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DEMYSTIFYING AND NAVIGATING ELECTION PETITION PRACTICE AND PROCEDURE IN NIGERIA.

Ooreoluwa O. Agbede[*] and *Timothy S. Ayorinde*[**]

ABSTRACT

The 2023 general election in Nigeria and the resulting petitions witnessed a remarkable surge in the participation of the younger generation in the political and electoral sphere, exacerbated by the ease of access and dissemination of information, often without an appreciation of the judicial process, practice and procedures, creating a disconnect between the average Nigerian and the judiciary. In light of these challenges, this article seeks to address the valuable lessons that could have been gleaned from the electoral and judicial process and the formidable obstacles and intricate steps involved in asserting claims within the realm of election petitions. Furthermore, the article explores the labyrinth of rules, practices, and procedures that serve as the guiding principles for both the election tribunal and the court. This article shall unravel the complexities of rules, laws, and practices that govern election petitions, the tribunals and the court. Ultimately, it is emphasized that triumph at the tribunals is not a matter of chance but a result of strategy and adherence to these established rules. In the grand tapestry of Nigeria's democracy, it is not only about obtaining a return but also about skillfully navigating the intricate terrain of legalities and evidence to secure victory within the courtroom.

Keywords: Elections, Election petitions, Timelines and time limitation, Pleadings, Principles of Evidence.

1.0 INTRODUCTION

While it is undisputed that elections are primarily won through grassroots politicking and campaigns in the streets, it is equally imperative to recognize that the battleground often shifts from the bustling streets to the solemn confines of the courtrooms. Here, the key to success doesn't lie in political strategies, charisma or public appeal but rather in the meticulous adherence to a complex web of rules, encompassing practice, procedures, evidence, and the law itself. These rules are abundant, and more importantly, they are binding.

As authors of this article, we represent the emerging generation—a generation with a burgeoning interest in the political landscape of Nigeria. Additionally, our legal

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training and experience equip us with a unique perspective on the intersection of law, politics and the judiciary. While we acknowledge that prevailing in an election petition in Nigeria is no walk in the park, we also empathize with the profound shock that accompanies the daunting task of substantiating a petition. It is with this understanding that we embark on this journey to unravel the intricacies of election petitions. Our objective is twofold: first, to equip the new and younger generation of Nigerians, who are increasingly engaging with the intricacies of elections and governance, with an in-depth understanding of the substantial rules, duties and burdens involved in establishing claims at the tribunals. Secondly, we aim to foster awareness and understanding of the current framework to aid the making of informed critiques and future demands for a comprehensive review of electoral legislation, practices, and procedures.

2.0 THE CHALLENGES FACED BY PETITIONERS IN ELECTION PETITIONS IN NIGERIA

It is far from an exaggeration to assert that the atmosphere during the 2023 election petitions, both in physical and social media spaces, was charged with emotions, questions, and allegations. The fervour and intensity of these discussions were palpable. One notable point of note was the conception that the act of tendering bundles of electoral documents sufficed to establish alleged non-compliance and corrupt practices. However, this perception, like several others, often overlooked critical factors such as the specific facts pleaded in the petition, the credibility and relevance of the witnesses called, the admissibility of the documents tendered, the probative value of the documents tendered, and most significantly, the intricate provisions of the law and judicial precedents that election tribunals and courts are obligated to uphold[1]. In contrast to the elections conducted and announced outside the courtroom, election petitions adhere to a stringent set of requirements, procedures, and practices, some of which can be perceived as formidable obstacles for the petitioner(s)[2] who seek to substantiate their case. In the following sections, we will delve into some of these key challenges that petitioners and parties face when navigating the complex terrain of election petitions.

[1] V.O Ayika, 'An analysis of the discretionary powers of the court: A case study of election petition tribunal decisions', available at https://ir.nilds.gov.ng/bitstream/handle/123456789/979/Valentine.pdf?sequence=1&isAllowed=y last accessed 15 March 2024, [61 – 62].

[2] By the provisions of section 133 of the Electoral Act, 2022, an election petition may be presented by petitioner(s): a candidate in an election, or/and a political party which participated in the election.

A. LEGAL REPRESENTATION:

In an era where election results are bound to be challenged in court, the role of competent legal practitioners can never be overemphasized, and the engagement of a competent and experienced legal practitioner becomes a critical step for a candidate. Challenging election results in Nigeria is a game of velocity cognisance the statutory time limitation, credibility of evidence, and deluge of documents. In election petitions, a petitioner is saddled with the responsibility of adducing credible evidence before the court and within the statutory time limitation[3]. Hence, no wiser would it be for a serious candidate to have a formidable legal team to observe the electoral process, before and after the electoral events.

In the face of this challenge, a petitioner must take proactive measures by engaging a capable legal practitioner as early as possible in the election process. Ideally, this engagement should occur before the official election results are announced, as regardless of the outcome, a candidate is likely to find themselves in the role of either petitioner or respondent and due to the time-sensitive nature of election petitions, swift action is imperative. By promptly securing experienced legal counsel before the announcement of the results, the petitioner provides time to strategize effectively. This may involve assembling a familiar legal team, establishing a secretariat if required, and offering comprehensive advice to the candidate and their associates regarding essential documents, evidence, and the deployment of agents. In practice, collaboration between the legal team and the situation room is crucial, particularly given the stringent timelines and constraints that characterize election petitions[4].

In essence, legal representation for petitioners underscores the critical importance of proactive planning and swift action. Engaging an experienced legal practitioner at the right moment can significantly enhance the petitioner's ability to navigate the complex world of election petitions effectively.

[3] Section 285(6) of the 1999 Constitution of the Federal Republic of Nigeria (1999 Constitution) prescribes a strict timeline for the presentation and delivery of judgment in an election petition proceeding before a Tribunal, that "an election Tribunal shall deliver its judgment in writing within 180 days from the date of the filling of the petition." See *Atiku & Anor v. INEC & Ors* (2023) LPELR-61556(SC) Per Tijjani Abubakar, JSC (Pp 330 – 336, Paras A - B).

[4] Section 285 of the 1999 Constitution, Paragraph 12 (1) and 16(1) of the first schedule to the Electoral Act, 2022.

B. TIMELINES AND TIME LIMITATION:

The election practice is filled with strict timelines from timelines with respect to pre-election matters, filing of election petitions, replying to petitions, applying for pre-hearing, etc. Section 285 (9), (11), (12), (14) of the 1999 Nigerian Constitution as amended by the 4th Alteration Act, 2017 provides for the time stipulations, as subsection 9 states that every pre-election matter shall be filed not later than 14 days from the date of the occurrence of the event or action complained of, the court in every pre-election matter shall deliver its judgment 180 days from the filing of the suit, and while an appeal shall be filed within 14 days from the date of the delivery of the judgment, the appeal shall be determined within 60 days from the filing of the appeal. This shows that, prior to the election, lawyers, aspirants aspiring to be candidates of their parties, the political parties hoping to sponsor candidates and even the body in charge of the administration of the election have to count their fingers in respect of their respective matters[5].

After the election, the petitions must be filed within strict timelines. The 1999 Constitution provides that every election petition shall be filed within 21 days after the date of the declaration of the result of the election[6] and the tribunal is bound to deliver its judgment in writing within 180 days from the date the petition is filed[7].

Between these 180 days from the date of filing of the petition to the date the judgment must be delivered in writing falls other procedures with strict time stipulations. After the petitioner files the petition, the Respondents each have 21 days to file their respective replies to the petition, but the Respondents' time does not start counting until they have been served[8], and although there is usually a difficulty in personally serving the Respondents, especially the returned candidate, substituted service is possible and also advisable[9], but an application has to be made, granted and service done in strict compliance with the order of the court while being guided by the timelines and stipulations. After the Petitioner receives the Respondent's replies, the Petitioner may reply to the Respondent's replies within five days of receipt of the replies, where the

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[5] Uwadineke C. Kalu, Emmanuel O. C. Obidimma and Anthony O. Anazor, 'Time Limitation in Election Petitions in Nigeria: The imperative for further Constitutional reforms', (2016) 5 (14) International Journal of Innovative Research & Development (IJIRD) available at https://internationaljournalcorner.com/index.php/ijird_ojs/article/viewFile/136703/95826 last accessed 16 March 2024.

[6] Section 285(5) of the Constitution of the Federal Republic of Nigeria, 1999.

[7] *Supra* footnote 3.

[8] Paragraph 12 (1) of the first schedule to the Electoral Act, 2022.

[9] Paragraph 8 of the first schedule to the Electoral Act, 2022.

Respondent raises new issues of fact in its reply[10]. The timing in the above is not general to all respondents, as the service may not be done at the same time, hence, time may not flow the same for all the respondents. There is no assurance that the service will be done on time, as service, if done by the bailiff, may be subject to circumstances beyond the parties' control, or any Respondent may willingly withhold its reply to the petitioners, even if for as little as 3 days.

After pleadings are closed, there is the pre-hearing session, which also has a strict timeline. After pleadings are closed, the petitioner shall apply for the issuance of the pre-hearing notices within seven days after either the petitioner files and serves its reply to the Respondent's replies where new issues of facts are raised in all or some of the Respondent's replies, or within seven days after the Respondents' serves the reply on the petitioner where the Petitioner does not file a reply to the Respondent's reply[11]. This provision is immutable, and where the petitioner fails to apply for the issuance of the pre-hearing notices either within 7 days from the date it last serves a Reply on any Respondent, or 7 days from the date the last respondent to serve its reply serves it on the petitioner, the petition is dead and will be struck out[12]. This was the fate of the petitioners in *Hon. Seyi Olowu & Anor v. INEC & Ors*[13] at the Lagos State National and State House of Assembly Election Petition Tribunal in 2023. Conversely, where a premature application for the issuance of the pre-hearing notice is made before pleadings close i.e. where after the petitioner makes the application, a Respondent serves its reply on the petitioner, the application for the pre-hearing notice becomes premature, and the petitioner has to be wary and alert to make another application within time, and consequently withdraw the premature application. After the application is properly made, the pre-hearing session which ought to be concluded within 14 days, but can be extended by the panel, commences. This time still falls within the 180 days of the tribunal's time to deliver judgment from the date of the filing of the petition.[14]

The strict timelines in election petitions in Nigeria are a critical aspect of the legal framework governing these cases. These timelines are designed to ensure prompt

[10] Paragraph 16(1) of the first schedule to the Electoral Act, 2022.
[11] Paragraph 18 (1) of the first schedule to the Electoral Act, 2022.
[12] Dr. Aderemi Olatubora, SAN, *Election Litigation in Nigeria (General Principles),* vol 1 (Aderemi Olatubora & Co, 2015) 102-104.
[13] EPT/LAG/HR/23/2023.
[14] *Supra* footnote 3.

resolution of election petitions given the tenure of the seat holders[15] and their significant impact on the political landscape and governance. With these provisions as to time, it is necessary for the potential litigators, the legal team and the tribunal to be both aware and alert of the time progression in their respective matters[16].

C. PLEADINGS, FRONTLOADING, EVIDENCE AND PROCEDURE

The obstacles of pleadings, hearing, procedure and evidence are an off-shoot of the time constraint and are related, as pleadings not supported by evidence are deemed abandoned,[17] and evidence cannot be adduced to prove facts not pleaded[18], while the tribunal has the power to reduce the number of witnesses of either party because of the time handicap. These obstacles will be fragmented and discussed below:

a. The grounds, specific pleadings, filing of the petition and frontloading:
As the petitions are required to be filed within the strict timeline as explained previously, so also, are the accompanying documents. Firstly, the grounds are as provided by the Electoral Act, 2022. Section 134 of the Electoral Act, 2022 provides thus:

(1) An election may be questioned on any of the following grounds:

(a) A person whose election is questioned was, at the time of the election, not qualified to contest the election.

(b) The election was invalid by reason of corrupt practices or non-compliance with the provisions of this Act; or

(c) The respondent was not duly elected by a majority of lawful votes cast at the election.

By this provision, a petitioner can only hope to succeed where its complaints stem from either ground, and the recent Act expressly excludes wrongful or unlawful exclusion

[15] C. J. Ubanyionwu, PhD, "Election petition cases and the right to fair trial within a Reasonable time in Nigeria, available at https://www.ajol.info/index.php/naujilj/article/view/136349/125840, last accessed on 20th September, 2023.
[16] 'Timelines associated with election petitions and the various stages of the legal process in Nigeria' (*NESG Blog*, 4 August 2023) available at https://nesgroup.org/blog/Timelines-associated-with-election-petitions-and-the-various-stages-of-the-legal-process-in-Nigeria last accessed 15 March 2024.
[17] *Oraegbunam v. Chukwuka & Ors* (2009) LPELR-4796 (CA).
[18] *Ogba v. Vincent & Ors (2015)* LPELR-40719 (CA).

which was contained in the previous Act[19]. The effect of the position of the law that a ground of an election petition can only be a valid and cognizable ground if it stems from the Electoral Act or the Constitution[20] and the removal of the ground of unlawful exclusion is that a candidate whose name was excluded by the Independent National Electoral Commission (hereinafter referred to as INEC) from the ballot will have no ground for his petition, and consequently, will lack the locus standi to even institute the petition. This was the fate of the petitioners in *Adeola Adegbenga & Labour Party v. INEC, Hon. Kuye & All Progressives Congress*[21]. In essence, a candidate has to be alert and conduct preliminary checks before the election, to ensure his party's emblem is on the ballot, this is especially necessary as the presumption of regularity will apply, deeming the exclusion of the candidate from the ballot as regular, and the excluded candidate will have no locus standi to attempt to rebut the presumption.

After ensuring the grounds of the petition are cognized by the Act, the legal team also has to ensure that the petition complies with the requirement of specificity of facts and is filed within time alongside the accompanying documents. Paragraph 4 of the first schedule to Electoral Act, 2022 provides for the content of the petition, some of which are:

Paragraph 4 (1): An election petition under this Act shall—

> (a) specify the parties interested in the election petition ;
>
> (b) specify the right of the petitioner to present the election petition ;
>
> (c) state the holding of the election, the scores of the candidates and the person returned as the winner of the election; and
>
> (d) State clearly the facts of the election petition and the ground or grounds on which the petition is based and the relief sought by the petitioner.

Paragraph 4 (5): The election petition shall be accompanied by—

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[19] In the now repeaeled Electoral Act of 2010 (As amended), Section 138 outlined four grounds for challenging an election. However, Section 134 of the current Electoral Act of 2022 delineates only three grounds, notably excluding the ground of 'Unlawful exclusion

[20] Dr. Aderemi Olatubora, SAN, *Election Litigation in Nigeria (General Principles),* vol 1 (Aderemi Olatubora & Co, 2015) 217-220.

[21] EPT/LAG/HR/12/2023.

(a) a list of the witnesses that the petitioner intends to call in proof of the petition ;

(b) Written statements on oath of the witnesses; and

(c) Copies or list of every document to be relied on at the hearing of the petition.

Paragraph 4 (6): A petition which fails to comply with sub-paragraph (5) shall not be accepted for filing by the Secretary.

Paragraph 4 (7): An election petition, which does not comply with sub-paragraph (1) or any provision of that sub-paragraph is defective and may be struck out by the Tribunal or Court.

This requirement for specificity has been reiterated in a myriad of cases[22]. Hence, within the 21 days provided for the filing of the petition, the legal team drafting the petition must know the facts in support of the grounds of the petition, and plead those facts specifically to eliminate any surprise to the opposing party and prevent the paragraphs from being struck out. In instances where the ground is of either, "the election was invalid by reason of corrupt practices, or non-compliance with the provisions of this Act, or the respondent was not duly elected by a majority of lawful votes cast at the election", the specific facts must be tied to the respective and specific polling units[23] and upwards. Words like "some polling units", "many polling units", "most polling units" or "several polling units" cannot be used[24].

These specific facts will be replicated in the witness statement on oath and further supported by the documents that will be tendered in evidence, and some instances, the facts pleaded and allegations made in the petition will determine the parties, without prejudice to the statutory parties as provided in Section 133 of the Electoral Act, that will be made the respondents, to ensure that the persons against whom criminal allegations are made, has the opportunity to defend himself[25]. Additionally, the facts pleaded and contained in the witness statement will also determine the standard of

[22] *Ashiru Noibi v. Fikolati & Ors* (1987) 3 SC 105 AT 119, (1987) 1 NWLR (PT. 52) 619.
[23] *PDP v. INEC* (2012) 7 NWLR (Part 1300) page 538*; PDP v. Okogbuo & Ors* (2019) LPELR-48989 (CA) Per Theresa Ngolika Orji-Abadua, JCA (Pp 34 - 35, Paras D - E)
[24] *Okwuru v. Ogbee & Ors* (2015) LPELR-40682 (CA) Per Misitura Omodere Bolaji-Yusuff, JCA (Pp 10 - 13, Paras D - E).
[25] *Onwudinjo v. Dimobi & Ors* (2005) LPELR-7518 (CA).

proof on the petitioner, as criminal allegations must be proved beyond a reasonable doubt[26], even as the person must be made a respondent and allowed the opportunity to defend himself.

Where the facts in the petition are not specific, the affected paragraphs will be struck out, and the ground(s) to which the facts are pleaded further, will be deemed abandoned. This also affects the evidence which will be unsupported by pleadings when the affected paragraphs of the petition are struck out.

As an advice, the necessary agents, witnesses, candidates and the political party's representative has to be available within reasonable time to relay the specific facts to the legal team, the documents should be inspected to ensure facts and allegations do not contradict the documents, the specific facts has to be pleaded in the petition and replicated in the accompanying witness statements, the petition has to be carefully drafted with foresight even if all the necessary documents have not been inspected, as amendments that are not to cure typographical and clerical errors and which affect the substance, reliefs and grounds of the petitioner are not allowed after the 21 days for filing the petition has lapsed[27], all the necessary statements on oath have to be carefully prepared for the respective witnesses to be called, and the legal team has to have the foresight to plead and list all the necessary and precise documents in proof of the specific facts as contained in the petition, and as replicated in the necessary witness statements including documents that establish the identity of the witnesses, all with precision, specificity and clarity[28]. Fortunately, while the petitioner and the legal team have to have the foresight and experience, there is no need for the petitioner(s), unlike the Respondents, to frontload the copies of documents listed on the list of documents while filing the petition[29].

b. Collecting and gathering the evidence from INEC and subpoenaing witnesses:

While the legal team prepares the petition in consideration of the factors previously discussed, they also bear the responsibility of requesting, collecting, gathering and inspecting documents from INEC, and forming strategies on the witnesses to call

[26] *Ibrahim v. Shagari & Ors* (1983) LPELR-1412 (SC).
[27] *APC v. Mbawike & Ors (2017)* LPELR-41434 (CA); Dr. Aderemi Olatubora, SAN, *Election Litigation in Nigeria (General Principles),* vol 1 (Aderemi Olatubora & Co, 2015) 131-140.
[28] Dr. Aderemi Olatubora, SAN, *Election Litigation in Nigeria (General Principles),* vol 1 (Aderemi Olatubora & Co, 2015) 208 – 211.
[29] Paragraph 4 (5) (c) of the first schedule to the Electoral Act, 2022 provides that the election petition shall be accompanied by "copies **or** list of every document to be relied on at the hearing of the petition."

during trial, whether to call witnesses on subpoena, which polling unit agents and ward agents to call before the tribunal[30]. Take note that all witnesses must be listed (or initiated) including subpoenaed witnesses, and the witness statement on oath of all witnesses, including those of subpoenaed witnesses where the witness was subpoenaed at the instance of a party's application, must be filed and front-loaded alongside the petition within time as oral examination-in-chief is not recognized by the current legal framework of election petitions[31].

There have been varying reactions to the requirement for the witness statement of a subpoenaed witness to be filed and frontloaded alongside the petition. In *Mohammed v. Kwankwaso & Ors*[32] and *Bashir & Anor v. Kurdula & Ors*[33], the Court of Appeal held that the provisions on the requirement of frontloading witnesses deposition on oath only contemplated willing and voluntary witnesses who elect out of their volition to testify for the petitioner, and they do not and cannot be contemplated or intended to apply to witnesses who are compelled by an order of Court through a subpoena to testify before the Tribunal. However, the Court of Appeal in *Ogba v. Vincent & Ors*[34] and *Ararume v. INEC*[35] distinguished a witness subpoenaed at the instance of a party's application for subpoena, from one summoned by the court or tribunal itself per its powers in paragraph 41(5) & (6) of the first schedule to the Electoral Act 2022, and held that where a witness is subpoenaed at the instance of a party's application for issuance of the subpoena, the witness' name or initial must be on the list of witnesses and the witness statement on oath of that subpoenaed witness must also be frontloaded alongside the petition. This stance in *Ararume v. INEC* has been applied in recent times including the tribunal in *Gbadebo Rhodes-Vivour v. INEC & Ors* in 2023, the court of appeal/presidential election petition tribunal and has been upheld by the Supreme Court in the 2023 presidential elections petitions and appeals. Hence, irrespective of the criticism that the current position of the law concerning the

[30] This is crucial in light of the power of the tribunal to streamline witnesses pursuant to Paragraph 18 (8) and 41 (7) of the first schedule to the Electoral Act, 2022 and the importance of quality and quantity of witnesses and evidence especially where the grounds of the petition are allegations of substantial non-compliance or corrupt practices. See Dr. Aderemi Olatubora, SAN, *Election Litigation in Nigeria (General Principles)*, vol 1 (Aderemi Olatubora & Co, 2015) 355 - 358.

[31] Paragraph 41 (3) of the of the first schedule to the Electoral Act, 2022 provides that there shall be no oral examination of a witness during his evidence-in-chief except to lead the witness to adopt his written deposition and tender in evidence all disputed documents or other exhibits referred to in the deposition.

[32] *Mohammed v. Kwankwaso & Ors* (2015) LPELR-40868 (CA).

[33] *Bashir & Anor v. Kurdula & Ors* (2019) LPELR-48473 (CA).

[34] *Ogba v. Vincent* (2015) LPELR-40719 (CA).

[35] *Ararume v. INEC* (2019) LPELR-48397 (CA).

requirement that the filing of the witness statement of an unwilling witness - to be subpoenaed must be within 21 days for the filing of the petition is demanding the impossible, the Supreme Court's stance is final and dispositive.

From the provisions of Paragraph 41 (3) of the of the first schedule to the Electoral Act, 2022, the decision of *Ararume v. INEC* and taking the time constraints earlier discussed into account, it is advisable for a party who intends to make an application for the issuance of the subpoena (either ad testificandum or duces tecum ad testificandum) to make the application before the petition is filed, serve the subpoena, ensure that the subpoenaed witness is available on time to give evidence and facts of same is replicated in the pleading and reproduced in the witness statement, and ensure the witness statement on oath of the subpoenaed witnesses are filed alongside the petition and other accompanying processes.

c. Tribunal's power to reduce the number of witnesses to be called, and give parties the number of days to call witnesses and evidence:
Paragraph 18 (8) of the first schedule to the Electoral Act provides that at the pre-hearing session, the Tribunal or Court shall ensure that the hearing is not delayed by the number of witnesses and objections to documents to be tendered and shall pursuant to subparagraphs 7 (b), and (e), allow parties to admit or exclude documents by consent, and direct parties to streamline the number of witnesses to those whose testimonies are relevant and indispensable. Paragraph 41 (7) of the first schedule to the Electoral Act, 2022 further provides that the Tribunal or Court may, at or before the hearing of a petition order or direct that the number of witnesses who may be called at the hearing be limited as specified by the order or direction.

Further to the time restriction, and the tribunal's power to reduce the number of witnesses, paragraph 41 (10) of the first schedule to the Electoral Act, 2022 provides that the petitioner, in proving his case, shall have, in the case of —

(a) Councilor, Chairman and State House of Assembly, two weeks ; (b) House of Representatives, three weeks ; (c) Senate, five weeks ; (d) Governor, six weeks; and (e) President, seven weeks, to do so and each respondent shall have not more than 10 days to present his defence.

However, depending on the parties' strategy and demands during the pre-hearing, the days given to parties may be reduced. For instance, the days required to prove the ground of non-qualification may be less than the days required to prove non-compliance, corrupt practices, or lack of the majority of lawful votes cast.

Due to several factors, including the concession of all counsel during the pre-hearing conference, and the number of petitions before a panel, the tribunal's power may be exercised as needed, however, this may restrict the petitioner's ability to present a comprehensive case and adversely affect the petitioners where, although the petitioners are serious about establishing their claims through as many witnesses as are available, the tribunal exercises its power.

It is advisable and crucial for the petitioners to select and prioritize witnesses while having regard to the quality of the witnesses' testimony, and the quantitative effect and reach of the witnesses' testimony in terms of establishing the substance of the respective allegations.

D. PRINCIPLES OF EVIDENCE

After the petition and the accompanying documents are filed and served, and the pre-hearing conference is over, the hearing of the petition commences and the tribunal and parties become bound by principles of evidence. They are discussed below:

a. The burden of proof, presumption of regularity and standard of proof:

It is important to state that the petitioner has the primary legal burden to prove the grounds for his petition since the petition would fail if no evidence is led on either side and because of the presumption of regularity of the conduct and result of the election[36]. This presumption of regularity is rebuttable by calling evidence to prove the allegation the non-compliance or corrupt practices, that the result was irregular, or that the returned candidate was not constitutionally qualified. The petitioner in proving his case must succeed on the strength of his case and not on the weakness of the respondent's case[37]. Hence, no matter what transpires during the election, the election is deemed proper until the petitioner establishes the impropriety with the use of evidence, not sentiment. In calling and putting the evidence before the court in

[36] Section 131, 132 and 168 (1) of the Evidence Act 2011 (as amended); See *Abubakar v. Yar'Adua* (2008) 19 NWLR (Pt. 1120) 1 at 155, per Niki Tobi JSC.
[37] *CPC v. INEC & Ors* (2011) LPELR.- 8257 (SC).

rebutting this presumption, the petitioner has to be guided by multiple principles of evidence.

A petitioner, when complaining of non-compliance with provisions of the Electoral Act[38], has a duty to prove it polling unit by unit, ward by ward and the standard ordinarily required is proof on the balance of probabilities. With respect to allegation of and proof of non-compliance with the Electoral Act, the petitioner must prove the occurrence of acts or omission constituting the fact of non-compliance pleaded, and that the non-compliance was substantial and had indeed affected the result and outcome of the election. These two conditions must co-exist, so much so that a proof of one without the other would not result in the invalidation of an election at the instance of such a Petitioner[39]. As such, the non-compliance, where established, must be substantial and widespread to affect the results as declared, and it is only when the petitioner establishes the substantial non-compliance that the respondents are to lead evidence in rebuttal[40].

When a petitioner makes any allegation of corrupt practices which is by all standards, criminal in nature, including other criminal and electoral offences[41], the criminal allegations must be proved beyond reasonable doubt[42], through cogent and credible evidence. In proving this nature of allegations, the petitioner must note that: criminal allegations are personal and cannot be transferred from one person to another, and it must be proved that the respondent whose election is being challenged personally committed the corrupt acts or aided, abetted, consented or procured the commission of the alleged corrupt practices, or where the alleged act was committed through an agent, it must be proved that the agent was expressly authorized to act in that capacity or granted authority; and that the corrupt practice substantially affected the outcome of the election, while also proving how it affected the election[43].

Irrespective of the nature of the allegations, the petitioner, in discharging the burden of proof, must take note of the need to establish that the allegations (non-compliance or corrupt practices) were substantial, and it is with respect to this requirement, that

[38] *Orji & Anor v. INEC & Ors* (2020) LPELR-49525 (CA).
[39] *PDP v. INEC* (2014) 17 NWLR (Pt. 941).
[40] *Buhari v. Obasanjo* (2005) 13 NWLR (Pt. 941).
[41] This includes allegations of ballot box stuffing and snatching, voter intimidation, or bribery, violence, etc.
[42] Section 135 of the Evidence Act 2011 (as amended); *Nwobodo v. Onoh* (1984) 1 SCNLR 1;
[43] *Omisore v. Aregbesola* (2015) NWLR (part 1482), 205 at 334-335, Para G-C per Okoro, JSC.

the petitioner has to carefully select and prioritize witnesses who can provide the most compelling evidence within the allotted number as agreed by the tribunal and counsel while ensuring that the witnesses come from polling units and areas with the substance, quantity and quality of non-compliance or corrupt practices that he can establish sufficiently within the required standard of proof, and adducing legally admissible evidence of the facts alleged in the petition.

b. Relevancy, admissibility and the hearsay rule:

Relevant means connected with the matter at hand, pertinent and relevant evidence is that which is applicable to the issue[44]. Admissibility is the concept in the law of evidence that determines whether or not evidence can be received by the Court. The evidence must first be relevant, but even relevant evidence must be tested for its admissibility. A fact ordinarily relevant may become inadmissible for some legal reason. In other words for the piece of evidence to be admissible, it must be relevant but this is not necessarily vice versa since a piece of evidence could be relevant without being admissible[45].

Firstly, for documents to be admitted, it must be relevant and be admissible. Concerning the admissibility of public documents, while section 102 of the Evidence Act, 2011 (as amended) defines public documents, section 104 provides for the duty of a public officer with custody of a public document to give any person with a right to inspect a copy of the document upon demand and payment of the legal fees. The copy given shall contain a certificate written at the foot of such copy that it is a true copy (certified true copy) of such document, such certificate shall be dated and the name and official title of the public officer shall also be subscribed[46]. The non-payment of certification fees makes the certification incomplete and the public document, if a certified true copy, will be inadmissible[47].

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[44] *Ifaramoye v. State* (2017) LPELR-42031 (SC) per Amina Adamu Augie, JSC (Pp 33, Paras C)

[45] Ibid pp 33 - 34, paras C – B; Hon. Justice Peter Akhimie Akhihiero, 'Judicial approaches to the admissibility of evidence and the emerging principles: reconciling the Supreme Court's decision in the cases of *Benjamin v. Kalio* (2018) and *Abdullahi* v. *Adetutu* (2019)' (Paper presented at the workshop organized by the Edo State Ministry of Justice with the theme "Relevance and Admissibility of Electronically Generated Evidence and other Emerging Trends in the Admissibility of Documents", 20 February 2024), Edo State High Court, 3 available at https://edojudiciary.gov.ng/wp-content/uploads/2024/02/JUDICIAL-APPROACHES-TO-THE-ADMISSIBILITY-OF-EVIDENCE-AND-THE-EMERGING-PRINCIPLES.pdf last accessed 15 March 2024.

[46] *ITF Governing Council v. Plateau Publishing Co. Ltd & Ors* (2015) LPELR-24774 (CA).

[47] *Federal Republic of Nigeria v. Abubakar* (2020) LPELR-52291 (CA).

If the document or electronic record sought to be tendered is computer generated, section 84 of the Evidence Act provides that evidence must be given about the frequency of the use of the computer to store or process information of the kind and the condition of the computer as well as ascertainment of the authenticity of the information contained in the document or electronic record[48].

Even if the document is relevant and is admitted, it may still not be accorded probative value, as the document will still be considered documentary hearsay if the petitioner fails to call an eye witness since the admission of the documents cannot substitute the requirement to call eye-witnesses[49]. The courts have distinguished the principle of admissibility from the probative value ascribed to the document when the content of the document is sought to be proved[50]. For instance, it is settled law that once a public document is certified and signed as required by Section 104 of the Evidence Act, such a document is admissible on its mere production and it is unnecessary to prove custody or verify it, however, a person who did not make a document is not competent to give any evidence on its content, otherwise, it would amount to hearsay evidence[51], and will render the document valueless. The court in *Ararume & Anor v. INEC & Ors* while reiterating this hearsay principle, gave the solution thus: "The only acceptable mode is for the party agents at all tiers to testify". The persons who witnessed the averments or allegations are the only persons who can give evidence of what they witnessed for it to be given any evidential value. This principle against hearsay evidence applies to both oral and documentary evidence.

This hear-say evidence rule is subject to exceptions[52], some of which are as provided in the proviso to Section 83(1)(b) of the Evidence Act, 2022 with respect to documentary hearsay: that the person giving the hearsay evidence establishes that the makers of the document are either dead, or unfit by reason of bodily or mental condition to attend Court as witnesses, or that they were beyond reach and it is not

[48] *Kubor & Anor v. Dickson & Ors* (2012) LPELR-15364 (CA).
[49] *Abubakar, GCON & Ors v. Yar'adua & Ors* (2008) 19 NWLR (Pt 1120) 1.
[50] *Folorunsho & Anor v. Ige & Ors* (2015) LPELR-41680 (CA).
[51] *Yako & Anor v. Jibrin & Ors* (2019) LPELR-48971 (CA).
[52] Sebastine Tar. Hon, SAN, *Law of Evidence in Nigeria*, (3rd edn, Pearl Publishers International Ltd 2019) 671-720.

reasonably practicable to secure their attendance, or that all efforts were made to find the makers without success[53].

Section 137 of the Electoral Act, 2022 attempts to lighten the need to call direct oral evidence and application of the principle of documentary hearsay to allegations of non-compliance in petitions when the non-compliance is manifest from the documents relied upon. The section provides that:

> "*It shall not be necessary for a party who alleges non-compliance with the provisions of this Act for the conduct of elections to call oral evidence if originals or certified true copies manifestly disclose the non-compliance alleged.*"

The Supreme Court in *Oyetola & Anor v. INEC & Ors*[54] with respect to when it will not be necessary for a party who alleges non-compliance to call oral evidence pursuant to Section 137 of the Electoral Act held that while the language of the section is simple, clear and unambiguous resulting in its literal interpretation, the section will only apply where the non-compliance alleged is manifest from the originals or certified true copies of documents relied on. In that instant, the Supreme Court held that neither the BVAS Reports nor the other documents relied on by the petitioners remotely disclosed non-compliance with the provisions of the Electoral Act, especially as rather than the BVAS reports relied upon, the BVAS machine ought to have been produced to prove over-voting.

From the case, it is evident that the Supreme Court, and consequently, the judiciary, has not categorically ruled out the application of the section in situations where the non-compliance is apparent from the presented documents. However, there exists uncertainty regarding the specific circumstances under which non-compliance will be deemed manifest from the documents alone. This uncertainty is compounded by the fact that, in 2023, several tribunals relied on the principle of documentary hearsay, overlooking the novel section. They concluded that the petitioners failed to establish non-compliance due to their omission to summon direct witnesses (polling unit agents) to testify about the document contents related to the allegations concerning the respective polling units.

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[53] These constitute proper foundation which must be laid, otherwise, the document will be inadmissible. See Ibid page 797.

[54] *Oyetola & Anor v. INEC & Ors* (2023) LPELR-60392 (SC).

Questions arise on how a petitioner can take advantage of the novel section, will the novel section apply where multiple form EC8As and the BVAS machines are tendered by a sole witness to prove over-voting in multiple polling units, but no direct witness from the affected polling units are called? or will there be a need to produce the BVAS machine and form EC8As, and call the agents of the polling units in respect of which the Form EC8As are tendered and intended to be compared to the record on the BVAS machine to prove overvoting?

c. Expert opinion and witness:

The use of expert witnesses in election petitions is common practice due to the nature of petitions, the sheer volume of documents involved to be examined, and the issues that need to be addressed[55]. These experts are individuals with specialized knowledge in relevant fields who provide professional opinions, analysis, and interpretation on various aspects of the disputes, in this case, the electoral process, voter accreditation, ballot counting, non-compliance or corrupt practices and quantum of votes affected, and the number of voters, votes cast and collected permanent voters cards per units.

Expert witnesses are typically drawn from fields such as statistics or electoral processes. However, the calling of expert witnesses and the admission of their evidence are subject to strict rules and requirements. Here are some key points to consider:

A. Qualifications: An expert witness must begin by presenting their qualifications or practical experiences in the relevant field to satisfy the court that they are indeed experts in the subject matter they are providing evidence. All materials supporting their status as experts must be presented to the court at this stage, and the qualification must relate specifically to the area they claim expertise and give opinions. Failure to do so will result in the witness being declared unqualified and incompetent[56].

B. Impartiality: Section 83 (3) of the Evidence Act, 2011 provides that nothing in the Section shall render admissible as evidence any statement made by a person interested at a time when proceedings were pending or anticipated involving a dispute as to any fact which the statement might tend to establish, by effect and application mandates that expert witnesses should not have an interest in the outcome of the

[55] Emem Udoh, 'Enhancing the Value of Expert Evidence in Nigerian Electoral Matters: Striking a Balance for Fair and Effective Resolution' available at https://www.linkedin.com/pulse/enhancing-value-expert-evidence-nigerian-electoral-matters-emem-udoh/ last accessed on 19 March, 2024

[56] *Buhari v. INEC* (2008) 18 NWLR (Pt.1120) 246 at 386 - 391, *Abubakar & Anor v. INEC & Ors* (2019) LPELR-48488 (CA) (Pp 359 - 361 Paras E - C).

proceeding. If an expert is found to be personally interested, such as being a member of the petitioner's political party or holding a political office due to their relationship with the petitioner, their testimony may be considered biased and inadmissible. The court expects expert witnesses to provide independent, impartial, detached, and professional analyses[57].

C. Testing the Expert opinion: Even if an expert establishes his/her qualification, and is impartial and untainted, their opinion is not automatically binding on the court, as the court reserves the power to assess the probative value of the expert's testimony.

D. Consistency with the pleadings and time: Expert opinion must not contradict or attempt to amend the pleadings in the petition, and cannot be introduced outside the time provided for the filing of the petition. Parties are bound by their initial pleadings, and the expert report and testimony cannot be used to amend or alter these pleadings[58].

Expert witnesses are a crucial part of the legal process in election petitions, especially as lawyers in election petitions embrace the division of labour, and these experts offer specialized knowledge to help in understanding complex election-related issues[59]. However, because of the above key factors, legal practitioners in pratice adopt different approaches concerning expert opinions/reports. While some lawyers incorporate the expert's opinion or report into paragraphs of the petition, and replicate the same into the necessary witness statement on oaths to ensure the report is subsumed into the petition's body as part of the pleadings, others prepare the expert analysis, report or opinion as a separate document and list it in the list of documents filed alongside the petition.

The parties, lawyers, courts and tribunals are bound by these principles and requirements, and more, and the petitioner(s) should be cautious of these principles when selecting the grounds of the petition, pleading the facts in support of the grounds, selecting the witnesses to call and the documents to tender within the time and number of witnesses as agreed and/or allotted to the petitioner pursuant to the tribunal's power under paragraph 18 (8) and 41(7) of the first schedule to the Electoral Act, 2022[60].

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[57] *Oyetola & Anor v. INEC & Ors* (2023) LPELR-60392 (SC) (Pp 26 - 28 Paras E - B).
[58] *Oduoye & Anor v. Ajayi & Ors* (2015) LPELR-40527 (CA) (Pp 35 - 42 Paras E - A)
[59] *Supra* footnote 54.
[60] *Supra* footnote 30.

Upon the conclusion of the hearing, adoption of addresses and delivery of judgment, any party dissatisfied with the whole or part of the judgment delivered may elect to appeal to the designated court, which also operates under tight timelines and rules. By the provision of section 285(7) of the 1999 Constitution, after judgment is given, an appeal arising shall be concluded within 60 days of the delivery of the judgment of the tribunal or court of appeal.

3.0 CONCLUSION

While the increased interest of the younger generation in Nigeria's electoral processes is undoubtedly commendable, it is equally imperative to foster a clearer understanding of the intricate web of laws, rules, practices, and procedures that govern our courts, particularly in the context of election petitions. Our judiciary operates within the confines of these legal frameworks, and the entire populace needs to grasp the fundamental principles that guide the court's proceedings from the presentation of the election petition to the admission and evaluation of evidence and delivery of judgment[61].

A thorough comprehension of these laws and rules, which the court is steadfastly bound by, is paramount. This understanding equips our society with the ability to construct informed critiques and advocate for targeted changes that address specific challenges, and only through such comprehension can we hope to address the intricacies of our electoral challenges effectively. Until such reforms materialize, it is incumbent upon lawyers and litigants alike to embark on their journey to establish their cases in court with a vigilant and strategic mindset. This includes careful consideration of the facts, meticulous counting of days, planning and case strategy, and the presentation of compelling and best evidence that aligns seamlessly with the principles, requirements and rules of law. By doing so, they can navigate the legal landscape without stumbling into the numerous pitfalls that may be inadvertently set by the law.

[61] These principles are fully enshrined in Dr. Aderemi Olatubora, SAN, *Election Litigation in Nigeria (General Principles)*, vol 1 (Aderemi Olatubora & Co, 2015) ch 5 – 22.