

IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY

HOLDEN AT JABI ABUJA

DATE: 15TH DAY OF JULY, 2020
BEFORE: HON. JUSTICE M. A. NASIR
COURT NO: 10
SUIT NO: CV/2390/2018

BETWEEN:

ELEVENTH PHARMACY LIMIT ----- PLAINTIFF

AND

ABUJA MUNICIPAL AREA COUNCIL ----- DEFENDANT

JUDGMENT

The plaintiff instituted this action by way of originating summons seeking the determination of the following question:

“1. Whether the Abuja Municipal Area council can issue the plaintiff a demand notice seeking the payment of any taxes, rates or levies not provided for in part III of the Schedule to the Taxes and Levies (approved list for collection) Act Cap. T2, LFN 2004 (as amended) and

Taxes and Levies (approved list for collection) Act (amended) Order, 2015.

2. *Whether the imposition of taxes, levies, charges and rates by the defendants, being a local government council in Nigeria apart from those listed in part III of the Schedule to the Taxes and Levies (approved list for collection) Act Cap. T2, LFN 2004 (as amended) and Taxes and Levies (approved list for collection) Act (amended) Order, 2015.*
3. *Whether the Abuja Municipal Area Council can issue an order on the plaintiff a demand notice seeking the payment of the sum of N60,000.00 (Sixty Thousand Naira) being the levy of inspection and certification of habitable properties despite the fact that 'inspection and certification of habitable properties' is not provided for in part III of the Schedule to the Taxes and Levies (approved list for collection) Act Cap. T2, LFN 2004 (as*

amended) and Taxes and Levies (approved list for collection) Act (amended) Order, 2015.

To the above question, the claimant has claimed some reliefs before the Court. In support of the suit is an affidavit of 28 paragraphs and a written address.

In opposition the defendant filed a counter affidavit to the originating summons and a preliminary objection challenging the jurisdiction of the Court to entertain this suit. On the 22/6/2020 when the case came up for hearing, the Court directed that the originating summons be moved alongside the preliminary objection. The grounds of the objection is that the claimant are mandatorily required to serve Pre - action notice on the defendant pursuant to Section 124 of the Local Government Act, 1796. No such notice was served on the defendant.

The notice was supported by a written address duly adopted in Court. Umaru Yunusa Esq of counsel to the

defendant submitted that the law is cast iron that failure to serve requisite pre - action notice or to meet with any of the condition precedent prescribed in the notice would adversely affect the competence of the action filed in Court. Reference was made to Ntiero vs. NPA (2008) 10 NWLR (part 1094) page 129 SC.

Learned counsel to the plaintiff Emmanuel Akuma Esq filed a reply on points of law and submitted therein while relying on the case of ITC Plc vs. NAFDAC (2007) 10 NWLR (part 1043) 613 at 635 that the Court of Appeal had held that where the plaintiff acts under genuine fear of impending danger and the object of this suit is to prevent irreparable mischief from being done, a statutory provision, which requires the service of a pre-action notice on the defendant need not be complied with. That the plaintiff's contention is that it will suffer irreparable harm and danger if its place of business is illegally closed or locked up by the

plaintiff. Reference was made to A.G. Anambra State vs. Eboh (1992) 1 NWLR (part 218) 491 at 509.

Legally, a pre action notice is some form of legal notification or information the law requires that a party must give before commencement of any legal action against such a person. It is usually provided for in legislations establishing certain statutory bodies. Pre-action notice is a procedural requirement that also have effect on jurisdiction. It actually gives notice to the beneficiary to either amend or correct the alleged act or prepare for litigation. They are not part of initiating processes but pre litigation procedures provided for by law. See Enoidem & ors vs. Umoh (2018) LPELR - 46155 (CA)

The effect of failure to serve a pre action notice gives such a Defendant the right to insist on such notice first served before the Claimant can approach the Court. The non service of a pre action notice puts the Court's jurisdiction on hold and renders the suit incompetent. See

Nigercare Development Company vs. Adamawa State Water Board (2008) LPELR-1997 (SC).

In Mobil Producing Nigeria Unlimited vs. Lagos State Environmental Protection Agency (2002) LPELR-1887 (SC)

the Court held that:

"A suit commenced in default of service of a pre-action notice is incompetent as against the party who ought to have been served with a pre action notice provided such party challenges the competence of the suit."

It is a settled principle of law that where a statute or contract stipulates the issuance and service of a pre-action notice, that stipulation generally constitutes a condition precedent to the assumption of jurisdiction by a Court of law, with the effect that failure to serve such pre-action notice constitutes an impediment to the full assumption of jurisdiction by the Court, especially where the issue is

timeously raised by the party who ought to receive the notice. See FAAN & anor vs. Autoport (Nig) Ltd & ors (2018) LPELR – 46798 (CA)

The apex Court in the case of Yaki & anor v. Bagudu & ors (2015) LPELR–25721 (SC) stated thus:-

"A pre-action notice has been held to be a condition for the exercise of the right to bring the action and not as abridgement of that right."

See Anambra State Government & ors v. Marcel & ors (1996) 9 NWLR (Pt.213) 115, Ugwuanyi v. NICON Insurance Plc (2013) LPELR–20092 (SC); Adeyemo & ors v. Abefe & ors (2018) LPELR–44855 (CA); and Ughelli South Local Government Council v. Edojakwa (2018) LPELR–43927(CA).

Undoubtedly, such statutory rules of procedure are not in themselves unconstitutional or even irregular, per se. A pre-action notice, is duly recognized as a veritable procedural provision. However, as in every given general

principle, there may be an exception. The exception comes into play where the particular requirement is prejudicial by constituting an infringement of the exercise of judicial power by the Courts; or where the pre-action notice tends to abridge the citizen's right of access to the Court, thereby being inconsistent with the Constitution of the Federal Republic of Nigeria, 1999, as amended. See NIC VS Oyefesobi & ors (2013) LPELR –20660 (CA).

See also Amadi vs. NNPC (2000) 10 NWLR (Pt. 674) 76, where it was emphatically held by the Supreme Court, thus

“ Regulations of the right to access to the Court abound in the rules of procedure and are legitimate... where (however) an enactment regulates the right of access to the Court in a manner to constitute an improper obstacle to access to Court, such enactment could be appropriately regarded as an infringement of

Section 33 (1) rather than infringement of Section 6 of the Constitution.”

It is equally trite, that the main object of pre-action notice is to accord the (potential) Defendant a breathing time so as to enable him to determine whether he should make any preparation regarding the Plaintiff's claim. So it was aptly held by the Apex Court in a plethora of authorities, including the following: Ngelegla vs. Tribal Authority, Nongowa Chief Dom (1953) 14 WACA 325 @ 327. See also Atolagbe vs. Awuni (1997) 9 NWLR (Pt. 522) 536.

Instructively, the provision of Section 124(1) and (2) of the Local Government Act, 1976 provides:

“(1) No suit shall be commenced against a Local Government until one month at least after written notice of intention to commence the same has

been served upon the local Government by the intending plaintiff or his agent.

(2) Such notice shall state the cause of action, the name and place of abode of the intending plaintiff, and the relief which he claims.”

The case of **Amadi vs. NNPC (supra)**, was predicated upon the provision of Section 11(2) of the NNPC Act, 1977, which is to the following effect: (2) No suit shall be commenced against the Corporation before the expiration of a period of one month after written notice of intention to commence the suit shall have been served upon the Corporation by the intending plaintiff or his agent; and the notice shall clearly and explicitly state the cause of action, the particulars of the claim, the name and place of abode of the intending plaintiff and the relief which he claims. It is pertinent to state, that the provisions of Section 11(2) of the NNPC Act 1977 (above), upon which the decision of the Apex Court in **Amadi vs. NNPC (supra)** was based is in pari-

materia with Section 124 (1) & (2) of the Local Government Act, 1976 relied on in this application. The Apex Court's unanimous decision in *Amadi vs. NNPC* (supra) is to the effect, inter alia, that a pre-action notice is a precondition precedent to the institution (or commencing) of an action or suit against the Defendant.

In the instant case, the phrase – *"No suit shall be commenced..."* as couched in Section 124 (1) of the Local Government Act (supra), arguably connotes an obligation, as the word "shall" therein is rather mandatory. Thus, the implication being that no suit or action could be validly instituted (commenced) against the present defendant in any Court unless a pre-action notice is served thereupon. And that in the event of being duly served upon the defendant, a suit can only validly be instituted or commenced against the defendant after the expiration of 30 days after the pre-action notice was served upon the defendant.

What's more, in the case of Katsina Local Government vs. Makudawa (1971) 1 NWLR 100 @ 107, the Supreme Court held that the purpose of giving notice of claim to the Local Government against it was to guard against being taken by surprise, and to have adequate time to prepare to deal with the defence thereto.

The plaintiff herein has placed heavy reliance on the case of ITC Plc v. NAFDAC (supra) for the proposition that where the action is to forestall irreparable damage to the res, the requirement for pre-action notice may be jettisoned.

The principle which was espoused in that case was that there can exist exceptional situations wherein the mandatory requirements of a pre-action notice provided by statute may be jettisoned, and one of such situations is where there is reasonable fear of destruction or loss of the res, that is the preservation of the res is at stake, or danger to life and limbs.

The case is certainly on all fours with this instant case.

The Court in ITC Plc vs. NAFDAC had this to say:

“It is of course correct to conclude as the appellant has, that the decisions of this Court and the Supreme Court on the mandatoriness and the constitutionality of pre-action notice provisions in different statutory provisions can invite exceptions. These would be where irreparable damage would be done if the prospective plaintiff was to issue the notice and wait out the statutory period before accessing the Courts. A typical example would be where life and limb is threatened. In the present case, the payment of the fees demanded by NAFDAC cannot constitute such irreparable damage, as the fees paid are easily recoverable on successful prosecution of the suit challenging it.”

This suit is that of demand for payment of taxes, rate and levies by the defendant from the plaintiff. The Court in

ITC Plc vs. NAFDAC above has already held that demand for payment of fees cannot constitute irreparable damage as the fees paid are easily recoverable on successful prosecution of the suit challenging same. This Court is not satisfied that there is reasonable fear of destruction of the res or indeed any damages to life and limbs. The exception therefore does not avail the plaintiff in this instance. I cannot but agree with the submission of learned counsel to the defendant that failure of the plaintiff to comply with the condition precedent for instituting this action robs the Court of jurisdiction to adjudicate and the Court is duty bound to strike same out.

This preliminary objection has merit and same is upheld by this Court. The plaintiff's suit is incompetent and same is hereby struck out.

Signed
Honourable Judge

Appearances:

Emmanuel Akuma Esq – for the plaintiff/respondent

Umaru Yunusa Esq – for the defendant/applicant