IN THE AREA COUNCIL ELECTION PETITIONS TRIBUNAL
HOLDEN AT ABUJA, THE FEDERAL CAPITAL TERRITORY

PETITION NO: FCT/ACET/EP/06/2019

IN THE MATTER OF ELECTION TO THE OFFICE OF THE COUNCILLOR OF WARD 10, BWARI AREA COUNCIL HELD ON THE 9TH MARCH 2019

CORAM:

1. SAMUEL E. IDHIARHI ESQ. .....CHAIRMAN
2. MOHAMMED ZUBAIRU ESQ. ..... MEMBER
3. A.A. MOHAMMED ESQ. .....MEMBER

BETWEEN:

1. AMINU ALIYU MALUMFASHI ..... 1ST PETITIONER
2. PEOPLES PARTY OF NIGERIA (PPN) ..... 2ND PETITIONER

AND

1. INDEPENDENT NATIONAL ELECTORAL COMMISSION (INEC) ..... 1ST RESPONDENT
2. PEOPLES DEMOCRATIC PARTY (PDP) ..... 2ND RESPONDENT
3. ABUBAKAR SULEIMAN ..... 3RD RESPONDENT

JUDGMENT

(Lead Judgment delivered by Samuel E. Idhiarhi Esq. on the 25/09/2019)

On the 9th March, 2019, as part of the General Elections for this year, the Independent National Electoral Commission (INEC) conducted elections to fill the offices of Chairmen and Councillors for the six Area Council Areas in the FCT. The Bwari Area Council was among the six Area Councils and one of the Councillorships seats for grab was the one for Bwari Ward 10 (Usuma Ward). The 1st petitioner claimed that he was the candidate of the 2nd petitioner in that election and he has on the 29th March, 2019 filed this petition, challenging the return of the 3rd respondent by the 1st respondent as the winner of the councillorship seat for Bwari Ward 10 (Usuma Ward).

The petitioners have sought for three reliefs, as contained in paragraph 24 of the petition, namely:

i. That it may be declared that the councillorship election for Ward No. 10 (Usuma Ward) held on the 9th March, 2019 wherein the 1st petitioner, though validly nominated for the election but unlawfully excluded, is invalid and unlawful.
ii. An order setting aside and/or nullifying the Ward No. 10 (Usuma Ward) Bwari Area Councillorship election held on the 9th March, 2019 and the return of the 3rd respondent, Mr. Abubakar Suleiman as winner of the said election.
iii. An order directing the 1st respondent to conduct a fresh councillorship election for the Ward No. 10 (Usuma Ward) Bwari Area Council forthwith wherein the 1st petitioner shall be allowed to participate as the councillorship candidate of the 2nd respondent.

The sole ground for the petition is contained in paragraph 11 of the petition and it is to the effect that the 1st petitioner was validly nominated by the 2nd petitioner as its candidate but he was unlawfully excluded from the election. In paragraph 23, the petitioners set out particulars of their grievance, namely:

a. The name of the 2nd petitioner, or its candidate, the 1st petitioner, was not included in the final list of candidates issued by the 1st respondent for the said election.
b. In practice, it was the logo of the political parties that sponsored candidates that were printed on the ballot paper.
c. The logo of the 2nd petitioner was not printed on the ballot paper, thereby excluding its candidate, the 1st petitioner, from the election whereas the logos of all the other political parties sponsoring candidates were printed.
d. The name of the 1st petitioner did not appear in the final result sheet (FORM EC8E) or any document used by the 1st respondent in the said election.

In paragraphs 12, 13, 14, 15, 16, 17, 18, 19, 20, 21 and 22 of the petition, the petitioners have stated facts in support of the ground for the petition. To summarise, from January 2018 the 1st respondent started publicizing and sensitizing members of the public and the political parties about its plan to conduct the said elections and, in line with the timetable released by the 1st respondent, the 2nd petitioner sold expression of interest and nomination forms to members of the party with interest to contest for chairmanship and councillorship seats for the Bwari Area Council. The 1st petitioner claimed that he was the only aspirant that purchased the expression of interest and nomination forms of the 2nd petitioner for the office of the councilor for Ward No. 10 (Usuma Ward) Bwari Area Council. In paragraph 16, the petitioners have claimed that the 2nd petitioner on the 18th day of October, 2018 submitted to the 1st respondent the nomination forms earlier issued to the petitioners by the 1st respondent with the list of candidates by a letter from the FCT State Chairman of the 2nd petitioner receipt of which was acknowledged by the 1st respondent.

The petition pleaded several documents, namely FORM EC8E (declaration of result) (paragraph 10), copy of the letter of the 2nd petitioner's State Chairman attached to nomination form and list of candidates (paragraph 16), acknowledgment of receipt of nomination form (paragraph 18), Copy of letter of request dated 20th March, 2019 to the 1st respondent for CTC of 1st petitioner's Form CF001 (paragraph 19), copy of the Permanent voter's card of the 1st petitioner (Paragraph 22) and a sample of the ballot paper used for the election and copy of result sheet (Paragraph 23).

Expectedly, the 1st respondent filed a reply dated 23rd April, 2019. The 1st respondent admitted paragraphs 1 to 10 of the petition while it denied paragraphs 11, 14, 15, 16, 19, 20, 21 and 23, while it averred that it was not within its power to cancel or nullify any election without a valid court order once results have been declared. More specifically, in paragraph 2, it was averred that to the best of 1st respondent's knowledge the petitioner was not excluded by the 1st respondent while it was averred in paragraph 3 that the 1st respondent did not receive any nomination form from the petitioner. In

paragraph 4 it was averred that the petitioner was not nominated in accordance with the law while in paragraph 5 it was averred that the petitioners name was never omitted by the 1st respondent. In specific reference to paragraph 23 of the petition, the 1st respondent stated that the name and logo of the petitioner was not excluded by the 1st respondent.

As a rejoinder to the petition, the 2nd and 3rd respondents on the 18th April, 2019 filed a joint reply dated 17th April, 2019. The respondents admitted paragraphs 1, 5, 6, 7, 9 and 10 of the petition while paragraphs 8 and 12 were conditionally admitted. Every other paragraph in the petition was denied. In paragraphs 4, 6 and 8 of the joint reply, besides denying paragraphs 4, 8 and 11 of the petition, it was affirmatively denied that the 2nd petitioner sponsored the 1st petitioner as a candidate in the councillorship election for Ward 10 (Usuma Ward) of the Bwari Area Council that held on the 9th March, 2019 or that the 1st petitioner was validly nominated by the 2nd petitioner and cleared to participate in the said election but he was unlawfully excluded. In paragraphs 9, 10 and 11 of the 2nd and 3rd respondents' joint reply, they reiterated their disavowal of the petitioners' claims and averred that the 1st petitioner was not validly nominated to participate in the election, and that indeed the 1st or 2nd petitioners were not in the 1st respondent's final list of candidates cleared to contest the election, a fact the petitioners were aware of well ahead of the holding of the election. As par documents, the 2nd and 3rd respondent gave notice that they will rely on the final list of candidates cleared by the 1st respondent to contest the election and indeed gave notice to the 1st respondent to produce the original list during the trial. The 2nd and 3rd respondents' joint reply also gave notice that they consider the petition fundamentally defective and liable to be struck out for want of jurisdiction.

The 1st and 2nd petitioners filed a reply dated 29th April, 2019 of 13 paragraphs in reply to the joint reply of the 2nd and 3rd respondents. The reply was in the main a reiteration of the facts earlier averred in the petition dated 29th March, 2019. However, the following averments are worth repeating. In paragraph 8 it was averred by the petitioners that the 2nd

petitioner duly sponsored, nominated and submitted the name of the 1st petitioner to the 1st respondent as its candidate. In paragraph 9, it was averred that the 1st respondent received the nomination of the 1st petitioner and duly acknowledged same on the 18th October, 2018. It was averred that the 1st respondent did not disqualify the 1st petitioner from contesting the councillorship election for Ward 10 (Usuma Ward) held on the 9th March 2019.

The petitioners called three witnesses in this case, and, in fact, one of the witnesses (the PW3) was the 1st petitioner. On the other hand, the 1st respondent called one witness while the 2nd and 3rd respondents rather chose to rest their cases on the evidence of the petitioners' witnesses and the witness called by the 1st respondent.

However, before proceeding to adduce evidence, the petitioners sought to tender from the bar five documents, namely, Peoples Party of Nigeria (PPN) membership card issued to Aminu A. Malumfashi (admitted as Exhibit AAM1), voter's card issued to Aminu Aliyu Malumfashi (admitted as Exhibit AAM2), a letter dated 20th March, 2019 from Greenbridge Partners to INEC (admitted as Exhibit AAM3) and a page of Form CF001 headed 'Acknowledgement' (admitted as Exhibit AAM4). The copy of ballot paper tendered by the petitioner's counsel from the bar was withdrawn. Extensive argument was taken in objection to the admissibility of the 'Acknowledgement' admitted as Exhibit AAM4 but it was nevertheless admitted by the court. For the 1st respondent the ground for objection to Exhibit AAM4 was because the document did not emanate from the 1st respondent and that it was not authentic, a point we considered irrelevant to the question of the admissibility of the document except as to weight and which may have consequence on the burden of proof. Counsel on behalf of the 2nd and 3rd respondents argued against the admissibility of Exhibit AAM4 on the ground that being a public document the copy before the court is not a CTC and it was being tendered through someone other than the maker without laying foundation to fit the exceptions in s83 of the Evidence Act.

The PW1 was Osuagwu Augustine Ndubuisi whose statement on oath was filed along with the petition and he identified the signature on page 18 of the petition as his. The substance of his evidence was that he is registered to vote at the Delim polling unit and having purposed that he will vote for the 1st petitioner as candidate of the 2nd petitioner (whose logo is a star) at the 9th March, 2019 councillorship election, but he discovered when he went to cast his vote on the day of voting that the 2nd petitioner's name and logo were missing from the ballot paper, thereby preventing the PW1 and others from voting for the 1st petitioner. Both counsel for the respondents chose not to cross-examine the PW1.

The second witness for the petitioners (the PW2) was Ogendegbe Victor Stephen who adopted his witness statement on oath contained at pages 20 to 22 of the petition, which is of the same tenor as that of the PW1. The PW2 was cross-examined by the 1st respondent's counsel while counsel to the 2nd and 3rd respondents refrained from cross-examining the witness. During the cross-examination by the 1st respondent's counsel, the witness said the polling unit he had registered to vote was 001 Queen Amina at Kubwa but when his attention was drawn to paragraph 2 of his statement where he had claimed he was registered to vote at the Delim polling unit, Usuma Ward, he said he cannot remember if the two are the same. By way of re-examination, the petitioners tendered PW2's voter's card which was admitted in evidence as Exhibit AAM5.

The star witness for the petitioners was the 1st petitioner whose statement on oath at pages 10 to 14 of the petition was adopted by him. The witness thereafter identified Exhibits AAM1, AAM2, AAM3 and AAM4 as the documents he had mentioned in the statement he made and ended by calling on the tribunal to do justice in this case.

Counsel to the 1st respondent was the first to cross-examine the PW3 (1st petitioner). The 1st petitioner claimed he has been involved in politics for over 16 years. Asked to shed light on the procedure to get nominated as a candidate for election as councilor, the PW3 explained that he first got form

through his party which he filled according to the rule and then submitted to the party which brought the acknowledgment letter to him. Asked at what stage he realized that there was an omission of his party logo or name, the PW3 responded that it was on the day of the election. The witness was referred to paragraph 16 of his witness statement on oath and it was put to him that he in fact does not know if his name was submitted or not submitted and the 1st petitioner responded thus: 'The truth is that I don't know but my Chairman called to say my name was submitted'.

The PW3 was next cross-examined by counsel to the 2nd and 3rd respondents. Asked if he knew that list of candidates are published thirty (30) days before election, the 1st petitioner said he does not know. When it was suggested to the PW3 that since he did not know that the list was published he also cannot confirm whether his name was on the list, the PW3 conceded that he did not know but said he knew INEC collected his form, further insisting that he knew he was qualified to contest because they brought his acknowledgment for him. Asked when the party submitted its list of candidates for the election or the party official who submitted the list of candidates, the PW3 admitted that he does not know the actual date or the party official that submitted the list, insisting, however that he can verify his name was submitted because he was given the acknowledgement paper (Exhibit AAM4). Asked to confirm if he saw the list of candidates submitted by his party, the PW3 admitted that he did not see the list. He also confirmed that he did not see the final list of candidates published by the INEC (the 1st respondent). The PW3 was asked if after he submitted his expression of interest form and nomination form his party did anything else before forwarding the 1st petitioner's name to INEC, the witness said he did not know and the party never informed him that they did anything before submitting his name to INEC. Form CF002B was shown to the PW3 to confirm the name of the party from which it ensued and the witness identified it as 'PPN', which is the acronym of his party and that it was dated 14th November, 2018 but he said he cannot confirm if the signatures on it were those of the National Chairman or the National Secretary, in fact

expressing his doubt that the document came from them. The 2nd and 3rd respondents' counsel's attempt to tender the said Form CF002B was objected to by counsel to the petitioners on the ground that it was not frontloaded. The document was consequently withdrawn by counsel even though he had started justifying why it should be admitted (citing the case of *Yusuf Umar Gumda v University of Maiduguri (2014) LPELR 23351CA*) but the counsel to the petitioners also said he had no objection to its withdrawal.

Before the 1st petitioner was discharged as a witness, he was recalled to adopt an additional statement on oath he made on the 30th April, 2019 as part of the reply to the 2nd and 3rd respondents' reply to the petition. Consequently, opportunity was given to the respondents to cross-examine the PW3. Counsel to 2nd and 3rd respondents asked if, after the submission of the form as claimed in paragraph 8 of the additional statement, the PW3 went to the 1st respondent's office to confirm if he was cleared or disqualified, he said he did not visit the INEC office or its website because he believed that with Exhibit AAM3 he was qualified.

The only witness called for the defence was the one called by the 1st respondent. Uhaa Gabriel deposed to a statement on oath filed along with the 1st respondent's reply to the petition, and, as the DW1, adopted the said statement. It is deposed that he is an INEC staff at the Legal department and that by virtue of his position he is familiar with the facts and circumstances surrounding the receipt of nomination forms. He deposed that to the best of his knowledge the petitioner did not submit any nomination form to the 1st respondent. It was also deposed that the 1st respondent did not exclude the petitioners from the elections as no nomination form was submitted.

The petitioner's counsel was first to cross-examine the DW1. Asked what his schedule of duty is, the DW1 replied that it includes receiving communications and correspondences that comes into the department and any correspondence that goes out of the department, type documents in the department, registering registrants as a registration officer, issuing of PVCs, conduction of elections as an electoral officer and any other duty assigned to

him by his head of department, all of which he admitted made him a clerical officer of the department. When it was put to him that the Legal department was not the secretariat of the INEC, he responded that as they involve in administration, they carry out secretarial duty in the department but when asked to whom a letter addressed to the INEC REC will be submitted, he replied that it should be taken to the REC's office, conceding thereby that the REC has a secretariat. Asked when the councillorship elections held, the DW1 replied that it was on the 23rd March, 2019 but he said he did not know how many political parties contested in the election and nor could he list the political parties that participated in it.

Next the DW1 was cross-examined by the counsel to 2nd and 3rd respondents. He confirmed that part of the documents of political parties nominating candidates is the list of candidates containing the names of those candidates they propose to sponsor, and he identified a document shown to him (tendered and admitted as Exhibit AAM6) as one of such documents emanating from the PPN (2nd petitioner) for the Bwari Area Council and confirming that in Exhibit AAM6 the 2nd petitioner did not enter the name of any candidate for the Usuma Ward. More directly, the DW1 confirmed that from Exhibit AAM6, the 1st petitioner was not a candidate in the election.

The parties were ordered to file their final addresses. As the 2nd and 3rd respondents called no witness, the parties were asked to file in this order; the 1st respondent files first, the petitioner files a reply to 1st respondent coupled with a final address of their own, then the 2nd and 3rd respondents file their joint final address/reply, to which the petitioners and 1st respondents may file their replies.

In the final address filed by the 1st respondent on the 31st July, 2019 three issues were formulated for determination. These were whether the petitioner was validly nominated but unlawfully excluded, whether the petitioner was a candidate in the election and whether the petitioner was entitled to the reliefs sought. On issue 1, counsel referred to s138(1)(d) of the

Electoral Act and conceded that unlawful exclusion of a candidate validly nominated is a ground for questioning an election but argued that the onus of proof of such unlawful exclusion of a candidate validly nominated is squarely on the petitioner, citing the cases of *Abubakar & Ors. v Yar'adua & Ors. (2008) 12 SC (Pt. 2) 1* and *Idris v ANPP (2008) 8 NWLR (Pt. 1088) 1* where it was held that the petitioner must show that he was validly nominated by his party, that an election was conducted, that a winner was declared, and, that the petitioners' name was not included in the list of contestants. Counsel referred to the evidence where the PW3 under cross-examination agreed that he submitted his form to his party and does not know what happened thereafter and that he could not confirm if his name was on the nomination list submitted by his party.

On the second issue, counsel referred to s137(1) of the Electoral Act (on who may present an election petition), s139 of the Electoral Act (on the grounds on which an election may be questioned), s31(1) of the Electoral Act (on submission of the list of the candidates the party proposes to sponsor at the elections) and s33 of the Electoral Act (on change or substitution of a political party's candidate whose name has been submitted) and submitted that the petitioner has no case here since he was not a candidate in the election of 9th March, 2019 having not been validly nominated as shown in Exhibit AAM6. On the final issue, counsel referred to s34 of the Electoral Act requiring the Commission to publish by displaying or causing to be displayed at the relevant office or offices of the Commission and on the Commission's web site, a statement of the full names and addresses of all candidates standing nominated, at least 30 days before the day of the election, to enable persons verify if their names are on the list of nominated candidates but the petitioner was not vigilant in this case to take advantage of that. The 1st respondent therefore urged the tribunal to dismiss the petition as lacking in merit.

The petitioners filed a final address of twenty-nine (29) pages dated the 7th August, 2019 and filed same date. Counsel paraphrased the cases for the petitioners and the respondents and observed that paragraph 2, 5 and 6

of the 1st respondents reply (which averred that the petitioner was not excluded) was inconsistent with paragraph 3 of their reply (which averred that they did not receive any nomination form from the petitioners) are conflicting averments and at variance with the evidence before the tribunal and so the tribunal should discountenance same, citing the case of *Okoko v Dakolo (2006) LPELR 2461SC*. It was also argued that since the 2nd and 3rd respondents failed to present any evidence before the tribunal, they rest their case on that of the petitioners and have not made out any independent case. The counsel then identified facts which they said are not in dispute such as the fact that the 1st petitioner was sponsored by the 2nd petitioner for the councillorship election for Ward No. 10 (Usuma Ward) (paragraph 3, allegedly admitted by the 1st respondent), the fact that the election held on the 9th March, 2019 (paragraph 3), the fact that the 2nd petitioner submitted the nomination form (CF 001) to 1st respondent who acknowledged same in writing (Exhibit AAM3) (paragraph 18), the fact that the name of the 1st petitioner was contained in the list of candidates of 2nd petitioner for the councillorship elections for Usuma Ward (paragraph 17), and, that the name and logo of the 2nd respondent was not on the ballot paper for the election (paragraph 9 and 23). It was submitted that averments in a paragraph of a pleading not specifically denied are deemed admitted and facts admitted need no proof, citing the case of *First Equity Securities Ltd v Anozie (2015) 12 NWLR (Pt. 1473) 337 at 360* and *Nwosu v Imo State Environmental Sanitation Authority (1990) 2 NWLR (Pt. 135) 688*.

The petitioners then formulated three issues for determination. While issue 1 was whether, in view of the provisions of the Electoral Act this tribunal is not bound to reject the purported list of candidates admitted as Exhibit AAM6, issue 2 was whether the admission of Exhibit AAM6 will not amount to denial of fair hearing and occasion a miscarriage of justice against the petitioners. Issue 3 was whether, in view of the totality of the pleadings and the evidence, the petitioners are not entitled to the reliefs claimed.

On issue 1, it was argued that objection was taken to the admissibility of Exhibit AAM6 through the DW1 having not been frontloaded as required

by the Electoral Act and the tribunal was in error to admit it on the ground that the 2nd and 3rd respondents had stated that they will rely on all other documents used in the election whereas the tribunal had, at the stage of prehearing session, deemed that part of the list of document as imprecise and abandoned. It was submitted that to now admit Exhibit AAM6 based on same will amount to the tribunal overruling itself, and that the fact that the 2nd and 3rd respondent never had Exhibit AAM6 and confronted another party in the suit before it was tendered was it is immaterial provided it fell within the 'every other materials'. Counsel cited paragraph 12(3) of the First Schedule to the Electoral Act as not discretionary and submitted that where a document such as Exhibit AAM6 was not frontloaded the only remedy could have been invoking paragraph 41(8) by seeking leave of the tribunal to tender such non-frontloaded document such as Exhibit AAM6 which was not done. It was submitted that the court having wrongly admitted Exhibit AAM6, it is within its competence to expunge or discountenance it at this stage of judgment and the tribunal was urged to so do, counsel citing several cases among them *Agbi v Ogbe (2006) All FWLR (Pt. 392) 941*, *Onochie v Odogwu (2006) All FWLR (pt.317) 544* and *Dagaci of Dere v Dagaci of Ebwa (2006) All FWLR (Pt. 306) 786*. It was further argued that earlier the parties had joined issues on the admissibility of Exhibit AAM6 before the counsel to 2nd and 3rd respondents was allowed to withdraw it when the court should have ruled on the admissibility, citing the case of *Wassah v Kara (2006) 4 All NWLR (Pt. 1449) 374 at 379*. Counsel concluded that the pleading of a fact relating to a document would not be enough to defeat the mandatory provisions of paragraphs 12(3) and 41(8) of the First Schedule to the Electoral Act.

Petitioners' issue 2 was also on the admissibility of the same Exhibit AAM6, this time referring to s36(1) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) and it was submitted that it would be breach of fair hearing where a document was let in as evidence when the adverse party has no opportunity to cross-examine on it, as was the situation in this case, the petitioners' counsel having concluded his cross-examination

of the DW1 before the counsel to the 2nd and 3rd respondents tendered the document through the DW1. It was additionally argued that the said document was tendered at a point the petitioners have no opportunity to comment on it, or give rebuttal evidence, the petitioners having closed their case, more so as Exhibit AAM6 was not frontloaded. It was argued that there was apparent injustice in this case especially as the petitioners had requested the 1st respondent in paragraph 16 of the petition to produce the a list of the candidates provided by the 2nd petitioner in respect of the election but the 1st respondent failed to provide the list requested only to subsequently smuggle it in.

The petitioners' final issue was whether, in view of the totality of the pleadings and evidence, the petitioners are not entitled to the reliefs sought. Counsel referred to the reliefs claimed in the petition and submitted that it was not in dispute that the 1st respondent was nominated by the 2nd petitioner and his nomination form, CF001, was duly submitted and received by the 1st respondent, the receipt of which was acknowledged in writing by the 1st respondent, facts which remain unchallenged, the 1st respondent having failed to conspicuously deny paragraphs 17 and 18 of the petition. The tribunal was therefore urged to deem the said averments as admitted. Counsel argued that even if it were assumed but not conceded that the respondents did not admit the above facts relating to the receipt of the nomination form, the contents of Exhibit AAM4 were explicit enough, submitting that where the content of a document is explicit, no oral evidence can be given to vary its contents, citing the case of *Maku v Al-Makura (2016) 5 NWLR (Pt. 1505) 201*. Referring to the evidence of the DW1, it was pointed out that he never claimed to have received nomination forms from the 2nd petitioner or any other political party, he admitted to only been a clerical staff of the legal department saddle with the responsibility of receiving communications/correspondences that come to the legal department and that his listed schedule of duty do not include receiving nomination forms submitted by political parties to the 1st respondent. It was also observed that DW1 was a lying witness who has no knowledge of the

facts, illustrated by his saying under cross-examination that the election held on the 23rd March, 2019 or that he did not know how many political parties contested for the election. It was submitted that once a witness is shown to have lied under oath or given contradictory evidence, the court cannot pick and choose which of the accounts to believe but must rather reject the entirety of his evidence, counsel citing the cases of *Omerede v Eleazu & Ors. (1996) 6 NWLR (Pt. 452) 1*, *Ezemba v Ibeneme & Anr. (2004) 14 NWLR (Pt. 894) 617* and *Egbuche v Egbuche (2013) LPELR-22512(CA)*.

Counsel submitted further that even if Exhibit AAM6 were considered by the tribunal to have been validly admitted, the date of its receipt was 14th November, 2018 long after the petitioners claimed to have submitted the 1st petitioner's nomination form together with a list of candidates and that it can be surmised that what was submitted later was an additional list in respect of other candidates and did not in fact diminish the potency of Exhibit AAM4. Counsel also pointed out a signature inconsistency in Exhibit AAM6 compared with Exhibit AAM1 and that the numbering of Exhibit AAM6 starts from No. 8 clearly showing it is only part of a document, the rest of which were not tendered.

In response to the address filed on behalf of the 1st respondents, counsel to the petitioners dismissed it as not impugning the case that has been made out, submitting that the authorities cited were not helpful to the 1st respondents as they were inapplicable to the current case. Counsel dismissed the reference to s34 of the Electoral Act to suggest that the petitioner was not vigilant as a futile attempt to avoid the issue as the section has only imposed obligations on the 1st respondent.

Counsel to the petitioners therefore urged the tribunal to find for the petitioners and grant the reliefs claimed in this petition.

Counsel to the 2nd and 3rd respondents also filed a written address of twenty-nine pages constituted by a preliminary objection, an analysis of the evidence before the tribunal and then a formulation of three issues for determination.

The first lap of the preliminary objection was that the petition is incompetent because it was not signed by Abdullahi Omoloye Esq., whose true signature can be seen in Exhibit AAM3 and EXHIBIT AMINU-3 attached to the petition, apparently different from the signature on the petition itself purporting to be that of Abdullahi Omoloye Esq. It was submitted that the court cannot pick and choose which of the signature is the true signature, and in view of this contradiction the tribunal should reject the entire evidence, counsel citing the case of *Zakari v Muhammad & Ors. (2017) LPELR-42349SC*. It was submitting that the implication of rejecting or not having the signature of Abdullahi Omoloye Esq., on the petition is that the petition was not signed by him or it was signed by an unknown person (not known to be a legal practitioner), thereby rendering the whole petition invalid and incompetent and incapable of activating the jurisdiction of the court, counsel citing the case of *GTB Plc v Innoson Nigeria Ltd (2017) LPELR-42368(SC)*.

The second lap of the preliminary objection is that the petition is a pre-election matter having regard to paragraphs 21 and 23 of the petition, counsel arguing that the petitioners have admitted against their interest that the 1st petitioner was neither a candidate at the election nor did they contest in the election of 9th March, 2019, with the implication that admitted facts need no further proof, counsel citing the cases of *Onigbinde v S.B. Olatunji Global Nig. Ltd (2015) LPELR-25943(CA)* and *Egbuta & Anr. v Elekwachi & Anr. (2013) LPELR-20666(CA)*. Counsel referred to ss31(3) and 34 of the Electoral Act which makes the publication of names of candidates for any election mandatory and submitted that anything about the nomination and publication of the list of candidates are steps or stages of election prior to or before the election. Counsel cited the cases of *Uduma v Arunsi & Ors. (2010) LPELR-9133CA* and *ANPP v Usman (2008) 12 NWLR (Pt. 1100) 1 at 55* where the Court of Appeal illustrated when a matter is a pre-election matter, submitting that the petitioners' claim that their names and logo were omitted from the ballot paper used for the election cannot be taken as 'omission that was contemporaneous with the conduct of the election'

because they thereby admitted that the name of the 1st petitioner was not in the final list published by INEC as candidates standing nominated for the election thirty days before the election, Counsel drawing a distinction if the name had been published but omitted on the day of voting. It was then argued that since the petitioners' main complaint is the failure of the 1st respondent to include the name of the petitioners in the list of candidates published as nominated for the election, being a pre-election matter, the petitioners lack the *locus standi* to bring the matter to the tribunal which also lack the jurisdiction to entertain same, the proper forum for the complaint being the High Court or the Federal High Court.

On the evidence led by the parties, counsel referred to the evidence of the PW1 and PW2 who both testified to the fact that on the day of voting they were disappointed to discover that the names and logo of the 1st and 2nd petitioners were not on the ballot paper but counsel went further to attack the PW2 as an unreliable witness for his evidence under cross-examination that his polling unit was Queen Amina (001) was inconsistent with his earlier deposition that it was Delim polling unit only for him, when confronted, to later say he cannot remember saying so. On the evidence of the 1st petitioner as PW3, it was submitted that, against the interest of the petitioners, 1st petitioner had confirmed under cross-examination that he submitted the nomination form to his party, not to 1st respondent, that it was the party not him that submitted the nomination form and list of candidates to the 1st respondent, that he did not know which party official submitted the list of candidates to the 1st respondent, that he did not know the date on which the list of candidates was submitted to the 1st respondent, that he did not see the list of candidates submitted by the 2nd petitioner to the 1st respondent, that he cannot confirm if his name was on that list that was submitted to the 1st respondent and that he did not see the list of candidates published by the 1st respondent as standing nominated for the election that held on the 9th March, 2019. It was argued that the consequence of the above concessions was that the 1st petitioner lied on oath when he deposed in paragraphs 16, 17, 21 and 22 of the statement on oath where he had said he knew his party

submitted his name as a candidate, thereby making the PW3 a witness not worthy of credit, counsel citing the case of *Okechukwu v UBA Plc & Anr. (2017) LPELR-43100(CA)*. It was submitted that in the absence of any evidence of the list of the names of the candidates submitted by the 2nd petitioner to the 1st respondent as candidates it was sponsoring for the election, and also in the absence of the final list of candidates for the election, the court cannot effectively determine whether the petitioners were duly nominated and qualified but wrongly excluded. Counsel referred to the witness called by the 1st respondent who testified as DW1 (Gabriel Uhaa) and through whom, under cross-examination, Exhibit AAM6 which established that the 1st petitioner was never a candidate in the said election as his party never sponsored any candidate for the councillorship election of Usuma Ward was tendered.

Counsel listed the several documents admitted into evidence as exhibits and singled out Exhibit AAM4 (the acknowledgment of Form CF001) for attention. Counsel described Exhibit AAM4 as a secondary copy of a public document which was not certified by the appropriate authority. It was additionally argued that Exhibit AAM4 was not tendered by the maker and there is no foundation laid to make its tendering by someone other than the maker permissible under s83 of the Evidence Act. For these propositions, counsel cited the case of *Zenith Bank v Akinniyi (2015) LPELR-24715(CA)* and *Uduma v Arunsi & Ors. (Supra)*. It was similarly argued that Exhibit AAM4 was not a class of document that could be tendered from the bar, not been a certified true copy of a public document but rather a private document of the petitioners, counsel citing the case of *Access Bank Plc. v Trilo Nigeria Company Ltd & Ors. (2013) LPELR-22945(CA)* and since it was not tendered through the author, it then deprived the respondents of the opportunity to cross-examine on it, a case of denial of fair hearing, counsel citing the case of *FRN v Saraki (2017) LPELR-43392(CA)*. Counsel then urged the court to expunge Exhibit AAM4, something well within its power to do at the stage of writing judgment where a document has been wrongly admitted or the court

was urged to give no weight or probative value to the said document, counsel citing the case of *Durosimi v Adeniyi & Anor (2017) LPELR-42731(CA)*.

Flowing from the foregoing, counsel now formulated the issue for determination thus: whether from the totality of the evidence before the tribunal, the petitioners are entitled to the reliefs claimed. Counsel set out the three reliefs, the first being a 'declaration' and the other two being 'orders' to be made consequent on the declaration. It was submitted that the burden of proof was on an applicant to satisfy the court that he was entitled to a relief and he must do so on the strength of his case, not on the weakness of the defence, counsel citing the case of *Popoola v Edobor & Ors. LPELR-42539(CA)*.

Citing the case of *Abubakar & Ors. v Yar'adua & Ors. (2008) LPELR-51*, counsel reproduced the ingredients in a case of unlawful exclusion in an election and submitted that, as to the question of whether the 1st petitioner was validly nominated by the 2nd petitioner, the only evidence is the inadmissible Exhibit AAM4 which in any event only disclosed the cover page without other documents which should ordinarily have accompanied a nomination form such as copy of the nomination form itself, the affidavit of particulars sworn to at the Federal High Court and the credentials of the 1st petitioner. It was submitted that Exhibit AAM4 alone is not sufficient to establish valid nomination, counsel citing the case of *James Yakubu v INEC & Ors. (2008) LPELR-4350CA* and arguing that, on the authority of *Progressive Peoples Alliance & Anr. v INEC & Ors. (2009) LPELR-4864CA*, the submission of Exhibit AAM4 without more is at best a mere proposal of the name and that, for a nomination to be valid, it must meet statutory procedures as contained in the Electoral Act, a point similarly reiterated in the case of *Nwambam v Ugochima & Ors. (2010) LPELR-4643(CA)*. It was argued that the 1st petitioner has admitted under cross-examination that he did not see the list of candidates submitted by the 2nd respondent and could not confirm if his name was on the list and the petitioners in fact failed to tender the said list of candidates they submitted to INEC to buttress the claim that 1st respondent omitted them without any reason. It was contended by the 2nd

and 3rd respondents' counsel that the factual circumstance is embedded in Exhibit AAM6 (Form CF002b) admitted by 1st respondent as its document which shows that the 2nd petitioner never sponsored 1st petitioner for the election and which by the document marked EXHIBIT AMINU-3 filed along with the petition. It was argued that in EXHIBIT AMINU-3 the petitioners had asked for the production of Form CF002b to them by the respondent but failed to tender EXHIBIT AMINU-3 because if they do it will be inimical to their case despite having pleaded the same document, thereby withholding evidence contrary to s167(d) of the Evidence Act.

In specific response to the petitioners' final address, counsel to the 2nd and 3rd respondents submitted that the facts averred by the petitioners were heavily contested and denied on the pleadings and argued that in any event the principle that facts not disputed need no proof do not apply to the petitioners case where they are seeking for declaratory reliefs, citing the case of *Grace & Ors v Omolola Hospital & Anr (2014) LPELR-22777(CA)*. In reply to the petitioners' argument on the admissibility of Exhibit AAM6, it was submitted that it was a public document, duly certified by the issuing authority, emanated from proper custody, and is relevant to the just determination of the petition. On the petitioner's reference to paragraphs 12(3) and 41(8) of the First Schedule to the Electoral Act 2010 as amended as a basis to exclude Exhibit AAM6 because it was not frontloaded, counsel cited the case of *Ogboru & Anr. v Uduaghan & Ors. (2010) LPELR-3938(CA)* and argued that a document that was not frontloaded may nevertheless be admissible provided it is duly pleaded and it is germane to the determination of the petition, further submitting that Exhibit AAM6 was in fact pleaded by the petitioners in paragraph 16 of the petition which is sufficient for all parties, citing the case of *Agagu & Ors. v Mimiko & Ors. (2009) LPELR-21149(CA)*. Further citing the case of *Gunda v UNIMAID (2014) LPELR-23351(CA)* it was submitted that once the relevant facts are pleaded a document need not be specifically pleaded before it can be admissible. As to the allegation of want of fair hearing with respect to Exhibit AAM6, counsel argued that the 1st petitioner (as PW3) was cross-examined on it and the

petitioners had the opportunity to cross-examine the 1st respondent's witness (the DW1) on it, particularly on why the 1st respondent failed or refused to produce it. It was posited that the 2nd and 3rd respondents were entitled to capitalize on the weaknesses in the case of the petitioners and the 1st respondents to their advantage, citing the case of *CPC v INEC (2011) LPELR-9085(CA)*. Counsel then urged the tribunal to find the petition as incurably defective having not been signed by the counsel, incompetent for been a pre-election matter, not proven by the petitioners that the 1st petitioner was validly nominated but unlawfully excluded for the councillorship election for Usuma Ward, and hence liable to be dismissed.

In response to the address of the counsel to 2nd and 3rd respondents, counsel to the petitioners filed a written address in reply. With respect to the preliminary objection argued by counsel to the 2nd and 3rd respondents, it was contended that, though permissible under paragraph 53(5) of the First Schedule to the Electoral Act, 2010 (as amended), the tribunal had during pre-hearing on the 22nd May, 2019 ordered the 2nd and 3rd respondents to file and serve it within a week and directed that it shall be heard along with the petition but the counsel contemptuously did not comply with the court's order. Thus, having not complied with the order of the court, the 2nd and 3rd respondent loses the right to argue the preliminary objection.

Be that as it may, counsel addressed each of the grounds for the preliminary objection. As to the claim that the petition was not signed, it was argued that the petition was in fact signed, the alleged difference in the signatures being irrelevant as a person can have multiple signatures, and may in fact sign by proxy provided the signature is not denied by the purported maker. As to the claim that the petition was a pre-election matter, counsel cited s138(1) of the Electoral Act and submitted that valid nomination but unlawful exclusion is a ground for challenging an election, consistent with paragraph 11 of the petitioners petition, distinguished the case in hand from cases where the challenge is on the validity of the petitioner's nomination which are patently pre-election matters.

On the evidence of the PW2 who allegedly gave inconsistent evidence regarding his polling unit, counsel submitted that contradictions must be material to have effect; it was explained that the PW2 was a layman who simply mentioned a landmark associated with the venue and in any event the confusion was cleared by Exhibit AAM5. Finally, with regard to the petitioners' failure to tender the candidates list and the ballot paper, as to suggest the petitioners did not tender admissible evidence, counsel submitted that the petitioners had averred in paragraph 16 of the petition that the nomination form and candidates list was submitted to the 1st respondent who has custody of them and was given notice to produce but failed to produce them.

The principal issue for determination before this tribunal is actually a very narrow one, that is, whether the 1st petitioner was validly nominated by the 2nd petitioner as its councillorship candidate for Ward 10 (Usuma Ward) of the Bwari Area Council Area for the elections that held on the 9th March, 2019. Put differently, the issue is whether a list of candidates was submitted to the 1st respondent (the Independent National Electoral Commission (INEC)) by the 2nd petitioner (the Peoples Party of Nigeria (PPN)) as required by s31(1) of the Electoral Act, 2010 (as amended) for the elections into the offices of Chairmanship and councillorships of the Bwari Area Council Election on the 9th March, 2019 and if the 1st petitioner's name was on that list as PPN's candidate for councillor for Usuma Ward? Thus, the credibility or otherwise PW1 and PW2 are irrelevant to this question and we would make no further reference to them.

By s138(1)(d) of the Electoral Act 2010 (as amended) one of the grounds for which election may be questioned is that the petitioner or its candidate was validly nominated but was unlawfully excluded from the election. From a long line of authorities, in order to prove that a person was validly nominated by his party but unlawfully excluded from the election, such a person has to prove (i) that he was validly nominated by his party, (ii) that the election was conducted and concluded, (iii) that a winner was declared, and (iv) that the name and logo of the petitioners was/were not on the ballot

papers used at the election. Indeed, it has been held that the petitioner must not only state the above requirement in his petition, he must specifically prove them at the trial. See: *Jelili v Adebomi & Ors. (2009) LPELR-4351(CA)* citing the case of *Effiong v Ikpeme & Ors. (1999) 6 NWLR (Pt. 606) 260*. In the case at hand, the fact that the election held is not disputed. (See paragraph 8 of the petition and admitted by the 1st respondent in paragraph 1 of their reply and admitted by the 2nd and 3rd respondents in paragraph 6 of their reply). In paragraph 7 of the petition it has been averred that the 3rd respondent sponsored by the 2nd respondent was declared winner of the election by the 1st respondent, a fact admitted by the 1st respondent in paragraph 1 of their reply and the 2nd and 3rd respondents in paragraph 5 of their reply. Even though the ballot used for the election to the office councilor for Ward 10 (Usuma Ward) was not tendered before this tribunal, the three witnesses called for the petitioners (including the petitioner) has amply proved that the petitioners' name or logo were not in the ballot paper used for the election held on the 9th March, 2019. However, all three respondents have contested that the 1st petitioner was validly nominated for the election and justifies that his name was not in the list of candidates that contested the election of 9th March, 2019 into the office of councilor of Ward 10 (Usuma Ward).

Before we go into consideration of the evidence and arguments that has been canvassed before this tribunal, it is apposite to set out the various statutory provisions and some judicial authorities concerning the matter of nomination of candidates for elections. The first of these provisions is section 31 of the Electoral (Amendment) Act 2010. It is provided that every political party shall, not later than 60 days before the date appointed for a general election under the provisions of the Act, submit to the Commission, in the prescribed forms, the list of the candidates the party proposes to sponsor at the elections (s31(1)). Such list or information submitted by each candidate shall be accompanied by an Affidavit sworn to by the candidate at the Federal High Court, High Court of a State, or Federal Capital Territory indicating that he has fulfilled all the constitutional requirements for

election into that office (s31(2)). On its part, the Commission shall, within 7 days of the receipt of the personal particulars of the candidate, publish same in the constituency where the candidate intends to contest the election (s31(3)). Additionally, the Commission shall, at least 30 days before the day of the election publish by displaying or causing to be displayed at the relevant office or offices of the Commission and on the Commission's web site, a statement of the full names and addresses of all candidates standing nominated (s34).

While the prescribed forms referred to in s31(1) have not been stated in the Electoral (Amendment) Act it was held by the Supreme Court in the case of *Emeka v Chuba Ikpeazu (2017) 15 NWLR (Pt. 1589) 345 at 378, paras. A-C, E-F (SC)* that, by a combined reading of subsections (1) and (2) of s31 of the Electoral (Amendment) Act, 2910, the submission of the particulars of a candidate sponsored by a political party must be accompanied by the list of the candidates proposed for sponsorship by the party for the election. Thus, Forms CF002 as well as Form CF001 of all the candidates and documents shall be forwarded by the political party to the Commission. This authority, and other similar authorities such as *C.P.C. v Ombugadu (2013) 18 NWLR (Pt. 1385) 66SC*, suggests to us that Form CF002 is the list of the candidates while Form CF001 is the particulars of a candidate that ought to be submitted together by the party sponsoring a candidate.

In the case of *Progressive Peoples Alliance & Anr. v INEC & Ors. (2009) LPELR-4864(CA)*, the Court of Appeal held that the mere proposal of the name of a candidate by a political party, without more, does not amount to a valid nomination and no lawful exclusion can take place without a valid nomination, the Court further holding that for a nomination to be valid it must meet statutory procedures and mere proposal of a person as its candidates in an election to INEC through a letter is insufficient and does not amount to a valid nomination. The case of *Okocha & Anr. v INEC & Ors. (2010) LPELR-4718(CA)* also buttressed two points; firstly, to succeed in a petition under the above section, the onus of proof of valid nomination and unlawful exclusion is squarely on the petitioner, consistent with the

combined effect of ss132 and 133 of the Evidence Act that the burden of first proving the existence or non-existence of facts lies on a party against whom judgment would be given if no evidence were produced. Secondly, the case underscored that in proving valid nomination but unlawful exclusion, the petitioner must rely on the strength of his case and not on the weakness of the respondent's case.

It was held by the Court of Appeal in *Iniama v. Akpabio (2008) 17 NWLR (Pt. 1116) 225 at 310* that non-publication by INEC of the name of an otherwise validly nominated candidate does not derogate from the validity and subsistence of the candidate's nomination nor amount to his unlawful exclusion from the election since such a publication does not constitute a condition precedent to the validity of an *otherwise* valid party nomination list. However, the authority suggest to us also that the fact of publication is a strong factor in determining if a valid nomination was submitted to INEC and unless steps were taken to remedy the exclusion of the name after such non-publication, it might be a factor that may subsequently weigh against the validity of the nomination of any candidate whose name was excluded. This is more so if there is evidence that there are other candidates of the same party as the candidate whose name was not published but those other candidates' names were published and ordinarily should have been in the same list as the candidate excluded.

Now the method we will adopt is to first consider the preliminary objection that has been made in the 2nd and 3rd respondents' final address. Where the case of the petitioners survives the preliminary objection, we will then proceed to evaluate and ascertain from the evidence that has been adduced by all the parties if there was a valid nomination in favour of the 1st petitioner in this case as to make his non-inclusion in the election of 9th March, 2019 unlawful.

2ND AND 3RD RESPONDENTS' PRELIMINARY OBJECTION

The preliminary objection is hinged on two grounds; firstly, that the petition is incompetent because it was not signed by Abdullahi Omolori

Esq., and secondly, that the petition is a pre-election matter and the petitioner having admitted that he was not on the ballot he has no *locus standi* to bring this petition. Of course the petitioner counsel responded to the preliminary objection by arguments which have earlier been captured in this judgment. However, in what may be an objection to the 2nd and 3rd respondents' preliminary objection, the tribunal has been urged us not to entertain the preliminary objection having been filed out of time against the order of the tribunal made on the 22nd May, 2019 during the pre-hearing session that it should be filed within a week. Truly, at the pre-hearing session the counsel to the 2nd and 3rd respondents' indicated he intends to file a preliminary objection and was given a week to do so though the tribunal ordered that it shall be heard together with the petition, consistent with s285(8) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) and paragraph 12(5) of the First Schedule to the Electoral Act. Obviously, this was not done and the proper course open to the 2nd and 3rd respondents was to seek for enlargement of time under paragraph 45 of the First Schedule to the Electoral Act but this was also not done. In the consequence, we agree with the petitioners that the preliminary objection was not competent before this court and it is hereby dismissed.

THE EVIDENCE BEFORE THE COURT VIS-À-VIS WHETHER THE 1ST PETITIONER WAS VALIDLY NOMINATED

We will start by first addressing the arguments canvassed by the petitioners counsel that some facts are not disputed whether because they were not specifically denied in the pleadings of the respondents and are therefore deemed admitted or because evidence in rebuttal was not led on them by the respondents, more so as the 2nd and 3rd respondents rested their case on those of the petitioners and the 1st respondent. On this account we disagree with the petitioners. We do not find any inconsistency where the 1st respondent stated that the petitioner 'was not excluded from the election by the 1st respondent' and later stated that 'the 1st respondent did not receive any nomination form from the petitioner'; we rather think the two statements are mutually self-reinforcing. Contrary to the claim of the

petitioners that the 1st respondent allegedly admitted paragraph 3 of the petition claiming the 1st petitioner was sponsored by the 2nd petitioner for the councillorship election for Ward No. 10 (Usuma Ward), we think what was admitted in paragraph 1 of the 1st respondent's reply was the 1st petitioner's right to vote and be voted for, given that the claim of his sponsorship as a candidate for the election by the 2nd petitioner and his candidature was subsequently denied in paragraphs 2, 3 and 4 of the same reply. The same argument enures for the petitioners claim that the respondents admitted that the 2nd petitioner submitted the nomination form (CF001) to 1st respondent who acknowledged same in writing (paragraph 18) and the name of the 1st petitioner was contained in the list of candidates of 2nd petitioner for the councillorship elections for Usuma Ward (paragraph 17). Of course, the 2nd and 3rd respondents in their reply much forcefully and specifically denied all the above averments in the petition and, in any event, where a party is seeking for a declaration as in this case, the petitioners must rely on the strength of their case and not on the weakness of the case of the adverse party (see *Okocha & Anr. v INEC & Ors (Supra)*). Finally, the fact that a party chooses not to call witness do not automatically mean that he cannot get favourable judgment. Thus, in *Agagu & Ors v Mimiko & Ors. (2009) LPELR-21149(CA)* it was held that a defendant may also be entitled to judgment without adducing oral evidence, if through cross-examination of the plaintiff and his witnesses and by tendering of documents through them he destroys the plaintiff's case and establishes a valid defence.

At the centre of whether the 1st petitioner was validly nominated by the 2nd petitioner are two documents. One was admitted as Exhibit AAM4 while the other is Exhibit AAM6. Exhibit AAM4 was tendered by the petitioner but Exhibit AAM6 was tendered by the 2nd and 3rd respondent's counsel through the witness of the 1st respondent in the course of cross-examination. Exhibit AAM4 is acknowledgment of receipt of Form CF001 from PPN (we believe an acronym for 'Peoples Party of Nigeria', the 2nd petitioner) in favour of 'Hon. AMINU MANUNFASHI' (we believe the 1st petitioner). Exhibit AAM6 is a Certified True Copy of INEC Form CF002B for submission of names by

political party, in this case the political party making the submission was 'PPN' and it has the names of two persons as candidates for 'SHERE' and 'USHAFA' but no candidate for 'USUMA'. Now, if we accept that Exhibit AAM6 was the list submitted by the 2nd petitioner, it settles the fact that the 2nd petitioner nominated no candidate and submitted no name, let alone that of the 1st petitioner, to contest for Usuma ward. On the other hand, Exhibit AAM4 is *prima facie* evidence that the 2nd petitioner submitted the name of the 1st petitioner as its candidate and we will have to consider if that is sufficient proof that the 1st petitioner was nominated as a candidate given the state of the law as earlier espoused. Besides, questions have been raised as to the admissibility of Exhibit AAM6 and the authenticity of Exhibit AAM4. We will therefore take each of these documents and consider them in the light of the evidence adduced in support of them and the circumstances they were admitted, starting with Exhibit AAM6.

EXHIBIT AAM6 (INEC FORM CF002B)

Exhibit AAM6 was tendered through the DW1 (witness called by the 1st respondent), the attempt to do so through the 1st petitioner in the course of cross-examination having been objected to and it was withdrawn. When it was to be tendered through the DW1 counsel to the petitioners stridently opposed it and reiterated its opposition in the final address and has asked for the document to be dispensed with. The arguments are as follows. The said document was not pleaded and frontloaded as required by paragraph 12(3) nor was leave of the tribunal obtained under paragraph 41(8) of the First Schedule to the Electoral Act and the tribunal having during prehearing struck out as imprecise the 2nd and 3rd respondents' statement that they will rely on all documents used in the election, it will amount to the tribunal overruling itself if it now allows it. That apart, it was contended that it will amount to lack of fair hearing since the petitioners had no opportunity to cross-examine on it.

The response of the counsel to the 2nd and 3rd respondents was four-fold: firstly, that it is relevant and hence is admissible, citing the case

Durosimi v Adeniyi & Anr. (2017) LPELR-42731(CA), and secondly, citing the case of *Ogboru & Anr. v Uduaghan & Ors. (2010) LPELR-3938(CA)* it was contended that even though not frontloaded, a document may be admissible provided it is duly pleaded and it is germane to the determination of the petition. Thirdly, it was argued that the document was indeed pleaded in paragraph 16 of the petition and any such pleading by any of the parties enures to the benefit of every other party, citing the case of case of *Agagu & Ors. v Mimiko & Ors. (2009) LPELR-21149(CA)*. Finally, citing the case of *Gunda v UNIMAID (2014) LPELR-23351(CA)* it was submitted that once the relevant facts are pleaded a document need not be specifically pleaded before it can be admissible. As to the allegation of want of fair hearing, it was submitted that it was open to the petitioners to have asked the DW1 questions pertaining to the list they claimed was submitted by the 2nd petitioner but they failed to do so and so cannot be seen to complain of lack of opportunity.

The provisions of paragraphs 12(3) and 41(8) of the First Schedule to the Electoral (Amendment) Act are quite straightforward. Paragraph 12(3) is to the effect that reply filed in response to a petition *shall* be accompanied by copies of documentary evidence, list of witnesses and the written statements on oath. Paragraph 41(8) has also in categorical terms provided that, save with leave of the Tribunal or Court, no document, plan, photograph or model shall be received in evidence at the hearing of a petition *unless* it has been listed or filed along with the petition in the case of the petitioner or filed along with the reply in the case of the respondent. These provisions are, in our opinion mandatory and leave the court no discretion unless to the extent contemplated in paragraph 41(8).

It appears to us that the cases of *Ogboru & Anr. v Uduaghan & Ors. (Supra)* and *Agagu & Ors. v Mimiko & Ors. (Supra)* appears to have modified the force of the above provisions. However, both decisions were based on the Electoral Act, 2006 which was repealed upon the enactment of the Electoral Act 2010 which has, itself, being further amended. Despite a close scrutiny, it is obvious that provisions analogous to paragraph 12(3) or paragraph 41(8) in

the First Schedule of the amending Act were not contained whether in the body of the statute or the First Schedule to the Electoral Act, 2006. It means, therefore, that the above two decisions no longer represents the law as to permit the use of document or documents not pleaded by a respondent or filed or listed by such respondents.

The consequence is that Exhibit AAM6 was *ab initio* not admissible and, consequently, it is hereby expunged from the records of the court.

EXHIBIT AAM4 (INEC FORM CF001)

Next before us is the document admitted as Exhibit AAM4. Indeed it is the anchor for the 1st petitioner's case. We had earlier in the course of this judgment given a summarized description of the said document. The burden of proof that the 1st petitioner was validly nominated rests on the petitioners (see *Okocha & Anr. v INEC & Ors. (Supra)*). This is more so as the 1st respondent objected to the admissibility of the document on the ground that it did not emanate from them. The question for us is, *ex facie*, is Exhibit AAM4 sufficient to prove that the 1st petitioner was validly nominated by the 2nd petitioner?

Now, making recourse back to *Emeka v Chuba Ikpeazu (Supra)*, obviously Exhibit AAM4 can only be *prima facie* proof of nomination but is not conclusive where not accompanied with Form CF002. The 1st petitioner has been asked if after he submitted his expression of interest form and nomination form his party did anything else before forwarding his name to INEC, and the witness said he did not know and the party never informed him that they did anything before submitting his name to INEC. Thus, there is no evidence before the court that any such Form CF002 exist, the only one tendered at the behest of the respondents having been rejected even though it was against the interest of the petitioners. The fact that the 1st petitioner gave no evidence of the procedure validating his nomination is significant given the provisions of ss87(5) and 110(1) of the Electoral Act. In the first case, it is provided that, in the case of a Councillorship candidate, the procedure for the nomination of the candidate shall be by direct primaries in

the ward and the name of the candidate with the highest number of votes shall be submitted to the Commission as the candidate of the party while, in the second provision, it is stated that, if, after the expiration of time for the delivery of nomination papers and the withdrawal of candidates for election of Councillors under the Act only one candidate remains duly nominated, that candidate shall be declared returned unopposed. Agreed the 1st petitioner claimed he was the only one that collected nomination forms, though he did not explain how he came by that information, at the very least he should have informed the tribunal of the party declaring him unopposed in compliance with the law.

It is telling that the 1st petitioner conceded that he merely obtained nomination form from the 2nd petitioner, completed it and returned to them and they subsequently gave him Exhibit AAM4 as proof that he has been nominated. When under cross-examination by 1st respondent's counsel he was referred to paragraph 16 of his witness statement on oath and it was put to him that he in fact does not know if his name was submitted or not submitted and the 1st petitioner responded thus: 'The truth is that I don't know but my Chairman called to say my name was submitted', logically so since he also admitted he never saw the list of candidates submitted by his party. When asked under cross-examination by counsel to 2nd and 3rd respondents if he knew that list of candidates are published thirty (30) days before election, the 1st petitioner said he does not know and when it was put to him that since he did not know that the list of candidates was published he also cannot confirm whether his name was on the list, the PW3 conceded that he did not know except that he was given a letter of acknowledgment (Exhibit AAM4). Of course he also admitted that he does not know the actual date when the party submitted its list of candidates for the election or the party official who submitted the list of candidates to the 1st respondent.

The aggregation of the above facts is that the 1st petitioner himself has very little personal knowledge of the events that led to his being given Exhibit AAM4. The origin of a document is of substantial importance in the weight to be attached to it (*Odutola v Paper Sack Nigeria Limited (2006) 18*

NWLR (Pt. 1012) 470 at 489). To discharge the burden of proof, it would have been expected that the official of the 2nd petitioner or any other of its officials should have been called to give evidence concerning the circumstances of the making of Exhibit AAM4 and the submission of nomination forms to the 1st respondent. The inability of a party to call the maker of a document or someone who has personal knowledge of the content of the document renders the content of such document to be a specie of documentary hearsay evidence which is generally inadmissible (Per Owoade JCA in *Osigwelem v INEC (2010) LPELR-4657 (CA)*). Even if admitted, it may nevertheless carry little weight. This becomes even more imperative where a document is challenged and impugned as unauthentic; in such instance, unless the maker of the document or another person who has personal knowledge of the content of such a document is called to support the document, no weight or probative value should be attached to it (*Odumade v Mr. Osulade Ogunnaike & Anor. (2010) LPELR-4809 (CA)*). It is a matter of surprise that the 2nd petitioners had largely played a nominal role in prosecuting this petition even though it was filed by counsel on behalf of 1st and 2nd petitioners jointly.

Other than stating that it is an acknowledgment of receipt of Form CF001, there is nothing much in aid of Exhibit AAM4. Where a document is entirely remote and conjectural such that its true context could only be ascertained by an enquiry into fresh collateral matters, scant weight will be given to such a document (*Ndiong v CFAO (1958) SCNLR 153*). In other words, the document ought not to be in any material particular inchoate. As a measure of conclusiveness, a document ought to be unambiguous, decisive and unequivocal in the facts it seeks to establish (*Edewor v Uwegba & Ors. (1987) NSCC 148*).

The petitioners pleaded several documents, among them a copy of the letter of the 2nd petitioner's State Chairman attached to nomination form and list of candidates (paragraph 16), acknowledgment of receipt of nomination form (paragraph 18), Copy of letter of request dated 20th March, 2019 to the 1st respondent for CTC of 1st petitioner's Form CF001 (paragraph 19), copy of the Permanent voter's card of the 1st petitioner (Paragraph 22)

and a sample of the ballot paper used for the election and copy of result sheet (Paragraph 23). Notice was given to the 1st respondent to produce the said documents. We particularly find as very relevant the letter allegedly written by the Chairman of the 2nd petitioner to the 1st respondent to which was attached nomination form and list of candidates. Obviously, no such documents were produced to the petitioners. The question then arises whether the petitioners did not have copies of their own to adduce, the necessary foundation for doing so having being laid by the notice to produce? In *Buhari & Anr. v Obasanjo & Ors. (2005) 13 NWLR (Pt. 941) 1 at 198-199* it was held that in notice to produce procedure, it is supposed that the person asking for the document knows of the contents, perhaps has a copy of it such that if the person called to produce fails to produce it, the secondary evidence of it can be admitted in evidence. Where this is not done by the person who requested for the production of the document, it then means that either the document do not exist or if it does the presumption can as well be that the contents would not have supported the case of the party asking for its production.

Of course there are apparent gaps in the case of the respondents, particularly the 1st respondent. The manner in which they traversed and denied the averments in the petition leaves much to be desired. Even as publication of names of nominated candidates is a key component of the nomination process, it is not clear on the 1st respondent's pleading if this was done. The first publication is to be at the constituency where the candidate intends to contest the election, within seven days of receiving the particulars while, the second publication is a statement of the full names and addresses of all candidates standing nominated at the relevant office or offices of the Commission and on the Commission's web site. Fortunately for the 1st respondent the petitioners did not allege that publication was not done and in any even there is a rebuttable presumption of regularity in the doing of official acts in favour of the 1st respondent. Another gap is that the DW1 is, by his admission, from the Legal Department of the 1st respondent and obviously was not in charge of receiving nomination forms from political

parties, amply illustrated when he was cross-examined by the counsel to the petitioners. However, where an establishment or institution is concerned and an official function is in issue, the law allows that any official who has access to documents or information relevant to the fact in issue may give evidence on such transaction irrespective that such a person may not have been privy to the transaction from its origin (*Kate Enterprises Ltd v Daewoo Nigeria Ltd (1985) All NLR 267* and *Ordia v Piedmont (Nigeria) Ltd (1995) 2 NWLR (Pt. 379) 516*). Of course, such evidence would carry greater weight if the official with personal knowledge of the transaction were to testify on it instead of some other person relying on information garnered from records.

Despite the gaps, however, this is a case in which the petitioners must succeed on the strength of their case and not on the weakness of the respondents' case. In other words, the case of the petitioner must preponderate on its own strength and not on the weakness of the respondents' case (*Hawad International Schools Ltd v Mima Projects Ventures Ltd (2003) 39 WRN 57 per* Salami JCA) though the tribunal will also add to the weight of the petitioner's case those parts of the respondents' case that support the former's case or such evidence in the respondent's case on which the petitioner is entitled to rely. In this case, we are of the considered opinion that the petitioners presented a rather weak case vis-à-vis the shortcomings of the 1st respondent.

From the foregoing, we hereby find and hold that the petitioners have failed to establish on the preponderance of evidence that the 1st petitioner was validly nominated by the 2nd petitioner as its candidate for councilor of Ward 10 (Usuma Ward) of Bwari Area Council in the Area Councils Elections that held on the 9th March, 2019. Consequently, the 1st petitioner having not shown that he was validly nominated by the 2nd petitioner, he could not have been unlawfully excluded by the 1st respondent as to necessitate the nullification of the election of the 3rd respondent under s138(d) of the Electoral (Amendment) Act, 2010. Accordingly, this petition is hereby dismissed for lack of merit.

SAMUEL E. IDHIARHI ESQ.
CHAIRMAN
25TH SEPTEMBER, 2019

I concur.

MOHAMMED ZUBAIRU ESQ.
MEMBER
25TH SEPTEMBER, 2019

I concur.

A.A. MOHAMMED ESQ.
MEMBER
25TH SEPTEMBER, 2019

REPRESENTATION:

PETITIONERS: Abdullahi Omoloye Esq., with Joshua Afolabi Esq. and Oluwaseun Awotona Esq.

1St RESPONDENT: Owabie Emeka Esq., with Grace Ogbona Esq., and Franca Osagiede Esq.

2ND AND 3rd RESPONDENTS: E. Elaigwu Esq. and M.P. Ejembi Esq.