

**SUPREME COURT OF NIGERIA**

5TH OCTOBER, 2001. SC. 32/2001

**CORAM:- M. L. UWAISS CJN, A. G. KARIBI-WHYTE, S. M. A.  
BELGORE, I. L. KUTIGI, A. I. IGUH, U. A. KALGO, E. O.  
AYOOLA.**

BOLA TINUBU ..... DEFENDANT/APPELLANT  
AND  
I.M.B. SECURITIES PLC ..... PLAINTIFF/RESPONDENT

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***APPEALS** - Issue - Not raised in a matter - Governor's right to sue for private wrong - Not arising for decision in this case - Will not be pronounced upon (H3)*

***APPEALS** - Issues - Suo motu raising of issues - Did not arise in this case - Court of Appeal merely pronounced its own view - On the issue fully argued by the parties (H1)*

***APPEALS** - Order - Immunity - Governors' Immunity s. 308(1)(a) 1999 Constitution - Where court of Appeal rightly disallowed this appeal - Proper order is to strike it out - And not sine die adjournment (H5)*

***CONSTITUTIONAL LAW** - Immunity from legal action - Conferred on Governors - By s. 308(1)(a) of the 1999 Constitution - Applies to discontinue pending suits against appellant (H2)*

***CONSTITUTIONAL LAW** - Immunity from legal action - Waiver - S. 308(1)(a) 1999 Constitution - Neither the incumbent officers nor courts can waive it (H4)*

**FACTS**

This is an appeal against the interlocutory decision of the Court of Appeal Lagos Division. In its judgment, the Court of Appeal had adjourned Sine die the appeal of the 3rd defendant pending before it until he

ceased to hold his office as the Governor of Lagos State.

By a writ of summons, instituted on the 26th. day of November, 1999 at the High Court of Lagos State, plaintiff claimed the sum of N2.5 million being the outstanding balance owed in respect of an overdraft facility he granted to the 1st defendant. Against the 2nd and the 3rd defendants, plaintiff claimed the same amount together with interest as a result of the breach of their obligation under the contract of guarantee entered into by the parties and arising out of the overdraft facility. The 3rd defendant, by a motion on notice applied to the trial court for an order to set aside the service on the ground that they were served on him after the expiration of the 12 months life span of the writ of summons. He also prayed the court to strike out and dismiss the said writ and statement of claims, or alternatively, the striking out of the plaintiff's action.

Plaintiff on the other hand, swiftly applied by a motion on notice for the renewal of its writ of summons by a period of six months. The trial judge granted the plaintiff's prayer. The 3rd defendant's application was having been overtaken by events, stuck out. Dissatisfied with the Decision, the 3rd defendant with the leave of Court, lodged an appeal to the Court of Appeal. While the appeal was pending, he was sworn in as the Governor of Lagos State. Counsel for the plaintiff/respondent applied for adjournment sine die until the 3rd defendant ceased to hold office as Governor of Lagos State. Counsel for the 3rd defendant/appellant opposed the application. The court of appeal adjourned the case sine die until the 3rd defendant vacates office of the Governor. Aggrieved by the decision, the 3rd defendant has now appealed to the Supreme Court.

**ISSUE FOR DETERMINATION**

*Whether having regard to the provisions of section 308(1)(a) of the Constitution of the Federal Republic of Nigeria, 1999, the Court of Appeal was right in declining to entertain the appeal of the appellant pending before it until the appellant vacated his office as the Governor of Lagos State.*

**HELD** (Unanimously dismissing the appeal per lead judgment of **IGUH JSC**)

***Suo motu raising of Issues***

1. There can be no question, therefore, that the court below based its decision on any issue which it raised suo motu without giving the parties an opportunity to be heard.

The issue that arose for determination concerned the interpretation and / or construction of section 308(1) (a) of the 1999 Constitution. It is a clear question of law in respect of which the court below was entitled to pronounce its own view upon so long as such a view is related to the legal issue placed before it for resolution. But as I have already indicated, the issue of whether or not the present suit ought to be continued while the appellant, the party sued, remained in office as the Governor of Lagos State was fully argued by both parties to the parties of the action and no question of the court not inviting the parties for further addresses did arise in the case. (p. 3101 G)

***Governors - Immunity from legal action***

2. The appellant remains the Governor of Lagos State till this day. The claim against him did not arise by virtue of any act executed by him in his official capacity as Governor of Lagos State nor was he, as the said Governor, sued in the action as a nominal party. It is thus clear that applying the mandatory provisions of section 308(1) (a) of the 1999 constitution, no civil proceedings may be instituted or, if already instituted, as in the present action, shall be continued against him while he holds the office of Governor of Lagos State. See Colonel Olu Rotimi and others v. Macgregor (1974) 11 S.C. 123 or (1974) 9 N.S.C.C. 542. (p. 3103 A)

***Issue - Governor's right***

3. Whether or not the appellant, while he remains he Governor of Lagos State is entitled to institute an action against any person for an alleged private wrong done to him has not arisen for decision in his appeal. Accordingly, I will decline from making any pronouncement on the issue. (p. 3103 E)

***Waiver - Immunity from legal action***

4. It suffices to say that this is a suit in which the appellant is sued as a defendant. The suit therefore falls directly within the ambit of the provisions of section 308(1) (a) of the 1999 constitution. Nor do I accept that the appellant may waive the immunity granted to him under section 308(1)(a) of the 1999 constitution. In my view, the immunity granted to the incumbent of the relevant office under section 308(1)(a) of the 1999 constitution prescribes an absolute prohibition on the courts from entertaining any proceedings, civil or criminal, in respect of any claim or relief against a person to whom that section of the Constitution applies during the period he holds such office. No question of waiver of the relevant immunity by the incumbent of the offices concerned or, indeed, by the courts may therefore arise. (p. 3103 F)

***Appeals - Immunity***

5. It seems to me that the court below was entirely right when it held that to allow the appellant who at all material times was the Governor of Lagos State to press on with his interlocutory appeal in the suit instituted against him by the respondent would amount to nothing short of continuing the said suit. This course of action is what section 308(1) (a) of the 1999 Constitution expressly prohibits. I think that pursuant to the reasoning of this court in the Colonel Olu Rotimi case, the court below ought to have struck out the appeal pending before it as the same under the mandatory provisions of section 308(1) (a) of the relevant Constitution was not liable to be continued during the period in office of the appellant as the Governor of Lagos State. (p. 3106 H)

**NOTABLE POINTS OF INTEREST**

**IGUJSC**

***1. General principles of interpretation of the constitution***

H In this regard, it will be necessary to recall the general principle of law governing the interpretation of our Constitution. This is that such interpretation as would serve the interest of the Constitution and best carry out its object and purpose should be preferred. Its relevant provisions

must be read together and not disjointedly and where the words of any section are clear and unambiguous, they must be given their ordinary meaning unless this would lead to absurdity or be in conflict with other provisions of the Constitution. See Chief D. O. Ifezue v. Livinus Mbadugha & Anor [1984] 5 S.C. 79 at 101. (p. 3098 H)

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### **KARIBI-WHYTE JSC**

#### *2. The effect adjournment Sine die*

The Latin expression sine die means without a date being fixed, indefinitely. A matter is said to be adjourned sine die when it is adjourned without a day being fixed for its resumption. In Goddard v. Smith 6 Mod. 261, Holt C.J. explained the effect of a nolle prosequi by analogy with sine die. He said,

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*"The entering of a nolle prosequi was only putting the defendant sine die, and so far from discharging him from the offence, that it did not discharge any further prosecution upon that very indictment, but that notwithstanding new process might be made out upon it."*

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The effect of an adjournment sine die in the analogy is not to continue but to keep the pending civil action in abeyance indefinitely. In the instant case the provisions of Section 308(1)(a) which confers the immunity from civil suits and criminal proceedings applies during the period of office of the Governor. (p. 3121 G)

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### **BELGORE JSC**

#### *3. Essence of Immunity in section 308 of the Constitution*

The reason for the protection of the person given the immunity in S.308 of the Constitution is to afford him quiet tenure free from harassment on personal matters rather than matters of office. It is to afford the person complete devotion to the high office which pertains to the welfare and stability of governance. (p. 3124 G)

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### **KALGO JSC**

#### *4. Pith and substance of section 308 of the Constitution*

It is my view that the pith and substance of Section 308 (1) of the Con-

stitution is to restrict all legal proceedings in which the Governor, in this case, is involved while he is in office and that is why the proviso to the section says that no account shall be taken of his period of office for the purpose of any period of limitation in the case. (p. 3128 H)

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**REPRESENTATION**

B.R. Fashola Esq. for Appellant/Defendant.

Respondent/Plaintiff unrepresented.

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**CASES REFERRED TO**

Commissioner for Works, Benue State and Another V Devon Development Consultants Ltd. and Another [1988] 3. N.W.L.R. (pt. 83) 407

Management Enterprises Ltd. & Another V. Jonathan Otusanya [1987] 2

D N.W.L.R. (pt. 55), 179

Okafor v. Anaife [1972] 3 ECSLR 261

Ojo v. Babalola [1991] 4 NWLR (pt. 185) 267 at 280

Colonel Olu Rotimi and others v. Macgregor [1974] II S.C, 123 or [1974]

E 9 NSCC 542

Shitta-Bey v. Federal Public Service Commission [1981] 1 S.C. 40

Ugo v. Obiekwe (1989) 1 N.W.L.R. (pt. 99) 566 at 578.

Odiase v. Agbo (1972) 1 All N.L.R. (pt. 1) 170

F Ajao v. Ashiru (1973) 11 S.C. 23

Atanda v. Lakanmi (1974) 3 S.C. 109

Oniah v. Onyia [1989] 1 N.W.L.R. (pt. 99) 514 at 529

**STATUTES & RULE REFERRED TO**

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Supreme Court Rules, order 2 rule II (1)

Constitution of the Federal Republic Nigeria, 1999, S. 308(1)(a), 308(3)

Constitution of Federal republic of Nigeria, 1963, S. 161(1)(c)

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**LEAD JUDGMENT BY IGUH JSC**

This is an appeal against the interlocutory decision of the Court of Appeal, Lagos Division, delivered on the 29th of January, 2001. In its judgment, the Court of Appeal had adjourned sine die this appeal of the

3rd defendant pending before it until he ceased to hold his office as the Governor of Lagos State.

I think it is desirable for a better appreciation of the issue that arises for determination in this appeal to set out briefly the history of the proceeding leading thereto.

By a writ summons instituted on the 26th day of November, 1992 at the High Court of Lagos State, the plaintiff claimed against the 1st defendant the sum of N2.5 million being the outstanding balance owed in respect of an overdraft facility granted by the plaintiff to the said 1st defendant. The plaintiff also claimed, as against the 2nd and 3rd defendant, the same amount together with interest upon the breach of their obligations under the contract of guarantee entered into by the parties and arising out of the overdraft facility.

The 3rd defendant, by a motion on notice dated the 27th January, 1994 applied to the trial court for an order to set aside the service of the writ of summons and the statement of claim in the suit on the ground that they were purportedly served on him on the 20th January, 1994 after the expiration of the 12 months life span of the writ of summons. The 3rd defendant, in the same application, also prayed for the striking out of the writ of summons and the statement of claim and for the dismissal, or alternatively, the striking out of the plaintiff's action.

Following this development, the plaintiff, in a swift reaction. Applied by motion on notice for the renewal of its writ of summons by a further period of six months.

Both applications of the 3rd defendant and the plaintiff were consolidated and heard together by the learned trial judge who in his ruling of the 17th day of June, 1994 granted the plaintiff's prayer. The life span of the plaintiff's writ of summons was accordingly extended by a further period of six months and the service of the processes in issue on the 3rd defendant on the 20th January, 1994 was deemed good and the proper service. The application of the 3rd defendant for the dismissal or alternatively the striking out of the plaintiff's action was, having been overtaken by events, struck out.

Dissatisfied with this decision of the trial court, the 3rd defen-

dant, with the necessary leave of court, lodged an appeal against the same to the Court of Appeal, Lagos Division on the 12th June, 1995. Whilst this appeal was pending and the parities had duly filed and exchanged their respective briefs of argument in respect thereof, the 3rd  
B defendant/appellant successfully contested election to the office of the Governor of Lagos State. He was accordingly sworn in as Governor of Lagos State of Nigeria on 29th May, 1999.

On the 1st day of December, 1999 when the appeal was listed  
C for hearing before the Court of Appeal, learned counsel for the plaintiff/respondent applied for the adjournment of the appeal sine die until such time as the 3rd defendant/appellant would cease to hold office as Governor of Lagos State. It was his contention that the civil proceedings in issue, in so far as it concerned the claim against 3rd defendant/appellant,  
D could no longer be continued, having regard to the provisions of section 308(1)(a) of the Constitution of the Federal republic of Nigerian, 1999. He argued that any hearing of the interlocutory appeal was tantamount to the continuation of hearing of the main suit against the 3rd defendant/  
E appellant. He submitted that this course of action is prohibited by the express provisions of Section 308 (1)(a) of the 1999 Constitution.

Learned counsel for the 3rd defendant/appellant indicated his opposition to the adjournment of the appeal sine die as applied for by the  
F plaintiff. He contended that the appeal could be heard, notwithstanding the position of his client as the Governor of Lagos State. He submitted that in-as-much-as Section 308(1)(a) of the 1999 Constitution prohibits the institution or continuation of civil or criminal proceedings against a person to whom the section applies, while he is in office, it would be  
G wrong to suggest that such a person to whom the section applies cannot himself institute or continue civil proceedings to enforce his private and personal right. He stressed that Section 308(1)(a) of the Constitution nowhere expressly stated that a State Governor cannot, while in office,  
H sue to enforce his personal right. He pointed out that the appeal in issue was filed at the instance of the 3rd defendant/appellant and that it is not covered by the immunity prescribed under Section 308(1)(a) of the relevant Constitution.



The Court of Appeal at this stage ordered that written briefs of argument be filed by the parties on the issue in controversy between them.

One issue was formulated by the parties as arising for the determination of the Court of Appeal. This, as formulated by the plaintiff./respondent, B and endorsed by the Court of Appeal, is set out as follows:-

*‘Whether having regard to the entire provisions of Section 308 of the 1999 Constitution, the entire proceedings in this suit should be adjourned sine die’.*

The 3rd defendant, on the other hand, preferred to frame the sole issue C for resolution by the Court of Appeal thus:-

*“Whether or not the appellant (meaning the 3rd defendant) can continue the appeal in the light of section 308(1) of the 1999 Constitution.”*

It is plain that the substance of the issue as framed by the parties D and accepted by the court is to all intents and purposes similar and revolve on whether or not the provisions of Section 308(1) of the 1999 Constitution permit the 3rd defendant/appellant to continue with the prosecution of his appeal in the suit instituted against him. E

After hearing the arguments of the parties on the issue, the Court of Appeal in a unanimous decision delivered on the 29th January, 2001 granted the plaintiff’s application and adjourned the appeal of the 3rd defendant/appellant sine die until he “vacated the office of Governor of F Lagos State”. In the main, it held that the prohibition imposed under Section 308(1)(a) of the 1999 Constitution against the institution or the continuance of any civil or criminal proceedings against a person to whom Section 308(3) of the same Constitution applies during his period of office is a restraining order which binds the parties in the class of cases G therein specified and that the continuation of an interlocutory appeal in respect of such a suit is an indirect way of continuing the case before the trial court.

Aggrieved by this decision of the Court of Appeal, the 3rd defendant/appellant has now appealed to this court. I shall hereinafter refer H to the 3rd defendant and the plaintiff in this judgment as the appellant and the respondent respectively.

Five grounds of appeal were filed by the appellant against the decision of the Court of Appeal. It is unnecessary to reproduce them in this judgment. It suffices to state that the appellant pursuant to the Rules of this court filed his written brief of argument which was duly served on the respondent. No brief of argument was filed on behalf of the respondent in answer to the appellant's brief of argument.

The two issues distilled from the appellant's grounds of appeal set out on his behalf for the determination of this appeal are as follows:-

“(a) Is the decision of the Court of Appeal not a nullity, having been based on grounds not relied on by the respondent without hearing the parties on those grounds?”

(b) Were the learned Justices of the Court of Appeal correct in their decision to adjourn the appeal of the appellant indefinitely?

It seems to me that in the light of the grounds of appeal filed and the substance of the submissions made in the appellant's brief of argument the single issue for determination in this appeal is:-

*“Whether having regard to the provisions of section 308(1)(a) of the Constitution of the Federal Republic of Nigeria, 1999, the Court of Appeal was right in declining to entertain the appeal of the appellant pending before it until the appellant vacated his office as the Governor of Lagos State”.*

At the oral hearing of the appeal before us, learned counsel for the appellant, B.R. Fashola Esq., was in court. The respondent, although served with the hearing notice in respect of the appeal, was absent and unrepresented. As already mentioned, no respondent's brief of argument in reply to the appellant's brief was before the court or filed. Accordingly the court proceeded with the hearing of the appeal ex parte pursuant to the provisions of Order 2 Rule 11 (1) of the Rules of this court.

Learned counsel for the appellant in arguing the appeal adopted the appellant's brief of argument and proffered oral arguments in further elucidation of the submissions therein made. He contended that the decision of the Court of Appeal complained of is a nullity in that same was based on matters neither argued nor related or connected with the grounds upon which the application for the adjournment of the appeal was con-

tested. He complained that the grounds on which the case was adjourned sine die by the court below were issues on which the parties were not heard. He claimed that they are issues which were raised suo motu by the court below and in respect of which the parties were not heard. Citing the decision in Kuti v. Balogun [1978] All N.L.R (Reprint) 6 at 12 and Ndigwe v. Nwude [1999] 11 N.W.L.R. (pt. 262) 314 at 345, learned counsel submitted that failure by the court below to hear the parties on the grounds upon which it based its decision after rejecting the grounds upon which the application for adjournment was made rendered its decision a nullity. He argued that this amounted to making a case for a party which such a party failed to make contrary to our adversarial system of justice. He contended that the only question before the court below was the interpretation of section 308(1) of the Constitution of the Federal Republic of Nigeria, 1999 with a view to determining whether it prohibited the appellant from the prosecution of his appeal. He submitted that the said provisions of section 308 of the Constitution are clear and ought to be construed literally. He further submitted that if section 308 of the Constitution is construed literally, it would be clear that nothing therein prohibited the appellant from prosecuting his appeal. He pointed out that the court below, in fact, held that there was nothing under the provisions of section 308(1) of the 1999 Constitution which stops a State Governor from initiating actions while in office against other persons for reliefs in his personal capacity. Learned counsel submitted that having rejected all the grounds upon which the respondent's application for an adjournment of the appellant's appeal sine die were predicated, the only course left for the Court of Appeal was to have refused the application and proceed with the hearing of the appeal. This it failed to do. On the contrary, it proceeded to adjourn the appeal sine die as prayed for by the respondent on grounds which it raised suo motu without giving the parties, particularly the appellant who was adversely affected thereby, the opportunity to be heard thereupon. He submitted, relying on the decision of this court in Kuti v. Mrs. S. Balogun (supra) that this is a grave error of law on the part of the Court of Appeal. He urged the court to allow this appeal and direct the court below to proceed expeditiously with the determination of

the appellant's appeal before it.

It is clear to me that a resolution of the sole issue for determination in this appeal revolves entirely on a close examination and interpretation of the provisions of section 308 of the Constitution of the Federal Republic of Nigeria, 1999. That section of the Constitution provides thus:-

“308(1) Notwithstanding anything to the contrary in this Constitution, but subject to subsection (2) of the this section:-

(a) no civil or criminal proceedings shall be instituted or continued against a person to whom this section applies during his period of office;

(b) a person to whom this section applies shall not be arrested or imprisoned during that period either in pursuance of the process of any court or otherwise;

(c) no process of any court requiring or compelling the appearance of a person to whom this section applies, shall be applied for or issued: Provided that in ascertaining whether any period of limitation has expired for the purposes of any proceedings against a person to whom this section applies, no account shall be taken of his period of office.

(2) The provisions of subsection (1) of this section shall not apply to civil proceedings against a person to whom this section applies in his official capacity or to civil or criminal proceedings in which such a person is only a nominal party.

(3) This section applies to a person holding the office of President or Vice-President, Governor or Deputy Governor; and the reference in this section to “period of office” is a reference to the period during which the person holding such office is required to perform the functions of the office”.

The real question posed for determination is whether any part of the provisions of section 308 of the 1999 Constitution may be construed as prohibiting the appellant from continuing the prosecution of his interlocutory appeal in the civil proceedings instituted against him by the plaintiff/respondent before the trial court.

In this regard, it will be necessary to recall the general principle of

law governing the interpretation of our Constitution. This is that such interpretation as would serve the interest of the Constitution and best carry out its object and purpose should be preferred. Its relevant provisions must be read together and not disjointedly and where the words of any section are clear and unambiguous, they must be given their ordinary meaning unless this would lead to absurdity or be in conflict with other provisions of the Constitution. See Chief D. O. Ifezue v. Livinus Mbadugha & Anor [1984] 5 S.C. 79 at 101.

No dispute has arisen between the parties with regard to subsection 2 and 3 of the section 308 of the Constitution under consideration. Both subsections are clear enough. Section 308(2) exempts the application of the proceedings against a person to whom section 308 applies in his official capacity or to civil or criminal proceedings in which such a person is only a nominal party. Section 308 confines the application of the provisions of Section 308 of the constitution to persons holding the office of President, Vice President, Governor or Deputy Governor and the "period of office" therein referred to is defined as referring to the period during which the person holding such office is required to perform the functions of the office. The application of the provisions of these two subsections of section 308 of the Constitution are not in issue in this appeal.

Before I turn to section 308(1)(a) of the Constitution around which dispute has risen between the parties in this appeal to dispose of the submission of learned counsel to the appellant that the decision of the Court of Appeal now challenged is a nullity by virtue of the fact that it was based on grounds not relied upon by the respondent but that they were raised suo motu by that court without affording the parties an opportunity to be heard thereupon. In this regard, it cannot be disputed that Judgement in any court proceedings must be confined to the issues therein raised by the parties and it is not competent for the court suo motu to make a case for either of the parties and proceed to give judgement on the case so formulated contrary to the case of the parties before it. See Commissioner for Works, Benue State and Another v. Devcon Development consultants Ltd. and Another [1988] 3 N.W.L.R. (pt. 83) 407],

Adeneji and others [1988] 3 ALL N.L.R. (pt.1) 278 and A.C.B. Ltd.. v. Attorney-General, Northern Nigeria [1969] B,N,K,R, 231. See too Shitta-Bey v. Federal Public Service Commission [1981] 1 S.C. 40 and Chief Ebba v. Chief Ogodo and Another [1984] 4 S.C. 84 at 112. A court of law, particularly an appellate court, may only hear and decide on issues raised on the grounds of appeal filed before it and an issue not covered by any grounds of appeal is incompetent and will be struck out. See Management Enterprises Ltd. & Another v. Jonathan Otusanya [1987] 2 N.W.L.R. (pt. 55) 179, Oniah v. Onyia [1989] 1 N.W.L.R. (pt. 99) 514 at 529, Adelaja v. Fanoiki and Another [1990] 2 N.W.L.R. (pt. 131) 137 at 148.

When a court raises a point suo motu, the parties must be given an opportunity to be heard on the point, particularly the party that may suffer prejudice as a result of the point raised suo motu. See Odiase v. Agbo (1972) 1 All N.L.R. (pt. 1) 170, Ajao v. Ashiru (1973) 11 S.C. 23, Atanda v. Lakanmi (1974) 3 S.c. 109, Adegoke v. Adibi (1992) 5 N.W.L.R. (pt 242) 410.

Accordingly on no account should a court raise a point suo motu, no matter how clear it may appear to be, and proceed to resolve it one way or the other without giving the parties an opportunity to be heard. See Okafor v. Anaife (1972) 3 E.C.S.L.R. 261, Ugo v. Obiekwe (1989) 1 N.W.L.R. (pt. 99) 566 at 578. If it does so, it will be in breach of the parties' right to fair hearing. See Ojo v. Babalola (1991) 4 N.W.L.R (pt. 185) 267 at 280.

The above are fundamental but well settled principles of law. With great respect to learned counsel for the appellant, however, I find it difficult to appreciate how those principles of law are relevant to the issues in controversy between the parties in the present appeal. This is because the only issue before the court of Appeal was whether, having regard to the entire provisions of section 308(1) (a) of the 1999 Constitution, the proceedings in respect of the civil action instituted by the respondent against the appellant, the Governor of Lagos State, in the latter's personal and private capacity for some reliefs could properly be continued during the period of office of the appellant as the Governor of

Lagos State. It is clear from the record of proceedings that this issues was fully argued before that court which in its ruling, concluded thus:-

“The suit at the Lower Court was filed by the plaintiff/respondent against the appellant and two others. Under section 308(1)(a) of the 1999 Constitution, that suit ought not to be further continued. It seems to me B however that continuation of a suit can be undertaken by all parties to the suit. When it is said that a suit may not be continued, all the parties to the suit must be held to the restraining order. Just as a plaintiff may not continue the suit, so much a defendant not do so once it is determined C that a suit is of the character which must not be further continued under section 308(1) (a) of the 1991 Constitution. To allow the appellant, who is now the executive Governor of Lagos State to further press on with his appeal is another way of continuing the suit before the Lower Court. This is more so when it is borne in mind that the appeal being pursued by D the appellant is upon an interlocutory matter with the result that if the appeal succeeds, the appellant may still have to go back to the High Court. Setting aside the service of a writ does not mean that the writ has ceased to exist. Allowing this appeal to move forward therefore is an indirect E way of continuing the suit at the High Court.

It seems to me that while I recognise that a Governor may sue for redress of personal wrongs to him, the right to sue for personal wrongs cannot be equated with a right to appeal in the course of a suit F which being contrary to section 308(1) (a) of the 1999 constitution cannot be continued.

I accordingly determine that this appeal ought to be adjourned sine die to be relisted only when the appellant vacates the office of Governor of Lagos State. I make no order as to costs” G

**There can be no question, therefore, that the court below based its decision on any issue which it raised suo motu without giving the parties an opportunity to be heard.**

**The issue that arose for determination concerned the interpretation and / or construction of section 308(1) (a) of the 1999 Constitution. It is a clear question of law in respect of which the court below was entitled to pronounce its own view upon so long as H**

such a view is related to the legal issue placed before it for resolution. But as I have already indicated, the issue of whether or not the present suit ought to be continued while the appellant, the party sued, remained in office as the Governor of Lagos State was fully argued by both parties to the parties of the action and no question of the court not inviting the parties for further addresses did arise in the case.

Turning now to section 308(1)(a) of the 1999 constitution, it is beyond dispute that the present suit instituted by the plaintiff/ respondent was one to enforce the repayment of an overdraft facility granted to the 1st defendant. It is also clear that the action was instituted against the appellant in his personal capacity and did not arise by virtue of his position as the Governor of Lagos State. It is admitted by both sides that the appellant, as at the time the decision of the Court of Appeal in issue was handed down, was and still remains the Governor of Lagos State. Section 308(1) (a) of the 1999 Constitution of the Federal Republic of Nigeria, 1999 provides in the clearest possible language that notwithstanding anything to the contrary in that Constitution, no civil or criminal proceedings shall be instituted or, if already instituted, continued against any person to whom that section of the Constitution applies during his period of office. As already indicated, section 308(3) provides that the said section 308 of the 1999 Constitution applies to a person holding the office of President or Vice-President, Governor or Deputy governor. Section 308 (2) however lays down that the provisions of the said subsection (1) of section 308 shall not apply to civil proceedings instituted against any of the relevant public officers in his official capacity or to civil or criminal proceeding in which such a person is only a nominal party. Although the present action was instituted against the appellant as a private citizen, he had cause, as already mentioned, to file an appeal to the court below against an interlocutory decision of the trial court in the suit . It was during the pendency of this appeal that the appellant was sworn in as the Governor of Lagos State and it was thereafter the question whether or not the suit could lawfully be continued against him as the Governor of Lagos State arose before the Court of Appeal. It is the ruling of the said



Court of Appeal that is now the subject of this appeal.

**The appellant remains the Governor of Lagos State till this day. The claim against him did not arise by virtue of any act executed by him in his official capacity as Governor of Lagos State nor was he, as the said Governor, sued in the action as a nominal party. It is thus clear that applying the mandatory provisions of section 308(1) (a) of the 1999 constitution, no civil proceedings may be instituted or, if already instituted, as in the present action, shall be continued against him while he holds the office of Governor of Lagos State. See Colonel Olu Rotimi and others v. Macgregor (1974) 11 S..C. 123 or (1974) 9 N.S.C.C. 542.**

Learned counsel for the appellant did argued that it was open to the appellant to waive the immunity granted to him as a State Governor under section 308(1)(a) of the 1999 constitution. He submitted that this is because no provision of that section of Constitution prohibited a State Governor or the holder of any of the offices mentioned under section 308(3) from instituting an action in his private capacity against any person during his tenure of office.

**Whether or not the appellant, while he remains the Governor of Lagos State is entitled to institute an action against any person for an alleged private wrong done to him has not arisen for decision in his appeal. Accordingly, I will decline from making any pronouncement on the issue. It suffices to say that this is a suit in which the appellant is sued as a defendant. The suit therefore falls directly within the ambit of the provisions of section 308(1) (a) of the 1999 constitution. Nor do I accept that the appellant may waive the immunity granted to him under section 308(1)(a) of the 1999 constitution. In my view, the immunity granted to the incumbent of the relevant office under section 308(1)(a) of the 1999 constitution prescribes an absolute prohibition on the courts from entertaining any proceedings, civil or criminal, in respect of any claim or relief against a person to whom that section of the Constitution applies during the period he holds such office. No question of waiver of the relevant immunity by the incumbent of the offices concerned**

**or, indeed, by the courts may therefore arise.** In my view the Court of Appeal was absolutely right to have declined to entertain the appellant's appeal pending before it as to do other wise would amount to continuing the plaintiff/respondent's suit against the defendant / appellant, a suit which  
B under section 308(1) (a) of the 1999 constitution shall not be continued against the appellant while he remained the Governor of Lagos State.

The final point which needs be considered is the order which the Court of Appeal, having held that the suit against the appellant could not  
C be continued,ought to have made. That court, having so held, proceeded to adjourn the appeal before it sine die with liberty to relist the same when the appellant vacated the office of Governor of Lagos State.

In the case of Colonel Olu Rotimi and others v. Macgregor, (supra) the plaintiff/respondent had instituted a civil action against the de-  
D fendants claiming inter alia a declaration of title to land in Ikeja. During the pendency of this action, the 1st defendant assumed office as the Military Governor of the Western State of Nigeria. In the course of his final address before the trial Lagos High Court, learned counsel for the  
E defendants, for the first time and without pleading the same, raised the question of the constitutional position of the 1st defendant who during the pendency of the suit had been appointed the Military Governor of Western State, a position he held up to the time the appeal against the  
F judgment of the trial court was determined by this court. This constitutional issue is exactly the same question that has arisen for decision in the present appeal. Learned counsel submitted in that case that by virtue of section 161(1) (c) of the Constitution of the Federation of Nigeria, 1963, the suit against 1st defendant could given any judgment against the 1st  
G defendant during his tenure of office as the Military Governor of the western state and that the immunity from prosecution conferred on the 1st defendant / appellant could not be waived.

The above submissions were carefully considered by the learned  
H trial judge who came to the conclusion that the provisions of section161(1)(c) of the 1963 Constitution being the supreme law of the land could neither be waived by the court. Accordingly, he declined to make any orders against the 1st defendant. On appeal, it was held by this

court that as the appellant assumed the post of the Military Governor of Western State during the pendency of the suit at the trial court, the provisions of section 161(1) (c) of the 1963 Constitution applied and that the action against him should have been struck out. This court further held that by virtue of the provision of section 161(1)(c) of the 1963 Constitution, the suit against the 1st defendant/appellant should not have been continued from the moment he assumed the post of the Military Governor of Western State, that the immunity prescribed by section 161(1)(c) could not be waived and that the court was bound to give effect to it. B

It is pertinent to point out that the said provisions of section 308(1) (a) of the Constitution of the Federal Republic of Nigeria, 1999 in issue in the present case are clearly in pari materia with those of section 161(1) (c) of the 1963 Constitution. Accordingly, I entertain no doubt:- C

(i) That the appellant, being a party against whom the present action was instituted, the constitutional mandatory provisions of section 308(1)(a) of the Constitution of the Federal Republic of Nigeria, 1999 applied to and are unquestionably binding on him from the moment he was sworn in as Governor of Lagos State, during the pendency of the suit at the trial court. D

(ii) That by virtue of the express provisions of section 308(1) (a) of the 1999 constitution, the suit was rendered incapable of being continued against the appellant during the period of office as the Governor of Lagos State F

(iii) That this constitutional immunity conferred on the appellant under section 308(1) (a) of the 1999 constitution during his period of office as the Governor of Lagos State, being an absolute prohibition, admits of no waiver by the appellant or by any incumbent of the relevant offices stipulated under section 308(3) of the 1999 constitution. G

(iv) That the court of appeal, indeed all courts, are bound in appropriate cases to give effect to the said immunity prescribed under section 308(1) (a) of the 1999 Constitution during the period of office of the holder of any of the posts prescribed under section 308(3) of the 1999 constitution and it would not matter whether or not such immunity is pleaded or relied on by the parties to any proceedings. H

(v) That the Court of Appeal was right by declining to entertain the interlocutory appeal filed by the appellant before it against the ruling of the trial court in respect of the civil suit instituted against the said appellant as to do otherwise would amount to continuing the suit before the trial court during the period in office of the appellant as the Governor of Lagos State.

The court below having upheld the respondent's contention that the hearing of proceedings in respect of the suit instituted against the appellant could not be continued adjourned the appeal before it sine die "to be relisted only when the appellant vacates the office of Governor of Lagos State". The final question is whether this consequential order of the Court of Appeal is right.

As I have already observed, an issue entirely similar to the one in question in the present appeal arose for the consideration of this court in the case of Colonel Olu Rotimi and others v. Macgregor (supra). In that case, this court was of the view that the 1st defendant / appellant became the military Governor of the Western State during the pendency of the appeal, the provisions of section 161(1)(c) of the Constitution of the Federation of Nigeria, 1963 applied and that the case of the plaintiff as against the appellant should have been struck out by the trial court. In that case, this court per Coker, J.S.C stated:

*"We think that the learned trial Judge was right in concluding that section 161(1) (c) of the Nigerian Constitution confers an immunity on the 1st defendant and that the action should not have been continued against him since he became the Governor of Western State during the pendency of the present proceedings. No question of waiver, arises, for the section prescribes an absolute prohibition to "any court" during the period of office of the holder of any of the posts described in section 161(2) of the Constitution to entertain any claim for relief against such person.*

*In the circumstance, the learned trial judge should have struck out the case of the plaintiff as against the 1st defendant which, in effect, is what he did, although he made no formal order in that respect."*

In the light of the above statement of the law, **it seems to me that**

the court below was entirely right when it held that to allow the appellant who at all material times was the Governor of Lagos State to press on with his interlocutory appeal in the suit instituted against him by the respondent would amount to nothing short of continuing the said suit. This course of action is what section 308(1) (a) of the 1999 Constitution expressly prohibits. I think that pursuant to the reasoning of this court in the Colonel Olu Rotimi case, the court below ought to have struck out the appeal pending before it as the same under the mandatory provisions of section 308(1) (a) of the relevant Constitution was not liable to be continued during the period in office of the appellant as the Governor of Lagos State. B C

In the final result and for all the reasons that have given above, the issue for determination in this appeal must be resolved against the appellant. This appeal accordingly fails and it is hereby dismissed but the consequential order of the Court of Appeal adjourning the appeal pending before it sine die is hereby set aside. In substitution thereof is an order striking out the interlocutory appeal before the Court of Appeal with liberty to relist the same after the appellant has vacated his office as the governor of Lagos State. There will be no order as to costs. D E

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UWAIS CJN

I have had the opportunity of reading in draft the judgment read by my learned brother Iguh, JSC. I entirely agree with the judgment. F

The provisions of section 308 subsections (1) (a) and (3) of the Constitution of the Federal Republic of Nigeria are very clear and are not therefore ambiguous. The proceedings against the appellant cannot continue for as long as he remains in office as Governor of Lagos State - See Rotimi & Ors. v. Macgregor, (1974) 11 S.C. 123. G

It is for this and the fuller reasons contained in the judgment of my learned brother Iguh, JSC that I too will dismiss this appeal. I adopt the consequential order made by him. H

**KARIBI-WHYTE JSC**

I have had the privilege of reading the judgment of my learned brother Iguh, JSC in this appeal. I agree entirely with his reasoning and conclusion striking out the appeal. I have chosen to make my own contribution to the lead judgment because of the constitutional importance of the issue involved, and the fact that in some respect the issue is primaef impressionis.

The facts of the case are quite simple and short. The issue can be better appreciated and understood if the whole scenario is taken sequentially together.

The action was initiated by the Plaintiff against the three defendants including Appellant. There was the subsequent application by the Defendants seeking to set aside the service of the writ of summons and statement of claim, and to strike out the writ of summons and statement of claim. They also asked for an order dismissing the action/striking out same. On the application of the Plaintiff in the High Court the life of the writ of summons was renewed for another six months. The 3rd Defendant filed a notice of appeal against the decision of the High Court renewing the life of the writ of summons, etc.

On the 25th October, 1999, Suit No.LD/3729/92 of the Lagos State High Court from which this appeal arose was adjourned sine die on the application of the Plaintiffs

*"When it is said that a suit may not be continued, all the parties to the suit must be held to the restraining order. Just as a Plaintiff may not continue a suit, so must a defendant do so once it is determined that a suit is of the character which must not be further continued under section 308(1)(a) of the 1999 Constitution. To allow the appellant, who is now the Executive Governor of Lagos State to further press on with his Appeal is another way of continuing the suit before the lower Court. This is more so when it is borne in mind that the appeal being pursued by the appellant is upon an interlocutory matter with the result that if the appeal succeeds, the appellant may still have to go back to the High Court. Setting aside the service of writ does not mean that writ has ceased to exist. Allowing this appeal to move forward is an indirect way*

*of continuing the suit at the High Court."*

On the above reasons, the Court went on to hold as follows-

*"I accordingly determine that this appeal ought to be adjourned sine die to be relisted only when the Appellant vacates the office of Governor of Lagos State."*

Appellant has appealed against this decision in those aspects where it was held that,

(a) The appeal is to be adjourned sine die pending Appellant vacating the office of Governor.

(b) Allowing the appeal to continue in the Court of Appeal is an indirect way of continuing the suit before the lower court.

(c) The determination that the right to sue cannot be equated with a right to appeal.

Appellant has filed five grounds of appeal on which he relies. Two issues for determination have formulated as rising from grounds of Appeal. Respondent has not filed his brief of argument and is not represented in this Court. I herein below set out verbatim, the grounds of appeal, and the issues for determination formulated by Appellant.

#### GROUND OF APPEAL

1. The decision of the Court of Appeal is a nullity.

#### PARTICULARS

(a) The decision of the Court was reached on grounds not canvassed but either of the parties to wit:- that the continuation of the appeal is an indirect way of continuing the suit in the trial Court and that the right to sue is not the same as the right to appeal;

(b) The parties were not heard on these grounds raised by the Court suo motu before the Court made its decision.

(c) The grounds upon which the objection of the Respondent was predicated and contested had been resolved against the Respondent.

2. The learned Justices of the Court of Appeal erred in law when they Adjourned the pending appeal of the Appeal sine die.

#### Particulars

(a) The provisions of the section 308(1)(a) of the 1999 Constitution do not stop the Appellant from prosecuting his appeal;

(b) The prosecution of the Appeal before the Court of Appeal albeit a rehearing are distinct proceedings from the proceedings in the trial Court;

(c) The view of the Court of Appeal as to what might happen in the trial court after hearing the appeal were based on speculation;

3. The learned Justices of the Court of Appeal misdirected themselves in law; when they held inter alia, per Oguntade, J.C.A.. that:-

*"Having made the above point; I must however, still adjourn this appeal sine die for another reason."*

Particulars

(a) the particulars under ground 1 are repeated;

(b) the particulars under ground 2 are repeated;

(c) the Court of Appeal had correctly held that there is nothing in section 308(1)(a) of the 1999 Constitution stopping a Governor from suing;

(d) there was no lawful reason under section 308 or any other law to justify the adjournment sine die;

(e) the adjournment sine die proceeded on a wrong principle of law in that it infringes the right of the Appellant to a hearing within a reasonable time as provided under Section 36(1) of the 1999 Constitution.

4. The learned Justices of the Court of Appeal erred in law when they held that right to sue cannot be equated with the right to Appeal.

Particulars

(a) an appeal is a complaint initiated by a Notice of Appeal which is a different and distinct process from the writ summons against the decision of the lower Court;

(b) section 308(1)(a) of the 1999 Constitution protects the holder of the office who enjoys the privilege from being a respondent or from answering any complaint in Judicial proceedings, it does not stop them from making complaints in judicial proceedings;

(c) an appellant in the Court of Appeal is a complainant who is similar to the Plaintiff in a trial Court;



(d) the distinction between a "suit" and an "Appeal" is not necessary to give effect to the substance of section 308(1)(a) of the 1999 Constitution;

5. The learned justices of the Court of Appeal erred in law when They held that:-

*"It seems to me however that the continuation of a suit can be undertaken by all parties to the suit. When it is said that suit may not be continued, all the parties to the suit must be held to the restraining Order. Just as a plaintiff may not continue a suit, so must a defendant not do so, once it is determined that a suit is of the character which must not further continued under Section 308(1)(a) of the 1999 Constitution."*

#### Particulars

(a) the order to stay proceedings which can be made where a privileged person is defendant/respondent under Section 308(1)(a) of the 1999 Constitution is different from an Order for stay given in the exercise of the discretionary powers of the Court;

(b) the proviso to Section 309(1) of the 1999 Constitution protects the right of action of the person against whom the privilege is invoked from the defence of limitation, but makes no such protection for the holder of the privilege who fail to sue for personal wrongs done to him whilst in office.

(c) the privilege does not create a disability."

#### "ISSUES FOR DETERMINATION.

Having regard to the Notice and grounds of Appeal, the Appellant Respectfully submits that the following are the issues arising for Determination in this appeal:-

(a) Is the decision of the Court of Appeal not a nullity, having been based on grounds not relied on by the Respondent without hearing the parties on those grounds?

(b) Were the learned Justices of the Court of Appeal Correct in their decision to adjourn the Appeal of the Appellant indefinitely." Issue 1 is on the contention that the decision of the Court of Appeal was a nullity. Appellant's Counsel arguing the issue submitted that the reasons for seeking adjournment in the Court below were that,

(i) Appellant, as Governor could not continue the appeal because the subject matter related to his private affairs as distinguished from his functions as Governor of a State.

B (ii) Allowing the appeal to continue was likely to result in a situation the court would make an order or issue process against the Governor in violation of his immunity under Section 308 of the Constitution.

C (iii) There is no express constitutional provision permitting the Appellant as Governor to sue in his private or personal capacity.

(iv) Appellant enjoys immunity from suit in his personal capacity. It will be inequitable to allow him to maintain an action in his personal capacity.

D Appellant has submitted that in view of the liberal construction which should be given the provisions of section 308 of the Constitution 1999 none of the reasons relied upon by Respondent was valid. It was contended that section 308(1) does not create an absolute bar against the issuance of the Court process against the Governor. Only processes that  
E require or compel his appearance are barred. Accordingly, in the instant appeal, hearing notices seeking to notify the addressee of hearing dates and which do not compel appearance are not prohibited. Again, orders either dismissing or allowing the appeal, or orders as to costs which do not require appearance of the Governor or purport to arrest or imprison  
F him are not prohibited. It was submitted relying on Onabanjo v. Concord Press (1981) 2 NCLR.399 that there was nothing inequitable in allowing the Governor to maintain a private action merely because he enjoys immunity from such actions. It was argued it is necessary for a Governor  
G to have such right of private action, because a valid order of court, commanding his arrest in violation of section 308 would require an application to set it aside; and cannot be ignored. Finally to refuse Appellant to continue his appeal tantamounts to rewriting the provisions of section  
H 308(1)(a) by importing into the section words which are not contained therein.

Learned Counsel to the Appellant submitted that the Court below in its judgment rejected all the grounds relied upon by the Applicant seek-

ing adjournment sine die. The only course left for the Court of Appeal was to have refused the application, and for the Court to make the necessary orders for the hearing of the appeal.

Learned Counsel has submitted that reasons given by the Court of Appeal that all parties must be held to the restraining order not to continue a suit, and that continuation of the appeal is an indirect way of continuing the suit before the lower court where Appellant is a defendant, and the right to sue for personal wrongs cannot be equated with a right of appeal; are not reasons related to or connected with the grounds upon which the application was contested.

It seems to me clear from the record of proceedings and from the resume of the facts that learned counsel to the Appellant has misapprehended the facts of the case before the Court, and the basis on which the ruling of the Court below was made.

It is pertinent to refer to the formulation of the issues for determination in the brief of argument of Appellant, who was Respondent in the Court of Appeal.

Respondent formulated the only issue in the Court of Appeal as follows:-

*"Whether having regard to the entire provisions of section 308 of the 1999 Constitution, the entire proceedings in this suit should be adjourned sine die."*

The only issue formulated in Appellant's brief of argument was credited to the Court of Appeal and reads,

*"Having regard to the matters set out in paragraphs 3.1.2-3.1.6. above, the Court of Appeal formulated the following issue for determination namely:-*

*"Whether or not the Appellant can continue the appeal in the light of section 308(1) of the 1999 Constitution."*

Arising from the contentions of Counsel for the Respondent relying on section 308 of the 1999 Constitution praying the Court to adjourn the appeal sine die, and counsel for the Appellant urging the Court to hear the appeal since an order for parties to file written briefs in support of their differing provisions, the Court of Appeal thereupon formu-

lated the issue arising as follows:-

*"Whether having regard to the entire provisions of section 308 of the 1999 Constitution, the entire proceedings in this suit should be adjourned sine die."*

B This is identical with the formulation of the issue by the Respondent. This was the issue relied upon by the Court of Appeal in the determination of the application before it. The application was contested on the issue whether the appeal should be adjourned sine die or hearing be continued.

C It is difficult therefore to appreciate the contention of learned Counsel to the Appellant that the reasons given in the decision of the Court of Appeal were not related to or connected with the grounds upon which the application was contested.

D It is not correct to contend as was done by learned Counsel to the Appellant that the grounds which formed the basis of the decision were raised suo motu by the Court of Appeal. The issue was formulated by the parties, and the decision was based on the issue as formulated. It is difficult to understand the argument of learned counsel to the Appellant that the Court of Appeal failed to hear the parties particularly Appellant who was affected on the issue. The record of proceedings and the ruling of the Court of Appeal are clearly to the contrary. In the circumstances therefore the ruling of the Court of Appeal was not a nullity. The issue is accordingly resolved against the Appellant.

F Issue No.2 involves the proper construction of the provisions of section 308(1) and consideration of grounds 2, 3, 4 and 5.

G Section 308(1)(2)(3) of the Constitution 1999 provides,  
*"(1) Notwithstanding anything to the contrary in this Constitution, but subject to sub-section (2) of this section-*

(a) no civil or criminal proceedings shall be instituted or continued against a person to whom this section applies during his period of office;

H (b) a person to whom this section applies shall not be arrested or imprisoned during that period either in pursuance of the process of any court or otherwise; and

(c) no process of any court requiring or compelling the appearance of a person to whom this section applies, shall be applied for or issued:

Provided that in ascertaining whether any period of limitation has expired for the purposes of an proceedings against a person to whom this section applied, no account shall be taken of his period of office. B

(2) The provisions of subsection (1) of this section shall not apply to civil proceedings against a person to whom this section applies in his official capacity or to civil or criminal proceedings in which such a person is only a nominal party. C

(3) This section applies to a person holding the office of President of Vice-President, Governor or Deputy Governor, and the reference in this section to "period of office" is a reference to the period during which the person holding such office is required to perform the functions of the office." D

I agree entirely with the Court of Appeal that the above constitutional provision is simple and straightforward. The words used are not ambiguous, and should be given their ordinary plain meaning. It is however important to advert to the meaning and effect of the expression in Section 308(1)(a). E

*"no civil or criminal proceedings shall be instituted or continued against a person to whom this section applies during his period of office."* F

Section 308 is only subject to the provisions of it sub-section (2) which excludes actions in civil proceedings in an official capacity, or civil or criminal proceedings in which such person is only a normal party. The immunity enures during the period of office of the incumbent. G

The literal construction of section 308(1)(a) is that no actions, civil or criminal can be brought, or continued against any of the persons stated in Section 308(3). Such a person cannot be arrested or imprisoned during tenure either in pursuance of the process of any Court or otherwise - S.308(1)(b). No process of any Court requiring or compelling the appearance of a person to whom the section applies, shall be H

applied for or issued.

It would seem unarguable that apart from the matters excluded in S.308(2) there is an absolute bar to actions in civil or criminal proceedings against the persons named in section 308(3).

B Concisely stated, civil or criminal proceedings in a private capacity against the persons named in section 308(3) cannot be initiated during their tenure and if pending before they assumed office shall not be continued.

C The facts of this case are quite simple and short. The action which has given rise to this application was by the Respondents as Plaintiff against the Appellant as one of the three Defendants. Appellant appealed against the decision of the High Court which made an order extending the life of the writ of summons and relisting the case. Before the D Appeal was heard, Appellant was elected Governor of Lagos State, was sworn, and became entitled to the protection of Section 308(1)(a) of the Constitution.

The question now is what order should the Court make? The E words of Section 308 (1)(a) are clear and unambiguous. The action before the Court was instituted against the Appellant. The mandatory provision of Section 308(1)(a) is that "no civil" or criminal proceedings shall be instituted or continued against a person to whom this section F applies during his period of office."

It cannot be disputed that hearing an appeal arising out of an action is the continuation of the case. This is so whether the appeal is by the person against whom the action was originally instituted or by the originator of the action. Accordingly, the civil action against the Appellant cannot in view of the mandatory provisions of the section 308(1)(a) G be continued against him as from the 29th May, 1999 when he was sworn in as the Executive Governor of Lagos State.

H Learned Counsel has submitted that since the Court of Appeal has held that there was nothing in the Constitution which prevented the Governor from suing while in office to enforce personal rights, the decision to adjourn the appeal indefinitely for the reasons adduced contrary to the clear words of section 308 amounts to a presumption that the 1999

Constitution withholds the right of suit of Appeal by the Appellant in respect of personal wrongs, When it is in fact silent on the point. It was submitted that such a construction in the absence of clear words prohibiting his right to prosecute an appeal is a construction that infringes on his right to a hearing within a reasonable time under Section 36(1) of the B 1999 Constitution.

With due respect to learned counsel to the Appellant this contention is based on a misconception of the correct legal position. The right of the Appellant to prosecute the appeal against the action by the Plaintiff C is dependent on the continuation of the action by the Plaintiff/Respondent. Since Respondent is precluded by a mandatory provision of the Constitution to continue with the action against the Appellant, there is no legal basis for Appellant to exercise a right of appeal in respect of an D action which is in abeyance.

The interpretation of the provisions of the Constitution should be guided by the facts of the case. Appellant in the instant case was the Defendant. The provisions of section 308 speaks of a civil action or criminal proceedings instituted or continued against a person to whom E the section applies during his period of office. The provision goes on to preclude arrest or imprisonment, and issuance of process requiring or compelling appearance of such person. There is no suggestion that such persons can institute actions against other persons, who cannot apply for F processes against them. The provision of Section 308 is a policy legislation designed to confer immunity from civil suit or criminal process on the public officers named in Section 308(3) and to insulate them from harassment in their personal matters incurred before their election. It G follows from such immunity that such persons will not be involved in ordinary transactions that will necessitate resorting to the institution of civil suits or criminal actions.

The text of section 308 are explicit and conclusive. The liberal H approach to the interpretation of our Constitution counselled in Nafiu Rabi v. The State (1988) 12 NSCC. 281, does not encourage reading the provisions to neutralise the public policy principle protected by the provision.

It has never been allowable and the sacred obligation of the Courts is not to construe any of the provisions of the Constitution to defeat the obvious ends the Constitution was designed to serve. To construe the provisions of Section 308(3) to exercise the right to sue in addition to the absolute immunity conferred on them whilst in office by Section 308(1)(a) will defeat the immunity designed by the Constitution, and lead to manifest injustice.

On the 2nd issue learned Counsel to the Appellant is challenging the correctness of the order of the Court of Appeal adjourning the appeal before it sine die. It was submitted that the reasons given by the Court of Appeal for the adjournment are not supported by law. The only issue for determination before the Court as disclosed on the brief of argument of the parties was the construction of the entire provisions of Section 308 of the Constitution 1999 to see whether any part of the Constitution prohibited the Appellant from presenting or continuing the prosecution of an appeal.

It is necessary to correct a misapprehension by learned Counsel for the Appellant of the nature of the case before us. The appeal before us is against the ruling of the Court of Appeal on the application of the Respondents to adjourn the appeal sine die. It is not a decision on the appeal to the Court of Appeal for the construction of Section 308 of the 1999 constitution. That appeal to the Court of Appeal against the ruling of Humponu-Wusu J of 17.6.94 for striking out 3rd Defendant's application dated 27.1.94 to strike out the Plaintiff's writ of summons and statement of claim is still pending.

It was when the appeal of the 3rd Defendant came up for hearing that learned Counsel for Plaintiff/Respondent raised the issue relying on Section 308 of the Constitution 1999 seeking to adjourn the appeal sine die. Counsel were ordered to file and filed written briefs of argument on the issue,

"Whether having regard to the entire provisions of Section 308 of the 1999 Constitution, the entire proceedings in this suit should be adjourned sine die."

It is therefore obvious from the issue formulated that the parties



were contending whether or not the proceedings in the suit should be adjourned sine die. The application was brought by Respondent/Applicant because 3rd Defendant who was sworn in as the Executive Governor of Lagos State was the Appellant, and was affected by the provisions of Section 308(1)(a) of the 1999 Constitution which prohibited the institution or continuation of civil or criminal proceedings against him during his period of office. B

Section 308(1)(a) provides as follows-

*"(a) no civil or criminal proceedings shall be instituted or continued against a person to whom this section applied during his period of office."* C

The words of this provision are clear and unambiguous. It means that no civil actions can be instituted against a Governor during his period of office, and if there is any pending action, it cannot be continued against him during his period in office. D

The same issue arose on similar facts in Colonel Olu Rotimi & Ors. v. Mrs. F.O. Macgregor (1974) All NLR.828, where action was against Colonel Rotimi & ors. By Mrs. F.O. Macgregor, Section 161(1) E of the 1963 Constitution relied upon for the decision is in pari materia with Section 308(1) of the 1999 Constitution Affirming the judgment of the High Court in effect striking out the action against the 1st Defendant, this Court held, at p.833

*"We think that the learned trial Judge was right in concluding that Section 161(1)(c) of the Nigerian Constitution confers an immunity on the 1st Defendant, and that the action should not have been continued against him since he became the Governor of the Western State during the pendency of the present proceedings. No question of waiver arises, for the Section prescribes an absolute prohibition to "any court" during the period of office of any of the posts Described in Section 161(2) of the Constitution to entertain any claim for relief against such person."* F G

*In this circumstance, the learned trial judge should have struck out the case of the Plaintiff as against the 1st Defendant, which, in effect, is what he did, although he made no formal order in that respect."* H

It is necessary to point out the court below considered the argu-

ment of Respondent's counsel why the appeal should be adjourned sine die. It was submitted that not adjourning the appeal sine die may create a situation where the court may issue processes against the Appellant in violation of Section 308(1)(c) of the 1999 Constitution. The Court of Appeal rejected the submission as mere speculation. It was pointed out that if the appeal were allowed to continue, all the court will decide is whether or not the Court below was right to have refused to set aside the writ of summons and Statement of Claim issued by the Plaintiff/Respondent. The need to issue processes under Section 308(1)(c) of the 1999 Constitution will not arise.

The Court of Appeal stated its reasons for adjourning the appeal sine die as follows-

*"The suit at the lower court was filed by the Plaintiff/Respondent against the appellant and two others. Under Section 308(1)(a) of the 1999 Constitution that suit ought not to be further continued. It seems to me however, that continuation of a suit can be undertaken by all parties to the suit. When it is said that a suit may not be continued, all the parties to the suit must be held to the restraining order. Just as a Plaintiff may not continue a suit, so must a defendant not do so once it is determined that a suit is of the character which must not be further continued under Section 308(1)(a) of the 1999 Constitution. To allow the appellant, who is now Executive Governor of Lagos State to further press on with his Appeal is another way of continuing the suit before the Lower Court. This is more so when it is borne in mind that the appeal being pursued by the appellant is upon an interlocutory matter with the result that if the appeal succeeds, the appellant may still have to go back to the High Court. Setting aside the service of a writ does not mean that the writ has ceased to exist. Allowing this appeal to move forward therefore is an indirect way of continuing the suit at the High Court."*

The requirement of the prohibition of Section 308(1)(a) of the institution or continuance of civil actions or criminal proceedings against a Governor is that such civil actions or criminal proceedings cannot be initiated and if pending cannot continued. In the instant case the Court of Appeal relying on the provisions of Section 308(1)(a) adjourned the ap-

peal sine die. Learned Counsel criticising the adjournment has submitted that the adjournment required by section 308 is statutory and one not subject to the exercise of discretion by the Court. It was contended that once it was found that the statute did not prohibit a right of action or appeal for personal wrongs, it does not justify an adjournment and the court had no discretion to exercise in the matter as they have done. It was also submitted that having found that the application to adjourn the appeal was lacking in merit, the proper order to make was one dismissal of the application.

It is clear from the facts of this case that the appeal before the Court, subject matter of the application for adjournment is still pending before the Court. Similarly pending in the High Court is the civil action the three Defendants including the Appellant Governor. This last mentioned action which has given rise to the appeal. Both actions are pending before the Court, and are by the mandatory provision of Section 308(1)(a) of the 1999 Constitution not to be continued against the Appellant/3rd Defendant.

I do not agree with submission of learned Counsel to the Appellant/3rd Defendant that the requirement of Section 308(1)(a) not to continue pending civil action against the Appellant being a mandatory provision leaves no room for the exercise of discretion. Not to continue with the action may involve either striking out the action or granting an adjournment. The latter option leaves the Judge with the discretion to adjourn the matter sine die or indefinitely as was urged by learned Counsel to the Respondent/Plaintiff, or to a stated date. In each of these latter options the action against the Governor is still on the Court list even though no proceedings are continuing.

The Latin expression sine die means without a date being fixed, indefinitely. A matter is said to be adjourned sine die when it is adjourned without a day being fixed for its resumption. In Goddard v. Smith 6 Mod. 261, Holt C.J. explained the effect of a nolle prosequi by analogy with sine die. He said,

*"The entering of a nolle prosequi was only putting the defendant sine die, and so far from discharging him from the offence, that it did not*

*discharge any further prosecution upon that very indictment, but that notwithstanding new process might be made out upon it."*

The effect of an adjournment sine die in the analogy is not to continue but to keep the pending civil action in abeyance indefinitely. In the instant case the provisions of Section 308(1)(a) which confers the immunity from civil suits and criminal proceedings applies during the period of office of the Governor.

In my considered opinion, a fair, correct and acceptable continue but keep the pending civil action in abeyance indefinitely. In the instant case the provisions of Section 308(1)(a) which confers the immunity from civil suits and criminal proceedings applies during the period of office of the Governor.

In my considered opinion, a fair, correct and acceptable construction of the expression "no civil or criminal proceedings shall be instituted or continued against a person to whom this section applies during his period of office" in Section 308(1)(a) of the Constitution 1999 must take into account in the application of the prohibition the qualification of and limitation by the words of the prohibition.

It seems to me obvious that the qualification and limitation by the expression, prohibiting the institution of or continuing an action during the tenure of the persons mentioned in Section 308(3) is also clear and not ambiguous. The plain words therefore mean that no action civil or criminal action can be filed, and no pending proceedings continued during the period in office of the persons mentioned in Section 308(3). This construction is justified by the qualification of the prohibition by section 308(1)(a) and limitations for its application to persons stated in Section 308(3).

It is important also to consider the etymological meaning of the word "continued in Section 308(1)(a). This is neither a technical term nor a word of art, and to my understanding has not acquired a technical meaning. The ordinary plain dictionary meaning of the word "continue" is "maintain" "keep up," "not cease," "resume", "prolong", "remain." The expression "continued" is the antonym of the word "discontinue" The meaning of the word "discontinue" is "cease" "cease from", "give up."

What gives the expression force is the peremptory word "shall" with the negative "not." Both of which prohibit continuance.

The word "*discontinuance*" has acquired a technical meaning with a procedural requirement involving legal consequences to the person who has initiated the action. See the decision of this Court in Aghadiuno B v. Onubogu (1988)5 NWLR.16 SC. It seems to me that the prohibition that the pending action "*shall not be*" "*continued*" is a direction to the Court and necessarily to the Plaintiff.

Stricto sensu, Section 308(1)(a) therefore enables the cessation <sup>C</sup> pro tempore of proceedings instituted against persons mentioned in Section 308(3) of the Constitution 1999 during their tenure in office. It is not a requirement permanently depriving the aggrieved the right to institute actions or continuing with pending proceedings. It is therefore in my considered opinion permissible for a court seised with a matter requiring the application of Section 308(1)(a) in the exercise of its judicial discretion in compliance with the constitutional requirement to adjourn the pending proceedings appropriately. Accordingly such proceedings may be adjourned to a convenient future specified date outside the prohibited period, or sine die as it deems fit with liberty to the Plaintiff to <sup>D</sup> apply to restore the proceedings to the cause list. <sup>E</sup>

The lead judgment has made an order striking out the appeal. I agree with this order. It is appreciated that striking out the appeal is not a dismissal of the appeal. This is because in this case Section 308(1)(c) provides that the period of office shall not be taken into account in calculating the period of limitation. The right of an applicant to restore the suit to the cause list will not be adversely affected by the order. <sup>F</sup>

On the other hand, an adjournment sine die as granted by the court below, or a long adjournment to a date outside the period of prohibition leaves the pending proceedings on the cause list subject to application for restoration on the cause list. <sup>G</sup>

In Colonel Oluwole Rotimi & Ors v. Mrs. Macgregor (1974) 11 <sup>H</sup> SC.133 this Court on similar situation as in the instant case observed that the trial Court should have struck out the action against Colonel Oluwole Rotimi, who was at the material time Military Governor of Western State

of Nigeria.

The appeal before us is against the ruling of the Court of Appeal granting the application before that Court that the appeal before it be adjourned sine die pending when the 3rd Respondent ceases to be Executive Governor of Lagos State.

The appeal is accordingly dismissed. The order of the Court below adjourning the appeal sine die is amended.

The appeal is accordingly hereby struck out.

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### BELGORE JSC

The purport of S.308 of the Constitution leaves no room for ambiguity. I do not have to quote the section as it is already set out in the judgment of my learned brother, Iguh JSC but it is clear no civil or criminal proceedings shall be instituted (or even commenced) against the President or Vice-President, the Governor or Deputy Governor during the period in office of any of them. (Subsection (3)) of the section 308 refers). The only permissible proceedings is when such a person holding any of the aforementioned offices is sued in his official capacity i.e. President or Vice-President, or as Governor or Deputy Governor and only when he is a nominal party. Thus, when a proceeding is pending against any of the persons S.308 refers immediately before he assumes office the proceedings should be discontinued. The idea of the matter being adjourned sine die is not applicable, rather the proceedings should be discontinued. I therefore find no merit in this appeal and I dismiss it. As for the Order of adjournment **sine die** made by Court of Appeal, it is not a competent order and I set it aside.

The reason for the protection of the person given the immunity in S.308 of the Constitution is to afford him quiet tenure free from harassment on personal matters rather than matters of office. It is to afford the person complete devotion to the high office which pertains to the welfare and stability of governance.

I therefore strike out the entire appeal in this Court with liberty to litigate after the appellant might have left the high office of Governor

of Lagos State. I make no order as to costs.

### KUTIGIJSC

The issue here is simply whether having regard to the provisions of section 308 of the 1999 Constitution, the Court of Appeal was right in declining to determine the appeal of the appellant pending before it until after the appellant must have vacated his office as Governor of Lagos State.

Section 308 of the Constitution reads:-

*"308 (1) Notwithstanding anything to the contrary in this Constitution, but subject to subsection (2) of this section:*

*(a) no civil or criminal proceedings shall be instituted or continued against a person to whom this section applies during his period of office.*

*(b) a person to whom this section applies shall not be arrested or imprisoned during the period either in pursuance of the process of any court or otherwise; and*

*(c) no process of any court requiring or compelling the appearance of a person to whom this section applies, shall be applied for or issued:*

*Provided that in ascertaining whether any period of limitation has expired for the purpose of any proceedings against a person to whom this section applies, no account shall be taken of his period of office.*

*(2) The provisions of subsection (1) of this section shall not apply to civil proceedings against a person to whom this section applies in his official capacity or to civil or criminal proceedings in which such a person is only a nominal party.*

*(3) This section applies to a person holding the office of President or Vice-President, Governor or Deputy Governor; and the reference in this section to "period of office" is a reference to the period during which the person holding such office is required to perform the functions of the office."*

It is noteworthy to point out that the above provisions are in pari

materia with those of section 161 of the 1963 Constitution and section 267 of the 1979 Constitution.

In the case of ROTIMI & ORS VS MACGREGOR (1974) 11 S.C.133, this court said:-

B *"The provisions of section 161 of the Constitution are peremptory and admit of no waiver and the introductory words of the section clearly assert the supremacy of the Constitutional provisions over any other laws including the laws of pleading"*

C The Court also said:-  
*"In the circumstances, the learned trial judge should have struck out the case of the plaintiff against the 1st defendant (Governor), which in effect is what he did, although he made no formal order in that respect but declined to make any orders against him (Governor) only."*

D The court thereafter proceeded to make a final order amongst others striking out the Plaintiff's case against the 1st defendant (Governor).

Following ROTIMI & 2 ORS VS MACGERGOR (supra) I have  
E no hesitation in coming to the conclusion that the Court of Appeal rightly declined to entertain the Appellant's appeal pending before it thus giving effect to the mandatory provisions of section 308 of the Constitution above. But the Court of Appeal was wrong when it proceeded to adjourn  
F the appeal *sine die* instead of striking it out. The appeal certainly cannot be continued during his (appellant) period in office. A Proper order striking out the appeal will therefore have to be substituted for that of an adjournment "*sine die*" And I so do.

G For the above and more detailed reasons contained in the lead judgment of my learned brother Iguh, J.S.C. Which I read before now, I must dismiss this appeal. It is accordingly dismissed. I endorse the consequential orders made therein.

H

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### KALGO JSC

I have had the privileged of reading in advance the judgment delivered by my learned brother Iguh JSC in this appeal. I entirely agree



with him that there is no merit in the appeal and it ought to be dismissed.

The Defendant/Appellant appealed to the Court of Appeal Lagos, in which that court declined to hear his appeal there but adjourned it *sine die* until after the Appellant vacates office of the Governor of Lagos State. The adjournment was granted pursuant to the provisions section 308 of the 1999 Constitution. B

Section 308 of the Constitution reads:-

"(a) *No civil or criminal proceedings shall be instituted or continued against a person to whom this section applies during his period of office;* C

*(b) A person to whom this section applies shall not be arrested or imprisoned during that period either in pursuance of the process of any court or otherwise; and*

*(c) No process of any court requiring or compelling the appearance of a person to whom this section applies, shall be applied for or issued.* D

*Provided that in ascertaining whether any period of limitation has expired for the purposes of any proceedings against a person to whom this section applies, no account shall be taken of his period of office.* E

*(2) The provisions of subsection (1) of this section shall not apply to civil proceedings against a person to whom this section applies in his official capacity or to civil or criminal proceedings in which such a person is only a nominal party.* F

*(3) This section applies to a person holding the office of President or Vice President, Governor or Deputy, Governor and the reference in this section to "period of office" is a reference to the period during which the person holding such office is required to perform the functions of the office.* G

*(Underlining mine)*

There is evidence on the record that the Defendant/Appellant was sworn in as the Executive Governor of Lagos State on the 29th of May 1999 and remains so to this day. There is no doubt therefore that Section 308 of the 1999 Constitution applies to him. Also in the action which was commenced in the High Court before 1999, the Defendant/ H

Appellant was one of the three Defendants in the case, and was sued in his personal capacity. And looking at the writ of summons on page 1A and the affidavit of page 5 of the record, the Defendant/Appellant was sued as one of the guarantors to loan of N2.5m granted to the 1st Defendant, Mawi International Limited. It is therefore very clear that he is necessary party and not a nominal or desirable party in this case as the case cannot effectually be disposed of without him. So for all intents and purposes, the provisions of subsection 1 of the said Section 308 applied to him.

I now come to subsection (1) of Section 308. Under paragraph (a) of that subsection (1) "no civil or criminal proceedings shall be instituted or continued against the Defendant/Appellant whilst in office. In the first place the instant proceedings are civil proceedings and they were instituted before the Defendant/Appellant became the Executive Governor of Lagos State. By virtue of the same paragraph of subsection (1), the proceedings should not be continued against him whilst he is in office as Governor. It is admitted that the appeal now pending in the Court of Appeal and which was adjourned sine die was instituted by the Defendant/Appellant and so it was not against him. But even if one argues that the continuation of the case by way of appeal was by Defendant/Appellant himself and not against him as required under paragraph (a) of subsection (1), one would be bound by the provisions of paragraph (c) of subsection (1) which prohibited the issue of any court process to the Defendant/Appellant. And once the appeal is allowed to proceed, court processes like hearing notices etc. must have to be issued to him and this is what paragraph (c) of subsection 1, prohibits. Another way of looking at it that the appeal arose out of same case which was filed in the High Court and which paragraph (a) of subsection (1) said should not be continued. It is my respectful view therefore that whichever way you look at it, the combined effect of paragraphs (a) and (c) of subsection (1) of Section 308 constitutes a total prohibition and any step taken to proceed with the appeal now pending in the Court of Appeal, is a contravention of Section 308 (1) of the 1999 Constitution. It is my view that the pith and substance of Section 308 (1) of the Constitution is to restrict all legal

proceedings in which the Governor, in this case, is involved while he is in office and that is why the proviso to the section says that no account shall be taken of his period of office for the purpose of any period of limitation in the case.

For the above and the more detailed reasons set out in the leading judgment of my learned brother Igu JSC, I find no merit in this appeal. I accordingly dismiss it and affirm the decision of the Court of Appeal. I abide by the consequential orders made in the leading judgment including the order as to costs.

C

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### AYOOLA JSC

Section 308 of the Constitution restricted legal proceedings against a person holding the office of President or Vice-President, Governor or Deputy Governor during the period such person holds such office provided that such proceedings could be initiated or continued against him during his period of office in his official capacity. D

The civil proceedings from which this appeal arose was against the Appellant in his personal capacity when he was not holding office of Governor. There is no doubt that by virtue of Section 308(1) (a) of the Constitution such civil proceedings could not be continued against him during his period of office. Oguntade, J.C.A. Delivering the leading judgment of the Court of Appeal, now appealed against, held that nothing in Section 308 of the 1999 Constitution precluded a Governor from initiating action against other persons for reliefs in his personal capacity. He was of the view that:- E

*"If this appeal is allowed to continue, all that this court will decide is whether or not the lower court was right to have refused to set aside the writ of Summons and Statement of Claim issued by the Plaintiff/Respondent. The need will not arise for us to issue any process as stated under Section 308(1) (c) of the 1999 Constitution. I do not therefore agree with the respondent's submission on the point."* F

On this appeal the appellant's case is that learned Justices having disposed of the grounds on which the respondent in that court asked the G

court to stay the appellate proceedings should not have proceeded to adjourn this appeal sine die "for another reason", When such other reason had been raised suo motu by the learned justice and the parties had not been heard on it.

B The "another reason" relied on the Court of Appeal was put thus in the leading judgment of Oguntade, J.C.A:-

*"The suit at the lower court was filed by the plaintiff / respondent against the appellant and two others. Under Section 308(1) of the 1999 Constitution that suit ought not to be further continued, it seems to me however that continuation of a suit can be undertaken by all parties to the suit. When it is said that a suit may not be continued, all the parties must be held to the restraining order. Just as a plaintiff may not continue a suit, so must a defendant not do so once it is determined that a suit is of the character which must not be further continued under Section 308(1) (a) of the 1999 Constitution. To allow the Appellant, who is now the executive Governor of Lagos State to further press on with his appeal is another way of continuing the suit before the lower court."*

No doubt, if the arguments advanced before the court below are narrowly viewed the appellant would be right in his submission that the reason given as above went beyond the arguments advanced by counsel in the appeal. However, the crux of the respondent's application for an adjournment of the appellate proceedings was that a continuation of the appeal would be in contravention of Section 308(1) of the Constitution. The question that thus arose was whether by his appealing from the decision of High Court, a civil proceeding was being continued against the appellant.

This is a point which in my opinion had not been argued with sufficient clarity and depth to deserve a definitive pronouncement by this court. A general pronouncement on the scope of Section 308(1) without regard to the circumstances of each case may not be expedient. For instance, if an action had been instituted against a person and judgment obtained against him before he assumed office as Governor, does section 308(1) preclude him from continuing an appeal filed by him before he

became a Governor during his period in office, even if the only relief he sought from the appellate court was a re-hearing of the suit in the court of first instance?

In this case if the appeal of the appellant in the court below succeeded, it would have led to a termination rather than continuation of the proceedings against him. If he failed, the suit against him in the High Court would have had to be struck out on the authority of Rotimi & Others v. Macgregor (1974) 9 N.S.C.C. 542.

I am unable to share the view of the Court of Appeal on that part of its decision appealed from, that by prosecuting his appeal the appellant was "continuing" the civil proceedings against himself. One of the reliefs he had sought from the Court of Appeal and, indeed, the main purpose of his appeal was that the action be struck out. It is not necessary to put a strained construction on Section 308(1) of the Constitution to get to a reasonable and just resolution of this matter. When a matter can otherwise be disposed of without resort to strained interpretation of the Constitution, that should be the preferred course.

In this case, having regard to its particular circumstances, the course that is just, reasonable and fair is the pragmatic course. It is evident that on the authority of Rotimi and others v. Macgregor (supra) which was cited by counsel in the court below, the proceedings pending in the high Court were now due for determination by striking out. If the appellant's appeal in the Court of Appeal had succeeded, that suit would have been struck out. If his appeal in that court had failed the same end would, all the same, have attended the proceedings by virtue of Section 308. In the result and in the ultimate, the appeal in the Court of Appeal is on the verge of being an academic exercise.

In the circumstances I am of opinion that the judgment of the Court of Appeal adjourning the appeal before it sine die should be set aside. However, I do not think the relief sought by the appellant that we should substitute an order that the hearing of the appeal be accelerated by the court below is a proper relief to grant. In substance, the view held by the court below was that the suit should not be continued in the High Court by virtue of the prohibition of civil proceedings against a person

holding the office of Governor by virtue of Section 308 of the Constitution. Having come to that view, the court below should have considered the options available to it, namely, to remit the suit to the High Court with directive that it be struck out pursuant to Section 308 or to strike it out itself as this court did in the case of Rotimi v. Macgregor (supra). Which-  
 B ever option is chosen would have made no difference to the conclusion of the matter.

Before I part with this appeal, I venture to recapitulate some  
 C points for emphasis. First, although an appeal is from a decision and not from an action, once the action in the High Court stood discontinued by virtue of section 308 of the Constitution, an interlocutory decision aimed at furthering the proceedings disappears with the discontinued proceed-  
 D ings. Secondly, the case of Rotimi & Ors v. Macgregor (supra) did not at all decide that an appeal amounted to a continuation of civil proceeding  
 E against an appellant. What this court did in that case was to strike out the case against the 1st defendant / appellant as the trial court should have done, notwithstanding that the 1st defendant / appellant had appealed and  
 E had not relied on the section 161(1) of the 1993 Constitution. It seems instructive that in this case what this court struck out was the case in the trial court and not the 1st defendant / appellant's appeal.

Thirdly, I am unable to construe a provision of the constitution  
 F that granted an Immunity, such as section 308(1), as also constituting a disability on the person granted immunity when there is no provision to that effect, either expressly or by necessary implication in the enactment. If the makers of the Constitution had wanted to prohibit a person holding  
 G the offices stated in section 308 from instituting or continuing action instituted against any other person during his period of office, nothing  
 H would have been easier than to provide expressly that: *"No civil or criminal proceedings shall be instituted or continued against any person by a person to whom this section applies during his period of office; and, no civil or criminal proceedings shall be instituted or continued against such person during his period office"*. or , in like terms, the makers of the Constitution in their wisdom did not so provide.

Fourthly, when section 308(1) provides that a civil proceeding

against a person to whom section 308 applies shall not be continued, its effect is the same as if it is discontinued. "*Discontinuance*" means "*ending*" "*causing to cease*", "*leaving off*" In this regard the case in the High Court had been caused to cease by operation of section 308 of the Constitution.

B

In my judgment, the whole tenor of section 308 points to a prohibition of proceedings against a person to whom the section applies and not to a proceedings by him. Both in section 308(1) (a) and the provision to section 308(1)(c) the operative word "*against*" was present.

C

I had not intended to write a lengthy judgment since, as I earlier said, this appears to be on the verge of an academic exercise. It is evident that the case against the appellant having been discontinued by operation of Section 308(1) is to be struck out in consonance with the view of this court in Rotimi & Ors v. Macgregor (supra). No useful purpose is therefore served by adjourning the appeal in the court below sine die, nor in going into the merits of the appellant's contention before that court.

D

I agree that the appeal in the court below should be struck out but I add expressly, in order to explain why in my opinion that Appeal should be struck out, that the case in the High Court should itself be struck out pursuant to section 308(1) and, as I said in consonance with this Court's decision in Rotimi & Ors v. Macgregor (supra).

F

I would order accordingly. There is no order as to costs.

G

H