

**IN THE HIGH COURT OF THE FEDERAL
CAPITAL TERRITORY, ABUJA
HOLDEN AT MAITAMA, ABUJA**

ON MONDAY, 28TH DAY OF FEBRUARY, 2022

BEFORE HON. JUSTICE SYLVANUS C. ORIJI

SUIT NO. FCT/HC/CV/1429/2018

MOTION NO. M/2963/2021

BETWEEN

HRH IGWE DAMIAN EZEANI

--- CLAIMANT/RESPONDENT

AND

- | | | |
|--|---|------------------------------------|
| 1. SEAL TOWERS NIGERIA LIMITED | } | DEFENDANTS/
RESPONDENTS |
| 2. THE HON. MINISTER, MINISTRY
OF FEDERAL CAPITAL TERRITORY | | |
| 3. NIGERIAN COMMUNICATIONS
COMMISSION | } | DEFENDANT/
APPLICANT |

RULING

This Ruling is on the 3rd defendant/applicant's Motion No. M/2963/2021 filed on 23/3/2021 seeking the following orders:

1. An order of this Honourable Court striking out the name of the 3rd defendant/applicant, NIGERIAN COMMUNICATIONS COMMISSION, from the claimant's instant Suit No. FCT/HC/CV/1429/2018 for lack of

jurisdiction, non-disclosure of any cause of action against the 3rd defendant and for failure by the claimant to comply with the mandatory provisions of Section 142[3] of the NIGERIAN COMMUNICATIONS ACT, 2003.

2. And for such further order or orders as this Honourable Court may deem fit to make in the circumstances.

The grounds upon which the application is brought are:

- a) That the Originating Processes in the instant suit do not disclose any cause of action against the 3rd defendant, Nigerian Communications Commission.
- b) Where a suit discloses no cause of action against a defendant, the case will be struck out.
- c) This Honourable Court lacks the jurisdiction to entertain the instant suit against the 3rd defendant as prescribed by Sections 3 and 138 of the NIGERIAN COMMUNICATIONS ACT, 2003 as jurisdiction thereof is exclusively vested in the Federal High Court of Nigeria.
- d) Persons desiring to initiate any suit or legal proceedings against the 3rd defendant/applicant are mandatorily required to serve a Pre-action Notice on 3rd defendant/applicant, as prescribed by Section 142[3] of the NIGERIAN COMMUNICATIONS ACT, 2003.

- e) Prior to initiating this suit or proceedings, no such pre-action notice was served on the 3rd defendant/applicant by the claimant.
- f) This Honourable Court lacks jurisdiction to entertain suits pertaining to the conduct of the 3rd defendant arising out of or pursuant or consequent upon the Nigerian Communications Act, 2003.
- g) The claimant's suit against the 3rd defendant is incompetent.
- h) This Honourable Court lacks the jurisdiction to entertain this claimant's suit against the 3rd defendant/applicant as presently constituted.

In support of the Motion, Abang Moses Ochang, the litigation secretary in the Law Firm of Ola-TaiwoFakunle& Associates, filed a 6-paragraph affidavit together with the written address of TaiwoOlaoluFakunleEsq.ChinonsoOffor, a litigation assistant in the Law Firm of IkechukwuEzechukwu, SAN & Co., filed a 6-paragraph affidavit in opposition together with the written address of Ifeanyi M. NrialikeEsq. At the hearing of the application on 12/1/2022, the two learned counsel adopted their respective processes. The 1st& 2nd defendants did not oppose the grant of the application.

The depositions of Abang Moses Ochang in the affidavit in support of the application are similar to the grounds of the application earlier set out.

In the counter affidavit, ChinonsoOffor stated that: [i] there is a cause of action disclosed against the 3rd defendant; [ii] the reliefs sought, particularly

reliefs 3 and 4 are against all the defendants; [iii] pre-action notice is required where the officers of the 3rd defendant are sued and not necessarily the 3rd defendant; and [iv] the Court has jurisdiction to entertain this suit.

In his written address, TaiwoOlaoluFakunle Esq., learned counsel for the 3rd defendant/applicant, formulated one issue for determination, to wit:

Whether this Honourable Court has the jurisdiction to entertain the claimant's suit against the 3rd defendant as it is presently constituted.

On the other hand, Ifeanyi M. NrialikeEsq., learned counsel for the claimant/respondent, posed two issues for determination, which are:

1. Whether the 3rd defendant's application was competently made at this stage having regards to the fact that the 3rd defendant has not filed her statement of defence.
2. Whether or not this Honourable Court has jurisdiction to entertain the claimant's suit against the 3rd defendant.

From the grounds of the application and the submissions of both learned counsel, the Court is of the view that there are four issues for determination.

These are:

1. Whether this application filed by the 3rd defendant without first filing its statement of defence is incompetent.

2. Whether the 3rd defendant is entitled to be served a pre-action notice before the institution of this suit against it.
3. Whether the claimant's suit has disclosed a reasonable cause of action against the 3rd defendant.
4. If the answer to Issue 3 is in the affirmative, whether it is this Court or the Federal High Court that has jurisdiction to entertain this suit by virtue of section 138 of the Nigerian Communications Act, 2003.

ISSUE 1

Whether this application filed by the 3rd defendant without first filing its statement of defence is incompetent.

The learned claimant's counsel argued that the ruling on this application can be conveniently taken at the time of writing final judgment after the trial. The justice of this case deserves that the matter be tried to conclusion and a decision taken, first on the application and finally the substantive case, if need be. Ifeanyi M. Nrialike Esq. also submitted that this application is akin to raising a demurrer, which has been abolished by the Rules of the Court. The 3rd defendant's counsel did not put forward any argument on this issue either by a reply on points of law or by oral argument at the hearing.

Now, the essence of the procedure by way of demurrer is that the party raising it contends that even if all the allegations in the pleadings of the

adverse party were true, it still does not in law disclose a cause of action for the party to answer to the claimant's claim. See **Bamisile v. Osasuyi**[2007] 9 **NWLR** [Pt. 1042] 225. It is correct that by virtue of Order 23 rules 1 & 2 of the Rules of this Court, 2018, no demurrer shall be allowed. A party may by his pleadings raise any point of law and the court may dispose of the point so raised before, at or after the trial.

The 3rd defendant's application challenges the jurisdiction of the Court to entertain the claimant's suit. The question that calls for resolution is whether the 3rd defendant can challenge the jurisdiction of the Court to entertain this suit without first filing its statement of defence. In the case of **N.D.I.C. v. C.B.N. & Anor.** [2002] 7 **NWLR** [Pt. 766] 272, the Supreme Court held that there is a distinction between objection to jurisdiction and demurrer, and that the issue of jurisdiction is not a matter for demurrer proceedings. See also **Oyerogba v. Akinyemi & Ors.** [2016] **LPELR-41940** [CA]. In **Usman v. Baba** [2005] 5 **NWLR** [Pt. 971] 113 @ 133, D-H, His lordship, *Abubakar Abdulkadir Jega*, JCA restated the position of the law thus:

"... An application or preliminary objection, as in this case, seeking an order to strike out a suit for being incompetent on the ground of absence of jurisdiction is not a demurrer and therefore can be filed and taken before the defendant files his statement of defence or without the defendant filing a statement of defence. This is because the issue of jurisdiction can be raised at any time. ..."

The decisions in the above cases resolve the question under consideration against the claimant/respondent. It is also trite law that whenever the issue of jurisdiction of a court to entertain a suit is raised, the court has a duty to first resolve the issue one way or the other before taking any further steps in the proceedings. See the case of Kwatte v. Isah [1999] 1 NWLR [Pt. 588] 638.

In the light of the foregoing, the submissions of Mr. Ifeanyi M. Nriale that this application amounts to a demurrer and that the ruling on the application can be conveniently taken in the final judgment after the trial are not tenable. The decision of the Court on Issue 1 is that the 3rd defendant's application is not a demurrer and is therefore competent.

ISSUE 2

Whether the 3rd defendant is entitled to be served a pre-action notice before the institution of this suit against it.

The argument of learned counsel for the 3rd defendant is that the claimant failed to comply with the mandatory provision of section 142[3] & [4] of the Nigerian Communications Act, 2003. Section 142[3] and [4] thereof provide:

3. *No suit shall be commenced against a Commissioner, the Secretary or any official or employee of the Commission before the expiration of a period of 1 month after written notice of the intention to commence the suit shall have been served on the Commission by the intending plaintiff or his agent.*

4. *The notice referred to in subsection [3] of this Section 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.*

TaiwoOlaoluFakunleEsq. relied on the decision of the Supreme Court in **Ntiero v. NPA [2008] 10 NWLR [Pt. 1094] 129** to support the principle that any suit commenced without serving a pre-action notice where same is statutorily required renders the action incompetent. It was submitted that the provisions of section 142[3] & [4] of the Nigerian Communications Act, 2003 applies to suits brought against 3rd defendant. Since the claimant instituted this suit without first serving the requisite pre-action notice on the 3rd defendant, the suit is incompetent as it was filed without compliance with a condition precedent.

The viewpoint of learned counsel for the claimant is that by section 142[3] of the Nigerian Communications Act, 2003, pre-action notice is required where “*a Commissioner, the Secretary or any official or employee of the Commission*” is to be sued. The provision specifically referred to the staff or employee of the Commission which is different from the Commission itself. He referred to the case of **Ntiero v. NPA** where the provision of section 92[1] of the Nigerian Ports Authority Act was in issue; and submitted that the decision in that case is not applicable to the present case. He further submitted that where the words in a statute are clear, the words must be given their ordinary meaning. He cited **Kings Planet Int’l v. C.P.W.A. Ltd. [2014] 2 NWLR [Pt. 1392] 605.**

In my view, the provision of section 142[3] of the Nigerian Communications Act, 2003 is clear and unambiguous. The subsection provides that pre-action notice shall be served on the Commission [i.e. the 3rd defendant] before a suit shall be commenced by an “*intending plaintiff*” against “*a Commissioner, the Secretary or any official or employee of the Commission*”. As rightly stated by the claimant’s counsel, it is trite law that by the rules of interpretation, where words used in a statute are clear, they must be given their plain and ordinary meaning. See Caesar & Jones Ltd. v. Amanda [2021] LPELR-55873 [CA]. I hold the view that if the intention of the Legislature is for pre-action notice to be served on the Commission before a suit is commenced against it, it would have said so. The Court cannot add to the said provision what the Legislature did not enact.

I have read the case of Ntiero v. NPA [supra] relied upon by Mr. Fakunlewhere the Supreme Court interpreted the provisions of section 110[2] of the Ports Act, Cap. 361, Laws of the Federation of Nigeria, 1990, which is now section 92[1] of the Nigerian Ports Authority Act, 1999. The provision reads:

No suit shall be commenced against the Authority before the expiration of a period of one month after written notice of intention to commence the suit shall have been served on the Authority by the intending plaintiff or his agent and the notice shall clearly and explicitly state:

a) the cause of action;

- b) *the particulars of the claim;*
- c) *the name and place of abode of the intending plaintiff; and*
- d) *the reliefs which it claims.*

As rightly submitted by learned counsel for the claimant, the above provision relates to suits against Nigerian Ports Authority but the provision of section 142[3] of the Nigerian Communications Act relates to suits against “*a Commissioner, the Secretary or any official or employee of the Commission*”. Thus, the decision in **Ntiero v. NPA [supra]** is not applicable to this case. The Court holds that the 3rd defendant is not entitled to a pre-action notice before the institution of this suit against it.

ISSUE 3

Whether the claimant’s suit has disclosed a reasonable cause of action against the 3rd defendant.

Learned counsel for the 3rd defendant stated that the claimant’s suit has not disclosed any cause of action against the 3rd defendant to warrant the joinder of the 3rd defendant to this suit. He referred to the case of **Adepoju v. Afonja [1994] 8 NWLR [Pt. 363] 437** and other cases for the meaning of cause of action. He submitted that apart from a brief introductory reference to the 3rd defendant in paragraph 3 of the amended statement of claim, no other reference or claim is made with regards to the 3rd defendant. He urged the Court to strike out the name of the 3rd defendant from the suit.

On the other hand, learned counsel for the claimant contended that this suit bothers on tort of trespass, nuisance and damages. The 1st defendant claimed to have approval from the 3rd defendant without any document to show it. Reliefs 3 and 4 are against all the defendants. He submitted that the suit of the claimant has disclosed a reasonable cause of action against the 3rd defendant.

In **Chevron Nig. Ltd. v. Lonestar Drilling Nig. Ltd. [2007] 16 NWLR [Pt. 1059] 168**, a cause of action was defined as the entire set of circumstances giving rise to an enforceable claim. It is in effect the fact or combination of facts which give rise to a right to sue and it consists of two elements namely, [i] the wrongful act of the defendant which gives the plaintiff his cause of complaint; and [ii] the consequent damage. In determining whether a suit has disclosed a reasonable cause of action, the court needs only to examine the averments in the statement of claim. See **Otubu v. Omotayo [1995] 6 NWLR [Pt. 400] 247** and **Ibe&Anor. v. Bonum [Nig.] Ltd. [2019] LPELR-46452 [CA]**.

In the 22-paragraph amended statement of claim filed on 4/6/2018, it is averred that:

1. The claimant is the holder of a statutory right of occupancy over Plot No. 145 behind NNPC Filing Station, Nyanya, Abuja. The Plot has 6 blocks of flats occupied by families including the claimant.
2. The 3rd defendant is the Independent Regulatory Authority for the Telecommunication Industry in Nigeria.

3. In March 2018, they found that 1st defendant is erecting and installing unauthorized Mast right beside the claimant's wall slightly away from the gate at the claimant's set-back.
4. Further inquiry disclosed that the Mast is being constructed without authorization except the verbal approval from one local Karu Chief.
5. No approval was received from the 2nd& 3rd defendants and the 2nd defendant did not issue any Environmental Impact Assessment Report before the erection of the Mast at the set-back of the claimant's Plot.
6. The exposure of the Mast and its radiation will cause the neighbourhood including the claimant and other residents of the said Plot 145 serious health challenges like lung cancer, sleeping disorderliness, physical disabilities, among others.
7. The 1st defendant did not undertake or carry out any Environmental Impact Assessment to know the health implication of mounting telecommunication Mast behind the walls of the claimant's building and directly in front of the gate at the set-back of the said Plot 145.

In paragraph 22 of his amended statement of claim, the claimant stated that he claims his reliefs against the 1st defendant. In reliefs [i] & [ii], the claimant seeks declaratory orders to the effect that the construction and installation of telecommunication Mast by the 1st defendant at the set-back space of the said Plot 145 belonging to the claimant without his authorization and approval is

wrong, illegal, risky, unsafe and constitute danger to the public. Relief [iii] is an order *“restraining the erection and installation of telecommunication mast without the requisite approval of the claimant and without successfully undergoing environmental impact assessment.”* Relief [v] is the sum of N100 million as general damages while relief [vi] is the sum of N3 million as the legal fee of filing the suit.

In relief [iv], the claimant seeks an order of perpetual injunction restraining the defendants, their agent, assigns or privies from further constructing and installing telecommunication Mast directly in front of claimant’s property.

From the amended statement of claim, the claimant only mentioned the 3rd defendant in paragraphs 3 & 9. These averments are that: [i] 3rd defendant is the Independent Regulatory Authority for Telecommunication Industry in Nigeria; and [ii] 1st defendant did not obtain approval from the 3rd defendant for the construction and installation of the Mast.

As I said earlier, for the claimant’s suit to disclose a cause of action or a reasonable cause of action, the averments in the statement of claim must disclose facts showing: [i] the wrongful act of the defendant which gives the plaintiff his cause of complaint; and [ii] the consequent damage suffered by the claimant as a result of the wrongful act of the defendant. In the instant case, there is no averment of the wrongful act of the 3rd defendant which gave the claimant his cause of complaint.

In my considered opinion, the fact that relief [iv] is said to be against all the defendants will not change the fact that the amended statement of claim has no averment of the wrongful act of the 3rd defendant which gave the claimant his cause of complaint. I agree with Mr. Fakunle that the claimant's suit has not disclosed a cause of action against the 3rd defendant.

Conclusion:

In the light of the above decision that the claimant's suit has not disclosed a cause of action or reasonable cause of action against the 3rd defendant, it will not serve any useful purpose to consider Issue 4, which is whether it is this Court or the Federal High Court that has jurisdiction to entertain this suit by virtue of section 138 of the Nigerian Communications Act, 2003.

In conclusion, the prayer sought by the 3rd defendant/applicant has merit. It is granted. The name of the 3rd defendant, *Nigerian Communications Commission*, is struck out from this suit. The parties are directed to amend their processes to reflect the proper parties. The claimant is directed to file and serve his amended processes on or before 8/3/2022. The defendants are directed to file and served their amended processes within 7 days from date of service of the claimant's amended processes.

HON. JUSTICE S. C. ORIJI
[JUDGE]

Appearance of Counsel:

1. Ifeanyi M. Nrialike Esq. for the claimant/respondent.
2. Divine Davies Esq. for the 1st defendant/respondent.
3. BunmiFasan Esq. for the 2nd defendant/respondent.
4. T. O. Fakunle Esq. for the 3rd defendant/applicant.