ALL PROGRESSIVES CONGRESS

V.

1. PEOPLES DEMOCRATIC PARTY (PDP)

2. MR. PETER AYODEEE FAYOSE

3. INDEPENDENT NATIONAL ELECTORAL COMMISSION (INEC)

4. THE CHIEF OF DEFENCE STAFF

5. INSPECTOR-GENERAL OF POLICE

SUPREME COURT OF NIGERIA

SC. 113/2015

JOHN AFOLABI FABIYI, J.S.C. (Presided)
SULEIMAN GALADIMA, J.S.C.
OLABODE RHODES-VIVOUR, J.S.C.
NWALI SYLVESTER NGWUTA, J.S.C. (Read the Leading Judgment)
CLARA BATA OGUNBIYI, J.S.C.
KUMAl BAYANG AKA'AHS, J.S.C
JOHN INYANG OKORO, J.S.C.

TUESDAY, 14th APRIL 2015

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ACTION - Parties to an action - Joinder of parties - Principles governing joinder of parties to a suit - Who should not be joined as a part}' to an action.

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CODE OP CONDUCT - Impeachment of Governor of a Stag Impeachment panel - Whether can pronounce Governor guilty of contravention of Code of Conduct.

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CONSTITUTIONAL LAW - Impeachment of Governor of a State' Impeachment panel - Whether can pronounce Governor guilty of contravention of Code of Conduct.

CONSTITUTIONAL LAW - Impeachment of Governor of a State- Procedure therefor.

CONSTITUTIONAL LAW - Impeachment proceedings against u Governor - Nature of - Scope of finding impeachment panel can make.

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CRIME - Forgery - Meaning and nature of.

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PRACTICE AND PROCEDURE - Pleadings in election petition – Petitioner's reply to respondent's reply to petition – Purpose of – What it should contain - Scope of.

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Issue:

1. Whether the Court of Appeal was right in its decision that the 4th and 5th respondents were not necessary parties to the petition in the light of the pleadings and findings made by the Court of Appeal and whether the Independent National Electoral Commission (INEC) ought to take responsibility for their actions.
2. Whether the Court of Appeal was right in its decision that the appellant based its petition on impeachment and whether the decision in *Omoworare v. Omisore* (2010) 3 NWLR (Pt. 1180) 58 was rightly applied to this case by the Court of Appeal.
3. Whether the Court of Appeal was right in its decision that the appellant did not prove the allegation of forgery of the HND Certificate submitted by the 2nd respondent to INEC.
4. Whether the Court of Appeal was right in its decision affirming the striking out of paragraph 13 of the appellant's reply to the 2nd respondent's reply to the petition.

Facts:

On 21st June 2014, the 3rd respondent, INEC, conducted Governorship election in all the wards of live 16 Local Government Areas of Ekiti State. Eighteen political parties, including the appellant and the 1st respondent, contested the election through their respective candidates. The result of the election showed that the 2nd respondent, sponsored by his party, the Peoples Democratic Party (PDP) won with a total of 203,020 votes against a total of 120,433 scored by his closest rival, the candidate sponsored by the appellant in this appeal. The appellant's said candidate at the election, John Olukayode Fayemi, accepted the result of the election and did congratulate the 2nd respondent although the appellant did not accept the result and challenged same at the Governorship Election Tribunal constituted for Ekiti State in petition No. EPT/EKS/GOV/01/2014 as the sole petitioner.

In its petition, the appellant averred, *inter alia:*

> " ... that the election was marred with irregularities that are unprecedented in the annals of elections in this country as 'photo chromic' and "thermo chronic' ballot papers already programmed to favour the 1st and 2nd respondents in all the polling units, were used."

Specifically, the appellant predicated its petition on the following grounds:

"(i) The 2nd respondent was not duly elected by majority of lawful votes cast at the election.

(ii) The election of the 2nd respondent is invalid by reason of corrupt practices.

(iii) The election of the 2nd respondent is invalid by reason of non-compliance with the provisions of the Electoral Act 2011 as amended and the Manual of Election Officials 2014 and the Constitution of the Federal Republic of Nigeria 1999 (as amended).

(iv) The 2nd respondent was not qualified to contest as at the time of the election on the following grounds:

(a) The 2nd respondent was found guilty of the contravention of the Code of Conducts by the impeachment panel set up by the Acting Chief Judge of Ekiti State on allegation of gross misconduct involving embezzlement of funds preferred against him by the Ekiti State House of Assembly consequent upon which

he was impeached and removed from office of the Governor of Ekiti State in the year 2006.

(b) The 2nd respondent presented a forged Higher National Diploma (HND) Certificate of The Polytechnic Ibadan to the 3rd respondent (INEC)."

The appellant adopted the facts averred in paragraphs 1 to 16 of the petition, as facts in support of the grounds of the petition, and also made and iched on specific averments in respect of some Local Government Areas in the State.

Based on the tacts stated in its petition, the appellant sought the following reliefs:

"A. That it be determined and declared that the 2nd respondent, Peter Ayodele Fayose, was not qualified to contest the Governorship election held on 21st June, 2014 on the ground that he was found guilty of the contravention of the code of conduct by the impeachment panel set up by the Acting Chief Judge of Ekiti State and the Ekiti State House of Assembly, consequent upon which he was impeached and removed from the office of the Governor of Ekiti State in the year 2006.

B. That it may be determined that the 2nd respondent presented a forged certificate of Higher National Diploma (HND) of The Polytechnic Ibadan to the Independent National Electoral Commission thus was not qualified to contest the election.

C. That it be determined and declared that the 2nd respondent Peter Ayodele Fayose was not duly elected or returned by the majority of lawful votes cast at the Ekiti State Governorship Election held on Saturday, 21st June 2014.

D. That it may be determined that having regards to the non-qualification of the 2nd respondent to contest the election, the 3Rd respondent ought to have declared the candidate of the petitioner, John Olukayode Fayemi who scored the highest number of lawful votes east at the election, as the winner of the election.

E. An order of the tribunal withdrawing lite Certificate of Return issued to the 2nd respondent by the 3rd respondent and present the Certificate of Return to the candidate of the petitioner, John Olukayode Fayemi, who scored the majority of valid votes cast and having met the constitutional requirements as required by law."

In the alternative, the appellant sought:

> "An order nullifying the governorship election held on 21st June 2014 and a fresh election ordered."

Upon service of the petition on them the respondents filed replies, denying all the material averments therein.

At the end of the trial, the three-man tribunal considered the relevant materials before it as well as the addresses of learned counsel representing the parties and came to the unanimous conclusion that:

> "On the whole, all the relevant issues arising from the grounds upon which this petition is predicated and the reliefs sought therein having been resolved against the petitioner, the petition is hereby dismissed for lacking in merit."

Aggrieved by the judgment, appellant appealed to the Court of Appeal Ekiti Judicial Division.

Also, the 1st respondent, aggrieved by the order of the tribunal over-ruling its preliminary objection to the locus standi of the appellant cross-appealed same.

In a unanimous decision the Court of Appeal dismissed appeal in the following terms:

> "Even though some of the issues relating to the handling of the trial by the tribunal were resolved in favour of the appellant, those errors did not occasion a miscarriage of justice. Thus having resolved the substantive issues of disqualification and return as well as forgery against the appellant, we are of the opinion that there is no merit in this appeal and it is hereby dismissed. The judgment of tine tribunal delivered on 19th December, 2014 is hereby aflirmed."

With respect to the cross-appeal, the Court of Appeal held:

"In the result, having resolved as above in respect of the two issues, the cross-appeal succeeds in part in the following terms:

1. The election tribunal acted rightly when it held that the 1st cross-respondent had a right under the Electoral Act, 2010 (as amended) and was competent to claim all the reliefs contained in the petition in spite of the non-joinder of the gubernatorial candidate as a co-petitioner.
2. The election tribunal was in error to hold that the allegation of the 1st cross-respondent on the issue of disqualification of the 2nd cross-respondent was founded on the contravention to the code of conduct and not on impeachment.

The cross-appeal succeeds in part."

Again, the appellant felt aggrieved and it appealed to the Supreme Court on the 14 grounds of appeal endorsed on the notice 0f appeal filed on 27/2/2012. Also, the 1st respondent was aggrieved by part of the judgment of the court below and cross-appealed same on ten grounds endorsed on the "notice of appeal" also filed on 27/2/2015.

There is also another "notice of appeal" filed on 27/2/2015 by the 1st respondent, it has seven grounds of appeal (cross-appeal). The 2nd respondent, Peter Ayodele Fayose, also filed a cross-appeal on 2/3/15 of five grounds of appeal.

In the determination of the appeal, the Supreme Court construed the following statutory provisions.

Section 182 (1) (e) of the Constitution of the Federal Republic of Nigeria, 1994 which provides:

"182 (1): No person srall he qualified for election to the office of Governor of a State if

(a) ….
(b) ….
(c) ….
(d) ….
(e) within a period of less than ten years before the date of election to the Office of Governor of a State he has been convicted and sentenced fur an offence involving

dishonesty or has been found guilty of the contravention of the Code of Conduct "

Section 137 of the Electoral Act, 2010 as amended, which states as follows:

"137(1): An election petition may he presented by one or more of the following persons:

(a) A candidate in an election.

(b) A political party which participated in the election.

(2) A person whose election is complained of is in this Act referred to as the respondent.

(3) If the petition complains of the conduct of an Electoral Officer, a Presiding or Returning Officer, it shall not be necessary to join such officer or persons notwithstanding the nature of the complaint and the Commission shall, in this instance, be

(a) made a respondent, and

(b) deemed to be defending the petition for itself and on behalf oi officers or such other persons."

Held (Unanimously dismissing the appeal and allowing the cross-appeal in part):

1. *On Principles governing joinder of parties to a suit*- **Generally, a necessary party is one not only interested in the dispute but one in whose absence the matter cannot he decided fairly. In this ease, the appellant did not show what interest any or both of the 4th and 5th respondents had in the result of the election. It was not even shown that either or both of them were indigenes of Ekiti State.** [*Green v. Green* **(1987) 3 NWLR (Pt. 61) 480 referred to and applied.]** (P. 60, paras. F-H)

2. *On Who should nor he joined as a party to an action* –

It does not make sense to join a party to any proceeding, except a statutory party, where no complaint is made against such party. In this ease there was no complaint against either or both of the 4th and 5th respondents. The two respondents

were mentioned in paragraphs 6, 7, 68, 92, 98, 99 and 101 of the petition. In paragraphs 6 and 7, the status of the 4th and 5th respondents were stated. In paragraphs 68 to 101 the only reference to the 4th and 5th respondents was in the phrase "officers and men of the 4th and 5th respondents". The said officers and men were alleged to have committed series of acts which are criminal in nature. The soldiers against whom allegations of crime were made were unknown and could not therefore be said to be servants of the 4th and 5th respondents in order to invoke the fiction that the master had impliedly commanded his servant to do what he did. The appellant did not show the basis of holding the 4th and 5th respondents vicariously liable for the criminal acts of the un-named soldiers. [*Iko v. John Holt & Co*. **(1957) SCNLR 107 reffered to and applied.)** (P.62, paras. B-P)

3. *On Need for parts to he consistent in ease put forward by him at trial and on appeal –*

There should be consistency by a party in prosecuting his ease at the trial court as well as on appeal. There should be no summersault. In the instant case, the appellant's argument dealing with impersonation did not rest on any pleading as paragraph 13 of the appellant's reply to the 2nd respondent's reply to the petition was struck out by the tribunal and affirmed by the Court of Appeal. Therefore, the new argument relating to impersonation was of no moment. [*Adegoke Motors v. Adesanya* **(1989) 3 NWLR (Pt. 109) 250 referred to.**] (P. 79,paras. F-H)

4. On Nature of impeachment proceedings against a Governor -

The impeachment of a Governor is a legislative constitutional affair outside the jurisdiction of the court. Consequently, in this ease, the further proceedings by the 2nd panel which culminated in the impeachment of the 2nd respondent was illegal

and unconstitutional, clearly contrary to the provisions of section 188(8) of the 1999 Constitution. [*Musa v. Speaker, Kadnna State House of Assembly* (1982) 3 NCLR 450; *Abaribe v.Abia State House of Assembly* **(2002) 14 NWLR (Pt. 788) 466 referred to.**) (P. 101, paras. F-G)

5. *On Procedure for impeachment of Governor of a state –*

Per FABIYI, J.S.C. at pages 75-77, paras. A-B:

"As can be seen in exhibit U, the substantive Chief Judge of the State - Hon. Justice Kayode Bamisile, on request by the Speaker of the State House of Assembly, set up a seven (7) man Panel to investigate allegations made against the State Governor. The Panel met and issued a report on 12th October, 2006; which the State Governor and his Deputy wen exonerated.

Exhibit V is a letter addressed to Justin Aladejana by the Chief Justice of Nigeria and Chairman, National Judicial Council, it reads as follows:-

"13th October, 2006

Ref. No. JN/COR/SG/A.79/111/144
Hon. Justice Jide Aladejana,
High Court of Justice,
Ado Ekiti,
Ekiti State.

RE: PETITION AGAINST THE CONDUCT OF HON. JUSTICE JIDE ALADEJANA OF EKITI STATE HIGH COURT ON ILLEGAL COMPOSITION OF PURPORTED IMPEACHMENT PANEL IN EKITI STATE.

It has been brought to my notice that you have been appointed by the House of Assembly of Ekiti Slate as the Acting Chief

Judge, following the suspension of the State Chief Judge, Hon. Justice Kayode Bamisile for exercising his constitutional power. Your faxed letter and other documents of 12th October, 2006 to me were also in the same vein.

2. **As you are aware, the procedure for appointment of an Acting Chief Judge for the State is clearly spelt out in section 271 of the 1999 Constitution of the Federal Republic of Nigeria.**
3. **I am to stress that the perceived constitutional crises in the State mentioned in your letter not withstanding, the procedure and circumstances under which you have been appointed are contrary to the aforesaid provision of the 1999 Constitution on appointment of an Acting Chief Judge. Hence, any action by you in your capacity as the Acting Chief Judge will be unconstitutional.**

Sgd

(S.M.A. Belgore, CON)
Chief Justice of Nigeria and
Charman, National Judicial Council."

As can be seen on page 2 of the above letter, same was opied to the 2nd respondent and the substantive Chief Judge of the State - Hon. Justice Kayule Bamisile. It appears hat notwithstanding the advice of the Chief Justice of Nigeria and Chairman of the National Judicial Council in exhibit V, a Panel consttuted by Aladejana, J. rendered its own report is in exhibit M to the Speaker of the House on 16th October, 2006. This is the exhibit relied uponto remove the State Governor.

To say the least exhibit M is glaringly a product of arrant illegality as Aladejana, J. had no vires to initiate the process leading to exhibit M as he was not a lawful Acting Chief Judge. The imconstitutonal act rendered exhibit M to be null and void. In law, as well as in logic and in the realm of scienee, one cannot put something upon nothing and expect it to stand. It must collapse. See *Mcfoy v. UAC* **(1962) AC 152. There is a proverb in a certain clime which says 'it is only a dog which desires to get lost that will not listen to the whistle of the hunter" In the same fashion, this Judge failed to listen to the admmition of the National Judicial Council am got consumed in the process. As can be seen on page 529 in Volume one (1) of the record, for his rather negative role in the episode, he was given the 'red card' by the National Judicial Council. As stated therein 'Justice Jide Aladejana of the Ekiti State Judiciary was dismissed from service for accepting the illegal position of acting Chief Judge of the State at the peak of the crisis that trailed the removal of the former Governor Ayo Fayose.' What a pity and an eye opener? The above is still not the end of my remarks on this point. It is apt to point it out that section 188 (8) CFRN 1999 provides as follows:-**

> **"188 (8) where the panel reports to the House of Assembly that the allegation has not been proved, no further proceedings shall be taken in respect of the matter."**

The above only deserves a literal interpretation. It is not difficult to comprehend its purport. After exhibit IJ was rendered to the Speaker, as mandatorily stated by the employment of

the word shall, no further proceedings should take place after the report in exhibit U that the allegation has not been proved. Again, exhibit M rendered by another panel constituted by the unlawful acting Chief Judge on 16th October, 2006 was to no avail."

6. *On Scope of finding impeachment Panel can make –*
By virtue of section 188(8) and (9) of the 1999 Constitution, the impeachment panel has power only to find that the allegations against the Governor are proved or not proved. The panel has no power to find the Governor guilty of allegations of gross misconduct. (P. 101, paras. G-H)

7. *On Which forum can try and convict a person ») contravention of Code of Conduct –*
It is now getting entrenched that the only substantive proceedings to secure a guilty verdict for contravening the code of conduct is one initiated by the Code of Conduct Bureau before the Code of Conduct Tribunal. Same must be pleaded and proved to sustain a disqualifying ground under section 182 (1) (e) of the 1999 Constitution. The uppellad failed to comply with this requirement. The apiellant failed to plead and prove a verdict of guilty for contravention of the Code of Conduct. As such no disqualifying ground was established under section 182(1) (e) of the 1999 Constitution. [*Omowoware v. Omisore* **(2010) 3 NWLR (Pt. 1180) 58 referred to, adopted and applied.**] (Pp. 77. paras P-G: 78 para. D)

8. *On Which forum can try and convict a person of contrvention of Code of Conduct –*
It is thecourt of law or a tribunal duly set up by the Cod of Conduct Bureau that has power to try any public officer for contravention of the code of conduct for any of such is the forum where he can

be sure if adequate fair hearing as enshrined in section 36(1) and (5) of the 1999 Constitution. [A.C. v. INEC **(2007) 12 NWLR (Pt. 1048) 220 referred to**.] (P. 78 paras. B-C)

Per OGUNBIYI, J.S.C. at pages 106-107, paras. H-E; 101, paras. A-F:

> **"In A.C. v. INEC (2007) 12 NWLR (Pt. 1048) 222 at 291, paras. G-H, wherein his Lordship Tabai, JSC held and said:-**
>
> > **'The disqualification of a person from any elective office under the Constitution involves the determination of that person's civil rights and obligations and which determination is, by virtue of sections 6 and 36 of the Constitution specifically assigned to courts or other tribunals established by law and constituted in a manner as to ensure their independence and impartiality.'**
>
> **Katsina-Alu, JSC who wrote the lead judgment and in the same tone also said:-**
>
> > **'The disqualification in section 137(1) (i) clearly involves a deprivation of right and a presumption of guilt for embezzlement or fraud in derogation of the safeguards in section 36(1) and (5) of the Constitution. The trial and conviction by a court is the only constitutionally permitted way to prove guilt and therefore the only ground for the imposition of punishment or penalty for the criminal offences of embezzlement or fraud. Clearly the imposition of the penalty of disqualification for embezzlement of fraud solely on the basis of an indictment for these offences by an administrative panel of inquiry implies a presumption of guilt contrary to**

section 36(5) of the Constitution of the Federal Republic of Nigeria, 1999'....

It follows therefore that to interpret section 182(1)(e) in the light of the contemplation by the appellant, will certainly negate the construction and purpose of section 36(1) and (5) of the Constitution on the right to fair bearing and presumption of innocence. This I say because, while a court of law or tribunal carried the identity of impartiality, the same cannot be said of a panel set up for a specific purpose by a body which will eventually report to itself directly or indirectly. There cannot, certainly be the right to fair hearing because the panel will act as a judge in its own cause. *The case in point is Garba & Others v. University of Maiduguri* **(1986) 1 NWLR (Pt. 18) 550, (1986) 2 SC 129, (1986) All NLR 149**. **The presumption of innocence envisaged by the Constitution will also be undermined grossly. In the light of the constitutional provision which places heavy premium on the protection of a citizen and the presumption of lis innocence until proved otherwise, I feel safe to say that the interpretation of the phrase "pronouncement of guilt" envisaged by section 182(1)(e) of the Constitution must be an outcome of a judicial proceeding, either by a regular court or the Code of Conduct Tribunal. In the absence of such, the decision in the case of Omoworare v. Omisore should be applied; that is to say an act of Impeachment** *simplicita* **cannot be used as a ground for a disqualification under section 182(1)(e) of the Constitution 1999 (as amended) for purpose of precluding from contest, in other words, impeachment cannot be used as the basis of disqualification of the 2nd respondent to**

contest the Governorship election in Ekiti State."

Per AKA'AHS, J.S.C.at pages 120-121, paras. K-F:

"The operative words in section 182 (1) (c) of the Constitution are "convicted and sentenced for an offence invoicing dishonesty" and "found guilty of the contravention of the Code of Conduct."

Paragraph 3 (d) & (e) Part 1 of the Third Schedule to the 1999 Constitution create a Code of Conduct Bureau with powers to ----

"(d) ensure compliance with and, where appropriate, enforce the provisions of ihe Code of Conduct of any law relating thereto;

(e) receive complaints about non-compliance with or breach of the provisions of the Code of Conduct or any law relating thereto, investigate the complaint and. where appropriate, refer such matters to the Code of Conduct Tribunal."

Where the Code of Conduct Tribunal finds a public officer guilty of contravention of any of the provisions of this Code it shall have power to impose the appropriate sanction which includes the barring for 10 years of the person convicted from contesting election into the office of Governor of a State as stipulated in section 182 (1) (e) and paragraph 18 (2) Fifth Schedule to the Constitution.

In *Fawehinmi v. I.G.P* **(2002) 7 NWLR (Pt.767) 606 Uwaifo J.S.C. stated at page 678 thus:**

"It cannot be suggested that clear and unambiguous terms of our Constitution may be rewritten or

construed beyond what they mean in the guise of liberal or broad interpretation"

If the framers of the Constitution intended to imbue the Panel of Investigation, appointed by the Chief Judge of the State in accordance with section 188 (5), to investigate the allegation against the Governor or Deputy, with powers to find him guilty of the criminal offence or breach of the Code of Conduct and convict him accordingly, there would be no need to donate such powers to a court of law or the Code of Conduct Tribunal whose decisions are subject to appeal. The Panel can only find the allegations prosed and if the report is adopted by the House of Assembly and a resolution supported by two-lhirds majority of the members is passed, the holder of the office stands removed. As clearly stated in section 182 (1) (e) of the Constitution, and the various judicial pronouncements regarding finding a person guilty of an offence or being convicted and sentenced, it is only a court of law that can convict and sentence a person while the Code of Conduct Tribunal can find the person guilty of a breach of the Code of Conduct. See *Garba v. University of Maiduguri* (1986) 1 NWLR (Pt.18) 550; Laoye v. F.C.S.C. (1989) 2 NWLR (Pt.106) 652."

Per OKORO, J.S.C. at pages 125-126, paras. F-B:

"Under section 182(1) (e) of the 1999 Constitution (as amended), no person shall be qualified for election to the office of governor of a State if, within a period of less than ten years before the date of the election to the office of governor of a State he has Ik en comicled and sentenced for an offence involving dishonesty or lias been

found guilty of the contravention of the Code of Conduct. There is no evidence that the 2nd respondent was ever "convicted and sentenced". The words "convicted and sentenced", without any modicum of doubt refers to conviction and sentence by a court of law. This is so because no other body does sentencing except the courts. So even where the Constitution did not say "by the courts", it is presumed since no other body is empowered to convict and sentence people who have committed crime.

The other leg of section 182(1) (e) is "being found guilty of the contravention of the Code of Conduct." That in my opinion will mean being found guilty by the Code of Conduct Tribunal, the Constitution having set up the tribunal for that purpose. Certainly not by any politically motivated tribunal. To hold otherwise wih spell doom for the weak and vulnerable of our society."

9. *On Whether Impeachment panel can pronounce a person guilty of contravention of Code of Conduct* -

The tribunal with powers to find anyone guilty of contravention of the Code of Conduct is the Code of Conduct Tribunal established under paragraph 15(1) of the 5th Schedule to the Constitution of the Federation 1999 (as amended). Although there is no provision vesting exclusive jurisdiction on the Code , of Conduct Tribunal over matters of contravention of Code of conduct, that jurisdiction cannot be shared by the Code of Conduct Tribunal with an impeachment panel which is an ad-hoc tribunal inferior to the Code of Conduct Tribunal. (Pp. 64-65, paras. H-B)

Per NGWUTA, J.S.C. at pages 65-66. paras. B-D:

"Even if it is assumed that an impeachment panel is of the same status as the Code of Conduct Tribunal, can the court rely on the finding of the panel in the circumstances of this ease? A second question is: What is the status of the impeachment panel that purportedly found the 2nd respondent guilty of a contravention of the Code of Conduct? It is on record that earlier, at the request of the Ekiti State House of Assembly, the Chief Judge of the State constituted a panel to investigate allegations against the 2nd respondent, it would appear that the House did not substantiate the allegation levelled against the 2nd respondent and so the impeachment panel gave him a clean bill of health, as it were. This should have ended the matter in compliance with section 188 (8) of the Constitution (*supra*) which provides:

"S.188 (8): Where the panel reports to the Mouse of Assembly that the allegation has not been proved, no further proceedings should be taken in respect of the matter."

Contrary to the mandatory provision reproduced above, the Ekiti House of Assembly, in apparent witch hunt, procured a Judge in Ekiti State Judiciary to set up a second and unconstitutional panel to investigate the 2nd respondent a second time. It is on record that the then Chief Justice of Nigeria wrote to the Judge to say that his purported appointment as Acting Chief Judge of Kkiti State was unconstitutional and so null and void. It follows therefore that:

(1) The second impeachment panel was in violation of section 188 (8) of the Constitution.

(2) The "Acting Chief" Judge who set up the panel was not appointed in accordance with relevant constitutional provisions. At the material time he was not Acting Chief Judge and he has no powers to act as one.

(3) The unconstitutionality of his purported appointment as Acting Chief Judge of Ekiti State tainted his action in that capacity with illegality and rendered all his actions in that office, including the setting up of the panel, null and void and of no factual or legal effect.

(4) The proceedings conducted by the panel was an exercise in futility, and

(5) The finding of guilt made against the 2nd respondent is not worth the paper on which it was written"

In suspending the Chief Judge of the State and purporting to appoint an Acting Judge for the purpose of impeaching the 2nd respondent who had been cleared by an earlier panel, the Ekiti State House of Assembly acted with impunity and reckless abandon. The so-called Acting Chief Judge fared worse having sacrificed his integrity and career as a Judicial Officer for a moment of fame and glory offered to him by politicians."

10. *On Ground of disqualification for election to office of Governor of a state -*

By virtue of section 182(1) (e) Constitution of the Federal Republic of Nigeria 1999 no person shall be qualified for election to the office of Governor of a State if within a period of less than ten years before the date of election to the office of Governor of a State he has been convicted and sentenced for an offence involving dishonesty or he has been found guilty of the contravention of the Code of Conduct,

(P. 120, paras. C-E)

11 *On Whether Impeachment is a ground for disqualification from contesting gubernatorial election –*

Impeachment is not a ground for disqualification of a candidate to contest a gubernatorial election. In this case, the appellant pungently maintained that it did not place reliance on impeachment as a ground for disqualification of the 2nd respondent. The appellant said it placed reliance on contravention of the Code of Conducts. [Omoworare v. Omisore **(2010) 3 NWLR (Pt. 1180) 58 referred to and applied.]** (P. 77,paras. E-F)

Per RHODLS-VIVOLR, J.S.C. at pages 101-102, paras. H-C:

> **"When a Governor in this case the 2nd respondent is impeached for embezzlement of funds, clearly a criminal offence, he should he taken before a competent court of law or the Code of Conduct Tribunal to face prosecution. It is only after any of these courts finds the Governor guilty and he is com icted and sentenced for the offence can he be disqualified under section 182(1) (d) or (e) of the Constitution and indeed under any known law**.
>
> **Disqualification as a result of impeachment can only arise if the impeached person is thereafter convicted and sentenced for the offence for which he was impeached. Since the 2nd respondent was never prosec uted lor embezzlement of funds or any criminal offence, and never convicted he cannot by any stretch of imagination he disqualified under section 182 (1) (d) (c) or any of the subsections supra**. *Omoworare v. Omisore* **(2014) 3 NWLR (Pt. 1180) p. 58 is still good law."**

Per AKA'AHS, J.S.C. at pages 121-122, paras. F-B.:

> **"As a result of the immunity enjoyed by elected public officers under section 308 of the Constitution, an incumbent Governor cannot he arraigned before a court of law or the Code of Conduct Tribunal. See** *Tinubu v. I.M.B. Securities Plc* **(2001) 16 NWLR (Pt. 740) 670;** *Fawehinmi v. I.G.P.* **(2002) 7 NWLR (PL 767) 606. If a governor is removed from office hut is not taken before the Code of Conduct Tribunal, such a removal will not bar him from contesting election either immediately or before the expiration often years from the date of the impeachment. So it is very important for post impeachment proceedings to be taken out against the impeached Governor before the Code of Conduct Tribunal or before a court of law because it is only a court or tribunal established by law and is impartial that is constitutionally empowered to convict for an offence or find a person guilty of the breach of the Code of Conduct. See** *Garba v. University of Maiduguri* ***supra;*** *Loaye v. F.C.S.C.* **supra;** *Action Congress v. INEC* (**2007) 12 NWLR (Pt. 1048)222**.
>
> **From the records it is obvious that the 2nd respondent was not taken before the Code of Conduct Tribunal to pronounce on his guilt. Consequently he could not be said to have been disqualified from**

contesting the governorship election in Ekiti State in 2014."

12. On Application of principle of estoppel -

The governing considerations for the application of the principle of estoppel are that the parties and subject matter in dispute are the same. With respect to the appellant's allegation of presentation of forged HND Certificate to INEC by the **2nd respondent, the same was caught by the principle of estoppel by virtue of the decision in the case of *Alliance for Democracy v. Fayose* (2005) 10 NWLR (Pt. 932) 151 which is on all fours with this case Thus, the Court of Appeal was in order in upholding the application of the principles of estoppel, in addition, that decision is a judgment in rem by sv hich the appellant and the whole world were bound to the determination that Peter Ayodele Fayose and Peter Ayodele Oluwayose are one and the same person. The 2nd respondent was the owner of exhibit E, and the parties therein were the same as those in this case due to the metamorphosis of the defunct Alliance for Democracy into Action Congress of Nigeria, and later All Progressives Congress. The 1st, 2nd and 3rd respondents herein were respondents therein. Thus, the issue was completely put to rest therein and was not open to further litigation. All the ingredients for the application of the principle of estoppel were fulfilled**. [Ogboru v. Uduaghan **(2011) 17 NWLR (Pt. 1277) 727 referred to and applied.]** (Pp. 79-80. paras. H-D)

Per GALADIMA, J.S.C. at page 96. paras. D-H:

"Judicial notice can be taken of the fact that the appellant (APC) herein was a product of the Alliance for Democracy (AD) and Action Congress of Nigeria (ACN). The 1st, 2nd and 3rd respondents herein were respondents in that case. The Court of Appeal as the final court then for Governorship Election Petition made pronouncements dismissing the allegation

of presentation of the same High National Diploma of The Polytechnic of Ibadan by the 2nd respondent herein. The too courts below correctly relied on the case. The decision, which is a judgment in rein, binds the appellant and the whole world to the effect that "Peter Ayodele Fayose," and "Peter Ayodele Oluwayose are one and the same person. That the 2nd respondent is the owner of the certificate exhibit "E" in that case. The decision that the 2nd respondent herein is the owner of exhibit "E" is not open to any further litigation, in the light of the foregoing. I hold that the appellant did not prove the allegation of presentation of forged HND Certificate against the 2nd respondent and the principles of estoppel is applicable to this case."

13. *On Application of doctrine of issue estoppel –*

The doctrine of issue estoppel is that where an issue has been decided by a competent court the court will not allow it to be relitigated by different parties. The rule of estoppel is a mile of evidence and the matters which will found an issue estoppel may be of law, fact, or mixed law and fact. Issue estoppel applies only to issues. In this case, the issue of the 2nd respondent's HND Certificate was laid to rest in *A.D. v. Fayose* **(2005) 10 NWLR (Pt. 932) 151 in w hich the Court of Appeal found that the 2nd respondent's HND Certificate was genuine. The decision was final. It laid to rest for all times any further consideration of the authenticity of the HND Certificate in question**. (*Pp. 102-103, paras. H-B)*

14. *On Sui generis nanny of election petition –*

Ejection petition proceedings are sui generis. Section 137 (1), (2) and (3) of the Electoral Act clearly sets out and circumscribes those who qualify to he made respondents in an election petition. (P. 73, paras. D-E)

15. On Sui peneris nature of election petition –

Proceedings in election petitions are *sui generis*. They are in a class of their own. They are made to fast-track the hearing of petitions. They are, however,not designed to spring surprise on parties. [*Adepoju v. Awoduyilemi* **(1999) 5 NWLR (Pt. 603) 364 referred to.]** (*P. 81. para. B*)

16. On Proper respondents to on election petition –

The Electoral Act, 2010, as amended, in section 132 (3) prohibits the joinder of electoral officers returning officers and other staff or agents of n-J Commission. The Commission has the duty to answer for the conduct of its "officers or such other persons". By the doctrine of cjusdem yeuensy those referred to as "such other persons", permanent or temporary staff of the Commission exclude non employees of the Commission. The Commission answers for the conduct of its officers and "such other persons" even if the allegation or complaint against them is of criminal offence. Any person or group of persons, outside the Commission's "officers and such other persons'", not employed for the proper conduct of the election, who gets involved in the election process does so at his own risk. He is on a frolic of his own and the Commission has no duty to answer for his conduct. *(P. 61, pares. D-G)*

17. *On Whether the Inspector-General of Police and the Nigerian Army are proper respondents to an election petition* -

The Inspector-General of Police and the Nigerian Army are not within the class of the Independent National Electoral Commission's officers or "such other persons" who may have been employed as permanent staff or ad hoe staff in the Commission. In other words, they at all material limes were neither "officers" of the Commission nor were they "such of her persons" engaged by tbe Commission and it therefore follows that they were not necessary' or even parlies to the petition challenging the result ol the June 21st , 2014 election in Ekili State. Also, in considering whether they are necessary or proper parlies, the issue of relief sought against either or both ol them does not arise in view of the fad that in an election petition, the usual relief is on order to declare the petitioner winner or to nullify the election and order a fresh election in the area involved.

As rightly submitted by the respondents, the two lower courts were light when they held that the 4th and 5th respondents were wrongly joined to the petition as respondents, more so in the absence of any relief against the said 4th and 5th respondents in the petition. [*B.A.T. Company Limited v. International Tobacco Company Limmited* **(2013) 2 NWER (Pt. 1339) 493 referred to.]** (*Pp. 61 -62, paras. G-A: 105. paras. A-B)*

Per FABIYI, J.S.C. at pages 73-74, paras. H-A:

> **"It can he seen that the appellant did not claim any relief against the 4th and 5th respondents. Same ultimately render their presence an unnecessary burden on the proceedings. They were never contemplated by the Electoral Act. The trial tribunal and the court below rightly found that they were not proper parties since they did not qualify as statutory respondents and no reliefs were sought against them by the appellant. Their**

names were properly struck out for the reasons stated."

18. *On Onus and standard of primj' of allegation of mime in election pennon -*

Where an allegation of crime is made in an election petition, as herein, the person making the allegation must prove same beyond reasonable doubt. Such standard of proof, however, is not one beyond all shadows of doubt. [*Nwobodo v. Onoh* **(1984) 1 SCNLR 1**; *Akindipe v. State* **(2010) 16 NWLR (Pt. 813) 340 referred to.]** (P. 78, paras. F-G)

Per FABIYI, J.S.C. at pages 78-79, paras. G-E:

"The appellant rested its contention that it proved that the 2nd respondent presented a forged certificate to INEC beyond reasonable doubt on exhibits E, G and P. Exhibit E is the HND Certificate of The Polytechnic Ibudan issued to the 2nd respondent; duly certified by the Institution's Registrar as a true copy. So also was exhibit G, the student record of the 2nd respondent duly certified by the stated Registrar. The 2nd page of exhibit G contains the passport photograph of Oluwayose p. Both, in the prevailing circumstances, must be presumed to be genuine and authentic documents. The passport photograph on page 2 of exhibit G was identified by RW1, the 2nd respondents friend for over forty years, as that of his friend 2nd respondent. RW1 was never challenged on his assertion. The appellant did not have any axe to grind with respect to exhibits E and G. Exhibit P is the affidavit in support of the personal particulars of the 2nd respondent for the election to the office of Governor of Ekiti State which was also duly certified. In the age declaration by the 2nd respondent's mother, it is depicted therein that at a time

the family surname of Fayose was changed to Oluwayose due to their religious belief. The deponent maintained that Ayodele Fayose and Ayodele Oluwayose is one and the same person.

In the appellant's brief of argument, it was argued that 'the petitioner/appellant is not saying that The Polytechnic Ibadan did not issue a certificate to one Oluwayose Ayodele Peter, rather the thrust of the position or contention of the petitioner/appellant is that exhibit E which the 2nd respondent submitted to INEC was never issued to the 2nd respondent as a person yet he brought same forward as his.'

On behalf of the 2nd respondent, it was pointed out that while the appellant pleaded presentation of a forged HND Certificate in its petition, it attempted to set up a new ease of impersonation in its brief of argument and same is a clear ease of summersault that is not allowed. The case of *Adegoke Motors v.Adesanya* **(1985) 5 SC 11 at 139; (1989) 3 NWLR (Pt. 109) 250 was cited in support."**

19. *On Function and scope of reply -*

A reply is the defence of the plaintiff to the case put forward by the defendant or even to the counterclaim of the defendant or to the new facts raised by the defendant in his defence to the plaintiff's statement of claim. A plaintiff is not allowed, in law, to introduce a new issue in the reply. In this case, the averment by the appellant in its reply to the 2nd respondent's reply to the petition was a clear case of an attempt by the appellant to change its case against the 2nd respondent from being that presentation of a forged HND Certificate to impersonating the

owner of the certificate. It was an effort to amend the petition when the period alowed for amendment had lapsed. The tribunal was therefore right to strike out paragraph 13 of the appellant's reply and the Court of Appeal also right to affirm the striking out. [*Olubodun v. Lawal* **(2)08) 17 NWER (Pt.1115) 1**; *Ishola, v. S .B. N.* **(1997) 2 NWLR (Pt. 488) 405 referred to.]** *(Pp. 118, paras. F-G; 120, paras. B-C)*

20. On Purpose and content of petitioner's reply to repondent's reply to petition –

Per FAB1YI. J.S.C. at pages 80-81. paras. G-H:

"Paragraphs 16 (1) (a) of the First Schedule to the Electoral Act regulates the content of the reply that may be filed by a petitioner in answer to the reply of a respondent to the petition. It provides as follows:-

"16 (1) If a person in his reply to the election petition raised new issues of facts in defense of his case which petition has not dealt with, the petitioner shall be entitled to file in the registry, within five days from the respondent's reply, a petitioner's in answer to the new issues of fact so however that:-

(a) The petitioner shall not at this stage be entitled to bring in new facts, grounds or prayers tending to amend or add to the contents of the petition filed by him, and"

I think that I should repeat it that proceedings in election petitions are sui generis. They are in a class of their own.They are made to fast-track the hearing of petitions. They are, however, not designed to spring surprise on parties.

In respect of this issue the appellant in its petition maintained that the 2"' respondent presented forged certificate to the 3rd respondent. The 2'"' respondent denied same and maintained that the certificate was not forged but earned by him in 1987. By paragraph 13 of its reply, the appellant then brought in the fresh issue of impersonation. Same was not proper. It should have come in by w ay of a due amendment of the petition which can be done within 21 days after the result of the election was declared. The appellant did not base a lee-way to aver new facts which ought to be in the original petition filed.

The court below was right when it found as follows: -

> **"It is trite that the petitioner cannot introduce new fact not contained in the petition in his reply as in the instant ease because as at the time of filing his petition, that fact is within his knowledge and if he did not adequately include it in his petition, the proper thing to do will be to amend his petition."**

I support the stance of tbe court below in not allowing the appellant the chance of springing surprise on the 2nd respondent. The court below was right in affirming the striking out of the said paragraph 13 which tried to overreach the 2nd respondent as no new facts should feature in a petitioner's reply. See: *Adepoju v. Awoduyilemi* (1999) 5 NWLR (Pt. 603) 364 at 382. It is clear that restoring the paragraph would have occasioned a great miscarriage of justice on the 2nd respondent who would have been shut out completely, He will not be able to respond at all to the weighty but belated allegation of impersonation which forms the bed-rock of

paragraph 13 of the said reply. This issue is without hesitation resolved in favour of the 2nd respondent and against the appellant."

21. *On Meaning and nature of forgery and standard of proof required thereof -*

Forgery is a criminal offence and when it is an issue in any proceeding it must he proved beyond reasonable doubt. Forgery is the noun form of the verb "forge" and to forge means *inter alia*, to make a copy or an imitation of something in order to deceive people. It means to fabricate by false imitation. (*P. 66. paras. F-G)*

22. *On Proof of forgery -*

In order to prove forgery, or that a document is forged, two documents must be produced, viz:-

(a) the document from which the forgery was made; and

(b) the forgery or the forged document.

In this ease, only one document - the allegedly forged HND Certificate - was produced. If it was forged, then the genuine document from which the forgery was made must exist. No such document was in evidence. It followed that the allegation of forgery of the HND Certificate was not proved and consequently the appellant failed to prove the allegation that the 2nd respondent presented a forged HND Certificate to INEC. *(Pp. 66-67, paras. H-B)*

23. *On Whether principle of vicarious Liabilities applies in crime –*

There is no vicarious liability in the renin of criminal law. Anyone who contravenes tin law should cany his own cross. In this case, tie 4th and 5th respondents could not therefore he Imntl answerable for the crimes alleged in the election petition to have been committed by their

unknown soldiers and policemen. *(P. 73, paras. G-H)*

Per OGUNBIYI, J.S.C. at pages 105-106, paras. D-A:

> **"It is also pertinent to state that no allegation was specifically made against the persois of the 4th and 5th respondents. Their joinder by the petitioner will appear to have stemned from a misapplication of the principl of vicarious liability which is applicable only in civil matters as opposed to where allegation of commission of crimes have been made against agents of a disclosed principal. See Adeoye v. Olorunoje (1996) 2 MAC 256 at 262 where it was held that:-**
>
> > **"it is not the law that a mastei is responsible for the crime of his servant."**
>
> **From the nature of the claim at the trihmal, the petition could effectively and effectually be determined in the absence of the 4th and 5th respondents. In the absence of any agency relationship between INEC and the 4th and 5th respondents coupled with the failure of the appellant to establish any act of malfeasance against the 4th and 5th respondents in lite circumstance, all arguments proffered by the appellant's counsel relating them are merely academic. See *C.P.C v. INEC* (2012) All FWLR (Pt. 617) 605 at 651, (2012) 13 NWLR (Pt. 1317)260**
>
> **The 4th and 5th respondents in the circumstance are not parties therefore within the contemplation of the Electoral Act and the upholding of the striking out of their names by the lower court had not occasioned any miscarriage of justice."**

24. *On Constitutionally permitted means of proviny guilt of a person and imposing punishment –*

The trial and conviction by a court is the only constitutionally permitted way to prove a person guilty and therefore the only ground for the imposition or criminal punishment or penalty for the disqualification for embezzlement of fund. Apart from the court or the Code of Conduct Tribunal, as the case may be, no administrative panel can find a person guilty of any criminal allegation because they lack the machinery and mechanism to do so in view of section 36(1) of the Constitution of the Federal Republic of Nigeria 1999 (as amended). (*A.C. v. INEC* **(2007) 12 NAVLR (Pt. 1048) 222**; *Ahmed v. Ahmed* **(2013) 15 NWLR (Pt. 1377) 274**. *(Pp. 124-125, paras. C-A*)

Per OKORO, J.S.C. at page 125, paras. R-F:

> **"It must he noted that a judicial commission of inquiry or an administrative panel is not the same thing as a court of law or its equivalent. The hierarchy of courts in this country makes it possible for a person w rongly convicted to appeal his conviction even to the Supreme Court. This right is protected by the Constitution. It is not so with administrative tribunals. See** *Amaechi v. INEC* **(2008) 5 NWLR (Pt. 1080) 227.This court held in** *Hon. Polycarp Effiom & Ors v. Cross River State Independent Electoral Commission &* ***Anor*** **(2010) 14 NWLR (Pt. 1213) 106 at 132 paras. E to G in the same direction. It states, per Tabai, JSC**:
>
> > **For the purpose of establishing a person's disability from holding an elective public office such as President, Governor, Chairman of Council therefore etc, it is not enough to allege that the person had been inflicted for embezzlement or fraud by a judicial commission of inquiry or an Administrative Panel of Inquiry or a tribunal. Such an**

assertion remains a mere allegation and no more. To amount to a disability, it must be established that the person claimed to have been so indicted, was tried and found guilty to the alleged embezzlement or fraud by a court or other tribunal established by law as stipulated by sections 6 and 36 of the 1999 Constitution.'''

25. **NOTABLE PRONOUNCEMENTS:**

On Need re reform ihv process of inipttieiuiieiit to ensure thai a Governor impeached does not return to contest election -

Per NGWUTA, J.S.C. at pages 69-70, paras. G-B:

"I think that the procedure of impeachment should he modified in a manner that would protect the mandate given by the electorate and to ensure that a governor who is impeached and removed from office does not contest the election to return to the exalted office for w hich he was found unworthy.

The signatures of a simple majority of those who voted at the election should hack the allegations of gross misconduct against the governor before a panel can be set up to investigate same. The same process should be followed in approving the result of the panel. Once the governor is removed he should be charged to court and if convicted, he should be banned from contesting any election. This will ensure that the legislature does not engage in forum shopping to secure a panel that will find in its favour. It will ensure that once a person is found unworthy, he does not return to desecrate the exalted office of State Governor."

Per RHODES-VIVOUR, J.S.C. at page 102, paras.C-H:

"The Court of Appeal made a very important and serious observation when it said:

> **"We however wish to observe in passing that the essence of impeachment was to identify somebody who is not fit to hold public office, but is rather sad and unfortunate that after finding one, the law appears- reluctant to give the desired punch. It is hoped that in future this issue will he reviewed by the appropriate authority."**

There is nothing wrong with the Constitution. On the contrary, the law gives the required punch, and there is nothing to be reviewed. The problem lies with our institutions which are too weak. A Governor impeached for stealing (embezzlement of funds) ought to be prosecuted in a competent court or Code of Conduct Tribunal. See section 182(1) (d) and (e) of the Constitution, f ailure to do that amounts to grave lapses and abandonment of duties by the authorities concerned and an impeached Governor would be allowed to contest elections again, as a result of our weak institutions.

Impeachment can never be listed under section 182 of the Constitution as a ground for disqualification, but a Governor, etc impeached for dishonesty or fraud (i.e. criminal offences) and taken before a competent court of the Code of Conduct Tribunal would be disqualified by Ihe provisions of section 182(1) (d0 and (e) if he is convicted and sentenced for the offence/s for which he was impeached."

26 *On What amounts to finding of court for purpose of appeal -*

Findings of court properly so-called are made in respect of an issue before the court. In the instant case, the issue of deployment of soldiers or whether- or not such deployment was lawful was not a matter properly before the tribunal or the Court of Appeal as the person who made the deployment was not named. At best, what the appellant dubbed crucial finding of the Court of Appeal was a comment which amounts to obiter dictum. (Pp. 62-63. paras H-B)

27. *On Whether appeal can arise from "obiter dictum" –*

An *obiter dictum* **cannot be the basis for raising a ground of appeal from which an issue can be framed. Tie comment is not a ratio decidendi of the decision appealed against,** [*Ede v. Omeke* ***(1992) 5 NWLR (Pt. 242) 428***; *Igwe v. A.I.C.E., Owerri* ***(1994) 8 NWLR (Pt. 363) 549*** **referred to.]** (P. 63, para. B)

28. *On Attitude if the Supreme Court to concurrent finding of lower courts -*

The law is strictly cautious that concurrent decision should not le interfered with in the absence of the appellant slowing that it is perverse, wrongful or unsupportakle either in fact or in law. In this case, the decision of the two lower courts concerning the striking out of the names of the 4th and 5th respondents and the paragraphs of the petition where their names were mentioned were concurrent, *(P. 105. paras. B-C)*

Nigerian Cases Referrec to in the Judgment:

A.C. v. INEC (2007) 12 NWLR (Pt. 1048) 220

A.C.N v. I.N.E.C. (2013) 13 NWLR (Pt. 1370) 101

A.C.N. v. Lamido (2012) 8 NWLR (Pt. 1303) 560

A.D. v. Fayose (2005) 10 NWLR (Pt. 932) 151

Abaribe v. Abia State House of Assembly (2002) 14 NWLR (Pt. 788) 466
Adegoke Motors v. Adesanya (1989) 3 NWLR (Pt. 109) 250
Adeoye v. Olorianoje (1996) 2 MAL 256
Adepoju v. Awoduyilemi (1999) 5 NWLR (Pt. 603) 364
Ahmed v. Ahmed (2013) 15 (14. 1377) 274
Ajide v. Kelami (1985) 3 NWLR (Pt. 12) 248
Akindipe v. State (2012) 16 NWLR (Pt. 1325)
Ali v. State (2012) 7 NWLR (Pt. 1299) 209
Amaechi v. I.N.E.C (2O08) 5 NWLR (Pt. 1080) 227
B.A.T. (Nig.) Ltd. v. Int'l Tobacco Co. Ltd. (2013) 2 NWLR (Pt. 17-30) 493
Balonwu v. A.-G., Anambra State (2009) 18 NWLR (Pt. 1172) 13
Buhari v. INEC (2008) 18 NWLR (Pt.1129) 349
Buhari v. Obasanjo (2003) 17 NWLR (Pt. 850) 587
Buhari v. yusuf (2003) 14 NWLR (Pt. 84 1) 446
CPC. v. INEC (2012) 13 NWLR (Pt. 1317) 260
Ede v. Omeke (1992) 5 NWLR (Pt. 242) (28
Effiom v. C.R.S.I.E.C. (2010) 14 NWLR (Pt. 1213) 106
Egolum v. Obasanjo (1999) 7 NWLR (Pt. 611) 355
Fawhinmi v. I.G.P. (2002) 7 NWLR (Pt. 767) 606
Gar*ba v. University of Maiduguri* (1986) 1 NWLR (Pt 18) 550
Green v. Green (1987) 3 NWLR (Pt. 61) 480
lgwe v A.I.C.E., Owerri (1994) 8 NWLR (Pt. 363) 549
Iko v. John Holt & Co. (1957) SCNLR 107
Ishola v. SGB (Nig.) Ltd. (1997) 2 NWLR (Pt. 488) 405
Kalu v. Chukwumerije (2012) 12 NWLR (Pt. 1315) 425
Laoye v F.C.S.C. (1987) 2 NWLR (Pt.106) 952
Musa v. Speaker, Kaduna State House of Assembly (1982) 3 NCLR 450
Nwobodo v. Onoh (1984) 1 SCNLR 1
Ochemaje v. State (2008) 15 NWLR (Pt. 1109) 57
Ogboru v. Uduaghan (2011) 17 NWLR (Pt. 1277) 727
Oyguonzee v. State (1998) 5 NWLR (Pt. 551) 521
Olawoye v. Jimoh (2013) 13 NWLR (Pt. 1371) 362
Olubodan v. Lawal (2008) 17 NWLR (Pt.1115) 1
Omoworare v. Omisore (2010) 3 NWLR (Pt. 1180) 58
Ransome-Kuti v. A.-G., Fed. (1985) 2 NWLR (Pt. 6) 211
State v. Onyeukwu (2004) 14 NWLR (Pt. 893) 340
Tinubu v. I.M.B. Securities Plc (2001) 16 NWLR (Pt. 740) 670

Foreign Case Referred to in the Judgment:

Mcfoy v. UAC (1962) AC 152

Nigerian Statutes Referred to in the Judgment:

Constitution of the Federal Republic of Nigeria, 1999 (as amended) Ss. 6, 36(1)(5), 66(1)(d)(h), 153(1). 182(1)(d)(e), 188(5)(8)(9), 214(1), 217(1), 276, para. 18, Fifth Schedule and Part 1, Para. 15(1), Fifth Schedule

Criminal Code Act, S. 486

Electoral Act, 2010 (as amended), Ss. 38, 132(3), 137(1)(2)(3)

Paragraph 16(1)(a), 1st Schedule to the Electoral Act

Evidence Act, 2011. S. 135(1)

Nigerian Rules of Court Referred to in the Judgment:

Supreme Court Rules, O. 6 r. 5(3)

Books Referred to in the Judgment:

Black's Law Dictionary, Special Deluxe, Fifth Edition, P. 585

Oxford Advanced Learners Dictionary, P. 462

Appeal and Cross-appeal:

This was an appeal against the judgment of the Court of Appeal which dismissed the appellant's appeal from the decision of the Ekiti State Governorship Election Trihunal which had dismissed the petition of the appellant challenging the return by the 3rd respondent of the 2nd respondent as the duly elected Governor of Ekiti State at the gubernatorial election held in Ekiti State State on 21st June 2014.

The 1st respondent cross-appealed against some aspects of the judgemnet of the Court of Appeal.

The Supreme Court, in a unanimous decision, dismissed the appeaI and allowed the cross-appeal in part.

History of the Case:

Supreme Court:

Names of Justice: that sat on the appeal: John Afolabi Fabiyi, J.S.C. [Presided); Suleiman Galadima. .J.S.C.; Olabode Rhodes-Vivour, J.S.C.; Nwali Sylvester

Ngwuta, J.S.C. (Read the Leading Judgment); Clara Bata Ogunbiyi, J.S.C.; Kumai Bayang Aka'ahs. J.S.C.; John Inyang Okoro, J.S.C.

Appeal No.: SC.113/2015

Date of Judgment Tuesday, 14th April 2015

Names of Counsel: L. O. fagbemi, SAN (with him, Chief Akin Olujinmi, SAN, Oluwarotimi Akeredolu, SAN H.O. Afolabi, SAN, Olusola A. Dare, Sikiru Adewoye, A. O. Popoola. A. F. Yusuf, R. Isamotu, R.O. Balogun, B.A. Oyun, Kabiru Akingbolu, Akeem Umoru, M.A. Adelodun, Lateefah Abdulkareem [Miss], E.A. Uwa, O. T. Olujide-Poko, Akinsola Olujinmi, Abayomi Abdulwahab, Ricardo Ebikade) - for the Appellant/Cross-Respondent

E.R. Emukpoeruo (with him, Olatunji Adeoti) - for the 1st Respondent /Cross-Appellant

Yusuf Ali, SAN, (with him, Pius Akubo, SAN, Adebayo Adelodun, SAN, Obafemi Adewale, Akin Oladeji, Prof. Wahab Egbewole, Ayo Olanrewaju. K. K. Eleja. Tafa Ahmed, B.R. Gold, Yakub Dauda, Alex Akoja, S. O. Babakebe, K.T. Sulyman [Miss], Patricia Ikpegbu [Mrs.], K.O. Lawas, Adeyemi Adewumi, lbrahim Alabidun, Haleemah Suleiman (Miss), Lawal O. Rafiu) for the 2nd Respondent/Cross-Appellant.

Eyitayo Fatogun - for the 3rd Respondent

Abayomi Sadiku (with him, Adetayo Adeniyi) - for the 4th Respondent

Chief Olusola Oke (with him. O. K. Akuiyibo) - for the 5th Respondent

Olalekan Ojo (with him, A. F. Yusuf) - for the 1st Cross-Respondent

Court of Appeal:

Division of the Court of Appeal from which the appeal was brought: Court of Appeal, Abuja

Names of justices that sat on the appeal: Abdu Aboki, J.C.A. (Presided and Read the Leading Judgement); Jummai Hannatu Sankey, J.C.A.; Joseph Shagbaor Ikyegh, J.C.A.; Ita George Mbaba. J.C.A.

Appeal No.: CA/EPT/GOV./01/2015

Date of Judgment: Monday, 16th February 2015

Names of Counsel: E Rober Emukpoeruo, Esq.; Kolapo Kolade, Esq.; Olatunji Adeoti, Esq.; Peter Nwatu, Esq.; Ojediran lleoluwa, Esq.; - for the Cross Appellant

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Wilcox Abereton, Olubunmi Ipinlaye - for the 3rd Cross Respondent

Abayomi Sadik, Adetayo Adeniyi - for the 4th Respondent

Chief Olusola Oke, N. O. Ogunleye, Gbadebo Ikuesan - for the 5th Crass Respondent

Tribunal:

Name of the Tribunal: Governorship Election Petition Tribunal, Ekiti State

Names of Members: M. I. Sirajo, J (*Chairman*); Isah J. Gantsa, J. member, C. H. Ahuchaogu, J.

Petition No: EPT/EKS/GOV./01 /2014

Date of Judgment: Friday, 10th December 2014

Names of Counsel: R. O. Baloyun (with him, A. 0. Popoola, David Ojo, M. A. Adelodun, O. J. Lateefah Abdulkareem [Miss] and Daniel Odubitan) - for the Petitioners

Kolapo Kolade (with him, Olatunji Adeoti) - for the 1st Respondent

P. A. Akubo, SAN (with him. Obafemi Adewale, Ayo Olanrewaju. S. O. Babakebe, A. Nkechinyere [Mrs.|, Patience Adejoh [Miss) and A. 0. Usman) - for the 2nd Respondent

Dr. Onyechi Ikpeazu, SAN (with him, Ebuka Nweze, Obinna Onusia, Julius Mba and Amanzi Amanzi) - for the 3rd Respondent

Chief A. O. Ajana (with him, S. G. Ikuesan) - for the 5th Respondent

Counsel:

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[Miss], Lawal O. Rafiu) - for the 2nd Respondent/Cross-Appellant.

Eyitayo Fatogun - for the 3rd Respondent

Abayomi Sadiku (with him, Adetayo Adeniyi) - for the 4th Respondent

Chief Olusola Oke (with him. O.K. Akuiyibo) - for the 5th Respondent

Olalekan Ojo (with him. A. F. Yusuf) - for the Cross-Respondent

NGWUTA, J.S.C. (Delivering leading Judgment): On the 21st day of June, 2014 the 3rd respondent (INEC) conducted governorship election in all the wards of the 16 Local Government Areas of Ekiti State. Eighteen political parties, including the appellant and 1st respondent, contested the election through their respective candidates.

The result of the election showed that the 2nd responded sponsored by his party, the Peoples Democratic Party (PDP) won

with a total of 203,020 votes against a total of 120,433 scored by his closest rival a candidate of the main opposition party in the country, the All Progressive Congress (APC), the appellant in this appeal.

Though its candidate at the election, John Olukayode Fayemi, accepted the result of the election and did congratulate the winner, Ayodele Peter Fayose of the PDP as shown in the record, the A PC did not accept the result and challenged same at the Governorship Election Tribunal constituted for Ekiti State in petition No. EPT/ EKS/GOV/01/2014 as the sole petitioner.

In its petition, the petitioner averred, *inter alia:*

> "… that the election was marred with irregularities that are unprecedented in the annals of elections in this country as 'photo chromic' and 'thermo chronic' ballot papers already programmed to favour the 1st and 2nd respondents in all the polling units, were used."

Specifically, the petitioner (now appellant) predicated his petition on the following grounds:

"(i) The 2nd respondent was not duly elected by majority of lawful votes cast at the election.

(ii) The election of the 2nd respondent is invalid by reason of corrupt practice.

(iii) The election of the 2nd respondent is invalid by reason of non-compliance with the provisions of the Electoral Act 2011 as amended and the Manual of Election Officials 2014 and the Constitution of the Federal Republic of Nigeria 1999 (as amended).

(iv) The 2nd respondent was not qualified to contest as at the time of the election on the following grounds:

(a) The 2nd respondent was found guilty ot the contravention of the Code of Conducts by the impeachment panel set up by the Acting Chief Judge of Ekiti State on allegation of cross misconduct involving embezzlement of funds preferred against him by the Ekiti State House of Assembly consequent upon which he was impeached and removed from office of the Governor of Ekiti State in the year 2006.

(b) The 2nd respondent presented a forged Higher National Diploma (HND) Certificate of The

Polytechnic lbadan in the 3rd respondent (INEC)."

Not only did the appellant as petitioner adopt the facts averred in paragraphs 1 to 35 of the petitioner, as facts in support if the grounds of the petition, it also made and relied on specific averments in respect of some Local Government Areas in the State.

Based on the facts stated in its petition the appellant (as petitioner sought the following reliefs:

"A. That it be determined and declared that the 2nd respondent, Peter Ayodele Fayose, was not qualified to contest the Governorship election held on 21st June, 2014 on the ground that he was found guilty of the contravention of the code of conduct by the impeachment panel set tip by the Acting Chief Judge of Ekiti State and the Ekiti State House of Assembly, consequent upon which he was impeached and removed from the office of the Governo of Ekiti State in the year 2006.

B. That it may be determined that the 2nd respondent presented a forged certificate of Higher National Diploma (HND) of The Polytechnic lbadan to the Independent National Electoral Commission thus was not qualihed to contest the election.

C. That it be determined and declared that the 2nd respondent Peter Ayodele Fayose was not duly elected or returned by the majority of lawful votes east at the Ekiti State Governorship Election held on Saturday 21st June 2014.

D. That it may be determined that having regards to the non-qualification of the 2nd respondent to contest the election, the 3rd respondent ought to have declared the candidate of the petitioner, Joint Olukayode fayemi who scored the highest number of lawful vote cast at the election, as the winner of the election.

E. An order of the tribunal withdrawing the Certificate of Return to the issued to the 2nd respondent by the respondent and present the Certificate of Return to the candidate of the petitioner, John Olukayode Fayemi who scored the majority of valid votes cast and having met the constitutional requirements as required by law."

In the alternative the petitioner (now appellant) asked for:

> "An order nullifying the Governorship Election held on 2nd June 2014 and a fresh election ordered."

Upon service of the petition on them the respondents filed their replies, denying all the material averments therein.

At the end of the trial, the tribunal considered the relevant materials before it as well as the addresses of learned counsel representing the parties and came to the conclusion that:

> "On the whole, all the relevant issues arising from the grounds upon which this petition is predicated and the reliefs sought therein having been resolved against the petitioner, the petition is hereby dismissed for lacking in merit."

The judgment dismissing the petition by the three-man tribunal was unanimous. Aggrieved by the judgment, appellant appealed to the Court of Appeal Ekiti Judicial Division.

Also the 1st respondent aggrieved by the order of the tribunal over ruling its preliminary objection to the *locus standi* of the appellant/cross-respiindent cross-appealed same to the Court of Appeal Ekiti Judicial Division.

In a unanimous decision the court below dismissed the appeal in the following terms:

> "Even though some of the issues relating to the handling of the trial by the tribunal were resolved favour of the appellant, those errors did not occasion a miscarriage of justice. Thus having resolved the substantive issues of disqualilieation and return as wll as forgery against the appellant, we are of the opinion that there is no merit in this appeal and it is hereby dismissed. The judgment of the tribunal delivered on 19th December, 2014 is hereby affirmed."

With reaped to the cross-appeal, the lower court said:

> "In the result, having resolved as above in respect of the two issues, the cross-appeal succeeds in part in the following terms:
>
> 1. The election tribunal acted rightly when it held that the 1st cross-respondent had a right under the electoral Act. 2010 (as amended) and was competent to claim all the reliefs contained in the petition in

spite of the non-joinder of the gubernatorial candidate as a co-petitioner.

2. The election tribunal was in error to hold that the allegation of the 1st cross-respondent on the issue of disqualification of the 2nd cross-respondent was founded on the contravention to the code of conduct and not on impeachment. The cross-appeal succeeds in part."

Again, appellant felt aggrieved and appealed to this court on the 14 grounds of appeal endorsed on the notice of appeal filed on 27/2/2015. Also the 1st respondent was aggrieved by part of the judgment of the court below and cross-appealed same on ten grounds endorsed on the "notice of appeal" (which should have been headed notice of cross-appeal) filed on 27/2/2015.

There is also another "notice of appeal" filed on 27/2/2015 by the 1st respondent. It has seven grounds of appeal (cross-appeal). Mr. Peter Ayodele Fayose filed the 3rd cross-appeal on 2/3/15 on live grounds of appeal.

In compliance with the rules of this court, learned counsel for the parties in the main appeal and cross-appeals filed and exchanged briefs of argument.

In his brief of argument, learned senior counsel for the appellant distilled the following seven issues from the appellant's grounds of appeal for the court to resolve:

"(1) Whether the Court of Appeal was right in its decision that the 4th and 5th respondents were not necessary parties to the petition in the light of the pleadings and liiulmgs made by the Court of Appeal and whether INEC ought to take responsibility for their actions" (Grounds 11,12 and 13).

(2) Whether the Court of Appeal was right in its decision that the appellant based its petition on impeachment, and whether the decision in Omoworare v. Omisore (2010) 3 NWLR (Pt. 1180) 58 was rightly applied to this case by the Court of Appeal? (Grounds 2, 4, 5 and 7).

(3) Whether the Court of Appeal was right that the appellant did not prove disqualifying ground under section 182(1) (e) of the Constitution of Nigeria. 1999 (as amended) against the 2nd respondent? (Grounds 1, 3 and 6).

(4) Whether the Court of Appeal was right in its decision that the appellant did not prove the allegation of forged HND Certificate by the 2nd respondent to INEC? (Ground 8).

(5) Whether the Court of Appeal wars right in us decision that the case of *Alliance for Damocracy v. Fayose* (2004) All FWLR (Pt. 222) 1719 at 1744-46; (2005) 10 NWLR (Pt. 932) 151 has settled the issue of authenticity of HND Certificate presented by the 2nd respondent to INEC? (Ground 9).

(6) Whether the Court of Appeal was right in its decision affirming the striking out of paragraph 13 of the appellant's reply to the 2nd respondents reply to the petition? (Ground 10).

(7) Whether the Court of Appeal was right when it failed to nullify the Governorship Election for Ekiti State held on the 2nd June, 2014 in spite of its findings that soldiers were unlawfully depleted and used for the election? (Ground 14)."

Learned counsel for the 1st respondent formulated four issues for determination by the court:

"1 Whether the court below was in error to hold that the appellant did not make out a case in its pleadings of prove the disqualifying ground under section 182 (1) (e) of the 1999 Constitution as amended. (Grounds 1-7).

2 Whether the court below was in error to affirm the decision of the tribunal that the appellant failed to prove its allegation that the 2nd respondent presented forged certificate of The Polytechnic Ibadan to the 3rd respondent. (Grounds 8 and 9).

3 Whether the court below was in error to affirm the decision of the tribunal striking out paragraph 13 of the petitioner's reply to the 2nd respondents reply. (Ground 10).

4 Whether the court below was in error to affirm the decision of the tribunal striking out tlte names of the 4th and 5th respondents and in not nullifying the gubernatorial election of June 21st 2014. (Ground 11, 12, and 14)."

The learned Silk for the 2nd respondent presented, the five issues hereunder reproduced:

"1. Whether the learned Justices of the Court of Appeal were not right in agreeing and coming to the conclusion that the appellant relied on the alleged impeachment of the 2nd respondent as one of the grounds of disqualification and in holding that the allegation of contravention of code of conduct relied upon by the appellant was not proved and whether the reliance of the Court of Appeal on the decision in *Omoworare v. Omisore* was not right. (Grounds 1-7).

2 Whether the Court of Appeal was ma right in holding that the allegation of forgery of a Higher National Diploma (HND) Certificate by the 2nd respondent was not proved and that the ownership of the said certificate had earlier been decided in the case of *A.D v. fayose* (2004) All FWLR (Pt. 222) 1219; (2005) 10 NWLR (Pt. 932) 151. (Grounds 8 and 9).

3 Whether the Court of Appeal was not correct in its decision affirming the trial tribunal's striking out of paragraph 13 of the petitioner's reply to the 2nd respondent's reply to the petition when the said paragraph 13 was in fact filed in contravention of the applicable provision on reply and pleadings. (Ground 10).

4 Whether the Court of Appeal was not correct in its interpretation and views on the provisions of section 137 (2) and (3) of the electoral Act 2010 (as amended) by upholding the sinking out of the 4th and 5th respondents who are not statutory parties and are not agents of the 3rd respondent (INEC) and whether INEC could take responsibility for their acts. (Grounds 11, 12 and 13).

5 Whether tire mere (act that the Court of Appeal made comments on the alleged deployments of members of the Armed Forces at the election of 21st June, 2014 in Ekiti State which was not even proved would without more, lead to nullification of the election which was conducted in substantial compliance with the electoral Act and the law. (Ground 14)."

Learned senior counsel for the 3rd respondent distilled the following live issues from the appellant's grounds of appeal:

"1. Whether the Court of Appeal was right in its decision that the ground of disqualification under section 182 (1)(e) of the Constitution of the Federal Republic of Nigeria 1999 was not proved? (Grounds 1, 3 and 6).

2 Whether the Court of Appeal was right in its decision that the outcome of the impeachment process of the 2nd respondent did not constitute a ground of disqualification of a candidate under section 66 (1) (d) and (h) of the Constitution of the Federal Republic of Nigeria. 1999 as amended. (Grounds 2, 4, 3 and 7).

3 Whether the Court of Appeal was right in affirming that the criminal allegation of forgery of Higher National Diploma Certifcate by the 2nd respondent was not proved. (Grounds 8 and 9).

4 Whether the Court of Appeal was right in its decision that paragraph 13 of the appellant's reply to the 2nd respondent's reply was rightly struck out. (Ground 10).

5. Whether it was proper to have joined the 4th and 5th respondents as parties who did not qualify as statutory respondents and there being, no reliefs sought against by the appellant as petitioner before the tribunal. (Ground 11, 12, 13 and 14).

For the 4th respondent, the following three issues were presented for determination:

"1. Whether the court of Appeal was right when it upheld the tribunal's decision to the effect that the 4th respondent did not qualify as a respondent as contemplated by section 137 (2) and (3) of the Electoral Act, 2010 (as amended). (Ground 11).

2 Whether the Court of Appeal was right when it affirmed the decision of the Election Tribunal striking out the names of the 4th and 5th respondents and if striking out the names of the 4th respondent contravened his (4th respondent's) constitutional right to fair hearing. (Ground (sic) 12 and 13).

3 Whether the Court of Appeal was light when it failed to nullify the Governorship Election of Ekiti State held on the 21st day of June, 20 14. (Ground 14).”

Learned counsel for the 3rd respondent adopted the appellant's issue 1 for determination on the ground that the said issue is the only one of appellant's seven issues which relates to the issues raised and canvassed by the 5th respondent in the court below.

Learned counsel for the parties made copious submissions on the issues in their respective briefs. The learned senior counsel for the appellant made submissions in his reply briefs to the briefs filed by 1st to 5th respondents.

Learned counsel for the parties adopted and relied on the argument in their briefs including the reply briefs at the bearing of the appeal on 26th March, 2015, each earnestly urging the court to decide in favour of his clients.

At this point in the judgment there is need to scrutinize ami sanitize the issues raised by learned counsel in their briefs. Learned senior counsel formulated seven (7) issues from his 14 grounds of appeal. For the 1st to 5th respondents 5, 5, 5, 3 and 1 issues respectively were distilled for determination. Apart from the 5th respondent who expressly adopted appellant's issue 1, the 1st to 4th respondents' issues are variations of, and subsumed in, the seven issues formulated and canvassed by the appellant.

I will therefore determine the appeal on the issues in the appellant's brief. Some of the issues are so related that it will be neater to resolve them together. Issue 1 can conveniently be resolved together with the related issue 7, issues 2 and 3 are also to be resolved together; also issues on the alleged forged HND Certificate will be resolved as one issue, leaving issue 6 to be resolved alone. In summary:

Issues 1 and 7 constitute issue 1;

Issues 2 and 3 constitutes issue 2;

Issues 1 and 5 constitute issue 3;

And what was issue 5 becomes issue 4.

Appellant's 7 issues in which, as I said earlier in the judgment, the various issues submitted by the respondents are subsumed, are collapsed into 4 issues which I purpose to resolve seriatim. The two issues merged to constitute issue 1 are appellant's original issues and 1 and 7, hereunder reproduced once more for each of reference.

> "Original issue 1: Whether the Court of Appeal was right in its decision that the 4th and 5th respondents were not necessary parties to the petition in the light of the pleadings and findings made by the Court of Appeal and whetherINEC ought to take responsibility for their acts. Grounds 11, 12 and 13.
> Original issue 7: Whether the Court of Appeal was tight when it failed to nullify the Governorship Election for Ekiti State held on the 21st June, 2014 in spite of its findings that soldiers were unlawfully deplored and used for the election? (Ground 14)."

The main thrust of the appellant's argument appears to he that section 137 (2) and (3) of the Electoral Act 2010 (as amended,) is not exhaustive as to persons who can be joined as respondents to an election petition. It was argued that the section of the Electoral Act did not provide that any other constitutional or statutory body such as the police and the Armed forces against whom allegation of conduct amounting to a violation of the provision of the Electoral Act and the Constitution are made cannot be joined as respondents to defend the allegations made against them.

Reference was made to constitutionally guaranteed right of any person against whom allegations are made in a petition to defend himself. Reference was made to Egolum v. Obasanjo (1999) 7 NWLR (Pt. 611) 355 at 497 to stress the fact that no person shall be guilty of an offence without being given an opportunity to defend himself.

Appellant also relied on the case of *Kalu v. Chukwumerije* (2012) 12 NWLR (Pt. 1315) 425 at 559-560. It was emphasised that the 4th and 5th respondents are necessary respondents to the petition and could defend the allegation made against them. Appellant made reference to section 153 (1) of the Constitution (supra) for the creation of INEC, section 217 (1) for the creation of the Armed Forces of the Federation and section 214 (1) of the Constitution creating the Nigeria Police Force and submitted that INEC can not be an agent of the 4th and 5th respondents and that INEC as an independent statutory body cannot answer for the sins of the statutory bodies such as the 4th and 5th respondents.

Appellant reproduced copiously portion of the judgment of the court below and concluded that based on the court of Appeal's acknowledgement of deployment of soldier, the court below was bound to nullify the election.

In the 1st respondent's issue 4 which related to appellant's issues 4 and 7, it was contended that those who can be made respondents in an election petition under section 137 (a) and (3) fall into two classes: (1) those whose election is complained of in section 137 (2) of the Act and (2), those officers specified under Section 137 (3) of the Act by whatever designation they may be called. Reliance was placed on section 38 of the Act which amended the First Schedule to the Electoral Act.

Placing reliance B.A.T. Company Ltd. V. International Tobacco Company Ltd. (2012) LPELR 2875; reported as B.A.T. (Nig.) Ltd. V. Int'l Tobacco Co. Ltd. (2013) 2 NWLR (Pt. 1339) 493 it was contended that absence of any relief claimed against the 4th and 5th respondents in the petition made their joinder wrong. First respondent referred to page 1470 vol. 2 of the record for the finding of fact by the trial tribunal that the appellant failed to prove its allegation against the 4th and 5th respondents and noted that since this finding was not challenged in the court below, the allegation of intimidation and harassment by soldiers or policemen cannot be raised in this court.

It was submitted for the 1st respondent that since the court below endorsed the decision of the trial tribunal with regards to 4th and 5th respondents, its comments on the alleged deployment of soldiers cannot be a ground for nullifying the election.

The 2nd respondent dealt with this issue in his issues 4 and 5. It was emphasized on behalf of the 2nd respondent that no specific member of the Armed forces or the Nigeria Police Force was named in the petition and no relief was sought against the Chief of Defence Staff or the Inspector-General of Police as the 4th and 5th respondents.

With reference to page 1434 of the record, it was contended that the 4th and 5th respondents did not take part in the conduct of the election but merely provided security nor did the 4th and 5th respondents qualify as statutory respondents under section 137 (2) and (3) of the Act and that the decision of the tribunal was affirmed by the court below.

It was contended, with reliance on Buhari v. Yusuf (2003) 14 NWLR (Pt. 841) 446 at 508 that an election petition is *sui generis* and that the reliefs grantable are limited by statute in the same way as the parties who can sue and be sued. It was contended for the 2nd respondent that since no allegation was made against the persons of the 4th and 5th respondents their joinder in the petition was a result

of misapplication of the principle of vicarious liability which applies only in civil cases.

Reliance was placed on *Adeoye v. Olorianoje* (1996) 2 MAL 256 at 262 to the effect that a master is not responsible for the crime of his servant. It was argued that the petition could be effectively and effectually determined in the absence of the 4th and 5th respondents and so they are not necessary parties. With reference to appellant's issue 7 distilled from ground 14, it was contended that the comments of the court below did not amount to a specific finding or pronouncement by the said court but only an *obiter which* cannot lorm the basis of a ground of appeal.

Reference was made to Balonwu v. Governor Anambra State (2010) All FWLR (Pt. 503) 1206 at 1229; (2009) 18 NWLR (Pt. 1172) 13. It was further argued that mere deployment of soldiers even though deprecated by the court below is not evidence that such deployment substantially affected the outcome of the election in any way. The court was urged to resolve the issue against the appellant.

The 3rd respondent dealt with issue 1 in its issue 5 but appeared to have ignored appellant's issue 7 which now forms part of issue 1. It was argued for the 3rd respondent that the petition did not name any officer of any security agency who was involved in the acts alleged therein, and no relief was claimed against the 4th and 5th respondents in the petition. It was also argued that section 137 (3) of the Electoral Act does not extend to the 4th and 5th respondents in respect of the criminal allegation made against soldiers and policemen and that there is no vicarious liability in crime.

Reference was made to Chief Rex Olawole v. Engr. Raphael jimoh & ors (2013) LPELR 20344, reported as olawoye v. Jimoh (2013) 13 NWLR (Pt. 1371) 362 in support contention that the 4th and 5th respondents were wrongly joined as parties. Third respondent urged the court to resolve the issue against the appellant.

The 4th respondent dealt with issue 1 in its issues 2 and 3; though issues 1 and 2 were argued together, it was argued for the 4th respondent that the trial tribunal upheld the preliminary objection to the joinder of the 4th and 5th respondents and the decision was affirmed by the Court of Appeal resulting in a concurrent finding of facts by the two courts below. Reliance was placed on section 137 (2) and (3) in the contention that the 4th and 5th respondents were not in the two classes of persons envisaged therein.

It was further submitted that appellant did not appeal the determination on merit made by the tribunal that the 4th respondent

was not a party and consequently the appellant cannot urge the court to rely on any act of the 4th respondent to nullify the election since it was not a party to the petition.

The 5th respondent adopted the appellant's issue 1 as originally formulated since only the issue referred to the 5th respondent. It was argued that the tribunal rightly struck out the 5th respondent for the following reasons:

(i) It was not a necessary party.

(ii) No allegation of wrongdoing was made against it and it cannot be held liable vicariously for acts of crimes alleged against unnamed Policeman, and

(iii) No relief in the petition was sought against it.

It was noted that the court below affirmed the above decision and there was no perversity shown to oblige this court to interfere with the concurrent findings of the two courts below.

Issue 2 is a merger of appellant's issues 2 and 3. It queries the decision of the court below that the petition was predicated on impeachment rather than disqualification of the 2nd respondent under section 182 (1) (e) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) and impugns the decision of the court below that the disqualifying factor in section 182 (1) and (e) of the Constitution was not proved.

It was submitted for the appellant thus: That the tribunal accepted the case of the appellant that the ground of the petition was breach of the rode of conduct and not impeachment .The Court of Appeal erred and misrepresented the judgment of the tribunal by purporting to affirm the decision of the tribunal that the result of the impeachment is not a ground for disqualification under section 182 (1) (e) of the Constitution, and that this error led the court below to wrongly apply the decision in *Amoworare v. Omisore* (2010) 3 NWLR (Pt. 1180) 58 in which it was held that the impeachment relied on as a ground of the petition is not a disqualifying factor in an election petition.

It was argued that a holistic look at section 182 (1) (e) of the Constitution will reveal that the intention of the law makers is that a panel set up by House of Assembly and the House itself can find a governor guilty of a breach of code of conduct. It was contended that it is not exclusive duty of the law court or Code of Conduct tribunal to determine that a governor has committed a breach of the Code of Conduct.

It was stressed that the words “conviction and sentence” in the first arm of the provision and the use of "or" shows that the 1st arm is used as alternative to the 2nd arm which does not involve “conviction and sentence”. It was emphasised that each of the two arms of section 182 (e) constitutes a disqualification. Reference was made to the record for the finding of guilt returned by the impeachment panel and the removal of the 2nd respondent by the House of Assembly based mi the finding.

It was also contended that the appellant duly pleaded relevant facts and tendered relevant documents in proof of the ground of petition and reliance was placed on exhibit H, the result of unsuccessful attempt by the 2nd respondent to vacate the finding that he was guilty of contravention of the code of conduct at the Court of Appeal Benin that struck out his claim. The court was urged to resolve the issue in favour of the appellant.

The 1st respondent dealt with this issue in its issue 1. The 1st respondent relied on appellant's paragraphs 35 (iv) (a) and 110 - 120 of the petition in its argument that the petition as a whole did not make a case under section 182 (1) (e). Reference was made to the 1st respondent's pleading of an earlier impeachment which was constituted by the Chief Judge of Ekiti State and it was submitted that the setting up of another panel by a purported Acting Chief Judge of the State is unconstitutional and the result thereof suffers the same fate.

Pursuant to paragraph 18 of the fifth Schedule to the Constitution Part 1 it was argued dial a guilty verdict of contravention of the Code of Conduct cognizable under section 182 il)(e) of the 1999 Constitution must be a verdict returned by the Code of Conduct Tribunal. The court was urged not to disturb the concurrent findings ol the two courts below.

The 2nd respondent did not specifically deal with the appellant's issues 2 and 3 merged to form issue 2.

The 3rd respondent answered issue 2 in its issues 1 and 2 but it would appear that reference to section 96 (1) (d) and (h) of the Constitution of the Federal Republic of Nigeria 1999 as amended was in error. With reference to paragraphs 35 (iv) (a), 110, 111, 118 and 119 of the petition it submitted that the petition relied on the purported impeachment of the 2nd respondent as a disqualifying factor. It was argued that neither a witness called, nor a document tendered by the appellant made reference to section 182 (1) (e) of

the Constitution and so the appellant did not prove non-qualification under the said section of the Constitution (*supra).*

The 2nd respondent relied on the judgment of the tribunal which was affirmed by the court below to the effect that exhibits M, M1, N and N1 relied on by the appellant, not being the outcome of judicial proceeding of either a regular court or Code of Conduct Tribunal cannot be the basis of disqualification of the 2nd respondent from contesting the governorship election in Ekiti State, the court was urged to resolve issues 1 and 2 in the 3rd respondent's brief against the appellant.

The 4th respondent skipped appellant's issues 2 and 3 (now issue 2). Issues 4 and 5 in the appellant's brief were collapsed into issue 3 herein. The issue is on proof *vel non* of the allegation of presentation of forged certificate to INEC and whether the authenticity of the 2nd respondent's HND Certificate was settled in *A-D. v. Fayose* (2905) All FWLR (Pt.222.) 1719 at 1744-46; (2005) 10 NWLR (Pt.932) 151.

Appellant's case is that exhibit G tendered by the 2nd respondent is the bio-data of one Oluwayose Ayodele Peter while exhibit E is the document submitted by the 2nd respondent to the 3rd respondent as the 2nd respondent's Higher National Diploma certificate. It was contended that exhibit E which the 2nd respondent submitted to INEC was never issued to 2nd respondent by The Polytechnic Ibadan. Appellant relying on Nwobodo v. Onoh (1984) 1 NSCC 1 at 3; (1984) 1 SCNLR 1 conceded the allegation relating to the HND Certificate was allegation of crime and ought to be proved beyond reasonable doubt.

Relying on *Akindipe v. State* (2012) 16 NWLR (Pt. 1325) 64 at 114 and *State v. Onyeukwu* (2004) 14 NWLR (Pt. 893) 340 at 370 appellant submitted that proof beyond reasonable doubt is not proof beyond all shadow of doubt and on the authority of *Oguonzee v. State* (1998) 5 NWLR (Pt. 351) 521 at 551, Ali v. State (2012) 7 NWLR (Pt. 1299) 209 at 235 it was submitted that proof beyond reasonable doubt can be attained by the evidence or one witness and not necessarily by a host of witnesses.

It was argued that in view of the documents before the tribunal oral evidence was irrelevant to prove the facts in the documents and that where a certified true copy of the document has been tendered the content of such document are presumed to be genuine and correct. It was argued that exhibit 5 exposed the falsity of the claim in exhibit E. It was pointed out that the 2nd respondent

is distinct and different from the person referred to in exhibit G as being from Oluyole Local Government of Oyo State.

It was also argued that requiring the appellant to procure the man named exhibit G would amount to subjecting the appellant to proof beyond all shadow of doubt. With reference to section 182(1) (sic) of the 1999 Constitution, it was argued that the 2nd respondent was disqualified from contesting the election of 21st June, 2014 which took place in Ekiti State. It was contended that while *AD v. Peter Ayodele Fayose* (supra) decided the alleged non-possession of the basic educational qualification to contest the election whereas the present petition charged the 2nd respondent with presentation of a forged HND Certilicate to INEC and since the parties and the questions decided are not the same issue estoppel cannot apply in the present case. It was argued that the earlier decision cannot be relied on in this case as the decision was not a final decision, and that the court below was wrong to have relied on it.

The 1st respondent answered the issue of forged certificate in its issue 2 which is said to relate to appellant's issues 4 and 5 (herein issue 3). In dealing with the issue 1st respondent referred to exhibit E, the HND Certificate issued by the Polytechnic Ibadan to the 2nd respondent and certified by the Registrar of the Institution, exhibit. G - the student record of the 2nd respondent on the second page of which is the passport photograph of the 2nd respondent which certilied by the Registrar of the institute, exhibit P is the affidavit in support of the petsonal particulars of the 2nd respondent also certified by AG Director Legal Services of INEC.

It was urged on the court to accept the contents of the documents to be true and correct. With reference to the evidence of one Mrs Victoria Oluwayose (formally Fayose) it was contended that Ayodele Fayose and Ayodele Oluwayose is one and the same person. The witness swore that she is the mother of Mr. Ayodele Fayose. The court was urged to affirm the current finding of the two courts below that the appellant failed to prove that the 2nd respondent presented a forged certificate to INEC especially as Nsofor, JCA had decided the issue in *A.D v. Fayose* (supra) m that the petitioner in the said case failed to produce the Ayodele Peter Oluwayose to claim the certificate as his. The court was urged to resolve the issue against the appellant.

The 2nd respondent dealt with the issue of proof of allegation of forged certificate allegedly presented to INEC in his issue 2. On behalf of 2ndrespondent, reliance was placed on *AD v. Fayose*

(supra) for reliance on the principle of *res judicata* in view of the earlier decision. In any case, it was submitted that the allegation of forgery being one of a crime was not proved beyond reasonable doubt by virtue of section 486 of the Criminal Code Act and section 135 of the Evidenee Act dealing with onus of proof in criminal cases.

It was argued that the decision of the tribunal that the allegation was not proved and the affirmation of the decision by the court below constitute concurrent findings of fact with which this court cannot interfere as no perversity has been demonstrated by the appellant. Reference was made to page 1938 of the record for the decision of the court below that the appellant did not make a *prima facie* case for the 2nd respondent to rebut by adducing evidence.

The 2nd respondent argued that the parties herein are the same as the parties in *A.P. v. Fayose (supra*) as the court can take judicial notice of the fact-of the metamorphosis of the defunct Alliance for Democracy into the Action Congress of Nigeria and later to be All Progressive Congress, the appellant herein. The 2nd respondent urged the court to resolve the issue against the appellant.

The issue of the criminal allegation of forgery was dealt with by the 3rd respondent in its issue 3. It was stated that the court below was right in affirming the decision of the tribunal that the allegation was not proved beyond reasonable doubt in accordance with seetion 135 (1) of the Evidence Act, 2011. Reliance was placed on *ACN v INEC* (2013) 13 NWLR (Pt. 1370) 161 at 185, *Nwobodo v. Onoh (supra*)

On the appellant's argument that the 2nd respondent ought to have testified in his defence. It was argued that the burden of proof of the allegation of crime rests on the person who made the allegation as the accused person does not have to prose his innocence. The court was urged to resolve the issue against the appellant.

The 4th and 5th respondents skipped the issue in their respective briefs.

Issue 6 as originally formulated (now issue 4) questions the affirmation by the court below of the order striking out paragraph 13 of the appellant's reply to 3rd respondent's reply to the petition. Appellant referred to paragraph 16(1) (A) of the First Schedule to the Electoral Act 2010 on raising new issue in a party's reply. Reference was made to paragraph 109 of the petition and the answer in paragraph 29 of the 2nd respondent's reply and the paragraph in

question - paragraph 13 of the appellant's reply to the 2nd respondent's reply to the petition.

It was argued that paragraph 13 of the appellant's reply did not raise new issues but only explained an issue which a defendant could have raised so that a plaintiff or petitioner would neutralize the position taken by the defendant or a respondent. Relevance was placed on Ishola v. SGB (Nig.) Ltd. (1997) 2 NWLR (Pt. 488) 405 at 421 paras E-F and *Amaechi v. INEC* (2008) 5 NWLR (Pt. 1036) 227 at 315-316. The court was urged to rely on the concept of substantial justice to save paragraph 13 of the petitioner's reply and set aside the decision of the court below.

In dealing with this issue as issue 3 in its brief, the 1st respondent adopted the submission of the 2nd respondent on the issue and relied on the case of *Charles Ehighe Airhavbere, Maj. Gen. (Rtd) v. Comrade Adams Aliyu Oshiomhole & ors* (citation not supplied), adding that the paragraph struck out ought to have been excluded in the petition.

The 2nd respondent argued the issue in his brief as issue reproduced paragraph 13 in the appellant reply and argued that the owner of the HND Certificate being an indigene of Oluyole Local Government is a material fact and came for the first time in the petitioner s reply. It was argued that the decision of the court below the decision oi the tribunal striking out the paragraph was impeachable.

It was emphasized that it was not the case of the appellant that the HND Certificate was issued to an indigene of Oluyole Local Government of Oyo State. Refernce was made to *Adepoju v. Awoduyilemi* (1999) 5 NWLR (Pt. 603) 364 at 382. It was contended that a restoration of paragraph 13 of the appellant's reply could occasion a great injustice on the 2nd respondent who would be shut out from contesting the allegation of impersonation in the said paragraph 13. The court was urged to affirm the concurrent findings of the lower courts in striking out the said paragraph 13 of the appellant's reply.

The 3rd respondent dealt with the issue in its issue 4 in its brief. Reference was made to paragraph 16 (1) (a) of the First Schedule to the Electoral Act, 2010 regulating the contents of appellant's reply to a respondent's reply to the petition. It was argued that additional issue of presenting a certificate belonging to a different person from another State is impersonation and was raised by the appellant for the first time. It was argued that the Court of

Appeal was right to have affirmed the decision of the trial tribunal to strike out the said paragraph 13 of the appellant's reply. It was further argued that forgery is not related to impersonation. The court was urged to resolve the issue against the appellant.

The 4th and 5th respondents did not deal with the issue relating to paragraph 13 of the appellants reply to the 2nd respondent's reply in their respective briefs.

Learned senior counsel for the appellant filed appellant's reply briefs to the 1st to 4th respondents' briefs. This would appear to be in consonance with Order 6 rule 5 (3) of the Supreme Court Rules which provides, *inter alia*, that "The appellant may also file in the court and serve on the respondent a reply brief …"

The appellant may or may not file a reply brief. Appellant would need to file a reply brief only in response to a new issue raised in the respondent's brief. The intendment of Order 6 rule 5 (3) (*supra*) is not to confer a right on the appellant to repeat the argument in the appellant's brief, perhaps with a view to improving the brief or bringing in new issues upon which the respondents would have no right of reply.

It cannot be employed as a forum for laying emphasis on the arguments in the appellant's brief. Appellant ought not to repeat the issues joined in the brief either by emphasis or expatiation. That would amount to taking undue advantage of the respondent who has no right of reply. See *Ochemaje v. The State* (2008) 6-7 SC (Pt. 11) page 1; (2008) 15 NWLR (Pt. 1109) 57.

In the light of the above, can it be said that appellant's reply, briefs relate to new issues raised in the respondents' brief. I do not think so. Coach reply brief set out issues identified and argued in the respondents' brief and proceeded to re-argue the issues seriatim. To allow this practice would amount to encouraging a ding-dong affair in the filing of briefs. I will ignore the reply briefs as repetition of arguments on the issues joined and canvassed in the appellant's and respondents' brief.

Having considered all the relevant materials put before us, I will now resolve the issues in the appeal.

Resolution of issues

Issue 1 is composed of the appellant's issues 1 and 7 hereunder reproduced for case of reference:

> "1. Whether the Court of Appeal was right in its decision that the 4th and 5lh respondents were not necessary parties to the petition in the light of the pleadings and

findings made by the Court of Appeal and whether INEC ought to take responsibility for their acts. (Grounds 11, 12 and 13).

7. Whether the Court of Appeal was right when it failed to nullify the Governorship Election for Ekiti State held on the 21st June, 2014 in spite of the findings that soldiers were unlawfully deployed and used for the election? (Ground 14)."

Generally, a necessary party is one not only interested in the dispute but the matter cannot be decided fairly in his absence. See *Chief Abusi David Green v. Chief Dr. ETD. Green* (1987) 3 NWLR (Pt. 61) at 480 pages 492 and 493. What interest does the 4th respondent - Chief of Defence Staff or the 5th respondent - Inspector-General of Police have in the subject matter of the petition? In other words, what is the interest of the 4th and 5th respondents in the dispute as to who won the Governorship election held on 21/6/2014 for Ekiti State. The appellant did not show what interest any or both of them had in the result of the election. It was not even shown that either or both of them is/are indigenes of Ekiti State.

However, section 137 of the Electoral Act, 2010 as amended made provision for parties to an election petition. The section is hereunder reproduced:

"S. 137(1): An election petition may be presented by one or more of the following persons:

(a) A candidate in an election.

(b) A political party which participated in the election.

(2) A person whose election is complained of is in this Act referred to as the respondent.

(3) If the petitioner complains of the conduct of an Electoral Officer, a Presiding or Returning Officer, it shall not be necessary to join such officers or persons notwithstanding the nature of the complaint and the Commission shall, in this instance, be

(a) made a respondent, and

(b) deemed to be defending the petition for itself and on behalf of its officers or such other persons."

The Act, in section 132 (3) prohibits the joinder of electoral officer, returning officer and other staff or agents of the Commission. The Commission has the duty to answer for the

conduct of “its Officers or such other persons. By doctrine of *ejusdem generis*, those referred to as “such other persons”, permanent or temporary staff of the Commission exclude non employees of the Commission. The Commission answers for the conduct of its officers and “such other persons” even if the allegation or complaint against them is of criminal offence. Any person or group of persons outside the Commission's “officers and such other persons” not employed for the proper conduct of the election getting involved in the election process does/do so at his/their own risk. They are on a frolic of their own and the Commission has no duty to answer for their conduct.

In my view, the 4th and 5th respondents are not within the class of the Commission's officers or “such other persons” who may have been employed as permanent staff or adhoc staff in the Commission. In other words, the 4th and 5th respondents at all material times were neither “officers” of the Commission nor were they “such other persons” engaged by the Commission and it therefore follows that they are not necessary or even parties to the petition challenging the result of the June 21st, 2014 election in Ekiti state.

But assuming without conceding that the 4th and 5th respondents the necessary parties to the petition what is the claim against them? The issue of relief sought against either or both of the arise in view of the fact that in declare the petitioner winner or to nullify the election and order a fresh election in the area involved.

It does not make sense to join a party to any proceeding except a statutory party, where no complaint is made against such party. One may ask what is the complaint against either or both of the 4th and 5th respondents? The two respondents are mentioned in paragraphs 6, 7, 68, 92, 95, 99 and 101. In paragraphs 6 and 7, the status of the 4th and 5th respondents were stated. In paragraph 68 to 101 the only reference to the 4th and 5th respondents was in the phrase “officers and men of the 4th and 5th respondents”. The said officers and men were alleged to have committed semes of acts which are criminal in nature. The words “officers and men in the 4th and 5th respondents” evoke memories of the "unknown soldiers” of Dr. Mrs. Ransome Kuti fame. See *Dr. Mrs Ransome-kuti & ors v. A.-G., Federation & ors* (1985) 2 NWLR (Pt. 6) 211.

The identities of the soldiers who were alleged to have done damage to the property of the plaintiff in the case were not issues at the trial or appeals. 'The criminality of the acts of the soldiers was

not an issue at the trial of the civil matter or appeals arising therefrom. However, in the matter at hand, the soidiers against whom allegations of crime were made were unknown and cannot therefore be said to be servants of the 4th and 5th respondents in order to invoke the fiction that the master had impliedly commanded his servant to do what he did. See Iko v. John Holt & Co. (1957) 2 FSC 50 page 2004 paras. G-H, page 2091 paras. D-E; SCNLR 107.

Appellant has not shown the basis of holding the 4th and 5th respondent vicariously liable for the criminal acts of the un-named soldiers. But as I said earlier, the respondents in an election petition under the Electoral Act 2010 as amended are those persons who are officers and such other persons in the service of the Commission- The 4th and 5th respondents are neither "officers" nor "such other persons" employed by the Commission for the conduct of the election.

The second arm of issue 1 deals with the alleged crucial findings of the court below concerning the alleged deployment of soldiers at elections. However findings of court properly so-called are made in respect of an issue before the court. The issue of deployment of soldiers or whether or not such deployment is lawful was not a matter properly before the tribunal or the court below as the person who made the deployment was not named. At best what the appellant dubbed crucial finding of the Court of Appeal is a comment which amounts to *obiter dictum*. *Obiter dicta* cannot be the basis for raising a ground of appeal from which an issue can be framed. The comment is not a *ratio decidendi* of the decision appealed against. See Ede v. Omeke (1992) 5 NWLR (Pt. 242) 428. *Igwe v. A.I.C.E., Owerri* (1994) 8 NWLR (Pt. 367) 549 ratio 14.

Ground 14 of the appellant's grounds of appeal and issue purportedly raised from it are hereby struck out as incompetent. In the final result, issue 1 (originally appellant's issues 1 and 7) is resolved against the appellant.

Appellant's issues 2: Whether the Court of Appeal was right in its decision that the appellant based its petition on impeachment and therefore the decision in Omoworare v. Omisore (2010) 3 NWLR (Pt. 1180) 58 was rightly applied to this case by the Court of Appeal. (Grounds 1, 4, 5 and 7) and issue 3: Whether the Court of Appeal was right that the appellant did not prove the disqualifying ground under section 182 (1) (e) of the Constitution of Nigeria 1999 (as amended) against the 2nd respondent? (Grounds 1, 3 and 6) were merged to form issue 2.

Apart from the usual grounds of an election petition relating to majority of lawful votes, corrupt practices and non-compliance with Electoral Act. 2014 and Manual for Election Officials 2014 and the Constitution of the Federal Republic of Nigeria 1999 (as amended) in paragraph 35 (i-iv) of the petition appellant relied mostly on paragraph 35 (iv) hereunder reproduced:

> "iv. The 2nd respondent was not qualified to contest at the time of the election on the following grounds:
>
> (a) The 2nd respondent was found guilty of the contravention of the Code of Conducts by the impeachment panel set up by the Acting Chief Judge of Ekiti State on allegation of gross misconduct involving embezzlement of funds preferred against him by the Ekiti State House of Assembly consequent upon which he was impeached and removed from the office of the Governor of Ekiti State in the year 2006.
>
> (b) The 2nd respondent presented a forged Higher National Diploma (HND) Certificate of The Polytechnic Ibadan to the 3rd respondent (INEC)."

My noble Lords, with profound respect to the learned Silk for the appellant, paragraph 35 (i) (ii) (iii) appear to be peripheral matter while the petition is really predicated on paragraph 35 (iv) (a) and (b) of the petition as reproduced above. The 2nd respondent was tried by an impeachment panel. He was found guilty of contravention of the Code of Conduct. The fact that the finding of guilt relates to the Code of Conduct does not derogate from the fact that the finding is that of the impeachment panel.

It is a play on words to say that the petitioner relies on the finding of the panel but not on the panel itself. The finding relating to the Code of Conduct is a product of the impeachment panel. On the facts herein, the appellant cannot jettison the process for the product. The process - the impeachment proceedings and the product - a finding of guilt relating to code of conduct must stand or fall together. It is the impeachment that gave rise to the finding of guilt.

I share the views, of the court below that the appellant based us petition on the alleged impeachment of the 2nd respondent and this being the ease, the decision of the Court of Appeal (then the ultimate

court in governorship petition appeals) in *Omoworare v. Omisore* (supra) was rightly applied to the facts of this case.

The second arm of issue 2 calls for examination of section 182 (1) (e) of the Constitution (supra). It provides:

> "S.182 (1): No person shall be qualified for election to the office of Governor of a State if -
>
> (a) …
>
> (b) ...
>
> (c) ...
>
> (d) ...
>
> (e) Within a period of less than ten years before the date of election to the Office of Governor of a State he has been convicted and sentenced for an offence involving dishonesty or has been found guilty of the contravention of the Code of Conduct."

Now, a conviction and a sentence on one hand and a finding of guilt on the other hand are different results of proceedings before different font. The one results from proceedings before a court properly so-called while the other is a result of proceedings before a tribunal. The tribunal with powers to find anyone guilty of contravention of the Code of Conduct is not an impeachment panel. It is the Code of Conduct Tribunal established under paragraph 15 (1) of the 5th Schedule to the Constitution of the Federation 1999 (as amended).

However, this may not be the correct position of the law. There is no provision vesting exclusive jurisdiction on the Code of Conduct Tribunal over matters of contravention of Code of Conducts. But this jurisdiction cannot be shared by the Code of Conduct Tribunal with an impeachment panel which is am adhoc tribunal inferior to the Code of Conduct Tribunal, Even it it is assumed that an impeachment panel is of the same status as the Code of Conduct Tribunal, can the court rely on the finding of the panel in the circumstances of this case? A second question is:

What is the status of the impeachment panel that purportedly found the 2nd respondent guilty of a contravention of the Code of Conduct? It is on record that earlier, at the request of the Ekiti State House of Assemble, the Chief Judge of the State constituted a panel to investigate allegations against the 2nd respondent. It would appear that the House did not substantiate the allegation levelled against the

2nd respondent and so the impeachment panel gave him a clean bill of health, as it were.

This should have ended the matter in compliance with section 188 (8) of the Constitution (supra) which provides:

> "S. 188 (8): Where the panel reports to the House of Assembly that the allegation has not been proved, no further proceedings should be taken in respect of the matter."

Contrary to the mandator}' provision reproduced above, the Ekiti House of Assembly, in apparent witch hunt, procured a Judge in Ekiti State Judiciary to set up a second and unconstitutional panel to investigate the 2nd respondent a second time. It is on record that the then Chief Justice of Nigeria wrote to the Judge to say that his purported appointment as Acting Chief Judge of Ekiti State was unconstitutional and so null and void.

It follows therefore that:

(1) The second impeachment panel was m violation of section 188 (8) of the Constitution.

(2) The "Acting Chief Judge who set up the panel was not appointed in accordance with relevant constitutional provisions. At the material time he was not Acting Chief Judge and he has no powers to act as one.

(3) The unconstitutionality of his purported appointment as Acting Chief Judge of Ekiti State tainted his action in that capacity with illegality and rendered all his actions in that office, including the setting up of the panel, null and void and of no factual or legal effect.

(4) The proceedings conducted by the panel was an exercise in futility, and

(5) The finding of guilt made against the 2nd respondent is not worth the paper on which it was written.

In suspending the Chief Judge of the State and purporting to appoint an Acting Judge for the purpose of impeaching the 2nd respondent who had been cleared by an earlier panel, the Ekiti State House of Assembly acted with impunity and reckless abandon. The so-called Acting Chief Judge fared worse having sacrificed his integrity and career as a Judicial Officer for a moment of fame and glory offered to him by politicians. The issue is resolved against the appellant.

I merged appellant's issue 4 with his issue 5 to constitute issue 3. The two issues are reproduced hereunder:

> "4. Whether the Court of Appeal was right in us decision that the appellant did not prove the allegation of presentation of forged HND Certificate by the 2nd respondent to INEC (Ground 8).
>
> 5. Whether the Court of Appeal was right in its decision that the *Alliance for Democracy v. Fayose* (2004) All FWLR (Pt. 222) 1719 at 1744-46: (2005) 10 NWLR (Pt. 932) 151 has settled the issue of authenticity of HND Certificate presented by the 2nd respondent to INEC? (Ground 9)"

Forgery is a criminal olleitce and when it is an issue in any proceeding, it must be proved beyond reasonable doubt. Forgery is the noun form of the verb "forge" and to forge means, *inter alia*, to make a copy or an imitation of something in order to deceive people. See Oxford Advanced Learner's Dictionary p. 462. It means to fabricate by false imitation. See Black's Law Dictionary Special Deluxe Fifth Edition p.585.

In my view, based on the definition above, to prove dupery of that a document is forged, two documents must be produced:

(1) the document from which the forgery was made, and

(2) the forgery or the forged document.

Only one document the allegedly forged HND Certificate was produced. If it is forged, then the genuine document from which the forsery was made must exist. No such document is in evidence. It follows that the allegation of forgery of the HND Certificate was not proved and consequently the appellant failed to prove the allegation that the 2nd respondent presented a forged HND Certificate to INEC.

Exhibit E is the 2nd respondent's HND Certificate which he presented to INEC. It was issued to Oluwayose Ayodele. In exhibit G is a personal bio-data of Oluwayose Ayodele whereas in exhibit p the 2nd respondent gave his name as Ayodele Peter Fayose. Based on the apparent difference in the names on the documents, appellant argued that exhibit E was not issued to the 2nd respondent. It was pressed that Oluwayose Ayodele in exhibit E from Oluyole Local Government of Oyo State cannot be the same as the 2nd respondent, Mr. Peter Ayodele.

In his argument on the issue of identity of 2nd respondent *vis-a-vis* exhibit E and exhibit G, learned senior counsel for the appellant state:

> "Exhibit G is a personal bio-data, particulars of one Oluwayose Ayodele. It clearly shows that Oluwayose Ayodele, if any was from Oluyole Local Government of Oyo State." (*Italics mine*).

The mother of the 2nd respondent testified that the two names belong to one and the same person and the way to contradict this piece of evidence is to produce another person bearing the name Oluwayose Ayodele. Appellant was not even certain that such persons exists and that is apparent from the expression: "It clearly shows that Oluwayose Ayodele. if any was from Oluyole LG of Oyo State." This is speculation, a far cry from proof beyond reasonable doubt of the crime alleged.

The attempt to prove that the HND Certificate exhibit E was a forgery led the appellant to a different allegation of criminal act against the 2nd respondent. The substance of the appellant's argument is that the 2nd respondent impersonated Oluwayose Ayodele by presenting the later's HND Certificate to INEC. Again, the person impersonated must at one time or the other be proved to have been in existence. There was no attempt to call Oluwayose Ayodele, if another person by that name exists, to testify.

As for the authenticity of exhibit E, the HND Certificate, the court below held, *inter alia:*

> "In addition to all we have said above, the anthentieiiv of the aliened forced Higher National Diploma certificate lias been settled once and for all in the lead judgment by Nsofor, JCA. In the case of Alliance for Democracy v. Fayose (2004) All FWLR (Pt. 222) page 1719 at 1744-46; (2005) 10 NWLR (Pt. 932) 151 was held that the said HND Certificate was earned by the present respondent."

The appellant cannot run away from the fact that not only was the HND Certificate made an issue in the earlier case, its authenticity was canvassed and decided upon by the ultimate court in election petition relating to Governorship election at the time. It was a final decision. As illustrated by the learned Silk for the 2nd respondent in his brief the appellant then AD underwent a metamorphosis and became AC and finally APC.

It was the appellant in the earlier case in which the authenticity of the certificate was settled to finality and it is bound by the decision and is estopped from raising the issue in any other case. I resolve the issue against the appellant.

Appellant's issue 6 was re-numbered issue 4 and it reads:

Whether the Court of Appeal was right in its decision affirming the striking out of paragraph 13 of the appellant's reply to the 2nd respondent's reply to the petition? (Ground 10).

I will set out the relevant pleadings of the parties on this issue.

Paragraph 109 of the petition reads:

> "The 2nd respondent presented a forged Higher National Diploma Certificate of The Polytechnic Ibadan to the 3rd respondent and was thereby not qualified to contest the election and his purported election is invalid and null and void *ab initio.*"

In reply, the 2nd respondent in paragraph 79 of his reply to the petition pleaded that:

> "The respondent denies paragraph 109 of the petition and states that he did not present a forged Higher National Diploma Certificate of The Polytechnic Ibadan as the Higher National Diploma presented by him to the 3rd respondent was earned and awarded to him by the Polytechnic in 1987."

In paragraph 13 of the petitioner's reply, it was pleaded:

> "In specific response to paragraph 79 of the 2nd respondent's reply, the petitioner avers that thecertificate issue by The Polytechnic Ibadan to one Peter Ayodele Oluwajose if any, was earned and awarded to an indigene of Oyo State from Oluyole Local Government. The petitioner will at the trial rely on the admission form, transcript and other relevant documents."

My noble Lords, appellant's case in paragraph 109 of the petition is limited to a presentation of forged HND Certificate of The Polytechnic Ibadan to the 3rd respondent, INEC, an assertion which the 2nd respondent denied, adding that he earned the certificate and that the same was awarded to him by the institution in 1987. However, paragraph 13 of the appellant's reply has introduced a

completely new dimension to the ease the 2nd respondent has to meet.

It is now a case of impersonation in which the 2nd respondent was alleged to have presented a certificate issued to another person as his own. Far from being a reply to paragraph 79 of the 2nd respondent's reply to the petition, paragraph 13 of the appellant has introduced impersonation as a fresh issue without compliance with the rules and it was properly struck out by the tribunal and the court below rightly affirmed the decision of the tribunal. The issue is resolved against the appellant.

All the issues having been resolved against the appellant, the appeal is devoid of merit and it is my order that the same be, and whereby, dismissed in its entirety.

Preliminary Objections and Cross/Appeals:

The preliminary objections are ignored in order to determine the appeal and cross/appeal on the merit.

The resolution of issues in the main appeal impacted on the issues in the cross-appeal. There is therefore no need to deal with them in details.

I think that the procedure of impeachment should be modified in a manner that would protect the mandate given by the electorate and to ensure that a governor who is impeached and removed from office does not contest the election to return to the exalted office for which he was found unworthy.

The signatures of a simple majority of those who voted at the election should back the allegations of gross misconduct against the governor before a panel can be set up to investigate same. The same process should be followed in approving the result of the panel. Once the governor is removed he should be charged to court and if convicted, he should be banned from contesting any election. This will ensure that the Legislature does not engage in forum shopping to secure a panel that will find in its favour. It will ensure that one a person is found unworthy, he does not return to desecrate the exalted office of State Governor.

Appeal dismissed. The judgment of the court below which endorsed the judgment of the trial tribunal is affirmed.

The issues raised in the cross-appeals have been resolved in the main appeal.

Parties to hear their respective costs.

FABIYI, J.S.C.: This is an appeal by the appellant against the judgment of the Court of Appeal, Ekiti Division ('the court below' for short) delivered on 16th February, 2015. Therein, the judgment of the Ekiti State Governorship Election Tribunal delivered on 19th December, 2014 was, in substance, affirmed.

On 21st June, 2014, Governorship Election was conducted by the 3rd respondent. (INEC) in Ekiti State. The appellant sponsored one Dr. John Olukayode Fayemi as its Governorship candidate while the 1st respondent sponsored the 2nd respondent as its candidate. Other political parties, as well, sponsored candidates who look part m the election.

At the conclusion of the election, the 2nd respondent had a total of 203,090 valid votes. The appellant's candidate came second with a total of 120,433 votes. Having scored the majority of lawful cast and satisfied the requirements of the constitution, the rd respondent returned the 2nd respondent as duly elected on 22nd June, 2014.

The appellant's candidate threw in the towel as he declined to file any complaint against the election. The appellant, as the political party which sponsored the candidate, filed and prosecuted the petition which led to this appeal.

The tribunal garnered evidence, oral and documentary from both sales of the divide and was duly addressed by learned senior counsel/counsel to the parties. In its considered judgment delivered on 19th December, 2014, the tribunal dismissed the appellant's petition and affirmed the declaration and return of the 2nd respondent as the winner of the election.

The appellant felt unhappy with the position taken by the tribunal and appealed to the court below which heard the appeal. In its own judgment which was handed out on 16th February, 2015, the appeal was, in substance, dismissed.

The appellant has decided to make a further and final appeal to this court vide notice of appeal attended by fourteen (14) grounds. filed on 27th February, 2015.

In this court, briefs of argument were filed and exchanged by the parties. On 26th March, 2015 when the appeal was heard each senior counsel/counsel to the parties adopted and relied on the brief filed on behalf of his client and advanced oral submissions in support.

On behalf of the appellant, seven (7) issues decoded lor determination of the appeal, read as follow:-

"(1) Whether the Court of Appeal was right in its decision that the 4th and 5th respondents were not necessary parties to the petition in the light of the pleadings and findings made by the Court of Appeal and whether INEC ought to take responsibility for their acts - Grounds 11,12 and 13.

2) Whether the Court of Appeal was right in its decision that the appellant based its petition on impeachment and whet lien he decision in *Omoworare v. Omisore* (2010) 3 NWLR (Pt. 1180) 58 was rightly applied to this case by the Court of Appeal - (Grounds 2,4, 5 and 7.

(3) Whether the Court of Appeal was right that the appellant did not prove disqualifying ground under section 182(1) (e) of the Constitution of Nigeria, 1999 (as amended) against the 2nd respondent - Grounds 1, 3 and 6.

(4) Whether the Court of Appeal was right in its decision that the appellant did not prove the allegation of presentation of forged HND Certificate by the 2"d respondent to INEC - Ground 8.

(5) Whether the Court of Appeal was right in its decision that the case of Alliance for *Democracy v. Fayose* (2004) All FWLR (Pt. 222) 1719 at 1744-46. (2005) 10 NWLR (Pt. 932) 151 has settled the issue of authenticity of HND Certificate presented by the 2nd respondent to INEC - Ground 9.

(6) Whether the Court of Appeal was right in its decision affirming the striking out of paragraph 13 of the appellant's reply to the 2nd respondent's reply to the petition - Ground 10.

(7) Whether the Court of Appeal was right when it failed to nullify the gosernorfinp election for Ekiti State held on the 21st June, 2014 in spite of its findings that soldiers were unlawfully deployed and used for the election - Ground 14."

On behalf of the 1st respondent, four (4) issues distilled for a due determination of the appeal read as follows:-

"3.1 Whether the Court of Appeal was in error to hold that the appellant did not make out a case in its pleadings or prose the disqualifying ground under section 182

(1) (e) of the 1999 Constitution as amended - Grounds 1-7.

3.2 Whether the court below was in error to affirm the decision of the tribunal that the appellant failed to piow us allegation that the 2nd respondent presented a forged certificate of Polytechnic lbadan to the 3rd respondent - Grounds 8 and 9.

3.3 Whether the court below was in error to affirm the decision of the tribunal striking out paragraph 13 of the petitioner's reply to the 2nd respondent's reply Ground 10.

3.4 Whether the court below was decision of the tribunal strike the 4th and 5th respondents and in not nullifying the Gubernatorial Election of June 11, 12 and 14."

On behalf of the other three (3) respondents, similar issues for determination were couched with admiration different words. They are hereby acknowledged.

Issue (1) of the appellant, in sum, is whether the court below was right in its decision that the 1st and 5th respondents were not necessary parties to the petition. Arguing the issue, it was submitted on behalf of the appellant that section 137(2) and (3) of the Electoral Act, 2010 (as amended) does not fore-close the joinder of the 4th and 5th respondents as allegation are made against them in the petition, and such wall afford them the opportunity to defend themselves. The cases of *Egolum v. Obasanjo* (1997) 7 NWLR (Pt. 611) 355 at 497 and *Kalu v. Chukwumerije* (2012) 12 NWLR (Pt. 1315) 425 at 559 were cited in support.

It was contended on behalf of the appellant that the provision of section 137(2) and (3) of the Electoral Act does not require that a relief must be sought against a person before he is made a respondent to the petition. Learned senior counsel urged that the issue be resolved in favour of the appellant.

On behalf of the respondents, it was seriously contended that the 4th and 5th respondents are not statutory parties known to section 137(2) and (3) of the Electoral Act, 2010 (as amended). They maintained that they are not necessary parties and no wrongdoing, was ascribed directly against them. It was asserted that they cannot be made vicariously liable for allegation of crime against unnamed soldiers and police men. As well, no relief in the petition was sought against them. The cases of *Buhari v. Obasanjo* (2003) 17 NWLR (Pt. 850) 587; *Buhari v. Yusuf* (2003) 14 NWLR (Pt. 841) 446 at 508

and *Green v. Green* (1987) 3 NWLR (Pt. 61) 480 were cited in support; among others.

It must be stated right away that election petition proceedings are *sui generis.* Section 137 (1) (2) and (3) of the Electoral Act clearly set out and circumscribed those who qualify to be made respondents in an election petition. Section 137 (2) and (3) stipulates the statutory/necessary parties to a petition as follows:-

> 137 (2) –"a person whose election is complained of is in this Act referred to as the respondent."
>
> (3) – "if the petitioner complains of the conduct of an Electoral Officer, a Presiding or Returning Officer --- the Commission shall in this instance be:-
>
> (a) made a respondent; and
>
> (b) deemed to be defending the petition for itself and on behalf of its officers or such other persons."

It is basic that there is no vicarious liability in the realm of criminal law. Anyone who contravenes the law should carry his own cross. The 4th and 5th respondents cannot therefore be found answerable to the alleged crimes committed by their unknown soldiers and policemen in an election petition.

It can he seen that the appellant did not claim any relief against the 4th and 5th respondents. Same ultimately render their presence burden on the proceedings. They were never contemplated by the Electoral Act. The trial tribunal and the court below rightly found that they were not proper parties since they did not qualify as statutory respondents and no reliefs were sought against them by the appellant. Their names were property struck out for the reasons stated. The issue is hereby resolved against the appellant.

The 2nd and 3rd issues of the appellant as merged together on behalf of the 2nd respondent, read as follows:-

> "Whether the Learned Justices of the Court of Appeal were not right in agreeing and coming to the conclusion that the appellant relied on the alleged impeachment of the 2nd respondent as one of the grounds of disqualification and in holding that the allegation of contravention of Code of Conduct relied upon by the appellant was not proved and whether the reliance of the Court of Appeal on the decision in Omoworare v. Omisore was not right."

The appellant contended that the 2nd respondent was disqualified from contesting the election as he was found guilty of contravention of the Code of Conduct by an impeachment panel set up by the Ekiti State House of Assembly for embezzlement of funds. This is extent in paragraphs 35 (iv) (a) and 110-120 of the petition.

The 1st respondent in its reply denied the ground put up by the appellant and joined issues with paragraphs 110-120 of the petition. Same should not be glossed over in any respect. In sum, the 1st respondent pleaded the report of an earlier impeachment panel which was duly constituted by the Chief Judge of Ekiti state pursuant to a request from the Speaker of the Ekiti State House of Assembly in which the 2nd respondent was absolved of all the, allegations levelled against him. That report is exhibit 'U'.

Futher, the 1st respondent maintained that some days attain the report in exhibit U. the speaker of the Ekiti State House of Assembly appointed a purported acting Chief Judge who purportedly constituted another Panel to re-investigate the same allegations against the 2nd respondent outside the constitutional time. Limit for so doing; without any letter of request from the Speaker or resolution of the House and without setting aside earlier report of the duly constituted Panel. It is this 2nd Panel. It is this 2nd Panel that purportedly found the 2nd respondent guilty of contravention of the Code of Conduct involving embezzlement of funds vide exhibit M in defiance of the Constitution and the letter of the Chief Justice of Nigeria - Exhibit V.

The above scenario deserves a few remarks by me. As can be seen in exhibit U, the substantive Chief Judge of the State – Hon. Justice Kayode Bamisile, on request by the Speaker of the State House of Assembly, set up a seven (7) man Panel to investigate allegations made against the State Governor. The panel met and issued a report on 12th October, 2006; in which the State Governor and his Deputy were exonerated.

Exhibit V is a letter addressed to justice Aladejana by the Chief justice of Nigeria and Chairman, National Judicial Council. It reads as follows:

"13 October, 2006

Ref. No. CJN/COR/SG/A.79/111/144

Hon. Justice Jide Aladejana,
High Court of Justice,

Ado Ekiti,
Ekiti State.

RE: PETITION AGAINST THE CONDUCT OF HON. JUSTICE JIDE ALADEJANA OF EKITI STATE HIGH COURT ON ILLEGAL COMPOSITION OF PURPORTED IMPEACHMENT PANEL IN EKITI STATE.

It has been brought to my notice dial you have been appointed by the House of Assembly of Ekiti State as the Acting Chief Judge, following tpe suspension 0f the state Chief Judge, Hon. Justice Kayode Bamisile for exercising his constitutional power. Your faxed letter and other document of 12th October, 2006 to me were also in the same vein.

2 As you are aware, the procedure for appointment of an Acting Chief Judge for the State is clearly spelt out in section 271 of the 1999 Constitution of the Federal Republic of Nigeria.

3 I am to stress that the perceived constitutional crises in the State mentioned in your letter not withstanding, the procedure and circumstances under which you have been appointed are contrary to the aforesaid provision of the 1999 Constitution on appointment of an Acting Chief Judge. Hence, any action by you in your capacity as the Acting Chief Judge will be unconstitutional.

Sgd

(S.M.A. Belgore, CON)
Chief Justice of Nigeria and
Chairman, National Judicial Council."

As can be seen on page 2 of the above letter, same was copied to the 2nd respondent and the substantive Chief Judge of the State -Hon Justice Kayode Bamisile.

It appears that notwithstanding the advice of the Chief Justice of Nigeria and Chairman of the National Judicial Council in exhibit V, a Panel constiluted by Aladejana, J. rendered its own report as in exhibit M to the Speaker of the House on 16th October, 2006. This is the exhibit relied upon to relieve the State Governor.

To say the least, exhibit M is glaringly a product of arrant illegality as Aladejana. J. had no vires to initiate the process leading

to exhibit M as he was not a lawful Acting Chief Judge. The unconstitutional act rendered exhibit M to be null and void. In law, as well as in logic and in the realm of science, one cannot put something upon nothing and expect it to stand. It must collapse. See *Mcfoy v. UAC* (1962) AC 152.

There is a proverb in a certain clime which says "it is only a dog winch desires to get lost that will not listen to the whistle of the hunter". In the same fashion, this Judge failed to listen to the admonition of the National Judicial Council and got consumed in the process. As can be seen on page 529 in Volume one (1) of the record, for his rather negative role in the episode, he was given the 'red card' by the National Judicial Council. As stated therein, 'Justice Jide Aladejana of the Ekiti State Judiciary was dismissed from service for accepting the illegal position of Acting Chief Judge of the State at the peak of the crisis that trailed the removal of the former Governor Ayo Fayose.' What a pity and an eye opener?

The above is still not the end of my remarks on this point. It is apt to point it out that section 188 (8) CFRN 1999 provides as follows:-

> "188 (8) where the panel reports to the House of Assemble that the allegation has not been proved, no further proceedings shall be taken m respect of the matter."

The above only deserves a literal interpretation. It is not difficult to comprehend its purport. After exhibit U was rendered to the Speaker, as mandatorily stated by the employment of the word shall, no further pioceedings should take place after the report in exhibit U that the allegation has not been proved. Again, exhibit M rendered by another Panel constituted by the unlawful acting Chief Judge on 16th October, 2006 was to no avail.

Let me now assume that exhibit M is in order and proceed to treat the point relating to contravention of the Code of Conduct. The law on the point is section 182(1) (e) Constitution of the Federal Republic of Nigeria 1999 which provides as follows:-

"182 (1) No person shall be qualified for election to the office of Governor of a State if -

> (e) within a period of less than ten years before the date of election to the office of Governor of a State he has been convicted and sentenced for an offence involving

> dishonesty or he has been found guilty of the contravention of the Code of Conduct."

It must me stated that all the parties agreed with tribunal and the court below that impeachment is not a ground for disqualification of a candidate to contest a gubernatorial election. The appellant pungently maintained that it did not place reliance on impeachment as a ground for disqualification of the 2nd respondent. The appellant said it placed reliance on contravention of the Code of Conduct.

It is now getting entrenched that the only substantive proceedings to secure a guilty verdict for contravening the code of conduct is one initiated by the Code of Conduct Bureau before the Code of Conduct Tribunal. Same must be pleaded and proved to sustain a disqualifying ground under section 182 (1) (e) of the 1999 Constitution. The appellant failed to comply with this requirement. The trial tribunal and the court below so found. I endorse same.

The court below placed maximum reliance on the pronouncement of Ogunbiyi, JCA (as she then was) in the case of *Omowarare v. Omisore* (2010) 3 NWLR (Pt. 1180) 58 at 112 paras. A-B where it was pronounced as follows:-

> "… In addition to regular courts therefore, the Code Conduct Tribunal has the power to sanction a public officer by disqualifying him from holding public office for a period not less than 10 years, it is apt therefore that the 1st respondent to have been disqualified in the instant case, he must have been found guilty either by a regular court of law or a tribunal set up and pursuant to its powers enshrined in the 5th schedule."

I completely endorsed the above. It is the court law or a tribunal duly set up by the Code of Conduct bureau that has power to try any public officer for contravention of the code of conduct for any of such, is the forum where he can be sum of adequate fair hearing as enshrined in section 36(1) and (5) CFRN 1999. See also *A.C. v. INEC* (2007) 12 NWLR (Pt. 1048) 220.

The trial tribunal, as well as the court below, were right to place reliance on the position taken by the Court of Appeal in *Omoworare v. Omisore* (supra). The appellant failed to plead and prove a verdict of guilty, contravention of the Code of Conduct. As such, no disqualifying ground was established under section 182(1) (e) CFRN, 1999

In short, this issue is resolved against the appellant; viewed from any angle.

The next issue for consideration is whether the Court of Appeal was not right in holding that the allegation of presentation of a forged Higher National Diploma (HND) Certificate In the 2nd respondent to INEC was not proved and that the ownership of the said certificate had earlier been decided in the case of *Alliance for Democracy v. Fayose* (2004) All FWLR (Pt. 222) 1719; (2005) 10 NWLR (Pt. 932) 639.

It has now become trite that where an allegation of crime is made in an election petition, as herein, the person making the allegation must prove same beyond reasonable doubt. See: Nwobodo v. Onoh (1984) NSCC 1 at 3; (1984) 1 SCNLR 1. Such standard of proof, however, is not on beyond reasonable doubt. See *Akindipe v. The State* (2010) 16 NWLR (Pt. 813) 340 at 370.

The appellant rested its contention that it proved that the 1st respondent a forged certificate to INEC beyond reasonable' doubt on exhibit E, G and P. Exhibit E is the HND Certificate of The Polytechnic lbadan issued to the 2nd respondent; duly certified by the Institution's Registrar as a true copy. So also was exhibit G, the student record of the 2nd respondent duly certified by the stated Registrar. The 2nd page of exhibit G contains the passport photograph of Oluwayose P. Both, in the prevailing circumstance, must be presumed to be genuine and authentic documents.

The passport photograph on page 2 of exhibit G was identified by PW1, the 2nd respondent's friend for over forty years as that of his friend – 2nd respondent. PW1 was never challenged on his assertion. The appellant did not have any axe to grind with respect to exhibits E and G.

Exhibit P is the affidavit in support of the personal particulars of the 2nd respondent for the ejection to the office of Governor of Ekiti State which was also duly certified. In the age declaration by the 2nd respondent's mother, it is depleted therein that at a time, the family surname of Fayose was changed to Oluwayose due to their religious belief. The deponent maintained that Ayodele Fayose and Ayodele Oluwayose is one and the same person.

In the appellant brief of argument, it was argued that 'the petitioner/appellant is not saving that The Polytechnic lbadan did not issue a certificate to one Oluwayose Ayodele Peter, rather the thrust of the position or contention of the petitioner/appellant is that exhibit 1st which the 2nd respondent submitted to INEC was never

issued to the 2nd respondent as a person yet he brought same forward as his.'

On behalf of the 2nd respondent, it was pointed out that while the appellant pleaded presentation of a forged HND Certificate in its petition, it attempted to set up a new case of impersonation in its brief of arguement and same is a clear ease of summersault that is not allowed the case of *Adegoke Motors v. Adesanya* (1985) 5 SC 11 at 139; (1989); NWLR (Pt. 109) 250 was cited in support.

There is no gainsaying the point that the 2nd respondent's argument can well be put on its mettle. There should be consistency by a party in prosecuting his case at the trial court as well as on appeal. There should be no summersault. See: Ajide v. Kelani (1985) 3 NWLR (Pt. 12) 248. The new argument dealing with impersonation does not rest on any pleading as paragraph 13 of appellant's reply to the 2nd respondent's reply, to the petition was Struck out by the tribunal and affirmed by the court below. The new argument relating to impersonation is of no moment.

The other point made in respect of this issue is that the allegation of presentation of forged HND Certificate is caught by the principle of estoppels by virtue of the decision in the case of Alliance for *Demoracy v. Fayose* (2004) All FWLR (Pt.222) 1719 at 1744 -1746; (2003) 10 NWLR (Pt. 942) 151.

There is no doubt about it that the trial tribunal and the court below relied on the decision which is on all fours with this case It was further contended that the decision therein is a judgment *in rem* by which the appellant and the whole world is bound to the determination that Peter Ayodele Fayose and Peter Ayodele-Oluwayose are one and the same person. The 2nd respondent is the owner of exhibit E. it was also contended that same is not open to further litigation following the decision of this court in *Ogboru & Anor v. Uduaghan & Ors.* (2011) LPELR 823; (2011) 17 NWLR (Pt. 1277) 727.

It was pointed out that the parties in this case are the same as those in Alliance for *Democracy v. Fayose* (supra) due to the metamorphosis of the defunct Alliance for Democracy into Action Congress of Nigeria and later, All Progressives Congress. The 1st, 2nd and 4th respondents herein were respondents therein. The issue of presentation of forged certificate by 2nd respondent was completely put to rest therein. All the ingredients for the application of the principle of estoppel are fulfilled.

I am of the considered opinion that the court below was in older in upholding the application of the principles of estoppel. In sum, I find that the appellant failed to prove the allegation of presentation of forged HND Certificate by the 2nd respondent to the 3rd respondent (INEC) beyond reasonable doubt. This issue is also resolved against the appellant.

The last notable issue is 'whether the Court of Appeal was not correct in its decision affirming the trial tribunal's striking out of paragraph 13 of the petitioner's reply to the 2nd respondent's topic to the petition when the said paragraph 13 was in fact filed in contravention of the applicable provisions on reply and pleadings.

Let me start by observing that paragraphs 16 (1) (a) of the First Schedule to the Electoral Act regulates the content of the reply that may be filed by a petitioner in answer to the reply of a respondent to the petition. It provides as follows:-

> "16(1) If a person in his reply to the election petition raised new issues of facts in defense of his case which the pet ition has not dealt with, the petitioner shall be entitled to file in the Registry, within five days from the receipt of the respondent's reply, a petitioner's reply in answer to the new issues of fact, so however that:-
>
> (a) The petitioner shall not at this stage be entitled to bring in new facts, grounds or prayers tending to amend or add to the contents of the petition filed by him, and"

I think that I should repeat it that proceedings in election petitions are *sui generis*. They are in a class of their own. They are made to fast-track the bearing of petitions. They are, however, not designed to spring surprise on parties.

In respect of this issue the appellant in its petition maintained that the 2nd respondent presented forged certificate to the 4th respondent. The 2nd respondent denied same and maintained that the certificate was not forged but earned by him in 1987. By paragraph 13 of it's reply, the appellant then brought in the fresh issue of impersonation. Same was not proper. It should have come in by way of a due amendment of the petition which can be done within 21 days after the result of the election was declared. The appellant did not have a lee-way to aver new facts which ought to be in the original petition filed.

The court below was right when it found as follows:-

> "It is trite that the petitioner cannot introduce new fact not contained in the petition in his reply as in the instant case because as at the time of filing his petition, that fact is within his knowledge and if he did not adequately include it in his petition, the proper thing to do will be to amend his petition."

I support the stance of the court below in not allowing the appellant the chance of springing surprise on the 2nd respondent.

The court below was right in affirming the stinking out of the said paragraph 13 which tried to overreach the 2nd respondent as no new facts should feature in a petitioner's reply. See: *Adepoju v. Awoduyilemi* (1999) 5 NWLR (Pt. 604) 364 at 382. It is clear that restoring the paragraph would have occasioned a great Iniscarriage of justice on the 2nd respondent who would have been, shut out completely. He will not be able to respond at all to the weighty but belated allegation of impersonation which forms the bed-rock of paragraph 13 of the said reply.

This issue is without hesitation resolved in favour of the 2nd respondent and against the appellant.

The last issue No. 7 is 'whether the Court of Appeal was right when it failed to nullify the governorship election for Ekiti State held on the 21st June, 2014 in spite of its findings that soldiers were unlawfully deployed and used in the election.'

Let me say it clearly, that having resolved issue (1) in favour of the respondents; this issue is no longer of moment.

For the above reasons and those clearly set out in the lead judgment of my learned brother, Ngwuta, JSC I too, feel that the appeal should be dismissed. I order accordingly. I abide by all consequential orders therein made; inclusive of that relating to costs.

The issues in the two cross-appeals have been treated in the lead judgment. The cross-appeals are hereby allowed. I make no order on costs as well.

GALADIMA, J.S.C.: The subject matter of this appeal is against the decision of Court of Appeal Ekiti Division in the Governorship Election for Ekiti State held on the 21st day of June, 2014.

The facts of this ease are set out as follows: The 2nd respondent was declared the winner of the election by the 3rd respondent and returned as the Governor of Ekiti State. The appellant herewith, was dissatisfied and for that reason flied a

petition on 12/7/2014 before the Governorship Election Tribunal in which it challenged the declaration of the 2nd respondent by the 3rd respondent, as the winner of the said Governorship election.

The following were the grounds upon which the petition was premised:

(i). That the 2nd respondent was not duly elected by majority of lawful votes cast at the election.

(ii). That the election of the 2nd respondents is invalid by reason of corrupt practices.

(iii). That the election of the 2nd respondent is invalid by reason of non-compliance with the provisions ol thc Electoral Act 2011 as amended and the Manual for Election Officials 2014 and the Constitution of the Federal Republic of Nigeria, (as amended).

(iv). That the 2nd respondent was not quahhed to contest as at the time of the election based on the following reasons:

(a) The 2nd respondent was found guilty of ihe contravention of the Code of Conduct by the impeachment panel set up by the acting Chief Judge of Ekiti State on allegation of gross misconduct involving embezzlement of funds preferred against him by the Ekiti State House of Assembly consequent upon which he was impeached and removed from the office of the governor of Fkiti State in the year 2006.

(b) The 2nd respondent presented a forged Higher National Diploma (HND) Certificate of The Polytechnic, Ibadan to the 3rd respondent (INEC).

It is pertinent here to set out the reliefs which this appellant sought at the Election Tribunal, which are as follows:

(a) That it be determined and declared that the 2nd respondent Peter Ayodele Fayose was not qualified to contest the Governorship Flection held on 21st June, 2014 on the ground that he was found guilty of the contravention of the Code of Conduct by the impeachment panel set up by the acting Chief Judge of Ekiti State and the Ekiti State House of Assembly, consequent upon which he was impeached and

removed from the office of the governor of Ekiti State in the year 2006.

(b) That it may be determined that the 2nd respondent presented a forged certificate of High National Diploma (HND) of The Polytechnic Ibadan to the Independent National Electoral Commission, thus was not qualified to contest the election.

(c) That it be determined and declared that the 2nd respondent Peter Ayodele Fayose was not duly elected or returned by the majority or lawful votes cast at the Ekiti State Governorship Election held on Saturday 21st June, 2014.

(d) That it may be determined that having regards to the non qualification of the 2nd respondent to contest the election, the 3rd respondent ought to have declared the candidate of the Petitioner John Olukayode Fayemi, the election as the winner of the election.

(e) An Order of the tribunal withdrawing the Certificate of Return issued to the 2nd respondent by the 3rd respondent and presents the Certificate of Return to the candidate of the petitioner John Olukayode Fayemi who scored the majority of valid votes cast and having met the constitutional requirements as required by law.

In the Alternative:

An order nullifying the Governorship Election held on 21st June, 2014 and a fresh election be ordered."

After the conclusion of trial and addresses by respective counsel for the parties, the Election Tribunal dismissed the appellant's petition.

Dissatisfied with the decision of the Election Tribunal appellant approached the Court of Appeal Ekiti Division, which "dismissed the appellant's appeal and affirmed to decision of the tribunal.

This is further appeal against the decision of the Court of Appeal. The notice of appeal of the appellant contains 14 grounds of appeal out of which 7 issues were distilled in his brief of argument settled by learned silk Prince Lateef O. Fagbemi. The 7 issues are as follows:

1. Whether the Court of Appeal was right in its decision that the 4th and 5th respondents were not necessary

parties to the petition in the light of the pleadings and findings made by the Court of Appeal and whether INEC ought to take responsibility for their acts? Grounds 11, 12 and 13.

2. Whether the Court of Appeal w as right in its decision that the appellant based its petition on impeachment and whether the decision in *Omoworare v. Omisore* (2010) 3 NWLR (Pt. 1180) 58 was rightly applied to this case by the Court of Appeal? Grounds 2, 4, 5 and 7.
3. Whether the Court of Appeal was right that the appellant did not prove disqualifying ground mulct section 182(1) (e) of the Constitution of the Nigeria, 1999 (as amended) against the 2nd respondeat' Grounds 1, 3, and 6.
4. Whether the Court of Appeal was right in its decision that the appellant did not prove the allegation of presentation of forged HND Certificate by the 2nd respondent to INEC? Ground 8.
5. Whether the Court of Appeal was right in its decision that the case of *Alliance for Democracy v. Fayose* (2004) All FLWLR (Pt.222) 1719 at 1744- 46; (2005) 10 NWLR (Pt. 932) 151 has settled the issue of authenticity of HND Certificate presented by the 2nd respondent to INEC Ground 9.
6. Whether the Court of Appeal was right in its decision affirming the striking out of paragraph 13 of the appellant's reply to the 2nd respondent's reply to the petition? Ground 10.
7. Whether the Court of Appeal was right when it failed to nullify the Governorship Election for Ekiti State held on the 21st June, 2014 in spite of its finding that soldiers were unlawfully deployed and used lot the election? Ground 14.

In the brief of argument sett fed by E. R. Emukpoeruo, Esq. for the 1st respondent cross appellant. The following 4 issues have been Identified for determination of the appeal:-

"3.1. Whether the court below was in error to hold that the appellant did not make out a case in its pleading or prove the disqualifying ground under section

182(1)(E) of the 1 999 Constitution as amended. Grounds 1 – 7.

3.2 Whether the court below was in error to affirm the decision of the tribunal that the appellant failed to prove its allegation that the 2nd respondent presented a forged certificate of The Polytechnic Ibadan to the 3rd respondent. Grounds 8 and 9.

3.3 Whether the court below was in error to affirm the decision of the tribunal striking out paragraph 13 of the petitioner's reply to the 2nd respondent's reply. Ground 10.

3.4 Whether the court below was in error to affirm the decision of the tribunal striking out the names of the 4th and 5th respondents and in not nullifying the Gubernatorial Election of June 21st, 2014. Grounds 11, 12 and 14.

In the 2nd respondent's brief of argument settled by Yusuf O Ali (SAN) 5 issues were distilled for determination as follows:

"1. Whether the learned justices of the Court of Appeal were not right in agreeing and coming to the conclusion that the appellant relied on the alleged impeachment of the 2nd respondent as one of the grounds of disqualification and in holding that the allegation of contravention of code of conduct relied upon by the appellant was not proved and whether the reliance of the Court of Appeal on the decision in *Omoworare v. Omisore* was not right. (Grounds 1 to 7)

2 Whether the Court of Appeal was not right in holding that the allegation of forgery of a Higher National Diploma (H.N.D) Certificate by the 2nd respondent was not proved and that the ownership of the said certificate had earlier been decided in the case of *A.D. v. Fayose* (2004) All FWLR (Pt. 222) 1719; (2005) 10 NWLR (Pt. 932) 151. (Grounds 8 and 9)

3. Whether the Court of Appeal was not correct in its decision affirming the trial tribunal's striking out of paragraph 13 of the petitioner's reply to the 2nd respondents reply to the petition when the said paragraph 13 was in fact held in contravention of the

applicable provisions on reply and pleadings. (Ground 10).

4. Whether the Court of Appeal was not correct in its interpretation and views on the provisions of section 137(2) and (3) of the electoral Act 2010 (as amended) by upholding the striking out of the 4th and 5th respondents who are not statutory parties and are not agents of the 3rd respondent (INEC) and whether INEC could take responsibility for their acts. (Grounds 11, 12 and 13).
5. Whether the mere fact that the Appeal made comments on the alleged deployment of members of the Armed Forces at the election of 21st June, 2014 in Ekiti State which was not even proved, would without more, lead to the nullification of the election which was conducted in substantial compliance with the…

In the 3rd respondents' brief settled by Chief Adegboyega Awomolo SAN, 5 issues were distilled for determination as follows:

1. Whether the Court of Appeal was right in its decision that the ground of disqualification under section 182(1) (e) of the Constitution of the Federal Republic of Nigeria, 1999 was not proved? (Grounds 1, 3 and 6).
2. Whether the Court of Appeal was right in its decision that the outcome ol impeachment process of the 2nd respondent did not constitute a ground of disqualification of a candidate under section 66(1) (d) and (h) of the Constitution of the Federal Republic of Nigeria, 1999 as amended; (Grounds 2, 4, 5 and 7).
3. Whether the Court of Appeal was right in affirming that the criminal allegation of forgery of Higher National Diploma Certificate by the 2nd respondent was not proved. (Grounds 8 and 9).
4. Whether the Court of Appeal was right in its decision that paragraph 13 of the appellant's reply to the 2nd respondent reply was rightly struck out; (Ground 10).
5. Whether it was proper to have joined the 4th and 5th respondents as parties, who did not qualify as statutory respondents, and there being no reliefs

sought against them by the appellant as petitioner before the tribunal; (Grounds 11, 12, 13 and 14)."

As for the 4th respondent, his learned counsel Abayomi Sadiq, Esq. who settled the brief of argument, has confined himself to only those grounds of appeal directly relevant to the said 4th respondent. Hence, 3 issues were set out for determination thus:

"1. Whether the Court of Appeal was right when it upheld the tribunal's decision to the effect that the 4th respondent did not qualify as a respondent as contemplated by section 137(2) and (3) of the Electoral Act 2010 (as amended). (Ground 11)

2 Whether the Court of Appeal was right when it affirmed the decision of the election tribunal striking out the names of the 4th and 5th respondents and if striking out the name of the 4th respondent's contravened his 4th respondent constitutional right to fair hearing. (Ground 12 and 13).

3 Whether the Court of Appeal was right when it fail to nullify the Governorship election of Ekiti State held on the 21st Day of June, 2014. (Ground 14)."

It would appear that only issue No. 1 of the appellant's 7 issues relate to the issues formulated and canvassed by the 1st respondent before the lower court. Hence, 5th respondent's brief of argument is confirmed and limited to the said issue No. 1.

CROSS-APPEALS

It would be recalled that the Court of .Appeal delivered separate judgment in the mam and the cross-appeal. The C respondent filed two notices of appeal against parts of each judgment. The indulgence of this court was craved for and granted to have the notices of appeal heard together. I shall come to this. But first the main appeal.

My careful perusal ol the appellant's issues raised for determination shows clearly that the complaint in the first and 7 issues are the same. The kernel of the argument of the learned silk for the appellant is that the 4th and 5th respondents were wrongly held by the Court of Appeal not to be necessary respondents to the appellant's petition.

Appellants' issues 2 and 3 is similar to the 2nd respondent's issue 2. This issue is predicated first upon the correctness or otherwise of the concurrent finding of the two courts below that the appellant relied on impeachment as a ground of disqualifications of the 2nd respondent; secondly the mutual conclusion of the courts that the alleged contravention of the Code of Conduct by the 2nd respondent was not prosed by the appellant; and whether the two lower courts were right in relying and applying the decision of the Court of Appeal in *Omoworare v. Omisore* (2010) 3 NWLR (Pt.1180) 58.

I am of the linn belief that the foregoing issues will effectively determine the appeal. There may be need to consider other issue raised by the parties for the purpose of emphasis only as they have been exhaustively dealt with in the lead judgment.

First, appellants' 1st and 7th issues. These are 2nd respondents issue 4, 4th and 5th respondents' issue 2 respectively.

Vide their respective notice of preliminary objections, the 4th and 5th respondents' among other grounds challenged the competence of the petition of the appellant and sought an order striking out their names on the grounds that:

(i) The petition did not disclose any reasonable cause of action against them.

(ii) That they did not participate in the conduct of the election.

(iii) That they cannot be vicariously field liable for criminal acts of others or unarmed/unknown police officers.

(iv) That they slid not qualify as statutory or Recessary or desirable parties.

The tribunal upheld the preliminary objection and tins was further confirmed by the Court of Appeal that the respondents did not qualify as statutory or necessary parties and thus struck out the names of 4th and 5th respondents as parties to the petition.

To my mind the Court of Appeal rightly upheld the ruling on the 4th & 5th respondents' preliminary objection. The court below in its judgment found that the tribunal reasoned correctly m its analysis of the provisions of section 137(2) and (3) of the Rleciorul Act 2010 (as amended), it held that:

> "... The Electoral Act 2010 (as amended) provides for two classes of statutory respondents that is the winner of the election and the Independent National

> Electoral Commission, the body with the responsibility of conducting the election ...”

The law expressly specified and legislated on who can be a respondent in an election petition. Whosoever is contemplated to be a respondent to defend an election petition must fall into any of the two categories named in said section 137 (2) and (3) of the Electoral Act (*supra*).

Appellant cannot seek to assail the concurrent findings of the tribunal and the court below.

The appellant should not have dissipated his energy in bid to promote an orbiter of the Court of Appeal to the level of *ratio decidendi*. The court's gratuitous sweeping general statement had no co-relation to the justice of the appellant's case before it.

The court opined, *inter alia*, that

> “It is however common ground from the proceedings of the parties that soldiers and police were present in the state to provide security during the election. We find as a fact that the petition is replete with allegation of harassment, intimidation use of force and arrest of petitioner's supporters against unnamed soldiers and policemen ..."

I agree with the learned counsel for tire 4th and 3rd respondents that the above statement of the court below is not intended to be at more than an arbiter since nowhere in the entire record of appeal had the tribunal found anyone guilty of the several allegations of criminal nature. Being completely mindful that its *arbiter* in law is of no moment whatsoever to the case at hand. The court at the later stage of its judgment, rightly resolved the issue before it against the appellant and accordingly struck out the names of the 4th and 3rd respondents the paragraphs related thereto, notwithstanding its strongly worded *obiter dictum*. This cannot take the place of a ratio *dedicendi.*

It is of no moment whatsoever to dwell a lot on the appellant's postulation to the effect that the striking out of the 4th respondent's name is tantamount to an infringement of the constitutional right to fair hearing. This argument would not avail the appellant. It is the person whose fundamental right has been breached that can legitimately complain and seek redress. 4th respondent did not approach the court to strike out his name as a party to the petition. Is it a case of being more "Catholic than the Pope,” or the surreptitious move to lure the 4th respondent into the

arena of conflict where the appellant will have the opportunity to unleash his venomous petition.

In this case the 4th and 3rd respondents can neither be said to be respondents within the contemplation of section 137 (2) and (3) of the electoral Act nor necessary or interested party in the subject matter of the proceeding. Their presence is not required to settle the issues or questions between the statutory respondents in the petition.

Now to the most important appellants' issues 2 and 3 distilled from grounds 1-7 of the notice of appeal.

This issue questions the correctness or otherwise of the two lower courts' concurrent findings that the appellant relied on impeachment as a ground of disqualification of the 2nd respondent. The issue also complains about the mutual conclusion of the two lower courts that the alleged contravention of the Code of Conduct by the 2nd respondent was not proved by the appellant as required by law. Finally whether the decision in *Omoworare v. Omisore* (supra) is reliable and applicable to the case at hand.

In its petition, appellant pleaded in paragraph 33 thus:

"33. IV. The 2nd respondent was not qualified to contest as at the time of the election on the following grotmd:-

> The 2nd respondent was found guilty of the contravention of the Code of Conducts (sic) by the impeachment panel set up by the acting Cruet Judge of Ekiti State on allegation of gross misconduct involving embezzlement of funds preferred against him by the Ekiti State House of Assembly, consequent upon which he was impeached and removed from the office of the Governor of Ekiti State in the 2006."

Pages 23 – 35, paragraphs 110 - 120 of Vol.1 of the record, appellant herein pleaded copious facts and exhibition of documents to establish the fact that the 2nd respondent was indeed impeached. The documents tendered for the consideration of the trial tribunal's through PW1 include exhibits H, J, K, L, M, N while exhibits K1; J1; L1; M1; N1 and a number of subpoena were tendered by the appellant. The 2nd respondent also tendered exhibits U, V, X, etc. While PW9 and PW11 adduced evidence tending to show that there was an impeachment as pleaded. PW1 also gave evidenee in opposition to the allegation of impeachment of the 2nd respondent

by the Ekiti State House of Assembly and the verdict of "guilt" for the contravention of Code of Conduct by the 2nd respondent.

The trial tribunal was thereafter addressed as to whethcr or not there was an impeachment of the 2nd respondent. The tribunal found that under section 182 of the Constitution of the Federal Republic of Nigeria 1999, impeachment is not a ground for disqualifying a candidate. It relied on the case of Omoworare v. Omisore (supra). In the same vein, the Court of Appeal found that the appellant's predicated the alleged non-qualification/disqtialification of the 2nd respondent in his impeachment. At page 1917 - 1918 of the record, it held clearly that the result of impeachment cannot be used as a ground for the disqualification of the 2nd respondent to contest the gubernatorial election placing reliance too on the case of *Omoworare v. Omisore* (*supra*). The concurrent findings on the point cannot be faulted. These are not perverse or unsupported. The courts correctly found that it is only a finding of guilt for contravention of the Code of Conduct by the Code of Conduct Tribunal or a court of law, as opposed to the 7 man Investigation Panel set up by the Chief Judge of Ekiti State High Court that could pronounce a person guilty the contravention of the Code of Conduct which may be used as a bar to contest the gubernatorial election.

Strengthening its stand on the foregoing, the tribunal relying on the pin port of the decision of this court in *A. C. v. INEC* (2007) 12 NWLR (Pt.1048) 220, held at page 1479 -1480 of the record as follows:

> "Assuming again that the Panel was properly set up according to law, does it have the power to find the 2nd respondent guilty of the contravention of the Code of Couduct In view of prevailing judicial authorities, our answer is an emphatic No. We cannot assail the submissions of learned counsel for the 1st, 2nd and 3rd respondents that the only body or authority saddled with the responsibility of finding a public officer guilty of breach or contravention of the Code of Conduct which involved embezzlement of funds is the Code of Conduct Tribunal established under the 5th Schedule to the Constitution. This is the important of the decision of the Supreme Court in A.C. v. INEC (2007) 2 NWLR (Pt. 1048) 220 at p. 291 paras. G-H where Tabai JSC held:

> The disqualification of a porson from any elective office under the constitution involves the determination of that person's civil rights and obiigations and which determination is, by vertue of sections 6 and 36 of the Constitution specifically assigned to courts or other tribunals established by law and constituted in a manner as to ensure their independence and impartiality"

Katsina-Alu, JSC, (as he then was) was more pungent on this point in the lead judgment where he said at p. 260 paras. B-D:

> *"The disqualification in section 137 (1) (i) clearly involves a deprivation of right and presumption of guilt for embezzlement or fraud in derogation of the safeguards in section 36(1) and (5) of the Constitution. The trial and conviction by a court is only Constitutionally permitted way to prove guilt and therefore the only ground for the imposition of punishment or penally for the criminal offences of the embezzlement or fraud. Clearly the imposition of the penalty of disqualification for embezzement of fraud solely on the basis of an indictment for these offences by an administrative panel of inquiry implies a presumption of guilt contrary to section 36 (5) of the Constitution of the Federal Republic of Nigeria, 1999 (Italics ours).* We hold that the investigation Panel lacks the legal of constitutional vires to return a verdict of "guilts" as they did in exhibits 'M' and "M1".

In affirming the finding of tribunal on the matter, the Court of Appeal held at pages 1916 – 1917 as follows:

> "Consistency and adherence to the Constitutional allocation of powers is well thought of, as it seeks to safeguard a vindictive and an indiscriminate use or abuse of power, which danger and consequence could be far reaching and out of control. There is every opportunity that human actions could take the turn of being subjective in nature especially where the alter ego side of the personality is involved, it could result into a complete absence of self control and or sense of sound reasoning. The concept of

> power always connotes position of authority. Power swapping therefore and or its alteration thereof, if allowed would in the situational circumstances subject the weaker at the mercy of the powerful authority. The insignificant for instance cannot face the fury of powerful lion. The balance would not certainly meet the equation. We affirm the said finding accordingly as we are concerned with whether the decision reached by the tribunal on the issue is right and not whether it's reasoning is faulty."

Consequently, the Court of Appeal concluded, that since the finding of guilt for contravention of the Code of Conduct by the 2nd respondent emerged from impeachment cannot be used as ground for disqualification of the 2nd respondent to contest for the gubernatorial election. In my humble opinion this position of the court below is unassailable. The court correctly alluded to section certificate to the 3rd respondent beyond reasonable doubt. Exhibit 'E' is the HND Certificate of Ibadan Polytechnic. Exhibit 'G' is his student record. Both are duly certified as true copy by the Registrar They are presumed genuine and authentic documents and cannot be said to be forged. On the second page of exhibit, it has the passport photograph of "OLUWAYOSE AYODELE PETER."

It is not in doubt that the passport photograph on exhibit 'G' clearly identified "OLUWAYOSE AYODELE PETER." The identification of the passport photograph on exhibit 'G' as that of the 2nd respondent was not challenged by the appellant when PW1 was cross-examined. The appellant did not lead any evidence that the face on exhibit 'G' was not that of the 2nd respondent'

It is quite revealing that exhibit P, the affidavit of the 2nd respondent in support of his personal particulars for election to the office of Governor of Ekiti State duly certified by the Legal Officer of the 3rd respondent herein was not challenged. In part B of the exhibit, 2nd respondent swore on Oath thus:

"(i) That his surname is FAYOSE

(ii) Other names (in block letters) PETER AYODELE.

(iv) Former name(s) OLUWAYOSE".

I cannot fathom why the appellant has argued that exhibits 'E' particularly 'G' and 'P' were proof beyond reasonable doubt that the 2nd respondent presented a forged certificate to the 3rd respondent. These exhibits were not shown to any of the appellant's witnesses. (PW9, and PW11) whose depositions touched on the

issue. These witnesses were neither makers of the exhibits nor workers in any of the Institutions from where the exhibits emanated. The exhibits were not demonstrated in open court to assess their purport and worth. See *A.C.N. v. Sule Lamido & Ors* (2012) LPELR 7825 SC; (2012) 8 NWLR (Pt. 1303) 560. These were type of document which this court affirmed rightly expunged by the Court of Appeal in *Buhari v. INEC* (2008) 18 NWLR (Pt.1120) 246 at 414.

I agree with the learned counsel for the 1st respondent that in the absence of any oral evidence to prop them up, they were beeft of any probative value in proof of the allegation of a forged certificate to the 3rd respondent.

Assuming, without conceding that point, the exhibit E, G, and P were evidence the trial tribunal could have acted on without oral evidence to prop them up, then they were at the highest or best evidence that the 2nd respondent claimed to be from "Oluyole Local Govt 182 (1) (e) of the 1099 Constitution in conjunction with the 5th schedule to the Constitution and sections 6 and 36 of the 1999, which guaranteed to the 2nd respondent a determination of his rights and obligations (including criminal liability) before a court or tribunal constituted by law. See *Action Congress v. INEC* (*supra*).

The court, in my view cannot be faulted when relying on *Omoworare v. Omisore* (*supra*) it held at pp. 1917 - 1918 of the record as follows:

> "Since the finding of guilt for contravention of the Code of Conduct by the 2nd respondent emerged from impeachment proceedings, which were argued in issues 3, 4, 5 and 6 of the appellants' issues tor determination, the result of the impeachment cannot be used as ground for disqualification of the 2nd respondent to contest the gubernatorial election."

In the light of the foregoing, I resolve this issue in favour of the 1st and 2nd respondents.

Appellants' issues 4 and 5 conflate issue 2 of the 1st and 2nd respondents. The issue examines the correctness or otherwise of the decision of the Court of Appeal to the effect that the appellant failed to prove the allegation of forgery of the Higher National Diploma Certificate presented by the 2nd respondent to the 3rd respondent, and the court further view that the allegation is caught by the doctrine of *res judicata* having regards to the earlier decision of the Court of Appeal in the case of *A.D. v. Fayose & 4 Ors* (2004) All FWLR (Pt. 222) 1719; (2003) 10 NWLR (Pt. 932) 151. Appellant's

petition on this point is rooted in paragraph 33.IV (b), where the appellant averred that:

> "35 (IV).The 2nd respondent was not qualified to contest as at the time of the election on the following ground:
>
> (b). The 2nd respondent presented a forged Higher National Diploma (HND) Certificate of The Polytechnic Ibadan to 3rd respondent (INEC)."

The 2nd respondent and all other respondents joined issue with the appellant and put it to strict proof of the allegation of forgery.

The 2nd respondent pleaded further in his reply that the issue of presentation of forged HND Certificate is caught by the principles of estoppels.

The appellant rested mainly its contention as on exhibits E, G and P that it had proved the allegation of presentation of forged Government" of Oyo State and later claimed "Afao" in Ekiti state. 2nd respondent was identified on exhibit G; this was not challenged by evidence of RW1. This negated the contention of the appellant that the claim of two different states (Oyo and Ekiti) of Origin connote two different persons.

The other aspect of this issue has to do with the Ending of the lower court that the allocation of presentation of forged HND Certificate is caught by the principle of estoppels by virtue of the decision in the case of *Alliance for Democracy v. Fayose* (*supra*).

The main reason for dismissing the allegation of presentation of forged HND Certificate by the 2nd respondent to the 3rd respondent was because the allegation was not proved beyond reasonable doubt as required by law. The second reason was because the allegation was caught by principles of estoppels. Once this court has come to the conclusion that the allegation of presentation of forged certificate was not proved, that should have made the issue of estoppels secondary. The governing considerations for the application of the principle of estoppels are that the parlies and subject matter in dispute are the same. Judicial notice can be taken of the fact that the appellant (APC) herein was a product of the Alliance for Democracy (AD) and Action Congress of Nigeria (ACN). The 1st, 2nd and 3rd respondents herein were respondents in that case. The Court of Appeal as the final court, then for Governorship Election Petition made pronouncement dismissing the

allegation of presentation of the same High National Diploma of The Polytechnic of Ibadan by the 2nd respondent herein. The two courts below correctly relied on the case. The decision, which is a judgment in rent, bounds the appellant and the whole world to the effect that "Peter Ayodele Fayose," and "Peter Ayodele Oluwayose are one and the same person. That the 2nd respondent is the owner of the certificate exhibit 'E' in that case. The decision that the 2nd respondent herein, is the owner of exhibit 'E' is not open to any further litigation.

In the light of the foregoing, I hold that the appellant did not prove the allegation of presentation of forged HND Certificate against the 2nd respondent and the principles of estoppel is applicable to this case.

In the light of the foregoing and the resolution of other issues m the lead judgment of my brother, NGWUTA, JSC, I too hereby dismiss this appeal by consequential orders made as to costs.

CROSS-APPEAL OF 1st AND 2nd RESPONDENTS

I agree with my learned brother, NGWUTA JSC that the issues raised in them have been quite extensively dealt and resolved in the main appeal. I adopt his reasons and conclusion that the two cross Appeals be allowed, and are hereby allowed. I make no order as to cost.

RHODES-VIVOUR, J.S.C.: 1 have had the privilege of reading in draft the leading judgment of my learned brother, Ngwuta, JSC. So completely do I agree with it that I have decided to add only a few paragraphs of mine. I shall consider issues 2 and 3, 4 and 5. I must say straightaway that the questions that arise from the issues are:

1. Whether impeachment is a ground for disqualify ing a candidate?
2. Whether section 188(1) is applicable in this appeal, and
3. How relevant is the decision in *A.D. v. Fayose* (2004) AFWLR (Pt.222)P. 1719; (2005) 10 NWLR (Pt.932) 151 to this appeal.

In considering 1 and 2 above, there is the urgent need to examine the language of sections 182 and 188 of the Constitution.

Section 182 of the Constitution states the instances when a person seeking to be a Governor of a State can be disqualified. It reads:

182(1) No person shall be qualified for election to the office of Governor of a State if -

(a) subject to the prov isions of section 28 of this Constitution, he has voluntarily acquired the citizenship of a country other than Nigeria or, except in such cases as may be prescribed by the National Assembly he has made a declaration of allegiance to such other country; or

(b) he has been elected to such office at any two previous election; or

(c) under the law in any part of Nigeria, he is adjudged to be lunatic or otherwise declared to be of unsound mind; or

(d) he is under a sentence of death imposed by any competent court of law or tribunal in Nigeria or a sentence of imprisonment for any office involving dishonesty or fraud (by whatever name called) or any other offence imposed on him by any court or tribunal or substituted by a competent authority for any other sentence imposed on him by such a court or tribunal; or

(e) within a period of less than ten years before the date of election to the office of Governor of a State he has been convicted and sentenced for an offence involving dishonesty or he has been found guilty of the contravention of the Code of Conduct; or

(f) he is an undischarged bankrupt, having been adjudged or otherwise declared bankrupt under any law in force in Nigeria; or

(g) being a person employed in the public service of the Federation or of any State, he has not resigned, withdrawn or retired from the employment at least thirty days to the date of the election: or

(h) he is a member of any secret society; or

(i) he has presented a forged certificate to the Independent National Electoral Commission.

2 Where in respect of any person who has been –

(a) adjudged to be a lunatic;

(b) declared to be unsound mind;

(c) sentenced to death or imprisonment; or

(d) adjudged or declared bankrupt;

an appeal against the decision is pending in any court or law in accordance with any law in force in Nigeria, subsection (1) of his section shall not apply during a period beginning bom the dale when such appeal is lodged and ending on the date when the appeal is finally determined or, as the case may be, the appeal lapses or is abandoned, whichever is earlier.

188(1) The Governor or Deputy Governor of a state may be removed from office in accordance with the provition of this section.

(2) Whether a notice of any allegation in writing signed by not less than one-third of the members of the House of Assembly –

(a) is presented to the Speaker of the House of Assembly of the State;

(b) stating that the holder of such office is guilty of gross misconduct in the performance of the functions of his office, detailed particulars of which shall be specified,

the Speaker of the House of Assembly shall, within seven days of the receipt of the notice, cause a copy of the notice to be served on the holder of the office and on each member of the House of Assembly, and shall also cause any statement made in reply to the allegation by the holder of the office, to be served on each member of the House of Assembly.

(3) Within fourteen days of the presentation of the notice to the Speaker of the House of Assembly (whether or not any statement was made by the holder of the office in reply to the allegation contained in the notice), the House of Assembly shall resolve by motion, without any debate whether or not the allegation shall be investigated.

(4) A motion of the House of Assembly that the allegation be investigated shall not be declared as having been passed unless it is supported by the votes

of not less than two-thirds-majority of all the members of the House of Assembly.

(5) Within seven days of the passing of a motion under the foregoing provisions of this section, the Chief Judge of the State shall at the request of the Speaker of the House of Assembly appoint a Panel of.seven persons who in his opinion are of unquestionable integrity, not being members of any public service, legislative house or political party, to investigate the allegation as provided in this section.

(6) The holder of an office whose conduct is being investigated under this section shall have the right to defend himself in person or lie represented before the Panel by a legal practitioner of his own choice.

(7) A Panel appointed under this section shall

(a) have such powers and exercise its functions in accordance with such procedure as may be prescribed by the House of Assembly; and

(b) within three months of its appointment report its findings to the House of Assembly.

(8) Where the Panel reports to the House of Assembly that the allegation has not been prosed, no further proceedings shall be taken in respect of the matter.

(9) Where the report to the Panel is that the allegation against the holder of the officer has been proved, then within fourteen days of the receipt of the report, the House of Assembly shall consider the report, and if by a resolution of the House of Assembly supported by not less than two-thuds majority of all its member, the report of the Panel is adopted, then the holder of the office shall stand removed from office from the date of the adoption of the report.

(10) No proceedings or determinations of the Panel or of the House of Assembly or any matter relating to such proceedings or determination shall be entertained or questioned in any court.

Acting under subsection 5 of section 188 of the Constitution, K. Bamisile Chief Judge of Ekiti State in 2006 set up a 7 man panel to investigate the allegations of misconduct against the 2nd respondent, who at the time was the Executive Governor of Ekiti State. See page 522 of the record of appeal. The panel investigated

the allegation of gross misconduct against the 2nd respondent and his deputy and presented a report to the Ekiti State House of Assembly. The panel exonerated the 2nd respondent of all the allegations of gross misconduct in these words:

> "It is trite that he who alleges must prose beyond reasonable doubt in criminal allegation as it is in this ease. The allegations are therefore unsubstantiated gold-digging and therefore failed in its entreaty. This panel hereby absolves the Governor and his Deputy of all the allegations contained in the notice of impeachment.
>
> This panel under the relevant provisions of the 1999 Constitution and the applicable substantive laws of the land hereby dismiss the case of the petitioner."

After this report was deliberated upon by the Ekiti State House of Assembly, the Chief Judge of Ekiti State was removed from office and an acting Chiet Judge was appointed by the Ekiti State House of Assembly. The acting Chief Judge constituted another panel to investigate the 2nd respondent despite a warning by the Chief Justice of Nigeria, Hon. Justice S.M.A. Belgore, who warned him that his appointment as acting Chief Judge by the Ekiti State House of Assembly is unconstitutional and any action he undertakes would be equally unconstitutional. The panel the acting Chief Judge set up indicted the 2nd respondent and the was removed/ impeached by the Ekiti State House of Assembly. The 2nd panel set up by the Chief Judge of Ekiti State found the allegations of gross misconduct against the 2nd respondent not proved. The panel set up by an acting Chief Judge found the allegation proved.

Subsection 8 of section 188 of the Constitution stales that

> "(8) Where the Panel reports to the House of Assembly that the allegation has not been proved, no further proceedings shall be taken in respect of the matter."

The panel set up by the Chief Judge of Ekiti State reported to the Ekiti State House of Assembly that tiie allegations against 2nd respondent were not proved. That report is final and in accordance with section 188(8) of the Constitution, no further proceedings can/ shall be taken in respect of the matter. The 2nd panel set up by the acting Chief Judge of Ekiti State undertook further proceedings in respect of the same matter resolved by the first panel. Whether the 2nd panel was properly or improperly constituted is not the issue.

The proceedings of the 2nd panel falls within "no further proceedings shall be taken in respect of the matter"

Consequently, further proceedings by the 2nd panel which culminated in the impeachment of the 2nd respondent was illegal and unconstitutional, clearly contrary to the provisions of section 188(8) of the Constitution, The impeachment of a Governor is a legislative constitutional affair outside the jurisdiction ol the court. See *Musa v. Kaduna State House of Assembly & Or* (1982) 3 NCLR 450; *Abaribe v. Abia State House of Assembly* (2002) 14 NWLR (Pt. 788) p. 466.

The impeachment panel has power only to find that the allegations against the Governor are proved or not proved. See section 188(8) and (9) of the Constitution. The panel has no power to find the Governor guilty of the allegations of gross misconduct. When a Governor in this case the 2nd respondent is impeached for embezzlement of funds, clearly a criminal offence, he should be taken before a competent court of law or the Code of Conduct Tribunal to face prosecution. It is only after any of these court finds the Governor guilty and he is convicted and sentenced for the oflence can he be disqualified under section 182(1) (d) or (e) of the Constitution and indeed under any known law.

Disqualification as a result of impeachment can only arise if the impeached person is thereafter convicted and sentenced for the offence for which he was impeached. Since the 2nd respondent was never prosecuted for embezzlement of funds or any criminal offence, and never convicted he cannot by any stretch of imagination be disqualified under section 182 (1) (d) (e) or any of the subsections supra. *Omoworare v. Omisore* (2010) 3 NWLR (Pt. 1180) p. 58 is still good law.

The Court of Appeal made a very important and serious obsorvaiion when it said:

> "We however wish to observe in passing that the essence of impeachment was to identify somebody who is not fit to hold public office, but is rather sad and unfortunate that after finding one, the law appears reluctant to give the desired punch. It is hoped that in future this issue will be reviewed by the appropriate authority."

There is nothing wrong with the Constitution. On the contrary, the law gives the required punch, and there is nothing to be reviewed. The problem lies with our institutions which are too

weak. A Governor impeached for (embezzlement of funds) ought to be prosecuted in a competent court or Code of Conduct Tribunal. See section 182(1) (d) and (e) of the Contitution. Failure to do that amounts to grave lapses and abandonment of duties by the authorities concerned and an impeached Governor would be allowed to contest elections again, as a result of our weak institutions.

Impeachment can never be listed under section 182 of the Constitution as a ground for disqualification, but a Governor, etc impended toi dishonesty or baud (i.e. criminal offences) and taken below a competent court or the Code of Conduct Tribunal would be disqualified by the provisions of section 182(1) (d) and (e) if he is convicted and sentenced for the offence/s for which he was impeached.

The doctrine of issue estoppel is that where tin issue has been decided by a competent court, the court will not allow it to be relitigated by different parties. The rule of esloppel is a rule Incidence and the matters which will found an issue estoppel may be of law, fact, or mixed law and fact. Issue estoppel applies only to issues. The issue of the 2nd respondents HND Certificate was laid to rest in *AD v. Fayose* (2004) AFWLR (Pt. 222) p. 1719; (2005) 10 NWLR (Pt. 932) 151. The Court of Appeal found that the 2nd respondents HND Certificate was genuine. The decision was final. It lays to rest for all time, any further consideration of the (authenticity of the HND Certificate in question.

For this and the more detailed reasoning in the leading judgment, the appeal is dismissed.

OGUNBIYI, J.S.C.: The historical back ground and subject matter of this appeal are all well expounded in the lead judgment of my learned brother, Ngwuta, JSC. I do not wish to repeat same. There are four grounds predicating the petition and specifically ground IV is reproduced as follows:-

> "iv) The 2nd respondent was not qualified to contest as at the time ol the election on the following grounds:-
>
> (a) The 2nd respondent was found guilty of the contravention of the Code of Conduct by the impeachment panel set up bv the acting Chief Judge of Ekiti State on allegation of gross misconduct involving embezzlement of funds preferred against him by the Ekiti State House of Assembly consequent upon which

he was impeached and removed from the office of the Governor of Ekiti State in the year 2006.

(b) The 2nd respondent presented a forged High National Diploma (HND) Certificate of the Polytechnic Ibadan to the 3rd respondent (INEC)."

Inclusive of the five main reliefs sought from the trial tribunal, the petitioner sought for:-

"An order of the tribunal withdrawing the certificate of return issued to the 2nd respondent by the 3rd respondent and present the certificate of return to the candidate of the petitioner John Olukayode Fayemi who scored the majority of valid votes cast and having met the constitutional requirements us required by law.

In the alternative however, the petitioner sought for an order nullifying the Governorship election held on 21st June, 2014 and a fresh election be ordered"

The petition was dismissed by the trial tribunal. So also the appeal to the Court of Appeal Ekiti Judicial Division. On a further appeal before us, the appellant has now raised seven issues which in my view are grossly proliferated and can be consolidated in the following terms. In other words, while issues 1 and 7 could be taken together, issues 2 and 3 are also closely related. Issues 4 and 5 relating to the authenticity of the 2 respondent's certificate are also very interwoven while issue 6 can stand and be determined on its own.

Issues 1 and 7

The issues revolve around the sinking out of the names of the 4th and 5th respondents on the ground that they were not statutory or necessary respondents under the provision of section 137(2) of the Electoral Act 2010. Consequently, all the paragraphs of the petition containing allegations against them were therefore struck out. It is the appellant's contention that subsections (2) and (3) of the said section 137 are not exhaustive on the list of persons who can be respondents to an election petition.

It is pertinent to state that the section of the Act specifically states the two classes of respondents to an election petition under the subsections (2) and (3), that is to say, while the former contemplates

the person whose election is complained of in the petition, the second category of respondent under sub-section (3) are the officers of INEC by whatever designation they may be called. Furthermore, the phrase "or such other persons" used in subsection (3) (b) are related to the officials of INEC whose identities are not specifically designated in section 137(3) of the Act. Examples are poll clerks, ward collation officers, supervisory presiding officers, resident electoral commissioners etc. This is made clear by section 38 of the Act which amended paragraph 5 of the First Schedule to the Act.

It is clear on the record, per volume 2, that the tribunal found that the appellant failed to prove its allegations against the 4th and 5th respondents. That finding has not been challenged by the appellant the court below i.e. the allegation of intimidation, harassment by soldiers or policemen; the allegations were not live issues below the court below.

As rightly submitted by the respondents, the two lower courts were right when they held that the 4th and 5th respondents were wrongly joined to the petition as respondents, more so in the absence of any relief against the said 4th and 5th respondents in the petition as it was held in the case of B.A.T Company Limited v. International Tobacco Company Limited (2012) LPELR 7875 CA, (2013) 2 NWLR (Pt. 1339) 493.

The decision of the two lower courts concerning the striking out of the names of the 4th and 5th respondents and the paragraphs of the petition where their names were mentioned were concurrent. The law is strictly cautious that such concurrent decisions should not be interfered with in the absence of the appellant showing that it is perverse, wrongful or unsupportablc either in fact or in law. Election petition cases are *sui generis* in nature and hence the reliefs grantable are limited by stature and parties can sue and be sued, see Buhari Yusuf (2003) 14 NWLR (Pt. 841) 446 at 508 or (2003) FWLR (Pt. 174) 360 at 372.

It is also pertinent to state that no allegation was specifically made against the persons of the 4th and 5th respondents. Their joinder by the petitioner will appear to have stemmed from a misapplication of the principle of vicarious liability which is applicable only in civil matters as opposed to where allegations of commission of crimes have been made against agents of a disclosed principle. See *Adeoye v. Olorunoje* (1996) 2 MAC 256 at 262 where it was held that:-

> "it is not the law that a master is responsible for the crime of his servant"

From the nature of the claim at the tribunal, the petition could effectively and effectually be determined in the absence of the 4th and 5th respondents. In the absence of any agency relationship between INEC and the 4th and 5th respondents coupled with the failure of

the appellant to establish any act of malfeasance against the 4th and 5th respondents in the circumstance, all arguments proffered by the appellant's counsel relating them are merely academic. See *C.P.C. v. INEC* (2012) All FWLR (Pt. 617) 605 at 651; (2012) 13 NWLR (Pt. 1317) 260.

The 4th and 5th respondents in the circumstance are not parties therefore within the contemplation of the Electoral Act and the upholding of the striking out of their names by the lower court had not occasioned any miscarriage of justice.

In respect of the appellant's issues 2 and 3, the learned counsel for the 2nd respondent has rightly, in my view compartmentalized same into three segments. That is to say:- the correctness or otherwise of the two lower courts' concurrent findings that the appellant relied on impeachment as a ground of disqualification of the 2nd respondent; the mutual conclusion of the two lower courts that the alleged contravention of the Code of Conduct by the 2nd respondent was not proved by the appellant as required by law and thirdly, whether the two lower courts were indeed right in relying and applying the Court of Appeal decision in *Omoworare v. Omisore*. (2010) 3 NWLR (Pt. 1180) 58.

The petitioner/appellant has on his petition copiously pleaded facts and documents tending to show that the 2nd respondent was impeached and is as a result disqualified. The said allegation was outrightly denied by the 2nd respondent, in particular, and therefore joined issues refuting the alleged impeachment. While PW1 and the appellant tendered a number of exhibits inclusive of exhibit H, the 1st respondent and also the 2nd respondent tendered documents inclusive of exhibits U and V.

It is obvious and apparent that the appellant relied on impeachment as a ground for disqualification of the 2nd respondent to contest the election in issue. This is despite the findings in the case of *Omoworare v. Omisore* supra at pages 111 - 114 wherein it was held in summary that an impeachment is not a ground for disqualification of a candidate wishing to contest an election. Reference can be made to section 182 of the Constitution in point.

The conduct of the appellant through its witnesses especially PW9 and PW11, the volume of the pleadings as well as the documents tendered will leave no one in doubt that the appellant indeed relied on impeachment as a ground seeking for the disqualification of the 2nd respondent to contest the election in issue.

The second leg of the tripod is whether the 7 man investigation panel set up by the Chief Judge of Ekiti State had the power to find the 2nd respondent guilty of contravening the Code of Conduct? The tribunal in its findings, in view of the prevailing, judicial authorities, did not hesitate to answer the question posed in the negative especially in the light of the decision of this court in *A.C. v. INEC* (2007) 12 NWLR (Pt. 1048) 222 at 291, paras. G-H, wherein his Lordship Tabai, JSC held and said:-

> "The disqualification of a person from any elective office underthe Constitution involves the determination of that person's civil rights and obligations and which determination is, by virtue of sections 6 and 36 of the Constitution specifically assigned to courts or other tribunals established by law and constituted in a manner as to ensure their independence and impartiality"

Katsina-Alu, JSC who wrote the lead judgment at page 260, paras. B-D and in the same tone also said:-

> "The disqualification in section 137(1)(i) dearly involves a deprivation of right and a presumption of guilt for embezzlement or fraud in derogation of the safeguards in section 36(1) and (5) of the Constitution. The trial and conviction by a court is the only constitutionally permitted way to prove guilt and therefore the only ground for the imposition of criminal punishment or penalty for the criminal offences of embezzlement or fraud. Clearly the imposition of the penalty of disqualification for embezzlement of fraud solely on the basis of an indictment for these offences by an administrative panel of inquiry implies a presumption of guilt contrary to section 36(5) of the Constitution of the Federal Republic of Nigeria, 1999.'

The sole purpose which is well thought out by the foregoing authority is the guardian nature of the Constitution which seeks to

safeguard the weak against the indiscriminate and excessive use or abuse of power by the mighty.

It is no wonder that the lower court, did not hesitate but said thus at pages 1916 -1917 in its judgment:-

> "The rationale or wisdom for insisting that entry of guilt must be made by a regular court or Code of Conduct Tribunal, as the case may be, was amply supplied by court in *Omoworare v. Omisore* (supra) at page 119 thus -
>
> > "... consistency and adherence to the constitutional allocation of powers is well thought of, as it seeks to safeguard a vindictive and an indiscriminate use or abuse of power, which danger and consequence could be far reaching and out of control. There is every opportunity that human actions could take the turn of being subjective in nature especially where the alter ego side of the personality is involved. it could result into a complete absence of self control and or sense of sound reasoning. The concept of power always connote position of authority. Power swapping therefore and or its alteration thereof it allowed, would in the situational circumstances subject the weaker at the mercy of the powerful authority. The insignificant for instance cannot lace the fury of powerful lion. The balance will not cerianlly meet the equation."
>
> We affirm the said finding accordingly as we are concerned with whether the decision reached by the tribunal on the issue is right and not whether its reasoning is faulty."

It is the decision by the lower court iherefore that since the findings of guilt for contravention of Code of Conduct by the 2nd respondent emerged from impeachment proceedings, the result of impeachment cannot be used as a ground for disqualification of the 2nd respondent to contest the gubernatorial election. I see no reason why that finding should be faulted.

What is even more intriguing about the case at hand is the circumstance relating to the setting up of the panel investigating the

2nd respondent of the allegation of misconduct. In other words, it is revealing on the pleadings of parties, in particular those of the respondents, that there were a total of two panels set up to investigate the 2nd respondent. While the 1st panel which was constituted on 10th October, 2006, totally exonerated the 2nd respondent of all the allegations of misconduct levied against him, it further concluded in its report that the allegations of gross misconduct levied against the 2nd respondent were "unsubstantiated, gold digging" and in consequence of which they absolved the said respondent of all the allegations contained in the notice of impeachment. Paragraph 44(g)(vi) of the 1st respondent's reply to the petition at pages 219 -220 of volume 1 of the record is in evidence.

"Furthermore and while the report of the exonerating panel was still in place, it is on record that the 2nd respondent was eventually removed from office by a subsequent 2nd panel impeached and indicted him of misconduct. The propriety or not of the 2nd panel will briefly be considered in the light of section 188 subsection (8) of the Constitution which states:-

> "(8) Where the panel reports to the House of Assembly that the allegation has not been proved, *no further proceedings shall be taken in respect of the matter*." Italics is for emphasis.

The foregoing constitutional provision is very clear and unambiguous. It does not call for any further interpretation. This provision therefore calls to question the legality and the effect of the outcome of the report submitted by the subsequent panel which purportedly removed the Governor. The Constitution is final and binding on all without exception. The report by the 2nd panel cannot in the result stand while that of the 1st panel subsists.

I further wish to say that section 182(1)(e) of the Constitution is very much applicable to this case and has specified clearly the criteria which will disqualify a person from contesting election to the office of Governor of a State. The section states thus:-

"182(1) No person shall be qualified for election to the office of Governor of a State if -

> (a) ……..
>
> (b) ……..
>
> (c) ……..
>
> (e) within a period of less than ten years before the date of election to the office of Governor

> of a State he has been *convicted* and *sentenced* for an offence involving dishonesty or he has been *found giulty* of the contravention of the Code of Conduct…..” (emphasis supplied).

From the foregoing provision, the ground for the disqualification has to be by reason of conviction and sentence for an offence of dishonesty or for finding of guilt for contravening the Code of Conduct. We are here concerned with the interpretation of the phrases “*found guilty of the contravention of the Code of Conduct.”* Wherein the lower court relied on the decision of *Omoworare v. Omisore* (*supra*) by endorsing the findings by the tribunal which was earlier reproduced supra.

It follows therefore that, to interpret section 182(1)(e) irTthe light of the contemplation by the appellant, will certainly negate the construction and purpose of section 36(1) and (5) of the Constitution on the right to fair hearing and presumption of innocence. This I say because, while a court of law or tribunal carried the identity of impartiality, the same cannot be said of a panel set up for a specific purpose by a body which will eventually report to itself directly or indirectly. There cannot, certainly be the right to fair bearing because the panel will act as a judge in its own cause. The case in point is *Garba & Others v. University of Maiduguri* (1986) I NWLR (Pt. 18) 550, (1986) 2 SC 129, (1986) All NLR 149. The presumption of innocence envisaged by the Constitution will also be undermined grossly. In the light of the constitutional provision which places heavy premium on the protection of a citizen and the presumption of his innocence until proved otherwise, I feel safe to say that the interpretation of the phrase “pronouncement of guilt” envisaged by section 182(1)(e) of the Constitution must be an outcome of a judicial proceeding, either by a regular court or the Code of Conduct Tribunal. In the absence of such, the decision in the case of *Omoworare v. Omisore* should be applied; that is to say an act of impeachment *simplicita* cannot be used as a ground for a disqualification under section 182(1)(e) of the Constitution 1999 (as amended) for purpose of precluding from contest. In other words, impeachment cannot be used as the basis of disqualification of the 2nd respondent to contest the Governorship election in Ekiti State.

It is unfortunate to state that the same Constitution has failed to give a clear cut sanction or what would be the implication of an outcome of findings of wrong doing by a panels' report. The effect I

hold can be anything else, but short of finding the 2nd respondent guilty of contravening of the Code of Conduct within the contemplation of section 182(1)(e) of the said Constitution.

My learned brother, Ngwuta, JSC has dealt adequately with this appeal and I agree with the reasoning and conclusion arrived thereat. 1 hereby adopt same as mine and also dismiss the appeal as lacking in merit and abide by all other orders made in respect of the cross appeal.

AKA'AHS, J.S.C.: In the Governorship election conducted, in Ekiti State on Saturday, 21st June, 2014, eighteen registered political parties sponsored candidates for the election. At the conclusion of the said election, the Independent National Electoral Commission (INEC) (the 3rd respondent) in this appeal announced the scores of the parties and their candidates who participated in the election. Dr. John Olukayode Fayemi who was sponsored In the All Progressives Congress (APC) scored 120,433 votes while Mr. Peter Ayodele Fayose of the Peoples Democratic Parly (PDP) was credited with 203.090 votes. It declared the PDP (1st respondent) the winner of the election and returned Mr. Ayodele Peter Payose (2nd respondent) as the duly elected Governor of Ekiti State. The APC, now appellant in this appeal, was not satisfied with the declaration and return made and filed a petition in the Governorship Election Petition Tribunal tit Ado-Ekiti. The grounds upon which the petition was based are contained in paragraph 35 of the petition as follows:-

> "35 Your petitioner states that:
>
> (i) The 2nd respondent was not duly elected by majority of lawful votes cast at the election.
>
> (ii) The election of the 2nd respondent is invalid by reason of corrupt practices.
>
> (iii) The election of the 2nd respondent is invalid by reason of non-compliance, with the provisions of the Electoral Act 2011 as amended and the Manual for Election Officials 2014 and the Constitution of the Federal Republic of Nigeria 1999 (as amended).
>
> (iv) The 2nd respondent was not qualified to contest as at the time of the election on the following grounds -
>
> (a) The 2nd respondent was found guilty of the contravention of the Code of Conduct by the impeachment panel set up by the Acting Chief Judge of Ekiti State on allegation of

gross misconduct involving embezzlement of funds preferred against him by the Ekiti State House of Assembly consequent upon which be was impeached and removed from the office of governor of Ekiti State in the year 2006.

(b) The 2nd respondent presented a forged Higher National Diploma (HND) Certificate of the Polytechnic Ibadan to the 3rd respondent (INEC).

In paragraph 125 of the petition, the petitioner prayed ionta following reliefs:-

A. That it be determined and declared that the 1st respondent, Peter Ayodole Fayose was not qualified to contest the Governorship election held on 21st June, 2014 on the ground that he was found guilty of the contravention of the Code of Conduct by the impeachment panel set up by the acting Chief Judge of Ekiti State and the Ekiti State House of Assembly, consequent upon which he was impeached and removed from the office of the governor of Ekiti State in the year 2006.

B. That it may be determined that the 2nd respondent presented a forged certificate of Higher National Diploma (HND) of The Polytechnic Ibadan to the Independent National Electoral Commissioner thus not qualified to contest the election.

C. That it be determined and declared that the 2nd respondent Peter Ayodele Fayose was not duly elected or returned by the majority of law ful votes cast at the Ekiti State Governorship election held on Saturday 21st June, 2014.

D. That it may be determined that having regards to the non-qualification of the 2nd respondent to contest the election, the 3rd respondent ought to have declared the candidate of the petitioner John Ohikayode Fayemi, who scored the highest number of lawful votes east at the election as the winner of the election.

E. An order of the tribunal withdrawing the certificate of return issued to the 2nd respondent by the 3rd respondent and present the Certificate of Return to

the candidate of the petitioner John Olukayode Fayemi who scored the majority of valid votes cast and having met the constitutional requirements as required by law.

In the Alternative

An order nullifying the Governorship Elociion held on 21st June, 2014 and a fresh election be ordered.

On 19th December, 2014, the Governorship Election Petition Ekiti State delivered its judgment and dismissed the petition for lacking in merit. The petitioner appealed while the 1st respondent also cross-appealed to the Court of Appeal. Although some issues were resolved in favour of the appellant, the lower court found that the errors committed by the tribunal in the the handling of the petition did not occasion a miscarriage of justice as a substantive issues of disqualification and return as well as forgery were resolved in favour of the 2nd respondent. The appeal was accordingly dismissed and the judgment of the tribunal was affirmed. The cross appeal succeeded in part. The appellant felt dissatisfied and filed an appeal to this court. The 1st and 2nd respondent equally felt dissatisfied with some adverse findings made by the Court of Appeal and cross-appeal.

The appellant filed 14 grounds of appeal from which he distilled seven issues for determination as follows:-

1. Whether the Court of Appeal was right in its decision that the 4th and 5th respondents were not necessary parties to the petition in the light of the pleadings and findings made by the Court of Appeal and whether INEC ought to take responsibility for their acts? Grounds 11, 12 and 13.
2. Whether the court of Appeal was right in its decision the the appellant based its petition on impeachment and whether the decision in Omoworare v. Omisore (2010) 3 NWLR (Pt.1180) 58 was rightly applied to this case by the Court of Appeal? Grounds 2, 4, 5 and 7.
3. Whether the court of Appeal was right that the appellant did not prove disqualifying ground under section 182(i) (e) of the Constitution of Nigeria 1999 (as amended) against the 2nd respondent? Ground 1, 3 and 6.

4. Whether the Court of Appeal was right in its decision that the appellant didi not prove the allegation of presentation of forged HND Certificate by the 2nd respondent to INEC? Ground 8.
5. Whether the Court of Appeal was right in its decision that the case of Alliance for Democracy v. Fayose (2004) All FWLR (Pt. 222) 1719 at 1744-46; (2005) authenticity of HND Certificate presented by the 2nd respondent to INEC? Ground 9.
6. Whether the Court of Appeal was right in its decision affirming the striking out of paragraph 13 0f the appellant's reply to the petition? Ground 10.
7. Whether the Court of Appeal was right when it failed to nullify the Governorship Election for Ekiti State held on the 21st June, 2014 inspite of its findings that soldiers were unlawfully deployed and used for the election? Grounds 14.

The 1st respondent submitted four issues for determination while the 2nd and 3rd respondents had live issues each. The 4th respondent distilled three issues and the 5th respondent adopted issue 1 in the appellant's brief in his brief of argument.

The issues formulated by the 1st respondent are:-

1. Whether the court below was in error in holding that the appellant did not make out a case in its pleadings or prove the disqualifying ground under section 182(1) (e) of the 1999 Constitution as amended. Ground 1 - 7.
2. Whether the court below was in error to affirm the decision of the tribunal that the appellant failed to prove its allegation that the 2nd respondent presented a forged certiiicate of The Polytechnic Ibadan to the 3rd respondent. Grounds 8 and 9.
3. Whether the court below was in error to affirm the decision of the tribunal striking out paragraph 13 of the petitioner's reply to the 2nd respondent's reply. Ground 10
4. Whether the court below was in error to affirm the decision of the tribunal striking out the names of the 4th and 5th respondents and in not nullifying the gubernatorial election of June 21st 2014. Grounds 11, 12 and 14.

The five issues raised by the 2nd respondent are:-

1. Whether the learned Justices of the Court of Appeal were not right in agreeing and coming to the conclusion that the appellant relied on the alleged impeachment of the 2nd respondent as one of the grounds of disqualification and in holding that the allegation of contravention of Code of Conduct relied upon by the appellant was not proved and whether the reliance of the Court of Appeal on the decision in *Omoworare v. Omisore* was not right. Grounds 1 to 7.
2. Whether the Court of Appeal was not right in holding that the allegation of forgery of a Higher National Diploma (HND) Certificate by the 2nd respondent was not proved and that the ownership of the said certificate had earlier been decided in the case of *A.D. v. Fayose* (2004) All FWLR (Pt.222) 1719; (2005) 10 NWLR (Pt. 932) 151. Grounds 8 and 9.
3. Whether the Court of Appeal w as not correct in its decision affirming the trial tribunal's striking out of paragraph 13 of the petitioner's reply to the 2nd respondent's reply to the petition when the said paragraph 13 was in fact filed in contravention of the applicable provisions on reply and pleadings. Ground 10.
4. Whether the Court of Appeal was not correct in its interpretation and views on the provisions of section 137(2) & (3) of the Electoral Act 2010 (as amended) by upholding the striking out of the 4th and 5th respondents who are not statutory parties and are not agents of the 3rd respondent (INEC) and whether INEC could take responsibility for their acts. Grounds 11, 12 and 13.
5. Whether the mere fact that the Court of Appeal made comments on the alleged deployment of members of the Armed Forces at the election of 21st June, 2014 to Ekiti State which was not even proved, would without more, lead to the nullification of the election which was conducted in substantial compliance with the Electoral Act and the law. Ground 14.

The issues which the 3rd respondent considered as arising for determination in the appeal are:-

1. Whether the Court of Appeal was right in its decision that the ground of disqualification under section 182 (1) (e) of the Constitution of the Federal Republic of Nigeria 1999 was not proved? (Grounds 1, 3 and 6)
2. Whether the Court of Appeal was right in its decision that the outcome of impeachment process of the 2nd respondent did not constitute a ground of disqualification of a candidate under section 66 (1)(d) & (h) of lhe Constitution of the Federal Republic of Nigeria, 1999 as amended (Ground 2, 4, 5 and 7).
3. Whether the Court of Appeal was right in affirming that the criminal allegation of forgery of Higher National Diploma Certificate by the 2nd respondent was not proved. (Grounds 8 and 9)
4. Whether the Court of Appeal was right in its decision that paragraph 13 of the appellant's reply to the 2nd respondent's reply was rightly struck out. (Ground 10)
5. Whether it was proper to have joined the 4th and 5th respondents as parties who did not qualify as statutory respondents, and there being no reliefs sought against them by the appellant as petitioner before the tribunal (Grounds 11, 12, 13 and 14).

Three issues were formulated by the 4th respondent and they are:-

1. Whether the Court of Appeal was right when it upheld the tribunal's decision to the effect that the 4th respondent did not qualify as a respondent as contemplated by section 137 (2) & (3) of the Electoral Act 2010 (as amended) (Ground 11)
2. Whether the Court of Appeal was right when it affirmed the decision of the Election Tribunal striking out the names of the 4th and 5th respondents and if striking out the name of the 4th respondent

contravened his (4th respondent's) constitutional right to fair hearing (Grounds 12 and 13).

3. Whether the Court of Appeal was right when it failed to nullify the Governorship Election of Ekiti State held on the 21st day of June, 2014 (Ground 14).

The appellant filed replies to the briefs of 1st, 2nd, 3rd and 4th respondents and learned senior counsel applied to make oral submissions in reply to 3rd respondent's brief since he was served with 5th respondent's brief in the morning of 26/3/2015 when learned counsel adopted the briefs and made oral submissions on them.

The 1st and 2nd respondents cross-appealed. Learned counsel for 1st respondent had two notices of cross-appeal and he obtained the leave of the court to rely on the two notices in the brief he filed in the cross-appeal. I intend to deal with the main appeal first.

The petition is anchored mainly on the disqualification of 2nd respondent to contest the election on account of his impeachment and the submission of a forged certificate as evidence of his academic qualification. This thread runs through issues 2, 3, 4, 5 and 6 in the appellant's brief.

Paragraphs 108 and 109 of the petition deal with the Higher National Diploma Certificate of The Polytechnic lbadan which 2nd respondent presented to the 3rd respondent to enable him contest the election. It is this certificate which petitioner alleged was forged in paragraph 109 of the petition.

The 2nd respondent denied paragraph 109 of the petition in paragraph 79 of his reply. He said

"79 The respondent denies paragraph 109 of the petition and states that he did not present a forged Higher National Diploma Certificate of the Polytechnic lbadan as the Higher National Diploma Certilieate presented by him to the 3rd respondent was earned and awarded to him by the Polytechnic in 1987".

It was in response to this pleading by 2nd respondent that the petitioner attempted to file a reply alleging the following in paragraph 13:-

"13. In specific response to paragraph 79 of the 2nd respondent's reply, the petitioner avers that the certificate issued by The Polytechnic lbadan to one Peter Ayodele Oluwayose if any, was earned and awarded to an indigene of Oyo Slate from Oluyode Local Government. The petitioner w ill at the trial

rely on the admission form, transcript and other relevant documents."

2nd respondent took objection to paragraph 13 of the petitioner's reply on the ground that same raised a new point to which he could not have opportunity to react and it was a subtle attempt by the petitioner to amend the petition when the time for doing so had lapsed. The tribunal agreed and struck out the paragraph. The Court of Appeal affirmed the decision of the tribunal striking out the paragraph because it amounted to amending the petition. The petitioner was in possession of this information as far back as 2004 when the appeal in Alliance for *Democracy v. Fayose* (2005) 10 NWLR (Pt. 932) 151 was decided on 7th May, 2004 in CA/IL/EP/GOV/1/2004 and the leading senior counsel who filed the petition was the person w ho argued the appeal in *AD v. Favose* supra. Since the issue about 2nd respondent's educational qualification was dealt with in 2004, learned senior counsel who incidentally was the same person who appeared for the 2nd respondent in 2004 raised in his reply issue estoppel and estopped *per rem judicata* in paragraph 85 where he said:-

"85. The respondent states that the issue of his Hisrher National Diploma Certificate was judicially settled by the Court of Appeal Ilorin Division (then as the final court in Governorship Flection Petition) in appeal number CA/1L/EP/GOV/1/2004: *Alliance for Democracy v. Peter Favose & 4 ors* by virtue of which the averments in paragraph 108 and 109 of the petition are caught by the principles of issue estoppel and estoppel *per rem judicata* and therefore liable to be dismissed as constituting an abuse of court process."

The argument advanced by leaned counsel to the appellant is that the propriety of paragraph 13 of the petitioner's reply must be construed within the parameters of paragraph 109 of the petition and paragraph 79 of the 2nd respondent's reply. It is the contention of the learned senior counsel that paragraph 13 of the petitioner's replv contains the averment to demonstrate that the HND Certificate of which the 2nd respondent claimed was, awarded to him vide paragraph 79 of his pleadings could not have been his own because the owner of the said certificate to which the 2nd respondent is laying claim was from Oluyole Local Governement of Oyo State.

A reply is the defence of the plaintiff to the case put forward by the defendant or even to the counter-claim of the defendant or to the new tacts raised by the defendant in his defence to the plantiff's statement of claim. A plaintiff is not allowed, in law to introduce a new issue in the reply. See Olubodun v. Lawal (2008) 17 NWLR (Pt.1115) 1, *Ishola v. S.B.N.* (1997) 2 NWLR (Pt.488) 405.

The averment by the petitioner/appellant in his reply to the 2nd respondent's reply to the petition was a clear case of an attempt by the appellant to change its case against the 2nd respondent from being that of presentation of a forged HND Certificate to impersonating the owner of the certificate. Both issues were fully considered by the Court of Appeal, Ilorin Division in *A.D. v. Fayose* supra. In that ease, paragraph 9(iii) (d) (d)(ii) of the petition was reproduced where the appellant pleaded as follows:-

> "9. Grounds and facts in support of the petition
>
> (iii) the 1st respondent was disqualified from contesting the Ekiti State gubernatorial election on 19th day of April 2003 because
>
> d) 1st respondent did not possess the basic educational qualification to qualify him to contest the election under reference.
>
> (d) Petitioner shall contend that the use of the names and credentials of Oluwayose Ayodele Peter was fraudulent on the part of the 1st respondent. Particulars
>
> (ii) "the 1st respondent - Peter Ayodele Fayose is distinct and/or different from Oluwayose Ayodele Peter hence the credentials relied on did not belong to the 1st respondent"

Dealing with the issue, Onnoghen JCA (as he then was) said:-

> "The fact that the Oluwayose who owns the certificates is said to be one from Oyo State as contained in the form filled in 1985 is not conclusive of the fact that he is not the 1st respondent in view of the fact that other information supplied in that form equally point to the 1st respondent, such as his permanent home address ... so, granted that the act that the owner of the certificates came from Oyo State is pleaded by the appellant which equally point to the 1st respondent as the owner of the certificates show clearly that there are doubts as to the identity of the owner of those certificates and by

operation of law, such doubts are to be resolved in favour of the 1st respondent.

When the petition in *A.D. v. Fayose* was tried, the 1st respondent (now 2nd respondent) called his father who testified as DW1. His (1st respondent's) classmate at The Polytechnic Ibadan, Adigun Gozel Ramoni, gave evidence as DW2, and through him the 1st respondent produced a copy of the Daily Sketch issue of Monday July 22, 1974 where DW1 did the change of name from John Olorunfemi Fayose to John Olorunfemi Oluwayose. The issue of the change of name and ownership of the certificates was laid to rest in *AD v. Fayose*. By bringing the issue up again, learned senior counsel wanted to re-open the issue which had been settled by the Court of Appeal when it was the final court in the matter. The subsequent amendment of the Constitution allowing appeals in gubernatorial election petitions to be heard by the Supreme Court did not alter or change the state of the law on the finality of the decision. The attempt by the appellant to re-litigate the issue on whether 1st respondent had changed his surname to Oluwayose or was falsely claiming the HND Certificate issued by The Ibadan Polytechnic was most tendentious and therefore an abuse of the process of the court. It was an effort to amend the petition when the period allowed for amendment had lapsed. The tribunal was therefore right to strike out paragraph 13 of the appellant's reply which was affirmed by the Court of Appeal. The plea of learned counsel on issue estopped is well made out.

The other issue regarding the disqualification of the 2nd respondent has to do with his impeachment. Section 182 (1) (e) of the 1990 Constitution (as amended) provides:-

"182(1) No person shall be qualified for election to the office of Governor of a State if -

(e) within a period of less than ten years before the date of election to the office of Governor of a State he has been convicted and sentenced for an offence involving dishonesty or he has been found guilty of the contravention of the Code of Conduct.

The operative words in section 182 (1) (e) of the Constitution are "convicted and sentenced for an offence involving dishonesty" and "found guilty of the contravention of the Code of Conduct."

Paragraph 3 (d) & (e) Part 1 of the Third Schedule to the 1999 Constitution creates a Code of Conduct Bureau with powers to

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"(d) ensure compliance with and, where appropriate, enforce the provisions of the Code of Conduct or any law relating thereto;

e) receive complaints about non-compliance with or breach of the provisions of the Code of Conduct or any law relating thereto, investigate the complaint and, where appropriate, refer such matters to the Code of Conduct Tribunal."

Where the Code of Conduct Tribunal finds a public officer guilty of contravention of any of the provisions of this Code it shall have power to impose the appropriate sanction which includes the barring for 10 years of the person convicted from contesting election into the office of Governor of a State as stipulated in section 182 (1) (e) and paragraph 18 (2) fifth Schedule to the Constitution.

In *Fawehinmi v. I.G.P*. (2002) 7 NWLR (Pt. 767) 606 Uwaifo J.S.C. stated at page 678 para. D thus:

> "It cannot be suggested that clear and unambiguous terms of our Constitution may be rewritten or construed beyond what they mean in the guise of liberal or broad interpretation"

If the framers of the Constitution intended to imbue the panel of investigation, appointed by the Chief Judge of the State in accordance with section 188 (5), to investigate the allegation against the Governor or Deputy, with powers to find him guilty of the criminal offence or breach of the Code of Conduct and convict him accordingly, there would be no need to donate such powers to a court of law or the Code of Conduct Tribunal whose decisions are subject to appeal. The panel can only find the allegations proved and if the report is adopted by the House of Assembly and a resolution supported by two-thirds majority of the members is passed, the holder of the office stands removed. As clearly stated in section 182 (1) (e) of the Constitution, and the various judicial pronouncements regarding finding a person guilty of an offence or being convicted and sentenced, it is only a court of law that can convict and sentence a person while the Code of Conduct Tribunal can find the person guilty of a breach of the Code of Conduct. See Garba v. University of Maiduguri (1986) 1 NWLR (Pt.18) 550; *Laoye v F.C.S.C.* (1989) 2 NWLR (Pt.106) 652.

As a result of the immunity enjoyed by elected public officers under section 308 of the Constitution, an incumbent Governor cannot be arraigned before a court of law or the Code of

Conduct Tribunal. See *Tinubu v. I.M.B. Securities Plc* (2001) 16 NWLR (Pt. 740) 670: *Fawehinmi v. l.G.P.* (2002) 7 NWLR (Pt. 767) 606. If a governor is removed from office but is not taken before the Code of Conduct Tribunal, such a removal will not bar him from contesting election either immediately or before the expiration of ten years from the date of the impeachment. So it is very important for post impeachment proceedings to be taken out against the impeached Governor before the Code of Conduct Tribunal or before a court of law because it is only a court or tribunal established by law and is impartial that is constitutionally empowered to convict for an offence or find a person guilty of the breach of the Code of Conduct. See *Garba v. University of Maiduguri supra; Laoye v. F.C.S.C.* supra; *Action Congress v. INEC* (2007) 12 NWLR (Pt. 1048)222.

From the records it is obvious that the 2nd respondent was not taken before the Code of Conduct Tribunal to pronounce on his guilt. Consequently he could not be said to have been disqualified from contesting the governorship election in Ekiti State in 2014.

It is for these and the more detailed reasons contained in the judgment of my learned brother. Ngwuta JSC that I find that this appeal lacks merit and it is accordingly dismissed. Since the issues in the main appeal have been revolted against the appellant, there is no need to consider the cross-appeals and the preliminary objection filed by 1st and 2nd cross-appellants.

The main appeal fails and it is dismissed accordingly while the issues raised in the cross-appeals have been resolved in the main appeal. I make no order on costs.

OKORO, J.S.C.: My learned brother. Nwali Sylvester Ngwuta, JSC obliged me in advance a copy of the lead judgment which he has just delivered with which I agree with the reasons ably adumbrated therein to arrive at the conclusion that this appeal is devoid of merit and warrants an order of dismissal. The facts of this case are well set out in the lead judgment and I do not intend to repeat the exercise here except as may be necessary to reler to in the course of this judgment.

There are seven issues for determination in this appeal.Though I am not trying to down play the importance or potency of any issue. I think issues two and three are key to the determination of this appeal. I shall add my voice to the views

already expressed in the lead judgment on these two issues. I may or may not say one or two words on the other issues. The second and third issues state as follows:-

> "2. Whether the Court of Appeal was right in its decision that the appellant based its petition on impeachment and whether the decision in *Omoworare v. Omisore* (2010) 3 NWLR (Pt. 1180) 58 was rightly applied to this case by the Court of Appeal.
>
> 3 Whether the Court of Appeal was right that the appellant did not prove disqualifying ground under section 182(1) (e) of the Constitution of Nigeria 1999 against the 2nd respondents"

The contention of the appellant herein is that the ground for the petition was contravention of the code of conduct and not impeachment as was decided by the lower court. The respondents in their various arguments agree with the lower court that impeachment w as a ground for the petition. The decision of the Lower court on the issue is on pages 1915 to 1918 of the record of appeal. It states:

> "In the case *Omaworare v. Omisore* (*supra*) the issue of the outcome of an impeachment process was treated exhaustively and held out to constitute one of the grounds of disqualification of a candidate for an election under section 66(1) (d) and (h) of the 1999 Constitution, as amended which is on all fours with section 282 (1) (e) of the same Constitution. We gratefully adopt same as our decision in this case … …
>
> Since the finding of guilt for contravention of the Code of Conduct by the 2nd respondent emerged from impeachment proceedings which were argued in issues 3,4,5 and 6 of the appellant's issues for determination, the result of the impeachment cannot be used as a ground for disqualification of the 2nd respondent to contest the gubernatorial election … … … …
>
> It is our conclusion on issues 3, 4, 5 and 6 (*supra*) that the tribunal was right in holding that the result of the impeachment proceedings is not a ground for disqualification of the 2nd respondent to vie for the election under section 182 (e) of the 1999

Constitution, as amended, read along with section 138(1) (a) of the Electoral Act (supra). The issues are resolved against the appellant."

From the factsofthiscase.the pleadings and proceedings before both the trial tribunal and the court below, issue of impeachment of the 2nd respondent featured prominently. It was clearly alleged that the 2nd respondent was found guilty of the contravention of the Code of Conduct by the impeachment panel. Note that it was the impeachment panel and not the Code of Conduct Tribunal. Paragraph 35(iv) (a) of the petition states on page 9 Vol. 1 of the record as follows:-

"iv The 2nd respondent was not qualified to contest as at the time of the election on the following grotmds:-

(a) The 2nd respondent was found guilty of the contravention of the Code of Conduct by the impeachment panel set up by the acting Chief Judge of Ekiti State on allegation of gross misconduct involving embezzlement of funds preferred against him by the Ekiti State House of Assembly consequent upon which he was impeached and removed from the office of the Governor of Ekiti State in the year 2006."

The above was the 4th ground upon which the petition was anchored. The appellant went ahead in paragraphs 110 -120 of the petition and chronicled the events which led to the impeachment of the 2nd respondent in 2006. This includes the fact that the 2nd respondent was found guilty of contravention of the Code of Conduct by the impeachment panel set up by the acting Chief Judge of Ekiti State. No matter how one looks at the above ground upon which the petition was predicated, it cannot be said that impeachment was not part of it. I can also discern from this ground of the issue of the 2nd respondent being found guilty of contravention by the Code of Conduct by the impeachment panel. The Court of Appeal in *Omoworare v. Omisore* (2010) 3 NWLR (Pt. 1180) 58 held that impeachment is not a ground for disqualification under the Constitution winch case was relied upon by the tribunal. I think this is the reason the appellant harps on the point that they did not include impeachment as a ground for bringing the petition. Be that as it may, that ground of the petition is a combination of impeachment and being found guilty of contravention of Code of Conduct by the

impeachment panel. If this issue had to do with impeachment alone, I would have drawn the curtain in view of the insistence of the appellant that impeachment was not part of the ground. The other aspect which relates to being found guilty of contravention of Code of Conduct deserves some comments.

This court has held in quite a number of cases that the trial and conviction by a court is the only constitutionally permitted way to prove a person guilty and therefore the only ground tor the imposition or criminal punishment or penalty forthe disqualification for embezzlement of fund. Apart from the court or the Code of Conduct Tribunal, as the case may be, no administrative panel can find a person guilty of any criminal allegation because they lack the machinery and mechanism to do so in view of section 36(1) of the Constitution of the Federal Republic of Nigeria 1999 (as amended). See *A.C. v. INEC* (2007) 6 SCNJ 65; (2007) 12 NWLR (Pt. 1048) 222; *Ahmed v. Ahmed* (2013) 15 NWLR (Pt. 1377) 274.

It must be noted that a judicial commission of inquiry or an administrative panel is not the same thing as a court of law or its equivalent. The hierarchy of courts in this country makes it possible for a person wrongly convicted to appeal his conviction even to the Supreme Court. This right 'is protected by the Constitution. It is not so with administrative tribunals. See *Amaechi v. INEC* (2008) 5 NWLR (Pt. 1080) 227. This court held on *Hon. Polycarp Effiom & Ors v. Cross River State Independent Electoral Commission & Anor* (2010) 14 NWLR (Pt. 1213) 106 at 132 paras. E to G in the same direction. It states, per Tabai, JSC:

> "For the purpose of establishing a person's disability from holding an elective public office such as President, Governor, Chairman of Council therefore etc, it is not enough to allege that the person had been indicted for embezzlement or fraud by a Judicial Commission of Inquiry or an Administrative Panel of Inquiry or a tribunal. Such an assertion remains a mere allegation and no more. To amount to a disability, it must be established that the person claimed to have been so indicted, wms tried and found guilty for the alleged embezzlement or fraud by a court or other tribunal established by law as stipulated by sections 6 and 36 of the 1999 Constitution."

Under section 182(1) (e) of the 1999 Constitution (as amended), no person shall be qualified for election to the office of governor of a State if, within a period of less than ten years before the date of the election to the office of governor of a State he has been convicted and sentenced for an offence involving dishonesty or has been found guilty of the contravention of the Code of Conduct. There is no evidence that the 2nd respondent was ever "convicted and sentenced". The words "convicted and sentenced", without any modicum of doubt refers to conviction and sentence by a court of law. This is so because no other body does sentencing except the courts. So even where the Constitution did not say "by the courts", it is presumed since no other body is empowered to convict and sentence people who have committed crime. The other leg of section 182(1) (e) is "being found guilty of the contravention of the Code of Conduct." That in my opinion will mean being found guilty by the Code of Conduct Tribunal, the Constitution having set up the tribunal for that purpose. Certainly not by any politically motivated tribunal. To hold otherwise will spell doom for the weak and vulnerable of our society.

That is not the end of the matter. The 2nd respondent had tendered exhibits U, V and X to show that he was never even found guilty of contravention of Code of Conduct by the impeachment panel. This is contrary to the appellant's exhibits H, J, K, L, M and N. Let me state clearly here that in making these comments, I am not oblivious of section 188(10) of the 1999 Constitution of the Federal Republic of Nigeria (as amended) which states:

> "10. No proceedings or determination of the Panel or of the House of Assembly or any other matter relating to such proceedings or determination shall be entertained or questioned in any court".

However that is not the case here. Although the Court of Appeal Iterated the trial Flection Tribunal for considering the exhibits, I think the tribunal was in order since the exhibits were placed before it and issues joined. Exhibits U is the report of the investigation panel against the 2nd respondent which was set up by the Chief Judge of Ekiti State upon the request of the Speaker of the House of Assembly. On 12/10/06, the panel submitted its report wherein the 2nd respondent was completely exonerated of all allegations of misconduct made against him. In other words, the investigative panel found him not guilty of any contravention of the Code of Conduct. The House of Assembly was not happy with the outcome

of the investigation. In a commando style, the substantive Chief Judge was removed and an acting Chief Judge appointed, who constituted another panel loyal to the House. This was in disobedience to the directive of the Chief Justice of Nigeria and Chairman National Judicial Council in a letter dated 13/10/06 and addressed to Hon. Justice Jide Aladejana who tided as Chief Judge. This letter is exhibit V tendered before the tribunal. In the said letter, the Honourable Chief Justice warned him that what he was about to do was unconstitutional as his appointment was also unconstitutional. He did not heed. No wonder he was sacked by the National Judicial Council.

Now section 188(8) of the 1999 Constitution of the Federal Republic of Nigeria (as amended) states:

> "(8) Where the Panel reports to the House of Assembly that the allegation has not been proved, no further proceedings shall be taken in respect of the matter."

But in brazen and flagrant disobedience to the above section of the Constitution, the House of Assembly set up another panel which found the appellant guilty of contravention of Code of Conduct. In the eye of the law, it seems crystal clear to me that by section 188(8) of the Constitution, exhibit U exonerated the 2nd respondent. A party who brazenly breaches or violently violates a section of the Constitution in order to perform an illegality should not be allowed to rely on another section of the same Constitution or any other law in order to legitimatize his illegal and unconstitutional act. By section 188(8) of the Constitution (supra) I will accept that the 2nd respondent was never found guilty of any contravention of the Code of Conduct. Can we now see why it is only a court of law that cm completely find guilty, convict and sentence a person alleged to have committed any crime. I need not say more on this.

The resolution of other issues are well articulated in the lea.d judgment for which I adopt as mine. On the whole, I do not see any merit in this appeal. It is hereby dismissed by me. I abide by all consequential orders made in the lead judgment, that relating to costs, inclusive.

In respect of the two cross appeals, I agree that the issues raised in them have been adequately resolved while treating the main appeal. I adopt the reasons and conclusions in the lead judgment as mine that the cross appeals be allowed. I also abide by the order as to costs made therein.

Appeal dismissed.

Cross appeals allowed in part.