1. BARRISTER ORKER JEV
2. ACTION CONGRESS OF NIGERIA (NOW ALL PROGRESSIVE CONGRESS) (APC)

V.

1. SEKAV DZUA IYORTYOM
2. INDEPENDENT NATIONAL ELECTORAL COMMISSION (INEC)
3. ENGR. STEVE MOZEH

SUPREME COURT OF NIGERIA

SC. 164/2012

WALTER SAMURL NKANU ONNOGHEN. *J.S.C. (Presided)*
SULEIMAN GALADIMA, .J.S.C.
BODE RHODES-VIVOUR, J.S.C.
KUMAI BAYANG AKA'AHS, J.S.C.
JOHN INYANG OKORO, J.S.C. *(Read the Leading Judgment)*

FRIDAY, 30th MAY 2014

ACTION - Originating summons - Advantages of commencing action thereby.

ACTION - Originating summons - Type of actions that can be commenced thereby - Conflicting and contentious affidavit evidence therein - How resolved.

ACTION - Preliminary objection to jurisdiction - Where raised on appeal for the first time without leave- Duty on court to determine.

ACTION – Commencement of action - Use of originating summons - Advantages thereof.

APPEAL – Issues for determination - Issue formulated from combination of competent and incompetent grounds of appeal - Whether competent.

APPEAL – Leave to appeal - Where required hut not obtained – Effect.

APPEAL – Preliminary objection to appeal - Procedure for raising same.

APPEAL – Preliminary objection to appeal - Respondent intending to raise - Duty thereon.

APPEAL – Preliminary objection to jurisdiction Where raised on appeal for the first time without leave- Duly on court to determine.

CONSTITUTIONAL LAW – Issues before court - Court raising issue suo motu - Need to hear parties thereon - Failure to hear parties before deciding - Effect.

COURT - Issues before the court - Where court raises issue suo motu - Need to hear parties thereon before deciding - Failure to do so - Effect.

COURT - Jurisdiction of court - Issue of selection/nomination of candidate for election by political party - Which court has jurisdiction to entertain - Section 87(9) of Electoral Act, 2010 considered.

COURT - Jurisdiction of court -Ingredients of.

ELECTION - Candidates for election - Sponsorship of candidate) for election by political party - Where court finds that party, sponsored wrong candidate for election - Proper order for court to make.

ELECTION - Election matters - Nature of - Duty on counsel to allow speedy determination of and avoid delay.

FAIR HEARING - Court raising issue suo motu - Need to hear parties thereon before deciding - Failure to do so - Effect.

INTERPRETATION OF STATUTES - Clear and unambiguous words in a statute - How construed.

INTERPRETATION OF STATUTES - Section 87(4) (c)(ii) and (9) of Electoral Act 2010 - How construed.

INTERPRETATION OF STATUTES - Section 87(9) of Electoral Act 2010 - How construed - Legislative intent in enactment of -What constitutes.

JUDGMENT AND ORDER - Election - Sponsorship of candidate for election by political party - Where court finds that party sponsored wrong candidate for election - Proper order to make.

JUDGMENT AND ORDER - Candidates for election - Sponsorship of candidate for election by political party - Where court finds that party sponsored wrong candidate for election - Proper order to make.

JURISDICTION - Federal High Court - Action arising from selection/nomination/sponsorship of candidate for election by political party - Which court has jurisdiction to entertain - Section 87(9) of Electoral Act, 2010 considered.

JURISDICTION - Federal High Court - Exclusive jurisdiction of under section 251 of the 1999 Constitution - Matters listed thereunder - Whether exhaustive.

JURISDICTION - Jurisdiction of court - Determination of - What court considers.

JURISDICTION - Jurisdiction of court - Ingredients of.

JURISDICTION - Jurisdiction of court - Issue of - Importance of – Where court lacks jurisdiction - Effect.

JURISDICTION - Jurisdiction of court - Issue of selection/nomination/sponsorship of candidate for election by political, party - Which court has jurisdiction to entertain - Sectio-87(9) of Electoral Act, 2010 considered.

LEGAL PRACTITIONER - Election matters - Duty on counsel to allow speedy determination of and avoid delay.

PRACTICE AND PROCEDURE - Appeal - Issues for determination - Issue formulated from combination of competent and incompetent grounds of appeal - Whether competent.

PRACTICE AND PROCEDURE - Appeal - Leave to appeal - Where-required and not obtained - Effect.

PRACTICE AND PROCEDURE - Appeal - Preliminary objection to appeal - Procedure for raising same.

PRACTICE AND PROCEDURE - Appeal - Preliminary objection to appeal - Respondent intending to raise - Duty thereon.

PRACTICE AND PROCEDURE - Appeal - Preliminary objection to jurisdiction - Where raised on appeal for the first time without leave- Duty on court to determine.

PRACTICE AND PROCEDURE - Commencement of action - Originating summons - Types of actions that can be commenced thereby - Conflicting and contentious affidavit evidence therein - How resolved.

PRACTICE AND PROCEDURE - Commencement of action – Use of originating summons - Advantages thereof.

PRACTICE AND PROCEDURE - Issues before the court - Where court raises issue suo motu - Need to hear parties thereon before deciding - Failure to do so - Effect.

PRACTICE AND PROCEDURE - Jurisdiction of court Determination of - What court considers.

PRACTICE AND PROCEDURE - Jurisdiction of court – Ingredients of.

PRACTICE AND PROCEDURE - Jurisdiction of court – Issue of – Importance of - Where court lacks - Effect.

PRACTICE AND PROCEDURE - Preliminary objection to jurisdiction - Where raised on appeal for the first time without leave- Duty on court to determine.

STATUTE - Section 87 (9), Electoral Act, 2010 - How construed.

STATUTE - Section 87(4) (c) (ii) and (9) Electoral Act 2010 - How construed.

Issues:

1. Was the Court of Appeal right when it struck out appellants' grounds 1, 3 and 4 and issue No. l for the reason that competent and incompetent grounds of appeal were argued together?
2. Was the Court of Appeal right in affirming the trial court's jurisdiction to entertain this action, given that the main relief of the 1st respondent at the trial court was not against an agency of the Federal Government?
3. Was the Court of Appeal right to have affirmed the decision of the trial court that originating summons procedure used to initiate this action was proper in spite of the highly contentious affidavit and documentary evidence tendered by the parties?
4. Did the appellants' appeal against the findings made by the trial court on exhibits A, B and C?
5. Was the 1st respondent's notice of preliminary objection competent before the Court of Appeal?
6. Was the judgment of the Court of Appeal affirming the trial court's judgment not against the weight of evidence adduced at the trial?

Facts:

On 12th January 2011, the 2nd appellant, Action Congress of Nigeria, now All Progressive Congress, (APC) conducted the primary elections to choose its candidates for various elective offices in Nigeria at the general elections scheduled for April, 2011. On that day, the 1st appellant, the 1st respondent and John Tine contested its primary election in Buruku Federal Constituency of Benue State for selection of its candidate for the House of Representatives for that constituency. At the end of the primary election, the 3rd respondent, Engr. Mozeh, as head of the Electoral Committee of the 2nd appellant, declared the 1st respondent as the winner having polled 8,030 against the 1st appellant and John Tine who scored 1,316 and 494 votes respectively.

In spite of the result of the primary election, the 2nd appellant declared the 1st appellant as the winner and submitted his name to INEC, the 2nd respondent, as its candidate for the election. The 1st respondent, being dissatisfied with the conduct of the primary election, filed an action by originating summons at the Federal High, Court, Makurdi challenging the nomination of the 1st

appellant and the subsequent submission of his name to the 2nd respondent and, prayed for the following reliefs:-

1. Declaration that the 2nd defendant has breached Article 21.3, b of the Constitution of the 2nd defendant in that the 2nd defendant has forwarded the name of the 1st defendant as candidate of the 2nd defendant for the April 2011 general elections for the House of Representatives to the 3rd defendant whereas the plaintiff won the primaries for the said office as conducted by the 2nd defendant.
2. A declaration that the forwarding of the name of 1st defendant to 3rd defendant by the 2nd defendant as the candidate for the House of Representative for Buruku Federal Constituency for the forthcoming general elections and the corresponding act of 3rd defendant by accepting, listing and publishing the 1st defendant as the 2nd defendant's candidate for the Federal House of Representatives Buruku Federal Constituency is illegal, unconstitutional, null and void and of no effect.
3. An order of perpetual injunction restraining the 1st defendant from parading himself as the 2nd defendant's candidate for the Federal House of Representative, Buruku Federal Constituency in respect of the forthcoming election into the Federal House of Representative.
4. An order of perpetual injunction restraining the 2nd and 3rd defendants from recognizing and dealing with the 1st defendant as the 2nd defendant's candidate for the House of Representative, Buruku Federal Constituency in respect of the forthcoming Election into the Federal House of Representative.
5. An order directing the 2nd and 3rd defendants to take all steps, actions, including listing the name of the plaintiff as the 2nd defendant's candidate for the House of Representative, Buruku Federal Constituency in respect of the forthcoming elections into the Federal House of Representative and to allow the plaintiff contest the election into the House of Representative, Buruku Federal Constituency in the forthcoming General elections on the Party platform of 2nd defendant."

Upon being served with the 1st respondent's originating processes, the appellants filed their Counter Affidavit at the Federal High Court which heard the suit on its merit and gave judgment declaring the 1st respondent as the winner of the said primary election and directing the 2nd appellant to forward his name to INEC as its candidate for the general election.

The appellants, being dissatisfied with the judgment of the Federal High Court, appealed to the Court of Appeal which dismissed the appeal, and affirmed the judgment of the Federal High Court.

The appellants further appealed to the Supreme Court contending that the Federal High Court did not have jurisdiction to entertain the action; that the action ought not to have been brought by originating summons and that the judgment was against the weight of evidence. They also contended that the preliminary objection of the respondent which resulted in the Court of Appeal striking out of their three grounds of appeal and issue 1 formulated out of them was not properly before the Court.

In determining the appeal, the Supreme Court construed the section 87(9) of the Electoral Act, 2010, as amended, which states as follows-

> "87 (9) Notwithstanding the provision of this Act or rules of a political party, an aspirant who complains that any of the provisions of this Act and the guidelines of a political party has not been complied with, in the selection or nomination of a candidate of a Political Party for election, may apply to the Federal High Court or the High Court of a State or FCT for redress."

Held *(unanimously dismissing the appeal):*

1. *On Ingredients of jurisdiction of court* -
A court is competent when -
a) **it is properly constituted as regards members and qualifications of the members of the bench, and no member is disqualified for one reason or another; and**
b) **the subject matter of the case is within its jurisdiction, and there is no feature in the case**

which prevents the court from exercising its jurisdiction; and

c) **the case comes before the court initiated by due process of law, and upon fulfillment of any condition precedent to the exercise of jurisdiction.**

[Madukolu **v.** *Nkemdilim* **(1962) 2 SCNLR 341 referred to.]** *(P. 631, paras. A-C)*

2. *On Determinant of jurisdiction of court to entertain an action -*

It is the claim of the plaintiff as disclosed in the statement of claim that determines the jurisdiction of the court. In the instant case, going through the reliefs claimed by the 1st respondent, the appellant was wrong in his contention that the trial court had no jurisdiction to hear and determine the suit as constituted. *(P. 626, para. F-H)*

3. *On Source and importance of issue of jurisdiction -*

Jurisdiction is the life-wire of a court as no court can entertain a matter where it lacks jurisdiction. It is also well settled that the jurisdiction of courts in this country is derived from the Constitution and statutes. No court is permitted to grant itself power to hear a matter where it is not so endowed and if it does, the entire proceedings and the judgment derived therefrom, no matter how well conducted, is a nullity. Therefore, every court must ensure that it is well endowed with the jurisdiction to hear a matter before embarking on the exercise else it would be wasting precious judicial time. [*Utih v. Onoyivwe*** **(1991) 1 NWLR (Pt. 166) 166;** ***Madukolu v. Nkemdilim*** **(1962) 2 SCNLR 341 referred to.]** *(P. 611, paras. B-D)*

4. *On Importance of issue of jurisdiction and when and how can he raised -*

A preliminary objection which borders on jurisdiction cannot be brushed aside by the court but must be considered by the court regardless of the manner in which it is raised. Such issue can be raised for the first time in the Supreme Court with or without leave. *[Nnonye v. Anyichie* **(2005) 2 NWLR (Pt. 910) 623 referred to.]** *(P. 608, paras. D-E)*

5. *On Court with jurisdiction to entertain matters arising from selection or nomination of candidate for election –*
By virtue of the provision of section 87(9) of the Electoral Act 2010, as amended, notwithstanding the provision of the Act or rules of a political party, an aspirant who complains that any of the provisions of the Act and the guidelines of a political party has not been complied with, in the selection or nomination of a candidate of a political party for election, may apply to the Federal High Court or the High Court of a State or the Federal Capital Territory for redress. Clearly, the Federal High Court is one of the High Courts clothed with jurisdiction to hear and determine actions such as the one instituted in this case. *(P. 611, paras. D-E; 627 Paras. B-D; 629, paras. G-H)*

6. *On Jurisdiction of court to entertain action arising from conduct of primary election by political party –*
Issue of nomination and/or sponsorship of a candidate for an election falls within the domestic affairs of a political party being a pre-primary duty of the party. However, where the political party decides to conduct a primary election to choose its flag bearer, any dissatisfied contestant at the primary is now empowered by section 87(9) of the Electoral Act 2010, as amended, to ventilate his complaint before the Federal High Court or High Court of a State or of the Federal Capita) Territory. *[People's Democratic Party* ***v.*** *Sylva* **(2012) 13 NWLR (Pt. 1316) 85 referred to.]** *(P. 611, paras. F-G)*

7. *On Jurisdiction of court to entertain action arising from nomination of candidate for election –*
By virtue of the provisions of section 87(4)(c)(ii) of the Electoral Act, 2010, an aspirant with the highest number of votes at the end of voting shall be declared the winner of the primary election of the party and the aspirant's name shall be forwarded to the Independent National Electoral Commission as the candidate for the party. In the instant case, the complaint of the 1st respondent amounted to a violation of the provisions of the Constitution and of section 87(4) (c) (ii) of the Electoral Act, 2010. By the use of 'shall' the provision is mandatory and leaves no discretion

for the political party to exercise in the matter. So when the 1st respondent's name was not sent to the 2nd respondent as required by law, the 1st respondent had the right and duty under section 87(9) of the Electoral Act, 2010 as amended, to institute the action in the Federal High Court which court undoubtedly had the jurisdiction to hear and determine same. *(P. 627, paras. E-G)*

8. *On Jurisdiction of court to entertain action arising from nomination of candidate for election –*
Section 87(9) of the Electoral Act confers jurisdiction on the Federal High Court, or the High Court of a State, or the High Court of the Federal Capital Territory to examine the conduct of primary elections and see if the primary elections were conducted in accordance with the parties constitution and guidelines, only when a dissatisfied contestant at the primaries complains about the conduct of the primaries. In the instant case, the finding of the trial court affirmed by the Court of Appeal, was that it was the 1st respondent and not the 1st appellant that won the APC's primaries conducted on 12/1/2011 to choose its candidate to represent the Buruku Federal Constituency of Benue State in the general elections for the Federal House of Representatives. The 1st respondent had a cause of action when his party, the APC, rather than submit his name to INEC for the general elections, submitted the name of the 1st appellant as the APC's candidate. The 1st respondent, by virtue of section 87(9) of the Electoral Act, was entitled to sue in the Federal High Court, or a State High Court, or the High Court of the Federal Capital Territory. He was right to file his action in the Federal High Court since the subject matter of the case was within the jurisdiction of that court. *(Pp. 631-632, paras. D-A)*

9. *On Jurisdiction of Federal High Court to entertain action arising from conduct of primary election y political party –*
Although section 251 of the Constitution of the Federal Republic of Nigeria, 1999 confers exclusive jurisdiction on the Federal High Court in respect of matters listed in the paragraphs of the section, it does not create an exhaustive item/list or subject matters upon which that court

may exercise jurisdiction. Section 251 of the Constitution does not foreclose the conferment of jurisdiction on a matter not listed under that section of the Constitution on the Federal High Court by an Act of the National Assembly. The opening paragraph of the section states 'Notwithstanding anything to the contrary contained in this Constitution and in addition to such other jurisdiction as may be conferred upon it by an Act of the National Assembly, the Federal High Court shall have and exercise jurisdiction to the exclusion of any other court in civil cases and matters....' Beyond the items in section 251 of the Constitution upon which the Federal High Court exercises exclusive jurisdiction, section 87(9) of the Electoral Act 2010, as amended, an Act of the National Assembly, confers additional jurisdiction on the Federal High Court to hear and determine disputes, complaints and grievances arising from the conduct of a primary election of a political party. This special jurisdiction so conferred is, by law, to be exercised concurrently with the State High Court and the Federal Capital Territory High Court. *(Pp. 612-631, paras. E-B)*

10. *On Jurisdiction of Federal High Court to entertain action arising from conduct of primary election by political party –*

Issue of selection/nomination and or sponsorship of a candidate for an election falls squarely within the ambit of domestic affairs and decisions of a political party. It is a basic and a pre-primary duty of a political party. However, a rider has been provided in section 87(9) of the Electoral Act, 2010 that a flag bearer of a political party who contested at the primary and who is dissatisfied can resort to the Federal High Court or High Court of a State or Federal Capital Territory to redress or ventilate his complaint. The section is clear and unambiguous In the instant case, the finding of the Federal High Court Makurdi, which was affirmed by the Court of Appeal, was that it was the 1st respondent and not the 1st appellant that won the APC Primary conducted on 12/1/2011 to nominate its candidate to represent the Buruku Federal Constituency of Benue State in the General Elections for the House of Representatives. The 1st respondent no doubt had

a cause of action when his party APC submitted the name of the 1st appellant and not his own name. By virtue of section 87(9) of the Electoral Act, the 1st respondent, who had complained could apply to the Federal High Court or the High Court of a State or of the Federal Capital Territory for redress. In this case he chose the Federal High Court. He was right. The subject matter in the case was within the jurisdiction of that court. *(P. 630, paras. A-E)*

11. *On Purport and intent of section 87(9) of the Electoral Act, 2010 –*
The provision of section 87(9) of the Electoral Act 2010 is clear and unambiguous and does not need any cannon of interpretation. It means what it says. Where the words of a statute are clear and unambiguous, the courts are enjoined to give them their ordinary grammatical meanings. By inserting this new provision into the Electoral Act, the legislature made its intention very clear as to the reason, and purport, that a member of a political party who contested the party primary election is entitled to challenge a breach of the party Constitution or guidelines and the Electoral Act, by filing an action at the Federal High Court or a State High Court or the Federal Capital Territory High Court, *simpliciter. [Egbe v. Yusuf* **(1992) 6 NWER (Pt. 245) 1 referred to.**] *(Pp. 611-612, paras. H – B)*

12. *On Purport and intent of section 87(9) of the Electoral Act, 2010 –*
A statute, like the Electoral Act, is the Will of the legislature and any document which is presented to the court as a statute is an authentic expression of the Legislative Will. The function of the court is to interpret that document according to the intent of those who made it. Thus the court declares the intention of the legislature. The legislative intent of inserting section 87(9) into the Electoral Act, 2010 is to give an aggrieved party the flexibility of ventilating his grievance in any of the courts listed therein, depending on where it is most convenient to the parties; that is to make things easier for the parties. To impute any other intention to the section would be to radically violate the intention of the legislature. [*Ugwu v. Ararume* **(2007) 12**

NWLR (Pt. 1048) 367 referred to.] *(P. 612, paras. B-D)*

13. *On Proper order to make where a political party sponsored the wrong candidate in an election –*
By virtue of section 141 of the Electoral Act, 2010 an election tribunal or court shall not under any circumstances declare any person a winner at an election in which such a person has not fully participated in all the stages of the said election. By section 141 of the Electoral Act, the 1st respondent could not be declared the winner of the election as was done in *Amaechi v. I.N.E.C.* **(2008) 5 NWLR (Pt. 1080) 227. The clear position of the law now is that a person must participate in all the stages of an election before he can be declared the winner of the said election. In this case, although the Federal High Court held that the 1st respondent was the candidate of the 2nd appellant, the 2nd appellant and the 2nd respondent herein refused to place his; name on the ballot. The inevitable outcome of this appeal was that there must be fresh election with the name of the 1st respondent as the candidate of the 2nd appellant in its new name, All Progressives Congress.** *[Amaechi v. 1NEC* **(2008) 5 NWLR (Pt. 1080) 227;** *Odedo v. INEC* **(2008) 17 NWLR (Pt. 1117) 554 referred to and distinguished**

Per OKORO, J.S.C. at pages 621-622, paras E-A:

> **"The outcome of this appeal from the trial court, Court of Appeal to the Supreme Court is that the 1st respondent was the candidate of the 2nd appellant at the April 2011 election into the House of Representatives seat for the Buruku Federal Constituency of Benue state. This was the position as early as 21st March, 2011 when the Federal High Court ordered that his name be placed on the ballot. Both the 1st and 2nd -appellants ignored this order and put forward the 1st appellant for the election. Now that the appellants have lost their appeal in this court, it should dawn on them that the 1st appellant's name was placed on the ballot unlawfully, illegally and in utter disobedience to the order of the Federal High Court. It is now well settled that a person who is in contempt of a subsisting court order is not entitled to be granted the court's discretion to enable him continue with the breach. See** *Shugaba v. Union Bank of Nigeria Plc* **(1999) 11 NWLR (Pt. 627) 459;** *Gov., Lagos State* v.

Ojukwu **(1986) 1 NWLR (Pt. 18) 621. The truth of the matter is that the 1st appellant cannot continue to maintain his seat at the House of Representatives, having found his way into the House unlawfully. I shall make the appropriate orders anon.**

At the same time, the 1st respondent cannot be ordered to be sworn in immediately because section 141 of the Electoral Act 2010 (as amended) forbids such an order since the 1st respondent did not participate in all stages of the election."

Per ONNOGHEN, J.S.C. at pages 628-629, paras E-D:

"It is clear from the record and very much unfortunate that 1st appellant has glued himself to the seat of Buruku Federal Constituency of Benue State in the House of Representatives following an election in which he was adjudged by a court of competent jurisdiction not to be a candidate, which decision was affirmed by the lower court, and despite the injunctions ordered by that court. This is, to say the least, a very worrisome development which constitutes a danger to the growth of the Rule of law in this country. What has happened in this case is a negation of justice, equity and good conscience. A situation where a court order/decision/ judgment is rendered ineffective or nugatory by the acts or inaction of a party(ies) in the suit should not by any means be encouraged as same would result in chaos and anarchy and self help. This court will therefore not fold its hands and watch the judgment of a court of law being trivialized and/or rendered nugatory without doing something to give effect to same. What then is the proper consequential order be made to meet the justice of the case?

The provisions of section 141 of the Electoral Act, 2010, as amended, prevents this court from declaring a person who has not participated in all the processes of an election a winner of the said election contrary to the earlier decisions of this court as evidenced in *Amaechi v. 1.N.E.C* **(2008) All FWLR (Pt. 407) 1; (2008) 6 NWLR (Pt. 1080) 227;** *Odedo v. 1.N.E.C* **(2009) All FWLR (Pt. 449) 844, (2008) 17 NWLR (Pt. 1117) 554 etc, etc. It is in the light of the above provision of the Electoral**

Act 2010, as amended and to give effect to the extant decision of the trial court in this matter that the consequential orders made in the lead judgment of my learned brother Okoro, JSC is necessary.

May be this case points to the need to amend the law - Electoral Act - to make it possible for the courts, in circumstances of this case, to make an order that the party who has benefitted from an illegality, as the 1st appellant in the instant case, refunds all public funds he collected while the illegality lasted; to discourage others."

Per AKA'AHS, J.S.C. at page 633, paras A-E:

"My learned brother, Okoro, JSC dealt in an admirable way with the issues arising in the appeal. I agree entirely with his resolution of the issues. My Lord however could not order the immediate swearing in of the 1st respondent as the member elected to represent the Buruku Federal Constituency in the Houses of Representatives because of section 141 of the Electoral Act 2011 (as amended) which provides that-

"An election tribunal shall not under any circumstance declare any person a winner at an election in which such a person has not fully participated in all the stages of the said election."

The provision to my mind is an unnecessary interference by the Legislature with the discretion of the court to do substantial justice to the respondent who was clearly wronged by the action of the appellants to deny him the opportunity to contest the election. The 2nd appellant is culpably guilty for its failure to send the 1st respondent's name to INEC after the Federal High Court had delivered its judgment a month before the election. For democracy to thrive all the adherents of the political parties and especially the party officials must allow the Will of the electorate to prevail and not display overt preference of one candidate over another."

14. *On Types of actions that may be commenced by Originating Summons and effect where affidavits conflict -*

Where the proceedings are hostile, originating summons should not be used. The general

principle of law regarding conflict in affidavit in an originating summons procedure is that where that is the case, the court should order pleadings in order for the parties to lead evidence to resolve such conflicts. However, where there are documents annexed to the affidavit of the parties which can be effectively used to resolve the conflicts, there would be no need to order pleadings. *[Nwosu v. Imo State Environmental Sanitation Authority* **(1990) 2 NWLR (Pt.135) 688;** *Kimdey v. Military Gov., Gongola State* **(1988) 2 NWLR (Pt.77) 445;'** *Fashanu v. Adekova* **(1974) 1 All NLR (Pt.l) 35;** *National Bank of Nigeria v. Alakija* **(1978) 9-10 SC 42 referred to.)** *(P.* 651, *paras. F-H)*

Per ONNOGHEN, J.S.C. at pages 627-628, paras. H-E:

> **"On the issue as to whether originating summons process is the appropriate procedure for the determination of the case of 1st respondent, the answer is clearly in the affirmative as there is no dispute on the relevant/essential facts grounding the claims of 1st respondent, which is anchored on the interpretation of the relevant provisions of the constitution of the 2nd appellant relating to nomination of its candidates for election. Secondly, there is t finding of fact, which is also borne out by exhibit 'G', that 1st respondent was the winner of the primary election in question having scored the highest number of votes cast at the election. The question to be decided by the court in the circumstance is therefore whether in the circumstances of the facts and constitution provisions of 2nd appellant, and the Electoral Act, 2010, as amended, 1st respondent is not the proper candidate of 2nd appellant for the election in issue. Of course, parties can seek to raise disputes where none exists or irrelevant the determination of the issue (s) in controversy between the parties. In such a case, it is the duty of the court not to allow its eyes to be blinded by irrelevancies and smoke screen. The primary issue therefore is the consequences of the finding, as supported by exhibit 'G' that 1st respondent was the winner of the said primary election and by the provisions of section 87(4) (c) (ii) his name must be sent to 2nd respondent as the candidate for the election in issue.**

From the exhibits before the court, the court had no doubt as to who scored the highest number of votes cast in more than half of the wards within the constituency in question, which is the main issue calling for determination in the case."

15. *On Duty on court when it raises issue sua motu–*
Our system of appeals in our adversary system does, not allow or permit a court to dig into the records and fetch issues no matter how patently obvious, and, without hearing the parties, use it to decide an issue in controversy between the parties to the appeal. It runs counter to the impartial status and stance expected of a Judge in the system. It is better that the parties raise and argue issues by themselves. If an issue is so fundamental that it goes to the jurisdiction or *vires* of the court, then it must be brought to the notice of the parties to the appeal and argument received on it before it is decided. *[Eholor v. Osayande* **(1992) 6 NWLR (Pt. 249) 524;** *Ndiwe v. Okocha* **(1992) 7 NWLR (Pt. 252) 129;** *Kuti v. Balogun* **(1978) 1 SC 53;** *Iriri v. Erhurhobara* **(1991) 2 NWLR (Pt. 173) 252 referred to.]** *(P. 606, paras. F-H)*

16. *On Duty on court when it raises issue sua motu–*
Where a court raises an issue *sua motu* **and bases its decision on it without arguments from both parties, the party affected is denied the opportunity of being heard and this is a breach of his right to fair hearing entrenched in section 36 of the Constitution of the Federal Republic of Nigeria 1999 as amended. Where a court fails to bring an issue raised** *suo motu* **to the attention of the parties and takes argument on it before deciding on it, such a decision is liable to be set aside,** *[Ibori v. Agbi* **(2004) 6 NWLR (Pt.868) 78;** *Pan African Int. Inc. v. Shoreline Lifeboats Ltd.* **(2010) 6 NWLR (Pt.1189) 98 referred to.]** *(Pp. 606-607, paras. H-C)*

17. *On Attitude of court to disobedience of subsisting court order and whether will grant discretion to contemnor –*
A person who is in contempt of a subsisting court order is not entitled to be granted the court's discretion to enable him continue with the branch. In this case, the 1st appellant cannot continue to

maintain his seat at the House of Representatives, having found his way into the House unlawfully, illegally and in utter disobedience to the order of the Federal High Court. [*Shugaba v. Union Bank of Nigeria Plc.* **(1999) 11 NWLR (Pt. 627) 459;** *Gov., Lagos State* v. *Ojukwu* **(1986) 1 NWLR (Pt. 18) 621 referred to.]**

18. *On Competence of issue formulated from combination of competent and incompetent ground of appeal –*

Any issue or issues formulated for the determination of an appeal must be distilled from, or must arise or flow from a competent ground or grounds of appeal. Issues distilled from either incompetent grounds of appeal or a combination of competent and incompetent grounds of appeal are in themselves not competent and are liable to be struck out. An incompetent ground of appeal cannot give birth to a competent issue for determination. Though one can validly lump several related grounds of appeal into one issue and argue same together, if any of the grounds so lumped together is found to be incompetent, then it contaminates the whole issue and renders it incompetent as the court cannot delve into the issue on behalf of the litigant and excise the argument in respect of the competent grounds from those of the incompetent grounds in the issue. *[Akpan v. Bob* **(2010) 17 NWLR (Pt.1223) 421;** *Amadi v. Orisakwe* **(1997) 7 NWLR (Pt. 511) 161;** *Fagunwa v. Adibi* **(2004) 17 NWLR (Pt. 903) 544 referred to.]** *(Pp. 608-609. paras. G-A)*

19. *On Effect of failure to obtain leave to appeal where leave required –*

Where leave is required before an appeal could be filed, failure to obtain the leave would not only render the appeal incompetent but also rob the court of its jurisdiction. In the instant case, the interlocutory decision on the issue of abridgment of time was decided in the course of the proceedings. Under section 24(2) of the Court of Appeal Act, the appellants had 14 days within which to appeal the said interlocutory decision. The appellants did not appeal within the 14 days allowed but lumped the appeal on the main decision with the interlocutory decision. That, in itself, was not a bad practice but always encouraged. However, the appellants ought to have sought and obtained the leave of court with

regards to the appeal on the interlocutory decision that was filed outside the 14 days period which they did not do. *(P. 609, paras. A-C)*

20. *On Duty on respondent intending to rely on preliminary objection at hearing of appeal –*
By virtue of Order 10 rule 1 of the Court of Appeal Rules, 2011, a respondent intending to rely upon a preliminary objection to the hearing of an appeal, has to give the appellant three clear days notice thereof before the hearing, setting out the grounds of objection, and he shall file such notice together with twenty copies thereof with the registry within the same time. *(P. 618, paras. G-H)*

21. *On Methods of raising preliminary objection to an appeal –*
The provision of Order 10 rule 1 of the Court of Appeal Rules, 2011 is clear and unambiguous, and the court is enjoined to give it its ordinary grammatical meaning. By that rule, the method of raising a preliminary objection, apart from giving, the appellant three clear days notice before the date of hearing, may be in the respondent's brief, or by a formal separate notice of objection, or both. However, there is the need for the respondent or his counsel, with the leave of the court to move the objection before the hearing of the substantive appeal. In the instant case, the respondent at the Court of Appeal gave notice of the preliminary objection in his brief as attested to by the appellants and that was sufficient notice, the said brief having been served on the appellants. The complaint by the appellants in this respect was therefore untenable. *[Magit v. University of Agriculture, Makurdi* **(2005) 19 NWLR (Pt.959) 211;** *Tiza v. Begha* **(2005) 15 NWLR (Pt.949) 616;** *Nsirim v. Nsirim* **(1990) 3 NWLR (Pt.138) 285;** *Okolo v. Union Bank (Nig.) Ltd.* **(1998) 2 NWLR (Pt.539) 618;** *Arewa Textile Plc v. Abdullahi & Bros. Musawa Ltd.* **(1998) 6 NWLR (Pt.554) 508 referred to.]** *(P. 619, paras. A-D)*

22. *On Advantage of commencing action by originating summons –*
The procedure of originating summons ensures a quick disposal of a suit especially an election matter which requires some measure of urgency. *(P. 615, paras. E-F)*

23. *On Types of actions that may be commenced by originating summons -*
Originating summons is one of the ways of commencing an action in the courts and provided for in the various High Court Rules. For the Federal High Court (Civil Procedure) Rules, 2009, Order 3 rules 6 and 7 thereof provide that any person claiming to be interested under a deed, will, enactment or other written instrument may apply by originating summons for the determination of any question of construction arising under the instrument and for a declaration of the rights of the persons interested. Any person claiming any legal or equitable right in a case where the determination of the question whether such a person is entitled to the right depends upon a question of construction of an enactment, may apply by originating summons for the determination of such question of construction and for a declaration as to the right claimed. The above provisions clearly state the type of actions that may be commenced by way of originating summons. Where the issue is that of construction of documents or interpretation of statutory provisions, it is safe and prudent to approach the court by originating summons. *(P. 614, paras. B-F)*

Nigerian Cases Referred to in the Judgment:

Abdullahi v. Tasha (2001) FWLR (Pt. 2001) 1807
Akpan v. Bob (2010) 17 NWLR (Pt. 1223) 421
Amadi v. Orisakwe (1997) 7 NWLR (Pt. 511) 161
Amaechi v. l.N.E.C. (2008) 5 NWLR (Pt. 1080) 227
Amasike v. Reg.-Gen., C.A.C. (2010) 13 NWLR (Pt. 1211) 337
Arewa Textile Plc v. Abdullahi & Bros. Musawu Ltd. (1998) 6 NWLR (Pt. 554) 508
Egbe v. Yusuf (1992) 6 NWLR (Pt. 245) 1
Eholor v. Osayande (1992) 6 NWLR (Pt. 249) 524
Etajata v. Ologbo (2007) 16 NWLR (Pt. 1061) 554
Fagunwa v. Adibi (2004) 17 NWLR (Pt. 903) 544
Fashanu v. Adekoya (1974) 1 All NLR (Pt. 1) 35
Gov., Lagos State v. Ojukwu (1986) 1 NWLR (Pt. 18) 621
Ibori v. Agbi (2004) 6 NWLR (Pt.868) 78
Iriri v. Erhurhobara (1991) 2 NWLR (Pt. 173) 252
Kaduna Int'l Ltd. v. Kano Tannery Co. Ltd. (2004) 4 NWLR (Pt. 864) 545

Keyamo v. L.S.H.A. (2002) 18 NWLR (Pt. 799) 605
Kimdey v. Mil. Gov., Gongola State (1988) 2 NWLR (Pt. 77) 445
Korede v.Adedokun (2001) 15 NWLR (Pt. 736) 483
Kuti v. Balogun (1978) 1 SC 53
Madukolu v. Nkemdilim (1962) 2 SCNLR 341
Magit v. University of Agriculture, Makurdi (2005) 19 NWLR (Pt. 959) 211
N.B.N. v. Alakija (1978) 9 - 10 SC 42
Ndiwe v. Okocha (1992) 7 NWLR (Pt. 252) 129
Nnonye v. Anyichie (2005) 2 NWLR (Pt. 910) 623
Nsirim v. Nsirim (1990) 3 NWLR (Pt. 138) 285
Nwadike v. Ibekwe (1987) 4 NWLR (Pt. 67) 718
Nwosu v. I.S.E.S.A. (1990) 2 NWLR (Pt. 135) 688
Odedo v. I.N.E.C. (2008) 17 NWLR (Pt. 1117) 554
Ogigie v. Obiyan (1997) 10 NWLR (Pt. 524) 179
Ogunyade v. Oshunkeye (2007) 15 NWLR (Pt. 1057) 218
Okolo v. U.B.N. Ltd. (1998) 2 NWLR (Pt. 539) 618
Olufeagba v. Abdul-Raheem (2009) 18 NWLR (Pt. 1173) 384
Oyewole v.Akande (2009) 15 NWLR (Pt. 1163) 119
P.A.I. Incorp. v. S.L. Ltd. (2010) 6 NWLR (Pr. 1189) 98
P.D.P. v. Sylva (2012) 13 NWLR (Pt. 1316) 85
Shugaba v. U.B.N. Plc (1999) 11 NWLR (Pt. 627) 459
Tiza v. Begha (2005) 15 NWLR (Pt. 949) 616
Ugwu v.Ararume (2007) 12 NWLR (Pt. 1048) 367
Ukpong v. Comm. for Finance and Economic Development
(2006) 19 NWLR (Pt. 1013) 187
Utih v. Onoyivwe (1991) 1 NWLR (Pt. 166) 166
Uzodinma v. Eunaso (2011)17 NWLR (Pt. 1275) 30

Nigerian Statutes Referred to in the Judgment:

Constitution of the Federal Republic of Nigeria, 1999, S. 251
Court of Appeal Act, S. 24(2)
Electoral Act, 2010 (as amended), Ss. 87(4) (c)(ii) (9), 141

Nigerian Rules of Courts Referred to in the Judgment:

Court of Appeal Rules, 2011, O. 10 r. 1
Federal High Court (Civil Procedure) Rules, 2009, O. 3 rr. 6, 7

Appeal:

This was an appeal against the judgment of the Court of Appeal which dismissed the appeal of the appellants against the decision of the trial court declaring the 1st respondent as the proper candidate of the 2nd appellant for the 2011 House of

Representatives election for the Buruku Federal Constituency. The Supreme Court in a unanimous decision dismissed the appeal.

History of the case:

Supreme Court:
Names of Justices that sat on the appeal: Walter Samuel Nkanu Onnoghen, JSC *{Presided);* Suleiman Galadima, JSC; Bode Rhodes-Vivour. JSC; Kumai Bayang Aka'ahs, JSC, John lnyang Okoro, JSC *(Read the Leading Judgment);*
Appeal No.: SC. 164/2012
Date of judgment: Friday, 30th May 2014
Names of counsel: S. T. Hon, SAN. *(with him,* A. Akaanger, Esq., J. S. Awinde, Esq., D. O. Penda, Esq., E. S. Njoka, Esq. S. T. Udu, Esq.) - *for the Appellants*
Yusuf Ali, SAN *(with him,* S. A. Oke, Esq., E. C. Teeve, Esq., Wahab Ismail, Esq., Alex Akoja, Esq., N. N. Adegboye, Esq., K. T. Usman [Miss], Mohammed Shehu, Esq., P. I. Ikegbu (Mrs), Safinat Lamidi [Miss], H. Y. Sheikh [Miss], Y. R. Waziri, Esq.) - *for the 1st Respondent*
M. A. Magaji, SAN,(*with him,* Olusegun Jolaawo, Esq., Uche V. Obi, Esq., Joshua Olobo, Esq., K. N. Azie, Esq., Daniel Ibegbu, Esq. and Folu Adedeji, Esq.) - *for the 2nd Respondent*
Olufunke Agboyade (Ms) SAN *(with* Boma Ozobia [Mrs]) - *for the 3rd Respondent*

Court of Appeal:
Division of the Court of Appeal to which the appeal was brought: Court of Appeal, Makurdi
Appeal No.: CA/MK7136/2011
Date of Judgment: Wednesday, 7th March 2012
High Court:
Name of the High Court: Federal High Court, Makurdi
Suit No.: FHC/MKD/CS/19/2011
Date of Judgment: Monday, 21st March 201 1

Counsel:
S. T. Hon, SAN, *(with him,* A. Akaanger, Esq., J. S. Awinde, Esq., D. O. Penda, Esq., E. S. Njoka, Esq. S. T. Udu, Esq.) - *for the Appellants*

Yusuf Ali, SAN, *(with him,* S. A. Oke, Esq., E. C.Teeve, Esq., Wahab Ismail, Esq., Alex Akoja, Esq., N. N. Adegboye,

Esq., K. T. Usman [Miss], Mohammed Shehu, Esq., P. I. Ikegbu (Mrs), Safinat Lamidi [Miss], H. Y. Sheikh [Miss], Y. R. Waziri, Esq.) - *for the 1st Respondent*
M.A. Magaji, SAN,*(with him,* Olusegun Jolaawo, Esq., Uche V. Obi, Esq., Joshua Olobo, Esq., K. N. Azie, Esq., Daniel Ibegbu, Esq. and Folu Adedeji, Esq.) -*for the 2nd Respondent*
Olufunke Agboyade (Ms) SAN, *(with* Boma Ozobia [Mrs]) – *for the 3rd Respondent*

OKORO, J.S.C. (Delivering the Leading Judgment): This appeal is against the decision of the Court of Appeal, Makurdi division delivered on 7th March, 2012 which affirmed the judgment of the Federal High Court, Makurdi which had found in favour of the plaintiff/1st respondent and granted the reliefs sought by him.

The facts of the case giving birth to this appeal may be summarized as follows: On 12th January 2011, the 2nd appellant conducted the primary elections to choose its candidates for various elective offices in Nigeria at the general elections scheduled for April, 2011. On that same day, the Action Congress of Nigeria (now All Progressive Congress (APC 2nd appellant) conducted its primary election in Buruku federal constituency of Benue State to choose its House of Representatives candidate for that constituency. The primary election was contested amongst the 1st appellant, the 1st respondent and one John Tine.

At the end of the primary election, the 3rd respondent, Engr. Mozeh as head of the electoral committee of the 2nd appellant, declared the 1st respondent as the winner having polled 8,030 against the 1st appellant and John Tine who scored 1,316 and 494 votes respectively.

In spite of the result of the primary election, the 2nd appellant declared the 1st appellant as the winner. The 1st respondent being dissatisfied with the conduct of the primary election, filed suit No. FHC/CS/19/2011 at the Federal High Court, Makurdi challenging the nomination of the 1st appellant and the subsequent submission of his name to the 2nd respondent wherein he prayed for the following reliefs:-

1. Declaration that the 2nd defendant has breached Article 21.3, b of the Constitution of the 2nd defendant in that the 2nd defendant has forwarded the name of the 1st defendant as candidate of the 2nd defendant for the April 2011 general elections for the House of Representatives to the 3rd defendant whereas, the plaintiff won the primaries for the said office as conducted by the 2nd defendant.

2. A declaration that the forwarding of the name of 1st defendant to 3rd defendant by the 2nd defendant as the candidate for the House of Representative for Buruku Federal Constituency for the forthcoming general elections and the corresponding Act of 3rd defendant by accepting, listing and publishing the 1st defendant as the 2nd defendant's candidate for the federal House of Representatives Buruku federal constituency is illegal, unconstitutional null and void and of no effect.
3. An order of perpetual injunction restraining 1st defendant from parading himself as the 2nd defendant's candidate for the Federal House of Representative Buruku Federal Constituency in respect of the forthcoming election into the Federal House of Representative.
4. An order of perpetual injunction restraining the 2nd and 3rd defendants from recognizing and dealing with the 1st defendant as the 2nd defendant's candidate for the House of Representative Buruku Federal Constituency in respect of the forthcoming Election into the Federal House of Representative.
5. An order directing the 2nd and 3rd defendants to take all steps, actions including listing the name of the plaintiff as the 2nd defendant's candidate for the House of Representative Buruku Federal Constituency in respect of the forthcoming elections into the Federal House of Representative and to allow the plaintiff contest the election into the House of Representative Buruku Federal Constituency in the forthcoming general elections on the party platform of 2nd defendant.

Upon being served with the 1st respondent's originating processes, the appellants filed their defence at the Federal High Court which heard the suit on its merit and gave judgment on 21st March, 2011, declaring the 1st respondent as the winner of the said primary election and directing the 2nd appellant to forward the name of the 1st respondent to the 2nd respondent as its candidate for the general election.

The appellants, being dissatisfied with the judgment of the trial court, appealed to the Court of Appeal which dismissed the said appeal, and unanimously affirmed the judgment of the Federal High Court.

Again, the appellants are not satisfied with the judgment of the lower court. They filed notice of appeal on 24th May, 2012 containing seven grounds of appeal.

With the leave of this court, the appellants filed two additional grounds of appeal on 6th July, 2013. Both the original notice of

appeal and the additional grounds of appeal were amended on 9th October, 2013 to correct the name of the 2nd appellant. From these grounds of appeal, the appellants have formulated six issues for the determination of this appeal. On 3rd March, 2014 when this appeal was heard, counsel for both parties adopted their respective briefs. In the brief of the appellants, which was settled by Sebastine T. Hon. SAN, leading other counsel, the six issues for determination are as follows:-

1. Was the Court of Appeal right when it struck out appellants' grounds 1, 3 and 4 and issue No. l for the reason that competent and incompetent grounds of appeal were argued together? (Grounds 3 and 4)
2. Was the Court of Appeal right in affirming the trial court's jurisdiction, given that the main relief of the 1st respondent at the trial court was not against an agency of the federal government? (Grounds 6 and 7)
3. Was the Court of Appeal right to have affirmed the decision of the trial court to determine the matter upon the 1st respondent's originating summons in spite of the highly contentious affidavit and documentary evidence tendered by the parties? (Ground 1)
4. Did the appellants appeal against the findings made by the trial court on exhibits A, B and C? (Grounds 2)
5. Was the 1st respondent's notice of preliminary objection competent before the Court of Appeal? (Grounds 5)
6. Was the judgment of the Court of Appeal affirming the trial court's judgment not against the weight of evidence adduced at the trial? (Additional ground 1)

Learned counsel for the 1st respondent, Yusuf Ali Esq. SAN, also leading other counsel, has distilled five issues, short of one by the appellants. The five issues are reproduced hereunder:-

Issue 1

Whether the lower court was not right in affirming the decision of the trial court assuming jurisdiction in the matter when the complaint of the 1st respondent as disclosed in the originating summons was for the interpretation of the provisions of law and constitution of the 2nd appellant, and when section 87 (9) of the Electoral Act, 2010 (as amended) specifically confers, jurisdiction on the trial Federal High Court in this case (Grounds 6 and 7 of the grounds of appeal).

Issue 2

Whether the lower court was not right in affirming the decision of the trial court that the affidavit evidence of the parties were not in conflict such that calling oral evidence

or ordering pleadings may be required and that the issues in controversy between the parties may be properly resolved by the available documentary evidence relied upon by the parties. (Grounds 1 of the grounds of appeal).

Issue 3

Whether the lower court was not right in holding that the appellants did not challenge or appeal against the crucial findings of the trial court that disbelieved the scores of the 1st appellant as doubtful, fake and irreconcilable, and which accredited the result presented by the plaintiff/1st respondent as genuine, credible and authentic. (Grounds 2 of the grounds of appeal).

Issue 4

Whether on the preliminary objection of the 1st respondent as incorporated in the 1st respondent's brief of argument served on appellant, the lower court was not right in striking out issue No. l of the issues formulated for determination by the appellants at the lower court when both incompetent and competent grounds of appeal and issues were argued and lumped together by the appellants, under one issue. (Grounds 3, 4 and 5 of the notice of appeal).

Issue 5

Whether the judgment of the lower court affirming the decision of the trial court was against the weight of evidence adduced at the trial. (Additional ground one of the additional amended notice of appeal).

In the 2nd amended brief of argument of the 2nd respondent, three issues have been distilled by Mahmud Abubakar Magaji, SAN and other counsel with him. The three issues are:-

a. Whether the learned Justices of the lower court were right in affirming the decision of the trial court regarding its evaluation of the affidavit evidence of the respective parties to the suit commenced by way of originating summons before it? (Grounds 1 & 2).
b. Whether the learned Justices of the lower court were right in affirming the decision of the trial court wherein it assumed jurisdiction to hear the suit, and granted the reliefs sought by the 1st respondent *vis-a-vis* section 87 (9) of the Electoral Act, 2010 (as amended). (Grounds 6 &7).
c. Whether the lower court was not right in striking out issue No. 1 formulated for determination before it by the appellants on the basis that arguments on same

incorporated both competent and incompetent ground of appeal (Grounds 3, 4 and 5).

Ms. Funke Aboyade, SAN settled the brief of the 3rd respondent wherein she adopted the five issues distilled by the 1st respondent. There is no need to reproduce them here having earlier done so. I intend to determine this appeal based on the six issues formulated by the appellants.

The appellants' first issue, which is the 1st respondents' 4th issue, is whether the Court of Appeal was right when it stuck out appellants' ground 1, 3 and issue No. l for the reason that competent and incompetent grounds of appeal were argued together. This issue is also issue No. (c) of the 2nd respondent's brief of argument.

In his argument on this issue, the learned senior counsel for the appellants submitted that the Court of Appeal was in grave error of law, occasioning negative consequences on the constitutional rights of the appellants when they *suo motu* struck out appellants grounds 1, 3 and 4 and issue No. 1 on the excuse that appellants had combined under issue 1 competent and incompetent grounds of appeal. That none of the parties before the lower court raised the issue of the appellants combining arguments on both competent an incompetent grounds of appeal. Learned senior counsel submitted that by raising the issue *suo motu* without inviting the parties to address it, and going further to *suo mom* strike out appellants' grounds 1, 3 and 4 and issue 1 thereof, the lower court infringed on appellant's constitutional right of fair hearing as enshrined in section 36 (1) of the Constitution of the Federal Republic of Nigeria, 1999. It is his contention that the lower court's failure to hear them on this issue is fatal. He referred to the following cases: *Oyewole v. Akande* (2009) All FWLR (Pt. 491) 813 - 83b F - G; (2009) 15 NWLR (Pt. 1163) 119; *Olufeagba v. Abdul-Raheem* (2008) All FWLR (Pt.512) 1033; (2009) 18 NWLR (Pt. 1173)384; *Ukpong v. Commissioner of Finance and Economic Development AKS* (2007) All FWLR (Pt. 350) 1246; (2006) 19 NWLR (Pt. 1013) 187. It is his further argument that breach of fair hearing by a court results in the entire proceedings being nullified, no matter how well conducted, relying on *Pan African Int. Inc.* v. *Shoreline Lifeboats. Ltd.* (2010) All FWLR (Pt. 524) 56 at 65 B – E, (reported as *P.A.I Incorp. v. S.L. Ltd.* (2006) NWLR (Pt. 11 89) 98.

Stretching the argument further, the learned silk opined that right of appeal is constitutional and should not be truncated on flimsy or technical grounds. That although it is true that for an issue to be competent, it must be based on a competent ground of appeal, the situation in this appeal is different because some of the grounds of appeal struck out were competent. According to him,

this means that issue No. 1 formulated by the appellants in the court below can, under the doctrine of severance, be competently determined based on the remaining competent grounds of appeal. It is his view that substantial justice would have been done devoid of technicality. He cited the case of *Ogunyade v. Oshunkeye* (2007) all FWLR (Pt. 389) 1178 at 1196 E; (2007) 15 NWLR (Pt. 1057)218.

Relying also on the case of *Etajata v. Ologbo* (2007) All FWLR (Pt. 386) 584 at 605 – D; (2007) 16 NWLR (Pt. 1061) 554, he submitted that no matter how bad or inelegant the art of combining competent and incompetent grounds of appeal under issue one, the lower court was bound to consider the said issue. Citing a litany of cases on the same matter, he urged this court to resolve this issue in favour of the appellants.

In response, the learned senior counsel for the 1st respondent submitted that the lower court was right in considering and upholding the objection of the 1st respondent by striking out issue No. 1 of the issues formulated by the appellants at the lower court. Noting that issue 1 by the appellants is segmented into three limbs and distilled from grounds 1,3 and 4 of the grounds of appeal, and being that sub issue one is incompetent, they were however argued and lumped up together under issue one. That the incompetency of the first limb stems from the fact that the trial courts' order of abridgment of time challenged under sub issue one is an interlocutory decision of the trial court made on 21/3/11 and that by section 24(2) of the Court of Appeal Act, the appellants had 14 days within which to appeal. That having not done so within the time prescribed, they needed leave to do so. He pointed out that issue one, as argued by the appellants was an hybrid of both competent and incompetent sub issues. It was his contention that contrary to appellants argument that the lower court *suo mom* struck out their grounds 1, 3 and 4 and issue 1, the said decision was sequel to the preliminary objection of the 1st respondent at the lower court challenging the competency of the said issue and grounds. He referred to pages 893 - 913 of the record of appeal, particularly at page 897.

It was his submission that an objection challenging the competence of an interlocutory appeal filed without leave and in express violation of section 24 (2) of the Court of Appeal Act would still be considered by the court even though no formal notice of objection was filed so long as same is incorporated in the respondent's brief of argument and served on the appellants. He cited the case of *Abdullahi v. Tasha* (2001) FWLR (Pt. 2001) 1807 at 1821. It is his conclusion that this court has no power to separate argument in respect of competent grounds of appeal from incompetent ones. He cited the cases of *Nwadike v. Ibekwe*

(1987) 4 NWLR (Pt. 67) 718, *Kaduna Int'l Ltd. v. Kano Tanneng Co. Ltd.* (2003) FWLR (Pt. 184) 255, (reported as *Kaduna Int'l Ltd. v. Kano Tannery Co. Ltd.* (2004) 4 NWLR (Pt. 864) 545); *Konede v. Adedokun* (2001) FWLR (Pt. 65) 421, (reported as *Korede Adedokun* (2001) 15 NWLR (Pt. 736) 483). He urged this court to resolve this issue against the appellants.

The learned senior counsel for the 2nd respondent also made arguments on this issue. It is contained in their issue No. 3. His argument and submissions are on all fours with that of the 1st respondents' senior counsel and I do not intend to reproduce them, again. So also the learned silk for the 3rd respondent. I shall now proceed to resolve this issue.

The first port of call relates to the argument, or is it an allegation by the learned senior counsel for the appellants that the learned justices of the Court of Appeal *suo motu* raised an issue and resolved same without calling on the parties to address the court I agree, and, it is trite that our system of appeals in our adversary system does not allow or permit a court to dig into the records and fetch issues no matter how patently obvious, and, without hearing the parties, use it to decide an issue in controversy between the parties to the appeal. It runs counter to the impartial status and stance expected of a Judge in the system. It is better that the parties raise and argue it by themselves, but if it is so fundamental that it goes to the jurisdiction or *vires* of the court, then it must be brought to the notice of the parties to the appeal and argument received on it before it is decided. See Ojo *Ogbemudia Eholor v. Felicia Osayande* (1992) 6 NWLR (Pt. 249) 524 or (1992) 7 SCNJ 217; *Ndiwe v. Okocha* (1992) 7 SCNJ 355; (1992) 7 NWLR (Pt. 252) 129; *Kuti* v. *Balogun* (1978) 1 SC 53 at 60; *Iriri* v. *Erhurhobara* (1991) 2 NWLR (Pt. 173) 252 at 265. By raising an issue *suo motu* by a court and basing a decision on it without arguments from both parties, the party affected is denied the opportunity of being heard and this is a breach of his right to fair hearing entrenched in section 36 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended). Where a court fails to bring an issue raised *suo motu* to the attention of the parties and argument taken on it before deciding on it, such a decision is liable to be set aside. See *Ibori v.agbi* (2004) All FWLR (Pt. 202) 1799 at 1835; (2004) 6 NWLR (Pt.868) 78; *Pan African Int. Inc. v. Shoreline Lifeboats Ltd.* (2010) All FWLR (Pt. 524) 56 at 65; (2010) 6 NWLR (Pt. 1189) 98. That is the position of the law as regards raising issue *suo motu*. But was the issue raised *suo motu* by the lower court as alleged by the learned senior counsel for the appellants? The record of appeal will certainly bear this out.

On pages 893 to 913 of the record of appeal is the brief of argument of the 1st respondent herein (at the lower court). Specifically at page 897 thereof, the 1st respondent's counsel argued as follows;-

> "Rather, the appellant merged the interlocutory appeal with the substantive appeal and filed same on 30th March, 2011. We submit that, an interlocutory appeal may be merged with a final appeal. However, the appellants must apply for leave and extension of time to appeal; especially where time within which to file the interlocutory appeal has lapsed. *Ogigie v. Obiyan* (1997) 10 SCNJ 1 at 15; (1997) 10 NWLR (Pt. 524) 179."

Also, on pages 946 - 947 of the record, the lower court appreciated this point in its judgment as follows:-

> "The appellant had sufficient notice of the grounds of objection in the 1st respondents' brief which obviously was served on him and he reacted to same in his reply brief. The nature of the objections is not such that can be ignored. The competence of an appeal touches on the jurisdiction of the court and once raised must be taken first and decided before any other issue. The rational is that any defect in competence is fatal, it is extrinsic to adjudication and any proceedings arising therefrom amounts to a nullity."

It is very clear from extracts from the record of appeal that this issue and the argument thereof stem from the imagination of counsel for the appellants. There is no doubt that this issue of combining both competent and incompetent grounds in one issue was appropriately raised and argued by the parties before the lower court. The judgment of the lower court was properly based on these arguments. It is therefore not only erroneous but also puerile for the learned senior counsel to allege and argue that the court below raised the issue *suo motu* and decided it without allowing the appellants to proffer any argument. The appellants' counsel has not challenged the decision of the court below that the 1st respondent's brief containing the objection was served on them and that they made a reply to it in their reply brief. I am strongly persuaded to hold and I hereby hold that the court below did not raise the issue *suo motu* in view of the avalanche of evidence to the contrary in the record of appeal. It follows therefore that the appellants' right to fair hearing was never breached in any way whatsoever.

Let me quickly add here that a preliminary objection which borders on jurisdiction cannot be brushed aside by the court but must be considered by the court regardless of the manner in which it was raised. Such issue, I must say can be raised for the first time

in this court with or without leave. *Nnonve v. Anyichie* (2005) All FWLR (Pt. 253) 604; (2005) 2 NWLR (Pt. 910) 623.

On the other submission which stretched argument in this issue much longer, I wish to say that this court has. in a plethora of decisions held that though one can validly lump several related grounds of appeal into one issue and argue same together, if any of the grounds so lumped together is found to be incompetent, then it contaminates the whole issue and renders it incompetent as the court cannot delve into the said issue on behalf of the litigant and excise the argument in respect of the competent grounds from those of the incompetent grounds in the issue. The law is no doubt settled that any issue, or issues formulated for the determination of an appeal must be distilled from, or must arise or flow from a competent ground or grounds of appeal. Again, issues distilled from either, incompetent grounds of appeal or a combination of competent and incompetent grounds of appeal are in themselves not competent and are liable to be struck out. An incompetent ground of appeal cannot give birth to a competent issue for determination, See *Akpan* v. *Bob* (2010) 17 NWLR (Pt. 1223) 421; *Amadi v. Onsakwe* (1997) 7 NWLR (Pt. 511) 161; *Fagunwa & anor v. Adibi & ors* (2004) 7 SCNJ 322; (2004) 17 NWLR (Pt. 903) 544.

In the instant case, there is no doubt that the interlocutory decision on the issue of abridgment of time was decided in the course of the proceedings. Under section 24 (2) of the Court of Appeal Act, the appellants had 14 days within which to appeal the said interlocutory decision. The appellants did not appeal within the 14 days allowed but lumped the appeal on the main decision with the interlocutory decision. This, in itself, is not a bad practice but is always encouraged. However, the appellants did not obtain the leave of court with regards to the appeal on the interlocutory decision that was filed outside the 14 days period. It is trite that where leave is required before an appeal could be filed; failure to obtain the leave would not only render the appeal incompetent but also rob the court of its jurisdiction. The court below captures the matter as follows on page 947 of the record of appeal:-

> "Under section 24 (2) of the Court of Appeal Act, the period for the giving of notice of appeal or notice of application for leave to appeal in an interlocutory decision is fourteen days. Section 24 (4) of the Court of Appeal Act vest the power on the court to extend the period prescribed in sub sections 2 and 3 of the section. It is crystal clear that the appellant's ground one is on an interlocutory decision of the court below. It did not arise from the judgment of the court below delivered on 21 of March, 2011 which is the subject of this appeal as glaringly set out in the notice of

> appeal. The appellant did not seek extension of time nor leave to appeal against the interlocutory order of the court below. Ground one in the notice of appeal is incompetent and is hereby struck out."

The court below concluded thus on page 949 of the record:-

> "The position of the law is that issues distilled from other incompetent grounds or from a combination of competent grounds and incompetent grounds of appeal are in themselves not competent and liable to be struck out. See *Ogundipe v. Adenuga* (2006) All FWLR (Pt. 330) 206."

I agree completely with this conclusion. The doctrine of severance argued by the learned senior counsel for the appellants has no place here. Accordingly, I agree with the court below which struck out the incompetent issue which derived its life from a combination of incompetent and competent grounds of appeal. Having struck out the said issue, the three grounds of appeal i.e, 1, 3 and 4 had no issue distilled from them and I agree that the court below was right to strike them out. On the whole, this issue does not avail the appellants as it is resolved against them.

The 2nd issue in the appellants' brief is the first issue in the 1st respondent's brief. For the 2nd respondent, it is issue 'c' in its brief. The 3rd respondent abides the issues of the 1st respondent. It has to do with the assumption of jurisdiction in this matter by the trial court which was affirmed by the court below. Learned senior counsel for the appellants submitted that the main relief at the trial court was the challenge of the primary election conducted by the Action Congress of Nigeria - the 2nd appellant herein wherein the 1st appellant was returned as the winner of the election instead of the 1st respondent who is alleged to have won the primary election. It was his contention that it was wrong for the trial court to assume jurisdiction based on relief B which, according to him is an ancillary relief.

Relying on the case of *PDP v. Sylva (supra)* he submitted that where a court has no jurisdiction to entertain the main claim, it cannot hear the ancillary claim. He urged this court to hold that the lower court was wrong to affirm the assumption of jurisdiction by the trial court.

In his response, the learned counsel for the 1st respondent submitted that given the complaint/claims of the plaintiff/1st respondent as disclosed in the originating summons, and in view of the clear provisions of section 87 (9) of the Electoral Act, 2010 (as amended), the lower court was right in holding that the trial court has jurisdiction in the matter. Learned senior counsel opined that the decision of this court in *PDP v. Sylva (supra)* which has exhaustively examined and interpreted the provision of section 87 (9) of the Electoral Act, 2010 (as amended) has put paid to, and

rendered otiose the complaint of the appellants that the trial court had no jurisdiction in the matter. He urged this court to resolve this issue against the appellants.

Learned silk for the 2nd respondent submitted that based on section 87(9) of the Electoral Act 2010 (as amended), an aggrieved person may now approach the Federal High Court or High Court of a State or the FCT to ventilate his grievance with respect to the conduct of primary election.

Also, the learned senior counsel for the 3rd respondent, apart from adopting the submission of the 1st respondent, also submitted that in view of section 87 (9) of the Electoral Act 2010, the trial court was right in assuming jurisdiction in this matter.

It is now well settled that jurisdiction is the life wire of a court as no court can entertain a matter where it lacks the jurisdiction. It is also well settled that the jurisdiction of courts in this country is derived from the Constitution and statutes. No court is permitted to grant itself power to hear a matter where it is not so endowed and if it does, the entire proceedings and the judgment derived therefrom, no matter how well conducted, is a nullity. Therefore, every court must ensure that it is well endowed with the jurisdiction to hear a matter before embarking on the exercise else it would be wasting precious judicial time. See *Utih v. Onoyivwe* (1991) 1 NWLR (Pt. 166) 166; (1991) 1 SCNJ 25; *Madukolu v. Nkemdilim* (1962) 2 A11 NLR (Pt. 11) 5; (1962) 2 SCNLR 341.
Having said that, let me consider the provision of section 87 (9) of the Electoral Act, 2010 (as amended). It provides:-

> "87(9) Notwithstanding the provision of this Act or rules of a political party, an aspirant who complains that any of the provisions of this Act and the guidelines of a political party has not been complied with, in the selection or nomination of a candidate of a political party for election, may apply to the Federal High Court or the High Court of a State or FCT for redress."

It is now well settled that issue of nomination and/ or sponsorship of a candidate for an election falls within the domestic affairs of a political party being a pre-primary duty of the party. However, where the political party decides to conduct primary election to choose its flag bearer, any dissatisfied contestant at the primary is now empowered by section 87 (9) of the Electoral Act, 2010 (as amended) to ventilate his complaint before the Federal High Court or High Court of a State or of the Federal Capital Territory. See *Peoples Democratic Party v. Timipre Sylva (supra).* The said section 87 (9) is clear and unambiguous and does not need any cannon of interpretation. It means what it says. It is trite that where the words of a statute are clear and unambiguous, the

courts are enjoined to give them their ordinary grammatical meaning. See E*gbe v. Yusuf* (1992) 6 NWLR (Pt. 245) 1.

By inserting this new provision into the Electoral Act the legislature has made its intention very clear as to the reason, and purport, that a member of a political party who contested the party primary election is entitled to challenge a breach of the party's Constitution or guidelines and the Electoral Act, by filing an action at the Federal High Court or State High Court or the FCT High Court, *simpliciter*.

In *Ugwu v. Ararume* (2007) 12 NWLR (Pt. 1048) 367, this court stated clearly that a statute, like the Electoral Act is the will of the legislature and that any document which is presented to it as a statute is an authentic expression of the legislative will. The function of the court is to interpret that document according to the intent of those who made it. Thus the court declares the intention of the legislature. For me, I think the legislative intent of inserting S. 87 (9) into the Electoral Act is to give an aggrieved party the flexibility of ventilating his grievance in any of the courts listed therein, depending on where it is most convenient to the parties. That, in my opinion is to make things easier for the parties. To impute any other intention to the section would be to radically violate the intention of the legislature.

I wish to state further that although section 251 of the Constitution of the Federal Republic of Nigeria, 1999 confers exclusive jurisdiction on the Federal High Court in respect matters listed in the paragraphs of the section, it does not create an exhaustive item/list or subject matters upon which that court may exercise jurisdiction. Section 251 of the Constitution does not foreclose the conferment of jurisdiction of a matter not listed under that section of the constitution on the Federal High Court by an Act of the National Assembly. The opening paragraph of the section states:-

> "Notwithstanding anything to the contrary contained in this constitution and in addition to such other jurisdiction as may be conferred upon it by an Act of the National Assembly, the Federal High Court shall have and exercise jurisdiction to the exclusion of any other court in civil cases and matters..."

As was rightly submitted by the learned senior counsel for the 1st respondent, beyond the items in section 251 of the Constitution upon which the Federal High Court exercises exclusive jurisdiction section 87 (9) of the Electoral Act, 2010 (as amended), an Act of the National Assembly, confers additional jurisdiction on the federal High Court to hear and determine disputes, complaints and grievances arising from the conduct of a primary election of a political party. This special jurisdiction so conferred is, by law, to

be exercised concurrently with the State High Court and the FCT High Court. For me, all the arguments of the learned senior counsel for the appellants as to "main relief", ancillary relief" are not part of section 87(9) of the Electoral Act.

It does not in the circumstance leave room for argument on whether or not the parties or any of the parties is an agency of the Federal Government. And in any case, if one should take the argument further as the appellants would want to, is INEC not an agency of the Federal Government? And if we are to go by section 251 of the Constitution, does the Federal High Court not have competence to hear the matter where INEC is a party? I think, counsel, especially in election matters which are *sui generis*, should allow these matters to be decided speedily and not unnecessarily prolonging them on such matters like jurisdiction which the law is clear on. I say no more. The lower court, in my opinion was right to hold that the Federal High Court had jurisdiction to hear and determine this matter. This issue, as it stands does not avail the appellants at all.

I now consider issue No. 3 which is the same as issue No. 2 in the 1st respondent's brief. Issue No. 1 by the 2nd respondent is also in tandem with this issue. After a lengthy run down of the affidavit evidence filed by both parties at the trial court, the learned senior counsel for the appellants submitted that there were conflicts in the affidavit filed by the parties and as such originating summons was not suitable for the commencement of this matter. Citing the case of *Amasike v. The Registrar General, C.A .C.* (2010) All FWLR (Pt. 541) 1406; (2010) 13 NWLR (Pt. 1211) 337, learned silk contended that originating summons is not suitable for hostile or even likely hostile proceedings. He also cited these cases - *Keyamo v. House of Assembly, Lagos State* (2003) FWLR (Pt. 146) 925: (2002) 18 NWLR (Pt. 799) 605; *National Bank of Nigeria v. Alakija* (1978) 9 -10 SC 42.

The learned senior counsel further submitted that in such situations, pleadings must be ordered and that in the instant case, the court below was wrong to affirm the decision of the trial court not to order pleadings.

In response, the learned senior counsel for the first respondent submitted that the lower court was right in affirming the decision of the learned trial judge that resolved the issue in dispute between the parties by relying essentially on the documents produced by the appellants and the 1st respondent. Both the 2nd and 3rd respondents senior counsel agree with the learned silk for the 1st respondent that the lower court was right to affirm the trial court's decision to hear the matter based on originating summons process.

There is no doubt that originating summons is one of the ways of commencing action in our courts. It is provided for in the

various High Court Rules. For the Federal High Court (Civil Procedure) Rules. 2009, Order 3 rules 6 and 7 thereof provide:-

"6. Any person claiming to be interested under a deed will, enactment or other written instrument may apply by originating summons for the determination of any question of construction arising under the instrument and for a declaration of the rights of the persons interested."

7. Any person claiming any legal or equitable right in a case where the determination of the question whether such a person is entitled to the right depends upon question of construction of an enactment, may apply by originating summons for the determination of such question of construction and for a declaration as to the right claimed."

The above provision clearly states the type of actions that may be commenced by way of originating summons. Where the issue is that of construction of documents or interpretation of statutory provisions, it is safe and prudent to approach the court by originating summons.

The record of appeal shows that the 1st respondent herein commenced this matter at the Federal High Court by an originating, summons. Essentially, the action was for the interpretation of the provisions of the Constitution of the 2nd appellant, which said Constitution was said to have been breached by the appellants in the aftermath of the conduct of primary election to Buruku Federal Constituency of Benue State held on the 12th April. 201 1 for which: the plaintiff/1st respondent says he was the winner.

The 1st respondent deposed to an affidavit of 28 paragraphs and exhibited several documents as follows:-

1. The result of the ACN primary election for Buruku Federal Constituency which shows that the 1st respondent won the said primary election with 8,030 votes. It is exhibit F at page 83 of the record.
2. Action Congress of Nigeria guideline for the nomination of candidates for public offices m Nigeria. This is contained on pp. 38 – 44 of the record.
3. Constitution of the Action Congress of Nigeria (exhibit 1) at pp. 45 - 64 of the record.
4. Result of screening - Exhibit J at page 65 of the record.
5. Membership registration form at page 23 of the record.
6. Report of primary election of the 2nd appellant in Benue State exhibit U.
7. Register of members of Action Congress of Nigeria for the wards in Buruku Local government - Exhibits A, B & C.

The appellants also annexed some exhibits to their counter affidavit. They are:-

1. Ward result of primary election exhibit C I - C 12
2. Summary of the result - Exhibit D

A close look at the facts deposed to in the affidavit of both parties and the documents annexed will disclose that the parties do not agree on all issues and that is not strange, else, the appellants would have conceded to the claim of the 1st respondent in the first place. I agree that the procedure by originating summons ensures a quick disposal of a suit especially an election matter which requires some measure of urgency. However where the proceedings are hostile, originating summons should not be used. See *National Bank of Nigeria v. Alakija {supra).* The general principle of law regarding conflict in affidavit in an originating summons procedure is that where this is the case, the court should order for pleadings m order for the parties to lead evidence to resolve such conflicts. However, where there are documents annexed to the affidavit of the parties which can be effectively used to resolve the seemingly conflicts, there would be no need to order for pleading and this is exactly what the learned trial Judge did which was affirmed by the Court of Appeal. See *Nwosu v.Imo State Environmental Sanitation Authority* (1990) 2 NWLR (Pt. 135) 688; *Kimdey v. Military Governor of Gongola State* (1988) 5 SCNJ 28 at 56, (1988) 2 NWLR (Pt. 77) 445; *Fashanu v. Adekoya* (1974) 1 All NLR (Pt. 1) 35 at 91 - 92.

At this stage, I shall refer to the judgment of the learned trial Judge and see how he effectively and quite admirably resolved the seeming conflict in the affidavit using the documents annexed by the parties. I refer to page 383 of the record where the learned judge states:-

> "I shall reproduce the total numbers in the membership register for the three wards respectively, the membership register is *prima facie* of proof of membership in a ward, against it reflects total No. of registered members." Exhibit A - Mbatyough – 410
> Exhibit B – Mbaade – 601
> Exhibit C - Mbaazager – 761
> The total No. of votes and scores exhibited by the 1st and 2nd defendants for those wards are:-
> Votes cast Scores of 1st defendant
> Exhibit c7 – Mbatyough 612 608
> Exhibit c3 - Mbaade 2005 2000
> Exhibit c9 - Mbaazager 725 721
> It is observed that the total number of votes cast and the no of scores declared by 1st defendant is far excess of the total no of members in the ward.

> In Mbaade for example, 1st defendant declared 2000 to himself this is far and over the total number in the register which is 601. These scores definitely cannot stand.
> A glance through exhibit 1A -1L result of 1st defendant, the figures are just too good on paper.
> On part of the plaintiff, scores are
> Mbatyough - 310
> Mbaade - 500
> Mbaazager - 628"

On page 384 of the record, the learned trial Judge concluded as follows:

> "It is trite that the total scores of a candidate in any election where it exceeds the total no of voters in the register of the place where the election held, it amounts to anomaly and it's a symptom of manipulated result. It's not legal, credible and cannot stand in a democratic setting. It is not a reflection of a fair election exercise.
> Assuming all the members in the register voted for one candidate, in a place of 601 people, it can never translate to 2,000 scores no matter the chemistry by mathematics or algebra. It means only one thing: Scores were allocated."

The above exposition by the learned trial Judge was upheld by the court below. This was a far reaching decision by the learned trial Judge but, as was noted by the court below, the appellants have not appealed against it. In view of how the learned trial Judge used the exhibits to resolve the seeming conflicts in the affidavit, what exactly were pleadings meant to do had it been ordered? For me, there was nothing pleadings could have done. The 1st appellant who scored 2,000 votes in a ward winch had 601 voters in the register knows that he is just playing games and that his appeal is an exercise in futility. In the circumstance of this issue. I hold that the appellants have failed to show why it should be resolved in their favour. I resolve it in favour of the respondents.

I make a few remarks on issue 4. The learned trial judge had found that the 1st appellant's score of 2000 votes in Mbaade ward was far above the number of voters in the register which stands at 601 and because of that he held that the votes were allocated and not earned. Now the court below observed that the appellants failed to appeal against crucial findings of the trial court. The appellants herein are saying in issue 4 that they had appealed against the finding in grounds 2 and 5 of the notice of appeal used at the Court of Appeal. The said notice of appeal is on pages 395 to 398 of the record of appeal. I shall reproduce the two grounds of appeal referred to by the appellant:

> "Ground 2

The learned trial Judge fell in a grave error of law when she ascribed a different meaning to exhibit D of the appellant's counter-affidavit, and thereafter proceeded to attach weight to exhibit E and F authored by the 4th respondent in favour of 1st respondent and that occasioned a miscarriage of justice.

Ground 5

The trial court lacked the jurisdiction to try the suit"

This is the notice of appeal referred to by the 1st respondent in his brief. The two grounds quoted above have nothing to do with the said finding of the learned trial Judge on the issue of allocation of votes.

The learned senior counsel for the appellants also referred to another notice of appeal on pp 414-419.

Grounds two and five also state as follows:

"2. The learned trial Judge erred in law in proceeding to judgment against the 1st & 2nd defendants in the place of violent conflicts in the parties' affidavits pertaining to the originating summons instead of ordering pleadings or taking oral evidence to resolve the obvious material conflicts and this occasioned a grave miscarriage of justice to the appellants.

5. The learned trial Judge erred in law in referring, failing or neglecting to act on the unchallenged and uncontroverted evidence - the certificate of return dated 15th January, 2011. (Exht A to 1st defendants counter affidavit and Exht 3 to 2nd defendants counter affidavit) in finding for the 1st and 2nd defendants and this occasioned a gross miscarriage of justice to the appellants."

Again the two grounds of appeal have not challenged the crucial finding of the learned trial Judge on the scores of the 1st appellant *vis-a-vis* the number of members on the register which made the appellants' result and victory improbable. It is my view that the observation by the court below on the issue is unassailable. Accordingly, I resolve this issue against the appellants.

The appellants' complaint in issue 5 is that the l[st] respondent herein failed to file notice of preliminary objection as required by Order 10 rule 1 of the Court of Appeal Rules, 2011 but embodied same in the respondent's brief which he also argued. Also, that he failed to file twenty copies as prescribed in the Rules. He also complained that the 1st respondent failed to seek leave to argue the preliminary objection before the appeal was heard. Neither the 1st respondent nor any of the other respondents made any argument on this issue.

Order 10 rule 1 of the Court of Appeal Rules, 2011 states:

> "A respondent intending to rely upon a preliminary objection to the hearing of the appeal, shall give the appellant three clear days' notice thereof before the hearing, setting out the grounds of objection, and shall file such notice together with twenty copies thereof with the registry within the same time."

The above provision is clear and unambiguous. This court is enjoined to give it its ordinary grammatical meaning. By that Rule, the method of raising a preliminary objection, apart from giving the appellant three clear days notice before the date of hearing may be in the respondent's brief, by a formal separate notice of objection, or both. However, there is the need for the respondent or his counsel, with the leave of the court to move the objection before the hearing of the substantive appeal. See *Magit v. University of Agriculture, Makurdi* (2005) 19 NWLR (Pt. 959) 211; *Tiza & anor v. Begha* (2005) 15 NWLR (Pt. 949) 616; (2005) 5 SCNJ 168, *Nsirim v. Nsirim* (1990) 5 SCNJ 174; (1990) 3 NWLR (Pt. 138) 285; *Okolo v. Union Bank Nig., Ltd.* (1998) 2 NWLR (Pt. 539) 618; *Arewa Textile Plc v. Abdullahi & anor* (1998) 6 NWLR (Pt. 554) 508.

In the instant case, the respondent at the court below gave notice of the preliminary objection in his brief as attested to by the appellants and this court is satisfied that it was a sufficient notice, the said brief having been adequately served on the appellants. The complaint by the appellants in this respect is untenable. As to whether the respondent filed 20 copies or not or whether he raised the objection before the appeal was heard or not is a question of fact and not just for legal argument. The appellants' senior counsel has not provided any evidence that the respondent did not file 20 copies or that he did not seek leave to argue same. The argument of counsel, no matter how brilliant cannot take the place of evidence. In any case, these are issues which ought to have been raised at the court below to be determined before an appeal is made to this court. As it stands, this issue does not avail the appellants.

The 6th and last issue is whether the judgment of the Court of Appeal affirming the trial court's judgment was not against the weight of evidence adduced at the trial. The learned senior counsel for the appellants argued that the weight of evidence clearly tilted in favour of the appellants as against the respondents, especially the 1st respondent and that the judgment of the Court of Appeal ought to have been in favour of the appellants.

The learned silk for the 1st respondent submitted that the judgment of the trial court as affirmed by the court below is sound in law being a product of sound thorough appraisal and dispassionate assessment of the affidavit and documentary evidence produced by the parties at the trial.

While considering issue three in this appeal. I touched on the evidence which the learned trial Judge relied upon to give judgment for the 1st respondent. It should be noted that this suit was commenced by an originating summons procedure wherein both parties filed their respective affidavits with documents attached. It was noted by the learned trial Judge which the court below affirmed, that from the affidavit as well as documentary evidence of the parties, the main issue in contention between the appellants and the 1st respondent touches on who as between the 1st appellant and 1st respondent won the ACN primary election of 12th January, 2011 for Buruku Federal Constituency of Benue State. Both parties produced and relied on the results of the election. While the appellants produced exhibits cl - cl2 as results of the election the 1st respondent produced exhibit F as his own result. Exhibits A, B, C, are the ACN register of members of the party who were eligible to vote in the election.

In the course of evaluating the evidence, the learned trial Judge noted that in Exhibits A, B and C (the Party Registers for Mbatyough, Mbaade and Mbaazager wards) the number of voters are 410, 601 and 761 respectively. However, in exhibits c7, c3 and c9. (the scores exhibited by the appellants) votes cast were 612, 2,005 and 725 respectively while the 1st appellant scored 608; 2,000 and 721 respectively. The court found that the total number of votes cast and the number of scores declared by the appellants were far in excess of the total number of members in those wards. The learned trial Judge then held as follows:

> "In Mbaade for example 1st defendant declared 2,000 votes to himself, this is far and over the total number in the register which is 601. These scores definitely cannot stand."

On the other hand, the respondents tendered results in these wards as 310, 500 and 628 respectively. The learned trial Judge believed this later result and held that of the appellants as being "allocated". Based on the above, the learned trial Judge entered judgment for the 1st respondent and this was affirmed by the court below. I have no reason to disagree with these findings of the two courts below. This was the crux of the matter. How did the appellants' score of 2,000 fit into a register of voters having only 601 members? The appellants ought to have focused their energy and eloquence on this aspect. For me, the appellants have no case as far as this issue is concerned.

On the whole, having resolved all the issues against the appellants, the inevitable outcome is that this appeal is devoid of merit and is accordingly dismissed.

On the consequential orders to be made as a result of the outcome of this appeal, the learned senior counsel for the 1st respondent

submitted that since the Federal High Court and the court below held that the 1st respondent was the sponsored candidate of the 2nd appellant for the election into the House of Representatives seat of Buruku Federal Constituency of Benue State, this court should order the immediate vacation of the seat by the 1st appellant and that the 1st respondent be sworn in immediately. It is his view that this order would meet the justice of the case and to do otherwise would leave the 1st respondent without a remedy.

In his reply brief, the learned senior counsel for the appellants opposed any order directing his client to vacate the seat. He opined that neither the Federal High Court nor the Court of Appeal ordered his client to vacate the seat. Also that issue of vacation of seat was not part of the case at the lower court. It was his further submission that section 141 of the Electoral Act has forbidden all courts from ordering any person to assume an electable seat if that person did not go through all the stages of the election.

The outcome of this appeal from the trial court, Court of Appeal to the Supreme Court is that the 1st respondent was the candidate of the 2nd appellant at the April 2011 election into the House of Representatives seat for the Buruku Federal Constituency of Benue state. This was the position as early as 21st March, 2011 when the Federal High Court ordered that his name be placed on the ballot. Both the 1st and 2nd appellants ignored this order and put forward the 1st appellant for the election. Now that the appellants have lost their appeal in this court, it should dawn on them that the 1st appellant's name was placed on the ballot unlawfully, illegally and in utter disobedience to the order of the Federal High Court. It is now well settled that a person who is in contempt of a subsisting court order is not entitled to be granted the court's discretion to enable him continue with the breach. See *Shugaba v. Union Bank of Nigeria Plc* (1999) 11 NWLR (Pt. 627) 459, *Governor of Lagos States v. Ojukwu (*1986*)* 1 NWLR (Pt. 18)621 .The truth of the matter is that the 1st appellant cannot continue to maintain his seat at the House of Representatives, having found his way into the House unlawfully. I shall make the appropriate orders anon.

At the same time, the 1st respondent cannot be ordered to be sworn in immediately because section 141 of the Electoral Act 2010 (as amended) forbids such an order since the 1st respondent did not participate in all stages of the election. Section 141 of the said Electoral Act *(supra)* states:-

> "An election tribunal or court shall not under any circumstances declare any persona winner at an election in which such a person has not fully participated in all the stages of the said election."

By section 141 of the Electoral Act *(supra), the* 1st respondent cannot be declared the winner of the election as was done in *Amaechi v. INEC* (2008) All FWLR (Pt. 407) 1; (2008) 5 NWLR (Pt. 1080) 227. The clear position of the law now is that a person must participate in all the stages of an election before he can be declared the winner of the said election. In this case, although the Federal High Court held that the 1st respondent was the candidate of the 2nd appellant, the 2nd appellant and the 2nd respondent herein refused to place his name on the ballot. The inevitable outcome of this appeal is that there must be fresh election with the name of the 1st respondent as the candidate of the 2nd appellant in its new name, All Progressives Congress.

In sum, I make the following consequential orders:-

1. The 1st appellant Barrister Orker Jev is hereby ordered to vacate the seat of Buruku Federal Constituency of Benue state in the House of Representatives immediately.
2. The 2nd respondent. Independent National Electoral Commission (INEC) is hereby ordered to conduct election into the vacant seat of Buruku Federal Constituency of Benue State in the House of Representatives within three months (90 days) with the 1st respondent, Sekav Dzua Iyortyom as candidate of the Action Congress of Nigeria (now All Progressives Congress.)
3. The appellants shall pay N500, 000.00 costs to each set of respondents except the 2nd respondent.

ONNOGHEN, J.S.C.: This appeal is against the judgment of the Makurdi division of the Court of Appeal in appeal No. CA/MK/136/2011 delivered on the 7th day of March, 2012 in which the court dismissed the appeal of appellants against the decision of the Federal High Court holden at Makurdi in suit No. FHC/MKD/CS/19/2011 delivered on the 21st day of March, 2011 in favour of the instant 1st respondent.

The facts of the case have been stated in the lead judgment of my learned brother, Okoro, JSC and may be summarized as follows:-

On the 12th day of January,2011 the 2nd appellant conducted the primary elections to choose its candidates for the various elective offices in Nigeria including the Buruku Federal Constituency of Benue State's representative in the Federal House of Representatives, in the general election scheduled for April, 2011. The 1st appellant, 1st respondent and one John Tine contested the primary election which was won by the 1st respondent with 8,030 votes. 1st appellant scored 1, 316 votes while John Tine got 494 votes. The 3rd respondent was the head of the electoral committee

that supervised the primary election and submitted a comprehensive report to the 2nd appellant. The said report is exhibit 'G'.

However, rather than submit the name of the 1st respondent to the 2nd respondent as the winner of the primary election and therefore the sponsored candidate of 2nd appellant for the election into the House of Representatives for Buruku Federal constituency as required by the Electoral Act, 2010, as amended, and the Constitution of 2nd appellant, the 2nd appellant rather submitted the name of the 1st appellant, as its candidate for the said election resulting in the 1st respondent instituting action at the Federal High Court, Makurdi claiming the following reliefs:-

"1. A declaration that the 2nd defendant has breached Article 21.3.6 of the Constitution of the 2nd defendant in that the 2nd defendant has forwarded the name of the 1st defendant as candidate of the 2nd defendant for the April, 2011 general elections for the House of Representatives to the 3rd defendant whereas, the plaintiff won the primaries for said office as conducted by the 2nd defendant.
2. A declaration that the forwarding of the name of 1st defendant by the 2nd defendant as the candidate for the House of Representatives for Buruku Federal Constituency for the forthcoming General elections and the corresponding act of 3rd defendant by accepting, listing and publishing the 1st defendant as the 2nd defendant's candidate for the federal House of Representatives, Buruku Federal Constituency is illegal, unconstitutional, null and void and of no effect.
3. An order of perpetual injunction restraining 1st defendant from parading himself as the 2nd defendant's candidate for the Federal House of Representatives Buruku Federal Constituency in respect of the forthcoming election into the Federal House of Representatives.
4. An order of perpetual injunction restraining the 2nd and 3rd defendants from recognizing and dealing with the 1st defendant as the 2nd defendant's candidate for the House of Representatives Buruku Federal Constituency in respect of the forthcoming election into the Federal House of Representatives.
5. An order directing the 2nd and 3rd defendants to take all steps, action including listing the name of the plaintiff as the 2nd defendant's candidate for the House of Representatives, Buruku Federal Constituency in respect of the forthcoming elections into the Federal House of Representatives and to allow the plaintiff contest the election into the House of Representatives Buruku

Federal Constituency in the forthcoming general elections on the platform of 2nd defendant."

As stated earlier in this judgment, the trial Judge entered judgment for the plaintiff/1st respondent in this appeal and granted all the reliefs reproduced *supra*. An appeal against that judgment was dismissed by the lower court giving rise to the instant further appeal, the issues for the determination of which have been identified by learned senior counsel for appellants, Sebastine T. Hon. SAN in the further amended appellants' brief deemed filed and served on 3/3/14 as follows:-

"1. Was the Court of Appeal right when it struck out appellants' grounds 1, 3 and 4 and issue No. l for the reason that competent and incompetent grounds of appeal were argued together? (Grounds 3 and 4).
2. Was the Court of Appeal right in affirming the trial court's jurisdiction, given that the main relief of the 1st respondent at the trial court was not against an agency of the Federal Government? (Grounds 6 and 7).
3. Was the Court of Appeal right to have affirmed the decision of the trial court to determine the matter upon the 1st respondent's originating summons in spite of the highly contentious affidavit and documentary evidence tendered by the parties? (Ground 1).
4. Did the appellants' appeal against the findings made by the trial court on exhibits A, B and C? (Ground 2)
5. Was the 1st respondent's notice of preliminary objection competent before the Court of Appeal? (Ground 5).
6. Was the judgment of the Court of Appeal affirming the trial court's judgment not against the weight of evidence adduced at the trial? (Additional Ground 1)."

In arguing issue 1, learned senior counsel submitted that the lower court was in grave error of law which adversely affected the appellants' constitutional right to fair hearing when it, *suo motu*, struck out appellant's grounds 1, 3 and 4 and issue 1 formulated therefrom on the ground that competent and incompetent grounds of appeal were combined to form issue No. l, when the lower court did not invite any of the parties to address it on the matter; that the judgment of the lower court based on the issues raised *suo motu* amounts to a *"determination"* of the appellants' *"civil rights and obligations"* by which appellants were mandatorily, under section 36(1) of the 1999 Constitution required to be given "a fair hearing" by the lower court.

However, it is not correct to say that the matter was raised *suo motu by* the lower court and without calling on counsel for appellants to address the court thereon before deciding the matter. The issue of the competence of issue 1 arising from grounds 1, 3

and 4 of the grounds of appeal before the lower court was raised by way of preliminary objection incorporated in the 1st respondent's brief of argument and duly argued therein. That brief was served on the appellants as a result of which they filed a reply brief of argument. It is therefore very strange that learned senior counsel now submits that the issue was raised *suo motu* by the lower court and without calling for address by counsel for appellants.

At pages 946-947 of the record, the lower court found/held as follows:

> "...The appellant had sufficient notice of the ground of the objection in the 1st respondent's brief which obviously was served on him and he reacted to same in his reply brief.
>
> The nature of the objection is not such that can be ignored. The competence of an appeal touches on the jurisdiction of court and once raised must be taken first and decided before any other issue. The rationale is that any defect in competence is fatal, it is extrinsic to adjudication and any proceedings arising there from amounts to a nullity."

To demonstrate the uselessness of appellants' issue 1 and the submissions thereon, learned senior counsel for appellants contradicted seriously, the legal consequences of the court's breach of appellants' right to fair hearing as guaranteed under section 36(1) of the 1999 Constitution by conceding, in no uncertain terms, that the lower court actually considered the merit of the said issue earlier struck out by the court for being incompetent in its judgment before arriving at its decision in the appeal. At page 17, paragraph 4.31 of the appellants' further amended brief of argument, *supra* the learned senior counsel stated as follows:-

> "In the present case, we concede that after striking out the appellants' grounds 1, 3 and 4 and issue No. 1 and all the arguments thereon, the lower court gave an alternative judgment on the merits on issue No. 1 on pages 950 - 956 of vol. 2 of the MROA…."

In any event, it is very much untrue that the lower court raised the issue of competence of issue No. l *suo motu* and without giving appellants the opportunity to address it thereon.

On appellants' issue No. 2, I had earlier reproduced, *in extensor*, the reliefs claimed by 1st respondent at the trial court. It is settled law that it is the claim of the plaintiff as disclosed in the statement of claim that determines the jurisdiction of the court. Going through the reliefs claimed by the 1st respondent I find it very difficult to agree with learned senior counsel for appellants that the trial court had no jurisdiction to hear and determine the suit as constituted. The contention of appellants on the issue is, clearly without foundation whatsoever. The matter before the trial, court

originates from a primary election conducted by the 2nd appellant to choose its candidates for a general election, as earlier stated, which particular primary election was won by 1st respondent who was denied the right of sponsorship by the appellants, He instituted the action calling for interpretation of the provisions of the Constitution of the 2nd appellant relating to the nomination exercise.

Secondly, the 2nd respondent is an agency of the federal Government of Nigeria which also makes the Federal High Court the appropriate venue for the ventilation of the grievances of the 1st respondent against the parties concerned.

Thirdly, by the provisions of section 87(9) of the Electoral Act, 2010, as amended, the Federal High Court is one of the High C Courts clothed with jurisdiction to hear and determine actions such as the one instituted in this case; it provides thus:-

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

The complaint of 1st respondent, apart from being said to be a violation of the provisions of the Constitution of 2nd appellant, is also a violation of the provisions of section 87(4) (c) (ii) of the Electoral Act, 2010 as amended which provides as follows:-

> "The aspirant with the highest number of votes at the end of voting *shall* be declared the winner of the primaries of the party and the aspirant's name *shall* be forwarded to the Commission as the candidate for the party..." The underlined mine

From the underlined word, shall, it is clear that the provision is mandatory and leaves no discretion for the political party to exercise in the matter.

So where 1st respondent's name was not sent to the 2nd respondent as required *supra,* the 1st respondent has the right and duty under section 87(9) of the Electoral Act, 2010 as amended, to institute the action in the Federal High Court which court undoubtedly has the jurisdiction to hear and determine same.

On the issue as to whether originating summons process is the appropriate procedure for the determination of the case of 1st respondent, the answer is clearly in the affirmative as there is no dispute on the relevant/essential facts grounding the claims of 1st respondent, which is anchored on the interpretation of the relevant provisions of the constitution of the 2nd appellant relating to nomination of its candidates for election. Secondly, there is the

finding of fact, which is also borne out by exhibit 'G', that 1st respondent was the winner of the primary election in question haven scored the highest number of votes cast at the election. The question to be decided by the court in the circumstance is therefore whether in the circumstances of the facts and constitutional provisions of 2nd appellant, and the Electoral Act, 2010, as amended, 1st respondent is not the proper candidate of 2nd appellant for the election in issue. Of course, parties can seek to raise disputes where none exists or irrelevant to the determination of the issue(s) in controversy between the parties. In such a case, it is the duty of the court not to allow its eyes to be blinded by irrelevancies and smoke screen. The primary issue therefore is the consequences of the finding, as supported by exhibit 'G' that 1st respondent was the winner of the said primary election and by the provisions of section 87(4) (c) (ii) his name must be sent to 2nd respondent as the candidate for the election in issue.

From the exhibits before the court, the court had no doubt as to who scored the highest number of votes cast in more than half of the wards within the constituency in question, which is the main issue calling for determination in the case.

It is clear from the record and very much unfortunate that 1st appellant has glued himself to the seat of Buruku Federal Constituency of Benue State in the House of Representatives following an election in which he was adjudged by a court of competent jurisdiction not to be a candidate, which decision was affirmed by the lower court, and despite the injunctions ordered by that court. This is, to say the least, a very worrisome development which constitutes a danger to the growth of the Rule of law in this country. What has happened in this case is a negation of justice, equity and good conscience.

A situation where a court order/decision/judgment is rendered ineffective or nugatory by the acts or inaction of a party(ies) in the suit should not by any means be encouraged as same would result in chaos and anarchy and self-help. This court will therefore not fold its hands and watch the judgment of a court of law being trivialized and/or rendered nugatory without doing something to give effect to same. What then is the proper consequential order to be made to meet the justice of the case?

The provisions of section 141 of the Electoral Act. 2010, as amended, prevents this court from declaring a person who has not participated in all the processes of an election a winner of the said election contrary to the earlier decisions of this court as evidenced in *Amaechi v. I.N.E.C.* (2008) All FWLR (Pt. 407) 1; (2008) 5 NWLR (Pt. 1080) 227; *Odedo v. I.N.E.C.* (2009) All FWLR (Pt.449) 844; (2008) 17 NWLR (Pt. 1117) 554 etc, etc. It is in the light of the above provision of the Electoral Act 2010, as amended,

and to give effect to the extant decision of the trial court in this matter that the consequential orders made in the lead judgment of my learned brother Okoro, JSC is necessary.

May be this case points to the need to amend the law - Electoral Act - to make it possible for the courts, in circumstances of this case, to make an order that the party who has benefitted from an illegality, as the 1st appellant in the instant case, refunds all public funds he collected while the illegality lasted; to discourage others.

It is for the above reasons and the more detailed reasons given in the lead judgment of my learned brother Okoro, JSC that I too find no merit whatsoever in the appeal and consequently dismiss same and abide by the consequential orders made therein including the order as to costs.

Appeal dismissed.

GALADIMA, J.S.C.: I have had the opportunity of reading the judgment of my learned brother Okoro, JSC. I am in complete agreement with him in the manner he meticulously considered and resolved the multiple of issues arising for determination in this appeal particularly on the question of whether or not the trial court had jurisdiction to hear and determine complaints on the conduct of political party primaries.

The question of jurisdiction is predicated on the interpretation of section 87 (9) of the Electoral Act 2010 (as amended). It provides as follows:

> "87 (9) Notwithstanding the provision of this Act or rules of a political party, an aspirant who complains that any of the provisions of this Act and the guidelines of a political party has not been complied with, in the selection or nomination of a candidate of a Political Party for election, may apply to the Federal High Court or the High Court of a State or FCT for redress."

It is now trite that the issue of selection/nomination and or sponsorship of a candidate for an election falls squarely within the ambit of domestic affairs and decision of a political party. It is basic and a pre-primary duty of a political party. A rider has been provided in the foregoing section 87 (9) *(supra).* It says clearly that a flag bearer of a political party who contested at the primary, who is dissatisfied can resort to the Federal High Court or High Court of a State or FCT to redress or ventilate his complaint. This section is clear and unambiguous. See *PDP v. Timipre Sylva* (2012) All FWLR (Pt.637) at 606; (2012) 13 NWLR (Pt. 1316) 85.

The finding of the trial Federal High Court Makurdi, which was affirmed by the Court of Appeal, Makurdi division is that it

was the 1st respondent and not the 1st appellant that won the APC Primary conducted on 12/1/2011 to nominate its candidate to represent the Buruku Federal Constituency of Benue State in the General Elections for the House of Representatives.

The 1st respondent, no doubt had a cause of action when his party APC submitted the name of the 1st appellant and not his own name. By virtue of S. 87 (9) of the Electoral Act *(supra)*, the 1st respondent, who had complained could apply to the Federal High Court or High Court of a State or FCT for redress. In this case he chose the Federal High Court. He was right. The subject matter in this case is within the jurisdiction of that court.

In view of the foregoing reasons and those adumbrated by my learned brother aforementioned, I too agree that there is no merit whatsoever in the appeal and consequently it is dismissed. I abide by the orders made therein as to costs.

RHODES-VIVOUR, J.S.C.: I have had the privilege of reading in draft the leading judgment of my learned brother, Okoro, JSC. I agree with his lordship on the points which arise in this case, but in view of the fundamental nature of the jurisdiction issue in particular I express my view.

The full history and circumstances have already been set out in the leading judgment, and need not be repeated.

The question on jurisdiction is:

> Whether the trial court had jurisdiction to hear and determine complaints on the conduct of political party primaries.

In *Madukolu & Ors v. Nkemdilim* (1962) 2 NSCC p.374; (1962) 2 SCNLR 341.

Bahamian. JSC made some observations on jurisdiction and the competence of a court. His lordship said that a court is competent when-

(a) it is properly constituted as regards members and qualifications of the members of the bench, and no member is disqualified for one reason or another; and

(b) the subject matter of the case is within its jurisdiction, and there is no feature in the case which prevents the court from exercising its jurisdiction; and

(c) the case comes before the court initiated by due process of law, and upon fulfillment of any condition precedent to the exercise of jurisdiction.

The question on jurisdiction turns on the interpretation of section 87(9) of the Electoral Act which states that:

> "87(9). Notwithstanding the provision of this Act or Rules of a political party an aspirant who complains that any of the

> provisions of the Act and the guidelines of a political party has not been complied with, in the selection, nomination of a candidate of a political party for election, may apply to the Federal High Court or the High Court of a State or FCT for redress."

Section 87(9) of the Electoral Act confers jurisdiction on the Federal High Court, or High Court of a State, or High Court of the Federal Capital Territory to examine the conduct of primary elections and see if the primary elections were conducted in accordance with the parties' constitution and guidelines, only when a dissatisfied contestant at the primaries complains about the conduct of the primaries. See *PDP v. T. Sylva & 2 ors* (2012) All FWLR (Pt.637) p.606; (2012) 13 NWLR (Pt. 1316) 85; *Hope Uzodinma v. Senator O. Izunaso* (2011) vol.5 (Pt.i) MJSC p. 27; (2011) 17 NWLR (Pt. 1275) 30.

The finding of the trial court, affirmed by the Court of Appeal is that it was the 1st respondent and not the 1st appellant that won the APC primaries conducted on 12/1/2011 to choose its candidate to represent the Buruku Federal Constituency of Benue State in general elections for the Federal House of Representatives. The 1st respondent had a cause of action when his party, the APC rather than submit his name to INEC for the general elections, submitted the name of the 1st appellant as the APC's candidate. The 1st respondent by virtue of section 87(9) of the Electoral Act was entitled to sue in the Federal High Court, or a State High Court, or a High Court of the Federal Capital Territory. He was right to file his action in the Federal High Court since the subject matter of the case is within the jurisdiction of that court.

For this brief reasons as well as those comprehensively given by my learned brother, Okoro, JSC I find no merit in the appeal. The appeal is hereby dismissed.

I endorse the consequential orders given in the leading judgment together with costs.

AKA'AHS, J.S.C.: On 12th January, 2011, the 2nd appellant conducted primary elections to choose its candidates for various elective offices to be contested for in the general elections which were scheduled for April, 2011 throughout the country. This included the primary election for the Buruku Federal Constituency of Benue State which was between the 1st appellant, 1st respondent and one John Tine. At the conclusion of the said primary election, the 3rd respondent, Engr Mozeh, who headed the electoral committee of the 2nd appellant declared the 1st respondent as winner having polled 8,030 votes as against the appellant who garnered 1,316 votes and John Tine who came 3rd with 494 votes.

But in spite of the result of the primary election, the 2nd appellant declared the 1st appellant as the winner. The 1st respondent being dissatisfied with the declaration filed suit No. FHC/CS/19/2011 at the Federal High Court, Makurdi challenging the nomination of the 1st appellant whose name was submitted to INEC to contest the general, election. The Federal High Court gave judgment in favour of the 1st respondent on 21/3/2011 and declared him the winner of the said primary. It directed the 2nd appellant to forward the name of the 1st respondent to INEC as the candidate sponsored by the party for the general election. The appellants appealed against the judgment and so did not comply with the order of the court to send the 1st respondent's name to be included in the ballot for the election. The election was conducted in April 2011 with the 1st appellant's name reflected on the ballot as the candidate sponsored by the 2nd appellant. The appellants' appeal to the Court of Appeal failed. The lower court affirmed the judgment of the Federal High Court. Again, the appellants were dissatisfied and have appealed to this court. My learned brother, Okoro, JSC dealt in an admirable way with the issues arising in the appeal. I agree entirely with his resolution of the issues. My Lord however could not order the immediate swearing in of the 1st respondent as the member elected to represent the Buruku Federal Constituency in the House of Representatives because of section 141 of the Electoral Act 2011 (as amended) which provides that-

> "An election tribunal shall not under any circumstance declare any person a winner at an election in which such a person has not fully participated in all the stages of the said election."

The provision to my mind is an unnecessary interference by the legislature with the discretion of the court to do substantial justice to the respondent who was clearly wronged by the action of the appellants to deny him the opportunity to contest the election. The 2nd appellant is culpably guilty for its failure to send the 1st respondent's name to INEC after the Federal High Court had delivered its judgment a month before the election. For democracy to thrive all the adherents of the political parties and especially the party officials must allow the will of the electorate to prevail and not display overt preference of one candidate over another.

I therefore find no merit in the appeal and it is hereby dismissed. 1 endorse the orders made on costs.

Appeal dismissed.