IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY
IN THE ABUJA JUDICIAL DIVISION
HOLDEN AT JABI

THIS MONDAY, THE 29TH DAY OF NOVEMBER, 2021

BEFORE: HON. JUSTICE ABUBAKAR IDRIS KUTIGI – JUDGE

SUIT NO: CV/2915/2019
MOTION NO: M/7038/2020

BETWEEN:

1. INVESTRITE LIMITED
2. MR. TAIWO AYODELE } **..... CLAIMANTS/RESPONDENTS**

AND

1. HERITAGE BANK PLC
2. P.C. LEASE CONSORTIUM } **.... DEFENDANTS/APPLICANTS**

RULING

By a Notice of Preliminary Objection dated 20th May, 2020, the Defendants/Applicants pray for the following Reliefs:

1. **An Order striking out the Claimants/Respondents ("the Respondents") suit against the Applicants for being incompetent.**

2. **And for such further order(s) as this Honourable Court may deem fit to make in the circumstances.**

GROUNDS

1. **The Respondents failed to serve a mandatory 60 (sixty) day pre-action notice on the Applicants.**

2. **Consequently, this Honourable Court lacks the requisite jurisdiction to entertain the suit due to the failure of the Respondents to satisfy a condition precedent to instituting the action.**

The application is supported by a seven (7) paragraphs affidavit with two (2) annexures marked as **Exhibits CA1** and **CA2. Exhibit CA1** is the Offer of Term Loan Facility dated 2nd July, 2013 while CA2 is a copy of the Offer of Term Loan Facility (Tenure Extension) dated 23rd March, 2015.

A written address was filed in compliance with the Rules of Court in which one issue was raised as arising for determination to wit:

"Whether this Honourable Court has the jurisdiction to entertain this suit."

Submissions were then made on the issue which forms part of the Record of Court. The summary and substance of the submissions is simply to the effect that the loan agreement the Claimants and 1st Defendant executed vide Clause 13 (a) of the **Exhibit CA2** contains the requirement of issuance of a pre-action notice of 60 (sixty) days before any legal action or suit shall be instituted against the 1st Defendant/Applicant. That the failure of the Claimants to fulfill this requirement, a condition precedent, renders the action incompetent and liable to be struck out.

In opposition, the Claimants/Respondents filed a Counter-Affidavit of 8 paragraphs with two annexures marked as **Exhibits A** and **B**.

In the written address two issues were raised as arising for determination as follows:

1. **Does the content of the letter Exhibit "CA2" relied upon by the Defendants/Applicants in bringing this Application titled "Offer of Term of Loan Facility (Tenure Extension) and dated 23rd of March, 2015" relate to or participate in the governance of the transaction between the Claimants and the Defendants in this case?**

2. **Does the exception to giving of pre-action notice as enunciated in the case of International Tobacco Company Plc VS National Agency for Food and Drug Administration and Control (NAFDAC) 10 NWLR (2007) part 1043 page 613, at page 619 Ratio 5, particularly at page 634-**

635, paragraphs D-A; 635-636, paragraphs H-D; 639, paragraph D apply to this case before this Honourable Court?

Submissions were equally made on the above issues which forms part of the Record of Court. On **issue (1),** the substance of the case made out is that the Offer of Term Loan Facility (Tenure Extension), **Exhibit CA2** containing the pre-action notice and relied on by Applicants is a strange document, completely unknown to them and does not define the extant dispute and accordingly the pre-action notice contained in it is unavailing. That the only known agreement Claimants had with 1st Defendant is the Offer of Term Loan Facility vide **Exhibit CA1** which does not contain any pre-action and that is the document to govern the transaction between parties and not the extraneous document vide **Exhibit CA2** which they contend has no nexus or relationship with **Exhibit CA1**.

On **Issue 2**, which is an alternative submission, it was contended that if it is assumed or conceded that **Exhibit CA2** has anything to do with the present dispute that there are exceptions to the rule of giving pre-trial notice particularly in situations where irreparable mischief will be occasioned and that in such situation, the service of pre-action notice will not be necessary. That in this case, they have asserted the position that they are not indebted to the Respondents at all and that the Defendants have resorted to using threats by actively seeking to dispose off the Mortgage property without resorting to the Claimants by advertising the property for sale and taking potential buyers to the property. That this active threat, provides the exception to allow them commence this action without issuing a pre-action notice in the event it was even applicable.

The Defendants in response filed a Further Affidavit in support of the Notice of Preliminary Objection with two (2) annexures marked as **Exhibits CA3** and **CA4**. A Reply on points of law was equally filed which equally forms part of the Records of Court which essentially sought to accentuate the points relating to the application of **Exhibit CA2** containing the pre-action notice and further that the exceptions relied on by Respondents to the application of the pre-action notice has no application and that they are bound by terms of the offer letter which contains the requirement of a pre-action notice.

I have carefully considered the processes filed and the submissions made on both sides of the aisle and the narrow issue is whether this court has the requisite jurisdiction to entertain the extant action. As already highlighted, the

case of the Applicants is that the loan facility agreement parties extended contains a **pre-action notice** which Respondents did not adhere to and as such this court lacks the jurisdiction to entertain the Action. The Respondents countered otherwise contending that the loan facility agreement they executed contains no such requirement and even if it assumed that it has such requirement, that in view of the threats to dispose off the Mortgage property, that it is inapplicable.

Let me start my consideration of the issue by making some prefatory remarks. Firstly, the question of issuance of a **pre-action notice** is not an area free of controversy in legal circles. There is the position advanced that in civil trials, it is a procedural irregularity which is waivable and does not go to the root of the case. See **Eze V Okechukwu (2002) 12 SC (pt.11) 103**. There is another school of thought which sees the position differently and contends that pre-action notice is a key component of jurisdiction and failure to comply with the requirements renders the proceedings of the court a nullity. See **Nigeria Ports Plc V Ntiero (1998) 6 NWLR (pt.555) 640 at 650-651; O.A.U V Oliyide & Sons Ltd (2002) AU FWLR (pt.105) 799 at 818-819; Shuaibu V Naicom (2002) 12 NWLR (pt.780) 116 and Odoemelan V Amadiume (2008) 12 NWLR (pt.1070) 179.**

Secondly, and flowing from the above, it is merely stating the obvious that jurisdiction is a crucial question of competence extrinsic to the adjudication on the merits. Lack of jurisdiction cannot be waived by one or both parties as it is a hard matter of law clearly beyond the compromise of the parties. The law on the point is graphically captured by the oft-cited dictum of Bairamian, Fj in the leading case of **Madukolu V Nkemdilim (1962) 1 All NLR 587 at 595** as follows:

"A Court is competent to adjudicate when –

(a) It is properly constituted as regards numbers and qualifications of the members of the bench, and no member is disqualified for one reason or another; and

(b) The subject matter of the case is within its jurisdiction and there is no feature which prevents the court from exercising its jurisdiction; and

(c) The case comes before the court initiated by due process of law and upon fulfillment of any condition precedent to the exercise of jurisdiction.

Any defect in the competence of the court is fatal and the proceedings however well conducted and decided are a nullity as such defect is extrinsic to the adjudication.

Jurisdiction is the threshold of judicial power and judicialism; and the very lifeline of all proceedings in a court or tribunal without which the entire proceedings, trial, findings, orders and pronouncements are futile, invalid, null and void *ab initio* however brilliantly they must have been conducted. Once the jurisdiction of a court in respect of a cause or matter is ousted, the court will lack the competence to entertain and determine that cause or matter. See **Rossek V ACB Limited (1993) 8 NWLR (Pt.312) 382 at 437 C-G; 487 G-B; AG, Lagos V Dosunmu (1989) 3 NWLR (Pt.111) 552."**

Now to the crux of the objection. It is again stating the obvious that some legislations make room for service on defendant of a pre-action notice with varying time lines, by an intending plaintiff before institution of actions against them. The principle is settled that where a pre-action notice is enshrined in a statute, a defendant reserves the right to waive or insist on its compliance and, in the case of the latter situation, the jurisdiction of a court is off until the service of it. That is to say, if the defendant insists on the service of pre-action notice, where it is required by an enactment, the non-issuance by the plaintiff before commencing action constitutes a brake on jurisdiction of a court to hear it. See **Nnonye V Anyichie (2005) 1 KLR (pt.189) 129 (2005) 2 NWLR (pt.910) 623.**

It is noteworthy to add that a pre-action notice is not limited to statutes exclusively, but it can also be situated at times by contract or agreement wherein a prospective plaintiff will be required to give such notice to a prospective defendant. Indeed in **Ntiero V N.P.A (2008) 10 NWLR (pt.1094) 129 SC**, the Supreme Court stated thus:

"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."

See also the case of **Chief Nathaniel Ekwe Ede V Access Bank Plc & Anor (2020) 4 NWLR (pt.1715) 417 at 440 – 441 BG.**

In this case the pre-action notice according to the Applicants is said to be embodied in **Exhibit CA2**, the Offer of Term Loan Facility (Tenure Extension) dated 23rd March, 2015. The Respondents contends otherwise as highlighted already. That **Exhibit CA2** is unknown to them and that it is **Exhibit CA1** the offer of term loan facility dated 2nd July, 2013 that governs the relationship and that it does not contain any **pre-action notice**.

I note that in the further affidavit filed by Applicants and indeed in the processes filed by parties, serious issues were joined on even the application of **Exhibit CA2** to the contract: conflicting evidence was proffered by both sides on its application; the integrity of the said **Exhibit** was seriously questioned or impugned and extensive submissions made by parties on its legitimacy and this then raises the fundamental question of whether this is an issue that the court can rightly and properly inquire into at this stage. It appears to me that parties on both sides of the aisle proceeded on the rather erroneous assumption that the court is dealing with the substantive case as distinct from an interlocutory application even if raising an important procedural or jurisdictional point.

The principle is rather settled now that it is not part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed arguments and mature considerations. There are matters better dealt with really at trial.

Now what is interesting here is I have carefully read or perused the process filed by the **plaintiffs** particularly the writ of summons and the statement of claim and their case is situated or based on an offer of loan transaction in the sum of **N450, 000, 000** which it contends it has fully liquidated and this offer appears to be **Exhibit CA1** attached to the extant preliminary objection of Applicants. This offer of term loan facility was frontloaded by claimants as part of the documents they will rely on at the hearing. There is no mention of any tenor extension or the offer of term loan facility (tenor extension) vide **Exhibit CA2** within the confines or purview of the pleadings of claimants and it was equally not frontloaded.

I have read the **Exhibit CA1,** the document or offer of term loan facility frontloaded by Claimants and there is no doubt that the said document contains no clause or provision for the issuance of a **pre-action notice** on 1st defendant.

It therefore logically follows that strictly on the basis of facts presented by claimants as clearly delineated in their pleadings, that the projection of any requirement of issuance of a pre-action notice by defendants will not fly. The point to underscore is that it is the **statement of claim of the claimants** that primarily nominates the issues to be tried in a suit and on which he relies to have the judgment of the court. For the defendants in this case, it is only necessary to resist the claim on the facts pleaded. It is not for the defendant to set up facts which would convey that it is setting up a new case of their own. They are only permitted to this when they set up a counter-claim as done here which is a distinct cause of action from the claim of claimants. See **Longe V FBN Plc (2016) 6 NWLR (pt.1189) 1 at 24 – 25 H-B**.

Now it is true that in the **defence and counter-claim** of Defendants/Applicants, they introduced the new dynamic relating to the fact that the loan facility was restructured vide the loan facility (tenor extension) dated 23rd March, 2015 which was attached to the objection as **Exhibit CA2**. The defence is situated on the basis that the claimants have refused to liquidate the term loan facility and the accrued interest despite several demands by the defendants. This equally forms the basis of the defendants **counter-claim** against claimants which in law and as already highlighted is a distinct cause of action from the main substantive claim of claimants.

It is clear therefore that the case or cause of action presented by plaintiff as demonstrated which is precisely delineated on the basis of the offer of loan facility **Exhibit CA1** which situates their action does not provide for the **issuance of a pre-action notice**. It does not appear to me right that the defendants can expand the remit of the grievance submitted by claimants within the purview of their pleadings to suit a particular purpose. The basic character of the case of plaintiffs can, at this point, only be conceptually projected or situated by what it contains.

It is equally true that by the **defence and counter-claim** filed by defendants, the dynamics with respect to what was actually offered to claimants **changed in fundamental respects** including the now contested assertion that the offer was restructured and a new offer of term (tenor extension) was offered but these are now clearly **contested assertions** and matters for **proof** at plenary hearing. The

defence and counter claim at this point or stage is really the position of defendants and does not define the case of plaintiff.

It would have made a world of difference if there was no dispute or contest with respect to the restructured offer letter, **Exhibit CA2** containing the pre-action provision or clause. In such circumstances, parties will be held bound to or by the **terms** of the offer letter including the clause containing the **pre-action notice**. The dynamic must however in my opinion change where the existence and application of the letter is impugned after it was introduced not by the party who filed the substantive action but by the adversary, the defendants in this case.

The court must therefore be **circumspect** and resist the temptation to at this stage be determining whether the tenor extension facility has been impugned or not or whether it is applicable or availing in the circumstances. I leave it at that.

I therefore incline to the view that it does not appear to me right that the defendants will introduce a new element via its defence and counter-claim as done here through the instrument of **Exhibit CA2** and on the basis of this new dynamic introduced by them **demand** for the issuance of a pre-action notice to be served on them.

As stated severally and to avoid any element of confusion, the determination of legal rights of parties on the offer letters including the restructured offer introduced by defendants is best left for the substantive hearing. These are clearly principal issues. Any comment by court on the extensive submissions canvassed by the parties on the validity of the restructured offer will definitely be prejudicial to the determination of the substantive case.

It is settled law that one of the functions of pleadings is to enable parties in the case give a fair notice of the nature of their respective cases to each other; thereby circumscribing and fixing issues in respect of what they are in agreement and those in respect of which they are not in agreement. See **UBA Plc V Godm Shoes Ind. (Nig.) Plc (2011) 8 NWLR (pt.1250) 590 at 614-615**.

The letter of offer (tenor extension) thus pleaded by defendants/applicants which provides a contrary narrative to the case made out by claimants serves perfectly the purpose of delineating a critical and or defined issue in this case and which ultimately is now a matter subject of proof at trial on established legal threshold.

As I round up, let me state that the cases cited and referred to by counsel on the application of a pre-action notice and the case situating the exceptions remain valid and good laws but clearly are distinguishable and have no application to the peculiar facts of this case. None of the cases cited dealt with a situation where the subject matter of dispute is said to be governed by **different agreements**, and the agreement containing the alleged pre-action notice was never alluded to or mentioned by the claimant who filed the substantive action but by his adversary and even at that, the claimant has challenged or impugned the existence of such agreement.

Let me quickly add that those decisions been decisions of our Superior Courts are binding on all lower courts including this court under the doctrine of **judicial precedent**. This doctrine however properly understood postulates that where the facts in a subsequent case are similar or close to the facts in an earlier case that has been decided upon, judicial pronouncement in the earlier case are subsequently utilized to govern and determine the decision in the subsequent case. See **Nwangwu V. Ukachukwu (2000)6 N.W.L.R (pt.662)674.** What is however binding on a lower court in the decision of a higher court is the principle or principles decided and not the rules and where the facts and circumstances in both cases are not similar or the same, the inferior court is not bound by the decision of the superior court. See **Clement V. Iwuanyanwu (1989)3 N.W.L.R (pt.107)39; Emeka V. Okadigbo (2012)18 N.W.L.R (pt.1331)35.**

In **Ugwuanyi V. Nicon Ins Plc (2013)11 N.W.L.R (pt.1366)546,** the Supreme Court made the point thus:

"…cases remain authorities only for what they decided. Thus an earlier decision of this court will only bind the court and subordinate courts in a subsequent case if the facts and the law which inform the earlier decision are the same or similar to those in the subsequent case. Where, therefore, the facts and/or legislation, which are to inform the decision on the subsequent case differ from those which informed the courts earlier decision, the earlier decision cannot serve as a precedent to the subsequent one."

On the whole, and on the basis of the agreement which informed the cause of action presented in court by the **claimants**, there is absolutely no requirement on claimants to issue a pre-action notice on defendants; the present action does not present any feature preventing the exercise of the court's jurisdiction.

The Preliminary Objection thus fails and it is dismissed.

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Hon. Justice A.I. Kutigi

Appearances:

1. **P.O. Okolo SAN with A.J. Okolo, Esq., Kenneth U. Udemba, Esq., B.Y. Edogbonya, Esq. and J.O. Ameh, Esq., for the Claimants/Respondents.**

2. **O.I. Arasi, Esq., with A.H. Arhere, Esq., for the Defendants/Applicants.**