

**SUPREME COURT OF NIGERIA**  
16TH JULY, 2010. SC. 170/2009  
**CORAM:- M. MOHAMMED, W. S. N. ONNOGHEN,**  
**F. F. TABAI, M. MUNTAKA-COOMASSIE,**  
**O. O. ADEKEYE, JJSC**

ALHAJI JIBRIN BALA HASSAN ..... APPELLANT  
AND

1. DR. MU AZU BABANGIDA ALIYU  
2. PEOPLES DEMOCRATIC PARTY (PDP) ..... RESPONDENTS  
3. INDEPENDENT NATIONAL  
ELECTORAL COMMISSION

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ACTIONS - Limitation - Public Officers' Protection Act - Exception -  
It does not apply where the public officer failed to act in good faith -  
Or acted in abuse of office (H1)

ACTIONS - Words & phrases - Right of action - Distinction from  
cause of action - While cause of actions refers to the facts entitling a  
plaintiff to his claims - Right of actions is the means by which he  
accesses judicial relief (H2)

ACTIONS - Statutes of Limitation - Application - Effect - The effect  
of its application is that it takes away the right of action - Leaving  
plaintiff with a cause of action devoid of any judicial relief (H3)

ACTIONS - Limitation - Public Officers' Protection Act - Proof of  
exception - It is the duty of plaintiff to prove the circumstance - That  
makes the case an exception - Which duty was not discharged in this  
case (H4)

CONSTITUTIONAL LAW - Actions - Immunity clause - Effect - It  
suspends the right of action against those to whom it applies - Until  
the expiration of the tenure of their offices (H5)

ELECTION PETITIONS - Immunity clause - Applicability - Election  
petitions and election related proceedings - Are special proceedings -  
To which immunity clause does not apply (H6)

ELECTIONS - Actions - Commencement - Need for promptness - Time is of the essence in election-related matters - So an aggrieved party must promptly commence action - Or his right of action may abate (H7)

SUPREME COURT - S. 22 of Supreme Court Act - Applicability - It can only be invoked where the lower courts had jurisdiction to do a thing - But neglected to do so (H8)

### ***FACTS***

The plaintiff/appellant sued the defendants/respondents before the Federal High Court holden at Kaduna by way of originating summons. By his action, appellant challenged the alleged wrongful substitution of his name with that of 1st respondent as the gubernatorial candidate of 2nd respondent for Niger State in the said election. It was undisputed that 2nd respondent conducted its primary election in respect of the position on 13th December 2006 and that appellant had won that election, whereupon his name was forwarded to 3rd respondent as 2nd respondent's flag-bearer for the election. Accordingly appellant was screened and cleared by 3rd respondent to contest the election. However, 2nd respondent in February 2007 applied to 3rd respondent to substitute the name of 1st respondent for that of appellant for the election. Accordingly, 1st respondent eventually contested and won the election on the platform of 2nd respondent and was sworn in as Governor of Niger State on 29th May 2007.

Between the substitution of his name in February 2007 and the end of October 2007, appellant never challenged his substitution in any way. Not until 7th November 2007 when he instituted the suit leading to this appeal. In reaction to the suit, 1st respondent filed a notice of preliminary objection challenging the jurisdiction of the court to entertain same on the ground *inter alia*, that the action being about steps taken by 3rd respondent, a public officer, is statute barred in view of the provisions of the Public Officers Protection Act and that it cannot be maintained against 1st respondent in view of his constitutional immunity as the governor of Niger State. Trial court heard the objection and upheld same. So it struck out the action. Aggrieved, appellant appealed to Court of Appeal which court dismissed his ap-

peal. This is a further and final appeal by appellant to the Supreme court.

### **ISSUE FOR DETERMINATION**

Whether the court has jurisdiction to entertain and determine the action of the appellant having regards to the provisions of section 2(a) of Public Officers Protection Act and section 308 of the Constitution of the Federal Republic of Nigeria 1999 (hereinafter referred to as the 1999 Constitution).

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

### **Public Officers' Protection Act - Exception**

1. In the case of *Egbe vs Adefarasin* (1985) 1 NWLR (pt. 3) 549 at 568 - 569, this Court stated the law as follows:-

*"The general principle of law is that where the law provides for the bringing of action within a prescribed period, in respect of a cause of action accruing to the plaintiff, proceeding shall not be brought after the time prescribed by the statute - see Obiefuna vs Okoye (1961) 1 All NLR 357. An action brought outside the prescribed period offends against the provision of the section and does not give rise to a cause of action. A cause of action means the factual situation stated by the plaintiff; if substantiated, entitles him to a remedy against the defendant - See Latana vs Cooper (1964) 2 All ER 929. The claim must rest on and be supplied by a cause of action....."*

To the above general rule there is an exception, which exception constitutes the contention of the appellant in this case to wit, where the public officer concerned fails to act in good faith or acts in abuse of office or maliciously or with no semblance of legal justification, as decided in the case of *Lagos City Council vs Ogunbiyi* (1969) All NLR 297 at 299. (p. 2329 A)

### **Right of action - Distinction from cause of action**

2. It should be noted that there is clear distinction between a cause of action and a right of action to enforce the cause of action or the right of judicial relief in the plaintiff. The distinction must be constantly kept in view to avoid confusion.

The cause of action refers to the facts or combination of facts which the plaintiff must adduce to entitle him to the relief(s) claimed while the action or right to institute the action remains the means or

medium affording the plaintiff the opportunity to ventilate his grievances - cause of action or bundle of facts, as variously described by the courts over the years. (pp. 2329 F/2330 B)

***Statutes of Limitation - Application - Effect***

- B 3. Now the effect of a statute of limitation, such as the provisions of section 2(a) of the Public Officers Protection Act, *supra*, on both cause of action and right of action is that it bars the right of action and not the cause of action.
- C It takes away the right of the plaintiff to institute the action but leaves him with his cause of action intact, though, without the right to enforce same or right to judicial relief. (p. 2330 A)

***Public Officers' Protection Act - Proof of exception***

- D 4. It is however correct that where a public officer acts outside the scope of his authority or without a semblance of legal justification, he cannot claim the protection of the provisions of the Public Officers Protection Act. It is the duty of plaintiff/appellant to adduce evidence or facts to establish the bad faith, lack of semblance of legal justification etc, etc.

Are there facts on record from which the court can agree with the appellant that the 3<sup>rd</sup> respondent acted outside its scope of authority or without the semblance of legal justification in acting on the letter of substitution in question?

- F To answer the question one has to look at the affidavit in support of the Originating Summons.

- G Looking at the totality of the depositions in the affidavit *supra*, it is clear there is no import or allegation of bad faith or lack of semblance of legal authority etc in or against the 3<sup>rd</sup> respondent. (pp. 2331 A/D/2334 D)

***Actions - Immunity clause - Effect***

- H 5. There is no doubt that section 308 of the 1999 Constitution confers absolute immunity on the President, Vice President, Governor and Deputy Governor in respect of civil or criminal matters during their tenure in office. The provision clearly suspends the right of action or the right to judicial relief of an aggrieved party during the tenure of office of the officials mentioned therein. In other words, the

right of action is put in limbo until the expiration of the tenure of office of the affected government official. The expiration of the tenure kick starts the accrual of the cause of action or revives same. (p. 2336 H)

***ELECTION PETITIONS - Immunity clause - Applicability*** B

6. The provisions of section 308 of the 1999 Constitution do not protect a President or Governor from legal proceedings in a matter of his election per se or in a matter connected therewith even when he has been, as a contestant, declared duly elected and sworn in as such. The reason for that is that election petitions and election related proceedings are really special proceedings distinct from civil or criminal proceedings which fall within the province of the said section 308 of the 1999 Constitution. (p. 2337 B) C

***ELECTIONS - Actions - Commencement - Need for promptness*** D

7. It is settled law that in an election or election related matter, time is of the essence. I will add that the same applies to pre-election matters. Election matters are sui generis, very much unlike ordinary civil or criminal proceedings. Appellant ought to have instituted the action soon after the substitution to keep his interest in the political contest alive but he did not. If he had but the election went on and the 1<sup>st</sup> respondent sworn to as the Governor, by the authority of the decision in Amaechi vs INEC supra, section 308 of the 1999 Constitution would have been rendered a toothless bull dog. E

I hold the view that at the time appellant decided to go to court in the circumstances of this case, the question of nomination by way of substitution which is a pre-election matter had ceased to exist leaving only the election proper to be questioned and the proper place to do so is the Election Tribunal. (p. 2338 D) F

***S. 22 of Supreme Court Act - Applicability***

8. The invocation of the powers of this Court under section 22 of the Supreme Court Act by learned Senior Counsel for the appellant is misconceived having regards to the facts of this case. Section 22 of the Act can only be invoked where the lower courts are found to be clothed with the requisite jurisdiction to entertain and determine the matter under consideration but failed and or neglected to do. H

Where, however, as in this case, the lower courts have no jurisdiction to entertain the matter the power of this Court under section 22 of the Supreme Court Act becomes irrelevant and consequently inapplicable. (p. 2340 E)

**B** **NOTABLE POINTS OF INTEREST**  
**ADEKEYE JSC**

*1. Issue of statute bar does not require evidence to determine*

I have to emphasize also that a defence founded on Statute of Limitation like the Public Officers Protection Act, is a defence that the plaintiff has no right of action. It is a defence which can be traced in limine and without any evidence in support, it is sufficient if prima facie the date of taking the cause of action outside the prescribed period is disclosed in the writ of summons and statement of claim.  
**C** The defence must be pleaded while the trial court has a duty to confine itself to the pleadings filed by the parties. In order to determine the period, consideration must be given to the writ of summons and the statement of claim alleging when the wrong was committed and by comparing that date with the date on which the writ of summons was filed. This can be done without taking oral evidence from witnesses. If the time on the writ of summons is beyond the period allowed by the limitation law then the action is statute-barred.  
**E** (p. 2358 H)

**F** *2. Immunity clause applies to all actions but election petitions*

Where the election of a Governor is questioned in an election Tribunal, the provisions of section 308 of the Constitution will not apply, but that of section 21 (5) of the Electoral Act. Since the appellant in this case sought to remove the 1<sup>st</sup> respondent as the Governor by an originating summons filed before the Federal High Court, the provision of section 308 will protect him. The trial court was therefore right to decline jurisdiction in the light of the clear provision of section 308. Justice Musdapher, JSC in the case of Amaechi v. INEC (2008) 5 NWLR pt. 1080 pg. 227 at page 343 drove home the point that immunity under section 308 of the Constitution will not avail a Governor, since the immunity is not within the contemplation of a dispute in an election petition within the meaning of section 285 of the Constitution. (p. 2363 F)

## **REPRESENTATION**

P.I.N. Ikweuto, Esq., S.A.N. with him, Messrs T. Oladoja; M. Abdul-Rasheed; F.A. Esu; C.I. Mbaeri; J.I. Idigo-Nwosu (Miss); C.O. Nwankwo; C.K. Alabi and N. Nvatarah (Miss) for the Appellant.

B

Olajide Ayodele. Esq., S.A.N. with him, M. Aneche Esq., D. Baba Esq., A.N. Yisa Esq., G. Tumaka Esq., A. Adeniyi for the 1<sup>st</sup> Respondent.

Rotimi Ojo Esq., with him, Messrs. T. Beji; M. Suleiman; D. Mohammed; Tassala Jiyi (Miss); G. Mohammed; O. Okonofua (Miss); Vera Okpaluwa (Mrs.) for the 2<sup>nd</sup> Respondent.

C

Dr. S.S. Ameh, S.A.N. with him, Messrs. C.N. Ndekwe; J. Anyandayi (Miss); M. Abu; F.U. Adejoh; Z. Eshata; I.A. Joshua; V. Ndanusa (Miss); Ahmed Mohammed; Kolo Makama for the 3<sup>rd</sup> Respondent.

## **CASES REFERRED TO**

Onitri vs Benson (1960) SCNLR 314

E

Oyekan vs Akinjide (1965) NMLR 381

Saraki v. Kunini (2000) FWLR pt. 18 pg. 309

Ojah vs Ogboni (1996) 6 NWLR (pt. 454) 272

Abiodun v. FRN (2009) All FWLR pt. 483 pg. 1360

F

Abubakar v. Yar'Adua (2008) 1 SC pt. 1177 at 122

Ugwu vs Ararume (2007) 12 NWLR (pt. 1048) 367

Nwankwere vs Adewunmi (1966) All NLR 119 at 124

C.B.N vs Okojie (2004) 10 NWLR (pt. 882) 448 at 523

Amaechi vs INEC (2008) 5 NWLR (pt. 1080) 227 at 296

G

Egbe v. Alhaji (1990) 1 NWLR pt.128 pg. 546 at pg.592

Lagos City Council vs Ogunbiyi (1969) All NLR 297 at 299

Agbeotu vs Brishe (2005) All FWLR (251) 1454 at 1464 -1465

Njideka Ezeigwe v. Chief Sir Benson Chuks Nwawulu & ors (2010) 4 NWLR pt. 11 83 pg. 159 at pg. 200

H

Mathias Oko Offoboche v. Ogoja Local Government & 1 Or. (2001)16 NWLR pt. 739 pg. 458 at pg. 484

**STATUTES REFERRED TO**

Constitution of the Federal Republic of Nigeria, 1999, s. 308

Electoral Act, 2006, ss. 32, 34 & 36

Public Officers' Protection Act, s. 2

B Supreme Court Act, s. 22

**LEAD JUDGMENT BY ONNOGHEN JSC**

This is an appeal against the judgment of the Court of Appeal, Holden at Kaduna in appeal No.CA/KD/78/08 delivered on the 22<sup>nd</sup> day of April, 2009 in which the court dismissed the appeal of the appellant against the judgment of the Federal High Court, Holden at Kaduna in suit No. FHC/KDS/CS/162/2007 delivered by that court on the 14<sup>th</sup> day of December, 2007, striking out the suit of the appellant, as plaintiff for lack of jurisdiction.

The facts of the case include the following: On the 13<sup>th</sup> day of December, 2006, the 2<sup>nd</sup> respondent conducted its primary election to select/nominate its candidate for the Gubernatorial election for Niger State scheduled for April, 2007 which election was won by the appellant, as a result of which his name and particulars were forwarded by the 2<sup>nd</sup> respondent to the 3<sup>rd</sup> respondent as the sponsored candidate of the 2<sup>nd</sup> respondent for the Niger State Governorship Election so scheduled. The 1<sup>st</sup> respondent was not a candidate at the primary election conducted in December, 2006 resulting in the emergence of the appellant; in fact at the material time, he was still a civil servant. Appellant was duly screened by the 3<sup>rd</sup> respondent and cleared to contest the said election.

However, on the 5<sup>th</sup> and 13<sup>th</sup> day of February, 2007, the 2<sup>nd</sup> respondent applied to the 3<sup>rd</sup> respondent to withdraw/substitute the 1<sup>st</sup> respondent for the appellant as the sponsored candidate of the 2<sup>nd</sup> respondent for the election in question which application was duly acted upon by the 3<sup>rd</sup> respondent. The 1<sup>st</sup> respondent, rather than the appellant, therefore contested the Niger State Governorship Election on the 14<sup>th</sup> day of April, 2007 and was consequently declared the winner thereof and was sworn in as the Governor of Niger State on the 29<sup>th</sup> day of May, 2007.

On the 7<sup>th</sup> day of November, 2007 the appellant instituted an action, suit No. FHC/KD/CS/162/2007 at the Federal High Court,



Holden at Kaduna by way of Originating Summons asking for the determination of the following questions:-

"1. WHETHER having regard to the provisions of section 34 (2) of the Electoral Act, 2006, the 2nd Defendant can without adducing cogent and verifiable reason change and or substitute the name of the plaintiff for the 1<sup>st</sup> Defendant as the Peoples Democratic Party Governorship candidate in the 14<sup>th</sup> April, 2007 Election in Niger State. <sup>B</sup>

2. WHETHER having regard to the non-compliance with the condition to give cogent and verifiable reason as provided by section 34(2) of the Electoral Act, 2006 by the 2nd Defendant, can the 3rd Defendant can act on the name of the 1<sup>st</sup> Defendant as replacement of the plaintiff's <sup>C</sup>

3. WHETHER having regard to the non-compliance with the condition to give cogent and verifiable reason as provided by section 34(2) of the Electoral Act, 2006 by the 2<sup>nd</sup> Defendant, the plaintiff is not the duly nominated candidate for the 14th April, 2007 Gubernatorial Election in Niger State under the platform of the 2<sup>nd</sup> Defendant. <sup>D</sup>

4. WHETHER having regard to the provisions of Article 17.2 (b) of the Constitution of the Peoples Democratic Party and Articles 13(a)-(g), 14(a)-(k), 15(i) (a)-(e) (2), 16(a)-(f), 18(a) & (b) and 19 its Electoral Guidelines for primary election, 2006, the 1<sup>st</sup> Defendant who did not contest the Gubernatorial Primary Election could be changed and or substituted by the 2<sup>nd</sup> Defendant for the plaintiff who won the said Primary Election by 3,575 lawful votes." <sup>E</sup> <sup>F</sup>

Consequently upon the determination of the above questions, the appellant claimed the following reliefs:-

"a. A DECLARATION that the plaintiff was the lawful candidate to contest the 14<sup>th</sup> April, 2007 Governorship Election in Niger State on the platform of the 2<sup>nd</sup> Defendant being the candidate who won the majority of 3557 (sic) lawful votes at the Primary Election conducted by the 2<sup>nd</sup> Defendant on the 13<sup>th</sup> day of December, 2006 and whose name was submitted by the 2<sup>nd</sup> Defendant to the 3<sup>rd</sup> Defendant. <sup>G</sup> <sup>H</sup>

b. A DECLARATION that the 1<sup>st</sup> Defendant who did not contest the Primary Election aforesaid as mandated by Article 17.2(b) of the Constitution of the Peoples Democratic party and the Electoral guide-

*lines for Primary Election, 2006 issued pursuant thereto, was not qualified to be nominated by the 2nd Defendant as its Gubernatorial Candidate in the 14th April, 2007 Governorship Election in Niger State.*

B c. *A DECLARATION that the 1<sup>st</sup> Defendant who did not contest the Primary Election aforesaid was not the lawful candidate to contest the 14<sup>th</sup> April, 2007 Governorship Election in Niger State on the Platform of the Peoples Democratic Party, the 2<sup>nd</sup> Defendant.*

C d. *A DECLARATION that by virtue of the provisions of section 32(5) of the Electoral Act, 2006 it is only a court of law that can disqualify the plaintiff who was duly nominated as the Governorship candidate of the 2nd Defendant in the 14<sup>th</sup> April, 2007 Governorship Election in Niger State and whose name and particulars were submitted by the 2<sup>nd</sup> Defendant to the 3<sup>d</sup> Defendant as such.*

D e. *A DECLARATION that the option of changing or substituting the plaintiff with the 1<sup>st</sup> Defendant is only exercisable by the 2<sup>nd</sup> Defendant in strict compliance with the provisions of section 34 (2) of the Electoral Act, 2006.*

E f. *A DECLARATION that the sudden substitution of the plaintiff's name with the 1<sup>st</sup> Defendant's name lacked any merit and it constitutes a deliberate and flagrant infraction of the provisions of section 34(2) of the Electoral Act, 2006.*

F g. *A DECLARATION that the nomination of the 1<sup>st</sup> Defendant as the gubernatorial candidate of the Peoples Democratic Party at the said Election and the acceptance thereof by the 3<sup>d</sup> Defendant is VOID AB INITIO*

G h. *A DECLARATION that the plaintiff, whose name was unlawfully and unjustifiably removed as the Governorship candidate of the 2nd Defendant in 14<sup>th</sup> April, 2007 Governorship Election remains the candidate of the Peoples Democratic Party in the eyes of the law.*

H i. *IN THE PREMISES OF THE FOREGOING, AN ORDER directing the 1<sup>st</sup> Defendant to immediately vacate the coveted seat of the Governor of Niger State.*

j. *A FURTHER ORDER directing the relevant authorities to immediately inaugurate and or swear in the plaintiff as the Executive Governor of Niger State."*

On the 23<sup>rd</sup> of November, 2007, the 1<sup>st</sup> respondent, as 1<sup>st</sup> de-

pendant filed a notice of preliminary objection challenging the jurisdiction of the trial court to hear and determine the suit as constituted on the following grounds:

“(i) *This Honourable Court lacks jurisdiction in this matter.*

(ii) *This action being about steps taken by a Public Officer is statute barred having regard to the provisions of the Public Officers Protection Act.*

(iii) *Action of the Plaintiff amounts to an abuse of the process of the court.*

(iv) *The 1<sup>st</sup> Defendant is the sitting Governor of Niger State of Nigeria and enjoying constitutional immunity from civil and criminal actions whilst in office.*

(v) *The action of the Plaintiff is caught by the principles of Estoppel and Standing-by.”*

In respect of the 2<sup>nd</sup> Defendant, the Preliminary Objection is to the effect that:

(i) The Plaintiff's action is caught by the equitable doctrine of Standing-by

(ii) The issue of nomination and substitution are all pre-election matters which are no longer justiciable after holding of the election.

(iii) The 1<sup>st</sup> Defendant is covered by Constitutional Immunity.

The trial court heard arguments on the Originating Summons and the objections, and, in a judgment delivered on the 14<sup>th</sup> day of December 2007, the Court upheld the primary objections and consequently struck out the action.

Appellant was dissatisfied with that judgment and appealed to the Court of Appeal, as stated earlier in this judgment, which court dismissed the appeal in a judgment delivered on the 22<sup>nd</sup> day of April, 2009. The present appeal is against the said judgment, the issues for the determination of which have been identified in the appellant's brief of argument filed by learned Senior Counsel for the appellant, P.I.N. IKWUETO ESQ, SAN on the 16<sup>th</sup> day of October, 2009 as follows:-

*“Having regard to the clear, unequivocal and manifest provisions of section 34(2) and 36(1) of the Electoral Act; and Article 8 of the Guidelines and Regulations was the Change/Substitution of the Appellant as the sponsored candidate of the PDP in the 2007 Governorship Election in Niger State an abuse of office and with no sem-*

*blance of legal justification*

*(Grounds 1, 2, 3, 5 and 6)*

*2. Whether the lower court properly considered and resolved the cardinal issues arising from the undisputed facts before it in reaching its conclusion in the appeal before it. (Grounds 3, 4, 7 and 9)*

B *3. Is the immunity clause provided in section 308 of the 1999 Constitution applicable in any action challenging the unlawful assumption of office of a person who was never a lawfully sponsored candidate for the Governors/up Election in a State (Niger State). (Ground 8)."*

C In the opinion of Learned Senior Counsel for the 1<sup>st</sup> respondent, OLAJIDE AYEDELE ESQ, SAN, the following are the issues that call for determination as stated in the 1<sup>st</sup> respondent's brief of argument filed on 30/11/09:-

D *"(i) Whether the court below correctly found that the Public Officers Protection Law would apply to protect the 3<sup>d</sup> Respondent in this case?*

*(ii) Whether the Court of Appeal correctly considered the cardinal issues of fact arising from this case?*

E *(iii) Whether the immunity clause would apply to the 1<sup>st</sup> Respondent in the circumstances of this case."*

Learned Counsel for the 2<sup>nd</sup> respondent, ROTIMI OJO ESQ identified two issues for determination in the brief of argument filed on 30/11/09. The issues are as follows:-

F *"(a) Whether the concurrent findings of the lower courts are perverse or are not supported by credible evidence or have resulted in miscarriage of justice, and,*

G *(b) Whether the cause of action of the appellant is not extinguished by the combination of the provisions of section 2 (a) of the Public Officers Protection Act and that of section 308 of the 1999 Constitution."*

Dr. S.S. AMEH, SAN for the 3<sup>rd</sup> respondent, also formulated three issues for determination. These are as follows:-

H *"1) Whether in the circumstances of this case the Public Officers Protection Act is applicable to bar the right of the Appellant to institute this action?*

*2) Whether the 1<sup>st</sup> Respondent having been sworn in as the Executive Governor of Niger State enjoys constitutional immunity*

against civil and criminal proceedings?<sup>2</sup>(same as the Appellant's issue C which he more succinctly reformulated at page 32 of his Brief)

3) *Whether the Lower Court was right in law in affirming the decision of the Trial Court declining jurisdiction to determine the Appellant's Originating Summons on the merit.*"

Looking at the above issues, it is clear that they are the same. I have gone through the record of proceedings including the processes filed in this matter and I am of the view that the primary issue agitating the minds of the parties and the courts is one, to wit:

Whether the court has jurisdiction to entertain and determine the action of the appellant having regards to the provisions of section 2(a) of Public Officers Protection Act and section 308 of the Constitution of the Federal Republic of Nigeria 1999 (hereinafter referred to as the 1999 Constitution).

It should be noted that the lower courts did not go into the merit of the action at all, so they never considered nor resolved the issue as to whether there was compliance with the provisions of sections 34(2) and 36(1) of the Electoral Act, 2006 nor go into the facts relating to the merit of the suit and resolve same. So in effect, appellant's issues 1 and 2 supra that touch on the substance of the case of the appellant are not relevant to the determination of the appeal. As regards appellant's issue 2, there was no need for the lower courts to *resolve "the cardinal issues arising from the undisputed facts before it"* as the matter was struck out based on a preliminary objection. In any event, the facts relevant to the grounds of the objection to wit, section 2(a) of the Public Officer's Protection Act and section 308 of the 1999 Constitution are not in dispute in the proceedings. Anyway, learned Senior Counsel has admitted in the said issue 2 that the said facts were undisputed.

However, when one looks at page 8 of the appellant brief, another version of issue 1 is presented. It is as follows:

*"Application of the Public Officers Protection Act to an Unlawful/unconstitutional act by a public officer."*

In arguing the new look appellant's issue I, supra, learned Senior Counsel for the appellant submitted that the Public Officers Protection Act is designed to protect a Public Officer who acts in good faith and does not apply to acts done in abuse of office and with no semblance of legal justification, relying on Nwankwere vs Adewunmi

(1966) All NLR 119 at 124; Lagos City Council vs Ogunbiyi (1969) All NLR 297 at 299; C.B.N vs Okojie (2004) 10 NWLR (pt. 882) 448 at 523 and Offoboche vs Ogoja Local Government (2001) 16 NWLR (pt. 739) 458. It is the further submission of learned Senior Counsel that for a court to determine whether a public officer acted in good faith or without a semblance of legal justification the court has to go into a proper analysis of the facts and circumstances of the act complained of. As a follow up to the above submission learned Senior Counsel went into the gist of the appellant's case before the court which is that contrary to and in total disregard of binding statutory provisions, the 3<sup>rd</sup> respondent purported to substitute the name of the appellant with that of the 1<sup>st</sup> respondent as the governorship candidate of the 2<sup>nd</sup> respondent in Niger State for the 2007 elections; that the affidavit in support of the Originating Summons contain detailed particulars of the gross violation of binding statutory provisions which rendered the purported substitution illegal, unlawful and being without any semblance of legal justification; that the 3<sup>rd</sup> respondent cannot act in total disregard of binding statutory provisions and still claim protection under the Public Officers Protection Act.

Citing and relying on the decision in the case of Ibrahim vs Judicial Service Committee, Kaduna State, (1998) 14 NWLR (pt. 584) at 32 learned Senior Counsel submitted that "the action of the Respondents in totally disregarding and violating clear and mandatory statutory provisions is unlawful, malicious and unconstitutional."

It is the submission of learned Senior Counsel that the concurrent findings by the lower courts that there is no evidence by the appellant before the Court that the 3<sup>rd</sup> respondent acted beyond the scope of his office or maliciously or even with no semblance of legal justification is perverse having regards to the facts deposed to in the supporting affidavit and that on the authority of the case of Ojah vs Ogboni (1996) 6 NWLR (pt. 454) 272; Alakija vs Abdullahi (1998) 6 NWLR (Pt. 552) 1 AND Ogbu vs Wokoma (2005) 14 NWLR (pt. 944) 118 at 140, this Court should intervene by exercising its powers under section 22 of the Supreme Court Act. Learned Senior Counsel then went on to point out what he terms "*manifest defects/irregularities*" in the letter of substitution and notice of withdrawal / substitution which counsel says show that the purported act of substitution was in flagrant disregard of the dictates of the official duties

incumbent on the 3<sup>rd</sup> respondent and without any semblance of legal justification. The statutory defects, according to learned Senior Counsel include absence of cogent and verifiable reason for the substitution contrary to section 34(2) of the Electoral Act, 2006 as decided in the case of Ugwu vs Ararume (2007) 12 NWLR (pt. 1048) 367; Amaechi vs INEC (2008) 5 NWLR (pt. 1080) 227 at 296; Agbakoba vs INEC (2008) 18 NWLR (pt. 1119) 489 at 549 and Ehinlawo vs Oke (2008) 16 NWLR (pt. 1113) 357 at 403 and urged the court to resolve the issue in favour of the appellant.

On his part, learned Senior Counsel for the 1<sup>st</sup> respondent, OLAJIDE AYODELE ESQ, SAN submitted that the 3<sup>rd</sup> respondent is protected by section 2(a) of the Public Officers Protection Act because the action against it was not instituted within 3 months of the accrual of the cause of action. Referring to paragraphs (n), (o), (p) and (g) of the affidavit in support of the Originating Summons, learned Senior Counsel submitted that they do not contain facts showing what unlawful acts or steps were taken by the 3<sup>rd</sup> respondent; that the matter having been decided on a preliminary objection, there was no need to go into the merits of the case even though appellant appears to argue that in order to determine whether the act of the public officer (3<sup>rd</sup> respondent) was done outside its scope of authority the court has to examine the merit of the case presented by the appellant; that the acts of a public officer that would make his actions not to be protected by the Public Officers Protection Act must be extraneous to the merits of the case against the public officer which the appellant has failed to show; that the courts below were under no obligation to determine the unlawfulness or otherwise of the purported substitution of the candidate but whether having regards to the facts and circumstances of the case the Public Officers Protection Act avails the 3<sup>rd</sup> respondent; that it does avail the 3<sup>rd</sup> respondent as it took the appellant eight months from the time his cause of action accrued to the institution of the action contrary to the three months required by the Act, and urged the court to so hold.

Learned Counsel for the 2<sup>nd</sup> respondent, ROTIMI OJO ESQ H referred to paragraphs 4 - 5 of the affidavit in support of the Originating Summons and submitted that they contain no act of malice against the 3<sup>rd</sup> respondent nor do they show the act of the 3<sup>rd</sup> respondent which is devoid of legal justification; that there was therefore no

evidence in support of the allegation that 3rd respondent acted outside the scope of its authority etc, etc.

On his part, learned Senior Counsel for the 3rd respondent, DR. S.S. AMEH, SAN submitted that there is no doubt that the 3<sup>rd</sup> respondent is a public officer to whom section 2(a) of the Public Officer's Protection Act applies; that the only dispute is whether the circumstances of this case constitute an exception in the applicability of the said provision of the Act; that there is no evidence on record that the 3<sup>rd</sup> respondent acted outside the scope of its authority or maliciously or with no semblance of authority; that appellant devoted the whole time in arguing the merit of the case to the effect that the act of the 3<sup>rd</sup> respondent was unlawful whereas the merit of the case is not the issue in this case but that of jurisdiction - a threshold issue; that learned Senior Counsel has not addressed the issue determined by the lower courts as his submission on issue 1 is completely irrelevant and urged the court to discountenance same. Finally learned Senior Counsel submitted that the issue in this case is whether the action of the appellant is maintainable having regards to the circumstances of the case and not whether the 3<sup>rd</sup> respondent is liable, relying on the case of Egbe vs Alhaji (1990) 1 NWLR (pt. 128) 546; Yusuf vs Egbe (1987) 2 NWLR (pt. 56) 341; Fajimolu vs University of Ilorin (2007) All FWLR (350) 1361.

At this stage, it is necessary to state that the 3<sup>rd</sup> respondent filed a preliminary objection which he argued in the brief of argument urging the court to strike out grounds 2, 3, 5 and 6 for not questioning the decision appealed against. The grounds on which the objection is grounded are stated as follows:-

(a) That issues 1 and 2 as framed by the appellant do not arise from the grounds of appeal filed.

(b) That grounds 2, 3, 5 and 6 of the grounds of appeal do not attack the decision appealed against.

(c) That issues 1 and 2 are equally incompetent having being framed from one ground of appeal; to wit, ground 3.

In arguing the objection, learned Senior Counsel for the 3rd respondent referred the court to issues 1 and 2 as framed by the appellant at page 7 of the appellant's brief and submitted that the issues as framed go to the merit of the case which was never determined by the lower courts as conceded by appellant at page 6, para-



graph 2.14 of the brief; that the lower courts struck out the action for lack of jurisdiction and that issues 1 and 2 were never issues before the lower courts neither did the courts determine same; that if issues 1 and 2 are struck out, it follows that grounds 1, 2, 3, 4, 5, 6, 7 and 9 on which the invalid issues are based must be struck out, relying on *Osafire vs Odili* (1994) 2 NWLR (pt. 325) 125 at 129. Learned Senior Counsel further submitted that grounds 2,3,5 and 6 do not attack the decision of the lower court and as such are incompetent, relying on *Addumo vs Oganla* (2009) All FWLR (451) 992; *Isah vs Kamba* (2009) All FWLR (456) 1901 at 1904; that ground 1 should be struck out for being argued together with the incompetent grounds 2,3,5 and 6, relying on *Tamiyu vs Olaosun* (2009) All FWLR (451) 960 at 965. B C

It is the further contention of learned Senior Counsel that issues 1 and 2 were distilled from ground 3 thereby rendering the two issues incompetent and liable to be struck out, relying on *Agbeotu vs Brishe* (2005) All FWLR (251) 1454 at 1464 -1465; *D.E.N.R. Ltd vs Trans International Bank Ltd* (2009) All FWLR (456) 1823. D

In the reply brief filed on the 20<sup>th</sup> day of January, 2010, learned Senior Counsel for the appellant went on to reargue his case as already argued in the main brief and strangely introduced the issue of breach of the rules of fair hearing in that the lower court, by not determining the case put forward by the appellant as to the legality of the substitution denied appellant fair hearing which constitutes a substantial error for which this Court can intervene to set same aside, under section 22 of the Supreme Court Act; that the court can reject, modify or reframe issues for determination so as to bring out the real question in controversy, relying on *Ojikutu vs Odeh* (1954) 14 WACA 640 at 641; *Labiya vs Anretiola* (1992) 8 NWLR (pt. 258) 139 at G 159; *Agbakoba vs INEC* (2008) 12 S.C. (pt. 111) 171 at 203 etc. F Finally on this point, learned Senior Counsel submitted thus, at page 15 of the reply brief, paragraph 431

*"Your Lordships are therefore invited to find that the interest of justice would be best served by hearing and determining this appeal on its merits. Should your Lordships be inclined to so find, your Lordships may rightly proceed to take such necessary reparative measures as are necessary to determine this appeal finally on its merits."* H

I had earlier in this judgment commented briefly on the

appellant's issues 1 and 2 as formulated at page 7 of the brief of argument and my doubts as to their propriety having regards to the facts and circumstances of the case relevant to the determination of the main issue in contention between the parties. However, when I turned to page 8 of the said brief, I saw a reformulated issue 1 which  
 B is more in accord with the grounds of appeal and the issue in contention between the parties. I had adopted the reformulated issued I at page 8 of the brief and summarised appellant's argument in support thereof as well as those of the other parties. In short, I have exercised  
 C the power of the court to correct the defect in the framing of the issues for determination by modifying or reframing same so as to bring out the real issue in contention between the parties in the appeal. Consequently, the Preliminary Objection is hereby overruled.

Turning now to the resolution of the reframed issue I, both  
 D parties agree that an action against a public officer must be commenced within three months of the accrual of the cause of action as provided in section 2(a) of the Public Officers Protection Act. The party who claims protection under the above Act is the 3<sup>rd</sup> respondent. What does section 2(a) of the Public Officers Protection Act  
 E provide?

*"2. Where any action, prosecution or other proceedings is commenced against any person for any act done in pursuance of execution or intended execution of any Act or Law or of any public duty or authority or; in respect of any alleged neglect or default in the execution of any Act, Law, duty or authority, the following provisions shall have effect:*  
 F

*(a) The action, prosecution, or proceedings shall not lie or be instituted unless it is commenced within three months next After the  
 G act, neglect or default complained of or in the case of continuance of damage or injury, within three months next after the ceasing thereof. Provided that if the action, prosecution proceedings be at the instance of any person for cause arising while such person was a convict prisoner, it may be commenced within three months after the  
 H discharge of such person from prison."*

It is the case of the appellant that though the 3<sup>rd</sup> respondent can, in an appropriate case, claim the protection offered by the above provisions of the Act, the said provisions do not avail the 3<sup>rd</sup> respondent in the instant case because in taking the action complained of

the 3<sup>rd</sup> respondent did not act in good faith or did not act with any semblance of legal justification or acted in total disregard of binding statutory provisions which in this case include the provisions of sections 34(2) and 36(1) and (2) of the Electoral Act, 2006

**In the case of *Egbe vs Adefarasin (1985) 1 NWLR (pt. 3) 549 at 568 - 569*, this Court stated the law as follows:-**

***"The general principle of law is that where the law provides for the bringing of action within a prescribed period, in respect of a cause of action accruing to the plaintiff, proceeding shall not be brought after the time prescribed by the statute - see *Obiefuna vs Okoye (1961) 1 All NLR 357*. An action brought outside the prescribed period offends against the provision of the section and does not give rise to a cause of action. A cause of action means the factual situation stated by the plaintiff; if substantiated, entitles him to a remedy against the defendant - See *Latana vs Cooper (1964) 2 All ER 929*. The claim must rest on and be supplied by a cause of action....."***

**To the above general rule there is an exception, which exception constitutes the contention of the appellant in this case to wit, where the public officer concerned fails to act in good faith or acts in abuse of office or maliciously or with no semblance of legal justification, as decided in the case of *Lagos City Council vs Ogunbiyi (1969) All NLR 297 at 299*; *C.B.N vs Okojie (2004) 10 NWLR (pt. 882) 448 at 523*; *Nwankwere vs Adewunmi (1966) All NLR 119 at 124*; *Offoboche vs Ogoja Local Government (2001) 16 NWLR (pt. 739) 458*.**

***It should be noted that there is clear distinction between a cause of action and a right of action to enforce the cause of action or the right of judicial relief in the plaintiff. The distinction must be constantly kept in view to avoid confusion.*** There is no doubt that the appellant in this case has a cause of action. The cause of action is founded on the fact that appellant, who alleged that he was the duly nominated candidate of the 2<sup>nd</sup> respondent for election into the office of Governor of Niger State scheduled for 14<sup>th</sup> April, 2007, was by a letter of 5<sup>th</sup> and 13<sup>th</sup> February, 2007 substituted by the 1<sup>st</sup> respondent as the sponsored candidate for that election contrary to the provisions of sections 34(2) and 36(1) & (2) of the Electoral Act, 2006. The above cause of action accrued on the 13<sup>th</sup>

day of February, 2007 when the substitution was affected. It is the accrual of the cause of action that confers on the appellant the right to institute an action to enforce the cause of action or right to a judicial relief.

**Now the effect of a statute of limitation, such as the provisions of section 2(a) of the Public Officers Protection Act, supra, on both cause of action and right of action is that it bars the right of action and not the cause of action. The cause of action refers to the facts or combination of facts which the plaintiff must adduce to entitle him to the relief(s) claimed while the action or right to institute the action remains the means or medium affording the plaintiff the opportunity to ventilate his grievances - cause of action or bundle of facts, as variously described by the courts over the years.** The effect of a statute of limitation on the action of a plaintiff therefore is that **it takes away the right of the plaintiff to institute the action but leaves him with his cause of action intact, though, without the right to enforce same or right to judicial relief.**

When an issue of limitation of time to institute an action is raised, it is a preliminary issue touching on the competence of not only the action, but of the court before which the action pends. It is long settled that an issue of jurisdiction is a periphery matter which must be resolved before proceeding to determine the merits of the case, where the issue is found not to have any merit.

In the instant case, the matter resulting in the instant appeal originated by way of a preliminary objection challenging the jurisdiction of the trial court to entertain the action as Constituted. However, I am worried that Learned Senior counsel for the appellant has emphatically submitted that the lower courts, in trying to resolve the issue at stake, ought to have delved into the merits of appellant's case. At page two (2) paragraph 4.15 of the appellant's brief, counsel submitted as follows:-

*"My Lords, it is submitted that the lower courts completely ignored and overlooked the relevant statutory provisions enumerated above in determining the unlawfulness of the purported substitution of the Appellant by the Respondents as the Governorship candidate of the 2nd Respondent for Niger State in the 2007 Elections."*

It is trite that jurisdiction is very fundamental to adjudication

and that where a court lacks the competence to hear and determine a matter but proceeds to do so, an appellate court is duty bound to nullify a decision resulting therefrom.

***It is however correct that where a public officer acts outside the scope of his authority or without a semblance of legal justification, he cannot claim the protection of the provisions of the Public Officers Protection Act. It is the duty of plaintiff/appellant to adduce evidence or facts to establish the bad faith, lack of semblance of legal justification etc, etc.*** The facts to be produced must exist to enable the court find the absence of semblance of legal justification etc, etc otherwise once it is established that the action was instituted outside the statutory period of three months, the action is time barred and the court will have no jurisdiction to entertain same.

***Are there facts on record from which the court can agree with the appellant that the 3<sup>rd</sup> respondent acted outside its scope of authority or without the semblance of legal justification in acting on the letter of substitution in question?***

***To answer the question one has to look at the affidavit in support of the Originating Summons***, particularly paragraphs 4 and 5 thereof, which deposed as follows:-

*“4: That in the course of my duty aforesaid in chambers on the 6th day of November, 2007 at 11.00am, I am informed by the Plaintiff and Tajudeen O. Oladoja Esq of Counsel and I verily believe their information as true and correct as follows:*

*a. That the Plaintiff is a member of the Peoples Democratic Party, the 2<sup>nd</sup> Defendant in Niger State. He contested the Niger state Gubernatorial Primary Election conducted by the 2nd Defendant. A copy of the receipt of payment of nomination form is annexed herewith and marked as annexure 1.*

*b. That the Plaintiff was duly nominated and sponsored by the 2nd Defendant as its Gubernatorial Candidate for the 14th April, 2007 Governorship Election in Niger State.*

*c. That the Plaintiff emerged as the candidate of the 2<sup>nd</sup> Defendant having gone through the screening, clearance and primary Election conducted by the 2<sup>nd</sup> Defendant on the 13<sup>th</sup> day of December, 2006 in Minna, Niger State.*

*d. That upon being screened and cleared to contest the 2nd*

*Defendant's primary election, the Plaintiff and 9 other aspirants contested the said primary election and he emerged the winner having scored 3,579 lawful votes. Copies of the Certificate issued to the Plaintiff by the 2nd Defendant and the result sheet of the primary election aforesaid are exhibited as "annexure I "a" & "1b".*

B *e. That the detail particulars of the result of the primary election aforesaid are as follows:*

S/NO NAMES	TOTAL NO. OF VOTES SCORED	POSITION
C 1. JIBRIN BALA GUN A	3,579	1 <sup>ST</sup>
2. UMAR AHMED BAKAY	09	9 <sup>TH</sup>
3. IDRIS ABUBAKAR AZOZO	542	4 <sup>th</sup>
4. BWARI ABUBAKAR BAWA.	261	5 <sup>th</sup>
D 5. MOHAMMED ISHA LADAN	795	2 <sup>nd</sup>
6. TANKO MOHAMMED LOKOJA	002	10 <sup>th</sup>
7. SANI MUSA	054	7 <sup>TH</sup>
8. SHEM ZAGBAYI NUHU	202	6 <sup>TH</sup>
E 9. DAVID UMARU	547	3 <sup>RD</sup>
10. INUWA MOHAMMED ZAKARI	005	8 <sup>TH</sup>

F *f. That as at the date of the primary election aforesaid, the 1st Defendant was a Federal Civil Servant. He retired from the Federal Civil Service with effect from the 1<sup>st</sup> day of February 2007. A letter accepting the retirement of the 1<sup>st</sup> Defendant from the Federal Civil Service is exhibited as annexure 2.*

G *g. That following the victory of the Plaintiff at the primary election aforesaid. The National Chairman & National Secretary of 2<sup>nd</sup> Defendant submitted the plaintiff's name along with names of its 35 other governorship candidate nationwide to the 3rd Defendant for the 14<sup>th</sup> April, 2007 Gubernatorial Election. A copy whereof is here-with attached and marked "annexure 3."*

H *h. That the 3<sup>rd</sup> Defendant upon the receipt of the name of the Plaintiff from the 2<sup>nd</sup> Defendant, published the Plaintiff's name on their notice board and went further to publish the information and sworn affidavit in support of the particulars of the Plaintiff in all local Government Area Secretariat in Niger State.*

i. That on the 16<sup>th</sup> January, 2006, the 3<sup>d</sup> defendant began what is called the verification of the documents of the candidates of all political parties.

j. That on the 21st day of January, 2007, the plaintiff participated in the 3<sup>d</sup> Defendant's mandatory screening exercise and was cleared to contest the aforesaid Governorship Election. B

k. That no law Court disqualified either the Plaintiff or his running mate from contesting the 14<sup>th</sup> April, 2007 governorship election in Niger State.

l. That since the receipt by the 3<sup>d</sup> Defendant of the submission of the name of the Plaintiff from the 2<sup>nd</sup> Defendant and the publication of his particulars showing the piece of information supplied by him and his running mate, no person challenged the veracity of the information. C

m. That despite the fact the 1st Defendant did not contest the primary Election aforesaid as mandated by the constitution of the 2<sup>nd</sup> Defendant and the Electoral guideline made pursuant there-to the 2<sup>nd</sup> Defendant submitted the name of the 1<sup>st</sup> Defendant to the 3<sup>d</sup> Defendant (sic which) accepted the said substitution or change without any cogent or verifiable reasons adduced by the 2<sup>nd</sup> Defendant. Copies of the constitution of the 2<sup>nd</sup> Defendant, the Electoral guideline made pursuant thereto and the letter of submission dated 5<sup>th</sup> February, 2007 are here with attached and marked as annexures "4" "5" & "6" respectively. D E

n. That despite the fact that the Plaintiff did not withdraw from the Governorship Elections the 2<sup>nd</sup> Defendant submitted to the 3<sup>d</sup> Defendant a purported notice of withdrawal/submission of candidates dated 13<sup>th</sup> day of February, 2007. A copy whereof is herewith attached and marked as annexure "7". F G

o. That the purported change and or substitution of the Plaintiff was effected on the 13<sup>th</sup> day of February, 2007 which was 59 days to the Governorship Election of 14th April, 2007.

p. That it is on the premise of the substitution aforesaid that the 1<sup>st</sup> Defendant contested the Niger State Governorship Election, which cumulated into his being declared as the winner thereof subsequent to which he was sworn in as in Executive Governor of Niger State. H

q. "That the Plaintiff has suffered irreparable political injury

*on account of his name being wilfully and wrongfully changed or substituted with the 1<sup>st</sup> Defendant's name by the 2<sup>nd</sup> Defendant.*

*r. That the Plaintiff was not indicted by any Court of Law.*

*5. That it is the interest of Justice to grant this application."*

It is not the contention of the appellant that the 3<sup>rd</sup> respondent has no legal authority to receive and act on the application of the 2<sup>nd</sup> respondent to substitute its candidate in accordance with the provisions of section 34(2) of the Electoral Act, 2006. In fact, and as concurrently found by the lower courts, the 3<sup>rd</sup> respondent is duty bound to so act, the issue as to whether the said application contains cogent and verifiable reason(s) notwithstanding. In fact, it is the absence of a cogent and verifiable reason for any substitution that confers a cause of action on a plaintiff which can be legally enforced in a court of law subject, of course, to the fulfillment of any preconditions that may exist. I hold the view that where the 3<sup>rd</sup> respondent acts on an application for substitution that is later found to contain no cogent and verifiable reason it cannot be held to have acted outside its scope of authority or without any semblance of legal authority or to have acted in bad faith etc, etc. In fact, **looking at the totality of the depositions in the affidavit supra, it is clear there is no import or allegation of bad faith or lack of semblance of legal authority etc in or against the 3<sup>rd</sup> respondent.** Paragraph 4 (q) of the affidavit specifically accuses the 2<sup>nd</sup> defendant, and rightly in my view, as being the cause of the substitution of the appellant by the 1<sup>st</sup> respondent, not the 3<sup>rd</sup> respondent.

Returning to the facts deposed to in the supporting affidavit can any fact be gleaned therefrom to ground any of the exceptions to the applicability of section 2(a) of the Public Officers Protection Act? I do not see any. There is nothing to show that in acting the way the 3<sup>rd</sup> respondent did, it acted in bad faith, maliciously or that its act was devoid of any legal justification. There are many facts to support or prove the cause of action, if it had survived, but definitely none to support the allegation that 3<sup>rd</sup> respondent acted outside the scope of its authority etc, etc. I therefore agree with the concurrent findings of facts that there was no scintilla of evidence in support of the allegation of the appellant. It is therefore clear that with the accrual of the cause of action on the 5<sup>th</sup> and/or 13<sup>th</sup> of February, 2007 and the institution of the action on the 7<sup>th</sup> day of November, 2007, a period



of more than three months from the accrual of the cause of action, the action so instituted was caught by the provisions of section 2(a) of the Public Officers Protection Act and therefore incompetent. The lower courts were right in so holding. I therefore resolve issue 1 against the appellant.

On the second issue which deals with the provisions of section 308 of the 1999 Constitution, learned Senior Counsel for the appellant submitted that the lower court overlooked the binding decision of this Court in the case of Amaechi vs INEC (2008) 5 NWLR (pt. 1080) 227 in coming to the conclusion that 1st respondent was protected by the provisions of section 308 of the 1999 Constitution particularly as the instant action challenges *the process through which the respondents contrived and unlawfully planted the 1<sup>st</sup> Respondent as the Governor of Niger State.*"

It is the further submission of learned Senior Counsel that the instant case is an election related matter whose res will be totally destroyed unless action can be instituted and maintained against the 1<sup>st</sup> respondent "*who is unlawfully and unconstitutionally occupying the office of Governor of Niger State.*"

On his part, learned Senior Counsel for the 1st respondent submitted that the provisions of section 308 of the 1999 Constitution apply to the facts of this case particularly as the appellant did not challenge the election of the 1<sup>st</sup> respondent at the Election Tribunal, which he should have done to prevent the applicability of section 308 supra neither did he challenge his substitution by the 1<sup>st</sup> respondent prior to the election in question as a pre-election matter; that looking at the reliefs claimed in this case, it is clear that claim (h) is like a claim under section 145(1) (d) of the Electoral Act, 2006 and ought to have been filed at the Election Tribunal just as claim (i); that appellant brought the claims eight or nine months after the election making the suit a civil suit against the 1<sup>st</sup> respondent as the Governor of Niger State and therefore subject to the provisions of section 308 of the 1999 Constitution, learned Senior Counsel further submitted, and urged the court to resolve the issue against the appellant.

In his view, learned Counsel for the 2<sup>nd</sup> respondent stated that the action could have qualified as a pre-election matter if it had been instituted before the election in question and if it had not gone on to question the return of the 1<sup>st</sup> respondent as the duly elected Gover-

nor and also prayed the court not only to nullify the said election but declare the appellant as the duly elected Governor who is to be sworn in as such; that the present case is distinguishable from the Amaechi's case supra on the facts and as such the provisions of section 308 of the 1999 Constitution apply to the facts of this case.

B Learned Senior Counsel for the 3rd respondent submitted that the action is not an election petition but a civil matter which is caught by the provisions of section 308 of the 1999 Constitution and that the courts have no jurisdiction to entertain the matter as constituted; that the case of Amaechi is distinguishable from the facts of this case particularly as Amaechi's case was instituted before the election.

C Now section 308 of the 1999 Constitution provides as follows:-

D *"(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.*

E *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*

F *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 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.*

G *(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.*

H *(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 period during which the person holding such office is required to perform the functions of the office."*

**There is no doubt that section 308 of the 1999 Constitution confers absolute immunity on the President, Vice President, Governor and Deputy Governor in respect of civil or**

**criminal matters during their tenure in office. The provision clearly suspends the right of action or the right to judicial relief of an aggrieved party during the tenure of office of the officials mentioned therein. In other words, the right of action is put in limbo until the expiration of the tenure of office of the affected government official. The expiration of the tenure kick starts the accrual of the cause of action or revives same.** B

However, **the provisions of section 308 of the 1999 Constitution do not protect a President or Governor from legal proceedings in a matter of his election per se or in a matter connected therewith even when he has been, as a contestant, declared duly elected and sworn in as such. The reason for that is that election petitions and election related proceedings are really special proceedings distinct from civil or criminal proceedings which fall within the province of the said section 308 of the 1999 Constitution** - See Onitri vs Benson (1960) SCNLR 314; Oyekan vs Akinjide (1965) NMLR 381; Amaechi vs INEC (2008) 5 NWLR (pt. 1080) 227 at 343. C D

The question that follows is whether the instant action is a civil matter or action or election related matter. The answer to the question will determine the applicability of the provisions of section 308 of the 1999 Constitution. E

I had earlier reproduced the questions for determination and the reliefs claimed by the appellant in the Originating summons which initiate the action. Of particular interest are reliefs (h), (i) and (j) which claim as follows:- F

*“h. A DECLARATION that the Plaintiff, whose name was unlawfully and unjustly removed as the Governorship Candidate of the 2<sup>nd</sup> Defendant in the 14th April, 2007 Governorship Election remains the candidate of the Peoples Democratic Party in the eyes of the law.* G

*i. IN THE PREMISES OF THE FOREGOING AN ORDER directing the 1<sup>st</sup> Defendant to immediately vacate the coveted seat of the Governor of Niger State.* H

*j. A FURTHER ORDER directing the relevant authorities to immediately inaugurate and or swear in the plaintiff as the Executive Governor of Niger State.”*

While claim (h) can be said to be a pre-election civil matter,

claims (i) and (j) relate to election petition reliefs. Taking the reliefs as a whole, it is clear that reliefs (a) - (h) are pre-election matters.

It should be noted that it is not in dispute that the substitution of the 1<sup>st</sup> respondent for the appellant which constitutes the cause of action of the appellant took place on the 5<sup>th</sup> day of February, 2007.

B Appellant did not immediately institute the action to challenge the said substitution. The 1<sup>st</sup> respondent subsequently contested the Governorship Election of 14<sup>th</sup> April, 2007 and was declared the winner. Still appellant did not institute the action. In fact, he did not even challenge the election at the Election Tribunal for appropriate relief(s). C Appellant did not institute the present action until 8<sup>th</sup> November, 2007, months after the election and the swearing-in of the 1<sup>st</sup> respondent as the duly elected governor of Niger State. In fact, appellant has not produced any evidence to explain why he did not file any action D either at the High Court challenging the substitution or at the Election Tribunal challenging the election of the 1<sup>st</sup> respondent until about eight or nine months after the election in question.

***It is settled law that in an election or election related matter, time is of the essence. I will add that the same applies E to pre-election matters. Election matters are sui generis, very much unlike ordinary civil or criminal proceedings. Appellant bought to have instituted the action soon after the substitution to keep his interest in the political contest alive but he F did not. If he had but the election went on and the 1<sup>st</sup> respondent sworn to as the Governor, by the authority of the decision in Amaechi vs INEC supra, section 308 of the 1999 Constitution would have been rendered a toothless bull dog.***

***I hold the view that at the time appellant decided to go G to court in the circumstances of this case, the question of nomination by way of substitution which is a pre-election matter had ceased to exist leaving only the election proper to be questioned and the proper place to do so is the Election Tribunal.***

H If the situation in this case is encouraged, it will bred uncertainty in the polity when a person may wake up a year or more after an election and swearing-in of a President or Governor to challenge his nomination by way of substitution for the election that brought him to power. Or he may even do so after the tenure of office of the official concerned which attitude ought not to be encouraged by the law. It

should be noted that appellant has the right to waive his right to the nomination by way of substitution which by his inordinate delay, he appears to have projected. Everyone must be watchful of his legal rights and be vigilant. In the instant case, appellant went to sleep until section 308 of the 1999 Constitution caught up with him upon his waking up. The instant action is clearly a civil action which is not maintainable against the 1<sup>st</sup> respondent during the tenure of the 1<sup>st</sup> respondent. I therefore agree with the lower courts that section 308 of the 1999 Constitution applies to the facts of this case, and resolve the issue against the appellant. B

Appellant might have had a good case but he was not diligent in pursuing it. It is dangerous to lay the precedent that a party who was substituted wrongfully or otherwise is at liberty to challenge the substitution or nomination by way of substitution of his opponent months or years or at anytime during or even after the tenure of the elected government official and have the election annulled and himself declared the winner or governor by the regular courts. That will be ambushing the Governorship seat at the gate of the judiciary, which I think ought not to be encouraged. C D

It is clear that at the expiration of the tenure of the incumbent Governor of Niger State, the cause of action of the appellant would have been completely extinguished but that is what he ought to have known when he went to sleep over his right(s), if any. The above clearly demonstrates the fact that in election matters, whether pre-election or the election proper or election related matters, time is of the essence. It will do no one any good if the political system is kept heated up for months or even years after an election without giving those sworn in the peace of mind to steer the ship of state in the right direction or fail in the process. E F

I had earlier stated that appellant's issue 2 is not relevant. The issue is as follows: G

Whether the lower court properly considered and resolved the cardinal issues arising from the undisputed facts before it in reaching the conclusion in the appeal before it. H

It has to be noted that the undisputed facts of the case do not relate to the facts needed to establish the case on the merit but the facts needed to resolve or determine the preliminary objection. What are the grounds of the objection? They are

(i) That the 3<sup>rd</sup> respondent being a public officer is protected by the Public Officers Protection Act;

(ii) that the 1<sup>st</sup> respondent having been duly sworn in as Governor of Niger State, the action against him is not maintainable having regards to the provisions of section 308 of the 1999 Constitution;

B (iii) that appellant is estopped from instituting the action having regards to the equitable doctrine of laches, acquiescence and standing-by, and,

(iv) that the suit not being an election petition challenging the C return of the 1<sup>st</sup> respondent cannot be maintained in the Federal High Court.

The facts relating to the above grounds of objection are not in dispute and abound in the record. It is very clear from this judgment affirming the decisions of the lower courts that those courts actually D took time to examine the grounds of objection before coming to the conclusion they reached.

To repeat the whole process all over again by way of resolving an issue will definitely serve no useful purpose as a resolution of the above two issues in this appeal has completely taken care of the original issue 2 and I so hold. E

***The invocation of the powers of this Court under section 22 of the Supreme Court Act by learned Senior Counsel for the appellant is misconceived having regards to the facts of this case. Section 22 of the Act can only be invoked where the lower courts are found to be clothed with the requisite jurisdiction to entertain and determine the matter under consideration but failed and or neglected to do.*** F

***Where, however, as in this case, the lower courts have no jurisdiction to entertain the matter the power of this Court under section 22 of the Supreme Court Act becomes irrelevant and consequently inapplicable.*** G

In conclusion, I find no merit in this appeal which is accordingly dismissed by me. I however make no order as to costs having H regards to the nature of the case and the parties involved.

Appeal dismissed.

**MOHAMMED JSC**

I have had the privilege before today of reading the judgment just delivered by my learned brother Onnoghen JSC. I entirely agree with him that this appeal lacks merit and ought to be dismissed. B

It is quite clear from the record of this appeal that the Appellant as Plaintiff commenced his action at the trial Federal High Court by Originating Summons on 8th November, 2007 claiming a number of reliefs against the Respondents who were Defendants in the action. In the main, the Appellant claimed in his suit that he was duly nominated by the 2<sup>nd</sup> Respondent as its Gubernatorial candidate in Niger State to contest the Gubernatorial Election of 14<sup>th</sup> April, 2007; that he was wrongfully, unlawfully and fraudulently excluded from participating in the election by the conduct of the 3<sup>rd</sup> Respondent actively aided by the 2<sup>nd</sup> Respondent in substituting and withdrawing his name from the list of candidates for the election and replacing his name with that of the 1<sup>st</sup> Respondent in contravention of the provisions of Sections 34 and 36 of the Electoral Act, 2006. From paragraph 4 sub-paragraph (m), (n), (o) and (p) of the affidavit in support of the claims in the Originating Summons of the Appellant filed on 8<sup>th</sup> November, 2007 at the trial Court, the facts therein have revealed that the Appellant was quite aware of the steps taken by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent to substitute or withdraw his name and replace the same with the name of the 1<sup>st</sup> Respondent to contest the Governorship election scheduled for 14<sup>th</sup> April, 2007. Although these steps taken in writing took place since 5<sup>th</sup> February, 2007 and 13<sup>th</sup> February 2007 respectively, nearly two months to the date of the election when the letter of substitution and the document signifying the withdrawal of the Appellant from the election were issued, the Appellant stood by and was contented with the unfolding events and did nothing to challenge the actions of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents in an appropriate Court of law to stop the 1<sup>st</sup> Respondent from contesting the election which the 1<sup>st</sup> Respondent contested, won and was duly sworn in as the Governor of Niger State on 29<sup>th</sup> May, 2007. Even with this glaring development in the events which the Appellant later regarded as a violation of his right to contest the 14<sup>th</sup> April, 2007 election, the Appellant still did nothing to even attempt the assertion C  
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of that right until 8<sup>th</sup> November, 2007, when his action was filed at the trial Court to challenge the nomination of the 1<sup>st</sup> Respondent to contest the election of 14<sup>th</sup> April, 2007.

With these undisputed facts, coupled with the fact that the status of the 3<sup>rd</sup> Respondent as one of the Federal Government Agencies entitled to the protection of the law under Section 2(a) of the Public Officers Protection Act, the learned trial Judge found the Appellant's action against the 3<sup>rd</sup> Respondent was statute barred which deprived that Court of jurisdiction to entertain and determine the same. This decision was affirmed on appeal by the Court of Appeal giving rise to the present appeal.

In spite of the rather strange approach to this case by the learned senior Counsel for the Appellant in raising and pursuing a number of issues touching on the merit of the Appellant's case which was merely struck-out for being statute barred, the only issue arising for determination in this appeal is whether or not the provisions of Section 2(a) of the Public Officers Protection Act applied to the claims of the Appellant against the 3<sup>rd</sup> Respondent. On the undisputed facts of his case therefore, the fact that the Appellant had failed to seek redress against the 3<sup>rd</sup> Respondent in Court for the steps taken on 5<sup>th</sup> February, 2007 and 13<sup>th</sup> February, 2007 to deny the Appellant the right to contest the election of 14<sup>th</sup> April, 2007 within the 3 months period prescribed by the law, the Appellant had clearly lost his right of action justifying the decision of the trial Court in striking out the action as affirmed by the Court below. See *Egbe v. Adefarasin* (1985) (Pt. 3) 549; and *Egbe v. Alhaji* (1990) 1 N.W.L.R. (Pt. 128) 546 at 592.

In the final analysis, I also find no merit at all in this appeal and the same is hereby dismissed. I abide by the orders as contained in the lead judgment, including the order on costs.

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### **MUNTAKA-COOMASSIE JSC**

The Appellant in this case participated in the Governorship Primary Election of the 2<sup>nd</sup> Respondent, the P.D.P which he won. His name was sent to INEC, he was screened and had his name published in INEC Notice Board as the P.D.P Gubernatorial Candidate in Niger State. Thereafter the 2<sup>nd</sup> Respondent applied to INEC to have



his name substituted with that of the 1<sup>st</sup> respondent in February, 2007. His name was accordingly substituted with that of the 1<sup>st</sup> Respondent, who contested the Governorship Election in Niger State on 14<sup>th</sup> April, 2007 and having scored the highest number of valid vote. The Appellant did not challenge his substitution before the Governorship Election took place neither did he challenge the election of the 1<sup>st</sup> Respondent at the Governorship Election Petition Tribunal. About nine (9) months after he woke up by instituting the action challenging his substitution with the 1<sup>st</sup> Respondent and claimed to be the rightful candidate of the 2nd respondent at the said election relying on the case of AMAECHI V. INEC (2006) 5 NWLR (Pt. 1080) 227 and provisions of Section 34(2) of the Electoral Act, 2006. B  
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No doubt the provisions of Section 34(2) of the Electoral Act 2006, is a new innovation in our electoral law, which is meant to cure the mischief and injustice that a candidate who laboured and won a party's primary election to contest in an election would substituted with a candidate who either lost in a primary election or did not participate in the primary election at all. It prevents the high handedness of a political party to unilaterally substitute a candidate in an election without due process, by showing a cogent and verifiable reason for making such substitution. Hence, when a candidate has won its party's primary election and his name submitted to INEC, such candidate can no longer be substituted unless cogent and verifiable reasons are given for such substitution. Where such reasons are not shown the said substitution would be declared null and void by a competent court of law. D  
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However, it is my view that the case of AMAECHI V. INEC (supra) is not an authority to the effect that in all cases, where there is a wrongful substitution of a candidate in an election, such substitution would automatically be set aside. With due respect, the candidate who was substituted at the election must act timeously to enforce his rights. Substitution and nomination being pre-election matters, the candidate must approach the competent court to seek for the enforcement of his rights before the real election takes place. This was the position in AMAECHI V. INEC (Supra). Immediately the candidate was substituted Amaechi did not wait for election to hold before he sought for redress, hence, if the election thereafter took place after the filing of the action having become subjudice, it remains pre-election matter, even if the matter G  
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is fought to this court.

On the other hand, where the candidate who was substituted did not take any step to seek redress, before the election took place, and a candidate declared as the winner, and thereafter seeks to be declared as the winner of the election, it is my view that the matter is no longer pre-election matter. That is his right to pursue a pre-election matter ceases after the holding of the election except only, if the action is instituted before the holding of the election.

To make matter worse, in the instant case, the Appellant did not institute the action until about nine (9) months after the alleged substitution it is for this reason that the respondents filed preliminary objection on the ground that the action is statute barred by virtue of the provisions of Section 2(a) of the Public Officers Protection Act.

No doubt that the 3<sup>rd</sup> Respondent is a Public Officer under the provisions of Section 2(a) of the Act, it is also not in dispute that this action was instituted about nine (9) months after the accrual of the cause of action in February, 2007. However, the Appellant had forcefully argued that the said provision would not apply to this case because the substitution of the Appellant was done with malice, bad faith and semblance of legal justification. It is to be noted that the preliminary objection was raised in limine, before the case is heard on merit, thus; the sole questions is whether the action was filed within the prescribed time as provided by the law. The issue of malice, bad faith or semblance of legal justification would only be relevant where there is evidence before the court on the merit of the case. This is not the situation in this case.

At the initial stage of writing this contribution my mind went to the issue of illegality, i.e. whether the action of substitution was wrongful therefore illegal. Then if it is illegal who can make such action legal. Was it the court or any of the Respondents i.e. P.D.P or INEC or even court? However, when I read the illuminating lead judgment of my learned brother Onnoghen JSC, with which I entirely agree, I now hold that since this action was commenced outside the period prescribed by the law it is my position that the action is statute barred and the court therefore lacks jurisdiction to hear same.

There was no need to invoke the provisions of Section 22 of the Supreme Court Act under the circumstances of this appeal as there were no facts and reasons available for doing so. For this humble

contribution, and the fuller reasons contained in the lead judgment of his Lordship Walter Onnoghen JSC, which I had the privilege of reading in advance, I too hold that the appeal lacks merit and it is accordingly dismissed. I make no order as to costs.

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### ADEKEYE JSC

This is an appeal against the judgment of the Court of Appeal; Kaduna delivered on the 22<sup>nd</sup> of April, 2009. That judgment of the Court affirmed the judgment of the Federal High Court, Kaduna which declined to adjudicate on the cause of action of the appellant as plaintiff before the trial court. The judgment was dated 14/12/07. The appellant was dissatisfied with the decision of the court below; he appealed the judgment to this court. The appellant filed nine grounds of appeal. When the appeal was heard on the 29<sup>th</sup> of April 2010, the appellant adopted and relied on the Brief filed on 16/10/09 and the Reply brief filed on 20/1/2010. In the brief, the appellant represented by learned senior counsel, P.I.N. Ikwueto, SAN distilled three issues for the determination of this court in the appeal as follows -

*“(1) “Having regard to the clear, unequivocal and manifest provisions of section 34 (2) and 36 (1) of the Electoral Act, and Article 8 of the Guidelines and Regulations, was the change/substitution of the appellant as the sponsored candidate of the PDP in the 2007 governorship election in Niger State an abuse of office and with no semblance of legal justification.”*

*“(2) Whether the lower court properly considered and resolved the cardinal issues arising from the undisputed facts before it in reaching its conclusion in the appeal before it.*

*“(3) Is the immunity clause provided in section 308 of the 1999 Constitution applicable in any action challenging the Unlawfully assumption of office of a person who was never a lawfully sponsored candidate for the governorship election in a State.”*

The 1<sup>st</sup> respondent represented by learned senior counsel, Olajide Ayodele, SAN settled three issues for the determination of this court in this appeal in the brief filed on 30/11/09.

*“(i) Whether the court below correctly found that the Public Officers Protection Law would apply to protect the 3<sup>d</sup> respondent in this case.*

(ii) *Whether the Court of Appeal correctly considered the cardinal issues of fact arising from the case.*

(iii) *Whether the immunity clause would apply to the 1<sup>st</sup> respondent in the circumstance of this case.*”

The 2<sup>nd</sup> respondent was represented by learned counsel Rotimi B Ojo. In the 2<sup>nd</sup> respondent’s brief filed on 30/11/09, two issues were identified for determination in this appeal:-

“(a) *Whether the concurrent findings of the lower courts are perverse, or are not supported by credible evidence or resulted in miscarriage of justice.*

(b) *Whether the cause of action of the appellant is not extinguished by the combination of the provisions of section 2 (a) of the Public Officers Protection Act and that of section 308 of the 1999 Constitution.*”

The 3<sup>rd</sup> respondent was represented by learned senior counsel, Dr. S.S. Ameh, SAN. In the 3<sup>rd</sup> respondent’s brief filed on 1/12/09 which was adopted and relied upon by the 3<sup>rd</sup> respondent three issues were formulated for determination in this appeal as follows:-

“(a) *Whether in the circumstance of this case the public officers protection act is applicable to bar the right of the appellant to institute this action.*

(b) *Whether the 1<sup>st</sup> respondent having been sworn in as the Executive Governor of Niger State enjoys constitutional immunity against civil and criminal proceedings.*

(c) *Whether the lower court was right in law in affirming the decision of the trial court declining jurisdiction to determine the appellant’s originating summons on the merit.*”

My learned brother in the leading judgment rightly noted that the appellant on page 8 of their brief reformulated the first issue for determination. I intend to adopt and be guided by the appellant’s issues for determination in the consideration of this appeal for ease of reference. Before I delve into the subject-matter of the appeal, I find it appropriate to throw light into the background facts of this appeal.

The appellant who was the plaintiff at the trial court, and the 1<sup>st</sup> respondent, Dr. Muazu Babaginda Aliyu - the incumbent Governor of Niger State belonged to the same party, the Peoples Democratic Party, the 2<sup>nd</sup> respondent in this suit. The appellant, Alhaji Jibrin Bala Guna Alhassan was sponsored and nominated by the 2<sup>nd</sup> respondent to be

its flag bearer in the April 2007 Gubernatorial race until the 5<sup>th</sup> of February 2007, when the 2<sup>nd</sup> respondent forwarded the name of the 1<sup>st</sup> respondent to the 3<sup>rd</sup> respondent, Independent National Electoral Commission [INEC] as the Party's Governorship candidate for Niger State for the election of the 14<sup>th</sup> of April 2007. In compliance with the Notice of withdrawal/substitution dated the 13<sup>th</sup> of February 2007, the 3<sup>rd</sup> respondent substituted the name of the 1<sup>st</sup> respondent for that of the appellant. The Record also shows that the appellant agreed to withdraw his candidature for the Governorship election thus giving the 1<sup>st</sup> respondent room to contest the election. At the polls of the 14<sup>th</sup> of April 2007, the 1<sup>st</sup> respondent contested as the candidate for the 2<sup>nd</sup> respondent - the Peoples Democratic Party, and having scored the highest number of votes, was issued the Certificate of Return as the Governor-elect of Niger State. The 1<sup>st</sup> respondent had accepted the seat of the Governor of Niger State since he took his oath of office on the 29<sup>th</sup> of May 2007.

On the 8<sup>th</sup> of November 2007, the appellant headed for the Federal High Court to file an originating summons challenging the 1<sup>st</sup> - 3<sup>rd</sup> respondents and claiming as follows: -

*“(a) A declaration that the plaintiff was the lawful candidate to contest the 14<sup>th</sup> April 2007 election in Niger State on the platform of the 2<sup>nd</sup> defendant being the candidate who won the majority of 3579 lawful votes at the Primary Election conducted by the 2<sup>nd</sup> defendant on the 13<sup>th</sup> day of December 2006 and whose name was submitted by the 2<sup>nd</sup> defendant to the 3<sup>rd</sup> defendant.*

*(b) A declaration that the 1<sup>st</sup> defendant who did not contest the primary election aforesaid as mandated by Article 17.2 (b) of the guidelines for primary election 2006 issued pursuant thereto was not qualified to be nominated by the 2<sup>nd</sup> defendant as its Gubernatorial candidate in the 14<sup>th</sup> April 2007 governorship election in Niger State.*

*(c) A declaration that the 1<sup>st</sup> defendant who did not contest the primary election aforesaid was not the lawful candidate to contest the 14<sup>th</sup> April 2007 Governorship election in Niger State on the platform of the Peoples Democratic Party, the 2<sup>nd</sup> defendant.*

*(d) A declaration that by virtue of the provisions of section 32 (5) of the Electoral Act 2006, it is only a court of law that can disqualify the plaintiff who was duly nominated as the Governorship candidate of the 2<sup>nd</sup> defendant in the 14<sup>th</sup> April 2007 Governorship*

*Election in Niger State and whose name and particulars were submitted by the 2<sup>nd</sup> defendant to the 3<sup>d</sup> defendant as such.*

(e) A declaration that the option of changing or substituting the plaintiff with the 1<sup>st</sup> respondent is only exercisable by the 2<sup>nd</sup> defendant in strict compliance with the provisions of section 34 (2) of the Electoral Act 2006.

(f) A declaration that the sudden substitution of the plaintiff's name with the 1<sup>st</sup> defendant's lacked any merit and it constitutes a deliberate and flagrant infraction of the provisions of section 34 (2) of the Electoral Act 2006.

(g) A declaration that the nomination of the 1<sup>st</sup> defendant as the Gubernatorial Candidate of the Peoples Democratic Party at the said Election and the acceptance thereof by the 3<sup>d</sup> defendant is void *Ab Initio*.

(h) A declaration that the plaintiff, whose name was unlawfully and unjustifiably removed as the Governorship candidate of the 2<sup>nd</sup> Respondent in the 14<sup>th</sup> April 2007 Governorship Election remains the candidate of the Peoples Democratic Party in the eyes of the law.

(i) In the premises of the Foregoing an order directing the 1<sup>st</sup> defendant to immediately vacate the coveted seat of the Governor of Niger State.

(j) A further order directing the relevant authorities to immediately inaugurate and/or swear in the plaintiff as the Executive Governor of Niger State."

At trial before the Federal High Court, the appellant supported the originating summons with an affidavit of six paragraphs and seven annexure.

The 1<sup>st</sup> - 3<sup>rd</sup> respondents opposed the originating summons by filing counter affidavits and attachments. The 1<sup>st</sup> - 2<sup>nd</sup> respondents filed notice of preliminary objection to the originating summons. The appellant reacted to the preliminary objection by filing counter affidavit (vide pages 117-254 of the Record). The grounds of the preliminary objection filed by the respondents in limine are that:-

(a) That the 3<sup>rd</sup> respondent being a Public Officer is Protected by the Public Officers Protection Act.

(b) That the 1<sup>st</sup> respondent having been sworn in as Governor of Niger State, the action against him is barred by the immunity clause in section 308 of the 1999 Constitution.

(c) That the appellant is estopped from instituting this action having regard to the equitable doctrine of laches, acquiescence and standing-by.

(d) That the present civil suit not being an election petition challenging the return of the 1st respondent as the Governor of Niger State cannot be maintained in the Federal High Court since the 1st respondent has been elected and sworn into office as Governor of Niger State. B

At the conclusion of hearing the preliminary objection, the trial court sustained the objection and struck out the originating summons. The Court of Appeal affirmed the judgment of the trial court. The appeal against the judgment is now before this court. It is therefore noteworthy that the judgment being appealed against is not a judgment on the merits, that is, after hearing of the substantial issues in the action but that arising from preliminary objection of the respondents, which the trial court struck out for lack of jurisdiction. C D

At the hearing of this appeal, the parties were given audience in respect of their respective briefs. The learned senior counsel for the appellant P.I.N. Ikwueto, SAN laid emphasis on the withdrawal and substitution of the appellant which acts are illegal in view of sections 34 (1) and 36 (1) of the Electoral Act. The 3<sup>rd</sup> respondent cannot take advantage of section 2 (a) of the Public Officers Protection Act Cap 379 Laws of the Federation 1990. The acts were done in bad faith without legal justification and conspicuously outside its colour or scope of duty. He cited the cases: - E F

Agbakoba v. INEC (2008) 18 NWLR pt. 1119 pg. 489 at pg. 543.

Abubakar v. Yar'Adua (2008) 1 SC pt. 1177 at 122.

Chief Ufikairo M. Efet v. INEC & 2 ors (2009) 46 WRN 141 G at pgs. 155 - 157.

Njideka Ezeigwe v. Chief Sir Benson Chuks Nwawulu & ors (2010) 4 NWLR pt. 11 83 pg. 159 at pg. 200.

Olajide Ayodele SAN, learned senior counsel for the 1<sup>st</sup> respondent relied on the case of Forestry Research institute of Nigeria v. Mr. I. A. Enaifoghe Gold (2007) All F.W.L.R. pt. 380 pg. 1444 at page 1457 on the defence of Public Officers Protection Act and concluded that it is premature to delve into the merit of the case as the appellants had done. H

Mr. Rotimi Ojo, learned counsel for the respondent emphasized that the argument in the preliminary objection should not touch the issues in the substantive appeal.

Dr. S.S. Ameh SAN, drew the attention of the court to the fact that the issue now before the court is jurisdictional. It is not on the cause of action or illegality now canvassed by the appellant that is in issue and affected by the Public Officers Protection Act- but it is the right of action or right to judicial relief of the appellant that is affected. The 3<sup>rd</sup> respondent canvassed that in the argument of the appellants on the preliminary objection on page 15 of the Reply brief - the appellants agreed with the objection at paragraph 4. 31. The learned senior counsel referred to the case *University of Ilorin v. Oluwadare* (2009) All FWLR pt. 452 pg. 1175 at pg. 1204.

At the hearing of this appeal, the 3<sup>rd</sup> respondent raised a further preliminary objection urging this court to strike out issues 1 and 2 formulated by the appellant at page 7 of his brief as they neither arise from the grounds of appeal filed nor from the decision appealed against. The 3<sup>rd</sup> respondent thereby urged this court to strike out grounds 2, 3, 5 and 6 of the Grounds of appeal as they do not question the decision appealed against.

The grounds relied upon are as follows:

- (a) That issues 1 and 2 as framed by the appellant do not arise from the grounds of appeal filed.
- (b) That grounds 2, 3, 5 and 6 of the grounds of appeal do not attack the decision appealed against.
- (c) That issues 1 and 2 are equally incompetent having been framed from one ground of appeal to ground 3.

The 3<sup>rd</sup> respondent considered the objection on pages 7-13 of the brief and urged this court to strike out grounds 1, 2, 3, 4, 5, 6, 7 and 9 of the grounds of appeal as incompetent as no issues were framed from them. Issues Nos. 1 and 2 are to be struck out as they did not arise from any competent grounds of appeal, and not properly flow from ground 3. The 3<sup>rd</sup> respondent cited cases -

*Labour Party v. INEC* (2009) All FWLR pt. 478 pg 233 at pg 237.

*Onifade v. Olayiwola* (1990) 7 NWLR pt. 161 pg. 130 at pg. 177.

*Saraki v. Kunini* (2000) FWLR pt. 18 pg. 309.



Abiodun v. FRN (2009) All FWLR pt. 483 pg. 1360.

Osafire v. Odili (1994) 2 NWLR pt. 325 pg. 125.

Adelumola v. Oganla (2009) All FWLR pt. 451 pg. 992.

Isah v. Kamba (2009) All FWLR pt. 456 pg. 1901 .

Agbeotu v. Brisbe (2005) All FWLR pt. 257 pg. 1454.

Progressive Action Alliance v. INEC (2009) All FWLR pt. 478 B  
pg. 260.

The objection was exhaustively considered in the leading judgment - I agree with the reasoning and conclusion of my learned brother that the preliminary objection be overruled.

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Issue 1

Applicability of the Public Officers Protection Act to an Unlawful/Unconstitutional Act by a Public Officer.

The appellant canvassed that it is well established as a primary point that the Public Officers Protection Act is designed to protect a public officer who acts in good faith and does not apply to acts done in abuse of office and with no semblance of legal justification. Whether a public officer acted in good faith or without any semblance of legal justification cannot be rightly determined without a proper analysis of the facts and circumstances of the act complained of. The crucial issue to be decided in this appeal is, whether the 3<sup>rd</sup> respondent as a public officer created by the 1999 Constitution can act in total disregard of binding statutory provisions and still claim the protection provided under the Public Officers Protection Act. The act of the 3<sup>rd</sup> respondent in totally disregarding and violating clear and mandatory statutory provisions is unlawful, malicious and unconstitutional. He cited the case of Ibrahim v. Judicial Service Committee Kaduna State & anor. (1998) 14 NWLR pt. 534 pg. 1 at pg. 32 which pronounced that -

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*“Once public officers step outside the bounds of their public authority and are acting outside the colour of their office or employment or outside their statutory or constitutional duty, they automatically lose protection of that law.”*

This court is urged in the circumstance of this case to disturb H the concurrent findings of the two lower courts because they are perverse and resulted in grievous miscarriage of justice by holding that there is no shred or scintilla of evidence by the appellant before the trial court - that the 3<sup>rd</sup> respondent acted beyond the scope of his

office or maliciously or even with no semblance of legal justification.

Though the Notice of Withdrawal/ Substitution of candidate for the Governorship Election is alleged to have been pursuant to sections 34 and 36 of the Electoral Act 2006, the appellant outlined defects and irregularities based on decided cases which show that the act of substitution done by the 3rd respondent was in flagrant disregard of the dictates of the official duties incumbent on the 3rd respondent and without any semblance of legal justification. On the withdrawal of the appellant, the lower court failed to examine the effect of section 36 (1) and (2) of the Electoral Act 2006 and articles of the Guidelines and Regulations for the conduct of Federal, State and Area Council Elections and thus occasioned miscarriage of justice. The appellant cited cases like-

- Nwankwere v. Adewunmi (1996) All NLR pg. 119 at pg. 124.
- Egbe v. Alhaji & ors. (1990) 1 NSCC pg. 306 at pg. 341.
- Ojah v. Ogboni (1996) 6 NWLR pt. 454 pg. 272.
- Charles Ugwu v. Ararume (2007) 12 NWLR pt. 1048 pg. 367.
- Amaechi v. INEC (2008) 5 NWLR pt. 1080 pg. 227 at pg. 296.
- Agbakoba v. INEC (2008) 18 NWLR pt. 1119 pg. 489.
- Senator Ehinlawo v. Chief Oke (2008) 16 NWLR pt. 1113 pg. 357 at pg. 403.

The appellant filed two additional lists of authorities with twenty-five cases.

The 1st respondent submitted and urged this court to dismiss this appeal and affirm the judgment of the court below. The inclusion of the 3rd respondents, INEC in the suit as at the time the suit was filed in November 2007 made the suit statute-barred. The 3rd respondent is a Public Officer under the Public Officers Protection Act section 2 (a) and any action not brought against a Public Officer within three months of its accrual will be deemed statute-barred. The action of the appellant was filed after a period of eight to nine months after the cause of action accrued. The 1<sup>st</sup> respondent argued that in that circumstances, the Public Officers Protection Act section 2 (a) of Cap 379 Laws of Nigeria 1990 will apply to protect the 3<sup>rd</sup> respondent. The time within which the action ought to have been brought against it has lapsed. When the matter was brought to court by way of originating summons that the 3<sup>rd</sup> respondent acted maliciously and

without bona fides in abuse of its power and outside the colour of its office, the court having considered all the argument on the merits of the case put forward by the appellant cannot replace the argument required to establish the foregoing. The two concurrent findings of the lower court found that the 3<sup>rd</sup> respondent had rightly invoked the Public Officers Protection Act. The two courts cannot be placed in a position of speculating or conjecturing that the appellant has a good cause of action which in the circumstance of that case was rendered bare and empty by limitation of time. Even if the appellant had a good case, his action has now been caught by the provisions of the Public Officers Protection Act. The action is now bare and empty. The 1<sup>st</sup> respondent cited many cases some of which are: -

Egbe v. Justice Adefarasin & Anor. (1985) 1 NWLR pt. 3 pg. 549 at pg.569.

Egbe v. Alhaji (1990) 1 NWLR pt.128 pg. 546 at pg.592.

Mathias Oko Offoboche v. Ogoja Local Government & 1 Or. (2001)16 NWLR pt. 739 pg. 458 at pg. 484.

Lagos City Council v. Ogunbiyi (1969) 1 All NLR pg. 297 at pg. 299.

The 2<sup>nd</sup> respondent submitted that there are concurrent findings of the two lower courts that the cause of action of the appellant has been extinguished by the combined provisions of section 2 (a) of the Public Officers Protection Act. The 2<sup>nd</sup> respondent cited cases:-

Udengwu v. Simon Uzoegbu & 4 Ors (2003) 13 NWLR pt. 836 pg. 136 at 152.

Abisi v. Ekwealor & 1 Or. (1993) 6 NWLR pt. 302 pg. 643 at pg. 674.

Larmie v. DPMS Ltd. (2005) 8 NWLR pt. 958 pg. 463.

The 2<sup>nd</sup> respondent contended further that the affidavit of the appellants in support of the originating summons did not show any acts of the 3<sup>rd</sup> respondent which are preempted by malice or devoid of any legal justification. The trial court had rightly concluded that there is not shred or scintilla of evidence by the appellants before the court that the 3<sup>rd</sup> respondent acted beyond the scope of his office or maliciously or even with no semblance of legal justification. The cause of action of the appellant was statute barred as at the time he filed their originating summons.

The 3<sup>rd</sup> respondent canvassed in respect of the applicability

of the Public Officers Protection Act to an unlawful/unconstitutional act by a public officer, by distinguishing the right of action or right to judicial relief from the cause of action. It stressed that it is the right of action that is barred by the Public Officers Protection Act and not the cause of action. The statute of limitation robs the plaintiffs of the right of enforcement, the right to judicial relief while though the cause of action remains intact but in a vacuous and bare form. The 3<sup>rd</sup> respondent emphasized that INEC is a person to whom the Public Officers Protection Act applies. Moreover the act of the 3<sup>rd</sup> respondent which the appellant described as unlawful/unconstitutional, illegal, unlawful and being without any semblance of legal justification, were done in the course of duty. The 3<sup>rd</sup> respondent pointed out that argument and facts relied upon in support of issue 1 were never before the two lower courts and they were facts meant to be argued in the main appeal. The issue meant to be resolved at this stage is the issue of jurisdiction which is a threshold issue.

The line of argument of the appellant is that in resolving the applicability of the Public Officer Protection Act- the court must first and foremost decide the merit of the case and if the case has merit, then the court must have jurisdiction. The 3<sup>rd</sup> respondent urged that this court must not allow the persistence of the appellant to avail him. The court is to direct the appellant to confine his argument to the issues raised and determined by the lower courts which is a preliminary issue of jurisdiction of the trial court to adjudicate on the matter. The 3<sup>rd</sup> respondent rounded up its argument by submitting that the defence of statute of limitation is an absolute bar to the appellant's right to judicial relief notwithstanding any cause of action they might otherwise have or how meritorious their action might be. The concurrent findings of the two lower courts are that there is no iota of evidence of malice and this court is urged to uphold same. The 3<sup>rd</sup> respondent backed up the foregoing submission with cases-

University of Ilorin v. Oluwadare (2009) All FWLR pt. 452 at page 1204.

Akpoji v. Udemba (2009) All FWLR pt. 471 pg. 811.  
E.T.B. Ltd. v. Alkokad Trading Co. Ltd. All FWLR (1974) pt.

476

Uwazurike v. A-G Federation (2007) All FWLR pt. 367 pg. 834.

Egbe v. Alhaji (1990) 1 NWLR pt. 128 pg. 546.

Issue No. 3

Is the immunity clause provided in Section 308 of the 1999 Constitution applicable in any action challenging the unlawful assumption of office of a person who was never a lawfully sponsored candidate for the Governorship Election in the State (Niger State). B

The appellant argued and submitted that the lower court rightly appreciated that there is no doubt that the action which gave birth to this appeal was instituted by the appellant to challenge the process through which the 1<sup>st</sup> respondent became the PDP candidate for the governorship election in Niger State including his right to continue to remain in the office as such. The lower court erroneously concluded that by virtue of the provisions of Section 308 of the 1999 Constitution, the 1<sup>st</sup> respondent is protected by immunity. The conclusion of that court overlooked the binding decision of the apex court in the case of Amaechi v. INEC & 2 ors. (2008) 5 NWLR pt. 1080 pg. 227 at page 343 paragraphs A-B where the court stated the correct legal principle that - C

*“It is very clear to me that section 308 of the Constitution does not protect a Governor from legal proceedings in a matter of his election per se or in a matter connected with the election even when he as a contestant has been declared duly elected or returned as Governor.”* E

The appellant also urged, following the decision in Amaechi’s case, that the suit here is related to an election and the res will be totally destroyed unless the action can be instituted and maintained against the 1<sup>st</sup> respondent who is unlawfully and unconstitutionally occupying the Office of Governor of Niger State. F

The lower court’s conclusion that “This attempt to remove an elected Governor via an originating summons six months after the Governor was sworn into office is to my mind a civil matter for which the Governor enjoys immunity as per Section 308 of the Constitution” resulted in a miscarriage of justice. In the circumstance, this court is urged by the appellant to hold that the lower court totally misapplied the law to the facts of the instant case and thereby failed to correctly resolve the issues in the suit. The appellant relied upon the cases of G

Amaechi v. INEC & 2 ors. (2008) 5 NWLR pt. 1080 pg. 227 at pages 324-325. H

Agbakoba v. INEC (2008) 18 NWLR pt. 1119 pg. 489 at pg. 560.

Odedo v. INEC (2008) 17 NWLR pt. 1117 pg. 554 at pg. 612.

The 1<sup>st</sup> respondent in its submission on this issue brought out the distinguishing features between this case and that of Amaechi. The appellant in this case did not challenge the election of the 1<sup>st</sup> respondent at an election Tribunal, if it had done so, the provisions of section 308 of the 1999 Constitution would not avail the 1<sup>st</sup> respondent. The case of Amaechi drew a line between a case filed as an election petition and that which is a pre-election matter filed before the ordinary courts with undoubted jurisdiction to adjudicate in pre-election matters or matters not connected with the conduct of the election. The action before the trial court was commenced by originating summons, and the issues involved were pre-election matters - substitution and withdrawal of candidate. The action was filed before an ordinary court and not at an election petition Tribunal. The claim before the Federal High Court in the main was for the removal of a validly elected Governor. The suit is therefore a civil suit within the contemplation of section 308 of the Constitution and the immunity clause thereunder can avail the 1<sup>st</sup> respondent. The 1<sup>st</sup> respondent cited the case *Ejura v. Idris & 2 ors.* (2006) 4 NWLR pt. 971 pg. 538.

The 2<sup>nd</sup> respondent submitted that following the concurring decisions of Okoro JCA in the judgment of the lower court - that this case is a civil matter masquerading as an election matter, If the appellant had approached the Federal High Court immediately after his disqualification, his case would have fallen within the ambit of the facts of the case or be on all fours with Amaechi's case - which the appellant heavily relied upon on this issue. The appellant cannot by way of originating summons remove a duly elected Governor before a Federal High Court in view of the provisions of section 308 of the 1999 Constitution which has covered him with the shield of immunity. The appellant approached the Federal High Court after the 1<sup>st</sup> respondent was sworn in as a Governor and had occupied the seat for four months. The 2<sup>nd</sup> respondent concluded that because of indolence of the appellant in watching the 1<sup>st</sup> respondent being sworn in, his cause of action has been extinguished by the provision of section 308 of the 1999 Constitution.

The 3<sup>rd</sup> respondent submitted on this issue that the 1<sup>st</sup> respondent enjoys constitutional immunity against both civil and criminal proceedings by virtue of section 308 (1) (a) of the Constitution of the Federal Republic of Nigeria 1999. He was elected as Governor-elect on the 14<sup>th</sup> of April 2007 and sworn in as Governor of Niger State on 29<sup>th</sup> May 2007. The action before the court is not an election petition but a civil proceeding which is clearly caught up by section 308 (1) (a) of the 1999 Constitution. Section 308 provides an absolute bar to civil and criminal suits against Governors while in office. The 3<sup>rd</sup> respondent gave the distinguishing features between this case and that of Amaechi, while finally concluding that the Federal High Court lacks the jurisdiction to entertain the appellant's claims. This court is urged to uphold the concurrent findings of the courts below and dismiss the appellant's appeal in its entirety.

I have painstakingly considered the submission of parties in the appeal. I am duty bound to emphasize at this stage that on gleaning through the records and as confirmed by the 3<sup>rd</sup> respondent in his brief of argument, the judgment in this instant appeal is not a judgment on the merits but the trial court upheld the preliminary objection of the respondents and struck out the action filed by way of originating summons, for lack of jurisdiction without delving into the merits of the case. The Court of Appeal had this at the back of its mind when it remarked in the judgment that

*"As can be glaringly seen, I have carefully avoided the lengthy arguments on the merit of the case. This is so because there is no issue on the merit of the case before us. That is to say, the issue as to whether the appellant was properly substituted or not is not before us."*

I find it rather surprising that in the appeal before us on a preliminary issue of statute of limitation - relating to the defence of Public Officers Protection Act by the 3<sup>rd</sup> respondent or based on the immunity clause in Section 308 of the Constitution pleaded on behalf of the 1<sup>st</sup> respondent, the appellant in his argument and submission urged this court to determine the constitutionality and/or illegality of an act by the 3<sup>rd</sup> respondent (INEC) which is patently illegal and without any legal justification and will further serve to define the limits of the statutory powers of INEC as an impartial Regulator in the

development of civilian democracy in our country. The appellant maintained this standard in this appeal. The arguments put forward is in my view a roll-up meant to satisfy the preliminary issues and the claims before the court in the merit. As a matter of fact the appellant wants the court to determine the issues raised in the main which are the claims in the originating summons before the defence of Public Officers Protection Act raised in the preliminary objection. My simple answer is that the court is being succinctly persuaded to put the cart before the horse. It cannot do so and the reasons will unravel themselves within my reasoning and conclusion in this judgment. The 1<sup>st</sup> - 3rd respondents' preliminary objection was predicated on section 2 (a) of the Public Officers Protection Act Cap 379 Laws of the Federation 1990, a statute of limitation, a point of law touching on the jurisdiction or competence of a court to adjudicate upon a matter before it. It is a fundamental and a threshold issue. It is in the best interest of justice that where the issue of jurisdiction is raised in any proceedings before any court of law, it should be dealt with at the earliest opportunity and before trial or consideration of any other issues raised in the case as anything done without or in excess of jurisdiction by any court established under the Constitution shall be a nullity.

Nalsa Team Associates v. NNPC (1996) 3 NWLR pt. 439 pg. 621.

NDIC v. CBN (2002) 7 NWLR pt. 166 pg. 272.

Petro-jessica Enterprises Ltd. v. Leventis Technical Co. Ltd. (1992) 5 NWLR pt. 244 pg. 675.

Anyah v. Iyayi (1993) 7 NWLR pt. 305 pg. 290.

Kotoye v. Saraki (1994) 7 NWLR pt. 357 pg. 414.

Madukolu v. Nkemdilim (1962) 2 SCNLR pg. 341.

A-G Lagos State v. Dosunmu (1989) 3 NWLR pt. 111 pg. 552.

E.T.B. Ltd. v. Akkad Trading Co. Ltd. 476 All FWLR pg. 1974 at pg. 1976.

I have to emphasize also that a defence founded on Statute of Limitation like the Public Officers Protection Act, is a defence that the plaintiff has no right of action. It is a defence which can be traced in limine and without any evidence in support, it is sufficient if prima facie the date of taking the cause of action outside the prescribed



period is disclosed in the writ of summons and statement of claim. The defence must be pleaded while the trial court has a duty to confine itself to the pleadings filed by the parties. In order to determine the period, consideration must be given to the writ of summons and the statement of claim alleging when the wrong was committed and by comparing that date with the date on which the writ of summons was filed. This can be done without taking oral evidence from witnesses. If the time on the writ of summons is beyond the period allowed by the limitation law then the action is statute-barred. This is to debunk the contention of the appellant that the two lower courts failed to consider the case of the appellant on the merits.

P.W. Udoh Trading Co. Ltd. v. Abere (2001) 11 NWLR pt. 723 Pg. 114.

Egbe v. Adefarasin (1985) 1 NWLR pt. 3 pg. 549.

NEPA v. Olagunju (2004) 3 NWLR pt. 913 pg. 602

Ibeto Cement Co. Ltd. v. A-G Federation (2008) 1 NWLR pt. 1069 pg. 470.

According to Section 2 (a) of the Public Officers Protection Act Cap 379 Laws of the Federation of Nigeria 1990 -

*"Where any action, prosecution or other proceeding is commenced against any person for an act done in pursuance or execution or intended execution of any Act or Law or of any public duty or authority or in respect of any alleged neglect or default in the execution of any act, law, duty or authority, the action, prosecution or proceeding shall not lie or be instituted unless it is commenced within three months next after the act, neglect or default complained of or in the case of a continuance of damage or within three months next after the ceasing thereof. If the action, prosecution or proceeding is at the instance of any person for cause arising while such person was a convict prisoner, it may be commenced within three months after the discharge of such person from prison."*

Egbe v. Belgore (2004) 8 NWLR pt. 875 pg. 336.

NEPA v. Olagunju (2005) 3 NWLR pt. 913 pg. 602.

Alhaji v. Egbe (1986) 1 NWLR pt. 16 pg. 361

Yusuf v. Egbe (1987) 2 NWLR pt. 56 pg. 341.

The two conditions which must exist before a person can avail himself of the protection provided by section 2 of the Public Officers Protection Act are -

(1) The person must be a public officer,

(2) The act done by the person in respect of which the action was commenced was an act done in pursuance or execution or intended execution of a law or public duty or authority.

CBN v. Okojie (2004) 10 NWLR pt. 882 pg. 488.

<sup>B</sup> It is of common ground that the 3<sup>rd</sup> respondent, INEC is a public officer within the ambit and scope of section 2 (a) of the Public Officers Protection Act Cap 379 Laws of the Federation 1990.

The emphasis of the appellant in this appeal is that the 3<sup>rd</sup> respondent at the time of the nomination and substitution of candidate of the 2<sup>nd</sup> respondent, PDP to contest in the April 14<sup>th</sup> 2007 Gubernatorial Election, acted contrary to and in total disregard of binding statutory provisions in purporting to substitute the name of the appellant with that of the 1<sup>st</sup> respondent as the governorship candidate of the 2<sup>nd</sup> respondent in Niger State for the 2007 elections. In effect, the Public Officers Protection Act is designed to protect a public officer who acts in good faith and does not apply to acts done in abuse of office and with no semblance of legal justification. On the purport and scope of section 2 (a) of the Public Officers Protection Act, it is well established that the Act gives full protection or cover to all public officers or persons engaged in the execution of public duties who at all material times acted within the confines of their public authority and are not acting outside their statutory or constitutional duty. A public officer can be sued outside the limitation period of three months, if at all times material to the commission of the act complained of; he was acting outside the colour or scope of his office or outside his statutory or constitutional duty. Where he acted within the colour or scope of his office, he can only lose protection of the limitation laws if he is sued within three months.

<sup>G</sup> Ibrahim v. JSC Kaduna State (1998) 14 NWLR pt. 584 pg. 1. The appellant concluded that the 3<sup>rd</sup> respondent having acted maliciously and unlawfully cannot be protected by the Public Officers Protection Act. The Public Officers Protection Act heavily relied upon by the lower court is inapplicable to justify a patently illegal and unconstitutional act. On this issue, I will like to quote from the pronouncement of Ademola CJN (of blessed memory) in the case Lagos City Council v. Ogunbiyi (1969) 1 ALL NLR pg. 297 at pg. 299 that—  
*“Abuse of office and bad faith are factors that deprive a party*

*who would otherwise have been entitled to the protection of section 2 (a) of the Public Officers (Protection) law of such protection. The burden is on the plaintiff to establish that the defendant had abused his position or that he has acted with no semblance of legal justification evidence that he may have been over zealous in carrying out his duties or that he had acted in error of judgment, or in honest excess of his responsibility, will not amount to bad faith or abuse of office. Abuse of office as use of power to achieve ends other than those for which power was granted for example for personal gain, to show undue favour to another or to wreak vengeance on an opponent to mention but a few.”*

Nwankwere v. Adewunmi (1966) 1 SCNLR 356. Offoboche v. Ogoja L.G. (2001) 16 NWLR pt. 736 pg. 458.

I must observe that going through the affidavit evidence before the court, there is nothing to show that the 3<sup>rd</sup> respondent acted outside the scope of its responsibility as a public officer. Even the appellant accepted that it is an issue to be established by facts on the prevailing circumstance of this case. The concurrent findings of the two lower courts noted that whether a public officer abused his office or acted maliciously is a question of fact for which credible evidence must be led to prove same. There is no shred or scintilla of evidence by the appellant before the trial court that the 3<sup>rd</sup> respondent acted beyond the scope of his office or maliciously or even with no semblance of legal justification. This court vehemently agrees with this thinking. The lower courts also agreed that there is no issue on the merit of the case filed by originating summons before the court which is whether the appellant was properly substituted or not. For the purpose of the limitation of action, time begins to run from the moment the cause of action arose or accrued. Therefore in determining whether an action is statute-barred or not, it is pertinent to ask when time begins to run. Time begins to run when there is in existence a person who can be sued and all facts have happened which are material to be proved to entitle the plaintiff to succeed.

Fadare v. A-G Oyo State (1982) 4 SC pg. 1.

Humbe v. A-G Benue State (2000) 3 NWLR pt. 649 pg. 419.

Egbe v. Adefarasin (No.1) (1985) 1 NWLR pt. 3 pg. 549.

The relevant facts here are that there was an application by

the 2<sup>nd</sup> respondent, PDP for the substitution of the appellant with the 1<sup>st</sup> respondent on the 5<sup>th</sup> of February 2007 as the governorship candidate for the Peoples Democratic Party in Niger State. There was a notice of withdrawal and substitution on the 13<sup>th</sup> of February 2007.

The 3<sup>rd</sup> respondent acting on the request effected the substitution.

B The resultant effect was that the 1<sup>st</sup> respondent contested and won the Governorship Election in Niger State on the 14<sup>th</sup> of April 2007. He was duly sworn in as the Executive Governor of Niger State on the 29<sup>th</sup> of May 2009. The appellant waited till November 2007

C to commence an action at the Federal High Court, Kaduna challenging his withdrawal and substitution - a period of nine months thereafter. By the Public Officers Protection Act he is allowed three months to vent his grievance against the 3<sup>rd</sup> respondent. The effect is that his action has become statute-barred. When an action is statute-barred,

D the plaintiff who might have had a cause of action loses the right to enforce the cause of action by judicial process because the period of limitation had elapsed. An action commenced after the expiration of the statutory period within which an action must be brought is not maintainable. In other words, when a statute of limitation prescribes

E a period within which an action must be initiated, legal proceedings cannot be properly and validly instituted after the expiration of the prescribed period. Any such action instituted must be struck out as not being properly instituted before the court. In effect, the right of the appellant to commence an action against the withdrawal and  
F substitution of the 1<sup>st</sup> respondent is extinguished by operation of law - that is, section 2 (a) of the Public Officer Protection Law Cap 379 Laws of the Federation 1990.

Egbe v. Adefarasin (1987) 1 NWLR pt. 47 pg. 1.

G Obiefuna v. Okoye (1964) 1 All NLR pg. 96

Adeosun v. Jibesin (2001) 11 NWLR pt. 724 pg. 290.

Ibrahim v. Judicial Service Committee Kaduna State (1998)  
14 NWLR pt. 584 pg. 1.

Eboigbe v. NNPC (1994) 5 NWLR pt. 347 pg. 649.

H Odubeko v. Fowler (1993) 7 NWLR pt. 308 pg. 637.

I shall proceed to consider the issue of the applicability of the immunity clause, section 308 of the 1999 Constitution, to the instant case. The germane question for determination is, whether the 1<sup>st</sup> respondent enjoys constitutional immunity against both civil and crimi-

nal proceedings by virtue of section 308 (1) (a) of the Constitution of the Federal Republic of Nigeria 1999. The 1<sup>st</sup> respondent was elected Governor of Niger State following the result at the polls held on 14th of April 2007. He was sworn in as Governor on the 29<sup>th</sup> of May 2007. The appellant commenced an action at the Federal High Court Kaduna against him in November 2007. The suit is in all its ramifications a civil proceeding. The jurisdiction vested in the Federal High Court by virtue of section 251(1), (2) and (3) of the 1999 Constitution Cap 134 Laws of the Federation 1990 includes both Civil and Criminal. The provisions of section 308 of the 1999 Constitution provide for an absolute bar to civil and criminal proceedings against all Governors while in office. B C

Ejura v. Idris (2006) All FWLR pt. 318 pg. 646.

Inspector General of Police v. Fayose (2008) All FWLR 404 pg. 1516 No. 9 at pg. 1522. D

By virtue of section 308 of the 1999 Constitution, there is an absolute prohibition on the courts from entertaining civil and criminal proceedings in respect of any claim or relief against the following persons: -

- (a) President
- (b) Vice-President
- (c) Governor and
- (d) Deputy Governor

Proceedings are held in abeyance until the person concerned vacates office, thereafter proceeding can commence. Where the election of a Governor is questioned in an election Tribunal, the provisions of section 308 of the Constitution will not apply, but that of section 21 (5) of the Electoral Act. Since the appellant in this case sought to remove the 1<sup>st</sup> respondent as the Governor by an originating summons filed before the Federal High Court, the provision of section 308 will protect him. The trial court was therefore right to decline jurisdiction in the light of the clear provision of section 308. Justice Musdapher, JSC in the case of Amaechi v. INEC (2008) 5 NWLR pt. 1080 pg. 227 at page 343 drove home the point that immunity under section 308 of the Constitution will not avail a Governor, since the immunity is not within the contemplation of a dispute in an election petition within the meaning of section 285 of the Constitution. In his submission, the appellant made strong refer- F G H

ences to the case of Amaechi v. INEC & 2 ors (2000) All FWLR pt. 407 pg. 1.

I agree with the respondents that Amaechi's case is clearly distinguishable from the appellant's case by the under mentioned factors -

- B (1) Applicability of Statute of Limitation
- (2) In Amaechi's case the matter was commenced before the regular courts before the election was held, whereas this action was commenced after the election and the 1<sup>st</sup> respondent had occupied the seat of governor for nine months.
- C (3) The doctrine of lis pendens was not raised in this case.
- (4) The doctrine of laches, acquiescence and standing-by was not raised in Amaechi's case.
- (5) In this case, there was no case pending in court before the date of the election on the 14<sup>th</sup> of April 2007.

The conclusion of the lower court that: -

*"This attempt to remove an elected Governor via an originating summons six months after the Governor was sworn into office was to my mind a civil matter for which the Governor enjoys the immunity as per section 308 of the Constitution"* is in my view impeccable.

The appellant by way of conclusion in the appeal, urged this court to dismiss the preliminary objection of the 3<sup>rd</sup> respondent and in the interest of justice proceed to finally determine this appeal on its merits and allow this appeal, set aside the decision of the lower court and grant the reliefs sought in the originating summons. The latter part of the request of the appellant is obviously not tenable - as the preliminary objection is meant to consider the issue of jurisdiction or competence of the court to entertain this suit.

The essence of section 308 of the Constitution is not designed to deny the citizen of this country his right of access to the court, rather it is a provision put in place to enable a Governor, while in office to conduct the affairs of governance free from hindrance, embarrassment and difficulty which may arise if he is being constantly pursued and harassed with court processes of a civil or criminal nature while in office. In the same vein, where actions are brought against public officials, they must be brought quickly, that is within 3 months as provided by section 2 of the Public Officers Protection Law. This is

designed to protect public officials who are very busy people from being distracted or submerged in a sea of litigation usually at the instance of professional litigants. As observed by the respondents, there are concurrent findings of fact of two lower courts before us. It is customary that the Supreme Court will not interfere with such findings of fact where: -

(a) Exceptional circumstances does not exist for its interference with the findings of fact or

(b) The findings of fact is based on proper appraisal and evaluation of the evidence adduced before the trial court or

(c) The finding of fact is not perverse.

In the instant appeal, there are no grounds for this Court to interfere with the concurrent findings of the trial court and the court of appeal, that this action is statute-barred.

Afolayan v. Osunrinde (1990) 1 NWLR pt. 127 pg. 369.

The court must put an end to its proceedings on discovery that it lacks jurisdiction. Where in particular a preliminary objection to an appeal succeeds and is upheld by the court that would bring the proceedings in which it was raised to an end as there could no longer be any other competent live issue in the case. There would be no need to consider the issues raised for determination in the main case in view of the success of the preliminary objection of the 1<sup>st</sup> - 3<sup>rd</sup> respondents.

With fuller reasons given in the leading judgment of my learned brother W.S.N. Onnoghen, JSC I also dismiss the appeal for being unmeritorious. I abide by the consequential orders made in the leading judgment as mine.