

**IN THE NATIONAL AND STATE HOUSES OF ASSEMBLY**  
**ELECTION PETITION TRIBUNAL**  
**HOLDEN AT AKURE**  
**ON FRIDAY THE 23<sup>RD</sup> DAY OF OCTOBER, 2015**

**BEFORE THEIR LORDSHIPS**

HON. JUSTICE G. O. IMADEGBELO - CHAIRMAN  
HON. JUSTICE I. O. HARRISON - MEMBER  
HON. JUSTICE KADI S.W.A. YUSUF - MEMBER

PETITION NO: EPT/AK/HA/7/2015

**BETWEEN:**

1. GBENGA EDEMA  
2. ALL PROGRESSIVES CONGRESS (APC) } ..... PETITIONERS

AND

1. COKER ADENIYI MALACHI  
2. PEOPLES DEMOCRATIC PARTY (PDP)  
3. INDEPENDENT NATIONAL ELECTORAL  
COMMISSION (INEC) } ..... DEFENDANTS

**J U D G M E N T**

The Independent National Electoral Commission (3<sup>rd</sup> Respondent) conducted the election of the Ondo State House of Assembly Ilaje Constituency II on the 11<sup>th</sup> of April 2015. Coker Adeniyi Malachi of the Peoples Democratic Party (PDP) scored 12,762 votes and was returned as winner of the election. Gbenga Edema of the All Progressive Congress (A.P.C.) 6,956 votes. Being aggrieved by the declaration of the result the Petitioners filed this petition dated 30<sup>th</sup> April 2015 challenging the result of the election and declaration on the following grounds.

- (1) That the 1<sup>st</sup> Respondent was not duly elected by majority of lawful votes cast at the election to the membership of Ondo State House of Assembly for Ilaje Constituency II held on the 11<sup>th</sup> April 2015,
- (II) That the election to the membership of Ondo State House of Assembly for Ilaje Constituency II held on the 11<sup>th</sup> day of April 2015, specifically in wards and polling units/points complained of in this petition, was invalid by reason of corrupt practices and or non compliance with the provisions of the Electoral Act 2010 (as amended).

The Petitioner therefore prayed for the following reliefs:

- (I) That it may be determined that the said 1<sup>st</sup> Respondent, Coker Adeniyi Malachi was not duly elected or returned and his election was void.
- (II) That it may be determined that the said election to membership of Ondo State House of Assembly for Ilaje Constituency II held on the 11<sup>th</sup> day of April 2015 was avoided by reason of corrupt practices and/or non compliance with the provisions of electoral Act 2010(as amended).
- (III) That it may be determined that 1<sup>st</sup> Respondent, Coker Adeniyi Malachi was not duly elected by majority of lawful votes cast at the said Ilaje Constituency II election.
- (IV) That it may be determined and declared that the election and return of the 1<sup>st</sup> Respondent be nullified and a fresh election be ordered amongst the parties and candidates who contested the said election.

On the 15<sup>th</sup> day of September, 2015 the petitioners opened their case.

PW1 is Sola Ajisafe he lives at Rockview Odoo-Layout Estate, Akure and seeks to adopt his statement on oath before the Tribunal as his evidence before the tribunal. In paragraph 11, 12, 13 he made reference to card reader machine and evidence generated. This is the report. He made reference in paragraph 7

of his report of Inspection. This is the report. (1) Certification of INEC marked as Exhibit U (2) Report of Inspection marked as Exhibit V.

Under cross examination, PW1 said the representative of the Respondent were at the inspection venue, carried out at INEC office Alagbaka Akure. He also said accreditation during the election was by card reader. He stated he was not a card reader bearer or a card reader operator. He said he did not doctor the report to retain his position and also said his inspection was not in company of forensic expert.

PW2 is Odidi Okpeyemi he lives at No.124 Okoga Street Mahin 4. He made a statement on oath and he relied and adopts the statement to be used as his evidence before the Tribunal. That accreditation was not done with the card reader.

Under cross examination he stated that accreditation was done in his presence but not done with card reader. He was a party agent. He witnessed people casting their votes but it was not in compliance with the use of card reader. He did not file any report as to the incidences that happened on the election day to his party.

PW3 is Asogbon Olabode, he lives at Kumgbere – Igbokoda. He adopted his statement on oath before the tribunal as his evidence. He read the punch news papers of April 13 that said election was not conclusive and news paper was admitted same in evidence as Exhibit “W”. Under cross-examination he stated he voted at Unit 023 and was not accredited and later said he did not vote. He did not have a voting card. He was in his house throughout the election. He was the personal Assistant and Media Officer of the 1<sup>st</sup> Petitioner. It was all over the radio that election was cancelled. His opinion was based on what he heard from the radio and what he read from the news paper.

PW4 is Olarotimi Omomuwasian, he lives at Mototomi, Mahin ward II Ilaje Local Government. He adopted his statement on oath before the Tribunal as his evidence before the Tribunal. He stated that the collation/returning officers were forced to make a return for the winner for the election held on 11<sup>th</sup> of April,

2015. That thugs threatened to kill the returning officer if he did not make a return

Under cross-examination the witness stated that there was violence at the polling unit 024 Mahin ward II where he registered, was accredited and voted. He said he called the police at headquarters but did not reduce it into writing about the incident of violence, but said the security operators were present at the unit but could not contain the violence. He reported the violence to his Chairman.

PW4 further stated that the violence at the polling unit on election day was still fresh in his memory. He is not the party agent, but was present at the collation centre located at Igbokoda. He stated that he was assigned to distribute election materials. He witnessed the returning officer being put under duress to announce election result. He further tendered the manual for election officials 2015 admitted in evidence and marked as Exhibit 'X'.

PW5 is Kabir Ayanna Omosanya Admin. Secretary INEC he lives at No. 62 Alagbata street, G.R.A. Akure. Witness stated he was subpoenaed to appear before the Tribunal and further said he had the copy of the subpoena document. Petitioners' Counsel tendered the following documents though objected to by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents' Counsel but were admitted in evidence.

1. Subpoena documents marked as Exhibit Y
2. Manual for election officials marked as Exhibit Z
3. Sixty seven copies of form EC 8A marked as Exhibit AA1 – AA67
4. 6 copies of form EC 8B marked as Exhibit BBI – BB6
5. A copy of form EC 8C marked as Exhibit CC
6. 5 copies of form EC 40G of Mahin 1,2,3 and 4 Marked as Exhibit D1 – D5
7. A copy of form EC 40G Ilaje Constituency marked as Exhibit EE
8. 11 copies of the incidence report (handwritten) is marked as Exhibit FF1 – FF11
9. 9 copies of voters' register is marked as Exhibit GG1 – GG13
10. 4 packets of voters register are marked as Exhibit HH1 – HH4
11. 5 copies of voter register marked as Exhibit JJ1 – JJ5
12. 12 copies of voters register of Mahin II are marked as Exhibit KK1 – KK 12

13. 21 copies of voters register of Mahin III marked as Exhibit LL1 – LL21
14. 13 copies of voters register marked as Exhibit MM1 – MM13

PW6 is Egbowo Komolafe, he lives at Seja Odo. He deposed to a statement on oath before the tribunal and he adopted same statement to be used as his evidence before the Tribunal. Under cross examination. PW6 said he was in the polling unit by 8:30 am he said he went together with other voters but couldn't see the INEC official. He got the information of hijacking of election materials by phone and by witnessing and the hijacking was done by thugs by 11:30 a.m.

PW7 is Oteje Akin Olaiya, he lives at Abe-Oroyo. He made a statement on oath before the tribunal and wanted same statement to be used as evidence before the tribunal. . He was present at the ward collation centre at Zion Ogogoro. He stated that there was no collation of result at the said collation centre at Zion Ogogoro, as same was moved to Igbokoda. He did not vote in his unit as the materials were hijacked by thugs.

Under cross-examination he said he was told that election materials were hijacked by thugs at 4 pm.

PW8 is Osusegun Olagoke and he worked with INEC as Resident Electoral Commissioner Ondo State. He was on subpoena. Petitioners' Counsel tendered the following documents though they were objected to but the tribunal admitted the documents in evidence. (1) Subpoena dated 10/9/2015 marked as exhibit NN (2) The report of the returning officer marked as exhibit OO.

Under Cross-examination, PW8 said he relied on what he was told about the election precisely. He said the electoral officer Mr. Ajala Segun briefed him about the tense atmosphere on phone that the life of the electoral officer and that of the returning officer were in danger and was advised not to declare the result inconclusive for the safety of his people he said based on the security situation and because of the returning officer was held hostage, he was compelled to announce the result eventually.

PW9 is Dr. Joseph Akanbi Adewuyi, he works at Dept. of French Adeyemi College of Education Ondo State. He is on subpoena. 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents did not object to the subpoena document and the subpoena document was admitted in evidence by the Tribunal and marked as exhibit QQ witness further said he made a written statement on oath and wanted same to be used as his evidence before the Tribunal he said he wrote a letter on duress to the R.E.C. Petitioner's Counsel tendered letter written on duress to the R.E.C Letter dated 12/4/2015 from R/Officer to the REC was admitted in evidence marked as exhibit RR. That at the end of the election, PDP had 12,762 votes while APC had 6,956 votes with a difference of 5,806 votes in some of the polling units and wards. That due to report of violence, hijack of materials, election were not declared for several polling units as captured in the incident report form EC40G for Aheri, Mahin I, Mahin II Mahin II and Mahin IV. The total number of voters who were unable to vote are 9,879. The total number of registered voters who were unable to vote as a result of the act of violence is 9,879. That there is a constituency Incident form EC40G cancelling 9,879 votes. That he knows that when the difference between the winner and the first runner up is less than the number of registered voters who are deprived from voting, the election must be declared inconclusive and a supplementary election held at a later date. Based on this he informed the party agents and security agents that the election should be declared inconclusive. That some party agents and hoodlums said he must declare a winner otherwise he will loss his life. The Policemen did not come to intervene. He made calls to the Resident Electoral Officer who advised him to use wisdom. He was compelled to return the 1<sup>st</sup> Respondent.

Under Cross-examination PW9 said his wisdom was to declare the result he was under duress.

PW10 is Olugbenga Edema, he lives at No.12, Ikale Street Ijapo Estate Ilaje Local Government Ondo State. He is the Petitioner. He made statement on oath before the tribunal and adopted same as his evidence before the tribunal he prayed for a fresh, credible and transformed election to be conducted for Ilaje II.

Under Cross-examination PW10 said it was his agents that witnessed all that happened at the polling units. He further said the report made by his agents were verbal. He said he prepared the statement on oath on the basis of the reports by his agents and radio Nigeria Radio Adaba 88.9 positive F.M. 102.5, Nation news paper of 13/4/2015 the Punch news paper of 13/4/2015.

DW1 is Joto Omotuyole, he lives at No.66 Larada street Ilaje Local Government. He made a statement on oath before the tribunal and adopted the statement as his evidence before the tribunal. He voted at unit 1007 Mahin ward 3, Ilaje Constituency II. He was accredited, votes were counted the result announced. Election was free fair and peaceful.

Under Cross examination, DW1 said he did not know that 55 voters finger was not authenticated by the card reader machine.

DW2 is Chief Ebitigha Igbekekele Emmanuel. He lives at No. 2 College Road Igboegunrin Ilaje Local Government he made statement on oath before the tribunal and wished same to be used as his evidence before tribunal. He voted at unit 003 Mahin ward 4 Ilaje Constituency II. They were educated by the presiding officers of election process. He was accredited by the card reader machine, he voted.

Under Cross-examination DW2 stated his finger was accepted by the card reader machine but said he did not know whether the card reader had accepted the authentication of other voters.

DW3 is Hannah Lebile she lives at No. 19 Broad Street Ondo State. She made statement on oath before the tribunal and adopted her statement as her evidence before the tribunal. That she voted in unit 005 Mahin ward 3 Ilaje Constituency II. She was accredited by the presiding officer with the card reader machine. She voted, votes were counted and result announced. Election in the polling unit was free fair and peaceful.

Under cross examination the witness was asked to append her signature before the Tribunal and she did and the appended signature was tendered in evidence

by the Petitioner. 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents did not object and same signature was admitted as evidence and marked as SS witness stated she signed her statement on oath before her lawyer.

DW4 is Ogunbayo Dare, he lives at No. 65 Market street Ilaje Local Government. He made statement on oath before the tribunal. He voted in unit 029, Mahin ward 1 Ilaje Constituency II. He was accredited by the use of card reader machine. He voted. Election was free fair and peaceful.

Under cross-examination DW4 said card reader accepted his finger print but did not know if card reader was used for every voter in his unit.

The 1<sup>st</sup> 2<sup>nd</sup> and 3<sup>rd</sup> Respondents filed their written addresses on the 23/9/2015. The Petitioners filed their final address on the 1/10/2015.

The 1<sup>st</sup> Respondent in his final address distilled the following issues for determination.

1. Whether paragraphs 11,12, 13, 14, 15, 16, 17, 18, 19, 23, 24, 26, 28, 29, 32, 34, 35, 37, 38, 40, 42, 43, 44, 45, 46, 47, 48, 49 and 50 of the petition ought not be struck out for being vague, imprecise generic omnibus, unspecific and general
2. If issue 1 is answered in the affirmative, whether the entire petition ought not be struck out for want of cause of action or for being bereft of any destitute substance.
3. Whether the petition is competent having regards to the manner in which the grounds are couched and facts in support of the grounds.
4. Having regard to the facts of this case, whether the 1<sup>st</sup> Respondent ought not have been returned as the winner of majority of lawful votes cast in the election to the House of Assembly Ilaje Constituency II of Ondo State held on the 11<sup>th</sup> day of April, 2015.



Mrs. Adeoti Adejuyigbe submitted that the 1st Respondent adopts issues 1,2, and 3 contained in the preliminary objection dated 30/5/2015 and filed on 1/6/2015.

On Issue 4 Counsel relied on **Buhari V Obasanjo (2005) 13 NWLR (pt.941) 1 308 -309.** That it is not enough for the Petitioners to plead substantial non compliance; they must lead evidence to show how the non compliance complained of would upset the outcome of the result. **CPC V INEC (2011) 18 NWLR (pt.1276) 493, 571; Oke V Mimiko (2014) 1 NWLR (pt.1388) 332, 395 – 396.**

On the evaluation of documentary evidence of petitioners witnesses, Counsel submitted that;

- (1) Some of the documents were tendered in parts and bundles.
- (2) Some of the forms tendered relates to wards and units that are not in contention.
- (3) The content of the card readers attached to the petitioners report filed on the 14/9/2015 was not pleaded. These documents were dumped on the tribunal. It would be inappropriate for the tribunal to remove the heaps of document and fix them to their specific units at the behest of the Petitioners when they had failed to do so. **Iniama V Akpabio (2008) 17 NWLR (116) 225 at 299.** That the petitioners have not led evidence to rebut the presumption of regularity that inures in favour of the 1<sup>st</sup> Respondent. **Chime V Ezea (2009) 2 NWLR (pt.1125) 263 at 341.**

The allegations that the petitioner's supporters were prevented from voting cannot be proved by the dumping of documents on the tribunal. Proof of such allegations can only be done by voters who were prevented from voting, who must duly tender their voters card along with the voters register. **Chime V Ezea (supra) at 357.** In the instant case, the petitioner' witnesses who alleged that they were not allowed to vote did not tender their voters' cards. Counsel submitted that the fact that the forms which relate to wards that are not in contention does not in any way support the case of the petitioner. On the

contrary the documents supports the case of the Respondents as they showed that elections held and people voted.

Counsel further submitted that the exhibit "V" the petitioners inspection contains statement in the card reader. Cannot be tendered in evidence, the content of the card reader was not pleaded in evidence and cannot be tendered. If the computer printout of the new facts which the petitioners discovered in the cause of their unilateral inspection and which were neither pleaded nor listed, would have been brought in and consequently add to or enhance the value and status of the petition and amounting to an amendment. Paragraph 4(1) and (5) of the first schedule to the electoral Act, 2010 and paragraph 14 of the first schedule to the electoral Act 2010 (as amended) prohibits amendment that seeks to introduce new facts. That the Petitioners application is a subtle attempt to amend the petition. That assuming that the contents of the card readers are pleaded, that they are not admissible for failure to comply with section 84(1) (2) of the Evidence Act. Counsel submitted that the Petitioners failed to fulfill the condition precedent in subsection (2) that the report of inspection is inadmissible and should be expunged.

Aderemi Olatubora Esq. of learned Counsel for the 2<sup>nd</sup> Respondent distilled 4 issues for determination identical to the issues for determination of the 1<sup>st</sup> Respondent.

Counsel submitted that the reliefs sought by the petitioners are incongruous with the facts pleaded and evidence led. That the important part of the case of the petitioners can be found in paragraph 33 of the petition. The issue in the entire petition is narrowed to whether the election ought to be declared inconclusive as stated by PW9 the Constituency returning officer in paragraph 5 of his statement on oath. PW8, the Resident Electoral Commissioner for Ondo State came to the same conclusion. The National Electoral Commission Headquarters in Abuja disagreed with PW8 and advised that the declaration must stand. From the evidence, arguments and submissions there is no cogent evidence placed before the tribunal on the basis on which it could invalidate the election result from the disputed polling units. The sole point on which issue is joined is whether the election result ought to have been declared. In this

petition if it is established that the result of the election ought not to have been declared for being inconclusive, the legal consequence that should follow is to order a supplementary election in the areas where the petitioners claim that 9,879 voters who wanted to vote could not vote. This rules out the cancellations of the entire elections when no admissible evidence has been led to justify such allegation. No evidence was led on disenfranchised voters. The prayer of the petitioner for nullification of the entire election being sought is in conflict with the case pleaded by the petitioner. **Uzoukwu V Ezeonu II (1991) 6 NWLR (pt.200) 708, 781 783.** That the petition be dismissed for asking for ungrantable or incompetent relief.

On Issue 4 Counsel submitted that evidence of disenfranchised voters must come from voters who were deprived of the opportunity to cast their votes and not on reliance on election documents or documentary hearsay. **Adewale V Oliafa (2012) 17 NWLR (pt.1330) 478, 515; Chime V Ezea (2009) 2 NWLR (pt.1125) 263, 357** Apart from PW2, PW6 and PW7 no other witness testified with respect to the events in any of the 165 polling units in the House of Assembly election of 11<sup>th</sup> April, 2015 in Ilaje constituency II.

Counsel further submitted that analysis of PW1 who claimed to have carried out analysis on forms EC8A(1) incident reports or some data he got from ICT in INEC Headquarters, the data relied upon by PW1 in preparation of his statement on oath and report of inspection Exhibit 'V' was got from a computer and printer described in his report. All documents relied upon by PW1 in his analysis Exhibit 'V' are secondary hearsay as the conclusion are based on Exhibit 'U' which is not pleaded or listed in the list of document, and on documents made by 3<sup>rd</sup> parties. The Petitioner did not plead or show the impracticability of bringing the makers of the document relied upon by PW1 for his analysis.

Counsel further submitted that all the documents tendered by Counsel to the Petitioners and PW5 constitute primary documentary hearsay. **Buhari V Obasanjo (2005) 13 NWLR (pt.941) 1 at 315; Adewale V Olaifa (2012) 17 NWLR (pt.1330) 478, 479; Buhari V INEC (2008) 19 NWLR (pt.1120) 246,**

**414 415; Abubakar V Yar’Adua (2008) 9 NWLR (pt.1120) 1 at 173; Chime V Ezea (2009) 2 NWLR (pt.1125) 263, 357 – 358.**

Counsel further submitted that exhibit “U” was not pleaded nor listed in the petitioners lists of documents. In paragraph 18 the Petitioners pleaded “card readers used in all the polling units” “19” that I rely on card reader machine. Item 7 list of documents, “electronic Card reader machines.” Exhibit U and V in addition to being hearsay are at variance with the pleadings **NIPC Ltd. V Thompson Organisation Ltd (1969) 1 NMLR 99; Iwuoha V NIPOST Ltd. (2003) 15 NWLR (pt.843) 352; Ajada V Ajibola (2004) 16NWLR (pt.898) 91; Court of Appeal Akure Division Appeal NO CA/AK/EPT/HR/85.2015; Court of Appeal Lagos Division Appeal NO CA/L/EP/OGV 75/A/2015 APC V Agbaje & Ors.**

Counsel further submitted that apart from the evidence of PW2, PW6 and PW7 who gave direct evidence in three polling units, whose evidence were self contradictory and discredited during cross-examination because their evidence are in conflict with Exhibit U. PW1, PW3, PW4, PW5, PW8 PW9 and PW10 placed before the tribunal inadmissible hearsay. No witness was called to breath life into any of the documents tendered from the bar by learned Senior Counsels or Exhibits listed in paragraph 4.35 of 2<sup>nd</sup> Respondent’s address. All the documents tendered in evidence were simply dumped on the tribunal. **A.C.N. V Nyako (2013) All FWLR (pt.686) 424, 477; Belgore V Ahmed (2013) 8 NWLR (pt.1355) 60, 100.** It is not the duty of the tribunal to do cloistered by making enquiry into the case outside the open court by looking into bundles of documents. **Ucha V Elechi (2012) All FWLR (pt.615) 237, 259; Nwonbodo V ONOH (1984)1 SCNLR 1 at 32.**

Adamson Adeboro Esq. of Learned Counsel for the 3<sup>rd</sup> Respondent adopted issues 1 and 2 of the petitioners issues for determination. Counsel submitted that in election, the issue of who has majority of lawful votes is based largely on documentary evidence, mainly election result forms. The question of the appraisal of the oral evidence and demeanor of witness is of little help. **Ngige V Obi (2006) 14 NWLR (pt.999) 1 at 233; Chukwuma V INEC & Anor (2006) All FWLR (pt.302) 121.** By virtue of bullet point 2.41 at page 32 of the manual

for election officers there can be resort to the use of manual accreditation. That after accreditation, there was voting at the polling units, before collation at the last collation centre by the Returning Officer who makes the final result. All these procedures were followed during the election. None of the officers directly involved in election was called to give evidence that these procedures were not followed. The announcement and return of the 1<sup>st</sup> Respondent was based on the total number of votes cast. The number of registered voters recorded in the constituency is irrelevant. It was never in evidence that unlawful votes were counted for any of the parties. The presiding Officers did not make any report of any discrepancies in their various units. To that extent the election in the units were regular. The incident forms only indicated the use of manual accreditation. There is no pleading on the total number of registered voters in Ilaje Constituency II to verify the claim of the returning officer in Exhibit OO. How the Returning Officer arrives at his difference of 9,879 votes are unknown. There was no proof of disenfranchised voter, therefore the election was in compliance with the Electoral Act and Manual for election officials 2015. **Uduma V Arunsi (2012) 7 NWLR (pt.1298) 55 at 118 paras F – H.**

A Returning Officer does not have the power to declare an election inconclusive; such action is *utravires* and void. **Nwokolo v Uboh (2012) 17 NWLR (pt.1330) 604 at 611 para D 612 paras B – C** The 3<sup>rd</sup> Respondent being aware of the foregoing authored Exhibit PP to authenticate the return of the 1<sup>st</sup> Respondent **Salik V Idris (2014) 15 NWLR (pt.1429) 36 at 52, para F – H; Okechukwu V INEC (2014) 17 NWLR (pt.1346) 255 PP 308 -309 paras G – B, G – H; 309 – 310 G. A** Where an election has been held and the result declared by the election body, as in this case, the 3<sup>rd</sup> Respondent, the result is *prima facie*, correct by virtue of section 108 (1) of the Evidence Act 2011, on the presumption of regularity. **PDP V INEC (2014) 17 NWLR (pt.1437) 525 at 568, paras A – B.**

On Issue two Counsel submitted that a Petitioner alleging corrupt practices and or non-compliance with the electoral Act in the conduct of an election has the evidential burden to prove his assertion. Section 138 (1) and 139(1) must be read together. **Akeredolu V Mimiko (2014) I NWLR (pt.1388) 402 at 452; Goyol V INEC (No.1) 2012 II NWLR (pt.1311) 207.** Most of the witnesses

called by the Petitioner gave account of what was not within their knowledge, the three subpoenaed witnesses testified of what they were told. **Gundiri V Nyako (2014) 2 NWLR (pt.1391) 211 at 240; Doma & Anor V INEC & Ors 2012 LPELR 772 (SC)**. None of the witnesses gave evidence of any hijacked ballot box or election materials. Some of the witnesses called by the petitioner could not read nor write, their depositions were in English language no illiterate jurat was provided. No interpretation of their statement in Yoruba. Such deposition has no probative value. **Gundiri V Nyako Supra 241 para A – D 260 -261 paras G – C** A party who seeks nullification of election must succeed on the strength of his case and not on the weakness of the Respondent. **Ngige V INEC (2015) 1 NWLR (pt.1440) 281**. The complaint in this petition is that the total number of 9,879 registered voters were disenfranchised. The petitioners called on 3 witnesses who said they did not vote and did not tender their voters card.

Oluwarotimi Akeredolu SAN of Learned Counsel for the Petitioner formulated three issues for determination.

1. Whether by virtue of the provisions of the electoral Act 2010 (as amended) and the manual for election officials 2015, the 1<sup>st</sup> Respondent Coker Adeniyi Malachi was duly elected or returned and rightly declared winner of the Ilaje Constituency II election for membership of Ondo State House of Assembly held on 11<sup>th</sup> April 2015.
2. Whether the Petitioners have proved corrupt practices and/or non compliance with the provisions of the election Act 2010, which can invalidate the election into the membership of the Ondo State House of Assembly held on 11<sup>th</sup> April 2015 for Ilaje Constituency II
3. Whether in the circumstances of the facts presented in this Petition by the Petitioners, it will be appropriate for a fresh election to be ordered by this tribunal, as provided under the electoral Act (as amended).

Counsel argued the 3 issues together that the election did not take place in many polling units as a result of non compliance with the electoral Act, proper

accreditation more particularly contained in the report of inspection. Collation of results did not take place at the ward collation centres but at the constituency collation centres. That the declaration of the 1<sup>st</sup> Respondent was contrary to the guidelines of the Independent electoral commission. Counsel relied on Incident Report Sheets Form EC40g Exhibits H, L, O, R T and hand written presiding officers reports FF – FF11 to come to the conclusion that there were malpractices and non compliance which did not allow election to take place in the affected polling units stated in the Incident Report Forms. This fact was confirmed by the evidence of the returning officer Dr. J. Adewuyi that 9,879 registered voters did not vote. The hand written incident reports speak for themselves. That these documents were not dumped on the tribunal, they were tied to the evidence of the 1<sup>st</sup> Petitioner. The documents were tendered by the Administrative Secretary of INEC. The law is trite that where a witness is not cross-examined on a material point in his evidence, the defendant is deemed to have admitted the evidence. **Agbanifo V Aiwereoh (1988) 2 SCNJ 146.** The 1<sup>st</sup> and 2<sup>nd</sup> Respondent abandoned their pleadings without leading any evidence where a person who filed a reply fails to adduce evidence in support, he is deemed to have accepted the evidence led by the Petitioner and is entitled to judgment. In a case where the petitioner has to still prove his case he needs only minimal proof. **Dingyadi v Wamako (2003) 17 NWLR (1116) 393 at 386 – 387.**

Election petitions are decided more on documentary evidence than on oral evidence. **Aregbesola V Oyinlola (2000) All FWLR pt.472 1174 at 1189.** That the tribunal can evaluate the documentary evidence put before it **CPC V Ombugadu (2013) All FWLR pt. 706 at 406,**

On non-compliance Counsel submitted that the Petitioner filed report of inspection Exhibit V and Report of INEC card reader accreditation Exhibit U. That in 63 polling units of Ilaje Constituency II were affected by non compliance with provision of accreditation. That the tribunal can verify the report of Inspection by looking at the documentary evidence tendered by the petitioners. **Chukwuma V INEC & Anor (2006) All FWLR (pt. 302) 121.** On non compliance with accreditation of voters Counsel relied on **INEC V Onyimba E. C. Ray & Ors (2014) 14 NWLR pt.812 pg. 92; Ajadi V Ajibola (2004) 16**

**NWLR (pt.898) 1 at 182 – 183; Hon John O. Fayemi V Olusegun A. Oni & Ors (2009) 7 NWLR (pt.1140) 223 at 285, 286, 387; Fayemi V Oni (2010) 17 NWLR (Pt.1222) at page 326; Aondoakaa V Ajo ( 1991) 5 NWLR (pt.602); Osunbor V Oshiomole (2009) All FWLR (pt.463) 1363 at 1404.** The Respondents did not produce a contrary document, they are deemed to have admitted the report of inspection presented by the Petitioners. **Okpoko Comm. Bank V Igwe (2013) 15 NWLR (pt.1376) 167 pg. 183 – 184 paras G – C, F-D.**

The Resident Electoral Commissioner gave evidence on how he was forced to declare a winner under duress and painted a graphic picture of what happened on that day. Counsel relied on the following authorities. **Buhari V Obasanjo (2005) 2 NWLR (pt.910) 241 at 525; Ojukwu V Onwudiwe & Or (1984) 1SCNLR 247 (1984) Vol. 14, 15 NSCC 172 at 200.**

In reaction to 1<sup>st</sup> Respondent's final address Counsel submitted that the petitioners witnesses are credible reliable and their evidence were not impeached during cross examination. The Petitioner has shown that accreditation was not properly followed by 3<sup>rd</sup> Respondent. 1<sup>st</sup> Respondent's final address cannot take the place of evidence. He contended that the documents were in bulk and dumped on the tribunal, that the tribunal ordered all documents to be taken as read. That 1<sup>st</sup> Respondent did not mention the wards and units that are not in contention but tendered during trial. That the petitioner pleaded the content of the card reader in paragraph 12 – 19 of the petition. The Petitioner pleaded paragraphs 18, 19, 51, 52 and the report of Inspection used, that the pleading renders the computer printout of the recording of the card reader admissible. **Monler Construction V Azubike (1990) 3 NWLR (pt.136); Ogu V Manid (2010) LPELR 4690.** The tribunal granted leave to the petitioner to file and rely on the INEC computer printout of the card reader. 'The Respondents did not oppose the application, did not appeal the ruling and cannot by way of final address urge the tribunal to overrule itself. That proper foundation was laid for admissibility of the card reader report.

In reply to 2<sup>nd</sup> Respondent's address, the learned Counsel for the Petitioner submitted it is trite law that written addresses cannot take the place of the evidence which the 2<sup>nd</sup> Respondent failed to adduce. The analysis by the



Respondents of the petitioners witnesses when two of the Respondents failed to call any witnesses on facts not put to petitioners witnesses is meant to create a surprise at the address stage. That proof of non-compliance with electoral Act is not strictly an issue of calling witnesses to give oral evidence. The most credible evidence a tribunal can place reliance on are documentary evidence. The documentary evidence before the tribunal have in no way been controverted by 2<sup>nd</sup> Respondent. **Owoeye V Oyinlola (2012) 15 NWLR (pt.1322) 84 at 122 para. C; Bongo V Governor of Adamawa State (2013) 2 NWLR (pt.1339) 403 at 410.** The documents tendered by the Administrative Secretary of INEC was rightly admitted in evidence. All documents were tendered from proper custody and specifically by the person who received it and to whom it was addressed, be regarded as documentary hearsay. The pleadings of the petitioner is totally different from that of the Petitioner in Appeal NO. CA/AK/EPT/HR/85/2015 referred to by the 2<sup>nd</sup> Respondent. That INEC computer generated evidence and report of accreditation carried out by smart card reader is not a document that can be frontloaded. **Aregbesola V Oyinlola (2000) All FWLR pt. 472, 1174 at 1189 DG**

The tribunal is funtus officio to overrule itself on the reliance of the petitioners on the use of the report of Inspection and the annexed INEC computer generated evidence. Appeal NO. CA/AK/EPT/HR/85/2015 is not applicable to this case. The dictum relied upon by 2<sup>nd</sup> Respondent in Appeal NO. CA/L/EP/GOV./751A/2015 APC V Agbaje was not based on the hearing on the full merit.

On reply to 3<sup>rd</sup> Respondent's final address Counsel submitted that 3<sup>rd</sup> Respondent wrongly submitted that the manual for election officials directs the use of manual accreditation. That incident report form EC40 J is not an alternative form of accreditation. That 3<sup>rd</sup> Respondent Counsel said he did not know how the returning officer for Ilaje Constituency II came up with fact that 9.879 voters did not vote in the election, that Counsel is shying away from form EC40G". That the Petitioner can be proved on balance of probability in respect of non-compliance with the electoral Act **Fayemi V Oni (supra)** calling all the voters who were not allowed to vote when there are documentary evidence from INEC in this regard is not necessary, as their oral testimony cannot vary the

content of documentary evidence tendered by INEC **Ngige V INEC (2015) 1 NWLR (pt.1440) 281.**

To start with, by our ruling dated the 23/10/2015 we struck out paragraphs 11, 12, 13, 14, 15, 17, 18, 23, 26, 27, 28, 29, 32, 33, 34, 35, 36, 37, 38, 40, 42, 43, 44, 45, 47, 48 for being vague, imprecise and nebulous. We wish to state that having struck out these paragraphs of the petition we have no intention of considering them in this judgment as we are functus officio of them. Furthermore, we hold that any purported evidence led on them goes to no issue. See the case of **Ukpo V Ngali (2010) 1 NWLR (pt.1174) p.201 -202,** where the Court reiterated the established principle that;

***“Parties are bound by their pleadings and that any evidence on a matter not pleaded goes to no issue as the duty of the trial tribunal is limited strictly and confined to trying issues arising from the pleadings.”***

Having reviewed the evidence of all the parties including the issues for determination; We formulate the following issues for determination

1. Whether the petitioners have discharged the burden on them to prove the allegations in the petition and thereby entitled to the reliefs sought.
2. Whether the petition is competent having regards to the manner in which the grounds are couched and facts in support of the grounds.

In proof of their case, the petitioners called ten witnesses. The relevant facts are contained in the evidence of these witnesses who testified at the hearing, and we will refer to their evidence in the course of the judgment.

The crux of the petitioners' case is that some 9,879 voters who would have voted could not vote and therefore the election ought to have been declared incompetent by the tribunal. PW2, PW6 and PW7 laid claim to be registered voters in respect of 3 polling units out of 165 polling units being disputed by the Petitioners. PW2 and PW3 did not vote. None of these witnesses tendered

their voters card. In the instant petition none of the disenfranchised voters alleged to be 9,878 voters claimed by the petitioners who could not vote, presented their voters card before the tribunal to be compared with the voters register and the witness oral testimony. What is before the tribunal are documents tendered by PW1 who conducted analysis on forms EC8A (1), Incident reports, data form ICT at INEC headquarter Abuja. Exhibit “U”, Inspection Report Exhibit V, documents made by third parties including documents tendered in evidence through PW5.

It is trite law that evidence that voters who wanted to vote could not vote must come directly from those who were deprived of the opportunity or right to cast their votes and not on reliance by documentary hearsay. **Adewale V Oliafa (2012) 17 NWLR (pt.1330) 478, 515; Chima V Ezea (2009) 2 NWLR (pt.1125) 263, 357.** There is no evidence before the tribunal of 9,879 voters who were disenfranchised by presenting their voters card which will be verified against the voters register and such witness oral testimony. No voters card was tendered in evidence in proof thereof.

The Petitioner also made allegations of non-compliance. The petitioners did not call any polling agents or presiding officers who were present at the polling units. A petitioner alleging corrupt practices or non compliance with electoral act in the conduct of the election has the burden to prove his assertion. **Akeredolu V Mimiko (2014) 1 NWLR pt.1388 402 452.** The petitioner must also prove not only that there was non compliance with the provisions of the Act but that the non compliance complained of would upset the result of the election. We place reliance on the cases of **C.P.C. V INEC (2011) 18 NWLR (pt.1279) 493, 57; Oke V Mimiko (2014) 1 NWLR (pt.1388) 332, 395 -396.** This petitioner failed to do. In **Ucha V Elechi (2012) 13 NWLR (pt.1317) pg. 330 at 359 paras E – G** where it was held;

*“The results declared by INEC are prima facie correct and the onus is on the petitioner to prove the contrary”.*

Where a petitioner complains of non compliance with provisions of the electoral Act, 2010 (as amended), he has a duty to prove it polling unit by polling unit,

ward by ward and the standard of proof is proof on the balance of probabilities and not on minimal proof. He must show figures that the adverse party was credited with as a result of the non compliance. Forms EC8A, Election materials not stamped/signed by presiding officers. He must establish that non-compliance was substantial, that it affected the election result. It is only then that the Respondents are to lead evidence in rebuttal. See **Buhari V Obansanjo (2005) 13 NWLR (pt.941) p1; Awolowo V Shagari (1979) 6-9 SC p.51; Akinfosile V Ijose (1960) SCNLR P.447; Chime Ezea (2009) 2 NWLR (PT.1125) 357** In **Abubakar V Yar'Adua (2008) 9 NWLR pt. 1120 1 at 173** the Supreme Court set out the procedure a petitioner who contests the legality or lawfulness of votes cast in an election.

*“A Petitioner who contests the legality or lawfulness of votes cast in an election and the subsequent result must render in evidence all the necessary documents by way of forms and other documents used at the election. He should not stop there. He must call witnesses to testify that the illegality or unlawfulness substantially affected the result of the election. The documents are amongst those which the results of the votes are recorded. The witnesses are those who saw it all on the day of the election.*

See **ACN V Nyako (2013) All FWLR 424, 477.**

On hearsay evidence, we are in agreement with learned Counsel for the Respondents that the PW1 played no role in the conduct of the election, PW10 deposition contained facts which he admitted under cross examination he derived from other sources.

The Petitioners in proof of its case tendered documents vide the following witnesses. PW1, PW5 PW8 and PW9. Exhibits A1 to T” were tendered from the bar.

PW1 Shola Ajisafe tendered “Certification by INEC LCT department Exhibit ‘u’. That he used Exhibit A-U for his analysis which was admitted as Exhibit ‘V’. The

witness under cross-examination said he is not the author of these documents. He is not the maker of Exhibit 'U'.

PW5 Kabri Ayanna Omosanya Administrative Secretary INEC Ondo State tendered Exhibit 'Z' manual for election officials and the following: Exhibits AA1 AA 67 BB1 – BB6, CC, DD1 – DD5, EE, FF1 – FF11, GG1 – GG13, H1 – HH4, JJ1 – JJ5, KK1 – KK12, LL1 – LL21, MM1 – MM13. The PW1 and PW5 tendered these documents before the tribunal, no evidence was led by these two witnesses to link the documents to the specific areas the petition. It is not the duty of the tribunal to remove the heaps of documents and proceed to fix them to their specific units **Iniam V Akpabio (2008) 17 NWLR (Pt.116) 225 at 331 paras F-G.** In **ucha V Elechi supra at 360 paras F-G** it was held and we quote

*“I cannot agree more with the above. When a party decides to rely on documents to prove its case, there must be a link between the documents and the specific areas of his case for which the document was tendered. On no account must Counsel dump documents on a trial court. No court would spend precious judicial time linking documents to specific areas of a party’s case.”*

The documents can therefore not speak for themselves and are like a dummy in the words of Learned Counsel for the 2<sup>nd</sup> Respondent.

Moreover, the learned Counsel for the Petitioners in his address urged the tribunal to look at these documents, this in our humble view we cannot do. It was held by the Supreme Court in the case of **Omisore V Aregbesola 2015 Vol. 246 LRCN pg. 44 at pg. 133 parags JJ.**

*“It has long been settled that a Judge is not permitted to embark on an inquisitorial examination of documents outside the court room. Worse still, he is not allowed to act on what he discovered in such a document in relation to an issue when that was not supported by evidence or was not brought to the notice of the parties to be agitated in the usual adversarial procedure.”*

The learned Counsel for the Petitioner in his address tried to link up the documents with the witnesses. It is trite law that address of Counsel no matter how brilliant cannot take the place of evidence. **Adua V Essien (2010) 14 NWLR (PT.1213) 141 at 167; Aamah V Eboside (2010) All FWLR (pt.516) 1925 at 1939.**

Learned Counsel for the Petitioners submitted that tribunal gave directive in the pre-trial report and scheduling that documents be tendered in bulk and taken as read which we ordered. With due respect to Counsel, the tribunal did not direct that documents should not be linked to specific facts of the case.

On submissions of Learned Counsel for 1<sup>st</sup> and 2<sup>nd</sup> Respondents on the admissibility of the petitioners' Inspection report Exhibit U, was not pleaded and Exhibit V in addition amounts to hearsay. The petitioners pleaded 'All card reader machine' in paragraph 18 of their pleadings. In paragraph 19 of petitioners statement on oath he testified he relied on card readers machine. In item 7 of the list of documents what is listed is 'Electronic card reader machines'

The essence of pleadings is to narrow down the case of the parties and to eliminate surprises at the trial. Thus where a party in any proceeding, specifically pleaded certain documents to establish his case, he cannot be allowed during the trial to rely on other documents different from those specifically pleaded. **Hashidu V Goje (2003) 15 NWLR (pt.843) pg. 352 at 359.**

A trial court has a duty to reject any evidence which is contrary to the pleading. **Hashidu V Goje supra at pg. 360** . Where a petitioner fails to accompany its petition with copies or list of every document to be relied on at the hearing of the petition, in line with the requirements of paragraph 4 (5) (c) and 41 (8) of the 1<sup>st</sup> schedule to the electoral Act, 2010 which result in refusal of the trial tribunal to admit the documents in evidence, no complaint of denial of fair hearing at all shall arise from the refusal to admit the documents in evidence. **ACN V Lamido (2012) 8 NWLR (pt.1303) pg. 560 at pg. 568.**

We have perused the exhibits, Exhibit 'U' is the certification of INEC, Exhibit 'V' is the report of Inspection which included the print out data from the data base of INEC at Abuja. We have examined the pleadings filed by the Petitioner. The Petitioners Counsel argued vigorously that the print out from the data base of particulars of the card reader was pleaded, we find as fact and we are in agreement with the 1<sup>st</sup> and 2<sup>nd</sup> Respondent that what was listed in the list of documents in item 7 is 'Electronic card reader machines used in all units and voting points. Card reader machines varies and is not the same particular as the print out from the card reader machine. In paragraph 51 of the petition the petitioners pleaded that they shall rely on 'sensitive materials and electronic machines' these also in our view are not specific pleadings on the computer print out of the INEC headquarters in Abuja of the card readers machine. We are of the humble view, that the data from the card reader machine as stated in Exhibit 'U' was not listed nor pleaded and could not be stated nor included in Exhibit 'V'. It is at variance with the pleadings. Therefore, a trial court or tribunal has a duty to reject any evidence which is contrary to their pleadings. It is the duty of parties to confine themselves to their pleadings. In **Buhari V Obasanjo supra at pg. 256 para G-H was held:**

*"A court is bound to confine its decision within the limits of the scope of inquiry before it. In other words, a court has no competence to determine an issue beyond the scope of what was put in issue by the parties in their pleadings."* **Awojuba Light Ind. Ltd. V Chinukwe (1985) 4 NWLR (pt.390) 379, 427.**

Consequently Exhibit 'U' is rejected. The content of Exhibit 'U' as attached to Exhibit V is also rejected.

The Remaining portion of Exhibit V as relates to the order of Inspection granted by the tribunal is pleaded and brought pursuant to an order of the tribunal for inspection. No evidence was linked to this document by the petitioners' witnesses.

The Court of Appeal Lagos Division Appeal NO CA/L/EP/GOV 751A/2015 between APC and Agbaje & ors it was held as follows:

“The evolution of the concept of smart card reader is a familiar one. It came into being during the last general election held in March and April, 2015 in Nigeria. On this score, it is a nascent procedure injected into our infant and fledgling electoral system to ensure credible and transparent election. Specifically, it is aimed to concretise our fragile process of accreditation – the keystone of any suffrage. The concept, owing to its recent invention by INEC, a non – Legislative body, traces its paternity to the manual for election officials 2015; Chapter 2, pages 35-42 put the other way round, the extent electoral Act, 2010, as amended, which predates the concept, is not its parent or progenitor. Since it is not the progeny of the Electoral Act, a ground in a petition fronting it as a ground to challenge any election does not have its blessing, nay Section 138(1) of it put simply, a petitioner cannot project the non-presence or improper use of smart card reader as a ground for questioning an election it does not qualify as one.”

PW8 Olusegun Agbaje Resident Electoral Commissioner INEC Ondo State. Tendered the report of the returning officer to the resident electoral officer dated 12/4/2015 which was admitted in evidence as Exhibit ‘OO’. Under cross-examination stated that the results would have been inconclusive if the returning officer was not forced to declare the winner.

Cross examination by the 2<sup>nd</sup> Respondent the witness stated that at 15 minutes to 4 p.m. Mr. Ajale Segun an electoral officer called him that his life and that of PW9 were in danger, he phoned the commissioner of police, he advised that the officers be allowed to declare the result and later write their report.

PW9 is Akanbi Adewuyi, he wrote exhibit ‘OO’ to the Resident Electoral Commissioner. Under Cross-examination he stated that he was not at the polling units but relied on reports from collation officers from various units. He collated Exhibit ‘(S)’ Six wards Aheri Ekikan mahin 1, Mahin II mahim III and mahin IV is a material contradiction in the petitioners case that collation of result did not take place at ward collation centre. This witness did also state that he was not present at the polling units but was at the collation centre. The evidence of PW8 and PW9 made allegations of crimes, made reference to the



commissioner of police, that the returning officer was held hostage. The PW4 said thugs wanted to kill the returning officer if he did not make a return no police extract was tendered before the tribunal to prove same. These are criminal allegations which have to be proved beyond reasonable doubt. See **Gundiri V Nyako (2014) 2 NWLR (pt.1391) page 211 at 255.**

On the conclusion of the Resident Electoral Commissioner PW8 that the election is inconclusive after it being declared by the PW9 the returning officer is a rebuttable presumption that an election result declared by a returning officer is authentic and correct and the burden of rebutting that presumption is on the person who denies its correctness. **C.P.C. V INEC (2011) 18 NWLR pt 1279 pg. 493 at 510.** Therefore after declaring the result the Resident Electoral Commissioner is estopped from denying the authenticity, the genuiness and truth of all therein contained in the document voluntarily released by (INEC) relating to the information or figures pertaining to the results. **Ngige V Obi (2006) 14 NWLR (pt.999) pg. 1 at pg. 197 paras F – G.**

Learned Counsel for the petitioners submitted that the onus shifted to the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents to call evidence in rebuttal. In the case of **Gunduri V Nyako supra at pg. 225 it was held as follows:-**

*“In a claim for a declaration, the onus is on the plaintiff or petitioner to establish his case on the strength of his evidence and not on the weakness of the case of the defendant. In this case, the success of the appellants’ case was not dependent on whether the Respondents called witnesses or not, but squarely rested on the applicants to prove the declaratory reliefs sought.”*

See the following cases. **Ucha V Elechi (2012) 13 NWLR pt.1317 pg. 330 at 365 paras E-H; Omisore V Aregbesola (supra) pg. 179 paras K-JJ; Iniama V Akpabio (2008) 17 NWLR pt. 1116 pg. 225 at 30 paras A-E; Buhari V Obasanjo (2005) 13 NWLR pt.941 pg. 1 at 122.** We are of the humble view that the burden of proof has not shifted to the Respondents.

On Issue 2 whether the petition is competent having regards to the manner in which the grounds are couched and facts in support of the grounds.

We are in agreement with the submissions of learned Counsels for the Respondents that the relief sought is incompetent, the issue in the entire petition is narrowed to whether the election ought not to have been declared inconclusive, the prayer of nullification of the entire election being sought is in conflict with the case pleaded by the Petitioners. We are of the view that the relief sought by the Petitioners is incompetent as it runs contrary to the cause of action.

On whole, we are of the firm but humble view that this petition is lacking in merit. Consequently, it is hereby dismissed in its entirety.

**HON. JUSTICE G. O. IMADEGBELO  
CHAIRMAN**

**HON. JUSTICE I. O. HARRISON  
MEMBER**

**HON. JUSTICE KADI S.W.A. YUSUF  
MEMBER**