CAN THE REQUIREMENT OF PRE-ACTION NOTICE BE WAIVED?

BY

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Introduction

The Judicial power of the courts in Nigeria is conferred by section 6 (6) of the constitution of the Federal Republic of Nigeria, 1999 which provides that the judicial power shall extend to all matters between persons or between government or authority and to any person in Nigeria and to all actions and proceeding relating thereto, for the determination of any question as to the civil rights and obligations of that person. It is therefore the duty of the court to guard the constitutional rights of its citizens and ward off any infringement of those rights by the state. A corollary of such rights is the right of fair hearing within a reasonable time under section 36 (1) of the said constitution which necessarily involves the right of access to court. However, the courts do not automatically become seized of every dispute except it is brought by the due process of law. Following the due process entails complying with conditions precedent. One of such a condition precedent[1] is the giving of pre-action notices where required by law.

This article examines the question whether the requirement of giving pre-action notice before instituting an action can be waived. This has become necessary because the Supreme Court in *Katsina Local Authority v. Alhaji Makudawa*[2] and *Mobil Producing (Nig.) Unltd v. LASEPA*[3] adopted the position that a pre-action notice as a jurisdictional fact or issue could be waived. However, in the subsequent and more recent decision of *Nigercare Development Co Ltd v. Adamawa State Government*[4], the Supreme Court held that an issue of pre-action notice being a jurisdictional issue can be raised at any stage of the proceeding even for the first time on appeal. This decision is in conflict with the courts earlier decisions and calls into questions the authoritativeness of the earlier decisions[5]. This article would examine the decisions of the Supreme Court and thereafter make suggestions as to the way forward.

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[1] Adedamola K "Pre-action Notices and Access to Court in Nigeria" Nigerian Bar Journal Vol. 2 No. 2 April 2004 P. 205

[2] (1971) 1 NMLR 100

[3] (2002) 18 NWLR (Pt. 798)1

[4] (2008) 9 NWLR (pt. 1093) 498

[5] Ogbulafor C. A. "Can Jurisdiction be waived? Waiver and Jurisdiction in cases involving pre-action Notice: Nigercare Development Company Ltd v. Adamawa State Government & Ors Revisited". The Appellate Law Review Vol. 1. No. 2 Dec. 2009/Jan. 2010 p. 221

What is a Pre-action Notice?

Adedamola[6] has stated that pre-action notices are conditions which a party intending to sue must comply with where such legislation provide for such notices before instituting such action in court by serving prerequisite notices, on the other party. Such condition or condition precedent are necessary for the successful determination of the suit before the court, whether such actions are initiated with due process of law or not. An example of provisions of law requiring pre-action notice is section 83(2) of the Nigerian Railway Corporation Act[7] which provides:

> No suit shall be commenced against the Corporation, until three months at least after written notice of intention to commence the same, shall have been served upon the Corporation by the intending plaintiff or his agent; and such notice shall clearly and explicitly state the cause of action, the particulars of the claim, the name and place of abode of the intending plaintiff and the relief which he claims.

Another example is section 92(1) of the Nigerian Ports Authority Act[8] which provides:

> No suit shall be commenced against the authority before the expiration of a period 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-
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> (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 relief which it claims.

Justification for requirement of pre-action notice

Adedamola[9] has further stated the justification for requirement of notice. According to him, the justification for requirement of notice before a person can commence or institute legal proceeding against certain bodies or persons is based on the fact that sufficient notice of the claim against it is necessary in order not to be taken by surprise and also to give it adequate time to prepare to deal with the matter in its defence

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[5] Adedamola Op. cit. p. 208

[6] Madukolu v. Nkemdilim (1962) 2 SCNLR 341

[7] Cap N129 Laws of the Federation of Nigeria 2004

[8] Cap N126 Laws of the Federation of Nigeria 2004

[9] Adedamola Ibid

and if necessary to settle the matter out of court. The rationale for imposition of pre-conditions for exercise of rights is also based on public policy. It provides that claims to rights must not be exercised in perpetuity. This is so because long dormant claims have more of cruelty than justice in them, above all, the defendant may have lost the evidence to disprove the stale claim. Persons with good cause of action should pursue them with reasonable diligence and those who go to sleep on their claims should not be assisted by the courts, and there should be an end to stale demands[10].

The above justification for the requirement of notice notwithstanding, it is submitted that the requirement is discriminatory since the defendant is not required to give such notice to the plaintiff, when instituting an action against the plaintiff. It also has the tendency of slowing down the judicial process and may arm the defendant to take certain acts to preempt and frustrate the litigation.

It may be argued that the requirement of pre-action notices before instituting actions is unconstitutional in that such requirement impede free access to our courts which is guaranteed by the constitution[11]. Apart from, chapter iv of the 1999 constitution which deals with fundamental rights, sections 13 and 17(2) of the said constitution which fall within the fundamental objectives and Directive Principle of State Policy, although not justiciable, however supplement the judicial powers of the courts as provided for in section 6 of the constitution. Section 13 of the 1999 constitution provides: "It shall be the duty and responsibility of all organs of government, and of all authorities and persons exercising legislative, executive or judicial power to conform to, observe and apply the provisions of this chapter of the constitution." Section 17 (2) (e) on the other hand provides that in furtherance of the social order, the independence, impartiality and integrity of courts of law and easy accessibility thereto shall be secured and maintained.

Despite these constitutional provisions, it appears they are being whittled down by some legislation such as those requiring pre-action notices which deny free and unimpeded access to the courts. The provisions have laid down certain conditions precedent which a party intending to sue must fulfill before instituting an action and failure to comply will make the suit premature and incompetent.

It is important to note that the Supreme Court has held that the giving of pre-action notices relates to statutory duties only imposed on the corporation as a pre-action notice is not required before commencing an action against such corporation where it involves a contractual obligations. Thus in *N.P.A v. Construzioni Generali FCS & Ors,*[12] the Supreme Court considered the effect of section 97 of the Ports Act 1958

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[10] Shell Petroleum Development Company v. Uzoaru (1994) 9 NWLR (Pt. 366) 51

[11] Section 4 (8), 6 (6) (b), 17 (2) (c) and 36 (1) of the Constitution of the Federal Republic of Nigeria 1999.

[12] (1974) 9 NSCC 623

(then applicable) and held that the giving of one month pre-action notice provided under the Act and such like statutes are not applicable to cases relating to specific contracts. It further held that when goods have been sold and the price is to be paid upon a *quantum meruit* the section will not apply to an action for the price because the refusal or omission to pay would be a failure to comply with terms of the contract and not with the provision of the statute. The facts of the case were that the appellant was a statutory corporation entrusted with the management of the Ports of Nigeria, while the first respondent, were building contractors engaged by the appellant to construct the Apapa Wharf extension. The second respondent was the chief executive of the appellant. The appellant sued the respondent for a total sum of £163, 124:00 being payment authorized by the second respondent. The first respondent also counter claimed for the sum of £287,986:00. The appellants claim was dismissed for want of evidence while the counter claim of the respondent was upheld by the court. However, during trial the appellant contended that the notice required under section 97 of the Port Act was not complied with before the action was commenced.

The Supreme Court affirmed the decision of the lower courts holding that the section requiring giving of one month notice did not apply to specific contracts entered into by the corporation and does not apply to the filing of a counter claim where the suit itself was commenced by the very authority for whose protection the section was enacted.

However, in the case of *Umukoro & Ors v. N.P.A & Ors*[13] the Supreme Court held that where it involves statutory duty imposed on the corporation the pre-action notice prescribed under section 97 of the Act must be complied with. The fact of the case were that the appellant sued for the sum of N301,658.90 as compensation agreed, ascertained and certified due and payable for the raffia palms and economic trees destroyed or damaged by the respondent during the construction and building of the Sapele Port Complex (a statutory duty) by the corporation. The appellant commenced the action without giving the statutory notice required by section 97 (1) and (2) of the Port Acts 1958. The Supreme Court affirmed the decision of the lower court by holding that the action is incompetent, null and void for failure to comply with the provisions of the Act before the action was instituted.

Position of the Law Prior to the Decision of the Supreme Court in Nigercare Development Co Ltd v. Adamawa State Water Board & Ors[14]

In 1971, the Supreme Court had cause to make an authoritative statement on pre-action notices in *Katsina Local Authority v. Alhaji Makundawa*[15]. The fact of the case were as follows: In the Upper Area

[13] (1997) 4 NWLR (Pt. 502) 656
[14] (2008) 3 SCNJ 28
[15] (Supra)

Court, judgment had been given against the Katsina Local Authority in a suit in which the plaintiff, Alhaji Barmo Makudawa claimed the cost of 105 cattle sold and delivered to the Katsina Local Authority through its employee, Sarkini Shanu.

The Katsina Local Authority appealed to the High Court, Kaduna arguing inter alia that by virtue of section 116(1) of Local Authority Law, the debt was statute barred; that by virtue of section 116 (2) the proceedings of the trial court was a nullity; and that in any case judgment should not have been entered against the Katsina Local Authority alone, since there were two defendants before the Upper Area Court. The High Court considered the arguments put forward for both sides and eventually dismissed the appeal.

Thereupon the defendants, with leave of the High Court appealed to the Supreme Court where the argument of the appellant ranged around the provisions of section 116 as follows:

(i) That the action had not been commenced within six months of the act, neglect or default of Katsina Local Authority, contrary to section 116 (1).

(ii) That notice had not been served on Katsina Local Authority at least one month before the commencement of the proceedings, contrary to section 116 (2)

(iii) That even if these objections had not been raised at the trial, they could be raised in the High Court or Supreme Court in the course of appeal.

Coker J.S.C delivering the judgment of the Court held that the present proceedings do not come within the types of action described in section 116 (1) of the Local Authority Law and as such, the competency of the proceedings cannot be challenged on that score. Consequently the ground of appeal complaining that the proceedings contravened the provisions of section 116(1) is misconceived and must fail.

The Court further held that in regard to the effect of section 116 (2), it is settled law that where a party intends to rely upon a condition precedent, it must be specifically pleaded. Section 116 (2) prescribes a condition precedent to the competence of any action commenced against a Local Authority.

Furthermore, that although pleadings are not filed or required in connection with suits in the Upper Area Court, so that the opportunity is not available of expressly pleading a condition precedent, it is nevertheless correct that the plea cannot be properly raised for the first time on appeal.

The Court of Appeal in *Nigerian Ports Authority v. Ntiero*[16] appeared not to have followed the decision of the Supreme Court in *Katsina Local Authority v. Alhaji Makudawa*[17]. In *Nigerian Ports Authority v. Ntiero*[18], the respondent was a Senior Industrial Relations Officer with the ports

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[16](1998) 6 NWLR (Pt.555)640

[17](Supra)

[18](Supra)

authority. The respondent was issued a query about arrangements he made for the reception of the Minister for Transport; and at the same time, the said query letter purported to interdict him on 9/5/84. He replied the query on 25/5/84. By a letter dated 6/6/84, the respondent appealed to the General Manager of the first appellant against the purported interdiction. Thereafter he went to court to challenge the validity of the interdiction. While in court, he learnt that his appointment had been terminated and that he had been retired from service without any letter of termination/retirement served on him. He then amended his statement of claim to accommodate these developments. In response, the appellants raised two statutory defences in their statement of defence

(1) That the trial court lacked the jurisdiction to inquire into the retirement of the respondent by virtue of the *Public Officers (Special Provision)* and

(2) That the respondent failed to give adequate statutory notice to the chairman or secretary of the 1st appellant as required by sections 97(1) & (2) and 98 of the Ports Act.

Thereafter, the appellants filed a preliminary objection at the trial court. The court ruled in favour of the respondent and dismissed the objection. The matter then proceeded to trial. Judgment was given for the respondent but his claim for damages was dismissed. Both parties were dissatisfied. The Appellants appealed and respondent cross-appealed on damages. In determining the appeal, the Court of Appeal had to consider sections 97 (1) & (2) of the Ports Act. It was held by the Court of Appeal, allowing the appeal and dismissing the cross-appeal, that even though the action was instituted within the time limit prescribed by the *Ports Act,* Exhibit 6 could not operate as a pre-action notice properly so called as it did not meet the requirement of section 110(2) of the *Ports Act.*

The Court of Appeal per Akpabio J.C.A (as he then was) further stated:

> Finally, I should also observe that failure to serve a pre-action notice is not a mere irregularity which could be waived by the defendant, taking further steps in the proceedings as in *Adegoke Motors Ltd v. Adesanya (1989) 3 NWLR (Pt. 109) 250 at 275.* Rather it is a statutory requirement, failure of which means that a condition precedent had not been complied with. Such failure will therefore deprive the trial court of any competence or jurisdiction to try the case[19].

The Court of Appeal appeared to have established another line of authority that where there is a non-compliance with a stipulated pre-condition for setting a legal process in motion, any suit instituted in contravention of the pre-condition is incompetent and the court is equally incompetent to entertain the suit.[20] Thus pre-action notice at any

[19] At 651

[20] Gambari v. Gambari (1990) 5 NWLR (Pt.152) 572; Fumudoh v. Aboro (1991) 9 NWLR (Pt 214) 210;Umukoro v. NPA (1997) 4 NWLR (Pt. 502) 656

rate was not waivable and therefore could be raised at any stage of the proceedings even for the first time on appeal.

This was the scenario before the Supreme Court decided to use the opportunity offered by *Mobil Producing (Nig) Unltd. v. LASEPA*[21] to clarify the law and its earlier decision in *Katsina Local Authority v. Alhaji Makudawa*[22]. The facts of *Mobil Producing (Nig) Unltd. v. LASEPA* are as follows: By an originating summons issued in the Federal High Court on 22nd December, 1999 Mobile Producing Nigeria Unlimited, the appellant, commenced the proceedings from which this appeal arose against (1) Lagos State Environmental Protection Agency; (2) Federal Environmental Protection Agency (3) Ministry of Environment; (4) Various respondents whose names were set out in a schedule to the originating summons and were described as the 4th set of respondents. On 3rd December, 1999 the appellant obtained an order of interim injunction, the terms of which are not material to this appeal. Thereafter, a number of motions were severally filed by some of the 4th set of respondents to discharge the order. One of the motions heard by the trial court, the ruling from which this appeal arose, was by Nos. 77 and 78 of the 4th set of respondents wherein they took an objection to the originating summons on the ground that it disclosed no reasonable cause of action. In the affidavit sworn by a counsel in the firm of the solicitors to the applicants, it was stated thus:

> The dispute between the applicant and the appellant in the present suit is not about the statutory powers or any government agency or the liability of the appellant to any of the respondent *(sic)* but a claim for compensation for damage arising from negligence and violation of right to safe environment under Article 24 of the African Charter on Human and Peoples' Rights.

In the course of arguing the motion counsel to the applicant submitted thus: "I now refer to section 29 (2) of the FEPA Act which refers to the one month pre-action notice. A material plea of the appellant ought to be that one month pre-action notice was given".

In response, counsel for the appellant replied that no question of absence of pre-action notice was raised in the affidavit in support of the application to discharge the interim order of injunction. He further argued that it was not within the right of the respondents to say that notice was not given to the Federal Environmental Protection Agency ("FEPA") when there was no evidence whatsoever before the court to that effect.

At the conclusion of counsel's argument, the trial court upheld the objection and struck out the entire suit. The appellant's appeal to the Court of Appeal having been dismissed, the appellant further appealed to the Supreme Court.

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[21](Supra)

[22]Supra

In resolving the appeal, the Supreme Court considered the provision of section 29 (2) of the Federal Environmental Protection Agency Act, Cap. 131, Laws of the Federation of Nigeria, 1990 which states as follows:-

> No suit shall be commenced against the Agency before the expiration of a period of one month after written notice of intention to commence the suit shall have been served upon the Agency 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 relief which he claims.

The Supreme Court unanimously allowing the appeal held that an irregularity in the exercise of jurisdiction should not be confused with a total lack of jurisdiction. The procedure for invoking the jurisdiction of the court should not be confused with the authority of the court to decide matters which on the face of the proceedings have been properly presented in the formal way for its decision and which are within its jurisdiction. Furthermore, that where pleadings are filed and it is intended to rely on a condition precedent then that condition precedent must be pleaded. For, if such condition precedent is not pleaded, the defendant would by the simple rules of pleading be taken to have waived whatever rights he possesses in the subject-matter. In other words, a party who challenges the competence of a court on the basis of certain facts but fails to put in issue those facts stands the risk of being precluded at a later stage when the proceedings have been brought to a final conclusion from re-opening that issue of fact. That a suit commenced in default of service of a pre-action notice is incompetent as against the party who ought to have been served with the pre-action notice, provided such party challenges the competence of the suit.

The Supreme Court also took time to explain what it decided in the case of *Katsina Local Authority v. Makudawa*. The Court held that it clearly and unequivocally, decided, among other things in the case that:

(a) provisions prescribing pre-action notice are mandatory;

(b) non-compliance with such mandatory provisions can be waived;

(c) non-compliance with such provisions is an irregularity in the exercise of jurisdiction which should not be confused with a total lack of jurisdiction.

(d) non-compliance with a condition precedent to the

commencement of action must be pleaded; and

(e) failure to plead it amounts to a waiver.

The Supreme Court clearly drew a distinction between substantive and procedural rules where it stated that notwithstanding that sometimes the distinction between substance and procedure is blurred, it is generally accepted that matters (including facts) which define the rights and obligations of the parties in controversy are matters of substance defined by substantive law, whereas matters which are mere vehicles which assist the court or tribunal in going into matters in controversy or litigated before it are matters of procedure regulated by procedural law. Facts which constitute the cause of action are matters of substance and should be pleaded, whereas facts which relate to how a party is to invoke the jurisdiction of the court for a remedy pursuant to his cause of action is a matter of procedure outside the realms of pleadings. Generally speaking, substantive rules give or define the right which it is sought to enforce and procedural rules govern the mode or machinery by which the right is enforced.

The Court further held that if the object of a statute is not one of general policy, or if the thing which is being done will benefit only a particular person or class of persons, then the conditions prescribed by the statute are not considered indispensable. The rule is expressed in the maxim *quilibet potest renunciare juri pro se introducto,* (an individual may renounce a law made for his special benefit). Thus, although as a general rule the conditions imposed by statutes which authorize legal proceedings are treated as being indispensable to giving the court jurisdiction, if it appears that the statutory conditions were inserted by the legislature simply for the security or benefit of the parties to the action themselves, and that where no public interests are involved, such conditions will not be considered indispensable, and either party may waive them without affecting the jurisdiction of the court. The right to be served with a pre-action notice does not fall within the category of the rights which cannot be waived.

Thus in both *Katsina Local Authority v. Alhaji Makuda* and *Mobil Producing (Nig) Unltd v. LASEPA* the Supreme Court had held firmly that pre-action notice, though a condition precedent in a case in which is applied, is in the nature of a privilege and such non-compliance will be treated as a mere irregularity, a defendant may be deemed to have waived where it is not raised properly and timeously.[23]

The Position of the Law in Nigercare Development Co Ltd v. Adamawa State Water Board & Ors[24]

The decision of the Supreme Court in *Nigercare* to the effect that an issue of pre-action notice being a jurisdictional issue can be raised at any

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[23]Ogbulafor C. A. op. cit at 223

[24](Supra)

stage of the proceedings even for the first time on appeal is in conflict with it earlier decisions in *Katsina Local Authority* and *Mobil Producing (Nig) Unltd.* In this case, the appellant had won a contract from the 1st and 2nd respondents for the rehabilitation of water treatment plants in Yola, Numan and Mubi in Adamawa State under the Adamawa State National Water Rehabilitation Project sponsored by the World Bank. On July 4, 1997, the Sole Administrator of the 1st defendant/respondent terminated or revoked the said contract even when the period for the execution of the contract had not elapsed. As a result of the revocation, the Appellant, as plaintiff, instituted the action leading to this appeal. The plaintiff sought the following declarations, namely, that:

(1) The 1st defendant's letter dated July 1997 signed by the Sole Administrator of the Adamawa State Water Board on the Water Rehabilitation Project between the plaintiff and 1st defendant was against the provisions of the law establishing the 1st defendant, ultra vires and illegal, null and void.

(2) The 1st and 3rd defendant's failure to pay the 15% of the contract sum to the plaintiff even after the submission of Advance Security Guarantees was a breach of the agreement between the parties.

(3) In the circumstances of the case, the National Water Rehabilitation Project contract was still valid and subsisting.

Lastly, the plaintiff sought an order of compensation against the 1st and 2nd defendant jointly and severally in the total sum of N53,640, 335.00 in line with the contract agreement dated July 15, 1996, though signed on August 16, 1996. It sought 15% on the contract sum and payment for job already executed amongst other claims.

The 1st and 2nd defendants/respondents counter-claimed. Pleadings were filed and exchanged. The case proceeded to trial with both parties calling witnesses. It was while the parties were awaiting the judgment that the trial judge, Banu J., in the course of writing the judgment, invited counsel for the parties to address him on the legal effects of the provisions of section 51(1) and (2) of the Adamawa State Water Board Edict No. 4 of 1996 and on non-compliance with its provisions. In the judgment delivered on May 22, 1998, the judge struck out the appellant's suit as well as the counter-claim. He found as a fact and held that there was non-compliance with the said provision of the Edict and that, as a result, the appellant's suit was incompetent. Dissatisfied with the decision, the plaintiff appealed to the Court of Appeal, which dismissed the appeal. The plaintiff/appellant further appealed to the Supreme Court.

At the Supreme Court, the main issues for determination were:

(1) Whether the provisions of section 51(1) & (2) of Adamawa State Edict (sic) No. 4 of 1996 was not inconsistent with the provisions of section 236 (1) and section 33 of the 1979 Constitution as amended and therefore unconstitutional.

(2) Whether the learned Justices of the Court of Appeal were right to

have held that the defendants need not plead the defence of pre-action notice in their statement of defence and that parties could not waive this special defence.

In dismissing the appeal and affirming the decision of the lower court, the Supreme Court held, in relation to the first issue, that a pre-action notice such as the one leading to this appeal was not inconsistent with section 33 (1) of the 1979 Constitution and this put to rest any argument to the contrary. In relation to the second issue, the court in interpreting the relevant provisions of the Edict under consideration held, first, that the phrase, no suit shall be commenced in the said provision prohibited the commencement of all suits whatsoever. For this position, the Court cited the case of *Fawehinmi Construction Co Ltd v. Obafemi Awolowo University*[25]. According to the Court, where an issue of competence or jurisdiction of a court is fundamental and crucial, the issue of waiver cannot be of any consequence. The Court, therefore, dismissed the appeal because, according to it, the issue of waiver was of no consequence in the instant case. As the Court further held, a provision such as section 51(1) and (2) of the Edict or Law requiring a pre-action notice to be given to a defendant, not only goes to the competence of a suit, but also touches on the jurisdiction of the court to entertain such suit. The Court concluded by holding that where there is non-compliance of the statute that is shown to be mandatory, the suit and/or proceeding(s) are a nullity however well conducted.

Critique of Nigercare Development Co Ltd v. Adamawa State Water Board & Ors[26]

The decision of the Supreme Court in *Nigercare* conflicts with the earlier decision of the court in *Katsina Local Authority v. Alhaji Makudawa* and *Mobil Producing (Nig) Unltd v. LASEPA*. It is our view that the decision in Niger Care is with all respect to the Supreme Court erroneous.

In the first place even though the Supreme Court cited and relied on *Katsina Local Authority*, the authoritative pronouncement of the Court in *Mobil Producing (Nig) Unltd* was neither cited nor relied on. It is submitted therefore that had the Supreme Court considered *Mobil Producing (Nig) Unltd*, it is very likely that the decision would have been different.

Secondly, the Supreme Court with all respects, failed to appreciate their distinction between substantive jurisdiction and procedural jurisdiction. According to Ogbulafor[27], whereas the former goes to the root of the case and can always be raised at any stage of proceedings, the latter does not go to the root of the case and its neglect can only result in a procedural irregularity which can be waived unless it is timeously and

[27]Op. Cit at 229

[25](1998) 6 NWLR (pt. 553) 171 at 190, 194

[26](Supra)

properly raised. Service of a pre-action notice on the party intended to be sued pursuant to a statute is at best, a procedural requirement and not an issue of substantive law on which the rights of the plaintiff depend.[28] On whether procedural Jurisdiction could be waived, the following passage of Mohammed JSC in *Kossen Nig. Ltd V. Savannah Bank Nig. Ltd*[29] is instructive:

> In reply to the above submissions, learned counsel for the respondent quite correctly, pointed out that there is a difference between jurisdiction over subject matter which is unlimited and covered by the 1979 constitution and procedural jurisdiction... But procedural jurisdiction could be waived or acquiesced in by the affected party.

Thirdly, as correctly stated in *Mobil Producing (Nig) Unltd V. LASEPA*[30] a pre-action notice which is for the benefit of the person or agency on whom or on which it should be served is not to be equated with processes that are an integral part of the proceedings-initiating process. The law is clear that conditions imposed for the benefit only of a particular person or class of persons can be dispensed with. A party who has the benefit given to him by statute may waive it if he thinks fit. If the object of a statute is not one of general policy, or if the thing which is being done will benefit a particular person or class of persons, than the conditions prescribed by the statute are considered indispensible. If it appears that the statutory conditions were inserted by the legislature simply for the security or benefit of the parties to the action themselves, and that no public purposes are involved, such conditions will not be considered indispensible and either party may waive them without affecting the jurisdiction of the court. The Supreme Court therefore rightly concluded that the right to be served with a pre-action notice does not fall within the category of rights which cannot be waived.[31]

Fourthly, it is submitted that the requirement of giving a pre-action notice as a special privilege is a special defence that a defendant wishing to rely on must specifically plead and proceed by way of motion or preliminary objection. It is therefore not right for a trial judge to rely on the submission of counsel to determine whether pre-action notice was given or not in order to strike out or dismiss a case, after the parties have joined issues, taken testimonies on all sides and fought their case up to judgment. In fact, it was in the course of writing the judgment that Banu J. suo moto, invited learned counsel for the parties to address him on the legal effect of non-issuance of pre-action notice. With all respect, the conduct of Bunu J. is more like descending into the arena

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[28]Per Ayoola JSC in Mobil Producing (Nig) Unlimited V. LASEPA (Supra) at 35.

[29](1995) a NWLR (pt. 420) 439 at 451

[30](supra) Pp. 36-37

[31]Mobil Producing (Nig) Unltd V. LASEPA (supra) P. 37

of conflict, that is, reminding a defendant that he has a special defence which he has forgotten to raise. This is a practice that has been condemned by the court of Appeal. In *Eti-osa Local Government v. Jegede*,[32] the court stated:

> It is learned counsel and not the learned trial judge nor any judge at all, who is paid to fish out the loophole in the opponent's suit. The solemn duty of the trial judge is to be a dispassionate umpire. The submission of the learned counsel for the appellant that the trial judge should have raised the issue of non-compliance with pre-action notice is therefore untenable and misplaced. It is only when the issue of jurisdiction is so manifest, apparent *ex-facie* the processes before the court that the judge may raise it *suo moto*.

Fifthly, while agreeing with the Supreme Court that where an issue of competence or jurisdiction of a court is fundamental and crucial, the issue of waiver cannot be of any consequence, it must be stated that pre-action notice requirement is neither fundamental nor crucial in any case where it is not timeously and properly raised as was done in *Nigercare*.

As stated above, the decision of *Nigercare* conflicts with earlier decisions of the Supreme Court in Katsina Local Authority and Mobil Producing (Nig) Unltd. In Eti-osa Local Government v. Jedege[33] the Court of Appeal adopted a different approach from Nigercare. In that case, the respondents as plaintiffs took out an originating summons against the Local Government seeking a determination of certain questions relating to the power of the Local Government to demand and collect taxes. The Local Government did not participate in the proceedings at the trial court. In a considered ruling, the trial court granted all the four reliefs sought by the respondents. Dissatisfied with the decision, the appellants appealed to the Court of Appeal, contending that the respondents' action was incompetent because they did not comply with the requirement of issuing a pre-action notice on the Appellant. Unanimously dismissing the appeal, the Court of Appeal relying on Mobil Producing (Nig) Unltd held inter alia that

> The effect of non-service of a pre-action notice where it is statutorily required is only an irregularity which however renders an action incompetent. It follows therefore that the irregularity can be waived by a defendant who fails to raise it either by motion or plead it in the statement of defence. If therefore a defendant refuses to waive it and raises it, then the issue becomes a condition precedent which must be met before the court can exercise jurisdiction. However, where a defendant failed to plead the issue of pre-action notice and did not raise same timeously, the presumption of the law is that he has waived his right to rely on same. In that case, the Appellant did not raise the issue of pre-action

[32] (2007) 10 NWLR (pt. 1043) 537 at 555-556

[33] (supra)

notice in its pleadings and it was not canvassed at the trial court. As such, it was presumed waived and abandoned.[34]

Concluding Remarks

The Supreme Court has to, at the earliest opportunity find a way of resolving these conflicting decisions. Nigercare conflicts with the earlier decisions of the court in both Kastina Local Authority and Mobil Producing (Nig) Unltd and does not present a correct perspective of the law on pre-action notices. Katsina Native Authority and Mobil Producing (Nig) Unltd decisions permit a better position of the law on the subject as in both cases the Supreme Court held firmly that pre-action notice though a condition precedent in a case in which it applies is in the nature of the privilege and where there is non-compliance, such non-compliance will be treated as a procedural irregularity, a defendant may be deemed to have waived where it fails to raise it timeously and properly. This writer is in agreement with Ogbulafor[35] that:

> ...the foregoing position of the law which both Kastina Local Authority and Mobil Producing (Nig) Unltd establish is unimpeachable. First, it tends to reduce the power imbalance between private individuals and government agencies in litigation (at least in theory). Secondly, it makes for consistency in the interpretation and application of the law. The approach does not allow parties to approbate and reprobate in the same breath.

Much more fundamentally, it is submitted that the time has come for the legislature to repeal legislations such as those requiring pre-action notice that deny free and unimpeded access to courts. This is necessary as a result of abuse of office by public officers and agencies encroaching on the right of citizens by exposing their lives and property to danger where their rights of access to court are delayed until certain conditions such as pre-action notices are fulfilled.

It is also hoped that even within the present provisions of the 1999 Constitution, the Supreme Court would reconsider its stand in later decisions by holding that the requirement of pre-action notices since they hinder free and unimpeded access to courts are unconstitutional.

[33] (supra) pp. 562-563

[34] Op. at 32