IN THE NATIONAL AND STATE HOUSE OF ASSEMBLY

ELECTION PETITION TRIBUNAL

HOLDEN IN UMUAHIA, ABIA STATE

THIS TUESDAY THE 3RDDAY OF OCTOBER, 2023

BEFORE THEIR LORDSHIPS

HON. JUSTICE ABUBAKAR IDRIS KUTIGI……CHAIRMAN

HON.JUSTICE AHMAD MUHAMMAD GIDADO……MEMBER I

HON. JUSTICE MOMSISURI BEMARE ODO……MEMBER II

EPT/AB/SHA/5/2023

BETWEEN:

1. HON. UJOUMUNNA NNABUGWU CHIMEZIE - PETITIONERS

2. ALL PROGRESSIVE CONGRESS (APC)

AND

1. HON. EMMANUEL IHUOMA NDIUKWU EMERUWA - RESPONDENTS

2. LABOUR PARTY (LP)

3. INDEPENDENT NATIONAL ELECTORAL COMMISSION (INEC)

JUDGMENT

JUDGMENT DELIVERED BY HON. JUSTICE MOMSISURI BEMARE ODO

The 1st and 2nd Petitioners and 1st and 2nd Respondents were all contestants at the 18th March 2023 Houses of Assembly Elections. While the 1st petitioner was sponsored by the 2nd petitioner, the 1st Respondent was sponsored by the

2nd Respondent at the said election conducted by the 3rd Respondent in to the Aba South State constituency.

At the conclusion of the Election, the 1st and 2nd Respondents were declared the winners and returned as the candidate who scored the highest number of valid votes at the election by the 3rd Respondent.

Aggrieved by the outcome of the election the 1st and 2nd petitioners filed this petition challenging the declaration and return of the 1st and 2nd Respondents as winners of the election on the following grounds-

1. **The 1st Respondent was not duly elected by the majority of lawful votes cast at the election.**
2. **That the election of the 1st Respondent is invalid by reason of the election being marred by irregularities.**
3. **The 1st Respondent was at the time of the election not qualified to contest the election.**

The facts in support of the three (3) grounds of this petition are contained in paragraph 1-14 at pages 3-5 of the petition. the reliefs sought by the petitioners are as follows.

a) **That it may be determined that the 1st Respondent was not duly elected by a majority of lawful votes cast in the said election and therefore the declaration and the return of the 1st Respondent by the 3rd Respondent as elected of Aba South State constituency is unlawful, undue, null and void and of no effect.**

b) That it may be determined that the 1st Respondent was at the time of the election not qualified to contest the said election.

c) That it may be determined that the Abia State House of Assembly election held on the 18th March 2023 was marred by irregularities and a fresh election be ordered or IN ALTERNATIVE the entire election in Aba South State constituency be nullified and a fresh election be ordered.

At the trial of this petition, the 1st Petitioner testified as PW1 and the only witness of the petitioners.

He adopted his evidence in chief on oath and tendered the followings:-

(i) The 2nd petitioners (APC) membership card of PW 1 as EXHIBIT P1

(ii) The Permanent voters card of PW1 as EXHIBIT P2

(iii) A copy of a letter titled

"APPLICATION FOR CERTIFIED TRUE COPIES OF ALL THE ELECTORAL MATERIALS USED IN THE CONDUCT OF THE GOVERNORSHIP/HOUSE OF ASSEMBLY ELECTION TO WIT- POLLING UNITS RESULT SHEET AND COLLATION RESULT SHEET IN FORM EC8A(1)

Written on behalf of the petitioners by the Law firm of UKPABIO& ASSOCIATES (UWANAH CHAMBERS) as EXHIBIT P3

When cross-examined, the 1st petitioner as PW1 said that his major bone of contention are as contained in paragraphs 15,16,17and 18 of his written deposition on pages 9-10 of the petition.

He said that he came 5th in the election as declared by the Independent National Electoral Commission (INEC).

That he was not a contestant in the PDP primaries nor the Labour Party primaries in the Aba South state constituency.

The petitioners closed their case with the evidence of the 1st petitioner.

On the part of the Respondents, the 1st Respondent at the close of the petitioner's case opened his defense and testified as DW1. He adopted his deposition which he made on oath as his evidence and tendered the following documents which were admitted and accordingly marked as EXHIBITS:

(i) DW1 permanent voters card as exhibit D3 (a).
(ii) DW1 Labour party membership card exhibit D3 (b).
(iii) A letter titled " NOTICE OF RESIGNATION AS A MEMBER OF PDP (PEOPLES DEMOCRATIC PARTY) written by Emmanuel I Emeruwa (1st Respondent) as EXHIBIT D3(C).
(iv) Polling units result for 7 wards INEC form EC8A of 7 wards as EXHIBIT D4 (1)-(7).
(v) Form EC8C summary of result sheets for Aba South State constituency as EXHIBIT D5.
(vi) Certified True Copy (CTC) of 3 INEC forms mentioned above as EXHIBIT D6.

When he was cross-examined DW1 said he resigned from PDP and joined Labour Party (LP) on the 21st May 2022 as contained on EXHIBIT D3 (C).

The 1st Respondent called one more witness who testified as

DW2- one Mr Gabriel Nwaobilor. He also adopted his written deposition on oath as his evidence in –chief and tendered his-

(i) Permanent voters card as EXHIBIT D1 (a)
(ii) Labour Party membership card as EXHIBIT D1(b)
(iii) Labour Party original Register of members which was substituted with a photocopy of same as EXHIBIT D2. DW2 was accordingly cross-examined and said that the 1st Respondents name is NO 77 as seen in EXHIBIT D2.

With the evidence of DW1, the Respondent closed his defense.

The 3rd Respondent on her part called 3 witnesses as follows

DW3- He is by name IrobiChijioke. He adopted his written deposition on oath as his evidence in chief and was duly cross-examined by all parties. He tendered his permanent voters card which was marked as EXHIBIT D7

DW4- Kingsley IfeanyiMadubuike also testified. He adopted his written deposition on oath as his evidence and was duly cross-examined. And lastly

DW5- His name is Okoro Martins. He described himself as a public servant working with INEC. He said he conducted the election in the Aba South state constituency on 18th/3/2023.

He gave evidence with respect to the duties he performed on the day of the election and he was duly cross-examined by all parties. At the end of DW5's evidence the 3rd Respondent also closed her case.

At the close of evidence of all the parties, addresses were filed and exchanged in accordance within the stipulated time available to all parties in accordance with the provision of the Electoral Act as follows.

The petitioner's final written address was filed on the 9th August 2023 and they formulated and canvassed one issue for determination to wit-

> **"whether it is not in contravention of section 107 (f) of the 1999 constitution of the Federal Republic of Nigeria (as amended) for the 1st Respondent having not resigned his membership of Peoples Democratic Party (PDP) to contest the Aba South state constituency election of 18th March 2023 under the platform of the 2nd Respondent Labour Party"**

The 1st Respondent final written address was filed on the 1st of August 2023, while the reply on points of law was filed on 13th August 2023. He formulated and argued 3 issues for determination which are

a) **Having regard to the relevant provisions of the constitution of the Federal Republic of Nigeria, 1999 (as amended) the provision of the Electoral Act 2022 and the plethora of Judicial authorities, as well as admissible evidence on record, whether the election of the 1st Respondent as a member representing Aba South State**

constituency on the 18th March 2023 was not in substantial compliance with the provision of the Electoral Act 2022.

b) Regard being had to the clear provisions of the constitution of the Federal Republic of Nigeria, 1999 (as amended), the provision of the Electoral Act 2022, and decided case law authorities, whether the 1st Respondent was not qualified to contest the election in to the office as a member representing Aba South State constituency on the 18th March 2023.

c) Considering the evidence received in this Tribunal, whether the Honourable Tribunal can grant the reliefs sought by the Petitioners.

The 2ndpetitioners final written address was filed on the 1st of August 2023 while the reply on points of law was filed on the 13th August 2023. The 2nd Respondents formulated 4 issues for determination; to wit

1. **Whether the petition as constituted and in the circumstance is competent?**

2. **Whether the 1st Respondent was qualified to contest the election into Aba south State constituency?**

3. **Whether the election in to Aba South State was not conducted substantially in accordance/compliance with the provisions of the Electoral Act 2022?**

4. **Whether the petitioners were able to prove the various allegation in their petition as to be entitled to the grant of the reliefs sought in their petition.**

And finally,

The 3rd Respondent only filed her final written address on the 1st/8/2023. She formulated and argued 3 issues for determination as follows;

a) **Whether this petition can still survive in view of the facts that the 1st petitioner admitted having come to his lawyer's office and made the written statement on oath and signed them before his lawyer.**

b) **Whether the presentation of the petition particularly the grounds, pleadings and reliefs present any justifiable basis for this Tribunal to countenance same?**

c) **Whether the petitioners have being able to discharge the evidential burden placed on them for the Tribunal to believe that the 1st Respondents name is not in the membership register of the Labour party as at the time he was given that ticket as a candidate for Aba South State constituency by the Labour Party and that the Labour party did not submit, her membership register of the 3rd Respondent before the conduct of her party primaries.**

Having carefully studied the petition, the responses by the Respondents, the evidence adduced during the trial both oral and documentary and finally the

addresses filed before us, we have unanimously formulated the sole issue for determination to wit:

> **"having recourse to the evidence before us vis-à-vis the provision of the relevant Laws, whether the petitioners have proved their petition and the reliefs they seek thereof."**

It can be recalled that at the pre-hearing sessions of this petition, a number of Interlocutory Application were filed by the Respondents. We shall now deal with these applications before resolving the issues formulated by us.

INTERLOCUTORY APPLICATIONS

The first interlocutory application is a motion on notice filed by the 1st Respondent on the 17th May 2023. It was brought pursuant to

> **"Sec 134 (1) and 140 (1) & (2) (b) of the Electoral Act 2022, paragraphs 4 (1) (c) & (d), (2) & (7) and 47 (1) and (3) of the 1st schedule to the Electoral Act 2022.**

The motion is seeking for

1. **An order of this Tribunal dismissing and/or striking out the petition or parts of it thereof for being incompetent.**
2. **And for such further order(s) as the Tribunal may deem fit and proper to make.**

The grounds upon which the motion on notice is predicated are.

1. **The Honourable Tribunal has no jurisdiction to adjudicate on the petitioner's allegation predicated on grounds (1-3) of the petition contained at page 3 of the said petition which lacks necessary facts and /or particulars or required by paragraph 4 (1) (d) of the 1st schedule of the Electoral Act 2022.**

2. **The Honourable Tribunal lacks the jurisdiction to entertain the petition in that the petitioners failed to state the results of the questioned election of the Aba South state constituency as required by the Electoral Act 2022.**

3. **The 1st petitioner lacks the locus -standi to present the petition and therefore violated the provisions of paragraphs 4 (1) (d) and 7 of the 1stschedule of the Electoral Act 2022.**

4. **Ground 2 of the "GROUNDS" on which the petition is founded is contrary to Sec 134 (1) of the Electoral Act 2022 that stipulates the grounds upon which a petition can be presented.**

5. **The petitioner'sground 3 on non- qualification is vague, bare and meaningless.**

6. **The 3rd Respondent pasted in the Aba South state constituency particulars of the 1st Respondent for the notice of the general public long before the holding of the election under reference to enable action to be taken by any member of the public**

(including the petitioners) to challenge the Respondent's claim and qualification, and no objection was entered by the petitioners or anyone.

7. **Paragraphs 4, 5, (the whole grounds) at pages 1-2 of the petition and 2, 5-15 of the said petition offend the mandatory rules of competent pleadings in election petition and are liable to be struck out, for the respective reasons that they are generic, vague, speculative unreferable non- specific, nebulous, bogus, imprecise, and at large, contrary to the mandatory provisions of paragraphs 4 (1) (d)of the 1st schedule to the Electoral Act 2022.**

8. **Paragraph 5-16 of the facts in support of the grounds upon which election petition is predicated are not within the jurisdictional purview of the Hon Tribunal as they deal with the internal administrative matters of the 2nd Respondent which are purely and exclusively pre-election issues. The said named paragraph ought to be struck out.**

9. **The petition discloses no reasonable cause of action against the Respondent and ought to be struck out.**

10. **That the petition is an abuse of the process of this Hon Tribunal and ought to be dismissed.**

In support of this application is an 8 paragraphs affidavit deposed to by one MrsNkechiIgbeh, a litigation clerk at Munachi chambers, and a written

address. The 1st Respondent/Applicant sought to rely on both affidavit and the written address.

The 1st respondent sole issue for determination is

> **Whether – this Hon Tribunal in the interest of justice can grant this application?**

The learned counsel for the 1st Respondent submits that by the 3 grounds of the petitioner's petition, this Tribunal lacks the jurisdiction to adjudicate on the petitioner's allegation as same lack necessary facts and/ or particulars as required by paragraph 4 (1) (d) of the 1st schedule to the Electoral Act 2022.

He submits that Ground 2 of the petition contravenes Sec 134 (1) of the Electoral Act 2022. That the petitioners hinged their 2nd ground on the fact that the "election was invalid by reason of it being marred by irregularities", which ground is unknown to the Electoral Act 2022. He submits that the petitioner's ground 3 on non-qualification is vague, bare and meaningless. He also submits that the petitioners failed to plead and give particulars in support of the grounds of the petition. he cited the case of **GOYOL V INEC (2012) 11 NWLR (PT1311) 218, and BUHARI V OBASANJO (2005) 13 NWLR 13 (PT941) 1.**

Learned counsel submits that the petition robs this Hon Tribunal of jurisdiction to entertain same because no result of the questioned Aba South State constituency election is stated there in as required by the Electoral Act 2022 making the petition incompetent and liable to be struck out. He cited the case of **KALU V CHUKWUMEREIJE (2012) 12 NWLR (PT1315) 425.**

On the grounds of locus- standi, the learned counsel, submits that the 1st petitioner's lacks the requisite locus-standi to present this petition as he failed to plead and establish his membership of the 2nd petitioner and he equally failed to demonstrate that he participated in the questioned election by voting. He referred to paragraph 2, and 4-15 of the petition at pages 1-2. Learned counsel submits that the pleadings in the paragraphs are fraught with fictitious and false fact that are at variance with the reliefs sought in the petition. He refers to the case **of JEGA V ALIU (2010) ALL FWLR (PT502) 1066.**

On non-qualification of the 1st Respondent. The learned counsel submits that the paragraphs 5-16 of the petition in support of the grounds of non-qualification of the 1st Respondent deals with the internal administrative matters of the 2nd Respondent which are purely pre-election matters over which this Tribunal has no Jurisdiction.

He urged us to dismiss the petition in the overall interest of justice.

In response to the 1st Respondent's Application, the 1st petitioner on behalf of the petitioners, filed a 10- paragraphs counter-affidavit as well as a written address in opposition to the Application.

Learned counsel to the petitioners submits that "an abuse of court process" means the **improper use of legal process or judicial process to the irritation and annoyance of an opponent and the efficient and effectual administration of justice. It is also a process that is frivolous, vexatious and oppressive-** He refers us to the case **of ADENIYI V FRN (2012) 1 NWLR (PT1281) PG 284**

Learned counsel submits that, this application of the 1st Respondent is an abuse of court process, in that, the 1st Respondent filed an application on the 22nd May 2023 seeking to dismiss/striking out this petition for non-compliance with the law, which ruling in the application had been reserved and on the 17th June 2023 again the 1st Respondent filed this Application seeking amongst other reliefs, an order of this Tribunal dismissing and of striking out this petition or parts of it for being incompetent. He submits that the multiplicity of this motion constitute an abuse of court process and ought to be dismissed. He refers to the case **of KODE V YUSSUF (2001) 4 NWLR (PT 703) PG 392.**

Learned counsel submits that the reliefs sought by the applicants are incoherent and speculative. He also submits that the prayers as contained on the face of the motion paper is also incompetent as matters are not determined by the Court /Tribunal in piecemeal.

Learned counsel for the petitioner urged us to strike out paragraph 4, 5 and 6 of the affidavit in support of the motion as they offend Sec 115 (2) of the Evidence Act 2011 as they contain extraneous matters by way of objection, prayers of legal argument or conclusion.

He urged us to dismiss this application of the 1st Respondent.

We having gone through this Application as filed before us by the 1st Respondent as well as the response by way of a counter-affidavit by the petitioners, we raised the following issues for determination by us.

1. **Whether from the facts on record, the petitioners are possessed of the requisite locus -standi to present this petition bearing in mind the relevant provisions of the Electoral Act 2022.**
2. **Whether by the provisions of Section 134 (4) of the Electoral Act 2022 and paragraph 4 (1) (c) &(d), (2) and (7) of the 1st schedule to the Electoral Act 2022 the petition filed on the 7/4/2023 in petition NO EPT/AB/SHA/5/2023 between HON UJUOMUNNA NWAGBUGWU CHIMEZIE & ANOR V HON EMMANUEL IHUOMA .N. EMERUWA & 2 ORS is competent**

ON ISSUE 1

Whether from the facts on record, the petitioners are possessed of requisite Locus-Standi to present this petition bearing in mind the relevant provisions of the Electoral Act 2022.

LOCUS STANDI- is the legal capacity to institute (in this case) an election petition before a Court /Tribunal duly constituted under the relevant laws. To buttress this point we shall refer to the case of **WIKE EZENYVO NYESOM V HON (DR) DAKUKU ADOL PETERSIDE & 3 ORS (2016) 17 NWLR (PT 1512) 452 at 528 SC** – where the Supreme Court held as follows:

> **"where a plaintiff in this case, a petitioner lacks locus standi to maintain an action, the Court/Tribunal lack the competence to entertain his complaint. It is therefore a threshold issue which affects the jurisdiction of Court/Tribunal"**

We also refer to the case of **DANIEL V INEC (2015) 9 NWLR (PT 1463) 113.**

The provisions of **Sec 133 (1) (a) and (b) of the Electoral Act 2022**, spells out the person with the requisite legal standi to a present petition in election matters,

This Section provide that

S 133 (1)

> **An election petition may be presented by one or more of the following persons**
>
> **a) A candidate in an election or**
> **b) A political party which participated in the Election.**

In this petition filed before us by the petitioners and by their paragraphs 1,2, and 5 thereof, the 1st and 2nd petitioners have clearly demonstrated and shown their legal interest in the subject matter of this petition. Irrespective of paragraph 1 and 2 of the 1st Respondent reply to the petition, the 1st Respondent has inadvertently admitted the said paragraphs 1,2 and 5 of the petition by including the names of the 1st and 2nd Petitioners in the table containing the list of parties candidate and their respective allotted scores at the said election, in paragraph 5 at page 7 of his reply to the petition. the 1st Respondent cannot approbate and reprobate at the same time.

The petitioners having clearly demonstrated their locus standi cannot be denied of their right to prosecute their petition to its logical conclusion.

We therefore resolve issue one in favor of the Petitioners.

ON ISSUE 2

Whether by the provisions of Sec 134 (1) of the Electoral Act 2022 and paragraph 4 (1) (c) and (d), (2) and 7 of the 1st schedule to the Electoral Act, the petition filed on the 7/4/2023 in petition NO EPT/AB/SHA/5/2023 BETWEEN HON UJUOMUNNA NNBUGWU CHIMEZIE &ANOR V HON EMMERNUEL IHUOMA .N. EMERUWA & 2ORS is competent

By the provision of **Sec 134 (1) of the Electoral Act 2022,**the grounds upon which an Election may be questioned are as follows;

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

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

c) **The Respondent was not duly elected by a majority of lawful votes cast at the election.**

From the content of the petition at page 3, grounds 1 and 3 of the petition are clearly well formulated with no infractions or additions from what is obtainable in Sec 134 of the Electoral Act 2022. We therefore hold thatAny contention to the contrary by the 1st Respondent is therefore discountenance and struck out.

We are left with the competency of ground 2 of the petition.

The petitioner's ground 2 is to wit:

> **"That the election of the 1st Respondent is invalid by reason of the Election being marred with irregularities"**

The formulation of ground 2 upon which this petition is predicated clearly contravenes **S 134 (1) (b) of the Electoral Act 2022** and the Supreme Court decision in the case of **WIKE EZENYVO NYESOM V DAKUKU ADOL PETERSIDE & 3 ORS (SUPRA)**

Where the apex Court held that

> **"the grounds for questioning an election provided in the Electoral Act are sacrosanct and admits no addition"**

This is because ground 2 of Sec 134 (1) (b) is very specific as it relates to corrupt practices or non – compliance with the provision of the Electoral Act 2022. It is important to bear in mind that by the provisions of **Sec 135 (1) of the Electoral Act 2022,** not all acts of non-compliance with the provision of the Electoral Act 2022 that invalidates or substantially affects the result of an election but that as adjudged by the Election Tribunal or a Court. To this effect, before a petitioner can question the election of the Respondent, his petition must fall within the grounds specified in the Act and not as the ground 2 formulated by the petitioner which is generic in nature unlike that specified by the electoral Act2022- see the case of **OKONKWO V INEC &ORS (2003) 3LRECN 599.**By the decision of the Supreme Court in **NYESOM V PETERSIDE (SUPRA**) any grounds based on section **134 (1) Electoral Act 2022** is competent.In essence any grounds not based on **Sec 134 (1) of the Electoral Act 2022** is incompetent.

The 2nd ground of the petition clearly shows infraction and additions in the way it has been couched and this is contrary to the said section 134 (1), and the Supreme Court decision in **NYESOM WIKE V PETERSIDE (SUPRA)**to this extent, the 2nd ground of the petition is incompetent and we so hold.

The 2nd ground of the petition, all the facts in support of same, as well as the reliefs sought in respect of same by the petitioners are accordingly struck out.

The 1st and 3rd grounds of the petition succeeds and are competent grounds upon which the 1st and 2nd Respondent election can be questioned.

This motion on notice of the 1st Respondent succeed with respect to the 2nd ground of the petition only but fails with respect to the 1st and 3rd grounds of this petition.

We also have a motion on notice also filed by the 1st Respondent which was dated and filed on the 22nd May 2023 and brought pursuant to **Section 140 (1) and (2) (b) of the Electoral Act 2022, paragraph 16(1) and (2) and 47 (1) and (3) of the 1st schedule to the Act.**

The Application is seeking for the following reliefs;

"**an order striking out the petitioners reply to the 1st Respondent's reply for being incompetent**"

The grounds upon which this Application is predicated are;

a) **The petitioners filed their reply to the 1st Respondent reply on 5/5/2023 more than 5 days allowed by the law.**

b) By paragraph 16(2) of the 1st schedule to the Electoral Act, there is no extension of time to enable the petitioners regularize the said reply out of time.

c) The petitioners said reply dated 2/5/2023 filed on the 5/5/2023 is incompetent and ought to be struck out.

d) The Honourable Tribunal lacks the jurisdiction to entertain the said reply of the petitioners to the 1st Respondent reply.

The motion is supported by an 8paragraphs affidavit deposed to by one Darlington Orji Esq of Munachi Chambers. Also in support is a written address which the learned counsel for the 1st Respondent adopted as oral argument in support of the Application.

Learned counsel submits that paragraph 16(1) of the 1st schedule to the Electoral Act 2022, requires the petitioners to file the said reply within 5 days upon being served with the 1st Respondent reply. He submits that affidavit evidence shows that the petitioners were served with the 1st Respondents reply on the 27th /April/2023 while the petitioners reply was filed on the 5th/May/2023 which service was out of time rendering the reply to be incompetent and ought to be struck out. He cited the case of **MRS OLABISI AYODELE SALIS & ANOR V BAREEHU OLUGBENGA ASAFA & ORS (2005) LPELR 25670** where the Court of Appeal held that;

"**the times stipulated in the practice directions are sacrosanct and must be strictly obeyed as failure to comply will render such brief filed out of time incompetent and liable to be struck out**"

Learned counsel also referred us to the case of **BABATOPE AKINTOPE & ANOR V ELIJAH OLUWATAYO ADEWALE & 2 ORS-LER (2015) CA/L/EP/HR/2015,** Per Y.S Nimpar JCA.

He urged us to strike out the said reply of the petitioners dated 2/5/2023 and filed out of time on 5/5/2023

In response to the Application by the 1st Respondent, the petitioners filed a counter affidavit deposed to by the 1st petitioner on their behalf. The counter affidavit is of 5 paragraphs and it is supported by a written address wherein the learned counsel for the petitioners submits that petitioners reply to the 1st Respondent answer to the petition was filed within the time stipulated by paragraph **16(1) of the 1st schedule to the Electoral Act 2022**.

He refers us to paras 3 (a) (b) (c) and (d) of the counter affidavit and further submits that by arithmetic calculation, 27th /April/2023 to the 5th/May/2023 to the exclusion of Sunday and public holiday being 1st may 2023 is exactly five (5) days. He cited the case of **BUHARI V OBASANJO (2003) LPELR-24859 SC** – where the Supreme Court held that

> "**Election petition being special in nature should in the public interest not be short circuited by technicality where the compliant against same is peripheral"**

He finally submits that the petitioners complied with the provisions of paragraph 16(1) of the 1st schedule of the Electoral Act 2022 and he urged us to discountenance with the 1st Respondent Application and strike same out.

Having gone through the motion on notice filed by the 1st Respondent, the affidavit and the submissions in the written address as well as the petitioners

counter affidavit and their arguments contained in the written address. We shall proceed to determine the priority or impropriety of the Application.

Election matters are sui-generis with special character of their own quite different from ordinary civil or criminal proceedings. They are governed by their own statutory provision regulating their practice and procedure -see **HASSAN V ALIYU (2001) 17 NWLR (PT 1223) 547, ENUWA V OSIEC (2006) 10 NWLR (PT 1012)544 at page 145 para G-A and NYESON V PETERSIDE & ORS (2016) 2 MJSC PT 1.**

From the facts on record before us, the 1st Respondent reply to the petition which incorporated a preliminary objection was filed on the 27th/April/2023, while the petitioners reply captioned

> **"PETITIONERS REPLY IN ANSWER TO THE ISSUES/NEW ISSUES OF FACTS RAISED BY THE 1ST RESPONDENT IN HIS REPLY TO THE PETITION AND REPLY TO THE NOTICE OF PRELIMINARY OBJECTION"**

Was undoubtedly filed on the 5/5/2023. The petitioners contended that, filing their reply on the 5/5/2023 is within time and not outside the stipulated 5 days required by paragraph 16(1) of the 1st schedule to the Electoral Act 2022

Contrary to the contention of the 1st Respondent. He also contended that by arithmetic calculation, exclusive of Sunday and 1st May which was a public holiday, from 27th April to 5th May 2023 is five days.

Paragraphs 16 (1) of the 1st schedule to the Electoral Act 2022 provides as follows:

> "**if a person in his reply to the election petition raises new issues of facts in defense of his case which the petition has not dealt with, the petitioner shall be entitled to file in the registry , within 5 days from the receipt of the Respondents reply, a petitioners reply in answer to the new issues of facts"**

Also **paragraph 16(2)** provides

"The time limit by subparagraph (1) <u>shall</u> not be extended"

Paragraph 26(2) of the same schedule

Provides that

> **"the hearing may be continued on a Saturday or on a public holiday if circumstances dictate"**

From the above provision, first of all, the petitioners are entitled to 5 days to file their reply.Secondly, the 5 days SHALL NOT be extended and thirdly the tribunal may sit on a Saturday or a public holiday.

It is not in contention that the petitioner filed their reply on 5/5/2023, so, by our own arithmetic counting , from 27th April to 5th May is eight (8) clear days.If we are to include 27th/April it is nine (9) clear days.counting the days minus the 27th April, Sunday and 1st may 2023, we are left with 6 days and not 5 days as contended by the petitioners. Assuming the Tribunal decides to be magnanimous and excludes 27th, Sunday and the said public holiday, the petitioner reply will still not fall within the 5 days stipulated by the law as at when it was filed but 6 days which means the reply was filed out of time.

The Supreme Court in the case of

ENTERPRISE BANK LIMITED V AROSO (2014) 3 NWLR PT 1394 at 256 per Mary Ukaego Peter- Odili (JSC) held that

> **"it is now notorious and trite law that all rules of court shall be obeyed and followed. This is because rules of court are not for fancy or fun or window dressing, since they are helpful in regulating prosecution of cases in court, such that they occupy a place akin to a road map for quick convenience, fair trial and orderly disposal of cases. Rules of court are part of the support system in the administration of justice"**

The petitioners having filed their reply on 5th May 2023, filed same out of the 5 days stipulated by the law and which time shall not be extended and same is incompetent and we so hold.

The said reply of the petitioners dated 2/5/2023 and filed out of time on the 5/5/2023 is accordingly struck out. The motion of the 1st Respondent is accordingly granted.

The 2nd Respondent also file a motion on notice dated 10th/May/2023 and filed on the 22nd/May/2023. It is brought pursuant to**Sec 140 (1) and (2) (b) of the Electoral Act 2022, paragraph 16 (1) and (2) and 47 (1) and (2) of the 1st schedule to the Electoral Act 2022 and also seeking for**-

> "**An order of this Tribunal to strike out the Petitioners Reply in answer to the 2ndRespondent reply for being incompetent"**

The motion on notice and the previous one filed by the 1st Respondent, the grounds upon which the Application is brought, the affidavit and the written address of counsel in support of the motion are on all fours.

We therefore refer to and adopt our ruling on the motion filed by the 1st Respondent seeking for the same relief on the 22nd /May/2023.

The said reply of the petitioners having been filed out of time is also struck out and the motion of the 2nd Respondent accordingly succeeds, and is granted.

The next motion on notice was still filed by the 1st Respondent on the 23rd May 2023. It is brought pursuant to **Section 140 (1) and (2) (b) of the Electoral Act 2022, paragraph 18 (1) and (3)-(5) and 47 (1) and (3) of the 1st schedule to the Act**

It is praying this Tribunal for an Order

> **"dismissing this petition for non-compliance with the law by the petitioners and**
>
> **For such further order(s) as this Tribunal may deem fit and proper to make in the circumstances."**

The Application is predicated on the following grounds.

a) **The petitioners filed their reply to the 1st Respondent reply on 5/5/2023 together with pre hearing notice served on the 1st Respondent on 7/5/23**

b) **By paragraph 18(1) of the 1st schedule to the Electoral Act 2022, it is mandatory for the petitioners to first apply for the issuance of**

pre -hearing notice as in form TF 007 before the first notice is issued.

c) **The petitioner did not apply for the issuance of the said Pre-Hearing notice as in form TF 007 and totally failed to comply with the provisions of the said law.**

d) **The Honourable Tribunal has the jurisdiction to dismiss the petition having been abandoned.**

In support of the motion on notice is an 8 paragraphs affidavit deposed to by one Ojebe U. UjebeEsq, legal practitioner at Munachi Chambers and a written address which were adopted and relied upon in advancing this application by the counsel for the 1st Respondent.

The learned counsel submits on behalf of the 1st Respondent that the provisions of **paragraph 18 (1) of the 1st schedule to the Electoral Act 2022**mandatorily requires the petitioners to apply for the issuance of pre-hearing notice as in form TF 007 within 7 days after the filing and service of the petitioners reply on the Respondents or 7 day after filling and service of the Respondent reply, whichever is the case.

Learned counsel contends that the affidavit evidence shows that the petitioners filed and served the respondents with the pre-hearing notice in form TF 007 without applying for the issuance of the said form as prescribed by the law. He submits this amount to non-compliance with the provision of the law and it also amount to abandonmentof the petition by the petitioners

and same should be dismissed in accordance with the provisions of paragraph **18 (3), (4) and (5) of the 1st schedule to the Electoral Act 2022.** He cited the case of **AJAYI V NOMIYE (2012) 7 NWLR (PT 1300) 593 and OKEREKE V YAR' ADUA (2008) 12 NWLR (PT1100) 95** and submit that the Court of Appeal held relying on **paragraph 18 (3) of the 1st schedule to the Electoral Act 2010** which is in parimaterial with **paragraph 18 (3) of the 2022 Act**to wit

> **"paragraph 18 (3) of the 1st schedule to the Electoral Act 2010 clearly and in unambiguous terms stipulates that a respondent has two option where a petitioner fails to apply for pre hearing notice- to wit , either to apply for the issuance of pre-hearing notice or to file a motion on notice seeking that the petition be dismissed for having been abandoned"**

He also refers us to the case of **SALVADOR V INEC (2012) NWLR (PT1300) 417.**

He further submits that the courts have held that an election petition dismissed for failure to apply for pre -hearing notice is irredeemable, it is dead and cannot be revived or resuscitated and the trial Tribunal becomes functus-officio. He refers us to the case of **GEBI V DAHIRU (2012) NWLR (PT 1282) 560**

And finaly he asked us to dismiss the petition as being abandoned by the petitioners.

In response to this Application by the 1st Respondent/Applicant's, the Petitioners/Respondent filed a counter Affidavit of 10 paragraphs deposed to by the 1st Petitioner on behalf of the Petitioners on the 28th/5/2023 supported by a written address wherein the learned counsel for the Petitioners formulated their issue for determination to wit:

> ***"Whether the Petitioners have complied with paragraph 18(1) of the 1st Schedule to the Electoral Act 2022".***

Learned counsel submits on this issue that the said paragraph 18 (1) provides that:

> ***"Within seven days after the filing and service of the Petitioners reply on the Respondent or seven days after the filing and service of the respondents reply, whichever is the case, the Petitioner shall apply for the issuance of pre-hearing notice as in form TF008".***

He submits that the petitioners' reply to the answer of the respondents was filed and served on the 3rd Respondent on the 9th May 2023 and by arithmetic calculation 9TH May 2023 to the 11th May 2023 when the petitioners applied for the issuance of the hearing notice is within 7 days provided for under **paragraph 18(1) of the said Act.**

Learned counsel submits that assuming without conceding that the petitioners failed to apply for the issuance of the pre-hearing notice, the respondents and in particular the 2nd and 3rd Respondents having taken steps in activating the commencement of the pre-hearing session and by filing their respective pre-hearing answers, the respondents could no longer argue that

the petitioners have not applied for issuance of pre-hearing notice by asking the Tribunal to dismiss the petition **in limine**. He Refers us to the case of **APC V ORU GBANI & ORS (2019) LPELR 14846 (CA).** Also the case of **SHOTE V KORADE & ORS (2019) LPELR 49445(CA)** Where the Court of Appeal held that:-

> "**Having accepted service of the pre-hearing information notice and reacted to it positively by filing the attached pre-hearing information sheet (form TF008) and having responded to the pre-hearing session by attending same, I cannot even see the legal basis of the 1st respondent for issuance of the pre-hearing notice after the said application had achieved its purpose of generating or activating the pre-hearing notice and fixing the pre-hearing session".**

He submits that in the instant case, the petitioners have on the 11th May 2023 applied for the issuance of the hearing notice pursuant to **paragraph 18(1) of the 1st Schedules of the Electoral Act 2022** and including the 1st respondent filed their answers to the pre-hearing information sheet and he could no longer argue that the petitioners have abandoned the petition. He also cited the case of **BUHARI V. OBASANJO (2003) LPELR 24859 (SC)** as held by the Supreme Court that:

> **"That election petition being special in nature, should in the public interest not be short circuited by technicality where the complaint against same is peripheral"**

He also cited the case of **CHIA V. UMU 7 NWLR (PT. 518) Pg 95.** He finally urged us to dismiss this application and hold that the petitioners are in

compliance with the said **paragraph 18(1) of the 1st schedule of Electoral Act 2022.**

Having studied the application, the reliefs being sought by the 1st Respondents, and the arguments advance for and against same by both parties on each side of the aisle, we shall be resolving the issue of

> "**Whether the petitioners are indeed in violation of the said paragraph 18(1) of 1st Schedule to the Electoral Act.**

The said paragraphs provides as follows:

18(1) - **"Within seven days after the filing and service of the petitioner's reply on the respondent or seven days after the filing and service of the respondents reply which-ever is the case, the petitioner shall apply for the issuance of the pre-hearing notice as in form TF007".**

(3) **"The respondent may bring the application in accordance with subparagraph (1) where the petitioner fails to do so or by motion which shall be served on the petitioner and returnable in three clear days apply for an order to dismiss the petition".**

On record, an application for the issuance of pre-hearing notice in this petition was made on behalf of the petitioners by their counsel UKPABIO & ASSOCIATES (UWANAH CHAMBERS) to the secretary of the tribunal captioned.

"APPLICATION FOR ISSUANCE OF PRE-HEARING NOTICE IN PETITION NO. EPT/AB/SHA/5/2023, BETWEEN, UJUOMUNNA NWABUGWU CHIMEZIE & ANOR VS HON EMMANUEL IHUOMA NDIUKWU EMERUWA & 2 ORS".

It is dated and filed on 11/5/2023 and signed by one C. D. Iroha Esq. The Petitioner's reply to all the 3 respondent's answers to the petition are all filed on the 5th of May 2023, and the affidavit of service on record shows that service on the 3rd Respondent of the said reply was effected on the 9/5/2023 by 11:07am; which was the last reply of the Petitioner, indicating close of pleadings.

The petitioners contended that having filed the last reply on the 5th/5/2023 and served on the 9th/5/2023, and the Application for the pre-hearing notice being filed on the 11/5/2023, they were within the 7 days stipulated by the time provided by **Paragraph 18(1) of the 1st schedule to the Electoral Act 2022.**

It could be recalled that earlier on, we had ruled on the motions on notice filed on 22/05/2023, by the 1st and 2 respondents in this petition seeking to strike out these reply of 5/5/2023 referred to by the petitioners and we granted these applications and struck out the said reply of the petitioners for being filed out of time.

We cannot now refer to this same reply in computing the 7 days required for petitioners to apply for the issuance of the pre-hearing notice. The computation of the 7 days within which the petitioners shall apply for the issuance of the pre-hearing notice after the filing and service of the last reply shall begin with the last reply filed by each of the 3 respondents in this

petition. In the instant case, the last reply was file by the 3rd Respondent whose reply to the petition was filed on the 28th April 2023 and affidavit of service shows that service was effected on the petitioners on the same 28th April 2023 by 4:18pm. Computing the 7 days from 29th April, the 7thday will lapse on the 5th May 2023 and the petitioners said application for the issuance of the pre-hearing sheet is dated 11th/05/2023 thirteen (13) days after the service of the 3rd Respondent's reply on the 28th April 2023 on the Petitioners.

By virtue of **paragraph 18(1) of the 1st Schedule to the Electoral Act 2022** the petitioners are required to apply for the issuance of pre-hearing notice withing 7 days after the filing and service of (in this case) the respondent's reply as in form TF008 – We refer to the case of **TUNJI VS BAMIDELE (2012) 12 NWLR (PT 1315) 477 AT 469.** The petitioners in this case did not bring their application within the stipulated 7 days required by the provisions of **paragraph 18 (1)** after the filing and service of the respondent's reply on them. Their application was brought 13 days after such filing and services on them. The 1st Respondent in the face of such a failure by the petitioners to apply for the pre-hearing notice have accordingly activated the provisions of **paragraph 18 (3) (4) and (5) of same** by promptly filing this motion to dismiss this petition for abandonment by the petitioners. **See ENEJI & ANOR VS AGAJI & ORS (2011) LPELR 2520 (CA).** From the facts before us, it is clear from the records that the petitioners are no doubt in violation of the unambiguous provisions of **paragraphs 18(1) of the 1st schedule to Electoral Act 2022.** The consequences of this violation is clearly spelt 'out in **subparagraph (5) of paragraph (18)** where the respondents activates the 'provisions of **subparagraph (3),** which the 1st Respondent has so activated by the filing of this motion on notice seeking for an order of this Tribunal to

dismiss this petition for being abandoned by the petitioners. The provisions of **subparagraph (5) of paragraph 18** provides that

> "**Dismissal of a Petition under subparagraph (3) and (4) is final, and the Tribunal or Court shall be functus officio"**

The provision of **subparagraph (4)** talks about where the petitioner fails to apply for pre-hearing notice under **(1)** and the respondent fails to apply for the same pre-hearing notice or fails to file a motion to dismiss the application, the court may suomotu dismiss the petition.In the instant case, the 1st Respondent has activated the provision of **subparagraph (3) of paragraph 18.** We therefore in the circumstance hold that the petitioners having failed to apply for the pre-hearing notice as in Form TF008, within the stipulate 7 days 'provided for under **Paras 18(1) of the 1st Schedule to the Electoral Act 2022,** have abandoned this petition and the bitter consequence is dismissal and we accordingly dismiss this petition for being abandoned by the petitioners. This application accordingly succeeds and is hereby granted. In the event we are wrong, we shall still in the interest of justice determine the petition on the **merit.**

The same relief was also sought for by the 2nd Respondent in a motion on notice filed on the 22/5/2023 which was brought pursuant to **paragraph 18(3) and (5) of the 1st Schedule to the Electoral Act 2022, Section 6 (6) (a) and (b) of the Constitution of the Federal Republic of Nigeria 1999 (as amended) and under the inherent jurisdiction of this Tribunal.** The relief sought is

"An order dismissing the Petition for failure of the Petitioners to apply for issuance of pre-hearing notice as envisage under the Electoral Act 2002.

And for such order(s) as the Honourable Tribunal may deem fit"

The grounds for this application as well as the submissions in the supporting written address are in parimateria with the motion filed by the 1st Respondent on the 23/5/2023.

We shall refer to and adopt our ruling on the said motion above filed by the 1st Respondent and proceed to dismiss this petition for being abandoned by the Petitioners and accordingly grant this application as prayed by the 2nd Respondents.

The 3rd Respondent in her motion before us also seeks the same relief whichwas brought pursuant to **paragraphs 18 (1) (2) (3) (5) (7) (d), (11) (a) and 47 (1) and (2) of the 1st Schedule to the Electoral Act 2022.** The motion was filed on the 16/6/2023 and seeking for:

"An order dismissing the Petition as the Petitioners purported application for issuance of pre-hearing notice is incompetent and divest the Honourable Tribunal requisite jurisdiction to hear and determine the Petition.

And for such further order(s) as this Honourable Tribunal may deem fit."

The motion on notice is also predicated on the same grounds, facts and the submissions of learned counsel in the written address in support of the application is in parimateria with that of the 1st and 2nd Respondents' submissions in their respective written addresses in support of the motions on notice that we have already rule on above.

We shall refer to and adopt our said rulings in the 1st and 2nd Respondents motions above and accordingly dismiss this petition for being clearly abandoned and grant the 3rd Respondent's application as prayed.

PRELIMINARY OBJECTIONS

The 2nd and 3rd Respondents' preliminary objections were incorporated in their respective reply to the petition filed on the 27th April 2023 for the 2nd Respondent and 28th April 2023 for the 3rd Respondent respectively. These preliminary objections have been deemed abandoned by the 2nd and 3rd Respondents as same were not argued in their respective final written addresses and we so hold – **KENLINK HOLDINGS LTD VS R. E. INVESTMENT LTD (1997) 11 NWLR (PT 529) 438.**

The 1st respondent also incorporated his preliminary objection in the 1st Respondents reply to the Petition also filed on the 27th April 2023. He adopted his argument taken before the Tribunal on the 20th of June in respect of his motion on notice filed on the 17th May 2023 as his arguments on the Preliminary Objection mutatis mutandis in urging us to grant the Preliminary Objection and dismiss this petition.

We shall accordingly refer to and adopt our ruling on the said motion filed on the 17th May 2023 by the 1st Respondents without repeating ourselves. The

preliminary objection succeeds in part. It succeedsin respect of the 2nd ground of the petition only which has been earlier struck out. The 1st and 3rd grounds of the petition remains competent and the preliminary objections is dismissed in respect of the 1st and 3rd grounds of the petition only. As stated, earlier, in the event we are wrong in our decision dismissing the petition, we shall now go ahead to consider the petition on the merit.

JUDGMENT ON THE PETITION

The issue for determination is to wit:

> **"Having recourse to the evidence before us -vis-à-vis the provisions of the Relevant laws, whether the petitioners have proved their petition and the reliefs they seek thereof"**

We have struck out the 2nd ground of the petition in our earlier ruling on the motion filed by the 1st Respondent on the 17th May 2023 for being incompetent. The petitioners are only left with grounds 1 and 3 as the grounds for questioning the 1st and 2nd Respondents election and return as member representing Aba South State Constituency. We shall be considering these grounds under the sole issue, we formulated.

We shall begin with ground 3 of the petition which questions the qualification of the 1st Respondent before coming back to ground 1 which contends that the 1st Respondent was not elected by the majority of lawful votes cast at the election. This seem more logical to us.

GROUND 3

The 1st Respondent was at the time of the election not qualified to contest the said election.

We shall begin with reminding the petitioners of the provisions of **Section 131 (1) and (2) of the Evidence Act 2011.** Which provides that:

S131 (1) "Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts shall prove that those fact exist.

131 (2) When a person is bound to prove that the existence of any fact, it is said that the burden of proof lies on that person"

See -**OYETOLA V. INEC (2023) 11 NWLR (PT 1894) Pg. 125 at 134 & 1 Per** Emmanuel AkomayeAgim JSC.

The petitioners 'in this case desired that this Tribunal give them judgment and likewise grant them the reliefs they claimed on the basis that the facts they asserted in their petition existed. They therefore have the primary legal burden to prove the existence of the fact they asserted as the burden placed on them would only shift and be placed on the respondents only if the evidence produced by the petitioners established the alleged facts in the petition. This is the combined effect of the aforementioned provision of the **Evidence act 2011.**

It is the contention of the petitioners that the 1st Respondent was not a member of 2nd Respondent and having not resigned his membership of the People Democratic Party (PDP) before contesting the said election under the platform of the 2nd Respondent, he stand disqualified. He cited the provisions of **sections 106 (a) and 107 (1) (f) of the 1999 constitution (as amend).**

Learned counsel made a very lengthy submissions in the Petitioner final written address on pages 5 – 10 thereof and urged us to hold that the 1st Respondent was not qualified to contest the election as at 18th March 2023 when the 2nd Respondent did contest for same.

Despite all the beautiful and sensible submissions of counsel, may we at this juncture remind ourselves that

> **"Address of counsel no matter how brilliant is never a substitute for evidence needed to prove a case. "**

This is the Supreme Court's decision in

> **ALIUCHA & ANOR V ELECHI & ORS (2012) LPELR 7823 (SC)** and also **OYEYEMI & ORS VS OWOEYE & ANOR (2017) LPELR 41903 (SC)**

From evidence adduced by the sole witness of the petitioners who is the 1st Petitioner himself, even without the 1st Respondent's denial of the allegation that he was a member of the PDP as at the time of the said election, the petitioner have not produced any scintilla of evidence, 'oral or documentary, in proof that the 2nd Respondent was still a member of PDP as at election time. Moreover, the 2nd Respondent did denied same and Said that he resigned his membership from the PDP, thereafter, he contested and won the primaries of the 2nd Respondent when he joined the party. The petitioner did not call any one from PDP to testify that the 1st Respondent was their member, neither did they produce any proof of the alleged participation of the 2nd Respondent in the PDP primary election. Further, the 1st Petitioner who testified as PW1

said under cross-examination that he is not a member of PDP nor the 2nd Respondent.

From these evidence and the submissions of the learned counsel for the petitioners, especially his reference to **Sections 106 and 107 (1) (f) of the 1999 Constitution (as amended),** which are provisions particularly section 106 (supra) which is a provision relating to the qualifications of a person seeking for election in to the State House of Assembly.We have not seen how these provisions relates to or can be related to the disqualification of the 2nd Respondent on the grounds that he was a member of another party besides the 2nd Respondent or that the 1st Respondent did not resign from the said PDP before joining the 2nd Respondent. For the benefit of doubt we shall reproduce the **Section 107 (1) (f) of the 1999 constitution** below:

Sec. 107 (1) (f)

> **"(1) – No person shall be qualified for election to a House of Assembly if –**
>
> **(f) he is a person employed in the public service of the Federation or of any State and he has not resigned, withdrawn or retired from such employment 30 days before the date of election"**

With due respect to the learned counsel, the provisions of this **sub section (f)** has no nexus whatsoever with grounds 3 of the petition, the facts in support, evidence produced at the trial and the submissions of counsel in proof of the said ground 3 as well as the relief sought there from. Borrowing from biblical

quotations, we shall add that "**as far as the east is from the west…"** so is this sub-section very far away from ground 3 and all that relates to same.

Assuming but without aligning with the submissions of the learned counsel for the petitioners that the 1st Respondents participated in 2 primaries, the petitioners have not shown us and indeed there is no provision in the **Electoral Act 2022 or the constitution 1999 (as amended)** precluding the 2nd Respondent from participating in more than one primary. What is forbidden is the nomination of a candidate by more than one political party. This is per KEKERE – EKUN JSC in the case of **JIME V. HEMBE (2023) LPELR – 60334 (SC).** He further held that:

> **"There is NO doubt from the evidence before the trial court that the 1st respondent moved from Party to party in search of a place to perch in order to secure a nomination for the 2023 gubernatorial election in Benue State. While such an act might have moral implications, there is no provision in the Electoral Act that precludes a candidate from participating in more than one primary. What is forbidden is the nomination by more than one political party at the same time and to his knowledge…"**

The petitioners in the instant case just as in the extant case did not show that the 1st Respondent was nominated by the PDP and to his knowledge, and since the 1st Respondent is not precluded from participating in more than one primary election by any express provision of the law, by the supreme court's decision of **JIME V. HEMBE (Supra),** he cannot be disqualified based on that same ground and we so hold.

In rebuttal of the petitioners allegation that the 1st Respondent did not resign from the PDP before joining the 2nd Respondent, the 1st Respondent tendered his membership card of the 2ndRespondent as **Exhibit D3 (b),**which original was substituted with a photocopy of same. The petitioners did not produce any evidence contradicting **Exhibit D3 (b)** whether oral or documentary showing that the 1st Respondent is not a member of 2nd Respondent but PDP. Further the 1st Respondent through **DW1,** whois the 2nd Respondent chairman of Igwebuike Ward 7, the ward of the 1st Respondent, tendered the original copy of**Exhibit D2** which was also substituted with the photocopy and which the petitioners did not object to the admissibility of same. **Exhibit D2** contains the name of the 1st Respondent as her member at serial No. 77 – The petitioners did not produce any documentary or oral evidence in opposition to **Exhibit D2.**

Also **Exhibit D3 (c)** is the resignation letter of the 1st Respondent from PDP, dated 21st May 2022. He said in evidence that the original copy of **Exhibit D3 (c)** is with the PDP ward chairman who received it from him and **Exhibit D3 (c)** is a printed copy of same. **Exhibit D3 (c)** was admitted without any objections to it admissibility by the petitioners. And having falling within the provisions of **Section 87 (b) (i) of the Evidence Act** regarding secondary evidence, it is admitted and duly marked. ThePetitioners did not also adduce any evidence controverting **Exhibit D3 (c).**

It is very glaring that the legal burden of proof that had rested upon the shoulders of the petitioners from the beginning by their pleadings in the petition has not been discharged by them. The 3rd ground of the petitioners petition has not be proved by any piece or speck of credible and admissible

evidence. The said ground 3 having not be proved by the petitioners therefore fails and is accordingly dismissed.

Ground 1:

The 1st Respondent was not duly elected by the majority of votes cast at the election.

We shall still refer to the provision of **Section 131 (1) and (2) of the Evidence Act.**

From the contents of the pleadings in the petition and the deposition of the 1st petition which is inparimateria with the pleadings, the material facts that relates to ground 1 of the petition are contained in paragraph 4 pages 1-2 where the petitioners tabulated the names of the parties that contested the said election and the purported number of votes allotted to them at the end of the said election of 18th March 2023 only.

PW1's deposition on oath as we earlier observed is a repetition of the pleadings.From his evidence under cross examination, we have not seen any single sentence in proof of ground 1. The petitioners did not plead the name of a single polling unit or a polling unit result in all the 7 wards of Aba South State Constituency he listed in his paragraph 4 at page 3 and repeated in paragraph 10 page 9 of the deposition where he scored the majority of the votes cast.

Also, in the entire pleadings in the petition, deposition on oath and oral evidence in court of the 1st petitioner as PW1, there is nothing on record that attempted to prove the ground one of the petition.

The petitioners did not plead a single polling unit result as in Form EC8A, not a single polling unit BVAS device that was used at the election, not a single polling unit register of voters, and there is no oral evidence on record that attempted to prove the said ground one of the petition in line with the Supreme court's case of **OYETOLA V. INEC (2023) 11 NWLR (PT 1894) PG 215.**

The petitioners **Exhibit P3** which was tendered by PW1 shall definitely go to no issue as no single Electoral material as polling units result sheet and collation result sheet in Form EC8A(1) mentioned in the said exhibit was pleaded in the petition or contained in the 1st petitioners deposition on oath – **see AKANIWON V NSIRIM (2008) LCN/3636 (SC)** where the Supreme Court per NIKI TOBI JSC held that

"**Normally fact which was not pleaded goes to no issue".**

We actually wonder what was on the minds of the petitioners when they filed this petition; probably they were carried away by the excitement of just challenging the election of the 1st and 2nd Respondents and became oblivious of the fact that "**he who assert must go ahead to prove his assertion" – MRS BETTY DAREGO VS A. G. LEVENTIS (NIG) LTD & 3 ORS LER (2015) – CA/L/481/2011.**

With respect to the counsel to the petitioners, we find it really amazing that the petitioner would file this petition and capture a ground such as the ground one therein and confidently approach the Tribunal with not a single polling unit result to substantiate their claim. Even if the Tribunal were a father Christmas, there is a reason for and a season when a father Christmas may be seen, though the tribunal is not. We are sorry to disappoint the petitioners

that every single allegation of fact by them must be proved on the preponderance of credible and admissible evidence they produced in support of their claim. It is not automatic – **MRS ROSEMARY ONWUSOR VS YAHI MAINA & ORS (2021) LPER (CA) 11919.**

The ground one of this petition has obviously been caught of by the provisions of **Sec. 132 and 133 (1) of the Evidence Act 2011** for the petitioners failing to discharge the burden of proof placed on them to prove same and we accordingly strike it out.

At this juncture, we shall be doing the 1st and 2nd Respondents grave injustice if we are to by any means disturb their duly earned victory without the petitioners having to prove their petition filed against them.

This petition have not been proved by the petitioners. It has not just been starved but malnourished of all the vital and supplementary evidence to prove and sustain same. We unanimously dismiss this petition and all the reliefs sought there from, and we award the cost of N300,000.00 to the Respondents.

HON. MOMSISURI BEMARE ODO

MEMBER II

REPRESENTATION

1. C. M. UkpabioEsq with C.DIroha – For Petitioners
2. Sir P. C. UzoagaEsq with L. D. Orji - For the 1st Respondent
3. Sir UcheIheamanmaEsq – For 2nd Respondent
4. EmekaIwegbulamEsq – For 3rd Respondent