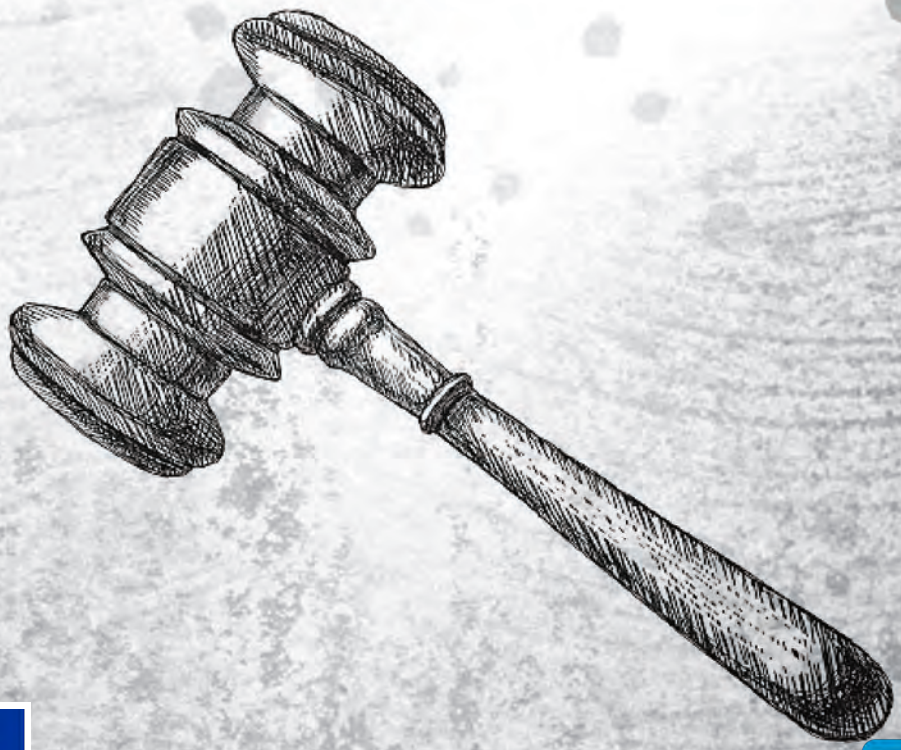
FROM BALLOT TO THE COURTS:

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



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PLAC
POLICY AND LEGAL ADVOCACY CENTRE

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ANALYSIS OF ELECTION PETITION LITIGATION FROM NIGERIA'S 2023 GENERAL ELECTIONS

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PLAC
POLICY AND LEGAL ADVOCACY CENTRE

Plot 451 Gambo Jimeta Crescent, Guzape District, Abuja, Nigeria.

Website: www.placng.org
Email: info@placng.org
Phone: 0809 189 9999

www.facebook.com/placng
@placng
@placng

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Part 04

PROVING THE GROUNDS OF ELECTION PETITION: CASE STUDIES

Acronyms

AA – Action Alliance
ADR – Alternative Dispute Resolution
ANOR – Another
APC – All Progressives Congress
APGA – All Progressives Grand Alliance
APM – Allied People's Movement
BVAS – Bi-modal Voter Accreditation System
CA – Court of Appeal
CFRN – Constitution of the Federal Republic of Nigeria
CTC – Certified True Copy
EPT – Election Petition Tribunal
FCIID - Force Criminal Investigation and Intelligence Department
FOI – Freedom of Information
HR – House of Representatives
IFES – International Foundation for Electoral Systems
INEC – Independent National Electoral Commission
IREV - INEC Result Viewing Portal
IVED - INEC Voter Enrolment Device
JCA – Justice of the Court of Appeal
JSC – Justice of the Supreme Court
LGA – Local Government Area
LPELR – Law Pavilion Electronic Law Report
LP – Labour Party
NEC – National Executive Committee
NNPP – New Nigerian Peoples Party
NSCQR - Nigerian Supreme Court Quarterly Law Report
NWLR – Nigerian Weekly Law Report
NYSC – National Youth Service Corps
ORS - Others

PEPC – Presidential Election Petition Court
PDP – Peoples Democratic Party
PO – Presiding Officer
PRP – Peoples Redemption Party
PU – Polling Unit
PVC – Permanent Voters Card
REC – Resident Electoral Commissioner
S – Section
SC – Supreme Court
SCNLR – Supreme Court of Nigeria Law Report
SEN – SENATE
SHA – State House of Assembly
SPO – Supervisory Presiding Officer
SPO – Screenshot Printout
TEI - The Electoral Institute
V – Versus

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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. It follows from the engagement and capacity-building support provided by PLAC to the Election Petition Tribunals (EPT) and Court of Appeal under the European Union Support to Democratic Governance in Nigeria (EUSDGN 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 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 judgements 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 with a total 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/

This report is presented in seven main sections. Part 1 of 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. Part 2 of 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. Part 3 which is the main body of the report delves into the trends and issues, detailing how they featured in the cases analysed and how the courts responded to them. Part 4 provides case studies that further illustrate salient points in the court's response to issues raised in petitions. Part 5 examines the role of the election management body and its response to petitioners challenging the results of elections they conducted. Finally, the conclusion and recommendations are presented in parts 6 and 7 respectively.

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)* – parties who did not contest elections filing a petition; winners filing cross-petitions; political parties withdrawing from petitions and abandoning their candidates; parties still attempting to raise unlawful exclusion as a ground for petition even after its removal from the Electoral Act, 2022;

b. *Issues of Procedure* – 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; improper content and endorsement of court processes; incomplete court processes;

c. *Nomination, Sponsorship, Qualification, and Disqualification of Candidates* – parties raising pre-election matters dealing with party nominations at the tribunals contrary to the provisions of the Constitution and Electoral Act and ensuing conflicting judgments by the courts and tribunals in their interpretation of the law and application of judicial authorities on the matter.

d. *Burden and Standard of Proof* – challenges with satisfying the high legal burden; difficulty calling oral witnesses and obtaining documentary evidence from INEC; the Supreme Court's onerous requirement for petitioners 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; 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 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; INEC delaying or not complying with Court Orders to produce documents; and, INEC defending petitions and appealing judgments.

The following recommendations are offered:

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

"

...Proving an Election Petition or proof of an Election Petition is [not] as easy as the Englishman finding coffee on his breakfast table and sipping it with pleasure ...

"

- *Niki Tobi, JSC, (of blessed memory) in* ***Buhari v. INEC*** *(2008) LPELR-814 (SC)*

"

The way politics in this country is played frightens me every damning day. It is a fight to finish affair. Nobody accepts defeat at the polls. The Judges must be the final bus stop

- *Niki Tobi, JSC, (of blessed memory) in* ***Buhari v. INEC*** *(2008) 19 NWLR (Pt. 1120) 246 at 427 – 428.*

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PART 01

01

01 Introduction

1.1 OVERVIEW OF THE 2023 GENERAL ELECTIONS

1.1.1 *Political and Legal Context*

The 2023 General Elections took place on 25 February 2023 for the Presidential and National Assembly Elections and on 18 March 2023 for the Governorship and State Houses of Assembly election. The election was in several respects, notable in the history of elections in Nigeria. With the swift passing of the Electoral Act, 2022 just before the conduct of the election, it saw a series of 'firsts' in the election processes such as the the legal recognition of the use of technology in the elections and mandated early release of funds to the Independent National Electoral Commission (INEC) for election preparations.

The elections were held in a tense environment owing to several destabilising factors occurring to various degrees in different parts of the country. For several years, Nigeria had been battling diverse manifestations of insecurity and terrorism ranging from attacks by the Boko Haram religious sect to banditry which spread from the North to other parts of the country. These were and still are characterised by attacks and sacking of whole villages, killings, kidnapping for ransom, abduction and killing of farmers and collection of taxes from some rural dwellers. Added to these were rampant cases of farmer-herder clashes in Benue, Plateau and some Southern states, again resulting sometimes in the sacking of whole villages or towns, and producing hundreds, if not thousands of internally displaced persons (IDPs). In the South-East of Nigeria, insecurity manifested in the form of alleged secessionist tendencies with no clearcut strategy beyond random unprovoked attacks and killings of citizens, restriction of movement of citizens, attacks on government facilities and security personnel, kidnapping for ransom and threats and violence against election officials.

As the election approached, citizens laboured under petrol scarcity with most vehicle owners and commercial drivers queuing for hours to fill their vehicle tanks. This, coupled with the exorbitant cost of travel affected the mobility of certain voters who had registered to vote in places where they were no longer residing. As the elections became imminent, the government through the Governor of the Central Bank decided to change existing bank notes to new ones, and persons in possession of cash were encouraged to deposit the same in banks for exchange with new currency notes. After mopping up the cash in circulation, withdrawal became problematic. The new currency notes were hardly available, and online banking platforms could barely handle the volume of necessary transactions. While it was speculated that this policy was aimed at curtailing the use of money as an inducement to influence voters and officials at the elections, its timing and improper planning created a lot of hardship for the masses in Nigeria in the lead-up to the election.

1.1.2 *The Electoral Legal Framework*

The legal framework for elections regulates the existence and operations of INEC, the entire electoral process and electoral dispute resolution processes. It prescribes the eligibility and processes for political and electoral activities. In Nigeria, the electoral legal framework consists of the relevant provisions of the Constitution of the Federal Republic of Nigeria, 1999 (CFRN) (as amended), the Electoral Act, 2022 and Regulations and Guidelines developed by the Independent National Electoral Commission (INEC).

The Electoral Act 2022 was passed into law on the 25th day of February 2022 and repealed the preceding 2010 Act. It contains about 80 new provisions and revisions to the former Act addressing wide-ranging issues such as the independence of INEC, the time frame for the publication of notice of elections, the conduct and management of political party primaries and campaigns, the development and management of electronic databases for the register of voters as well as for election results, the power of INEC to review election results and declarations, clarification of the meaning of over-voting, the involvement of political appointees in partisan politics, the procedure for dealing with the death of candidates that occur in the middle of an election, the deployment of election technology, as well as the management of results. The Act enhanced the financial autonomy of INEC via **section 3 (3)**, which provides that the release of funds for general elections be made not later than one year before the election. Similarly, **section 28 (1) and (2)** provides for INEC to publish the Notice of Election for a general election not later than 360 days before the election, giving the commission and political parties sufficient time to plan for the election and conclude the candidate nomination process respectively.

By far one of the most significant new provisions in the Electoral Act, 2022 is **section 29 (1)** that makes it mandatory for political parties to submit the list of their validly nominated candidates to INEC, not later than six months or 180 days to a general election. This was to allow sufficient time for logistics preparations and for political parties to conclude their nomination process, which is often contentious. The Act similarly extended the time frame for campaigns by political parties, providing that party campaigns shall begin 150 days before polling day and end 24 hours before election day. Other novel provisions include the provision to establish a central database of electronic register of voters and electronic national register of election results (**Section 62 [2]**); the provision on over-voting that now defines over-voting in terms of the discrepancy between the number of accredited voters and the number of votes cast (**Section 51 [2]);** the provision on the powers of INEC to review the results of an election declared under duress (**section 65**); and the incorporation of technology in the result management processes of INEC such as those providing for INEC's Results viewing portal (IReV) and the Bimodal Voter Accreditation System (BVAS) indicated in **sections 41, 46, 47, 50, 60, and 62,** of the Electoral Act.

1.1.3 *Technological Innovations*

Enabled by the Electoral Act 2022 and the Guidelines for the Conduct of Elections, 2022, technological innovations like the Bimodal Voter Accreditation System (BVAS) and IReV for electronic transmission of and viewing of results were introduced to guarantee transparent accreditation and uploading of polling unit results to counter the age-long practice of changing results in the process of manual transmission of same for collation. The promise by INEC that the use of BVAS and IReV was the answer to the endemic culture of election malpractice in its processes contributed to raised expectations especially among the youth, unregistered and newly qualified voters. There was a surge in new voter registrations in anticipation of transparent, credible and hitch-free polls. Unfortunately, the expectations of the electorate in this regard were dashed.

The innovations in the Electoral Act 2022 and the enhanced powers it gave INEC did not necessarily lead to transparent and credible elections as expected by citizens; as the organizational flaws, allegations of fraud, disputes over results and outbreak of violence which had marred elections in the past persisted.[1] Despite assurances given by INEC to deliver improved and credible elections, the 2023 elections process was still marred by deficiencies in logistics management and abuse of the electoral process by the commission's staff, security officials and politicians.

1 Report on Nigeria's 2023 General Election, Nigeria Civil Society Situation Room(Situation Room) pages 3-4

At the presidential elections of 25th February 2024, a "glitch" reportedly prevented the transmission of polling unit results of the presidential election in several areas across the country. Interestingly, this "glitch" did not affect the results of the National Assembly elections which were held simultaneously. There were calls for cancellation of results in the areas where the BVAS or IReV portal or servers failed, were manipulated or were inactive. The large-scale failure in the technology deployed by INEC and poor service delivery experienced by voters cast doubts on the transparency of the election and was one of the basis for questioning the result of the Presidential Elections by petitioners.

Other challenges recorded at the elections included: late arrival of election materials and election officials, INEC ad hoc staff not reporting for duty or refusing to perform their duties including uploading the election result sheets in some areas, errors and cancellations on result sheets. Additionally, there were allegations of corruption and compromise by election officials to manipulate voting figures or perpetrate other irregularities, multiple voting and unverified persons being allowed to vote and election violence. INEC as an institution was also not spared of the violence. Starting from the pre-election period to post-election, a number of INEC offices and facilities were burnt down or attacked, and lives were lost.

1.1.4 *Political Party Primaries, Nominations and Contenders*

Each of the 18 registered political parties in Nigeria as of 23rd February 2022 nominated candidates for the 2023 General Election. According to the timetable and schedule of activities for the election, primaries for the nomination of candidates by political parties were to be held between the 4th of April and the 3rd of June 2022. Pressed for time, all the political parties sought and got an extension of the timeline by one (1) week, to the 9th of June 2022. Eighteen (18) Political Parties nominated candidates and participated in the election, a significant drop from the ninety-one (91) parties that participated in the 2019 General Election. This followed a 2017 amendment to **section 225** of the Constitution that allowed INEC to deregister political parties. INEC had on February 6, 2020, de-registered 74 political parties for non-compliance with the provisions of the Constitution and Electoral Act – majorly failure to win any seat in the 2019 general election. INEC's decision was contested in court by the National Unity Party (NUP) but upheld by the Supreme Court in 2021. Another lawsuit brought by 22 other parties deregistered by INEC also failed as the Commission's constitutional power to deregister political parties was further affirmed by the Supreme Court in 2022.

A notable feature of the nomination processes of some political parties was the requirement of aspirants to pay exorbitant fees ranging from one hundred (100) million Naira charged by the APC to forty (40) million Naira charged by the PDP for presidential nomination form and expression of interest forms with graduated sums of money applicable to other

positions. This practice which was widespread among other political parties had the effect of further commercialising an already expensive process and alienating young and other aspirants unable to raise such sums. Another significant feature was the new provision in **section 29 (5)** of the Electoral Act that allows only aspirants who participated in their party primaries to challenge candidates who submit false information to INEC. This kept out non-party members from pre-election litigation not directly involving them.

Another provision in **section 84 (12)** sought to reduce the influence of executive power and create a level playing field by excluding political appointees from acting as voting delegates or being voted for in party congresses and conventions. This provision however generated much controversy causing the President at the time, Muhammadu Buhari via the Attorney-General of the Federation (AGF) to file a suit against the National Assembly at the Supreme Court to void the provision on the ground that it would disenfranchise political appointees and prevent them from engaging in the electoral process in the exercise of their constitutional rights to participate in politics. The Apex Court in a unanimous decision, described the suit as an abuse of court process and subsequently dismissed it for being incompetent and lacking in merit.

Another provision that was the subject of controversy was **section 84(8)** of the Act which provides that a political party that adopts the system of indirect primaries for the choice of its candidate shall clearly outline in its constitution and rules, the procedure for the democratic election of delegates to vote at the convention, congress or meeting. The provision for statutory delegates was removed i.e. the President, Vice-President, serving and former members of the National Assembly; serving and former Governors and Deputy Governors; members of the National Working Committee and state chairmen and secretaries of the party. The new provision meant that only delegates elected for that purpose could vote at the party convention. This provision which altered the power dynamics in the political parties, was described by the National Assembly as an error and omission, which they unsuccessfully tried to fix before the elections. The two chambers of the National Assembly hurriedly amended the provision to reinstate the excluded "statutory delegates" but the President refused to sign the amendment.

New political forces in the form of "smaller" political parties, such as the Labour Party, New Nigeria People's Party and the African Democratic Congress, emerged to challenge the two traditional parties, the All Progressives Congress and People's Democratic Party, thereby altering the political landscape, and shifting the political dynamics particularly, in the National and State Assemblies.

Although there were 18 candidates for the presidential election, it was keenly contested between four (4) main candidates: Bola Ahmed Tinubu of the APC, Atiku Abubakar of the PDP, Peter Obi of the Labour Party and Rabiu Musa Kwankwaso of NNPP. Notably, out of the 18 political parties, only the Allied People's Movement (APM) fielded a female presidential candidate. About 25 women contested for governorship positions out of 419 candidates across 16 States (6 per cent) in the country. Overall, of the 15,307 candidates for election, only about 1,553 (roughly 10 per cent) were women.[2] Bola Ahmed Tinubu (APC) won the election and was declared the winner with 8,794,726 votes, Atiku Abubakar followed with 6,984,520 votes and Peter Obi polled 6,101,533 votes. Trailing in fourth position was Rabiu Musa Kwankwaso with 1,496,687 votes. The APC also maintained the lead in the Governorship elections winning 16 of the 28 gubernatorial seats that were contested in March 2023.

Table 1: Decisions of Election Petition Tribunals, Court of Appeal and Supreme Court on Governorship Elections held in March 2023

S/N	STATE	INEC	TRIBUNAL	COURT OF APPEAL	SUPREME COURT
1	ABIA	LP	LP (AFFIRMED)	LP (AFFIRMED)	LP (AFFIRMED)
2	ADAMAWA	PDP	PDP (AFFIRMED)	PDP (AFFIRMED)	PDP (AFFIRMED)
3	AKWA-IBOM	PDP	PDP (AFFIRMED)	PDP (AFFIRMED)	PDP (AFFIRMED)
4	BAUCHI	PDP	PDP (AFFIRMED)	PDP (AFFIRMED)	PDP (AFFIRMED)
5	BENUE	APC	APC (AFFIRMED)	APC (AFFIRMED)	APC (AFFIRMED)
6	CROSS-RIVER	APC	APC (AFFIRMED)	APC (AFFIRMED)	APC (AFFIRMED)
7	DELTA	PDP	PDP (AFFIRMED)	PDP (AFFIRMED)	PDP (AFFIRMED)
8	EBONYI	APC	APC (AFFIRMED)	APC (AFFIRMED)	APC (AFFIRMED)
9	ENUGU	PDP	PDP (AFFIRMED)	PDP (AFFIRMED)	PDP (AFFIRMED)
10	GOMBE	APC	APC (AFFIRMED)	APC (AFFIRMED)	APC (AFFIRMED)
11	KADUNA	APC	APC (AFFIRMED)	APC (AFFIRMED)	APC (AFFIRMED)
12	KANO	NNPP	APC (REVERSED)	APC (AFFIRMED)	NNPP (REVERSED)
13	KEBBI	APC	APC (AFFIRMED)	APC (AFFIRMED)	APC (AFFIRMED)
14	LAGOS	APC	APC (AFFIRMED)	APC (AFFIRMED)	APC (AFFIRMED)
15	NASARAWA	APC	PDP (REVERSED)	APC (REVERSED)	APC (AFFIRMED)
16	OGUN	APC	APC (AFFIRMED)	APC (AFFIRMED)	APC (AFFIRMED)
17	PLATEAU	PDP	PDP (AFFIRMED)	APC (REVERSED)	PDP (REVERSED)

2 See: Alabi, M. (2022, November 26). 2023: Only 10% of candidates in Nigeria are women. *Premium Times*. Retrieved December 3, 2023, from https://www.premiumtimesng.com/gender/567616-2023-only-10-of-candidates-in-nigeria-are-women.html?tztc=1

S/N	STATE	INEC	TRIBUNAL	COURT OF APPEAL	SUPREME COURT
18	RIVERS	PDP	PDP (AFFIRMED)	PDP (AFFIRMED)	PDP (AFFIRMED)
19	SOKOTO	APC	APC (AFFIRMED)	APC (AFFIRMED)	APC (AFFIRMED)
20	TARABA	PDP	PDP (AFFIRMED)	PDP (AFFIRMED)	PDP (AFFIRMED)
21	ZAMFARA	PDP	PDP (AFFIRMED)	SUPPLEMENTARY ELECTIONS ORDERED (APC PART SUCCEEDED)	PDP (REVERSED)
22	OYO	PDP	WITHDRAWN		
23	KATSINA	APC	NO PETITION FILED		
24	KWARA	APC	NO PETITION FILED		
25	NIGER	APC	NO PETITION FILED		
26	YOBE	APC	NO PETITION FILED		
27	BORNO	APC	WITHDRAWN		
28	JIGAWA	APC	DISMISSED		
29	IMO	APC	ELECTION CONDUCTED IN NOVEMBER 2023		
30	KOGI	APC	ELECTION CONDUCTED IN NOVEMBER 2023		
31	BAYELSA	PDP	ELECTION CONDUCTED IN NOVEMBER 2023		
32	OSUN	NO ELECTION IN 2023			
33	EDO	NO ELECTION IN 2023			
34	EKITI	NO ELECTION IN 2023			
35	ONDO	NO ELECTION IN 2023			
36	ANAMBRA	NO ELECTION IN 2023			

Source: Adapted from 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].

1.1.5 *Development Partners Support for the 2023 Electoral Process*

Ahead of the elections, development partners supported INEC on several election-related activities via technical assistance, training, capacity building, civic and voter education, and information dissemination, among others, with the aim of strengthening the electoral process and promoting citizens' participation, particularly of marginalized groups such as women, youths, and persons with disability.

Concerning Election Dispute Resolution, PLAC, the European Union (EU), International Foundation for Electoral Systems (IFES), Development Alternatives Inc. (DAI), UK Foreign Commonwealth and Development Office (FCDO) and the United Nations Development Programme (UNDP) collaborated to support key training workshops in November 2022 and January 2023 for the Members of the Election Petition Tribunals (EPT) and Justices of the Court of Appeal. About 958 persons including Court of Appeal Justices and other judicial officers, Election Petition Tribunal (EPT) Registry staff and INEC legal staff from across the 36 States and FCT were trained. The workshops focused on the innovations in the Electoral Act 2022 and the resolution of election disputes. In May 2024, a post-election review workshop was organised by the Court of Appeal with the support of PLAC, IFES, EU and FCDO and this provided an opportunity for reflections on the outcome of the election petitions, the role of the judiciary in the resolution of election disputes from the 2023 elections, and further electoral reforms. A communique was issued at the end of the workshop.

1.2 ELECTION DISPUTES AND PETITIONS IN NIGERIA

An election dispute broadly refers to "any contentious electoral matter that is presented for resolution to a competent authority, whether civil, criminal, administrative or constitutional. The matter is deemed election-related if it breaches the legal framework for elections or it affects the rights and interests of individuals as participants in the election process and is presented to the competent authority through a complaint."[3]

Challenges to the result of an election are a fundamental part of the electoral process. The right to vote and be voted for would be merely cosmetic if the right to challenge the outcome of an election is not guaranteed by law. Effective resolution of election petitions is aimed at providing a means of redress for violations of electoral rights, remedying flaws in electoral processes, and minimising election-related violence. According to the International Foundation for Electoral Systems (IFES), the credibility of elections, acceptance of election results and stability of the election environment is dependent on the effective resolution of disputes and violations throughout the electoral cycle.[4]

3 OSCE Office for Democratic Institutions and Human Rights (ODIHR). (2019). Handbook for the Observation of Election Dispute Resolution. OSCE/ODIHR. https://www.osce.org/files/f/documents/9/7/429566_0.pdf

4 *Electoral Justice and Dispute Resolution*. (2024, December 20). IFES - the International Foundation for Electoral Systems. https://www.ifes.org/our-expertise/election-integrity/electoral-justice-and-dispute-resolution

However, the state of the legal regime is such that succeeding in overturning the declaration of the result of an election is a herculean task.[5]The attitude and approach of the average Nigerian politician to the electoral process is such that there is no concession of defeat. This has resulted in the electoral process being highly litigious.

The law saddles the Judiciary with the role of resolving election petitions. This includes adjudicating matters arising from pre-election and post-election disputes. Where the contestation is a pre-election dispute, jurisdiction is vested in the Federal High Court while for post-election disputes, it is the Election Petition Tribunals (EPT) and the Court of Appeal (for Presidential Election) that exercise jurisdiction.[6] Reports and data from elections held in Nigeria, since the return to democracy in 1999, show that candidates increasingly rely on the courts to settle post-election disputes. While it appears commendable that losers are ventilating their grievance through legal channels and not following the path of violence (as has been experienced with previous elections), the proliferation of post-election petitions has overwhelmed the judiciary's capacity to handle non-electoral matters, contributed to the judicialization of elections, and ultimately weakened the legitimacy of both the electoral and judicial process.

The prevailing view among experts is that democratic legitimacy and judicial independence are at risk in Nigeria because of the increasing judicialization of elections.[7] The judicialization of elections refers to the increasing involvement of the judiciary (courts) in the electoral process, especially in resolving disputes. With the courts' increasing pivotal role in election matters, this has become a hallmark of the country's electoral landscape. While it has contributed to the protection of political rights, it has also raised concerns about over-reliance on the judiciary and the potential for political manipulation.

Election petitions belong to a special class of civil litigation and are often referred to in law, as being *sui generis* (in a class of its own). While election petitions are legal processes, their political nature is undeniable. This comes from several factors such as partisan interests, the political nature of underlying issues in the disputes, the broader political context, as well as public policy considerations. It is not only the legal rights of parties that are at stake, other issues for consideration include the need to ensure government continuity and maintain political stability, especially in a fragile democracy like Nigeria where the outcome of a petition has the potential to alter power dynamics. For this reason, balancing judicial oversight and political processes will likely remain a critical issue for Nigeria's democratic evolution.

The solution may lie in a concerted effort to ensure that the election dispute resolution process remains grounded in legal principles and impartiality; safeguarding the integrity of the elections process; holding the election management body to account; judicial training on

5 Prof. Taiwo Osipitan, SAN – "Problems of Proof under the Electoral Act" in Essays in Honour of Hon. Justice Anthony Iguh, JSC.
6 **Sections 239 and 285 of** the 1999 Constitution (as amended) and **Section 29 (5) of** the Electoral Act, 2022
7 Odinkalu, C. A. (2024, February 5). African Democratic Recession & Judicialization of Elections. Georgetown Journal of International Affairs. https://gjia.georgetown.edu/2024/02/03/democratic-recession-and-the-judicialization-of-elections-in-africa/

the electoral law and the clarification of their roles; strengthening internal dispute resolution mechanisms of political parties; and the promotion of other means of dispute resolution. It has been suggested that upon close examination, some election disputes border on the needs and interests of the candidates, rather than their legal rights.[8] Based on this and on the need to reduce the number of election petitions, the Courts have advocated for the use of Alternative Dispute Resolution in settling election disputes. However, this approach does not yet seem to be attractive to Nigerian politicians who see elections as a "do or die" affair and a path towards self-enrichment.

1.2.1 *Jurisdiction of Courts to Entertain Petitions*

The basic, substantive and procedural laws governing election petitions in Nigeria include the following:

- The Constitution of the Federal Republic of Nigeria 1999 (as amended)
- The Electoral Act, 2022 and the First Schedule to the Act
- The Evidence Act, 2011
- The Court of Appeal Rules
- The Election Judicial Proceedings Practice Direction, 2023
- INEC Guidelines and Regulations
- Decided cases.

The Judiciary, by virtue of **section 6** of the Constitution, has the power to settle and determine disputes arising from the electoral process. However, the judiciary will not interfere in the internal affairs of political parties, except if it involves violations of the principles of the rule of law and fair hearing by parties or is expressly provided for by law.

The courts generally have the jurisdiction to determine whether a candidate is qualified for an election and the validity of the nomination of a candidate for an election but the forums for both determinations are separate. **Section 26 (5)** and **84(14)** of the Electoral Act provide that the Federal High Court shall have jurisdiction over pre-election matters while **section 285** of the Constitution specifically spells out the court's jurisdiction on post-election matters, particularly as regards whether a candidate validly won an election, or whether an election was validly contested. Section **87 (9)** of the repealed 2010 Act allowed for pre-election matters to be instituted in the Federal High Court or the High Court of a State or the FCT. However, the 2022 Act restricted this to just the Federal High Court in **sections 29(5) and 84(14).**

8 See: Idornigie, P. (2022, November 7). *The viability or otherwise of ADR as a dispute resolution mechanism in election matters*. Workshop Organised for the Members of the Election Petition Tribunal on Election Matters., Abuja, Nigeria.

"Section 29(5): Any aspirant who participated in the primaries of his political party who has reasonable grounds to believe that any information given by his political party's candidate in the affidavit or any document submitted by that candidate in relation to his constitutional requirements to contest the election is false, may file a suit at the Federal High Court against that candidate seeking a declaration that the information contained in the affidavit is false."

"Section 84(14): Notwithstanding the provisions of this Act or rules of a political party, an aspirant who complains that any of the provisions of this Act and the guidelines of a political party have not been complied with in the selection or nomination of a candidate of a political party for election, may apply to the Federal High Court for redress."

1.2.2 *Procedure for Questioning an Election*

The process for questioning the validity of an election is through the mechanism of election petitions presented before an Election Petition Tribunal or the Court of Appeal. The validity of an election may be questioned on two main broad complaints. It may be challenged based on an undue election or undue return. A person challenging the election result shall do so through a petition presented before the Court of Appeal or a competent Election Tribunal.[9] The law stipulates that the only way an aggrieved party can challenge the results of an election conducted under the Electoral Act is by going through the procedure prescribed therein and in the 1999 Constitution of the Republic of Nigeria (as amended). Since the inception of the 1999 Constitution, regular courts such as the High Courts ordinarily have no jurisdiction to hear and determine election petitions. Every Election Petition Tribunal derives its jurisdiction from the Constitution.

Election Petition Tribunals are established by **section 285** and the **sixth schedule** of the 1999 Constitution of the Federal Republic of Nigeria. This section provides for the establishment of the National Assembly, Governorship, and Legislative Houses Election Tribunals. These election petition tribunals have original jurisdiction to hear and determine petitions as to whether a person has been validly elected to the offices as Senator, Member of the House of Representatives, Governor and Deputy Governor, and Member of the State House of Assembly. The election tribunals are also established to hear and determine petitions as to whether any person through an undue election or return has been elected to an office/position and other related issues. By virtue of **section 239** of the 1999 Constitution, the Court of Appeal is the court of first instance in a Presidential election petition.

9 Section 130 of the Electoral Act, 2022

1.2.3 *Grounds for Petition*

Section 134 (1) of the Electoral Act, 2022 stipulates only three grounds upon which an election may be questioned. They include the following:

a. That a person whose election is questioned was, at the time of the election, not qualified to contest the election;
b. That the election was invalid by reason of corrupt practices or non-compliance with the provisions of the Electoral Act; or
c. That the Respondent was not duly elected by majority of lawful votes cast at the election.

It is pertinent to underscore that questioning an election on the ground that the petitioner or its candidate was validly nominated but, unlawfully excluded from the election which was in the previous Electoral Act was removed from the Electoral Act, 2022. Therefore, an election petition can no longer be founded on unlawful exclusion. Before now, **section 138 (e) of the repealed 2010 Act,** which stated that the election of a person can be questioned on the ground that he submitted to INEC, an affidavit containing false information of a fundamental nature in aid of his qualification for the election, opened the door for petitioners to raise a multitude of issues, many of which were outside of those in the Constitution.

This would be the first time, unlawful exclusion from an election would not be a ground for an election petition. Unlawful exclusion was seen as the easiest ground to prove in an election petition as all that the petitioner needed to establish was that he bought the form of his political party, participated in the screening exercise, and was cleared by his political party and his name submitted to INEC as the candidate of the party for the general election, but that at the general election, his party's logo was not on the ballot. Such instances usually provided a clear case of unlawful exclusion which was a ground for the nullification of an election.[10]

An election may be questioned on the ground that the election was invalid by reason of non-compliance as stated in **section 134 (1) (b)** of the Electoral Act, however by **section 135(1)**, an election shall not be invalidated by reasons of non-compliance if it appears to the court that it was conducted substantially in accordance with the Act and the non-compliance did not substantially affect the result of the election.

1.2.4 *Parties to an Election Petition*

The parties to an election petition are the Petitioner, who files the petition, and the Respondent, against whom the petition is brought. By **section 133 (1)** of the Electoral Act, 2022, an election petition can be presented by a candidate at an election, or by a political party which

10 Hon. Justice Husseini Baba Yusuf (November 2022), *"Pertinent Issues in the Determination of Election Disputes, Challenges, and the Way Forward"* – Paper presented at a 4-Day Workshop for the Justices of the Court of Appeal and Members of Election Petition Tribunals.

participated in the election. The person returned as the winner of an election is usually the main Respondent in an election petition.[11] However, where the Petitioner complains specifically about the conduct of an Electoral Officer, Presiding Officer, Returning Officer, or any other person who took part in the conduct of an election, it shall not be necessary to join such officers or persons. The Independent National Electoral Commission (INEC) shall be made a Respondent and be deemed to be defending the petition on its behalf and on behalf of its officers or such other persons.[12]

1.2.5 *Timelines for Resolving an Election Petition*

The time for election petition tribunals to hear and determine election petitions is provided for in the Constitution. **Section 285 (5)** CFRN prescribes 21 days within which to file election petitions, while **section 285 (6)** gives the tribunal 180 days from the date of the filing of the petition within which to deliver its judgment. The Electoral Act, 2022 has followed the prescription of the Constitution and makes similar provisions in respect of petitions over Area Council Elections in the Federal Capital Territory, Abuja.[13]

One of the most important provisions in all the laws relating to Election Petitions is the essentiality of time. The essence thereof is that as much as possible, such petitions should be given expeditious adjudication. The courts are strict on the requirement that an election petition shall be filed within 21 days of the declaration of the result of the election. There is no provision for an extension of time within which to file an election petition. Once a petitioner fails to file his petition within this time, he loses his right of action. It is pertinent to note that by **paragraph 4(5)** of the First Schedule to the Electoral Act, 2022, a petitioner is required to frontload the following documents:

- a list of the witnesses that the petitioner intends to call in proof of the petition;
- written statements on oath of the witnesses; and
- copies or list of every document to be relied on at the hearing of the petition.

Where a petitioner fails to comply with this provision, his petition shall not be accepted for filing by the secretary of the tribunal registry.[14] A Respondent's reply to the petition is also expected to be accompanied by the documents listed above. It is pertinent to make the point here that an election petition can only be amended within the time limited for filing it; that is, 21 days from the date of declaration of the result of the election. This rule applies to substantial amendments involving the contents of a petition. The same rule also applies to an amendment to a reply to a petition.

11 Section 133 (2) of the Electoral Act, 2022
12 Section 133 (3) of the Electoral Act, 2022
13 Section 132 (7) & (8) of the Electoral Act, 2022
14 Paragraph 4 (6), First Schedule to the Electoral Act 2022

The challenge with the above provision is that because elections are held in polling units spread all over the country and involve a lot of people, there are many witnesses involved and many exhibits (documents) to rely on during the trial. This demonstrates how tasking an election petition can be for the parties and lawyers involved. Undoubtedly, this explains why election petitions are very difficult to prove as the witnesses may just not be available. Furthermore, the decisions of the courts that even a subpoenaed witness cannot testify if his statement on oath was not filed along with the petition further underscores the clog in the attainment of electoral justice. This has a direct bearing on the attainment of justice and was a huge factor in the failure of petitions.

Previously, when there was no fixed time for resolving petitions, it usually took an inordinately long period to conclude election petitions and appeals therefrom. **Section 285 (6)** of the Constitution has now addressed this fundamental problem by stipulating that an election tribunal shall deliver its judgment in writing within 180 days from the date of filing of the petition. But, the fixed time of 180 days to determine an election petition also constitutes a clog, as the requirement of the time within which the tribunal or court shall deliver its judgment is strict and cannot be extended and any judgment given outside 180 days will be a nullity. In consequence, most tribunals are overworked and this impacts on the quality of the adjudication.

1.2.6 *Remedies in Election Petitions*

According to **section 136 (1)** of the Electoral Act, if the winner of an election is found not to be validly elected on any ground, the Court shall nullify the election and order INEC to conduct a fresh election not later than ninety (90) days after the court's decision if there is no appeal on the decision. If an appeal is filed against this decision, and the election is further nullified by the court having final appellate jurisdiction (the Court of Appeal or Supreme Court, as the case may be), the fresh election is also to be held not later than ninety (90) days from the date of the final decision.

Where the Court finds that the person declared winner was not qualified to contest the election, **section 136 (2)** of the Act requires the Court to declare the person with the second highest number of valid votes the winner, but on the condition that this person –(i) has satisfied relevant the constitutional requirements to be declared winner; and, (ii) is still a member of the party on which platform he contested i.e. he has not resigned from the party or decamped to another party. If this person is no longer a member of the party on which he ran, then the winner will be the person with the next highest votes who satisfies this requirement.

By virtue of **section 136 (3),** where a declared winner did not receive the majority of the valid votes cast or the petitioner proves that he/she won the election by a majority of the lawful

votes cast, the Tribunal or Court is empowered to declare such petitioner the winner of the election, but on the condition that they have satisfied all legal requirements to be returned as elected.

1.2.7 *Impediments faced in Election Petition Adjudication*

Several challenges and impediments are faced by both parties and election tribunals in the resolution of election disputes. These impediments include those brought about by the timelines for election petition described above, those caused by INEC, litigants, as well as environmental/socio-economic factors.

As the election management body, INEC is charged with the conduct of the elections. It is often INEC's acts of omission or commission that are complained about in election petitions. It has custody of all the documents and materials it used for the conduct of elections. Following the challenge to the conduct of an election by INEC which is brought before a tribunal by a petition on the various grounds stipulated by the law, there are certain challenges encountered by the tribunal which emanate solely from the conduct and activities of INEC. One of the greatest problems is the delay in the release of documents used for the election, even after the tribunal has ordered a forensic inspection of such documents by a petitioner. The proof of any petition before a tribunal largely rests on the strength of the case presented by a petitioner which ought to be supported by credible evidence.

To prove the regularity or otherwise of an election, the petitioner would need to produce credible evidence before the tribunal for it to be successful. Most of the documents needed to discharge this burden of proof comprise the electoral documents in the custody of INEC. In most cases, the relevant documents are never available. Even in some instances, till the close of the case of the petitioner, the documents are not made available. This prevents the tribunal from properly delivering justice and remains one of the greatest challenges facing the election dispute resolution process. [15]

Most petitions presented before the tribunals are considered dead on arrival because in most cases, the petitioners do not receive the relevant documents to enable them to present their case properly before the tribunal. A glaring instance is where INEC had to reconfigure the BVAS machines after the presidential election for use in the state-level elections, thereby deleting the data on them which could have been utilised as evidence in the petitions filed in respect of the Presidential and National Assembly elections. INEC has also been accused by litigants of evading service of court orders, withholding useful electoral documents or issuing

15 Hon. Justice Husseini Baba Yusuf (November 2022), *"Pertinent Issues in the Determination of Election Disputes, Challenges, and the Way Forward"* – Paper presented at a 4-Day Workshop for the Justices of the Court of Appeal and Members of Election Petition Tribunals.

documents and then denying the same documents during trial. While it is acknowledged that the documents involved could be voluminous, INEC has a legal duty to make adequate arrangements to ensure that the documents are made available timeously to parties in order to assist the tribunal in the dispensation of justice. Furthermore, while the electoral body must defend its actions/activities which include the conduct of an election; it is under a legal obligation to maintain a neutral position both in pre-election and post-election irrespective of the outcome of an electoral process.[16]

Petitioners also contribute to the challenges experienced in electoral adjudication with their congestion of dockets with frivolous petitions. There were several petitions where the tribunal/court chastised the petitioners for coming to court to try their luck and in some of these instances, it was obvious that the case was not well put together. In other instances, matters were thrown out for errors and lack of diligent prosecution by counsel to litigants.

With respect to the environmental and socio-economic factors, corruption has become a malaise in society and it has a direct negative effect on all spheres of society including the election tribunals. There are cases where judges were sanctioned with dismissals for their involvement in corrupt or unethical conduct. Some judiciary/registry staff and officials are also not left out in the allegations of misconduct. The same goes for the lawyers and the litigants, usually politicians, who are the greatest enablers of this malaise. Judicial independence is so critical to the process of election dispute resolution that the aphorism, "justice must not only be done but should be manifestly and undoubtedly seen to be done" should be the mantra for judicial officers.

In terms of the operating environment for Tribunals and judicial officers, the accommodation and sitting arrangements for the tribunals are not always conducive and this affects the output of the Tribunals. There were a few cases where logistics issues like a faulty air conditioner forced a tribunal to suspend its sitting, thus taking away much-needed time. There is also the issue of insecurity which is a major challenge limiting the performance of the election tribunals. Where there is insecurity, tribunal members cannot properly carry out their duties dispassionately for fear of their lives and property. Regrettably, today, insecurity permeates the whole length and breadth of Nigeria. The insecurity in the 2023 election cycle was pervasive in all geo-political zones such that some tribunals sat at locations outside the States where the elections complained about took place. For instance, the Imo State Election Petition Tribunal was relocated to Nasarawa State. Due to the insecurity in several parts of Imo State, some of the political parties also held their primaries in safe areas outside the constituency. It became ironic that the Tribunal for Imo State which sat in Nasarawa State on account of the insecurity

16 Hon. Justice Husseini Baba Yusuf (Supra)

in Imo State nullified the results of some of the elections on the grounds that the primaries of the political parties took place outside the constituency. However, several of such judgments were set aside on appeal.

Table 2: Locations of Tribunals and Courts for the 2023 Election Petitions and Appeals

S/N	State	Tribunal	Court of Appeal
1.	Federal Capital Territory	Abuja	Abuja
	South West		
2.	Ogun	Abeokuta	Lagos
3.	Ondo	Akure	Lagos
4.	Oyo	Ibadan	Lagos
5.	Osun	Osogbo	Lagos
6.	Ekiti	Ado-Ekiti	Lagos
7.	Lagos	Lagos	Lagos
	South East		
8.	Anambra	Awka	Lagos
9.	Enugu	Enugu	Lagos
10.	Ebonyi	Abuja	Abuja
11.	Imo	Nasarawa	Abuja/Lagos
12.	Abia	Umuahia	Lagos
	South South		
13.	Delta	Asaba	Abuja
14.	Edo	Benin City	Lagos
15.	Cross River	Calabar	Lagos
16.	Akwa-Ibom	Uyo	Abuja
17.	Rivers	Abuja	Lagos
18.	Bayelsa	Yenagoa	Port-Harcourt
	North Central		
19.	Nasarawa	Lafia	Makurdi/Abuja
20.	Kogi	Lokoja	Abuja
21.	Kwara	Ilorin	Abuja

S/N	State	Tribunal	Court of Appeal
22.	Niger	Minna	Abuja
23.	Benue	Makurdi	Abuja
24.	Plateau	Jos	Abuja
	North East		
25.	Adamawa	Yola	Abuja
26.	Gombe	Gombe	Abuja
27.	Borno	Maiduguri	Abuja
28.	Yobe	Damaturu/Maiduguri	Abuja
29.	Bauchi	Bauchi	Abuja
30.	Taraba	Jalingo	Yola
	North West		
31.	Kaduna	Kaduna	Abuja
32.	Sokoto	Sokoto	Abuja
33.	Zamfara	Sokoto	Abuja
34.	Kebbi	Birnin-Kebbi	Sokoto
35.	Katsina	Katsina	Abuja
36.	Kano	Kano	Abuja
37.	Jigawa	Dutse	Abuja

Note: The Abia State Tribunal heard some cases in the FCT, Abuja following a strike action by the Judiciary Staff Union of Nigeria (JUSUN). The Plateau State Tribunal also heard a few cases in the FCT. At the Court of Appeal, some Plateau State appeals were heard in the Port Harcourt, Asaba and Jos divisions.

"It amounts to judicial misconduct of a very extreme proportion for a judicial officer to disregard clear provisions of the constitution and other legislations and the precedents of this court."

- ***Muftwang Caleb Manasseh v. Nentawe Yilwatda Goshwe & 3 Ors.*** *(Unreported) SC/CV/1190/2023. Judgment delivered 12th January 2024*

PART 02

02

02

Facts and Figures on the 2023 Election Petitions

2.1 Official Data and Result from Case Analysis

The Court of Appeal is responsible for constituting Election Petition Tribunals (EPT) and therefore holds the official records and statistics of the number of petitions filed by parties. 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. A total number of 840 appeals were filed at the Court of Appeal, 21 appeals were filed at the Supreme Court with respect to the governorship elections, and 2 appeals were filed at the Supreme Court with respect to the presidential election.

PLAC reviewed a total number of **1,503** petitions and judgments of the EPT, Court of Appeal, and Supreme Court. Out of this number, 895 are Tribunal judgments. A total of 588 Court of Appeal judgments were analysed while 20 Supreme Court judgments were analysed. The analysis carried out involved a review of the lead, concurring, and dissenting judgments.

Overall, about 89.2 percent of the election petitions considered by the Tribunals were analysed, while about 70 percent of appeals were analysed. This provides significant insight into the outcome of the process, the success and failure rate of petitions, as well as the trends and issues observed across cases. 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 3: Official Summary of Number of Petitions Filed in 2023 Per the Court of Appeal

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
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

S/N	STATE	PRES.	GOV.	SEN.	HOR	SHA	TOTAL
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
	TOTAL	**5**	**83**	**147**	**417**	**557**	**1209**

Source: Adapted from 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].

2.2 Overview of Successful and Unsuccessful Petitions and Appeals

The table and images below show the number of successful and unsuccessful petitions and appeals analysed by PLAC.

Table 4: Estimated number of successful and unsuccessful petitions and appeals per State

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
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

States	EPT(D)	EPT(S)	CA (D)	CA (A)	WB	WA	WE
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			
Total	**794**	**99**	**446**	**115**	**43**	**42**	**30**

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)

The image 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%**.

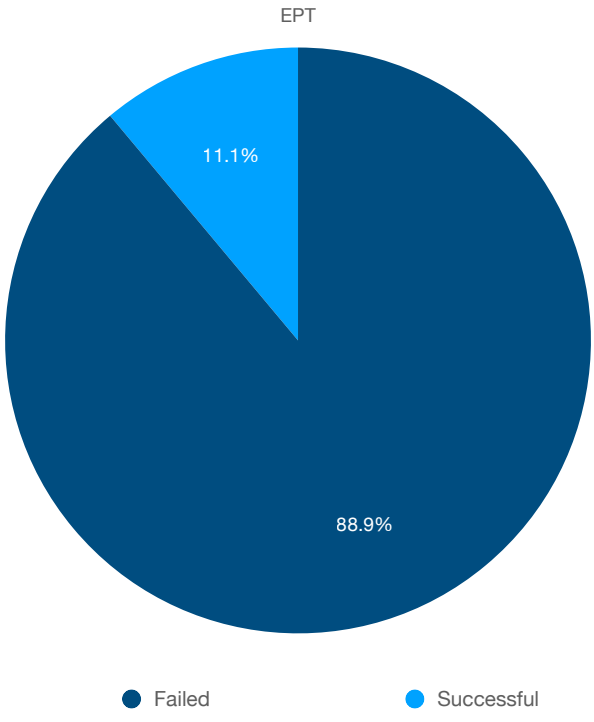

Figure 1: Percentage of successful and unsuccessful petitions at the Tribunal

The image below shows the percentage of successful and unsuccessful petitions on appeal. The failure rate of Election Appeals analysed is **79.4%**, while the success rate is **20.9%**

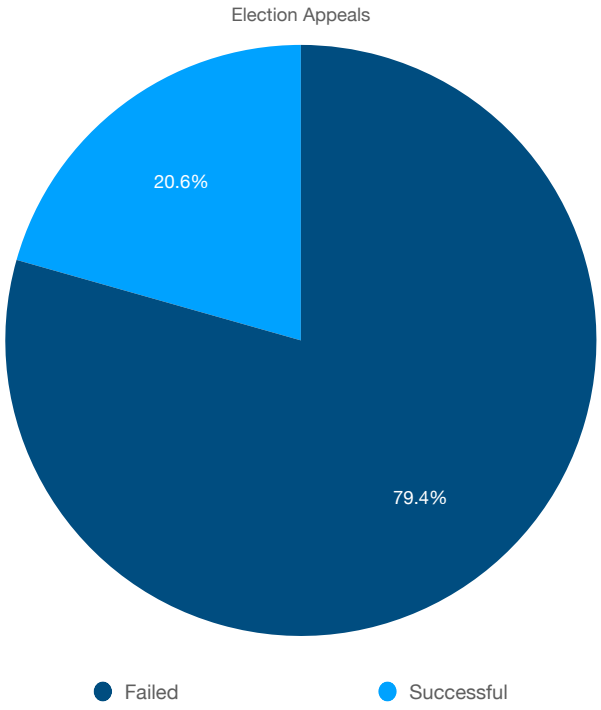

Figure 2: Percentage of successful and unsuccessful election appeals at the Court of Appeal

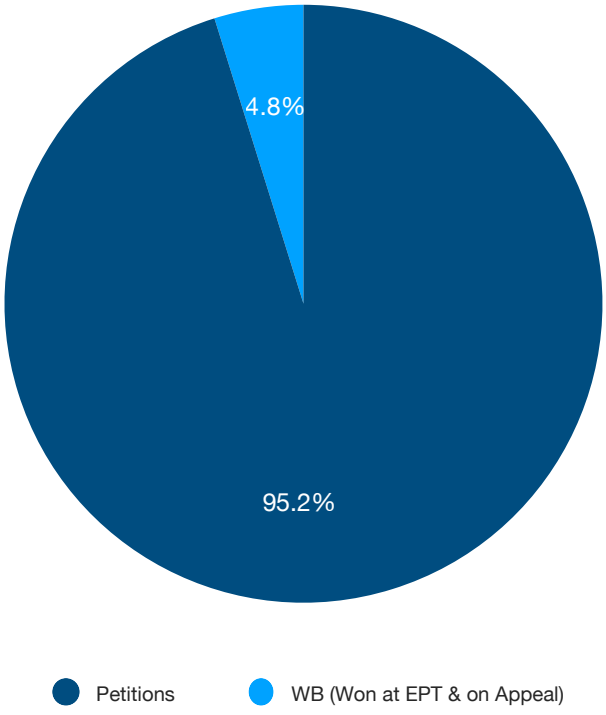

Figure 3: Percentage of petitions won at EPT and on Appeal

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).

2.3 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 State had the highest number of dismissed appeals.

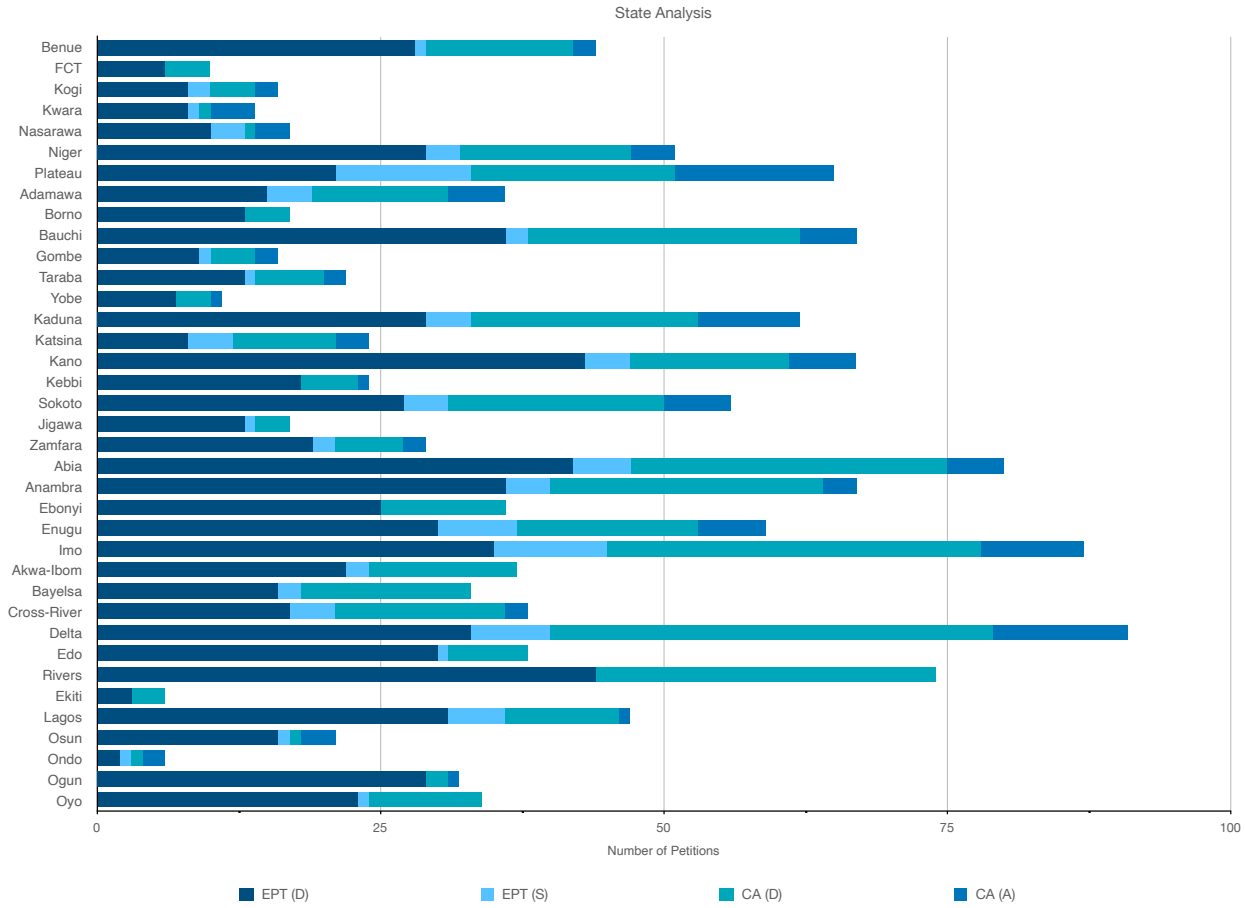

Figure 4: Successful and unsuccessful petitions and appeals per State

***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)

2.4 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.

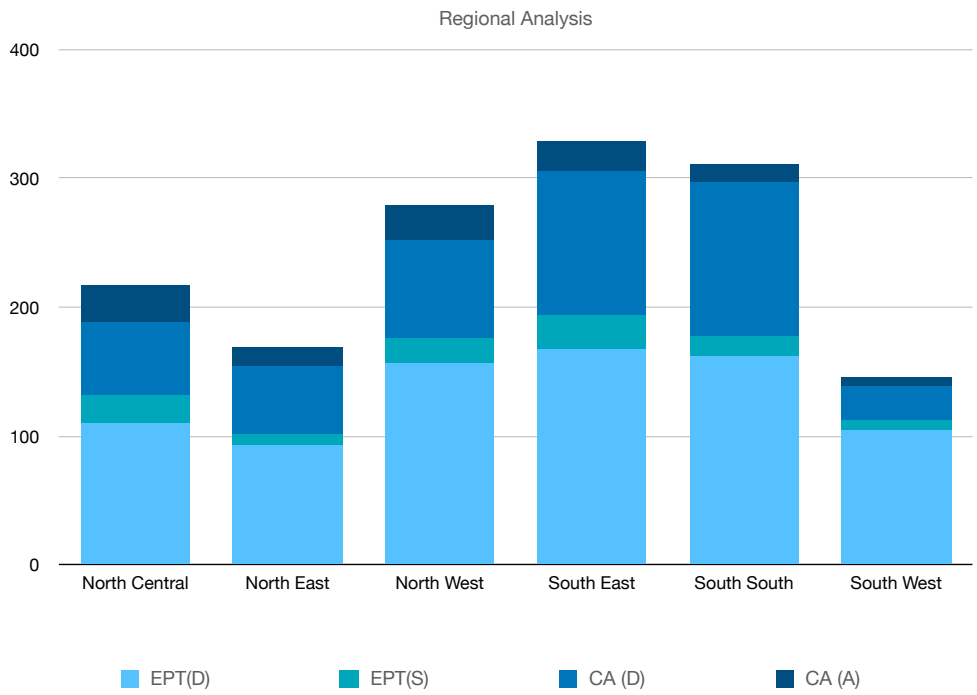

Figure 5: Successful and unsuccessful petitions and appeals per region

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)

2.5 Trends, Issues and Reasons for Dismissal of Petitions

Figure 6 below 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%).**

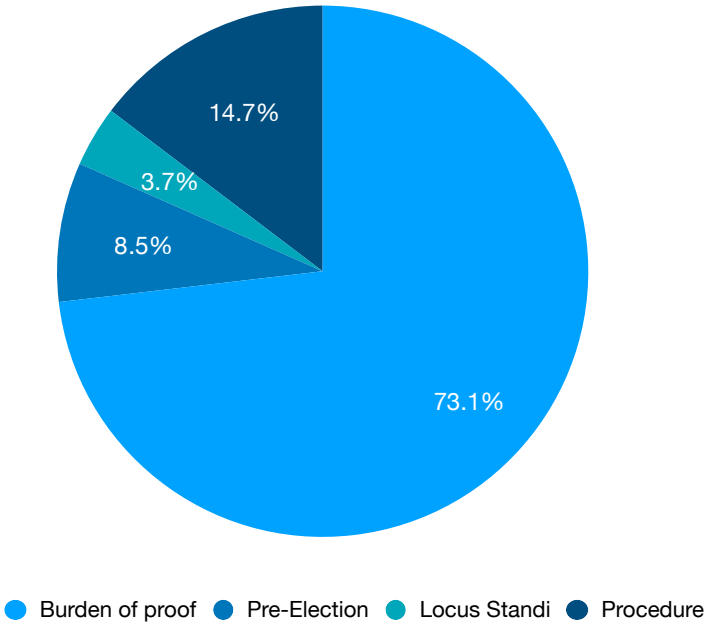

Figure 6: Trends, Issues and Reasons for Dismissal of Petitions

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

Figure 7 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.

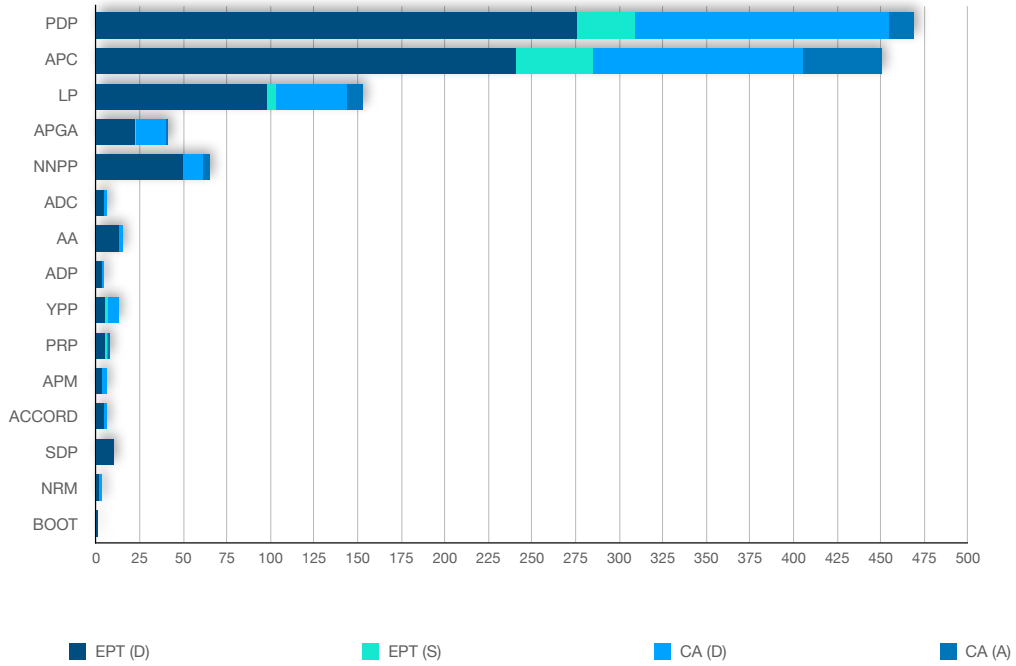

Figure 7: Estimated number of petitions and appeals analysed won or lost by political parties

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)

"By section 135 (1) of the Electoral Act 2022, an election shall not be liable to be invalidated by reason of non-compliance with the provisions of this Act if it appears to the election tribunal or court that the election was conducted substantially in accordance with the principles of the Act and that the non-compliance did not affect substantially the results of the election... A petitioner in this situation must therefore adopt a kind of double barrel approach, you don't fire one barrel and leave the other intact. Both must be fired together at the same time."

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- **Atiku & Anor. v. INEC & 2 Ors.** (Unreported) SC/CV/935/2023
Judgment delivered 26th October 2023

PART 03

03

03

Trends And Issues Arising From Tribunal And Court Decisions

The analysis of the 2023 election petitions disclosed various trends and issues in the application of the provisions of the Constitution and the Electoral Act, 2022. This formed the basis of the decisions of the Election Petition Tribunals and Courts. Petitions were dismissed or struck out for various reasons such as jurisdictional issues, failure to discharge the burden of proof, and failure to adhere to legal rules and procedures for filing petitions. These issues are examined in detail in this part.

3.1 JURISDICTION - LOCUS STANDI

This is a Latin phrase that means "*Place of Standing*." It also means the legal capacity to institute proceedings in court.[17] The Black's Law Dictionary, 9th Edition, defines it as "*a place of standing or the right to bring an action or to be heard in a given forum*."

Challenging *Locus Standi* is a prominent and persistent feature in election petitions, and this remained the case with the post-2023 general election litigations. Because it is a threshold issue that determines access to electoral justice, if a person who has no locus standi to file an election petition institutes a petition, the petition will be struck out. Similarly, a petition heard by a Tribunal or Court can be dismissed on the ground that the Court had no *vires or* jurisdiction to entertain the petition.

The Judiciary, by virtue of **section 6** of the Constitution, has the general judicial powers to adjudicate and determine disputes arising from the electoral process. However, the judiciary will not interfere in the internal affairs of political parties, except if it involves violations of the principles of the rule of law and fair hearing by parties or is expressly provided for by law.

In hearing election matters, any objection to the jurisdiction of the tribunal or the validity of the petition itself is heard during the proceedings of the substantive suit and the decision

17 See: **Daniel v. INEC** (2015) LPELR 24566 (S.C) P. 47, Paras A-D

delivered when judgment is being given. This follows from the provision in **section 285 (8)** of the Constitution aimed at preventing unnecessary prolongations of the proceedings by flimsy objections. This provision states that:

> *"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."*

Before this provision was introduced to the Constitution in 2017, counsel to litigants often mischievously used preliminary objections to prevent the courts from hearing the substantive suit. The aim was to frustrate the process, and this often culminated in long-drawn-out litigation that extended into the tenure of the officeholder whose election was being contested. Borrowing the words of Pats-Acholonu, JSC, (of blessed memory) in **Buhari v. INEC**,[18] the incumbent would have long finished and left his office and even if the petitioner finally wins, it will be an empty victory bereft of substance.

The Supreme Court has also enjoined the lower courts to consider the merits of the issues placed before it when faced with a jurisdictional challenge based on the competence of the originating process[19] – particularly where there is an opportunity for appeal to the Supreme Court. The settled principle is that once a Court has no jurisdiction it must hands-off and strike out a case. However, it is considered expedient and imperative for the Court in such a case to determine the merit of the case particularly, in a time-bound action like an election petition because if the Supreme Court, for instance, finds that the Court of Appeal has jurisdiction, it will not be able to determine the merit of the case and sending it down for rehearing will not be feasible as time would have lapsed for a decision on the merit.[20]

However, it appears that this situation would depend on the facts of the case. For instance, in **Sule Nasiru Garo & NNPP v. INEC & 2 Ors**,[21] the Court of Appeal held that where the Tribunal does not have jurisdiction, and its decision is a nullity; an appellate court will equally be devoid of jurisdiction to decide the appeal on the merits. In this case, the Tribunal gave judgment outside the constitutionally mandated 180 days and the Court of Appeal held that the Tribunal's judgment is a nullity, based on want of jurisdiction and the effect of the nullity is as though there is no judgment. The Court also held that the issue of jurisdiction is extrinsic

18 (2008) 19 NWLR (part 1120) 1 at 155

19 See **O. A. J. Idiagbon V APC** (2019) 18 NWLR (PART 1703) 102 AT 121 A – H per ODILI, JSC who said: *"…in making the finding and declaration that there is incompetency of the process and the lack of jurisdiction, the court whether of trial or appellate should go further in the alternative by stating that in the event that the Supreme Court makes a contrary finding on the competency or otherwise along with the lack of jurisdiction, the court would consider the merit and proffer a conclusion so as to give the necessary material with which the apex court would place its work of adjudication and decide with finality whether there is no jurisdiction…"*

20 Peter Olabisi Ige, **The Role of An Independent and Impartial Judiciary in Electoral Adjudication**. Paper Presented at a Workshop for Election Petition Tribunal Members & Justices in Abuja. (November 2022, Abuja)

21 (Unreported) Appeal No. CA/KN/EP/HR/KAN/33/2023. 2023 LPELR-61253 (CA)

to the adjudication and an appellate court cannot begin to consider and resolve the merits of the decision since the want of jurisdiction rendered the decision void ab initio.

In construing **section 285 (6)** CFRN, the Court in the **Sule Garo** Case stated as follows:

> *"It gives an election tribunal a jurisdictional timeline of 180 days from the filing of an election petition to determine the petition. At the expiration of the 180 days, the jurisdiction of the election tribunal expires and abates by effluxion of time."*

Following this, the Court of Appeal held that the Tribunal delivered its judgment outside the mandatory period or timeframe prescribed and stipulated in **section 285 (6)** of the Constitution and declined to hear the appeal. According to the Court:

> *"After day 180, which as computed above will be 12th September 2023, the Tribunal lost its jurisdiction to adjudicate in the matter by effluxion of time. The framers of the Constitution minced no words in stating that the decision of the Court in an election petition shall be delivered "within 180 days from the date of the filing of the petition. The judgment of the Tribunal delivered on 13th September 2023 is therefore a nullity as the Tribunal court had already lost its jurisdiction to adjudicate on the matter after 12th September 2023 as the time fixed cannot be extended..."*

The situation presented in the **Sule Nasiru Garo** case is to be contrasted with the situation in cases where the decision of the court or tribunal is not a nullity *per se.* It is a question of whether based on the peculiar circumstances of a case, it can be rightly held that the court lacks jurisdiction to adjudicate. In such circumstances, since it may be a thin line that separates a decision either way, the wisdom of the law is that the court considers the merits of the case in the event that it may have arrived at a wrong decision on the jurisdictional question. A parallel has to be drawn in the situation presented in this case. It is not that the Tribunal did not have jurisdiction to adjudicate ab initio, it is rather that on account of effluxion of time, the Tribunal lost its jurisdiction to adjudicate, and its decision had become a nullity. It became as though there was never a trial.

3.1.1 *Parties Who Did not Contest Elections, Filing Petitions*

One key observation from the cases analysed was persons who did not contest elections or who were not valid candidates, filing an election petition. **Section 130** of the Electoral Act provides that an election can be questioned by way of a petition complaining of an undue election or undue return. **Section 133 (1)** stipulates that only candidates or political parties that participated in an election can file petitions. By this provision, the only petitions that a tribunal can hear are those presented by either a candidate at the election or the political party which participated in the election or both. Consequently, petitions brought by non-participants were always dismissed for lack of *Locus Standi*.

These cases often arose from situations where persons who were declared by the court in a pre-election matter as being the rightful candidate of their party were unable to contest in the election proper because the judgment was delivered after the election or at a time when a substitution of names was no longer possible.[22] Several of such candidates went ahead to file petitions against the opposing party even though they were not on the ballot. They operated on the premise that the validation of their nomination meant that they could automatically replace the candidate whose name was on the ballot, but subsequently removed as a candidate. Where such petitioner's name was not forwarded by their political party as their candidate, the tribunals often held that they did not participate in all stages of the election and thus could not file a petition. Conversely, the courts held that persons that contest elections, but whose nomination is subsequently invalidated by a Court in a pre-election matter, cannot file petitions. In all the cases analysed where a candidate sought to argue that he was the rightful candidate for his party after winning a pre-election matter and therefore had the right to sue, the court's position is that such a candidate has no right to file an election petition due to their non-participation in the election.

The Court of Appeal in **Araraume v. Okewulonu & Ors**[23] defines what constitutes participation in an election as follows:

> *" the legislative interpretation of what encapsulates or constitutes participation "in all stages of the election" implies that a candidate seeking political office or election into any position created under the Nigerian Constitution and the law must, along with the political party sponsoring him strictly comply with laid down statutory conditions and regulations and procedures under the Constitution of the Federal Republic of Nigeria 1999 (as amended) (CFRN) and the Electoral Act, particularly sections 31, 85, and 87 of the said Act."*

The Supreme Court in **Modibbo v. Usman**[24] held that by virtue of **section 285 (13)** of the CFRN, an Election Tribunal or Court shall not declare any person a winner at an election in which such a person has not fully participated in all stages of the election. 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 a candidate, in all the stages of the election, starting from his nomination, as a candidate to the actual voting.

In the case of **Onyeabor Ugochukwu Ngwu & LP v. INEC, Ezenta Ugochukwu Ezeani & PDP,**[25] the Petitioner/Appellant (Onyeabor Ngwu of the Labour Party) filed a petition against the return of the 2nd Respondent (PDP candidate, Ezenta Ezeani) as the winner of the Igbo-Etiti East State constituency election in Enugu State. The Petitioner did not contest

22 This issue was also observed with parties that complained that they were unlawfully excluded from an election. In such cases, the Tribunals also did not hear their case on the ground that they did not participate in the election.
23 (2021) LPELR - 55433 (CA)
24 (2020) 3 NWLR (PT. 1712) 470
25 (Unreported) Appeal No. CA/E/EP/SHA/EN/30/2023

the election because his nomination was annulled by a pre-election judgment of the Federal High Court. The Court of Appeal later reinstated him,[26] but after another candidate, Johncross Enyivigbo, was presented by the Labour Party (LP) as their candidate for the election. This candidate went on to contest but lost the election.

The Petitioner/Appellant (Onyeabor Ngwu) thereafter, filed a petition on the basis that he was the validly nominated candidate for the Labour Party, but the Tribunal disagreed holding that he was not a candidate in the election and therefore had no *locus standi* to sue. The Tribunal called his petition an abuse of court process, which should not have been received for filing in the first place since he did not contest.[27] The Tribunal further held that because he did not participate in the election and his name was not on the ballot or result sheet, he is not covered by section **133** (**1**) and (**b**) of the Electoral Act as a person who can bring an election petition.

Explaining the concept of participation in an election, the Tribunal noted that a political party's participation in an election is linked to that of the candidate they present or sponsor and that because of the lingering pre-election matter, the Labour Party (LP), by implication, had no candidate for the election. On appeal, the Court of Appeal agreed with the Tribunal stressing that a candidate must have participated in all the stages of the election and that none of the two LP candidates that were in a contest over nomination had the *locus standi* to present a petition because they did not participate in all stages of the election.

The Tribunal and Court of Appeal reached the same decision in the sister case of **Johncross Enyivigbo & LP v. Ezeani & 2 Ors.**[28] which was filed by the other LP candidate who contested but had his nomination invalidated by the Court of Appeal in a pre-election matter. Even though the Petitioner/Appellant in this case (Johncross Enyivigbo) was the person who contested the election on the LP platform, the Tribunal still held that he could not question the election because of the court judgment that removed him as candidate.

The Court of Appeal in affirming the Tribunal held that it is settled by the courts that:

> *"where a pre-election matter lingers or drags on until it is decided by the courts after the election in issue nullifying the candidacy of the person who contested the election, the political party will be deemed not to have had a candidate in the election."*[29]

The Court of Appeal added that the appellant was wrong in his belief that his petition was superior to the sister case of Onyeabor Ngwu noting that:

26 The Court of Appeal pre-election judgment on the LP candidacy for the election to this particular seat was delivered on 28th March 2023 which was after the State Assembly elections held on 18th March 2023.

27 Abuse of Court or judicial process simply means the use of a Court process mala fide or in bad faith to the annoyance of the opponent. An example is the institution ot multiple actions between the same parties with regard to the same subject matter and the same issue, in the same or another Court. **APM V INEC & 5 Ors** (Unreported) Appeal No. CA/PEPC/04/2023 at page 396

28 (Unreported) Appeal No. CA/E/EP/SHA/EN/25/2023

29 The Court cited Supreme Court cases **Orji Chima & Ors (2023) LPELR-60345-SC** and **Modibbo v. Usman** (Supra)

"…the two petitions as rightly submitted, rank equal in their collective incompetence; and even at that, the appellant's petition which was filed later in time is surely the worst abuse of court process." [30]

3.1.2 *Non-Joinder of a Candidate or Political Party Not Interested*

While it is expected that it is only persons that participated in an election that file election petitions, it should be noted that the failure of a petitioner to join his political party to a petition as a co-petitioner does not invalidate the petition. This issue came up in **Rhodes-Vivour v. INEC, Sanwo-Olu, Hamzat & APC**[31] where the respondents (APC and Babajide Sanwo-Olu) argued that the non-joinder of Labour Party by the Petitioner/Appellant Gbadebo Rhodes-Vivour, as a co-petitioner made his petition incompetent, and as a result, he lacked the *Locus Standi* to present the petition. The Petitioner/Appellant's response was that the non-joinder of the Labour Party by virtue of **section 133 (1) of the Electoral Act** does not affect the competence of his petition and that the law offers a choice to a candidate and/ or his sponsoring political party at an election to either present a petition individually or jointly. The Tribunal agreed with him on this point stating that it is unarguable that both a candidate, as well as the Political Party sponsoring the candidate, or both may present an election petition.

Similarly, in **Peter Obi & LP v. INEC, Bola Ahmed Tinubu, Kashim Shettima & APC (CA),**[32] the first petitioner, Peter Obi, in suing the APC candidate and winner of the presidential election, Bola Ahmed Tinubu (2nd respondent), did not include the first runner up, Atiku Abubakar, as a respondent and this issue was raised as an objection by the second respondent. Ruling against the 2nd respondent on this matter, the Court of Appeal held that by the import of **Section 133** of the Electoral Act, 2022, the contest in an election petition is strictly between the petitioner who challenges the outcome of the election, the person who was declared the winner of the election, and the Commission that conducted and declared the outcome of the election. This means that every candidate who lost the election and who is desirous of challenging the outcome of the election is expected to file his own petition against the winner of the election, and in so doing, he is not required to join any other candidate who lost the election like himself. [33] The Court further added that it is in furtherance of this that **Paragraph 50 of the 1st Schedule** to the Electoral Act, 2022 requires an Election Tribunal or Court to consolidate two or more petitions which are presented in relation to the same election or return.[34]

30 **Johncross Enyivigbo & LP v. Ezeani & 2 Ors.** (Supra) per Bolaji-Yusuff, JCA at page 18.
31 (Unreported) Petition No. EPT/LAG/GOV/04/2023
32 (Unreported) Petition No. CA/PEPC/03/2023
33 An unsuccessful candidate in an election cannot be made a party to an election petition against his will. See **Buhari & Anor. v. Yusuf** (2003) 14 NWLR (Pt. 841) 446 @ 520
34 See **Peter Obi & Anor. v. INEC & 3 Ors.** (Supra) @page 40

In **Onwuegbu Befford Anayo & PDP v. INEC, Chijioke Stanislaus Okereke & LP**[35] the Petitioner, Befford Anayo, was the first runner up/came second at the election for Aninri/Awgu/Oji River Federal Constituency won by Okechukwu Tobias Tobi whose name was on the ballot for the 3rd respondent, Labour Party (LP). While Okechukwu Tobi was declared the winner of the election, he ceased to be the LP candidate for the election following a pre-election judgment that voided his nomination.[36] Chijioke Okereke (2nd respondent) was declared the valid LP candidate by the Federal High Court and was therefore issued the certificate of return. The Petitioners (Befford Anayo and PDP) then filed this petition contending that it was Okechukwu Tobias Tobi who was declared the winner of that election and not Chijioke Okereke, therefore, INEC was wrong to issue him with the certificate of return. They added that because Okechukwu Tobi was not the valid LP candidate, his votes were wasted votes. The Labour Party on their part argued that the failure to join Okechukwu Tobi in the petition was fatal to the petition and made it void and incompetent.

The Tribunal held that while Chijioke Okereke (2nd respondent) was the rightful candidate for LP per the Federal High Court judgment, he did not fully participate in all stages of the election and should not have been issued a certificate of return. INEC's defence was that the court order to substitute the LP candidate came late – around the eve of the election when a name substitution for LP was not possible because election materials had been printed. Notwithstanding, the Tribunal chastised INEC holding that their issue of a certificate of return to the 2nd respondent (Okereke) is like replaying the scenario in the notorious case of **Amaechi v. INEC & Ors.**[37] which has since been rectified by the provision of **section 285(13) CFRN**. The Tribunal also held that Okechukwu Tobi's votes cannot be transferred to Chijioke Okereke who did not participate in the election. The Tribunal added that all the votes ascribed to Okechukwu Tobi are wasted votes and the failure to join him as a party does not affect the merit of the petition.

The Court of Appeal[38] affirmed the Tribunal's decision stating that political parties do not contest, win or lose election directly; that they do so by the candidates they sponsored and before a person can be returned as elected by a Tribunal or Court, that person must have fully participated in all stages of the election starting from nomination to the actual voting. It held that the Tribunal correctly applied section **136 (2)** of the Electoral Act which says that where an election is nullified on the ground that the winner was not qualified to contest, the person who scored the second highest votes (Befford Anayo in this case) shall be declared the winner.

35 (Unreported) Suit No. EPT/EN/HR/02/2023

36 In Suit Nos: FHC/CS/205/2022 and FHC/CS/218/2022

37 **2008) 5 NWLR (PART 1080) 227.** In this case, Amaechi contested the Primary Election on the Platform of PDP under the 2006 Electoral Act, and he won the Primary Election but another person's name, Celestine Omehia, was sent to INEC to contest the Governorship Election of Rivers State even though he did not participate in the party primary. Omehia was returned and was sworn in as a Governor while Amaechi was still busy challenging the purported right of his party to deny him the right to contest the election having emerged winner at the party primaries. The matter went up to the Supreme Court and Amaechi was declared winner. Section 285(13) CFRN has overtaken the decision in this case.

38 See: **LP v. ANAYO & 3 Ors.** (Unreported) Appeal No. CA/E/EP/HR/07/2023. See also **CPC & ANOR VS. OMBUGADU & ANOR (2013) 8 NWLR (PART 1385) 66** where this was stated by the Supreme Court.

It should be noted that parties who contest an election but lose are not seen as necessary respondents to an election petition. For example, in **Gbagi Kenneth Omemavwa & SDP v. INEC & 12 Ors.**[39] the Petitioner joined all the parties that contested the Delta State Governorship election in his petition. The Tribunal held that he incompetently sued respondents who were not returned or elected in the questioned election contrary to the Electoral Act and subsequently ordered for the names of nine out of thirteen respondents to be struck out. A similar issue arose in **Pela Kawahariebie Kennedy & LP v. INEC & Ors,**[40]where the Supreme Court affirmed the decision of the lower court to strike out the names of certain respondents not considered to be necessary parties. The apex noted that **section 133** forbids and prevents the "lumping and protuberance of names of parties in an election petition that was common in the past."[41]

The Box below contains examples of cases where the issue of a candidate's non-participation in the election was raised.

Box 1: Candidates Who did not Contest Elections, Filing Petitions

- **Imasuen Paul Murphy v. INEC, Osawaru Billy Famous Adesuwa & APC**[42] - The Tribunal held that the Petitioner lacked the *locus standi* to institute the petition having not participated in all stages of the election. From the declaration of the final result for Orhionmwon/Uhunmwonde Federal Constituency, it was the name of Ativie Elizabeth Uyinmwen that appeared as the candidate for Labour Party. The Tribunal held that the Petitioner did not contest the election on the Labour Party ticket and therefore, he cannot be said to have participated in all stages of the election.
- **Wagbara Chiemele Iheanacho & LP v. Uruakpa Chijioke, PDP & INEC.**[43] The Court held that the 1st Petitioner/Appellant (Iheanacho) was not the person sponsored by the 2nd Appellant (LP) and therefore lacked the *locus standi* to bring a valid petition before the court.
- **Hon. Ejiofor Vincent Chukwu v. INEC, Hon. Nwebonyionyeka Peter & APC.**[44] The Petitioner cannot maintain the petition in view of a Court of Appeal decision in a pre-election matter, CA/E/326/2022, where it was held that the Petitioner was not entitled to have his name forwarded to INEC as LP's candidate at the election.
- **Arc. Abiodun Abubakar Dabiri & LP v. INEC, Olawande George & APC.**[45] The Appellant lacked the locus standi to present the election because he was not a candidate and did not participate in the election given the fact that his name was not submitted to INEC in accordance with the Electoral Act, 2022. The Court of Appeal held that for an individual to claim that he is a candidate in an election he must show that he was not only nominated by his party but that his name was submitted to INEC within the 180 days prescribed in Section 29 (1) of the Electoral Act, 2022.
- **Abasiama Essien- Ette & 1 Or. v. Udeme Otong & 2 Ors.**[46] The Tribunal held that the 1st Petitioner having not contested in the election lacked the *locus standi* to bring a petition challenging the results.
- **Hon. Adamu Baba Mustapha, PDP v. INEC, Hon. Kabiru Mijinyawa, APC & Abdulhamid Tukur.**[47] The Court of Appeal held that the 1st Appellant was not qualified to present the petition before the Tribunal having not participated in the election. Consequently, the Tribunal lacked the jurisdiction to entertain the petition.

39 (Unreported) Petition No. EPT/DL/GOV/2/2023
40 (Unreported) SC/CV/1204/2023
41 Per U.M. Abba Aji, Supra @ page 24
42 (Unreported) Petition No. EPT/ED/HR/12/2023
43 (Unreported) Petition No. EPT/AB/SHA/9/2023
44 (Unreported) Petition No. EPT/EB/SEN/11/2023
45 (Unreported) Appeal No.CA/L/EP/SEN//13/2023
46 (Unreported) Petition No. EPT/AKW/SHA/03/2023
47 (Unreported) Petition No. CA/YL/EP/AD/SHA/12/2023

Overall, these cases underscore the need for pre-election matters to be concluded before the commencement of elections. There is a timeline overlap where the conclusion of a pre-election matter can still be pending while the election has commenced. This makes potential reliefs for litigants illusory. In addition, pre-election matters are heard by the Federal High Court and can be heard up to the Supreme Court while election petitions over legislative positions terminate at the Court of Appeal by virtue of **section 246(1)(b) of the Constitution**. The reason for this distinction is not clear and raises the need for reform in this area.

3.1.3 *Withdrawal of a Sponsoring Political Party from a Petition*

There were several cases where a sponsoring political party withdrew from a petition and the Tribunals ruled that the consequence is that the petitioner lost the *Locus Standi* to sue. 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.

For example, in the case of **Ngofa Oji Nyimenuate v. Mpigi Barinada & 2 Ors.**,[48] which concerned the election for the Rivers South-East Senatorial District, the Tribunal held that the withdrawal by the All Progressives Congress (APC) from the petition rendered the petition incompetent especially as the petitioner did not make effort to streamline the petition. The Tribunal's opinion was that despite the provisions of **section 133(1)** of the Electoral Act, since the Petitioner, Ngofa Nyimenuate, and his political party filed a joint petition seeking joint reliefs, they either swim or sink together. It, therefore, concluded that the legal effect of the withdrawal of APC from the joint petition is that it has conceded the election and no longer wishes to dispute the declaration and return of the PDP candidate, Mpigi Barinada.

In **Cole Tonye Patrick v. INEC, Fubara Siminalayi & PDP,**[49] the APC candidate for the Rivers State Governorship election, Tonye Cole, who is the Petitioner/Appellant in this case, approached the Tribunal after losing the Rivers State governorship election. However, prior to the commencement of the hearing of the Petition, the APC dramatically withdrew from the proceeding and its name was accordingly struck out by the trial Tribunal. The APC had, via an affidavit submitted to the Tribunal, said that it had reviewed the process, procedure, facts and circumstances regarding the conduct of the election that led to the petition and decided to withdraw from the petition. In response, the PDP and its candidate, Siminalayi Fubara (2nd and 3rd Respondents) alleged that APC's withdrawal meant that they had conceded the election. They claimed that the party had given a directive to Tonye Cole to withdraw, which he disobeyed with his persistence with the petition and that Cole was bound by the decision of APC to withdraw from the petition, as the party is supreme.

48 (Unreported) Petition No. EPT/RV/SEN/08/2023
49 (Unreported) Appeal No. CA/ABJ/EP/GOV/RV/121/2023

The Tribunal consequently dismissed the petition ruling that Tonye Cole lost *Locus Standi* to petition the election following APC's withdrawal and in doing so, posed this question:

> *"There is only one issue here. Rivers State Governorship elections of 18th of March, 2023. The party has taken a decision and have gone with their broom flag, the flag bearer is still in the tribunal doing what?"*[50]

The matter went on appeal where the issue of whether the Tribunal was wrong in dismissing Cole's petition on account of the APC withdrawing from the Petition was raised. The Court of Appeal, relying on the Supreme Court's decision in **Ihedioha v. Nwosu**[51] overruled the Tribunal stating that APC's decision to withdraw from the suit did not equate to their withdrawal of the petition. It held further that it is not lawful or reasonable to conflate the status of Tonye Cole with that of APC because their rights to bring a petition were independently acquired, as they post-date the holding of the election. It added that neither the Appellant (Cole) nor the political party (APC) may impede the statutory right conferred on each other, even where they have filed a petition together. While the Appellant, Tonye Cole, lost his appeal on other grounds, this position was affirmed by the Supreme Court.

50 **Cole Tonye Patrick v. INEC & 2 Ors.** (Supra) @ page 20
51 (2019) LPELR-52790 (SC)

Box 2: Cases of Withdrawal of a Sponsoring Political Party from a Petition

Jumbo Dabota Godswill v. Jumbo Victor Oko & 2 Ors.[52]

The Tribunal held that the Petitioner and APC jointly filed the petition, hence the withdrawal of APC from the petition denies the Petitioner of the competence to continue with the petition. The Court of Appeal held that the Tribunal was wrong in adjudging the Appellant's petition as defective and incompetent because APC, the party that sponsored her withdrew from the petition.

Bank Goteh Gbarane v. INEC, Ngbar Bernard Baridamue & PDP[53]

The same Tribunal decision as above was delivered. The Court of Appeal held the Tribunal was wrong in adjudging the Appellant's petition as defective and incompetent because APC withdrew from the petition.

Duke Ibim Dagogo v. Abbey Peter Enemeneya & 2 Ors.[54]

Same as above. The Tribunal held that the petitioner lost the *locus standi* to maintain the petition after APC was struck out of the petition. The Court of Appeal set aside this decision on the ground that the withdrawal of APC from the petition does not render the petition incompetent.

Other Rivers State Petitions with the same outcome.

- **Masi Prince Ernest v. INEC; Nwabochi Frankline Uchenna; PDP**[55]
- **Ubani Kelechi Kenneth v. Enyinna & 2 Ors.**[56]
- **Nwokocha Raymond v. INEC & 2 Ors.** [57]
- **Emeka Edeh Emmanuel v. INEC & 2 Ors.** [58]

Note: In **West Okorinama v. George Enemi Alabo & 2 Ors.,**[59] the Tribunal rightly ruled that APC's withdrawal did not affect the petition.

3.1.4 *Winners Filing Cross-Petitions*

In spite of the provision of **sections 130 and 133** of the Electoral Act and existing case law that prescribes how to and who can file a petition, there were a few cases where the respondent in a petition or winner of the election filed a cross-petition to challenge the petitioner's case. The tribunal/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.[60]

In **Gwacham Maureen Chinwe & APGA v. Okafor Uchenna Charles & 3 Ors,**[61] the cross-petitioner, Maureen Gwacham, was returned as the winner of the Oyi/Ayamelum Federal Constituency election in Anambra State. Her return was contested by the cross-

52 (Unreported) Appeal No.CA/ABJ/EP/SHA/RV/122/2023
53 (Unreported) Appeal No. CA/ABJ/EP/SHA/RV/124/2023
54 (Unreported) Appeal No.CA/ABJ/EP/SHA/RV/128/2023
55 (Unreported) Appeal No. CA/ABJ/EP/SHA/RV/133/2023
56 (Unreported) Appeal No. CA/ABJ/EP/SHA/RV/126/2023
57 (Unreported) Appeal No. CA/ABJ/EP/SHA/RV/129/2023
58 (Unreported) Appeal No. CA/ABJ/EP/SHA/RV/131/2023
59 (Unreported) Petition No. EPT/RV SHA/25/2023
60 A cross-appeal (at appeal stage) is however allowed after a case has been decised by the tribunal and the respondent disagrees with some part of the judgment was not granted all the reliefs requested.
61 (Unreported) Petition No. EPT/AN/HR/13/2023. Appeal No. CA/AW/EP/HR/AN/13/2023

respondent Okafor Uchenna Charles (the petitioner in the main petition)[62] on the ground that she did not win the majority of lawful votes cast. In response, she filed this suit separate from the main petition to argue that the election result, as declared, did not represent the accurate score and margin with which she won the election. She contended that a true and proper computation of results from the polling units and respective collation centres would show that there were errors in the collation of results that led to the reduction of her votes and that she was elected with a higher margin than what was declared by INEC. The Tribunal dismissed her cross-petition and she appealed.

The Court of Appeal upheld the Tribunal's decision holding that her contention was not a competent ground for filing a petition under **section 134** of the Electoral Act.[63] The Court held that she misconstrued and misconceived the concept of cross petitions as mentioned in paragraph **18 (7) (g)** of the First Schedule to the Act, which makes reference to cross-petitions by other parties to an election that can be consolidated. The Court per Yargata Nimpar, JCA, further held as follows:

> *"The Act does not provide for a ground enabling the winner of an election to still challenge the conducted election merely because the winner feels he is entitled to more votes than the ones relied on in declaring him the winner. As a matter of fact, it is very strange and unimaginable that a winner would still turn back to challenge his election…"* [64]

The Court held that she should have come under **paragraph 15 of the First Schedule to the Act** if she was, in replying to the petitioner's case, objecting to the votes of the petitioner, but that the objection must be within the limits and confines of the case of the petitioner. This provision allows a winner or respondent in an election petition to object to or counter votes credited to or claimed by the petitioner in the election and states as follows:

> ***"Particulars of votes rejected***
>
> *15. When a petitioner claims the seat alleging that he had the highest number of valid votes cast at the election, the party defending the election or return at the election shall set out clearly in his reply particulars of the votes, if any, which he objects to and the reasons for his objection against such votes, showing how he intends to prove at the hearing that the petitioner is not entitled to succeed."*[65]

62 **Okafor Uchenna Charles & Anor v. INEC, Gwacham & APGA**. (Unreported) Petition No. EPT/AN/HR/11/2023

63 See also **Hon. Chris Emeka I. Azubogu, APGA v. Obinna Chukwudum Uzoh, LP, INEC, Patrick Ifeanyi Ubah & YPP.** (Unreported) Appeal No. CA/AW/EP/SEN/AN/19/2023

64 Supra at page 14 – 15. Interestingly, the return of the respondent, Maureen Gwacham, was affirmed by the Court of Appeal in the main/substantive suit of: **Gwacham v. Okafor & 3 Ors. (CA/AW/EP/HR/AN/17/2023)** for failure of the Petitioners/Respondents (YPP & APGA) to discharge the burden of proof. The Tribunal had upheld the Petition in part and ordered a supplementary election in some PUs which the Court of Appeal set aside.

65 Where a party defending an election or return fails to comply with **paragraph 15** of the 1st schedule to the Electoral Act, 2022, the result tendered by the Petitioner would be deemed unchallenged and uncontroverted. See **Agagu v. Mimiko** (2009) 7 NWLR PT. 1140 342. See also **Uzodinma v. Ihedioha** (2020) LPELR 50260 (SC) pp 31 - 40 para E- D.

The cross-petitioner, Gwacham, had relied on **paragraph (18) (7) (g)** of the First Schedule to the Act, which makes reference to the hearing of "cross-petitions" to argue that cross-petitions are allowed by the Act. The Court explained that cross petitions here refer to other petitions filed by different parties that can be consolidated. The Court of Appeal held as follows:

> *"If the Appellant wanted to reject some votes, she must come by way of paragraph 15 of the 1st schedule and not a cross petition…. this Appellant's cross-petition is highly defective on every side, both from the angle of filing the cross-petition which is not provided by the Electoral Act and from the angle of the incompetent ground used in filing the cross-petition. The Tribunal had every reason to dismiss the cross-petition for being incompetent and the Tribunal was absolutely right in doing so. The Appellants contention is quite new and irregular when compared to usual election matters, but it is sadly an unfortunate development in the jurisprudence of election matters..."*

The Court further explained that generally, a cross action is a feature of a normal civil suit but because election petitions are known to be sui generis, which is in a class of its own, ordinary principles that apply to civil proceedings do not apply to election litigation. Moreover, the court stated that where the law prescribes the method of doing a thing, it excludes other ways, and only that method must be employed.[66]

A similar situation was observed in the Nasarawa State governorship case of **Ombugadu & Anor v. INEC, Sule Audu Alhaji & APC**[67] where the 2nd and 3rd respondents raised objections to some of the votes credited to the petitioner. The Tribunal[68] was of the view that the respondents clearly and distinctly set out the votes of the Petitioners which they object to pursuant to **paragraph 15** of the First Schedule to the Electoral Act, 2022 and declined to make an order striking out the paragraphs of the petition containing those objections. While this case went up to the Supreme Court, the application of paragraph 15 was not the issue in focus, thus, there was no ruling on it by the apex court.

The requirement for a respondent to restrict his objection to a petitioner's votes to the confines of the petitioner's case is illustrated in **Natasha Akpoti-Uduaghan & Anor v. Ohere Sadiku Abubakar & 2 Ors**[69] where the Tribunal held that **paragraph 15 of the 1st Schedule** to the Electoral Act cannot be used to challenge an election in its entirety nor interpreted to contradict **section 130 (1) of the Act** which states how to challenge an election. Here the 1st Respondent (Ohere Abubakar) as part of his defence, challenged the scores in the Kogi Central Senatorial election where he was returned winner. The scores or

66 The Court relied on **APC v. ADP & Ors** (2021) LPLER-54280(CA), **Ndifon v. C.O.P** (2022) 18 NWLR (PT. 1862) 421 (SC)
67 (Unreported) Petition No. EPT/NS/GOV/01/2023
68 relying on **Adamu Muhammed & Anor v. INEC & Ors** (2015) LPELR- 400631(CA) pages 28 – 36.
69 (Unreported) Petition No. EPT/KG/SEN/03/2023

votes being challenged were PU results that were outside the areas/results being contested by the Petitioner, Akpoti-Uduaghan in her petition. To counter Akpoti-Uduaghan's allegation that scores were inflated to his benefit and aided his win, he sought to bring evidence to prove that there were areas where he should have gotten more scores. The EPT held that it was a miniature petition and that reliance on **paragraph 15 of the First Schedule** to challenge his election and return would be contrary to and overruling the provisions of **section 130 (1)** of the Electoral Act. The Tribunal added that a respondent should limit his objections and confines of the case of the petitioner especially the grounds relied upon by the petitioner since there is nothing like a cross petition. The Tribunal specifically stated as follows:

> *"It is indeed ironic that the Respondent, the candidate returned as the winner, will be challenging the election results used in declaring him the winner…Instead of conceding to the 1st Petitioner winning the election, he rather is asking the Tribunal to "Split the baby" as done by the woman who was not the mother of the baby in the judgment by King Solomon over two women fighting over the baby, as contained in the Holy Bible."*[70]

The Court of Appeal affirmed the Tribunal's decision holding that an election can only be questioned by way of a petition in conformity with **Section 130** of the Electoral Act,[71] and that **paragraph 15** of the First Schedule to the Electoral Act dealing with objection to votes cannot be used to challenge the election based on the complaint of non-compliance.

3.1.5 *Non-Joinder of Persons Accused of Criminal Conduct*

An unsuccessful candidate in an election cannot be made a party to an election petition against his will,[72] but where allegations have been made against a person named in a petition, then that person ought to be joined. However, the non-joinder of such a person will not vitiate the entire petition.

In **Wada v. INEC,**[73] the Supreme Court held that criminal allegations in election petitions are personal to the person who is accused of committing such offences and that because such criminal allegations cannot be transferred from one person to another, it follows that 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.

This position was reiterated by the Court of Appeal in **Abubakar Atiku & PDP v. INEC, Bola Ahmed Tinubu & APC** [74] where the Chairman of Olamaboro Local Government

70 **Akpoti-Uduaghan & Anor v. Ohere Sadiku Abubakar & 2 Ors.** (Supra) at page 62 – 63
71 See also: **Azubogu, APGA v. Uzoh & 4 Ors.** (Unreported) Appeal No. CA/AW/EP/SEN/AN/19/2023. This was an appeal from a cross-petition. The Court of Appeal also held here that there was no provision for a cross-petition in the Electoral Act.
72 **Ohere Sadiku Abubakar & Anor v. Akpoti-Uduaghan & 2 Ors**. (Unreported) Appeal No. CA/ABJ/EP/SEN/KG/35/2023. See: **Buhari & Anor. v. Yusuf** (2003) 14 NWLR (Pt. 841) 446 @ 520
73 (2022) 11 NWLR (PT. 1841) 293 @ 232 paras E-G
74 (Unreported) Petition No. CA/PEPC/05/2023

Area (LGA) of Kogi State, Friday Adejoh, was accused by the Petitioner (Abubakar Atiku) of leading thugs at gunpoint to force Electoral officers in some polling units in the LGA to declare concluded elections in the said units as cancelled. The former Governor of the State, Yahaya Bello was similarly accused in the petition of committing electoral malpractices, wielding a gun and leading thugs to compel cancellation of concluded elections in polling stations. They were not joined as respondents, therefore the paragraphs referencing these allegations were struck out and discountenanced by the Court.

The Petitioner argued that both persons are not persons contemplated by **section 133** of the Electoral Act 2022 to be joined to an election petition, but the court disagreed holding that **section 133** only deals with the issue of which contestant of an election ought to be joined in an election petition by a co-contestant. The court added that it has nothing to do with the issue of joining of third parties against whom allegations of electoral infractions are made by petitioners as in this case. Furthermore, such persons must be joined to the petition if the court is not to be exposed to the risk of infringing their fundamental right to fair hearing guaranteed by the Constitution.[75] The Court of Appeal referenced the Ondo State Governorship case of **Eyitayo Jegede & Another v. INEC & Ors**[76] where criminal allegations were made by the Petitioners in that case against the then National Caretaker Committee Chairman of the APC, Governor Mai Mala Buni of Yobe State. Because he was not joined, the allegations were struck out. Overall, the non-joinder of such persons does not mean that the whole petition will be struck out, but the allegations will be struck out and not entertained by the tribunal or court.

3.2 INCOMPETENT GROUNDS FOR FILING A PETITION

3.2.1 *Improperly Couched Grounds and Particulars by Petitioners*

A petitioner in an election petition who scales the hurdle of *locus standi* must restrict his grounds to the limit prescribed by law. Many petitions in the 2023 Election Petition Tribunals were dismissed because of reliance on invalid grounds for challenging an election. The Electoral Act, 2022 in Section 134(1) outlines specific grounds for questioning an election as follows:

> *"134(1) An election may be questioned on any of the following grounds:*
> *(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 by a majority of lawful votes cast at the election."*

75 **Atiku v. INEC** (Supra) @ pages 515-517 and 521. The Court of Appeal relied on the Supreme Court's Judgment in **Nwankwo v. Yar'adua (2010) 12 NWLR (Pt. 1209) 518 at 583** where it held that it is necessary to join in a petition, a person whose conduct in the election is in question in order to afford such party a fair hearing.
76 (2021) LPELR-55481 (SC)

An election petition that strays outside these prescribed grounds will be struck out for being incompetent.

The Supreme Court in **Ojukwu v. Yar'adua & Ors.**[77] held that the grounds for challenging an election petition must be those stated in the Electoral Act and where a petitioner chooses to use his own words, the words used must convey the exact intent and purpose as those used by the legislature in the Electoral Act. The tribunals were not liberal on this unfortunately and seemed to prefer petitioners using the exact words in the Electoral Act. Consequently, many petitions failed because they lumped the grounds together, particularly those in **section 134(1)(b)**, which requires separating allegations of corrupt practices from those of non-compliance.

The courts have held in some cases that both grounds can be joined but must be pleaded differently, that is, the facts and evidence for each ground must be presented separately. The reason is that they have different standards of proof – non-compliance is proved on a balance of probabilities while an allegation of corrupt practices has the same burden of proof as in criminal cases, i.e., "beyond reasonable doubt."

3.2.2 *Lumping Corrupt Practices & Non-Compliance*

With regards to section **134 (1) (b)**, 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," thus replacing 'or' with 'and.' In the latter case, the tribunals were mostly unanimous that this was a clear instance of lumping based on the function of the conjunction 'and.' However, where 'or' was used, which is an express restatement of the Act, the tribunals in a few instances considered the petition on its merits, focusing on the grounds supported by particulars in the petition.

For example, in the case of **Bello Muhammad Matawalle & APC v. Dauda Lawal, PDP & INEC,**[78] the Tribunal ruled that the grounds of 'corrupt practices or non-compliance,' though lumped together, were competent based on the decisions in **Ojukwu v. Yaradua**[79] and **Buhari v. Obasanjo.**[80] However, the general practice of the tribunals was to strike out grounds that were written together, regardless of whether 'or' or 'and' was used[81]. When grounds are struck out in a petition, the effect is that facts pleaded in the petition and the

77 (2009) 12 NWLR (Pt. 1154) 50
78 (Unreported) Petition No. EPT/ZM/GOV/02/2023
79 (2009) 12 NWLR (pt.1154) 50 @121-122
80 (2005) 2 NWLR (pt.910) 241
81 See **Paragraph 4 (7) of the First Schedule** that says that an election petition, which does not comply with the provisions of this paragraph on the form and contents of a petition, is defective and may be struck out by the Tribunal or Court.

accompanying reliefs which are in support of the flawed ground equally stand struck out, as they have no ground to stand on. This can be damaging for a petitioner as every fact and evidence adduced in support of that ground collapses and goes to no issue.

Sometimes, the objections raised on this matter by litigants came across as trivial. An example is the case of **Dahiru Yusuf Liman v. Katuka Solomon & 3 Ors**.[82] where it was argued that the Petitioner used the plural "Respondents" not "Respondent" as contained in the Act. An objection was raised that it violates **section 134 (1)(c)** of the Act because it did not use the exact words in the statute. The Court dismissed this objection holding that pluralising what is singular in the Act does not water down the clarity of the grounds the petitioner wishes to base his claim.

In **Adebutu Oladipupo Olatunde & Peoples Democratic Party v. INEC, Abiodun Adedapo Oluseun & (APC),**[83] the Tribunal struck out the petitioner's ground for questioning the election that merged corrupt practices with non-compliance in one ground. It read as follows: "*The election of the 2nd Respondent was invalid by reason of non-compliance with the provision of the Electoral Act, 2022,* ***and*** *by reason of corrupt practices.*"

On appeal, counsel to the Petitioner/Appellant (Adebutu) argued that **section 134 (1)(b)** contains two limbs in one ground and not two separate grounds as misconceived by the Tribunal and permits the appellants to challenge the election either on the ground of corrupt practices or non-compliance with the provisions of the Electoral Act or on both corrupt practices and non-compliance.[84] The Tribunal had also struck out the ground which challenged the election on the ground that *"the 2nd Respondent was not duly elected by the majority of lawful votes cast at the election."* The issue here was that the Petitioner/Appellant added the words "2nd Respondent" which is not an exact replication of **section 134 (1)(c).** The Tribunal, in what looked like a technicality, held that it was incompetent for circumscribing, limiting and personalising the complaint to the election of the 2nd Respondent alone.

While the Court of Appeal dismissed the petitioner/appellant's case (for other reasons, majorly for failure to discharge the burden of proof), the lead judgment disagreed with the Tribunal's reasoning that the grounds of non-compliance and corrupt practices could not be merged in appropriate cases. This was because the facts supporting both grounds were separately pleaded in the petition. The dissenting judgment of Hon. Justice Jane Inyang, JCA, explained this further by stating that there was no need for the Tribunal to strike out the ground lumping non-compliance and corrupt practices if they are well particularised under different headings in the pleadings.

82 (Unreported) Appeal No. CA/K/EP/SHA/KD/41/2023

83 (Unreported) Petition No. EPT/OG/GOV/03/2023; (Unreported) Appeal No. CA/IB/EP/GOV/OG/22/2023

84 The counsel relied on **Deen & Anor v. INEC & Ors**. (2019) LPELR -49041 (CA) pp12-16 para C, where the Court of Appeal held that, *"...in my view, Section 138 (1)(b) of the Act (now Section 134(1)(5) of the Electoral Act, 2022) gives the Petitioner the option to plead or rely on either the allegation of non-compliance with the Electoral Act or corrupt practices or both. This is why they are in one paragraph under Section 138 of the Act."*

The facts were a bit different in **Rhodes-Vivour v. INEC & 3 Ors.**[85] where the Tribunal struck out the second ground of the petition of Rhodes-Vivour (Petitioner/Appellant) for being unknown to **section 134** of the Electoral Act, 2022. The said ground stated that:

> *"the election of the 2nd respondent was invalid by the reasons of corrupt practices or non-compliance with the provisions of the Electoral Act 2022* ***and Constitution of the Federal Republic of Nigeria 1999.***"

Counsel to the 2nd respondent (Babajide Sanwo-Olu) argued that it was incompetent and strange to the Electoral Act because it inserted the phrase "Constitution of the Federal Republic of Nigeria 1999." The Tribunal agreed that even though a petitioner is permitted to use his own language in couching the grounds of his petition, the ground so couched by him must not expand or subtract from the provisions of **section 134** of the Electoral Act 2022 and that the Petitioner "overshot the boundary" by adding that phrase. The Court further held that:

> *"… each ground of the said Section 134 (1) (b) must be relied upon separately. A Petition is incurably defective and incompetent where two disjunctive grounds are lumped together as one ground. So as lumping the two grounds together renders the petition vague, generic and nebulous."*

This case demonstrates the debilitating effect of striking out a ground for questioning an election as only one of the petitioner's three grounds for questioning the Lagos State governorship election survived. The petitioner was left to prosecute the petition on the sole ground of non-qualification of the respondents, which eventually failed. Similarly, in the aforesaid Adebutu's case, the tribunal struck out the petitioner's 3 grounds, essentially crippling the petition. On appeal, counsel to the petitioner/appellant argued that the tribunal showed a pre-determined disposition to dismember and peremptorily dismiss the petition at the outset of the hearing and that this was a technicality taken too far. While the Court of Appeal agreed that the tribunal relied on some wrong reasons in reaching its decision, it upheld the dismissal of the petition on the basis that the case was heard on its merit and the burden of proof was not discharged.

Notwithstanding issues of technicality, in several cases, petitioners went far outside the Electoral Act to import their own grounds. An example is the case of **Bello Kabiru & PDP v. INEC, Kaoje, & 11 Ors.**[86] The contentious ground in the petition was "*Gross failure in the mandatory electronic transmission of result (IREV) only 20% of result transmitted.*" The petitioner also included overvoting as one of the grounds in his petition. They were both held to be outside the valid grounds outlined in **section 134(1)** of the Electoral Act, 2022.

85 Supra
86 (Unreported) Petition No. EPT/KB/HR/01/2023

Box 3: Lumping of Grounds of Petitions

- **Hon. Dennis Oguerinwa Amadi & LP v. Engr. Osita Ngwu, PDP & INEC.**[87] The tribunal held that the use of the word 'OR' connotes alternatives therefore quoting section 134(1)(b) verbatim would amount to lumping grounds and thus liable to be struck out.

- **Misbahu Rabiu & Anor. v. Makki Abubakar Yan'Leman & 2 Ors.**[88] The Petitioners' grounds were declared incompetent because their Ground 1 merged corrupt practices with non-compliance and Ground 2 expanded the wordings of section 134 of the Electoral Act, 2022 by adding non-compliance with *"…. constitutional requisites."*

- **Linus Abaa Okorie & LP v. INEC, Engr. David Nweze Umahi & APC.**[89] The second ground of the petition which stated that "the election was invalid by reason of corrupt practices 'and' non-compliance with the Electoral Act", was struck out for the lumping of grounds contrary to section 134(1)(b) and upheld by the Court of Appeal.

- **Ohio-Ezomo Michael Imorhin & APC v. INEC, Agbeaku Blessing Sheriff & PDP.**[90] The Tribunal held that the presentation of the petition made ground one therein unsustainable and incompetent because the petitioners not only joined together the disagreeable and alternative twins of non-compliance and corrupt practices as their ground one, but they also lumped the facts in support of both under a single roof.

- **Safiyanu Aliyu Aminu & APC v. INEC, Emmanuel Kefas & PDP.**[91] Petitioners lumped non-compliance with the provisions of the Electoral Act with "*non-compliance with the Regulations and Guidelines for the Conduct of Elections*" which runs contrary to the provisions of the law and further strips the Tribunal of the Jurisdiction to entertain it. Concurring with the decision of the Tribunal, the Court of Appeal held that the Petitioners while opting to use their own words in framing the sole ground of the petition, expanded the scope of the statutory provision under the Act.

- **Ohiomero Amaka Joy & LP v. INEC, APC & Ajiya Abdulrahaman.**[92] The Petitioners lumped together all the grounds contrary to the provision of the Act, and according to the Tribunal, it became a fundamental breach of section 134 (1) (b) and (c) of the Electoral Act, 2022. Apart from the grounds being lumped together, the petition was also compiled and inelegantly drafted contrary to **paragraph 4 (2)** of the First Schedule to the Electoral Act, 2022, hence, the Petition was held to be incompetent, robbing the Tribunal of jurisdiction to entertain to it.

3.2.3 *Incompatible Grounds, Particulars, and Prayers*

The Courts have held that Petitions must be coherent and precise. The grounds must align with the particulars and prayers as outlined in **Paragraph 4 (1) (d)** of the 1st Schedule to the Electoral Act, 2022 which provides that:

> *"4 (1) An election petition under this Act shall—*
> *(d) state clearly the facts of the election petition and the ground or grounds on which the petition is based and the relief sought by the petitioner."*

87 (Unreported) Petition No. EPT/EN/SEN/07/2023
88 (Unreported) Petition No. EPT/JG/HR/03/2023
89 (Unreported) Petition No. EPT/EB/SEN/07/2023. Appeal No. CA/ABJ/EP/SEN/EB/74/2023
90 (Unreported) Petition No. EPT/ED/SHA/05/2023
91 (Unreported) Petition No. CA/YL/EP/AD/SHA/07/2023
92 (Unreported) Petition No. EPT/FCT/HR/04/2023

The grounds of a petition shall be set out separately from the facts to be adduced in support of the grounds. By **paragraph 4 (2)** of the First Schedule, the facts in support of the grounds of the petition must be distinctly stated. They must also be succinct, precise, and not vague, improper, speculative, generic, omnibus or nebulous. Any petition that is infested with a deficiency in the manner which it sets out facts in support of the grounds of petition is considered dead on arrival.[93]

In the Presidential Election Petition of **Atiku & Anor v. INEC & 2 Ors.,**[94] the Court of Appeal held that the petitioners (Atiku and PDP) did not plead facts in support of non-qualification or disqualification of 2nd Respondent (Bola Tinubu) in their petition and their efforts to remedy it through their replies to respondents' replies were belated. The Supreme Court upheld this decision as well as the decision of the Court of Appeal to strike out several paragraphs of the petition alleging wrongful cancellation of polling unit results in various Local Governments for being vague, imprecise and lacking particulars.

Because it is the ground on which a petition is based that determines the nature of the reliefs a petitioner is entitled to, there must be a correlation between the ground and the facts in support of the ground on one hand and the relief sought on the other hand. Therefore, grounds and facts in support must not run against the reliefs sought. This is captured in **Paragraph 4(3)(a)** of the First Schedule which provides that:

> *"(3) The election petition shall—*
> *(a) conclude with a prayer or prayers, as for instance, that the petitioner or one of the petitioners be declared validly elected or returned, having polled the highest number of lawful votes cast at the election or that the election may be declared nullified, as the case may be;"*

Based on this, the Courts have held that a Petitioner cannot seek reliefs that are at variance with the grounds upon which his/her petition is premised. The petition will be incompetent where reliefs sought have no bearing with the grounds complained of. It would render the ground incompetent and liable to be struck out.[95] For example, in the case of **Hon. Ahmed Usman Gummi & APC v. INEC, Engr. Suleiman Abubakar Gummi & PDP** [96] one of the grounds for the petition was that the election was invalid for being conducted contrary to the Electoral Act. However, the petitioner's third relief requested the Tribunal to declare the first petitioner as the winner of the said invalid election. It was held that a Petitioner alleging corrupt practices can only seek nullification and a rerun, not a declaration of themselves as the winner.

93 See: **Rhodes-Vivour v. INEC & 3 Ors.** (CA) (Supra)
94 Supra
95 **Obiuwevbi v. INEC** (2019) LPELR-48895 (CA) pp 33-38 Para E-D.
96 (Unreported) Petition No. EPT/ZM/HR/04/2023

Also, in **Hon. Olatunji Abiola Shoyinka & PDP v. Lanre Okunola, APC & INEC**[97] the Tribunal held that the facts pleaded in support of the two grounds of corrupt practices and non-compliance with the Electoral Act were lumped leaving the court in speculation as to which facts pleaded were for the two grounds. It further held that the reliefs sought in the Petition do not synchronize with the grounds of the Petition or bear relevance to the grounds relied upon by the Petitioner.

Other instances where petitions failed due to incompatibility of grounds with particulars include 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 with the Electoral Act but failed to mention the polling units where the alleged non-compliance occurred. For example, in **Ferdinand Dozie Nwankwo & APGA v. INEC, LP & Umeh Victor Chukwunonyelu,**[98] grounds 2 and 3 of the petition were struck out because the pleadings in support did not mention any polling unit where the alleged non-compliance occurred. Additionally, the petitioners pleaded facts relating to non-qualification instead of facts relevant to not being elected by the majority of lawful votes, which was one of the grounds of the petition.

Petitions with incompatible elements were often dismissed, and in other cases, they failed because the offending parts of the petitions, which were fundamental to the case, were struck off.

3.2.4 *Unlawful Exclusion as an Incompetent Ground for Petitions*

Some petitions raised unlawful exclusion from the election, but they were dismissed because it is no more a ground for filing a petition under the 2022 Electoral Act. Under the repealed Electoral Act 2010, **section 138 (1)** provided five grounds for presenting an election petition. Besides grounds (a) (b) and (c) retained in the 2022 Act, Grounds (d) and (e) were –

> *"(d) that the Petitioner or its candidate was validly nominated but was unlawfully excluded from the election;* [99] *and*
>
> *(e) that the person whose election is questioned had submitted to the Commission affidavit containing false information of a fundamental nature in aid of his qualification for the election."*[100]

By deleting these two grounds, the 2022 Electoral Act removed issues which are in the realm of pre-election matters from being raised during petitions and narrowed down the scope of the grounds for election petitions. To prove the former ground (d), valid nomination but unlawful exclusion, candidates and parties often claimed that they were excluded from participating in

97 (Unreported) Petition No. EPT/LAG/HR/03/2023
98 (Unreported) Petition No. EPT/AN/SEN/05/2023
99 This was originally enacted in 2010
100 This ground was added in the 2015 amendment to the 2010 Electoral Act

the election because the name or logo of their political party was not duly represented in the ballot or other materials for the election. These kinds of complaints are now covered under **section 285 (14)(c) CFRN 1999** 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.

The removal of this ground in the Act did not prevent some petitioners from raising it in the post-2023 election petitions. For instance, in **Musa Abba Ali & LP v. Aminu Ahmad Chindo, PDP & INEC,**[101] the petitioner raised the ground of unlawful exclusion. It was held that this is no longer a ground to challenge an election as it has been repealed by the provisions of the Electoral Act, 2022 and the Tribunal lacked jurisdiction to adjudicate on it. The same decision was reached in **Hon. Olatunji Sanni & LP v. INEC, Oshun Moshood Olanrewaju & APC**[102] where the Tribunal held that the ground of unlawful exclusion raised by the petitioner and formerly accommodated in the Electoral Act, 2010 is no longer a provision in the Electoral Act, 2022.

In some cases, petitioners tactically avoided raising unlawful exclusion as a ground and tried to come under non-compliance with the Electoral Act to argue that their party logo was omitted, but they were often unsuccessful. An example is the case of **Gbogbolomo Adewale Funmilola Maryam & NNPP v. INEC, Alli Sharafadeen Abiodun & APC.**[103] This case involved the alleged omission of the logo of the New Nigeria People's Party NNPP in the Oyo South senatorial district election. The Petitioner/Appellant (Maryam Gbogbolomo) and her party, NNPP, alleged that their logo was omitted from the ballot paper, thus resulting in the disenfranchisement of their members and supporters who were registered to vote. While the Petitioner raised non-compliance with the Electoral Act as a ground for her petition, the facts she pleaded pointed to unlawful exclusion.

The Respondents argued that a petition can no longer be presented on the ground of unlawful exclusion and therefore the petition was outside the scope of the provision of **section 134 (1)** of the Electoral Act. They also contended that the case was a pre-election matter; that by **section 42** of the Electoral Act, the power to design the format, shape and style of ballot paper is that of INEC and that the petitioner having failed to complain to INEC within the statutory window period of 20 days given by the Act, their complaints after the conduct of the election is an afterthought.

The Court of Appeal affirmed the Tribunal's decision and dismissed the appeal for these reasons, holding that issues bordering on INEC omitting a political party's identity is a pre-election matter by **section 285 (14) (c)** of the Constitution. Moreso, that **section 42(3)** of the

101 (Unreported) Petition No. EPT/KT/HR/01/2023
102 (Unreported) Petition No. EPT/LAG/HR/10/2023
103 (Unreported) Petition No. EPT/OY/SEN/01/2023, Appeal No. CA/IB/EP/SEN/11/2023

Electoral Act gives a timeframe for political parties to inspect their logos before the election. The Court also found that the NNPP did not prove their case because there was evidence that they garnered some votes – slightly over 1,000 – at the election thus contradicting their claim of disenfranchisement. Furthermore, the court held that the petitioners did not bring any voter to testify that they were disenfranchised as required under the law.

A similar issue was raised in a petition by a candidate for the Oyo North senatorial district election. In **Shuaib Adeniyi, NNPP v. INEC, Buhari Abdulfatai & APC,**[104] the petitioner raised non-compliance with the Electoral Act as a ground for his petition. The facts were that INEC failed to include the NNPP's approved logo on the ballot and this meant that their supporters were unable to vote the party. The Tribunal held here that the said ground of the petition was not consistent with the facts pleaded, which show exclusion and non-participation of the petitioners in the election. The Tribunal also found inconsistency in the petitioner's claim of exclusion; the petitioner alleged that their logo was omitted from the ballot and in the same breath argued that the proper logo was not used. In addition, it was found that the party had participated in the election and scored a total of 742 votes at the election which contradicted their claim of exclusion. Apart from the EPT's finding that they did not adduce evidence to prove their case, the matter of whether their logo was excluded was held to be a pre-election issue, statute-barred, and not within the Tribunal's jurisdiction to determine.

Compare this to the case of **Abdulrasheed Haruna & NNPP v. INEC, Musa & SDP**[105] where the tribunal treated a similar case as a post-election matter. The ground on which this election petition was predicated is that the election of the 2nd Respondent for the Karshi/Uke State Constituency of Nasarawa State was invalid by reason of non-compliance with the provisions of the Electoral Act, 2022 and the facts in support were that INEC did not properly insert the symbol/logo and acronym adopted by NNPP in its Constitution, which failure the petitioners alleged, substantially affected the outcome of the election as their supporters were misled. Unlike the previous case, the Tribunal held that it was not a pre-election matter but a post-election matter that it could hear. In the opinion of the Tribunal, the cause of action arose on election day because the petitioners had inspected and approved their logo before the election, but then allegedly saw a different logo on election day.[106]

The Petitioners argued that the logo shown to their party representative who saw the sample ballot paper during the pre-election inspection with INEC and which it approved was not the same as the one used on election day. Their case was eventually dismissed for failure to prove this assertion as they did not tender the sample ballot paper, which they alleged contained

104 (Unreported) Petition No. EPT/OY/SEN/03/2023
105 (Unreported) Petition No. EPT/NS/SHA/08/2023
106 The Tribunal in **Wakili Kabiru Mohammed & NNPP v. INEC & 2 Ors** (Unreported) Petition No. EPT/NS/SEN/01/2023 which facts are almost on all fours with the Abdulrasheed Haruna's case held that it is impossible to file an action as a pre-election matter in respect of an event that took place on the day of the election as the law clearly does not encourage impossibility.

their approved logo nor did they call as a witness, the National Secretary of their party who inspected the symbol, to give evidence in respect of the alleged omitted logo/symbol.

Notwithstanding, it was observed that the prevailing opinion in decided cases from the 2023 petitions is that matters complaining of omission of party logo is a pre-election matter that is not meant to be heard by an election petition tribunal. Furthermore, in all the analysed cases where this was an issue, the petitioners could not prove that their logo was omitted or that their supporters were disenfranchised as a result.[107]

It should be noted however that the Electoral Act, 2022 does not expressly provide for a course of action where a political party's logo is excluded or omitted on election materials by INEC after the political party has inspected its identity in compliance with **section 42 (3)** of the Act. It is also important to note that even if such omission is treated as a pre-election matter, **section 28(9)** of the Constitution provides that every pre-election matter shall be filed not later than 14 days from '*the date of the occurrence of the event, decision or action'* complained of in the suit. Considering this provision, it seems unrealistic and absurd that a candidate or political party, who discovers on election day that their logo was omitted after inspection and approval will file a pre-election suit, when the timing of the suit is no longer favourable and the relief is uncertain, instead of a post-election suit where they can latch on to "non-compliance." On the other hand, even if the matter is deemed appropriately filed as a post-election matter under the ground of non-compliance, the petitioner must still scale the hurdle of proving that such non-compliance substantially affected the election, which is notoriously hard to do. As aforesaid, in all the cases analysed, none of the petitioners who were allowed to argue this issue successfully proved their case.

In **Mubarak Ahmad Tijjani & NNPP v. Kingibe Ireti Heebah, LP & INEC,**[108] the petition was based on the sole ground of non-compliance with the Electoral Act and identified **section 80** of the Electoral Act (dealing with allocation of symbols by INEC to political parties) as the basis for the non-compliance. The summary of the Appellant's petition in the Tribunal is that the 3rd Respondent (INEC) gave the 2nd Appellant (NNPP) a strange symbol/logo different from what it supplied; that the party's acronym was removed from the ballot paper and this action by INEC cost the 1st Appellant (Tijjani) to lose the election. The Tribunal dismissed the petition on the basis that the Petitioners could not prove their petition and that there was no reasonable cause of action. The Court of Appeal set aside the tribunal's decision that there was no reasonable cause of action and held that the ground of the complaint of the Appellants is covered under **section 134 (1) (b)** of the Electoral Act which deals with non-compliance, while **section 80** cited by the Appellant buttresses the non-compliance.

107 See: **Olawale Ojetunde Sunday & NNPP v. INEC & 2 Ors.** (Unreported) Petition No. EPT/OY/HR/04/2023; **Bawa Mansurat Lolade & NNPP v. INEC & 2 Ors** (Unreported) Petition No. EPT/OY/HR/05/2023; **Ahmed & NNPP v. INEC & 2 Ors.** (Unreported) Petition No. EPT/NS/SHA/01/2023.

108 (Unreported) CA/ABJ/EP/SEN/FCT/43/2023

The Court, applying **sections 42, 79(1) and 80** of the Electoral Act, however, held that the Appellants must present three documents to prove their case – (i) INEC's register of symbols in which the NNPP symbol and name is written, (ii) a document that shows the symbol and name submitted to INEC by the NNPP, and (iii) the ballot paper used for the election. The Appellant could not provide any of these and the appeal was dismissed for failure to discharge the burden of proof.

It has been argued that the unlawful exclusion of a party symbol or logo is not the only species of unlawful exclusion known to law and that another species is the unlawful exclusion of a party's candidate from the election. This was the case in **Aida Nath Ogwuche & PDP v. INEC & Agbese Philip, APC & Francis Ottah Agbo**[109] where the Petitioner alleged non-compliance with the Electoral Act as a ground for her petition, but the facts presented were that of unlawful exclusion of her name on the ballot. The Petitioner's complaint was that INEC did not comply with a Supreme Court pre-election judgment, given about three days before the election, to reinstate her as the PDP candidate. INEC's defence was that her party did not communicate this change to them, so it went ahead with the existing candidate's name. The Tribunal declined jurisdiction on the ground that it was a pre-election matter, and the Court of Appeal affirmed this decision holding that not only did the petitioner lack *locus standi* to sue not being a participant in the election, but the unlawful exclusion of candidates cannot be accommodated under the ground of non-compliance with the Electoral Act, 2022 as envisaged by section 134 of the Act.

The case of omission of a party logo/symbol or unlawful exclusion was a recurring issue with certain political parties. For instance, this was seen in petitions in Nasarawa and Oyo States with New Nigerian Peoples Party (NNPP) and in Osun State with Action Alliance (AA). Petitions filed by members of the Action Alliance over elections to several state constituencies in Osun State (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 and their cases were dismissed for lack of jurisdiction.

In the case of **Mary Omolewa & Action Alliance v. INEC, Oderinwale Elisha Akinyemi & PDP,**[110] which involved the Ayedire State Constituency, the Tribunal declined jurisdiction to entertain the matter as the petitioner was not a candidate at the election. INEC argued, in its defence, that the Action Alliance had two factions, one of which produced the petitioner and that the facts in the petition related to unlawful exclusion, which is no longer recognised under the Electoral Act. The age and qualification of the petitioner were also in question as the Tribunal found that she was 24 years old at the time of nomination and

109 (Unreported) Petition No. EPT/BN/HR/3/2023, Appeal No. CA/MK/EP/BN/HR/17/2023.
110 (Unreported) Petition No. EPT/OS/SHA/15/2023

concluded that she was also not qualified to contest the election. The Tribunal subsequently dismissed the petition for lack of *locus standi*.

3.3 JURISDICTION – PROCEDURE

Elections Petitions are *sui generis (in a class of their own)*. Election matters are called "*sui generis*", primarily because specific and special provisions are enacted by the legislature to regulate and govern the procedure for the determination and settlement of election disputes by the courts/tribunals. Any failure to comply with a condition precedent for doing anything in an election petition will amount to abuse of process, thereby depriving the tribunal of jurisdiction to hear the petition.[111]

The peculiar and overriding feature in the constitutional and other statutory provisions on election matters is the timeline mandatorily prescribed and imposed for all procedural steps to be taken by all the parties in election disputes as well as the courts/tribunals; from the beginning to the end. Due to the mandatory nature of these constitutional and statutory provisions, the law has evolved to the point 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.[112]

For example, the Supreme Court held in **Ambrose Ahiwe & PDP v. INEC, Alex Otti & LP** [113] that an election petition, being *sui generis* and time-bound, does not permit piecemeal filing and presentation of a petition and that all witnesses, whether subpoenaed or not, should have their statements and evidence ready to accompany the petition before the petition is filed since there will not be time again to allow for such substantial amendments.

It is important to note that several election petitions analysed in this report failed due to the failure of the petitioner to follow laid down rules and procedures. The strategy used by respondents is to terminate a petition at the very beginning by raising several preliminary objections to challenge the tribunal's jurisdiction to hear a petition or to tackle the petition itself for not following the rules of procedure. These ranged from serious procedural issues such as filing processes out of time and omitting key records to minor issues like document formatting i.e. font type and size, or line spacing, which the tribunals often overlooked.

Fortunately, due to the provision of **section 285 (8) of the Constitution,** which was introduced in 2018, any objection contesting the jurisdiction of the tribunal or the validity of the petition itself is heard during the proceedings of the substantive suit and the decision delivered when final judgment is being given. This solved the once notorious problem of lawyers using such objections as delay tactics in petitions.

111 **Buhari v. Yusuf** (2003) 14 NWLR (pt.84)
112 **Edeoga v. INEC** (Supra) at p.18
113 (Unreported) SC/CV/1250/2023

3.3.1 *Processes Filed Out of Time*

One of the most important provisions in all the laws relating to the Election Petition Tribunal is the essentiality of time. The essence is that as much as possible, such petitions should be given expeditious adjudication. But inherent in the need for timely disposition of election disputes, is the high possibility of technical justice being delivered. However, the law remains that statutory provisions must apply in a case even if the application results in some hardship or is otherwise onerous.[114]

Time is a crucial aspect of the electoral cycle, and the Electoral Act does not permit an extension of time 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) CFRN**. Replies from respondents and petitioners must be filed within 21 days and 5 days respectively, in compliance with **Paragraphs 12 and 16** of the 1st Schedule to the Electoral Act, 2022. Failure to comply with these provisions renders the petition incompetent. In **Mr. Utomi Nwanne & LP v. INEC, Mr. Victor Nwokolo & PDP,**[115] the Tribunal ruled that the petitioners' reply was invalid because it was not filed within the stipulated time. Additionally, the petitioners' application for pre-hearing was also held to be out of time and therefore incompetent.

Similarly, some petitions were dismissed for late filing or failing to meet other deadlines stipulated in the Electoral Act, 2022, such as lateness in applying for the issuance of a pre-hearing notice. A pre-hearing session is used by the tribunal and litigants to facilitate the efficient and speedy disposal of the petition, and it addresses matters like preliminary objections, setting of timelines, formulation and settlement of issues for trial, scheduling of inspection and production of documents, directions for further proceedings, etc.[116]

A petitioner is required to apply for the issuance of a pre-hearing notice within 7 days after pleadings are closed, not before and not more than 7 days after (**Paragraph 18,** First Schedule to the Electoral Act). In **Umeha Sunday Cyracus & LP v. Dr. Festus Sunday Amaechina Uzor & PDP & 4 Ors,**[117] the Court of Appeal, in overturning the decision of the Tribunal, ruled that an application for the issuance of a pre-hearing notice is invalid if made before pleadings are closed or after the allowed time.

The Supreme Court affirmed this stance in the Kaduna State Governorship election petition of **Mohammed Ashiru Isa & PDP v. INEC, Sani Uba & APC**[118] where it held that the premature filing of the pre-hearing notice before the close of pleadings was fatal to the continuous hearing of the Petition. It reiterated that the application for pre-hearing notice

114 Per Supreme Court in **Edeoga v. INEC** (Supra)
115 (Unreported) Petition No. EPT/DL/HR/04/2023
116 See **paragraph 18(7)** of the First Schedule to the Electoral Act 2022.
117 (Unreported) Appeal No. CA/E/EP/HR/EN/09/2023
118 (Unreported) SC/CV/1240/2023

must be made within 7 days after the close of pleadings and pleadings are deemed closed at the filing and service of reply either by the Respondents or Petitioner. In the instant case, the application was made prematurely and was therefore held to be incompetent, invalid, null, void and of no effect whatsoever, thereby resulting in the instant dismissal of the Petition as being abandoned as prescribed by **paragraph 18 (4)** of the 1st Schedule.

In **Francis Adewale Gomez & PDP v. INEC, Hon. Wasiu Eshilokun Sanni & APC,**[119] the petition was deemed abandoned by the petitioners for failure of the Petitioners to file the notice for the commencement of the Pre-Hearing session within the time prescribed in **paragraph 18(1) & (3) of the First Schedule**. Respondents may also bring this application, as stated in **paragraph 18(3)**, although there were no instances where respondents did, understandably so, because bringing the application would mean proceeding to trial to challenge the respondents' victory.

A major difficulty experienced by petitioners in the 2023 election petitions was meeting up with the timeline for filing statements on oath of witnesses. According to **section 285(5)** of the Constitution, **paragraph 4(5)** of the First Schedule to the Electoral Act and case law, witness depositions must be filed along with the petition within the 21 days allowed for filing a petition. In the cases where this was not complied with, the defaulting statements were struck out and this had severe consequences for the outcome of the petition particularly where the defaulting statement on oath was fundamental to proving the grounds of the petition.

One issue that was rare in the 2023 election petitions but was observed in one petition was a judgment being delivered out of time by the Tribunal. This is an important issue because failure of a Tribunal to adhere to the statutory timeline would render its judgment null and unappealable. Going by the decision of the Supreme Court in the case of **Aliyu v. Namadi & Ors,**[120] the computation of 180 days within which the trial Tribunal is to deliver its judgment includes the date of filing of the Petition. The Court of Appeal followed this position in **Sule Nasiru Garo & NNPP v. INEC, Gwarzo & APC**[121] where the issue was whether the Court of Appeal has jurisdiction to entertain an appeal based on the fact that the trial Tribunal gave judgment outside the constitutionally mandatory time of 180 days from the date the petition was filed. The petition was filed on 17th March 2023 while judgment was delivered on 13th September 2023 – 181 days after the day of filing and outside the mandatory period of 180 days. The Court of Appeal did not even entertain the matter and held that it is rudimentary law that election-related matters being sui generis, the provision of the **Interpretation Act** on computation of time does not apply. Consequently, in computing time in election-related matters, time shall run from the day of the act and that day shall not be excluded. In dismissing the appeal, the Court held that the jurisdiction of the Tribunal over the petition ceased on day

119 (Unreported) Petition No. EPT/LAG/SEN/03/2023
120 (2023) LPELR-59742 (SC) (Pp 58-59)
121 (Unreported) Appeal No. CA/KN/EP/HR/KAN/33/2023

180 and that the law is that where the Tribunal does not have jurisdiction, and its decision is a nullity, an appellate court will equally be devoid of jurisdiction to decide the appeal on the merits.

The Court relied on the decision in **ANPP v. Goni**[122] where it was held that a Court must deliver its judgment, ruling or order in writing within180 days from the date the action was filed. It was also held here that a judgment cannot be given a day or more or even an hour after the 180 days, and that if what is to be done is not done within the fixed time, it lapses, and the court will be deprived of jurisdiction.

The situation in Sule Nasiru Garo's case is a clear situation of a litigant being affected by a Tribunal's tardiness. A similar unfortunate situation was observed in two conflicting decisions of the Court of Appeal sitting on appeals from the Katsina State National and State Houses of Assembly Election Petition Tribunal. It concerned the time for filing petitions and when exactly the date starts to run when calculating the 21 days prescribed for filing petitions.

In the case of **Ahmed Yusuf Doro & 2 Ors. v. Aliyu Haruna Jani & PDP**[123] the Court of Appeal held that the Tribunal erred in holding that the day of the declaration of the result of an election should be excluded in the computation of the 21 days provided for filing an election petition. The result of the election being challenged was declared on 26th February 2023 while the petition was filed on 19th March 2023. The Court ruled that it was statute barred and the Tribunal lacked the jurisdiction to entertain it on the ground that the 21 days begins to count "***from the day of declaration"*** of the result.

The Court was faced with two Supreme Court Judgments on the matter. One was **Maku v. Sule (2019)**[124] where it was held that a competent election petition cannot be filed the very day the result of the election being contested was declared and that by **section 285(5)** of the Constitution, in computing the time within which an election is to be filed, the date the result of the election was declared is excluded.

The second case was **All Progressives Congress v. Udom Udo Ekpo Udom & Anor.**[125] where the Supreme Court held that the computation of time in an electoral action includes the date on which the results of the election were declared. The Court of Appeal in resolving this case acknowledged the seeming conflict between the two Supreme Court cases and held that if there is any conflict between the decision in **Maku v. Sule** (judgment delivered in September 2019) relied upon by the Tribunal, and the decision in **All Progressives Congress v. Udom Udo Ekpo Udom & Anor** (judgment delivered in January 2023), then the principle

122 (2012) 7 NWLR (PT 1298) 147 at 180
123 (Unreported) Appeal No. CA/K/EP/HR/KT/14/2023. Judgment delivered on 19th October 2023.
124 **Labaran Maku & Anor. v. Audu Alhaji Sule & 2 Ors** (2019) LPELR-58513 (SC)
125 (2023) LPELR-60216; (SC/CV/1476/2022) See page 12 of unreported lead judgment of Saulawa, JSC

of *stare decisis* obliges it to follow the later decision of the Supreme Court which states that the date of declaration should be counted. The appeal was then struck out by the Court of Appeal which held that the tribunal proceedings were a nullity, and that because of this, the Court of Appeal lacks the jurisdiction to entertain an appeal arising therefrom.

However, the Court took a different position stating that the day of the declaration of the result should not be counted in the latter case of **Dalha Ismail Kusada v. Abubakar Yahaya Kusada & 3 Ors** (judgment delivered on 2nd November 2023).[126] Here, the Court of Appeal held that the 21 days starts counting *"**after the date of the declaration**"* of result. It stated that the Tribunal in this case was right to have held that the petition which was filed on 18th March 2023 following the declaration of results on 25th February 2023, was within 21days after the date of the declaration of results as contemplated by the provision of section 285 (5) of the Constitution. Unlike the previous case, it relied on the Supreme Court decision of **Maku v. Sule** [127] which held that in computing the time within which an election is to be filed, the date the result of the election was declared is excluded.

The Court's reason for departure here was that it discovered that the facts of the case of **APC v. Ekpo Udom (2023)** which it earlier applied was based on a pre-election matter and the apex court was interpreting **section 285(9)** of the Constitution dealing with such matters and not **section 285(5)** of the Constitution which deals with post-election matters. The Court highlighted the difference in both provisions. Section 285 (9) provides that: every pre-election matter shall be filed ***"not later than 14 days from the date of the occurrence"*** of the event, decision or action complained of in the suit while section 285 (5) provides that an election petition shall be filed ***"within 21 days after the date of the declaration of result"*** of the election.

This case highlights the challenge of conflicting judgments and the need for clarity and consistency by the courts in its application of legal authorities as doing otherwise often results in a miscarriage of justice to litigants.

3.3.2 *Improper Content and Endorsement of Court Processes*

According to **paragraph 4 (1) to (5)** of the First Schedule to the Electoral Act, 2022, every petition must include the required elements specified in the provision. The absence of essential components, such as the petitioner's address for service, signatures, or the Tribunal secretary's certification, can result in the dismissal of the petition. It is contended that the dismissal of a Petition on account of improper endorsement of the court process on account of the absence of certification by the Secretary of the Tribunal is inherently unjust. This is because it flies in the face of the trite law that a litigant cannot be held liable for the failure by the registry of the

126 **Dalha Ismail Kusada v. Abubakar Yahaya Kusada & APC, INEC & PDP**. Appeal No:CA/K/EP/HR/KT/30/2023
127 **Labaran Maku & Anor. v. Audu Alhaji Sule & 2 Ors** (2019) LPELR-58513 (SC)

court or tribunal to do its duty. The cases on this principle include **Alawode vs. Semoh**[128] and **Ogbuanyiya vs. Okudo**[129]

This remains so notwithstanding **paragraph 4(7)** of the First Schedule to the Electoral Act, 2022 which states that: *"An election petition, which does not comply with subparagraph (1) or any provision of that subparagraph is defective and may be struck out by the Tribunal or Court."* Accordingly, in **LP & Barr. Mrs. Ugboaku Chinemerem Tracy Amadigwe-Dike v. INEC, Hon. Balogun Bayo & APC**,[130] the Appellants' failure to include the candidates' scores in the Petition, as mandated by the Electoral Act, led to the failure of both the petition and the appeal.

Interestingly, the term 'may' in **paragraph 4(7)** grants the Tribunal or Court the discretion to strike out a petition that does not comply with sub-paragraph (1). However, the Act does not specify the implication if the Tribunal or Court decides not to exercise this discretion. Despite this, Tribunals have consistently chosen to strike out petitions in cases of non-compliance with sub-paragraph (1). This approach by the Tribunals is hardly surprising as the onerous duty of the Tribunal Judges faced with several Petitions filed by litigious politicians and the timeline for the determination of such Petitions is such that the Tribunals would not hesitate to do technical justice by striking out a Petition for non-compliance to deal with all the matters within the stipulated time. The panacea for this may lie in a constitutional amendment regarding the time when elections are to be held and giving more time for the post-election adjudicatory process.

Petitions have been dismissed for non-compliance with **paragraph 4(4)** of the First Schedule to the Electoral Act, which requires the address for service and the name of the occupier of that address to be stated at the foot of the petition. For example, in **Sen. Emmanuel Uzor Onwe & APGA v. INEC, Eze Kenneth Emeka & APC,**[131] the petition was deemed incompetent due to the petitioner's failure to indicate the name of the occupier of the premises where the petition would be served. Notably, the Act does not specify the penalty for non-compliance with this sub-paragraph, unlike sub-paragraphs (1) and (5). As a result, Tribunals have relied on the decisions of superior courts to guide their discretion in such matters.

This issue came up in **Pela Kawahariebie Kennedy & LP v. INEC, Oborevwori Sheriff Francis Orohwedor & 2 Ors,**[132] where the counsel to the appellants as petitioners, failed to indicate the name of the occupier of the petitioners' address for service within the jurisdiction as endorsed at the foot of the petition. In interpreting the provision of **paragraph 4(4)** which states that: "*At the foot of the election petition there shall also be stated an address of the petitioner for service at which address documents intended for the petitioner may be left and its occupier,*" the Supreme Court held

128 (1959) 4 FSC 27 at 29
129 (No. 2) (1990) 4 NWLR (PT 146) 551 at 560, 561-562 and 572.
130 (Unreported) Appeal No. CA/L/EP/HR/LAG/20/2023
131 (Unreported) Petition No. EPT/EB/SEN/06/2023
132 (Unreported) Appeal No. SC/CV/1204/2023

that the use of the word "shall" is mandatory. The Court further held that the requirement here is twofold, therefore in this case, while the Petitioner/Appellant inserted their address, they did not separately type out and indicate the "Occupier" which the apex court held to be a non-compliance that was, in their words, "fatal and unpardonable."

3.3.3 *Non-Compliance with Rules of Procedure*

The **Election Judicial Proceedings Practice Direction, 2023,** (made pursuant to **section 140** of the Electoral Act and **section 248** of the Constitution and issued by the Court of Appeal), outlines the required form for appeals from Election Petition Tribunals. It was specially made to regulate appeals arising from election petition proceedings. The Supreme Court has held that any special and specific statutory provision excludes the general one[133] meaning that the provisions of the Practice Directions take precedence over general rules contained in the Court of Appeal Rules because of the *sui generis* nature of election matters. However, the Practice Directions will not have the force of law where it conflicts with the provisions of the Constitution, as the Practice Directions and all other subsidiary legislations are inferior, subordinate and subservient to the Constitution.[134]

Non-compliance with key provisions in the Practice Directions influenced the determination of several election petitions on appeal. For instance, **Paragraph 14 (1)** of the **Election Judicial Proceedings Practice Direction, 2023 (EJPPD)** (which came into effect in May 2023) stipulates a 25-page limit for a Brief of Argument by lawyers. **Paragraph 14 (c)** of the same Practice Directions provides that "*Any brief of Argument which does not comply with these provisions shall be invalid.*" Consequently, appeals that contravened these provisions were struck out. In **Mrs. Beatrice Itubo & LP v. INEC, REC, Rivers State, Siminalayi Fubara & PDP,**[135] the appeal was struck out for contravening this rule. The brief in question was 40 pages long. However, it appears the appellant relied on the 2022 version of the Practice Directions which prescribed a 40-page limit.

In **Eleodimuo Uchenna Clement Nwachukwu v. Uzokwe Peter Ifeanyi and 3 Ors.**[136] an objection was raised that the 1st and 2nd Respondents' counsel did not use the required font or typographical character and spacing in their final written address. The Court of Appeal held that while the Election Judicial Proceedings Practice Direction, 2023 possesses the toga of law, it must not be followed slavishly to defeat justice. However, in a Cross Appeal involving the same parties - **APGA v. Uzokwe Peter Ifeanyi, YPP, INEC, & Eleodimuo Uchenna Clement,**[137] the Court of Appeal dismissed the appeal because the Brief of Argument filed by the counsel for the Appellant was 40 pages which exceeds the maximum

133 See: **Maku v. Sule (2022) 3 NWLR (PART 1817) 231** at 258 A – D per Muhammad, JSC
134 **Aishatu Dahiru v. Fintiri** (Unreported) Appeal No. CA/YL/EPT/AD/GOV/18/2023
135 (Unreported) Appeal No. CA/ABJ/EP/GOV/RV/144/2023
136 (Unreported) Appeal No. CA/AW/EP/HR/AN/09/2023
137 (Unreported) Appeal No. CA/AW/EP/HR/AN/07/2023

25 pages stipulated under **paragraph 14 (1) of the EJPPD**. The same counsel also filed a reply brief of argument of 7 pages against the required 5 pages provided in the Practice Direction. The Court held that the attitude of the counsel smacks of flagrant disobedience and contempt for the Election Judicial Proceedings Practice Direction.

In **Gwacham Maureen Chinwe v. Okafor & Uchenna Charles & 3 Ors.,**[138] the Appellant's reply brief was struck out for exceeding 5 pages in violation of the mandatory provisions of the Practice Directions. It was in excess by just one page i.e. 6 pages. In **Adamu Idris & APC v. Yusuf Abdullahi Itas, PDP & INEC**[139] it was argued that the appellants' brief of argument was not competent having not followed the provisions of **paragraphs 13 and 14(a-c)** of the Practice Directions. The Court held that an incompetent and defective process cannot be cured by an amendment as the brief of argument filed by the Appellants in the circumstance was fundamentally defective and therefore incompetent. Consequently, the Court ruled 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.

In **Osikuminu Akinwande Ayokunle v. Hon. Sanni Ganiyu Babatunde, APC & INEC,**[140] the Appeal was dismissed for want of diligent prosecution. 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 only mandatory provisions of which non-compliance is a ground for nullity. Also, in **Hon. Idongesit Etim Ntekpere & Anor v. Patrick Umoh & 2 Ors,**[141] the failure of the Appellant to limit its Brief of Argument to 25 pages as required by Paragraph 14 of the Practice Directions led to the Appeal being struck out.

Election appeals were also struck out where processes were filed out of time or incomplete. By **paragraph 13** of the Practice Direction, *"No time specified in these Rules shall be extended by the Court."* This was reiterated in **APC v. Aidam & Ors.**[142] where the Court held that **paragraph 13** of the Practice Directions makes it abundantly clear that there is no room for the court to extend time limits prescribed in the practice directions.

For example, in **Mahmud Abdulahi Gaya & Anor v. INEC & 2 Ors**.[143]which concerned an Appeal filed against the decision of the Tribunal over the election to the Albasu/Gaya/Ajingi Federal Constituency, Kano State, the Respondent urged the Court to dismiss the appeal on the grounds of transmission of incomplete record of appeal by the Appellant because the evidence of three witnesses was omitted from the record. The Appellant had later filed a supplementary record of appeal with the evidence of the said witnesses, but this was

138 (Unreported) Appeal No. CA/AW/EP/HR/AN/17/2023
139 (Unreported) Appeal No. CA/J/EP/BA/SHA/11/2023
140 (Unreported) Appeal No. CA/L/EP/SHA/LAG/24/2023
141 (Unreported) Appeal No. CA/C/EP/HR/AKS/08/2023
142 (Unreported) Appeal No. CA/C/EP/HR/CS/14/23
143 (Unreported) Appeal No. CA/KN/EP/HR/KAN/26/2023. Judgment delivered on 8th November 2023

done more than 10 days after the Notice of Appeal contrary to **Paragraph 9** of the Practice Directions. The Court discountenanced the out-of-time supplementary record and ruling on the initial record of appeal with the missing witnesses, it held that it cannot hear an appeal where the record of appeal is incomplete. It, therefore, dismissed the appeal.

However, the Court of Appeal took a somewhat different position in **Sunusi Bataiya & Anor. v. INEC & 2 Ors.**[144] In this case, the 1st Respondent (INEC) had sought the order of the Court dismissing the appeal based on the Appellants transmitting an incomplete record of appeal and further re-transmitting a supplementary record out of time without the leave of Court contrary to **Paragraph 9 of the Practice Directions**. The Court held that the supplementary record of appeal that was clearly transmitted out of time will be struck out for being incompetent, but that it cannot void the appeal. Firstly, the Court (a different panel from that of **Gaya v. INEC** above) opined that the objection to the completeness or adequacy of the record of appeal as transmitted is not an objection that can terminate the appeal. Secondly, the Court held that the earlier record of appeal that came within time is intact, not offensive to the Rules and will be the operative record to be used by the Court.

This appeal was eventually dismissed for a different reason, i.e., failure of the Appellant's lawyer to sign the Notice of Appeal, which the Court held to be defective and invalid. Unlike the case of **Gaya v. INEC**, where the evidence of material witnesses was missing, what was missing from the incomplete record in this case was not clear from the judgment. Moreso, the Court held that the objection to the use of the record transmitted within time for reasons of incompleteness should have come by way of motion on notice which the 1st respondent (INEC) did not follow.

These cases show how procedural defects or mistakes can be fatal to an election petition/appeal and the importance of diligent prosecution by lawyers. However, it further reinforces the widely held notion of inconsistent decisions and technicalities being rife in election cases.

3.4 JURISDICTION – QUALIFICATION, DISQUALIFICATION, NOMINATION, AND SPONSORSHIP

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 the majority of the conflicting decisions observed. Qualifications for elections typically deal with citizenship, age, membership and sponsorship by a political party, and educational qualification and are covered by the following provisions of the Constitution:

- Sections 131 & 137 (Qualification and Disqualification for President)
- Sections 65 & 66 (Qualification and Disqualification for National Assembly)

144 (Unreported) Appeal No. CA/KN/EP/SHA/37/2023. Judgment delivered on 28th November 2023

- Sections 177 & 182 (Qualification and Disqualification for Governor)
- Sections 106 & 107 (Qualification and Disqualification for State House of Assembly)

Membership and sponsorship by a political party generated the most controversy followed by 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 from the party register. This was used to import into the election petition, matters which are internal to political parties.

Such attempts are however not new. As far back as 2015, the issue of whether qualification especially as it relates to party primaries, was a pre-election or post-election issue was prominent in the tribunals with conflicting decisions abounding on the matter. **Section 138 (e) of the repealed Electoral Act 2010** which provided that the election of a person can be questioned on the ground that he submitted to INEC, an affidavit containing false information in aid of his qualification for the election, opened the door for petitioners in that election cycle to raise a multitude of issues outside of those in the Constitution. To address this problem, the Electoral Act 2022 deleted this ground[145] and emphasised in **sections 84 (3) and 134 (3)** of the Act that only constitutionally prescribed qualifications (and disqualifications) of a candidate matter.

The Tribunals and Courts in the 2023 post-election petitions, in some cases, refused jurisdiction over issues related to the nomination or sponsorship of a candidate, as these are considered pre-election matters, rightly so, in light of **sections 29(5) & (6)** and **130(1)**[146] of the Electoral Act, 2022 and **section 285 (14)** of the CFRN 1999. However, several other Tribunals and Courts wrongly assumed jurisdiction on the matter. With the numerous conflicting decisions on this issue, the line either remained blurred or the lower courts deliberately sidelined judicial precedent. This issue has been resolved in a new line of decided cases by the Supreme Court which is discussed extensively in the following section.

It is interesting to note that **section 31(1)** of the repealed 2010 Electoral Act which stated that ***"…the Commission shall not reject or disqualify the candidate(s) for any reason whatsoever"*** is not included in the 2022 Electoral Act. However, **section 84 (13)** introduced in 2022, seems to suggest that INEC has the power to exclude a candidate and political party from participating in the elections where they contravene the provisions on party nominations. It says that:

145 Issues of false information in an affidavit is now clearly stated to be a pre-election matter by virtue of **Section 29(5) of the Act** which provides that: *"Any aspirant who participated in the primaries of his political party who has reasonable grounds to believe that information given by his political party's candidate in the affidavit or any document submitted by the candidate…is false may file a suit at the Federal High Court against the candidate …."*

146 **Section 130 (1)** - *"No election and return at an election under this Act shall be questioned in any manner other than by a petition complaining of an undue election or undue return (in this Act referred to as an "election petition") presented to the competent tribunal or court in accordance with the provisions of the Constitution or of this Act, …"*

"84(13) Where a political party fails to comply with the Provision of this Act in the conduct of its primaries, its candidate for election shall not be included in the election for the particular position in issues."

While this provision does not explicitly say "who" is responsible for ensuring that a non-compliant party is not included in the election, the question is whether it can be inferred from the preceding that the Commission can examine internal party affairs to determine the validity of a candidate's nomination. Furthermore, if read together with the Commission's oversight responsibilities regarding political parties and their primaries under **sections 83, 84, and 85** of the Electoral Act, 2022, can the Commission rely on these to reject or disqualify a candidate or political party?

In answering this, there seems to be, by extrapolation, the decision of the Court to the effect that INEC must accept and publish the names of the candidates submitted by political parties and that it is not within the remit of INEC to do any more than accept and publish the names. In **APM vs. INEC & Ors**.,[147] it was held that by **sections 29 (3) and 32 (1)** of the Electoral Act, 2022, the duty of INEC is to accept and publish the list of candidates submitted to it by a political party.

3.4.1 *Whether Qualification is a Pre-Election or Post-Election Matter*

Many petitioners that raised the issue of non-qualification argued that any ground in an election petition alleging that a candidate did not emerge from valid party primaries conducted in accordance with the requirement of the law, is a valid ground for challenging qualification under **section 134(1) (a) and 134 (3)** of the Electoral Act, 2022, and therefore it can be ventilated before an Election Tribunal as an issue of qualification/non-qualification. **Section 134 (1) (a) & (3)** of the Electoral Act provides as follows:

"(1) An election may be questioned on any of the following grounds—

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

(3) With respect to subsection (1) (a), a person is deemed to be qualified for an elective office and his election shall not be questioned on grounds of qualification if, with respect to the particular election in question, he meets the applicable requirements of sections 65, 106, 131 or 177 of the Constitution and he is not, as may be applicable, in breach of sections 66, 107, 137 or 182 of the Constitution."

Subsection (3) of section 134 was a new provision introduced in the 2022 Electoral Act. The legislative intent was to reinforce constitutional requirements for contesting elections and

147 (2023) 9 NWLR (PT 1890) 419 at 495-496

preclude petitioners from raising issues not related to what is already outlined in the constitution when making claims of non-qualification of their opponent. These constitutional provisions deal with age, citizenship, education, sponsorship by a political party, being of sound mind, no undischarged bankruptcy, no past criminal convictions, no subsisting employment in the public service, no membership of a secret society, etc. This emphasis was also introduced in **section 29 (6)** of the Electoral Act dealing with the submission of candidate lists by parties, which provides as follows:

> *"29 (6) – Where the Court determines that any of the information contained in the affidavit is false only as it relates to* ***constitutional requirements of eligibility****, the Court shall issue an order disqualifying the candidate and the sponsoring political party and then declare the candidate with the second highest number of valid votes and who satisfies the constitutional requirement as the winner of the election."*

What are Pre-election Matters?

A pre-election matter simply means any event, action or conduct that occurred or took place before the election proper.[148] It is also defined in **section 285 (14)** of the CFRN. In the case of **Gogwim v. Abdulmalik & Ors**[149] it was held that "the issues of disqualification, nomination, substitution and sponsorship of candidates for an election precede election matters and are therefore pre-election matters".

In the more recent case of **Mustapha Bala Dawaki & APC v. INEC, Danjuma & NNPP**[150] the Court of Appeal in explaining the difference in qualification as a pre-election and post-election matter, held that qualification is a constitutional issue, while nomination is regulated by the Electoral Act. 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.

In the *Locus Classicus* of **APM v. INEC, APC, Bola Tinubu, Kashim Shettima, Kabiru Masari**[151] the Court of Appeal held that where the issue of qualification or disqualification arises before the election (pre-election), an action on that issue must be instituted under **section 285(11) and (14)** of the Constitution but that where the election has been conducted and the result declared, such election cannot be questioned on grounds of qualification save under **sections 131 and 137 of the Constitution.**[152]

148 See the case of **Amakom & Ors v. Obidigwe & Ors** (2021) LPELR-53253 (CA).
149 (2008) LPELR-4210 (CA), Per Ndukwe-Anyanwu, JCA (P. 18, Paras. D-F).
150 (Unreported) Appeal No. CA/KN/EP/HR/KAN/15/2023, per **Ugochukwu Ogakwu, JCA** at Page 11.
151 (Unreported) Appeal No. CA/PEPC/04/2023
152 In the case of a Presidential election

The case of the Petitioner (Allied People's Movement – APM) rested on the sole ground of the alleged invalid nomination of Tinubu's running mate, Kashim Shettima, which they claimed breached the provisions of the Electoral Act and Constitution. The Court of Appeal held that the issue of qualification or nomination of any candidate is a pre-election matter and should have gone to the Federal High Court. But that even if the Court has jurisdiction on the issue of nomination of Shettima, the matter is statute-barred and incompetent because pre-election matters are to be filed within 14 days after the cause of action as required by law. Ultimately, the Court of Appeal held that the petitioner (APM) has no locus standi to challenge the nomination of the candidate of another political party (APC).

The Supreme Court was emphatic on this timeline in the Delta State governorship petition of **Pela Kawahariebie Kennedy & LP v. INEC, Oborevwori Sheriff Francis Orohwedor & 2 Ors**[153] where it held that it is abundantly established and decided by the courts that a suit seeking the disqualification of a candidate on the grounds of false information or document contained in his Forms CF001 or EC9 is a pre-election matter which must be filed within 14 days of the cause of action i.e. after the candidate presents the alleged false information to INEC.[154]

Before the 2023 election cycle, the Supreme Court, in the case of **Fayemi v. Oni**,[155] held, relying on **Dangana v. Usman**,[156] that the issue of qualification or non-qualification to contest an election is both a pre-election and a post-election matter, which can be instituted in the High Court (as a pre-election suit) or in the Tribunal (as a post-election suit). Also, in **Dickson v. Sylva**,[157] the Supreme Court, relying on **Dangana v. Usman**[158] held that the issue of qualification to contest an election is both a pre-election issue which can be contested at the High Court and a post-election dispute, to be contested at the election tribunal. *(Note that before the 2022 Electoral Act, the High Court of a State could also hear pre-election matters. This case was decided before 2022).*

Similarly, in **Oshiomhole v. Airhiavbere**,[159] the Supreme Court held that, by **section 138(1)** of the Electoral Act, 2010, the issue of qualification can be one of the grounds for questioning the election of a person. In **Dingyadi v. INEC**,[160] the Supreme Court held as follows:

153 (Unreported) SC/CV/1204/2023
154 See: **Kennedy Osoh v. APC, INEC, & Raymond Nwokocha** (Unreported) SC/CV/1540/2022. Until the false information in the candidate's Form EC9 is submitted or given to INEC, the cause for an action under S.29(5) of the Electoral Act 2022 would not arise.
155 (2020) 8 NWLR (Pt. 1726) 222 at 249-251 SC
156 (2013) 6 NWLR (Pt. 1349) 50 SC.
157 (2017) 10 NWLR (Pt. 1573) 299 at 341-342 SC.
158 Supra
159 (2013) 7 NWLR (Pt. 1353) 376 SC.
160 (2011) All FWLR (Pt. 581) 1426 at 1464F SC, reliance on **Ango v. Achida** (1999) 3 NWLR (Pt. 594) 246; **Peters vs. David** (1999) 5 NWLR (Pt. 603) 486.

"The Constitution of the Federal Republic of Nigeria stipulates conditions which a candidate wishing to contest an election must possess. It is trite law that the qualification of a candidate to contest an election can be challenged even if he is validly nominated, before a tribunal."

The apex court shifted its position by holding in **Akinlade v. INEC**,[161] and **Abubakar v. INEC**,[162] that issues of qualification or disqualification are pre-election matters and not matters for the election tribunal. This continued to be a contentious issue in the 2023 election cycle but has been resolved by the Supreme Court in recent decisions where it has made a clear distinction.

In the Kano State Governorship case of **Yusuf Abba Kabir v. APC, INEC & NNPP**[163] (via judgment delivered on 12th January 2024), the Supreme Court held that as long as a political party agrees to sponsor a candidate, he is eligible to contest the election. In his lead judgment, Hon. Justice Inyang Okoro, JSC stated that:

"The fact that the party decides to sponsor the person makes the person automatically qualified for the office of governor of a state."

In this case, the Kano State Governorship Election Petition Tribunal (EPT),[164] had nullified the election of Respondent/Appellant, Yusuf Abba Kabir based on an allegation of "unlawful votes", among others. Kabir's membership of NNPP was also questioned as it was alleged that his name was not on the membership register at the time he was purportedly sponsored by NNPP (which is about 120 days to the election) and therefore was not qualified to contest the governorship election under **section 177(c) CFRN**. In a somewhat confusing judgment and internal conflicting decision, the Tribunal ruling on a preliminary objection raised by the APC held that it is not within the right of the APC to question Kabir's membership of the NNPP as it is an internal affair of the party. But the same Tribunal went ahead in their final determination to hold that he was not qualified to contest the election for this same reason and on the basis that every candidate at an election must have an existing and unbroken membership of the political party sponsoring him at the election at all stages of the election and the process, starting from nominations.

The Court of Appeal[165]upheld the nullification of the election of Yusuf Kabir by the Election Petition Tribunal (EPT), set aside the Tribunal's ruling on the preliminary objection and assumed jurisdiction to inquire into Kabir's nomination to arrive at the same finding that he was not qualified to contest. On further appeal, the Supreme Court set aside the Court of Appeal's judgment referring to its finding as perverse and assailable. Inyang Okoro, JSC, held as follows:

161 (2020) 17 NWLR (Pt. 1754) 439 SC.
162 (2020) All FWLR (Pt. 1052) 898 SC
163 (Unreported) SC/CV/1179/2023
164 **APC v. INEC, Kabir & NNPP** (Unreported) Petition No.EPT/KN /GOV/01/2023)
165 (Unreported) Appeal No: CA/KN/EP/GOV/KN34/2023

> *"...the court below erred in law when it held that section 134 (1) (a) of the Electoral Act juxtaposed with section 77 (3) of the Act has opened a window for the court to investigate the qualification of this Appellant duly sponsored by the 3rd Respondent. No door or window was opened at any point. It does not matter whether the Appellant is a foundation member of the 3rd Respondent or joined shortly before the primaries. As long as the 3rd Respondent has accepted him, nominated him and sponsored him, that door is shut and the ship has sailed."* [166]

In **Ambrose Ahiwe & PDP v. INEC, Alex Otti & LP**[167] which was over the Abia State governorship election, the issue was that Alex Otti was not a member of the Labour Party (LP) at the time of the election since his name was not contained in the Membership Register of the LP, which the LP failed to submit to INEC 30 days before the conduct of its primary election as required by **section 77 (3)** of the Electoral Act.

The Court of Appeal held that the requirement of a political party maintaining a Register of Members and making it available to the Independent National Electoral Commission (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.[168] Moreso, that there is nothing in the provision (**section 77**) banning political parties from taking on new members after the submission of their register or prohibiting such new members who joined after the submission of the register of members from participating in party primaries conducted thereafter. The Supreme Court affirmed this decision and noted that the fact that the 2nd Respondent (Otti) was jumping from one party to another until he found harbour is not contrary to the Electoral Act or the Constitution.[169] Another prominent decision and *Locus Classicus* on this matter is the Plateau State governorship case of **Muftwang Caleb Manasseh v. Nentawe Yilwatda Goshwe, APC, INEC & PDP.**[170] The judgment was also delivered by the Supreme Court on 12th January 2024 which made an extensive pronouncement on the subject. Foremost is that:

> *"the primary election and nomination or sponsorship of a person by a political party as its candidate for an impending general election, being a process preparatory to and before the general election is clearly a pre-election process."*

It further held 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 the Governorship Election Tribunal by **section 285(2)** of the 1999 Constitution.

166 **Yusuf Abba Kabir v. APC, INEC & NNPP**. (Supra) at page 28
167 (Unreported) Appeal No. CA/OW/EP/GOV/AB/31/2023
168 The Court relied on the Supreme Court decision in **Enang v. Asuquo (2023) 1 NWLR (Pt 1896) 510 at 536G.**
169 Per *Ogunwumiju JSC* who also stated in her concurring judgment that it will amount to an atrocious violation of the Constitution for a Court to read the provision of Section 77 of the Electoral Act, 2022 into the Constitution and bend same to conform to Section 177 (c) of the 1999 CFRN. See **Ahiwe & Anor. v. INEC & 3 Ors.** (Unreported) SC/CV/1250/2023. See also: **Jime v. Hembe** (2023) LPELR-60334 (SC)
170 (Unreported) SC/CV/1190/2023. Judgment delivered 12th January 2024

The Supreme Court, in this case, also clarified its decisions in earlier cited cases such as **Dangana v. Usman**[171] which it held had been misapplied by Tribunals and the Court of Appeal to wrongly investigate the validity of party nominations and used as a basis for their decisions. The Supreme Court noted that this decision was given before the enactment of **section 285(9) & (14)** of the Constitution (as altered by the 2017 4th Alteration Act, No. 21) which now clearly defines what constitutes pre-election matters and timelines for bringing them before a Court.

3.4.2 *Conflicting Decisions on Jurisdiction of Tribunals to Inquire Into Party Nominations*

Concerning petitions premised on the non-qualification of candidates due to improper nomination exercises by political parties, two States stand out – Plateau State and Imo State. The Election Petition Tribunals (EPT) and Court of Appeal in these two States notoriously gave several conflicting decisions on the matter. There were also several petitions in Abia and Anambra States bordering on invalid candidate nomination and qualification, but they were mostly dismissed for being pre-election matters.

The case of Plateau was triggered by a controversy over the validity of the PDP primaries in the State. Two positions were taken at the Tribunals; one was by panels that consistently declined jurisdiction on petitions against PDP (and its candidates) for not having a valid structure to nominate candidates. The other position was that of panels that assumed jurisdiction to rule that the PDP primaries were invalid. However, on appeal, a single position was adopted by the Court of Appeal which was that the PDP could not validly sponsor candidates for the election. The result was that all the petitions involving PDP were resolved against them leading to a mass sacking of PDP candidates that won seats in the legislature.

Petitions in Imo and Abia States, where the issue of valid nomination was raised, often involved candidates that moved from one party to another just before the election seeking to be the flagbearer. This led to questions about the valid party membership of such candidates. In Abia State, for instance, several respondents defending petitions on grounds of non-qualification, especially for the House of Representatives elections, were Labour Party candidates. This also included the declared winner of the Governorship Election, Dr. Alex Chioma Otti who defected from the APC to the Labour Party just before the election. In Imo State, the misapplication of a Supreme Court judgment on a pre-election matter involving PDP primaries in the State skewed the judgment of the Tribunals and led to conflicts in their decision. The conflicting decisions by the Tribunals and Court of Appeal in Imo also led to varied outcomes, but not to the extent seen in Plateau State. The following case studies illustrate the conflicting decisions by the Tribunals and Court of Appeal on the issue of qualification and nomination.

171 Supra

3.4.3 *The Case of Plateau State*

Case Study: Mutfwang Caleb Manasseh v. Nentawe Goshwe & 3 Ors.

Facts of the Case

The Appellant (Mutfwang Caleb Manasseh of PDP) was returned as Governor of Plateau State following the Governorship election held on 18th March 2023. Aggrieved by this return, the APC Candidate, Nentawe Goshwe filed a Petition at the Governorship Election Tribunal Plateau State. The Tribunal, led by Hon. Justice Rita Irele-Ifijeh, found in favour of Mutfwang and dismissed the petition on the ground that it was hinged on the validity of the PDP state congress, which is a pre-election matter that the tribunal could not hear. Dissatisfied, Goshwe approached the Court of Appeal. The appeal panel led by Hon. Justice Williams-Dawodu reversed the Tribunal's judgment holding that Mutfwang was not validly sponsored by his party. Mutfwang then approached the Supreme Court for a final resolution of the matter. In what may be described as a scathing judgment, the Supreme Court unanimously set aside the judgment of the Court of Appeal holding that the Tribunal rightly declined jurisdiction to entertain the matter, and for this reason, the Court of Appeal also lacked the jurisdiction to determine the appeal.

Delivering the lead judgment, Hon. Justice Emmanuel Agim, JSC, berated the Court of Appeal stating that: *"It amounts to judicial misconduct of a very extreme proportion for a judicial officer to disregard clear provisions of the constitution and other legislations and the precedents of this court."* Concurring, Hon. Justice Moronkeji Ogunwumiju, JSC, stated that: *"The decision of the Court of Appeal was wholly unwarranted, unjust and an affront to all settled principles of law."*

Background to the Case

The Plateau State Elections Petitions were influenced by nominations issues within the State chapter of the People's Democratic Party (PDP), hence a back story to this will be considered.

In August 2020, the Plateau Chapter of the PDP held a congress to elect members of its State Executive Committee, but the election was contested and followed by litigation. In November 2020, the Plateau State High Court in the case of **Bitrus Kaze & 11 Ors v. PDP & Ors,**[172] ordered the PDP to conduct a fresh congress to constitute its organs/executive committees at the wards, local governments and state levels as provided by the constitution of the PDP. The party had constituted a caretaker committee to re-convene the congress to elect the State Executive Committee and extended the tenure of this caretaker committee which the petitioners opposed. The High Court nullified the tenure extension and gave an order directing the PDP to take all steps to conduct an election of the PDP executive committee members for the State in accordance with the combined provisions of **sections 223(1)** of the Constitution, **section 85(3)** of the Electoral Act 2010 and the provisions of the Constitution

172 (Unreported) Suit. No: PLD/J304/2020

of the PDP. On September 25, 2021, a repeat congress, which was observed by INEC, was held. Further issues and contentions arose on the validity of the repeat congress, but they were not formally brought before the courts until the post-election petitions.

The 2020 Plateau State High Court order had a domino effect on PDP. Its consequence was so severe that in a separate suit[173] filed by the PDP against the Plateau State Independent Electoral Commission (PLASIEC) for disqualifying PDP's candidates from participating in local government elections in 2021, the courts dismissed the PDP's suit saying that they were not eligible to participate or sponsor any candidate in the election, having failed to comply with the positive and extant orders of a court of competent jurisdiction.[174] Following this, the Court of Appeal upheld tribunal decisions on bye-elections held in February 2022 to fill vacancies in Jos North/Bassa Federal Constituency and Pankshin South State Constituency[175] that held that PDP had no structure in place to nominate candidates.

This position was carried into the 2023 election petition tribunals. In several Tribunal and Court of Appeal judgments, it was held that PDP candidates lacked the locus standi to challenge the elections because the party had failed to comply with the decision of the State High Court in Bitrus Kaze's case to conduct a fresh and valid congress and therefore, their sponsorship was defective. In cases where the PDP was the winner and respondent in the petition, their election was overturned on the grounds that they were not validly sponsored.

The argument against PDP across the post-election cases analysed for Plateau State is that in so far as no valid ward, local government and State Congress was conducted and democratically elected executive committees in these areas are not in place, then no delegate can emerge to vote in any primary election of the PDP. In the instant case, the first respondent, **Nentawe Goshwe** and his party, the APC argued that in so far as PDP remained in breach of a Court Order to do a fresh congress, then no platform existed for them to contest the governorship election. Furthermore1because of the invalidity of the sponsorship of Caleb Mutfwang, he was not qualified for the election and his return as the winner of the governorship election is void with the votes cast for him being wasted votes. The Supreme Court per Agim, JSC, responded to this argument as follows:

> *"The question of the validity of the primary election and nomination of the candidate of a political party for a general election and the question of whether Ward, Local Government and State Executive Committees existing at the time were validly elected are clearly outside*

173 See **PDP v. Plateau State Independent Electoral Commission (PLASIEC)** (Unreported) Suit No: PLD/J250/2021. See also **Appeal No. CA/J/196/2021** where the Court of Appeal affirmed the decision of the Plateau State High Court. The PDP went to the Supreme Court, but its case was dismissed for lack of diligent prosecution.

174 The effect was that the PDP was excluded from participating in the Local Government Elections in Plateau State which saw the APC winning all the 17 Local Government Chairmanship and 325 Councillorship seats. See: Adinoyi, S. (2021, October 11). *APC Wins All Seats in Plateau LG Elections.* This Day. https://www.thisdaylive.com/index.php/2021/10/11/apc-wins-all-seats-in-plateau-lg-elections/ See also: Mark, I. (2021). *Why Zamfara APC's 2019 Fate May Befall Plateau PDP. Leadership*. https://leadership.ng/why-zamfara-apcs-2019-fate-may-befall-plateau-pdp/

175 See: **Dasat v. INEC and Ors.** (Unreported) Petition No. EPT/PL/HOA/02/2022. See also: **Ibrahim Baba Hassan & APC v. INEC, Musa Agah Avie & 5 Ors** (Unreported) Appeal No. CA/J/PL/HR/16/2023. **Adamu Muhammed Alkali & PRP v. INEC; Musa Agah Avia & PDP** (Unreported) Appeal No. CA/J/EP/PL/HR/14/2023

the subject-matter jurisdiction given to a State Governorship Election Tribunal by S.285(2) of the Constitution of the Federal Republic of Nigeria which provides that the Governorship Election Tribunal shall to the exclusion of any court or tribunal, have original jurisdiction to hear and determine petitions as to whether any person has been validly elected to the office of Governor or Deputy Governor of a State."[176]

The Supreme Court's Opinion on the Order of the Plateau State High Court for PDP to Repeat their Congress.

The Supreme Court faulted the Court of Appeal's finding that PDP disobeyed a subsisting court order to hold a fresh or repeat congress. The apex court held that apart from the fact that the parties, including INEC, admitted that there was a repeat congress, **section 84 (5) (b)** of the Electoral Act and existing case law[177] asserts that it is the National Executive Committee (NEC) of a political party that can conduct party primaries for governorship aspirants. In light of this, it held that the State High Court Order had no effect on the exercise of the power by the PDP National Executive Committee to organise a special congress for the primary election from which Caleb Muftwang Manasseh emerged.[178]

The Tribunal had in fact found that there was a repeat PDP congress on 25 September 2021, but the Court of Appeal failed to take cognisance of it. The procedure for the repeat congress was however challenged by PDP members but not before a court. Referring to the petitioners (APC) as busybodies and meddlesome interlopers, the Tribunal had held that the validity of the repeat congress was a pre-election matter that could have been challenged by members of the PDP in the Federal High Court and not by the APC and its candidate at the Election Petition Tribunal. The Supreme Court criticised the Court of Appeal for substituting this finding of the Tribunal with its own contrary opinion without basis.

It is important to note that while the Tribunal held that the repeat State Congress of the PDP, which was held before the primary election, is also a pre-election matter, the Supreme Court did not affirm this point but instead, went beyond to broadly state that the internal affairs of political parties are non-justiciable. The Supreme Court stated categorically that issues related to the administration of a party are its internal affairs and not within the jurisdiction of the courts. In an *obiter dictum* in his lead judgment, Agim, JSC, stated that the Order of the Plateau State High Court of 20th November 2020 was made without jurisdiction. [179]

176 Supra at page 20

177 **Kente v. Bwacha** (2023) 9 NWLR (Pt. 1889) 329 at 380 and 387: The primary elections of political parties cannot be conducted by a State chapter; neither can a State chapter decide the mode of primary election to be adopted.

178 Justice Inyang Okoro, in his concurring judgment, stated that the order of the Plateau State High Court directed and binding on the Plateau State chapter of PDP had no hold on the National Executive Committee (See page 4 of Concurring Judgement on Mutfwang v. Goshwe). The Supreme Court panel all agreed on this point.

179 **Manasseh Muftwang v. Nentawe Goshwe & 3 Ors**. (Supra) @ at Page 34.

On non-justiciability of internal affairs of parties.

The Supreme Court restated the *Locus Classicus* of **Onuoha v. Okafor**[180] and its long-held position on the non-justiciability of internal affairs of political parties. With respect to the instant case of Caleb Manasseh and Nentawe Goshwe, the Supreme Court, per Agim JSC, held as follows:

> *"Matters about a political parties congress to elect officers of any level of its executive committees, the constitution of such executive committees and matter related to the administration of the party are its internal affairs and not within the jurisdiction of the courts. See Aguma V. APC (supra) and Osagie V. PDP (2023) 5 NWLR (Pt. 1877) 355 at 3820387). Only a primary election congress is open to litigation as a pre-election action by virtue of s.84 of the Electoral Act, 2022. A congress to elect officers of any level of the executive committees of a political party has to do with the internal management of the political party. It is non-justiciable. Therefore, a court or tribunal has no jurisdiction to entertain any dispute arising therefrom."* [181]

On Misapplication of Judicial Authority

It is important to note that the Supreme Court had cited its earlier decisions in **Jegede & Anor v. INEC & Ors.** [182] and **Oni v. Oyebanji** [183] to support its assertion that the limited scope of jurisdiction vested in the election tribunal by **section 285(2)** CFRN cannot extend to the validity of a party's primary election and nomination or sponsorship of a party's candidate before an election. But in so doing, it clarified its position on whether qualification was both a pre-election and post-election issue. This is because these two cases and several others,[184] were copiously cited in several election petitions and used by the Court of Appeal in the instant case of Caleb Manasseh and in other cases to affirm Tribunal decisions that held that the sponsorship of a candidate by a political party as prescribed in the Constitution as a requirement for qualification, extends to and encompasses valid primary election and nomination of the person. The apex court held that this interpretation by the Court of Appeal contradicts and disregards the decisions of the Supreme Court on the issue.

In a nutshell, the Court opined that the provision of the Constitution intended to prevent independent candidates and ensure that only persons sponsored by a political party qualify as candidates, was deliberately misapplied to confer jurisdiction on Tribunals to hear internal party nomination disputes. The Supreme Court's position on this matter is simply that the fact that a member of a political party is sponsored by it as its candidate for an election (governorship in this case) satisfies the constitutional requirement on sponsorship by a political

180 (1983) 2 SCNLR 244 at 254
181 Supra at page 30
182 (2021) LPELR-55481(SC)
183 (2023) NWLR(Pt.1902) 507(SC)
184 **APP v. Obaseki** (2022) 13 NWLR (Pt. 1846) 1 @ 33(SC); **Aguma v. APC & Ors** (2021) LPELR - 5592(SC), **Sani V APC** (2023) 17 NWLR (1912) 109 at 142 and **Ndukwe v. Ayu** (2023) 5 NWLR (Pt. 1877) 309(SC).

party.[185] Furthermore, that any dispute on the validity of party sponsorship should be settled outside the Election Petition Tribunal.

Also in focus was the reliance on **section 134(1)(a)** of the Electoral Act by Petitioners to challenge the qualification of a winner or person elected based on criteria outside of those already outlined in the Constitution. This provision states as follows:

> *"134. (1) An election may be questioned on any of the following grounds—*
> *(a) a person whose election is questioned was, at the time of the election, not qualified to contest the election;"*

The Supreme Court further held that the Constitution "covers the field" on the criteria for qualification and non-qualification. In their opinion, any law that provides for anything contrary to the provisions of the Constitution is to that extent void by virtue of **section 1(3)**[186] of the Constitution.[187] The Supreme Court did not say that this provision of the Electoral Act was void1but was misinterpreted or misapplied in a way that contradicted constitutional requisites. This was also its position in the case of **Yusuf Abba Kabir v. APC & 2 Ors.**[188] While the Appellant and Governorship candidate, Caleb Manasseh Muftwang, had the benefit of approaching the Supreme Court to review his case and this changed his electoral fortune, the candidates for the federal and state legislature were not lucky as all legislative appeals terminated at the Court of Appeal.

3.4.4 *The Case of Imo State*

In Imo State, there was a split decision at the Tribunal and the Court of Appeal on whether they could hear matters dealing with the validity of party nominations and sponsorship of candidates. Some of the Tribunals and Courts ruled that they could, while others took the opposite view and declined jurisdiction. Unlike Plateau State where a single position was taken at the Court of Appeal, election petitions in Imo had two different outcomes at the tribunal level and on appeal.

Case Study: Ikeagwuonu Onyinye Ugochinyere v. Paschal Chigozie Obi & 2 Ors. [189]

Facts of the Case

The issue for determination was whether the failure of PDP to conduct its primary election within the Ideato North/Ideato South Federal Constituency affected the qualification of its candidate, Ikeagwuonu Ugochinyere (Appellant), to contest as the candidate of PDP. The primary election that led to the emergence of Ugochinyere was conducted at Aladimma

185 See page 24 of the lead judgment in **Manasseh v. Goshwe & Ors**. (Supra)
186 **Section 1(3) CFRN**: "If any other law is inconsistent with the provisions of this Constitution, this Constitution shall prevail, and that other law shall to the extent of the inconsistency be void."
187 Per Agim, JSC at page 25
188 Supra
189 (Unreported) Appeal No. CA/ABJ/EP/HR/IM/66/2023

Mall Owerri, which was a venue outside the Federal constituency. He went on to contest the election and was declared the winner.

The (Petitioner/Respondent), Paschal Obi of the Labour Party (LP) approached the Tribunal and argued that the PDP's primary election violated **Section 84 (5) (c) (i)** of the Electoral Act, 2022 which requires that such party primary be held within the constituency. He argued that PDP failed to conduct a primary election known to law and based on this, Ugochinyere offended the provisions of **Section 65 (2)(b)** of the Constitution and cannot be said to be duly sponsored by PDP.

He further submitted that any ground in an election petition alleging that a person did not emerge from any valid primaries conducted in accordance with the law, is a valid ground for challenging qualification under **section 134(1) (a) and 134 (3)** of the Electoral Act, 2022, that can be ventilated before an Election Tribunal.

Another major issue in contention was whether PDP was bound by the decision of the Supreme Court in **Hon. Jerry Alagboso v. INEC & 2 Ors** [190] and a similar case of **Hon. Nnamdi ThankGod Ezeani v. Jones Onyeriri & 2 Ors.** [191] These were pre-election matters that originated from the Federal High Court. In Alagboso's case, the Supreme Court held that the failure of the PDP to adhere to the party guidelines and the Electoral Act as it pertains to the venue for primaries meant that the party had no candidate for the Senatorial elections in Imo West. The Supreme Court made the same finding in Onyeriri's case, as the issues emerged from the same primaries.

The respondent, Paschal Obi argued that these cases were judicial precedents on the PDP primaries which the appellant, Ugochinyere, was bound by. The Tribunal, led by Hon. Justice Anthony Akpovi, relying on these cases, held that the primary election of PDP, which produced Ugochinyere was invalid. In its reasoning, it was essentially the same primary election that produced him as a candidate.[192] To justify its decision to assume jurisdiction on the matter, the tribunal noted that "a plethora of authorities have situated the issues of qualification in the realm of both pre-election and post-election."[193]

This decision was set aside by the Court of Appeal. In the lead judgment delivered by Peter Affen, JCA, the court held that the cases of Alagbaso and Jones Onyeriri were an offshoot of a litigation initiated at the Federal High Court by an aspirant and that what the Supreme Court ruled is that PDP has no candidate for Imo West Senatorial District at the 2023 General Elections which is markedly different from the election for the seat of member representing Ideato North/South Federal Constituency in the House of Representatives.

190 (Unreported) SC/CV/1440/2022; (2023) 8 NWLR (PT. 1885)
191 (Unreported) SC/CV/1441/2022
192 The Primary election of all the candidates for the House of Assembly, Federal House of Representatives and the Senate of the National Assembly in all parts of the State of Imo was held at Owerri, the Imo State Capital due to security reasons.
193 The Tribunal cited among others: **Dickson v. Sylva**, **Fayemi v. Oni, and Dangana v. Usman**.

The Court of Appeal, relying on the decision of the Supreme Court in **Oni v. Oyebanji,**[194] stated that the Supreme Court in that case was emphatic that an election tribunal is not vested with jurisdiction to entertain matters relating to the selection, nomination or sponsorship of a candidate, and that this decision is binding on both the Court of Appeal and the Election Petition Tribunal.

Going further, the Court noted that being a pre-election matter, the cause of action was extinguished and statute-barred by the operation of **section 285(9)** of the Constitution which gives only 14 days from the cause of action for a person to file a pre-election matter. In its opinion, this cause of action remained extinguished and cannot be revived subsequently in an Election Petition Tribunal as a ground for questioning an election.

The Court reasoned that the legislative intent behind **s. 84(14)** of Electoral Act 2022 and **s.285(14)** of the **CFRN** is to ensure that such pre-election grievances are concluded before the general election so that Election Tribunals would grapple with post-election challenges arising from the conduct of the general election or such questions bordering on criteria for qualification and/or disqualifying factors for various elective offices as specified in the Constitution as opposed to the Electoral Act.

On Misapplication of Judicial Authority

To support their argument that the defect in the sponsorship of Ugochinyere by the PDP affects his qualification and that qualification is an issue that operates as a pre-election and post-election issue, counsel to the Petitioner (Paschal Obi) relied, among others, on **Dangana & Ors v. Usman & Ors**,[195] and **Dickson v. Sylva**[196] They also relied on **Jegede & Anor v. INEC & Ors**[197] where they averred that the Supreme Court in interpreting **section 138(1)** of the Electoral Act, 2010 which is the same as **section134(1)(a)** of the Electoral Act, 2022, held that the issue of a defective sponsorship is one that can be raised before a Tribunal.

The Court of Appeal disagreed with this interpretation holding that these cases were a product of pre-existing legal regimes at the time they were handed down and that the situation was markedly different from what is contained in the new Electoral Act, 2022 and **section 285(14)** CFRN, which has restricted the class of persons eligible to complain of infractions in the process of nomination/sponsorship of candidates for election to only aspirants and within specific timelines.

194 (2023) 13 NWLR (Pt. 1902) 507
195 Supra
196 (2017)10 NWLR (PT. 1573) 299 @ 341-342, PARAS H-A. Other judicial decisions relied on include: **Wambai v. Donatus** (2014) LPELR- 23303 (SC); **James v. INEC & Ors** (2015) LPELR - 24494 (SC). **Gwede v. INEC** (2014) 18 NWLR (PT. 1438) 56 @ 102-103, PARAS F-A, **Akpamgbo-Okadigbo v. Chidi** (2015) 10 NWLR (PT. 1466) 124 @ 152-153, PARAS E-A; **A.P.M v. INEC** (2022) 13 NWLR (PT 1846) P. 159 @ PP. 182 - 183, PARA H – A.
197 Supra

The Court of Appeal noted that **Jegede v. INEC**[198] was a defective authority on this issue as what the Petitioner (Paschal Obi) relied on was a dissenting judgment having no binding force. The Court of Appeal also referenced the Supreme Court's decision in **Akinlade v. INEC & Ors.**[199] where the apex court explained that their earlier decision in **Dangana & Anor v. Usman & Ors (2013)**[200] was given before the enactment of Section 285(9) & (14) of the Constitution (as altered by the 2017 4th Alteration Act, No. 21) which now clearly defines what constitutes pre-election matters and timelines for bringing them before a Court.

To buttress the current position of the Court, Peter Affen, JCA who delivered the lead judgment in the instant case of **Ugochinyere v. Obi** held as follows:

> *"any lingering misgivings as to whether a complaint bordering on the qualification of a person returned as elected on the basis that the circumstances of his selection, nomination and sponsorship by a political party contravened the provisions of the Electoral Act 2022 can be ventilated before an Election Tribunal was laid to rest by the Supreme Court held in ONI v OYEBANJI [2023] 13 NWLR (PT 1902) 507 at pp. 543 - 544 (per Agim, JSC) thusly: "The clear provisions of S. 177(c) of the 1999 Constitution do not provide for considerations of how a political party arrived at the decision to sponsor a person as its candidate or the validity of the sponsorship itself."* [201]

The Trend of Conflicting Decisions Across Imo State Election Petitions

At the Imo State Election Petition Tribunals (EPT), several cases were determined relying on the cases of Jerry Alagbaoso and Jones Onyeriri. The marked difference between Plateau and Imo States is that while in the former, cases involving PDP candidates were all resolved against them when they approached the Court of Appeal, in Imo State, the Court of Appeal delivered conflicting decisions. In some of the appeals, it was held that the Alagboso and Onyeriri cases applied, while in others it was held not to be applicable.

In Box 4 are examples of some conflicting decisions in Imo State.

198 Supra

199 (2019) LPELR- 55090 (SC)

200 In **Dangana v. Usman** (Supra), the basis of the challenge of the Appellant's qualification was that the primary election of PDP was not monitored by INEC. The Supreme Court in interpreting the then Section 138(1)(a) of the 2010 Electoral Act, [*now 134(1)(a) of the 2022 Electoral Act*], had said that that "an issue of qualification of a candidate to contest an election under the Electoral Act, 2010 (as amended) is both a pre-election and a post-election matter which both the High Courts and the relevant Election Tribunals have jurisdiction to hear and determine."

201 Supra at page 21

Box 4: Some Conflicting Decisions in Imo State Election Petitions

- **PDP v. Abazu Chika Benson, INEC & 4 Ors.**[202] The APC candidate (Abazu Benson) argued that the party primaries for Imo West that was in contention in Jerry Alagbaoso's case was held in the same venue as that of the PDP Ideato North/South Federal Constituency and because the Supreme court had declared the Imo West primaries as null and void, this could be extended to apply to the PDP candidate for Ideato. The petition succeeded at the EPT panel led by Hon. Justice Anthony Akpovi. The Court of Appeal panel led by Hon. Justice Gumel JCA, maintained their position in the ***Ugochinyere v. Obi*** case. It set aside the tribunal's decision holding that the issue of party primaries was an issue which ought not to have been entertained by the tribunal and that the decisions in the case of Alagboso and Onyeriri only determined the status of the particular subject matter relating to the primary election held by PDP in Imo West Senatorial District and not Ideato North/South.

- **Paschal Okolie & PDP v. Ihezuo Ikenna Martin, APC & INEC.**[203] This case was over the Orlu State constituency. Hon. Justice Anthony Akpovi panel held that the primary election of the PDP candidate was invalid relying on the Supreme Court cases of Onyeriri and Alagboso [2023]. On appeal, the Gumel, JCA, panel held that the 2nd Respondent (APC) had no locus standi to challenge the process by which PDP nominated and sponsored its candidate.

- **Okeke Jonas Onwuegbuchulam & PDP v. INEC, Okafor Chike John & APC.**[204] The qualification of the PDP candidate to contest for the Ehime Mbano/Ihitte Uboma/Obowo federal constituency was questioned at the Tribunal. The Akpovi-led Tribunal applied the decision in *Alagboso v. INEC* to hold that he was not qualified to contest the election following the failure of PDP to conduct valid primaries. The Court of Appeal (led by Hon. Justice Georgewill, JCA) affirmed the decision that the Appellant (Okeke Jonas) was not qualified to contest the election.

- **Okeke Jonas Onwegbuchulam & PDP v. Reginald Keke, PRP & INEC.**[205] The Court of Appeal (led by Georgewill, JCA) affirmed the Tribunal's decision that the Appellant was not qualified to contest the election based on invalid primaries conducted by the 2nd appellant (PDP).

- **Nwankwo Sunday Kanayo & PDP v. Ukechukwu Ernest Udeze, APC & INEC.**[206] This petition concerned the Ideato North State Constituency. The Akpovi panel held that the Petitioner (PDP candidate) lacks locus standi to institute the petition due to invalid primaries.

- **Modestus Osakwe v. Ozurumba Kingsley; APC, INEC & PDP.**[207] The Court of Appeal led by Williams-Dawodu, JCA, affirmed the decision of the Tribunal (Akpovi led) that the Appellant, following the failure of his party (PDP) to conduct primaries in the way prescribed, per the venue, was not qualified to contest. The reliance remained on the pre-election decisions in the cases of Onyeriri and Alagboso.

- **Nwadike Harrison Anozie & APC v. Ozurigbo Ugonna, PDP, Nwugo Ozurumba, LP, INEC.**[208] The petition was over the Isu/Njaba/Nkwere/Nwangele Federal Constituency and the EPT (led by Hon. Justice Salisu Umar) held that the Petitioner/Appellant had no *locus standi* to challenge the qualification of the PDP and LP candidates to contest the election. The Court of Appeal (led by Williams-Dawodu, JCA) reversed the ruling of the EPT relying on Alagboso and Onyeriri.

- **Ifeanyi Godwin Akwitti & APC v. INEC, Matthew Nwogu & LP.**[209] The petition was over the Aboh Mbaise/Ngor Okpala federal constituency, the EPT led by Hon. Justice Salisu Umar held that the issue of the 2nd respondent's membership, nomination and sponsorship by 3rd respondent is a pre-election issue which the tribunal had no jurisdiction to address. On appeal, the Gumel, JCA, panel dismissed the appeal, but for procedural reasons, not nominations. [210]

- **Onyebuchi & PDP v. INEC, Nwosu Gilbert Chiedozie & APC.**[211] Both the EPT (led by Hon. Justice Halilu) and Court of Appeal[212] (led by Ali Gumel JCA) discountenanced the issue of qualification, i.e., the primaries of the Appellant and focused on the Petitioner/Appellant's inability to have witnesses speak to evidence provided.

202 (Unreported) Appeal No. CA/ABJ/EP/HR/IM/64/2023
203 (Unreported) Appeal No. CA/ABJ/EP/SHA/IM/119/2023
204 (Unreported) Appeal No. CA/ABJ/EP/HR/IM/HR/89/2023
205 (Unreported) Appeal No. CA/ABJ/EP/HR/IM/HR/88/2023
206 (Unreported) Petition No. EPT/IM/SHA/48/2023
207 (Unreported) Appeal No. CA/ABJ/EP/IM/SHA/152A/2023
208 (Unreported) Appeal No. CA/ABJ/EP/HR/IM/154/2023
209 (Unreported) Petition No. EPT/IM/HR/16/2023
210 (Unreported) Appeal No. CA/ABJ/EP/HR/IM/76/2023
211 (Unreported) Petition No. EPT/IM/SHA/35/2023
212 (Unreported) Appeal No. CA/ABJ/EP/SHA/IM/105/2023

3.5 BURDEN OF PROOF: ADDUCING EVIDENCE IN ELECTION PETITIONS

3.5.1 *Burden & Standard of Proof in Election Petitions*

It is an age-long settled position of law that the onus of proof lies squarely on a petitioner who questions the return of an election on any of the three grounds for presenting an election petition in **section 134(1) of the Electoral Act 2022**, to prove his case by adducing credible and cogent evidence, moreso where the petitioners seek declaratory reliefs. He must rely on the strength of his case and not on the weakness or absence of the defence or respondent's case.[213]

Speaking on the legal burden of proof in election petitions, the Supreme Court in **Oyetola v. INEC**[214] stated that by virtue of **section 131 (1) and (2)** of the Evidence Act 2011, the appellants (petitioners) had the primary legal burden to prove the existence of the facts asserted by them. And that by **section 133(2)** of the Evidence Act 2011, it is only when the appellants discharge that burden, that the evidential burden would shift to the respondents to adduce evidence to disprove the case made by the appellants.

*NB: **Oyetola v. INEC** was the Locus Classicus for the tribunals and courts in the 2023 election petitions. By the established principle of stare decisis, the tribunals and courts were therefore bound by the decision of the Supreme Court in this case, which they applied in their decisions.*

In many cases, it was observed however that even where the petitioner adduced evidence or raised serious issues, the respondents, including INEC often failed to put up a serious defence or rested their case on that of the petitioner. It was not uncommon for INEC or respondents to call just one or two witnesses. They mostly fell back and allowed the petitioner to prove their case using legal provisions and judicial authorities, to argue that "he who asserts must prove."

The standard of proof in an election petition usually depends on the allegations contained in the Petition. Usually, it is on a balance of probabilities or a preponderance of evidence. However, the Courts have held that where an allegation of commission of a crime is made in a petition, the standard of proof is beyond reasonable doubt, irrespective of the fact that election petitions are sui generis.

It is interesting that the Courts say that election 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 the respondents to adduce evidence in defence of their case will inure to the benefit of the Petitioners in an election petition. Similarly, the courts often rule that petitions

213 See: **Buhari V INEC** (2008) 19 NWLR (Pt 1120) 216, 350. D-E
214 Supra

are declaratory and even upon admission by respondents, reliefs will not be granted without credible evidence.[215]

About **89 per cent** of the Tribunal decisions analysed by PLAC were dismissed. Out of this number, about **73 per cent** were dismissed for failure to discharge the burden of proof, mostly due to insufficient or inadmissible evidence. The remaining **27 percent** were dismissed due to lack of Jurisdiction owing to want of *locus standi*, pre-election subject matter and procedural reasons, in that order.

The current law is that 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 on the balance of probabilities and not on minimal proof.[216] 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. Consequently, polling unit agents are seen to be the best witnesses to prove allegations, whether criminal activities or otherwise, occurred at the polling unit level.[217] Based on the sheer number of election petition cases that have been dismissed for lack of proof, it is clear that this presents a difficult hurdle to scale for aggrieved parties. A petitioner must also tender relevant electoral documents and forms used at the election showing the infractions complained of because the conduct of an election is based on the use of numerous documents.

In the *Locus Classicus* of **Buhari v. INEC,**[218] the Supreme Court of Nigeria, per Niki Tobi JSC, in explaining that a petitioner needs both election forms/documents and witnesses to prove his case categorically held as follows:

> *"A Petitioner who contests the legality or lawfulness of votes cast in an election and subsequent result must tender in evidence all the necessary documents by way of forms and other documents used at the election. He should not stop there. He must call witnesses to testify to the irregularity or unlawfulness of the votes cast and prove that the illegality or unlawfulness substantially affected the result of the election. The documents are among those in which the results of the votes are recorded. The witnesses are those who saw it all on the day of the election; not those who picked that evidence from an eyewitness. No. They must be eyewitnesses too. Both forms and witnesses are vital for contesting the legality or lawfulness of the votes cast and the subsequent result of the election. One cannot be a substitute for the other. It is not enough for the Petitioner to tender only documents. It is incumbent on him to lead evidence in respect of the wrongdoings or irregularities both in the conduct of the election and the recording of votes;*

215 See: **Ibrahim Sirajo Tanko v. INEC& 2 Ors**. (Unreported) Appeal No. CA/J/EP /BA/SEN/ 20/2023 at page 42
216 See: **Ucha v. Elechi, Atiku v. INEC** (2023), **Rhodes-Vivour v. INEC** (Supra), **Adebutu v. INEC** (Supra)
217 See: **Buhari v. Obasanjo** (2015) 13 NWLR (PT. 941).
218 (2008) LPER-814 (SC) p.172-173 paragraphs E-D; (2008) 19 NWLR (part 1120) 1 at 155

wrongdoings and irregularities which affected substantially the result of the election. Proving an Election Petition or proof of an Election Petition is not as easy as the Englishman finding coffee on his breakfast table and sipping it with pleasure; particularly in the light of section 146(1) of the Electoral Act. A petitioner has a difficult though not impossible task."

To put this in perspective, at the time of the 2023 general elections, there were 176,846 polling units spread over 8,809 wards, 774 Local Government Areas, 36 States and the FCT. An aggrieved party that is contesting the outcome of an election on the grounds of non-compliance, such as overvoting, improper accreditation, or corrupt practices, must prove these allegations by tendering the electoral forms of all the polling units where the non-compliance allegedly took place and call, at least, one witness who served as polling unit agent from each of the disputed polling units across the constituency, local government(s) or state(s), as the case may be. This is a herculean task, especially for election disputes involving large constituencies.

Furthermore, these witnesses must be identified and listed when filing the petition. The petitioner must write down their statements on oath i.e. deposition, and file it along with his/her petition. During trial, the witnesses would be cross-examined by counsel to the respondents and all this must be done within strict times allotted for proving their case.[219]

On the importance of polling agents being called as witnesses, the Court of Appeal in **Atiku & Anor. v. INEC & Ors.**[220] held that it is not anticipated by the law for any political party to appoint "an octopus agent with his tentacles in all the polling units and collation centres."[221] That when evidence is required to prove what happened in any polling unit or a collation centre, it is only the agent who witnessed the anomaly or the malfeasance that can legally and credibly testify. In light of this, the evidence of collation agents is useless for proving what occurred at a polling unit. Unfortunately, many petitioners brought their collation agents to testify to incidents that occurred at polling units where they recounted information given to them by the polling agent. Such testimonies were always inadmissible and expunged for being hearsay.

To buttress the importance of party agents as witnesses, the Supreme Court in **Edeoga & Anor v. INEC & 2 Ors**[222] emphasised the need for party agents presented as eyewitnesses to be accredited party agents as indicated in **section 43 (1)** of the Electoral Act. Here, the Supreme Court held that persons who were presented as "polling units and collation

219 See **paragraph 41(10), First Schedule:** "The petitioner, in proving his case shall have, in the case of –
(a) Councillor, Chairman and State House of Assembly, two weeks; (b) House of Representatives, three weeks; (c) Senate, five weeks; (d) Governor, six weeks; and (e) President, seven weeks,to do so and each respondent shall have not more than 10 days to present his defence." These must be done within the 180 days timeframe for hearing petitions and delivery of judgment. The repealed 2010 Act provided a uniform 14 days for all petitioners to prove their case, irrespective of the office being contested.
220 Supra
221 **Atiku v. INEC** (Supra) at page 655-656
222 Supra at page 74

agents" witnesses by the Appellants and who were listed as such in the petition, but who were admittedly not duly accredited by INEC and who did not sign election results as such agents, cannot rightly be said to be competent witnesses or be made "eyewitnesses." The Supreme Court opined that it would be dangerous to allow anyone into an election and result venue who is not accredited just so that they can be termed "eyewitness" for the purpose of election litigation and as a competent witness. The testimonies of such witnesses were therefore discountenanced.

In the case of documentary evidence, the documents to be used in petitions must also be listed. If a petitioner tenders electoral documents without calling oral witnesses to 'speak' to the documents, the petitioner would be deemed to have "dumped" the documents on the Tribunal and the Tribunal would usually refuse to evaluate the documents tendered.

Box 5: Proving an Election Petition

- **Sen. Chimaroke Nnamani Ogbonna & PDP v. INEC, Chukwu Chizoba & LP.**[223] Election petitions are declaratory in nature, therefore an admission by the Respondent is not enough proof. The Petitioner must prove his case which they failed to do in failing to call eyewitnesses or tender the BVAS machine or report thereof.
- **Olujimi Biodun Christine & Anor v. INEC & 2 Ors.**[224] The petitioners' evidence that was tendered through 6 witnesses spanning 748 polling units, 64 wards and 6 local government areas in the State was held to be hearsay and hence inadmissible as they couldn't be in all those venues at the time of the election. Also, the entire 748 PUs were not pleaded in the petition, i.e. not all of them were contested. The Court held that they should have confined themselves to the PUs where they complained of irregularities and brought eyewitnesses to speak to those specific areas instead of bringing a witness to tender a report that alleged overvoting across the board.
- **Chiedozie & Anor v. Collins & 2 Ors.**[225] The Appellant was the sole witness in his petition and sought to use his testimony, which was not first-hand, to establish overvoting in 35 polling units, margin of lead and non-compliance. The Tribunal dismissed the suit for being "devoid of any merit or substance." This decision was affirmed by the Court of Appeal.

3.5.2 *Frontloading Witness Statements on Oath/Depositions*

Frontloading in law means filing all documents to be used at trial upfront. The provision on frontloading in election petitions is grounded on **section 285(5)** of the Constitution which stipulates that an election petition shall be filed within 21 days after the date of the declaration of the result of the elections and **paragraph 4(5)** of the First Schedule to the Electoral Act that states that an election petition shall be accompanied by–

(a) a list of the witnesses that the petitioner intends to call in proof of the petition;

223 (Unreported) Appeal No. CA/E/EP/SEN/EN/35/2023
224 (Unreported) appeal No. CA/EK/SEN/EKT/01/2023
225 (Unreported) Appeal No. CA/OW/EP/SHA/AB/34/2023

(b) written statements on oath of the witnesses; and
(c) copies or list of every document to be relied on at the hearing of the petition.[226]

The Supreme Court in **Abubakar Atiku & Anor. v. INEC & Ors**[227] held (via judgment delivered on 26th October 2023) that a combined reading of **section 285 (5)** of the Constitution and **paragraph 4(5)** of the 1st Schedule to the Electoral Act shows that the time limit for the filing of written statements on oath of witnesses in the election petition proceedings is 21 days from the date of declaration of results. This was restated by the apex court in the Nasarawa State governorship case of **Ombugadu v. Sule**.[228]

The aim of frontloading is to save time, hasten the trial process, prevent surprises from being sprung on the other party and enable them to prepare. The courts have held that this provision is mandatory and cannot be varied. Likewise, an amendment to a petition or calling of additional witnesses is not allowed after the statutory time limit for the filing of the petition has expired.[229] In the eyes of the court, doing otherwise is akin to using the back door to modify a petition and amounts to a breach of the other party's right to a fair hearing. The tribunals were very strict on this and struck out witness statements that were not filed within the statutory period. In fact, in **Edeoga & LP v. INEC, Mbah & PDP**,[230] the Supreme Court described its position on frontloading, "as definite, precise, unequivocal and clear for easy understanding and comprehension even to a non-legal mind."

There were however, a few instances where the Tribunals did not apply this requirement strictly. For example, **in Dennis Amadi & LP v. Osita Ngwu, PDP & INEC**[231] the Petitioners/Applicants prayed for leave to file an additional written statement of an already listed witness along with the petitioner's reply instead of filing it along with the petition as required under the First Schedule to the Electoral Act. The application, according to the Petitioners, arose as a result of an inspection the witness conducted sequel to an order granted by the Tribunal. The Petitioners thus sought leave for the witness to bring forward the documents and evidence seen at the inspection. The 2nd respondent argued that it was not permissible in an election petition for the court to grant parties the liberty to call additional witnesses and lead evidence of facts which were not pleaded. The Tribunal allowed the application on the ground that the name of the said witness and his original statement were already frontloaded. However, in its final decision, it discountenanced the evidence of the additional witness and rejected

226 See also **Paragraph 41(3)** of the First Schedule to the Electoral Act, which presupposes that the statements on oath of all witnesses have been frontloaded in compliance with **paragraph 41(1)** that says that any fact required to be proved at the hearing of a petition shall be proved by written deposition and oral examination of witnesses in open court.
227 (Unreported) Appeal No. SC/CV/935/2023
228 (Unreported) SC/CV/1213/2023**.** Delivered on 19th January 2024
229 See: **APC Vs Marafa (2020) 6 NWLR (Pt. 1721) 383 @ 423** – The Supreme Court held that applications for extension of time to call additional witnesses and to file additional witness statements after the prescribed period for presenting election petitions are not permitted because election petitions are time bound and by reason of being sui generis, the procedure in handling them are stricter than ordinary civil matters.
230 (Unreported) Appeal No. SC/CV/1130/2023
231 (Unreported) Petition No. EPT/EN/SEN/07/2023

the documents tendered on the ground that they were unpleaded. Even though the petition was eventually dismissed, the Tribunal's decision to allow the additional statement seemed to contradict judicial precedent.

Petitioners in the 2023 post-election suits often did not meet the timeline mostly because of the difficulty in securing the attendance of witnesses in court – particularly, witnesses outside their control such as INEC officials. To circumvent this challenge, petitioners resorted to getting the Court to "subpoena[232] or summon such witnesses so that they would not be caught by the requirement on frontloading depositions. This unfortunately did not have the desired effect because the tribunals and courts mostly ruled that such statements were defective and liable to be struck out where the accompanying statements were not filed within the 21-day time limit for filing petitions.

This issue was prevalent in most of the petitions and was a major contributing factor to the failure of most cases especially, the 2023 Presidential Election Petitions. For example, in **Peter Obi & Anor. v. INEC & Ors.**, about 10 out of 13 Labour Party 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. In this same case, the Petitioners sought to rely on the sole evidence of a subpoenaed expert witness, a Professor of Mathematics, and the Forensic Report made by him to prove over-voting in 4,457 polling units which they said affected 2,317,129 voters who had collected their PVCs. Because his statement was not frontloaded, the Court of Appeal expunged this evidence.

In many cases, petitioners' lawyers tried to argue that filing of witness statements on oath of subpoenaed witnesses along with the petition was not within the contemplation of **paragraph 4(5)(b)** of the 1st Schedule as this provision only applies to statements of 'regular witnesses' of a petitioner and not to 'unwilling witnesses' of an adverse party not available to them or known at the time of preparation of the petition. Some added that because the Electoral Act, in **Paragraph 4 of the First Schedule**, does not categorically mandate that statements of subpoenaed witnesses be frontloaded, then the provision of the Federal High Court Civil Procedure Rules 2019, which is liberal on frontloading the statements of such witnesses, should apply.[233] The judicial authorities relied on by proponents to support the view that the evidence of a witness summoned by the court via subpoena is not expected to be frontloaded

232 "A subpoena is a formal document issued by the court commanding a person required by a party to a suit to attend before the court at a given date to give evidence on behalf of the party or to bring with him and produce any specified documents required by the party as evidence or for both purposes.

233 **Order 3 Rule 3 (2)** of the Federal High Court Rules says that where a statement on oath of the witness requires a subpoena from the court, it need not be filed at the commencement of the suit. The argument, which the court disagrees with, is that by virtue of **Parag. 54 of the First Schedule to the Electoral Act**, the Federal High Court Rules can be adopted to fill in the supposed gap on frontloading statements of subpoenaed witnesses in the Electoral Act.

included older decided cases like **Ibrahim v. Ogunleye & Ors**[234], **Ombugadu v. Sule**[235] **Omidiran v. Etteh,**[236] and **Lasun v. Awoyemi.**[237] In the last two cases mentioned, the Court of Appeal was of the view that it would be unreasonable for a Petitioner to frontload the witness statement on oath of a subpoenaed witness. These cases were however decided before the 2022 Electoral Act.

The Supreme Court's current position as stated in **Peter Obi & Anor v. INEC & Ors and Atiku v. INEC** is that whether the witnesses that a party intends to call are ordinary or expert and whether they are willing or subpoenaed, their witness depositions must be filed along with the petition before they can testify before the tribunal or court.[238] The reasoning is that the timelines provided in the constitution for filing petitions are sacrosanct.

In **Ahiwe & PDP v. INEC, Otti & LP,**[239] the Supreme Court held that an election petition, being sui generis and time-bound, does not permit piecemeal filing and presentation of the petition and all witnesses, whether subpoenaed or not, and that petitioners should have their statements and pieces of evidence ready to accompany the petition before the petition is filed since there will not be time again to allow for such substantial amendments.

This was reiterated in **Emmanuel David Ombugadu & PDP v. Sule Alhaji, INEC & APC**[240] (delivered on 19th January 2024)**.** In this case, the Supreme Court recalled its decision in **Oke v. Mimiko** *(2013 LPELR - 20645 (SC))* where it held as follows:

> *" There is no distinction between witnesses and subpoenaed witness under paragraph 4(5) of the First Schedule to the Electoral Act. In essence paragraph 4(5) of the Electoral Act covers witness Statements on Oath of all categories of witnesses the Petitioners intend to call at the trial of his or her petition."*

Going further, the apex court in Ombugadu's case, per Kekere-Ekun, JSC, added that:

> *"Whether the witnesses a party intends to call are willing or subpoenaed witnesses, ordinary or expert witnesses, their witness depositions must be filed along with the petition within the stipulated time and neither the petitioner nor the respondent shall be allowed to lead evidence, oral or documentary unless it is pleaded, listed and front loaded."*[241]

In his concurring judgment, Mohammed Lawal Garba, JSC went further to call it an abuse of court process for petitioners not to abide by this rule. He stated that until the Supreme Court departs from its decisions in **Abubakar v. INEC, Obi v. INEC, Oyetola v. INEC**, and

234 (2010) LPELR-4556 (CA) AT 26
235 (2019) LPELR - 48880 (CA)
236 (2011) 2NWLR (pt. 1232) 471
237 (2009) 16NWLR (pt. 1168) 513.
238 **Peter Gregory Obi & Anor v. INEC & Ors;** CA/PEPC/03/2023 delivered on 6th September 2023. SC/CV/937/2023 delivered on 26th October 2023.
239 Supra
240 (Unreported) SC/CV/1213/2023
241 Suprat at page 37-38. The Supreme Court said it was bound by its decisions in **Atiku v. INEC, Peter Obi v. INEC** and **Edeoga & Anor v. INEC** and that its position in **Omidiran v. Etteh** has been overtaken by these recent cases.

other recent Supreme Court cases on subpoenaed witnesses whose statements on oath were not filed along with the petition, but after the expiration of the time within which a petition is to be filed or presented, *"it will constitute and amount to an abuse of court process on the part of counsel to subsequently bring appeals and canvas arguments to the contrary in the courts."*[242]

The Supreme Court's reasoning was further elucidated in the concurring judgment by Ogunwumiju, JSC, in **Edeoga v. INEC**[243] where she gave a detailed history of the frontloading system and how it was first introduced to election petition proceedings in the Election Tribunal and Court Practice Directions of 2007 and subsequently enacted in the 2010 Electoral Act.

In her judgment, she noted that during the 2019/2020 election petition cycle, the Court of Appeal reportedly delivered many conflicting decisions on this matter. [244] For instance, she cited **Bashir & Anor v. Kurdula & Ors**[245] where the Court of Appeal had asked whether it is within the contemplation of the law that a respondent in an election petition should sign a deposition or written statement on behalf of the petitioner whose allegation in the petition he is defending. The Court opined that:

> *"it is a legal fallacy, logically and practically incongruent, barring any collusion or illegality, to expect a respondent in an election petition to sign a written deposition in favour of the petitioner, or to require a petitioner to frontload as part of his petition, depositions of his opponent as one or more of the witnesses to be called at the trial in proof of his petition."*

The Court of Appeal added that the Electoral Act would not have contemplated a scenario where a petitioner would be expected or required, to frontload the deposition of his adversary or that the adversary would willingly without any collusion or illegality, depose to a statement in favour of the petitioner. Further, since respondents are mandated by law to defend a petition, it cannot be within the estimation of the law, in a normal situation, that a respondent will actively take deliberate steps or actions in support or proof of his opponent's case.

A different position was adopted in cases such as **PDP v. Okogbuo**[246] and **Ararume v. INEC & Ors**[247] where the Court of Appeal held that to allow a Petitioner to file an additional witness statement at any stage of the election petition proceedings would destroy the regulated environment that must exist to ensure that both parties to the Petition are expeditiously heard and the petition determined within 180 days from the date of the petition. The Court observed that such an indulgence would remove the control of the pace of electoral litigation

242 **Ombugadu v. Sule** (Supra) See page 2 of Concurring judgment of Mohammed Lawal Garba, JSC.
243 Supra
244 While the Court of Appeal in **Lasun v. Awoyemi** (supra); **Bashir v. Kurdula** (supra); and **Omidiran v. Etteh** (supra) decided that a witness should not be shut out from testifying just because his witness statement on oath was not filed along with the Petition and that the provisions of paragraph 4 (5) of the 1st Schedule to the Electoral Act 2010 does not envisage a subpoenaed witness, the Court of Appeal decided in **PDP v. Okogbuo** (supra) and **Ararume v. INEC** (supra) that a subpoenaed witness cannot testify orally and such witness' written deposition must be filed along with the Petition. The earlier cases were not decided under the 2010 Electoral Act.
245 (2019) LPELR-48473 (CA) at p. 20 para F.
246 (2019) LPELR-48989(CA)
247 (2019) LPELR- 48397(CA)

proceedings from the Constitution, the Electoral Act and the First Schedule to the Electoral Act and leave it at the whim of the parties and open the floodgate for all kinds of abuses of the judicial process. The Court however later adjusted its position in **ANDP v. INEC**[248] where it allowed a party to seek an extension of time to call additional witnesses.

However, with the Supreme Court's position in the recent 2023 election petitions, such an extension of time would not be possible. Hon. Justice Ogunwumiju, JSC, thinks that the current position of the Supreme Court is consistent with public policy or interest, which requires that post-election litigation is disposed of expeditiously so that, as quickly as possible, elected public officers are allowed to settle down to carry out the functions of their offices for which they were elected. However, in an obiter, she 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 as a known or recognised witness such as cases where public servants like police officers who are required to be impartial, are needed as a witness for a party.[249]

The judgment of Hon. Justice Agim, JSC in Edeoga's case where he departed from the view of the majority is instructive. He is of the opinion that the requirement for the statements of subpoenaed witnesses to be frontloaded within the timeline given for filing a petition has led to injustice and is defeating public expectations of legitimate election law enforcement. He explained that it is unreasonable 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 for filing an election petition or to exclude the admission of a document not accompanying the petition 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 noted that the law does not compel a man to do that which cannot possibly be performed and suggested that the Supreme Court consider departing from or overruling its previous decisions on this point.

By demanding that the evidence of subpoenaed witnesses be also uploaded within the 21-day timeline, the court has created an extremely high threshold for petitioners. It has also raised the question of what the benefit is, of parties asking for a subpoena and a tribunal or court issuing the same knowing that any evidence emanating therefrom could be expunged. In fact, in the dissenting judgment of Hon. Justice Inyang, JCA, in **Adebutu & INEC,**[250] he asked:

> *"Why did the Tribunal bother to subpoena these witnesses knowing full well the futility of their various testimonies in the circumstance?" (at page 65).*

248 (2020) LPELR-58279(CA)
249 See **Edeoga v. INEC**, page 40 the concurring judgment of Hon. Justice Ogunwumiju, JSC.
250 Supra

The Courts may need to adjust their position on this matter if substantial justice is to be served. The words of Pats Acholonu, JSC *(of blessed memory)* **in Duke vs. Akpayubo Local Govt**[251] where he stated that (the Rules of Court) are to be used to discover justice and not to choke, throttle or asphyxiate justice, is instructive. In the process of adhering to rules of procedure, the essence of justice should not be sacrificed.

3.5.3 *Expert Witnesses*

The use of expert witnesses came under scrutiny in the post-election petitions. It was observed that the courts often did not feel that evidence given by experts called by petitioners was of an "expert" nature, necessary or even beneficial to a party. Expert testimonies were frequently discountenanced or little weight given to them, thus raising questions on their role or utility in election petitions. The feasible explanation for experts' statements not being accorded significant weight is that they are not eyewitnesses and given that the courts have ruled severally that direct eyewitness accounts from the polling units or wards are the best type of evidence for election petitions.

Usually, in litigation, expert evidence is considered necessary if there is scientific or technical information to be provided that is outside the experience of the Judge.[252] The expert must be present in court to testify, satisfy the court of his qualifications and state reasons for his/her opinion. However, if an expert fails to present their qualification, it affects the weight attached to the evidence rather than admissibility.

A casual observer may ask why a petitioner would need an expert to testify in an election petition. In practice, petitioners use the oral evidence of expert witnesses to link the relevant aspects of their case to documents tendered. The expert witness usually analyses the numerous documents used for elections, extracts the petitioners' allegations from the documents and presents their opinion or report to the Court. For instance, expert witnesses have been brought in to examine result sheets for forgery or alterations, to make and present mathematical calculations of votes, or to carry out investigations on the functionality of technological devices used for election (e.g. BVAS). Usually, expert witnesses enjoy the exception to the rule that "opinion evidence" is inadmissible in law.[253] However this exception is confined to expert opinion on specialised issues such as on point of foreign law, customary law, custom, science or arts, the identity of handwriting, or finger impressions. Because of this, the courts have often held in election petitions, that reports, analyses or opinions presented by experts on election documents did not fall within these exceptions provided in **sections 68 to 76 of the Evidence Act**.[254]

251 **Duke v. Akpayubo Local Govt** (2005) 19 NWLR (Pt. 959) 130

252 See: **Egesimba v. Onuzurike 11 NSCQR 588 at 643** where Niki Tobi JSC held that: an expert witness is only necessary if by the nature of the evidence, scientific or other technical information which is outside the experience and daily common knowledge of the trial judge as judge of facts, is required.

253 See: section 67 of the Evidence Act

254 See: **Yusuf Abba Kabir v. APC, INEC &** NNPP – (SC/CV/1179/2023)

The courts have also frequently taken the position that the practice of experts being brought to testify on the contents of election documents or results amounted to documentary hearsay, as the evidence of the said 'expert' witness is not an eyewitness account of what happened at a polling unit and is limited to his/her observations from the documents; especially where it involves allegations of overvoting, invalid votes, altered results or improper accreditation at the polling units.

In **Yusuf Abba Kabir v. APC,**[255] a university lecturer with a PhD in Test/Testing Measurement was brought by the petitioner to demonstrate that some ballots were either not signed, stamped or dated, and the Supreme Court noted that identification and numbering of unmarked ballot papers was a straightforward arithmetic calculation that the Tribunal could do. They added that there is nothing scientific or technical about identifying and numbering unmarked or any type of ballot papers or any election document. They referred to the expert's testimony and analysis report as opinion evidence that did not fall within the exceptions provided in **sections 68 to 76** of the Evidence Act.

This attitude by the courts can be gleaned from earlier judicial authorities such as **Omisore v. Aregbesola (2015) 15 NWLR (part 1482) 205**, where Ngwuta, JSC, held that:

> *"parties to election petitions in desperation to win their cases employ the so-called experts believing that their description as experts elevated their evidence to a pedestal higher than the evidence of ordinary witnesses."*

In the same case, Nweze C.C. JSC, (of blessed memory) held (*at pp. 283-284)* that the expert witnesses in question looked at the electoral materials, brought out facts therefrom, and therefore their reports and themselves will be treated not as expert evidence or witnesses. Ogunbiyi, JSC, concurring, held *(at pp 325 – 236)* that the witnesses only made their personal observations on the election materials.

Another observed challenge to the use of expert witnesses is the likelihood of the tribunals and court imputing bias on the part of the expert, especially where they are employed or paid by the petitioner to testify, or where it is found that they have prepared their report specifically for the purpose of the petition. It was found that in such cases, the courts did not place much premium on the expert's testimony or evidence, because in the eyes of the court, they are persons "interested" in the proceedings which removes their opinion from the realm of expert testimony.

By virtue of **section 83(3) of the Evidence Act**, any statement made by a person interested at a time when proceedings were pending or anticipated involving a dispute as to any fact

255 Supra

which the statement might tend to establish is inadmissible.[256] Expert evidence is treated as an exception to **section 83 (3)** of the Evidence Act. The logic is that an expert who makes a statement in any form in respect of a matter in court is generally regarded as a person who has no temptation to depart from the truth as he/she sees it from his professional lens.[257] But where it was found that an expert was paid a fee to analyse election documents for a case, there is usually an imputation that the expert is an interested party, and his/her statement is coloured.

In **Atiku & Anor v. INEC & Ors,**[258]the Court of Appeal explained that the whole idea behind **section 83(3)** of the Evidence Act, 2011, is to eliminate the danger inherent in allowing a party to manufacture and bring in evidence specifically tailored in anticipation of a case or worse still produce such fresh evidence after the case had begun and parties had fully joined issues in it. In this case, the evidence of the petitioner's (Atiku's) two experts was held to be inadmissible for being made in anticipation of proceedings. His lawyer argued that the reports on election documents they tendered were a product of an inspection order/order made by the court to produce documents by virtue of **section 146 (1)** of the Electoral Act. The Court responded that **section 146(1)** does not give a petitioner leeway to adduce evidence in breach of **section 83(3)** of the Evidence Act. Further, it added that section **146(1)** of the Electoral Act 2022 and the interim orders of the court only permitted the petitioners to inspect election documents for the purposes of "instituting or maintaining" an election petition. The Court added that nothing in that provision allows a petitioner to file evidence, let alone the bulky expert reports put in as exhibits during the pendency of the petition.[259]

Similarly, in **Peter Obi & Anor. v. INEC & Ors,** the evidence of an expert witness who was an employee of Amazon Web Services was expunged because not only was her statement not frontloaded, she was also found to be a Labour Party member who contested the Ogoja/Yala federal constituency (Cross River State) seat in the 2023 general election, and thus, in the eyes of the court, she was a person interested in the proceedings. The court noted that this was underscored by the fact that she was attending court and watching the proceedings ahead of her testimony. According to the court, her testimony was essentially a demonstration of her support and loyalty to the 2nd Petitioner (Labour Party) and thus unreliable.

In **Oyetola v. INEC**,[260] the Supreme Court held, in respect of PW1, an expert who was engaged by the Appellants to establish the invalidity of the disputed results in Form EC8A

256 See **Oyetola & Anor. v. INEC & Ors.** (Unreported judgment of the Supreme Court of Nigeria of 9/5/2023 in Suit No SC/CV/508/2023).

257 The Supreme Court in **Ladoja v. Ajimobi** (2016 LPELR 40658) (SC) explained that a person who is not interested is a person whose interest is not affected by the result of the proceedings; completely detached, impartial, independent, non-partisan and really not interested which way the case goes and, therefore would have no temptation to pervert the truth to serve his personal or private ends. It does not mean an interest in the sense of intellectual observation or an interest purely due to sympathy. It means an interest in the legal sense, which imports something to be gained or lost. Normally, a person who is performing an act in an official capacity cannot be a person interested

258 Supra at page 594

259 **Atiku v. INEC** (CA) (Supra) at @ page 593-594

260 Supra

for 744 polling units and produced an expert analysis report therefrom, that such a report is not the product of independent, impartial, detached and professional analysis and that he is clearly a person with the disposition or temptation to depart from the truth**.**

Overall, testimonies of expert witnesses were often held to be insufficient to establish a case in the absence of eyewitnesses. The point that is underscored is that the court or tribunal is not bound to accept the testimony of an expert.[261] Moreover, by virtue of the current position of the Courts in **Atiku v. INEC, Ombugadu v. Sule**, etc. the evidence of expert witnesses must also be frontloaded, failing which it will be expunged by the court.

3.5.4 *The Use of BVAS*

The Electoral Act, 2022 gave stronger legal backing to the use of technology in elections. Nigerians went into the 2023 general election with the hope that this would help eliminate the issues that have dented the credibility of elections in the country. Foremost of the technological innovations introduced by INEC is the Bimodal Voter Accreditation System, which the Commission described as a "game-changer."

The Bimodal Voter Accreditation System (BVAS for short) is a technological device or machine that is used for the accreditation of voters and transmission of election results. Because of its inclusion in the law and the critical election information it stores, the BVAS machine or device was highlighted by the tribunals and courts as indispensable evidence for proving non-accreditation, over-voting, and disenfranchisement of voters.[262] The BVAS was very critical to elections that the courts consistently recognised and affirmed INEC's decision to record zero votes for polling units where the use of the BVAS machine was resisted, as provided for in **Regulation 100(ii)** of the INEC Regulations and Guidelines for the Conduct of Elections, 2022 (also called INEC Regulations).

The BVAS machine was indeed a game changer, but not in the way expected. While it made voter accreditation more efficient and helped to identify incidents of overvoting, the Supreme Court's requirement for it to be tendered in court as evidence changed the game for petitioners as it became an extra evidential requirement to satisfy in the 2023 elections.

In laying the foundation for proving overvoting for instance, the Supreme Court in **Oyetola v. INEC**, held that whenever it is alleged that there was over-voting in an election, by virtue of sections **47(1) & (2), 51(2)** of the Electoral Act 2022, Regulations **14, 18, 19 (b) (i-iv), e (i-iii) and 48 (a)** of the INEC Regulations and Guidelines for the Conduct of Elections 2022, the evidence which must be tendered are:

a. ***the voters register*** to show the number of registered voters,

261 See **County & City Bricks Development Co. Ltd. vs. MKC Nig. Ltd.** 2019 LPELR-46889 (CA) at 26-27
262 Per the Supreme Court case of OYETOLA vs. INEC (2023) 11 NWR (PT.1894) 125 at 168 - 172 and 163

b. the ***BVAS*** to show the number of accredited voters and
c. the ***Forms EC8As*** to show the number of votes cast at the polling unit. [263]

Before the Electoral Act 2022 was enacted, the BVAS machine was not a requirement; rightly so because it was not part of the voting process. In **Oyetola v. INEC**, the petitioners sought to prove the record of accredited voters in the BVAS devices for 744 polling units using a report of the examination of the INEC database or back-end server said to contain details ok the number of accredited voters and number of votes cast in a polling unit transmitted by the BVAS to the said INEC database. The Supreme Court held that this report does not qualify as the BVAS as mentioned in **section 47** of the Electoral Act and that the BVAS machine for each polling unit is the direct and primary record of the number of voters accredited in that polling unit on the election day in the process of the election. It also held that for practical purposes and for ease of reference, an original or certified true copy of an INEC certificate of the record of the number of accredited voters of the BVAS for each polling unit can be produced from an examination of the record of the BVAS machines and tendered in evidence "**along with"** the BVAS machines.

The requirement to tender the BVAS machine was a significant hurdle, which many petitioners could not successfully overcome. Over 80% of petitions were dismissed due to insufficient or inadmissible evidence. Key issues included the failure to present the BVAS machine as evidence and the inability to call eyewitnesses to support the allegations. This was made more difficult by the fact that the Courts and Tribunals granted applications by INEC for it to be permitted to reconfigure the BVAS machine, thereby wiping the data which could have afforded evidence for use in the pending cases. For several petitioners, the 8 weeks interval between the presidential elections of 25th February 2023 and the governorship elections of 18th March 2023 was insufficient to inspect the BVAS and produce a report therefrom before the reconfiguration.

In the cases analysed, some tribunals accepted a BVAS report where the machine could not be tendered, but in most cases, the tribunals insisted on the physical presentation of the BVAS machine, in line with the decision in **Oyetola v. INEC**. This was a key area of conflicting decisions by the Tribunal.

In **Ibrahim Sirajo Tanko & APC v. INEC, Kaila Samaila & PDP**[264] the Court of Appeal held that the CTC of the BVAS report is an allowable substitute for the BVAS machine. And that in the absence of the BVAS machine, the report of their contents per accreditation must be brought. In this case, the Petitioners/Appellants, who contested the election for Bauchi North Senatorial District, tendered polling unit results and BVAS machines for 91 PUs along

263 Per Okoro, JSC at p.48 in **Oyetola v. INEC** (Unreported) (Supra)
264 (Unreported) Appeal No. CA/J/EP/BA/SEN/20/2023 at pages 36 and 42

with the voters register and polling unit results in Form EC8A (1). Unfortunately, the BVAS machines were empty as the accreditation data had been wiped out in preparation for the state-level elections. The tribunal stated that they should have brought the back-end server report of accreditation. The Petitioners/Appellants argued that they were constrained and could not possibly produce the BVAS report in place of the data to be extracted from the BVAS device. They sought to rely only on the entries in Election Forms EC8A (1) and the voter registers to prove the alleged over-voting and the tribunal held that the failure to produce the BVAS report of accreditation was fatal to their case.

Contrast this with **Adebutu & Anor v. INEC & 2 Ors.**[265] where the Court of Appeal relying on **Oyetola v. INEC** held that the BVAS machine or devices are necessary to prove non-accreditation, over-voting, and disenfranchisement of voters. Here, the Petitioners/Appellants produced BVAS records of 92 Polling Units which ended up not helping their case as the Court found it to be inadequate and demanded the physical machines. It must be stated, that is not enough that BVAS machines are tendered, they must be accompanied by oral evidence or witnesses to speak to them or their contents.

In **Ombugadu v. Sule,**[266] the Supreme Court in affirming the declaration and return of the Respondent (Sule Alhaji) held that the Petitioner/Appellant (David Ombugadu) failed to demonstrate the BVAS machine to show overvoting. They also restated their decision in **Oyetola v. INEC** to say that the physical BVAS machines are indispensable in proving overvoting.

In this case, the Petitioner/Appellant tendered Polling Unit Results Form EC8As, 207 BVAS machines, 207 certified BVAS "screenshot printouts" (SPO) and relevant voters' registers for disputed polling units. At the Petitioner/Appellant's request, the BVAS machines were returned to INEC immediately after the cross-examination of the witness who produced them, therefore the Tribunal could not examine its contents. They then argued that the screenshot printout (SPO) of the BVAS machines (i.e. screenshot of the contents of the BVAS) sufficed to show the number of accredited voters and there was no need to demonstrate the contents of the machines to the tribunal.

The tribunal disagreed and expunged the 207 BVAS machines and so-called screenshot printouts. This decision was affirmed by the Supreme Court which held that that in addition to the fact that they were dumped on the tribunal without being demonstrated in any shape or form, there is no provision in the Electoral Act or INEC Regulations & Guidelines for the tendering of a screenshot of the BVAS machines, especially where there is no evidence as to when, where and how the screenshots were obtained.

265 Supra
266 Supra

The Supreme Court then evoked its decision in **Oyetola v. INEC** where it held that the CTC of an INEC certificate of the record of accredited voters in the BVAS for each Polling Unit can be produced and tendered **along with** the machines. Elucidating further, it held that the record of the examination of the BVAS machine may be tendered alongside the machines **"but not as an alternative."**[267] The Court concluded by holding that Petitioner/Appellant did not discharge this burden and that his failure to tender the three required documents or materials for proving over voting, that is; the voters register, the BVAS machines and the Forms EC8A, was fatal to their case.

Box 6: Some Tribunal and Court Decisions that allowed the use of a BVAS Report

Ibrahim Isah Shaba & PDP v. INEC, Aguye Suleiman Danladi & APC.[268]
The Court held that the record of accredited voters on the BVAS and the polling unit results are the required evidence for proving overvoting. And that the CTC of the report of accreditation data obtained from physical inspection of the BVAS machine will suffice if the BVAS machine is not produced.

Hon. Aghedo Sunday & APC v. INEC, Enabulele Destiny Oghayerio & PDP.[269] The Tribunal (curiously) relied on *Oyetola V. INEC* to hold that it is enough to tender the BVAS report alone to prove the number of voters accredited with BVAS machine and voters register and that it is not necessary to tender the BVAS machine itself. This Tribunal also allowed additional witness statements filed outside 21 days on the ground that Petitioners could do so via their written reply as long as pleadings hadn't closed. This was the only successful petition analysed in the Edo State National & State Houses of Assembly Tribunal and looking at the Tribunal's ratio and departure from judicial precedent, it is doubtful that its decision would have held up on appeal.

Awai Paul Congo & SDP v. INEC, APC & Mairiga Usman Uba.[270] The Tribunal held that appropriate secondary evidence in place of the BVAS machine should have been produced by the petitioner.

Abdullahi Umar Kamba & PDP v. Rabiu Garba Kamba, APC & INEC.[271] The Court dispensed with the requirement for the Petitioner/Appellant to tender the BVAS machine for proving overvoting.

Tegbe Olasunkami v. Alli Sharafadeen Abiodun & 2 Ors.[272]
The Petitioner urged the tribunal to take judicial notice of the fact that the BVAS machine used in the conduct of the Presidential, Senatorial and House of Representatives elections have been reconfigured hence their reliance on the BVAS report. They lost and appealed. The Petitioner/Appellant argued that the 2 weeks period between the Federal and State level elections was too short to enable them to inspect the devices. The Court held that it is not possible that the entire data was wiped out, and that alternately, they could have produced INEC to testify that they had reconfigured the machines, so it was not available or that its contents could not be accessed. The Court eventually held that the Petitioner merely dumped the BVAS report on the court and did not speak to it or tender compelling evidence to show over-voting.

267 Per Kekere-Ekun, JSC at page 50 in **Ombugadu v. Sule** (Supra)
268 (Unreported) Appeal No. CA/ABJ/EP/SEN/KG/34/2023
269 (Unreported) Petition No. EPT/ED/SHA/16/2023
270 (Unreported) Petition No. EPT/TR/SHA/15/2023
271 (Unreported) Appeal No. CA/S/EP/HR/KB/48/2023
272 (Unreported) Appeal No. CA/IB/EP/SEN/OY/16/2023

3.5.5 *Section 137 of the Electoral Act & "Dumping" of Documents*

Dumping a document on a court during trial means putting the document in evidence as an exhibit without the vital evidence of a witness to relate or link it with the specific aspect or part of the case in support of which the document was tendered or put in evidence by a party.[273]

The burden on petitioners to call witnesses who witnessed the allegations of non-compliance at the polling units to testify during trial is grounded on the principle established by **section 37 of the Evidence Act**, which provides that a document not made by a witness in a proceeding amounts to 'hearsay.' In other words, a document is said to amount to '*documentary hearsay'* if the purpose of tendering the document is to prove the truth of its contents and the person who made and/or signed the document is not the one tendering it in Court. Under **section 38 of the Evidence Act,** hearsay evidence is, generally, inadmissible. This principle has been reiterated in election petitions.

In **Atiku v. INEC & Ors (2023),**[274] the Court of Appeal held that when a party decides to rely on documents to prove his case, there must be a link between the documents and the specific areas of the petition. The party must relate each document to the specific areas of his case for which the documents were tendered. Failure to link the documents can be catastrophic as was held in this case. However, it was also noted that if dumping is proved, it only goes to the weight to be attached to the document rather than admissibility.

To avoid the challenge encountered with tendering documentary evidence and reduce the number of oral witnesses called in election petitions, the National Assembly in the 2022 Electoral Act, introduced a new provision in **section 137** that allows a tribunal to examine electoral documents where the non-compliance is manifest on the face of the document and oral witnesses were not called to speak to the document. It states as follows:

> *"137. 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"*

What this provision seeks to achieve is to eliminate the requirement of calling the maker of a document to 'speak' to it. Reinforcing this is the provision in **Paragraph 46 (4) of the First Schedule** dealing with hearing in a petition which states that:

273 See: **Omisore v. Aregbesola (2015) 15 NWLR (Pt. 1482) 205 at 323:** Documentary Evidence no matter its reliance, cannot on its own speak for itself without the aid of an explanation, relating its existence. The validity and reliance of documents to admitted facts or evidence is when it is one in open court, and it is not a matter of Counsel's address. See also **Tumbido v. INEC & Ors. (2023) LPELR-50004 (SC):** "The practice of dumping documents on the Court without speaking to them has been deprecated by this court on numerous occasions. No Court is entitled to conduct inquisitorial investigations into the contents of a document or purport thereof in its chambers."

274 Supra at page 746 – 747

> *"46(4) 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."***
>
> *(Bold content introduced in the 2022 Act)*

This provision allows counsel and litigants in election petition matters to tender documents and argue them without calling witnesses and allows tribunal judges to examine and attach probative value to such documents or otherwise. It was meant to lighten the burden os petitioners, but the Courts often saw it as a window that was used to smuggle in and dump documents not identified by witnesses. Ultimately, the Courts refused to elevate this provision above the Evidence Act and often insisted on eyewitness testimonies in addition to documents. To demonstrate the requirement of **section 137,** Hon. Justice Ebiowei Tobi, JCA in his concurring judgment in **Aishatu Ahmed Dahiru & Anor. v. INEC & 2 Ors**[275] explained that at least one witness identifying the documents with the words "*these are the documents I am referring to*" will be enough to take the documents from the dumping site to the Court for proper consideration on its probative value. However, there were still cases where this minimum threshold was considered insufficient. The Courts also made it clear that this provision cannot be invoked to prove criminal allegations in a petition meaning that eyewitnesses must be called to testify to criminal or corrupt acts alleged in an election.

For example, the Court of Appeal in **Dahiru Yusuf Liman v. Solomon** & **3 Ors.,**[276] explained that the effect of **section 46 (4)** of the First Schedule of the Electoral Act is that a Court/Tribunal is at liberty to personally examine and evaluate a document in order to do justice to a case especially if there are several documents from which a court or tribunal will need to draw analogy and conclusion of a case from. It added however, that **section 137** of the Electoral Act and **Paragraph 46(4)** of the First Schedule, would not apply in circumstances that raise the allegation of commission of a crime as such cannot be manifest upon examination of electoral documents without admissible evidence to establish the allegation beyond reasonable doubt.[277]

Shortly after the 2022 Electoral Act was adopted and before the Election Petitions Tribunals were set up, some legal experts had expressed concerns that **section 137** may be in conflict

275 (Unreported) Appeal No. CA/YL/EPT/AD/GOV/18/2023 @ page 9 to 10 (Concurring Judgment)
276 (Unreported) Appeal No. CA/K/EP/SHA/KD/41/2023
277 Tribunals aligning with this view referenced cases such as **Tunji v. Bamidele** (2012) 12 NWLR (PT.1315) P.47 and **Doma v. INEC** (2012) 13 NWLR (PT.1317) P.297 @327. See also: **APC v. Katuka Solomon, PDP, Dahiru Liman & INEC** (Unreported) Appeal No. CA/K/EP/SHA/KD/42/2023

with the Evidence Act 2011, as well as rules of procedure that require documents to be demonstrated in open court. [278] The provision was seen by some as potentially abridging a party's right to a fair hearing, because failure to demonstrate a document in open court means that the Court will have to go into its chambers to examine documents tendered by parties to enable it to determine the allegations that such documents establish. Furthermore, by dispensing with the requirement of calling oral evidence to support documentary evidence already tendered before the tribunal, **section 137** appears to make 'documentary hearsay' evidence admissible, contrary to the Evidence Act.

a. Application of the Novel Section 137 of the Electoral Act, 2022 by Tribunals

The interpretation and application of section 137 was not always consistent at the tribunals. In some cases, the tribunal went ahead to examine documents tendered to see if they disclosed non-compliance or dispensed with oral evidence in their application of the provision. But the results were mostly the same i.e. the non-compliance was not manifest and the petitioner should have called oral witnesses in addition as a buffer. Where this provision was successfully applied, it was often held that the allegations were not substantial enough to upturn the election.

See Box 7 for examples of how the Tribunals applied section 137 of the Electoral Act, 2022

278 Onyechi Ikpeazu, OON, SAN, FCArb, (November, 2022) "*Election Petition: Practice And Procedure*", A Paper Presentation at the Workshop Organized for the Members of The Election Petition Tribunal" held in Abuja.

Box 7: Examples of Application of Section 137 by the Tribunals

Hon. Yakubu Umar Barde & PDP v. Hon. Ekene Abubakar Adams, LP & INEC.[279] It was held that a party who did not make a document is not competent to give evidence on it. Where the maker of the document is not called to testify, the document will not be accorded probative value by the court and the Petitioners failed to lead evidence to speak to the documents before the court.

Enemari Patrick Peter & Anor. v. Agada Ismail Samuel & 2 Ors.[280] The EPT in dismissing the Petition held that "...the Petitioners simply dumped the exhibits and quietly walked away without breathing life into them and expects the Tribunal to pick, resuscitate, analyse and reach a finding when they have not discharged the burden placed on them by law."

Hon. Mutiu Olakunle Okunola & LP v. Hon. James Abiodun Faleke, APC & INEC.[281] The Tribunal discountenanced the Petitioner's bundle of documentary evidence as no link was established between the documents and proof required i.e., oral evidence explaining its essence.

Tegbe Joseph Olasunkanmi & PDP v. Alli Sharafadeen Abiodun, APC & INEC.[282] The Petitioner merely dumped the BVAS report on the court and did not speak to it. The Petitioner failed to present cogent, reliable and compelling evidence to show over-voting which could affect the outcome of the result.

APC & Bala Ibn Na'Allah v. INEC, PDP & Garba Musa.[283] The Petitioners dumped the exhibits on the Tribunal when their witnesses failed to link the documents tendered by the Petitioners' counsel from the bar to specific parts of the case. The Petitioners relied on the testimonies of PW4 and PW5 to prove over-voting, but the witnesses made no references to any documents including the voters' registers and BVAS report which are required to prove over-voting.

INEC v. Abdulkadir Ahmed Zakka, APC, Aliyu Ilyasu & PDP. [284] The Tribunal held that when it comes to non-compliance or over-voting, the BVAS report or Voters Register should be enough proof. It further held that there's no need to overburden the court with unnecessary witnesses except where issues have been joined on facts which necessitate the calling of witnesses. However, the Court of Appeal held that the Tribunal erred in law when they held that the provisions of S.137 of the Electoral Act 2022 and Para. 46(4) First Schedule has dispensed with the need to call witnesses as it relates to overvoting and non-compliance.

Ahmed Uba Nana & APC v. INEC, Ningi & PDP.[285] The Court of Appeal held that the trial tribunal, in seeming compliance with section 137 of the Electoral Act, 2022 examined the exhibits tendered before it by the appellants, but failed to find any manifest irregularities on their respective faces, therefore, the tribunal was justified in not giving them any value.

Onyejeocha & Anor v. INEC & 2 Ors.[286] The Tribunal relied on section 137 to hold that the Petitioner did not need to call oral evidence to speak to the veracity of the documents tendered. It relied on documents/results sheets tendered by the petitioner's counsel from the bar to make its findings. This was upturned on appeal[287] where it was held that the provision in section 137 is only applicable where there is no dispute on the authenticity of the contents of the certified true copies of the documents tendered, which was not the case here.

279 (Unreported) Petition No. EPT/KD/HR/2/2023
280 (Unreported) Petition No. EPT/BN/SHA/05/2023
281 (Unreported) Petition No. EPT/LAG/HR/18/2023
282 (Unreported) Petition No. EPT/OY/SEN/04/2023
283 (Unreported) Petition No. EPT/KB/SEN/01/2023
284 (Unreported) Appeal No. CA/K/EP/HR/KT/33/2023
285 (Unreported) Appeal No. CA/J/EP/BA/SEN/30
286 (Unreported) Petition No. EPT/AB/HR/8/2023
287 See **LP v. Hon. Nkeiruka Chidubem Onyejeocha, APC, INEC & Chief Amaobi Godwin Ogah** (Unreported) CA/OW/EP/EP/HR/AB/05/2023

b. The Position of the Court of Appeal and Supreme Court on Section 137

The Court of Appeal and Supreme Court mostly relied on **Oyetola v. INEC (SC)**[288] to hold that oral evidence is still a necessity when tendering documents in election petitions. In **Adebutu & PDP v. INEC & 2 Ors,**[289] counsel to the Petitioners, in their submissions argued that the strict approach of the Tribunals/Courts did not align with the progressive approach of the legislature to fast-track the determination of election petitions previously tied down by the need to call polling unit agents in respect of allegations that are manifest on the face of electoral documents or forms. The Tribunal and Court of Appeal were not swayed by this argument and held that **section 137** of the Electoral Act cannot be accorded superiority over the provisions of the Evidence Act 2011.

In **Ohuabunwa & PDP v. INEC, Kalu Orji Uzor & APC,**[290] the witness of the Petitioner/Appellant (Ohuabunwa) tendered result sheets for the entire 980 Polling Units in Abia North Senatorial District without identifying and singling out the 109 polling units results that he was contesting. In the eyes of the Tribunal, the appellants did not tender the requisite evidence i.e. polling unit results sheets for the specific disputed 109 PUs. The documents were treated as documents dumped on the court and not deserving of probative value. The court held that it is not its duty to embark on sifting and identifying PU results sheets tendered in the recess of its chambers.

In **Onuoha Chikwem Chijioke & LP v. INEC, Onuoha Miriam Odinaka & APC**[291] the Court of Appeal said it was bold for the Apellants to stake the fortunes of their appeal on the provisions of **section 137 and paragraph 46(4)** of the First Schedule to the Electoral Act, which is not a magic wand to herald the success of an election petition that has not been fed with relevant, credible and sufficient information to establish complaints of non-compliance.

In **Adebutu v. INEC,**[292] the Court of Appeal held that the electoral documents that were subjected to forensic analysis by the petitioner/appellant did not manifestly disclose the alleged non-compliance with the provisions of the Electoral Act as it was not plain, obvious or indisputable to human eyesight. It stated as follows: the "*evidence of non-compliance being presented in court must be plain, obvious or indisputable to human eyesight and not one that could only be discovered by forensic examination and statistical calculation by experts.*"[293] This was affirmed by the Supreme Court who held that the non-compliance should be evident on the face of the document to the court or tribunal without the need for forensic or deep analysis.[294]

288 Supra
289 Supra
290 (Unreported) Appeal No. CA/OW/EP/SEN/AB/13/2023
291 (Unreported) Appeal No. CA/ABJ/EP/HR/IM/48/2023
292 Supra
293 **Adebutu & Anor v. INEC & Ors.** (Supra) at page 28
294 **Adebutu & Anor v. INEC & Ors.** (Supra) per Tijjani Abubakar, JSC at page 19

The Court of Appeal in **Tanko & Anor v. INEC & Ors.**[295] held that the position of the law in this regard remains constant like the northern star. The Court per Sirajo, JCA, further held as follows:

> *"…all that the section connotes is that instead of calling a host of witnesses to speak to each document tendered, as was the case until now, a Petitioner can call a single witness or a few witnesses to speak to all the documents tendered, if that is possible. But this can only be achieved if the single witness or few witnesses, in their front-loaded written depositions, referred to the document(s) and relate them to the specific non-compliance alleged in the petition."* [296]

Unfortunately, this is easier said than done. In this case, there were allegations of overvoting and the evidence of two eyewitnesses were wrongly expunged by the Tribunal. The Court held that it did not matter because it would not have made any difference to the outcome of the election.[297] The reasons were that the number of contested votes in the two polling units they were called to testify to was not enough to change the results; and that there was no BVAS report nor demonstration of its contents to show the number of accredited voters which is required to prove overvoting. This shows that even the evidence of oral witnesses to speak to documents can be inadequate, as other evidentiary requirements to upturn an election must be fulfilled.

In **Abubakar Atiku & Anor. v. INEC & Ors,**[298] the Presidential Election Petition Tribunal (PEPT), i.e. the Court of Appeal, held that the use of the word '**manifestly**' by the draftsman in **section 137** of the Electoral Act 2022 suggests that the non-compliance complained of must be apparent on the face of the electoral document. It must not be something that can be explained away by oral evidence. The court in response to the Petitioner's argument that a careful examination of exhibits tendered and supported by the uncontroverted reports of two expert witnesses, PW21 (a statistician) and PW26 (a forensic expert) manifestly disclosed large-scale 'irregularities' that have never been witnessed in Nigeria, held as follows:

> *"This interpretation of section 137 of the Electoral Act by the Petitioners has generously and swiftly silenced the otherwise potent adverbial word "manifestly" used by the legislature in that section of the law. "Manifestly" is defined by online dictionary: www.dictionary.com to mean: "in a way that can be readily seen by the eye or the understanding; plainly or obviously; evidently." This means for the Petitioners to throw up their arms and say we need not call oral evidence in proving non-compliance as they are canvassing, the certified copies of documents presented must be manifestly or readily seen to convey the fact of non-compliance."* [299]

295 (Unreported) Appeal No. CA/J/EP/BA/SEN/20/2023. Judgment delivered on 27 October 2023
296 Supra at pp. 40–41
297 The Court cited **Section 251 (2) of the Evidence Act** which stipulates that wrongful rejection of evidence, shall not, of itself, be a ground for the reversal of any decision in any case, if it appears to the Court on appeal, that had the evidence excluded been admitted, it may reasonably be held that the decision would be the same.
298 Supra
299 per Tsammani, JCA, at page 742

On appeal, the Supreme Court[300] agreed that the provision states clearly that oral evidence may not be necessary if and only if originals or certified true copies manifestly disclose non-compliance. Also, in **Jibrin Muhammad Barde & Anor. v. INEC & 2 Ors,**[301] the Supreme Court per Olatokumbo Kekere-Ekun, JSC held that: "*section 137 of the Electoral Act, 2022 was seen as a saviour, absolving the petitioners of the need to properly link any of the bulk of documents tendered to specific aspects of their case.*" It added that **section 137** does not absolve a party from the need to properly link any of the bulk of documents tendered to specific aspects of their case.

In the Court of Appeal case of **Adeleke v. Oyetola**[302] which was decided before the election petition tribunals of 2023 commenced, the Court of Appeal ruled extensively on **section 137** as follows:

> *"It is the exclusive preserve of the Judge to decide whether or not there is a 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 (6) of the First Schedule to the Electoral Act, 2022 … 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! (at page 94-95)"*

The decision of the Court of Appeal was affirmed by the Supreme Court, but the lead judgment by Emmanuel Agim, JSC, in **Oyetola v. INEC**[303] (delivered on 9th May 2023), did not delve into **section 137** of the Electoral Act even though it maintained the position that a petitioner who alleged non-compliance with the provisions of the Electoral Act still had a duty to call witnesses who observed the alleged acts of non-compliance. However, Adamu Jauro, JSC, in his concurring judgment, explicitly stated (at pp 58-59) that the provision in **section 137** was drafted in simple, clear and unambiguous words and a literal interpretation of the words should be made, which is that the section only applies where the non-compliance alleged is manifest from the originals or certified true copies of documents relied on.

300 **Abubakar Atiku & Anor. v. INEC & Ors** (Supra)
301 (Unreported) SC/CV/1226/2023 at page 52
302 (Unreported) Appeal No. CA/AK/EPT/GOV/01/2023
303 Supra

Hon. Justice Agim's stance on section 137 is explicit in the cases of **Edeoga v. INEC**[304] and **Abubakar Sadique Baba v. INEC & 2 Ors.**[305] In Edeoga's case, his opinion is that oral evidence is not necessary to prove alleged non-compliance such as arithmetical error on the face of a result sheet, non-accreditation that is obvious from the record of the BVAS, non-recording of the numbers and other particulars of result sheets, ballot papers and other sensitive electoral materials made available by INEC for the election, absence of official mark such as date, signature and stamp of presiding officer on a ballot paper used to cast a vote in a polling unit, etc. He held that 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 **section 137**.[306]

In Abubakar Sadique Baba's case, he explained in his dissenting opinion, that the experience with the repealed 2010 Electoral Act and established case law decided before the 2022 Electoral Act against dumping of documentary evidence, imposed requirements of proof that were in practice impossible to attain and rendered electoral justice illusory "with the declared winners of allegedly sham or false elections glorying in the infamy of their victories with impunity." He noted that the objective of the twin provisions of **section 137 and paragraph 46(4)** of the First Schedule is to put a nail in the coffin on the rule against dumping of documentary evidence and "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." [307]

The main complaint in this case, which concerned the Bauchi State Governorship election, is the Court of Appeal's appraisal of the applicability of **section 137 of the Electoral Act, 2022 and paragraph 46(4) of the First Schedule** vis-a-vis the alleged breach of the provision of **section 73(2) of the Electoral Act**. The facts are that the Appellants alleged that the provision of **section 73 (2)** of the Act[308] which requires that the quantity, serial numbers and other particulars of result sheets, ballot papers and other sensitive electoral materials be filled by the presiding officer in the polling unit was not complied with in all the polling units in (7) seven Local Government Areas of Bauchi State.

The majority decision of the Supreme Court (affirming the Tribunal and Court of Appeal) held that the Appellants failed to call any of their agents in the affected polling units to demonstrate their complaint in open court. They added that the position is well settled that

304 Supra
305 (Unreported) SC/CV/1189/2023. Judgment delivered on 12th January 2024.
306 He noted that counsel to the petitioner can demonstrate the manifest disclosure in his written address or brief by referring the Tribunal or Court to the paragraph of the pleading where the allegation is made and to the particular exhibit that manifestly discloses such non-compliance. And that the best practice to facilitate the court's evaluation is to plead in the petition in a tabular form, the relevant polling units, particulars of non-compliance and the votes affected and then in the written address, state in a tabular form the relevant exhibit that establishes the pleading concerning the particular unit.
307 **Abubakar Sadique Baba v. INEC & 2 Ors** (Supra) Dissenting Judgment by Agim, JSC @ page 9
308 Also, **paragraph 17(c)** of the INEC Regulations and Guidelines for Elections, 2022

the provision of **section 137** does not absolve a petitioner of the need to lead credible evidence to prove non-compliance with the provision of the Act except where the alleged non-compliance is manifest from the originals or Certified True Copies (CTC) placed before the court. [309] Furthermore, the apex court applied the rule of presumption of regularity of the said Forms in favour of INEC holding that it is only when the Appellants discharge the burden of proving the irregularity or non-filling of the Forms, that the burden would then shift to INEC.

The Court also held that the alleged non-compliance with **section 73(2)** did not substantially affect the election. The same decision was reached in the earlier case of **Obi v. INEC**[310] where the apex court held that petitioners who allege non-compliance with section 73(2) as part of their cause of action have the burden to establish that such non-compliance substantially affected the election in accordance with the requirements of **section 135(1)** of the Electoral Act.

However, Agim, JSC, reasoned differently. Firstly, he held that the Court of Appeal and the Bauchi State Election Tribunal wrongly applied the provisions of **section 137** of the Electoral Act 2022 and **Paragraph 46(4)** of the First Schedule by deciding that the INEC Forms[311] admitted in evidence and relied on by the Petitioner/Appellant to prove non-compliance with **section 73(2)** of the Electoral Act were dumped on the Tribunal. In his opinion, the relevant Form(s) EC40G[312]presented in Court is sufficient evidence of whether they were filled or not filled by the Presiding Officer and that this does not need oral evidence as it is manifest on the face of the document. He mentioned that the result of the rule against dumping has become a tool to block the courts from considering relevant and useful evidence contained in the document already admitted as evidence before it.

Secondly, he noted that the wordings of **section 73(2)** do not allow for the application of the rule of the presumption of regularity of official acts or processes. According to him, INEC produced the Forms for 834 polling units in court but refused to produce the Forms for 1,844 polling units, therefore raising the presumption that the evidence was unfavourable to them.

Furthermore, Agim, JSC, held that once the relevant INEC forms are not filled with the required particulars, the election in that polling unit shall be invalid because, while **section 135(1)** gives the discretion to the Election Tribunal or Court to determine if an act of non-

309 The Supreme Court cited its earlier decisions in **Oyetola Vs. INEC** (2023) LPELR-60392 (SC); **Atiku & Anor. Vs. INEC &Ors.** (2023) LPELR-61556 (SC).

310 Supra. Judgment delivered in October 2023

311 This refers to the INEC polling unit booklet containing Forms EC25B (Electoral Material Receipt/Reverse Logistics), EC40A (Ballot Paper Account and Verification Statement), EC40B (Statement of Rejected and Spoilt Ballot), EC40C (Statement of Used and Unused Ballot Papers) and EC40G (Record of elections not held/cancelled in polling units).

312 Some of the Forms complained about such as EC40A, EC40B & EC40C are non-sensitive materials that are completed at the close of polls (per INEC Manual for Election Officials). Form EC40G is considered sensitive material but is also completed at the close of polls. Section 73(2) refers to "prior recording" of sensitive materials.

compliance should invalidate an election, **section 73(2)** statutorily declares the election in that polling unit invalid for non-compliance with the provision and does not give the Election Tribunal or court any discretion on the matter.

While Agim's position is not the majority opinion of the Supreme Court, similar reasoning was observed in some Court of Appeal judgments where the doctrine of substantial non-compliance was not factored in the interpretation of **section 73(2)** and the provision was interpreted strictly as is. For instance, in **Abdullahi Umar Kamba & PDP v. Rabiu Garba Kamba, APC & INEC,**[313] the Court of Appeal set aside the decision of the Election Petition Tribunal in Kebbi State which held that the failure of INEC officials to fill the statutory forms in 50 polling units in the Arewa/Dandi federal constituency as prescribed by **Section 73** of the Electoral Act is not substantial to affect the result of the election; that documents were dumped on the Tribunal; and that **section 137** of the Act cannot avail the Petitioners.

The Court allowed the burden of proof to shift to INEC noting that the Appellants led unchallenged evidence in proof of their petition and claim that that the forms prescribed by the Commission of the quantity, serial numbers and particulars of the result sheets, ballot papers and other sensitive electoral materials made available by the Commission for the election were not filled at 50 polling units, while the respondents merely denied the allegations and failed to call a single witness. The Court of Appeal held that the Tribunal erred when it ignored the provision of **section 137** and instead insisted that eyewitness testimony was relevant. The Court also held that the intention of the lawmakers in enacting **section 73 (2)** of the Electoral Act, 2022 is devoid of ambiguity and to the effect that an election conducted without filling of the requisite forms is invalid.[314]

The reasoning in **Khaleed Abdulmalik Ningi & APC v. Abubakar Yakubu Suleiman, PDP & INEC**[315] is similar but the case has different facts in that the Forms EC40G (showing where elections were cancelled due to overvoting and disruptions) were filled but the Tribunal refused to grant probative value to the Forms because the Presiding Officers were not called as witnesses. The Court of Appeal setting aside the decision of the Tribunal, applied **section 137** to grant probative value to the Forms which showed cancellation of results in 10 polling units. The Petitioner/Appellant had tendered the relevant Forms EC40G issued by INEC, but the Respondents, including INEC challenged the documents and asked the Court to discountenance it because the Presiding Officers did not testify.

The Court of Appeal noted that the said EC40G Forms were already tendered by the Petitioner/Appellant's polling agents along with other Forms EC8A (PU results) and that their contents

313 (Unreported) Appeal No. CA/S/EP/HR/KB/48/2023

314 There were other issues in this case that would not have passed the scrutiny of the Supreme Court. E.g. BVAS machines were not required to prove overvoting, which contradicts the current Supreme Court position.

315 (Unreported) Appeal No. CA/J/EP/BA/SHA/56/2023

were self-explanatory. The Court then shifted the burden of proof to INEC to disprove the documents stating that the act of INEC filling the Forms EC40G(PU) and certifying it raises a presumption of satisfaction of the legal requirement of documents tendered '*manifestly*' disclosing the non-compliance alleged. The complaint was that INEC cancelled elections but failed to conduct supplementary elections in the disputed polling units even in the face of a significant margin of lead. The Court chided INEC for denying their documents and the alleged overvoting, stating that it was embarrassing for the Commission to make such denial after issuing Certified True Copies of Forms EC8A (1) and EC40G(PU) to the Petitioner for use as exhibits. To be specific, Hon. Justice K.I. Amadi, JCA, in his lead judgment, stated that INEC as an institution should be reminded of its role in an election to be an unbiased umpire between the parties and should "*stop dancing naked in the marketplace pretending that nobody is seeing its dancing steps and nakedness*." [316]

3.5.6 *Proving Margin of Lead*

By the provisions of the 2022 Electoral Act, the number of voters who collected their Permanent Voters Cards (PVCs) is now the determining factor for calculating the margin of lead in elections. The Margin of Lead Principle establishes the conditions or situations where a supplementary election is needed. It applies where the difference in the votes cast for the two leading candidates in an election is more than the total number of votes cancelled or voided for reasons under **section 24** (violence), **section 47**(BVAS malfunction) & **section 52** (over-voting) of the Electoral Act, 2022. In such cases, the election is deemed to be inconclusive, and no declaration can be made until supplementary elections are conducted in the PUs where elections were cancelled. The Margin of Lead principle is defined in **Clause 62 of the INEC Regulations**[317] and it provides as follows:

> *"where the margin of lead between the two leading candidates in an election is NOT in excess of the total number of voters who collected their permanent voters cards in polling units where elections are postponed, voided or not held in line with sections 24(2 &3) , 47 (3) and 51(2) of the Electoral Act, the returning officer shall decline to make a return for the constituency until polls have been conducted in the affected polling units and the results collated into the relevant forms for declaration and return…"*

The Margin of Lead Principle enables INEC to not only ensure that voters are not disenfranchised, but also answers the question of whether the overall result of an election will be substantially affected where there have been cancellations or nullification of results. The margin of lead is also important in determining if a candidate obtained the majority of lawful votes cast (a ground for filing a petition), therefore it was frequently raised by petitioners in the Tribunals.

316 **Khaleed Abdulmalik Ningi & Anor v. Abubakar Yakubu Suleiman & 2 Ors.** (Supra) @ page 12

317 Note that this provision on Margin of Lead is replicated for all the levels of election – in **Reg. 67** for Presidential Elections, **Reg. 71** for Senatorial Elections, **Reg. 75** for Federal Constituency Elections, **Reg. 82** for Governorship Elections, and in **Reg. 85, 87 & 89** for State Constituency Elections.

Previously, under the Electoral Act, 2010, tendering of the voters' register was held to be sufficient where a petitioner was alleging that the margin of lead was not properly applied or should have been applied.[318] However, the courts have held that under the provisions of the 2022 Electoral Act, it is incumbent on a party who urges the court to apply the Margin of Lead principle, to produce in evidence not only the Voter's Register for the polling units but the documentary evidence showing the number of the collected Permanent Voter's Cards (PVCs) and to show that such number exceeds the difference of votes between the two leading candidates.

In **APC & Asarya Tarpaya v. PDP, Midala Usman Balami & INEC,**[319] the Court of Appeal per Sirajo, JCA held as follows:

> *"It is important to note that the Regulations and Guidelines for the Conduct of Elections, 2022, has introduced a new legal regime in Nigeria's electoral jurisprudence in the determination of the margin of lead principle. The determining factor now is* ***the total number of PVCs collected, not the total number of registered voters, as was hitherto the case****. …. The Appellants neither pleaded nor proved the total number of collected PVCs in the areas they alleged election was either cancelled or did not hold. They wrongly built their case on the number of registered voters, which was the old legal regime, and in the process failed to make a case that the election was inconclusive."*

Like the aforesaid case, there were several cases where petitioners sought to establish that there was a significant margin of lead between them and the winner of the election and therefore, supplementary elections should have been ordered, but the petitioner failed to show the number of PVCs collected.

For example, in **Awoyeye Abiola Jeremiah v. Adejobi Adeyinka Johnson, APC, INEC & PDP**[320] the Court of Appeal held that a mere averment in pleadings or oral evidence without tendering the voters register and the list of those who collected their Permanent Voters Cards from the polling units does not satisfy the requirement of proof. It further held that the EPT was wrong for applying the margin of lead without any legally acceptable proof of the total number of collected permanent voters' cards regarding disputed polling units. Here, the 1st and 2nd Respondents/Petitioners sought to prove the total number of voters who collected their Permanent Voter's Cards by personal evidence of a witness stating the figure but did not tender the voters register for disputed polling units. The Court held that the source of the data and how the figure was arrived at was not disclosed and that result forms tendered are not proof of voters accredited.

The Court of Appeal in explaining the rationale behind the Margin of Lead Principle stated that:

318 See: **Osakwe v. Obiefule & Ors.** (2019) LPELR-48910(CA)
319 (Unreported) Appeal No. CA/G/EP/HR/BR/01/2023. Judgment delivered on 20th October 2023
320 (Unreported) Appeal No. CA/AK/EP/SHA/0S/17/2023

> *"…votes of voters in polling units where election is disrupted shall not be wasted nor shall the intended or prospective voters who had collected their PVCs be disenfranchised. They shall be given an opportunity to determine the winner of the election provided that their number exceeds the Margin of Lead between the two leading candidates who scored the majority of lawful votes at the election."*

In **Atiku & Anor. v. INEC & Ors**,[321] the case was slightly different being that the precise number of collected PVCs was not indicated in the pleadings. Here, the petitioners complained that the PVCs collected in the polling units where elections were cancelled or not held across the country was above 1,810,206, which is the margin of lead between the 1st Petitioner (Atiku) and 2nd Respondent (Tinubu), but the exact number of PVCs collected in the relevant polling units was not provided. Unfortunately, the Court of Appeal struck out the paragraphs of the petition where this was pleaded for being vague, imprecise and lacking in particulars. In his lead judgment, Tsammani, JCA, held as follows:

> *"This pleading ought to contain the precise number of Permanent Voters Card (PVCs) alleged collected in the polling units which by petitioners' contention would have closed the margin of lead between 1st Petitioner and 2nd Respondent to make the latter's return unlawful. Without that information, the complaint is difficult to understand and respond properly to let alone resolve".*[322]

In **Njidda Babangida Mohammed v Nashon Gubi Umar & 3 Ors.**[323] the Court of Appeal held that the trial tribunal was in error when it relied on forms EC8A (1) (polling unit result forms) only to order a rerun election in two polling units based on Margin of Lead principle without relating same to the number of permanent voters' cards collected which is the most important requirement.

It is important to remember that when claiming a margin of lead, the general rule on proving allegations with witnesses remain. Therefore, if a party is asking the court to order a supplementary election, it is not enough that they produce the list of persons who collected their PVCs and claim that the total exceeds the margin of lead. They must also lead evidence to establish the existence of the conditions outlined in the Electoral Act required to trigger the application of the principle of Margin of Lead i.e. evidence must be led and witnesses called to prove that elections did not hold, elections were cancelled, or votes were voided.

This was demonstrated in **Inyang Emil Lemke v. Igwe Augustine Aidam & 3 Ors.**[324] The petition and appeal were over the Akampka/Biase federal constituency of Cross River State and was narrowly hinged on the issue of margin of lead. The Respondent, Aidam

321 Supra
322 **Atiku & Anor v. INEC & Ors.** Supra at page 530
323 (Unreported) Appeal No. CA/YL/EP/AD/SHA/13/2023
324 (Unreported) Appeal No. CA/C/EP/HR/13/2023

Augustine (as Petitioner) and his party contended that INEC erroneously declared the appellant (Inyang Lemke) the winner of the election when the PVCs in polling units where elections were not held or cancelled exceeded the margin of lead between himself (Aidam) and the Appellant (Lemke) who was declared winner. To prove their contention, the respondents called 18 witnesses from the affected polling units who all adopted their written statements on oath testifying to the fact that elections were not held at the polling units complained of and tendered several exhibits in support.

The Tribunal found that there was proof of no election in 12 polling units because of BVAS malfunction and cancellation following overvoting in 7 PUs. They also found that there were 12,100 registered voters who collected their PVCs in the affected 19 PUs which exceeded the margin of lead of 2,804 votes. It then ordered supplementary elections to be held in the 19 polling units.

The Court of Appeal in affirming the decision of the Tribunal, held that the respondents properly structured their contentions in line with the grounds provided in the INEC guidelines, and as well, pleaded and proved that the total number of collected PVCs in the areas they alleged election was either cancelled or did not hold was higher than the margin of lead between the two leading contestants. The Court further held that they successfully proved that the election was inconclusive and an order of supplementary election in the affected polling units was proper. Without the evidence of the 18 witnesses, the decision would have been different. This demonstrates the challenge of the burden of proof, the intricacies around proving allegations in an election petition and how one misstep can have a domino effect on the petition.

In **Adebutu Oladipupo & Anor. v. INEC & 2 Ors.**[325] where the Petitioners/Appellants (Adebutu and his party, PDP) alleged that the margin of lead was 13,915 which they said was less than the total number of voters who collected their PVCs in disputed 49,066 polling units. They argued that by virtue of the margin of lead principle, INEC should not have declared the 2nd Respondent (APC candidate, Dapo Abiodun) winner without conducting elections in the polling units where elections were cancelled and that by virtue of **section 24** of the Electoral Act, the power to conduct supplementary elections should have been exercised before making a return or declaring a winner.

During the trial, INEC admitted there were violent disruptions and violence in several polling units, and that it did not hold supplementary elections in those units. The Petitioners/Appellants (the PDP and its candidate, Adebutu) tendered several election documents to this effect such as the BVAS records for 92 Polling Units, CTCs of results from 99 Polling Units from the IREV portal, and voters register for 1,074 Polling Units, yet the tribunal still thought that the evidence was not substantial. On appeal where the main issue was that INEC failed

325 Supra

to apply the margin of lead principle, the Court of Appeal held that the documents tendered and admitted as exhibits were insufficient to establish not only the fact that elections were cancelled in 99 polling units but that the number of persons who collected their PVCs in the said 99 polling units are 49,066 as alleged.

The Tribunal had discountenanced the summary of PVCs tendered by the appellant that was certified by INEC's Head of Legal Services for the reason that it was unsigned by the maker, was undated and had no logo to show that it emanated from INEC even though it had INEC's stamp, the name and signature of the certifying official, date of certification and receipt issued by INEC. The evidence of 91 witnesses (a mix of voters and polling agents) who testified was deemed to be chorused and not credible while the evidence of two expert witnesses brought to highlight the irregularities in the election was expunged for not being frontloaded, further damaging the appellants' case. All these, put together defeated the petitioner's claim that the Margin of Lead principle should have been applied and supplementary elections ordered.

Curiously, the counsel for INEC in this case, argued that the margin of lead principle created under its Regulations and Guidelines does not apply to a governorship election because **section 179** of the Constitution exhaustively covers incidents of inconclusive governorship election and how they are to be resolved. The judgment did not address this claim, but the Court ruled that the petitioners did not prove that the margin of lead should have been applied. The Supreme Court affirmed the Court of Appeal's holding that none of the exhibits produced by the appellants manifestly disclosed the non-compliance alleged in connection with the 99 polling units with precision.[326]

a. Who Can Raise Margin of Lead?

With respect to who can raise the Margin of Lead principle, the general disposition is that the petitioner must show him/herself to be one of the two leading candidates.

In **Okuji Oreh v. INEC, Ibe Osonwa & LP,**[327] the Court of Appeal held that the margin of lead principle only applies to the first and second candidates with the leading votes in an election and that the Appellant cannot by this Petition seek reliefs on behalf of the first runner up who is not a party to the Petition. In this case, Okuji Oreh, the Petitioner/Appellant was the second runner-up in the election for the Arochukwu/Ohafia Federal Constituency and filed a petition against the winner, Ibe Osonwa. It was found that the complaint of Oreh was built around the margin of lead between Ibe Osonwa (the winner/first respondent) and the first runner up, the APC candidate who was not a party to the suit. The Tribunal held that the margin of lead principle was not of any use to the Petitioner because it affects the APC candidate who is not a party to the suit and that Oreh ought to have consolidated his

326 See **Oladipupo Adebutu & PDP v. INEC, Abiodun Adedapo Oluseun & APC**, (Unreported) SC/CV/1221/2023
327 (Unreported) Appeal No. CA/OW/EP/HR/AB/07/2023

petition with that of the APC candidate (first runner-up).[328] The Court of Appeal affirmed the Tribunal's decision noting that while the Appellant had the *locus standi* to file a petition, he lacked the *locus standi* to challenge the return of the winner based on margin of lead between the two leading candidates (of which he is none); consequently, he cannot seek reliefs on behalf of the absent first runner-up.

In **Ohuabunwa & PDP v. INEC, Kalu & APC,**[329]the Petitioner/Appellant (Mao Ohuabunwa) who was the candidate for the PDP in the Abia North senatorial district election came 3rd in the election that was won by the APC candidate (Orji Kalu). The candidate for the Labour Party came 2nd but was not a party to this suit.[330] The Tribunal noted in passing that it was interesting that the Petitioner, who came 3rd in the election, made no mention of the candidate who scored the second highest number of votes in the election. The Court of Appeal focused more on the fact that the appellant relied on the number of registered voters in the disputed PUs instead of the number of voters who had collected their PVCs. The Court, in its decision affirming the Tribunal's decision to set aside the petition, noted that the counsel for the Appellant tried to smuggle in this detail i.e., the number of PVCs collected, through his brief of argument, but the Court rejected it stating that the address of counsel, no matter how brilliant, cannot substitute for pleadings and/or evidence.

It would have been good to see the Court elucidate this point in **Peter Obi & Anor v. INEC & Ors,**[331] where the Petitioners (who came 3rd in the election) claimed that there was over-voting in 4,457 polling units which affected 2,317,129 voters who had collected their PVCs. They contended that this exceeds the margin of lead of 1,807,206 over the first runner-up Atiku Abubakar. In addition to the fact that the Court found that the Petitioners did not produce relevant BVAS machines and voters' registers for the said polling units to back up this claim, the Court of Appeal expunged the related testimony for not being frontloaded, therefore the issue of the Petitioner raising Margin of Lead, not being the 1st runner up, was not delved into. However, it could be argued that, unlike the preceding examples, the fact of the second runner-up raising margin of lead would not have been contentious because the 1st runner-up (Atiku Abubakar) had also raised the Margin of Lead principle in his petition which was consolidated with that of Peter Obi.

The general sense from the cases observed is that where the difference in votes is such that even if the votes of all those that collected their PVCs in the affected areas are credited to the 3rd or 4th runner up and it would not change the result, then the Margin of Lead principle should not apply.

328 **Okeke Chimezie & APC v. INEC, Osonwa and LP** (Unreported) Petition No: EPT/AB/HR/24/2023. The Petition was successful but upturned on Appeal.

329 (Unreported) Appeal No. CA/OW/EP/SEN/AB/13/2023

330 The Labour Party Candidate filed a separate suit **in Oji & Anor v. Kalu & 3 Ors.** (**EPT/AB/SEN/06/2023**) and raised the Margin of Lead. The EPT however held that he did not show the total number of PVCS collected in the disputed polling units but rather based his computation on the total registered voters which is no longer applicable.

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b. Exception to Margin of Lead

Note that there is an exception to the general rule on the margin of lead. **Rule 100 (ii)** of the Regulations and Guidelines for the conduct of Election 2022, provides that where there is wilful destruction or resistance to the distribution of electoral materials or resistance to the use of the BVAS, the affected Polling Units shall be credited with ZERO votes during collation and shall not count in the application of the margin of lead principle. This issue came up in the earlier mentioned case of **Awoyeye Abiola Jeremiah v. Adejobi Adeyinka Johnson**[332]where the Court of Appeal, in recognising this exception held that:

> *"Basically, this provision is invoked where there is resistance to the use or distribution of BVAS at a polling unit. The dire consequence of it is also understandable since the BVAS has now become the only means of accreditation of voters. It is only logical that where the voters resist the use or distribution of the BVAS they should swallow the bitter pill of self-disenfranchisement; to the great disadvantage of the candidate(s) they would have voted for."*
> - per Wambai, JCA, at p.30

In **Obi Ebam Ndep & PDP v. INEC, APC & Isong**[333] the Tribunal held that the Petitioners/Appellants did not establish that Margin of Lead should apply and INEC was right to go ahead to make a return for the election for the Etung State Constituency of Cross River State since the Respondents were able to prove violence and obstruction in disputed Polling Units. Affirming the Tribunal, the Court of Appeal held that the Margin of Lead principle can only be applied where it is possible to conduct a supplementary election under **sections 24(2) and (3), 47(3) and 51(2) of the Electoral Act 2022,** which was not the case here. In this case, it was on record that elections could not be held as scheduled on 18th March 2023 due to violent resistance to the use of BVAS by thugs and violence that broke out in about 5 polling units in Abijang ward where some people were reported to have lost their lives. The Electoral Officer for Etung State Constituency testified that the INEC ad-hoc staff sent to the Abijang ward were taken hostage by political thugs on the day of the election. The election was rescheduled to hold the following day being 19th March 2023, but the materials were destroyed, and people were injured and killed. The Court held that it was impossible for INEC to conduct a supplementary election in that situation.

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333 (Unreported) Appeal No. CA/C/EP/SHA/CR/37/2023

Table 5: Where Margin of Lead Principle & Supplementary Elections Would Apply

Incident/Provision	Action to be taken	Outcome
Threat to breach of peace, natural disasters or emergencies before elections commence or inability to deploy to Polling Units because of logistic challenges. **Section 24 (2), Reg. 59 & 100 (i)**	New date for election in the affected polling units or area(s) to be announced.	Supplementary election subject to margin of lead
Substantial disruption of the election midway by violence, intimidation, harassment etc. before announcement of result **Section 24 (3) & Reg. 100 (v)**	Suspend the election and appoint another date for the continuation.	Supplementary election to hold, but no further supplementary election if disruption or violence persists
Sustained malfunction of BVAS, its use is discontinued midway, and no replacement is available before 2:30 pm or any extended period for voting approved by the Commission. **Section 47 (3), Reg. 61 & 100 (iv)**	If no replacement BVAS is available, a new date to continue the election is announced.	Supplementary election subject to margin of lead
Overvoting, i.e. where number of votes cast in any polling unit exceeds the number of accredited voters in that polling unit. **Section 51(2), Reg. 40, 56 & 57**	Cancel or void the result of the election in that polling unit and fix another date for supplementary election in affected areas. No returns to be made until polls are conducted in the affected Polling Units.	Supplementary election subject to margin of lead

Table 6: Where Margin of Lead Principle & Supplementary Elections Would not Apply

Incident/Provision	Action to be taken	Outcome
Wilful obstruction or resistance to the distribution of electoral materials or resistance to the use of the BVAS or any electoral device deployed by the Commission. **Reg. 100 (ii)**	Record zero votes for affected polling units.	Continue with collation & conclude election
Violent disruption after announcement of result, including destruction of ballot papers and result forms. **Reg. 100(vi)**	Regenerate results from electronically transmitted results, results from IReV Portal or duplicate hardcopies, and fill new replacement result sheets as approved.	Continue with collation & conclude election
Snatching or destruction of result forms in transit or at collation centres. **Reg. 100(vii)**	Regenerate results from electronically transmitted results, results from IReV Portal or duplicate hardcopies, and fill new replacement result sheets as approved.	Continue with collation & conclude election

3.5.7 *Proving Disenfranchisement*

If a petitioner claims that voters were disenfranchised or not allowed to vote, either due to disruptions or other irregularities, then there is the additional onerous burden of bringing those voters along with their PVCs to testify that they have been disenfranchised. Disenfranchisement is usually raised when a breach of the Margin of Lead principle is alleged i.e., that elections or votes were cancelled and no rerun was conducted, therefore, voters were deprived of the opportunity to vote.

In **Omalaji Vs. David & Ors.,**[334] the Supreme Court outlined what is needed to prove disenfranchisement as follows:
(a) The disenfranchised voters must give evidence to establish the fact that they were registered but were not allowed to vote;
(b) The voters' cards and voters register for the polling unit must be tendered; and,
(c) All the disenfranchised voters must testify to show that if they were allowed to vote their candidate would have won the election.

The Supreme Court restated this point in the lead judgment of His Lordship, C. C. Nweze, J.S.C., (of blessed memory) in the case of **Waya v. Akaa**[335] where he held that to prove the allegation of disenfranchisement, it is necessary for such voters to tender in evidence their respective voters' cards and the registers of voters from each affected polling unit to confirm the allegation of non-voting and that most important is the need for such disenfranchised voters to give evidence to show that if they had been given the opportunity to vote, the candidate of their choice would have won the election. This is however near impossible to achieve especially where it involves a large constituency like a governorship or presidential election.

In **Adebutu v. INEC,**[336] the Tribunal admitted that it was a herculean task and likened it to fetching water from the ocean with a spoon. In this case, the Appellants (PDP and its candidate) contended that the elections in 99 polling units which cut across 41 wards and 16 local government areas of Ogun state were cancelled. They alleged violent disruption of the election process in 95 polling units and overvoting in 4 polling units. They also claimed disenfranchisement of 49,066 registered voters who had collected their permanent voters' cards. They complained that INEC wrongly went on to declare a winner instead of considering the margin of lead and ordering a supplementary election in the affected areas. Despite acknowledging that this was a herculean task and mountainous, the Tribunal still ruled that the Petitioner did not prove disenfranchisement on the ground that the law requires the petitioners to call the 49,066 voters purportedly disenfranchised in over 90 polling units

334 (2019) 17 NWLR (PT. 1702) 348, 461 PARAS B
335 (2023) 10 NWLR (Pt. 1893) 537 at 559
336 Supra at page 389

to give evidence to that effect, tender their PVCs and the voters register for their respective polling units.

This was affirmed by the Court of Appeal which relied on the Supreme Court's decisions in **Waya v. Akaa**[337] and in **Oyetola v. INEC**[338] where it was held that the BVAS machine or devices are necessary to prove non-accreditation, over-voting, or disenfranchisement of voters. Simply put, now added to the requirement are the BVAS machines for the polling units where disenfranchisement is alleged.

It must be recalled that by **paragraph 41(10)** of the First Schedule, a Petitioner in a Governorship petition has just 6 weeks to prove his/her case during trial and this includes calling witnesses. The allotted time for proving a Presidential election petition is 7 weeks; for a senatorial election petition, 5 weeks, and for the House of Representatives, 3 weeks. It is difficult to imagine a situation where it would be possible for a petitioner to call hundreds or thousands of witnesses claiming disenfranchisement to testify or even for a Tribunal to sit and listen to those witnesses within the time allotted. The requirement and insistence on this standard of proof and evidence, which the court itself would arguably be unable to handle if they are presented, is, therefore, an absurdity.

3.5.8 *Controversy on Results Transmission, Collation and the IReV Portal*

The changes introduced by the Electoral Act, 2022 to support the use of technology in elections gave legal backing to INEC deploying 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.

Before the general elections, INEC had consistently assured Nigerians that election results would be electronically transmitted to IReV from the polling units. Yet, on election day, election officials in many polling units were unable to access the IReV portal to upload the results of the presidential election. There were reports of election officials who either refused or were unable to upload results.[339]

At the federal level elections held on 25th February 2024 a "glitch" reportedly prevented the transmission of polling unit results of the presidential election in several areas across the country. This was worsened by the fact that while it was possible to upload the National Assembly results on IReV, the Presidential Election Result which was held simultaneously was not uploaded. A widely held belief was that certain electoral officials were compromised to make the technology fail and revert to the manual transmission which allowed the doctoring of results.[340]

337 Supra
338 Supra
339 Nigeria Civil Society Situation Room, Report on Nigeria's 2023 General Election (Supra)
340 Nigeria Civil Society Situation Room, Report on Nigeria's 2023 General Election (Supra)

There were calls for cancellation of results in the areas where the BVAS or IReV portal or servers failed and this was raised in several petitions, the most notable being the Presidential Election Petitions. However, the Court, to the disappointment of many Nigerians, made a definitive pronouncement on the status of the IReV Portal which is that the Electoral Act, 2022 did not specifically provide that the results of the election should be electronically transmitted. The Tribunals and Courts took a unified position on this as there was no observed case where the failure to transmit results to the IReV portal was a basis for their decision on a petition.

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.[341] Furthermore, that their election Regulations and Guidelines was inferior to the Electoral Act 2022, which only allows for manual collation of results.

On this matter, the 2023 post-election Tribunals and Courts followed the precedent set by the Supreme Court in **Oyetola v. INEC**[342] who distinguished between INEC's Collation System and the IReV portal and held categorically that the INEC Results Viewing Portal (IReV) is not a collation system. In this case, Agim, JSC held as follows:

> *"As their names depict, the Collation System and the INEC Result Viewing Portal are part of the election process and play particular roles in that process. The Collation System is made of the centres where results are collated at various stages of the election. So, the polling units results transmitted to the collation system provides the relevant collation officer the means to verify a polling unit result as the need arises for the purpose of collation. The results transmitted to the Result Viewing Portal is to give the public at large the opportunity to view the polling unit results on the election day."*

In **Rhodes-Vivour v. INEC & Ors,**[343] the Petitioner, Rhodes-Vivour, recalled the assurances made by the Chairman of the Commission as well as certain provisions of INEC's Regulations and Guidelines on the real-time transmission of Polling Unit results to INEC's Result viewing Portal (IReV). INEC however argued that the nature of non-compliance the Electoral Act 2022 contemplates is non-compliance with the Provisions of the Electoral Act 2022 itself and not non-compliance with the assurances allegedly made by the officers of INEC. They relied on the decision of the Supreme Court in **INEC v. NNPP**[344] to argue that the Regulations and Guidelines for the Conduct of the Election is a subsidiary legislation that cannot take primacy over the express provisions of the Electoral Act.

341 See: This Day. (April 2023) INEC's Dramatic U-turn on Electronic Transmission of Election Results. https://www.thisdaylive.com/index.php/2023/04/16/inecs-dramatic-u-turn-on-electronic-transmission-of-election-results/
342 Supra
343 (Unreported) Petition No. EPT/LAG/GOV/04/2023 at page 167
344 (2023) LPELR-60164 (SC)

In **Atiku & Anor. v. INEC & 2 Ors,**[345] Atiku's counsel argued that INEC's failure to electronically transmit results as promised was a gross misrepresentation to the public, which the Supreme Court had the duty to address. INEC's counsel argued that **paragraph 38(1)** of its Guidelines gives a Presiding Officer the option to either transmit electronically or transfer results as directed by INEC, while 2nd respondent, Bola Ahmed Tinubu's counsel contended that only manual collation was provided for in the Guidelines, and further, that electronic copies of results are only useful when hard copies are unavailable. The Supreme Court held that while the non-functioning of the IReV portal may reduce voter confidence, it is not legally required and cannot be a basis for nullifying an entire election, especially considering that hard copies of the results sheets existed.

During the detailed hearing of this matter at the PEPT (i.e. Court of Appeal), INEC had explained that the "technical glitch" that occurred on the election day was the failure of the transmission server to upload Polling Unit results for the presidential election into the IREV portal. It claimed that the glitch only prevented the members of the public from viewing or accessing the results that were already uploaded and listed on its e-transmission system.

The Court of Appeal, in interpreting the relevant legal provisions held that the Electoral Act had used the words **"deliver"** in section 62(1), **"transfer"** in section 60(5) and **"transmitted directly"** in sections 50(2), 64(4), (5) and (6), of the Electoral Act, 2022, in stating how results of elections should be handled under those provisions. In its opinion, the Electoral Act, 2022 has used these words (**"deliver, "transfer"** and **"transmitted directly**") interchangeably to describe how the results of the election shall be moved from one stage to another until the results are finally collated and declared. The Court concluded that in all these, the Electoral Act, 2022 did not specifically provide that the results of the election shall be electronically transmitted.[346]

Speaking on the provisions in the INEC Guidelines and Regulations which referenced the IReV portal, the Court 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. It added that there is nothing in the Regulations to show that the BVAS was meant to be used to electronically transmit or transfer the results of the Polling Unit directly to the collation system.[347]

Explaining further, the Court of Appeal held that a community reading of the relevant provisions of the Electoral Act, 2022, the Regulations and Guidelines for the Conduct of Elections, 2022 and the INEC Manual for Election Officials, 2023, shows that the Electoral Act expressly provides in **Section 62(1)** that after recording and announcement of the result,

345 Supra
346 **Atiku v. INEC** (Supra) (CA) at page 681 to 682
347 **Atiku v. INEC** (Supra) (CA) at page 687 to 688

the Presiding Officer shall deliver same along with election materials under security and accompanied by the candidates or their polling agents to such persons as may be prescribed by the Commission. The Regulations and Guidelines as well as the INEC Manual also state that hard copies of election results shall be used for collation, and it is only where no such hardcopies of the election results exist that electronically transmitted results or results from the IReV will be used to collate the results.

In addition to the Court's decision on the status of the IREV portal, the Court noted that the Petitioner also did not substantiate the claim that results were not transmitted. It stated that the Petitioner (Atiku) called less than 20 witnesses to testify that results were not uploaded and the petition did not state nor plead the details of the polling units where results were not transmitted using BVAS. The Court further held that it is enjoined by the law not to invalidate an election if it appears that the election was conducted substantially in accordance with the principles of the Electoral Act (i.e. the doctrine of substantial compliance).

The same decision was reached in the sister case of **Obi & Anor v. INEC & Ors.** where the Court of Appeal added that the matter of INEC not being mandated to electronically transmit results was decided by the Federal High Court in a separate suit[348] that was instituted but not appealed by the Labour Party (LP). It further added that LP could not prove that INEC is required to mandatorily transmit results and that none of the witnesses by LP could give evidence of a mandatory electronic collation system prescribed by the Commission.

IReV not Part of the Collation Process, but Part of the Electoral Process

The Supreme Court's decision in Oyetola's case was understood by some to mean that the IReV portal served no purpose and should not be resorted to during collation. This was the stance taken by the Court of Appeal in the case of **Bello Muhammad Matawalle & APC v. Dauda Lawal & 2 Ors.**[349] where it cited **Atiku v. INEC** to hold that the IReV portal was only for viewing results and should not be used for collation. Overruling the Court of Appeal, the Supreme Court emphasised that it never held, in its earlier decisions, that IReV was not a part of the "electoral process." It clarified that the IReV portal may not be a collation system, but can be resorted to and used when necessary for collation.[350]

In this case, there was a dispute over results collated for Maradun L.G.A in the Zamfara State Gubernatorial elections. The INEC collation officer had presented a disputed collated result for the Local Government (in Form EC8C) at the State collation centre, but the agents of the PDP and its candidate, Dauda Lawal (whose win and declaration was set aside by the Court

348 As at the time of the hearing of **Obi v. INEC** (**supra**), there was a subsisting judgment of the Federal High Court, Abuja in **Labour Party v. INEC Suit No. FHC/ABJ/CS/1454/2022** to the effect that INEC was under no mandatory obligation to electronically transmit or collate results of an election.

349 (Unreported) Appeal No: CA/S/EP/GOV/ZM/21/2023. Judgment delivered on 16th November 2023

350 **Dauda Lawal v. Bello Muhammed Matawalle, APC, INEC & PDP** (Unreported) (SC/CV/1165/2023). Judgment delivered on 12th January 2024.

of Appeal) objected on the ground that it does not contain the correct results collated at the Local Government Collation Centre. It was alleged that the collation officer had at some point gone away with State Government Officials to the Government house and reappeared later with the result he presented. Due to this protest, the State Returning Officer directed that the dispute be resolved by reference to the IReV, BVAS and INEC copies of the polling unit results in Form EC8As to verify the entries in the LG results (Form EC8C). Upon verification, it was discovered that the scores or results in Form EC8B (ward collation results) on the IReV portal were different from those in Form EC8C presented by the collation officer and that the records in the INEC copies of the polling unit results (Forms EC8A) and BVAS supported the documents uploaded to the IReV. Consequently, the Returning Officer directed that the results in Form EC8B on the IReV portal be used to collate the correct results in Form EC8C as the Maradun Local Government result. This was used in computing the final scores of the election that returned Dauda Lawal as the winner and led Bello Matawalle to file a petition.

The Tribunal relied on the corrected local government result to uphold INEC's return of Lawal as the winner but the Court of Appeal refused to grant probative value to the re-collated results on the ground that political party agents did not sign or counter-sign the alterations therein. Citing the Supreme Court's decision in **Atiku v. INEC,**[351] the Court held that the IReV is not part of the collation system but meant for the viewing public and therefore, it was manifestly wrong for INEC to use figures or results from IReV in computing the result for the Gubernatorial Election.

The Supreme Court set aside the Court of Appeal's decision calling it perverse, contrary to law and in disregard of established judicial precedent. It held that the decision of the Court of Appeal that the IReV is not part of the election process is wrong and contrary to its decisions in **Oyetola v. INEC and Atiku & Anor v. INEC Ors**. The apex court restated its position on the IReV portal in these cases, which is that **Regulations 38(i) and (i), 48(a) and(b) and 93** of the INEC Regulations and Guidelines expressly provide for IReV as part of the election process, particularly for the verification of the correctness of the INEC hard copies of election results at any level of the election, and that when the need arises, it can be used to collate result for any level of an election. The apex court further held that in this regard, the approach of the Returning Officer to resort to IReV was in line with the Regulations. It added that the Tribunal did not rely on IReV as a direct portal or collation system or as full-proof evidence, but rightly used it as back-up to ascertain the election results from Maradun LGA, which was in dispute.

3.5.9 *The Status of FCT in Determining the Win of a Presidential Candidate*

A major bone of contention in the resolution of the 2023 Presidential Election Petition was whether in interpreting **section 134 (2) (b)** and **section 299** of the Constitution, securing

351 Supra

one-quarter of the total votes cast in the Federal Capital Territory Abuja (FCT), Abuja is a constitutional requirement for the valid return of a candidate for President.

Following the 2023 presidential election, there were legal gymnastics by lawyers, non-lawyers and members of the public on whether Bola Ahmed Tinubu was lawfully declared and returned as the winner of the Presidential election having not secured one-quarter of the total valid votes cast in the FCT. Closely related to this was the argument over whether in determining two-thirds of the States of the Federation, the FCT is to be included and regarded as one of the States of the Federation, or its status is to be regarded as distinct from the other States of the Federation, such that scoring one-quarter of votes in the FCT is mandatory. This is the first time that this issue would be raised for determination in a presidential election petition.

The Court of Appeal (affirmed by the Supreme Court) held that the interpretation of the Constitution seeking to require a presidential candidate to secure one-quarter or 25 per cent of votes in the FCT is fallacious and ludicrous. The Court explained that the argument that the votes of voters in the FCT Abuja have more weight than other voters in the country implies that they have a veto effect on other voters and that this viewpoint is futile and hollow. The Court further held that the constitutional provision in question means nothing more than that the FCT shall be considered in calculating the said two-thirds of the States of the Federation.

Giving its *ratio*, the Court noted that in the interpretation of the Constitution, it is to be guided by the principles upon which the Constitution was established rather than the direct operation or literal meaning of the words used. Consequently, where the literal meaning of the words used does not align with the guiding principles, the literal interpretation must be jettisoned for another approach that accords with the guiding principles of the Constitution

A contrary opinion by the Supreme Court would have upturned the election, and while this was not the case, it put to rest, confusion over this subject which until now, had not been tested in Court.

PART 04

04

04

Proving the Grounds of Election Petition: Case Studies

In this section, case studies will be used to demonstrate how petitioners attempted to discharge the burden of proof in election petitions, particularly with respect to the four grounds for filing an election petition outlined in **section 134** of the Electoral Act.

4.1 Proving Non-Compliance with the Provisions of the Electoral Act

The ground of non-compliance cuts across the procedure laid down for the election and relates to whether INEC complied with this process during the election. Facts in support of this ground of petition usually involve establishing that any of the requirements in **sections 45 to 72** and other relevant provisions of the Electoral Act 2022 has been violated.[352] It is however not enough to allege non-compliance; it must be substantial.

By **section 149 of the Electoral Act 2022**, results declared by the INEC enjoy a presumption of regularity and by the application of **sections 131, 132 and 133 of the Evidence Act 2011,** the burden of dislodging the presumption usually rests with a petitioner, particularly where the petition alleges that the election was invalid by reason of non-compliance.

This doctrine of substantial non-compliance is rooted in **section 135** of the Act which provides that:

> *"An election shall not be liable to be invalidated by reason of non-compliance with the provisions of this Act if it appears to the Election Tribunal or Court that the election was conducted substantially in accordance with the principles of this Act and that the non-compliance did not affect substantially the result of the election."*

In the words of the Supreme Court, "a petitioner in this situation must therefore adopt a kind of double barrel approach, you don't fire one barrel and leave the other intact. Both must be fired together at the same time."[353]

352 See **Omolewa & Anor v. INEC & Ors** (Supra)
353 **Atiku & Anor. v. INEC & 2 Ors.** (SC/CV/935/2023)

The Supreme Court expounded on this in **Ojukwu v. Yar'adua (Supra),** where the majority decision of the Court explained the import of sections 145 (1) (b) and 146 (1) of the Electoral Act, 2006 [now **sections 134 (1) (b) and 135(1)** of the Electoral Act, 2022]. It held as follows:

> *"By virtue of the combined provisions of sections 145 (1) (b) and 146 (1) of the Electoral Act, 2006, a petitioner who challenges the election of a respondent on the ground of non-compliance with the provisions of the Electoral Act* ***must plead not just the fact of the alleged non-compliance, but must go a step further to plead that the non-compliance substantially affected the result of the election****." (emphasis provided).*

This position was reaffirmed in the 2023 petitions and was applied strictly by the Courts. For instance, in **Jibrin Muhammad Barde & Anor. v. INEC & 2 Ors.**,[354] the Supreme Court held that where there is a complaint of non-compliance with the provisions of the Electoral Act, the petitioner must go further to prove that the alleged non-compliance substantially affected the outcome of the election. Consequently, the burden on Petitioners to prove non-compliance is to:

- effectively plead the non-compliance complained of in their petition;
- show credible evidence to prove the said non-compliance; and,
- show that the non-compliance substantially affected the result of the election.

The challenge of discharging this burden is acknowledged by the courts as can be seen in the dissenting opinion of Oguntade, JSC, in the aforesaid case of **Ojukwu v. Yar'adua**[355]where, speaking on then section 146 (1), **now section 135 (1)** of the Electoral Act 2022, he stated as follows:

> *"it is saddening in the extreme that section 146 (1) above, a provision which was designed to ensure that minor infractions of the Electoral Act which could not in any event be expected to have an effect on the result of an election has been elevated by our courts into a ground for an accommodation of the most glaring failure to comply with the provisions of the Electoral Act. … Where a petitioner's compliant is founded on non-compliance with an essential condition precedent to the conduct of the election, this cannot and ought not to be seen as a noncompliance which did not substantially affect the result of the election. My view is that the preponderant majority of election petitions in Nigeria would fail in our courts even in the face of clear evidence of serious malpractices unless, a proper and correct interpretation is given to section 146 (1)."*

354 (Unreported) SC/CV/1226/2023
355 Supra

Unfortunately, the tribunals and courts did not make any transformative decision on this provision but maintained their long-held position in previous election cycles on the necessity of proving substantial non-compliance even where the infractions complained of were glaring and proved. **Section 137** of the Electoral Act which was introduced to relieve the burden on petitioners of calling many witnesses to prove non-compliance, was basically rendered redundant by the Courts.

Overall, the Tribunals were very strict in applying the high threshold for proving non-compliance which includes that eyewitnesses, preferably party agents, must be called[356] and BVAS machines or reports must be brought to Court. Tribunals also consistently struck out or discountenanced evidence brought in to show non-compliance on the grounds that they were either not tendered as required by the law or that the evidence was not credible. For instance, there were cases where it was simply held that the evidence of direct eyewitnesses presented was rehearsed or chorused and therefore unreliable.[357] Meanwhile in some of such cases, the infractions alleged were either admitted by INEC or not responded to in their defence, yet the petitioner was held to an unreasonably high standard.

The introduction of technology to the electoral process saw consequential burdens placed on petitioners and very little on INEC, the electoral management body employing those technological devices. An example is the requirement to tender actual BVAS machines in Court. In **Ibrahim Sirajo Tanko & APC v. INEC, Kaila Samaila & PDP,**[358] the Appellants alleged that they applied for the certified true copy of documents in the custody of INEC (First Respondent), particularly the BVAS report but that some were not given to them within the period of 21 days within which petitioners must file their petition. At the Tribunal, an INEC official testified that they had purged the BVAS machine of data from the previous federal-level election following a court order that allowed them to reconfigure the machines. The Court's response was as follows:

> *"The constraints of the Appellants to procure the necessary and relevant evidence in proof of their petition at the trial Tribunal is not the concern of this Court. Even though I sympathise with the Appellants for their inability to obtain the relevant reports of the contents of the BVAS, the law on the duty of the Appellants to prove their petition with credible evidence remain sacrosanct."*[359]

The Court further chided the appellants for what it called "going into a voyage of nothingness" and coming to court to "try their luck," knowing that they had no BVAS report.[360]

356 See: **Hon. Fredrick Emeka Anagwu & LP v. INEC, Eleodimuo Uchena Clement & APGA** (Unreported) Petition No. EPT/AN/HR/21/2023. To prove non-compliance, eyewitnesses must be called to testify to same.
357 See: **Edeoga & Anor. v. INEC & Ors.** (Supra) **and Adebutu & Anor. v. INEC & Ors.** (Supra)
358 Supra
359 **Ibrahim Sirajo Tanko & APC v. INEC, Kaila Samaila & PDP** (Supra) Per Sirajo JCA at page 45
360 **Ibrahim Sirajo Tanko & APC v. INEC, Kaila Samaila & PDP** (Supra)

According to the Supreme Court, any evidence put forward by a petitioner to prove non-compliance must disclose such non-compliance with precision. In **Saidu Umar & PDP v. Aliyu Ahmed Sokoto, Mohammed Gobir Idris, APC & INEC,**[361] the Supreme Court, sitting on an appeal over the Sokoto State Governorship election petition, held that the exhibits presented to the Court over polling units complained about were insufficient; did not manifestly disclose the non-compliance alleged by the appellants in the petition "with precision," and fell short of sustaining the case set up in the petition.[362] The Court noted that the evidence supplied may have disclosed non-compliance in the polling units they relate to, but that the evidence does not sustain the whole or overall case or petition of the appellants. The same ratio was applied in the Ogun State Governorship election appeal of **Adebutu & Anor. v. INEC & Ors**[363] where the Supreme Court held that none of the testimonies of over 90 eyewitnesses or exhibits produced by the appellants manifestly disclosed the non-compliance alleged "with precision."[364]

The difficulty with proving substantial non-compliance accounts for the high failure rate of election petitions. That is not to say that there were no cases where failure to discharge the burden of proof was obvious. For instance, in **Obasa Tajudeen Adekunle & PDP v. INEC, LP & Sowunmi, APC & Ogunyemi,**[365] the complaint of the Petitioners was directed against 28 Polling Units in 6 out of the 11 wards (with a total number of 582 Polling Units) that make up Ojo Federal Constituency of Lagos State. The Petitioners only identified 3 polling units in his petition and failed to identify the other 25 polling units. The Tribunal held that it was insufficient to sustain the complaint of non-compliance in 28 polling Units. It held further that the complaint of the Petitioners regarding 28 out of 582 polling units translated to just about 4.8 % of the total registered voters. Besides the fact that the petitioners led hearsay evidence and failed to prove the alleged non-compliance and corrupt practices, the Tribunal held that the votes from the 28 polling units were insufficient to ask that the entire election for the constituency be invalidated.

Another example is the case of **Aishatu Ahmed Dahiru & APC v. INEC, Ahmadu Umaru Fintiri & PDP**[366] where neither eyewitnesses at the election nor the makers of electoral documents were called to adduce evidence. The facts of the case are that the Petitioner/Appellant, Aishatu Dahiru, challenged the result of the Adamawa State Governorship election which returned the second respondent, Ahmadu Fintiri, as the winner. She alleged non-compliance with the Electoral Act in 14,104 polling units across 21 LGAs in Adamawa State and that the 2nd Respondent, Ahmadu Fintiri, did not score the majority of lawful votes cast in the elections held on 18 March 2023. She also alleged that the election was marred

361 (Unreported) **SC/CV/1257/2023**
362 **Umar & Anor v. Sokoto & 3 Ors** (**SC/CV/1257/2023**). Delivered 19th January 2024. Per Tijjani Abubakar JSC at pages 36 and 41.
363 Supra
364 **Adebutu & Anor. v. INEC & Ors.** (2023). Delivered 19th January 2024. Per Tijjani Abubakar JSC at pages 23 and 26.
365 (Unreported) Petition No: EPT/LAG/HR/25/2023
366 (Unreported) Appeal No: CA/YL/EPT/AD/GOV/18/2023

by thuggery, ballot paper snatching, BVAS snatching, and harassment of election officials, among others. She stated, that in Fufore Local Government Area, which she alleged was a stronghold of hers and her political party APC, PDP officials and thugs invaded the collation centre, violently disorganised the collation exercise that was ongoing and carted away the result sheets. She added that because of the disruption, the Police directed that the collation exercise should continue at the Police Station, Fufore, but that the PDP thugs again invaded the police station at Fufore and beat up the collation and the Electoral officers. The election was declared inconclusive, and a supplementary election was subsequently fixed for 15 April 2023, which she lost.

At trial, her counsel called only 3 witnesses to prove the two grounds of their petition and failed to tender relevant forms such as Form EC8E (Form for declaration of the result of the election) which was in dispute. Affirming the decision of the Tribunal dismissing the petition, the Court of Appeal held that there is no way the evidence of 3 witnesses can establish non-compliance or that the declared winner of the election did not score the majority of lawful votes cast in 14,104 polling units especially considering the legal principle that non-compliance must be proved by witnesses from each polling unit. The Court noted that the nature of the witnesses made the Petitioner/Appellant's case worse. Two of the witnesses were not polling unit agents but rather the campaign coordinators of the APC who were not at the polling units, while the third was an employee of the legal counsel to the Petitioner/Appellant. The Court ruled that their testimonies were inadmissible hearsay evidence which deserve to be ignored. The Court of Appeal also noted that the Appellant's legal team knew that they lacked evidence and therefore sought to rely on **section 137 of the Electoral Act**, which they had hoped would rescue their petition from the lack of oral evidence. The Appeal was therefore dismissed for lacking merit.

A common thread among the few cases where non-compliance was held to be proved was where the provision of **section 137** of the Electoral Act, 2022 was liberally applied, thus lightening the burden on the petitioner. An example is **Rufai & Anor v. Kefas Japhet & 2 Ors.**[367] where the Tribunal held that the requirement to call witnesses has been relaxed by the provision of **section 137** where the non-compliance is manifest on the face of the original or certified document. The Court of Appeal affirmed the Tribunal's decision in this case. In **Dauda Lawal v. Bello Muhammed Matawalle & 3 Ors,**[368] the Court of Appeal, in a departure from several of its other decisions, held that **section 137** of the Electoral Act is a novel provision that sought to cure a mischief and that a party who alleges alterations in a collated result is not bound to call oral/eyewitness evidence because the documents tendered manifestly disclosed the irregularities alleged. The Supreme Court however overruled the Court of Appeal in this case holding that the provision was wrongly applied.

367 (Unreported) Petition No. EPT/AD/SHA/10/2023
368 (Unreported) Appeal No. CA/S/EP/GOV/ZM/21/2023

When the Tribunal/Court allowed the burden of proof to shift to INEC, it helped the petitioner's case. Examples are **Akpoti-Uduaghan, PDP v. Ohere Sadiku Abubakar, APC & INEC**[369] where the Tribunal and Court of Appeal asked INEC to justify its exclusion of polling unit results from collation and **Abdullahi Kamba & PDP v. Rabiu Kamba, APC & INEC**[370] where the Court of Appeal allowed the application of **section 137** and held that the Appellants led evidence unchallenged by INEC in proof of their petition.

4.2 Proving Non-Qualification

Section 134 (1) (a) of the Electoral Act allows a petitioner to question an election on the ground that the person whose election is questioned was, at the time of the election, not qualified to contest the election. The courts have held that the issue of qualification or disqualification in a post-election matter can only be ventilated on the grounds enumerated in **sections 131 or 137** of the Constitution. By this provision and **section 134 (3)** of the Electoral Act, qualifying factors for an election include citizenship, age, membership and sponsorship by a political party and school certificate qualification. Where qualification or disqualification was held to be properly raised as a ground within the confines of the Constitution, it often bordered on academic credentials or qualifications like NYSC certificate, citizenship, etc. Below are four case studies on how the courts resolved the issues of qualification that were considered properly brought under the Constitution as a post-election matter.

4.2.1 *Disqualification – Allegation of Presentation of Forged NYSC Certificate*

EDEOGA CHIJIOKE JONATHAN & LP V. INEC, PETER MBAH & PDP[371]

Finding: NYSC certificate is not a constitutionally required qualification for election, therefore (alleged) forgery of same is not a disqualifying factor for a candidate.

Facts

This petition was over the Enugu State Governorship Election. INEC conducted the election to the office of the Governor of the State on 18th March 2023 and at the close of the polls, the 2nd Respondent, Peter Mbah, who was sponsored by the PDP (3rd respondent), was duly returned as the winner of the election.

The petitioners contended that the declared winner, Peter Mbah, at the time of the election, was not qualified to contest the disputed election on the ground that he presented a forged National Youth Service Corps (NYSC) Certificate in aid of his qualification. The Appellant, Chijioke Edeoga, scored 152, 778 votes, whereas Mbah scored 157, 997 votes. Dissatisfied

369 (Unreported) Petition No. EPT/KG/SEN/03/2023
370 (Unreported) Appeal No. CA/S/EP/HR/KB/48/2023
371 (Unreported) **SC/CV/1130/2023.** Judgment delivered on 22nd December 2023

with the result, Edeoga filed a petition at the Tribunal for the sole relief of being returned as winner of the election. The petition also raised allegations of electoral malpractice, falsification of results and over-voting.

The petitioner, Edeoga, alleged that Mbah presented a forged NYSC certificate to INEC in contravention of the requirements of **Section 182(1) (j)** of the Constitution. To back up this claim, he relied on a disclaimer issued by a witness, the NYSC Director of Corps Certification who, in responding to a Freedom of Information (FOI) request made by a lawyer (not a party to the suit) on details of Mbah's youth service, claimed that the NYSC certificate in question which Mbah submitted to INEC was not issued by NYSC. It was also alleged that he stopped attending the compulsory Weekly Community Service in his state of assignment – Lagos State.

The respondent (Mbah) explained that he started the NYSC programme in January 2001 but got approval for a deferral in October 2001 to enable him to write bar exams at the Nigerian Law School. He stated that after law school, he was remobilised in May 2003 to complete his service in a law firm which he did in September 2003, but that he was given a backdated NYSC certificate dated 6th January 2003, which was when members of his call set were issued their certificates. He argued that the NYSC Director failed to tender any document to support the allegation that he stopped attending the compulsory Weekly Community Service in Lagos or show that he was not cleared as having completed his NYSC program and not given his discharge certificate. His major defence however was that he cannot be disqualified by virtue of a certificate that is not a qualifying certificate under **sections 177, 182 and 318** of the CFRN.

The Tribunal considered two issues. One was whether the certificate presented by Mbah was forged. On this, the Tribunal held that to prove forgery, two documents are required – the document from which the forgery was made and the forged document. The Tribunal was of the opinion that the petitioner did not satisfy this requirement and failed to prove the allegation of forgery beyond reasonable doubt (as it is a criminal allegation). The second issue was whether Mbah presented a forged NYSC Certificate "*in aid of his qualification*" for the election. On this issue, the Tribunal held that the NYSC certificate is not a qualifying factor, and that Mbah is more than qualified to contest for the office of Governor in Enugu State.

In addition to this finding, one issue that was fatal to the petition was that the evidence adduced by the petitioners to prove the alleged certificate forgery was built upon the testimony of witnesses whose statements were expunged for not being filed within the statutory 21-day period for filing petitions and witness statements. The Tribunal's decision was affirmed by the Court of Appeal who categorically stated that there is nothing in **section 177** of the Constitution that suggests that the NYSC Certificate is a requirement for qualification to contest a governorship election. They further held that one of the best ways of proving

forgery is to tender official disclaimers from the institution which the party against whom such allegation is made claimed to have issued the certificate to him, and that to prove document forgery, a petitioner must show the following:

(i) The existence of a document in writing.
(ii) That the document or writing was forged.
(iii) That the party who made it knew that the document or writing was false; and
(iv) That the party intended for the forged document to be acted on as genuine.

It was held that these requirements were not satisfied by the petitioner/appellant. Consequently, the Supreme Court affirmed the decision of the Court of Appeal.

Box 8: Proving Forgery of Academic Qualifications in Election Petitions

- **Ugwu Chukwuebuka & PDP v. Amuka Tochukwu Williams, LP & INEC.**[372] The Tribunal held that where a forged document is submitted to INEC, in this case, the nomination form with a forged certification, the election of the person who tendered the forgery will be nullified. On appeal, the Court held that forgery of certification is not a ground for disqualification.
- **Tochukwu Michael Ozioko Esq. & APC v. INEC, Ogara Harrison Chinwe, LP, Okechi Vitus Ikenna & PDP.**[373] To prove a certificate is forged, there must be a disclaimer from the awarding school or from the examination body and the Petitioners failed to produce this.
- **Umahi Maxwell Uzoechi & APC v. Nwoke Victor Chidi, PDP & INEC.**[374] The petitioners alleged that the 1st Respondent was not qualified because he did not have a First School Leaving Certificate, and he presented two different educational qualifications bearing different names to INEC. The court held that the document which the Petitioners claim the 1st Respondent falsified does not relate to the requirements for qualification and thus cannot be used to disqualify the candidate. Basically, a qualified person cannot be disqualified for falsification of documents, unless it is an infraction that touches on a ground for disqualification under the provisions of law i.e. the Electoral Act, 2022, or the Constitution.
- **Shehu Balarabe Kakale & Anor. v. Shehu Nasiru & 2 Ors.**[375] The Petitioner alleged that the 1st Respondent forged his educational certificates and was not qualified to contest the election. The Tribunal held that where an allegation of forgery of certificates is made in a civil proceeding, such allegation is criminal and the standard of proof required is beyond reasonable doubt. The requirement is that the petitioner needs to tender in evidence two sets of certificates, the original certificate he claims to be genuine and the alleged fake one to enable the court to juxtapose.

372 (Unreported) Appeal No. CA/E/EP/SHA/EN/27/2023
373 (Unreported) Appeal No. CA/E/EP/SHA/EN/42/2023
374 (Unreported) Petition No. EPT/EB/SHA/27/2023
375 (Unreported) Petition No. EPT/SK/HR/02/2023

4.2.2 *Qualification - Citizenship*

GBADEBO PATRICK RHODES VIVOUR V. INEC, BABAJIDE OLUSOLA SANWO-OLU, KADIRI OBAFEMI HAMZAT & APC[376]

Finding: Only persons who are not citizens of Nigeria by birth, such as citizens by registration or naturalization, can be affected by the disqualification for election to the office of Governor of a State prescribed in **section 182** of the Constitution upon their simultaneous acquisition of the citizenship of another country or declaration of allegiance to such other country.

Facts:

The sole ground for determination at the Tribunal was whether the 2nd Respondent, Babajide Sanwo-Olu, was not qualified to contest because he was affected by the qualification of his running mate, Kadiri Hamzat, who allegedly renounced his Nigerian citizenship by swearing an oath of allegiance to the United States of America. The issue was rooted in the interpretation and application of the provisions of **sections 177(a), 182(1) (a) 187(1) and (2) and section 28 of the Constitution** dealing with qualification and disqualifications for contesting election to the office of the Governor of a State in Nigeria.

Section 177(a) provides that a person shall be qualified for election to the office of Governor of a State if he is a citizen of Nigeria by birth. **Section 187** deals with the nomination and election of the Deputy Governor and provides in **subsection (2)** that the provisions of the Constitution on qualification for election and disqualifications, among others, applicable to a Governor shall apply to the office of the Deputy Governor.

Section 182 (1) (a) deals with disqualification for the office of Governor and provides that:

> *No person shall be qualified for election to the office of Governor of a State if -*
> *(a) subject to the provisions of section 28 of this Constitution, he has voluntarily acquired the citizenship of a country other than Nigeria or, except in such cases as may be prescribed by the National Assembly, he has made a declaration of allegiance to such other country;*

Section 28 deals with dual citizenship and states as follows:

> *"(1) Subject to the other provisions of this section, a person shall forfeit forthwith his Nigerian citizenship if, not being a citizen of Nigeria by birth, he acquires or retains the citizenship or nationality of a country, other than Nigeria, of which he is not a citizen by birth.*
> *(2) Any registration of a person as a citizen of Nigeria or the grant of a certificate of naturalisation to a person who is a citizen of a country other than Nigeria at the time of such registration or grant shall, if he is not a citizen by birth of that other country, be conditional upon effective renunciation of the citizenship or nationality of that other country within a period of not more than twelve months from the date of such registration or grant."*

376 (Unreported) SC/CV/1152/2023. Judgment delivered on 12th January 2024

At the Tribunal, the evidence led by the Petitioner/Appellant (Rhodes-Vivour) to prove his assertion, as well as his key witness statements, were rejected and struck out because they gave oral evidence in contravention of **paragraph 41(1) and (3) of the 1st Schedule to the Electoral Act**. In addition, the depositions of three witnesses brought to testify were not filed along with the appellant's petitions within the statutory time prescribed. The petition was dismissed by the Tribunal, and this was affirmed by the Court of Appeal on the basis that subscribing to an Oath of Allegiance to a foreign country is not specifically listed as one of the inhibiting factors with a disqualifying effect in the Constitution.

Affirming the decision of the Court of Appeal, the Supreme Court held that the plain interpretation of **section 177 (a)** means that once a person is a citizen of Nigeria by birth and remains so at the time of the election, he is constitutionally presumed and deemed to be qualified to contest for the office of Governor by virtue of his birth as a citizen of Nigeria.
The apex court explained that the provisions of **section 182(1) (a)** is to be interpreted in line and conformity with the provisions of **section 28** to which they are made subject. It held that the essence of **section 28** is to prevent a person from acquiring and simultaneously holding the citizenship of Nigeria and another country (of which he is not also by birth or has acquired), not more than 12 months after acquiring the Nigerian citizenship. It added that **section 28** deals with persons who are not citizens of Nigeria by birth, therefore the provisions of **section 182 (1) (a)** only apply to such Nigerians who are not citizens by birth.

Elucidating further, the apex court stated that only persons who are not citizens of Nigeria by birth, such as citizens by registration or naturalization, can suffer the disqualification for election to the office of governor of a state prescribed in **section 182** upon their acquisition of the citizenship of another country or declaration of allegiance to such other country and that by virtue of **section 28**, such a person will only lose his citizenship and become unqualified if he renounces his Nigerian citizenship as prescribed in **section 29** of the Constitution.

Ultimately, the Court held that no credible evidence was presented to show that Kadiri Hamzat renounced his Nigerian citizenship and that because he was not disqualified from contesting the election, there was no consequential disqualifying effect on Babajide Sanwo-Olu as the candidate for the Governor of Lagos State.

4.2.3 Disqualification – Fine for an offence involving dishonesty or conviction for fraud or an offence involving dishonesty

PETER OBI & LABOUR PARTY V. INEC, SENATOR BOLA AHMED TINUBU, SENATOR SHETTIMA KASHIM & APC.[377]

Finding: Civil forfeiture does not amount to a criminal conviction such as to disqualify a candidate for election.

Facts

The Petitioners/Appellants (Peter Obi and LP) alleged that the 2nd Respondent (Bola Ahmed Tinubu) was fined the sum of $460,000 (Four Hundred and Sixty Thousand Dollars) by the US District Court of Illinois on October 4, 1993, for an offence involving dishonesty, namely narcotics trafficking and money laundering. The issue was whether he was not disqualified under the provisions of **section 137(1) (d)** of the Constitution from contesting the presidential election held on the 25th day of February 2023, having regard to the alleged order of forfeiture issued against him following from a drug-related offence in the United States. **Section 137 (1) (d)** provides as follows:

> *"(1) A person shall not be qualified for election to the office of President if -*
> *(d) he is under a sentence of death imposed by any competent court of law or tribunal in Nigeria or a sentence of imprisonment or fine for any offence involving dishonesty or fraud (by whatever name called) or for any other offence, imposed on him by any court or tribunal or substituted by a competent authority for any other sentence imposed on him by such a court or tribunal;"*

The Court held that the order of forfeiture produced and relied on by the Petitioners does not qualify as a sentence of fine for an offence involving dishonesty or fraud within the contemplation of **section 137(1)(d)** of the 1999 Constitution. The Court explained that the word "fine" referred to in this provision is one which emanates from a sentence for a criminal offence involving dishonesty or fraud; that the words "*for imprisonment or fine*" also pre-supposes that the "fine" envisaged under the section is one imposed as an alternative to imprisonment. In other words, the provision of **section 137(1)(d)** only relates to a sentence of death, or a sentence of imprisonment or fine imposed following a ***criminal trial and conviction***.

The Court explained that the case being relied on was in the civil docket of the US District Court, Northern District of Illinois and a civil forfeiture proceeding against funds in specified bank accounts. The Court further held that in the instant case, the Petitioners failed to show evidence that Tinubu was indicted or charged, arraigned, tried and convicted and was sentenced to any term of imprisonment or fine for any particular offence. It added that the United States, through its Embassy in Nigeria, had confirmed to the Inspector General of

377 (Unreported) Appeal No. CA/PEPC/03/2023. Judgment delivered on 6th September 2023. Supreme Court No. SC/CV/937/2023. Judgment delivered on 26th October 2023.

Police that there are no records of any form of criminal arrest or warrants against Tinubu. Going further, the Court noted that a Forfeiture Order made in a foreign court can only be recognised in Nigeria if it is made after an indictment, trial and conviction and proved in line with **section 49** of **the Evidence Act, 2011**. This provision deals with the admission of the written statement of an investigating police officer (IPO) in criminal trials and allows the written and signed statement of such officer to be admitted in evidence where their physical attendance is not possible. The implication was that the Petitioners should have brought a written and signed statement of such an officer showing the existence of an indictment, criminal trial and conviction of Bola Ahmed Tinubu.

Finally, the Court held that in any case, the conviction must have been within the past 10 years, since in both **paragraphs (d) and (e) of section 137(1)** "a sentence for the offence involving dishonesty" is mentioned but in paragraph (e) a limitation of ten years is introduced. This was interpreted to mean that in respect of a sentence for an offence of dishonesty, the two paragraphs must be read together, such that for conviction and sentence for an offence involving dishonesty, it must have occurred within a period of less than ten years before the date of the election in order for such a conviction and sentence to be used for disqualifying a presidential candidate from contesting the election. The Court of Appeal concluded by holding that the Petitioners/Appellants failed to establish their allegation that Tinubu was disqualified from contesting the presidential election under **section 137 (1) (d)** of the 1999 Constitution because he was fined the sum of $460,000.00 by US District Court, Northern District of Illinois.

This decision was upheld by the Supreme Court which further held that the particulars of this criminal allegation were not set out in the Petition, but were only raised in the Petitioner's Reply Brief at a time when the Respondents had lost their right of reply and which in essence, offends the cardinal principle of fair hearing, **paragraph 4(1)** of the First Schedule to the Electoral Act, which requires that facts supporting a petition be clearly stated, and **paragraph16 (1)** which frowns on the introduction of new facts, grounds or prayers in a Petitioner's Reply Brief.[378]

4.2.4 *Disqualification-Resignation from Public Service Before Election*

DATTI YUSUF UMAR V. ILIYASU MUSA KWANKWASO, APC, INEC & NNPP[379]

Finding: The constitutional requirement for the resignation of a person employed in the public service who seeks to run for office to resign, withdraw or retire from such employment thirty days before the date of election relates to the general election and not the primary election of a political party.

378 See lead judgment of Inyang Okoro, JSC in the sister appeal of **Atiku & Anor v. INEC & 2 Ors**. **(SC).** Unreported, (Supra) @ pages 94 to 97. The Judgment in **Obi v. INEC** abides by the judgment in **Atiku v. INEC** as the petitions were consolidated in the lower court and the facts, similar. See also **Oni & Anor v. Oyebanji & Ors,** (2023) LPELR-60699 (SC).

379 (Unreported) Appeal No. CA/KN/EP/HR/KAN/14/2023 & CA/KN/EP/HR/KAN/20/2023

Facts

This petition was over the election for the Kura/Madobi/Garun Mallam Federal Constituency of Kano State. The Appellant (Yusuf Datti) was declared winner and the 1st and 2nd Respondents (Iliya Musa Kwankwaso and APC) presented a Petition to the Tribunal on the grounds that at the time of the election, Datti was not qualified to contest; that he was not duly elected by majority of lawful votes cast at the said election; that his election was invalid as a result of non-compliance with the provisions of the Electoral Act; and that there were corrupt practices. This summary focuses on the decision of the court on the ground of non-qualification.

On this ground, the issues were whether Yusuf Datti, whose name was admittedly not contained in the NNPP's membership register, was qualified to contest the election for the House of Representatives in the National Assembly and whether he had resigned his appointment as a public servant in the Kano State Government before the election. His letter of resignation was submitted on 14 June 2022 and approved on 4 July 2022 which was about 7 to 8 months before the National Assembly elections of February 2023.

The Tribunal allowed the petition holding that he participated in the primary election of the NNPP while still in the employment of the Bayero University Kano contrary to **section 66(1) (f)** of the Constitution and that he failed to prove his membership with the NNPP in accordance with **section 65(2) (b)** of the Constitution. The Tribunal held that by the provision of **section 77(2) and (3)** of the Electoral Act, 2022, it is only a member of a political party whose name is contained in the Register of members submitted to INEC, 30 days before the primary election of his party, that can contest election to the office in issue. The Tribunal reasoned that Datti should have resigned his employment before his primary election and because he did not, the primary election that produced him was void.

On appeal, the Court of Appeal held that the Tribunal was wrong to hold that the Appellant was not a member of NNPP and that the Supreme Court has ruled that once a party puts forward a person's name as their candidate, then he is their candidate. In addition, it was held that it was wrong for the Tribunal to import the stipulations of **section 77** of the Electoral Act, 2022 into the clear and unambiguous stipulations of **section 65 (2) (b)** of the Constitution.

On the effect of resignation, the Court of Appeal stated that a letter of resignation takes effect from the date it is delivered and received by the employer or its agent and that there is absolute power to resign and no discretion to refuse to accept the notice of resignation. The effect of this is that the letter of resignation having been received, brought the employment relationship to an end.

The Court also noted that is settled by previous court decisions,[380] that a public servant or civil servant can belong to a political party but that the requirement for such officer to resign thirty days before the election as stipulated in **Section 66 (1)(f)** of the Constitution relates to the election such officer is intending to contest – the National Assembly election as in this case, and not the primary election of a political party. It concluded, therefore, that the Tribunal was wrong when it held that Datti's resignation from employment ought to have been thirty days before the primary election of the NNPP. The Tribunal decision was set aside, and Datti Yusuf's return upheld.

4.3 Proving Failure to Secure a Majority of Lawful Votes Cast

This ground typically deals with errors of collation, miscalculations, exclusion of lawful votes, or inflation and deflation of votes during collation to the disadvantage of a petitioner.[381] When an election petition is premised on the ground that the respondent was not elected by majority of lawful votes cast at the election, the petitioner must plead the necessary facts to show that there is wrong computation of votes in favour of the candidate declared as the winner as against the petitioner.

The decision on who has the majority of lawful votes is based largely on documentary evidence, mainly election result forms, therefore proving this ground would require the tendering of the relevant results forms for the polling units disputed.[382] It is important to note this ground is distinct and stands on its own therefore facts alleging either non-compliance or corrupt practices cannot be put forward to establish the failure to secure majority of lawful votes cast.[383]

The Court requires that two sets of results must be tendered to prove unlawful votes – the alleged incorrect results and correct results.[384] **In Atiku v. INEC**[385] the Court of Appeal held that when a petitioner is alleging that the respondent was not elected by the majority of lawful votes cast at the election, he ought to plead and prove the votes cast at the various polling stations, the votes illegally credited to the winner and the votes which ought to have been deducted from the supposed winner, in order to see if it will affect the result of the election. Where this is not done, it will be difficult for the court to address the issue. Also, these must be backed by the evidence of polling unit agents.

380 The Court held that the question of a public servant belonging to a political party was resolved by the apex court in **INEC Vs. Musa (2003)** 3 NWLR (PT 806) 72 at 166. It held that section 40 CFRN allows 'every person,' including public office holders and civil servants, the freedom to assemble freely and associate with other persons to form or belong to any political or trade union or any party, association for the protection of his interests.

381 See: **Akpoti-Uduaghan & Anor. v. Abubakar & 2 Ors**. (Unreported) Petition No. EPT/KG/SEN/03/2023. See also: **Odofin Adesoji David & ADC v. INEC, Obaro Emmanuel & APC** (Unreported) Petition No. EPT/KG/SHA/16/2023. Appeal No. CA/ABJ/EP/SHA/KG/138A/2023

382 **Justice Chukwunonye Azuka & LP v. INEC, Egbuna Douglas Nwachukwu & PDP** (Unreported) Petition No. EPT/AN/SHA/05/2023. Appeal No. CA/AWK/EP/SHA/AN/26/2023

383 See: **Deen & Anor v. INEC & Ors. (2019) LPELR -49041 (CA)**

384 This was the position of the Supreme Court in **Wada v. INEC** (2022)11 NWLR (PT. 1841) 293 @ 326 – 327 who also held that the pleadings of the scores of each polling unit must be made and testified to by a Party Agent or an official at the polling unit.

385 Supra

The Court of Appeal in **Ibrahim Sirajo Tanko & APC v. INEC, Kaila Dahuwa Sumaila & PDP**[386] gave a breakdown of what a petitioner alleging that a declared winner was not duly elected by a majority of lawful votes cast at the election must do. They include the following:

a. Place two sets of results; one being the official votes announced by the electoral body which they consider to be unlawful and the other being the result they believe to be correct;
b. Tender in evidence all the necessary forms at the election, voters register and the BVAS report of accreditation/machine;
c. Call witnesses who have the capacity to give positive, direct and credible evidence to prove how votes were misappropriated at the election; and
d. Prove that the illegality and/or unlawfulness affected the result substantially.

This ground was raised quite frequently in the post-2023 election petitions. Its success usually depended on the facts of the case, as well as the evidence tendered in support. Three cases will be presented where the ground of failure to win the majority lawful votes cast were raised. Two were based on allegations of wrong computation of scores - one was successful and the other failed, while the third case was based on alleged use of unlawful ballot papers, which failed.

CASE 1: DAUDA LAWAL V. BELLO MUHAMMED MATAWALLE, APC, INEC & PDP[387]

Finding: Polling unit results in Form EC8A remain the primary evidence of the votes scored in any polling unit; they constitute the foundation or fulcrum of a petition where there is a claim involving the number of votes scored.

Facts

The Appellant, Dauda Lawal, was the candidate sponsored by the PDP, while the 1st Respondent, Bello Muhammed Matawalle, was the candidate sponsored by the 2nd Respondent, APC. Dauda Lawal was declared the winner of the Zamfara State Governorship election held on 18 March 2023 and was duly returned by INEC.

The Petitioner/Respondent, Bello Matawalle filed a petition alleging over-voting, among others, and contending that the margin of lead (65,750 votes) between him and Lawal – as the two leading candidates - was less than the number of accredited registered voters (98,904) in polling units where elections could not hold or were cancelled and that the election ought to have been declared inconclusive. He alleged that if votes from Maradun Local Government Area where he allegedly scored 98,506 votes were added to the total votes, he would emerge winner.

386 (Unreported) Appeal No. CA/J/EP/BA/SEN/20/2023, delivered 27 October 2023
387 (Unreported) SC/CV/1165/2023. Judgment delivered on 12th January 2024.

Part of his contention was that there were two versions of the results in Form EC8A for each polling unit in Maradun Local Government Area, that is, the INEC top original copy containing the votes declared as scored by the candidates versus the duplicate copies of the polling unit result given by the presiding officer of each polling unit to the party agents. He alleged that the correct and actual votes scored in each polling unit in the wards of Maradun Local Government Area are the ones in the said duplicate copies in the custody of his party agents, which if correctly tabulated in the Form EC8C (Local Government Results Form), would give him a higher score of 98,506 and leave Lawal with a lower score of 618 votes in Maradun Local Government Area.

Matawalle/APC tendered duplicate Forms EC8B (ward results) and EC8C (LG results) given to their agents (both of which the Tribunal said did not tally). To prove the non-holding and cancellation of elections in the said polling units, they also tendered Forms EC40G, which is the Form that contains information on polling units where no elections were held or were cancelled.[388] They then called their ward-level agents (but not polling unit agents) to testify to the cancellation or non-holding of elections.

The collation officer for the Maradun LGA was also called by the Petitioner, Matawalle, to testify and he submitted that the Form EC8C that he signed was not the one used for the final collation because INEC had decided to use the results uploaded on the IReV portal to recompute and declare the result. He mentioned that due to a protest at the Local Government collation centre over inconsistencies in the originally collated Form EC8C, the State Returning Officer directed that the dispute be resolved by reference to the BVAS machine, copies of results uploaded to the IReV portal, and INEC copies of the polling unit results in Form EC8As to verify the entries in the LG results. Upon cross-examination, the collation officer's testimony was not favourable to the Petitioner, because he admitted that he could not see some of the results on the disputed Form EC8C that he had collated and admitted that the writing was not clear. He also categorically stated that APC did not score 98,506 votes as alleged.

The Tribunal subsequently held as follows: that Matawalle did not adduce the relevant and satisfactory documentary evidence in the proof of his Petition; that he failed to provide the Tribunal with the Forms EC8As from the various polling units which are the primary evidence in the proof of the number of votes cast at the election; and that the correctness of a Form EC8B (ward results) or EC8C (LG results) is assessed by a thorough examination of the relevant Polling Unit Forms EC8As (polling unit results). The Tribunal added that Form EC8C is regarded as secondary evidence in the face of the appropriate Forms EC8As.
Matawalle approached the Court of Appeal which allowed the appeal in part, declared the

388 The form EC40G is signed by a collation officer (ward level). It includes names of all polling units under the registration area where the election was not held/cancelled.

election inconclusive and ordered a re-run in the areas it believed that elections were proven to be cancelled.[389] The appeal panel reached this decision because it applied the provision of **section 137** of the Electoral Act to say that the recomputed Form EC8C, showed manifest non-compliance and cited as proof, their observed failure of party agents to countersign the Form as well as multiple alterations of erroneous computation without initials. The Court was of the view that this case dealt with collation of results not polling unit results, therefore it allowed the evidence of ward level and local government collation agents, whose testimonies the Tribunal had ruled as being hearsay as they were not present at the polling units.

The Supreme reversed the Court of Appeal calling its decision perverse and held as follows:

- That polling unit result in Form EC8A remains the primary evidence of the votes scored in any polling unit and in this case, the Petitioners (Matawalle & APC) failed to tender the Polling Units Results (EC8A) in evidence to prove the existence of actual votes scored different from the votes in the results declared by INEC.
- That duplicate copies of the polling unit results that were given to the APC's polling agent in each of the polling units constitute the foundation or fulcrum of the petition and claim of the petitioner having scored 98,506 votes in Maradun Local Government Area.
- That Form EC40G alone cannot be relied on to prove non-holding or cancellation of election in a polling unit. The necessary evidence to prove non-holding and cancellation of election is the report of the presiding officer ***and*** Form EC40G ***and*** the testimony of persons or party agents present during election in those polling units.
- That the ward and local government collation agents were not competent witnesses of the elections and results in any of the disputed polling units as they were not present in those locations.

In conclusion, the Supreme Court held that the Court of Appeal did not correctly apply **section 137** of the Electoral Act 2022 when it held that a party is not bound to call oral evidence where the original or certified true copies of documents tendered manifestly disclose the irregularities alleged. The Apex Court added that section137 cannot apply to an allegation of any irregularity but applies only to allegations of non-compliance with the provisions of the Electoral Act to remove the need to call oral evidence to prove the alleged non-compliance.

389 See **Bello Matawalle & Anor v. Lawal & 2 Ors.** (Unreported) Appeal No. CA/S/EP/GOV/ZM/21/2023. Judgment delivered on 16th November 2023.

CASE 2: OHERE SADIKU ABUBAKAR & APC V. AKPOTI-UDUAGHAN, PDP & INEC[390]

Finding: A ward collation officer has no power to cancel or reject a polling unit result that was not cancelled at the polling unit by the Presiding Officer.

Facts

The Appellant, Ohere Abubakar of APC was declared the winner of the election for Kogi Central senatorial district that was held on February 25th and 26th 2023 and Respondent/Petitioner, Natasha Akpoti-Uduaghan of the PDP, being dissatisfied, filed a Petition at the Tribunal. The crux of their matter was that in the Ganaja Township Registration Area/Ward of Ajaokuta LGA, INEC collation officers wrongly omitted or excluded results cast for various candidates during their collation of results from Form EC8A(I) (PU results for senatorial election) into Form EC 8B(I) (Ward collation results for Senate).

To prove their claim, Respondents/Petitioners, Akpoti-Uduaghan & PDP, called 20 witnesses who were party agents present at the different disputed polling units and collation centres. They tendered the duplicate copies of the result sheets issued to them and their certified true copies and gave evidence of the smooth conduct of the election in the respective polling units. They also tendered BVAS reports from the polling units which showed evidence of accreditation. These were to prove that elections took place in those polling units. The witnesses further testified that the results in the 9 polling units whose results were omitted during collation were signed by the agents of Abubakar and APC and they did not contest the integrity of the results nor dispute the scores of the parties at that level. However, the ward collation agent for the PDP alleged that he witnessed the omission of his party's polling unit results, as well as wrong entries of scores at the ward level and that he refused to sign the ward collation result after his complaint was not addressed.

The Tribunal agreed that there were errors in entering the scores of the parties in the ward collation Form EC8B(I), which caused a reduction in the votes for Akpoti-Uduaghan in 3 polling units by 996 votes and led to an inflation of votes for Ohere Abubakar in 9 polling units by 1,031 votes. The Tribunal recalculated the final scores for the candidates using these figures and ordered the return of Akpoti-Uduaghan as the winner of the election.

The Appellant, Ohere Abubakar, denying that scores were wrongly entered or inflated in his favour, argued that INEC's action was a case of rejection of votes, not omission. He alleged that the results from the disputed polling units were rejected on the complaint of agents of political parties at the Local Government collation centre on the belief that the results were manipulated since they were brought by a Supervising Presiding Officer straight for collation

390 (Unreported) Appeal No. CA/ABJ/EP/SEN/KG/35/2023

at the Local Government collation centre about 2 to 3 days after the conduct of elections in the said polling units without cogent and verifiable reason. In the same breadth, his party, APC made a contradictory claim that the said results were never presented for collation at the ward collation centre.

INEC in its defence, denied the reduction, inflation or wrong entry of scores. They argued that the results of the 9 disputed polling units were "cancelled" for various reasons. Specifically, they alleged that of the 9 disputed polling unit results, one was cancelled for failure to use BVAS, another for overvoting and the other 7 were not presented for collation at the ward level until 2 days later – on Monday, 27th February 2023 at about 2:00 pm by a Supervisory Presiding Officer (SPO) at the point of presentation of results to the Local Government collation officer. INEC averred that at the instance of the ward collation officer, the alleged results were rejected for failure of integrity considering the time lag for their presentation and the questionable source (the SPO) of the alleged results. (By the INEC Guidelines, the results should have been presented by the Presiding Officers of the polling units).

INEC's account however contradicted the evidence of the PDP party agents who testified that elections were held hitch free in the disputed 9 polling units and that copies of the result sheet were given to them (the agents) which they signed. The testimony of the PDP collation agent who said he protested the omission of the result during ward collation and refused to sign the ward-level result in protest also contradicted the denial by INEC and APC that the results were ever presented for collation.

The Tribunal allowed the burden of proof to shift and put INEC to task to show evidence of cancellation such as polling unit results sheets, BVAS report or Form EC40G showing the Presiding Officer's entries that elections did not hold or were cancelled in a polling unit. INEC instead, presented a written report made by the collation officer with an explanation therein that the votes were cancelled for various reasons. The Tribunal held that the report was not in the statutory form or prescribed INEC Forms; and that the collation officer was not a direct eyewitness at the polling unit and so could not testify to what happened there. It also found that the document was prepared in hindsight – after the petition was filed, which led the Tribunal to hold that it was contrived for the petition. The evidence was then expunged for not being credible.

In the opinion of the Tribunal, the fact that the 9 polling unit results were presented was evidence that the said results existed and were presented to the ward collation officers appropriately and this negates the respondents' defence that the results were never presented for collation at the ward collation centre. The Tribunal noted that it is immaterial at what point or venue the results were presented in so far as the duly issued results were presented to the collation officers for collation. Furthermore, that collation officers are duty-bound to accept

the results from the Presiding Officers. The Tribunal also referred to **INEC Regulations 39 to 43** to hold that the ward collation officer had no power to cancel or reject the results as the results were not cancelled at the polling unit by the Presiding Officer who is the only person legally allowed to do so. It reasoned that even if it is conceded that it was questionable that a Supervisory Presiding Officer (SPO) brought the results 2 days later, the SPO supervises the Presiding Officers who should have brought the result and nothing in the law invalidates this action. The Tribunal concluded by holding that, importantly, no facts were adduced to challenge the integrity of the said results or to show that the scores therein were incorrect or afflicted by any substantial non-compliance.

The Court of Appeal affirmed the Tribunal's finding that INEC did not justify the non-collation of the results in the disputed polling units, holding that the Tribunal's conclusion on the issue cannot be faulted. It also held that agents of the 2nd Respondent (PDP), dutifully tendered in evidence, the duplicate copies of the results for the polling units under consideration and that this erased any inkling of doubt of the fact that the results were submitted for collation.

CASE 3: YUSUF ABBA KABIR V. APC, INEC & NNPP[391]

Finding: A Tribunal lacks the jurisdiction or power to declare votes invalid for the mere reason that they are cast by unmarked ballot papers, without more.

Facts

In the Kano State Governorship election held on 18th March 2023, the NNPP candidate, Yusuf Kabir, was returned as elected and declared winner. The APC filed a petition at the Tribunal (without joining their candidate Nasiru Yusuf Gawuna) alleging that Yusuf Kabir did not win the majority of the votes cast and there was non-compliance with the provisions of the Electoral Act. They won the case at the Tribunal and Yusuf Kabir appealed.

The APC's petition contained allegations of over-voting, cancellation due to violence and disruption of voting, disenfranchisement of voters, non-use of BVAS machines in polling units and alleged use of what was termed "unlawful ballot papers" in 34 local government areas. The validity of the sponsorship of Yusuf Kabir by the NNPP was also questioned by the APC and was a major issue in this case, however, this summary focuses on the Court's decision on the allegation of unlawful ballots.

The Tribunal had ruled in favour of the APC after deducting a total of 165,616 votes from Yusuf Kabir's votes on the basis that the votes emanated from "unlawful ballot papers." The ballots were unmarked i.e., not signed, stamped, dated and did not have the names of the Presiding Officers. The Tribunal's decision was predicated on **section 71** of the Electoral Act which provides among others, that

391 (Unreported) SC/CV/1179/2023. Judgment delivered 12th January 2024

"every Result Form completed at the ward, local government, state, and national levels, shall be stamped signed and countersigned by the relevant officers and polling agents at those levels."

Yusuf Kabir (Appellant) approached the Court of Appeal whose judgment contained two conflicting decisions via inconsistent statements in the closing paragraphs of the judgement. On one hand, the appeal was dismissed (in favour of the APC) while on the other hand, the decision of the trial tribunal was set aside (in favour of Yusuf Kabir). The first closing statement stated in the judgment stated as follows:

"I will conclude by stating that the live issues in this appeal are hereby resolved in favour of the 1st Respondents and against the Appellant." Then the second one stated: "in the circumstances I resolve all the issues in favour of the Appellant and against the 1st Respondent."

(Note that the Appellant at the Court of Appeal was Yusuf Kabir while the 1st Respondent was the APC.)

The next paragraph dismissing the appeal followed with the court stating:

"Therefore, I find no merit in this appeal which is liable to be and is hereby dismissed."

The Court then concluded with an even more confusing statement allowing the appeal. This is replicated as follows:

"The judgment of the tribunal in petition No: EPT/KN/GOV/01/2023 between All Progressives Congress (APC) Vs. Independent National Electoral Commission & 2 Ors. delivered on the 20th day of September, 2023 is hereby set aside." The sum of N1,000,000.00 (one million naira only) is hereby awarded as costs in favour of the appellant and against the 1st respondent."

Dissatisfied, Yusuf Kabir appealed to the Supreme Court. The two major issues in contention at the apex court were the cancellation and deduction of his votes and his alleged non-membership of the NNPP.

The Supreme Court's decision on his membership of NNPP is already treated in the section of this report dealing with qualification for election but to reiterate, the Supreme Court categorically stated that the issue of nomination and sponsorship of a candidate for election is exclusively within the prerogative of a political party as long as such selection complies with the law. Hon. Justice Inyang Okoro, JSC, added that the requirement under **section 77(3)** of the Act for submission of the register of members to INEC not later than 30 days before the party primaries is to ascertain that the party to be put on the ballot is not a hoax.[392] Hon. Justice I.M.M. Saulawa, JSC, in his concurring judgment setting aside the Court of Appeal's

392 **Yusuf Abba Kabir v. APC, INEC & NNPP** (Supra) at page 28

decision that Kabir was not validly nominated by the NNPP, stated that for reasons best known to them, *"they deemed it expedient to throw caution and reason to the winds and perversely declined to abide by the settled principle of law"*.

On the issue of cancellation and deduction of votes, which was the crux of the matter, the Supreme Court held that the Tribunal lacks the jurisdiction or power to declare votes invalid for the mere reason that they are cast by unmarked ballot papers. The Court also held that it was wrong for the Tribunal to have relied on **Section 71** of the Act to declare the unmarked ballot papers and the votes cast with them as invalid. The provision of **section 71** which was relied on refers to "results forms" not "ballot papers" which is what was is in dispute in this case. Explaining this provision, the apex court noted that **section 71** only regulates actions commencing from the ward level (results) not polling unit level (voting).

Going further to interrogate the effect of a ballot paper not having the official mark prescribed by INEC, the apex court noted that a reading of **section 63** of the Electoral Act shows that it does not invalidate a ballot paper in all cases. This is because while **section 63 (1)** says that a ballot paper without an official mark prescribed by the Commission should not be counted, **section 63 (2)** goes on to say that if the Returning Officer is satisfied that the said ballot without an official mark was from a book of ballot papers supplied to the presiding officer of the polling unit for use in the election, then that ballot paper can be counted.

The Court held, therefore, that once unmarked ballot papers have been allowed to be counted, the decision to allow such votes to be counted can only be challenged on the ground that the discretion of the Returning Officer to allow such unmarked ballot, as allowed by **section 63(2)**, was improperly exercised. In this suit, the APC did not plead nor prove that the Returning Officer wrongly exercised his/her discretion in allowing the said votes to be counted.

To buttress its finding, the apex court noted that the APC had called an expert to show that out of the 165,616 ballot papers deducted from Yusuf Kabir, about 146, 292 were signed and stamped but had no date. The Court held that this proved that those ballots substantially complied with the provisions of the Electoral Act and that at the very minimum, the 146,292 votes arising from ballot papers confirmed to be signed and stamped should have been restored to the Appellant (Kabir) which by itself reinstates his victory.

The Supreme Court concluded by describing the judgment of the Court of Appeal as being misconceived and perverse. It restored all the signed and stamped ballot papers to Yusuf Kabir, especially as no evidence was brought to show that the ballot papers were not for the Kano governorship elections or that Kabir influenced the non-signing, stamping or dating of some of the ballot papers.

The judgment of the Court of Appeal in this case was very controversial. It led to harsh public criticism and commentary on judicial integrity when it was published, due to the conflicting decisions contained in the Judgment. The Supreme Court was also quite critical in its review of the case. In his lead judgment, Hon. Justice Inyang Okoro, JSC, stated as follows:

> *"The above scenario, to say the least is a complete mess which is capable of bringing the judicial process to disrepute. A situation where each paragraph of the conclusion of the judgment is a contradiction of the previous one is a complete disaster and makes nonsense of the high office of a Judge. I just want to advise Judges to be more meticulous in doing their job in all cases and more particularly in sensitive cases like a governorship election appeal in order to avoid unnecessarily setting fire to the polity. I need not say more on this."*[393]

4.4 Proving Corrupt Practices

In election petitions, where allegations of corrupt practices are raised, the petitioner making the allegations must provide cogent and credible evidence to prove them beyond reasonable doubt because they are criminal allegations. The petitioner must establish that not only did the corrupt practice or non-compliance take place but that they substantially affected the result of the election.

Also, criminal allegations cannot be transferred from one person to another.[394] The Court's position is that such a person should be named in the petition, and possibly joined as a party. For instance, in **Wada v. INEC**[395] the Supreme Court held that criminal allegations in election petitions are personal to the person who committed such offences and that because criminal allegations cannot be transferred from one person to another, it follows that 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. For allegations of crime to be proved against a respondent it must be proved that they committed the corrupt acts or aided, abetted, consented to, or procured their commission and that the corrupt practices substantially affected the outcome of the election.[396]

CASE 1: ADEBUTU OLADIPUPO OLATUNDE & PDP V. INEC, ABIODUN ADEDAPO OLUSEUN & APC[397]

Finding: A petitioner must show beyond reasonable doubt that the respondent whose election is being challenged on the ground of corrupt practices, personally committed the corrupt act or aided, abetted, consented or procured the commission of the alleged corrupt

393 **Yusuf Abba Kabir v. APC, INEC & NNPP** (Supra) at page 31
394 Per Supreme court in **Waziri v. Geidam (2016)** 1 NWLR (Pt. 1523) 230
395 11 NWLR (PT. 1841) 293 @ 232 paras E-G
396 See Court of Appeal decision in **Atiku v. INEC.** See also **Omisore v. Aregbesola (2015)** (Supra) where it was held that it is important that criminal allegations are directly made personal.
397 (Unreported) SC/CV/1221/2023

practice. Where the alleged corrupt act was committed through an agent or proxy, it must be shown that the agent or proxy was expressly authorized to act in that capacity or granted authority and that the corrupt practice substantially affected the outcome of the election.

Facts

The first Appellant, Adebutu Olatunde, running on the platform of PDP (2nd Appellant) contested and lost the Ogun State governorship election held on 18 March 2023. They filed a petition against the winner, Abiodun Adedapo (2nd Respondent), where they contended that the elections in 99 polling units which cut across 41 wards and 16 local government areas of Ogun state were cancelled due to violent disruption of the election process by agents of the APC and its candidate, and overvoting. They alleged that this disenfranchised 49,066 registered voters who had collected their permanent voters' cards and were ready to vote. They further alleged various acts of non-compliance and corrupt practices such as multiple thumb printing of ballot papers in favour of APC in certain Local Government Areas. Specifically, they stated that a total of 37,401 ballot papers were thumb printed by the same set of persons in favour of APC; that 3,470 ballot papers with the logo of APC were found to have been thumb-printed with sham ink pad; and that about 162 ballot papers with the logo of APC were ticked with markers rather than thumbprints.

To prove this, the appellants called about 90 oral witnesses, and two expert witnesses. One expert was a leading forensic analyst from the Force Criminal Investigation and Intelligence Department (FCIID) of the Nigeria Police Force who conducted a forensic examination of the electoral documents and results forms, and the other was a handwriting expert who examined the ballot for signs of use of markers. The evidence of these two experts was unfortunately expunged for not being frontloaded and on the basis that their reports were made during the pendency of the suit. This decision by the Tribunal was damaging to the petitioner's case. The Court of Appeal in affirming the decision, acknowledged this fact when it stated on appeal that the expulsion of the testimonies of the two expert witnesses

> *"… created a crater in the evidence in support of the petition and sort of castrated or amputated the petition and left it bare, barren and sterile on the legs of alleged non-compliance with the provisions of the Electoral Act and corrupt practices…"* [398]

The Court added that in any case, an allegation of corrupt practices at polling units can only be proved by a witness who was present at the polling unit at the material time.[399] However, upon examining the testimonies of the eyewitnesses presented, the Court held that there were inconsistencies in their testimonies, failure to link the violent acts complained of with the respondents (APC and Adedapo Abiodun), failure to link hoodlums allegedly seen with these

398 Per Ikyegh, JCA at page 27 of the Lead Court of Appeal Judgment (unreported)
399 **Abubakar v. INEC** (2020) 12 NWLR (Pt. 1737) 37 at 180.

respondents and how or whether they disrupted voting. They also held that the appellants did not show that any of the electoral offences under **Part VII of the Electoral Act** were established by on- the-spot or field witnesses.

On the standard of proof required, the Court held that the Appellants did not show "beyond reasonable doubt" that the respondent, Adedapo Abiodun, personally committed the corrupt acts or aided, abetted, consented or procured the commission of the alleged corrupt practice. The Court added that they also did not show that he expressly authorized his agents or proxies to act in his capacity, to carry out the alleged corrupt practices alleged or that such practices substantially affected the outcome of the election. Affirming the decision of the Court of Appeal, the Supreme Court held that none of the 91 witnesses called could prove the allegation of corrupt practices, and that the appellants did not establish beyond reasonable doubt under **section 135 (1)** of the Electoral Act, 2022, that the respondent personally committed the criminal or corrupt acts complained of in the petition.

CASE 2: COLE TONYE PATRICK V. INEC, FUBARA SIMINALAYI & PDP.[400]

Finding: A case of corrupt practices or non-compliance cannot be founded on vague expressions. The allegations must be precise with the persons and places of occurrence named in the petition.

Facts

The appellant, Cole Tonye Patrick of the APC filed this petition against the declaration of PDP candidate, Fubara Siminalayi on several grounds one of which is that the election was invalid by reason of corrupt practices or non-compliance with the provisions of the Electoral Act. He alleged that INEC not only authorised corrupt practices which plagued the election but also colluded with the other respondents to give victory to Fubara via a flawed process. To prove the ground that the election was invalid by reason of corrupt practices or non-compliance with the provisions of the Electoral Act, he, relied on the novel **section 137** of the Electoral Act, 2022, called a total of 40 witnesses and tendered over six thousand (6,000) exhibits to prove the complaint of over-voting, non-stamping of result sheets, unsigned alterations, cancellations and mutilation of result sheets, unaccounted ballot papers, in addition to corrupt practices.

Of the appellant's 40 witnesses, only 21 were Polling Unit agents, 2 were ward agents, 16 were Local Government agents and one was the Appellant himself (Tonye Patrick Cole). The Appellant, in his testimony, sought to rely on the European Union Election Observation Mission in Nigeria (EU EOM) 2023 Final Report on the Election of 25th February and 18th March 2023, which he alleged contained reports of widespread violence, voters' intimidation, killing of agents of the petitioner, among others. He also produced a flash drive containing videos evidencing corrupt practices.

400 (Unreported) SC/CV/1193/2023

The Tribunal held that the appellant did not meet the standard of proof of the allegation of corrupt practices, which is proof beyond reasonable doubt.[401] It ruled that several paragraphs of the petition seeking to prove this ground were vague, generic, speculative and imprecise for using phrases such as "*prevalent instances of,*" "*instances of vote buying*," "*several instances,*" "*in many polling units,*" "*agents of the 2nd and 3rd respondents,*" "*the said polling units,*" "*in most instances,*" and "*some of the irregularities that pervaded the elections*." On this point, the Tribunal was of the view that the pleadings did not meet the standard set by law for the pleading of corrupt practices and non-compliance and therefore struck out the offending paragraphs in the petition containing these words.[402]

Ruling on the evidence provided, the Tribunal noted that out of about 1,541 polling units in the Rivers State Governorship Election across 23 local government areas over which allegations were made, the appellant did not call a single voter who was either intimidated, harassed, disenfranchised or who witnessed the perpetration of the crimes alleged. The Tribunal stated that no single polling unit that was allegedly affected by these irregularities was mentioned anywhere in the petition, and neither was the name of a single polling unit agent who was allegedly beaten or chased away from his polling unit mentioned. The Tribunal further discountenanced the European Union Observation Mission's election observation report and flash drive with videos on the ground that they were not tendered through their makers.

On appeal, the Court of Appeal affirmed the decision of the Tribunal, holding that the evidence adduced by Tonye Cole (as a witness for his case) was "tainted with hues of hearsay" and was without any credibility. Furthermore, the Court believed that the evidence of the 39 other witnesses was insufficient to build up his case. The Court also held that **section 137** of the Electoral Act, 2022 is not a substitute for the need to prove criminal allegations, for which the Electoral Act provides penal sanctions for defaulters.

On further appeal, the Supreme Court affirmed the Court of Appeal's decision holding that the fact that several of the witnesses that were examined admitted to receiving reports from others is proof that they were in no position to testify about what transpired at the various Polling Units in question. It held that the witnesses' testimonies were irredeemably plagued by the vice of inadmissible hearsay evidence.

It is instructive to note that in this case, the Petitioner's sponsoring party, APC, withdrew from the petition at the Tribunal, leaving the Petitioner (Tonye Cole) to prosecute the case alone. APC also took the same decision to withdraw from all petitions involving its candidates in Rivers State.

401 As stated in the case of **Ikpeazu v. Otti & Ors** [2016] LPELR - 40055(SC).
402 See Tribunal Case: **Tonye Cole v. INEC & 2 Ors**. (Petition No: EPT/RV/GOV/10/2023)

Box 9: Sample Petitions Dealing with the Ground of Corrupt Practices

Suleiman Hussaini Kangiwa & APC v. INEC, Abdullahi Yahaya Abubakar & PDP.[403] Petitioners did not provide credible evidence to prove the allegations of vote suppression, fictitious and fabrication of scores, which are crimes that must be proven beyond reasonable doubt.

Onunkwo Johnbosco Obinna & APGA v. Okafor Dominic Ifeanyi & INEC.[404] Mutilation and falsification are corrupt practices which are criminal in nature and must be proved beyond reasonable doubt. The Petitioners could not prove that there were cancellations, alterations or mutilations or that the respondents dishonestly committed to falsifying the result of the election.

Katuka Nuhu Solomon & PDP v. Dahiru Yusuf Liman, APC & INEC.[405] The Petitioners alleged corrupt practices as regards alterations, erasures and mutilations. The EPT held that the act was fraudulent and conspicuous on the face of the document therefore, oral evidence was not necessary to prove the alterations. This decision was set aside by the Court of Appeal on the ground that fraud, as a criminal allegation, must be proved with eyewitnesses beyond reasonable doubt.

Utazi Thaddeus & LP v. Ekwueme Chukwuma I. Martins, PDP & INEC. [406] The standard of proof for allegations of crime is proof beyond reasonable doubt, but the Appellants as Petitioners did not lead any evidence to prove the allegations of forgery.

403 (Unreported) Petition No. EPT/KB/SEN/03/2023
404 (Unreported) Petition No. EPT/AN/HR/22/2023
405 (Unreported) Petition No. CA/K/EP/SHA/KD/43/2023
406 (Unreported) Appeal No. CA/E/EP/SHA/29/2023

PART 05

05

05

Examining the Role of INEC In Election Petitions

The conduct of INEC deserves special mention due to its role as the election management body and respondent in all election petitions. If the rate of success or failure of election petitions is used to assess the performance of INEC, with the observed **88.9%** failure rate of petitions in cases analysed, it could be said that the courts gave the Commission a distinction. It could also be argued that the conduct of the 2023 elections was generally in substantial compliance with the Electoral Act. Yet, this is in contrast with the prevailing public sentiment.

Conversations are rife in the public domain among politicians, lawyers, media, civil society organisations, election observers, and ordinary citizens in different fora about the failure of INEC to meet citizens expectations and the minimum threshold of a transparent election.[407] The number of petitions filed is proof of the discontent with the election results. The ensuing voter apathy in supplementary and off-cycle elections that followed the 2023 General Elections is also a testament to this.[408] Indeed, stakeholders, especially CSOs, have called for a complete restructuring of INEC and reforms to the mode of appointments of members of the Electoral Commission as a way of promoting its independence, and rebuilding public trust and confidence in elections. [409]

In addition to the presumptive deference enjoyed by election management bodies (EMBs) (i.e. presumption of regularity of election results in this case), it has been found that the courts in many jurisdictions, generally approach allegations of irregularities in the conduct of an election from the premise that a perfect election is an unattainable ideal. This presumption

407 See: Nigeria Civil Society Situation Room Credibility Threshold for the 2023 General Election. Available at: https://situationroomng.org/wp-content/uploads/formidable/6/Credibility-Threshold-for-the-2023-General-Election.pdf

408 See: Ebiowei, L. (2023, November 12). Off-Cycle Elections: Violence, voter apathy in Bayelsa. *Nigerian Tribune Online*. https://tribuneonlineng.com/off-cycle-elections-violence-voter-apathy-in-bayelsa/. See also: Ibiefo, F. (2024, September 23). Edo Governorship Election Recorded Abysmal Turnout, Says AidAfrica Executive Director. *Arise News*. https://www.arise.tv/edo-governorship-election-recorded-abysmal-turnout-says-aidafrica-executive-director/#google_vignette

409 See: Amodu, T. (2023, October 24). IPAC to INEC: Restore trust in electoral process with off-season elections. *Nigeria Tribune Online*. https://tribuneonlineng.com/ipac-to-inec-restore-trust-in-electoral-process-with-off-season-elections/. See also: Aluko-Olokun, A. (2024, May 27). Stakeholders Identify Strategies to Rebuild Trust in Nigeria's Electoral Process. *Nigeria Democratic Report*. https://www.ndr.org.ng/stakeholders-identify-strategies-to-rebuild-trust-in-nigerias-electoral-process/

causes judicial restraint and reluctance of courts to nullify election results; allows EMBs significant latitude and margin for error when its conduct of an election is being reviewed against the law; and is identified as the basis for the legal requirement for petitioners to prove substantial non-compliance, which appears to be the standard in several other jurisdictions.[410]

INEC failed to put up a serious defence in responding to petitions, often citing the legal requirement that "he who asserts must prove." Because the commission was not always forthcoming with producing election documents, many petitioners unsuccessfully tried to contrive explanations of how, for example, election results came to be altered, miscalculated or wrongly collated. In several cases, INEC did not tender any evidence or call any witness; they merely replicated the addresses of other respondents with very slight modifications. In some cases, they disowned their documents or objected to official documents they issued to a petitioner for reasons such as that it was undated, unsigned by the maker or had no official logo.[411] 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. For example, in **Victor Alewo Adoji & PDP v. Jubrin Isah, APC & INEC,**[412] the Commission failed to object to the admissibility of some of the petitioners' evidence and the Tribunal held that INEC is bound by the contents of documents it issued where it did not proffer any contrary evidence challenging the authenticity of such documents.

In **Khaleed Abdulmalik Ningi & APC v. Abubakar Yakubu Suleiman, PDP & INEC,**[413] the Court of Appeal stated that it was embarrassing that the Commission could appear before it and disown documents that it not only issued but also duly certified. It held that the electoral body has continued to "dance naked in the marketplace pretending that nobody is seeing its dancing steps and nakedness," even though it is meant to assume a neutral stand in election litigations.

INEC's attitude in petitions is bolstered by the position of the law which says that an election is proved on the balance of probabilities and that this burden shifts or swings like a pendulum, but at the same time, that not even failure or refusal of a respondents 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. In the eyes of the courts, this is justice according to the law, which can only be changed by legislation. The solution here may lie in a legal prescription that demands that the Commission bears the burden of proof in elections.

410 Prempeh, K. (2016). *Comparative Perspectives on Kenya's Post-2013 Election Dispute Resolution Process and Emerging Jurisprudence* (C. Odote & L. Musumba, Eds.) [Balancing the Scales of Electoral Justice: 2013 Kenyan Election Disputes Resolution and Emerging Jurisprudence]. International Development Law Organization (IDLO). https://kenyalaw.org/kl/fileadmin/pdfdownloads/JWCReports/Balancing_the_Scales_of_Electoral_Justice.pdf

411 See **Adebutu & Anor v. INEC & Ors.** (Supra). See also **Khaleed Abdulmalik Ningi & Anor v. Abubakar Yakubu Suleiman & 2 Ors.** (Supra)

412 (Unreported) Petition No: EPT/KG/SEN/11/2023, Appeal No. CA/MK/EP/BN/HR/23/2023

413 Supra

Interestingly, INEC's attitude was not always consistent across petitions as they usually put up a defence where its powers or actions as an election management body was questioned or criticised by a Tribunal. The commission was also seen defending some petitions and filed appeals specifically asking that judgments be set aside in several cases. This cast them in a bad light because it gave the impression that they were taking sides with parties.

5.1 Delay or Non-Compliance with Court Orders

It is important to underscore that pervading many of the cases analysed was the manifest action by INEC to frustrate petitioners. The procedure for filing petitions includes obtaining certified true copies (CTC) of all relevant electoral materials from INEC, obtaining the payment receipts of each certified document, and filing the petition together with the CTC of the documents. A petition that fails to do these stands the risk of being struck out or dismissed.

By virtue of **section 146** of the Electoral Act, INEC shall produce election documents for inspection by litigants when ordered by the Court. INEC, however, in several cases, was accused of delaying action on Court Orders to produce electoral documents or flat out disobeying same, failing to honour subpoenas and evading service. These actions often contributed to the failure of the petitioner's case as the documents requested were often fundamental. For example, in **Aida Nath Ogwuche & PDP v. INEC & Agbese Philip, APC & Francis Ottah Agbo**,[414]the petition alleged that INEC evaded service of a Supreme Court judgment on a pre-election matter[415] that ordered the Commission to put the rightful candidate on the ballot, that is, the Petitioner in this matter. In **Mzondu Bem Benjamin & PDP v. INEC, Tarkighir Dickson Dominic & APC**,[416] INEC's refusal to honour the court's order of notice to produce certified true copies of result sheets negatively impacted the petitioner's case.

In **Sunday Oka Ifere & Labour Party v. INEC, Alex Egbona, APC, Eko Atu & PDP**[417] the Tribunal found that there were inconsistencies in documents obtained from the custody of INEC and complained that the commission churned out documents that were confusing. The INEC Resident Electoral Commissioner (REC) for the State in question - Cross River – who was issued a subpoena to appear at the Tribunal to explain the documents failed to appear. In berating the REC and expressing its aversion to the commission's actions, the Tribunal stated that the Commission's approach in defence of the petition leaves much to be desired as an agency of the State funded with taxpayers' money and an umpire in the elections. It held as follows:

414 (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 the Supreme Court Order to reinstate her as PDP candidate. INEC said the party did not write them to do a candidate substitution. The Tribunal & Court of Appeal dismissed the case as being a pre-election matter.

415 **Aida Nath Ogwuche v. Francis Ottah Agbo & 2 Ors.** (Unreported) SC/CV/119/2023

416 (Unreported) Petition No. EPT/BN/HR/04/2023

417 (Unreported) Petition No. EPT/CR/HR/07/2023. Appeal No. CA/C/EPI/HR/CR/18/2023

> *"We hope that our jurisprudence advance rapidly and our laws amended in the near future to make the legal burden of proof in election tribunal matters shift to INEC – the 1st Respondent, to prove any veracity of any challenged election before the election tribunal without hiding under the guise of "presumption of correctness/regularity" available in our law. We also hope that our laws are amended to criminalize as a felony without option of fine, the refusal and /or neglect of any INEC official subpoenaed to appear before an election tribunal to testify, as obedience to a subpoena is only a civic duty that every patriotic citizen owe to the state and society and to act otherwise amounts to betrayal of public confidence bestowed on the disobedient INEC official, deserving of punishment."*[418]

Where INEC failed to produce requested documents, the Tribunals often took the position that it behoves the party requesting to tender secondary evidence along with proof of the dishonoured notice to produce. In **Awai Paul Congo & SDP v. INEC, APC & Mairiga Usman Uba,**[419] the Tribunal was of the view that the petitioners did not have appropriate secondary evidence in place of the BVAS machine even though they had served INEC a notice to produce. In other instances, Tribunals would reiterate the need for secondary evidence but fail to state what kind of secondary evidence is acceptable. For example, in **Muhammadu Alhaji Salisu Hassan & Anor. v. Aliyu Ibrahim Almustapha & 2 Ors**,[420]INEC disobeyed the Tribunal's Order of notice to produce Form EC9 (Form for Academic Qualifications) and the Tribunal held that it behoved on the petitioners to adduce secondary evidence of the document in question to prove their case. In **Onyema Chukwuka Wilfred & PDP v. Ogene Victor Afamefuna, LP & INEC,**[421] the Commission failed to honour a notice to produce the declaration of result Form EC8C(II), causing the Petitioner to tender secondary evidence which was rejected by the Tribunal for not being admissible in line with **section 89** of the Evidence Act.

5.2 Defending Petitions and Filing Appeals

In several cases, it was not clear whether INEC was an adverse party in a petition or a necessary party. This question came up in **Ombugadu v. Sule (CA)**[422] where the appellants argued that INEC's statutory role as a respondent in an election petition makes it an adverse party to the petitioner, while the Court of Appeal opined that INEC is an independent umpire not an adverse party to the appellants. However, the commission did appear to take an adversarial position in some petitions and the courts often frowned on it. For instance, INEC was criticised in several cases for appealing petitions and seeking reliefs where no harm was suffered by the Commission instead of defending their conduct of the election, the Electoral Act and its Guidelines.

418 Per Hon. Justice Olukayode A. Adeniyi in **Sunday Oka Ifere & Labour Party v. INEC & 4 Ors** (Supra) @ page 90
419 (Unreported) Petition No. EPT/TR/SHA/15/2023
420 (Unreported) Petition No. EPT/SK/HR/04/2023
421 (Unreported) Petition No. EPT/AN/HR/25/2023
422 Supra

In **Datti Yusuf Umar v. Iliyasu Musa Kwankwaso & 3 Ors,**[423] the Court of Appeal found that INEC, via its brief of argument as a respondent, attacked the decision of the Tribunal and urged the Court to allow the appeal filed by a party. The Court of Appeal per Ogakwu, JCA, held that:

> *"this is not permissible as it constitutes a departure from the traditional role of a respondent in an appeal, which is to defend the judgment appealed against."*

It held that INEC's Brief of Argument was incompetent and struck it out.

Similarly, in **Emeka Sunday Nnamani v. Ikwechegh Alexander Ifeanyi & 3 Ors,**[424] INEC, as the 4th respondent, urged the Court of Appeal to allow the appeal. Referring to this as unacceptable, the Court, per P. A. Mahmoud, JCA, held that the traditional role of INEC in appeals is to support the judgment of the lower court and not attack the judgment in which it has nothing to gain as an unbiased umpire. The Court added that INEC, not having filed a cross-appeal, cannot file a Brief of Argument in which their argument is to attack the decision of the Court and ask for the appeal to be allowed.

However, it is not in all cases that an appeal by INEC will be treated as competent. For instance, in **INEC v. Bashir Abdullahi, PDP, Abubakar Mohammed & APC**[425] where the facts were different from the preceding case, the Court of Appeal held that INEC's appeal was an abuse of court process. The Court held that INEC, as appellant, adopted the wrong approach by filing an appeal instead of a brief of argument hence providing for a multiplicity of actions dealing with the same issues, same parties and same subject matter.

Explaining when an appeal by INEC would be proper, the Court of Appeal in the aforesaid case of *Nnamani v. Ikwechegh*[426] stated that a respondent, especially one who does not have a cross- appeal, is not allowed to attack the judgment from which there is an appeal except where he disagrees with some aspects of the judgment in which case he should file a cross-appeal wherein he can ask the appellate court to set aside that aspect of the judgment.

The role of INEC in petitions was examined in detail in **INEC v. Nkeiruka Onyejeocha & 3 Ors.**[427] Here, INEC led evidence against the 1st Respondent (Onyejeocha) at the EPT and filed an Appeal challenging the Tribunal's judgement that was in her favour. The lead judgment delivered by Abiru, JCA, was to the effect that the Appeal is an abuse of court process as the Appellant (INEC) has no right of appeal in the matter. The Court of Appeal held that INEC breached their role of neutrality in election matters first by leading evidence

423 (Unreported) Appeal No. CA/KN/EP/HR/KAN/14/2023
424 (Unreported) Appeal No. CA/OW/EP/HR/AB/19/2023
425 (Unreported) Appeal No. CA/G/EP/SHA/GM/10/2023
426 Supra
427 (Unreported) Appeal No. CA/OW/EP/HR/AB/15/2023

against the Petitioner and even accusing the Petitioner of forging her evidence (result sheets) presented before the Court. The Court added that the position of the law in 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 made a definite finding or conclusion in law which affects it 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. In this case, the Court held that the lower Court did not make any comment or finding or reach any conclusion on the conduct of the Commission or any of its officials in the management of the election and neither did INEC suffer any grievance by the judgment of the lower court.

The situation referred to by the Court in the above case was observed in **INEC v. Dahiru Liman & 3 Ors,**[428] where INEC as an Appellant, alleged that the Tribunal, in its judgment, showed unprecedented hostility by using strong and derogatory language on the Commission. INEC further alleged that the Tribunal had without evidence, accused them of fraudulently altering about 37 disputed polling unit result sheets to favour one of the parties and indicted its officers when it ordered the INEC Chairman to assign other officers to conduct re-run/ supplementary elections in those polling units as doing otherwise would amount to "*pushing the petitioners into the lion's den*." The Court of Appeal set aside the Tribunal's Order stating that while the Tribunal or Court may make comments on the activities of any INEC staff whose conduct it feels is unwholesome, it should not extend to directing the Commission on the way, manner or personnel to use for the discharge of her statutory/constitutional duties for the conduct of an election.

In some cases, no grievance against INEC was disclosed but the Court nonetheless allowed INEC's appeal. An example is **INEC v. Abazu Chika Benson & 5 Ors.**[429] which is a cross-appeal filed by INEC concerning whether a political party should have a say in the primaries of another party over which INEC had been a supervisory stakeholder. INEC argued that the Tribunal should not have assumed jurisdiction to entertain questions relating to the validity or legality of the primary election of a political party. None of the parties here, including the Court, challenged INEC's right to bring the cross-appeal. While the Commission, on the face of it, seemed to be merely raising issues related to the application of relevant provisions of the law dealing with pre-election matters, there were other appeals before the same Court involving the same parties and with the same issues, including those brought by the candidate and political party whose nomination process was in dispute. INEC's appeal therefore came across like a surplusage.[430]

428 (Unreported) Appeal No. CA/K/EP/SHA/KD/46/2023
429 (Unreported) Appeal No. CA/ABJ/EP/HR/IM/65/2023
430 See: **Ikeagwuonu Ugochinyere v. Abazu Chika Benson & Ors.** (Unreported) Appeal No. CA/ABJ/EP/HR/IM/68/2023; **PDP v. Abazu Chika Benson & Ors.** (Unreported) Appeal No. CA/ABJ/EP/HR/IM/64/2023.

Overall, the general disposition of the Courts is that the Constitution does not give INEC the right to appeal any question as to whether or not any person has been validly elected and that INEC can only exercise the right of appeal where the Tribunal made a definite finding or conclusion in law which affects the Commission directly.[431]

An interesting case study where the Commission's neutrality was questioned and which led it to file an appeal accusing the Tribunal of being partial to a litigant is the case of **INEC v. Akpoti-Uduaghan, PDP, Ohere Sadiku Abubakar & APC.**[432] The summary of the facts leading up to the appeal is that the Respondent/Petitioner (Natasha Akpoti-Uduaghan) won her petition at the Tribunal after the EPT found that INEC collation officers wrongly omitted or excluded results and votes cast for her during collation. INEC argued that the alleged results were rejected by the ward collation officer for failure of integrity considering the time lag for their presentation and the questionable source of the alleged results. It was presented for collation by a Supervisory Presiding Officer (SPO) two days after the election but before completion of collation. The Petitioners pleaded that the elections in the polling units whose results were omitted were signed by the agents of the 1st and 2nd Respondents who did not contest the integrity of the results nor dispute the scores of the parties, but they were excluded. The Petitioner also brought witnesses/party agents present at those polling units who tendered duplicates of the relevant results as well as their CTCs.

The Tribunal held that the ward collation officer was wrong to cancel the results as he was not legally authorised to do so. It shifted the burden of proof to INEC and other respondents to call any of their agents to explain the reason for the rejection of the said results and its exclusion from the ward collation result, which they failed to do. The Tribunal then held that the disputed polling unit results were unlawfully and deliberately omitted and excluded during collation. It then nullified the 3rd Respondent's (Ohere Abubakar) election. The Court of Appeal, in a substantive appeal filed by Abubakar, affirmed the decision of the tribunal.

However, while the main appeal was pending, INEC filed a cross-appeal asking the Court of Appeal to set aside the Tribunal decision. Counsel for INEC made weighty allegations against the Tribunal accusing it of descending into the arena in favour of the Petitioners/Respondents (Akpoti-Uduaghan and PDP) and not affording INEC the right to be heard. Counsel to the 1st Respondent (Akpoti-Uduaghan) argued that not being a candidate or a political party seeking to be declared winner, INEC had no locus to appeal. He added that INEC being a statutory body established by the Constitution to conduct elections must be seen to be neutral in the contest between the parties and must avoid a situation where it will be seen to be partial.

431 See **Madumere Vs Nwosu & Ors** (2009) LPELR 12706(CA)
432 (Unreported) Appeal No. CA/ABJ/EP/SEN/KG/57/2023

INEC on its part argued that the right of appeal is both a constitutional and an individual right that can be exercised by an aggrieved party and that the findings of the trial court directly impacted their rights and obligations. They opined that because they were joined as parties, it is wrong to say they could not complain against the judgment. INEC further argued that even though the higher courts had frowned on them appealing, they nonetheless recognised INEC appealing in deserving cases.

Despite these arguments, the Court of Appeal struck out INEC's appeal for being incompetent. Hon. Justice Hamma Akawu Barka, PJCA, in his lead judgment held that INEC has the right of appeal in deserving cases, but that the proper question to ask in each case is: "What is it complaining about?" In examining this, the Court found that not only was INEC's appeal supportive of the appeal of the 3rd Respondent (Ohere Abubakar), but it also mimicked the complaints of the said respondent and his political party, the APC (4th Respondent). It therefore held that this was an abuse of the judicial process, more so as the same grounds being agitated upon in INEC's appeal are the same as those sought by the APC and Ohere Abubakar in a sister appeal before the same Court. The Court concluded that such appeals emanating from INEC, and in support of a particular candidate should be discouraged.

The Court of Appeal, in its judgment, relied on its earlier decision in **INEC v. Ejezie**[433] where it held that the Constitution does not clothe INEC with, or confer on it, any right of appeal to this Court to seek the determination of any question as to whether or not any person has been validly elected. And that the fact that the Electoral Act (2006) makes INEC and its officers, proper respondents that can be sued in circumstances enumerated under the Act does not vest the Commission with a corresponding right to appeal against the decision of the Tribunal in a petition in which it has been sued as a Respondent. The Court also relied on the decision of the Supreme Court in **INEC v. Otti & Ors**[434] where the apex court accused INEC of taking over the case of the party who lost at the lower court to prosecute an appeal. In that case, the apex court per Galadima, JSC, had stated as follows:

> *"My lords, permit me to make these comments in the light of what has been the recent trend of events in respect of the stance of the Independent National Electoral Commission (INEC). In an election petition, they readily take over the case of a party who lost at the Court below to prosecute the appeal. This appeal is one such example. Is INEC not expected to be neutral and discharge its statutory responsibility in all election matters? Does it want to cry itself hoarse more than the bereaved?"*

433 (2010) LPELR - 4311 (CA)
434 (2016) LPELR – 40056 (SC)

5.3 Collation of Results

As mentioned in the preceding section, there were instances where INEC excluded certain results from collation or declared improperly collated results. These instances often formed the basis of petitions grounded on failure to score the majority of lawful votes cast but rarely went to the issue of the conduct of the Commission and its officers except in cases such as the aforesaid case of **Ohere Sadiku Abubakar & APC v. Natasha Hadiza Akpoti-Uduaghan, PDP & INEC**[435] where the Court of Appeal held that INEC was "grossly irresponsible" when they rejected the results from disputed polling units.

In **Prof. Bunza Mukhtar Umar & APC v. INEC, Ibrahim Mohammed & PDP**[436] one of the particulars adduced to support the prayer for cancellation of election in disputed areas was that the ward collation officer disappeared with the results for a ward. In an interesting turn of events, the Tribunal held that the disappearance of a ward collation officer with results for a ward is not one of the grounds for the cancellation of an election. This brings to the fore, the requirement for persons accused of criminal conduct to be joined in petitions, as well as the provision of **section 135 Electoral Act, 2022** which requires that a mistake or non-compliance with the Act must substantially affect the outcome of the election before such an election can be cancelled.

5.4 Unlawful Returns and Duress

Unlawful returns and duress used to be a common trend in past elections but did not feature prominently in the cases analysed. In the past, there were reports of INEC officials returning candidates based on threats to their lives or outrightly conniving with parties to return candidates even before elections were concluded in the relevant polling units. There were only a few instances where INEC was accused of unlawfully returning a candidate or declaring results under duress. An example is the case of **Yusuf Umar Nabo & 1 Or v. INEC, Umar Abubakar & APC**[437] where the Returning Officer, Prof. Abubakar Sambo Junaidu declared the 2nd Respondent on the election date but later wrote a letter to the Sokoto State Resident Electoral Commissioner (REC) denouncing the declaration for having been done under duress. INEC then declared the election inconclusive and an order for the conduct of a re-run was subsequently made by the Court of Appeal. Similarly, in **INEC v. Dahiru Yusuf Liman, Katuka Nuhu Solomon, PDP & APC,**[438] elections were cancelled in some polling units however, INEC went ahead to declare a winner and the Court held that it acted wrongly in proceeding to make a declaration and return of the election without conducting a re-run election in the polling units where it had cancelled elections.

435 (Unreported) Appeal No. CA/ABJ/EP/SEN/KG/35/2023
436 (Unreported) Petition No. EPT/KB/HR/04/2023
437 (Unreported) Appeal No. CA/S/EP/HR/SK/46/2023
438 (Unreported) Appeal No. CA/K/EP/SHA/KD/46/2023

Perhaps the most controversial case of unlawful return of a candidate in the 2023 petitions is that of **Aishatu Ahmed Dahiru & APC v. INEC, Ahmadu Umaru Fintiri & PDP**.[439] The major issue in contention was whether a Resident Electoral Commissioner (REC) has powers to declare the result of an election and the effect of **section 149** of the Electoral Act 2022 on such declaration.

The facts before the Tribunal were that following a supplementary election by INEC over the Adamawa governorship election, the Resident Electoral Commissioner (REC) of Adamawa State declared Aishatu Dahiru (1st Appellant) as the winner of the election contrary to the provisions of the Electoral Act. The election which was held on 18 March 2023 had been declared inconclusive and a supplementary election was fixed for 15 April 2023. The Petitioners/Appellants (Dahiru & APC) alleged that while waiting for the result of the supplementary election on 16th April 2023, they heard a broadcast where the REC for Adamawa State announced Dahiru as the winner of the Governorship election. They claimed that 35 minutes after the declaration, Festus Okoye, then INEC National Commissioner for Voters Education and Publicity, announced a cancellation of the result declared by the REC and nullified her declaration as the winner of the election. INEC thereafter directed its agents and officials to carry out further collation which led to the return of Fintiri (the 1st Respondent) being declared the winner on 18 April 2023.

Relying on **section 149** of the Electoral Act, 2022, Dahiru's lawyers averred that the declaration made by the REC of Adamawa State on 16th April 2023 that she won the Governorship election of Adamawa State conducted on 18th March 2023 and 15th to 18th April 2023, is valid. They argued that the nullification of the election by INEC was invalid and that in so far as the declaration has not been challenged and declared invalid by any competent court or tribunal, she remains the duly elected Governor of Adamawa State.

Section 149 of the Electoral Act provides as follows:

> *"Notwithstanding any other provisions of this Act, any defect or error arising from any actions taken by an official of the Commission in relation to any notice, form or document made or given or other things done by the official in pursuance of the provisions of the Constitution or of this Act, or any rules made thereunder remain valid, unless otherwise challenged and declared invalid by a competent court of law or tribunal."*

Counsel for Fintiri submitted that the provision of **section 25(2) (f)** of the Electoral Act, 2022 makes it clear that it is the duty of the Returning Officer to declare and return the winner of the election and not the Resident Electoral Commissioner (REC). The Tribunal held that the role of a Resident Electoral Commissioner and that of a Returning Officer are distinct and

439 (Unreported) Petition No. EPT/AD/GOV/1/2023. Appeal No: CA/YL/EPT/AD/GOV/18/2023

separate and a REC cannot perform the duties of a Returning Officer unless he has been appointed by INEC to be a Returning Officer.

On appeal, the Court of Appeal affirmed the decision of the Tribunal. In his concurring Judgment, Ebiowei Tobi, JCA, held that the law gives the responsibility of declaring an election result to the Returning Officer of the particular election and no other person no matter how highly placed within and outside the Commission has the powers to declare any election result. He held further that this power is exclusively for the Returning Officer of the election and that if anyone outside of the Returning Officer announces the result of any election and declares a winner, it will be illegal and such declaration will be null and void. Explaining the provision of **section 149** of the Act, he stated that this provision does not validate any action taken by an official of the Commission which is contrary to the Constitution and the Electoral Act or rules governing the election. He added that this section only applies if the action taken is in compliance with the provisions of the law, but that the action of the REC in this case was absolutely outside his powers.

In a unanimous judgment, the Supreme Court affirmed the decision of the Court of Appeal holding that the APC governorship candidate, Aishatu Dahiru, also failed to provide credible and sufficient evidence to prove her claim that she got the majority of lawful votes cast in the Adamawa Governorship polls.[440] On the conduct of the Resident Electoral Commissioner (REC), Mr. Hudu Ari, the apex court held that his announcement of the election result while collation was ongoing was irresponsible and unlawful.

5.5 Failure to Uphold its Regulations

In election petitions, the provisions of the **INEC Regulations and Guidelines for the Conduct of Elections 2022** are usually read and cited along with the substantive provisions of the Electoral Act. Petitions based on the ground that an election was not conducted in compliance with the provisions of the Electoral Act often involve a breach of accompanying provisions in the INEC Regulations and Guidelines for the Conduct of Elections. Therefore, petitions that complained, for instance, that INEC failed to cancel elections and conduct a supplementary election or that there was improper accreditation, meant that the conditions and procedure outlined in the Regulations for holding supplementary elections had to be consulted. However, being a subsidiary instrument to the Electoral Act, the INEC Regulations cannot stand by itself.

As a quick background, the INEC Regulations is what is called in law, a delegated or subsidiary legislation. Delegated legislation usually refers to a law or regulation made by a body other than the legislature and this occurs when the legislature, via an Act of Parliament, delegates to

440 See **Aishatu Ahmed Dahiru & APC v. INEC, Fintiri & PDP** (Unreported) SC/CV/1/2024

government ministers, departments, or agencies, the power to make and apply more detailed rules or subordinate legislation on a subject. Delegated legislation usually has the force of law provided its provisions are not *ultra vires* or contradictory to the parent legislation. In other words, it must be consistent with and within the scope of the delegated power.

The issue in focus in the 2023 post-election petitions was whether the provisions of the INEC Regulations on electronic collation and transmission of results and the use of the IReV for collation were enforceable. The Court's position is that non-compliance with Regulations and Guidelines for the conduct of the Election cannot take primacy over the express provisions of the Electoral Act because the Regulations is a subsidiary legislation.[441] The Courts therefore interpreted the legal framework to hold that manual collation of results, as stipulated in the Electoral Act, is what is allowed by the law. This position by the Courts, while controversial, is not surprising given its refusal to recognise INEC's use of the Smart Card Reader in the 2019 election cycle. This led the National Assembly to introduce the Card Reader and "any other technological device" to the 2022 Electoral Act. What is surprising however was INEC contributing to the argument by respondents in election petitions that its Regulations and Guidelines are ordinary manuals or inferior documents that are not legally binding.

For example, in **Rhodes-Vivour v. INEC & Ors.,**[442]counsel to INEC cited **sections 134 (2) and 148** of the **Electoral Act, 2022** to argue the point at the tribunal that its Electoral Guidelines and Regulations are "nothing but instructional manuals." They also cited **Nyesom Wike v. Dakuku Peterside**[443] where the Supreme Court held that failure to follow the Manual and Guidelines which were made in the exercise of the powers conferred by the Electoral Act, cannot by itself be a ground for questioning the election.

Ahead of the 2023 elections, INEC's position on the legal status of its technological innovations was different. The Commission's Chairman and other officers made public statements to the effect that the use of its innovations was backed by law.[444] For example, at a public event held by the Commission on 3 August 2022 and reported on its website, the Chairman of the Commission stated as follows:

> *"Let me draw your attention to the fact that the use of electronic devices such as Bimodal Voters Accreditation System (BVAS), INEC Voter Enrolment Device (IVED), INEC Results Viewing Portal (IRev) and other technological devices, are now legally allowed in the accreditation process for voters, collation of results and in the general conduct of elections."*[445]

441 See **Rhodes-Vivour v. INEC & Ors.** (Supra); See also **INEC v. NNPP** (2023) LPELR-60164 (SC)

442 Supra

443 (2016) 1 NWLR (PT.1492) SC 71

444 See keynote address delivered by the INEC Chairman, Prof. Mahmood Yakubu at the 4th Abubakar Momoh Memorial Lecture with the theme *"Electoral Act 2022: Imperatives for Political Parties and the 2023 General Election"*, held on Wednesday, 3 August, 2022 at Auditorium of The Electoral Institute (TEI), Abuja. https://inecnews.com/2023-general-election-voters-will-decide-the-winners-inec-chairman-assures/ Assessed 4th July 2023. See also: Ajayi, O. (2022, August 3). 2023: We've no preferred candidates, says INEC. *Vanguard*. https://www.vanguardngr.com/2022/08/2023-weve-no-preferred-candidates-says-inec/#google_vignette

445 See: 2023: Get Used to New Electoral Act, We'll Scrupulously Apply the Laws, INEC Chairman Tells Parties. https://www.

These comments, naturally, created high expectations among the public. INEC however took a different position after the elections in the several petitions where this issue was raised. A counsel to INEC in one case even went so far as to argue that the 1999 Constitution does not contemplate the addition of the Margin of Lead principle created under INEC's Regulations and Guidelines to operationalise the applications of the rules of inconclusive election beyond what has been fully provided for by the Constitution when it comes to declaring the winner of a governorship election.[446] The Supreme Court did not make a pronouncement on this argument but held that public assurances by the Commission's staff (on transmission of results) has no evidential value in court.

This position was reiterated in the case of **Atiku v. INEC**[447] where the Court of Appeal (later affirmed by the Supreme Court) held that by virtue of **section 134 (2)** of the Electoral Act, any circular, press release, promise or stated intention of INEC that is in conflict with or expand the provisions of the Electoral Act cannot prevail over the Act.[448] It stated that INEC Regulations and Guidelines cannot be elevated above the provisions of the Electoral Act so as to elevate electronic transmission of results above physical transmission of hard copies and manual collation of results to the extent that non-compliance with the Regulations automatically invalidates an election.[449]

inecnigeria.org/?page_id=11329. Assessed 24th July 2024.

446 See **Adebutu & Anor. v. INEC & Ors.** (SC) (Supra)

447 Supra

448 See concurring judgment of Bolaji-Yusuff, JCA @ page 7

449 See lead judgment of Tsamanni, JCA, Supra @ page 253

PART 06

06

06 CONCLUSION

The prevalent feature in the petitions challenging the outcome of the 2023 general elections is the collapse of a substantial number of the cases mainly due to lack of jurisdiction – a threshold requirement for hearing petitions, as well as 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 success of 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. Many petitioners won only at the tribunal but lost on appeal; some who lost at the EPT won on appeal, which is ultimately a win; while a few others were fortunate and won both at the tribunal and on appeal. 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.

The break down of the reasons for the dismissal of petitions include: the failure of the petitioner to discharge the Burden of Proof (i.e. the inability of the petitioner to prove their case with credible and admissible evidence – which was about **73.1%** of the cases). This is distantly followed by a lack of adherence to election petitions procedure and rules of court e.g. filing court processes out of time, not following the prescribed format or omitting critical details and documents **(14.7%).** Other reasons given were that petitions filed were pre-election matters for which the Tribunal lacked the jurisdiction to hear **(8.5%),** and that the Petitioner lacked the *Locus Standi* to file an election petition, mainly because they did not fully participate in all the stages of the election, or they are legally precluded from filing an election petition **(3.7%).**

There were also issues with the quality of evidence 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 the legal practitioners. Inherent in the requirement for expeditious disposition of election disputes, is the high possibility of technical justice being delivered. However, the law remains that statutory provisions must apply even if such application results in hardship or is otherwise onerous. As a result, some petitions were lost, not on merit, but on procedure.

With regard to successful petitions, there is no singular reason that can be attributed to this outcome, as it often depends on the facts of the case. However, some factors were identified as contributing to the success of a petition. First, in cases where the provision of **section 137** of the Electoral Act, 2022 was liberally applied by the tribunal, the decision lightened the burden on the petitioner to produce oral witnesses to speak to documents tendered in a petition. However, the decision of the tribunal in some of such cases was set aside by the Court of Appeal, relying on the case of **Oyetola v. INEC,**[450] where it was held that **section 137** of the Electoral Act does not override the requirement of the **Evidence Act, 2011** to call oral witnesses to speak to documents. In this regard, it is important to restate that the Evidence Act is the operative law guiding the presentation and taking of evidence in election petitions.

Second, successful petitions were helped by the Tribunal/Court allowing the burden of proof to shift to INEC where the petitioner led evidence, that was unchallenged by INEC, in proof of their petition. This was however not the prevailing disposition of the courts, as most of them demanded that petitioners present very compelling, undeniable and uncontroverted evidence to substantiate their claims, even where the respondent/INEC did not deny those claims or put up a defence.

Third, the magnitude of allegations and issues in question was found to be a contributing factor. Some successful petitions were confined to a narrow issue such as errors in collation or failure to apply the margin of lead principle and conduct supplementary elections. This streamlined the issues in contention and reduced the need for a mountain of evidence. In this regard, it should be noted that many successful petitions did not declare the petitioner the winner of the election but ordered supplementary elections.

Finally, the size of the constituency in dispute plays a role in the ability of a petitioner to satisfy evidential requirements. The larger the constituency, the more improbable it is that the petitioner will discharge the burden of proof. Petitions over smaller-sized constituencies like the State Houses of Assembly or a smaller number of polling units, were easier to prove than petitions involving large constituencies like the Governorship, and Presidential election petitions. This is evident in the success rate of these petitions, which is almost zero. While four governorship election petitions that arose from the March 2023 governorship elections had

450 Supra

varied success at the lower courts, when they got to the Supreme Court, the original winners were returned. In the 2023 Presidential election petitions of **Atiku Abubakar & Anor. v. INEC & Ors**.[451] and **Peter Obi & Anor v. INEC & Ors,**[452] the Court did not hesitate to make the finding that the Petitioners did not meet the legal threshold required to upturn the presidential election. The difficulty in proving presidential election petitions could also be attributed to the fact that the political stakes are higher at that level and a change in outcome could potentially alter the power dynamics in the country. While election petitions appear to be purely legal disputes because they come in the form of legal processes, they are inherently political due to the partisan interests involved.

With regards to proving the grounds of petitions, proving corrupt practices was found to be the most unattainable because of the standard of proof – beyond reasonable doubt – as well as requirements to name the individuals being accused, link the corrupt acts complained of to them, and possibly join them as parties.

Some petitions succeeded based on the ground of failure to win the majority of the votes cast, probably because this ground mostly deals with collation errors and miscalculations. Even then, the petitioners had to rely on INEC to produce the relevant electoral documents, which has proved not to be a seamless experience for petitioners.

The ground of non-compliance with the Electoral Act, which traverses the procedure laid down for the election provided a wider basis for questioning the election, as it usually raised questions of whether the procedure outlined in the Act was followed – for example, in the collation of results or the endorsement of the various election forms.

Parties who could no longer raise unlawful exclusion in the election as a ground for petition e.g. those that complained that their party logo/symbol was omitted from the ballot, even latched on to this ground, although unsuccessfully. Unfortunately, the double-barreled requirement for a petitioner to prove the non-compliance complained of and then show that it is substantial, coupled with the observed discretion exercised by judges in determining what is "substantial," was basically like a "camel passing through the eye of a needle."

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. The inability of the courts to nullify flawed elections because alleged irregularities are deemed inconsequential, is further contributing 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.[453] Such statement and the high failure

451 Supra
452 Supra
453 See: Ndujihe, C. (2024, December 22). Wobbling democracy – 'We rigged election, go to court'. Vanguard. https://www.vanguardngr.com/2024/12/wobbling-democracy-we-rigged-election-go-to-court/

rate of petitions has led many to ask if challenging an election result in court is a worthwhile attempt.[454] This perception could lead to an increase in election misconduct, as parties may increasingly decide to win elections "by hook or crook" and bypass the post-election petition process entirely.[455]

Concerning the ground of qualification, 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 the majority of the conflicting decisions observed – particularly in Plateau and Imo States. Most of the election petitions in these two states were filed on the basis that the respondent was not qualified to contest the election because they were not validly sponsored by a political party. The tribunals took different positions on this matter. Unfortunately, the conflicting decisions led to the inconsistent outcomes observed in the 2023 election cycle and raised serious questions about the integrity of the Judiciary. This is the elephant in the room that the Judiciary, as an institution, must confront if it is to restore trust and public confidence in its process.

In terms of adducing evidence, the decision in **Oyetola v. INEC** was the *Locus Classicus* or reference case for the 2023 Election Petition Tribunals and Courts on key issues such as the need to tender the BVAS machine in court, the electronic transmission of results, the status of the IReV portal, proving overvoting, and disenfranchisement of voters.

Also observed was INEC's largely passive attitude as a respondent in election petitions, which is caused by the fact that election results enjoy a presumption of regularity, and the commission does not bear the burden of proof. The commission faced allegations of delay or non-compliance with court orders, and in some cases, disowning documents it issued to petitioners. However, the commission was also seen defending petitions, appealing judgments and requesting reliefs where no grievance or harm to the commission was disclosed. All of this cast doubt on the commission's neutrality and commitment to remedying flaws in the electoral process.

It appears that the avenue for improvement in the conduct of elections would be for the applicable laws to be amended so that the burden of proof of the result declared is placed on INEC. After all, it is INEC that asserts that the declaration it made is the product of the votes cast by the electorate. It should therefore behove it to establish this assertion. The usual complaint in an election petition is usually the negative assertion and denial that the return by INEC is not the product of the will of the electorate. Such a negative assertion is usually incapable of proof. This is expressed in the Latin maxim *incumbit probation qui dicit, non qui*

454 See: Enumah, A. (2023, March 12). Is 'Go to Court' wild goose chase for justice? – THISDAYLIVE. https://www.thisdaylive.com/index.php/2023/03/12/is-go-to-court-wild-goose-chase-for-justice/.

455 See the dissenting opinion of Oguntade, JSC in the case of **Ojukwu V. Yar'adua** (**Supra**) where, speaking on then section 146 (1), now **section 135** (**1**) of the Electoral Act 2022, he noted that: "*My view is that the preponderant majority of election petitions in Nigeria would fail in our courts even in the face of clear evidence of serious malpractices unless, a proper and correct interpretation is given to section 146 (1).*"

*negat (*the burden of proving a fact rests on the party who asserts the affirmative of the issue and not upon the party who denies it).[456] Nigeria has now arrived at a pass where the only way to advance and improve upon the conduct of the election by the election management body and sanitise the electoral process is to overhaul the electoral jurisprudence to put the burden of proof on the election management body, in order to curb the brazen disregard of the applicable laws, regulations and guidelines.

The Petitions filed in Plateau State and the decisions thereon deserve special mention. 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 a split decision in the legislative election petitions. As the petitions were on the same grounds, the split in the Tribunals' decision underscores that the decisions were conflicting. However, at the Court of Appeal, a single decision was arrived at, and all the petitions were resolved against the candidates of the PDP. The determination of Petitions in respect of legislative houses ended at the Court of Appeal; there was therefore no further appeal to the Supreme Court. Therefore, by the decision of the Court of Appeal, the candidates who won the legislative elections were unseated. However, the Constitution allows a further appeal to the Supreme Court in respect of the Governorship election. The apex court therefore adjudicated on the appeal against the decision of the Court Appeal in the Plateau State governorship election petition which, like in the case of the legislative houses, also unseated the Governor. The Supreme Court in its judgment, however, set aside the decision of the Court of Appeal and affirmed the qualification of the governor and his victory at the polls.

It is pertinent to underscore that it was on the same grounds on which the Petition succeeded at the Court of Appeal, that it failed at the Supreme Court in the Governorship Petition. The concomitance is that the decision of the Court of Appeal removing the legislators is the wrong decision. In effect, the legislators are stuck with the manifest injustice occasioned by the wrong decision because they had no right to further appeal to the Supreme Court. By extension, the electorate has been deprived of having the elected representatives they voted for represent them. It is a sad and telling position that demands some reforms to be fashioned to address such a situation if it were to recur in the future. Seeing that the error in the decision of the Court of Appeal is glaring, the reform should be such that the Court of Appeal ought to have the power to set aside its errant decision *ex debito justitiae (by reason of an obligation of justice).*

456 See **Omisore v. Aregbesola** (2015) LPELR-24803 (SC) at 53-54

PART 07

07

07 Recommendations

Following the findings discussed in the preceding sections, the following recommendations are proffered to the National Assembly, the Judiciary, Executive, Political Parties and INEC.

7.1 Adjust the Requirement to Frontload the Written Statement on Oath of a Subpoenaed Witness

By demanding that the evidence of subpoenaed witnesses be also frontloaded within the 21-day timeline for filing petitions, the Courts have created an extremely high and onerous threshold for petitioners. The Court reasons that allowing such statements to be brought outside the indicated timeline would not only lead to opposing parties being surprised in court but would also remove the control of the timing and pace of proceedings from the control of the Constitution, the Electoral Act and the First Schedule to the Electoral Act, which all operate in tandem to ensure that a petition is determined expeditiously.

Despite this take, it is recommended that the frontloading of witness statements on oath should not be a requirement for a subpoenaed witness especially due to the difficulty in getting such witnesses who are usually adverse to the party. Addressing this would end the confusion which emerged in several election petitions where the courts expunged the evidence of such witnesses on the ground that the failure to frontload their statement contravened **section 285 (5)** of the Constitution and **paragraph 4(5)** of the First Schedule to the Electoral Act, 2022.

Because **paragraph 54** of the First Schedule to the Electoral Act, 2022 requires that the practice and procedure applicable in an election petition be near as possible to the practice and procedure obtainable at the Federal High Court, and there is no express provision in the First Schedule of the 2022 Act on whether or not the written statement on oath of a subpoenaed witness should be frontloaded along with the Petition, many petitioners and their lawyers expected that the Court would adopt the position of the **Federal High Court Civil**

Procedure Rules 2019, which is that a witness on subpoena does not need to file a witness statement on oath at the commencement of a suit at the Federal High Court. The Courts in the 2023 election cycle, have categorically stated that this does not apply to election litigation.

Previous or older decisions of the Courts appreciated the difficulty with frontloading subpoenaed witness statements and often queried whether it is within the contemplation of the law that a respondent in an election petition should sign a deposition or written statement on behalf of a petitioner whose allegation in the petition he is defending. It must be remembered that the necessity to subpoena a witness is informed by the fact that such a person is not willing to voluntarily come forward to testify and therefore requires the coercive powers of the law via a subpoena to compel his attendance. It is unrealistic that even before a petition is filed, such a witness or respondent (such as an INEC official or a police officer) will willingly and actively take deliberate steps or actions to make themselves available to support a petitioner's case.

During the 2019/2020 election petition cycle, the Court of Appeal reportedly delivered many conflicting decisions on this matter. This occurred in the 2023 cycle on a lesser scale, following the Court's strong position on the matter. It has been suggested that the apex court could 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 as a known or recognised witness or special cases where public servants like police officers are needed as witnesses.[457] However, because the Supreme Court has ruled with finality, that front loading of witness statements is controlled by both the Constitution and Electoral Act, it means that either the Supreme Court distinguishes such special cases in its future decisions, or that the Constitution and Electoral Act are amended to achieve this. For instance, it is recommended that there should be an amendment to **paragraph 4(5)** of the First Schedule of the Electoral Act, 2022 to create an exception for subpoenaed witnesses since they are witnesses of the court and may at the time of filing the petition be unknown to the party applying for his/her presence.

Overall, it must be remembered that in the process of adhering to rules of procedure, the essence of justice is not sacrificed. In the words of Pats Acholonu, JSC (of blessed memory),[458] *"(the Rules of Court) are to be used to discover justice and not to choke, throttle or asphyxiate justice. They are not a sine qua non in the just determination of a case and therefore not immutable."*

7.2 Review section 135 (1) of the Electoral Act on Substantial Non-compliance

This provision has been interpreted in decided cases to require that for an election to be invalidated, the Petitioner must prove that there was substantial non-compliance with the provisions of the Electoral Act, and additionally, that the non-compliance substantially

457 See the concurring judgment of Ogunwumiju, JSC, in **Edeoga v. INEC (2023)** who made this suggestion by way of *obiter*.
458 In **Duke v. Akpayubo Local Govt** (2005) 19 NWLR (Pt. 959) 130

affected the result of the election. This provision which is aimed at ensuring that elections are not invalidated by minor errors or lapses has become a stumbling block in the election dispute resolution process, as there is no yardstick or standard formula for measuring what is substantial and politicians have utilised this to perpetuate all forms of electoral malpractice.

It is recommended that this double-barrelled requirement be revisited by an amendment to the law. It should suffice if it is established that there is non-compliance with the provisions of the Act without the added requirement of establishing that the non-compliance substantially affected the result of the election. This is being recommended because an election that is proved not to have been conducted substantially in accordance with the letters and spirit of the law cannot be said to be an election properly called for there to be the added requirement of establishing that the non-compliance substantially affected the result of the said flawed election. In addition, non-compliance should go beyond the magnitude or frequency of the acts complained about to its kind or nature, because they may appear insignificant, but have far-reaching consequences on the electoral process.

7.3 Amend Section 137 of the Electoral Act on Documentary Proof of Non-Compliance

This novel provision stipulates that 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. It was however rendered redundant in the election petitions. While the provision intends to provide for the use of original or certified true copies of 'documents' to prove non-compliance with the provision of the Electoral Act, the word 'document' was, however, inadvertently omitted from the provision. This needs to be amended by the National Assembly.

The Tribunals and Courts consistently held that this novel provision did not remove the burden on a petitioner to call direct eyewitnesses, thus making the provision redundant during election petitions. The argument is that **section 137** of the Electoral Act has not displaced the Burden and Standard of Proof enacted in **sections 131 – 136 of the Evidence Act**. The Evidence Act governs proof of cases in Court and the Electoral Act does not override it. As well intended as this provision may seem, the courts still view it as going against the principle of fair hearing for a judge to be asked to do cloistered justice by going into the recesses of his/her chambers to sift through mountains of documents tendered by a petitioner to discover the non-compliance complained about.

The Court of Appeal, via its submissions to the Joint National Assembly Committee on Electoral Matters in September 2024, has proposed that the provision be deleted while others have suggested particularising the circumstances and situations where this section could be

applied.[459]Furthermore, the provision could be tweaked to at least require some minimal level of oral evidence to call the attention of the court or tribunal to the non-compliance as may be apparent on the face of the documents.

7.4 Require INEC to Bear the Burden of Proof in Election Petitions

Most election petitions are unsuccessful on account of the failure to discharge the burden of proof. Credible evidence is an indispensable requirement to establish the grounds on which the result of an election is challenged. Several reasons can account for the burden of proof not being discharged and/or the standard of proof not being met. The reasons for this could 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. Pervading the failure of many cases on the failure to discharge the burden of proof is the refusal or failure of the Commission to produce election documents, thereby frustrating petitioners.

Consequently, it has been recommended that the applicable laws such as the Evidence Act and Electoral Act should be amended to shift the burden of proof in election petitions to INEC. The rationale is that because it is INEC that asserts that the declaration it made is the product of the votes cast by the electorate, it should be made to establish this assertion. The usual complaint in an election petition is usually the negative assertion and denial that the return by INEC is not the product of the will of the electorate. Such a negative assertion is usually incapable of proof. Where INEC bears the burden of proof, it will curb its brazen disregard of the applicable laws, regulations and guidelines, and its "*go to court*" malevolent challenge. Alternatively, a middle ground can be taken where for instance, the petitioner is required to prove non-compliance with the Electoral Act, after which the burden shifts to INEC to demonstrate that the non-compliance did not substantially affect the results.

At a review workshop for Judges of the 2023 Election Petition Tribunals and Court of Appeal Justices held in May 2024,[460]when asked their opinion on the burden of proof required of a petitioner in an election, **81%** of 84 judges surveyed responded that it was too demanding; **12%** said it was adequate; while **3%** expressed no opinion on the matter. When asked for a solution, **45%** of the judges proposed that the burden of proof, especially on producing election materials, should be put on INEC; **4.8%** proposed reducing the volume of materials

459 **Proposed Amendments to the 1999 Constitution (As Amended) And Electoral Act, 2022** presented by the Hon. Justice M.B. Dongban-Mensem, Cfr, Jp+, President Court of Appeal at a 3-Day Retreat On Amendment of the Electoral Act, 2022, Held on Tuesday, 3rd September, 2024, at Transcorp Hilton, Abuja.
See also: Oyetibo Tayo, SAN, **Impact of Recent Judicial Decisions on Nigeria's Electoral Legal Framework (Court of Appeal/Supreme Court),** Paper Presented at the Retreat of the National Assembly Joint Committee on Electoral Matters Held 16th to 19th November 2023, Lagos.

460 Two-day Review Workshop organised by PLAC and IFES for Justices of the Court of Appeal and Judges of the Election Petition Tribunal at Abuja Continental Hotel on Monday, 20th and Tuesday, 21st May 2024.

required by the tribunal/court, while **34%** chose both options. There was however a split view when asked whether the provision in **section 137** of the Electoral Act should be given precedence over the Evidence Act on documentary proof of non-compliance in election petitions. Of 83 judges that responded, **33.7%** said yes, **31.3%** said no, and **34.9%** asked for both legal provisions to be harmonised.

Finally, the court needs to adjust its position on the quantum of proof required for proving disenfranchisement, especially when the petitioner has proved by credible evidence, that he would not have lost the election, if not for the alleged infraction. Insisting that every voter who was disenfranchised appear in court to tender their PVCs is a mirage considering that such witnesses, if called, would be in their hundreds, if not thousands.

7.5 Reconsider the Standard of Proof of Criminal Allegations in Petitions

The Courts have held that where an allegation of commission of a crime is made in a petition, the standard of proof is beyond reasonable doubt irrespective of the fact that election petitions are *sui generis*. It has been argued that for the same reason, i.e. the *sui generis* nature of election petitions, a special and different set of principles whose aim should be to do justice and nothing but substantial justice, should be established. Some are of the view that an exemption should be made, or a special provision should be imported into the Evidence Act by amending **section 135 (1)** for the purpose of proving allegations of crime in a civil suit with particular reference to an election petition.[461] The bar is too high for the petitioner who is not in control of the state apparatus, does not have ready access to law enforcement officers and cannot guarantee the safety of witnesses who may have to risk testifying against political heavyweights. It is recommended that there be an adjustment of the standard of proof in proving a criminal allegation in an election petition and for it to be on preponderance of evidence.

7.6 Abridge Timelines and Levels of Appeal for Pre-Election Matters

One aspect of pre-election matters that needs to be re-examined is the appeal process. Presently, appeals in pre-election matters go up to the Supreme Court irrespective of the class of election concerned. However, appeals from the decisions of the National and State Houses of Assembly Election Tribunals terminate at the Court of Appeal by **section 246(3)** of the Constitution.

Consequently, there were several cases in the 2023 election cycle where persons who were declared by the court in a pre-election matter as being the rightful candidate of their party were unable to contest in the election proper because the judgments were delivered after the election was conducted. Many of these candidates went ahead to file election petitions against opposing parties even though their names were not on the ballot. They did this on the false

461 See CLP Legal. (2024, July 7). Analyzing the election petition procedure in Nigeria: Is the system rigged against the petitioner? Part 1. https://clplegal.com.ng/analyzing-the-election-petition-procedure-in-nigeria-is-the-system-rigged-against-the-petitioner-part-1/

premise or understanding that they are imbued with the right to file a post-election matter over an election in which they did not participate, or that the validation of their nomination meant that they could automatically replace the candidate whose name was on the ballot, but subsequently removed as a candidate. All such cases were dismissed by the tribunal with the Court of Appeal calling it an abuse of court process. The Supreme Court's position is that where a pre-election matter lingers or drags on until it is decided by the courts after the election in issue, nullifying the candidacy of the person who contested the election, the political party will be deemed not to have had a candidate in the election.

In terms of the impact of such decisions on election administration, INEC has complained of challenges occasioned by court judgments on candidate nominations coming on the eve of elections after they have printed materials. Another problem is the 180 days allotted to the Federal High Court by **section 285 (10)** of the Constitution for the resolution of disputes arising from party primaries and the nomination of candidates which does not support a quick dispensation of such cases. To address these issues, it is recommended as follows:

(i) The Constitution, in **sections 246 and 285**, should be amended to make the Court of Appeal the final court in National Assembly and State Houses of Assembly pre-election matters. This would save useful time.

(ii) In the alternative, the determination of all pre-election matters should be made to be concluded before the commencement of general elections to avoid judgments becoming an academic exercise. This will necessitate an amendment to **sections 285 (10), (11) and (12)** of the Constitution. It will also be necessary to outline the procedure for instituting pre-election matters in the Electoral Act to attain this objective

(iii) Flowing from (ii) above, the Constitution should be altered, and the timeframe for resolving pre-election matters pegged at 90 days. This will enable the Court of Appeal, and the Supreme Court to dispose of pre-election matters faster and subsequently enable the Commission to prepare adequately instead of preparing in an atmosphere of uncertainty.

(iv) **Section 285** of the Constitution should be amended to make it mandatory that any court order requiring the Commission to delete the name or logo of any political party from the ballot, be issued not later than 45 days before the election (or such other time as may be guided by existing timelines for activities preparatory to the elections).

7.7 Amend Section 29 of the Electoral Act dealing with Pre-election Matters for Clarity

Section 29 (5) of the Electoral Act empowers an aspirant who participated in the primary election of his political party to challenge any false information contained in the affidavit of

the candidate returned as the winner of the primary election, while **section 29(6)** provides for the disqualification of not only the candidate who submitted the false information but also the political party. These provisions imply that a member of a political party can institute an action that will lead to the disqualification of his/her political party from contesting the general election. It raises this question - why should a defeated aspirant or an aspirant who believes that his party's candidate is not eligible to contest an election go to court? There is no incentive here as the offending candidate will be disqualified and the complainant's party will be banned from fielding candidates. This provision needs to be amended.

7.8 Reconsider the Timeline for the Post-Election Adjudicatory Process

The onerous duty of the Tribunal Judges faced with several Petitions filed by litigious politicians and the timeline for the determination of such Petitions is such that the Tribunals would not hesitate to do technical justice by striking out a Petition for non-compliance in order to deal with all the matters within the stipulated time. The panacea for this may lie in a constitutional amendment regarding the time when elections are to be held and giving more time for the post-election adjudicatory process.

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. Furthermore, the possibility of holding all elections on the same day should be explored to eschew the vice of destruction of the evidence in the BVAS machine in the guise of reconfiguring the same for the next election.

It is also important that all election petitions do not exceed 2 stages. The provision of the Constitution that limits Presidential, National Assembly and State Houses of Assembly elections to two stages should be applied to governorship election petitions as well. It is suggested that the governorship election petition should be determined at the Court of Appeal and Supreme Court levels only.

7.9 Ensure Conclusion of Post-Election Matters Before the Swearing-In of Candidates

There are public concerns over declared winners being sworn in while their petitions are pending before the election petition tribunal. A provision should be inserted in the 1999 Constitution to provide that all post-election matters shall be heard and determined before the winners of the election take the oath of office. This is to avoid distractions and ensure that such persons do not use the benefits of their office to gain an undue advantage.

7.10 Amend the Constitution on Time for Decision on Appeal

Section 285 (7) of the Constitution requires that an appeal from the decision of the

Tribunal or Court is **to be delivered within 60 days of the delivery of the judgment** of the Tribunal or Court. This is an overly short period given the timelines for filing an appeal after judgment and other processes that will culminate in the hearing of the appeal. Resultantly, when the appeal is ripe for hearing, the appellate court is left with only a few days out of the 60 days to hear and determine the appeal. It is recommended that the provision be amended to provide for an appeal to be determined **within 60 days of the filing of the Notice of Appeal** as is the case with pre-election appeals as enshrined in Section 285 (12) of the Constitution.

7.11 Clarify Legislative Intent on Electronic Transmission of Results and Status of INEC Result Viewing Portal (IReV)

There should be specific provisions to address the issue of the electronic transfer of results and the status of the INEC Result Viewing Portal (IReV). The Supreme Court has held that under the Electoral Act 2022, INEC is not mandatorily required to electronically transmit polling unit results to the collation system. The Court further held that the IREV is not a collation system. If it is the legislative intent to make electronic transmission of polling unit results mandatory, this should be clearly stated in the Act. If this is to be considered, the integrity of the IREV portal and any other technology adopted must be assured. The relevant provisions for amendment would be **sections 60(1) to (5)** of the Electoral Act 2022 & **Regulation 38** of the INEC Regulations, 2022.

7.12 Maintain the Position that Political Parties' Choice of Candidates Cannot be Challenged by Non-Members

The position of the law is that the choice of a candidate for election is the internal affair of a political party. Therefore, the Supreme Court consistently held that the proper person who can challenge the primary election of a political party is an ***aspirant*** who participated in the primary election. Members of other political parties cannot do so. There are differing views on this with some proposing that a member of any political party should be able to challenge the nomination of the candidate of another political party because a person that is not qualified to contest an election should not be allowed to contest the election concerned in the first instance. Others align with the court's position that party nominations are within the exclusive preserve of a party and that outsiders looking in are meddlesome interlopers.

However, the provision of **section 84 (14)** of the Electoral Act which gives an unsuccessful aspirant at the primaries of a political party the right to question the conduct of the primaries before the Federal High Court has resulted in the Courts ultimately choosing candidates for the parties. The further irony is that such pre-election complaints can go all the way to the Supreme Court, even when post-election appeals against such seats terminate at the Court of Appeal.

Furthermore, other litigants have complained of congestion at the courts during the election cycle with election matters being prioritised over other important civil matters. In view of this, there is little merit in arguing for just anybody to be allowed to file a pre-election matter, more so as the forum has been restricted to the Federal High Court who have also complained of "high volume dockets" that presents enormous challenges for its Judges.[462]

The Supreme Court is generally of the opinion that the choice of candidates of a political party for election should remain the internal affair of the political party and should not be justiciable. Alternatively, the law should be left as is with only aspirants within the political party having the *locus standi* to file pre-election matters.

7.13 Prescribe the Effect of Non-Submission of a Political Party's Membership Register before Primaries

Section 77(2) of the Electoral Act provides that: *"Every registered political party shall maintain a register of its members in both hard and soft copy"* and **section 77(3)** *provides that "Each political party shall make such register available to the Commission not later than 30 days before the date fixed for the party primaries, congresses or convention."*

This provision however does not provide clear sanctions for violation or refusal of a party to comply. For this reason, the Courts ruled that the failure of a party to submit their membership register before the election had no effect on the nominations by the party in question. There may be a need to include consequences here to ensure compliance. **Section 77** of the Act should also be amended to provide that on submission of the membership register, only those whose names are on the register of their parties can be nominated for an elective position.

7.14 Prescribe the Effect of Omission of Party Symbols on Election Materials, After Its Inspection and Approval by Political Parties

The Electoral Act, 2022, in **section 42(3),** does not expressly provide for a course of action where a political party's logo is excluded or omitted on election materials by INEC after the political party has inspected its identity in compliance with the provision. Petitioners who complained that they approved their party logo/symbol but saw something different (e.g. an altered version) on election day relied on the ground of non-compliance with the Act. Even though this allegation was usually not supported by strong evidence in the cases observed and mostly failed, it may be useful to revisit **section 42(3)** of the Act to close the loophole.

7.15 Relax the Requirement to Provide the Bimodal Verification and Accreditation System (BVAS) Machine During Election Petitions

One of the key requirements that emerged from **Oyetola v. INEC**[463] was that the petitioner asserting over-voting or disenfranchisement MUST tender the BVAS Machine to be able to

462 See (2023, January 8). Electoral Act 2022: The big hurdle before Federal High Court judges. *Vanguard*. https://www.vanguardngr.com/2023/01/electoral-act-2022-the-big-hurdle-before-federal-high-court-judges/

463 Supra

prove this. 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.

Perhaps, the machines could be upgraded to enable them to retain memory or records of accreditation figures used for each election up till the conclusion of all litigations in respect of the election concerned. It has also been suggested that instead of insisting on the physical production of the BVAS machines, it should be sufficient for the Petitioner to produce a certified report of a joint inspection of the BVAS machines to be carried out by INEC officials and representatives of the Petitioner and Respondent.[464] It is therefore strongly recommended that the report from the BVAS machine at the end of the elections and declaration of results should suffice for evidential purposes.

7.16 Impose Consequence for Disobedience of Court Orders to Produce Documents

Failure of INEC to obey court orders issued before and during the pendency of electoral matters should be judicially deemed as an admission of complicity in the allegations of the petitioner and therefore matters relating thereto be ruled in favour of the Petitioner. To serve as a deterrent, the tribunals and courts should also apply the criminal sanction prescribed in **section 146 (4)** of the Electoral Act which allows a court to summarily convict and imprison INEC officials that disobey its order to produce documents.

7.17 Penalise Frivolous Petitions

In addition to the punitive award of cost against presenters of frivolous petitions which result in abusing the processes of the court, administrative sanctions should be meted out to both individual petitioners and political parties who bring frivolous and vexatious suits before tribunals. The desperation of candidates to win at all costs was not only seen in the polls but also in the election petitions where some parties approached the Tribunals with no discernible case or evidence whatsoever. Introducing penalties for filing baseless or frivolous petitions can discourage parties from using election petitions as a tactic for political advantage. This

464 See: Oyetibo Tayo, SAN, ***Impact of Recent Judicial Decisions on Nigeria's Electoral Legal Framework***. Paper Presented at the Retreat of The National Assembly Joint Committee on Electoral Matters. Lagos, November 2023

ensures that the petition system is used to address real issues rather than as a tool for partisan manoeuvring.

Furthermore, the filing of ill-founded appeals by INEC against the decisions of Tribunals in such a blatant display of partiality in the process of the determination of election matters should be addressed by the Commission.

7.18 Incorporate ADR in Post-Election Dispute Resolution

As an adjunct to the burden of proof being placed on INEC, it is recommended that election alternative dispute resolution mechanisms be incorporated in resolving post-election disputes. The simplicity of the alternative resolution procedure and its abhorrence for undue technicalities and legalese will help in the speedy resolution of election disputes, where parties agree to adopt it. This would however require acceptance and cooperation of political parties.

7.19 Discourage Termination of Cases at the Preliminary Stage

It is recommended that practice directions should be modified to ensure that judges at the Election Petition Tribunal always go into the merit of the case irrespective of whether there is a preliminary issue which should terminate the judicial process at the EPT. This way, upon appeal, the Court of Appeal will have the benefit of the views of the tribunal on the substantive questions in the case.

7.20 Adopt Internal Systems and Mechanisms to Address Conflicting Judgments

Conflicting judgments from courts of concurrent jurisdiction is a recurring issue in election petitions and the 2023 cycle was no different. This occurs for several reasons such as differing legal interpretations, inconsistent application of the law, reliance on outdated case law, or plain disregard of judicial precedent. The Judiciary must find a way to resolve or minimise this problem by not only penalising errant judicial officers in cases of neglect of precedent, but also improving their administrative systems. Suggestions have been made for the adoption of tools such as centralised or real-time case reporting for judicial officers and their aides/researchers, as well as electronic case management systems.

Modern courts often use sophisticated electronic case management systems to monitor ongoing cases and ensure that similar cases do not lead to contradictory outcomes. Case management can also help identify conflicts early on, allowing the courts to take steps to address them. Court decisions should be published timeously and made immediately accessible to judges via an internal case management system to eliminate instances of conflicting decisions. To facilitate this, there must be a transition from the manual recording of the proceedings of election petition tribunals to the electronic recording of election proceedings and appeals.

The Court of Appeal is reported to have an election petition management system[465] but its functionality, level of sophistication and effectiveness with respect to managing conflicting decisions is publicly unknown.

Finally, the National Assembly is enjoined to pass clear and precise laws that leave little room for interpretation or conflicting application in the courts as vague statutes often lead to inconsistent decisions.

7.21 Review Working Conditions of Judicial Officers

Tribunal Judges and Justices in the Court need a good working environment to carry out their judicial duties in our milieu where electoral contestation is seen as a do-or-die affair. The presiding officers hearing these election cases usually leave their comfort zones and are sent to work at locations where they are expected to live in a hotel for at least six months. The environment and atmosphere are often not conducive. It is therefore little wonder that a Tribunal may not hesitate to terminate a Petition *in limine* (at the outset) based on a technicality, in order to quickly dispose of the cases and for the judges to return to their comfort zones. Again, there is the issue of security challenges which manifested in some of the Tribunals sitting outside the States in which they were dealing with its cases and even where they sat *in situ* (in the original place), having to deliver judgments remotely due to the charged atmosphere meant that the security of the judges could not be guaranteed.

In addition, there is need to increase the number of Judges in Nigeria. The judiciary has reported having an inadequate number of Judges in the superior courts of the country to handle pre-election and post-election matters. The contentious and time-bound nature of election-related matters causes disruptions to the dockets and calendar of Courts and many cases suffer serious delays because serving judicial officers on election petition tribunals work outside their routine judicial functions, thereby causing the normal business of the courts to suffer and undermining the judiciary's role in dispensing justice.

7.22 Strengthen the Capacity, Independence and Perception of the Judiciary

Judicial capacity, independence and perception are critical to the integrity of the electoral process. The judiciary must, therefore, be fair and impartial in resolving election disputes. The aphorism, justice must not only be done but be manifestly and undoubtedly seen to be done should be the mantra for every judicial officer.[466] Unfortunately, concerns have been raised regarding the impartiality, efficiency, and transparency of the judiciary in handling election-related cases. The negative perception of the judiciary on election matters stems from several factors, many of which are tied to perceptions of bias, corruption, political influence, politicisation of judicial appointments, and a lack of transparency in decision-making.

465 See: https://ept.courtofappeal.gov.ng/

466 "Pertinent Issues in the Determination of Election Disputes, Challenges, and the Way Forward" – Paper presented by Hon. Justice Husseini Baba Yusuf, Chief Judge, FCT High Court, at a 4-Day Workshop for the Justices of the Court of Appeal and Members of Election Petition Tribunals.

While the hearing of the 2023 presidential election petition was going on, an online campaign titled "All Eyes on the Judiciary" gained momentum. The slogan was advertised by citizens who many believed were being vigilant, engaging the process and exercising their right to free speech.[467] However, it was seen in some quarters as an intimidation of the judiciary and an act likely to cause public unrest.[468]These responses demonstrate the need to strengthen judicial independence and improve its perception by citizens.

Perception of the Judiciary

To assess the perception of the Nigerian judiciary on election petitions, in May 2023, (before the courts rendered their decisions on election petitions), PLAC commissioned a Perception Survey of the Judiciary in handling election matters. The survey interviewed 6,242 respondents across the 6 geo-political zones, which included legal practitioners, political actors, civil society organisations, and members of the public. The findings of this report shed light on the key issues surrounding the perception of the Nigerian judiciary on election dispute resolution.

About **49.3%** of surveyed respondents reported being slightly knowledgeable about the judicial process, **32.5%** reported moderate confidence in the ability of the judiciary to be fair and impartial in election petitions, while **38.5%** reported having slight confidence in the ability of the judiciary to be fair and impartial. Only **23.2%** reported not having confidence at all in the Judiciary. In addition, **36.4%** said they do not believe in the ability of the judiciary to resist external pressure in reaching electoral decisions. Only **13.4%** of persons surveyed thought that the judiciary is completely financially independent but a significant **73.3%** thought that the judges hearing election petitions have the requisite knowledge. Respondents were split about how transparent the judiciary is, with **51.4%** saying the judiciary is transparent and **48.6%** saying that the judiciary is not transparent. The respondents however gave the judiciary an overall less-than-average rating in resolving election disputes.

Lack of transparency and accountability in the judicial process were identified as significant challenges. For example, the lack of clear and consistent criteria for selecting judges to hear election petition cases, as well as limited or delayed public access to court proceedings and judgments contributes to the perception of opacity.

The perception of the judiciary worsened after the conclusion of the 2023 post-election petitions. In a follow up nationwide survey of 7,477 citizens conducted by PLAC between August and September 2024, **65%** of respondents reported lacking confidence in the judiciary's ability to handle electoral disputes fairly and impartially; **66%** of respondents believed that

467 See: Ovorumu, J. (2023, August 29). *Election tribunal: 'All Eyes on the Judiciary' The story so far…* International Centre for Investigative Reporting. https://www.icirnigeria.org/election-tribunal-all-eyes-on-the-judiciary-the-story-so-far/. See also: Nda-Isaiah, J. (2023, December 1). *The bashing of the judiciary*. The Cable. https://www.thecable.ng/the-bashing-of-the-judiciary/

468 The lead judgment of the Supreme Court in **Atiku & Anor. v. INEC & Ors,** cautioned litigants against publicly discussing cases while trial was ongoing and mentioned that judges were being sent threatening messages.

the judiciary's rulings on election petitions were not consistent; **67%** rated the judiciary's effectiveness in managing election petitions and post-election dispute resolutions as poor; and the overall rating on the performance of the judiciary in resolving election matters from the 2023 general election stood at **35.6%**. These results emphasise the need for deep-rooted reform and improved transparency.

Strengthening transparency measures is crucial to enhancing public trust in the judiciary. To address these challenges and improve the perception of the Nigerian judiciary in election petition disputes, several recommendations were proposed by the survey respondents. Foremost is the need for comprehensive judicial reforms that prioritise full implementation of financial independence of the judiciary, strengthening of accountability mechanisms, enhancement of the capacity and expertise of judges in handling election-related cases, insulation of judges from political interference and external pressures, and importantly, addressing impunity by ensuring that erring judicial officers are sanctioned. Suggestions for enhancing transparency include the publication of judgments and quick access to court proceedings, updates of judiciary websites or online presence, and public awareness or education about the role of the judiciary.

In terms of judicial capacity, the training of Judges and members of Election Petition Tribunals is imperative. This training should focus on the application of the law and judicial precedent, the role of the Judiciary in the political process, the impact of the judicialisation of elections, and good practices from similar jurisdictions. It should also extend to the quality of written judgments. It was not unusual to see judgments with severe typographical and grammatical errors that cast doubt on the meaning of the words used. In some cases, the wrong sections of the Electoral Act or other legal framework were cited while in others, names of litigants or their constituencies were badly spelled. Such mistakes were observed more with tribunal judgments and less so with appellate court judgments.

Some of these errors were also raised by litigants on appeal. Usually, the appellate courts in petitions where this was an issue overlooked such clerical mistakes as there was no miscarriage of justice occasioned to a party as a result.[469] However, it is a cause for concern where such mistake significantly varies or affects the substance of the judgment as was seen in the Court of Appeal's judgment in the Kano State governorship election appeal where there were inconsistent conclusions in the closing paragraphs of the judgement. On this point, the words of *Inyang Okoro, JSC,* (in his leading judgment on the appeal to the Supreme Court[470]) are instructive: *"I just want to advise Judges to be more meticulous in doing their job in all cases and more particularly in sensitive cases like a governorship election appeal in order to avoid unnecessarily setting fire to the polity. I need not say more on this."*

469 A court cannot review its judgment but can correct mistakes in judgments or orders through what is called the "Slip Rule" doctrine. This doctrine allows a court to correct clerical errors, such as misspellings, incorrect dates, or mathematical errors that arise from accidental omissions or slips.

470 See **Yusuf Abba Kabir v. APC, INEC & NNPP** (2023 - SC) (Supra) at page 31

7.23 Strengthen Internal Political Party Processes

The actions of politicians no doubt affected the conduct of elections and the resolution of ensuing disputes. Violence by politicians, political parties and their supporters remains a large threat to the elections. It is common knowledge that many politicians consider elections to be a "do-or-die affair" for many reasons, including the fact that elective office appears to be a lucrative business undertaking with quick returns. The attitude of the average politician to the electoral process is such that there is no concession of defeat, thus resulting in an electoral process that is highly litigious. The 2023 election cycle saw high levels of abuse of the electoral and collation process by political actors. Their sponsorship of violence and manipulations are electoral crimes that must be prosecuted if this trend is to be reversed. A failure to prosecute the sponsors and beneficiaries of electoral crimes will allow an environment of impunity to continue and escalate, putting Nigeria's democracy at severe risk.[471]

Political parties, candidates and their supporters must agree to or be forced to play fair and abide by the rules if the electoral process is to be sanitised. Unfortunately, the prosecution of electoral offences, which is INEC's responsibility, remains a weak link in the electoral process. INEC has maintained that it is overburdened and cannot effectively handle the prosecution of electoral offences in addition to its other functions. Holding elections in an atmosphere of peace and security remains an overarching issue, therefore, it is important to prioritise the creation of the Electoral Offences Commission to respond urgently to such matters. Part of the reform here should also include enforcing accountability on the part of election officials who collude with politicians to subvert the will of the electorate.

7.24 Invest in Polling Agents Recruitment & Training

In light of the court's position that party agents at the polling units are the best witnesses in election petitions, Political Parties must begin to invest in the recruitment and training of polling agents and ensure that they obtain necessary election documents issued at the polling units ahead of petitions. There were instances where petitioners could not present a single accredited polling unit agent to prove their petition or tender the duplicate of the Form EC8A polling unit election result. Only duly accredited polling agents who signed the result can tender such result forms. In the absence of such witnesses, petitioners often relied on ward or local government collation agents or their campaign coordinators, whose testimonies have been described as inadmissible "hearsay evidence" with respect to proving incidents at polling units. The Court of Apeal[472] described such agents as "*octopus agents*" with tentacles in all the polling units and collation centres. Party agents also need to understand their roles and responsibilities, as well as the relevant provisions of the Electoral Act, and other rules and regulations made by the Commission.

471 Report on Nigeria's 2023 General Election, (Situation Room) op. cit., page 91
472 See: **Abubakar Atiku & Anor v. INEC, & 2 Ors.** (Supra) per Tsammani JCA @ page 655 - 656

The challenge is that political parties lack a strategic method for the recruitment of party agents from the polling units upwards. They often haphazardly handpick random persons unknown to the party; fail to submit names of such persons to INEC for accreditation; and when they do, they fail to train them. Furthermore, party agents, who ideally should be party members that volunteer for such a role, often demand monetary payment and many have been caught working for rival parties. It is noteworthy that with the off-cyle Edo and Ondo State Governorship Election held in September 2024 and November 2024 respectively, INEC announced plans to produce name tags with QR codes (quick response code) for party agents. This is an improvement from the previous situation where blank accreditation tags were issued without a name, photo or location. Nevertheless, political parties need to look inward to devise strategies for overcoming internal challenges and come up with solutions that can make their agents more efficient at the polling station.

Overall, every citizen has a responsibility to safeguard Nigeria's democracy by actively engaging the electoral process and promoting actions aimed at improving the resolution of electoral disputes. Election stakeholders should strive toward a future where only a handful of election results, if any, are contested. Everyone 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.

Glossary

Accreditation – The verification of a voter's eligibility to cast their vote at an election, to ensure that only eligible and registered voters participate in the election to prevent voter fraud.

Affidavit – A written statement of facts confirmed by the oath of the party making it. Affidavits must be notarized or administered by an officer of the court with such authority.

Affirm – Judgment by appellate courts where an order is declared valid and will stand as decided in the lower court.

Appellant – A party who appeals against a decision of a lower court.

Brief of Argument – A written or printed document prepared by the lawyers or litigants on each side of a dispute and submitted to the court in support of their arguments - a brief includes the points of law which the person wished to establish, the arguments he or she uses, and the legal authorities on which he or she rests his/her conclusions.

Burden of proof – The duty to prove disputed facts. In civil cases, a complainant or petitioner generally has the burden of proving his or her case. In criminal cases, the government has the burden of proving the defendant's guilt. But in petitions, this burden is on the petitioner.

Balance of probabilities – Also known to mean preponderance of evidence. Refers to the degree of certainty of belief in the mind of a tribunal or the court by which it is convinced that the "existence of a fact is more probable than its non-existence".

Certificate of Return – refers to an electoral document issued to the winner of an election, declaring the candidate the rightfully elected candidate of the election.

Close of Pleadings – Pleadings are closed when a complainant has delivered a reply to every defence in an action, or when the time for delivery has expired, and every respondent who is in default (failed to deliver a statement of defence) has been noted in default.

Civil proceedings – refers to the process through which a person whose legal right and interest has been breached may have recourse to the courts of law for the resolution and determination of the controversy or dispute.

Court of Appeal – refers to the Penultimate Court in the hierarchy of Courts in Nigeria, established as an appellate Court to entertain appeals, whether Civil or criminal, from the Federal High Court, High Court of the Federal Capital Territory, the High Courts of each of the 36 States, as well as the National Industrial Court. It also hears appeals from the Customary Court of Appeal of States and the Federal Capital Territory, the Sharia Court of Appeal of States and the Federal Capital Territory, as well as Election Petition Tribunals. The Court of Appeal has original jurisdiction to hear Presidential Election Petitions.

Cross-Appeal – 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.

Cross-Petition – refers to when a respondent in a legal case makes a claim against another party involved in the case.

Documentary Evidence – a statement contained in a document produced as a means of establishing or proving a fact.

Election Petition Tribunal – is a special court established by the Constitution and is saddled with the original jurisdiction to hear and determine, to the exclusion of any Court or Tribunal, petitions as to whether any person has been validly elected as a member of the National Assembly, State House of Assembly, or to the office of Governor or Deputy Governor of a State

Ex debito justitiae – by reason of an obligation of justice

Exhibit – A paper, document or other object produced and exhibited to a court during a trial or hearing and, on being accepted, is marked for identification or admitted in evidence.

Federal High Court – is one of the superior Courts of record in Nigeria. The Federal High Court has both criminal and civil jurisdiction over matters instituted before it and has original jurisdiction to hear pre-election matters

Form EC8A – INEC document showing the polling unit results of an election.

Forms EC8B – INEC document showing the Ward/Registration area level results of an election. It is made up of the summary of the results from each polling unit in the ward and is therefore a derivative of the results in the polling units results in Form EC8A.

Form EC8C – Summary of results from the Wards/Registration Areas & Collation at Local Government Area Level

Form EC8D – Summary of Results from Local Government Areas & Collation at State Level

Form EC8E – INEC Form for declaration of the final result.

Form EC9 – INEC Form for Academic Qualifications

Forms EC40G – INEC form showing record of elections not held/cancelled in polling units.

Frontloading – Upfront filing all documents to be used at trial. This includes witness Statements on oath, list of witnesses to be called at the trial, list of exhibits, etc.

Hold/Held – A term used to indicate what a court has decided or ruled, specifically in relation to a legal matter

Incumbit probation qui dicit, non qui negat – the burden of proving a fact rests on the party who asserts the affirmative of the issue and not upon the party who denies it.

In limine – At the outset

In situ – In the original place

Interlocutory application – refers to applications that are made to court while an action is pending in court and may be made at any stage of an action. The purpose of this application is to cure a defect in a substantive suit e.g. to amend a pleading or to obtain a temporary relief especially when time is of essence, it can also be used to nip an action in the bud or fulfil a condition precedent before the commencement of a substantive suit.

Judicial precedent – refers to earlier decisions of courts which are applied in later cases.

Jurisdiction – The legal authority of a court to hear and decide a certain type of case. It also is used as a synonym for venue, meaning the geographic area over which the court has territorial jurisdiction to decide cases.

Locus Classicus – an authoritative legal decision on a particular subject matter.

Locus Standi – denotes the legal capacity to institute proceedings in a court of law.

Margin of Lead Principle – establishes the conditions or situations where a supplementary election is needed. It applies where the difference between the total number of votes cast between the two leading candidates in an election is more than the total number of votes

cancelled or voided for reasons under sections 24 (violence), 47 (BVAS malfunction) & 52 (over-voting) of the Electoral Act, 2022.

Non-joinder – refers to the omission of a necessary party who should have joined in the suit but was not.

Non-justiciable – refers to cases or issues that are not capable of being decided by law or a court.

Notice to Produce Documents – refers to a written letter that asks another party to produce evidence relevant to the case at hand. The documents may include photos, financial records, emails etc.

Obiter Dictum – judicial expression of opinion or comment by a judicial officer made in passing while rendering a judgment which does not decide the live issue in the matter.

Objection – A protest by a lawyer, challenging a statement or question made at trial. Common objections include an opposing lawyer "leading the witness" or a witness making a statement that is hearsay. Once an objection is made, the judge must decide whether to allow the question or statement.

Opinion – A judge's written explanation of a decision of the court. In an appeal, multiple opinions may be written. The court's ruling comes from a majority of judges and forms the majority opinion. A dissenting opinion disagrees with the majority because of the reasoning and/or the principles of law on which the decision is based. A concurring opinion agrees with the end result of the court but offers further comment possibly because they disagree with how the court reached its conclusion.

Oral argument – An opportunity for lawyers to summarize their position before the court and to answer the judges' questions.

Original jurisdiction – means that a court has the right to hear a case brought before it as a court first instance.

Originating process – refers to one of the modes of commencing an action in a High Court in a civil suit.

Overrule – this occurs when a court sets aside the decision/ judgment of a lower court in an earlier case.

Overvoting – this occurs where the number of votes cast at the polling unit exceeds the total number of accredited voters in that polling unit.

Petition - Petitions are special prayers framed in a special form supported with facts and often adopted in elections

Particulars – refers to the details of a claim or a defence contained in a pleading.

Prayers – refers to a request for judgment, relief, or damages at the end of a complaint or petition.

Petitioner – refers to the party who presents a petition or motion to the court.

Respondent – refers to the party against whom a petition is filed

Pleadings – Pleading is one of the first stages of a lawsuit. The parties formally submit their claims and the defenses against the opposition's claims.

Practice Direction – Practice Directions set out the procedures to be followed when bringing preceedings before the courts. There are separate practice directions for each court.

Pre-election matters – any event, actions or conduct that occurred or took place before the election proper. E.g. the issues of disqualification, nomination, substitution and sponsorship of candidates for an election precede election matters and are therefore pre-election matters.

Pre-hearing – refers to a session held by the Tribunal and the parties to ensure that trial proceeds without any unnecessary delay. At the pre-hearing session, all preliminary and interlocutory matters such as amendments of pleadings, formulation/settlement of issues, scheduling, inspection and discoveries of documents, etc., would be disposed of within a specified time so that once the matter is set down for hearing, trial may proceed day to day without any unnecessary delay.

Preliminary objections - points of law or fact raised at the outset of a case or lawsuit by the defense without going into the merits of the case.

Reply – A petitioner's response to a respondent's answer when the answer contains a counterclaim

Ruling – refers to a court's decision on a matter presented in a lawsuit. A ruling could refer to a judgment, which can be final or non-final.

Service – Refers to the formal delivery of litigation documents to give the opposing litigant notice of the suit against them.
Set Aside – means to disagree with and overturn a decision of a lower court or tribunal upon review.

Sine qua non – refers to an indispensable and essential action, condition, or ingredient without which another event cannot occur.

Standard of proof – refers to the amount of evidence that is necessary and needed to prove an assertion or claim in a trial in court.

Stare decisis – By the doctrine of judicial precedent or stare decisis, once a point of law has been conclusively decided by a decision of a competent court of law, it will no longer be open for examination or new ruling by the same Court or Tribunal or a Court or Tribunal which are bound to follow its decision. Where a court (e.g. Court of Appeal) is faced with conflicting decisions of the Supreme Court, the law is that it is bound by the later decision of the Supreme Court.

Statute barred – an action is statute-barred when no proceedings can be brought to court on the ground that the statutory period laid down by the law has expired by passage of time.

Substantive suit – refers to a civil suit instituted by a claimant, through an application in a court competent to deal with the matter, wherein the facts of the dispute along with the remedies sought, are stated.

Subpoena – A subpoena is a formal document issued by the court commanding a person required by a party to a suit to attend before the court at a given date to give evidence on behalf of the party or to bring with him and produce any specified documents required by the party as evidence or for both purposes.

Sui generis – literally interpreted to mean in a class of its own.

Supplementary Elections – refers to follow up elections conducted in polling units for certain political positions in order to conclude outstanding elections.

Void *ab initio* – refers to an action, document or transaction that never had legal effect.

Ultra vires – refers to acts or deeds performed beyond the scope of legal power or authority.

Vel non – literally interpreted to mean "or not". It is used to indicate the presence or absence of something.

Appendix

Number of Election Petitions and Appeals analysed by PLAC

S/N	STATES	SHA		HOR		SEN		GOV			PRESIDENTIAL
		EPT	CA	EPT	CA	EPT	CA	EPT	CA	SC	CA & SC
	NE										
1	Borno	2	0	7	2	3	2	1	0	0	
2	Gombe	6	3	1	0	1	1	2	2	1	
3	Adamawa	11	12	4	2	2	1	2	2	0	
4	Yobe	4	2	2	1	2	1	0	0	0	
5	Bauchi	25	19	10	7	2	2	1	1	1	
6	Taraba	8	4	5	3	0	0	1	2	0	
	Subtotal NE	**56**	**40**	**29**	**15**	**10**	**7**	**7**	**7**	**2**	
	NW										
7	Jigawa	2	0	9	3	3	0	0	0	0	
8	Kaduna	14	14	15	10	3	2	1	3	1	
9	Kano	23	10	21	8	2	1	1	3	0	
10	Katsina	1	1	9	11	2	0	0	0	0	
11	Kebbi	8	1	6	3	3	1	1	1	1	
12	Sokoto	16	15	11	7	3	2	1	1	1	
13	Zamfara	15	4	4	2	1	1	1	1	1	
	Subtotal NW	**79**	**45**	**75**	**44**	**17**	**7**	**5**	**9**	**4**	
	NC										
14	Benue	14	3	11	6	3	3	1	3	0	
15	Kogi	1	0	6	1	3	5	0	0	0	
16	Kwara	7	6	2	0	0	0	0	0	0	
17	Nasarawa	7	4	3	0	1	0	3	0	1	
18	Niger	21	11	7	12	4	3	0	0	0	
19	Plateau	17	14	9	9	5	3	2	1	1	
20	Federal Capital Territory	0	0	4	2	2	4	0	0	0	
	Subtotal NC	**67**	**38**	**42**	**30**	**18**	**18**	**6**	**4**	**2**	
	SE										
21	Ebonyi	12	5	5	1	6	3	2	2	0	
22	Abia	21	13	17	15	7	3	2	2	1	
23	Anambra	17	9	16	13	7	6	0	0	0	
24	Imo	24	14	16	21	5	7	0	0	0	
25	Enugu	23	15	8	5	4	4	2	2	2	
	Subtotal SE	**97**	**56**	**62**	**55**	**29**	**23**	**6**	**6**	**3**	

S/N	STATES	SHA		HOR		SEN		GOV			PRESIDENTIAL
		EPT	CA	EPT	CA	EPT	CA	EPT	CA	SC	CA & SC
	SS										
26	Delta	20	19	12	16	5	13	3	5	2	
27	Edo	17	0	11	6	3	1	0	0	0	
28	Akwa Ibom	8	4	9	5	1	0	6	4	0	
29	Bayelsa	12	12	4	2	2	1	0	0	0	
30	Cross River	9	6	6	5	3	4	3	1	1	
31	Rivers	20	17	15	8	5	1	4	4	1	
	Subtotal SS	**86**	**58**	**57**	**42**	**19**	**20**	**16**	**14**	**4**	
	SW										
32	Lagos	9	3	22	7	3	1	2	2	3	
33	Osun	16	14	1	1	0	0	0	0	0	
34	Oyo	4	2	14	5	6	3	0	0	0	
35	Ekiti	2	2	0	0	1	1	0	0	0	
36	Ogun	18	1	8	1	2	0	1	1	0	
37	Ondo	2	3	1	0	0	0	0	0	0	
	Subtotal SW	**51**	**25**	**46**	**14**	**12**	**5**	**3**	**3**	**3**	
38	Presidential										5
	Totals per court	**436**	**262**	**311**	**200**	**105**	**80**	**43**	**43**	**18**	**5**

	Grand Total	**1503**

PLAC
POLICY AND LEGAL ADVOCACY CENTRE

ABOUT PLAC

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.

The main focus of PLAC's intervention in the democratic governance process is on building the capacity of the legislature and reforming the electoral process. Since its establishment, PLAC has grown into a leading institution with capacity to deliver cutting-edge research, policy analysis and advocacy. PLAC receives funding support from donors and other philanthropic sources.

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