

CHIEF EMMANUEL OSITA OKEREKI,
V.

1. ALHAJ UMARU MUSA YAR'ADUA
2. DR. GOODLUCK JONATHAN
3. CHIEF RESIDENT ELECTORAL COMMISSIONER ,
4. RESIDENT ELECTORAL COMMISSIONER, ADAMAWA STATE ST
5. RESIDENT ELECTORAL COMMISSIONER, AKWA IBOM STATE
6. RESIDENT ELECTORAL COMMISSIONER, ANAMBRA STATE
7. RESIDENT ELECTORAL COMMISSIONER, BAYELSA STATE
8. RESIDENT ELCTORAL COMMISSIONER, BENUE STATE
9. RESIDENT ELECTORAL COMMISSIONER, CROSS RIVER STATE
10. RESIDENT ELECTORAL COMMISSIONER, DELTA STATE
11. RESIDENT ELECTORAL COMMISSIONER, EBONYI STATE
12. RESIDENT ELECTORAL COMMISSIONER, EDO STATE
13. RESIDENT ELECTORAL COMMISSIONER, EKITI STATE
14. RESIDENT ELECTORAL COMMISSIONER, ENUGU STATE
15. RESIDENT ELECTORAL COMMISSIONER, GOMBE STATE
16. RESIDENT ELECTORAL COMMISSIONER, IMO STATE
17. RESIDENT ELECTORAL COMMISSIONER, JIGAWA STATE
18. RESIDENT ELECTORAL COMMISSIONER KADUNASTATE
19. RESIDENT ELECTORAL COMMISSIONER, KATSINA STATE
20. RESIDENT ELECTORAL COMMISSIONER, KEBBI STATE
21. RESIDENT ELECTORAL COMMISSIONER, KOGI STATE
22. RESIDENT ELECTORAL COMMISSIONER, KAWARA STATE
23. RESIDENT ELECTORAL COMMISSIONER, NASARAWA STATE
24. RESIDENT ELECTORAL COMMISSIONER, NIGER STATE
25. RESIDENT ELECTORAL COMMISSIONER, OGUN STATE
26. RESIDENT ELECTORAL COMMISSIONER, ONDO STATE
27. RESIDENT ELECTORAL COMMISSIONER, OSUN STATE
28. RESIDENT ELECTORAL COMMISSIONER, OYO STATE
29. RESIDENT ELECTORAL COMMISSIONER, PLATEAU STATE
30. RESIDENT ELECTORAL COMMISSIONER, RIVERS STATE
31. RESIDENT ELECTORAL COMMISSIONER, SOKOTO STATE
32. RESIDENT ELECTORAL COMMISSIONER, TARABA STATE
33. RESIDENT ELECTORAL COMMISSIONER, YOBE STATE
34. RESIDENT ELECTORAL COMMISSIONER, ZAMFARA STATE
35. INDEPENDENT NATIONAL ELECTORAL COMMISSION (INEC)

SUPREME COURT OF NIGERIA

SC. 246.2007

ALOYSIUS IYORGYER KATSINA-ALU, J.S.C. (Presided)

GEORGE ADESOLA OGUNTADE, J.S.C.

WALTER SAMUEL NKANU ONNOGHIEN, J.S.C.

FRANCIS EEDODE TABAI, J.S.C

IBRAHIM TANKO MUHAMMAD, J.S.C. (Read the Leading Judgment)

FRIDAY, 9TH MAY, 2008

APPEAL- Appeal to Court of Appeal and the Supreme Court in election matters - Determination of- Procedure therefor.

APPEAL - Court of Appeal - Exclusive jurisdiction of over Presidential election petition - Section 239, 1999 Constitution.

COURT- Court of Appeal - Exclusive jurisdiction of over I": Presidential election petition - Section 239, 1999 Constitution.

COURT- Jurisdiction of court - Ingredients of.

COURT-Rules of court - Election petition tribunal - Rules of procedure to be adopted therein- Section 151, Electoral Act, 2006 considered.

COURT- Rules of court - Election Tribunal and Court Practice I" Directions, 2007 - Source and purport of.

COURT- Rules of court - Status of vis-a-vis Practice Directions.

COURT-"Tribunal" - Meaning of.

ELECTION PETITION - Election petition - Amendment of- When be granted.

ELECTION PETITION - Election petition - Contents of- Mode of

ELECTION PETITION - Election petition - Meaning of.

ELECTION PETITION - Election petition - Motion in election petition matters - When can be entertained.

ELECTION PETITION - Ejection petition - Pre-hearing session and requirements of - Failure to comply therewith - Effect jurisdiction of tribunal.

ELECTION PETITION - Election petition matters - Pre-hearing session therein - Importance of - Steps to be taken therein Failure of petitioner or respondent to apply for - Effect.

ELECTION PETITION - Election petition matters - Pre-hearing, session therein - Conduct of- Whether tribunal can suo motuo cause a pre-hearing session to be held.

ELECTION PETITION - Election petition tribunal - Rules of procedure to be adopted - Section 151, Electoral Act, 2006 considered.

ELECTION PETITION-Election tribunal – Practice and procedure of- Nature of.

ELECTION PETITION - Election Tribunal and Court Practice Directions, 2007 - Source and purport of.

ELECTION PETITION - Presidential election petition-exclusive jurisdiction of Court of Appeal with respect thereto.

JURISDICTION - Jurisdiction of court - Ingredients of.

JURISDICTION - Jurisdiction of superior courts - Source of.

PRACTICE AND PROCEDURE - Election petition - Pre-hearing session and requirements of - Failure to comply therewith Effect on jurisdiction of the tribunal.

PRACTICE AND PROCEDURE - Procedure stipulated in a status for performing an act - Need to comply therewith.

STATUTE-

WORDS AND PHRASES- procedure stipulated in a statute for performing an act- need to comply therewith.

WORDS AND PHRASES- election petition- meaning of.

WORDS AND PHRASES- tribunal- meaning of.

Issue:

Whether, having regard to the provision of paragraph 6(1) of the election tribunal and court practice direction, 2007 (No. 1), the determination of the motion on the notice and

the determination of the motion on notice and the preliminary objection by the tribunal was not without jurisdiction.

Facts:

The appellant filed an election petition at the Court of Appeal i challenging the election of the 1st and 2nd respondents as the President and Vice President of Nigeria. He claimed the following reliefs:

1. A declaration that the 1st and 2nd respondents were not qualified to contest the offices of President and Vice-President of Federal Republic of Nigeria in that both were at the lime of the election disqualified by their respective indictments by Administrative Panel of Inquiry set up by Abia Stale government under section 137(1) (d) (l) Constitution of the Federal Republic of Nigeria, 1999.
2. A declaration that the omission or commission of the 35th respondent in removing the petitioner's party logo/ symbol in most of the States of the Federation and the Federal Capital Territory amounts to unlawful exclusion at the Presidential Election held on 21st April, 2007.
3. An order cancelling/nullifying the Presidential Election held on 21st April, 2007 and directing the 35th respondent to conduct fresh/and/or bye-election into the offices of President and Vice-President of Nigeria."

The 1st and 2nd respondents filed a memorandum of conditional appearance and a notice of preliminary objection. The 3rd to 35th respondents also filed a notice of preliminary objection. All the respondents in their preliminary objections contested the competency of the petition.

Subsequently, the appellant filed an application seeking the Court of Appeal's order tor him to furnish better and further particulars to his petition.

The Court of Appeal took all the applications together and after hearing the submissions of counsel for the parties, sustained the notices of preliminary objections and struck out the petition for being incompetent.

Dissatisfied with the Court of Appeal's decision, the appellant appealed to the Supreme Court and contended that the Court of Appeal sitting as the Presidential Election Petition Tribunal did not have the jurisdiction to determine the preliminary objection of the respondents as that was contrary to the provision of paragraph 6(1) and (4) of the Election Tribunal and Court Practice Directions which provide that all motions shall be heard at the pre-hearing session. The respondents, on their part, contended that the provision of paragraph 4(1)(d) of the 1st Schedule to the Electoral Act, 2006 and paragraph 1(1)(b) of the Election Tribunal and Court Practice, Directions, 2007 were not complied with by the appellant which rendered his petition incompetent and robbed the tribunal the jurisdiction to hear and determine the petition. They equally contended that the issue of jurisdiction can be raised at any stage of the proceedings and that once raised it must be heard and determine first by the tribunal.

In determining the appeal, the Supreme Court considered the provisions of paragraphs 1(1)(b); 3(1)(4) and 6(1) & (4) of the Election Tribunal and Court Practice Directions:

"1(1) All petitions to be presented before the tribunal or court shall be accompanied by:

(b) Written statements on both of the witnesses."

3(1) Within 7 days after the filing and service of the petitioner's reply on the respondent; or 7 days after the filing and service of the respondent's reply which

ever is the case, the petitioner shall apply for the issuance pre-hearing notice in form TFO07.

- (4) Where the petitioner and the respondent fail to bring an application under this paragraph, the tribunal or court shall dismiss the petition as abandoned petition and on application for extension of time to take that step shall be filed or entertained."

"6(1) No motion shall be moved. All motions shall come up at the Pre-Hearing session except in extreme circumstances with leave of the tribunal or court.

- (4) Where the respondent to a motion intends to oppose the application he shall within 7 days of the service on him of such application, file his written address and may accompany it with a counter affidavit."

Held (Unanimously dismissing the appeal):

1. On Exclusive jurisdiction of the Court of Appeal to entertain petition in respect of Presidential election **By virtue of section 239 of the 1999 Constitution, the Court of Appeal shall to the exclusion of any other court of law in Nigeria, have original jurisdiction to hear and determine any question as to whether:**
 - (a) Any person has been validly elected to the office of President or Vice-President under the Constitution; or
 - (b) The term of the President has ceased.
 - (c) The office of President or Vice-President has become vacant.**In hearing and determining an election petition under this section, the Court of Appeal shall be duly constituted if it consists of at least three Justices of the Court of Appeal. (P. 115, paras. E-H)**
2. On Meaning of tribunal –
Tribunal means an election tribunal established under Electoral Act or the Court of Appeal. (p.115, para. H)
3. On Source of rules of procedure for election petitions –
Section 151 of the Electoral Act provides that the rules of procedure to be adopted for election petitions and appeals arising there from shall be those set out in First Schedule to the Act. (Pp. 115-116, paras. H-A)

ELECTION PETITION - Election petition - Motion in election petition matter - When can be entertained.

ELECTION PETITION - Election petition - Pre-hearing session and requirements of - Failure to comply therewith - Effect on jurisdiction of tribunal.

ELECTION PETITION - Election petition matters - Pre-hearing session therein - Importance of - Steps to be taken therein - Failure of petitioner or respondent to apply for - Effect.

ELECTION PETITION - Election petition matters - Pre-hearing session therein - Conduct of- Whether tribunal can suo motuo cause a pre-hearing session to be held.

ELECTION PETITION - Election petition tribunal - Rules of procedure to be adopted - Section 151, Electoral Act. 2006 considered.

ELECTION PETITION - Election tribunal - Practice and procedure of - Nature of.

ELECTION PETITION - Election Tribunal and Court Practice Directions, 2007 - Source and purport of.

ELECTION PETITION - Presidential election petition - Exclusive jurisdiction of Court of Appeal with respect thereto.

JURISDICTION - Jurisdiction of court - Ingredients of.

JURISDICTION - Jurisdiction of superior courts - Source of

PRACTICE AND PROCEDURE - Election petition - Pre-hearing session and requirement of - Failure to comply therewith Effect on jurisdiction of the tribunal.

PRACTICE AND PROCEDURE - Procedure stipulated in a statute for performing an act - Need to comply therewith.

STATUTE - Procedure stipulated in a statute for performing an act - Need to comply therewith.

WORDS AND PHRASES - Election petition - Meaning of.

WORDS AND PHRASES - Preliminary objection - Meaning of.

WORDS AND PHRASES - Tribunal - Meaning of.

Issue:

Whether, having regard to the provision of paragraph 6(1) of the Election Tribunal and Court Practice Direction, 2007 (No. 1), the determination of the motion on notice and the preliminary objection by the tribunal was not without jurisdiction.

Facts:

The appellant filed an election petition at the Court of Appeal challenging the election of the 1st and 2nd respondents as the President and Vice President of Nigeria. He claimed the following reliefs:

- "1. A declaration that the 1st and 2nd respondents were not qualified to contest the offices of President and Vice-President of Federal Republic of Nigeria in that both were at the time of the election disqualified by their respective indictments by Administrative Panel of Inquiry set up by Abia State Government under section 137 (1)(d)(1) Constitution of the Federal Republic of Nigeria, 1999.
2. A declaration that the omission or commission of the 35th respondent in removing the petitioner's party logo/ symbol in most of the States of the Federation and the Federal Capital Territory amounts to unlawful exclusion at the Presidential Election held on 21st April, 2007.
3. An order cancelling/nullifying the Presidential Election held on 21st April, 2007 and directing the 35th respondent to conduct fresh/and/or bye-election into the offices of President and Vice-President of Nigeria."

The 1st and 2nd respondents filed a memorandum of conditional appearance and a notice of preliminary objection. The 3rd to 35th respondents also filed a notice of preliminary objection. All the respondents in their preliminary objections contested the competency of the petition.

Subsequently, the appellant filed an application seeking the Court of Appeal's order for him to furnish better and further particulars to his petition.

The Court of Appeal took all the applications together and after hearing the submissions of counsel for the parties, sustained the notices of preliminary objections and struck out the petition for being incompetent.

Dissatisfied with the Court of Appeal's decision, the appellant appealed to the Supreme Court and contended that the Court of Appeal sitting as the Presidential Election Petition Tribunal did not have the jurisdiction to determine the preliminary objection of the respondents as that was contrary to the provision of paragraph 6(1) and (4) of the Election Tribunal and Court Practice Directions which provide that all motions shall be heard at the pre-hearing session. The respondents, on their part, contended that the provision of paragraph 4(1)(d) of the 1st Schedule to the Electoral Act, 2006 and paragraph 1(1)(b) of the Election Tribunal and Court Practice

Directions, 2007 were not complied with by the appellant which rendered his petition incompetent and robbed the tribunal the jurisdiction to hear and determine the petition. They equally contended that the issue of jurisdiction can be raised at any stage of the proceedings and that once raised it must be heard and determined first by the tribunal.

In determining the appeal, the Supreme Court consider the provisions of paragraphs 1(1)(b); 3(1)(4) and 6(1) & (4) of the Election Tribunal and Court Practice Directions:

1. All petitions to be presented before the tribunal or court shall be accompanied by:
 - (b) Written statements on both of the witness.
- 3 (1). Within 7 days after the filing and service of the petitioner's reply on the respondent; or 7 days after the filing and service of the respondent's reply which ever is the case, the petitioner shall apply for the issuance pre-hearing notice in form TFO07.
- (4). Where the petitioner and the respondent fail to bring application under this paragraph, the tribunal or court shall dismiss the petition as abandoned petition and application for extension of time to take that step shall be filed or entertained."
- 6(1) No motion shall be moved. All motions shall come up at the Pre-Hearing session except in extreme circumstances with leave of the tribunal or court.
- (4) Where the respondent to a motion intends to oppose the application he shall within 7 days of the service on him of such application, file his written address and may accompany it with a counter-affidavit."

Held (Unanimously dismissing the appeal):

- 1 On Exclusive jurisdiction of the Court of Appeal to entertain petition in respect of Presidential election **-By virtue of section 239 of the 1999 Constitution, the Court of Appeal shall to the exclusion of any other court of law in Nigeria, have original jurisdiction to hear and determine any question as to whether:**
 - (a) Any person has been validly elected to the office of President or Vice-President under the Constitution; or
 - (b) The term of the President has ceased.
 - (c) The office of President or Vice-President has become vacant.

In hearing and determining an election petition under this section, the Court of Appeal shall be duly constituted if it consists of at least three Justices of the Court of Appeal. (p. 115, paras. E-H)

- 2 On Meaning of tribunal –
Tribunal means an election tribunal established under Electoral Act or the Court of Appeal. (p. 115, para. II)
- 3 On Source of rules of procedure for election petitions **-Section 151 of the Electoral Act provides that the rules of procedure to be adopted for election petitions and appeals arising there from shall be those set out in First Schedule to the Act.** (Pp. 115-116, paras. H-A)
- 4 On Meaning of election petition **-An election petition means any election petition under the Electoral Act including election petition which challenges the validity of election of persons into the office of the President and Vice-President of the Federal Republic of Nigeria.** (P. 116, paras. A-B)
- 5 On Practice and procedure for determining election-petitions **-By paragraph 50 of the First Schedule to Electoral Act 2006, the practice and procedure of the tribunal or**

the court in relation to an election petition shall be as possible similar to the practice and procedure of the Federal High Court in the exercise of its civil jurisdiction, and the Civil Procedure Rules shall apply with such modifications as may be necessary to render them applicable having regard to the provisions of the Act as if the petitioner and respondent were respectively the plaintiff and the defendant in an ordinary civil action. (P. 116, paras. B-D)

- 6 **On Practice and procedure to determining arising from election matters -An appeal to the Court of Appeal or to the Supreme Court shall be determined in accordance with practice and procedure relating to appeals in the Court of Appeal or of the Supreme Court as the case may be, regard being had to the need for urgency on electoral matters. (P.I 16, paras. D-E)**
- 7 **On Source and purport of Practice Directions for election petitions -The Practice Directions were made in exercise of the powers conferred on the Honourable President of the Court of Appeal by the provisions of the Constitution and the Electoral Act. The Practice Directions must from all intents and purposes be taken to form part and parcel of powers conferred on the Honourable President of the Court of Appeal by all the powers exercisable by him in that behalf with a view to facilitating the tribunals or the court to dispose of electoral matters with the urgency they require. (p. 116, paras. F-G)**
- 8 **On Effect of failure to comply with pre-hearing requirements in election petitions -Where neither the petitioner or the respondent files an application for a pre-hearing session, the tribunal or court is under a duty to dismiss the petition as abandoned and no application for extension of time to take that step shall be filed or entertained. Although the provision of the Practice Direction appears harsh on the petitioner by prescribing an order of dismissal of the petition which forecloses any chance for him to re-present the petition, it still has to be complied with by the tribunal or court as such steps are a condition precedent to the hearing of any matter in relation to the petition pending before the tribunal or court. Non-compliance will strip the tribunal or court of jurisdiction. (PI18, paras. B-E)**
- 9 **On Ingredients of jurisdiction of court - A court is said to be competent to determine a matter before it when the following are present:**
 - (a) **It is properly constituted with respect to the number and qualification of its membership;**
 - (b) **the subject-matter of the action is within its jurisdiction;**
 - (c) **the action is initiated by due process of law; and**
 - (d) **Any action (condition precedent) to the exercise of its jurisdiction has been fulfilled.**

In the instant case, the Court of Appeal was wrong to have heard the motion and the preliminary objections as filed by the parties as the appellant failed to comply with the condition precedent to the exercise of the court's jurisdiction. [A. -G., Federation v. Guardian Newspapers Ltd. (1999) 9 NVVLR (Pt. 618) 187; Ajao v. Ajao (1985) 5 NWLR (Pt. 45) 802; Madukolu v. Nkemdilim (1962) 2 SCNLR 341 referred to.] (Pp. 118, paras. E-G; 125, paras. F-G)

10. **On Steps required to be taken at pre-hearing session in election petition -By paragraph 3(7) of the Election Tribunal and Court Practice Directions, the tribunal shall at the pre-hearing session consider and take appropriate action in respect of the following:**

- (a) amendment and further and better particulars;
- (b) Hearing and determination of objections on point of law;
- (c) Such other matters as may facilitate the just and speedy disposal of the petition bearing in mind the urgency of the election petitions.

In the instant case, the motion and the preliminary objections were simultaneously taken by the Court of Appeal sitting as a court entertaining the petition filed by the appellant. Consequently, the steps provided for treating of amendment and further and better particulars, objections on point of law and such other matters which may facilitate the just and speedy disposal of the petition were not followed by the court.

(P. 118-119, paras. H-D)

11. On When motion in an election petition entertained- **By paragraph 6 of the Election Tribunal and court Practice Directions, all motions shall come up at the pre-hearing session except in extreme circumstances with leave of tribunal or court. The paragraph therefore makes an outright prohibition of moving motions before the tribunal except if it is at the pre-hearing sessions.** (P. 120. para. E)
12. On Importance of pre-hearing sessions in election petition - **Pre-trial sessions are a condition precedent before a tribunal or court can proceed to entertain any election petition or matters relating thereto, where a court lacks the competence and jurisdiction entertain a matter, the proceedings conducted thereon are a nullity. In the instant case, the court of Appeal lacked competence and had no jurisdiction to entertain the motion on notice filed by the appellant and the preliminary objection filed by the 1st and 2nd respondents.** [Achiakpa v. Nduka (2001) 14 NWLR (Pt. 734) 623; I.B.W.A Ltd. v. Pavex International Co. (Nig.) Ltd. (2000) 7 NWLR (Pt. 663) 105; Adcsola v. Ahidoeye (1999) 14 NWLR (Pt. 637) 28 referred to.] (Pp. 120-121, paras. H-C)
13. On Need to comply with procedure stipulated by statute - **Where legislation lays down a procedure for doing a thing there should be no other method of doing it. In the instant case, the necessary procedure to be adopted in cases of motion by way of amendment or objection on point of law in an election petition is that laid down in paragraphs 6(1) and 3(2)(a) of the Election Tribunal and Court Practice Directions, 2007.** (P. 127, paras. E-G)
14. On Whet lie r election tribunal can suo motu it conduct a pre-hearing session - **By paragraph 3(1) and (3) of the Election Tribunal and Court Practice Directions, 2007 (lie tribunal or court does not, suo motu, conduct or cause a [ire-hearing session to be held. Such a session can only be held upon an application by either the petitioner or the respondent to the petition. In the instant case, both parties agreed that no such pre-hearing session was applied for nor held though the applications determined by the tribunal ought to have been determined at the pre-hearing session if one had been applied for and held.** (Pp. 128-129, paras. H-A)
15. On Effect of failure to apply for pre-hearing session in election petition - **Where the petitioner and respondent fail to bring an application for pre-hearing session, the tribunal has the power to dismiss the petition as abandoned petition and no application for extension of time to take that step shall be filed or entertained and such dismissal is final. This law applies only to election petitions in which are of the essence.** (p. 129, paras. B-C)

16. On Meaning of preliminary objection - **A preliminary objection is a special procedure whereby the respondent contests the competence of a suit and jurisdiction of the court and if upheld has the effect of terminating the life of the suit by its' being struck out.** [Galadima v. Tanibia (2000) 11 NWLR (Pt. 677) 1 referred to.] (P. 134. paras. C-D)
17. On When amendment can be granted in election petition- **Amendments of substantial nature in an election petition can only be sought and granted before the expiration of thirty days from the date the result of the election was declared. In the instant case, although the date the result of the election was declared was not indicated anywhere in the application, it was sometime before the 21/5/2007 when the petition was filed. The petition for amendment was filed on the 8/8/2007 over two and a half months from the date the petition was filed. it was clearly outside the period stipulated for amendments. Consequently, the motion having been brought more than two months after the declaration of the result of the presidential election held on 21/4/07 was statute-barred and was rightly struck out.** (P.140, paras. A-C)
18. On Contents of an election petition -
By paragraph 4 of the 1st Schedule to the Electoral Act, 2006, an election petition shall:
- (a) specify the parties interested in the election petition;
 - (b) specify the rights of the petitioner to present the election petition;
 - (c) state the holding of the election, scores of the candidates and the person returned as the winner of the election; and
 - (d) State clearly the facts of the election petition and the grounds on which the petition is based and the relief sought by the petitioner.

An election petition which does not confirm with the above paragraph is defective and may be struck out by the tribunal. (P. 140, paras. E-H)

19. On Mode of filing election petition -
Paragraph 1 of the Election Tribunal and Court Practice Directions provides for the mode of filing an election petition. All petitions to be presented before the tribunal or court shall be accompanied by:
- a. List of all the witnesses that the petitioner intends to call in proof of the petition
 - b. Written statements on oath of the witnesses; and
 - c. Copies or list of every document to be relied on at the hearing of the petition.

A petition which fails to comply with these requirements shall not be accepted for filing by the secretary. (P.p. 140-141, paras. H-C)

20. On Relationship between Practice Directions 2007 and Electoral Act, 2006 -
The Practice Directions 2007 are ancillary to the Electoral Act 2006. They are complementary to the provisions of the 1st Schedule to the Electoral Act and specifically designed to meet the need for urgency in election matters. Thus, it is the combination of paragraph 4(1)-(5) of the 1st Schedule of the Act and paragraph 1(1) of the Practice Directions that constitutes the complete contents of the election petition. Specifically, paragraph 1 (1) (b) of the Practice Directions provides for the proof of evidence by which the petition can be proved. The requirement is

mandatory. In the instant case, the petition as constituted was without the witness's written statement on oath. In other words, the petition was bare skeleton without the flesh to sustain it. It did not meet the requirements of the two provisions of paragraph 4(1)(d) of the 1st Schedule to the Electoral Act; 1(l)(b) and 1(i) of the Practice Directions. In the circumstance, the petition was incompetent for non-compliance with the Electoral Act. (P. 141, paras. C-F)

Nigerian Cases Referred to in the Judgment:

7up Bottling Co. Ltd. v. Abiola & Sons Bottling Co. Ltd. (2001) 13NWLR (Pt.730)469
A.-G., Fed. v. Guardian Newspaper Ltd. (1999) 9 NWLR (Pt.618) 187
Achiakpa v. Nduka (2001) 14 NWLR (Pt. 734) 623
Adesola v. Abidoye (1999) 14 NWLR (Pt. 637) 28
Ajao v. Alao (1986) 5 NWLR (PUS) 802
Buhari v. Yusuf (2Q03) 14 NWLR (Pt.841) 446
C.C.B. (Nig.) Ltd. v. A.-G., Anambra State (1992) 8 NWLR (Pt. 261)528
Egolum v. Obasanjo (1999) 7 NWLR (Pt.611) 355
Ezemba v. Ibeneme (2004) 14 NWLR (Pt. 894) 617
Ezomo v. Oyakhire (1985) 1 NWLR (Pt.2) 195
Galadima v. Tambai (2000) 11 NWLR (Pi. 677) 1
Galaudu v. Kambu (2004) 15 NWLR (Pi.895) 3 1
I.B.W.A. Ltd. v. Pavex International Co. (Nig.) Ltd. (200) NWLR (Pt. 663) 105
Ibrahim v. I.N.E.C. (1999) 8 NWLR (Pt.614) 334
Ishola v. Ajiboye (1994) 6 NWLR (Pt.352) 506
Madukolu v. Nkemdilim (1962) 2 SCNLR 341
Okafor v. A.-G., Anambra State (1991) 6 NWLR (Pt.200)6
Okesuji v. Lawal (1991) 1 NWLR (Pt. 170) 661
Omeh v. Okoro (1999) 8 NWLR (Pt.6L5) 356
Onamade v. A.C.B. Ltd. (1997) 1 NWLR (Pt. 480) 194
Owoniboy Technical Services Ltd. v. John Holt Ltd. (1991) NWLR (Pt. 199) 550
University of Lagos v. Aigoro (1985) 1 NWLR (Pt. 1) 143

Nigerian Statutes Referred to in the Judgment:

Constitution of the Federal Republic of Nigeria, 1991 137(1)(d)(i)(g); 239; 285(3)
Election Tribunal and Court Practice Directions 2001 paragraphs 1(1)(a)(b)(c), (2), 3(4)(2)(a); 3(7); 6(1)(4); 7(a),
First Schedule to Electoral Act, 2006, paragraphs 4(1)(d), 14(2)(i)(ii);49(2)and50
Electoral Act, 2006, Ss. 14, 141 and 144(l) (a)
National Assembly (Basic Constitutional and Transitional Provisions) Decree No' 5 of 1999, 5th Schedule, paragraph 27(1) supreme Court Act, Cap. S.15,
Laws of the Federation of Nigeria, 2004, S. 22

Appeal:

This was an appeal against the ruling of the Court of Appeal sitting as the Presidential Election Petition Tribunal which granted the respondents' preliminary objection and struck out the appellant's petition.

History of the Case:

Supreme Court:

Names of Justices that sat on the appeal: Aloysius Iyorgyer
Katsina-Alu, J.S.C. (Presided); George Adesola Oguntade.

J.S.C.; Walter Samuel Nkanu Onnoghen, J.S.C.; Francis Fedode Tabai, J.S.C.; Ibrahim Tanko Muhammad, J.S.C.
(Read the leading Judgment)

Appeal No.: SC.246/2007

Date of Judgment: Friday, 9th May, 2008

Names of Counsel: Orji Nwafoi Orizu, Esq. (with him Chief Tagbo Ike; C. L. Okaforagu, Esq.) -for the Appellant
Dr, Alex Izinyon, SAN (with him, D. D. Dodo, SAN; Chinedu Urneh, Esq.; Audu Hannatu Abdulrahman (Mrs); Festus Jumbo; T. O. Gbashima(Mrs); Bello Abu) -for the and 2nd Respondents
kanu Agabi, SAN (with him, Amaechi Nwuiwu, SAN; C. U. Ekomaru, Esq.; Okon N. Efut, Esq.; I. C. Acholonu,(Miss) Esq.; Darracolt Osawe, Esq.; Adam Abdullahi, Esq.; Egang Agabi, Esq.; Patience Osagede, John Ochogwu, Esq.; O. M. Enebeli, Esq.; Dyagas Ezekiel) for the 3rd - 35th Respondents

Tribunal:

Name of the Tribunal: Court of Appeal, Abuja sitting the Presidential Election Petition Tribunal

Names of Justices that sat on the petition: James Ogen Ogebe, J.C.A. (Presided); John Afolabi Fabiyi, J.C.A Abubakar Abdulkadir Jega, J.C.A.; Uwani Musa Abba J.C.A. (Read the Leading Riding); Raphael Chikwe J.C.A.

Petition No.: CA/A/EP/4/2007

Date of Ruling: Monday, 20th August, 2007

Names of Counsel: Chief Tagbo Ike -for the Petitioner, Chief Wole Olanipeku, SAN, (with him, Mallam Yusuf Ali, SAN; D. D. Dodo, SAN; Alh. KabiruT. Turaki, SAN; Prof. Fidelis Oditah, SAN; Moh'd Bello Adore, SAN; K. Eleja, Esq.; M. I. Hanafi, Esq.; A. M. Kayode, Esq A. Oke, Esq.; Maureen Onyuke [Ms]; A. A. Malik, Esq M. T. Adekilekun, Esq.; Alex Akoja, Esq.; M. Okpara Esq.; U. Gabriel, Esq.; D. Adeyemi, Esq.; E. Amedu, Esq Omoruan, Esq.; M. Abdulrahman [Mrs]; Paul Abhulimen [Mrs] and Festus Jumbo, Esq.) - for the 1st and 2nd Respondents

Kanu Agabi, SAN (with him, O. Osaze Uzzi, Esq.; wole Adebayo, Esq.; Peter Ofikwu, Esq.; Biodun Aikin Aina Esq.; I. C. Acholonu [Miss] Lami Jibrin [Miss] and iren Imade Ideva) -for the 3rd - 35th Respondents

Counsel:

Orji Nwafor-Orizu, (with him. Chief Tagbo Ike; C. L. Okaforag Esq.) -for the Appellant
Dr. Alex Izinyon, SAN (with him, D. D. Dodo, SAN; Chinedu Umeh, Esq.; Audu Hannatu Abdulrahman (Mrs); Festus Jumbo T. O. Gbashima(Mrs); Bello Abu) -for the 1st and 2nd Respondents

Kanu Agabi, SAN (with him, Amaechi Nwaiwu, SAN; C.J Ekomaru, Esq.; Okon N. Efut, Esq.; I. C. Acholonu,(Miss)Esq.; Darracott Osawe, Esq.; Adam Abdullahi, Esq.; Egang Agab Esq.; Patience Osagede, John Ochogwu, Esq.; O. M Enebel Esq.; Dyagas Ezekiel) - for the 3rd - 35th Respondents

MUHAMMAD, J.S.C. (Delivering the Leading Judgment): The relevant facts in this appeal are that the appellant as petitioner at the lower court, filed his election petition containing tour

grounds challenging that the 1st and 2nd respondents were not qualified to contest election into the offices of the president and vice president of the Federal Republic of Nigeria in that both were at the time of the election disqualified by their respective indictments by an administrative Panel of Inquiry set-up by Abia State Government. He prayed for an order canceling or nullifying the return or election of the 1st and 2nd respondents as aforesaid and prayed further, that the 35th respondent, (INEC) be ordered to conduct fresh and/or bye election into the two highest offices of the land.

The 1st and 2nd respondents filed a memorandum of conditional appearance, a notice of preliminary objection, etc, on 23/7/07. The 3rd 35th respondents filed a notice of preliminary objection on 2/8/07.

On 8/8/07, the petitioner/appellant filed a motion on notice, seeking the lower court's order for him to furnish better and further particulars to his petition, among others.

The lower court took together the petitioner's motion on notice of 8/8/07; 1st and 2nd respondents' notice of preliminary objection of 23/7/07 and the 3rd - 35th respondents' notice of preliminary objectio of 8/8/07.

After taking submissions by learned counsel for the respective parties, the lower court sustained the notices of preliminary objection and struck out the petition for being incompetent.

Aggrieved with the lower court's decision, the petitioner (now appellant before this court) filed his appeal to this court.

All the parties filed and exchanged briefs of argument including reply briefs (where necessary) as required by this court's rules. The appellant distilled four issues for determination. They are as follows:

1. Whether having regard, to the provision of paragraph 6(1) of the Election Tribunal and Court Practice Direction, 2007 (No. 1), the determination of the motion on notice and the preliminary objection by the tribunal was not without jurisdiction? (Distilled from ground one).
2. Whether on the state of affidavit evidence by the petitioner, the tribunal reached a correct conclusion of law in its application of section 141 or the Electoral Act, 2006 that all the amendments sought were statute and time-barred. (Distilled from grounds 2 and 4).
3. Whether the tribunal's conclusion that the petition did not comply with provision of paragraph 4(1)(d) of the 1st Schedule to the Electoral Act, 2006 and paragraph 1(1)(a)(b)(c) and (2) of the Election Tribunal and Court Practice Directions, 2007 is not in total disregard of the documents tiled before the tribunal and the contents of the petition as filed (Distilled from ground 5).
4. Whether the tribunal below properly directed itself as cause of action in the petition having regarded to paragraph 4(1) of the petition before it? (Distilled from ground six)."

1st and 2nd respondents formulated three issues. They are as follows:

1. Whether the presidential election petition tribunal lack jurisdiction to hear and determine the notice of preliminary objection filed by the 1st and 2nd respondents?
2. Whether the appellant's petition is not incompetent for failure to comply with the mandatory provision of paragraphs 4(1)(d) of the 1st Schedule to the Election Act, 2006 and paragraph 1(b) of the Election Tribunal and Court Practice Directions, 2007 and whether suspect fundamental breach can be aimed by way of amendment outside the period stipulated in section 141 of the Electoral Act, 2006" ?.

3. Whether by not averring to facts in support of the grounds of the election petition, the petition did not fast to disclose a cause of action?"

3rd - 35th respondents formulated three issues. They are as follows:

1. Whether the lower court had the jurisdiction determine the preliminary objection of the 1st and 2nd respondents dated 23rd July, 2007 at the stage the and the time it did. (Based on ground 1 of the ground of appeal).
2. Whether the lower court was right to refuse the petitioner/appellant's motion which sought to effect substantial alteration of the grounds and prayers of petition. (Based on grounds 2 and 4 of the grounds appeal).
3. Whether the lower court was right in dismissing the petition for non-compliance with mandatory provisions of paragraph 4(1) (d) of the 1st Schedule to the Electoral Act, and paragraph 1 (1)(a)(b)(c) and 2 of the Election Tribunal and Court Practice Directions (2007). (Based of (sic) grounds 5 and 6 of the grounds of appeal)."

All the parties to this appeal agree in their respective briefs of argument that issue one from each of the briefs is premised on jurisdiction of the lower court to determine the preliminary objection of the 1st and 2nd respondents dated 23rd July, 2007 at the stage and time it did.

From the arguments marshaled by learned counsel for the appellant, Prince Orji Nwafor Orizu, Esq., of the briefs, the bone of contention and upon which pungent submissions were made by him is that:

- (a) The issue is a challenge to the jurisdiction of the lower court, which it lacked to determine the preliminary objection.
- (b) The issue did not raise the question of competence of the petition before that court.
- (c) The main grouse of the appellant under the issue is as summarized below.
 - (i) The proceedings in relation to the preliminary objection were that the tribunal was sitting as the presidential election petition tribunal and not a pre-hearing session.
 - (ii) Paragraphs 6(1) & (4) of the Election Tribunal and Court Practice Directions provide that no motion shall be moved. All motions shall come up at the pre-hearing session except in extreme circumstances with leave of the tribunal or court.
 - (iii) The determination by the tribunal below, sitting as a tribunal instead of the pretrial session is without jurisdiction and therefore null and void."

Both learned senior counsel for the 1st and 2nd respondents chief Olanipekun, SAN, and that for the 3rd - 35th respondents Kanu Agabi, Esq., SAN, each on his part argued that:

- i. The tribunal below rightly assumed jurisdiction when it heard the objection of the respondents, determined same and consequently dismissed the petition of the appellant
- ii. The provision of paragraph 4(1) (d) of the 1st Schedule to the Electoral Act, 2006 (as amended) and paragraph 1(1) (b) of the Election Tribunal and Court Practice Directions, 2007 were not complied with/violated by the appellant which rendered his petition incompetent and robbed the said tribunal of jurisdiction to hear and determine the petition.
- iii. Objection to the competence of a petition must be raised as soon as the defect is discovered (the 1st and 2nd respondents raised the objection before the tribunal timorously. Issue of competence of the petition border on jurisdiction and it can be raised at any stage of the proceedings and once raised, it must be heard and determined first by the tribunal. Cases in support were cited such as *Ishola v. Ajiboye* (1994) 6 NWLR (Pt.

352) 506 at pp. 578 - 579 H-A; 7up Bottling Co. Ltd. v. Abiola & Sons Bottling Co. Ltd. (2001) 13 NWLR (Pt.730) 469 at 513-514.

- iv. The distinction between sitting of the court below as tribunal and it's silting at a pre-hearing session is like asking the difference between six and half a dozen, where is paramount is that the court at the time it determined that objection was properly constituted as a court of tribunal as required by the law establishing it and the tribunal below was properly constituted in law and fact when it heard and determined the objection.
- v. The issue of competence of a petition being jurisdictional can be raised at any stage of the proceedings whether at pre-hearing or outside pre-hearing. Referred to ishola v. Ajiboye (supra)

Learned SAN for the 3rd - 35th respondents toed the same line of argument. He however, made the following additions:

- i. Definition of 'pre-trial',
- ii. That the ordinary grammatical meaning of that expressed should be applied in determining whether the 'session' which the preliminary objection was argued are determined in the context of paragraph 6(1) of the Practice Direction, 2007 was pre-trial or post-trial or at trial was submitted that the processes were taken when act trial was yet to commence, thus, it was pre-trial.
- iii. A preliminary objection connotes an objection taken prior to commencement of trial proceedings in the instant case, it was an objection taken during the pre-trial or pre-hearing session and in full compliance with the provisions of the Election Tribunal and Court Practice Directions. 2007."

As it has been seen from the facts, which gave rise to this appeal, the whole matter had to do with the election of the President and commander-in-Chief of the Federal Republic of Nigeria and his vice during the election conducted on 21st April, 2007. Pursuant to the powers conferred upon him by section 285(3) of the Constitution of the Federal Republic of Nigeria. 1999 and paragraph 50 of the first Schedule to the Electoral Act, 2006 and by virtue of other powers enable him in that behalf, the Hon. President of the Court of Appeal issued out on the 29th day of March, 2007 "Election Tribunal and court Practice Directions, 2007". The Practice Directions shall apply to the Presidential, Governorship, National Assembly and States assembly Election Petitions. The conferment of powers on the court of appeal to assume original jurisdiction to hear and determine election petition in respect of elections to the offices of the President of the Federation and his vice, is provided by section 239 of the constitution of the Federal Republic of Nigeria. The section states:

- 239(1) Subject to the provisions of this Constitution, the Court of Appeal shall, to the exclusion of any other court of law in Nigeria, have original jurisdiction to hear and determined any question as to whether –
- a) any person has been validly elected to the office of president or vice resident under this Constitution; or
 - b) The term of the president or vice-president has eased.
 - c) the office of president or vice-president has become vacant

- 2) in the hearing and determination of an election petition under paragraph (a) of Subsection (1) of this section: the Court of Appeal shall be duly constituted if it consists of at least three justices of the Court of Appeal."

In reference to the Electoral Act, 2006, a "Tribunal" is defined as "an Election Tribunal established under this Act or the Court of appeal". On rules of procedure for the tribunal or court, section 151 of the Electoral Act, (hereinafter referred to as "the Act") provides that the rules of procedure to be adopted for election petitions and, appeals arising there from shall be those set out in First Schedule to the Act. An Election petition means any election petition under the act including election petition which challenges the validity of election of persons into the office of the President and Vice President of the Federal Republic of Nigeria.

Paragraphs 50 and 51 of First Schedule to the Act provide as follows:

"50. *Subject to the express provisions of this Act, the practice and procedure of the Tribunal or the Court in relation, to an election petition shall be as possible, similar to the practice and procedure of the Federal High court in the exercise of its civil jurisdiction, and the Civil Procedure Rules shall apply with such modifications as may be necessary to render them applicable having regard to the provisions of this Act, as if the petitioner and respondent were respectively the plaintiff and the defendant in an ordinary civil action.*

51. *Subject to the provisions of this Act, an appeal to the Court of Appeal or to the Supreme Court shall be determined in accordance with practice and procedure relating to appeals in the Court of Appeal or of the Supreme Court, as the case may be, regard being had to the need for urgency on electoral matters. "*

Thus, according to the preamble of the Election Tribunal and Court Practice Directions, 2007, (referred to hereinafter as "the Practice Directions") which apply to election petitions for Presidential, Governorship, National and State Assemblies election, the Practice Directions were made in exercise of the powers conferred on the Hon. President of the Court of Appeal by those provisions of the Constitution and by the Act set out earlier. The Practice Directions must, from all intents and purposes be taken to form part and parcel of powers conferred on the Hon. President of the Court of Appeal by all the powers exercisable by him in that behalf, with a view to facilitating the tribunals or the court to dispose of electoral matters with the urgency they require. It is the requirement of paragraph 6(1) and (4) of the Practice Directions, that:

"6(1) No motion shall be moved. All motions shall come up at the pre-Hearing session except in extreme circumstances with leave of the tribunal or court.

(4) Where the respondent to a motion intends to oppose the application he shall within 7 days of the service on him of such application, file his written address and may accompany it with a counter-affidavit. "

As for the Pre-hearing session and its requirements, the practice direction has provided the following:

"3. Pre-hearing Session and Scheduling

- 1) Within 7 days after the filing and service of the petitioner's reply on the respondent, or 7 days after the filing and service of the respondent's reply, whichever is the case, the petitioner shall apply for the issuance of pre-hearing notice as in Form TF007.
- 2) Upon application by a petitioner under sub-paragraph (1) above, the tribunal or court shall issue to the parties or their legal practitioners (if any) a pre-hearing

conference notice as in Form TF 007 accompanied by a pre-hearing information sheet as in Form TF 008 for the purposes set out hereunder:

- a) disposal of all matters, which can be dealt with on interlocutory application;
 - b) Giving such directions as to the future course of the petition as appear best adapted to secure its just, expeditious and economical disposal in view of the urgency of election petitions.
 - c) giving directions on order of witnesses to be called and such documents to be tendered by each party to prove their cases having in view the need to expeditious disposal of the petition;
 - d) Fixing clear dates for hearing of the petition.
- 3) The respondent may bring the application in accordance with sub-paragraph (I) above where the petitioner fails to do so, or by motion, which shall be served on the petitioner and returnable in 3 clear days, apply for an order to dismiss the petition.
- 4) Where the petitioner and the respondent fail to bring an application under this paragraph, the tribunal or court shall dismiss the petition as abandoned petition and no application for extension of time to take that step shall be filed or entertained."

It has not been clear for me to decipher from the record of appeal, nor from the counsel's submissions whether all the steps stipulated above were followed by the parties, especially the petitioner/appellant. Secondly, sub-paragraph 4 of paragraph 3 as quoted above, makes it mandatory that where neither the petitioner; nor the respondent files an application for pre-hearing session, the tribunal or court is under a duty to 'dismiss' the petition as abandoned and no application for extension of time to take that step shall be filed or entertained. Now, although the stipulation under subparagraph (4) of paragraph 3 of the Practice Direction, appears to me to be harsh on the petitioner by making an order for dismissal of the petition which forecloses any chance for him to re-present the petition, it still had to be complied with by the tribunal or court as such steps are a condition precedent to the hearing of any matter in relation to the petition pending before the tribunal or court. Non-compliance thereof will strip off the tribunal or court of jurisdiction, as one of the factors which confer jurisdiction on a court of law is not complied with. In the case of *Madukolu v. Nkemdilim* (1962) 1 All NLR 589; (1962) 2 SCNLR 341, a court is said to be competent to determine a matter before it when the following are present:

1. If it is properly constituted with respect to the number and qualification of its membership;
2. The subject matter of the action is within its jurisdiction;
3. The action is initiated by due process of law and;
4. Any action (condition precedent) to the exercise of its jurisdiction has been fulfilled.

See further: *A.-G., Federation v. Guardian Newspaper Ltd* (1999) 9 NWLR (Pt.618) 187; *Ajao v. Alao* (1986) 5 NWLR (Pt.45) 802.

Condition No. 4 above will be the determining factor as to the competence of the court below. Thus, it was wrong in my view, of the court below to go ahead to hear (the motion and the preliminary objections as tiled by parties.

Further, it is pertinent as well to look at paragraph (3) of the Directions 2007, which provides:

- "(7) At the pre-hearing session, the tribunal or court shall consider and take appropriate action in respect of the following as may be necessary or desirable:
- (a) amendment and further and better particulars;
 - (d) Hearing and determination of objections on point of law;
 - (i) such other matters as may facilitate the just and speedy disposal of the petition bearing in mind the urgency of the election petitions."

These steps, although they provide for treating of amendment and further and better particulars; objections on point of law and such other matters which, may facilitate the just and speedy disposal of the petition, were not followed by the court below. The motion and the preliminary objections were simultaneously taken by the court below sitting as a court entertaining the petition tiled by the petitioner. This too, I think, is wrong.

Now, turning to the motion filed by the petitioner. It is true that it was moved before the court below. The preliminary objection filed by the 1st and 2nd respondents was moved before the lower court on 9/8/07. Below is what transpired in the court below on 9/8/2007.

"Petitioner in Court.

Chief T. Ike for petitioner/applicant.

Chief W. Olanipekun with Y. Ali, SAN and 20 others for the 1st and 2nd respondents.

Chief K. Agabi, SAN for 3rd - 35th respondents with O. O. Uzzi and 8 others.

Chief Ike: We have a motion filed on 8/08/07.

Chief Olanipekun: We filed a motion of preliminary objection which has been fixed for today. My learned friend has replied to it. It should take precedence by virtue par 49(5) of 1st schedule of Electoral Act, 2006.

Chief Agabi: we have an identical application. If the petitioner survives the objection, he can move his motion.

Chief Ike: there is a conflict of law. The motion is to save the petition and it should be given priority over motion to strike out the petition. See par 49(4) of 1st schedule which allow for amendment.

Court: The motion fixed for hearing is the preliminary objection. The petitioner filed a motion yesterday to be allowed to provide better particulars to his petition. We shall take both applications together.

Chief Olanipekun: I will reply on points of law.

Chief Agabi: I will reply on points of law.

Chief Ike: The motion filed yesterday is for order to allow petitioner to furnish better and further particulars and leave to allow the petitioner to advance and rely on proposed documents. I rely on the supporting affidavit and exhibit attached. I filed a written address filed on 8/08/07. I adopt it. I urge the court to allow the application.

Chief Olanipekun: I oppose the application on following grounds of law.

Chief Agabi: I associate myself with submission of my learned brother, Olanipekun."

What else can I say?"The motion and the objections were moved. The court below delivered its ruling on 20/8/2007 striking out the petition. At the risk of repetition, I need to quote once more, paragraph 6 of the Practice Directions:

"6. Motions and Applications:

(i) No motion shall be moved. All motions shall come up at the pre-hearing session except in extreme circumstances with leave of tribunal or court."

The paragraph above has made an outright prohibition of moving motions before the tribunal or court except if it is at the pre-hearing sessions or where extreme circumstances are shown and leave of the tribunal or court was sought and obtained. From the record of appeal, I fail to trace where such extreme circumstances were shown or where the court's leave was sought and obtained. From the record of appeal, I fail to trace where such extreme circumstances were shown where the court's leave was sought and obtain. I then wonder what was the basis upon which the court below relied to entertain the motion and the preliminary objection of the 1st and 2nd respondents in utter disregard to the provisions of the practice directions as contained in paragraph 6(1) above. Whatever was the basis, I think the law as set out earlier is that where any of the factors which entitle a court to assume jurisdiction is missing, that court lacks competence to adjudicate over the parties and the subject matter before it. See the locus classicus case of *Madukolu v. Nkemdilim* (supra).

Pre-trial sessions in the present dispensation are a condition precedent before a tribunal or court can proceed to entertain any election petition or matters relating thereto. The position of the law is trite that no matter how well conducted, where a court lacks the competence and jurisdictions to entertain a matter, the proceedings conducted thereon are a nullity. See: *Achiakpa & Anor. v. Nduka & Ors.* (2001) 7 SCNJ 585; (2001) 14 NWLR (Pt. 734) 623; *International Bank for West Africa Ltd. v. Pavex International Co. (Nig.) Ltd.* (2000) 4 SCNJ 200; (2000) 7 NWLR (Pt. 663) 105; *Adesola v. Abidoye & Anor.* (1999) 12 SCNJ 61; (1999) 14 NWLR 1637)28.

I hold that the court below lacked competence and had no jurisdiction to entertain the motion on notice filed on 08/08/07 by the petitioner and the preliminary objection filed by the 1st and 2nd respondents. The proceedings, including the ruling delivered on the 20th of March, 2007, are a nullity. They are hereby set aside.

My Lords, in view of my holding above, and in view of the Consequential orders I shall make herein below, I do not consider the necessity of treating the remaining two issues i.e. issues (2) and (3) formulated by the appellant.

In the final result, I find no merit in this appeal and it is hereby dismissed. Accordingly, I make an order striking out the motion and the preliminary objections filed on 8th of August, 2007, and on the 25th of July, 2007 and 2nd August, 2007 as incompetent. By the provision of section 22 of the Supreme Court Act (Cap. S.15, the Laws of the Federation, 2004), which entitles me to exercise all those powers and jurisdiction that are exercisable by the lower court and as the lower court is empowered by paragraph 3(4) of the Practice Directions, to dismiss the petition where the petitioner and the respondent fail to bring an application for such dismissal, I hereby dismiss the appellant/petitioner's petition pending in the court below. I order each party to bear its own costs.

KATSINA-ALU, J.S.C.: I have had the advantage of reading in draft the judgment of my learned brother, I.T. Muhammad, J.S.C. I entirely agree with his reasoning and conclusion. There is nothing I can usefully add.

OGUNTADE, J.S.C.: I have had the advantage of reading in draft the lead judgment by my learned brother, Muhammad, J.S.C I agree with him that this appeal has no merit.

I would also dismiss it and make the same order as in the lead judgment.

ONNOGHEN, J.S.C.: This is an appeal against the ruling of the Court of Appeal holden in Abuja, in the exercise of its original jurisdiction as the Presidential Election Tribunal in Election Petition No. CA/FP/4/07 on the 20th day of August, 2007 striking out the said petition.

On the 21st day of May. 2007, the appellant, as petitioner petitioned the Presidential Election Tribunal, sitting at Abuja against the election/return of the 1st respondent as President of the Federal Republic of Nigeria following the 2007 Presidential Election on the following grounds:

"(i) That the 1st and 2nd respondents were at the time of the said election not qualified to contest the election into the offices of the President and Vice President of Federal Republic of Nigeria respectively in that both of them were indicted for offences/breaches of law by Administrative Panel of Inquiry set up by Abia State Government on the (activities of some persons and serving/past government functionaries between 1999 and 2007 dated 21/2/07, and which indictment was accepted by the Government of Abia State in its While paper.

The petitioner shall at the trial found upon the copy of the said While Paper.

(ii) The petitioner shall also at the trial, lead evidence and contend that the election was invalid by reason of corrupt practices or non-compliance with the provision of the Electoral Act.

(iii) The petitioner further avers that at the trial, he shall lead evidence and contend that he was validly nominated for the election but was unlawfully excluded at the poll."

The petitioner/appellant consequently claimed the following reliefs:-

"1. A declaration that the 1st and 2nd respondents were not qualified to contest the offices of president and vice-president of Federal Republic of Nigeria in that both were at the time of the election disqualified by their respective indictments by Administrative Panel of Inquiry set-up by Abia State Government in the wise of section 137(1) (d) (I) Constitution of the Federal Republic of Nigeria, 1999.

2. A declaration that the omission or commission of the 35th respondent in removing the petitioner's party logo/ symbol in most of the states of the federation and Federal Capital Territory amounts to unlawful exclusion at the presidential election held on 21st April, 2007.

3. An order canceling/nullifying the return or election of the 1st and 2nd respondents and (sic) president and vice president of Federal Republic of Nigeria respectively at the presidential election held on 21st April, 2007.

4. An order canceling/nullifying the presidential election held on 21st April, 2007 and directing the 35th respondent to conduct fresh/and/or bye-election into the offices of President and Vice-President of Nigeria.

"On the 23rd day of July, 2007 the 1st and 2nd respondents filed memorandum of conditional appearance as well as a notice of preliminary objection to the petition contending that the tribunal lacked the jurisdiction to hear and determine "the petition as the petition is incompetent, irregular, nullity incurably defective and or non compliance with the mandatory provision of the Electoral Act 2006 and the Election Tribunal and Court Practice Direction, (sic) 2007."

On the 2nd day of August, 2007. learned senior counsel for the 3rd respondent, Kanu Agabi Esq., SAN filed a motion before the tribunal praying for an order dismissing the petition on the ground that the tribunal has no jurisdiction to entertain the petition as the same is not properly constituted for failure to comply with the provisions of paragraph 4(1)(a), (d) of the First Schedule to the Electoral Act, 2006.

On the 8th day of August, 2007, the petitioner filed a motion praying the lower court for the following orders:

"(a) AN ORDFR for petitioner/applicant to furnish better and further particulars in his petition in terms of the accompanying schedule hereto attached and marked exhibit "A".

(b) LEAVE of this tribunal to allow the petitioner/ applicant to adduce and rely on the following attached proposed documents, to wit:

(a) List of documents relied upon marked exhibit "C".

(b) Written deposition of petitioner marked exhibit "D"."

The motion by the petitioner/appellant for the order to furnish better and further particulars is indeed very strange as it is usually the defendant/respondent to a petition who, by the rules of procedure is entitled to call for further and better particulars from the plaintiff petitioner in an appropriate case and circumstance. It is clear from the facts deposed to in the supporting affidavit that what the petitioner is seeking is actually an amendment of the petition filed.

However, the lower court consolidated the above motions and heard same on the 9th day of August, 2007. On the 20th day of August, 2007, the lower court delivered its ruling sustaining the preliminary objection in the following terms:

"In the instant petition, there was no list of witnesses that the petitioner intends to call in proof of his petition and written statement of witnesses on oath and copies

or lists of documents to be relied on for the hearing of the petition were also not attached to the petition required by the Court Practice Directions, 2007. Though it is my candid view that the petitioner has the locus standi to present the petition by virtue of section

144(1) (a) of the Electoral Act, 2006, nonetheless the petition as presently constituted is not only defective but incurably defective and ought to be struck out. The preliminary objection therefore succeeds and it is thereby allowed. The petition dated and filed on the 21st March, 2007 is hereby struck out for being incompetent."

The appellant is dissatisfied with the above ruling and he consequently, appealed to this court on six grounds of appeal out which learned counsel for the appellant, Prince Orji Nwafor-Orji has identified the following issues for the determination of the appeal

i. Whether having regard to the provision of paragraph 6(I) of the Election Tribunal and Court Practical Direction 2007 (No.1), the determination of the motion on notice and the preliminary objection by the tribunal was not without jurisdiction? (Distilled from ground one).

ii. Whether on the state of affidavit evidence by the petitioner, the tribunal reached a correct conclusion of law in its application of section 141 of the Electoral Act, 2006 that all the amendments sought were statute and time barred. (Distilled from grounds 2 and 4).

iii. Whether the tribunal's conclusion that the petition did not comply with provision of paragraph 4(1) (d) of the 1st Schedule to the Electoral Act, 2006 and paragraph 1(1)(a)(b)(c) and (2) of the Election Tribunal and Court Practice Directions, 2007 is not in total disregard of the documents filed before the tribunal and the contents of the petition as filed (Distilled from ground).

iv. Whether the tribunal below properly directed itself as to cause of action in the petition having regard to paragraph 4(I) of the petition before it? (Distilled from ground six)."

It is very clear from the issues formulated that a positive resolution of issue 1, i.e. in favour of the appellant, will make it unnecessary for the court to proceed any further, since the said issue 1 deals with the competence or jurisdiction of the lower court to entertain the processes leading to the ruling on appeal while the remaining issues (2-4) deal with the merits of the case before the lower court, in respect of the preliminary objection and the motion to furnish better and further

particulars. If the lower court is found not to have had the jurisdiction to hear and determine the relevant proceedings, then whatever it decided becomes null and void however well conducted or determined. That is settled law, however see *Madukolu r. Nkemdilim* (1962) 1 All NER 587 at 595; (1962) 2 SCNER 341.

In arguing issue 1, learned counsel for the appellant referred to paragraph 6(1) and (4) of the Election Tribunal and Court Practice Direction 2007 and submitted that where a statute provides for a method of performing a duty regulated by the statute, that other must have to be adopted, relying on *C.C.B. (Nig.) Ltd. A,-G., Anambra State* (1992) 10 SCNJ 137 at 163; (1992) 8 NWLR(Pt. 261) 528; *Nuhu Sani Ibrahim v. I.N.E.C.* (1999) 8 NWLR (Pt. 614) 334 at 352; *Buhari v. Yusuf* (2003) 14 NWLR (Pt. 841) 446 at 498; and *Galaudu v. Kamba* (2005) All FWLR (Pt.288) 1119; (2004) 15 NWLR (Pt.895) 31, that the provisions of paragraph 6(1) supra is mandatory and that the only condition for moving a motion in the tribunal is in "extreme circumstances with leave of the court" as motions can only be moved at pre-trial session, relying further on paragraphs 3(2) (a) and 3 (7) of the said Practice Directions, 2007

Learned counsel then submitted that the facts of this cases are similar to those in *Omeh v. Okoro* (1999) 8 NWLR (Pt.615) 356 and 368 where it was held that in an application for amendment of an election petition, the determination of that application by the Tribunal sitting as a panel, is contrary to the provision of the relevant law which provides otherwise and that it raises a jurisdictional issue. It should be noted that in *Omeh's* case paragraph 27(1) of Schedule to the National Assembly (Basic Constitutional and Transitional Provisions) Decree No. 5 of 1999 gave the power to the chairman of the election tribunal to hear and dispose of all interlocutory questions and matters but the application for amendment was considered, not by the chairman, but by the tribunal (which included the chairman. Learned counsel therefore urged the court to hold that the

determination by the lower court instead of the pre-trial session without jurisdiction and consequently null and void.

On his part, learned senior counsel for the 1st and 2nd respondents. Chief Wole Olampekun, SAN, in the respondents' brief filed on 14/1/08 but deemed filed on 22/1/08 submitted that the court below rightly assumed jurisdiction to hear and determine the objection; that the petition as filed by the petitioner/appellant was incompetent as it failed to state facts in support of the grounds state therein, contrary to paragraph 4(1)(d) of the 1st Schedule to the Electoral Act, 2006 and paragraph l(1)(b) of the Election Tribunal and Court Practice Directions, 2007 which provisions are mandatory that the distinction being drawn by learned counsel for the appellant between the tribunal sitting as a tribunal and "as a pre-hearing session is like asking of the difference between six and half a dozen that the tribunal, at the time it heard and determined the object was properly constituted as a court or tribunal as required by law establishing it; that this court cannot be bound by the decision in the case of *Omeh v. Okoro* supra, as the same was reached Court of Appeal even though the same is distinguishable from facts of the instant case; that the competence of the petition, be an issue of jurisdiction of the lower court, can be raised at any state of the proceedings, whether at the pre-hearing session or at hearing of the tribunal, relying on *Ishola v. Ajiboye* (1994) 6 NWLR (Pt. 352) 506 at 578 - 579. Finally, learned counsel urged the court to resolve the issue against the appellant.

On his part, learned senior counsel for the 3rd - 35th respondents, Kami Agabi Esq, SAN, submitted that the submission of his learned friend for the appellant on issue I does not reckon with provisions of paragraph 6(1) and (4) of the Election Tribunal and Court Practice Directions, 2007. Learned senior counsel then defined "pre-trial" to mean "before trial" as distinguished

from "during trial" or "after trial" that applying the meaning of the term to the expression as used in paragraph 6(1) supra, it is clear that the "session" in which the preliminary objection was argued and determined was definitely pre-trial as at the time trial was yet to commence, that the motion by way of objection came up for hearing at the pre-hearing stage hence no leave of the lower court was needed before its being heard; that an issue of jurisdiction can be raised at any stage of the proceedings, relying on Galadima v. Tambai (2000) 6SC (Pt.1) 196 at 206-207; (2000) 11 NWLR (Pt. 677) 1; Owoniboye Technical Services Ltd. v. John Holt Ltd. (1991) 6 NWLR (Pt. 199) 550; Ezomo v. Oyakhire (1985) 1 NWLR (Pt.2) 195; Madukolu v. Nkediilim (1962) 1 All NLR 587;(162) 2 SCNLR 341 and Okafor v. A.-G., Anambra State (1991) 6 NWLR (Pt.200) 659; and urged the court to resolve the issue against the appellant.

It is settled law that where legislation lays down a procedure for doing a thing there should be no other method of doing it - See C.C.B. Plc v. A.-G., Anambra State (1992) 10 SCNJ 137 at 163;(1992) 8 NWLR (Pt. 261) 528; Buhari v. Yusuf (2003) 14 NWLR (Pt.841) 446 at 498. In the instant case, the necessary procedure to be adopted in case of motion by way of amendment or objection on point of law is said to be that laid down in paragraph 6(1). 3(2)(a) of the Election Tribunal and Court Practice Directions, 2007.

Paragraph 6(1) & (4) of the Election Tribunal and Court practice Directions, 2007 provide as follows:-

"6(1) No motion shall be moved. All motions shall come up at the pre-hearing session except in extreme circumstances with leave of the tribunal or court. '

(4) Where the respondent to a motion intends to oppose the application, he shall within 7 days of the service on him of such application file his written address and may accompany it with a counter-affidavit."

When then is the pre-hearing session? Paragraph 3(1) of the said Practice Directions, 2007 provides thus:

"(1) Within 7 days after the filing and service of the petitioner's reply on the respondent; or 7 days after the filing and service of the respondent's reply whichever is the case, the petitioner shall apply for the issuance pre-hearing notice in formTF007.

(2) Upon application by a petitioner under sub-paragraph (1) above, the tribunal or court shall issue to the petitioner or their legal practitioners (if any) a pre-hearing conference notice as in FormTF007 accompanied by pre-hearing information sheet as in Form TF008 for the purposes set out hereunder;

- (a) disposal of all matters which can be dealt with on interlocutory application;
- (b) giving such directions as to the future course the petition as appear best adapted to secure just, expeditious and economical disposal view of the urgency of election petitions.
- (c) giving directions on order of witnesses to called and such documents to be tendered each party to prove their cases having in view the need to expeditious disposal of the petition
- (d) fixing clear dates for hearing of the petition

(3) The respondent may bring the application in accordance with sub-paragraph (1) above where the petitioner failed to do so, or by motion, which shall be served on

petitioner and returnable in 3 clear days, apply for order to dismiss the petition.

(4) Where the petitioner and the respondent fail to bring application under this paragraph, the tribunal or court shall dismiss the petition as abandoned petition and application for extension of time to take that step be filed or entertained.

(5) Dismissal of a petition pursuant to sub paragraphs & (4) above is final and accordingly, the tribunal court shall be functus officio.”

It is clear from paragraphs 3(1) & (3) supra that the tribunal court does not, suo motu conduct or cause a pre-hearing session be held. Such a session can only be held upon an application either the petitioner or the respondent to the petition. In the instant case, both parties agree that no such pre-hearing session was applied for nor held though the applications determined by the lower court ought to have been determined at the pre-hearing session if one had been applied for and held.

However, paragraph 3(4) supra gives power to the lower court, where the petitioner and respondent fail to bring an application for pre-hearing session as in the instant case, to dismiss the petition as abandoned petition and that no application for extension of time to take that step i.e. apply for pre-hearing session, shall be filed or entertained. That is the law, though it may sound very harsh. It should however, be borne in mind that the provisions apply to election petition in which time is of the essence.

Not only did sub-paragraph 4 of paragraph 3 (supra) give the tribunal or court the power to dismiss the petition for the default, sub-paragraph 5 of the said paragraph 3 makes the dismissal of the petition in the circumstances final.

In view of the facts of this case and by virtue of the powers conferred on this court by section 22 of the Supreme Court Act, this court can and does assume the powers of the lower court conferred on that court by paragraph 3(4) supra and exercise same by dismissing the petition of the appellant for non-compliance with the provisions of the Practice Directions, 2007. It is not enough for the appellant to argue that the lower court, sitting not in pre-hearing session, has no jurisdiction to entertain the applications when he failed and or neglected to present an application before that tribunal or court for a pre-hearing session to hear the applications.

He cannot benefit from his own default. In the instant case however, the lower court, and by extension this court; has the power to deal with the petition as provided in the Practice Directions, 2007.

It is for the above and the much fuller reasons assigned in the lead judgment of my learned brother, Muhammad. J.S.C. that I too dismiss the appeal and affirm the ruling of the lower court delivered 20th day of August, 2007 except the order striking out the petition for which I hereby substitute an order dismissing the petition. I abide by the order as to costs contained in the said lead judgment.

Appeal dismissed.

TABAI J.S.C.: The petition which dismissal has given birth to the appeal was presented at the registry of the court below on the 21/2/ 2007. In it, the petitioner claimed four reliefs. The grounds and fact to be relied upon in proof of the petition were stated therein be

"i. That the 1st and 2nd respondents were at the time of the said election not qualified to contest the election in the offices of the president and vice president of the Federal Republic of Nigeria respectively in that both them were indicted for offences/breaches of law Administrative Panel of Inquiry set up by Abia state Government on the activities of some person are serving/past government functionaries between 1999 to 2007 and which indictment was accepted by the Government of Abia State in its White Paper. The petitioner shall at the trial found upon the copy of the said White Paper.

ii. The petitioner shall also at the trial lead evidence vbnm contend that the election was invalid by reason corrupt practices or non-compliance with the provision of the Electoral Act.

iii. The petitioner further avers that at the trial he shall be evidence and contend that he was validly nominal for the election but was unlawfully excluded at the poll.

The list of witnesses was stated to be only the petitioner. That the only document to be relied upon was stated to be:

"Abia State Government While Paper on Commission of Inquiry into the activities of some persons serving/past government functionaries between 1999 to 2007 dated 21/2/2007."

On the 18/7/2007, filed a motion for an order for the petitioner appellant to furnish better and further particulars in the petition terms of exhibit 'A' attached to the affidavit in support of the motion. This motion was withdrawn on the 30/7/07 and it was struck and another motion of substantially identical terms was filed on 8/8/07.

Meanwhile, on behalf of the 1st and 2nd respondents a notice of preliminary objection was filed. It was dated and filed on the 7/08. The grounds of the objection were that:

(i) The petition as presently constituted is devoid of a cause of action.

(ii) The petitioner did not comply with the mandatory provision of the Election Tribunal and Court Practice Direction, 2007.

(iii) The petitioner lacks the locus standi to present this petition.

Also on behalf of the 3rd respondent a second notice of preliminary objection was filed on the 2/8/2007. The ground for the objection was that the court had no jurisdiction and the petition incompetent in that it failed to comply with the mandatory provisions of paragraph 4(1)(a)(d) of the 1st Schedule of the Electoral Act.

By its unanimous ruling on the 20/8/2007, the court below dismissed the petitioner/appellant's application of the 8/8/2007, sustained the preliminary objections filed by the respondents and struck out the petition for incompetence.

This appeal is against that ruling. Briefs of argument were filed and exchanged. Prince Orji Nwafor-Orizu prepared the appellant's brief. He also prepared appellant's reply brief to the brief of the 1st and 2nd respondents and another reply brief to the 3rd -35th respondents' brief. The 1st and 2nd respondents' brief was prepared by Chief Wole Olampektin, SAN. While the 3rd - 35th ip'ondents' brief was prepared by Kami G. Agabi, SAN.

In the appellant's brief, Orji Nwafor-Orizu formulated the Slowing four issues for determination:

(1) Whether having regard to the provisions of paragraph 6(1) of the Election Tribunal and Court Practice Directions 2007(No. 1) the determination of the motion on notice and the preliminary objection by the tribunal was not without jurisdiction.

(2) Whether on the state of affidavit evidence by the petitioner, the tribunal reached a correct conclusion of law in its application of section 141 of the Electoral Act, 2006 that all the amendments sought were statute and time barred.

(3) Whether the tribunal's conclusion that the petition did not comply with the provisions of paragraph 4(1)(d) of the 1st Schedule to the Electoral Act, 2006 and paragraph 1(1)(a)(b)(c) and (2) of the Election Tribunal and Court Practice Directions, 2007 is not in total disregard of the documents filed before the tribunal and the contents of the petition filed.

(3) Whether the tribunal below properly directed itself as to the cause of action in the petition having regard to paragraph 4(1) of the petition before it.

On behalf of the 1st and 2nd respondents, Chief Olanipekun SAN, in their brief, prepared the following issues:

(1) Whether the Presidential Election Petition Tribunal lacked the jurisdiction to hear and determine the notice of preliminary objection filed by the 1st and 2nd respondents?

(2) Whether the appellant's petition is not incompetent for failure to comply with the mandatory provisions of paragraphs 4(1) (d) of the 1st Schedule to the Electoral Act, 2006 and paragraph 1(b) of the Election Tribunal and Courts Practice Directions, 2007 and whether such fundamental breach can be cured by way of amendment outside the period stipulated in section 141 of the Electoral Act, 2006.'

(3) Whether by not averring to facts in support of the grounds of the election petition, the petition did not fail to disclose a cause of action?

In the 3rd -35th respondents' brief of argument Kanu G. Agabi SAN also formulated three issues which are to the same effect as those of the 1st and 2nd respondents. A close comparison of the 1st issue of the appellants, the 1st and 2nd respondents and the 3rd-35th respondents shows that they are substantially the same. The 2nd and 3rd issue proposed by the 1st and 2nd respondents in their brief effectively covers the 2nd, 3rd and 4th issues of the appellant. In this judgment therefore, I shall adopt the issues as formulated by the 1st and 2nd respondents.

On the first issue of whether the court below had the jurisdiction to entertain and determine the motion and preliminary objection notwithstanding the provisions of paragraph 6(1) of the Election Tribunal - Court Practice Direction 2007 (No.1), Prince Orji Nwafor orizu proffered the following arguments. He referred to 6(1) and (4) of the Election Tribunal and Court Practice Directions, 2007 and submitted that "where a statute provides for a particular method of performing a duty regulated by the statute, that method and no other must have to be adopted. For this submission he relied on C.C.B. Plc. v. The Attorney-General of Anambra State (1992) 10SCNJ 137 at 163; (1992) 8 NWLR (Pt. 261) 528; Nuhu Sani Ibrahim v. I.N.E.C (1999) 8 NWLR (Pt.614) 334 at 352; General Muhammadu Buhari & Anor: v. Alh. Muhammadu Diko Yusuf (2003) 14 NWER (Pt.841) 446 at 498 and Galaudu v. Kamba (2005) All FWLR (Pt.288) 119; (2004) 15 NWLR (Pt.895) 31. He referred to the text "no motions shall be moved" in paragraph 6(1) of the provision and submitted that the provision is mandatory, and that motions can only be moved at the re-trial session. Learned counsel referred further to paragraph 3(2)(a) and 7(a) and (d) and submitted that preliminary objection on point of law can only be heard and determined at the pre-hearing session.

On his part, Chief Olanipekun, SAN submitted that the tribunal rightly assumed jurisdiction to entertain the preliminary objection and dismissed the petition. He referred to paragraph 4(1)(d) of the 1st Schedule of the Electoral Act, 2006 and paragraph 1(1)(b) of the Election Tribunal and Court Practice Directions, 2007 and argued that they are mandatory provisions and relied on Buhari v. Yusuf (2003) 14 NWLR (Pt.841) 446 at 498 - 499. It was the submission that the failure of the appellant to comply with the said provisions rendered the petition incompetent and robbed the tribunal of any jurisdiction to hear and determine the petition. Learned senior counsel further referred to paragraph 49(2) of the 1st schedule to the Electoral Act, 2006 and contended that the preliminary objection was by reason thereof raised timeously. He, like the appellant, also submitted that the issue of the competence of the petition bothers on jurisdiction which can be taken at any stage of the proceedings and once raised must be heard and determined first by the tribunal. Reliance was placed on Ishola v. Ajiboye, (1994) 6 NWLR (Pt. 352) 506 at 578-579; 7up Bottling Co. Ltd. v. Abiola & Sons Bottling Co. Ltd. (2001) 13 NWLR (Pt. 615) 356 at 368 is quite distinguishable from the present case.

For the 3rd – 35th respondent, Kanu Agabi, SAN submitted that the preliminary objection was raised and taken before the actual trial and so falls within the pre-trial session as provided in paragraph 6(1) of the Election Tribunal and Court Practice Directions, 2007.

Learned senior counsel further submitted that the issue of jurisdiction can be taken at any time and in any manner. He relied on *Galadima v. Tambai* (2000) 6 SC (Pt. I) 196 at 206-207; (2000) 11 NWLR (Pt. 677) 1; *Owoniboy Technical Services Ltd. v. John Holt Ltd.* (1991) 6 NWLR (Pt.199) 550, *Ezomo v. Oyakhire* (1985) 1 NWLR (Pt. 2) 195; *Madukolu v. Nkemdilim* (1962) 1 All NLK 589; (1962) 2 SCNLR 341 and *Okafor v. Attorney-General Anambra State* (1991) 6 NWLR (Pt.200) 659.

Let me first of all attempt a deliberation on the first issue since its possible resolution in favour of the appellant effectually determines the appeal. I have taken a close look at the submissions of the parties. It appears, in my humble view, that there are two fundamental flaws and misconceptions in the arguments of Orji Nwafor-Orizu. The first flaw is that by his insistence on the applicability of paragraph 6(1) of the Election Tribunal and Court Practice Directions, 2007 to the respondents' preliminary objection, he attempts to reduce a preliminary objection to the status of an ordinary motion under the rules of court like the appellant's motion for leave to amend and for further and better particulars. The two sets of applications are miles apart. A motion by which a respondent challenges the competence of a suit and thus the jurisdiction of the court, (otherwise called a notice of preliminary objection) is a special procedure whereby the respondent contests the competence of a suit and jurisdiction of the court and if upheld has the effect of terminating the life of the suit by its being struck out. See *Galadima v. Tambai* (2000) 6 SCNJ (Pt.1) 196 at 207; (2000) 11 NWLR (Pt. 677) 1. The jurisdiction of all superior courts of record is constitutional, some having been donated by the constitution and cannot therefore circumscribed or limited by any other statute, let alone practice directions. The issue of jurisdiction cannot therefore be subjected to the dictates of any statute, including rules of court. A party's right to raise the issue of jurisdiction is available to him at all times. And that gives credence to the immutable principle that the issue of jurisdiction can be raised at any stage of the proceedings at the court of trial or in the appellate courts. See *Madam Alice Okesuji v. Fatai Alabi Lawal* (1991) 1 NWLR(Pt.170)661 at 672, in paragraph 4.08 of the appellant's brief, the appellant not only conceded the validity of this principle but also advocated its application to this case when he said:

"It is further submitted that being a jurisdiction question, it can be raised at any stage of the proceeding including on appeal."

It is therefore a contradiction in terms for the same appellant to argue in the same paragraph 4.08 and elsewhere in the brief that the preliminary objection by which the issue of jurisdiction is raised could only have been taken and determined at the pre-trial session.

There is yet another aspect of manifest internal conflict in the case of the appellant. His motion for leave to amend and for further and better particulars was filed on the 8/8/07 - over two months outside the period stipulated in the practice directions for proceedings at the pre-trial session. Going by his arguments therefore, it is his motion that should be heard and determined at the pre-trial session. Yet the appellant proffered sustained arguments that the application be granted. By necessary implication, he singles out himself as an exception to the operation of paragraph 6(1) of the Election Tribunal and Court Practice Directions, 2007. He cannot eat his cake and still have it. In my view, having regard to the character of his motion, he is and should be the first and only victim of the Practice Directions.

There is still another aspect of the submissions of learned counsel for the appellant, which needs some comments. For the purpose of giving force to his arguments, counsel referred variously to the Practice Directions as statutes or enactments. I think he got it wrong. Practice Directions do not, strictly speaking, qualify as statutes or enactments. They do not even stand on equal footing with Rules of Court. They are ancillary to and therefore subordinate to the rules of court. Consequently, in the event of a conflict between the Rule of Court and a Practice Direction the rule must prevail. I have taken the liberty to emphasize these relative strengths of a Rule of Court and a Practice Direction because of the appellant's undue projection of the latter as a statute. It is perhaps necessary to refer to *University of Lagos & Anor v. Aigoro* (1984) NSCC745; (1985) 1 NWLR (Pt.1) 143, where this court had cause to embark upon some comparative analysis of the Supreme Court Rules and Practice Directions made by the Chief Justice of Nigeria and at page 756 said:

"The Supreme Court Rules, 1977 is an enactment while the Practice Directions do not qualify as such. Consequently, a Practice Direction has no force of law and cannot fetter a rule of court such as Order 1 rule 5 and cannot tie the court in the exercise of its discretion. Where there is a conflict between a rule of court and practice direction the rule must prevail."

The result of the above is that if the motion of the 23/7/07 by which this issue of jurisdiction is raised is competent under the Federal High Court Rules which is the enabling enactment, the same cannot be rendered incompetent under paragraph 6(1) of the Election Petition and Court Practice Directions, 2007. In my consideration this is another reason why this issue should be resolved against the appellant.

I can identify yet another problem of the appellant which ought not to be glossed over. Paragraph 3(1) of the Election Tribunal and Court Practice Directions, 2007 provides for the much vaunted pre-hearing session and scheduling. Paragraph 3(1) states:

"3(1) Within 7 days after the filing and service of petitioner's reply on the respondent, or 7 days after the filing and service of the respondent's reply, whichever ever in the case, the petitioner shall apply for the issuance of the pre-hearing notice as in Form TF 007.

(2) Upon application by a petitioner under sub-paragraph (1) above, the tribunal or court shall issue to the parties or their legal practitioners (if any) a pre-hearing conference notice as in Form TF 007 accompanied by pre-hearing information sheet as in Form TF 008 for the purposes set out hereunder:

It is clear from the above that it is the petitioner that has the responsibility to apply to the tribunal or court for the issuance of pre-hearing notice and pre-hearing conference. I cannot find any such application in the record. Nor is there any evidence of proceedings at any pre-hearing session. The inevitable conclusion therefore is that the appellant failed to initiate any pre-hearing session. Yet the appellant's entire complaint is that the respondent's preliminary objection could only have been raised and determined at a pre-hearing session that never was. He is again caught by his own inactivity, he cannot benefit from his own default. This in my view is another reason for resolving the 1st issue against the appellant.

In view of the foregoing considerations and particularly in view of the immutable principle that the issue of jurisdiction can be raised, entertained and determined at any stage of a proceeding, the motion or preliminary objection of the 23/7/07 was properly brought before the lower court which therefore has the jurisdiction to hear and determine it. The result is that the 1st issue is resolved against the appellant.

This leads me to the remaining twin issues of whether by virtue of the provisions of paragraph 4(1)(d) of the 1st Schedule to the Electoral Act, 2006 and paragraph 4(b) of the Election Petition

and Court Practice Directions, 2007 the appellant's petition shows no reasonable cause of action and therefore incompetent and whether the defect (if any) in the petition is such that can be cured by way of an amendment in view of the provisions of section 141 of the Electoral Act, 2006. On this question of the competence or otherwise of the petition, Prince Orji Nwafor-Orizu argued that the finding by the court below that the petition is 'incurably defective' was made without due regard to the documents filed. He admitted that the statement on oath of the sole witness was not attached but submitted that the filing of such a statement on oath is not one of the requirements of paragraph 14(2)(i)(ii) of the 1st Schedule to the Electoral Act, 2006. It was his submission that by the combined effect of section 141 of the Electoral Act, 2006 and paragraph 14(2)(i) of the 1st Schedule to the Electoral Act amendment which does not seek to introduce any of the requirement of 4(1) of the said 1st Schedule to the Act is permissible, according to counsel, the amendment only seeks to introduce facts and/or materials in support of matters already contained in the petition and ought not to be granted. He referred to section 137(1)(i) of the 1999 constitution and submitted that there are enough materials in the attached Abia State Government gazette to prove that at the time of the election the 1st and 2nd respondents were not qualified to contest the election. He relied on *Onamade v. A.C.B. Ltd.* (1997) 1 SCNJ 136 at 87-88; (1997) 1 NWLR (Pt. 480) 123; *Ezemba v. Ibeneme* (2004) 7 SCNJ 136 at 148; (2004) 14 NWLR (Pt. 894) 617.

Still on amendments, learned counsel further argued that it is only fundamental which seek to introduce new grounds and new prayers that are regarded as substantial contending that the proposed amendments which only seek to support existing grounds and prayer therefore not substantial and ought to be granted. In conclusion learned counsel invited this court to invoke its powers under section 22 of the Supreme Court Act to deem the amendment as having been granted and remit the case back for trial and determination on the merits.

On his part, Chief Olanipekun, SAN on behalf of the 1st and 2nd respondents argued that for a petition to be competent, it must comply with the mandatory provisions of paragraph 4(1)(d) of the 1st schedule to the Electoral Act and paragraph 1 of the Election Tribunal and Court Practice Directions, 2007. He submitted that in view of the facts admitted by the statement on oath of witnesses, the petition failed to meet the mandatory requirements of the Electoral Petition and Court Practice Directions, 2007. In my consideration, this is another reason why this issue should be resolved against the appellant *can identify yet another problem the appellant which ought not to be glossed over. Paragraph 3(1) of the Election Tribunal and Court Practice Directions, 2007 provides for the much vaunted pre-hearing session and scheduling. Paragraph 3(1) states:*

"3(1) Within 7 days after the filing and service of the petitioner's reply on the respondent, or 7 days after the filing and service of the respondent's reply, whichever ever in the case, the petitioner shall apply for the issuance of the pre-hearing notice as in Form TF 007.

(2) Upon application by a petitioner under sub-paragraph (1) above, the tribunal or court shall issue to the parties or their legal practitioners (if any) a pre-hearing conference notice as in Form TF 007 accompanied by a pre-hearing information sheet as in Form TF 008 for the purposes set out hereunder: "

It is clear from the above that it is the petitioner that has the responsibility to apply to the tribunal or court for the issuance of pre-hearing notice and pre-hearing conference. I cannot find any such application in the record. Nor is there any evidence of proceedings at any pre-hearing session. The inevitable conclusion therefore is that the appellant failed to initiate any

pre-hearing session Yet the appellant's entire complaint is that the respondent preliminary objection could only have been raised and determined at a pre-hearing session that never was. He is again caught by his own inactivity. He cannot benefit from his own default. This is my view is another reason for resolving the 1st issue against the appellant In view of the I ore going considerations and particularly in view of the immutable principle that the issue of jurisdiction can be raised entertained and determined at any stage of a proceeding, the motion or preliminary objection of the 23/7/07 was properly brought before the lower court which therefore had the jurisdiction to hear and determine it. The result is that the 1st issue is resolved against the appellant.

This leads me to the remaining twin issues of whether by virtue of the provisions of paragraph 4(1) (d) of the 1st Schedule to the Electoral Act, 2006 and paragraph 1(b) of the Election Petition and Court Practice Directions, 2007 the appellant's petition shows no reasonable cause of action and therefore incompetent and whether the defect (if any) in the petition is such that can be cured by way of amendment in view of the provisions of section 141 of the Electoral Act, 2006.

On this question of the competence or otherwise of the petition.

Prince Orji Nwafor-Orizu argued that the finding by the court below that the petition is 'incurably defective' was made without due regard to the documents filed. He admitted that the statement on oath of the sole witness was not attached but submitted that the filing of such a statement on oath is not one of the requirements of paragraph 4(2)(i)(ii) of the 1st Schedule to the Electoral Act, 2006. It was his submission that by the combined effect of section 141 of the Electoral Act, 2006 and paragraph 14(2)(i) of the 1st Schedule to the Electoral an amendment which does not seek to introduce any of the requirements of 4(1) of the said 1st Schedule to the Act is permissible.

According to counsel, the amendment only seeks to introduce facts and or materials in support of matters already contained in the petition and ought not to be granted. He referred to section 137(1)(i) of the 1999 Constitution and submitted that there are enough materials in the attached Abia State Government gazette to prove that at the time of the election the 1st and 2nd respondents were not qualified to contest the election. He relied on *Onamade v. A.C.B. Ltd* (1997) SCNJ 65 at 87-88; (1997) 1 NWLR (Pt. 480) 123; *Ezemha v. Ibeneme* (2004) SCNJ 136 at 148; (2004) 14 NWLR (Pt. 894) 617.

Still on amendments, learned counsel further argued that it is amendments which seek to introduce new grounds and new prayers that are regarded as substantial contending that the proposed amendments which only seek to support existing grounds and prayer therefore not substantial and ought to be granted. In conclusion learned counsel invited this court to invoke its powers under section 22 of the Supreme Court Act to deem the amendment as having been granted and remit the case back for trial and determination on the Merits.

On his part, Chief Olanipekun, SAN on behalf of the 1st and Respondents argued that for a petition to be competent, it must comply with the mandatory provisions of paragraph 4(1)(d) of the schedule to the Electoral Act and paragraph 1 of the Election Tribunal and Court Practice Directions, 2007. He submitted that in view of the facts admitted by the statement on oath of witnesses the petition failed to meet the mandatory requirements of the Electoral Act and the Practice Directions. The consequence, he argued, is that the petition discloses no cause of action and is incompetent. In support of this argument he relied on *Egolum v. Obasanjo* (1999) 7 NWLR(Pt.611)355 at 410.

With respect to the appellant's motion for amendment, it was the submission of learned senior counsel that the application having been made outside the time limited by section 141 of the Electoral Act, 2006, was caught by the provisions of paragraph 14(2) of the 1st Schedule to the Electoral Act and was therefore rightly dismissed by the court below for incompetence.

The submissions of Kami Agabi, SAN for the 3rd - 35th respondent were, in substance, to the same effect as those for the 1st and 2nd respondent. I have had a careful consideration of the petition, the motion for amendment and the address of counsel for the parties. Let me first attend to the issue of the amendments sought. The prayer sought in the motion paper is an order for the supply of further and better particulars. The lower court reasoned that the application was one for amendment under the guise of one for further and better particulars. This much, learned counsel for the appellant concedes both in his written and oral submissions at the lower court. The same is also conceded in appellant's brief before this court. As regards the competence or otherwise of the motion for amendment the court below thoroughly examined facts of the holding of the election on the 21/4/07, the presentation of the petition on the 21/5/07, the nature of the proposed amendments and the various statutory provisions and some case law authorities and dismissed the application for the main reason that it was statute barred. It also held that the amendments sought were substantial and would radically change the complexion of the petition. Can the court below be faulted in its reasoning and conclusion? I do not think so.

The application for amendment is at page 71 of the record, stated on the motion paper itself brought pursuant to Order 26 rules 6 and 7(I), Order 27 rule 1 and Order 41 rule 1 of the Federal High Court (Civil Procedure) Rules, 2000. The enabling law is paragraph 50 of the 1st Schedule to the Electoral Act, 2006. As stated there the Federal High Court Rules apply only as nearly as possible and with such modifications as may be necessary for the control of proceedings in the tribunal or court with regard being had to the need for urgency in election matters. And more importantly, the Federal High Court Rules apply subject to the express provisions of the Electoral Act, 2006. Paragraph 14 of the 1st Schedule to the Electoral Act, 2006 provides expressly for the amendment of election petitions and replies and by reason thereof the application of the Federal High Court (Civil Procedure) Rules to amendments is deluded. Thus amendment of election petitions and replies is expressly reserved under paragraphs 14 and 50 of the 1st Schedule to the Electoral Act.

The relevant provision is paragraph 14(2)(a) and it states: 14(2) After the expiration of the time limited by section 14(1) of this Act for presenting the election petition, no amendment shall be made:

- (i) Introducing any of the requirements of subparagraph (I) of paragraph 4 of this schedule not contained in the original petition filed, or
- (ii) Effecting a substantial alteration of the ground for or the prayer in the election petition, or
- (iii) Except anything which may be done under the provisions of subparagraph (3) of this paragraph, effecting a substantial alteration of or addition to, the statement of facts relied on to support the ground for, or sustain the prayer in the election petition.

And section 141 of the Electoral Act, 2006 provides:

"An election petition under this Act shall be presented within thirty (30) days from the date the result of the election is declared."

This means that all amendments substantial to the extent as indicated in paragraph 14 (2) (a) must be made before the expiration thirty days (from the date the result of the election is declared. The application for amendment sought to add amongst others a new ground that:

"1st and 2nd respondents did not resign from their respective public offices 30 days to the time of their nomination by their party in December 2006 contrary to section 137(1)(c) of Constitution of the Federal Republic of Nigeria 1999."

This no doubt, is a substantial alteration of the original petition within the context of paragraph 14(2)(a)(ii) above. The amendment as seeks to bring in the writ ten depositions on oath of the petition. Which is not in the original petition? This again, is another substantial addition to or alteration of the original petition as envisaged in paragraph 14(2Ma)(n) of the 1st Schedule to the Electoral Act.

Amendments of this substantial nature can only be sought and granted before the expiration of thirty days from the date the result of the election was declared. Although the date the result of the election was declared is not indicated anywhere in the application, it was some time before the 21/5/2007 when this petition was filed This motion for amendment was filed on the 8/8/2007 - over two and a half months from the date the petition was filed. It is clearly outside the period stipulated for amendments. In the premise I fully endorse the opinion of the court below that the motion having been brought more than two months after the declaration of the result of the presidential election held on the 21/4/07 is statute barred and was rightly struck out for incompetence.

Let me now examine the issue of whether the petition presently constituted is incompetent in view of the provisions paragraph 4(1)(d) of the 1st Schedule to the Electoral Act, 2006 and paragraph 1(b) of the Election Tribunal and Court Practice Direction 2007. Paragraph 4 of the 1st Schedule to the Electoral Act provide for the contents of an Election Petition. Paragraph 4(1)(a)-(d) provide as follows:

"4(1) An election petition under this Act shall:

- a) specify the parties interested in the election petition;
- b) specify the rights of the petitioner to present election petition;
- c) state the holding of the election, the names of the candidates and the person returned winner of the election; and
- d) state clearly the facts of the election petition the grounds on which the petition is been the relief sought by the petitioner."

Paragraph 4(2), (3), (4) and (5) specify other content election petition. And paragraph 4(6) provides:

"An election petition which does not conform with 8th paragraph 1 of this paragraph or any paragraph of the sub paragraph is defective and may be struck out by tribunal or court."

And paragraph 1 of the Election Tribunal and Court practice Directions provides further for the mode of filing an election petition.

It provides:

"1(1) All petitions to be presented before the tribunal or court shall be accompanied by:

- (a) List of all the witnesses that the petitioner intends to call in proof of the petition;
- (b) Written statements on oath of the witnesses; and
- (c) Copies or list of every document to be relied on at the hearing, of the petition

(2) A petition which fails to comply with sub paragraph (1) of this paragraph shall not be accepted for filing in the secretary."

As I stated earlier in this judgment, the Practice Directions, 2007 are ancillary to the Electoral Act, 2006. They are complementary to the provisions of the 1st Schedule to the electoral act and specially designed to meet the need for urgency in election us, it is the combination of paragraph 4(1) - (5) of the 1st the Act and paragraph 1(1) of the Practice Directions that constitute the complete contents of an election petition. Especially paragraph 1(1) (b) of the Practice Directions provides the proof of evidence by which the petition can be proved. The requirement is mandatory. The petition as presently constituted is without the witness's written statement on oath. In other words, the petition is bare skeleton of a petition without the flesh to sustain it. Does not meet the requirements of the two provisions of paragraph 1(b) of the first Schedule to the Electoral Act 1(1)(b) and 1(i) of practice Directions. The result is that the petition filed on the 21/ 5/07 is incompetent for non-compliance with the Electoral Act. I do not disturb the finding and conclusion of the lower court on this issue. I fully endorse the decision of the lower court striking out the petition.

It is for the foregoing reasons and the fuller reasons contained in the lead judgment of my learned brother, Muhammad, J.S.C., that I dismiss appeal. I abide by the order as to costs contained in the leading judgment.

Appeal dismissed.