THE SUPREME COURT OF NIGERIA
HOLDEN AT ABUJA
ON TUESDAY THE 14TH DAY OF JANUARY 2020
BEFORE THEIR LORDSHIPS

IBRAHIM TANKO MUHAMMAD	CHIEF JUSTICE OF NIGERIA
NWALI SYLVESTER NGWUTA	JUSTICE, SUPREME COURT
OLUKAYODE ARIWOOLA	JUSTICE, SUPREME COURT
KUDIRAT MOTONMORI OLATOKUNBO KEKERE-EKUN	JUSTICE, SUPREME COURT
AMIRU SANUSI	JUSTICE, SUPREME COURT
AMINA ADAMU AUGIE	JUSTICE, SUPREME COURT
UWANI MUSA ABBA AJI	JUSTICE, SUPREME COURT

SC. 1462/2019

BETWEEN

1. SENATOR HOPE UZODINMA
2. ALL PROGRESSIVES CONGRESS (APC)

APPELLANTS

AND

1. RT. HON. EMEKA IHEDIOHA
2. PEOPLES DEMOCRATIC PARTY (PDP)
3. INDEPENDENT NATIONAL ELECTORAL COMMISSION

RESPONDENTS

JUDGMENT
(DELIVERED BY KUDIRAT MOTONMORI OLATOKUNBO KEKERE-EKUN, JSC)

The 1st appellant and the 1st respondent were candidates of the 2nd Appellant (APC) and the 2nd respondent (PDP) respectively in the Governorship

Election conducted in Imo State on 8th March, 2019 along with 68 other candidates. The 1st respondent was returned as the winner of the election. The 1st appellant was dissatisfied with the return of the 1st respondent and filed a petition challenging the said return on two grounds: (a) The 1st Respondent was not validly elected by majority of lawful votes cast and (b) The declaration and return of the 1st Respondent is invalid by reason of non-compliance with the Electoral Act. He sought several reliefs including the nullification of the 1st respondent's return and the declaration of the 1st appellant as the winner of the said election. It was the Appellant's contention, *inter alia*, that election held in 27 Local Governments Area, 305 Electoral Wards and 3, 523 polling units. That the 3rd respondent cancelled the election in 252 polling Units, collated results from 2,883 polling units and excluded results from 388 polling units. It was the appellants' contention that they scored an overwhelming majority in the 388 polling units, the result of which was excluded from ward collation result (Forms EC8B). Furthermore, the appellants contend that the total

votes due to the appellants but unlawfully excluded from the 388 polling units is 213,695 while the 1st respondent is entitled to 1,903 votes from the same 388 polling units. It was also contended that the 1st respondent was returned based on a wrong computation of votes collated from 2,883 polling units.

The respondent filed replies to the petition, called witnesses and tendered documents in support of their respective positions. After considering written addresses of counsel, the trial Tribunal found no merit in the petition and dismissed it.

Dissatisfied, the appellant appealed to the lower court. In a majority decision of 4:1, the lower court dismissed the appeal on 19/11/2019. The appellants are still dissatisfied and have further appealed to this court. The parties duly filed and exchanged their respective briefs which were duly adopted and relied upon in support of argument of their positions.

The 1st respondent filed a motion on notice on 10/1/2020 seeking to strike out the appeal on the ground

that this court had delivered a judgment in **SC. 1384/2019: Ugwumba Uche Nwosu Vs Action Peoples Party (APP) & Ors.** delivered on 20/12/2019 on the nomination of the appellant therein as candidate of two political parties and held that the nomination was invalid, null and void and in violation of Section 37 of the Electoral Act, 2010 (as amended). It is the 1st respondent's contention that the judgment is a judgment in rem and is therefore binding on all parties. That in the instant case, the 2nd appellant also nominated the 1st appellant as its candidate for the same election with the effect that two candidates were projected for the 2nd appellant in the same election.

In their counter affidavit and written address in opposition, the appellants argued, *inter alia,* that the judgment in SC. 1384/2019 is in respect of the validity of the nomination of the 1st appellant by the 2nd appellant, which is a pre-election matter for which jurisdiction is vested in the High court. It is also argued that the applicant was not a party in the 2nd appellant's primary election which gave rise to the nomination of the 1st

Appellant. It is further contended that the issue as to who was the validly nominated candidate of 2nd appellant was laid to rest in the judgment of the High Court of Imo State in Suit No. HOW/756/2018: **HE Prince Madumere Vs (1) APC (2) Ugwumbo Uche Nwoso** delivered on 21/11/2018.

I have considered the submissions of learned counsel on either side as contained in their written addresses. My first observation is that the issue raised in the 1st respondent's application is a fresh issue being raised for the first time in this court without prior leave having been sought and obtained. Failure to seek and obtain the requisite leave renders the issue so raised in competent, See: **A.I.C Ltd Vs NNPC (2005) 5 SCN J 316; Rockonoh Prop Co. Ltd. Vs NITEL Plc (2001) 14 NWLR (Pt. 733) 468; Ukachukwu Vs PDP (2014) 4 NWLR (Pt. 1396) 65 @ 81 E-F**.

Furthermore, leave to raise a fresh issue is limited to the case of the parties as pleaded, the evidence on record in support of the parties' contending positions and the judgment of the court in respect thereof. The issue

cannot be at large, otherwise it would constitute an instrument of ambush against an opponent. See: **Adeosun Vs Governor of Ekiti State (2012) 4 NWLR (Pt. 1291) 581**. The rationale for this principle was explained in the case of: **Bankole & Ors. Vs Mejidi Pelu & Ors. (1991) LPELR-749 (SC) @ 36 C-F as follows:**

> **"The rationale for these principles is the consideration that a trial court is generally required to make primary findings of fact. Where there are such findings by the court of trial, the appellate court will not lightly depart from them. The appellate court relies on the opinion of the court below for its determination of the appeal before it. Besides, the jurisdiction of the court is confined to the correction of the errors of the court from which it hears appeals. It can only do so where the points argued before it consist of allegation of errors made by the court below. In such a circumstance the point must have been raised in the court below, and that court should have expressed its opinion.... Since the appeal is against the judgment of the court below, the Appellate court is entitled to the opinion of the court below on every allegation of error raised before it against the judgment of that court."**

The parties to this application are *ad idem* that the judgment in **SC.1384/2019** was in respect of the issue of double nomination in the 2nd appellant's primaries. The 1st to 3rd respondents in the appeal had by way of originating summons, challenged the nomination of Ugwumba Uche Nwosu as the Governorship candidate of the Action Alliance Party on the ground that the said nomination was made during the pendency of a similar nomination of the same Ugwumba Uche Nwosu by the All Progressives Congress. The contention in that case was that Unche Nwosu had "knowingly" allowed himself to be nominated by more than one political party in breach of Section 37 of Electoral Act, 2010, as amended, which therefore rendered his nomination as the Governorship candidate of the Action Alliance null and void. The trial court and the court of Appeal declared Uche Uwosu's nomination null and void and of no effect. This court in **SC. 1384/2019** upheld the concurrent findings on the ground that the said Uche allowed himself to be "knowingly" nominated by two political parties for the same position at the same time.

The opening sentence of the judgment reads. "**This appeal deals purely with the issue of double nomination**." It is instructive to note that in the application under consideration the applicant is not contending that the 1st appellant knowingly allowed himself to be nominated by more than one political party.

Furthermore, as rightly submitted by learned counsel for the appellants, the jurisdiction to determine whether or not a party has been validly nominated as a candidate in an election is vested in the High Courts. Section 87 (9) of the Electoral Act, 2010, as amended, provides:

> **"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 has 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 or the High Court of a State or FCT for redress."**

Section 233(1) of the 1999 constitution as amended, provides:

> **"The Supreme Court shall have jurisdiction, to the exclusion of any other court of law in Nigeria, to hear and determine appeals from the Court of Appeal."**

The original jurisdiction conferred on this court by Section 232(1) of the Constitution does not extend to pre-election or election related matters. It was clearly acknowledged at page 7 of the judgment of this court in **SC. 1384/2019**, attached as Exhibit 1 to the supporting affidavit, that the subject matter of the appeal was a pre-election matter. It was commenced by originating summons at the Federal High Court, Abuja (in compliance with Section 87 (9) of the Electoral Act, 2010, as amended) and proceeded through the Court of Appeal to this court. This court has no original jurisdiction to determine whether an aspirant was properly nominated by his party as a candidate for election.

The issue fought between the parties to this appeal at the trial court was on the exclusion of votes scored by the appellants in 388 polling units from ward collation results (Form EC8B) which led to a wrong declaration of the 1st respondent as the winner of the election. The issue of the 1st appellant's nomination by the 2nd appellant did not arise.

It is for these reasons that I agree with learned counsel for the appellant that the validity of the 1st appellant's nomination as a candidate of the 2nd appellant for the Governorship Election in Imo State is a fresh issue raised for the first time in this court without leave. Furthermore, it is a pre-election matter, in respect of which this court lacks original jurisdiction to determine same in a post-election appeal. The application therefore fails and is accordingly dismissed.

In the substantive appeal, the appellants raised 6 issues for determination as follows:

1. *Considering the facts of this case and the case law on polling unit results given to Police Officers deployed to polling units, whether the court below was not in grave error when it held that PW54 was not the proper person to tender Exhibits PPP1 – PPP366? (Grounds 2, 3, 4 and 5).*
2. *Given the state of pleadings and the evidence before the lower court, whether the decision of the court below that the Appellants did not "prove their allegation that their scores were excluded from collation" was not wrong as a result of a*

misconception of the Appellants' case? (Grounds 6, 7, 8, 9, 11, 13, 15, 16 and 22).

3. Was the court below not in error when it held that Appellants' issues 1, 2, 4 and 5 which raised distinctive complaints against the decision of the trial Tribunal "are all indexed in the evaluation of evidence by the trial Tribunal" thereby failing to consider and resolve each issue distinctly and distinctively? (Ground 1 of the Grounds of Appeal).
4. Whether the court below was in grave error when it failed to fully resolve the complaint raised in Issue 3 before it and having lumped issues 1, 2, 4 and 5 together, without considering the distinct complaint in each issue, it proceeded to resolve them in the Respondents' favour? (Grounds 10, 12 and 14).
5. Having regard to the facts of this case, whether the court below was not wrong in its construction and interpretation of Section 179 of the 1999 Constitution of the Federal Republic of Nigeria (as amended) to the effect that only a candidate who came second in an election can raise allegation of

non-compliance within Section 179? (Grounds 17 and 19)

6. *Was the court below not in error when it held that failure to join "2nd and 3rd runners-up?" (Losers) in the election rendered the Petition incompetent and accordingly struck out same? (Grounds 18, 20 and 21)*

The 1st, 2nd and 3rd respondents formulated 3,9, and 5 issues respectively. I adopt the issues formulated by the appellants for the resolution of the appeal.

I shall consider issues 1 and 2 together.

With regard to issue 1, it is contended on behalf of the Appellants that the crux of their case as pleaded in paragraphs 19, 20, 21, 22, 23 and 24 of their petition and as found by the two lower courts, was that scores due to the appellant from 388 polling units were not collated into forms EC8B, thereby denying the appellants 213,695 votes while the Respondents denied the exclusion of such results and the 3rd respondent specifically pleaded in paragraph 14 of its Reply to the petition that the authentic results of the election would be tendered at the trial.

Learned Senior counsel for the Appellants, D.D. Dodo, SAN submitted that at the trial, the respondents extracted evidence from PW41, PW43, PW45, PW46, PW47, and PW49 under cross-examination confirming the presence of Police Officers in their units thereby illustrating the relevance of the evidence of PW54, who tendered Exhibits PPP1-PPP366. He noted that the trial Tribunal expunged the exhibits on the ground that PW54 lacked the competence and authority to testify and tender the said documents. He noted further that the lower court upheld their appeal against the rejection of the documents and held that PW54 was properly before the court as a subpoenaed witness but refused to accord the exhibits any probative value, relying on extraneous grounds without affording them a hearing.

One of the grounds relied on by the lower court was that the documents were not certified. It is contended by Learned Senior counsel that Exhibits PPP1-PPP366 are duplicate originals and therefore do not require certification in order to be admissible. He referred to Section 86 (2) of the Evidence Act, 2011; **Nwobodo Vs**

Onoh (1984) 1 SC NLR 1 @ 29-30; Aja Vs Odin (2011) 5 NWLR (Pt.1241) 509 @ 503 C-D.

Another ground relied upon in rejecting the said exhibits is that they were directly in the custody of PW54. Learned Senior counsel referred to portions of the evidence of PW54 to show that the documents were in the custody of the Police authorities and released to PW54 on the authority of the Commissioner of Police in obedience to the subpoena issue by the trial Tribunal. Relying on several authorities, he submitted that the court is not entitled to speculate and must confine itself to the evidence before it.

In the circumstances he urged the court to find and hold that the lower court drew wrong inferences from the evidence before it as regards Exhibits PPP1 – PPP366 and therefore reached a wrong conclusion. He urged the court to exercise its powers under Section 22 of the Supreme Court Act to consider, evaluate and give probative value to the documents.

On the admissibility and evidential value of election results given to Policemen, learned senior counsel

submitted that the procedure of giving election results to the Police is provided for in Section 63(3) of the Electoral Act, 2010, as amended and paragraph 22(c)(iv) of INEC Guidelines for 2019 General Elections. He submitted further that the procedure has been validated by several decisions, such as: **Omoboriowo Vs Ajasin (1984) 1 SCNLR 10, Adebayo Vs Maiyaki (1991) LRCN 1; Nnadi Vs Ezike (1999) 10 NWLR (Pt.622) 229 @ 239; Uche Vs Igwe (2012) LPELR-14439 (CA) @ 34-39; Emerengwa & Anor. Vs INEC & Ors. (2017) LPELR – 43226 (CA).**

He submitted that the authorities relied upon by the lower court did not consider the *sui generis* nature of election results given to Police Officers and that the cases dealt with documents tendered from the Bar without calling their makers or anyone linked to them.

In paragraph 4.31 of their brief, the appellants set out the relevance of the exhibits in contention. He noted that the respondents failed to adduce any evidence in proof of their allegation that the documents were forged. He also referred to **Adelaja Vs Fanoiki & Anor. (1990)**

2 NWLR (Pt. 131) 137 @ 153 B-D where it was held that where there is a complaint that a document does not exist (as contended by the respondents), the proof of the existence of the document would be conclusive as to its validity.

With regard to the second issue, it is the appellants' contention that in spite of correctly stating that the Petitioners' main grouse was that the 1st respondent was not validly elected by the majority of votes cast at the election and that the election was invalid by reason of non-compliance with the Electoral Act and that the non-compliance arose as a result of the action of the 3rd respondent by unlawfully excluding polling unit results in areas where the petitioners recorded a very high number of votes, the two lower courts wrongly held that the allegation of exclusion of votes could not be proved without calling the relevant polling agents from the affected polling units.

Learned senior counsel submitted that by Section 133(1) of the Evidence Act, 2011, the burden of first proving the existence or non-existence of a fact lies on

the person against who the judgment of the court would be given if no evidence were produced on either side, regard being had to any presumption that may arise on the pleading. He also referred to Section 136(1) of the Act, which provides that the burden of proof may in the course of the trial, be shifted from one side to the other. Relying on the case of **Okoye Vs Nwankwo (2014 15 NWLR (Pt.1429) 93**, he submitted that the burden of proof is fixed on the pleadings.

He submitted that the appellants discharged the burden of proving exclusion of results by tendering relevant documents and calling several witnesses. He submitted further that there was no issue joined by the parties as to whether elections held in the various polling units and that by Section 168 (1) of the Evidence Act, there is a presumption that elections held in all the polling units on election day. He also referred to Section 145(2) of the Evidence Act.

Learned senior counsel submitted that the respondents did not tender any result for the election in the 388 polling units in issue to contradict the duplicate

originals of the results tendered by the appellants even though RW5 admitted that men and materials were deployed to the 388 polling units for the election. He submitted that the duplicate originals of Forms EC8A tendered by the Appellants enjoyed the presumption of regularity and the duty to rebut same was on the respondents. He referred to: **Ogbole & Anor. Vs Okloho (2015) LPELR – 41772 (CA) @ 45 – 46 A – B.**

He submitted that the lower court misconstrued the appellants case when it held, *inter alia,* that PW11 and PW51 could not give evidence about the anomalies in the 388 polling units complained of because the appellants, in their pleading, never made any complaint about any anomaly in any of the 388 polling units. He submitted that having misconceived their case and having misplaced the burden of proof, the decision of the lower court is perverse and has occasioned a miscarriage of justice. He relied on: **Edilcon (Nig) Ltd. Vs UBA Plc (2017) 18 NWLR (Pt. 1596) 74 @ 105 – 106 H – A.**

Learned senior counsel submitted that all that a petitioner who alleges wrongful exclusion of votes or cancellation needs to do is to produce and tender the results in Form EC8A showing that they were excluded from Form EC8B. He referred to **Uduma Vs Arunsi (2012) 7 NWLR (Pt. 1298) 55 @ 118 – 119 H – B.** He noted that the 3rd respondent called no witness nor tendered any documentary evidence to justify the exclusion and none of the respondents cross-examined the appellants' witnesses on the complaint that polling unit results were excluded from ward collation result. He contended that it was the misconception of the appellants' case by the lower court that led it to treat the evidence of PW11 and PW51 as hearsay evidence having wrongly construed their evidence to be seeking to prove what transpired at the polling units during the election. He referred to the dissenting opinion of Oho, JCA, in this regard.

In addition, learned counsel argued that the respondents failed to comply with Paragraphs 12(2) and 15 of the First Schedule to the Electoral Act, 2010, as

amended, which requires them to plead specifically the particulars of votes objected to, the reason for the objection against the votes and to show how the respondent intends to establish at the trial that the petitioner was not entitled to succeed or be returned. He submitted that the respondents ought to have tendered what they claimed to be the genuine results to enable the tribunal compare both sets of results to determine which is authentic from the 388 polling units.

He reiterated the fact that the only issue joined on the pleadings was whether or not the 3rd respondent excluded votes due to the appellants from 388 polling units and not on whether election took place in those units and therefore the presumption under Section 168(1) of the Evidence Act, 2011 remained unchallenged.

In reaction to the above submission, Dr. Onyechi Ikpeazu, SAN, submitted on behalf of the 1st respondent that having regard to appellants' pleading, particularly in paragraphs 20 and 21 of the petition, they were obliged to prove (i) that elections were conducted in each of the 388 polling units; (ii) that the elections were properly

conducted in those polling units; (iii) that they had agents in each of the polling units and (iv) that the results of the election in each of the 388 polling units were issued by the presiding officers to the appellants' agents who were present when the election took place in those units. He contended that the only evidence that would infuse life into the Forms EC8A and EC8B relied upon by the appellants was the evidence of the makers of the documents i.e. the appellants' agents. He referred to the 1st respondent's pleading in paragraph 8(i) and (ii) of his reply wherein he denied the averment of the appellant relating to the exclusion of votes and alleged that the result sheets relied upon were false. He referred to similar averments by the 3rd respondent in its reply.

Replying on the case of **Buhari Vs Obasanjo (2005) 13 NWR (Pt. 941) 1 @ 315 – 316 B – C,** he submitted that the duplicate result sheets tendered were of no evidential value, having not been tendered by their makers. He submitted that it was imperative that the Police Officers who were at the specific polling units ought to have been called to testify. On the effect of

documents not tendered by polling unit agents or their makers, he referred to: **Udom Emmanuel Vs Umana (2016) LPELR – 40659 (SC); Wike Vs Peterside (2016) 7 NWLR (Pt. 1512) 452.**

Learned senior counsel submitted that the appellants called only 28 polling unit agents whose evidence was disbelieved by the Tribunal leaving 360 polling units unattended and that the finding was unchallenged. He submitted further that from the record, the evidence led by the appellants' polling unit agents was untruthful because it was evident that they alone signed all the results tendered. Relying on the authority of **Ezemba Vs Ibeneme (2004) 14 NWLR (Pt. 894) 617 @ 654,** he submitted that the evidence of PW1 – PW10, PW35 – PW50 and PW52 – PW53 should be discountenanced.

He submitted further that evidence of PW11 (the 1st appellant) and PW51 (the State Agent) and the tabulation of scores relied upon in their pleading in fact contradicted their case by revealing inconsistences between the number of votes scored *vis a vis* the number of registered voters. He submitted that the lower court was right in

holding that the appellants were not entitled to the reliefs sought in the absence of the evidence of polling unit and ward collation agents.

On the review of evidence by the lower court, learned senior counsel submitted that it was the appellants who urged the court to invoke its powers under Section 15 of the Court of Appeal Act. He also submitted that paragraphs 12(2) and 15 of the First Schedule to the Electoral Act referred to by learned senior counsel for the appellants are inapplicable to this case. He submitted that an objection to votes contemplated by the said paragraphs is in relation to votes declared by INEC for Petitioners and that since the 1st respondent's score was much higher than that of the Appellants, there was no basis for such an objection.

It was contended that the appellant's grouse is principally with the style adopted by the lower court in writing its judgement which complaint as to form would not vitiate an otherwise valid judgment. He referred to **Andrew Vs INEC (2018) 9 NWLR (Pt. 1625) 507; Doma Vs INEC (2018) LPELR – 7822 (SC).**

Learned senior counsel for the 2nd respondent, K.C.O. Njemanze, SAN made similar submissions to those of learned senior counsel for the 1st respondent to the effect that the appellants pleadings were contradictory and unreliable in terms of the calculation of scores allegedly excluded and as regard the failure of the appellants to call the makers of the documents relied upon and the relevant polling unit agents. It was contended that the evidence of PW11 and PW51 amounted to documentary hearsay and therefore lacked probative value. He submitted that there was uncontradicted evidence led by DW4, an INEC Official and Exhibit G2RD1 – 27 tendered by him to show that elections in the 388 polling units did not hold or were cancelled by the 3rd respondent.

He submitted that none of the appellants' witnesses i.e. PW11, PW51 and PW54 made or witnessed the making of the documents tendered in evidence and the lower courts were right in not attaching any evidential value thereto. On the difference between admissibility of a document and its probative value, he referred to: **ACN**

Vs Lamido (2012) 8 NWLR (Pt. 1303) 360; Buhari Vs INEC (2008) 19 NWLR (Pt. 1120) 246; Belgore Vs Ahmed (2013) 8 NWLR (Pt. 1355) 60 @ 100 E – F.

On the need for polling agents who received the forms from the electoral body and in whose presence the said officials prepared and signed the forms on which the disputed figures are written, to testify, he relied on: **Hashidu Vs Goje (2003) 15 NWLR (Pt. 843) 352 B – C; Omoboriowo Vs Ajasin (1984) 1 SCNLR 108; Adewale Vs Olafia (2012) 17 NWLR (Pt. 1330) 478 @ 510 F.**

Learned senior counsel submitted that the onus was on the appellants to call the INEC officials including the presiding officers who purportedly made the 388 pink copies of the polling units' results to testify that they issued those results. He submitted that the onus of proving that the election results declared by the 3rd respondent were incorrect, lay on the appellants, having regard to the presumption that the results declared by INEC are correct and authentic. It was submitted that

since the appellants were seeking declaratory reliefs, they must succeed on the strength of their case and not on the weakness of the defence. It is further contended that the documents relied upon were dumped on the Tribunal and no attempt was made to tie them to the specific aspects of the appellants' case. Learned senior counsel also contended that the appellants failed to demonstrate the voters register. He referred to **Yahaya Vs Dankwambo (2016) 7 NWLR (Pt. 1511) 284 @ 313 A – B; Eze Vs Okoloagwu (2010) 3 NWLR (Pt. 1180) 183.**

The submissions of learned senior counsel for the 3rd respondent, Aham Eke Ejelam, SAN are in line with the submissions on behalf of the 1st and 2nd respondents.

I have read and digested the appellants' replies to the 1st, 2nd and 3rd respondents' respective briefs. Relevant aspects thereof will be referred to if and when the need arises in the course of the judgment.

In order to properly appreciate the basis on which the case was sought at the trial Tribunal, it is necessary

to consider the pleadings of the parties. It is settled law that the essence of pleadings is to compel the parties to define accurately and precisely, the issues upon which the case is to be contested in order to avoid the surprise at the trial and to confine the evidence relied upon within the parameters of the facts pleaded. See: **Katto Vs CBN (1991) 9 NWLR (Pt. 214) 126; Adeosun Vs Govt. of Ekiti State & Ors (Supra); Buhari Vs Obasanjo (2005) 13 NWLR (Pt. 941); Anyafulu & Ors. Vs Meka & Ors (2014) LPELR – 22336 (SC).**

It is also settled law that issues are said to be joined on the pleadings when an averment in an opponent's pleading has been denied or traversed. The court and the parties are bound by the issues so joined. See: **Nwadiogbu Vs Nnadozie (2001) 6 SC 107; Dulek Nig. Ltd. Vs. Ompadec (2007) 7 NWLR (Pt. 1033) 402; Kubor Vs Dickson (2013) 4 NWLR (Pt. 1345) 534.**

The crux of the appellant's case was pleaded in paragraphs 18 – 25 of the Petition at pages 7 – 28 of the record as follows:

"18. It was in the course of collation of the results at the Ward, Local Government and State Levels, that the 3rd respondent incorrectly stated the votes of the 1st respondent and thus reduced the votes of the Petitioners by excluding the results from the polling units where the Petitioners scored overwhelming, majority of the votes cast.

19. Your petitioners state further that the 3rd Respondent's omission to record and reckon with votes due to the Petitioners from the units set out in the table below gave undue advantage to the 1st and 2nd respondents. The 3rd respondent (at the Collation centres) unlawfully excluded the polling unit results in the areas where the Petitioners recorded very high number of votes. The Petitioners shall rely on the excluded results as shown on the face of results Forms EC8B of the Ward Collation Centres at the trial of this petition. The 3rd respondent is hereby given notice to produce the originals of the said forms EC8B at the trial.

20. The 3rd Respondent unlawfully excluded the polling unit results in units where elections were properly conducted and results issued by the presiding officers to the petitioners' agents. The petitioners plead and shall rely on the duplicate copies of the polling unit results (Form EC8A) given to their agents. The 3rd respondent is hereby given notice to produce the originals of the results at the trial.

21. The total votes cast at the polling units (where the 3rd Respondent unlawfully excluded the results), and the scores recorded for the parties are as shown in the table hereunder... [at pages 9-21 of

Vol. 1 of the record, the table of the excluded results was pleaded.]

23. ***The Total votes of the petitioners from the unlawfully excluded polling units is 213,695 while the total votes of the 1st respondent from the same unit is 1,903.***

24. ***When the votes from the excluded units are added to the 1st petitioners and 1st respondent the total score will be 310,153 for the first petitioner and 260,162 for the first respondent.***

    Grand total votes after addition of unlawfully excluded votes:

1st Respondent	***260, 162***
1st Petitioner	***310, 153***

25. ***The 1st Petitioner by the above figures clearly secured the majority of the lawful votes cast at the election and ought to be returned as the winner of the election."***

The 1st respondent denied these averments in paragraph 8(i) and (ii) of his reply as follows:

"8. 1st Respondent denies paragraphs 18, 19, 20, 21, 22, 23, 24, 25 and 26 of the Petition and puts the Petitioners to the strictest proof. 1st Respondent further states as follows:

(i) The 3rd Respondent did not in the process of the collation at the Ward, Local Government and Constituency Collation Centres, incorrectly state the votes of the 1st Respondent, and reduce the votes of the Petitioners by excluding results from polling units where the petitioners scored "overwhelming majority of

the votes cast", as alleged or at all. <u>Petitioners have embarked on a scheme to introduce false result sheets into the result of the election. They are thus put to the strictest proof of the origin of the result, the existence of the Polling Units as well as the distribution of election materials to those purported Polling Units;</u>

(ii) 3rd Respondent did not exclude any valid result sheets from computation of the result of the election, as all competent result sheets which emanated from all recognized Polling Units were collated in the process."

The 2nd respondent in paragraphs 13 and 14 of its reply pleaded thus:

"13. In specific reaction to paragraphs 18, 19, 20, 21, 22, 23, 24, 25 and 26 of the petition, the 2nd respondent denies that the 3rd respondent incorrectly stated the votes of the 1st respondent and/or reducing the fictional votes scored by the petitioners. The 2nd respondent further deny that the petitioners polled overwhelming majority of the votes cast at the said election.

14. The 2nd respondent further states that the 3rd respondent did not exclude any valid result sheet from the computation of the result of the election which emanated from all polling units collated."

The 3rd respondent, who conducted the elections also denied these averments in paragraph 7 of its reply thus:

> ***"7. Paragraphs 18 – 26 of the said petitions are denied and the petitioners put to the strictest proof of the averments contained in the said paragraphs. In further denial of the said paragraphs, the 3rd Respondent states thus:***
>
> ***a. The 3rd Respondent did not incorrectly state the votes of the 1st respondent in the course of collation of results at the Ward, Local Government and State Levels as alleged or at all.***
>
> ***b. The 3rd Respondent did not reduce any alleged votes of the Petitioners by excluding results from polling units where the petitioners allegedly scored overwhelming majority of votes cast.***
>
> ***c. The 3rd respondent did not omit to record and reckon, with votes due to the Petitioners as alleged or at all from any table set out in the said petition and <u>any such table showing results are fictitious and suborned.</u>***
>
> ***d. The 3rd Respondent did not unlawfully exclude the polling unit results in units where elections were properly conducted***

and results issued by any presiding officer to the petitioner's agent as alleged or at all.

e. ***The 3rd Respondent did not unlawfully exclude the polling unit results in units where elections were properly conducted and results issued by any presiding officer to the Petitioner's agent as alleged or at all.***

f. ***The tables drawn and shown by the Petitioners as containing the purported accurate results from the various units are incorrect and the 3rd Resident further states that it did not unlawfully exclude the results of the Petitioners.***

The trial Tribunal, in its judgment, stated at page 3031 Vol. 4 of the record:

"It is to be noted, as per the petition of the Petitioners that the main grouse is that the 1st petitioner was not validly elected by the majority votes cast and that the election is invalid by reason of non-compliance with the Electoral Act, 2010 (as amended) and by the pleadings of the Petitioners the said non-compliance arose as a result of the action of the 3rd respondent by unlawfully excluding polling unit results in the area

where the Petitioners recorded very high number of votes."

The court below also identified the issues joined by the parties as follows:

> ***"In the instant case, the Appellants, by their pleadings put forward in their paragraphs 19-24, the issue of exclusion of appellants' votes or scores in 388 polling units. Exclusion of votes has to do with collation of votes at the election."***

It is thus quite clear that from the state of the pleadings and the finding of the two lower courts, the main issue joined on the pleadings was the allegation that votes due to the appellants from 388 polling units were excluded from the votes accredited to them at the election and that if the said excluded votes were added to their score, they would have emerged as the winners of the election.

The question then arises as to how an allegation of exclusion of votes is to be proved. In **Buhari Vs Obasanjo (Supra),** it was held that where a petitioner contests the legality of votes cast in an election and the

subsequent result, he must tender not only the forms and other documents used at the election, he must also call witnesses to testify to the illegality or unlawfulness of the votes cast and prove that the illegality or unlawfulness substantially affected the result of the election. The onus was on the Petitioners who challenged the results to prove same on a preponderance of evidence.

However, in the instant case, the contention was that at the Ward Collation stage, votes scored by the appellants were unlawfully excluded. The documents required to prove this allegation would be Form EC8A series, which is the primary evidence of an election i.e. statement of results from polling units and Form EC8B, the ward collated results. The appellants called 54 witnesses and tendered Forms EC8A, EC8B, EC8C, EC8D and EC8E series. The 1st respondent also tendered certified true copies of the Form EC8 series and called 4 witnesses. The 2nd respondent called one witness while the 3rd respondent did not call any witness and did not tender any documents.

The trial Tribunal and the court below were of the opinion that in order to prove unlawful exclusion of results in the said 388 polling units, it was incumbent upon the appellants to call the polling unit agents to testify to the fact that elections took place in their respective units.

A careful perusal of the appellants' pleading 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 appliable in the circumstances. This is more so because the respondents, particularly the 3rd respondent denied excluding the votes scored by the appellants in the affected units. In other words, they did not contend that elections did not take place in the 388 polling units. Their contention is that the results relied

upon by the appellants are false. That they are not genuine. They pleaded that they would tender the genuine results.

Having pleaded that the documents are false, the respondents made allegations of a criminal nature against the appellants. They were required to plead the specific elements of fraud and lead evidence showing the genuine results. Not only must the allegation be proved beyond reasonable doubt, it must also be proved that the appellants personally committed the forgery or aided and abetted the commission of the crime or that they procured the commission of the crime through their agents or officials. It is well settled that mere averment in pleadings do not constitute evidence. See: **Uchechukwu & Anor. Vs Barr. Uzama Simon Okpalake & Ors (2010) LPELR – 5041 (CA); Maihaja Vs Gaidam (2017) LPELR – 42474 (SC) @ 35 – 36 A – D; Audu Vs INEC (No. 2) (2010) 13 NWLR (Pt. 1212) 456.** Although they relied heavily on the assertion that Exhibits PPP1 – PPP366 were fake, no evidence was adduced to prove the assertion at all, let

alone beyond reasonable doubt. The respondent failed to produce the "genuine" results as pleaded.

I have considered the submissions of learned counsel for the appellants to the effect that, contrary to the holding of the lower court, Exhibits PPP1 – PPP366 being duplicate originals required no certification. Section 86(2) of the Evidence Act, 2011 provides:

> ***" 86(2) Where a document has been executed in several parts each part shall be primary evidence of the document."***

The said documents being duplicates of the original required no certification. See: **Gambo Idi Vs the State (2017) 6 SC (Pt. IV)96; P.D.P. Vs INEC (2014) 17 NWLR (Pt. 1437) 525; Daggash Vs Bulama (2004) 14 NWLR (Pt. 892) 144.**

The issue to consider is whether any probative value ought to have been accorded to Exhibits PPP1 – PPP366 tendered by PW54, a Deputy Commissioner of Police, who testified on the basis of a subpoena *duces tecum et testificandum* issued to him by the court. (See pages 2572 – 2589 of the record). The documents tendered

where available, a copy of each of the completed forms after it has been duly signed as provided in Subsection (2) of this Section."

See also paragraph 22(c) (vi) of INEC Guidelines for 2019 General Elections.

On the admissibility and validity of Election Result Forms given to the Police, it was held in **Nnadi Vs Ezike (1999) 10 NWLR (Pt. 622) 228 at 238 C-E** (a decision of the Court of Appeal sitting as the final court at the time) as follows:

"Election result forms given to the Police security men cum observers at the polling booths, as dictated by the provisions of paragraph 33 of Schedule 4 to Decree No.5 of 1999, constitute an internal and inbuilt control mechanism or measures designed to unravel unlawful cancellations, alterations, mutilations and juggling of figures during elections and such result as produce by the Police are the best and tenable available source to test the veracity of the parties' contention on the issue of what in fact were the actual scores made by the contending parties. To jettison the forms given to the Police under any guise, as in the instant case, is like throwing discretion to the wind."

The tendering of Exhibits PPP1 - PPP366 through PW54 was to show that the scores recorded therein were excluded from the forms EC8B (ward collation results). It is also to be reiterated that PW54 was summoned by the court to produce and tender the documents. His Lordship Oho, JCA in his dissenting opinion at page 410 Vol. 5 of the record, held:

> ***"The Police copies are particularly relevant and admissible where, as in this case, the respondents raised the issue of the authenticity of the results in their pleadings. The copies given to the Police are in those circumstances relevant and tenable to test the veracity of the parties' contention on the issue of what in fact transpired."***

I agree with him. The respondents failed to prove that the documents were fake or forged.

Paragraph 12(2) of the First Schedule to the Electoral Act, 2010 (as amended), provides:

> ***"Where the respondent in an election petition complaining of an undue return and claiming the seat or office for a petitioner intends to prove that the claim is incorrect or false, the respondent in his reply shall set out the facts and figures clearly and distinctly disproving the claim of the petitioners."***

See also paragraph 15 of the First Schedule.

Once again, I agree with the dissenting opinion of Oho, JCA, that the respondents failed to comply with these provisions. With respect to learned senior counsel for the 1st respondent, it is not correct to state that the 1st respondent did not need to comply because the votes credited to him were far higher than the votes credited to the appellants.

As regards the 3rd respondent, it failed woefully to tender the results it termed "genuine," which would have rebutted the presumption of regularity in favour of the documents tendered by the appellants.

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 the 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

declared in their favour, they would have emerged as the winners of the election.

This court does not lightly set aside concurrent findings of the two lower courts. It will however, disturb those findings where it is satisfied that there is an apparent error on the face of the record of proceedings showing or manifesting that such findings are perverse. A decision is perverse where, for example, it has been shown that the trial court (or the court below) took into account matters which it ought not to have taken into account or where the decision has occasioned a miscarriage of justice. See: Also **Ayeni Vs Adesina (2007) ALL FWLR (Pt.370) 1451 @ 1557-1458.**

I am of the view that the consideration of the appellants' case on a wrong premise occasioned a miscarriage of justice. I resolve issues 1 and 2 in favour of the appellants. On this basis I hold that the two lower courts were wrong when they held that the appellants failed to prove their entitlement to the reliefs claimed. I find these two issues sufficient to determine the appeal.

In the circumstances, I hold that there is merit in this appeal. The appeal is allowed. The judgment of the lower court affirming the judgment of the Governorship Election Tribunal, is hereby set aside. It is further ordered as follows:

1. It is hereby declared that votes due to the Appellants (i.e. Sen. Hope Uzodinma & All Progressives Congress) from 388 polling units were wrongly excluded from the score ascribed to them.
2. It is hereby ordered that the Appellants' votes from the 388 polling units unlawfully excluded from the Appellants' score shall be added to the results declared by the 3rd respondent.
3. It is hereby declared that the 1st Respondent, Rt. Hon. Emeka Ihedioha was not duly elected by a majority of lawful votes cast at the said election. His return as the Elected Governor of Imo State is hereby declared null and void and accordingly set aside.

4. It is hereby declared that the 1st appellant, Sen. Hope Uzodinma Polled a majority of lawful votes cast at the Governorship Election held in Imo State on 9th March, 2019 and satisfied the mandatory constitutional threshold and spread across the state.

5. It is hereby declared that the 1st appellant, Sen. Hope Uzodinma is the winner of the Governorship Election of Imo State held on 9th March, 2019.

6. The Certificate of Return issued to the 1st respondent Rt. Hon. Emeka Ihedioha is hereby withdrawn.

7. It is hereby ordered that a certificate of return shall be issued to the 1st appellant, Sen. Hope Uzodinma forthwith and he should be sworn in as the Governor of Imo State immediately.

CROSS-APPEAL

SC.1470/2019

Rt. Hon. Emeka Ihedioha Vs Sen. Uzodinma & 3 Ors.

Having regard to the resolution of Appeal No SC.1462/2019 in favour of the appellants, this cross-appeal is spent. It has become academic and is hereby struck out. Parties to bear their costs.

KUDIRAT MOTONMORI OLATOKUNBO KEKERE-EKUN
JUSTICE, SUPREME COURT

SC. 1462/2019

D.D. DODO, SAN, CHIEF OLUSOLA OKE, ABDUL IBRAHIM, SAN, CHIEF A.O. AJANA, SAN for the Appellants with CHIEF C.O.C. AKAOLISA ESQ.

DR. ONYECHI IKPEAZU, SAN, J.T.U. NNODUM, SAN, EMEKA OKPOKO, SAN, BODE OLANIPEKUN,SAN & A.S. OGUJIOFOR ESQ. for the 1st Respondent.

K.C.O. NJEMANZE, SAN, CHIEF C.U. EKOMARU, SAN, EMEKA ETIABA, SAN & L.M. ALOZIE, SAN for the 2nd Respondent with L.A. NJEMANZE ESQ.

AHAM EKE EJELAM, SAN & J.O. ASOLUKA, SAN, C.O. AHUMIBE ESQ., C.U. ONYEUKWU ESQ. & C.C. CHIKERE ESQ. for the 3rd Respondent