

1. **ALHAJI MAINA WAZIRI**
2. **PEOPLES DEMOCRATIC PARTY (PDP)**

V.

1. **SENATOR MAMMAN B. ALI**
2. **INDEPENDENT NATIONAL ELECTORAL COMMISSION (INEC)**

*COURT OF APPEAL
(JOS DIVISION)*

CA/J7EP/GOV/249/J

ISA AYO SALAMI, J.C.A. (*Presided*)

RABIU DANLAMI MUHAMMAD. J.C.A.

JA'AFARU MILKA'ILU, J.C.A.

NWALI SYLVESTER NGWUTA. J.C.A.

MOHAMMED LAWAL GARBA. J.C.A. (*Read the Leading Judgment*)

TUESDAY, 26TH FEBRUARY, 2008

ACTION - Election petition - Special nature of.

ACTION - Striking out of an action -.Effect of.

APPEAL - Appeal - Court of Appeal - Powers of in relation to appeals under Order 3 rule 2(1), Court of Appeal Rules, 2002.

APPEAL - Appeal against decision of trial court - Implication of-Whether relevant to issue before the trial court.

APPEAL - Court of Appeal - Decision of in Governorship election petition matters - Finality of - Extent of - Whether bound to consider other issues where has found one of the issues to, substantially dispose of appeal.

APPEAL-Decision of court - Subsistence of until set aside on appeal.

APPEAL -Issues for determination - Issues in cross-appeal – Where raised from incompetent appeal - How treated - Effect of.

CONTEMPT OF COURT - Stay of execution pending appeal -Application therefor- Whether amounts to contempt of court.

COURT- Competence of court - Determinants of.

COURT- Court of Appeal - Powers of in relation to appeals wider Order 3 rule 2(1), Court of Appeal Rules, 2002.

COURT- Decision of court - Subsistence of until set aside on appeal.

COURT- Hierarchy of courts - Power of court - Source of- Doctrine of judicial precedent - How it works.

COURT- Issues before court - Appeal against decision of trial court-Implication of - Whether relevant to issue before the trial court.

COURT - Jurisdiction - Importance of.

COURT - Jurisdiction of court - Where court had earlier declined jurisdiction in a matter - When can assume jurisdiction on same matter.

COURT - Setting aside of judgment - Order made by a court -Whether can be set aside or varied b\ another court of concurrent jurisdiction.

ELECTION PETITION - Court of Appeal - Decision of in Governorship election petition matters - Finality of- Extent of -Whether bound to consider other issues where has found one of the issues to substantially dispose of appeal.

ELECTION PETITION - Special nature of election petition.

ESTOPPEL - Defence of estoppel - Party seeking to rely on previous-judgment - When not necessary to plead specifically.

EVIDENCE - Admissions - Facts admitted - Whether need be proved.

EVIDENCE - Proof - Facts in pleading - Where not challenged Effect.

JUDGMENT AND ORDER - Decision of court - Subsistence of until set aside on appeal.

JUDGMENT AND ORDER - Setting aside of judgment - Order made, by a court - Whether can he set aside or varied by another court of concurrent jurisdiction.

JUDGMENT AND ORDER - Void act - Legal status of- Judgment declared a nullity - Consequences of.

JUDICIAL PRECEDENT-Hierarchy of courts – Power of court Source of- Doctrine of judicial precedent - How it works.

JURISDICTION - Importance of jurisdiction.

JURISDICTION - Jurisdiction of court - Where court had earlier declined jurisdiction in a matter - When can assume jurisdiction on same matter

JURISDICTION - Setting aside of judgment - Order made by a court-Whether can be set aside or varied by another court of concurrent jurisdiction.

NIGERIA LEGAL SYSTEM - Hierarchy of courts - Power of court-Source of- Doctrine of judicial precedent - How it works-;

PRACTICE AND PROCEDURE - Appeal - Appeal against decision of trial court - Implication of- Whether relevant to issue before the trial court.

PRACTICE AND PROCEDURE - Appeal - Court of Appeal - Powers of in relation to appeals under Order 3 rule 2(1), Court of Appeal Rules, 2002.

PRACTICE AND PROCEDURE - Competence of court-Determinants of.

PRACTICE AND PROCEDURE - Decision of court - Subsistence of until set aside on appeal.

PRACTICE AND PROCEDURE - Issues for determination - Issues in cross-appeal - Where raised from incompetent appeal – How treated - Effect of.

PRACTICE AND PROCEDURE - Jurisdiction - Importance of.

PRACTICE AND PROCEDURE - Pleadings - Facts in pleading-Where not challenged - Effect.

PRACTICE AND PROCEDURE - Stay of execution pending appeal - Application therefor - Whether amounts to contempt of court.

PRACTICE AND PROCEDURE - Striking out of an action – Effect

PRACTICE AND PROCEDURE - Void act - Legal status of -Judgment declared a nullity - Consequences of.

STAY OF EXECUTION - Stay of execution pending appeal-Application therefor - Whether amounts to contempt of court.

Issue:

Whether, in the light of the parties pleadings and the preliminary objection before the tribunal, it was proper for the tribunal to rely on the Court of Appeal judgment CA/K/164/04 of 13/07/07.

Fact:

The 1st appellant and the 1st respondent contested the 14th April, 2007 election into the office of the Governor of Yobe State. The 1st appellant contested on the platform of the 2nd

respondent whilst the 1st respondent contested on the platform of the All Nigeria Peoples Party (ANPP). At the end of the election, the 2nd respondent declared and returned the 1st respondent as the winner of the said election having scored majority of the lawful votes cast at the election. The appellants were dissatisfied and filed an election petition before the Governorship and Legislative Houses Election Petition Tribunal, Yobe State. The ground of the petition was that the 1st respondent at the time of the election was not qualified to contest the election under section 177(c) of the 1999 Constitution; they based their objection on the decision of the Federal High Court Kaduna which disqualified the 1st respondent.

The respondents however filed a notice of preliminary objection challenging the competence of (he petition and the jurisdiction of the tribunal to hear the petition on the grounds *inter alia* that the appellants had not disclosed any constitutional disqualification against the 1st respondent.

The tribunal after hearing the parties held that the petition did not disclose a reasonable or any cause of action, and dismissed the petition.

The appellants being aggrieved appealed to the Court of Appeal, and contended that the tribunal was wrong to have relied on the Court of Appeal judgment CA/K/164/04 of 13th July, 2007 in deciding the petition. **Held** (*Unanimously dismissing both the appeal and the en appeal*):

1. *On Whether facts admitted need further proof-*

The failure of a party to challenge or controvert fact amounts to admission that they are true, correct and do not require any further proof but are deemed established. In the instant case, the appellants neither admitted nor effectively denied the facts that the 1st respondent had challenged the decision of the Federal High Court, Kaduna that he was not qualified to contest the election and had relied on the copy of the notice of appeal as well as copies of the motion for stay of execution of the judgment of the Federal High Court, Kaduna. Failure of the appellants to challenge these facts amounted in law to admission on their part and was deemed established. [*Federal College of Education v. Anyanwu* (1997) 4 NWLR (Pt.501) 533; *Akibu v. Oduntan* (1992) 2 NWLR (Pt.222) 210; *Gabari v. Ilori* (2002) 14 NWLR (Pt.786) 78; *Owosho v. Dada* (1984) 7 SC 149 referred to.] (*Pp. 216, paras. F-G; 217, para. C*) Per GARBA, J.C.A. at pages 216-217, paras. H-B: "Even though the appellants did not admit the above facts expressly like I pointed out earlier they had not effectively denied their existence or correctness. Failure to challenge or controvert these facts amounts in law to admission on the part of the appellants that they are true and correct. *See Akaosev. Nwosu* (1997) 1 NWLR (Pt.482) 478; *Oshodi v. Eyifunmi* (2000) 13 NWLR (Pt.684) 298; *Elendu v. Ekwoaba* (1998) 63 LRCN 4975; (1998) 12 NWLR (Pi. 578) 320; *Daggash v. Bulama* (2004) 14 NWLR (Pt.892) 144; *Makanjuola v. Ajilore* (2001) 12 NWLR (Pt.727) 416.

From the above state of affairs, the decision of the Federal High Court, Kaduna, the appeal against same at the Court of Appeal, Kaduna and the decision of the Federal High Court, Maiduguri had become relevant, live and admitted issues before the lower tribunal. Having been deemed admitted, the law does not require any or further proof of these issues, but are rather deemed established."

2. *On Implication of appeal against decision of trial court*

The fact that an appeal is lodged against the decision of a trial court/tribunal makes the outcome of such appeal, that is the decision or judgment on the appeal, a very relevant issue in the case and upon which the trial court or tribunal is entitled to act upon. In the

instant case, the tribunal was right to have acted upon the judgment of the Court of Appeal. (P. 217, para. E)

3. *On When not necessary to specifically plead judgment in defence -*

Where a judgment is not used or relied on as defence of *estoppel* or any special defence, it is not necessary for it to be specifically pleaded before it becomes relevant. Furthermore, where the principle of *stare decisis* applies to the facts and circumstances of a case, the trial court/tribunal is bound to accord the recognised respect to an appellate court's decision on the same issues to be determined by it. In the instant case, since the 1st respondent had pleaded the facts leading to the judgment of the Court of Appeal and which were admitted by the appellant there was therefore no legal duty on the 1st respondent to plead the judgment specifically, which arose from admitted facts in the pleadings of parties, before the tribunal could consider it to be relevant to the issues being determined by it. The principle of *stare decisis* applies to the facts and circumstances of the appellants' petition and so the tribunal was bound to accord the due and recognised respect to the decision of the Court of Appeal, which was on the same issues being determined by it.

[*Egbaram v. Akpotor* (1997) 7 NWLR (Pt.514) 559; *Ajadi v. Ajibola* (2004) 16 NWLR (Pt.898) 91; *Hashidu v. Goje* (2003) 15 NWLR (Pt.843) 352 referred to.] (Pp. 217-218, paras. G-B)

Per GARBA, J.C.A. at page 218, paras. D-F:

"In the circumstances outlined above, there was no way that the lower tribunal could have ignored the decision of the Court of Appeal in whatever guise because it dealt directly with the primary and sole or only ground upon which the appellants' petition was based and built. To have made any such attempt, I agree with the learned senior counsel for the 1st respondent, would have amounted to judicial impertinence, arrogance, insubordination and immolation. In addition, that would have been judicial irresponsibility and irrationality, attitudes that have been irremissible to both the Supreme Court and this court as shown in the cases cited supra by learned counsel for the respondents on the issue."

4. *On Source of power of court and how doctrine of judicial precedent works -*

All the courts established under the Constitution derive their powers and authority from the Constitution. The hierarchy of courts shows the limits and powers of each court. There must be respect for the authority of each court. Thus, even where a Judge disagrees with the decision of a higher court, he is constitutionally bound to accord it respect until it is set aside. In the instant case, the tribunal was right in holding itself bound to accord respect to the decision of the Court of Appeal in Appeal No. CA/ K/1 64/07 by accepting and relying on it in the determination of the preliminary objection raised by the respondents to the appellants' petition. [*Mohammed v. Olawitumi* (1993) 4 NWLR (Pt. 287) 254 referred to.] (Pp. 218-219, paras. G-C)

5. *On Effect of failure to challenge facts in pleadings –*

The failure to challenge facts in a pleading means that the facts are admitted. In the instant case, the appellants failed to traverse or deny the facts stated in the pleadings of the respondents at the trial court that the 1st respondent had challenged the decision of the Federal High Court, Kaduna, which disqualified him from contesting election on the ground that the appellants obtained the judgment by concealment of facts, abuse of court process and thereby misleading the court. Thus, the appellants could not claim that the decision was extraneous to a fresh fact in the petition. (P. 219, paras. G-H)

6. *On Power of Court of Appeal in relation to appeal under Order 6 rule 2(1) of the Court*

of Appeal Rules, 2007 -

Under the provision of Order 6 rule 2(1) of the Court of Appeal Rules, 2007, all appeals to the Court of Appeal shall be by way of re-hearing of the matter tried in court or election tribunal. Consequently, an appeal to the Court of Appeal is a continuation of the case decided by the trial court or tribunal and cannot be said to be extraneous, fresh or different from it. In the instant case, the decision of the Court of Appeal in Appeal No. CA/K/164/07 was a continuation, part and parcel of the case decided by the Federal High Court, Kaduna in the decision delivered on the 19th March, 2007. The appellants could therefore not excise and use any part of the whole case which suited them and then abandon or throw away that other parts that did not please them. [*George v. Dominion Flour Mills* (1963) 1 SCNLR 117; *Orizuv^ Anyaegbunam* (1978) 5 SC 21; *Ajule v. Kelani* (1985) 3| NWLR (Pt.12) 248; *Akpa v. Itodo* (1997) 5 NWLfi-(Pt.506) 589; *Akuneziri v. Okenwa* (2000) 15 NWLR' (Pt.691) 526; *Ngige v. Obi* (2006) 4 NWLR (Pt.999) 1; *F.B.N. v. Akparabong Comm. Bank* (2006) 1 NWLR (Pfc> 962) 438 referred to.] (P. 220, paras. A-D)

7. *On when judgment in respect of an appeal against decision of trial court deemed to have started –*

A judgment delivered in respect of an appeal from the decision of a trial court, being one in continuation of the case before the trial court, is deemed to have started from the date of the decision of the trial court. In the instant case, though the judgment of the Court of Appeal setting aside the judgment of the trial that the 1st respondent was not qualified to contest election three months after the election on 14th of April, 2007 for lack of jurisdiction being one in continuation of the case before the Federal High Court, Kaduna is deemed to have started from the date of the decision of the trial court. Thus, even as at 19th March, 2007 when the Federal High Court made the decision that the 1st respondent could not contest an election, it had no jurisdiction to entertain the suit and it stood struck out. (P. 221, paras. A-C)

8. *On Constitutional right of access to court -*

The Constitution has guaranteed the citizens the right to pursue their cases through the various stages of the judicial hierarchy in the country. The same Constitution also makes the final outcome in such cases at the different stages binding on the parties until set aside by a competent superior court in the judicial ladder. Parties cannot pick and choose which portion of a case that has gone through the appellate processes, to accept or reject. In the instant case, the Election Tribunal was right to have held itself bound by and relied on the judgment of the Court of Appeal on Appeal No. CA/K/164/07 in its determination of the respondents' objection to the appellants' petition. (P. 220, paras. E-G)

9. *On Effect of striking out an action -*

Where a case has been struck out by a trial court, it is no longer on the cause list of that trial court for any order to have been properly made which can confer any lawful right or impose any obligation on the parties therein. There is no order which can form the basis of any claim on the part of the parties to a case or anyone else from that dead case. In the instant case, the Court of Appeal having struck out the judgment of the Federal High Court, Kaduna that the 1st respondent was not qualified to contest election, the case could no longer be on the cause list of the trial court for any order to have been properly made or form any basis for any claim on the part of any of the parties. [*Trans Nab v. Joseph* (1997) 5 NWLR (Pt.504) 176; *Geo Source v. Biragbara* (2000) 13 NWLR (Pt.684) 355; *Oroni v. Onigbanjo* (2004) 17 NWLR (Pt.903) 601; *A.N.P.P. v. R.O.A.S.S.D.* (2005) 6 NWLR (Pt.920) 140 referred to.] (P. 221, paras. B-D)

10. *On Treatment of issues in cross-appeal raised from incompetent appeal –*
 Where in a main appeal an action has been found in be incompetent, all issues raised in the cross-appeal which are premised on the incompetent action are no longer of any material value and effect in the outcome of the appeal and so of no moment. In the instant case, the issues in the cross-appeal had been overtaken by the determination or resolution of the central or crucial issue in the main appeal, which was sufficient for the disposal of both appeals.(p. 222, paras. D-F)
 Per GARBA, J.C.A. a(page 222, paras. C-F:
 "Once more, a calm reading of the three (3) issues raised by the learned senior counsel for the Cross appellant/1st respondent would reveal that they are premised on the fact that the Cross respondent/appellants' petition at the *lower* tribunal was filed on a valid ground on which the election and return of the cross appellant could be questioned as provided in the Act However with the finding in the main appeal on the competence of that petition, a consideration of the issues of whether or not the petition was based on intra party dispute *standi* of the 1st cross respondent to file the petition and the appropriate or proper order that should have been made by the lower tribunal would clearly be purely academic to the appeal. Such issues are no longer of *arm* material value and effect in the outcome of the appeal and so of no moment. Like the other issues raised by the learned senior counsel for the cross respondents/appellants' the issues ill the cross appeal have been overtaken by determination or resolution of the central or crucial issue in the main appeal which is sufficient for the disposal of both appeals."
11. *On Finality of decision of Court of Appeal in Governorship election petition matters –*
 The Court of Appeal is the final court in respect of appeal on election petition into the offices of the Governor and Deputy Governor. Where it has found that the resolution of one of the issues in the appeal may be sufficient to substantially or fully dispose of the appeal, the duty of the court to consider the other issues raised in the appeal does not exist anymore as it abates since the court is the final court in respect of the appeal. It is not legally or factually possible for anything to arise out of nothing. (P. 221, paras. G-H)
 Per GARBA, J.C.A. at pages 221-222, paras. G-B:
 "I have before now stated that the resolution of the above issue may be sufficient to substantially or fully dispose of the appellants' appeal. With my finding that the appellants' petition was no longer competent on the basis of this court's decision in the aforementioned appeal, there can't be any other competent issue that can properly arise therefrom for consideration in the appeal. It is not legally or even factually possible for anything to arise out of nothing. In the above circumstances, the duty of the court to consider the other issues raised by the learned senior counsel for the appellants in the appeal does not exist any more or it abates since this court is the final court in respect of the appeal. See *Okonji v. Njokanma* (1991) 7 NWLR (Pt. 202) 131; *Ebba v. Ogodo* (1984) 1 SCNLR 372; *Anyaduba r. Nig. Renowned Trading* (1992) 5 NWLR (Pt.243) 535 at 561; *Alao v. Akano* (2005) All FWLR (Pt.264) 799at 808; (2005) 11 NWLR (Pt. 935) 160.
 All the other issues in the appeal have effectively been overtaken by the finding that the appellants' petition was no longer premised on any valid ground upon which an election may be questioned under the electoral act and therefore incurably incompetent."
12. *On Whether application for Slav of execution pending appeal amounts 10 contempt of court –*

Where a person is appealing against a matter in which he had suffered a defeat and asked for a stay of execution pending the determination of the appeal he would not be liable in contempt merely because he had not obeyed the order which he is appealing against or which he wants stayed pending the appeal. Trial and appellate courts have always had jurisdiction to grant stay of execution of judgments pending appeal. The exercise of the right to appeal for a stay of execution has not been treated as a disobedience to the judgment he is appealing against. In the instant case, the 1st respondent had not on appeal against the decision of the Federal High Court, Kaduna to the Court of Appeal but he had also applied for a stay of execution. He was therefore seeking to set aside the order disqualifying him from contesting the election. Neither the 1st respondent nor the 2nd respondent could be said to be acting in disobedience of the order when the 1st respondent nor contested the election with the active support of the 2nd respondent. The 1st respondent exercised his constitutional right of appeal coupled with his application for stay of execution which excused him from obeying the order or judgment. [*Mobil Oil Nigeria Ltd. v. Assan* (1995) 8 NWLR (Pt.412) 129; *Okoma v. Udoh* (2002) 1 NWLR (Pt.748) 438; *Adelakun v. Adelakun* (1993) 7 NWLR (Pt.308) 746 referred to.] (P. 223, paras. B-H)

13. *On Special nature of election petition –*

Election petitions are *sui generis*, that is special in nature, character and class, and are not ordinarily classified along with civil proceedings. They are therefore specially treated or handled because it is not candidates alone that are interested in the election. So, if a candidate is disqualified, the electorates who would have voted for him are thereby disenfranchised or denied their right of choice. But if he is permitted to contest, he could be removed in an election petition if he is eventually found to be ineligible to contest or disqualified. [*Ayua v. Adasu* (1992) 3 NWLR (Pt.231) 610; *Obih v. Mbahve* (1984) 1 SCNLR 192 referred to.] (P. 224, paras. F-H)

14. *On Subsistence of decision of court until set aside on appeal -*

The decision of a trial court, without a successful appeal setting it aside, subsists. In the instant case, the appeal against the decision of the Federal High Court, Maiduguri declining jurisdiction to hear the suit in respect of the disqualification of the 1^M respondent to contest election was abandoned. Thus the decision of the Federal High Court, Maiduguri subsisted. [*Chukwunta v. Chukwit* (1953) 14 WACA 341 referred to.] (P. 225, paras. B-C)

15. *On Whether court can assume jurisdiction on matter it had earlier declined jurisdiction –*

A court cannot assume jurisdiction over a matter in which it had earlier declined to exercise jurisdiction, as this will amount to a trial court sitting on an appeal on its own decision, a thing it has no competence to do.

16. *On Whether a court has statutory power to set aside or vary order of another court of concurrent jurisdiction –*

In the absence of statutory authority, one Judge has no power to set aside or vary the order of another Judge of concurrent or co-ordinate jurisdiction. In the instant case, the Federal High Court Judges sitting in Kaduna and Maiduguri are Judges of coordinate or concurrent jurisdiction. The assumption of jurisdiction by the Federal High Court Judge sitting in Kaduna implied!} overruled the earlier decision of the same court holden in Maiduguri that it had no jurisdiction over the matter. The latter decision delivered in Kaduna was consequently a nullity. [*Skcnconsnltd (Nig.) Ltd. r. Ukey* (1981) 1 SC 6

- referred to.] (P. 225, paras. C-H)
17. *On Importance of jurisdiction* -
The issue or the question of jurisdiction is a fundamental pre-requisite in the adjudication of any matter. It is the life-wire of all trials, and where a court lacks jurisdiction to entertain a matter or suit before it, the proceedings, however well conducted will be a nullity. [*Olobu v. Akereja* (1988) 3 NWLR (Pt.84) 508; *Akinbinu v. Oseni* (1992) 1 NWLR (Pt.215) 97 referred to.] (P. 226, paras. A-D)
 18. *On Importance of jurisdiction* -
The reason for settling the issue of jurisdiction one way or the other is that it involves a radical, crucial and fundamental question of competence, because if the court lacks jurisdiction to hear the case, the proceedings are and remain a nullity however well conducted and brilliantly determined they might otherwise have been. As a defect in competence is extrinsic but not intrinsic to the adjudication. [A-G., *Lagos State v. Dosummt* (1989) 3 NWLR (Pt.III)* 552; *Fumudoh v. Aboro* (1991) 9 NWLR (Pt.214) 210; *Madukohi v. Nkemdiini* (1962) 2 SCNLR 341 referred to.] (P. 226, paras. E-F)
 19. *On Determinants of competence of court* A court is said to be competent when:
 - (a) it is properly constituted as regards the number of members and their qualification;
 - (b) the subject matter of the case is within its jurisdiction;
 - (c) there is no feature in the case which prevents the court from exercising its jurisdiction;
 - (d) the case comes before the court initiated by due process of law; and upon fulfillment of all conditions precedent to the exercise of jurisdiction.

In the instant case, the Federal High Court, Kaduna was properly constituted as regards number and qualification of member. The action came before the court initiated by due process of law and upon fulfillment of the condition precedent to the exercise of jurisdiction. But the court lacked jurisdiction to entertain the case after it had initially refused to entertain the action at Maiduguri. Apart from its not having jurisdiction to entertain the question in dispute, it was not entitled to constitute itself into an appellate court over its own decision. In the circumstance, the decision was a nullity and an irregularity. (Pp. 226-227, paras. F-B)

If an act is void, it is in law a nullity. It is not only bad but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding, which is founded on it, is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse. It is *ex nihilo nihil fit*, that is, out of nothing, nothing comes. In the instant case, the judgment of the Federal High Court, was a nullity and therefore could not have been the basis of disqualifying the 1st respondent. Furthermore, since the decision was bad and incurably bad, the 1st respondent was never disqualified and was a qualified candidate on the day of the election. He was on that day qualified to contest the election. (P. 227, paras. C-H)

Nigerian Cases Referred to in the Judgment:

A.D. v. Faym-e (2005) 10 NWLR (Pi.932) 151
A.-G., Lai'os Stale r. Dosium'n (1989) 3 NWLR (Pi.III) 552

A.-G., Ogun Staler Egcnti (1986) 3 NWLR (Pt.28) 265
A.N.P.P. v. R.O.A.S.S.D. (2005) 6 NWLR (Pt.920) 140
Adah r. NYSC (2004) 13 NWLR (Pt.891) 639
Adelakim v. Adelakim (1993) 7 NWLR (Pt.308) 746
Ajadi v. Ajibohi (2004) 16 NWLR (Pt.898) 91
Ajide v. Kelam (1985) 3 NWLR (Pt.12) 248
Akaose v. Nwoxn (1997) 1 NWLR (Pt.482) 478
Akibu v. Odwitan (1992) 2 NWLR (Pt.222) 210
Akin bin 11 v. Oseni (1992) 1 NWLR (Pt.215) 97
Akpa v. Itodo (1997) 5 NWLR (Pt.506) 589
Akuneziri v. Okenwa (2000) 15 NWLR (Pt.691) 526
Alao v. Akano (2005) 11 NWLR (Pt. 935) 160
Anyaduba v. Nig. Renowned Trading (1992) 5 NWLR (Pt.243) 535
Alohigbe v. Awum (1997) 9 NWLR (Pt.522) 536
Ayua v. Adasit (1992) 3 NWLR (Pt.231) 598
Buhariv. Obasanjo (2005) 13 NWLR (Pt.941) 1
Chukwunta v. Chukwu (1953) 14 WACA341
Daggash v. Bularna (2004) 14 NWLR (Pt.892) 144
Dalliatii v. Turaki (2003) 15 NWLR (Pt.843) 310
Ebba v. Ogodo (1984) 1 SCNLR 372
Egbaram v. Akpotor (1997) 7 NWLR (Pt.514) 559
Elendu v. Ekwoaba (1998) 12 NWLR (Pt. 578) 320
Emerah & Sons Ltd. v. A.-G., Plateau State (1990) 4 NWLR(Pt, 147) 788
F.B.N. Plc v. Akparabong Comm. Bank (2006) 1 NWLR (Pt 962)438
Federal College of Education v. Anyanwu (1997) 4 NWLR (Pt.501)533
Fimmdoh v. Aboro (1991) 9 NWLR (Pt.214) 210
Gabari v. Ilori (2002) 14 NWLR (Pt.786) 78
George v. Dominion Flour Mills Ltd. (1963) 1 SCNLR 117
Gcosource v. Biragbara (2000) 13 NWLR (Pt.684) 355
Goodheadv. Amachree (2004) 1 NWLR (Pt.854) 352
Gowon v. Ike-Okongwu (2003) 6 NWLR (Pt.815) 38
Hashidu v. Goje (2003) 15 NWLR (Pt.843) 352
Kareem v. Ogunde (1972) 1 SC 182
Lipcde v. Sonckan (1995) 1 NWLR (Pt.374) 668
Madnkoln v. Nkemdilim (1962) 2 SCNLR 341
MakanJHohi v. A/7/rOT (2001) 12 NWLR (Pt.727) 416
Mobil Oil (Nig.) Ltd. v. Assan (1995) 8 NWLR (Pt.412) 129 *Mobil Oil v. Coker* (1971) 1 NMR56
Mohammed v. Ohiwuwni (1993) 4 NWLR (Pt. 287) 254
Ngigc v. Obi (2006) 4 NWLR (Pt.999) 1
fwangwu v. Ilkachukwu (2000) 6 NWLR (Pt.662) 674
tfwokoro v. Onuma (1994) 5 NWLR (Pt. 343) 191 *Obih v. Mbakwe* (1984) 1 SCNLR 192
Okeke v. Okoli (2000) 1 NWLR (Pt.642) 641
Okoma v. Udoh (2002) 1 NWLR (Pt.748) 438
Okonji v. Njokunma (1991) 7 NWLR (Pt. 202) 131
Olatunji v. Adisa (1995) 2 NWLR (Pt.376) 167

Oloba v. Akereja (1988) 3 NWLR (Pt.84) 508
Olutola v. Unilorin (2004) 18 NWLR (Pt.905) 416
Orizu v. Anyaegbimam (1978) 5 SC 21
Oronti v. Onigbanjo (2004) 17 NWLR (Pt.903) 601
Osafile v. Odi(\990) 3 NWLR (Pt.137) 130
Osakwe v. IN EC (2005) 13 NWLR (Pt.942) 442
Oshodi v. Eyifimmi (2000) 13 NWLR (Pt.684) 298
Owoslw v. Dada (1984) 7 SC 149
Skenconsitlt (Nig.) Eld. & Another v. Ukey (1981) 1 SC 6
Thomas v. Olufosoye (1986) 1 NWLR (Pt.18) 669
Trans Nab v. Joseph (1997) 5 NWLR (Pt.504) 176
Yerokun v. Adeleke (1960) SCNLR 267

Nigerian Statutes Referred to in the Judgment:

Constitution of the Federal Republic of Nigeria. 1999, Ss. 177(c), 178(2) and 182(1); para. 15(a) of First Schedule Electoral Act, 2002, S. 23 Electoral Act, 2006, Ss. 26, 34(2), 35 and 145(1); paras. 9(5) and 14(2)(b) of First Schedule

Nigerian Rules of Court Referred to in the Judgment:

Court of Appeal Rules, 2002, O. 3 r. 2(1) Court of Appeal Rules, 2007, O. 6, r. 2(1)

Appeal:

This were an appeal and a cross-appeal against the ruling of the Governorship Election Tribunal, which struck out the petition of 'he appellants for being incompetent. The Court of Appeal, in a unanimous decision, dismissed both the appeal and the cross-appeal.

History of the Case:

Court of Appeal:

Division of the Court of Appeal to which the appeal was brought: Court of Appeal, Jos
Names of Justices that sat on the appeal: Isa Ayo Salami J.C.A. (*Presided*); Rabi Danlami Muhammad, J.C.A Ja'afaruMika'ilu, J.C.A.;Nwali Sylvester Ngwuta, J.C.A Mohammed Lawal Garba (*Read the Leading judgment*) .

Appeal No.: CA/J/EP/GOV./249/07 *Dale of Judgment:* Tuesday, 26th February, 2008
Names of Counsel: Akin Olujinmi, Esq. (SAN) (*with him* J. Bayesha, Esq. (SAN); Musa Bello, Esq.; Yusuf Haido, Esq.; R. Bayesha, Esq.; E. Fatogun, Esq. and T. Nasim Esq.)
-for the Appellants

Yusuf O.Ali, Esq. (S AN) (*with him*, A. O. Adelodun, Esi (SAN); S. A. Oke, Esq.; Kola Oiadokun; S. O. Balarab

Esq.; Wada Ibrahim, Esq. and Alex Akojah, Esq.)*for the 1st Respondent*

Wale Adebayo. Esq. (*with him*, Chuka Ugwu. Esq. and Kato Halita, Esq.) *-far the 2nd Respondent*

Tribunal:

Name off the Tribunal: Governorship and Legislative Houses Election Petition Tribunal, Yobe State

Counsel:

Akin Olujinmi, Esq. (SAN) (*with him*, J. Bayesha, Esq. (SAN) Musa Bello. Esq.; Yusuf Haido. Esq.; R. Bayesha, Esq.; "E Fatogun. Esq. and T. Nasim, Esq.) *-far the Appellants*
Yusuf O. Ah. Esq. (SAN) (*with him*, A. O. Adelodun, Esq. (SAN); S. A. Oke, Esq.; Kola Oiadokun; S. O. Balarabe, Esq.; Wada Ibrahim, Esq. and Alex Akojah. Esq.) *- for the 1st Respondent*

Wale Adebayo. Esq. (*with him*, Chuka Ugwu. Esq. and Kato Halita. Esq.) -*far the 2nd*
Respondent GARB, J-C.A. (Delivering the Leading Judgment): Pursuant to paragraph 15(a) of the First Schedule to the 1999 constitution and section 26 of the Electoral Act, 2006, the 2nd respondent; independent National Electoral Commission, conducted elections into the offices of the Governor and Deputy Governor of Yobe State like other States of the Federation, on the 14th of April, 2007. The 1st appellant and the 1st respondent participated in the election and contested as candidates for the office of the Governor. The 1st appellant was sponsored by the 2nd appellant; the Peoples Democratic party(PDP) while the 1st respondent contested under the banner of all the Nigeria Peoples Party (ANPP). At the end of the election the 2nd respondent declared and returned the 1st respondent as the winner of the said election having scored majority of the lawful vote was at the election.

The appellants being dissatisfied and aggrieved by the declaration and return of the 1st respondent as the winner of the election, filed an election petition before the State's Governorship and Legislative Houses Election Petition Tribunal (hereinafter called lower tribunal) as provided by the Electoral Act, 2006. The ground of the petition was that the 1st respondent at the time of the election, was not qualified to contest the election under section 177(c) of the 1999 Constitution. In paragraph 16 of the petition, which is at page 5 of the printed record of appeal, the 1st appellant had pleaded that voters in the State were all aware of the non-qualification of the 1st respondent as a candidate for the election.

After service of the petition on the respondents, the 2nd respondent who was served first, entered a conditional appearance and on the 23rd of May, 2007 filed a notice of preliminary objection under Paragraph 9(5) of the First Schedule to the Electoral Act, 2006, challenging the competence of the petition and the jurisdiction of the lower tribunal to entertain it. The grounds of the objection are:

- "(i) The petitioners have not disclosed any reasonable cause of action against the respondent, the petition having failed woefully to disclose any constitutional disqualification against the 1st respondent who has not been shown to be disqualified to contest election into any office in Nigeria, particularly election into the office of Governor.
- (ii) The petitioners have failed to join the Gubernatorial returning officer, a statutorily mandated respondent who is a necessary party to the election.
- (iii) The petitioners have failed to join the All Nigeria people Party, the political party who sponsored the respondent and which is an indispensably necessary party to the petition."

See pages 124-5, 126 and 127 of the record of appeal.

The 1st respondent had also in paragraph 12 of his reply to the petition raised a preliminary objection to its competence and on the jurisdiction of the lower tribunal to entertain same.

The six (6) grounds upon which the 1st respondent's preliminary objection was premised are:-

- i. The tribunal lacks the jurisdiction and vires to take cognizance of and try the petition of the petitioner.
- ii. The petition was filed in total violation of all the conditions precedent under the Electoral Act and all the rules made there under.
- iii. The petitioners lack the locus standi and/or standing bring the petition,
- iv. The petition is a gross abuse of the process of court vexatious and inchoate
- v. The petition discloses no reasonable cause of action or any cause of action at all against the respondent.
- vi. There is non-joinder and mis-joinder of necessary and desirable parties."

Written addresses were filed and adopted by the learned counsel for the parties on the preliminary objections and in the ruling delivered on the 26th of July, 2007, the lower tribunal after due consideration of all the submissions by learned counsel made therein held that the petition did not disclose a reasonable or any cause of action. It made the following orders in conclusion:

1. The 1st respondent's relief for order of lack of jurisdiction on the ground that this is an intra party dispute fails and is hereby dismissed.
2. The 1st respondent's relief for order that the petitioner lacks locus standi is based on a false premise and is struck out.
3. The 1st respondent's reliefs for orders striking out the petition for non-joinder of the returning officer and ANPP fails and are hereby dismissed.
4. The 1st respondent's relief for order of abuse of court process fails and is hereby dismissed.

The 1st respondent's relief for orders striking out this petition on the ground that it discloses no cause of action succeeds. The petition be and is hereby struck out.

The 2nd respondent's relief for orders striking out this petition for non-joinder of the returning officer and ANPP fails and are hereby dismissed.

The 2nd respondent's relief for order striking out this suit on grounds of abuse of court process was deemed abandoned. It fails and is hereby struck out.

The 2nd respondent's relief for order striking out this petition on the ground that it discloses no cause of action succeeds."

Naturally, the appellants were not satisfied with the order striking out their petition and so exercised their right of appeal against it by filing a notice of appeal on 7th August, 2007. There are seven (7) grounds of appeal set out in the said notice of appeal from which the learned senior counsel for the appellants, at page 4. Paragraph 4.1.1- 4.1.4 of the appellant's brief of argument filed on the 23rd of August, 2007 distilled and submitted the following issues for determination in the appeal:

- "4.1.1. Whether in the light of the parties' pleadings and the preliminary objection before the tribunal, it was proper for the tribunal to rely on the Court of Appeal judgment CA/K/164/04 OF 13/07/07.
- 4.1.2. Whether a case of non qualification of the 1st respondent under the 1999 Constitution and the Electoral Act, 2006 was not adequately made, out in the petition.
- 4.1.3 Whether the election tribunal was right when it decided the substantive issue in the petition at the interlocutory stage.
- 4.1.4. Whether the election tribunal was right when it struck out the petition of the appellants on the grounds that the petition did not disclose a cause of action."

For the 1st respondent, issues as follows were said to arise for determination in the appeal at pages 5-6 of the 1st respondent's brief Wed on 30th August, 2007.

1. Whether the trial tribunal was not right in relying on the Court of Appeal decision in case No. CA/K/164/ 42/07 which was the basis, foundation and the hanger upon which the appellant's petition was predicated in striking out the petition having regard to the fact that the ground of alleged non qualification of the 1st respondent to contest the governorship election in yobe State was founded on the High Court judgment that led to the judgment in the appeal relied upon by the-tribunal.
2. Whether the tribunal was not right in striking out the petition for disclosing no reasonable cause of action when the petition was bereft of and lacked all material

facts upon which the allegation of non qualification of the 1s' respondent could be sustained.

3. Whether the trial tribunal in its ruling striking out the petition, dealt with or touched in any way the material the petition when considering the preliminary objection that led to the ruling appealed against."

Similar issues to the above three (3) were formulated by the learned counsel for the 2nd respondent at page 9 of the 2nd respondent's brief of argument filed on the 20th September, 2007.

On his part, the 1st respondent also aggrieved with some of the decisions and orders of the lower tribunal, filed a notice of cross appeal against same on 13th August, 2007. From the four (4) grounds contained in the notice, learned senior counsel for the 1st respondent in the brief filed on 30th August, 2007 referred to earlier at page 40- 41 raised the following three (3) issues which he said require resolution in the cross-appeal. "

1. Whether the trial tribunal was right by holding that the petition of the appellants/cross respondents was not based on intra party dispute but that it was inter party
2. Whether the lower tribunal was right to have held that the appellant/cross respondents have the locus standi to file and pursue the petition as filed.
3. Whether the lower tribunal having found that the petition disclosed no reasonable cause of action, ought not have ordered a dismissal of the petition rather than striking out"

In the cross-respondent's brief of argument filed on the 10th w September, 2007 the above issues were adopted for determinations at paragraph 2 on page 3 thereof. It would appear that the 2nd respondent in the main appeal that is Independent National Electoral Commission is not a party in the cross appeal and so has not to it. Just for the records.

In addition to the briefs of argument mentioned earlier, the appellant had also filed a reply to the 2nd respondent's brief on the 26th of November, 2007. All the briefs were adopted and relied on by the learned counsel at the hearing of the appeal on 15th January, 2007 in support of their respective positions in the appeals.

In his oral amplification, Chief Akin Olujunmi, (SAN) learned counsel for the appellants said the central issue for determination in the main appeal is the use made by the lower tribunal of the judgment of the Court of Appeal, Kaduna Division in appeal No. CA/K/164/07, which was delivered on the 13th of July, 2007. He submitted that the judgment was not pleaded by any of the parties and it was not in existence at the time of the trial and so ought not to have featured in the judgment of the lower tribunal. That as at the time of the election on 14th April, 2007, the decision of the Federal High Court, Kaduna had adjudged the 1st respondent not qualified to stand for that election and that decision was subsisting. It was contended that the 1st respondent by that decision remained disqualified from the 18th march, 2007 when it was delivered up to the date of the election. The case of Yerokun v. Adeleke (1960) SCNLR 267 at 272 - 3 was cited where the Supreme Court was said to have held that if a candidate was not qualified as at the time of an election then he could not properly participate in the said election. It was the further submissions of the learned senior counsel that the fact that independent National Electoral Commission (2nd appellant) decided not to obey, respect or comply with the decision of the Federal High court, Kaduna did not change the position of the 1st respondent as at the time of the election. He urged us to allow the appeal.

On the cross-appeal, it was submitted that the lower tribunal was right in its decisions on intra party dispute and locus standi grounds of objection because there was no intra party dispute and that the appellant had the locus to present the petition since he was a candidate at the election,

we were urged by him to dismiss the cross appeal.

Yusuf O. Ali, (SAN) learned counsel for the 1st respondent in his own oral emphasis said eligibility and qualification to contest election as a Governor of a State are governed by 182(1) of the 1999 Constitution. That any ground outside those set out in the section would be unlawful and unconstitutional. He pointed out that the only ground relied on by the appellant in his petition was that the 1st respondent was disqualified to stand for the election because of the judgment of the Federal High Court, Kaduna and that it is not one of the grounds for disqualification set out in section 182(1). Furthermore that section 177 of the 1999 Constitution deals with qualification for election into the office of Governor of a State and when read along with Section 182(1) the combined effect is that 1st respondent was qualified and not disqualified to stand election into the office the Governor of Yobe State.

Learned senior counsel, referred to pages 4 - 6, 155 - 7 and 201-203 of the record of appeal and said that the 1st respondent had joined issues with the appellant in the decision of the Federal high Court, Kaduna against which an appeal was filed as well as a motion for stay of execution at the Court of Appeal. According to him by the provisions of Section 178(2) of the Constitution. Independent National Electoral Commission did not have an option on the date to conduct the election and that the case of Yerokun v. Adeleke (supra) is different and so does not apply to the appeal. He urged us to dismiss the appeal.

On the cross-appeal, it was submitted that the proper order the lower tribunal should have made after finding that there was no reasonable cause of action, was that of dismissal of the petition. The case of Thomas v. Olufosoye (1986) 1 NWLR (Pt.18) 669,682-3 was cited in support of the submission.

In addition, it was argued that since the 1st respondent did not set up the defence of res judicata, he was under no duty to have pleaded the judgment of the Court of Appeal before the lower tribunal could properly use and rely on it. That since the judgment was cited before the lower tribunal, it was entitled to use it. We were urged to allow the cross appeal by learned senior counsel.

Mr. Wale Adebayo learned counsel for the 2nd respondent on his part submitted that the appellant did not disclose any ground for disqualification on the part of 1st respondent in the petition and so no reasonable cause of act was shown. He cited section 177 of the 1999 Constitution and said the lower tribunal was right in its decision that no reasonable cause of action was disclosed in the petition. That the case cited by the learned senior counsel for the appellant did not add any value to the appellant's case and we were urged to dismiss the appeal.

In a brief response, learned senior counsel for the appellant said that all the submissions on the application for stay of the execution of the decision of the Federal High Court, Kaduna, should have been raised at the lower tribunal. That there was no issue of stare decisis in the petition because the two cases are different. He referred to appellant's ground of appeal No. 6 and issue No. 4 in the appellant's brief and urged us once again to allow the appeal.

Now let me at me onset say that I am in total agreement with the learned senior counsel for the appellants when he said that the central or crucial issue to be determined in the appellant's appeal is whether the lower tribunal was right to have applied the principle of stare decisis and to have been bound by the decision of this court in appeal No. CA/K/164/07, regard being had to the state of the pleadings before it. A resolution of this issue is capable of and may be sufficient to dispose of the appeal. I would now review the submissions of learned counsel on the issue as presented in their respective briefs of argument.

For the appellant after reference was made to the petition and replies of the respondents

thereto, it was submitted that none of the parties pleaded the judgment of the Court of Appeal, Kaduna in CA/k/164/07 delivered on the 13th of July, 2007, which in fact was not in existence at the time pleadings were settled. That it was not even part of the written addresses of the parties on the objection but the lower tribunal erroneously held that it was bound by the said judgment under the principle of stare decisis and that it had destroyed the foundation of the petition. It was further submitted that the law is settle that parties as well as the court are bound by pleadings and that the lower tribunal wrongly applied the principle of stare decisis in so far as the judgment of the Court of Appeal was not pleaded by any of the parties. The cases of A.D. v. Fayose (2005) 10 NWLR (pt.932) 151 at 223; Buhari v. Obasanjo (2005) 13 NWLR (Pt.941) 1 at 223; Nwangwu v. Ukachukwu (2000) 6 NWLR (Pt.662) 695; and Okeke v. Okoli (2000) 1 NWLR (Pt.642) 641 at 654 were relied on. Learned senior counsel had argued that the issue before the lower tribunal in the light of the pleadings before it was to make a finding on whether as at the date of the election, the 1st respondent was qualified to contest the election regard being had to the judgment of the Federal High Court. That issue according to him, can only be resolved after parties have led evidence on the point and addressed lower tribunal on the applicable law. By striking out the petition, it was further argued, that the appellant was deprived of the opportunity to prove his case. In addition it was contended that since the judgment of the Court of Appeal was not in existence as at 14th April, 2007, it could not be properly used to determine an issue be considered relative to 14th April, 2007 since the law is that matter occurring after an action was instituted are irrelevant and should disregarded. The cases of Kare.em v. Ogunde (1976) 1 All NLR73 Mobil Oilv. Coker (1971) 1 NMLR 56; and Gowon v. Ike Okongwu (2003) 6 NWLR (Pt.815) 38 at 49 were cited and relied on.

That a preliminary objection must be confined to the defects apparent on the face of the petition, which the lower tribunal did not do.

On the authority of the case of Goodhead v. Amachree (2004) 1 NWLR (Pt.854) 352 at 375 it was submitted that the judgment the Court of Appeal amounted to an amendment of the pleadings through the back door contrary to paragraph 14(2)(b) of the first Schedule to the Electoral Act.

Similarly the learned senior counsel said it was erroneous for a the lower tribunal to invoke the principle of stare decisis because the judgment of Court of Appeal was only cited as a decision of a higher court but not pleaded as a fact against the judgment of the Federal High Court. He concluded that the decision of the lower tribunal should therefore be set aside.

For the 1st respondent, it was submitted, if is important to note that the only ground relied upon for the petition of the appellant as borne out by paragraph 7 thereof is that the 1st respondent was at the time of the election, not qualified to contest the election. In addition the appellants in paragraph 8 - 15 of the petition made it abundant clear that the fulcrum of their petition was the decision in suit No FHC/KD/CS/42/2007 about which the 1st respondent in paragraph 4-8 of his reply frontally joined issues with them. It was therefore argued by the learned counsel for the 1st respondent that issues were joined on the relevance of the ruling in the above suit and appellants were bound by the case they put forward. He relied on Nwokoro v. Omima (1994) 5 NWLR (Pt.343) 191 at 212; olatunji v. Adisa (1995) 2 NWLR (Pt.376) 167 at 181 and Lipede v. Sonekan (1995) 1 NWLR (Pt.374) 668 at 686 and submitted that the lower tribunal was addressed on the decision of the Court of Appeal which upturned and set aside the ruling in suit No FHC/KD/CS/42/07. Thai counsel to the appellant did not say a word on the effect of the decision of the Court of Appeal, which was exhaustively considered by the lower tribunal before arriving at its decision at pages 374-5 of the record of appeal. According to him that decision, given the facts

and Circumstances of the case, is sound and unimpeachable because it would have amounted to judicial impertinence, arrogance, insubordination and immolation for the lower tribunal to have ignored, side tracked or failed to accord the decision of the Court of appeal its desired respect. The case of *Atolagbe v. Awuni* (1997) 9 NWLR (Pt.522) 536 at 564, 565, 567 and 577 was relied on.

It was also submitted that section 177(c) of the 1999 constitution, which provides for election sponsorship of a candidate for election by a registered political party was satisfied by the 1st respondent since the ANPP had made it clear that he was its candidate for the election. That once a higher court had set aside the decision of the Federal High Court, Kaduna, the issue of any other candidate than the 1st respondent was lost and ended.

Learned senior counsel then said the submissions in paragraphs 6.1.9, 6.1.10, 6.1.11 - 6.1.19 are not borne out by facts and circumstances of the case and so the authorities cited therein are not apposite but irrelevant. The case of *Goodhead v. Amachree* (supra) was said to have turned on the interpretation of section 23 of the Electoral Act, 2002 and dealt with withdrawal of a political party from an election and the right of its sponsored candidate to maintain an election petition. That a decision that has been set aside or nullified is in the eyes of the law dead and creates no obligations whatsoever on the authority of *Osafire v. Odi* (No.1) (1990) 3 NWLR (Pt.137) 130 at 156 & 177.

It was further submitted that the settled position of our law is that the relevant law applicable in respect of cause of action is the law in force at the time the cause of action arose but the jurisdiction of the court to entertain an action is determined upon the state of the law at the time of trial. The cases of *Olutola v. Unilorin* (2004) 18 NWLR (Pt.905) 416 at 464 and *Adah v. N.Y.S.C.* (2004) 13 NWLR (Pt.891) 639 at 651 were cited on the position. These are the submissions for the 1st respondent under the 1st issue.

The learned counsel for the 2nd respondent treated the issue in his brief as issue 2 at page 28. It was submitted by him that the principle of *stare decisis* being an integral part of our judicial ethic which is mandatory, the lower tribunal had no other option than to apply and be bound by the decision of the Court of Appeal in CA/K/ 164/07 because it was on the same judgment of the Federal High Court, Kaduna relied on by the appellant in their petition to say the 1st respondent was not qualified to contest the election in question.

A number of cases were cited by learned counsel including *Dalhatu v. Turaki* (2003) 15 NWLR (Pt.843) 310; *Einerah & Sons Ltd v. Attorney-General of Plateau State* (1990) 4 NWLR (Pt.147) 788; *Ogun State v. Egenti* (1986) 3 NWLR (Pt.28) 265 as authorities on the doctrine or principles of *stare decisis*. He said the decision of the Court of Appeal being final in a gubernatorial election petition the lower tribunal could not have ignored the Court of Appeal decision cited before it and that the learned counsel for the appellant did not argue before the tribunal that the Court of Appeal decision did not apply. In addition, that it was illogical and self contradictory for the Appellant who relied on the judgment of the Federal High Court, Kaduna as the only ground for saying that 1st respondent was not qualified to contest the election, to expect that the lower tribunal should not apply the decision of the Court of Appeal on that judgment in the petition. It was also contended that as the record show, there is nothing about the appellants' petition that was .not about the judgment of the Federal High Court Kaduna, which was their whole and sole case. Consequently any issue relating to that

judgment including the state of appeal thereon, is in issue in the petition as a matter of law and since the lower tribunal was to determine the same issue dealt with or decided in the decision of the Court of Appeal, there was no room to swagger.

On the submission for the appellant that it was the disqualification of the 1st

respondent as at the date of election was in issue, it was argued by the learned counsel for the 2nd respondent that it is basic law that an appellate decision speaks from the date of the original judgment from which the appeal arose, As a result, he said the decision of the Court of Appeal which set the judgment of the Federal High Court Kaduna means that. The judgment upon which the appellants' petition was founded never existed as at the date of the election or at all. That the cases of *Kareem v. Oguiule: Mobil Oil v. Coker*; and *Goodhead v. Amachree* (all supra) were not decided on facts similar to this appeal. We were urged to resolve the issue against the appellant and in favour of the 2nd respondent.

The appellants in the reply brief to the 1st respondent brief said he issue whether the 1st respondent was as at the date of the election qualified to contest the election was one of fact which can only be answered by fact and not relying on the authority of a higher court as a binding precedent. It was submitted that the case of *Osafire v. Odi* (supra) was completely misapplied and irrelevant in the context of the appellant's petition. That election petitions are *sui generis*, special in nature, character and class and are not considered to be identical with other civil proceedings on the authorities of *Ayua v. Adasu* (1992) 3 NWLR (Pt.231) 598; and *Obih v. Mbakwe* (1984) 1 SC325; (1984) 1 SCNLR 192. Thus, it was the Electoral Act, 2006. which regulates election petitions that must be interpreted and given effect to. Further, that the cases of *Olutola v. Unilorin* (supra) are applicable because the law as at the time of the election; 14th April, 2007 and when the petition was filed remained the same.

In the reply to the 2nd respondent's brief, it was argued for the appellants that the issues before the Court of Appeal in appeal No, CA/K/164/07 were not the same as the issues before the lower tribunal and neither were the parties. The statement of Onnoghen, JCA (now JSC) in *Osakwe v. INEC* (2005) 13 NWLR (Pt.942) 442 at 474 was set out and we were urged to, discountenance the submissions at paragraphs 4.2.1- 4.2.14 on pages 28-34 of the 2nd respondents' brief.

It may be recalled that I had earlier agreed entirely with the learned senior counsel for the appellant when he said in his oral submission that the central issue or question for decision in the appellant's appeal is the use which the lower tribunal made of the decision of this court in appeal No. CA/K/164/07 in the determination of the objection raised by the respondents to the petition filed by the Appellant. Put briefly, the question is whether the lower tribunal was right to have accepted, used, relied and held to be bound by the decision in the appeal No. CA/K/164/07 regard being had to the state of the facts and circumstances in the petition of the appellant before it. The resolution of this central issue would in my view, depending on the outcome, substantially or fully dispose of the appellants' appeal. In order to appreciate the facts of the petition before that tribunal (or the pleadings as they may be called) it is necessary to refer and set out in their full details, the relevant portions of the petition as well as the replies by respondents (particularly that of the 1st respondent) as they appear in the printed record of appeal before us. The relevant paragraphs of the appellants' petition are 7-19: -

7. *The petitioners state that the 1st respondent, Senator Mamman B. Ali whose election is being questioned was at the time of the election not qualified to contest the election; facts Supporting the Grounds of the Petition:*
8. The petitioners aver that sometime in the month of January 2007, the 2nd respondent, pursuant to the Electoral Act, called for the submission by all registered political parties of candidates of persons sponsored to contest gubernatorial elections at the *April 2007 election*;
9. The petitioners aver that in compliance with mandatory provisions of the Electoral Act, the

- All Nigeria People Party (ANPP) nominated as candidates, Senator Usman AI-Basir and Senator (Dr.) Lawan Zarami as Governor and Deputy Governor respectively;
10. The petitioners further aver that sometime or about the 13th day of February, 2007, the party (ANPP) vide letter reference ANPP/HDQ/INEC/19 of 13th February, 2007 removed the name of Usman AI-Bashir and substitute it with the name of Senator Mamman Ali (the 1st respondent) as candidate for the office of the Governor the reason being that AI-Bashir was indicted by a panel (sic) of Inquiry and was therefore disqualified;
 11. The petitioners aver that Usman AI-Bashir, dissatisfied with the decision to remove him and substitute him with the 1st respondent, Senator Mamman Ali, he (Usman AI-Bashir) instituted a civil suit at the Federal High Court in suit No. FHC/KD/CS/42/2007 Between Senator Usman AI-Bashir and Independent National Electoral Commission (INEC), All Nigeria People Party (ANPP) and Senator Mamman Ali;
 12. The petitioners aver that the Federal High Court sitting at Kaduna heard the case on the merit and on Monday the 19th day of March, 2007, delivered its judgment.
 13. That the court specifically made the following Orders
 - "1. That the 2nd defendant cannot change plaintiffs as its gubernatorial candidate/running mate for the April, 2007 election in Yobe State without giving any 'cogent and verifiable reasons' or any reason at all.
 2. That the 1st defendant cannot accept any replacement or substitution of the plaintiff by any reason whatsoever without the 2nd defendant giving any cogent and verifiable reasons or any reason at all;
 3. That the purported substitution made by the 2nd defendant to *the P' defendant as the gubernatorial candidate/running mate in Yobe State is hereby set aside for non-compliance with the condition set out by Section 34(2) of the Electoral Act 2006;*
 4. That the Defendants, their agents, or servants are hereby perpetually restrained from tampering with or doing anything whatsoever to the names or otherwise of the plaintiffs as already verified and cleared as the gubernatorial candidate/running mate for Yobe State in the April, 2007 general elections under the platform of the 2nd defendant;
 5. That the 1st defendant is hereby restrained from acting or carrying into effect or doing anything whatsoever or taking any step on the letter dated 13th February, 2007 relating to the substitution or otherwise of the plaintiffs/applicants as the Yobe State gubernatorial candidates under the platform of the 2nd defendants.
 6. That the 1st defendant is hereby restrained from acting or further acting on or in any way publishing any names other than those of the plaintiff herein as the candidates of the 2nd defendant for the 2007 Governorship election in Yobe state whether in pursuance of section 35 of the Electoral Act or otherwise howsoever or in anyway printing or publishing the names and photographs of any other persons as the candidates of the 2nd defendant for the 2007 Governorship elections in Yobe State on the ballot paper or on any other document however."
 14. The petitioners aver that the decision of the Federal High Court remains extant having not been set aside;

15. The petitioners state that the decision of the Federal High Court nullifying the purported nomination of the 1st respondent was given very wide publicity throughout Nigeria particularly throughout the print and electron media circulating and popular in the State. These, British BroNigerian particularly throughout the print and electronic media circulating and popular in the state . these are British Broadcasting Corporation (BBC) Hausa, the Radio Nigeria, Kaduna. In English and Hausa languages, the Daily Trust, Weekly Trust and Leadership:

The petitioners aver that registered voters in Yobe State were all aware of the non qualification of the 1st respondent as a candidate in the Governorship election held on J4th April, 2007, by reason of the judgments of the Federal High Court, nullifying or setting aside his sponsor by the All Nigeria Peoples Party (ANPP) and the wide publicity given to it in the media and at campaign rallies throughout the State:

The petitioners aver that by reason of the foregoing it shall be contended at the hearing that the votes cast for the said 1st respondent in the election are deemed thrown away;

The petitioners will rely on the following documents at the trial of this petition:

- i. Letter reference ANPP/HDQ/JNEC/19 dated 13th February 2007;
- ii. Judgment of the Federal High Court in suit No. EHC/KD/CS/42/2007, between *Senator USMAN Al-Bashir & Another v. Independent National Electoral Commission & 2 Others* delivered on Monday, the 19th day of March 2007.
- iii. Engrossed order of the court dated the 19th day of March. 2007;
- iv. Daily Trust Vol. 16 No. 7 of Tuesday, Mar4 20th. 2007;
- v. Daily Trust Newspaper of Thursday, March 22nd. 2007 page 49
- vi. Leadership Newspaper No. 366 of Thursday March 22nd, 2007:
- vii. INEC Form EC8D declaration of result of election to the office of the Governor dated 22 day of April. 2007;
- viii. INEC Form ECSE, Reference GV/35/YB Yobe Stale, dated 15th April. 2007.
- ix. Weekly Trust Newspaper of February 24th. 2007 page 3;
- x. Weekly Trust Newspaper of February 24th. 2007 page 4: .
- xi. Daily Trust Newspaper of Thursday March 22nd, 2007 page 3;
- xii. Daily Trust Newspaper No. 85 Vol.15 of February 16th, 2007 page 1 & 4;
- xiii. Ballot paper used at the Governorship election, in Yobe State;
- xiv. Letters to Independent National Electoral Commission (INEC)

19. WHEREOF your humble petitioner prays that this honorable tribunal finds and holds as follows:

- i. That the 1st respondent was not a candidate sponsored by a registered political party at the Governorship election in Yobe Slate on the 14th day of April, 2007.
- ii. That the Federal High Court sitting at Kaduna had set aside, nullified or rendered non existent by the judgment delivered on March 19th. 2007 the sponsorship of the 1st respondent;
- iii. The 1st respondent was not a candidate at (he Governorship election in Yobe State held on Saturday. 14th April. 2007;
- iv. That the non qualification (sic) of the L" respondent was a mailer of common knowledge lo all registered voters in Yobe Slate;

- v. That at the Governorship election held in Yobe State on April 14th. 2007. there were only 9 constitutionally qualified and valid candidates,
- vi. That the 1st petitioner scored the highest number of lawful votes and scored one quarter of votes in at least two thirds of all the local government in the State at the Governorship election of April 14(1-1,2007, in Yobe State."

The relevant paragraphs of the 1st respondent's reply are 1-11 as follows -

- "1 The 1st respondent denies as totally spurious, untrue and without any iota of foundation paragraphs 6. 7. 8. 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, and 20 of the petition and shall require very strict proof of the averments at the trial.
2. The 1st respondent in answer to paragraph 6 of the petition states that he was lawfully, rightly and constitutionally declared as the Governor-elect of Yobe State by the 2nd respondent on 15th April, 2007 after the fulfillment of all the requisite constitutional and statutory conditions for such declaration. In particular, he score the highest number of lawful voles and ($\frac{1}{4}$) of the votes cast in more than ($\frac{2}{3}$) of all the local government areas in Yobe State.
3. The 1st respondent denies paragraph 7 of the petitions and avers that at all times relevant, he did not suffer any disqualifying ground constitutionally, statutorily and politically, he was thus qualified having not suffered any disability to contest the April 14th, 2007 Gubernatorial Election in Yobe State. In further answer to the said paragraphs of the petition the 1st respondent states as follows"
 - (i) The All Nigerian Peoples' Party (hereinafter referred to as ANPP) the political party that sponsored the respondent had its primaries to elect Governorship candidate late in 2006.
 - (ii) After the conduct of the primaries, Senator Usman Al-Bashir was declared the winner, while the respondent was declared the runner-up.
 - (iii) The ANPP, after it had forwarded on Al-Bishir's name to 2nd respondent, discovered that the primaries were not conducted in accordance with its rules and regulations, and that the said non-compliance with the rules of the primaries were engineered and perpetrated by the said AI-Bishir.
 - (iv) After the submission of the said AI-Bishir's name to the 2nd respondent, the ANPP got to know that the said AI-Bishir was under investigation by the Code of Conduct Bureau vide letters dated 9th January, 2007 copied to the party by the said Code of Conduct Bureau.
 - (v) The ANPP also got other complaints including allegations of collusion made against the said AI-Bishir.
 - (vi) The ANPP based on the above facts invited Senator Usman AI-Bishir to explain the various allegations made against him by the Code of Conduct Bureau and others and these opportunities were extended to him up to 13th February, 2007 but he refused, neglected and failed to offer explanations on these serious allegations.
 - (vii) The deadline for the submission of the names of candidate as stipulated by the 2nd respondent was 13th February, 2007 and the party had no choice rather than to write its letter of 13th February, 2007 in which it lawfully and legally substituted the name of the respondent for that of Senator Usman AI-Bishir.
 - (viii) Even as at the time of the judgment of the Federal High Court Kaduna, the ANPP had lost its power to substitute its candidate except on the ground of

death, which was not applicable. The 1st respondent shall contend that the act of substitution of his name for that of Senator Usman AI-Bishir was legal, lawful and was done as one of the ordinary functions of the internal affairs of the ANPP. The 1st respondent state that and shall contend that the purported judgment in suit No. FHC/KD/CS/42/2007 was obtained by Senator Usman AI-Bishir by misleading the court, concealment of facts and in abuse of the process of court and the said judgment is now the subject matter of an appeal filed by the 1st respondent at the Court of Appeal, Kaduna Division.

PARTICULARS OF MISREPRESENTATION, CONCEALMENT AND ABUSE OF COURT PROCESS

- (i) Senator Usman AI-Bishir had earlier in suit No. FHC/MG/CS/8/2007 before the Federal High court in Maiduguri claimed the same reliefs which he subsequently replicated in the latter suit before the Federal High Court Kaduna in suit No. FHC/KD/CS/42/2007 and the Federal High Court sitting in Maidugun declined jurisdiction and struck out the suit. This fact of the earlier suit was suppressed by senator Usman AI-Bishir in the latter case in Kaduna
 - (ii) Senator Usman AI-Bishir filed a notice of appeal against the said ruling.
 - (iii) The 1st respondent also filed an appeal against the decision of the Federal High Court in Kaduna and the appeal has since been entered before the Court of Appeal, Kaduna Division and briefs have been filed in the said appeal The,
 - (iv) ANPP got to know that the judgment in FHC/KD/CS/42/2007 was obtained by Senator Usman AI-Bishir in collusion with a counsel who purported to have represented the party without the party's instruction at the trial of the suit.
 - (v) Thai event led the National Secretariat of the party to issue a query to the national legal adviser H. I. Dederi, Esq; to which the said legal adviser replied and apologized for embarrassing the party.
 - (vi) The said Usman AI-Bishir had since been expelled from the ANPP for various anti-party activities and breaches of the constitution of the party.
7. The 1st respondent shall contend that the judgment of the Federal High Court, Kaduna (supra) now being a subject of appeal before the Court of Appeal, Kaduna division, cannot be the foundation of the cause of act for the petitioners who were neither parties nor privies in the said action.
 8. The 1st respondent denies paragraphs 15, 16 and 17 the petition and states that all eligible votes in Yobe State knew that the respondent was the gubernatorial candidates for the ANPP at the election and they voted for him as such and that many of such voters unaware of any purported judgment and/or pleaded in the petition.
 9. The 1st respondent shall also contend that all the Newspaper reports pleaded in the petition were sponsored and or orchestrated by the petitioners and their supporters and that no reasonable tribunal will rely on such concocted stories.
 10. The 1st respondent denies paragraphs 19 and 20 of the petition and shall contend that the petitioners are not entitled to any of the reliefs endorsed on those paragraphs and that the reliefs are fortune seeking and frivolous in the extreme.
 11. The 1st respondent shall at the trial rely on the under listed documents but not limited to them:
 - (i) Letters of the ANPP dated 13th February, 2007 substituting the name of the respondent for that of Senator Usman AI-Bishir.

- (ii) Letters from Code of Conduct Bureau dated 9th January, 2007.
- (iii) Charge sheet from the Code of Conduct Tribunal between the Federal Republic of Nigeria and Senator AI-Bishir.
- (iv) Letter of query issued to the National Legal Adviser and his reply thereto.
- (v) Ruling of the Federal High Court Maidugun in FHC/MG/CS/8/2007.
- (vi) Notice of appeal and brief of argument filed in the said suit to the Court of Appeal, Kaduna in appeal no. CA/K/146/07.
- (vii) Motion on notice for stay of execution of the said judgment dated 20th March, 2007 filed before the Federal High Court, Kaduna.
- (viii) Motion on notice for stay of execution of the said judgment filed before the Court of Appeal, Kaduna.
- (ix) Copy of the notice of appeal filed by the said AI'Bishir before the Court of Appeal, Jos against the judgment of the Federal High Court, Maidugun in suit No. FHC/MG/CS/8/2007. (x) Final declaration of the Gubernatorial election for Yobe State by INEC dated 15th April, 2007.
- (xi) All the letters and advertisement that evidence the expulsion of Senator Usman AI-Bishir from the ANPP
- (xii) Any other documents that are relevant to or connected with the Yobe State gubernator election."

What is clear from the state of the above pleadings and so can seriously be disputed, is that the only basis, or reason or group upon which the appellants relied in the petition to say that the respondent was at the time of the election not qualified to contest the election, was the decision of the Federal High Court, Kaduna. The 1st respondent had challenged that decision on two fronts: that is, by way of an appeal against same to the Court of Appeal as stated in paragraph 6(iii) and (7) above, and by stating and relying on an earlier decision of the same Federal High Court sitting at Maiduguri, on the same issue as set out in paragraph 6(i)(iv) of the reply above. The 1st respondent had relied on a copy of notice of appeal filed at the Court of Appeal, Kaduna on 20th March, 2007 as well as copies of the motions for stay of execution of the judgment in question filed in that court and the Federal High Court, Kaduna as contained in paragraph II (vi) - (viii) of his reply above.

In the seven (7) paragraphs reply to the 1st respondent's reply to the appellants did not specifically and emphatically deny the facts set out above as required by law in order to effectively controvert them and join issues with the 1st respondent. Rather in paragraphs 1, the appellants stated thus:-

"1. The petitioners join issues with the 1st respondent in his reply save in so far as the same consists of admissions My understanding of what the appellants did by this respond to the 1st respondent's reply is that they did not traverse the facts set out by the latter in respect of the decision of the Federal High Court Kaduna, the appeal against that decision at the Court of Appeal Kaduna, the motions for stay of execution filed at the Court of Appeal and Federal High Court as well as the decision of the Federal High Court sitting at Maiduguri. Even though the appellants did not admit the above facts expressly like I pointed out earlier they had not effectively denied their existence or correctness. Failure to challenge or controvert these facts amounts in law to admission on the part of the appellants that they are true and correct. See *Akctose v. Nwosu* (1997) 1 NWLR 478; *Oshodi v. Eyifimmi* (2000) 13 NWLR (Pt.684) 298; *v. Ekwoaba* (1998) 63 LRCN 4975; (1998) 12 NWLR (Pt.)320; *Daggash v. Bulama* (2004) 14 NWLR (Pt.892) 144; *Anjuola v. Ajilore* (2001) 12 NWLR (Pl.727) 416. , prom the above

state of affairs, the decision of the Federal High Kaduna, the appeal against same at the Court of Appeal, and the decision of the Federal High Court, Maiduguri had relevant, live and admitted issues before the lower tribunal. It has been deemed admitted the law does not require any or further of these issues, but are rather deemed established. See *Federal of Education v. Anyanwu* (1997) 4 NWLR (Pt.501) 533; *Akibu v. Oduntan* (1992) 2 NWLR (Pt.222) 210; *Gabari v. Ilori* (2002) 14 NWLR (Pt.786) 78 at 100; *Owosho v. Dada* (1984) 7 SC 149.

Learned senior counsel for the appellants had contended with some force, that the judgment of Court of Appeal was not in existence at the time pleadings were filed and exchanged by the respondents, and so not pleaded. According to him, it was therefore not relevant or an issue before the lower tribunal. With the respect due to him, the fact that an appeal was lodged at the Court of Appeal against the decision of Federal High Court. Kaduna which was central the appellants' petition, made the outcome of such appeal, that is, decision or judgment thereon, a very relevant issue in the petition which the lower tribunal was entitled to act. The case of *Goodhead Amachree and others* (supra) relied on by the learned senior counsel for the appellants that in considering a preliminary objection extraneous, facts or issue are to be avoided, are not applicable here because the facts leading to the judgment of the Court of Appeal were added and admitted by the appellant. The said facts cannot therefore be extraneous to the preliminary objection of the respondents to the appellants' petition, even on its face. In addition, the objection submitted by the learned senior counsel for the 1st respondent in his brief of argument, that the judgment of the Court of Appeal was not used or relied on as defence of estoppel or any special defence for that matter and so it was not necessary in law for it to be specifically pleaded by the 1st respondent before it became relevant purposes of the appellants' petition. See *Egbaram v. Akpotor* (2007) 7 NWLR (Pt.514) 559; *Ajadi v. Ajibola* (2004) 16 NWLR (Pt.898) 91; *Hashidit v. Goje* (2003) 15 NWLR (Pt.843) 352. The facts relevant to that judgment had been clearly set out in the 1st respondent's reply and been admitted by the appellant as she above. There was no legal duty on the 1st respondent to plead the judgment, which arose from admitted facts in the pleadings of the parties. Furthermore, it is to be noted that apart from arising the facts of the petition, the judgment of the Court of Appeal question was cited as a decision of a higher court that was relevant to the issues being determined by the lower tribunal. It has not been suggested that learned counsel could not cite relevant authorities the course of addressing the lower tribunal on the issues determination in order to guide it in its decision. Similarly it was contended that having found the decision of the Court of Appeal relevant to the issues for determination, the lower tribunal was bound to apply the ratio decidendi of the said decision of the said decision to the appellants' petition. As I have demonstrated earlier, the established principle of stare decisis, applies to the facts and circumstances the appellants' petition and so the lower tribunal was legally bound to accord the due and recognised respect to the decision of Court Appeal, which was on the same issue/s to the ones to be determined by it. In the circumstances outlined above, there was no way that lower tribunal could have ignored the decision of the Court of Appeal in whatever guise because it dealt directly with the primary and sole or only ground upon which the appellants' petition was based and built. To have made any such attempt, I agree with the learned Senior counsel for the 1st respondent, would have amounted to judicial impertinence, arrogance, insubordination and immolation addition, that would have been judicial irresponsibility and irrationality, attitudes that have been irremissibly to both the Supreme Court and this court as shown in the cases cited supra by learned counsel for the respondents on the issue. In deprecating such attitude *Olatawura, JSC* in his usual blunt manner in the now very well know case of *Mohammed v. Olawunmi* (1993) 5 SCNJ 94 at 112-3; (1993) 4 NWLR (Pt. 287) 254 at 278 had stated thus: -

"The attitude in disregarding the process of the Court of Appeal borders on judicial impertinence. It is an affront to the authority of the Court of Appeal. All the courts established under our Constitution derive their powers and authority from the Constitution. -hierarchy of courts shows the limits and powers and authority of the Court of Appeal. All the courts established under our Constitution derive their powers for each court. To defy the authority and powers of a higher court appears undesirable and distasteful. There must be respect for the authority of each court... Even if a Judge disagrees with the decision of a higher court, he is constitutionally bound to accord it respect until it is set aside.

A lower court should try to avoid defiance of the order or process of a superior court."

In the circumstances it found itself, the lower tribunal had no other viable legal option than to accord respect to the decision of the t of Appeal in Appeal No: CA/K/164/07 by accepting and relying on it the determination of the preliminary objection raised by the respondents to the appellants' petition. My view is therefore that the lower tribunal was right to have accepted, used, and relied on the judgment from the state of the pleadings before it. It is further F opinion that the tribunal was right in holding itself bound by that judgment because the decision contained therein dealt with the same issue/s that arose for determination in the appellants' petition to which the objections were raised.

It may also be recalled that I had before now pointed out that the 1st respondent had challenged the decision of the Federal High Court, Kaduna which was the meat and hard bone of the appellants' petition, on the ground that it was obtained by concealment of facts, abuse of that court's process and thereby misleading it. See paragraph of the 1st respondent's reply above. A copy of the ruling of the Federal High Court Maiduguri in suit No. FHC/MG/CS/8/2007 was specifically pleaded and relied on by the 1st respondent in paragraph I(v) of his reply. This is one of the pleadings that was not traversed even denied by the appellant specifically in his response to the 1st respondent's reply. The fact of the pleading is that the same issue decided in the decision of the Kaduna Division of the Federal High Court had earlier been decided by the same court sitting at Maiduguri against the plaintiff therein. The failure to challenge this pleading the appellants mean that they had admitted that the issue decided the same Federal High Court at Maiduguri and Kaduna was the same and between the same parties. Having made the decision of the Federal High Court, Kaduna the basis of questioning the qualification of the 1st respondent to contest the election, the appellants cannot now be heard to say that the outcome of an appeal filed on 20th March, 2007 which was the next day after the decision, that decision was extraneous to or a fresh fact in the petition. Let me remind learned senior counsel for the appellants that all appeals to this court under the provision of Order 3 rule 2(1) of the Court of Appeal Rules, 2002, applicable at the time the appeal was filed (now Order 6 rule 2(1) of the Court of Appeal Rules, 20of shall be by way of rehearing of the matter tried in the courts tribunals below this court.

Consequently, an appeal in this court is a continuation of the case decided by the lower court or tribunal and cannot be said to extraneous, fresh or different from it. See *George v. Dominion Flour Mills* (1963) 1 SCNLR 117; *Orizu v. Anyaegbunam* (1978) 5 SC2J *Ajide v. Kelani* (1985) 3 NWLR (Pt. 12) 248; *Akpa v. Itodo* (1997 NWLR (Pt.506) 589; *Akimeziri v. Okemva* (2000) 15 NWLR (Pt.6 526; *Ngige v. Obi* (2006) 4 NWLR (Pt.999) 1 at 106-8; *First Bank of Nigeria v. Akparabong Comm. Bank* (2006) All FWLR (Pt.31) 927; (2006) 1 NWLR (Pt. 962) 438. In the above premises, decision of this court in appeal No. CA/K/164/07 was a continuation of part and parcel of the case decided by the Federal High Court, Kaduna in the decision delivered on the 19th of March, 2007. The appellant cannot excise and use any part of that whole case which suits

then and then abandon or throw away the other part/s that do not please them. Our constitution has guaranteed the citizens the right to pursue their cases through the various stages of the judicial hierarchy in the country. The same constitution also makes the final outcome in sue cases at the different stages binding on the parties until set aside by a competent superior court in the judicial ladder. Parties cannot pick and choose which portion of a case that has gone through the appellant processes, to accept or reject.

For the above reason. I find myself more persuaded and convinced that the lower tribunal was unassailably right to have held itself bound by and relied on the judgment of this court in appeal No. CA/K/164/07 in its determination of the respondents' preliminary objection to the appellants' petition.

furthermore, the decision of this court in that appeal has undoubtedly taken out the "wind" heart and life of the appellants petition since the only ground set out therein for questioning the qualification of the 1st respondent to contest the election had been effectively and legally washed away by its being set aside. This what this court decided in that appeal:

"In conclusion therefore, the appeal succeeds and hereby allowed. The judgment of the Federal High Court in suit No. FHC/KCS/42/2007 per Liman, J, delivered on the 19/3/07 is hereby set aside and it is accordingly struck out for lack of jurisdiction."

Though this judgment was delivered on 13/7/07 three (3) months after the election on the 14th of April, 2007, being one in continuation of the case before the Federal High Court, Kaduna as the date of the decision of the trial court. As a result the effect is that even as at the 19th of March, 2007 when the Federal High Court made the decision, it had no jurisdiction to entertain the suit and it struck out. Having been struck out the case was no longer on the cause list of that trial court for any order to have been properly ; which could have conferred any lawful right or imposed any obligation on the parties therein. There was no order which could have formed the basis of any claim on the part of the parties thereto or any one else from that dead case. See *Trans Nab v. Joseph* (1997) **Jl** (Pt.504) 176; *Geo Source v. Biragbara* (2000) 13 NWLR (Pt. 684) 355; *Omni v. Onigbanjo* (2004) 17 NWLR (Pt.903) 601; *ANPP v. R.O.A.S.S.D.* (2005) 6 NWLR (Pt.920) 140.1 therefore agree with the lower tribunal when it held that: -

"The foundation of the petition has been destroyed at a stroke. The petition therefore collapses." For that reason there was no longer any competent petition that could be said to have been filed on any of the grounds set out in Section 145(1) of the Act for the lower tribunal to take to trial or determine. Consequently the preconditions for the presentation of a valid and therefore competent election petition under the Electoral Act, 2006 were no longer satisfied or met by the appellants' petition under the decision of the Court of Appeal in question.

In the result, I resolve this central issue in favour of the above respondents and against the appellants.

I have before now stated that the resolution of the above issue may be sufficient to substantially or fully dispose of the appellants' appeal. With my finding that the appellants' petition was no longer competent on the basis of this court's decision in the aforementioned appeal, there can't be any other competent issue that can properly arise therefrom for consideration in the appeal. It is not legally or even factually possible for anything to arise out of nothing. In the above circumstances, the duty of the court to consider the other issues used by the learned senior counsel for the appellants in the appeal does not exist any more or it abates since this court is the final court in respect of the appeal. See *Okonji v. Njokanma* (1991) 7 NWLR (Pt. 202) 131; *Ebba u Ogodo* (1984) 1 SCNLR 372; *Anyadujm Nig. Renowned Trading* (1992) 5 NWLR (Pt.243) 535 at 561; *Alao v. Akano* (2005) All FWLR (Pt.264) 799 at 808; (2005) 11 (Pt. 935) 160.

All the other issues in the appeal have effectively been overtaken by the finding that the appellants' petition was no longer premised on any valid ground upon which an election may be questioned under the electoral act and therefore incurably incompetent.

I would now go to the issues raised for the cross appeal by the 1st respondent as set out earlier.

Once more, a calm reading of the three (3) issues raised by the learned senior counsel for the Cross appellant 1st respondent would reveal that they are premised on the fact that the Cross respondent appellants' petition at the lower tribunal was filed on a valid ground on which the election and return of the cross appellant could be questioned as provided in the Act. However with the finding main appeal on the competence of that petition, a consideration the issues of whether or not the petition was based on intra party dispute, locus standi of the 1st cross respondent to file the petition and the appropriate or proper order that should have been made by the lower tribunal would clearly be purely academic to the Such issues are no longer of any material value and effect outcome of the appeal and so of no moment. Like the other raised by the learned senior counsel for the cross respondents/appellants', the issues in the cross appeal have been overtaken; the determination or resolution of the central or crucial issue main appeal which is sufficient for the disposal of both appeal.

I propose to dilate on one or two other points raised in appeal. In this connection, I accept the proposition of the senior counsel for the appellant, Chief Olujinmi in his elaboration on the appellants brief that the crux of the appeal was the qualification of the first respondent to contest the election on the 14th April, That as at that time the decision of the Federal High Court, Kaduna in suit No. FHC/KD/CS/42/2007 had adjudged the first respondent not qualified to stand for that election and that decision was subsisting up to and including the date of the election. Learned senior counsel then, submitted on the authority of the Federal Supreme Court decision in Yerokun v. Adeleke (1960) SCNLR 267, 272 - 3; VFSC 126 that held that if a candidate was not qualified as at the time off the election, he stood disqualified and could not properly participate in the election .

But the Federal Supreme Court decision cited by the learned senior counsel is distinguishable on two grounds.

Firstly, it is common ground on the admission of the appellant in the first respondent had not only appealed against the decision ; Federal High Court, Kaduna to the Court of Appeal but he had also applied for a stay of execution. He was therefore by his conduct seeking to set aside the order disqualifying him from contesting the election. Neither himself nor the Independent National Electoral Commission could be said to be acting in disobedience of order when he contested the election with the active support of the commission. He is by exercising his constitutional right of appeal coupled with his application for stay of execution excused from lying the order or judgment. See Mobil Oil Nigeria Ltd. v. Assan 95-) 8 NWLR (Pt.412) 129, 150 where Supreme Court per Ogwuegbu, JSC stated thus:-

"Chief F.R.A. Williams, SAN, referred the court to the cases of Huang Ors v. Bella & Others (Supra) and Rastico Nigeria Ltd. v. Societe Generale Surveillance S.A. (supra). These are Court of Appeal decisions and were in my view rightly decided. What the court below was saying in both cases was that where a person is appealing against a matter in which he had suffered a defeat and asked for a stay of execution pending the determination of the appeal, he would not be liable in contempt merely because he had not obeyed the order which he is appealing against or which he wants stayed pending the appeal." Trial and appellate courts have always had jurisdiction to grant stay of execution of judgments pending appeal. The exercise of the right to apply for a stay of execution by an unsuccessful litigant pending his appeal has not been treated as a disobedience to the judgment he is appealing against."

See also decisions of Court of Appeal in *Okoma v. Udoh* (2002) -NWLR (Pt.748) 438 at 448 and *Adelakun v. Adelakun* (1993) 7 (Pt.308) 746, 762 where in a not very dissimilar situation, Salami, JCA, stated as follows -

"The other aspect of the application I propose to dilate upon concerns the submission of the learned counsel for the respondents, Mr. Suleiman, to the effect that the applicant is not entitled to the discretion of the court below. I think the learned counsel for the respondent is under a misapprehension of the provisions of Order 8 rule 11 of the Ogun State High Court (Civil Procedure) Rules, 1989. That rule vests the applicant herein right to seek within seven days of making an order, pane that the order made on ex-pane applications either varied or discharged. It is in pursuance of statutory right that the applicant herein brought motion in the court below to have the order of the below quashed. She cannot, in the circumstance, be to be in contempt of the court below until she exhausted this remedy.

Consequently, on the decided cases referred to in this judgment, it seems to me that the respondents are not in contempt of the Federal High Court while the first respondent was in pursuit of constitutional right seeking the reversal of the decision of that Federal High Court.

On this point, the first respondent's application for a stay, execution was for the preservation of the res which, in this case his right to contest the governorship election of Yobe State. The res is of the nature or character which if destroyed cannot be retrieved. There is therefore substance in the submission of the Learned Senior Counsel for appellants in the appellants' reply brief that election petitions are sui generis special in nature, character and class are not ordinarily classified along with civil proceedings *Ayua v. Adasu* (1992) 3 NWLR (Pt.231) 610; and *Obi v. Mbakwe* (1984): SC 325. They are therefore specially treated or handled simply because it is not candidates alone that are interested in the election. So, if a candidate is disqualified, the electorates who would have voted for him are thereby disenfranchised or denied their right choice. But, if he was permitted to contest, as it was done, in t instant appeal, he could be removed in an election petition if he eventually found to be ineligible to contest or disqualified. Secondly, the contention of the appellants is that he was disqualified by the decision of the Federal High Court given in suit FHC/KD/CS/42/2007 obtained by Senator Usman Al'Bishir. Prior to his approaching the Federal High Court, sitting in Kaduna. Senator Usman Al'Bashir had, in suit No. I TIC/MG/CS/8/2007, before the Federal High Court, holden in Maiduguri sought the same reliefs, which he subsequently replicated in he latter suit before the same court in Kaduna. The court in Maiduguri declined Jurisdiction and brought an appeal against the ruling, declining jurisdiction; Court of Appeal, Jos which appeal he eventually abandoned.

The decision of the Federal High Court, Maiduguri, without a successful appeal setting it aside, subsists *Chukwunta v. Chukwu* (1953) 14 WACA 341 - 342. The Federal High Court, Kaduna wrongly assumed jurisdiction on a matter in which the same court, "in Maiduguri had refused to assume jurisdiction. A court cannot assume jurisdiction over a matter in which it had earlier declined to exercised jurisdiction. As this will amount to a trial court sitting on appeal on its own decision a thing it has no competence to so do. In *Consult (Nig.) Ltd. & Another v. Godwin Sekondy Ukey* (1981) 1 SC 6, 34, Supreme Court per Nnamani, JSC stated as follows;-

"There is a general proposition that, in the absence of statutory authority, one judge has no power to set aside or vary the order of another judge of concurrent or co-ordinate jurisdiction. There are several authorities local and English in support of this principle. In *Grace Amanabu v. Alexander Okafor and Another* (1966) 1 All NLR 205 at 207, this court refused to allow an amendment made by a judge to be treated as a nullity. Onyeama, JSC delivering the judgment of the court said;

'We think that Betuel, J, erred in treating the amendment made by Reynolds, J. as a

nullity, for it was made in the presence of both parties, and Betuel, J. had no power to review it as if he were sitting on appeal from that order of amendment...' The Supreme Court took a similar view in *Chief Uku & ors v. D.E. Okimmgba & ors.* (1974) 1 All NLR (Pt.1). 475."

The Federal High Court Judges sitting in Kaduna and Maiduguri are Judges of co-ordinate or concurrent jurisdiction. The assumption jurisdiction by the Federal High Court judge sitting in Kaduna impliedly over-ruled the earlier decision of the same court holden in Maiduguri that it had no jurisdiction over the matter. The latter decision delivered in Kaduna is consequently a nullity.

It goes without saying that the issue or the question of jurisdiction is a fundamental pre-requisite in the adjudication of any matter, it has been aptly described as the "life wire of all trials" and where

lacks jurisdiction to entertain a matter or suit before it the proceeding, however, well conducted, will be a nullity vide *Oloba v. Akereja* (13 NWLR (Pt.84) 508 at 520 per Obaseki J.S.C. –

"If a court or tribunal is not competent to entertain matter or claim or suit, it is a waste of valuable tin the court to embark on the hearing and determination of the suit, matter or claim. There is no justice exercising jurisdiction where there is none. It is injustice to the law, to the court and to the parties so to do."

Also in *Akinbinu v. Oseni* (1992) 1 NWLR (Pt.215) 97 at Akpata, JSC, of the blessed memory, opined as follows –

"It seems to me that the fact that a matter appears fundamental to the administration of justice will itself entitle a Judge to pronounce on it when the in the first place should not have been before him."
(Italics mine)

The reason for settling the issue of jurisdiction one way or the other is that it involves a radical, crucial and fundamental question of competence. Because if the court lacks jurisdiction to hear the case, the proceedings are and remain a nullity however well conducted and brilliantly determined they might otherwise have been as a defect in competence is extrinsic but not intrinsic to the adjudication. See *Attorney General of Lagos State v. Dosunwu* (19J 3 NWLR (Pt. 111) 552 at 558; (1989) 1 NWLR 1; *Fumudoh v. Aboro* (1991) 9 NWLR (Pt.214) 210 and *Madukolu v. Nkemdilim* (196 All NLR 587 at 595; (1962) 2 SCNLR 341 - 348. A court is said| be competent when it is properly constituted as regards the number of members and their qualification; when the subject matter of the case is within its jurisdiction and there is no feature in the case which prevent the court from exercising its jurisdiction and the case con before the court initiated by due process of law and upon fulfillment of all conditions precedent to the exercise of jurisdiction.

In the instant appeal, the Federal High Court, Kaduna properly constituted as regards number and qualification of member. The action came before the court initiated by due process of la upon fulfillment of the condition precedent to the exercise of jurisdiction. But the court lacks jurisdiction to entertain the case after it had initially refused to entertain the action at Maiduguri. Apart from its not having jurisdiction to entertain the question in 1st respondent not entitled to constitute itself into an appellate court own decision. In the circumstance, the decision herein is a nullity and not an irregularity.

The consequences of a judgment being declared a nullity was enunciated in the case of *Macfoy v. United Africa Co. Ltd* (196\ 3 1169 per Lord Denning while delivering the decision of the Advisory Judicial Committee of the Privy Council at p.1172 when he stated thus:-

"The defendant here sought to say therefore that the delivery of the statement of claim in

the long vacation was a nullity and not a mere irregularity. This is the same as saying that it was void and not merely voidable. The distinction between the two has been repeatedly drawn. If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding, which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse." (Italics mine)

The Latin expression *ex nihilo nihil fit* (meaning out of nothing,) thing comes) comprehensively sums up or captures the issue, s judgment of Kaduna Federal High Court, being a nullity does tvest AI'Bishir with any right to contest the election because it's duct of forum shopping. If Senator Usman AI'Bishir derived any benefit from the null and void judgment, whatever he gained from it is a nullity, which inures to no one and could therefore not have been the basis for disqualifying the first respondent herein, were the same is "bad and incurably bad." That being the case, first respondent was never disqualified, and was a qualified candidate on the day of the election. He was on that day qualified 'contest the election. The decision in *Yerokun v. Adeleke* (supra) 'is inapplicable to this case.

In the final result, I find no merit in the main appeal and so dismiss same. The cross appeal for being overtaken by the dismissed of the main appeal, is also dismissed for being incompetent' order by the lower tribunal striking out the appellants' pet; hereby affirmed. Each party to bear their costs of prosecute appeal.

SALAMI, J.C.A.: I agree.

R.D. MUHAMMAD, J.C.A.: I agree

MILKA'ILU, J.C.A.: I agree.

NGWUTA, J.C.A.: I agree.

Appeal and Cross-Appeal dismiss