
BURDEN OF PROOF IN ELECTION PETITION IN NIGERIA AND THE IMPLICATION OF SECTION 137 OF THE ELECTORAL ACT, 2022 * **

Abstract

Over the years, election petition litigation has become a common feature of Nigeria's electoral process. Every election cycle in Nigeria comes with its attendant disenchantment about the outcome, with aggrieved parties challenging the outcome in courts. However, on getting to courts, litigants face legal barriers in their quest for justice. One of these issues is the problem of proof. The inability of litigants to meet the legal threshold of proof has led to the dismissal of the majority of these election petition suits. Efforts to address this issue led to the enactment of the Electoral Act, 2022. The new Act introduces several novel provisions that address many issues that have been bedevilling Nigeria's electoral process for a long time. One such provision is section 137 of the Electoral Act, 2022. The paper finds that the rationale behind section 137 is to lighten the onerous burden of proof placed on a petitioner by dispensing with oral evidence where the electoral documents manifestly disclose the allegation of non-compliance. The paper argues that the provision of section 137 is not inconsistent with the provisions of the Evidence Act to the extent that it dispenses with oral evidence. The paper notes that while courts are yet to make an authoritative pronouncement on the propriety of section 137 of the Electoral Act, recent decisions of courts have not shown a positive reception of this innovative provision of the law. The paper calls on the Supreme Court to provide clarity by making authoritative pronouncement on the propriety of Section 137 of the Electoral Act and put to rest the raging legal uncertainty around the new law.

Keywords: Election Petition, Section 137, Burden of Proof, Electoral Act, Non-compliance.

1. Introduction

The right to contest the outcome of an election in courts is a common feature of many democracies, including Nigeria. Nigeria operates a constitutional democracy, with a constitution that sanctions periodic elections for those seeking to occupy public offices every four years. Not only that, Nigeria's constitution recognises the rights of aggrieved persons to contest the outcome of an election in courts and tribunals.¹ This affirms the pre-eminent position of courts in electoral matters to review the outcome of an election and give their verdict. In recent times, the trend of cases decided by courts and tribunals in Nigeria on election-related disputes has been greeted with mixed reactions.

However, aggrieved persons have and continue to face legal barriers in their quest for justice in election petition litigation. One such problem is the problem of proof. The settled state of the law is that an aggrieved party – commonly referred to as the petitioner – bears the burden to prove allegations of non-compliance with the electoral laws during an election and their impact on the outcome of the election.² Based on the preponderance of courts' decisions, proving allegations of non-compliance requires tendering of documents, which are usually in their thousands, and calling oral evidence to give eye

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¹ F O Osadolor, 'Constitutional Grounds For Questioning Election in Nigeria: An Overview', *Journal of Politics and Law*, *Journal of Politics and Law*, 2019, 12 (3), 167.

² E Q Okolie, 'Evidential Imperatives in Election Petitions in Nigeria', *World Journal of Innovative Research (WJIR)*, 2019, 6 (4) 31.

witness accounts of those allegations.³ The issue here is that an aggrieved person has a limited time under the law to prove his case, and given the enormous burden placed on petitioners by the law, many litigants have failed to meet this standard of proof resulting in the dismissal of many of these election suits due to lack of proof.

While Nigeria's journey to electoral justice has been a bumpy ride and is still miles ahead of its destination, there has been noticeable progress along the way. The enactment of the Electoral Act, 2022 months before the 2023 general elections has been applauded as a major significant reform towards deepening electoral justice in Nigeria. The new Act introduces several novel provisions that address many issues that have been bedevilling Nigeria's electoral process for a long time. One such provision is section 137 of the Electoral Act, 2022. The rationale behind section 137 is to lighten the onerous burden of proof placed on a petitioner. To achieve this section 137 stipulates that a party alleging non-compliance with the provisions of the Electoral Act during the conduct of an election does not need to call oral evidence to prove the allegation if originals or certified true copies of documents manifestly disclose the non-compliance alleged.

While courts are yet to make an authoritative pronouncement on the application or legality of section 137 of the Electoral Act, 2022, recent decisions of courts have not shown a positive reception of this innovative provision of the law. Therefore, this paper examines the propriety of section 137 of the Electoral Act, 2022 and its potential future impact on election petition-related matters in Nigeria. The paper finds that the rationale behind section 137 of the Act is to lighten the onerous burden of proof placed on a petitioner by dispensing with oral evidence where the electoral documents manifestly disclose the allegation of non-compliance. The paper argues that given the state of the law, the provision of section 137 is not inconsistent with the provisions of the Evidence Act to the extent that it dispenses with oral evidence. The paper notes that while courts and tribunals are yet to make an authoritative pronouncement on the propriety of section 137 of the Electoral Act, 2022, recent decisions of courts have not shown a positive reception of this innovative provision of the law. The paper calls on the Nigeria's Supreme Court to provide clarity on the state of the law by making authoritative pronouncement on the propriety of Section 137 of the Electoral Act, and put to rest the raging legal uncertainty around the new law.

2. Non-Compliance as a Ground for Questioning an Election under the Electoral Act

An election is a process that culminates into voting and declaration of results by the umpire. In Nigeria, there are laws regulating all the stages of an election i.e. before the election, during the election, and after the election. The Electoral Act, 2022, which is the extant law, provides for the procedure for registration of voters before an election,⁴ accreditation of voters on the day of the election,⁵ voting at the polling units,⁶ collation and transmission of results,⁷ declaration of the winner of an election⁸ among others. Where any of the procedural provisions of the Electoral Act concerning the conduct of an election has not been complied with, it constitutes non-compliance and such non-compliance may be a ground for questioning an election in courts or tribunals by an aggrieved party.⁹

³ *Abubakar v. Yar'adua* (2008) 19 NWLR (1120) 1 at 155.

⁴ Section 10 of the Electoral Act, 2022.

⁵ Section 47 of the Electoral Act, 2022.

⁶ Section 50 – 59 of the Electoral Act, 2022.

⁷ Section 60 - 64 of the Electoral Act, 2022.

⁸ Section 65 - 66 of the Electoral Act, 2022.

⁹ Section 134 (b) of the Electoral Act, 2022.

However, not every breach of the Electoral Act can result in the invalidation of an election. In *Ngige v INEC*,¹⁰ the court held that the framers of the Electoral Act recognise the fact that elections in Nigeria cannot always be perfect. Therefore, in addition to proving non-compliance with the provisions of the Electoral Act, the law confers an additional burden on a petitioner to prove that such non-compliance substantially affected the result of the election.¹¹

3. The Historical Burden of Proving Non-Compliance with the Electoral Act

The Nigerian electoral process is tailored along a pyramid structure, and at the bottom of the pyramid are polling units, where accreditation of voters and actual voting take place. At the end of the election in each of the polling units, results are then transferred to the Registration Areas commonly referred to as Wards, then to the Local Government Collation Centres, and finally to the State Collation Centres. However, if it is a presidential election, another layer is added which is the National Collation Centre. Historically, a petitioner questioning an election on the ground of non-compliance with the Electoral Act in several polling units had an onerous burden to prove such an allegation in all the disputed polling units.¹² Emphasising this point of law, the Nigerian Supreme Court in *PDP v. INEC*¹³ held as follows:

“This court has held in UCHA V ELECHI 359 PARAS E-G that: “Where a Petitioner complains of non-compliance with the provisions of the Electoral Act, 2010 (as amended), he has a duty to prove it polling unit polling unit, ward by ward and the standard of proof is on the balance of probabilities and not on minimal proof.”

Also in *Abubakar v Yar'adua*¹⁴, the Supreme Court had this to say:

“A petitioner who contests the legality or lawfulness of votes cast at an election and subsequent return must tender in evidence all the necessary evidence by way of forms and other documents used at the election. He should not stop there. He must call witnesses to testify that the irregularity and unlawfulness substantially affected the result of the election. The documents are among those in which the results of the votes are recorded. The witnesses are those who saw it all on the day of the election not those who picked that evidence from an eyewitness. No, they must be eyewitnesses too”.

The above decisions of the courts represent the state of the law.¹⁵ The consequence is that every allegation of non-compliance must be proved polling unit by polling unit,¹⁶ by tendering the relevant electoral documents evidencing the infractions and calling witnesses who witnessed the infractions at the polling units to testify during the trial.¹⁷ Based on the sheer number of election petition cases that have been dismissed for lack of proof, it is quite clear that this presents a difficult hurdle to scale for aggrieved parties.

In the events leading to the 2023 general election, the body saddled with the conduct of elections in Nigeria, the Independent National Electoral Commission (INEC) established 56,872 additional polling

¹⁰ (2018) 1 NWLR (Pt. 1440) 281 @ 329, PARA: C – F.

¹¹ Section 135(1) of the Electoral Act, 2022.

¹² S M Piate, and I O Effiong, ‘An Appraisal of the Grounds and Burden of Proof in Election Petition in Nigeria’, *Journal of Social Sciences and Humanities* available at <https://journals.aphriapub.com/index.php/SS/> accessed on 20 July, 2023.

¹³ (2014) 17 NWLR (pt. 1437) 525 at 568.

¹⁴ (2008) 19 NWLR (1120) 1 at 155.

¹⁵ *Hashidu v Goje; Haruna v Modibbo* (2004) 16 NWLR (Pt. 900) 487 @ 545.

¹⁶ *Gundiri v Nyako* (2014) 2 NWLR (Pt. 1391) 211 @ 246 – 247.

¹⁷ *Buhari v INEC* (2008) LPELR-814(SC); *Abubakar v Yar'adua* (2008) 19 NWLR (Pt. 1120) @ 173.

units, bringing the total number of polling units in Nigeria to 176,846.¹⁸ Assuming an aggrieved party is contesting the outcome of a presidential election on the grounds of non-compliance, such as over-voting, lack or improper accreditation, or suppression of votes, such a petitioner must prove these allegations by tendering the electoral forms of all the polling units where the non-compliance allegedly took place and call, at least, one witness who served as polling unit agents from each of those polling units. These witnesses would be cross-examined by counsel to the respondents and all this must be done within 180 days.¹⁹ If a petitioner tenders the electoral documents without calling witnesses to ‘speak’ to the documents, the petitioner would be deemed to have dumped the documents on the Tribunal and the Tribunal would be unable to evaluate the documents tendered.²⁰

Under the old dispensation, there simply was not enough time for a petitioner to prove a petition grounded on non-compliance with the Electoral Act when it is alleged that irregularities occurred in a large number of polling units. Due to the sheer number of witnesses that petitioners had to call, and the short period within which the trial of an election petition had to be concluded, petitions grounded on non-compliance with the Electoral Act had a very low success rate.

3.1 Proving Non-Compliance under the New Act

In what appears to be an acknowledgment of the weaknesses in the electoral laws, the Nigerian Parliament responded to the calls for reform with the enactment of the Electoral Act, 2022. Under the new Act, the heavy burden on petitioners to prove non-compliance with the Electoral Act appears to have been lightened by section 137, which provides thus:

*It shall not be necessary for a party who alleges non-compliance with the provisions of this Act for the conduct of elections to call oral evidence if originals or certified true copies manifestly disclose the non-compliance alleged.*²¹

Section 137 of the new Act dispenses with the historical burden of calling witnesses from each polling unit to prove allegations of non-compliance with the provisions of the Electoral Act in the conduct of the election. Section 137 permits a petitioner to rely solely on documentary evidence if such documents manifestly disclose the non-compliance alleged. Again, the Electoral Act in its First Schedule further cemented this novel provision thus:

*Documentary evidence shall be put in and may be read or taken as read by consent, such documentary evidence shall be deemed demonstrated in open court and the parties in the petition shall be entitled to address and urge argument on the content of the document, and the Tribunal or Court shall scrutinize or investigate the content of the documents as part of the process of ascribing probative value to the documents or otherwise.*²²

The above provisions of the law demonstrate the deliberate efforts by the lawmakers to not only provide a legal framework that lightens the problem of proof in election petitions but also place a legal duty on courts and tribunals to accept the new development as part of the electoral law.

4. Is Section 137 of the New Act Inconsistent with the Evidence Act?

¹⁸ <https://www.thecable.ng/just-in-inec-creates-additional-56872-polling-units-total-now-176846> accessed on 17th June, 2023.

¹⁹ Section 285 (6) of the Constitution 1999.

²⁰ *INEC v Abubakar* (2009) 8 NWLR (Pt. 1143) 259 @ 294 Paras E-G.

²¹ Section 137 of the Electoral Act, 2022.

²² See Paragraph 46 (4) of the First Schedule to the Electoral Act, 2022.

The historical burden on petitioners to call witnesses who witnessed the allegations of non-compliance at the polling units to testify during trial is grounded on the principle established by section 37 of the Evidence Act; a document made otherwise by a witness in a proceeding amounts to hearsay. In other words, a document is said to amount to ‘documentary hearsay’ if the purpose of tendering the document is to prove the truth of its contents and the person who made and/or signed the document is not the one tendering it in Court.²³

What section 137 of the new Act purports to achieve is to eliminate the requirement of calling the maker of a document to ‘speak’ to it. By dispensing with the requirement of calling oral evidence to support documentary evidence already tendered before the tribunal, section 137 purports to make ‘documentary hearsay’ evidence admissible. Under section 38 of the Evidence Act, hearsay evidence is, generally, inadmissible. This principle has been reiterated in several cases and is a trite principle of law.²⁴ However, section 38 provides an exception to the inadmissibility of hearsay evidence as follows:

Hearsay evidence is not admissible except as provided in this Part or by or under any other provision of this or any other Act.

In other words, hearsay evidence may be admissible if it is made so by a provision of the Evidence Act or by the provision of “any other Act”, and section 137 of the Electoral Act, 2022 is a provision of “any other Act” that has made documentary hearsay admissible. Furthermore, under section 3 of the Evidence Act, the admissibility of evidence is not governed exclusively by the provisions of the Evidence Act. Therefore, the evidence made inadmissible by the Evidence Act may be admissible under another law.²⁵ It is quite clear that the provisions of sections 3 and 38 of the Evidence Act have broadened the scope of admissible evidence to include evidence that is inadmissible under the Evidence Act but has been made admissible by other legislations. Hence, by merely making ‘documentary hearsay’ evidence admissible, section 137 of the new Act does not become inconsistent with the Evidence Act.

4.1 The Rule against Dumping: a Clog in the Wheel?

Closely related to the principle of ‘documentary hearsay’ is the rule against dumping of documents. Documents are deemed to have been dumped on a Court or Tribunal when the party relying on such documents fails to proffer oral evidence to link the documents to the part of his case in respect of which the documents have been tendered.²⁶

The foundation of the rule is twofold: it is an infraction of a party’s right to a fair hearing for the court to do in the recess of its chambers what a party has not himself done in the advancement of his case in the open court;²⁷ and the court cannot be saddled with the partisan responsibility of linking documents to specific aspects of a party’s case when that party has not himself done so.

Due to the strict time limit within which a petitioner must prove his or her case, and the huge number of documents that are required to prove allegations of non-compliance with the provisions of the Electoral Act, it is common practice for petitioners to tender certified true copies of the documents intended to be relied on from the bar.²⁸ Nonetheless, in order not to break the rule against dumping of documents, historically, it has been a requirement for petitioners to call eye-witnesses who were at the

²³ *Tasiu (A.T.S) v Sammani* (2019) LPELR-49189 (CA) Pp 11 – 12 Paras F – C.

²⁴ *Ladoka v Ajimobi & Ors.* (2016) LPELR-40658 (SC) Pp 75 Paras B – D.

²⁵ *A-G Federation v Anuebunwa* (2022) 14 NWLR (Pt. 1850) 211 at 294 – 295, H – A.

²⁶ *Doukplolagha v Alamiyesigha* (1999) 6 NWLR (Pt. 607) 502 at 513.

²⁷ *Terab v Lawan* (1992) 3 NWLR (Pt. 231) 569 @ 590.

²⁸ Paragraph 46(4) of the First Schedule to the Electoral Act, 2022.

polling units where the infractions were alleged to have taken place to ‘speak’ to the documents and link them to the relevant aspect of the petitioner’s case.²⁹

The rule against dumping of documents is founded on the constitutional right of all persons to a fair hearing, as enshrined under section 36 of the Constitution, 1999. The objective of the rule is to avoid a situation where the court ends up assisting a party in the presentation of his case against the other party or puts itself in a situation where it can reasonably be perceived to be doing so. The rule ensures the equality of arms of the parties in the case before the court. It is a rule of fair hearing that seems to provide an exception to another rule of fair hearing that a court must consider all the evidence adduced by both sides in the case. The rule postulates that to avoid helping a party present its case, the Court should not consider documents tendered by a party when the party has not explained the relationship between those documents and the case via the oral evidence of a witness.

As the rule against dumping of documents is grounded on the constitutional right to a fair hearing, it is submitted that any law that is inconsistent with the rule against dumping documents on a Court – to the extent that such a law places the responsibility of linking documents to specific aspects of a party’s case on a Court or Tribunal – is inconsistent with section 36(1) of the Constitution and is void to the extent of such inconsistency.³⁰

By dispensing with oral evidence, section 137 conflicts with the rule against dumping of documents because Tribunals would have to examine documents tendered by parties in chambers to determine the allegations that such documents establish. However, in practice, documents tendered by petitioners are linked to the relevant aspects of their case via the oral evidence of an expert witness who has examined the documents and extrapolated the petitioners’ allegations from the documents. Even at this, the Supreme Court has recently held that this practice amounted to documentary hearsay, as the evidence of the said ‘expert’ witness is limited to his observations from the documents, and not an eyes witness account of a person who was present at the polling unit, especially when the allegations are about over-voting and lack or improper accreditation at the polling units.³¹

5. Emerging Attitude of Courts towards Section 137

As we have noted above, courts are yet to make an authoritative pronouncement on the application or validity of section 137 of the Electoral Act, 2022. However, recent courts’ rulings on this issue have not shown a positive reception by courts. And even though it is still early in the day to form an opinion, a pattern is already emerging from the courts and tribunals. The first case that came before the court immediately after the enactment of the Electoral Act, 2022 was the case of *Oyetola & Anor. v. INEC & Ors*³². In this case, the courts had the opportunity to engage with, and pronounce on, section 137 of the Act. The brief facts are: The Nigerian electoral body, INEC, conducted a governorship election in Osun State sometime in July, 2022 in which both the appellants and the 2nd respondent participated. After the election, INEC declared the 2nd respondent as the winner having scored the majority of lawful votes cast during the election.

Dissatisfied with the outcome of the election and INEC’s declaration and return of the 2nd respondent as the winner of the election, the appellants filed a petition challenging the result of the election on the

²⁹ *Andrew v INEC* (2018) 19 NWLR (Pt. 1625) 507 @ 557 – 559.

³⁰ Section 1(3) of the Constitution 1999.

³¹ *Oyetola v INEC* (2023) 11 NWLR (Pt. 1894) 125 at 177.

³² *Oyetola v INEC* (2023) 11 NWLR (Pt. 1894) 125.

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ground, inter alia, that the election of the 2nd respondent was invalid because of non-compliance with the provisions of the Electoral Act, 2022 during the conduct of the election. Specifically, the appellants alleged that the election was vitiated by over-voting and lack or improper accreditation in 744 polling units, and therefore urged the Tribunal to among other reliefs declare that the election was marred with substantial non-compliance with the Electoral Act, and as such the 2nd respondent was not duly elected by the majority of the lawful votes cast during the election.

At the tribunal level, a split majority decision ruled in favour of the appellants, holding that the appellants proved that the election in 744 polling units was vitiated by over-voting which substantially affected the results of the election. Therefore, the tribunal set aside the declaration of the 2nd respondent and returned the appellants as the winners of the election. In what appeared to be a veil reference to section 137 of the Act, the Tribunal dismissed the respondents' argument that the appellants failed to call oral evidence in each of the disputed polling units, holding that there was no need to call presiding officers or polling agents when the documents tendered by the appellants disclosed allegations of non-compliance.³³

Dissatisfied with these findings, the respondents appealed to the Court of Appeal. Specifically, the respondents urged the Court of Appeal to strike down the provisions of section 137 of the Electoral Act, 2022 on the ground that it encroached on the exclusive powers of courts to evaluate evidence and attach probative value to same. The Court of Appeal tacitly declined this invitation, but in what appeared to be a daring move, the court held thus:

*It is the exclusive preserve of the Judge to decide whether or not there is a need to call oral evidence to demonstrate the contents of documentary exhibits because it is the Judge that is saddled with the responsibility of evaluation of evidence especially where the documentary evidence is not a single document but several, and are intended to cover various aspects of a party's case. Such a function cannot be circumscribed by a statutory provision like Section 137 of the Electoral Act, 2022 and paragraph 46 (6) of the First Schedule to the Electoral Act, 2022 ... Whether or not the evidence is satisfactory is for the Court to decide not the legislators, who in their desire probably to cut down on the size of witnesses needed to prove an election petition decided to insert Section 137 of the Electoral Act, 2022. They may have succeeded in cutting down on the size of witnesses but can the same be said of having justice done in such a petition? I think not!*³⁴

It is clear from the above passage that even though the Court of Appeal refused to strike down Section 137 of the Electoral Act, 2022, the court perceived such law as an attempt to abridge its judicial powers to evaluate evidence, and this explains the negative reception by the court. Furthermore, the court reinstated the historical but settled position of law that a party must call oral evidence from the disputed polling units to speak to, and demonstrate, the documentary evidence before the court; otherwise, it would amount to *dumping*, and 'a party cannot dump a bundle of documentary evidence on a Court or Tribunal and expect the Court to conduct an independent enquiry to provide the link in the recess of its chambers. This would no doubt amount to a breach of the principle of fair hearing.'³⁵

³³ *Oyetola v INEC* (2023) Suit No. EPT/OS/GOV/01/2022, at page 72. Delivered on 27th January, 2023.

³⁴ *Peoples Democratic Party (PDP) v Oyetola & Ors*, Appeal No: CA/AK/EPT/GOV/02/2023, page 94 – 95. Delivered on 24th March, 2023.

³⁵ *Peoples Democratic Party (PDP) v Oyetola & Ors* (n) at 96.

It is important to note that a further appeal³⁶ to the Supreme Court by the appellants did not yield any positive outcome, as the apex court affirmed the findings of the Court of Appeal. However, the Supreme Court tacitly avoided being drawn into the contentious issue of the validity or otherwise of Section 137 of the Electoral Act, 2022. The Supreme Court did not mention or even engage with Section 137 of the Act throughout its judgment, indicating perhaps that the apex court does not attach any significant value to it. Indeed, in what appeared to be a restatement of the settled position of the law, the Supreme Court held:

“The entire testimony of PW1 in evidence in chief was, as admitted by him, based on his examination and analysis of the said Forms EC8A and BVR. He had no personal knowledge of the facts of the case. He was not present in the election in any of the polling units. He was not the polling unit agent of the 2nd appellant ... He admitted that he did not examine the BVAS and the Register of Voters for the 744 polling units before he wrote his Expert Analysis Report. Yet he analysed the content of the record of the BVAS he never saw and drew conclusions that there was no accreditation or improper accreditation of voters and overvoting in the disputed 744 polling units without directly examining the record of the BVAS or a report of the direct examination of the said record. His testimony in the examination in chief is hearsay evidence and is inadmissible evidence. See Ss. 37 and 38 of the Evidence Act 2011.”³⁷

5.1 Reconciling the Contradiction

In *Oyetola’s* appeal, the Supreme Court ruled that ‘section 137 of the Electoral Act will only be applicable where the non-compliance alleged by a petitioner is manifest from the originals or certified true copies of documents relied on.’³⁸ The apex court further held that ‘neither exhibit BVR nor any other documents relied on by the appellants remotely disclosed, non-compliance with the provisions of the Electoral Act ... In the circumstance, they still had a duty to call witnesses who witnessed the alleged acts of non-compliance to testify.’³⁹ This finding could be interpreted to imply that the court had examined the contents of those documents before it came to the conclusion that the said documents tendered did not ‘remotely’ disclose any non-compliance thereon. It could also be argued – and this is also plausible – that the apex court did not in fact look at or examine those documents. However, the finding of the court might unwittingly give the impression that the court had examined those documents.

The question to be asked is: does the court have the power to look at those documents when it had already held that the petitioners failed to call oral evidence to demonstrate those documents? Going by the principle of law on *dumping*, especially in election petition matter, no court or tribunal has the power to examine documents which have not been demonstrated by oral evidence in open court. This is based on the rule of fair hearing as doing otherwise will amount to clustered justice. By holding that the documents did not manifestly disclose non-compliance the court implied that it had examined those documents and found no manifest non-compliance thereon.

It may be argued that this may create a contradiction in the sense that in an attempt to abide by the provisions of section 137 of the Electoral Act, a court might be breaching the long standing rule of law on *dumping*. Perhaps a more plausible approach would have been for the court to hold that section 137

³⁶ *Oyetola v INEC* (2023) 11 NWLR (Pt. 1894) 125.

³⁷ *Oyetola v INEC*, *ibid* at page 177.

³⁸ *Oyetola v. INEC*, *ibid*, 93, paras. D-H.

³⁹ *Ibid*.

of the Act does not take away its powers to evaluate evidence before it and attach probative value thereto. The justification for this is that by using the word ‘manifestly’, section 137 of the Act still allows a court wide discretion to determine whether an alleged non-compliance is apparent on the documents before it.

It should be noted that going by the literal meaning of manifestly,⁴⁰ there is hardly a way a court or tribunal will come to the conclusion that a document does not disclose allegation of non-compliance without at the very least looking at the document which, as we have stated above, is contrary to the rule against dumping, especially where oral evidence has not been adduced. This situation further amplifies the call for the apex court to authoritatively make a pronouncement on the propriety of section 137 of the Electoral Act, 2022 in order to avoid unnecessary contradiction and also achieve clarity and uniformity.

5.2 Potential Future Impact

While the provision of Section 137 of the Electoral Act, 2022 is no doubt a positive development in Nigeria’s electoral jurisprudence, the hostile and unfavourable reception by courts will impact future and pending election petition cases. Indeed, the ongoing cases before courts and tribunals founded on the provisions of Section 137 now run the full risk of being dismissed by courts. It may be argued that Section 137 is still good law and therefore binding on courts. However, the failure of courts to attach any value to it in deciding cases means that the provision of Section 137 is simply a lame dog, at least for now.

5.3 A Call for Clarity

The authors suggest that the Supreme Court should take advantage of the ongoing election petition cases to make an authoritative and definite pronouncement on the validity or otherwise of the provision of Section 137 of the Electoral Act, 2022. Any further attempt by the apex court to look the other way on this issue will deepen uncertainty regarding this contentious provision of the law.

6. Conclusion

The state of the law on the burden of proof continues to remain an albatross hanging on the neck of petitioners in election petition litigation. Many cases have been dismissed because of this problem of proof. This work has examined the application and validity of Section 137 of the Electoral Act, 2022, and argued that even though the new law sought to lighten the degree of burden of proof on a petitioner, it has not been positively received by courts. It has been pointed out that the courts are yet to strike down Section 137 of the Electoral Act, 2022. This situation will create uncertainty and will also have a significant impact on future and pending cases. The authors called on the Supreme Court to make an authoritative pronouncement on the validity of Section 137 of the Electoral Act and put to rest this raging legal uncertainty around the new law.

⁴⁰ Cambridge Dictionary defines it as ‘Very obviously’. Available at <https://dictionary.cambridge.org/dictionary/english/manifestly> accessed on 17th August, 2023.