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

THIS WEDNESDAY THE 1ST DAY OF FEBRUARY, 2023.

BEFORE: HON. JUSTICE ABUBAKAR IDRIS KUTIGI -- JUDGE

SUIT NO: CV/3144/2020
MOTION NO: M/5695/2021

BETWEEN:

ZHEJIANG PUFA GROUP BUILDING MATERIALS LTD ..... CLAIMANT/RESPONDENT

AND

1. **CHRIS JONATHAN OLUWAFEMI .... DEFENDANT/RESPONDENT**
   (Also known as Ajongolo Oluwafemi John and Ajongolo Oluwafemi Jonathan, doing business as Tin Tan Services)

2. **NIGERIA NATIONAL PETROLEUM CORPORATION ..... DEFENDANT/APPLICANT**

3. **FIDELITY BANK ..... DEFENDANT/RESPONDENT**

RULING

By a notice of preliminary objection, the 2nd Defendant/Applicant prays for the following Reliefs:

1. **An Order striking out the suit of the Claimant herein constituted for want of jurisdiction for failure to fulfil a condition precedent for the institution of an action against the 2nd defendant.**

2. **An Order striking out the suit of the Claimant herein constituted for want of jurisdiction as the suit is statute barred.**

3. **An Order of this Honourable Court striking out this suit for want of jurisdiction on the ground that the Claimant as constituted on the face of its Originating processes is unknown to law, not being a legal or a justice person.**

4. **And for such further orders as this Honourable Court may deem git to make in the circumstances.**

The Grounds of the application as contained on the motion paper as follows:

1. **This Honourable Court lacks jurisdiction to entertain this suit.**

2. **This suit is statute barred as it was instituted more than 12 months after the course of action arose contrary to the provision of Section 12 (1) of the NNPC Act, Cap N123, LFN 2004.**

3. **The claimant did not serve pre action notice on the 2nd defendant which is mandatory to fulfil the condition precedent to warrant the exercise of jurisdiction by this honourable court as provided for in Section 12 of the NNPC Act, Cap N123, LFN 2004.**

4. **The claimant lacks legal capacity to institute this action.**

5. **The suit is not competent.**

In support of the application is a 7 paragraph affidavit with two (2) annexures marked as **Exhibits A** and **B**. A written address was filed in compliance with the Rules of Court in which three (3) issues were raised as arising for determination thus:

1. **Given the claimant's failure to fulfil the mandatory condition precedent for the institution of this suit against the 2nd defendant, whether this suit can be said to be competent?**

2. **Having regard to the institution of this suit outside the twelve months of the course of action arisen (sic) whether this suit is not statute barred, thus robbing the court of jurisdiction to entertain same?**

3. **Whether this Honourable Court has the requisite jurisdiction to entertain and determine this suit which was initiated by a person without legal capacity?**

Submissions were then made on the above issues which forms part of the Record of Court. I will only highlight the essence of the submissions of the issues as made out.

On **issue 1**, the case made out is that by the provision of **Section 12 of the Nigerian National Petroleum Corporation Act, Cap N123 LFN 2004 (NNPC Act)**, it is mandatory for the claimant to first issue and serve a 30 days pre-action notice on the 2nd defendant before instituting the present action but that the claimant failed or neglected to do so and that service of this pre-action notice was a condition precedent that must be complied with before an action can be maintained against 2nd defendant. The cases of **NNPC V Evwori (2007) All FWLR (pt.369) 1324; UTEK V Official Liquidator (2009) All FWLR (pt.475) 1774 at 1791** were cited.

On **issue (2),** the case made out is that the present action is statute barred. That by virtue of **Section 12 (1) of the NNPC Act, Cap N123, LFN 2004**, the present action ought to have been filed within twelve (12) months after the act, neglect or default complained of or in the case of a continuance of damage or injury, within 12 months next after the ceasing thereof.

It was submitted that the case of claimant can be summarised with specific reference to paragraphs 7, 8 and 9 of the statement of claim and that from those paragraphs, the claimant stated that it completed payment for the crude oil it wanted to purchase since 2017 but that the 1st and 2nd defendants failed to deliver the cargo which they claimed to have been loaded on a ship with available 4 Million barrels of Bonny Light Grade Oil (BLCO) for more than 3 years.

That the claimant woke up from its apparent slumber sometimes in November 2020 and commenced this action outside the period permitted by the applicable law, the NNPC Act, thereby making the action statute barred and accordingly that the court lacks jurisdiction to entertain the case and same be struck out. The cases of **Archianga V A.G. Akwa Ibom State (2015) 6 NWLR (pt.1454) 1 at 55, Sylva V Inec (2015) 10 NWLR (pt.1486) 576; Ndaeyo V Ogunnaya (1977) 1 SC 11** were cited amongst other cases.

On **issue (3),** it was contended that the juristic personality of claimant is in question here and that it goes to the jurisdiction of the court. That in law a non-juristic person cannot sue or be sued. That it follows that no action can be brought by or against any party other than a natural person(s) except where such a party has been conferred with legal capacity either expressly or impliedly.

That in this case, the claimant only described itself as a company in its claim but that it is not a juristic person. That the claimant did not include its certificate of incorporation in its list of documents to be relied on which was filed as part of its originating processes neither was it frontloaded as evidence of its been incorporated. It was further submitted that having challenged the legal capacity of claimant, the burden was on the claimant to establish its legal personality by credible evidence which it failed to discharge. The cases of the **Administrators/Executors of the Estate of General Sanni Abacha (Deceased) V Eke-Siff (2009) 7 NWLR (pt.1139) 97 at 176; Bank of Baroda V Iyalabani Co. Ltd (2022) 12 SCM 7** were cited. It was finally contended that the claimant has failed to establish its legal capacity to institute and maintain this action and thus it should be struck out.

The Claimant/Respondent filed a 6 paragraphs counter-affidavit with 2 annexures marked as **Exhibits PUFA1** and **PUFA2**. A written address was filed in compliance with the Rules of Court in which no was raised, streamlined or identified. The address commenced by stating that a court has no business delving into issues that are not properly placed before it or to make a case different from that made by the parties themselves.

It was contended that a look at the Relief sought in the preliminary objection is for the entire suit to be struck out. That it is the only relief that can be granted and that the court cannot amend the relief. That it is either refused or granted.

That as the relief is presently constituted, it cannot be granted because the case against 1st and 3rd defendants does not suffer any impairment, therefore why should the entire case be struck out?

It was further submitted that cases are fought on the basis of facts pleaded. That where a party alleges that he is entitled to a pre-action notice and none was given to him, he must state so by way of pleadings; that it is not a matter to be raised by affidavit. The case of **Edu V Access Bank Plc (2020) 4 NWLR**

(pt.1715) 417 at 438; Nocklink Ventures Ltd V Arah (2020) 7 NWLR (pt.1722) 63 at 93 were cited.

It was submitted that by the provisions of **Order 23 Rule 2 (1)** and **(2) of the Rules of Court** parties are allowed to raise points of law in their pleadings and the court is entitled to set same down for hearing and if it proves decisive on the point, then the appropriate order will be made. Again that the provision of **Order 15 Rules 6** and **7 (1) of the Rules of Court** was cited to the effect it demands that all conditions precedent to the commencement of the suit and all defences which make on action unmaintainable must be pleaded.

That the 2nd defendant has not filed any defence and thus not complied with the basic condition precedent for the court to competently hear this objection.

The 2nd defendant/applicant then filed an 8 paragraphs further and better affidavit in response to the counter-affidavit of respondent with one annexure marked as **Exhibit NNPC1**. A Reply on points of law was filed with this affidavit which equally forms part of the Record of Court. In the Reply address it was submitted that the preliminary objection is grantable as it has stated clear grounds for the objection.

On the issue that the point of pre-action must be pleaded before it can be taken, it was submitted that the contention is wrong as the issue of jurisdiction is fundamental and can be taken without the need to file pleadings. The cases of **Madukolo V Nkemdilim (1962) 2 SCNLR 341; Ajayi V Adebiyi & ors (2012) LPELR-381** were cited.

Learned counsel stated that the case of **Edu V Access Bank Plc (2020) 4 NWLR (pt.1715) 417 at 438** is not applicable to the case as it is distinguishable because in that case, the Appellant filed a statement of defence and did not raise the issue of a pre-action notice. He then subsequently filed a preliminary objection on the ground of non-service of a pre-action notice. The lower court heard the objection and dismissed the case but the Court of Appeal said it was wrong as the failure to plead the non-service of a pre-action notice was regarded as a waiver.

The Applicant contends that this scenario did not play out in this case as they have not waived their right to a pre-action notice neither have they filed a statement of defence.

It was finally contended that the issue of jurisdiction is a threshold issue that cannot be defeated by Rules of Court.

At the hearing, counsel on either side relied on the contents of the processes they filed. The Applicant urged the court to resolve the issues raised in its favour and strike out the suit of the claimant. On the other side of the aisle, the claimant/respondent prayed the court to dismiss the objection and set the matter down for hearing.

I have carefully considered the processes filed on both sides of the aisle together with the oral adumbration by Counsel. I am of the opinion that the issues raised or framed by the Applicant fully captures the crux of complaints streamlined on the objection and it is on the basis of the said three issues that I will determine the extant objection.

Before proceeding to deal with the substance, I will first resolve the two preliminary issues or points raised by learned Senior Advocate for the plaintiff/respondent.

Firstly, learned Senior Counsel contends that the relief sought on the preliminary objection is for the **entire suit** to be **struck out** and that is the only relief that can be granted or refused and that the court does not have vires or powers to amend the relief sought by party. He contends further that the relief as sought is not grantable because the case against 1st and 3rd defendants does not suffer any impairment. He then asked rhetorically why the case against them should be struck out?

Let me start by saying that a prayer or relief in civil jurisprudence is simply a portion of a complaint in which a party describes or defines the remedy he seeks from court. It is equally true that a relief or remedy must be specifically stated and the relief or remedy sought clearly spelt out.

The relief itself on its own does not however define or streamline the crux of the complaint(s) in the motion and cannot be treated independent of the complaint(s) as respected learned silk seeks with profound respect to do here. It is conceded that the relief usually has a nexus or is linked with the complaint but it is a determination of the complaint or issues raised that now determines whether the relief sought is granted. A party may formulate any relief he chooses; it is however the consideration of the issues in dispute, if successful in

his favour, that now determines whether the relief is grantable. The crux of this dispute from the objection is clearly situated within the body of the objection. There is no confusion here. The objection and the grounds stated therein do not project any ambivalence or anything ambiguous. It cannot therefore be right to isolate the relief sought from the defined complaints. Indeed it is difficult to accept that an application or in this case the objection can be construed that way except of course if the intent is to undermine the object it was intended to serve.

At the risk of prolixity, the Application or objection has precisely raised defined issues. The Relief may rightly suffer accusations of been inelegantly framed and lacking finesse but that cannot affect the contents or substance of the serious legal issues raised.

The court will be loathe to accept an interpretation of the essence of the preliminary objection that will result in defeating the essence of the application or an interpretation that will essentially prevent a resolution of the clear issues raised by the objection. That with respect will be taking extreme liberties with technicalities.

The fact that the Applicant has sought for the striking out of the whole action cannot by any stretch of the imagination mean or have the effect that the question of failure to serve 2nd defendant a pre-action notice cannot be heard even if strictly speaking the impairment has nothing to do with 1st and 3rd Defendants? As rightly argued by learned SAN, the issue of pre-action notice is a matter of procedural jurisdiction which enures only in favour of the party entitled to it. Indeed it can be waived by the party entitled to it. See **Mobil Prod. (Nig.) Unltd V (2003) 1 MJSC 112 at 132; Ndayako V Santoro (2004) 13 NWLR (pt.889) 187 at 219**.

If that is the position, then if the question of failure to serve a pre-action notice is answered in the affirmative, the success logically will only avail the party entitled to it. No more. The formulation here of striking out the whole matter where only one party is entitled to the notice out of the three defendants will be of no significance, if any, at all.

The cases therefore cited by learned counsel that a court will be granting what was not claimed has no application here. A court in the present circumstances will be in order in granting what was not only claimed but creditably

established. It is settled that a court is not a charitable institution but a party in law may be granted less but not more than claimed.

The point to again underscore is that a relief on its own is devoid of any value. A party or counsel on his behalf has to be up and doing in canvassing the relief he seeks. Therefore a party must move the court on each prayer or relief and any of such prayer that is left unattended would be taken by the court as abandoned. The duty and jurisdiction of court is to entertain whatever has been presented to it as in this case and decide one way or the other. See **Society B.C.S.A. V Charzin Ind. Ltd (2014) 4 NWLR (pt.1398) 497; Oforkire V Maduka (2003) 5 NWLR (pt.812) 166.**

On the whole, the extant objection has clearly and positively situated questions to be determined. Whether the questions raised enures in the favour of the Applicant is however a different matter altogether. The Relief therefore sought or as formulated has no negative impact on the consideration and determination of the substance of the Application.

The 2nd point raised has to do with the failure to file a defence and to plead the issue of failure to file a pre-action before filing the extant objection.

Now it is settled principle of general application that the issue of 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."**

The failure to serve a pre-action notice on the authorities falls within the above third element or ground and therefore a jurisdictional point.

The Apex Court in **Nnonye V Anyichie (2005) 2 NWLR (pt.910) 633 at 647** per Akinta JSC stated as follows:

> ***"As has been shown earlier above, the objection on jurisdiction was founded on non-compliance with the requirement of a pre-action notice which does not abrogate the right of a plaintiff to approach the court or defect his cause of action. If, therefore, the subject matter is within the jurisdiction of the court, as in this case, failure of the plaintiff to serve the pre-action notice on the defendant gives the defendant a right to insist on such notice before the plaintiff may approach the court. In other words, non-service of a pre-action notice merely puts the jurisdiction of a court on hold pending compliance with the pre-condition... "***

As a logical corollary, the question of jurisdiction on the authorities is a threshold issue and the very basis or lifeline on which a court tries or decides any dispute in court. Where an action is not competent or properly constituted, it robs the court of jurisdiction to entertain same and must be dealt with first. See **Ofia V Ejem (2006) 11 NWLR (pt.992) 652 at 663.** Because of its

importance, it can be raised at any stage of the proceedings and even on appeal and in any manner.

Indeed time does not run against the raising of jurisdiction by a party. See **Galadima V Tambai (2000) 11 NWLR (pt.677) 1. In Nuhu V Ogele (2003) 18 NWLR (pt.852) 231 at 279**, the Supreme Court per Edozie JSC stated instructively as follows:

> ***"It has long been settled that where an objection to the jurisdiction of an inferior court appears on the face of the proceedings and I will add, manifested in the uncontroverted affidavit evidence of the parties, it is immaterial by what means or by whom the court is in formed of such objection. … The issue of jurisdiction being fundamental to the existence of the writ or claim, the form, nature or procedure of how it is raised is not strictly material. Where a challenge to the decision of a court is founded on lack of jurisdiction, the court is bound to consider such challenge. A party to a litigation cannot be shut out and the court inhibited from entertaining a matter on technical ground particularly where the issue of jurisdiction is concerned."***

It is true as argued by learned silk for the respondent that a distinction must be drawn between two types of jurisdiction viz jurisdiction as a matter of procedural law and jurisdiction as a matter of substantive law. While a litigant can waive the former, no litigant can confer jurisdiction in the court where the constitution or a statute or any provision of common law says that the court shall have no jurisdiction. A litigant may submit to procedural jurisdiction of the court e.g where a writ has been served outside jurisdiction without leave. See **Ndayoko V Santoro (supra)**.

In this case, the right to be served with a pre-action notice is a matter relating to jurisdiction as a matter of procedural law and a domestic right which can be waived, but where the party entitled to it insists on service of same, the jurisdiction and or competence of the court to hear and entertain such a case is directly in question because that would mean that there is a feature which prevents the court from exercising jurisdiction and the case was not initiated by due process of law and upon fulfilment of a condition precedent to the exercise of jurisdiction. See **Madukolu V Nkemdilim (supra)**.

Accordingly, I hold that the failure to file a defence has no bearing with the competence of the application. Where a challenge to jurisdiction is posed, the parties need not plead or the defendant peremptorily required to raise the jurisdictional issue in his defence before filing the challenge. I am therefore again unable to agree that the application is incompetent.

Now to the substance. The first issue situated within Ground 1 of the objection is that of the alleged failure to issue a pre-action notice to the 2nd defendant in compliance with the provision of **Section 12 of the NNPC Act** and thus incompetent.

Now it is stating the obvious that most legislations make room for service on a defendant 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.**

Now **Section 12 of the NNPC Act** provides as follows:

> ***"Notwithstanding anything in any other enactment, no suit against the Corporation, a member of the Board or any employee of the Corporation for any act done in pursuance or execution of any enactment or law, or of any public duties or authority, or in respect of any alleged neglect or default in the execution of such enactment or law, duties or authority, shall lie or be instituted in any court unless it is commenced within twelve months next after the act, neglect or default complained of or, in the case of a continuance of damage or injury, within twelve months next after the ceasing thereof."***

The above provision appear to me clear and unambiguous. The principle is settled that in the interpretation of a statute, where the language used is plain and unambiguous, effect must be given to its plain and ordinary meaning without resort to any intrinsic or external aid unless this would lead to manifest absurdity or injustice. See **Okotie Eboh V. Manager (2004)18 N.W.L.R**

(pt.905)242 at 186-187 HB; Olanrewaoju V. Gov. of Oyo State (1992)9 N.W.L.R (pt.265)335 at 362.

The important question here is whether the claimant complied with the above provision. In the counter-affidavit filed by claimant to the objection, they stated in paragraph 5 that they issued a pre-action notice and that the 2nd defendant responded vide **Exhibits PUFA1** and **PUFA2**.

Now in reaction to the above, the 2nd defendant in its further affidavit stated as follows in paragraph 7 (a) – (d) thus:

"7. That in line with paragraph 6 above, Mr. Emmanuel Orih, the Manager of the 2nd Defendant/Applicant's Crude Oil Terminal informed me in our office at No. 2 Mungo Park, Jesse Jackson, Off Asokoro FCT Abuja, on the 24th day of June 2022 at about the hour 14:00 of the following facts and I verily believed him to be telling me the truth.

a. That the pre action notice i.e Exhibit PUFA 1, that was served on the 2nd Defendant/Applicant was in respect of Suit No. CV/3145/2020 between ZHEIJANG PUFA GROUP LTD V. PERRAHUMS NIG LTD AND 3 ORS wherein Perrahums Nig Ltd was alleged in Exhibit PUFA 1 to have committed some infractions against the Claimant/Respondent herein.

b. That Exhibit PUFA1 did not state the names of the 1st Defendant who was alleged to be the one acting on behalf of the 2nd Defendant/Applicant nor does the Exhibit PUFA1 contains claims or facts leading to the cause of action of this suit.

c. That there is no correlation between the content of Exhibit PUFA1 and the Statement of Claim of the Claimant/Respondent in this present suit. The Statement of Claim of the claimant is herein attached and marked as EXHIBIT NNPC1.

d. That the pre action notice and reply thereto attached as Exhibit PUFA1 and PUFA2 are with regards to distinct matter and has no correlation to the case before this Honourable Court."

Now I have carefully gone through the 51 paragraphs statement of claim in this case and it would appear that there is a complete disconnect between the pre-action notice **PUFA1** claimant claims they issued in this case and the extant case. **Exhibit PUFA1** situates the cause of complaint as relating to the appointment of **Perrahums Nig. Ltd** by NNPC as a **Fiduciary Agent** to sell 30, 000, 000 barrels of Bonny light Crude Oil quarterly and that certain payments to the tune of USD500, 000, 000 was made to this agent by claimant to supply Bonny Light Crude Oil which was never supplied. This pre-action notice was essentially for recovery of this amount and attendant damages. This letter is clear and unambiguous.

Now in the extant case before me, no where did **Perrahums Nig. Ltd** who is the Fiduciary Agent said to be appointed by 2nd defendant appear. In the entire claim, this Fiduciary Agent was not directly mentioned except in the context of similarities drawn to similar transaction in which Perrahums Ltd was involved.

Indeed by the statement of claim in this case, the Fiduciary Agent appointed by NNPC or 2nd defendant is the 1st defendant **Chris Jonathan Oluwafemi (Also known as Ajongolo Oluwafemi John and Ajongolo Oluwafemi Jonathan doing business as Tii Tan Services)**

It is therefore clear as crystal that the contents of **PUFA1** does not feature 1st defendant who was said to have acted for 2nd defendant in the **extant case**. There is therefore no nexus between the contents of **Exhibit PUFA1** and the statement of claim in this case.

At the risk of prolixity, the extant statement of claim before me projects unequivocally that 1st defendant is the Fiduciary Agent and representative appointed by 2nd defendant to represent it and that it was 1st defendant who allegedly informed claimant that there was 4 million barrels of Bonny Light Crude Oil on a ship already in Quingdao. See **paragraphs 7** and **8** of the claim. I am in no doubt that **Exhibit PUFA1** has no correlation with the extant case. The said pre-action notice clearly relates to another or different transaction as rightly pointed out by the claimant themselves in **paragraphs 20** and **49** of the claim thus:

"20. The Plaintiff had a similar transaction as the present one which was brokered by a Nigerian Company Perrahums Ltd. In the contract between the parties, they agreed, as is the custom, that from the price

for a barrel of Crude Oil, the seller will pay to the Plaintiff the sum of $10.00. There was a similar agreement in respect of the present transaction.

49. The Plaintiff is a going commercial concern which applied its money by way of its trade and for profit. Usually the plaintiff make 20% of any sum it invests as profit. When the plaintiff did this "business" with the Defendants one barrel of Bonny Light Crude Oil was USD50. In a sister transaction between the 2nd Defendant and the Plaintiff, but brokered by another of their allies Perahum Ltd, it was agreed that the plaintiff was to be paid USD10 per barrel of all and USD10 is 20% of USD50. This payment is standard in all oil sales transactions."

The above is confessional and self defeating. It confirms in no uncertain terms that **PUFA1** does not relate to this case but a different case or transaction as stated in the above paragraphs. This transaction by **Perrahums Ltd** is also already subject of another case or litigation in a different court which situates that claimant has sued this Perrahum Ltd and the pre-action notice vide **PUFA1** was in respect of that case.

The claimant did not in substance controvert the contents of the further affidavit and the originating process attached as NNPC1 involving the following parties in **CV/3145/20: Zhejiang Pufa Group Building Materials V Perrahums Ltd & 3 ors**.

In the absence of any counter evidence, the facts relating to the filing of this case by claimant is deemed admitted. As a logical corollary, I accept that **Exhibit PUFA1** is clearly in respect of that case and has **nothing to do** with the extant case.

In the circumstances, it is clear that the claimant has not served the required pre-action notice on the 2nd defendant and accordingly this puts the jurisdiction of court on hold pending compliance with the pre-action condition. See **Nnonye V Anyiche (supra)**.

This then leads me to the next issue or questions with respect to whether the case is statute barred covered by Ground 2 of the objection.

Again, it is situating the obvious that certain enactments stipulate a time limit within which a party who alleges that his civil rights and obligations are

stamped on must approach the court for redress. If such a wronged party fails or neglects to institute an action on schedule, as permitted by that enactment, his suit becomes stale and statute barred. Such a party is taken to be indolent who has slept on his violated rights. His tardiness in not taking action within the statutory period, makes the court to lose the jurisdiction to entertain his claim. See **Ajayi V Military Administrator of Ondo State (supra); Ekiti State V Aladeyelu (2007) 14 NWLR (pt.1055) 619**.

The limitation law or statute, the present action is said to have fallen foul of is the provision of **Section 12 (1) of the NNPC Act** which provides as follows:

> ***"Notwithstanding anything in any other enactment, no suit against the Corporation, a member of the Board or any employee of the Corporation for any act done in pursuance or execution of any enactment or law, or of any public duties or authority, or in respect of any alleged neglect or default in the execution of such enactment or law, duties or authority, shall lie or be instituted in any court unless it is commenced within twelve months next after the act, neglect or default complained of or, in the case of a continuance of damage or injury, within twelve months next after the ceasing thereof."***

The above provision is clear. Again in law, it is settled principle of general application that where the words of a statute are clear, the court shall give effect to their literal meaning. See **Adewunmi V A.G. Ekiti State (2002) 2 NWLR (pt.751) 474 at 511 – 512 H-B**.

The Act situates a time sensitive criteria of 12 months to commence an action after the act or neglect complained on, or in the case of a continuance of damage or injury, within 12 months next after the ceasing thereof.

The next question to determine in the context of the facts streamlined in the claim is whether the case was brought within time. In addressing this issue, we must first determine how a court knows or determines that a suit is statute barred.

The formula on the authorities is fairly straightforward. A court looks at the filed writ of summons and statement of claim alleging when the wrong was committed by the defendant, that is when the **cause of action** accrued, and situate the date with that when the writ of summons was filed in court. If the

date of the filing as endorsed on the writ, is beyond that permitted by the limitation law, then the action is statute barred. See **Amusan V Obideyi (2005) 14 NWLR (pt.945) 322; Asabosa V Pan Ocean Oil (Nig.) Ltd (2008) 4 NWLR (pt.971) 595**. If otherwise, then it is not statute barred. Let me quickly add that on the authorities, negotiation is not reckoned with as it does not break the period of limitation. That is to say time for limitation runs during negotiation. See **N.B.N Ltd V A.T. Eng. Co. Ltd (2006) 16 NWLR (pt.1005) 210; Ibeto Cement Co. Ltd V A.G. Fed (supra).**

The duty of court now is to determine the cause of action in this case, when it accrued and most importantly whether the provision of **Section 7 (1) (a) and 4** is applicable to the case of plaintiff. In resolving this issue, the court must have recourse to the statement of claim. Parties on both sides have understandably set out in different terms the cause of action and when it accrued. That is their right but then the court must still do its duty by carefully perusing the claim to precisely situate the cause of action and when it accrued.

Perhaps it may be apposite to first define what a cause of action is. In **Akibu V Oduntan (2000) 13 NWLR (pt.685) 446 at 463**, the Supreme Court defined cause of action as follows:

"A cause of action is 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:

a. **The wrongful act of the Defendant which gave the Plaintiff his cause of complaint, and**

b. **The consequent damage."**

I have here carefully gone through the writ of summons and the rather voluminous 50 paragraphs statement of claim. In so far as can be evinced from the statement of claim, the fact or combination of facts on which plaintiff has premised his right to sue seem not difficult to recognise and or discern.

I will highlight the **essence** of the case made out without going into unnecessary details as I had already alluded to aspects of the case of claimant.

For purposes of clarity, the case of plaintiff from the statement of claim situates that it had a contract to supply Bonny Light Crude Oil which was said to be

available in Nigeria and it reached out to 2nd defendant who it was alleged introduced 1st defendant as its Fiduciary Agent to represent it in all questions and enquiries.

Claimant said it made contact with 1st defendant who informed them that he had 4 million barrels of Bonny Light Crude Oil (BLCO) on a ship in Quingdao and that if they meet all logistics, the cargo will be transferred.

The claimant in paragraph 14 of the claim then averred that it made payments at different times in 2017 but neither the oil stationed in Quingdao was delivered or money paid back. The moneys claimant paid to defendants as alleged was streamlined in **paragraph 28** of the claim thus:

"28. The 3rd Defendant received monies from the Plaintiff as follows:

a. **$250, 000 on 30th August, 2017**
b. **$250, 000 on 3rd July, 2017**
c. **$187, 500 on 11th September, 2017 and $148, 600 on 23rd September, 2017."**

The above represented the total sums claimant paid and all were in 2017. Indeed the last payment was in September 2017.

In paragraph 16, the claimant stated that the "total amount paid over to the defendants was USD 836100 and yet no Bonny Light Crude Oil was sold or delivered." In paragraphs 17 and 18, the claimant stated that after the last payment and no crude was supplied, it became restive and started suspecting that the whole thing was a scam and that to calm frayed nerves that the 2nd defendant undertook to refund the plaintiff all its expenditure and to pay a penalty of US1, 000, 000 USD should the transaction fail. In paragraph 18, it stated categorically that the transaction failed but the defendants have not refunded either the expenditure sum of $836, 100 nor paid the penalty of USD 1, 000, 000. What is interesting in this case is, that the claimant in paragraphs 45 and 46 agreed that it had been fleeced and reported the matter to the police.

I have deliberately and at some length situated the material averments in this case and it shows that the last payment for the oil was made as far back as 23rd September, 2017 and since then up till the filing of this suit on 10th November, 2020, a period of nearly 3 years, neither the 4 million barrels of Bony Crude Oil

said to have already been loaded or the money paid by claimant has been received by claimant.

On the averments, it is really difficult on the very fluid facts as presented to precisely situate when the cause of action arose except of course the court engages in an idle exercise in speculation which it has no jurisdiction to do.

As I have demonstrated, the contract may have been in 2017 and payments made but nothing was situated or frontloaded situating the terms of the contract. Indeed not one single document relating to the transaction was frontloaded. All the documents pleaded were not frontloaded. Even on the pleadings, there is nothing situating when the report to the **police** was made to provide basis to situate when the breach can be said to have occurred.

As alluded to already, there are clearly no specifics with respect to dates and there is a real difficulty on the part of the court to situate when the wrongful act crystallised and time can be said to effectively begin to run.

The bottom line is that on the basis of the claim before me, there is no real clarity on a date or clear facts putting the court in a commanding height and firm position to say that on a particular date or day, there was in existence a person or party who can sue and another who can be sued and all facts had happened which are material to be proved to enable the plaintiff to succeed.

In law, cause of action arises on a date or from time when a breach of any duty or act occurs which warrants the person who is injured or the victim who is adversely affected by such breach to take a court action to assert or protect his legal right that has been breached or violated. See **A.G. Adamawa State & ors V A.G. Fed. (2014) LPELR-23221 (SC)**.

The point to perhaps underscore is that cause of action arises on the date of occurrence, neglect or default complained of and not the consequence of the neglect or default. Once a person will be adversely affected by a breach or any act which would warrant the taking of an action in court as in this case, a cause of action would have accrued. See **Mosojo V Oyetayo & ors (2003) LPELR – 1917 (SC); Dada V Aina & ors (2007) LPELR – 8305.**

In the circumstance, the present objection cannot properly be taken. This legal point can only therefore only be properly taken after facts, if they exist, are first adduced in or established in evidence to allow for the point of law to be taken.

It cannot be taken in a vacuum or where the facts are obscure as in this present situation. The point must be underscored that the 2nd Defendant/Applicant by the objection to dismiss this action in limine is deemed to have admitted and accepted the averments contained in the writ of summons and statement of claim put forward by the plaintiff and it is only upon those facts that the court can determine the application and not any other extraneous consideration or submissions. I find authority for this in the pronouncement of the Supreme Court in **Woherem V Ehereuwa (2004) 13 NWLR (pt.890) 418 at 419** per Iguh JSC as follows:

> ***"Another point that ought to be borne in mind is that the application of the respondents, as defendants, before the trial court was by way of a preliminary objection for the dismissal of the appellant's suit in limine on the ground of Limitation of Action Law of Rivers State of Nigeria, 1988. The principle of law is well established that an application by way of preliminary objection for the dismissal of a suit in limine may be made on points of law and where there are no facts in dispute for the purpose of determining such a objection. See Bello Adegoke Foko and others V Oladokum Foko and another (1968) NMLR 441. The applicant relies only on the facts as stated by the plaintiff in the writ of summons and statement of claim. The facts stated by the plaintiff in the writ of summons and statement of claim are for that purpose deemed to have been admitted by the defendant/applicant. See Ayanbode V Balogun (1990) 5 NWLR (pt.151) 392 at 407. Where, however, disputes as to facts appear on the pleadings of the parties, as is the case in the present application, it is only open to a defendant to raise a preliminary objection on the face of the plaintiff's writ of summons if the said defendant accepts the plaintiff's averments of fact either on the writ of summons or on his statement of claim but submits that even in those circumstances no cause of action would appear to have been disclosed or that the court has no jurisdiction to entertain the suit or that the action is statute-barred by virtue of some Limitation Law. But, if facts exist, which must first be adduced in or established by evidence to enable a point of law to be sustained, the preliminary objection may not be properly taken. See Banjo and others V Eternal Sacred Order of Cherubim and Seraphin (1975)3SC 37. Similarly if the facts to sustain the preliminary point are obscure or at large, a preliminary objection may not properly be taken. A matter, therefore, which is raised by way***

of preliminary point but which may be answered if evidence is adduced cannot be properly raised as preliminary objection. Such a matter is more properly answered by evidence during the trial and shall constitute an issue for determination at the trial."

This matter can only be answered during trial.

The final complaint has to do with the legal capacity of claimant. The case here is that Applicant contends in the affidavit in support that the claimant is not registered or incorporated under any law in Nigeria and is not a juristic person.

Now in the statement of claim, in paragraph 1, the plaintiff describes itself as a "company". The defendant has not filed any defence and so the issue of whether plaintiff is a registered or incorporated body has not been raised as a precisely defined issue. It is not a matter that can be raised or determined via the conduit of an affidavit in an interlocutory application.

If the Applicant wants to challenge the legal capacity of claimant or that it is not registered, then that is a matter that can be determined at the substantive trial and that is where issues are joined on that point.

At this point, it would be premature and even overtly presumptuous, to at the interlocutory stage determine whether the plaintiff is registered or not; this is a matter for trial. The cases of onus of proof with respect to juristic personality of a company and how it is proved or determined remains good law but it is only at trial that the claimant can establish or prove its legal status, if as stated earlier, the defendant joins issue on it.

On the whole, this issue is without doubt premature and cannot be determined now.

On the whole, and for the avoidance of doubt, **issues 1** and **3** are matters properly for trial and cannot be determined now.

Issue 2, for service of pre-action notice has merit and succeeds. In the absence of a pre-action notice, the jurisdiction of the court to entertain this matter against 2nd Defendant must be put in abeyance, particularly since there are two other defendants who suffer no legal impairment. The proper order accordingly will be to strike out the name of 2nd Defendant.

The name of 2nd Defendant is accordingly hereby struck out.

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Hon. Justice A.I. Kutigi

<u>Appearances</u>:

1. ***O. Maduabuchi SAN with Farouk Mamodu for the Claimant/Respondent.***
2. ***Yunus Abdulsalam, Esq. With Fatiu Abdulrahim for the 2nd Defendant/Applicant.***
3. ***Caleb Momoh, Esq., for the 3rd Defendant/Respondent.***