THE LEGAL BASIS OF PRE-ACTION NOTICE AND IMPLICATIONS OF THE FAILURE TO COMPLY WITH ITS REQUIREMENT*

Abstract

Statutory provisions relating to requirement of pre-action notice is a condition precedent as far as law suits are concerned. Therefore, the failure of a plaintiff to comply with its requirement clearly makes a suit incompetent. Contrary to the submissions of some learned scholars that statutory provisions that impose requirement of pre-action notice before a suit, bars access to court. However, such provisions, the courts have held, do not seek to oust forever, the jurisdiction of the court but only temporarily. It has been held equally, that where there is fundamental failure to comply with the requirement of a statute the issue is not of irregularity but a nullity. On the implications of failure to issue pre-action notice before a suit where such notice is required, although there are some judicial authorities that say that failure to issue same can be waived, this study discovered that it is the position of the Supreme Court that failure to comply with such statutory requirement makes the suit a nullity ab-initio and the defendant does not have the competence to waive the failure to comply with such statutory requirement, whether expressly or by implication.

Keywords: Pre-action Notice, Failure to comply, Legal basis, Nigeria

1. Introduction

Before a person can commence any action in court, there are certain preliminary factors or conditions that a party must consider. One of those preliminary considerations includes jurisdiction of the court. In a litany of cases, particularly, the celebrated case of *Madukolu & Ors. v Nkemdilim*[1] the court stated three conditions that must be in existence before the court can be said to have jurisdiction. These are:

1. The court must be properly constituted as to qualification and number of members of the bench and no member is disqualified for one reason or another.
2. Subject matter of the dispute must be within the jurisdiction of the court and there are no features in the case which prevents the court from exercising its jurisdiction.
3. The case must have been brought to court in accordance with due process after satisfaction of relevant provisions of law as to conditions precedent.

Deducing from the decision of the court in the case discussed, these conditions precedent must be met before the commencement of action in court and such condition must be fulfilled by the plaintiff or applicant. The court in the case of *Panalpina World Transport Holding Ag v Jeidoc Ltd & Anor,*[2] held that condition precedent is an act that is to be performed before some right, dependent thereon accrues. One of such conditions precedent includes the requirement of pre-action notice. The court in the case of *Utek v Official Liquidator*[3] held that where a plaintiff commences action which requires the fulfillment of a condition precedent or pre-condition for the commencement of the action, that condition must be fulfilled before the action can be validly commenced. Where there is non-compliance with a stipulated pre-condition for setting the legal process in motion, any suit instituted in contravention of that condition is incompetent. The Court in another case of *Agip Nig Ltd v Agip Petrol Int'l*[4] held that where by a rule of Court, the doing of an act or taking a procedural step is a condition precedent to the hearing of a case, such rule must be strictly followed and obeyed. Non-compliance with a condition precedent is not a mere technical rule of procedure; it goes to the root of the case. The court will not treat it as an irregularity but as nullifying the entire proceedings. This article aims at taking a broad reflection on the constitutionality of pre-action notice, its purposes, and exceptions and whether or not failure to serve pre-action notice can be waived, etc.

2. Meaning of Pre-Action Notice

Pre-action notice is a written notice required by a statute to be served on the appropriate person or statutory body, of an intention to sue them by the intending plaintiff. Pre-action notice is a statutory privilege granted to the defendant. It seems that it can be waived by the person or institution for whose benefit it was created. It is not to be equated with processes that are an integral part of the proceedings –initiating process rather its purpose is to enable that person or agency to decide what to do in the matter. The Court in the case of held that a pre-action notice is a condition precedent that must be fulfilled in a particular case before *NNPC v Evwori*[5] one is entitled to

***By Stephen Chuka UNACHUKWU, PhD, BL,** Senior Lecturer, Department of Public and Private Law, Faculty of Law, Chukwuemeka Odumegwu Ojukwu University, Igbariam, Phone No. 08035550743, E-mail: stevechuka@gmail.com or sc.unachukwu@coou.edu.ng

[1] (1962) 2 SCNL 341.

[2] (2011) LPELR-CA/L/522/2009.

[3] (2009) ALL FWLR PT 475 of 1774 @ 1791.

[4] (2010) ALL FWLR (PT 520) P.119.

[5] (2007) ALL FWLR (PT 369) Pg. 1324 @1345.

institute an action. It is not of the essence of such a cause of action but it has been made essential by law. It is a condition precedent that must be complied with by an intending plaintiff before an action can be maintained against a defendant and it is to give the defendant breathing time so as to enable him to determine whether he should make preparation or pander to the demand of the plaintiff. The requirement of pre-action notice, where this is prescribed by law is known to have one rationale. It is to acquaint the respondent beforehand of the nature of the action anticipated and to give him enough time to consider or re-evaluate his position in the matter as to whether to contest it. The giving of pre-action notice has nothing to do with the cause of action. It is not a substantive element but a procedural requirement, albeit statutory, which a respondent is entitled to before he may be expected to defend that action.[6] The Apex Court also came to this conclusion in the case of *Ntiero v Nigerian Ports Authority*[7] on the nature of pre-action notice when it held per Muhammad, J.S.C

> a pre-action notice connotes some form of legal notifications or information required by law or implied by operation of law, contained in an enactment, agreement or contract, which requires compliance by the person who is under legal duty to put on notice the person to be notified, before the commencement of legal action against such a person.

The rationale of pre-action notice is stated in the case of *Amadi v NNPC* where the court held that the purpose of giving notice is to give the prospective defendant an [8]opportunity to meet the prospective plaintiff and negotiate an possible out of court settlement. Another purpose of pre-action notice is for the defendant not to be taken by surprise but to be given a breathing space to decide whether or not to negotiate with the other party.

3. Effect of Non-Service of Pre-Action Notice

In the case of *Mekaowulu v Ukwa West Local Government Council,*[9] it was **held** that the effect of non-service of a pre-action notice where it is statutorily required is only an irregularity which, however, renders an action incompetent. Also in the case of *Noclink Ventures Ltd & Anor v Chief Okey Muo Aroh,*[10] the Supreme Court in upholding the view that non-service of pre-action notice merely puts the jurisdiction of the court on hold pending compliance with the pre-condition and that failure to serve the said notice amounts to an irregularity that renders the suit incompetent. The court further stated thus:

> pre-action notice is a harmless procedure designed essentially to stop a possible litigation thus saving money and time of the parties. It is almost like a pre-action letter of demand emanating from the chambers of counsel for a plaintiff to a defendant, asking for specific conditions to be fulfilled in order to avert litigation. The only difference between the two is that while one is a statutory requirement, the other is not, in the sense that a plaintiff can file an action without writing a pre-action letter. In the case of the former, an action commenced without pre-action notice where one is statutorily required, is a nullity ab initio.

It follows therefore that the irregularity can be waived by a defendant who fails to raise it either by motion or plead it in his statement of defence, or where a defendant willfully neglects to file statement of defence. It is said that waiver is the intentional or voluntary relinquishment of a known right or such conduct as warrants an inference of the relinquishment of such right. It also arises when one dispenses with the performance of something he is entitled to whether conferred by law or by contract, with full knowledge of the material facts; or when a person does or forbears to do something, the doing of which is inconsistent with the right, or his intention to rely or insist upon it. It is therefore, an option for the defendant to waive the issue of non-service of pre-action notice. The question now is how can issuance of pre-action notice be waived? It is open to a defendant to waive the non-service of pre-action notice, when it is so waived the suit can proceed to trial without the plaintiff incurring any disability therefrom. Therefore, when a defendant elects not to raise the matter in his statement of defence, he automatically conveys to the plaintiff that it is being waived. In *Chief Nathaniel Ekwe Ede v Access Bank & Anor,*[11] the Court held that the defendant, having not raised in his pleading that the needed pre-action demand was not served on him, he ought not to be allowed by affidavit evidence to raise the matter not pleaded before the court rather the defendant ought to have raised it in his statement of defence and also lead evidence in support of his case. It was the position of the court that the defendant, having filed his statement of defence without raising the objection in the pleading, the appellant was given the impression that the respondents had waived their right to be notified and reminded of the pre-action notice clause.[12] It was also the position of the court in the aforementioned case that non service of a pre-action notice cannot be raised by way of preliminary objection by the party who ought to plead it as a defence. A pre-action notice, being a statutory defence cannot be relied upon

[6] EZE V. OKECHUKWU & ORS.
[7] (2008) LPELR-2073 (SC)
[8] *(2000) 10 NWLR (pt 674)* 76
[9] (2018) LPELR-43807-CA
[10] (2007)7 NWLR P. 86, PARAS. D-H
[11] (2020) 4NWLR (Pt.1715) 437-438 PARAS.H-E: 439, PARAS. C-D.
[12] *Nonye v Anichie* (2005) 3 NWLR (Pt. 910) 623.

by a party who is entitled to rely on it but did not plead it. The defendant cannot by way of preliminary objection challenge the competence of the suit on that ground, having not pleaded it. Where the defendant failed to plead the failure to give pre-action notice and intends to raise it as an objection to the trial, he is deemed to have waived same and cannot raise it by way of affidavit evidence.[13]

The court has also resolved the fate of a plaintiff who did not comply with service of pre-action notice in an uncontested or undefended suit. In *Noclink Ventures Ltd & Anor v Chief Okey Muo Aroh*[14] the court held that it was not for either the trial court or the Court of Appeal to quixotically do cloister justice by scooping the said special defence from nowhere for the defendants, as the trial court did *suo motu*. It follows therefore, that a defendant who wishes to raise non-issuance of pre-action notice must file a defence and the absence of filing such defence will amount to the fact that the defendant has waived his right hence he cannot raise the issue of non-service of pre-action notice on appeal. The position of the court in this case contrasts sharply with the Supreme Court decision in the case of *Nigercare Development Company Ltd v Adamawa State Water Board & Ors*[15]. Here, the Supreme Court determined an appeal from a suit where the appellant did not serve the statutory pre-action notice in an action for revocation of a contract and where Pleadings were filed and exchanged and the case proceeded to trial with both parties calling witnesses. Learned counsel for the parties addressed the court and the case was adjourned for judgment. It was while the parties were awaiting the judgment, that the learned trial Judge Banu, J. in the course of writing the Judgment, *suo motu,* invited the learned counsel for the parties, to address on the effect of the Adamawa *State Water Board Edict No 4 of 1996* (hereinafter called 'the Edict/Law') and the non-compliance with its provisions. The learned trial judge said at page 168 of the Records inter alia, as follows:

> In the course of writing the Judgment, my attention was caught by the provisions of Section 51 of Adamawa State Water Board Edict No 4 of 1996 which states: ...
> It is my view that this provision is crucial as it affects the 1st defendant and I would like counsel to address me on whether or not the provision has been complied with, and if not, its consequence.

In his Judgment, the learned trial Judge, struck out the Appellant's said suit as well as the counter-claim. On appeal, the Supreme Court held that the said provision is a condition precedent as far as suits against the 1st Defendant/Respondent are concerned. Therefore, the failure of the Appellant to comply with it clearly makes the suit incompetent. Contrary to the submission of the learned counsel for the Appellant, the provision, does not seek to oust forever, the jurisdiction of the court but only temporarily. It just provides that unless the condition precedent is complied with, a complainant or Plaintiff, cannot, sue or initiate any action against the 1st Defendant. Period! In the case of *Prince Atolagbe & anor v. Alhaji A. Awuni & 8 ors*[16] where there was a split decision of 5 – 2, Mohammed, JSC, in his contribution, stated at pages 22-23 of the SCNJ inter alia, as follows:

> .... Conditions precedent ordered to be done before a litigant is entitled to sue by reason of the provisions of some statute is not an ouster clause and not a device adopted by the Government to prohibit a judicial review. It is an additional formality and unless proved to be enacted with a view to inhibiting citizens from having access to the Courts, is not contrary to Section 6(6) (b) of 1979 Constitution.[17]

In the recent case of *Bakare v. Nigerian Railway Corporation*[18] - per Chukwumah-Eneh, JSC, where by virtue of *Section 83 (2)* of the *Nigerian Railway Corporation Act*, no suit shall be commenced against the Corporation, until three (3) months at least after written Notice of the intention to commence the same, shall have been served upon the Corporation by the intending plaintiff or his agent. Section 83(2) of the said Act, is also *in pari materia* with Section 51(1) and (2) of the Act in the instant case. It was held that the said Section, provides a form of limitation period within which an action against the Corporation must be commenced while Section 83(2) provides for a pre-action Notice which must be given to the Corporation, That the two requirements, must be met before any action against the Corporation is instituted otherwise, failure to comply with either of the provisions, will lead to such an action, being declared incompetent. The case of *Madukolu v. Nkemdilim*[19] was referred to. The case of

---

[13] *Duerueburuo v Nwanedo* (2000) 15 NWLR (Pt. 690) 287; *Mobil Producing (Nig.) Unltd v LASEPA* (2002)18 NWLR (Pt. 798) 1; *Ojo v. National Pension Commission* (2019) 14 NWLR (Pt. 1693) 547; *Ugwuanyi v. NICON Insurance Plc* (2013) 11 NWLR (Pt. 1366) 546; *Gov. Akwa Ibom State v. Udoka* (2015) LPELR-25854.

[14] supra

[15] (2008) JELR 47160, S.C.

[16] (1997)9NWLR (Pt. 522) 536: (1997)1SCNJ.

[17] See *Madukolu v. Nkemdilim*[17], See also the case of *Katsina Local Authority v. Alhaji B. Makudawa*[17]; *His Highness Umukoro & Ors v. NPA & anor*[17]; per Kutigi, JSC, (as he then was). *Ngelela v. Tribal Auihority, Nongowg Chiefdom*[17] where Sutton, PJ stated *inter alia*, as follows: The language is imperative and would appear to debar a court from entertaining a suit instituted without compliance with is provision. The object of the notice is to give the defendant a breathing time to enable it determine whether he would make reparations to the Plaintiff.

[18] (2007)17 NWLR (Pt. 1064)606 @ 656, (2007) 7 S.C.N.J. 131; (2007) 7 S.C. 1.

[19] (1962) 2 SCNLR 341

Eboigbe v. The NNPC[20] was also referred to. Where *Section 12(1) & (2)* of the *NNPC Act Cap. 320 Laws of the Federation, 1990,* provides for the giving of pre-action Notice within Twelve (12) months. The said Section also provides that no action shall be taken against the Corporation or its employees and no action shall be taken against these persons for any act done in pursuance of or execution of any Act or Law or any public duty or authority unless commenced within twelve (12) months after the act complained of. In the case of *Eimskip Ltd, v Exquisite Industries (Nig.) Ltd.*[21]*,* Mohammed, JSC, stated inter alia, as follows: *'... Where there is fundamental failure to comply with the requirement of a statute the issue is not of irregularity, but a nullity'...* From all these firmly established authorities, with profound humility, it is idle, therefore, to argue or submit as has been done in paragraphs 5.02 of the Appellant's brief that- 'The law prescribing pre-action notice is a privilege, conferring a special advantage in favour of the first defendant in this case and it is left for the 1st defendant to take advantage of the special provision at the trial or waive same by proceeding with the case without insisting on its legal rights'.

In the first place, where an issue of competence or jurisdiction of a court, is fundamental and crucial, the issue of waiver, cannot be of any consequence. See the case of *Onyema & ors. v. Oputa & ors.*[22] Secondly, if at all the defendant, has a legal right conferred on him/it by a statute, it is again with respect, idle to submit as has been done in the Appellant's Brief, that the defendant, should waive same and proceed with the hearing of the case. However, and significantly, the learned counsel to the Appellant, concede that such a defendant, can take advantage of the said provision. In the circumstances, there will be no need (which will not even arise or be necessary), to start pleading such pre-action Notice as a defence. Being a question of jurisdiction, the issue can be raised by a defendant or even by the court *suo motu* and, thereafter, hear from the parties as was done in this case. See also the cases of *Alhaji K. Abubakar & 10 ors v. Jos Metropolitan Development Board & anor.*[23] *C.A.*, - per Edozie, JCA, (as he then was) and *Katto v. CBN*[24]- per Akpata., JSC.

Furthermore, there is also an exception to the issuance of pre-action notice to the effect that where a suit is brought under an express or specific contract, it is no longer necessary to serve on the defendant a pre-action notice. The court in the case of *Noclink Ventures Ltd & Anor v Chief Okey Muo Aroh*[25] held that there won't be need to serve pre-action notice when goods have been sold and the price is to be paid upon *quantum meruit,* or for causes of breach of contract, claims for work and labour done. In the aforementioned case, it was the case of the appellant that they owed the respondents ₦12,000,000.00 debts for contract executed (being the rehabilitation of the roads in Abatete, repairs of the Local Government Bulldozer and vandalisd transformers) at the behest of the appellants and for the benefit of the respondents. Exhibits were tendered evidencing the contract work, work done, outstanding debts and demand notice (which qualifies as pre-action notice).

In the above case, the court held that to insist that a debtor will always enjoy and be protected from his duty and obligation of settling and remedying his debts and wrong respectively done against his creditor is to put the creditor to a gross disadvantage in the world of business and contract. A party should not be made to enjoy the right and protection of pre-action notice where it is shown that he has failed in his own part of his responsibility and duty to the creditor or where in fact he is at fault in discharging his obligation in a contract relationship. It does not and should not matter whether such party is a statutory body or not. The Supreme Court, per Rhodes-Vivour, JSC, in *Ugwuanyi v Nicon Insurance Plc*[26] pungently ensconced the matter thus:

> the position of the law is that where a suit is brought under express or specific contract, it is no longer necessary to serve the corporation pre- action notice. Furthermore, from the decided authorities, there would be no need to serve pre-action notice when the goods have been sold and the price is to be paid upon quantum meruit or for cases of breach of contract, claims for work and labour done.' See Adamu v Comptroller Of Prisons, Federal Prisons, Aba & Ors.[27]

Naturally, the requirement of pre-action notice is a legitimate regulation to scrutnise those accessing the courts. However, it should not be utilized to impede ready access to the court. It was held in the case of *NNPC v Evwori*[28] that where the requirement of a pre-action notice is an impediment to easy access to court, it becomes unconstitutional. It is the law that fundamental rights enforcement cases are exempted from the requirement of pre-action notice. In the case of *Olisa Agbakoba v Directorate of State Security Service*[29] it was held that the end

[20] (1994) 5 NWLR (Pt.347) 649; (1994) 6, SCNJ. 71.
[21] (2003) 4 NWLR (Pt.809) 88 (a). 118: (2003) 1 SCNJ. 317.
[22] (1987) 3 NWLR (Pt.60) 259; (1987) 7 SCNJ.176.
[23] (1997) 10 NWLR (Pt.524) 242 @ 250-251.
[24] (1991) 9 NWLR (Pt.214) 126 @149; (1991)12 SCNJ. 1.
[25] Supra.
[26] (2013) LPELR 2009 2, (SC) or (2013) 11 NWLR (Pt.1366) 546,
[27] (2013) LPELR-CA/OW/292A/2011.
[28] (2007) ALL FWLR (Pt. 369) 1324 p. 1340.
[29] (1994) 6 NWLR (Pt. 351) 475 @ 520.

purpose of the Fundamental Rights Enforcement Procedure Rules is to ensure that where an infringement of fundamental rights has been complained of or threatened, a speedy enforcement of such rights and simplification of procedure is employed to deal with such complaints.

4. Is Pre-Action Notice an Infringement on the Right of Access to the Court?

The contention as to the relevance of pre-action notice is not novel in our legal system, some are of the school of thought that pre-action notice is merely a regulation of the right of access to the court and does not amount to infringement of Section 6(6)(b) of the 1999 CFRN. The Court of Appeal in the case of *NNPC v Tijani*[30] per Fabiyi, J.C.A (as he then was), in determining whether pre-action notice constitutes an infringement of right of access to court stated thus:

> There are arguments in some quarters that pre-action notice constitutes an infringement of right of access to court as guaranteed in Section 6(6) (b) and 36 of the 1999 CFRN. I do not subscribe to such a view. Regulation of the right of access to the court abounds in rules of procedure. They are in order in my humble view. I see nothing unusual in provisions for pre-action notices. They do not impede constitutional right of access to court. They are meant to give room for the government or its officials to consider settlement of the matter. It does not remove the adjudicatory power of the court. Generally, omission to serve required notice in a deserving case would be fatal to the suit.

The Supreme Court, in the case of *Amadi v NNPC,*[31] in determining the attitude of the court to statutory provisions limiting access to court per Karibi-Whyte J.S.C held that:

> In my opinion a legitimate regulation of access to courts should not be directed at impeding ready access to the courts. There is no provision in the constitution for special privileges to any class or category of persons. Any statutory provision aimed at the protection of any class of persons from the exercise of the court of its constitutional jurisdiction to determine the right of another citizen seems to me inconsistent with the provisions of section 6(6) (b) of the constitution.

The above reasons may have led the Courts in plethora of cases, to try over and again to uphold the spirit and letter of those statutes requiring pre-action notice before commencing an action in court. In the case of *Anambra State Government v Nwankwo,*[32] the court had to decide on the constitutionality of a pre-action notice. Section 11 (2) of the State Proceedings Law Cap.131 vol. 4 of the Laws of Anambra State (1986) provides that no action shall be instituted against the State or a public officer until the expiration of a period of three months after notice in writing has been delivered to some designated persons. The respondents argued that the said provision infringed their constitutionally guaranteed right to free access to the court as guaranteed by section 6 (6) (b) of the 1999 Constitution. The court held that section 11 (2) of the State Proceedings Law of Anambra State is valid and not unconstitutional. Achike, JCA (as he then was) stated thus:

> It is clear to my mind that section 11 (2) is a condition precedent for the institution of any action against the State Government…Sections 6 (6) (b) simply shows the plenitude of judicial powers exercisable by the courts but that cannot be taken to mean that the powers to exercise judicial powers cannot be limited to prescribed conditions precedent before such powers are exercised.

5. Conclusion and Recommendations

Pre-action notice is a condition precedent to be served by the applicant to the respondent (where such is a requirement before the commencement of an action) before the institution of any civil action. The effect of not serving a pre-action notice is that it will rob the court of its jurisdiction. However, as seen from the argument above and litany of judicial authorities, it is obvious that judicial attitude is not crystallised on the effect of failure to serve pre-action notice before a suit, particularly where the defendant proceeds to defend the suit. The position of the court in the case of *Nigercare Development Company Ltd v Adamawa State Water Board & Ors*[33] and others like it that pre-action notice cannot be waived does not seem to be good law as it does not lie on the court to make cases for parties before it, given our adversarial system of conducting judicial proceedings. Just like the case of immunity for Governors and Presidents, it is believed that where any of the persons for whom immunity inures volunteers to go to trial in waiver of such immunity, it is not known whether the court has got the competence to refuse to conduct the proceedings. It is submitted, most humbly, that the hardship foisted by the requirement of pre-action notice on litigants, particularly, those faced with high handed actions of persons in authority, coupled with the penchant of our public office holders to do impunity has made a re-visit of the law on pre-action notice an imperative. It is hope that the apex court in Nigeria would find cause to reconcile the seeming irreconcilable lines of judicial authority. The area of the law dealing on waiver of pre-action notice deserves urgent legislative intervention so as to clear any doubt as to what the law is where a defendant deliberately abandons his right to insist on being served pre-action notice. It is recommended that the court should be totally divested of the power to raise the issue of failure to serve pre-action notice before a suit, *suo motu.*

[30] (2007) Vol. 35 WRN 17 @ 29-30, lines 40-20(CA).
[31] (2000) 10 NWLR (Pt. 674) 76
[32] (2000)4 NWLR (Pt. 564)354
[33] (2008) JELR 47160, S.C.