IN THE NATIONAL ASSEMBLY ELECTION PETITION TRIBUNAL

HOLDEN AT SOKOTO

ON MONDAY THE 24TH DAY OF JUNE, 2019

BEFORE:

HON. JUSTICE P.A. AKHIHIERO----------CHAIRMAN

HON. JUSTICE A.N. YAKUBU----------1ST MEMBER

HIS WORSHIP S.T BELLO ----------2ND MEMBER

PETITION NO.: EPT/SKT/HA/25/19

IN THE MATTER OF THE ELECTION TO SOKOTO STATE HOUSE OF ASSEMBLY FOR SOKOTO- SOUTH 1 STATE CONSTITUENCY HELD ON THE 9TH MARCH, 2019

BETWEEN

1. HON. IBRAHIM MUH'D GIDADO ……..…PETITIONER/APPLICANT

AND

1. MUSTAPHA ABDULLAHI
2. ALL PROGRESSIVES CONGRESS
3. INDEPENDENT NATIONAL ELECTORAL COMMISSION (INEC)

……..….RESPONDENTS

RULING

DELIVERED BY: HON. JUSTICE P.A.AKHIHIERO

This is a ruling on a motion on notice, dated and filed on the 20th of June, 2019 brought pursuant to section Paragraph 45 (1) of the 1st schedule of the Electoral Act 2010 (as amended) and Order 3 rule 3 (1) (i) of the Federal High Court Rules 2009 and under the inherent jurisdiction of this Tribunal.

By this motion, the Petitioner/Applicant is praying the Tribunal for the following Orders:

1. An Order of this honourable Tribunal for the extension of time to file Witness' statement on Oath for the Subpoenaed witness from INEC;

2. An Order deeming the Witness' Statement on Oath as properly filed and served filing fees having been paid; and

3. An Order for such further Orders that this honourable Tribunal may deem fit to make in the circumstances.

The grounds on which the application is based are as follows:

1. That the Applicant served a ***Subpoena Duces Tecum ad et testificandum*** on the 3rd Respondent (INEC) on the 22nd day May, 2019.

2. That since that date the 3rd respondent could not assign anyone to produce and tender the register of voters as a result of the pressure of work.

3. That they only assigned a witness from the 3rd Respondent by 2pm on 20/6/19.

4. That the Applicant only met the witness for the 1st time in the Tribunal on 20/6/19 and he informed them that he needed permission from his office before he could sign any deposition on Oath for the Petitioner.

The application is supported by a 9 paragraphs affidavit and a Written Address of Counsel which was adopted as his arguments in support of the application.

At the hearing of the motion the learned counsel for the Applicant, ***Paul Kasim Esq.*** adopted his written address and made some additional oral submissions. In his additional submission he contended that the counter affidavit of the 3rd Respondent offends the rules on affidavit as contained in the Evidence Act. According to him, paragraph 3 thereof is a legal conclusion and paragraphs 6, 7, 8, and 10 are all legal arguments which he urged the Tribunal to expunge.

In his Written Address, the learned counsel identified a sole issue for determination as follows:

"Whether this Honourable Tribunal has the power to grant this Application."

Arguing the sole issue for determination, learned counsel referred the Tribunal to ***Paragraph 4 (5) (b) of the 1st Schedule to the Electoral Act, 2010 as amended*** which stipulates that ***"An election Petition shall be accompanied by the written Statement on Oath of the Witnesses"***

Again, he referred to ***ORDER 3 RULE 3 (I) (E) OF THE FEDERAL HIGH COURT RULES 2009*** which provides that written statements on oath shall accompany the writ of summons or the originating process.

He contended that the subpoenaed witness being a witness at the request of the Petitioner, falls within the category of witnesses that ought to testify on oath and the time stipulated for filing of deposition having expired, the tribunal has the power to extend time in dire circumstances such as this. For this view, he relied on the provisions of: Paragraph 45(1) of the 1st Schedule to the Electoral Act which stipulates thus:

" the Tribunal or Court shall have Power subject to provisions of Sections 134 of this Act and paragraph 11 of this schedule to enlarge time for doing any Act or taking any proceedings on such terms (if any) as the justice of the case may require except as otherwise provided by any other provision of this schedule".

Learned counsel submitted that since the subpoenaed witness is not under the control of the Petitioner, this is one of the exceptions to the general rule relating to filing of witness' statement outside the period of 21 days within which the petition could be filed.

He referred to their affidavit in support of the motion where they deposed to the fact that the witness is a staff of their adversary (the 3rd Respondent) and that they applied for the Subpoena as far back as at the 22nd of May, 2019**.**That it was just on the 20th of June 2019 that a staff of the 3rd Respondent who was assigned to testify informed them that he needs the permission of his office before he can sign the said witness' Statement on Oath.

Counsel submitted that the tribunal has been imbued with wide powers including its inherent powers to do substantial justice at times like this. He relied on the case of: ***IKPEAZU V. OTTI & ORS (2016) LPELR-40055(SC)*** where the Court opined as follows:
"As correctly observed by the Court below, on this point, the "Tribunal should have, in the interest of doing substantial justice ignored the inconsequential mistakes." That is true; the Courts are enjoined to do substantial justice and to refrain from undue technicality. Nowhere else is the need to do substantial justice greater than in election petition, for the Court is not only concerned with the rights of the parties inter se but the wider interest and rights of the constituents who have exercised their franchise at the polls. However, an election petition is statutory and is unlike any other civil claim, where there is much latitude".

Furthermore, counsel submitted that the Federal High Court Rules had contemplated a situation involving a subpoenaed witness like the one at hand when it provided in ***Order 3 Rule 3 (1) (i)*** thus:

"the Statements on Oath of witnesses requiring Subpoena from the Court need not be filed at the Commencement of the suit"

Counsel emphasized that a party who needs to call an adversary and a witness that is not within his control is faced with a great challenge. He urged us to grant the Application since the Petitioner's Counsel has done all that is humanly possible to summon the witness to testify in respect of the documents produced.

He said that they have filed the statement for the subpoenaed witness and urged the Tribunal to deem same as properly filed and served.

He maintained that the Respondents will not be prejudiced by this application as whatever testimony given by the witness will be subject to cross - examination by other Counsel.

Finally, he urged the Tribunal to grant this Application in the interest of fair hearing since the failure to get the said subpoenaed witness was due to pressure of work of the 3rd Respondent whose office has been inundated with petitions and applications from various Electoral Tribunals during this period.

In opposition to the motion, the learned counsel for the 1st and 2nd Respondents, ***Nuhu Adamu Esq.*** made his oral submissions on points of law at the hearing of this application. He submitted that the application which is coming very late has the flavour of an amendment. He posited that there are a plethora of authorities that amendments must be made within 21 days of filing of the Petition. He urged the Tribunal to refuse the application since calling an additional witness amounts to an amendment.

Also in opposition to the motion, the learned counsel for the 3rd Respondents, ***Aminu Alhassan Esq.*** filed a 12 paragraphs counter affidavit and a Written Address of Counsel which he adopted as the arguments in opposition to the application.

In his written address, the learned counsel formulated two issues for determination as follows:

1. ***Whether this Application is grantable; regard being had to the non-listing of the proposed additional witness and absence of his witness deposition in the first place, notwithstanding his being a subpoenaed witness.***

2. ***Whether when amendments proved to be substantial in nature, same could be allowed at such time not only outside statutory days, but towards the end of the petitioner's close of evidence in election petition matter.***

Thereafter, learned counsel argued the two issues *seriatim*.

ARGUMENTS ON ISSUE 1.

Counsel for the 3rd Respondent submitted that, the provisions of the Electoral Act 2010 (as amended) as it relates to amendments are very clear and mandatory. That although the Applicant's Counsel did not categorically define their true intent to this tribunal, what their Application connotes, by applying for extension of time to **add a witness** and **file Additional Witness Statement On Oath,** notwithstanding the court's assistance to bring him for them, is certainly an application for re-amendment, which if granted, would give their Petition another face contrary to their pre-hearing answers, which did not list any INEC official to be subpoenaed as a witness who shall testify and tender documents before this tribunal.

He contended that it would be very difficult to demarcate between additional statement of a witness who has not been listed before, nor his deposition filed, and amendment of a petition to supply more evidence. He submitted that a community reading of the provisions of **Paragraph 14 of the 1st Schedule to the Electoral Act 2010 (as amended), Order 17 rule 3 of the Federal High court (Civil Procedure) Rules, and Paragraph 4 (7) (a) of the said Schedule** would

definitely illuminate on what it means by bringing additional witness statement on oath, which he maintained refers to amendment of the originating process.

He submitted that there is a strong link between all the provisions *supra,* which one cannot avoid or tamper with, when it comes to anything to be done after filing of an election petition and referred to: **Paragraph 14 of the 1st Schedule to the Electoral Act 2010 (as amended),** which states as follows:

> **"14 (1) Subject to subparagraph (2) of this paragraph, the provision of the Civil Procedure Rules relating to amendment of pleadings shall apply in relation to an Election Petition or a Reply to Election Petition as if for the words "any proceedings" in those provisions there were substituted the words "the Election Petition or reply"**

He submitted that the above provision undoubtedly refers the readers to the provisions of **Order 17 the Federal High Court (Civil Procedure) Rules** which provide under **Rule 3** as follows:

> **"Where any originating process and or pleading is to be amended, a list of any additional witness to be called together with his written statement on oath and a copy of any document to be relied upon consequent on such amendment shall be filed with application."**

According to him, granting extension of time to file a witness statement on oath at this time would amount to an affront to the extant constitutional and electoral law provisions, as same is tantamount to giving the petitioner a second chance to rewrite his petition.

He submitted that the above provision of the Rules explicitly indicates that no witness statement can be filed and adopted without amendment to the originating process in order to incorporate the supplementary proofs, which most often than not spring surprises to the unsuspecting adversary who thought that the issue of the report of pre-hearing session has sealed all substantial amendments.

Still, referring to the aforesaid provisions of the said Schedule to the Electoral Act, he posited that Paragraph **4 (7) (a) further** clarifies his point when it states as follows:

> **"(7) The election petition shall be accompanied by-**
>
> **(a) a list of the witnesses that the petitioner intends to call in proof of the petition"**

Again, he submitted that the provision of **Paragraph 45 (1)** and **Order 3 Rule 3 (1) (i) of the Federal High Court (Civil Procedure) Rules** that the Applicant relied on, cannot assist him now. He explained that **Section 45 (1)** is now subject to **Section 95(5) of the**

Constitution of the Federal Republic of Nigeria (Second Alteration) Act, which, together with **Section 14 (2) (a) (ii)** prohibits any major or substantial amendments/alteration which, filing of additional witness statement seeks to represent. Moreover he maintained that while **Order 3 Rule 3 (3) (i) of the Federal High Court (Civil Procedure) Rules** deals with opportunity to call a subpoenaed witness even when his deposition has not been filed at the commencement of the suit; the same **Order 3, Rule 3 (d)** requires a party to file its list of witnesses to be called at the trial.

Furthermore, counsel submitted that **Order 3 Rule 3 (1) (e) (ii) stipulated** a condition precedent which the Applicant herein has not complied with. To wit: serving his subpoenaed witness with **Civil Form 1 (a)** before filing the witness's deposition in court. He reproduced the provision of **Order 3 (1) (e) (ii)** as follows:

> ***"the witness who require subpoena or summons shall at the instance of the party calling them be served with Civil Form 1 (a) before the filing of the statements of such witnesses".***

Flowing from the above counsel submitted that it is clear that what the Applicant is seeking before this tribunal in essence is an amendment of his Petition at this time without complying with the statutory provisions.

He therefore urged the tribunal to resolve this issue against the Applicant.

ARGUMENTS ON ISSUE 2.

Here, learned counsel submitted that it is settled law that amendments in an election petition are not granted as a matter of course. That they are not even allowed when the amendments sought, appear substantial and application to amend thereof, comes after the mandatory 21 days provided under **Section 95(5) of the Constitution of the Federal Republic of Nigeria (Second Alteration) Act, 2010.** See the cases of: **ALAHJI MUHAMMED DIKKO YUSUF & ANR v. CHEF OLUSEGUN OBASENJO (2003) 16 NWLR (Pt. 847) 554; OBI-ODU v. DUKE (2005) 10 NWLR (Pt. 932); and NGIGE V. OBI (2006) 14 NWLR (Pt. 999) 136**.

He contended that although the Electoral Act or other statutes did not categorically define what constitute substantial amendments, the court is always at liberty to weigh the magnitude of the amendment sought to determine whether the amendment sought can be granted. He said that to determine this, the Tribunal must foresee the effect of the amendments on the petition sought to be amended, in order to avoid giving the petitioner the opportunity to present an entirely new case after issues have been joined with the respondents.

He contended that substantial amendments on any part of the petition may render it a strange one to the adversary and therefore occasion a miscarriage of justice through denial of fair hearing. He urged the Tribunal to so hold.

Finally he submitted that the Tribunal should refuse the Application or in the alternative, order that the documents sought to be tendered through the proposed additional witness, be tendered from the bar.

At the hearing of the motion, the learned counsel for the Applicant made a brief reply on points of law. In his reply, he urged the Tribunal to discountenance the objections of the respondents in the interest of justice and fair hearing.

He maintained that for the sake of fair hearing the subpoenaed witness should be allowed to testify. He reiterated that the delay in calling this witness was caused by the 3rd Respondent who refused to provide an official in time. He emphasised that they do not intend to amend their pleadings.

We have carefully examined all the processes filed in this application together with the submissions of counsel on the matter. The issue for determination in this application is whether the Petitioner/Applicant can be granted extension of time to file Witness's deposition for the subpoenaed witness from INEC and to deem the deposition as properly filed and served.

Before determining the issue it will be expedient to determine a preliminary issue which arose in the course of this application on the objection of the Applicants counsel that the counter affidavit of the 3rd Respondent offends the provisions of the Evidence Act. According to him, paragraph 3 thereof is a legal conclusion and paragraphs 6, 7, 8, and 10 are all legal arguments which he urged the Tribunal to expunge.

For the avoidance of doubt the relevant section of the Act is ***section 115(2) of the Evidence Act*** which stipulates as follows:

"115. (2) An affidavit shall not contain extraneous matter, by way of objection, prayer or legal argument or conclusion."

The question is when it can be said that an Affidavit contains extraneous matter by way of objection, prayer, legal argument or conclusion.

A simple test to be adopted in order to determine whether an Affidavit runs contrary to provisions of Section 115 of the Evidence Act 2011 was propounded in the case of: ***ISHAYA BAMAIYI VS. THE STATE & ORS (2001) 8 NWLR (PART 715) 270 at 289 C F*** where ***UWAIFO, JSC*** put it lucidly as follows:

"The test for doing this, in my view, is to examine each of the paragraphs deposed to in the affidavit to ascertain whether it is fit only as a submission which counsel ought to urge upon the Court. If it is, then it is likely to be either an objection or legal argument which ought to be pressed in oral argument; or it may be conclusion upon an issue which ought to be left to the discretion of the Court either to make a finding or to reach a decision upon through its process of reasoning. But if it in the form of evidence which a witness may be entitled to place before the Court his testimony on oath and is legally receivable to prove or disprove some fact in dispute, then it qualifies as a statement of facts and circumstances which may be deposed to in an affidavit. It therefore means that prayers, objections and legal arguments are matters

that may be pressed by counsel in Court and are not fit for a witness either in oral testimony or in affidavit evidence, while conclusions should not be drawn by witness but left for the court to reach. Thus it is settled that where an affidavit indulges in deposing to extraneous matters, legal or speculative conclusions instead of stating the hard facts the tendency is that such affidavits or part of its paragraphs may be struck out."

In order to apply the above test, it is necessary to reproduce the contents of the affected paragraphs as follows:

> ***" 3. That I have read through the supporting affidavit of the Applicant, relying on whose content the Applicant sought for the reliefs as per contained on the motion paper, but found the averments worthless, misleading and conflicting, hence the need to file this counter affidavit.***
>
> ***6. That the 3rd Respondent denied in its entirety the content of paragraph 4 of the supporting affidavit and states that, the Applicant/ Applicant's counsel having not even listed the additional witness, dawdles around and remain indecisive as to their trial plan, thereby wasted time in choosing between calling additional witness from INEC or not, which created the wide gap between the time they served the subpoena and the date a witness appeared in court, i.e. between 22/05/19 and 20/06/19; a period of 28 days.***
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> ***7. That further to the above denial, and in response to paragraph 5 of the supporting affidavit, the Applicant could not be understood to state that he speculates on which witness he was to call, thereby taking the 3rd Respondent too long to decide who comes, randomly, since the witness was intended to testify, it is the only witness that has relevant information of the documents to be tendered that must have been subpoenaed and therefore, such witness should, and is known to the Applicants.***
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> ***8. That in response to statement contained in paragraphs 6 and 7 of the supporting affidavits, the 3rd Respondent contends that the leave of court sought which if granted, would give way to amendments and consequential amendments as well, at an odd time like the present in this petition, it will only give birth to affronts to the boldly written and clear provisions of both Federal High Court (Civil Procedure Rules) for amendments, and extant provisions of the 1st Schedule to the Electoral Act 2010 (as amended), and generally prejudice the Respondents (especially the 3r Respondent)***
>
> ***10. That this honorable tribunal lacks the power to so do as the Application comes at a wrong time and made mala."***

Upon a careful examination of the above paragraphs it is quite evident that rather than stating the hard facts the paragraphs are articulating some extraneous matters leading to some legal or speculative conclusions. All such arguments and submissions should not be found in the affidavit but in the Written Address of counsel. Following the aforementioned test, such paragraphs are liable to be struck out. Accordingly paragraphs 3,6,7,8 and 10 are struck out from the 3rd Respondents Counter affidavit.

Coming to the merits of the application, we must emphasize that ***ex facie***, the application is for extension of time to file Witness's deposition for the subpoenaed witness from INEC and to deem the deposition as properly filed and served. However, in their vehement objection to the application, the learned counsel for the Respondents has seriously contended that the application is for amendment of the petition. The learned counsel for the Applicant has stoutly refuted this claim.

It is pertinent to observe at the outset that the procedure for summoning a witness to Court by means of a ***subpoena duces tecum*** or ***ad testificandum*** is not provided for in the First Schedule to the Electoral Act. By virtue of paragraph 54 of the First Schedule to the Electoral Act recourse may be had to the practice and procedure of the Federal High Court in the exercise of its civil jurisdiction, with such modifications as may be necessary to render them applicable having regard to the provisions of the Electoral Act.

There is no doubt that the 1st Schedule to the Electoral Act provides for the front loading of witness statements along with the petition and that evidence at trial shall be by adoption of the written statements followed by cross-examination. However, the situation where a subpoena has been issued presents a slightly different scenario.

Firstly, by its very nature, a subpoena is issued by the Court at the instance of one of the parties to command the appearance of a witness ***who may be an adversary to the party calling him*** to produce specified documents or to testify, or both. That is the position in the instant case. In such a situation it cannot be envisaged that the statement of such a witness would accompany the petition. For the avoidance of doubt, ***Order 3 Rule 3 (1) (i) of the Federal High Court Rules 2009 as amended*** provides thus*:*

"the Statements on Oath of witnesses requiring Subpoena from the Court need not be filed at the Commencement of the suit"

In compliance with paragraph 54 of the First Schedule to the Electoral Act, the procedure for the issuance of subpoena under the Federal High Court Rules is therefore applicable in election petition proceedings by directing the applicant to obtain a deposition from the witness after he has been served with the summons.

In the event it is quite clear that the deposition of a subpoenaed witness coming after the filing of the petition cannot amount to an amendment of the petition. It is simply to comply with the procedure permitted by the rules to file the deposition of a subpoenaed witness subsequent to the filing of the Petition. Since the deposition of the subpoenaed witness is coming outside the period for filing depositions it is expedient to seek the leave of the Tribunal to extend the time at this stage.

In the case of: ***Obi-Odu vs Duke (2006) 1 NWLR (961) 375 at 419 D***, the Court held that having regard to the sensitive nature of election petition proceedings and from the point of view of public policy, it was better for the Court to allow a party subpoenaed to obey the subpoena to testify since the Tribunal would have been in a position at the conclusion of the trial to determine the probative value of the evidence elicited thereby. See also: ***Buhari vs. Obasanjo (2005) 1 NWLR (941)*** 1.

In election petition proceedings, it is in the interest of justice that parties are given full opportunity to ventilate their case without undue regard to technicalities.

It is settled law that the granting of an application for extension of time is entirely at the discretion of the Court, and as with all exercise of discretion, Courts are enjoined to consider the rules governing the matter under consideration.
For an application for enlargement of time to succeed the affidavit in support of the application and supporting documents must be detailed in showing good and substantial reasons for failure to file the process within the prescribed period. See: ***Mobil Oil v. Agadiagho 1988 2 NWLR pt.77 p.383 Oba v. Egberongbe 1999 8 NWLR pt.615 p.485***

We have carefully examined the reasons for the daily as contained in the affidavit in support of this application. The Applicant applied for the subpoena since the 22nd of May. 2019. The failure to get the subpoenaed witness was due to the pressure of work of the 3rd respondent whose office has been inundated with petitions and applications from various electoral tribunals this period. We do not think the Respondents will be prejudiced by the granting of this application since the witness will be subject to cross-examination by their Counsel.

In the event the issue for determination is resolved in favour of the Applicant and the application is granted as follows:

(1) An Order of this honourable Tribunal for the extension of time to file Witness' statement on Oath for the Subpoenaed witness from INEC; and
(2) An Order deeming the Witness' Statement on Oath as properly filed and served the appropriate filing fees having been paid.

HON. JUSTICE P.A. AKHIHIERO
CHAIRMAN

HON. JUSTICE A.N. YAKUBU
1ST MEMBER

HIS WORSHIP S.T BELLO
2ND MEMBER

COUNSEL:
1. PAUL KASIM ESQ……..…….PETITIONER/APPLICANT

2. NUHU ADAMU ESQ.……..…..…1ST & 2ND RESPONDENTS/RESPONDENTS
3. AMINU ALHASSAN ESQ…….…….……3RD RESPONDENT/RESPONDENT