

1. SENATOR ADEMOLA NURUDEEN ADELEKE
2. PEOPLES DEMOCRATIC PARTY (PDP)

V.

1. INDEPENDENT NATIONAL ELECTORAL COMMISSION (INEC)
2. ADEGBOYEGA ISIAKA OYETOLA
3. ALL PROGRESSIVES CONGRESS

SUPREME COURT OF NIGERIA

SC.556/2019

IBRAHIM TANKO MUHAMMAD, J.S.C. (*Presided*)

OLABODE RHODES-VIVOUR, J.S.C.

KUMAI BAYANG AKA' AHS, J.S.C. (*Dissented*)

KUDIRAT MOTONMORI OLATOKUNBO KEKERE-EKUN, J.S.C.

AMIRU SANUSI, J.S.C.

PAUL ADAMU GALUMJE, J.S.C. (*Dissented*)

UWANI MUSA ABBA AJI, J.S.C. (*Read the Leading Judgment*)

FRIDAY, 5TH JULY 2019

APPEAL - *Preliminary objection to an appeal - Purpose of - When should be filed - When should not be filed - Order 2 rule 9 (1), Supreme Court Rules - Where successful - Effect of.*

CONSTITUTIONAL LAW - *Governor of a State - When deemed elected - Section 179(2)(a) and (b), 1999 Constitution.*

COURT - *Academic exercise - Attitude of courts thereto.*

COURT - *Judgment of court - Judgment delivered by a panel - Where one of the members did not hear the argument or absent at the hearing - Effect.*

COURT - *Judgment of court - Null judgment - Treatment of.*

COURT - *Judgment of court - When Supreme Court can declare as a nullity.*

COURT - *Jurisdiction of court - Fundamental nature of - Issue of - Where raised - Need to consider first.*

ELECTION - *Election results - Cancellation of - Who can cancel election results - Whether State Returning Officer can cancel election results.*

ELECTION - *Election results - Inconclusive election – When Independent National Electoral Commission can declare result of an election inconclusive.*

ELECTION - *Governor of a State - When deemed elected - Section 179(2)(a) and (b), 1999 Constitution.*

INDEPENDENT NATIONAL ELECTORAL COMMISSION - *Election results - Inconclusive election - When Independent National Electoral Commission can declare result of an election inconclusive.*

JUDGMENT AND ORDER - *Judgment of court – Judgment delivered by a panel - Where one of the members did not hear the argument or absent at the hearing - Effect.*

JUDGMENT AND ORDER - *Judgment of court - Null judgment - Treatment of.*

JUDGMENT AND ORDER - *Judgment of court - When Supreme Court can declare as a nullity.*

JURISDICTION - *Jurisdiction of court - Fundamental nature of - Issue of - Where raised - Need to consider first.*

PRACTICE AND PROCEDURE - *Academic exercise - Attitude of courts thereto.*

PRACTICE AND PROCEDURE - *Jurisdiction of court - Fundamental nature of - Issue of - Where raised - Need to consider first.*

PRACTICE AND PROCEDURE - *Judgment of court – Judgment delivered by a panel - Where one of the members did not hear the argument or absent at the hearing - Effect.*

PRACTICE AND PROCEDURE - *Judgment of court – Null judgment - Treatment of.*

PRACTICE AND PROCEDURE - *Judgment of court – When Supreme Court can declare as a nullity.*

PRACTICE AND PROCEDURE - *Nullity - Meaning and effect of.*

PRACTICE AND PROCEDURE - *Preliminary objection to an appeal - Purpose of - When should be filed - Order 2 rule9, Supreme Court Rules - When should not be filed – Where successful - Effect of.*

WORDS AND PHRASES - *Nullity - Meaning and effect of.*

Issue:

Whether the Supreme Court has the jurisdiction to entertain the instant appeal.

Facts:

The 1st appellant was a candidate in the Governorship election which was conducted on 22nd September 2018 and 27th September 2018 in Osun State. He was sponsored by the 2nd appellant, a political party registered with the 1st respondent. The 2nd respondent was the candidate of the 3rd respondent, a political party registered with the first respondent, while other candidates from other political parties also participated in the election.

The 1st respondent is the body charged with the responsibility of conducting elections into the office of the president, Governors, Senators, members House of Representative and members of Houses of Assembly.

At the end of the election, the State returning officer of the 1st respondent cancelled the election of seven polling units, which cut across four Local Government Areas in the State. After the cancellation of the election in seven polling units, the 1st appellant scored 254,698 votes, while

the 2nd respondent scored 254,345 votes. From the number of votes scored by the parties, it is very clear that the 1st appellant scored the highest number of votes followed by the 2nd respondent.

The 1st respondent, however, declared the election inconclusive and ordered for a re-run of the election on 27th September 2018. On 27th September 2018, the re-run election took place in the four Local Government Areas. At the end of the rerun election, the 1st respondent declared the 2nd respondent as the winner of the election with 255,505 votes while the 1st appellant was credited with 255,023 votes.

The appellants were dissatisfied with the declaration and return of the 2nd respondent as the winner of the election. Consequently, they filed a petition before the Osun State Governorship Election Tribunal on 16/10/2018, praying that the 1st appellant be declared the winner of the election, which was conducted on the 22nd September 2018. In defence, the respondents on 9/11/2018 filed their reply challenging the competence of the petition and the jurisdiction of the Tribunal. On 16/11/2018, the appellants filed a reply to the respondents' reply wherein new issues were raised which caused the respondents to object vide a preliminary objection on 26/11/2018.

At the end of the proceedings, the Tribunal in a split decision of 2-1 nullified the election in 17 polling units and declared the 1st appellant as the winner of the election, but struck out paragraphs 18, 23 and 24 of the appellants' reply and held that it had no jurisdiction to nullify paragraph 44(n) of the 1st respondent's Approved Guidelines which empowered it to declare the election inconclusive. The chairman of the Tribunal Muhammed I. Sirajo, J. dissented. He dismissed the appellants' petition.

The respondents who were aggrieved with the majority decision of the Tribunal appealed to the Court of Appeal. The appellants were dissatisfied with certain aspect of the judgment of the Tribunal and cross-appealed. The appeal and the cross-appeal were heard, and in a split decision of 4-1 delivered on the 9th May 2019, the respondents' appeal was allowed.

Aggrieved with the decision of the Court of Appeal dismissing the cross-appeal, the appellants appealed to the Supreme Court. Meanwhile, the Supreme Court had earlier dismissed the sister appeal against the decision of the Court of Appeal allowing the respondents' appeal.

Held (*Striking out the appeal by a majority decision of 5 to 2, Aka'ahs and Galumje, JJ.S.C. dissenting by allowing the appeal*):

1. *On Fundamental nature of issue of jurisdiction and need to consider first where raised –*

The issue of jurisdiction takes precedence over every other issue, and to go ahead to consider all the issues in a matter when the issue of jurisdiction or nullity is at stake is to chase the winds. Issue of jurisdiction of courts, including the Supreme Court, in relation to what they entertain, remains fundamental. It will be a futile exercise for the Supreme Court to proceed on a matter without the necessary jurisdiction. The Supreme Court being the Apex Court, the issue of jurisdiction when considered first can end all other issues therein canvassed, if same is sustained and upheld. [Elelu -Habeeb v. A.-G., Federation (2012) 13 NWLR(Pt.1318) 423; Eneh v. NDIC (2018) 16 NWLR(Pt.1645) 355 referred to.] (P. 38, paras. D-E)

2. *On Treatment of judgment delivered by a panel where one of the members did not hear argument or absent at hearing –*

A judgment delivered by a panel, where one of the members did not hear the argument nor was he present at the hearing is a nullity. [Sokoto State Govt. of Nigeria v. Kamdex (Nig.) Ltd. (2007) 7 NWLR(Pt.1034) 466; Nyesom v. Peterside (2016) 7 NWLR(Pt.1512) 452 referred to.] (Pp. 38-39, paras. H-A)

3. *On When Supreme Court can declare judgment on appeal a nullity –*

It is the duty of the Supreme Court suo motu or where the nullity of the appeal proceedings has been brought to its notice, to declare as a nullity the judgment on appeal made from either want of jurisdiction and in contravention of the Constitution, or other statutory requirement or condition. [Adeoye v. State (1999) 6 NWLR (Pt.605) 74; General & Aviation Services Ltd.v. Thahal (2004) 10 NWLR (Pt.880) 50 referred to.] (P. 39, paras. G-H)

4. *On Meaning and effect of “nullity” and treatment of a null judgment –*
A nullity in law has been defined as a void act and the effect thereof is that such an act has no legal consequence. A void act such as a null proceeding is not only bad but of no legal consequence. It is incurable and cannot be salvaged. Any defect in the composition of an Election Tribunal is fatal, for the proceedings are a nullity no matter how well they were handled and decided. The defect is extrinsic to the proceedings. A judgment that is a nullity has no legal validity and can confer no right nor impose any obligation on anybody. [Ajiyoye v. Ishola (2006) 13 NWLR (Pt.998) 628; Saleh v. Monguno (2006) 15 NWLR (Pt. 1001) 26; M.P.P.P. v. I.N.E.C. (2015) 18 NWLR (Pt.1491) 251 referred to.] (Pp. 39-40, paras. H-C)
5. *On Attitude of courts to academic exercise –*
Courts should not engage or indulge in academic exercise. Courts are to determine live issues. An academic suit is one, where it amounts to a waste of precious judicial time in resolving it, since it does not relate to any live issue in the litigation because it is spent. It confers no right or benefit on the successful party. The instant appeal was from the decision of the Court of Appeal which by a majority of 4 to 1 declared the judgment of the Tribunal a nullity. The Supreme Court affirmed the judgment of the Court of Appeal in a majority decision of 5 to 2 in SC.553/2019 - Senator Nurudeen Ademola Adeleke & Anor. v. Adegboyega Isiaka Oyetola & Ors.; SC.554/2019 - Senator Nurudeen Ademola Adeleke & Anor. v. APC & Ors.; and SC.555/2019 – Senator Nurudeen Ademola Adeleke & Anor. v. INEC & Ors. delivered on 5th July 2019. In view of the fact that the Supreme Court affirmed the decision of the Court of Appeal which declared the decision of the Tribunal a nullity, the instant appeal became academic as nothing could come from a judgment that was a nullity. [Bamgboye v. Unilorin (1999) 10 NWLR (Pt.622) 290; NICON v. Power & Industrial Engineering (1986) 1 NWLR (Pt.14) 1; Obi-Odu v. Duke (No.2) (2005) 10 NWLR (Pt.932) 105 referred to.] (Pp. 40-41, paras. H-C)

6. *On Purpose of preliminary objection to an appeal and when should be filed –*
Preliminary objection should only be filed against the hearing of an appeal and not against one or more grounds of appeal which are not capable of disturbing the hearing of the appeal. The purpose of a preliminary objection is to convince the court that the appeal is fundamentally defective, in which case the hearing of the appeal comes to an end if found to be correct. Where a preliminary objection would not be the appropriate process to object or show to the court defects in processes before it, a motion on notice filed complaining about a few grounds or defects would suffice. In the instant case, the 3rd respondent challenged the competence of the appellants’ appeal on grounds 2 and its particulars, ground 3, particular 1 of ground 1 and issue 1, and came by way of preliminary objection. He nevertheless did not ask for the striking out of the whole grounds of appeal. By the foregoing, therefore, the preliminary objection file by the 3rd respondent was incompetent and inappropriate in the circumstances, and was accordingly dismissed. [*Umanah v. NDIC (2014) 14 NWLR (Pt.1533) 458* referred to.] (Pp. 37-38, paras. H-B)

7. *On Purpose of preliminary objection to an appeal and when should not be filed -*
By Order 2 rule 9 of the Supreme Court Rules, a respondent intending to rely upon a preliminary objection to the hearing of the appeal shall give the appellant three clear days’ notice thereof before the hearing, setting out the grounds of objection and shall file such notice together with ten copies thereof with the Registrar. Order 2 rule 9 of the Supreme Court Rules allows a respondent to rely on a preliminary objection to the hearing of an appeal. The purpose of a preliminary objection is to bring the hearing of an appeal to an end for being incompetent or fundamentally defective. Consequently, a successful preliminary objection terminates the appeal. Where the preliminary objection is filed against some grounds of appeal and there are other grounds of appeal that can sustain the appeal, a preliminary objection is inappropriate. Preliminary objections are only filed against the hearing of an appeal and not

against one or more grounds of appeal which cannot stop the court from hearing the appeal. The instant notice of appeal contained thirty-one grounds of appeal. The 3rd respondent's preliminary objection was against the second and third grounds of appeal only. A preliminary objection in the circumstance was clearly inappropriate. The 3rd respondent should have filed a motion on notice praying the Supreme Court to strike out the offending grounds. The preliminary objection not being suitable was incompetent and same was accordingly struck out. [*NNPC v. Famfa Oil Ltd.* (2012) 17 NWLR (Pt.1328)148; *General Electric Company v. Akande* (2012) 16NWLR (Pt.1327) 593; *Obiuweubi v. C.B.N.* (2011) 7NWLR (Pt.1247) 465; *Adejumo v. Olawaiye* (2014)12 NWLR (Pt.1421) 252 referred to.] (Pp. 49-50, paras. F-A)

DISSENTING OPINIONS OF AKA' AHS AND GALUMJE, JJ.S.C.:

1. *On When candidate for election to the office of Governor of a State shall be deemed to have been duly elected –*

By virtue of section 179(2) of the 1999 Constitution, a candidate for an election to the office of Governor of a State shall be deemed to have been duly elected where there being two or more candidates - he has a majority of the votes cast at the election; and he has not less than one quarter of the votes cast at the election in each of at least two-thirds of all the local government areas in the State. Section 179(2)(a) and of the Constitution is very clear on the duty imposed on INEC in such a situation, and it is simply to declare the result of the election and return the winner as duly elected. In the instant case, the 1st appellant satisfied these constitutional requirements and in spite of this, the 1st respondent who was supposed to be an umpire contrived the arrangement whereby it declared the result inconclusive and proceeded to conduct a re-run that enabled the 2nd respondent to secure 255,508 votes to the 1st appellant's 255,023 votes. (P. 43, paras. D-G)

2. *On Who can cancel results of an election –*
Cancellation of results can be done only by the Supervisory Polling Unit Officer and not by the State Returning Officer. (P. 44, para. B)

3. *On When Independent National Electoral Commission can declare result of an election inconclusive –*
The only occasion the Independent National Electoral Commission is allowed to declare the result of an election inconclusive is where the candidates with highest votes cast have a tie and voting did not take place in some areas, and that is when a re-run can be ordered in those polling units where the election did not hold. (Pp. 43-44, paras. H-A)

Per AKA’AHS, J.S.C. at page 43, paras. G-H:

“The State Returning Officer of the 1st respondent had no power to cancel the election of seven polling units which cut across four local government areas in the State. Even with the cancellation the 1st appellant still had a majority of 353 votes over the 2nd respondent and it was after the re-run that the 2nd respondent got 482 votes more than the 1st appellant. What this shows is that the 1st respondent had a preferred candidate in the election which should not be the case.

The re-run ordered by the 1st respondent was a nullity as it had no power to declare the election inconclusive.”

Nigerian Cases Referred to in the Judgment:

Adejumo v. Olawaiye (2014) 12 NWLR (Pt.1421) 252

Adeoye v. State (1999) 6 NWLR (Pt.605) 74

Ajiboye v. Ishola (2006) 13 NWLR (Pt.998) 628

Bamgboye v. Unilorin (1999) 10 NWLR (Pt.622) 290

Elelu-Habeeb v. A.-G., Fed. (2012) 13 NWLR (Pt.1318) 423

Eneh v. NDIC (2018) 16 NWLR (Pt.1645) 355

Garuba v. Omokhodion (2011) 15 NWLR (Pt.1269) 145
General & Aviation Services Ltd. v. Thahal (2004) 10 NWLR(Pt.880) 50
General Electric Company v. Harry Akande (2012) 16 NWLR(Pt.1327) 593
M.P.P.P. v. I.N.E.C. (2015) 18 NWLR (Pt.1491) 251
NICON v. Power & Industrial Engineering (1986) 1 NWLR(Pt.14) 1
NNPC v. Famfa Oil Ltd. (2012) 17 NWLR (Pt.1328) 148
Nyesom v. Peterside (2016) 7 NWLR (Pt.1512) 452
Obi-Odu v. Duke (No.2) 2005 10 NWLR (Pt.932) 105
Obiuweubi v. C.B.N. (2011) 7 NWLR (Pt.1247) 465
Saleh v. Monguno (2006) 15 NWLR (Pt. 1001) 26
Sokoto State Govt. of Nigeria v. Kamdex (Nig.) Ltd. (2007) 7 NWLR (Pt.1034) 466
U.B.N. Plc v. Ravih Abdul & Co. Ltd. (2019) 3 NWLR(Pt.1659) 203
Umanah v. NDIC (2014) 14 NWLR (Pt.1533) 458

Nigerian Statutes Referred to in the Judgment:

Constitution of the Federal Republic of Nigeria, 1999 (as amended) Ss. 179(2)(a)(c) and 285(2) Electoral Act, 2010 (as amended) Ss. 69 and 70

Nigerian Rules of Court Referred to in the Judgment:

Supreme Court Rules, O. 2 9(1)

Appeal:

This was an appeal from the cross-appeal filed by the appellants at the Court of Appeal against some of the findings of the trial Tribunal as contained in its majority decision delivered on 22nd March 2019. The trial Tribunal by a majority of 2:1 granted the appellants' petition and declared the 1st appellant the winner of the election. The 1st appellant was however dissatisfied with some

findings of the Tribunal that were not in his favour. The appellants filed a cross appeal to challenge those aspects of the majority decision they were not happy with. The Court of Appeal, in a majority judgment of 4 to 1, dismissed the cross-appeal. The Supreme Court, in a majority decision of 5 to 2, struck out the appeal.

History of the Case:

Supreme Court:

Names of Justices that sat on the appeal: Ibrahim Tanko Muhammad, J.S.C. (Presided); Olabode Rhodes-Vivour, J.S.C.; Kumai Bayang Aka'ahs, J.S.C. (Dissented); Kudirat Motonmori Olatokunbo Kekere-Ekun, J.S.C.; AmiruSanusi, J.S.C.; Paul Adamu Galumje, J.S.C. (Dissented) and Uwani Musa Abba Aji, J.S.C. (Read the Leading Judgment)

Appeal No.: SC.556/2019

Date of Judgment: Friday, 5th July 2019

Names of Counsel: Onyechi Ikpeazu, SAN; Chief N.O.O. Oke, SAN; Dr. Paul Ananaba, SAN; Emeka Etiaba, SAN; Kehinde Ogunwumiju, SAN (with them, Ademola Abimbola and Tunde Ahmed Adejumo) – for the Appellants

Yusuf Ali, SAN; K.K. Eleja, SAN; Prof. Wahab Egbewole, SAN (with them, Prof. A.H. Yadudu; Lasco M. Pwahomdi; Bashir Isa; Niyi Akinsola; Yakub Dauda; Tunde Salako; Adesina A. Agbede; Alex Akoja and A.O. Mohammad) - for the 1st Respondent

Chief Wole Olanipekun, SAN; John Baiyeshea, SAN; Abiodun Owonikoko; SAN, Dayo Akinlaja, SAN; Bode Olanipekun, SAN (with them, Chuba Obi-Okaro; Shola Bojuwoye; Akintola Makinde; Mayowa Ajileye; Oluwayomi Adejuyigbe; Bebor Tabai; Olajide Salamiand Gbenga Oshin) - for the 2nd Respondent

Chief Akin Olujinmi, SAN; Alhaji Lasun Sanusi, SAN; Dr. Abiodun Layonu, SAN; Chief Yomi Aliyu, SAN (with them, A.A. Abimbola; Sola Ajayi; Abiodun Olaide;

Olayinka Okedara; Oloyede Oyediran; K. B. Odedeji; Dr. Nasir Adeniyi; Olumide Olujinmi; Akinsola Alujinmi; Abdulwahab Abayomi; Olukayode Ariwoola; Kafayat Abiola Olajude; Rukayat Oyejola and Chiazor Ngige) -for the 3rd Respondent

Court of Appeal:

Division of the Court of Appeal from which the appeal was brought: Court of Appeal, Abuja Names of Justices that sat on the appeal: Jummai Hannatu Sankey, J.C.A. (Presided); Abubakar Datti Yahaya, J.C.A.; Ita George Mbaba, J.C.A.; Isaiah Olufemi Akeju, J.C.A. (Read the Leading Judgment); Bitrus Gyarazama Sanga, J.C.A.

Appeal No.: CA/A/EPT/295/2019

Date of Judgment: Thursday, 9th May 2019

Names of Counsel: Dr. Onyechi Ikpeazu, SAN; Chief N. O. O. Oke, SAN; Dr. Paul C. Ananaba, SAN; Emeka Okpoko, SAN and Kehinde Ogunwumiju, SAN (with them, Niyi Owolade, Esq.; Sunday Abednego, Esq.; I.N.T. Iheanacho, Esq.; Edmund Z. Biriomoni, Esq.; Wole JimiBada, Esq.; Eze George Alala, Esq.; Stanislaus Mbaezue, Esq.; Igbeaku Evulukwu, Esq.; Tochukwu Nweke, Esq.; Prince Adebisi Adetosoye, Esq.; Tunde Adejumo, Esq.; Itodo George, Esq.; Umoru Jubrin, Esq. and Deborah Anonaba, Esq.) - for the Cross-Appellants

Yusuf Ali, SAN; K.K. Eleja, SAN and Prof Wahab Egbewole, SAN (with them, Bashir Isa, Esq.; Adesina Agbede, Esq. and Alex Akoja, Esq.) - for the 1st Cross-Respondent

Chief Wole Olanipekun, SAN; John Olusola Baiyeshea (SAN); Abiodun Owonikoko, SAN; Dayo Akinlaja, SAN and Bode Olanipekun, SAN (with them, Abiodun Olaide; Dr. Ajibola Basiru; Abudulasak Adeoya; Dr. M.T. Adekilekun; Taiwo Awokunle; M.K. Fidelis; Aso Amata O'thuke; M.O. Adebowale Olugbenga

Fayemiwo; Simisola Okenla; Ayo Olatubora; Oghenetajiri Gbemre and Olajide Salami) - for the 2nd Cross-Respondent

Chief Akin Olujimi SAN; Dr. Abiodun Kayoun, SAN and Chief Yomi Aliyu, SAN (with them, A.A. Abimbola, Esq.; A.W. Salimon, Esq.; Olayinka Okedera, Esq.; Kolapo Alimi, Esq.; Olumide Olujinmi, Esq.; Oloyede Oyediran, Esq. and Ayodele Akinsanya) - for the 3rd Cross-Respondent

Election Tribunal:

Name of the Election Tribunal: Osun State Governorship Election. Tribunal

Name of the Judge: Peter C. Obiora; Adegboye A. Gbotatunde and Muhammed I, Sirajo (Dissented)

Petition No.: EPT/OS/Gov/1/2019

Date of Judgment: Friday, 22 March 2019

Counsel:

Onyechi Ikpeazu, SAN; Chief N.O.O. Oke, SAN; Dr. Paul Ananaba, SAN; Emeka Etiaba, SAN; Kehinde Ogunwumiju, SAN (with them, Ademola Abimbola and Tunde Ahmed Adejumo) - for the Appellants

Yusuf Ali, SAN; K.K. Eleja, SAN; Prof. Wahab Egbewole, SAN (with them, Prof. A.H. Yadudu; Lasco M. Pwahomdi; Bashir Isa; Niyi Akinsola; Yakub Dauda; Tunde Salako; Adesina A. Agbede; Alex Akoja and A.O. Mohammad) - for the 1st Respondent

Chief Wole Olanipekun, SAN; John Baiyeshea, SAN; Abiodun Owonikoko; SAN, Dayo Akinlaja, SAN; Bode Olanipekun, SAN (with them, Chuba Obi-Okaro; Shola Bojuwoye; Akintola Makinde; Mayowa Ajileye; Oluwayomi Adejuyigbe; Bebor Tabai; Olajide Salami and Gbenga Oshin) - for the 2nd Respondent

Chief Akin Olujinmi, SAN; Alhaji Lasun Sanusi, SAN; Dr. Abiodun Layonu, SAN; Chief Yomi Aliyu, SAN (with them, A.A. Abimbola; Sola Ajayi; Abiodun Olaide;

Olayinka Okedara; Oloyede Oyediran; K.B, Odedeji; Dr. Nasir Adeniyi; Olumide Olujinmi; Akinsola Alujinmi; Abdulwahab Abayomi; Olukayode Ariwoola; Kafayat Abiola Olajude; Rukayat Oyejola and Chiazor Ngige) - for the 3rd Respondent

ABBA AJI, J.S.C. (Delivering the Leading Judgment): The appellants as petitioners filed their petition on 1/10/2018 seeking the following reliefs:

- i. That it may be determined and thus declared that the 2nd respondent Adegboyega Isiaka Oyetola was not duly elected and/or returned by a majority of lawful votes cast in the Osun State Governorship election held on Saturday 27th September, 2018 and therefore his declaration and return as the governor elect of Osun State is null, void and of no effect whatsoever.
- ii. That it may be determined and thus declared that the 1st petitioner having fulfilled the requirements of section 179(2)(a) and of the Constitution of the Federal Republic of Nigeria, 1999 as amended in respect of the Osun State Governorship Election held on the 22nd September, 2018, having scored a total vote of 254,698 while 2nd respondent scored 454,345 votes.
- iii. That it may be determined and thus declared that the 1st petitioner having satisfied the provisions of the Constitution of the Federal Republic of Nigeria, 1999, as amended and the Electoral Act, 2010, as amended, in respect of the election of 22nd September, 2018, the act of the 1st respondent in ordering a rerun election of 27th September, 2018 is invalid, void and of no effect whatsoever howsoever.
- iv. That it may be determined and thus declared that the re-run election held on 27th September, 2018 is invalid by reason of corrupt practices, substantial non-compliance and offences against the provisions of the Electoral Act, 2010 (as amended).

-
- v. That it may be determined and thus declared that the rerun election of 27th September, 2018 and the rerun of the 1st respondent are voided by acts which clearly violate and are in breach of the provisions of the Electoral Act, 2010 (as amended), including but not limited to rigging and manipulation of election results, unprecedented acts of violence, unlawful allocation of votes, thuggery and coercion of voters, committed at towns, villages, other communities, wards and polling units aforementioned in Osun State as well as unlawful interference in the electoral process by the respondents.
 - vi. That it may be determined and thus declared that the results of the rerun Governorship Election of Osun State held on Thursday 27th September, 2018 as declared and announced by the 3rd respondent be nullified and to be of no effect whatsoever.
 - vii. An order of this Honourable Tribunal nullifying the certificate of return issued to the 2nd respondent by the 1st respondent.
 - viii. A declaration that Paragraph 44 of the 1st respondent's Approved Guidelines and Regulations for the conduct of the Osun State Governorship Election 2018 is void because it is in conflict with the Electoral Act, 2010, as amended and the Constitution of the Federal Republic of Nigeria, 1999 (as amended) and/or has the effect of expanding or amending the Electoral Act 2010, as amended and the Constitution of the Federal Republic of Nigeria, 1999 (as amended) and/or confers additional powers on the 1st respondent which were neither conferred or envisaged in the Electoral Act, 2010, as amended and the Constitution of the Federal Republic of Nigeria, 1999 (as amended).

- ix. An order striking down and nullifying paragraph 44(n) of the 1st respondent approved Guidelines and regulations for the conducts of the Osun State Governorship Election 2018 because it is in conflict with the cumulative provisions of sections 69 and 70 of the Electoral Act, 2010 as amended and section 179 of the Constitution of the Federal Republic of Nigeria 1999 (as amended) and/or has the effect of expanding or amending the cumulative provisions of sections 69 and 70 of the Electoral Act, 2010 as amended and section 179 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) and/or confers additional powers on the 1st respondent which were neither conferred nor envisaged by the cumulative provisions of sections 69 and 70 of the Electoral Act, 2010 as amended and section 179 of the Constitution of the Federal Republic of Nigeria 1999 (as amended).
- x. A declaration that the respondents manipulated, altered, amended the card reader accreditation data/accreditation on Forms EC8A at Osogbo, Olorunda, Ola Oluwa, Boripe, Ilesha East, Atakumosa East, Ife Central, Ife North, Ife South, Iwo, Egbedore, Ayidire, Ayedaade and Ejigbo Local Government Areas of Osun State.
- xi. A declaration that by virtue of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) and the Electoral Act, 2010 (as amended) the 1st respondent's press release and pronouncement (through the Returning Officer) on the 23rd of September, 2018 that the election conducted for the office of the Governor of Osun State on the 22nd of September, 2018 was inconclusive, was null void, ultra vires, unlawful and of no effect whatsoever, howsoever.
- xii. A declaration that the 1st respondent's decision to order for and conduct a rerun election for the office of the Governor of Osun State conducted in the following seven polling units - polling unit 012, Adefeti Ward 7 and polling

unit 010 Osi Ward 8 of Ife South Local Government, Polling unit 2 in Oyere II Alapata Villageward 10 in Ife North Local Government, Polling Unit 017 in Ward 5 in Osogbo Local Government polling units 1 and 4 in ward 8, Polling unit 3 in Ward 9 in Orolu Local Government on the 27th September, 2018 was null, void, ultra vires, unlawful and of no effect whatsoever, howsoever.

- xiii. An order nullifying the result of the rerun election into the office of the Governor of Osun State conducted on the rerun election of 27th September, 2018 for being null, void, unlawful, ultra vires and of no effect whatsoever, howsoever.
- xiv. An order nullifying and/or cancelling all votes in all polling units where the petitioners have established over-voting and non-accreditation during the Osun State Governorship election 22nd day of September, 2018.
- xv. A declaration that neither the 2nd respondent nor the 3rd respondent scored the majority of lawful votes cast at the election to the office of the Governor of Osun State held on the 22nd of September, 2018 upon cancellation by this Tribunal of the unlawful votes allotted to the 2nd and 3rd respondents in all the polling units where there were over-voting and non-accreditation.
- xvi. A declaration that your petitioners scored the majority of lawful votes cast at the election to the seat of the Governor of the Osun State held on the 22nd September, 2018 and the 1st petitioner Senator Ademola Nurudeen Adeleke is therefore entitled to be returned as the duly elected Governor of Osun State.
- xvii. An order returning your petitioners as the winner of the election to the office of the Governor of Osun State held on the 22nd of September, 2018 and the

1stpetitioner Senator Ademola Nurudeen Adeleke as the duly elected Governor of Osun State.

In the Alternative:

- xviii. An order declaring your 1st petitioner as the winner of the election to the office of Governor of Osun State held on the 22nd September, 2018 and the rerun election of 27th September, 2018 and that the 1st petitioner Senator Ademola Nurudeen Adeleke is the duly elected Governor of Osun State based on the scores of the valid votes of the parties after deduction of the votes affected by total votes exceeding accreditation and votes affected by non-recording of accreditation.”

The 1st appellant was the candidate of the 2nd appellant at the 2018 Governorship election in Osun State. On 22/9/2018, the 1st respondent conducted the election into the office of Governor, Osun State, wherein 1st appellant scored the highest number of votes with 254,698 while the 2nd respondent came second with 254,345 votes. For some reasons, the said election was declared by the 1st respondent inconclusive and a rerun was ordered to take place in 4 Local Governments wherein the 2nd respondent scored the highest votes of 255,505 while the 1st appellant came second with 255,023 votes. Dissatisfied, the 1st appellant petitioned the respondents at the Osun State Election Petition Tribunal on 16/10/2018. In defence, the respondents on 9/11/2018 filed their reply challenging the competence of the petition and the jurisdiction of the Tribunal. On 16/11/2018, the appellants filed a reply to the respondents’ reply wherein new issues were raised which caused the respondents to object vide a preliminary objection on 26/11/2018. At the end of the proceedings, the Tribunal gave judgment in favour of the appellants but struck out paragraphs 18, 23 and 24 of the appellants’ reply and held that it had no jurisdiction to nullify paragraph 44(n) of the 1st respondent’s Approved Guidelines which empowered it to declare the election inconclusive. The appellants as a result cross-appealed against these portions of the Tribunal’s decision but the lower court on 9/5/2019 dismissed the cross-appeal, hence this appeal before this honourable court.

The appellants' appeal before this court vide a notice of appeal, formulated 6 issues for the determination of this appeal thus:

1. Whether or not the lower court was right when their Lordships found that the trial Tribunal lacked the jurisdiction to entertain reliefs (viii) & of the petition and then refused to grant the said reliefs.
2. Whether or not the lower court was right when their Lordships affirmed the decision of the trial tribunal to strike out certain paragraphs in the appellants' replies to the respective replies of the 2nd & 3rd respondents.
3. Whether or not the lower court was right to have affirmed the trial tribunal's decision that the final addresses of the 2nd & 3rd respondents
 - (i) were not incompetent. all the witness statements of the 2nd respondent's
 - (ii) witnesses were valid and
 - (iii) the 1st respondent had not abandoned its pleadings.
4. Whether or not the lower court was right when their Lordships held that the appellants failed to prove their allegations of over-voting.
5. Whether or not the lower court was right when their Lordships held that the trial Tribunal's decision that only 17 witnesses were able to establish the appellants 'case on lack of ballot accounting and non-recording of accreditation was right and did not occasion a miscarriage of justice.
6. Whether or not the lower court was right when their Lordships held that the appellants were unable to prove their allegation that the rerun election of 27thSeptember, 2018 was invalid having regard to the corrupt practices, violence and non-compliances with the Electoral Act."

The 1st respondent in its brief formulated 6 issues for the determination of the appeal filed on 31/5/2019 thus:

1. Whether the court below was not right in affirming the decision of the trial Tribunal that the jurisdiction of an election tribunal is limited to issues of the challenge to the return of a successful candidate and that the Tribunal could not

2. grant reliefs viii and xi as subscribed on the petition and thereby refusing the reliefs?
3. Whether the court below was not right in upholding the decision of the trial Tribunal that struck out some of the paragraphs of the appellants' reply to the replies of the 2nd and 3rd respondents to the petition.
4. Whether the court below was not right in agreeing with the trial tribunal that the final addresses filed by the 2nd and 3rd respondents were proper and valid and whether that decision in anyway prejudiced the appellants.
5. Whether the court below was not right in agreeing with the trial Tribunal that given the circumstances of the facts of the case, the 1st respondent who cross-examined witnesses, tendered documents and elicited relevant evidence in support of its case cannot be held to have abandoned its pleadings and that the written depositions of RW1, RW2, RW3, RW5, RW6, RW7, RW8, RW9, RW10, and RW12 are valid and not vitiated merely because the depositions carried illiterate jurat but that the witnesses gave evidence in English language.
6. Whether the court below was not right in agreeing with the trial Tribunal that the appellants as petitioners failed to prove the allegations of over-voting, corrupt practices and other sundry allegations in their petition and that there was no merit in the appellants' cross-appeal at the court below having regard to the facts and circumstances of the case.
7. Whether the court below was not right in endorsing the decision of the trial Tribunal that rejected the testimonies of PW38, PW40, PW45, PW47, PW49 and PW63 having regard to the non-credible nature of the testimonies of the witnesses."

The 2nd respondent in his brief filed on 31/5/2019 formulated 6 issues for the determination of the appeal as follows:

1. Considering the unambiguous provision of section 285(2) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended), whether the lower court was

- not correct when it affirmed the trial Tribunal's finding, with respect to reliefs (viii) and ix of the petitions. (Grounds 1, 2 and 3)
2. Did the lower court correctly affirm the decision of the trial Tribunal which struck out paragraphs of the petitioners' reply? (Grounds 4 and 5)
 3. Was the lower court not right when it affirmed the decision of the trial Tribunal, which countenanced respondent's final written address submitted before it? (Ground 6)
 4. Was the decision of the lower court correct in respect of 1st respondent's pleadings and evidence at the trial Tribunal? (Ground 7)
 5. Were the testimonies of the sworn witnesses of the 2nd respondent at the trial tribunal valid as found by the lower court? (Ground 8)
 6. Did the lower court reach a correct decision in respect of the complaints made by the appellants in their petition before the trial Tribunal relating to over-voting, accreditation and ballot accounting, corrupt practices and other species of non-compliance? (Grounds 9, 10, 11 and 12)"

The 3rd respondent in its brief filed on 28/5/2019 formulated 6 issues for the determination of the appeal thus:

1. Whether the lower court was not right when it affirmed the decision of the tribunal refusing reliefs (VIII) and (IX) claimed by the appellants on the ground that it had no jurisdiction to question the competence of INEC to make the guidelines which the appellants wanted to be nullified.
2. Whether on the state of the law regarding the limited scope of the right of a petitioner to file a reply to the reply of a respondent to the petition, the lower court was not right when it affirmed the decision of the tribunal striking out paragraphs 18, 23 and 24 of the appellants' reply to the 2nd respondent's reply to the petition and paragraph 22 of the appellants' reply to the 3rd respondent's reply to the petition.
3. Whether the lower court was wrong when it affirmed the decision of the tribunal holding that it would be tantamount to a denial of fair hearing if the final address

of the 3rd respondent was discountenanced and that by cross-examining the witnesses for the petitioners, the 1st respondent could not be said to have abandoned its pleadings.

4. Whether on the state of the law and the evidence on the records, the lower court was wrong when it held that the appellants failed to prove over-voting.
5. Whether the lower court was wrong when it affirmed the decision of the tribunal that only 17 witnesses of the cross-appellants gave evidence on the alleged non-compliance with the Electoral Act.
6. Whether the lower court was not right when it affirmed the decision of the Tribunal that the allegation of corrupt practices and violence during the re-run election was not proved.”

The parties adopted their briefs and the replies and asked this honourable court for judgment. Having gone through the records and the evidence therein, this appeal shall be considered on the issues formulated by the appellants’ learned senior counsel.

There is however a preliminary objection filed by the 3rd respondent incorporated in its brief I must consider first.

Preliminary Objection:

The 3rd respondent urged this honourable court to strike out ground 2, the particulars and issue 1, for being vague and not arising from the judgment of the lower court. He equally asked for the striking out of ground 3 as there is no issue distilled therefrom. He also urged for the striking out of particular 1 of ground 1 directed at showing that the Tribunal has jurisdiction to determine the validity of any law or regulation in relation to petition before it. He further asked for the striking out of the appellants’ issue 1 and the arguments therein for not relating to the complaint in issue 1. He cited *Garuba v. Omokhodion* (2011) 7 SCM at 105F, (2011) 15 NWLR (Pt.1269) 145.

The appellants’ reply to the 3rd respondent’s preliminary objection was filed on 30/5/2019 wherein he contended that where a respondent seeks to challenge the competence of some grounds of appeal, he ought to file a motion on notice to strike out the incompetent grounds and not a

preliminary objection. He referred to *U.B.N. Plc v. Ravih Abdul & Co. Ltd.* (2019) 3 **NWLR (Pt.1659) at 203.**

The 3rd respondent challenged the competence of the appellants 'appeal on grounds 2 and its particulars, ground 3, particular 1 of ground 1 and issue 1 and came by way of preliminary objection. He is nevertheless not asking for the striking out of the whole grounds of appeal. It is trite therefore that a preliminary objection should only be filed against the hearing of an appeal and not against one or more grounds of appeal which are not capable of disturbing the hearing of the appeal. The purpose of a preliminary objection is to convince the court that the appeal is fundamentally defective in which case the hearing of the appeal comes to an end if found to be correct. Where a preliminary objection would not be the appropriate process to object or show to the court defects in processes before it, a motion on notice filed complaining about a few grounds or defects would suffice. See *Per Rhodes-Vivour, JSC in Umanah v. NDIC* (2016) LPELR-42556(SC), (2014) 14 **NWLR (Pt.1533) 458.**

By the foregoing therefore, I will not dissipate energy and time in considering the preliminary objection file by the 3rd respondent since it is incompetent and inappropriate in this matter and is hereby dismissed.

There is nonetheless a viral string that runs through all the sister appeals which this one is unfortunately tied to. The issue of jurisdiction takes precedence over every other issue and to go ahead to consider all the issues herein when the issue of jurisdiction or nullity is at stake is to chase the winds. This being the Apex Court, the issue of jurisdiction when considered first can end all other issues therein canvassed, if same is sustained and upheld. See *Mohammed, JSC, in Elelu-Habeeb & Anor v. A.-G., Federation & Ors* (2012) LPELR-15515(SC), (2012) 13 **NWLR (Pt.1318)423.** Per *Muhammad, JSC in Eneh v. NDIC & Ors* (2018) LPELR-44902(SC), (2018) 16 **NWLR (Pt.1645) 355** nailed it down that the issue of jurisdiction of courts, including this one, in relation to what they entertain remains fundamental. It will be a futile exercise for this court to proceed on a matter without the necessary jurisdiction.

In the sister case, Appeal No. Sc. 553/2019, to the appeal at hand, my learned brother, Rhodes-Vivour, JSC, dismissed the proceedings and judgment of the trial Tribunal as a nullity,

having no foundation and stratum to stand on. In his judgment therein, the judgment of the Tribunal was infected when a Member of the Tribunal, who did not participate in the hearing of evidence was involved in writing the lead judgment as the record of the proceedings shows.

It is now settled that a judgment delivered by a panel, where one of them did not hear the argument nor was he present at the hearing is a nullity. See Per Ogbuagu, JSC, in *Sokoto State Govt.of Nigeria & Ors v. Kamdex (Nig.) Ltd.* (2007) LPELR-3093(SC), (2007) 7 **NWLR (Pt.1034)** 466. Per Kekere-Ekun, JSC, rightly and boldly handled such a matter in *Nyesom v. Peterside & Ors* (2016) LPELR-40036(SC), (2016) 7 **NWLR (Pt.1512)** 452 pg. 504-505, wherein he analyzed as follows:

“...it is my view that the principle is applicable to any Court or Tribunal that sits in a panel of two or more members. In the instant case, Pindiga, J as Chairman with Leha, J and Taiwo, J, heard the application. The ruling delivered on 9/9/2015 signed by Ambursa, J as Chairman and Leha and Taiwo, JJ as members reviewed the submissions of learned counsel made at the hearing of the application before dismissing same. There is no doubt that Ambursa, J could not have formed an opinion on the submissions of learned counsel, which he did not hear. In the eyes of the law only Leha, J and Taiwo, J delivered the ruling. The signature of Ambursa, J on the ruling was invalid. In the case of *Sokoto State Govt v. Kamdex Nig. Ltd.* (2007) 7 **NWLR (Pt.1034)** 466 a similar situation arose where a Justice of the Court of Appeal who did not participate in the hearing of the appeal wrote and delivered a judgment therein. The judgment so delivered was declared a nullity. See also: *Ubwa Tiv Traditional Council* (2004) 11 **NWLR (Pt.884)**427. The remaining two members of the Tribunal who participated in the hearing of the application and delivered opinion therein could not form a quorum in the absence of the chairman who participated in the hearing. The Tribunal was not properly constituted for the delivery of the ruling and therefore lacked the competence to do so. See *Madukolu v. Nkemdilim* (1962) 2 SCNLR 341.”

It is therefore the duty of this court suo motu or where the nullity of the appeal proceedings has been brought to its notice, to declare as a nullity the judgment on appeal made from either want

of jurisdiction and in contravention of the constitution or other statutory requirement or condition. See Per Onu, JSC in Adeoye v. State (1999) LPELR-134(SC), (1999) 6 **NWLR (Pt.605) 74**, Per Uwaifo, JSC in General & Aviation Services Ltd. v. Thahal (2004) LPELR-1317(SC), (2004) 10 **NWLR (Pt.880) 50**. It is settled law that a judgment that is a nullity has no legal validity and can confer no right nor impose any obligation on anybody, Per Onnoghen, JSC in Ajiboye v. Ishola (2006) LPELR-301(SC), (2006) 13 **NWLR(Pt.998) 628**. A nullity in law has been defined as a void act and the effect thereof is that such an act has no legal consequence. A void act such as a null proceeding is not only bad but of no legal consequence. It is incurable and cannot be salvaged. See Saleh v. Monguno (2006) 15 **NWLR (Pt. 1001) P. 26** at P.74. Any defect in the composition of an Election Tribunal is fatal, for the proceedings are a nullity no matter how well they were handled and decided. The defect is extrinsic to the proceedings. See Per Rhodes-Vivour, JSC in M.P.P.P. v. I.N.E.C. & Ors (2015) LPELR-25706(SC), (2015) 18 **NWLR (Pt.1491) 251**.

Having found that the judgment delivered on 22/3/2019 was a nullity as declared by my learned brother, Rhodes-Vivour, JSC, in his judgment in appeal No. SC. 553/2019, it constitutes a good ground for not considering the other issues for determination as all will become academic and hypothetical. Thus, a court and even this court has no jurisdiction to adjudicate over an appeal that was a nullity even before it was seized of it. This appeal is hereby dismissed in its entirety and parties are to bear their costs.

I.T. MUHAMMAD, Ag. C.J.N.: I read in advance a draft copy of this judgment just delivered by my learned brother, Uwani AbbaAji, JSC. I agree entirely with her reasoning and conclusion in dismissing the appeal. I, too, dismiss the appeal for lack of merit.

RHODES-VIVOURE, J.S.C.: I had the advantage of reading in draft the leading judgment delivered by my learned brother, Abba Aji JSC. I agree with it.

The full history and circumstances have already been set out in the judgment delivered.

This appeal is from the decision of the Court of Appeal which by a majority of 4 to 1 declared the judgment of the Tribunal a nullity. This court affirmed the judgment of the Court of Appeal in a unanimous decision 5 to 2, in SC.553/2019 - Senator Nurudeen Ademola Adeleke &

anor v. Adegboyega Isiaka Oyetola & Ors.; SC.554/2019 - Senator Nurudeen Ademola Adeleke & Anor v. APC & Ors and SC.555/2019 - Senator Nurudeen Ademola Adeleke & anor v. INEC & Ors delivered today.

It has been said in a plethora of cases that courts should not engage or indulge in academic exercise, courts are to determine live issues. An academic suit is one, where it amounts to a waste of precious judicial time in resolving it since it does not relate to any live issue in the litigation because it is spent. It confers no right or benefit on the successful party. See *Bamgboye v. Unilorin* (1999) 10 NWLR (Pt.622) p.290; *NICON v. Power & Industrial Engineering* (1986) 1 NWLR (Pt.14) p.1; *Obi-Odu v. Duke* (No.2) (2005) 10 NWLR (Pt.932) p. 105.

In view of the fact that this court has affirmed the decision of the Court of Appeal which declared the decision of the Tribunal a nullity this appeal becomes academic as nothing can come from a judgment that is a nullity.

For these brief reasons as well as those more fully given by Abba Aji, JSC, the appeal is hereby struck out.

KEKERE-EKUN, J.S.C.: This appeal arose from the cross appeal filed by the appellants at the court below against some of the findings of the trial Tribunal as contained in its majority decision delivered on 22nd March 2019. It is in respect of the Osun State gubernatorial election conducted on 22nd and 27th September 2018. The trial Tribunal by a majority of 2:1 granted the appellants petition and declared the 1st appellant the winner of the election. The 1st appellant was however dissatisfied with some findings of the Tribunal that were not in his favour. The 2nd respondent was dissatisfied with the majority decision in the 1st appellant's favour and appealed against it to the court below. The appellants filed across appeal to challenge those aspects of the majority decision they were not happy with. The lower court in a unanimous judgment, dismissed the cross-appeal.

In our judgment in sister appeals Nos. *SC.553/2019: Senator Nurudeen Ademola Adeleke & Anor v. Adegboyega Isiaka Adetola & Ors.*; *SC.554/2019: Senator Nurudeen Ademola Adeleke & Anor. v. APC & Ors* and *SC.555/2019: Senator Nurudeen Ademola Adeleke & Anor. v. INEC & Ors* delivered this morning, I agreed with my learned brother, Olabode Rhodes-Vivour, JSC who

wrote the lead judgment, that the judgment of the trial Tribunal delivered on 22nd March, 2019 is a nullity and accordingly dismissed the appeals. It follows that nothing founded upon the null judgment can stand. In effect, this appeal has become academic. I agree with my learned brother, Uwani Abba Aji, JSC that the only option is to strike it out.

The appeal is hereby struck out. The parties shall bear their respective costs in the appeal.

SANUSI, J.S.C.: I read an advance copy of this judgment supplied to me by Uwani Abba Aji, JSC, I agree entirely with her reasoning and conclusion.

In the sister appeal Nos. SC.553/2019 in respect of which judgment has just been delivered, I agreed with the lead judgment of Rhodes-Vivour JSC. I endorsed his conclusion that the judgment of the Tribunal delivered on 22/3/19 is a nullity.

It was earlier agreed by learned counsel to the parties that that appeals Nos. SC.554/2019 & SC.555/2019 should abide that judgment. This instant case was based on the annulled majority judgment of the tribunal that has been annulled.

This appeal, for that reason has become academic and this court lacks luxury of time to consider it. I therefore strike out this appeal. I make no order on costs.

AKA' AHS, J.S.C. (Dissenting): After we had taken arguments in this appeal, we adjourned for judgment. In the interval we held conference in SC.553/2019 and the majority of the members of the panel (Coram: Muhammad, Ag. Chief Justice, Rhodes-Vivour, Kekere-Ekun, Sanusi and Abba Aji, JJSC) concluded that the appeal lacked merit and should be dismissed. The judgments in SC.553/2019 were delivered a short while ago and the majority of the Justices dismissed the appeal while the minority judgments of my learned brother, Galumje JSC and my humble self-found merit in that appeal and allowed same.

When it came to discussing this appeal, the majority felt the appeal was a mere academic exercise since appeal No. SC.553/2019 had been dismissed and they decided to strike out the appeal

hence the majority judgment of my learned brother, Abba Aji JSC. The minority was of the view that the appeal was meritorious and therefore should be allowed.

I have read the judgment of my learned brother, Galumje, JSC and I am in complete agreement with him that the appeal has merit and ought to be allowed. I adopt in toto the reasoning and conclusion that Galumje, JSC reached in the judgment as mine.

The crux of this appeal is whether the 1st respondent has power to declare the Gubernatorial election for Osun State of 22September, 2018 as inconclusive and proceed to fix a re-run on 27September, 2019 when the 1st appellant who polled 254,698 votes, had the highest number of votes cast and met with the constitutional spread of securing one-quarter of the votes cast in at least two-thirds of the Local Government Areas throughout Osun State?

My answer to this question is an emphatic No. Section 179(2) and of the Constitution is very clear on the duty imposed on the 1st respondent in such a situation and it is simply to declare the

(a) result of the election and return the winner as duly elected.

The section states as follows: -

“179(2) A candidate for an election to the office of Governor of a State shall be deemed to have been duly elected where there being two or more candidates - he has a majority of the votes cast at the election; and he has not less than one quarter of the votes cast at the election in each of at least two-thirds of all the local government areas in the State.”

The 1st appellant satisfied these constitutional requirements and in spite of this, the 1st respondent who is supposed to be an umpire contrived the arrangement whereby it declared the result inconclusive and proceeded to conduct a re-run that enabled the 2nd respondent to secure 255,508 votes to the 1st appellant's 255,023 votes. The State Returning Officer of the 1st respondent had no power to cancel the election of seven polling units which cut across four local government areas in the State. Even with the cancellation the 1st appellant still had a majority of 353 votes over the 2nd respondent and it was after the re-run that the 2nd respondent got 482 votes

more than the 1st appellant. What this shows is that the 1st respondent had a preferred candidate in the election which should not be the case.

The re-run ordered by the 1st respondent was a nullity as it had no power to declare the election inconclusive. The only occasion the 1st respondent is allowed to declare the result of an election inconclusive is where the candidates with highest votes cast have a tie and voting did not take place in some areas, that is when a re-run can be ordered in those polling units where the election did not hold. Cancellation of results can be done only by the Supervisory Polling Unit Officer and not by the State Returning Officer.

It is for these reasons that I allowed the appeal and declared the 1st appellant as the candidate who polled the highest number of votes in the gubernatorial election held in Osun State on 22 September, 2018 and ought to have been declared the winner of that election and returned as the duly elected Governor of Osun State. I make no order on costs.

GALUMJE, J.S.C. (Dissenting): The 1st appellant was a candidate in the Governorship Election which was conducted on the 22nd September, 2018 and 27th September, 2018 in Osun State. He was sponsored by the 2nd appellant, a political party registered with the 1st respondent. The 1st respondent is a body charged with the responsibility of conducting election into the office of the president, Governors, Senators, members House of Representative and member House of Assembly. The 2nd respondent was the candidate in the Governorship election in Osun State and he was so sponsored by the 3rd respondent, a political party registered with the first respondent candidates from other political parties also participated in the election.

On the 22nd September, 2018, the first respondent conducted Governorship election in order to elect the Governor of Osun State. At the end of the election, the State returning officer of the 1st respondent cancelled the election of seven polling units which cut across four Local Government Areas in the State. After the cancellation of the election in seven polling units, the 1st appellants scored 254,698 votes, while the 2nd respondent scored 254,345 votes. From the number of votes scored by the parties, it is very clear that the 1st appellant scored the highest number of

votes followed by the 2nd respondent. The first respondent, however declared the election inconclusive and ordered for a re-run of the election on the 27th September, 2018.

On 27th September, 2018, the re-run election took place in the four Local Government Areas. At the end of the rerun election of, 27th September, 2018, the 1st respondent declared the 2nd respondent as the winner of the election with 255,505 votes while the 1st appellant was credited with 255,023 votes.

The appellants were dissatisfied with the declaration and return of the 2nd respondent as the winner of the election. Being aggrieved, they filed a petition before the Governorship Election Tribunal and prayed that they be declared the winner of the election which was conducted on the 22nd September, 2018. At the end of the trial and in a considered judgment delivered on the 22nd March 2019, the tribunal in a split decision, 2-1 nullified election in 17 polling units and declared the appellants herein as the winner of the Governorship election in Osun State. The chairman of the Tribunal Muhammed I. Sirajo, J. dissented. He dismissed the appellants' petition.

The respondents who were aggrieved with the majority decision of the Tribunal appealed to the Court of Appeal (the lower court). The appellants who were dissatisfied with certain aspect of the judgment of the Tribunal, cross-appealed. The appeal and the cross-appeal were heard, and in a split decision of 4-1 delivered on the 9th May 2019, the respondents' appeal was allowed as all the issues submitted for consideration by learned senior counsel for the appellants, now respondents herein were resolved in their favour Mbaba, JCA dissented. The cross-appeal was equally dismissed.

The appellants were dissatisfied with the judgment of the lower court. They have now brought this appeal. Their notice of appeal at pages 4278-4307 contains 31 grounds of appeal. Parties filed and exchanged briefs of argument. The appellants formulated six issues for determination of this appeal, which I reproduce hereunder as follows: -

- i. Whether or not the lower court was right when their lordships found that the trial tribunal lacked the jurisdiction to entertain reliefs (viii) of the petition, and then refused to grant the said reliefs.

- ii. Whether or not the lower court was right when their lordships affirmed the decision of the trial tribunal to strike out certain paragraphs in the appellants' replies to the respective replies of the 2nd and 3rd respondents.
- iii. Whether or not the lower court was right to have affirmed the trial tribunal's decision that:
The final addresses of the 2nd and 3rd respondents were not competent.
All the witnesses' statements of the 2nd respondent's witnesses were valid, and
The 1st respondent had not abandoned its pleadings.
- iv. Whether or not the lower court was right when their lordships held that the appellants failed to prove their allegations of over voting.
- v. Whether or not the lower court was right when their Lordships held that the trial Tribunal's decision that only 17 witnesses were able to establish the appellants' case on lack of ballot accounting and non-recording of accreditation was right and did not occasion a miscarriage of justice.
- vi. Whether or not the lower court was right when their lordships held that the appellants were unable to prove their allegation that the return election of 27th September, 2018 was invalid having regard to the corrupt practices, violence and non-compliances with the Electoral Act.

Mr. Yusuf Ali, learned senior counsel for the 1st respondent equally formulated six issues for determination of this appeal. I reproduce them as follows: -

1. Whether the court below was not right in affirming the decision of the trial Tribunal that the jurisdiction of an Election Tribunal is limited to issues of the challenge to the return of a successful candidate and that the Tribunal could not grant reliefs viii and ix as subscribed on the petition and thereby refusing the reliefs.
2. Whether the court below was not right in upholding the decision of the trial Tribunal that struck out some of the paragraphs of the appellants reply to the replies of the 2nd and 3rd respondents to the petition.

3. Whether the court below was not right in agreeing with the trial Tribunal that the final addresses filed by the 2nd and 3rd respondents were proper and valid and whether that decision in any way prejudiced the appellants.
4. Whether the court below was not right in agreeing with the trial Tribunal that given the circumstances of the facts of the case, the 1st respondent who cross-examined witnesses, tendered documents and elicited relevant evidence in support of its case cannot be held to have abandoned its pleadings and that the written depositions of RW1, RW2, RW3, RW5, RW6, RW7, RW8, RW9, RW10 and RW12 are valid and not vitiated merely because the depositions carried illiterate jurist but that the witnesses gave their evidence in English language.
5. Whether the court below was not right in agreeing with the trial tribunal that the appellants as petitioners failed to prove the allegations of over voting, corrupt practices and other sundry allegation in their petition and that there was no merit in the appellants cross-appeal at the court below having regard to the facts and circumstances of the case.
6. Whether the court below was not right in endorsing the decision of the trial Tribunal that rejected the testimonies of PW38, PW40, PW45, PW47, PW49, and PW63 having regard to the non-credible nature of the testimonies of the witnesses.

Chief Olanipekun, learned senior counsel for the 2nd respondent formulated six issues for determination of this appeal. They read as follows: -

- i. Considering the unambiguous provision of section 285(2) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) whether the lower court was not correct when it affirmed the trial tribunal's finding, with respect to reliefs (viii) and of the petition.
- ii. Did the lower court correctly affirm the decision of the trial Tribunal which struck out paragraphs of the petitioners, reply?
- iii. Was the lower court not right when it affirmed the decision of the trial Tribunal, which countenanced respondent's final written address submitted before it?

- iv. Was the decision of the lower court correct in respect of 1st respondent's pleadings and evidence at the trial Tribunal?
- v. Were the testimonies of the sworn witnesses- of the 2nd respondent at the trial Tribunal valid as found by the lower court.
- vi. Did the lower court reach a correct decision in respect of the complaints made by the appellants in their petition before the trial Tribunal relating to over-voting, accreditation and ballot accounting, corrupt practices and other species of non-compliance?

Chief Akin Olujinmi, learned senior counsel for the 3rd respondent also formulated six issues for determination of this appeal and I reproduce them as follows: -

- i. Whether the lower court was not right when it affirmed the decision of the tribunal refusing reliefs (viii) and claimed by the appellants on the ground that it had no jurisdiction to question the competence of INEC to make the guidelines which the appellants wanted to be (ix) nullified.
- ii. Whether on the state of the Law regarding the limited scope of the right of a petitioner to file a reply to the reply of a respondent to the petition, the lower court was not right when it affirmed the decision of the tribunal striking out paragraphs 18, 23 and 24 of the appellant's reply to the 2nd respondent's reply to the petition and paragraph 22 of the appellants' reply to the 3rd respondent's reply to the petition.
- iii. Whether the lower court was wrong when it affirmed the decision of the tribunal holding that it would be tantamount to a denial of fair hearing if the final written address of the 3rd respondent was discountenanced and that by cross-examining the witness for the petitioners the 1st respondent could not be said to have abandoned its pleadings.
- iv. Whether on the state of the Law and the evidence on the records, the lower court was wrong when it held that the appellants failed to prove over-voting.

- v. Whether the lower court was wrong when it affirmed the decision of the Tribunal that only 17 witnesses of the cross-appellants gave evidence on the alleged noncompliance with the Electoral Act.
- vi. Whether the lower court was not right when it affirmed the decision of the Tribunal that the allegation of corrupt practices and violence during the re-run election was not proved.

Although the issues formulated by parties are similar, it is the appellants that are aggrieved. It is their grievances that will be looked into. The respondent's duty is merely to reply to the appellants' grievances, since they did not file a cross appeal. I will therefore adopt the issues formulated by the appellants in the determination of this appeal. Before doing so I will like to consider the notice of preliminary objection, issued by the 3rd respondent first before venturing into the appeal. The 3rd respondent's preliminary objection reads as follows: -

“The 3rd respondent hereby gives notice of its intention to rely upon the following preliminary objection against the competence of the notice of appeal, notice whereof is hereby given to the appellants.”

Thereafter, learned senior counsel for the 3rd respondent proceeded to proffer argument against the competence of the 2nd and 3rd grounds of appeal and their particulars. Learned senior counsel did not provide grounds upon which the preliminary objection is issued. Order 2 rule 9(1) of the rules of this court provides as follows: -

“A respondent intending to rely upon a preliminary objection to the hearing of the appeal shall give the appellant three clear days' notice thereof before the hearing, setting out the grounds of objection and shall file such notice together with ten copies thereof with the Registrar...”

In *NNPC & Anor. v. Famfa Oil Ltd. (2012) LPELR-7812 (SC), (2012) All FWLR (Pt.635) 204, (2012) 17 NWLR (Pt.1328) 148* pg.185-186 this court explained the purpose of a preliminary objection as follows: -

“Order 2 rule 9 of the Supreme Court Rules allows a respondent to rely on a preliminary objection to the hearing of an appeal. The purpose being to bring the

hearing of the appeal to an end for being incompetent or fundamentally defective. Consequently, a successful preliminary objection terminates the appeal. If I may add to the above, whereas in this appeal the preliminary objection was filed against some grounds of appeal and there are other grounds of appeal that can sustain the appeal, a preliminary objection was inappropriate. The respondent ought to have filed a motion on notice since the preliminary objection if successful would not have terminated the hearing of the appeal as there were other grounds of appeal to sustain the appeal. Preliminary objections are only filed against the hearing of an appeal and not against one or more grounds of appeal which cannot stop the court from hearing the appeal.”

See *General Electric Company v. Harry Akande* (2011) 4 NSCGR. 611, (2012) 16 **NWLR (Pt.1327) 593**, *Obiweubi v. C.B.N.* (2011) 7 **NWLR (Pt.1247) 465**, *Adejumo & Ors v. Olawaiye* (2014)12 **NWLR (Pt.1421) 252**. The notice of appeal herein contains thirty-one grounds of appeal.

The 3rd respondent’s preliminary objection is against the 2nd and 3rd grounds of appeal only. A preliminary objection in the circumstance is clearly inappropriate. The 3rd respondent should have filed a motion on notice praying this court to strike out the offending grounds. The preliminary objection not being suitable is incompetent and same is hereby struck out.

This appeal arose from the judgment in the appellant’s cross appeal at the lower court, from the majority decision of the Tribunal delivered on the 22nd March, 2019. In my judgment in sister appeal No. SC.553/2019, *Senator Nurudeen Ademola Adeleke & Anor.v. Adegboyega Isiaka Adetola & Ors* delivered this morning, I allowed the appellants appeal on the grounds that the appellant sat the election conducted on the 22nd September, 2018 satisfied the requirement of section 179(2)(a) and of the Constitution of the Federal Republic of Nigeria and was duly elected as Governor of Osun State.

I have nothing more to say here, only to state that this appeal abides my decision in SC.553/2019.

Appeal dismissed.