IN THE COURT OF APPEAL OF NIGERIA
ABUJA JUDICIAL DIVISION
HOLDEN AT ABUJA

ON THURSDAY THE 2ND DAY OF NOVEMBER, 2023

BEFORE THEIR LORDSHIPS:

MOORE ASEIMO A. ADUMEIN	**JUSTICE, COURT OF APPEAL**
IBRAHIM W. JAURO	**JUSTICE, COURT OF APPEAL**
SAMUEL ADEMOLA BOLA	**JUSTICE, COURT OF APPEAL**

APPEAL NO. CA/K/EP/HR/KD/35/2023

BETWEEN:

1. **HON. ZAYYAD IBRAHIM**
2. **ALL PROGRESSIVES CONGRESS (APC)**

APPELLANTS

AND

1. **INDEPENDENT NATIONAL ELECTORAL COMMISSION (INEC)**
2. **JALLO HUSSAINI MOHAMMED**
3. **PEOPLES DEMOCRATIC PARTY (PDP)**

RESPONDENTS

JUDGMNENT
(DELIVERED BY IBRAHIM WAKILI JAURO, JCA)

This is an appeal against the judgment of the National and State Houses of Assembly Election Petition Tribunal, Kaduna (the "Tribunal") Coram: Hon. Justice Haruna H. Kereng (Chairman), Hon. Justice Abdu Maiwada Abubakar (Member 1), Hon. Justice Oyinkansola O. Oluboyede (Member

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COURT OF APPEAL ABUJA
ADEBAYO O. JOHNSON
PRINCIPAL EXECUTIVE OFFICER 1
Signature.....
Date: 13/11/2023

they both adopted their statements and were cross examined by the Petitioners on the 5th of July, 2023 wherein after the 2nd Respondent closed its case on the same date. See pages 139 to 140 for the witness statement on Oath of RW2(1) and the proceedings containing the adoption of the Witness Statement on Oath and cross examination is at pages 890 to 892. While the Witness Statement on Oath of RW2(2) is at pages 145 to 146 and the proceedings containing to the adoption of the Witness Statement on Oath and cross examination is at pages 892 to 894.

The 1st and 3rd Respondents did not call any witness nor adduce any evidence in support of their case.

THE APPELLANTS' GROUSE

The Appellants' grouse is that the candidate of the 3rd Respondent in the said elections - that is the 2nd Respondent; Jallo Hussaini Mohammed, was erroneously returned by the 1st Respondent. The contentions of the Appellants' based on the pleadings on issues of substantial non-compliance in various polling units was structured under the following headings for easy appreciation:

a. Miscalculation of votes as recorded on the Summary of Results from Polling Units in a Registration Area Form EC8B(ii) of the 12 registration areas (Paras 26-30, Page 9- 11 of the Record). Their Lordships agreed with the Appellants' that there were miscalculations but not on the Forms EC8C(II) which was pleaded but on Forms EC8A(II) in Polling Units Code 020, 022 and 049. See pages 939 to 942. The Appellants are dissatisfied with this finding owing to the fact that (a) Codes 020, 022 and 049 were already

2) delivered on 7th September 2023 by which the Tribunal dismissed the Petition of the Appellants.

STATEMENT OF FACTS

The 1st Respondent, Independent National Electoral Commission (INEC) conducted the elections to the Igabi Federal Constituency, Kaduna State on 25th February 2023 wherein the 2nd Respondent sponsored by the 3rd Respondent, Peoples Democratic Party (PDP) was declared and returned as the winner of the election. Aggrieved by the outcome of the election, the Appellants instituted the Petition leading to this Appeal against the Respondents via a Petition and other accompanying originating processes dated 17th March 2023.

By the Petition dated and filed on 17th March 2023, the Appellants prayed for the following reliefs against the Respondents:

a) That it may be determined, and thus determined, that the said election and return of the 2nd Respondent Jallo Hussaini Mohammed as winner of the election to the Igabi LGA Federal Constituency Elections, Kaduna State conducted on the 25th February, 2023 is void by reason of substantial non-compliance and acts which clearly violate and breach various provisions of the Electoral Act, 2023 including but not limited to violence, over-voting, manipulation and miscalculation of votes, discrepancies between ballot papers issued and total .votes cast, non-stamping of INEC Forms and non-signing or dating of same.

b) That it may be determined, and thus determined, that the results of the election in the Igabi LGA Federal Constituency

Elections, Kaduna State conducted on the 25th February 2023 as declared and announced variously by the 1st Respondent are void and be nullified.

c) AN ORDER setting aside the Certificate of Return issued to the 2nd Respondent by the 1st Respondent.

d) AN ORDER directing the 1st Respondent to conduct a fresh election the Igabi LGA Federal Constituency elections, Kaduna State conducted on the 25th February 2023.

Or Alternatively

e) AN ORDER directing the 1st Respondent to conduct fresh election in the particular Polling Units affected by the substantial non-compliance as pleaded in the Petition.

f) Any further appropriate consequential relief(s) that this Honourable Tribunal may deem fit and expedient to grant in this Petition.

The Appellants opened their case on the 20th of June, 2023 with one Tasiu Musa (Code AKTLCA) who was the Local Government Collation Agent of the Petitioners and whose Statement on Oath is at Pages 76 — 99 of the Record. He testified as PW1 and was cross examined before being discharged on the same day. The proceedings containing his adoption of the witness statement on oath and cross examination is at pages 882 to 886 of the Record. Afterwards the Appellants closed their case.

The 2nd Respondent opened theirs by calling two witnesses namely Sani Balarabe RW2(1) and Masaud Isiyaku RW2(2) who were acclaimed PDP agents for Rigachikun and Turunku Registration Areas respectively and

cancelled by the 1st Respondent owing to infractions and all the candidates did not complain about the cancellation. That is why the 1st Respondent did not compute same. This is the Appellants Ground 2 of the Notice of Appeal. See pages 974 to 975 of the Record.

b. Deducted Votes of the 1st Appellant and extra votes added for the 2nd Respondent in recording the votes from certain polling units while collating the Forms EC8B(ii) of Registration Areas Code 01, Code 05, Code 06, Code 08 and Code 12 (Paras 31-39, Page 11-14 of the Record). Their Lordship agreed with the Appellants on this Part of the Petition see pages 942 to 944.

c. Votes wrongly marked as over-voting and as a result, not recorded in the Summary of Results from Polling Units in a Registration Area Form EC8B(ii) (Paras 40-49, Page 14-17 of the Record). Their Lordship agreed with the Appellants on this issue. See page 944.

d. Polling units with over voting as evidenced from the Statement of Result of Poll from Polling Unit Form EC8A(ii) and the BVAS but wrongly recorded and included in the votes collated on the Summary of Results from Polling Units in a Registration Area Form EC8B(ii). (Paras 50-59, Page 17-20 of the Record) Their Lordships agreed with us and found at pages 945 to 947 that this has been proven

e. Unsigned Statement of Result of Poll 'from Polling Unit Forms EC8A(ii) (Paras 40- **45,** Page 20-21 of the Record) The Tribunal agreed with us and found that this has been proven. See page 947 to 949 of the Record

f. Discrepancy between number of ballots and votes recorded on Statement of Result of Poll from Polling Unit Forms EC8A(ii) (Paras 46-58, Page 21-28 of the Petition) Their Lordship did not agree with the Appellants on this aspect of their case. See pages 951 to 954.

g. As where elections were not conducted or cancelled and thus not forming part of the! final collation of results.

   i. Elections cancelled as a result of violence and failure of BVAS Machine (*Paras 59- 60, Page 28-29 of the Petition)

   ii. Elections cancelled as a result of over voting (Paras 61-64, Page 29-31 of the Petition).

   iii. Total number of disenfranchised voters emanating from cancellation due to over voting, violence, failure of BVAS Machine and or non-conduct of elections. (Paras 65-69, Page 31 of the Petition).

Their Lordships at the trial Tribunal did not agree with the Petitioners on this aspect of their case

9. At Paragraphs 75 - 76 of the Petition at page 33 the Petitioners averred as follows:

> **"75. Your Petitioners contend that if the Honourable Tribunal makes the necessary deductions and additions that** the number of registered voters and or accredited voters in the areas marred with substantial non-compliance leading to nonconducting or cancellation votes as

a result of violence, BVAS failure, over voting etc. greatly surpass the margin of lead left after the vital arithmetic is carried out, and the Petitioners have carefully shown these in the paragraphs above.

10. Their Lordships in giving effect to this Pleading in view of the success of some and failure of others found at page 966 thus:

> "Thus, from the above figures found by this Tribunal, the 2nd Respondent has 46,438 votes, while the 1st Petitioner has 41,677 votes"

11. Yet their Lordship refused to allow the Petition in spite of the fact that Exhibit P16 the (Form EC40(G)(I)) puts the number at 9782 registered voters and 7102 as the number of voters who have collected their PVC in the affected Polling Units. Their Lordship reasoned that

> **"Thus from the above figures found by this Tribunal, the 2nd Respondent has 46,438 votes, while the 1st Petitioner has 41,677 votes. And by this figures the margin of lead between the 2nd Respondent and the 1st Petitioner is a total of 4, 761 votes. And by the evidence already examined in this judgement there is no number of registered voters who were denied the opportunity/right to vote in any polling unit where election did not take place or cancelled.**

Hence there is no number of votes of registered voters who did not vote/or collect their PVCs in any of the Polling Units that will upset these 4,761 votes; which is now the margin of lead between the 2nd Respondent and the 1st Petitioner"

12. This is contrary to the rules of the conduct of election as pleaded in paragraph 76 of the Petition (see page 33 of the Record) and reproduced above for ease of reference-thus:

"Your Petitioners aver that **where the margin of lead between the two leading candidates is not in excess of the total number of collected PVCs of the Polling Unit(s) where election was not held or was cancelled in line with the Electoral Act and the Regulations & Guidelines For The Conduct Of Elections, 2022, the Returning Officer shall decline to make a return until polls have been conducted in the affected Polling Units and the results incorporated into a new Form EC8D**(II) **and subsequently recorded into Form EC 8E**(II) **for Declaration and Return."**

The Appellants being dissatisfied with the judgment of the Tribunal **(Contained at pages 898 to 967 of the Records of Appeal),** filed a Notice of Appeal on 26th September 2023 challenging the entire

Judgment. The Notice of Appeal can be found at pages 969 to 982 of the record.

ISSUES FOR DETERMINATION

Learned counsel for the Appellants in his brief of argument settled by **Kabir Momoh Esq** filed on 8/10/23 distilled the following four issues for determination:-

i. Whether the Tribunal was right to have held that this Particular Petition is one where the scores of all the candidates are necessary for the purpose of determining the Margin of Lead complained of by the Appellants in the Petition? **(Distilled from Ground 1)**

ii. Whether their Lordships were right to have held that the Appellants did not prove that 278 votes were wrongfully added to the Votes of the 2nd Respondents as alleged
in the Appellants pleading and proceeded to introduce votes that were never in issue before the Court? **(Distilled from Ground 2)**

iii. Whether their Lordship properly evaluated the evidence when it found that the Petitioners did not prove the non compliance pertaining to the discrepancies in the entries made in the Results sheets capable of nullifying the elections from those Polling Units? **(Distilled from Ground 3)**

iv. Whether their Lordship were right when they found that there was nothing with which they could determine the principle of the Margin of lead? **(Distilled from Ground 4)**

Learned counsel for the 1st Respondent in his brief filed on the 16/10/23 adopted the issues nominated by the Appellants for the determination of this appeal.

In his brief of argument filed on 13/10/23 counsel for the 2nd Respondent **O.I. Habeeb Esq** submitted two issues for determination and these are:

1) **WHETHER the Honourable Tribunal was justified in holding that having regard to the thrust of the petition, the failure of the Appellants to state the score of all the 11 candidates that participated in the election as mandated by the provision of Paragraph 4(I)(c) of the First Schedule to the Electoral Act, 2022 is fatal to the petition?**
2) **WHETHER the Honourable Tribunal properly evaluated the evidence led in proof of the allegations of non-compliance made by the Appellants in terms of miscalculations of votes, discrepancy between the number of ballots and votes recorded before coming to the conclusion that the Appellants did not make out a case of substantial non-compliance to warrant the invocation and application of the margin of lead principle?**

For the 3rd Respondent in their brief of argument filed on 15/10/23 settled by **Josephine K. Nuhu Esq** formulated two issues for determination viz:

1. **Whether in the peculiar facts and circumstances of this petition, the trial Tribunal was not right in striking out the petition for failure by the Appellant to state the scores of all the candidates that participated in the election. (Distilled from ground 1)**
2. **Whether the Tribunal was not right in its evaluation of the evidence before it in arriving at the decision to dismiss the petition. (Distilled from grounds 2, 3 and 4).**

The Appellants counsel filed a reply brief on 18/10/23.

I will adopt the issues distilled by the Appellants for the determination of the appeal as it is all encompassing of the issues as nominated by the 2nd and 3rd Respondents.

Before that however there is a motion on notice filed by the 2nd Respondent on 13/10/23. We shall consider the motion first before considering the appeal on its merit.

NOTICE OF MOTION

Learned counsel on behalf of the 2nd Respondent/Applicant filed a motion on notice praying for the following orders of this Honourable Court to wit:-

1. **AN ORDER** of this Honourable court striking out ground one of the Notice of Appeal filed by the Appellants as contained in the Notice of Appeal filed on the 26th of September, 2023.
2. **AN ORDER** striking out issue one formulated by the Appellants in their Appellants' Brief of Argument filed on 8th day of October, 2023

and predicated on ground one of the Notice of Appeal filed on 26/09/2023.

3. **AND** for such further order(s) as this Honourable the circumstances of this application.

RESOLUTION OF THE MOTION

On the motion on notice by the 2nd Respondent seeking the court to strike out Ground one of the Notice of Appeal filed by the Appellants as contained in the Notice of Appeal filed on the 26th September 2023, learned counsel for the 2nd Respondent argued that the Appellants are out of time in filing the notice against the said ruling delivered on the 7th September 2023 along with the judgment.

I am inclined to the position of learned counsel for the Appellants that ground one complained about by the 2nd Respondent was delivered on the same date, 7th September 2023 together with the final judgment and as rightly admitted by the 2nd Respondent.

The plethora of cases cited by learned counsel for the Appellants amongst which are **P.D.P V Lawal (2023) 12 NWLR pt 458 SC 205 at 248 – 249; Warri Refining & Petro chemical co. Ltd V Gecmep Nig. Ltd (2020) LPELR – 49380 (SC)** and by virtue of the combined reading of Sections 285 (5) and (8) of the Constitution of the Federal Republic of Nigeria there is nothing wrong in combining the Ruling and the Judgment in a single Notice of Appeal in order to save time, cost and energy. See **Ogbotobo & Ors V Kaka & Ors (2019) LPELR – 49098 (CA).**

Thus I find the motion to be without any merit and same is hereby dismissed.

NOW ON THE MERITS OF THE APPEAL

SUBMISSIONS OF COUNSEL FOR THE APPELLANTS ON ISSUE ONE

Whether the Tribunal was right to have held that this Particular Petition is one where the scores of all the candidates are necessary for the purpose of determining the Margin of Lead complained of by the Appellants in the Petition?

Counsel submitted that the Tribunal held that the Appellants' Petition was liable to be struck out because according to the Tribunal the Appellants did not state all the scores of the candidate at the election. The Provisions of Paragraphs 4(1)(c) of the 1st Schedule of the Electoral Act 2022 have been subjected to interpretation by this Honourable Court and the Supreme Court. This is what this Honourable Court and the Supreme court have held to be the proper interpretation of the position of the law. That where **"the Petitioners stated their score, as well as the scores of their contender and where the petition could be determined without the scores or presence of the other candidates that contested the election, failure to state the scores of the other parties will not be fatal to the petition"**

In the case of **General Buhari & Anor v. Alhaji Yusuf & Anor (2003) 14** NWLR (Pt 841) 446, . the scores of all the candidate that participated in the election was not stated. His Lordship Uwaifo, JSC stated that failure to state the score of all the candidate could ONLY be an issue capable of debilitating the competence of the Petition if the Tribunal finds that it could

not resolve the Petition without the scores of all the candidates at the election. His Lordship held that:

> **"In respect of para. 4(1)(c), it is enough to supply the particulars in the body of the petition without joining the said candidates as parties to the petition. Such particulars shall be in respect of candidates who were validly nominated and who Upon that basis contested the election, not any other candidates upon whom votes Ajvere wasted. It is from such proper candidates, particulars that an order under section 136(2) may be made based on the valid votes cast at the election.**
>
> **However, if there is any doubt or controversy as to whether all the candidates necessary to be pleaded under paragraph 4(l)(c) were pleaded this is better resolved upon admissible evidence at trial of the petition at which stage the tribunal would decide the competency of the petition if that still remained as issue."**

This Courts stated the same position in the more recent case of **Falgore v Zarewa** (2021) 2 NWLR

> **"In the instant case, while it certainly would have been preferable to state the names and scores of all the candidates that participated in the election, the**

importance of Paragraph 4(1) of the First Schedule to the Electoral Act above, is to make clear the entitlement of the petitioner to his claim in the petition and his grievance over the results.

It certainly would have been fatal to the petition were the 1st and 2nd respondents to fail to state the scores of all the parties to the election. Where, however, as in this case, the Petitioners stated their score, as well as the scores of their contender and where the petition could be determined without the scores or presence of the other candidates that contested the election, failure to state the scores of the other parties will not be fatal to the petition, I hold. I thus uphold the dismissal by the lower tribunal of the appellants' preliminary objection"

In **PDP v Taiwo (2004) 8 NWLR (Pt 876) Pg 656 at 662 - 663** this Court held that the word "shall" used in paragraph 4(1)(c) of the 1st Schedule is to be interpreted as "May" so that non-compliance should not lead to the striking out of the Petition. According to this Court:

"construing the said paragraph 4(I)(c) not in isolation but on the backdrop of paragraph 4(6) which is clearly permissive as imported by the word "may" used therein and also against other relevant provisions of the said paragraph 4 as a whole, the clear intention of the said provisions has conferred upon the tribunal

discretionary power as to whether or not to strike out a defective petition for failing to conform with the requirements as prescribed by the said paragraph 4(l)(c). In other words, the word "shall" as used in paragraph 4(l)(c) has to be construed as discretionary and not mandatory so as to produce a consistent enactment of paragraph 4 as a whole and also within the context of other relevant provisions of the said Act.

The above interpretation was followed in the cases of **Oworu v INEC (1999) 10 NWLR (Part 622) Pg. 201 at 212 - 213 para F - A; Awuse v Obili (2004) 8 NWLR (Part 876) Pg. 481 at 521 - 523 paras A - G; Ogbeide v. Osula (2003)15 NWLR (Pt.843) 266 at 288.** We humbly submit that the scores of the two necessary parties involved in the petition which form the crux of the Petitioners complaint have been stated and the scores of the other candidates are not in issue whatsoever and as such the failure to state the scores of all the candidates is not fatal to the Petitioners as has been held in the above cases.

The Tribunal disagreed and its reason is stated at page 917 of the Record thus:

> In this Petition a careful perusal of all the seventy-nine (79) paragraphs will show that the crux of the Petitioners' complaint is centered on the scores of the 2nd Respondent, the 1st Petitioner and other candidates who participated in the Election to the Igabi Federal Constituency on the 25/2/2023. This can be deduced from

Paragraphs 26-30 complaining about deduction of votes of the 1st Petitioner.

And addition of extra votes for the 2nd Respondent, Paragraph 40-49 grievances about votes wrongly marked as over voting and Paragraph 60-67 complaining about unsigned statements of result of Polling Units. And other subsequent complaints are centered on discrepancy between number of ballot papers and votes recorded, Areas where Elections were not conducted or cancelled and complaint about total number of disenfranchised voters.

All the above clearly confirmed that the crux of this Petition is the Petitioners complaint about votes and in essence scores of the Candidates that participated in the Election

The Petitioners in Paragraph 8 of their Petition stated only the scores of the 2nd Respondent, 1st Respondent and that of the other two candidates. There is no reason in this Petition why the Petitioners did not state the official scores which the 1st Respondent declared for each of the 11 candidates- before declaring the 2nd Respondent the winner of the Election. And in our view since this Petition is predicated upon scores of the Candidates, this failure goes to the root or foundation of this Petition. That has rendered the Petitioners' Petition incompetent under the doctrine of non-compliance, since the circumstance of the Petition has made the stating of the Candidates' scores/votes mandatory. See the cases of **AGBASO V QHAKIM (2010) 7 EPR 420 AT 472 AND OGBURU V UDUAGHAN (2011)8 EPR 476 AT 699.**

Their Lordships relied on the formula set by this Court in the case of **Kalu v Chukwumereije (2011) LPELR-1988 (CA)**. We submit that the Tribunal misconceived the formula set by this Court. This is because the scores of the other candidates not listed did not hinder the Tribunal in determining the complaints of the Petition. Indeed the Petition is Predicated on the Margin of Lead and their Lordship in the final analysis saw that it was only faced with a determination of the margin of lead between the scores of the "Petitioner and the Contender". We refer their Lordships to pages 964 to 967 of the Record. Counsel submits that their Lordships erred in law when they found that the Petition is liable to be struck out in spite of the fact that they found that the scores of the Petitioners and the 2nd and 3rd Respondents have been stated in the body of the Election, and the fact that the Petition can be resolved based on these two candidates scores and the failure to state the scores of other candidates did not hinder the tribunal in the resolution of the Petition.

SUBMISSIONS OF COUNSEL FOR THE APPELLANTS ON ISSUE TWO

Whether their Lordships were right to have held that the Appellants did not prove that 278 votes were wrongfully added to the Votes of the 2nd Respondents as alleged in the Appellants pleading and proceeded to introduce votes that were never in issue before the Court?

The Petitioners complaint in paragraph 26 of the Petition is that the scores of the 1st Petitioner and the 2nd Respondent were not properly summed up in the Form EC8C(II) in respect of the scores the Petitioners got in the

Form EC8B(II) in Code 06 and 012. This is pleading of the Petitioners reproduced hereunder for ease of reference thus:

Your Petitioners aver that a proper summation of the votes in the twelve Registration Areas in the Igabi Local Government Area will show that the votes recorded for the 2nd Respondent did not secure the highest vote entitling him to be returned elected. The proper summation as deduced from the Statement of Result of Poll from Polling Unit Form EC8A(II) in contrast with the figures stated on the Summary of Results from Polling Units in a Registration Area Form EC8B(II) is demonstrated below:

WARD TOTAL	APC	PDP (As should be from the calculation of the results imputed on the Forms EC8B(II)	PDP (As Recorded and announced as the calculation of the results imputed on the Forms EC8B(II)
WARD 01 Turunku	3733	4737	4737
WARD 02 Zangon Aya	2783	3817-2169	3817-2169
WARD O3 Gwaraji	1589		
WARD 04 Birnin Yero	2984	3019	3019
WARD 05 Igabi II	2039	2854	2854
WARD 06 Rigachikun	5024		There is an addition of 238 votes to PDP
WARD 07 Afaka	3369	2995	2995
WARD 08	2119	2586	2586

Sabon Birnin Daji			
WARD 09 Kerawa	1492	1367	1367
WARD 10	2819		4359

The resolution of this complaints requires the "PROPER SUMMATION" of the scores of the candidate as entered in **Exhibit P3** compared with the votes recorded in **Exhibit P2.**

In **Dabup v. Kolo (1**993) LPELR-905(SC) the Supreme Court per Ogundare, J.S.C at p. 36 para's. D stated the law thus:

> **"It has been said that where a trial conducted by pleadings, the judgment of the court must be based on issues which the parties have raised and joined in the pleadings. It has also been stated that the object of pleadings is to compel the parties to define that issues upon which the case is to be decided. Oke-Bola v. Molake (1975) 12 SC 61. and Total v. Nwaka (1978) 5 SC 1."**

IN **Ofolix International Limited v. Tejtj Investment And Property Company Limited (2023) LPELR-60410(CA), this Court Per Obande Festus Ogbuinya, JCA (Pp. 22-23, paras. C-D)**

> "It is an elementary law, known for its antiquity, that a Court of law is drained of the jurisdiction to grant a relief that is not claimed by a party to a suit. See Ochonma v. Unosi (1965) NMLR 321, AgU v. Odofin (1992) 3 SCNJ 161, Agbi v. Ogbe (2006) 11 NWLR (Pt. 990) 65, Eagle Super Pack (Nig.) Ltd. v;. ACB Pic. (2006) 19 NWLR (Pt. 1013) 20,

Odunze v. Nwosu (2007) 13 NWLR (pt. 1050) 1, Veepee Ind. Ltd. v. Cocoa Ind. Ltd. (2008) 13 NWLR (Pt. 1105) 486, Osuji v. Ekeocha (2009) 16 NWLR (Pt. 1166) 81, Oduwole v. West (2010) 10 NWLR (Pt. 1203) 598, Stowe v. Benstowe (2012) 9 NWLR (Pt. 1306) 450, Unijos v. Ikegwuoha (2013) 9 NWLR (Pt. 1360) 478, Odom v. PDP (2015) 6 NWLR (Pt. 1456) 547, Al-Hassan v. Ishaku (2016) 10 NWLR (pt. 1520) 230. The rationale behind this ageless and inelastic principle of law is not farfetched. A Court of law is not clothed with the garment of a philanthropist that dishes out awards that are not solicited by recipients. For a Court to make an order which no party has supplicated for and which the parties were not heard constitutes a gross infraction of the other party's inviolable constitutional right to fair hearing as enshrined in Section 36(1) of the Constitution, as amended, the fons et origo of our laws. See **Umukoro Usikaro** vs. **Itsekiri Communal Land Trustees (1991) 12 SCNJ 75 at 91/(1991) 2 NWLR (Pt. 172) 150, Kalejaiye v. LPDC (2019) 8 NWLR (Pt. 1674) 365."**

It is predicated upon this misconception of the law that their Lordship found that:-

> **"However, our examination has revealed that this issue of miscalculation of votes is not in respect of 278 votes alleged by the Petitioners.**

It is also not limited to Exhibits P2 and P3, as it is more than that. It includes Exhibit P9(same with Exhibit R2(2) which are Forms EC8A(ii) of Statement of Results from Polling units of Rigachikun **Ward Code 06 made of** 69 **Polling Units, PJ5 being** Form **EC8(ii) of Statement of Result of 153 polling Units of Rigasa Ward and P17 which is Form EC40G(PU) of Polling Unit Code 13 in Rigachikun Ward Code 06.**

Now from the above, the issue of miscalculation of votes is not that of the alleged 278 votes said to have been added to the 2nd Respondent as per Exhibit P2 and P3. We hold that this allegation has not been proved.

Exhibit P17 was presented by the Petitioners as proof of Item 3 of the categories of its complaints which pertains to "wrongfully marked as over voting and as a result not recorded in the summary of Results from Polling Units in Registration Area Form EC8B(II)" which the Tribunal found to be correct.[1] They did not form part of the complaint under Item 1 which is "miscalculation of votes as recorded on the summary of results from Polling units in

Registration Area Form EC8B(ii) of 12 Registration Areas".

Counsel added that the Tribunal has no basis for including these votes when the result from these Polling Units have been cancelled by the 1st Respondent and none of the parties complained about the cancellation before it. We therefore respectfully submit that the Tribunal has a duty to restrict itself to the pleadings of the parties, it is the failure of the Tribunal to restrict itself to the pleadings that led it to make the erroneous finding that the Petitioners did not prove the allegation that there was wrongful calculations of the entries in the Form EC8B(ii) for Code 06 and Code012 in the Rigachikun Registration Area. In the case of **Awani & Ors v. Erejuwa ii, Olu of Warri & Ors** (1976) LPELR-644(SC) the Supreme Court per Alexander, J.S.C at p. 11 paras. A held that

> **"In Solanke v. Ajibola (1969) 1 NMLR 253, this Court held that an appeal from a decision made in the exercise of a trial Judge's discretion can be entertained when, in exercising his discretion, the trial Judge has acted under a mistake of law, or in disregard of principle, or under a misapprehension of the facts, or has taken into account irrelevant matters, or on the ground that injustice could arise."**

THIS POSITION IS TRITE AND WAS RESTATED IN Ogundare & Anor v. Executive Governor of Lagos State & ors (2017) LPELR-41859(CA) **PER NIMPAR,** J.C.A **AT P.** 31-32 **PARAS** E thus:

"It is settled that evaluation of evidence is primarily the duty of a trial Court. The rule of the thumb for a start in issues questioning evaluation of evidence is that generally, an appellate Court does not interfere with the trial Court's evaluation unless it breaches certain rules, see Are V Ipaye (1990) 3 S.C. (Pt. 11)109 where the Apex Court per Nnamani, J.S.C held thus:

"I think it has to be appreciated that the evaluation of evidence and findings of facts are within the province of the trial Court, and that an appellate Court will only interfere if such evaluation and findings are perverse and Show a misapprehension of the facts."

Counsel invites this Court to do the proper summation and deduct the 278 extra votes emanating from the wrongful calculation of the Summary of Result from Polling Units Form EC8B(II) in respect of Registration Areas Code 06 and Code 12

In **Military Gov of Lagos State & Ors v. Adeyiga & Ors** (2012) LPELR-7836**(SjC)** p. 46-47 Paras. E, Per Adekeye, J.S.C the Supreme Court held thus:

"The position of the law where evidence is unchallenged or uncontroverted is that such evidence will be accepted as proof of a fact it seeks to establish. A trial Court is entitled to rely and act on the uncontroverted or uncontradicted evidence of a

plaintiff or his witness. In such a situation, there is nothing to put or weigh on the imaginary scale of justice. In the circumstance the onus of proof is naturally discharged on a minimum proof.

Now, from the above cited authorities, and in line with section 134 (1) of the Electoral Act it is clear that this Honourable Court have the powers to deduct the votes and set aside the finding that the pleading have not been proven.

SUBMISSIONS OF COUNSEL FOR THE APPELLANTS ON ISSUE THREE

Whether their Lordship properly evaluated the evidence when it found that the Petitioners did not prove the non-compliance pertaining to the discrepancies in the entries made in the Results sheets capable of nullifying the elections from those Polling Units?

The Appellants pleaded at paragraphs 46 - 58 at pages 22 - 28 of the Petition that there were the following discrepancies as can be discerned on the face of the result:

Turunku Registration Area			Code C	01					
Polling Unit/Code No.	Registered Voters	Accredited Voters	Total Valid Votes	Total Invalid Votes	Total Ballot Issued	Total Ballot Used	Total Unused Ballot	Difference less	Difference More
PU 046	321	148	148	0	321	148	171	2	

By the provisions of Regulation 41 of the Regulations & Guidelines for the conduct of Elections, 2022 where after a crosscheck and recount, the total sum of spoiled ballot papers, rejected ballots and valid votes is not equal to the total number of used ballots, an anomaly exists, **and** the Presiding Officer shall submit a written report to the RA/Ward Collation Officer. **Regulation 42 then goes ahead to prescribe that:**

> **"The RA/Ward Collation Officer shall examine the report of the Presiding Officer on any discrepancy in ballots** and votes **and further attempt to reconcile the figures. Where the figures cannot be reconciled, the RA/Ward Collation Officer shall make his/her own report to the LGA Collation Officer, attaching the Presiding Officers' Report."**

The evidence presented by the Appellants are Exhibits P4 Code 001, 007, 019, 030, 041, 041, 046 for Turunku Ward, Exhibit P6 Code 011 for Gwaraji Ward, Exhibit P8 Code 009, 019, 030 and 038 for Igabi Ward, Exhibit P9 Code 001, 055, 069 for Rigachikun Ward, Exhibit P13 Code 014, 019, 026, 029, 030 and 031 for Kwarau Ward, and Exhibit P14 Code 008 for Gadan Gay an Ward.

Their Lordship at page 952 found as follows:

> The Petitioners posit that there is discrepancy between the number of ballot papers and votes recorded. But we wish to state clearly that in this Petition there is no evidence adduced

by the Petitioners relating to the said discrepancy. Further no single ballot paper issued, spoiled or rejected during the Election of member of Igabi Federal Constituency on 25/2/2023 was tendered by the Petitioners or the respondents before the Tribunal during trial

In addition to the above for there Paragraphs 41, 42, 65, and 99 of the INEC Regulation and Guidelines for Conduct of Elections, 2022, to be applicable in this Petition, there must be in existence the following:-

i. The evidence ofthe discrepancy stated in Paragraph 41 above
ii. Report of the Presiding Officer to the RA/Ward Collation Officer
iii. Report of the RA/Ward Collation Officer to the Local Government Area Collation Officer

In this Petition, we reiterate that there is no evidence of this discrepancy before us. Equally there is no report either from the Presiding officer or the RA/Ward Collation Officer was tendered before this Tribunal. In addition, no Presiding Officer, RA/Ward Collation Officer or Local Government Area Collation Officer was called by the Petitioners to appear before this Tribunal to testify on the said discrepancy

In fact, the Petitioners averred in Paragraph 71 (wrongly referred as Paragraph (51) ofthe Petition thus:

> "Your petitioners aver that there was no written report to the RA/Ward Collation Officer neither did the RA/Ward

Collation Officer make his/her own report to the LGA Collation Officer, attaching the Presiding Officers' Report.

We are not persuaded by the Petitioners submission in Paragraph 86 of their adopted written address that the Respondent especially the 1st Respondent (INEC) has custody of such report and same was not tendered. This is because the Petitioners did not prove that the reports envisaged by Paragraphs 42 was in custody of the Respondents especially the 1st Respondent.

Learned counsel observed thus- that where the complaint is that there are discrepancies in the entries on the Result, sheet, it is not the law that ballot papers must be presented before the Tribunal before it can be said to have been proven. In **Okoye v. Charles & ors** (2015) LPELR-40664(CA), this Court recognises that it is the nature of the pleadings that determine whether Ballot Papers need to be presented in proof or otherwise.

Secondly, once it is shown on the face of the Result Sheets that those discrepancies exist, then it becomes the duty of the 1st Respondent to provide a report stating why the Result of the Polling Unit is utilised in spite of the discrepancy. In the case of **APC v. Adeleke** & ORS (2019) LPELR-47736(CA) their Lordship stated this much when they held at p. 1034 paras. B-F that:

> **"It is the duty of the Presiding Officer to give report to Ward Collation Officers, who receive and consider the reports and communicate the Local Government Collation Officer etc and**

any report of anomalies, adverse incidents and equipment failure from the presiding officers, including report of where polls are either cancelled or not held, by the Presiding Officer was to be made in Form EC40G at the polling units, where election was cancelled, or not held; and the original copies of Forms EC8B, EC8BI and EC8BII, together with other materials and equipment and reports (if any) were to be forwarded to the Ward Collation Officer, who, would in turn, communicate the LGA Collation centre, and finally the State Collation/Returning Officer, who would receive similar report from the LG Officer.

Since the law imposes a duty on the 1st Respondent to make such a report, their Lordships held that failure to produce the Report entitled the Court to apply the principle of adverse inference as envisaged by 167(d) of the Evidence Act. We rely on INEC v. Adeleke & ors **(2019) LPELR-47545(CA) at p. 94 paras. C-G See also** Aremu v Adetoro **(2007) 16 NWLR (Pt. 1060) at 261 where the Supreme Court held as follows: "A Court of law can invoke Section 149 (d) of the Evidence Act that evidence which could be and is**

not produced would, if produced, be unfavourable to the person who withholds it."

We therefore submit that once the Appellants show that there is discrepancy on the face of the Results, the burden shift to the 1st Respondent to explain away the discrepancy by following the 1st Respondent's Regulation. Thus, the non presentation of the Report shows that the pleadings in paragraph 71 of the Petition is proved.

Their Lordships felt otherwise. We submit that the finding of their Lordships that Ballot papers must be provided before the discrepancies complained about by the Petitioners is accepted is perverse. It is not supported by any law. Their Lordship's finding that because we failed the produce the Reports, the Pleading fails is with the greatest respect perverse. This is because the burden of proof is not static but it oscillates even in election cases so that once we show the discrepancy, the burden shifts to the 1st Respondent to explain same in the Report which it has a duty to produce before the Court. See **Omisore** V. **Aregbesola** (2015) 15 NWLR (PT. 1482) 205; **Agbaicoba** V. I.N.E.C. (2008) 18 NWLR (PT. 1119) 489; **Eseigbe** V. **Agholor** (1993) 9 NWLR (PT. 316) 128.

We submit that their Lordship agreed that the Report was not produced before it but with all sense of humility misconceived the person who has the duty to produce same and rather found that the failure to produce the Report is tantamount to the failure of the Appellants to prove the averment.

However, these discrepancies complained of by the Appellants are apparent on the face of the documents containing these exhibits. By

section 137 of the Electoral Act 2022, the- Court was entitled to act on them and having activated the section, cannot pick and choose where to apply them as it did in this case. The law prevents the court from approbating and reprobating at the same time. We rely on **FRN v. iweka** (2011) LPELR-9350(SC).

The Tribunal ought to find that this aspect of the Appellants' case has been proven in the light of the evidence before the Court. In **igba & ors v. angbande & ors** (2021) LPELI-53295(CA) per Nimpar, J.C.A p. 45-48 paras. F)

> **"Where a prima facie case is made out, the burden shifts to the defence to adduce counter evidence to sustain their defence. Where an allegation is made, positively or negatively and it forms an essential part of a party's case, the proof of such allegation rests on him. See also: Plateau State of Nig. & Anor. Vs A.G. Federation & Anor. (2006) 3 NWLR (Pt. 967) 345 @ 417 D - F; Imana Vs Robinson (1979) 3 - 4 SC (Reprint) 1. However, the evidential burden of proving particular facts may shift throughout the proceedings. See: Buhari vs. INEC (2008) 19 NWLR (pt. 1120) 246; Okoye vs. Nwankwo (2014) !5 NWLR (pt. 1429) 93; Odukwe vs. Ogunbiyi (supra)." Per KEKERE-EKUN, J.S.C See also the case of ODOM**

& ORS V. PDP & ORS (2015) LPELR-24351(SC); OKOYE & ORS V. NWANKWO (2014) LPELR-23172(SC) and ONI V. OJOGBOGBO & ORS (2015) LPELR-41741(CA)."

Further, the finding that the Collation Agent of the Appellants could not give evidence regarding the discrepancy on the face of the document in an election is perverse in the light of the decision of the Supreme Court in the case of **Omisore V Aregbesola** (2015) 15 NWLR (Pt. 1482) 205 the Supreme Court held per Ogunbiyi JSC that:

> **"...In an Election Petition, Ward Supervisors, Local Government, Collation agents and State Collation agents are competent in law to testify not withstanding that they are not polling agents as long as their evidence is direct within the meaning of S.125 of the Evidence Act...."**

In **Aregbesola** V **Oyinlola** (2011) 9 NWLR (Pt. 1253) 458, the Court of Appeal held at p.610-611 that;

> "...We do not agree with the tribunals reasoning that the witness should have participated in the conduct of the election or the preparation of the electoral documents before he could make observations on the electoral materials used. **On the other hand,** we take the view that his evidence was rather direct as to the observations he made on the electoral materials. **This is consistent with**

the direct evidence rule enshrined in S. 77 of the Evidence Act. In Ajiboye V State (1984) 8 NWLR (Pt.36) 593, @ 600, it was held that "a witness in a case is supposed to give evidence of what he personally saw did or discovered" **See also PENU JSC in Kola V Potiskum (1998) 1 KLR (Pt.57) 231."**

In the case of **Uzodinma & anor v. Ihedioha & ors** (2020) LPELR-50260(SC) and p. 31-33 paras. E the Supreme Court agreed that it is not in all cases that a Polling Units Agents become the only competent witnesses to give evidence in respect to certain complaints. Their Lordships held that:-

> **A careful perusal of the appellant pleadings reveals that they did not, at any stage challenge the holding of elections in any polling unit.** I am of the view that this is crucial. Indeed, their contention was that elections held, they scored votes but their votes were excluded at the collation stage. **The need to call the polling unit agents to prove that elections actually held in those polling units did not arise.** The authorities of this Court requiring the evidence of polling unit agents, polling unit by polling unit, are therefore not applicable in the circumstances.

The Supreme Court continued at page 39 to 40 that:

> Furthermore, as pointed out by learned senior counsel for the appellants, **PW12- PW34, who were the appellants' Local Government Area collation agents and who**

were present at the collation centres, testified that they witnessed the exclusion of results. The Court below did not give any consideration to the evidence of these witnesses. In my considered view, the crux of this appeal is whether the lower "Court and by implication, the trial tribunal misconstrued the appellants' case and therefore misplaced the burden of proof. **Having regard to the state of the pleadings, I am of the view and I do hold that the burden of proof was misplaced, as a result of which the bulk of the evidence relied upon by the appellants was disregarded by the two lower Courts.** The evidence of PW11 and PW51 were rejected on the ground that they were unable to prove any anomalies in th'e 388 polling units. The appellants did not plead or base their claims on any anomalies in the polling units. **Their case was that votes lawfully earned were unlawfully excluded from the collation at Ward level.** The documents relied upon were alleged to be fake or forged but none of the respondents was able to prove forgery.

I hold that on a preponderance of evidence, the appellants discharged the burden on them of proving that the results from 388 polling units, which were in their favour, were excluded from the collation of results and that if the excluded votes are added to the results