

**IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY
IN THE ABUJA JUDICIAL DIVISION (APPELLATE)
HOLDEN AT COURT 10 GARKI, ABUJA
TODAY TUESDAY 20TH FEBRUARY, 2024.**

APPEAL NO: CRA/02/2023

CASE NO CR/94/2022

BEFORE THEIR LORDSHIPS

HON JUSTICE S.B BELGORE- (Presiding Judge)

HON JUSTICE ADELAJA O.I (judge)

BETWEEN

MR. EDET GODWIN ETIM APPELLANT/RESPONDENT

AND

PASTOR UMO BASSEY ENO RESPONDENT/APPLICANT.

JUDGEMENT.

This is an Appeal against the decision of the Chief Magistrate Court in case No CR/94/2022 delivered on 11th January 2023 by his worship Hon. Emmanuel Iyanna. The Parties in the Appeal have moved a number of applications on which the Court delivered rulings. The instant application is by the Respondent Pastor UmoBasseyEno. The application vide a Motion on Notice motion No/M/181/2023 dated and filed on 1/6/2023 is brought pursuant to Section 308 of the Constitution of the Federal Republic of Nigeria 1999 (as amended) and under the inherent jurisdiction of the Honourable Court. The motion prays the Court for **an Order striking out this Appeal for want of jurisdiction by the Honourable Court to entertain same against the Applicant pursuant to section 308 of the Constitution of the Federal Republic of Nigeria**

1999 (as amended) and for such further Orders as the Honourable Court may deem fit to make in the circumstances of this Appeal.

There are five grounds for the application:

The first ground is “The Applicant was sworn in as the Governor of Akwa Ibom State on Monday 29th May 2023, having been declared by the Independent National Electoral Commission as the winner of the Governorship election conducted on Saturday 18th March 2023.

The second and third grounds narrates the events leading to this Appeal from the decision of the Chief Magistrate Court Wuse Zone 6 Abuja. The fourth ground is “consequent upon his being sworn in as the Governor of Akwa Ibom State the Applicant has been conferred with immunity by section 308 (1) of the Constitution in the following terms: 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 processes of any Court or otherwise and
- c) No process of any Court requiring or compelling the appearance of a person to whom this section applies shall be applied for or issued.

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

The 5th ground is that this Honourable Court is without jurisdiction to entertain this Appeal against the Applicant pursuant to the

aforereferenced explicit provisions of section 308 (1) of the 1999 Constitution.

In support of the application is an 8 paragraphs affidavit sworn to by one Yusuf Ahmed a litigation assistance in the law firm of the learned silk representing the Respondent/Applicant. Annexed to the affidavit as Exhibit UBE 1 is the Appellant's Notice of Appeal. Filed in support of the application is the written submission of the Learned silk Paul Usoro representing the Respondent/Applicant also dated 1/6/2023.

The Appellant/Respondent responded to the application by filing a 9 paragraphs counter affidavit deposed to by Lukman Abdulmalik a litigation secretary in the firm of the learned silk representing the Appellant/Respondent. In support is the written submission of the learned silk Ayinla Suleiman SAN.

In response to the counter affidavit is an 8 paragraphs further affidavit of the Respondent/Applicant deposed to by the same Yusuf Ahmed on 25th July 2023. Annexed to the further affidavit and marked Exhibits are the following documents:

- a) The Certified True Copy of the Petition of All Progressive Congress (APC) challenging the Election of the Applicant as the Governor of Akwa Ibom State. – Exhibit UBE 2.
- b) The certificate of return for the Governor of a State No GO/0005/2023 dated 20/3/2023 – Exhibit UBE 3.
- c) The copy of the Oath of office and Oath of allegiance signed by the Applicant before the Chief Judge of Akwa Ibom State marked Exhibit UBE4 and UBE 4A

A written reply address was filed along with the further affidavit.

The Appellant/Respondent responded to the further affidavit of the Respondent/Applicant by filing 8 paragraphs further and better counter affidavit dated 15th June 2023 sworn to by Lukman Abdumalik, the litigation secretary of the Learned silk representing the

Appellant/Respondent. Annexed to the affidavit are the final list of the Governorship candidates of all political parties for the election conducted on 18th March 2023 and a document indicating the person that won the Governorship election in Akwa Ibom State, respectively marked Exhibits 1 & 2. The parties addressed the Court in writing on their different consideration of the issue raised in the instant application. The learned silk also orally adumbrated on their written submission.

In the written submission by the learned silk for the Respondent/Applicant the five grounds for the application as stated on the face of the motion paper were reviewed and a sole issue distilled for determination which is **“whether this criminal appeal can lie against the Respondent/Applicant hereof following his assumption of office as the Governor of Akwa Ibom State of Nigeria and during his tenure in office pursuant to section 308 (1) of the Constitution of the Federal Republic of Nigeria 1999 (as amended).”** The learned silk submitted that the criminal appeal cannot lie against the Respondent/Applicant during his tenure in office as the Executive Governor of Akwa Ibom State having regard to the provisions of Section 308(1) of the Constitution. He stated the Appellant /Respondent is aware of the status of the Applicant as the Governor of Akwa Ibom State going by some facts deposed to in the affidavits in support of earlier applications filed by the Appellant/Respondent particularly the application for accelerated hearing of this Appeal. He submitted it is not possible for any of the prayers of the Appellant/Respondent in this appeal to be granted without violating the provisions of section 308 (1) of the Constitution. He referred to the decision of the Court of Appeal in *MUSTAPHA V SUNTAI & ORS* (2013) LPELR-22109 (CA). The learned silk further submitted that another rationale behind immunity clause under section 308 of the Constitution is to consolidate the achievements of democracy, to prevent harassment through political witch hunting and to save cost because every time a Chief Executive is sued the costs are paid by taxpayers’ fund. He relied on

ALAMIEYESEIGHA V YERIMA (2002) 7 NWLR (Pt 767)581 and ATTORNEY GENERAL OF THE FEDERATION & 2 ORS V ABUBAKAR (2007) 8 NWLR (Pt 1035) 117 @154-155 para.D-C.He relied on the provision of section 308 (1) of the Constitution and the cited judicial authorities and urged the Court to strike out the Appeal for want of jurisdiction.

In response the learned silk representing the Appellant/Respondent in the written submission filed in support of the Appellant/Respondent's counter affidavit filed on 8th June 2023, reviewed the facts leading to this appeal and submitted one issue for determination **“whether this appeal is caught by the provision of section 308(1) of the Constitution of the Federal Republic of Nigeria 1999.** The learned counsel submitted that the Appeal is not caught by the provision as the Applicant is not a person protected by that section.

On preliminary note the learned silk stated that paragraphs 6 a and b of the affidavit of the Applicant are statement of the law and legal conclusions which offends section 115 (2) of the Evidence Act 2011. He submitted the paragraphs are liable to be set aside. He referred to MILITARY GOVERNOR OF LAGOS STATE V OJUKWU (1986) 1NSCC 304.

The learned silk submitted that the purported change of status has never occurred for section 308 (1) to be applicable. He stated it is trite law that you cannot apply the law on non-existing facts, he relied on ALADE V ALEMULOKE (1988) 1 NWLR (Pt 69) 207 He submitted further that the Appeal is not caught by section 308 (1) and as such the Court is well placed to proceed with the appeal and determine it on the merit. He stated it is clear from the record of Appeal on pages 188-201 that the central issue in this Appeal is the breach of Fundamental Right to Fair Hearing guaranteed by section 36 (1) of the Constitution of the Federal Republic of Nigeria 1999 (CFRN). He stated that the Supreme Court restated the importance of Fair Hearing in MUYIDEEN ESQ V N.B.A

(2021) LPELR-55885 (SC), UMEANO V ANAEKWE (2022) LPELR-56855 (SC). The learned silk submitted that assuming without conceding that the status of the Applicant changed on 29th May 2023, section 308 (1) cannot be invoked to stultify the right to Fair Hearing guaranteed by section 36 (1) of the CFRN 1999. He submitted that the provisions relevant to the issue at hand must be read together to arrive at the correct position of the intendment of the legislators. He referred to SOSANWO V MUSTAPHA (2019) LPELR-48323 (CA). He submitted that the provisions of sections 6(1), (5) d. (6) a & b, 36(1) and 308 CFRN 1999 would have to be considered together to determine whether this Appeal is caught by section 308 of the said Constitution. He stated that the provisions of the sections by literary interpretation are clear and unambiguous. He relied on NWOBIKE V F.R.N (2021) LPELR-56670(SC), ALIYU V NAMADI (2023) LPELR-59742 (SC). the learned silk submitted that section 308 cannot be invoked to obstruct the operation of the provisions dealing with the jurisdiction of the Court and to cover up the breach of fair hearing which is a Fundamental Right under the CFRN 1999 and the African Charter on Human and Peoples' Right. He submitted that no constitutional provision is superior to Fundamental Right, Public interest and National Security. He urged the Court to hear the Appeal and set aside the ruling of the lower Court made on 11th January 2023.

The learned silk stated further that allowing the instant application will be a mockery of the law and it is trite the Court will not allow itself to be used as engine of fraud to perpetrate impunity and injustice. He relied on GBADAMOSI V AKINLOYE (2013) 15 NWLR (Pt1378) 455, BULET INT LTD V OLANIYI (2017) 17 NWLR (Pt 1594) 260, he also relies on the provisions of the African Charter on Human and Peoples' Right (Ratification and Enforcement) Act LFN 1990. He submitted that the Respondent/Applicant is using the law to evade justice. He submitted that the essence of immunity is not to put a hold on justice particularly when the subject matter of the case might be permanently destroyed if

the matter is discontinued, he stated the Appellant will be estopped by the law from again prosecuting this case if discontinued. He referred to *OGBUOJI V UMAHI* (2022) 8 NWLR (Pt 1832) Per Oyewole JCA @pages 364-365.

The learned silk representing the Appellant/Respondent further submitted that the principal relief which is against the decision of the trial Court is not against the Applicant and as such the Applicant will be deemed to be a nominal party. He stated section 308 will not apply to appellate proceedings which do not require the physical presence of the Applicant. He stated that section 308 (1) is subject to subsection (2) where the party is just nominal or private as in this Appeal. He submitted that the ancillary reliefs cannot deprive the Court the jurisdiction it has over the principal reliefs. He stated the first three principal reliefs in the Notice of Appeal are not against the Applicant, they are not caught by section 308 and the Applicant did not attack the reliefs. He stated that to hold that because of section 308, the decision of the Magistrate Court affecting the fundamental right to fair hearing of the Appellant and the integrity of the judiciary cannot be heard would amount to disservice to the society as held in *FAWEHINMI V IGP* (2002) 23 WRN 1 where he stated the Court held that the evidence gathered during the time of the person holding the office of the Governor can be used for his impeachment or for the prosecution of the incumbent Governor after he has left office. The Respondent urged the Court to dismiss this application on the ground inter alia that the Applicant has waived his right if any having regard to his conduct in this case.

The Appellant/Respondent also has before the Court a further and better counter affidavit filed on 15th June 2023 deposed to by the litigation secretary of the learned silk representing the Appellant/Respondent wherein the deponent stated he deposed to the counter affidavit and not Isaq Ramat Funmilayo. He exhibited two documents referred to in the

counter affidavit which was inadvertently not annexed to the counter affidavit. The Documents are the final list of governorship candidates of all political parties that participated in the Twenty-Eight States where governorship elections were conducted on 18th March 2023 marked Exhibit 1 and Exhibit 2 is a certified true copy of a document from INEC indicating the person that won the governorship election in Akwa Ibom State.

In response to the counter affidavit and further counter affidavit of the Respondent, the Applicant on 15th June 2023 filed an 8 paragraphs further affidavit in support of the instant application wherein the Applicant exhibited the petition filed by Mr. Akanimo Udofia and APC against the Applicant and 4 others marked Exhibit UBE2, the certificate of return for Governorship of a State specifically Akwa Ibom State marked Exhibit UBE3, the Certified True Copy of the Oath of Allegiance of Pastor Umoh Bassey Eno as the Governor of Akwa Ibom State dated 29th May 2023 marked Exhibit UBE4 and the Certified True Copy of the Oath of office of Pastor Umoh Bassey Eno as the Governor of Akwa Ibom State also dated 29th May 2023 marked Exhibit UBE4A. filed along with the further affidavit is the written address on point of law in reaction to the earlier reviewed submission of the learned counsel to the Respondent. The learned counsel to the Respondent/Applicant adopted the issue distilled for determination in his written address in support of the instant application dated 01/06/2023 which is **“whether this criminal appeal can lie against the Respondent/Applicant hereof following his assumption of office as the Governor of Akwa Ibom State of Nigeria and during his tenure in office pursuant to section 308 (1) of the Constitution of the Federal Republic of Nigeria 1999 (as amended).”**

On the issue of some paragraphs of the affidavit of the Respondent/Applicant being offensive to section 115 (2) of the Evidence Act. He stated the paragraphs contain facts the deponent and

the Court can easily have access to by merely reading the Constitution. He urged the Court to discountenance the submission.

On the submission of the learned silk for the Appellant/Respondent that the Applicant is not a person protected by section 308 of the Constitution, he submitted that the Appellant and his counsel are aware the Applicant is the Governor of Akwa Ibom State. He relied inter alia on the motion for accelerated hearing filed earlier in the proceedings by the Appellant/Respondent. He submitted that it is not possible for this Court to proceed with this Appeal without violating the express provision of section 308 (1) of the Constitution. He relied on GLOBAL EXCELLENCE COMMUNICATION LIMITED & ORS V DUKE (2007) LPELR-1323 (SC) per Onnoghen JSC @16 para.C-G., TINUBU V I.M.B SECURITIES PLC (2001) 16 NWLR (Pt 740) 670 @708. He stated the law does not permit a party and his counsel to approbate and reprobate as done by the Appellant as regards the governorship office of the Respondent/Applicant, he referred to AJUWON & 10 ORS V GOVERNOR OF OYO STATE & 6 ORS (2021) 16 NWLR (Pt 1803) 485 @ 534 para.F-G, COMPTROLLER GENERAL OF CUSTOMS & ORS V GUSAU (2017) 4 SC (Pt II) 128.

On the issue of the constitutional mandate for fair Hearing vis-à-vis the provisions of section 308 of the Constitution addressed upon by the learned counsel to the Appellant/Respondent, it is the submission of the learned counsel to the Applicant that neither the case number (CR 94/2022) nor the Appeal Number (CRA/02/2023) support the contention of the Appellant, he stated the case and the Appeal are definitely not allegations of breach of fundamental right to fair hearing guaranteed by section 36 (1) of the 1999 Constitution. He stated it is elementary principle in law that the reliefs in a matter determines its subject matter, he referred to Salami JCA in FAYEMI & ANOR V ONI & ORS (2010) LPELR-4145 (CA) @ 99-100. The learned counsel to the Applicant thereupon reproduced the reliefs claimed in this Appeal by the

Respondent in paragraphs 4.1, 4.2, 4.3, 4.4, 4.5, 4.6, & 4.7 of the Notice of Appeal, he submitted none of the reliefs is a Fundamental Human Right relief and that there is none of the reliefs claimed by the Respondent if granted that will not result in the conviction of the Applicant and the issuance of Bench Warrant for his arrest and sentencing. He stated this is the mischief section 308 set out to arrest. He relied on *HASSAN V ALIYU & ORS* (2010) LPELR-1357 (SC) @ 93-94 PARA G-B.

The learned counsel to the Applicant submitted that the learned counsel to the Respondent has no judicial pronouncement in support of his contention that the subject matter of the instant Appeal might be permanently destroyed if the matter is discontinued and that the Appellant/Respondent will be estopped by law from being able to prosecute the Appeal again. He stated there is no legislation or judicial authority that places time limit on prosecution of Criminal Appeal. He stated that the counsel to the Respondent did not cite such authorities before this Court. He stated the cases relied on by the Respondent's counsel are not on all fours with the instant case and are not applicable in this criminal Appeal. He relied inter alia on *EKWUNIFE V NGENE* (2000) 2 NWLR (Pt 646) 650 @ 667-668, he referred to the dictum of lord Halsbury in *QUINN V LEATHEM* (1901) AC 495 @ 506 where his lordship held that a case is only authority on what it actually decides. In support of that position of the law he further relied on *Augie JSC in SIFAX (NIGERIA) LIMITED & ORS V MIGFO (NIGERIA) LTD & ANOR* (2018) LPELR-4973 (SC) @ page 77 para.C-F. He thereupon stated that the facts in *AMAECHI V INEC* (Supra) and *OGBUOJI V UMAHI* (Supra) relied upon by the Respondent's learned counsel are poles apart and distinguishable from the facts of the Criminal Appeal in the instant suit. He stated the issues in the Appeal in the two cases had time limitation whereas the instant criminal Appeal has no time limitation.

On whether the Applicant is a nominal party as submitted by the learned silk for the Respondent it is the submission of the learned silk for the Applicant that all the reliefs sought by the Respondent in this Appeal are targeted at the Applicant. For the import of the word ‘nominal party’ he referred the Court to *AGAMORE ENERGY LTD V ESSAR EXPLORATION & PRODUCTION LIMITED & ORS* (2021) LPELR-54843 (CA). He stated the implication of calling the Applicant a nominal party is that the Applicant will not be affected by the judgement of this Court in this Appeal, he stated he does not see how that will be possible. He submitted that if the Judgement of this appeal Court will affect the Applicant, then the Applicant cannot be described a nominal party. He submitted section 308 (1) therefore applies to the Applicant in all respect mandating the abatement of this proceedings for the duration of the Applicant’s stay in office as the Governor of Akwa Ibom State. He urged the Court to grant this application and strike out this Appeal.

The learned silk representing the two parties in addition to the foregoing addressed the Court Orally by way of adumbration.

By oral submission the learned counsel to the Respondent/Applicant Mr. Paul Usoro SAN argued that section 308 (1) b applies to the Applicant, he reproduced the provision for emphasis. He submitted it will be a breach of the Constitution if the Court grants any of the reliefs sought in the Appeal. He stated the Applicant is not applying for the dismissal of the Appeal since the Appeal has not been determined on the merit, he stated the Appellant can still restore the Appeal after the Respondent/Applicant’s tenure in office is completed. He stated limitation of time does not operate in criminal appeal, he relied on the proviso to section 308 (1) and the case of *ICS NIG. LTD V BALTON BV NIG LTD* (2003) 8 NWLR (Pt 822) 223 @ 234-235.

Mr. Jawando SAN in his oral submission relied on section 122 of the Evidence Act 2011 and submitted that for the Applicant to make the Court believe he is now the Governor of Akwa Ibom State he has to

place sufficient materials before the Court to make the Court believe the assertion. He stated that Exhibits UBE2 UBE3 UBE4 and UBE4A relied upon by the Applicant are public documents which are not reliable because they are not Certified True Copies. He relied on *MORDI V HON. MINISTER OF DEFENCE& ORS* (2015) LPELR-52157 @ 15-17. He stated there is no evidence of payment for certification for Exhibit UBE3 as required by section 104 of the evidence Act. He relied on *TABIC INVESTMENT LTD V GTB* (2011) LPELR-3131. He urged the Court to expunge Exhibits UBE2, UBE3, UBE4 and UBE4A. He submitted that even if the Exhibits are allowed to go in, the Respondent/Applicant still owes the responsibility of proving his status as the Governor of Akwa Ibom State, he argued that the Respondent in this case is Pastor Umoh Bassey Enoh. He stated the name of the Respondent/Applicant in Exhibits 1 and 2 of the counter affidavit is Eno Umoh Bassey. He argued that the Applicant failed to prove that the two names are the same. He referred to *TITILAYO PLASTIC IND V FAGBOLA* (2019) 5 SC 94 @ 130-132. *EZENOWO V UKPONG* (1999) 4 SC (Pt 1) 56. He argued that the problem is further compounded by Exhibits UBE3 which described the Applicant as Eno Umoh Bassey which is E.U Bassey and Exhibit UBE 4 which described the Applicant as Umoh Bassey Enoh. He submitted that the issue whether the Applicant is now the Governor of Akwa Ibom State is an issue of fact which must be established by credible evidence before they can invoke the provision of section 308 (1) of the Constitution. He argued that the issue of identity was not in dispute in all the cases relied upon by the Applicant's counsel in his submission, he stressed that the issue of identity is crucial whether the case is civil or criminal. He urged the Court to dismiss the Application.

The learned silk representing the Respondent/Applicant further responded to the submission of the learned silk for the Appellant/Respondent. He quoted the provisions of section 122 of the Evidence Act 2011 cited by the learned counsel to the

Appellant/Respondent with particular reference to section 122 (2) d which provides that the Court should take judicial notice of assumption of office of a Governor. He submitted that the Exhibits are certified and there was payment for certification. He stated the name of the Applicant in Exhibit UBE4 and UBE4A oath of office and oath of allegiance are the same. He said the issue of discrepancy in name is not a new issue as the Applicant was taken to Court on the same issue up to the Supreme Court by one of the aspirants after the Primary election. He referred to *IBEZIM V ELEGBEKE* (2022) 4 NWLR (Pt 1819) 1, *ABUBAKAR V INEC* (2020)12 NWLR (Pt 1737) 37 @172. He urged the Court to grant the application.

Having reviewed and considered the affidavit evidence of the parties the Exhibits relied on by the parties and the respective submissions of the learned silk representing the parties we believe the issue this Court is to determine is “**whether the provisions of section 308 (1) is applicable in this case and the possible effect of that section on the continuity of this Appeal.**”

We are to be reminded that this is not the trial Court but the High Court acting in Appellate jurisdiction over the decision of the trial Magistrate Court delivered on 11th January 2023; This Court will therefore limit itself to the consideration of the effect of section 308 (1) of the 1999 Constitution of the Federal Republic of Nigeria (as amended) to the instant appeal as constituted having regard to the argument of the parties on the issue.

The Applicant by the instant application motion No M/181/2023 prays this Court for **an Order striking out this Appeal for want of jurisdiction by the Honourable Court to entertain same against the Applicant pursuant to section 308 of the Constitution of the Federal Republic of Nigeria 1999 (as amended).** The instant application is basically on point of law. Section 308 of the 1999 Constitution of the Federal Republic of Nigeria provides ***308 (1) Notwithstanding anything***

to the 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 on pursuance of the process of any Court or otherwise and*
- c. No process of any Court requiring or compelling the appearance of a person to whom this section applies shall be applied for or issued,*

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

308 (2) the provisions of subsection one 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 a nominal party.

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

The learned counsel to the Appellant/Respondent is not debating whether or not the provisions of the section apply to the holders of the office mentioned in that section. His contention is that in the circumstances of this case the section does not apply in favour of the Applicant for the following three principal reasons.

1. That the instant Appeal is an appeal for the breach of the fundamental right to fair hearing of the Appellant/Respondent by

the lower Court and section 308 cannot override the sacred fundamental principles of Human Right enshrined in the same Constitution.

2. That in the peculiar circumstances of this Appeal the Respondent/Applicant is only a nominal party and will not enjoy the provision of section 308 (1) of the Constitution pursuant to the exception created by section 308 (2).
3. That there are disparities in the names of the Applicant in most of the documents the Applicant presented before this Court and the Applicant failed to prove before the Court that he is the actual holder of that office, the counsel stated that the issue whether the Applicant is now the Governor of Akwa Ibom State is an issue of fact which must be established by credible evidence before they can invoke the provision of section 308 (1) of the Constitution.

On the preliminary issue raised by the learned counsel to the Appellant/Respondent that the Exhibits relied on by the Applicant are public documents which must be certified to be admissible in evidence the learned counsel to the Applicant sufficiently explained the quality of the document in his response, we on our own took a close and critical look at the documents and it is clear to us that the documents are Certified True Copies. We also agree this Court should be guided by section 122 of the Evidence Act 2011 to take judicial notice of the assumption of office by the Governor of Akwa Ibom State on 29th May 2023. On the paragraphs 6 (a)&(b) of the affidavit of the Applicant, the Learned silk for the Respondent submitted it is a statement of the law which is not permitted by section 115 (2) of the Evidence Act 2011 which provides that "An affidavit shall not contain extraneous matter by way of objection, or prayers, or legal argument or conclusion, our view is that the said paragraph 6 (a)&(b) reproduced the provisions of the Constitution which violate that section of the Evidence Act. The paragraph is therefore discountenanced and expunged from the record.

On the argument of the learned silk for the Appellant/Respondent that the appeal bothers on the fundamental right to fair hearing of the Applicant, the learned counsel to the Respondent/Applicant argued that the reliefs sought by the Appellant is not for enforcement of fundamental right; For emphasis he reproduced the reliefs sought in the Notice of Appeal. The argument of the parties in this regard are as above reviewed herein before. We have carefully considered the argument of the parties and we must confess the two learned silk put up impressive legal argument on their different position. However as earlier observed the application is strictly on point of law. The instant Appeal was occasioned by the fact that the Appellant alleged the hearing and determination of this case on 11th January 2023 instead of 13th January 2023 communicated to the Appellant/Respondent as the hearing date. The lower Court also took decisions like setting aside the criminal judgement in the matter and consequently setting aside the conviction of the Respondent and the warrant issued for the arrest of the Respondent/Applicant. It is agreed that the application of the fundamental Right to fair hearing is literarily involved but there is more to the case than the right to fair hearing; It is obvious and very clear to us in this Court that any decision in this Court on the fair hearing will occasion the Court making pronouncement on the conviction and execution of the warrant of arrest. As argued by the learned counsel to the Respondent/Applicant conviction and arrest are part of the mischief section 308 is trying to address or avoid. We refer to AMAECHI V INEC (2008) 5 NWLR (Pt 1080) 227 where the Supreme Court in the consideration of section 221 and 308 of the Constitution of the Federal Republic of Nigeria 1999 held "the provision of section 308 of the Constitution of the Federal Republic of Nigeria 1999 is not meant to deny a citizen of this country his right of access to Court. It is a provision put in place to enable a Governor while in office to conduct the affairs of governance free from hinderances embarrassment and the difficulty which may arise if he is being constantly pursued and harassed

with Court processes of a civil or criminal nature while in office. It is a provision designed to protect the dignity of the office.” In GLOBAL EXCELLENCE COMMUNICATIONS LTD & ORS V. DUKE (2007) LPELR-1323(SC) (Pp. 16-17 paras. C) the Supreme Court per Onnoghen JSC held "It is very clear that section 308(1)(a) of the 1999 Constitution confers on the President, Vice-President, Governor or Deputy Governor, absolute immunity against the institution of civil or criminal proceedings or the continuation of such civil or criminal proceedings against the President or Vice-President, Governor or Deputy Governor, as long as they remain in office as such. It follows therefore that where an action or proceeding had been instituted prior to the person assuming the relevant office, such action or proceeding cannot be continued against the occupant of the relevant office during his tenure in the said office-see Tinubu v. I.M.B. Securities Plc (2001) 16 NWLR (Pt. 740) 670 at 708.

By the provision of Subsection 2 of Section 308, it is clear that the immunity conferred on the persons occupying the offices mentioned under Section 308 of the 1999 Constitution does not extend to cases or actions instituted against the said persons in which the persons are nominal parties and in their official capacities such as the President, Vice-President, Governor or Deputy Governor." These decisions of the Apex Court on the application of section 308 to the holders of the office to which it relates is clear and explicit. The decisions are also judicial authorities on the fact that the right of action against the holder of the office is only suspended for the duration his period in office. The proviso to section 308 makes it clear that the right of action subsists and the period of limitation if any will be suspended to cover the period of office. It is also true as argued by the learned silk for the Applicant that there is no limitation period in Criminal Appeal. We therefore hold that the right of action can be revived by the Appellant at the end of the tenure of office of the Respondent/Applicant.

We will also observe that through out the argument of the learned silk for the Appellant/Respondent he had no statutory or judicial authorities for the proposition that section 308 cannot override the principles of fair hearing. The proviso to section 308 created an exemption to the application of section 308 (1) but the fundamental right principles are not part of the exemptions. In addition to the foregoing, we agree with the submission of the learned counsel to the Applicant that there is no way this Appeal Court will grant any of the reliefs sought in the Notice of Appeal without requiring the physical presence or psychological detriment of the Applicant who is the Defendant in the criminal case and the Respondent in the instant Appeal. The issue is therefore resolved in favour of the Respondent/Applicant.

On whether the Applicant is a nominal party to whom section 308 will not apply by reason of the exception created by section 308 (2) of the 1999 Constitution. We adopt our above reasoning and further state the Applicant cannot be described a nominal party by any stretch of imagination in this Appeal. Our understanding of nominal party is that person in the proceedings whose presence is not material to the determination of the case. In *AGAMORE ENERGY LTD V. ESSAR EXPLORATION & PRODUCTION LTD & ORS* (Supra) relied on by the learned silk for the Applicant the Court of Appeal held @ (PP. 14-15 PARAS. E)"The word 'nominal' is defined by the Oxford Advanced Learner's Dictionary as something in name only and not in reality. The Black's Law Dictionary Ninth Edition, defines nominal party as: 'A party to an action who has no control over it and no financial interest in its outcome; a party who has some immaterial interest in the subjectmatter of a lawsuit and who will not be affected by any judgment, but who is nonetheless joined in the lawsuit to avoid procedural defects." Per DANIEL-KALIO J.C.A. In *ZAMFARA STATE JUDICIARY & ORS V. MAIGORO & ORS* (2021) LPELR-56315 CA the Court of Appeal @ (Pp. 27-28 paras. F-F) held per IDRIS JCA "Looking at the statement of claim and the record of appeal before me, it is clear and I will not

hesitate to agree with the Respondents that the Zamfara State Government, who allegedly donated the land in question to the Appellants, cannot be a necessary party in this case because with or without the Zamfara State Government the case can be dealt with fairly and judiciously.

There are no claims against the Zamfara State Government, at best the Zamfara State Government can only be a nominal party without whom the matter can be effectively dealt with. The Black's Law Dictionary defined a nominal party to be:

"a person who is joined as defendant in an action, not because he is immediately liable in damages or because any specific relief is demanded against him, but because his connection with the subject matter is such that the Plaintiff's action would be defective, under the technical rules of practice, if he were not joined."

In *AGBAREH & ANOR V. MIMRA & ORS* (2008) LPELR-43211(SC) the Supreme Court held "it describes itself as "a nominal party", (i.e. a party in name only and not in reality as defined in the Oxford Advanced Learner's Dictionary or existing in name only as defined in Black's Law Dictionary)." Per *OGBUAGU ,J.S.C @* (Pp. 49 paras. E).Going by the above cited cases It is possible to have a nominal party in civil action, but in a criminal proceeding in which the party is the Defendant, we doubt if the description of the Defendant as a nominal party will be appropriate. That the Applicant is a nominal party is not a sustainable argument. That beautiful and powerful suggestion by the learned silk for the Appellant/Respondent is hereby jettisoned.

On the disparities in the names of the Applicant as described in the processes and Exhibits before the Court. The processes filed by the parties before this Court including the record of proceedings from the lower Court all described the Respondent Applicant as Pastor UmoBasseyEno. That is the person the Appellant/Respondent has a case against before the lower Court and in this Appeal. That fact is not in

doubt. The argument of the learned silk for the Appellant/Respondent is that the Applicant was not so described in the exhibits tendered by the parties particularly some of the Exhibit which attest to the status of the Governor of Akwa Ibom State. He stated that the assertion that the Applicant is the Governor of Akwa Ibom State is a question of fact which must be proved by credible evidence. We shall examine the description of the Applicant in the Exhibits tendered by the Respondent. Exhibits 1 and 2 were referred to in the Counter affidavit but made available to the Court in the further and better counter affidavit. Exhibit 1 is the Final List of Candidates for State election. (Governorship and House of Assembly) the name of the Applicant is Number 94 on the list written as EnuUmoBassey. Exhibit 2 is the names of the candidates that participated in the election in the state. The name of the Applicant on the list is No. 14 written as EnuUmoBassey. In the processes filed by the Respondent/Applicant the Notice of Appeal is Exhibit UBE1 and like all other processes of the Court, it described the Applicant as Pastor UmoBasseyEnu. In Exhibit UBE2 a petition filed against the Applicant and four others the Applicant was referred to as Pastor UmoBasseyEnu as described in the processes before the Court but on page 5 of the same petition in the schedule thereto at No 14 the Applicant was described as EnuUmoBassey. In Exhibit UBE 3 titled 'Certificate of Return for Governor of a state the Applicant was described as EnuUmoBassey, in Exhibit UBE 4 Oath of Allegiance and Exhibit UBE 4A he was called UmoBasseyEnu. Our observation is that the three names are consistent in all the processes and Exhibits before the Court but are not consistently arranged. There are no disparities in the names in the processes of this Court, if there is the law allows the party to apply to the Court to rectify the anomaly. See GOV. OF KADUNA STATE & ORS V. DURBAR HOTEL PLC where the Court of Appeal per Hassan JCA held @ (Pp. 19-20 paras. D) "This issue is very straight forward and clear, as it is mandatory that a proper party is brought before a Court of law as that is the only time the Court's jurisdiction may be invoked to determine the

matter on the merit. The Respondent is not contesting that the party brought to Court initially was a wrong party, this is clear and admitted and that was why she brought and apply to amend and bring the right party, and appellants are saying that the wrong name cannot be amended for the right party. First, the 3rd Respondent's name whose name was wrongly placed is a statutory body, it is clear that the placing of agency instead of Authority is a simply matter of spelling and identification. **The Appellants are not misled in any way as to the person the Respondent intended to sue, the facts and circumstances of the case is clear to all parties, so the interest of justice must be put first.** I am unable to agree with the contention of the Appellant that the name of the 3rd Appellant cannot be amended, this is because the case before the Court is just an issue of wrong name of a right party which can be corrected by amendment as rightly brought. And secondly as rightly argued by Respondent's counsel, the era of technical justice is gone as all the Appellants seek to achieve is to place technicality over substantive justice, this is not the interest of Courts now." See also REGISTERED TRUSTEES OF MASTERS VESSEL MINISTRIES (NIG) INCORPORATED V. EMENIKE & ORS (2017) LPELR-42836(CA) where the Court of Appeal per OGUNWUMIJU J.C.A @ (Pp. 35-36 paras. F) held "Where there is a mistake with regard to the name of a litigant in an action, such a mistake is described as a misnomer. It simply means a wrong description or use of a wrong name. It is a mistake as to the name and not a mistake as to the identity of the particular party to the litigation. While the former can be corrected by an application made to amend the writ in order to substitute the mistaken name for the correct one, the latter cannot be corrected.

In the instant case it is obvious to us that there is no mistaken identity as held in Gov. of Kaduna State &ors v. Durbar hotel plc (supra) the Appellant is not confused as to the identity of the Applicant. the three names were not arranged in consistent pattern but there is no fourth name, and in all the documents relied upon by the parties only the three

names featured, the truth is that if this Court should grant the reliefs sought by the Appellant in the Appeal it will be enforce on no other person but the Respondent/Applicant. We do not therefore agree the Applicant failed to prove his identity and status as the Executive Governor of Akwa Ibom state during the consideration of the instant application. It is the finding of this Court that the section protects the holder of the office from litigation to dignify the office and avoid distractions, we sympathize with the Appellant in the circumstances of this Appeal but the law especially the Constitution must be obeyed by this Court. Section 308 of the 1999 Constitution of the Federal republic of Nigeria is an express, explicit and unambiguous expression of immunity in favour of the holders of the office mentioned in section 308 (3), section 308 (2) creates the permissible exemptions but the case for the Appellant/Respondent is not one of the exemptions. In effect the provision has expressly asked this Court to abate the continuity of this proceedings pending the tenure of the office of the Respondent/Applicant and we so hold. This case is placed on hold till the end of the tenure of the Respondent/Applicant as the Executive Governor of Akwa Ibom State after which the right of action can be revived as provided by section 308 (2) of the 1999 Constitution of the Federal Republic of Nigeria (as amended).

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HON JUSTICE S.B BELGORE

(PRESIDING)

I have read in advance the above judgement of my learned brother and I agree with the finding and the reasoning and I further state that section

308 is not a fanciful provision it is part of our Constitution which every Court in this country is bound to obey to maintain the dignity of the office to which the section relates. I can only imagine the number of endless cases that would have been constantly filed against the holders of the office if the immunity clause had not been in place.

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HON. JUSTICE O.I ADELAJA