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SIFAX NIG. LTD v MIGFO NIG. LTD (2018): COULD TIME FREEZE TOO, FOR THE PURPOSE OF TIMELINES FOR HEARING ELECTION PETITIONS?

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ABSTRACT

In 2018, the Supreme Court delivered a landmark decision in Sifax Nig. Ltd v. *Migfo Nig. Ltd,*[1] *which established the principle that time stops running for the purpose of a statute of limitation upon the institution of an action notwithstanding that the action was first instituted in a wrong court. That said, one of the raging issues in our current electoral jurisprudence, especially since the passing of the Electoral Act 2010*[2] *(as amended), is the increasing injustice experienced from the rigid timelines set by the Act in the hearing of election petitions and the appeals arising therefrom. The main concern here is that the current posture portends the enthronement of technicality over justice. The writer thus makes a case for the adoption of the exception created in the Migfo's case in an election petition, albeit with some qualifications.*

1.0. INTRODUCTION

Statutes of Limitation, as rules of procedure, limit the time allowed for a claimant to institute an action in court. The rationale for these rules includes the following:

a. that long dormant claims have more of cruelty than justice in them,
b. that a defendant might have lost the evidence to disprove a stale claim and;
c. that persons with good causes of action should pursue them with reasonable diligence.[3]

The rules are of an antiquated pedigree and bear evidence of the ever competing interests in the growth of our legal system – that is, the desire for quick resolution of disputes and the certainty that no

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[1] (2018) 9 NWLR (Part 1623) 138 SC.
[2] Cap E6, Laws of the Federation of Nigeria 2010.
[3] See *Aremo II* v. *Adekanye* (2004) 13 NWLR (Part 891) (p. 592, paras. F-G).

claim is left unattended.[4] The rules are products of legislative and judicial interventions which classify claims and prescribe periods within which actions are to be taken, lest such claims remain foreclosed.[5]

Perhaps, there is no stricter implementation of these rules than in an election petition where time is of the essence.[6] The strict compliance to time in an election petition is understandable on the ground that it is not desirable that matters of that nature are left to be dragged by the usual clogs in other civil matters and also to avert a situation where election petitions are still being heard well into the full term of the office being contested. It has also been argued that the timelines are not set to punish any litigant, but that interest of justice and the need to hear matters on merits have all been taken into account by the drafters of our Electoral Act.[7]

Notwithstanding these laudable intentions, the operation of statutes of limitation generally and the timelines set in the Electoral Act specifically, has been decried as being adverse to the public policy that seeks to dispose litigation on the merits rather than on procedural grounds and that it promotes the enthronement of the regime of "technicalities" which the courts have constantly frowned upon.[8] Another reason cited for the relative unpopularity of statutes

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[4] M. Heise "Statutes of Limitation", (2001) *International Encyclopedia of Social and Behavioural Sciences* available at: https://www.sciencedirect.com/science/article/pii/B0080430767028266?via%3Dihub (accessed 28 October 2019).

[5] Tyler T. Ochoa and Andrew Witstrich, "The Puzzling Purposes of Statutes of Limitation", 28 *Pacific Law Journal* 1996 – 1997 available at: https://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1107&context=facpubs (accessed 27 October 2019).

[6] *Eneji & anor.* v. *Agaji & ors.* (2011) LPELR-4540(CA), per Ndukwe-Anyanwu, J.C.A. (p. 9, paras. E-G)

[7] *Ikoro* v. *Izunaso* (2009) 4 NWLR (Pt.1130) 45 @ 70.

[8] The Supreme Court, Per Oguntade, J.S.C in *Amaechi* v. *Independent National Electoral Commission & Ors* (2008) LPELR-446(SC) held that: "the sum total of the recent decisions of this court is that the court must move away from the era when adjudicatory power of the court was hindered by a constraining adherence to technicalities. This often results in the loser in a civil case taking home all the laurels while the supposed winner goes home in a worse situation than he approached the court". See also *ODEH* v. *FRN* (2008) LPELR-2205(SC) where the Supreme Court, per Onu, JSC (p. 35, para. B), held that "The

of limitations is the desire to vindicate meritorious claims[9] which is expressed in the maxim *ubi jus ibi remedium*, that is, for every wrong, the law provides a remedy.

In reaction, the courts, and most statutes of limitation of actions, have provided for various exceptions. The common ones include doctrine of continuing injury;[10]or where, in respect to the Public Officers Protection Act, the public officer fails to act in good faith, or acts in abuse of office or maliciously, or with no semblance of legal jurisdiction,[11] amongst others. Recently, the Supreme Court in *Sifax Nig. Ltd* v. *Migfo Nig. Ltd*, created the exception, which is to the effect that time stops to run for the purpose of limitation law once an action has been instituted. The relevant question which the writer seeks to address is whether the principle underlying the decision of the Supreme Court can be extended to election petitions, for instance, where the petitioner successfully appeals the striking out of his petition and the 180 day period for the hearing of a petition lapses, would time be deemed to have frozen all the while the appeal was lodged and heard?

Another scenario is where the 60 day period for the hearing of an appeal arising from an election petition elapsed while a motion to restore the appeal is pending before the Appellate Court, would the appeal become statute barred at the expiration of 60 days notwithstanding the pending application?[12] These questions become relevant as the application of the decision in *Sifax Nig. Ltd* v. *Migfo Nig. Ltd*,[13] although decided under the Limitation Law of Lagos State, is not limited to the Lagos state law only. The underlying principle

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attitude of courts has been that cases should not be decided on the basis of technicalities".

[9] *Supra* n 3.

[10] *Abiodun* v. *Attorney-General, Federation* (2007) 15 NWLR (Pt. 1057) 359.

[11] *Lagos City Council* v. *Ogunbiyi* (1969) 1 All NLR 279; *CBN* v. *Okojie* (2004) 10 NWLR (Pt. 882) 488;

[12] The Supreme Court recently answered this in the affirmative in its 28 October 2019 decision in Appeal No: SC/1110/2019 *Owuru & Anor* v. *Buhari & 2 Ors* (unreported). According to the Apex Court, the Appeal was already caught by Section 285 of the Constitution of the Federal Republic of Nigeria 1999 (as amended).

[13] *Supra* n 1.

seems all-encompassing as it seeks to curb the excesses of strict observance of the statutes of limitation generally.

2.0. ANALYSIS OF *SIFAX NIG. LTD* v *MIGFO NIG. LTD* (2018)

2.1. Brief facts

The 1st Appellant and the Respondents signed a Memorandum of Understanding dated 25 July 2015 to jointly bid the concession and the joint management of Terminal "C", Tin Can Island Port, Apapa, Lagos, put up for concession by the Federal Government through the Bureau of Public Enterprise (BPE) and the Nigerian Ports Authority (NPA). It was also agreed that if the bid was successful, a joint venture company would be incorporated to manage the operation of the port. The bid was submitted and the joint venture partners emerged as the preferred bidders. However, the Respondents later discovered that the 1st, 3rd and 4th Appellants had secretly incorporated the 5th Appellant without their knowledge; and that the Port had been handed over to the 5th Appellant by the BPE and NPA.

After all efforts at resolving the issue failed, the Respondents filed Suit No: FHC/L/CS/664/2006 at the Federal High Court, Lagos where judgment was entered in the Respondents' favour. The said judgment was affirmed by the Court of Appeal on 17 December 2008. However, on further appeal, the Supreme Court, in its judgment delivered on 8 June 2012 and reported as *Ports & Cargo handling Services Co. Ltd* v. *Migfo Nig Ltd*,[14] struck out the Respondents' suit on the ground that the Federal High Court lacked jurisdiction over the suit.

Following the decision of the Supreme Court, the Respondents then commenced a fresh suit at the High Court of Lagos State via a Writ of Summons dated and filed on 18 July 2012 where they alleged fraudulent breach of trust and concealment by the Appellants. In response, the Appellants applied for the suit to be struck out for

[14] (2012) 18 NWLR (Part 1333) 553.

being statute barred, and improperly constituted because of the non-joinder of the NPA and BPE.

The trial court held that the Respondents' claim was not based on simple contract as envisaged by Section 8(1) of the Limitation Law of Lagos State, 2003, and that because of the reliefs sought by the Respondents, Section 13 of the law excluded Section 8(1) of the law from applying to the suit. Further, the trial court relied on a book, "Limitation Periods" by Andrew McGee[15] and also held that time did not run between 2006 when the Respondents' first suit was commenced and 2012 when the Supreme Court decided that suit. The trial court also held that NPA and BPE were not necessary parties to the respondents' suit.

The Appellants appealed to the Court of Appeal, which confirmed the decision of the State High Court. Consequently, the Court of Appeal dismissed the appeal. Still dissatisfied, the Appellants appealed to the Supreme Court.

2.2. Issues for determination

The Appellants, like the Respondents, formulated three issues for the determination. This review will however address only the first issue which is reproduced below, thus:

> Having regard to the clear relevant provision of Section 8(1)(a) of the Limitation Law, Lagos State[16] *vis-a-vis* the respondents' claim as per their statement of claim dated 18/7/2012, whether the lower court was not in grave error in affirming the trial court's finding that the respondents' action was not statute-barred.

2.3. Decision

In affirming the decision of the lower court, the Supreme Court relied on many principles and rightly held that the substance of the claim, that is, allegation of fraud, brought it outside the application of the Limitation Law by virtue of the Section 13 thereof. This review

[15] (8th edn, Sweet & Maxwell, 2018).
[16] Cap L67, Laws of Lagos State of Nigeria, 2003.

is particularly focused on the Apex Court's decision on the recondite issue of whether time stops running for the purpose of limitation law upon the institution of an action. The Supreme Court held on the vexed subject as follows:

> I am persuaded by the works of Professor Andrew McGee (supra) and the foreign cases cited therein by the learned author to hold (sic) that time ceased to run for the purpose of limitation period during the pendency of the respondents' action at the Federal High Court, Court of Appeal and Supreme Court between 2006 and 8 June 2012. Further, to accede to the appellants' contention that time should not stop to run during the pendency of an action in court for the purpose of limitation Law would unwittingly permit the legislature, to take over control of the time-table of litigation indirectly or by subtle means, to wrongly/technically dictate the pace cases are heard in court under the cloak of limitation enactment. This will create the alarming scenario in which pending cases caught by effluxion of time and objection to their determination on the merit on account of lapse of time so upheld would meet undeserved grief or it may create the dangerous repercussion of stampeding the court to operate on full throttle to grapple with time in the course of which justice may be sacrificed on the altar of neck-breaking speed or indecent haste which will drain the adjudication of dispute of the patience, fairness, diligence or balanced/even handed justice, which it is wont to have, which will be a sad day for the administration of justice …[17]

The decision of the Apex Court reflects the policy that matters are to be heard on the merits and is highly commendable. The relevant question here is whether the principle laid down in the *Migfo* can be extended to an election petition. Luckily, the Apex Court commented on this issue thus:

> In this case, the respondents filed the earlier suit expeditiously, and thus the issue is whether the time

[17] *Supra* n 1 per Augie JSC, p.181, paras. A – E.

> spent at the wrong court can be frozen or suspended. The appellants say it cannot be and filed additional authorities on the principle that time runs at every material time in determining statute bar… it is their contention, as argued at the hearing of the appeal, that in each one, this court sent the cases for trial *de novo,* but in between it made the order and the time the case was to start *de novo*, the statute of limitation had crept in, and there was nothing anybody could do and so, for the decision of the lower courts to be sustained, this court must depart from these decisions.[18]

The court continued:

> I have gone through the additional authorities: they are election matters…It is a very common refrain in such cases that "election matters are *sui generis*", which means that they are much unlike ordinary matters, and in an election related matter, it is said that time is of the essence – *Wambai* v. *Donatus & Ors* (2014).[19] In effect, the question of this court departing from its decisions in the above listed cases does not arise in this case that deals squarely with ordinary civil proceeding.[20]

From the foregoing excerpts, it can be gleaned that the Apex Court restricted the application of the principle to general civil matters. However, and in the opinion of the writer, the underlying principles and policies necessitating for the exception are no less applicable in election related disputes as it is in general civil matters. Thus, taking into cognizance the *sui generis* nature of election petitions, justice, which the principle in *Migfo* seeks to meet, should not be sacrificed on the altar of stringent timelines. The writer thus advocates for a principle which strikes a balance – one which respects the peculiarities of election petitions and, at the same time, ensures that justice is served.

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[18] S*upra* n 1 per Augie JSC, p.184, paras. A – D.
[19] 14 NWLR (Pt. 1427) 223 SC.
[20] S*upra* n 1 per Augie JSC, p.181, paras. D – G.

3.0. POLICIES INFORMING THE PRESENT STRICT TIMELINES IN ELECTION PETITIONS

At the inception of the fourth republic, and before 2010, election petitions in Nigeria were not subject to strict timelines for the hearing of either the petitions or appeals resulting therefrom. Admittedly, while Section 141 of the Electoral Act, 2006 states that "an election petition shall be presented within 30 days from the date the result of the election is declared, the Act does not put a ceiling on when such petitions should be concluded by the tribunals and the court."[21] What this means is that like any other civil matter, election petitions could dragged on for indefinite periods. Cases like *Ngige* v. *Obi*,[22] *Rauf Adesoji Aregbesola* & *2 Ors* v. *Olagunsoye Oyinlola* & *Ors*[23] and *Fayemi* v. *Oni*[24] bore testament to the delays often experienced in the course of hearing and determining election petitions. In particular, it took over 34 months for *Ngige* v *Obi* to be heard and concluded from the tribunal to the Court of Appeal.

Also, in both *Rauf Adesoji Aregbesola* & *2 Ors* v. *Olagunsoye Oyinlola* & *Ors* and *Fayemi* v. *Oni,* it took over three years before the matters were concluded at the Court of Appeal – which meant three years into the tenure of the incumbents. The arrangement then is partly responsible for the imbalance in the period for conducting elections across states in the country today.[25] Besides that, where the Court found that the election was marred by irregularities, as it did in *Aregbesola*'s case, it would mean that a candidate who did not have the peoples' mandate had been allowed to enjoy virtually the same privileges any legitimate candidate would. This was a daylight robbery of the peoples' mandate. It also meant that they had been forced to enter into a social contract against their will. It then

[21] Kunle Animashahun, "Regime Character, Electoral Crisis and Prospects of Electoral Reform in Nigeria" 2010 1 *Journal of Nigeria Studies*, p. 1. PDF available at http://www.unh.edu/nigerianstudies/articles/Issue1/1-3Article.pdf (accessed 31 October 2019).
[22] (2006) 14 NWLR (pt. 999), p.1.
[23] (2010) LPELR-CA/I/EPT/GOV/02/2010.
[24] (2010) 48 WRN 30.
[25] U.C. Kalu, E.O.C. Obidimma, A.O. Anazor, "Time Limitation in Election Petitions in Nigeria: The Imperative for Further Constitutional Reforms", (2016) 5 *The International Journal of Innovative Research and Development*, p. 14.

became imperative that something drastic be done to curb the menace.

The clamours[26] for review finally yielded positive result when the Electoral Act 2010 (as amended) was passed and the Constitution of the Federal Republic of Nigeria 1999[27] (as amended) was amended to reflect the timelines for the hearing of petitions and appeals arising therefrom. In 2018, by virtue of the Constitution of the Federal Republic of Nigeria 1999 (Fourth Alteration, No. 21) Act, 2017, timelines were also set for pre-election matters. By inserting new subsections (9)-(14) in Section 285 of the Principal Act, the Act provides that every pre-election matter shall be filed not later than 14 days from the date of the occurrence of the event and judgment in writing is to be given within 180 days; appeal from a decision in such pre-election matter is to be filed within 14 days from the date of delivery of the judgment and same shall be heard and disposed of within 60 days from the date of filing of the appeal.[28]

However, nine years of experimenting with the strict timelines have taught us how much injustice that can work. In these years, petitions and appeals flowing from same have been struck off on crudely shocking technical grounds. This again has led to clamour for a review of the timelines set by the Electoral Act 2010 (as amended) and enforced by the Constitution. An analyst,[29] while exploring the lacuna in the 180 days rule, raised the following questions:

1. What happens where, in the course of trial, a member of the panel or the entire panel, for one reason or the other, cannot proceed with hearing after commencement of trial?

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[26] Following the Late President Yar'adua's emergence at the President in 2007, he inaugurated a committee which in its final report submitted in 12 December 2008, recommended that the election petitions should be resolved within a timeline of 4-6 months at the tribunals and 2 months at the Appeal Court.

[27] Cap. C23, LFN 2010.

[28] LawPavilion, "The Hydra-headed Fourth Alteration", available at: https://lawpavilion.com/blog/the-hydra-headed-fourth-alteration/ (accessed 31 October 2019).

[29] M.A. Oyelade, "A Lacuna in the 180 days rule" *Lawaxis 360degree*, available at: https://lawaxis360degree.com/2019/07/26/a-lacuna-in-the-180-days-rule-mohammed-a-oyelade-esq/ (accessed 31 October 2019).

2. Where the member/panel is replaced and continues from where the last panel stops, will an infringement on the principles of fair hearing not be occasioned, since trial had already commenced?[30]

The questions become relevant in the light of the probable option available in instance (1) or (2) – that is, a reconstitution of the panel or the hearing of the petition *de novo*. However, any of these options will reduce the 180-day period for the hearing of the petition, unfortunately, at no fault of the petitioner. Such is the absurdity and injustice the present strict timelines can work.[31]

4.0. STRIKING A BALANCE: BETWEEN STRICT INTERPRETATION, RIGHT TO FAIR HEARING AND MEETING THE ENDS OF JUSTICE

In the light of the present development and the apparent immutability of the timelines set by the Constitution, the writer argues that our courts should toe the path of striking a balance between adhering to the letters of the law and meeting the ends of justice in a deserving case. The writer argues that as it was done in *Amaechi* v. *INEC & Ors*[32] the Court should, when deserving, adopt the principle enunciated in *Migfo*.

Accordingly, it is the recommendation of the writer that a balance should be struck between the rigid adherence to timelines set under the Electoral Act 2010 (as amended) – which is also reinforced by Section 285 of the Constitution - and the need to serve justice. How exactly is this supposed to work? First, election petitions or the appeals resulting from them which are dismissed or struck out *in limine*, or which are to be tried *de novo* need to be considered within the peculiarities of the circumstances which led to their dismissal, or the need to try them *de novo*, the general conduct of the parties, and the justice of the matter.

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[30] See *Kunle Kalejaiye* v. *LPDC* (2019) LPELR- 47035; APPEAL NO: SC/533/2019 *Adeleke* v. *Oyetola* (unreported) delivered on 5 July 2019.
[31] See *ANPP & Ors* v. *Goni & Ors*. (2012) LPELR-SC.1/2012.
[32] (2008) LPELR-446(SC).

As done by the Learned Justices in *Migfo*, the tribunal is expected to adopt a purposive interpretation of the Electoral Act and the Constitution. The *sui generis* nature of election petition should not be a cover to enthrone sheer injustice. Cases like *ANPP& Ors* v. *Goni & Ors* where the Supreme Court held that: "a petition must be heard and determined within 180 days. Outside the 180 days, the Court of Appeal is not cloaked with statutory power to extend the period meant for the hearing of a petition for any reason either in the interest of justice or in exceptional cases. Once any petition comes before the tribunal outside the 180 days, the court is divested of jurisdiction to hear it" are unfortunate.

On the constitutionality of such a proposal, the writer argues that constitutional provisions are not meant to mete out injustice.[33] Constitutional provisions are to be applied to advance the purpose informing them. The timelines are expected to ensure that election petitions are not unduly stalled, and to avert the experiences of the *Aregbesol*a, and *Ngige*.

Evidence of the purposive interpretation of the statutes is found in *Migfo* where the Learned Justices of the Supreme Court held that apart from the fact that the subject matter – bordering on concealment of facts and fraud – was outside the scope of Section 8 of the Limitation Law of Lagos, it would be absurd to think that, as argued by the Appellant, the limitation period would continue to run even upon institution of the action. According to the Learned Justices, what the Law seeks to protect against are stale claims being made against the defendant. As such, where the claimant has shown seriousness in instituting or bringing his claims within time, it would be wrong to hold that time would continue to run in that circumstance.

It is important to review at least a case decided in third republic, which is capable of shedding further light and lending a judicial support to the instant submission: *Paul Unongo* v. *Aper Aku & Ors.*[34] The facts were that following the governorship elections held all

[33] *Marwa* v. *Nyako* (2012) 6 NWLR (Pt. 1296) 199.
[34] (1983) 2 SCNLR 232.

over the country in 13 July 1983, the Appellant lodged a petition at the High Court, challenging the return of the 1st Respondent as the Governor of Benue State. However, the High Court struck the petition out ostensibly based on technical grounds, some of which include that the joinder of the 1st Respondent, who was then the incumbent Governor, was unconstitutional because he enjoys constitutional immunity and that non-inclusion of the occupier of the address for service of the petitioner was fatal. On appeal, the Court of Appeal upturned the decision of the trial court. However, the Court of Appeal could not grant the consequential relief of "restoring the petition and ordering a resumption of hearing in the trial court" as that would be inconsistent with Sections 129(3) and 140(2) of the 1982 Electoral Act which prescribed a 30-day time frame for the determination of an election petition. Considering the said provision *vis-a-vis* the avowed principles of separation of power and fair hearing, the Supreme Court, on further appeal, held:

> I do not see how a reasonable person will have the impression that a party has had a fair hearing where his petition which has been instituted within the time stipulated by the Electoral Act cannot be concluded because the time available to the court for the petition to be heard will not be sufficient for either or both parties to present their case or will not allow the court at the close of the parties' case sufficient time to deliver its judgment. There can be no doubt that the provisions of Section 129 subsection (3) and 140 subsection (2) of the Electoral Act neither allow a petitioner or respondent reasonable time to have a fair hearing, nor give the court the maximum period of 3 months to deliver its judgment after hearing a petition as envisaged by Sections 33 subsection (1) and 258 subsection (1) of the constitution respectively. Accordingly, the provisions of Section 129 subsection (3) and 140 subsection (2) of the Electoral Act, 1982 which limit the time for disposing of election petition by the courts are in my view ultra

> vires the National Assembly and therefore null and void.[35]

This is important to point out that Sections 129 (3) and 140 (2) of the Electoral Act 1982[36] had no constitutional backing in the 1979 Constitution as we now do with Section 285 of the Constitution and the Supreme Court could easily find that the said sections offend Section 33 of the 1979 Constitution. The same cannot be easily held now when the timelines are constitutional provisions. Even at that, it the writer's opinion that the injustice experienced back then are no less inapplicable now as such the Supreme Court is implored to intervene in deserving instances.

5.0. CONCLUSION AND RECOMMENDATIONS

Election petitions are *sui generis*, and by that it means that they are not in the same class as regular civil causes. It is thus understandable that they are subject of special laws and regulations. Due to the importance of the decisions on election petition bear in overall running of our political system as well as the economy, the strict timelines within which they are to be determined also accord within reason. However, one principle remains sacrosanct – one that cannot be overshadowed by the importance and the urgency characteristic of election petitions – and that is the principle that justice must be served even though heavens may fall. This principle, which is expressed in the maxim *fīat jūstitia ruat cælum,* is foundational and goes to the root of any legal system.

While a further amendment to the Constitution may be timely in addressing the injustice and absurdity of the current timelines for the hearing of election petition and appeals arising therefrom, our courts can also intervene by interpreting the provisions of the Constitution purposively in the meantime by extending the principle

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[35] See *Unongo* v. *Aper Aku* (*supra*) a 342 – 343; see also *Collins Obih* v. *Samuel Mbakwe,* Suit No. HOW/EPI/83 both cited in C.J. Ubanyionwu, "Election Petition Cases and the Right of Fair Trial within a reasonable time in Nigeria" available at: https://www.ajol.info/index.php/naujilj/article/viewFile/136349/125840 (accessed 31 October 2019).

[36] Cap E105, Laws of the Federation of Nigeria, 1990.

such as that in *Migfo* to election petition in deserving cases. Thus, the writer strongly commends that our Courts adopt purposive interpretation as it is also capable of bolstering confidence in our electoral process.

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