can there be an appeal on a finding made by a court which has no bearing on the final order made by that court.** See: Ogunbiyi v. Ishola (1996) 5 SCNJ 143; Egbe v. Adefarasin (1987) 1 NWLR (Pt.47) 1; Yakubu v. Kuppes International (1996) 4 SCNJ 40 at 48. Equally, where a ground of appeal derives from matters outside those relating to the decision, it is an incompetent ground of appeal. See: Saraki v. Kotoye (supra); Atoyebi v. Governor Oyo State (1994) 5 SCNJ 62.

My Lords, I always consider it monotonous, at this level, to be setting out Grounds of Appeal in a Ruling/Judgment except where it appears expedient, particularly where competence of a ground is challenged. The grounds of appeal in this appeal which are challenged by the 1st and 3rd respondents are grounds Nos. 1, 2, 5, 17 and 23. These grounds as contained in the Notice of Appeal (pp 11813 -11836), are fairly lengthy, but I can hardly avoid quoting same as they are:

GROUND(S) OF APPEAL

1. The learned Justices of the Court of Appeal misdirected themselves in law and contradicted themselves in the judgment when they held in two separate portions of their judgment, per Bada, JCA, as follows:

- a) But on the 6th day of December, 2015, election was inconclusive in Southern Ijaw Local Government Area and was therefore rescheduled to the 9th day of January, 2016.
- b) Apparently, there is no evidence to the effect that the 1st respondent changed her mind and decision with respect to the election of 6/12/2015 in Southern Ijaw Local Government Area, being declared inconclusive and consequently, rescheduling the same to be

reconducted on 9/1/2016.

Particulars of Misdirection in Law/Contradiction

a) Appellants had led cogent oral and documentary evidence of the conduct of elections in Southern Ijaw Local Government Area on 6th December, 2015, which was cancelled on 7/12/2015. B

b) The respondents, though pleaded inconclusiveness of the said election, abandoned their pleadings and did not lead evidence on the said pleadings.

c) No admissible evidence was led to prove that the election was inconclusive, hence was rescheduled. C

d) Unchallenged evidence was led to show that the cancellation of the election was done on 7/1/2016.

e) An election which took place on 6/12/15 could not have been ordered rescheduled on 7/12/2015, to take place on 9/1/2016. D

f) Contrary to their holding above that the election was inconclusive and was rescheduled, in the later part of their judgment, they held that “*the appellants are deemed or taken to have accepted the cancellation of the Southern Ijaw Local Government election of 6/12/15.*” E

2. The learned Justices of the Court of Appeal erred in law when they held thus:

‘In order to prove that there was election in Southern Ijaw Local Government Area, the appellants called PW63, the 1st Petitioner, PW62 and PW23.’ F

Particulars of error in law

a) The appellants called many other witnesses and tendered several documents to prove that election was held in Southern Ijaw Local Government Area on 6/12/2015. G

b) The appellant had demonstrated before the Court of Appeal that the trial Tribunal itself had found that appellants called witnesses who tendered documentary evidence to prove the holding of election in Southern Ijaw Local Government Area on 6/12/15.

c) Appellants’ proof of election in SILGA was not limited to the evidence of PW62, PW63 and PW23,” H

5. The learned Justices of the Court of Appeal erred in law when they held, per J. O. Bada, JCA, as follows:

‘The appellants also called PW58 who tendered in evidence Exhibit 51, under cross-examination by counsel to the 1st respondent he stated thus: ...

Due to inconclusiveness of the election of 6/12/15, it was postponed to 9/1/2016, Independent National Electoral Commission was fair to the candidates in the conduct and declaration of results of the election, (see pages 11,169 lines 14 - 18 Volume Eleven of the Record of Appeal.”

Particulars of Error in Law

C a) The above piece of evidence of the PW58 extracted under cross-examination was inadmissible hearsay.

b) If an election exercise is partly conducted (i.e. is “*inconclusive*”), only the areas where election did not take place will such election be “*postponed*” to, and not the entire area in question.

D c) There is nothing in the Electoral Act, 2010 as amended that empowers the 1st respondent to cancel election that had taken place and declare it “*inconclusive*.”

d) “*Inconclusive*” means partly done but not concluded.

E 17. The learned Justices of the Court of Appeal erred in law when held, per Bada, JCA, as follows:

‘I have perused the Judgment of the lower tribunal contained especially at the last paragraph of page 11,477 of Vol.11 of the Record of Appeal to the first paragraph of page 11,478 of the Record of Appeal. It is glaring to me that those portions of the judgment referred to above are not findings by the tribunal. They are no more than a summation of the contention by the appellants to the effect that since the appellants believed that the Southern Ijaw Local Government Area, is their stronghold, if the voter strength of 120,000 registered voters had not been prevented by the cancellation of 6/12/2015 proceedings, the appellants would have had an upper hand in the election. That certainly was not a finding by the Tribunal as erroneously submitted by learned appellants’ senior counsel.’

Particulars of Error in law

H a) The trial Tribunal was assessing the submissions of Appellants’ counsel vis-à-vis the contents of Exhibit P42B, wherein the figure 120,000 was mentioned.

b) Exhibit P42B was a document validly before the Court of

Appeal, which had power to evaluate same.

23. The learned justices of the Court of Appeal erred in law when, in purporting to rely on the authority of *All Progressives Congress v. PDP* (2015) 15 NWLR (Pt.1481) 1 SC, and some other authorities, they affirmed the decision of the Tribunal which had struck out the names of persons contained in some paragraphs of the Petition. B

Particulars of Error in Law

a) *The issue in All Progressives Congress v. PDP, supra, was whether or not the 4th and 5th respondents therein who were joined to the Petition as parties were necessary parties; and not whether some persons were named in some paragraphs of the petition.* C

b) *The Supreme Court, in All Progressives Congress v. PDP, supra, held that only statutory respondents were/are to be joined to an election petition.* D

c) *The decision of the Court of Appeal in this appeal runs contrary to the decision of the Supreme Court in All Progressives Congress v. PDP, supra.* "

Issues related to these grounds of appeal challenged as well by the said respondents, are set out (infra). E

It can be seen from the totality of the grounds set out above that ground one, for instance, is on the issue of postponement or inconclusiveness of the election held in Southern Ijaw Local Government Area on 6/12/2015 in respect of which the court below made a finding: F

"But on the 6th day of December, 2015, election was inconclusive in Southern Ijaw Local Government Area and was therefore rescheduled to the 9th day of January, 2016."

In ground of appeal No.2, there is a finding by the court G below which reads:

"In order to prove that there was election in Southern Ijaw Local Government Area, the appellants called PW63, the 1st petitioner, PW62 and PW23." (underlining supplied)

Equally, in the remaining grounds challenged there are definitive findings made by the court below which the appellants' counsel considered faulty and for which they seek remedy in this court. Ground 23 in particular which both respondents challenged, is an H

attack on the issue joined by the parties on the applicability of the case of APC v. PDP (supra) with which the court below, agreed with the reliance placed by the trial court on that case.

Thus, from the said grounds of appeal and their particulars as set out above, it is clear to me that in each ground, both the main ground and its particulars have clearly explained the grouse of the appellants against the decision of the court below which this court is entitled to consider, once they are not abandoned and are properly covered by issues formulated in that regard. It is the general law, again, for the sake of emphasis, that in determining whether a ground of appeal contains a genuine complaint which arises from the decision complained of, substantiality of the complaint is what matters most. Any defect in the form or elegance of how the ground is couched is immaterial so long as the ground misleads no one.

See: Abiodun v. FRN (2009) 7 NWLR (Pt.1141) 489; Ladoja v. Ajimobi (2016) All FWLR (Pt.703) 1861; Military Administrator of Benue State v. Ulegede (2001) 17 NWLR (Pt.741) 194 at 212 - 213 G - H; Banjo v. Chadu (1998) 9 NWLR (Pt.564) 139 at 148; Ogboru v. Arthur (2016) All FWLR (Pt.833) 1805 at 1823 C - E.

My lords, in concluding my excursion en route the objections raised by the 1st and 3rd respondents, it is captivating to restate what this court said in almost a similar situation in the case of Ogboru v. Arthur (supra):

"I agree entirely with learned senior appellants' counsel, Dele Adesina, that the true function of a ground of appeal is indeed to give the respondent the necessary notice of the grudges the appellant has against the judgment he appeals against. The particulars of the ground of appeal, learned senior counsel is also right, only provide specific details to fill in the yearning gaps in the inexplicit ground. It is long settled that once a ground of appeal gives the respondent the necessary notice of the grudges the appellant has against the decision on appeal and leaves no room for any surprise to be thrust on the respondent on the issue to be raised in the appeal, the ground is valid and competent. Learned senior counsel's reference to and reliance on the decisions of this court in Iwuoha v. Ninost Ltd. and Osasona v. Ajayi (2004) All FWLR (Pt.216) 443 (2004) 14 NWLR (Pt.894)

527 on the point is apposite. Whether or not the grounds of appeal in contention herein are valid depends on their meeting the foregoing enabling principles. My perusal of all the grounds leave me in no doubt that they all arise from the judgment appealed against and even if also right, some are verbose, none in the entire grounds attack the obiter dicta in the decision appealed against.” B

With this, I find no merit in the Preliminary Objections raised by the 1st and 3rd respondents. Both are hereby dismissed for want of merit.

On the main appeal, the learned SAN for the appellants submitted on issue 1 that the first faulty foundation laid by the lower court which influenced its decision with respect to the cancellation of the election held on 6/12/15 in Southern Ijaw Local Government Area (SILGA) is the holding that the election of 6/12/15 was inconclusive in Southern Ijaw Local Government Area and was therefore rescheduled to 9/1/16. The learned SAN argued that this was what influenced the court below to cancel the said election. This, he maintained further, amounted to contradiction by the court below leading to a misdirection. He cited and relied on some part of the contents of page 11773 of Vol.12 of the Record of Appeal. The contradiction, in two words: “inconclusive” and “cancellation”, he said, was deliberately aimed at denying the appellants justice after they had shown by admissible evidence that election had taken place in Southern Ijaw Local Government Area on 6/12/2015 but was wrongly and unlawfully cancelled. He placed reliance on the evidence of PWs 28, 62 and 63 whom he described as witnesses of truth who were not cross-examined by the respondents. In that position, he submitted, the pieces of evidence by the said PWs have to be accepted by this court as the truth. He cited the cases of *Amadi v. Nwolu* (1992) 5 NWLR (Pt.241) 273; *Daggash v. Bulama* (2004) All FWLR (Pt.212) 1666. Learned SAN made reference to Exhibits P42B, the video tape which captured the announcement of the Resident Electoral Commissioner on the cancellation of the election, which was tendered in evidence and played in open court. None of the counsel for the respondents asked even a question on it. Learned SAN urged on this court to play the exhibit to confirm what the Resident Electoral Commissioner announced on the cancellation of the election. The learned SAN ar-

gued that evidence was given that the cancellation announcement was made on 7/12/15 - a day after the election held on 6/12/15. He posited further that if it was mere postponement as the court below held, how can there be a postponement on 7/12/15 when the event had already taken place on 6/12/15? This, he said, was a pertinent question which the court below failed to resolve. References were made to several pages and volumes of the Record of Appeal upon which the learned SAN anchored his challenge against the findings of the court below in arriving at its decision against the appellants particularly on the election of 6/12/15 held in Southern Ijaw Local Government Area (pages 11439, Vol.11; 11,510, 11,669,; 11,754 to 11,755 of Vol.12) of the Record of Appeal. The learned SAN argued that the learned Justices of the court below did not rule one way or the other on appellants' submission that apart from paragraphs 8 and 9 of the petition, the appellants challenged in paragraph 26 of the petition the power of the 1st respondent to cancel the election of 6/12/15 in Southern Ijaw Local Government Area. PWs 62 and 63 gave unchallenged evidence in support of this pleading without any countering by any of the respondents. Learned SAN alleged also that another unfortunate decision of the court below was the jettisoning of admissible evidence in preference of inadmissible evidence to prove that election did not take place in Southern Ijaw Local Government Area on 6/12/15 by relying on the inadmissible portions of the evidence of PWs 52, 58 and 61. Learned SAN argued further that documentary evidence tendered by the appellants to prove the holding of election in Southern Ijaw Local Government Area on 6/12/15 is superior to any oral evidence to the contrary. He urged this court to review the documentary evidence and having proved that election took place in Southern Ijaw Local Government Area but was wrongly cancelled, the learned SAN for the appellants urged this court to resolve issue 1 in favour of the appellants while commending to this court its earlier decision in *Otti v. Ikpeazu* (2016) All FWLR (Pt.533) 1946.

H The submission of learned SAN for the appellants on his issue No.2 is that since the 1st respondent's action of annulling the election in Southern Ijaw Local Government Area which took place on 6/12/2015 was void ab initio; the subsequent purported election

of 9/1/2016 was also null and void, it being stood on nothing, citing the principle of the law that when a thing is a nullity, it is deemed not to exist in law, even though it does exist in fact. He relied on the cases of *Barigha v. PDP* (2013) All FWLR (Pt.696) 414 at 447 and *Garba v. Omokhodion* (2011) All FWLR (Pt.596) 404 at 429G; and that the appellants did not need to specifically challenge same in court citing *Bilante International Ltd. v. NDIC* (2011) All FWLR (Pt.598) 804 at 825E; *Barigha v. PDP* (supra). That, since the Bayelsa State Resident Electoral Commissioner/1st respondent had no scintilla of authority to cancel the election that took place in Southern Ijaw Local Government Area on 6/12/2015, the so called election that took place in that Local Government Area on 9/1/2016, in so far as it was hinged on the said cancellation, was/is null and void. It is deemed not to have taken place, even though in fact it did take place;; hence the question of waiver/acquiescence/estoppel cannot arise as was wrongly held by the court below. Learned SAN submitted further that the appellants pleaded and tendered in evidence (Exhibit P55) a protest letter wherein they unequivocally challenged the power of the Resident Electoral Commissioner to cancel the election of 6/1/2015 and pleaded in reply that they had not waived their right but that they were compelled by circumstances to participate in the purported 9/1/2016 election, which in any case, coincided with supplementary elections in other Local Government Areas rescheduled to hold on that same day. Bayelsa State governor's office, he contended, is a public trust and a right which cannot be waived. He further stated that the appellants denied the so called meetings/what was said thereafter (pp 6089 to 6091, 10,210 to 10,211 and 6,141 to 6142 of Vols. 7 and 11) of the Record of Appeal and that none of the respondents called oral evidence which was capable of being tested under cross-examination to prove their pleadings on the issue. The so called documentary evidence pleaded in support of those meetings were not also tendered. He called in aid Section 167(d) of the Evidence Act, 2011. He contended that the decision of the court below on acquiescence/waiver/estoppel holds no water in law and fact. He urged this court to intervene by setting aside these findings and resolve issue 2 against the residents in favour of the appellant.

Appellants issue No.3 on the state of the findings and the

evidence had and formal admissions, the learned SAN argued that the court below ought not to have affirmed the decision of the Tribunal and by extension return of the 2nd respondent as the Governor of Bayelsa State. He argued further that Exhibit P42B contained the admission of INEC official that Southern Ijaw Local Government Area had 120,000 registered voters. Even if the Tribunal had failed to review this evidence and make pronouncement on how it affected the result of the election, the court below ought to have done so since Exhibit P42B is a document that can be evaluated even on appeal and that the lower court having refused to evaluate Exhibit P42B, this court should do so. Learned counsel cited and relied on *Ogundepo v. Olumesan* (2012) All FWLR (Pt.609) 1136; *Ayuya v. Yonrin* (2011) All FWLR (Pt.583) 1842.

The learned SAN contended further that the failure of the lower court to make a decision one way or the other on the appellants' arguments on the effect of the cancelled votes being more than the difference between the PDP and the APC, when in fact, such failure of the Tribunal breached the appellants' fundamental right to fair hearing while the return of the 2nd respondent as Governor of Bayelsa State breached established INEC Rules. Learned SAN urged this court to, in the interest of justice, set aside the said judgment and void the return of the 2nd respondent as the Governor of Bayelsa State within specified period.

On the state of the pleadings, admissions and evidence made/led, the learned SAN recapitulated the pleadings and evidential scenario and submitted that none of the respondents denied the return of the 2nd respondent, hence there was no need to prove what was admitted. He cited and relied on *Abubakar v. Yar'adua* (2009) All FWLR (Pt.457) 1 at 134. He urged this court to resolve issue 3 in appellants' favour and against the respondents.

Appellants' issue 4 is on admissibility, weight of evidence and the striking out of some of the appellants' pleadings. The learned SAN submitted that though the appellants pleaded and led evidence (oral and documentary) in proof of the fact that election took place in Southern Ijaw Local Government Area but was unlawfully cancelled, the respondents did not call any admissible/weighty evidence to dispose either of these. The weight of evidence, therefore, tilts in

favour of the appellants. He further urges that this court should resolve the nagging issue of election/wrongful cancellation of election with respect to the election in Southern Ijaw Local Government Area held on 6/12/2015 in favour of the appellants and against the respondents. The purported return of 2nd respondent will then be set aside as it was based on faulty foundation and a fresh election will become imperative. He submitted, that of all the cases cited and relied upon, the one which is most relevant in this appeal is the decision in *Otti v. Ikpeazu* (2016) All FWLR (Pt.833) 1946. B

Learned SAN contended further that:

a) Evidence of eye witnesses who tendered result sheets and other INEC documents to prove that election in fact held in Southern Ijaw Local Government Area on 6/12/15 and it was wrongly cancelled and the respondents did not tender any documentary evidence to prove otherwise; C

b) The findings of the Justices of the lower court on Exhibits tendered by the appellants through PW63, that they were duplicates, were, wrong as apart from few certified result sheet the remaining were duplicate originals which are admissible in evidence if tendered by a person who has them, moreso, where such results were tendered by the petitioners witness and their pleadings show clearly the source, they are admissible and weighty. *Okeke v. Ejezie* (2011) All FWLR (Pt.603) 1811 at 1870 D - E cited; D

c) As for the other ones (result sheets) which were certified by the Magistrate's court Registry, the appellants pleaded in paragraph 9 of the petition that their agent was bringing them to Yenogoa when he was arrested and arraigned in that court and that the said result sheets were in custody of the said court. He called in aid Section 104 of the Evidence Act, 2011. E

d) Notice to produce was given to the 1st respondent by the appellants to produce those documents and he failed. Secondly, evidence of the contents of such documents will be admitted. *Buhari v. Obasanjo* (supra) cited; F

e) It was an error from the lower court to ascribe to the Tribunal the finding that all the INEC documents tendered by the appellants did not have INEC stamp thereby refusing to assess even the ones that had such stamp, that no such finding can be seen from the Tribunal's judgment. G

f) The refusal by the court below to assess some mentioned Exhibits in ground of appeal No. 10, which did not suffer from any legal disability prevented it from applying the rule in *Otti v. Ikpeazu* (supra) to avoid the return of the 2nd respondent and that this court should intervene by applying the said authority by nullifying the return of the 2nd respondent and order a re-run or fresh election in Bayelsa State.

g) It was wrong of the court below to have applied the decision of this court in *APC v. PDP* (2015) 5 NWLR (Pt.1481) 1, to the facts of this appeal.

h) Another error and injustice committed by the court below was the affirming of Tribunal's wrongful striking out of paragraphs 8 and 11 of the appellants' Reply to the 1st respondents' Reply to the petition on the ground that the appellants did not suffer a miscarriage of justice. It was contended on the contrary that grave injustice was caused the appellants by the striking out of these paragraphs which were on the cancellation of the election in Southern Ijaw Local Government Area on 6/12/15. The Tribunal and the lower court, it is argued further, closed their eyes to the weighty facts raised in them. If the said paragraphs had not been struck out, the Tribunal would have reached a different decision on the facts about the Southern Ijaw Local Government Area election of 6/12/15. This court is urged to restore the struck out paragraphs which will have decisive effect in this appeal, and that this court should intervene by a resolution of the said issue against the respondent and in favour of the appellants.

Learned SAN for the appellants concluded by urging this court to allow the appeal and appellants' prayers in the petition be granted either in the main or as alternatively prayed.

From the various and comprehensive responses to appellants' issues the respondents are *ad idem* on appellants' issues and made copious submissions to the effect that:

i. On application and interpretation of Section 26 of the Electoral Act: that the findings of the trial court which was affirmed by the court below on the violence and illegalities which pervaded on the 6/12/2015, robbed the proceedings of any iota of legitimacy and the application of "*Section 26(1) of the Electoral Act*", 2010 (as amended) became essentially imperative. The Act empowers the 1st respondent to postpone an election if it is impossible to conduct the election

as a result of natural disaster or other emergencies. Such submissions were supported by legion of decided authorities such as: *Aondoaka v. Ajao* (1999) 5 NWLR (Pt.602) 206 at 225; *Adeyemi v. Ofayemi* (1987) 3SC 213 at 247; *Ojukwu v. Onwudiwe* (1984) 2 SC 15 at 88.

ii. On the issue of cancellation/postponement of the “inconclusive” election. It is the submissions of the learned SANs for the respective respondents, each in his brief of argument (1st respondent’s issue 1; 2nd respondent’s issue one; 3rd respondent’s issue one), more particularly Learned SAN for the 2nd respondent who argued as follows:

“Fourthly, in an attempt to prove their allegation that the Resident Electoral Commissioner unilaterally cancelled the election said to have been held on 6th December, 2015 in Southern Ijaw Local Government Area, the appellants pleaded-in paragraph 23 of their petition that they would rely on the DVD containing the clip of the alleged unilateral cancellation. At the trial, the appellants called PW51 who tendered the DVD in evidence as exhibit P42B and demonstrated the same by playing it back for the Tribunal to see and hear the contents.

Now, in Exhibits P42B, the Resident Electoral Commissioner stated that the election in Southern Ijaw Local Government Area on 6th December, 2015 was inconclusive because of widespread violence, hijacking of materials, abduction of electoral officials, complaint from political parties, stakeholders and observers, and that in order to save the integrity of the process which he said did not meet international thresholds of valid elections, the Commission decided to jettison the election and fix a new date for a fresh election.

This piece of evidence was well captured in the judgment of the Tribunal at page 11440, volume 11 of the record and confirmed by the Court of Appeal in its judgment at page 11765 Volume 12 of the record,”

iii. On waiver/Acquiescence by the appellant (1st respondent issue 1 pp 32 - 33; 2nd respondent’s issue 2, pp 23 - 28; 3rd respondent’s issue 2, pp 27 - 34). After a proper summary of the appellant complaint under the issue, learned SAN for the 3rd respondent stated that despite their concession to and participation in

the rescheduled election of January 9, 2016, the appellants insisted on reserving the right and have not waived it to challenge the election of 6th December; 2015. In other words, appellants mounted a challenge against the election of January 9, 2016 despite having participated therein and lost. A question which the appellants have failed to answer from the Tribunal to this Hon. court is: Would they still have challenged the January 9, 2016 election if they had won the said rescheduled election, and, on the contrary, is a party allowed in law to challenge a process which he has participated fully in, just because he was not successful in such process?

Learned SAN had recourse to the appellants' petition where there is no specific declaration for the nullification of the January 9, 2016 election and there was no appeal on that to the lower court, Appellants contended as well that there was no need to challenge that election as it was *ab initio* a nullity, citing Barigha v. PDP (2013) All FWLR (Pt.696) 414 and Garba v. Omokhodion (2011) All FWLR (Pt.596) 404. The senior counsel for the 3rd respondent contended that these cases could not avail the appellant as the cases cited were non election petition (*sui generis*) cases. The only inference that can be made by this court, given the failure of the appellants to challenge the election of January 9, 2016 is that they have accepted and/or acquiesced to the result. Appellants have thus, undoubtedly conceded to the propriety of the January 9, 2016 election which effectively snuffed life out of the purported protestations to the postponement of the election from December 6, 2015 to January 9, 2016. The case of Ukaegbu v. Ugoji (1991) 6 NWLR (Pt.196) 127 at 157; Joe Iga v. Amakiri (1976) 2 SC 1 at 12 - 13, were cited and relied upon. Learned SAN pointed out also that PWs 58 and 61 all gave evidence to the effect that the election of January 9, 2016 was acquiesced and conceded to by the petitioners (pp 11,170 and 11,175 of the record of appeal). Other witnesses also confirmed petitioners/appellants' full participation at the election held on January 9, 2016. In view of these facts, the learned SAN submitted that the Tribunal and the lower court had no other option but to come to the conclusion that appellants indeed acquiesced to the January 9, 2016 election.

I find submission of other senior counsel for the respective respondents on the issue of waiver, in agreement with the position

espoused by Chief Olanipekun, SAN, for the 3rd respondent. I do not think it necessary to set same out.

iv. On the issue of Admissibility and weight of Evidence; the striking out of some paragraphs of appellants' petitions.

These issues are argued by each of the learned SANs under issues formulated by each: (1st respondents' issue 1, pp 14-22; 2nd respondent's issue 3, pp 29-31; 3rd respondent's issue 4, pp 36-39). The submissions made by the learned SAN for the 1st respondent, Dr. Izinyon, is that the evidence of all the witnesses called by the appellants did not amount to proof of the complaint projected by the appellants and that was the finding of both the Tribunal and the court below. He stated that out of the 425 polling units, only in thirty three (33) units thirty one (31) witnesses called. In 392 poling units, no witnesses were called. The SPOs called for ward 12, units 1 -12 (PW52); SPO for ward 13 (units 1-11) (PW57), learned SAN argued that none of them was a Polling Agent or a Presiding Officer who can testify as to what transpired at the polling units from commencement of the election to its resolution. The evidence offered by the appellants in the 33 units and wards are basically of no value. Further, on non-compliance with the Electoral Act the appellants have a duty to prove such non-compliance based on polling unit by polling unit. He cited the cases of Buhari v. Obasanjo (2005) 13 NWLR (Pt.941) 1 at 315; Gunduri v. Nyako (2014) 2 NWLR (Pt.1391) 211 at 245. Learned SAN argued further that the bulk of the documents tendered by the appellants with respect to 6/12/2015 were duplicate copies of Forms EC8A, EC8B and EC8C. Exhibit P73 series which ostensibly were certified true copies from the magistrate court of result sheets said to be delivered to APC agent for custody. The Tribunal and the court, he contended, did not ascribe probative value to them. The exhibits were essentially dumped on the Tribunal as found by the court below. The purported result sheets, too, were not tendered by witnesses who could have been cross-examined as to their origin and circumstances in which they were produced. Probative value can only be attached to documents duly demonstrated by witnesses who had nexus with them.

The learned SAN posited that it is totally wrong for the appellants to contend that the Tribunal and the court below failed to

evaluate the evidence of their witnesses. They indeed duly evaluated the evidence led and, found them unworthy of belief. Learned SAN impressed the point that the burden of proof as to the due conduct of the election of 6/12/15 lies squarely on the appellants who would lose if no evidence was called on either side. The principle of “He who asserts must prove” was anchored by the learned SAN to Section 131(1) of the Evidence Act, 2011 and the case of *Oyovbiare v. Omamurhonu* (2001) FWLR (Pt.68) 1129.

On the Tribunal striking out of paragraphs 8 and 11 of the petitioners’ reply, learned SAN, submitted that the court below was correct when it held that the appellants failed to show how they were affected by the Tribunal’s decision, as all matters raised in the said paragraphs indeed formed the centre point of the entire case.

However, the learned SAN for the 3rd respondent argued this issue (pp 36 - 39) in reaction to appellants’ issue 4 where appellants contended that the respondents did not call any admissible/weighty evidence to disprove the claim that election held in Southern Ijaw Local Government Area on December 6, 2015. He pointed out that in his issue 1, he showed the fallacy of appellants’ submission when he made reference to the evidence of unchallenged and impeached witnesses who were called by the respondents. Further, appellants cannot be allowed to re-order and/or amend their petition in praying for the nullification of elections in respect of pleadings directly tied to reliefs for declaration of the 1st appellant, as the law always, is a party must be consistent in making his case from trial courts to the appellate courts. The cases of *Ajide v. Kelani* (1985) 3 NWLR (Pt.12) 248 at 269 and *Akpan v. Bob* (2010) 17 NWLR (Pt.1223) 421 at 523 - 524, were cited. The proper thing for the appellants to do in the circumstance is for them to concede to the concurrent findings of the lower courts on the inadmissibility and/or weightiness of the exhibits tendered by PW63.

Each of the senior counsel for the respective respondents urged this court to dismiss this appeal, affirm the decision of the lower court and endorse the return of the 2nd respondent as the Governor of Bayelsa State.

My noble lords, in the consideration of this appeal, I think I should follow seriatim the issues formulated by the learned SAN for

the appellants. Issue 1 (already set out earlier), essentially deals with:

a) Correct interpretation of Section 26 of the Electoral Act, 2010 as amended with respect to:

b) Issue of election/cancellation of election/postponement of same in Southern Ijaw Local Government Area held on 6/12/2015 having regards to the pleadings and admissible evidence. B

I think I should consider (b) first then (a).

(b) The first issue to be considered here which is of primary importance and which lays a solid foundation to any other issue in this appeal is the question which must be asked: Was there any election held in Southern Ijaw Local Government Area of Bayelsa State on the 6/12/2015? C

In the 2010 Electoral Act (as amended), Section 156 (interpretation Section) gives the interpretation of 'election' as follows:

"*Election*" means any election held under this Act and includes a referendum: D

And,

"*General Election means an election held in the Federation at large which may be at all levels, and at regular intervals to select officers to serve after the expiration of the full terms of their predecessors.*" E

Election referred to in the issue under consideration by necessary intendments from the facts contained in the petition of the petitioners (appellants) and for the avoidance of any doubt, is to my understanding the one referred to in the latter part of the Interpretation Section set out above from the Electoral Act. In appellants' petition of 29th of January, 2016, the title and heading are as follows: F

"*In the Governorship Election Tribunal Holden at Yenagoa. The Election to the office of Governor of Bayelsa State Held on the 5th, 6th of December, 2015 and 9th January, 2016.*" G

Paragraph 1 of the petition reads:

"*Your 1st petitioner was the candidate of your 2nd petitioner in the Governorship Election held in Bayelsa State on the 5th of December, 2015, 6th of December, 2015 and 9th January, 2016, and your 1st petitioner claims to have had a right to contest in that said election and be returned as the winner thereof.*" (underlining for emphasis) H

The reliefs prayed for before the Tribunal also made clear reference to the said election ‘held’ in Southern Ijaw Local Government Area of Bayelsa State which were said to have been cancelled or annulled. There is no doubt in my mind, therefore, that the election referred to in this issue and in the other parts of this judgment (and of course the record of appeal), except where otherwise indicated, would certainly refer to general Election held in Bayelsa State but particularly in the Southern Ijaw Local Government Area on the dates stated earlier. Permit me my lords, to support my understanding further, from the petition laid before the Governorship Election Tribunal for Bayelsa State where in it was pleaded by the petitioners, the following:

“(8) On 6th day of December 2015 the election was also conducted in Southern Ijaw Local Government Area but instead of collating and announcing the final result of the election and declaring the winner, the Resident Electoral Commissioner of the 1st respondent unilaterally cancelled the election and declared the election “inconclusive” and proceeded to fix 9th day of January 2016 as the date to conclude the election in Bayelsa State. This was in spite of strong verbal and written protestations by the Petitioner.

(9) In spite of the said protestations by the Petitioners, the 1st respondent went on to hold supplementary election on the 9th January, 2016 in the entire Southern Ijaw Local Government Area...”

But, what was the finding and conclusion of the Tribunal on the said election and as per the complaints contained in the paragraph of the petition set out above? The Tribunal stated:

“We had come to the humble conclusion, after a very careful and detailed consideration of all the facts and events leading to the jettisoning of that election by the 1st respondent, that the election of 06/12/2015 in Southern Ijaw Local Government was inconclusive having been proved to have been marred by widespread violence; high scale malpractices and serious irregularities, which rendered that process not only inconclusive but unsustainable. Even PW63 -Dennis Otio-tio-vide paragraph 20 of his written statement on oath said the collated result from Amasuma ward was snatched. This further led (sic -lends) credence to the fact that the election of 6/12/15 in Southern Ijaw Local Government Area was inconclusive...”

If any of these stages is missed, the election thus become (s) seriously flawed and not sustainable.” (pages 11478- 11479, Vol. 11 Record of Appeal)

In its review of the pleadings, evidence and holdings of the tribunal, the court below summarised its findings and conclusion as follows: B

“The evidence of PW52 contradicted the pleadings of the appellants and 4 points could be adduced from the evidence:

1) that no election known to law took place in the whole (of) Southern Ijaw owing to widespread violence on 6/12/15.
2) that the election being inconclusive was postponed to 9/1/ 2016. C

3) that the Resident Electoral Commissioner (REC) did not unilaterally cancel the inconclusive election of 6/12/2015, and;

4) that the security operatives and political parties reported D that the election did not take place on 6/12/2015.” (pp 11756- 11757, Vol.11 of Record of Appeal)

A further review of the evidence of PW61, led the court below to observe, inter alia:

“The evidence of PW61 knocked off the foundation upon E which the appellants’ case was built when he testified...

A careful review of the evidence of this witness would reveal that contrary to the pleadings of the appellants and the evidence of PW23 called as collation officer for Southern Ijaw Local Government Area to the effect that the collation of results had occurred at the wards and partly at the Local Government levels before the process was truncated, that there was no such collation of results and that the process of 6/12/2015 did not qualify as an election known to law. It also shows that the Resident Electoral Commissioner did not unilat- G erally cancel the process. The witness PW61 went further that any results brandished for Southern Ijaw must be false as none was returned to or emanated from the 1st respondent. Furthermore, the reports of Supervisory Presiding Officer (SPO) which indicated that election took place were baseless for the reason that the assertions H were not supported by Forms EC8A and EC8B submitted to the 1st respondent at any of the collation centres.

In view of the foregoing the foundation on which the appel-

lants rested their case was totally eroded.”

I have myself, carefully, reviewed the pleadings, evidence and views expressed by both the Tribunal and the court below. I cannot agree more. Their decisions on this issue are not only based on concurrent findings of fact but are fault-
lessly unassailable. Perhaps, I only need to remind ourselves that the settled principle of the law is that parties are bound by their pleadings. This principle of law is rightly supported by
plethora of decided cases, for instance, this court held in Mogaji v. Cadbury Nig. Ltd that in such an instance, the com-
compound conflict can result in nothing less than the breakdown of the case for the plaintiff as set out in the pleading. Again, not very long ago, this court, per Tobi, JSC (Rtd. and now late) in *Odi v. Iyale* (2004) 8 NWLR (Pt.875) 283 at 310 D-E, held, *inter alia*:

“I cannot see better evidence against a party than one from a witness called by him who gives evidence contrary to the case of that party. This is because the party is calling the witness to testify in favour of his case as pleaded in his pleadings.”

My lords, from the excepts as above, it is now beyond any peradventure that even if there was an election on 06/12/15, in Ijaw Southern Local Government Area, that election was found to be inconclusive as it was also found to be marred by widespread violence, high scale malpractices and other serious irregularities, which rendered the process incon-
clusive and unacceptable. There was therefore no election known to law that took place in the whole of Southern Ijaw Local Government Area. That of course, was the reason why secu-
rity operatives and political parties made the reports that the election did not take place in Ijaw Southern Local Govern-
ment Area on the 6/12/2015. The election being inconclusive was thus re-scheduled/postponed to the 9th of January, 2016.
 The evidence of PW52 who was the SPO is pointedly clear on this when he said during cross-examination:

“Owing to very widespread violence which eventually resulted in very late distribution of election materials it became obvious that no election known to law could take place in Southern Ijaw Local Government Area on either 5th or 6th December, 2015, The elec-

tion being inconclusive was postponed till 9th day of January, 2016 when supplementary election was scheduled to take place in polling units in some other Local Government Areas and wards where election was not conclusive on the previous occasions.”

Secondly, the challenge posed by the learned SAN for the appellants in relation to the application of section 26 of the Electoral Act, 2010 (as amended) is that the provision in Section 26(1) of the Act as amended acts as a limitation on the powers of the commission to arbitrarily postpone an election, even if the appellants conceded that the cancellation of the election was a postponement and it was the duty of the 1st respondent to proffer “cogent and verifiable” reasons for the so called ‘postponement’ as pleaded by the respondents.

My lords, the relevant provision of Section 26 of the Act is herein-below reproduced:

“26(1) Where a date has been appointed for the holding of an election, and there is reason to believe that a serious breach of the peace is likely to occur if the election is proceeded with on that date or it is impossible to conduct the elections as a result of natural disasters or other emergencies, the commission may postpone the election and shall in respect of the postponed election, provided that such reason for the postponement is cogent and verifiable.” (underlining supplied)

After the review, the court below, in relation to Section 26 of the Act, made several pronouncements, for instance:

“In case of Exhibit P42B upon which the appellants based their case showed that it was the decision of the 1st respondent announced by the Resident Electoral Commissioner which supplied reasons justifying the decision.

In view of the foregoing, a proper application of Section 26 of the Electoral Act, 2010 (as amended) in my view, would accommodate a situation where at the close of election there were no results as they were hijacked according to the evidence before the Tribunal and where collation did not take place at the ward collation centres because the results were not available. The PW61 testified that as Electoral Officer and the custodian of the Local Government Collation centre, he did not see a single INEC polling unit or ward result.

Based on the foregoing, there was no election and the decision to hold a proper election at a future date can only mean a postponement of polls.”

I again, agree, most humbly, with the view expressed by the court below that:

B “Section 26 of the Electoral Act 2010 (as amended) cannot be considered in abstract. It must be considered in the context of the totality of the case. The emergence of the breach of peace at the time of polls not being anticipated (at the time of polls) is within the context of Intervening emergencies as envisaged by Section 26 of the Electoral Act, 2010 (as amended).”

C **In Collins COBUILD Learners Dictionary (Latest Reprint, 2001), ‘emergency’ is described as an unexpected and difficult or dangerous situation, especially an accident, which**
D **occurs suddenly and which must be dealt with quickly and an emergency action is one that is done or arranged quickly and not in the normal way, because an emergency has occurred. As a legal doctrine, it is a legal principle exempting a person**
E **acted instinctively to meet a sudden and urgent need for aid. (Blacks Law Dictionary, Eighth ed, p.82). The framers of the Act anticipated that there might arise natural disasters or other**
F **“emergencies”, such as snatching of ballot boxes, violence, other election malpractices or irregularities that could make the holding of an election (or better, free and fair election) possible. Evidence upon which the Tribunal and the court below reviewed, recorded that there were such unforeseen emergencies on the election day 06/12/15 in Ijaw Southern Local**
G **Government area which necessitated the postponement of the scheduled election to the 9th of January, 2016. I am in agreement that what the 1st respondent did through the Resident Electoral Commissioner was perfectly in order. Appellants issue No.1 is resolved in favour of the respondents and against**
H **the appellants.**

Appellants’ issue No.2 is on propriety of the court below’s affirming the waiver/acquiescence by the appellants of their right to protest against the cancellation of the election of 6/12/2015.

Now, my noble lordships, going by the record of appeal, it is clear that what happened in Southern Ijaw Local Government election was one of 6/12/2015 (if there was any), according to the evidence of PW61, who was called by the appellants, while being cross-examined by the learned SAN for the 1st respondent, stated as follows: B

“The postponement of the election to 9/1/2016 was the decision of the Commission and not that of the Resident Electoral Commissioner. Because there was no declaration of results and return of 6/12/2015, what happened was a postponement and not cancellation of the election (see page 11175 lines 16 - 20 of Vol. Eleven of the record of appeal).” C

This was a witness called by the appellants. Further, although the appellants pleaded (paragraphs 8, 9 and 24 of the petition) that they protested to the 1st respondent against the cancellation of the election of 6/12/2015, in respect of Southern Ijaw Local Government Area and the rescheduling of same to 9/1/2016, the court below found that at the instance of the appellants, Exhibits P55 was admitted in evidence, there was no evidence that as a result of Exhibit P55, 1st respondent had a change of mind and decision with regard to the election of 6/12/2015 in Southern Ijaw Local Government Area, being declared inconclusive and consequently rescheduling same to the 9/1/2016. **There is also a finding by the court below in confirmation of the trial court’s finding that, evidence was proffered by PW1 (page 11038 of Vol. 11 of the record of appeal) and PW23 (page 11118, Vol. 11 of the Record of Appeal) to the effect that the appellants duly participated in the election of 9/1/2016 in respect of the re-scheduled Southern Ijaw Local Government Area election. If, as indeed found by the Tribunal and the court below, the appellants fully participated in the rescheduled election of 9/1/2016, one is poised to ask: Why did the appellants take part in the rescheduled election for the Southern Ijaw Local Government Area election of 9/1/2016? Wouldn’t that suggest that they had by their conduct withdrawn their protest as indicated in Exhibit P55? Can the appellants be permitted by law to resile? The answer is in the negative as one cannot eat one’s cake and have it and** D E F G H

as one cannot approbate and reprobate. Their participation in the re-scheduled election has shown that by their conduct, they had waived their right to protest any longer and are caught up by the cob-webs of both waiver and estoppel. In the case of

Ariori & Ors v. Elemo & Ors (1983) 1 SCNLR 1 at p.22, this court,
 B per Idigbe, JSC defined the concept of waiver:

*“By way of a general definition, waiver is the intentional and voluntary surrender or relinquishment of a known privilege and or right; it, therefore implies a dispensation or abandonment by the
 C party waiving of a right or privilege which, at his option, he could have insisted upon.”*

On the principles of estoppel, this court said in the case of Ude v. Nwara & Anor (1993) LPELR 3289, per Nnaemeka-Agu, JSC:

*“By operation of the rule of estoppel a man is not allowed to
 D blow hot and cold, to affirm at the time and ... deny at the other, or, as it is said, to approbate and reprobate. He cannot be allowed to mislead another person into believing in a state of affairs and then
 E turning round to say to that person’s disadvantage that the state of affairs which he had represented does not exist at all or as represented by him: See: Cane v. Mills (1862) 7 H. & No. 913 at pp. 927 - 928. Dealing with the broad principle of estoppel in Joe Iga & Ors v. Ezekiel Amakiri & Ors (1976) 11 SC1, this court stated at pp. 12-13:*

*‘If a man by his words or conduct willfully endeavours to cause another to believe in a certain state of things which the first knows to be false and if the second believes in such state of things and acts upon the belief, he who knowingly made the false statement
 G is estopped from averring afterwards that such a state of things does not exist at the time; again, if a man ‘either in express terms or by conduct, makes representation to another of the existence of a state of facts which he intends to be acted upon in a certain way, in the belief of the existence of such a state of facts, to the damage of him
 H who so believes and acts, the first is estopped from denying the existence of such state of facts.’*

Thus, the appellants, willy-nilly, are deemed or taken to have accepted the cancellation (if at all) or rescheduling of

the Southern Ijaw Local Government Area election of 6/12/15 and by their conduct and active participation in the election of 9/1/2016, they are consequently estopped from disowning or distancing themselves from that election, as they were, by so doing, no longer pursuing Exhibit P55 and cannot lay any claim to the election of 6/12/2015. They are, on the other hand, taken to have voluntarily and fully acquiesced to the election of 9/1/2016 by participating in the exercise which was declared conclusive by the 1st respondent. Issue No.2 is resolved against the appellants and in favour of the respondents.

Appellants' issues Nos.3 and 4 which I prefer to take together are on the state of the pleadings, evidence and the admissibility and weight of evidence which the court below considered in affirming the return of the 2nd respondent as the Governor of Bayelsa State.

Permit me my noble lordships, to again recapitulate the relevant submissions of the learned SAN for appellants in his brief of argument in paragraphs 576-579, learned SAN argued that the court below did not evaluate Exhibit P42B and that the exhibit, showed that Southern Ijaw Local Government Area had 120,000 registered voters by reason of which the difference between the scores of the 2nd respondent and the 1st respondent was lesser in number than the voting strength in Southern Ijaw Local Government Area. It was also argued that the voting strength in Southern Ijaw Local Government Area is higher than half the total number of votes scored at the election and that for that reason, the return of the 2nd respondent ought not to have been affirmed by the court below. Now, it is to be noted that Exhibit P42B was tendered through appellants' witness (P63) below is what the court below found:

"In this case, Exhibit P42B upon which the appellants based their case showed that it was the decision of the 1st respondent announced by the Resident Electoral Commissioner which supplied the reasons justifying the decision. In view of the foregoing, a proper application of Section 26 of the Electoral Act, 2010 (as amended) in my view would accommodate a situation where at the close of election there were no results as they were hijacked according to the evidence before the Tribunal and where collation did not take place

at the ward collation centres because the results were not available. The PW61 testified that as Electoral Officer and custodian of the Local Government Collation Centre, he did not see a single INEC Polling Unit or Ward result. Based on the foregoing, there was no election and the decision to hold a proper election at a future date only mean a postponement of polls.” (Underlining for emphasis)

It is my understanding from the quoted excerpt from the court below’s judgment that the court below did evaluate Exhibit P42B and came to the conclusion that the decision to jettison the election of 6/12/2015, was that of the 1st respondent through the Resident Electoral Commissioner who supplied the reasons justifying the decision. Secondly, on the voting strength of Southern Ijaw Local Government Area it was found by the court below that the appellants did not lead any evidence at the trial that the 120,000 registered voters in Southern Ijaw Local Government Area cast their votes for the appellants on 6/12/2015. Thus, in the absence of any such evidence, it becomes a matter of speculation in assuming that those registered voters would have cast their votes in favour of the appellants if the election had been concluded. On the allegation of cancellation of votes, appellants alleged that the court below failed to give consideration to the allegation that the total number of votes cancelled is beyond the difference between the votes of the 2nd respondent and that of the 1st appellant, citing and relying on the guideline and manual of the 1st respondent i.e. where the number of cancelled votes is more than the margin between the candidates, the 1st respondent ought to make no return but to order a re-run election.

Analysis of the votes pleaded, appellants claimed that they scored 86,852 votes while the 2nd respondent scored 134,998 votes. Court below found that no evidence was adduced at the trial Tribunal to show how the 86,852 votes of the 1st appellant became 127,219 votes and the 2nd respondents votes of 134,998 became 118,483 votes. Appellants’ witness gave some figures which he said were based on Forms EC8As, EC8Bs, EC8Cs and EC8Ds but the witness failed to tender the said forms in evidence. The witness admitted under cross-examination by 2nd respondent’s learned counsel (pages 11186 Volume 11 of record of appeal) that:

“The result announced which I want this Tribunal to set aside

is as contained in my witness statement...I cannot isolate and say how many numbers of votes, were cancelled in the various Local Governments I stated in my witness statement”

It is clear from this piece of evidence that the appellants did not themselves know the number of votes alleged by them to have been cancelled by the 1st respondent. It is known to all that a court of law is not a magician who would begin to allocate votes and or reduce votes arbitrarily. It relies and makes its decision upon tested evidence placed before it. So, as the appellants have failed to lead evidence as to the actual number of votes alleged to be cancelled at the Bayelsa State Government election held on 5th and 6th of December, 2015 and the 9th of January, 2016, their claim as pleaded goes to no issue at all. Further, the case of *Otti v. Ikpeazu* (supra) relied upon by the appellants is not helpful to them as it is quite distinguishable from the present appeal.

It is to be noted again, that the law has for long been settled that the primary function of evaluation of evidence and ascription of probative value belongs to the trial court which observed the witnesses and where a trial court unquestionably evaluates the evidence and appraises the facts, it is not the business of the Court of Appeal or this court to substitute its own views for that of the trial court. See *Akinloye v. Eyiola* (1967) SCNLR 19; *Okunzua v. Amosu* (1992) NWLR (Pt.248) 416; *Onovo v. Mba* (2014) 14 NWLR (Pt. 1427) 391 at 424 - F.

Issue No. 4 by the appellant is on the striking out of some paragraphs (6 and 11) of the appellants’ pleading. The contention of learned SAN for the appellants is that the court below was wrong in affirming the striking out of these paragraphs from the appellants’ reply to the replies of 1st and 2nd respondents.

In the said petitioners (appellants) Reply it was pleaded as follows:

“8, In further answer to paragraph 8 of the 1st respondents reply petitioners aver that the 1st respondent’s averment that the election of 6th December, 2015 in Southern Ijaw Local Government Area was ‘inconclusive’ and therefore ‘postponed’ is nothing than an afterthought as no such postponement was made at the material time.

The 1st respondent's Resident Electoral Commissioner in Bayelsa State unilaterally cancelled the said election.

11. *In addition to the above and contrary to the insinuation that the election was postponed, the petitioners hereby aver that election had taken place in most of the Polling Units on 6/12/2015 while in some very few polling units, it took place in the early hours of 7/12/2015 as lavishly pleaded in the main petition and shown above. The cancellation was done around 4:00pm on 7/12/2015 long after the election exercise had been rounded up. "Postponement" of an event occurs before and not after the said event."*

In their various submissions, learned senior counsel for the respective respondents contended that the appellants in the paragraphs of their Reply (as above) pleaded new facts. The court below was correct in affirming the Trial court's order striking out the said paragraphs.

Your lordships, the circumstances under which a petitioner may file a reply to the reply filed by a respondent to the petition are clearly provided by the First Schedule to the Electoral Act, 2010 (as amended). It provides as follows:

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

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

b) the petitioner's reply does not run counter to the provisions of subparagraph (1) of paragraph (4) of this schedule."

It is clear from the above quoted provisions of the Act, that one can easily conclude that a petitioner may only file a reply to the reply of a respondent where new issues of facts are raised by the respondent. Where a respondent raises no new issue of fact in his reply but simply answers the facts in the petition, the petitioner does not have a right to file a reply to the same. Two issues militate against appellants' Reply which contains paragraphs 8 and 11:

- i. Time provided by the Act for filing such reply had lapsed.
- ii. The 1st and 2nd respondents claimed that new issues of fact such as several reports sought to be introduced into the petition as per paragraphs 8 and 11 of appellants reply would constitute an amendment to the petition and in violation of the provisions of the Act.

I agree with the submissions of respective learned senior counsel for each of the respondents that the appellants failed to show the injury they suffered by the Tribunals striking out of their paragraphs 8 and 11. At no point did the appellants refer the lower court to the injury caused them by the striking out of the said paragraphs. In any event, the principle of the law is well settled that it is not every error in a judgment (if any) that will lead to that judgment or decision being set aside, more so, when no injustice was caused thereby. See: Amayo v. Erinmwingboro (2006) 11 NWLR (Pt.992) 699; Bankole v. Delu (1991) 8 NWLR (Pt.211) 523.

My noble lords, issues 3 and 4 by the appellants lack merit and are resolved against the appellants and in favour of the respondents.

In the final analysis, I find no merit in this appeal. I hereby dismiss the appeal. I make no order as to costs.

OGUNBIYI JSC

This appeal was heard on the 8th November, 2016 and judgment was pronounced shortly thereafter on the same day wherein the entire appeal was dismissed as lacking in merit. The reason for the judgment was reserved to the 18th November, 2016 and it is now ready and I hereby deliver same.

I had the privilege of reading in draft the lead judgment just delivered by my brother Hon. Justice Tanko Muhammad, JSC. I agree that the appeal is devoid of any merit and I dismiss same while I affirm the concurrent judgments of the two lower courts.

The facts of this case are well expounded in the lead judgment. The two lower courts were concurrent by dismissing the appellants' cases both at the trial and the lower courts. In the appeal be-

fore us, the appellants have formulated four issues for determination. I will however wish to say a few things on issue no 1 formulated by the appellants which states thus:-

B Was the Court of Appeal correct in its interpretation of section 26 of the Electoral Act, 2010 as amended, with respect to the issue of electoral cancellation of election/postponement of election in Southern Ijaw Local Government Area held 6/12/2015, having regard to the state of the pleadings and the admissible evidence? (Grounds 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14 and 15)

C The grouse of the appellants' case is centered in paragraphs 8 and 9 of the petition wherein they pleaded and said:

"(8) On the 6th day of December, 2015 the election was also conducted in Southern Ijaw Local Government Area but instead of collating and announcing the final result of the election and declaring D the winner, the Resident Electoral Commissioner (REC) of the 1st respondent unilaterally cancelled the election and declared the election "inconclusive" and proceeded to fix 9th day of January 2016 as the date to conclude the election in Bayelsa state. This was inspite of strong verbal and written protestations by the petitioner. (9) Inspite E of the said protestations by the petitioners, the 1st respondent went on to hold supplementary election on the 9th January 2016 in the entire Southern Ijaw Local Government Area."

F The governing provision of the law upon which appellants' petition is anchored is section 26 of the Electoral Act which the counsel submits was erroneously interpreted by the Court of Appeal. The reproduction of section 26(1) states as follows:-

"26(1) where a date has been appointed for the holding of an election, and there is reason to believe that a serious breach of the G peace is likely to occur if the election is proceeded with on that date or it is impossible to conduct the elections as a result of natural disasters or other emergencies, the Commission may postpone the election and shall in respect of the area, or areas concerned, appoint another date for the holding of the postponed election, H provided that such reason for the postponement is cogent and verifiable."

It is the submission on behalf of the appellants that the two lower courts were wrong to have reached their decision in respect of

the cancelled election. The appellants therefore are assertive that the election in question was conclusive and was subsequently cancelled. For the appellants to succeed on their claim, the onus of proof placed on them would require them to show that:-

1) Election was in fact conducted in Southern Ijaw on 6th December 2015 and that due collation took place. B

2) The Resident Electoral Commissioner unilaterally cancelled the election.

3) The holding of the supplementary election was unlawful.

As a pre-requisite to establishing the foregoing conclusions, C
the pertinent question to pose is; Did the appellants establish that election was duly conducted in Southern Ijaw Local Government Area (SILGA) on 6th December, 2015?

The two lower courts were concurrent in their findings of facts and the onus is now on the appellants to identify the crucial matters in the decision appealed against on which the rationale or finding of the lower court can be impeached. The law is well settled that this court will not interfere with concurrent findings of fact by the two lower courts unless special circumstances are shown by the appellants, such as that the findings are perverse, or that there was a serious error of procedural or substantive law which has resulted in miscarriage of justice. See *Owhoruke V. C. O. P.* (2015) 15 NWLR (Pt. 1483) 557 at 575; *Lasisi V. State* (2013) 8 NWLR (pt. 1358) 74; *Ndulue V. Ojiakor* (2013) 8 NWLR (Pt. 1356) 31 and *Ibodo V. Enarofia* (1980) 5-7 SC 42. E
F

A perverse decision is one that persists in error and runs contrary to the ordinary expectation or against the weight of evidence. It also occurs where matters which ought not to have been countenanced are taken into account and eyes are shut to the obvious. See *James V. INEC* (2015) 12 NWLR (Pt. 1474) 538 and *Atolagbe V. Shorun* (1985) 1 NWLR (Pt. 2) 360. G

The question to raise is whether in the appeal at hand, the appellants have established perversity of the concurrent findings appealed against or in any way established that the decision occasioned a miscarriage of justice? Rather and in my view when regard is had to the witnesses called by the appellants especially PW61 (the Electoral officer for Southern Ijaw Local Government), the revelation would H

work against the interest of the appellants wherein they shot themselves in the foot. This, I say, because PW61 for instance testified eloquently and quite contrary to the case of the appellants that the stronghold of their case, which was that election was duly conducted in the Southern Ijaw Local Government Area on 6/12/2015 but was cancelled by the 1st respondent's Resident Electoral officer, was not true. The witness did not only testify to the contrary, he also tendered a Report to that effect.

The lower court, just like the trial tribunal duly considered the state of the pleadings as well as the uncoordinated and inadequate evidence led by the appellants and found no difficulty in arriving at the decision that the case should be dismissed. There is no evidence from the witnesses to show that original result sheets were returned at any of the legally designated collation centers and the few reports of the supervisory Presiding officers who claimed that election took place were not accompanied by any original result sheets. With the allegation that election materials were snatched and taken to undisclosed places, the only proof would have been the duly recorded result sheets from the polling stations and collation centers as well as sufficient eye witness account which could have proved due conduct of the election in Southern Ijaw LG on 6/12/2015. It was the absence of the foregoing put together that formed the essence of both the decision of the tribunal which was endorsed by the Court of Appeal and thus concluding that the appellants did not only fail to call the requisite evidence in support of their case, but to their detriment, called witnesses who testified contrary to their case, that no regular election was held on that day, the 6/12/2015.

The case of the appellants was clearly captured in paragraphs 8 and 9 of the petition which I did reproduce earlier in this judgment. The crucial point for the appellants lies in showing that election was duly held on 6/12/2015 in Southern Ijaw and that they indeed won the election by available evidence presented by them.

In answer to the question whether the appellants did establish that election was duly conducted in Southern Ijaw LGA on 6/12/2015, reference can be made to the various pieces of evidence given by the appellants' witnesses:-

PW52 the supervising Presiding Officer of Oporoma ward of

Southern Ijaw LGA was called to buttress the case of the appellants to the effect that election took place in ward one (1) of SILGA where he acted as a supervisory Presiding officer (SPO). In his evidence in chief he claimed that election duly took place on 6/12/2015 in units 1 to 12 where he supervised.

Under cross examination the witness was confronted with his statement made on oath at page 11,148 of the record wherein at paragraphs 3 and 4 the witness deposed thus:-

“3. Owing to very spread violence which eventually resulted in very late distribution of election materials it became obvious that no election known to law could take place in Southern Ijaw LGA on either the 5th and 6th December, 2015. The election being inconclusive was postponed till 9th January, 2016 when supplementary election was scheduled to also take place in polling units in some other Local Government Areas and Wards where election was not conclusive on the previous occasions.

4. I am aware that it was not the unilateral decision by the 1st respondent to cancel proceedings of 6th December, 2015 which cannot by any appropriate nomenclature be classified as an election within the ambit of the Electoral Act 2010 (as amended). There were series of complaints from security operatives and members of the respective political parties all glaringly depicting that there was no conclusive election on that day,”

The evidence of PW52 supra, contradicts the appellants’ pleadings at paragraphs 8 and 9 and it relates to facts:-

(1) that no regular election took place in the whole of Southern Ijaw owing to widespread violence on 6/12/2015

(2) that the election being inconclusive was postponed to 9/12/2016

(3) that the Resident Electoral Commissioner (REC) did not unilaterally cancel the inconclusive election of 6/12/2015; and

(4) that the security operatives and political parties reported that election did not take place on 6/12/2015.

It is spelt out clearly from the testimony of the witness that the election was not conclusive and consequent upon which there was a postponement.

Another relevant witness also called by the appellant is PW58

who tendered Exhibit 51. He said:-

B *"I know that Governorship election took place in Bayelsa State on 9/01/2016 when the result was declared. Due to inconclusiveness of the election of 06/1/2015, it was postponed to 09/01/2016. Independent National Electoral Commission was fair to the candidates in the conduct and declaration of results of the election."*

Under cross examination by counsel to 3rd respondent, the witness further said thus amongst others:-

C *"...I am aware that election was held on 09/01/2016 in Bayelsa. It is the tradition of Independent National Electoral Commission and it held meetings with all political parties before fixing the date 09/01/2016. They were all consulted before fixing that date. I am also aware that Independent National Electoral Commission gave freedom to all the political parties to campaign for votes for that election. They all took advantage of it, supposedly I am satisfied with the result and declaration made on the governorship election because Independent National Electoral Commission has put in its best."*

F The foregoing witness PW58 by his evidence eroded completely the pleadings of the appellants to the effect that the 1st respondent cancelled the election of 6/12/2015 as the witness maintained that the election was not cancelled but was postponed. The further destruction to the appellants' pleadings was where the witness maintained by his testimony that 1st respondent met with all the political parties before fixing the election of 09/01/2016.

The most precarious and damaging effect to the appellants' case was the evidence of PW61 who under cross-examination testified emphatically in contradiction of appellants' case and said:-

G *"It is correct that all political parties complained about the election of 06/12/2015. There was no collated result for Southern Ijaw LGA on 06/12/2015. Before the date was fixed for the supplementary election of 09/01/2016 all the political parties met and agreed to 09/01/2016. The postponement of the election to 09/01/2016 was the decision of the Commission and not that of the Resident Electoral Commissioner (REC). Because there was no declaration of results and return of 06/12/2015 what happened was a postponement and not cancellation of the election. The election conducted on 09/01/2016 was free and fair and credible."*

Under cross examination also by the 2nd respondent's counsel, the witness said:-

"Independent National Electoral Commission does not have any collated results from the Southern Ijaw LGA for the 06/12/2015 Governorship election. Nobody could therefore claim that he scored any particular number... It's as a result of that on 07/12/2015, the Commission took a decision to postpone the elections to 09/01/2016. Up to date no result has come from Southern Ijaw LGA on the 06/12/2015 election. So anybody brandishing any report, will not be genuine for Southern Ijaw LGA for that election of 06/12/2015, having not emanated from Independent National Electoral Commission. All Progressive Congress, Peoples Democratic Party and other political parties actively participated in the 09/01/2016 elections in Southern Ijaw except two wards which were cancelled for irregularities".

The said witness was also cross examined by the 3rd respondent's counsel and again in his testimony he said:-

"As a result of the irregularities which marred the 06/12/2015 elections in Southern Ijaw LGA, Independent National Electoral Commission and all the political parties agreed to its postponement to 09/01/2016. After that, the political parties went out canvassing for votes and campaigning for the 09/01/2016 election. Form EC 8A is the foundation of all subsequent results at ward and Local government levels i.e. Forms EC 8B and then EC 8C. The collation of results starts form EC 8A and escalates to EC 8B and then EC 8C. If there's any supervisory Presiding Officer Report suggesting that any elections took place in Southern Ijaw LGA without form EC 8A reports then that Report cannot be authentic. To the best of my knowledge the election of 09/01/2016 was conducted in accordance within the law and Independent National Electoral Commission manual on conduct of election."

Contrary to the pleadings of the appellants, this witness was emphatic that there was no such collation of results and that the process of 06/12/2015 did not qualify as an election and that the REC did not unilaterally cancel the process. On the totality of the evidence by the appellants' witnesses, it is true to say that the foundation on which the appellants rested their case was totally eroded. The law is trite that if pleadings are to be of any use, parties must be held bound

by them. See *Owoade V. Owoade* (1988) 2 NWLR (Pt. 77) 413; *Abaye V. Ofili* (1986) 1 NWLR (Pt. 15) 413 and *Afolabi V. W. S. W. Ltd* (2012) 17 NWLR (Part 1329) 286. In the case of *Mogaji V. Cadbury Nig. Ltd* (1985) 2 NWLR (Pt 7) 393 this court held that where evidence contradicts a pleading, being the foundation on which the case was erected, “the compound conflict can result in nothing less than the breakdown of the case for the plaintiff as set out in the pleadings. See also *Oke V. Atoloye* (1986) 1 NWLR (Pt 15) 241. With the conglomerate contradiction in the evidence of the appellants’ witnesses, the effect, as rightly submitted by the 1st respondent’s counsel, was that the tribunal could not pick and choose which of them to believe and was bound to reject both versions. See *Onubogu V. The State* (1974) 9 SC 1.

PW61 a permanent staff of INEC in his report Exhibit P54 gave a vivid account of the teeming irregularities experienced in the aborted election and which same cannot amount to a hearsay. He was by his position present at the local government collation center, and his evidence was based on what he observed at the collation center, including the activities of PW23. PW61 was very emphatic that no results in original form were submitted to the office headquarters of Southern Ijaw LGA with respect to the alleged election of 6/12/2015. He was in charge of the office and ought to know if such results were submitted. None of the witnesses, including PW63, the constituency collation Agent of ARC, testified that he saw any of the original result sheets being submitted to the Returning officer with respect to Southern Ijaw LGA.

The absence of original result supports the report of PW61 to the effect that no election took place in the manner known to law and as rightly found by both courts below.

The appellants pleaded that not only did election take place, but that collation had taken place at the ward levels and that the local government collated result was awaited at the Constituency collation center when the REC unilaterally terminated the process. The onus lie on them to show that due collation had taken place at least at the ward and local government collation centers. PW61 who was the electoral officer refuted this clearly and out rightly. He was the officer who should have known, being the person who should have accom-

panied results to the ultimate collation centers. The appellants did not also call witnesses who were at the seventeen (17) ward collation centers when the collation allegedly took place.

The witness PW23 who testified as the Local Government Collation Officer had his testimony full of flaws. He left his duty post and spent the night outside the collation center, only to surface one day after the election to claim that he collated eight (8) out of the seventeen (17) ward results. He did not tender or identify the alleged eight (8) ward results or even the form EC 8C allegedly prepared by him. Intriguingly, when he was cross examined by 3rd respondent, he said “...*I am aware form EC 8A is the declaration of result from polling units. I did not submit any.*” (See page 11, 119 at lines 12-13 of the record). The witness thus categorically admitted that he did not submit any forms EC 8A to the 1st Respondent which he was bound to do if he indeed collected the result. There can be no collation of eight (8) ward results without the foundation of these results being the forms EC 8A.

For all intents and purposes, it is totally wrong and completely out of reason for the appellants to contend that the two lower courts failed to evaluate the evidence of their witnesses. As a matter of fact, the record is clear as borne out that the trial tribunal evaluated exhaustively the entire evidence led by the witnesses for the appellants and the said evidence was thoroughly reviewed by the lower court. In my view, both courts were therefore right in finding the evidence unworthy of belief.

The principle of law is firmly established that the primary function of evaluation of evidence and ascription of probative value belongs to the trial court which has the 1st hand observation of the witnesses. Where a court of trial properly evaluates the evidence and appraises the facts, the Court of Appeal has no right to substitute its own views for that of the trial court. See *Onovo V. Mba* (2014) 14 NWLR (Pt 1427) 391 at 424; *Akinloye V. Eyiola* (1967) SCNLR 19; and *Okunzua V. Amosu* (1992) NWLR (Pt. 248) 416.

There was no evidence of any miscarriage of justice established by the appellant which might have occasioned as a result of either wrongful evaluation of evidence or non-evaluation at all. It is evident from the case under consideration that the principal witnesses

of the appellants namely PW61, 58 and 52 all testified in contradiction of the appellants' case as well as the evidence of other witnesses. The consequential effect to be drawn is that those inherent conflicts destroyed the appellants' case. The testimonies of PW23, PW31 and PW54 did further compound the conflicts. See *Mogaji V. Odofin* B (1978) 3 SC 91; *Guinness V. Udeani* (2000) 14 NWLR (Pt. 687) 367.

The burden of proof on the appellants was to prove the due conduct of the election of 6/12/2015; the respondents' assertion that due election did not take place on 6/12/2015 is in the negative. Since C the principal claim of the appellants is declaratory, the law places heavy burden of proof on them without any reference to the state of the case of the respondents. See the decision of this court in *C.P.C. V. INEC* (2011) 18 NWLR (Pt. 1279) 493 at 554 (paras F-H); also D another recent decision of *Nyesom V. Peterside* (2016) 7 NWLR (Pt. 1512) 452 at 535 (para F-G) where in a claim for declaratory reliefs, the burden is on him who alleges to establish his case and not to rely on the weakness of the defence. The appellants have failed to prove their case on the merit. The totality of the appeal is that it is lacking in E merit.

My learned brother Hon. Justice Tanko Muhammad, JSC has dealt with the appeal exhaustively and I adopt his judgment as mine. In the same terms as the lead judgment, I also dismiss same and uphold the concurrent judgment by the two lower courts. I abide F also by the order made as to costs.

AKA'AH'S JSC

G When the panel of Justices in which I participated, heard this appeal on 8/11/2016, we dismissed the appeal as unmeritorious and we adjourned to today, 18/11/2016 to give reasons for dismissing the appeal. I now set down my reasons My learned brother, Ibrahim Tanko Muhammad JSC had made available to me his lead judgment H giving his reasons for dismissing the appeal which I adopt as mine.

The crux of this appeal relates to the cancellation/postponement of the election in the Southern Ijaw Local Government Area with 120,000 registered voters. Both the preliminary objections and

the interpretation of Section 26 of the Electoral Act 2010 (as amended) revolve around this issue.

Sections 26 and 27(1) and (2)(f) of the Electoral Act 2010 (as amended) provide as follows:-

“26(1) Where a date has been appointed for the holding of an election, and there is reason to believe that a serious breach of the peace is likely to occur if the election is proceeded with on that date or it is impossible to conduct the elections as a result of natural disasters or other emergencies, the commission may postpone the election and shall in respect of the postponed election, provided that such reason for the postponement is cogent and verifiable.

(2) Where an election is postponed under this Act on or after the last date for the delivery of nomination papers and a poll has to be taken between the candidates nominated, the electoral officer shall, on a new date being appointed for the election, proceed as if the date appointed were the date for the taking of the poll between the candidates.

(3) Where the commission appoints a substituted date in accordance with subsection (1) and (2) of this section there shall be no return for the election until polling has taken place in the area or areas affected.

(4) Notwithstanding the provision of subsection (3) of this section the commission may, if satisfied that the result of the election will not be affected by voting in the area or areas in respect of which substituted dates have been appointed, direct that a return of the election be made.

(5) The decision of the commission under subsection (4) may be challenged by any of the contestants at a court or tribunal of competent jurisdiction and on such challenge, the decision shall be suspended until the matter is determined.

27(1) The results of all the elections shall be announced by –

- (a) The presiding officer at the polling unit;*
- (b) The ward collation officer at the ward collation;*
- (c) The local government or area council collation officer at the local government area council collation centre;*
- (d) The state collation officer at the state collation centre; and*
- (2) The returning officer shall announce the result and de-*

clare the winner of the election at:-

(f) *State collation centre in the case of election of a governor of a state”.*

Where all the steps enumerated in section 27(l)(a-d) have been complied with no Resident Electoral Commissioner (REC) has power to unilaterally cancel the result. But where the process is disrupted halfway, the Resident Electoral Commissioner has power to declare the result of the election as inconclusive and will then proceed to arrange for a new date to conduct a fresh poll in the areas where the process was disrupted. It is only after this has been done that the results of votes cast for each candidate are added to the already collated results where no disruption took place in order to decide the winner of the election. Before a candidate is returned as the duly elected Governor of the State, the returning officer must ensure that the candidate has a majority of votes cast at the election and has not less than one quarter of the votes cast at the election in each of at least two-thirds of all the local government areas in the State See: Section 179(1) of the 1999 Constitution (as amended).

In paragraphs 8 and 9 of the Petition, the appellants/petitioners pleaded thus:

“8. *On the 6th December, 2015 the election was also conducted in Southern Ijaw Local Government Area, but instead of collating and announcing the final result of the election and declaring the winner, the Resident Electoral Commissioner (REC) of the 1st respondent unilaterally cancelled that election and declared the election “inconclusive” and proceeded to fix 9th January, 2016 as the date to conclude the election in Bayelsa State, This was in spite of strong verbal and written protestations by the Petitioners.*

9. *In spite of the said protestations by the petitioners, the 1st respondent went on to hold supplementary election on the 9th of January, 2016 in the entire Southern Ijaw Local Government Area”.*

In his brief of argument Mr. Hon. SAN for the appellants argued that appellants testified as PW62 and called other witnesses who gave evidence on the wrongful cancellation of the election of 6/12/2015. He referred to the evidence of PW23 and Exhibit P42B which stood unchallenged and submitted that the lower court laid a faulty foundation which later influenced its judgment regarding the

cancellation of the election held on 6/12/2015 in Southern Ijaw Local Government when it stated at page 11, 736 of vol. 12 of the records of appeal that:-

“But on the 6th day of December 2015 election was inconclusive in Southern Ijaw Government Area and was therefore re-scheduled to the 9th day of January, 2016”. B

This submission was countered in the briefs of argument filed by learned senior counsel for 1st and 3rd respondents. Learned Senior Counsel for 2nd respondent on his part submitted that the two lower courts made a concurrent findings of fact that the election in Southern Ijaw Local Government Area on 6th December, 2015 was inconclusive and this Court will not interfere with such findings arising from evidence of witnesses whom the trial court had the opportunity and advantage of observing their demeanour. C

PW52 and PW61 are officials of 1st respondent who has the statutory duty to conduct elections. They were subpoenaed to testify on the Bayelsa Governorship election scheduled for 5th and 6th December, 2015. PW52 who was the Supervising Presiding Officer of Oporoma Ward of Southern Ijaw Local Government stated in paragraphs 3 and 4 of his Statement on Oath as follows:- D

“3. Owing to very widespread violence which eventually resulted in very late distribution of election materials it became obvious that no election known to law could take place in Southern Ijaw Local Government Area on either the 5th and 6th December 2015. The election being inconclusive was postponed to 9th day of January, 2016 when supplementary election was scheduled to also take place in polling units in some other Local Government Areas and Wards where election was not conclusive on the previous occasions. E

4. I am aware that it was not the unilateral decision by the 1st Respondent to cancel proceedings of 6th December, 2015 which cannot by any appropriate nomenclature be classified as an election within the ambit of the Electoral Act 2010 (as amended). There were series of complaints from security operatives and members of the respective political parties all glaringly depicting that there was no conclusive election on that day”. F G

PW61 who was the Electoral Officer Southern Ijaw Local Government Area stated under cross-examination thus:- H

“There was no collated result of Southern Ijaw Local Government Area on 6/12/2015, ...Independent National Electoral Commission does not have any collated results from Southern Ijaw Local Government Area for the 6/12/2015 Governorship Election. Nobody can therefore claim that he scored any particular number. Up to date no result has come from Southern Ijaw Local Government Area on the 6/12/2015 election. So anybody brandishing any report will not be genuine for Southern Ijaw Local Government Area for that election of 6/12/2015, having not emanated from Independent National Electoral Commission. As a result of the irregularities which marred the 6/12/2015 elections in Southern Ijaw Local Government Area, Independent National Electoral Commission and all the Political Parties agreed to its postponement to 9/1/2016. The collation of results starts from EC8A escalates to EC8B and then EC8C. if there is any Supervisory Officer’s Report suggesting that any election in Southern Ijaw Local Government Area without Form EC8A then that report cannot be authentic”.

Reacting the evidence of PW61 elicited under cross-examination and the argument of learned senior counsel for the 1st and 3rd respondents, learned Senior Counsel for the appellants argued that the analysis of the evidence of some of the appellants’ witnesses on pages 7-10 of the 1st respondent’s brief is not only incorrect but falls short of the weight of evidence adduced at the trial. He said that the 1st respondent has not impugned the validity of the Forms EC8A tendered but is rather dwelling on the fact that oral evidence extracted from some of the appellants’ witnesses was fatal to the latter’s case. He therefore submitted that that predisposition is contrary to settled law on the position of oral evidence vis-à-vis documentary evidence to the effect that:-

- (a) Oral evidence cannot be used to impugn the validity of documentary evidence; and
- (b) Documentary evidence is the hangar on which oral evidence floats. He went further to submit that the majority of the witnesses proved that election took place in Southern Ijaw Local Government Area on 6/12/2015 and since the witnesses who tendered Forms EC8A were eye witnesses and it agrees with the report of PW61 which was received in evidence as Exhibit 54 more reliance should

be placed on their evidence and not the other four witnesses whose evidence is hearsay and therefore inadmissible.

Out of the 15 reports attached to Exhibit 54 it is in only six of the polling units that elections were conducted without a hitch and results declared. These are to be seen at pages 2302, 2303, 2345, 2347 and 2362 of the record of appeal. The submission of learned Senior Counsel for the appellants is therefore not borne out by the evidence adduced be it oral or documentary. The evidence adduced pointed to a prevalence of insecurity in majority of the polling units in Southern Ijaw Local Government Area which did not conduce to guaranteeing a free and fair election on 6/12/2015, In the prevailing circumstances the 1st respondent had the power under section 26(1) of the Electoral Act 2010 (as amended) to order the postponement of the election.

It seems the words “*postponement*” and “*cancellation*” of election have been used interchangeably. Where a poll has been taken and a result is announced, the 1st respondent cannot cancel the result already announced. It is only the Election Tribunal or the Court that can annul such a result upon a petition being laid before it. The burden would be on the petitioner to produce Form EC8A to prove that a result was announced after the poll. Presently the burden is quite heavy on the petitioner since the result of each polling unit must be produced. That burden was not discharged in this case. It is for this reason and the more detailed reasons advanced by my learned brother, I. T. Muhammad JSC that I dismissed this appeal on 8th November, 2016 with no order on costs.

KEKERE-EKUN JSC

On 8/11/2016, after a careful consideration of the record of appeal, briefs of arguments of the respective parties and the submissions of learned counsel, I dismissed this appeal as lacking in merit and promised to give my reasons today, 18/11/2016.

I have read in draft the leading Reasons for Judgment just delivered by my learned brother, IBRAHIM TANKO MUHAMMAD, JSC. I agree entirely with the reasoning and conclusions ably and comprehensively advanced by him and adopt in them as mine.

In support of the lead judgment, I shall make a few remarks in respect of the first issue for determination, which I believe is fundamental to the determination of other issues in the appeal.

This appeal is against the judgment of the Court of Appeal Abuja Division delivered on 22/9/2016 affirming the judgment of the Bayelsa State Governorship Election Tribunal delivered, on 26/7/2016 affirming the return of the 2nd respondent as the duly elected Governor of Bayelsa State.

The 1st respondent (INEC) conducted elections into the office of Governor of Bayelsa State on the 5th and 6th of December 2015. However due to widespread incidents of violence, electoral malpractices and irregularities, the election conducted in Southern Ijaw Local Government Area on the 6th of December 2015 was inconclusive. The 1st respondent rescheduled same to 9/1/2016. On 9/1/2016 supplementary elections were held in the said Local Government Area and other polling units in designated Local Government Areas where the election was inconclusive.

The 1st appellant contested the election on the platform of the APC (2nd appellant) while 2nd respondent was the candidate of the PDP (3rd respondent). At the conclusion of the election, the 1st respondent declared the 2nd respondent as the duly elected Governor of Bayelsa State.

The appellant was dissatisfied with the return of the 2nd respondent and filed a petition before the lower Tribunal on the following grounds:

“(i) The 2nd respondent was not duly elected by majority of lawful votes cast at the election”

IN THE ALTERNATIVE

(ii) The election of the 2nd respondent is invalid by reason of non-compliance with the provisions of the Electoral Act, 2010 (as amended).

(iii) The election of the 2nd respondent is invalid by reason of corrupt practices’

It was the appellant’s contention that on 6/12/2015 there was a valid election in Southern Ijaw Local Government Area. That results from the polling units were collated at ward Collation Centres and that the collation of the results of Southern Ijaw Local Govern-

ment Area was ongoing when the Resident Electoral Commissioner (REC) unilaterally cancelled the election. That notwithstanding their protests against the cancellation, the 1st respondent went ahead to conduct elections in the said Local Government Area and other designated Local Government Areas on the said 9/1/2016. It was the appellants' further contention that having regard to the fact that there was a valid election in Southern Ijaw Local Government Area on 6/12/2015; the cancellation of the election was uncalled for, as the 1st appellant had already scored the highest number of lawful votes cast at the election and ought to have been returned as the winner. They urged the Tribunal to collate the results and declare 1st appellant winner of the election.

The respondents on the other hand contended that no election known to law took place on 6/12/2015, that the decision to postpone the election was that of the 1st respondent and not that of the REC and that the rescheduling was proper in the circumstances. And finally that the 2nd respondent was properly returned as duly elected. At the conclusion of the trial, the victory of the 2nd respondent was affirmed.

The appellants' subsequent appeal to the Court of Appeal Abuja Division (the lower court) was dismissed, hence the instant appeal.

The Appellant's first issue reads;

"Was the court of Appeal correct in its interpretation of Section 26 of the Electoral Act 2010, as amended, with respect to the issue of election/cancellation of election/postponement of election in Southern Ijaw Local Government Area held on 6/12/2015 having regard to the state of the pleadings and the admissible evidence."

The bone of contention is whether the trial Tribunal and the court below were right in holding that what occurred on 6th of December 2015 was a postponement of the election in Southern Ijaw Local Government Area of Bayelsa State and not a cancellation as contended by the Appellants and that the said postponement was within the powers of the 1st respondent as provided for in Section 26 (1) of the Electoral Act 2010, as amended.

The submissions of learned counsel on either side have been fully captured in the lead judgment.

Section 26 (1) of the Electoral Act 2010, as amended provides:

“Where a date has been appointed for the holding of an election and there is reason to believe that a serious breach of the peace is likely to occur if the election is proceeded with on that date, or it is impossible to conduct the elections as a result of natural disasters or other emergencies, the Commission may postpone the election and shall in respect of the area or areas concerned appoint another date for the holding of the postponed election, provided that such reason for the postponement is cogent and verifiable.”

In paragraphs 8, 9 and 26 of the petition the appellants led as follows; (Page 6 of the 1st Respondent’s brief)

8 On the 6th of December, 2015 the election was also conducted in Southern Ijaw Local Government Area, but instead of collating and announcing the final result of the election and declaring the winner; the Resident Electoral Commissioner (REC) of the 1st Respondent unilaterally cancelled that election and declared the election “inconclusive” and proceeded to fix 9th January, 2016 as the date to conclude the election in Bayelsa State. This was in spite of strong verbal and written protestations by the petitioners.

9 In spite of the said protestations by the petitioners, the 1st respondent went on to hold supplementary election “on the 9th of January, 2016 in the entire Southern Ijaw Local Government Area, 26 The cancellation was done arbitrarily, wrongful and unlawful; and that under the Electoral Act, 2010 (as amended) neither the REC of Bayelsa State nor any other officer of the 1st Respondent has power to cancel an election which has already been conducted at the polling units, collated at the wards and was in the process of collation at the local government level.” Having regard to the afore-said pleadings, it was argued at the court below and also in this court that in order to properly challenge the cancellation/postponement of the election/ the appellants must establish the following:

(a) That election was conducted in Southern Ijaw on 6th December 2015 and that due election took place.

(b) That the Resident Electoral Commissioner unilaterally cancelled the election.

(c) That the holding of the supplementary election was

unlawful.

In considering the first issue, the lower court at pages 11755 to 11760 of the record, carefully analysed the evidence of some of the appellants' witnesses, namely PW52, PW58 and PW61, particularly evidence elicited from them under cross-examination, which was at variance with the pleadings and case put forward by them. B

PW52, a Supervisory Presiding Officer for Oporoma Ward in Southern Ijaw Local Government Area, whose testimony was to confirm that election took place in Ward 1 of the Local Government Area, testified under cross-examination (fully captured by the lower court at pages 11755 to 11756 of Vol.12 of the record) C

"owing to widespread violence which eventually resulted in very late distribution of electoral materials, it became obvious that no election known to law could take place in Southern Ijaw Local Government Area on either the 5th and (sic) 6th of December 2015. The election being inconclusive was postponed till the 9th day of January 2016" D

The same witness also stated under cross-examination that it was not the unilateral decision of the 1st respondent to cancel the proceedings of 6th December 2015, as there were series of complaints from security operatives and members of the respective political parties *"all glaringly depicting that there was no conclusive election on that day."* E

The lower court noted that under cross-examination, PW58 admitted that the elections were postponed, while PW61 stated categorically not only that the postponement of the election to 9/1/16 was the decision of the Commission but that all the political parties were consulted before the new date was fixed. Under cross-examination he maintained that it was the Commission (1st respondent) G and not the REC that took the decision to postpone the election and went further to state that, in the absence of any collated results.

"anybody brandishing any report will not be genuine for Southern Ijaw Local Government Area for that election of 6/12/2015 having not emanated from Independent National Electoral Commission. All Progressives Congress, Peoples Democratic Party and other political parties actively participated in the 9/1/2016 election in Southern Ijaw except two wards, which were cancelled for irregularities." H

See page 11176 of the record.

The court below noted that under cross-examination by Chief Wole Olanipekun, SAN, for the 3 respondent, the witness stated further that after the postponement, the political parties went out canvassing for votes.

B The court found as follows at pages 11756 and 11757, and 11759 to 11761 of the record:

“The evidence of PW52 contradicted the pleadings of the appellant and 4 points could be deduced from the evidence:

C 1. That no election known to law took place in the whole Southern Ijaw owing to widespread violence on 6/12/15.

2. That the election being inconclusive was postponed to 9/1/2016.

D 3. That the Resident Electoral Commissioner (REC) did not unilaterally cancel the inconclusive election of 6/12/2015 and

4. That the security operatives and political parties reported that election did not take place on 6/12/2015.

E The evidence of PW61 knocked the bottom off the foundation upon which the appellants’ case was built when he testified and contradicted the case of the appellant thus
[evidence referred to earlier]

F *A careful review of the evidence of this witness [PW61] would reveal that contrary to the pleadings of the appellants and the evidence of PW23 called as collation officer for Southern Ijaw Local Government Area to the effect that the collation of results had occurred at the wards and partly at the Local Government Levels before the process was truncated, that there was no such collation of results and that the process of 6/12/2015 did not qualify as an election known to law. It also shows that the Resident Electoral Commissioner did not unilaterally cancel the process. The witness, PW61 went further that any results brandished for Southern Ijaw must be false as none was returned to or emanated from the 1st respondent. Furthermore the reports of Supervisory Presiding Officers, which indicated*
H *that election took place were baseless for the reason that the assertions were not supported by forms EC8A and EC8B submitted to the 1st respondent at any of the collation centres. In view of the foregoing, the foundation on which the appellants rested their case*

was totally eroded. The law is settled that parties are bound by their pleadings.

The case presented by the appellants is a classical example of violent conflicts in the evidence of witnesses called by the appellants. In this case, it is my view that the Tribunal could not pick and choose which evidence to believe because of the contradiction in the evidence of the witnesses. The Tribunal was bound to reject both versions of evidence'

These findings, which affirm the findings of the trial Tribunal, are unassailable. The law is settled that concurrent findings of fact by two lower courts will not be disturbed by this court unless such findings are perverse, not supported by the evidence on record or where there has been a miscarriage of justice. See PDP Vs INEC (2012) 7 NWLR (Pt.1300) 538 @ 565; Akeredolu Vs Mimiko (2014) ALL FWLR (Pt.728) 829 @ 886; Ehwrudje Vs Warri Local Government & Anor (2016) LPELR - 40052; Gbadamosi Vs Dairo (2007) 3 NWLR (Pt .1021) 282

I am in full agreement with the two lower courts that the contradictory evidence given by the appellants' witnesses, albeit as a result of cross-examination, knocked the bottom off their challenge to the postponement of the election to 9/1/2016. The law is that where there is an admission by a party against his interest, such admissions will be admissible against him.

See kamalu vs Umunna (1997) 5 NWLR (Pt.505)321 @ E-G; Odi Vs Iyala (2004) 8 NWLR (Pt. 875) 283 @ 308 D-E & D-F; Doma Vs INEC (2012) 13 NWLR (Pt. 1317) 260 @322-323 H-C.

In effect, the appellants failed to prove that there was due election in Southern Ijaw Local Government Area of Bayelsa State on 6/12/2015. They also failed to prove that the election was unilaterally postponed by the Resident Electoral Commissioner.

As a result, what was before the trial court as affirmed by the court below was clear evidence, even by the witnesses called by the appellants, that no election known to law took place in Southern Ijaw Local Government Area on 6/12/2015 as a result of widespread violence, high level of electoral malpractices and serious irregularities.

In affirming the decision of the trial Tribunal, the lower court held at page 11765 of the record as follows:

“In this case Exhibit P42B upon which the appellants based their case showed that it was the decision of the 1st respondent announced by the Resident Electoral Commissioner which supplied the reasons justifying the decision.

In view of the foregoing a proper application of Section 26 of the Electoral Act 2010 (as amended), in my view would accommodate a situation where at the close of election there were no results as they were hijacked according to the evidence before the Tribunal and where collation did not take place at the Ward Collation Centres because the results were not available. The PW61 testified that as Electoral Officer and the Custodian of the Local Government Collation Centre he did not see a single INEC Polling Unit or Ward result.

Based on the foregoing there was no election and the decision to hold a proper election at a future date can only mean a postponement of polls. Section 26 of the Electoral Act 2010 (as amended) cannot be considered in abstract. It must be considered in the context of the totality of the case. The emergence of the breach of peace at the time of polls not being anticipated at the time of polls is within the context of intervening emergencies as envisaged by Section 26 of the Electoral Act 2010 (as amended). The case of the 1st respondent was that what transpired in Southern Ijaw on 6/12/2015 cannot be classified as an election because there were no results returned to the 1st respondent. The election was therefore not credible and it was rescheduled.”

(underlining mine for emphasis)

I fully agree with the above finding. In the prevailing circumstances I am of the considered view that the postponement of the election to 9/1/2016 for the cogent and verifiable reasons given by the 1st respondent was well within its power under Section 26 (1) of the Electoral Act, 2010 (as amended).

The two lower courts thoroughly reviewed the evidence led by the parties before reaching the above conclusions. Beyond this is the fact that it was established by the appellants’ own witnesses that not only did they agree to the rescheduled date, despite their protests, but they also actively campaigned and participated in the election of 9th January 2016. The evidence of PW23 under cross-exami-

nation at page 11119 of Volume 11 of the record is instructive in this regard, This is what he said:

"I am aware... that after 6/12/2015 all the political parties went to campaign for the election of 9/01/2016.

(Underlining mine)

In the circumstances, I agree with the two lower courts that the appellants had waived their right to challenge the validity of the election conducted on 9/1/2016 or to seek to maintain the inconclusive election of 6/12/2015. See: *Ariori Vs Elemo* (1983) SCNLR 1 @ 22. They are estopped by their conduct. See: *Ukaegbu Vs Ugoji* (1991) 6 NWLR (Pt.196) 127 @157; *Ude vs Nwara & Anor .*(1993) LPELR -3289 (SC) @ 27. The conclusions reached by the trial Tribunal and affirmed by the lower court have not been shown to be perverse. I see no justification for disturbing them.

It was for these and the fuller reasons given by my learned brother, IT, Muhammad, JSC in the lead judgment that I held on 8/11/2016, that this appeal lacks merit and accordingly dismissed it. The parties shall bear their respective costs in the appeal. Appeal dismissed.

E

NWEZE JSC

When this court heard this appeal on November 8, 2016, it struck it out for being incompetent. It, however, deferred its reasons for the said decision: reasons which have just been, ably, adduced by my Lord, I. T. Muhammad JSC.

His Lordship, graciously, obliged me with the draft of his elaborate reasons. I am persuaded by the compelling logic of my Lord's eloquent reasoning. I agree with the conclusion that, being incompetent, this appeal ought to be struck out. I abide by the consequential orders.

SANUSI JSC

This appeal was heard by this court on 8th of November 2011. After going through the briefs of arguments filed by learned counsel who represented the parties at the hearing of the appeal and

H

the oral arguments proffered by them, I found the appeal to be devoid of any merit hence I proceeded to dismiss it. I then promised to give my reasons for dismissing the appeal today the 18th of November 2016. The reasons for the judgment are advanced hereunder:-

This appeal is against the decision of the Court of Appeal,
B Abuja which affirmed the judgment of the Bayelsa State Governorship Election Petition Tribunal.

FACTS

The Appellants filed election Petition challenging the election
C and declaration and return of the 2nd Respondent as the Governor of Bayelsa State and the cancellation of the election in Southern Ijaw Local Government Area of the state. The petition is contained at pages 1-1,930 Vol.1 & 2 of the record while the 2nd Respondents reply can be seen is at page 4,447-6,077 of the record.

D The Appellants in proof of their petition called 75 witnesses and tendered several documents which were admitted in evidence and marked exhibits P1-P100 while the 1st Respondent called 2 witnesses and tendered Exhibits R1-R84. The 2nd Respondent called RW3 to RW50 as witnesses and tendered Exhibits R85-R181 while
E the 3rd Respondent called R182-R220 as its witnesses. At the end of the trial, the Tribunal delivered its judgment on the 26/7/2016 and dismissed the petition. The appellant appealed to the Court of Appeal (the lower court) and the appeal was also dismissed.

F Dissatisfied with the decision of the lower court, the appellants appealed to this court vide a notice of appeal containing 27 grounds of appeal. The appellants formulated 4 issues for determination out of the 27 grounds of appeal.

ISSUE NO.I First issue deals with whether the lower court
G was correct in its interpretation of Section 26 Electoral Act 2010 as amended, with respect to the issue of cancellation/postponement of election in Southern Ijaw Local Government.

The learned counsel to the 1st Appellant opened his argument by referring to page 11,736, Vol.12 of the record and page
H 11,773 of the same record to show the contradictions in the judgment of the lower court. He argued that what has been said to be “inconclusive” cannot at the same time be cancelled and that this was a deliberate attempt to deny the Appellants justice after they have

shown that election took place in Southern Ijaw local government but was wrongfully cancelled. He referred to evidence of PW23 and his written deposition at pages 10,615-10,619 of the record Vol.11 and to his evidence at pages 11,117-11,119 of the record. He contended that none of the Respondents' counsel cross examined the witness on that very vital eye witness account. He also referred to Exhibit P42B, the video tape which captioned the announcement of the REC's cancellation of the election which was tendered and played in court. The Appellants submitted at the lower court that the 1st Respondent had no power to cancel election in Southern Ijaw local government, (page 11,669 of Vol.12 of the record and that the lower court in their judgment appealed against, did not rule one way or the other. On this, he referred to paragraph 260 of his petition at page 7 Vol.1 and argued that PW62 and PW63 gave unchallenged evidence in support of his pleading in their written deposition at pages 82 and 120 of Vol.1 of the record. He also referred to the evidence of PW52 where the lower court's finding that PW52 was called to confirm that election took place in Ward 1 of the Southern Ijaw local government and stated that the same person gave evidence of what transpired in the entire Southern Ijaw local government area. He argued that it was wrong for the lower court to say that no election known to law took place and yet contradicted itself when it referred to the evidence of PW52 that the security operatives and political parties reported that election took place. He contended that reliance on the admissible evidence of PW52 and contradictory finding of the lower court could not support the dictation of that court. He argued that the evidence of PW 58 and PW 61 are hearsay and therefore inadmissible. He submitted that evidence which is inadmissible cannot be credible and be utilised in the process of evaluation of evidence. He also referred to the evidence of PW61 during cross examination, where the witness said there were no result sheets for the election of 6/12/15 and any result produced therefore is false. He referred to several errors committed by the lower court by referring to page 11,763 Vol.12 of the record i.e. the finding of the Court of Appeal. He argued that the excerpt from the judgment that election took place in some polling units was enough to void the actions of the 1st Respondent, the cancellation of the whole election without legal justification.

He referred to the case of OTTI v IKPEAZU (2016) ALL FWLR (pt.833)1946, where the Supreme Court relying on its decision in DOMA v INEC (2012) ALL FWLR (pt.628) 813 at 833, where it was held that only presiding officer who presides at the polling unit has power to cancel results declared at that polling unit. He argued that neither the 1st Respondent nor the REC of Bayelsa was the presiding officer at the various polling units, hence he lacks power to cancel result. On the issue of burden of proof, he argued that from the state of pleadings, the first burden was on the 1st Respondent and not the Appellant and he referred to Section 26(1) of the Electoral Act. He submitted that this provision serves as a limitation on the powers of the Commission to arbitrarily postpone an election. He argued further, that the 1st Respondent is supposed to take the action i.e. the postponement before commencement and not after the commencement of an election. He referred to UGWU Vs ARARUME [supra] where the apex court held that it is the Commission that must proffer the “urgent and verifiable” reasons for its action and that no other person particularly the Appellant, has that duty. He argued that the 1st Respondent did not discharge the burden because the witnesses called by it, said nothing about the postponement of the election in Southern Ijaw local government area. He submitted the Appellants called not only oral but also documentary evidence to prove that election took place. He argued that the evidence of eye witnesses and the tendering of result sheets of election that took place is acceptable evidence that election took place, is acceptable evidence that election took place. He urged this court to resolve this issue in favour of the Appellant.

Issue No.2 queries whether the lower court was right in its decision that, Appellants having participated in the election of 9/1/16 had waived their right to protest against cancellation. He submitted that when a thing is a nullity it is deemed not to exist in law even though it does exist. He argued that since the purported election was built on nothing, it cannot be expected to stand. He argued further, that the concept of waiver is not as sweeping as the lower court posited or took it to be and that the Appellant did not, at any time, waive their rights arising from the wrongful cancellation of the election. He submitted that the decision of the lower court that the Appellants had

waived their right against wrongful cancellation of election holds no water in law and in fact, hence he urged us to resolve this issue in favour of the Appellants.

Issue No.3: This issue deals with the lower court's affirmation of the judgment of the tribunal having regard to the position of pleadings, evidence led and formal admission on pleadings. He referred to exhibit P4213 which contains the admission of INEC that Southern Ijaw had 120,000 registered voters but that the difference in votes between the 1st Appellant and 2nd Respondent was merely 48,146. He submitted that the difference between the votes scored by PDP and APC was 48,146 while the cancelled votes were 54,296. He therefore submitted further, that INEC cannot make a return where the difference between the scores of the contesting candidates is less than the cancelled votes. He urged the court to set aside the return of the 2nd Respondent as the Governor of Bayelsa State and resolve this issue in favour of the Appellant.

ISSUE NO.4: Issue No.4 deals with whether the lower court was correct with respect to admissibility and correctness in stating out some appellants pleading. He submitted that the appellant had been able to show that there was election in Southern Ijaw local government area but unlawfully cancelled and that the Respondents did not call any admissible evidence to disapprove it. He urged the court to resolve the issue of wrongful cancellation of election in his favour. He submitted that the election in other local government areas were based on faulty foundation as all authorities relied on revolves on non-proof of substantial noncompliance, non-proof of corrupt practices are therefore not applicable here. He referred to the decision of OTTI v IKPEAZU (supra) where the cancellation affected only 3 out of 17 local government areas and yet the court held that no proper return could have been made on such election. On the exhibits tendered by the Appellant through PW63, he contended that the finding of the lower court was as the conditions for admissibility were met because few were certified results sheet and the remaining were duplicate original which are admissible in evidence if, tendered by a person who made them. He argued that Forms ECSA's met the requirement of admissibility namely, whether it is pleaded, whether it is relevant and whether it is admissible. He urged further that the Appellants gave

the 1st Respondent notice to produce those documents in Paragraphs 44, 45, 47 and 73 at pages 19, 22, 29 of Vol.1 of the record. He submitted that when a party is given notice to produce a document and he fails to do so, secondary evidence of the contents of such documents will be admissible. See *BUHARI v OBASANJO* (2005) ^B ALL FWLR (pt.288)1604. The learned senior counsel referred to another error of the lower court that all the documents tendered by the Appellants does not have INEC's stamp. He argued that there was no where in the tribunal's judgment where it was so held, rather, ^C the tribunal held that the document did not suffer from any of those disabilities (See page 11,444 of Vol.11 of the record). He faulted the striking out of paragraph 8 of their reply to the 1st Respondents' Reply to the petition, filed at the tribunal which was affirmed by the lower court. He therefore submitted that all the errors of the lower ^D court identified under Issue 4 are weighty and have led to a miscarriage of justice. He urged this court to resolve this issue in favour of the Appellants.

The 1st Respondents also formulated 4 issues for determination. I will below summarize his submissions on that and on other ^E issues.

Issue No.1 This issue queries whether the lower court was correct when it held that the Appellants who had the burden of proof, failed to establish that there was duly conducted election in Southern ^F Ijaw local government area and whether such election was wrongfully and unilaterally cancelled by the 1st Respondent. The learned counsel to the 1st Respondent argued that Appellants shot themselves on the foot when they called PW61 (Electoral officer) who testified contrary to their case that the election was duly conducted ^G and cancelled by the 1st Respondent was not true and tendered a report to that effect. He argued that the Appellants did not establish that election was duly conducted in Southern Ijaw local government area which constitutes contradictions of the evidence of the key Appellants witness destroying their case as they pleaded. For instance, ^H evidence of PW52 during cross examination admitted that owing to wide spread violence which ensued due to very late distribution of election materials that no election known to law could take place in the Southern Ijaw on either the 5th or the 6th of December 2015.

The election being inconclusive was postponed till 9th January 2016 in some polling unit and wards in some local government areas where election was not conclusive He submitted that from the testimony of the witness who clearly stated that there was no conclusive election that day for which reason there was a postponement after a series of complaints from the security operatives and members of the political parties. (See the cross examination of PW58 at page 11169 lines 14-18 Vol.11 of the record. He therefore submitted that based on that evidence, the foundation upon which the Appellants rested their case was totally eroded. He referred to a testimony of PW61. Upon written complaint by the 1st Respondents, an Ad hoc staff Report attesting that election in the manner they knew it, did not take place and argued that the Appellants were unable to rebut the authenticity of the Report. He argued that the PW61 was emphatic that no result in original form were submitted to the INEC headquarters of Ijaw Southern L.G.A. He referred to some admitted reports of some ad hoc staff submitted to PW61 that election took place in few isolated localities. He also referred to Annexure 2, that the Card Reader was not used because the time programmed for the card reader to shut down had since expired as disclosed in the Report. He equally referred to Annexures 11 and 15 that it was late to use any card reader because the time configured had expired. Witness also stated that thugs snatched the election results in disclosed units which negate the case of the Appellants that there was no violence. With respect to Annexure 35, which states that there was no need for collation of results at the ward level or for the submission of the purported result to the Ward Collation officer with respect to Annexure 36. On the author's claim that election took place and that result were returned; he argued that the PW61 was emphatic that election known to law did not take place in Southern Ijaw. He therefore submitted that the evidence of all the witnesses called by the Appellants did not amount to proof of complaint projected by the Appellants that election collation took place and that it was in the process of finality that the REC stopped the process. He then argued that it behoves on the Appellants to call the officers or their Ward Collation agent present at the collation centres who participated in collation process which he failed to do. He argued that the absence of evidence on 392 out 425 poll-

ing centres rendered the evidence called by the Appellants far too inadequate to contend that the case projected was proved in any way whatsoever. He contended further, that the bulk of the documents tendered from EC8A and EC8B were duplicate copies certified from magistrate court. The courts did not ascribe probative value to them not because of the character but because of the absence of evidence to the effect that they were credible. He also argued that besides the document were dumped at the tribunal with no evidence led to demonstrate each of them tendered by then. On the list of admissibility, he argued that the issue goes beyond admissibility and he submitted that the question issue is “Can probative value be ascribed to them? He answered in the negative, because, the witness had no knowledge of them and did not make them therefore he cannot be cross examined as to the circumstances in which they were made. He submitted that notice to produce applies to private documents and official documents can only be produced either by subpoena or any other form of compulsion by the court. He further argued that the Appellants did not call witnesses whom were at the seventeen wards collation centres. He submitted that in the absence of proof of collation, there is no basis for a party to contend that election took place. He urged that the Appellant did not plead that the 1st Respondent unilaterally cancelled the election and fixed a date for supplementary election and that the Resident Electoral Commissioner announced the cancellation of election. On the issue of waiver, he submitted that the Appellants having taken part in same, can not later resile from it. He argued that if the Appellants had won, they would not contend that the election was improperly conducted.

ISSUE NO. 3 This issue relates to the inability of the Appellants to prove substantial non-compliance, irregularities and corrupt practices. He submitted that a careful examination of the judgments of the tribunal will reveal a painstaking review of the pleadings and evidence led by parties with regard to all the questions piling into on the identified L.G.A. He argued that the allegation that there were allocation of votes is a criminal offence which must be proved polling unit by polling unit and ward by ward and such allegations must be proved beyond reasonable doubt. He urged the court to resolve this issue in favour of the 1st Respondent.

ISSUE NO.4: Issue No.4 deals with the decision of the court of appeal disregarding the allegation of commission of crime against person who were not joined in the petition. He argued that the decision of the tribunal can be justified having regard to the petition containing allegation of commission of electoral offences made against named individuals who were not made parties to the petition. He urged the court to resolve this issue in favour of the 1st Respondent. On issue No.4 pertains to striking of paragraphs 8 and 11 of the Appellant's reply to the 1st and 2nd Respondents. He argued that the tribunal dealt with overall effect of the decision of the 1st Respondent to hold the supplementary election, he argued that the Appellants suffered no injury having regard to the facts that all matters raised in the said Paragraphs indeed formed the centre point of the entire case. He urged the court to dismiss the appeal.

The 2nd Respondent also formulated 4 issues for determination.

Issue No.1 deals with whether the lower court was right or correct in its interpretation of Section 26 Electoral Act 2010 (as amended) and in affirming the decision of the tribunal that the election of December was inconclusive. The learned counsel for the 2nd Respondent referred to the judgment of the tribunal at pages 11440-11441 and 11765 of Vol.12 of the Record and argued that the election of 6th of December, 2015 was inconclusive. He submitted that the Court of Appeal captured and properly relied on these pieces of evidence in its judgment. He argued that the Appellant sought to rely on exhibit P42B to show that the election of 6th December 2015 was cancelled but ignored the reasons stated by the REG for the decision as contained in the said exhibit. On the argument of the Appellants that postponement and cancellation cannot mean the same thing he responded that the Appellant overlooked the simple meaning of the word "postpone" which simply means "put off" according to (Chamber Dictionary 20th Century Edition). He therefore submitted that it is not correct to say that thing that has commenced cannot be postponed. He argued further, that an election that had commenced but characterised by wide spread violence can be postponed under Section 26(1) of Electoral Act. He submitted that it does not matter and makes no difference, whether the word cancellation or postpone-

ment is used in whatever context. He contended that the Appellants had refused to recognise that an election is a process. He argued further, that an election which produced no result is not an election in the eyes of the law. He contended that there was no legally admissible result placed before the court in respect of the said election. He urged the court to resolve this issue in favour of the Respondents.

On issue No.2 which deals with waiver, he submitted that the Appellants misconceived the effect of waiver. He referred to the case of *ARIORI v ELEMO* (1983) 1SC. He stated that if the Appellant were convinced that the rescheduled election of 9th January, 2016 was illegal, they should have gone to court or tribunal as they had ample time to do so. He submitted that on the face of evidence in the record, the Appellants are estopped in law and equity from laying claim to any votes allegedly scored on 6th December 2015 in Southern Ijaw L.G.A. He urged the court to resolve the issue against the Appellant.

On issue No.3, whether the lower court was not right in affirming the judgment of the tribunal on the contention of the Appellants that the lower court did not evaluate Exhibit P4213 that Southern Ijaw had 120,000 registered voters by reason of which the difference between the scores of the 2nd Respondent and the 1st Appellant was less in number than the voting strength. He referred to the judgment of the lower court at page 11,765 Vol.12 and submitted that the court did evaluate Exhibit P42 before it reached the conclusion that the decision to jettison the election of 6th December 2015 was that of the 1st Respondent but announced by the REG who supplied the reasons justifying the decision. He submitted that the Appellants, having failed to lead any evidence as to the actual number of votes cancelled on election held on 5th & 6th of December and January 9th, there was no evidence led at the trial, which the lower courts should have used. He urged the court to resolve this issue in favour of the Respondents.

On issue No.4 which deals with admissibility and weight of evidence and the correctness of tribunal's decision in striking out some of the Appellant pleadings. He adopted his argument posed on issues one and two and submitted that the lower court was right in law, in upholding the election in all those local government area. He re-

ferred to Paragraph 16(1) (a) and (b) of the 1st Schedule to the Electoral Act 2010 and submitted that one can only file a Reply to a Reply of the Respondent where new issues or facts are raised by the Respondent. He argued that facts which the Appellants sought to introduce into the petition by paragraphs 8 and 11 of their Reply to the Reply of the 1st Respondent constitute amendment to the petition already filed before the tribunal and that this was due, after the period stipulated by the Electoral Act within which any amendment could be done. He submitted that the lower court was correct in affirming the order of the tribunal which struck out those paragraphs of the Appellants' pleadings. He urged the court to resolve this issue in favour of the Respondents.

The 3rd Respondents also formulated 4 issues for determination.

Issue no.1 deals with whether from the pleading, evidence led, vis-à-vis the case law and the statute, the lower court was not correct to refuse Appellants case that election known to law held and concluded in Southern Ijaw L.G.A., He referred to the evidence of PW52 at page 11, 148 Vol.11 of the record to the effect that there was widespread violence which resulted in late distribution of election materials. He argued that the evidence of PWs 52, 58 and 61 are deemed to be the evidence of the Appellants which constitute admission against their interest He submitted the admission that they made by the Appellants' own PW 52, 58 and 61 affirm the decision of the lower court that no election known to law could be said to have been held in Southern Ijaw L.G.A on December 6th, 2015. On the contention of the Appellants that the Respondent led no evidence in proof of the case made by them, he submitted that the burden is on party who alleges to prove and that the defendant is not obliged to adduce any evidence. He argued that this imperative for the Appellants not only to tender form EC8A for each of the said polling units but he also must specifically prove that in respect to the said polling units. He argued that less than 100 unsigned and unstamped forms EX8A tendered by the Appellants for 424 polling units in Southern Ijaw L.G.A cannot be relied upon as proof of holding of election on December 6th 2015. He submitted further, that voters register is the most crucial document that must be tendered

but was not so tendered.

He argued further that as no election known to law was held, it is incumbent on the party making such claim to prove that all the stages of election i.e. accreditation, voting, collation, recording on all relevant INEC forms and declaration of result took place. He cited the case of *FAYEMI V ONI* (2010)17 NWLR (pt.1222) 326 at 388. He argued that the Appellant cannot derive any benefit from the decision of Supreme Court in *IKPEAZU V OTTI* (supra) as it behoves on them to prove that it was the REC who indeed unilaterally cancelled the purported election of December 6th 2015. He submitted that when the court finds that the said authority does not apply, its appeal becomes completely bereft of substance and merit. On the contention of the Appellants that election can only be postponed before the commencement and that it behoves on the 1st Respondent to find cogent and verifiable reasons for the postponement, he gave an example of a scenario where distribution of materials and accreditation has commenced and there is an outbreak of violence he argued that it is fallacious to say that INEC cannot exercise its power of cancellation of such process and postponement in that circumstances. He argued that the clear wordings of the relevant portion of Section 26 are “if it is impossible to conduct” as a result of material disaster or other emergencies, he submitted that INEC can postpone the election in that circumstances. He submitted also that widespread violence, hijacking of materials abduction of electoral officials referred to by the 1st Respondent in Exhibit P4213, qualifies as cogent and verifiable reasons under Section 26 of the Electoral Act.

He argued that this is also corroborated by the Appellants own witness i.e. PW52 and PW61. He argued that the insertion of the phrase other emergencies in Section 26 suggests that the said Section is not exhausted of all kinds of scenario that may warrant postponement of election. He urged the court to uphold the argument herein, canvassed on the issue.

On issue No.2 which deals with Appellants’ concession and waiving their right by participating in the January 9th 2016 election he argued that the Appellants would not have challenged the January 9th 2016 election, if they had won the said rescheduled election. He referred to the contention of the Appellants when they argued

that there was no need challenging the January 9th 2016 election as it is a nullity. He argued that the contention is an assault to law and logic as it would mean that any election which offends the Constitution or Electoral Act is null and void without a specific relief in that regard. He referred to paragraph 1 at page 10 of the record that the petitioner was the candidate of an election held on the 5th of December 6th of December and 9th of January, 2016. He argued that a review of the averment shows that the Appellants indeed premised their claim on and allegedly won the election on the basis of election of 5th and 6th of December and 9th of January 2016. He submitted that having participated in the election of January 9th 2016, the petitioners are caught by the principle of estoppel by conduct, hence cannot be allowed to represent otherwise. He submitted that the Appellants by consenting to take part and participate in January 9th election, have waived their right which may enure to them by reason of the purported election of December 6, 2015. He referred to Exhibit R161, where the 1st Appellant addressing the members of the press-supporters and members of the 2nd Appellant on January 6th 2016 that he participate in January 9, 2016 election. He argued that the contention of the Appellants that they were compelled to participate in 9/1/16 election, were not supported by any evidence on record. On the argument of the Appellants that there is non-compliance, waiver and acquiescence do not avail a party, relying on the authority of *NWANCHO V ELEM* (2004) ALL FWLR (pt.225) 93. He replied that all the cases cited by the Appellants are not relevant except, *AGUNBIADE YOKE* and in that case the court never held that case that there can be no waiver in an election petition. He urged the court to refuse the Appellants' argument on Issue 1 of their brief and hold as correct, the Respondents' argument as canvassed under this issue.

Issue No.3

This issue deals with whether the Appellants have been able to prove various allegations contained in the petition. He referred to the argument of the Appellants and Exhibit P4213 that the registered voters in Southern Ijaw were 120,000. 'He responded by saying that there is no documentary evidence on record that the registered voters are 120,000. He argued that the Appellants failed to

prove the total score gathered by parties at the 2015/2016 election. On the Appellants' extending their challenge to other local government areas where they alleged various acts of corrupt practices and irregularities, the learned counsel to the 3rd Respondent referred to the judgments of the tribunal and the lower court, that except in four polling units in ward 5 of bia L.G.A. The Appellants failed to prove the allegation contained in their petition and that the few disenfranchised persons did not amount to so much as the law requires to come to a conclusion that they substantially flawed the election.

Issue No.4

The issue pertains to invalidity of various paragraphs of the petitioners' Reply to Respondent Reply to the petition. He referred to the argument of the Appellate that once a document is pleaded, relevant and admissible evidence and same becomes automatically admissible. He argued that while the Appellant tried to show that Exhibits P58-PB A-2 were pleaded and relevant, they failed to prove their admissibility in the light of mandatory demand that such must be tendered by their maker by virtue of Section 83 of the Evidence Act. He argued further, that at no point did the Appellants referred the lower court to the injury caused or suffered by them by the tribunal striking out their Paragraphs 8 and 11, moreso, even though the tribunal struck out the said Paragraphs, it still considered the entire case on its merit by considering the issues which were not raised before both lower courts. He urged this court to dismiss the appeal in the face of various admissions and unchallenged evidence of the Respondents and the findings unappealed against to the lower court.

APPELLANT'S REPLY BRIEF TO 1ST RESPONDENT BRIEF OF ARGUMENT

On the issue of contradiction and errors committed by both lower courts, he argued that concurrent findings of the two courts could be interfered with if such findings are made on an inadmissible evidence. He urged the court to discountenance all the arguments and authorities cited by the 1st Respondent. He argued that since the witnesses who tendered the exhibits were eye witnesses their evidence agree more with the documents tendered and should therefore be accepted as correct evidence. He went further to say that all the submissions in respect of insufficiency of the evidence adduced

by the Appellants are of no moment and that the authority in *IKPEAZU V OTTI* remains valid and applicable.

The Reply of the Appellants to the 2nd Respondent brief of argument are essentially the same. Most of the arguments therein seem to be more on facts rather than law.

APPELLANT'S REPLY TO THE 3RD RESPONDENT BRIEF OF ARGUMENT B

This Reply Brief posed a reply on alleged admission/evidence detrimental to ones case, he argued that no issue of an admissible hearsay was raised in any of those cases. He argued that the two lower courts shouldn't have relied on the evidence of PWs 57, 58 and 61 as their evidence constitute hearsay. He argued further that the evidence of PW23 and PW63 conflict with those of PWs 58 and PWs 62, and 61 adding that the court cannot pick and choose which to believe or not. He urged the court to allow the appeal. C

Suffice it to say, that the 1st and 2nd Respondents raised Preliminary Objections in their respective briefs of argument challenging, inter alia, the competence of some of the grounds of appeal. The appellants learned counsel have met the arguments on the Preliminary Objections in their Appellants' Reply briefs of argument. His lordship Hon. Justice I.T. Muhammad has ably and painstakingly dealt with the preliminary objection in his lead Reasons for judgment and in conclusion he found the preliminary objections to be devoid of merit and struck them out. I am in entire agreement with His Lordship, that the objections are merit-less and do not see the need to deal with the objection herein. I hereby also strike out the two preliminary objections filed and argued by the 1st Respondent and the 3rd Respondent herein for want of merit. D

A careful and passionate appraisal of the submissions of G learned counsel for the parties leaves one in no doubt, that the pith of the submissions and on this appeal resolves on the interpretation given to Section 26(1) of the Electoral Act 2010 (as amended) by the trial tribunal which the lower court had affirmed. In fact, the petition filed before the trial tribunal was anchored on that provision. I will hereunder reproduce the said provisions for ease of reference. E

Section 26(1) of Electoral Act 2010 as amended read thus:-
Section 26 F

- (1) *“Where a date has been appointed for the holding of an election and there is reason to believe that serious breach of peace is likely to occur if the election is proceeded with on that date or it is impossible to conduct the elections as a result of natural disasters or other emergencies, the Commission may postpone the election and shall in respect of the area, or areas concerned, appoint another date for the holding of the postponed election, provided that such reason for the postponement is cogent and verifiable.*
- (2) *not relevant*
- (3) *not relevant*
- (4) *not relevant*
- (5) *not relevant...*”

There is no gainsaying, that the appellants hinged their arguments in support of their first issue for determination on the applicability or otherwise of the provisions of Section 26(1) of the Electoral Act 2010 (as amended) and they contended that the trial tribunal wrongfully interpreted that provisions and also the lower court was faulty in considering and affirming or endorsing the interpretation of law to that provision by the tribunal. The appellants herein, took the stance that the election held on 6th December 2015 was conclusive, contrary to what the tribunal held and for that reason, the concurrent findings of the trial and the lower courts were wrong. The learned appellants’ counsel stated that what had been held to be inconclusive could not at the same time be cancelled. He said the finding of the tribunal in that regard; amounted to denial of justice.

On the other hand the learned counsel for the respondents took the stance, that in law, no election had taken place on 6th of December 2015 since the 1st respondent decided to postpone the said election and rescheduled it and that decision, was informed by the impending circumstance at the time of that postponement, as envisaged by the provisions of Section 26(1) of the Electoral Act 2010. And afterwards, the 2nd respondent was returned winner of the election after the conclusion of the said 9th January, 2016 election. The question to be asked is “Were the tribunal and the lower court correct in holding that what occurred on 6/12/2015 a postponement of the election in the affected Southern Ijaw local government area and NOT a cancellation, as argued by the Appellants? and

“Was the action of the 1st Respondent covered by the provisions of Section 26(1) of the Electoral Act 2010?”

Now let us consider some of the evidence that adduced the trial in the record in order to answer these questions and also to appreciate what had actually transpired on 6th December, 2015. Part of some of the witnesses who testified at the trial stated as below:- B

(i) PW61 an Election Officer testified contrary to the case of the appellants, that the election was duly conducted and cancelled by the 1st Respondent was not true as no reprint was tendered to that effect

(ii) PW52 when being cross examined testified that owing to wide spread violence which resulted in very late distribution of electoral materials, it means that no election known to law could take place in Southern Ijaw on 6th December 2015 hence the election was postponed until 9th January 2016. C

(iii) Pw58 when being cross examined also stated that the election of 6/12/2015 was inconclusive due to series of complaints from security agents and some members of political parties. D

It seems to me, that the appellants failed to lead cogent and convincing evidence to prove that there was conclusive election on the 6th December 2015 or that the tense atmosphere that informed the 1st Respondent to postpone the election, did not really exist on that day. As the petitioners, the burden was on them to prove so which they failed to do. I am aware of Paragraphs 8, 9, and 26 of the appellants pleadings in their petition but I must say that in order to establish or debunk those pieces of evidence, the appellants ought to establish that election had actually taken place and that the 1st respondent illegally cancelled same and also to show that the order to hold the supplementary election on 9th January 2016 was illegally made or was done with any malice. With these few remarks I also endorse the concurrent findings of the two lower courts and their conclusion with regard to the provisions of Section 26(1) of the Electoral Act 2010 as amended. I also see no fault in the postponement or the rescheduling of the inconclusive election held on 6th December 2015 to 9th January 2016, in the light of the circumstances that prevailed at the trial time. I hold the view, that the 1st Respondent was really covered by the provisions of Section 26 (1) of the Elec- E
F
G
H

toral Act 2010. I therefore resolve the first issue against the appellants.

The 2nd issue has to do with the issue of waiver. I do not think that the resolution of this issue will require any of dissipation energy. It is not in dispute that when the 1st respondent postponed the election of the 6th December 2015, it rescheduled a supplementary one to hold on the 9th of January 2016. Nobody including the appellants refused to participate in the rescheduled election, despite the protests. All the political parties and other stakeholders participated in the supplementary election. In fact, PW23 on behalf of the appellants testified that all the political parties including his own party went ahead to campaign for the supplementary election fixed for 9th January 2016. In this regard, I hold the view that the findings of the two lower courts that the appellants had waived their right to challenge the validity of the supplementary election held or conducted on 9th January 2016. Their protest now is in my view, coming at the 23rd hour of the day and the issue is also resolved against the appellants.

With regard to the third issue for determination, the appellants seem to be suggesting that the lower court goofed in affirming the decision of the trial tribunal, in dismissing the petition filed before the tribunal and ultimately endorsing the tribunal's return of the 2nd respondent as the Governor of Bayelsa State. Definitely, this issue had to do with proof of the petition of the petitioners before the tribunal by leading credible evidence to prove or support their pleadings in their petition which they failed to do, hence that led to the dismissal of their petition.

The other point the appellants principally complained of, is that the lower court failed to evaluate Exhibit P42B in which it was shown that the Southern Ijaw local government area had 120,000 registered voters but that the difference in votes between the 1st appellant and the 2nd respondent was merely 48,146. He also stated that the difference of votes scored by PDP and APC was 48,146 while the cancelled votes were 54,296. He then stated that INEC can not make a return where the difference between the votes of the contesting candidates is less than the cancelled votes. But in his reacting to the above submissions of the senior counsel for the appellants,

the learned counsel for the 1st respondent insisted that the tribunal had actually evaluated the evidence adduced through Exhibit P46B before it reached the conclusion that the decision to jettison the election of 6th December 2015 was that of the 1st Respondent but announced by REC that supplied the reason justifying that decision.

Looking at the entire proceedings contained in various volumes of the records, I am not convinced by the submissions of the learned senior counsel for the appellants that Exhibit P42B was not evaluated by the lower court. I say so because, my attention has been drawn to part of the finding of the lower court on the issue of evaluation where the lower court stated as follows:-

“In this case, Exhibit P42B upon which the appellants based their case showed that it was the decision of the 1st respondent announced by the Resident Electoral Commissioner which supplied the reasons justifying the decision. In view of the foregoing, a proper application of Section 26 of the Electoral Act 2010 (as amended), in my view, would accommodate a situation where at the close of election there were no results as they were hijacked according to the evidence before the tribunal and where collation did not take place at the ward collation centres because the results were not available. The PW61 testified that as Electoral Officer and custodian of the local Government Centre, did not see a single INEC Polling Unit or Ward result. Based on the foregoing, there was no election and the decision to hold a proper election at a future date only mean (sic) a postponement of polls”.

Generally speaking, a trial court/judge has the liberty to make inferences or to infer from the evidence adduced before him/it during the trial or proceedings. See *Osuagwu vs The State* (2013) 1-2 SC (pt. 1) 37. The judge weighs the evidence in the surrounding circumstance of the case. Once the evaluation of evidence is properly done, the findings of the trial judge or court cannot and should not be assailed or interfered with or disturbed by an appellate court. See *Ibanga v Usanga* (1982) 5 SC 102; (REPRINT) 49. From the above excerpt of the judgment of the court below, I am not influenced or carried away by the appellant’s suggestion that the evidence they adduced; particularly Exhibit P42B, was not evaluated. They also did not show any inference to suggest that the evaluation was not prop-

erly done or was perverse.

In fact, from the foregoing excerpt from the lower court's judgment, I do not think the assertion by the appellants that their Exhibit P42B was not evaluated could, be true or will not hold water. It is porous and unconvincing. I reject that sentiment of the appellants and in the result I resolve the third issue against them too.

The fourth and last issue raised by the appellants pertains to the striking out of Paragraphs 8 and 11 on their pleadings/petition by the tribunal and affirmed by the lower court below. The appellants' learned senior counsel abhorred the lower court's resolve to affirm the striking out of those paragraphs by the tribunal. The grouse of the appellants that the paragraphs mentioned above which were struck out by the tribunal, caused injustice to them and that they suffered injury in view of the fact that all other facts pleaded in the said Paragraphs formulated the centre or focal points of their case. The respondent's learned senior counsel and other counsel for the parties are ad idem, that - new facts were pleaded in those paragraphs in question as contained in their Reply.

By the provisions of Paragraph 16 of the First Schedule to the Electoral Act 2010 as amended; an appellant or petitioner can file a Reply to the Reply of the Respondents only where new or fresh facts or issues were introduced in the Respondent's Reply, but where no such fresh or new facts were raised or introduced in the Respondent's Reply, the petitioner lacks the right to file Reply to the Respondent's Reply.

A cursory look at the Replies filed by the Respondent or respondent's Reply does not suggest or show that any new or fresh issues were raised in those Replies on the petitioner's petition that could warrant the filing of Reply by the petitioners/appellants. Moreso, it would not be out of place to say, that the petitioners/appellants' Reply in question, was even filed out of the time or outside the period stipulated by the Electoral Act 2010 as amended within which such Reply or Replies could be filed by parties to an election petition. In view of that, I do not think that the striking out of the two paragraphs can justify me to the resolution of this issue in favour of the respondent I therefore resolve it against the appellants.

It is worthy of note, that in this instant appeal, there are,

concurrent findings of two lower courts with prominence and pre eminence and this court will always hesitate to disturb or interfere with such concurrent findings except where there is clear manifesta- tion of perversion or wrong application of law or misconception of the Law and there was none in this appeal. See Ojo Ogbomudia Ebolor vs Felica Osayande L PELR 8053; Kenneth Ogoala vs The B State (1991) LPELR 230.

Thus, for these few reasons I advance herein which convince me to dismiss the appeal and for the more detailed lead reasons given by my learned brother Ibrahim Tanko Muhammad JSC, in his judgment which I also adopt as mine and having agreed with them, I C also adjudge this appeal as lacking in merit. It is accordingly dismissed by me. I make no order on costs.

D

E

F

G

H