

GENERAL MUHAMMADU BUHARI

V.

- 1. INDEPENDENT NATIONAL ELECTORAL COMMISSION (INEC)**
- 2. CHIEF NATIONAL ELECTORAL COMMISSIONER (PROFESSOR MAURICE IWU)**
- 3. THE INSPECTOR-GENERAL OF POLICE**
- 4. UMARU MUSA YAR'ADUA**
- 5. DR. JONATHAN GOODLUCK**

V.

- 1. ALHAJI ATIKU ABUBAKAR, (GCON)**
- 2. SENATOR BEN OBI**
- 3. ACTION CONGRESS (AC)**

V.

- 1. ALHAJI UMARU MUSA YAR'ADUA**
- 2. DR. GOODLUCK JONATHAN**
- 3. PEOPLES' DEMOCRATIC PARTY (PDP)**
- 4. INDEPENDENT NATIONAL ELECTORAL COMMISSION**
- 5. PROFESSOR MAURICE MADUAKOLAM IWU (CHAIRMAN, INEC)**
- 6. CHIEF ELECTORAL COMMISSIONER AND 805 OTHER ELECTORAL OFFICIALS.**
- 7. INSPECTOR GENERAL OF POLICE(IGP)**
- 8. CHIEF OF DEFENCE STAFF**

COURT OF APPEAL (A13UJA DIVISION)
CA/AAEP/2/07, CA/A/EP/3/07

JAMES OGENYI OGEBE, J.C.A. (*Preside*)

JOHN AFOLAB1 FABIYI, J.C.A. (*Read the leading Judgment*)

ABUBAKAR AI3DULKADIR JEGA, J.C.A.

UWANI MUSA ABBA AJI, J.C.A.

RAPHAEL CHIKWE AGBO, J.C.A.

TUESDAY, 26TH FEBRUARY, 2008

ACTION - Election petition - Special nature of - Authorities not in respect of election petition - Whether relevant.

ACTION - Non-joinder or mis-joinder of a party - Effect of- Nature of order court should make.

ACTION - Parties to election petition - Respondent - Who may be Joined as such - Relevant considerations.

ACTION - Parties to election petition - Petitioner - Right of to institute alone.

APPEAL - Election Tribunal and Court Practice Directions, 2007 -Constitutionality of- Sections 284 and 285, 1999 Constitution - Whether ultra vires the power of the President of the Court of Appeal - Relevant considerations.

APPEAL - Practice Directions for the Court of Appeal - Power of President of Court of Appeal to make - Source of- Sections 248 and 28 (3), 1999 Constitution. CONSTITUTIONAL LAW - Election Tribunal and Court Practice Directions, 2007 - Constitutionality of- Sections 284 and 285

APPEAL - Practice Directions for the Court of Appeal - Power of President of Court of Appeal to make - Source of- Sections 24S and 28^(3), 1999 Constitution.

CONSTITUTIONAL LAW - Election Tribunal and Court Practice Directions, 2007 - Constitutionality of- Sections 284 and 285, 1999 Constitution - Whether ultra vires the power of the President of the Court of Appeal - Relevant considerations.

COURT- Election Tribunal and Court Practice Directions, 2007 Constitutionality of- Sections 284 and 285, 1999 constitution

- Whether ultra vires the power of the President of the Court of Appeal - Relevant considerations.

COURT - Practice Directions for the Court of Appeal Power of President of Court of Appeal to make - Source of Sections 248 and 285(3), 1999 Constitution.

CRIMINAL LAW AND PROCEDURE - Proof Standard of proof -Allegation of crime - Standard of proof Allegation of crime - Standard of proof thereof

DOCUMENT-Admissibility - Documentary evidence- White Paper

- Whether requires certification to be admissible.

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ELECTION - Disqualification for election - Indictment for¹¹ embezzlement - What »n;"t satisfy to deprive a person of right to contest election - Rationale for.

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ELECTION PETITION - Ballot papers - Failure to number serially

- Whether fatal to election result.

ELECTION PETITION - Collation of election result - Electronic collation as opposed to manual collation prescribed by law whether sufficient to annul the result of an election - Relevant^ consideration.

ELECTION PETITION -Election result declared by electoral body - Party disputing same - Duty thereon.

ELECTION PETITION- election Tribunal and Court Practice Directions 2007 constitutionality of- Sections 284 and 285, 1999 Constitution - Whether ultra vires the power of the President of the Court of Appeal - Relevant considerations.

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ELECTION PETITION - Irregularities - Petitioner alleging at an election - Duty on to establish how they affected the conduct of an election.

ELECTION PETITION - Non-compliance with Electoral law -Petitioner making same foundation of his petition - Burden thereon.

ELECTION PETITION - Oath of loyalty and neutrality - Failure of public officer to subscribe thereto in an

election - Effect of -Whether affects result of election.

ELECTION PETITION - Parties to election petition - Petitioner -Right of to institute alone.

ELECTION PETITION - Parties to election petition - Respondent -Who may be joined as such - Relevant considerations.

ELECTION PETITION - Rules of election - Breaches thereof -Whether sufficient to prove alone.

ELECTION PETITION - Special nature of election petition -Authorities not in respect of election petition - Whether relevant

ELECTION PETITION- Voting period or lime of election - Changes or shifts thereof- Whether constitutes non-compliance with the electoral law - Whether fatal to election result.

ELECTION PETITION - Voters register - Non-display of -Allegation of - How proved.

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EVIDENCE - Affidavit - Where defective - When court may permit to be used - Sections 84 and ,S'5, Evidence Act - When court may not permit.

EVIDENCE - Affidavit - Whether can be admitted or sworn before | notary public who is interested in a matter - Section 83, Evidence , Act and section 19, Notaries Public Act.

EVIDENCE - Estoppels - Issue estoppels - Whether can be raised in^ the same suit.

EVIDENCE - Admissibility - Inadmissible evidence - Where erroneously admitted - Duty on court to expunge from its record.

EVIDENCE - Oath of loyalty and neutrality - Failure of public office to subscribe thereto in an election - Infect of- Whether **affects** result of election.

EVIDENCE - Proof- Counsel's submission - Whether substitute) evidence.

EVIDENCE - Proof - Election result declared by electoral be Party disputing same - Duty thereon.

EVIDENCE - Proof- Electoral malpractices - Petitioner alleging Duty thereof - Allegation of - How established.

EVIDENCE - Proof- Evidence led on facts not pleaded - How treated.

EVIDENCE - Proof- Irregularities - Petitioner alleging (it an election -Duty on to establish how they affected the conduct of an election.

EVIDENCE - Proof- Non-compliance with electoral law - Petitioner making same foundation of his petition - Burden thereon.

EVIDENCE - Proof- Voters register - Non-display of - Allegation of- How proved.

EVIDENCE - Proof - Standard of proof - Allegation of crime -Standard of proof thereof.

LEGAEPRACTITIONER - Counsel's submission - Whether substitute for evidence.

NOTARY PUBLIC - Affidavit - Whether can be admitted or sworn before notary public who is interested in a matter - Section 83, Evidence Act and section 19, Notaries Public Act.

PRACTICEAND PROCEDURE-Affidavit - Where defective - When court may permit to be used - Sections 84 and 85 Evidence Act - When court may not permit.

PRACTICE AND PROCEDURE - Affidavit - Whether can be admitted or sworn before notary public

who is interested in a matter - Section 83, Evidence Act and section 19, Notaries Public Act.

PRACTICE AND PROCEDURE- Counsel's submission - Whether substitute for evidence.

PRACTICE AND PROCEDURE - Duty - Where statute provides special method for performing - Effect.

PRACTICE AND PROCEDURE - Election petition - Special nature of- Authorities not in respect of election petition - Whether relevant.

PRACTICE AND PROCEDURE - Election Tribunal and Court Practice Directions, 2007 - Constitutionality of- Sections 284 and 285, 1999 Constitution - Whether ultra vires the power of the President of the Court of Appeal - Relevant considerations.

PRACTICE AND PROCEDURE - Non-joinder or mis-joinder of a party - Effect of- Nature of order court should make.

PRACTICE AND PROCEDURE - Parties to election petition -Respondent - Who may be joined as such - Relevant considerations.

PRACTICE AND PROCEDURE - Pleadings - Function of.

PRACTICE AND PROCEDURE - Practice Directions for the Court of Appeal - Power of President of Court of Appeal to make -Source of- Sections 248 and 285(3), 1999 Constitution.

PRACTICE AND PROCEDURE - Parties to election petition - Petitioner - Right of to institute alone.

STATUTE - Duty - Where statute provides special method for - performing - Effect.

WORDS AND PHRASES - "Exclusion " in relation to election - What constitutes.

WORDS AND PHRASES - "Or" - Meaning of.

Issues:

1. Whether the 4th respondent (formerly 5th respondent) in the first petition was at the time of the election qualified to contest the election.
2. Whether there were acts of non-compliance with the provisions of the Electoral Act, 2006 in the conduct of the election which rendered or were capable of rendering the election invalid.
3. Whether or not the second petition was incompetent for the reason that the ground of unlawful exclusion was raised along with other grounds as alternatives.
4. Whether the 5th respondent in the second petition was a proper party to the petition. If the answer to issue three is resolved against the petitioners and the court finds that the petitioners were not unlawfully excluded at the said election, whether or not the election should be set aside for non-compliance with the provisions of the Electoral Act, 2006 and also for corrupt practices as set out in paragraphs 17 and 18 of the petition.

Facts:

At the Presidential Election held in the country on the 21st April, 2007, the petitioner in petition No. CA/A/EP/2/07, General Muhammadu Buhari was the candidate of All Nigeria Peoples Party (hereinafter referred to as ANPP). He contested the election along with the other candidates including the 1st petitioner in CA/A/EPT/ 3/07, Alhaji Atiku Abubakar, who was the flag bearer of the Action Congress (simply referred to as AC), and the 5th respondent in the petition, Umaru Musa Yar'Adua, who was the flag bearer of the Peoples Democratic Party (to be referred to simply as PDP).

At the end of the election, the 4th respondent (formerly 5th respondent) Umaru Musa Yar' Adua of the

PDP was returned elected by the 2nd respondent who was the Chief Electoral Officer and Returning Officer of the said election, having scored a total number of twenty-four million, seven hundred and eighty four thousand and two hundred and twenty-seven (24,784,227) votes, as against six million, six hundred and seven thousand, four hundred (6,607,400) vote' scored by the petitioner.

The 5th respondent (formerly 6th respondent) Dr. Jonathan Good luck was the running mate of the 4th respondent. Chief Edwin Ume-Ezoke was the running mate of the petitioner, but later in the proceedings applied to withdraw from the petition on the ground of lack of interest and the court obliged him his request, and his name was accordingly struck out from the petition.

The petitioner was not satisfied with the return and declaration of the 4th respondent as the winner of the said election, and thus presented a 27-paragraph petition, dated and filed on the 22nd day of May, 2007. The petitioner prayed the court to nullify the election on the following grounds as contained in paragraph 8 of the petition:

- "(a) The 5th respondent Umaru Musa Yar'Adua was at the time of the election not qualified to contest the election.
- (b) The election was invalid by reason of Non-compliance with the provisions of the Electoral Act 2006.
- (c) The election was invalid by reason of corrupt practices."

The prayers of the Petitioner in paragraph 25 of the petition were that it be determined as follows:-

- "(a) The 5th respondent was at the time of the election not qualified to contest election for the post of the President of the Federal Republic of Nigeria and that his election was void.
- (b) The election of the 5th respondent is on account of (a) above also void.
- (c) The Presidential elections of 21st April, 2007 is invalid for non-compliance with the provisions of the Electoral Act, 2006.
- (d) The Presidential election of 21st April, 2007 is invalid by reason of corrupt practices that negate the spirit and principles of the Electoral Act, 2006.
- (e) The 2nd, 3rd and 4th respondents committed acts and omissions which were corruptive of the electoral system and process in the conduct of the election."

The petitioner further prayed the court to grant the reliefs pleaded in paragraph 27 of the petition as follows:-

- "(i) That the 5th respondent was not qualified to contest the Presidential election of 21st April, 2007, consequent upon which his election together with the 6th respondent as President and Vice-President respectively is void.
- (ii) That the election to the office of President of the Federal Republic of Nigeria conducted on the 21st April, 2007 is invalid and therefore cancelled.
- (iii) That the 3rd respondent is guilty of gross misconduct for, without any just or probable cause, involving the military in a purely civil matter, the conduct of election, contrary to the powers conferred on his office by section 217 of the Constitution of the Federal Republic of Nigeria.
- (iv) That the 1st respondent conducts another election for the Office of the President of the Federal

Republic of Nigeria between the remaining 22 (twenty-two) candidates within three (3) months.

- (v) That the 2nd respondent in the person of Professor Maurice Iwu be disqualified from participation in the conduct of any future elections in the Federal Republic of Nigeria."

In compliance with paragraph 1(0('0 of the Election Tribunal and Court Practice Directions 2007 (henceforth referred to as the Practice Directions, 2007), issued by the President of the Court of Appeal, the Hon. Justice Umaru Abdullahi, CON, in the exercise of his powers conferred by section 285(3) of the Constitution of the Federal Republic of Nigeria 1999, paragraph 50 of the 1st Schedule to the Electoral Act 2006, for the expeditious hearing of election petitions, the Petitioner filed his petition with the list of his witnesses, witnesses depositions on oath and the list of exhibits to be tendered in the trial.

The 1st and 2nd respondents also in compliance with paragraph 2 of the Practice Directions 2007, filed their reply to the petition dated 23rd August, 2007 alone; with the list of their witnesses, and depositions of witnesses on oath and list of exhibits; so also the 3rd respondent. The 4th and 5th respondents filed a joint reply dated 14th August, 2007 and front-loaded their witnesses statements on oath.

A pre-trial conference was conducted as required by the Practice Directions 2007. During the pre-trial conference, the 2nd petitioner, Chief Edwin Ume-Ezoke, applied to have his name struck out from the petition as he was no more interested to pursue his petition. He was obliged his request. The original 3rd respondent in the petition, Chief Olusegun Obasanjo had his name struck out from the petition upon objection by his counsel for mis-joinder in the petition.

Trial in the petition commenced on the 23rd October, 2007 with the testimony of PW 1, Mr. Emmanuel Iwuamadi, who was the only witness who physically appeared before the court, adopted his written deposition and was cross-examined by counsel to the respondents. Thereafter, it was agreed, by counsel that written depositions of all witnesses be taken as adopted without the need for cross-examination or physical appearance of the witnesses before the court.

In line with the agreement of counsel, all documents pleaded : in the petition, and the respective replies of the respondents were tendered from the Bar, admitted in evidence, and taken as read without prejudice to objections on admissibility respective opposing counsel could raise in their final addresses. This agreement was reduced into writing by the court and the recorded version, accepted by all the parties.

The gravamen of the petitioners' complaint were as adumbrated in paragraphs 9B, 9B(i)(a), 9B(i)(b), 9B(i)(c), 9B(ii)(a), 9B(ii)(b), 9B(iv),(a)(b)(c)(d) and (e), 9B(v) and 9B(vi), all touching on non-compliance with the provisions of the Electoral Act 2006, more particularly sections 20, 21, 45(2), 48, 49(i), 63, 64 and 75 of the Electoral Act, 2006.

In paragraphs 9C(i), 9C(ii), 9C(iii), 9C(iv), 9C(v). 9C(vi), 9C(vii)5 9C(viii) and 9C(ix) of the petition, the petitioner complained of acts of corrupt practices and abuse of executive power on the part of the 3rd and original 4th respondents. In paragraph 9C(x)(a)(b)(c)(d) and (e), the petitioner complained of manifest bias on the part of the 1st and 2nd respondents in favour of the 4th respondent.

With respect to acts of non-compliance and corrupt practices in flagrant breach of the provisions of

the principles of the Electoral Act which he said applied to all States of the Federation, the Petitioner mentioned particularly the following States; (1) Akwa Ibom, (2) Cross River, (3) Gombe, (4) Abia, (5) Jigawa, (6) Ebonyi, (7) Imo, (8) Anambra, (9) Osun, (10) Katsina and (11) Benue.

To establish the petition, the petitioner adopted and relied on the written depositions of his 19 witnesses. He also tendered before the court thousands of INEC documents in evidence. It is however pertinent to note that most of the depositions were sworn before a notary public who was a counsel to the petitioner in the petition.

The 1st and 2nd respondents in their reply to the petition, vehemently opposed the petition and relied on the written depositions of their 156 witnesses and a few exhibits tendered by them in evidence. The 3rd respondent also denied the allegations contained in the petition in its reply to the petition. In their joint reply, the 4th & 5th respondents seriously opposed the petition and relied on the depositions of their 65 witnesses and a few exhibits, which were carefully marked in the record of the court.

On the other hand, in petition No. CA/A/EP/3/07, which was consolidated with petition No. CA/A/EP/2/07, Alhaji Atiku Abubakar and Action Congress were the petitioners.

The 1st and 2nd petitioners maintained that they were candidates in the election duly nominated by the 3rd petitioner in the said election as Presidential candidate and Vice Presidential candidate respectively. The 1st and 2nd respondents were the Presidential and Vice Presidential candidates sponsored by the 3rd respondent.

At the end of the poll, the 4th respondent, on 23rd of April, 2007 declared the 1st and 2nd respondents as winners of the election. The 1st respondent scored a total of 24,638,063 while the 1st petitioner scored 2,637,848 votes respectively.

The petitioners felt dissatisfied with the conduct of the election and challenged the outcome of same on the following grounds as contained in paragraph 15 of the petition -

"15. The grounds on which this petition is based are -

(a) The 1st petitioner was validly nominated by the 3rd petitioner but was unlawfully excluded from the election;

Alternatively That:

(b) The election was invalid by reason of corrupt practices;

(c) The election was invalid for reason of non-compliance with the provisions of the Electoral Act, 2006 as amended; and

(d) The 1st respondent was not duly elected by majority of lawful votes cast at the April 21, 2007 Presidential Election."

The petitioners then prayed for eight reliefs which read as follows:

"1. It may be determined that the Presidential Election of 21st April, 2007 is invalid for unlawful exclusion of the 1st and 2nd petitioners who were validly nominated by the 3rd petitioner as its candidate at the presidential election, and the said election be nullified

Alternatively that:

2 .It may be determined that Alhaji Umaru Musa Yar'Adua who was returned by the 1st - 6th

respondents as the President elect based on the Presidential Election held on 21st April, 2007 was not duly elected (or returned) and his election be nullified.

3. It may be determined that the said Presidential election held on 21 April 2007 is invalid for non-compliance with the provisions of Electoral Act, 2006, which non-compliance had substantially affected the result of the election, and that the election be nullified.
4. It may be determined that the said election be invalidated or annulled by reason of widespread corrupt practices, and that the election be nullified.
5. It may be determined that a fresh election be conducted into the office of the President of the Federal Republic of Nigeria, in accordance with section 147 of the Electoral Act, 2006 at which the 1st and 2nd petitioners shall be accorded full and unimpeded right to contest as validly nominated candidates.
6. It may be determined that the 5th, 7th, 42nd respondents as officials of the 4th respondent, who directly and negligently mis-conducted the April 21, 2007 Presidential Election in contravention of the provision of the Electoral Act, 2006 be recommended for criminal prosecution by the Attorney General pursuant to section 157 of the Electoral Act, 2006.
7. It may be recommended that the 5th, 7th, 42nd respondents who supervised and/or mis-conducted the April 21, 2007 Presidential Election be prohibited from participating in the conduct of the fresh election which may be ordered in consequence of this petition.
8. And for such order or further orders as the Honorable Court may deem fit to make in the circumstance." At the trial, the petitioners relied on the sworn testimonies of their witnesses and tendered several documents in support of their petition. At the end, they prayed the court, among other things, to nullify the election.

Equally, the respondents relied on the sworn testimonies of their own witnesses and tendered documents in opposition to the petition. At the end, they urged that the election be upheld.

In determining the petitions, the Court of Appeal sitting as the Presidential Election Petition Tribunal, considered the following statutory provisions.

Sections 144(2), 145(1), 146, Electoral Act, 2006 which provide as follows:

"144(2) The person whose election is complained of, is in this Act, referred to as the respondent, but if the petitioner complains of the conduct of an electoral officer, a presiding officer, a returning officer or any other person who took part in the conduct of an election, such officer or person shall for the purpose of this Act be deemed to be a respondent and shall be joined in the election petition in his or her official status as a necessary party provided that where such officer or person is shown to have acted as an agent of the Commission, his non-joinder as aforesaid will not on its own operate to void the petition if the Commission is made a party."

"145(1) An election may be questioned on any of the following grounds -

- (a) that a person whose election is questioned was, at the time of the election, not qualified to contest the election;
- (b) that the election was invalid by reason of corrupt practices or non-compliance with the provisions of this Act;

- (c) that the respondent was not duly elected by majority of lawful votes cast at the election; or
- (d) that the petitioner or its candidate was validly nominated but was unlawfully excluded from the election."

"146(1) An election shall not be liable to be invalidated by reason of non compliance with the provisions of this Act if it appears to the Election Tribunal or court that the election was conducted substantially in accordance with the principles of this Act and that the non compliance did not affect substantially the result of the election."

Sections 83, 84 and 85 of the Evidence Act, which state as follows:

"83. An affidavit shall not be admitted which is proved to have been sworn before a person on whose behalf the same is offered, or before his legal practitioner, or before a partner or clerk of his legal practitioner.

84. The court may permit an affidavit to be used, notwithstanding it is defective in form according to this Act, if the court is satisfied that it has been sworn before a person duly authorized.

85. A defective or erroneous affidavit may be amended and re-sworn by leave of the court, on such terms as to time, costs or otherwise as seem reasonable."

Section 19 of the Notaries Public Act, Cap. 331, Laws of the Federation of Nigeria, 1990 which provides thus:

"19. No notary shall exercise any of his powers as a notary in any proceedings or matter in which he is interested."

Held (*Unanimously dismissing the petition*):

1. *On Whether Government White Paper requires certification to be admissible* -While a Government White Paper purported to have been printed by the order or may be proved under section 112 of the Evidence Act by the production of certified true copy thereof, the document does not need certification in order to prove its contents by virtue of section 113(a)(iv) of the Evidence Act. In the instant case, exhibit EP2/34 purporting to be a Government White Paper from Abia State Government though a public document pursuant to section 109 of the Evidence Act, was admissible in evidence. (*P. 613, paras. D-F*)
2. *On What indictment for embezzlement must satisfy to deprive a person of right to contest election* — The indictment of embezzlement against a person to deprive him of the right granted by section 131 of the Constitution to contest or vie for the post of the President of Nigeria is a very serious matter, and the issues can only be pronounced upon by the judicial branch. Such serious issues are riddled with complex questions of law and facts which are, by the provisions of the Constitution, in the exclusive preserve of the judiciary. No executive body should have the power or competence to unravel such serious and far-reaching complex issues without a proper recourse to the proper judicial process. Moreover, it is impermissible under a civilized system of law to find a person guilty of a criminal offence without first affording him opportunity of a trial before a court of law in the

country. This provision is also supported by Article 7(1)(a) of the African Charter on Human Right, Cap. 10, Laws of the Federation of Nigeria, 1990. [*Action Congress v, [NEC (2007) 12 NWLR (Pt. 1048) 222; Amaechi v. INEC (2007) 18 NWLR (Pt. 1065) 105 referred to.] (Pp. 613-614, paras. H-F)*

Per FABIYI, J.C.A. at pages 614-615, paras. G-B: "Even if these judgments were not so, could exhibit EP2/34 really be said to constitute an indictment for fraud and embezzlement as required by section 137(I)(i) of the Constitution? The so-called indictment is at page 10 of the White Paper, and it reads as follows:-

'that the following persons herein under listed who were found to have done their jobs contrary to the laws, rules, principles and regulations be reprimanded, indicted and punished accordingly to the relevant laws.' And thereafter, was listed the names of the 5th and 6th respondents. No where *ex facie* in the White Paper was it stated that the 5th and 6th respondents were indicted for fraud and embezzlement as required by section 137(I)(i) of the Constitution to disqualify the 5th and 6th respondents.

From the foregoing, the issue of disqualification is of no moment and it is resolved in favour of the respondents."

On How allegation of electoral malpractices established

3. **Allegation of failure to deliver result sheets to States and polling units, failure to count votes and absence of announcement of scores at various polling units throughout the country, except some few units, can**

only be established by the direct evidence of those who observed the non-compliance. Proof of such averment cannot be established by looking at the documentary exhibits tendered. [*Lawal v. U.T.C. (Nig.) Plc (2005) 13 NVVLR (Pt. 943) 601 referred to.] (P. 629, paras. E-F)*

4. *On Effect of omission or failure of public officer to subscribe to oath of loyalty or neutrality* -The omission or default of a public officer to subscribe to affirmation or oath of loyalty or neutrality does not affect the validity of any act done or intended to be done by the defaulting officer in the execution of his official duty. The penalty which attaches to such omission or default can only be borne by the officer himself. In this case, even if the averment of the petitioner that the officers of the 1st respondent who participated in the election did not affirm to the oath of loyalty or neutrality was not denied by the respondents, it would still have no effect on the result of the election. [*Buhari v. Obasanjo (2005) 2 NWLR (Pt 910) 241; Amadi v. Eke (2004) 14 NVVLR (Pt 892) 1 referred to.] (Pp. 630, paras. G-H; 655, para. II)*

5. *On Whether allegation of non-display of voter's register proved by the petitioner in the first petition—*

Per FAHIYI J.C.A. at pages 630-631, paras. H-H: "On the issue of voters register already referred to in this judgment, the petitioner averred in his pleading that the 2nd respondent after the Presidential election, postponed the Local Government Council elections in the country on the ground that there was at that time not existing a valid voters register. This averment was not

denied by the 1st and 2nd respondents. The petitioner considers this non denial as proof of the non-display of the voters register 60 days before the Presidential election. We beg to disagree. We see no nexus between the non-display of voters' register and the postponement of the Local Government elections, and the want of voters register for that election. This is because the voters register used for the Presidential election cannot be the same as the voters register to be used in any other election, as by operation of law, the registration of voters is a continuous exercise. S. 10(5) of the Electoral Act provides that the registration of voters and the updating and revision of the register of voters shall stop not later than 120 days before any election covered by the Act. This means that the registration of voters for the presidential election, stopped 120 days before the election. The register of voters used for the presidential election is not therefore the same as that to be used in any subsequent election. Nothing in the petition links the invalidity of the voters register for Local Government elections to the register of voters used for the presidential election. Learned counsel for the petitioner in an attempt to establish non display of voters register and non integration of same with the supplementary voters register, in his address drew a chart, Chart No. 1 at page 25 of his written address to page 29 showing irregular entries in the voters registers, from the following five States of Nasarawa, Kwara, Rivers, Imo and Taraba. With due respect to the learned senior counsel, the chart drawn has no relevance to the determination of the non display of voters register and non integration of the supplementary voters registers to the National voters registers. Irregularities shown on the voters registers are entirely different from the allegation of non display of the voters registers. One cannot be proof for the other. There is indeed no shred of evidence to substantiate the allegation."

6. *On Whether failure to number ballot papers serially fatal to election result -*

Section 45(2) of the Electoral Act provides that the ballot papers shall be numbered serially and bound in booklets. In this case, the 1st and 2nd respondents pleaded that the bundles containing the ballot papers were serialized for audit purposes. This in effect was an admission that the ballot papers were not numbered serially and bound in booklets. The averment was therefore considered proven and constituted a non-compliance with the provisions of *the Electoral Act. However, the petitioner failed to establish that the non-compliance substantially affected the result of the election. (Pp. 631-632, paras. 11-B)* Per FABIYI, J.C.A. at pages 632-633, paras. H-C: "I have looked at the exhibits before me, particularly, Forms EC 25, EC 40C, EC 40E, which are tendered in their hundreds. Form EC 25 is electoral material receipt, form EC 40C is ballot paper account and verification statement, form EC 40E is the tendered ballot statement. The exhibited forms do show that the ballot papers were indeed not numbered serially. They have however, shown the number of ballot papers issued by the relevant electoral officers to each polling unit, and the numbers tendered in these polling units. The petitioner led no evidence to show that any of these entries relating to the number of ballot papers issued at the polling units, and the number of ballot papers tendered in those units are false. This the petitioner's agents at the polling units could easily have ascertained. It is

therefore not correct that the petitioner could not maintain an audit trail, simply because the ballot papers were not serially numbered. It is incumbent on the petitioner pursuant to the provisions of section 146 of the Electoral Act to establish that the non-compliance established by him substantially affected the result of the election. This he has failed to do in the instant case."

7. *On Whether change in the voting period of election constitutes a non-compliance with the provisions of the Electoral Act -*

Section 28 of the Electoral Act provides that nothing in any particular election under the Act should take place on the same day and time throughout the Federation. Section 26 provides that the *Independent Electoral Commission shall appoint the date on which the election to the office of the President and Vice President shall hold*. While section 27(i) of the same Act provides that the commission can postpone the Presidential Election and other elections set out in section 26 for reasons set out in section 27, and the postponement may relate to either the whole country or a part of the country as may be determined by the commission. A community reading of those sections shows clearly that the 1st respondent can *fix* the date and time for the Presidential election and change same. Moreover, a change of the voting period of election throughout the federation do not constitute a non-compliance with any provision of the Electoral Act. It could only be said to constitute an amendment to the manual for the elections officials for 2007. (P. 632, paras. C-G)

7A. *On Burden on petitioner who makes non-compliance with Electoral Act the foundation of his petition*

Where a petitioner makes non-compliance with the Electoral Act the foundation of his complaint, he is fixed with the heavy burden to prove before the court, by cogent and compelling evidence, that the non-compliance is of such a nature as to affect the result of the election. He must show and satisfy the court that the non-compliance substantially affected the result of the election to his disadvantage. [*Haruna v. Modibbo* (2004) 16 NWLR (Pt. 900) 487 referred to] (P. 633, paras. C-E)

Per FAB1YI, J.C.A. at pages 633-634, paras. E-C: "Also in *Buhari v. Obasanjo* (2005) 13 NWLR (Pt 941) 1, Belgore, JSC in interpreting this provision of section 135(1) of the Electoral Act, 2002, which is *pari material* with section 146(1) of the Electoral Act 2006, had this to say:

'It is manifest that an election by virtue of section 135(1) of the Act shall not be invalidated by mere reason that it was not conducted substantially in accordance with the provisions of the Act. It must be shown clearly by evidence that the non-substantiality has affected the result of the election. Election and its victory is like soccer and goals scored. The Petitioner must not only show substantial non-compliance but also the figures, i.e. votes that the compliance attracted or omitted. The elementary evidential burden of 'the person asserting must prove' has not been derogated from by section 135(1). The petitioners must not only assert but must satisfy the court that the non-compliance has so affected the election results to justify nullification. See also *Awolowo v. Shagari* (1979) 6-9 SC 5,1; *Itute v.*

INEC (1999) 4 NWLR (Pt 599) 360; Akinfosile v. Ijose (1960) SCNLR 447; and Ajadi v. Ajibola (2004) 16 NWLR (Pt. 898) 91.'

It is clear from the above authorities that the onus of proof of the substantiality of the non compliance and the substantiality of the effect of the non compliance on the election result rests on the petitioner.

The petitioner has in the instant case established the substantiality of the non compliance with section 145(2) of the Electoral Act, but has failed to establish the substantiality of this non compliance on the result of the election."

8. *On Grounds of election petition and whether petitioner relying on unlawful exclusion from election can rely on other grounds in his petition -*

By virtue of section 145(1) of the Electoral Act, 2006, an election may be questioned on any of the following grounds:-

- (a) that a person whose election is questioned was, at the time of the election, not qualified to contest the election;
- (b) that the election was invalid by reason of corrupt practices or non-compliance with the provisions of this Act;
- (c) that the respondent was not duly elected by majority of lawful votes cast at the election; or
- (d) that the petitioner or its candidate was validly nominated but was unlawfully excluded from the election.

In the instant case, having relied on the ground of valid nomination and unlawful exclusion, the petitioners were, ordinarily, precluded from relying on any other ground under section 145(1) of the Electoral Act, 2006 and the alternative grounds ought to be struck out. (*Pp. 643, paras. C-F; 644, para. F*)

9. *On Whether petitioner relying on unlawful exclusion from election can rely on other grounds in his petition*

Reliefs sought in an election petition and the grounds therein are distinct. While reliefs or prayers can be made in the alternative in an election petition, a ground of exclusion cannot be made in the alternative with other grounds. A ground of exclusion in an election petition stands clearly on its own. It is mutually exclusive of other grounds. Thus, in this case, the petitioners were approbating and reprobating at the same time, and that should not be allowed since it is frowned at by the law. (*P. 644, paras. C-E*)

10. *On Meaning of "exclusion " and whether the petitioners in the second pennon were excluded from the election-*

"Exclusion" means 'keeping out, barring, prohibited, eliminated, ruled out.' In this case, although, the petitioners pleaded facts of unlawful exclusion, they also pleaded facts and had evidence showing that they participated in the election. Therefore, they were not excluded, but were included and actively participated in the election. (*Pp. 646; para. A, 647, paras. A-F; 652, paras. F-G*) Per FABIYI, J.C.A. at page 724, paras. C-G:

"In our considered opinion, the above scenario points to the inescapable fact that the 1st

petitioner's name was published by INEC after the judgment of the Supreme Court on April 16, 2007 to contest the Presidential election of 21st April, 2007.

At this point we appreciate the submissions of the learned senior counsel to the petitioners in respect of his stance over acts which he contended as amounting to acts that constitute exclusion. It appears that from the date of nomination until 16th of April, 2007, the 4th respondent attempted to exclude the 1st petitioner from participating in the election. Certainly, some hurdles were placed on his way which ordinarily should not be so. But by the judgment of the Supreme Court of 16th April, 2007, the coast was cleared for him to contest the election. It needs no further gainsaying the fact that he participated in the election. Exclusion means 'keeping out, barring, prohibited, eliminated, ruled out.' The petitioners, from their own showing in their pleadings, evidence of their salient witnesses as depicted earlier on in this judgment, as well as their conduct after the judgment of the Supreme Court on 16th April, 2007, cannot be heard to say that they have been excluded from the presidential election."

11. *On Wlio.se favour votes are cast in an election -*

Votes east in an election are for the sponsoring political party. The inclusion of the name and photograph of the candidate is of no moment. Further, there was no evidence in this case that any voter was misled. In any event, if any complaint in that regard was cognizable, same was cured by the provisions of section 146(1) of the Electoral Act, 2006. [*Ainaeclii v. INEC* (2007) 18 NWLR (Pt. 1065) 105 referred to.] (*Pp. 659-660, paras. II-A*)

12. *On Whether shift of time for poll fatal to an election -Per FABIYI, J.C.A. at page 660, paras. B-H:*

"The senior counsel for the petitioners maintained that the 4th respondent flouted its Guideline by shifting the poll slated for 8.00 a.m. to 3.00 p.m. to 10.00 a.m. to 5.00 p.m. on 21st April 2007; a day before the election. He contended that the 4th respondent had no power to shift the time fixed for the poll. The petitioners did not, in clear terms, state their grievance and remedy sought for the alleged infraction.

learned senior counsel for the 1st and 2nd respondents observed that even by shifting of the poll the seven hours scheduled for the poll still remained intact. He submitted that it must be shown that late poll affected electorates who would have voted. He cited the case of *Bassey v. Young* (1960) All NLR 31 at 37. He observed that there is no evidence by the petitioners that this affected the result of the election.

Learned senior counsel for the 4th - 808th respondents maintained that the shifting of time for poll is a matter in the discretion of the respondents having regard to exigencies of the time. He observed that the petitioners have not shown that the discretion was wrongly exercised and that all the candidates were equally affected. Further, he maintained that the court was not told how the late commencement of the elections affected the outcome of same. We must express it here that it is immaterial that the poll was shifted by two hours on 21st April, 2006. The period of 7 hours

slated for the election was still maintained. The shifting of poll affected all the contestants. It was not shown that the exercise of discretion to shift the poll was wrongly done. And there is no evidence that any prospective voter was denied the right to cast his vote. Candidly speaking, I cannot, with adequate precision, surmise the rationale behind this complaint. The decision in the case of *Bassev v. Young (supra)* is in point here. The issue, in my opinion is of no serious moment."

13. *On Duty on petitioner to establish how irregularities affected the outcome of an election* - Per FABIYI, J.C.A. at pages 661-662, paras. B-D:

"The complaint of the petitioners is that many election results forms tendered by them contain manifest irregularities that they strongly feel substantially affected the result of the election. According to the petitioners, the results afflicted by one defect or the other are contained in their schedule on State by State basis.

Learned senior counsel for the 4th - 808th respondents observed that after the parties had closed their case, the petitioners attempted to introduce fresh facts in the three volumes described as Schedules 1 - 25 to specify alleged defects in the results of the Presidential election.

He cited *Ademoso v. Okoro* (2005) 22 NSCOR (Pt. 1) 460 at 472 and *National Investment and Properties Co. Ltd. v. The Thompson Organisation* (1969) 1 All NLR 138.

Learned senior counsel strongly felt that the petitioners should not be allowed to introduce fresh facts via their address as the respondents cannot now reply to those facts.

I am of the view that the submissions of the senior counsel for the 4th - 808th respondents can well be put on their mettle. I have carefully perused the contents of Schedules 1 - 25 as presented by the petitioners in their written address. I am of the view that there is a strong attempt to introduce fresh facts not pleaded in the original petition.

In Schedule No. 16 which deals with Kwara State, for example, the facts pleaded in the petition, in sum, are late arrival of electoral materials, ballot boxes filled with thumb printed ballot sheets, and unlawful voting in the private residences of P.D.P. supporters. The fresh facts attempted to be introduced in the schedule to the address which cannot be said to be analysis of evidence by any imagination as they are not based on any existing pleadings are:- mutilated results of voting scores, results witnessed by agents without party affiliation, 100% vote for PDF, undated results, unsigned result sheets, unstamped results, non-signed results by party agents and apparent similar writing.

The above, as depicted, is replete in respect of the other 25 States complained about by the petitioners. And this should not be allowed as it offends the rules of pleadings and takes the other side by surprise. Even then, the analysis contained in the schedules has no bearing whatsoever with the facts as pleaded in the petition.

It is glaring that most of the defects pinpointed appear trivial in character and insignificant in number. For example, 100% vote for a party at a polling unit cannot be regarded as an act of non-compliance. Wrong form used for result deals with form and not substance. Allegation

that results were witnessed by agents without party affiliation appears untenable. There can be no agent without party affiliation. Allegation of apparent similar writing can only be sustained after evidence by a hand writing expert which is not available. Allegation of non-signing by party agents cannot frustrate the election. Complaint in respect of under supply of ballot papers is a logistic problem and not a defect.

Beside, the fact that the litany of defects alleged were not pleaded, the petitioners have failed to show how same affected the outcome of the election. To this extent, the defects pinpointed do not help the case of the petitioners."

14. *On Duty of petitioner alleging electoral malpractices in an election petition -*

Where a petitioner, as in this case, alleges electoral malpractices, he has a duty to prove the malpractice alleged, and show that same affected (In u suit of the election. In the instant case, it has not been demonstrated how the alleged acts affected the result; of the election. Further, the alleged malpractices were not shown to be authorized by the 1st and 2nd respondents whose return was sought to be annulled. [*Oyegitn v. Igbinedion* (1992) 1 NWLR (I't. 226)747; *Falae v. Obasanjo* (1999) 4 NWLR (Ft. 599) 476 referred to.] (P. 664, paras. B-D).

15. *On Burden on party who disputes results declared by electoral body -*

The burden lies on any party who disputes the correctness of the result declared by the electoral body, to lead rebuttal evidence. In this case, it was for the petitioners to call their agents at the state collation centres to give evidence in rebuttal by production of their copies of form EC8I) to rebut the declared results. This they failed to do. (P. 665, paras. B-D)

16. *On Whether electronic collation as opposed to manual collation of election results as prescribed by law sufficient to annul the result of an election -*

Per FABIYI, J.C.A. at pages 665-666, paras. D-D:

"It is noted that the result that was declared by the 6th respondent as in exhibit EP3/12(1) was arrived through electronic collation as in exhibit EP3/12(3) which was against the law. Such is a goof as the result that should have been declared ought to be from the Manual collation as in exhibit EP3/12(2). The vital question is whether the goof is sufficient to annul the result of the election.

1 refer to the case of *Bush v. Gore* (2000) 531 US 98 148L ED 388 131 SCT 525 cited by the senior counsel for the 1st and 2nd respondents which is of persuasive authority. It is a case based on presidential election in the United States which has operated democracy for over two centuries. In short, it was whether or not the counting of votes in the State of Florida should be done manually or by mechanical means as prescribed by law. The Supreme Court of the U.S. decided to queue behind electronic counting as dictated by law. In doing so, Chief Justice Rehnquist pronounced thus:

'We deal here not with an ordinary election for the President of the United States. In *Burwchsv. United Suites*, 290 US 534, 535, 78 L Ed 484, 54 S. ct 287 (1934) while presidential electors are not officers or agents of the Federal Government (in re *Green*, 134 US 377, 379, 33 L Ed. 95 1, 10 Sct 586 (1890) they exercise federal functions under, and discharge duties in virtue of authority

conferred by the Constitution of the United States, the President is vested with the executive power of the nation. The importance of his election and the vital character of its relationship to and effect upon the welfare and safety of the whole people cannot be too strongly stated.'

I have carefully perused the two results as contained in exhibits EP3/12(2) and EP3/12(3). The disparity is not such that would affect the totality of the result. And beside, the result in the manual collation has not been rebutted. The result in the manual collation is before the court and I cannot close my eyes to it. The result of the election of the 1st respondent cannot be nullified based on this complaint which has in no way affected the real substance of the election. The 1st respondent is deemed as returned via the manual result. I take note of the importance of the election and the vital character of its relationship to and the effect upon the welfare and safety of the entire nation, which cannot be too strongly stated."

17. *On Whether sufficient to prove alone breaches of electoral rules -*

It is not enough to prove that breaches of the rules enacted into the Electoral Act, and other rules made for the conduct of elections were breached. A petitioner, as in this case, must go further to prove that such breaches prevented the majority voters from casting their votes in their favour. Thus, it is not just all miniature complaints that can ground the nullification of a presidential election. In the instant case, the petitioners agreed that their party logo was on the ballot paper. Their complaint was only in respect of the colour of the background of the logo. There was however no evidence that any prospective voter was misled. Moreover, it was not demonstrated how the alleged lapse substantially affected the result of the election. [*Musikeln v. C, iwa* (1956) WRNLR 61; *Buhari v. Obasanjo* (2005) 13 NWLR (Pt.941) 1 referred to] (Pp. 659, paras. A-E)

18. *On Who may be joined as respondent to election petition and who may not -*By virtue of section 144(2) of the Electoral Act, 2006 the person whose election is complained of is in the Act referred to as the respondent, but if the petitioner complains of the conduct of an Electoral Officer, a Presiding Officer, a Returning Officer or any other person who took part in the conduct of an election, such officer shall for the purpose of the Act be deemed to be a respondent and shall be joined, in the election petition in his or her official status as a necessary party. Provided that where such officer or person is shown to have acted as an agent of the Commission, his non-joinder as aforesaid will not on its own operate to void the petition if the Commission is made a party. The above provision of the Electoral Act is to the effect that where the conduct of an official of the 4th respondent is complained about, as in this case, he must be made a respondent, in his or her official status, for the effectual and complete determination of the election petition. [*Uzodinma v. Udenwa* (2004) 1 NWLR (Pt.854) 303; *Kalu v. Uzo* (2004) 12 NWLR (Pt. 886) 9 referred to.] (Pp. 653-654, paras. L-D)

19. *On Effect of non-joinder or mis-joinder of a party -*In order to decide the effect of non-joinder or mis-joinder of a party, the court should ask itself the following questions -

- (a) Is the cause or matter liable to be defeated by non joinder?
- (b) Is it possible to adjudicate on is the cause or matter liable to be defeated by non joiner?
- (c) Is the third party a person whose presence before the court as a defendant will be necessary in order to enable the court to effectually and completely adjudicate or settle all the questions involved in the cause or matter?
- (d) Is the 3rd party a person who should have been joined in the first instance? In this case, since the 4th respondent commission had been joined in the suit, non-joinder of its official would not operate to avoid the petition. The 5th respondent should therefore not have been joined, in the first instance, in his personal capacity. More so, when the same 5th respondent had been joined as 6th respondent in his official capacity. It is therefore a clear case of mis-joinder. And since he was not properly joined, his name was struck out by the court. (Pp. 654-655, paras. E-B)

On Function of pleading -

The main function of pleading is to focus with much certainty, as far as possible, the various matters actually in dispute between the parties without the pleading of evidence. Therefore, both the courts and the parties are bound by the facts pleaded whilst the facts not pleaded go to no issue. Thus, pleading allows for the just and effectual determination of a suit or claim based on disputed facts. In this case, it is clear that the petitioner did not fully set out facts on which his case was supposedly based, particularly paragraphs 9B, 9(i)(b), 9B(iii)(g) and 9B(iii)(h). What the petitioner did was to plead legal results, arguments, conclusions, inferences and submissions, rather than material facts founding their claim.

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However, what the court did was to expunge the affected parts of the pleadings and allowed the rest to stand, but not to discountenance the paragraphs as argued by the 1st and 2nd respondents. [*Sosanya v. Onadeko* (2000) 11 NVLR (Pt. 677) 34; *Abacha v. Fawehinmi* (2000) 6 NWLR (Pt. 660) 228 referred to.] (Pp. 622-623, paras. G-C)

21 *On Treatment of evidence led on facts not pleaded or averment on which no evidence is led —*

Evidence led on facts not pleaded go to no issue, just as an averment on which evidence is not led. In this case, the petitioner tendered result sheets not signed by his agents, but led no evidence to establish why the agents did not sign result sheets. He also made heavy weather about stamping and dating and counter-signing in his address. But the irregularities were not pleaded, and therefore went to no issue. [*Buhari v. Obasanjo* (2005) 13 NWLR (Pt 941) 1; *Lawal v. U.T.C. Pic* (2005) 13 NWLR (Pt 943) 601 referred to.] (P. 629, paras. F-H) Per FABIYI, J.C.A. at page 630, paras. A-F:

"In paragraph 9B(iii)(e), the petitioner alleged that a vast majority of polling units of the local government areas affected by a deliberate disenfranchisement of the electorate did not receive sensitive and non-sensitive materials until after 4.00 p.m. No shred of evidence was led in this regard. The listed States are found in paragraph 9B(iii)(i) of the petition, namely, Enugu, Ebonyi, Abia, Anambra, Imo, Ondo, Osun, Cross River, Edo, Benue, Bayelsa, Delta,

Gombe, Niger, Taraba, Kogi, Katsina, Sokoto and Kaduna States.

Paragraph 9B(iii)(i) list 19 States mentioned above and alleges that in these States, voting materials including sensitive and non-sensitive materials were delivered by the 1st respondent on the election day between 12 noon and 2.30 p.m. This was denied by the respondents. No piece of evidence was tendered by the petitioner to prove this fact. The averment therefore goes to no issue.

Finally, the petitioner averred in paragraph 9B(v) of the petition that the officers and staff of the 1st respondent who participated in the election did not affirm to the oath of loyalty and neutrality. Again, the petitioner led no evidence to establish this averment. The respondents denied this averment. There is no evidence led in proof of the averment."

22. *On whether issue estoppel can be invoked in the same case -*

Issue *estoppel* cannot be invoked in the same case but in a different case. It is only in that circumstance that the first case, in appropriate circumstances, acts as issue *estoppel* against the second one. The appropriate circumstances are:-

- (a) That the same question was decided in earlier proceedings.
- (b) That the judicial decision said to create the *estoppel* was final.
- (c) That the parties to the judicial decision or their privies were the same person as the parties to the proceedings in which the *estoppel* is raised or their privies.

In this case, issue *estoppel* did not avail the petitioners on the issues of exclusion of the petitioners and the juristic personality of the 5th respondent, as the issues were not decided by the court in its earlier ruling of 20th September, 2007. [*Inakojii v. Adeleke* (2007) 4'

NWLR (Ft. 1025) 423 referred to.] (Pp. 640-641 paras. H-C)

23. *On Special nature of election petitions -*

Election petitions are *sui generis*. That is to say they are in a class of their own. Thus, other authorities that are not in respect of election petitions are not directly of moment herein. (Pp. 643, paras. B-C; 644, paras. B-C)

24. *On Standard of proof of allegation of crime -*

The standard of proof of criminal allegation is one of proof beyond reasonable doubt, codified in section 138(1) & (2) of the Evidence Act. In this case, the allegations made by the petitioners against unidentified policemen and soldiers, as well as alleged thugs of the 3rd respondent whom the petitioners tried to incriminate, were criminal in nature. However, none of the witnesses called by the petitioners specifically identified any police officer or soldier. Accordingly, no allegation of crime can be established by the scenario painted by the petitioners. [*Lori v. State* 1980) 8 -11 S.C. 81; *Akalezi v. State* (1993) 2 NWLR (Pt. 273) 1; *Nwobudo v. Onoh* (1984) SCNLR 1; *Ransome-Kuti v. A.-G. Federation* (1985) 2 NWLR (Pt. 6) 211 referred to.] (Pp. 663-664, paras. D-B)

25. *On Power of President of Court of Appeal to make Practice Directions for the Court of Appeal -*

The combined reading of sections 248 and 285(3) of the 1999 Constitution empowers the President of the Court of Appeal not only in its appellate jurisdiction while hearing appeals, but also in the exercise of its original jurisdiction under section 239 of the Constitution. Thus, the power or the authority of the President of the Court of Appeal to issue Practice Directions is derived from the Constitution of the Federal Republic of Nigeria. The Practice Directions, stand as a guide to proceedings before the court, just as the Rules of the court. (Pp. 601-602, paras. F-C)

26. *On Constitutionality of the Election Tribunal and Court Practice Directions 2007 -*

The Election Tribunal and Court Practice Directions 2007 has constitutional flavour. It is not *ultra vires* the powers of the President of the Court of Appeal.

The Practice Directions constitute condition precedent to the presentation and maintenance of an election petition. The panel hearing this petition was constituted pursuant to the powers conferred on the President of the Court of Appeal under section 285 of the 1999 Constitution. The power of the President of the Court of Appeal to set up the various Election Tribunals is derived from the 1999 Constitution, and in as much the same way he does make Rules for the conduct of cases or proceedings before the Election Tribunals under sections 284 and 285 of the 1999 Constitution. The powers of the President of the Court of Appeal under sections 284 and 285 of the Constitution is not limited to the Practice and Procedure of the Court of Appeal in its appellate jurisdiction, it does extend to the power to issue Practice Directions not only in the appellate jurisdiction of the Court of Appeal, but also in its original jurisdiction under section 239 of the Constitution. However, as the petitioner's counsel submitted that the Court of Appeal lacked the power to set aside the Practice Directions, it followed that the argument was misconceived. (Pp. 601-602, paras. F-C)

Per FABIYI, J.C.A. at pages 600-601, paras. H-C: "It is indeed strange that it is at the address stage that the petitioner's counsel is questioning the validity or constitutionality of the Practice Direction issued by the President of the Court of Appeal in the exercise of his powers conferred by section 285(3) of the Constitution of the Federal Republic of Nigeria, 1999. The petitioner has since the inception of his petition relied on, applied and made substantial use of the provisions of the Practice Directions without raising any objection. The same duty and obligations that ensures to the petitioner under the Practice Directions is the same that ensures to the respondents. One therefore wonders that it is at this stage that the Petitioner, after taking full advantage of all the provisions of the Practice Directions that is now crying foul that the Practice Directions has no constitutional backing. If this submission by the petitioner is sustained, then it goes without saying that the petition itself has no foundation or platform on which it can be based. *U.A.C. v Macfoy* (1952) AC 61."

27. *On Right of a petitioner to institute alone an election petition-*

The right of a petitioner to institute and maintain a petition alone is statutory, and is to be found in section 144(I) (a) of the Electoral Act, 2006, which states that an election petition

may be presented by a candidate in an election petition. The right to file an election petition must be distinguished from the ability to prove the petition. In this case, the 5th and 6th respondents admitted that the petitioner was a candidate at the April 21, 2007 Presidential Election. Therefore the objection of the 5th and 6th respondents challenging the competence of the petitioner to file and maintain the petition after his running mate, Chief Edwin Ume-Ezoke, withdrew from the petition was misconceived. (P. 606, paras. F-H)

28. *On Impropriety of deposing to affidavit before notary public who is interested in a matter -*
By section 83 of the Evidence Act, an affidavit shall not be admitted which is proved to have been sworn before a person on whose behalf the same is offered, or before his legal practitioner, or before a partner or clerk of his legal practitioner. The said provision is clear and unambiguous and the word "shall" therein is clearly mandatory. Moreover, by section 19 of the Notaries Public Act, no Notary shall exercise any of his powers as a notary in any proceedings or matter in which he is interested. In this case, the depositions were made in favour of the petitioner, Mr. Val. 1. Ikeonu, who was also a legal practitioner to the petitioner. The combined effect of the two provisions above is that Val. I. Ikeonu being a legal counsel to the petitioner lacked the competence to notary any document used in the petition. (Pp. 607-608, paras. II-C)
29. *On Duty of court to expunge from its record inadmissible evidence erroneously admitted -*
Where a court erroneously admitted a patently inadmissible evidence, the court can at any stage of the proceedings expunge the inadmissible evidence from its record. In this case, documents were admitted by the court based on clear agreement by the parties that all documentary and material exhibits should be admitted subject to the right of all opposing parties to raise objection to the admission at a later stage. [U.B.N. Plc v. Sparkling Breweries Ltd. (2000) 15 **NVLR (Pt. 698)** 200; *Kabo Air v. Inco Lid.* (2003) **6 NVLR (Pt. 816)** 323; *Agbi v. Ogbe* (2006) **11 NVLR (Pt. 990)** 65; *Dağacı of Den v. Dağacı of Ebwa* (2006) **7 NVLR (Pt. 979)** 382 **referred to.**] (P. 608, paras. D-F)
30. *On whether counsel submission substitute for evidence -*
Documents, apart from what they contain, do not speak. Thus, however ingenious or brilliant a counsel's address might be, it cannot be a substitute for evidence or pleadings. [*Oduola v. Coker* (1981) 5 SC **197**; *Reynolds Construction Ltd. v. Reynolds Brezina Brown* (1993) **6 NVLR (Pt 297)** **122 referred to.**] (Pp. 629-630, paras.H-A)
31. *On when court may permit defective affidavit to be used and when it cannot -*
By sections 84 and 85 of the Evidence Act, the court may permit an affidavit to be used, notwithstanding it is defective in form according to this Act, if the court is satisfied that it has been sworn before a person duly authorized. Also, a defective or erroneous affidavit may be amended and re-sworn by leave of the court on such terms as to time, cost or otherwise. However, the provisions are not all saving provisions. It is clear from the provisions that they are intended to save only affidavits that are defective "in form" and not those that are defective in substance. In this case, the court was satisfied that the depositions in issue were not sworn

before a person duly authorized to administer oath in the circumstance. Moreover, in order to rely on section 85 of the Evidence Act, leave of court must be sought, and no such leave was obtained by the petitioner to accept the defective depositions or to re-swear them. Consequently, all the depositions made before Val. I. Ikeonu of counsel and Notary Public were inadmissible in evidence and were expunged from the record of the Court of Appeal. (P. 608-609, paras. G-D)

32. *On Meaning of the word "or" -*

The word "or" is a disjunctive participle used to express an alternative or to give a choice of one among two or more things. It separates the provision preceding it from the provision coming after it. Its role is to show that the provision in which it is appearing are distinct and separate one from the other. [*Antho v. Aiyelem* (1993) 3 NVVLR (Pt. 280) 126; *Abici State University v. Anyaibe* (1996) 3 NVVLR (Pt. 439) 646 referred to.] (Pp. 643-644, paras. B-B)

33. *On Effect where a statute provides a particular method of performing a duty -*

Where a statute provides a particular mode of performing a duty regulated by statute that method, and no other must have to be adopted. [*Ibrahim v. INEC* (1999) 8 NVVLR (Pt. 614)

334; *Buhari v. Yusuf* (2003) 4 NWLR (Pt. 841) 446 referred to.] (P. 644, paras. G-H)

Nigerian Cases Referred to in the Judgment:

A.-G., Adainawa State v. A.-G., Federation (2005) 18 NWLR (Pt. 958) 581

A.-G., Kano State v. A.-G., Federation (2007) 6 NWLR (Pt. 1029) 164

A.-G., Oyo State v. Fairlakes Hotels (No.2) (1989) 5 NWLR (Pt. 121) 255

Abacha v. Fawehinmi (2000) 6 NWLR (Pt 660) 228

Ahiu State University v. Anyaibe (1996) 3 NWLR (Pt. 439) 646

Achineku v. Ishagha (1988) 4 NWLR (Pt. 89) 411

Action Congress v. INEC (2007) 12 NWLR (Pt. 1048) 222

Adaniu v. Gwadabawa (1999) 3 NWLR (Pt. 594) 256

Adejumo v. Ayaniegbe (1989) 3 NWLR (Pt. 110) 417

Adesanya v. President of the Federal Republic of Nigeria (1981) 2 NCLR 358

Adigunn v. A.-G. Oyo State (1987) 2 NWLR (Pt.56) 197

Agbi v. Ogbeli (2006) 11 NWLR (Pt. 990) 65

Ajadi v. Ajibola (2004) 16 NWLR (Pt. 898) 91

Akalezi v. State (1993) 2 NWLR (Pt. 273) 1

Akinfosile v. Ijose (1960) SCNLR 447

Aniudi v. Eke (2004) 14 NWLR (Pt 892) 1

Amaechi v. INEC & Ors. SC/252/2007

ANPP v. Hanma (2003) 14 NWLR (Pt. 841) 546

Aondoakaa v. Ajo (1999) 5 NWLR (Pt. 602) 206

Aniho v. Aiyelern (1993) 3 NWLR (Pt. 280) 126

Atagnba & Co. v. Guru (Nig.) Ltd. (2005) 8 NWLR (Pt. 927) 429

Awolowo v. Shagari (1979) 6-9 SC 51

Awuru v Awuse (2004) All FWLR. (Pt. 211) 1429

Bakoshi v. Chief of Naval Staff (2004) 15 NWLR (Pt.896) 26
Bala v. Bankole (1986; 3 NWLR (Pt. 27) 141
Benson v. Onitiri (1960) SCNLR 177
ItinKiri v. Obasanjo (2005) 2 NWLR (Pt. 910) 241
Buhari v. Yusuf '(2003) 14 NWLR (Pt. 841) 446
C.C.B. (Nig.) Plc v. A.-G. Anainbra State (1992) 8 NWLR (Pt. 261)528
Chigbu v. Toninms (Nig.) Ltd. (1999) 3 NWLR (Pt. 593) 115
Chukwiima v. Anyakow (2006) All FWLR (Pt. 302) 121
Chukwuogor v. Clmkwuogor (2006) 7 NWLR (Pt. 979) 302
Dagaci of Dere v. Dagaci of Ebwa (2006) 7 NWLR (Pt.979)382
Daggash v. Bulama (2004) 14 NWLR (Pt. 892) 144
Edel v. Evo (1999) 6 NWLR (Pt. 605) 18
Egolitm v. Obasanjo (1999) 7 NWLR (Pt. 611) 355
Emegokwue v. Okadigbo (1973) 4 SC 113
Emcku v. Emodi (2004) 16 NWLR (Pt. 900) 433
Emesim v. Nwachnkwn (1999) 3 NWLR (Pt. 596) 590
Eseigbe v. Agholor (1993) 9 NWLR (Pt.316) 128
Ezike v. Ezeugwii (1992) 4 NWLR (Pt. 236) 462
F.R.N. v. Ifegwn (2003) 15 NWLR (Pt. 842) 113
Falae v. Obasanjo (No. 1) (1999) 4 NWLR (Pt. 599) 435
Falobi v. Ealobi (1916) 9-10 SC 1
Federal Mortgage Finance Ltd. v. Ekpo (2004) 2 NWLR (Pt 856)100
Garba v. University of Maiduguri (1986) 1 NWLR (Pt. 18) 550
Green v. Green (1987) 3 NWLR (Pt. 61) 480
Hiimmi v. Modibbo (2004) 16 NWLR (Pt 900) 487
Hashidn v. Goje (2003) 15 NWLR (Pt. 843) 352
Help (Nig.) Ltd. v. Silver Anchor (Nig.) Ltd. (2006) 5 NWLR (Pt. 972) 196
Ibrahim v. INEC (1999) 8 NWLR (Pt. 614) 334
Idika v. Ensi (198&) 2 NWLR (Pt.78) 563
Unite r. INEC (1999) 4 NWLR (Pt 599) 360
Ikeni v. Efamo (2001) 10 NWLR (P, 720) 1
Imire v. Salami (1989) 2 NLPLR 131
liuikojn v. Adcleke (2007) 4 NWLR (Pt. 1025) 423
INEC v. Ray (2004) 14 NWLR (Pt. 892) 92
INEC v. PDP (1999) 11 NWLR (Pt 626) 174
Lta v. Ekpeyoitg (2001) 1 NWLR (P. 695) 587
Kabo Air Ltd. v. INCO Beverages Ltd. (2003) 6 NWLR (Pt. 816)323
Kulgo v. Kalgo (1999) 6 NWLR (Pt. 608) 639
Kano N.A. v. Obiora (1959) SCNLR 577

KaUo v. C.Ii.N. (1991) 9 NWLR (Pt. 214) 126
Kudu v. Aliyit (1992) 3 NWLR (Pt. 231) 615
Labocle v. Otubu (2001) 7 NWLR (Pt. 712) 256
Lawal v. U.T.C. Pic. (2005) 13 NWLR (Pt 943) 601
Magnusson u Koiki (1993) 9 NWLR (Pt.317) 287
Metal Construction (W.A.) Ltd. v. Aboderin (1998) 8 NWLR (Pt 563)538
Musedikit v. Giwa (1956) WRNLR 61
N.B.C. Pk v. Ezeifo (2001) 12 NWLR (Pt. 726) 11
Na'baturc v. Mahuta (1992) 9 NWLR (Pt. 263) 85
National Investment & Properties Co. Ltd. v. Thompson Organisation (1969) 1 All NLR 138
NEC v. Iziogit (1993) 2 NWLR (Pt. 275) 270
Newbreed Organisation Ltd. v. Erhomosele (2006) 5 NWLR (Pt. 974) 499
Nnajofofor v. Ukomt (1985) 2 NWLR (Pt. 9) 686
Nuhii v. Ogele (2003) 18 NWLR (Pt. 852) 251
Nwabuokn v. Onih (1961) 2 SCNLR 232
Nwokoro v. Omtma (1990) 3 NWLR (Pt. 136) 22
Nwole v. Iwuagwu (2005) 16 NWLR (Pt. 952) 543
Obasanjo v. Yusitf (2004) 9 NWLR (Pt. 877) 144
Obasuyi v. Business Ventures Ltd.; (2000) 5 NWLR (Pt. 658) 668
Odiv. O.safile (1985) 1 NSCC (Vol.16) 14
Oduola v. Coker(1986) 5 SC 197
Ogunde.ru v. Adebayo (1999) 6 NWLR (Pt.608) 684
Okotie-Ehoh v. Manager (2004) 18 NWLR (Pt. 905) 242
Olagitnjin v. Yahaya (1998) 3 NWLR (Pt. 542) 501
Olarewaju v. Bc.migboye (1987) 3 NWLR (Pt. 60) 353
Olujinle r. Adeagbo (1988) 2 NWLR (Pt. 75) 238
Olukade v. Alade (1976) 1 All NLR (Pt. 1) 67
Orizu v. Anyaegbunam (1978) 5 SC 21
Orubii v. NEC (1988) 5 NWLR (Pt. 94) 323
Osakwe v. Gov. Imo State (1991) 5 NWLR (Pt. 191)318
Otapo v. Sunmonu (1987) 2 NWLR (Pt. 58) 587
Otuo v. Nteogwuile (1996) 4 NWLR (Pt 440) 56
Oviawe v. I.R.R (Nig.) Ltd. (1997) 3 NWLR (Pt. 492) 126
Oyegnn v. Igbinedion (1992) 2 NWLR (Pt. 226) 747
Ransome-Kuti v. A.-C. Federation (1985) 2 NWLR (Pt. 6) 211
Reynolds Construction Ltd. v. Reynolds Brezina Brown (1993) 6 NWLR (Pt. 297) 122
S.B.M. Services Ltd. v. Okon (2004) 9 NWLR (Pt.879) 529
Sudan v. Kadir (1956) SCNLR 93

Sofekitn v. Akinyemi (1981) 1 NCLR 135
Sosanya v. Onadeko (2000) 11 NWLR (Pt.677) 34
Swem v. Dzingwe (1966) 1 SCNLR 111
Thomas v. Ohtfosoye. (1986) 1 NWLR (Pt. 18) 669
Titkitr v. Government of Gongola State (1989) 4 NWLR (Pt. 117)517
U.B.N. PLC v. Sparkling Breweries Ltd. (2000) 15 NWLR (Pt. 689)200
Uku v. Okumagba (1974) 1 All NLR 475
University of Lagos v. Aigoro (1985) 1 NWLR (Pt. 1) 143
University of Lagos v. Olaniyan (1985) 1 NWLR (Pt. 1) 156
Uzodinma v. Udenwa (2004) 1 NWLR (Pt.854) 303

Foreign Cases Referred to in the Judgment:

Baker v. Ambrose (1896) 2 QB 372 *Bush v. Gore* (2000) 531 US 98 *Davies v. Lord Kensington* LR 9 CP 720 *Miller v. Min. of Pensions* (1947) 2 All E.R. 372 *R. v. Bishop of Oxford* (1879) 4 QBD 245 *Re Bagley* (1919) 1 KB 317 *U.A.C. v. Mac/by* (1962) AC 152 *Woodward v. Sarsons* (1875) LR 10 CP733 *Woolmington v. D.P.P.* (1935) AC 462

Nigerian Statutes Referred to in the Judgment:

Constitution of the Federal Republic of Nigeria, 1999, Ss. 36(1) & (5); 46(1); 134(1); 137(l)(i); 217, 239(l)(c) & (d), 248 and 285(3) Electoral Act, 2002 S. 132(2) Evidence Act Cap. 112, Laws of the Federation of Nigeria, 1990 Ss. 2(2), 74(l)(e) & (j), 83, 84, 85, 11, 112, 113(a)(iv), 109, 151, 138(1) & (2), 189(2) Election Tribunal and Court Practice Directions 2007, paras. 1(1) (a), 2 and 50 Oaths Act Cap 333 Laws of Federation of Nigeria, 1990, S. 4(1) Police Act, Cap. 359, Laws of the Federation of Nigeria, 1990 S.4 Notaries Public Act, Cap. 331, Laws of the Federation of Nigeria, 1990, Ss. 15, 19 First Schedule to Electoral Act, 2006 paras. 49(2); 47(1) High Court Law of Eastern Nigeria, 196.3 amended by the (High Court Amendment) Law of Imo State 1988 S. 26 Third Schedule of the Constitution of the Federal Republic of Nigeria, 1999, para. 15(e) Regulation 62(g) of the Western Region (Local Government) Election Regulation.
. Electoral Act, 2006 Ss. 10(1) & (5), 20, 21, 26, 27, 28(l)(h), 29(1) & (2), 31, 32,45(2), 46(b), 48,49(1), 63, 64(1) & (4), 74, 75, 161, 144(l)(a), (2), 146(1), 145(l)(d), 147 and 157

Nigerian Rules of Courts Referred to in the Judgment:

Court of Appeal Rules, 2002, O. 7 r. 7 Federal High Court (Civil Procedure) Rules, 2000, O.12, r. 3 and O. 26, r. 4(1) & (4) High Court of Abia State (Civil Procedure) Rules O. 43, r. 1

Books Referred to in the Judgment:

Black's Law Dictionary 6th Ed. Bowen on Res Judicata p. 85 para. 173 Bullen, Leake and Jacob's Precedents of Pleadings 12th Ed. p. 41 Civil Procedure in Nigeria 2nd Ed. Fidelis Nwadialo, SAN p. 381 Constitutional Democracy in Africa (Vol. 1) 2003 by Prof. Ben Nwanbueze pp. 246-247

Halsbury's Laws of England 4th Ed. Vol. 15 para. 158 p. 355; Malsbury's Laws of England 4th Ed. para. 31th) p. 229 Law and Practice of Documentary Evidence by Ike D. Uzop. 285 New Webster's Dictionary of the English Language

ELECTION PETITION:

These were consolidated election petitions challenging the declaration of Alhaji Umaru Musa Yar'adua as the President of, Nigeria in the election held on 21st April, 2007. The Court of Appeal, sitting as Presidential Election Petition Tribunal, dismissed both petitions.

Counsel:

Chief M. 1. Ahamba, SAN, (*with him*, Val. 1. Ikeonu, Esq., Joy Nunieh, Esq., Chike Nwosu, Esq., A. T. U. Ibinola, [Mrs.] and Uloma Emenyonu, Esq.) -*for Petitioners in EP/2/07* Prof. A. B. Kasunmu, SAN, (*with him*, Rickey Tarfa, SAN, Chief Emeka Ngige, SAN, Chief T. A. Ashaolu, SAN, Dr. M. Ladan, H. A. Nganjiwa, Dr. [Mrs.] Ego Ezuma, Esq. A. J. Owomkoko Esq., Gabriel Tsenyen Esc., Wole Iyamu, Esq., J.O Odubela, O. Jolaawo, Esq., Bamidele Aturu, Esq., Eestus Keyamo, Kolawole Olowookere Esq., Regina Okotie-Eboh [Miss], Joshua Aloba, Esq., Deborah Tarfa [Miss], Olufunmilayo Ampitan [Mrs.], H. Kwabe [Miss], Tunde Osadare, Esq., Yemi Pitan, Esq., Eseoghene Okodaso [Miss], 1. Zuofa [Miss], 1. Ngige, Esq., R. O. Rasaq, Esq. and

Osatohanmwun Akpata [Miss]) -*for Petitioners in EP/3/07* Kami Agabi, SAN, (*with him*, A. B. Mahmood, SAN, Amaechi Nwaiwu, SAN, Dr. Bello Eadile, Wole Adebayo, Esq., Efut Okon Esq., I. C. Acholonu, Esq., Daracoti Osawe, Egang Agabi Esq., John Ochogwu, Esq., and Mrs. O. M. Enebeli -*for the 1st and 2nd Respondents in EP/2/07 and for 4th - 805th Respondents in EP/3/07* Chief Wole Olanipekun, SAN, (*with him*, Yusuf Ali SAN, Dr. Alex A. Izinyon, SAN, D.D. Dodo, SAN, K.T. Turakia, SAN, Prof. E. Oditah, SAN, M. B. Adoke, SAN, A.M. Kayode, Esq., Gbenga Adeyemi, Esq., Ihua-Maduenyi Charles, Esq., S. A.Oke, Esc., Alex Akoja, Esq., Kenneth Omoruan, Esq., Hannatu Abdurrahman [Mrs.], Ronke Ifayefunmi [Miss], Paulyn Abiulimen Esq. , Jumbo Festus Esq., and E. Ameduj -*for the 5th and 6th Respondents in EP/2/07; and 1st and 2nd Respondents in EP/3/07* Chief J. K. Gadzama, SAN, (*with him*, R. O. Yusuf, C. I. Nwako, C. P. Oli, S. 1. Bamgbose [Mrs.] and O. O. Olusanya) -*for 3rd Respondent in EP/3/07*

Mrs. P. Ohabor (*with her*, Chris Erabor, Esq.) -*for 809th Respondent in EP/3/07* Lami Jibnn [Miss] -*for 810th Respondent in EP/3/07*

FABIYI, J.C.A. (Delivering the Leading Judgment): At the Presidential Election held in the country on the 21st April, 2007, the petitioner herein, General Muhammadu Buhari was the candidate of All Nigeria Peoples' Party (hereinafter referred to as ANPP). He contested the election along with the other candidates including the 1st petitioner in EPT/3, Alhaji Atiku Abubakar, who was the flag bearer of the Action Congress (simply referred to as AC), and the 5th respondent in the petition, Umaru Musa Yar'Adua, who was the flag bearer of the Peoples' Democratic Party (to be referred simply as POP).

At the end of the election, the 5th respondent, Umaru Musa Yar'Adua of the PDF was returned elected by the 2nd respondent who was the Chief Electoral Officer and Returning Officer of the said election, having scored a total number of twenty-four million, seven hundred and eighty four thousand and two hundred and twenty-seven (24,784,227) votes, as against six million, six hundred and seven thousand, four hundred (6,607,400) votes scored by the petitioner.

The 6th respondent, Dr. Jonathan Goodluck was the running mate of the 5th respondent. Chief Edwin Ume-Ezoke was the running mate of the petitioner, but later in the proceedings applied to withdraw from the petition on the ground of lack of interest and the court obliged him his request, and his name was accordingly struck out from the petition.

The petitioner is not satisfied with the return and declaration of the 5th respondent as the winner of the said election, and thus presented a 27 paragraph petition, dated and filed on the 22nd day of May, 2007. The petitioner prayed the court to nullify the election on the following grounds as contained in paragraph 8 of the petition:-

- "(a) the 5th respondent Umaru Musa Yar'Adua was at the. Time of the election not qualified to contest the election.
- (b) The election was invalid by reason of non-compliance with the provisions of the Electoral Act, 2006.
- (c) The election was invalid by reason on of corrupt practices."

The prayers of the petitioner in paragraph 25 of the petition are that it be determined as follows:-

- "a) The 5th respondent was at the time of the election not qualified to contest election for the post of the President of the Federal Republic of Nigeria and that his election
- b) The election of the 5th respondent is on account of (a) above also void.
- c) The Presidential elections of 21st April, 2007 are invalid for non-compliance with the provisions of the Electoral Act, 2006.
- d) The Presidential election of 21st April, 2007 is invalid by reason of corrupt practices that negate the spirit and principles of the Electoral Act, 2006.
- e) The 2nd, 3rd and 4th respondents committed acts and omissions which were corruptive of the electoral system and process in the conduct of the election."

The petitioner further prayed the court to grant the reliefs I pleaded in paragraph 27 of the petition as follows:-

- "i) That the 5th respondent was not qualified to contest the Presidential election of 21st April, 2007, consequent upon which his election together with the 6th respondent as President and

Vice-President respectively is void.

- ii) That the election to the office of President of the Federal Republic of Nigeria conducted on the 21st April, 2007 is invalid and therefore cancelled.
- iii) That the 3rd respondent is guilty of gross misconduct for, without any just or probable cause, involving the military in a purely civil matter, the conduct of election, contrary to the powers conferred on his office by section 217 of the Constitution of the Federal Republic of Nigeria.
- iv) That the 1st respondent conducts another election for the Office of the President of the Federal Republic of Nigeria between the remaining 22 (twenty-two) candidates within three (3) months.
- v) That the 2nd respondent in the person of Professor Maurice Iwu be disqualified from participation in the conduct of any future elections in the Federal Republic of Nigeria."

In compliance with the paragraph I(i)(a) of the Election Tribunal and Court Practice Directions 2007 (henceforth referred to as the Practice Directions, 2007), issued by the President of the Court of Appeal, the Hon. Justice Umaru Abdullahi, CON, in the exercise of his powers conferred by section 285(3) of the Constitution of the to the Electoral Act 2006, for the expeditious hearing of election petitions, the petitioner filed his petition with the list of his witnesses. Witnesses' depositions on oath and the list of exhibits to be tendered in the trial.

The 1st and 2nd respondents also in compliance with paragraph 2 of the Practice Directions 2007, filed their reply to the petition dated 23rd August, 2007 alone; with the list of their witnesses, and depositions of witnesses on oath and list of exhibits; so also the 4th respondent. The 5th and 6th respondents filed a joint reply dated 14th August, 2007 and front loaded their witnesses statement on oath.

A pre-trial conference was conducted as required by the Practice Directions 2007. During the pre-trial conference, the 2nd petitioner, Chief Edwin Ume-Ezoke, applied to have his name struck out from the petition as he was no more interested to pursue his petition. He was obliged his request: The 3rd respondent in the petition, Chief Olusegun Obasanjo had his name struck out from the petition upon objection by his counsel for misjoinder in the petition.

Trial in the petition commenced on the 23rd October, 2007 with the testimony of PW 1, Mr. Emmanuel Iwuamadi, who was the only witness who physically appeared before the court, adopted his written deposition and was cross-examined by counsel to the respondents. Thereafter, it was agreed, by counsel that written depositions of all witnesses be taken as adopted without the need for cross-examination or physical appearance of the witnesses before the court.

In line with the agreement of counsel, all documents pleaded in the petition, and the respective replies of the respondents were tendered from the Bar, admitted in evidence, and taken as read without prejudice to objections on admissibility respective opposing'; counsel could raise in their final addresses. This agreement was reduced into writing by the court and the recorded version accepted by all the parties.

The gravamen of the petitioners' complaint are as adumbrated in paragraphs 9B, 9B(i)(a), 9B(i)(b), 9B(i)(c), 9B(ii)(a), 9B(ii)(b), 9B(iii)(a), 9A(m)(b), 9B(iii)(c), 9B(iii)(d), 9B(iii)(e) 9B(iv),(a)(b)(c)(d) and (e), 9B(v) and 9B(vi), all touching on compliance with the provisions of the Electoral Act, 2006, more ;,f particularly sections 20, 21, 45(2), 48, 49(i), 63, 64 and 75 of the \$ Electoral Act, 2006. In paragraphs 9C (i), 9C (ii), 9C (iii), 9C (iv), 9C (v), 9C (vi), 9C (vii), 9C (viii) and 9C (ix) of the petition, the petitioner complains of acts of corrupt practices and abuse of executive power on the part of the 3rd and 4th respondents. In paragraph 9C(x)(a)(b)(c)(d) and (e), the petitioner complains of manifest bias on the part of the 1st and 2nd respondents in favour of the 6th respondent. With respect to acts of non-compliance and corrupt practices in flagrant breach of the provisions of the principles of the Electoral Act which he said applied to all States of the Federation, the petitioner mentioned particularly the following States; (1) Akwa Ibom, (2) Cross River, (3) Gombe, (4) Abia, (5) Jigawa, (6) Ebonyi, (7) Imo, (8) Anambra, (9) Osun, (10) Katsina and (11) Benue.

To establish the petition, the petitioner adopted and relied on the written depositions of his 19 witnesses. He also tendered before the court thousands of INEC documents in evidence. The documents tendered were carefully marked in the record of this court.

The 1st and 2nd respondents in their reply to the petition vehemently opposed the petition and relied on the written depositions of their 156 witnesses and a few exhibits tendered by them in evidence. The 4th respondent also denied the allegations contained in the petition in its reply to the petition. In their joint reply, the 5th & 6th respondents seriously opposed the petition and relied on the depositions of their 65 witnesses and a few exhibits, which were carefully marked in the record of the court.

In his address before the court, the learned senior counsel for the petitioner, Chief M. I. Ahamba, SAN formulated the following issues for determination of the petition:-

- "1) The 5th respondent was at the time of the election qualified to contest the election.
- 2) Whether there were acts of non-compliance with the provisions of the Electoral Act, 2006 in the conduct of the election which rendered or were capable of rendering the elections invalid.
- 3) Whether there were corrupt practices manifest in the conduct of election which rendered or were capable of rendering the election invalid.
- 4) Whether the petitioner is entitled to the reliefs sought in the petition.

The 1st and 2nd respondents in their joint address prepared by their lead counsel, Kanu Agabi, SAN the following issues for determination were formulated:

- 1) Whether the depositions of the petitioner's witnesses made before a Notary Public who is also counsel representing the petitioner in the proceedings are admissible to prove the petition and if not whether the remaining depositions are sufficient to sustain the petition.
- 2) Whether the 5th respondent was at the time of the election disqualified from contesting the Presidential election of 21st April, 2007.
- 3) Whether the 2nd respondent, Chief National Electoral , Commissioner (Professor Maurice Iwu) is a proper and necessary party within the contemplation of section 144(2) of the Electoral Act,

2006, and if not, whether the Tribunal has jurisdiction to grant the orders sought against him. Whether paragraphs 9B, 9B (i) (b), 9B(ii),9B(iii)g, 9b(iii)(h), 9B(iv)(a)(b)(c)(d) and (e), 9B(v), 9B(vi), 12(B)(c) 16(b)(i), 16(b)(iv), 16(b)(v), 16(b)(vi) and 16(c), which offends the rules of pleadings by pleading - inferences of Law without pleading the facts from which such inferences are to be drawn ought not to be struck out?

- 5) Whether the alleged corrupt practices or non-compliance with the provisions of the Electoral Act 2006 have been proven and if so whether they are substantial enough to affect the outcome of the election.
- 6) Whether the Presidential Election was conducted substantially in accordance with the principles and provisions of the Electoral Act 2006, and whether the alleged breaches affected the outcome of the election.

The 4th respondent, through his counsel, A. O. Mbamali (Mrs) formulated a lone issue that touches on the 4th respondent, the Inspector General of Police, for determination, namely:- ;

"Whether from the totality of evidence before this Honourable Court, the 4th defendant can be said to have conducted himself in any manner contrary to his constitutional powers and duties in the course of his participation in the 21st April, 2007 Presidential Election."

The 5th and 6th respondents through their lead counsel, Chief Wole Olanipekun, SAN, formulated the following issues for determination:

- "i) Whether or not this Honourable Tribunal can countenance the petitioners' witnesses statements deposed to before Val I. Ikeonu, Esq., a Notary Public who is one of the petitioner's counsel, and which said witness statements were purportedly deposed to on 17th May, 2007, while the petition itself was filed on the 22nd May, 2007.
- ii) Considering the fact that Chief Edwin Ume-Ezeoke the 2nd petitioner who was the running mate of the petitioner at the election has withdrawn from this petition, and expressed his disinterestedness in it on oath, coupled with the fact that the ANPP that-sponsored the petitioner withdrew its own petition, stating on oath that it is no longer interested in challenging the return of the 5th respondent, whether or not the entire petition has not become academic, cognizance being taken of the reliefs sought by the petitioner,
- iii) Whether the 5th respondent was qualified to contest the election at the time of the election.
- iv) Whether the petitioner has proved the various acts of non-compliance, malpractices and corruption pleaded in his petition.
- v) Even if the answer to (iv) *supra* is in the affirmative, can the election of the respondents be invalidated for such reasons bearing in mind the clear provisions of section 146 of the Electoral Act, 2006.
- vi) Are the petitioner's reliefs in paragraph 27 of the petition grantable within the context and provisions of the Electoral Act, 2006?"

At the hearing of the petition on the 5th February, 2008, learned counsel for the respective parties

adopted and relied on their written addresses already filed before the court. Learned counsel for the 1st and 2nd respondents, Kami Agabi, SAN, adopted and relied on written address filed by them dated 27/12/2007, and filed on the same day, their reply address dated and filed on the 28/1/2008 on behalf of the 1st and 2nd respondents. Substantiating further, he submitted that the petition is unsupported by evidence. It is also his view that of the 36 States and Federal Capital Territory, the petitioners only filed depositions in respect of five states, namely Katsina, Abia, Imo, Plateau and Rivers States. He submitted that 12 of these depositions are in respect of Imo State, one each for Katsina, Plateau and Rivers States. There is no evidence in respect of Abia State and the other 31 States and the FCT. He urged the court to dismiss the petition on that basis.

Learned counsel further submitted that the depositions in respect of the States that are challenged do not raise any issue of substance and not only that, the depositions are inadmissible because they are sworn before a counsel to the petitioner. Learned counsel also submitted that, if the Court upheld the submission of learned counsel for the petitioner that the Practice Directions is unconstitutional, that means the petition must be dismissed because it violated due process. He submitted also that the petitioner cannot rely on section 85 of the Evidence Act, as there is no such application before the court to accept the defective depositions or to re-swear the incompetent depositions.

Learned counsel further submitted that the petitioner challenge election of 11 States in the petition, Akwa Ibom, Cross River, Gombe, Abia, Jigawa, Ebonyi, Ibadan, Anambra, Osun, Katsina and Benue States. It is submitted that the other States are not condemned and even if the 11 States are condemned the court will still uphold the election. He submitted that the general averment made in paragraph 22 of the petition condemning other States in general is a vague averment and the 1st and 2nd respondents denied same. On the issue of irregularities, learned counsel submitted that apart from the fact that same have not been proved, same have not been attributed to the 5th and 6th respondents, and it had not been shown how it affected the outcome of the election referring to section 146 of the Electoral Act where the law provides for substantial compliance and not a perfect compliance.

Learned counsel also submitted that the petitioner tendered more than 30,000 documents that show that the election was comprehensively documented and he urged the court to disregard the almost 600-page address as it is an attempt to use the address as evidence and to also discountenance all the fresh facts in the address as they are not pleaded.

It is also the view of learned counsel that if the ballot is valid in State A or B, then it is also valid for State C and D. He urged the court to dismiss the petition.

The 5th and 6th respondents through their lead counsel, Chief Wole Olanipekun, SAN, adopted and relied on their written address dated 24/12/2007 and filed on the 27/12/2007, and the reply address dated 25/01/2008, and filed on the same day. Learned counsel submitted that the petitioner challenged only the elections in 4 States by witness depositions, as almost all the witnesses are from Imo State challenging elections in other States of the Federation, and that there is no single agent of the petitioners that witnessed all the corrupt practices and irregularities complained in the petition. He

referred to the case of *Hashidu v. Goje*. (2003) 15 NWLR (Pt. 843) 352, and submitted that an election of this nature cannot be voided on hearsay evidence. Learned counsel further submitted that all the allegations in the petition border on commission of crime which the learned counsel for the petitioner agreed, and submitted that the doctrine of severance of pleadings cannot apply since all the allegations hinge on commission of crime which requires proof beyond reasonable doubt and the learned counsel had not severed them.

Learned counsel referred to the issue of disqualification of the 5th respondent and referred to the case of *Action Congress v. INEC* (2007) 12 NWLR (Pt. 1048) 220 where the Supreme Court 'considered the issue, and the case of *Anxieclii v. INEC*, and submitted that the issue of indictment is not a matter of course. He also submitted that exhibit EP2/34 which is supposed to be a public Document, is not certified as required under section 111 of the evidence Act.

Learned, counsel urged the court to take judicial notice under on 74 of the Evidence Act that the 5th am 6th respondents 'ere Governors of their respective States in Kalsina and Bayelsa. is submitted that the petitioner has totally abandoned his pleadings id went on a voyage, and the court was urged to dismiss the petition. P. Ohabor Esq. for the 4th respondent adopted and relied, on ie4th respondent's address dated 11/01/2008, and filed on the same day. Learned counsel referred to the duties of the Police as contained under section 4 of the Police Act and submitted that the Police are only doing their duty on the Election Day. That the allegations against the Police have not been proven in any way, and the 4th respondent cannot be held vicariously liable for the act of the Police Officers. The learned counsel for the petitioner, M. I. Ahamba, SAN adopted and relied on the petitioner's written address dated 17/01/2008 and filed on 18/01/2008. Learned counsel submitted that they did not attack the elections in only 11 States. He referred to paragraph 7 of the petition at page 3, paragraph 9B (iv) at page 10 and paragraph 22 at page 41, and submitted that the States mentioned are just examples.

On the Practice Directions, learned counsel submitted that they did not attack the Practice Directions, but only urged the court t observe its limitations.

Learned counsel also submitted that the main issue in the petition is whether the results declared on 23/04/2007 were arbitrarily assigned to the parties or candidates or arose from election conducted in accordance with the principles of the Electoral Act. He urged the court to look at all the certified 1NEC documents tendered in evidence and apply the doctrine of severance of pleadings, and to discountenance all criminal allegations in the petition, that is, the issue of violence, malpractices, ballot box snatching and stuffing same, as abandoned, save the claim dealing with non-compliance with the provisions of the Electoral Act including arbitrary allocation of votes at all levels. Learned counsel relied on the case of *Chnkwiimci v. Anyakoro* (2006) All FWLR (Pt. 302) 121 at 141.

On the depositions of witnesses, learned counsel referred to section 84 of the Evidence Act, and urged the court to use the defective affidavit. That the issue of witnesses depositions did no arise at the hearing and that the respondents are now estopped from raising any objection to the depositions of witnesses.

Learned counsel further submitted that it is non-compliance where final results manifest inconsistency with 28 States of the Federation and inconsistencies with Forms EC8As with each State

having two result sheets and where some voters' registers are inconsistent with the Electoral Act, and where results were dated 31/04/2007 which does not exist in the calendar.

On the Abia State Government White Paper, learned counsel submitted that this court has no jurisdiction to enquire into it. He also submitted that under section 113(a) of the Evidence Act, a Government White Paper does not require certification. Learned counsel urged the court to nullify the election.

Before going into the issues for determination, let us comment on the preliminary issue that reared its head from the address of the petitioner's counsel. Chief M. 1. Ahamba, SAN, at the onset of his submission questioned the source of authority of the President of the Court of Appeal to issue Practice Directions 2007. That in view of the respondents' heavy reliance on the Practice Directions, the determination of the validity of the Practice Directions becomes relevant. It is the view of the learned senior counsel that the Practice Directions 2007, as it relates to election petitions proceedings in the Tribunals and the Court of Appeal in its first instance jurisdiction in election petition proceedings is invalid, the same being ultra vires, the powers of the President of the Court of Appeal to make Practice Directions.

It is also his view that the authority of the President of the Court of Appeal to make rules regulating the Practice and Procedure of the Court of Appeal is as contained in section 248 of the Constitution of the Federal Republic of Nigeria 1999 limits the powers of the President of the Court of Appeal to make the Practice Directions. He referred to Order 7, rule 7, of the Court of Appeal Rules 2002. It is further submitted by the learned senior counsel that apart from section 248 of the Constitution and Order 7, rule 7 of the Court of Appeal Rules, there is no other provision under the Constitution or the Electoral Act and its Schedules empowering the President of the Court of Appeal to make Practice Directions or Rules relating to procedure under the First Schedule to the Act which are Rules for the prosecution and defense of an election petition, and the Federal High Court Civil Procedure Rules pursuant to paragraph 50 of the First Schedule to the Electoral Act.

Counsel further submitted that there is no provision under section 285(3) of the Constitution empowering the President of the Court of Appeal to issue Practice Directions or any Rules for the trial of election petitions at first instance support of this submission, learned counsel referred to the following cases; *Ilamiui v. Modihbo* ;004) 14 NWLR (Pt 900) 487 at 535; *University of Lagos v. Aigoro* (1984) NSCC Vol. 15, 745 at 782, (1985) 1 NWLR (Pt. 1) 143; *Falobi v. Falobi* (1976) 9-10 SC 1 at 13. Learned counsel urged not to give any legal efficacy to the provisions of the Practice Directions 2007, save the Practice Directions Amendment which contains actions on appeal from the Tribunal to the Court of Appeal. The above notwithstanding, learned counsel has submitted that this court lacks the competence to set aside the Practice Directions under section 239 of the Constitution.

In their response to this submission, the 1st and 2nd respondents through their counsel, Kami Agabi, SAN, submitted that the

contention of the petitioner is akin to making a mountain out of a molehill, or at best, beating about the bush. It is his view that the powers of the President of the Court of Appeal to make Practice Directions are statutorily embedded in the Court of Appeal Rules and are constitutionally implied and

permissible. It is also the view of the learned senior counsel that the effect of the Practice Directions when subjected to community reading with other Statutes and the Rules of the court does not go to the validity of the Practice Directions as same cannot by virtue of the existence of other statutory provisions or enactments be said to be invalid, null and void.

It is also his view that the courts have readily achieved a balance by applying the provisions of the Practice Directions not by invalidating the Practice Directions, but by construing same as part of the Rules of Court, citing for support also the cases of Haruna v. Modibbo (supra); University of Lagos v. Aigoro (supra) and Falobi v. Falobi (supra); all cited by the learned senior counsel for the petitioner. K, Agabi, SAN, urged the court to disregard the contention of the petitioner that the Practice Directions is invalid, null and void and to proceed to apply same as an integral part of the Rules of this court.

The 4th respondent, the Inspector General of Police, did not respond to the challenge on the constitutionality or validity of the Court's Practice Directions. The 5th and 6th respondents, now 4th and 5th respondents in response through their counsel, Chief Wole. Olanipekun, SAN are of the view that section 285 of the 1999 Constitution read together with section 248 empowers the President of the Court of Appeal to make Rules and Regulations for the Practice and Procedure to be followed in Election Petition cases.

On the sanctity and force of the Rules of Court, learned counsel referred to the following cases; Chukwuogorv. Chukwuogor (2007) All FVCLR (Pt. 349) 1154 at 1167, (2006) 7 NWLR (Pt. 979) 302 Haruna v. Modibbo (2004) 16 NWLR (Pt. 900) 487 at 591; and Awurn v. Awu.se (2004) All FVCLR. (Pt. 211) 1429 at 1439-40 Learned senior counsel urged the court to disregard the submission of the learned counsel for the petitioner and hold that the Court's Practice Directions 2007 is extant and accordingly applied by the court.

It is indeed strange that it is at the address stage that the petitioner's counsel is questioning the validity or constitutionality of the Practice Direction issued by the President of the Court of Appeal in the exercise of his powers conferred by section 285(3) of the Constitution of the Federal Republic of Nigeria, 1999. The I petitioner has since the inception of his petition relied on, applied and made substantial use of the provisions of the Practice Directions without raising any objection. The same duty and obligations that ensures to the petitioner tinder the Practice Directions is the same that ensures to the respondents. One therefore wonders that it is at this stage that the petitioner, after taking full advantage of all the provisions of the Practice Directions, that is now crying foul that the Practice Directions has no constitutional backing. If this submission by the petitioner is sustained, then it goes without saying that the petition itself has no foundation or platform on which it can be based. U.A.C. v. Macfoy (1962) ACT 152.

The combined reading of sections 248 and 285(3) of the Constitution empowers the President of the Court of Appeal to make Rules and Regulations for the Practice and Procedure to be followed by the Court of Appeal, not only in its appellate jurisdiction, while hearing appeals, but also in the exercise of its original jurisdiction under section 239 of the Constitution.

The Practice Directions stand as a guide to the proceedings before the court just as the Rules of the Court. This Court, in the case oU-Iantna v. Modibbo (2004) 16 NWLR (Pt. 900) 487 at 591 settled

the point relating to the powers of the President of the Court of Appeal to issue the Practice Directions wherein the Court held that:-

"The power or the authority of the President of the Court of Appeal to issue Practice Directions is derived from the Constitution of the Federal Republic of Nigeria."

The Practice Directions has a constitutional flavour. It is not ultra vires the powers of the President of the Court of Appeal. The

Practice Directions constitute a rule for the guidance and regulation of election petition proceedings as established by the Constitution,

and it must be obeyed strictly as they constitute condition precedent to the presentation and maintenance of an election petition. The panel

hearing this petition was constituted pursuant to the powers conferred on the President of the Court of Appeal under section 285 of the

1999 Constitution. The power of the President of the Court of Appeal to set up the various Election Petitions Tribunals is derived from the

1999 Constitution, and in as much the same way he does make Rules for the conduct of cases or proceedings before the Election Tribunals. See sections -248 and 285 of the Constitution.

The powers of the President of the Court of Appeal under sections 284 and 285 of the Constitution is not limited to the Practice and Procedure of the Court of Appeal in its appellate jurisdiction, it does extend to the power to issue Practice Directions not only in the appellate jurisdiction of the Court of Appeal, but also in its original jurisdiction under section 239 of the Constitution. The petitioners' counsel submitted that this court lacks the competence to set aside the Practice Directions. It then follows that the argument is entirely misconceived and same is hereby discountenanced. Both the 1st and 2nd respondents and the 5th and 6th respondents made an issue of the petitioner's witnesses' depositions. They formulated as their first issue for determination, whether the depositions of the petitioner's witnesses made before a Notary Public who is also counsel representing the petitioner in the proceedings are admissible to prove the petition and if not, whether the remaining depositions are sufficient to sustain the petition.

Though the issues are differently formulated, they in effect mean the same thing. It is our view that it is apposite to consider this issue before going to the petitioner's issues for determination as adopted for determination by the court.

It is submitted by the lead counsel for the 1st and 2nd respondents, K. Agabi, SAN that the petitioner in an attempt to establish his case as required of him to do so by law accompanied his petition with 21 witnesses' depositions. He submitted that the positions of these 21 witnesses, but one, were sworn before Valentine I. Ikeonu, one of the legal practitioners for the petitioner on whose behalf the said depositions were offered. He submitted that the 20 witnesses' statements, the petitioner relies to support his case were signed and stamped: Office of the Notary Public, Val. I. Ikeonu, Esq., 7 Kodesoh Street, Ikeja, Lagos.

He submitted that this violates section 83 of the Evidence Act.-' We were also urged to look at our record and take judicial notice of , the fact that Val. I. Ikeonu of counsel for the petitioner had severally' appeared with the lead counsel, M.I. Ahamba, SAN, in the prosecution of this petition.

Learned counsel also referred to the proceedings of this court on the 23rd October, 2007, where PW1 -

Emmanuel Iwuamadi-identified Val Ikeonu, as the person before whom he deposed to his affidavits and the learned counsel stood up to be identified. It is further submitted that the 20 witnesses' statements are irrelevant and therefore inadmissible and liable to be struck out, thereby rendering the petition deficient of material facts to support the grounds and petitioners' prayer .

Counsel also further submitted that the lone evidence of Bernard Nimfa Banfa of Langtang town, Langtang Local Government Area of Plateau State, whose deposition was sworn before the Court of Appeal, Abuja does not contain sufficient facts to sustain the grounds and prayers of the petitioners relying on the case of *Uiodiiuna v. Udenwa* (2004) 1 NWLR (Pt.854) 303 at 345. He also submitted that the witness, Bernard Nimfa Banta merely alluded to what he saw in just one polling station of about 1,892 votes and the facts therein touching and concerning Plateau State whose elections was not challenged by the petitioner. Learned counsel urged the court to expunge the inadmissible witness depositions citing in support the following cases; *U.B.N. PLC v. Sparkling Breweries Ltd.* (2000) 15 NWLR (Pt. 689) 200 at 212; *Kabo Air Ltd. v. INCO Beverages Ltd.* (2003) 6 NWLR (Pt. 816) 323 at 339; *Agbi v. Ogbeh* (2006) II NWER (Pt. 990) 65 at 119; *Dagaci of Dere v. Dagaci of Ebwa* (2006) 7 NWLR (Pt.979) 382 at 427; and *Ohtkade v. Alade* (1976) 1 All NLR (Pt. 1) 67.

Learned counsel also submitted that if the 20 witnesses' depositions were expunged from the record, the petition is thus rendered incompetent as having not been accompanied by witness statements and the pleadings not being supported by evidence, all the allegations, grounds and prayers of the petitioner come to nothing. In support of his submission, learned counsel referred to the following authorities; *Agbi v. Ogbe (supra)* at 132-133; *Olarewajit v. Bamigboye* (1987) 3 NWLR (Pt. 60) 353; *Alliaji Bala v. Mrs. Bankole* (1986) 3 NWLR (Pt. 27) 141; and *Magnusson v. Koiki* (1993) 9 NWLR (Pt.317) 287. The court was urged to expunge from the records, the 20 witnesses' statements filed in violation of the law.

On their part, the 5th and 6th respondents submitted that a statement can only be made on oath before a Commissioner of Oaths and by virtue of the Oaths Act or before a Notary Public under and by virtue of the Notaries Public Act Cap 331, LFN, 1990. Learned counsel also referred to the evidence of PW 1, Emmanuel Iwuamadi, wherein he identified Val. I. Ikeonu in court as the counsel before whom he took the oath to him. It is also submitted that the counsel had deposed to so many affidavits before the court on behalf of the petitioner.

The court was urged to take judicial notice of its own proceedings and also make use of its own processes citing the cases of *S.B.M. Sen-ices Ltd. v. Okon* (2004) 9 NWLR (Pt.879) 529 at 556; and *Daggash r. Bulaimi* (2004) 14 NWLR (Pt. 892) 144 at 233. I was invited by the learned senior counsel to take judicial notice of the seals of Notaries Public in Nigeria under section 74(1)(e) of the Evidence Act, the names, members and officers of the court under section 74(1)(j), and all legal practitioners enrolled to practice law as Barristers and Solicitors of the Supreme Court of Nigeria, and to also look at each of the depositions of witnesses in support of the petition and note that each one of them was notarized by Val. I. Ikeonu except the deposition of Bernard Nimfa Banfa.

The learned counsel referred to section 83 of the Evidence Act, section 19 of the Notaries Public Act, Cap. 331 LFN 1990 and section 15 thereof, that every Notary Public shall be deemed to be an officer of the court. Learned counsel submitted that the combined effect of section 83 of the Evidence Act, and

section 19 of the Notaries Public Act is that a Notary Public is forbidden from attesting to any affidavit in respect of any proceeding or matter in which he is interested. It is submitted that the word "shall" used in both enactments, means what is to be done thereat is mandatory and what is prohibited is absolute. He cited in support of the proposition the case of *Bakoshi v. Chief of Naral Staff (2004) 15 NWLR (Pt.896) 268 at 291*; Halsbury's Laws of England (4th Edition) Paragraph 319 at page 229; wherein the authors opined that a Commissioner for Oaths or Solicitor must not administer any oath or take any affidavit in any proceedings in which he is solicitor to any party to the proceedings, or clerk to any such Solicitor, or in which he is interested.

It is submitted that "proceedings" as used in the Oaths Act is not confined to litigious proceedings alone, relying on the case of *Re-Barley (1911) 1 KB 317 (CA)*; *Raker v. Ambrose (1896) 2 QB 372*; and Law and Practice of Documentary Evidence By Ike D. Uzo, particularly at page 285, to the effect that no affidavit deposed to before a solicitor to the proceedings who is acting as a Notary Public shall be admissible in evidence. Learned counsel further submitted that what happened are not irregularities, but fundamental breaches of the law which render the entire depositions invalid. It is also further submitted that the remaining depositions cannot sustain the petition as the cause of action cannot be sustained, referring to the cases of *Arubo v. Aiyelent (1993) 3 NWLR (Pt. 280) 126 at 146*; *Eseigbe v. Agholor (1993) 9 NWLR (Pt.316) 128 at 152*. On the non-payment of filing fees, learned counsel referred to the cases of *Emeka v. Emodi (2004) 16 NWLR (Pt. 900) 433*; and *Emesim v. Nwachukwit (1999) 3 NWLR (Pt. 596) 590.1* was urged to resolve this issue in favour of the respondents.

In his response to this important issue, the petitioner, through his counsel, M. I. Ahamba, SAN, conceded that by the provisions of section 83 of the Evidence Act, the court is enjoined not to admit an affidavit which is proved to have been sworn before a person on whose behalf the same is offered, or before his legal practitioner, or before a partner or clerk of his legal practice. However, he submitted that this means an affidavit sought to be tendered as exhibit and not a deposition, which is written testimony in lieu of oral testimony, which is open to cross-examination.

Learned counsel referred to the definition of the word "proved" under section 2(2) of the Evidence Act and submitted that only facts in issue are subject to proof in a proceedings. That the matter must be made an issue for determination before a court may decide to admit or not to admit such an affidavit evidence as an exhibit which a deposition is not. On the interpretation of Statutes, learned counsel referred to the following cases; *Oviawe v. I.R.P. (Nig.) Ltd. (1997) 3 NWLR (Pt. 492) 126*; *A.-G., Kano State v. A.-G., Federation (2007) 6NWLR(Pt. 1029) 164*.

Counsel submitted that the issue of swearing of the depositions is not an issue for determination before the court. He submitted that a court has no competence to adjudicate on an issue not brought before it by the parties, citing in support the cases of *Orizu v Anyuegbunani (1978) NSCC VOL. U, 20*; and *Idika v. Erlsi (1988) 2NWLR (Pt.78) 563*. Learned counsel submitted that the issue, not having arisen from the pleadings, the issue having been elicited for the first time from cross-examination, is irrelevant.

Learned counsel made reference to section 189(2) of the Evidence Act, and submitted that relevant

facts are pleaded facts citing the cases of *Chigbu v. Tonimas (Nig.) Ltd.* (1999) 3 NWLR (Pt. 593) 115 at 144; *ha v. Ekpeyong* (2001) 1 NWLR (Pt. 695) 587 at 614; and *Otno v. Nteogwitile* (1996) 4 NWLR (Pt 440) 56 at 72, and submitted that whatever facts that were elicited from Emmanuel Iwuamadi, under cross examination on the unpleaded issue before whom the depositions were sworn is illegal evidence and cannot be applied by this court as proof to determine the issue at stake.

Learned counsel referred to section 83 of the Evidence Act and submitted that the section is not absolute, given the discretionary provisions in sections 84 and 85 of the Evidence Act. It is his view that the provisions of sections 84 and 85 of the Act has whittled the peremptoriness of section 83 and that the word "shall" may be interpreted as "may". Learned counsel also submitted that this court is functus officio on the issue of depositions, same having been adopted by the court, and the 5th and 6th respondents are estopped from raising the issue by section 151 of the Evidence Act. He also referred to the case of *Nnajofofor v. Ukonu* (1985) 2 NWLR (Pt. 9) 686 at 706.

He therefore, submitted that by paragraph 49(2) of the First Schedule to the Electoral Act, the application to discountenance petitioner's witnesses statement is belated not having been brought within a reasonable time and after the respondents have taken steps in the proceedings. The following cases were referred to; *Opubu v. IN EC* (1988) 5 NWLR (pt 94) 323 at 367; and *Egolnni v. Obasanjo* (1999) 7 NWLR (Pt. 611) 355 at 387. It is also submitted that this court has no competence to allow what the respondents are seeking as they did not only file their reply after service of the petition but raised preliminary issues which did not include this point. The court was urged to resolve this issue in the affirmative and against the respondents.

I shall first dispose of the objection taken by the 5th and 6th respondents and maintain this petition on the competence of the petition to file and maintain this petition alone is statutory and is to be joined upon the withdrawal of the 2nd petitioner, his running mate, Chief Edwin Ume-Ezoke, the answer is simple. The petitioner's right to institute section 144(I)(a) of the Electoral Act, 2006, which states that an election petition may be presented by one or more of the following persons:

- a. A candidate in an action.

The petitioner is admitted by the 5th and 6th respondents to have been a candidate at the 21st April, 2007 Presidential Election. His right to file an election petition must be distinguished from his ability to prove the petition. The objection is misconceived and it is hereby dismissed. The petitioner accompanied his petition with the written depositions of 19 witnesses and not 21 witnesses as submitted by the learned counsel for the 1st and 2nd respondents as required by the Practice Directions. The witnesses are

1. Salihijo Sa'ad Tahir
2. General Muhammad Buhari
3. Umar Abdu Dankama
4. Sampson Amuchonu
5. Muhammadu Kabir Yakubu
6. Mike Achugamonu

7. Nze Alex Ohanwe
8. Ebere Ihekoronye
9. Adaugo Obi
10. Opara Paul C.
11. OfoegbuA. J.
12. Bernard Nimfa Banfa
13. Philip Onyenali
14. Obasi Thaddeus
15. Colman Okafor
16. Emmanuel Iwuamadi
17. Rev. Emmanuel Epere
18. Ezeji Ignatius Nwaji
19. Yimbe Jos Nunieh

It is a fact before the court that all the witnesses' depositions, but Bernard Nimfa's were taken before Val. I. Ikeonu, Esq., Notary Public. The said Val. I. Ikeonu, Esq. has consistently appeared before us as one of the counsel to the petitioner, up to the time we took final addresses. It is also clear to us from the oral testimony of PW1, Emmanuel Iwuamadi that at the time these depositions were taken, Val. I. Ikeonu, Esq., had already been employed by the petitioner. Also on record before us, are several affidavits sworn to by Val. I. Ikeonu in his capacity as petitioner's counsel. The respondents have now challenged the legality of these depositions on the ground that the depositions were not taken before a person authorized to do so by law.

Section 83 of the Evidence Act, provides as follows:

"An affidavit shall not be admitted which is proved to have been sworn before a person on whose behalf the same is offered, or before his legal practitioner, or before a partner or clerk of his legal practitioner."

The provision is clear and unambiguous and appears to me that the word "shall" is clearly mandatory. These depositions made in favour of the petitioner, General Muhammadu Buhari. Mr Ikeonu is no doubt a Notary Public, but he is a legal practitioner representing General Muhammadu Buhari in this petition. He is therefore precluded from taking depositions which are in fact affidavit evidence in this petition.

Also section 19 of the Notaries Public Act, Cap. 331 LFN 1990 provides as follows:

"No Notary shall exercise any of his powers as a notary in any proceedings or matter in which he is interested.

The combined effect of these two provisions is that Val. I. Ikeonu being a petitioner's counsel lacked the competence to notarise any document used in the petition.

The petitioner's counsel, M. I. Ahamba, SAN, had argued that the objection to the admissibility of these depositions ought to have been taken before they were admitted, and having not objected at the material time, the respondents have waived their right to object to the documents and they cannot be heard to object to it after the documents have been admitted. These documents were admitted by the

court based on clear agreement by the parties that all documentary and material exhibits shall be admitted subject to the right of the opposing parties to raise objections to the admission at a later stage. The petitioner cannot, at this stage, resile from this agreement. More importantly, where a court erroneously admits a patently inadmissible evidence, the court can at any stage of the proceedings, expunge the inadmissible evidence from its record. See U.B.N. Plc v. Sparkling Breweries Ltd. (2000) 15 NWLR (Pt. 698) 200 at 213; Kabo Air v. Inco Ltd. (2003) 6 NWLR (Pt. 816) 323 at 339; Agbi v. Ogbe (2006) 11 NWLR (Pt. 990) 65 at 119; and Dagaci of Dere v. Dagaci of Ebwa (2006) 7 NWLR (Pt. 979) 382.

Learned counsel for the petitioner had urged the court to invoke the provisions of sections 84 and 85 of the Evidence Act to remedy whatever defect in the depositions, that the provisions of sections 84 and 85 of the Act have whittled down the preemptoriness of section 83 of the Evidence Act. It was submitted by the respondents that the provisions of section 84 and 85 would not avail the petitioner in the circumstances of this case. Sections 84 and 85 of the Evidence Act provide as follows:

"84. The court may permit an affidavit to be used, notwithstanding it is defective in form according to this Act, if the court is satisfied that it has been sworn before a person duly authorized.

85. A defective or erroneous affidavit may be amended and re-sworn by leave of the court on such terms as to time, costs or otherwise as seem reasonable. "(The italics is for emphasis)

The above provisions are not all saving provisions. It is clear from the provisions that they are intended to save only affidavits that are defective "in form" and not those that are defective in substance. In the instant case, the court is satisfied that the depositions were not sworn before a person duly authorized to administer oath in the circumstance.

In order to rely on section 85, there has to be an application for leave, and no such leave was obtained by the petitioner to accept the defective depositions or to re-swear them. Consequently, all the depositions made before Val. I. Ikeonu of counsel and Notary Public are inadmissible in evidence and they are hereby expunged from the record of this court. This does not affect the deposition of Bernard Nimfa Banfa whose deposition was not made before Val. I. Ikeonu, of counsel for the petitioner, but before a Commissioner for Oath in the Court of Appeal Registry in Abuja; the oral testimony of Emmanuel Iwuamadi who testified as PW1 and the material evidence tendered from the Bar.

I have carefully considered the issues as presented by all respective counsel before us for determination, and we are of the view that the issues as presented by the learned counsel for the petitioner, M. I. Ahamba, SAN, are more apt and encapsulate all the points raised by the petitioner in the determination of the petition. Issues raised by the respondents not considered by the petitioner were subsumed into the issues formulated by the petitioner where necessary.

The issues as formulated by the petitioner are:

1. Whether the 5th respondent was at the time of the election qualified to contest the election.

Arguing this issue, M. I. Ahamba, SAN. referred to section 137(1)(i) of the 1999 Constitution and

submitted that the ingredients I required to be established from the section are three:

- i) that the person was indicted for fraud or embezzlement;
- ii) that the indictment was by a Judicial Commission of Inquiry; an Administrative Commission of Inquiry or a Tribunal of Inquiry set up by a Federal or State government;
- iii) The instituting authority accepted the indictment by any of the three bodies above.

Learned counsel submitted that the three ingredients in section 137(l)(i) are present in exhibit EP2/34, the White Paper published by the Government of Abia State as pleaded in paragraph 9(2)(i) at page 10 of the exhibit EP2/34, where he was included in the list of those indicted by the Administrative Commission of Inquiry for Fraud and that Abia State is one of the States of the Federation of Nigeria listed in Part I of the 1st Schedule to the Constitution and therefore competent to set up an administrative panel of inquiry. It is also submitted that the Government of Abia State accepted the indictment by Administrative Commission of Inquiry at page 11 of exhibit EP2/ 34.

In the response to the traverse of the respondents on this issue, learned counsel posed the question whether this court exercising its jurisdiction under section 239(1) of the Constitution, has the competence to inquire into the validity or otherwise of the White Paper containing the indictment, or the body that indicted the 5th respondent (exhibit EP2/34) or the competence of the instituting authority which he submitted is not a party to the case.

Learned counsel submitted that this court had no competence to engage in a judicial review of an administrative act of a body set up by a competent authority that, that role has been specifically assigned to the High Court of Abia State under section 26 of the High Court Law of Eastern Nigeria 1963, as applicable to Abia State, as amended by the High Court law (Amendment) Law 1988, of Imo State, and Order 43, rule 1 of the High Court of Abia State (Civil Procedure) Rules.

It is his view that the original jurisdiction of the court under section 239(l)(c) and (d) cannot be expanded by judicial pronouncement to include judicial review of administrative acts of the Government or any other authority for that matter. He cited in support the following authorities; *Nuhu v. Ogele* (2003) 12 SCNJ 158 at 174, (2003) 18 NWLR (Pt. 852) 251; *A-G., Kano State v. A- G., Federation* (2007) All FWLR (Pi. 364) 238 at 258, (2007) 6 NWLR(Pt. 1020) 164; *Tukur v. government of Gongola State* (1989) 4 NWLR (Pt. 117) 517 at 561; *Yusuf v. Obasanjo* (2004) 9 NWLR (Pt. 877) 144 at 183

He submitted that a forum for a complaint about breach of the right of fair hearing is as provided under section 46(1) of the Constitution. It is submitted by the learned senior counsel that the issue of fair hearing under section 36(1) of the Constitution or the allegation of ultra vires act against the Government of Abia raised by the respondents that the appropriate forum of complaint is the High Court of Abia State or the Federal High Court sitting in Abia State, and that this court cannot assume jurisdiction suo motu or at all to adjudicate on a subject matter expressly consigned to other court by the Constitution and other laws.

It is the view of learned counsel that, to hold otherwise, would amount to over-ruling the Supreme Court's decision in *Yusuf v. Obasanjo* (supra) citing in support the case of *University of Lagos v. Olaniyan* (1985) 1 NWLR (Pt. 1) 156 at 167. Learned counsel urged the court to apply exhibit EP2/34 since it is

legally valid and subsisting having not been quashed by any competent court prior to the election and to hold that the 5th respondent was at the time of the election not qualified to contest the election for the office of President of the Federal Republic of Nigeria.

On the part of the 1st and 2nd respondents, it is submitted by their counsel, Agabi, SAN, that the disqualification in section 137(1) of the Constitution clearly involves a deprivation of right and a presumption of guilt of embezzlement or fraud in derogation of the safe guards in section 36(1) and (5) of the 1999 Constitution. It is submitted that trial and conviction by court is the only constitutionally permitted way to prove guilt. That the imposition of the penalty of disqualification for embezzlement or fraud solely on the basis of indictment for those offences by a Commission of Inquiry or an Administrative Panel of Enquiry implies a presumption of guilt, contrary to section 36(5) of the Constitution, whereas, convictions for offences and imposition of penalties and punishment are matters appertaining exclusively to judicial powers, citing in support the following cases: Sofekun v. Akinyemi (1981) 1 NCLR 135; Garba v. University of Maiduguri (1986) 1 NWLR (Pt. 18) 550; Action Congress v. INEC (2007) 12 NWLR (Pt. 1048) 222; and Hon. Rotimi Chibuike Auuiechi v. INFC & Ors. SC/252/2007 (unreported), decided by the Supreme Court of Nigeria on 25/10/2007.

He submitted that even though the setting of the commission of inquiry by the Government of Abia State is an executive act, the commission of inquiry is an administrative body and not a court of law or a judicial body. On the doctrine of separation of powers, the learned counsel referred to the book - Constitutional Democracy in Africa, Vo. 1, first published in 2003 at pages 246-247, by Professor Ben Nwanbueze, and also at page 247, and submitted that the 5th respondent having not been tried and convicted by a court of law cannot be guilty of embezzlement or fraud, and he cannot on that, basis be said to be disqualified from election to the office of the President.

He further submitted that the 5th respondent was not notified of the proceedings nor was he given any opportunity of being heard in accordance with the provisions of section 36(1) of the Constitution of the Federal Republic of Nigeria. He further submitted that the decision of the Government of Abia, was unconstitutional, null, void and did not operate to clear the 5th respondent from contesting the said election. The cases of Mallam Sadau of Kubya v. Abdulkadir of Fagge (1956) 1 FSC 39 at 41, (1956) SCNLR 93; Kano Native Authority v. Raphael Obiora (1959) 4 FSC 226 at 230, (1959) SCNLR 577; and NEC v. Izuogu (1993) 2 NWLR (Pt. 275) 270 per Sulu-Gamban, JCA at 295.

Learned counsel finally submitted that the 5th respondent was not given a fair hearing by the commission of inquiry, as he was not invited before the Commission of Inquiry, and that any report issued purportedly indicting him, must be in gross violation of section 36 of the Constitution. The court is urged to so hold.

In their response, the 5th and 6th respondents, through their counsel, Chief Wole Olanipekun, SAN, first attacked the legality or competence of exhibit EP2/34, the White Paper from Abia State Government commission of inquiry indicting the 5th respondent for embezzlement and fraud and submitted that the document, exhibit EP2/34 is a public document under, and by virtue of sections 111, 112 and 113 of the Evidence Act, which must be duly certified before being admitted in evidence. It is submitted that a "White Paper falls within the meaning and definition of public document under section

109 of the Evidence Act, citing in support the case of *dagassh v. Bulimia* (2004) 14 NWLR (Pt. 892) 144

The learned senior counsel invited the court to take judicial notice of the fact that the 5th and 6th respondents have never been public officers in Abia State, especially within the period the said White Paper covers, as they were respectively the Governors of Katsina and Bayelsa State, and also of the fact that the White Paper has been set aside by a competent court of law in Abia State. It is therefore submitted, that the said White Paper does not meet the constitutional requirement under section 137(l)(i) of the Constitution to act as a disqualifying instrument against any of the respondents, for the reasons that, it is not gazetted as required by law, and that it has also been established that respondents were not afforded any hearing before they were purportedly indicted. He cited in support the following cases: *Adaum v. Gwadubawa* (1999) 3 NWLR (Pt. 594) 256; *Okotie-Eboh v. Manager* (2004) 18 NWLR (Pt. 905) 242.

It is further submitted that for an indictment to constitute a bar to contesting for the office of the president, the indictment must have been pronounced upon by the Judiciary or a court of law validly constituted, relying on the authority of *Action Congress v. INEC* (2007) 12 NWLR (Pt. 1048) 220 at 259-260. I was urged to resolve this issue against the petitioner.

The 4th and 6th respondents have argued that exhibit EP2/34, Government of Abia State White Paper having not been certified is inadmissible in evidence.

It is not in doubt that exhibit EP2/34 is a public document pursuant to section 109 of the Evidence Act. While it may be proved by section 112 of the Evidence Act by the production of certified true copy thereof, the document being a Government White Paper supported to have been printed by the order of the Government of Abia State does not need certification in order to prove its contents by virtue of section 113(a) (iv) of the Evidence of Act. This document exhibit EP2/34 purporting to be a Government White Paper from Abia State Government is admissible in evidence.

The principal question to be determined in this issue is whether from the contents of exhibit EP2/34, it can be determined that the 4th respondent was not qualified to contest election to the office of the President of the Federal Republic of Nigeria. Exhibit EP2/34 purports to have indicted the 5th respondent by the said White Paper "are having done their jobs contrary to the laws, rules, principles and regulations." The petitioner has argued that pursuant to the provisions of section 137(l)(i) of the Constitution of the Federal Republic of Nigeria, having been indicted by exhibit EP2/34, the 5th and 6th respondents were disqualified from holding public office, and (therefore did not qualify to contest for the Presidential election in 2007. This provision of our Constitution has been interpreted by our courts especially the Supreme Court in the cases of *Action Congress v. INEC* (2007) 12 NWLR (Pt. 1048) 220; and *Hon. Rotimi Chibuike Amaechi v. INEC & Ors. SC/252/2007* (unreported), decided by the Supreme Court of Nigeria on 25/10/2007. In *Action Congress v. INEC* (supra), Musdapher, JSC said at page 266 that:

"The indictment of embezzlement against a person to deprive him of the right granted by section 131 of the Constitution to contest or vie for the pose to the President of the Republic is a very serious matter and the issue can only be pronounced upon by he judicial branch. Such serious issues are riddled with complex 01 questions of law and facts which are by the

provisions of the Constitution in the exclusive preserve of the judiciary, no executive body should have the power or the competence to unravel such serious and far reaching complex issues without a proper recourse to the proper judicial process."

In *Amaechi v. INEC* (supra), the Supreme Court per Oguntade, JSC, held at page 38 thus:

"It is simply impermissible under a civilized system of law to find a person guilty of a criminal offence without first affording him opportunity of a trial before a court of law in the country. See also Article 7(1)(a) of the African Charter on Human Right Cap 10. Laws of the Federation. The court below would appear not to have paid heed or attention to the reasoning of the court in *Action Congress & Anor. v. INEC* (supra) in coming to the conclusion that Amaechi was indicted. Indeed, Amaechi needed not have asked his supposed indictment to be set aside by Kuewumi since the same was not in any case cognizable under the law. No court of law ought to pay any iota of regard to such alleged indictment."

Even if these judgments were not so, could exhibit EP2/34 realty be said to constitute an indictment for fraud and embezzlement as required by section 137 (l) (i) of the Constitution? The so-called indictment is at page 10 of the White Paper, and it reads as follows:

"that the following persons herein under listed who were found to have done their jobs contrary to the laws, rules, principles and regulations be reprimanded, indicted and punished accordingly to the relevant laws."

And thereafter, was listed the names of the 5th and 6th respondents. Nowhere *ex facie* in the White Paper was it stated that s the 5th and 6th respondents were indicted for fraud and embezzlement as required by section 137(l) (i) of the Constitution to disqualify the 5th and 6th respondents.

From the foregoing, the issue of disqualification is of no moment and it is resolved in favour of the respondents.

Issue 2, is whether there were acts of non-compliance with the provisions of the Electoral Act, 2006 in the conduct of the election which rendered or were capable of rendering the election invalid.

M. I. Ahamba, SAN for the petitioner, before going into the main issue for determination, submitted what he termed as the state of the law on non-compliance with the sections of the Act, the Schedule thereto and the manual and guidelines made pursuant to sections 74 and 161 of the Act, all amounted to non-compliance with the provisions of the Act. He cited the case of *University of Lagos v. Aigoro* (supra) at pages 755-756.

Learned counsel referred to paragraph 9B(i)(a)-(c), failure to conduct the election with an authentic register of voters contrary to section 20 and 21 of the Act, failure to use ballot papers printed in booklets with serial numbers contrary to section 45(2) of the Act -see paragraph 9B(ii)(a)(b) of the petition.

Failure to comply with the scheduled date and time for the election contrary to sections 48, 49(1) and 63 of the Act and the provisions of the manual - See paragraph 9B(iii)(a)-(i) of the petition. Failure to comply, with the procedure for voting and collation provided in sections 64(1)-(4) and 75 of the Act, and the manual for Electoral officials - See paragraph 9B (iv)(a)-(e), and the failure to administer the oath of neutrality contrary to sections 29 (1) and (2) of the Act as contained in paragraph 9B(iv) of the

petition.

Learned counsel thereafter submitted that the nine sections which the 1st and 2nd respondents failed to comply with were fundamental provisions designed by the law makers to safeguard the principles of the Electoral Act in the conduct of the election. Learned counsel referred to the following cases; *Swem v. Dzungwe* (1966) NMLR 297 at 303, (1966) 1 SCNLR 111; *Ezike v. Ezeugwu* (1992)4NWLR (Pt.236) 462 at 473; and *Buhari v. Obasanjo* (2005) 2 NWLR (Pt.910) 241 at 370.

Learned counsel referred to section 146(1) of the Electoral Act. The section has two expressions that are dominant. These are:-

1. That the election was conducted substantially in accordance with the principles of this Act; and
2. That the non-compliance did not affect substantially the result of the election.

He submitted that under section 146(1) of the Act, there is no provision requiring the Tribunal or Court to consider whether a non-compliance with the provisions of the Electoral Act was substantial or not before such non-compliance could invalidate the election. It is his view that what should be considered is whether the conduct of the election was in accord with the principles of the Electoral Act, and whether non-compliance did not substantially affect the result of the election.

On what amounts to the principles of the Electoral Act, learned counsel referred to the following authorities of; *Imiere v. Salami* (1989) 2 NEPLR 131 at 159; *Na'bature v. Malnita* (1992) 9 NWLR (Pt. 263) 85 at 104. On the expression that, "and that the non-compliance did not affect substantially the result of the election", learned counsel referred to the case of *Ezike v. Ezeugwu* (1992) 4 NWLR (Pt. 236) 462 at 473. Learned counsel also referred to the Halsbury's Laws of England, page 355, Vol. 15 in Paragraph 158; and the case of *Morgan v. Simpson* (1975) 1 QB 151.

Arguing this issue, learned counsel submitted that the 1st and 2nd respondents directly traversed the averments in paragraphs 10 and 11 of their joint reply and asserted that everything alleged in the petition not to have been done was actually done and in accordance with the law. He submitted that the traverse by the 1st and 2nd respondents in their reply did not include any specific traverse of the specific allegations of fact and that the 2nd respondent publicly stated that Local Government Council election could not be held after the general elections for the reason of non-existence of a valid voters' register.

Learned counsel then went on to produce a chart, Chart No.1 captioned, "Irregular Voters Register", with names, states and comments made by the learned counsel at pages 25-29 of his address. The States therein are five, namely, Nasarawa, Kwara, Rivers, Imo and Taraba, and submitted that the chart tilt the balance of the imaginary scale of justice decidedly in favour of the petitioner as all the exhibits referred in the chart are certified by the 1st respondent. He further submitted that conducting the election with an invalid voters register is an illegality that would vitiate the election without recourse to whether the result was affected as there would be no valid result to be considered. He cited the cases of *INEC v. Ray* (2004) 14 NWLR (Pt. 892) 92 at 123; *Nwokoro v. Onuma* (1990) 3 NWLR (Pt. 136) 22 at 32. Counsel submitted that the election was without voters registers and was invalid as the voters register is the foundation upon which an election rest, and the court was urged on that ground to nullify the election.

On non-compliance with section 45(2) of the Electoral Act, i.e. that the election was conducted with ballot papers which had no serial numbers and which were not printed in booklets, learned counsel submitted that the use of the word "shall" in the section is mandatory, which connotes that the election must be conducted with ballot papers with the serial numbers and produced in booklets. On the interpretation of the word "shall", he relied on the following cases; Achineku v. Ishagba (1988) 4 NWLR (Pt. 89) 411 at 420; Katto v. C.B.N. (1991) 9 NWLR (Pt. 214) 126 at 147. He submitted that the provision of section 45(2) of the Act was designed to provide the materials for audit trail of the ballot papers. In this submission, learned counsel also referred to section 161 of the Act and section 74.

In order to provide for transparency and to provide the necessary audit trail for the movement and use of the ballot papers on Election Day, learned counsel referred to exhibit EP 2/A1 at page 10, and submitted that where the forms 25 and 40 series are not filled as provided, no ballot papers were delivered to such polling units. He further submitted that without the serial numbers, there is no way the quantity of ballot paper supplied can be ascertained, and that majority of the States did not put Forms EC 25 and EC 40 into use, because there was no delivery of ballot papers at the polling booths.

Learned counsel finally submitted that the petitioner has proved the allegation in paragraph 9B(ii) of the petition on balance of probabilities and the court is urged to nullify the election, that if the illegal ballot papers are expunged from the process, there would be no single vote left as cast at the election.

On non-compliance with the sections 48, 49(1) and 63 of the Electoral Act, as pleaded in paragraph 9B(iii)(a)-(i) of the petition, learned counsel submitted that the 2nd respondent has no competence under the Constitution and the Electoral Act or the manual exhibit EP 2/A1 to change or adjust the already published time for polls in the election. That the 2nd respondent by the provisions of the Electoral Act, section 28(i)(h) and the manual does not have the power to adjust the election time schedule. It is thus submitted that when the 1st and 2nd respondents pleaded in paragraph 21 of their reply that the 2nd respondents directed that polls open at 10.00 a.m. and close at 5.00 p.m., they were pleading to an ultra vires conduct.

On the delayed arrival of polling materials which 1st and 2nd -respondents conceded that the delay was caused by minor adjustments here and there in paragraphs 19 and 21 of their reply, learned counsel for the petitioner submitted that the onus shifted to the 1st and 2nd respondents to prove that what they admitted did not substantially affect the result, particularly as they conceded that it could not affect the result.

He submitted that the 1st and 2nd respondents did not discharge this onus, and the court is enjoined to nullify the election on the authority of Swem v. Dzungwe (1966) NMLR 297 at 303, (1966) 1 SCNLR 111; where the Supreme Court quoted with approval, the dictum of LORD Coleridge, C.J., in Woodward v. Sarsons (1875) LR 10CP733. It is submitted that the 1st and 2nd respondents cannot be heard to argue that lateness in the commencement of polls was not capable of affecting the result of the election.

Learned counsel submitted that they complained of non-compliance with section 64(1) - (4), section 75 of the Electoral Act, and paragraphs of the Manual for Electoral Officials (exhibit EP2/ A1) in paragraph 9B(iv)(a) - (e) of the petition. He submitted that while section 74 of the Act provide for step

by step recording of poll in the electoral forms, section 75 provides for the recording of result into the forms and to be signed and countersigned by the relevant "officers and polling agents at those levels, and copies given to the Police Officers, and the polling agents where available.

Counsel submitted that the results of the April 21, 2007 Presidential Election were collated and announced in a manner that was so inconsistent with the provisions of section 75 of the Act and exhibit EP2/A1 as to amount to substantial non-compliance that rendered the entire exercise illegal, void and of no legal consequence whatsoever. He referred to the case of C.C.B. (Nig.) Plc v. A.-G. Anambra State (1992) 8 NWLR (Pt. 261) 528 at 556.

He submitted that the mandatoriness of section 75 of the Act is express, and that any result purporting to be a collated result from a Ward (EC SB), Local Government (EC 8C), State (EC 8D) and National (EC 8DA) and (EC 8E) collation centre, but which does not have any of these mandatory features of being stamped, signed and countersigned was conclusively not produced in a normal electoral process at the relevant collation centres, and is therefore void and of no electoral value citing C.C.B. (NIG.) Plc v. A.-G. Anambra State (supra). Learned counsel also referred to S. 46(B) of the Electoral Act, and submitted that it is for the respondents to show that the act or thing done in spite of the failure of other officials or agents or their non-attendance, was otherwise done properly.

Learned counsel submitted that the collation exercise at the National level was inconclusive, and there are two collated results at the National level namely EP2/B2 and EP2/B3 and submitted that these results apart from being inconsistent between two, also manifest inconsistencies between both EC8D (A) s and the States results forms ECSDs, and also between EC8D (A) s and the EC8E. He also submitted that there are inconsistencies in the state result with Form EC8E.

Learned counsel went on to name States where the entries in the two EC8D(A)s are mutually in conflict on number of registered voters, with the total number of votes cast, and on the total number of rejected votes, (page 44, paragraph 5.02D(vi)). Learned counsel also went on to highlight some inconsistencies in EP2/B2, and EP2/ B3 at paragraph 5.02D (vii) at page 45 of the address and also paragraph 5.02D (viii) at page 46 of his address.

Learned counsel then made a graphical presentation of all the inconsistencies explained in the address at page 46a of his address and produced a chart No. 3 where all the final scores of the political parties are presented, both the electronic and the manual and submitted that neither exhibit EP2/B2 and EP2/B3 is of any legal efficacy, not having been produced in accordance with the provisions of the law and the overwhelming inconsistencies between the statements in the two results and the inconclusiveness of the collation exercise. Learned counsel cited and relied on the following cases; Olujinle K Adeagbo (1988) 2 NWLR (Pt. 75) 238 at 254-255; Nwabuoku v. Ottih (1961) 1 ALL NLR 487, (1961) 2 SCNLR 232; Aomloakaa v. Ajo (1999) 5 NWLR (Pt. 602) 206 at 225; INEC v. Ray (2004) 14 NWLR (Pt. 892) 92 at 123; and A-G., Oyo State v. Fairlake Hotels (No.2)(1989) 5 NWLR (Pt. 121) 255 at 283. Counsel submitted that both exhibits EP2/B2 and EP2/B3 are fundamentally defective and thus illegal and the court is urged to so hold.

Learned counsel also submitted that in the absence of any valid EC8D (A) on record, there was nothing upon which the form EC8E could stand; exhibit EP2/B I would naturally collapse as something

which is put on nothing cannot stand, citing *Macfoy vs. U.A.C* (1962) AC 152.

Learned counsel in Chart 4 at pages 53 to 56 of his address made an analysis of the entries in the EC8E and the ECSDs from the States and submitted that the entries made in form EC8E must be expunged as being arbitrary, and that same will amount to substantial disenfranchisement enough to nullify the election.

On non-compliance with section 29(1) and (2) of the Electoral Act, learned counsel submitted that in paragraph 9B(v) of the petition, the petitioner complained that the 1st respondent failed to administer the Oath of neutrality to all its officers thus, they were left without moral inhibition from evil and unfair conduct. That the 1st and 2nd respondents having denied the averment in the petition, failed to produce before the court a copy of the affirmation or oath, it is thus submitted that the 1st and 2nd respondents are deemed to have admitted following cases are cited; *Olujinle r. Adeagbo* (supra); *'Osakwe v. Gov. Imo State* (1991) 5 NWLR (Ft. 191) 318 and A.-G.; *Oyo State v. Fairlake Hotels* (NO.2) (1989) 5 NWLR (Pt. 121) 255 at 283.

Petitioner's lead counsel submitted that the petitioner has established that there was absolute non-compliance with section 29(1) and (2) of the Act. It is submitted as a result of this, the 1st respondent through its agents returned favourable results for the 5th and 6th respondents, for example in Taraba, Katsina, Kaduna, Benue, Imo, Abia and Nasarawa States. It is thus submitted that manifestation of bias in the conduct of an election is an act of non-compliance with the provisions of the Act, and thus capable of vitiating an election under section 146(1) of the Electoral Act.

He submitted that bias once established vitiates any process even if the result would have been the same if there was no bias citing the case of *Adigun v. A.G. Oyo State* (1987) 2 NWLR (Pi.563) 197. The court was urged to nullify the election on that ground.

Learned lead counsel for the 1st and 2nd respondents, K. Agabi, SAN, challenged the competence of paragraphs 9B, 9B(i)(b), 9B(ii), 9B(iii)(a), 9B(iii)(b), 9B(iii)(c), 9B(iii)(d), 9B(iii)(f), 9B(iii)(g), 9B(iii)(h), 9B(i v)(a)(b)(c)(d) and (e), 9B(v), 9B(vi), 12(B)C, 16(b)(i), 16(b)(iv), 16(b)(v) 16(b)(vi) and 16(c) of the petitioner's petition which he submitted, offends the rules of pleadings by pleading inferences of law without pleading the facts from which such inferences are to be drawn and whether same ought not to be struck out.

Learned counsel highlighted all the above paragraphs of the petition and submitted that the pleadings in respect of all the allegations of non-compliance with The provisions of the Electoral Act fall short of the requirement of the rules of pleadings. Learned counsel submitted that paragraph 9B of the petition which ought to set out the facts in support of the grounds challenging the election for "non-compliance", consist of general complaints bereft of specific facts, speculative assertions and legal arguments and conclusions. With respect to paragraph 9B (i) (b) of the petition, it is submitted that the pleadings is at best speculative, and argument on it is bereft of any specific facts. It is also submitted that the petitioner ought to plead the specific facts which, if proven will enable the court to draw such inference or conclusion.

In respect of paragraph 9B (iii) of the petition, it is submitted that it is an argument with no specific facts in relation to the irregular times or the several parts of the country. It is also submitted

that paragraph 9B (iii) (g) of the petition is at best speculative. Paragraph 9B (iii) (h), it is submitted is argumentative.

He submitted that it is elementary that the rules of pleadings are mandatory as it allows for the just and effectual determination of a suit or a claim based on disputed facts. It is his view that a pleading of intention or motive of a defendant bereft of the facts upon which the inference of such intention or motive could be drawn is bad and ought to be discountenanced. Paragraph B of the petition, it is submitted, fails to fulfill the purpose of pleading and cited and relied on the following cases; *Sosanya v. Onadeko* (2000) 11 NWLR (Pt.677) 34 at 55 - 56; *Abacha v. Fawehinmi* (2000) 6 NWLR (Pt 660) 228 at 306; *Buhari v. Obasanjo* (2006) 2 EPR 295 at 431-432; (2005) 13 NWLR (Pt.941) 1; and *Emegokwe v. Okadigbo* (1973) 4 SC 113. Counsel submitted that the petitioners in their pleadings have not set out any facts on which their case is supposedly based, but the paragraphs of the pleadings reek of legal arguments, conclusions, inferences and submissions, rather than material facts founding their claims and the Court is urged to strike out the aforementioned paragraphs of the petition which offend the law on pleadings.

Learned lead counsel to the petitioner, M. I. Ahamba, SAN, in response to this issue submitted that none of the paragraphs named under this issue offends any known rule of pleading. In respect of paragraphs 9B (ii) (b) of the petition, he submitted that evidence exists not on a satellite station, but a satellite LGA in exhibit EP2/8B (9) under Taraba State. That the LGA called Special Area does not exist in the list of LGAs in Taraba State under Part I of the First Schedule of the 1999 Constitution. He referred to Form EC8C.

He also submitted that the paragraph is not bereft of any facts as' all the facts alleged have been proved concerning conduct of election at irregular times and which facts have been admitted by the 1st and 2nd respondents in paragraph 20 of their reply. Learned counsel also submitted that the allegation of rigging elections has been proved with result sheets, some of which bear dates that are pre-election date like 20/4/2007 and other post election dates like 22, 23, 24, 26, and 27 and even 31/04/07.

In respect of the other paragraphs, learned counsel referred to all the documents admitted in the proceedings, and submitted that this goes to prove all the allegations in the pleadings and is not in any way speculative. The court is urged to resolve the issue of the 1st and 2nd respondents in the negative and against the 1st and 2nd respondents.

Order 26; rule 4(1) of the Rules of the Federal High Court provides:

1. Every pleading shall contain a statement in a summary form of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which they are to be proved, and shall when necessary, be divided into paragraphs and numbered consecutively.
2. The facts shall be alleged positively, precisely and distinctly, and as briefly as is consistent with a clear statement.

It is trite that the main function of pleading is to focus with much certainty, as far as possible, the various matters actually in dispute between the parties without the pleading of evidence. Therefore, both

the courts and the parties are bound by the facts pleaded whilst the facts unpleaded go to no issue. Thus pleadings allow for the just and effectual determination of a suit or claim based on disputed facts. See *Sosanya v. Onadeko* (2000) 11 NWLR (Pt 677) 34 at 55-56.

It is clear from the above stated paragraphs that the petitioners have not fully set out facts on which their case is supposedly based, particularly paragraphs 9B, 9B(i)(b), 9B(iii)(g) and 9B(iii)(h). What the petitioner did was to plead legal results, arguments, conclusions, inferences and submissions rather than material facts founding their claim. See *Abacha K. Fawehinmi* (2000) 6 NWLR (Pt. 660) 228 at 306. However, in the circumstances, what the court will do is to expunge these aspects of the pleadings in the above stated paragraphs and allow the rest to stand. The said stated paragraphs cannot therefore be discountenanced as submitted by the 1st and 2nd respondents' counsel.

For the 1st and 2nd respondents, it is a total denial of allegations of non-compliance by the petitioner in paragraphs 10-27 of their reply to the petition. They posit that the election of 21st April, 2007 was conducted in substantial compliance with the Electoral Act. They denied that the election was conducted without a voters register. They denied that ballot papers were invalid or that adjustment in polling times due to late arrival of polling materials in some polling stations affected the outcome of the elections. It is also denied that polling materials were deliberately delayed to favour the 5th and 6th respondents and the respondents did not deliver result sheets or that they refused to count or collate results. They also deny the fact that the electoral officers did not swear to oath of neutrality, or that they were biased towards any candidate or political party.

In his submission, learned counsel for the 1st and 2nd respondents, Kanu Agabi, SAN referred to section 146 of the Electoral Act, and submitted that the petitioners' address citing the cases of *University of Lagos v. Aigoro* (supra); *Swen v. Dzungwe* (supra); *Buhari v. Obasanjo* (2005) 2 NWLR (Pt. 910) 241 at 370; *Imiere v. Salami* (1989) NEPLR 131 at 159; *Na'bature v. Mahuta* (1992) 9 NWLR (Pt. 263) 85 at 104; *Ezike v. Ezeugwu* (1992) 4 NWLR (Pt. 236) 462 at 472; and *Morgan v. Simpson* (1975) QB 157 is to suggest that in construing the provisions of section 146(1) of the Electoral Act, the Court should not consider whether a non-compliance with the provisions of the Electoral Act was substantial or not in deciding whether to invalidate or uphold the election.

Learned counsel urged the court to reject this submission. He submitted that the principle of the Electoral Act is that of substantiality rather than of perfection. It is his view that to say that an election was conducted substantially in accordance with the principle of the Electoral Act should mean no more than any proved non compliance with the provisions of the Electoral Act in the conduct of the election is not substantial.

On non-compliance with section 20 and 21 of the Electoral Act, learned counsel submitted that there is nothing more specific in the allegations of the petitioner than as traversed and denied in the respondents' reply. He submitted that nothing has been established by the petitioner to suggest that it is now the duty of the 1st and 2nd respondents to prove that the allegation of the petitioner is untrue. He argued that there is no evidence before the court or referred to in the address of the petitioner proving the allegations.

He submitted that there is no admission by the 1st and 2nd respondents of any fact in issue and

none of exhibit EP2/33/F57 from Nasarawa State, exhibit EP2/18h (32) from Kwara State and exhibit EP2/8E (81) from Taraba State is relevant as a proof of the allegations in paragraph 9B (i) (a) (c) of the petition asserting non-display of the voters' register, creation of satellite polling booths, postponements of LGA elections.

Counsel further submitted that Chart No. 1 at page 25 of the petitioners' address apart from being an unsubstantial, if not insignificant allegation of imperfection of the Voters Register, is irrelevant to the allegations in paragraph 9B(i)(a)-(c) of the petition. It is also submitted that the case of *IN EC v. Ray* (2004) 14 NWLR (Pt 892) 92; and *Nwokoro v. Oniuna* (1993) 3 NWLR (Pt 136) 22 decided no law supportive of the contention of the petitions. He submitted that imperfections in a number of wards in 5 States out of 36, cannot invalidate the entire voters register so as to invalidate the franchise of the tens of millions of validly registered voters in all the 36 States and the FCT including the majority of wards in the 5 states alleged, as shown in exhibit EP2/1NEC 1-35 tendered by the 1st and 2nd respondents. That section 146(2) of the Electoral Act forbids that.

On the allegation of non-compliance with section 45(2) of the Electoral Act, Agabi, SAN for the 1st and 2nd respondents submitted that the absence of serialization of the ballot papers does not invalidate same, when the evidence before the court is to the effect that not only were the ballot papers bound in serialized booklets, but were also rigorously trailed, audited and returned as in exhibits EP 2/A1, and all the forms EC 25, EC 40C, EC 40D and EC 40E, to ensure that the number of votes cast did not exceed the number of ballot papers duly issued.

Counsel also submitted that there is no evidence led by the petitioner to prove that the rigorous audit of the serialized bundles did not take place or that there was any misuse of the ballot papers or loss of audit trail. He further submitted that the ballot paper used were substantially in compliance with the principles of the Electoral Act and that the impossibility of serialization was due to having only a few days to print fresh ballot papers to include the candidate of Action Congress on the orders of the Supreme Court, and to also comply with the constitutional time for the conduct of the election.

On non-compliance with sections 48, 49(i) and 63 of the Electoral Act, learned counsel submitted that the 2nd respondent being the Chief Executive Officer of the 1st respondent as its Chairman, and the Chief Electoral Commissioner, has the vires to communicate a directive or decision of the 2nd respondent with apparent authority and which authority has not been disclaimed by the 1st respondent. Learned counsel submitted, that, it is the duty of the petitioner to allege and show by evidence how the late arrival of voting material was prejudicial to the petitioner or disenfranchised a substantial number of voters before the onus could shift to the respondents to prove that it was not substantial enough to affect the result of the election.

He submitted that the issue of late arrival of voting materials is a common ground between the petitioner and the 1st and 2nd respondents, but that the respondents have denied the late arrival of voting materials to have any practical or substantial effect on the result of the election because every voter willing to vote was allowed to do so by means of an extension of the hours of voting to accommodate all which was not denied by the Petitioner. Counsel submitted that it is not the decision of the court in *Ezike v. Ezeugwu* (supra); *Swen v. Dzungwe* (supra), or *Buhari v. Obasanjo* (supra), the late

arrival of voting materials simplicities would warrant automatic nullification of the election. He submitted that adjustment in the election timetable publicly announced cannot be regarded as a late commencement of voting to amount to non-compliance with any section of the Electoral Act.

On non-compliance with sections 64(1)-(4), 75 of the Electoral Act, and paragraphs of the Manual for Electoral Officers, exhibit EP2/A1, Kanu Agabi, SAN, submitted that the argument is not founded on the pleadings of the petitioner in his petition, and there is no evidence led to show that the results collated did not arise from actual votes cast at the polling units which were collated upwards to be announced by the 2nd respondent. That the cases of *Nwokoro v. Onuma (supra)*; *C.C.B. (NIG) Plc, vs. A.-G., Anambra State (supra)* are not relevant in the absence of any positive evidence of illegality.

He submitted only one result was announced and there was no evidence showing any illegality in the result announced and that non-signing or mis-signing would not vitiate an otherwise valid result. Counsel submitted that it is not for the 2nd respondent personally to depose to any statement to show that the collation of the result was conclusive, but that the evidence of any person present at the collation was enough with the presence of documents showing conclusive collations. Counsel submitted that the cases of *Nwaboku v. Ottih (1961) 1 All NLR 487, (1961) 2 SCNLR 232*; *Osakwe v. Gov. Imo State (1991) 5 NWLR (Pt. 191) 339*; *Aondoakaa v. Ajo (1999) 5 NWLR (Pt 602) 206 at 255*; and *INEC v. Ray (supra)* were wrongly invoked by the petitioner and do not apply to the present case.

Learned counsel urged the court to disregard Chart No. 4 at page 53 of the petitioners' address, same being incorrect and inconsistent with the pleading and not arising from evidence before the court. On non-compliance with section 29(1) and (2) of the Electoral Act, counsel submitted that the petitioner who asserted that the oath was not administered did not make any effort to establish that oath was not administered. It is submitted that administration of oath being an official act to be done by the 2nd respondent is presumed to have been done until the contrary is proved.

In his own response, learned lead counsel for the 5th and 6th respondents, Chief Wole Olanipekun, SAN, submitted on the issue of "non-compliance with section 29(1) and (2) of the Electoral Act that there was nothing sacrosanct about this provision, more so that there is no penalty or punishment if the provision was not complied with. learned counsel submitted that the position of law in respect of oath of neutrality by staff of INEC under section 18 of the Electoral Act, 2002, which is impart material with section 29 of the Electoral Act, 2006 is as posited by Uwais, CJN, (retired) in *Buhari v. Obasanjo (2005) 13 NWLR (Pt. 941) 1 at 137*, and submitted that the contention of the petitioner on this issue is non sequitur and must be discountenanced.

On non-compliance with sections 45, 48, 49(i) and 63 of the Electoral Act, Chief Olanipekun, SAN, submitted that the alleged absence of serial number on the ballot papers as required by section 45(1) of the Electoral Act is not made out at all, since no ballot paper, used or unused was presented before the Court upon which the Court can make a finding, citing, *Federal Mortgage Finance Ltd. v. Ekpo (2004) 2 NWLR (Pt 856) 100 at 120*.

For the allegation under section 48 of the Electoral Act, he submitted that the Presidential Election took place throughout Nigeria on 21st April, 2007, and that since no contrary evidence has been adduced, it is submitted that the allegation is not made out. He submitted that even if there is any

breach of the provisions of the Electoral Act, that same cannot affect the election of the 5th respondent, citing in support the case of *Imiere v. Salami* (1989) 2 NEPLR 131 at 159.

Counsel submitted that the case of *Na'bature v. Mahuta* (1992) 9 NWLR (Pt 263) 85 at 104 cited by the petitioner would not be applicable to nullify the election in question as the facts of this case are dis-similar from that of *Mahuta*. He also submitted that the decision in *Ezike v. Ezeugwu* (supra) cited by the petitioners is inapplicable because there is lack of evidence that Electoral Officers failed to open the poll at the time prescribed by law as a result of which a large percentage of the electorates that turned out to vote dispersed or that voting did not hold in any particular area.

It is also submitted by the learned counsel, that, assuming there was a breach of any of the allegations raked up in counsel's address, it is submitted that the burden of proving substantial non-compliance, and that it affected the outcome of the elections, rests squarely on the petitioner, who must also show what figures or votes the non-compliance attracted or extinguished. Learned counsel cited and relied on the following cases; *Buhari v. Obasanjo* (2005) 13 NWLR (Pt. 941) at 191 - 192, 308 - 309; *Swem v. Dzungwe* (1966) NMLR 297 at 303; (1966) 2 SCNLR 111. He also submitted that the address of counsel, no matter how beautifully presented can never take the place of evidence, referring to the case of *Obasuyi v. Business Ventures Ltd.* (2000) FWLR (Pt. 10) 1722; (2000) 5 NWLR (Pt. 658)668.

Counsel also further submitted that there is no iota of credible evidence before the court suggestive of the conclusion that the election in issue was badly conducted to warrant the application of the cases of *Ezike v. Ezeugwu* (supra); *Imiere v. Salami* (supra); and *Na'bature v. Mahuta* (supra) cited by the petitioner's counsel.

On the power of the 2nd respondent to readjust time schedule for election already provided in the election manual, and that the delay in arrival of election materials affected the results of the election, learned counsel submitted that the 2nd respondent by virtue of section 27 of the Electoral Act has the competence to issue any regulation as to the time and date of the election citing the case of *INEC vs. PDP* (1999) 11 NWLR (Pt 626) 196.

On the absence of valid voters register used at the Presidential election based on the alleged public declaration by the 2nd respondent that Local Government Elections could not hold because there was no valid register of voters, it is submitted that this is misleading in view of paragraph 15(e) of the Third Schedule to the Constitution, and the power of the 2nd respondent with regards to fixing date for elections under section 27 of the Electoral Act.

On the late arrival of election materials, it is submitted that this is an unsubstantiated allegation, given the state of pleadings and evidence before the court. It is submitted that late arrival of election materials will not of itself affect the result of an election except it is sufficiently proved to have had effect on the outcome of election, citing in support the case of *Kudu v. Aliyu* (1992) 3 NWLR (Pt. 231) 615.

We will now deal with the issue of non-compliance with the provisions of the Electoral Act as pleaded by the petitioner. The first issue in contention here is non-compliance with the following provisions of the Electoral Act, to wit, sections 20, 21, which section deal with compilation of national voters' register and display of same to the public not less than 60 days to the date of the election, and the integration of the supplementary voters' list with the voters register and publication of same. The

petitioner complains of non-compliance with section 45(2) of the Electoral Act which states that the ballot papers shall be bound in booklets and numbered serially with differentiating colours.

The petitioner further challenged non-compliance with sections 48, 49(1) and 63 of the Electoral Act, which is to the effect that voting shall take place on the same day and time throughout the country, the opening of the ballot box, and show same to such persons as may lawfully be present at the time of polling, and shall then close and seal the box in such manner as to prevent its being opened by unauthorized persons. Section 63 prescribed the hour for the close of polls.

Learned counsel also pleaded non-compliance with section 75 of the Act, failure to stamp, sign and counter-signed result sheets by the relevant officers and polling agents at these levels, and a breach of the guidelines, and manuals complaining of absence of ward collation centres in more than 80% of the States of the Federation. Petitioner also attacked sections 29(1) and (2) the failure to take oath of neutrality by the officers of the 1st respondent.

Having identified the provisions of the Law, the Electoral Act, and the guidelines not complied with, the question that arise is, what are the facts pleaded by the petitioner to establish the non-compliance. The first fact is the non-display of voters register, not less than 60 days before the date of the election. Ballot papers were not bound in booklets and numbered serially, and that the time of the election was arbitrarily changed from 8.00 am. To 3.00p.m., to 10.00 a.m. to 5.00 p.m. The late delivery of election materials. Omission of result sheets, non-setting up of ward collation centres and inconclusive collation at the National Collation Centre as result was announced after collation from only 13 States.

In paragraph 9B (IV) (a) and (b), the petitioner alleges that result sheets were not delivered to the States and polling units. He also alleges that there was no counting of votes and announcement of scores at the various polling units throughout the country, except some few units in some States. The petitioner led no evidence to establish this averment. Proof of this averment cannot be established by looking at the documentary exhibits tendered, see the case of *Lawal v. U.T.C. plc.* (2005) 13 NWLR (Pt 943) 601. It can only be established by the direct evidence of those who observed the non-compliance.

The petitioner tendered result sheets not signed by his agent, but led no evidence to establish why the agents did not sign the result sheets. The petitioner made heavy weather about stamping and dating and counter signing in his written address. These irregularities were not pleaded, and, therefore, go to no issue, see *Buhari v. Obasanjo* (2005) 13 NWLR (Pt 941)1; *Lawal v. U.T.C. Plc* (2005) 13 NWLR (Pt 943) 601. Evidence led on unpleaded facts go to no issue, in the same way, an averment of which evidence is not led.

Moreover, documents apart from what they contain do not speak. However, ingenious or brilliant a counsel's address might be, it cannot be a substitute for evidence or pleadings. See *Oduola v. Coker* (1981) 5 SC 197; *Reynolds Construction Ltd. v. Reynolds Brezina Brown* (1993) 6 NWLR (Pt 297) 122. "

In paragraph 9B (iii) (b), the petitioner alleged that while polls commenced at 10.00 a.m. in some places, it commenced at 5.00 p.m. in some others, and even 10.00 p.m. in others. There is in this paragraph not only a want of specificity of what happened where, but there is no shred of evidence to establish the averment.

In paragraph 9B(iii)(e), the petitioner alleged that a vast majority of polling units of the local

government areas affected by a deliberate disenfranchisement of the electorate did not receive sensitive and non-sensitive materials until after 4.00 p.m. No shred of evidence was led in this regard. The listed States are found in paragraph 9B(iii)(i) of the petition, namely, Enugu, Ebonyi, Abia, Anambra, Imo, Ondo, Osun, Cross River, Edo, Benue, Bayelsa, Delta, Gombe, Niger, Taraba, Kogi, Katsina, Sokoto and Kaduna States.

Paragraph 9B(iii)(i) list 19 States mentioned above and alleges that in these States, voting materials including sensitive and non-sensitive materials were delivered by the 1st respondent on the election day between 12 noon and 2.30 p.m. This was denied by the respondents. No piece of evidence was tendered by the petitioner to prove this fact. The averment therefore goes to no issue.

Finally, the petitioner averred in paragraph 9B (v) of the petition that the officers and staff of the 1st respondent who participated in the election did not affirm to the oath of loyalty and neutrality. Again, the petitioner led no evidence to establish this averment. The respondents denied this averment. There is no evidence led in proof of the averment.

Even if this averment is not denied, it would still have had no effect on the result of the election. This is because, the omission or default of a public officer to subscribe to affirmation or oath of loyalty or neutrality does not affect the validity of any act done or intended to be done by the defaulting officer in the execution of his official duty. The penalty which attaches to such omission or default can only be borne by the officer himself. See S. 4(1) of the Oaths Act, Laws of the Federation 2004. See also *Buhari v. Obasanjo* (2005) 2 NWLR (Pt 910) 241 at 360; *Amadi v. Eke* (2004) 14 NWLR (Pt 892) 1. On the issue of voters' register already referred to in this judgment, the petitioner averred in his pleading that the 2nd respondent after the Presidential election, postponed the local government Council elections in the country on the ground that there was at that time not existing a valid voters' register. This averment was not denied by the 1st and 2nd respondents. The petitioner considers this non denial as proof of the non-display of the voters' register 60 days before the Presidential election. We beg to disagree. We see no nexus between the non-display of voters' register and the postponement of the local government elections, and the want of voters register for that election.

This is because the voters register used for the Presidential election cannot be the same as the voters register to be used in any other election, as by operation of law, the registration of voters is a continuous exercise. S. 10(5) of the Electoral Act provides that the registration of voters and the updating and revision of the register of voters shall stop not later than 120 days before any election covered by the Act.

This means that the registration of voters for the presidential election, stopped 120 days before the election. The register of voters Bused for the presidential election is not therefore the same as that to be used in any subsequent election. Nothing in the petition links the invalidity of the voters' register for local government elections to the register of voters used for the presidential election.

Learned counsel for the petitioner in an attempt to establish non display of voters' register and non integration of same with the supplementary voters' register, in his address drew a chart, Chart No. 1 at page 25 of his written address to page 29 showing irregular entries in the voters registers, from the following five States of Nasarawa, Kwara, Rivers, Imo and Taraba. With due respect to the learned senior

counsel, the chart drawn has no relevance to the determination of the non-display of voters register and non-integration of the supplementary voters' registers to the National voters registers. Irregularities shown on the voters' registers are entirely different from the allegation of non-display of the voters' registers. One cannot be proof for the other. There is indeed no shred of evidence to substantiate the allegation.

The petitioner in paragraph 9B(ii)(a) and (b) pleaded that contrary to S. 45(2) of the Electoral Act, the ballot papers were not numbered serially and not bound in booklets.

In their reply, the 1st and 2nd respondents pleaded that the bundles containing the ballot papers were serialized for audit purposes. This in effect is an admission that the ballot papers were not numbered serially and bound in booklets. Section 45(2) of the Electoral Act provides that the ballot papers shall be numbered serially and bound in booklets. This averment therefore, is considered proven and constitutes a non compliance with the provisions of the Electoral Act.

The next complaint by the petitioner is the change of time for the election from 8.00 a.m. to 3.00 p.m. as provided by the guidelines to 10.00 a.m. to 5.00 p.m. by the 2nd respondent. The petitioner alleges that the change of time constitutes a breach of the Electoral Act. S. 48 of the Electoral Act provides that voting in any particular election under the Act should take place on the same day and time throughout the Federation. S. 26 of the same Electoral Act provides that the 1st respondent, the Independent National Electoral Commission shall appoint the date on which the elections to the Office of the President and Vice President shall hold.

S. 21(1) of the same Electoral Act also provides that the Commission, the 1st respondent can postpone the Presidential Election and other elections set out in S. 26 of the Act for reasons set out in section 27 of the same Act and the postponement may relate to either the whole country or a part or area of the country as may be determined by the Commission.

A community reading of sections 26, 27 and 48 of the Electoral Act shows clearly that the 1st respondent can fix the date and time for presidential election and change same. The 2nd respondent is the Chief Operating Officer of the 1st respondent and all his acts on behalf of the 1st respondent are deemed to be act of the 1st respondent until proved otherwise.

I am not in doubt that a change of the voting period from 8.00 a.m. to 3.00 p.m., to 10.00 a.m. to 5.00 p.m. throughout the Federation does not constitute a non-compliance with any provision of the Electoral Act. The most that can be said is that it constitutes an amendment to the Manual for Elections Officials 2007 Exhibit EP2/ A1.

I have looked at the exhibits before me, particularly, Forms EC 25, EC 40C, EC 40E, where are tendered in their hundreds. Form EC 25 is electoral material receipt, form EC 40C is ballot paper account and verification statement, form EC 40E is the tendered ballot statement. The exhibited forms do show that the ballot papers were indeed not numbered serially. They have however, shown the number of ballot papers issued by the relevant electoral officers to each polling unit, and the numbers tendered in these polling units. The petitioner led no evidence to show that any of these entries relating to the number of ballot papers issued at the polling units, and the number of ballot papers tendered in those units are false. This the petitioner's agents at the polling units could easily have ascertained, it is

therefore not correct that the petitioner could not maintain an audit trail, simply because the ballot papers were not serially numbered. It is incumbent on the petitioner pursuant to the provisions of section 146 of the Electoral Act to establish that the non-compliance established by him substantially affected the result of the election. This he has failed to do in the instant case. In *Haruma v. Modibbo* (2004) 16 NWLR (Pt 900) 487, this court held that where a petitioner makes non-compliance with the Electoral Act, the foundation of his complaint, he is fixed with the heavy burden to prove before the court by cogent and compelling evidence that the non-compliance is of such a nature as to affect the result of the election. He must show and satisfy the court that the non-compliance substantially affected the result of the election to his disadvantage.

Also in *Buhari v. Obasanjo* (2005) 13 NWLR (Pt 941) 1, Belgore, JSC in interpreting this provision of section 135(1) of the Electoral Act, 2002, which is in pari material with section 146(1) of the Electoral Act 2006, had this to say:

"It is manifest that an election by virtue of section 135(1) of the Act shall not be invalidated by mere reason that it was not conducted substantially in accordance with the provisions of the Act. It must be shown clearly by evidence that the non-substantiality has affected the result of the election. Election and its victory, is like soccer and goals scored. The petitioner must not only show substantial non-compliance but also the figures, i.e. votes that the compliance attracted or omitted. The elementary evidential burden of "the person asserting must prove" has not been derogated from by section 135(1). The petitioners must not only assert but must satisfy the court that the non-compliance has so affected the election result to justify nullification" See also *Awolowo v. Shagari* (1979) 6-9 SC 51; *Ihute v. INEC* (1999) 4 NWLR (Pt 599) 360; *Akinfosile v. Ijose* (1960)

SCNLR 447; and *Ajadi v. Ajibola* (2004) 16 NWLR (Pt. 898)91.

It is clear from the above authorities that the onus of proof of the substantiality of the non-compliance and the substantiality of the effect of the non-compliance on the election result rests on the petitioner.

The petitioner has in the instant case established the substantiality of the non-compliance with section 145(2) of the Electoral Act, but has failed to establish the substantiality of this non-compliance on the result of the election. This issue is therefore resolved in favour of the respondents.

On allegation of corrupt practices in the petition, I do not deem it necessary to go into it because the petitioner has withdrawn all pleaded facts bordering on criminal conduct in paragraph 36.05c of his written address found at page 585 thereof, wherein he expressly stated that he has severed his case from criminal allegations and settled on the civil aspect only. This severance is also reiterated in the oral address by his counsel before the court. Ground 9C of the petition fails and is hereby dismissed. That also disposes of all the allegations against the 3rd respondent, the Inspector General of Police. The case against the Inspector General of Police is hereby dismissed.

In conclusion, this petition has been plagued by want of evidence in proof of virtually all the allegations contained therein. Even if I were to accept all the excluded evidence proffered by the petitioner would still have been unable to establish this petition. Accordingly, the petition is hereby

dismissed.

CA/A/EP/3/07

This petition no. CA/A/EP/3/2007 was consolidated with Petition No. CA/A/EP/2/2007 – general Mohammed Buhari v. Independent National Electoral commission & 5 Ors. On 16th October, 2007. Notwithstanding the fact of consolidation, this petition retains its own identity and would be determined on its own merit.

On the 21st of April, 2007, the 4th respondent to wit: The Independent National Electoral Commission (INEC), under its constitutional powers and other law enabling it in that behalf, organized and conducted election into the office of the President of the Federal Republic of Nigeria. The 1st and 2nd petitioners maintained that they were candidates in the election duly nominated by the 3rd petitioner in the said election as Presidential candidate and Vice Presidential candidate respectively. The 1st and 2nd respondents were the Presidential and Vice Presidential candidates sponsored by the 3rd respondent.

At the end of the poll, the 4th respondent, on 23rd of April, 2007 declared the 1st and 2nd respondents as winners of the election. The 1st respondent scored a total of 24,638,063 while the 1st petitioner scored 2,637,848 votes respectively.

The petitioners felt dissatisfied with the conduct of the election and challenged the outcome of same on the following grounds as contained in paragraph 15 of the petition -

"15. The grounds on which this petition is based are -

- (a) The 1st petitioner was validly nominated by the 3rd petitioner but was unlawfully excluded from the election;

Alternatively That:

- (b) The election was invalid by reason of corrupt practices;
- (c) The election was invalid for reason of non-compliance with the provisions of the Electoral Act, 2006 as amended; and
- (d) The 1st respondent was not duly elected by majority of lawful votes cast at the April 21, 2007 Presidential Election."

At pages 55 - 56 of the petition, the petitioners prayed for eight reliefs which read as follows:

"1. It may be determined that the Presidential Election of 21st April, 2007 is invalid for unlawful exclusion of the 1st and 2nd petitioners who were validly nominated by the 3rd petitioner as its candidate at the presidential election, and the said election be nullified

Alternatively that:

2. It may be determined that Alhaji Umara Musa Yar'Adua who was returned by the 4th - 6th respondents as the President elect based on the Presidential Election held on 21st April, 2007 was not duly elected (or returned) and his election be nullified.

3. It may be determined that the said Presidential election held on 21st April, 2007 is invalid for none compliance with the provisions of Electoral Act, 2006, which non-compliance had substantially affected the result of the election, and that the election be nullified.

4. It may be determined that the said election be invalidated or annulled by reason of widespread

corrupt practices, and that the election be nullified.

5. It may be determined that a fresh election be conducted into the office of the President of the Federal Republic of Nigeria, in accordance with section 147 of the Electoral Act, 2006 at which the 1st and 2nd petitioners shall be accorded full and unimpeded right to contest as validly nominated candidates.
6. It may be determined that tire 5th, 7th - 42nd respondents as officials of the 4th respondent, who directly and negligently mis-conducted the April 21,2007 Presidential Election in contravention of the provision of the Electoral Act, 2006 be recommended for criminal prosecution by the Attorney General pursuant to section 157 of the Electoral Act, 2006.
7. It may be recommended that the 5th, 7th - 42nd respondents who supervised and/or misconduct the April 21, 2007 Presidential Election be prohibited from participating in the conduct of the fresh election which may he ordered in consequence of this petition.
8. And for such order or further orders as the Honourable Court may deem fit to make in the circumstance."

At the trial, the petitioners relied on the sworn testimonies of their witnesses and tendered several documents in support of their petition. At the end, they prayed the court, among other things, to nullify the election.

Equally, the respondents relied on the sworn testimonies of their own witnesses and tendered documents in opposition to the petition. At the end, they urged that the election be upheld. At the close of the case for the parties, the court ordered that written addresses be filed and same was complied with. On 5th February, 2008, learned counsel for the parties adopted their respective addresses.

At page 46 of the petitioners' written address in response to the B4th - 808th respondents' address, the petitioners formulated the following five issues for determination, namely:

1. Whether or not a case of unlawful exclusion from participating in the Presidential Election of 21st April, 2007 has been made out by the petitioners.
2. If the answer to the above is in the affirmative, whether or not the election should not be set aside having regards to the provisions of section 147(1) of the Electoral Act, 2006.
3. If the answer to issue 1 is resolved against the petitioners and the court finds that the petitioners were not unlawfully excluded at the said election, whether or not the election should be set aside for non-compliance with the provisions of the Electoral Act, 2006 and also for corrupt practices as set out in paragraphs 17 and 18 of the petition.
4. Whether or not section 146(1) of the Electoral Act, 2006 can be applied to validate the said election in spite of the various acts of non-compliances and corrupt practices discussed in issue No. 3 above.
5. Whether or not a case has been made out by the petitioners for the prosecution of the 5th respondent and other erring officials of the 4th respondent and the prohibition of the 5th respondent from participating in the conduct of future elections in the country."

At page 6 of the 1st and 2nd respondents' written address filed on the 27th December, 2007,

three issues were formulated for determination. They read as follows:

- i. Whether or not the 1st petitioner could have been unlawfully excluded from the petition (*sic*) election and still participated in the same election to the extent of questioning the outcome of the election on merit,
- ii. Have the petitioners been able to establish the various acts of malpractices and corruption pleaded in their petition?

Even if the answer to ii) *supra* is in the affirmative can the election of the 1st respondent be invalidated for such reasons in mind the clear provision of section 146 of the Electoral Act, 2006?

At pages 4 and 5 of the final address of the 4th – 808th respondents filed on 21-12-07, six issues were couched by their learned counsel. And they read as follows:

- 2.2. "2.1. Whether the entire petition does not constitute a abuse of the process of the court having regard to the fact that it is manifestly inconsistent, contradictory and speculative.
- 2.3. Whether, having pleaded that excluded from the election, the petitioners can validly challenge the election on any other ground.
- 2.4. Whether, having pleaded that the 1st respondent did not score the majority of lawful votes cast at the election petitioners can validly urge, as they have done, that the election be annulled.
- 2.5. Whether having pleaded that they were unlawfully excluded from the election, the 1st and 2nd petitioners are competent to present this petition
- 2.6. Whether the Presidential Election substantially in accordance with the principles and provisions of the Electoral Act, 2006 and whether the alleged breaches affected the outcome of the election including the results credited to the ol and the petitioners.
- 2.7. Whether the 5th respondent is a prop, petition."

On behalf of the 3rd respondent, four issues u. They read as follows:

1. Whether the 1st and 2nd petitioners can be candidates who contested the election of the President of the Federal Republic on the 21st April, 2007 having stated in their petition that they were unlawfully excluded from contesting the said election.
2. Whether by virtue of the provisions of provisions of the Electoral Act, 2006 especially section 145(1) thereof, the petitioners can bring a Petition where their prayers (*sic*) grounds are in the alternative.
3. Whether the 5th respondent is a person that can be validly joined as a party to the petition.
4. Whether the petition did not constitute an abuse of judicial process as the same is speculative and contradictory.

In the written address filed on behalf of the 809th respondent on 4-1-08, four issues were distilled.

They read as follows:

1. Whether the 1st petitioner was a candidate in the Presidential Election held on the 21st of April, 2007.
2. Whether the petitioners proved their case to the effect that the presidential election of 21st April, 2007 was marred by corrupt practices.
3. Whether the 21st April, 2007 Presidential election was conducted in accordance with the Electoral

Act 2006, the law that regulated the conduct of all the elections held in Nigeria in 2007, the Presidential Election inclusive.

4. Whether the 1st respondent, who won the said Presidential election was elected by the majority of lawful votes cast at the April 21, 2007 Presidential Election. "

At page 5 of the written address filed on behalf of the 810th respondent on 24/12/07, two issues were formulated. They read as follows:

- "1. Whether in view of the state of pleadings and the evidence led at the trial, the petitioners proved any case against the 810th respondent or showed that the 810th respondent and or any military personnel under him took part in the conduct of the April 21st 2007 Presidential election or committed any malpractice at the election to warrant his joinder in this petition.
2. Assuming (without conceding) that the acts referred to in paragraph 18 of the petition as being the acts of persons variously described therein as 'military personnel', 'security personnel', 'armed soldiers', and 'armed security personnel' were the acts of the 810th respondent, whether those acts influenced the conduct and or outcome of the April 21, 2007 presidential election." The petitioners raised objection to issue No. 1 pinpointed on

behalf of the 1st and 2nd respondents. They also raised a similar objection to issues Nos. 1, 2, 3, 4 and 6 identified by the 4th - 808th respondents. The pivot of their objection relates to the ruling of this court delivered on 20th September, 2007 which they contend has dealt with the issues now sought to be canvassed by the 1st and 2nd respondents as well as 4th - 808th respondents. They argued that this court cannot re-open the issues of exclusion of the petitioners from the election as well as the juristic personality of the 5th respondent. They contend that this court is caught by the doctrine of issue *estoppel* and therefore has become *functus officio*.

The learned senior counsel for the 1st and 2nd respondents observed that this court did not pronounce on the merit of the objection in the ruling delivered on 20th September, 2007. He submitted that where a matter was not decided on merit, it cannot give rise to invocation of *res jtdicata*. He referred to Bowen on '*res jjudicaci*', page 85. para. 175 and the case of *F.R.N. v. Ifegwu* (2003) 15 NWLR (Pt. 842) 113 at 212 paras. C-F.

Learned senior counsel for the 4th - 808th respondents submitted that the plea of issue *estoppel* does not arise. He observed that issue *estoppel* avails only when the issue has been determined and in this case, the issues were not determined. He further contended that in considering whether or not issue *estoppel* operates to estop the respondent from raising the issues complained about, the court will examine the issues to determine whether the issues had been previously resolved or determined. He cited *Ikeni v. Efutno* (2001) 10 NWLR (Pt 720) 1 at 15 paras. C-D.

At this stage, it must be noted that this court in its ruling delivered on 20th September, 2007 pronounced thus:

"It is trite law that in interlocutory stage, issues that call for determination in the main case should be avoided. The issues of joinder and inconsistent claims are not jurisdictional matters but mere irregularities which can be sorted at the hearing of the petition. I see no proper challenge of jurisdiction in the two applications. This court has full jurisdiction to entertain the petition to

enable all panics to ventilate their cases on merit. Accordingly, I dismiss both applications." It is settled law that issue *estoppel* cannot be invoked in the same case but in a different case. It is only in that circumstance that the first case, in appropriate circumstances, acts as issue *estoppel* against the second one. The appropriate circumstances are:

1. That the same question was decided in earlier proceedings.
2. That judicial decision said to create the *estoppel* was final.
3. That the parties to the judicial decision or their privies were the same person as the parties to the proceedings in which the *estoppel* is raised or their privies. Refer to *Inakoju v. Adeleke & Ors.* (2007) 29 NSCQR (Pt. 11) 958 at 1105 - 1106; (2007) 4 NWLR (Pt. 423).

It should be reiterated that the issues of exclusion of the petitioners and the juristic personality of the 5th respondent were never determined in the ruling handed out on 20th September, 2007. It is extant in the stated ruling that substantive issues were ordered to be taken on merit at the hearing of this petition. In effect, *estoppel* does not avail the petitioners. The objection is hereby overruled. And we hereby proceed to determine all deserving live issues contained in the petition.

The first pertinent issue as agreed by the parties is whether or not the petition is incompetent for the reason that the ground of unlawful exclusion was raised along with other grounds as alternatives.

Learned senior counsel for the 1st and 2nd respondents submitted that ground of unlawful exclusion vide section 145(I)(d) of the Electoral Act 2006 cannot be made in the alternative with other grounds provided for in section 145(1)(a), (b) and (c) of the stated Act. He observed that the wordings of the section are very clear, simple and free from any ambiguity and, therefore, should be given their ordinary literal meaning. He cited *Awolowo v. Shaman* (1979) 6-9 S.C. 51.

Learned senior counsel for the 1st and 2nd respondents further submitted that the ground provided under section 145(l)(d) of the Electoral Act relating to the exclusion of a candidate from contesting the election and the three earlier grounds provided under the same section 145(1)(a), (b) and (c) relating to disqualification of a candidate who was returned, corrupt practices and non-compliance with the provisions of the Act and failure of the respondents to secure majority of the lawful votes cast at the said election are mutually exclusive. Learned senior counsel further contended that a candidate who is complaining of exclusion at an election does not have the *locus standi* to challenge the result of the election based on other alternative grounds. He referred to section 144(1) of the same Act and submitted that it is only a candidate in an election or a political party which participated in the election that can present an election petition.

Learned senior counsel observed that the use of 'or' after the provision of section 145(l)(a),(b) and (c) of the Act demarcates it from the provision 145(l)(d)of the stated Act. He referred to *Arubo v. Aiyelent* (1993) 3 NWLR (Pt. 280) 126 at 141 - 132 paras. G-A; *Ahia State University v. Anyaibe* (1996) 3 NWLR (Pt. 439) 646 at 661; *ANPP v. Haruna* (2003) 14 NWLR (Pt. 841) 546 at 570.

Learned senior counsel for the 4th - 808th respondents was at one in his submission with the learned senior counsel for the Island 2nd respondents. He felt that since the petitioners alleged that

they did not participate in the election, they cannot vest themselves with *locus standi* to challenge the election under section 145(l)(a), (b) and (c) of the Act. He contends, in effect, that the court has no jurisdiction to entertain the petition as constituted since the grounds are inconsistent and fail to meet the requirements of the law. He cited *Adesanya v. President of the Federal Republic of Nigeria* (1981) 2 NCLR 358; *Thomas: Olufosoye* (1986) 1 NWLR (Pt. 18) 669; *A.-G., Adanmwa State v. A.-G., federation* (2005) 18 NWLR (Pt. 958) 581 at 623 and *Olagwiju v. Yahava* (1998) 3 NWLR (Pt. 542) 501.

Learned senior counsel finally observed that the petitioners should not be allowed to approbate and reprobate at the same time. He referred to *I .abode v. Otubii* (2001) 7 NWLR (Pt. 712) 256 at 283-284; *N.B.C. Pic v. Ezeifo* (2001) 12 NWLR (Pt. 726) 11 at 28-29 paras. G-A.

Learned counsel then urged us to hold that having relied on the ground of valid nomination and unlawful exclusion, the petitioners are not permitted to rely *on* any other ground under section 145 of the Electoral Act, 2006.

Learned senior counsel for the petitioners, on this issue, felt otherwise. He submitted that a petitioner is not precluded from relying on alternative grounds under section 145 of the Electoral Act, 2006. He referred to Bullen and Leake and Jacob's Precedents of Pleadings, 12th Edition at page 41 as well as 'Civil Procedure in Nigeria', 2nd Edition, page 381 by Fidelis Nwadialo, SAN. He also cited *Metal Construction (WA) Ltd. v. Aboderin* (1998) 8 NWLR (Pt.563); *Newbreed Organisation Ltd. v. Erhomosele* (2006) 5 NWLR (Pt. 974) 499 at 544; *Help (Nig) Ltd. v. Silver Anchor (Nig.) Ltd.* (2006) 5 NWLR (Pt. 972) at 222; *Buhari v. Obasanjo* (2005) 13 NWLR (Pt. 941) 1.

Learned senior counsel opined that definition given to the word 'or' in the case of *Abia State University v. Anyaibe (supra)* supports : the petitioners, stand. It is agreed that election petitions are *sui generis*. That is to say that they are in a class of their own. This is no longer a moot point. At this point, the law under consideration is the provision of section 145(1) of the Electoral Act, 2006 which provides as follows:

145-(1) An election may be questioned on any of the following grounds,

- (a) that a person whose election is questioned was, at the time of the election, not qualified to contest the election;
- (b) that the election was invalid by reason of corrupt practices or non-compliance with the provisions of this Act;
- (c) that the respondent was not duly elected by majority of lawful votes cast at the election;
- or
- (d) that the petitioner or its candidate was validly nominated but was unlawfully excluded from the election."

The word 'or' is defined in Black's Law Dictionary, sixth Edition in the following terms:

"A disjunctive participle used to express an alternative or to give a choice of one among two or more things:"

In *Arubo v. Aiyeleru (supra)* at pages 141-142 paras G-A, the Supreme Court in construing the use of the word 'or' held thus: "... The power given to the court under the rule is to either strike out or amend, the word 'or' having a disjunctive connotation. It does not give the court power to strike out

and amend ..."

Also in the case of *Abut State University v. Anyaibe (supra)* at page 661 paras. B-C, this court, per Katsina Alu, JC.A (as he then was) held:

"... It is to be noted that twelve months period is separated from the next period following by the word "or": This word always bears the disjunctive meaning in an enactment. That is to say it separates the provision preceding it from the provision coming after it Its role is to show that the provisions in which it is appearing are distinct and separate one from the other."

With due diffidence to the senior counsel for the petitioners, the views of the learned authors referred to by him on 'Precedents of Pleadings' and 'Civil Procedure in Nigeria' and other authorities cited by him are not directly of moment herein. This is so as they are not in respect of election petitions which are *siii generis*.

Learned senior counsel for the petitioners confused reliefs sought in an election petition and grounds therein which in our humble view, are distinct. While reliefs or prayers can be made in the alternative in an election petition, a ground of exclusion cannot be made in the alternative with other grounds. A ground of exclusion in an election petition stands clearly on its own. It is mutually exclusive of other grounds. See, -WPP r. *Hanma* (2003) 14NWLR (Pt. 841) 546 at 570. It is instructive to note it here that in the case of *Buhtiri u Obasanjo (supni)*. the alternative ground therein is not in respect of unlawful exclusion.

It is crystal clear from the foregoing that the petitioners are approbating and reprobaing at the same time. This should not be allowed since it is frowned at by the law.

Accordingly, this issue is resolved in favour of the respondents against the petitioners. We find that having relied on the ground of valid nomination and unlawful exclusion, the petitioners are, ordinarily, precluded from relying on any other ground under section 145(1) of the Electoral Act, 2006 and the alternative grounds ought to be struck out. After all, it has been variously held that where a statute provides a particular mode of performing a duty regulated by statute, that method, and no oilier, must have to be adopted. Refer *Nuhu Sani Ibrahim v. IN EC & Ors,*. (1999) 8 NWLR (Pt. 614) 334 at 352; *Muhamadu Buhari v. Alhaji Mohammed Dikko Yusuf* (2003) 14 NWLR (Pt. 841) 446 at 498-499.

The next salient issue for determination, in our view, is whether the petitioners were excluded from participating in the Presidential election of 21st April, 2007 or not.

Learned senior counsel for the 4th - 808th respondents submitted that in order to annul the election on the "round of unlawful exclusion, the court will first have to determine that the petitioners were unlawfully excluded from the election. He maintained that the petitioners pleaded facts showing that they participated in the election. Me referred specifically to paragraphs 18(a)(xxii), 18(a)(.xxiii), 18(a)(xxiv) and 20 of the petition.

Learned senior counsel also referred to sworn testimonies of eminent party members of the 3rd petitioner who testified to the fact that the petitioners duly participated in the presidential election of 21st April, 2007. These witnesses include Alhaji Oumar Shitten, the legal adviser of the Campaign Outfit of the petitioners; Chief Tom Ikimi, who introduced himself as a former Minister of Foreign Affairs; Senator Ben Obi, the 2nd petitioner herein and Alhaji Lai Mohamed, a Legal Practitioner and Chairman of

the 3rd petitioner's Media and Publicity Committee; along with others.

Learned senior counsel observed that the petitioners, on their own, identified 26 States in which certain irregularities were allegedly committed during the conduct of the election. He contended that if they were not participants at the election how would they arrive at such allegations?

Learned senior counsel for the petitioners maintained that the petitioners were excluded at nomination state. He referred to sections 31 and 32 of the Electoral Act, 2006, He submitted that exh. EPT/ 03/P/6, the judgment of the Supreme Court is conclusive proof that the 1st petitioner was excluded from the election up until 16th April, 2007 when the judgment of the Supreme Court was delivered.

Further, learned senior counsel opined that the 1st petitioner was excluded subsequent to nomination before close of campaign. He referred to exh. EPT/03/P/17 (2) which depicts that the 1st petitioner was not on, INEC's list as at 16th March, 2007.

It is also the stance posed by the petitioners that their exclusion continued even after 16th April, 2007. They maintained that up to this date and up to the day of election on 21st April, 2007 the 1st petitioner was not on the same level with other candidates for the election.

Learned senior counsel felt that the 1st petitioner was made a conditional candidate. He referred to exh. EPT/03/P/36 (22) and cited the case of *Davies v. Lord Keusington* LR 9 CP 720. There is also the contention that the 1st petitioner was excluded during the poll and from the ballot.

Learned senior counsel mooted the idea of bad faith as a test of exclusion.

In this petition, the petitioners strenuously pleaded the fact of unlawful exclusion from the election of 21 st April, 2007. In paragraph 7 of the petition, they pleaded as follows.

"7. Your petitioners state that the Presidential election was held on 21st April, 2007 in which twenty-five (25) political parties fielded candidates: Alhaji Atiku Abubakar was validly nominated on the platform of Action Congress (AC) although excluded by the 4th respondent ..."

Further, in relevant parts of paragraph 15 of the petition dealing with the grounds of the petition, they pleaded as follows: "15. The grounds on which this petition is based are:

- a) The 1st petitioner was validly nominated by the 3rd petitioner but was unlawfully excluded from the election.
- b) In the statement of the full names of candidates standing nominated published by the 4th respondent, the name of the 1st petitioner was unlawfully excluded.
- c) In addition to sub paragraphs (a) - (d) above, the 4th and 5th respondents at different public for a and after nomination had closed, repeatedly declared and stated that the 1st petitioner was disqualified from contesting the April 21, 2007 Presidential Election and implacably maintained this position till the day of the election.
 - i. The 3rd respondent by a letter dated 18th January, 2007 actually instigated the events that led to the unlawful exclusion of the 1st petitioner.
 - ii. Thereafter, in defiance of the said judgment the 4th respondent proceeded to publish its official list of candidates excluding the name of the 1st petitioner. In addition, the list was

published on the INEC Website.

A letter was written by the 3rd petitioner to the 4th and 5th respondents on the 9th day of February, 2007 complaining about the unlawful exclusion of its candidate.

The 4th respondent replied the petitioner's letter on 17th of February, 2007 declining to revisit the unlawful exclusion.

Your petitioners shall lead evidence that apart from the final list of Presidential candidates published by the 4th respondent on 15th March, 2007, no further amended supplementary or modified list of presidential candidates was published by the 4th respondent in which the names of the petitioners were included.

Notwithstanding the fact that the 1st petitioner was unlawfully excluded, the 4th respondent proceeded to allocate 2,637,848 votes to the 1st petitioner as a candidate in the election.

Notwithstanding the judgment of the Federal High Court of 3rd April, 2007 and the judgment of the Supreme Court, of 16th April, 2007, the 4th respondent still refused to restore and/or publish the name of the 1st petitioner on the list of candidates standing nominated as at Tuesday, 17th April, 2007."

Curiously, the above notwithstanding, the petitioners, in paragraphs 18 and 20 of their petition pleaded facts showing that they participated in the election. The said paragraphs read as follows:

"Oyo State

Voters were intimidated by security officials particularly in Ogbomosho Local Government Area; also, agents of the 3rd petitioner were driven away from the polling units by security agents. *Rivers Shite*

18(a)(xxiii) ... Agents of 3rd petitioner were prevented from observing the conduct of the elections.

Zamfara State

18(a)(xxiv) ... As a result majority of eligible

Party Agents, particularly those of the 3rd petitioner were deprived the opportunity to observe the conduct of the election. 20.

Before and during the election, the 5th respondent exhibited acts of gross bias with impunity against the person and candidature of the 1st petitioner..."

At this point, it is relevant to produce the material parts of the testimonies of some of the witnesses called by the petitioners who testified to the fact of participation in the Presidential election of 21st April, 2007.

Alhaji Oumar Shitten:

"I am the legal adviser to Atiku Campaign Office, the campaign outfit of the 1st and 2nd petitioners ... I voted in the Presidential and National Assembly Election of 21st April, 2007. The name of my polling station is Kallum Central School in Kallum Ward in Shendam Local Government Area of Plateau State. When I was given the Presidential Ballot Paper, I observed that the symbol reflected thereon is not the symbol as approved by INHC. It does not have two out of the three colours that are associated with the symbol i.e. Green and Black. Many of the voters did not recognize the symbol of Action Congress in the few places where election took place in Plateau State." *Chief Tom Ikimi.*

"I know the 1st petitioner, Alhaji Atiku Abubakar. He is the leader of our Party and its flag bearer in the just concluded Presidential Election held on the 21st of April, 2007. I know the 2nd petitioner, Senator Ben Obi. He was the running mate of the 1st petitioner ... I remember the 21st day of April, 2007. On that day was the Presidential and National Assembly Election in Nigeria ... I was appointed collation agent of the Action Congress to represent the Party all the final collation of results of the Presidential Elections of April 21, 2007 and to be assisted by Iyi Okwi Nwodo. This was in response to an invitation by INEC to all political parties who fielded presidential candidates in the elections to send such representatives for the collation of results on Saturday 21 April evening ... At around 11 a.m. on Sunday April 22, Senator Ben Obi, Vice Presidential candidate of the Action Congress telephoned me conveying to me information he had just received, that collation of results was about to commence at INEC Headquarters but that our party agents were not there. I immediately rushed to the venue. Nothing had yet started.

Senator Ben Obi:

"I am a Senator of the Federal Republic of Nigeria, representing Anambra Central Senatorial District. I am the 2nd petitioner in these proceedings and the Vice Presidential candidate of Action Congress. The first petitioner was the validly nominated candidate of the Action Congress; the political party that nominated us for the Presidential Election held on the 21st of April, 2007. The party is the 2nd respondent in these proceedings. The 4th respondent excluded us in the said election ... I remember vividly the events that took place on the day of the election in Anambra State. On the said day, I was in my hometown, Awka, the capital of Anambra State to cast my vote. It was there that I registered as a voter ... On April 21, 2007, when the Presidential and National Assembly Election held, I was in Awka to cast my vote. I made several visits to the polling station where I was supposed to vote but did not see any electoral official or voting materials ... It is noteworthy that when AD replaced its deceased Presidential candidate, Chief Adefarati with Chief Pere Ajuwa on or about the 5th of April 2007, the latter's name was promptly reflected on the INEC list of Presidential candidates and posted in the website. It is therefore not in doubt that we were unlawfully excluded in the questioned election." *Alhaji Lai Mohammed:*

"... They are the duly nominated candidates of the 3rd petitioner who were unlawfully excluded by the 4th respondent (INEC) from contesting the Presidential who fielded presidential candidates in the elections to send such representatives for the collation of results on Saturday 21 April evening ... At around 11 a.m. on Sunday April 22, Senator Ben Obi, Vice Presidential candidate of the Action Congress telephoned me conveying to me information he had just received, that collation of results was about to commence at INEC Headquarters but that our party agents were not there. I immediately rushed to the venue. Nothing had yet started.

Senator Ben Obi:

"I am a Senator of the Federal Republic of Nigeria, representing Anambra Central Senatorial District. I am the 2nd petitioner in these proceedings and the Vice Presidential candidate of Action Congress. The first petitioner was the validly nominated candidate of the Action Congress; the political party that nominated us for the Presidential Election held on the 21st of April, 2007. The party is the 2nd respondent in these proceedings. The 4th respondent excluded us in the said election ... I remember vividly the events that took place on the day of the election in Anambra State. On the said day, I was in my hometown, Awka,

the capital of Anambra State to cast my vote. It was there that I registered as a voter ... On April 21, 2007, when the Presidential and National Assembly Election held, I was in Awka to cast my vote. I made several visits to the polling station where I was supposed to vote but did not see any electoral official or voting materials ... It is noteworthy that when AD replaced its deceased Presidential candidate, Chief Adefarati with Chief Pere Ajuwa on or about the 5th of April 2007, the kilter's name was promptly reflected on the INEC list of Presidential candidates and posted in the website. It is therefore not in doubt that we were unlawfully excluded in the questioned election." *Alhaji Lai Mohammed:*

"... They are the duly nominated candidates of the 3rd petitioner who were unlawfully excluded by the 4th respondent (INEC) from contesting the Presidential Election of 21st April, 2007 ... That I followed the materials to my polling unit (Bolki Unit 1) in Bolki Ward so as to cast my vote."

Pillion P. Digoli:

Was the Chairman of the 3rd petitioner in Numan Local Government and was charged with the responsibility

for monitoring the Presidential Election in the Local Government."

Alluji Hayatu Magdari:

'That I am the LGA Collation Agent of the Action Congress representing the petitioner in this petition.

That

1 was the one charged with the responsibility of overseeing the distribution of election materials meant for the Presidential Election in Eufure LGA."

Alliaji .hiuro Autlu:

"That I am the Party Chairman of the Action Congress in Maiha Local Government representing the 1st petitioner in this petition That I was the one charged with the responsibility of monitoring the conduct of

Presidential Election in the Local Government. 1 moved around the whole ward in the Local Government Area."

Mr. Wilson Japhet Fofana

That I am the LGA Collation Agent of Action Congress representing the 1st petitioner in this petition.

That 1

was the one charged with the responsibility of overseeing the distribution of electoral materials fixed

for the Presidential Election in Numan LGA."

Alhaji Audu Suleiman:

"That I am the Local Government Collation Agent of the Action Congress representing the petitioner in this

petition ... That I was the one charged with the responsibility of monitoring and collation of Presidential

Election in Shelleng Local Government."

Dr. Chiebonam Orji:

"That I remember the 2 1st day of April, 2007. On that day there was a Presidential and National

Assembly

elections in Nigeria. I was the Action Congress Party Agent of Enugu North Local Government."

Mr. Emeka Udeli:

"That I remember the 21st day of April, 2007. On that day there was a Presidential and National Assembly Elections in Nigeria. I was the Action Congress Party Agent of Ezeagu Local Government." *Mr.*

Hakeem Okedara:

"My names are Mr. Hakeem Okedara. I live at No. 45 Olowu Road, Own, Abeokuta; I am a Contractor by profession. (am also a Politician. I am a registered member of Action Congress. (AC), the 1st petitioner in these proceedings. I hail from Abeokuta North Local Government of Ogun State. I know the 1st petitioner, Alhaji Atiku Abubakar. He is the leader of our party and its flag bearer in the just concluded Presidential Election held on the 21st of April, 2007. I know the 2nd petitioner, Senator Ben Obi. He was the running mate of the 1st petitioner. He is also a serving Senator of the Federal Republic of Nigeria. I remember the 21st day of April, 2007. On that day there was a Presidential and National Assembly elections in Nigeria. I was the AC Coordinator for Abeokuta North Local Government Area of Ogun State. In my capacity as a co-ordinator, I moved freely around all the polling booths in Abeokuta North on the 21st day of April, 2007 during the Presidential/National Assembly Elections."

Chief Tom Ikimi's testimony is corroborated by exhibit EP3 28, a letter by the 3rd petitioner to the Chairman of INEC, the 4th respondent dated 19th April, 2007 by which he and others were appointed delegates at the National Election Collation Centre. In his testimony, Chief Tom Ikimi maintained that the letter was sequel to the invitation by INEC to all Political Parties which fielded presidential candidates for the election of 21st April, 2007. For ease of reference, exhibit EP3/28 reads thus:

19th April 2007

The Chairman

Independent National Electoral Commission (INEC) INEC Headquarters Plot 436,
Zambezi Crescent

Maitama, Abuja

Introducing Five Man Delegation to the National Election Result Collation Center

This is to introduce to you five man delegation that will represent our party Action Congress (AC) at the National Election Result Collation Center (INEC). They are:

1. Chief Tom Ikimi - Leader of the Delegation
2. Bashir Dalhatu
3. Chief Yomi Edu
4. Dr. Okwesilieze Nwodo
5. Alh. Lai Mohamed

Please accept the assurances of our highest esteem.

Alhaji Abubakar Suleiman

National Admin. Secretary

For: National Secretary."

In our considered opinion, the above scenario points to the inescapable fact that the 1st petitioner's name was published by INEC after the judgment of the Supreme Court on April 16, 2007 to contest the Presidential election of 21st April, 2007.

At this point, we appreciate the submissions of the learned senior counsel to the petitioners in respect of his stance over acts which he contended as amounting to acts that constitute exclusion. It appears that from the date of nomination until 16th of April, 2007, the 4th respondent attempted to exclude the 1st petitioner from participating in the election. Certainly, some hurdles were placed on his way which ordinarily should not be so. But by the judgment of the Supreme Court of 16th April, 2007, the coast was cleared for him to contest the election. It needs no further gainsaying the fact that he participated in the election.

Exclusion means 'keeping out, barring, prohibited, eliminated, ruled out.' The petitioners, from their own showing in their pleadings, evidence of their salient witnesses as depicted earlier on in this judgment, as well as their conduct after the judgment of the Supreme Court on 16th April, 2007, cannot be heard to say that they have been excluded from the presidential election. They were not excluded; they were included and actively participated in the election. This issue is accordingly resolved against the petitioners and in favour of the respondents.

Having determined the issue of exclusion against the petitioners this should have been enough to determine the petition in its entirety. But out of abundant caution, we hereby proceed to determine all the other relevant live issues as presented in the petition.

The next vital issue is whether the 5th respondent is proper party to the petition. The learned senior counsel for the 4th - 808th respondent referred to section 144(2) of the Electoral Act, 2006 and argued that the 5th respondent is not a juristic personality. He contended that the law distinguishes between those who are respondents properly so called and those who are merely deemed to be. He further contended that he should have been sued in his *official status*. Learned senior counsel referred to *Kalu v. Uzor* (2004) 12 NWLR(Pt. 886) 1.

The learned senior counsel for the 3rd respondent was at one with the position taken by the senior counsel for the 4th- 808th respondents. He cited *Uzodinina \>. Udenwa* (2004) 1 NWLR (Pt. 854) 303 at page 330.

Learned senior counsel for the petitioners felt that in law, both natural and artificial persons can sue and be sued. He referred to *Ataguba & Co. v. Guru (Nig.) Ltd.* (2005) 8 NWLR (Pt. 927) 429 at 445, *Green u Green* (1987) 2 NSCC 1155; (1987) 3 NWLR (Pt. 61) 480. He equally referred to section 144(2) of the Electoral Act, 2006 as well as paragraph 47(1) of the First Schedule to the Electoral Act and Order 12 rule 3 of the Federal High Court (Civil Procedure) Rules. 2000. He cited *Egohim v. Obasanjo* (1999) 7 NWLR (Pt. 611) 355 at 397 and *Otapo v. Sunmonu* (1987) 2 NWLR (Pt. 58) 587 at 603.

At this point, it is appropriate to consider the purport and intendment of section 144(2) of the Electoral Act, 2006 which provides as follows:

"144(2) The person whose election is complained of, is in this Act, referred to as the respondent, but if the petitioner complains of the conduct of an Electoral Officer, a Presiding Officer, a Returning Officer or any other person who took part in the conduct of an election, such officer or person shall for the purpose of this

Act be deemed to be a respondent and *shall be joined in the. election petition in his or her official status* as a necessary party PROVIDED that where such officer or person is shown to have acted as an agent of the Commission, his non-joinder as aforesaid will not on its own operate to void the petition if the Commission is made a party." (italics for emphasis). The above provision of the Electoral Act reproduced above is to the effect that where the conduct of an official of the 4th respondent is complained about, as in this case, he must be made a respondent in his or her official status. This court in interpreting section 132(2) of the Electoral Act, 2002 which is in *pari inateria* with the above quoted section in *Uzodinnia v. Udenwu (supra)* at P. 330 held as follows per Aderemi, J.C.A., as he then was -

"In construing the above provisions, I am of the clear view that a person whose election is being challenged must be made a respondent to the petition. Where the complaint of the petitioner is focused on the conduct of an electoral officer, a presiding officer, a returning officer or any other person who took part in the conduct of an election such a person in his official capacity must be joined as a respondent for the effectual and complete determination of the election petition."

Also, in *Kalu v. Uzor (supra)* it was held that section 132(2) of the Electoral Act, 2002 provides for those who shall be joined as respondents to defend an Election petition. To add any other person apart from those enumerated in the sub-section would be tantamount to reading what is not in the statute.

In *Chief Abusi David Green v. Dr. E. T. Dublin Green (1987)* 3 NWLR (Pt. 61) 480, Oputa, J.S.C. maintained that in order to decide the effect of non-joinder or mis-joinder of a party, the court should ask itself the following questions:

- a) Is the cause or matter liable to be defeated by non-joinder?
- b) Is it possible for the court to adjudicate on the cause of action set up by the plaintiff unless the 3rd party is added as a defendant?
- c) Is the 3rd party a person who ought to have been joined as a defendant'?
- d) Is the 3rd party a person whose presence before the court as a defendant will be necessary in order to enable the court effectually and completely to adjudicate on and settle all the questions involved in the cause or matter? See also *Uku v. Okitnutgbc* (1974) f All NLR475.

It is extant in the petition, that the Commission is a party to same. Non-joinder of its official will not operate to void the petition. The 5th respondent should not have been joined, in the first instance, in his personal capacity. And besides, the 5th respondent has also been joined in the instant petition as 6th respondent in his official status as the Chief Electoral Commissioner.

The 5th respondent, sued in his personal status, is not a juristic personality. It is clear that the failure to join him in his official status is improper. This is a clear instance of mis-joinder. Since the 5th respondent is not properly joined in law, his name is hereby struck out. Accordingly, this issue is also resolved against the petitioners and in favour of the respondents.

The next issue for determination is issue No. 3 as formulated by the petitioners which reads thus:

"3. If the answer to issue 1 is resolved against the petitioners and the court finds that the petitioners were not unlawfully excluded at the said election, whether or not the election should

be set aside for non-compliance with the provisions of the Electoral Act, 2006 and also for corrupt practices as set out in paragraphs 17 and 18 of the petition."

At paragraph 13 of the petition, the petitioners attempted to make an issue in respect to non-subscription to oath of neutrality by INEC officials as enjoined by section 29(1) of the Electoral Act, 2006.

The learned senior counsel for the 4th - 808th respondents contended that the petitioners did not show how same affected the outcome of the election. He observed that no evidence was led on the issue and it should be taken to have been abandoned.

The learned senior counsel for the 1st and 2nd respondents observed that the issue of subscription to the oath of neutrality has been settled by the Supreme Court in the case of *Buhari v. Obasanjo* (2005) 13 NWLR (Pt. 941) 1 at 137.

The petitioners merely allege in paragraph 13 of their petition the issue of non-subscription to oath of neutrality by INEC officials but failed to adduce any evidence to substantiate same. No issue has been specifically made out of it by the petitioner in their written addresses. At this point, it can be taken as having been abandoned.

Out of abundance, we must reiterate that the issue has been laid to rest by the Supreme Court in the case of *Buhari v. Obasanjo (supra)* at page 137 where it was held that such omission alone was not enough to justify the nullification of an election in the absence of any proof of any malpractice on the part of the officials.

In respect of issue 3, the first serious complaint by the petitioners relates to failure by INEC to carry out the provision of section 10(1) of the Electoral Act, 2006 as it affects the registration of voters.

The learned senior counsel for the petitioners submitted that section 10(1) of the Electoral Act, 2006 provides that the register of voters which it requires INEC to compile shall include the names of all persons entitled to vote in any election through out the Federation of Nigeria. He contended that the use of the word 'shall' in section 10 of the Act imports an imperative command directed at INEC. He cited *Ifeziie v. Mbadugha* (1984) 1 SCNLR 427; *R. v. Bishop of Oxford* (1879) 4 Q.B.D. 245 and *Odi v. Osafile* (1985) 1 NSCC (Vol.16) 14; (1985) 1 NWLR (Pt. 1) 17.

Learned senior counsel opined that millions of persons qualified to be registered as voters were not duly registered. He also maintained that INEC failed to produce an integrated official register of voters comprising the initial voters' register, the result of revision of it and a supplementary voters' list. He felt that at the time of the election, INEC did not make available to the political parties a voters' register. All that INEC made available to them was a compact Disc (CD) copy of a list of polling booths in the country. He felt that the elections are invalid on this ground.

Learned senior counsel for the 1st and 2nd respondents observed that there is no evidence from persons who complained that they were not registered and therefore barred from exercising their right to vote. He maintained that registration of voters is an ongoing affair and is not the business of the petitioners to make out a case for persons whose names were omitted in the voters' register as they are entitled to file their objection and even go to court, if need be. He strongly felt that the court cannot be invited to pronounce on the issue of lack of updated voters' register as constituting a ground for the

invalidation of the result.

Finally, learned senior counsel for the 1st and 2nd respondents submitted that the provision of section 146(1) of the Electoral Act, 2006 is clear on the effect of the alleged non-compliance. He submitted that the alleged non-compliance did not substantially affect the result of the election. The contention of the learned senior counsel for the petitioners that millions of persons who were qualified to be registered as voters were not duly registered was not substantiated by evidence. It appears that the contention is speculative. There is no evidence from persons who complained that they were not registered and therefore barred from exercising their right to vote. None of them has been shown to have filed any objection or even gone to court to challenge their non-registration. It is therefore highly untenable for the court to be invited to invalidate the election on this ground. Even if there was a surmised non-compliance, by the provision of section 146(1) of the Electoral Act, 2006, same has not been shown to have substantially affected the result of the election.

The next point canvassed by the petitioners relates to non-compliance in respect of non-binding of ballot papers in booklet form and non-serialization of same.

Learned senior counsel for the petitioners referred to the definition of ballot in 'New Webster's Dictionary of the English Language' and observed that the invalidity of ballot papers used in an election renders ballot or the vote invalid and consequently the election itself, as an exercise based on an invalid ballot paper, is invalid. He cited *Mcfoy v. U.A.C. Ltd.* (1961) 3 W.L.R. 1405 at 1409; *Adejwno v. Ayantegbe* (1989) 3 NWLR (Pt.110) 417 at p. 451.

He maintained that the non-binding of ballot papers in booklet form and non-serialization of same created a flaw that invalidates the ballot papers and consequently, the ballots cast at the election. He referred to section 45(2) of the Electoral Act, 2006, which provides that the ballot papers shall be bound in booklet form and numbered serially. He cited *Ifezue v. Mbadugha (supra)* and *Odi v. Osafile (supra)*.

He contended that the failure to bind the ballot papers in booklet form and non-serialization of same inhibit the tracing of any fraud committed in the conduct of the election.

Learned senior counsel for the 1st and 2nd respondents observed that apart from the specimen ballot paper tendered, no ballot paper was tendered in this petition.

He submitted that there is no evidence that non binding of ballot papers in booklet form and non-serialization of same affected the election. He maintained that one of the Election observers said that non binding or serializing can lead to electoral fraud but there is no evidence that such led to any electoral fraud.

Learned counsel for the 4th - 808th respondents observed that the same ballot papers were used throughout the federation for the presidential election. As well, it was the same ballot papers which were used in ten States and the Federal Capital Territory where the petitioners, by implication, conceded that the election conformed substantially with the laws. According to Senior Counsel, the States are: Abia, Akwa Ibom, Borno, Delta, Lagos, Kaduna, Kano, Ondo, Yobe, Plateau and the Federal Capital Territory.

He finally submitted that there was substantial compliance as 'enjoined by section 146(1) of the

Electoral Act, 2006.

Both senior counsel for the 1st and 2nd respondents and 4th - 808th respondents concede that there is an infraction of the provision of section 45(2) of the Electoral Act, 2006 which provides that ballot papers shall be bound in booklet form and numbered serially. The vital question is whether or not the flaw pinpointed is, on its own, enough to nullify the election.

There is no evidence before the court to show that the non binding of the ballot papers and non serialization of same affected the election. Further, there is no evidence to show that the lapse complained about led to any electoral fraud and same cannot be left to guess work. The same ballot papers were used in the ten States and the Federal Capital Territory where the petitioners, by implication conceded that the election conformed substantially with the laws. The flaw, in our considered opinion, is not sufficient to warrant the annulment of the Presidential election. The infraction, without more, is one of those envisaged and curable by the provision of section 146(1) of the Electoral Act, 2006 relating to substantial compliance.

The next point canvassed by the parties relates to non-compliance in respect of failure to include in the ballot papers the symbol of the 3rd petitioner.

Learned senior counsel for the petitioners felt that the correct Logo of the 3rd petitioner was not reflected on the ballot paper. He submitted that same contravenes the provision of section 45(1) of the Electoral Act, 2006. He felt that having failed to insert the correct logo of the 3rd petitioner on the ballot paper, that failure on its own is enough to invalidate the entire election.

Learned senior counsel for the 1st and 2nd respondents observed that there is no evidence of the number of voters who were misled at the election by the insertion of the alleged incorrect logo of the 3rd petitioner on the ballot paper. He further submitted that same did not affect the result of the election in any way.

Learned senior counsel for the 4th - 808th respondents observed that the petitioners complained that its approved party symbol was not reflected on the ballot papers. He pointed it out that the same ballot papers were used through out the Federation including those States whose results the petitioners accepted.

It must be observed here that the petitioners agreed that their party logo was inserted on the ballot paper. Their complaint is only in respect of the colour at the background of the logo. There is no evidence that any prospective voter was misled. As well, it has not been demonstrated how the alleged lapse substantially affected the result of the election. In *Lamidi Musediku v. Rabin Giwa* (1956) WRNLR 61 where the appropriate symbol was not allotted to the petitioner under Regulation 62(g) of the Western Region (Local Government) Elections Regulations, it was held that the fairly literate petitioner who was not under any misapprehension about the symbol allotted to him and who did not complain until after the publication of the result could not provide sufficient evidence to show that the election was not conducted in substantial compliance with the regulations.

In *Buliari v. Obasanjo* (2005) 13 NWLR (Pt. 941) 1 at 255, the apex court held that it is simply not enough to prove that breaches of the rules enacted into the Electoral Act, and other rules made for the conduct of the election were breached. The appellants, as in this case, must go further to prove that

such breaches prevented the majority voters from casting their votes in their favour.

It therefore follows from the above that it is not just all miniature complaints that can ground the nullification of a presidential election.

The petitioners further complained about the non-inclusion of the name and photograph of the 1st petitioner in the ballot papers.

Learned senior counsel for the petitioners contended that an election in which the ballot papers used, do not carry the names and/ or photographs of the candidates is invalid.

Learned senior counsel for the 1st and 2nd respondents submitted that the inclusion of the name/photograph of the candidate is not a must as vote cast is for the political party sponsoring him. He referred to the case of *Amaechi v. INEC* (unreported) SC/252/ 2007 delivered on 18th January, 2008.

Learned senior counsel further maintained that votes were cast for the petitioners and they have not shown how the non-inclusion of the name/photograph of the 1st petitioner has affected the result. This issue, as canvassed by the petitioners, has been settled by the Supreme Court in *Amaechi v. INEC (supra)*. Since it has been decided therein that votes cast at an election is for the sponsoring political party, the inclusion of the name and photograph of the candidate appears to be of no moment. Further, there is no evidence that any voter was misled. In any event, if any complaint in this regard is cognizable, same is cured by the provision of section 146(1) of the Electoral Act, 2006.

The next issue put up by the petitioners relates to non-compliance by reason of arbitrary shifting of the time fixed for polling.

The senior counsel for the petitioners maintained that the 4th respondent flouted its guideline by shifting the poll slated for 8.00 a.m. to 3.00 p.m. to 10.00 a.m. to 5.00 p.m. on 21st April, 2007; a day before the election. He contended that the 4th respondent had no power to shift the time fixed for the poll. The petitioners did not, in clear terms, state their grievance and remedy sought for the alleged infraction.

Learned senior counsel for the 1st and 2nd respondents observed that even by shifting of the poll the seven hours scheduled for the poll still remained intact. He submitted that it must be shown that late poll affected electorates who would have voted. He cited the case of *Bassey v. Young* (1963) All NLR 31 at 37; (1963) 1 SCNLR 61. He observed that there is no evidence by the petitioners that this affected the result of the election.

Learned senior counsel for the 4th - 808th respondents maintained that the shifting of time for poll is a matter in the discretion of the respondents having regard to exigencies of the time. He observed that the petitioners have not shown that the discretion was wrongly exercised and that all the candidates were equally affected. Further, he maintained that the court was not told how the late commencement of the elections affected the outcome of same.

We must express it here that it is immaterial that the poll was shifted by two hours on 21st April, 2007. The period of 7 hours slated for the election was still maintained. The shifting of poll affected all the contestants. It was not shown that the exercise of discretion to shift (the poll was wrongly done. And there is no evidence that any prospective voter was denied the right to cast his vote. Candidly speaking, I cannot, with adequate precision, surmise the rationale behind this complaint. The decision in the case

of *Bassey v. Young (supra)* is in point here. The issue, in my opinion is of no serious moment.

The next point raised by the petitioners relates to alleged corrupt practices as disclosed in result sheets and other related documents. The petitioners specified 26 States in which they allege that there were malpractices. The States are: Anambra, Adamawa, Bauchi, Bayelsa, Benue, Cross River, Ebonyi, Edo, Ekiti, Enugu, Gombe, Sokoto, Taraba, Imo, Jigawa, Katsina, Kebbi, Kwara, Kogi, Nasarawa, Niger, Ogun, Osun, Oyo, Rivers and Zamfara.

The complaint of the petitioners is that many election results forms tendered by them contain manifest irregularities that they strongly feel substantially affected the result of the election. According to the petitioners, the results afflicted by one defect or the other are contained in their schedule on State by State basis.

Learned senior counsel for the 4th - 808th respondents observed that after the parties had closed their case, the petitioners attempted to introduce fresh facts in the three volumes described as Schedules 1 - 25 to specify alleged defects in the results of the Presidential election. He cited *Ademeso v. Okoro* (2005) 22 NSCOR (Pt. 1) 460 at 472; (2005) 14 NWLR (Pt. 945) 308 and *National Investment and Properties Co. Ltd. v. The Thompson Organization* (1969) 1 All NLR 138.

Learned senior counsel strongly felt that the petitioners should not be allowed to introduce fresh facts via their address as the respondents cannot now reply to those facts.

I am of the view that the submissions of the senior counsel for the 4th - 808th respondents can well be put on their mettle. I have carefully perused the contents of Schedules 1 - 25 as presented by the petitioners in their written address. I am of the view that there is a strong attempt to introduce fresh facts not pleaded in the original petition.

In Schedule No. 16 which deals with Kwara State, for example, the facts pleaded in the petition, in sum, are late arrival of electoral materials, ballot boxes filled with thumb printed ballot sheets, and unlawful voting in the private residences of P.O. P. supporters.

The fresh facts attempted to be introduced in the schedule to the address which cannot be said to be analysis of evidence by any imagination as they are not based on any existing pleadings are: - mutilated results of voting scores, results witnessed by agents without party affiliation, 100% vote for PDP, undated results, unsigned result sheets, unstamped results, non-signed results by party agents and apparent similar writing.

The above, as depicted, is replete in respect of the other 25 States complained about by the petitioners. And this should not be allowed as it offends the rules of pleadings and takes the other side by surprise. Even then, the analysis contained in the schedules has no bearing whatsoever with the facts as pleaded in the petition.

It is glaring that most of the defects pinpointed appear trivial in character and insignificant in number. For example, 100% vote for a party at a polling unit cannot be regarded as an act of non-compliance. Wrong form used for result deals with form and not substance. Allegation that results were witnessed by agents without party affiliation appears untenable. There can be no agent without party affiliation. Allegation of apparent similar writing can only be sustained after evidence by a hand writing expert which is not available. Allegation of non-signing by party agents cannot frustrate the

election. Complaint in respect of under supply of ballot papers is a logistic problem and not a defect.

Besides, the fact that the litany of defects alleged were not pleaded, the petitioners have failed to show how same affected the outcome of the election. To this extent, the defects pinpointed do not help the case of the petitioners. See *Buhari v. Obasanjo* (1999) 12 SCNL 191; *Awolowo v. Shagan* (1979) All NLR 120 at 161; *Akinfosile v. Ijose* (1960) SCNLR 447.

We need to observe here that the petitioners in paragraph 15(d) of the petition maintained that the 1st respondent was not duly elected by majority of lawful votes cast at the April 21, 2007 presidential election. The 1st petitioner, by way of relief, did not pray that he be returned and no argument was advanced in this respect. We take it that this ground is deemed as having been abandoned.

The next point is in respect of allegations of criminal nature made by the petitioners in the petition against soldiers, police men, armed security men, alleged agents and thugs of the 3rd respondent. The alleged criminal offences include aiding and snatching of polling materials, abortion of voting by shooting into the air to intimidate voters, ballot box snatching as well as stuffing of ballot papers into ballot boxes.

The petitioners maintained that the sworn testimonies of their twenty-two witnesses support the above allegations in respect of the 809th respondent. They also relied on the reports of International observers at the election. They contended that the alleged malpractices substantially influenced the conduct or outcome of the 21st April, 2007 presidential election.

Learned counsel for the 809th respondent observed that the petitioners made allegations of electoral malpractices which are criminal in nature against the respondents. He submitted that the evidence required in proof thereof must be clear and unambiguous. He asserted that the proof must be beyond reasonable doubt. He cited *Harium v. Modibo* (2004) 16 NWLR (Pt. 900) 487 at 542.

Learned senior counsel for the petitioners submitted that the soldiers deployed by the 810th respondent colluded with the 1st, 2nd and 3rd respondents to commit corrupt practices which 'substantially affected the result of the election. He felt that certain retired generals and soldiers facilitated the commission of electoral malpractices.

Learned counsel for the 810th respondent observed that the allegations made by the petitioners are basically criminal in nature and not linked to military personnel under the control of the 810th respondent.

Learned counsel submitted that since the allegations are criminal in nature, the petitioners have a duty to prove them beyond reasonable doubt. He referred to section 138 of the Evidence Act and cited *E Nwobodo v. Onoh* (1984) 1 SCNLR 1; *Ogundem v. Adebayo* (1999) 6 NWLR (Pt.608) 684 at 699; *Edet v. Eyo* (1999) 6 NWLR (Pt. 605) 18 at 29.

Beside the retired Generals who were named no serving soldier under the control of the 810th respondent is identified in respect of the criminal allegations. No doubt, the retired named Generals as well as other retired soldiers were not under the control of the 810th respondent.

It cannot be disputed that the allegations made against unidentified policemen and soldiers are criminal in nature. As well, the alleged thugs of the 3rd respondent, whom the petitioners also tried to incriminate, have also not been identified.

The standard of proof in criminal allegations is one of proof beyond reasonable doubt. This principle of law was evolved by Lord Sankey, L.C. in *Woolmington v. D.P.P.* (1935) A.C. 485. It was further reinforced by Denning, J. as he then was in *Miller v. Minister of Pensions* (1947) 2 All E.R. 372. See also *Lori v. State* (1980) 8-11 S.C.81 i\.\Vy, *Akalezi v. The State* (1993) 2 NWLR (Pt. 273) 1 at 13: *Nwobodo v. Onoh (supra)*. Same has been codified in section 138(1) & (2) of the Evidence Act.

It is instructive to note that of all the witnesses called by the petitioners, none of them specifically identified any police officer or soldier. The case of *Ransome-Kuti v. A.-G. Federation* (1985) 2 NWLR (Pt. 6) 211 is here relevant.

Accordingly, no allegation of crime can be established with the scenario painted by the petitioners.

I need to point it out that where a petitioner, as in this case alleges electoral malpractices, he has a duty to prove the malpractices alleged and show that same affected the result of the election. See *Kalgo v. Kalgo* (1999) 6 NWLR (Pt. 608) 639. It has not been demonstrated in this petition how the alleged acts affected the result of the election.

Further, it must be pointed out that the alleged malpractices have not been shown to be authorized by the 1st respondent whose return is sought to be annulled. See *Oyegun v. Igbinedion* (1992) 2 NWLR (Pt. 226) 747; *Falae v. Obusunjo (No. 1)* (1999) 4 NWLR (Pt. 599) 435 at 498.

In sum, I find that nothing of real substance has been made out against the 809th and 810 respondents.

There was also the complaint in respect of collation of results at the National level. The petitioners contend that the procedure adopted for the collation of results at the National level did not comply with the guidelines in INEC manual - exhibit EPT/3/2. The petitioners' agent at the National collation centre, Chief Tom Ikimi testified that the guidelines were not followed. He testified that after collating results from thirteen States and the Federal Capital Territory, the 6th respondent, the Chief Electoral Commissioner informed them that it would take time before the remaining States were brought in by the States Resident Electoral Commissioners. He then informed them that he would dictate the results which he had with him. To this suggestion, they vehemently objected. The 6th respondent then went and announced the result.

The petitioners contended that the 1st respondent was declared the winner of the election not on the basis of votes said to have been manually collated but by means of all electronic collation of votes, a procedure not provided for in the INEC Manual or in the Electoral Act. They contended that the 1st respondent was declared a winner in violation of section 134(1) of the 1999 Constitution.

Learned senior counsel for the 1st and 2nd respondents submitted that the petitioners have not been able to show by credible evidence any invalid collation of result at the National centre.

Learned senior counsel for the 4th - 808th respondents maintained that it is for the petitioners to show the magnitude of the discrepancies with a view establishing that if these discrepancies were corrected and which when corrected do not affect the outcome will not count.

It is my considered view that since the 6th respondent declared results despite the objection raised by the agents of the parties at the National collation centre, there is a rebuttable presumption

that the

result declared is correct. The burden lies on any party who disputes the correctness to lead rebuttal evidence. See *Buhari v. Obasanjo*(*supra*) 255; *Nwole v. Iwuagwu* (2005) 16 NWLR (Pt. 952) 543; *Akinfosile v. Ijose* (*supra*) and *Benson v. Onitiri* (1960) SCNLR 177.

It is for the petitioners to call their agents at the State collation centres to give evidence in rebuttal by production of their copies of Form EC8D to rebut the declared results. This, they have failed to do.

It is noted that the result that was declared by the 6' respondent as in exhibit EP3/12(1) was arrived through electronic collation as in exhibit EP3/12(3) which was against the law. Such is a goof as E the result that should have been declared ought to be from the Manual collation as in exhibit EP3/12(2). The vital question is whether the goof is sufficient to annul the result of the election.

I refer to the case of *Bush v. Gore* (2000) 531 US 98 148L ED 388, 131 SCT 525 cited by the senior counsel for the 1st and 2nd respondents which is of persuasive authority. It is a case based on presidential election in the United States which has operated democracy for over two centuries. In short, it was whether or not the counting of votes in the State of Florida should be done manually or by mechanical means as prescribed by law. The Supreme Court of the U.S. decided to queue behind electronic counting as dictated by law. In doing so, Chief Justice Rehnquist pronounced thus:

"We deal here not with an ordinary election for the President of the United States. In *Burroughs v. United States*. 290 US 534, 535, 78 L Ed 484, 54 S.ct 287 (1934) while presidential electors are not officers or agents of the Federal Government (in re Green, 134 US 377, 379, 33 L Ed. 951, 10 Set 586 (1890) they exercise federal functions under, and discharge duties in virtue of authority conferred by the Consitution of the United State, the President in vested with the executive power of the nation. The importance of his election and the vital character of its relationship to and effect upon the welfare and safety of the whole people cannot be too strongly stated."

I have carefully perused the two results as contained in exhibits EP3/12(2) and EP3/12(3). The disparity is not such that would affect the totality of the result. And besides, the result in the manual collation has not been rebutted. The result in the manual collation is before the court and I cannot close my eyes to it. The result of the election of the 1st respondent cannot be nullified based on this complaint which has in no way affected the real substance of the election. The 1st respondent is deemed as returned via the manual result. I take note of the importance of the election and the vital character of its relationship to and the effect upon the welfare and safety of the entire nation, which cannot be too strongly stated.

In sum, I come to the conclusion that all the issues raised in the petition have not been established. Accordingly, it is hereby dismissed.

Since the two consolidated petitions have failed, it follows that Alhaji Umaru Musa Yar'adua and Dr. Goodluck Jonathan remain the elected President and Vice President respectively of the Federal Republic of Nigeria.

In view of the importance of the petitions to the development of the evolving democracy in

Nigeria, make no order as to costs. The parties are to bear their own costs.

OGEBE, J.C.A.: I read the lead judgment of my learned brother, Fabiyi, J.C.A. just delivered and I agree entirely with his reasoning and conclusion. He has dealt exhaustively with all the salient issues raised in the two petitions and I adopt the judgment as mine.

ABDUL-KADIR, J.C.A.: I fully participated in the conference that articulated this judgment just delivered by my learned brother, Fabiyi, J.C.A. I am in agreement with the judgment and I adopt it as mine.

ABBA -AJI, J.C.A.: I partook fully in the deliberations that resulted into this judgment just delivered by my learned brother, Fabiyi, J.C.A. I am entirely in agreement with the judgment and adopt same as mine.

AGBO, J.C.A.: I have been privileged to read in draft the judgment just read by my learned brother Fabiyi, J.C.A. and I adopt same as mine. I have nothing to add.

Appeal dismissed

