

## ELECTION PETITION CASES AND THE RIGHT TO FAIR TRIAL WITHIN A REASONABLE TIME IN NIGERIA<sup>1</sup>

### Abstract

*Justice delayed, they say, is justice denied. Delay in the dispensation of electoral disputes in Nigeria has become an albatross to the Nigerian nation. It has become a sour point in our electoral process. In this article, the writer meticulously looked at fair hearing in the determination of electoral disputes, and its application and problems created as a result of judgments of courts and sources of the problems. Positions on fair hearing in other jurisdictions were equally considered.*

**Key words:** Election Petition, Right to Fair Trial, Reasonable Time, Nigeria

### 1. Introduction

Section 36(1)<sup>2</sup> gives to every person the right to have his civil rights and obligations determined by a court after a fair hearing and within a reasonable time. For clarity, the sub-section provides that, “In the determination of his civil rights and obligations; 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”.<sup>3</sup>

Fair hearing is derived from the principle of natural justice. Its twin pillars are *audi alteram partem* and *nemo iudex in causa sua*. It is of general application in Nigerian courts and courts are expected at all times to adjudicate in accordance with the rules of natural justice. That is to say, a judge should allow both parties to be heard and he should listen to the point of view or the case of each side before delivering a judgment. This practice is well rooted in all civilized societies and has its roots in the Old Testament in the Bible<sup>4</sup>. The Lord had overwhelming evidence that Adam had eaten the forbidden fruit, the apple, which the Lord told him never to eat, but still gave Adam an oral hearing before judgment was passed.<sup>5</sup>

The issue as to whether a specific time span should be stipulated within which election petitions must be concluded has always generated heated and unending debates among Nigerian legal practitioners, jurists, and politicians alike. Attempts to resolve the issue have also, at best, resulted in continually shifting legal positions. This article will examine the application of the right to fair trial within a reasonable time in Nigeria with respect to election petition cases to determine the extent of its applicability in view of the recent amendments of the constitution<sup>6</sup> and the Electoral Act.<sup>7</sup>

### 2. Meaning of Election Petition

Election is the corner stone of democracy.<sup>8</sup> Election is a means through which people make choice of leadership.<sup>9</sup> It is the process of electing one person or more for leadership positions

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<sup>2</sup> Constitution of the Federal Republic of Nigeria 1999 (as amended).

<sup>3</sup> *Ibid*, ACN v. Lamido (2012) 26 WRN 1.

<sup>4</sup> Genesis Chapter 3 verse 11.

<sup>5</sup> ACN v. Lamido, (*Supra*).

<sup>6</sup> Constitution of the Federal Republic of Nigeria 1999 (as amended).

<sup>7</sup> Electoral Act 2010 (as amended).

<sup>8</sup> T. Osipitan, “Problems of Proof under the Electoral Act 2002,” in *Judicial Excellence, Essays in Honour of Hon. Justice Anthony Iguh JSC CON*, Snaap Press Ltd Enugu, 2004.

<sup>9</sup> <http://www.internationalpeaceandconflict.org/Profiles/blogs/election...> (accessed on 18 June, 2012).

in both public and private establishments. Election offers a medium through which citizens in a polity choose their representatives and political leadership.<sup>10</sup> It also allows a degree of communication between the rulers and the ruled and further provides a means of legitimizing the rights of the rulers to govern.<sup>11</sup>

In the contemporary world, elections have become the most acceptable means of changing leadership in any given political system. Representative government is often referred to as democracy where the authority of government is derived solely from the consent of the governed. The principal mechanism for translating that consent into government authority is the holding of free and fair election.<sup>12</sup> A free and fair election gives the assurance that those who emerge as rulers are the elected representatives of the people. Except in case where an aspirant is returned unopposed, there will usually be at least two contestants to elective posts. Rules and regulations are normally put in place for the conduct of free and fair elections.

The Electoral Act<sup>13</sup> is the law which currently regulates elections in Nigeria. Applying broad interpretation, the Court of Appeal in *Progressive People Alliance (APP) v. Sariki*<sup>14</sup> interpreted the word “election” as used in section 137(1)(b) of the Constitution of the Federal Republic of Nigeria 1999 (as amended) to mean the “process of choosing by popular votes a candidate for a political office in a democratic system of government.” It cannot refer exclusively to the polls. The casting of votes by the electorates on the day of the polls is just part of the electoral process<sup>15</sup>. By the provision of the Electoral Act<sup>16</sup> under Part IV, the word election is a generic term comprising *inter alia* submission of list of candidates and their affidavit by political parties, nomination of candidates, conduct of the polls, etc. In this paper, the term election will be used in a broad manner.

The procedure for challenging an election under the Electoral Act 2010 is by way of an election petition complaining of either an undue election or undue return<sup>17</sup>. An election petition presupposes that an election has been held and the result announced. A petition, for example as to who is validly elected as governor of a State can only arise after an election.<sup>18</sup> After the 2007 general elections, Nigerians did not only witness the challenge of the presidential election won by Late Alhaji Umaru Musa Yar Adua, but also litigations against governorship election results in States across the country.<sup>19</sup> The former Court of Appeal President, Justice Abdullahi Umaru said that about 1,527 petitions were lodged in respect of the 2007 general elections saying it was the highest in the history of Nigeria.<sup>20</sup> Justice Abdullahi Umaru agreed with the former President of the Nigeria Bar Association (NBA), Chief Oluwarotimi Akeredolu (SAN), that the way and manner the 2007 general elections were conducted might have given room for the welter of petitions.

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<sup>10</sup> *Ibid.*

<sup>11</sup> *Ibid.*

<sup>12</sup> [www.buzzle.com/articles/electoral-reform-in-Nigeria-html-28k](http://www.buzzle.com/articles/electoral-reform-in-Nigeria-html-28k) (accessed on 18 December, 2008.)

<sup>13</sup> Electoral Act 2010, (as amended).

<sup>14</sup> (2007)17 NWLR (pt 1064) 456.

<sup>15</sup> *Ibid.*, per Ogunwumi, JCA who read the lead judgment.

<sup>16</sup> Electoral Act 2010 (as amended).

<sup>17</sup> *ANPP v. PDP* (2006)17 NWLR (Pt 1009) 467

<sup>18</sup> *Amaechi v. INEC* (2008) MJSC 1 the Supreme Court held that the case was not an election petition because it did not arise out of an election.

<sup>19</sup> [www.tribune.com.ng/2005 2008/politics-2.html](http://www.tribune.com.ng/2005%202008/politics-2.html) (accessed on 18/12/2008).

<sup>20</sup> [www.champion-newspapers.com/news/articles/14-120209.html](http://www.champion-newspapers.com/news/articles/14-120209.html) (accessed on 18/12/2008).

### 3. Nature of Election Petition

Election petitions are neither criminal nor civil cases. On the ground of public policy, they are regarded as unique and therefore, accorded special treatment. In legal parlance, it is common knowledge that election petitions are “*sui generis*” which means special, or, put in another expression, proceedings of its own kind or class, unique or peculiar.

Election petitions have peculiar features which modify the operation of certain rules of civil proceedings. Some technical defects or irregularities which in other proceedings are considered too immaterial to affect the validity of the claim, could be fatal to proceedings in election petitions. In *Obasanya v. Babafemi*<sup>21</sup> the Court of Appeal held that election petitions basically complain about elections or conduct of elections. In *Orubu v. NEC*<sup>22</sup> it was further held that election petitions are peculiar in nature, and because of their peculiar nature, and importance to the well-being of a democratic society, they are “regarded with an aura that places them over and above normal day to day transaction between individuals which give rise to ordinary claims in court.”<sup>23</sup> Uwais CJN (as he then was) puts it succinctly as follows:-

An election petition is not the same as the ordinary civil proceedings. It is a special proceeding because of the nature of elections which, by reason of their importance to the well-being of a democratic society are regarded with aura that places them above the normal day to day transactions between individuals which give rise to ordinary or general claim in court. As a matter of deliberate policy to enhance urgency, election petitions are expected to be devoid of the procedural clogs that cause delay in the disposition of the substantive dispute.<sup>24</sup>

This view was also expressed by Oguntade JCA in *Abdulahi v. Elayo*<sup>25</sup> thus:-

It must be borne in mind that an election petition is not always to be treated as the ordinary civil suits in court. An election petition creates special jurisdiction and the ordinary rules of procedure in civil cases do not always serve to affectuate its purpose.

### 4. The Concept of Reasonable Time

Before the Supreme Court decisions in *Unongo v. Aku*<sup>26</sup> and *Ariori v. Elemo*,<sup>27</sup> the meaning of reasonable time for the purposes of fair hearing had been one of bewilderment.<sup>28</sup> What amounts to reasonable time within the context of this section is a question of fact to be determined in accordance with the circumstances of each case.<sup>29</sup> In *Ariori v. Elemo*,<sup>30</sup> it was argued that the plaintiffs were deprived of their right to a fair hearing guaranteed by section 22(1) of the 1963 constitution in that the trial judge having adjourned for judgment *sine die* at the conclusion of the hearing on 18<sup>th</sup> July, 1974 would not have been in a position to appreciate issues involved in the case in its proper focus or remember his own impressions of the twenty witnesses who

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<sup>21</sup> (2000) 15 NWLR (pt 689). 1

<sup>22</sup> (1988) 5 NWLR (pt. 94 323 at p.347).

<sup>23</sup> *Ibid.*

<sup>24</sup> *Ibid.*

<sup>25</sup> (1993) 1 NWLR 332.

<sup>26</sup> (1983) 1 SCNLR 1.

<sup>27</sup> (1983) 1 SCNLR 1.

<sup>28</sup> C. Okpaluba, *The Right to a fair hearing in Nigeria*, 2<sup>nd</sup> ed, Matt Madek & Co. Enugu, 1990, 32.

<sup>29</sup> Per Bello JSC in *Unongo v. Aku* (*supra*).

<sup>30</sup> *Supra.*

gave evidence at the time he delivered his judgment on October 3, 1975. Although this case turned to be decided on whether the right to a fair trial could be waived by a party to litigation, their Lordships of the Supreme Court took the time to discuss the essence of the right to a speedy trial. Thus in considering whether the delay caused was detrimental to the course of justice or not, Eso JSC said:

It is to be realized that speed in trying any case is not itself a primal and separate consideration. The idea of justice is that there should be justice to both the litigant and the public. This in fact is the prime consideration. Speedy trial therefore becomes just an important element or attribute of justice.<sup>31</sup>

Obaseki JSC defined “reasonable time” as “the period of time which, in the search for justice, does not wear out the parties and their witnesses and which is required to ensure that justice is not only done but appears to reasonable persons to be done.”<sup>32</sup> Therefore, a period of time which dims or loses the memory or impressions of witnesses is certainly too long and is unreasonable. Where a period of time dims or loses the memory or impressions of witnesses, it occasions a miscarriage of justice, contravenes the fair trial provision of our constitution and vitiates the whole proceedings.<sup>33</sup> Both Bello and Nnamani JJSC (as they were) addressed the issue of reasonable time in *Unongo v. Aku*.<sup>34</sup> Answering the question: what is a “reasonable time” within the purview of section 33(1),<sup>35</sup> Justice Bello expressed the view that: “I may venture to generalize ... that undue delay and undue haste or hurry cannot by any standard be said to be reasonable and consequently either constitutes an infraction of the provisions of section 33(1) of the constitution.”<sup>36</sup> Justice Nnamani opined that the fundamental right to a fair hearing within a reasonable time “is basic to the concept of the rule of law,” and in adopting the opinion of Obaseki JSC in *Ariori v. Elemo*<sup>37</sup> as apposite, the Learned Justice of the Supreme Court went on to offer his own definition of reasonable time when he said:

Briefly put, it assumes that a litigant would be allowed sufficient time in court to put forward his case. In other words, he would be allowed sufficient time to call such witnesses or tender such documents as he deems necessary for the purpose of proving his case in court. What is reasonable or sufficient time for this purpose ought to be left in the discretion of the court to determine according to the circumstances of each case.<sup>38</sup>

## **5. Fair Hearing under the 1999 Constitution of the Federal Republic of Nigeria**

Despite constitutional provisions relating to fair hearing since 1960, the Nigerian courts followed closely the development in relation to natural justice in the area of administrative law before and after independence.<sup>39</sup> Section 36 of the 1999 Constitution of Nigeria provides for the right to fair hearing. Meanwhile, the Constitution does not define the phrase “Fair Hearing.” This Lacuna notwithstanding, it is submitted that the phrase substantively incorporates the

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<sup>31</sup> *Ibid* at 16.

<sup>32</sup> *Ibid* at 24.

<sup>33</sup> Per Obaseki JSC at p. 25.

<sup>34</sup> Per Anagolu JSC (1983) 1 SCNLR 1 at 28.

<sup>35</sup> Now section 36(1) of the 1999 constitution.

<sup>36</sup> Per Bello JSC *ibid* at 35 2.

<sup>37</sup> (1983) 1 SCNLR 1 at 24.

<sup>38</sup> *Ibid*, at 367.

<sup>39</sup> K.M. Mowoe, *Constitutional Law in Nigeria*, Malthouse Law Books, Lagos (2008) p. 344.

common law doctrine of natural justice and its components.<sup>40</sup> In *Donatus Ndu v. The State*,<sup>41</sup> Nnaemeka Agu, JSC stated the law succinctly as follows:

The very essence of fair hearing under section 36 (in the 1999 constitution) (but section 33, then in 1979 constitution) (brackets mine) is a hearing which is fair to both parties to the suit be they plaintiffs or defendants or prosecution and defence. The section does not contemplate a standard of justice, which is biased in favour of one party and to the prejudice of the other. Rather it imposes an ambidextrous standard of justice in which the court must be fair to both sides of the conflict.

In fact, the concept of natural justice at common law has been as interchangeable with the concept of fair hearing as stated above under the Nigerian constitution.<sup>42</sup> As was held *inter alia* by the court in *Ajagunbade III v. Adeyelu II*,<sup>43</sup> thus:

The pillar of our adversarial system is the rule of natural justice of fair hearing... Enshrined in section 36 (1) of the 1999 constitution... and echoed that justice should not only be done but hence be manifestly seen to have been done.

## 6. Fair Hearing in Election Petition Cases in Historical Perspectives

The case of *Paul Unongo v. Aper Aku & Ors*<sup>44</sup> quickly comes to mind. This case emanated from the governorship election held all over the country on the 13<sup>th</sup> July, 1983. The appellant contested the said election with the 1<sup>st</sup> respondent who then was also the incumbent governor of Benue State. The 1<sup>st</sup> respondent was returned as having been elected as the winner of the election. Aggrieved with this decision, the appellant lodged a petition to the High Court Makurdi claiming that the 1<sup>st</sup> respondent was not duly returned and that it was the appellant who should have been declared the winner instead. All sorts of technical objections were put in the petitioner's way. The High Court struck out the petition on the grounds that the joinder of the governor was unconstitutional because he enjoys immunity under the constitution. The court equally stated that the non-inclusion of the name of the occupier of the address of the petitioner for service was fatal to the petition. On appeal to the Court of Appeal, their Lordships did not waste time in upturning the decision of the court below on all grounds. However, the court could not grant the consequential relief of "restoring the petition and ordering a resumption of hearing in the trial court" on the ground that such an order would run foul of the provisions of section 140(2) of the Electoral Act which prescribed a time limit for the determination of an election petition. On appeal to the Supreme Court, the effect of section 140(2) of the Electoral Act 1982 on the jurisdiction of the court and the principle of separation of powers were strongly canvassed. The Supreme Court stood firm to uphold the constitutional right to fair hearing of the litigant under section 33 of the Constitution of the Federal Republic of Nigeria 1979 and asserted the independence of the judiciary and the supremacy of the constitution.

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<sup>40</sup> A.O. Omotesho, et'al, in "Issues on Constitutional Law" Bold Technology & Systems (Nig) Ltd, Abuja, 2001, p. 44.

<sup>41</sup> (1990) 7 NWLR (pt. 164) 550 at 578.

<sup>42</sup> D. O. Odeleye, "The Right to Fair Hearing under the 1999 Constitution of the Federal Republic of Nigeria and under the Indian Constitution", in *Port Harcourt Law Journal*, Vol. 5 No. 1, April, 2013 at pp 309 – 326.

<sup>43</sup> (2002) 9 WRN p. 92.

<sup>44</sup> (1983) 2 SCNLR 232.

The problem in *Unongo's* case<sup>45</sup> arose while considering the provisions of section 129(3) and 140(2)<sup>46</sup> which provide that all election petitions in the High Court must be completed no later than 30 days after the election. The Act<sup>47</sup> further provides in addition that appeal from High Court shall be heard and determined at the Court of Appeal within 7 days and a further appeal to the Supreme Court should also be determined within 7 days or the Appeal stands abated in each case. The Supreme Court quashed the provisions of section 129(3) and 140(2) of the Electoral Act 1982 in the following words: -

I do not see how a reasonable person will have the impression that a party has had a fair hearing where his petition which has been instituted within the time stipulated by the Electoral Act cannot be concluded because the time available to the court for the petition to be heard will not be sufficient for either or both parties to present their case or will not allow the court at the close of the parties' case sufficient time to deliver its judgment. There can be no doubt that the provisions of section 129 subsection (3) and 140 subsection (2) of the Electoral Act neither allow a petitioner or respondent reasonable time to have a fair hearing, nor give the court the maximum period of 3 months to deliver its judgment after hearing a petition as envisaged by sections 33 subsection (1) and 258 subsection (1) of the constitution respectively. Accordingly, the provisions of section 129 subsection (3) and 140 subsection (2) of the Electoral Act, 1982 which limit the time for disposing of election petition by the courts are in my view ultra vires the National Assembly and therefore null and void.<sup>48</sup>

The Supreme Court, drawing from American precedent in *State of Indiana ex rel Kostas v. Johnson*<sup>49</sup> reasoned that any attempt to prescribe and fix the time limits within which certain cases must be tried and determined by the courts or limited the time within which appeals must be heard and determined were held to be unconstitutional and void by virtue of sections 1(3), 4 (8), 6 (6) (a) and (b), section 33(1) of the 1979 constitution which is *in pari materia* with section 1(3), 4 (8), 6 (6) (a) and (b), and section 36(1) of the Constitution of the Federal Republic of Nigeria 1999 (as amended).

It should be noted that the petitioner/appellant had a smooth sail in the Court of Appeal and won on all grounds, but the judgment could not be implemented as the court was unable to grant the consequential reliefs of retrial sought. This was because of the limitation of time prescribed under the Electoral Act 1982. Thus, the petitioner/appellant's victory in the Court of Appeal became meaningless because the court could not order a retrial having regard to the passage of time within which actions were to have been instituted. The Supreme Court rose to the occasion and ordered a retrial despite the provision of the Electoral Act. The ridiculous situation created by the provisions of section 129(3) and 140 (2) of the Electoral Act 1982 was vividly brought out by Oputa C J, (as he then was) in *Collins Obih v. Samuel Mbakwe*<sup>50</sup> where His Lordship stated thus:-

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<sup>45</sup> *Supra.*

<sup>46</sup> Electoral Act 1982.

<sup>47</sup> *Ibid.*

<sup>48</sup> *Unongo v. Aper Aku (supra)* at 342 – 343.

<sup>49</sup> 168 A.L. R. 1118.

<sup>50</sup> Suit No. HOW/EPI/83.

the Electoral Act 1982 did not seem to envisage proper hearing and scrutiny by the courts. Section 119(4) gives a petitioner 14 days after the publication of the result to file his petition. Section 135 gives the respondent 6 days to reply thus making a total of 20 days (where the result is announced on the day of election), section 139(1) gives the registrar at least 10 days to fix date of hearing making 30 days. The court is given only one day to hear and dispose of the petition; an impossible situation.<sup>51</sup>

The facts of the case of *John Jatau Kadiya v. Solomon Lar & Ors*<sup>52</sup> are in *pari materia* with the facts in *Unongo v. Aper Aku*.<sup>53</sup> In *Kadiya's* case, the petition was filed on 29/8/83. Repeated efforts to serve it personally on the 1<sup>st</sup> respondent (that is the incumbent governor) proved unsuccessful. The petitioner had to apply for an order of the court for substituted service through the newspaper. The order was made on 7/9/83 and the necessary publications appeared in the newspaper the following day. The case was fixed for hearing on 12/9/83 which was the last day it could validly be heard, having regard to the stipulation in the Electoral Act requiring an election petition to be disposed of within thirty days from the date of the election (in this case; 13/8/83). When the case came up for hearing on 12/9/83, objection was taken on behalf of the 1<sup>st</sup> respondent that it was not ripe for hearing because the 1<sup>st</sup> respondent had not filed his reply, which he was allowed six days to do from the date of service of the petition on him under section 135 of the Electoral Act. The six days would not expire until 14/9/83. The objection was upheld by the election tribunal. The petition was accordingly struck out. On appeal to the Federal Court of Appeal, the court held that they could have decided to send the case back for hearing in the High Court, but for the provisions of sections 129(3) and 140 (2) of the Electoral Act 1982 to the effect that all such proceedings would abate after 30 days.

### **7. Problems Created by the Supreme Court in *Unongo v. Aper Aku***

As a result of the defect inherent in the Electoral Act 1982, the Supreme Court rose to the challenges to declare that any provision limiting the time within which election petitions must be determined is unconstitutional.<sup>54</sup> With this development, the 1999 constitution<sup>55</sup> did not provide for any time limit within which to conclude election petitions. In the same vein, the electoral legislation<sup>56</sup> that followed the 1999 constitution jettisoned the provisions imposing time limit for the disposal of election petitions. This new paradigm shift created another problem that has to do with delay in the determination of electoral disputes. Delay, according to the Black's Law Dictionary<sup>57</sup> means the period during which something is postponed, or slowed. Delay has been equally defined as "a situation in which something does not happen when it should; the act of delaying."<sup>58</sup> As noted earlier, one of the problems that have trailed the 1999 constitution and the 2002 and 2006 Electoral Acts is the time frame for deciding election matters. It seems to have become an albatross to the Nigerian nation. Delay in the dispensation of electoral justice is a sour point in our electoral process. The case of *Dr. Chris*

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<sup>51</sup> *Ibid.*

<sup>52</sup> (1983) 11 SC 209.

<sup>53</sup> *Supra.*

<sup>54</sup> *Unongo v. Aper Aku (supra); Kadiya v. Lar (supra); Attorney General of Abia State & Ors v. Attorney – General of the Federation* (2002) 6 NWLR (pt 762) 264.

<sup>55</sup> Constitution of the Federal Republic of Nigeria 1999.

<sup>56</sup> Electoral Acts 2002 and 2006.

<sup>57</sup> B. A. Garner, (Ed), *Black's Law Dictionary*, Thompson Group, USA, 2004, p. 458.

<sup>58</sup> A. S. Hornby, *Oxford Advanced Learner's Dictionary of Current English*, 7<sup>th</sup> ed, Oxford University Press, Oxford, 2005, p. 403.

*Ngige v. Peter Obi*<sup>59</sup> has become a reference point in the analysis of the problems and challenges of electoral dispute resolution. Peter Obi the then governorship candidate of the All Progressive Grand Alliance (APGA) filed his case on the 16<sup>th</sup> day of May, 2003. He called 45 witnesses in support of his petition. Dr. Chris Ngige of the Peoples Democratic Party (PDP) that was declared as duly elected by the Independent National Electoral Commission (INEC) called 425 witnesses. The INEC called 12 witnesses bringing the total to 437 witnesses for the defence of the petition. In all 482 witnesses testified before the tribunal. The tribunal took more than two years to hear all the witnesses and delivered judgment on the 12<sup>th</sup> day of August, 2005. The appeal came up for hearing on the 23<sup>rd</sup> day of January, 2006 and judgment was delivered on the 15<sup>th</sup> day of March, 2006. The petitioner waited for 35 months to receive justice out of a mandate of 4 years.

The case of *Ngige v. Obi*<sup>60</sup> 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 & 2 Ors v. Olagunsoye Oyinlola & Ors*<sup>61</sup> readily comes to mind under the 2007 general election in this regards. The facts of this case are that on 14/4/07, the 4<sup>th</sup> respondent (INEC) conducted an election for the office of the governor of Osun State. The 3<sup>rd</sup> petitioner/appellant sponsored the 1<sup>st</sup> and 2<sup>nd</sup> petitioners/appellants as its governorship and deputy governorship candidates respectively. The 3<sup>rd</sup> respondent sponsored the 1<sup>st</sup> and 2<sup>nd</sup> respondents as its governorship and deputy governorship candidates respectively. At the end of the exercise, the 4<sup>th</sup> respondent announced that the 1<sup>st</sup> respondent scored a total of 426,666 votes as against the 1<sup>st</sup> petitioner’s 240,722 and consequently declared the 1<sup>st</sup> respondent duly elected and returned as the governor of Osun State. Dissatisfied with the conduct and result of the election, the petitioners/appellants on 11/5/07 filed the petition at the Governorship and Legislative Houses Election Petition Tribunal holden at Osogbo, Osun State. The tribunal delivered its judgment on 28/5/10 and dismissed the petition on the ground that the petitioners had not made out their case. Dissatisfied with this judgment, the petitioner appealed to the Court of Appeal, which said court delivered its judgment on 26/11/10. In this particular case it took the petitioner more than three years to get justice. The same scenario plays out in *Fayemi v. Oni*<sup>62</sup> where judgment was delivered on 15/10/2010.

### **8. Consequences of Delayed Determination of Petitions**

The governments run by Dr. Chris Ngige, Oyinlola and Oni for nearly three years as the *de facto* governors of Anambra, Osun and Ekiti States respectively were uprooted. The change of government inevitably resulted in an upheaval in the political and administrative aspects of governance. Since they belonged to different political parties, new State commissioners and members and chairmen of parastatals were appointed; several permanent secretaries shuffled around, and so on.<sup>63</sup>

Where an incumbent President or State governor is removed from office as a result of a long delayed election petition, lasting two or more years in the courts, how much of the four – year tenure is left for the winning candidate to occupy and perform the functions of the office? In a subsequent case of *Peter Obi v. Uba & Ors*<sup>64</sup> the Supreme Court in interpreting section 180(2)

<sup>59</sup> (2006) 14 NWLR (pt 999) 1; (2006) ALL FWLR (pt 330) 1041.

<sup>60</sup> *Ibid.*

<sup>61</sup> *Ibid.*

<sup>62</sup> (2010) 48 WRN 30.

<sup>63</sup> <http://www.hg.org/article.asp?id=4988> (accessed on 18/12/2008).

<sup>64</sup> *Supra.*



(a)<sup>65</sup> ruled that Obi's tenure of four years as the governor of Anambra State commenced from the date he was sworn in as governor. The said section<sup>66</sup> provides thus:-

(2) subject to the provisions of subsection (1) of this section, the governor shall vacate his office at the expiration of four years commencing from the date when:

(a) in the case of a person first elected as governor under this constitution, he took the oath of allegiance and oath of office;

Even though the Supreme Court enabled Peter Obi to enjoy in full his allotted period of four – years as governor despite the long time it took to finally determine the case, there was no way the court could have reversed the fact that Dr. Ngige had, for nearly three years, governed the State without being duly elected to do so. In general, the consequence of these long delays is that the people's choice in being governed by those they want is greatly weakened; they become frustrated and cynical about the democratic system.<sup>67</sup>

Another consequence of delay determination of petition is the changing of the electoral map of Nigeria. Various verdicts from the election tribunals and the Court of Appeal have automatically introduced staggered system into the gubernatorial elections in the country. Gubernatorial elections may never hold again at the same time in the 36 States of the Federation. For example, in Anambra State, the governorship election was held on 6<sup>th</sup> February, 2010 while that of Bayelsa State came up on 11<sup>th</sup> February, 2012.<sup>68</sup> That of Edo State was held on 14<sup>th</sup> July, 2012.<sup>69</sup>

With the decision of the apex court in *Obi's case*<sup>70</sup> now becoming the law, governors who were sworn – in after months of litigations will not conclude their tenure at the same time as their colleagues whose mandate remain un – impeached.

## 9. Sources of the Problem

There are two sources of the problem of elected persons not being able to commence their tenure as and when due. Both sources are derived from the current constitution<sup>71</sup> and the Electoral Act.<sup>72</sup> It should be noted that the Independent National Electoral Commission (INEC) is one of the executive bodies established for the federation. Its composition and powers are contained in paragraph 15(a) of Schedule III<sup>73</sup> which provides that:-

The commission shall have power to: -

(a) Organize, undertake and supervise all elections to the offices of the president and vice president, the governor and deputy governor of a state, land to the membership of the senate, the house of representatives and the house of assembly of each state of the federation.

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<sup>65</sup> Section 180 (2) (a) Constitution of the Federal Republic of Nigeria 1999 (as amended).

<sup>66</sup> *Ibid.*

<sup>67</sup> <http://www.hg.org/article.asp?id=4988> (accessed on 18/12/2008).

<sup>68</sup> Nwankwo, Joe, "Bayelsa 2012; Appeal court reserves ruling, tension mounts," *The Daily Independent*, December 13, 2011 at page 2.

<sup>69</sup> F. Onoiribholo, "Why Oshiomhole won Edo governorship," *Daily Independent*, Monday, July 30, 2012, page 19.

<sup>70</sup> *Obi v. INEC & Ors* (2007) 11 NWLR (pt 1046) 582, (2007) 7 SC 268; (2007) 45 WRN 1.

<sup>71</sup> Constitution of the Federal Republic of Nigeria (1999) (as amended).

<sup>72</sup> The Electoral Act 2010 (as amended).

<sup>73</sup> Constitution of the Federal Republic of Nigeria 1999 (as amended).

Even though the INEC is empowered to draw up the schedule for elections, that power is circumscribed by the provisions of section 25 of the Act<sup>74</sup> which provides thus:-

an election into the offices of the president and vice president, the governor and deputy governor of a state and to the membership of any of the legislative houses at federal and state level shall be held not earlier than one hundred and fifty days and not later than thirty days before the end of the tenure of the occupants of those offices or positions.

The question which arises is where, for instance, an election is conducted thirty days before the expiration of the tenure of the current occupant of a particular political office, when would the tribunal determine an election petition in respect of such an election. The answer to this question is simple, section 25 of the Act<sup>75</sup> does not allow sufficient time for filing and completion of an election petition before the winner of an election assumes office. The mischief caused by section 25 of the Act<sup>76</sup> is that politicians who probably rigged their way into office are allowed to function in those offices, enjoy all the prerequisites of such offices, and wield all the powers conferred on them by law in such offices, unjustifiably.<sup>77</sup>

However, the point must be made here and now, that a situation where a man rigs himself into high office such as that of governor of a State and is allowed to use the resources, weight and prestige of that office to fight his opponent who lodged an election petition against his victory is most undesirable indeed.<sup>78</sup> If statistics were to be taken of the number of petitioners, who succeed against sitting governors, it will be found that a very infinitesimal number of petitioners achieve success in their election petition against sitting governors; none has ever succeeded against a sitting president.<sup>79</sup>

Whether we like it or not, we have to accept the fact that judges are human beings and all sorts of considerations weigh on the mind of a judge when deciding these cases. A judge may be upright and just but at the same time he may feel that a particular judgment will not meet the ends of society unless the *status quo* is maintained.<sup>80</sup> We shall use the case of *General Muhammadu Buhari v. INEC & 4 Ors*<sup>81</sup> to illustrate the point being made. The petition was on the 2007 presidential election. Umaru Musa Yar'Adua the People's Democratic Party (PDP) candidate was declared winner of the election by the INEC. Muhammadu Buhari and Atiku Abubakar who contested for the same office under the All Nigerian Peoples Party (ANPP) and the Action Congress (AC) respectively disputed the result of the election by filing separate petitions in the Court of Appeal, the court with jurisdiction to receive and adjudicate on presidential petitions in the first instance. The two petitions being on the same subject – matter and raising almost the same issues, the Court of Appeal consolidated the two petitions and heard them together to expedite proceedings. After a long hearing of the two petitions, the

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<sup>74</sup> Electoral Act 2010 (as amended).

<sup>75</sup> *Ibid.*

<sup>76</sup> *Ibid.*

<sup>77</sup> F. O. Orbih, "Improving Adjudication Procedure in Election Petitions in Nigeria" being a paper presented at the Nigerian Bar Association Conference on Review of Performances of Election Petition Tribunals held on 5<sup>th</sup> March, 2012 at Benin City, Edo State at pages 7 – 8.

<sup>78</sup> *Ibid.*, at p. 8.

<sup>79</sup> *Ibid.*, at p. 9.

<sup>80</sup> *Ibid.*

<sup>81</sup> (2008) 12 SCNJ (pt. 1) 1; (2009) 3 SCLR 17; (2008) 18 WRN 36.

Court of Appeal dismissed the petitions and confirmed the return of Umaru Musa Yar'Adua by INEC as the president – elect. Dissatisfied with the judgment of the Court of Appeal, both Buhari and Atiku appealed to the Supreme Court. The Supreme Court in a split decision (4 -3 in the case of Buhari and 6 – 1 in the case of Atiku) affirmed the decision of the Court of Appeal in dismissing the petitions held that the petitioners had failed to prove their claim that the election which brought Alhaji Musa Yar'Adua to power in April 21, 2007 was not conducted in substantial compliance with the Electoral Act, 2006. It should be noted that the April 14 and 21, 2007 general elections were universally condemned as a plaque, a national disgrace and a reproach to the collective aspirations of all Nigerians. Max Van Den Berg, the European Union (EU) Chief Observer of the said elections, had this to say: -

The EU observers witnessed many examples of fraud, including ballot box stuffing, multiple voting, intimidation of voters, alteration of official result forms, stealing of sensitive polling materials, vote buying and under – age voting, adding that INEC's selectivity, and inconsistency with regard to the application, and enforcement of electoral laws and court orders were apparent in a number of instances

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Even the greatest beneficiary of the elections, Late President Musa Yar'Adua, openly acknowledged the flaws in the elections. But the presidential election petition tribunal glossed over all this to the utter consternation of the public.<sup>83</sup> In all probability, the learned justice of the Court of Appeal may, under the doctrine of consequences, have weighed the cost of fresh elections in both human and financial terms, in addition to a possible upsurge of socio – political disturbances in the body politics, before crafting the judgment that is completely silent on the highly discredited elections and on the cruel theatrics of what was intended to be their unbiased umpire. If indeed Their Lordships had chosen to give a ruling on these grounds, it perhaps would have been better if they had said so, expressly.

The kernel of the matter is that Their Lordships may have delivered legal justice relying heavily on technicalities, but substantial justice has not been done. The hands of the tribunal may have been tied and Their Lordships may have been interpreting the law, strictly as it is, but the responsibility of a court of law is to do justice, and for it to be seen to have done, even if the heavens fall.<sup>84</sup> The general outcry and public disquiet that have attended the tribunal's ruling are proof enough of how an uninspiring judgment from the bench can erode confidence in the judicial system. It is the judiciary that has been placed on trial.<sup>85</sup>

### **10. The Position of Fair Hearing in some other Jurisdictions**

In the Republic of Ghana, it is the judiciary that is constitutionally mandated to adjudicate all electoral disputes, that is, disputes pertaining to presidential and parliamentary elections. The High Courts and the Supreme Court of Ghana are empowered by law to determine election disputes.<sup>86</sup> In Nigeria, though the judiciary is involved in adjudication of election disputes, unlike the position in Ghana, the 1999 Constitution of the Federal Republic of Nigeria provides for election Tribunals for the settlement of disputes arising from Governorship, National

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<sup>82</sup> Presidential Election Petition Tribunal and the cause of Justice. Available at [www.goggle.com.Election Petition in Nigeria](http://www.goggle.com.Election%20Petition%20in%20Nigeria).

<sup>83</sup> *Ibid.*

<sup>84</sup> *Ibid.*

<sup>85</sup> *Ibid.*

<sup>86</sup> Article 64 (1), Constitution of Ghana 1992.

Assembly, State Houses of Assembly election.<sup>87</sup> The Court of Appeal has original jurisdiction to determine disputes pertaining to Presidential election.<sup>88</sup> In Ghana and Kenya, both countries have provisions in their respective constitutions for presidential election petitions to be filed in the Supreme Court to challenge the election of the President.<sup>89</sup> We are of the view that the position under Ghana and Kenya constitutions where presidential election disputes are determined by the Supreme Court of each country is most appropriate and preferable, given the fact that it is heard by a panel of more than three justices, the matter is given expeditious hearing and there is no forum for appeal.

As discussed above, the 1999 Constitution of the Federal Republic of Nigeria prescribes a time limit for determination of all election disputes.<sup>90</sup> There is no similar provision under the 1992 Constitution of Ghana. The absence of this provision could be attributed to the fewness of election petitions that have arisen since successive elections from 1992.<sup>91</sup> In Kenya, there is limit provided by the Electoral Act No 24, 2011 for the determination of disputes as to the validity of elections to County Governors, National Assembly and Senate.<sup>92</sup> There is no similar provision in respect of disputes as to the validity of Presidential election in both the Constitution of Kenya 2010 and in the Kenya Electoral Act 2011. Disputes as to the validity of an election of a County Governor, member of House of National Assembly and Senate shall be heard and determined within six months of the date of lodging the petition. In Kenya, unlike in Nigeria, election disputes pertaining to the election of County Governor, National Assembly and Senate are heard by the High Courts.<sup>93</sup> In respect of appeals, it shall be heard and determined within six months from the date of filing the appeal. Although there is no time limit provided in the Kenyan Constitution of 2010 for the determination of Presidential election disputes, the sense of urgency demonstrated by the Chief Justice of Kenya and the other Justices of the Kenyan Supreme Court in the determination of the recent presidential election dispute between Uhuru Kenyatta and Raila Odinga is commendable. Their Lordships wasted no time in disposing of the dispute so that Kenyans could return to their normal businesses. It is hope that in future, Nigerian Justices would emulate the Kenyan Justices in this regard.

## 11. Conclusion and Recommendations

There is no doubt that the good intention behind the provision of time limit in the determination of election petitions and appeals in the Electoral Act No. 64, 2010 (as amended) is to prevent delay and ensure expeditious hearing and conclusion of election matters in the country. The problem however is the effect of the strict interpretation of the provision of the law by the Supreme Court and Court of appeal as demonstrated in the analysis of the provisions and cases considered in this paper. To ameliorate the effect arising from the strict interpretation of the law, it is suggested that the following should be noted in future amendments of the Constitution and the Electoral Act.

There should be a proviso to sections 285 (6) and 285 (7) of the 1999 Constitution to the effect that, where however, in the determination of election petitions and appeals the sittings of the

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<sup>87</sup> Sec. 285 (1) & (2) 1999 Constitution of the Federal Republic of Nigeria (second alteration) Act, 2010.

<sup>88</sup> Section 239 1999 Constitution of the Federal Republic of Nigeria (Second Alteration) Act, 2010.

<sup>89</sup> Article 163 (3) (a) Constitution of the Republic of Kenya 2010 and Article 64 (1) of the Constitution of the Republic of Ghana 1992.

<sup>90</sup> Section 285 (6) & (7), 1999 Constitution of the Federal Republic of Nigeria (Second Alteration) Act, 2010.

<sup>91</sup> K. Dabo, "Time Limit to determine Election Petitions and Appeals; A call for review of Section 285 (6) & (7) of the 1999 Constitution of the Federal Republic of Nigeria", in *The Nigerian Law Journal*, Vol. 16, No. 1, 2013, Pp. 183 – 198.

<sup>92</sup> Section 75(4) Kenya Electoral Act 2011.

<sup>93</sup> *Ibid*, Section 54(4).

tribunals and courts is prevented by labour strike, judges' vacation and unforeseen circumstance, such circumstances should be excluded from the 180 days or 60 days provided respectively in section 285 (6) & (7) of the Constitution. It is suggested that there should be a provision in the Electoral Act for duration of time within which petitions ordered by the Court of Appeal to be heard *de novo* are to be determined.

With respect, it is improper to hold that the 180 days provided in section 285 (6) of the Constitution is not limited to trials but also *de novo* trials that may be ordered by an appeal Court. Considering the slow process of civil litigation in tribunals and Courts in Nigeria and the number of petitions and appeals, it is indeed impossible to determine a petition and appeal from it, and another retrial within 180 days from the time of filing of the petition. This could never have been the intention of the framers of the Constitution.

It is suggested that section 285 (6) of the Constitution be amended to take care of retrial of petitions by providing for a separate time limit. It is humbly suggested that the Supreme Court when faced with the interpretation of such constitutional provisions, should adopt a liberal judicial attitude that allows the aggrieved persons to be heard rather than a strict interpretation that slams the door of the court against them. The right to be heard and to be heard fairly is a cardinal principle of justice that ought not to be tampered with.

It is also suggested that the Constitution be amended to increase the number of Justices of the Supreme Court and those of the Court of Appeal. For example, in the years 2011 and 2012 there were only three Justices in the Kaduna Division of the Court of Appeal. Whenever one was absent as a result of ill health or any other reason quorum would not be formed and the court would not sit. A situation as this is indeed an impediment to quick disposal of not only election petitions, but all cases on appeal before the court.

The National Assembly is urged to always consult regularly with the judiciary before legislating on matters which are inherently within the province of the judiciary, such matters like the limitation of time within which to dispose election petitions. When this is done, it will eliminate completely the embarrassing situation our courts face due to limitations placed over their functions by the legislature. The Supreme Court is urgently called to overrule itself on the 180 days interpretation given in Borno governorship election petition. The Supreme Court has done this in some cases before now.<sup>94</sup> Section 285 (6) and (7) of the constitution should be amended to avoid technicalities at the level of election tribunals which deprive litigants of their right to fair hearing. Provisions relating to pre-hearing applications should be amended to clarify the position in line with the decisions of the Supreme Court on the matter. The appellate powers of courts over decisions of election tribunal should be properly defined and the number of justices be increased to cater for the numerous election appeals filed in courts.

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<sup>94</sup> *Johnson v. Lawanson* (1971) All NLR 56; *Bucknor Maclean & Anor v. Inlaks Ltd* (1980) 8 – 11 SC 1; *Oduola & Ors v. Coker & Ors* (1981) 5 SC 197.