**ALL PROGRESSIVES CONGRESS**

**V.**

**PEOPLES DEMOCRATIC PARTY & ORS**

IN THE COURT OF APPEAL OF NIGERIA

THE 16TH DAY OF FEBRUARY, 2015

CA/EK/EPT/GOV/1/2015

**LEX (2015) - CA/EK/EPT/GOV/1/2015**

OTHER CITATIONS

2PLR/2015/14 (CA)

(2015) LPELR-24349(CA)

**BEFORE THEIR LORDSHIPS**

ABDU ABOKI, JCA

JUMMAI HANNATU SANKEY, JCA

JOSEPH SHAGBAOR IKYEGH, JCA

ITA GEORGE MBABA, JCA

PAUL OBI ELECHI, JCA

**BETWEEN**

ALL PROGRESSIVES CONGRESS (APC) - Appellant(s)

AND

1. PEOPLES DEMOCRATIC PARTY (PDP)

2. MR. PETER AYODELE FAYOSE

3. INDEPENDENT NATIONAL ELECTORAL COMMISSION (INEC)

4. THE CHIEF OF DEFENCE STAFF

5. INSPECTOR GENERAL OF POLICE - Respondent(s)

**ORIGINATING COURT(S)**

GOVERNORSHIP ELECTION TRIBUNAL FOR EKITI STATE HOLDEN AT THE FCT HIGH COURT, JABI, ABUJA

**REPRESENTATION**

APPELLANT

1. H. O. AFOLABI, SAN

2. O. A. DARE

3. L. L. AKANBI

4. R. ISAMOTU

5. R. O. BALOGUN

6. I. T. BALOGUN

7. KABIRU AKINGBOLU

8. TAJUDEEN AKINGBOLU  
  
CROSS-APPELLANT

1. E. ROBER EMUKPOERUO ESQ

2. KOLAPO KOLADE ESQ.

3. OLATUNJI ADEOTI ESQ

4. PETER NWATU ESQ.

5. OJEDIRAN ILEOLUWA ESQ. For Appellant

**AND**

1ST RESPONDENT

1. E. ROBER EMUKPOERUO ESQ.

2. KOLAPO KOLADE ESQ.

3. OLATUNJI ADEOTI ESQ.

4. PETER NWATU ESQ.

5. OJEDIRAN ILEOLUWA ESQ  
  
2ND RESPONDENT

1. YUSUF O. ALI SAN

2. PIUS AKUBO SAN

3. ADEBAYO ADELODUN SAN

4. OBAFEMI ADEWALE ESQ.

5. AKIN OLADEJI ESQ.

6. SALISU AHMED ESQ.

7. PROF. W. W. EGBEWOLE

8. AYO OLANREWAJU ESQ.

9. K. K. ELEJA ESQ.

10. TAFA AHMED ESQ.

11. B. R. GOLD ESQ.

12. YAKUB DAUDA ESQ.

13. SULYMAN O. BABAKEBE ESQ.

14. A. M. ABDULKAREEM ESQ.

15. EZEKIEL AGUNBIADE ESQ.

16. OLUBUNMI OLUGBADE ESQ.

17. A. ABDULKAREEM ESQ.

18. IBRAHIM ALABIDUN ESQ.

19. K. A. DANDASO ESQ.

20. ADEYEMI ADEWUMI ESQ.

21. ABDULRAFIU OPEYEMI LAWAL ESQ.

22. IDRIS SULEIMAN ESQ.

23. MRS OLUWASEYI EBENEZER

24. DR. FOLUKE DADA

25. STEPHEN ADEMUAGUN

26. REBBECCA ADEOLA OJO (MRS)  
  
3RD RESPONDENT

1. WILCOX ABERETON

2. OLUBUNMI IPINLAIYE  
  
4TH RESPONDENT

1. ABAYOMI SADIK

2. ADETAYO ADENIYI  
  
5TH RESPONDENT

1. CHIEF OLUSOLA OKE

2. N. O. OGUNLEYE

3. GBADEBO IKUESAN  
  
CROSS-RESPONDENT  
  
1ST CROSS RESPONDENT

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2. ADETAYO ADENIYI  
  
5TH RESPONDENT

1. CHIEF OLUSOLA OKE

2. N. O. OGUNLEYE

3. GBADEBO IKUESAN For Respondent

**ISSUES FROM THE CAUSE(S) OF ACTION**

ELECTION LAW/PETITION: Legal nature of election Petitions – Sui geenris designation - Distinction from other proceedings like common law civil actions

ELECTION LAW/PETITION - FILING OF ELECTION PETITION:- Parties to an election petition – Determination of locus standi – relevant considerations thereto

ELECTION PETITION/LAW– ELIGIBILITY OF CANDIDATE FOR ELECTION:- Question of eligibility - Whether can be raised as part of a post election petition - Relevant considerations

ELECTION PETITION/LAW– ELIGIBILITY OF CANDIDATE FOR ELECTION:- Effect of impeachment on eligibility of a person as a candidate for the office of Governor – Whether impeachment on grounds of gross misconduct or breach of code of conduct for public officers satisfies the ineligibility criteria of Section 182 (1) (e) of the 1999 Constitution

ELECTION PETITION/LAW - ALLEGATION OF PRESENTATION OF FORGED CERTIFICATE: Eligibility for election - Conditions precedent for the substantiation of an allegation of presentation of forged certificate – Standard of proof – Onus of proof

CONSTITUTIONAL LAW: Eligibility as candidate for election - Governor of a State - Section 182 (1) (e) of the 1999 Constitution – Interpretation thereof

**PRACTICE AND PROCEDURE ISSUES**

ACTION - NECESSARY PARTY**:** Necessary party to a suit – Meaning thereof

APPEAL: Filing of fresh issues in petitioner’s reply – Attitude of court thereto – How treated by court

APPPEAL:- Reply brief – Essence thereof – Applicable general guidelines

EVIDENCE - GIVING OF EVIDENCE:- Whether parties to an action are obligated to give evidence in their trial

EVIDENCE – STANDARD OF PROOF:- Allegation of the commission of crime - Proof beyond reasonable doubt

**MAIN JUDGMENT**

ABDU ABOKI, J.C.A. (DELIVERING THE LEADING JUDGMENT):

This is an Appeal against the Judgment of the Governorship Election Tribunal Ekiti state (that sat at the FCT High Court Jabi, Abuja) delivered on 19th December, 2014.

The Brief facts of the petition leading to this Appeal are as follows:

At the Lower Tribunal the petitioner filed its petition challenging the declaration and return of the 2nd Respondent as the winner of the Ekiti State Governorship Election conducted on the 21st June, 2014 by the 3rd Respondent.

At the said Election, the Appellant sponsored one John Olukayode Fayemi as its Governorship candidate, while the 1st Respondent sponsored the 2nd Respondent as its candidate. At the conclusion of the Election the 2nd Respondent polled a total of 203,090 (Two Hundred and Three Thousand, Ninety) votes, while the Appellant's candidate polled a total of 120,433 (One Hundred and Twenty Thousand, Four hundred and Thirty Three) votes. The 2nd Respondent was declared winner of the Election by the 3rd Respondent and accordingly returned as elected on the 22nd June, 2014.

The Appellant being dissatisfied challenged the declaration and Return of the 2nd Respondent. The Appellant's Grounds of the Petition as set out in paragraph 35 thereof at page 8 Volume 1 of printed record are reproduced as follows:

“i. The 2nd Respondent was not duly elected by majority of lawful votes cast at the Election;

ii. The Election of the 2nd Respondent is invalid by reason of corrupt practices.

iii. The Election of the 2nd Respondent is invalid by reason of non-compliance with the provisions of the Electoral Act 2011 as amended and the Manual of Election officials 2014 and the Constitution of the Federal Republic of Nigeria 1999 (as amended).

iv. The 2nd Respondent was not qualified to contest as at the time of the Election on the following Grounds;

(a) The 2nd Respondent was found guilty of the contravention of the Code of Conduct by the impeachment panel set up by the Acting ChiefJudge of Ekiti State on allegation of Gross Misconduct involving embezzlement of funds preferred against him by the Ekiti State House of Assembly consequent upon which he was impeached and removed from the office of the Governor of Ekiti State in the year 2006.

(b) The 2nd Respondent presented a forged Higher National Diploma (HND) Certificate of the polytechnic Ibadan to the 3rd Respondent (INEC)".

The reliefs sought by the Appellant at the Lower Tribunal as set out in paragraph 125 of its petition at page 27 Volume 1 of the printed record read thus:

“A. That it be determined and declared that the 2nd Respondent Peter Ayodele Fayose was not qualified to contest the Governorship Election held on 21st June, 2014 on the Ground that he was found guilty of the contravention of the Code of Conduct by the Impeachment panel set up by the Acting Chief Judge of Ekiti State and the Ekiti State House of Assembly, consequent upon which he was impeached and removed from the office of the Governor of Ekiti State in the year 2006.

B. That it may be determined that the 2nd Respondent presented a forged certificate of Higher National Diploma (HND) of the Polytechnic Ibadan to the Independent National Electoral Commission, thus was not qualified to contest the Election.

C. That it be determined and declared that the 2nd Respondent Peter Ayodele Fayose was not duly elected or returned by the majority of the lawful votes cast at the Ekiti State Governorship Election held on Saturday 21st June, 2014.

D. That it may be determined that having regard to the non-qualification of the 2nd Respondent to contest the Election, the 3rd Respondent ought to have declared the candidate of the Petitioner John Olukayode Fayemi, who score the highest number of lawful votes cast at the Election as the winner of the Election.

E. AN ORDER of the Tribunal withdrawing the certificate of return issued to the 2nd Respondent by the 3rd Respondent and present the certificate to the candidate of the Petitioner John Olukayode Fayemi who scored the majority of the valid votes cast and having met the Constitutional requirements as required by law.

IN THE ALTERNATIVE

A. An order nullifying the Governorship Election held on 21st June, 2014 and a fresh Election be ordered."

The Lower Tribunal in its Judgment found in favour of the Respondents and dismissed the petition as lacking in merit.

Dissatisfied with the decision of the Lower Tribunal, the Petitioner appealed to this Court.

The Parties in accordance with the rules of this Court filed their respective briefs of argument. The Appellant also filed a reply to the 1st, 2nd, 3rd, 4th and 5th Respondents' Brief of arguments.

The Appellant in its brief of argument distilled Eleven issues for determination from Fifteen grounds of Appeal contained in their Notice of Appeal dated 5th January, 2015. The said issues for determination are adumbrated as follows;

1. Whether having regard to the provisions of Section 138 of the Electoral Act 2010 (as amended) dealing with the Grounds for the presentation of an Election petition and the interpretation of same by the Supreme Court, the Election Tribunal was right in its decision to strike out paragraphs 110 - 120 of the petition and relief 125A thereof on the Ground that the issue concerning the qualification of the 2nd Respondent for the Election, being a pre-Election matter, the Tribunal had no jurisdiction to entertain same and that the Appellant ought to have challenged same before the regular Court long before the Election? Covers Ground 1 in the Notice of Appeal.

2. Whether the Lower Tribunal was right when it struck out the names of the 4th and 5th Respondents and all allegations against them as well as paragraphs 60, 63, 69, 72, 76, 77, 83, 85, 100, 101 and 103 of the petition? Covers Grounds 2 and 3 in the Notice of Appeal.

3. Whether or not the Election Tribunal was right to have reviewed the decision of the panel that found 2nd Respondent guilty of breach of the Code of Conduct? Covers Grounds 10, 11 and 15.

4. Whether in the light of the clear provisions of Sections 182 (1) (e) and 188 of the 1999 Constitution as amended, the Election Tribunal was right in its decision that the panel that found the 2nd Respondent guilty of breach of the Code of Conduct had no power to find him guilty as such? Covers Ground 12 in the Notice of Appeal.

5. Whether in the light of the provision of the law and the case made by the Appellant, the Tribunal was right in applying the decision in Omoworare Vs Omisore against the Appellant? Covers ground 13 in the Notice of Appeal.

6. Whether in its decision on the petition, the Election Tribunal properly applied the Court of Appeal, Benin Division Judgment tendered before it? Covers Ground 14 in the Notice of Appeal.

7. Whether the report of an allegation of forgery to security agencies for investigation and possible prosecution is a requirement for proof of same before a Court or Tribunal and whether the Appellant did not prove the allegation of forgery against the 2nd Respondent? Covers Ground 7 in the Notice of Appeal.

8. Whether on the strength and evidential value of documentary evidence tendered by the Petitioner, the Tribunal is justified in concluding that the allegation of presentation of forged certificate was not proved, more so, thatthe 2nd respondent whose Conduct was personally in issue did not give any personal evidence to rebut the allegation against him? Covers Grounds 6 and 8 in the Notice of Appeal.

9. Whether the Tribunal was right in adjudging the evidence of PW9 and PW11 as hearsay without appreciating the fact that Exhibits G & P being Certified True Copies of Public documents can be tendered and commented on by anybody not necessarily the maker of the document? Covers Ground 9 in the Notice of Appeal.

10. Whether considering the totality of pleadings and the need to put all facts before the Court, the Tribunal was justified in striking out paragraph 13 of the Petitioner's reply when that paragraph of reply was in essence a clear rebuttal of the claim made by the 2nd Respondent that the certificate in issue belongs to him? Covers Ground 5 in the Notice of Appeal.

11. Whether or not the Election Tribunal was right when it held that it had no jurisdiction to determine whether or not Armed Force have role to play in Election? Covers Ground 4 in the Notice of Appeal.

The 1st Respondent in its brief of argument distilled four issues for the determination of this Appeal as follows;

1. Whether the Tribunal was in error in holding that the issue of the allegation of the contravention of the Code of Conduct by the 2nd Respondent was a pre-Election issue over which it had no jurisdiction and consequently struck out paragraphs 110-120 and - 125A of the petition? GROUND 1.

2. Was the Tribunal in error to strike out names of the 4th and 5th Respondents, strike out all the allegations made against them, strike out the issue concerning the role of the 4th and 5th Respondents in the Election, strike out some paragraphs of the petition and a paragraph of the Petitioner's reply? GROUNDS 2, 3, 4 AND 5.

3. Was the Tribunal in error to hold that the Appellants failed to prove as required by law its allegation that the 2nd Respondent presented a forged certificate of the Polytechnic Ibadan to the 3rd Respondent? GROUND 6, 7, 8 AND 9.

4. Whether the Tribunal was in error in scrutinizing the report of the investigative panel (which found the 2nd Respondent guilty of contravention of the Code of Conduct) and other documents to hold that, the panel was not set up according to law; its report could not be a basis for disqualifying the 2nd Respondent and the panel not being a regular Court or Code of Conduct Tribunal had no power to find the 2nd Respondent guilty of contravention of the Code of Conduct? GROUND 10, 11, 12, 13, 14 AND 15.

The 2nd Respondent in his Brief formulated five issues for determination from the Appellant's 15 grounds of appeal as follows:

1. Whether the trial Judges of the Tribunal are not right in the position they took by striking out paragraphs 110- 120 of the petition on the alleged contravention of the Code of Conduct by the 2nd Respondent moreover when they still went ahead to consider the merit of the allegation and found it unproved. (Ground 1)

2. Whether the trial Tribunal was not right in striking out the names of the 4th and 5th Respondents who did, not take any part in the conduct of the Election and when no relief was sought against them in the petition and whether the Tribunal was not right in declining to pronounce on whether the Armed Forces have any role to play in the Conduct of the Election. (Grounds 2 and 4)

3. Whether the Tribunal did not act rightly in striking out paragraphs 60, 63, 69, 72, 76, 77, 83, 85, 100, 101 and 102 of the petition for being vague' nebulous, ambiguous, imprecise and in also striking out paragraph 13 of the Petitioner's reply to the 2nd Respondent's reply when the said paragraph set up a new case not covered in the petition' (Grounds 3 and 5)

4. Whether the Tribunal was not correct in coming to the decision that the Appellant failed woefully in proving the sundry allegation of forgery of the Higher National Diploma (HND) Certificate presented by the 2nd Respondent to the 1st Respondent and whether the burden of Proof shifted unto the 2nd Respondent (Grounds 6, 7, 8 and 9)

5. Whether the Tribunal was not correct having regard to the facts and circumstances of the case that all the allegations of impeachment, and breach of Code of Conduct were not proved and that the case of OMOWORARE VS OMISORE (2010) 3 NWLR (Pt.1180) 58 supported the case of the Respondents moreover when the Tribunal as required by law drew the correct inference from all the documents tendered on the issue. (Grounds 10, 11, 12, 13, 14 and 15)

In the 3rd Respondents brief of argument seven issues were distilled for determination as follows:

1. Whether the Tribunal was right in striking out-paragraphs 110-120 of the petition which deal with the allegation of contravention of the Code of Conduct by the 2nd Respondent, along with the relief 125A founded on same as being a pre-Election matter over which the Tribunal lacks jurisdiction?

2. Whether the Tribunal was not right in striking out the names of the 4th and 5th Respondents from the petition being that they were not necessary parties to the petition and no relief was sought against them.

3. Whether the Tribunal was not right in striking out Paragraphs of the petition that were found to be imprecise, nebulous, and ambiguous?

4. Whether the Tribunal was right in striking out paragraph 28 of the petition, which raised the issue of Constitutionality of the security role of Nigerian Army in the Conduct of the Election, having found that it lacked jurisdiction to decide same?

5. Whether the Tribunal was right in striking out paragraph 13 of the Petitioner's reply to the reply of the 2nd Respondent which raised a newissue outside the issues raised in the petition.

6. Whether the Tribunal was not right in holding that the Petitioner failed to lead credible evidence to prove criminal allegation of presentation of forged certificate considering the pleadings and evidence before the Tribunal.

7. Whether the Tribunal was right in its decision concerning the Constitution, Activity and report of the impeachment panel set up by the Ekiti State House of Assembly as not amounting to the decision of the Code of Conduct Tribunal pursuant to the Constitution of the Federal Republic of Nigeria as amended.

The 4th Respondent distilled a lone issue for the determination of this appeal which reads as follows:

1. Was the Tribunal wrong in the decision that its jurisdiction does not extend to the 4th Respondent; and if wrong, did the decision culminate in a miscarriage of justice against the Petitioner on its case against the 4th Respondent. (Grounds 2, 3 and 4)

The 5th Respondent distilled two issues for determination of this appeal as follows:

1. Whether the Lower Tribunal was wrong in its decision striking out the name of the 5th Respondent and all paragraphs of the petition where allegations were raised against it.

2. Whether or not the trial Tribunal was right when it held that it had no jurisdiction to determine the Constitutional question as to the propriety or otherwise of the deployment of security, in this case, the Nigerian Army to provide security for Election.

The 5th Respondent in his Brief of argument raised and relied on preliminary objection on point of law and urged the Court to strike out the Appellant's brief of argument and consequently this appeal for being incompetent. However, he went ahead to respond to the Appellant's brief of argument on its merit in case his preliminary objection fails.

This Court will commence its determination of this appeal by first considering the 5th Respondent's preliminary objection. This is because its success may render the consideration of the appeal unnecessary and to avoid an exercise in futility by the Court.

**PRELIMINARY OBJECTION**

By an undated Motion on Notice filed on 30th January, 2015 supported by a seven paragraph affidavit, the 5th Respondent raised a preliminary objection praying for an order of this Court to strike out the Appellant's brief of argument and consequently this appeal for being incompetent and for want of jurisdiction, on the following grounds;

1. The record of appeal was served on the 5th Respondent on the 12th day of January 2015.

2. The Appellant's Brief of argument was filed on the 23rd of January, 2015.

3. The Practice Directions on Election Appeal to this Court mandates the Appellant to file its Brief of argument 10 days of the service of the record of appeal.

4. Appellant's Brief of argument was filed outside the mandatory time allowed by law.

The 5th Respondent distilled a single issue for the determination of the preliminary objection which reads as follows;

Whether the Appellant's Brief of argument was filed within the time allowed by the practice direction on Election appeals to the Court of appeal and whether this does not render the entire appeal incompetent and liable to be struck out.

In arguing the preliminary objection Chief Olusola Oke Esq learned counsel to the 5th Respondent submitted that in an Election petition, time is of essence in the proceedings and once the time prescribed for doing an act has lapsed, the defect becomes fatally incurable and robs the Court of its jurisdiction. He maintained that the Appellate court in this country have held in a plaethora of cases that compliance with the provisions as to time within which to file an Election process is a fundamental precondition, a breach of which is incurable. He referred the Court to the cases of:EMEKA VS EMODI (2004) 16 NWLR (PT.900) 43, UKUME VS LIM (2008) 16 NWLR (PT.1114) 490.

Learned counsel also placed reliance on Paragraph 10 of the practice Directions on Election Appeals to the court of Appeal, which provides thus;

"Within a period of 10 days after the service of the record of proceedings, the Appellant shall file in Court, his written Brief of Argument in the appeal for service on the Respondent"

He argued that in this appeal the record of appeal was served on the Appellant on the 12th January, 2015 and that the 10 days elapsed on 21st January, 2015. He argued that the Appellant's Brief was filed on 23rd January, 2015 outside the 10 days prescribed by the practice directions.

On the need to comply with the provisions of the rules and practice direction in an Election matter learned counsel referred the Court to the cases of: NWANKWO VS YAR' ADUA (2010) 12 NWLR PT.1209 518 AT 588., PRINCE ABUBAKAR AUDU & ANOR VS CAPTAIN IDRIS WADA & 5 ORS. (SUIT NO. SC.332/2012) Unreported delivered on 10th September, 2012., ACTION CONGRESS OF NIGERIA (ACN) VS REAR ADM. MURTALA NYAKO & ORS. (SUIT NO.SC.409/2012) Unreported delivered on 5th November, 2012, PDP vs INEC & 25 ORS (SUIT No. SC.480/2014) Unreported delivered on 22nd September, 2014.

In conclusion learned counsel urged the Court to hold that the Appellants Brief of argument is incompetent and to strike out the appeal.

Chief Olusola Oke Esq. Learned counsel to the 5th Respondent in his oral argument before the Court adopted their argument contained in their Brief and urged the Court to strike out the Appellant's Brief of argument for being incompetent. He said that they have not filed a further and better affidavit to the counter affidavit because as he put it the counter affidavit is against the case of the Appellant. He urged the court to grant the application.

H. O. Afolabi SAN Learned Appellant's counsel in his response to the 5th Respondent application stated that the Appellant filed a counter affidavit to the said application and in opposing the said application he relied on all the paragraphs of the said counter affidavit as well as the exhibit A attached thereto.

He formulated a sole issue for determination of the preliminary objection thus;

"Whether in the entire circumstance of this case and the extant provisions of paragraph 10 of the Election Tribunal and Court practice direction, 2011, the 5th Respondent's preliminary objection is sustainable and whether the Appellant's Brief is valid and competent?'

Learned Senior counsel submitted that the preliminary objection is grossly misconceived in law and in fact, having been based on a false premise. He argued that ground (iii) of the preliminary objection has no basis because the Practice Directions did not mandate the Appellant to file its Brief within 10 days of service of the record of appeal but within 10 days after the service of the record. He contended that the entire grounds of the application cannot sustain the objection.

He maintained that the 5th Respondent's objection is misconceived and is premised on the misconstruction of paragraph 10 of the Election Tribunal and Court practice direction, 2011 and misrepresentation of facts on his part in relation to the date of service and computation of time. He referred the Court to the case of; NWANKWO VS YAR'DUA (2010) 12 NWLR (PT.1209) 518 SC.

Learned Senior counsel insisted that from the provision of paragraph 10 of the Election Petition Practice Directions which is clear and unambiguous the Appellant is only mandated to file in the Court his written Brief of argument in the appeal within a period of 10 days after the service of the record of appeal on the Appellant.

He argued that contrary to the impression of the 5th respondent, the record of appeal was served on the Appellant on the 13th January, 2015 and not 12th January, 2015; exhibit A attached to the counter affidavit bears this out and this Court can on the authority of MHABE VS SHIDI (1994) 2 NWLR (PT.326) 321 look at its own record, which includes the proof of service and affidavit of service by the Court bailiff in this regard to ascertain when the record of appeal was served on the Appellant. He urged the Court to so do.

Learned senior counsel insisted that the Appellant's Brief of argument was filed on 23rd January, 2015 within 10 days after service of the record on 13th January, 2015 and it is valid and competent.

Learned senior counsel argued that the authorities relied on by the 5th Respondent/applicant on this issue are predicated on good laws but inapplicable and irrelevant to this application. He referred the Court to the cases of;   
ADESULE VS MAYOWA (2011) 13 NWLR (PT.1263) 135 AT 177. OLATUNJI VS OLAKUNDE & ORS (2011) LPELR 47374 CA; (2012) 1 NWLR (PT.1280) 13 AT 167.

He concluded that the Appellant has complied strictly with the 10 days permitted by the law in the filing of its Brief of argument. He urged the court to discountenance the 5th Respondent's objection as lacking in merit and to dismiss the preliminary objection same not having been borne out of correct interpretation of the law.

E. Robert Emukpoeruo Esq. Learned counsel to the 1st Respondent said they are not opposing the application.

Yusuf Ali SAN counsel to the 2nd Respondent submitted that when the word "Within" is used in relation to dates it is inclusive of the day of service and if that is so and the record was served on the 13th January, 2015 the Appellant's time lapsed on 22nd January, 2015. He refers the Court to the case of NYAKO VS ACN and said he was not opposing the application.

Wilcox Aberaton Esq. Learned counsel to the 3rd respondent and Abayomi Sadiku Esq. Counsel for the 4th Respondents aligned themselves with the submission of the learned Senior counsel to the 2nd Respondent and said that they were not opposing the application.

The sole issue distilled by the 5th Respondent/Applicant is adopted in the determination of the preliminary objection.

We have carefully perused the affidavit in support of the application as well as the counter affidavit of the Appellant/Respondent to the motion, particularly paragraphs 7 and 8 which are hereby reproduced as follows:

"7. That I was informed by DAVID OJO on the 13th day of January 2015 at about 6pm in our office situate at 4th floor, Rivers House, Plot 83 Ralph Shodeinde Street, Central Area, Abuja, and I verily believe him that the record of appeal in this case was served on him in our Abuja office on the 13th day of January, 2015 at 4:55pm for and on behalf of the Appellant, and was duly received by him. Attached herewith is a copy of the proof of service and same is marked as exhibit A.

8. That I know as a fact that the Appellant filed its Brief of argument on the 23rd day of January, 2015 within the time prescribed by the PracticeDirection of this Honourable Court, 2011."

It can be gleaned from the paragraphs of the counter affidavit that the Appellant was served with the record of appeal on 13th January 2015. Exhibit A (Certificate of Proof of Service) attached to the counter affidavit referred to in paragraph 7 above further support the averments in the counter affidavit. The Appellant's brief of argument was filed on the 23rd January, 2015.  
In the absence of any further affidavit to challenge or counteract the counter affidavit the averment on the counter affidavit stands to be true and correct. See the cases; A.G NASARAWA STATE VS A.G PLATEAU STATE (2012) 10 NWLR (PT.1309) 419 AT 457 SC; OBEYA VS FIRST BANK OF NIGERIA PLC (2012) ALL FWLR (PT.636) AT 544.; FARSON VS CALABAR MUNICIPAL GOVERNMENT (2004) 9 NWLR (PT.878) 217.

The result is that the Appellant's brief of argument was filed within the 10 days stipulated by clause 10 of the Election Tribunal and Court Practice Directions 2011, the service of the Record of Appeal on him, on 13/1/2015.  
We are of the opinion that there is therefore no merit in the Motion on Notice filed by the 5th respondent, same is hereby dismissed.

Now having determined the preliminary objection, we shall now consider the merit of the Appeal.

The Appellants eleven (11) issues for determination are adopted for the determination of this appeal.

However, we observed that some of the issues as formulated by the appellant are related and can be grouped together. It is for this reason that we grouped the eleven issues into three and this appeal shall be determined along this line.

(a) Issues 1, 3, 4, 5 and 6 dealing with the striking out of paragraphs 110-120 and 125A of the Petition and of the qualification and/or non qualification of the 2nd respondent.

(b) Issue 7, 8, 9 and 10 concerning the allegation of forgery against the 2nd respondent and the striking out paragraph 13 of the petitioner's reply.

(c) Issues 2 and 11 relating to all allegations against the 4th and 5th respondents resulting in the striking out of their names and of the question whether or not the Armed forces have a role to play in election.

ISSUES 1, 3, 4, 5 AND 6

H. O. Afolabi SAN counsel to the Appellant argued on issue one that having regard to the fact that an issue of qualification or disqualification of the 2nd Respondent to contest the Election is Pre-Election matter as well as a Post Election matter, the Tribunal was wrong to strike out paragraphs 110-120 and 1254 of the petition. He referred the Court to Section 138 (1) of the Electoral Act, 2010 as amended and the cases of; UWAGBA VS FRN (2009) 15 NWLR (PT.1163) 91.; DANGANA VS USMAN (2013) NWLR (PT.1439) 50.; BOYE VS NJIDDA (2004) 8 NWLR (PT.876) 544 AT 595.

Learned senior counsel maintained that the Tribunal was wrong to have raised and decided suo motu the issue of delay as a factor inhibiting the right of the Appellant to raise the ground of qualification and disqualification in the petition and the Tribunal denied the Appellant the right to be heard, occasioning miscarriage of justice. He referred the court to the following cases: OYEKANMI VS NEPA (2000) 15 NWLR (PT.690) 414 AT 439.; BADMUS VS ABEGUNDE (1999) 11 NWLR (PT.627) 497 AT 507-508.; OKERE VS AMADI (2005) 14 NWLR (PT.945) 545 AT 559.; TINUBU Vs IMB (2001) 16 NWLR (Pt.740) 670 at 691-692.

Learned Senior counsel submitted on issue three that having pleaded and proved by evidence in exhibits M, ML, H and L that the 2nd Respondent was found guilty of contravention of the Code of Conduct for Public Officers and impeached by the House of Assembly of Ekiti State pursuant to Section 188 of the Constitution of the Federal Republic of Nigeria 1999, as amended, the Tribunal erred in holding that the 2nd Respondent was not disqualified under Section 182 (1) (e) of the said constitution. The court was referred to Section 285 (2) of the 1999 Constitution and the cases of: BELGORE VS AHMED (2013) 8 NWLR (PT.1355) 60.; INAKOJU VS ADELEKE (2007) 4 NWLR (PT.1025) 427.

On issue four learned Senior counsel argued that the word "or" in Section 182 (1) (e) of the 1999 Constitution is disjunctive. He referred the court to the cases of: NDOMA-EGBA VS CHUKWUOGOR (2004) 6 NWLR (PT.869) 382;  
ABUBAKAR VS YAR'ADUA (2008) 19 NWLR (PT.1120) 1 AT 83; and Section 18 (3) of the Interpretation Act.

Learned Senior counsel argued that had the Tribunal literally interpreted Section 182 (1) (e) of the 1999 Constitution it would not have reached the erroneous conclusion that a person had to be found guilty for contravention of the Code of Conduct by the Code of Conduct Tribunal before he could be disqualified from contesting a Gubernatorial Election.

H. O. Afolabi SAN insisted that by the said erroneous reasoning the Tribunal misapplied the decision in the case of AC VS INEC (2007) 12 NWLR PT.1048 220 which is not apposite to the issues in the present case. He cited the case of;EMEKA vs OKADIGBO & ORS (2012) 7 SC PT.1 PAGE 1.

Learned Senior counsel argued that the Tribunal should have upheld the Appellant's contention that the said impeachment of the 2nd Respondent contained in exhibitM and M1 was done by a body with jurisdiction and was a ground for disqualification of the 2nd Respondent to contest the said Election under Section 182 (1) (e) of the 1999 Constitution read along with section 139 (1) (a) of the Electoral Act 2010.

On issue five Learned senior counsel argued that the case of OMOWORARE VS. OMISORE (SUPRA) solely decided that impeachment is not a ground for disqualification of a candidate for a Gubernatorial Election. He maintained that in the instant case the Tribunal misapplied the case and thus extending it to cover the 2nd Respondent qualification to contest the Election in question. He referred the court to: ABUBAKAR & ORS VS NASAMU & ORS (2011) 11-12 SC PT.1 PAGE 1; ABDULKAREEM VS. INCAR (1984) NSCC 628 and section 182 (1) (e) of the 1999 Constitution, as amended.

On issue six learned senior counsel argued that by the decision of this Court in Exhibit H striking out the 2nd Respondent's appeal over the impeachment proceedings, the impeachment was extant, therefore the Tribunal was in error to hold that exhibit H did not determine the right of the parties.

The 1st Respondent Brief of argument identified four issues. Issues 3.1 and 3.4 contained therein reply to issues 1, 3, 4, 5 and 6 of the Appellant's issues for determination.

E. Robert Emukpoeruo Esq' Learned counsel to the 1st Respondent referred to Section 177 and 182 of the 1999 constitution as amended and section 138 (1) (a) of the Electoral Act to contend that the alleged impeachment proceedings was a Pre-Election matter outside the powers of the Tribunal under Section 285 (2) of the 1999 Constitution, as amended. He argued that the Tribunal was right in striking out paragraphs 110-120 and 1254 of the petition; and that even if the Tribunal was in error in striking out the said paragraphs of the petition, this court is entitled to look at the decision reached by the Tribunal on the matter, not its reasoning. The court was referred to the cases of: N.I.I.A. vs AYANFALU (2007) 28 WRN 34 AT 57; IBULUYA & ORS VS DIKIBO & ORS (2010) 18 NWLR (PT.225) 627.

Learned counsel maintained that since the said paragraphs of the petition were not hinged on section 182 of the 1999 Constitution, as amended there was no miscarriage of justice resulting from the order of the Tribunal striking out paragraphs 110-120 and 1254 of the petition. He cited in support of his submission the case of OKOCHI vs. ANIMKWOI (2003) 18 NWLR (PT.851) PG. 1.

On issue three learned counsel argued that the issue of delay in raising the ground of disqualification under Section 182 of the 1999 Constitution, as amended being a question of law, the Tribunal was right to raise and decide it suo motu, and that it did not lead to miscarriage of justice. He referred the court to the cases of: EFFIOM VS C.R.S.I.E.C (2010) 14 NWLR (PT.1213) 106.; THE REGISTERED TRUSTEE OF THE ROSICRUCION ORDER & AMORC VS AWONIYI (1994) 7 NWLR (PT.355) 154.

On issue four learned counsel argued that the evidence of impeachment was placed before the Tribunal which evaluated it and came to the right decision that the result of the impeachment proceedings did not come within the context of Section 182 of the 1999 constitution, as amended and Section 138 (1) of the Electoral Act on disqualification and qualification, respectively, of the 2nd Respondent to contest the Election.

He insisted that the question of finding the 2nd Respondent guilty of contravention of the Code of Conduct by the impeachment panel pursuant to Section 188 of the 1999 Constitution, as amended was not arrived at by the Code of Conduct Tribunal vested with the Constitutional power to adjudicate on such matters as it is neither a court of law nor Tribunal established by law. He argued that the said finding of guilt by the impeachment panel was incompetent and not a disqualifying ground for the 2nd Respondent to contest the said Election. He cited in support the cases of: OMOWORARE VS OMISORE (2010) 3 NWLR (PT.1180) 58 AT 111-114; KUBOR VS DICKSON (2013) 4 NWLR (PT.1345) 534 AT 582.; ACTION CONGRESS VS INEC (2007) 12 NWLR (PT.1048) 222 AT 260, 291 and 293-294.; SOFEKUN VS AKINYEMI (1980) 5-7 SC 1.

The 2nd respondent subsumed issues 1, 3, 4,5 and 6 of the Appellant's brief of argument in issues (i) and (v) of his brief of argument.

Yusuf Ali SAN Counsel to the 2nd Respondent contended on issue (i) that the issue of disqualification of the 2nd Respondent arose before the Election, therefore the Appellant was wrong to have raised it at the Tribunal.

Learned senior counsel maintained that the issue was a pre-Election matter as rightly held by the Tribunal, He referred the court to the cases of: IBRAHIM VS INEC (1998) 8 NWLR (PT.614) 344 AT 351; CPC VS UMAR (2012) NWLR (PT.1315) 605 AT 624; KAKIH VS. PDP (2014) 15 NWLR (PT.1430) 374 AT 430; PDP VS INEC & ORS (2014) LPELR 1.; ODEDO VS. INEC (2008) 17 NWIR (PT.1117) 554 AT 602.

Learned Senior counsel argued that there was no miscarriage of justice since the Tribunal went ahead to consider paragraphs 110-120 and 125A of the petition on the merit. He cited in support the cases of: MEDICAL AND DENTAL PRACTITIONERS DISPLINARY TRIBUNAL VS OKONKWO (2001) FWLR (PT.44) 542 AT 598; AMASIKE VS REGISTRAR GENERAL CORPORATE AFFAIRS COMMISSION (2010) ALL FWLR (PT.541) 1406 AT 1442.

Learned senior counsel placed heavy reliance on the case of OMOWORARE VS. OMISORE (2010) 3 NWLR (PT.1180) 58 AT 111 - 114 to support the Judgment of the Tribunal that the outcome of the impeachment proceedings by an incompetent body, touching on contravention of the Code of Conduct by the 2nd Respondent did not disqualify the 2nd Respondent from contesting the Gubernatorial Election. He cited the cases of: OGBUAGU VS OGBUAGWU (1981) 2 NCR 680 AT 684.; ACTION CONGRESS VS INEC (2007) 6 SCNJ (PT.65) 77 - 78.

In the 3rd Respondent's Brief of argument issues 1 and 7 were framed to cover issues 1, 3, 4, 5 and 6 in the Appellant's Brief of argument.

In arguing issue one Learned counsel to the 3rd respondent cited the cases of: INT'L NIGERBUILD CONSTRUCTION CO. LTD VS GIWA (2003) 13 NWLR (PT.836) 69 AT 71.; BUHARI VS OBASANJO (2005) 13 NWLR (PT.941) AT 1

On the duty of the Court or Tribunal to keep within its jurisdiction which the Lower Tribunal rightly obeyed by its order striking out paragraph 110-120 and 1254 of the petition which were pre-Election matters outside section 182 of the 1999 constitution, as amended. The court was referred to section 23 (4) of the code of conduct bureau Tribunal Act CAP C15 LFN 2004 and the following cases of: AHMED VS AHMED (2013) 15 NWLR (PT.1377) 274 AT 329; DANGANA VS USMAN (2013) 6 NWLR (PT.1349) 50 AT 78.; ANPP VS USMAN (2008) 12 NWLR (PT.1100) 1 AT 55.; APGA VS UBA (2012) 11 NWLR (PT.1311) 325 AT 355.; AMAECHI VS INEC (2007) 18 NWLR (PT.1065) 170 AT 196.; IBRAHIM VS INEC (1999) I NWLR (PT.614) 344 AT 351.; NEC VS NRC 1993 1 NWLR (PT.267) 120 AT 129.; ADEBIYI BABALOLA (1999) 1 NWLR (PT.263) 24 AT 40.; ENAGI VS INUWA (1993) 3 NWLR (PT.231) 548 AT 564.; SAIDU VS ABUBAKAR (2008) 12 NWLR (PT.1100) 201 AT 263.; ODEDO VS INEC (2008) 12 NWLR (PT.1117) 554 AT 602.

Wilcox Abereton Esq. learned counsel to the 3rd respondent also referred the court to Section 182 (1) (e) of the 1999 Constitution, as amended and paragraph 15 (1) of the Fifth Schedule and the case of A.C vs INEC (2007) 12 NWLR (PT.1048) 220 and contended on his issues even the guilt or otherwise contemplated by section 182 (1) (e) of the 1999 constitution must be guilt determined by the regular court or the Code of Conduct Tribunal as the case may be and not by an impeachment panel that was setup by the House of Assembly of Ekiti State.

We observed that the 4th and 5th Respondents' Brief of argument did not respond to issues 1, 3, 4, 5 and 6 of the Appellant's Brief of argument.

The Appellant's reply to the 1st Respondent Brief dated 3/2/2015 and filed on 4/2/2015 combined its reply to issues 1 and 3 together and contended that there is no time limit for raising a question of disqualification of candidate to contest Election. The cases of PDP VS INEC (2014) 17 NWLR (PT.1437) 525 AT 558 was cited in support.

Learned appellant's counsel argued that by raising and deciding the issue of delay suo motu the Tribunal breached the Appellant's right to fair hearing under Section 36 (1) of the 1999 Constitution, as amended, which led to miscarriage of justice. He placed reliance on the case of OLUMESAN VS OGUNDEPO (1996) 2 NWLR (Pt.433) 628 AT 647.

In reacting to issue 4 the Appellant's reply Brief contended that the cases of; KUBOR VS DICSON (SUPRA) and SOFEKUN VS AKINYEMI (SUPRA) are inapplicable to the case in hand as the Tribunal had the jurisdiction to determine whether the allegation of breach of Code of Conduct against the 2nd Respondent were proved in the impeachment proceedings under Section 188 (8) & (9) of the 1999 Constitution, as amended.

In the Appellant's reply Brief to the 2nd Respondent's Brief filed on 4/2/2015 addressed issue 1 and 4 and contended that by raising and deciding the issue of delay in challenging the disqualification of the 2nd Respondent the Appellant was denied its fundamental right to fair hearing which led to miscarriage of justice to the Appellant. He cited in support the case of OLUMESAN VS OGUNDEPO (1996) 2 NWLR (PT.433) 628 AT 645.

It was argued in reply to issue 5 that Sections 182 (1) (e) and 188 of the 1999 Constitution, as amended, were in issue in the petition, unlike in the cases of;OGBUAGU VS OGBUAGU (SUPRA) and AKEREDOLU VS MIMIKO (SUPRA) which are distinguishable on that ground from the present case.

In the Appellant's reply Brief to the 3rd Respondent's Brief filed on 4/2/2015 it was argued that the arguments contained therein were mostly conceded by the 3rd Respondent and that some of the arguments on delay and contravention of the Code of Conduct were not covered by any ground of appeal, so it was not competent for the 3rd Respondent to raise any issue for determination. Cited in support of this submission is the case of; NKUTA VS NDEM (2009) LPELR 4632. It was maintained that the raising and deciding of the issue of delay suo motu by the Tribunal caused miscarriage of justice to the Appellant.

In considering issues 1, 3, 4, 5 and 6 we find Paragraphs 110-120 and 1254 struck out by the tribunal pertinent and same are hereby reproduced as follows:

“110. The Petitioner avers further that sometimes in the year 2006 while the 1st defendant was the Governor of Ekiti State, the Ekiti State House of Assembly by a notice signed by the 23 members of the House of Assembly called for the impeachment of the 2nd Respondent which notice was directed to the honourable speaker of the Ekiti State House of Assembly. The certified true copy of the notice of impeachment dated 2th September, 2006 is hereby pleaded.

111. Your Petitioner avers that the offences and the contravention of the Code of Conduct upon which the impeachment was hinged as contained in the notice mentioned above are as follows;

i. Illegal operation of foreign account with bank of America, united States of America with VISA CREDIT No.45397806 and 28083056 and illegal operation of foreign account with Barclays Bank Plc. 38 Hans Crescent, Knoghtsbridge, London, SW1 XOLZ contrary to paragraph 3 of the Code of Conduct for public officers.

ii. Illegal diversion of local government funds contrary to Section 162 of the Constitution of the Federal Republic of Nigeria 1999.

iii. Receipt of illegal gifts of the sum of 37,000 Pounds from Biological Concepts Ltd and receipt of a House lying and situate at No.10, Kobiewu Crescent Iyaganku, GRA, Ibadan Oyo State valued at over N40,000,000.00 built from the proceeds of the poultry project.

iv. Receipt of properties at No. 23 Ring Road Restaurant Street, Iyaganku GRA, Ibadan Oyo State built from the proceeds of the contract of Ekiti State Governor's office valued at about N20,000,000.00.

v. Receipt of property at Are Rad, Afao Ekiti valued at about N25,000,000.00 built from the proceeds of the contract for fountain hotel.

vi. Receipt of the sum of N42,000,000.00 collected from Mr. Abiodun Faari-ole of grid associates through Mr. Ayoola Abiola of the then Standard Trust Bank Plc being proceeds of contract for fountain hotel and Governor's Office.

112. The Petitioner will contend at the trial that the 2nd Respondent was found guilty of the contravention of the Code of Conduct.

113. Your Petitioner States that the notice of impeachment was served on the 2nd Respondent by the then speaker of the Ekiti State House of Assembly vide letter dated 26th September, 20O6. A certified true copy of the letter signed by Hon. Friday Aderemi will be relied upon at the hearing of this petition.

114. Your Petitioner avers that the 2nd Respondent filed his response to the impeachment notice wherein he made a blanket denial of the allegation levelled against him by the members of the House of Assembly. The certified true copy of the 2nd Respondents response dated 9th October, 2006 is also pleaded.

115. Your Petitioner avers that the then speaker of the House of Assembly requested the Acting Chief Judge of Ekiti State to appoint a panel of seven members to investigate the allegations as provided for under the Constitution of the Federal Republic of Nigeria 1999.

116. The Acting Chief Judge set up the panel to investigate the Conduct of the 2nd Respondent in his capacity as the Governor of Ekiti State and the panel submitted its report to the House of Assembly, which report indicted the 2nd Respondent and found him guilty of all the allegations including contravention of the Code of Conduct. The certified true copy of the report is hereby pleaded.

117. Your Petitioner avers that Ekiti State House of Assembly, which is one of the arms of government in Ekiti State accepted and adopted the report.

118. Pursuant to the report and its acceptance, the Ekiti State House of Assembly impeached the 2nd Respondent who thereby ceased to be Governor of the State. The Ekiti State House of Assembly debates and official report of Monday 16th October, 2006 is hereby pleaded.

119. Your Petitioner avers that the 2nd Respondent challenged his removal and/or impeachment from office as the Governor of Ekiti State in the Federal high Court Akure where the Ekiti State House of Assembly, economic and financial crimes Commission (EFCC) among others were made defendants.

120. Your Petitioner avers that the jurisdiction of the Federal high Court to entertain the case of the 2nd Respondent was challenged and the Court of appeal Benin division upheld the objection and struck out the case of the 2nd Respondent. The certified true copy of the Judgment delivered on 9th December, 2009 in appeal No.CA/44 (A/C) 2007 between Ekiti State House of Assembly V. Peter Ayodele Fayose will be relied upon.

125. WHEREOF your Petitioner prays as follows:

A. That it be determined and declared that the 2nd Respondent Peter Ayodele Fayose was not qualified to contest the Governorship Election held on 21st June, 2014 on the ground that he was found guilty of the contravention of the Code of Conduct by the impeachment panel set up by the Acting Chief Judge of Ekiti State and the Ekiti State House of Assembly, consequent upon which he was impeached and removed from the office of the Governor of Ekiti State in the year 2006."

The above paragraphs of the petition dealt with the qualification and disqualification of the 2nd Respondent to contest the Election in dispute. Section 138 (1) (a) of the Electoral Act 2010 as amended provides the grounds for challenging an Election on grounds of qualification thus:

"An Election may be questioned on any of the following grounds, that is to say;

a. That a person whose Election is questioned was, at the time of Election, not qualified to contest the Election..."

While Section 182 (1) of the constitution of the Federal Republic of Nigeria 1999 as amended, stipulates the grounds for the disqualification of a candidate to contest Gubernatorial Election thus:  
  
"No person shall be qualified for Election to the office of Governor of a state if:

(a) Subject to the provisions of Section 28 of this Constitution, he has voluntarily acquired the citizenship of a country other than Nigeria or, except in such cases as may be prescribed by the National Assembly, he has made a declaration of allegiance to such other country; or

(b) He has been elected to such office at any two previous Elections; or

(c) Under a law in any part of Nigeria, he is adjudged to be a lunatic or otherwise declared to be of unsound mind; or

(d) He is under a sentence of death imposed by any competent Court of law or Tribunal in Nigeria or a sentence of imprisonment for any offence involving dishonesty or fraud (by whatever name called) or any other offence imposed on him by any Court or Tribunal or substituted by a competent authority for any other sentence imposed on him by such a Court or Tribunal; or

(e) Within a period of not less than ten years before the date of Election to the office of Governor of a State he has been convicted and sentenced for an offence involving dishonesty or he has been found guilty of the contravention of the Code of Conduct; or

(f) He is an undercharged bankrupt, having been adjudged or otherwise declared bankrupt under any law in force in Nigeria; or

(g) Being a person employed in the public service of the federation or of any State, he has not resigned, withdrawn or retired from the employment at least thirty days to the date of the Election; or

(h) He is a member of any secret society; or

(i) He has presented a forged certificate to the Independent National Electoral Commission."

In our considered opinion, the issue of qualification or disqualification to contest an Election being a pre-Election and post Election matter, can be raised in an Election Petition.

In the case of DANGANA VS USMAN (SUPRA) AT 89-90; It was specifically stated:

"That the qualification/disqualification to contest a matter is both pre-election and on election matter"

Also in WAMBAI VS DONATUS & ORS (2014) 14 NWLR (PT.1427) 223 AT 252 the Court held thus;

"It is therefore not a correct Statement of the law that in all cases a pre-election matter must be instituted and heard and determined by the high Court as that principle admits of exceptions one of which is where the pre-Election matter is filed after the Conduct and conclusion of an Election, it is the relevant Election Tribunal that has the jurisdiction to hear and determine it."

See also: SALIM V. CPC & ANOR (2013) 30 WRN 1 AT 20-21.

We are of the opinion that the Tribunal was wrong in striking out paragraphs 110-120 and 125A of the petition dealing with the qualification of the 2nd Respondent to contest the Gubernatorial Election in question. The tribunal suo motu raised and decided the issue of delay by the Appellant and held that the Appellant lost the opportunity to present the complaint at the Tribunal. Since it however went on to consider and decide the Petition on its merits giving due consideration to those paragraphs, no miscarriage of justice has thereby been occasioned. See: MEDICAL AND DENTAL PRACTITIONERS DISCIPLINARY TRIBUNAL V. OKONKWO (2001) FWLR (PT.44) 542 AT 598; & AMASIKE V. REGISTRAR GENERAL CORPORATE AFFAIRS COMMISSION (2010) ALL FWLR (PT.541) 1406 AT 1442. Nonetheless, we resolve issue one in favour of the Appellant that the Election Tribunal was in error to have struck out paragraphs 110 -120 and relief 125A of the Petition.

Although the Tribunal struck out paragraphs 110-120 and 125A of the petition it nonetheless, out of an abundance of caution, considered the said paragraphs on the merit but found the allegation or ground not proved on the totality of the evidence adduced with respect to the said paragraphs of the petition. At pages 1471-1483 of the record the Tribunal gave the ground of the petition extensive treatment in its Judgment.

Issues 3, 4, 5 and 6 framed for determination by the Appellant are interrelated and would be taken together in the discourse, For ease of reference the said issues are reproduced thus;

3. Whether or not the Election Tribunal was right to have reviewed the decision of the panel that found 2nd Respondent guilty of breach of the Code of Conduct?

4. Whether in the light of the clear provisions of Sections 182 (i) (e) and 188 of the 1999 Constitution as amended, the Election Tribunal was right in its decision that the panel that found the 2nd Respondent guilty of breach of the Code of Conduct had no power to find him guilty as such?

5. Whether in the light of the provision of the law and the case made by the Appellant, the Tribunal was right in applying the decision in Omoworare V. Omisore against the Appellant?

6. Whether in its decision on the petition, the Election Tribunal properly applied the Court of Appeal, Benin Division Judgment tendered before it?

In our considered opinion, issues 3, 4, 5 and 6 dwell on the impeachment of the 2nd Respondent on ground of having been found guilty by the House of Assembly of Ekiti State for contravention of the Code of Conduct.

It would appear to us that the Appellant hinged its contention on the premise that the House of Assembly Ekiti State having found the 2nd Respondent guilty of contravention of Code of Conduct upon which the 2nd respondent was impeached, the 2nd Respondent was disqualified from contesting the gubernatorial Election under Section 182 (1) (e) of the 1999 constitution of the Federal Republic of Nigeria, as amended.

At the risk of repetition, Section 182 (1) (e) of the 1999 Constitution as amended reads as follows;

"No person shall be qualified for Election to the office of Governor of a State if;-

(e) within a period of less than ten years before the date of Election to the office of Governor of a State he has been convicted and sentenced for an offence involving dishonesty or he has been found guilty of the contravention of the Code of Conduct; or..."

In the case of OMOWORARE V. OMISORE (2010) 3 NWLR (PT.1180) 58where a similar question arose for determination this Court held that impeachment is not one of the grounds for disqualification of a candidate from contesting Gubernatorial Election.

It is also our considered opinion that Section 182 (1) (e) of the 1999 Constitution as amended dealing with disqualification of a candidate to stand for gubernatorial Election has to be construed together with section 36 (1) and (5) of the same Constitution in order to ascertain whether or not the type of conviction or guilt passed by an investigative panel of the House of Assembly of a state is the one contemplated by section 182 (1) (e) of the 1999 Constitution, as amended.

Appellant had a quarrel with the act of the tribunal sitting as if it were an appellate court on appeal to review the status of the panel that found the 2nd respondent guilty of breach of Code of conduct. We shall deal with this issue later, but suffice it here to say that the tribunal was wrong to take upon itself to review the status of the panel that handed down the impeachment verdict on the 2nd respondent.

In the case OMOWORARE V. OMISORE (SUPRA) the issue of the outcome of an impeachment process was treated exhaustively and held not to constitute one of the grounds of disqualification of a candidate for an Election under section 66 (1) (d) and (h) of the 1999 Constitution, as amended, which is on all Fours with Section 182 (1) (e) of the same Constitution. We gratefully adopt same as our decision in this case.

Consequently, the quantum of pleading and oral/documentary evidence on the impeachment process where the 2nd Respondent was found guilty of breach of Code of conduct tendered by the Appellants at the Tribunal did not establish the disqualifying ground under Section 182 (1) (e) of the 1999 Constitution, as amended. The Tribunal therefore arrived at the right decision that the leg of disqualification contained in section 182 (1) (e) of the 1999 Constitution, as amended, was not proved.

The rationale or wisdom for insisting that the entry of guilt must be made by a regular court or code of conduct Tribunal, as the case may be, was amply supplied by the Court in OMOWORARE V. OMISORE (SUPRA) AT PAGE 119 thus;

"Consistency and adherence to the Constitutional allocation of powers is well thought of, as it seeks to safeguard a vindictive and an indiscriminate use or abuse of power, which danger and consequence could be far reaching and out of control. There is every opportunity that human actions could take the turn of being subjective in nature especially where the alter ego side of the personality is involved, it could result into a complete absence of self control and or sense of sound reasoning. The concept of power always connotes position of authority.

Power swapping therefore and or its alteration thereof, if allowed, would in the situational circumstances subject the weaker at the mercy of the powerful authority. The insignificant ant for instance cannot face the fury of powerful lion. The balance would not certainly meet the equation."

We affirm the said finding accordingly, as we are concerned with whether the decision reached by the Tribunal on the issue is right and not whether its reasoning is faulty. See: UKEJIANA v. UCHENDU 13 WACA 45 AT 46.; TAIWO v. SOWEMIMO (1982) 5 SC 60 AT 74-75.; IBULUYA v. DIKIBO (2011) 3 WRN 1 AT 23.

Since the finding of the guilt for contravention of the Code of Conduct by the 2nd Respondent emerged from impeachment proceedings which were argued in issues 3, 4, 5 and 6 of the Appellant's issues for determination, the result of the impeachment cannot be used as a ground for disqualification of the 2nd Respondent to contest the gubernatorial Election. See the case of: OMOWORARE v. OMISORE (SUPRA)

It is our conclusion on issues 3, 4, 5 and 6 (supra) that the Tribunal was right in holding that the result of the impeachment proceedings is not a ground for disqualification of the 2nd Respondent to vie for the Election under Section 182 (1) (e) of the 1999 Constitution, as amended, read along with Section 138 (1) (a) of the Electoral Act (supra). The issues are resolved against the Appellant.

We however, wish to observe in passing that the essence of impeachment was to identify somebody who is not fit to hold public office, but is rather sad and unfortunate that after finding one, the law appears reluctant to give the desired punch. It is hoped that in future this issue will be reviewed by the appropriate authority.

**ISSUES 7, 8, 9 AND 10**

The Appellant's allegation of forgery of Exhibit E could be found in issues 7, 8, 9 and 10 of the Appellant's brief of argument. It was argued that the reasoning of the Tribunal that the petitioner, having failed to report the allegation of forgery to the security agencies meant that it has failed to prove beyond reasonable doubt such allegation. Learned senior counsel maintained that the allegation of forged certificate was not raised in the contest of criminal prosecution for the lower Tribunal to ascribe that level to the proof of same.

The Tribunal according to Appellant misdirected itself in importing an unnecessary standard of proof required in an allegation of crime. He then urged the court to resolve issue number seven in favour of the Appellant.

In a reply brief, the 1st Respondent stated that there is nothing to show that the Higher National Diploma (HND) certificate of the polytechnic Ibadan which the 2nd Respondent presented to the 3rd Respondent (INEC) was earned and awarded to any other mortal in this planet Earth other than the 2nd Respondent. And no attempt was made by the Appellant to prove same.  
In his brief of argument, the 2nd respondent submitted that since the allegation of the presentation of forged certificate borders on crime, it must be proved beyond reasonable doubt. See: GAMBARI VS. SARAKI (2009) ALL FWLR (PT. 469) PAGE 445; ALLIANCE FOR DEMOCRACY V. FAYOSE (2004) ALL FWLR (PT.222) PAGE 17191; IMAN VS. SHERIFF 1 LRECN 62 AT 152-153.

Appellant under issue eight sought to demonstrate that the Tribunal was wrong in the conclusion that the allegation on presentation of forged certificate against the 2nd Respondent was not proved beyond reasonable doubt. It was argued on behalf of the appellant that facts could be proved by either oral, or documentary evidence. Exhibits P, G and E are INEC forms, the bio data and Higher National Diploma respectively.

It was argued on behalf of the appellant that that the Polytechnic Ibadan did not issue a certificate to one Oluwayose Ayodele Peter rather the thrust of the position or contention of the Appellant is that Exhibit E which the 2nd Respondent submitted to INEC was never issued to him by the authority or the Polytechnic, Ibadan. That the likely presumption is that the said Exhibit E was invented and submitted by the 2nd respondent as a document which was never issued to him by the appropriate authority.

Learned Senior counsel to the Appellants conceded that where an allegation of crime is made in an election petition, it behoves on the person making the allegation to prove same and the standard of proof required is proof beyond reasonable doubt.

He referred the court to the case of:NWOBODO VS. ONOH (1984) NSCC 1 AT 3.

He argued that such proof does not require that such allegation must be proved beyond all shadow of doubt. See: AKINDIPE V. STATE (2012) 16 NWLR (PT. 1325) PAGE 94 AT 114. Learned Senior counsel submitted that having tendered documentary evidence in respect of Exhibit E, which said document is presumed to be genuine and correct, the allegation of forgery has been proved beyond reasonable doubt against the 2nd Respondent. See: DAGGASH V. BULAMA (2004) 14 NWLR (PT. 892) PAGE 144 AT 187; UBN V. OZIGI (1994) 3 NWLR (PT. 333) PAGE 385; AJIDAGBA V. IGP (1958) SCNLR 60.

Learned Senior counsel contended one citizen can only be from one State of the 36 States of the Federation. But in Exhibit P (INEC form), the 2nd Respondent supplied information to the 3rd Respondent (INEC) where he gave his name as Ayodele Peter Fayose and claimed to be from Afao Ekiti in Oye Ekiti Local Government Area of Ekiti State. Therein he represented Exhibit E to the 3rd Respondent (INEC) as his own Higher National Diploma Certificate. By that event learned Appellant's counsel contended that the authority of the Polytechnic Ibadan never issued a Higher National Diploma Certificate to a citizen of Afao - Ekiti in Ekiti State. In essence he contended that the said Exhibit E which the 2nd Respondent claimed and presented to INEC as his document exposed the falsity of his claim that Exhibit E was issued to him by the authority of the Polytechnic Ibadan. He contended Exhibit E would appear to have been issued to one Oluwayose Ayodele and that even Exhibit G (bio data) is a personal bio data of one Oluwayose Ayodele who is from Oluyole Local Government Area of Oyo State. Therefore the 2nd Respondent cannot be the one and the same person shown in Exhibits P & G as the parties in the two exhibits are from different Local Government Areas i.e. from Afao in Oye Ekiti Local Government Area of Ekiti State and Oluyole Local Government of Oyo State.

Learned Senior counsel contended that asking for the production of the man in Exhibit G is to create a circumstance or situation whereby the appellant is being burdened with a necessity or responsibility of proving beyond all shadow of doubt the difference of the two personalities. He argued that the 2nd Respondent therefore has a duty to offer an explanation as to how he came be a citizen of Afao Ekiti and at the same time from Oluyole Local Government of Oyo State.

On the absence of the evidence of 2nd Respondent, learned senior counsel contended that even though it is common knowledge and trite that ordinarily, a person is not obliged to enter the witness box in any proceeding but in the instant case, it has become necessary because the fact in issue relates to the personal Conduct of the 2nd Respondent. He therefore has a duty to offer an explanation and be cross-examined. He referred to the case of:ATTORNEY GENERAL KWARA STATE V. OLAWALE (1993) 1 NWLR (PT.272) PAGE 645.

Learned senior counsel argued that exhibit E and P which the 2nd respondent relied on is an invention and a forgery. He maintained that having presented same to the 3rd Respondent he ought to be disqualified under section 182(1) (j) of the 1999 constitution of the Federal Republic of Nigeria (as Amended) from contesting the Governorship seat in Ekiti State.

Learned senior counsel insisted that the Tribunal, fell into a very grievous error in its decision, that the 3rd Respondent never alleged that the 2nd Respondent submitted a forged document to them. He argued that the approach adopted by the Tribunal shows a clear misconception of the Tribunal's perception of the role and status of 3rd Respondent vis-a-vis Exhibit E. He maintained that it was wrong for the Tribunal to say that the Exhibit E is a genuine document simply because, 3rd Respondent did not deny its authenticity.

Learned senior counsel contended that the reasoning of the Tribunal that the failure to call an officer of the polytechnic Ibadan to give evidence on the propriety of Exhibit E as to whether it is a forged document or otherwise has rendered the allegation of forgery unproven and is a clear misunderstanding of the law. Having tendered Exhibits G & P in evidence there was therefore no need to call any other evidence from the polytechnic Ibadan as the documents speak for themselves.

It was the opinion of the tribunal that the certificate claimed by the appellant to have been forged was produced by the Registrar of the Polytechnic Ibadan and therefore there was no need to contend that Exhibit E was forged. Learned Appellant's counsel contended that such statement the central question before the tribunal is whether Exhibit E submitted by the 2nd Respondent to the 3rd Respondent was actually issued to the 2nd Respondent, since it is evident from Exhibit G that Ayodele Oluwayose who attended the polytechnic Ibadan is from Oyo State, the 2nd Respondent could not have therefore validly presented Exhibit E to the 3rd Respondent as none was ever issued in his favour by the Polytechnic Ibadan.

He argued that what the 2nd Respondent presented to the 3rd Respondent is his own invention, the fact that the Registrar of the Polytechnic, Ibadan tendered Exhibit E has not diminished the efficacy or potency of the contention of the Appellant that the 2nd Respondent presented a forged certificate to the 3rd Respondent.

Learned Senior counsel urged the Court to hold that the Tribunal was in grave error in concluding that the allegation or presentation of a forged certificate was not proved and to resolve this issue in their favour.

In the 1st Respondent's brief of argument the 1st Respondent's counsel contended that the first point to clear is the statement made in passing by the Tribunal that the Appellant made no report of forgery to the police. On this, learned Senior counsel submitted that the statement was made in passing by the Tribunal and that the Tribunal did not hold it against the Appellant as a failure of proof of the allegation of forgery, on the assertion by the Appellant he has proved a presentation of a forged certificate beyond reasonable doubt on the presentation of Exhibits E, G and P.

Learned counsel to the 1st Respondent contended that Exhibit E is the HND certificate of the 2nd Respondent issued to him by the Polytechnic, Ibadan and that the Registrar of the Polytechnic had duly certified it as a true copy. It is therefore assumed to be genuine and authentic. He maintained that Exhibit G is the student bio data of 2nd Respondent bearing the name of Oluwayose, Ayodele P. It is also duly certified as a true copy as presented by the Registrar of polytechnic Ibadan and the passport photograph at the back of Exhibit G is that of the 2nd Respondent duly identified by Rw1, his friend for over forty years.

Learned counsel maintained that the identification of the 2nd Respondent on Exhibit G was never challenged or impugned during cross-examination of Rw1 by the Appellant. Exhibit P is the affidavit in support of the personal particulars of the 2nd Respondent which was duly certified by Ibrahim K. Bawa, A.G. Director Legal services INEC. Also it was made clear that the former name of the 2nd Respondent is Oluwayose as per the evidence deposed to by the mother of the 2nd Respondent Exhibits E, G & P were not shown to the Appellant's witnesses because they are not the makers of the Exhibits nor were they employed in the services of the Polytechnic, Ibadan.

Learned counsel maintained that it was on the basis of this that the lower Tribunal treated their evidence as hear-say and the lower Tribunal was right to do so, and rejected their evidence.

Learned counsel submitted that the appellants have therefore failed to prove that the 2nd Respondent presented a forged HND certificate to the 3rd Respondent. Interestingly, learned 1st Respondent counsel contended that this same issue has been laid to rest by the lead judgment of Nsofor JCA in AD vs. FAYOSE (2005) 10 NWLR (PT. 932) PAGE 151 AT 192 - 194 to the effect that Peter Ayodele Fayose and Peter Ayodele Oluwayose are one and the same person. Also that the 2nd Respondent is the owner of the certificate in Exhibit E.

Learned senior counsel to the 2nd Respondent submitted that the allegation of forgery being a criminal offence proof of it is that beyond reasonable doubt which the Appellant has failed to do.

Learned senior counsel argued that the failure of the 2nd Respondent to personally give evidence and be cross-examined was fatal to his case is misconceived. He argued that the duty of the Appellant to prove his case beyond reasonable doubt is fixed and does not put any obligation on the 2nd Respondent to testify in person to prove his innocence especially on the face of the inability of the Appellant to prove his own case beyond all reasonable doubt as stipulated by law. He referred the court to the case of: PDP V. INEC (2012) 7 NWLR (PT. 1300) PAGE 538 AT 560.

According to learned senior counsel, since Rw1 was able to identify the 2nd Respondent's photograph on Exhibit G, the argument that the 2nd Respondent ought to testify personally becomes highly misplaced and tendentious.  
The 3rd Respondent on its own part as shown in issue No. 6 stated that the standard required in proof of the criminal allegation of presenting forged Higher National Diploma Certificate of Polytechnic Ibadan to the 3rd Respondent is beyond reasonable doubt. That since the Appellant has alleged the commission of a crime, he has a duty to introduce credible evidence to establish same in accordance with section 135(1) of the Evidence Act. He referred the court to the cases of;NWOBODO V. ONOH (1984) 1 SCNLR 1; CHIME V. EZEA (2009) 2 NWLR (PT. 1125) PAGE 263.

Learned 3rd Respondent counsel stated that in an attempt to prove the allegation, the Appellant subpoenaed the Registrar of the Polytechnic, Ibadan and Pw9 and Pw11 as witnesses. Their evidence before the Tribunal was found to be hear-say as they had no relationship whatsoever with the making of the certificates and have never worked at the Polytechnic. These were the evidence which the Appellant urged the Tribunal to come to the conclusion that a crime has been committed.

Learned counsel stated that the facts and grounds in support of the allegation of forgery were devoid of particulars. The assertion he contended is bare and worse still is that the evidence of Pw9 and Pw11 were merely a repetition of the pleadings in the petition. He submitted that the law is that assertion without credible evidence must be dismissed. He referred the court to the case: L.S.B.P.C V. PURIFICATION TECH LTD (2013) 7 NWLR (PT. 1352) PAGE 82.

Learned senior counsel then submitted that the fact that the Registrar of the Polytechnic, Ibadan produced a duly certified copy of the certificate defeats the whole allegation of forgery and presentation of forged certificate by the 2nd Respondent. This is more so as there is no evidence to show that what was produced by the Registrar is different from what the 2nd Respondent submitted to the 3nd Respondent.

It has been contended on behalf of the appellant that the 2nd Respondent ought to have been called to testify in his defence, apparently to show that he did not forged the certificate.

Nonetheless, the law is trite that the burden of proof of crime rests on the person who alleges same and the accused need not prove his innocence. He referred to the case of: CHIME V. EZEA (SUPRA). And if the Appellant is unable to prove the allegation of crime, the Tribunal need not speculate on facts not before it. He cited in support the case of; OGBORU V. UDUAGHAN (2013) 13 NWLR (PT. 1370) PAGE 33 AT 58.

The 3rd Respondents counsel in his submission urged the Court to resolve the issue of forgery in favour of the Respondents and against the Appellant as the required proof for the allegation of crime freely made in the petition was not satisfied by the evidence proffered by the Appellant.

On issue 10 learned senior counsel submitted on behalf of the Appellant that the relevant consideration for the purpose of this issue is to consider the propriety of Paragraph 13 of the petitioner's reply. He referred the court to Paragraph 109 of the Appellant's petition at page 23 of the record, paragraph 79 of the 2nd Respondent's reply to the petition at page 487 of the record and Paragraph 13 of the Petitioner's reply to the 2nd Respondent's reply to the petition at page 625.  
Learned senior counsel contended that taking a sincere and holistic view of consideration of the above paragraphs of the pleading of parties, it cannot be said that paragraph 13 of the Petitioner's reply Brief introduce new issue. He referred the court to the cases of: BUHARI V. OBASANJO 2005 13 NWLR PT. 941 1 AT 197 - 198.; ISHOLA v. SGBN 1997 2 NWLR PT.488 405 AT 421.; AMAECHI V. INEC 2008 5 NWLR PT.1080 227 AT 315-316.

He urged the court to uphold the concept of substantial justice in saving paragraph 13 of the Petitioner's reply by setting the decision of the lower tribunal and resolve this issue in favour of the Appellant.

The 4th and 5th Respondents did not join issues with the Appellant in respect of the alleged forgery of the Higher National Diploma Certificate Exhibit E.

We observed that the Appellant, as part of the issues raised for determination in this appeal alleged that the 2nd Respondent presented a forged document to the security agencies. This piece of allegation is shown to be reflected in issues 7, 8, 9 and 10 of the Appellant's Brief of argument. The alleged forged document is the Higher National Diploma Certificate of the Polytechnic Ibadan presented to the 3rd Respondent (INEC) for the Conduct of the Governorship Election held on the 21st day of June 2014. This piece of evidence was admitted at the lower Court and marked Exhibit E. For ease of reference, the Appellant's issues 7, 8, 9 and 10 are hereby adumbrated as follows;

Issue 7:

Whether the report of an allegation of forgery to security agencies for investigation and possible prosecution is a requirement of proof of same before a Court or Tribunal and whether the Appellant did not prove the allegation of forgery against the 2nd Respondent.

Issue 8

Whether on the strength and evidential value of documentary evidence tendered by the Appellant of forged certificate was not proved more so that the 2nd Respondent whose Conduct was personally in issue did not give any personal evidence to rebut that allegation against him.

Issue 9

Whether the Tribunal was right in adjudicating the evidence of PW9 and PW11 as hear-say without appreciating the fact that exhibits G & P being certified true copies of public documents can be tendered and commented on by anybody not necessarily the maker of the document.

Issue 10

Whether considering the totality of pleadings and the need to put all facts before the court, the tribunal was justified in striking out paragraph 13 of the petitioner's reply when the paragraph of the reply was in essence a clear rebuttal of the claim made by the 2nd respondent that the certificate in issue belong to him.

Since the allegation of forgery ran through all the aforementioned issues, we shall in our own wisdom hereby take all of the issues together.

An allegation of presenting a forged Higher National Diploma Certificate to an Electoral body INEC is an allegation of crime.

However, in order to substantiate the allegation, two conditions must be fulfilled to the satisfaction of the Court or Tribunal namely -

(a) That the said certificate presented by the candidate i.e. 2nd Respondent was forged:

(b) That it was the candidate that presented the certificate,  
See; K.I. IMAM VS. SENATOR A. M. SHERIF & ORS (2005) 10 NWLR (Pt. 914) page 80. The above two ingredients have to be proved beyond reasonable doubt pursuant to Section 138(1) of the Evidence Act.

On the other hand, where an allegation of the commission of a crime has not been proved beyond reasonable doubt, all possible doubts must be resolved in favour of the person accused of committing such a crime. See: KALU VS. THE STATE (1988) 4 NWLR (Pt. 90) page 503; OKONJI v. THE STATE (1987) 1 NWLR (Pt. 53) page 65; A.D. VS. FAYOSE & ORS (2005) 10 NWLR (Pt. 932) page 151.

To prove the allegation of forgery in respect of Exhibit E, the Appellant called two witnesses i.e. PW9 and PW11. The evidence of PW9on oath is that the 2nd Respondent presented a forged HND certificate to INEC. According to him, he gots to know about this from the internet. He is neither a staff of the Polytechnic Ibadan nor has he ever worked there. Worse still is the fact that he has never even met with the 2nd Respondent. He is an illiterate as far as the computer is concerned and does not know how to operate same. The evidence of PW11 did not really have much to offer. However, he admitted that Exhibit E is a certified true copy of the alleged HND certificate issued by the Polytechnic Ibadan. According to him, the 2nd Respondent has never been convicted for forging the said document or Exhibit G, which is the bio data of the 2nd Respondent.

On the part of the 2nd Respondent, RW1 testified on oath that he had known the 2nd Respondent for many years and about his educational background. He stated that the 2nd Respondent attended the Polytechnic Ibadan. When shown Exhibit G produced before the Tribunal by the Registrar of the Polytechnic, the RW1 identified the photograph of the 2nd Respondent on Exhibit G (bio data).

As stated earlier in the course of this Judgment, the evidential burden of proof of forgery rested on the Appellant who alleged. This type of allegation is not established on the mere ipse dixit of the Appellant's witnesses. There must be concrete evidence otherwise it would be regarded as having not been proved beyond reasonable doubt. See: FALAE VS. OBASANJO (1999) 4 NWLR (pt. 999) page 435; OYEGUN VS. IGBENEDION (1992) 2 NWLR (pt. 226) page 747.

In KAKIH VS PDP (2014) 15 NWLR PT.1430 pg.374 AT 423 the Supreme Court held thus;

"A person who asserts that another person presented a forged certificate must prove beyond reasonable doubt that the certificate was presented with knowledge that it will be used fraudulently or dishonestly as genuine"

See also the cases of: ODIAWA v. FRN (2008) ALL FWLR (PT.439) AT 437. AREBI V. GBABIJO (2010) ALL FWLR (PT.527) AT 710.

From our consideration of the Appellants case and evidence proffered in support of the allegation of forgery, we find the evidence weak and not capable of sustaining the allegation. Exhibits E and G were produced by the polytechnic Ibadan through the Registrar, being the issuing body. No effort was made to discredit the exhibits to call any other witness from the institution to do same. For the Appellant to succeed in this allegation of forgery, the Appellant ought to have called the alleged owner of the HND certificate now in the possession of the 2nd Respondent to testify that Exhibit E belongs to him. None of the above situations was applied. Therefore, we are of the strong opinion that the Appellant has not discharged the burden of proof placed on him by Section 138(1) of the Evidence. At any rate, until the Appellant establishes a prima facie case of forgery of the HND Certificate the 2nd Respondent has no burden to adduce evidence in rebuttal. The said burden has not been discharged.  
See; IMAM vs. SHEFIFF (2005) 4 NWLR (pt. 914) page 80; JELAYEMI & ORS VS. ALAOYE & ANOR. 18 NSCQR (pt. 11) page 682 at 703.

Learned Appellant's counsel stated in issue 8 that the 2nd Respondent whose Conduct was personally in issue did not give any personal evidence to rebut the allegation against him. That may well be so but it does not really matter because the 2nd Respondent can prove the authenticity of Exhibit E either by oral or documentary evidence. See NACR v. ADEAGBO (2004) 14 NWLR (pt. 894) page 551. In this case, the 2nd respondent has established the authenticity of Exhibit E through witnesses and he is not under any obligation to give evidence personally. See IMAM V. SHERIFF (SUPRA). In the case of ORUGBO & ORS VS. BULARA UNA & ORS 11 NSCQR 537 at 552; Niki Tobi, JSC had this to say -

"There is no law known to me that parties to a given action must give evidence at their trial. Parties are free to pick and choose witnesses they think can give cogent evidence to prove their case. If the law had required all parties to give evidence, the Court will be exposed in some cases to a village or community of witnesses and that will protract the litigation."

See IGYUSE V. OCHOLI (1997) 2 NWLR (Pt. 481) page 352 at 354. On the other hand, it does not mean that inability of the 2nd Respondent to give evidence in rebuttal that the case of the Appellant is true. After all, Exhibit E and G are public documents and no witness is even required to give evidence on them. See OKOH vs. IGUESHI (2005) ALL FWLR (PT.264) PAGE 891 AT 903; DAGGASH VS. BULAMA (2004) ALL FWLR (PT. 212) PAGE 1666 AT 1710.

In addition to all that we have said above, the authenticity of the alleged forged Higher National Diploma Certificate has been settled once and for all in a lead Judgment by Nsofor JCA in the case of ALLIANCE FOR DEMOCRACY VS. FAYOSE (2004) ALL FWLR (PT. 222) PAGE 1719 AT 1744 - 46. In that case, the same issue came up and the Court resolved that the same HND certificate was earned by the present 2nd Respondent.

Based on the foregoing, we come to the conclusion and hold that the Tribunal was right in its decision that the allegation of forgery was not proved beyond reasonable doubt by the Appellant.

On the issue of striking out paragraph 13 of the Appellant's reply brief to the 2nd Respondent's Brief, we are of the opinion that a reply brief is not necessary when the respondent's brief does not raise new or fresh issue or point, and where it is necessary it should be confined to answering any new or fresh issue or point raised in the Respondent's brief.

In FAYEMI VS ONI 2010 48 WRN 30 at 77 the court held thus;

"The essence of a reply Brief is to be limited to new points which are raised in the Respondent's brief. In other words, it is not a forum to wither engage in arguments at large or reargue the Appellant's brief. It is also not a repair kit for an otherwise damage Brief but, purely to answer to the new point raised..."

See also; FRN V. IWEKE Suit no. 454/2010 cited in 2013 3 NWLR P.285; OKPALA VS IBEME 1989 NWLR PT.102 PG. 208

We have carefully perused the record of this appeal, there is nowhere in the original petition, where the petitioner pleaded the fact that the certificate in question was issued by The Polytechnic Ibadan to one Peter Ayodele Oluwayose an indigene of Oluloye Local Government Oyo State.

It is trite law that petitioner cannot introduce new fact not contained in his petition in his reply as in the instant case, because as at the time of filling his petition, that fact is within his knowledge and if he did not adequately include it in his petition, the proper thing to do will be to amend the petition. The consequence of filling fresh issue or issues in the Petitioner's reply Brief to the Respondent's reply Brief is to strike out the paragraph(s) in the Petitioner's reply Brief. See; ADEPOJU VS AWODUYILEMI 1999 5 NWLR PT.603 PAGE 364. ORJI V. UGOCHUKWU 2009 14 NWLR PT.1161 207 AT 279.

This court has the duty to do substantial justice between the parties before it. In the instant case it was not a Miscarriage of Justice for the lower Tribunal to strike out paragraph 13 of the Appellants reply Brief to the 2nd Respondent's reply Brief while relying on the fact that the pleaded fact was not raised in the Appellant's original petition, nor was it raised by the 2nd Respondent in his reply Brief. We are of the opinion that the lower Tribunal was right in striking out paragraph 13 of the Appellant's reply to the 2nd Respondent reply Brief as offensive. More so, it has not been shown how the strike out of paragraph 13 by the lower Tribunal occasioned any miscarriage of justice to the Appellant to render the entire judgment of the lower tribunal a nullity.

Accordingly we hereby resolve issues 7, 8, 9 and 10 of the Appellant's Brief of argument against him.

ISSUES 2 AND 11  
  
We have earlier said in this judgment that Appellants Issues 2 and 11 shall be taken together. The issues are adumbrated as follows:

(2) Whether the lower Tribunal was right when it struck out the names of the 4th and 5th Respondents and all allegations against them as well as paragraphs 60, 63, 69, 72, 76, 77, 83, 85, 100, 101 and 103 of the petition. (Grounds 2 and 3).

(11) Whether or not the Election Tribunal was right when it held that it had no jurisdiction to determine whether or not Armed forces have a role to play in Election. (Ground 4).

Appellant's Counsel, (as per the Brief filed by Lateef O. Fagbemi Esq., (SAN) and argued by H.O. Afolabi Esq., (SAN), had argued that the trial Tribunal, in striking out the names of 4th and 5th Respondents and all the allegations against them, on the grounds that Appellant would not suffer any prejudice, if they were not joined and that no reliefs were sought against them in the petition, overlooked the trite principles of law that, where allegations are made against anyone, such a person must be made a party in the matter; that the Tribunal would be incompetent to investigate allegations made against a non-party.

He submitted that the trial Tribunal misapplied the provisions of Section 137 (2) and (3) of the Electoral Act, when it struck out the names of the 4th and 5th Respondents. Counsel relied on Section 133 (1) of the Electoral Act, 2010 (as amended) to assert that the 4th and 5th Respondents had to be joined as Respondents, because of the allegations made against them, since they were not INEC Officials. Learned counsel relied on the case of KALU VS. CHUKWUMERIJE (2012) 12 NWLR (PT.1315) 459-460.

On the holding that the Tribunal had no jurisdiction to determine whether or not the Armed Forces have a role to play in Election, Counsel submitted that, with the serious allegations made against members of the Armed Forces, the Election Tribunal had the jurisdiction to determine whether Armed Forces are statutorily or constitutionally empowered to participate in the Electoral process, and, if so, to what extent, particularly, considering Grounds 1, 2 and 3 of the instant petition, coupled with the various allegations of intimidation of voters by the armed forces. Counsel added that the agencies that have roles to play in the Conduct of elections are contained in the Electoral Act, and the Electoral Tribunal has jurisdiction to make this pronouncement, and failure to do so occasions a miscarriage of justice.

Counsel referred us to Section 217 (1) (2) of the 1999 Constitution, on the establishment and functions of the Armed Forces. He also relied on the Armed Forces Act and on Section 218 (1), (3) and 218 (4) of the 1999 Constitution, on how the deployment of the Armed Forces can be done by the President. Counsel also relied on the decision of this court in the case of YUSUF V. OBASANJO (2005) 18 NWLR (PT.956) 96 AT 174.

Responding, learned counsel for the 1st Respondent, E. Robert Emukpoeruo Esq., submitted that the decision to strike out the names of the 4th and 5th Respondents was proper and amply supported by the decision of the Supreme Court in the case of BUHARI v. YUSUF (2003) 14 (NWLR) (PT.841) 446. He further argued that the struck out paragraphs complained of were so struck out for being vague, imprecise, nebulous and ambiguous, and the Tribunal had relied on the cases of: UZODINMA VS. EZENWA (2004) 1 NWLR (PT.854) 303, OJUKWU VS. YAR'ADUA (2009) 12 NWLR (PT.1154) 50 and PDP VS. INEC (2012) LPELR 9724, which the Appellant did not fault.

On the role of the military in the Conduct of Elections, Counsel submitted that it is not the allegations made by Appellant in its petition that vests jurisdiction on the Tribunal, as contended by the Appellant, but that the jurisdiction of the Tribunal is delimited by the provisions of the Constitution, Section 285(2); that the jurisdiction does not extend to any academic matter touching on the role of the Armed Forces in the Conduct of Elections. He submitted that the issue of whether the military has a role in the Conduct of elections is academic and that the trial Tribunal was right to decline pronouncing on the issue.

On his part, the 2nd Respondent's Counsel, Yusuf Ali, Esq. SAN, leading other Counsel, said the Tribunal was right to strike out the names of the 4th and 5th Respondents, and to decline being dragged to pronounce on the role of the military in the Conduct of the elections. He added that the 4th and 5th Respondents did not qualify as statutory Respondents, under Section 137(2) and (3) of the Electoral Act, and they were not necessary parties as their rights will not be affected in any way by the decision of the Tribunal. Moreover, Counsel submitted that the Appellant sought no relief against the 4th and 5th Respondents. He relied on the cases of; ABUBAKAR v. BUKO (2003) LPELR 7188; BUHARI v. YUSUF (2003) 13 NWLR (PT.841) 446 at 508; or (2003) FWLR (PT.174) 360 at 372.

The arguments of the 3rd, 4th and 5th Respondents on the issues 2 and 11 were not different from those of 1st and 2nd Respondents, and we are of the opinion that it will be repetitive to reproduce them here, except to state that the 5th Respondent's Counsel, Chief Olusola Oke had asserted that the decision of the Tribunal to strike out the names of the 4th and 5th Respondents arose from the preliminary objection by the Respondents alleging that the petition did not disclose any reasonable cause of action against the 4th and 5th Respondents, and that no relief was raised against them. He also argued that they were not necessary parties and did not participate in the elections.

It was in upholding that objection that the Tribunal struck out the names of the 4th and 5th Respondents, and the paragraphs of the petition alleging wrong doings against the persons alleged to have been agents and or servants of the 4th and 5th Respondents. The Tribunal said:

"...From the averments in the petition, neither the 4th nor the 5th Respondent was physically present in Ekiti State during the Governorship election which held on 21st June, 2014. It is however common ground from the pleadings of the parties that soldiers and policemen were present in the State to provide security during the election. We find as a fact that the petition is replete with allegations of harassment, intimidation, use of force and arrest of the petitioner's supporters against unnamed soldiers and policemen. The question is whether these allegations render the 4th and 5th Respondents statutory or necessary parties in this petition, in whose absence this petition cannot be effectually determined. Who is a Respondent under the Electoral Act, is provided for in Section 137 (2) and (3) thereof ... From the above provision, we cannot but agree with learned counsel for the 4th and 5th Respondents ...That the Electoral Act, 2010 (as amended), provides for two classes of statutory Respondents, that is, the winner of the election and the Independent National Electoral Commission, the body charged, with the responsibility of Conducting the election. Other than submitting that the joinder of the 4th and 5th Respondents becomes necessary, in order to afford them opportunity to defend themselves on the allegations made against their officers, the petitioner's counsel failed to join issues with the 4th and 5th Respondents. He did not make any attempt to argue that the 4th and 5th Respondents are recognized Respondents, under the Act. The unnamed and unidentified soldiers and policemen against whom criminal allegations are made in the petition were only deployed to provide security during the election..." (See page 1433-1434 of the Records)

We are of the view that the tribunal, reasoned, correctly, while considering the provisions of Section 137 (2) and (3) of the Electoral Act, 2010 (as amended), when it held that the 4th and 5th Respondents did not qualify as Respondents, which, for the purpose of Electoral Act, is, statutorily specified or delineated.  
Section 137(2) and (3) says:

"(2) A person whose election is complained of is, in this Act, referred to as the Respondent.

(3) If the Petitioner complains of the Conduct of an Electoral Officer, a Presiding or Returning Officer, it shall not be necessary to join such officers or persons, notwithstanding the nature of the complaint and the Commission shall, in this instance be:

(a) Made a respondent; and

(b) Deemed to be defending the petition for itself and on behalf of its officers or such other persons."

The law, having expressly specified and legislated on who can be a respondent in an electoral petition, it appears conclusive that whoever is contemplated to be a respondent to defend an election petition, must fall into any of the two categories named in Section 137 (2) and (3) of the Electoral that is:

(i) The person whose election is complained of (normally the political party/candidate who won the election, or was declared winner) and

(ii) The person who conducted the election, that is, the Electoral Commission (and whoever acted for the Commission as agent or servant who did one thing or the other to advance or realize the objective of the Commission.

It is noteworthy that sub Section (3)(b) of the Section 137 of the Electoral Act includes the phrase "or such other persons"and the same falling within the confines of persons acting on behalf of the Electoral Commission for which Electoral commission is deemed to be defending the petition on their behalf, i.e. "its officers and such other persons".

The law relating to necessary party and joinder is well defined, and a person who is a necessary party must be sufficiently interested in the case, or possess such interest which will make the case incapable of being determined effectively and finally in his absence. See the case of B.A.T.N. LTD V. INT'L TOBACCO COY PLC (2012) LPELR 7875 CA.

"To qualify to join or be joined as a party in a suit, the applicant must establish that he has sufficient legal interest in the subject matter of the suit to qualify him as a necessary party, and to attain that status, he must establish that his absence in the case as a party will defeat a fair and complete trial; that the issues in controversy cannot be effectually and completely adjudicated upon and settled, in his absence. Apart from proving such proprietary interest in the subject matter of the suit, the applicant has to show that he will be affected by the order(s) that will be reached by the Court after the trial. See; also Green V. Green (2001) FWLR (Pt 75) 795, held 4; Mobil Oil Plc V. Denr Ltd (2004) 1 NWLR (pt.853) 142; Lawal V. PGP Nig Ltd (2001) NWLR (Pt.742) 393; Obasanjo Vs. Yusuf (2004) 9 NWLR (Pt 877) 144.

Of course, that cannot be said of the 4th and 5th Respondents in this petition in which the petitioner never raised any relief against, nor any allegation of wrong doing against, personally.

We are of the opinion that the electoral commission (INEC) should be made to take responsibility for the acts and misfeasance of the persons engaged by it to assist it in the Conduct of the election. And it should be deemed that the persons engaged by the Electoral commission, or which the Commission allows to be unleashed on the populace, in the name of security, are agents of the Electoral Commission (INEC) for the purpose of Conduct of the election, and where those persons' activities impact negatively on the electoral process and become a liability rather than a positive force in the overall Conduct of the election, the credibility of the election is compromised.

The Tribunal had held, in its findings, as follows:

"It is, however, common ground from the pleadings of the parties that soldiers and policemen were present in the state to provide security during the election. We find as a fact that the petition is replete with allegations of harassment, intimidation, use of force and arrest of petitioner's supports against unnamed soldiers and policemen..."

Unfortunately, the Tribunal was not patient enough to allow for the proof or otherwise of those allegations of harassment, intimidation, use of force and arrest of petitioner's supporters by the said unnamed soldiers and policemen, as it hurriedly struck out the paragraphs of the petition touching on those allegations, on the ground that the 4th and 5th Respondents, to whom the said unnamed soldiers and policemen were linked (as their principals) were not statutory or necessary parties. Perhaps, the stance of the Tribunal would have been different, if the said acts of harassment, intimidation, use of force and wrongful arrest levelled against the unnamed soldiers were taken in the capacity of agents of the Electoral Commission, or other persons acting on behalf of the Commission.

But the point which must be made and which the Tribunal appeared to shy away from pronouncing on was whether the Armed Forces or the Military has any constitutional or statutory role in the Conduct of the elections. The Tribunal had found, as a fact, that it was a "common ground from the pleadings of the parties that soldiers and policemen were present in the State to provide security during the election".

The law does not appear to make any provision or provide a role for the Armed Force or the Military to dabble in civil activities like elections to elect civilian leaders except perhaps, to exercise their right of franchise to vote, in their Barracks. Section 217 (1) and (2) of the 1999 constitution provides for the establishment and functions of the Military. The functions are:

(a) Defending the Nation from external aggression;

(b) Maintaining its territorial integrity and securing its borders from violation on land, sea or air;

(c) Suppressing insurrection and acting in aid of civil authorities, to restore order when called upon to do so by the President, but subject to such conditions as may be prescribed by an Act of the National Assembly; and

(d) Performing such other functions as may be prescribed by an Act of the National Assembly.

Of course, Section 217(2) (c) is what the Armed Forces Act is all about and the provisions therein can further be enriched or amended by further Acts of the National Assembly. See Section 217 (2) of the 1999 Constitution, and Section 1 of the Armed Forces Act, which elaborates on the functions, command structure and activities of the Armed Forces.

None of the above mentioned functions has anything to do with Electoral process and the Conduct of elections in the Country to select political leaders, Even the item (2) (c) which talk about "suppression of insurrection and acting in aid of civil authorities to restore order when called upon to do so by the president, appears to be applicable only in the event of insurrection, to restore order and, even then, the Military must be invited by the President, upon fulfilment of specified conditions, prescribed by an Act of the National Assembly. Thus, even the president of Nigeria has no powers to call out the Armed Forces and unleash them (Military Officers) on a peaceful citizenry who are exercising their franchise to elect their leaders. And even in the event of insurrection or insurgency, the call on the Armed Forces to aid civil authorities to restore order, must be with the approval of the National Assembly which must provide conditions as specified in Sections 217 (2) and 218 (4) of the 1999 Constitution, (as amended).

Who ordered the deployment of the military (soldiers) at the Governorship Elections? Was there any act of insurrection to warrant a call on the military to restore order? And was such deployment in accordance with Sections 217 (2) (c) and 218 (4) of the 1999 Constitution?

There is nothing before us, as per the Records, to aid in the answering of the above posers positively. We think whoever unleashed soldiers on Ekiti State to disturb the peace of the elections on 21/06/2014, acted in flagrant breach of the constitution and flouted the provisions of the Electoral Act, which requires only the Police and other civil authorities to provide the required enabling environment of law and order for the performance of the civil duties of Election. This point was stated in the case of Yusuf V. Obasanjo (2005) 18 NWLR (pt. 956) 96 at 174-175, when, my Lord, Salami JCA (as he then was) said:

"It is up to the Police to protect our nascent democracy and not the Military, otherwise the democracy might be wittingly or unwittingly militarized. This is not what the citizenry bargained for, after wrestling power from the Military in 1999. Conscious steps should be taken to civilianize the polity and thereby ensure survival and substance of democracy".

The acknowledgment by the Tribunal, that the petition was replete with allegations of harassment, intimidation, use of force and arrest of supporters of petitioner, shows the inherent threat in the ignoble act of inviting the Military to take part in the Conduct of civil act of Conducting elections. It does not even appear reasonable to bring soldiers out of Barracks to serve as guardian angels of civil elections, as that is akin to leaving a blonde virgin in the care and custody of an active male adventurer. Of course, the adventurous lad should not be blamed, if in the process of care, the maiden loses her innocence.  
Whoever makes such error does not love the maiden, and cares less about her future.

While therefore resolving the issue 2 against the appellant that the Tribunal was right to strike out the names of the 4th and 5th Respondents and the related paragraphs of the petition complaining against the purported agents/servants of the 4th and 5th Respondents, we resolve that though the Tribunal, had no jurisdiction over the 4th and 5th Respondents, in the circumstances, that did not stop it from making a pronouncement deprecating the unlawful role of the Military (Armed Forces) in the Conduct of the Ekiti election, since the Tribunal had made a finding that the pleadings of the parties revealed a consensus that soldiers were used in the conduct of the elections.

It must be stated by way of emphasis that the Armed Forces (the Military) has no role in the Conduct of elections and must not be involved, except perhaps in the areas of logistic services to agencies of Government in the preparation for the elections. They should not be called out on the streets or places of elections in the name of security, as that would militarize the process and create an atmosphere of military siege, fear and intimidation of the public.

See also the recent decision of the Federal High Court, Sokoto Division, in the case ofHON. BELLO MOHAMMED GORONYO & ANOR V. THE ATTORNEY GENERAL OF THE FEDERATION & INEC FHC/S/CS/29/2014 delivered on 29/1/2015 where R.M. AIKAWA J. Held and made the following orders;

"... any purported engagement of the Nigerian Armed Forces in the security supervision of the Election in the Federal Republic of Nigeria by any person holding the office of the President of the Federal Republic of Nigeria without an act of the National Assembly shall be unconstitutional and in view of the combined provisions of sections 217 (2) and 218 (1) and (4) of the Constitution of the Federal Republic of Nigeria (as altered)"

That, we believe is the law, and must be adhered to, in order to save the electoral process from the virus of illegality, credibility problems and absurdity.

The time has come in our learning process to establish the culture of democratic rule in the country and to strive to do the right thing, particularly when it comes to dealing with the electoral process, which is one of the pillars of democracy. In spite of the non-tolerant nature and behaviour of the political class in this country, we should, by all means, try to keep armed personnel, of whatever status and nature, from being a part and parcel of the election processes. The state is obligated to confine the Military to their very demanding assignments especially in these times of insurgencies and encroachment into the country's territories, by keeping them out of elections. The civilian authorities should be left to conduct and fully carry out the electoral processes at all levels. Thus, the state is obligated to ensure that citizens who are sovereign, can exercise their franchise freely, un-molested and un-disturbed.

Even though some of the issues relating to the handling of the trial by the tribunal were resolved in favour of the appellant; those errors did not occasion a miscarriage of justice. Thus, having resolved the substantive issues of disqualification and return as well as forgery against the appellant, we are of the opinion that there is no merit in this appeal and it is hereby dismissed. The judgment of the tribunal delivered on 19th December, 2014 is hereby affirmed.

**JUMMAI HANNATU SANKEY, J.C.A.:**

I agree.

**JOSEPH SHAGBAOR IKYEGH, J.C.A.:** I agree.

**ITA GEORGE MBABA, J.C.A.:** I agree.

**PAUL OBI ELECHI, J.C.A.:** I agree.

**CROSS APPEAL**

ABDU ABOKI, J.C.A (DELIVERING THE LEADING JUDGMENT):

This Cross Appeal emanates from the Judgment of the Ekiti State Governorship Election Tribunal, (hereinafter referred to as "The Election Tribunal", delivered on the 19th December, 2014 in the Petition filed by the 1st Cross Respondent herein.

In delivering its Judgment, the Election Tribunal substantially upheld the objections raised by the Respondents to the hearing of the Petition, while overruling same. In addition to this, the Election Tribunal considered the Petition on its merits and dismissed same.

A brief narration of the facts of the case leading up to this Cross Appeal is that, following the Governorship Election conducted by INEC in Ekiti State on the 21st June, 2014, the 3rd Cross Respondent (INEC) declared and returned the 2nd Cross Respondent, Peter Ayodele Fayose, the candidate of the Cross Appellant, (PDP), as the winner of the election with 203, 090 votes. John Olukayode Fayemi, the candidate of the 1st Cross Respondent, (APC), came second with 120, 433 votes. The 1st Cross Respondent, (APC), dissatisfied with the declaration of the result, promptly filed a Petition challenging this declaration and return. The 1st Cross Respondent premised its Petition on the following grounds:

i) The 2nd Respondent (now 2nd Cross Respondent) was not duly elected by a majority of the lawful votes cast at the election;

ii) The election of the 2nd Respondent (now 2nd Cross Respondent) is invalid by reason of corrupt practices;

iii) The election of the 2nd Respondent (now 2nd Cross Respondent) is invalid by reason of non-compliance with the provisions of the Electoral Act, 2011 as amended and the Manual for Election Officials 2014, and the Constitution of the Federal Republic of Nigeria 1999 (as amended);

iv) The 2nd Respondent (now 2nd Cross Respondent) was not qualified to contest as at the time of the election on the following grounds:

a) the 2nd Respondent (now 2nd Cross Respondent) was found guilty of the contravention of the Code of Conduct by the impeachment Panel set up by the Acting Chief Judge of Ekiti State on an allegation of gross misconduct involving embezzlement of funds preferred against him by the Ekiti State House of Assembly consequent upon which he was impeached and removed from the office of the Governor of Ekiti State in the year 2006;

b) The 2nd Respondent (now 2nd Cross Respondent) presented a forged Higher National Diploma (HND) Certificate of the Polytechnic Ibadan to the 3rd Respondent (INEC) (now 3rd Cross Respondent).(Emphasis supplied)

Following on the heels of these grounds, the Appellant, (now 1st Cross Respondent), sought the following reliefs from the Election Tribunal:

a) "That it be determined and declared that the 2nd Respondent Peter Ayodele Fayose was not qualified to contest the Governorship Election held on 21st June, 2014 on the ground that he was found guilty of the contravention of the Code of Conduct by the impeachment Panel set up by the Acting Chief Judge of Ekiti State and the Ekiti State House of Assembly, consequent upon which he was impeached and removed from the office of the Governor of Ekiti State in the year 2006.

b) That it may be determined that the 2nd Respondent presented a forged Certificate of Higher National Diploma (HND) of the Polytechnic Ibadan to the Independent National Electoral Commission, thus was not qualified to contest the election.

c) That it be determined and declared that the 2nd Respondent was not duly elected or returned by the majority of lawful votes cast at the Ekiti State Governorship Election held on Saturday 21st June, 2014.

d) That it may be determined that having regard to the non-qualification of the 2nd Respondent to contest the election, the 3rd Respondent ought to have declared the candidate of the Petitioner John Olukayode Fayemi- who scored the highest number of lawful votes cast at the election as the winner of the election.

e) AN ORDER of the Tribunal withdrawing the Certificate of Return issued to the 2nd Respondent by the 3rd Respondent and present the Certificate of Return to the Candidate of the Petitioner (now 1st Cross Respondent) John Olukayode Fayemi who scored a majority of valid votes cast and having met the Constitutional requirements as required by law.

**IN THE ALTERNATIVE**

AN ORDER nullifying the Governorship Election held on 21st June, 2014 and a fresh election be ordered."(Emphasis supplied)

The Respondents to the Petition, in particular the Cross Appellant herein, (as the 1st Respondent to the Petition), filed a motion on notice challenging the competence of the Petition. This objection was filed on 4th August, 2014, to which the 1st Cross Respondent (Petitioner) responded with a counter affidavit filed on 15th August, 2014.  The Cross Appellant thereafter filed a Reply to the counter affidavit. The 3rd and 5th Cross Respondents also raised similar objections challenging the locus standi of the 1st Cross Respondent as a Petitioner and seeking the reliefs in the Petition. The grounds for the motion were stated on its face as follows:

“1) It is only the political party (APC) that sponsored a candidate for the election that commenced this Petition without the candidate himself at the election, whereas the reliefs sought in the Petition directly enure (sic) in favour of John Olukayode Fayemi who was the Party's candidate at the election and who is not a party to this Petition.

2) John Olukayode Fayemi cannot take benefit of the Reliefs sought in a Petition when he is not a party thereof."

This preliminary objection in effect challenged the locus standi of the 1st Cross Respondent to seek the reliefs sought in the Petition, contending that the Election Tribunal lacked the requisite jurisdiction to entertain the Petition on the ground that a proper and necessary party was not before the Election Tribunal. The Cross Appellant's motion raising this objection, as well as the other motions questioning the competence of the Petition, were consolidated and heard along with the Petition.

At the close of hearing and addresses of all learned Counsel, the Tribunal firstly gave consideration to the preliminary objection of the Cross Appellant and allowed it in part. However, it overruled the objection raised to the locus standi of the 1st Cross Respondent to claim the reliefs sought in the Petition. In addition, it held that the case of the Petitioner/1st Cross Respondent on the disqualification of the 2nd Respondent was not based on his impeachment and removal from office as Governor of Ekiti State in 2006, as contended by the Cross Appellant, but was predicated on an allegation of having been found guilty of the contravention of the Code of Conduct for Public Officers contrary to Section 182(1)(e) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended). The Tribunal also held that the right conferred on a political party to present an Election Petition allows the Party to claim all the reliefs allowable under the Electoral Act, even where the reliefs are for the benefit of a candidate who did not join in the Petition and who did not seek any relief. Peeved by these findings, the Cross Appellant filed a Cross Appeal by its Notice of Cross Appeal on 6th January, 2015, complaining on five grounds.

At the hearing of the Cross Appeal on 9th February, 2015, learned Counsel for the Cross Appellant, E.R. Emukpoeruo, Esq., leading other Counsel, adopted and relied on the Cross Appellant's Brief of argument dated 20-01-15 and filed on 23-01-15, as well as the Cross Appellant's Reply Brief, (in response to the 1st Cross Respondent's Brief of argument), dated and filed on 02-02-15, as the Cross Appellant's argument in the Cross Appeal and urged the Court to allow the Appeal and grant the reliefs in paragraph 5 of same. No Reply Brief was filed in response to the 3rd and 5th Cross Respondents' Briefs of arguments.

In like vein, learned Senior Counsel for the 1st Cross Respondent, A.O. Afolabi, SAN, adopted and relied the 1st Cross Respondent's Brief of argument dated 29-01-15 and filed on 30-01-15 in urging the Court to dismiss the Cross Appeal in its entirety for lacking in merit. On their part, learned Senior Counsel for the 2nd Cross Respondent, Yusuf Ali, SAN with Pius Akubo, SAN, leading other learned Counsel, indicated that the 2nd Cross Respondent did not file a Brief of argument in response to the Cross Appellant's Brief. Also, Mr. Wilcox Abereton, learned Counsel for the 3rd Cross Respondent, in conceding the Appeal, adopted and relied on the 3rd Cross Respondent's Brief of argument dated 29-02-15 and filed on 30-01-15 as the arguments of the 3rd Cross Respondent in this Cross Appeal. Mr. Abayomi Sadiku representing the 4th Cross Respondent also did not file any Brief of argument in response to the cross Appellant's Brief, and so did not oppose the Cross Appeal. Finally, Chief Olusola Oke, learned Counsel for the 5th Cross Respondent, also conceding the Appeal, adopted and relied on the 5th Cross Respondent's Brief of argument dated and filed on 30-01-15, as his arguments in this Cross Appeal.

The Cross Appellant distilled two issues for the determination of the Cross Appeal, which issues were wholly adopted by the 1st, 3rd and 5th Cross Respondents who responded to the Cross Appeal. Since there is a consensus of opinion between the parties on the narrow issues arising for determination in the Cross Appeal, same are adopted by this Court in the resolution of the Cross Appeal. The issues are set out hereunder:

1. Whether the Tribunal was in error to hold that the 1st Cross Respondent had a right under the Electoral Act 2010 (as amended) and was competent to claim all the reliefs contained in the Petition despite the absence of its gubernatorial candidate as a co-petitioner.

2. Whether the Tribunal was in error to hold that the allegation of the 1st Cross Respondent on the issue of disqualification of the 2nd Cross Respondent was founded on the contravention of the Code of Conduct and not impeachment.

Issue One: Whether the Tribunal was in error to hold that the 1st Cross Respondent had a right under the Electoral Act, 2010 (as amended) and was competent to claim all the reliefs contained in the Petition despite the absence of its gubernatorial candidate as a co-petitioner.

It is the contention of learned Counsel for the Cross Appellant that the five reliefs sought for in the Petition of the 1st Cross Respondent, particularly paragraphs D and E thereof, were for the benefit of the Party's candidate, Peter Kayode Fayemi, who unarguably, was not a party to the Petition. Counsel thus argues that only the said candidate could competently petition the Tribunal for the grant of those reliefs. He further argues that reliefs D and E were for the benefit of the candidate alone, having been expressly mentioned by name, and did not inure to both the candidate and the Petitioner. He therefore contends that the finding of the Tribunal on this at pages 1422-1423 vol.2 of the Record of Appeal was perverse. Counsel argues that the right to be declared a winner, returned as Governor of Ekiti State, and to be issued with a certificate of return were personal to the candidate, in whose absence such reliefs cannot be granted. He relies on CPC V Ombugadu (2013) 18 NWLR (Pt.1385) 66 at 119-120 where the Supreme Court per Ngwuta, JSC emphasized the importance of Section 141 of the Electoral Act, 2010 (as amended) in every election. Thus, it is his submission that it is the candidate who wins an election, and winning is to his benefit alone. Thus, he argues that, since reliefs D and E seek to vest this right on the candidate, John Olukayode Fayemi, he is the only person who can seek to be vested with that right. Therefore, he argues, that where such a candidate claims no relief, none can be claimed by his political party.

Furthermore, learned Counsel submits that the case ofTafida V. Bufarawa (1999) 9 NWLR (Pt.597) 70; CPC v INEC (2011) 18 (NWLR (Pt.1279) 493; and Okonta V Philips (2010) 18 NWLR (Pt.1225) 32 at 327 paras D-H, A-B were directly relevant to this issue. Counsel submits thereon that, having regard to the reliefs sought in the Petition, John Olukayode Fayemi is a necessary party whom the Petitioner ought to have joined in the Petition so as to entitle him to the reliefs sought. He relies on Overseas Construction Ltd V Creek Enterprises Ltd & another (1985) 3 NWLR (Pt.13) 407 at 418.Counsel thus submits that the failure of the Petitioner to join John Olukayode Fayemi, its candidate at the election to the Petition, is fatal and has operated to rob the Tribunal of jurisdiction to entertain the Petition as the 1st Cross Respondent lacks the locus standi to seek the reliefs in the Petition.

Learned Counsel relies on Sections 177, 179, 180, 181, 182 and 185 of the Constitution of the Federal Republic of Nigeria, 1999, to contend that it is a candidate who acquires a right to the office of Governor of a state after an election, (and not the political party). The sponsorship by the party is merely a platform for the candidate to contest, win or lose the election. He argues that Section 137(1)(b) of the Electoral Act, 2010 (as amended) did not confer any right on a political party to seek a relief on behalf of its candidate who elected not to contest the election or to seek any relief. In conclusion, learned Counsel urged the Court to allow the Cross Appeal and grant all the reliefs sought in the Notice of Cross Appeal.

In response to the submissions of learned Counsel for the Cross Appellant, learned Senior Counsel for the 1st Cross Respondent, Afolabi, SAN, submits that the decision of the Tribunal cannot be faulted because the 1st Cross Respondent's locus standi is statutorily guaranteed by statute, i.e. the Electoral Act, 2010 (as amended) and the Constitution of the Federal Republic of Nigeria, 1999 (as amended). He submits that in determining locus standi in an election petition, election petitions are sui generis, distinct from ordinary proceedings, and largely governed by laws specially made to regulate their proceedings. Reliance is placed on Abubakar V Yar'Adua (2008) 19 NWLR (Pt.1120) 82 at 181. Thus, he argues that Section 137 of the Electoral Act, 2010 clarifies the persons who may present an election petition. He also relies on CPC V INEC (supra) to submit that, by the wordings of Section 137(1) of the Electoral Act, either a political party and/or its candidate can present an election petition and seek for the necessary reliefs. Further reliance is placed on Ojedokun V Adebayo (2008) 38 WRN 90 at 101-102; & Okonkwo V Ngige (2006) 8 NWLR (Pt.981) 119 at 136 paras A-B per Adekeye, JCA (as she then was).

Learned Senior Counsel argues that the issue of locus standi transcends the Common Law concept of locus standi in that parties are bound by the statute creating election petitions. He argues further that the law affecting the locus standi of a petitioner in an election is in the Electoral Act itself; and thus, by Section 137(1)(b) of the Electoral Act, an election petition may be presented by one or more of the following persons: (a) a candidate in an election; (b) a political party which participated in an election. Further relying on Disu v. Ajilowora (2000) 14 NWLR (Pt.1000) 783, Counsel submits that the Court is bound by the averments in an election petition and must limit itself to these averments in its determination of whether or not a petitioner has the locus standi to present the petition.

Learned Senior Counsel further submits that the reliefs sought in the Petition under review are for the benefit of both the 1st Cross Respondent being the political party that sponsored the candidate and without whom the candidate could not have contested the election in the first place, as well as its candidate. Counsel argues that the fact that the names of 'John Olukayode Fayemi' were mentioned in reliefs D and E, does not detract from the fact that the said reliefs inure to the benefit of both the 1st Cross Respondent and its candidate. He also submits that the findings of the Tribunal thereon are not perverse since they were based on the pleadings and the extant and applicable law.

In relation to the decision of the Supreme Court in CPC V Ombugadu (2013) 18 NWLR (Pt.1385) 66 @ 119 - 120 per Ngwuta, JSC, the learned Silk submits that this finding was in respect of the consideration of Section 141 of the Electoral Act, 2010 (as amended), which has to do with the effect of the non-participation of a candidate in an election.

Learned Senior Counsel further relies on the recent decision in Azubuike V PDP (2014) 7 NWLR (Pt.1406) 292 @ 315 paras A-D by which, he contends, the Supreme Court reaffirms and endorses the finding in Amaechi v INEC (2008) 5 (NWLR) (Pt.1080) 227 at 317-318 to the effect that no association, other than a political party, can canvass for votes for any candidate at an election, and therefore without a political party, a candidate cannot contest, as it is a political party that wins an election.

Learned Senior Counsel also sought to distinguish the decision of this Court in Tafida V Bafarawa (supra) at 79 which, he contends, was quoted out of context. He argues that in that case, what was in contention therein was Section 133 of Decree No. 3 of 1999, which is not in *pari materia* with Section 137 of the Electoral Act. Consequently, he submits that the arguments canvassed on the applicability of the decision in *Tafida V Bafarawa (supra)*, are of no moment.

Learned Senior Counsel additionally submits that the interest of Dr. John Kayode Fayemi is subsumed in that of the Petitioner, which is his political party, and either of them can present a petition and/or file same jointly as provided for under Section 137(1) of the Electoral Act, 2010 (as amended). He also sought to distinguish the facts in the case of CPC V INEC (2011) 18 NWLR (Pt.1279) 493 at 576 - 577 from the facts of this case.

Furthermore, learned Senior Counsel submits that the case of Okonta V Phillips (2010) 18 NWLR (Pt.1225) 320 relied on by the Cross Appellant is distinguishable from this case in that the case was a pre-election matter in which the Court of Appeal removed the Appellant from office pursuant to a suit instituted at the Federal High Court in which he was not made a party. The Supreme Court thus nullified the action for the absence of a necessary party. Learned Senior Counsel therefore urged the Court to resolve this issue in favour of the 1st Cross Respondent.

On his part, learned Senior Counsel for the 3rd Cross Respondent, Awomolo, SAN, relied on the authorities of BAT (Nig) Ltd. v. Int'l Tobacco Plc (2013) 2 NWLR (Pt.1339) 493 at 514-515 paras H-D; and NDP V INEC (2013) 6 NWLR (Pt.1350) 392 at 426to submit that the essence of joining a necessary party to an action is that he should be bound by the decision of the court. He further submits that by Section 137(1) of the Electoral Act, 2010 (as amended), the right of the 1st Cross Respondent to challenge the outcome of an election, having participated in the said election, is indisputable. However, that this right is totally independent of the right ascribed to a candidate who participated in an election to file a petition. He argues that a political party and a candidate cannot be held to be one and the same. Reliance is placed on Section 141 of the Electoral Act, 2010 (as amended) and CPC V Ombugadu (2013) 18 NWLR (Pt.1385) 66 at 119-120 per Ngwuta, JSCwhich demonstrates a clear distinction between a political party and its candidate to whom, he contends, the benefit resides.

Finally, learned counsel for the 5th Cross Respondent, Oke, Esq. relies on INEC V Izuogu (1993) 2 NWLR (Pt.275) 270, to submit that it is a candidate to an election that wins an election and thus, in him resides the locus standi to seek reliefs beneficial to him. He further submits that a political party cannot seek reliefs in favour of a person who is not a party to the case. Consequently, he submits that for the candidate, John Olukayode Fayemi, to benefit from reliefs D and E of the Petition, he ought to have been made a party, being a necessary party to the Petition, as the facts cannot be put forward on his behalf. Therefore, Counsel submits that the 1st Cross Respondent lacks the locus standi to seek judicial intervention with regard to the reliefs, and since that is so, the Tribunal lacked jurisdiction to entertain the Petition. He relies on the following authorities: Tafida V Bafarawa (1999) 4 NWLR (Pt.597) 70 at 83 paras B-D; Overseas Construction Ltd V Creek Enterprises Ltd & Another (1985) 3 NWLR (Pt.13) 407) at 418; CPC V INEC (2011) 18 NWLR (Pt.1279) 493 at 576 - 577; Mobil Prod. (Nig.) Ltd.V Monokpo (2003) 18 NWLR (Pt.853) 345; & Dapialong V Dariye (2007) 8 NWLR (Pt.1036) 332.

In a brief reply on point of law, learned Senior Counsel for the Cross Appellant reiterated his earlier arguments on this issue while disputing that the cases of Azubuike V PDP (supra) and AD V Fayose (supra) was applicable to the case at hand.

Findings:Undoubtedly, the interpretation of Section 137(1) of the Electoral Act, 2010 (as amended) is the pivot of this issue. The contents are therefore set out hereunder for ease of reference as follows:

137 - (1) An election petition may be presented by one or more of the following persons -

(a) A candidate in the election;

(b) A political party in the election.

By the literal or golden rule of interpretation, it is unarguably the law that both a candidate, as well as the political party sponsoring the candidate or both, may present an election petition. The crux of the complaint of the Cross Appellant is that, the candidate, having not joined the Petition as a co-Petitioner, the Cross Appellant lacked the requisite locus standi to present the Petition and to seek all the reliefs, but in particular, the reliefs contained in paragraphs D and E thereof in his favour, and thus the Tribunal acted wrongly when it overruled the objection raised on the ground of the absence of locus standi.

The law is since trite that election Petitions are sui generis in nature. For that reasons, they are distinct from other ordinary proceedings. By virtue of this, they are regulated by special provisions under the Constitution and the Electoral Act purposely enacted to guide the proceedings before an Election Tribunal. This issue of locus standi was firmly pronounced upon by Supreme Court in the case of Abubakar V Yar'Adua (supra) at 23, where it held, per Katsina Alu, JSC, as follows:

"An election petition is sui generis. That is to say it is in a class by itself. Surely this is no longer a moot point. It is different from a Common Law civil action. This must be borne in mind throughout these proceedings."

Since that is the case, all the authorities cited in respect of locus standi arising from regular civil suits are patently and demonstrably inapplicable to the instant Appeal.

Under the Electoral Act, a Tribunal in determining locus standi is bound only by the averments in the Petition. In addition to this, the Tribunal is enjoined to give strict interpretation to the statute in a way to give effect to the intendment of the Legislature. See Ndoma-Egba v. Chukwuogor (2004) LPELR-1974, Pg.13 paras G-H); (2004) 17 NSCQR 399 per Uwaifo, JSC:

"It is the law that the literal rule is the golden rule method of interpretation when the words of a statute are plan and unambiguous. It is a fundamental rule that such words should be given their ordinary plan meaning. It is not in such circumstances permissible to refrain from its meaning, even though it gives an unreasonable unfair result, and to go outside what the words themselves actually convey, in an attempt to consider what other things they ought to be capable of meaning."

Thus, by the wordings and construction of the provision, we have no doubt in our minds that the findings of the Tribunal in its interpretation of Section 137(1) of the Electoral Act, 2010 (as amended), are unassailable. By the same token, the Tribunal cannot be faulted in its finding that the Petitioner was competent to claim all the reliefs contained in the Petition, even without its candidate being joined as a co-petitioner.

Indeed, by the authority of Amaechi V INEC (supra) at 317-318, it is a political party that wins an election. Since there is no independent candidacy/candidature in our law, the responsibility in an election is placed on a political party. It is inarguable that without a political party, a candidate cannot contest. The primary method of contest is therefore between the political parties. Whereas a good or bad candidate may enhance or diminish the political party's chances, as the case may be, it is only a political party that canvasses for votes and thus wins an election. Consequently, the political party indubitably, has acquired a vested interest in the outcome of the election. As a result, it is this interest which Section 137(1)(b) of the Act permits the political party to protect via any of the statutory petitioners, either by themselves individually or jointly.

We are therefore of the firm view that the position of the Tribunal thereon cannot be faulted. The 1st Cross Respondent was at all times permitted to claim as it did in reliefs D and E by virtue of the power granted it in Section 137(1)(b) of the Act. To find otherwise is to render the provision powerless, impotent and ineffective, and also to deny the political party the right conferred upon it by statute. Consequently, contrary to the submission of learned Counsel for the Cross Appellant, the Tribunal's findings on this issue are far from being perverse, having been well founded on the provisions of the statute guiding the filing of election petitions in our Tribunals.

Pursuant upon this, the decision of the Tribunal that John Olukayode Fayemi was not a necessary party is well founded. The law is now certain that either the political party or the candidate or both may file a petition contesting the outcome of an election and seek necessary reliefs as sought in the Petition. See CPC V INEC (supra); & Okonkwo V Ngige (2006) 8 NWLR (Pt.981) 119 @ 136 per Adekeye JSC.

In CPC V INEC (2011) 18 NWLR (Pt.1279) 493 at 576 - 577, the issue of the joinder of the candidate of the CPC to the Petition was never raised before the Apex Court. This is because Ground 6 of the Petition which raised the issue of joinder was not one of issues for consideration before the Supreme Court as it was struck out by the Court of Appeal and this was not contested. Thus, the issue of the joinder of the candidate of the CPC to the Petition was never raised before the Apex Court and so no pronouncement was made to the effect that certain reliefs would not be granted because the candidate of the CPC was not joined as a co-petitioner. Hence, from the dictum of Ngwuta, JSC, the reason for the striking out of Relief 6 is not stated. The learned Jurist merely observed that even if the said Relief had not been struck out, it would not be granted because CPC did not prove the declaration sought on the preponderance of evidence, and not because the candidate of the CPC, General Muhammed Buhari (Rtd) was not joined as a co-Petitioner. In addition to this, the wordings of the said relief 6 was evidently misconceived in law in that it prayed for another election to be conducted by INEC between CPC, the Petitioner, and the candidate of the PDP, Goodluck Ebele Jonathan, the 3rd Respondent. Thus, that is the rationale behind the finding of the learned Jurist that the prayer for a fresh election between a political party, (CPC), and a candidate on the opposing side, (Goodluck Ebele Jonathan), was absurd and bizarre as there cannot be an election between a political party on one side and the candidate of a political party on the other side. The point was made that the relief already struck out by the Court below should have been more properly formulated to pray for an election to be conducted between the two candidates, and not between a political party (an inanimate object) and a candidate, (a human being).

Again, the case of CPC V Ombugadu (2013) 18 NWLR (Pt.1385) 66 @ 119-120 per Ngwuta, JSC, pertains to the consideration of Section 141 of the Electoral Act 2010, (as amended). This provision has to do with the effect of the non-participation of a person in an election. It was decided by the Apex Court that the implication of Section 141 of the Electoral Act, 2010 (as amended), is to the effect that, while the candidate at an election must be sponsored by a political party, the candidate who stands to win or lose the election, is the candidate and not the political Party that sponsored him. What this means is that political parties do not contest, win or lose elections directly. They do so by the candidates they sponsor. The crux of the decision was that, before a person can be returned as elected by a tribunal or a court, that person must have fully participated in all stages of the election, starting from nomination to the actual voting. Manifestly, the facts in both cases are not apposite as the candidate of the 1st Cross Respondent, John Olukayode Fayemi, fully participated in all the processes of the election and was said to have scored the second highest votes in the election. Thus, the sound and well-founded principle of law enunciated by Ngwuta, JSC, in the case cited, cannot be applied willy nilly to the facts in the instant case. It goes without saying that this provision i.e. Section 141, was a subsequent addition to the Electoral Act of 2010 by the Legislature to meet the contingency which arose in view of the decision of the Supreme Court in Amaechi V INEC (supra) in respect of its declaration of Amaechi as the winner in an election in which he did not participate after he was substituted by his political party as the nominated candidate for the election.

This decision of CPC V Ombugadu (supra) was reaffirmed in Azubuike V PDP (2014) 7 NWLR (Pt.1406) 292 @ 315 paras A-D with regard to Section 221 of the Constitution which provides that no association other than a political party can canvass for votes for any candidate at an election, and therefore without a political party, a candidate cannot contest, as it is a political party that wins an election. For ease of reference the verbatim provision is set out hereunder:

221 - No association, other than a political party, shall canvass for votes for any candidate at any election or contribute to the funds of any political party or to the election expenses of any candidate at an election.

Again, in the case of Tafida v Bafarawa (1999) 9 NWLR (Pt.597) 70 @ 79, the Petitioner, contrary to the then existing statute, being the obsolete Decree No. 3 of 1999, failed to join the candidate of the opposing Party, PDP, as well as INEC as co-respondents. In addition to these lapses, the Petition was not filed by any of the statutory Petitioners named in the extant law. The applicable law then was Section 133 of Decree No.3 of 1999, which is radically different contextually from the content of Section 137 of the Electoral Act, 2010. It was different in that Section 137 expressly gives both or either a political party or its candidate the right to present a petition; whereas, it was not so in Decree No.3 of 1999. In stark contrast to the facts in the case cited, in the instant Petition the 1st Cross Respondent, a statutory petitioner, filed the Petition against all the statutory Respondents, including INEC. The case cited is therefore not apposite.

Again, in AD V Fayose (2004) 1 EPR 85, the Petitioner therein, sought for similar reliefs as in the Petition under consideration in this Cross Appeal.

The Respondents took objection to the competence of the Petition, contending, (as has been done in this Appeal), that the Appellant ought to have joined its candidates as co-petitioners. Nonetheless, this Court allowed the Appeal following its interpretation of Section 133(1) of the Electoral Act, 2002 which is in pari material with Section 137(1) of the Electoral Act, 2010. The Court in that case held that while the candidates may be desirable parties, they are not necessary parties. In distinguishing the decision in Maikori V Lere from the facts of that case, the Court relied on Buhari V Yusufwhere Uwaifo, JSC held that Section 133 of the Act, 2002 placed no obligation on a Petitioner to make any candidate who lost an election or any political party, whether of a candidate elected or returned, or of a candidate who lost or who may not have fielded any candidate for the particular seat, a Respondent, other than the statutory Respondents envisaged under sub-section (2) and as identified in the Judgment. Opene, JCA reiterated the fact that election petitions were a special proceeding, sui generis, and therefore clearly distinct from ordinary civil matters, and it is for this reason that effect is fully given to the relevant statutes on the election. We are entirely in agreement with this decision.

Consequent upon the decisions in these decided cases, we are of the humble but firm view that the cases cited by the Cross Appellant to the effect that a court will not give Judgment or make an order that will affect the interest or right of a person who is not a party to the case and who was never heard in the matter, do not apply to the instant case since the substantive law guiding election petitions makes clear provision for persons who are at liberty to present an election petition. By the same token, the issue of fair hearing canvassed, does not also arise.

Yet again, learned Counsel for the Cross Appellant has submitted that winning an election is for the benefit of the candidate alone. With due respect, there is nothing that can be further than the truth as this submission is premised upon a fallacy. Certainly, the candidate cannot contest independently of the political party. He can only contest on the platform of a political party since, as afore-stated, independent candidature is not permitted in our laws - (see again Section 221 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended). Consequently, the fortunes of the candidate and its political party are intricately interwoven together. They are inseparable like Siamese/conjoined twins who are dependent on each other. Thus, political parties win or lose elections by the candidates they sponsor. As a result, a loss or a success inures as much for the political party as well as for the candidate. It is therefore not a true and correct statement of the law to argue that it is solely the candidate that has a vested right in the office of the Governor. Both the political party and the candidate, by virtue of the relevant statutes and the case law on the subject, have vested rights in the office of the Governor.

It is for all these reasons that we find that the authorities of Okonta V Philips (supra) and others cited in support of the contention that the candidate in this election proceeding falls within the category of a necessary party are inapplicable to these sui generis proceedings. Indeed, it is most worthy of note that the Okonta case (supra) was, in point of fact, another pre-election matter that emanated from the Federal High Court in an Originating Summons procedure. The Appellant therein had been removed from office as a member of the Delta State House of Assembly pursuant to a suit in which he was not made a party. Needless to say, the Supreme Court nullified the action for the absence of a necessary party. For the avoidance of doubt, the Apex Court held at page 327 as follows:

*"The plaintiff before the Federal High Court - now 1st Respondent in this Appeal - Kingsley Nonye Philips claimed that he was the nominated candidate of the Peoples' Democratic Party to contest as a representative for Ika South Constituency into the Delta State House of Assembly. The seat being contested by the 1st respondent in court was won by the Appellant - Hon. Martin Okonto, who was already sworn in as a member representing Ika South Constituency in the Delta House of Assembly. The Federal High Court did not deem fit to join the Appellant in this case to that action, regardless of the fact that there were relevant portions of the originating summons which made particular reference to the Appellant."*

Clearly, the circumstances and the issues are yet again quite dissimilar from the issue in the instant Appeal and therefore are distinguishable and inapplicable here. The action, being an election petition, is sui generis governed by the Electoral Act, and this must always be borne in mind.

Learned Counsel for the 1st Cross Respondent has rightly and fittingly submitted that it is a political party through the instrumentality of its sponsored candidate that wins or loses an election. A candidate cannot stand election without being sponsored by a political party neither can a political party win a seat in an election except through a candidate it sponsored. It follows that what affects one affects the other. Thus, it is a symbiotic relationship. And so, by the express provision of Section 137 of the Electoral Act, 2010 (as amended), it is erroneous to argue that one cannot claim a relief in the absence of the other. Accordingly, the lower Tribunal was right to hold that, by virtue of the right conferred on a political party to present an election petition under Section 137(1)(b) of the Electoral Act, 2010 (as amended), the 1st Cross Respondent was vested with the right to seek all the reliefs allowable under the Act, even in the absence of the candidate.

In consequence of all the above, we find that, having regard to the reliefs sought in the Petition, John Olukayode Fayemi was not a necessary party to the Petition and his absence did not in any way render the Petition and/or the reliefs sought incompetent.

At the end of the day, the reliefs A, B, C, D and E were proper reliefs in the eyes of the law as espoused in the relevant statute and the case law. Thus, the Tribunal acted rightly when it overruled and dismissed the objection raised to the hearing of the petition. In the result, pursuant to the findings above, issue one is resolved in favour of the 1st Cross Respondent.

Issue Two: Whether the Tribunal was in error to hold that the allegation of the 1st Cross Respondent on the issue of disqualification of the 2nd Cross Respondent was founded on the contravention of the Code of Conduct and not impeachment.

Under this issue, the Cross Appellant complains against the finding of the Tribunal that the Petitioner's case bordered on the contravention of the Code of Conduct for Public Officers, and not on impeachment. The Cross Appellant's argument that impeachment was not a ground for disqualification under Section 182 of the 1999 Constitution was accordingly discountenanced the Tribunal. The Cross Appellant argued that the allegation raised in the relevant paragraphs of the Petition was that the 2nd Cross Respondent was impeached by the House of Assembly and removed from office as Governor in 2006, and for that reason, they contend that he was thereby disqualified from contesting the June 21st 2014 gubernatorial election. After due consideration, the Tribunal in agreeing with the submission of the 1st Cross Respondent, found that the Petitioner's case on the pleadings bordered on the contravention of the Code of Conduct for Public Officers, and not on impeachment. The Cross Appellant's argument that impeachment was not a ground for disqualification under Section 182 of the Constitution of the Federal Republic of Nigeria was therefore discountenanced.    
Referring to paragraphs 35(iv)(a), 110-120 of the Petition, Counsel submits that the case raised by the 1st Cross Respondent against the 2nd Cross Respondent was in actual fact impeachment as the basis for praying for the disqualification of the 2nd Cross Respondent. He therefore urged the Court to so hold.

Learned Counsel for the 1st Cross Respondent, on his part, submits that the case of the 1st Cross Respondent/Petitioner was that the 2nd Cross Respondent was disqualified having been found guilty of a breach or contravention of the Code of Conduct for Public officers contrary to Section 182(1)(e) of the Constitution and not on the ground of his impeachment. He submits that his subsequent impeachment was just the sanction imposed on him for the said contravention.

Furthermore, learned Senior Counsel submits that Section 188(5) of the Constitution discloses that the Panel that investigates an allegation against a Governor is distinct and different by the composition and qualification of members from the House of Assembly which ultimately possesses the power of impeachment. He also argues that the submission that a panel set up under Section 188(5) of the Constitution is an integral part of the impeachment process was a new issue for which leave has not been sought to raise it. He therefore urged the Court to resolve this issue in favour of the 1st Cross Respondent and to dismiss the Cross Appeal in its entirety.

On the part of the 3rd and 5th Respondents who filed Briefs of argument, their arguments were essentially in consonance with the submissions of learned Counsel for the cross Appellant, since they have conceded the Appeal. It will therefore be merely repetitive for us to re-hash same here. Suffice it to say that due cognisance and consideration has been given thereto. In like vein, the Reply Brief did not raise any new point of law different from what has been argued in the Cross Appellant's Brief, aside from referring to paragraph paragraphs 4.7 of the 1st Respondent's Reply on point of law to the Petitioner's final Address at page 1336 Volume 2 of the printed Record of Appeal, where, he contends, this issue was distinctly raised and argued before the Tribunal.

Findings: In approaching this issue, the relevant provisions of the Constitution will first be examined in order to have a proper bearing and perspective on what the law is on the subject, before applying these provisions to the peculiar facts of this Cross Appeal as divulged in the pleadings and evidence.  
Sections 182(1)(e), 188(5) &188(9) of the Constitution of the Federal Republic of Nigeria, 1999 provide as follows:

"182 - 1. No person shall be qualified for election to the office of Governor of a State if –

(e) within a period of less than ten years before the date of election to the office of governor of a State he has been convicted and sentenced for an offence involving dishonesty or he has been found guilty of the contravention of the Code of Conduct..."

188-5.Within Seven days of the passing of a motion under the foregoing provisions of this section, the Chief Judge of the State shall at the request of the Speaker of the House of Assembly, appoint a Panel of seven persons who in his opinion are of unquestionable integrity, not being members of any public service, legislative house or political party,to investigate the allegation as provided in this section.

9. Where the Report of the Panel is that the allegation against the holder of the office has been proved, then within fourteen days of the receipt of the report, the House of Assembly shall consider the report, and if by a resolution of the House of Assembly supported by not less than two-thirds majority of all its members, the report of the Panel is adopted, then the holder of the office shall stand removed from office as from the date of the adoption of the report."

Ground iv (a) of the Petition states:

"The 2nd Respondent was not qualified to contest as at the time of the election on the following grounds:

(a) The 2nd Respondent was found guilty of the contravention of the Code of Conduct by the impeachment panel set up by the Acting Chief Judge of Ekiti State on allegation of gross misconduct involving embezzlement of funds preferred against him by the Ekiti State House of Assembly consequent upon which he was impeached and removed from the office of the governor of Ekiti State in the year 2006."

Without much ado and with due respect to learned Senior Counsel for the 1st Cross Respondent, an in depth examination of the relevant ground for the petition as well as the facts in support of the grounds, in my view, tell a story quite different from the picture painted by the 1st Cross Respondent in this Cross Appeal. Therefore, as cumbersome as it may be, it is important to set out a few of the relevant paragraphs from the Petition for ease of reference. The entire Petition itself can be found at pages 1-153 of Volume one of the Record of Appeal, and the relevant paragraphs are set out hereunder:  
  
"35. Your Petitioner states that:

iv. The 2nd Respondent was not qualified to contest as at the time of the election on the following grounds:

(a) The 2nd Respondent was found guilty of the contravention of the Code of Conducts (sic) by the impeachment panel set up by the acting Chief Judge of Ekiti State on allegation of gross misconduct involving embezzlement of funds preferred against him by the Ekiti State House of Assembly consequent upon which he was impeached and removed from the office of the governor of Ekiti State in the year 2006.

FACTS IN SUPPORT OF THE GROUNDS OF THE PETITION

110. The petitioner avers further that sometime in the year 2006 while the 1st Defendant was the Governor of Ekiti State, the Ekiti State House of Assembly by a Notice signed by 23 members of the House of Assembly called for the impeachment of the 2nd Respondent, which Notice was directed to the Honourable Speaker of the Ekiti State House of Assembly...

111. Your petitioner avers that the offences and the contravention of the Code of Conduct upon which the impeachment was hinged as contained in the Notice mentioned above are as follows:

112. The Petitioner will contend at the trial that the 2nd Respondent was found guilty of contravention of Code of Conduct.

113. Your petitioner states that the Notice of impeachment was served on the 2nd Respondent by the then Speaker of the Ekiti State House of Assembly vide Letter dated 26th September, 2006...

114. Your petitioner avers that the 2nd Respondent filed his response to the Impeachment Notice wherein he made a blanket denial of the allegations leveled against him by the members of the House of Assembly...

115. Your petitioner avers that the then Speaker of the House of Assembly requested the Acting Chief Judge of Ekiti State to appoint a panel of seven members to investigate the allegationsas provided for under the Constitution of the Federal Republic of Nigeria, 1999.

116. The Acting Chief Judge set up the Panel to investigate the conduct of the 2nd Respondent in his  capacity as the Governor of Ekiti State and the Panel submitted its Report to the House of Assembly, which Report, indicted the 2nd Respondent and found him guilty of all the allegations including contravention of the Code of Conduct...

118. Pursuant to the report and its acceptance, the Ekiti State House of Assembly impeached the 2nd Respondent who thereby ceased to be governor of the State...

119. Your petitioner avers that the 2nd Respondent challenged his removal and/or impeachment from office as Governor of Ekiti State in the Federal High Court, Akure where the Ekiti State House of Assembly, Economic and Financial Crimes Commission) (EFCC) among others were made defendants."  (Emphasis supplied).

A succinct summary of the paragraphs relied on, i.e. paragraphs 110 - 120 of the petition demonstrates quite plainly that the allegations brought against the 2nd Cross Respondent before the Ekiti State House of Assembly were those of offences such as embezzlement, as well as acts in contravention of the Code of Conduct. In line with Section 188 of the 1999 Constitution which sets out guidelines for the impeachment of a Governor and/or Deputy Governor, the Acting Chief Judge was invited to set up a Panel to investigate these allegations. The Panel duly carried out its assignment and forwarded its report thereon to the Acting Chief Judge, who dutifully passed it on to the Hon. Speaker of the Ekiti State House of Assembly. Thereafter, the Ekiti State House of Assembly impeached the 2nd Cross Respondent based on the Report of the Panel which found the 2nd Cross Respondent guilty of contravening the Code of Conduct. From all the above, what is visibly apparent and incontestable is that the 2nd Cross Respondent was in point of fact impeached,  and it is this inexorable fact of impeachment that formed the fulcrum of the Petition of the 1st Cross Respondent in paragraph 110-120 of the Petition.

All said and done, it is a fact beyond argument that one of the infractions for which the 2nd Cross Respondent was hauled before the said Panel was the contravention of the Code of Conduct. However, the matter of being found guilty of contravening the Code of Conduct was just the process leading into the impeachment. In our view, these are facts which clearly speak for themselves and which consequently require no further elucidation.

It is for these reasons that we therefore agree with learned Counsel for the Cross Appellant that the findings in the Report of the investigation panel set up by the Acting Chief Judge of Ekiti State merely formed a requisite part of the impeachment process as laid down in Section 188 of the 1999 Constitution. We must not however lose sight of the fact that the Panel which indicted the 2nd Cross Respondent was neither a court of law nor was it a tribunal such as the Code of Conduct Tribunal. Therefore, its findings cannot, by any stretch of the imagination be construed as a verdict of guilty tantamount and/or synonymous with that issued by a court of law trying a criminal matter. Instead, the Panel was consciously set up by the Acting Chief Judge at the behest of the Ekiti State House of Assembly with  a view to taking a decision on whether or not the 2nd Cross Respondent was guilty of gross misconduct that could warrant his impeachment, simpliciter. Therefore, to attempt to extricate the findings of the Panel from the impeachment process is to do violence to the wordings, spirit and intendment of Section 188 of the 1999 Constitution.

Going further, the impeachment of the 2nd Cross Respondent in the year 2006 is a fact and an unquestionable reality. No doubt the 2nd Cross Respondent was dissatisfied with the process leading up to his impeachment, and this led him to the corridors of the Federal High Court, as well as the Court of Appeal, seeking to question its legality on many grounds. Nevertheless, for reasons that are not at the moment relevant to this Cross Appeal, the matters were not conclusively resolved on the merit. Thereafter, the 2nd Cross Respondent appears to have lost interest and/or allowed sleeping dogs to lie, as he did not appear to have pursued the matter further. Consequently, the extant position to date, which has also become a historical fact, is that, rightly or wrongly, the 2nd Cross Respondent was impeached in the year 2006.

The question as to whether the process of impeachment was carried out correctly and in strict adherence to the relevant laws governing impeachment is not a subject for this Court, neither should it have been a matter upon which the Tribunal should have expended its energies. The question of the propriety of the impeachment process carried out in the year 2006 was not and could not have been before the Governorship Election Tribunal in the year 2014. Once it had been established by evidence that the 2nd Cross Respondent was impeached, the Tribunal had a duty to comply with the law and to steer clear of the issue. This is evidently because the law is now trite that impeachment is not one of the grounds for the disqualification of a person seeking the office of a Governor of a State. See Section 182(1)(e) of the 1999 Constitution. This principle of law was very well articulated by this Court in the case of Omoworare V Omisore (2010) 3 NWLR (Pt.1180) 58 per Ogunbiyi, JCA, (as she then was). Section 66(1)(d) of the 1999 Constitution considered in that decision is in pari materia with Section 182(1)(e) thereof now under consideration in this Appeal; therefore the principle of law enunciated therein applies mutatis mutandis to the facts of the instant case.

With all due respect, we are of the view that the Tribunal got it all wrong when it embarked upon a voyage of discovery into an area totally outside its jurisdiction in conducting an in-depth investigation into whether or not the provision of section 188 of the 1999 Constitution were strictly complied within the process of impeachment. Surprisingly, the Tribunal even went further to conduct an inquiry into whether or not the Acting chief Judge was ab initio qualified to set up the Panel of investigation that found the 2nd cross Respondent guilty of contravening the code of conduct, based on whose report the 2nd Cross Respondent was impeached. To our minds, all these were outside the purview of the jurisdiction of the Election Tribunal as circumscribed by Section 285(2) of the 1999 Constitution. For ease of reference, Section 285(2) states as follows:

"There shall be established in each State of the Federation one or more Election Tribunals to be known as the Governorship and Legislative Houses Election Tribunals which shall, to the exclusion of any court or tribunal have original jurisdiction to hear and determine petitions as to whether any person has been validly elected to the office of Governor or Deputy Governor or as a member of any legislative House."  
(Emphasis supplied)

Consequently, the Election Tribunal does not possess the jurisdiction to review the setting up, composition and/or question the validity of the decision of the investigation panel set up by the House of Assembly. See Belgore V Ahmed (2013) 8 NWLR (Pt.1335) 60. Indeed, no court of law, and by the same token no Governorship Election Tribunal, has the jurisdiction to review the proceedings of a panel set up under Section 188 of the Constitution to investigate the allegations of misconduct made against a Governor. Again, for the avoidance of doubt, Section 188(10) of the Constitution states:

"No proceedings or determination of the panel or of the House of Assembly or any matter relating to such proceedings or determination shall be entertained or questioned in any court of law."

Therefore, where a petitioner, as in this case, founds his Petition on disqualification, what he is required to do is to plead and adduce evidence of this fact of disqualification in line with Section 182 of the Constitution. In the instant case, the fact of disqualification was based undoubtedly on the impeachment of the 2nd Cross Respondent, having been found guilty of committing acts in contravention of the Code of Conduct for Public officers. That being the case, the determination of whether or not the process leading up to the fact of impeachment was proper or not was not within the jurisdiction of the Tribunal. However, it does appear that the Tribunal lost sight of the fact that the issue of impeachment was not before it for adjudication. What was always before it though, (specifically under this issue), was whether or not the 2nd Cross Respondent was disqualified from seeking/contesting for the office of Governor in the year 2014 by reason of any disqualifying factor set out in Section 182 of the 1999 Constitution.

Once the evidence before the Tribunal established that the 2nd Cross Respondent was impeached, the Tribunal was duty bound to find that impeachment was not a ground for disqualifying a candidate from seeking the office of Governor, and to go no further on that issue. There was no additional call on the learned Judges of the Tribunal to investigate the circumstances of the impeachment and to determine whether or not the impeachment was properly carried out in accordance with the law or to embark on a general inquiry into the processes leading to the impeachment. Those actions were certainly beyond the jurisdiction of an Election Tribunal by virtue of Section 285 of the 1999 Constitution. Therefore, the learned Judges of the Tribunal acted without jurisdiction when they embarked on a Columbus-like expedition to verify the propriety or otherwise of the impeachment of the 2nd Cross Respondent in 2006.

One more word before we conclude. The position of the law has been stated, and we are bound to faithfully interpret it as it is. Nonetheless, it is not out of place to suggest that the Legislature, the body constitutionally charged with enacting laws for the good governance of citizens of this country, should be invited to have a second look at the state of the law on this subject. This is because it is less than desirable and leaves a sour taste in the mouth to say that any person who has been found guilty of gross misconduct by the legislative arm of a State and is consequently impeached, is capable of being found to be a fit and proper person to subsequently hold office as the Governor of that self same State. This appears to us be both an unsavoury state of affairs and a contradiction in terms. Enough said!    

In consequence of all the above, it is our finding that the Election Tribunal acted in error and outside its jurisdiction when it embarked upon an inquiry into the process leading to the impeachment of the 2nd cross Respondent, the question of impeachment not being a matter within the jurisdiction of the Tribunal, and not capable of disqualifying the 2nd Cross Respondent from contesting for the office of Governor of Ekiti State. Accordingly, issue two is answered in the negative in favour of the Cross Appellant.

In the result, having resolved as above in respect of the two issues, the Cross Appeal succeeds in part in the following terms:

1. The Election Tribunal acted rightly when it held that the 1st Cross Respondent had a right under the Electoral Act, 2010 (as amended) and was competent to claim all the reliefs contained in the Petition in spite of the non-joinder of the gubernatorial candidate as a co-petitioner.

2. The Election Tribunal was in error to hold that the allegation of the 1st Cross Respondent on the issue of disqualification of the 2nd Gross Respondent was founded on the contravention of the Code of Conduct and not impeachment.

The Cross Appeal succeeds in part.

**JUMMAI HANNATU SANKEY, J.C.A.:**

I agree.

**JOSEPH SHAGBAOR IKYEGH, J.C.A.:**

I agree.

**ITA GEORGE MBABA, J.C.A.:**

I agree.

**PAUL OBI ELECHI, J.C.A.:**

I agree.