THE CLAMOUR FOR SPEEDY DETERMINATION OF ELECTION PROCEEDINGS IN NIGERIA AND THE IMPERATIVES OF SUBSTANTIAL JUSTICE: A CRITIQUE

Law and justice are kindred concepts. Law, however, is a much narrower concept than justice which is an ideal to which law aspires in order to remain relevant to any society to which it belongs. Therefore, law must endeavour to be assimilated to justice since law without justice is a mockery, or at best, a contradiction. It has been stated severally on most clear terms that the amendments to section 285 of the 1999 Constitution particularly, section 285 (6) and (7) of the said law are unassailable. However, that law, such as the one under discussion, should provide a pedestal for the annihilation of justice is an antithesis. The application of section 285 (6) and (7) of the 1999 Constitution of Nigeria (as amended) to election proceedings at some of the election tribunals in Nigeria had led to the destruction of about 80% of the petitions that arose from the 2011 general elections without hearing them on their merits.[1] At the end, justice was seemingly done according to law in respect of those petitions, yet the outcome of those election proceedings left sour tastes in the mouths of the Nigerian people and have accentuated the lack of confidence in the entire electoral process which situation on its own remains a veritable threat to our democratic arrangements as a nation.

Introduction

It is a common cliché that justice delayed is justice denied. That saying would never have had more relevance in any setting anywhere than it had in the litigations that followed the elections conducted in Nigeria in 2007. The Independent National Electoral Commission entrusted with the conduct of elections in Nigeria took the rest of the country for a ride and made a mockery of the exercise. The participants in the exercise headed to the election

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[1] See D.C Denwigwe, SAN: *The Performance of the Election Petition Tribunals in the South East Zone* , A Paper Presented at the NBA Conference on the performance of the Election Petition Tribunals in Nigeria on 15th – 16th March, 2012 at Benin City, Edo State, pp 30 and 32, wherein he gave the statics as regards the election petition filed in Anambra and Imo States as follows:

ANAMBRA STATE: Thirty Nine (39) petitions were filed on House of Assembly elections; Twenty two (22) petitions were filed for the House of Representatives elections; Seven (7) petitions were filed for the Senatorial elections; There was no governorship election petition because the tenure of Mr Peter Obi is yet to expire. Sixty two (62) of the petitions were struck out on preliminary objections, Eight (8) petitions were heard on the merit, Four (4) petitions were successful, Fifteen (15) petitions were returned from the Court of Appeal for trial on the merit;
COMMENTS: Less than 13% of the petitions were heard on the merit. Less than 7% of the petitions were successful. The petitions which were returned from the Court of Appeal for trial on the merit were caught up with the provisions of Section 185(6) of the Constitution. They could not be concluded within 180 days from their dates of filing. One tribunal (Tribunal 1) headed by Hon. Justice Bwala was disbanded upon allegation of corruption made against its members.

IMO STATE: A total of Forty Five (45) petitions were filed, Twenty Four (24) petitions were filed against the House of Assembly elections, Twelve (12) petitions were filed against the House of Representatives election, Five (5) petitions were filed against the Senatorial elections and Four (4) petitions were filed against the Governorship elections. Thirty One (31) petitions were struck out on preliminary objections, Eleven (11) petitioners were withdrawn, Four (4) petitions were heard on the merit, Twenty Nine (29) petitions went on appeal, Fourteen (14) petitions were remitted back to the tribunal to be heard on the merit. They were caught up by the 180 days time limitation, There were Four (4) Tribunal panel for Imo State. The chairman of the National/State Assembly Tribunal panel II withdrew and the next member to him in seniority became the chairman.
COMMENTS: It can be seen from the foregoing that the four panels could only conclude trial on the merit in four petitions which represents about 8.9% of the total petitions filed. The inability of the Tribunals to conclude more petitions on the merit resulted from the time wasted on preliminary objections and the appeals arising therefrom.

petition tribunals and courts to invoke the powers of judicial review vested in the judiciary to put right the perceived wrongs.

That there was a near total failure of justice was seen from the fact that as at less than a year to the end of the tenure of offices to which the disputed elections relate, several of the appeals emanating from the determination of the election petition tribunals were yet to be heard. Many of the appellants seeking cancellation of their own elections were constrained to withdraw them for want of time to conclude the appeals and go for re-run elections if such was ordered by the appellate court. The issue of want of time dealt fatal blows to election appeals in respect of legislative houses election as opposed to their colleagues pursing justice in respect of governorship elections. In fact some of the states, decisions in governorship election appeals were delivered few months to the end of the tenure to which the election relates. The cases of Delta State, Ondo state and Osun State will suffice here. In those states where governorship elections were nullified less than one year to the end of the tenure to which the disputed elections relate, the persons that were returned in the judgment had nothing to worry about in view of the decision of the Supreme Court in Peter Obi's v INEC[2]. It was from this background of near total failure of justice that the National Assembly reacted most responsibly by effecting amendments in both the 1999 Constitution and the Electoral Act, 2010. Section 285(5)-(8) of the 1999 constitution (as amended) provides that:

(5) An election petition shall be filed within 21 days after the date of the declaration of result of the elections.

(6) An election tribunal shall deliver its judgment in writing within 180 days from the date of the filing of the petition.

(7). An appeal from a decision of an election tribunal or court shall be heard and disposed of within 60 days from the date of the delivery of judgment of the tribunal.

(8). The Court in all appeals from election tribunal may adopt the practice of first giving its decision and reserving the reasons therefore to a later date".

Does The Provisions in These Amendments Infringe the Doctrine of Separation of Powers?

It needs not to be restated that we operate a constitutional democracy which recognizes the compartmentalization of governmental powers along three broad lines and the vesting of same upon three distinct arms of government[3]. The said political arrangement does not allow any of the arms of government to dictate to another on how it will conduct its business.[4] However the issue of control of the courts in Nigeria, at least as it concerns the time limited for delivering judgment in matters before the courts have never failed to attract both legislative and judicial attention.[5] In Ifezue v Mbadugha.[6] it was held by majority of the Justices of the Supreme Court who heard the appeal that it was mandatory for a court to deliver its judgment within 3 months in accordance with the provisions of section 258(1) of

[2] 31 NSCQR 734

[3] See Generally Sections 4, 5 and 6 of the 1999 Constitution; see also B.O Nwabueze : *The Presidential Constitution of Nigeria*, C Hurst & Co Publishers (London), 1981 at p.34.

[4] See the case of Unongo v Aku (1983) 2 SCNLR 332, Sofekan v Akinyemi & ors (1980) 5- 7 S. C. 1 at 25.

[5] See section 258 (1) of the 1979 Constitution which provides that such judgment must be delivered within 3 months; see also Section of the 1999 Constitution to the same effect.

[6] (1984) 1 SCNLR 427

the 1979 Constitution[7] and that any judgment delivered outside that period is a nullity and of no legal effect. The court took this position on the interpretation of the words "reasonable time" in the fair hearing provisions contained in section 33(1) of the 1979 Constitution because of the inordinate delays by courts in the determination of the cases before them. It goes without saying that the Supreme Court relied on the mischief rule of interpretation when it considered the prevalence of delays in court proceedings in Nigeria (as at then) in arriving at the decision in Mbadugha's case. The decision in Ifezue v Mbadugha[8] was followed in the case of Odi v Osafile[9] where the Supreme Court held a decision of the Court of Appeal in that case delivered about 11 months and 15 days after the conclusion of Final Addresses by Counsel as a nullity.

It seems that the Supreme Court recognized the need to ensure that justice is not only done but should be done timeously by the courts. It took up the duty of securing compliance with the terms of the constitutional provisions on that matter. In many other civil matters, the Supreme Court displayed zero tolerance for inordinate delays in the hearing and determination of cases[10].

In the case of Ariori v Elemo[11] Aniagolu JSC in discussing the issue of speedy trial and fair hearing stated that:

> *I shall restrict myself to a short commentary on speedy trial and fair hearing resulting there from. In the determination of cases by courts of the land, speedy trial and fair hearing are integral parts of justice….the doing of justice is an obligation which the state owes to its citizenry and which it exercises principally through its third arm, namely, the judiciary… speedy trial and fair hearing therefore become an aspect of public justice which sets a standard fixed by law and society, which a judge must attain in the determination of cases before him…*

The Principles of Fair Hearing and Speedy Trial of Election Petitions and Appeals in Nigeria.

Election matters are *sui generis* (of its own kind), to the extent that they are not subject to the rules that guide civil proceedings generally even when they are civil in nature. In election petitions and appeals, time is of the essence and every step in respect of election proceedings is governed by time limitation for doing same and in most of the cases, application for extension of time are ruled out.[12] The legislature must have had this nature of election petitions in mind when it enacted sections 129(3) and 140(2) of the Electoral Act, 1982, limiting the time for the hearing and conclusion of election petitions and declared that anyone not concluded within the limited period of time was time barred, null and void. The case of Unongo v Aku[13] could not be concluded within the limited time and the court in that matter declined to give judgment on it at the expiration of time. The matter fell for determination by

[7] 1979 Constitution of the Federal Republic of Nigeria.
[8] (Supra)
[9] (1985) 1 NWLR (pt 3) 117.
[10] See Sodipo v Leminkainem (1986) 1 NLTR I. Kakara & Anor v Omonikhe & Anor (1974) 1 ALL NLR 383 at 384, Per Coker JSC; Fakon & Ors v Kimisede & Ors (1976) 1 NMLR 194.
[11](1983) 1 SCNLR 1.
[12] See for instance the provisions of section 285 (5) of the 1999 constitution (as amended) and paragraph 18 of the First Schedule to the Electoral Act, 2010 (s amended) where failure to file processes within the limited time attracts fatal consequences.
[13] (1983) 2 SC NLR 332.

the Supreme Court. The apex court in protecting the autonomy of the judiciary to control its proceedings declared the relevant provisions of the Electoral Act, 1982 as null and void for being an infraction upon the judicial powers vested on the courts by the constitution but was yet unable to either deliver the judgment in question or direct its delivery.
In the views of Bello, JSC in the said case as to what justice is and what it should not be, he stated:

> *I may venture to generalize… that undue delay and undue haste or hurry cannot by any standard be said to be reasonable and consequently, either constitutes an infraction of the provisions of Section 33(1) of the Constitution.*

In furtherance of the efforts to ensure separation of powers and the authonomy of the judiciary as regards the determination of matters that fall for determination by the courts, in both the cases of Nnajiofor v Ukonu[14] and Obih v Mbakwe[15], the court rejected the attempts by the National Assembly to limit the time within which the court must determine election matters. It was decided in Nnajiofor v Ukonu[16] that what is reasonable time to be expended in the determination of any matter varies from one case to another depending on the circumstances of each case as to the number of witnesses and the length of their evidence, whether they are available, the documents to be tendered, the disposition of the judge physically and mentally to hear and determine the case etc. But in all circumstances, the courts have always held that there is every need for the court to afford the parties the opportunity to present their cases, tender their documents and call their witnesses.
Unfortunately, however, the National Assembly had, in limiting the time for hearing and determination of election petitions, through the Electoral Act, 1982 drastically curtailed the access of the citizenry to the courts for the purpose of election petition. Section 129(3) of the Electoral Act provides.

> *Proceedings before a High Court in the case of a petition in respect of the office of President or Vice President, Governor or Deputy Governor or in respect of any of the legislative Houses shall be completed no later than 30 days from the date of the election concerned.*

Section 140(2) of the same Act provides that:

> *A petition filed before a High Court in respect of any election shall be disposed of by the court not later than 30 days from the date of such election and any election petition not so disposed of shall be time barred and such petition shall be deemed null and void.*

It was under these provisions that the case of Unongo v Aku[17] arose. In that case, the High Court that heard the election petition declined to deliver judgment thereon on the ground that the time limited for the hearing and determination of the election petition has been exhausted and the petition has become time barred. The Court of Appeal allowed the petitioners appeal in its entirety but did not make the appropriate order sought by the appellant "not so much because of the time bar prescribed by section 129(3) and 140 (2) of the Act, but because the learned trial Judges had not taken the elementary caution of deciding the case on the merits within the period permitted by the Act"

[14] (1985) 2 NWLR (pt 10) 686
[15] (1985) 6 NCLR 783
[16] *OP. cit.*
[17] (1983) 2 SCNLR 332, see also the case of Kadiya v. Lar (1983) 2 SCNHR 368.

On further appeal to the Supreme Court the appellants contended that section 129(3) and 140(2) of the Electoral Act, 1982 were unconstitutional to the extent that they infringed not only on the liberty contained in section 258 of the 1979 Constitution[18] regarding the period within which a court of law shall deliver its judgment but also on the appellants right to a fair hearing within a reasonable time. It was further argued that in view of the constitutional doctrine of separation of powers recognised by the Nigerian Constitution, it was unconstitutional to use legislation to control the exercise of judicial functions except to the extent that such control by the legislature is expressly authorised by the Constitution.

The Supreme Court held on the propriety of sections 129 (3) and 140(2) of the Electoral Act, 1982 and their interference with judicial functions that although there was no doubt that the National Assembly had the constitutional power to prescribe the practice and procedure to be followed by a court in matters concerning election petitions, such powers cannot, in view of the doctrine of separation of powers among the three arms of government extend to the limitation of time within which a case properly instituted in a court can be heard and determined otherwise such an exercise as in the instant case, would be *ultra vires* for amounting to an unconstitutional interference with judicial functions. The views expressed by some of the justices of the Supreme Court on the matter are worth reproducing.
Obaseki, JSC had this to say on the issues involved in the case:

> *One of the powers which has always been recognized as inherent in courts which are protected in their existence, their powers and jurisdiction by constitutional provisions has been the right to control their order of business and to so conduct the same that the rights of all suitors before them may be safeguarded. This power has been recognized as judicial in nature and as being a necessary appendage to a court organized to enforce rights and redress wrongs the principle of separation of powers prohibits the legislature not only from exercising judicial functions but also from unduly burdening or interfering with the judicial department in its exercise thereof.*[19]

It was the view of Bello, JSC in the same case that:

> *Sections 129(3) and 140(2) of the Electoral Act, 1982 constitute fetters and clogs in the exercise of the jurisdiction of an election court and are inconsistent with the provisions of Section 4(8) 6(6)(a) and 237 of the Constitution and are in that respect void*[20].

According to Eso, JSC it is the absolute prerogative of the judiciary and they are matters within its absolute competence to determine the time the justice of a case demands for hearing and determination of a case. The court stated further, per Obaseki, JSC that:

> *The Nigeria Courts… have been made by the 1979 Constitution to be the judge of how they can best expedite judicial business before them. The court cannot be made or directed to sacrifice justice on the altar of speed…"*

In allowing the appeal unanimously, the court held that:

[18] Now Section 294(1) of the 1999 Constitution. Section 294(4) of the 1999 Constitution widened the freedom of the judiciary to control its proceedings by providing that a judgment of court shall not be set aside or treated as a nullity solely on the ground of non compliance with S. 294(1) of the Constitution. Proof of miscarriage of justice as a result of non compliance is required.
[19] Unongo v Aku *op cit* at p 359
[20] *Ibid* at p 353

> *If any portion of any Act enacted by the National Assembly infringes Section 33(1)[21] and thereby ousts the jurisdiction of a court of law to hear and determine a matter then there is a breach of section 4(8) of the Constitution of the Federal Republic of Nigeria, 1979 and to that extent the provisions of section 140(2) of the Electoral Act, 1982 which ousts the jurisdiction of the competent High Court to hear and determine election petition in conformity with the provisions of section 133(1) and Section 258 of the Constitution…is, therefore unconstitutional.*

Earlier in the case of Sofekun v Akinyemi[22] the Supreme Court had stated, per Aniagolu, JSC that:

> *It is essential in a constitutional democracy, such as we have in our country that for the protection of the rights of citizens, for the guarantee of the rule of law which includes according fair hearing to the citizens under procedural regularity, and for checking arbitrary use of power by the executive or its agencies, the power and jurisdiction of the courts under the constitution must not only be kept intact and unfettered, but also must not be nibbled at…*

It is, however, worthy to note, for the purpose of clarity that the provisions of sections 129 (3) and 140 (2) of the Electoral Act, 1982 under which the cases of Unongo v Aku[23] and kadiya v Lar[24] were decided were not provisions made in the Constitution. It is to the extent that the said provisions are found in statutes other than the Constitution that they were considered as affront to the provisions of the Constitution as to the right of the citizens of Nigeria to a fair hearing.

A different situation, however, obtains in cases such as the ones determined under the provisions of sections 285 (5) – (8) of the 1999 Constitution (as amended). Though section 134 of the Electoral Act, 2010 (as amended) has made similar provisions requiring speedy disposition of election proceedings, the main plank upon which the Supreme Court rested to enforce the time limitation for the hearing of the election petitions and appeals is section 285 (6) and (7) of the 1999 Constitution (as amended)[25].

In our legal system as indeed all over the world where constitutions are found, the Constitution is the ground norm, the mother of all laws. The legality of every legislation is grounded in the Constitution from which the three arms of government, the executive, the legislature and the judiciary derive their existence.

Where any legislation derogates from the provisions of the Constitution on the same subject matter, it is liable to be nullified. However, there is no occasion to declare the provisions of the Constitution as null and void or unconstitutional. Therefore, the provisions of section 285 (6) and (7) of the 1999 Constitution (as amended) are beyond a successful challenge in the courts on grounds of unconstitutionality. It remains to be seen however, if the said provisions have achieved the purpose for which they were enacted by the legislature. Where they have not, the chances of rolling back their effect may not be through a judicial remedy but rather through a legislative action.

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[21] Now Section 36(1) of the 1999 Constitution

[22] (1980) 5 – 7 S. C. 1 at 25

[23] Supra

[24] (1983) 2 SCNLR 368

[25] See the cases of Ugba v Suswam &Ors (2013) 4 NWLR (pt 1345) 427; Ngige & Anor v Akunyili & Ors (2012) 15 NWLR (pt 1323) 343,; Felix Amadi & Anor v INEC & Ors (2013) 4 NWLR (pt 1345) 595

Can Law Provide a Reciepe for Injustice?

As stated earlier, law and justice are kindred concepts. Law, however, is a much narrower concept than justice which is an ideal to which law aspires in order to remain relevant to any society to which it belongs. Therefore, law must endeavour to be assimilated to justice since law without justice is a mockery, or at best, a contradiction. It has been stated on most clear terms that the amendments to section 285 of the 1999 Constitution, particularly, section 285 (6) and (7) of the said law are unassailable. However, that law, such as the one under discussion, should provide a pedestal for the annihilation of justice is an antithesis. The application of section 285 (6) and (7) of the 1999 Constitution of Nigeria (as amended) to election proceedings at the various election tribunals and courts in Nigeria had led to the destruction of more than 80% of the petitions that arose from the 2011 general elections in some states without hearing them on their merits[26]. At the end, justice was seemingly done according to law in respect of those petitions, yet the outcome of those election proceedings left sour tastes in the mouths of the Nigerian people and have accentuated the lack of confidence in the entire electoral process which situation on its own remains a veritable threat to our democratic arrangements as a nation.

It is important, therefore, that an attempt be made to discover what went wrong with the application of the seemingly laudable provisions of section 285 (6) and (7) of the 1999 constitution (as amended) and how an interplay of the said provisions and other provisions of the 1999 Constitution and the Electoral Act, 2010 (as amended), under the hands of the nation's judicial officers, has led to a near total failure of justice.

The Need for Speedy Determination Election Proceedings

It is one of the cardinal principles upon which legal systems all over the world operate, that justice must be dispensated as timeously as the circumstances of a case may permit. This time-honoured attribute of justice is underscored by the popular cliché "justice delayed is justice denied"

Before the enactment of the amendments to the Electoral Act, 2010, time frames were not set by law for conclusion of election proceedings in Nigeria apart from the attempt in the Electoral Act, 1982. It was section 285 (6) and (7) of the Electoral Act, 2010 (as amended) that introduced the issue of limitation of time for the hearing of and determination of election proceedings. The desire for quick dispensation of justice stems from the fact that there may be no practical difference between losing one's case and securing a pyrrhic victory, long after the *res* has been expended, which victory the winner cannot enforce, which victory also may not do anything more than to contribute to the development of the law. The expression "justice delayed is justice denied" can find no better place than in election proceedings. Election proceedings are *sui generis* and time is of real essence in such proceedings. The scenario that attended the litigations which arose from Nigeria's general elections of 2007 became so despicable that it graduated to a national embarrassment. In respect of some petitions that arose from the said elections, proceedings were pending both at the election tribunals and appellate courts even few months to the next general elections.[27] The result that

[26] See D.C Denwigwe (*Op.cit*) at pages 30 and 32 where the case of Anambra and Imo states were discussed.

[27] In Ngige v Obi, 31 NSCQR 734, for instance, the respondent made an ingenious use of that situation and stretched the hearing of the petition and the appeal almost to breaking point. In that case, after a marathon trial spanning about two years, a total number of four hundred and eighty two witnesses (482) testified before the tribunal. The petitioner called forty-five (45) witnesses. The 1st Respondent called four hundred and twenty-five (425) witnesses while the second Respondent called twelve witnesses. The judgment of the Court of Appeal in the same case confirming the judgment of the tribunal that it was the petitioner, Mr Peter Obi that won the election and ought to be returned, was delivered on the 15th day of March, 2006, a period of almost three years after the conduct of the election that took place on 19th April, 2009.

followed this unprecedented delay in concluding the said cases was that many petitions especially elections into legislative houses in which petitioners were seeking cancellation of the elections in which they participated and orders for re-run election were rendered mere academic exercises.[28] Once again public interest suffered a setback.
It has been recognised that Nigeria operates a constitutional democracy that recognizes the compartmentalization of governmental powers and the vesting of same upon the three different and distinct organs of government[29]. Under the said arrangement, it is the duty of the legislature to make and amend laws for the good governance and welfare of Nigerians generally.

As would be expected of any responsive legislature, the National Assembly of Nigeria reacted to this obvious derailment by amending section 285 of the 1999 Constitution to facilitate speedy disposal of election petitions and appeals. Before the amendment, section 285 of the 1999 Constitution made provisions only for the constitution and jurisdiction of Election Tribunals.

The Legal Framework for Speedy Trial of Election Petitions in Nigeria
There were various provisions enshrined in the Electoral Act, 2006 to ensure a speedy determination of election proceedings. In the first instance, section 141 of the Electoral Act 2006 made mandatory provisions for a 30 day time limit within which to file an election petition. Paragraph 12 (1) as well as paragraph 16 (1) of the first schedule to the same Electoral Act provides time limits for the filing of both the respondent's reply as well as the petitioner's reply. Paragraphs 22(1), 23, 24 (1) and 25(1) and (2) of the first schedule to the Electoral Act 2006 made provisions for speedy determination of election petitions as regards adjournment of hearings in such petitions. However, it was the Practice Directions made on March 29, 2007 by the President of the Court of Appeal pursuant to the powers vested on him by section 285(3)of the 1999 Constitution that brought radical changes to the issue of speedy determination of election proceedings. The practice directions captioned "Election Tribunal and Court Practice Directions" No. 1, 2007 were published in the official gazette of the Federal Republic of Nigeria on 4th April 2007 and was given retrospective effect from 3rd April, 2007. The said practice direction provides among other things for the mandatory filing of application for the issuance of pre-hearing notice within 7 days of the conclusion of pleadings with fatal consequences stipulated for failure. It was the provisions of the said practice directions that were enacted as paragraph 18 of the first schedule to the Electoral

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In the case of Fayemi v Oni (2011) FWLR (pt554)1, it was as almost as bad as that of Uduaghan v Ogboru, it took the election tribunal and the Court of Appeal good three years and half to discover and determine that it was the petitioner Mr Fayemi and not Mr Oni that was validly elected as Governor of Ekiti State, in 2007 when election was held for the seat of Governor of Ekiti State. The case of Aregbesola v Oyinlola (2011)1 WRN 33, did not fare better. The most notorious of such cases was however, seen in the case of Ogboru & Ors v Uduaghan (Unreported) Appeal Nos. SC 361/2011 and SC 362/2011, Judgment delivered on the 17th of November, 2011 by the Supreme Court of Nigeria. Governor Uduaghan of Delta State almost completed his four year tenure before his election was nullified by the Court of Appeal which ordered a re-run. After the re-run election, Governor Uduaghan spent just three months in office before the 2011 general election where he was again a candidate for the office of the Governor, and was again re-elected governor. The election petition occasioned by the re-run election is the one cited herein which was disposed of by the Supreme Court almost one year after the governor had completed his tenure of office. It must be mentioned that delay in delivering judgment in election proceedings will only reduce the term of a successful petitioner/appellant who contested for a Legislative House election. As for a person that contested for election into an executive position, by virtue the decision in the case of Peter Obi v I.N.E.C, & Ors. 31 N.S.Q.R 734, such a person will stay in office for the whole term stipulated in the constitution starting from the date he first took the oath of office.

[28] In B.U osude v Chukwuma Umeoji & Ors. CA/ E/EPT/ 28/2007, the Appellant seeking cancellation of the election and re-run withdrew the petition on 15/ 9/2010 because the party primary election for the 2011 election in the constituency was about to commence while the appeal was yet to be heard. In CA/E/EPT/ 66/2007: Edith Mick-Ejezie v Ralph Okeke & Ors. Judgment was delivered on the appeal less than six months to the legislative term to which the election belong.

[29] See generally sections 4,5 and 6 of 1999 Constitution (as amended)

Act, 2010(as amended). To crown all the efforts aimed at speedy hearing of election proceedings under the Electoral Act, 2006, the tribunals were vested with powers to schedule at the end of the pre-trial conference(s) the number of witnesses and days allowed each petitioner and respondents to prove their cases.

Presently, section 285 of the 1999 Constitution has been amended by adding subsections (5)-(8) to the original section and subsections. Section 285 (5) – (8) of the 1999 Constitution (as amended) provides that:

> (5). *An election petition shall be filed within 21 days after the date of the declaration of result of the election.*
>
> *(6). An election tribunal shall deliver its judgment in writing within 180 days from the date of the filing of the petition*
>
> *(7). An appeal from a decision of an election tribunal or court shall be heard and disposed of within 60 days from the date of the delivery of judgment of the tribunal.*
>
> *(8). The court in all appeals from election tribunal may adopt the practice of first giving its decision and reserving the reasons therefore to a later date.*

The provisions of section 285 (5) – (8) of the 1999 Constitution (as amended) were also enacted verbatim by the National Assembly in section 134 (1)-(4) of the Electoral Act, 2010 (as amended) and both enactments took it beyond doubt that our election petition tribunals and courts are required, as a matter of law to deliver judgment on matters before them within the limited periods of time otherwise such matters would end up without any judgment at all as have become the case in many petitions and appeals.[30]

Many petitions were struck out by the election tribunals upon interlocutory applications contending that they were incompetent[31].

The petitioners therein appealed against the orders of the election tribunals striking their petitions out. Even after orders for trial *de novo* were made on them by appellate courts, including the Supreme Court, the trials *de novo* could not be concluded before the expiration of 180 days limited by law for hearing such petitions.

Existence of Loopholes in the Present Law

Experience have shown that no matter how meritorious an enactment may be, there may, occasionally be some loopholes that may lead to the circumvention of same law that were not envisaged by the legislature. That has become the case presently with the elegant and precise provisions of sections 285(5)-(8) of the 1999 Constitution (as amended).

Essentially, section 285 (5)–(8) of the constitution appears to be an answer to the yearnings of petitioners in election proceedings and the public in general who wished to see speedy conclusion of election petitions. However, these lofty expectations have been dashed to the ground so quickly, either because the surgical operation performed on the 1999 Constitution (as amended) and the Electoral Act, 2010 (as amended) by the National Assembly left

[30] See Ugba & Anor.v Suswam & Ors. (2013) 4 N.W.L.R (pt.1345) 427, Akpan Udoedehe & Anor V Godswill Akpabio & Ors. (unreported) Appeal No SC154/2012 judgment delivered on 1st June 2012; Ngige & Anor v Akunyili & Ors (2012)15 NWLR (pt 1323) 343.

[31] See P.D.P & Anor.v Okorocha & Ors (2012)15 NWLR (pt 1323) 205;Ngige & Anor v Akunyili & Ors (2012)15 NWLR (pt 1323)
343; ANPP & Anor v Goni & Ors (2012)7 NWLR (pt 1298) 147; P.D.P & Anor v C.P.C Ors (2011)17 NWLR (pt 1277) 485; P.P.A & Anor V I.N.E.C & Ors (2012)13 NWLR (pt 1317) 215; Shettima & Anor v Goni & Ors (2011)18 NWLR (pt 1279) 413; Udoedehe V Akpabio (unreported) Appeal No SC154/2012 judgment delivered on 1st June 2012; Ugba & Anor.v Suswan & Ors. (2013) 4 N.W.L.R (pt.1345) 427; *Awojobi & Anor v INEC & Ors (2012) 8 NWLR (pt 1303) 528* Abubakar v Nasamu (No 2) (2012)17 N.W.L.R (pt.1330)523.

loopholes which were exploited by respondents in election petitions or that the respondents and election tribunals that indulged them in their frivolous interlocutory applications to strike out election petitions *in limine*, were left behind when the rest of the country moved forward with the legislature in the amendments effected on our electoral laws. Their failure to move with the tide has obviously led to mutated results contrary to the good intentions of the legislature in trying to curb the mischief of inordinate delays in disposing of election petitions and appeals.

Still on the existence of possible loopholes in the electoral laws capable of being exploited for purposes of mischief, the existence of such loopholes became inescapable when the laudable provisions of section 285(5)–(8) of the 1999 Constitution(as amended) and paragraph 12(5) of the first schedule to the Electoral Act, 2010 (as amended) are considered side by side with the provisions of Section 140(4) and paragraph 53(2) and (5) of the first schedule to the Electoral Act, 2010 (as amended) as well as our case law on jurisdiction of courts.

Section 140(4) of the Electoral Act, 2010 (as amended) provides that:

> (4) *…subject to the provisions of paragraph 53 (2) of the First Schedule to this Act, on the motion of a respondent, in an election petition, the Election Tribunal or court, as the case may be, may strike out an election petition on the ground that it is not in accordance with the provisions of this part of this Act, or the provisions of the First Schedule of this Act.*

Paragraph 53(5) of the First Schedule to the Electoral Act 2010 (as amended) provides that:

> *An objection challenging the regularity or competence of an election petition shall be heard and determined after the close of pleadings.*

Paragraph 53(2) of the first schedule to the Electoral Act 2010 (as amended) to which alone Section 140(4) of the Electoral Act was made subject provides that:

> *An application to set aside an election petition or a proceeding resulting there from for irregularity or for being a nullity, shall not be allowed unless made within a reasonable time and when the party making the application has not taken any fresh step in the proceedings after knowledge of the defect.*

What constitutes taking fresh steps in the proceedings after knowledge of the defect in the petition depends on the circumstances of the case.[32] It has been held that taking fresh step in situations like this means allowing the case to proceed to hearing or doing such acts as would convey to the petitioner that the respondent is not raising any objection; or where he has raised one, that he is not pursuing it, see Ojo v Anongo[33] where the Court of Appeal stated, Per Bulkachuwa, J.C.A that:

> *As I pointed out earlier, this is a matter where there had been a ruling on the competency of the election petition and the tribunal held that it had jurisdiction and the petition was competent before it. The respondents to the petition had filed their replies and had participated in a full trial of the petition they were alleging was not competent, they cannot be allowed at this stage to do so…*

[32] See Uzodimma v Udenwa (2004)1NWLR (pt.854)303; Nnamani v Nnaji (1999)7 NWLR(pt.610) 331; Tafida v Bafarawa (1999) 4NWLR (pt.597) 70

[33] (2004) All FWLR (pt.218) 934 at 947; see also Buhari v Obasanjo (2003) 17NWLR (pt850) 485

If a respondent files a reply to an amended petition and participates in the Proceedings by leading evidence to an extent, he cannot be allowed to question the competence of the petition thereafter. With such objection not having been taken at the earliest opportunity, it is deemed to have been waived.[34]

The intendment of the above provisions of the Electoral Act, 2010 (as amended) seems to be that upon an application made timeously by a respondent who noticed a defect in an election petition as a result of non-compliance with the provisions of the Electoral Act, the applicant may move the election tribunal to determine the petition *in limine* by striking out same without hearing the petition on the merits. Since section 140(4) of the Electoral Act 2010, (as amended) was made subject only to paragraph 53(2) of the first schedule to Electoral Act, 2010 (as amended), it seems that the only bar to an election tribunal hearing a preliminary objection filed by a respondent seeking to have a petition struck out without hearing the petition on its merit remains where the party raising the objection has taken fresh steps after he became aware of the defect or non-compliance by the petitioner with the requirements of the Electoral Act in filing the petition. Where he raises his objection in good time , he would be heard *in limine* and if his objection is considered meritorious the petition would be determined *in limine* contrary to the intendment of paragraph 12(5) of the first schedule to the Electoral Act, 2010 (as amended).

It is instructive to note that most, if not all challenges that are always mounted against the hearing of election petitions on grounds of incompetence constitute direct attacks on the jurisdiction of the election tribunals to hear such petitions. Such objections have always been founded on the failure of the petitioner to comply with the provisions of the Electoral Act that require the petitioner to state the detailed particulars of the election he is challenging or to accompany his petition with competent witness depositions[35] and list/copies of documents he intends to rely upon.

Curiously, respondents in election petitions filed after the 2011 general elections tried new tactics in delaying proceedings when they began to raise objections on the forms by which petitioners activated pre-hearing sessions in their petitions. They tagged such objections as objections to the jurisdiction of the tribunals to hear the petitions and moved most, if not all, the election tribunals faced with such challenges to hear the objections at the pre-hearing sessions and had the petitions determined *in limine*. Why the judges at those tribunals obliged them in spite of the provisions of paragraph 12(5) of the first schedule to the Electoral Act, 2010(as amended) to the contrary is still subject to guesses.

[34] Maduabu v Onyimba Ray & Ors.(2006) All F.W.L.R (pt.300)167 The principle of waiver will however not apply where there has been a fundamental failure to comply with statutory requirements for the competence of such a petition. See Effiong v Ikpeme (1999) 6 NWLR (pt.606) 260. In Alh. Manu Mutum Biyu & Ors v Alh. Abdulaziz Ibrahim (2004) All FWLR(pt.220)1323, their Lordships at the Court of Appeal held that having filed the motion simultaneously along with his reply, the 1st respondent can be said to have taken fresh steps in the proceedings (though no evidence had been taken) despite the fact that he was aware of the alleged defect. The decision in Mutum Biyu's case was followed in the case of Tafida v Bafarawa (1999) 4NWLR (pt.597) 70 by the Court of Appealwhere that Honourable court held that: "an objection to set aside an election petition on ground of irregularity or for being a nullity must be taken before any fresh step is taken.

[35] See Nkeiruka v Joseph (2009) 5 NWLR (pt. 1135) 505

What if the objection touches on the jurisdiction of the tribunal?

It is trite law that jurisdiction is a threshold issue and the life wire of any adjudication.[36] It is therefore arguable that once the jurisdiction of an election tribunal or court is challenged, the court or tribunal ought to halt the trial at that stage and determine first whether it has jurisdiction or not because incompetence vitiates a trial no matter how well conducted.[37] Once the jurisdiction of a court is challenged the court is robbed of jurisdiction to continue to hear and determine the matter[38]. The only jurisdiction remaining in the court is the jurisdiction to inquire into whether it has jurisdiction or not.[39]

It seem to be good argument, therefore, and indeed one that accords with law and practice in our regular courts as canvassed in many of the election proceedings that issues of jurisdiction of courts should be taken at the point they arise since it will amount to waste of valuable judicial time for a court or tribunal to labour to hear a petition to the end only to discover at the point of judgment that it has no jurisdiction to try the petition in the first place. Tribunals that entertained preliminary objections and struck out petitions *in limine* also justified their positions by stating that if the legislature had intended to abolish the practice of hearing preliminary objections at the interlocutory stage, the legislature would have repealed section 140(4) and paragraph 53 (5) of the First Schedule to the Electoral Act, 2010 (as amended). This argument , however, seems to have overlooked the extant and mandatory provisions of paragraph 12(5) of the first schedule to the Electoral Act, 2010 (as amended) to the effect that such objections should be heard and determined along with the substantive matter.

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[36] Madukolu v Nkemdilim (1962)1 All NLR 587; Nwabueze v Okoye (2002)10 WRN, 123 at 155; Sken Consult Nig Ltd v Ukey (1981)1 SC6 at 26.

[37] Onyekwuluje v Animashaun (1996) 3 SCNJ 24 at 31 or (1996) 3 NWLR (Pt. 439)637; State v Onagoruwa (1992) 2NWLR (pt.221)33 at 52-53. See further Usman Dan Fodio University v Kraus Thompson Org. Ltd (2001)15 NWLR (pt 736) 305; Oloriode V Oyebi (1984)15 CNLR, 390, Ezomo V Oyakhire (1985)1 NWLR (pt 2) 195. In Hon. Abdulaki Kamba & anor V Alh. Ibrahim Bawa & ors (2005) 4 NWLR (Pt 914) 43 at 59, Obadina, JCA stated that "The primary objective of a preliminary objection is to terminate the proceedings at the stage the objection is raised. He referred to the case of Okoi & Oths V Ibian &Ors (2002) 10 NWLR (Pt. 776) 455 at 468. A court of law has a duty to decide on a preliminary objection before proceeding to consider the substantive issue. See Ahaneku & Ors v Ekeru & Oths (2002) 1 NWLR (Pt. 748) 301 at 308 see also Ogoja L.G v Offorboche (1999) 7 NWLR (Pt. 485) 48; Nwanwata v Esumei (1998) 8 NWLR (Pt. 563) 650. Where however, for some exigencies the court decides to take the preliminary objection along with the substantive matter, the court is still under a duty to determine the preliminary objection first before delving into hearing of the substantive, issue. Where the preliminary objection is upheld, that is the end of the journey for the substantive matter before that court, especially where the challenge is against the competence and jurisdiction of the court. The advantage of this practice is that it saves time and energy. See the judgment of I.T Mohammed JCA (as he then was) in ANPP V The Returning Officer, Abia South Senatorial District & Ors (2005) 6 NWLR (Pt 920) 140 at pp 170 – 171 as cited in P.A. Onamade: *Advocacy in Election Petition, Practice Directions and Removal of Public Office Holders* Philade Co. Ltd (Lagos) 2010 pp. J75-78. In GEN Onyekwuluje v G.B. Animashaen & Anor (supra), it was held that a court is duty bound to express in writing whether it agrees with a preliminary objection or not. Even where the objection is on mere technicality, it still touches on the cardinal issue of fair hearing. See also Ogbanu v Oti & ors (2000) 8 NWLR (Pt. 670) 582 at 590.

[38] In Nura Kahlil v. Alhaji Umaru Musa Yar'Adua &Ors (2003) 16 NWLR, part 847, 446 at pp. 484-485, Obadina, JCA stated in construing paragraph 49(5) of the First Schedule to the Electoral Act, 2002 stated that "paragraph 49(5) of the First schedule to the Electoral Act, 2002 makes it mandatory that once an objection is brought challenging the regularity or competence of an election petition, the objection shall be heard and determined before any further step in the proceedings. For clarity [of] purposes, paragraph 49(50 OF THE First Schedule to the Act reads as follows:- "49(5) An objection challenging the regularity or competence of an election petition shall be heard and determined before any further steps in proceedings if the objection is brought immediately the defect on the face of the election petition is noticed." In view of the provisions of paragraph 49(5) of the First Schedule aforesaid, the tribunal must hear and determine the preliminary objection filed on 27/5/2003; and I think the tribunal was right to have taken the objection first."

[39] Barclays Bank v CBN (1976), 6-7 SC175; Miscellaneous Offences Tribunal v Okoroafor (2001)18 NWLR (PT. 745)295 at 330.

Does the Mode of Activating Pre-Hearing Conference Affect the Jurisdiction of Election Tribunals to Hear such Petitions?

During the regime of the Electoral Act, 2006 the intention of the legislature to achieve speed in the hearing and determination of election petitions was manifested. The 1st schedule to that Act and the Practice Direction which was promulgated by the President of the Court of Appeal made provisions which limited the time for taking steps in the petitions. One of the provisions adopted therein for speedy trial was the provision for the convocation of pre-hearing proceedings. The Tribunals, the Court of Appeal and the Supreme Court interpreted and applied the provisions for application for the issuance of pre-hearing notice strictly so that many petitions were terminated for failure to apply by way of motion for pre-trial.[40] These decisions came after protracted arguments of counsel to the effect that the law does not necessarily require application for prehearing to be made by way of motion on notice.
However, if any doubt existed as to whether or not the Court of Appeal was right in those decisions, such doubts were erased by the decision of the Supreme Court in the cases of Okereke v Yar'adua[41] where the apex court stated thus:

> *"...although the stipulation under subparagraph (4) of paragraph 3 Practice Direction appears to me to be harsh on the petitioner by making an order of dismissal of the petition which forecloses any chance for him to re-present the petition, it still has to be complied with by the tribunal or court as such steps are a condition precedent to the hearing of any matter in relation to the petition pending before the tribunal or court. Non-compliance therefore will strip off the tribunal or court of jurisdiction..."*

Those wordings of the Practice Direction under the 2006 dispensation were re-enacted in paragraphs 18 and 47 of the 1st Schedule to the Electoral Act, 2010 (as amended). The application of paragraph 18 and 47 of the first schedule to the Electoral Act 2010(as amended) exposed the depth of uncertainty and inconsistency in the decisions of the Court of Appeal. The uncertainty surrounding these provisions showed up for the first time when some divisions of the Court of Appeal held that the provisions of paragraph 18 of the 1st Schedule should not be construed as to require an application by motion on notice.[42] The Court of Appeal stated categorically in Isa v Tahir.[43] that:

> *"....to hold that to apply for the issuance of Pre-Hearing Notice under Paragraph 18(1) of the of Schedule is restricted to filing a Motion on Notice or exparte to activate the issuance of Form TF007 and, therefore, reject the process filed by Petitioner, is to be hypocritical, and turn the Court to an agent or instrument of oppression and injustice, to celebrate procedural technicalities at the expense of justice on the merit."*

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[40] Some of those cases include Ikoro v Izunaso [2009] 4 NWLR (Pt 1130); Riruwari v Shekarau [2008] 16 NWLR (Pt 1100) pg 142 at 159 F – G; Ado v Mekara [2009] 9 NWLR (Pt 1147) 419

[41] [2008] 12 NWLR (Pt 1100) pg 95 at 127 E – G and 118 B – E. The apex court followed its reasoning in this case in the later case of Nwankwo v Yar'adua [2010] 12 (Pt 1209) 518

[42] See (unreported) judgments of the Court of Appeal in Appeal No. CA/J/EP/HR/127/2011: Gebi v Dahiru, delivered on 23/8/2011 by a full Court of five Justices of the Court of Appeal; Appeal No. CA/YL/EPT/ADS/HA/2/2011: Mr. Simon Isa & Anor v Alhaj1 Sa'ad Tahir & Anor delivered on 06/9/2011; Appeal No. CA/YL/EPT/TR/SE/5/2011: Arc. Aliyij Dainkaro & Anor v Peoples Democratic Party & Ors delivered on 06/9/2011; Appeal No. CA/YL/EP T/TR/6/2011: Rev. Jolly T. Nyame & Anor v Peoples Democratic Party & Ors delivered on 06/9/2011; Appeal No. CA/E/EPT/06/2011: Lawrence C. Ezeudu v Olibie John & Ors delivered on 05/9/2011. Somto Udeze & Anor v Princess Chinwe Nwaebili & Anor. delivered on 8/11/2011 in .Appeal No.CA/E/EPT/30/2011.

[43] Supra

Curiously, when the opportunity presented itself in the Supreme Court the statement of the law in Okereke v Yar'adua was not followed. The Supreme Court in confirming the position taken by the Court of Appeal Jos Division in Aliyu Ibrahim Gebi v Alhaji Garba Dahiru & Ors,[44] took the position that paragraph 18 of the First Schedule to the Electoral Act, 2010 merely prescribed an administrative procedure which could be commenced by whatever means the Tribunal is made to know that pre-hearing proceedings are due. The Supreme Court thus overruled the Court of Appeal in P.D.P v Ugba[45] and Senator Akpanudoedehe & 2 Ors v Godswill Akpabio & Ors.[46] To the effect that rules of procedure meant to secure speedy determination of election proceedings cannot oust the jurisdiction of a tribunal to hear a petition[47].

In Abubakar & Ors v Nasamu & Ors (No 2)[48], the Supreme Court confirmed this position of the law when the court held that:

> *The provisions of the First Schedule to the Electoral Act, 2010 (as amended) have been put in place to facilitate quick dispensation of justice in election matters. It would be improper to convert them into stumbling*
> *blocks to impede the speedy dispensation of election matters on the merits, that would defeat the whole object of the First Schedule to the Electoral Act, 2010 (as amended).*

The Apex Court stated also Per Chukwuma-Eneh, J.S.C in the same case[49] that:

> *I must say that even though the provisions of the First Schedule to the Electoral Act, 2010 are now of the status of statutory provisions, they are still, in the main, concerned with procedural matters aimed at smoothening out the process of determining election matters and not to hinder or impede their due administration. They have not by that baptism, so to speak, ceased to be tools and handmaids for the courts, the courts, I dare say, should not timorously succumb to technical objections as the instant one, with respect, that are fanciful and lacking in focus and even then deliberately designed to stultify the processes of moving the cases forward in the interest of justice. A simple process as contemplated per paragraph (18)(1) which has been made to facilitate very expeditious hearing of election matters has now been turned into a process for a quick kill of election matters albeit with respect by unwholesome practices and so run out of time the lives of the election petitions as they are time-limited by the Act, most of the time to the prejudice of the petitioners as in a manner not in consonance with the object of the Act, most of the time to the prejudice of the petitioners; clearly in a manner not in consonance with the object of the Act nor within the intendment of the justice, particularly so where it matters most, that is to say, in dealing with election petition matters. The polity's confidence in our system of adjudication is thereby greatly eroded to our chagrin. And so, doing substantial justice shall always be the watch-word of our courts in election matters*

The clear and emphatic statement of law as declared by the Supreme Court, to the effect that the issuance of notice of commencement of pre-hearing session is purely an administrative

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[44] *Op.cit*
[45] *Op.cit*
[46] (unreported) Appeal No. SC 154/2012.
[47] *30 See Awojobi & Anor V INEC & Ors (2012) 8 NWLR (pt 1303) 528*
[48] (2012)17 N.W.L.R (pt.1330)523 at pp 577 – 578, paragraphs. H–A
[49] pages 582-583 paragraphs H –E

matter which cannot be used to oust the jurisdiction of the court or take away the right of a petitioner to be heard, is unarguably, the unassailable position of the law on this matter. Unfortunately, this bold declaration did not come in good time enough to save the majority of the petitions filed after the 2011 elections that were destroyed on the issue of the correctness or otherwise of the mode of application for commencement of prehearing session.
The nation has never had it as bad as that. More unfortunate was the fact that judicial officers who presided over the said election proceedings did not help matters. There were instances where pre-hearing sessions have been commenced and concluded before the respondents raised the issue of defective method of applying for issuance pre-hearing notices. It would have been expected that the tribunals and courts would have reminded such persons that the essence of such application was to activate pre-hearing session. If pre-hearing sessions have been activated and were either concluded or running (as was the case in most of the dismissed petitions), there was nothing wrong with the proceedings.

However, contrary to reason, most of the election tribunals acceded to the wrong assertions of the respondents that because the applications were made in the wrong form, the tribunals lacked the jurisdiction to hear the petitions which were declared abandoned. Even persons who are not lawyers wept as they heard the election tribunals declare that election petition in which they held and concluded pre-hearing sessions were abandoned petitions in which no application for issuance pre-hearing notices were filed. There is indeed no better way to erode the confidence of the common man in our judicial system. An examination of some of the cases will demonstrate to us the level of miscarriage of justice that arose from the said avoidable confusion.

In the case of Ugba & Anor v P.D.P & Ors[50] application for issuance of pre-hearing notice was made by way of motion ex-parte. The 1st and 2nd respondents filed applications to have the suit dismissed on the grounds that the application was made ex-parte and leave of court was not sought and obtained in accordance with paragraph 47 (1) of the First Schedule to the Electoral Act, 2010 (as amended), before the motion was moved outside the pre-hearing session. The election tribunal dismissed the motion of the 2nd respondent after the 1st respondent had withdrawn his application. Aggrieved with the order of dismissal, the 2nd respondent appealed to the Court of Appeal. The Court of Appeal set aside the ruling of the election tribunal and held that leave under paragraph 47 (1) of the 1st Schedule to the Electoral Act, 2010 (as amended) was required to move the application validly.

On further appeal to the Supreme Court, it was held, relying on Abubakar & Ors v Nasamu & Ors (No.2),[51] that leave of the tribunal or court is only required where parties intend to move any motion outside the pre-hearing session, that is to say, at hearing or trial of the petition, otherwise all motions must be listed and heard at the pre-hearing session. Furthermore that the application under paragraph 18 (1) can be made either by a letter or ex-parte motion or motion on notice. This is because the matter is purely an administrative act, not judicial or quasi judicial and cannot be used to oust the jurisdiction of the court or take away the right of an applicant to be heard.

It is a fact worthy of note and which seems to have been lost on the election tribunals and respondents to election petition, that the recent amendments to our 1999 Constitution and the Electoral Act, 2010 are targeted at a particular mischief which becomes extant upon a

[50] (2013) NWLR (pt. 1345) 486
[51] (2012)17 NWLR (pt 1330) 523

community reading of section 285(5)-(8) of the 1999 Constitution and paragraph 12(5) of the First Schedule to the Electoral Act, 2010 (as amended).

In the case of A.N.P.P & Anor v Alh. Mohammed Goni & Ors[52], the Supreme Court reiterated its conviction on this issue when the court stated Per Bode Rhodes- Vivour JSC[53] as follows:

> *"In SC 476/2011, I explained what gave rise to the provisions as follows: Suits Nos. SC 361/2011 and SC 362/2011 Ogboru & Ors v Uduaghan, Judgment delivered on the 17th of November, 2011 by this court. This was a petition that was filed immediately after the 2007 Gubernatorial Elections in Delta State. The petition was still being heard on appeal after the 2011 Gubernatorial Elections. I observed that a case where a petition lasted more than four years for a four years gubernatorial term is scandalous, unthinkable and beggars belief... A respondent who apparently won an election would have finished his four year term and left office while the petition is still in the court. If the petitioner eventually wins he would have nothing but a worthless victory. A victory that cannot be enforced. Indeed, several similar cases were seen in the courts*.

Paragraph 12 (5) of the First Schedule to the Electoral Act, 2010 (as amended), which the legislature had intended to be the roller that would have coastered home the new consciousness towards prompt determination of election proceedings in Nigeria, provides that:

> *A respondent who has an objection to the hearing of the petition shall file his reply and state the objection therein and the objection shall be heard along with the substantive petition.*

There is no controversy as to the fact that the provisions of paragraph 12 (5) is mandatory since the word "shall" was used twice in couching the requirements of the said section. The import of the mandatory requirements in the provisions of the said sub-paragraph are two-fold. First, a respondent who is objecting to the hearing of a petition must file his reply to the petition and state his objection thereto in the reply. These provisions in the Electoral Act, 2010 as amended seems to suggest that any objection to the hearing of an election petition which is not incorporated in a respondents reply is incompetent and may not be heard.

Secondly, where an objection is incorporated in a respondents reply, it has crossed the hurdle of qualification, it is fit for hearing, but must be heard along with the substantive petition. When the history of the amendment that gave birth to paragraph 12(5) of the First Schedule to the Electoral Act, 2010 (as amended) is put into perspective, it is easily understandable that the obvious intention of the legislature in making the amendments to the 1999 Constitution and the Electoral Act, 2010 was to abolish interlocutory determination of election petitions upon preliminary objections so as to ensure speedy determination of cases. The practice of hearing preliminary objection along with the substantive matter is an age-long practice at the Court of Appeal and has so far aided very much in saving the valuable time of the court and litigants.

[52] Appeal Nos. SC/1/2012 and SC/2/2012 (consolidated appeals) judgment delivered on 17th February, 2012, later reported as (2012)7 N.W.L.R (pt1298)147

[53] At page 5 of His Lordship's concurring judgment.

The Essence and Impact of Section 285 (6) and (7) of the Electoral Act, 2010(as amended) on Election Proceedings.

The amendments to the 1999 Constitution introduced a new hurdle into election proceedings as the said amendments introduced limitation clauses in respect of time for determination of election petitions and appeals into both the 1999 Constitution and the Electoral Act, 2010 (as amended) that were not there before then. This particular issue was driven home by the Supreme Court in the case of Felix Amadi & Ors v I.N.E.C & Ors,[54] wherein the Supreme Court stated, Per Bode Rhodes–Vivour, JSC in reference to section 285(7) of 1999 Constitution (as amendment) that:

> *A point worth mentioning is, why was limitation periods for hearing election matters drafted into the constitution? It is important I address this point because in 1999 when this constitution came into force, section 285 titled 'Election Tribunals' had only four subsections, now it has eight subsections…, consequently in the 2003 and 2007 election petitions, there was no time limit for hearing election petitions. Counsel employed all types of tactics to delay the hearing of petitions, all for one hidden agenda or the other. A classical example is the consolidated Suit Nos SC 361/2011 and SC/362/2011 Ogboru & Ors v Uduaghan, judgment delivered on 17/11/2011 by this court. This was a petition that was filed immediately after the 2011 Gubernatorial Elections in Delta State. The petition was still being heard on appeal after the 2011 Gubernatorial Elections.*

It was expected that the administration of justice as regards election proceedings would have advanced so much from the said provisions of the amended 1999 Constitution and the Electoral Act, 2010 particularly, paragraph 12 (5) of the First Schedule to the Electoral Act, 2010 (as amended). The reverse was, however, the case at the tribunals and courts leading to the frustration of many election petitions. The question therefore arises:

What went wrong to bring our Justice Delivery System to where it found itself?

Unfortunately, in spite of the lofty provisions made in the 1999 Constitution (as amended) and the Electoral Act, 2010 (as amended) to secure speedy determination of election proceedings, some judicial officers saddled with the duty of adjudicating in election proceedings still carried on in their duties as if these provisions were not intended to regulate their conduct. It is worth mentioning that the derailment that attended the proceedings of some of the tribunals, went beyond the ordinary. Some tribunals struck out almost all the petitions that came before them upon preliminary objections and refused to heed arguments to the contrary. The dangers inherent in the indiscretion exhibited towards the said election proceedings is underscored by the fact that long after the mandatory 180 days limited for hearing election petitions have been declared over, most of the petitions in which retrial were ordered on appeal after their unmerited interlocutory determination were still pending at the election tribunals and have become time barred. The implications of this scenario cannot be lost on the polity. As the country bemoans the failure of justice that has just been recorded in respect of the 2011 election proceedings, it is important to re- examine the legal framework upon which such proceedings proceeded to fail.

[54] (2013)4 NWLR (pt 1345) 595

Juxtaposing Sections 140 (4) and Paragraph 53 (5) of the First Schedule to the Electoral Act, 2010 (as amended) with Paragraph 12 (5) of the First Schedule to the Electoral Act, 2010 (as amended)

It is submitted, most respectfully, that the provisions of the Electoral Act, 2010 (as amended) stated above seem to be contradictory to each other, to the extent that Paragraph 12 (5) of the First Schedule to the Electoral Act makes it mandatory for a respondent intending to raise objection to the hearing of a petition to raise same in his reply and have it heard along with the substantive petition. By the intendment of the said provisions (which was deliberately put into the Electoral Act, 2010 (as amended) by the legislature during the most recent amendment of the Act), there would be no room to hear interlocutory application and determine a petition on technicalities without a hearing on the merits of the petition.

It is a cardinal principle of interpretation of statutes that where the wording of a statute is clear and unambiguous, the law does not need interpretation. The words used by the legislature in Paragraph 12 (5) of the First Schedule to the Electoral Act, 2010 (as amended) are clear and the court need not to have recourse to anything else in the interpretation of the said provisions except to declare the law in accordance with the intention of the law makers which are borne out by the words used therein.[55]

Unfortunately, on the other hand, Section 140 (4) and paragraph 53 (5) of the First schedule to the Electoral Act, 2010 (as amended) allow a respondent to file a motion timeously to have a petition struck out *in limine.* None of these sections of the Electoral Act, 2010 (as amended) is made subject to the other even when they are antagonistic to each other and irreconcilable in their provisions.

It becomes difficult to determine which provisions of the said Act that would override the other. It is imperative, in order to determine a way out of the seeming contradictory positions in both provisions, to weigh the circumstances surrounding each provision, particularly the argument in favour or against each provisions as already discussed. In the first place, none of section 140 (4), paragraphs 12 (5), 53 (2) and 53 (5) of the First Schedule to the Electoral Act, 2010 (as amended) is a substantive part of the Electoral Act. The section and paragraphs of the Act in question made diverse provisions of procedural nature meant to aid the quick dispensation of justice in election proceedings in view of its nature. There is therefore no occasion to rate any of the said provisions as superior to the others so as to enjoy supremacy over them. It is believed that what should count to the advantage of any of them is how far it goes to accord with the purpose and intention of the legislature in attaining quick determination of election proceedings. Moreover, when the background of the said provisions of the Electoral Act, 2010 (as amended) are considered, paragraphs 12 (5) and 53 (5) of the First Schedule to the Act ought to override the rest of the provisions being more amenable to annihilating the very mischief of inordinate delays in election proceedings that necessitated the recent amendments to the 1999 Constitution and the Electoral Act 2010 (as amended).

[55] See Peter Obi v I.N.E.C (2007) 7 SCNJ 1 at 37; see also Global Excellence Communications v. Duke (2007) 16 NWLR [pt. 1059] 22 at 47 – 48, A.G Lagos State v. Eko Hotels Ltd (2006) 18 NWLR [pt. 1011] 378 at 458. Federal Republic of Nigeria v. Osalon (2006) 5 NWLR [pt 973] 361 at 415.

Are the Provisions of Section 285 (6) and (7) of the 1999 Constitution (as amended) Ambiguous?

There is no ambiguity in the provisions of section 285 (6) and (7) of the 1999 Constitution. However, being a new legislation, there was no settled position of the courts below the Supreme Court on what the application of 180 days should be and each began to speculate on what it ought to be[56]. There was this point canvassed by Counsel that appeared before election tribunals and courts, that where an election petition was determined *in limine* upon a preliminary objection and the petitioner goes on appeal over the dismissal of the petition *in limine*, if the appellate court finds merit in the appeal and returns the petition for trial *de-novo* at the election tribunal, the 180 days limited for the hearing of the petition shall start afresh to run.

This argument appears to be captivating, logical and would have been an easy way out of the unlawful and unwarranted but destructive ambush set for several election petitions by respondents in the form of preliminary objections. There is, however, always a limit to judicial activism or else it would graduate to judicial indiscretion. The provisions of section 285 (6) and (7) of the 1999 Constitution (as amended) are so clear that they, standing alone, would never have given rise to the near total failure of justice that befell litigants at the tribunals and courts recently. That the words used in the said enactments were so clear that they required no interpretation was re-echoed by the Supreme Court in the few of such cases that got to that court on appeal from the Court of Appeal.

In A.N.P.P v Alh. Mohammed Goni & Ors[57] the Supreme Court demonstrated beyond speculations that it stood for a literal interpretation of Section 285(5)-(8) of the 1999 constitution as amended. The apex court declared in the said judgment as follows:

> *180 days provided by section 285 (6) of the constitution is not limited to trials but also to de- novo trials that may be ordered by an appeal court. For the avoidance of any lingering doubt once an election petition is not concluded within 180 days from the date the petition was filed by the petitioner as provided by section 285 (6) of the constitution, an election tribunal no longer has jurisdiction to hear the petition, and this applies to re-hearing. 180 days shall at all times be calculated from the date the petition was filed... I am compelled by circumstances beyond my control to state, without fear of contradiction as same has been settled by a long line of authorities, that jurisdiction is a creation of statute or the constitution. Jurisdiction is therefore not inherent in an appellate court neither can it be conferred on a court by order of court…It has been held by this court in a number of cases including consolidated appeal Nos. SC/141/20011; SC/266/2011; SC/267/2011; SC/282/2011; SC/356/2011 and SC/357/2011: Brig. Gen. Mohammed Buba Marwa & Ors Vs Adm. Murtala Nyako & Ors delivered on 27th January, 2012 that the time fixed by the constitution is like the rock of Gibralter or Mount Zion which cannot be moved; that the time cannot be*

[56] The issue of interpretation of what constitutes180 days and 60 days as provided in sections 285 (6) and (7) as well as the effect of an order of trial *de novo* were the main trust of the appeals and decisions in the following cases: P.D.P & Anor.v Okorocha & Ors (2012)15 NWLR (pt 1323) 205;Ngige & Anor v Akunyili & Ors (2012)15 NWLR (pt 1323) 343; ANPP & Anor v Goni & Ors (2012)7 NWLR (pt 1298) 147; P.D.P & Anor v C.P.C Ors (2011)17 NWLR (pt 1277) 485; P.P.A & Anor V I.N.E.C & Ors (2012)13 NWLR (pt 1317) 215; Shettima & Anor v Goni & Ors (2011)18 NWLR (pt 1279) 413; Udoedehe V Akpabio (unreported) Appeal No SC154/2012 judgment delivered on 1st June 2012. The decisions on these appeals, though in consonance with the law, seems to have fallen short of the type of substantial justice expected by the Nigerian people. Justice, however, has never incorporated appeal to the public as the basis of its legitimacy.

[57] Supra

> *extended or expanded or elongated or in any way enlarged; that if what is to be done is not done within the time so fixed, it lapses as the court is thereby robbed of the jurisdiction to continue to entertain the matter.*

It is trite law and therefore taken beyond contention that statutory limitation of time is a jurisdictional issue[58] once the limited time elapses, jurisdiction is lost in the court to entertain an action arising from the subject matter.

The Court of Appeal had earlier (in some divisions) taken the position that the 180 days limited for the trial and determination of an election petition will begin to run afresh where an order of an appellate court is made that the petition should be tried *de-novo.* The journey made by the Court of Appeal in the wrong direction on this matter obviously had its origin in the dicta of Tur, JCA in Idongesit Godwin Akpan Udokpo v Kenneth Edet.[59] The lead judgment in that appeal was delivered by Ndukwe – Anyanwu, JCA wherein His Lordship held that the computation of the period of 180 days under Section 285(6) of the Constitution must commence from the date of filing of the petition. She also emphatically held that the time cannot be extended. All the Justices of the Court of Appeal that heard that case concurred with the lead judgment. However, Tur, JCA, after agreeing with the lead judgment, proceeded to add some comments of doubtful validity which turned out to be more attractive to the other Divisions of the Court of Appeal and the trial Tribunals. He stated that:

> *In an election petition this will enable the parties to reprove their respective cases within the 180 days stipulated by Section 285(6) of the Constitution of the Federal Republic of Nigeria, 1999 as altered. The provisions of Section 285(6) and (7) of (he Constitution of the Federal Republic of Nigeria, 1999 as altered should not be interpreted nor used as an engine of fraud to extinguish the rights of appellants who succeed on appeal from having their petitions determined de novo by Election Tribunals on the flimsy excuse that the 180 days for determining the petition had expired. In my view where the Court of Appeal has remitted a petition for rehearing or trial de novo, the effect is to recommence hearing or trial afresh as if the 180 day had not yet commence running. To hold otherwise is to make mockery of the decision of the appeal court and constitutional provisions. The legislature could not have intended such a monstrous construction or interpretation of the provisions of Section 285(6) and (7) of the Constitution, namely to extinguish the rights of the petitioner/appellant from having the petition determined de novo and on the merit.*

This argument was bought by the Court of Appeal, Enugu Division, in the case of Ngige & Anor v Akunyili & Ors[60] where the appellate court pronounced that 180 days limited for the trial of a petition is 180 days at the election tribunal spent on the trial of the petition and

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[58] See D.C Denwigwe, SAN (*Op.cit*) at p. 12; See also Olagunju v PHCN Plc (2011) 10 NWLR (Pt 1254) 113 at 126 para F, 129 – 130 para G – H, para 132 A – C and paras133 – 134 H – E, to the effect that statutes of limitation are jurisdictional because if the case is statute barred the court has no jurisdiction to entertain them however meritorious the case may be. See further Owners of Mv'Arabella v N.A.I.C. (2008) 11 NWLR (Pt 1097) 182 at 210 C – D and D – E where it was held that if an action is statute-barred, no amount of resort to its merit can keep it in being. The Supreme Court held in that case that the proper order to make in such a case is to dismiss it. It stands to reason that when the plaintiff can no longer approach any court again for such a claim the proper order is dismissal. See Chukwu v Amadi (2012) 4 NWLR (P1289] 136 at 168 D – E; Egbe v Adefarasin (NO. 2) [1987] 1 NWLR (Pt 47) 1 and Nasir v C.S.C. Kano State [2007] NWLR (Pt 1190) 253 at 276 C – D and 269 A – B.

[59] unreported judgment of the Court of Appeal (Calabar Division) delivered on the 17th day of November, 2011 in Appeal No. CA/C/NAEA/257/2011.

[60] Supra

does not include the days spent at the Court of Appeal on an appeal arising from an interlocutory decision in the said petition. This seemingly elegant judicial reasoning was elongated by the Court of Appeal, (Markurdi Division) in the case of P D P & Anor v Arc. Austine Asema Achado & Ors[61] where the court stated that the life span of an election petition may pass through three stages, commencing with declaration of result in the election and filing of petition by the aggrieved party. That an era ends when the tribunal delivers judgment in the petition. If a party aggrieved by the judgment files an appeal, another era in the life of the petition has commenced and ends with judgment delivered by the Court of Appeal. Where the Court of Appeal makes an order of retrial, there is yet another era in the life of the petition which derives its life and force from the order of retrial made by the appellate court.

The Court of Appeal yet followed this reasoning in the case of P D P & Anor v Prof. Steven Ugba & Ors[62] the court therein adopted and followed its earlier position in the case of Senator Ita Solomon Gyang & Anor v Obong Nsima Umoh & 3 ors[63] where the Court, Per Garba, JCA (of the Calabar Division) put the mater this way:

> *In fact, the basis of the new trial on the merits was not connected and affected by the date of filing the petition, but the order by this court which has nothing to do with the provisions of sections 285(6), as demonstrated earlier, and so cannot be said to have extended the period of 180 days provided therein. The Court did not pretend or give the impression that it extended the said period but very clearly showed that it was exercising the legitimate and unquestionable jurisdiction vested in it by the Constitution. Which having done so in no uncertain terms, the tribunal had the constitutional duty to give effect to enhance the order made by commencing the trial of the petition as ordered as provided for by the provision of section 287(2) of the Constitution(as altered)…*

The Court of Appeal seems to find justification for the position it had taken on this issue then in section 36(1) that requires fair hearing and other provisions of the 1999 Constitution (as amended) which vests jurisdiction on the various courts created by the constitution to make an order of retrial in any matter before it where that is the option that meets the justice of the case. That court also seems to have relied on the orders for trial *de-novo* made in Ugba's case and Udoedehe's case by the Supreme Court when the 180 days limited for trial had elapsed, having known the attitude of the apex court that it has never spared any court below it that hesitates to follow its judgment. In P.D.P & Anor v Arc. Austine Asema Achado & Ors[64] the Court of Appeal had this to say, Per Dongban-Mensem, JCA in justifying their position on this point:

> *Several decisions of the Apex Court and of this Court abound on this and indeed the consequence of non-compliance. I found as very instructive the decision of Katsina Alu, JSC (as he then was) in the case of Dalhatu v Turaki (2003) 15 NWLR (pt. 823) pg. 310 @ 336. His Lordship held that: 'This Court is the highest and final Court of Appeal in Nigeria. Its decision binds every Court, authority or person in Nigeria. By the doctrine of stare decisis, the courts below are bound to follow the decisions of the Supreme Court. The doctrine is a sine qua non for certainty to the practice and application of the law. A refusal, therefore by a judge of the court below to be bound*

[61] Appeal No. CA/MK/EPT/46/2011,

[62] Appeal No CA/MK/EPT/1/2012

[63] (Unreported) judgment delivered on Thursday, 26th day of January,2012

[64] *Op. cit* at page 17

> *by this court's decision, is gross insubordination (and I dare say such a judicial officer is a misfit in the judiciary'*.[65]

The Court of Appeal also cited the decision of the Supreme Court in the case of Paul Unongo v Aper Aku[66] where the apex court stated in circumstances similar to the one under consideration that the Court of Appeal was right in setting aside the decision of the trial tribunal but ought to have remitted the petition in which the limited time had elapsed back for retrial on the merits. It must be noted that the situation in Aku's case is distinguishable from the present situation since what was up for determination in that case was the relationship of the provisions of sections 129 and 140 of the Electoral Act, 1982 and the 1979 Constitution. In the present circumstances, what is in issue is a provision of the 1999 Constitution (as amended) which can not in any way be declared as unconstitutional. However, Some election tribunals and Divisions of the Court of Appeal refused to follow that route which seemed to be an easy and popular trend.[67]

It seems however, that while the Court of Appeal was laboring under this fanciful impression of the law, the Supreme Court had indeed taken a resolute stand against anything that would nibble adversely at the clear and mandatory provisions of Section 285 (5)-(8) of the 1999 Constitution, as amended. The apex court took the opportunity when it came to put aright the other courts below it.

In Ugba & Anor v Suswam & Ors[68] the appellant applied for the issuance of pre-hearing notice by way of motion ex-parte. The tribunal granted the motion and commenced prehearing. The 1st and 2nd respondents brought application to have the petition dismissed because leave of the tribunal was not sought and obtained before the motion was moved in accordance with paragraph 47 (1) of the First Schedule to the Electoral Act, 2010 (as amended). The tribunal dismissed the application of the 2nd respondent after the respondent had withdrawn his own application. The 2nd respondent appealed against ruling of the tribunal. The Court of Appeal allowed the appeal and dismissed the petition. The appellant appealed to the Supreme Court. The Supreme Court set aside the ruling of the Court of Appeal and remitted the petition back to the tribunal to be heard on the merit. The petition was filed on 17th May, 2011. The Court of Appeal dismissed the petition on 19th September, 2011. On 14th November, 2011, the Supreme Court allowed the appellants appeal and sent the petition back to be heard on the merits. Before that day, the 180 days limited for hearing the petition had already elapsed. The Supreme Court stated on the appeal that got to it upon the attempts by the appellants to have the petition heard on its merit in accordance with the order earlier made by the Supreme Court that:

> *By virtue of S 285 (6) of the 1999 Constitution, (as amended), an election tribunal shall deliver its judgment in writing 180 days from the date of the*

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[65] See also Ogunsola v NICON (1998) 11 NWLR (pt. 575) 683 @ 692, Ndili v Akinsumade & 2 Ors (2000) 8 NWLR (pt. 668) 293 at 346-347 paras. G-A); Uba v Etiaba (2005) 6 NWLR (pt.1082)154 at 182: Atolagbe & anor v Awuni & 2 Ors (1997)8NWLR (pt.522)536

[66] (1983) 2 SCNLR 332

[67] See D.C Denwigwe (*op.cit*) see also the decision of the Sokoto Division of the Court of Appeal in Aliero v Bagudu (unreported) in Appeal No. CA/S/EPT/SE/36/2011, see further the Election Petition Tribunals sitting in Owerri and Yenagoa on the cases of Kema Chikwe v Chris Anyanwu (unreported) judgment dated 14th November, 2011 in Petition No. EPT/IM/NASS/SN/04/2011, Udenwa v Uzodinma (unreported) judgment dated 23/1/2012 in Petition No. EPT/IM/NASS/SN/10/2011, Chikwem Onuoha v Hon. Matthew Omegara Petition No. EPT/IM/NASS/22/2011 dated 23/1/2012 and Kekeocha v Ngobiwu (unreported) dated February, 2012 in Petition No. EPT/IM/SHA/21/2011 and Tiengha v Ngobiri dated 25/1/2011 in Petition No. EPT/BYS/HA/17/2011

[68] (2013) 4 N.W.L.R (pt 1345)427; see also Action Alliance v INEC – Appeal no SC/23/2012 delivered on 14/2/2012

> *filing of the election petition. The provision is clear and unambiguous and does not require any special way of interpretation. It required the election tribunal to deliver its judgment in writing within 180 days from the date of filing of the petition. No one, not even the Supreme Court can by any mean extend, expend or elongate the 180 days prescribed by the constitution … Even the order of the Supreme Court of 14th November 2011 directing the trial tribunal to hear the appellants' petition on the merits pp 456 – 457 paragraphs H – A could not have any effect in low in the face of the clear provisions of section 285 (6) of the Constitution (as amended)…it should be noted that the word shall was used in section 285 (6) of the Constitution, a ground norm. The word shall signifies a command that must be complied with. See Onochie v Odogwu (2006) 6 NWLR (pt 975) 201; Ogidi v State (2005) 5 NWLR (pt 918) 286*[69]

It was also the expressed view of that court that:

> *The 180 days provided by section 285 (6) of the 1999 Constitution (as amended) is not limited to trials but also to de novo trials that may be ordered by an appeal court. Where an Appeal Court orders a retrial, the retrial must be concluded within the unexhausted days of the 180 days. In the instant case, there was no longer a live issue in the petitions filed by the appellants since the 180 days provided for the hearing of the petitions had expired. The appellants were unable to take advantage of the order of the Supreme Court for retrial*[70]

Their Lordships stated further that:

> *The court is created and empowered to adjudicate on cases, applying the law as it is but not as it ought to be. That is a function of another arm of the government. The law is made for man and not man for law. If a law made by the people for the people is creating hardship for the people, only the people can sit down and so something about it through their law makers. It is not for the court to alter or amend the law in performing its function of interpreting it...*[71]*The main function of a judex is to declare what the law is and not to decide what it ought to be. The business of law making is exclusively, the responsibility of the National Assembly at the Federal level or State House of Assembly at the state level all in Nigerian context … would amount to judicial legislation and that would be unfortunate for the steam of justice which should remain pure at all time.*[72]

The Court stated in the same case, Per Rhodes–Vivour, JSC[73] that:

> *A petitioner who is unable to argue his petition to his satisfaction within the 180 days as provided by section 285 (6) of the Constitution or finds the*
> *time too short should approach the National Assembly with an appropriate bill to amend section 285 (6) of the Constitution. Once again the courts have no jurisdiction to amend the Constitution or extend the time provide by section 285 (6) of the Constitution. An order of retrial is carried out subject*

[69] At *P. 465* paragraph C
[70] At page 460 paragraphs B –C.
[71] At page 465 paragraph G, page 474 paragraph B
[72] At page 474, paragraph C
[73] At pages 476-477, paragraphs G–B.

> *to section 285 (6) of the constitution. If this court or any court proceeds to amend the constitution or extend the time for the hearing of election petitions provided by section 285 (6) such an exercise would amount to a nullity.*

Certainly, after the Supreme Court has decided on this all important matter, the law has been laid down and it behoves the lower courts to adopt and follow the said judgment. However there are few issues that ought to be commended to the appellate courts for consideration.
In the first place, the judgments of the Supreme Court were subsisting in the cases of Ugba & Anor v Suswam & Ors[74] and Udoedehen & Anor v Akpabio & Ors[75]., where the apex court ordered trials *de novo* at a time the petitions had died and it was impossible for the election tribunals to comply with the terms of the said judgments without infringing on Section 285 (6) of the 1999 Constitution (as amended). It would appear that the confusion of the courts below the Supreme Court stemmed from their failure to grasp correctly, the position of the apex court on the said cases. Whether the Court of Appeal acted correctly when it went into an attempt to interpret a judgment of the Supreme Court is another question on its own.[76] With utmost respect to their Lordships of the Court of Appeal, it seems that their interpretation of that judgment of the Supreme Court is forbidden and unjustified.

However, it is submitted, most humbly and with utmost respect to My Lords, Justices of the Supreme Court of Nigeria that the Supreme Court, being the Apex Court in the country, ought to proceed with extreme circumspection at all times so as not to send a wrong signal that may mislead the courts below it. An order of court should never be made to lie in vain. There was uncertainty as to the effect of an order of retrial of a petition in which the 180 days limited for trial had elapsed arising from the said orders of the apex court. It was the emphatic statement of the law made by the same apex court on the appeals that came to it from the orders for retrial which could not be implemented that finally cleared the air on that issue. If it did occur to their Lordships at that time that the orders they were making for the retrial would go to no issue, it is believed that they would have saved the valuable time and resources of the court and that of the litigants and refrained from sending those appellants on a voyage of no discovery.

In the face of the decision of the Supreme Court in Ugba & Anor. v Suswam & Ors,[77] the Court of Appeal had no option on the matter. In the final analysis, the provisions of section 285 (6) and (7) of the 1999 Constitution (as amended) has been correctly applied to the relief of many Nigerians. The mischief targeted at in the amendments, which is undue delay in the determination of election proceedings has been struck down after expensive legal acrobatics, yet such intricate legal definitions as seen in the decisions of the courts will always remain difficult for the distraught Nigerian electorates to appreciate.

Conclusion

The history of election petition proceedings in Nigeria is a chequered one. Except for occasional flickers of light coming from the dark end of the tunnel that is our judicial landscape in the form of activist judgments, the performance of the judiciary in election

[74] Supra
[75] Supra
[76] See D.C denwigwe (*Op.cit)* at page ; see also Dingyadi v INEC (2011) 10 NWLR (Pt 1255) 345 at 401,Paras D – E thus:-
"It is a constitutional abomination for the Federal High Court to interpret the judgment of the Court of Appeal"
[77] *Op. cit*

petition proceedings may not have done so much to strengthen our weak and ailing democratic superstructure, particularly in the very recent past.

One of the notable characteristics of law, particularly law as found in a written constitution, is that it is certain, rigid and does not admit of the flexibility that may be required to meet the demands of justice in peculiar circumstances of a given case. It was this characteristic of rigidity found in law that led to the emergence of the principles of equity. The work of a judge is to declare the law as he finds it and not to speculate on what the law ought to be. The provisions of section 285(6) and (7) of the 1999 Constitution (as amended) is law and is certain. The election tribunals and courts have ostensibly done justice according to law in the election proceedings that arose from the 2011 general elections. It can be seen from the reactions of the Nigerian public that such justice as handed down to the people may not have satisfied the ideals of justice.

The Nigerian electorates got so frustrated with the *situation* that they have proposed all manner of amendments to the existing arrangement including the establishment of constitutional courts to hear election matters exclusively. The legislature had hitherto behaved as if it was a willing ally in the incessant abortion of the people's electoral mandate that receive stamp of finality at election petition proceedings. In the amendments that occurred to the 1999 Constitution and Electoral Act, 2010, the legislature commendably, turned a new leaf and demonstrated a deep understanding of the bottlenecks to speedy adjudication of election proceedings in Nigeria.

The provisions of section 285(5)-(8) of the 1999 Constitution as amended is a commendable piece of legislation that would have curbed almost completely, undue delay in determining election petitions and appeals. Regrettably, the good intentions of the legislature as regards the provisions of section 285(5)-(8) seem to have been thwarted by election petition tribunals that allowed preliminary objections to be taken at interlocutory stages of election petition proceedings rather than taking them together with the substantive matter as required by paragraph 12 (5) of the first schedule to the Electoral Act, 2010(as amended). That some of the tribunals preferred the provisions of section 140(4) of the Electoral Act, 2010 (as amended) to the provisions of paragraph 12(5) of the First schedule to the Electoral Act, 2010 (as amended) is the reason why many petitions were dismissed *in limine*. The successful challenge mounted by the petitioners at the appellate courts against the interlocutory dismissal of the said petitions have become of limited significance as the operation of section 285 (6) and (7) of the 1999 Constitution (as amended) had rendered such orders of retrial to be mere academic exercises.

In the final analysis, it is the same distraught and disillusioned Nigerian electorates, who are yet to see any good reason to trust the managers of our electoral and judicial processes (as far as elections and electoral proceedings are concerned), that bear the brunt of the bungled electoral exercises and the miscarried adjudication that followed it. Certainly, each failure recorded in our attempt to deepen democracy in the country, deepens further the crises of confidence that has plagued our national life over these years. Again the judiciary has been found wanting in our attempt to test-run the nation's amended electoral laws. The effect of this latest failure at operating our Constitution and the Electoral Act should not be lost on all the persons concerned therewith for such is the path of learning. In the final analysis, it would be important to persuade that all the stakeholders in the election business and the judicial proceedings that follow it should assist in giving Nigeria a credible democratic arrangement that will obviously lead the nation to greatness.

Recommendations

1. It is recommended, most humbly, that Section 140(4) and paragraph 53 (2) and (5) of the First Schedule to the Electoral Act, 2010 (as amended) should be repealed as they do not seem to be serving any useful purpose in the present arrangement. Alternatively, let those

paragraphs of the Electoral Act be made subject to paragraph 12(5) of the First Schedule to the Electoral Act, 2010 (as amended). That will effectively abolish the practice of terminating election proceedings *in limine.*

2. It is equally recommended, most respectfully, that the judiciary should evolve a system of ensuring improved accountability on the part of judicial officers that handle election petition proceedings. Many of the Judges that attend the election tribunals do so with seeming reluctance because they see the exercise as a distraction from their sittings at their regular courts from where they generate the "Returns" that count in their performance appraisal. At one point a Judge that has sat in many tribunals in the recent past informed members of the Bar at Awka that he has just received a query as to poor output in respect of the returns that ought to come from his court back home. He said that the cases they hear and determine at the election tribunals do not count as part of their returns.

If that is the case, then one can understand their mindset when they appear at the tribunals, more favourably disposed to issues that terminate the lives of election petitions *in limine.* We cannot eat our cake and have it, it is either that the relevant authorities should make the work done by Judges at election tribunals to count for them in their performance assessment or create Constitutional Courts as is being clamoured for; so as to provide the system with judicial officers who can afford the time and the right frame of mind to hear election petitions dispassionately and do to them the justice they richly deserve.

Equally, some judicial officers in Nigeria have interacted so much with politicians that both now behave alike.[78] Such judicial officers ought to be kept far away from the allure of filthy lucre that comes from politicians which has of recent inflicted cancer on the moral stay of our judiciary.

3. Finally, the issue of justice in election proceedings in Nigeria is a matter that deserves a wholistic approach. Pre-election matters ought to receive the kind of attention that has been accorded to election proceedings properly so called. Presently, pre- election matters linger in courts for inordinately long periods of time because there are no legislations to provide for a time frame within which they must be concluded as is the case with election petitions.

A situation where the legislative seat of a constituency remains vacant over a long period of time, or remains under the occupation of a usurper for more than half of the legislative term, leaves much to be desired. More than three years after the general elections conducted in 2011, many pre-election matters are yet to be heard in the courts where they are pending because the parties that took undue advantage of the weakness of our institutions are employing unending gimmicks to delay proceedings in those matters. Laws akin to the provisions of section 285 (6) and (7) of the 1999 Constitution (as amended) will do the magic and save the generality of Nigerian electorates the harrowing experience of having their will expressed in popular ballot suspended for such inordinate long period of time.

[78] In the case of General Mohammed Buhari v. INEC & Ors, *the need for Nigerian Judges to maintain a very big distance from politics and politicians. Our Constitution forbids any mingling. As Judges, we must obey the Constitution. The two professions do not meet and will never meet at all in our democracy in the discharge of their functions. While politics as a profession is fully and totally based on partiality, most of the time, judgeship as a profession is fully and totally based on impartiality, the opposite of partiality. Bias is the trade mark of politicians. Non bias is the trade mark of the Judge. That again creates a scenario of superlatives in the realm of opposites. Therefore the expressions, "politician" and "Judge" are opposites, so to say, in their functional contents as above; though not in their ordinary dictionary meaning. Their waters never meet in the same way Rivers Niger and Benue meet at the Confluence near Lokoja. If they meet, the victim will be democracy most of the time. And that will be bad for sovereign Nigeria. And so Judges should, on no account, dance to the music played by politicians because that will completely destroy their role as independent umpires in the judicial process. Let no Judge flirt with politicians in the performance of their constitutional adjudicatory functions.*
Niki Tobi, JSC stated that: *I see from Exhibit EP2/34*