

## **Inconclusive Governorship Election in Kogi State and the Sudden Death of the Leading Aspirant- Legal Implications**

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### **Abstract**

*The people of Kogi State went to the polls on November 21, 2015 to elect a new governor to pilot their affairs for another four years. They cast 240,867 votes for the All Progressives Congress ticket of Prince Audu Abubakar and Honourable James Abiodun Faleke and 199,415 votes for the people's Democratic Party ticket of Captain Idris Wada and Architect Yomi Awoniyi. It was a decisive and conclusive victory for the All Progressives Congress ticket. They won the highest number of votes and had the requisite local government spread as stipulated by the 1999 Constitution of the Federal Republic of Nigeria and the Electoral Act. Shortly afterwards, the APC candidate, Prince Abubakar Audu, died. For some inexplicable reason, INEC declared the election inconclusive and ordered for a supplementary election in 91 voting units across the state. INEC allowed the APC to substitute the late Audu with Alhaji Yahaya Bello who came second in the APC primaries. Bello went into the supplementary election without a running mate since Faleke declined to play that role contending that he should rightly be declared duly elected as the governor of the state. This paper takes a critical look at the knotty legal issues involved in this case and concludes that the supplementary election was superfluous as Abubakar Audu had won at the first ballot.*

### **Introduction**

On Saturday, the 21<sup>st</sup> day of November 2015, the good people of Kogi State had gone to the poll for a transition. The governorship election was a festive of choice, change or retention of the status quo. Although 22 political parties contested the election, the score line of collated results showed the poll to have been a two-horse race between the All Progressives' Congress (APC) ticket which

led with 240,867 votes, and the Peoples Democratic Party (PDP) that trailed with 199,514 votes.

All seemed set for the coronation of the All Progressives Congress' candidate. Then the shock- Abubakar Audu died! We were all humbled. The Independent National Electoral Commission (INEC) deepened the complexity by announcing that the election was inconclusive because the difference of 41,353 votes between the leading candidate and runner-up fell short of the 49,953 registered voters in 91 polling units across the State where elections were cancelled or didn't hold at all due to violence and sundry irregularities. A supplementary election was consequently ordered. The deepened complexity in the matter arises from the fact that the universally accepted ratio of the actual votes cast vis-a-vis the total number of registered voters is put at about one third. And this came to pass when the final results of the re-run subsequently ordered in the election were put together. The All Progressives Congress had 6,885 of the votes while the PDP gathered 5,365. This figure is less than one third of the remaining votes for which the election was declared inconclusive. The issue here is, had the election proceeded without hitches, the results would have been announced, as a winner had emerged. By the same extrapolation, the complications that followed the order for a supplementary election would have been staved off, the death of Abubakar Audu of the All Progressives Congress, notwithstanding. However, the issue goes beyond this. The All Progressives Congress' Candidate's sudden death created a new challenge. Since the 1999 constitution<sup>1</sup> is silent on the next step to be taken if a candidate dies during an election, politicians started capitalizing on the loopholes to make fresh claims.

The People's Democratic Party, whose candidate, Idris Wada, lost the election, judging by the results in the popular domain, started waging a curious war against the popular will of the people.

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<sup>1</sup> Constitution of the Federal Republic of Nigeria. Laws of the Federation of Nigeria, 2004 cap C23

According to Idris Wada, the All Progressives Congress should forfeit its hard earned victory because its candidate, Abubakar Audu, who defeated the People Democratic Party's Candidate, died on the eve of victory.

The All Progressives Congress itself started convulsing as the party was in a fix as to the legal consequence of its leading bearer in the Kogi election dying on the eve of victory. The Chairman of the All Progressives Congress eventually summoned courage to transfer the governorship ticket to Yahaya Bello, the aspirant who came second at the Original Primary with only two votes. Yahaya Bello's name was subsequently forwarded to the Independent National Electoral Commission (INEC) secretariat, Abuja as the All Progressives Congress' new Candidate to inherit the votes already garnered by the Late Abubakar Audu. James Faleke, the running mate to the late Abubakar Audu, also had his name sent to the same INEC as Bello's running mate.

James Faleke kicked, contending that the Kogi election had been won and lost at the first ballot and that there was no need for any supplementary election as ordered by INEC and that the law had envisaged the possibility of a candidate dying mid-stream and that was why it made provision for running mates!

The picture painted above, no doubt, presents a novel constitutional situation; perhaps never anticipated by the drafters of our laws. This is the first time in the course of a democratic transition that a validly nominated candidate of a political party will die after an inconclusive election but before and without participating in the Supplementary Election<sup>2</sup>. The 1999 constitution only dealt with a situation where a candidate had been duly elected<sup>3</sup>. The said provision states:

“If a person duly elected as Governor dies before taking and subscribing the Oath of Allegiance and Oath of office or is unable

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<sup>2</sup> Inebene Effiong, where there is right, there is need, Nov 24<sup>th</sup>, 2015 edition of The Nation Newspaper, page 2.

Section 181(1) of the Constitution of the Federal Republic of Nigeria (1999).  
Laws of the Federation of Nigeria, 2004 cap C23

for any reason whatsoever to be sworn in, the person elected with him as Deputy Governor shall be sworn in as Governor and he shall nominate a new Deputy Governor who shall be appointed by the Governor with the approval of a simple majority of the House Assembly of a State”.

With emphasis on the term “*Duly elected*” it does appear that in the situation at hand, nobody was declared duly elected as the Independent National Electoral Commission (hereinafter called INEC) considered in its wisdom that the election was inchoate. The result is that there is no precedent that can be referred to which could aid in the resolution of the present case.

### **Legal Issues Involved**

The death of Abubakar Audu has consequently thrown up a number of issues.

First, it is trite that where a principal dies in an election contested with a joint ticket, the constitutional vested interest inures to the benefit of the running mate. The question here is: does Faleke have any vested interest in this case which inures to his benefit upon the death of Abubakar Audu, especially in the light of the fact that the election was declared “inconclusive” by INEC?

Second, if the answer to the first question above is in the negative, can the All Progressives Congress substitute the Late Abubakar Audu as its Governorship Candidate?

Finally and ancillary to the first issues is the legality of INEC’s decision to declare the first election in Kogi State as inconclusive especially in the light of the clear provisions of section 179 of the Constitution of the Federal Republic of Nigeria<sup>4</sup>.

The issues highlighted above shall be considered seriatim.

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<sup>4</sup> *Constitution of the Federal Republic of Nigeria (1999).supra*

*Whether or not Faleke has any vested interest in this case which inures to his benefit upon the death of his principal, Abubakar Audu*

From the outset, it needs be appreciated that there are two legal documents guiding INEC in the conduct of elections. They are- the Electoral Act<sup>5</sup> and the Constitution<sup>6</sup>.

As pointed out earlier, where a principal dies in an election contested with a joint ticket, the constitutional vested interest inures to the benefit of the running mate<sup>7</sup>. However, going by the provisions of the 1999 Constitution<sup>8</sup>, two categories of persons/running mates are entitled to this right of succession<sup>9</sup>.

Section 181 (1) provides-

“if a person duly elected as governor dies before taking and subscribing the Oath of Allegiance and Oath of office, or is unable for any reason whatsoever to be sworn in, the person elected with

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<sup>5</sup> *Electoral Act, (2010). A 1103-1202 Vol 97, page 6 Gazette of the Federal Government of Nigeria.*

<sup>6</sup> *Constitution of the Federal Republic of Nigeria (1999). Supra*

<sup>7</sup> See *PDP vs INEC* (1999)11 NWLR Part 626, 200 Here, after winning the 1999 governorship election in Adamawa State, former Vice president Atiku Abubakar was nominated by former President Olusegun Obasanjo, as running mate., INEC refused to swear in Boni Haruna, Atiku Abubakar’s running mate in the governorship election. At the Supreme Court, it became necessary for the court to interpret section 45 of the then Decree 3 of 1999 (now the 1999 Constitution) which provides for the conditions under which a deputy governor may be sworn in as governor. According to the said Section, a deputy governor shall only be sworn in on the occurrence of such eventuality as death, resignation, impeachment, permanent incapacity or removal for any other reason. The supreme court found succor in the dictionary definition of the word “death”, which according to the Court, finds synonyms in, breath one’s last, deceased, depart, expire, finish, decay, decline, disappear etc. and finally decided that even though Atiku Abubakar was biologically alive, his renunciation of his mandate as governor-elect to run with Chief Olusegun Obasanjo as Vice President in effect had the same consequence as if he had died within the contextual meaning of the dictionary definition of death given above.

<sup>8</sup> Sections 181 (1) and 191 (1).

<sup>9</sup> Inibene Effiong, “Audu’s death and its legal implications”. *The Nation*, 24th Nov, 2015 Vol 10. No. 3407 page 2.

him as deputy governor shall be sworn in as governor who shall be appointed by the governor with the approval of a simple majority of the House of Assembly of the State”

Also section 191 (1) says-

The Deputy Governor of a State shall hold the Office of the Governor of the State if the office of the Governor becomes vacant by reason of death, resignation, impeachment permanent incapacity or removal of the Governor from office for any other reason in accordance with section 188 and 189 of the Constitution. From the above, section 181 clearly envisages a situation where a person who has been *‘duly elected’* as governor dies before taking and subscribing the Oath of Allegiance and Oath of office, while section 191 takes care of a situation where the office of a substantive governor of a state becomes vacant by reason of death, resignation, impeachment, permanent incapacity or removal from office. The position of INEC, which no doubt is contestable, is that there was no constitutional vested interest that could inure to the benefit of Faleke, the running mate of Abubakar Audu in this case because the Kogi election was inconclusive and as such none of the parties could be said to have been *“duly elected”* before Abubakar Audu died.

It will interest one that the Kogi elections did not hold in 91 polling units of 18 local government areas due to electoral infractions. The All Progressives Congress’ Candidate was clearly leading the People’s Democratic Party Candidate with a margin of 41,253 votes. The number of registered voters in the polling units where elections did not hold stood at 49,953. Since this dwarfs the 41,253 votes with which the Audu/Faleke ticket nudges out Idris Wada of PDP, Prof Emmanuel Kucha, the Returning officer for Kogi State, invoking Section M, Paragraph 4 of INEC’S Approved Guidelines and Regulations for the conduct of the 2015 General Elections<sup>10</sup> concluded thus:

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<sup>10</sup> “Where the margin between the two leading candidates is not in excess of the total number of registered voters of the polling units where elections were cancelled or not held, the returning officer will decline to make a return until another poll has taken place and the result incorporated.

“Applying the provisions of the guidelines therefore, the total number of registered voters of the polling units where elections were cancelled or not held is in excess of the margin of win between the two leading candidates. Consequently, this election is therefore, inconclusive and I hereby so declare”<sup>11</sup>

Now, using the INEC premise as a guide here, therefore, sections 181 and 191 did not apply in this case as none of the candidates had been “*duly elected*” as a governor. Since we have premised our position on INEC’s assumption<sup>12</sup> (that the answer to the first question is in the negative), the second issue is: can the All Progressives Congress substitute the Late Abubakar Audu as governorship candidate?

A quick glance at the relevant provisions of the Electoral Act<sup>13</sup> is apposite here,

Section 32 (1) provides;

“A candidate for an election shall be nominated in writing by such number of persons whose names appear on the register of voters in the constituency as the commission may prescribe<sup>14</sup>”

Section 33(1) says

**“A political party shall not be allowed to change or substitute its candidate whose name has been submitted pursuant to section 32 of this Act, except in the case of death or withdrawal by the candidate”<sup>15</sup>**

Section 36(1)<sup>16</sup> provides:

“if after the time for the delivery of nomination paper and before the commencement of the poll, a nominated candidate dies, the

<sup>11</sup> Yusuf Ali: “Kogi, a State with its peculiar mess and the way out” The Nation 26th November, 2015 Vol. 10 No.3409 page 2.

<sup>12</sup> This is not conceded as we shall see in our consideration of issue no 4.

<sup>13</sup> *Electoral Act, 2010; Supra sections 32, 33 and 36 thereof.*

<sup>14</sup> *Electoral Acts, (2010). Supra*

<sup>15</sup> *Electoral Act 2010*, contrast this to section 34 (2) of the repealed 2006 *Electoral Act* under which the substitution of candidates by political parties was allowable only if a political party gives “cogent” and verifiable reason for seeking to substitute a candidate whose name had been submitted to INEC. See also the cases of *Amaechi V INEC* (2008) 5NWLR (Pt 1080) 227; *Ugwu V Ararume* (2007) 12 NWLR (pt 1048)365.

<sup>16</sup> *Electoral Act, (2010). Supra*

Chief National Electoral Commissioner or the Resident Electoral Commissioner shall, being satisfied of the fact of the death, countermand the poll in which the deceased candidate was to participate and the commission shall appoint some other convenient date for the election within (14) fourteen days”

From the above, the combined effect of Sections 32(1) and 33(1) is that a political party cannot substitute the name of anyone duly nominated under section 32(1) with another name or candidate except in the case of either death or withdrawal.

However, the problem in the case of Kogi is that Abubakar Audu died *during* the Nov 21, 2015 election. Section 36 (1) however envisages a situation where the death of a candidate for an election occurs “*after the time for the delivery of nomination paper and before the commencement of the poll*”

Clearly none of the above sections applies. Section 33 that would have applied here is displaced by reason of the fact that Abubakar Audu’s death occurred during the election, whereas section 36(1) of the Electoral Act (which should be read together with sections 32 and 33 of the Act) speaks of *death occurring before the commencement of the poll*.

The question is: how do we resolve the logjam?

In *A-G., Federation V A-G., Lagos State*<sup>17</sup> the Supreme Court held inter alia:

“It is incumbent on the court to ascertain the true legal meaning of words used in a statute by the Legislature”<sup>18</sup>

In other words the only solution here is to navigate our way through the maze of the provisions of **Sections 32, 33 and 36** of the Electoral Act by attempting to discover the intention of the legislature.

It is trite that in interpreting a statute, a court must not give the statute an interpretation that would defeat the intention and purpose of the law makers, and should not read a particular

<sup>17</sup> (2013) 16NWLR (Pt 1380) 249 SC.

<sup>18</sup> see also *Toriola V Williams* (1982) 7 SC 27, *NPA Plc V Lotus Plastics Ltd* (2005) 19 NWLR (Pt 959) 158.

provision of the statute in isolation. Rather, the whole statute should be read to discover the intention of the law makers.<sup>19</sup> Applying the relevant provision of the Electoral Act, taking with the relevant and admissible rules, principles, presumptions and cannons which govern statutory interpretation, it is submitted that the mischief the Electoral Act, 2010 is trying to cure with those provisions is to avoid a situation where the death of a candidate frustrates the election. If this is taken, then as rightly pointed out by Kennedy Emetulu<sup>20</sup> the oversight of not specifically considering what happens when a candidate dies during election should not take away the justice and fairness provided in the law for all situation where a candidate dies before or during the poll, especially where there is no material change in the situation between the time before the poll and during the poll when death occurred.

The above submission, no doubt, is a weighty one. However, as ingenious as this argument is, it has not fully resolved the issue. Rather this position has further thrown up a number of questions. First who is the custodian of the joint ticket of a political party? Is it the party or a candidate of the party? Second, in the light of the death of Abubakar Audu of the All Progressives Congress, whose name could be forwarded to INEC to fill the position for the purpose of completing the process?

This second question becomes relevant in view of the fact that the Electoral Act envisages only a situation where the candidate who must be declared elected must have taken part in both the process of nomination and the election itself.

Dealing with the first poser above, it is pertinent to note that the judicial position is not explicit on this. The case of *AMAECHE V INEC* takes the view that it is the political party and not a

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<sup>19</sup> *Ansaldo V NPFMB* (1991) 2 NWLR (Pt 174) 392; *ACB V Losada (Nig) Ltd* (1995) 7 NWLR (Part 405).

<sup>20</sup> Kennedy Emetulu, *The Nation*, 26<sup>th</sup> Nov., 2015 Vol. 10 No. 3409 page 2. "Deaths, and inconclusive election and the Law" As a matter of fact, Emetulu premised this on the purpose approach to the interpretation of Section 36 (1)

candidate that contests and wins or loses election. Here, the supreme court of Nigeria, interpreting section 221<sup>21</sup> of the Constitution of the Federal Republic of Nigeria observes:

“Section 221 of the 1999 Constitution effectually removes the possibility of independent candidacy in our elections, and places emphasis and responsibility in election on political parties. Without a political party a candidate cannot contest. The primary method of contest for elective offices is therefore between parties. If as provided in section 221, it is only a party that canvasses for votes, it follows that it is a party that wins an election. A good or bad candidate may enhance or diminish the prospect of his party in winning but at the end of the day, it is the party that wins or loses an election. The failure of respondents’ counsel to appreciate the overriding importance of the political party rather than the candidate has made them lose sight of the fact that whereas candidates may change in an election but the parties do not. In mundane or colloquial terms a candidate has won an election in a particular constituency but in reality and in consonance with section 221 of the constitution, it is his party that has won the election.<sup>21(b)</sup>”

If we are to go by this impregnable premise, it means that the votes cast for Abubakar Audu in the 21<sup>st</sup> of Nov. 2015 governorship election in Kogi State belong to the All Progressive Congress and not Abubakar Audu/Faleke as candidates. If this is the case, then it means that those votes survive to the All Progressives Congress upon the death of Abubakar Audu. Since the votes belong to the All Progressives Congress, the “Purposive” approach to the interpretation of section 36(1) of the Electoral Act 2010 implies that All Progressive Congress could replace the Late Abubakar Audu with another candidate for the purpose of completing the election (i.e. the supplementary election).

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<sup>21</sup> Section 221 provides: “No association, other than a political party, shall canvas for votes for any candidate to the funds of any political party or to the election expenses of any candidate at an election.”

<sup>21(b)</sup> see Per Oguntade., J.S.C @ page 317-318 paras F-B of the Judgment.

The position of the Supreme Court in *AMEACHI v INEC*<sup>22</sup> is not only good law but also good sense. The reason for this can be found in section 221<sup>23</sup> of the Constitution itself, the effect of which is to remove the possibility of independent candidacy in our elections, and place emphasis and responsibility in elections on political parties. The implication is that, without a political party, a candidate cannot contest.

Now having taken the view that the late Abubakar Audu could be substituted by the All Progressives Congress, the party under whose platform he contested election, there remains the knotty issue of who the party should pick to assume the position and status of the late Audu Abubakar. The problem here has been further compounded by the provision of section 141 of the Electoral Act<sup>24</sup>

***Section 141 of the Act provides:***

“An election tribunal or court shall not under any circumstances declare any person a winner at an election in which such a person has not fully participated in all the stages of the said election”

It is submitted that the implication of this is that section 141 envisages only a situation where the candidate who must be declared elected must have taken part in all stages of the election, and this means, both the process of nomination and the election itself. If this is agreed, then the question is: what becomes of the fate of Faleke, the late Abubakar Audu’s running mate and Yahaya Bello whose name has been submitted to INEC as a replacement for the Late Abubakar Audu.

It would be realized that Faleke did not participate in the party primaries that produced the Late Abubakar Audu as the All Progressives Congress’ governorship flag-bearer for Kogi State. He was appointed as a running mate by Abubakar Audu after the latter had secured the ticket. Yahaya Bello, on the other hand, though participated in the primaries; could not participate in the

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<sup>22</sup> *Supra*

<sup>23</sup> *Supra*

<sup>24</sup> *Electoral Act (2010).Supra*

21<sup>st</sup> November, 2015 Kogi election as he lost to Abubakar Audu during the primaries. Technically both Faleke and Yahaya Bello are disqualified by the provision of above section.

This must have informed the position of lawyers hired by INEC when they advised the electoral body to countermand the Nov. 21, 2015 elections in Kogi State and conduct a fresh election in all the 21 Local Government Areas of Kogi State. According to the consortium of lawyers concerned:

“We are of the opinion that the best option in the circumstances is to countermand the election to the office of the governor of Kogi State, call for a nomination of another *governorship candidate* of the All progressives Congress and schedule another date for election in all the 21 Local Government Areas”<sup>25</sup> It is submitted with utmost respect to the learned Senior Advocates of Nigeria that the above position cannot stand for three main reasons. First, the 21<sup>st</sup> Nov, 2015 poll in Kogi State could not be countermanded as suggested because a purposive reading of the Electoral Act, 2010 will look at the provisions of section 33 and 36 of the Act and conclude that the mischief the Electoral Act is trying to cure with these provisions is to avoid a situation where the death of a candidate frustrates the election. So, the oversight of the drafters of the Act not specifically considering what happens when a candidate dies during election should not take away the justice and fairness provided in the law for all situations where a candidate dies before or during the poll, especially where there is no material change in the situation between the time before the poll and during the poll when death occurred. So, the death of Audu Abubakar, albeit during the Kogi poll, should not warrant a situation where the entire election results would be countermanded and fresh election ordered.

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<sup>25</sup> Letter of the consortium of lawyers hired by INEC to the chairman of INEC published on page 45 of the 4th December, (2015) edition of the nation newspaper. The affected lawyers are messrs Adegboyega Awomobo (SAN); A.B. Mahmoud (SAN); Onyechi Ikpeazu (SAN); Hassan Liman (SAN) and Ahmed Raji SAN.

Second, INEC Lawyers must have been goaded by the alleged position of the Supreme Court in the case of *CPC V OMBUGAGU*<sup>26</sup> traversed in the letter they wrote to INEC on this matter and in which the learned Senior Advocate of Nigeria quoted the Supreme Court as saying:

“In other words, parties do not contest, win or lose election directly; they do so by the candidates they sponsored and before a person can be returned as elected by a tribunal or court that the person must have fully participated in all stages of the election, starting from nomination to the actual voting”<sup>27</sup>

The learned Senior Advocate of Nigeria maintained in the letter<sup>28</sup> that by this judgment, the case of *AMAECHI V INEC* has been over ruled and that a joint ticket belongs not to the party but to the candidates of the party. It is respectfully submitted that the position of the leaned silks above is wrong. The Supreme Court in *CPC V OMBUGADU* did not touch the ratios of its decision in *AMAECHI V INEC* as the facts are radically different anyway. To underscore the sanctity of its decision in *AMAECHI V INEC*, the Supreme Court observed in the course of its judgment in *CPC V OMBUGADU* thus:

“And as the lower court rightly pointed out, the respondent failed to address the issue but preferred the well-established principle of law that the choice of a Candidate is an unfettered right of a political party over which the court cannot interfere. May be the respondent did not appreciate the mode of making the choice *of its candidate by a political party which is by* conclusive election<sup>29</sup>. And to drive home the point that the Supreme Court never disturbed its decision in *AMAECHI V INEC*, the Court went further to say:

“An army is greater than the numerical strength of its solders. In the same vein, a political party is greater than the numerical

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<sup>26</sup> *Supra*

<sup>27</sup> Extracts from INEC’s lawyers letter to INEC, The Nation 2<sup>nd</sup> Dec., 2015 Vol. 10 No. 3423 page 20.

<sup>28</sup> *Supra*.

<sup>29</sup> (2013) 18 NWLR (Part 1387) 66.

strength of its membership just like a country, for instance, is greater than the totality of its citizens. It follows that the case of political party such as the 1<sup>st</sup> Appellant herein, the interest of an individual member or a group of members within the party, Irrespective of the place of such member or group in the hierarchy of the party must yield place to the interest of the party”<sup>30</sup>

Consequently, the votes garnered by the late Abubakar Audu in the Kogi election belong to the All Progressives Congress. That being so, it would be wrong for INEC to countermand the votes. As a matter of fact, there is no provision in all of the 320 sections of the Constitution of the Federal Republic of Nigeria or the 158 sections of the Electoral Act that empowers INEC to nullify, cancel or void either a concluded or an inconclusive election.<sup>31</sup> The death of a candidate of a political party does not confer any power on INEC to set aside either a concluded or an inconclusive election. INEC could only countermand a poll that is yet to be conducted upon the death of a candidate in that election.<sup>32</sup>

Third, the case of *AMAECHI V INEC*<sup>33</sup> which is commended to the Supreme Court here establishes two core points to take away in this paper. First, that the party contests elections through the candidates they sponsor. Second, that replacement of candidates in an election must be based on the results of the party primaries<sup>34</sup>. Faleke was not part of the party primaries as he was chosen as a running mate to Abubakar Audu after the primaries. Yahaya Bello participated in the primaries. He was the closest rival to Abubakar Audu at the primaries. On the authority of *AMAECHI V INEC*<sup>35</sup> and the assumption that the election was inconclusive (which, with respect, is fallacious) if anyone had to be considered to inherit the votes of the ALL progressives Congress in the 21<sup>st</sup> Nov, 2015 poll in Kogi State outside a fresh primary, it must be Yahaya Bello.

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<sup>30</sup> Ogwuta JSC in *CPC V OMBUGADU (Supra)*.

<sup>31</sup> Inibene Effiong, “Audu’s death and its legal implications,” *Supra*

<sup>32</sup> Section 36 (1) *Electoral Act 2010 Supra*

<sup>33</sup> *Supra*

<sup>34</sup> Kenedy Emetulu, *Supra* @ page 2

<sup>35</sup> *Supra*

After all, there is no room for a candidate who never contested a primary election to emerge a party candidate. Therefore, the position of the consortium of lawyers to INEC that the election be countermanded cannot, with utmost respect, stand.

**Legality or Otherwise of INEC's Decision to Declare the 21<sup>st</sup> November 2015 Kogi Election Inconclusive**

The Nigerian Constitution <sup>36</sup> as well as relevant provisions of the electoral Act<sup>37</sup> prescribes the conditions to be satisfied in order to win a governorship election. For clarity purposes the relevant provisions concerned shall be set out here verbatim.

Section 179 of the constitution provides

- (1) A candidate for an election to the Office of Governor of a State shall be deemed to have been duly elected to such Office where, being the only candidate nominated for the election:
  - (a) He has a majority or YES votes over NO votes cast at the election; and
  - (b) He has not less than one-quarter of the votes cast at the election in each of at least two-thirds of all the local government areas in the State,  
But where the only candidate fails to be elected in accordance with this subsection, then here shall be fresh nominations.
- (2) A candidate for an election to the Office of Governor of a State shall be deemed to have been duly elected where, there being two or more candidates-
  - (a) He has the highest number of votes cast at the election; and
  - (b) He has not less than one-quarter of all the votes cast in each of at least two-thirds of all the local Government areas in the state.
- (3) In default of a candidate duly elected in accordance with subsection (2) of this section there shall be a second election in

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<sup>36</sup> Constitution of the Federal Republic of Nigeria 1999 *Supra*

<sup>37</sup> *Electoral Act, 2010 Supra*

accordance with subsection (4) of this section at which the only candidates shall be-

- (a) The candidate who secured the highest number of votes cast at the election; and
- (b) One among the remaining candidates who secured a majority of votes in the highest number of local government areas in the state, so however that where there are more than one candidate with a majority of votes in the highest number of local government areas, the candidate among them with the next highest total of votes cast at the election shall be the second candidate.

- (4) In default of a candidate duly elected under subsection (2) of this section, the independent national electoral; commission shall within seven days of the result of the election held under that subsection, arrange for an election between the two candidates and such a candidate election shall be deemed to have been duly elected to the office of Governor of a state if –
  - (a) He has a majority of the votes cast at the election; and
  - (b) He has not less than one-quarter of the votes cast at the election in each of at least two-thirds of all the local government areas in the State.
- (5) In default of a candidate duly elected under subsection (4) of this section, the independent National Electoral Commission shall within seven days of the result of the election held under that subsection, arrange for another election between the two candidates and such a candidate shall be deemed to have been duly elected to the office of governor of a state if he has majority of the votes cast at the election. It is submitted here that only section 179 (1) (a) & (b) is applicable here.

Section 27 of the Electoral Act says:

The results of the elections shall be announced by

- (a) The Presiding Officer at the polling unit:-
  - (b) The Ward Collation Officer at the polling unit
  - (c) The Local Government or Area council collation officer at the Local Government Area Council Centre
  - (d) The State Collation Officer at the State Collation Centre
2. The returning officer shall announce the result and declare the winner at
- (a) Ward collation centre in the case of counsellorship election in the Federal Capital Territory
  - (b) Area Council Collation Centre in the Case of Federal Capital Tertiary
  - (c) State Constituency Collation Centre in the case of state House of Assembly Election.
  - (d) Federal Constituency Collation Centre in the Case Of House of Representatives;
  - (e) Senatorial District Collation Centre in the case of Election To Senate;
  - (f) State Collation Centre in the case of election of the Governor of a State

Section 69 of the Electoral Act provides

In an election to the Office of the President or Governor whether or not contested and 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 section 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.

Section 75 of the Electoral Act says:

- (1) A sealed certificate of Return at an election in a prescribed form shall be issued within 7 days to every candidate who has won an election under this Act.  
Provided that where the Court of Appeal or the Supreme Court being the final Appellate Court in any election

petition as the case may be nullifies the certificate of Return of any candidate, the Commission shall within 48 hours after the receipt of the order of such Court, issue the successful candidate with a valid certificate of Return.

- (2) Where the Commissions refuses and, or neglects to issue a certificate of return, a Certified True Copy of the Order of a court of competent Jurisdiction shall, ipso facto, be sufficient for the Purpose of swearing- in a candidate declared as the winner by that Court.

By the clear provisions of sections 179 (2) (a) and (b) read together with section 27, 69 and 75 of the Electoral Act, it is clear that INEC is bound to declare a winner in an election to the office of the governor of a state where a candidate:

- (a) Scored the highest votes cast at the election and
- (b) Scored not less than one quarter of all the votes cast in each of all Local Government Area in the State.

The results of the election of 21<sup>st</sup> November, 2015 in Kogi State showed that Abubakar Audu/Faleke ticket satisfied all the above requirements even though, Votes were cancelled in ninety one polling units in the State on account of irregularities. About 49,000 voters are registered in the 91 polling units where elections were cancelled. Out of the 49,000 registered voters, only about 35,000 of them had Permanent Voters Card (PVC). The margin of victory between the joint ticket shared by Abubakar Audu and Faleke of the All Progressives Congress and the joint ticket shared by Idris Wada and Yomi Awoniyi of the propels Democratic Party was 41,000 votes.

Like earlier pointed in this paper, INEC decided to invoke the provision of Section M Paragraph 4 of INEC's Approved Guidelines & Regulations for the conduct of the 2015 General Elections<sup>38</sup> to declare the supplementary Election. This guideline mandated INEC to declare elections inconclusive and orders a

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<sup>38</sup> *Supra*

supplementary election where the margin between the two leading candidates is not in excess of the total number of registered voter of the polling units where elections were cancelled. The position of INEC here, it is submitted, is null, void and of no effect whatsoever as it is contrary to Section 1(1) and (3) of the Constitution of the Federal Republic of Nigeria <sup>39</sup>**Section 1(1)** provides:

“This constitution is supreme and its provisions shall have binding force on all authorities and persons throughout the Federal Republic of Nigeria”. Section 1(3) says: “If any other law is inconsistent with the provisions of this Constitution, the Constitution shall prevail and that other law shall to the extent of the inconsistency be void”

The Supreme Court, interpreting section 1(1) and (3) above in **A-G., Abia State V A-G., Federation**<sup>40</sup> said: “The 1999 Constitution is the supreme law in the country and it stands above any other enactment, statute or law and its provisions cannot be made subject to any other Act by virtue of section 1(1) and (3) of the 1999 Constitution, any other law that is inconsistent with the Constitution shall to the extent of its inconsistency be void.”

Therefore, it is submitted that the provision of Section M Paragraph 4 of INEC’s Approved Guideline and Regulation for the conduct of the 2015 General Elections is, to the extent that it seeks to compete with an area already covered by section 179(a) and (b) of the Constitution, null, void and of no effect <sup>41</sup>. Consequently, Abubakar Audu/Faleke had won the election at the first ballot. The supplementary election was therefore superfluous and cannot stand in the light of Section 179 (a) and (b) of the Constitution.<sup>42</sup>

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<sup>39</sup> *Constitution of the Federal Republic of Nigeria (1999) Supra*

<sup>40</sup> (2002) 6 NWLR (Pt 763) 264. See also *A-G., Lagos V. A-G., Federation* (2013) 16 NWLR (Pt 1380) 249 SC.

<sup>41</sup> See *A-G., Lagos V A-G., Federation supra*. In fact, the court said: The constitution of Nigeria is not only supreme when another law is inconsistent with it, but also when another law seeks to compete with it in an area already covered by the constitution. See P. 329 Paragraphs F-G of the Judgment.

<sup>42</sup> *Constitution of the Federal Republic of Nigeria (as amended) (1999). Supra*

### **Conclusion**

Even if we are to go by the jaundiced view of INEC it is true that 49,000 is greater than 41,000. But the question here is: how do we determine the number of registered voters? Obviously it is only with the Permanent Voters' Card that we can determine a legal vote. If this is true, then it is submitted that the permanent voters' registration amounts to the authentic source of the number of registered voters. It means therefore that the margin of difference between the two leading candidates in this election (41,000 votes) is in excess of the number of registered voters of the 91 polling units where elections were cancelled. This argument, with respect is valid. After all, elections do not sour in the abstract. They are about people. They are about voters who absorb agendas and decide with their ballots. In this dispensation, it is folly to refer to the old registered voters' list when the Permanent Voters Cards are the ones that matter. The argument can be taken further that if the holders of Permanent Voter's Card are not the authentic registered voters, then they are illegal. But since we have elected The President, Governors, Senator and House of Representatives on Permanent Voters Card, they are the bona fide documents of the vote. That makes the 21<sup>st</sup> November, 2015 election in Kogi State conclusive and the supplementary poll superfluous. It was not only superfluous; it amounted to a big act of mischief, a disservice to the majesty of Democracy and a violation of the principle of natural justice. Abubakar Audu's death was said to have occurred shortly after the announcement of the 21<sup>st</sup> Nov., Kogi election results. It means that he died before taking and subscribing the Oath of Allegiance and Oath of Office,<sup>43</sup> in which case the constitutional vested interest inured to the benefit of the running mate, Abiodun Faleke.

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<sup>43</sup> Section 181 (1) of the *Constitution of the Federal Republic of Nigeria 1999*.  
*Supra*