

IN THE COURT OF APPEAL
(PRESIDENTIAL ELECTION PETITION COURT)
HOLDEN AT ABUJA

ON WEDNESDAY THE 11TH DAY OF SEPTEMBER, 2019

BEFORE THEIR LORDSHIPS:

<u>HON. JUSTICE MOHAMMED LAWAL GARBA</u>	<u>JUSTICE, COURT OF APPEAL</u>
<u>HON. JUSTICE ABDU ABOKI</u>	<u>JUSTICE, COURT OF APPEAL</u>
<u>HON. JUSTICE JOSEPH SHAGBAOR IKYEGH</u>	<u>JUSTICE, COURT OF APPEAL</u>
<u>HON. JUSTICE SAMUEL CHUKWUDUMEBI OSEJI</u>	<u>JUSTICE, COURT OF APPEAL</u>
<u>HON. JUSTICE PETER OLABISI IGE</u>	<u>JUSTICE, COURT OF APPEAL</u>

PETITION NO: CA/PEPC/002/2019

BETWEEN:

1. ATIKU ABUBAKAR		
2. PEOPLES DEMOCRATIC PARTY (PDP)		
AND		
1. INDEPENDENT NATIONAL ELECTORAL COMMISSION (INEC)		
2. MUHAMMADU BUHARI		
3. ALL PROGRESSIVES CONGRESS (APC)		

PETITIONERS

RESPONDENTS

JUDGMENT

{ DELIVERED BY SAMUEL CHUKWUDUMEBI OSEJI, JCA }

I agree with the reasoning and conclusion contained in the lead judgment as per the fate of this petition. The facts are well spelt out therein and I will not repeat same. However, I deem it expedient to further address the issue of whether or not there

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SHERIFAT ADEBAYO
SECRETARY 1

existed a server for use by the 1st Respondent as well as the relevance of Smart Card Readers during the 2019 general elections.

The Petitioners stance is that by their utterances, news briefings and the manual, as well as guidelines for the conduct of elections it is not in doubt that the 1st Respondent intended to and did make use of Smart Card Readers and a server for the electronic transmission of election results during the 2019 Presidential and National Assembly elections.

The Law is trite that he who asserts must prove such assertion. See Section 136(1) of the Evidence Act 2011. See also **AWUSE VS. ODILI (2005) 16 NWLR (PT. 952); MOGAJI VS. ODOFIN & ORS. (1978) 4 SC 91 at 94; ELIAS VS. OMODARE (1982) 5 SC 25; DAODU VS. NNPC & ORS. (1998) LPELR – 927 SC.**

In **ADIGHIJE VS. NWAOGU (2010) 12 NWLR (PT. 1209) 419 at 463** this Court per Ogunwumiju JCA held that:

"Section 137 of the Evidence Act 2004 provides that for a burden of proof in civil cases. The burden of first proving the existence or non-existence of a fact lies on the party against whom the judgement of the court would be given if no evidence were produced on either side regard being had to any presumption that may arise in the pleadings. If such party adduces evidence

which might reasonably satisfy a court that the fact sought to be proved is established, the burden lies on the party against whom judgment will be given if no more evidence were adduced, and so on successively until all the issues in the pleadings have been dealt with."

Also in **M.O. KANU, SONS & CO, LTD VS. NZERIBE & ANOR. (2014) LPELR (228390 CA** at page 59, this court held per Abba Aji JCA (now JSC) as follows:

"..... The law is still trite that the party who asserts has the onus or duty to prove his assertion or claim by adducing credible evidence. By Section 136 of the Evidence Act, the burden of proof in civil cases lies on the party who would fail if no evidence at all was adduced on either side. Thus the onus or burden lies on the claimant to adduce credible evidence in proof of his claim, or defence, but strictly on the strength of his own case. The basis of proof in civil cases is on the balance of probability or preponderance of evidence so far adduced."

The Petitioners herein had pleaded in paragraphs 26 to 29 of their petitions as follows:

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"26. The Petitioners state that Smart Card Readers deployed by the 1st Respondent, in addition to accreditation, equally transmitted electronically the results of voting from polling units directly to the server of the 1st Respondent. The Presiding Officers of the 1st Respondent directly inputted the results from the polling units at the end of voting and transmitted directly to the server, in addition to manually taking the Form EC8As to the Wards for collation. The 1st Respondent is hereby given notice to produce the records of results from each polling unit uploaded and transmitted electronically by officials of the 1st Respondent through smart card readers to the 1st Respondent's servers.

27. The Petitioners plead and rely on the 1st Respondent's manual Technologies 2019, and notice is hereby given to the 1st Respondent to produce same at the trial. The 1st Respondent's agents at the polling units used the Smart Card Reader for electronic collation and transmission of results. The Petitioners plead and shall rely on

and play at the trial, the video demonstration by the ^{1st} Respondent of the deployment of Smart Card Reader for authentication of accreditation and for transmission of data.

28. The Petitioners hereby plead and rely upon the extract of data as contained on the ^{1st} Respondent's server as at 25th February, 2019, notice to produce whereof is hereby given to the ^{1st} Respondent. The Petitioners also will rely on the data on the ^{1st} Respondent's central server between 25th February 2019 and 8th March 2019 and hereby also give notice to produce same before this Honourable Court.

29. The Petitioners hereby plead the electronic data on the server of the ^{1st} Respondent and shall at the trial give evidence of the source of the data analysis and data material, including the website: www.factdontlieng.com."

The ^{1st} Respondent in response averred in paragraphs 15 and 16 of the ^{1st} Respondent's reply to the petition that:

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"15. In answer to paragraphs 26, 27, 28, and 29 of the Petition, the 1st Respondent states that the Smart Card Readers formed part of the instructions for the election and where they functioned, were employed for authentication only.

16. Further to the foregoing, the website described as www.factsdontlieng.com was neither created nor owned by the 1st Respondent. It is a site not known to the 1st Respondent. The 1st Respondent does not share information with such an unclassified entity and any information purportedly derived therefrom which does not accord with the result as declared by the 1st Respondent is not authentic but rather was invented for the purposes of this case. The 1st Respondent did not adopt electronic transmission or collation of results in the conduct of the election, voting by electronic means not having been adopted as a provisions of the Electoral Act. The 1st Respondent specifically denies the existence of electronic transmission of results as it is unknown to the Electoral Act, 2010 (as

amended) and Regulations and Guidelines for the conduct of the elections, 2019, and put the Petitioners to the strictest of proof thereof."

In the light of the above set out averments, there is no doubt that issues were strongly joined on the existence or non-existence of a central server and whether the results of the Presidential election which held on 23/2/2019 were electronically transmitted.

The Petitioners in support of their pleadings in this regard called PW2, PW3, PW4, PW12, PW16, PW17 and PW36.

PW2 testified that he was an adhoc staff of the 1st Respondent and he worked as a Registration Area Technician (RATECH) and Ward E-collation officer of Ward 5, constituency (ii) of Ogbe/Egbema/Ndoni Local Government Area of Rivers State. He stated that before the election day, he was trained by the 1st Respondent (INEC) on the use of the Smart Card Reader (SCR) at the election. The Smart Card Reader was to be used at each polling unit for the mandatory accreditation, verification, authentication, collation and transmission of results of the election and that apart from one polling unit in the Ward, where there was a snag, the Smart Card was used in all other polling units for accreditation, verification, authentication, collation and transmission of results of the election. He however admitted under cross-examination that

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he did not function as a presiding officer, or assistant presiding officer and did not use the card readers.

PW3 was another adhoc staff of the 1st Respondent who testified that he was employed as a presiding officer (PO) at the civic center Amorji (iii) polling unit with code 005 in Amorji Ward in Enugu East Local Government Area of Enugu State. He added that he was trained by the 1st Respondent on the mandatory use of Smart Card Readers for authentication, collation and transmission of results of the election at the polling unit and that upon conclusion of voting and collation of results, he transmitted the result of the polling units electronically to the 1st Respondent's server using the code or password provided by the 1st Respondent and as directed.

He stated under cross-examination that he was not told the name or number of the server but that all he knows is that he transmitted the results to the server.

PW4 also give similar evidence on the use of Smart Card Reader (SCR) at the election as he deposed in his statement on oath that he electronically transmitted the results of the election into the server belonging to the 1st Respondent, using the code or password provided by the 1st Respondent. He agreed during cross-

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examination that he did not state the serial number of the Smart Card or server location in his statement on oath.

PW12 testified that he was a polling agent for the Petitioners in Tanko-Kuta I polling unit of Chanchaga Local Government Area of Niger State. He stated that in his polling unit, election commenced with the use of Smart Card Readers which later broke down and resort was had to manual authentication of voters on the directive of the presiding officer.

PW16 also testified that he was an adhoc staff of the 1st Respondent and worked as Assistant Presiding Officer (APO) for Wako polling unite (001) in Kwali Local Government Area of the Federal Capital Territory. He stated that election was conducted by Smart Card Reader and the result of the election was transmitted electronically to the 1st Respondent's server using the code provided by the 1st Respondent after verification by the 1st Respondent's Area Technician.

He also stated under cross-examination that though he transmitted results to the server but no server number was given to him.

PW17 equally in his statement on oath, deposed that he was the 1st Respondent's adhoc staff during the election and worked as an Assistant Presiding Officer (APO) at the L.E.A Primary School,

Galadima/Gwarimpa polling unit, Federal Capital Territory were the card reader was used for accreditation, verification, authentication, collation and transmission of votes through the 1st Respondent's server by the code provided by the 1st Respondent. He also stated during cross-examination that he was told during training that the server belong to the 1st Respondent, though he was not given the server number.

PW36 also testified that he was an adhoc staff of the 1st Respondent during the election and he functioned as Area Presiding Officer (I) Apo (I) where he used the Smart Card Reader (SCR) in his polling unit and equally transmitted the election result electronically to the 1st Respondent's server via the Smart Card Reader. His response during cross-examination was that he was trained to transmit results by INEC and though he did not personally see the server he was told about it by INEC, (1st Respondent).

On the other hand, the 1st Respondent did not call any witness to support their pleadings in this regard, but rather opted to rely on the Petitioners' case via the evidence elicited during cross-examination.

The 2nd and 3rd Respondents did not also call any evidence to support or deny the existence of the 1st Respondent's server.

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I am not unmindful of the trite state of the law that a party can rest his defence on the evidence given by a claimant during cross-examination but this is based on the condition that such evidence must relate or derive from the facts averred to in the pleadings.

The bottom line here is that neither the 1st Respondent specifically nor the 2nd and 3rd Respondents called any evidence to add life or flesh to their facts in denial as averred in their pleadings with regard to the use or non-use of the Smart Card Reader or server.

The law is long settled that where issues are joined on any averments but no evidence is led to support such, the end result is that such averments are deemed abandoned and prone to be struck out. See **OMOBORIOWO VS. AJASIN (1984) LPLER – 2643 (SC)**. In **MAGNUSSON VS. KOIKI & ORS. (1993) 9 NWLR (PT. 319) 287**, the apex court also held that where a party's pleadings is not supported by evidence, those paragraphs of the pleadings will certainly be deemed abandoned. Further in **CAMEROON AIRLINES VS. OTUTUIZU (2011) 4 NWLR (PT. 1238) 512** their Lordships held per Rhodes Vivour JSC that:

"Averments in pleadings are facts as perceived by the party relying on them. There must be oral or/and

documentary evidence to show that the facts pleaded are true. Consequently, pleadings without evidence in support of it are worthless."

See also **ODUNSI VS. BAMABALA (1995) 1 NWLR (PT. 374) 641** and **AMAECHEI VS. INEC & ORS. (2007) 18 NWLR (PT. 1065) 105.**

On this premise, the position of the law is succinctly stated by the Supreme Court per Aloma Mukhtar JSC (as she then was) in the case of **NEWBREED ORGANISATION LTD. VS. EROMOSELE (2006) 5 NWLR (PT. 974) 499** as follows:

"When a defendant refuses to adduce evidence in his defence and rests his case on the evidence of the plaintiff, then he has himself to blame if the trial court finds for the plaintiff based on his evidence as was done in the instant case. The position of the law is that where an adversary fails to adduce evidence to put on the other side of the imaginary scale of justice, a minimum evidence adduced by the other side would suffice to prove its case. See BRAIMOH VS. BAMAGBOSE (1989) 3 NWLR (PT. 109) 352 and NWABUOKU VS. OTTIH (1961) 2 SCNLR page 232.

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In the instant case, the Respondents (particularly the 1st Respondent) refused or neglected to adduce evidence on the vexed issue of whether or not Smart Card Readers were used during the 2019 elections or that there exists a central server but opts to rest their case on the evidence as adduced by the Petitioners. The consequence is that there is no other evidence to put on the other side of the imaginary scale to judiciously weigh the evidence on both sides of the divide. It follows therefore that the evidence as adduced by the Petitioners in support of their pleadings as earlier detailed will be taken as sufficient proof that Smart Card Readers were used during the Presidential election which held on 23/2/2019.

What is more, Section 15(2) of the Electoral Act 2010 (as amended) 2015 states as follows:

“(2) Voting at an election under this Act shall be in accordance with the procedure determined by the Independent National Electoral Commission.”

Pursuant to the above provisions, the 1st Respondent introduced Exhibit P27 (Regulations and Guidelines for the conduct of Elections), Exhibits P28 (Manual for Election Officials 2019) and P33 (Manual on Election Technologies).

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The said Exhibits contains rules and regulations to guide the 1st Respondent's officials in the conduct of the elections and this includes the use of Smart Card Readers to verify permanent voters card and authenticate same before voting as shown in paragraph 8(b) of Exhibit P27. Other relevant paragraphs are: 10, 13, 28 and 29. The same goes with chapters 1, 2 and 3 of Exhibit P28 as well as page 15 of Exhibit P33 which contains specific procedures to be adhered to before, during and after close of voting as well as transmission of results and accreditation data using Smart Card Readers.

That said, I am however not oblivious of the present state of the law as enunciated by the Supreme Court in **NYESOM WIKE VS. PETERSIDE & ORS. (2016) 7 NWLR (PT. 1512) 452 or (2016) LPLER (40036) (SC)** wherein it held per Kekere-Ekun JSC as follows:

"I had stated earlier in this judgment that INEC is to be commended for the innovation of the Card Reader machine to bolster the transparency and accuracy of the accreditation process and to maintain the democratic norm of "one man one vote" by preventing multi-voting by a voter. Nevertheless, Section 49(1) and (2) of the Electoral Act 2010 (as amended) which

provide for manual accreditation of voters is extant and remains a vital part of our Electoral Law. The section provides thus: "49(1) Any person intending to vote with this voter's card, shall present himself to a Presiding Officer at the Polling Unit in the constituency in which his name is registered with his voter's card. (2) The Presiding Officer shall, on being satisfied that the name of the person is on the Register of Voters, issue him a ballot paper and indicate on the Register that the person has voted." In the recent decision of this Court in *Shinkafi v. Yari (supra)*, Okoro, JSC stated thus: "My understanding of the function of the Card Reader Machine is to authenticate the owner of a voter's card and to prevent multi-voting by a voter. I am not aware that the Card Reader Machine has replaced the voter's register or has taken the place of statement of results in appropriate forms." Again, Nweze, JSC in *Okereke vs. Umahi & Ors (unreported) SC.1004/2015* delivered on 5/2/2016 reiterated the position thus at pages 33- 34: "Indeed, since the Guidelines and Manual (*supra*), which authorized the use and deployment of the electronic

Card Reader Machine, were made in exercise of the powers conferred by the Electoral Act, the said Card Reader cannot, logically, depose or dethrone the Voters' Register whose juridical roots are, firmly embedded or entrenched in the self same Electoral Act from which it (Voter's Register), directly derives its sustenance and currency. Thus, any attempt to invest it [the Card Reader Machine Procedure] with such overarching pre-eminence or superiority over the Voters' Register is like converting an auxiliary procedure - into the dominant procedure - of proof, that is proof of accreditation."

Per KEKERE-EKUN, J.S.C (Pp. 60-62, paras. D-B)

Also in **EMMANUEL UDOM VS. UMANA (NO. 1) (2016) 12 NWLR (PT. 1526) 179**, the apex court held that:

"Indeed, since the guideline and manual (supra) which authorized the use and deployment of the electronic Card Reader Machine, were made in exercise of the powers conferred by the Electoral Act, the said Card Reader cannot, logically depose, or dethrone the voter's Register whose juridical root dare, firmly embedded or entrenched in the self same

Electoral Act from which it (the voters Register), directly derives its sustenance and currency. Thus any attempt to invest it (the Card Reader machine procedure) with such overarching pre-eminence or superiority over the voters Register is like converting an auxiliary procedure into the dominant method procedure of proof, that is proof of accreditation."

Their Lordships per Rhodes Vivour JSC also noted at pages 86 to 87 of the LPELR that:

"The Electoral Act is an Act of the National Assembly. Section 49(1) and (2) makes it abundantly clear that on election day, a person would be allowed to vote if his name is on the Register of voters. There is no provision for Card Reader. The Card Reader is the brainchild of the former head of INEC. It has no statutory backing."

Also, it was held by the Supreme Court in the case of **INEC v. PETERSIDE (2016) 7 NWLR (PT.1512) 555 AT 568**. Per Mohammed C.J.N. (as he then was) that:

"However, in the present case the 1st and 2nd respondents/petitioners only relied on the second leg of paragraph (b) of section 138(1) of the

Electoral Act, 2010 (as amended) to claim that the election in Rivers State was invalid only for failure for the officials of the appellant to comply with the appellant's order on them to use Smart Card Readers for accreditation of voters for the election which the respondents/petitioners failed to relate to any provision of the Electoral Act to qualify as non-compliance with the provisions of the Act. In this regard, I am of the view that the 1st and 2nd respondents/petitioners failed to prove their' case at the Election Tribunal that the failure to use Smart Card Readers for accreditation of voters at the election had the effect of nullifying the entire election in Rivers State. "

Okoro, J.S.C., held in his concurring judgment in page 570 thereof that -

"It is a serious error for anybody to elevate any directive of INEC far above the provisions of the Electoral Act. Where a party has complied with the provisions of the Electoral Act but is in breach of any

directive of INEC, he cannot be said to have breached the provisions of the Electoral Act. In this case, the staff of the appellant herein, resorted to accreditation as contained in section 49 of the Electoral Act when the Card Reader Machine failed. I do not think that such decision can be elevated to the level of non-compliance envisaged in section 138(1) of the Electoral Act, 2010 (as amended)."

Sanusi, J.S.C., also held in his concurring judgment in page 572 thereof that -

"It needs be stressed here that the provisions of regulations contained in INEC's Manual and Guidelines, should not by any means meant to have replaced amended provisions of the Electoral Act or to override the provisions of the latter. Breach of the regulations or provisions do not mean breach of the Electoral Act, 2010 (as amended) and such

breach could not amount to non compliance with the provisions of the Act. As 1 stated supra, the use of Card Reader is an innovation meant only to compliment and facilitate the method of accreditation as provided in section 49 of the Electoral Act."

Furthermore, the Supreme Court noted in the case of **SHINKAFI V. YARI (2016) LPELR – 26050**, that the function of card reader is solely to authenticate the owner of the voter's card and to prevent multi-voting by a voter and cannot replace the voters register or statement of results in appropriate forms.

His lordship, Okoro, J.S.C., added in the case of **OGBORU V. OKOWA (2016) 11 NWLR (PT.1522) 84 at 129** that:

"Let me reiterate my views in many other decisions rendered in this court in the recent past that the introduction of the card reader Machine into election process in this country does not amend, set aside or abolish section 49 of the Electoral Act, 2010, (as amended). It is meant to complement the provision. Section 49 of the Act provides that a person

intending to vote with his voters "card, shall present himself to a presiding officer at the polling unit in the constituency in which his name is registered with his voters" card. Secondly, the presiding officer, on being satisfied that the name of the person is on the register of voters, shall issue him a ballot paper and indicate on the register that the person has voted. This remains the law until the National Assembly amends the procedure for accreditation and voting provided in section 49 (supra). As I said, the appellants herein lost sight of this important provision. This is the bone of their case".

In the light of the above set out decisions which represents the extant law vis-à-vis Smart Card Readers as a means of proving non-voting, over voting, transmission or non-transmission of election results, the issue of Smart Card Readers in the present discourse serves only the purpose of helping to improve the accreditation process during elections and as such complements the procedure set out in Section 49 of the Electoral Act 2010 (as amended), which provisions, I dare say, does not include recourse

to a central server for the purpose of collation, or declaration of election results. This point finds expression in Section 63, 65, 69 and 74 of the Electoral Act 2010 as amended. They provide as follows:

"S.63.(1)The Presiding Officer shall, after counting the votes at the polling unit, enter the votes scored by each candidate in a form to be prescribed by the Commission as the case may be.

(2) The Form shall be signed and stamped by the Presiding Officer and counter signed by the candidates or their polling agents where available at the polling unit.

(3) The Presiding Officer shall give to the Polling Agents and the police officer where available a copy each of the completed Forms after it has been duly signed as provided in subsection (2) of this section.

(4) The Presiding Officer shall count and announce the result at the polling unit.

S.65. After the recording of the result of the election, the Presiding Officer shall announce the result and deliver same and election

materials under security to such persons as may be prescribed by the Commission.

S.69. In an election to the office of the President or Governor whether or not contested in any contested election to any other elective office, the result shall be ascertained by counting the votes cast for each candidate and subject to the provisions of sections 133, 134 and 179 of the Constitution, the candidate that receives the highest number of votes shall be declared elected by the appropriate Returning Officer.

S.74. Every Result Form completed at the Ward, Local Government, State and National levels in accordance with the provision of this Act or any Guidelines issued by the Commission shall be stamped, signed and countersigned by the relevant officers and polling agents at those levels and copies given to the police officers and the polling agents, where available."

The resultant effect of the above set out provisions is that collation of results are to be done manually and declaration of such results are to flow from the figures as entered in the relevant forms

at various levels of collation. It is not dependent on the content or use of a Smart Card Reader for the transmission of election results. Hence Section 74 specifically provided that every result form completed at the polling unit, Ward, Local Government, State and National levels shall be stamped, signed and countersigned by the relevant officers and polling agents at those levels and copies given to the police officers and the polling agents where available.

Albeit and for purposes of posterity, I will emphasis again that to all intents and purposes the law requires or mandates the 1st Respondent to operate a website under Section 71 of the Electoral Act which provides thus:

"S.71. The Commission shall cause to be posted on its notice board and website, a notice showing the candidates at the election and their scores; and the person declared as elected or returned at the election."

The above set out provisions used the word shall which connotes mandatoriness or command. See **SHETTIMA VS. GONI (2011) 18 NWLR (PT. 1279) 413; UGBA & ORS. VS. SUSWAM & ORS. (2012) LPELR – 9726 (SC); ONOCHIE VS. ODOGWU (2006) 6 NWLR (PT. 975) 65 at 89.**


Furthermore, the posting of the results must be on the notice board and website. The word "and" is conjunctive which means

that the result must not only be posted on the notice board, but also on the website. A website is defined by the English Dictionary as "a computer connected to the internet that maintains a series of webpages on the world wide web". It also defines a server as "a digital computer that provides workstations on a network with controlled access to shared resources."

In the light of the above clarifications, it will not be out of place to emphasize that as a fact duly proved as earlier indicated and by law as per the Electoral Act 2010 (as amended), there exists a website managed and controlled by the 1st Respondent.

The above clarification notwithstanding, I also hold that the Petitioners did not adduce sufficient evidence to justify the grant of the reliefs sought. The said petition is hereby dismissed.

I abide by the consequential orders made in the leading judgment including the order as to cost.


SAMUEL CHUKWUDUMEBI OSEJI
JUSTICE, COURT OF APPEAL

