# PROVING SUBSTANTIAL NON-COMPLIANCE IN ELECTION PETITION UNDER THE NIGERIAN ELECTORAL ACT: A MIRAGE OR A REALITY?*

**Abstract**

*Elections Petitions in Nigeria, particularly those challenging the outcome of elections on the ground of substantial non-compliance to the provisions of the Electoral Act fail more than they succeed. While it has become almost impossible to prove the said ground of substantial non-compliance, there is some ease and possibility in proving the other four grounds provided for when they are raised in an election petition. This problem seems traceable to the Electoral Act regime and the requirement of proof for allegation of substantial non-compliance in election cases. This paper examined the difficulty in proving the ground of substantial non-compliance as provided in Section 138(1)(b) and 139 of the Electoral Act 2010(As Amended). In doing so, it examined further the burden of proof placed on the petitioner where he attempts to prove allegations of offences that constituted the non-compliances in an election petition. The methodology adopted is doctrinal and analysis of the relevant provisions of the Act and literature on the subject. In the end, the researcher recommends the deletion of Section 139 of the Electoral Act 2010 (as Amended) and suggests other necessary amendments to the Act, which if adopted, will enable a petitioner succeed in proving the ground of substantial non-compliance.*

**Keywords:** Election Petition, Substantial Non-compliance, Electoral Act, Election Tribunal.

## 1. Introduction

Nigeria is heterogeneous and populous. It has about 374 ethnic formations.[1] On May 19, 2021, the population of Nigeria was estimated at 210,832,540 based on the latest United Nations estimates.[2] Also, Nigeria is peculiarly plural by vast number of different social groups and by vast number of different religious and traditional occupations. The deep and fundamental differences in attitude, character and culture also added to her peculiarity. Most social and political groups like Nigeria often times adopt election as a means of selecting their leaders and policy makers. From the 17th century, elections have been the usual mechanism by which modern representative democracy has operated.[3] Today, election is the corner stone of democracy.[4] Elections, therefore, are central institutions of democratic representative governments. Election in most democratic states is usually conducted by an institution set up by law. For Nigeria, the body is currently the Independent National Electoral Commission. Rules and regulations are normally put in place for the conduct of free and fair elections. As at date, the Electoral Act 2010 (As Amended) is the primary legislation for the conduct of elections in Nigeria. After the conduct of elections, in line with the dictates of the Act[5] and a winner emerges, a candidate in the election or his political party not satisfied with the outcome can challenge the result of the election.[6] This can be done by presenting a petition to the relevant Election Tribunal created under the law.[7] In presenting a petition, the petitioner, can only rely on any or a combination of the five grounds of petition provide for. The five grounds on which an election may be questioned or set aside are:

1. That the candidate declared to be the winner of an election is not qualified, at the time of the election, to contest the election.
2. That the election was invalid by reason of corrupt practices of non-compliance with the provisions of the Electoral Act

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[1] I AUmezulike, 'An Overview of Communal conflicts in Nigeria: Our Skeptical view and suggestions' *(2015) NBJ Vol.10, p 15.*

[2] 'Nigerian Population 2019-Worldmeters' www.worldometers.info/world-population/nigeria-populationaccessed on 19th May, 2021.

[3] 'Election Political Science,' Britannica online. www.britannica.com/topic/election-political-science accessed on 5 September 2016.

[4] T Osipitan, Problems of Proof under the Electoral Act 2002, Judicial Excellence, *Essays in Honour of Hon. Justice Anthony Iguh JSC CON*, (Enugu: Snaap Press Ltd Enugu, 2004) p 289-304.

[5] Act means the Electoral Act 2010 (As Amended)

[6] Section 137 of the Electoral Act 2010 (As Amended)

[7] Section 133 of the Electoral Act and Section 285 of the 1999 Constitution of the Federal Republic of Nigeria.

3. That the respondent was not duly elected by the majority of lawful votes cast at the elections or
4. That the petitioner or its candidate was validly nominated but was unlawfully excluded from the election.
5. That the person whose election is questioned had submitted to the commission affidavit containing false information of a fundamental nature in aid of his qualification for the election.[8]

Amongst these five grounds upon which an election petition can be challenged, ground two that is (Section 138(1)(b)), are resorted to more often than the other grounds. Most times, in the conduct of elections, the provisions of the Electoral Act are breached, giving rise to these complaints. As a result, majority of election petitions presented to the tribunal are often on the ground that there was non-compliance with the provision of the Act in the conduct of the election. On the other hand, ground one above rarely occurs as a post-election dispute. This is so because grounds one and five are both pre-election and post-election disputes. They can occur and be challenged prior to the election, just as they can be raised after the election. In most cases, however, other candidates in the election would have raised those grounds in a pre-election suit prior to the elections and a determination on the same would have been made thereby aborting its occurrence as a post-election dispute. Also, grounds three and four rarely occur as post-election dispute, because the electoral body after computing the majority of lawful votes scored in an election would have arrived at a correct determination of who scored majority of lawful votes. It is not the practice of the electoral body (INEC) to exclude the candidate of a political party whose name had been submitted to the Commission prior to the Elections. After the names of candidate of political parties have been submitted to INEC and published, INEC would have ample time to capture all the candidates for the election. Therefore, it rarely occurs that a lawfully nominated candidate would be excluded from the election. This leaves us with ground two as the ground that often arises for determination in an election tribunal.

## 2.0 Substantial Non-Compliance

By virtue of section 138(1) (b), an election can be invalidated by reason of corrupt practices or non-compliance with the provisions of the Act. Even though the Act provided these as a ground upon which an election can be nullified, establishing/proving the said ground *simpliciter* cannot result in the setting aside of an election because section 139(1) of the Act has further qualified ground 138 (1) (b) and made it more difficult to establish. Section 139 (1) of the Act provides thus:

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

Section 139(1) enunciated the principle of substantial non-compliance. It introduced a qualification for ground 138(1) (b). No other ground as shown in Section 138(1) (a-e) was so qualified.

What section 139(1) of the Act prescribes is that after establishing that there were non-compliances in an election, the petitioner must go further to satisfy two distinct requirements. These are that the election was not conducted substantially in accordance with the principles of the Act and that the non-compliance affected the result of the election substantially. In *PDP v. INEC & Ors*[9] the Apex Court restated this position when it held:

> By Section 138(1) (b) of the Electoral Act, 2010 (as amended), an election may be questioned on the ground that the election was invalid by reason of corrupt practices or non-compliance with the provisions of the Act. However, by Section 139(1) of the same Act an election shall not be liable to be invalidated by reason of non-compliance with the provisions of the Act if it appears to the Election Tribunal or Court that the election was conducted substantially in accordance with the principles of the Act and that the non-compliance did not affect substantially the result of the election. The two provisions i.e. Sections 138(1)(b) and 139(1) of the Electoral Act, from the way they are couched, have placed a heavy burden of proof on any petitioner seeking to challenge the result of an election on the ground that the election did not comply with the

[8] Section 138(1a-e) Electoral Act
[9] (2014) LPELR-23808(SC)

> provisions or principles of the Electoral Act. This is so because, apart from showing or proving that it did not comply with the provisions of the Act, such a petitioner must prove to the Tribunal or Court that the election was not conducted substantially in accordance with the principles of the Act and that the non-compliance substantially affected the result of the election.[10]

Before this, Niki Tobi in *Basheer v Same & Ors*[11] fell to the error of thinking that the two limbs of the conditions in section 139(1) should be read disjunctively and that an election may be invalidated if any of the limbs is proved. But he was quick to return on the subject and departed from his earlier position for the reason that he reached that decision *per incuriam.*[12] We agree that the two conditions must be satisfied before an election can be invalidated. This even makes the matter worse confounded.

We also submit that non-compliance with the provisions of the Act must not necessarily mean the commission of corrupt practices or electoral offence. From the provision of Section 138(1) (b), the commission of corrupt practice as a ground for election petition is distinct from non-compliance with the Act. The use of the word 'or' connotes disjunctive preposition.

**3. Evidential Burden in Proving Substantial Non-compliance for varied offences**

Even though, some non-compliance will not imply the commission of a criminal offence, a majority of non-compliances committed during an election connotes the commission of a criminal offence. Of course, where criminal allegations are made by the petitioner as constituting the non-compliance in the election, the burden of proving those allegations rests squarely on the petitioner and he must prove same beyond reasonable doubt. This principle was enunciated in of *Nwobodo v Onoh.*[13]A corollary to that principle is that where the commission of a crime by a party to any proceeding is directly in issue in any proceeding civil or criminal, it must be proved beyond reasonable doubt.[14] The substantive provisions are expatiated anon.

**Falsification of result**

Where a petitioner alleges that the result of an election was falsified and that the falsification has substantially affected the result of the election, he would be required to satisfy the requirement of proof beyond reasonable doubt as falsification of result constitutes a criminal act. In *Eboh v Ogujiofor*, it was held: 'The allegation of incident of fraudulent acts, falsifications, mutilations and cancellation of election result is criminal in nature of which the evidence required in proof of such allegations must be clear and unequivocal'.[15] Moreover, the petitioner in order to establish or prove an allegation of falsification of election result has a duty to produce and tender at the trial. at least two sets of results, one of which could be taken as genuine and the other stigmatized as held in *Etuk v Isemin*[16]*; Sabiya v Tukur &Ors*[17]*; Wali v Bafarawa*[18]*; Awuse v Odili*[19]*; Ojo v Esohi&Ors*[20]*Seikegba v Penawou&Ors.*[21] This is a big burden on the petitioner. The petitioner does not keep custody of the election results. INEC does and it is no news that INEC as a respondent in a petition often colludes with the winner so as to justify the outcome of the polls which they conducted. Even when all the electoral materials are subpoenaed, the petitioner would not be able to establish this requirement as the materials are often already tampered with in favour of the winner.

[10] Per John Inyang Okoro, J.S.C (p. 51, paras. A-G)
[11]*Basheer v. Same & Ors* (1992) LPELR-12762(CA)
[12]See *Alhaji Yusuf I. Na-Bature v Alhaji Isa Aliyu Mahuta & Ors* (1992) 9NWLR (Pt. 263) 85 at 108
[13](1984) All NLR 1. See also *Omisore & Anor v. Aregbesola &Ors* (2015) LPELR-25820(CA)
[14] Section 135(1) of the Evidence Act
[15](1999) 3 NWLR (Pt. 595) 419 @ 423 - 424
[16](1994) 4 NWLR (Pt 234) 402 at 414
[17](1983) 11 SC 109
[18](2005) (Pt 249) 1863
[19](2004) All FWLR (Pt. 261) 248; (2004) 8 NWLR (Pt. 876) 481
[20](1999) 5 NWLR (Pt. 603) 444 at 452 - 453
[21](1999) 9 NWLR (Pt.618) pg.354

**Disenfranchisement**

Disenfranchisement can be proved by the tendering of voter's registers, voters' cards and of course by the verbal or oral testimony of those who claim to have been disenfranchised. In *Chime v Ezea*, the court held thus:

> Everyone deprived of voting must come and show his voters card, express his constitutional right to pick a candidate of his choice. The comprehensive voters register must be tendered, authentic evidence of what happened at each polling booth must be given and this will not admit of any generalisation of evidence for Local Government or Constituency as it will not serve the purpose.[22]

This same is true of *Audu v INEC & Ors*[23] The above requirement is an onerous task considering that the number of persons disenfranchised may run into hundreds of thousands and or millions and may be scattered at different locations. Also, considering the fact that an election petition must be presented within 21 days after the election the procedural requirement of frontloading depositions of witnesses and documents to be relied on poses a difficult challenge for the petitioner. Furthermore, the fact that the petition must be concluded within a stipulated time makes it almost impossible for the petitioner to call all the witnesses that may be required to prove disenfranchisement. Where the number of persons that claim disenfranchised is less than the difference between the winner and the petitioner, the tribunal will again resort to the magic wand of substantial non-compliance to hold that it would not have affected the outcome of the results.[24] For the petitioner to succeed, he will have to prove that the disenfranchisement was substantial and such infringement or non-compliance affected the result of the election. As usual, the petitioner alleging non-compliance has the burden to establish, after he has shown that there was a substantial non-compliance, that it also affected the result of the election. The respondents have no burden of proof on them.

**Multiple Thumb Printing/Voting**

Multiple thump printing of ballot papers is an electoral offence. Under the electoral regime, a person is entitled to one vote and so where a person thump prints multiple ballot papers and or vote more than once, the offence is constituted. This is provided in section 53(1) of the Act. A petitioner in substantiating non-compliance with the Electoral Act may plead facts to the effect that the petitioner or his agents engaged in the offence of multiple thump printing/voting. Where this is the case, he would need to prove such offence beyond reasonable doubt. In addition to the requirement of proof beyond-reasonable doubt, there are the additional requirements that there must be established a nexus between the perpetrators and the candidate who was returned. What is more, it must, also, be shown that the act adversely affected the conduct of the election and substantially affected the result of the election[25]. Dealing with the offence, the court held in *Hon Ode Frank Igbe& Anor. v Dr. Joseph Adoga Ona & Ors* that an expert evidence showing that the finger prints appearing on the ballot papers belong to one and same person is essential. It also established that it must also be proved that the party, whose election is challenged, aided or abetted the multiple voting/thumb-printing.

**Thuggery**

Generally, election thuggery is the attempt to dictate the outcome of the election with the use of force and intimidation. It is the act of using violence and intimidation to prevent voters for voting a particular candidate or threatening them to vote a particular candidate.[26] Thuggery being a criminal act will require proof beyond reasonable doubt and before the result can be impugned. The petitioner must establish that the winner of the polls carried out the thuggery or establish a nexus between him and the perpetrators of the act.[27]As dictated by section 139(1) of the Electoral Act, the petitioner must establish that the thuggery has affected the result substantially and that thereby the provisions of the Act have not been complied with substantially.

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[22](2009) 2 NWLR (Pt. 1125) 263 at 357 Paras. E-F
[23](2010) 13 NWLR (Pt. 1212) 456 at 523
[24]*PDP & Anor. v INEC & Ors*. (2012) LPELR-8409(CA)
[25]*Oyegun v Igbinedion* (1992) 3 NWLR (Pt. 226) 747; (1992) 2 LRECN 1,747, 759-760
[26] Section 131 of the Act
[27]*Ogu v Ekweremadu* (2006) 1 NWLR (Pt. 961) 255 at 281 - 282 (CA)

**Stuffing of Ballot Boxes**

Another known electoral offence which can be particulars of substantial non-compliance is stuffing of ballot box with already unlawfully thumb printed ballot papers. Ordinarily, a voter will only be issued with one ballot paper with which he will vote by thumb printing and put in the ballot box. However, the offence occurs when the respondent or his agent through intimidation or other unlawful means obtains many ballot papers, thumb prints and stuffs the box with these. A Petitioner who relies on this offence to seek for nullification of the result will be required to tender and open before the court the ballot boxes he alleges to have been stuffed, for the contents to be seen by everyone present at the proceeding before the Tribunal. This pre requisite was introduced in the cases of *Haruna v Modibbo*[28]*; Iniama v Akpabio*[29] *and A.N.P.P. v Usman*[30]*, PDP v. INEC &Ors.*[31] In other words, the petitioner has to obtain custody of the boxes and produce them in court. This is quite an onerous burden to discharge. In the first place, after election, INEC retains all the materials and where they are colluding with the winner of the polls, they would have covered up the illegality before the matter gets to the tribunal. Perhaps, if immediately the result is declared, all the materials used in the election are deposited at the court's Registry for safe keeping; it would be easier for the petitioner during hearing to make use of these in discharging this burden. What is more, to prove the respondent's guilt, the petitioner will be expected to discharge the burden beyond reasonable doubt.[32] We now consider procedural drawbacks against the petitioner.

**4. Procedural Hitches in Proving Substantial Non-Compliances**

As has been shown above, the petitioner has onerous burden of discharging the burden of proof in any criminal allegation occasioning the non-compliance. Apart from this evidential burden on the petitioner, there are certain provisions of the rule of practice of an election tribunal that further compound the difficulty of proving substantial non-compliance by the petitioner. These procedural hitches are contained in the 1st Schedule to the Electoral Act (the rule of procedure for election tribunal). Some of these procedural hitches targeted against the petitioner alone are discussed hereunder.

**The Deposit of Security for Cost**

One harsh requirement introduced under the Electoral Act regime and procedure in election petitions is the requirement of a petitioner depositing money as security for cost. This provision already suggests that procedure of enforcement of election petition is anti the petitioner by confronting him with deposit of money for payment of cost not yet accrued and which no one knew if it will ever accrue. Paragraph 2 of the First Schedule brought out the stark realities of this stringent provision. It provides:

> 2(1) At the time of presenting an election petition, the petitioner shall give security for all cost which may become payable by him to a witness summoned on his behalf or to a respondent.
>
> (2) The security shall be of such amount not less than ₦ 5,000.00 as the Tribunal or Court may order and shall be given by depositing the amount with the Tribunal or court.
>
> (1) …….
>
> (2) If no security is given as required by this paragraph, there shall be no further proceedings on the election petition.'

An election petition is said to be presented under the Act, when the petitioner or his solicitor gives security for cost and pays all necessary fees as required in paragraph 2(1) and 3(4) of the First Schedule to the Act. Non-compliance with this provision is fatal to the petition.[33] The practice of deposit of cost is rarely practiced in other areas of law. This mandatory introduction under the Electoral Act has worsened the problem of the petitioner. What is more saddening is that the First Schedule did not prescribe with certainty the amount to be deposited in an election petition but has left the court/secretary to impose any amount as he/she may desire but not less than ₦5,000.00. This is not to be encouraged as an impecunious petitioner may by this provision be prevented from presenting his petition. For instance, in Enugu State after the 2019 General Elections, the Petition of Uchenna Nwegbo against the

[28](2004) 16 NWLR (Pt. 900) p.487
[29](2008) 17 NWLR (Pt. 1116) Pg. 225
[30](2008) 12 NWLR (Pt.1100) p. 1
[31](2011) LPELR-8831 (CA)
[32]*Uzu & Anor v Ogbu & Ors*. (2012) LPELR-9775(CA)
[33]*Eminue v Nkereuwen & Ors* (1966) 4 NSCC 51 at 54

return of Sen Dr. Chimaroke Nnamani in respect of Enugu East Senatorial District could not be presented as the said Petitioner could not pay the ₦ 600,000.00 (Six Hundred Thousand Naira) only being charged as security for cost.

**Frontloading**

Paragraph 4 (5) of the First Schedule to the Act introduced frontloading system under the Electoral Act regime. The paragraph provides:

> (5) The election petition shall be accompanied by-
> (a) A list of the witnesses that the petitioner intends to call in proof of the petition;
> (b) Written statements on oath of the witnesses; and
> (c) Copies or list of every document to be relied on at the hearing of the petition.

The provision of sub paragraph 6 went ahead to provide the penalty for non-compliance with the above requirement of frontloading. It provides that a petition which fails to comply with sub paragraph (5) of this paragraph shall not be accepted for filing by the secretary. That is to say if the petitioner did not comply with the provision requiring him to frontload the witness statement on oath as well as copies of every document he will rely on, his petition will not be accepted for filing. The gross effect of the provision is that where the petition did not obtain all his documents and frontload same within 21 days or failed to list them, he cannot bring it later and his petition would not be accepted for filing. This has increased the nightmare of the petitioner. Requiring a petitioner to assemble all his witnesses and do their deposition within 21 days is to say the least a difficult task. Where a petitioner wants to prove widespread irregularities, he is expected to have at least a witness from each polling unit to come and testify to that fact. In an election dealing with a House of Assembly seat, there may well be over 200 polling units. For this, the petitioner would have to source about 200 witnesses and prepare their written depositions within 21 days and as well obtain and frontload the necessary documents within 21 days. Additional to this is that by the provision of paragraph 14 (2)(i) of the First Schedule to the Electoral Act, any amendment that seeks to introduce any of the requirement under paragraph 4(1) of the First Schedule cannot be introduced or granted. To that extent, amendment is largely limited if not barred entirely. The import of the provision is that, the parties interested in an election petition, the right of the petitioner to present a petition, the winner of the election, the facts of the election petition, the scores of the candidate, the holding of the election, the ground of the petition, the relief sought by the petitioner cannot be amended or introduced. It means that any genuine mistake of counsel in these arears while filing the petition within the short period cannot be forgiven or corrected. This provision is very unfair on the petitioner and compounds his burden.

**Filing Pre-trial Forms:**

Subparagraph 1 of paragraph 18 provides that: 'Within 7 days after the filing and service of the petitioner's reply on the respondent or 7 days after the filing and service of the respondent's reply as the case may be, the petitioner shall apply for the issuance of pre-hearing notice as in Form TF007'.

One surprising feature in this provision is why the duty to apply for form TF 007 is imposed on the petitioner. Just as the Secretary effects services and gives notices, would it not be more appropriate and meet the ends of justice if the Secretary were to issue this pre-hearing notice form to parties without an application from the Petitioner. This provision is one of such provisions made without any legal purpose except to constitute another procedural trap for the petitioner with the intent to have him caught up in the legal web. The Schedule did not just leave that duty on the petitioner without prescribing penalty for failure. Paragraph 18(3) (4) and (5) provides thus:

> '(3) ……
> (4) Where the petitioner and the respondent fail to bring an application under this paragraph, the tribunal or court shall dismiss the petition as abandoned petition and no application for extension of time to take that step shall be filed or entertained.
> (5) Dismissal of a petition pursuant to subparagraphs (3) and (4) of this paragraph is final, and the tribunal or court shall be functus officio.'

Therefore, where the petitioner fails to apply for issuance of form TF007, the Respondent may apply for the said form or apply by motion that the petition be dismissed. In practice, the Respondent would

not apply for the issuance of form TF007 but are most often inclined to apply for the dismissal of the petition. The subparagraph goes further to provide that the Tribunal shall upon such Respondent's motion dismiss the petition as abandoned petition and the dismissal shall be final. What is very striking is that by subparagraph 4, an extension of time is not tolerated. The real essence of pre-hearing session is to avoid delays. However, this noble objective seems to be defeated by the albatross inherent in the way and manner applications for pre-hearing session are done. The above provision though made to aid the expeditious disposal of election petitions, has rather become counterproductive and self-defeating[34]. There is nothing progressive about the provision of paragraph 18 of the First Schedule. More succinctly, the provision does not ensure for speedy hearing of election petition but rather helps in speedy dismissal of a petition without substantive determination of the election petition. Such a provision in a country that needs to improve her electoral process should not be encouraged. Until the tribunals become more liberal in election petitions, Nigerian electoral body will not sit up, and political fraud and irregularity will not cease to feature. The country will continue to be led by people without credibility.

**Extension of Time**

A detailed study of the provisions of the First Schedule will reveal that the electoral petition procedure is anti-extension of time for the petitioner. One of the fall outs of human nature is that a party may not be able to comply with the time requirements for every step in the litigation process. The court's cardinal foundation is to give parties a listening ear. That explains why there is an in-built mechanism in litigation process that accommodates a request for extension of time. It is almost general in all species of litigation except election petitions. Perhaps this is to further make it difficult for the petitioner to prove any ground of his petition thereby punishing him for any delay and for non-performance of any of the roles imposed on him under the Act, without regards to any extenuating circumstances. In the first place, it has been constitutionally prescribed that the petitioner must present his petition within 21 days. Time for presentation of petition cannot be extended. In fact, the time limit for presenting election petition is in the nature of statute of limitation and its intendment is to oust the jurisdiction of the Tribunal once the period prescribed is past. It cannot be extended as it is limited[35]. This is not healthy; more time should be granted the petitioner. In Canada, a jurisdiction where election petition is treated summarily, ie where there is no need of frontloading, the petitioner is allowed 30 days to file his petition.[36] Similarly, in Kenya, a fellow African Country, the petitioner is granted 28 days to file his petition.[37] These two countries that allow longer time to present a petition both have stronger and more responsive institutions than Nigeria in the electoral process. Secondly, time cannot be extended for the petitioner for filing his reply. Paragraph 16 (2) of the First Schedule provides that the time limited by sub paragraph (1) of this paragraph shall not be extended. The said subparagraph 1 provides that; 'If a person in his reply to the election petition raises new issues of fact in defence of his case which the petition has not dealt with, the petitioner shall be entitled to file in the Registry, within five (5) days from receipt of the respondent's reply, a petitioner's reply in answer to the new issues of fact.' By that provision, the petitioner's time for filing his Reply cannot be extended. The effect is that if the petitioner fails to file a Reply within 5 days from service, he will be deemed at law to have admitted all the new factual averments made by the respondent. This is grave and can be fatal to the petition. By virtue of paragraph 10 (2), the Respondent is allowed a period of 21 days to file his reply. He can as well apply for and be granted extension of time if he fails to file his reply within 21 days. This is unlike the petitioner who cannot obtain extension of time to file petition or extension to file the petitioner's reply or extension of time to apply for the issuance of pre-trial form. In each case where the petitioner fails to comply with the time granted to him, his petition will face fatal consequences!

**Participation in Pre-trial Proceedings**

Paragraph 18 (11) (a) is another grave provision under the Electoral Act. This section provides that where a petitioner fails to attend the pre hearing sessions or fails to obey a scheduling or pre hearing order or is substantially unprepared to participate in the session or fails to participate in good faith, the

[34] U C Kalu, E O C Obidinma & A O Anazor, 'Time Limitation in Election Petitions in Nigeria: The Imperative for Further Constitutional Reforms' *International Journal of Innovative Research & Development (December 2016, Vol 5 Issue 14)* p 46, ISSN 2278-0211 (Online).

[35] *Lamido v Turaki* (1999) 4 NWLR (PT.600) 578

[36] Section 527 of Canada Elections Act

[37] Section 74 of Elections Act No 24 of 2011

tribunal shall dismiss the petition. This provision decapitates the petition because of any act perceived as indicating lack of seriousness on the part of the petitioner. What constitutes lack of seriousness in the mind of the court pursuant to the provisions ranges from being absent in court, to non-filing of issues for determination, including other inability to meet stipulated conditions. Paragraph 18(11) provides thus: 'If a party or his legal practitioner fails to attend the pre hearing session or obey a scheduling or pre hearing order or is substantially unprepared to participate in the session or fails to participate in good faith, the tribunal or court shall in the case of (a) The petitioner, dismiss the petition; and (b) A respondent, enter judgment against him' Even though, Paragraph 18(11) provided that judgment can be entered against the respondent for failure to participate effectively in pre-trial proceedings, the respondent unlike the petitioner, can apply to have the judgment entered against him set aside. Paragraph 18(12) provides thus: 'Any judgment given under subparagraph 11 of this paragraph may be set aside upon an application made within 7 days of the judgment (which shall not be extended) with an order as to cost of a sum not less than N20,000'.

Paragraph 18(12) talks about judgment alone and did not talk about the order of dismissal. In Paragraph 18(11), two consequences flow. These are order of dismissal against the petitioner and judgment against the respondent. Subparagraph 12 only saves the judgment against the respondent and not the order of dismissal against the petitioner. In other words, where the petition is dismissed pursuant to subparagraph 11, the order of dismissal cannot be set aside by an application made within 7 days in line with sub paragraph 12! This is the harsh reality of the provision of the Electoral Act. These provisions make life unnecessarily difficult for the petitioner. In *Solomon v Celestine & Anor*[38] the court held that the provision of paragraph 18 (12) of the First schedule to the Electoral Act dealing with setting aside can only apply in a situation where the Respondent has a judgment entered against him under the provision of paragraph 18 (11) (b) and does not apply, to a petition dismissed under paragraph 18 (11) (a) of the First Schedule. So, the provision of the Act punishes the petitioner for non-participation in pre-trial and gives him no remedy to save his petition unlike the respondent that it provides opportunity to set aside the judgement.

**5. Conclusion and Recommendations**

From the foregoing, substantiated by the outcome of a lot of election petitions, it is obvious that proving the ground of substantial non-compliance under the Electoral Act of Nigeria is a herculean, if not an impossible task. The combined provisions of section 138(1)(b) and 139(1) have created a high hurdle for petitioners to jump. Unfortunately, the existence of this high hurdle is now promoting the current high rate of electoral offences witnessed in the country. Since the Act by the above stated provisions requires the petitioner to prove that the non-compliance have substantially affected the result of the election and substantially detracted from the provisions of the Act, politicians have capitalized on this and they commit serial electoral fraud knowing that the Act has made it impossible for the petitioner to establish his case. This has also misled the electoral body into becoming more lackadaisical and nonchalant in regards to complying with the provisions of the law. We have attempted hereinabove to show how it is easier for a camel to pass through the needle's eye than for a petitioner to prove substantial non-compliance before an election petition tribunal. No matter how high he jumps, he cannot prevail because the hurdle is beyond his reach. Therefore, the parameters need be reset and a return visit made on the requirements so as to adjust or reduce the burden.

We recommend as follows:

(a) Deletion of Section 139 of the Electoral Act. This is to bring an end to the problem of proving substantial non-compliance. Section 139 of the Electoral Act can void an election without first examining whether such non-compliance substantially affected the result. We have found that it cannot even be said whether a non-compliance affected the result substantially as some seemingly little non-compliance can have a ripple effect in the entire process and thus snowball into derailing the efficacy of the entire election. Deleting Section 139 will therefore enthrone some sanity into the system. Politicians and political actors will know that it is no more business as usual and will begin to conduct

[38](2011) LPELR-9186(CA)

themselves properly during elections thus ensuring integrity in the electoral process. This is what obtains in Canada where such anachronistic provision has no room in the electoral law.[39]

(b) Section 285(5) and 285(6) of the 1999 Constitution should be amended to extend the time of filing election petition to at least 40 days and also extend the time for hearing of a petition to at least 240 days. These amendments are suggested so as to provide enough time for the Petitioner to prove any ground of his petition.

(c) Paragraph 14 (2)(i) of the First Schedule to the Electoral Act, should be amended to allow the petitioner room to amend any of the requirement of paragraph 4 (1) of the First Schedule except the ground of the petition.

(d) paragraph 18(4) of the First Schedule to Electoral Act should be amended to mandate the secretary of the Tribunal to issue pre-trial forms (Form TF 007) and fix a date for filing the answers thereto (Form TF008)

(e) Paragraph 18 (3) & (5) of the First Schedule should be deleted entirely.

(f) Paragraph 18(12) should also be amended to save petitions. The paragraph should provide that an order of dismissal can be set aside just as a judgment against a respondent can be set aside.

(g) Paragraph 2 of the First Schedule should be deleted entirely.

(h) Paragraph 16(2) and 45(1) of the First Schedule should all be amended to allow extension of time within which the petitioner can file the petitioners reply.

[39] Section 524 of Canada Elections Act S.C 2000 c.9.