

SECTION 42 OF THE ELECTORAL ACT, 2022 AND THE LURKING GHOST OF UNLAWFUL EXCLUSION- A CRITIQUE *

ABSTRACT

This paper examined the question of unlawful exclusion under the current Nigerian electoral law. Unlike the repealed Electoral Act, 2010 (as amended), the nascent Electoral Act 2022, does not recognise unlawful exclusion as a ground for election petition. This paradigm shift sought to address the erstwhile widespread problem of unlawful exclusion under the old legal order, which, if established, led to invalidation of elections and ordering of a repeat election. Using the doctrinal research method, this paper critically analysed the newly introduced safeguards against unlawful exclusion as provided under section 42 of the Electoral Act, 2022 which require political parties to take preemptive steps to avoid unlawful exclusion of their logos or symbols on the ballot paper used in an election. While these novel procedures in the textual provisions were acknowledged as forward looking, nevertheless, the paper identified that the safeguards are not full proof as there are inelegantly drafted clauses in section 42 of the Electoral Act, 2022 that lend themselves to ambiguities or mischief. Furthermore, the paper identified non-provision for what should happen when there is unlawful exclusion of a political party even after it had inspected and approved its identity in the sample relevant documents used in an election as a major lacuna that could lead to grave consequences in an election cycle. In order to finally rest the ghost of unlawful exclusion, far reaching recommendations were made including creating specific offences relating to unlawful exclusion and giving INEC the power to countermand an election where there is a proven case of unlawful exclusion since an injury to a right cannot go without remedy.

Keywords- Unlawful exclusion, party logo, party symbol, identity, jurisdiction, countermand

Introduction

Unlike the position under the now repealed Electoral Act, 2010 (as amended),¹ the fact that the party candidate who was validly nominated was unlawfully excluded from the election is no longer a ground upon which an election may be questioned under

* **Obiaraeri, N. O.**, Ph.D (Law), Professor of Law/former Dean of Law, Faculty of Law, Imo State University, Owerri, Nigeria: noobiaraeri@imsu.edu.ng; noobiaraeri@yahoo.com

¹ The Electoral Act, 2010 as amended was repealed in section 151 of the Electoral Act, 2022.

the Electoral Act, 2022. Who takes responsibility for ensuring that the identity of the political party is properly reflected in relevant electoral materials proposed for or used in the election? Are these safeguards watertight or unassailable? When the question of unlawful exclusion arises under the Electoral Act, 2022 what is the remedy open to the political party and or its candidate or should the violation of right go without a remedy? In preferring answers to these and other germane queries, this paper will examine what constitutes unlawful exclusion as established under the old legal order and the paradigm shifts recorded under the relevant provisions of the Electoral Act, 2022 and thereafter contend that given the lacuna inherent in the present provisions of the nascent law, the ghost of unlawful exclusion may not have been finally rested. Consequently, recommendations will be made on proactive measures to strengthen the law and obviate the embarrassment that may arise where despite the provisions of the Electoral Act, 2022, there is still unlawful exclusion of a political party.

What is unlawful exclusion?

The term or phrase “unlawful exclusion” is not defined either in the Electoral Act, 2010 as amended or in the Electoral Act, 2022 but it is generally denoted to mean where a party candidate who was validly nominated was unlawfully excluded from the election. The dictionary meaning of the word “unlawful” received judicial interpretation and approval in *Kwara State Judicial Service Commission & Ors v Miss Yetunde Zainab Tolani*² wherein the Supreme Court per Peter-Odili, JSC held as follows:

The Black’s Law Dictionary, by Bryan A. Garner 8th Edition, page 1644 at page 1574 had defined "WRONGFUL" and "UNLAWFUL" to be thus:- "Wrongful" (i) Characterized by unfairness or injustice, (ii) Contrary to law or unlawful (wrongful termination)" and "Unlawful" '(1) Not authorised by law, illegal (2) Criminally punishable (3) Involving moral turpitude.

In its recent decision in the case of *C.O.P v Ogor & ors*,³ the Supreme Court restated that the word "unlawful" means "not authorized by law; illegal; criminally punishable." On the other hand, with respect to the word “exclusion” in *Abubakar & Ors v Yar’adua & ors*,⁴ the Supreme Court per Tobi JSC, as he then was, defined "exclusion", as “an act of excluding or the fact of being excluded, connotes an element of ban, debarment, total denial, ostracism, preclusion, prohibition, refusal, rejection, removal, riddance, and seclusion."

² (2019) LPELR-47539(SC) (Pp. 18 paras. B).

³ (2022) LPELR-57558(SC) (Pp. 15 paras. D-D) per Augie JSC.

⁴ (2008) LPELR-51(SC) (Pp. 110 paras. A-A).

A political party is a juristic body registered with INEC and it is interpreted in *section 229* of the Constitution of the Federal Republic of Nigeria, 1999 (as amended), to include “any association whose activities include canvassing for votes in support of a candidate for election to the office of President, Vice-President, Governor, Deputy Governor or membership of a legislative house or of a Local Government Council”. Under *section 79* of the Electoral Act, 2022, party name, its symbol or logo are fundamental eligibility criteria for registration and they remain unique or exclusive. A party candidate is unlawfully excluded where the name, logo, emblem or party symbol is not placed on the ballot paper used in an election. A political party sponsors candidates to contest election in its registered name, logo and symbol. Thus, the duly nominated party candidate did not take part in the election because of the exclusion. There can be no unlawful exclusion where there is no valid nomination of candidate for election by a party.⁵ It is incontestable that a party without a candidate is not in the election whilst there is no room for independent candidate. To establish unlawful exclusion, a petitioner can only plead facts to prove that he was excluded after due nomination and did not in fact take part in the election. Relying on the decision of the Supreme Court in *Abubakar & ors v. Yar' Adua & ors*⁶ the Court of Appeal in *Yunusa & anor v. INEC & ors*⁷ held among other things that the law is settled that in order to prove unlawful exclusion after valid nomination by his party, the petitioner must show the following four things or facts:(a) That he was validly nominated by his party;(b) That an election was conducted;(c) That a winner was declared; and,(d) That his name, being the party logo or symbol, was not included in the list of the contestants.

In *Abimbola & anor v. INEC & ors*,⁸ the meaning and effect of unlawful exclusion was explicitly explained as follows:

Ballot papers are specifically made to enable the lawful voters, to choose a particular party candidate that they would want to represent their constituency. Any political party whose logo emblem and party symbol is not placed on the ballot paper is automatically denied their constitutional right to participate in the election.

In election petition matters, once it is established that, a qualified nominated political candidate or his sponsors party logo symbol is absent, it means the candidate and his party have been denied the

⁵*APP v Obaseki & Ors* (2021) LPELR-54277(CA) (Pp. 23-27 paras. C).

⁶ (2008) LPELR-51(SC) (Pp. 41 paras. B) per Katsina-Alu, JSC.

⁷ (2019) LPELR-48760(CA) (Pp. 45-46 paras. F) per Otisi, JCA. See also *Effiong v Ikpeme* (1999) LPELR-6675(CA); *Nwambam v Ugochima* (2010) LPELR-4643(CA); *Jelili v Adebomi* (2009) LPELR-43519CA).

⁸ (2009) LPELR-8526(CA) (Pp. 32 paras. A) per Thomas, JCA.

right to contest the election, and the purported election result must be discountenanced or set aside.

It is thus settled that it is the law that, where unlawful exclusion is proved, the Court is enjoined to nullify the election. This was the decision in *Kwapyong v. Daniang*⁹ and *Abimbola & anor v INEC & ors.*¹⁰

Old legal order on unlawful exclusion

For historical purposes and in order to engender a clear understanding of the subject matter under consideration, it is important to accentuate that until the recent enactment of the Electoral Act, 2022 which repealed the Electoral Act, 2010 as (as amended), unlawful exclusion was firmly cognizable as a ground for election petition. Under *section 138* of the Electoral Act, 2010 as amended, the following were the five grounds for election petition namely:

- (a) a person whose election is questioned was, at the time of the election, not qualified to contest the election;*
- (b) the election was invalid by reason of corrupt practices or noncompliance with the provisions of this Act; or*
- (c) the respondent was not duly elected by majority of lawful votes cast at the election;*
- (d) that the Petitioner or its candidate was validly nominated but was unlawfully excluded from the election; and*
- (e) that the person whose election is questioned had submitted to the Commission affidavit containing false information of a fundamental nature in aid of his qualification for the election.*

Thus, from the above, under *section 138(1)(d)* of the Electoral Act 2010 (as amended) (now repealed),¹¹ one of the grounds upon which an election may be questioned is that the petitioner or its candidate was validly nominated but was unlawfully excluded from the election. As held in *APP v Obaseki*,¹² there must be a premise of agreement, that the political party had made a valid nomination of its candidate(s) for the election, but the umpire being the Independent Electoral Commission¹³ unlawfully

⁹ (1989) 1 NEPLR 109.

¹⁰ (2009) LPELR-8526(CA) (Pp. 29 paras. B).

¹¹ Section 151 of the Electoral Act, 2022 expressly repealed the Electoral Act, 2010 as amended.

¹² (2021) LPELR-54277(CA) per Mbaba, JCA.

¹³ Hereinafter abbreviated and referred to as “INEC”. INEC is established in *section 153(1)(f)* of the Constitution of the Federal Republic of Nigeria, 1999 as amended. The functions of INEC are contained in *section 15, Part 1* of the Third Schedule of the 1999 Constitution as amended and additionally in *section 2* of the Electoral Act, 2022.

excluded the said party and/or its said candidates from the contest. Of course, in that case, the provisions of *section 138(1)(d)* of the Electoral Act 2010, as amended, applies as ground for questioning the conduct of the election, namely: "that the Petitioner, or its candidate was validly nominated but was unlawfully excluded from the election."

Under the old legal regime of the Electoral Act, 2010 as amended, when unlawful exclusion is successfully established, that ground of petition, being a strict liability ground, automatically led to the invalidation or nullification of any concluded election.¹⁴ Conclusively, this is no longer good law or the current position of the electoral law in Nigeria. As shall be demonstrated below, unlawful exclusion is no longer a cognizable ground for election petition under the current Electoral Act, 2022.

The new legal order on unlawful exclusion under the Electoral Act, 2022

It has already been noted that the Electoral Act, 2010 as amended was expressly repealed and replaced with a brand new Electoral Act, 2022. As a direct response to forestall the perennial challenges of omission of names or identity or logo of political parties and its dire consequences of cancellation of somewhat "concluded" elections, *section 134* of the Electoral Act, 2022 does not recognise unlawful exclusion as a ground for election petition. *Section 134(1)* of the Electoral Act, 2022 expressly recognise only three grounds upon which an election may be questioned namely-

- (a) a person whose election is questioned was, at the time of the election, not qualified to contest the election;
- (b) the election was invalid by reason of corrupt practices or noncompliance with the provisions of this Act; or
- (c) the respondent was not duly elected by majority of lawful votes cast at the election.

Section 134 of the Electoral Act, 2022 now contains only three grounds when compared to the five grounds contained in the equivalent provision of *section 138* of the Electoral Act 2010 (as amended). Significantly, unlawful exclusion is not one of the grounds. As held in a long line of cases like *Abubakar & ors v. Yar'adua & ors*,¹⁵ *Gangar & anor v. Bako & ors*,¹⁶ and *Awojobi & anor v. INEC & ors*,¹⁷ election petitions are *sui-generis* and the procedure inherent therein is peculiar to it. That is,

¹⁴ It is the law that, where unlawful exclusion if proved, the Court is enjoined to nullify the election. See *Kwapyong v Daniang* (1989) 1 NEPLR 109, *Abimbola & anor v. INEC & ors* (2009) LPELR-8526(CA) (Pp. 29 paras. B), *Gogwim v. Abdulmalik & ors* (2008) LPELR-4210(CA) (Pp. 26 paras. A)

¹⁵ 2008) LPELR-51(SC) (Pp. 22 paras. B).

¹⁶ (2019) LPELR-48672(CA) (Pp. 6-9 paras. A).

¹⁷(2011) LPELR 9094 (CA).

primarily, why election matters have been described and became known as *sui generis*, different from ordinary civil matters and in a class of their own since they are strictly governed and regulated by the special and specific rules of practice and procedure in the Courts.¹⁸ In *Ugba v. Suswam*,¹⁹ Ariwoola, JSC (now CJN) stated among other things that:

... It must be pointed out once again, as it has been so pointed out by this Court and the Court below, wherever the need had arisen that an election matter is sui generis. That is, "of its own kind or class". In other words, an election matter is unique and peculiar, different from civil matters. Hence, it should be handled specially.

*Thus, by extension of the above legal principle of sui generis rule and by direct and necessary implication of the provision of the Electoral Act, 2022, the grounds upon which an election petition can be presented are those clearly specified under section 134(1) of the Electoral Act, 2022. It does not and will include that the petitioner or its candidate was validly nominated but was unlawfully excluded from the election as a ground. As held in *Ojukwu v. Yar'adua*,²⁰ the issue is clear and strong. Anything outside these grounds statutorily provided will render the petition invalid. Those grounds and none other are the only valid grounds upon which an election petition can be presented. Any addition to or reduction from the set grounds will invalidate the petition. Thus, no election can be successfully questioned under the current electoral jurisprudence governed by the Electoral Act, 2022 on the ground that the petitioner or its candidate was validly nominated but was unlawfully excluded from the election.*

Safeguards against unlawful exclusion under section 42 of the Electoral Act, 2022

The Electoral Act, 2022 did not only eliminate unlawful exclusion as a ground for election petition, it also provided certain mandatory safeguards against such occurrences under section 42 of the Electoral Act, 2022. A careful perusal of the provisions of section 42 of the Electoral Act, 2022 will reveal that it contains

¹⁸This was also the decision in *Onitri v. Benson* (1960) SCNLR 314 at 317, *Oyekan v. Akinjide* (1965) NWLR, 381 at 383, *Obih v Mbakwe*(1984) 1 SCNLR, 192, *Dickson v Sylva* (2017) 10 NWLR (Pt. 1573) 299 (SC), *PDP v. Ezeonwuka* (2018) 3 NWLR (Pt. 1606) 187 (SC), *Toyin v. PDP* (2019) 9 NWLR (Pt. 1676) 50 (SC), *Abubakar v. INEC* (2004) 1 NWLR (Pt. 854) 1, *Eghareuba v. Eribo*(2010) 9 SCM, 121.

¹⁹(2012) LPELR - 9726 (SC).

²⁰12 NWLR (Pt. 1154) 50. See also *PDP v. El-Sudi & ors* (2015) LPELR-26036(CA) (Pp. 33-34 paras. F).

significant provisions that place the burden on political parties to double check and approve of sample ballot papers prior to their use in elections amongst other things. Failure, refusal or neglect of a political party to take these precautionary steps will then serve to justify why it should not be a ground to invalidate an election if the candidate who was validly nominated is excluded from the election. Specifically, *section 42* of the Electoral Act, 2022 provides that:

(1) The Commission shall prescribe the format of the ballot papers which shall include the symbol adopted by the political party of the candidate and such other information as it may require.

(2) The ballot papers shall be numbered serially with differentiating colours for each office being contested.

(3) The Commission shall, not later than 20 days to an election, invite in writing, a political party that nominated a candidate in the election to inspect its identity appearing on samples of relevant electoral materials proposed for the election and the political party may state in writing within two days of being so invited by the Commission that it approves or disapproves of its identity as it appears on the samples.

(4) Unless the political party disapproves of its identity under subsection (3) in writing, it shall not complain of unlawful exclusion from the election under this Act in relation to its identity appearing on electoral materials used for the election.

(5) A political party that fails to comply with an invitation by the Commission under subsection (3) shall be deemed to have approved its identity on samples of electoral materials proposed to be used for an election.

The following critical actions and procedures can be extracted from the above novel provisions namely:

(i) *Subsection (1)* acknowledged the right of candidates to contest election with their adopted or registered party logo or symbol.²¹ This is apposite since there is no room for independent candidacy in our current electoral jurisprudence and no two political parties shall have the same identity (name, symbol or logo).

²¹ It is provided in *section 80* of the Electoral Act, 2022 that “Where a symbol is registered by a political party in accordance with this Act, the Commission shall allot the symbol to any candidate sponsored by the political party at any election.”

(ii) *Subsection (2)* makes it mandatory (“shall” is used)²² for ballot papers used in the different elections into different offices to be numbered serially with differentiating colours. Serial numbering and different colour codes enhance security and accountability of votes. For example, ballot paper used for Senate election must never be used for House of Representatives election and vice-versa and when violated, it will be easy to detect.

(iii) *Subsection (3)* places INEC under a mandatory duty (“shall” is used)²³ to invite political parties in writing (not by radio announcements or newspaper adverts) to inspect its identity appearing on samples of relevant electoral materials proposed for the election. Cumulatively, the written invitation (which includes an e-mail delivered to the official e-mail account of the political party) must be made directly to the political parties and samples of the relevant materials must be made available and political parties given opportunity to inspect them.

(iii) *Subsection (2)* gives INEC a minimum period of twenty (20) days to an election to carry out and conclude this important exercise. Thus, the INEC may give this notice earlier than but not later than twenty days to the election.

(iv) *Subsection (2)* gives the political party two (2) days only to state in writing whether it approves or disapproves of its identity as it appears on the samples. It is to be noted that this subsection or indeed the entire *section 42* of the Electoral Act, 2022 does not state the rank or number of party officers that are entitled to convey the approval or disapproval of the identity of the party as they appear in the samples and whether there should be an affidavit to that effect. This nebulous provision is unlike the precise or specific provision in *section 32(2)* of the Electoral Act, 2022 which requires the notification of the omission of the party candidate on the list of candidates published by the INEC to be signed jointly by the National Chairman and Secretary of the political party supported with an affidavit.

The inelegant way this provision in *section 42(3)* of the Electoral Act, 2022 is couched is capable of lending itself to gross abuse and organizing mischief by

²² The Supreme Court in *Onochie v Odogwu* (2006) 2 SCNJ, 96 at 114, restated the law that "The use of the word "Shall" makes it mandatory that the rule or provision must be observed. The word "shall" is used to express a command or exhortation or what is legally mandatory." See also *Ngige v. Obi* (2006) 14 NWLR (Pt. 999) 1, *Ugwu v. Ararume* (2007) 12, NWLR (Pt. 1048) 365 at 441 (SC), *Nwankwo v. YarAdua* (2010) 12 NWLR (Pt. 1209) 578, *Chukwugor v. Chukwugor* (2021) 15 NWLR (Pt. 1799) 357 at 373 (SC). I.

²³ In *Uwazuruike & anor v. Nwachukwu & anor* (2012) LPELR-19659(SC) (Pp. 32 paras. A), the Supreme Court held that the word “shall” when used in a statute is a mandatory command. See also *Amokeodo v. Inspector General of Police & ors* (1999) LPELR-468 (SC). However, it is not in all instances where the word "shall" is used in an enactment that it connotes mandatoriness as held in *G. Ofodile Okafor, OON, (SAN) v. Peoples Democratic Party (PDP)* (2014) LPELR-23037.

political actors. It is suggested that this provision should be amended to expressly state which genre and number of party officers or leaders that are authorised to approve or disapprove of the identity of the political party on samples. The clarification is important because *section 152* of the Electoral Act, 2022 loosely interprets “leader of a political party” to mean “every person holding an executive position in that political party, including in particular, the Chairman, Secretary or Treasurer of the political party and every member of

its committee of management, however described”. It is further suggested that this written confirmation or disapproval should be supported with an affidavit, this being a critical stage of the election that has to do with identity of a political party on ballot papers and other sensitive materials. The law should also be amended to entitle the political party to apply for and obtain a certified true copy of the sample relevant documents it either approved or disapproved.

(v) *Subsection (4)* contains the clincher that a political party can no longer complain of unlawful exclusion if it attended to the INEC invitation but did not either in the required manner and or time frame disapprove of its logo as reflected on the sample ballot paper or relevant material used in the election. The political party would have slept on its right to disapprove of its identity.

(vi) Finally, *subsection (5)* deals with “deemed approval” of identity. This will arise in the situation where a political party which is in receipt of INEC invitation fails, refuses or neglects to comply with that invitation. As a consequence, this is deemed to be an approval (not a rejection) of its identity on samples of electoral materials proposed to be used for an election. Such a political party shall not complain of unlawful exclusion from the election.

It needs to be highlighted that the provisions of *section 42* of the Electoral Act, 2022 extensively analysed above is radical and will no doubt stem the tide of using the question of unlawful exclusion to invalidate elections. Nevertheless, it may then be asked whether the provision has settled with finality the likelihood of resurgence of the avalanche of cases that emanated from the provisions in the Electoral Act, 2010 (as amended) where unlawful exclusion formed a ground for invalidation of the election. This question becomes apposite because, despite satisfying the mandatory provisions of *section 42(3)* of the Electoral Act, 2022, the party logo or identity can still be omitted or excluded in the materials used at the poll. Should this unlawful exclusion not lead to invalidation of the election as it is an affront to *section 40* of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) or should the political party and its candidate go without remedy? The ensuing discussion below will attempt a resolution of these judicious posers.

Has the ghost of unlawful exclusion been finally laid to rest under *section 42* of the Electoral Act, 2022?

It is apposite at this juncture to inquire whether the provisions of *section 42* of the Electoral Act, 2022 on safeguards against unlawful exclusion are impregnable or watertight? What should happen where the political party identity is still excluded or omitted in materials used for the election after the political party has satisfied the provisions of *section 42(3)* of the electoral act, 2022? Is there a grave lacuna in the law? Is the ghost of unlawful exclusion not still lurking around? Granted that *section 42(3)* of the Electoral Act, 2022 affords the political parties the opportunity to inspect and approve its identity in the sample of relevant materials to be used in the election in writing and for which reason *section 42(5)* thereof prohibits or estops a political party from complaining if it failed to do so, it is to be noted that this does not cover the case where the party and its candidate may be excluded from the election by way of missing identity or mix-up in its identity (name, logo or insignia) in the materials used for the election despite satisfying the requirements of *section 42(3)* of the Electoral Act, 2022. It is beyond an informed guess that arising from human, technical or mechanical error or even plain mischief, the party identity or logo may still be missing on the ballot paper used in an election even after the political party had inspected sample copies of materials and confirmed its identity in writing. Blunders are neither impossible nor a remote possibility in human affairs.

In one case arising from the recently concluded 2023 general election, *Paul Meregini & anor v. INEC & ors*²⁴ the petition was presented on the ground of unlawful exclusion. Expectedly, the petition was dismissed because it was predicated on a ground not allowed under the Electoral Act, 2022. The Election petitions Tribunal in Abia State threw out a suit challenging the victory of Obinna Aguocha of the Labour Party as the duly elected member of the Ikwuano/Umuahia North/Umuahia South Federal constituency of Abia State. The petition was filed by Paul Meregini and his political party, Action Democratic Party, ADP, calling for the nullification of the election that produced Obinna Aguocha on the ground that the logo of ADP was excluded from the House of Representatives election ballot papers during the February 25 National Assembly polls. The petition had complained that the exclusion of ADP's logo affected the chances of the candidate of the party, Paul Meregini, as those who came to vote for the applicant and his party could not see the logo of the party.

What then is the remedy open to the political party in the event of it being unlawfully excluded in an election since unlawful exclusion is not a recognised ground for election petition under *section 134* of the Electoral Act, 2022? Will the injured

²⁴ Petition No. EPT/AB/HR/01/2023. See Daily Post, published on May 11, 2023, "Tribunal dismisses petition against LP rep-elect in Abia", <https://dailypost.ng/2023/05/11/tribunal-dismisses-petition-against-lp-rep-elect-in-abia/> (25/5/2023).

political party go without a remedy after it was unlawfully excluded? Which forum (court or tribunal) is vested with jurisdiction to address this type of challenge in the electoral process? Is the law no longer an equal dispenser of justice that leaves no one without a remedy for his right? What then is the relief or remedy open to a political party or its candidate that has suffered unlawful exclusion in circumstances which are clearly not attributable to it in all the circumstances envisaged under the Electoral Act, 2022?

The law is as encapsulated in the well-known Latin maxim *ubi jus ibi remedium* approximated to mean that *when* a person has suffered a legal injury, the court will surely provide a remedy irrespective of the fact that no remedy is provided either at common law or by statutes. The maxim is deeply etched in the classical decision of the Supreme Court in *Bello and 13 ors v. Attorney-General, Oyo State*,²⁵ where Oputa, JSC (as he then was) held that if from the facts available before the Court, it is satisfied:

(i) that the defendant is under a duty to the plaintiff;

(ii) that there was a breach of that duty;

(iii) that the defendant suffered legal injury;

(iv) that the injury was not too remote, it will surely provide a remedy, that is, create one irrespective of the fact that no remedy is provided either at common law or by statutes. The Courts cannot therefore be deterred by the novelty of an action. In other words, the law is an equal dispenser of justice, and leaves none without a remedy for his right. Wherever there is a wrong, there must be a remedy to redress that wrong. Justice, it is said, must not only be done but must be seen to be done.

This contemplated category of unlawful exclusion is definitely a post-election matter which should ordinarily be presented before an Election Petition Tribunal but for the fact that *section 134* of the Electoral Act, 2022 did not recognise unlawful exclusion as ground for election petition. The likely jurisdictional issues and reliefs to be sought from this kind of case will be discussed later. Suffice it to say at this stage that a political party that complains of unlawful exclusion after complying with the provisions of *section 42(3)* of the Electoral Act, 2022 must establish the following-

(a) That the party candidate was validly nominated as required under *section 29* of the Electoral Act, 2022.

(b) That the political party took steps as required under *section 42(3)* of the Electoral Act, 2022 to observe sample relevant materials to be used in the election and approve

²⁵(1986) 5 NWLR (Pt.45) 828 at 890. See also *Orianzi v. A-G Rivers State & ors* (2017) LPELR-41737(SC) (Pp. 65-66 paras. D-D); *Oyekanmi v. N.E.P.A* (2000) 15 NWLR (Pt. 690) 414 at 444 per Onu, JSC (as he then was), *Amaechi v. INEC & ors* (2008) LPELR-446(SC) (Pp. 96-97 paras. B).

of its identity and expressly communicated same in writing within the time frame to INEC or that it was a deemed approval under *section 42(5)* of the Electoral Act, 2022.

(c) That the election was conducted and concluded.

(d) That a winner was declared; and

(e) That the name or the identity or logo of the political party was not included or wrongly inputted in the materials used for the election despite complying with (b) above.

The political party must not only state all the above requirements in his petition he must specifically prove them at the trial.²⁶

Reliefs to be sought and jurisdictional issues

It is not the intention of the Electoral Act, 2022 to continue to make the question of unlawful exclusion a live issue in the electoral process. Hence, aside generally fixing the burden of proof of unlawful exclusion on political parties, the Electoral Act, 2022 specifically did not make unlawful exclusion a ground for invalidation of an election in its *section 134* dealing with grounds of petition. There is no perfect legislation-hence the necessity to amend laws or completely abrogate laws to suit realities and exigencies. Owing to the inelegant way *section 42* of the Electoral Act, 2022 was drafted as variously pointed out above; the electoral law did not make unassailable or impregnable provisions that will completely eliminate disputes that may arise from the question of unlawful exclusion. Thus, two jurisdictional issues may arise with regard to the question of unlawful exclusion under *section 42* of the Electoral Act, 2022. The forum and reliefs sought will depend on what stage of the election, whether pre-election or post-election, the question of exclusion arose. In *Aguma v. APC & ors*,²⁷ it was held by the Supreme Court that pre-election matters are as the name implies are matters that occurred before the election proper. They are live issues that must be heard and a judgment delivered.

Firstly, any dispute arising from non- implementation of objections taken at the time allowed political parties to confirm their identity on samples of relevant materials to be used at the election under *section 42(3)* of the Electoral Act, 2022 is a pre-election

²⁶ See *Effiong v Ikpeme* (1999) 6 NWLR (Pt. 606) 275 and *Ezeobi v Nzeka* (1989) 1 NWLR (Pt. 90) 437. Although these two cases were decided before the Electoral Act, 2022, they emphasise that a petitioner must specifically prove facts which can ground unlawful exclusion.

²⁷ (2021) LPELR-55927(SC) (Pp. 43-44 paras. D). See also *APC & anor v. Engr. Suleiman Aliyu Lere & anor* (2020) 1 NWLR (Pt. 1705) 254, *APC v. Uduji & anor* (2020) 2 NWLR (Pt. 1709) 541, *Anyakorah v. PDP & ors* (2022) LPELR-56876(SC) (Pp. 12-15 paras. D). Note that *section 285(14)* of the Constitution of the Federal Republic of Nigeria, 1999 as amended on what constitutes pre-election matters.

matter. The jurisdiction vests with the Federal High Court²⁸ provided this is presented and concluded timeously before the conduct of the election. If satisfied, the court may order that reasonable objections taken by the political party be timeously remediated by the INEC conscious of the fact that unlawful exclusion is not a ground for invalidation of election under *section 134* of the Electoral Act, 2022.

Secondly, the tricky situation will arise where the political party identity is excluded or omitted in materials used for the election after the political party has satisfied the provisions of *section 42(3)* of the Electoral Act, 2022. It has already been noted that there is no provision for tackling this kind of challenge in the new electoral law as it certainly escaped the imaginative realm of the law maker thus leaving a huge gap in the law. Ordinarily, the question of unlawful exclusion at the ballot after a winner has been declared, being a post-election matter, ought to have been presented for resolution in the Election Tribunal.²⁹ However, the bad situation is exacerbated as *section 134* of the Electoral Act, 2022 did not recognise unlawful exclusion as ground for election petition. What then is the affected political party expected to do in view of the effect of the cumulative provisions of *sections 40, 221 and 222* of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) guaranteeing the right of political parties to sponsor candidates and participate in an election? It is therefore suggested that such question of unlawful exclusion should be submitted before the Federal High Court which is entitled to invoke the inherent jurisdiction³⁰ of the court and apply the maxim of *ubi jus ubi remedium* to resolve the potential conflict between the Electoral Act, 2022 which does not recognise unlawful exclusion as a ground for invalidation of an election and the express provisions of *sections 40, 221 and 222* of the Constitution of the Federal Republic of Nigeria, 1999 (as

²⁸ Only the Federal High Court is vested with the jurisdiction to entertain pre-election matters under *section 84(14)* of the Electoral Act, 2022. Hence, any pre-election case maintained in any other court must fail no matter how pathetic or heart rending the wrong may be. *Senator Elisha Cliff Ishaku v. Abdullahi Suleiman & ors* (2023) LPELR-59910(CA) (Pp. 18-19, para. A-A) per Akeju, JCA. This was the decision of the Court of Appeal, Yola Division on the 23rd day of February, 2023 that the High Court of a State has no jurisdiction to hear and determine pre-election matte

²⁹ *Section 130* of the Electoral Act, 2022 recognised the various Election Tribunals established under the national Constitution for resolution of election dispute. See *section 285* of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) for establishment of Election Tribunals.

³⁰ On inherent jurisdiction of the court and when it can be invoked, see *section 6(6)(a)* of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) and the decisions of the Supreme Court in *Yonwuren v. Modern Signs (Nig.) Ltd* (1985) LPELR-3529(SC) (Pp. 34-36 paras. B) and *Akilu v. Fawehinmi (No.2)* (1989) LPELR-339(SC) (Pp. 138-139 paras. B-B).

amended) guaranteeing the right of political parties to sponsor candidates³¹ and participate in an election.

It remains to be pointed out that because of the sensitive nature of the question of unlawful exclusion, INEC must act diligently and responsibly by ensuring that the identity of political parties appear in substantially the same way they approved of it in the sample relevant documents for use in the election. It is strongly opined that any carelessness or negligence leading to omission, exclusion or inaccurate representation of a party identity in the election will be unlawful and inexcusable and should consequentially lead to invalidation of the election. The law should be amended to include prosecution and severe punishment of erring INEC official(s) or officer(s) found to have caused or occasioned such a grave omission to prevent willful or predetermined unlawful exclusion.

Way forward or recommendations

To completely obliterate unlawful exclusion, the following additions by way of amendments to the existing law are suggested-

(a) INEC should be empowered to countermand the election immediately there is an established case of unlawful exclusion. Where a political party that satisfied the provision of *section 42* of the Electoral Act, 2022 is still unlawfully excluded, the Chief National Electoral Commissioner, being satisfied of the fact of unlawful exclusion by reasons not attributable to the party, should be expressly authorised to countermand the poll in which the excluded party candidate was to participate and the Commission shall appoint some other convenient date for the election within fourteen (14) days as is the stipulated practice under *section 35* of the Electoral Act, 2022 relating to death of a candidate.

(b) Specific creation of offences relating to unlawful exclusion of the logo or symbol of political party in the ballot paper. In order to underscore the determination of the electoral jurisprudence to completely wipe out incidences of unlawful exclusion, it is suggested that acts leading to unlawful exclusion should be criminalized and punished. Anyone who knowingly or negligently or otherwise omits or excludes or obliterates the logo of a political party that satisfied the provisions of *section 42* of the Electoral Act, 2022 should be severely sanctioned. This tough posture will eliminate carelessness or mischief on the part of the INEC in relation to the sensitive issue of accurate reflection of the logo, symbol or identity of a political party in the ballot paper or other materials used in the election. This is not an unusual suggestion as already, the Electoral Act, 2022 contains several sanctions such as those relating to offences of buying and selling voters cards;³² offences relating to register of

³¹*Section 29(1), 80 and 101* of the Electoral Act, 2022 all recognise the right of political parties to sponsor candidates in an election.

³² Electoral Act, 2022, *section 22*.

voters;³³ offences in relation to finances of a political party;³⁴ and sundry offences like dereliction of duty.³⁵ It is further submitted that the oath of neutrality required of INEC officials in section of the Electoral Act and the recommended punishment for its breach in section 120 as dereliction of duty is not enough punishment for unlawful exclusion.

(c) Restore unlawful exclusion as a ground for election petition. As a last line of defence, unlawful exclusion should still be restored as a ground for election petition with the heavy onus or burden of proof of such exclusion cast on the party candidate alleging such exclusion. Aside the requirements for proof of unlawful exclusion established in *Abubakar & ors v Yar' Adua & ors*,³⁶ such a candidate alleging unlawful exclusion can only succeed if he further establishes that the election still held without him notwithstanding that the sponsoring political party satisfied the provisions of *section 42* of the Electoral Act, 2022 as well demanded for a countermand as suggested in paragraph (a) above to no avail.

(d) As an alternative to the suggestion in (c) above (that unlawful exclusion should be restored as a ground for election petition), unlawful exclusion should be treated as a pre-election matter and the jurisdiction to entertain matters relating to unlawful exclusion vested in the Federal High Court, High Court of a State or High Court of the Federal Capital Territory. The Court of Appeal should exercise the power of final appeal over such matters.

(e) *Section 42(3)* of the Electoral Act, 2022 should be amended to expressly state that it is only the National Chairman and Secretary of the party that are authorised to approve or disapprove of the identity of the political party on samples of ballot papers to be used in the election for reasons already adduced in this connection. It is further suggested that this written confirmation or disapproval should be supported with an affidavit, this being a critical stage of the election that has to do with identity of a political party on ballot papers and other sensitive materials. These suggested amendments are in tandem with the provisions in *section 32(2)* of the Electoral Act, 2022 which provides that where a registered political party observes that the name of its candidate is missing on the list of nominated candidates published by INEC, it shall notify the Commission in writing, signed by its National Chairman and Secretary, supported with an affidavit not later than 90 days to the election.

(f) The provisions of the law with respect to format of ballot papers and approval of same before their use in an election by party officials encapsulated in *section 42* of the Electoral Act, 2022 should also be amended to contain provisions that entitle the

³³ Electoral Act, 2022, *section 23*.

³⁴ Electoral Act, 2022, *section 85*.

³⁵ Electoral Act, 2022, *section 120*. For electoral offences, see generally Electoral Act, 2022, part VII, (sections 114 to 129).

³⁶ (2008) LPELR-51(SC) (Pp. 41 paras. B) per Katsina-Alu, JSC.

political party to apply for and obtain certified true copy of the sample relevant documents at the time it either approved or disapproved of the sample documents.

Conclusion

The Electoral Act, 2022 did not make any pretences about its intention not to recognise unlawful exclusion as ground for election petition. Notwithstanding the safeguards erected in *section 42* of the Electoral Act, 202 it has been shown in this paper that the Electoral Act did not succeed in burying the ghost of unlawful exclusion with finality as there is at least a reported actual case of unlawful exclusion in the 2023 general election which, sadly, left the injured party with no remedy.³⁷ Furthermore, given the present position of the law, there are many lurking or potential incidences of unlawful exclusion. It is hoped that immediate implementation of the sundry recommendations made in this paper will strike the needed balance between complete elimination of unlawful exclusion and or giving reprieve to any party that still suffers the injury of unlawful exclusion- *ubi jus ubi remedium*.³⁸

³⁷ Petition No. EPT/AB/HR/01/2023. See Daily Post, published on May 11, 2023, "Tribunal dismisses petition against LP rep-elect in Abia", <https://dailypost.ng/2023/05/11/tribunal-dismisses-petition-against-lp-rep-elect-in-abia/> (25/5/2023).

³⁸ In *Lau v. PDP & ors* (2017) LPELR-42800(SC) (Pp. 60-61 paras. E), the Supreme Court per Augie, JSC held *inter alia* "This brings to mind the Latin maxim - '*Ubi jus, ibi remedium*' where there is a right, there is a remedy. The law ensures that if the Plaintiff has a right, he must have the means to vindicate that right, and a remedy, if he is injured in the enjoyment or exercise of it - see *Bello v. A-G Oyo State* (1986) 5 NWLR (Pt. 45) 828 SC. In this case, the Appellant had the right to participate in a level playing field with other aspirants at the primaries, and if he was wronged in any way, he is entitled to a remedy, and nothing can stop him from getting it."