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Time Limitation in Election Petitions in Nigeria: The Imperative for Further Constitutional Reforms

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Abstract:
It cannot be gainsaid that the extant provisions of the Constitution of Nigeria on this issue is Section 285 (5), (6) and (7) of the 1999 Constitution. Prior to the enactment of the above provisions, which became effective or operational from the 16th day of July 2010, pursuant to or in consonance with the Constitution (First Alteration) Act 2010, otherwise called Act No. 1. The problem was that for the office of the Governor, President, National Assembly or State House of Assembly, which was all for a term or tenure of four (4) years, the observance of the requirement in Section 36 (1) that fair hearing be accorded parties in election petition matters was obeyed more in the breach. This led to grave injustices or travesty of justice as many electoral matters lapsed due to the time-wasting antics of some legal practitioners. As a result, "election petitions continued to be heard for many years and in some cases, the appeals in the Court of Appeal will be pending when the next election is held, thereby rendering the petition or appeal… otiose and academic". After about six (6) years of practice, there are still noticeable lapses or lacuna inherent in the application of these constitutional limitations that require immediate iconoclastic legislative action bordering on further constitutional amendment. This study highlights them and shall review the decision of our apex court (the Supreme Court) on this issue with a view to making reform projections that will foster the proper respect for Nigeria's constitutional development and make room for the upliftment of the rights to access to court/justice and elevate the right to be heard to a higher palladium or pedestal. If implemented, the recommendations will edify our current judicial practice, reform our extant procedural methodology and launch Nigeria further into the midst of working democratic models worthy of emulation at the global stage. That is the thrust of this study.

Keywords: *Time limitation, election petition, Nigeria, constitutional reforms.*

1. Introduction

Section 285 of the Constitution of the Federal Republic of 1999 (as amended) introduced some measures for a timely hearing and determination of election petitions. Before the innovations in the law, some election petitions were determined even at the tail end of tenure of such an office. So, the introduction of time limitation in the law was greeted with wide acknowledgement from the general public. Thus, section 285(6) of the 1999 Constitution as amended (180 days for the hearing and determination of election petition) was tested for the first time after the 2011 general elections in Nigeria. Unfortunately, some of the petitions were not determined on the merit due to lapse of time (the 180 days) at no fault of the petitioners. Most of the petitions were petitions which went to Court of Appeal and a retrial order was ordered. Before they could be decided by the retrial tribunal set up by the President of the Court of Appeal for the purpose of hearing those petitions being ordered for retrial, the 180 days had elapsed because the calculation of the 180 days includes the period of appeal. Section 285(6) does not take care of appeals thus seems to deny the successful appellant (petitioner) who has his/her petition returned back for retrial the constitutional right of access to court if his/her petition lapsed. Based on this, the writers propose some amendments in that regard including good case management system.

2. The Mischief/Misnomer that Created Time Limitation in Nigeria's Electoral Practice

The 2002 Electoral Act as well as the 2006 Electoral Act did not contain provisions for time limitation in the hearing and determination of election petitions in Nigeria. (Shaakaa 2012) However, Section 134 (2) of the Electoral Act (as amended) do contain such a provision. Section 285 (6) and (7) of the 1999 Constitution as amended by the First Alteration Act No. 1 of 2010, stipulated 180 days for the hearing and disposal of election petitions and 60 days for the disposal of any appeal arising there from. These

legislations were being "responsive to the yearnings of the populace for circumscription of time for delivery of judgement in election petitions and appeals therefrom as Nigerians sent to the 6th National Assembly, in droves, proposal for certain fundamental amendments to the Electoral Act 2006 and the Constitution of the Federal Republic of Nigeria 1999 (Shaakaa 2012)

The mischief that led Nigerians in droves to yearn for these amendments was that:

- Election petitions continued to be heard for many years and in some cases, the appeals in the Court of Appeals will be pending when the next election is held thereby rendering the petition or appeal against the decision of the Election Petition Tribunal otiose or academic (Nnadi 2012)

To drive the point being made here home and in the words of the erudite Learned Silk, O J Nnadi (SAN):

- The case of *Ngige v Obi* (2006) 14 NWLR (pt 999) p.1 took over 34 months from 2003 to March 2006 to conclude the petition from the Tribunal to the Court of Appeal… there is no doubt that if the current provision that enables appeals from Governorship Election Petitions to be heard by the Supreme Court was the state of the law during the case of Peter Obi aforesaid, the appeal would have gone to the Supreme Court and perhaps, the four (4) years tenure would have expired without the appeal heard. Peter \|Obi would not have been Governor of Anambra State as the appeal in the Supreme Court would have swallowed and exhausted the four (4) years tenure and the case of Peter Obi would have been academic or the appeal would have been pending in the Supreme Court at the time of the conduct of the Gubernatorial Election in 2007 (Emodi v Igbeke 2011)

One can further identify this mischief from what C J Ubanyionwu said. He stated that:

- The case of *Ngige v Obi* is not the only case where delay was noticed. Under the 2003 General Election, it took over two years for the petition of General Muhammadu Buhari against the re-election of Chief Olusegun Obasanjo as President to be concluded in the Supreme Court. The case of *Rauf Adesoji Aregbesola and 2 Ors v Olagunsoye Oyinlola & Ors* readily comes to mind under the 2007 General Election in this regards… On 14/4/07, the 4th Respondent (INEC) conducted an election for the office of the Governor of Osun State… the Petitioners/Appellants on 11/5/07 filed the petition… The Tribunal delivered its judgement on 28/5/10 and dismissed the petition on the ground that the Petitioners had not made out their case. Dissatisfied with this judgement, the Petitioner appealed to the Court of Appeal, which said Court delivered its judgement on 26/11/10. In this particular case, it took the Petitioner more than three years to get justice. The same scenario played out in *Fayemi v Oni* [2010] 48 WRN 30 where judgement was delivered on 25/10/10. (Ubayionwu 2012)

A S Shaakaa opines and we wholeheartedly concur that:

- The omission of definite time frame for the hearing and determination of election petitions prior to the enactment/amendment of the 2010 Electoral Act and the amendment of the 1999 Constitution *vis-à-vis* Section 285, created 'a deadly mischief' which became more like a canker threatening the substance of participatory democracy… an ignoble culture of tardiness was indestructibly established in election proceedings thereby making it impossible for the society to know the status of the candidates they voted for in an election. This situation created a serious albatross to the expeditious administration of electoral justice and intensified the call for urgent review

Just as it happened for the reform or review of 2010 in Nigeria's electoral jurisprudence, there is today, an urgent need to further review or expand the 2010 amendments. While we agree with O J Nnadi (SAN) that the 2010 reform was "a welcome development", we are of the firm view that it hinges on injustice to punish electoral litigants when Saturdays, Sundays, Public Holidays and Court Vacation periods are calculated as part of the time under Section 285 (6) and (7) of the Constitution. Also, when a retrial is deemed not to earn a fresh time frame or mandate, it is a clear travesty or desecration of electoral justice. There is need for urgent and further reform of the 2010 Reform to further meet the new challenges now thrown up by interpretation of these extant provisions by the Apex Court in recent times. The decisions in *PDP V CPC (2011)* and *ANPP v Goni (2012)* are unfortunate and regrettable.

Nigeria, as it were, had under Sections 129 (3) and 140 (2) of the 1982 Electoral Act provided only seven (7) days for the Supreme Court and the Court of Appeal to hear and deliver judgements in appeals from Election Petition Tribunals. The Supreme Court of Nigeria had relied on Section 33 (1) of the 1979 Constitution (on the right to fair hearing within a reasonable time) in declaring Section 132 (1) and (2) null, void, and unconstitutional, being a breach of the right to fair hearing. That was their decisions in both *Kadiya v Lar (1983)* and *Unongo v Aku. (1983)* These cases derailed the cause of time limitation in election matters in Nigeria. This "path of digression" continued until the enactment of the First Alteration Act in 2010 amending Section 285. There is also Section 134 (2) of the Electoral Act, 2010 (as amended) stipulating 180 and 60 days' time limits for the hearing and determination of election petitions and appeals arising from them.

It is pertinent and germane to point out here that the Military Government that ushered in the 4th Republic in 1999, enacted or promulgated a Decree containing 60 days' time limit for the hearing and determination of Local Government or Area Council Election vide Paragraph 2 (1) of Schedule 5 of the Local Government (Basic Constitutional and Transitional Provisions) Decree No. 36 of 1998(Aboje v Udoh 1999). For about a decade, we lost sight of the mischief in *Ngige v Obi* and the danger the cases of delay cited above represented in our legal system. Cases such as *Waziri v Damboyi, (1999) Ogolo v Legg-Jack (2007) Falae v Obasanjo, (1999)* noted the sacrosanctity or sacredness of time limitation stipulations or provisions in Nigeria. No court can be invested with any jurisdiction to hear and determine an election petition after the expiration of the limitation period specified or stipulated by law. (Apari V Hose & ors 1999) In the case of *PDP v CPC (2011),* where judgment was delivered on 31st October 2011, the Supreme Court of Nigeria interpreted Section 285 (5), (6) and (7) succinctly. It held that no court has the power to extend the time as constitutionally provided in Section 285 (5) -(7) of the 1999 Constitution (as amended). Onnoghen JSC opined thus:

- I have read over and over the provisions of Section 285 (7) of the 1999 Constitution (as amended) and have found words used therein to be clear, unambiguous and simple and straightforward… they are to be given their natural meanings, that is the natural meanings of the words are that appeals from a decision of an Election Tribunal or the Court of Appeal in an election matter shall be heard and determined within 60 days from the date of the judgement/decision appealed against was delivered by the Tribunal or Court of Appeal. It is clear that by the use of the word 'shall' in Section 285 (7) of the 1999 Constitution, the framers of the Constitution meant to make and did make the provisions mandatory as it admits no discretion whatsoever… it is my further opinion that the 60 days allotted in Section 285 (7) of the Constitution (as amended) includes Saturdays, Sundays and Public Holidays as well as Court Vacations because if it was the intention of the framers of the Constitution to exclude these days, they would have so stated in clear and unambiguous terms… The intention of the framers of the Constitution being to stop the practice of unnecessary delays in election matters, it is our duty to ensure compliance with the law by doing what is needed within the time frame. It may be difficult, in fact, it is very difficult but it is a sacrifice we all must make in the interest of our democracy until our politicians learn to accept the verdict of the people as expressed through the ballot box.

In the case of *ANPP v Goni (2012),* the Governor's Office in Borno State was the subject in contention. On 26/04/11, the Appellants were declared winners of the election by INEC. On 17/05/11, the Respondents filed a petition before the Governorship Election Tribunal. The Respondents had gone ahead, after the exchange of pleadings, to file an *ex parte* motion or application for the issuance of Pre-hearing Notice. Appellants opposed this on 10/08/11. The Tribunal held that an *ex parte* application was improper for the issuance of a Pre-hearing Notice and struck out the application. Respondents appealed against the Tribunal's Ruling to the Court of Appeal. While that was still on, the Appellants, through an application, sought an order of dismissal of the main petition citing abandonment pursuant to Paragraph 18(4) of the First Schedule to the Electoral Act, 2010 (as amended). The Respondents filed an application for extension of time to file Pre-hearing Notice. The two applications were taken together to be ruled upon on 20/09/11`, about five (5) months after the filing of the petition. The Court of Appeal fixed 21/09/11 to hear the appeal against the Tribunal's Ruling of 10/08/11. To arrest the Ruling slated for 20/09/11, the Court of Appeal abridged their time to 19/09/11 and made an order on 19/09/11 restraining the Tribunal from delivering its Ruling on 20/09/11. Appellants appealed to the Supreme Court. Consolidation of the appeals took place and the ruling of the Supreme Court favoured the Appellants and petition was ordered to be continued by the Tribunal. On 12/11/11, the Tribunal re-convened and delivered the Ruling earlier fixed for 10/08/11 and dismissed the petition as abandoned. The Respondents appealed to the Court of Appeal, which allowed the appeal and ordered a *trial de novo* by a different Panel. In doing so, it overruled a Preliminary Objection that the appeal had become incompetent and academic. By that date, more than 200 days had elapsed from the date of filing the petition. In a final appeal to the Supreme Court against the order of the Court of Appeal ordering a *trial de novo,* the Supreme Court held that, given the effluxion of more than 180 days and pursuant to Section 285 (6) and (7) of the 1999 Constitution (as amended) and Section 134 (2) of the Electoral Act 2010, the appeal was incompetent and naturally dead. It thus reiterated its stance in *PDP v CPC (2011)* earlier. In the case of *PDP v CPC, following* the declaration by INEC that former President Goodluck Ebele Jonathan and Arc. M. Namadi Sambo has won the 16th April 2011 General/Presidential Elections, the CPC, a political party, aggrieved with that declaration, filed an election petition at the Court of Appeal, challenging the result on a Sunday in May, 2011. The PDP, Dr Goodluck Jonathan and Arc M Namadi Sambo, filed Preliminary Objections to the filing of the petition on a Sunday. The Court of Appeal ruled on 14/07/11, dismissing the Preliminary Objections. The PDP and its candidates were aggrieved. They filed two separate appeals to the Supreme Court which consolidated both appeals. On 27/10/11, when the appeal came up for hearing, the Supreme Court called on the parties to address it on the continued competence of the petition or appeals in the light of Section 285 (7) of the 1999 Constitution (as amended). His Lordship, W.S.N Onnoghen JSC, who presided and read the leading judgement of the Supreme Court held *inter alia* that:

- … no court has the power to extend the times as constitutionally stipulated in Section 285(5), (6) and (7) of the 1999 Constitution (as amended) by interpretation of the subsections or otherwise…
- The sixty days stipulated in Section 285(7) of the 1999 Constitution (as amended) includes Saturdays, Sundays and Public Holidays as well as Court Vacations. If it was the intention of the framers of the Constitution that those days should be excluded from the computation of the sixty days stipulated in the Section, they would have stated that in clear and unambiguous terms" … the appeals were filed in July 2011, and had become time barred as at 27th October 2011 when they came up for hearing at the supreme court.

The abuse or misuse of preliminary objections and the fact that the mischief sought to be cured by S. 285 (5), (6) and (7) of the 1999 Constitution (as amended) has continued to dog the clear administration of electoral justice leaves much to be desired. The mischief of ANPP v Goni 2015) can only be remedied by a further constitutional amendment or tinkering of our extant electoral laws and covering constitutional provisions. The position of the Supreme Court in these cases appear "absurd, highly disingenuous and unjust". In the opinion of Hon. Justice Ibrahim Muhammad, voicing some of the public views… The Supreme Court should have been more proactive.

The view I hold and which I expressed in one of such decisions is that if section 285 of the Constitution is a bad law, the battle ground has now shifted from the Courts to the Legislature. Courts do not make laws. Courts interpret laws. If the amendment introduced by section 285 of the constitution does not cure the mischief it was meant to remove, then the citizens have every right to go back to the legislature for a further review.

We wholeheartedly endorse and adopt the above opinion and call for an immediate amendment of section 285 of the 1999 Constitution (as amended), which is already long overdue in the light of future elections in Nigeria.

3. Rationale for Statute of Limitation

Statutes of limitation are as old as mankind. Statutes of limitation have been described as statutes which have been passed,

- to preserve the peace of the kingdom, and to prevent those innumerable prejudices which might ensue if a man were allowed to bring an action for injury committed at any distance of time. These statutes are also based on the rule that a supine claimant who has slept on his rights is not to be assisted, the maxim being *vigilantibus non dormientibus jura subveniunt* – the watchful, and not the slothful, the laws assist. (Gibson v Weldon 1900)

The learned author of Halsbury's Laws of England gave the opinion that,

- the courts have expressed at least three differing reasons supporting the existence of statutes of limitation, namely (1) that long dormant claims have more of cruelty than justice in them, (2) that a defendant might have lost the evidence to disprove a stale claim, and (3) that persons with good cause of action should pursue them with reasonable diligence.

3.1. Judicial View

Katsina-Alu, JCA (as he then was) adopted the above view in *P.N. Uddoh Trading Co Ltd v Abere (1996)*, but added the point that,

> One of the principles of the Statute of Limitation is that a person who sleeps on his right should not be assisted by the courts in an action for the recovery of his property. Equity aids the vigilant and not the indolent. (Nwadiora v S.P.D.C 1990)

"The reason behind the Limitation Law", said Ndukwe-Anyanwu, JCA, in *Nigerian Railway Corporation Nwanze (2008),*

- is to give a time frame within which an aggrieved plaintiff can commence his action. When claims are stale, the evidence is also stale. Sometimes causes of action are overtaken by prevailing circumstances. In the case of a big corporation like the Railways, officers who are conversant with the fact might have been transferred or retired and sometimes memories of witness would have faded…Limitation Law is to guard against stale claims which become an inconvenience to the defendant. Outside the limitation period the plaintiff still has a cause of action that unfortunately cannot be enforced any longer.

The rationale behind the limitation of action is of general application, even in other jurisdictions of the world. The Indian Supreme Court reasoned that, statutes of limitation are designed to effectuate a beneficent public-purpose, *viz*; to prevent the taking away from one what he has for long been permitted to consider his own and on the faith of which he plans his life, habits and expenses. Law of Limitation is an Act of peace. Long dormant claims have often more of cruelty than of justice in them. Christianity forbids us to attempt enforcing the payment of a debt which time and misfortune have rendered the debtor unable to discharge. The whole purpose of the Limitation Act is to apply to persons who have good causes of action which they could, if so disposed, enforce, and to deprive them of the power of enforcing them after they have lain for a number of years respectively and omitted to enforce them. They are thus deprived of their remedy which they omitted to use. (*New Rettammalv State of Rajasthan* 1963)

3.2. Juristic View

The rules of limitation are founded on consideration of public policy and the provisions of the Limitation Act dealing with the limitation are required to be interpreted with the approach which advances the cause of public policy and not otherwise. The intention of the provisions of the law of limitation is not to give a right where there is none, but to impose a bar after the specific period authorizing a litigant to enforce his existing right within the period of limitation. The object of limitation laws is to compel a litigant to be diligent in seeking remedies in a court of law and put bar on stale claims. The interest of society requires that the party should be put to litigation keeping in view its nature, the law assists the vigilant and not those who sleep over their rights. It is also acknowledged position of law that law of limitation only bars a remedy and does not take away the rights of the courts to adjudicate the *lis* according to law and do not revive the rights of the parties unless permitted under a particular statute.

The demand that a claimant must be prompt in redressing his right is grimmer if the defendant in question is a public officer, a public authority or public body. Public officer means any member of the public service of the Federation within the meaning of the Constitution of the Federal Republic of Nigeria, 1999, or of the public service of a state.(Laws of the Federation of Nigeria 2004) A public officer is such a busy person that litigation ought not to hang on his head *sine die,* or for the duration of time it should hang on other citizens, which is subject to some exceptions which include the exceptions expressly excluded by the statute itself and those excluded by judicial interpretation like fraud, mistake or disability; *ultra vires* act; contractual relationship; criminal act; *et cetera.*

4. Forms/Kinds of Time Limitations in Election Petitions

Time limitation in election petitions could take different forms and kinds ranging from time provided for filing of the petition itself; time allowed for any amendment; time for filing of respondent's reply to the petition; time for filing of petitioner's reply to the reply of the respondent, if any; time to make application for issuance of pre-hearing notice for purposes of pre-hearing conference; time for hearing and determination of the petition itself; time for hearing and determination of election petition appeals, and so on. All these time limitations are inherent in our present electoral laws. However, the time limitation this write-up is centred on is the time limited for hearing and determination of election petition itself (180 days) and the bottlenecks inherent thereto that seems to make the time limit a denial of constitutional right of access to court/justice especially to the petitioner.

4.1. Time Limitation for Filing Election Petition

Section 285(5) of the 1999 Constitution (as amended) provides thus:

"An election petition shall be filed within 21 days after the date of the declaration of result of the elections". If a petition is filed outside this constitutional time limit, the tribunal lacks the necessary jurisdiction to deal with the petition for being statute barred. The tribunal has powers to strike out such a petition. (*Imerh v Okon* 2012)

4.2. Time Limitation to File Amendment and Further Particulars in Election Petition

The point is now trite that amendment relates back to the original process of court, which is sought to be amended, or which has been amended. (*MabrovEagleStarandBritishDominionsInsuranceCoLtd*1932) In the case of an election petition, amendment must be made within the period in which the petitioner can file his petition (within 21 days). Thus, if the period the petition must be presented has elapsed, no amendment on the substance of the petition can be entertained. This rule applies conversely to the respondent's answer to the petition. This rule is not based on practice and procedure, but on the express provisions of the Electoral Act, 2010 (as amended).

In *Ngige v Obi (2006)* the Court of Appeal interpreted the provision of Paragraph 14(2) of the First Schedule to the Electoral Act 2006 thus:

- The provisions of Paragraph 14(2) are clear and unambiguous. No amendment will be allowed which will introduce new parties to the petition, alter the right of the petitioner to present the petition, alter the holding of the election, the scores of the candidates and the person returned as the winner of the election or alter the facts of the election petition or the ground or grounds on which the petition is based or the relief sought by the petitioner.

More pointedly, in *P.D.P. v Abubakar (2004)* the court held that the time limited for amendment by paragraph 14(2) of the First Schedule to the Electoral Act by holding that,

- What a petitioner cannot do by the force of Paragraph 14(2) is to substitute a new respondent for an old respondent. If he is allowed to do that he will be introducing a matter not contained in the election petition filed.

Gleaned from the above authorities and the express provisions of the Electoral Act, the rule that amendment must be made within the time limit for filing election petition is not absolute. It is submitted that an amendment that is not contemplated or excluded under paragraph 14(2) of the First Schedule to the Electoral Act, 2010 (as amended) can be made. For instance, a misnomer could be corrected, and it is undeniable that such correction is an amendment, and can be effected after the lapse of the time for bringing election petition. Similarly, an amendment which the court can affect *suo motu* could be made in an election petition notwithstanding that the time for bringing the principal election petition has elapsed. (*NkwochavF.U.T.*1996)

4.3. Time Limitation for Filing Respondent's Reply

By the new electoral laws (1999 Constitution (as amended) there is timeframe for filing of Respondent's Reply. By virtue of paragraph 12(1) of the First Schedule to the Electoral Act 2010 (as amended), a respondent to an election petition has 14 days to file his reply. However, all hope for him to respond to the petition is not lost where he has not filed a Memorandum of Appearance. Another window of opportunity is open to him through paragraph 10(2) of the same First Schedule, provided he files his reply to the election petition in the registry within a reasonable time, but, in any case, not later than twenty-one (21) days from the receipt of the election petition.

The current position of the law is clear. Hence, it is clear from the above provisions that a respondent has a maximum time limit of 21 days from the receipt of an election petition within which to file his reply. A respondent cannot have a day more than that. The phrase "not later than twenty-one days from the receipt of the election petition" is emphatic, lucid and unequivocal and consequently does not brook any challenge. There is an absolute bar to the filing of a reply by a respondent after the period of 21 days and therefore no extension of time can be granted to a respondent to file a reply after that period. Paragraph 10(2) of the First Schedule has the status of a limitation law and must be applied as such. (*Lanlehin v Akanbi* 2016)

4.3.1. Time Limitation for Filing Petitioner's Reply to Respondent's Reply

Paragraph 16 of the First Schedule to the Electoral Act 2010 (as amended) provides:

(1) If a person in his reply to the election petition raises new issues of facts in defence of his case which the petition has not dealt with, the petitioner shall be entitled to file in the Registry, within five (5) days from the receipt of the respondent's reply, a petitioner's reply in answer to the new issues of fact, so however that –
   (a) the petitioner shall not at this stage be entitled to bring in new facts, grounds or prayers tending to amend or add to the contents of the petition filed by him; and
   (b) the petitioner's reply does not run counter to the provisions of subparagraph (1) of paragraph 14 of this Schedule.

(2) The time limited by subparagraph (1) of this paragraph shall not be extended.

By the above provision, there is no discretion reposed in the tribunal to extend the time. *(Gebi v Dahiru* 2012)

4.3.2. Time Limit to Apply for the Issuance of Pre-Hearing Notice

Paragraph 18 of the First Schedule to the Electoral Act, 2010 (as amended) stipulates thus:

(1) Within 7 days after the filing and serving of the petitioner's reply on the respondent, or 7 days after the filing and service of the respondent's reply, whichever is the case, the petitioner shall apply for the issuance of pre-hearing notice as in Form TF 007.

(2) Upon application by a petitioner under sub paragraph (1) above, the tribunal or court shall issue to the parties or their legal practitioners (if any) a pre-hearing conference notice as in Form TF 007 accompanied by a pre-hearing information sheet as in Form TF 008 for the purposes set out hereunder:
   (a) disposal of all matters which can be dealt with on interlocutory application;
   (b) giving such directions as to the future course of the petition as appear best adapted to secure its just, expeditious and economical disposal in view of the urgency of election petitions;
   (c) giving directions on order of witnesses to be called and such documents to be tendered by each party to prove their cases having in view the need to expeditious disposal of the petition;
   (d) fixing clear dates for hearing of the petition.

(3) The respondent may bring the application in accordance with subparagraph (1) above where the petitioner fails to do so, or by motion which shall be served on the petitioner and returnable in 3 clear days, apply for an order to dismiss the petition.

(4) Where the petitioner and the respondent fail to bring an application under this paragraph, the tribunal or court shall dismiss the petition as abandoned petition and no application for extension of time to take that step shall be filed or entertained,

(5) Dismissal of a petition pursuant to subparagraphs (3) and (4) of this paragraph is final, and the tribunal or court shall be *functus officio*".

The real essence of pre-hearing session is to avoid delays. However, this noble objective seems to be defeated by the albatross inherent in the way and manner application for pre-hearing sessions are to be done. The above provisions though sought to aid the expeditious disposal of election petitions, has rather become counterproductive and self-defeating.

In *All Progressives, Grand Alliance v Fort Ifeanyi Dike & Ors* the Court of Appeal affirmed the judgment of the lower tribunal dismissing the petition where there was no evidence that application for issuance of pre-hearing notice was made.

The timing to apply for issuance of pre-hearing notice posed a big challenge especially where the tribunal had extended time to any of the respondents; and the mode of making the application, which was later settled in *Gebi v Dahiru (2012)* that a mere letter could suffice. This is why it is suggested by Hon Justice Z.A. Bulkachuwa (President of the Court of Appeal) that paragraph 18(1) and (2) be further amended to make it a function of the Secretary of the Tribunal to issue the pre-hearing notice and accompany same with a pre-hearing information sheet and cause same to be served on the parties. (Bulkachuwa 2015) This will help ameliorate the hardship imposed by paragraph 18(4) and (5) of the Electoral Act 2010 (as amended) and curtail the undue resort to interlocutory appeal because interlocutory appeal does not favour the petitioner. If the he/she loses an interlocutory appeal, that is the end of the petition, if he/she succeeds and may be a retrial order is made by the appellate court, the time (180 days) is not extended for the petitioner to prove his/her case at the trial tribunal, hence the crux of this work.

4.3.3. Time Limitation for Determination of Election Petition

Section 285(6) of the 1999 Constitution (as amended) provides thus:

"An election tribunal shall deliver its judgment in writing within 180 days from the date of the filing of the petition". An election that does not conform to this timeframe is statute barred and liable to be struck out. (*A.N.P.P. v Goni*2012) Our paper centres more on this area of time limitation.

4.3.4. Time Limitation for Determination of Election Petition Appeal

Section 285(7) of the 1999 Constitution (as amended) provides thus:

"An appeal from a decision of an election tribunal or Court of Appeal in an election matter shall be heard and disposed of within 60 days from the date of the delivery of judgment of the tribunal or Court of Appeal". By virtue of this provision, an appeal from a decision of an Election Tribunal or the Court of Appeal either in an interlocutory proceeding or final decision must be heard by the appellate court and disposed of within sixty days from the date of the delivery of the judgment, or making of the decision, or the pronouncement of the order, decree, conviction, sentence, or recommendation of the Tribunal or Court of Appeal. (*Shettima v Goni* 2011)

5. Noticeable Procedural Defects in Election Petitions that Hinder Access to Justice

5.1. The Nature of Access to Court/Justice

Access to justice is the legal right of an aggrieved party to go to court and question the offending act of either a private person or governmental agency. Access to justice, which is a very important human right, is an integral part of the rule of law. Initially, the rule of law was limited to the protection of individual's political and civil rights. Later, the concept was expanded by the efforts of international movements, beginning with the Universal Declaration of Human Rights adopted by the United Nations in 1948, and followed by the European Convention on Human Rights signed in Rome in 1950. More attention was paid not just to equality before the law but also to equal access to law. In other words, the principle of equal access to the law and equal protection of the law became an essential ingredient of the rule of law, for the declaration of human rights in the constitution or their theoretical recognition in law will be rendered worthless if the aggrieved party is not able to enforce the law because of his inability to secure adequate legal representation. The 1999 Constitution of Nigeria (as amended) guarantees the right to fair hearing. *A fortiori* this right, among others,

include the right to free access to the courts for ventilation of real or imagined grievances in which the courts are called upon to adjudicate.

The judicial power of the court is conferred by the Constitution. Section 6(6) (b) of the 1999 Constitution of the Federal Republic of Nigeria (as amended) provides that the judicial power vested in accordance with the foregoing provisions of this section shall extend to all matters between persons, or between government or authority and to any person in Nigeria, and to all actions and proceeding relating thereto, for the determination of any question as to the civil rights and obligations of that person.

Consequently, it is the duty of the court to guard the constitutional right of its citizen and ward off any infringement of those rights by the State. (*Dahiru v Alkali charuci* 1960)

Section 36(1) of the 1999 Constitution (as amended) guarantees the right to fair hearing as follows:

- In the determination of his civil rights and obligation, including any question or determination by or against any government or authority, a person shall be entitled to a fair hearing within a reasonable time by a court or other tribunal established by law and constituted in such manner as to secure its independence and impartiality.

This right has assumed universal recognition and has been incorporated into other constitutions of the world.

The constitutional rights of access to courts have been guaranteed by the Constitution to its citizens (Constitution of the Federal Republic of Nigeria, 1999). For instance, section 17(2) (e), provides that the independence, impartiality and integrity of courts of law, and easy accessibility thereto shall be secured and maintained. Though not justiciable, the above provision, if achieved will further enhance access to court/justice. These involve the right of an aggrieved person to litigate and defend a claim in court without any hindrance. This right has been observed as the most important human right without which it will be most difficult to enjoy any other human right whether it be civil or political rights, social or economic rights. (Oputa 1989)

While section 17(2) provides that in furtherance of the social order –

(e) the independence, impartiality and integrity of courts of law, and easy accessibility thereto shall be secured and maintained.

However, despite these constitutional safeguards, it appears that the provisions are being whittled down by some legislation, which deny free and unimpeded access to the courts. It is submitted that an Act is restrictive when it is prohibitive, it makes the use of the right extremely difficult; it creates an unjustifiable inequality or it is so extensive that the exercise of the right becomes impossible or directly or indirectly impeded. Consequently, the provisions of the 1999 Constitution (as amended) and the Electoral Act 2010 (as amended) should be interpreted liberally by protecting the free and unhindered right of access to court by striking out provisions of legislations that tend to deprive citizens the right of access to courts. This writer found out that although some of the provisions in the Constitution and the Electoral Act in question are prohibitive, there are other remedies that if properly utilized, could even enhance access to court/justice. Justice is not only done when a party is allowed beyond 180 days to prove his/her petition, justice is also done when a petition is decided timeously. Attempt has been made to emphasize the importance of the right of access to court and the dangers of denying this to the citizen. The fundamental rights provisions of the Constitution can only be realized and protected when there is free and unhindered access to court especially when these rights are violated. It is now pertinent to highlight some of the challenges that affect the rights of access to court especially in election petitions.

5.1.1. Abuse of Cross-Examination

Cross-Examination is the questioning of a witness at a trial or hearing by the party opposed to the party who called the witness to testify. The cross-examiner is typically allowed to ask leading questions but is traditionally limited to matters covered on direct examination and to credibility issues. It is also called cross-interrogation. (Garner 2009)

Cross-examination is a stage in the examination of a witness designed to elicit information concerning facts in issue favourable to the party on whose behalf it is conducted, and to throw doubt on the accuracy of evidence given against that party known also as cross-examination to the issue.

The Evidence Act (2011) provides that the examination of a witness by a party other than the party who calls him shall be called his cross-examination. In the order of examining witness in a trial, cross-examination comes after the examination-in-chief and then re-examination, if need be. However, it is not compulsory or otherwise obligatory that the opposite party must cross-examine the witness of the adverse party after he has been examined-in-chief by the party who called him. However, failure to cross-examine may be held to imply acceptance of the testimony of the witness. *(Amadi v Nwosu*1992)

The purpose, importance and effect of cross-examination where properly employed will include:

a. To discredit a witness before the fact-finder in any of several ways, as by bringing out contradictions and improbabilities in earlier testimony by suggesting doubts to the witness and by trapping the witness into admissions that weaken the testimony. (Garner 2009)
b. To elicit information concerning facts in issue favourable to the party on whose behalf it is conducted and to throw doubt on the accuracy of evidence given against that party.
c. To contradict, destroy or discredit a witness and to water down the case of an adversary. *(Onwumere v Agwunedu*1987)
d. To attack the credibility of the facts given by the witness. The purpose of cross-examination is to discredit the witness and demolish the case of the opposing party. *(Olomosola v Oloriawo*2002)
e. To test the veracity of the evidence of the witness.

f. To weaken, overcome, qualify or explain the testimony given by the witness. Our adversary legal system allows for cross-examination of witnesses with a view to discrediting them or challenging the standard of proof as required in law. *(Nwobodo v Onoh*1984)
g. To put across and fortify the case of the party cross-examining. A party to a suit is entitled to lead evidence through his own witnesses or by extracting evidence in line with his pleading from the adverse party's witnesses during cross-examination. *(Bamgboye v Olanrewaju*1991)
h. To forestall the presumption of the truth of the evidence of the witness. Failure to cross-examine a witness means an acceptance in its entirety that the said evidence of the witness is the truth. The effect of failure to cross-examine a witness upon a particular fact is deemed a tacit acceptance of the truth of the evidence of the witness. In other words, it is not proper for a party not to cross-examine an opposing witness on a material point and then call a witness to give evidence on the matter after the adverse party had closed his case. *(Agbonifo v Aiwereoba*1988)

The Evidence Act also provides restrictions on questions to be asked a witness and whether or not the witness should answer them. (Evidence Act, 2011)

The Evidence Act clearly sets out the factors to be taken into consideration by the court when exercising the discretion of control in the questions a witness could answer or not, thus –

a) such questions are proper if they are of such a nature that the truth of the imputation conveyed by them would seriously affect the opinion of the court as to the credibility of the witness on the matter to which he testifies.
b) such questions are improper if the imputation which they convey relates to matters so remote in time, or of such a character, that the truth of the imputation would not affect or would affect in a slight degree, the opinion of the court as to the credibility of the witness on the matter to which he testifies.
c) such questions are improper if there is a great disproportion between the importance of the imputation made against the witness's character and the importance of his evidence.

Although the Electoral Act 2010 (as amended) gives the tribunal power to allocate time to examine-in-chief (only by written deposition), cross-examine and re-examine a witness (if any), and also to streamline the number of witnesses and number of days to prove his/her case, those provisions are always observed in breach to the detriment of the petitioner who is usually affected by the limited time allowable to prove his/her case. It appears some of the provisions are clumsy, which may warrant their breach.

An example of such abuse of cross-examination was experienced in the petition of *Dr Okey Udeh & Anor v Ben Nwankwo & Ors.* In that petition, Dr Udeh (petitioner) had more than 15 witnesses. Because the time remaining out of his 180 days (which was shortened by dismissal of his appeal as abandoned by Hon Justice Bwala led panel and his successful appeal to Court of Appeal, which ordered trial *de novo* by another panel) remained about 15 days for hearing, the retrial tribunal allotted two days for Dr. Udeh and two days for cross-examination by 1st respondent. Dr Udeh opted to be the sole witness. In his testimony, he tendered more than fifty documents. Some of the documents were not frontloaded because the Electoral Act 2010 (as amended) allows a petitioner to either accompany a petition with copies or list of the documents. It is only the respondent that must frontload documents. In the course of cross-examination of Dr. Udeh, it took the 1st respondent's counsel an average of 2 hours to cross-examine on each of the documents that were not frontloaded. The tribunal panel itself was helpless because the 1st respondent's counsel always insisted that he was seeing the documents for the first time. At the end, it was found out that the two days allotted to the 1st respondent to cross-examine was not sufficient.

Another obnoxious case law that has been an albatross to cutting down the number of witnesses is the law on bringing up witnesses in each polling unit if it involves questions on what transpired in the polling units. In *Chime v Ezea (2009),* the Court held:

> …Every one deprived of voting must come and show his voters card, express the disappointment to exercise his constitutional right to pick candidate of his choice. The comprehensive voters' register must be tendered, authentic evidence of what happened at each polling booth must be given and this will not admit of any generalization of evidence for Local Government or Constituency as it will not serve the purpose …

These cases were decided under the old electoral laws that did not provide a timeframe for hearing and determination of election petitions. However, to the chagrin of watchful eyes, even with the introduction of the timeframe (180 days) for filing and determination of a petition under the recent amendment to the Constitution, the Supreme Court in *Gundiri v Nyako (2014)* still went ahead and held that where a petitioner complains of non-compliance with the provisions of the Electoral Act, the petitioner has a duty to prove the non-compliance alleged based on what happened at **each polling unit.** The import of that duty is that the petitioner has to call witnesses who were at each polling unit during the election or in the alternative present the polling agents' report before the tribunal. (*Gundiri v Nyako)*

It is the opinion of this writer that the position of the law in this area of the type of evidence required should be shifted to a more liberal approach in order to enhance access to court/justice because such prolonged evidence will invariably affect the 180 days required to prove the petition.

5.1.2. De Novo Trial

De novo trial or trial *de novo* connotes a new trial on the entire case – that is, on both questions of fact and issues of law – conducted as if there had been no trial in the first

instance. (Garner 2009). This definition has gotten judicial interpretation in *Ngige v Obi (No 1) (2012).* The judicial effect or consequence of a case starting *de novo* before another tribunal is to render null and void all previous and pending proceedings and

orders made in the case before the order *de novo* is made. Thus, a pre-hearing session comes within the definition of trial and is covered by the meaning of trial *de novo.* This definition is only applicable where the court makes a blanket order for a trial *de novo.* It is entirely different where the court makes an order specifying what issues to be tried *de novo (Ngige v Obi 2012).* A lot of issues may affect a trial to start *de novo* in election petition*,* ranging from disbandment/reconstitution of tribunal, transfer/reassignment of cases, *et cetera.* At the end, these shorten the lifespan (180 days) allowed by the Constitution for a petition to be concluded to the detriment of the aggrieved party (usually the petitioner). Causes of *de novo* trial in election petitions could include:

(a) Disbandment/Re-constitution of Tribunal

Disbandment of tribunal occurs where a particular tribunal especially its composition is disbanded or recalled especially by the constituting authority. This power is usually exercised by the President of the Court of Appeal by the powers bestowed on the office by the provisions of paragraph 3. The resultant effect of this exercise of power is that any petition being handled in that particular tribunal stands stalled whereas the 180 days as allowed by the Constitution still runs, which cannot be extended. The pending cases suffer until the reconstitution of another panel to handle petitions in that particular tribunal. This was the case in Panel 1 of the National and State Houses of Assembly Election Tribunal sitting in Awka, Anambra State in 2011 when the panel as led by Hon Justice Bwala was disbanded. It took about one month (30) days for a new panel to be reconstituted thus affecting the number of days remaining out of the 180 days. This seriously affected a lot of petitions that emanated in the above-stated panel to wit: *Dr Okey Udeh & Anor v Ben Nwankwo & Ors;(2011) Chukwuma Umeoji & Anor v Eucharia Azodo & Ors;(2011) Prof Dora Akunyili & Anor v Dr Chris Ngige;(2011) Lawrence Ezeudu v John Olibie, (2011)* and so on. All those petitions mentioned were not decided on the merit because of lapse of time in accordance with section 285(6) of the 1999 Constitution (as amended) which stipulates the time limit to decide election petitions because when the new panel started sitting, the whole trial started *de novo* right from pre-hearing session.
Although this was not rampant during the 2015 election petitions. However, in Rivers State Governorship Election Petition sitting in Abuja, Justice Muazu Pindiga was replaced for Justice Mohammed Ambrosa as the tribunal chairman, thus truncating some days left for the hearing and determination of the petition. (Justice Ambrosa 2016)

(b) Transfer/Re-assignment of Petitions

Under our laws, Rules of Court and Practice, matters could be transferred and re-assigned from one Judge to another or from one election petitions tribunal to another. Transfer and re-assignment of cases are one of the major causes of delay in trial of cases in our court and hence adversely affect the administration of justice on our legal system. As exemplified in the above-stated election petitions emanating from Anambra State in 2011, transfer and re-assignment of cases occasion one form of delay or the other in court trials. It really involves some waste of time to transfer or assign a case or cause from one election tribunal to another. The time expended in these transfers and assignments can be better appreciated if it is realised that the cases, no matter the stage at which the transfer or assignment is effected are started *de novo*, and this is irrespective of the stage that suit had reached at the time of the said transfer. One can consider the time, cost, delay and oftentimes pains and agony caused litigants if trial had advanced or even in some cases reached judgment stage and then transfer or re-assignment is affected. Transfer or re-assignment of cases is indeed one of the real problems militating against the quick dispensation of justice in Nigeria thus hinders access to court/justice.
This is also the position in the election petition where the President of the Court of Appeal could transfer or reassign a particular petition from one panel to another. This seriously affects the petitions that are transferred because of time limitation in proving a petition and delivering judgment in that particular petition because when a petition is transferred or reassigned to another panel of a tribunal, it usually starts afresh irrespective of the particular stage the matter was before the transfer or reassignment. In 2011 National Assembly Election Petition Tribunal, the following cases were not decided on the merit because of time limitation occasioned by transfer or reassignment of the petitions to another panel of the tribunal among other factors: *Dr. Okey Udeh & Anor v Ben Nwankwo & Ors; Chukwuma Umeoji & Anor v Eucharia Azodo & Ors; Prof Dora Akunyili & Anor v Dr Chris Ngige; Lawrence Ezeudu v John Olibie.* This was not rampant during the 2015 election petitions,

(c) Abuse of Application for the Issuance of Pre-Hearing Notice

While we have dealt with timing for application of pre-hearing session in chapter three and the attendant consequences if not done or done according to the specified time, the purpose of the same topic here is to expose the inherent 'tricks' being utilised by the adversaries in order to make the tribunal to dismiss a petition as abandoned so that even if a retrial order is made by the appellate court upon successful appeal, the time limited by the Constitution for the petition to be concluded would have been shortened to the detriment of the petitioner.
The concept of "Pre-Trial Conference" has been defined in various ways. The Black's Law Dictionary defined the term as,

- An informal meeting at which opposing attorneys confer, usually with the judge, to work toward the disposition of the case by discussing matters of evidence and narrowing the issues that will be tried. (Garner 2009)

The pre-trial conference usually takes place before the trial. The rationale for pre-trial conference from the above definition is the supposition that some of the issues which occur or arise during trials such as objection to admissibility of evidence, amendment of pleadings, objections on points of law and applications for injunctive reliefs can conveniently be taken and disposed of at the pre-trial conference stage and thus shortens the trial. (Anaenugwu 2012)

The application for pre-hearing session could be by way of ordinary letter to the Judge or by motion *ex-parte* or Notice. Fortunately, the Court has put to rest the brouhaha that trailed the mode of application for pre-trial conference in many election petitions that led to the dismissal of same by the Election Petition Tribunals during the 2011 election petitions. *(Gebi v Dahiru* 2012)

However, lofty objectives of pre-trial conference have been seriously come into question by some 'sharp practices' employed by adversaries through the connivance of corrupt judiciary staff. For instance, in *Prof Dora Akunyili & Anor v Dr Chris Ngige,* the petition of Akunyili was dismissed as abandoned because the application for the issuance of Pre-Hearing Notice was not seen in the file at a stage of the petition. Meanwhile, the case had reached an advanced stage and the petitioners challenged the registry that they were the ones that actually 'removed' the application to the detriment of the petitioners. The appeal on such dismissal was upheld and a retrial order by another panel of tribunal was made. This particular petition lapsed based on section 285(6) of the Constitution because the time remaining for another panel to decide the petition was too short. Hence, it could be seen that the 'tactics' employed by the adversaries (respondents) had worked to the detriment of the petitioner. This is one of the albatross inherent in application for Pre-Hearing Notice in election petition.

On the other hand, in *Hon Barr (Mrs.) Njideka Ezeigwe & Anor v Hon Benson Nwawulu & Ors (2011)* where the issue that the petitioner did not apply for pre-trial notice arose and most mysteriously, a copy of a purported application appeared in the Court's file after a previous thorough search for same had disclosed that none was filed. In its ruling on the issue, the Tribunal found thus:

- Neither the Secretary of the Tribunal nor the Assistant Secretary has in his respective affidavit of facts addressed the issue of the non-existence of the letter in any of the files of this Tribunal and its subsequent appearance in the Chairman's file, even though they were both aware of this issue and were in fact involved in the search to ascertain its existence. It should also be stated that up till that moment, neither the Secretary to the Tribunal, Mr. A.I. Abubakar nor the Assistant Secretary Abdul-Ganiyu admitted to the Tribunal that he received such a letter or handled such a letter, as they have now done, in their respective affidavits.

Although the *Ezeigwe's case* went in favour of the petitioner, the essence of it here is to show the level the application for issuance of pre-hearing notice can be used to make or mar a petition thus depriving the petitioner the right of access to court/justice.

(d) Abuse of Preliminary Objection

Paragraph 12(5), 18(6)(c)(7)(d), 47(1) and 53(2)(3)(4) and (5) First Schedule, Electoral Act, 2010 (as amended) offer some guides as to when to raise preliminary objection in election petition and other related issues. They provide as follows:

12(5) A respondent who has an objection to the hearing of the petition shall file his reply and state the objection therein, and the objection shall be heard along with the substantive petition.

18(6) At the pre-hearing session, the tribunal or court shall enter a scheduling order for –
(c) filing and adoption of written addresses on all interlocutory applications.

(7) At the pre-hearing session, the tribunal or court shall consider and take appropriate action in respect of the following as may be necessary or desirable –
(d) hearing and determination of objections on point of law;

47(1) No motion shall be moved and all motions shall come up at the pre-hearing session except in extreme circumstances with leave of tribunal or court.

53(2) An application to set aside an election petition or a proceeding resulting there from for irregularity or for being a nullity, shall not be allowed unless made within a reasonable time and when the party making the application has not taken any fresh step in the proceedings after knowledge of the defect.

(3) An application to set aside an election petition or a proceeding pertaining thereto shall show clearly the legal grounds on which the application is based.

(4) An election petition shall not be defeated by an objection as to form if it is possible at the time the objection is raised to remedy the defect either by way of amendment or as may be directed by the tribunal or court.

(5) An objection challenging the regularity or competence of an election petition shall be heard and determined after the close of pleadings.

A *preliminary objection* is an objection against the irregularity of a court process which if it succeeds terminates the proceedings at that stage. (*Ojukwu v Yar'Adua* 2008) Preliminary objection as the expression connotes, is an objection which is initiated or commenced at the earliest opportunity. It should be taken first in time because it could be liable to be defeated by time in adjectival law. (*Onugha v Ezeigwe* 2011) Apart from preliminary objection as to the jurisdiction of the court, most others are liable to be defeated by delay in time and could be subject of waiver. *(Onugha v Ezeigwe* 2011)

In determining the appropriate mode and time to raise objection to a petition, a composite consideration must primarily be given to paragraphs, 12(5) 18(6)(c) (7)(d) 47(1) and 53(2) & (5) and section 285(6). (Constitution of the Federal Republic of Nigeria, 1999) (as amended).

It is in effort to make the constitutional prescription as to time within which election petition must be disposed of that the Legislature devised two expeditious optional modes of raising objection to election petition. The first of the modes of raising objection is the procedure under paragraphs 12(5) of the First Schedule to the Electoral Act, which provides:

12(5) A respondent who has an objection to the hearing of the petition shall file his reply and state the objection therein, and the objection shall be heard along with the substantive petition.

By prescribing that a tribunal must give its judgment within 180 days of filing a petition, the Constitution has clearly made time to be of the essence in election cases. It has been held (*Belgore v Ahmed* 2013) that it is for the purpose of meeting the clear dictates of the Constitution that the Legislature introduced paragraph 12(5) of the First Schedule. In *Belgore v Ahmed,* the Supreme Court held:

- On the question of whether paragraph 12(5) of the 1st Schedule to the Electoral Act is authority for the 1st and 2nd respondents' preliminary objection being embodied and argued in their brief and argument, it is necessary to highlight the state of the law before its coming into being. The 1999 Constitution before its amendment had no stipulation as to time within which an election petition was to be disposed of. Similarly, the 2006 Electoral Act made pursuant thereto had no limitation as to time within which an election petition was to be finally determined. The consequence was that election petitions suffered undue delays. It is on record that some election petitions could not be delivered until the four-year term of the elective office that was contested in the litigation expired. The rules of procedure for challenging the competence of an election petition or any part thereof were simply identical with paragraph 53 of the 1st Schedule to the current 2010 Electoral Act (as amended) … As I pointed out, both the 1999 Constitution in its original form and the Electoral Acts, made pursuant thereto contained no provisions limiting the lifespan of an election petition. I have also spoken on the consequential delays. There was thus the patent mischief both in the Constitution in its original form and the Electoral Act. In apparent bid to suppress and possibly remedy the mischief, makers of Constitution caused an amendment through Section 285(6) of the 1999 Constitution…By this amendment time is thus of essence in an election petition. And for the purpose of meeting the clear dictates of the Constitution, the Legislature introduced paragraph 12(5) of the 1st Schedule to the Electoral Act.

In the procedure contained in paragraph 12(5) First Schedule, respondent who has an objection to the competence of a petition may raise the objection in some paragraphs of his petition and set the objection down for hearing along with the substantive matter in the final address. (*PDP v INEC* 2012)

The second procedure is to raise objection to a petition by way of motion at the close of pleading during pre-hearing session. One of the listed issues required to be treated during pre-hearing sessions is the hearing and determination of objections on point of law. Application for pre-hearing notice in Form TF 007 is required to be made pursuant to paragraph 18(1) First Schedule, Electoral Act, 2010 (as amended) after the service of the petitioner's reply or after the close of pleading. There is therefore internal consistency in the First Schedule because under paragraph 53(5) an objection challenging the regularity or competence of an election petition is required to be heard and determined after the close of pleading.

The existence of the foregoing two alternative modes of raising objection to election petition has been acknowledged by the Supreme Court. In *PDP v INEC* the Supreme Court while considering the import of paragraphs 12(5) and 47(1) First Schedule held:

With tremendous respect, these paragraphs of the 1st Schedule apply to the different situations and proceedings, i.e.

(i) Where a party approaches the Tribunal with objection by way of motion, such motion shall be moved and determined during pre-hearing session except in extreme circumstances with the leave of the tribunal, that is the position under the provisions of paragraph 47(1) of the 1st Schedule; and

(ii) Where the objection is embedded, or stated in the reply such objection shall be heard along with the substantive case.

In the instant case on appeal, the respondent adopted the latter procedure by stating the objection in their reply and argued same in their final written address and the appellant also replied in its own written address.

In practice, there are cases in which respondents raise objections in their replies and rather than wait to set the objections down for hearing in their final addresses apply to the tribunals by way of motions to set the objections down for hearing at the pre-hearing sessions or at the interlocutory stage. The question has been whether a respondent who chooses to embody his objection in his reply can set same down for hearing and determination at the pre-hearing sessions or at an interlocutory stage.

Where the issue of want of jurisdiction for reason of incompetence is involved in an election petition, the provisions of paragraphs 47(1), 18(6)(c)(7), 53(2)(3) & (5) First Schedule to the Electoral Act, 2010 (as amended) cannot prevent a respondent from raising the issue of incompetence or jurisdiction at any stage of the proceedings. (Olatubora) In *Buhari v Obasanjo (2003),* the Court of Appeal held thus:

- In the present case therefore, notwithstanding the provisions of paragraphs 49(2)(3) and (5) of the 1st Schedule to the Electoral Act, heavily relied upon by the learned senior counsel to the petitioners, the jurisdiction of this court to determine whether or not it has jurisdiction to hear and determine the petitioners' petition in the form it is being questioned by the respondents as to its competence cannot be curtailed on the grounds being relied upon by the petitioners in the application or preliminary objection. With this position of the law on the issue of jurisdiction, the need to decide now whether or not the respondents had taken fresh steps in the proceedings after becoming aware of the defects in the petition is not necessary as the respondents' right to raise the issue of jurisdiction as contained in their preliminary objections now being objected to cannot be defeated by those provisions of paragraph 49(2) (3) and (5) of the 1st Schedule to the Electoral Act, 2002.

The issue of jurisdiction can be raise at any stage of the proceedings. It can be raised by the court *suo motu* provided that where it is raised *suo motu*; parties must be heard before the court will arrive at a decision. Objection to jurisdiction can even be raised for the

first time on appeal. But once raised, the court has a duty to resolve it first. *(Oredoyin v Arowolo* 1989) It is therefore clear that where an objection to a petition involves the jurisdiction of the election tribunal or court, it can be raised outside the pre-hearing session. This is because the competence of an action rubs on the jurisdiction of the court to hear it within the classification of the elements that confer jurisdiction on a court or tribunal as expounded in *Madukolu v Nkemdilim (1962),* and *Nnonye v Anyichie*. (2000) Lack of jurisdiction will constitute extreme circumstances within the provisions of paragraph 47(1) First Schedule, Electoral Act, 2010 (as amended) and by virtue of which it will be proper to raise objection outside pre-hearing session.

Paragraph 53(5) First Schedule, Electoral Act, 2010 (as amended) simply requires that an objection challenging the regularity or competence of an election petition shall be heard and determined at the close of pleading. It does not limit objection to *defect on the face of the petition*. The provision is not as restrictive as the provision of paragraph 49(5) First Schedule, Electoral Act, 2006 but is doubtful if an objection on ground of incompetence would succeed if the defect being challenged is not apparent on the face of a petition, that is, where the defect is exterior to the petition and can only be brought out when evidence is led to prove it.

This writer found out that what causes the hardship occasioned by section 285(6) of the 1999 Constitution (as amended) is not the feasibility of that provision but different issues that affect the time. One of the major things that affect the timing is raising preliminary objection whether on jurisdiction or not. It is suggested that every type of objection whether on jurisdiction or not should be decided in the main petition. The reason is that if an objection is raised (even if on jurisdiction) and a petition is either struck out or dismissed (striking out and dismissal have the same effect in election petition because a petition cannot be refilled after the mandatory 21 days allowed for filing a petition), the petitioner is entitled to appeal on that issue. If the petitioner succeeds on appeal and a retrial is ordered, the petition may be choked up by section 285(6) thus making the objector (respondent) to have benefited from the back door. The suggestion that every objection (whether on jurisdiction or not) should be decided with the main petition should be backed up with a constitutional amendment to oust the jurisdiction of tribunal or court to hear such objection otherwise. This is the only way to circumvent the hardship being created by that provision. In the alternative, the researchers adopt the suggestion made by (Bulkachuwa 2015) where a retrial order is made to the effect that such a retrial if ordered, time should start to run afresh for the successful appellant (petitioner). This is one of the ways to enhance access to court/justice in election petitions.

6. Reform Projections and Recommendations

6.1. Appeals in Election Petitions

Appeals in election petitions could take the form of interlocutory or final appeals or both. There is a line of decisions in the past in which, in the interpretation of statutory provisions which are similar to sections 6(2) and 8(1) it was held that decisions such as orders striking out election petitions for lack of *locus standi* or incompetence or other forms of interlocutory decisions were not appealable in the sense that such decisions did not decide whether any persons had been validly elected into the contested offices. Some of the decisions along this line are *Orubu v NEC (1988) Okokhue v Obadan (1989)* and *Aondoakaa v Ajo*. (1999)

Before delving into the appellate process in election petitions, it is pertinent to look into section 285 (5), (6) & (7) (Constitution of the Federal Republic of Nigeria, 1999) (as amended).

285 (5) An election petition shall be filed within 21 days after the date of the declaration of result of the elections;

(6) An election tribunal shall deliver its judgment in writing within 180 days from the date of the filing of the petition;

(7) An appeal from a decision of an election tribunal or Court of Appeal in an election matter shall be heard and disposed of within 60 days from the date of the delivery of judgment of the tribunal or Court of Appeal.

From the foregoing, it is noted that appeal is allowed in election petitions. The effect of appeal vis-à-vis the main petition after the expiration of the 180 days allowed for determination of the petition is a different issue to be looked into. It is now pertinent to see how appeals; especially interlocutory appeals affect the 180 days for determination of election petitions.

6.2. Reckoning with Time Spent in Deciding Interlocutory Appeal as Part of Time Spent in the Petition

There is no doubt that interlocutory appeal is part of a constitutional right. The effect of a retrial order made by the appellate court on the remaining days out of the 180 days allowed to a petitioner to get justice is part of the subject of us discuss. The writer further adopts the suggestion (Bulkachuwa) where a retrial order is made to the effect that such a retrial if ordered, time should start to run afresh for the successful appellant (petitioner) from the date such a retrial order commences at the tribunal. This will involve a further amendment of section 285(6) of the 1999 Constitution (as amended). This suggested is buttressed by the fact that in 2011 in Anambra State, Panel 4 tribunal was created by the President of the Court of Appeal to hear petitions where retrial orders were made. All the cases in the tribunal were extinguished by effluxion of time pursuant section 285(6) of the Constitution when the decision in *A.N.P.P. v Goni (2012)* was made and the tribunal got wound up immediately in the courtroom to the chagrin of litigants.

6.3. Reckoning with Time Spent in Deciding Final Appeal as part of Time Spent in the Petition

There is no doubt that section 285(7) gives right of appeal to the parties to the election petition, which must be decided within 60 days. From the foregoing, also, there is no doubt that final (main) appeal is also a constitutional right. The effect of a retrial order by the appellate court on the remaining days out of the 180 days allowed to a petitioner to get justice is also part of our subject of discuss. This provision has been seriously abused also where a retrial order is made and also when time should start to run. Therefore, this researcher further adopts the recommendation made by Bulkachuwa on the issue where a retrial order is made and also a further suggestion to amend section 285(7) so that the 60 days allowable for appeal should start running from the day of delivery of notice of

appeal and transmission of record of appeal at the Court of Appeal and not from the date of delivery of judgment at the tribunal or Court as presently constituted. This is because it was found out that with the collusion of tribunal registry, an appellant (usually the petitioner) may likely have the 60 days allowable for appeal shortened due to delay in transmission of record to the Court of Appeal for no fault of the petitioner. Sometime also, the unsuccessful litigant who wants to appeal does not get a copy of the tribunal judgment on time to enable him/her appeal the judgment. The amendment in that regard will help alleviate the sufferings of the intending appellant who is not to be blamed on non-availability of copy of the judgment to enable him/her file notice and grounds of appeal.

6.4. Administrative Lapses/Bureaucratic Bottlenecks

Sometime, the action or inaction of the tribunal, the constituting authority (President of the Court of Appeal) or the judiciary staff may affect the time limited for a decision in an election petition. This may range from the time spent from in reconstituting an already disbanded panel (*Dr Okey Udeh & Anor v Ben Nwankwo) & Ors supra* to frequent travelling by the panel members despite the fact that the Electoral Act specifies that hearing of election petition shall be from day to day.

The writer found out that the provisions of the said paragraph 25 of the Electoral Act (as amended) on the need for a petition to be heard from day to day are always observed in breach to the detriment of the petitioner who suffers access to justice if his/her petition becomes stale.

6.5. Judiciary Staff Corruption

Corruption has been identified as endemic within the populace. It is without equivocation the greatest inhibitor to the right of access to justice.

Corruption is a cankerworm that has eaten deep into the fabrics of Nigerian society including the judiciary in the handling of election petitions. Since time is now of essence in election petitions, issues that border on time for filing and/or making applications ought to be guarded jealously and manned by corrupt-free judiciary staff. For instance, in cases of application for pre-hearing session wherein time is of essence, where an application was not made, a colluding registry staff could backdate an application and smuggle same into the court's file or in the alternative remove an application from the court's file in order to dismiss the petition as abandoned. This type of situation arose in *Hon Barr (Mrs.) Njideka Ezeigwe & Anor v Hon Benson Nwawulu & Ors* where the issue that the petitioner did not apply for pre-trial notice arose and most mysteriously, a copy of a purported application appeared in the Court's file after a previous thorough search for same had disclosed that none was filed.

On the other hand, in the case of *Prof Dora Akunyili & Anor v Dr Chris Ngige,* the question that arose was that the petitioner maintained that she had made an application for issuance of pre-hearing notice. However, such an application was not in the court's file while she maintained that it must have been removed by corrupt judiciary officials. The tribunal dismissed the petition as abandoned having not applied for pre-trial conference. The petition subsequently died a natural death because before the time the petition was to be concluded pursuant to a retrial order, the 180 days had elapsed.

Also, numerous allegations of corruption have also been levelled against some Judges including the ones on election petitions.

There are other factors that impede access to court/justice in election petitions. They include improvement in infrastructure/court halls for sitting of tribunals, use and/or deployment of ICT equipment or electronic gadgets, inadequate/untrained secretariat staff of tribunal, *adhoc* nature of election tribunals, lack of refresher courses for Judges, human biases and prejudices and so on.

It was found that a lot of issues bedevil our electoral justice system ranging from loopholes in our electoral laws to case laws that needed to be improved if we must attain the objective of timely disposal of election matters in a way that will not hinder access to justice. It is suggested that where a retrial order is made, time should begin to count afresh in computing the time to dispose of an election petition. Thus, constitutional amendment is proposed in this respect. When a retrial order is made by the appellate court on an election petition that has few days to exhaust its 180 days, there is no extension of time to hear the petition any longer. A lot of adversaries utilize the loopholes inherent in our electoral laws (procedural) to thwart the laudable objectives of introduction of 180 days as time limit for filing and determination of election petitions to make it look as if it impedes access to court when a. However, the provision does not impede access to court. It is on that note that the writer suggests a further amendment to section 285 of the 1999 Constitution (as amended) in the following manner as underlined:

(6) An election tribunal shall deliver its judgment in writing within 180 days from the date of the filing of the petition.
Provided that in the computation of the said days, Sundays, Saturdays, public holidays, court vacations and such unforeseen events which may prevent the tribunal from sitting, shall not be included and if a case is remitted for retrial, the computation shall start from the date such retrial commences at the tribunal.

(7) An appeal from the decision of an election tribunal or Court of Appeal in an election matter shall be heard and disposed of within 60 days from the date of the delivery of the notice of the appeal at the registry of the appellate court.

It is the opinion of the writer that if these amendments are effected it will obviate the perceived denial of constitutional right of a petitioner (appellant) who has his/her petition ordered to be retried but who meets a stale petition owing to exhaustion of the original 180 days provided by section 285(6) for determination of election petitions.

7. Conclusion

We call on the National Assembly to immediately review or amend the constitution of Nigeria (as amended) by adopting our suggestions above. The Judiciary, particularly the Supreme Court, must rise to the occasion in handling electoral matter in a manner that edifies the rule of law, the right tom access to court/ justice, due process and democratic ideals / norm in Nigeria. It must heed the admonition of professor A Oyebode, that

- "… a political system can be considered as democratic on the basis of the extent to which the judicial arm is permitted to hold the scale of justice over and above other arms of government… for, if good governance has become a modern day desideratum, human ingenuity is yet to devise a better means of preventing arbitrariness and ensuring social wellbeing than that of separation of powers, due process of law, and independence of the judicially, which taken together constitute the hallmark of a well functional democratic society" (Oyebode 2005)

The Supreme Court should at the earliest opportunity rise to its interpretative best in the pursuit of evolving just electoral laws in Nigeria. It should overrule itself, particularly on cases like PDP v CPC and ANPP v Goni, if it must restore the confidence of Nigerians in our electoral process and practice. The time to act is now.

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