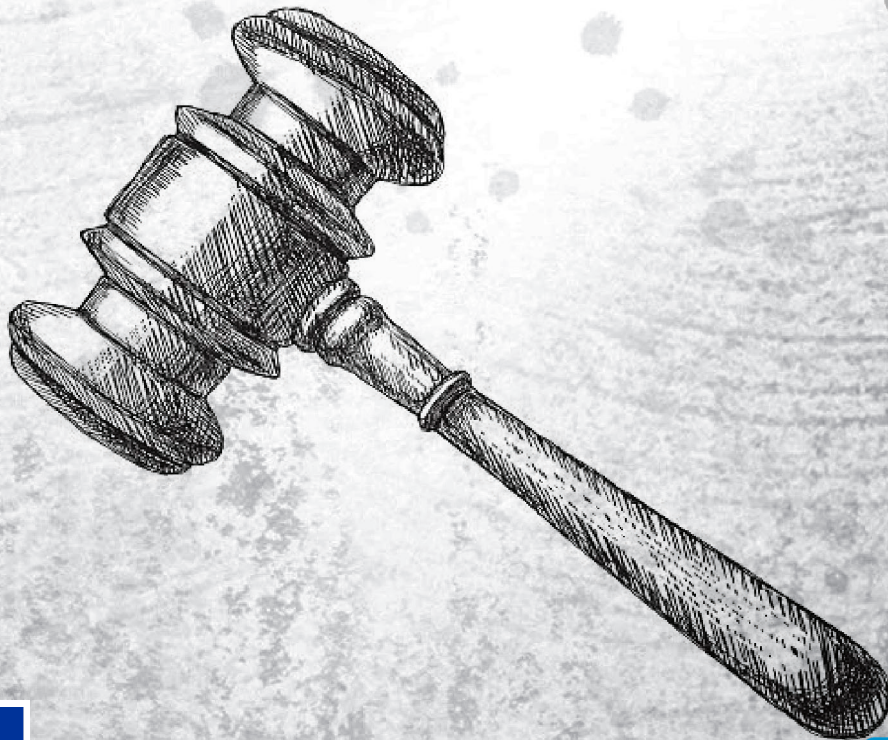


**ABRIDGED REPORT**

# FROM BALLOT TO THE COURTS:

**Analysis of Election Petition Litigation  
from Nigeria's 2023 General Elections**



Funded by  
the European Union

**PLAC**

POLICY AND LEGAL ADVOCACY CENTRE

**FROM BALLOT TO THE COURTS:  
ANALYSIS OF ELECTION PETITION LITIGATION FROM NIGERIA'S  
2023 GENERAL ELECTIONS**

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# EXECUTIVE SUMMARY

This Report by Policy and Legal Advocacy Centre (PLAC) is an in-depth analysis of the election petitions that followed the results of the 2023 general elections in Nigeria. The report analyses the judgments of the Election Petition Tribunals, the Court of Appeal and the Supreme Court on Presidential, Governorship, Senatorial, House of Representatives and State Houses of Assembly petitions. It focuses on the application of the legal framework for elections, such as the Constitution of the Federal Republic of Nigeria, the Electoral Act, 2022, as well as observed trends, issues and challenges arising therefrom. The predominant trends from the petitions were identified as a basis for analysis and recommendations.

The effort by PLAC to analyse judicial decisions on election petitions began in 2015 with the production of a research report on the adjudication of election disputes from the 2015 general elections. This was done under the auspices of the Nigerian Civil Society Situation Room. The current report scales up this effort by adopting a more comprehensive approach to the analysis of the petitions and integrating an online database of petitions analysed along with the certified true copies of the judgments. The current report is a product of PLAC's engagement with the Judiciary and on electoral reform. It follows from the engagement and capacity-building support provided by PLAC (in collaboration with other partners) to the Election Petition Tribunals (EPT) and Court of Appeal under the European Union Support to Democratic Governance in Nigeria (EU-SDGN II) Programme.

The report was developed with the following objectives:

- a. To produce a comprehensive and analytical compendium of post-election petitions and judgments from the 2023 general elections.
- b. To provide insights on the judgments of the Courts and Tribunals, as well as their interpretation and application of new provisions of the 2022 Electoral Act and the Constitution.

- c. To develop a useful resource and reference material for enlightening the public and election stakeholders on Nigeria's Election Dispute Resolution process and outcomes.
- d. To provide data and benchmarks for tracking the outcome of election petitions in Nigeria.

The activities that led to the production of this report were guided by the following Terms of Reference:

- a. Review tribunal and court judgments from the 2023 General Election Petitions Tribunal (EPT), Court of Appeal, and Supreme Court.
- b. Review the relevant legal framework including the Electoral Act 2022, the Constitution of the Federal Republic of Nigeria, INEC Regulations and Guidelines for Elections, Practice Directions of the Tribunals/Courts and related election guidelines and regulations as necessary.
- c. Identify the application of the legal framework to petitions by the Tribunals and Courts.
- d. Produce concise summaries of the tribunal and court judgments capturing the facts, issues, rules applied, court decision and rationale.
- e. Produce a comprehensive analysis of the overall findings.
- f. Develop recommendations on improvements to the electoral legal framework and election administration in Nigeria based on analyses and findings.

Activities towards the production of this report began in February 2024 shortly after the conclusion of appeals and delivery of final judgments by the Supreme Court on most election petitions. Over 1,700 court records of 82,400 pages comprising rulings and judgments on pre-election and post-election petitions and appeals were obtained. Case summaries and analyses of the judgments were carried out between April 2024 and August 2024 by a team of lawyers supervised by a lead legal expert and the PLAC project team. The report and an accompanying online case directory/repository were developed between August 2024 and December 2024 to house the case summaries and certified true copies of the judgments obtained. Overall, a total of **1,503** post-election petitions and appeals were analysed, which is the number of individual petitions and

judgments elicited from the court records obtained. The case summaries which contain key details such as the parties, issues, grounds, application of the legal framework and reasons for the decisions reached are available on an online repository managed by PLAC and accessible via this link: <https://electioncases.placlibrary.org/>

The report gives a broad overview and background on the 2023 general elections; the political and legal context, the legal framework, nominations process and outcomes among others. It also provides a background on election disputes in Nigeria, particularly, the legal procedure for filing petitions and remedies available. The report presents key data from the cases analysed by PLAC such as the success and failure rate of petitions and appeals, as well as the trends and issues observed from these cases. The role of INEC, the election management body, and its response to petitions is examined. Finally, recommendations are presented based on the findings.

### **Key Findings and Recommendations**

The prevalent feature in the petitions filed challenging the outcome of the 2023 general elections is that a substantial number of cases collapsed mainly due to lack of jurisdiction, a threshold requirement for hearing petitions, and failure to discharge the burden of proof. About **73%** of the petitions filed were determined by the ability or inability of the petitioner or appellant to prove their case with credible and admissible evidence. The remaining petitions were determined by the failure of the petitioner to adhere to mandatory procedural requirements (**14.7%**), the Tribunals' inability to assume jurisdiction because the particulars of the petition were pre-election matters (**8.5%**), and the petitioner did not have the legal standing to file a petition (**3.7%**).

At the Election Petition Tribunal, **88.9%** of cases analysed failed while only **11.1%** were successful. At the Court of Appeal, **79.4%** of election appeals analysed failed while **20.9%** succeeded. Some of the trends and issues identified from the analyses conducted include the following:

- a. *Jurisdictional issue of Locus Standi (Right to bring an action)* – There were cases of parties who did not contest elections filing a petition; winners filing cross-petitions; political parties withdrawing from petitions and abandoning their candidates; and parties still attempting to raise unlawful exclusion as a ground for petition even after its removal from the Electoral Act, 2022 as a

ground for questioning an election. Such cases were dismissed.

- b. *Issues of Procedure* – Observed were issues of non-compliance with Rules of Procedure of the Court by litigants; failure to adhere to constitutional and legal timelines for performing actions; challenges with frontloading of witness depositions; and filing of incomplete court processes.
- c. *Nomination, Sponsorship, Qualification, and Disqualification of Candidates* – Also observed were parties raising pre-election matters dealing with party nominations at the tribunals contrary to the provisions of the Constitution and Electoral Act, as well as the ensuing conflicting judgments by the courts and tribunals in their interpretation of the law and application of judicial authorities on this matter.
- d. *Burden and Standard of Proof* – There were challenges with satisfying the high legal burden for proving election petitions; difficulty calling oral witnesses and obtaining documentary evidence from INEC; challenges with the Supreme Court’s requirement to tender the Bimodal Voter Accreditation System (BVAS) machine in court; confusion of litigants over the provision of the law on electronic transmission of results and the legal status of INEC Regulations; challenges with proving criminal allegations, overvoting, and disenfranchisement of voters; as well as conflict in the court’s application of the novel provision in **section 137** of the Electoral Act which sought to counteract the rule against dumping of documentary evidence.
- e. *INEC and Election Petitions* – The Commission had a largely passive attitude towards election petitions caused by presumptive deference enjoyed by the election management body and the underlying premise that a perfectly conducted election is an unattainable ideal. There was also the issue of INEC delaying or not complying with Court Orders to produce documents, INEC defending petitions and appealing judgments.

Based on the trends and issues observed, the following recommendations are offered to the National Assembly, Judiciary, INEC, the Executive and Political Parties:

- i. Adjust the requirement to frontload the written statement on oath of a subpoenaed witness
- ii. Review Section 135 (1) of the Electoral Act on substantial non-compliance

- iii. Amend Section 137 of the Electoral Act on documentary proof of non-compliance
- iv. Require INEC to bear the burden of proof in election petitions
- v. Reconsider the standard of proof of criminal allegations in petitions
- vi. Abridge timelines and levels of appeal for pre-election matters
- vii. Amend Section 29 of the Electoral Act dealing with pre-election matters for clarity
- viii. Reconsider the Timeline for the post-election adjudicatory process
- ix. Ensure the conclusion of post-election matters before the swearing-in of candidates
- x. Amend the Constitution on time for decision on appeal
- xi. Clarify legislative intent on electronic transmission of results and status of INEC Result Viewing Portal (IREV)
- xii. Maintain the position that political parties' choice of candidates cannot be challenged by non-members
- xiii. Prescribe the effect of non-submission of a political party's membership register before primaries
- xiv. Prescribe the effect of omission of party symbols on election materials, after its inspection and approval by parties
- xv. Relax the requirement to provide the Bimodal Voter Accreditation System (BVAS) machine during election petitions
- xvi. Impose consequence for disobedience of court orders to produce documents
- xvii. Penalise frivolous petitions
- xviii. Incorporate ADR in post-election dispute resolution
- xix. Discourage termination of cases at the preliminary stage
- xx. Adopt internal systems and mechanisms to address conflicting judgments
- xxi. Review working conditions of judicial officers
- xxii. Strengthen judicial capacity and independence
- xxiii. Strengthen internal political party processes
- xxiv. Invest in polling agents' recruitment & training



## 01

# Facts and Figures on the 2023 Election Petitions

## 1.1 Official Data and Result from Case Analysis

According to the Court of Appeal, the official number of petitions filed following the general elections held in February and March 2023 is 1,209, out of which 206 were withdrawn, leaving 1,003. Following this, a total number of 840 appeals were filed at the Court of Appeal. Overall, PLAC reviewed a total number of 1,503 petitions and judgments of the Election Petition Tribunals (EPT), Court of Appeal, and Supreme Court. This includes 895 Tribunal judgments; 588 Court of Appeal judgments and 20 Supreme Court judgments. This section presents the official data on the 2023 Presidential, Governorship, Senatorial, House of Representatives and State Houses of Assembly elections and an overview of the results from PLAC's analysis of 1,503 election petitions and appeals.

*Table 1: Official Summary of Number of Petitions Filed after the 2023 General Elections*

S/N	STATE	PRES.	GOV.	SEN.	HOR	SHA	TOTAL
1	Abia		2	9	26	23	60
2	Adamawa		3	2	6	12	23
3	Akwa Ibom		9	4	13	14	40
4	Anambra		0	7	25	21	53
5	Bauchi		4	5	10	26	45
6	Bayelsa		0	4	7	22	33
7	Benue		1	4	13	18	36
8	Borno		1	3	7	2	13
9	Cross River		3	3	10	13	29
10	Delta		6	8	17	29	60
11	Ebonyi		3	8	8	13	32
12	Edo		0	3	12	18	33
13	Ekiti			3	1	2	6
14	Enugu		8	4	12	26	50

S/N	STATE	PRES.	GOV.	SEN.	HOR	SHA	TOTAL
15	FCT-Abuja		0	2	4	0	6
16	Gombe		2	2	2	8	14
17	Imo		0	6	19	39	64
18	Jigawa		1	3	9	2	15
19	Kaduna		5	5	17	18	45
20	Kano		1	2	24	40	67
21	Katsina		0	2	9	1	12
22	Kebbi		1	3	6	8	18
23	Kogi		0	5	10	3	18
24	Kwara		0	1	3	8	12
25	Lagos		4	5	26	16	51
26	Nasarawa		2	2	6	10	20
27	Niger		0	4	8	23	35
28	Ogun		4	2	9	18	33
29	Ondo		0	2	7	3	12
30	Osun		0	3	11	24	38
31	Oyo		2	6	16	4	28
32	Plateau		4	6	11	18	39
33	Rivers		12	12	27	30	81
34	Sokoto		1	3	11	16	31
35	Taraba		2	1	9	9	21
36	Yobe		0	2	2	4	8
37	Zamfara		2	1	4	16	23
38	PRESIDENTIAL	5					5
	<b>TOTAL</b>	<b>5</b>	<b>83</b>	<b>147</b>	<b>417</b>	<b>557</b>	<b>1209</b>

**Source:** Bolaji-Yusuf, M. O., JCA (2024, May 20). *The 2023 Election Petition Tribunals/Court And Appeals: An Overview*. [Presentation at a Review Workshop for Justices of the Court of Appeal and Judges of the Election Petition Tribunal held in Abuja].

## 1.2 Overview of Successful and Unsuccessful Petitions and Appeals

Table 2: Estimated number of successful and unsuccessful petitions analysed

States	EPT(D)	EPT(S)	CA (D)	CA (A)	WB	WA	WE
Benue	28	1	13	2	0	1	1
FCT	6	0	4	0	0	0	0
Kogi	8	2	4	2	1	0	1
Kwara	8	1	1	4	0	3	1
Nasarawa	10	3	1	3	0	2	1
Niger	29	3	15	4	0	0	0

States	EPT(D)	EPT(S)	CA (D)	CA (A)	WB	WA	WE
Plateau	21	12	18	14	9	13	0
Adamawa	15	4	12	5	2	3	2
Borno	13	0	4	0	0	0	0
Bauchi	36	2	24	5	0	4	1
Gombe	9	1	4	2	2	2	0
Taraba	13	1	6	2	0	0	1
Yobe	7	0	3	1	0	1	0
Kaduna	29	4	20	9	2	3	2
Katsina	8	4	9	3	3	0	1
Kano	43	4	14	6	1	0	2
Kebbi	18	0	5	1	0	1	1
Sokoto	27	4	19	6	2	3	2
Jigawa	13	1	3	0	0	0	0
Zamfara	19	2	6	2	1	2	0
Abia	42	5	28	5	2	2	1
Anambra	36	4	24	3	1	0	0
Ebonyi	25	0	11	0	0	0	0
Enugu	30	7	16	6	3	0	4
Imo	35	10	33	9	6	1	3
Akwa-Ibom	22	2	13	0	0	0	0
Bayelsa	16	2	15	0	1	0	0
Cross-River	17	4	15	2	2	0	0
Delta	33	7	39	12	3	0	5
Edo	30	1	7	0	0	0	0
Rivers	44	0	30	0	0	0	0
Ekiti	3	0	3	0	0	0	0
Lagos	31	5	10	1	1	0	0
Osun	16	1	1	3	0	0	1
Ondo	2	1	1	2	1	0	0
Ogun	29	0	2	1	0	1	0
Oyo	23	1	10	0	0	0	0
Presidential			3	0			
<b>Total</b>	<b>794</b>	<b>99</b>	<b>446</b>	<b>115</b>	<b>43</b>	<b>42</b>	<b>30</b>

**Key:**

EPT(D) = Dismissed (at EPT)

EPT(S) = Successful (at EPT)

CA (D) = Dismissed (by Court of Appeal)

CA (A) = Allowed (by Court of Appeal)

WB = Won Both (Petitioner won at EPT and won on Appeal)

WA = Won Appeal only (Petitioner lost at EPT but won on Appeal)

WE = Won EPT only (Petitioner won at EPT but lost on Appeal)

**Note:** Petitions that were withdrawn are not included in this table. Also, cross-appeals filed on the same subject matter with the same parties and the same decision are not counted. A cross-appeal refers to an appeal filed by a respondent (the party who won in the lower court) in response to an appeal filed by the appellant (the party who lost in the lower court) to challenge a part of the judgment that they do not agree with or to seek specific reliefs.

**Figure 1** below shows the percentage of successful and unsuccessful petitions at the EPT. The failure rate of petitions stands at 88.9% while the success rate stands at 11.1%.

**Figure 2** shows the Percentage of successful and unsuccessful election appeals at the Court of Appeal. Many petitioners won only at the tribunal but lost on appeal; some lost at the EPT but won on appeal, which is ultimately a win; while a few others were fortunate and won both at the tribunal and on appeal.

**Figure 3** shows the percentage of petitions won at both EPT and on Appeal.

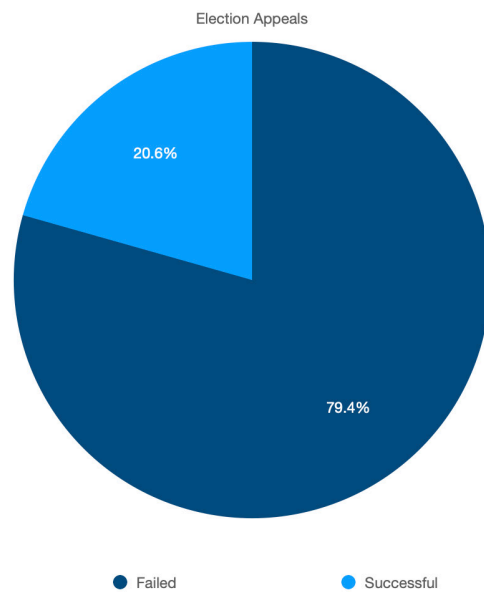
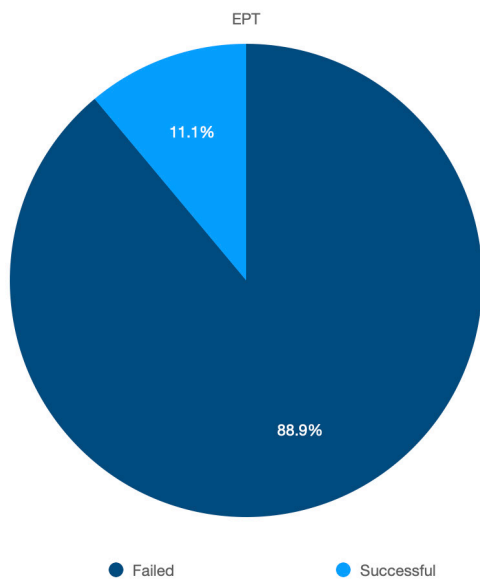


Figure 1: Percentage of successful and unsuccessful petitions at the Tribunal

Figure 2: Percentage of successful and unsuccessful election appeals at the Court of Appeal

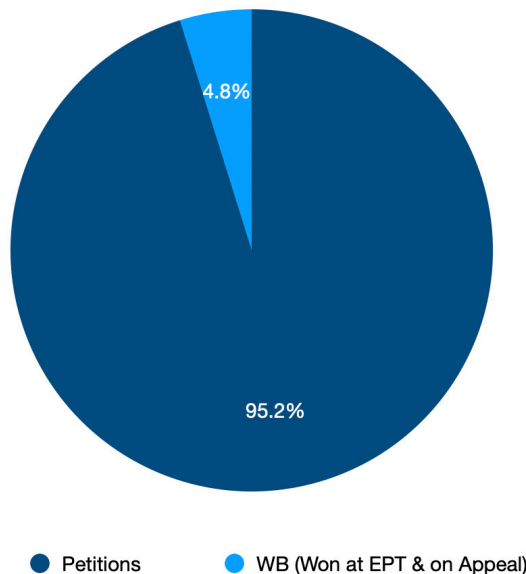


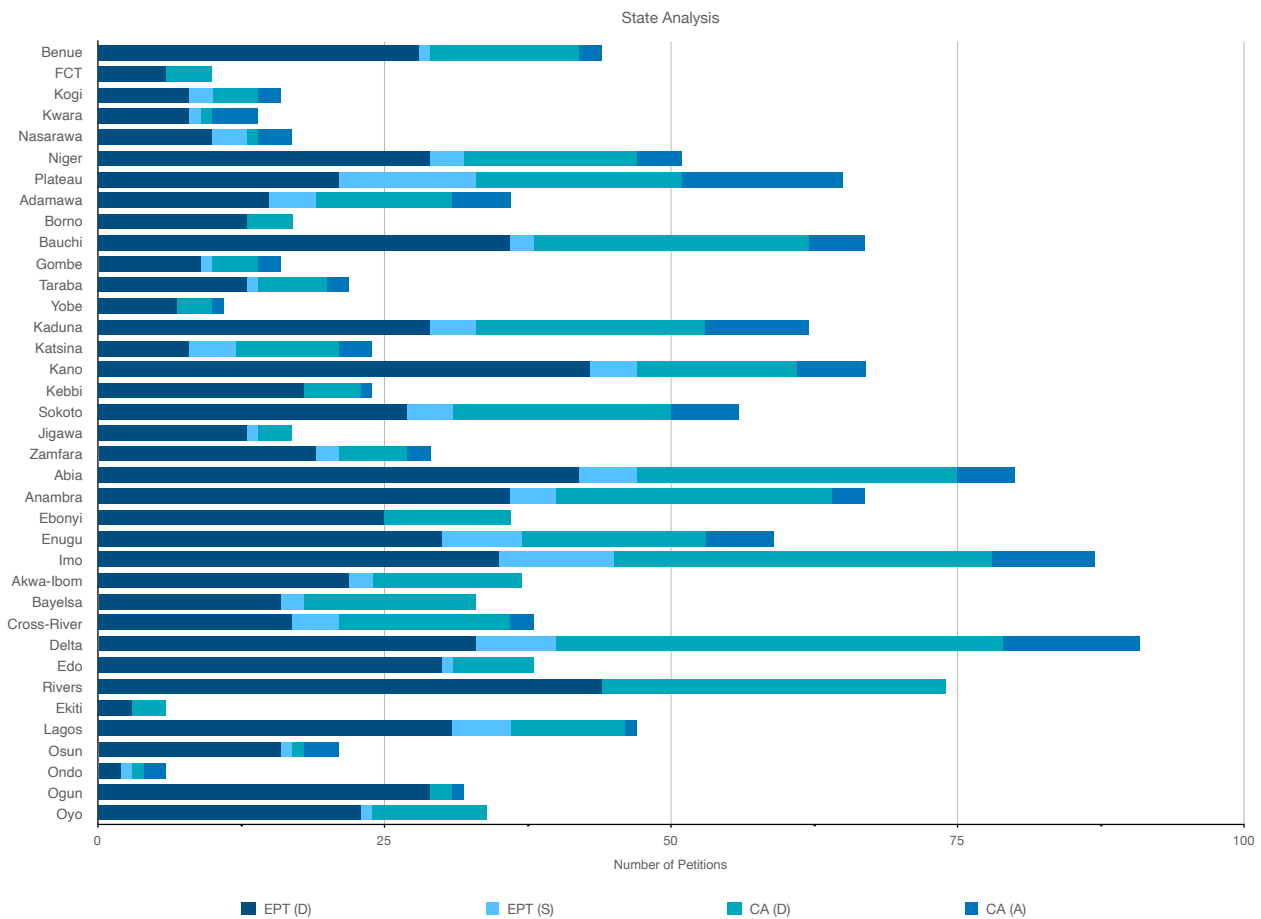
Figure 3: Percentage of petitions won at both EPT and on Appeal

Majority of petitions were unsuccessful both at the Tribunal and on Appeal with each level of adjudication having its own separate success and failure rates as shown in the pie charts above. However, drilling down, it was found that only an estimated **4.8%** of petitions were successful at both the EPT and on appeal (i.e., the petitioner won at both levels).

### 1.3 Successful and Unsuccessful Petitions and Appeals per State

Of the cases analysed, Plateau State had the highest number of successful Tribunal cases while Rivers State had the highest number of dismissed petitions with none succeeding at the EPT. At the Court of Appeal, Plateau State had the highest number of cases allowed on appeal while Delta had the highest number of dismissed appeals.

Figure 4: Successful and unsuccessful petitions and appeals per State



**Key:** EPT(D) = Dismissed (at EPT); EPT(S) = Successful (at EPT); CA (D) = Dismissed (by Court of Appeal); CA (A) = Allowed (by Court of Appeal)

## 1.4 Successful and Unsuccessful Petitions and Appeals per Region

Of all the cases analysed, the South-East region recorded the highest number of successful and dismissed cases at the EPT. At the Court of Appeal, the North-Central region had the highest number of successful appeals while the South-South region recorded the highest number of dismissed appeals.

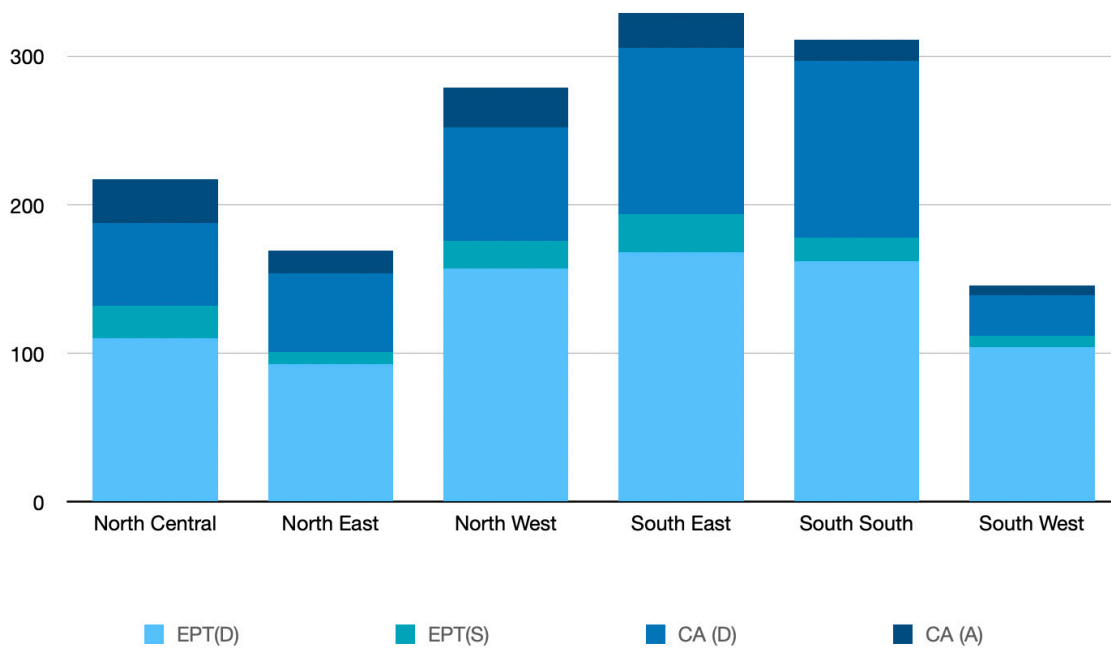


Figure 5: Successful and unsuccessful petitions and appeals per region

### Key:

EPT(D) = Dismissed (at EPT)

EPT(S) = Successful (at EPT)

CA (D) = Dismissed (by Court of Appeal)

CA (A) = Allowed (by Court of Appeal)

## 1.5 Trends, Issues and Reasons for Dismissal of Petitions

Figure 6 shows the general trend and issues from resolved petitions, particularly reasons adduced by the Tribunals and Courts for dismissing petitions and appeals. Overall, this was broadly categorized into Jurisdictional Issues (Procedure, Pre-Election Matters and Locus Standi) and Burden Proof. Tags with these categories were attached to each case analysed to ascertain the frequency of occurrence of the trend. Failure of the Petitioner to discharge the Burden of Proof featured the most as the primary reason for the dismissal of most petitions analysed (**73.1%**). This is distantly followed by procedural issues e.g. filing processes out of time, not following the prescribed procedure or omitting relevant documents (**14.7%**). Other reasons given were that petitions filed were pre-election matters for which the EPT lacked jurisdiction to hear (**8.5%**) or that the Petitioner lacked the *Locus Standi* to file an election petition (**3.7%**).

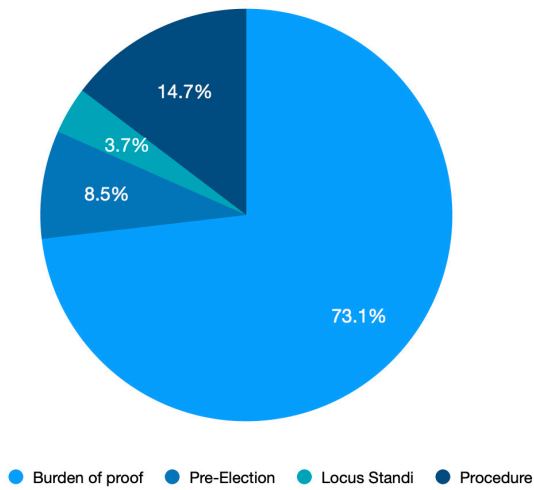


Figure 6: Trends, Issues and Reasons for Dismissal of Petitions

### 1.6 Estimated number of Petitions and Appeals won or lost by Political Parties.

The image below shows the estimated number of petitions and appeals won or lost by political parties from all the cases analysed. From the analysis, PDP had the greatest number of petitions and dismissed cases at the EPT and Court of Appeal. APC on the other hand, recorded a higher success rate both at the EPT and on appeal but filed a lower number of petitions than the PDP.

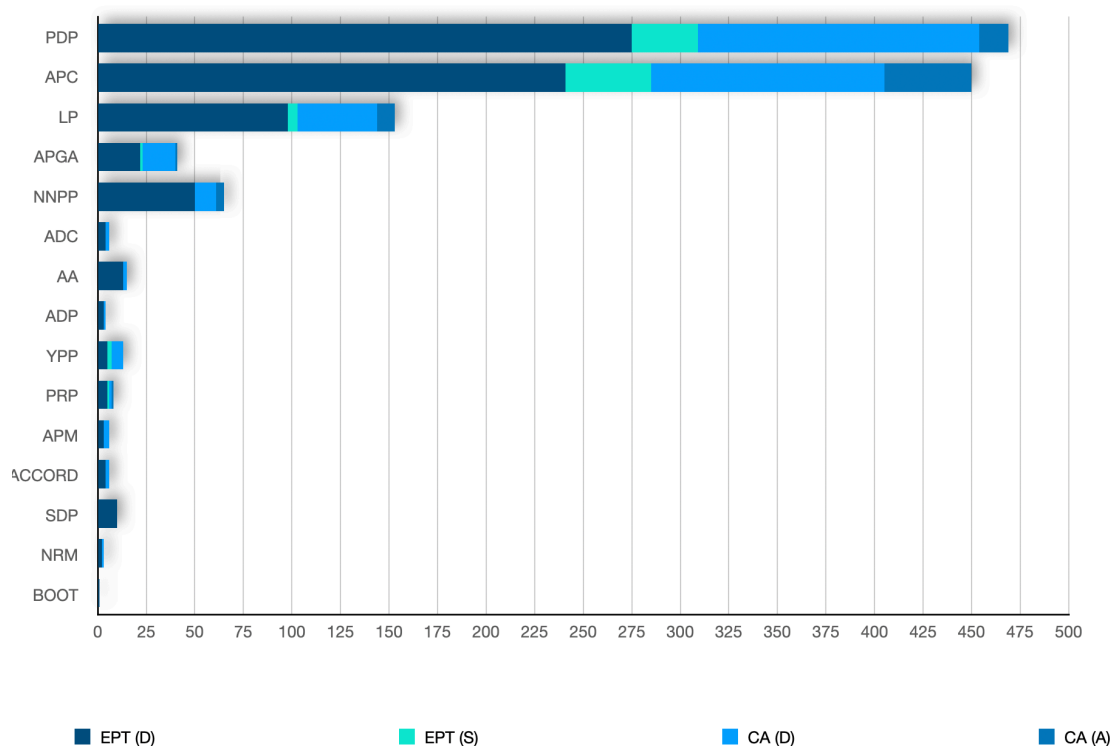


Figure 7: Estimated number of petitions and appeals analysed won or lost by political parties

**Key:** EPT(D) = Dismissed (at EPT) EPT(S) = Successful (at EPT) CA (D) = Dismissed (by Court of Appeal)  
 CA (A) = Allowed (by Court of Appeal)

## SUMMARY OF TRENDS & ISSUES ARISING FROM THE ANALYSIS OF 2023 POST-ELECTION PETITIONS

About 73% of the petitions filed were determined by the ability or inability of the petitioner or appellant to prove their case with credible and admissible evidence. The remaining 27% of petitions were determined by the Tribunals' inability to assume jurisdiction because the particulars of the petition were either pre-election matters, the petitioner did not have *locus standi*, or there was failure to adhere to mandatory procedural requirements.

### 2.1 Jurisdictional Issues - Lack of *Locus Standi*

*Locus Standi* is a latin phrase that means "Place of Standing" and refers to the legal capacity of a person to institute proceedings in Court. By **Section 133(1)** of the Electoral Act, 2022, the only petitions which a tribunal can hear are those presented by either a candidate at the election or the political party which participated at the election or both.<sup>1</sup> Therefore, if a person who has no *locus standi* to file an election petition institutes a petition, the petition will be struck out. Further, the courts have held that a person to be declared and returned as winner of an election by an election Tribunal or Court must have been a person who fully participated as candidate, in all the stages of the election, starting from his nomination, as a candidate to the actual voting.<sup>2</sup> Consequently, where pre-election disputes on the right candidate of a political party are not resolved before the elections, the political party will end up not having had any candidate in the election. In spite of this, there were several cases where persons who did not participate in an election filed a petition questioning an election. Such petitions brought by non-participants were always dismissed.

1. See **Egolum v. Obasanjo** where the Supreme Court held that: "The right to contest an election is not a common law right. It is created by statute and anyone seeking relief under such a law must bring himself strictly within the provisions of the law. The *locus standi* of any petitioner is a matter touching on the competence and the jurisdiction of the court to entertain the petition."

2. **Modibbo v. Usman** (2020) 3 NWLR (PT. 1712) 470



*a. Parties who did not contest filing a petition*

These kinds of petitions commonly followed from prolonged pre-election litigation where the validity of a candidate's nomination was determined by the court either after the election had taken place or on the eve of the election when a substitution had become difficult or impossible. In such cases, because the name of the candidate (or petitioner in this case) was not forwarded by their political party to INEC as their candidate ahead of the election, they were held not to have participated in all stages of the election and thus could not bring a petition. Such candidates went ahead to file election petitions against opposing parties even though their names were not on the ballot. They did this on the belief that the affirmation of their nomination or candidacy by the Court imbued them with the right to file a post-election petition or that they had become an automatic replacement of the candidate whose name was on the ballot and therefore inherited the right to sue. Conversely, there were candidates who contested the election, but were subsequently removed by a Court Order via a pre-election matter. Both the person who did not contest but was later affirmed as the rightful candidate and the person who contested, but was later removed, were held not to be candidates and therefore lacked the locus standi to bring a valid petition before the Court. Overall, the position of the Tribunals and Courts on this matter is that where a pre-election dispute as to who a party's candidate should be was not determined until after the election, the affected political party had in actuality, no candidate at the election, and INEC ought to declare and return the runner-up with the majority of lawful votes from the election.<sup>3</sup>

The situation of persons who did not contest, filing petitions was also observed in cases where parties complained that they were unlawfully excluded from an election because their party logo was missing or not properly represented on the ballot. Because "unlawful exclusion" no longer exists as a ground for filing a petition, such petitioners often relied on the ground of non-compliance with the Electoral Act. However, the Tribunals refused to assume jurisdiction over such matters either because the petitioner did not participate in the election, or that the complaint, which was presented as non-compliance by INEC with the Electoral Act, pleaded facts pointing to unlawful exclusion, which is no longer a recognised ground for petition. These kind of complaints are now seen as falling under pre-election matters.

<sup>3</sup> See **Orji Chima & Ors** (2023) LPELR-60345-SC and **Modibbo v. Usman** (2020) 3 NWLR (PT. 1712) 470

*b. Withdrawal of a Sponsoring Political Party from a Petition*

There were several cases where a sponsoring political party withdrew from the petition and some Tribunals ruled that the petitioner lost *Locus Standi* as a result. This was prominent in the Rivers State National Assembly and State Houses of Assembly Election Petition Tribunal where the All Progressives Congress (APC) withdrew from all the petitions involving their candidates, including that of their Governorship candidate, Tonye Patrick Cole. This was an area of conflicting decisions in the Rivers State Election Petition Tribunals where several panels took the position that the withdrawal of a political party amounted to a withdrawal of the petition and loss of *Locus Standi*.<sup>4</sup> The Court of Appeal set aside all the judgments on this matter holding that a political party's decision to withdraw from a suit did not equate to their withdrawal of the petition. The Court of Appeal also held that it is not lawful or reasonable to conflate the status of a petitioner with that of his party because their rights to bring a petition are independently acquired.<sup>5</sup>

*c. Winners filing Cross Petitions*

There were a few cases where a respondent in a petition or winner of the election filed a cross-petition to challenge the petitioner's case e.g. to contest the number of votes being challenged by the petitioner. The courts' general response to the competence of such cross-petition filed by the winner of an election who is a respondent in an election petition, is that there is no provision in the Electoral Act that allows for a cross-petition.<sup>6</sup>

## 2.2 Incompetent Grounds for Filing a Petition

*a. Improperly Couched Grounds for Petitions and Particulars*

The Electoral Act, 2022 mandates that petitions challenging an election must adhere to the specific grounds listed in **section 134(1)** of the Electoral Act, 2022. To properly present a petition, the grounds on which the petition is based must be separated with distinct particulars to support each ground. A petition will be treated as incurably defective and incompetent where two disjunctive grounds are lumped together as one ground. Consequently, many petitions failed because they lumped the grounds

<sup>4</sup> See: **Jumbo Dabota Godswill v. Jumbo Victor Oko & 2 Ors.** (Unreported) Appeal No. CA/ABJ/EP/SHA/ RV/122/2023; **Bank Goteh Gbarane v. INEC, Ngar Bernard Baridamue & PDP** (Unreported) Appeal No. CA/ABJ/EP/SHA/ RV/124/2023

<sup>5</sup> **Cole Tonye Patrick v. INEC & 2 Ors** (Unreported) Appeal No. CA/ABJ/EP/GOV/RV/121/2023

<sup>6</sup> A cross-appeal (at appeal stage) is however allowed.

together, particularly those in **section 134(1)(b)**, for which the court requires separating allegations of corrupt practices from those of non-compliance. Some petitioners presented their grounds as “*the election was invalid by reason of corrupt practices OR non-compliance with the provisions of this Act,*” expressly quoting the provisions of the Act. Others presented the ground as “*the election was invalid by reason of corrupt practices AND non-compliance with the provisions of this Act,*” thereby replacing ‘or’ with ‘and.’ In the latter case, the Tribunals were unanimous that this was a clear instance of lumping based on the function of the conjunction ‘and.’

However, where ‘or’ was used, an express restatement of what the Act contains, the Tribunals in a few instances considered the petition on its merits, focusing on the grounds supported by particulars in the petition which must be presented separately. However, the general practice was to strike out grounds that appeared to have been written together, regardless of whether ‘or’ or ‘and’ was used. The reason for this dichotomy is that the standard of proof required to prove non-compliance with the Electoral Act is the same as other civil matters i.e. on the balance of probabilities, while an allegation of corrupt practices is seen as a criminal complaint that must be proved beyond reasonable doubt.

#### *b. Incompatible Grounds, Particulars and Prayers*

Petitions are required to be coherent. The grounds for petition must align with the particulars or facts and prayers as specified in **Paragraph 4 of the 1st Schedule** to the Electoral Act, 2022 which provides that an election petition shall state clearly, the facts of the election petition, the ground(s) on which the petition is based and the relief sought by the petitioner. The relief sought must not run contrary to the grounds. For instance, some petitioners alleged that the election was invalid and marred by corrupt practices, but still asked to be declared the winner of the election.<sup>7</sup> A petitioner alleging that an election was not validly conducted can only seek nullification and a rerun, not a declaration of themselves as the winner. While this kind of situation would not invalidate a petition *per se*, it would weaken it because the incompatible elements of the petition will be expunged and discountenanced by the court.

<sup>7</sup> **Hon. Ahmed Usman Gummi & APC v. INEC, Engr. Suleiman Abubakar Gummi & PDP** (Unreported) Petition No. EPT/ZM/HR/04/2023

Some petitions failed due to incompatibility of the grounds with particulars presented such as situations where the petitioner alleged corrupt practices but only presented facts relating to non-compliance, or vice-versa. There were also instances where the petitioner alleged non-compliance or irregularities but failed to mention the polling units where the alleged non-compliance or irregularity occurred. In addition, vague and imprecise terms in election petitions are usually disregarded especially where they contain allegations. Some terms considered by tribunals and courts to be vague, speculative or imprecise include “*prevalent instances of,*” “*instances of vote buying,*” “*several instances,*” “*in many polling units,*” “*agents of the 2<sup>nd</sup> and 3<sup>rd</sup> respondents*” etc. The courts require that such instances, polling units, and agents be named. Overall, petitions with incompatible elements were often dismissed or they failed because the offending parts of the petitions, which were fundamental to the case, were struck off.

*c. Unlawful Exclusion as an incompetent ground for filing an election petition*

Unlawful exclusion is no more a ground for questioning an election, as it has been removed from the 2022 Electoral Act, but many petitioners still raised it at the Tribunal, although unsuccessfully. Some petitioners cleverly tried to avoid using the words “unlawful exclusion” in framing their grounds for petition and came under non-compliance with the Electoral Act but they were still dismissed because the facts pleaded, pointed to unlawful exclusion which is now considered a pre-election matter by virtue of section **285(14)(c)** of the Constitution which defines a pre-election matter to include suits by a political party against INEC challenging its action, decision or activities or for non-compliance with the Electoral Act or any other law in the process of nomination of its candidate.<sup>8</sup>

The Supreme Court has further provided a classification of issues dealing with pre-election matters as follows: (1) nomination of a candidate (2) double nomination of a candidate (3) disqualification of a candidate (4) wrongful substitution of a successful candidate’s name by the Electoral Body (5) wrongful omission of a successful candidate’s name by the Electoral Body (6) complaints about the conduct of primaries (7) false declaration on oath about particulars of a candidate.<sup>9</sup>

<sup>8</sup> **Gbogbolomo & NNPP v. INEC, Alli Sharafadeen Abiodun & APC** (Unreported) CA/IB/EP/SEN/11/2023  
<sup>9</sup> See **Bande Aminu & PDP V INEC & 3 Ors.** (SC/CV/1228/2023)

Complaints of omission of a party's logo/symbol or unlawful exclusion were observed in several petitions filed by candidates of the New Nigerian Peoples Party (NNPP) in Nasarawa and Oyo States. It was also observed with Action Alliance (AA) candidates in Osun State where petitions over several state constituencies (e.g. Olaoluwa, Ifelodun, Ilesa West, Iwo, Egbedore, Ede South, Ogbokun, and Ife Central State constituencies) raised unlawful exclusion based on the alleged absence of their party logo on the ballot for the election. The Tribunal held that they were not candidates and could not question the election, therefore their cases were dismissed for lack of jurisdiction.

There were a few cases though, where the petitioner complained that their petition could not have been filed as a pre-election matter because the cause of action arose on election day. This arose in cases where the petitioners alleged that they had inspected and approved their party symbol or logo before the election in compliance with **section 42(3)** of the Electoral Act, but then saw a different or unapproved symbol on election day. A few Tribunals agreed with this argument and treated such cases as a post-election matter.<sup>10</sup> However, all the petitions where this was observed failed for inability of the petitioner to prove their assertion. Nevertheless, it highlighted a gap in **section 42(3)** of the Act and the need for clarity on the course of action to take where a political party inspects its symbol or logo ahead of the election in line with **section 42(3)** of the Electoral Act but sees a different or unapproved symbol on the ballot on election day.

### 2.3 Jurisdictional Issues – Procedure

#### a. Timelines for filing petitions and other court processes

Elections Petitions are *sui generis* (in a class of its own) and any failure to comply with a condition precedent for doing anything will amount to abuse of process thereby stripping the tribunal of jurisdiction to hear the petition.<sup>11</sup> A peculiar feature in the constitutional and other statutory provisions on election matters is the timeline mandatorily prescribed for all procedural steps to be taken by all the parties, including the courts/tribunals. The Supreme Court has held that the slightest non-compliance with a procedural step in an election matter, which otherwise could either be cured or waived in ordinary civil proceedings, could result in fatal consequences.<sup>12</sup> It has further held that the Constitution and Electoral Act does not permit piecemeal filing and

<sup>10</sup> See **Abdulrasheed Haruna & NNPP v. INEC, Musa & SDP** (Unreported) Petition No. EPT/NS/SHA/08/2023

<sup>11</sup> **Buhari v. Yusuf** (2003) 14 NWLR (pt.84)

<sup>12</sup> **Edeoga v. INEC** (Unreported) SC/CV/1130/2023 at p.18

presentation of a petition or extensions for parties that fail to complete required actions within the designated timeframes.

An election petition must be filed within 21 days of the declaration of election results, in accordance with **Section 285(5)** of the Constitution or else, the petition will be deemed to be statute-barred. Unfortunately, one area where many petitioners defaulted was the frontloading or filing of written statements on oath of witnesses along with the petition within the 21 days allowed by law. Frontloading in law means filing all documents to be used at trial upfront.

The problem is that the courts do not differentiate between the written statement on oath of regular witness versus subpoenaed witnesses, therefore, all the statements must be filed at the same time as the petition.<sup>13</sup> In the cases analysed, defaulting statements were struck out, which in many instances, was fatal to the petition as the evidence of key witnesses in many cases were expunged.

This was a prominent feature of the presidential election petitions of **Abubakar Atiku & Anor. v. INEC & Ors**<sup>14</sup> and **Peter Obi & Anor v. INEC & Ors**<sup>15</sup> as well as several other decided cases where the Supreme Court took the rock-solid position that all evidence and statements of witnesses, whether subpoenaed or not, must accompany the petition when it is filed, as there will not be time again to allow for substantial amendments.<sup>16</sup> For example, in **Peter Obi & Anor. v. INEC & Ors**, about 10 out of 13 Labour Party witnesses including expert witnesses, whose statements on oath were filed after the 21-day statutory period for filing petitions, were struck out. Consequently, all the evidence and documents tendered by those witnesses were expunged.

Petitioners struggle with this onerous burden of frontloading the statements of subpoenaed witnesses because they are usually witnesses adverse to the petitioner (e.g. official witnesses like INEC staff or the Police) and often require a court summons to compel them to testify. Petitioners are of the view that the requirement by the Court to have the statement of such witnesses readied before filing is an unfair standard as the law could not have contemplated a scenario where a petitioner would be expected to

<sup>13</sup> This position and principle were earlier laid down by the Supreme Court in **Oke v. Mimiko (2013 LPELR – 20645) (SC)** who held that if there was evidence which was fundamental to the determination of a petition, that evidence ought to have been placed before the Tribunal within the time limit specified by the Electoral Act or any other Act.

<sup>14</sup> (Unreported) SC/CV/935/2023

<sup>15</sup> (Unreported) SC/CV/937/2023

<sup>16</sup> See the governorship petitions of **Ombugadu & Anor v. Sule & 2 Ors** (Unreported) SC/CV/1213/2023; **Ahiwe & PDP v. INEC, Otti & LP** (Unreported) SC/CV/1250/2023; **Edeoga & LP v. INEC, Mbah & PDP** (Unreported) SC/CV/1130/2023

frontload the deposition of his adversary or that the adversary will do so willingly without compulsion. This view is also shared by several judges as seen in the cases analysed even though they are constrained to follow judicial precedent laid down by the Supreme Court.

The majority view of the Supreme Court is that this is a constitutional requirement aimed at ensuring that a petition is determined expeditiously. However, of note is the dissenting opinion of Hon. Justice Agim, JSC in **Edeoga v. INEC**<sup>17</sup> where he stated that it is unreasonable and unjust to exclude the admission of the testimony of a compelled or official witness whose witness testimony on oath could not be secured and filed along with the petition or within the 21 days prescribed because the petitioner could not obtain same with reasonable diligence or did not know of its existence due to no fault of the petitioner or due to circumstances beyond his or her control. He opined that the current position of the apex court frustrates access to electoral justice. He further noted that the law does not compel a man to do the impossible and suggested that the Supreme Court considers departing from or overruling its previous decisions on this point. In similar vein, Hon. Justice Ogunwumiju, JSC, suggested that the apex court may need to consider appropriate cases where the circumstances may require that justice can only be done through the hearing of a witness who is unavailable to an election litigant, such as cases where public servants like police officers who are required to be impartial, are needed as a witness. Hopefully, the views expressed by these Justices of the Supreme Court is a signal of a shift in the thinking of the Court and forms the basis of reform in this area. The National Assembly would need to revisit the legal framework if a different outcome is desired in this area.

*b. Improper Content and Endorsement of Court Processes*

Pursuant to **paragraph 4 (1) to 5)** of the First Schedule to the Electoral Act, all petitions must include the required elements specified in the paragraph e.g. the names of the parties, the scores of the candidates and the person returned as the winner of the election, address for service of court documents, signatures, etc. The absence of these essential components can result in the dismissal of the petition.<sup>18</sup> For instance, the Supreme Court has held that the failure of a petitioner to indicate in his petition, the address of the occupier of an address where documents intended for the petitioner can

<sup>17</sup> Supra

<sup>18</sup> See **LP & Barr. Mrs. Ugboaku Chinemerem Tracy Amadigwe-Dike v. INEC, Hon. Balogun Bayo & APC** (Unreported) Appeal No. CA/L/EP/HR/LAG/20/2023. The Appellants' failure to include the candidates' scores in the Petition, as mandated by the Electoral Act, led to the dismissal of both the petition and the appeal.

be delivered, is a non-compliance that is “fatal and unpardonable.”<sup>19</sup>

*c. Non-Compliance with Rules of Procedure of the Court*

The **Election Judicial Proceedings Practice Direction, 2023**, issued by the Court of Appeal, outlines the required form for appeals from Election Tribunals. Non-compliance with this direction affected the success of some petitions on appeal. For instance, **Paragraph 14 (1)** of the **Practice Direction**, which stipulates a 25-page limit for brief of argument by lawyers led to several appeal briefs that exceeded this limit being struck out. This is such a fundamental requirement that briefs that went over by just one page were struck out.<sup>20</sup> The Court of Appeal often ruled in such instances that its jurisdiction to hear and determine the appeal was absent as the Notice of Appeal was not filed with a competent Brief of Argument.

Furthermore, election appeals were dismissed where transmitted records were incomplete or missing key documents. These examples go to show how procedural defects or mistakes can be fatal to an election petition or appeal and the importance of diligent prosecution by lawyers. However, it reinforces the widely held notion of technicalities or technical justice being rife in election cases.

## 2.4 Jurisdictional Issues – Nomination, Sponsorship, Qualification, and Disqualification of Candidates

The issue of nomination and qualification was the most contentious of all the grounds raised in the 2023 post-election petitions and gave rise to majority of the conflicting decisions observed. Constitutional qualifications for elections typically deal with citizenship, age, membership and sponsorship by a political party, and educational qualification. Several election petitions were brought on the basis that the respondent was not qualified to contest the election because they were not validly sponsored by a political party or that the candidate’s name was missing in the party register. Proponents of this view argued that any ground in an election petition alleging that a person did not emerge from any valid primaries conducted in accordance with the requirements of the law, is a valid ground for challenging qualification under **S. 134(1) (a) and (3)** of the

<sup>19</sup> **Pela Kawaharibie Kennedy & LP v. INEC, Oborewori Sheriff Francis Orohedor & 2 Ors** (Unreported) SC/CV/1204/2023

<sup>20</sup> See **Osikuminu Akinwande Ayokunle v. Hon. Sanni Ganiyu Babatunde & 2 Ors**, (Unreported) Appeal No. CA/L/EP/SHA/LAG/24/2023. The Appellant’s Brief of Argument was 26 pages instead of 25 pages as indicated by the Practice Directions which the Court held to be sacrosanct and contains mandatory provisions of which non-compliance is a ground for nullity.



Electoral Act, 2022, therefore it can be ventilated before an Election Tribunal. Meanwhile, **S. 134(3)** explicitly states that only constitutionally mandated qualifications matter.

There were differing opinions in the Tribunals and even at the Court of Appeal over whether issues of nomination and qualification or lack of it thereof, is a pre-election or post-election matter. Most Tribunals generally refused jurisdiction over issues related to the nomination or sponsorship of a candidate, as these were considered pre-election matters, rightly so, in view of **sections 29(5) & (6) and 130(1) of the Electoral Act, 2022**. However, several other tribunals and courts assumed jurisdiction on the matter, thereby ignoring established judicial precedent.

Petitions over nomination and qualification were prominent in Anambra, Abia, Plateau and Imo States. Several Tribunals in Imo and Plateau States, assumed jurisdiction over this matter, leading them to nullify the elections of a significant number of candidates that had won elections into legislative seats. At the tribunal level, Plateau State had the worst cases of conflicting decisions on this matter, closely followed by Imo State. At the Court of Appeal, a single position was adopted over the Plateau petitions, affirming the nullifications. In Imo State however, conflicting decisions were observed at both the tribunal level and on appeal. On one hand, it meant that some candidates were able to reclaim their seats (unlike their counterparts in Plateau), but on another hand, it showed inconsistency in the decisions of the Court within and across the States.

Further demonstrating this conflict is the fact that the Court of Appeal, in several other cases (relying on recent Supreme Court decisions), explained the difference between questioning a candidate's nomination or qualification in pre- and post-election matters. In one case, it stated that qualification is a constitutional issue, while nomination is regulated by the Electoral Act; and that a case would not be a post-election matter when the facts on which a candidate's sponsorship by the political party is predicated, is on the validity of the nomination process, which is governed by the Electoral Act.<sup>21</sup> In the *Locus Classicus* of **APM v. INEC & 4 Ors**,<sup>22</sup> the Court of Appeal held that where the issue of qualification or disqualification arises before the election, an action on that issue must be instituted as a pre-election matter pursuant to section **285(11) and (14)** of the Constitution, but that where the election has been conducted and result declared, such

<sup>21</sup> **Mustapha Bala Dawaki & APC v. INEC, Danjuma & NNPP** (Unreported) Appeal No. CA/KN/EP/HR/KAN/15/2023, per **Ugochukwu Ogakwu, JCA** at Page 11.

<sup>22</sup> **APM v. INEC, APC, Tinubu, Shettima & Masari** (Unreported) Appeal No. CA/PEPC/04/2023

election cannot be questioned on grounds of qualification except under the relevant provisions of the Constitution dealing with qualification and disqualification.

It was observed that petitioners who questioned the nomination of the candidates of other political parties at the Tribunal also relied on older or outdated legal authorities that were decided before the enactment of the 2022 Electoral Act where it was held that the issue of qualification is both a pre-election and a post-election matter, which can be instituted as a pre-election suit or as a post-election suit.<sup>23</sup> The Supreme Court noted that these cases were misapplied, as there is judicial precedent providing that Election Petition Tribunals should not hear matters questioning candidate nominations. In its opinion, its decisions or precedent on the matter were ignored. The apex court, in strongly worded judgments in cases such as the Kano and Plateau State governorship petitions, laid this matter to rest by categorically holding that questions about the validity of a party's primary election, nomination or sponsorship of the candidate of a political party are not within the subject matter jurisdiction vested on an Election Petition Tribunal.<sup>24</sup>

The same also goes for cases where a candidate's name was not contained in his party's register before the elections.<sup>25</sup> The Supreme Court has held here that the requirement of a political party maintaining a Register of Members and making it available to INEC, thirty days before the date fixed for the party primaries, congresses or convention is purely for regulatory purposes as there is no sanction provided in the Electoral Act for a political party that fails to comply.<sup>26</sup>

## 2.5 Burden and Standard of Proof

The law is that the onus of proof lies squarely on a petitioner who questions the return of an election. The petitioner must prove his case by adducing credible evidence; he must rely on the strength of his case and not on the weakness or absence of the defence.<sup>27</sup> The standard of proof in election petitions is on a balance of probabilities, but allegations of corrupt practices are seen as criminal allegations, therefore must be proven beyond reasonable doubt according to **sections 135(1) and (2)** of the **Evidence**

<sup>23</sup> **Dangana vs. Usman** (2013) 6 NWLR (Pt. 1349) 50 SC; **Fayemi vs. Oni** (2020) 8 NWLR (Pt. 1726) 222 at 249-251 SC; **Dickson vs. Sylva** (2017) 10 NWLR (Pt. 1573) 299 at 341-342 SC

<sup>24</sup> See: **Muftwang Caleb Manasseh v. Nentawe Yilwatda Goshwe, & 3 Ors.** ((Unreported) SC/CV/1190/2023. Judgment delivered 12<sup>th</sup> January 2024); **APC v. INEC, Kabir & NNPP** (Unreported) SC/CV/1179/2023; **Ambrose Ahiwe & PDP v. INEC, Alex Otti & LP**; (Unreported) Appeal No. CA/OW/EP/GOV/AB/31/2023

<sup>25</sup> **Ambrose Ahiwe & PDP v. INEC, Alex Otti & LP** (Unreported) Appeal No. CA/OW/EP/GOV/AB/31/2023

<sup>26</sup> The Court relied on the Supreme Court decision in **Enang v. Asuquo (2023) 1 NWLR (Pt 1896) 510 at 536G.**

<sup>27</sup> See: **Buhari v. INEC** (2008) 19 NWLR (Pt 1120) 216, 350. D-E

**Act, 2011.** Unfortunately, over 70% of petitions were dismissed due to insufficient or inadmissible evidence. Based on this number, it is clear that this presents a difficult hurdle for aggrieved parties to scale.

Several reasons account for the burden of proof not being discharged. Key issues included the failure to present the BVAS machine in court as evidence and the inability to call eyewitnesses to support the allegations. The reasons for this include paucity of evidence occasioned often by the refusal by INEC to comply with Orders made by the Court or Tribunal for the inspection of electoral documents and issuance of certified copies of the same; and sometimes the inadmissibility of the evidence proffered. The Standard of Proof in proving corrupt practices, which is beyond reasonable doubt, is notoriously difficult to surmount.<sup>28</sup> The Court's position is that irregularities at an election, corrupt practices, violence and other forms of illegality and criminality cannot be grounds for the nullification of an election, and the victorious party cannot be held responsible unless a nexus is established between the criminal acts and the consent or active participation of the winner of an election.<sup>29</sup> Also, persons accused of criminal conduct must be named in the petition and joined as a party to enable them defend themselves.<sup>30</sup> Where an allegation of crime is made against a person who is not joined in the petition, the paragraphs of the petition where such allegations are made are liable to be struck out.<sup>31</sup>

Complaints of irregularities in an election or non-compliance with the Electoral Act must be proved polling unit by polling unit, and ward by ward.<sup>32</sup> A petitioner must call witnesses to testify that the irregularity and unlawfulness substantially affected the result of the election. The witnesses must be those who saw the incidents or occurrences on the day of the election, and not those who heard the story or account from an eyewitness. Also, party agents presented as eyewitnesses must be accredited party agents as indicated in **section 43 (1)** of the Electoral Act.<sup>33</sup>

It was very common to see petitioners or candidates testify on incidents that happened outside the polling unit where they voted, often citing reports from their agents. It was also common to see them call their ward collation agents or campaign coordinators as

<sup>28</sup> See **Fabeke Douglas Deeka & Labour Party v. INEC, Barinada & PDP** (Unreported) CA/ABJ/EP/SEN/RV/61/2023

<sup>29</sup> See **Adebutu & Anor v. INEC & 2 Ors.** (Unreported) Appeal No. CA/IB/EP/GOV/OG/22/2023, and **Rhodes Vivour v. INEC & 3 Ors.** (Unreported) Appeal No. CA/L/EP/GOV/LAG/23/2023

<sup>30</sup> See in **Abubakar Atiku & PDP v. INEC, Bola Ahmed Tinubu & APC** (Supra)

<sup>31</sup> See **Wada V INEC** (2022) 11 NWLR (PT. 1841) 293 @ 232 paras E-G

<sup>32</sup> See: **Ucha v. Elechi, Atiku v. INEC** (2023), **Rhodes-Vivour v. INEC** (Supra), **Adebutu v. INEC** (Supra)

<sup>33</sup> **Edeoga & Anor v. INEC & 2 Ors** (Supra)

witnesses to recount occurrences that happened in several polling units on the basis that other people were feeding them with reports. Such testimonies were always expunged for being inadmissible hearsay evidence. This makes the case for political parties and candidates to invest heavily in polling unit agents because their first-hand testimonies are often seen as being more reliable by the courts.

## 2.6 Tendering BVAS Machine

The Supreme Court decision in **Oyetola & Anor. v. INEC**<sup>34</sup> was the *Locus Classicus* for the 2023 election petitions. This case reinforced the need to call oral evidence in petitions and laid down the requirement that the BVAS machine or device is necessary to prove non-accreditation, over-voting, and disenfranchisement of voters. Following the introduction of the BVAS machine to the electoral process, the Supreme Court in this case held that to sustain a claim of over-voting, the following requirements are necessary:

- (i) The voters' register to show the number of registered voters;
- (ii) The BVAS machines to show the number of accredited voters for the election; and,
- (iii) Forms EC8A to display the actual number of votes cast at each polling unit.

The requirement to tender the BVAS machine was a significant hurdle, which most of the petitioners struggled to overcome. This was especially so, as the tribunals granted applications by INEC for it to be permitted to reconfigure the BVAS machine for use in subsequent elections, thereby destroying the data which would have afforded evidence for use in the pending cases. In some cases, the tribunal accepted a BVAS report where the machine could not be tendered, but in most cases, they insisted on the physical presentation of the BVAS machine, in line with the decision in Oyetola's case. This was a key area of conflicting decisions by the tribunals and even the Court of Appeal who often allowed a certified report of the contents of the BVAS as evidence. However, the Supreme Court has insisted on its position in Oyetola's case by requiring that BVAS machines be brought to court and demonstrated along with the BVAS report.<sup>35</sup>

<sup>34</sup> (Unreported) SC/CV/508/2023

<sup>35</sup> See **Ombugadu v. Sule** (Supra). Judgment delivered in January 2024

Several lawyers have questioned the rationale behind requiring the physical BVAS machine when what is needed is the report from the machine. There is a need to rectify this in the Electoral Act. Thus, it is recommended that it should not be at the discretion of the judge to determine whether it is the BVAS machine or the BVAS report which should be provided as evidence. Besides, the decision in *Oyetola vs. INEC* should be contextualised against the background that it was an off-season election and so there was no pressing need to use the BVAS machine for other elections. In the 2023 General Election after the first round of federal-level elections, INEC was permitted to reconfigure the BVAS machines for use in the subsequent state-level elections, which had an interval of just three weeks. The reconfiguration wiped out the data on the machines, such that the production of the machines at the hearing of cases had no real evidential value.

## 2.7 Application of Section 137 of the Electoral Act on Documentary Proof of Non-Compliance

To avoid the challenge encountered with tendering documentary evidence in election petitions and calling several witnesses to speak to them, the National Assembly, in the 2022 Electoral Act, introduced a new provision in **section 137** to allow for oral evidence to be dispensed with where non-compliance is evident on the face of the document. Examples are alterations or arithmetical error on the face of a result sheet, or absence of official mark such as date or signature of a Presiding Officer on a ballot paper used to cast a vote in a polling unit that is obvious on the document, etc. An accompanying amendment in **paragraph 46 (4)** of the First Schedule was also included to allow lawyers in election petition matters to tender documents and argue them without calling witnesses. This provision aimed to get around the rule against “dumping” of documents on courts i.e. that documents were tendered in petitions without calling witnesses to speak to them.

Unfortunately, **section 137** was rendered redundant in the 2023 election petitions because the Tribunals and Courts still complained of dumping of documents and demanded oral evidence. In the opinion of the courts, this provision abridges a party's right to fair hearing, as the failure to demonstrate a document in open court means that judges will have to go into their chambers to examine documents tendered by parties to determine the allegations that such documents establish. They also felt that it made ‘documentary hearsay’ evidence admissible, contrary to the provisions of the **Evidence**

**Act, 2011** which governs the presentation of evidence in court. Also, interpretations of this provision were inconsistent and not uniformly applied. In some cases, the Tribunals applied **section 137** and dispensed with oral evidence, while in others, they required allegations to be proven through oral evidence.

The Court of Appeal in **Oyetola v. INEC**<sup>36</sup> held that it is within the discretion of the Judge to decide whether there is a need to call oral evidence to demonstrate the contents of documentary exhibits and that such a function cannot be circumscribed by a statutory provision like section 137 of the Electoral Act, 2022 and paragraph 46 (6) of the First Schedule to the Electoral Act, 2022. This position was applied across board in most of the petitions and affirmed by the Supreme Court.<sup>37</sup>

However, there was a dissenting opinion on this matter by Hon. Justice Agim, JSC in **Abubakar Sadique Baba v. INEC & 2 Ors**<sup>38</sup> to the effect that contrary to the purpose of section 137, the courts have imposed requirements of proof that are in practice impossible to attain and have rendered electoral justice illusory. In his opinion, the requirement for oral evidence to prove non-compliance with the Electoral Act that is manifestly disclosed on the face of an election document, is contrary to the express and unambiguous wordings of **S. 137** which seeks to “*guarantee an election dispute resolution process that decides the core election dispute and yields substantial justice by prescribing requirements of proof that accord with common sense and are reasonably not impossible to satisfy.*”<sup>39</sup>

<sup>36</sup> **Adeleke v. Oyetola** (Unreported) Appeal No. CA/AK/EPT/GOV/01/2023

<sup>37</sup> **Abubakar Atiku & Anor. v. INEC & Ors** (Supra)

<sup>38</sup> **Abubakar Sadique Baba v. INEC & 2 Ors** (Unreported) SC/CV/1189/2023. See also dissenting opinion of Agim, JSC in **Edeoga v. INEC** (Supra)

<sup>39</sup> **Abubakar Sadique Baba v. INEC & 2 Ors** (Supra) Dissenting Judgment by Agim, JSC @ page 9

## 3

# INEC and Election Petitions

## 3.1 Delay or Non-compliance with Court Orders

INEC faced allegations of disobeying subpoenas,<sup>40</sup> evading service of court documents,<sup>41</sup> and not honouring court orders to produce electoral documents. These delays often contributed to the failure of the petitioner's case as the documents requested were often fundamental.<sup>42</sup> In some cases, the Commission disowned their documents or objected to official documents they issued to a petitioner.<sup>43</sup> At other times, they failed to object to the admission of a document but still expected the Court not to take it as an admission, on their part, of its contents.<sup>44</sup>

INEC's largely passive attitude in petitions appears to be bolstered by the legal "presumption of regularity" of election results and the position of the law which says on one hand that an election petition is proved on the balance of probabilities and that this burden shifts or swings like a pendulum, but at the same time say that not even failure or refusal of respondents (such as INEC) to adduce evidence in defence of their case will work to the benefit of the petitioners in an election petition. The Courts continue to hold that petitions are declaratory and even upon admission by respondents, reliefs will not be granted to a petitioner. Interestingly, INEC usually put up a defence where its powers or actions as an election management body was questioned or criticised by a Tribunal and even filed appeals in such cases.<sup>45</sup>

<sup>40</sup> **Sunday Oka Ifere & Labour Party v. INEC & 4 Ors.** (Unreported) Petition No. EPT/CR/HR/07/2023. Appeal No. CA/C/EPI/HR/CR/18/2023

<sup>41</sup> See **Aida Nath Ogwuche & PDP v. INEC & Agbese Philip, APC & Francis Ottah Agbo** (Unreported) Petition No. EPT/BN/HR/3/2023. Appeal No. CA/MK/EP/BN/HR/17/2023. The Petitioner's complaint is that INEC did not comply with a Supreme Court Order in a pre-election matter to reinstate her as PDP candidate. INEC argued that the party did not write them for a candidate substitution. The Tribunal & Court of Appeal dismissed the case as being a pre-election matter.

<sup>42</sup> See **Mzondeu Bem Benjamin & PDP v. INEC, Tarkighir Dickson Dominic & APC** (Unreported) Petition No. EPT/BN/HR/04/2023

<sup>43</sup> **Khaleed Abdulmalik Ningi & APC v. Abubakar Yakubu Suleiman, PDP & INEC** (Supra)

<sup>44</sup> **Victor Alewo Adoji & PDP v. Jubrin Isah, APC & INEC** (Unreported) Petition No: EPT/KG/SEN/11/2023, Appeal No. CA/MK/EP/BN/HR/23/2023

<sup>45</sup> **INEC v. Akpoti-Uduaghan, PDP, Ohere Sadiku Abubakar & APC** (Unreported) Appeal No. CA/ABJ/EP/SEN/KG/57/2023

### 3.2 Defending Petitions and Appealing Judgments

INEC was criticized by the Courts in several cases for appealing petitions containing reliefs that were beneficial to certain candidates instead of defending the Electoral Act and its Regulations. The Commission often rested its case on the respondents' arguments, or did not call witnesses, or replicated respondents' addresses with very slight modifications. Some of the Courts opined that INEC should not be allowed to hide under the guise of "presumption of correctness" of election results as currently exists in the law. Some went as far as proposing that the laws be amended to place the legal burden of proof in election matters on the Commission. In some cases, INEC used its Brief of Argument to attack the judgment of a lower court while in others, it filed unnecessary cross-appeals thus creating a multiplicity of actions dealing with the same issues, parties and subject matter. The Courts often held that such suits were an abuse of court process and therefore incompetent.

The Court of Appeal explained that the position of the law with respect of the exercise of the right of appeal by INEC against the decision of an Election Tribunal is that INEC can only exercise the right of appeal where the Tribunal has made a definite finding or conclusion in law that affects the Commission and its officials directly and that the question is whether INEC as an Appellant is a person aggrieved by the decision contained in the judgment so as to be vested with a right of appeal.<sup>46</sup>

### 3.3 Results Transmission, Collation and the IReV Portal

The changes introduced by the Electoral Act, 2022 to legalise the use of technology in elections led to INEC employing the BVAS machine and INEC Results Viewing (IReV) portal for the real-time viewing of Polling Unit (PU) results of the election. Sadly, the IReV technology failed on election day as members of the public could not access the portal. Contrary to its stance before the elections where it showcased its technological innovations and promised to electronically transmit results, INEC took a completely different position at the tribunals and courts by arguing that the IReV portal and electronic transmission is not part of its collation system. Furthermore, they argued in some cases, that their election Regulations and Guidelines was inferior to the Electoral Act 2022, which only allows for manual collation of results.

<sup>46</sup> **INEC v. Nkeiruka Onyejeocha & 3 Ors.**, (Unreported) Appeal No. CA/ABJ/EP/SEN/KG/57/2023



On this matter, the 2023 post-election tribunals and courts followed the precedent set by the Supreme Court in **Oyetola v. INEC** where it distinguished between INEC's Collation System and the IReV portal and held categorically that the INEC Results Viewing Portal (IReV) is not part of INEC's collation system. This precedent was also applied in the presidential election petitions where the Court of Appeal held that INEC, by its Regulations and Guidelines, introduced electronic transmission to a collation system "*in addition to the physical transfer of the election results*" by the Registration Area/Ward Collation Officer which is provided in the Electoral Act.<sup>47</sup> The tribunals and courts took a unified position on this issue as there was no observed case from the 2023 post-election petitions where the failure to transmit results to the IReV portal was a basis for their decision on a petition.

With regards to INEC Regulations, the court's position is that the Regulations cannot be elevated above the provisions of the Electoral Act so as to elevate electronic transmission of results over and above manual or physical transmission of hard copies and manual collation of results as provided for by the Act to the extent that non-compliance with the Regulation automatically invalidates an election.<sup>48</sup> The import of this is that electronic transmission of results must be clearly stipulated in the Electoral Act.

<sup>47</sup> **Atiku v. INEC** (Supra) (CA) at page 687 to 688

<sup>48</sup> See lead judgment of Tsamanni, JCA @ page 253

## Conflicting Decisions

The recurring problem of conflicting decisions of courts of coordinate jurisdiction deserves special mention in view of the unmitigated injustice that has resulted from such. There were instances of conflicts in the decisions reached by different Panels of the Court of Appeal and the different Election Petition Tribunals (EPT). This was common in instances where the Tribunal had to determine if it had jurisdiction to inquire into the validity of the nomination of a candidate.

The most glaring of the conflicting decisions arose from the decisions of the Tribunals and Courts in election petitions in Plateau and Imo States. In Plateau State, the Petitions were contested and decided on the grounds of qualification *vel non (or not)* of the candidates sponsored by the Peoples Democratic Party (PDP). The outcome at the Tribunals was 50% success rate and 50% failures. As the Petitions were on the same grounds, the split in the decision of the Tribunals underscores that the decisions were conflicting. However, on appeal to the Court of Appeal, the same decision was arrived at, and all the Petitions succeeded. The determination of Petitions in respect of legislative houses ended at the Court of Appeal; there was no further appeal to the Supreme Court. So, by the decision of the Court of Appeal, the candidates who won the elections were unseated. By the provisions of the law, further appeal lies to the Supreme Court in respect of the Governorship election. Therefore, the apex court adjudicated on the appeal against the decision of the Court Appeal in the Governorship Petition which, like in the case of the legislative houses, also unseated the Governor. The Supreme Court in its judgment set aside the decision of the Court of Appeal, and affirmed the qualification of the Governor and his victory at the polls.<sup>49</sup>

<sup>49</sup> **Mutfwang Caleb Manasseh v. Nentawe Goshwe & 3 Ors.** (Unreported) SC/CV/1190/2023. Judgment delivered by the Supreme Court on 12<sup>th</sup> January 2024.

The situation in Imo State manifested in a different way. There were conflicting decisions among the tribunals with some candidates losing their seats on the basis that their nominations process was invalid for being held outside their constituencies. In other decisions with the same/similar facts, it was held not to have a disqualifying effect, and the candidates' elections were upheld. Unlike Plateau State, the conflicting decisions on this issue were replicated at the Court of Appeal where some appeals questioning the nominations of candidates were entertained and successful, while others were dismissed for lack of jurisdiction.

In Rivers State, several panels of the Rivers State National Assembly and State Houses of Assembly Election Petition Tribunal ruled that the withdrawal of a political party from an election petition amounted to a withdrawal of the petition, while a few others took the opposite view that the candidate could continue prosecuting the petition without his/her political party as their right to file a petition was separate. This was resolved by the Court of Appeal who held that it is wrong to hold an Appellant's petition as defective and incompetent because the political party that sponsored him/her withdrew from the petition.

## Conclusion

The prevalent feature in the petitions filed challenging the outcome of the 2023 general elections is that a substantial number of cases collapsed mainly due to lack of jurisdiction, a threshold requirement for hearing petitions, and failure to discharge the burden of proof. At the Election Petition Tribunal, **88.9%** of cases analysed failed while only **11.1%** were successful. At the Court of Appeal, **79.4%** of election appeals analysed failed while **20.9%** succeeded. The higher rate of successful appeals of **20.9%** is not to be taken to mean that more petitions succeeded at the Court of Appeal because some of the appeals, which were filed by respondents whose return or win was set aside by a Tribunal, were resolved in their favour against the petitioner. Several appeals affirmed the returns made by INEC. In the governorship election petitions for instance, the Supreme Court upheld the returns made by INEC in Plateau, Kano, Nasarawa and Zamfara States. This was also the case with the presidential election petitions.

There were issues with the quality of evidence tendered and the inability of petitioners to meet legally stipulated timelines, especially on frontloading the deposition of witnesses. These are factors, which to be charitable, may be attributable to the time constraints and pressure under which the cases are prosecuted, and not necessarily due to incompetence on the part of legal practitioners. Inherent in the need for timely disposition of election disputes is the high possibility of technical justice being delivered. The law remains that statutory provisions must apply even if the application results in some hardship or is otherwise onerous.

Compelling INEC to produce relevant election documents in court remains a huge impediment in election petitions that requires a definite resolution. The double-barrelled requirement for a petitioner to prove the non-compliance complained of and then show that it is substantial, is a difficult hurdle to surmount and has been likened to fetching water from the ocean with a spoon. It is argued that non-compliance with the provisions

of the Electoral Act, even if it appears insignificant, has both a ripple and cumulative effect that the electoral justice system must address. The inability of the courts to nullify flawed elections because alleged irregularities are deemed inconsequential contributes to the impunity that is currently being witnessed in the electoral process and the popular “go-to-court” challenge issued by election winners to losers.

Timelines for resolution of disputes is still a major challenge as the conclusion of election petitions often remain pending while the declared winners take office. While the hearing of election matters should not be open-ended as in the past, it is desirable to revisit the timelines for the hearing of election matters across all strata of the judicial rung. The same goes for the timeline for the resolution of pre-election matters.

Apart from ensuring consequences for judicial officers that deliberately ignore judicial precedent, the judiciary must adopt internal mechanisms to address the spate of conflicting judgments. Judicial capacity, independence and perception are critical to the integrity of the electoral process; therefore, judicial officers must be fair and impartial in resolving election disputes.

The high failure rate of election petitions has led many to ask if challenging an election result in court is a worthwhile attempt. The inability of litigants to get substantial justice in the courts could fuel an increase in election misconduct, as parties may increasingly decide to win elections “by hook or crook” at the polling units and bypass the post-election petition process entirely. Moreover, it does appear that it is easier to defend an election win or return in court than being in the unenviable position of “Petitioner.”

To discourage the spate of election misconduct, there should be a predictable set of consequences for electoral violations to create a disincentive for similar violations to occur in future elections. Election stakeholders should strive toward a future where only a handful of election results, if any, are contested. Citizens must push for reforms that reduce judicial involvement in the electoral process, ensuring that the will of the people remains the foundation of democracy in Nigeria.

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Policy and Legal Advocacy Centre (PLAC) is a non-governmental organization committed to strengthening democratic governance and citizens' participation in Nigeria. PLAC works to enhance citizens' engagement with state institutions, and to promote transparency and accountability in policy and decision-making process.

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