

**ALLIANCE FOR DEMOCRACY**

**V.**

- 1. PETER AYODELE FAYOSE**
- 2. JACOB ABIODUN ALUKO**
- 3. INDEPENDENT NATIONAL ELECTORAL COMMISSION**
- 4. RESIDENT ELECTORAL COMMISSIONER FOR EKITI STATE**
- 5. RETURNING OFFICER FOR EKITI STATE GUBERNATORIAL ELECTION**

*COURT OF APPEAL  
(ILORIN DIVISION)*

CA/IL/FP/GOV./3/03

MURITALA AREMU OKUNOLA, J.C.A. (*Presided and Read the Leading Judgment*)  
JOSEPH JEREMIAH UMORER J.C.A.  
JA' AFARU MIKA'ILU, J.C.A.  
AMINAADAMU AUGIE, J.C.A.  
STANLEY SHENKO ALAGOA, J.C.A.

MONDAY, 12<sup>TH</sup> JANUARY, 2004

*APPEAL -Reference of question of law- When can be made by the Court of Appeal to the Supreme Court.*

*CONSTITUTIONAL LAW - Immunity against suit conferred by section 308, the 1999*

*Constitution - Whether applicable in election petition matters -Effect of election petition on immunity conferred therein.*

*CONSTITUTIONAL LAW - Immunity conferred on Governor by section 308, 1999*

*Constitution - Whether applicable to election petition matter - Whether precludes issuance of subpoena on Governor whose election is challenged*

**CONSTITUTIONAL LAW- Interpretation of the**

**Constitution – Principles governing**

*CONSTITUTIONAL LAW – Reference of question of law – When can be made by the Court of Appeal to the Supreme Court*

*ELECTION PETITION –Immunity conferred on Governor by section 308, 1999 Constitution – Whether applicable to the election petition matter Whether precludes issuance of subpoena on Governor whose election is challenged.*

*ELECTION PETITION – Parties to election petition – Person declared as Governor elect- Whether can be sued to challenge declaration.*

*PRACTICE AND PROCEDURE- Reference of question of law- When can be made by the court of Appeal to the Supreme Court*

*PRINCIPLE OF INTERPRETATION – Interpretation of the Constitution – Principles governing.*

**Issue:**

Whether section 308 of the 1999 Constitution covers election petition matters and confers immunity on the 1st respondent from being sued and compelled by a writ of subpoena to tender document or give evidence before the election tribunal

**Facts:**

The appellant, a registered political party in Nigeria, participated in the Governorship election held on 12 April, 2003. The 1st respondent was declared the winner of the election and was sworn in as Governor. The appellant then filed a petition at the National Assembly/Governorship and Legislative Houses Election Tribunal to challenge the validity of the 1st respondent's election

claiming that the 1st respondent was not qualified to contest the election.

At the election tribunal, the appellant issued a *subpoena duces tecum* on the 1st respondent to appear before the tribunal to produce his credentials and international passport. The respondents filed a notice of objection dated 26/11/03 to the subpoena on the grounds of incompetence, lack of jurisdiction, nullity and unconstitutionality in its ruling in favour of the respondents upheld the objection.

Dissatisfied, the appellant appealed to the Court of Appeal. Before the hearing of the appeal, the 1st and 2nd respondents prayed court to refer to the upper court the question of the applicability of section 308 of the 1999 in election petition matters. This was declined by the court.

Section 308 of the Constitution of the Federal Republic of Nigeria, 1999 states thus:  
"308(1) Notwithstanding anything to the contrary in this Constitution, but subject to subsection (2) of this section:

- (a) no civil or criminal proceedings shall be instituted or continued against a person to whom this section applies during his period of office;
- (b) a person to whom this section applies shall not be arrested or imprisoned during that period either in pursuance of the process of any court or otherwise; and
- (c) no process of any court requiring or compelling the appearance of a person to whom this section applies shall be applied for or issued:

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

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

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

**Held** (*Unanimously allowing the appeal*):

1. *On Whether section 308 of 1999 Constitution confers immunity on Governor in election petition –The provision of section 308 of the 1999 Constitution is not applicable to confer immunity on a State Governor in an election petition challenging his election as to preclude the issuance of subpoena on him. The immunity provided by the provision of section 308 of the 1999 Constitution on a State Governor is put in abeyance when his election is being disputed before an election tribunal as to make him subject to being compelled by a subpoena to tender document(s) or give evidence before the election tribunal. [Tinubu v. I.M.B. Securities Ltd (2001) 16 NWLR (Pt. 740) 670; Obih v. Mbakwe (1984) 1 SCNLR 192; Unongo v. Aku (1985) 6 NCLR 262 referred to and distinguished.] (Pp. 652 paras. B-D)*

2. *On Whether section 308 of 1999 Constitution confers immunity on Governor in election petition*

**The provision of section 308 of the 1999 Constitution is applicable to ordinary civil proceedings and criminal proceedings and not in election related matter. Therefore, in an election petition, being a special proceeding, completely divorced and separated from civil proceedings, a Governor or any occupant of the office mentioned in section 308 of the 1999 Constitution does not enjoy immunity. In**

**other words, a Governor is not immune from legal proceedings against him in respect of an election petition.** [*Tinubu v. I.M.B. Securities Ltd.* (2001) 16 NWLR (Pt. 740) 670; *Obih v. Mbakwe* (1984) 1 SCNLR 192 referred to.] (Pp. 653, paras. G-H; 654, paras. E-F)

3. *On Whether section 308 of 1999 Constitution confers immunity on Governor in election petition*

**In an election petition where the status of the Governor is being challenged, the immunity conferred by the Constitution is also questioned. He has no immunity against being sued and consequently he cannot be immuned from being subpoenaed.** (P. 653, para. G)

4. *On Whether section 308 of 1999 Constitution confers immunity on Governor in election petition –*

**A person declared and sworn-in as the Governor-elect can be sued by an appropriate party to challenge the declaration. If the person is said to be immuned under section 308 of the 1999 Constitution, the resultant effect is that once a person is declared and sworn-in as Governor-elect, that ends the matter, and no one can complain or take any legal action even if the person conducted any gross election malpractices. This will encourage gross wrongful and illegal activities among the parties contesting for the position, and negate the spirit and necessary intent of the Constitution and hence destroy democracy.** (P. 653, paras. D-G)

**Per AUGIE, J.C.A. at pages 654, paras. A-E:**

**"I have read before now the lead judgment just delivered by my learned brother, Okunola, JCA, and I agree with him that the appeal succeeds as the lower tribunal failed to abide by the Supreme Court decision in *Obih v. Mbakwe* (1984) 1 SCNLR 192, and other cases on the same line which laid down clearly that a Governor cannot be immuned from legal proceedings against him in respect of an election petition. To hold that the Governor is immuned in such proceedings is to go counter to the spirit and intent of our Constitution. This standpoint is better appreciated when one envisages a situation where a person is sworn in as a Governor, but is later discovered to be a person of questionable character who won the election with doubtful papers, if he is immune, it would mean that an election tribunal provided for under the Constitution, will not be able to question his election and do something about it through the judicial process. In other words, the Constitution would have acted in vain in setting up election tribunals. That can not be so."**

5. *On Principle governing interpretation of the Constitution -*

**The Constitution is the highest law of the land and its interpretation must accord with the letter and spirit of the Constitution to reflect the intention of the framers.** (P. 654, para. E)

6. *On When reference of question of law can be made by the Court of Appeal to the Supreme Court -*

**The reference of a question by the Court of Appeal to the Supreme Court for determination can only be made by the Court of Appeal to the Supreme Court under section 295(3) of the 1999 Constitution only if there had been no guidance from the Supreme Court on the point. In the instant case, the point sought to be referred to the Supreme Court on the application of immunity to the principal officers named in section 308 of the 1999 Constitution in election petition matters had been resolved by the Supreme Court in *Obih v. Mbakwe* (1984) 1 SCNLR 192 and *Unongo v. Aku* (1985) 6 NCLR 262. Therefore, it is not a point for reference to the Supreme Court for clarification as the court had done the necessary clarification.** (Pp. 651-652, paras. G-A)

Per MIKA'ILU, J.C.A. at pages 652-653, paras. H-D: "By motion dated 17th December, 2003 and filed 18/12/2003 it has been prayed that this court grant an order to refer to the Supreme Court the question whether having regard to the decision of the Supreme Court in the case of *Obih v. Mbakwe* (1984) 1 SCNLR 192 and the case of *Tinubu v. IMB Securities Limited* (2001) 16 NWLR (Pt.740) 670 the provisions of section 308 of the 1999 Constitution of the Federal Republic of Nigeria 1999 are applicable to confer immunity on a State Governor in an election petition involving his election to preclude the issuance of subpoena on him. I am of the view that to refer this matter to the Tnurt would tantamount to asking the Supreme Court to clarify what it had earlier clarified. The decisions in the two cases above are far from being contradictory. The case of *Obih v. Mbakwe (supra)* is on election petition and similar to our present case. It is the main issue in the interlocutory appeal for this court to decide whether the trial Tribunal appreciated the case of *Obih v. Mbakwe (supra)* and properly interpreted the provisions of section 308 of the Constitution. There is nothing to be referred to the Supreme Court for clarification. I dismiss the motion."

Per AUGIE, J.C.A. at pages 654-655, paras. F-A:

"Now, the 1st and 2nd respondents prayed the court to refer this matter to the Supreme Court for clarification on the ground, *inter alia*, that there are apparent conflicting decisions on the proper interpretation of the provision of section 308 of the 1999 Constitution, but from the foregoing, it is obvious that the 1st & 2nd respondents argument on this score lacks merit. The pronouncement in *Obih v. Mbakwe (supra)* was to the point and decisive on the issue and must therefore be considered settled by the Supreme Court. This is therefore not a proper case for this court to order a reference to the Supreme Court as canvassed by the 1st & 2nd respondents, and their application to that effect is hereby refused."

#### **Nigerian Cases Referred to in the Judgment:**

*Obih v. Mbakwe* (1984) 1 SCNLR 192

*Tinubu v. I.M.B. Securities Ltd.* (2001) 16 NWLR (Pt. 740)670

*Unongo v. Aku* (1985) 6 NCLR 262

#### **Nigerian Statutes Referred to in the Judgment:**

Constitution of the Federal Republic of Nigeria, 1979, S. 267(1) Constitution of the Federal Republic of Nigeria, 1999, Ss. 295(3) and 308

#### **Appeal:**

This was an appeal against the ruling of the National Assembly/ Governorship and Legislative Houses Election Petition Tribunal which upheld the 1st and 2nd respondents' objection to the *subpoena* issued against the 1st respondent. The Court of Appeal, in a unanimous decision, allowed the appeal.

#### **History of the Case:**

##### *Court of Appeal:*

*Division of the Court of Appeal to which the appeal was brought:* Court of Appeal, Lagos

*Names of Justices that sat on the appeal:* Muritala Aremu

Okunola, J.C.A. (*Presided and Read the Leading Judgment*); Joseph Jeremiah

Umoren, J.C.A.; Ja'afaru

Mika'ilu, J.C.A.; Amina Adamu Augie, J.C.A.; Stanley Shenko Alagoa, J.C.A.

*Appeal No.:* CA/IL/EP/GOV./3/03

*Date of Judgment:* Monday, 12th January, 2004

*Names of Counsel:* L. O. Fagbemi, SAN (*with him*, A. Ojuawo, Esq., H. O. Afolabi, Esq., S. O. Ajayi, Esq. and A. Adewumi, Esq.) -*for the Appellant*

Yusuf O. Ali, SAN (*with him*, A. A. Kayode, SAN, A.

Adelodun, Esq., K. K. Eleja, Esq., T. Ahmed, Esq. and A. Okeya, Esq.) -*for the 1st and 2nd Respondents*

Chief Taiye Omonijo -*for the 3rd - 5th Respondents*

***Tribunal:***

*Name of the Tribunal:* National Assembly/Governorship and Legislative Houses Election Tribunal, Ekiti *Date of Ruling:* Thursday, 20th November, 2003

***Counsel:***

L. O. Fagbemi, SAN (*with him*, A. Ojuawo, Esq., H. O. Afolabi, Esq., S. O. Ajayi, Esq. and A. Adewumi, Esq.) -*for the Appellant*

Yusuf O. Ali, SAN (*with him*, A. A. Kayode, SAN, A. Adelodun, Esq., K. K. Eleja, Esq., T. Ahmed, Esq. and A. Okeya, Esq.) -*for the 1st and 2nd Respondents*

Chief Taiye Omonijo -*for the 3rd - 5th Respondents*

**(Delivering the Leading Judgment):** This an appeal against the ruling of the National Assembly Governorship and Legislature House Election Petition Tribunal hereinafter referred to as the tribunal) holden at Ekiti on 20th November, 2003, wherein the tribunal ruled in favour of the respondents. The facts of this case briefly put were as follows: the petitioner/appellant herein, the Alliance for Democracy Ekiti State Chapter, a registered political party in Nigeria participated in the election of 12th day of April, 2003 and claimed that the 1st respondent herein was not qualified to contest for the election. The

Appellant requested that 1st respondent should be subpoenaed to produce his credentials and international passport. The petitioner sued a subpoena *duces tecum* on the 1st respondent to appear before the tribunal with notice to produce dated 20/11/03. The 1st respondent filed a notice of objection dated 26/11/03 and re-notice to produce international passport dated 26/11/03 on the grounds of competence, lack of jurisdiction, nullity and unconstitutionality. After hearing the submissions of all learned counsel to the parties this objection the tribunal delivered a well considered ruling on 19/11/03 in favour of the respondents.

Dissatisfied with this ruling, the appellant herein has appealed to this court on six grounds.

From the six grounds of appeal the appellant herein has formulated the following three issues for

determination in this appeal viz:

1. Whether section 308 of 1999 Constitution confers any immunity on an incumbent governor:
  - (a) from being sued and from being issued or served with certain court processes;
  - (b) extends beyond civil and criminal matters to cover election petition and whether their Lordships of the lower Tribunal ought not to have followed laid down decision that the immunity under reference is not applicable in election petition matter?.
2. Whether, international traveling document of the 1<sup>st</sup> respondent is a document to be specifically pleaded, when issue had been joined as to the real identity of the 1st respondent which issue makes the traveling document of the 1st respondent relevant? and
3. Whether on the face of the preliminary objection, it can be said that the question of service was in issue to warrant the lower Tribunal to fall back on affidavit of service filed by the bailiff to conclude that personal service was not effected on the 1st respondent.

The 1st - 2nd respondents' counsel also formulated three issues from the grounds of appeal which but for framing and language used boil down to the three issues raised by the appellant in the appellant's brief. These are:

1. Whether the trial tribunal was not right on the interpretation it placed on the provisions of section 308 of the Constitution of the Federal Republic of Nigeria 1999 and in following the latter decision of the Supreme Court in *I.M.B. v. Tinubu* while distinguishing the Supreme Court's decision in *Obih v. Mbakwe* which led to the setting aside and striking out of the subpoena issued against the 1st respondent.
2. Whether the decision of the trial tribunal that the traveling documents or passport of the respondent having not been pleaded are or is irrelevant and that the notice to produce same cannot hold was not properly reached.
3. Whether the trial tribunal acted wrongly by relying on its record and coming to the conclusion that there was no personal service of the purported subpoena on the 1st respondent.

However, counsel to the 3rd - 5th respondents did not formulate any issue but agreed with those filed by the appellant in the appellant's brief. For the purposes of this judgment, I shall use the appellant's three issues which have incorporated the three issues in the respondents' brief. Be that as it may be, all learned counsel to the parties have filed their briefs of argument on behalf of their respective clients. On 12/1/04 when this appeal came before us for hearing, all leading counsel to the parties adopted and relied on their briefs and addressed us *viva voce*.

Learned counsel, to the appellant Mr. L. O. Fagbemi, SAN leading Messers A. Ojuawo, H. O. Afolabi, S. O. Ajayi and A. Adewumi adopted and relied on the appellant's brief filed herein on, 17/12/03. By way of reply, learned counsel to the 1st & 2nd respondents Mr. Yusuf Ali, SAN with whom were Messers A. A. Kayode SAN, A. Adelodun, K. K. Eleja, T. Ahamed and A. Okeya adopted and relied on the 1st & 2nd respondents' brief filed herein 18/12/03. Learned counsel to the 3rd - 5th respondents Chief Taiye Omonijo by way of further reply adopted and relied on the 3rd - 5th respondents brief filed herein on 24/12/03. I have considered the submissions of all learned leading counsel to the parties *vis-a-vis* the records and the prevailing law on issue No. 1. In my view their arguments boil down to one principal issue as contained in the appellant's issue No. 1 namely: Whether section 308 of 1999 Constitution confers any immunity on an incumbent governor:

- (a) from being sued and from being issued or served with certain court processes;
- (b) extends beyond civil and criminal matters to cover election petitions and whether their Lordships of the lower tribunal ought not to have followed laid down decision that the immunity under reference is not applicable in election petition matter?

It is the resolution of this principal issue that will dictate the consideration of other subsidiary issues. Be that as it may, on this principal issue, leading counsel to the appellant submitted by way of summary on page 18 paragraph 7(1) of the appellant's brief that in an election petition which is a special proceeding, the 1st respondent cannot claim any immunity in a suit to challenge the validity of his election or claim immunity from being issued with a writ of a subpoena which is one of the processes contemplated in section 308(1)(c) of the 1999 Constitution. By way of reply, learned counsel to the respondent by way of summary on page 35 paragraph 8.00 (1)-(3) submitted and urged the court on this principal issue to dismiss the appeal and remit the case for retrial before the trial tribunal with an order that the petition be disposed of speedily

*because:*

1. The interpretation of the trial tribunal of section 308 l(b) & (c) of the 1999 Constitution is unassailable.
2. A lower court faced with two conflicting decisions of a higher court has the option of following one.
3. The fact that an election petition is *sui generis* does not take it out of the ambit of the

Constitution which is the supreme law of the land.

The learned counsel to the 3rd - 5th respondents made his own summary during the submission before our panel. All the learned counsel to the parties, addressed us copiously when this matter came before us the 12/1/04. The learned counsel to the 3<sup>rd</sup> - 5<sup>th</sup> respondents submitted in addition that the issue of any thing done with pleading particularly with reference to the position of international passport of the 1<sup>st</sup> respondent goes to no issue.

I have considered the submission of all learned leading counsel to the parties on this principal issue vis-à-vis the records and the prevailing law. To my mind the poser raised by them is simply whether section 308 of the 1999 constitution extends beyond civil and criminal matter to cover election petition and whether the lower tribunal ought not to have followed laid down decision that the immunity under reference is not applicable in election matter? Leading counsel to the parties took two clear and distinct positions on this principal issue. Learned counsel to the parties took two clear and distinct positions on this principle issue. Learned counsel to the appellant answered this poser in the negative stating that section 308 does not extend the immunity therein to cover proceeding in an election petition while learned leading counsel to the respondents maintain strongly that the immunity extends beyond civil and criminal matters to cover election petitions.

While learned leading counsel to the appellant predicate his submission on the case of *Obih v. Mbakwe* (1984) 1SCNLR 192, 15NSCC 127 while the learned leading respondent counsel predicated their submission on the case of *Tinubu v. I.M.B. Securities Ltd.* (2001)16 NWLR (Pt. 740)640.

I have had the privilege of perusing these two sets of judgments each of which constitutes *locus classicus* on the point canvassed by the learned counsel. However, both cases can be clearly

Distinguished. While *Tinubu's* case (supra) relate to civil matter simpliciter (i.e. banking transaction entered into by the ; before he became the Governor of Lagos State, *Obih v.* (supra) relates specifically to an election matter which is in *materia* to the instant case). Thus, the two set of cases can be clearly distinguished. The apex court in *Obih's* case (1984) 1 SCNLR 19<sup>2</sup> and *Paul Iyorpuv Unongo v. Aper Aku and 2 Ors.* (1985) 6 NCLR 262 P. 268 considered the provision of S.267(1) of the 1979, Constitution which is in pari material to the provision of the section 308(1) of the 1999 constitution under consideration in the instant appeal. The apex court resolved the above pose in the following terms per Bello, CJN in *Obih v. Mbakwe* at page 130 line 40 to the end page 131 line 1-2 thus:

“In the same vein as in the former Constitution the 1979 Constitution made special provisions for the jurisdictions of the courts to hear and determine election petitions at the first instance and on appeal. Section 236 of the Constitution conferred on the High Court of a State unlimited jurisdiction to hear and determine any civil or criminal proceedings subject to the provisions of the Constitution. Section 237 then conferred jurisdiction on the competent High Court to deal with election petitions. The same distinction was manifested in the appellate jurisdictions of the Federal Court of Appeal and of this court. While appeals as of right were covered by section 220(1) (a) - (e) and section 213(2) (a) - (d) in the Federal Court of Appeal and in this court respectively, section 220(1)(f) and section 213(2)(e) conferred the right of appeal to the Federal Court of Appeal and to this court in respect of election petitions. From the provisions of the Constitution referred to above, I am of the opinion that election petitions were special proceedings completely divorced and separated from civil proceedings within the context of section 267 of the Constitution and consequently a Governor is not immune from legal proceedings against him in respect of an election petition.”

From the foregoing authority, this principal issue is resolved in favour of the appellant. In sum, this appeal succeeds on the principal issue and it is allowed. The ruling of the lower tribunal is hereby set aside. The case is hereby remitted back for retrial by a new panel in the lower tribunal to be

President of the Court of Appeal.

With this principal issue resolved in favour of the appellant, the motion filed herein for reference to the Supreme Court becomes Irrelevant. This is because from the argument of all learned counsel |o the parties, reference to the Supreme Court can only be made by Court of Appeal to the Supreme Court under section 295(3) of 1999 Constitution, if there have been no guidance from the apex Court on the point. This is not the position in the instant case where this point s sought to be referred to the Supreme Court – the application immunity by the principal officers named in S.308 of the 1999 Constitution in election petition matters - had been resolved by the Supreme Court in the *Obih v. Mbakwe* and *Unongo v. Aper Aku* set of cases cited by the appellants counsel supra.

In the light of these authorities, I hold that this is not a point for reference for clarification to the Supreme Court as the apex court had done the necessary clarification. In consequence application dated 17/12/03 and filed on 18/12/03 is hereby dismissed.

As held in the judgment supra it is hereby ordered that, having regard to the decision of the Supreme Court in the case of *Obih v. Mbakwe* (1984) 1 SCNLR 192 and *Tinubu v. I.M.B. Securities Ltd.* (2001) 16 NWLR (Pt. 740) 670 the provisions of section 308 of the 1999 Constitution of the Federal Republic of Nigeria are not applicable to confer immunity on a State Governor in an election petition involving his election to preclude the issuance of subpoena on him? OR put in another way: the immunity provided by the provisions of section 308 of the Constitution of the Federal Republic of Nigeria 1999 on a State Governor is put in abeyance when his election is been disputed before an election Tribunal as to make him amenable to being compelled by a subpoena to tender document(s) or give evidence before the election Tribunal.

No order is made as to costs. Each party shall bear its own costs.

UMOREN, J.C.A.: I have read in draft the judgment of my learned brother, Hon. Justice M.A. Okunola, JCA, I agree with his reasoning and conclusion, I agree that the appeal be allowed and the motion for reference to the Supreme Court becomes *otiose* the appeal having been allowed.

The learned counsel for the applicant to the motion date 12/03 and filed on 18/12/03 failed to convince the court that it appeal went outside the ambit of the decision in *Obih v. MbaKK* (1984) 1 SCNLR 192 at 199 - 200 on which the Apex court Mf made pronouncement.

I also agree that each party bears its costs.

MIKA'ILU, J.C.A.: I have had the preview of the judgment learned brother, Okunola, JCA, delivered by him. I agree reasons and conclusions therein. By motion dated 17th Decs 2003 and filed 18/12/2003 it has been prayed that this court & order to refer to the Supreme Court the question whether having regard to the decision of the Supreme Court in the case of *Obih v. Mbakwe* (1984) 1 SCNLR 192 and the case of *Tinubu v. IMB Securities Limited* (2001) 16 NWLR (Pt.740) 670 the provisions of section 308 of the 1999 Constitution of the Federal Republic of Nigeria 1999 are applicable to confer immunity on a State Governor in an election petition involving his election to preclude the issuance of subpoena on him.

I am of the view that to refer this matter to the Supreme Court would tantamount to asking the Supreme Court to clarify what it had earlier clarified. The decisions in the two cases above are far from being contradictory. The case of *Obih v. Mbakwe* (supra) is on election petition and similar to our present case. It is the main issue in the interlocutory appeal for this court to decide whether the trial Tribunal appreciated the case of *Obih v. Mbakwe* (supra) and properly interpreted the provisions of section 308 of the Constitution. There is nothing to be referred to the Supreme Court for clarification. I dismiss the motion.

I am also of the view that the appeal can be allowed on the main issue of immunity of the governor under the provisions of section 308 of the Constitution of the Federal Republic of Nigeria 1999. The issue can be resolved by a simple question as to whether a person declared and sworn-in

as the governor elect can be sued by appropriate party to challenge the declaration. By law the answer

Must be in the positive. If the said person is said to be immuned under the section the resultant effect is that once a person is declared<sup>1</sup> sworn - in as governor elect that ends the matter, no one complain or take any legal action even if the person conducted any issue election malpractice. This will encourage gross wrongful and gal activities among the parties contesting for the position. This would undoubtedly negate the necessary intendment of constitution and would destroy the democracy itself. In election petition where the status of the governor is being challenged, as in then the said immunity is also questioned. He has no immunity inst being sued and consequently he cannot be immuned from subpoenaed. It must be made clear that the provisions of section of the Constitution are applicable to ordinary civil proceedings ~ the case of *Tinubu v. I.M.B. Securities Limited* (supra) and proceedings and not in election related matter as in *Obih v. We* (supra) and our present case. In my judgment the appeal is allowed on this issue. It is allowed with an order that the

AUGIE, J.C.A.: I have read before now the lead judgment just delivered by my learned brother, Okunola, JCA, and I agree with him that the appeal succeeds as the lower tribunal failed to abide by the Supreme Court decision in *Obih v. Mbakwe* (1984) 1 SCNLR 192, and other cases on the same line which laid down clearly that a governor cannot be immune from legal proceedings against him in respect of an election petition. To hold that the governor is immune in such proceedings is to go counter to the spirit and intent of our Constitution. This standpoint is better appreciated when one envisages a situation where a person is sworn in as a governor, but is later discovered to be a person of questionable character who rjif<sup>1</sup> won the election with doubtful papers, if he is immune, it would mean that an election tribunal provided for under the Constitution, will not be able to question his election and do something about it through the judicial process, In other words, the Constitution would have acted in vain in setting up election Tribunals. That cannot be so. The Constitution is the highest law of the land, and its interpretation must accord with the letter and spirit of the Constitution ' to reflect the intention of the framers, particularly in a democracy such as ours where election matters have taken on the hue of a do or die affair. It is in the light of this that I uphold the submissions of f I the appellants that election petitions being a special proceedings, a governor or any occupant of that office mentioned in section 308 of the 1999 Constitution does not enjoy immunity when it comes to an election petition, which seeks for the determination of his election.

Now, the 1st and 2nd respondents prayed the court to refer this GI matter to the Supreme Court for clarification on the ground, *inter alia*, that there are apparent conflicting decisions on the proper interpretation of the provision of section 308 of the 1999 Constitution, but from the foregoing, it is obvious that the 1st & 2nd respondents argument on this score lacks merit. The pronouncement in *Obih v. Mbakwe* (supra) was to the point and decisive on the issue and must therefore be considered settled by the Supreme Court. This therefore not a proper case for this I court to order a reference to the Supreme Court as canvassed by the 1st & 2nd respondents and their application to that effect is hereby refused. It is for this reason and the other reasons out in the lead judgment that I also allow the appeal. I abide by the consequential orders in the lead judgment.

ALAGO, J.C.A.: I have read in advance the leading judgment and ruling of my learned brother, Okunola, JCA, and I am totally in agreement with his reasoning and conclusions. I abide by the orders made including that as to costs.

*Appeal allowed*

