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ADOPTING THE ELECTION PETITION MODEL AS A MEANS OF FAST TRACKING JUSTICE DELIVERY IN THE REGULAR COURT SYSTEM IN NIGERIA: PROBLEMS AND PROSPECTS

Samuel I Nwatu* and Chidebe Matthew Nwankwo**

Abstract

It is a truism that sound and credible elections are a sine qua non for sustainable democracy. The citizens in a society do not only desire a credible system for the selection of their leaders, but also seek functional and unbiased institutional processes to settle election matters. Consequently, election petition remains a viable and reorganized alternative open to any person or party dissatisfied with the conduct of an election to ventilate his or her grievances. Over the years, litigants/petitioners have continued to patronize the election petition tribunals/courts with minimal or no success as most of the petitions ended up being thrown out for non-compliance with the applicable electoral legislations or technicalities. Consequently, this paper analyses the current election petition model in Nigeria with a view to highlighting practices that may be adapted to the regular court process to improve speedy dispensation of justice. The paper adopts a doctrinal methodology which undertakes a comparative study of Nigeria and other relevant foreign jurisdictions. The paper analyses the procedural and institutional aspects of the election petition system viz-a-viz the court system in Nigeria and further examines the practice in other foreign jurisdictions with an attempt to identify norms and practices that can be adopted to strengthen the election petition model in Nigeria.

Keywords: Court system, election petition, justice delivery, Nigeria.

1. Introduction

Election petition remains a viable and reorganized alternative open to any person or party dissatisfied with the conduct of an election to ventilate his

*PhD (Nig); Senior Lecturer and the Dean of Law, Faculty of Law, University of Nigeria, Enugu Campus. He was a former member of the Governing Council of the University of Ibadan. E-mail: samuel.nwatu@unn.edu.ng.

** PhD (Brunel); Lecturer, Department of International and Comparative Law, Faculty of Law, University of Nigeria, Enugu Campus, Enugu, Nigeria. E-mail: matthew.nwankwo@unn.edu.ng.

or her grievances. Over the years, litigants/petitioners have continued to patronize the election petition tribunals/courts with minimal or no success as most of the petitions ended up being thrown out for non-compliance with the applicable electoral legislations or want of proof.

A total of 3,479 petitions have been filed in the four election cycles in Nigeria, between 2007 and 2019. This number not only highlights the frequency with which election outcomes are challenged post-election cycles, but also demonstrates the importance of an effective court system to the electioneering process in Nigeria. The post 2007 electoral reforms have culminated in a more robust election petition model in Nigeria. The amendment of the Electoral Act 2010, the Constitution of the Federal Republic of Nigeria (CFRN) 1999 (as amended) (Constitution) as well as the introduction of stricter rules of procedure has brought some sanity to the process of adjudication of election matters.

2. Critical Features of the Election Petition Model in Nigeria

An election *simpliciter* implies an institutional process which embraces the entire gamut of activities ranging from accreditation, voting, and collation to recording on all the relevant electoral forms, transmission and declaration of results.¹ For there to be an election known to law, all these constituent elements of an election must be shown to have taken place. If any of these constituent of activities is disrupted, it affects the conclusion of the election thus warranting the institution of a remediation process through an election petition before a tribunal. The Electoral Act 2010 is mute on the definition of an election petition. However, in *All Nigerian Peoples Party v The Independent National Electoral Commission*,² the court defined election petition as ‘a formal written request presented to a court or tribunal for enquiry into the validity or otherwise of a candidate’s return when such return is allegedly invalid’.

There shall be established two types of election tribunal for each state of the federation which are vested with original jurisdiction over the trial of election petitions. The first of the election tribunals is the National and State Houses of Assembly Election Tribunals that deals with the petition from the national and state Houses of assembly. The said

¹PI Kelechi, *Modern Nigerian Election Petitions and Appeals Law* (Chudanog Publishers 2017) 1.

²[2004] 7 NWLR (Pt 871) 55.

tribunals are vested with exclusive original jurisdiction to hear and determine whether any person has been validly elected as a member of the national and state houses of assembly. The second of the election tribunal is the governorship election tribunal which is vested with exclusive original jurisdiction to hear and determine petitions as to whether any person has been validly elected to the office of governor and deputy governor.³

Election Petitions proceedings are often described as being *sui generis* in nature. This attribute has been cited as the basis for the peculiarity and distinctive jurisprudential leaning of courts and tribunals in formulating and restating legal principles in election petition matters in comparison to regular court procedure.⁴ The distinct or *sui generis* nature of election petition proceedings is derived from two main features. First, the strict time requirement for the dispensation of election petitions as enshrined in the Constitution⁵ and other relevant electoral laws.⁶ Section 285(6) of the Constitution provides that the Election Petition Tribunal shall deliver its judgment in writing within 180 days from the date of the filing of the petition. An election petition itself shall be filed within 21 days after the date of the declaration of result of the elections.⁷ An appeal from a decision of an election tribunal or Court of Appeal in an election matter shall be heard and disposed of within 60 days from the date of the delivery of judgment of the tribunal or Court of Appeal.⁸ To meet this timeline, Tribunals are permitted to sit on all days of the week including Saturdays and Sundays⁹ and processes can be filed at any time even at midnight.¹⁰

³S 285(1)(a)(b), (2) of the CFRN 1999 as amended.

⁴ PI Nwafuru, 'Election Petition: The Judicial Policy behind the Legal Principles Forbidding the Dumping of Documents' <<https://www.linkedin.com/pulse/election-petition-judicial-policy-behind-legal-dumping-nwafuru/>> accessed 23 November 2021.

⁵Constitution of the Federal Republic of Nigeria 1999.

⁶Other laws and regulations governing elections in Nigeria are the Electoral Act (2010) Cap E6 *Laws of the Federation of Nigeria 2004*; Independent National Electoral Commission (INEC) Regulations and Guidelines for the Conduct of Elections 2019.

⁷The Nigerian Constitution s 285(5).

⁸ The Nigerian Constitution s 285(7).

⁹The Electoral Act 2010 (as amended) s 25(1) provides thus, 'No formal adjournment of the Tribunal or Court for the hearing of an election petition shall be necessary, but the hearing shall be deemed adjourned and may be continued from day to day until the hearing is concluded, unless the Tribunal or Court otherwise directs as the circumstances may dictate.' S 26(2) provides that after an adjournment of hearing of an

Another time management strategy of election petitions under the Constitution is found in section 285(8) of the Constitution (as amended by the 4th Alteration Act, 2017) which provides that the Tribunal or Court shall suspend its ruling on all preliminary objections and interlocutory applications touching on competence of the Petition or Pre-election matters and deliver such ruling at the stage of final judgment. The apex court has in recent times underscored the importance of the time-bound nature of election petition matters in the constitutional system. In *Oke v Mimiko*¹¹ the Supreme Court held thus:

The general principle of the law is that election matters are *sui generis*. They are limited by time span especially the gubernatorial one. They cannot withstand everlasting time span (*ad infinitum*). They must be concluded within a given time span in order to allow the winning candidate (governor-elect etc) assume his responsibilities of the office. He has a very limited number of years. Time lapse will seriously affect his term of office unlike in other ordinary civil matters with no time bar. In any event, in all cases, there must be end to litigation.

The second justification for the *sui generis* character of election petition matters in Nigeria is the abhorrence of tardiness in the process and procedure of litigation. Election petitions have peculiar features which modify the operation of certain rules of civil proceedings. Hence, some technical defects or irregularities which in other proceedings are considered too immaterial to affect the validity of the claim, could be fatal to proceedings in election petitions.¹² In *Orubu v National Electoral Commission*,¹³ it was held that election petitions are peculiar in nature, and because of their peculiar nature, and centrality to an effective democratic system they are 'regarded with an aura that places them over and above normal day to day transaction between individuals which give rise to ordinary claims in court.'¹⁴ The strictness of the standard of

election petition the 'hearing may be continued on a Saturday or on a Public Holiday if circumstances dictate'.

¹⁰Note 3.

¹¹[2014] 1 NWLR (Pt 1388) 225, 247 – 248 paras G –F.

¹²C Ubanyionwu, 'Strategies and Procedures for Expediting Election Petitions and Appeals' [2011] 2 *Nnamdi Azikiwe Journal of International Law and Jurisprudence* 322.

¹³[1988] 5 NWLR (Pt 94) 323, 347.

¹⁴*Ibid*.

procedure and the consequence of procedural inaccuracy in election petition matters is best captured by the Supreme Court in *Buhari v Yusuf*,¹⁵ where the court held thus:

Election petitions are distinct from the ordinary civil proceedings: see *Obih v Mbakwe*.¹⁶ It is such that in certain circumstances the slightest default in complying with a procedural step which otherwise either could be cured or waived in ordinary civil proceedings could result in fatal consequences to the petition. Examples are: *Benson v Allison*,¹⁷ *Eminue v Nkereuwen*,¹⁸ which were decided on failure to give security before presenting a petition as required by the rules; *Ige v Olunloyo*,¹⁹ decided on application to amend the prayers sought in a petition, which application was brought after the time allowed for filing the petition. So an election petition is neither seen as a civil proceeding in the ordinary sense nor, of course, a criminal proceeding. It can be regarded as a proceeding *sui generis*.

These two features are the main pillars upon which the election petition model in Nigeria is built. Therefore, due to the importance of these proceedings to the maintenance of our democratic system, it may be considered one of the most functional aspects of the Nigerian judicial system, albeit it is not without its own flaws which have prompted recent reforms.

3. Practice Directions

In time past the issue as to whether a specific time span should be stipulated within which election petitions are concluded has always generated unending debates among Nigerian legal practitioners, jurists and politicians alike. Election petition cases were characterized by undue delays leading to criticism from stakeholders in the electoral process.²⁰

¹⁵[2003] LPELR-812(SC).

¹⁶[1984] All NLR 132, 200 per Bello, JSC; 211 per Eso and Aniogolu, JJSC.

¹⁷[1955-56] WRNLR 58.

¹⁸[1966] 1 All NLR 63

¹⁹[1984] 1 SCNLR 158.

²⁰A consequence of the delays during this period has changed the electoral map of Nigeria. Various verdicts from the election petition tribunals and the Court of Appeal have automatically introduced staggered system into the gubernatorial elections in the country. For instance, the case of *Chris Ngige v Peter Obi* stands as a reference point in the analysis of the problems and challenges of the adjudication of electoral matters. Peter Obi, the then governorship candidate of the All Progressive Grand Alliance

To salvage the situation, then President of the Court of Appeal, in exercise of the (presumed) powers conferred on him by the Constitution 1999 section 285(3) and other powers issued new practice directions christened 'Election Tribunal and Court Practices Directions 2007' on 29 March 2007. The practice directions were published in the Federal Republic of Nigeria official gazette of 4 April 2007 and took effect retrospectively from 3 April 2007. The practice directions were made applicable to presidential, governorship, national assembly and states assembly election petition.

The most recent practice directions titled 'Election Tribunal and Court Practice Directions 2011' were introduced by Justice Isa Ayo Salami in 2011. Some of its important provisions are discussed *infra*. However, it is pertinent to highlight some recent decisions on practice directions in the election petition system in Nigeria.

In *Dele Taiwo Ololade v INEC*,²¹ the court of appeal, Mohammed JCA held thus:

Practice direction therefore remains in force having been made with the intention of guiding the courts and the legal profession on matters of practice and procedure. Practice directions are overridden by the rules of court only when they are in conflict with the rules. But when practice directions as issued or co-exist harmoniously with the rules of court, a party or counsel who ignores them does so at his peril.

The importance of Practice directions in understanding the nature of operation of the election petition model in Nigeria cannot be overstated. Okoro, JCA evinces the essence of practice directions in *Ado v Mekara*²² thus, 'as the purport of practice directions is to aid the quick dispensation of justice especially in election matters, time becomes of the essence and this makes it mandatory for the strict compliance with the directives. The court will always frown at any attempt to circumvent or treat the practice direction with levity.²³ Consequently, it may be adduced

(APGA) filed his case on 16 day of May 2003 challenging the declaration of Dr Chris Ngige as the winner of the election. The tribunal took more than two years to hear all the witnesses and delivered judgment on 12 August 2005. The appeal came up for hearing on 23 January 2006 and judgment was delivered on 15 March 2006. The petitioner waited for 35 months to receive justice out of a mandate of 4 years.

²¹[2008] JELR 53372 (CA).

²²[2009] 9 NWLR Pt 1147.

²³See also *Jimoh Ojugbele v Musemi Ltd Olamidi* [1999] 9 NWLR (Pt 621) 167.

that the main objectives of practice directions are: 1) to ensure just, efficient and speedy dispensation of justice; 2) to discourage the institution of frivolous actions in the courts; 3) to afford the courts the opportunity of knowing the cases of the parties beforehand; 4) to ensure diligent prosecution of cases by litigants and their counsel

The 2011 Practice Directions introduce certain provisions that merit mention and were hitherto applicable to election petition matters under the previous rules. For instance the directions introduce the sum of Two Hundred Thousand Naira (₦200,000.00) as security costs to be deposited with the tribunal or court. It further provides further deposit of the sum of Two Hundred Thousand Naira (₦200,000.00) to make up for costs of service of notices, registered postings and all other expenditures which may be occasioned by the petitioner.²⁴

Regarding election appeals, the 2011 Practice Directions stipulate that the appellant shall file in the registry of the tribunal his notice and grounds of appeal within 21 days from the date of the decision appealed against.²⁵ The secretary of the tribunal shall within a period of not more than ten days of the receipt of the notice of appeal, cause to be compiled and served on all the parties, the record of the proceedings.²⁶ Within a period of ten days after the service of the record of proceedings, the appellant shall file in the Court, his written brief of argument in the appeal for service on the respondent.²⁷ The respondent on their part shall file in the court his own brief of argument within five days after service of the appellant's brief.²⁸ These provisions highlight the importance of speedy adjudication of electoral matters and the realization by the judiciary that time is often of the essence in ensuring that governance does not suffer because the question over the rightfully elected individual persists.

4. Improving the Regular Court System in Nigeria: Borrowing a Leaf from the Election Petition Model

The election petition model is not without its weaknesses. However, the provisions governing the procedure in general have clearly improved over the years. The current model appears to have solved the problems

²⁴The Election Tribunal and Court Practice Directions 2011 Order 3 and 4.

²⁵Practice Directions 2011 Order 6.

²⁶Order 8 2011 Practice Directions 2011 Order 8.

²⁷Ibid Order 10.

²⁸Ibid Order 12.

that previously bedevilled election petition matters such as lengthy hearing, complex and irregular filing procedures, deliberate time-wasting by lawyers etc. Thus, the procedure of election petition matters are guided by the Rules of Procedure for Election Petitions found in the First Schedule of the Electoral Act 2010, the Election Petition Tribunals and Courts Practice Direction 2011, and certain aspects of the Constitution. Some of the current practices of the election petition model which can be transfixed into the general court process for fast and effective dispensation of justice include:

- I. The Practice Directions 2011 Order 4 make provision for deposit of a fixed sum in the court coffers to cover for cost of service of notices, processes, registered posting and similar expenditures. If this is practiced in regular courts, it will expedite proceedings as court processes and notices are served on intended parties immediately without recourse to the action or inaction of the other party. This may also help prevent the filing of frivolous actions if applied in regular courts.
- II. The First Schedule of the Electoral Act 2010 Order 47(1) provides that no motion shall be moved and all motions shall come up at the pre-hearing session except in extreme circumstances with leave of tribunal or court. By implication, applications will not be entertained during hearing save in the final address. If this procedure is adopted, proceedings will be concluded quicker as the wheel of justice will not be made to turn slow by barrage of applications put up by counsel.
- III. As highlighted earlier, the extant electoral laws make several provisions intended to abridge the time for filing a petition and reply. For instance, the First schedule of the Electoral Act 2010 Order 16(1) provides that 'if a person in his reply to the election petition raises new issues of facts in defence of his case which the petition has not dealt with, the petitioner shall be entitled to file in the registry, within five days from the receipt of the respondent's reply, a petitioner's reply in answer to the new issues of fact'. This can be applied in regular court process. Rather than the 42 days or 21 days to file a statement of defence, the defendant can be afforded just 5 or 7 days to reply. This will certainly put counsel on their feet and cases will be speedily determined.
- IV. Section 258(8): 'Where a preliminary objection or any other interlocutory issue touching on the jurisdiction of the tribunal or court in any pre-election matter or on the competence of the

petition itself is raised by a party, the tribunal or court shall suspend ruling and deliver it at the stage of final judgment’.

5. Election Petition beyond Nigeria: Lessons from Abroad

Defective and fraudulent elections are not the exclusive preserve of Nigeria alone. Irregular conducts of elections are common in Africa²⁹ and this warrants robust election petition systems characterized by effective adjudication of election disputes. In typical fashion, aggrieved political contestants often look to the judiciary for redress where elections have been assailed with anomalies and results disputed. Due to the constitutional and institutional weaknesses the judiciary is tasked with the ultimate responsibility of determining the ultimate outcome of the poll. Consequently, in order to protect the right to choose in an election, and to promote and safeguard democracy, the judiciary must be competent, honest, learned and independent. Such a judiciary plays a transformative role in democracy as an impartial umpire in a democracy.

It is often the case that disputed elections are the norm in Africa, and hopes of a constitutionalism revival³⁰ which were being harboured due to few instances of successful election in Africa have been dashed by the recent uptick in the number of military coups in the region.³¹ Huefner classifies the causes of disputed or failed elections into two categories, namely: fraud and mistake.³² Fraud in this context refers to the deliberate unfair manipulation of the electoral system by parties, candidates, or their supporters. Mistake on the other hand is the unintentional disturbance of the electoral process usually by electoral officials.³³ Ben Nwabueze aptly describes the consequences of dysfunctional electoral systems ‘robbery of the right of the people to participate in their own government’ and

²⁹SI Lindberg, *Democracy and Elections in Africa* (JHU Press 2008) 10, 14.

³⁰In the early 2000s, the change of government from military rule to democratic dispensations in some West African states led to a perceived constitutionalism revival in the African region. However, the recent resurgence of the culture of coups in some African States namely Burkina Faso, Mali, Chad, Guinea and most recently an attempted coup in Guinea Bissau appear to have put such hopes to bed. HK Prempeh wrote an article about the time of the constitutionalism revival entitled ‘Africa's "Constitutionalism Resurgence": False start or new dawn’ [2007] 5 *International Journal of Constitutional Law* 460.

³¹As at the time of writing, the West African Sub-region has witnessed four coups over the period of two years.

³²SF Huefner, ‘Remedying Election Wrongs’ [2007] 44 *Harvard Journal on Legislation* 265.

³³*Ibid.*

‘therefore the greatest offence that can be committed against the constitution and the people’.³⁴ This is a worthy observation because failed elections have the effect of denying the people their consent as a basis of the right to govern. Most African constitutions or electoral laws anticipate the fatal potentialities of irregular elections and thus make statutory provisions for redress. This is because election wrongs or allegations of wrongs often have a bearing on the legitimacy of the electoral process.³⁵

A transparent redress mechanism inherent in an effective election petition system, which commands the respect of the people, lends legitimacy and credibility to the election and ‘serves as a peaceful alternative to violent post-election responses’.³⁶ Furthermore, the failure of any society to prioritize an effective electoral dispute mechanism as a *sine qua non* of its constitutional system ‘can seriously undermine the legitimacy of an entire electoral process’.³⁷

Kabba identifies five patterns generally associated with election petitions in African courts, namely: (a) all cases are decided in favour of the incumbent candidate, the candidate sponsored by the ruling party, or the presumptive winner. (b) Many cases are dismissed on minor procedural technicalities without consideration of the merits. (c) There is misuse of the substantial effect rule. (d) In some countries, the resolution of disputes is inordinately delayed so as to render the whole process nugatory. (e) Judges simply fail to address the issues presented before them by constraining themselves from making appropriate decisions.³⁸

These challenges of adjudication are prevalent in most jurisdictions but the most decisive approach for any judicial system is the degree to which these systemic defects are managed and made unapparent to the common man. An effective judicial system and above all a legal order must be perceived as being just. As argued earlier, election

³⁴B Nwabueze, ‘Nature and Forms of Elections Rigging’ (21 July 2008) *Niger Delta Congress* <http://www.nigerdeltacongress.com/articles/nature_and_forms_of_elections_ri.htm> accessed 10 May 2021.

³⁵O Kabba, ‘The Challenges of Adjudicating Presidential Election Disputes in Domestic Courts in Africa’ [2015] 15 *African Human Rights Law Journal* 330, 331.

³⁶C Vickery, ‘Understanding, Adjudicating, and Resolving Election Disputes’ IFES Conference Papers 14 February 2011.

³⁷The Carter Centre, *Guide to Electoral Dispute Resolution* (2010).

³⁸Kabba (n 35) 335.

petition procedures are shrouded in technicalities. Thus, many cases are dismissed on minor technicalities. A combination of the technicality bound nature of election petition cases and the un-readiness of judges to apply purposeful judicial approach in adjudicating these cases has often led to unsatisfactory outcomes which weaken the electoral process. So far, the Nigerian legal system has attempted to shorten the length of election petitions through legislative amendments and improvement of the rules of court. However, questions remain over the imbalance in the election petition process in comparison to regular court process.

It is trite that the process of adjudication is a formal and institutionalized method of reasoned conflict resolution.³⁹ Thus, its main objective is to settle disputes fairly and on the basis of applicable laws exercised through two main pillars of substantive and technical or procedural rules. Those rules that apply to the fairness or merits of the case are considered substantive rules, while those that govern the manner of resolving a dispute are considered technical or procedural.⁴⁰ It follows therefore that adjudication should ideally be a system that balances substantive justice with procedural rules. Procedural rules and technicalities are manifestly ‘handmaids rather than mistresses’⁴¹ of substantive justice. These technical rules are instruments available to the judiciary to help it to render substantive justice and are, therefore, not ends in themselves.⁴² Lord Penzance observes in 1878 thus:

Procedure is but the machinery of the law after all – the channel and means whereby law is administered and justice reached. It strangely departs from its proper office when, in place of facilitating, it is permitted to obstruct, and even extinguish, legal rights, and is thus made to govern where it ought to sub serve.⁴³

³⁹LL Fuller, ‘The Forms and Limits of Adjudication’ [1978] 92 *Harvard Law Review* 353.

⁴⁰W Morrison, *Common Law Reasoning and Institutions* (University of London External Programme 2006) 36.

⁴¹CE Clark, ‘The Handmaid of Justice’ [1938] 23 *Washington University Law Quarterly* 298.

⁴²Kabba (n 35) 338.

⁴³*Henry JB Kendall v Peter Hamilton* [1878] 4 AC 504.

However, these two pillars of the adjudication do not easily complement each other in practice as observed by British legal historian Holdsworth,⁴⁴ thus:

One of the most difficult and one of the most permanent problems which a legal system must face is a combination of a due regard for the claims of substantial justice with a system of procedure rigid enough to be workable. It is easy to favour one quality at the expense of the other, with the result that either all system is lost, or there is so elaborate and technical a system that the decision of cases turns almost entirely upon the working of its rules and only occasionally and incidentally upon the merits of the cases themselves.

It is clear that courts all over the world inevitably struggle to attain a balance between these two aspects of adjudication in regular civil matters and this conundrum becomes ever more difficult to resolve in election petition matters that go to the root of producing credible leadership in a democratic society. Nevertheless, the aggrieved citizen must approach the courts expecting that courts look at the merit of their cases without being unduly fettered by technicalities even in election petition matters. Judges are therefore vested with the duty to do substantive justice irrespective of the nature of the matter before the court. Recognizing the complexity of the function of substantive justice some constitutions spell out the standard expected of the judge. For example, the Constitution of Kenya requires that ‘justice shall be administered without undue regard to procedural technicalities’.⁴⁵

A cursory look at some of presidential election petition cases across the African region reveals that the preference of judges is to avoid determining these high stake matters on merit and an over reliance on technicalities. In *Rally for Democracy and Progress v Electoral Commission of Namibia*,⁴⁶ election petition was brought by the opposition following the 2009 presidential and parliamentary elections in Namibia. The petition sought to void the presidential election in Namibia, *inter alia*, for noncompliance with electoral laws. The Electoral Act 1992 section 10 required that election petitions could only be presented within 30 days from the date of announcement of results. The petitioners

⁴⁴WS Holdsworth, *History of English Law* (1922) 251.

⁴⁵Constitution of the Republic of Kenya 2010 Art 159(2)(d).

⁴⁶[High Court] Case A01/2010.

presented their petition on the thirtieth day at 16:30 and, therefore, within the statutory requirement. The registrar of the High Court of Namibia accepted the petition. However, a rule of court did not allow the filing of a process on any day after 15:00. Because the petition was filed after 15:00, the Court held that the petition was invalid for being filed out of time and, therefore, in the eyes of the law there was no valid petition to adjudicate on.⁴⁷

In *John Opong Benjamin v National Electoral Commission*⁴⁸ a petition was brought by the losing opposition leader, John Opong Benjamin, and other opposition leaders against the election of Ernest BaiKoroma during the Sierra Leone elections of 2012.⁴⁹ The Constitution of Sierra Leone Article 55(1) provides that anyone with a grievance in a presidential election should petition the Supreme Court within seven days of the results being declared. The election was held on 17 November and the results were declared only on 23 November.⁵⁰ The petitioners filed their petition on 30 November, the seventh day after the declaration of results. Furthermore, rules of court required that petitioners submit the names of counsels acting for them at the court registry in a separate notice, and that, within five days of filing the election petition, the petitioners make payment for security of costs.⁵¹ The petitioners' lawyers had indicated their contact details by including it on the petition, but not in a separate notice, and made security of cost payments on 5 December. The court, however, struck out the petition, holding that it had been filed out of time due to a delay in payment for costs and for not complying with the requirement of lawyers' contact details to be in a separate notice.

Election petitions in Nigeria have long been characterized by strict adherence to technicalities and these have sometimes produced unfavourable political outcomes. One of the striking cases of a presidential election petitions determined by technicalities is *Atiku Abubakar v Umaru Musa Yar'Adua*.⁵² The petition arose from the presidential elections of 21 April 2007. The petitioner, Atiku Abubakar, had polled 2, 637, 848 votes against the winner, Umaru Musa Yar'Adua

⁴⁷Ibid paras 44 and 45.

⁴⁸SC 2/2012 [Supreme Court of Sierra Leone Judgment of 14 June 2013].

⁴⁹Ibid.

⁵⁰C Thorpe, 'Statement from the NEC Chairperson on the Conduct and Results of the Presidential Elections held on 17 November 2012' (23 November 2012).

⁵¹*Benjamin*, (n 48) paras 25-29.

⁵²SC 72/2008 Supreme Court of Nigeria Judgment of 12 December 2008.

who had received 24,638,638 votes. Prior to the election, the Independent National Electoral Commission of Nigeria (INEC) had disqualified the petitioner from the election and his name excluded from the ballot papers. This was based on the INEC's erroneous view that the petitioner had been indicted for corruption and was therefore unqualified for presidential office.⁵³ His name was finally printed on the ballot papers, only four days before the election, through a ruling to that effect by the Supreme Court.⁵⁴

The petitioner sought to challenge the election of Yar'Adua on the following grounds:⁵⁵ (a) The 1st petitioner [Abubakar] was validly nominated by the 3rd petitioner [Abubakar's party] but was unlawfully excluded from the election; alternatively that: (b) the election was invalid by reason of corrupt practices. (c) The election was invalid for reasons of non-compliance with the provisions of the Electoral Act, as amended; and (d) the 1st respondent was not duly elected by majority of lawful votes cast at the 21 April 2007 presidential election.

The applicable provision, on which the majority based its decision, states⁵⁶: an election may be questioned on any of the following grounds: (a) that a person whose election is questioned was, at the time of election, not qualified to contest the election; (b) that the election was invalid by reason of corrupt practices or noncompliance with the provisions of this Act; (c) that the respondent was not duly elected by majority of lawful votes cast at the election; or (d) that the petitioner or its candidate was validly nominated but was unlawfully excluded from the election.

The justices of the Supreme Court reasoned that grounds (a), (b) and (c) above were separated from ground (d) by the use of the word 'or', a disjunctive used to express an alternative or choice.⁵⁷ Since the petitioner's name ultimately made it onto the ballot paper and partook in the election, he could not, therefore, plead ground (d) as he had not been excluded from the election. In the view of the majority, the use of the word 'or' meant that the petitioner had to choose between the alternatives and could, therefore, only plead one set of grounds.

⁵³Ibid.

⁵⁴Ibid.

⁵⁵Ibid.

⁵⁶Electoral Act 2006 s 145(1).

⁵⁷SC 72/2008 (n 52).

Having considered the fact that the petitioner's name appeared on the ballot paper, the Supreme Court declined the invitation to consider whether his initial disqualification may have constituted constructive exclusion from the election as it had left him with barely four days to campaign.⁵⁸ The majority of the apex court judges agreed that since the petitioner took part in the election, his petition on the basis of ground (d) collapsed and, since the word 'or' denoted alternatives, the rest of the petition collapsed and, therefore, other grounds would not be entertained.⁵⁹ This decision is a far cry from an earlier decision of the Supreme Court which strongly condemned judges occupying themselves with technicalities at the expense of substantial justice and advised that judges had a duty to shy away 'from submitting to the constraining bind of technicalities'.⁶⁰

6. Conclusion

The current election petition model has introduced critical provisions aimed at reducing the time for the determination of election petitions and appeals. It has also attempted to remedy the long standing problem of unnecessary technicalities and the cynical lawyer whose purpose is to waste the time of the court and the public. However, these challenges remain and the provisions alone are not enough. The general institutional malaise plaguing the current judicial system also rears its head in the election petition system.

The same context can be applied within the African region where the courts have maintained a tradition of entertaining election petitions that often end in the same predictable outcome as highlighted above. However, certain jurisdictions appear to better appreciate the dilemma which the election petition judge is faced with in trying to balance substantive justice with the strict technical requirements of the adjudicatory process. Constitutional provisions such as those contained in the Constitution of Kenya 2010 Article 159(2)(d) serve the purpose of giving judges the backing to freely entertain election petition matters on its merits and ensure that justice is essentially served. The weight of political expediency should not be enough to subvert the cause of justice

⁵⁸Ibid.

⁵⁹Ibid.

⁶⁰See *Amaechi v Independent National Election Commission* [2008] Supreme Court of Nigeria Judgment 22, 93.

and it is imperative that the common man reposes faith in the system, or at least willing to do so.

Furthermore, the institutional challenges found in the regular court system must be addressed to ensure that the election petition process enjoys the general functionality of the system. From a Nigerian perspective, effective justice delivery in the general court system will benefit from digitization of the court system in Nigeria, specialization of Nigerian court judges, employment of more judicial staff to man the various courts and proper equipment of our courts.