

**SUPREME COURT OF NIGERIA**

13<sup>TH</sup> JULY, 2007, SC. 313/2006

**CORAM:- N. TOBI, D. MUSDAPHER, A. M. MUKHTAR,  
W. S. N. ONNOGHEN, P. O. ADEREMI, JJSC**

1. GLOBAL EXCELLENCE COMMUNICATIONS  
LIMITED

2. MAYOR AKINPELU ..... APPELLANTS

3. EJIRORENEADIGBO

4. OGECHI UDI

AND

MR. DONALD DUKE ..... RESPONDENT

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CONSTITUTIONAL LAW - Immunity - Against institution of criminal or civil proceedings - Is absolutely conferred on State Governor and some others - By s. 308 of 1999 Constitution (H1)

STATUTES - Interpretation - Constitution - Court's duty is simply to interpret the law - Where the language is clear - Court must give effect to it (H2)

CONSTITUTIONAL LAW - Interpretation - Governor's immunity - Courts - Equity, fairness, etc. - Is not a principle of constitutional interpretation - Governor is not prohibited from suing personally - Under s. 308 of 1999 Constitution (H3)

CONSTITUTIONAL LAW - Immunity of Governor - Judicial precedents - Tinubu case - Diction that supports no disability against Governor - To sue under s. 308 of 1999 Constitution is correct - While contrary dicta are rejected (H4)

**FACTS**

On 23-7-2004, the plaintiff/respondent who was then the Governor of Cross River State, instituted an action against the defendants/

appellants. Respondent claimed the sum of N5 billion being damages for libel published against him by the appellants in the Global Excellence Magazine of May 2004. Upon service of the writ on them, appellants entered a conditional appearance, and raised a preliminary objection challenging the court's jurisdiction to entertain the suit as constituted. They contended inter alia, that s. 308 of the 1999 Constitution precludes respondent from maintaining any suit in any court of law, nor can any proceedings be maintained against him in his personal capacity.

Upon the conclusion of argument, the trial judge ruled that a serving Governor cannot sue or be sued in his personal capacity while still in that office. Respondent's appeal to the Court of Appeal was allowed by a majority decision. Being dissatisfied, appellants have now appealed to the Supreme Court.

**ISSUE FOR DETERMINATION**

*"Whether, taking into consideration the decision of this court in Tinubu vs. I.M.B. Securities PLC (2001) 8 NWLR (pt.740) 192 at 708 and 718 and that of the Court of Appeal in I.C:S. (Nig) Ltd vs Balton B.V. (2003) 8 NWLR (pt. 822) 223 at 235, the learned justices of the Court of Appeal were right in coming to the conclusion that a serving Governor of a state can sue or initiate proceedings for reliefs in his personal capacity while in office?"*

**HELD** (Unanimously dismissing the appeal per **ONNOGHEN JSC**)

***Immunity - Against institution of criminal or civil proceedings***

1. It is very clear that section 308(1) (a) of the 1999 Constitution confers on the President, Vice-President, Governor or Deputy Governor absolute immunity against the institution of civil or criminal proceedings or the continuation of such civil or criminal proceedings against the President or Vice-President, Governor or Deputy Governor as long as they remain in office as such. It follows therefore that where an action or proceeding had been instituted prior to the person assuming the relevant office, such action or proceeding cannot be continued against the occupant of the relevant office during his tenure in the said office see *Tinubu vs I.M.B. Securities PLC (2001) 16 NWLR (pt. 740) 670 at 708*. By the

provision of subsection 2 of section 308, it is clear that the immunity conferred on the persons occupying the offices mentioned under section 308 of the 1999 Constitution does not extend to cases or actions instituted against the said persons in which the persons are nominal parties and in their official capacities such as the President; Vice-President; Governor or Deputy Governor. (p. 3353 F)

***Court's duty is simply to interpret the law***

2. It is settled law that the duty of the courts is simply to interpret the law or Constitution as made by the legislature or the framers of the Constitution. It is therefore not the Constitutional responsibility of the judiciary to make laws neither can it amend the laws made by the legislature. It must therefore be borne in mind always that courts cannot amend the Constitution neither can they change the words used in crafting it.

I had earlier reproduced the provisions of section 308 of the 1999 Constitution in this judgment and it is my considered view that the provisions are very clear and unambiguous. It is now settled that:

*“In the area of construction, the primary concern of the courts is the ascertainment of the intention of the legislature or law makers. From this function, the court may not reside however ambiguous or difficult of application the words of the law or Act may be, the court is bound to place some meaning upon them. If the language is clear and explicit, the court must give effect to it, for in that case, the words of the statute speak the intention of the legislature. Its function is jus dicere not jus dare. The words of a statute must not be overruled by the judges”* per OBASEKI, J.S.C. in *Ojokolobo vs Alamu* (1987) 3NWLR (pt. 61)317 at 402. (p. 3355 G)

***Governor's immunity - Courts - Equity, fairness, etc.***

3. As the words used in section 308 of the 1999 Constitution are very clear and unambiguous, I hold the view that they ought to be given their plain and simple meaning as the said words speak for themselves particularly as they clearly demonstrate the intention of the framers of the Constitution which is clearly, not to place any disability on the persons men-

tioned under subsection 3 of section 308 of the 1999 Constitution, including the respondent, from instituting or continuing any civil action against any person or persons during their tenure of office. The prohibition contained in section 308 of the 1999 Constitution is rather against B other parties and for the benefit of the respondent and others mentioned therein particularly during the period they occupy the relevant offices.

I hold the considered view that to hold otherwise or agree with the proposition of learned counsel for the appellants would amount to the C court reading into section 308 of the 1999 Constitution words that are not therein contained thereby, in effect, a mending the said provision, which would be outside the Constitutional province of the courts of law. That apart, I had earlier in this judgment reproduced some of the important principles of law guiding the courts in interpretation of our constitution and as can be gleaned therefrom there is nothing like the principle of D equity, fairness, social justice and equality in the conduct of judicial affairs as canons of interpretation of the Constitution. The submission of learned counsel for the appellants in that respect, though very persuasive E on moral grounds, has no foundation in law and is consequently discounted by me. The duty of the court is not to deal with the law as it ought to be but as it is. From the words used by the framers of section 308 of the 1999 Constitution, it is clear that their intention is explicitly to F confer absolute immunity on the respondent and the others therein mentioned without a corresponding disability on them to the exercise of their rights to institute actions in their personal capacities in any relevant court of law for redress during their tenure of office, as in the instant case. G (p. 3356 D)

***Immunity of Governor - Judicial precedents***

4. The above view finds support in the dictum of AYOOLA, J.S.C. in Tinubu vs IMB Securities PLC (supra) at 721 - 722 where the following H view is expressed:-

*“Thirdly, I am unable to construe a provision of the Constitution that granted an immunity such as section 308(1) as also constituting a disability on the person granted immunity when there is not provision to*

*that effect, either expressly or by necessary implication in the enactment. If makers of the Constitution had wanted to prohibit a person holding the offices stated in section 308 from instituting or continuing action instituted against any other person during his period of office, nothing would have been easier to provide expressly that:*

*“no civil or criminal proceeding shall be instituted 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 a person during his period in office’*

*Or in like terms. The makers of the Constitution in their wisdom did not so provide.”*

I entirely agree with the above dictum and adopt same as mine in this judgment. I consequently reject the contrary dicta of KARIBI-WHYTE AND KALGO, JJSC in the case of Tinubu vs IMB Securities P.L.C at 708 and 718 cited and relied upon by learned counsel for the appellants as the same are not in accord with the clear intention of the framers of section 308 of the 1999 Constitution. I also do not agree with the submission of learned counsel for the appellants that a confirmation of the interpretation of section 308 of the 1999 Constitution by the lower court would lead to absurdity particularly as a contrary interpretation would be adding to the said provision what is not expressly stated or intended, or putting unnecessary strain on that section which strain the said section will be unable to bear. (p. 3357 D)

### **REPRESENTATION**

MBA E. UKWENI Esq., with OKANGA O. OKANGA Esq. for the appellants with him

CHARLES E. DUKE Esq., for the respondent.

### **CASES REFERRED TO**

Awolowo vs Shagari (1979) All NLR 120; (1979) 6 -9 S.C 51  
Oviawe vs Integrated Rubber Products Ltd (1997) 3 NWLR (pt. 492) 126  
Abley vs Dale (1851) 11 CB 378

**3348 Global Excellence Ltd v. Duke (2007) 7 KLR Onnoghen JSC**

Magor & St Mellons Rural District Council vs Newport Corporation (1951)  
A.C 189

Media Tech. (Nig) Ltd vs Adesina (2005) 1 NWLR (pt.908)461

Rabiu vs The State (1981) 2 NCLR 293

B Chief Onabanjo v. Concord Press of Nigeria Ltd. (1981) 2 NCLR 399

ICS (Nig.) Ltd, v. Balton BV (2003) 8 NWLR (Pt. 822) 223

Amadi v. N.N.P.C. 2000 10 NWLR part 674 page 76

Owena Bank Nigeria PLC v. N.S.E. Ltd 1997 8 NWLR part 515 page 1

Ifezue v. Mgadugha 1984 1 SCLR 427

C Lawal v. G. B. Olivant 1972 3 S.C 124

**STATUTES REFERRED TO**

Sheriffs and Civil Process Act s. 97

D Constitution of Nigeria 1999 ss. 308(1), (2) & (3), 14(1), 17 (1)(2)(a),  
36

**LEAD JUDGMENT BY ONNOGHEN JSC**

E This is an appeal against the judgment of the Court of Appeal,  
holden at Calabar in appeal No.CA/C/06/05 delivered on 2<sup>nd</sup> May 2006, in  
which it allowed the appeal of the present respondent against the ruling  
of the High Court of Cross River State holden at Calabar in suit No.HC/  
F 26172004 delivered on the 8<sup>th</sup> day of November, 2004.

On the 23<sup>rd</sup> day of July, 2004 the present respondent, the Governor of Cross River State as plaintiff, instituted an action in the trial court against the appellants, as defendants, claiming the following reliefs:-

G “1. *The sum of N5 billion (five billion naira) being damages for libel published of and concerning the plaintiff by the defendants in the “Global Excellence” Magazine of Tuesday May 11- May 17, 2004 and Tuesday May 25 -May 30, 2004.*

H 2. *Exemplary or punitive damages in the sum of N10 billion (ten billion naira). ”*

Upon service of the writ on them, the appellants caused a conditional appearance to be entered on their behalf by learned counsel who proceeded further to file a notice of preliminary objection on the 3<sup>rd</sup> day

of September, 2004 challenging the jurisdiction of the court to entertain the suit as constituted.

The grounds on which the preliminary objection is based are stated as follows:-

“1. *The plaintiff cannot, by virtue of the provisions of section 308 of the Constitution of the Federal Republic of Nigeria, 1999, institute, maintain, or continue with any proceedings, including the present suit, in any court of law, nor can any proceedings be instituted, maintained or continued against him in his personal capacity.* B

2. *The Plaintiff has failed to comply with the mandatory requirement of section 37 of the Sheriffs and Civil Process Act.* C

3. *The annexure to the plaintiff’s statement of claim titled “VNIVERSITAS PENNSYLVANIENSIS” should be expunged from the court’s record, the same not being a document that this Honourable (sic) can use.* D

4. *This suit discloses no reasonable course (sic) of action*

5. *This suit (sic) vexatious and constitute a flagrant abuse of the process of this Honourable Court.”* E

There is no affidavit in support of the Notice of Preliminary objection.

Upon the conclusion of arguments on the preliminary objection, the learned trial judge held, inter alia, that F

“.....a serving Governor cannot sue or be sued in his personal capacity while still in that office.”

The plaintiff was not satisfied with that ruling and therefore appealed to the lower court which, by a majority decision, allowed the appeal resulting in the instant appeal to this Court. G

In the appellant’s brief of argument filed on 16/2/07 by MBA E. UKWENI Esq., learned counsel for the appellants, the following issue has been identified for the determination of the appeal:-

“Whether, taking into consideration the decision of this court in *Tinubu vs. I.M.B. Securities PLC (2001) 8 NWLR (pt.740) 192 at 708 and 718 and that of the Court of Appeal in I.C:S. (Nig) Ltd vs Balton B.V. (2003) 8 NWLR (pt. 822) 223 at 235, the learned justices of the* H

*Court of Appeal were right in coming to the conclusion that a serving Governor of a state can sue or initiate proceedings for reliefs in his personal capacity while in office?”*

On the other hand, learned counsel for the respondent, CHARLES E. DUKE Esq., in the respondent’s brief filed on 29/3/07 also formulated a single issue to wit:-

*“Whether having regard to section 308 of the Constitution of the Federal Republic of Nigeria 1999, the Respondent, being the Governor of Cross River State, is precluded from suing the Appellants for libel.”*

It can be seen clearly that the issues as formulated by both counsel are substantially the same. That apart, it is also clear that the substance of the appeal is grounded on the proper interpretation of the provisions of section 308 of the 1999 Constitution.

In arguing the issue, learned Counsel for the appellants’ submitted that by the provisions of section 308(1) of the Constitution of the Federal Republic of Nigeria, 1999, (hereinafter referred to as the 1999 Constitution) which he reproduced, the respondent, who is the Governor of Cross River State of Nigeria is incapable of suing or initiating any proceedings in his personal capacity in any court of law in matters affecting him while remaining the Governor of the said state; that it is not correct, as held by the lower court that the said section 308(1) of the 1999 Constitution prohibits persons, such as the appellants, from suing the holders of the offices listed under section 308(3) of the 1999 Constitution but left the categories of persons so immuned from suit or prosecution such as the respondent, free to institute actions in their personal capacities while in office; that it is unfair to hold that while the respondent is immuned from suits and/or prosecution by any person, the very respondent who is so immuned is free to institute actions against any person in his personal capacity for any wrong during the period of immunity; that the construction given by the lower court to section 308 of the 1999 Constitution is therefore one sided; that the decision of the lower court as well as the earlier decision of that court in *Media Techniques (Nig) Ltd vs Adesina (2005) 1 NWLR (pt. 908) 401* and the High Court decisions in *Aper Aku vs Plateau Publishing Corporation Ltd (1985) 6NCLR 338 at 342* and

Onabanjo vs Concord Press of Nigeria Ltd (-1981) 2 NCLR 298 all overlooked what learned counsel calls “the principles and policies (sic) (policies) of social justice, equality, equity and fairness upon which our constitution and law are founded, relying on sections 14(1); 17(1) (2) (a) and 36 of the 1999 Constitution.

Learned Counsel further submitted that the judicial powers vested in the courts under section 6 of the 1999 Constitution must be exercised at all times and circumstances in accordance with the dictates of the fundamental principles on which the Constitution and law are based; that to allow the respondent or any of those, mentioned under section 308(3) of the 1999 Constitution to sue or institute actions against persons, as done by the respondent in this case, who cannot serve him with any process issued at their instance nor can they counter claim against him does not accord with the principle of justice, equity and fairness which constitute the basis of our constitution and law; that the immunity granted by section 308(1) of the 1999 Constitution is absolute and cannot be waived. Referring to and relying on the dicta of Karibi-White, J.S.C. and KALGO, J.S.C, in the case of Tinubu vs I.M.B. Securities PLC at pages 708 and 718 of the report, learned counsel submitted that once one of the parties to a case, be it at trial or appeal stage is identified to come within the persons mentioned in section 308(3) of the 1999 Constitution, the action is rendered incompetent due to the absolute immunity conferred by the Constitution; that the lower court ought to have considered itself bound by the dicta relied upon by counsel; for which counsel cited and relied on the case of Ifediorah vs Ume (1988) 2 NWLR (pt. 74) 5 at 13 per NNAEMEKA - AGU, J.S.C.; that to allow the decision of the lower court to stand would lead to absurdity and that once it is clear that manifest absurdity will be occasioned by adherence to the ordinary and literal construction of a statute, particularly constitutional provisions, the liberal approach ought to be adopted to avoid the absurdity and injustice, relying on the case of Awolowo vs Shagari (1979) All NLR 120; (1979) 6 -9 S.C 51; Oviawe vs Integrated Rubber Products Ltd (1997) 3 NWLR (pt. 492) 126 at 147. Finally learned counsel urged the court to resolve the issue in favour of the appellants and allow the appeal.

On his part, learned counsel for the respondent reproduced the provisions of section 308 of the 1999 Constitution and submitted that the said provisions are very clear and unambiguous in that it gives immunity to the respondent while in office as Governor of Cross River State, against civil or criminal proceedings but does not thereby disable the respondent, while in that office, from instituting a civil proceeding against anybody and that the lower court was right in holding that the Constitution does not deprive the respondent of the right to sue; that section 508 of the 1999 Constitution should be construed by its plain or literal meaning and nothing more; relying on the case of *Abley vs Dale* (1851) 11 CB 378 at 391; *Magor & St Mellons Rural District Council vs Newport Corporation* (1951) A.C 189 at 191 and *Media Tech. (Nig) Ltd vs Adesina* (2005) 1 NWLR (pt.908)461 at 475 by the court of Appeal. .

Learned Counsel further submitted that there is no provision in the 1999 Constitution prohibiting a serving state Governor as the respondent, from instituting an action against another person; that the issue of fairness equity, social justice and equality do not arise in the instant case; that the case, of *I.C.S. vs Balton B. V* supra cited and relied upon by his learned friend never made a definitive pronouncement on the ability or disability of a serving Governor to sue another person in his personal capacity. On the principles of interpretation of the Constitution to guide the court, learned counsel cited and relied on the case of *Rabiu vs The State* (1981) 2 NCLR 293 at 326 and submitted that the power to fill in the gaps or amend the Constitution lies with the National Assembly. Relying on the dictum of *AYOOLA, JSC* in the case of *Tinubu vs IMB Securities PLC* (supra) at 721- 722 learned counsel submitted that a serving Governor of a state, has the power to institute an action against any person or persons in his personal capacity and urged the court to resolve the issue against the appellants and dismiss the appeal.

The whole case hangs on the interpretation or construction of the provisions of section 308 of the 1999 Constitution which provides as follows:-

“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 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 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 very clear that section 308(1) (a) of the 1999 Constitution confers on the President, Vice-President, Governor or Deputy Governor absolute immunity against the institution of civil or criminal proceedings or the continuation of such civil or criminal proceedings against the President or Vice-President, Governor or Deputy Governor as long as they remain in office as such. It follows therefore that where an action or proceeding had been instituted prior to the person assuming the relevant office, such action or proceeding cannot be continued against the occupant of the relevant office during his tenure in the said office see Tinubu vs I.M.B. Securities PLC (2001) 16 NWLR (pt. 740) 670 at 708. By the provision of subsection 2 of section 308, it is clear that the immu-**

**nity conferred on the persons occupying the offices mentioned under section 308 of the 1999 Constitution does not extend to cases or actions instituted against the said persons in which the persons are nominal parties and in their official capacities such as the President; Vice-President; Governor or Deputy Governor.**

From the facts of this case, it is not disputed by the parties that the respondent is the Governor of Cross River State of Nigeria and that he instituted suit No.HC/261/2004 at the High Court of Cross River State holden at Calabar against the appellants while holding that office; that the action so instituted is in the personal capacity of the said respondent arising from an alleged libel against the person and/or character of the respondent. In addition to the above undisputed facts, is the agreement of both counsel in their briefs of argument that section 308(1) of the 1999 Constitution grants absolute immunity to the respondent against the institution or continuation of any civil or criminal action against the respondent in any court of law in Nigeria. The bone of contention between the parties, however, remains the issue as to whether the respondent, having regards to the absolute immunity conferred on him by the said section 308(1) of the 1999 Constitution has the right or liberty to institute or continue any civil action against any person(s) during his tenure of office as Governor of Cross River State. In other words, does the immunity against institution or continuation of civil or criminal proceedings include a corresponding disability to institute to continue any proceedings by the Governor against any person(s) in any court in Nigeria? As stated earlier in this judgment, the answer to the issue lies in the interpretation or construction of the provisions of section 308 of the 1999 Constitution being the provision which conferred the immunity on the respondent and others so mentioned in that section.

In the case of A-G of Bendel State vs A-G of the Federation & ors (1981) 9 S.C (Reprint) 1 at 78.- 79, OBASEKI, J.S.C. stated the principles guiding the court in interpreting or constructing the provisions of our constitution to include the following:-

*“(1) Effect should be given to every word.*

*(2) A construction nullifying a specific clause will not be given to*

*the Constitution unless absolutely required by the context.*

(3) *A Constitutional power cannot be used by way of condition to attain unconstitutional result.*

(4) *The language of the Constitution where clear and unambiguous must be given its plain evident meaning.*

B

(5) *The Constitution of the Federal Republic of Nigeria is an organic scheme of government to be dealt with as an entirety; a particular provision cannot be disserved from the rest of the Constitution.*

(6) *While the language of the Constitution does not change, the changing circumstances of a progressive society for which it was designed yield new and fuller import to the meaning.*

C

(7) *A Constitutional provision should not be construed so as to defeat its evident purpose.*

(8) *Under a Constitution conferring specific powers, a particular power must be granted or it cannot be exercised.*

D

(9) *Delegation by the National Assembly of its essential legislative function is precluded by the Constitution (Section 58(4) and section 4(1))*

E

(10) *Words are the common signs that mankind make use of to declare their intention one to another and when the words of a man express his, meaning plainly and distinctly and perfectly, there is no occasion to have recourse to any other means of interpretation.*

F

(11). *The principles upon which the Constitution was established rather than the direct operation or literal meaning of the words used, measure the purpose and scope of its provisions.*

(12) *Words of the Constitution are therefore not to be read with stultifying narrowness."*

G

It is with the above principles in mind that the provisions of section 308 of the 1999 Constitution will be interpreted. However, **it is settled law that the duty of the courts is simply to interpret the law or Constitution as made by the legislature or the framers of the Constitution. It is therefore not the Constitutional responsibility of the judiciary to make laws neither can it amend the laws made by the legislature. It must therefore be borne in mind always that courts**

H

cannot amend the Constitution neither can they change the words used in crafting it.

I had earlier reproduced the provisions of section 308 of the 1999 Constitution in this judgment and it is my considered view that the provisions are very clear and unambiguous. It is now settled that:

*“In the area of construction, the primary concern of the courts is the ascertainment of the intention of the legislature or law makers. From this function, the court may not reside however ambiguous or difficult of application the words of the law or Act may be, the court is bound to place some meaning upon them. If the language is clear and explicit, the court must give effect to it, for in that case, the words of the statute speak the intention of the legislature. Its function is jus dicere not jus dare. The words of a statute must not be overruled by the judges”* per OBASEKI, J.S.C. in *Ojokolobo vs Alamu* (1987) 3NWLR (pt. 61)317 at 402.

Bearing the above words of wisdom in mind particularly as the words used in section 308 of the 1999 Constitution are very clear and unambiguous, I hold the view that they ought to be given their plain and simple meaning as the said words speak for themselves particularly as they clearly demonstrate the intention of the framers of the Constitution which is clearly, not to place any disability on the persons mentioned under subsection 3 of section 308 of the 1999 Constitution, including the respondent, from instituting or continuing any civil action against any person or persons during their tenure of office. The prohibition contained in section 308 of the 1999 Constitution is rather against other parties and for the benefit of the respondent and others mentioned therein particularly during the period they occupy the relevant offices.

I hold the considered view that to hold otherwise or agree with the proposition of learned counsel for the appellants would amount to the court reading into section 308 of the 1999 Constitution words that are not therein contained thereby, in effect, a mending the said provision, which would be outside the Constitutional

province of the courts of law. That apart, I had earlier in this judgment reproduced some of the important principles of law guiding the courts in interpretation of our constitution and as can be gleaned therefrom there is nothing like the principle of equity, fairness, social justice and equality in the conduct of judicial affairs as can-  
 ons of interpretation of the Constitution. The submission of learned  
 counsel for the appellants in that respect, though very persuasive  
 on moral grounds, has no foundation in law and is consequently  
 discountenanced by me. The duty of the court is not to deal with  
 the law as it ought to be but as it is. From the words used by the  
 framers of section 308 of the 1999 Constitution, it is clear that  
 their intention is explicitly to confer absolute immunity on the re-  
 spondent and the others therein mentioned without a correspond-  
 ing disability on them to the exercise of their rights to institute  
 actions in their personal capacities in any relevant court of law for  
 redress during their tenure of office, as in the instant case.

The above view finds support in the dictum of AYOOLA, J.S.C. in *Tinubu vs IMB Securities PLC* (supra) at 721 - 722 where the  
 following view is expressed:-

*“Thirdly, I am unable to construe a provision of the Constitution that granted an immunity such as section 308(1) as also constituting a disability on the person granted immunity when there is not  
 provision to that effect, either expressly or by necessary implication in  
 the enactment. If makers of the Constitution had wanted to prohibit a  
 person holding the offices stated in section 308 from instituting or  
 continuing action instituted against any other person during his period  
 of office, nothing would have been easier to provide expressly that:*

*“no civil or criminal proceeding shall be instituted 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 con-  
 tinued against such a person during his period in office’*

*Or in like terms. The makers of the Constitution in their wisdom did not so provide.”*

I entirely agree with the above dictum and adopt same as

mine in this judgment. I consequently reject the contrary dicta of **KARIBI-WHYTE AND KALGO, JJSC** in the case of **Tinubu vs IMB Securities P.L.C** at 708 and 718 cited and relied upon by learned counsel for the appellants as the same are not in accord with the clear intention of the framers of section 308 of the 1999 Constitution. I also do not agree with the submission of learned counsel for the appellants that a confirmation of the interpretation of section 308 of the 1999 Constitution by the lower court would lead to absurdity particularly as a contrary interpretation would be adding to the said provision what is not expressly stated or intended, or putting unnecessary strain on that section which strain the said section will be unable to bear.

In conclusion I resolve the lone issue in this appeal against the appellants and hold the considered view that the appeal is without merit whatsoever and deserves to fail.

The appeal is therefore dismissed with N10,000.00 costs in favour of the respondent.

The judgment of the Court of Appeal holden at Calabar in appeal No.CA/C/06/2005 delivered on the 2<sup>nd</sup> day of May, 2006 is hereby affirmed by me.

Appeal dismissed.

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### **TOBI JSC**

The respondent is the plaintiff. The appellants are the defendants. Following the publication in the Global Excellence Magazine of Tuesday, May 11-May 17, 2004 under the caption “GOV. DONALD DUKE IN MESSY CERTIFICATE SCANDAL, the respondent sued the appellants for the sum of N5 million (Five million naira) damages for libel and exemplary or punitive damages of N10 billion (Ten billion naira).

The appellants raised a preliminary objection on the competence of the action and the jurisdiction of the court to entertain it. Of relevance to this appeal is Ground 1 of the objection. It reads:

*“The Plaintiff cannot, by virtue of the provisions of section 308*

*of the Constitution of the Federal Republic of Nigeria, 1999, institute, maintain or continue with any proceedings, including the present suit, in any court of law, nor can any proceedings be instituted, maintained or continued against him in his personal capacity.”*

Upholding the preliminary objection, the learned trial Judge said at B pages 40 and 41 of the Record:

*“The Court of Appeal, to my mind, for the first time at one instance in the ICS LTD case, pronounced on the ability of a serving Governor to sue and be sued in his private/personal capacity. I say so because in the TINUBU case the Supreme Court pronouncement was in respect of any claim or relief against a person to whom that section of the Constitution applies during the period he holds office. In this case a serving Governor is the sole plaintiff. I think we have come to end of this journey as I am bound by the Court of Appeal decision in the ICS LTD case to wit: that the plaintiff cannot be sued nor can he sue another person in our courts while he occupies the position of Governor of Cross River State. He can of course do so when he vacates as time does not run against him while in that office.”*

In an appeal to the Court of Appeal, that court, in a split decision, allowed the appeal. The court, in a majority decision, said at page 91 of the Record:

*“The irony of it all is that this court never decided that a Governor cannot sue another person in our courts while he occupies the position of Governor. In the ICS v. Balton BV (supra) it was never an issue before the court and it made no such decision. It is for the foregoing reasons that I conclude that the trial judge misdirected himself when he held that the case of ICS vs. Balton BV (supra) overruled all other cases and that he had reached the end of the road. Perhaps the end of the road will be in sight when the Supreme Court finally decides this issue.”*

Dissatisfied, the appellants have come to this court. As usual, briefs were filed and duly exchanged. The appellants formulated the following issue H for determination:

*“Whether, taking into consideration the decision of this court in Tinubu vs. IMB Securities Plc (2001) 8 NWLR (Pt. 740) 192(sic) at 708*

*and 718 and that of the Court of Appeal in ICS (Nig) Ltd, v. Balton BV (2003) 8 NWLR (Pt. 822) at 235, the learned Justices of the Court of Appeal were right in coming to the conclusion that a serving Governor of a Stats can sue or initiate proceedings for reliefs in his personal capacity while in office.”*

The respondent formulated the following issue for determination:

*“Whether having regard to Section 308 of the Constitution of the Federal Republic of Nigeria 1999, the Respondent being the Governor of Cross River State, is precluded from suing the Appellants for libel.”*

“The crux of this appear is the interpretation of section 308 of the Constitution. The section provides:

*“(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 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 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.”*

In the interpretation of the Constitution, the court is bound by the provisions of the Constitution. Where the provisions of the Constitution are clear and unambiguous, the court must give a literal interpretation to them without fishing for a likely or possible meaning. This is because by the clear and unambiguous provisions, the makers of the Constitution do not intend any other likely or possible meaning. However, where the provisions are not clear, a court of law can fish for a likely or possible meaning to bring out or arrive at the intention of the makers of the Constitution. Even here, the court has no jurisdiction to go out on an unguarded voyage of discovery completely outside the intention of the makers of the Constitution. The court is expected to apply a compass in a ship to navigate the waters to arrive at the intention of the makers of the Constitution.

What does section 308 say? What is the real meaning of the section? Section 308 only bars or prohibits a person from instituting civil or criminal proceedings against the respondent. The section does not say that the respondent, who comes under subsection (3) cannot sue for any wrong done him. In other words, while the section bars any person to sue the respondent, it is silent in respect of the right of the respondent to sue for a wrong done him. It will be wrong to say that the silence of the section anticipates that the respondent cannot sue. In my view, if the Constitution does not specifically provide for a situation or is silent on a situation, it will not be right for the courts to read into the Constitution a particular meaning, as submitted by counsel for the appellants, barring the respondent from suing. Access to court is a constitutional right which can only be taken away by a clear provision in the Constitution. It cannot be taken away by implication or speculation by the courts.

In *Chief Onabanjo v. Concord Press of Nigeria Ltd.* (1981) 2 NCLR 399, the plaintiff - the Governor of Ogun State in Nigeria - in his personal capacity sued the defendant which is the publisher of Concord Newspapers for libel claiming N500,000 as damages. The defendant raised a constitutional objection to the jurisdiction of the court saying that since the Governor cannot be sued in his private capacity, while in office, it is inequitable and unconstitutional for the Governor to sue in his private

capacity since the supreme purpose of the Constitution is on the principles of freedom, equality and justice. Alternatively, the defendant requested that the question raised by the objection is substantial to warrant reference to the Federal Court of Appeal for determination.”

B            The court held that:

*“1. Although under Section 267 of the Constitution it is expressly stated that the plaintiff being a Governor cannot be sued in his personal and private capacity nevertheless the Constitution is silent on whether or not a Governor can sue in his personal or private capacity.*

C            *2. It is not the duty of a court of law to fill in any gaps in the Constitution.*

*3. Since he is not expressly incapacitated by any provision of the Constitution, the Governor can sue in his private and personal status.”*

D            I entirely agree with the judgment. It cannot, or better, should not be otherwise. See also ICS (Nig.) Ltd, v. Balton BV (2003) 8 NWLR (Pt. 822) 223.

          In the light of the above and the more comprehensive reasons  
E given by my learned brother, Onnoghen, JSC, in his judgment, I also dismiss the appeal. I abide by his orders as to costs.

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**MUSDAPHER JSC**

F            I have read before now the judgment of my Lord Onnoghen, JSC just delivered with which I entirely agree. In the aforesaid judgment his Lordship has admirably and exhaustively dealt with all the pertinent issues submitted for the determination of the appeal. I agree with reason-  
G ings and which I respectfully adopt the same as mine. I therefore dismiss the appeal and award N10,000 costs in favour of the respondent.

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**MUKHTAR JSC**

H            The publication complained of in this libel action instituted by the respondent who was then the plaintiff is contained in paragraphs (7) and (8) of the plaintiff’s statement of claim. The words of libel were pub-

lished in the. 1<sup>st</sup> appellant magazine, whose publisher is the 2<sup>nd</sup> appellant, and the 3<sup>rd</sup> and 4<sup>th</sup> appellants are the Editor and author of libel complained of respectively. A notice of preliminary objection was filed by learned counsel for the defendants/appellants in the High Court of Cross River state where the suit was instituted. The grounds of the objection are:- B

*“1. The plaintiff cannot, by virtue of the provisions of Section 308 of the Constitution of the Federal Republic of Nigeria, 1999, institute, maintain, or continue with any proceedings, Including the present suit, in any court of law, her nor can any proceedings be instituted, maintained C or continued against him in his personal capacity.*

*2. The plaintiff has failed to comply with the mandatory requirement of Section 97 of the Sheriffs and Civil Process Act.*

*3. The annexure to the Plaintiff’s statement of claim titled “VNIVERSITAS PENNSYLVANIENSIS” should be expunged from the court’s record, the same not being a document that this Honourable (sic) D can use.*

*4. This suit discloses no reasonable cause of action.*

*5. This suit (sic) vexations and constitute a flagrant abuse of the E process of this Honourable court”.*

The learned trial judge considered the submissions of both counsel and upheld the objection of the defendants/appellants stating the following:-

*“I think we have come to the end of this journey as I am bound by F the Court of Appeal decision^ in the ICS LTD case to wit; that the plaintiff cannot be sued nor can he sue another person in our courts while he occupies the position of Governor of Cross River State. He can of course do so when he vacates as time does not run against him while in that G office.”*

Dissatisfied with the ruling the plaintiff appealed to the Court of Appeal. The Court of Appeal by a majority decision allowed the appeal, and set aside the ruling of the court of first instance. The defendants H have appealed to this court against the majority decision on three grounds of appeal, from which a single issue was distilled in the appellants’ brief of argument. The issue is:-

*“whether, taking into consideration the (decision of this court in Tinubu vs. I.M.B. Securities PLC (2001) 8^NWLR (pt 740) 192 at 708 and 718 and that of the Court of Appeal in I. C. S. (nig) Ltd vs. Balton B. V. (2003) NWLR (pt. 822) 223 at 235, the learned Justices of Court of Appeal were right in coming to the conclusion that a serving Governor of a state can sue or initiate proceedings for reliefs in his personal capacity while in office?”*

The issue formulated in the respondent’s brief of argument is:-

*“whether having regard to Section 308 of the Constitution of the Federal Republic of Nigeria 1999, the Respondent, is precluded from suing the Appellants for libel”.*

This later issue is to my mind more succinct. The gravamen of this appeal revolves around the Interpretation of Section 308 (1) of the Constitution of the Federal Republic of Nigeria supra and I will reproduce the provision hereunder. It 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 should 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.....

(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 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 above provisions are as clear and crystal on the immunity available to the Governor of a state in civil and criminal suit that may be instituted against him. They did not state that the Governor (the respondent in this case) cannot sue, the provision of subsection (a) supra merely states that he cannot be sued. It will be definitely wrong to read between the lines and in the process smuggle matters which were not intended by the legislator into the provisions of section 308 of the Constitution supra. Extraneous matters should not be imported into a legislation, but they should be given their simple and grammatical meaning. In the instant case, to say that just because Section 308 says a person holding the office of a Governor cannot be sued does not mean that the converse obtain. It is trite that provisions of law (like Section 308 of the Constitution supra) which are unambiguous should be given ordinary grammatical interpretation without qualification. If the legislator had meant to preclude a Governor of a state from instituting an action against any body in court, because he cannot be sued, it would have said so. See *Amadi v. N.N.P.C.* 2000 10 NWLR part 674 page 76, *Owena Bank Nigeria PLC v. E.N.S.E. Ltd* 1997 8 NWLR part 515 page 1, *Ifezue v. Mgodugha* 1984 1 SCLR 427, and *Lawal v. G. B. Olivant* 1972 3 S.C 124.

In the light of the above and the fuller reasoning in the lead judgment of my learned brother Onnoghen JSC, I am of the view that the appeal lacks merit and should be dismissed. I also dismiss it, and abide by the consequential orders in the lead judgment.

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### ADEREMI JSC

The appeal is against the decision of the Court of Appeal [Calabar Division] in Appeal No. CA/C/06/05 delivered on the 2<sup>nd</sup> May 2006 in which the appeal of the present respondent against the ruling of the High Court of Cross River State sitting at Calabar in Suit No. HC/261/2004; *Donald Duke v. Global Excellence Communications Ltd & 3 Ors.* delivered on the 8<sup>th</sup> day of November, 2004.

Before I proceed to the main appeal, I shall preface its consideration

with the facts leading to it. By paragraph 17 of the statement of claim dated 23<sup>rd</sup> July 2004, the present respondent who was the plaintiff at the trial court claimed against the present appellants jointly and severally, who were the defendants before that court the following reliefs: -

B       *“The sum of ₦5 billion (five billion naira) being damages for libel published of and concerning the plaintiff by the defendants in the Global Excellence Magazine of Tuesday May 11 - May 17, 2004 and Tuesday May 25 - May 30, 2004, and ₦10 billion (ten billion naira) being exemplary or punitive damages.”*

C       Upon the receipt of the writ of summons from the plaintiff (hereinafter referred to as the respondent) the defendants (hereinafter referred to as the appellants) caused a conditional appearance to be entered on their behalf and further went ahead to file a Notice of Preliminary  
D       Objection dated 30<sup>th</sup> August 2004 contending that the trial court lacked jurisdiction to entertain the suit. The grounds upon which the Notice of Preliminary Objection was predicated are as follows: -

E       *“(1) The plaintiff/respondent cannot, by virtue of the provisions of Section 308 of the Constitution of the Federal Republic of Nigeria, 1999 institute, maintain or continue with any proceedings, including the present suit, in any court of law, nor can any proceedings be instituted, maintained or continued against him in his personal capacity.*

F       *(2) Failure on the part of the plaintiff/respondent to comply with the mandatory requirements of Section 97 of the Sheriffs and Civil Process Act.*

G       *(3) The annexure to the plaintiffs statement of claim titled “Universitas Pennsylvaniensis” should be expunged from the court’s record, the same not being a document that this Honourable (sic) can use.*

*(4) This suit discloses no reasonable cause (sic) of action.*

*(5) This suit (sic) vexatious and constitute a flagrant abuse of the process of this Honourable Court.”*

H       Sequel to the taking of arguments of counsel on the preliminary objection on the 27<sup>th</sup> of October 2004, the learned trial judge, in a reserved ruling delivered on the 1<sup>st</sup> of November 2004, held inter alia: -

*“I think we have come to the end of this journey as I am bound by*

*the Court of Appeal decision in the ICS LTD case to wit: that the plaintiff cannot be sued nor can he sue another person in our courts while he occupies the position of Governor of Cross River State. He can of course do so when he vacates as time does not run against him while in that office.*”

Dissatisfied with the above ruling, the plaintiff who is the present respondent appealed therefrom to the court below. By a majority decision of that court (Court of Appeal - the court below), the appeal was allowed. The respondents before the court below who are presently the appellants, being dissatisfied with the majority decision of the court below, therefore appealed to this court by a Notice dated 3<sup>rd</sup> July 2006 which carried three grounds of appeal. When this appeal came before us for argument on the 26<sup>th</sup> of April 2007, Mr. Ukwani, learned counsel for the appellants relied on and adopted his clients’ brief of argument filed on 16<sup>th</sup> February 2007 and urged us to allow the appeal. Mr. Duke, learned counsel for the respondent, for his part relied on and adopted his client’s brief of argument filed on 29<sup>th</sup> March 2007 and urged us to dismiss the appeal.

In their brief of argument, the appellants identified only one issue for determination and as set out in the said brief, it is in the following terms:-

*“Whether, taking into consideration the decision of this court in Tinubu v. I.M.B. Securities Plc (2001) 8 NWLR (pt.740) 192 at 708 and 718 and that of the Court of Appeal in I.C.S. (Nig.) Ltd v. Balton B.V. (2003) 8 NWLR (pt. 822) 223 at 235, the learned Justices of the Court of Appeal were right in coming to the conclusion that a serving Governor of a State can sue or initiate proceedings for reliefs in his personal capacity while in office?”*

For his part, the respondent identified only one issue for determination and as couched in his brief of argument, it is as follows: -

*“Whether having regard to Section 308 of the Constitution of the Federal Republic of Nigeria, 1999, the respondent, being the Governor of Cross River State, is precluded from suing the appellants for libel.”*

The issue identified by the appellants for determination and that raised by the respondent both set out supra, are materially the same. And of course, both turn on the interpretation of the provision of Section 308

of the Constitution of the Federal Republic of Nigeria which reads: -

*"308 (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*  
B *against a person to whom this section applies during the 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; and*

*(c) no process of any court requiring or compelling the appearance*  
C *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.*

D *(2) The provisions of sub-section (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.*

E *(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."*  
F

I have read the briefs of both the appellants and the respondent; by these briefs, both parties are ad idem that the interpretation of the provisions of Section 308 of the Constitution of the Federal Republic of Nigeria 1999 is the crucial issue that calls for determination in this appeal.  
G I have carefully read the provisions of Section 308 of the said Constitution and the irresistible conclusion that I have reached is that the words in which that section is couched are very clear and unambiguous; they are plain. Where the language of the provisions of a statute or Constitution is  
H clear and unambiguous, the court has a standing duty to do no more than to give it its plain evident meaning. See *A-G of Bendel State v. A-G of the Federation & Ors (1981) 9 S.C. (Reprint) 1*. It is very clear from the language of the provision of Section 308 particularly Section 308 (1) (a),

which is the relevant provision that the legislators are mincing no words that what they intend to prohibit and which is prohibited by the aforementioned sub-section is the institution of any action, be it civil or criminal or the continuation of same against the person of a Governor or Deputy Governor during the period of his office. It must always be remembered B that judges have no business expanding the law or even making same; that is the exclusive function of the lawmakers. It is often said that a judge, in interpreting the provisions of any law, must get at the intention of the legislators. Yes, that is a true statement; but in demonstrating his judicial C interpretative skill, a judge can get to know the intention of the legislators only through the wordings of the provisions of the statute or section of the Constitution being interpreted. Let it be remembered that when in the words used in couching the provision, there is no ambiguity, then no exposition contrary to the expressed words used, is to be made. It admits D of no argument that what is intended to prohibit by the aforesaid section is the institution or continuation of any suit, be it civil or criminal, against the occupier of the position of a Governor or Deputy Governor of a State during the duration of his office. There is nothing and I repeat nothing E preventing a Governor or Deputy Governor from taking out a writ of summons or originating summons or better put, suing anybody whilst still in office. The above is the clear and, in my humble view, a true interpretation of that section; that is a true declaration of the law. To do F otherwise, is to declare what the law ought to be which is not the function of the *judex*. If it is thought that the law ought to be amended, let that be the exclusive function of the legislators - members of our National Assembly. Section 308 afore-said does no more than to confer absolute G immunity on the holder of the position of the Governor or Deputy Governor in the State without drawing away from them their rights to seek a redress for any wrong done to them by instituting actions in their personal capacities against anybody they may think has transgressed their rights even while they are still in office. H

It is for this little contribution but most especially for the copious reasons contained in the leading judgment of my learned brother, Onnoghen, J.S.C. that I resolve the only issue raised by the appellants against

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them; while I answer the identical issue contained in the brief of the respondent in the negative. The appeal, by my judgment, is consequently unmeritorious and it has to be dismissed. And I so dismiss it. I abide by all other orders contained in the leading judgment including the order as to

B costs made therein.

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