IN THE COURT OF APPEAL
AKURE JUDICIAL DIVISION
HOLDEN AT ABUJA

ON FRIDAY THE 24TH DAY OF MARCH, 2023
BEFORE THEIR LORDSHIPS:

MUHAMMED LAWAL SHUAIBU	JUSTICE, COURT OF APPEAL
CORDELIA IFEOMA JOMBO-OFO	JUSTICE, COURT OF APPEAL
JAMES GAMBO ABUNDAGA	JUSTICE, COURT OF APPEAL

APPEAL NO: CA/AK/EPT/GOV/02/2023

BETWEEN:
PEOPLES DEMOCRATIC PARTY (PDP) = = = *APPELLANT*

AND

1. ADEGBOYEGA ISIAKA OYETOLA
2. ALL PROGRESSIVES CONGRESS (APC)
3. INDEPENDENT NATIONAL ELECTORAL COMMISSION (INEC)
4. ADELEKE ADEMOLA JACKSON NURUDEEN

} *RESPONDENTS*

JUDGMENT

(DELIVERED BY JAMES GAMBO ABUNDAGA, JCA)

The Independent National Electoral Commission (INEC) (3rd Respondent herein) conducted election for the Governorship of

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OCUNFUWA HASSANA (MRS)
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Date 27/3/23

27-3-2023
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Osun State on Saturday, 16th July, 2022. The Peoples Democratic Party (PDP) (the Appellant herein) and the All Progressives Congress (APC) (2nd Respondent herein), amongst other political parties fielded candidates for the election. The Appellant fielded Adeleke Ademola Jackson Nurudeen (th 4th Respondent herein) while APC fielded Adegboyega Isiaka Oyetola (1st Respondent herein). Following the conclusion of the conduct of the election and the collation of Results, the 4th Respondent was returned elected with 403,371 votes to beat his closest rival, the 1st Respondent who polled 375,027 votes. The 1st and 2nd Respondents were not satisfied with the result of the election. They therefore filed a petition on 5th August, 2022 to challenge the result of the election. Their petition was predicated on the grounds:

(a) That the 4th Respondent was at the time of the election not qualified to contest the election.

(b) That the 4th Respondent was not duly elected by majority of lawful votes cast at the election.

(c) That the election of the 4th Respondent was invalid by reason of non-compliance with the provisions of the Electoral Act, 2022.

Facts in support of the petition are as contained in paragraphs 20 -68 of the petition.

The 1st and 2nd Respondents as petitioners jointly and severally prayed the Tribunal for the reliefs hereunder stated against the Respondents therein in the petition which included INEC which was joined in the petition as 1st Respondent.

The Reliefs

a) That it may be determined that at the time of the Osun State Governorship election of 16th July, 2022, the 2nd Defendant was not qualified to contest the said election.

b) That it may be determined that all the votes recorded for the 2nd Respondent in the said election are wasted votes as a result of the non-qualification of the 2nd Respondent.

c) That it may be determined that on the basis of the remaining votes after discounting the votes recorded for the 2nd Respondent, in the said election the 1st Petitioner has a majority of lawful votes and has satisfied the constitutional requirement by obtaining the required spread, that is 25% of votes in each of at least two thirds (2/3) of all the local government areas of Osun State.

d) That it may be determined that the votes recorded and/returned in 749 polling units in the following Local Government Areas, namely Ede North (101 Polling Units); Ede South (91 polling units); Egbedore (55 polling units); Ejigbo (58 polling units); Ila (56 polling units); Ilesha West (67 polling units); Irepodun (48 polling units); Obokun (36 polling units)' Olorunda (103 polling units); and Osogbo (147 polling units) did not represent lawful votes cast in the said polling units in

the said Local Government Areas in the Osun State Governorship election held on 16 July, 2022 and as having been obtained in vitiating circumstances of substantial non-compliance with mandatory provisions of the Electoral Act, 2022.

e) That it may be determined that the 2nd Respondent was not duly elected by a majority of lawful votes cast in the Osun State Governorship election held on 16 July, 2022 and, therefore, the declaration and return of the 2nd Respondent by the 1st Respondent as the Governor of Osun State are unlawful, undue, null, void and of no effect.

f) That it may be determined that the 1st Petitioner was duly and validly elected and ought to be returned as Governor of Osun State, having polled the highest number of lawful votes cast at the election to the office of the Governor of Osun State held on Saturday, 16th July, 2022 and having satisfied the constitutional requirements for the said election by obtaining the required spread, that is by obtaining 25%

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of votes in at least two-thirds (2/3) of all the local government areas of Osun State.

g) That the 1st Petitioner be declared validly elected or returned in the said election.

h) An order directing the 1st Respondent to issue a Certificate of Return to the 1st Petitioner as the duly elected Governor of Osun State.

i) An order declaring null and void the Certificate of Return wrongly issued to the 2nd Respondent by the 1st Respondent.

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j) That the said election under reference was vitiated by substantial non-compliance with the mandatory statutory requirements which substantially affected the validity of the said election that none of the candidates in the said election can be validly returned as having won the said election.

k) That the Osun State Governorship election held on July 16th 2022 is void on the ground that the election

was not conducted substantially in accordance with the provisions of the Electoral Act, 2022.

l) That the Osun State Governorship election held on July 16th 2022 be nullified or cancelled and 1st Respondent be directed to conduct fresh election to the office of the Governor of Osun State.

m) Costs of this petition.

Upon service of the petition, the Appellant, 3rd and 4th Respondents filed replies and motions, on which issues were again joined between them and the 1st and 2nd Respondents. All the motions were heard during pre-hearing sessions and ruling suspended to be delivered along with judgment in the substantive petition. On the exhaustive exchange of relevant processes between the Petitioners and the Respondents, the tribunal proceeded to hearing at which the Petitioners called two witnesses and tendered Exhibits. The Respondents in the petition called three witnesses and tendered Exhibits. Hearing came to a close with the evidence of RW3, and thereafter the Respondents

and the Petitioners addressed the tribunal by adopting the written addresses that were filed upon the conclusion of hearing.

In the resulting judgment delivered on 27th January 2023, Coram: Hon. Justice T.A. Kume (Chairman), Hon. Justice B.A. Ogbule (Member), Rabi Bashir (M) (Member), the tribunal in a split decision found in favour of the Petitioners (1st and 2nd Respondents herein). The tribunal arrived at the following conclusion:

> "... the total lawful votes for each of the candidates after the said deduction of the invalid votes is 314,931 for 1st Petitioner, and 290,666 for the 2nd Respondent.
>
> Consequently, the 2nd Respondent did not score a majority of lawful votes cast at the election. The declaration and return is hereby declared null and void. The 2nd Respondent cannot "go lo lo lo lo" and "Buga won" as the duly elected Governor of Osun State in the election conducted on 16th day

of July, 2022. See Kizz Daniel Song, Buga. Rather, we hereby hold that the 1st Petitioner scored a majority of lawful votes in the said election and is hereby returned as such.

The 1st Respondent is hereby directed to withdraw the certificate of return issued to the 2nd Respondent, and issue to the 1st Petitioner as the duly elected Governor of Osun State. Accordingly, reliefs 72C, d in 744 polling units only, e, f, g, h, and i already produced in the judgment are hereby granted.

Having granted the main reliefs, the alternative reliefs are hereby struck out".

The Appellant received this decision with consternation, and therefore decided to appeal to this Court. The Appellant filed a notice of appeal containing forty-three (43) grounds of appeal inclusive of the ominibus grounds of appeal. The notice of appeal was filed on 8th February, 2023. The following reliefs are prayed for:

1. An order dismissing/striking out the petition for want of jurisdiction.
2. Allow the appeal and dismissing petition No: EPT/OS/GOV/01/2022 in its entirety.
3. Affirming the 4th Respondent as the duly elected Governor of Osun State having won the majority votes cast and satisfying the constitutional requirement in the Osun State Governorship election of 16th July, 2022.

The record of appeal was compiled and transmitted on 13th February, 2023. Thereafter, Counsel filed their briefs of argument.

The Appellant's brief of argument settled by Dr. Alex A. Izinyon, SAN was filed on 15th February, 2023. The 1st and 2nd Respondents filed their respondents' brief of argument on 24/2/2023. Same was settled by Muhydeen Adeoye, Esq. On receipt of the brief of argument of the 1st and 2nd Respondents, the Appellant filed a reply brief in response to the issues raised therein. It was filed on 28/2/2023.

The Appellant filed along with its brief of argument a list of authorities. On 24/2/2023, the 1st and 2nd Respondents filed a motion on notice, whereof they prayed for the following reliefs:

1. An order of this Honourable Court striking out grounds 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 16, 19, 20, 21, 22, 23, 25, 26, 27, 28, 30, 32, 33, 34, 35, 37, 38, 41, 42 and 43 of the Appellant's Notice of Appeal dated 6th day of February, 2023 in Appeal No: CA/AK/EPT/GOV/02/2023 between Peoples Democratic Party v Adegboyega Isiaka Oyetola & 3 Ors for being repetitive, prolix, verbrose, argumentative and vague and issues 3 and 9 formulated thereon for being incompetent.

2. An order of this Honourable Court striking out grounds 38, 39 and 40 of the Appellant's Notice of Appeal dated 30th day of January 2023 in Appeal No: CA/AK/EPT/GOV/02/2023 between Peoples Democratic Party v Adegboyega Isiaka Oyetola & 3 Ors for being unrelated to the ratio and formulated in

nubibus and issues 8 and 9 so formulated thereon are incompetent.

3. An order of this Honourable Court striking out grounds 9 and 34 of the Appellant's Notice of Appeal dated 6th day of February 2023 in Appeal No: CA/AK/EPT/GOV/02/2023 between Peoples Democratic Party v Adegboyega Isiaka Oyetola & 3 Ors for being at variance with the particulars and issues 6 and 7 formulated thereon for being incompetent.

4. An order of the Court striking out grounds 2, 6, 11, 14, 15, 21, 22 and 24 because the particulars did not state with sufficient clarity the error in the judgment complained about.

The motion is predicated on 18 grounds, which are listed in pages 2 - 3 of the motion on notice. In support of the motion is an affidavit of 6 paragraphs deposed to by Adebayo Adediran. The motion is supported by a written address settled by Muhydeen Adeoye, Esq. It was filed on 24/2/2023.

In opposition to the motion, the Appellant filed a counter affidavit of 7 paragraphs deposed to by Olawale Akinsola. It was filed on 28/2/2023. It is accompanied by a written address.

The appeal came up for hearing on 13/02/2023. At the hearing, the Appellant were represented by Dr. Alex A. Izinyon, SAN. Also with him was N. O. O. Oke, SAN, Olurotimi Alli, SAN together with C. S. Ekeocha and Alex Izinyon II Junior.

For the 1st and 2nd Respondents is Prince L. O. Fagbemi, SAN, who led Chief Akinlolu Olujinmi, SAN, Dr. Abiodun Layanu, SAN, H. O. Afolabi, SAN, Kunle Adegoke, SAN with Ifeanyi Eguasi.

Prof. Paul C. Anababa, SAN with Chief Emeka Okpoko, SAN, Chief Henry Akunebi, SAN and Olakunle Faokunla appeared for the 3rd Respondent; and Kehinde Ogunwumiju, SAN and Tunde Afe-Babalola, SAN with D. E. Obinna Onya, Esq., Julius Mba, Esq and Niyi Oloolade for the 4th Respondent.

Mr. Fagbemi leading the other Silks and other Counsel moved the motion on notice, adopted the processes filed therein, and prayed the Court to grant same by striking out the grounds of appeal specified on the motion on notice. In opposition to same, Dr. Izinyon together with the other Silks and Counsel in his team adopted the processes filed in opposition inclusive of Counsel's written address and urged the Court to dismiss the motion.

In respect of the appeal, Dr. Izinyon, SAN adopted the appellant's brief and reply brief, and urged the Court to allow the appeal.

Prince Fagbemi on his part adopted the 1st and 2nd Respondents' brief of argument earlier referred to in urging the Court to dismiss the appeal.

Mr. Anababa, SAN and Ogunwumiju, SAN both confirmed their status of having filed no brief in this appeal.

The motion filed by the 1st and 2nd Respondents shall take priority in the determination of this appeal. This is because issues for determination are framed from competent grounds of appeal. In the instant appeal, the application seeks to have quite a number of the grounds of appeal struck out and once all of those grounds are so struck out, the issues from which they are formulated will be also liable to be struck out.

The 1st prayer is in relation to grounds 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 16, 19, 20, 21, 22, 23, 25, 26, 27, 28, 30, 32, 33, 34, 35, 37, 38, 41, 42 and 42 which are sought to be struck out on the ground that they are repetitive, prolix, verbrose, argumentative and vague and issues 3 and 9 formulated from them.

The next set of grounds are grounds 38, 39 and 40. They are said to be unrelated to the ratio and that issues 8 and 9 formulated from them are therefore incompetent.

In relation to relief 3 on the motion paper, grounds 9 and 34 are allegedly at variance with the particulars, and therefore issues 6 and 7 formulated thereon are sought to be struck out for also being incompetent.

Relief 4 - seeks the striking out of grounds 2, 6, 11, 14, 15, 21, 22 and 24 because the particulars did not state with sufficient clarity the error in the judgment complained of.

In the written address, a lone issue was formulated thus:

> ***"Whether this application is not meritorious and ought to be granted in the interest of justice and rule of law"***

In Counsel's written address the Court is urged to strike out the listed grounds of appeal and the issues formulated therefrom.

It is submitted that appeals are determined not by a countless or a litany of grounds of appeal but on convincing,

substantial and competent grounds of appeal. Counsel proffered arguments as to why the grounds of appeal referred to are incompetent. The Court is therefore urged to strike out those grounds and the issues distilled from the said grounds.

Counsel to the Appellant in opposing the motion adopted the counter affidavit and the written address attached and urged the Court to dismiss the motion.

In the written address Counsel crafted a singular issue for identification. The issue is:

"Whether the Respondents/Applicants' four reliefs as sought can be granted having regards to the Applicant's Notice of Appeal dated 6th February, 2023".

In his submission, the Counsel to the Appellant pointed out that the Notice of Appeal filed by the Appellant contains 43 grounds, and therefore the Respondents' motion which refers to the Notice of Appeal filed on 8/2/2023 cannot be in reference

to the Appellant's notice which contain 43 grounds since it talks of 44 grounds of appeal. The Court is therefore urged to strike out the motion on this score. On the merit of the motion, Counsel submits that it is settled law that the issue of defective ground of appeal or particulars is now a mere form and that since it has nothing to do with the substantial issue, Courts have been enjoined to look on the substantial justice and not cling to technical justice in striking out grounds of appeal even if it infringes on the format of the rules. While not conceding that the Appellant/Respondent ran foul of the provision, Counsel submits that the apex Court has held that it is a matter of format and especially in election cases, the Court should be more concurred with substantial justice of the situation. As regards when a ground of appeal may be struck out, Counsel refers to the case of **Sokoto v. Dandaudu (2018) LPELR - 46605 (CA) Pp 14-22 Para E.** Counsel further submits that the Appellant's grounds of appeal and issues formulated therefrom have

concisely and clearly given sufficient notice of the precise nature of the Appellant's appeal in line with the extant rules of this Court and cannot be identified as repetitive, verbrose or argumentative. Counsel submits that the many cases cited by Respondents' Counsel have no bearing or correlation to the issues argued.

Counsel submits that the Applicants have not been misled by the grounds of appeal complained of, and have also not shown how they have been misled. Rather, Counsel submits that they have placed reliance in technicality to terminate the appeal. The Court is reminded that the grounds of appeal and issues are political in nature.

Resolution

The Appellant has urged that the application be struck out on the ground that the notice of appeal contain 44 grounds of appeal, whereas, the Appellant's notice of appeal contains 43

grounds of appeal. I have seen that in the motion on notice, the deponent of the affidavit in support of the motion in paragraph 4 (iii) states:

"Dissatisfied with the said judgment, the Appellant lodged an appeal vide a Notice of Appeal dated 6th February, 2023 but filed on 8th February, 2023 containing forty-four grounds"

However, both in the reliefs on the face of the motion on notice and the written address, no reference was made to any ground of appeal beyond forty-three (43). The conclusion is that the averment in paragraph 4(iii) of the Applicants' affidavit is a mere error, which does not go to the substance of the application. It is at best a pardonable blunder which results from human imperfection. It cannot and does not affect the competence of the motion. The motion, I hold is competent.

I shall address the complaint in relation to the grounds complained of. In other words, I shall deal with the issue whether

the listed grounds are incompetent and ought to be struck out. The whole point of consideration is to consider the position of the law as to instances when a ground of appeal can be said to be either competent and or incompetent. In the case of **Ground Condition Ltd. V. First Bank of Nigeria PLC (2022) LPELR - 59407 (CA)**, it was held:

> *"When is a ground of appeal incompetent? Onnoghen JSC (as he then was) answered this question in this way in COMMERCE BANK PLC & ANOR VS EKPERI (2007) 3 NWLR PART 1022, p 493. "It is settled law that for grounds of appeal to be valid and competent, they must be related to the decision appealed against and should constitute a challenge to the ratio of decision on appeal." Besides, a ground of appeal that is so inelegantly and illegibly crafted that it cannot be understood is a vague ground and is incompetent. See OLORUNTOBA & ORS VS ABDURAHEEM & ORS (2009) 13 NWLR PART 1157 page 83. ADEKEYE JSC, on this point opined thus: "By virtue of Order 8 Rule 2(4) of the*

Supreme Court Rules, no ground of appeal which is vague or general in terms and which discloses no reasonable grounds of appeal shall be permitted. Vagueness of a ground of appeal may arise where it is couched in a manner which does not give allowance for its being understood or where what is stated there is so uncertain and robs it of any form of intelligibility. It may also be vague when the complaint is not defined in relation to the subject matter or the particulars are clearly irrelevant to the grounds." See also ORDER 7 RULE 4 of the COURT OF APPEAL RULES 2021 which states: "Any ground which is vague or general in terms or which discloses no reasonable grounds of appeal shall not be permitted save that the general ground that the judgment is against the weight of the evidence..." per AWOTOYE, JCA (Pp. 4-6, paras. F-B).

I have carefully read the grounds of appeal complained of vis - a - vis the judgment appealed against. In my view, what is important in a ground of appeal is that it should specifically and clearly identify the part of the Judgment being attacked in such

a way that the Respondent is not confused or deceived as to what is being attacked. The grounds of appeal of the Appellant in my view are not ambiguous and inexact. Each of them attacks lives issues in the judgment appealed against. I am of the firm view that they are competent and valid. Moreover, this is an election matter, and being of a sui generis nature, this Court is inclined to determining the merit of all the grounds of appeal, having convinced myself that the Respondents who are applicants herein are not misled. Here are Respondents who proffered robust submissions on all the grounds of appeal. They cannot therefore be heard to argue that the grounds are either vague, verbrose, prolix or argumentative, or on the grounds of appeal being unrelated to the ratio and /or they lack clarity.

In my view, the application is principally hinged on technicality to defeat the substance of the complaints made in those grounds of appeal.

This application is therefore profoundly fated to be dismissed, and I accordingly dismiss it.

Having disposed of the Respondents' motion on notice by which resolution I sustained all the grounds of appeal it becomes imperative to consider the appeal upon the grounds of appeal and the issues distilled from the said grounds:

The appellant crafted nine (9) issues for determination. The issues are as hereunder stated:

1. Whether the Judgment of the learned Tribunal in Petition No: EPT/OS/GOV/01/2022 delivered on 27th January, 2023 is not a nullity. (Encompassing Ground 1 of the Notice of Appeal)
2. Whether the learned Tribunal has the jurisdiction to entertain Petition No: EPT/OS/GOV/01/2022 as constituted. (Encompassing Ground 2 of the Notice of Appeal).
3. Whether the finding of the learned Chairman and member of the tribunal on grounds 2 and 3 of the petition rooted

in issues 2 and 3 are not in violation of Section 134 (1) (a) – (c) of the Electoral Act, 2022. (Encompassing Grounds 41 and 42 of the Notice of Appeal).

4. Whether the learned tribunal was right when it admitted and relied on Exhibits RC1, RC2, BVR, PUBL 1-3, Exhibits in Forms EC8As, EC8B, EC8C, EC8D & EC8D in Exhibit SCH1, SCH2 & SCH3 and if the wrongful admission led to a miscarriage of justice. (Encompassing Grounds 3, 4, 5, 6, 19, of the Notice of Appeal).

5. Whether the learned tribunal's failure to determine Appellant's two Motions No: EPT/OS/GOV/01/M.11/2022 and EPT/OS/GOV/01/M.10/2022 denied Appellant right to fair hearing. (Encompassing Grounds 7, 8, 11 & 16 of the Notice of Appeal).

6. Whether the learned tribunal was right in finding the 3rd Respondent guilty of forgery having regard to the oral and documentary evidence before it. (Encompassing Grounds 9, 10, 14, 15, 17 of the Notice of Appeal).

7. Whether the learned Chairman and member of the learned tribunal were right in their evaluation of all the

evidence before them and made correct findings on issues 2 and 3 as formulated in favour of the 1st and 2nd Respondents, having regards to the evidence on the record. (Encompassing Grounds 12, 13, 18, 19, 20, 21, 22, 24, 25, 26, 27, 28, 29, 30, 32, 33, 34, 35, 36, 37, 38 and 43 of the Notice of Appeal).

8. Whether the learned Chairman and member of the tribunal were right in their resolution of the application of the provision of Section 137 of the Electoral Act, 2022 to the petition. (Encompassing Ground 23 of the Notice of Appeal).

9. Whether having regards to the facts and circumstances of the petition No: EPT/OS/GOV/01/2022 there was bias and or likelihood of bias against the Appellant and 3rd Respondent occasioning denial of fair hearing and miscarriage of justice. (Encompassing Grounds 39 and 40 of the Notice of Appeal).

The Respondents on the other hand distilled eight (8) issues for determination. The issues are:

1. Whether the Judgment of the learned tribunal in Petition No: EPT/OS/GOV/01/2022 delivered on 27th January, 2023 is a nullity? (Ground 1 of the Notice of Appeal).

2. Whether the learned tribunal rightly affirmed its Jurisdiction to entertain Petition No: EPT/OS/GOV/01/2022 as constituted? (Ground 2, 7, 8, 11 and 16 of the Notice of Appeal).

3. Whether the finding of the learned Chairman and member of the tribunal on grounds 2 and 3 of the petition rooted in issues 2 and 3 are not in violation of Section 134 (1) (a) - (c) of the Electoral Act, 2022? (Grounds 41 and 42 of the Notice of Appeal).

4. Whether the learned tribunal was right when it admitted and relied on exhibits RC1, RC2, BVR, PUBL 1-3, Exhibits in Forms EC8A, EC8B, EC8C & EC8D in exhibits SCH1, SCH2 and SCH3 and whether the admission thereof, led to a miscarriage of justice? (Grounds 3, 4, 5, 6, 19 of the Notice of Appeal).

5. Whether the learned tribunal having regard to the oral and documentary evidence before it rightly concluded that forgery was proved against the 4th Respondent with

regards to Exhibit EC9 and File D? (Grounds 9, 10, 14, 15, 17 of the Notice of Appeal).

6. Whether the learned Chairman and member of the learned tribunal were right in their evaluation of all the evidence before the tribunal and made correct findings on issues 2 and 3 as formulated in favour of the 1st and 2nd Respondents, having regard to the evidence on the record? (Grounds 12, 13, 18, 19, 20, 21, 22, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38 & 43 of the Notice of Appeal).

7. Whether the tribunal was right in its resolution of the application of the provision of Section 137 of the Electoral Act, 2022 to the petition? (Ground 23 of the Notice of Appeal).

8. Whether Appellant proved allegation of bias and/or real likelihood of bias against the Appellant and the 4th Respondent which occasioned a miscarriage of justice? (Grounds 39 and 40 of the Notice of Appeal).

It will be understood from a reflective and comparative reading of the issues distilled by the two parties that they are

the same in substance. However, there are differences in the number of the issues. While the Appellant's are nine, the Respondents' are eight. But the truth of the matter is that the Appellant's issues two and three can be subsumed into the Respondents' issue three. This appeal therefore can be appropriately determined on the issues formulated by the Appellant.

I will in the course of consideration and resolution of the issues, treat issues one, six and nine separately, issues two, three and five together and issues four, seven and eight together.

Issue 1

Whether the Judgment of the learned Tribunal in Petition No: EPT/OS/GOV/01/2022 delivered on 27th January, 2023 is not a nullity. (Encompassing Ground 1 of the Notice of Appeal)

Submission of Counsel

Submission of Counsel to the Appellant under this issue is that the judgment of the tribunal was delivered by a single member (in this case the Chairman). That even though one member signed the judgment alongside the Chairman, the fact that he did not express an opinion is tantamount to the judgment being delivered by a single member, and this Counsel submits is in violation of Section 294 (1) and (2) of the Constitution of the Federal Republic of Nigeria 1999 (as amended). That by this reason, the judgment is a nullity. Counsel relies on the following cases - **A.G Imo State v. A.G Rivers State (1983) LPELR - 4 (SC) Pp 17 - 18 Paras F-D; Nasko & Anor v. Bello (2020) LPELR - 52530 (SC); Nyesom v. Peterside & Ors (2016) LPELR - 40036.**

Counsel to the Respondent submits that the Appellant's Counsel's submission is grossly misconceived and bereft of any merit. Submits that the majority judgment satisfied the

requirement of Section 294 (2) and (3) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) same having also been signed by Rabi Bashir (CM) Counsel relies on the case of **Anache v. Bako & Ors (2019) LPELR – 65316 (CA) Pp 17 – 21 Para E.** Submits that the statement made by the apex Court on the case of **Nyesom v. Peterside (2016) LPELR – 40036 (SC)** that the principle that each member of a panel of justices of a panel should deliver their opinion is an *obiter dictum* which is not binding on this Court as held in the case of **Afro – Continental (Nig.) Ltd v. Joseph Ayantuyi & Ors (1995) LPELR – 218 (SC).** Rather Counsel relies on the case of **Saidu v. Abubakar (2008) 12 NWLR (Pt. 1100) 201 at 479** and the case of **Balonwu v. Ikpeazu (2005) 13 NWLR (Pt. 942) 479 at 530 Paras C-D.**

Submits further that Section 294 (1) and (2) of the Constitution of the Federal Republic of Nigeria, 1999 (as

amended) is limited to the Supreme Court and the Court of Appeal, and relies on the case of **Ubani Bulama & anor v. Seven - Up Bottling Co. Plc (2023) 2 NWLR (Pt. 1867) at 159 Paras C-H.**

Resolution

The law as it is extant is that Section 294 (2) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) applies to only Justices of the Supreme Court and the Court of Appeal. I rely on **Balonwu v. Ikpeazu (2005) 13 NWLR (Pt. 942) 479 at 530 PAras C - D, Saidu v. Abubakar (2008) 12 NWLR (Pt. 1100) 201 at 479. Nyesom v. Peterside (2016) LPELR - 40036 (SC) and Nasko & Anor V. Bello (2020) LPELR - 525330 (SC)** do not apply. The law as it is now is that the judgment of a tribunal is valid where signed by members without an opinion.

However, I shall want to opine that there can be an improvement. To make it what tight such that issues like this

should not continue to resonate, instead of the Chairman, or whoever among the members delivers the Judgment inserting his name as the person who delivered the judgment, the preface on the judgment can just be "Judgment of the tribunal" at the end of which the Chairman signs followed by the other members.

But for now in the instant appeal, it will amount to reading into the constitution, particularly Section 294 (2) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) what is not there.

In summing up, I hold that the judgment of the tribunal is valid. Issue one is therefore resolved in favour of the Respondents.

Issues 2, 3 and 5

Submission of Counsel

Issue 2:

Whether the learned Tribunal has the jurisdiction to entertain Petition No: EPT/OS/GOV/01/2022 as constituted. (Encompassing Ground 2 of the Notice of Appeal).

Appellant's Counsel submits that before the Tribunal, 1st and 2nd Respondents filed petition No: EPT/OS/GOV/01/2022 on 3 grounds, which are:

Ground 2: The 2nd Respondent was not duly elected by the majority of lawful votes cast at the election

Ground 3: The election of the 2nd Respondent was invalid by reason of non-compliance with the Provision of the Electoral Act, 2022.

Counsel submits that by the Provision of Section 134(1) (a), (b), (c) of the Electoral Act, 2022 the grounds (b) and (c) cannot be combined together. He submits that this position is due to the hyhen and on "or" demarcating 134 (1) (a) (b) from (c). He therefore submits that it is clear ab initio that the tribunal

lacked the jurisdiction to entertain the petition as constituted. That being a jurisdictional issue it can be raised at any stage and at any time before this Court. Counsel refers and relies on the case of **Abubakar V. Yar'Adua (2008) 19 NWLR (Pt. 1120) 1 at 83-84 Paras H-G.** Counsel submits that by the use of the word "or" which is disjunctive between section 134 (1) (a) and (b) together as against (c) it means that the petitioner can combine A and B of section 134 (1) (a) (b) of Section 134 (1) of the Electoral Act, 2022 in one petition and no more or he predicate his petition on section 134 (1) (c) of the Electoral Act, 2022 only. Therefore, submits that the 1st and 2nd Respondents predicated their petition on the three grounds set out in section 134 (1) (a) (b) and (c) of the Electoral Act, 2022 simultaneously. The Court is referred to paragraphs 34-51, and 52-68 of the petition and submits that the 1st and 2nd Respondents reliance on the ground as prescribed by Section 134 (1) (c) of the Electoral Act, 2022 as set out in paragraphs 34, 35, 36, 37, 38, 39, 40, 41, 42, 43,

44, 45, 46, 47, 48, 49, 50.1 - 50.751 and 51 of the petition has contaminated the entire petition and rendered same incompetent. Counsel thus submits that the instant was not initiated by due process of law and for fulfilment of the condition prescribed by Section 134 (1) (a) - (c) of the Electoral Act, 2022.

It is further argued by Counsel that the consequences of non-compliance as a ground is tied to Section 136 (2) and (3) of the Electoral Act, 2022. That the two cannot be entertained together.

Issue 3

Whether the finding of the learned Chairman and member of the tribunal on grounds 2 and 3 of the petition rooted in issues 2 and 3 are not in violation of Section 134 (1) (a) - (c) of the Electoral Act, 2022. (Encompassing Grounds 41 and 42 of the Notice of Appeal).

The submission of Appellant's Counsel is that the findings of the tribunal on the two issues was in error. On the findings of the tribunal on the two issues, the Court is referred to pages 11897 - 11996 Vol. 16 of the record of appeal. He submits that the finding is in violation of Section 134 (1) (a) - (c) of the Electoral Act, 2022. The reason Counsel explains is that between the Section 134 of the Electoral Act, 2022 only (a) and (b) can be combined together in an election petition. That Ground 3, which is Section 134 (1) (c) of the Electoral Act cannot co-exist with Section 134 (1) (b) because of the word or, which is disjunctive, or that it separates (b) and (c), and that the two cannot be mixed.

Counsel proceeds to submit that the consequence of a finding in the Appellant's favour is that the Court invokes its powers under Section 15 of the Court of Appeal Act. The Court

is referred to the case of **Oganu v. INEC (2013) LPELR - 22573 (CA) Pp 44 Paras A-D.**

Issue 5

Whether the learned tribunal is failure to determine Appellant's two Motions No: EPT/OS/GOV/01/M.11/2022 and EPT/OS/GOV/01/M.10/2022 denied Appellant the right to fair hearing. (Encompassing Grounds 7, 8, 11 & 16 of the Notice of Appeal).

Counsel submits that the tribunal erred when it failed to consider the Appellant's motion Nos: EPT/OS/GOV/01/M10/2022 and EPT/OS/GOV/01/M11/2022. Submits that the 1st and 2nd Respondent did not file any written address in response to the Appellant's motions aforesaid. That the learned tribunal acknowledged the motions even though identified them with wrong motion numbers. These motions, Counsel points out challenged the competence of some paragraphs of the 1st and 2nd Respondents' reply and jurisdiction

of the tribunal to entertain the petition respectively. Submits that the tribunal just glossed over the motions and proceeded to deliver its judgment and thereby denied the Appellant fair hearing which occasioned miscarriage of justice to the Appellant. That the learned trial tribunal having just glossed over those motions that this tribunal can consider them on merit as Counsel considers them fundamental. Court is referred to pages 1036 - 10350 Vol. 15 of the record of appeal and pages 10341 - 10333 Vol. 15 of the record of appeal.

The Court is urged to determine the motions and to resolve the issues therein in favour of the Appellant.

On the part of the Respondents' Counsel on the issues which are covered in the Respondents' issues two and three which are raised in motion Nos: EPT/OS/GOV/01/M10/2022 and EPT/OS/GOV/01/M11/2022, Counsel submits that in motion No: EPT/OS/GOV/01/M10/2022 the prayer is for striking out

paragraphs 10 and 18 9b), (c) and (d) of the Petitioners' 1st and 2nd Respondents' reply to the 3rd Respondents reply to the petition. That in motion No: EPT/OS/GOV/01/M11/2022, the Appellant as the 3rd Respondent challenged the competence of the petition on the grounds that (I) ground 2 of the petition is in breach of Section 134 (1) (a) - (c) of the Electoral Act, 2022 and (II) that the paragraphs listed by the Applicant for striking out raises pre-election issues which ought to be filed within 14 days of the presentation of the 2nd Respondent's/4th Respondent's educational qualifications. Counsel submits that since the objections raised by the Appellants are all the same the tribunal was perfectly in order to have resolved all the issues raised in the applications of all the Respondents together. That it cannot therefore be said that the preliminary objections were not determined.

It is further contended that having dismissed the preliminary objections, there was no longer any impediment to affirm the jurisdiction conferred on the tribunal under Section 285 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended). Submits therefore that the subject matter is within the jurisdiction of the tribunal.

1st and 2nd Respondents' issue three is their reply to the argument of Appellant's Counsel that the Respondent could not found their petition on Section 134 (b) and (c) of the Electoral Act, 2022 at the same time, and that having done so, the petition is incompetent and that the decision of the tribunal based on the two grounds is wrong and violated Section 134 (1) (a) - (c) of the Electoral Act.

Respondent's Counsel submits that there is nothing jurisdictional in the contention of the Appellant. It is submitted that the grounds for presentation of a petition in Section 134 (1)

of the Electoral Act defined the limits of the grounds. That it is only if a tribunal strays outside the grounds stated in the Section that it may be rightly argued that the tribunal acted in excess of its jurisdiction, which is not the case of the Appellant. In addition, Counsel adopts his argument on issue.

Counsel went on to further submit that the Court will not adopt an interpretation that would lead to absurdity. Submits further that Appellant's Counsel's submission is predicated on the decision of the Supreme Court in the case of **Abubakar v. Yar'Adua (2008) 19 NWLR (Pt. 112) 1 at 83.**, wherein the Supreme Court interpreted Section 145 (1) (a) - (d) of the Electoral Act 2006 which spelt out the grounds upon which a petition could be brought and the implications of same. Counsel submits that the 2006 Act as pointed out and the instant provision are not the same. Counsel submits that the use of the words "An election may be questioned on any of the following

grounds" shows that the draftsmen give to a petitioner right to predicate his complaint on any of the grounds provided for in law.

Further submission of Counsel is that the allegation of majority of lawful votes and non-compliance are mutually inclusive and not exclusive as it is only the vote cast in compliance with the Electoral Act that is lawful.

On the call by the Appellant that the Court exercises its power under Section 15 of the Court of Appeal Act, Respondents' Counsel submits that the Court cannot do so now since the 180 days constitutionally given to the lower Tribunal by virtue of Section 285 (6) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) has elapsed.

The Court is urged to resolve these issues in favour of the Respondents.

Resolution of Issues two, three and five

From the arguments on these issues, the following contentions clearly emerge, viz:

Whether the Appellant's preliminary objections were exhaustively determined,

If they were not exhaustively determined, what can this Court do under its power under Section 15 of the Court of Appeal Act, and

Whether having regard to Section 134(1) of the Electoral Act, 2022, the tribunal rightly assumed jurisdiction in the petition.

I will now deal with these issues starting with, whether the Appellant's preliminary objections were exhaustively determined.

What the objections were had earlier been stated in this judgment. For avoidance of doubt the preliminary objections filed were:

(i) Motion No: EPT/OS/GOV/01/M10/2022

Therein, the reliefs prayed for are:

1. An order of this Honourable tribunal striking out paragraphs 10 and 18 (b) (c) (d) of the Petitioners' reply to the 3rd Respondent's reply to the petition as same offend the settled law on reply and pleadings.

2. An order for any such order or further order as the Honourable tribunal may deem fit to make in the circumstances.

See page 10314 Vol. 15 of the record of appeal.

(ii) Motion No: EPT/OS/GOV/01/M11/2022

The following reliefs are prayed for:

1. An order of this Honourable Tribunal dismissing or striking out this petition for being incompetent, as presently constituted as same is incompetent, defective and void ab initio.

OR IN THE ALTERNATIVE

(c) The respondent was not duly elected majority of lawful votes cast at the election.

The grounds 134(b) and (c) as can be seen are not contradictory nor do not mean the same.

The can be an infraction of the two grounds at the same time. Even though as infraction of non-compliance with the provisions of the Electoral Act, and the Guidelines may affect the votes served by the candidate and may consequently found a ground 134(1)(a) which is that the Respondent were not duly elected by majority of lawful votes, a situation may also arise where though there may be no non-compliance with the provisions of the Electoral Act, a compliant a petition could still he founded a S.134(1) (c) of the Electoral Act where there is an honest miscalculation of votes credited to the petitioner. There could also be situation where a petitioner may also find reason to allege or found his petition in both of the grounds. To postulate that a

been decided and constitute estoppels per rem judicata to wit a judgment in rem which is binding on the Petitioners as decided by the Court of Appeal in ADELEKE v RAHEEM (2019) LPELR 48729 (CA).

6. An order striking out paragraph 23 of Ground 1 as same is contrary to Section 134 (3) of the Electoral Act, 2022.

7. An order striking paragraph 24 (b) of Ground 1 of the petition as same is vague and speculative.

8. An order striking paragraph 24(d), (e) (f) (g) (h) of Ground 1 of the petition for vagueness and speculative or in the alternative this Honourable tribunal prohibiting any evidence to insert city or country not stated in the above paragraph at the hearing of the petition.

9. An order striking out paragraphs 25, 26, 26 and 27 of Ground 1 of the petition as they are vague or in the alternative this Honourable tribunal prohibiting any evidence to supply particulars of the bogus purported criminal trial or and the city or country missing in the said paragraph at the hearing of the petition.

10. An order striking out paragraphs 28 and 29 of Ground 1 as the issue is res judicata to wit a judgment in rem settled in ADELEKE v RAHEEM (2019) LPELR - 48729 (CA).

11. An order striking out paragraph 33 (a) (b) (i) & (ii) of Ground 1 as same fell short of pleading on the doctrine of wasted votes and pleading of lawful majority votes cast or in the alternative Petitioners prohibiting in leading evidence on the said pleading at the hearing of this petition.

12. An order striking particular 33(a) & (b) of ground 1 on the above premises 1 - 14 above and further as particulars on pleadings relating to the doctrine of wasted votes are lacking.

13. An order striking out Ground 1 consequent to the grant of prayers 2 -12 above as there are no surviving paragraphs which can sustain the said Ground 1 of the petition.

14. An order striking out Ground 2 of the petition as the particulars set out thereunder do not support the said ground and the petitioners have failed woefully to

plead fact of lawful majority votes cast in an election petition.

15. An order striking out paragraphs 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, paragraphs 50.1 to 51 of Ground 2 of the petition which are rooted in non-compliance provision of the Electoral Act, 2022 and extraneous to the said Ground 2 based on lawful majority votes cast.

16. An order striking out paragraph 38, 43, 44 & 44 of Ground 2 as being vague.

17. An order striking ground 3 of the petition as the particulars set out thereunder do not support the ground.

18. An order striking out paragraphs 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67 and 68 in support of the said Ground 3 of petition on the grounds of vagueness, nebulous and deficiency of express pleading on non-compliance particulars.

19. An order striking out Grounds 2 and 3 of the said petition as the particulars of each ground cannot be

transported, transferred or transmitted to each other as they stand distant and no marriage union is permissible between the two grounds.

20. An order striking out paragraph 71 of the petition as vague as "no specific chamber" as there are Senior Counsel and Junior Counsel listed all under c/o Adeboye Galadima and Associate and which is address for service within jurisdiction only or in the alternative shall urge this Honourable tribunal to disallow any evidence on the paragraph at the hearing of this petition.

21. An order striking out paragraph 71 of the petition as no body or entity so described can be an agent of a candidate or political party in an election.

22. An order striking out the 2nd Petitioner as there is no political party known as All Progressives Congress (APC) but All Progressive Congress.

23. An order striking out the 1st Respondent as there is no body known as Independent National Electoral Commission (INEC) but Independent National Electoral Commission.

24. An order striking out the 3rd Respondent as there is no political party known as Peoples Democratic Party (PDP) but Peoples Democratic Party.

Whether or not the tribunal considered these objections exhaustively and rendered dispassionate decision on them will be confirmed from the record of appeal.

In the judgment of the tribunal sighted at pages 1891 - 11996 Vol. 16 record of appeal, the learned tribunal members whose judgment was read by the Chairman held thus at pages 11922:

> "Besides, certain paragraphs of the petition, which objections were raised against, cannot be read independent of, and in isolation from the other paragraphs of the petition. The said paragraphs are interwoven with each other and would be read as a whole. To do otherwise, would amount to a denial of the right of the Petitioners to be held on vital issues which those paragraph

seeks to proof in the petition. The objection to the said paragraphs is also dismissed.

Similarly, the several preliminary objections to the competence of the 1st Petitioner as a candidate in the election, and the jurisdiction of this Tribunal to determine the said petition are hereby dismissed. In other words, this Tribunal has the jurisdiction to determine the petition herein".

It can be seen clearly that what is reproduced above cannot pass for a ruling on preliminary objection both jurisdiction of the Court (tribunal). No doubt there were several objections raised by all the Respondents to the jurisdiction of the tribunal. Where there are several objections by several parties nothing compels a Judge to consider each and every one of them in detail if they are on the same grounds, and based on substantially the same facts. However, the tribunal was by law required to at least pick one of them, analyze the facts and issues therein and give well-

considered ruling on it. Thereafter the tribunal will be quite in order to pick others and situate the facts therein to the one in which a detailed and considered ruling had been delivered and adopt this ruling in those other objections. Anything short of this will not suffice as a ruling on the preliminary objections. Therefore, it is safe to hold that Motion No: EPT/OS/GOV/M11/2022 was not considered.

Now coming to Motion No: EPT/OS/GOV/M10/2022 which prayed for an order striking out paragraphs 10 and 18 (b) (c) (d) of the Petitioners' reply to the 3rd Respondent's reply to the petition as same offends the settled law on reply and pleadings, this motion was completely abandoned as I can see nowhere in the entirety of the judgment of the tribunal where this was considered and a determination made therein.

This is a gross detraction from the provision of Section 285 (8) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) which states:

> *"Where a preliminary objection or any other interlocutory issue touching on the jurisdiction of the tribunal or court in any pre-election matter or on the competence of the petition itself is raised by a party, the tribunal or court shall suspend its ruling and deliver it at the stage of final judgment".*

In this case, the objections were reserved to be determined at the final stage of judgment but the no ruling so defined was delivered. The result is that the Appellant was denied fair hearing. Or perhaps, if the preliminary objection to jurisdiction had been properly determined, the jurisdiction of the tribunal would have been ousted.

And in relation to the motion to strike out paragraphs 10 and 18 (b) (c) (d) of the Petitioners' reply to the petition, the

blatant refusal to consider and determine it meant that the said paragraphs were included in the Respondents pleading which was considered in the judgment of the tribunal. It cannot be gainsaid that this failure occasioned miscarriage of justice to the Appellant. It is settled law that where there is a denial of fair hearing, the proceedings in which it occurred is rendered null and void. The Supreme Court held so in the following words in the case of Alexander & Ors v. Albert & Anor (2022) LPELR - 56855 (SC):

> *"There is a plethora of authorities of this Court on the effect of a breach of the right to fair hearing. It is fundamental. It is a breach of one of the twin pillars of natural justice, "audi alteram partem," meaning, "let the other side be heard", the other being "nemo judex in causa sua" meaning "a person should not be a judge in his own cause." A denial of fair hearing renders the affected proceedings and any order, ruling or judgment therein, null and void. See: Adigun Vs*

A.G. Oyo State (1987) 1 NWLR (Pt. 53) 678; Salu Vs Egeibon (1994) 6 NWLR (Pt. 348) 23 @ 44; Bamgboye Vs Unilorin (1999) 10 NWLR (Pt. 622) 290 @ 333; NUT, Taraba State & Ors Vs Habu & Ors (2018) LPELR - 44057 (SC) @ 13 - 14 D - A; Zenith Plastics Industries Ltd. Vs Samotech Ltd. (2018) LPELR 44056(SC) @ 13 - 14, para D - F." Per KEKERE-EKUN, JSC (Pp. 13-14, paras. E-B)

See also Arjay Ltd & Ors v. Airline Management Support Ltd (2000) LPELR - 6787 (CA) Pp 16 - 20 Paras C-A; A.G. Abia State v. Phoenix Environmental Services (Nig) Ltd. & Anor (2015) LPELR - 25702 (CA) P. 20 Paras B-C; Udufia v. State (2016); Esezoobo v. Aji & Ors (2016) LPELR - 41289 (CA) Pp 23-24 Paras E-B.

Therefore, the breach of the Appellant's right to fair hearing can lead me to no option other than to declare the proceedings and judgment of the tribunal null and void, and so

declare. Accordingly, the entire proceedings and judgment is declared null and void for this reason.

The contention of the Appellant is that the founding of the 1st and 2nd Respondents' petition on the three grounds enumerated in Section 134(1) of the Electoral Act is wrong. It is his submission that because of the word "or" used between Section (134(1)(b) and (c), a petitioner can only found his petition either on Section 134(a) and (b) or Section 134(b) and (c).

The position as canvassed by the Appellants counsel cannot be right in view of the fact that a literal interpretation of the said Section gives a petitioner the choice of founding his petition on any of the three grounds or all of the three grounds.

It is instructive to reproduce for ease of reference the Provision of Section 134(1) of the Electoral Act, 2022. The said section provides as follows:

(a) A person whose election is questioned was, at the time of the election, not qualified to contest the election;

(b) The election was invalid by reason of corrupt practices or non-compliance with the provisions of this Act; or

(c) The respondent was not duly elected majority of lawful votes cast at the election.

The grounds 134(b) and (c) as can be seen are not contradictory nor do they mean the same.

There can be an infraction of the two grounds in the same election. Even though an infraction of non-compliance with the provisions of the Electoral Act, may affect the votes scored by the candidate and may consequently found ground 134(1)(c) which is that the Respondent was not duly elected by majority of lawful votes, a situation may also arise where though there may not be non-compliance with the provisions of the Electoral Act, a petition could still he founded on S.134(1) (c) of the Electoral Act

where there is an honest miscalculation of votes credited to the petitioner. There could also be situation where a petitioner may also find reason to allege or found his petition on both of the grounds. To postulate that a petitioner cannot found his petition on sections 134(1)(b) and (c) is to limit the petitioner in the presentation of his grievances against the undue return in an election, a situation that can only spell injustice for the petitioner. That cannot be the intendment of the law.

It was also contended by the appellant that the 1st and 2nd Respondents' petition is vitiated by reason of the fact that the petitioners only supported the grounds of non-compliance with the provisions with the Electoral Act with facts and without any facts and support of the ground for majority of lawful votes. The Electoral Act has not made it mandatory, especially if the same facts support both grounds as in this petition in which the contention of the 1st and 2nd Respondents is that if the unlawful

miscarriage of justice. (Encompassing Grounds 3, 4, 5, 6, 19, of the Notice of Appeal).

Counsel refers to the finding of the trial tribunal at page 11904 Vol. 16 and submits that the finding is wrong in law. Refers to the Exhibits tendered by the 1st and 2nd Respondents and the receipt for payment of certification of the Exhibits which include the BVR report and the forms which are themselves contained in schedules marked as Exhibits. Points out that the dates on the receipts for certification show that payment was a made day after certificates were issued. Counsel therefore submits that since the date of certification of Exhibit BVR is 27/7/2022, while the date of payment in Exhibit RC1 is 28/7/2022, it is clear that the date for payment are different. That it was therefore wrong for the tribunal to ignore Counsel's objection to their admissibility on the ground that they were made by the 3rd Respondent and they can be linked to each other. Counsel relies on the case of **Ahmed Aliyu Sokoto & Anor v.**

INEC & Anor (2022) 3 NWLR (Pt. 1818) 577 (CA) at P. 23 Paras A-E. Submits that the wrongful admission of this Exhibit led to a miscarriage of justice. Objection was raised by Counsel on the non-admissibility of several documents.

Objections were also raised as to the admissibility of Exhibit PUBL 1-3 on the ground that there were markings, alterations and cancellations on the said Exhibits.

Issue 7

> Whether the learned Chairman and member of the learned tribunal were right in their evaluation of all the evidence before them and made correct findings on issues 2 and 3 as formulated in favour of the 1st and 2nd Respondents, having regards to the evidence on the record. (Encompassing Grounds 12, 13, 18, 19, 20, 21, 22, 24, 25, 26, 27, 28, 29, 30, 32, 33, 34, 35, 36, 37, 38 and 43 of the Notice of Appeal).

Counsel submits that the learned tribunal in its consideration and determination of issues 2 and 3 in their

judgment failed to properly evaluate all the evidence, oral and documentary, and has made findings that did not support the evidence in report. Further submits that a petitioner must succeed on the strength of his case in his declaratory action, and that the burden cannot shift until the Petitioner had led unequivocal and unchallenged evidence of their analysis of the forms EC8A, EC8B, EC8C, EC8D and the Exhibit BVR. It is submitted that the tribunal ought to have rejected the evidence of PW1 and PW2.

Counsel faulted the tribunal's rejection of Exhibit 2 RRW4 and 2RRWA5. The Counsel urged the same in respect of Exhibit File D.

Counsel also took a swipe at the tribunal for holding that the 4th Respondent did not score the majority of lawful votes for paucity of evidence of such proof.

Further submits that the findings contained in the table in the judgment is at variance with the evidence of PW1 and PW2. It is submitted that the tribunal erred in relying on figures in a table unilaterally inserted in the address of Counsel. That the findings occasioned miscarriage of justice to the Appellant. It is thus submitted that the finding is against the weight of evidence.

The Court is urged to resolved this issue in favour of the Appellant.

Issue 8

Whether the learned Chairman and member of the tribunal were right in their resolution of the application of the provision of Section 137 of the Electoral Act, 2022 to the petition. (Encompassing Ground 23 of the Notice of Appeal).

This issue revolves round the import of Section 137 of the Electoral Act, 2022. Submission of Counsel is that Section 137 of the Electoral Act does not relieve a Petitioner the burden of

linking documents to the specific areas of his case. Counsel submitted that at the trial no polling agents were called to speak to the documents tendered in proof of the case of the 1st and 2nd Respondents. That PW1 and PW2 admitted under cross examination that they did not act as agents at the polling unit, ward and local government level.

Counsel submits that the Evidence Act is the substantive and procedural law that governs evidence before the Court or Tribunal. That the Evidence Act having covered the field, any other law which seeks to perform the role played by the Evidence Act is unconstitutional null and void. Counsel therefore further posits that the Electoral Act is ultra vires the National Assembly which Counsel further argues cannot make law to regulate how the Courts can perform its role of adjudication. It was also submitted by Counsel that even if it is conceded (though not conceding) that Section 137 of Electoral Act is applicable, it can

only apply to cases of non-compliance under Section 134 (1) (b) of the Electoral Act, 2022 and cannot apply to cases of lawful majority under Section 134 (1) (c) of the Electoral Act, 2022. That in this case where the two are lumped together, it is impracticable to apply Section 137 of the Electoral Act, 2022.

It is submitted that the provision of Section 137 of the Electoral Act is subject to the Evidence Act. Counsel however submits that even if Section 137 of the Electoral Act is applicable it does not nullify the age long burden of proof placed on the Petitioners by virtue of Section 131 (1) & (2) and Section 132 (1) of the Evidence Act, 2011. Counsel points out that the nature of the claims being declaratory, burden of proof is strictly on the Petitioner who must succeed on the strength of its case and not on the weakness of the defence of the adversary. Counsel draws attention to the use of the word "manifestly" in the said Section 137 of the Electoral Act. That the case of the 1st and 2nd

Respondents that complains of lack of accreditation makes Section 137 of the Electoral Act not applicable.

The Court is urged to find on these issues in favour of the Appellant.

On issue four, learned Counsel to the 1st and 2nd Respondents submits that the tribunal was right when it admitted and relied on Exhibits RC1, RC2, BVR, PUBL 1-3, Exhibits in Forms EC8A, EC8B, EC8C and EC8D in Exhibits SCH1, SCH2 and SCH3 in granting the reliefs. In reply to the submission of Appellant's Counsel that the Exhibits are not admissible because the receipts issued (Exhibits RC1 and RC2) have different dates, of certification. Counsel refers the Court to the wordings of Section 104 (1) and (2) of the Evidence Act, 2011. Counsel submits that no component of Section 104 of the Evidence Act was breached. That what the law requires is payment of fees. The Court is therefore urged to dismiss the arguments of Appellant's

Counsel. Counsel justified the admission in evidence of and reliance on all the Exhibits in granting the reliefs of the Petitioners (1st and 2nd Respondents). Counsel faults all the submission of Appellant's Counsel on which he urged the Court to treat all the 1st and 2nd Respondents Exhibits inadmissible and the tribunal's reliance on them.

Issue six deals with evaluation of evidence, it should be remembered. Learned Counsel to the 1st and 2nd Respondent defended the position taken by the tribunal in their evaluation of evidence. What Counsel did is to consider the substance of the complaints of the Petitioners (1st and 2nd Respondents) the evidence required to prove same, the evidence adduced, the extant/applicable law and the pleadings, evidence and explanations of the functionaries charged with the conduct of the election (INEC) adduced to justify/exonerate itself or defend the complaint made against it and the lower tribunal.

Counsel submitted that the Petitioners did not need to call polling agents contrary to the submission of Appellant's Counsel. Counsel also submitted that the tribunal was not wrong when it held that the content of Exhibit EC8D takes precedence over figures narrated by PW1 and PW2 in their evidence. Counsel further submits that the polling results forms in Exhibit SCH1, SCH2 and SCH3 and Exhibits EC8D, BVR, R. BVR1 - 129, RWC, RBVM and 2R.RW2 are documentary evidence which conclusively proved the incidence of over voting in the challenged polling units even if no oral evidence was called by the 1st and 2nd Respondents. That the non-compliance relating to over voting is quite manifest on the face of the certified true copies of form EC8As vis - a - vis BVR, R.BVR 1 - 129, RWC, RBVM and 2R. RW2. That thus the practice under the old regime mandatorily requiring oral evidence from each polling unit is no longer relevant. That decided cases relating to non-compliance under the repealed Electoral Act, 2010 (as amended) are no longer relevant. Counsel places reliance

on paragraph 46 (4) of the 1st Schedule to the Electoral Act. Counsel defends the table drawn in the written address of Counsel to the 1st and 2nd Respondent. Refers to and relies on Section 51 (2) of the Electoral Act, 2022 to submit that with the enactment of the new Electoral Act, the position of the law as relates to the proof of over voting changed drastically, and the judicial pronouncements on the old laws ceased to be applicable. That what determines over voting under the new law is only the number of the votes returned and the number of accredited voters as transmitted directly from the BVAS.

Counsel went on to submit that the Appellant and INEC did not explain the basis upon which they jettisoned Exhibit R.BVR 1 -129 (their document) for Exhibit RWC, which is in itself in conflict and contradiction with evidence given at the tribunal by INEC. Counsel also submits that INEC produced three different reports from which they sought to choose one for the tribunal to

rely on but that the tribunal correctly rejected this temptation. That the production and reliance on three different BVAS reports justify the genuineness of the complaints of the 1st and 2nd Respondents. Further submits that the burden to prove that more than one BVAS machine was used rested on INEC. Section 131 (1) of the Evidence Act, 2011 is relied on. Counsel therefore submits that it is only the Presiding Officers who purportedly used more than one BVAS machine as alleged by the Appellant that can give credible evidence on this but they were called. Counsel therefore regards as hearsay the evidence of RW1 and RW2 in this regard.

On issue 7 which deals with whether Section 131 of the Electoral Act dispenses with the need to call oral evidence in substantiation of non-compliance with the Electoral Act, Counsel agrees with the decision of the tribunal that it was not necessary: and justifies his position, and submits that the

provision of Section 131 of the Electoral Act, 2022 rhymes with the sui generis nature of election petition. That it is a special legislation regulating the conduct of election and proceedings of the election tribunal. Counsel submits that the Evidence Act is of general application. That the provision of a general legislation like the Evidence Act cannot override a specific legislation like the Electoral Act.

Counsel urges the Court to resolve this issue in favour of the 1st and 2nd Respondents.

The Appellant's reply brief will be considered in the course of the resolution of the issues, which I proceed to do anon.

Resolution of Issues 4, 7, and 8

The correctness or otherwise of the decision of the tribunal to allow the petition of the 1st and 2nd Respondents rests with these issues. Therefore, from these issues the following will be decided, viz:-

(i) Whether the documentary Exhibits from which the tribunal found the alleged over voting proved were rightly admitted in evidence.

(ii) Whether on a proper evaluation of the evidence on record the 1st and 2nd Respondents proved their case to be entitled to the judgment entered in their favour by the tribunal.

Let me commence with item one. The Exhibits in contention are Exhibits RC1, RC2, BVR, PUBL 1 -3, Exhibits in Forms EC8As, EC8B, EC8D in Exhibit SCH1, SCH2 and SCH3.

The learned tribunal at page 11904 Vol. 16 held as follows in respect those exhibits:

"Exhibits RC1 and RC2 are receipts for payment issued by the 1st Respondent for certification of various forms EC8 series contained in exhibits SCH1, SCH2 and SCH3. Exhibits RC1 and RC2 are dated the 28th day of July, 2022 and 3rd day of August, 2022 respectively. The said

Exhibits are in respect of the contents of Exhibits SCH1, SCH2 and SCH3 together with exhibit BVR. There is therefore a nexus between the said exhibit RC1 and RC2 with BVR, unlike the facts in the case of Sokoto vs. INEC (Supra), relied on by each of learned counsel for the Respondents. The fact that the dates in exhibits RC1 and RC2 postdate the dates on the various forms in exhibits SCH1, SCH2 and SCH3 does not make them inadmissible. See Section 157 of the Evidence Act (supra). The test of admissibility it should be noted, is relevancy. See Section 4 and 5 of the Evidence Act (supra)."

The Learned Counsel to the Appellant is aggrieved with their reception in evidence on the ground that their certifications were paid for day after the certification and not before they were certified. Counsel relied on Section 104 of the Evidence Act and the case of **Mamudu v. Ibrahim (2021) LPELR - 54137 (CA)** P. 23 Paras A-E.

On the other hand, Counsel to the 1st and 2nd Respondents is in sharp disagreement with his colleague for the Appellant, and submits contrariwise that what the law requires is just payment of fees, and relies on a number of judicial authorities including the case of **Tabik Investment Ltd. v. GTB Plc (2011) 17 NWLR (Pt. 1276) 240 at 258 - 259 Paras H-A.**

I have read the provision of Section 104 (1) and (2) of the Evidence Act, 2011. I have read the cases cited by Counsel particularly the case of **Mamudu v. Ibrahim (supra)** and the case of **Tabik Investment Ltd. v. GTB Plc (supra).**

Section 104 (1) of the Evidence Act talks of giving the certified true copy to the person who demands for the certified true copy on payment but is silent on when payment shall be made and how the payment can be proved. However, Section 104 (2) of the Evidence Act which states:

"The certificate mentioned in subsection (1) of this Section shall be dated and subscribed by such officer with his name and by his official title and shall be sealed whenever such officer is authorized by law to make use of a seal and such copies so certified shall be called certified copies". Suggest to me that payment shall be made at the time of issuance of the certified true copies. However, the decision of the apex Court in **Tabik Investment Ltd v. GTB Plc (supra)** makes my thinking insignificant. If at the level of apex Court, the Court can still direct payment to be effected to enable the Court attach weight to the document in question, it can only mean that paying for the certified true copy even several days or weeks after obtaining the certified true copy does not make the document inadmissible. The Exhibits referred to here were rightly admitted in evidence, I hold. The exhibits were rightly admitted in evidence.

Whether they were rightly relied on in coming at the judgment that the tribunal gave is an entirely different matter.

Now I come to the second issue/item, which I consider to be more engaging because it involves the consideration of several collateral and interrelated issues, such as burden of proof, how

to prove, whether by operation of Section 137 of the Electoral Act, 2022 the evidence of eye witness of polling agents, presiding officers or those who witnessed events at the polling units when the alleged non-compliance took place is no longer required.

It is important to make the point that it is common ground between the Appellant and the 1st and 2nd Respondents that it is still the law that the burden of proof in civil causes, the election petition inclusive still rests on the petitioner, and that where declaratory reliefs such as those sought for in the instant case are prayed for the burden of proof is strictly on the petitioner who must succeed on the strength of his case and not on the weakness of the case of his opponent. See **Obe v. MTN (2021) LPELR - 57730 (SC) Pp 31-32 Paras D-A; Akande v. Adisa & Anor (2012) LPELR - 7807 (SC) Pp 38 - 39 Paras F-B; Emenike v. PDP & Ors (2012) LPELR - 78021 (SC) Pp 22 Paras A -D;**

Adamu v. Nigeria Airforce & Anor (2021) LPELR – 56578 (SC) Pp 13 – 14 Paras E – A.

In the case of Nwokediaso & Ors v. Onuoha & Anor (2000) LPELR – 12004 (CA), Tobi JCA (as he then was) said:

> ""My learned brother, Fabiyi, JCA has traced the brief history of the granting of declaratory reliefs in this country as it relates to admission by a defendant, or in default of pleadings or by evidence. The current trend is that a declaratory relief should be backed by evidence. And this is consistent with the burden of proof as provided for in the Evidence Act. Section 135 (1) of the Evidence Act provides that whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. By Section 136 of the Evidence Act, the burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side. Section 137 (1)

provides that in civil cases the burden of first proving the existence or non-existence of a fact lies on the party against whom the judgment of the Court would be given if no evidence were produced on either side, regard being had to any presumption that may arise on the pleadings. See also Igwe v. A.I.C.E. (1994) 8 NWLR (Pt.363) 459; E.D. Tsokwa and Sons Co. Ltd. v. U.B.N. Ltd. (1996) 10 NWLR (Pt. 478) 281; Akinkunmi v. Sadiq (1997) 8 NWLR (Pt. 516) 277; U.B.N. Ltd. v. Osezuah (1997) 2 NWLR (Pt. 485) 28. In the instant case, the learned trial Judge gave judgment to the plaintiff/respondent in default of the appellants defending the action. He said at page 2 of the judgment: "The defendants filed a memorandum of appearance but none of them filed a statement of defence. I hold that the time prescribed by the High Court Rules, 1988, for filing statement of defence has passed. The plaintiff is entitled to judgment in default." With respect, the position taken by the learned trial Judge is against the current trend. In Motunwase

v. Sorungbe and Another (1988) 5 NWLR (Pt. 92) 90; a case cited by my learned brother." Per TOBI, JCA (Pp. 21-22, paras. A-E)"

His Lordship was particular to note that the burden of proof on a declaratory relief is backed by Section 135 of the Evidence Act (now, Section 131 (1) of the Evidence Act, 2011).

I understand this to mean that in declaratory relief, the Evidence Act still remains the basic foundation. That is only I still believe that the drafters of the Electoral Act, 2022 had this in mind when Section 137 of the Electoral Act was made part of the Act. They were careful to encompass cases of non-compliance by restricting application of section 137 to situation in which the originals or certified true copies manifestly disclose the non-compliance alleged.

It is instructive to reproduce the provision of Section 137 of the Electoral Act, which is:

"It shall not necessary for a party who alleges non-compliance with the provisions of this Act for the conduct of elections to call oral evidence if originals or certified true copies manifestly disclose the non-compliance".

If there was no intention on the part of the legislators to so limit the application of the Section to certain circumstances, it would have crafted the section thus:

> *"It shall not be necessary for a party who alleges non-compliance with the provisions of this Act for the conduct of elections to call oral evidence in proof of the non-compliance if originals or certified true copies have been put in evidence"*

With such a provision, the need to call any witness would have been obviated. It would have been sufficient for a party to put in evidence all the originals or certified true copies of documents of the affected areas complained of through the bar. In the case, the table prepared in the final written address of

counsel to the 1st and 2nd Respondents would be handy to amplify the party's case of non-compliance.

Therefore, in my view whether or not, Section 137 of the Electoral Act would apply where non-compliance is the party's grouse with the return in an election would depend on the party's pleading and the corresponding Replies of the Respondents to the petition.

The case of the 1st and 2nd Respondents is predicated on the polling units in which they alleged non-compliance, resulting in over voting. They pleaded the various electoral forms and the BVAS report with which they sought to prove their case.

The Appellant, 3rd and 4th Respondents did not accept the allegations of non-compliance and over voting as alleged. In specific reference to the 3rd Respondent, the averments in paragraphs 32 - 49 of their reply to the petition are relevant.

For the 3rd Respondent's reply to the petition I refer to pages 1265 - 22897 in volumes 3 - 4 of the record of appeal.

For case of reference paragraphs 32 - 49 of the reply are hereby reproduced hereunder:

32. In further reply to paragraph 33 of the petition, the Respondents state that the table created by the Petitioners is self-seeking as the 2n Respondent defeated the Petitioners in the landslide victory demonstrated voice and votes of the people of Osun State and not wasted votes as shamelessly claimed by the Petitioners.

33. The 3rd Respondent denies paragraph 33 (a) (b) (i) & (ii) of the Petition and state that all the votes recorded for the 2nd and 3rd Respondents on Saturday, 16th July 2022 in the Osun State Governorship Election and the result declared by the 1st Respondent on Sunday, 17th July 2022 in respect thereof are lawful and valid votes and not in any way wasted votes.

34. The 3rd Respondent further state that contrary to the averment of the Petitioner, the 2nd Respondent was eminently qualified to have participated in the Osun State Governorship Election held on 16th July 2022 and was duly declared the winner of the said election having polled the majority of lawful votes cast at the election.

35. The 3rd Respondent further states that the Petitioners woefully lost the Osun State Governorship election held on 16th July 2022 and is not entitled to be declared the winner of the Osun State Governorship Election having been rejected by the electorates.

36. The 3rd Respondent admits paragraphs 34, 35, 36 and 37 of the Petition and state that in the conduct of the Osun State Governorship election held on 16th July 2022, the 1st Respondent was guided by the mandatory provisions of the Electoral Act, 2022, its extant regulations and manual prior to and in

the conduct of the Governorship election in Osun State.

37. The 3rd Respondent further avers that the 1st Respondent complied with the use of the Bimodal Voter Accreditation System (BVAS) for the purpose of accreditation, verification, confirmation and authentication of the particulars of voters in the manner prescribed by the 1st Respondent in its Manual and other extant guidelines and regulations.

38. In the counting of votes cast at the polling unit and collation of the results of the election, the number of accredited voters recorded and transmitted directly from the polling units and votes or results recorded and transmitted directly from the polling units are used in conjunction with the relevant INEC Forms EC8A, EC8B, EC8C and EC8D.

39. The 3rd Respondent denies paragraph 39 of the Petition. In response to the said paragraph the 3rd Respondent avers that the Presiding

Officers at the various polling units and the collation officers at the collation centres duly complied with the fundamental requirement of the Electoral Act, 2022.

40. The 3rd Respondent denies paragraph 40 of the Petition and in response states that there were no act of non-compliance with the Electoral Act which substantially affected the election by the 1st Respondent's officials in the entire 749 polling units across 10 local government areas listed by the Petitioners in their Petition.

41. The 3rd Respondent denies paragraph 41, 42, 43, 44, 45, 46, 47 and 48 of the Petition and will at the trial put the Petitioners to the strictest proof of same.

42. In specific response, the 3rd Respondent avers that the total number of votes as well as the total number of accredited voters recorded in the respective Forms EC8As for the polling units tallies with the total number of accredited and verified voters on the record of

the Bimodal Voter Accreditation System (BVAS) for each polling unit.

43. The 3rd Respondent avers that there was proper accreditation of voters in all the Polling units and voting was done in accordance with the provisions of the Electoral Act, 2022 as well as the 1st Respondent's Guidelines which mandated the use of the BVAS for ensuring reliable, accurate and verifiable accreditation of voters. Furthermore, the total number of votes returned did not exceed the number of accredited voters as reported on the BVAS.

44. The 3rd Respondent further states that the votes credited to the 2nd and 3rd Respondents are not vitiated and liable to be voided by reason of non-compliance. Rather the election was conducted in substantial compliance with the mandatory provisions of the Electoral Act, 2022.

45. Contrary to paragraph 48 of the Petition, the 3rd Respondent avers that there are no unlawful

votes to be deducted from the lawful and valid votes obtained by the 2nd and 3rd Respondents at the election. Furthermore, the 1st Petitioner was woefully rejected at the poll by the electorate and thus, never scored the majority of lawful votes cast.

46. The 3rd Respondent further states that the election officials limited themselves to the record of accreditation in the BVAS and the results transmitted directly from the polling units.

47. The 3rd Respondent denies paragraphs 49 to 50.751 of the Petition and will at the trial put the Petitioners to the strictest proof of same.

48. The 3rd Respondent in response to the paragraphs 49 to 50.751 of the Petition avers that contrary to the erroneous contention of the Petitioners, there was no any incidence of non-compliance with the mandatory accreditation of all voters in the entire 750 polling units using the BVAS such that the total

votes cast and accreditation as recorded in Form EC8A for the polling units as listed by the Petitioners.

49. The 3rd Respondent denies paragraph 50 to 50.751 of the petition of the petition and in contrast avers that the purported particulars of breaches as pleaded or stated by the petitioners in the said paragraph of their petition did not occur at the said election in the said 749 polling units across the said 10 Local Government Areas of Osun State.

This vehement denial cast the burden on the petitioners (herein 1st and 2nd Respondents) to prove the weighty averments in their petition. Their reliefs as noted are declaratory in the main and therefore the law as settled is that they must call cogent and credible evidence in proof of their averments.

They can only succeed on the strength of their case and cannot rely on any perceived weakness in the Respondents' case or any admission made by them, whether qualified or otherwise, whether the admission is in full or in part. The law is quite settled on the burden and standard of proof in all cases and with

particular reference to declaratory reliefs. It is settled in numerous authorities that a declaratory relief being discretionary in nature, the onus of proof lies on the plaintiff and he must succeed on the strength of his own case and not on the weakness of the defence, except where the case of the defence supports the plaintiffs case. Thus, the burden of proof on the plaintiff in establishing declaratory reliefs to the satisfaction of the Court is quite heavy in the sense that such declaratory reliefs are not granted even on admission by the defendant in the event that the plaintiff fails to establish his entitlement to the declaration by his own evidence

See the case of OBE V MTN COMM. LTD (2021) LPELR -57730 (SC) PP 31 - 32 paras D - A. see also AKANDE V ADISA (2012) LPELR -7807 (SC) PP 38 - 39 paras F - B, EMENIKE V PDP & ORS (2012) LPELR -7802 (SC) P 22 paras A - D.

The law also remains settled that where the plaintiff has not proved his claim, there is nothing for the defendant to defend. See the cases of EFETIROJE & ORS V OKPALEFE II & ORS (1991) LPELR -1024 (SC) PP 19 - 20 paras D - C, DANBABA & ANOR V TAMBUWAL & ORS (2019) LPELR -48814 (CA) PP. 62

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paras D - B, MOMOH & ANOR V FRANCIS & ORS (2019) LPELR - 49000 (CA) PP 45 - 51 para A.

Against the background of these principles, can it be said that the 1st and 2nd Respondents as petitioners at the tribunal discharged the onus on them, and thus shifted the burden to the Appellant as 3rd Respondent at the tribunal to rebut?

The 1st and 2nd Respondents called two witnesses and tendered their documentary exhibits, in this case the forms EC8As, EC8Bs, EC8Cs and the others. They also tendered the BVR - the report obtained from the scanning of the BVAS machine. The two witnesses under cross examination told the Court that they were at all the polling units during the election and were in fact, not polling agents. Learned Counsel to the 1st and 2nd Respondents at the lower Court and this Court have come under the shield of Section 137 of the Electoral Act, 2022 to say that that provision has relieved them of any need to call oral evidence. They also called in aid the provision of paragraph 46(4) of the 1st Schedule to the Electoral Act, 2022. The learned Senior Counsel Prince Fagbemi Contended that the requirement of calling oral evidence has gone with the old Electoral Act.

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Now let's take a look at what Section 137 of the Electoral Act, 2022 and paragraph 46(4) of the 1st Schedule to the Electoral Act state. Section 137 of the Electoral Act, 2022:

> "It shall not be necessary for a party who alleges non-compliance with the provisions of this Act for the conduct of elections to call oral evidence if originals or certified true copies manifestly disclose the non-compliance alleged."

Paragraph 46(4) of the first Schedule to the Electoral Act:

> "Documentary evidence shall be put in and may be read or taken as read by consent, such documentary evidence shall be deemed demonstrated in open court and the parties in the petition shall be entitled to address and urge argument on the content of the document and the Tribunal or Court shall scrutinize or investigate the content of the documents as part of the process of ascribing probative value to the documents or otherwise."

Both of these provisions only deal with the figures entered into the forms. How do the figures get into the forms? Do they get there on their own or some people imputed in the figures? It is

also true that the BVAS are operated by the INEC staff posted to the polling units. My view is that there should also be evidence of how the BVAS were operated. This cannot be manifest on the forms, how well and how long you search. I remember that in the build up to the General Elections, there were several alerts shared in the social media. Some of them warned of possible induced over voting. The general public were seriously warned to beware of situation where compromised INEC officials may fake successful accreditation and ask people to proceed to vote. Such an occurrence if undetected will inflate the votes in the affected polling unit, thus creating an artificial over voting because the number of those accredited will be short by the number of those whose accreditation was not registered. That is why the court needs more than the mere figures in the electoral forms and the BVAS reports to satisfy itself that the petitioner either successfully proved his case of non-compliance or not. In other words, there must be the evidence of eye witnesses at the polling units to testify before the court as to how the accreditation and voting took place. These people are usually the presiding officers and the polling agents.

The 1st and 2nd Respondents did not see the need to call them. The Appellant however saw the need to call them.

Let me at this stage address the submission of the Appellant that it is not within the province of the National Assembly to make such a provision because it amounts to usurpation of the function of the Judiciary.

It is the exclusive preserve of the Judge to decide whether or not there is need to call oral evidence to demonstrate the contents of documentary exhibits because it is the Judge that is saddled with the responsibility of evaluation of evidence especially where the documentary evidence is not a single document but several, and are intended to cover various aspects of a party's case. Such a function cannot be circumscribed by a statutory provision like Section 137 of the Electoral Act, 2022 and paragraph 46(4) of the First Schedule to the Electoral Act, 2022. I have said so because in the cases I earlier cited, it was held that a plaintiff who claims declaratory reliefs to succeed must produce cogent and credible evidence to the satisfaction of the Court before the burden will shift.

Whether or not the evidence is satisfactory is for the Court to decide not the legislators, who in their desire probably to cut down on the size of witnesses needed to prove an election petition decided to insert Section 137 of the Electoral Act, 2022.

They may have succeeded in cutting down on the size of witnesses but can the same be said of having justice done in such a petition? I think not!

The Appellant has urged upon this Court to strike down the provision of Section 137 of the Electoral Act, 2022.

What I have done in this appeal is to state my position on the provision and to also state that it has not fettered me in the discharge of my duties as a Judge in the evaluation of the evidence before me. This is because, my duties are given me by section 6 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended). It is not necessary for me to strike down the provision of Section 137 of the Electoral Act, 2022 to exercise my duty as a Judge. Therefore, I decline the call to void that provision.

Now, let me return to the reality of this appeal. The 1st and 2nd Respondents as petitioners having not called the presiding officers and/or polling agents who can speak to the documentary exhibits tendered and/or to testify to events that happened at the polling units during the election, they are far from proving their complaints of non-compliance with the Electoral Act, and hence over voting. Therefore, no burden has been shifted to the

Appellant to rebut. In other words, the documentary evidence tendered remained dormant and were just dumped on the tribunal.

In my respectful view, it remains settled position of the Law that documentary evidence relied upon by a party must be specifically linked to the aspect of his case to which it relates. A party cannot dump a bundle of documentary evidence on a Court or tribunal and expect the Court to conduct an independent enquiry to provide the link in the recess of its chambers. This would no doubt amount to a breach of the principle of Fair hearing: - See the case of OKEREKE V UMAHI & ORS (2016) LPELR – 40035 (SC) PP 54-55 paras E – A, NWOKO V OSAKWE & ORS (2009) LPELR -4652 (CA) PP 26-29 paras E – C, EMMANUEL V UMANA & ORS (2016) LPELR -40037 (SC) PP 67-678 paras C – B, SAIDU & ANOR V NONO & ORS (2015) LPELR -40372 (CA) PP 25 – 32 paras C – B.

In in the premises of the above, I hereby resolve issues 4, 7 and 8 in favour of the Appellant and against the 1st and 2nd Respondents.

ISSUE 6

Whether the learned tribunal was right in finding the 3rd Respondent guilty of forgery having regard to the oral and documentary evidence before it. (Encompassing Grounds 9, 10, 14, 15, 17 of the Notice of Appeal).

Learned Counsel to the Appellant submits that the Learned Tribunal erred when it found the 4th Respondent guilty of forgery from the documents presented by the 2nd Respondent in the petition to the 1st Respondent in the petition.

Counsel faulted the tribunal for its refusal to be bound by the decision of the Court of Appeal in ADELEKE V RAHEEM (2019) LPELR -48729, the Judgment which was tendered as Exhibit 2 R.RW 4 and marked rejected by the tribunal even though they were bound to take judicial notice based on the fact in issue of forgery by virtue of Section 62 of the Evidence Act, 2011.

Learned Counsel further faulted the tribunal's error in finding the 2nd Respondent in the petition guilty of forgery even when there was a failure to present the fake and the original results.

Also caught the backlash of the Appellant's counsel is the failure of the tribunal to accord probative value to exhibit 2 R.RW5 which was the Originating process out of which the decision in ADELEKE V RAHEEM (2019) LPELR -48729 & exhibit 2R. RW4 was reached.

Finally, Counsel made a critique of the tribunal in its admission of File D despite his objection to it being photocopies of official documents.

Counsel urges the Court to expunge Exhibit File D being photocopies of public document which was not certified.

The Court is therefore urged to resolve this issue in favour of the Appellant.

This issue is featured in the brief of argument of the 1st and 2nd respondents as issue 5.

Learned Counsel to the 1st and 2nd Respondents drew the attention of the Court to the evidence on record to which he ascribed as unchallenged. Submits that confronted with this unchallenged evidence the tribunal was on a very sure ground in holding that the 1st and 2nd Respondents proved that the 4th Respondent presented forged or fake certificate to INEC in

Exhibits EC9 and file D. counsel cited the failure of the 2nd Respondent (4th Respondent herein) to call relevant witnesses to disprove their claim as to the 2nd Respondent's disqualification.

Counsel refers to pages 28 to 29 of the Judgment of the tribunal at pages 11917 to 11918 volume 6 of the record and the case of PDP V DEGI-EREMIENYO (2021) 9 NWLR (Pt. 1781) 279 at 292 cited in the Judgment of the tribunal.

Counsel also submitted that presenting two documents the genuine and the alleged forged documents are not the only way to prove forgery. That forgery cannot be alleged and proved in a current election. That the relevant question is whether the person has presented a forged certificate to INEC at any election.

Submits that Exhibit File D was not dumped. That it was tendered from the bar and RW3, the witness of the 3rd Respondent confirmed that both exhibits File D and EC9 belong to the 3rd Respondent.

Submits that the holding of the tribunal is that File D is in original form and does not need certification. That the trial Court's dismissal of the Preliminary Objection on that finding was not appealed and therefore cannot be a subject of argument now.

That the Appellant and other Respondents pleaded Exhibit 2R.RW4 as an issue estoppel, but submits that as settled by a plethora of authorities, evidence given in a previous case can never be accepted as evidence by the Court in a later case except where Sections 46 and 39 of the Evidence Act which have replaced Section 34(1) of the Evidence Act is considered and applied.

Equally submitted is that a plea of estoppel *per rem judicatem* had not been made out because the conditions for its application are non-existent.

Counsel made submissions on the failure to plead facts to controvert the specific pleadings of the 1st and 2nd Respondents to challenge the evidence of the petitioners on the issue, and that the Appellant is deemed to have admitted the averments of the petitioners regarding the testimonial. Reliance is placed in the case of AMINU V HASSAN (2014) 5 NWLR (Pt. 1400) 28.

On a final push, Respondents' counsel submits with reference to the case of ADELEKE V RAHEEM reported in (2019) LPELR -48729 that electronic law reporting is irrelevant to section 104 of the Evidence Act regarding admissibility of public documents.

Counsel submits that what is relevant for consideration is whether Exhibit 2R.RW4 was certified in line with Section 104 of the Evidence Act and not whether the decision had been reported in an electronic Law Report. Thus, counsel submits, the Exhibit was rightly rejected in evidence.

Appellant's counsel's reply brief centered on the introduction of paragraph 46(4) of the 1st Schedule to the Electoral Act, 2022 into the argument. That paragraph 46(4) used to uphold Exhibit File D should have been used in arriving at the conclusion of forgery even though not demonstrated. Counsel on a final note relied on Section 173 of the Evidence Act which in a nutshell provides that a Judgment is conclusive of facts forming ground of the Judgment.

RESOLUTION OF ISSUE 6:

The 1st and 2nd Respondents as petitioners at the tribunal challenged the qualification of the 4th Respondent as 3rd Respondent to contest the election in paragraphs 20 - 32 of their petition. See pages 4 - 7 vol. 1 of the record of appeal. The reply of the 4th Respondent to the averments in paragraphs 20 - 32 of the petition is contained in paragraphs 14 - 30 of the 3rd

Respondent's reply to the petition. See pages 1265 – 1280 of vol. 3 of the record.

To prove their case, the 1st and 2nd Respondents tendered in evidence EC9 and File D - INEC file with the documents submitted to it by the 3rd Respondent. The 3rd Respondent through RW3 tendered CTC of Judgment of the Court of Appeal in Appeal No: CA/A/362/2019: ADELEKE V RAHEEM & ORS (supra) but it was rejected in evidence and marked accordingly. However, the same Judgment delivered on 30/5/2019 reported in Law Pavilion Electronic Law Report (2019) LPELR -48129 (CA) was tendered and admitted in evidence and marked as Exhibit 2R.RW4.

It is in the light of these documents that the 1st and 2nd Respondents herein have submitted that the 4th Respondent having not called any evidence in support of his pleading has admitted to lying and was adjudged guilty of forgery and in the election thus disqualified from participating.

The 1st and 2nd Respondents in this appeal are supporting the verdict of the tribunal that the 3rd Respondent told a lie and was correctly found him guilty of forgery.

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Now, did the 4th Respondent lie? Was he rightly found to have committed forgery?

The 4th Respondent contended that he did not lie and did not commit forgery. He submitted that to be guilty of forgery, the accusers must tender the original document and the alleged forged one, which in this case was not done. That in the circumstances, he cannot be said to have committed forgery. However, the 1st and 2nd Respondent's contended that apart from tendering two documents - the original document said to have been forged and the alleged forged documents, there are other ways. That, it is sufficient if the culprit submitted forged documents in an election other than that in which the forgery is alleged. However, there was no proof of the 3rd Respondent having submitted forged documents. There is also no evidence of two documents - one original and the other the alleged forged one having been tendered.

I have also reviewed the evidence before me as to why the Judgment of the Court of Appeal in Appeal No: CA/A/362/2019 ADELEKE V RAHEEM & ORS was rejected in evidence. The reason is that the said document, being a photocopy of a CTC of a public document was not certified. Is that the Law? The law

as I know it is that a photocopy of a CTC of a public document does not require re-certification to be admissible in evidence. I had reviewed a number of decisions of the apex Court and arrived at this position in the case of HOTORO V ISYAKU & ORS (2019) LPELR -48231 (CA). See also the following - NJIBOLA V TALABI & ANOR (2022) LPELR -57353 (CA), ESIONE V ISIOFA (2016) LPELR -41060 (CA), MAGAJI V NIGERIAN ARMY (2008) LPELR -1814 (SC), BREDERO (NIG) LTD V SHYANTOR (NIG) LTD (2016) LPELR -40205 (CA).

In the light of the authorities, I set aside the decision of the tribunal rejecting the Judgment of the Court of Appeal in Appeal No: CA/A/362/2019 in evidence. In the stead of that decision the said Judgment is hereby admitted in evidence. Having admitted it in evidence, it thus becomes a CTC of a Judgment of the Court of Appeal properly tendered and admitted in evidence before this Court. Being an exhibit before this Court, what should it serve? An object of beautification or to serve the purpose for which it was pleaded and tendered in evidence?

The judgment has also been reported in the Law Pavilion Electronic Law Report as ADELEKE V RAHEEM & ORS (2019) LPELR -48729 (CA).

Now, the Judgment as submitted by Counsel to the 1st and 2nd Respondents may not bind the 1st and 2nd Respondents based on the principle of estoppel per rem judicata but certainly it is binding on all Courts and persons being a Judgment in rem, and to be taken judicial notice of.

In the case of AYAKNDUE & ANOR V AUGUSTINE (2022) LPELR -58926 (SC), it was held:

> "A Court of law is advised to take judicial notice of judgments of Court to assist it one way or the other to decide on issues before it. In fact, the judgment in suit No. FHC/ABS/M/239/2009, from the Federal High Court, Abuja, greatly assisted the lower Court to decide on the issue before it. Judicial notice refers to facts, which a Judge can be called upon to receive and to act upon, either from his general knowledge of them, or from inquiries to be made by himself for his own information from sources to which it is proper for him to refer. See

Per MOHAMMED, JSC, in AMAECHI V. INEC & ORS (2008) LPELR-446(SC) (PP. 141-142 PARAS. F). Where the Court takes judicial notice of a fact, proof is no longer necessary. A party who wishes to dispute the fact must provide evidence. See Per RHODES-VIVOUR, JSC, in JOSEPH V. STATE (2011) LPELR-1630(SC) (PP. 8 PARAS. A-A). Matters of which a Court can take judicial notice are not at large. Such matters are clearly defined by statute law and case law. Judicial notice is the cognizance taken by the Court itself of certain matters which are so notorious, or clearly established, that evidence of their existence is deemed unnecessary. See Per AGBAJE, JSC, in SARAKI V. KOTOYE (1990) LPELR-15503(SC) (PP. 106 PARAS. B). Where a Court takes judicial notice of a matter to decide a case one way or the other judiciously and judicially, it cannot be accused of breach of fair hearing, but should rather be commended." Per ABBA AJI, JSC (Pp. 14-15, paras. D-E)

See also the case of SARAKI V KOTOYE (1990) LPELR -15503 (SC) P. 106 paras B – F.

The 4th Respondent had pleaded facts relevant to the Judgment in Appeal No: CA/A/362/2019: ADELEKE V RAHEEM & ORS, which was also reported as (2019) LPELR -48729 (CA) in his defence to all the facts pleaded by the 1st and 2nd Respondents in their petition as to his disqualification.

If the Learned tribunal had appreciated that they were bound by the said Judgment which defined the 4th Respondent's qualification to contest election as Governor of Osun State, a reading of the said Judgment would have revealed that the issues on which the tribunal ruled that the 4th Respondent lied and found him guilty of forgery had been put to rest in that Judgment. Therefore, it is no longer in doubt that the wrongful rejection of the Judgment in evidence and to accord recognition to it as reported in the Law Pavilion Law Report had occasioned miscarriage of justice to the Appellant, as the 4th Respondent was/is the candidate of the said Appellant in the election.

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This finding leads me to the conclusion, that issue 6 is resolved in favour of the Appellant and against the 1st and 2nd Respondents.

Issue 9

Whether having regards to the facts and circumstances of the petition No: EPT/OS/GOV/01/2022 there was bias and or likelihood of bias against the Appellant and 3rd Respondent occasioning denial of fair hearing and miscarriage of justice. (Encompassing Grounds 39 and 40 of the Notice of Appeal).

Under this issue the Appellant's Counsel catalogues several actions of the tribunal from which to infer bias against the Appellant, after setting out what he considers to be the ingredients or elements of bias. Counsel relied on the following cases: **Real Admiral Agbite v. Nigeria Navy (2011) 4 NWLR (Pt. 1236) 175 at 215 Para 7; Daniel Teyar Ent. Co. Ltd v. Alh. Saidu Busari & Anor (2011) 8 NWLR (Pt. 1249) 387 at**

424-426 Para H; State Civil Service Commission & Anor v. Busugbo (1984) 4 NSCC 505.

Of particular concern in the action of the tribunal that demonstrates bias as submitted by Appellant's Counsel is the reference to the lyrics of **Kiss Daniel** when the learned tribunal states that the 2nd Respondent cannot "go lo lo lo lo" and "Buga won" as the duly elected Governor of Osun State..."

In the premises of the several actions of the tribunal which Counsel submitted have demonstrated bias and/or likelihood of bias perpetrated against the 4th Respondent by the tribunal, Counsel urged the Court to resolve this issue in favour of the Appellant.

The 1st and 2nd Respondent considered this issue in the 1st and 2nd Respondents' issue 8.

Quoting the alleged offending portion of the judgment of the trial tribunal, Counsel submits that an allegation of bias or

likelihood of bias is grave and must be proved only in a manner provided by law. Counsel submits that it is not every pronouncement made by a court that will give rise to an appeal or lead to the reversal of a decision. That the attempt by the Appellant to pick and choose areas of the judgment that are unfavourable to the Appellant as evidence of bias is nothing short of red herring, and that all the cases cited are not applicable and cannot assist the Appellant's case. It is further argued that there is no live issue in the complaint being ventilated by the Appellant. Counsel submits that the mere vague suspicion of whimsical, capricious and unreasonable people should not be made a standard to constitute proof of such serious complaints.

That in cases where a judgment is impeached on the ground of bias or likelihood of bias, the decision must turn on the facts whether or not under the circumstances alleged, there was bias

or on the part of the Court. The case of **Agengbede v. Essan (2001) 18 NWLR (Pt. 746) 783 Paras F-H** is relied on.

The Court is urged to discountenance the Appellant's argument in its entirety.

In the Appellant's reply brief, Counsel submits and relies on the case of **Mekwanye v. Carnation Registrars Ltd. (2021) 15 NWLR (Pt. 1798) 1 at 49 Paras F-G.** Counsel went on to further point out that he did not in the Appellant's brief attack the learned Chairman.

Resolution

The truth be told, what has irked the Appellant to complain of bias or likelihood of bias resulted from the uncharitable comments made by the learned tribunal in which its Chairman appears to have made mockery of the 4th Respondent by reference to the lyric of a music Pop Star, Kiss Daniel in his famous track "go lo lo lo lo" and "Buga"

I am very surprise that the very Senior Counsel to the 1st and 2nd Respondents rather than express his dismay with such a conduct by a man who sits over the affairs of other men only by virtue of his being a Judge appears to rise to his defence, probably because the judgment went in his favour. What is wrong is wrong. If the man loves dancing, let him dance all he likes, so long as, as is he did not do so at the sitting of the tribunal.

The circumstances from which to infer bias were clearly spelt out in the case of **Gebi v. Dahiru & Ors (2011) LPELR – 923 (CA)** where the Court of Appeal held:

> **"To question the integrity and impartiality of a court or tribunal, as was done by counsel in the instant case, tantamount to an accusation of bias against such a court or tribunal. And it's a well settled principle, that, bias, with particular regard to court or Tribunal, is an inclination, predisposition or preparation, to determine a matter or cause in a certain preconceived way, without**

any regard to laid down principles or law. See ANPP V. REC AKWA IBOM STATE (2008) 8 NWLR (pt 1090) 453 at 526-527 paragraphs G - D; 528 C - E, where in it was held by this court, inter alia, thus: "Bias may be attributable to a number of factors including corruption, vengeance, partnership, friendship, group membership or association" Per Saulawa, JCA. See also AZOUKWU V. NWOKANMA (2005) 11 NWLR (pt. 937) 537." Per SAULAWA, JCA (P. 51, paras. A-D)"

See also the case of Okon v. State (2019) LPELR – 47480 (CA) Pp. 36 – 38 Paras F-B; Mbaka v. Ndubuisi (2022) LPELR – 57285 (CA) Pp 74-76 Para D.

Learned Counsel has pointed to several actions taken by the tribunal that were not in his favour. However, there is no evidence to show that such actions emanated from a biased mind calculated to favour the 4th Respondent's opponent to the 4th Respondents disadvantage. Indeed, I have gone through the record of appeal and can point to nowhere in the record where

the tribunal took any unwarranted action openly designed to favour the 1st and 2nd Respondents to the detriment of the 4th Respondent, and that it was not as a result of the tribunals informed knowledge of the law but as a result of bias. The Appellant has not demonstrated to this Court the occasion or occasions when such a biased or prejudiced decision or action was taken or expressed and Counsel was compelled to react. In cases of bias or likelihood of bias, it is often too tempting for the person against whom bias is shown to keep his cool. No matter how patient a person is, sometimes the human nature in man will be betrayed. I have seen none of these in the entirety of the proceedings from the beginning up to judgment.

What the Appellant has catalogued as incidences of bias are alleged infractions or alleged errors of law which are being sought to be corrected in this appeal.

They are in my view not a display of bias or likelihood of bias, I hold.

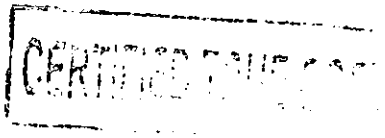
This issue is therefore resolved against the Appellant and in favour of the 1st and 2nd Respondents.

In sum, issues 1,2,3 and 9 are resolved in favour of the 1st and 2nd Respondents and against the Appellant.

Issues 4,5,6,7 and 8 are resolved in favour of the Appellant and against the 1st and 2nd Respondents. These being the determinant issues in this appeal, the appeal is hereby allowed.

Consequently, the Judgment of the tribunal delivered on 27th January 2023 is hereby set aside.

Accordingly, the election of the 4th Respondent as the duly elected Governor of Osun State is hereby affirmed.



Costs of N400,000 is awarded to the Appellant against the 1st and 2nd Respondents.

CERTIFIED TRUE COPY
COURT OF APPEAL ABUJA
OGUNFUWA HASSANA (MRS)
ASST. CHIEF ADMIN OFFICER
Signature .....
Date 27/3/23

JAMES GAMBO ABUNDAGA,
JUSTICE, COURT OF APPEAL.

APPEARANCES:

1. Dr. Alex A. Izinyin, SAN and N.O.O. Oke, SAN, and Olurotimi Alli, SAN for the Appellant, with C.S. Ekeocha Esq.

2. Prince Lateef O. Fagbemi, SAN and Chief Akinlolu Olujinmi, SAN, Dr. Biodun Layonu, SAN, Chief H.O. Afolabi, SAN, Kunle Adegoke, SAN, with Ifeanyi Eguasi Esq. for the 1st and 2nd Respondents

3. Prof. Paul Ananaba, SAN and Chief Emeka Okpoko, SAN, Chief Henry Akunebi, SAN with Olakunle Faokunla for the 3rd Respondent

4. Kehinde Ogunwumiju, SAN and Tunde Afe-Babalola, SAN with Dr. Obinna Onya Esq., Julius Mba, Esq., Niyi Owolade Esq. for the 4th Respondent.

APPEAL NO: CA/AK/EPT/GOV/02/2023

MUHAMMED L. SHUAIBU, JCA

I have had the privilege of reading in draft the judgment just delivered by my learned brother, **James Gambo Abundaga, JCA.** I, agree with the reasoning and conclusion reached in allowing the appeal.

It is not in doubt that the Appellants Motions Nos: EPT/OS/GOV/01/M10/2022 and EPT/OS/GOV/01/M11/2022 challenged the Competence of some paragraphs of the 1st and 2nd Respondent's reply and jurisdiction of the tribunal to entertain the Petition respectively. Regrettably, the lower tribunal glossed over the said motions and proceeded to dismissed same and thereby denying the appellant of its right to fair hearing.

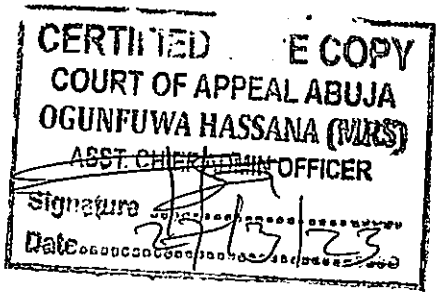
The right to fair hearing is certainly not a technical doctrine but one of substance. Thus, the question is not whether injustice has been done because of lack of hearing. Rather, it is whether a party entitled to be heard before deciding the matter had in fact

been given an opportunity of a hearing. And once an appellate Court comes to the conclusion that the party entitled to be heard before a decision was reached but, was only given the opportunity of hearing, the order, or Judgment thereby entered is bound to be set aside. See **KOTOYE VS C.B.N. (1989) 1 NWLR (Pt 98) 419.**

For these and for the fuller reasons contained in the leading Judgment, I also allow the appeal and abide by all the consequential orders including the order as to costs

MUHAMMED L. SHUAIBU

JUSTICE, COURT OF APPEAL.



APPEAL NO. CA/AK/EPT/GOV/02/2023

CORDELIA IFEOMA JOMBO-OFO, JCA

I had a preview of the Judgment just delivered by my learned brother, **JAMES. G. ABUNDAGA JCA,** and I agree with the reasoning and conclusion reached in allowing the appeal.

I also allow the appeal and abide by the consequential orders contained in the leading judgment.

CORDELIA IFEOMA JOMBO-OFO, JCA

JUSTICE, COURT OF APPEAL