

OLUSEGUN ADEBAYO ONI

V.

- 1. DR. JOHN OLUKAYODE FAYEMI**
- 2. INDEPENDENT NATIONAL ELEC TORAL COMMISSION (INEC)**
- 3. RESIDENT ELECTORAL COMMISSIONER EKITI STATE**
- 4. THE RETURNING OFFICER, EKITI EAST LOCAL GOVT. AREA**
- 5. THE RETURNING OFFICER, EKITI STATE SOUTH WEST LOCAL GOVT. AREA**
- 6. THE RETURNING OFFICER, EKITI WEST LOCAL GOVT. AREA**
- 7. THE RETURNING OFFICER, GBOYIN LOCAL GOVT. AREA**
- 8. THE RETURNING OFFICER, IDO – OSI LOCAL GOVT. AREA**
- 9. THE RETURNING OFFICER, IJERO LOCAL GOVT. AREA**
- 10. THE RETURNING OFFICER, IKOLE LOCAL GOVT. AREA**

- 11. THE RETURNING OFFICER, ILEJEME-JE LOCAL GOVT. AREA**
- 12. THE RETURNING OFFICER, IREPODUN/IFELODUN LOCAL GOVT. AREA**
- 13. THE RETURNING OFFICER, ISE/ORUN LOCAL GOVT. AREA**
- 14. THE RETURNING OFFICER, OYE LOCAL GOVT. AREA**
- 15. THE NIGERIA POLICE**
- 16. THE COMMISSIONER OF POLICE**
- 17. THE NIGERIAN ARMY**

COURT OF APPEAL

(ILORIN DIVISION)

CA/1L/EPT/C1OV/1/2007

SAIFULLAHI MUNTAKA-COOMASSIE, J.C.A. (*Presided*)

HELEN MORONKEJI OGUNWUMIJU, J.C.A.

JUMMAI HANNATU SANKEY, J.C.A. (*Read the Leading Judgment*)

THURSDAY, 8TH NOVEMBER, 2007

APPEAL - Ground of appeal - Need to relate to ratio decidendi of decision being challenged - Whether obiter dictum can form a foundation therefore.

APPEAL - Exercise of discretion by trial court - Attitude of Court of Appeal thereto - When will interfere therewith.

COURT - Exercise of discretion by trial court - Attitude of Court of Appeal thereto - When will interfere therewith.

COURT - Federal High Court - Power of to extend or abridge time - Order 23 rule 3(1) & (2), Federal High Court (Civil Procedure) Rules, 2000.

COURT - Judicial discretion - How exercised.

COURT- Practice Directions - Nature and status of- Need to comply with - Where in conflict with rides of court - Which prevails.

COURT- Rules of court - Nature and status of- Need to obey - Non-compliance therewith - Effect - Whether fatal to proceedings.

COURT - Rules of court - Practice Directions - Where in conflict -Which prevails.

ELECTION PETITION - Election petition - Rules of procedure applicable therein - Paragraph 50, First Schedule to the Electoral Act, 2007.

ELECTION PETITION - Extension of time - Extension of time in election petition proceedings - Power of Election Tribunal to grant - When exercisable - Purpose of- Paragraph 43, First Schedule to Electoral, Act, 2007.

ELECTION PETITION - Paragraph 4(8), Election Tribunal and Court Practice, 2007 - Import of- When applicable.

ELECTION PETITION - Election petitions - Nature of - Need to avoid technicality with respect thereto.

FAIR HEARING - Fair hearing - Meaning of - Denial of - What amounts thereto - Effect of.

FAIR HEARING - Fair trial - Determinants of.

JUDGMENT AND ORDER - Ratio decidendi - What constitutes.

NATURAL JUSTICE - Fair hearing - Meaning of- Denial of- What amounts thereto - Effect of.

NATURAL JUSTICE - Fair trial - Determinants of.

PRACTICE AND PROCEDURE - Appeal - Exercise of discretion by trial court - Attitude of Court of Appeal thereto - When will interfere therewith.

PRACTICE AND PROCEDURE - Appeal - Grounds of appeal -Need to relate to ratio decidendi of decision being challenged - Whether obiter dictum can form foundation therefore.

PRACTICE AND PROCEDURE - Fair hearing - Meaning of- Denial of - What amounts thereto - Effect of.

PRACTICE AND PROCEDURE - Fair trial - Determinants of.

PRACTICE AND PROCEDURE - Federal High Court - Power of to extend or abridge time - Order 23 rule 3(1) & (2), Federal High Court (Civil Procedure) Rules, 2000.

PRACTICE AND PROCEDURE - Judicial discretion - How exercised.

PRACTICE AND PROCEDURE - Practice Directions - Nature and status of- Need to comply with - Where in conflict with rules of court - Which prevails.

PRACTICE AND PROCEDURE - Ratio decidendi - What constitutes.

PRACTICE AND PROCEDURE - Rules of court - Nature and status of- Need to obey - Non-compliance therewith - Effect - Whether fatal to proceedings.

PRACTICE AND PROCEDURE - Rules of court - Practice Directions - Where in conflict - Which prevails.

PRACTICE AND PROCEDURE - Time - Extension of- Abridgment of- Power of Federal High Court to order - When exercisable - Order 23 rule 3(1) and (2), Federal High Court (Civil Procedure) Rules, 2000.

Issues:

Whether or not the appellant's right to a fair trial was not breached by the tribunal's dismissal of the appellant's application in this case.

Whether the tribunal was right to have acted under paragraph 4(8) of the Election Tribunal and Court Practice Directions, 2007 to refuse the appellant's application for an enlargement of time to file a bundle of documents or it should have acted under paragraph 43 of the First Schedule to the Electoral Act, 2006 to grant the appellant's application.

Facts:

The appellant and several other candidates including the 1st respondent contested the election for the office of Governor of Ekiti State, which was held on 14th April, 2007.

At the end of the election, the 2nd respondent declared the appellant duly elected as

Governor of Ekiti State. Dissatisfied, the 1st respondent filed a petition at the election petition tribunal. The appellant entered appearance and filed his reply to the petition thereafter, the 1st respondent in this appeal filed a reply to the appellant's reply.

Subsequently, the appellant filed an application. He sought leave of the tribunal to file certain documents referred to in his reply to the petition. He also sought an enlargement of time within which to file the said documents and an order deeming the said documents as having been duly filed and served. The application was supported by an 11 paragraph affidavit giving reasons for the tardiness. The reason the appellant gave in his affidavit was that the documents available to him at the time of filing his reply were not legible and that he approached the 2nd respondent for legible certified true copies but received the same after he had filed his reply. None of the respondents filed counter-affidavit against the application. However, the petitioner/1st respondent objected to the application on point of law.

In its ruling, the tribunal dismissed the application on ground of non-disclosure of exceptional circumstance to entitle him to the order sought.

Dissatisfied with the ruling, the appellant appealed to the Court of Appeal.

As part of his reaction to the appeal, the 1st respondent raised a preliminary objection to one of the appellant's grounds of appeal.

The Court of Appeal, in deciding the appeal, considered the following statutory provisions and rules of court.

Paragraphs 43(1),(2) and 50 of the 1SI Schedule to the Electoral Act, 2007; which read:-

"43(1) The Tribunal or Court shall have power, subject to the provisions of section 141 of this Act and paragraph 14 of this Schedule, to enlarge time for doing any act or taking any proceedings on such terms (if any) as the justice of the case may require except otherwise provided any other provision of this Schedule.

(2) An enlargement of time may be ordered although the application for enlargement is not made until after the expiration of the time appointed or allowed." "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 nearly 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 the respondent were respectively the plaintiff and the defendant in an ordinary civil action."

Paragraphs 1, 2 and 4(8) of the Election Tribunal and Court Practice Directions, 2007, which read:-

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

- (a) 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 by the Secretary.

2. The respondent's reply shall be a statement in summary form and shall be supported by copies of documentary evidence, list of witnesses and the written statement on oath."

"4(8) Save with the leave of Tribunal or Court after an application has shown exceptional circumstances, no document, plan, photograph or model shall be received in petition

unless it has been filed along with the petition or reply in accordance with these Directions."

Order 23 rule 3(1) & (2) of the Federal High Court (Civil Procedure) Rules, 2000, which reads:

"3. (1) The court may, on such terms as it thinks just, by order extend or abridge the period within which a person is required or authorized by these provisions, or by any judgment, order or directions to do any act in any proceedings.

(2) The court may extend any such period as is referred to in sub-ruled) of this rule although application for extension is not made until after the expiration of that period."

Held (*Unanimously allowing the appeal*) -

1. *On Determinants of a fair trial* -

The twin pillars of natural justice, namely, *nemo iudex in causa sua* and *audi alterem partem*, are two of the determinants of a fair trial in our adversarial system of justice. In other words, they are both indispensable principles and uncompromising inputs to a fair trial. Consequently, section 36(1) of the 1999 Constitution, which stipulates that all persons be accorded a fair trial provides that in the determination of his civil rights and obligations, including any question or determination by or against any government or authority, a person shall be entitled to a fair hearing within a reasonable time by a court or other tribunal established by law and constituted in such manner as to secure its independence and impartiality.

(*P.432, paras. B-E*)

2. *On Meaning affair hearing and what amounts denial thereof* -

Fair hearing has been defined as the right of a party to correct or contradict the evidence against him or in his favour. A denial of fair hearing is therefore a denial of a fair opportunity to present a litigant's case. (P.432, para. E)

3. *On Effect of denial affair hearing* -

The right of citizens to a fair trial before the courts and tribunals in Nigeria is guaranteed. Where there is any breach of this fundamental right, such a trial is liable to be declared a nullity. Where the principles of natural justice are violated in any decision, it is immaterial whether the same decision would have been arrived at in the absence of the departure from the essential principles of justice. The decision must be declared to be no decision. Accordingly, an exercise of discretion, which deprives a litigant of an effective exercise of the right to present his case resulting in the dismissal of his appeal is not a fair hearing within the meaning of section 36(1) of the 1999 Constitution. In the instant case, the appellants sought an enlargement of time to file a bundle of documents, which had been duly pleaded in his reply to the petition. He gave reasons in his affidavit in support of the application for his tardiness in filing these documents along with the reply as required by the Practice Directions. The reason briefly was that the documents available to him at the time of filing his reply were not legible, as a consequence of which he had to approach the 2nd respondent for clearer certified true copies of the documents, which he only received after he had filed the reply. All the respondents did not contest the veracity of these depositions by filing a counter-affidavit in that regard. There was therefore no challenge to the facts as contained in the affidavit. That being the case, the tribunal should have exercised its discretion liberally in favour of the appellants in order not to shut him out from being heard at the preliminary stage of the trial by enabling him to fully present his defence to the 1st respondent's petition. Since the fact of his inability to acquire the documents required for his defence had not been impugned by any affidavit evidence to the contrary, the principle of *audi alterem partem* should have

persuaded the tribunal to act differently in order not to deprive the appellant of his right to a fair trial. As it is, given the crucial nature of the documents as stated in the affidavit, the appellant may have been effectively deprived of the right to defend the petition presentation of his case before the tribunal. [*Ntukidem v. Oko* (1986) 5 NWLR (Pt. 45) 909; *Avont v. K.R.P.C. Ltd.* (2002) 14 NWLR (Pt. 788) 508; *Adigun v. A.-G., Oyo State* (1987) 1 NWLR (Pt. 53) 678; *Obi-Odu v. Duke* (2006) 1 NWLR (Pt. 961) 37f referred to.] (Pp.432, para. E-H; 433-434, paras F-\ C)

Per SANKEY, J.C.A. at page 433, paras A-B: "In the case of *Obi-Odu v. Duke* (*supra*) (relied upon by learned counsel for the appellant), this court held that by section 36 of the 1999 Constitution, a party's civil right and obligation can only be lawfully determined if he is given a fair hearing. The exercise of the court's discretion must not in any way circumscribe the party's constitutional right. The party has right to present his case in the way and manner he chooses."

4. *On Nature of election petitions* -Election petitions are *sui generis*, and election tribunals should at all times strive to do substantial] justice without undue dependence on technicalities! Which have a tendency to stultify proceedings and muffle litigants, *thereby defeating the ends of justice.*] (P.433, paras. E-F)
5. *On Power of Election Petition Tribunal to enlarge time for doing any act in election petition proceedings* By virtue of paragraph 43 of the First Schedule to the Electoral Act, 2006, the Tribunal or court shall] have power, subject to the provisions of section 141 of the Electoral Act and paragraph 14 of the Schedule to enlarge time for doing any act or taking any proceedings on such terms, if any, as the justice of the case may require except otherwise provided by any other provision of the Schedule. An enlargement of time may be ordered although the application for enlargement is not made until after expiration of the time appointed or allowed. The provision was specifically enacted to save proceedings in courts/tribunals, which would otherwise have been thrown out on technicalities without affording litigants the opportunity of either ventilating their grievances to the hilt or defending actions against them to the full extent. In other words, it operates to ensure that substantial justice, as much as possible, is done and that parties are not shut out of proceedings on the ground that they are unable, for good reason shown, to comply with the rules of court or Practice Directions that relate to set times for the filing of court processes. In the instant case, is not in dispute that paragraph 2 of the Practice Directions clearly mandates the appellant who is the respondent in the election petition to file his documents along with his reply. However, having failed to meet that explicit requirement of the Directions, the provisions of the First Schedule to the Electoral Act may be activated by the appellant on application presented in matters of enlargement of time. When that happens, all that is required of the appellant is to place some materials before the court/tribunal to show his entitlement to such an order enlarging the time apportioned for the doing of an act. He has no obligation to show exceptional circumstances before the documents sought to be filed can be filed. To require of him to do so would be to place a heavier burden on the appellant which the law itself did not envisage at that stage of the proceedings. (P. 439-440, paras. E-D)
6. *On When paragraph 4(8) of the Election Tribunal and Court Practice Directions, 2007 applicable* -It is clear from the ordinary and literal construction of paragraph 4(8) of the Election Tribunal and Court Practice Directions, 2007 that it pertains to the point **in time when documents are being tendered evidence. It is beyond the purview or stage of the**

filing of documents. It proceeds on the premise that' processes and documents had earlier been filed in fulfilment of paragraphs 1 and 2 of the Practice Directions, which deals with the filing of processes before the tribunal. (P.438, paras. F-H)

Per MUNTAKA-COOMASSIE, J.C.A. at pages 447-448, paras. B-E:

"I wish to make it abundantly clear that the lower Tribunal found itself in a cobweb which proved difficult to clear vis-a-vis the interpretation of paragraph 4(8) of the Practice Directions, 2007. One school of thought says that if the documents sought to be put in were not attached to the pleadings then the Tribunal could not oblige the applicant until and unless exceptional circumstances had been shown. See paragraph 4(8).

Other school of thought insisted that in such a situation there is no need for a defaulting applicant to show any exceptional circumstance before the lower Tribunal could grant the application. I refer to paragraph 43(1) and (2) of the 1st Schedule of the Electoral Act, 2006. My Lords permit me to juxtapose the two provisions for the sake of clarity thus:-Paragraph 4(8): 'Save with leave of Tribunal or court after an applicant has shown exceptional circumstances, no document, plan, photograph or model shall be received in evidence at the hearing of a petition unless it has been filed along with the petition or reply in accordance with these Directions.' Paragraph 43(1): The Tribunal or court shall have power, subject to the provisions of section 141 of this Act and paragraph 14 of the Schedule, to enlarge time for doing any act or taking any proceedings on such terms (if any) as the Justice of the case may require except other-wise provided by any other provision of this Schedule.

(2) An enlargement of time may be ordered although the application for enlargement is not made until after the expiration of the time appointed or allowed.'

Considering the above two provisions I have no difficulty in holding that the provisions of the Practice Directions were meant to apply at the hearing of the petition proper when all the basic and rudimentary matters have been settled. It cannot therefore be applicable at the initial stage where both parties were busy putting their respective houses in order. The Tribunal should have accepted the application and extended time for the applicant/appellant as it rightly did in its subsequent decision after the one at hand to avoid unnecessary waste of precious time. The same lower Tribunal in EKS/ EPT/HA/9/07 Olaiya Kupolati Anor. V. Olusola Oke & 10 Ors. Held that paragraph 4(8) of the Practice Direction is only applicable at the trial stage. In my view the lower Tribunal correctly interpreted the provision of paragraph 4(8) of the Practice Direction, 2007 and brought out the true intendment of the President of the Court of Appeal. It is regrettable that the lower Tribunal in the case at hand failed to grant the application for extension of time to file those documents referred to in their reply as it did subsequently in the unreported matter before it. I must agree with my learned brother, Sankey, JCA and hold that paragraph 43(1) and (2) of the Schedule to the Electoral Act, 2006 is the applicable provision at the initial stage of the matter. Had the lower Tribunal agreed, as they did in the

subsequent proceedings, this court would have accepted that its discretion was rightly exercised. I must say here that we decided to take this appeal, which borders on interlocutory matters, on the ground that the Tribunal failed to exercise its discretion judiciously and judicially. This does not mean that in future we are going to entertain indiscriminately interlocutory appeals in general."

7. *On Aim and status of rule of court and need to obey*

Rules of court are meant to be obeyed because they provide support in the administration of justice. However, it must be understood that being rules and regulations they assist the court in its effort to determine issues or controversies before the court. Care must therefore be exercised in not elevating them to the status of a statute as they are subsidiary instruments. They are to be used by the courts to discover justice and not to choke, throttle or asphyxiate justice. They are not sine qua non in the just determination of a case and therefore not immutable. (Pp. 442-443, paras. H-B) Per SANKEY, J.C.A. at page 443, paras. C-E:

"Consequently, it is fitting to emphasize that rules of court are made to enable the courts meet the ends of justice. They are not immutable and should not be construed in absolute terms. They have been described as being the handmaids of justice. Hence, care should be taken not to enthrone them as 'mistresses' of justice. It is the bounden duty of the court to use its powers to discover the true intents of the law and to do justice, not to destroy them unless the words used convey a meaning that renders obscure the true intentions of the statute. See again the findings of Pats-Acholonu, JSC (of blessed memory) in *Broad Bank of Nig. Ltd. v. Alhaji S. Olayowola & Sons Ltd. & Anor.* 2005) 3 NWLR (Pt.912) 434." Per OGUNWUMIJU, J.C.A. at page 451-452, paras G-B:

"Now, let us look at the Justice of this case to which end the tribunal is supposed to work. The appellant's affidavit in the motion of extension of time gave the reason that the forms which were supposed to be attached to the reply to the petition were illegible and so CTC of the documents were requested from the 2nd respondent to the petition and at the time of filing the reply the 1st respondent now appellant couldn't file them as required by the rules. The documents were to be used to defend the petition. None of the respondents to the application for extension of time filed any counter-affidavit to controvert the facts deposed by the applicant at the lower court. Most important to the justice of this case is the fact that all these happened at the early stage of the proceedings and there was no imputation that the filing of these documents at that time would in any way take the petitioner by surprise, or prejudice the case of the petitioner or cause undue delay in the hearing of the petition. In handling election petitions, the tribunal must do substantial justice regardless of technical hitches in the preparation of the petition. I am of the view that the tribunal should have exercised their discretion in favour of the appellant and that this appeal has merit. I abide by all the consequential orders made in the lead judgment."

8. *On Nature and status of Practice Directions –*

Practice directions are statements by the judiciary intended to guide the courts and the legal profession on the matters of practice and procedure. Although they do not have statutory authority, which statutory rules have, practice directions represent

the view of the judges of the court issuing them on practice and procedure and counsel cannot afford to ignore them except at their peril. Practice directions are concerned with the rules of court, indicating the manner in which applications in interlocutory proceedings in court shall be dealt with or regulated and the provision of guidelines as to what is to be done. They concern and regulate the manner in which a particular rule of court shall be complied with or adhered to. [Nigerian Airport Authority v, Okoro (1995) 6 NWLR (Pt. 403) 510; University Of Lagos v. Aigoro (1985) 1 NWLR (Pt. 1) 143 referred to.] (P.444, paras. C-F)

Per SANKEY, J.C.A. at pages. 444-445, paras G-A:

"It therefore bears emphasizing to state that the provisions of the Practice Directions, 2007, having been made pursuant to the powers of the President of the Court of Appeal under 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, is a piece of subsidiary legislation that enjoys statutory flavour. Consequently, litigants and counsel appearing before courts or Tribunals before which same are directed would do well to give heed to them, as not to do so may lead to unsavoury and unpalatable end results which would not augur well for the party failing foul of them. Rules and Directions of court must prima facie be obeyed to make for the orderly and expeditious conduct of the business of Courts and Tribunals."

9. *On Need to comply with Practice Directions –*

The Practice Directions of Court must be complied with and not circumvented and no favour should be shown for not obeying same. [Ojugbele v. Lamidi (1999) 10 NWLR (Pt. 621) 167 referred to.] (P.444, paras. F-G)

10. *On Paramount of Rules of Court over Practice Directions -*

Per OGUNWUMIJU, J.C.A. at pages 450-451, paras. H-

"I agree with appellant's counsel that excessive weight was given to the provisions of the Practice Directions to the detriment of superior legislation. This is because where as in this case Practice Directions are in conflict with the rules of court, the rules of court must perforce prevail. We are in no way denigrating the need and importance of Practice Directions. In fact they are tools in enhancing compliance with the rules of court. However, they must be used by the courts not only to ensure speedy trials within a reasonable time, they must also be utilized by the courts to promote the entrenched rights of the parties to fair hearing under S. 36(1) of the 1999 Constitution.

Let us look at the locus classicus on this point in Nigeria. See Unilag v. Aigoro (1984) NSCC pg 745; (1985) 1 NWLR (Pt. 1) 143 the contention was made that the Chief Justice of the Federation is incompetent to give practice direction which fetters the exercise of judicial discretion. The Supreme Court at pg. 755 to 756 of the NSCC report held unequivocally per Bello, JSC (as he then was) thus:-

'By the combined effect of the definition of "enactment" which means "provision of any law or a subsidiary instrument" under section 277(1) of the 1979 Constitution and section 27 of the Interpretation Act, 1964 which provides "subsidiary instrument" means any order, rules, regulations, rules of court or by laws either made before or after the commencement of this Act in exercise of powers conferred by an Act. The Supreme Court Rules, 1977 is an enactment while the Practice Direction do not qualify as such. Consequently, a Practice

Direction has no force of law and cannot fetter a rule of court and cannot tie the court in the exercise of its discretion where there is a conflict between a rule of court and a Practice Direction, the rule must prevail.'

I dare say that position of the law still holds good today."

11. *On Rules of procedure applicable in election petition -*
By virtue of paragraph 50 of the Electoral Act, 2006, subject to the express provisions of the Electoral Act, the practice and procedure of the tribunal or the court in relation to an election petition shall be as nearly 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 Electoral Act, as if the petitioner and the respondent were respectively the plaintiff and the defendant in an ordinary civil action. (P. 449, paras. F-H)
12. *On Power of the Federal High Court to extend or abridge time –*
By virtue of Order 23 rule 3(1) and (2) of the Federal High Court (Civil Procedure), 2000 Rules, the court may on such terms as it thinks just, by order extend or abridge the period within which a person is required or authorised by these provision, or by any judgment, order or directions to do any act in any proceedings. The court may extend any such period as is referred to in sub- rule (1), although the application for extension is not made until after the expiration of that period.fP. 450, paras. A-C)
13. *On Exercise of judicial discretion -*
Judicial discretion must be exercised according to the relevant rules of law and practice and according to the rules of reason and justice. The guiding principle is that discretion, being judicial, must at all times be exercised not only judicially but also judiciously based on sufficient materials placed before the court. (Pp. 440-441, paras. H-A)
14. *On When Court of Appeal will interfere with exercise of discretion by trial court -*
Ordinarily, the Court of Appeal is very reluctant to interfere with the exercise of discretion by a trial court, and it seldom does. However, the Court of Appeal will interfere with an exercise of discretion by a trial court where:
 - a) **The trial court acted under a misconception of the law.**
 - b) **The trial court misapprehended the facts in that it gave weight to irrelevant or unproved matters.**
 - c) **The trial court omitted to take into account matters that are relevant.**
 - d) **The discretion was exercised on wrong or inadequate materials.**
 - e) **It is in the interest of justice to interfere to prevent miscarriage of justice.**

In the instant case, the Court of Appeal held that the Tribunal acted under a misconception of the law and it omitted to take into account matters that are relevant while taking into account irrelevant matters, and that it was in the interest of justice for it to intervene in order to prevent a miscarriage of justice to the appellant. Consequently, it granted the application sought by the appellant at the tribunal. Ogar v. James (2000) 10 NWLR (Pt. 722) 621; University of Lagos v. Aigoro (1985) 1 NWLR (Pt. 1) 143; Solanke v. Ajibola (1969) NMLR 523; gbolohun v. Balogun (1990) 2 NWLR (Pt.134) 576 referred to.] (Pp. 441, paras.

A-H; 443, paras. E-F)

Per SANKEY, J.C.A. at pages 441-442, paras. G-F:

"Having held that it is paragraph 43 of the First Schedule to the Electoral Act, 2006 that is applicable to the application before the Tribunal as opposed to paragraph 4(8) of the Practice. Directions, 2007, I hold that the Tribunal was palpably wrong to have required the appellant to prove exceptional circumstances before he would be entitled to the order enlarging time to file his documents. As aforesaid, all that the law required of him at this stage was to place some materials before the Tribunal which would show his entitlement to the order sought. This requirement of the law was clearly spelt out by the Supreme Court in the case of *Williams v. Hope Rising Voluntary Fund Society* (1982) 1-2 SC 70. Idigbe, JSC at pages 152 -153 stated thus:-

'When the court is called upon to make an order for extension of time within which to do certain things, (that is extension of the time prescribed by the Rules of the Court for taking certain procedural steps), the court always ought to bear in mind that rules of court must prima facie be obeyed and that it therefore follows that in order to justify the exercise of the court's discretion in extending the time within which a procedural step has to be taken, there must be some material upon which to base the exercise of that discretion; any exercise of the court's discretion where no material for such exercise has been placed before the court would certainly give a party in breach of the Rules of Court uninhibited right to extension of time and the provisions as to time within which to take procedural steps set out in the rules of court would, indeed, in such circumstances have no legal content.' It is in the light of the preceding authorities, the law on the subject and the power of this court under section 16 of the Court of Appeal Act that I have examined the affidavit of the appellant and I find that sufficient materials were placed before the Tribunal to warrant the exercise of its discretion in his favour. This is more so having regard to the fact that there was no counter affidavit to controvert the materials placed before the Tribunal. *Ogbu v. Orum* (1981) ANLR (Reprint) 324 at 332; *Ratman v. Cumarasamy* (1964) 3 All ER 933 at 935."

15. *On what constitutes ratio decidendi -*

It is not every statement made by a trial Judge in the course of arriving at a decision that is binding. The reasoning of the trial Judge while in motion may gather many imports, some of which merely helped him in the decision-making process and others which are of no essence. It is only the quintessence of the reasons for his decision that is best described as the ratio-decidendi. (Pp. 427-428, paras. H-A)

16. *On what ground of appeal should be based -*

A ground of appeal should be based on an issue in controversy and must arise from the decision on appeal. It should constitute a challenge to the ratio of the decision. In other words, a ground of appeal against a decision must not only relate to the decision but should further be a challenge to its ratio-decidendi. This is because an appeal is not normally against an obiter dictum nor should an appellant appeal on a finding made by a court, which has no bearing on the final order made by that court. However, where an obiter dictum is so coupled with the ratio decidendi that it can reasonably be deemed to have radically affected the

ratio decidendi, it may be treated as a good root of a ground of appeal. In the instant case, the Court of Appeal held that a finding of the election tribunal on which the decision of the tribunal was based could be a subject of an appeal. [Saraki v. Kotoye (1992) 9 NWLR (Pt. 264) 156; Coker v. U.B.A. Plc. (1997) 2 NWLR (Pt. 490) 641-Yusufu v. Kupper International (1996) 5 NWLR (Pt. 446) 17referred to.] (Pp. 427, paras. G-H; 428, paras. A-G)

Per SANKEY, J.C.A. at page 428 paras C-F:

"There is, therefore, always the need to ascertain the ratio and this simultaneously satisfies the need to determine what binds the parties in any particular decision. When the quintessence of the reason for the decision has been sifted, what is usually left are mere obiter dicta, and an appellant's criticism cannot be founded upon an obiter dictum, as an obiter dictum does not found the foundation for a ground of appeal. Thus a finding or statement which is not part of the formal judgment or order of the lower court cannot be appealed against. For instance, a ground of appeal cannot be founded on an observation of the trial Judge which has no direct binding effect on the parties. However, where the obiter is so coupled with the ratio-decedent that it can reasonably be deemed to have radically affected the ratio-decedent, it may be treated as a good root of a ground of appeal. See Ede v. Omeke (1992) 5 NWLR (Pt. 242) 428; Saude v. Abdullahi (1989) 4 NWLR (Pt. 116) 387; Osolu v. Osolu (1998) 1 NWLR (Pt. 535) 532; Coker v. U.B.A. (1997) 2 NWLR (Pt. 490) 641."

Nigerian Cases Referred to in the Judgment:

Adigun v. A-G., Oyo State (No.1) (1987) 1 NWLR (Pt. 53) 678
Agbolohun v. Balogun (1990) 2 NWLR (Pt. 134) 576
Anisiubi v. Emodi (1975) 2 SC 9
Avong v. K.R.P.C. Ltd. (2002) 14 NWLR (Pt. 788) 508
Broad Bank of (Nig.) Ltd. v. Alhaji S. Olayiwola & Sons Ltd. (2005) 3 NWLR (Pt.912) 434
Coker v. U.B.A. Plc. (1997) 2 NWLR (Pt. 490) 641
Dafa v. F.C.D.A. (1994) 4 NWLR (Pt. 340) 549
Duke v. Akpabuyo L.G. (2005) 19 NWLR (Pt.959) 130
Ede v. Omeke (1992) 5 NWLR (Pt. 242) 428
Ekiyor v. bomor (1997) 9 NWLR (Pt. 519) 1
Emeka r. Emodi (2004) 16 NWLR (Pt. 900) 433
haruna v. Modibbo (2004) 16 NWLR (Pt. 900) 487
lfezue v. Mbudugba (1984) 1 SCNLR (Pt. 242) 427
Jang v. Dariye (2003) 15 NWLR (Pt. 843) 436
Kotoye v. C.B.N. (1989) 1 (Pt. 98) 419
Kupolati v. Oke (unreported) Suit No. EK/EPT/HA/9/07
Mattamdonna v. Abu (1995) 8 NWLR (Pt. 412) 225
N.A.A. v. Okoro (1995) 6 NWLR (Pt. 403) 510
N.B.A. v. Odiri (2007) 8 NWLR (Pt. 1035) 203
Ntukidem v. Oko (1986) 5 NWLR (Pt. 45) 909
Nwole v. hvuagwu (2004) 15 NWLR (Pt. 895) 61
Obi-Odu v. Duke (2006) 1 NWLR (Pt. 961) 375
Odutola v. Lawal (2002) 1 NWLR (Pt. 749) 633
Offodile v. Egwuatu (2006) 1 NWLR (Pt. 961) 421
Ogarv. James (2001) 10 NWLR (Pt. 722) 621

Ogbu v. Urum (1981) 1 ANLR (Reprint) 324
Ogboodu v. State (1987) 2 NWLR (Pt. 54) 20
Ojugbele v. Lamidi (1999) 10 NWLR (Pt. 621) 167
Olumesan v. Ogundepo (1996) 2 NWLR (Pt. 433) 628
Osolu v. Osolu (1998) 1 NWLR (Pt. 535) 532
In re: Shyllon (1994) 6 NWLR (Pt. 353) 735
Saraki v. Kotoye (1992) 9 NWLR (Pt. 264) 156
Saude v. Abdullahi (1989) 4 NWLR (Pt. 116) 387
Solanke v. Ajibola (1969) 1 NMLR 253
U.B.N. Plc. v. Sparkling Breweries Ltd. (1997) 5 NWLR (Pt. 505) 344
University of Lagos v. Aigoro (1985) 1 NWLR (Pt. 1) 143
Williams v. Hope Rising Voluntary Fund Society (1982) 1-2 SC 145
Yusufu v. Kupper International (1996) 5 NWLR (Pt. 446) 17

Foreign Case Referred to in the Judgment:

Ratnam v. Cumarasamy (1964) 3 All E.R 933

Nigerian Statutes Referred to in the Judgment:

Constitution of the Federal Republic of Nigeria, 1979, Ss. 33(1), 277(1)

Constitution of the Federal Republic of Nigeria, 1999, Ss. 36, 285(3).

Court of Appeal Act, 1976, S.16

Electoral Act, 2006, Ss. 141, 149

Electoral Tribunal and Court Practice Directions, 2007, paragraphs 1, 2, 4(8), 14(2)(b)

Interpretation Act 1964, S. 27, paragraphs 43, 74(2) (b), 50

Nigerian Rules of Court Referred to in the Judgment:

Federal High Court (Civil Procedure) Rules, 2000 O. 23, r. 3

Appeal:

This was an appeal against the ruling of the Election Petitioner Tribunal which struck out the appellant's application. The Court of Appeal in a unanimous decision, allowed the appeal and granted the application.

History of the Case:

Court of Appeal:

Division of the Court of Appeal to which the appeal was brought: Court of Appeal,
Ilorin

Names of Justices that sat on the appeal: Saifullahi
Muntaka-Comassie, J.C.A. (Presided); Helen Moronkeji
Ogunwumiju, J.C.A; Jummai Hannatu Sankey, J.C.A.

Appeal No.: CA/IL/EPT/GOV/1/2007

Date of Ruling: Thursday, 8th November, 2007

Names of Counsel: Olu Daramola, Esq. (with him, A. M.

Lawal, Esq. and Oluwole O.O. Ogungbade, Esq) - for the appellant

Yusuf ali, SAN; (with him, chief T.O ashaolu, SAN

Dayo akinlaja, Esq., ahmed tefa, Esq.,

Dada, ESq R.O. Balogun Esq s. saad, Esq and U. uwadiale, Esq)- for the first
Respondent

C.O roland-otaru,(mrs) (with her, adedoyin, [(mrs)])- for the 2nd to 16th respondents.

Election Tribunal:

Name of the Election Tribunal: National Assembly/ Governorship and Legislative Houses

Tribunal, Ekiti State. Date of ruling; Monday, 9th July, 2007

Counsel:

Olu daramola, Esq (with him A. M Lawal Esq., and oluwole o.o ogungbade, Esq)- for the applicant.

Yusuf ali San (with him T.O ashaolu, San., dayo akinlaja, Esq., K.K eleja Esq., ahmed tefa, Esq., A. dada, Esq., R.O. Balogun, Esq., S. saad and U.uwadiale, Esq) for the 1st respondent

C.O. roland-otaru (mrs) (with her, adedoyin[mrs])-for the 2nd-16th respondents.

SANKEY, J.C.A. (elivering the leading judgment): the appellant herein is the 1st respondent in an election pending before the Governorship and Legislative Houses Election Tribunal holding at Ado-Ekiti. In the election conducted into the office of governor of Ekiti State on the 14th April, 2007, he contested for the seat along with several other candidates including the 1st respondent of this application, Dr. John Olukayode Fayemi. The appellant was the people democratic party candidate in the said election while the 1st respondent was the action congress candidate. At the end of the election, the 2nd respondent declared the appellant duly elected as the Governor of Ekiti State. The 1st respondent, being dissatisfied with this declaration, filed an Election Petition at the trial Tribunal, hereinafter called the Tribunal), on the 11th May, 2007, wherein he sought certain relief on diverse grounds as set out exhaustively at pages 1-205 of the record of appeal. The appellant duly entered an appearance and filed his reply to the petition. Thereafter, the 1st respondent equally filed his reply of the 1st respondent/appellant herein. On the 18th June 2007, the appellant filed an application seeking the leave of the tribunal to file certain documents referred to in the reply to the petition, enlarging time within which to do this and deeming the said documents as having been duly filed and served. The motion was supported by an 11 paragraph affidavit giving reasons for his tardiness. No counter-affidavit was filed to controvert the averments in the applicant's affidavit by any of the respondents. However, the 1st respondent objected to the application on point of law. Written submissions by counsel were filed in respect of the application. The tribunal took argument on the motion on the 3rd of July, 2007, and on the 9th July, 2007, delivered its ruling dismissing the application mainly on the ground that the appellant failed to disclose any exceptional circumstance to entitle him to the orders sought. Dissatisfied with this ruling, the appellant has appealed to this court on eight grounds. The grounds of appeal, shorn of their particulars, are as follows:-

Ground One

The learned Chairman and members of the Tribunal erred in law and breached the appellant's right to fair hearing by dismissing his application to enable him bring in documents that would enable him defend the petition.

Ground Two

The learned Honourable Chairman and members of the Tribunal erred in law when they held as follows:-

"By the provisions of paragraph 4(8) Election Tribunal and Court Practice Directions, 2007, this court has jurisdiction to file some documents. However, there is a condition attached to paragraph 4(8) directions supra.

The conditions attached to paragraph 4(8) directions supra are that an applicant must show "exceptional circumstances". The Electoral Act, 2006 is silent about what "special circumstances" is.... special circumstance therefore is something that is beyond the ordinary. It is a question of fact which cannot be tied to any particular case. It is not a question of law, being a question of fact what amount to special circumstances will be determined upon the facts presented before a court".

Ground Three

The learned Chairman and members of the Election Tribunal erred in law when they failed to consider the provisions of paragraph 43 to the 1st Schedule of the Electoral Act, 2006 in the determination of the appellant's application for extension of time to file his documents.

Ground Four

The learned Chairman and members of the Election Tribunal erred in law and thereby misconceived the nature of the appellant's application before them when they held that the appellant ought to establish exceptional circumstance before the appellant's application for extension of time to file documents would be granted.

Ground Five

The learned Chairman and members of the Tribunal erred in law and misconceived the nature of the appellant's application before them when they held thus; "Thus, in *Jong Jang v. Achibi Dariye* 2 EPR 839; (2003) 15 NWLR (Pt. 843) 436 though it touches an amendment of a petition as in this case the same principle of law applies that there cannot be allowed amendment to a reply substantially altering the state of pleadings of parties".

Ground Six

The learned Chairman and members of the Tribunal erred in law when they held as follows:-

"Having looked at the other objections to the motion, we now asks the question has the applicant proved special and exceptional circumstances to warrant the Tribunal exercise its discretion in his favour and allow the application"?

Ground Seven

The learned Chairman and members of the Tribunal erred in law when they held thus:-
"As a result of bringing these forms at this stage the petitioner/respondent raised the issue of authenticity of these documents which will be relevant during the time they are to be tendered. The main reason for bringing the application is that the applicant has got the C. T. C. recently and they are legible. One would have thought that the illegible copies would have been attached to the reply when it was filed to convince one. It was not done. The mode of application for the C. T. C. whether letter or otherwise would have been exhibited to the affidavit, it has not been done. It is not enough to give reasons for applying for extension of time, one must go a step and give convincing reasons...
It behooves the applicant to positively assert that the reasons for failing to comply with paragraph 2 of the directions and give convincing reason for failing to comply with the said paragraph ... The reason for this application is contained in the supporting affidavit produced supra. The usage of "shall" in the paragraph 2 of the directions is to be given a strict compliance. The affidavit evidence of the application is before the court has been carefully looked into. We are of the considered opinion that the reason for bringing this falls short of convincing us to allow the application, and accordingly is dismissed."

Ground Eight

The learned Chairman and members of the Tribunal misdirected themselves and thereby wrongly dismissed the appellant's application when they failed to examine the appellant's witness statements on oath already filed before them in considering the appellant's application.

When the appeal came up for hearing on the 4th October, 2007 Mr. Olu Daramola, learned counsel for the appellant, moved the motion on notice filed by the appellant wherein he

sought the leave of court to extend time for the appellant to file a reply brief to the 1st respondent's brief of argument. This application, though initially opposed by learned senior counsel for the 1st respondent, was subsequently conceded and therefore granted. Consequently, learned counsel for the appellant adopted the appellant's brief of argument dated 27th July, 2007 and filed on 30th July, 2007 as the appellant's arguments in this appeal. He similarly adopted the appellant's reply brief dated 28th August, 2007 and deemed filed on 4th October 2007. He urged the court to allow the appeal.

On his own part, learned Senior Advocate for the 1st respondent Yusuf Ah, adopted the 1st respondent's brief of argument dated 8th July, 2007 and filed on 8th August, 2007. He prayed the court to dismiss the appeal. He drew the court's attention to the preliminary objection at pages 4-5 of the brief and adopted the arguments proffered and the submissions made therein.

Mrs. Roland-Otaru, learned counsel for the 2nd - 16th respondents, filed no brief of argument and so could urge nothing upon the court.

As noted earlier, the 1st respondent raised a preliminary objection in his brief of argument. It asks that ground 5 of the ground of appeal be struck out on the ground that it is not a proper ground in this appeal. Learned senior counsel submitted that the law is settled that only the ratio decidendi of a judgment or ruling can form the basis of a valid ground of appeal. An obiter dictum or chance comment by a court in a judgment or ruling cannot form the basis of a valid ground of appeal. Referring to the ruling of the Tribunal at page 579 of the record, he contended that the Tribunal only made reference to the case of *Jang v. Dariye* 2EPR 839; (2003) 15 NWLR (Pt. 843) 436 on the issue of amendment in Election Petitions. However, the decision in the ruling was not predicated on amendment as seen at pages 512 - 522 of the record. Learned senior counsel therefore submitted that ground 5 of the appellant's grounds of appeal is not available to the appellant in this appeal. He relied on the cases of *Dafa v. FCDA* (1994) 4 NWLR (Pt. 340) 549 at 556-557 & *In Re shyollon* (1994) 6 NWLR (Pt. 353) 735 at 752. He prayed the court to strike out ground 5 for being incompetent.

In urging the court to discountenance the submission by the 1st respondent in this preliminary objection, learned counsel for the appellant contended that one of the grounds of objection to the motion on notice before the Tribunal was that the application for the filing of the bundle of documents constituted an amendment to the reply filed by the appellant. Thus, it was in the course of addressing this ground that the Tribunal went on to hold as it did, relying on the case of *Jonah Jang v. Chief Joshua Chibi Dariye* (supra). In essence, the Tribunal resolved the ground of objection in favour of the 1st respondent by finding that the application of the appellant constituted an amendment. Learned counsel submitted that where the court reviews the submissions of a party with regard to an objection and comes to a decision on that objection, such a decision can properly be the subject of an appeal. Finally, learned counsel submitted that the holding of the Tribunal which formed the basis of ground 5 is not a mere reference but a decision which informed the final decision of the Tribunal in refusing the application of the appellant.

It is the law that a ground of appeal should be based on an issue in controversy and must arise from the decision on appeal. It should constitute a challenge to the ratio of the decision. An appeal is not normally against an obiter dictum nor should an appellant appeal on a finding made by a court which has no bearing on the final order made by that court. The law is therefore settled that it is not everything that is uttered by the trial Judge in the course of arriving at a decision that is binding. His reasoning while in motion may gather many imports, some of which merely helped him in the decision-making process and others which are of no essence. It is only the quintessence of the reasons for his decision that is best described as the ratio-decendent. A ground of appeal

against a decision must therefore not only relate to the decision but should further be a challenge to its ratio-decedent. See *Saraki v. Kotoye* (1992) 11/12 SCNJ 26 at 42; (1992) 9 NWLR (Pt. 264) 156; (1992) 3 NSCC 331; *Coker v. UBA* (1997) 4 SCNJ 130 at 145; (1997) 2 NWLR (pt. 490) 641 *Yusufu v. Kupper International* (1996) 4 SCNJ 40 at 48; (1996) 5 NWLR (Pt.446)17.

There is, therefore, always the need to ascertain the ratio and this simultaneously satisfies the need to determine what binds the parties in any particular decision. When the quintessence of the reason for the decision has been sifted, what is usually left are mere obiter dicta, and an appellant's criticism cannot be founded upon an obiter dictum, as an obiter dictum does not found the foundation for a ground of appeal. Thus a finding or statement which is not part of the formal judgment or order of the lower court cannot be appealed against. For instance, a ground of appeal cannot be founded on an observation of the trial Judge which has no direct binding effect on the parties. However, where the obiter is so coupled with the ratio-decedent that it can reasonably be deemed to have radically affected the ratio-decedendi, it may be treated as a good root of a ground of appeal. See *Ede v. Omeke* (1992) 5 NWLR (Pt. 242) 428; *Saude v. Abdullah!* (1989) 4 NWLR (Pt. 116) 387; *Osolu v. Osolu* (1998) 1 NWLR (Pt. 535) 532; *Coker v. U.B.A.* (1997) 47 LRCN 435; (1997) 2 NWLR (Pt. 490) 641.

A close examination of the proceedings of the Tribunal easily settles the matter as to whether the subject of amendment was made an issue and whether the Tribunal pronounced on same, and at the same time, whether its decision thereon informed the final decision of the Tribunal in refusing the application. At page 404 of the record of appeal, the 1st respondent/petitioner's counsel in his written address in opposing the appellant's application to file the bundle of documents referred to in his reply, submitted thus:-

"It is submitted that the 1st respondent's application is in effect amending his reply which was filed without any accompanying document. To allow the 1st respondent to now file the bundle of documents or what he termed bundle of documents would in effect amend his reply. This is clearly forbidden. See paragraph 14(2)(b) which clearly stated that no amendment to a reply shall be made after the expiration of time limited for filing the respondent's reply."

The appellant responded to this at pages 407-408 of the record as follows:-

"This arm of the petitioner's opposition is with respect to him ridiculous and totally lacking in merit... There is no prayer seeking an amendment of the 1st respondent's reply. It is submitted also that the documents sought to be relied on are neither capable of amending the 1st respondent's reply nor changing the thrust of his defence. Aside from the bare assertion, counsel did not demonstrate how the documents will amend the 1st respondent's reply."

In its ruling on the application at page 518 of the record, the Tribunal found inter alia thus on the issue of amendment raised: -

"Paragraph 14(2)(b) of the First Schedule is important in considering whether or not what is sought to be achieved in the application will amount to amendment of the reply already filed before us... Thus, in *Jonah Jang v. Chief Joshua Achibi Dariye* 2 EPR 839; (2003) 15 NWLR (Pt. 843) 436. Though it touches on amendment of a petition as in this case the same principle of law applies that there cannot be allowed amendment to a reply substantially altering the state of pleadings of parties."

With all these, can it seriously be canvassed that this was not one of the reasons for the decision of the lower Tribunal? That this was merely an obiter dictum of the court? The matter of the

amendment of the reply was surely made an issue in the application by the 1st respondent himself. The appellant duly responded to this issue. The Tribunal went on to pronounce on same, holding that the finding in the case of *Jonah Jang v. Dariye* (supra) applied mutatis mutandis to the matter before it, as an amendment to the reply cannot be granted which will substantially alter the state of the parties' pleadings. This was the decision of the Tribunal in respect of the issue of amendment in the application. As a finding which informed the final decision of the court, it can indeed be the subject of an appeal, as the appellant here in has chosen to make it. Therefore, in the light of all the above authorities, I find that the finding of the Tribunal in respect of the issue of amendment of the reply is a foundation for a ground of appeal. The preliminary objection raised against ground 5 of the grounds of appeal is misconceived and I do so find. It is accordingly dismissed.

The appellant, in his brief argument, distilled two issues from the grounds of appeal for the determination of this court as follows:-

- (a) Whether or not the appellant's right to a fair trial was not breached by the refusal of the appellant's application in this case, ground 1.
- (b) Whether or not from the circumstances of this case and the materials before the Tribunal, the appellant was entitled to the reliefs sought in the application. Grounds 2, 3, 4, 5, 6, 7 and 8.

The 1st respondent, in the other hand, formulated one sole issue for determination in his brief of argument thus:-

1. Whether, having regard to the materials before the Tribunal and the state of the law, the Tribunal was not right in its decision dismissing the application of the appellant to file additional documents in support of his reply to the petition of the 1st respondent in the circumstances of this case.

Since the issues formulated by the appellant adequately cover all the grounds of appeal, I hereby adopt them in the consideration of this appeal. *Issue one.*

Under this issue, learned counsel for the appellant submitted that the right to fair hearing is guaranteed under section 36(1) of the Constitution of the Federal Republic of Nigeria. He relied on the following authorities for the interpretation and construction the courts have placed on this constitutional provision: *Ekiyor v. Bomor* (1991) 9 NWLR (Pt. 519) 1 at 12; *Mattaradona v. Ahu* (1995) 8 NWLR (Pt. 412) 225 at 239; *Koioye v. CBN* (1989) 1 NWLR (Pt. 98) 1 NWLR 419; *Adigun v. Attorney General Oyo State* (1987) 1 NWLR (Pt. 53) 678; *NBA v. Odiri* (2007) 8 NWLR (Pt. 1035) 203 at 219; *Avong v. KRPC Lid.* (2002) 14 NWLR (Pt. 788) 508 at 535. In dismissing the appellant's application, the tribunal relied on paragraph 4(8) of the Practice Directions, holding that the appellant did not show exceptional circumstances to warrant the grant of the application. Learned counsel submitted that by so doing, the tribunal had denied the appellant the opportunity to defend the case put forward by the 1st respondent. This is more so as the 1st respondent by not filing a counter affidavit, had not stated what prejudice he would suffer by the grant of the application. Learned counsel invoked the rules of natural justice, particularly the principle of *audi allerem partem*, to contend that by shutting out the appellant from filing these crucial documents, the tribunal had shut out the appellant from a fair trial. He submitted that a hearing can only be fair when all the parties to a dispute are given the opportunity of a hearing. It is submitted further that the failure by the tribunal to allow the appellant to bring in the documents sought to be filed at the stage when the application was filed is a denial of fair hearing and it has the tendency to prevent the appellant from defending the case brought against him by the 1st respondent. In advocating that the courts take heed of the current trend towards doing substantial justice as opposed to doling out decisions based on technicalities, learned Counsel relied on the case of *Obi-Odu v. Duke* (2006) 1 NWLR (Pt. 961) 375 at 402-404. It is

counsel's contention that having denied the appellant the right to bring in these documents, the appellant is left with no tool to defend the case. He submitted that if the 1st respondent is not comfortable with the documents, the stage for objection has not even arisen. This could be done at the stage of tendering the documents. Learned counsel relied on the case of *Haruna v. Modibbo* (2004) 16 NWLR (Pt. 900) 487 at 537 to submit that the ruling of the Tribunal amounted to a denial of fair hearing against the appellant.

It is further the submission of learned counsel that where the constitutional right to a fair hearing has been breached, it nullifies a trial. He relied on the cases of *Adigun v. The State* (1987) 1 NWLR (Pt. 53) 678 at 707-708; *Olumesan v. Ogundepo* (1996) 2 NWLR (Pt. 433) 628 at 654 to buttress his submission that it is unnecessary for any person alleging a denial of fair hearing to establish any injury or prejudice to himself before he may invoke his right to fair hearing. He urged the court to hold that, having regard to the material before the Tribunal, the nature of the documents sought to be filed, the time the application was filed and the failure of the respondents to show the prejudice they would suffer, the refusal of the application by the Tribunal constitutes a denial of the right to fair hearing guaranteed by the Constitution. Learned counsel therefore urged the court to resolve this issue in favour of the appellant.

Learned senior counsel for the 1st respondent, in his response to this issue, very briefly contended that the issue of a denial of fair hearing does not arise in this appeal. It is his position that the Tribunal did even-handed justice in the matter and the allegation of a lack of a fair hearing is a far-fetched and forlorn claim that has no foundation in fact or in law.

This issue is intricately tied to issue No. two. Nonetheless, I shall also deal with it separately as formulated by the appellant. The twin pillars of natural justice, without a doubt, are one of the determinants of a fair trial in our adversarial system of justice. *Nemo iudex in causa sua* and *audi alteram partem* are both indispensable principles and uncompromising inputs to a fair trial. It is therefore no wonder that section 36(1) of the Constitution of the Federal Republic of Nigeria, 1999 makes it imperative that all persons be accorded a fair trial. It provides thus:-

"In the determination of his civil rights and obligations, including any question or determination by or against any government or authority, a person shall be entitled to a fair hearing within a reasonable time by a court or other tribunal established by law and constituted in such manner as to secure its independence and impartiality."

Fair hearing has been defined as the right of a party to correct or contradict the evidence against him or in his favour. A denial of fair hearing is therefore a denial of a fair opportunity to present a litigant's case. Consequently, the right of citizens to a fair trial before the courts and tribunals of our land is guaranteed. Where there is any breach of this fundamental right, such a trial is liable to be declared a nullity. Where the principles of natural justice are violated in any decision, it is immaterial whether the same decision would have been arrived at in the absence of the departure from the essential principles of justice. The decision must be declared to be no decision. It has been held that an exercise of discretion which deprives a litigant of an effective exercise of the right to present his case resulting in the dismissal of the appeal was not a fair hearing within the meaning of section 33(1) of the 1979 Constitution. (This provision is *in pari materia* with section 36(1) of the 1999 Constitution). See the cases of *Chief James Ntukidem & Ors. v. Chief Asuquo Oko & Ors.* (1986) 2 SC 172; (1986) 5 NWLR (Pt. 45) 909; *Avong v. K.R.P.C. Ltd.* (2002) 14 NWLR (Pt. 788) 508; *Adigun & Ors. v. A.-G., Oyo State & Ors.* (1987) 3 SC 308; (1987) 1 NWLR (Pt. 53) 678.

In the case of *Obi-Odu v. Duke (supra)* relied upon by learned counsel for the appellant, this

court held that by section 36 of the 1999 Constitution, a party's civil right and obligation can only be lawfully determined if he is given a fair hearing. The exercise of the court's discretion must not in any way circumscribe the party's constitutional right. The party has a right to present his case in the way and manner he chooses. Omokri, JCA, held as follows at page 418 of the report:-

"Election Petitions are very sensitive and of great public interest. They are by their very nature peculiar from other proceedings and are very important from point of view of public policy. In a situation where very serious allegations are made by the petitioner to shut him up in any manner does much harm to the course of justice.

Again in Nwole v. Iwuagwu (2004) 1 EPR 682 at 702; (2004) 15 NWLR (Pt. 895) 61, it was held that:-'The above is the more reason why greater care and pain must be taken in the handling of election petitions with a view to doing substantial justice to both parties regardless of the technical hitches that may abound in the couching or preparation of the petition.'

Thus, tribunals should do well to give heed to these admonitions by this court. They should always be mindful of the fact that Election Petitions are *sui generis* and should at all times strive to do substantial justice without undue dependence on technicalities, which have a tendency to stultify proceedings and muffle litigants, thereby defeating the ends of justice.-^

In the instant case, the appellant sought an enlargement of time to file a bundle of documents which had been duly pleaded in his reply to the petition. He gave reasons in his affidavit in support of the application for his tardiness in filing these documents along with the reply as required by the Practice Directions. The reason briefly is that the documents available to him at the time of filing his reply were not legible, as a consequence of which he had to approach the 2nd respondent for clearer certified true copies (CTC) of the documents, which he only received after he had filed the reply. All the respondents, (the 1st respondent inclusive), did not contest the veracity of these averments by filing a counter-affidavit in that regard. There was therefore no challenge to the facts as contained in the affidavit. That being the case, the Tribunal should have been well" advised to have exercised its discretion liberally in favour of the appellant in order not to shut him out from being heard at these preliminary stages of the trial by enabling him to fully present his defense to the Petition. Since the fact of his inability to acquire the documents required for his defence had not been impugned by any affidavit evidence to the contrary, the principle of *audi alteram partem* should have persuaded the Tribunal to act differently in order not to deprive the appellant of his right to a fair trial. As it is, given the crucial nature of the documents as stated in the affidavit, the appellant may have been effectively deprived of the right to defend the Petition by a full presentation of his case before the Tribunal. If this is not a denial of the right to a fair hearing, then nothing else is. Consequently, based on the facts before the Tribunal as presented in the uncontroverted affidavit evidence, (and without prejudice to our findings in respect of issue No. two), I answer this issue in the affirmative in favour of the appellant. Ground one succeeds. *Issue Two.*

Under this issue, learned counsel to the appellant submits that paragraph 4(8) of the Practice Directions is not relevant to the application of the appellant before the Tribunal. He referred to the reliefs in the application which, in summary sought orders for leave to the applicant to file the documents referred to in his reply, enlarging time within which to do this and deeming same as having been properly filed and served. Whereas paragraph 4(8) deals with the tendering of documents, plans, photographs or models which had not earlier been attached to the pleadings at the hearing of a petition. He submitted that since the paragraph is not relevant where the applicant is seeking an extension of time to file documents at the stage where hearing has not commenced (as in this case), the Tribunal misdirected itself when it relied on paragraph 4(8) of the Practice Directions

to refuse the application. The Practice Directions not being applicable, there was no obligation on the appellant therefore to show exceptional circumstances before the documents sought to be filed could be filed.

Learned counsel submitted that the relevant law under which the Tribunal ought to have acted is paragraph 43 of the First Schedule to the Electoral Act, 2006. He contended that the Tribunal wrongly relied on paragraph 4(8) of the Practice Directions and so also wrongly placed the burden that the appellant must show exceptional circumstances on the appellant. He submitted that where a court of trial has taken into consideration extraneous factors which it ought not to have considered and has brushed aside relevant factors which would have guided it in the proper exercise of its discretion, it is the duty of the Court of Appeal in the exercise of its power of review to interfere. He relied on the cases of *Ogobodu v. The State* (1987) 2 INWLR (Pt. 54) 20; *Anisiubi v. Emodi* (1975) 2 SC 9; *Solanke v. Ajibola* (1969) NMLR 253; *Agbolohun v. Balogun* (1990) 2 NWLR (Pt. 134) 576 at 581.

Learned counsel further submitted that since the application of the appellant was for an extension of time to file the documents to be used to defend the Petition, the applicable provision was paragraph 43 of the First Schedule to the Electoral Act which does not require that an applicant disclose exceptional circumstances. He again pointed out that none of the respondents filed a counter-affidavit to controvert the facts deposed to in the affidavit in support of the application. On the authority of *Williams v. Hope Rising Voluntary Fund Society* (1982) 1-2 SC 70 at 73 -74, a person, who applies to a court to extend time within which a procedural step is to be taken, needs only put some materials before the court on which to base the exercise of the court's discretion. He contended that the appellant to the application had placed materials before the Tribunal upon which it should have used to exercise its discretion in favour of the appellant, especially having regard to the fact that there was no counter-affidavit to controvert the materials placed before it. He submitted that the refusal of the application was a wrong exercise of judicial discretion which discretion must be exercised judiciously. He relied on *Offodile v. Egwuatu* (2006) 1 NWLR (Pt. 961) 421 at 430; *Odutola v. Lawal* (2002) 1 NWLR (Pt. 749) 633; *University of Lagos v. Aigoro* (1985) 1 NWLR (Pt. 1) 143; *UBN Plc v. Sparkling Breweries Ltd.* (1997) 5 NWLR (Pt. 505) 344; *Ogar v. Jones* (2001) 10 NWLR (Pt. 722) 621.

Learned counsel, in an alternative submission, submitted that, even if paragraph 4(8) of the Practice Directions is applicable, the approach adopted by the Tribunal did not serve the ends of justice. For the proper approach to the application of Practice Directions, learned counsel relied on the following cases: *Unilag v. Aigoro* (1985) 1 NWLR (Pt. 1) 143 and *Haruna v. Modibbo* (2004) 16 NWLR (Pt. 900) 487 at 591 -592.

In the final analysis, learned counsel submitted that having regard to the materials before the Tribunal, the Tribunal wrongly exercised its discretion in that it acted under a misconception of the law and omitted to take into account matters that are relevant. From the materials before the Tribunal, he urged the court to hold that the appellant was entitled to be granted time to file the documents. He asked the court to resolve this issue also in favour of the appellant.

In his response to this issue, learned Senior Advocate submitted that since the provisions of the Practice Direction are made pursuant to the powers of the President of the Court of Appeal under the Constitution, it is a piece of subsidiary legislation that enjoys constitutional favour. For the efficacy of Practice Directions, learned counsel relied on the case of *TV. A. A. v. Chief Okoro* (1995) 6 NWLR (Pt. 403) 510 at 522. He contended that the double appearance of the word "shall" in the Practice Direction confirms the imperativeness of the paragraphs therein making it mandatory that a respondent, when filing his reply, must attach, (among others), the documentary

evidence he intends to rely on. Where there is an omission in compliance, then a party is required to show exceptional circumstances. Learned senior counsel submitted that the use of the word "shall" in paragraphs 2 and 4(8) of the Practice Directions is a word of command that excludes the exercise of discretion. For the interpretation of the word "shall", he relied on the cases of *Ifezua v. Mbadugha* (1984) 1 SCNLR 427 at 425-426 and *Emeka v. Emodi* (2004) 16 NWLR (Pt. 900) 433 at 450.

Learned senior counsel submitted further that rules of court are meant to be obeyed. *Raluam v. Cumarasamy* (1964) 3 All ER 93 3 at 933 S; *Ogbu v. Urum* (1981) 1 ANLR (Reprint) 324 at 332. He submitted that the appellant, by his motion and affidavit before the Tribunal failed to satisfy or meet the requirement of both paragraphs 2 and 4(8) of the Practice Directions and paragraph 43 of the First Schedule to the Electoral Act, 2006. Therefore, he was not entitled to the reliefs claimed and the ruling of the Tribunal in that regard is unassailable, the appellant having failed to disclose cogent and compelling facts to support the application. He urged the court to dismiss the appeal and uphold the ruling of the Tribunal.

The appellant, in his reply brief, submitted that the Practice Directions issued by the President of this court is to guide the Tribunals. However, it cannot override the provisions of paragraph 43 of the First Schedule to the Electoral Act which clearly gives an applicant the right to seek an extension of time to take certain steps within the proceedings. He relied on *University of Lagos v. Aigoro* (supra) at 191 and *Haruna v. Modibbo* (supra) at 536-536. On the use of the word "shall" in the Practice Direction, learned counsel conceded that rules of court must primarily be obeyed. However, plunders do occur occasionally and it is to prevent justice being sacrificed on the altar of technicality and slavish adherence to rules that the law has provided an opportunity for litigants to seek the discretion of the court. In addition, learned counsel referred to paragraph 1(1)(c) of the Practice Directions which provides that copies of petitions shall be accompanied *inter alia* by:-

"(c) copies or 1st of every document to be relied on at the hearing of the petition."

By this, the Practice Direction only requires the petitioner to attach copies or a list of documents to be used at the hearing of his petition. Therefore, it follows that a petitioner who does not attach documents is at liberty to bring them in later, after filing the documents or even while the hearing is in progress. Learned counsel pointed out that up to the time of filing this reply and about 3 months after filing the petition, the 1st respondent/petitioner himself had not even filed the documents he intends to use at the hearing of the petition. Yet ironically, he still opposed the application of the appellant by which he sought to file his documents within two weeks of filing his reply. He questioned whether it was the intention of the makers of the Practice Directions to place a higher burden on the respondent than on the petitioner who ought to prove his case. He contended that having regard to paragraph 7(1)(c) of the Practice Direction, the word "shall" used in paragraph 2 for the respondent carries equal weight as the requirement expected of the petitioner, which is to list the documents to be used in the petition. He submitted that the Tribunal ought to have adopted a liberal approach in allowing the documents in, since the law will not place a heavier burden on the respondent than it has placed on the petitioner. In conclusion learned counsel submitted that the appellant had placed enough materials before the Tribunal for it to have exercised its power under paragraph 43 of the First Schedule to the Electoral Act, 2006. He again urged the court to allow the appeal.

In my humble view, the very narrow issue in contention here is, whether the Tribunal was right to have acted under paragraph 4(8) of the Practice Direction to refuse the application for an enlargement of time to file a bundle of documents or it should have properly acted under paragraph 43 of the First Schedule to the Electoral Act, 2006 to grant the application. I believe the proper

place to start is to answer the question: What was the nature of the application at the court/Tribunal below? The prayers on the motion paper as contained at page 358 of the record are set out hereunder:-

- 1) *An order granting leave to the 1st respondent/applicant to file the documents referred to in his reply filed on the 5th of June, 2007.*
- 2) *An order enlarging the time within which the 1st respondent/applicant can file the documents referred to in his reply filed on the 5th of June, 2007.*
- 3) *An order deeming as having been properly filed and served the documents referred to in the 1st respondent's reply, which have now been filed in a bundle of documents referred to as the "1st respondent's bundle of documents" in the Registry of this Tribunal. (Italics mine for emphasis).*

It is clear from the prayers on the motion paper that the operative word here is "*FILE*". Now, paragraph 4(8) of the Election Tribunal and Court Practice Directions, 2007 provides:-

"Save with leave of Tribunal or court after an applicant has shown exceptional circumstances, no document, plan, photograph or model shall be received in evidence at the hearing of a petition unless it has been filed along with the petition or reply in accordance with these Directions."
(Italics mine for emphasis).

It is clear from the ordinary and literal construction of paragraph 4(8) of the Practice Directions that this direction pertains to the point in time when documents are being *tendered in evidence*. It has clearly gone beyond the purview or stage of the filing of documents. Instead, it proceeds on the premise that processes and documents had earlier been filed in fulfillment of paragraphs 1 and 2 of the Practice Directions which deal with the filing of processes before the Tribunal. For ease of reference, these are also reproduced hereunder:-

1.-(1) All petitions to be presented before the Tribunal or court shall be accompanied by:-

- (a) 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 by the Secretary.
2. The respondent's reply shall be a statement in summary form and shall be supported by copies of documentary evidence, list of witnesses and the written statement on oath."

By this paragraph 2 of the Practice Direction, the 1st respondent/ appellant was obliged to have filed his documents *along* with his reply. However, for reasons stated in the affidavit in support of his motion on notice, he was obviously unable to do this. The question is, having failed to comply with this Practice Direction, was the door forever closed against him from putting in the documents he would need to buttress his defence? The Tribunal has answered this question with a resounding 'No', while the appellant herein disagrees. He insists that the applicable provision that governs his application at this stage is paragraph 43 of the First Schedule to the Electoral Act, 2006. For clarity of argument, paragraph 43 provides *inter alia* thus:-

"43(1) The Tribunal or court shall have power, subject to the provisions of section 141 of this Act and paragraph of this Schedule, to enlarge time for doing any act or taking any proceedings on such terms (if any) as the justice of the case may require except otherwise provided by any other provision of this Schedule.

- (2) *An enlargement of time may be ordered although the application for enlargement is not made until after the expiration of the time appointed or allowed. "*

From the content of the above, it seems to me that this provision was specifically enacted to save proceedings in courts/tribunals which would otherwise have been thrown out on technicalities. Without affording litigants the opportunity of either ventilating their grievances to the hilt or defending actions against them to the full extent. In other words, it operates to ensure that substantial justice, as much as possible, is done and that parties are not shut out of proceedings on the ground that they are unable, for good reason shown, to comply with the rules of court or Practice Directions that relate to set times for the filing of court processes. It is not in dispute that paragraph 2 of the Practice Directions clearly mandates a respondent in an Election Petition to file his documents along with his reply. However, having failed to meet this explicit requirement of the Directions, the provisions of the First Schedule to the Electoral Act may be activated on application presented in matters of enlargement of time. When that happens, all that is required of litigant is to place *some materials* before the court/tribunal to show his entitlement to such an order enlarging the time apportioned for the doing of an act. He has no obligation to show exceptional circumstances before the documents sought to be filed can be filed. To require of him to do so would be to place a heavier burden on litigant which the law itself did not envisage at this stage of the proceedings. I do agree with learned counsel for the appellant that by applying paragraph 4(8) of the Practice Directions to the application before it, the Tribunal misdirected itself and consequently took into consideration extraneous factors which it ought not to have considered and brushed aside relevant factors which should have guided it in the proper exercise of its discretion. Given such a scenario, it is the duty of this court in the exercise of its powers of review to interfere. *Agbolohun v. Balogun* (1990) 2 NWLR (Pt. 134) 576 at 581; *Ogbonu v. The State* (1987) 2 NWLR (Pt. 54) 20; *Anisiubu v. Emodi* (1975) 2 SC 9; *Solanke v. Ajibola* (1969) 1 NMLR 253.

In view of all the foregoing, it seems quite clear to me that the Tribunal has failed to exercise its discretion in accordance with the appropriate provision of the law governing applications of this nature. It has therefore ended up exercising its discretion on wrong principles of law leading to a miscarriage of justice. It is the law that where there has been a wrongful exercise of discretion or where no weight or insufficient weight has been given to relevant considerations, as in this case, the Court of Appeal is not just entitled to, but is duty bound to reverse the exercise of that discretion. Judicial discretion must be exercised according to the relevant rules of law and practice and according to the rules of reason and justice. The guiding principle is that discretion, being judicial, must at all times be exercised not only judicially but also judiciously based on sufficient materials placed before the court. Ordinarily, a Court of Appeal is very reluctant to interfere with the exercise of discretion by a lower court, and it seldom does, but if it appears that the result of the exercise of discretion by the lower court is to defeat the rights of the parties together, that is, if it will occasion injustice to one or the other of the two parties, then the appellate court will review the order made in order to ensure that there is no miscarriage of justice. See *Ogar v. James* (1997) 10 NWLR (Pt. 722) 621; *University of Lagos v. Aigoro* (1985) 1 NWLR (Pt. 1) 143. This court, in the case of *Offodile v. Ekwuatu* (2006) 1 NWLR (Pt. 961) 421 at 436, clearly set out the grounds for interfering with any judgment or order based on the discretion of the court thus:-

"The grounds or reasons for interfering with any judgment or order based on the discretion of court are well and properly specified in a plethora of cases as follows —

- (a) Where the trial court acted under a misconception of the law.
- (b) Misapprehension of the facts in that it gave weight to irrelevant or unproved matters.
- (c) Where it omitted to take into account matters that are relevant.
- (d) Where the discretion is exercised on wrong or inadequate materials.

(e) Where it is in the interest of justice to interfere to prevent miscarriage of justice."

In the case under consideration, it is apparent that the Tribunal acted under a misconception of the law and it omitted to take into account matters that are relevant while taking into account irrelevant matters. For that reason, it is undoubtedly in the interest of justice to intervene in order to prevent a miscarriage of justice.

Having held that it is paragraph 43 of the First Schedule to the Electoral Act, 2006 that is applicable to the application before the Tribunal as opposed to paragraph 4(8) of the Practice Directions, 2007,¹ hold that the Tribunal was palpably wrong to have required the appellant to prove *exceptional circumstances* before he would be entitled to the order enlarging time to file his documents. As aforesaid, all that the law required of him at this stage was to place *some materials* before the Tribunal which would show his entitlement to the order sought. This requirement of the law was clearly spelt out by the Supreme Court in the case of *Williams v. Hope Rising Voluntary Fund Society* (1982) 1-2 SC 70. Idigbe, JSC at pages 152 - 153 stated thus:-

"When a court is called upon to make an order extension of time within which to do certain things, that is extension of the time prescribed by the Rules of the Court for taking certain procedural steps), the court ought always to bear in mind that Rules of court must prima facie be obeyed and that it therefore follows that in order to justify the exercise of the court's discretion in extending the time within which a procedural step has to *be* taken, there must be *some material* upon which to base the exercise of that discretion; any exercise of the court's discretion where no material for such exercise has been placed before the court would certainly give party in breach of the Rules of Court uninhibited right to extension of time and the provisions as to time within which to take procedural steps set out in the Rules of court would, indeed, in such circumstances have no legal content."

(Italics mine for emphasis).

It is in the light of the preceding authorities, the law on the subject and the power of this court under section 16 of the Court of Appeal Act that I have examined the affidavit of the appellant and find that sufficient materials were placed before the Tribunal to warrant the exercise of its discretion in his favour. This is more so having regard to the fact that there was no counter affidavit to controvert the materials placed before the Tribunal. *Ogbu v. Orum* (1981) ANLR (Reprint) 324 at 332; *Ratnam v. Cumarasamy* (1964) 3 All ER 933 at 935.

Finally, it is well to state that it will advance the course of justice better if courts/tribunals give heed to the admonition of that very respected jurist of high repute, Pats-Acholonu, JSC, (of blessed memory), when he stated thus in *Duke v. Akpabuyo Local Government* 24 NSCQR 401; (2005) 19 NWLR (Pt.959) 130:-

"Rules of court are in the nature of beacon lights to the parties to a dispute illuminating the path leading to justice. Our courts have held that rules of court are meant to be obeyed. They provide supports in the administration of justice, but it must be understood that being rules and regulations they assist the court in its effort to determine issues or controversies before the court, care must be exercised in not elevating them to the status of a statute as they are subsidiary instruments. They are to be used by the courts to discover justice and not to choke, throttle or asphyxiate justice. They are not sine qua non in the just determination of a case and therefore not immutable."

Consequently, it is fitting to emphasize that rules of court are made to enable the courts meet the ends of justice. They are not immutable and should not be construed in absolute terms. They have

been described as being the handmaids of justice. Hence, care should be taken not to enthrone them as 'mistresses' of justice! It is the bounden duty of the court to use its powers to discover the true intentents of the law and to do justice, not to destroy them unless the (words used convey a meaning that renders obscure the true intentions of the statute. See again the findings of Pats-Acholonu, JSC (of Messed memory) in *Broad Bank of Nig. Ltd. v. Alhaji S. Olayiwola & Sons Ltd. & Anor*, 21 NSCQR 594 at 603, 603 and 610; (2005) 3 NWLR(Pt.912)434.

It bears repeating to state that the refusal of the application before the Tribunal amounted to a wrong exercise of discretion based on a misconception of the relevant rule of court applicable thereto which led it to omit to take into account matters that are relevant. I therefore hold that the appellant was entitled to be granted time within which to file the stated documents. In the circumstances therefore, the only conclusion that can be reached is that the order of the Tribunal refusing the appellant's application ought to be reversed. The complaint of the appellant is justified and I allow the appeal.

On the 10th October, 2007, this court was served an additional authority via a covering letter dated 9th October, 2007 from the appellant's solicitors, Chief Afe Babalola, SAN & Co. It is indicated therein that all the respondents have similarly been copied same through their respective counsel. The additional authority is EKS/ EPT/HA/9/07 *Olaiya Kupolati & Anor. v. Olusola Oke & JO Ors.* 'Unreported) ruling delivered on 14th August, 2007. It is a decision of the National Assembly/Governorship and Legislative Houses Election Tribunal sitting at Ado Ekiti, the same Tribunal that issued the decision upon which this appeal is predicated. It is apparent from the ruling of the court therein that the Tribunal, when faced with the same facts as in this case, had no difficulty in granting the orders for leave and extension of time sought to file additional documents. It clearly held therein that paragraph 4(8) of the Practice Directions is only applicable at the trial stage and not at the filing stage. See pages 5 to 6 of the said ruling. This is a clear departure from the position taken by the same Tribunal on the same facts in the instant case. Nevertheless, it is a welcome development as it would seem that the Tribunal has overruled itself by this later decision. This ruling is therefore binding on it in respect of this appeal *mutatis mutandis*. No more needs to be said.

Before I conclude, it is not out of place to reaffirm the statement of the Apex Court when it held that Practice Directions are statements 'by the judiciary intended to guide the courts and the legal profession on the matters of practice and procedure. Although they do not have the statutory authority which statutory rules have, Practice Directions represent the view of the Judges of the court issuing them on practice and procedure and counsel cannot afford to ignore them except at their peril. See *Nigerian Airports Authority' v. Chief Dick Celestine Okoro* (1995) 6 NWLR (Pt. 403) 510 at 523 per Uwais, JSC (as he then was). Practice Directions are concerned with the rules, indicating the manner in which applications in interlocutory proceedings in a court shall be dealt with or regulated and the provision of guidelines as to what is to be done. Simply put, they concern and regulate the { manner in which a particular rule of court shall be complied with or adhered to. See *University of Lagos & Anor. v. Aigoro (supra)* at ' 208. As this court has had occasion to hold in the case of *Ojugbele v. Lamidi* (1999) 10 NWLR (Pt. 621) 167, the Practice Directions of this court must be complied with and not circumvented and no favour should be shown for not obeying same. It therefore bears emphasizing , to state that the provisions of the Practice Directions, 2007, having been made pursuant to the powers of the President of the Court of Appeal under section 285(3) of the Constitution of the Federal Republic of Nigeria, 1999 and paragraph 50 of the First Schedule to the I Electoral Act. 2006, is a piece of subsidiary legislation that enjoys ' statutory flavour. Consequently, litigants and counsel appearing before courts or Tribunals before which same are directed would do well to give heed to them, as not to do

so may lead to unsavoury and unpalatable end results which would not augur well for the part) failing fowl of them. Rules and Directions of court *must prima facie* be obeyed to make for the orderly and expeditious conduct of the business of courts and Tribunals.

In the result and for all the reasons stated, this appeal succeeds It is allowed. The ruling of the Tribunal refusing the application for an extension of time and for leave to file the "Bundle of Documents referred to in the reply of the appellant is hereby set aside. Tin application is granted as prayed, and the 'Bundle of Documents annexed thereto is deemed duly filed and served today, the 8th November, 2007. The 1st respondent is ordered to pay the appellant costs in the sum of N10,000.00 only.

MUNTAKA-COOMASSIE, J.C.A.: On the 14th day of Apr. I 2007, as it is well known, elections were held throughout Nigeria into Governorship and State Houses of Assembly. The 1st petitioner, Dr. Kayode Fayemi, contested the election on the platform of Act Congress - A.C. while the 1st respondent Olusegun Adebayo On contested the election on the platform of People Democratic Part) P.D.P. At the end of the election the 1st respondent was declared the winner. The 1st petitioner was not happy and filed a petition challenging the declaration of the 1st respondent as the Governor Ekiti State. The hearing of the petition started in earnest and in the course of hearing the 1st respondent/Governor filed a motion c" notice seeking the following orders from the Tribunal.

1. An order granting leave to the 1st respondent/applicant to file the documents referred to in his reply filed on the 5th of June, 2007.
2. An order enlarging the time within which the 1st respondent/applicant can file the documents referred to in his reply filed on 5th of June, 2007.
3. An order deeming as having been properly filed and served the documents referred to in the 1st respondent reply, which have been filed in a bundle of document referred to as the 1st respondents bundle of document in the Registry of this Tribunal.

The parties filed their written addresses and a reply was also filed by the applicant. Both parties then adopted their written addresses many decided authorities were cited by both parties.

The lower Tribunal after considering arguments for and against took a position that the application for an order granting leave to the 1st respondent to file the documents referred to in his reply filed on 5th of June, 2007 failed. The lower Tribunal also refused to extend time for the appellant to file the said documents referred to. Finally it refused to allow the deeming order. That Tribunal has this to say on page 521 of the record of proceedings:-

"... The affidavit evidence of the application is (*sic*) is before the court has been carefully looked into. We are of the considered opinion the (*sic*) reasons for bringing this application falls shorts of convincing us to allow the application and accordingly the application is dismissed."

Not satisfied with the above ruling of the lower Tribunal the 1st respondent/appellant appealed to this court and filed a notice of appeal containing eight grounds of appeal.

The appellants brief dated 27/7/07 and filed on 30/7/07 along with their appellants' reply brief were adopted on 14/10/07. They urged this court to allow their appeal.

The respondents' brief was also filed and adopted on the same 4/10/07 in it a preliminary objection has been raised against ground five of the ground of appeal.

My Lord Justice Sankey has dealt with various issues presented to us for our deliberation I have closely considered the relevant provisions of the Practice Directions which clearly enjoined parties to attach and accompany their pleadings with the documents they intend to make us of. The issue is when these documents were supposed to be attached? Is it

before or at the hearing of the petition ? It is to be recalled that on the 18th June, 2007, the appellant herein filed an application seeking the leave of the lower Tribunal to file certain documents which were clearly referred to in the reply to the petition. He then applied for enlargement or extension of time within which to file such documents. The application was supported by an eleven paragraph-affidavit. It was a little bit curious that the *respondents in the application did not deem it fit to raise any objection by way of filing a counter-affidavit. The 1st respondents counsel however attempted to object to the application on point of law.*

The lower Tribunal after evaluating the submissions of both counsels on the application relied on paragraph 4(8) of the Practice Directions, 2007 and held that the application must fail and dismissed same. The Tribunal sole reason for dismissing the appellant's application is that the applicant failed to disclose any exceptional circumstance to entitle him to the orders sought. His Lordship has competently addressed all the issues filed. I do not think that I should go over them at this stage.

I wish to make it abundantly clear that the lower Tribunal found itself in a cobwebs which proved difficult to clear *vis-a-vis* the interpretation of paragraph 4(8) of the Practice Directions, 2007.

One school of thought says that if the documents sought to be put in were not attached to the pleadings then the Tribunal could not oblige the applicant until and unless exceptional circumstances had a been shown. See paragraph 4(8).

Other school of thought insisted that in such a situation there is no need for a defaulting applicant to show any exceptional (circumstance before the lower Tribunal could grant the application. I refer to paragraph 43(1) and (2) of the 1st Schedule of the Electoral Act, 2006. My Lords permit me to juxtapose the two provisions for the sake of clarify thus:-

Paragraph 4(8): "Save with leave of Tribunal or court after an applicant has shown exceptional circumstances, no document, plan, photograph or model *shall be received in evidence at the hearing of a petition* unless it has been filed along with the petition or reply in accordance with these Directions."

Paragraph 43(1): The Tribunal or court shall have power, subject to the provisions of section 141 of this Act and paragraph 14 of the Schedule, to enlarge time for doing any act or taking any proceedings on such terms (if any) as the Justice of the case may require except otherwise provided by any other provision of this Schedule.

(2) An enlargement of lime may be ordered although the application for the enlargement is not made until after the expiration of the time appointed or allowed." Considering the above two provisions I have no difficulty in holding that the provisions of the Practice Directions were meant to apply at the hearing of the petition proper when all the basic and rudimentary maters have been settled. It cannot therefore be applicable at the initial stage where both parties were busy putting their respective houses in order. The Tribunal should have accepted the application and extended time for the applicant/appellant as it rightly did in its subsequent decision after the one at hand to avoid unnecessary waste of precious time. The same lower Tribunal in *g* EKS/EPT/HA/9/07 *Qlaiya Kitpolati Anor. v. Olusola Oke & 10 Ors. Held that paragraph 4(8) of the Practice Direction is only applicable at the trial stage.* In my view the lower Tribunal correctly interpreted the provision of paragraph 4(8) of the Practice Direction, 2007 and brought out the true intendment of the President of the Court of Appeal. *If is regrettable that the lower Tribunal in the case at hand failed to grant the application for extension of time to file those documents referred to in their reply as it did subsequently in the unreported matter before it.*

I must agree with my learned brother Sankey, JCA and hold that paragraph 43(1) and (2)

of the Schedule to the Electoral Act, 2006 is the applicable provision at the initial stage of the matter. Had the lower Tribunal agreed, as they did in the subsequent proceedings, this court would have accepted that its discretion was rightly exercised. I must say here that we decided to take this appeal, which borders on interlocutory matters, on the ground that the Tribunal failed to exercise its discretion judiciously and judicially. This does not mean that in future we are going to entertain indiscriminately interlocutory appeals in general.

My Lords, based on the sound reasons adumbrated in the lead ruling of my Lord Sankey, JCA I too allow the appeal and I abide by the consequential orders made therein including order as to costs.

OGUNWUMIJU, J.C.A.: I have read the judgement just delivered by my learned sister Jumai Hannatu Sankey, JCA and I entirely agree with her reasoning and conclusions.

The gravamen of this appeal is whether or not the election petition tribunal properly exercised its discretion in refusing the application of the appellant for extension of time to file certain documents already pleaded in the reply to the petition. I will not go into the issue of fan hearing admirably and exhaustively dealt with by my learned sister.

We are here called upon to decide on whether the tribunal acted properly under paragraph 4(8) of the Practice Directions made by the President of the Court of Appeal pursuant to S. 149 of the Electoral Act, 2006 rather than exercise their discretion under paragraph 43 of the First Schedule to the Electoral Act, 2006. The Tribunal had decided that paragraphs 2 and 4(8) of the Practice Directions in using the word "shall" made it mandatory and excludes the use of discretion thus they could not grant the extension of time sought by the appellant.

Paragraph 43(1) & (2) of the 1st Schedule to the Electoral Act states as follows -

"43.(1) The Tribunal or court shall have power, subject to the provisions of section 141 of this Act and paragraph 14 of this Schedule, to enlarge time for doing any act or taking any proceedings on such terms (if any) as the justice of the case may require except otherwise provided by any other provision of this Schedule. (2) An enlargement of time may be ordered although the application for the enlargement is not made until after the expiration of the time appointed or allowed." Paragraph 4(8) of the Practice Directions provides as follows - *"Save with the leave of Tribunal or court after an applicant has shown exceptional circumstances, no document, plan, photograph or model shall be received in evidence at the hearing of a petition unless it has been filed along with the petition or reply in accordance with these Directions, "* Paragraph 50 of the Electoral Act, 2006 states 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 nearly 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 the respondent were respectively the plaintiff and the defendant in an ordinary civil action."

Order 23(3) of the Federal High Court Rules states as follows

"3.(1) The court may, on such terms as it thinks just, by order extend or abridge the period within which a person is required or authorized by these provisions, or by any judgment, order or directions to do any act in any proceedings. (2) The court may extend any such period as is referred to in sub-rule(1) of this rule although application for extension is not made

until after the expiration of that period."

In this case, it was the affidavit of the appellant that he was unable to secure certified true copy of the forms used for the election before the expiration of the time limited for filing a reply under the Electoral Act. The reply was therefore filed without the forms used by the 2nd respondent for the election. The appellant pleaded the said forms in his reply to the petition. The appellant, a few days later but long before the commencement of the pretrial session filed the application on notice for extension of time to file CTC of Forms EC8A, EC8B, EC8C and EC8D. The application was opposed by the petitioner. The tribunal took argument on 3/7/07 and on 9/7/07 delivered a considered ruling dismissing the application basically on the ground that the appellant did not show exceptional circumstances to warrant the grant of the application. The tribunal relied on paragraph 4(8) of the Practice Directions. The question here, is which is the superior enactment by which the tribunal ought to have been bound in the circumstances of this case? We must remember that the provision of Or. 23(3) of the Federal High Court Rules did not specify the need to adduce evidence of exceptional circumstances and neither did paragraph 43 of the 1st Schedule to the Electoral Act. I am of the view that courts should in interpreting any statute or regulation seek to serve the ends of justice. Where there has been a wrongful exercise of discretion or where excessive weight or insufficient weight has been given to a relevant consideration it is the duty of the appellate court to reverse the exercise of the lower court's consideration. See *Solanke v. Ajibola* (1969) 1 NMLRpg. 523 and *Agbolohun v. Balogun* (1990)2NWLR (Pt. 134) pg. 576 at 581. I agree with appellant's counsel that excessive weight was given to the provisions of the Practice Directions to the detriment of superior legislation. This is because where as in this case Practice Directions are in conflict with the rules of court, the rules of court must perforce prevail. We are in no way denigrating the need and importance of Practice Directions. Infact they are tools in enhancing compliance with the rules of court. However, they must be used by the courts not only to ensure speedy trials within a reasonable time, they must also be utilized by the courts to promote the entrenched rights of the parties to fair hearing under S. 36(1) of the 1999 Constitution.

Let us look at the *locus classicus* on this point in Nigeria. See *Unilag v. Aigoro* (1984) NSCC pg 745; (1985) 1 NWLR (Pt. 1) 143 the contention was made that the Chief Justice of the Federation is incompetent to give practice direction which fetters the exercise of judicial discretion. The Supreme Court at pg. 755 to 756 of the NSCC; report held unequivocally per Bello, JSC (as he then was) thus:-

"By the combined effect of the definition of 'enactment which means 'provision of any law or a subsidiary

instrument' under section 277(1) of the 1979 Constitution and section 27 of the Interpretation Act,

1964 which provides 'subsidiary instrument 'means any order, rules, regulations, rules of court or by laws either made before or after the commencement of this Act in exercise of powers conferred by an Act. The Supreme Court Rules, 1977 is an enactment while the Practice Direction do not qualify as such. Consequently, a Practice Direction has no force of law and cannot letter a rule of cowl and cannot tie the court in the exercise of its discretion. Where there is a conflict between a rule of court and a Practice Direction, the rule must prevail."

I daresay that position of the law still holds good today.

Now, let us look at the Justice of this case to which end the tribunal is supposed to work. The appellant's affidavit in the motion of extension of time gave the reason that the forms which were supposed to be attached to the reply to the petition were illegible and so CTC of the documents were requested from the 2nd respondent to the petition and at the time of filing the reply the 1st respondent

now appellant couldn't file them as required by the rules. The documents were to be used to defend the petition. None of the respondents to the application for extension of time filed any counter-affidavit to controvert the facts deposed by the applicant at the lower court. Most important to the justice of this case is the fact that all these happened at the early stage of the proceedings and there was no imputation that the filing of these documents at that time would in any way take the petitioner by surprise, or prejudice the case of the petitioner or cause undue delay in the hearing of the petition. In handling election petitions, the tribunal must do substantial justice regardless of technical hitches in the preparation of the petition. I am of the view that the tribunal should have exercised their discretion in favour of the appellant and that this appeal has merit. I abide by all the consequential orders made in the lead judgment.

Appeal allowed.