IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY
IN THE ABUJA JUDICIAL DIVISION
HOLDEN AT GUDU - ABUJA
ON THURSDAYTHE 30TH DAYOF MARCH, 2022.
BEFORE HIS LORDSHIP; HON. JUSTICE MODUPE OSHO-ADEBIYI
SUIT NO. CV/3142/2020
MOTION NO: M/708/2022

BETWEEN

ACIOE ASSOCIATES LTD ---------- CLAIMANT/RESPONDENT
AND
ABUJA MUNICIPAL AREA COUNCIL ----- DEFENDANT/APPLICANT

RULING

On the 11th of November, 2020, the Plaintiff filed an Originating Summons in this court against the Defendant, upon service the Defendant filed a conditional appearance and a notice of preliminary objection pursuant to Section 124 of the Local Government Act, 1976, Order 43 Rule 1 of the High Court of the Federal Capital Territory (Civil Procedure) Rules 2018 and under the inherent jurisdiction of the Honourable Court, praying for the following orders:

1. AN ORDER striking out/dismissing the instant suit for being premature, incompetent, fundamentally defective and for constituting an abuse of the court process for want of pre-action notice on the Applicant by the Respondent before filling this suit.
2. AND for such further or other order or orders as the honorable court may deem fit and just to make in the circumstances of this case.

The grounds upon which the application is brought are as follows;

1. The suit as constituted is pre-mature for want of a condition precedent for instituting the action.

2. The honorable court has no jurisdiction to entertain the Respondent's suit as constituted for want of service of pre-action notice on the Applicants.
3. That section 124 of the Local Government Act, No. 8, 1976, Volume 3, Laws of the Federal Capital Territory of Nigeria forbids a law suit of any nature to be commenced against the Applicant without first issued and served a Pre-action Notice on same.

Defendant/Applicant's counsel in their address raised one issue for determination to wit;

> "Whether the Respondent's suit as constitutes is incompetent, pre-mature and abuse of the process of this court".

Learned counsel in summary submitted that the Respondent's suit is pre-mature, incompetent and constitute the abuse of the process of this court for being filed without giving Applicant a mandatory one month pre-action notice as provided by **Section 124 of the Local Government Act, No.8, 1976, Volume 3, Laws of the Federal Capital Territory of Nigeria**.That it is trite law that a court is competent to entertain a suit if the suit is commenced by due process of law and upon the fulfillment of any condition precedent to the exercise of its jurisdiction and any defect in the competence of the court is fatal to the proceeding no matter how well conducted. Counsel submitted that since the Respondent did not give written notice of at least one month of intention to commence an action in court against the Applicant stating the cause of action, the name and place of abode of the Respondent and the reliefs claimed in line with **Section 124 of the Local Government Acts** the Respondent suit is fundamentally defective and liable to be struck out. He urged the court to strike out or dismiss the suit for being incompetent for want of pre-action notice. Counsel cited the cases of **SHOMOLU LOCAL GOVERNMENT COUNCIL VS AGBEDE (1999) 4 NWLR (part 441), page 174 at page 185 paras G-H; ODOEMELAM VS ADADIUME (2008) 2 NWLR (part 070) page 179 at page 188-189 paras D-A;EFFIONG VS IKPEME (1999) 6 NWLR (PT 606) page 260 and**

KATSINA LOCAL GOVERNMENT VS ALHAJI B. MAKUDAWA (1971) INMLR 100 AT 105, amongst others.

The Claimant/Respondent counsel filed their written address in opposition to the Defendant's preliminary objection wherein she raised three (3) issues for determination to wit;

1. Whether the Defendant's failure to seek leave of this honourable court to file their preliminary objection does not vitiate their action?
2. Whether their action amount to a Demurrer?
3. Whether the Preliminary objection is competent before the court?

Summarily learned counsel submitted that the Defendant having failed to seek leave of this court to file out of time after the time prescribed by law has elapsed cannot be heard. Counsel submitted that the Defendant having failed to file its Defense has foreclosed itself from further steps in this proceeding and the court should determine this suit based on the Originating Summons dated and filed 11thof November 2020 and the said Preliminary Objection filed by the Defendant be struck out for being incompetent and discountenance all submissions with regards to the preliminaryobjection. Counsel submitted that by decisions of the Supreme court non-service of pre-action notice is an irregularity which falls within the procedural rather than substantive jurisdiction of the court below. Thus,that an irregularity in the exercise of jurisdiction is not the same as total lack of jurisdiction.Counsel urgedthe court to foreclose the Defendant from entering defense and discountenance with the Defendant's Preliminary Objection for being incompetent and constitute abuse of court process as the 2018 High Court Cvil Procedure Rules Order 17 Rule 16 and Order 23 are blatantly clear. Counsel cited the following authorities amongst others;GbajabiamilaV. CBN & ORS (2014) LPELR22756 (CA); Araba Shiita Dada & 8 Ors V. Adeniran Adedokun Ventures & 6 Ors LER (2019) CA/l/578/2014; General Muhammadu Buhari V. Independent National Electoral Commission (2008) LPELR - 814 (SC); Mobil Producing (Nig) UnltdV.L.A.S.E.P.A

(2002) LPELR -1887 (SC) at p.18, 28; Anakwenze v Aneke&Ors (1985) 1 NWLR (Pt.4) 771,778 (1985) 16 NSCC (Pt 11) 798 at 803 and Onokomma v Union Bank (2017) LPELR42748 (CA).

Before going into the substantive application Claimant counsel raised the issue of demurrer and that the preliminary objection contains only a written address and no affidavit.Having read through the Notice of Preliminary Objection as filed by the Defendant/Applicant and the legal argument proffered by counsel, this Preliminary Objection is predicated upon an issue of law wherein the Defendant is objecting to the Claimant's case on the ground that the Claimant did not file or serve on the Defendant a pre – action Notice as required by law. Therefore, affidavit is not necessarily required on issues of law.On the issue of demurrer, the Supreme Court in**Nigerian Deposit Insurance Corporation v Central Bank of Nigeria (2002) 7 NWLR Part 766 Page 272 at 296-297 Para F-A per Uwaifo JSC**, held as follows:

> *"The tendency to equate demurrer with objection to jurisdiction could be misleading. It is a standing principle that in demurrer, the plaintiff must plead and it is upon that pleading that the defendant will contend that accepting all the facts pleaded to be true, the plaintiff has no cause of action, or, where appropriate, no locus standi .... But as already shown, the issue of jurisdiction is not a matter for demurrer proceedings. It is much more fundamental than that and does not, entirely depend as such on whata plaintiff may plead as facts to prove the reliefs he seeks. What it involves is what will enable the plaintiff to seek a hearing in Court over his grievance, and get it resolved because he is able to show that the Court is empowered to entertain the subject-matter. It does not always follow that he must plead first in order to raise the issue of jurisdiction."*

Thus, where an objection has to do with jurisdiction simpliciter, it can be raised whether or not the defendant had filed pleadings. Where however the matter before the court is complicated as to where it will

require facts and investigation, then the Court may order that pleadings should be filed and the issue raised therein as held in **Shell Petroleum Development & 5 Ors v. Nwawka (2001) 10 NWLR (Pt.720) 64**.

I need to say at this stage that the issue of jurisdiction and demurrer are different. The reason is that the issue of jurisdiction can be raised at any time whether it was pleaded or not. It can be raised by the Court suo motu and even on appeal. So, the issue of jurisdiction stands out being a threshold issue."

From the submissions of the parties the issues for determination are;

1. **Whether having been brought out of time this Court is competent to entertain the application**.
2. While the second, which is dependent on resolution of the first issue in the affirmative, relates to **whether the Applicant'sapplication can be granted.**

On the first issue, learned Counsel for the Claimant referred the Court to **Order 9 Rule 1 (3) of the Rules of Court** to the effect,inter alia, that a defendant entering appearance shall within 7 days serve a copy of the memorandum of appearance on a claimant's legal practitioner. Counsel argued that the Defendant/Applicant filed a Memorandum of conditional appearance 40 days after service of the Originating summons on them, with no application to regularize their process, no leave of court sought and no motion for extension of time contrary to the 7 (seven) days stipulated by the rules of this honourable court for a sealed copy of the Memorandum of appearance to be served on the Claimant's legal practitioner.

I have considered the submission of the learned counsel on this issue.In my opinion the defect if any is cured by **Order 5 Rule 1(1) & (2)of the High Court of the Federal Capital Territory Civil Procedure Rules 2018**which states:

(1). Where in beginning or purporting to begin any proceedings there has by reason of anything done or left undone, been a failure to comply with the requirements of these rules, such failure shall not nullify the proceedings.

(2) Where at any stage in the course of or in connection with any proceedings there has by reason of anything done or left undone been a failure to comply with the requirements as to time, place, manner, or form such failure may be treated as an irregularity. The court may give any direction as he thinks fit to regularise such steps.

The Court in**VORO V. VOTOH (2016) LPELR-40341 (CA)**had held that;

"A litigant, except he be guilty of some form of misconduct or ill behaviour in the failure or mistakes of his counsel, should rarely if at all or ever, be punished for such mistake of his counsel of which the litigant has no hand or contributed to its occurrence".

The litigants should not be punished for the tardiness of the Lawyer in the performance of his duty. Thus non – compliance in this regard in the instant case, ought to be treated as an irregularity and I so hold.

Next is the second issue having answered the first issue in the affirmative to wit; "**whether the Applicant's application can be granted**".Now the requirement for pre action notice on a Local Government is a condition precedent to the invocation of the Court's jurisdiction. Therefore, failure to comply has a serious effect on the jurisdiction of the Court. It is an intrinsic requirement and a failure is not a mere irregularity but a fundamental defect which calls to serious question the issue of jurisdiction and renders the entire proceeding a nullity.

The Defendant in this case is a Local Government within the federal capital territory. To sue a Local Government in the federal capital territory the aggrieved party is required to issue to the Local Government a pre-action Notice. This position is in accordance with

Section 124 the Local Government Act 1976, vol. 3 of the Federal Capital Territory of Nigeria which provide as follows: -

Section 124(1):

> "*No suit shall be commenced against a Local Government until a month at least after written notice of intention to the same has been served upon the Local Government by the intending plaintiff or his agent. Such notice shall state the cause of action, the name and place of abode of the intending plaintiff and the relief which he claims".*

From the tenor of **Section 124 of the Local Government Act 1976,** an intending Plaintiff must mandatorily serve a Local Government a written pre-action Notice which length of time must be one month prior to commencing an action against the Local Government. By the same token, the said Section 124 clearly state the content of such Notice which has to contain the cause of action, the name of the intending Plaintiff and his place of abode as well as the relief which the Plaintiff intends to claim. This Notice is mandatory. Therefore, the question here is did the Claimant in this suit comply with this statutory requirement?The Claimant/Respondent did not answer in the affirmative rather in its defence submitted that non service of pre action notice is an irregularity which falls within the procedural rather than substantive jurisdiction of the Court. That an irregularity in the exercise of jurisdiction is not the same as total lack of jurisdiction.

I have perused the processes filed by the Claimant at the time of commencement of this action on 11/11/2020.There is no pre action Notice served on the Defendant attached to the process. The consequence is most regrettably fatal to the Claimant's case where it is shown that there is non service of a pre – action Notice, the Court is bound to hold that the Plaintiff has not fulfilled the condition precedent for instituting this action, the action will be considered premature and liable to be struck out. In considering the provisions for pre-action notice, the Supreme Court, Per Ogbuogu JSC, in **Nigercare**

Development Co. Ltd. vs. Adamawa State Water Board & 3 Ors (2008) 2-3 S. C. (PT. II) 202, said:

> *"In my respectful view, 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."*

A pre-action notice is therefore a mandatory notice that has to be given by a plaintiff in required cases before his action can be competent. It is a pre-condition that must be complied with. Any action commenced in breach of this requirement would be incompetent.

In Eze vs. Okechukwu (2002) 12 S.C. (PT. 11) 103, per Uwaifo JSC held;

> *"The requirement of pre-action notice where this is prescribed by law is known to have one rationale. It is to apprise the defendant beforehand of the nature of the action contemplated and to give him enough time to consider or reconsider his position in the matter as to whether to compromise or 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 defendant is entitled to before he may be expected to defend the action that may follow."*

The Supreme Court further said on the issue of pre-action notice:

> *"It is a special defence available to an appropriate defendant by statute (or contract) which he ought to raise to the effect that he has not been served with the requisite pre-action notice and therefore that the action is incompetent or premature. Such a defence of non-service which is a matter of fact, should be raised in the proper manner of the trial Court preferably soon after the*

defendant is served with the writ of summons. If not so raised, the fact of non-service ought to be pleaded in the statement of defence".

The requirement for service of pre-action notice is a procedural requirement. But it is one that must be complied with, except it is waived by the beneficiary. It has been well articulated that the incompetence of the action as a result of non-service of a pre-action notice resulting in the

Court being unable to exercise its jurisdiction to proceed with the hearing, is an irregularity which is not such that cannot be waived by a defendant, who has failed to raise it by motion or plead it in the statement of defence. The defendant may choose to ignore the fact of the irregular commencement of the action and decide to waive his right to a pre-action notice as held in **Feed & Food Farms (Nig.) Ltd v NNPC (2009) 6 MJSC (PT 1) 120, per Tobi JSC**.The action commenced in breach of the requirement for pre-action is therefore incompetent; and, there is no jurisdiction for a Court to entertain an incompetent matter.

You cannot put something on nothing and expect it to stand, it will fall.It is trite law that where a suit is incompetent as in this case as a result of non-fulfillment of a precondition in commencing the action, the Court will lack jurisdiction to entertain the case.Having found that the application is incompetent and the Court has no jurisdiction to entertain same, I must proceed to do the needful by striking same out for being incompetent and for lack of jurisdiction. The Originating Motion is accordingly hereby struck out.

However, in this circumstance, the jurisdiction of the Court is only ousted temporarily or put on hold, pending compliance. When the Claimant/Respondent complies with the requirement for pre-actionnotice, they can proceed to prosecute their claim. See in **Eze vs. Okechukwu (supra).**

Parties: Absent

Appearances: U. P. Ogaraku appearing for the Defendant. Plaintiff is not represented.

HON. JUSTICE MODUPE OSHO-ADEBIYI
JUDGE
30TH MARCH, 2022