The Effect of Non-Service of Pre-Action Notice on the Competency of Courts to Entertain a Matter

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Abstract

The requirement of serving a pre-action notice as a fundamental pre-condition for triggering the jurisdiction of courts is always imbedded in statutes meant to protect public bodies. Though non-service of pre-action notice may affect the competence of the court to adjudicate on any matter in which it is required, the necessity of serving a pre-action notice may, if dispensed with by the party entitled to it, not affect the jurisdiction of the court. This position has met with divergent judicial as well as juridical pronouncements. While some decided cases tend to establish that pre-action notice affects the jurisdiction of the court and cannot be waived, others emphatically hold the position that the requirement of serving a pre-action notice can be dispensed with if waived by the party entitled to it. Conceding that the requirement for pre-action notice can be waived, there must be a point at which the defendant cannot rely on it again at the trial court. Cases establishing that pre-action notice can be waived are not in consensus on when the privilege of pre-action notice would be said to have been waived. This article reviews the leading Supreme Court cases on this issue and adopts the position that statutory requirement for pre-action notice can be waived by the party entitled to it and should be so held if the non service of same is not raised as a preliminary issue or pleaded as a defence. The paper also examines the jurisprudential basis of pre-action notice, the latest pronouncement on the issue by the Supreme Court in the case of Feed & Food Farms (Nigeria) Ltd v Nigerian National Petroleum Corporation and compared the position on the issue in Nigeria with

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> *other jurisdictions to recommend that pre-action notices where it is required to be served and it is not served ought to stay the action if the party entitled to it is interested in pursuing arbitration only, and not to have the effect of striking the suit.*

1. Introduction

A pre-action notice where required by a statute constitutes a pre-condition to the institution of action. Referred to as written notice, notice of demand, written letter or by such other similar expressions; it is a letter usually given by an intending Claimant or his solicitor to the prospective defendant giving him notice of the intention to institute legal proceedings against the prospective defendant for the recovery of claim or to remedy specified cause(s) of action. Generally, it is a notice given before any action can be taken on the issue upon which it is issued.[2] In *Ntiero v NPA*,[3] the Supreme Court described the nature of a pre-action notice thus:

> A pre-action notice connotes some form of legal notification or information required by law or imported by operation of law, contained in an enactment, agreement or contract, which requires compliance by the person who is under legal duty to put on notice the person to be put on notice, before the commencement of legal action against such a person.

In judicial proceedings, a pre-action notice is a statutory indulgence created in favour of the prospective defendant necessitating the would-be claimant to intimate the prospective defendant by way of a formal written notice, of the intention of the would-be claimant to institute an action. It therefore follows that, the requirement for pre-action notice is a privilege defence that becomes operative if the requisite notice is not issued and served in the prescribed form and the person in whose favor it is granted takes advantage of it by raising it as a defense. When it is thus raised and the court returns a finding that it was not issued and served or that it

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2 See *Ademola II v Thomas* (1946) 12 WACA 31.

3 [2008] 10 N.W.L.R. (Pt. 1094) 129 at p. 146, paras D-E.

was irregularly issued, it keeps the right of the claimant to institute action in abeyance.

The compulsive and mandatory nature[4] of the service of a pre-action notice when and where required has been emphasized in several cases and it has been conclusively ruled that if not served before the commencement of action and when raised as a defence, it robs the court of the competence to entertain the matter.[5] What however remains the point of divergence and on which decided cases are highly contradictory is whether it could be waived and if so, when it would be deemed waived.[6] On these two crucial issues, especially the latter; it is difficult to reconcile the decisions of the apex court.

More importantly apposite at this stage of this essay is to state that in arriving at the decisions on these issues, the courts have always been aided by the very words and phrases contained in the pre-action statutes. Typically, a pre-action notice provision runs as follows:[7]

> A suit shall not 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 on the Agency by the intending plaintiff or his agent and the notice shall clearly state the: cause of action; particulars of claim; name and place of abode of the intending plaintiff; and relief which he claims.

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4 *Forestry Research Institute of Nigeria v Mr. I.A. Enaifoghe Gold* [2007] 11 NWLR (Pt 1044) 1 at 18-19 paragraphs H-D.

5 Nigeria Cement Co. Ltd. v NRC [1992] 1 NWLR (Pt. 220) 747 at 761; *Obeta v Okpe* [1996] 9 NWLR (Pt. 473) 401 at 429.

6 *Forestry Research Institute of Nigeria v Mr. I.A. Enaifoghe Gold* [2007] 11 NWLR (Pt 1044) 1 at 18-19 paragraphs H-D.

7 See section 32 (1) (a-d), National Environmental Standards and Regulations Enforcement Agency(Establishment) Act No 25 of 2007, Government Notice No. 61, printed in Federal Republic of Nigeria Official Gazette, No 92, Vol. 94, pages A635-655. There are also variant forms, provided that the statute demands the giving of a notice before any action may be taken on an issue, it would be referred to as a pre-action notice.

Some of the key words and phrases in the provision have received much judicial attention and indeed there exist judicial pronouncements explaining the purport of the words.

The phrase "No suit shall be commenced" as appears in most pre-action notice laws has received judicial attention in several cases. In *Nigercare Development Co. Ltd v Adamawa State Water Board & Ors*,[8] the Supreme Court, interpreting that phrase under the Adamawa State Water Board Edict No. 4 of 1996, held that:

> The phrase "no suit shall be commenced" in Section 51(1) of the Adamawa State Water Board Edict No. 4 of 1996 prohibits the commencement of all suits and whatever causes of action and it is not limited to anything done pursuant to any Act or Statute.

Further, the use of the word "shall" connotes a mandatory adherence. The word "Shall" in the phrase "no suit shall be commenced" has received judicial interpretation to the effect that it invokes compulsion and strict adherence. In *Nwadike & Ors v Awka South Local Government*[9] the Court of Appeal held that:

> It appears to me that the first "shall" in subsection (a) imports obligation. No suit therefore, could be commenced against the Local Government until a period of one month expires after giving a prescribed notice.

The mandatory nature of a pre-action notice where required, is therefore beyond controversy.[10]

2. Essence of Pre-Action Notice

Depending on jurisdiction and form, pre-action notice mainly serves as a medium of information to the defendant, conveying to him the desire of a litigant to institute an action against him and stating the nature of the claim. The rationale is to enable him prepare for either

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8 [2008] 9 NWLR (Pt 1093] 498 at 517 paragraphs F-G.

9 [2008] 16 N.W.L.R. (Pt 1112) at p. 218, paragraphs B-G; see also *Amadi v NNPC* [2000] N.W.L.R. (Pt. 674), 76 at 98 per Uwais CJN.

10 See *Shomolu LGC v Agbede* [1996] 4 N.W.L.R. (Pt. 441) 174 at 181-183.

his defence or to opt for settlement. In *Feed & Food Farms (Nigeria) Limited v NNPC*,[11] the Supreme Court succinctly explains the underlying principle behind the service of pre-action notice as follows:

> The necessity of a pre-action notice is to enable the "statutory corporation" concerned to have "breathing time so as to enable him to determine whether he should make reparation to the plaintiff." See *Ngelagla v Tribal Authority Nongewa Chiefdom* (1953) WACA 325 at 327. It is to be expected therefore that a statutory corporation which is aggrieved by such non-service will bring the matter to the attention of the trial court.

Generally, the frontiers of pre-action notice have been expanded in some jurisdictions to include such objectives aimed at out-of-court settlement/Alternative Dispute Resolution (ADRs) procedures and, reducing the work load of courts. In such cases, the mandatory nature of pre-action notices involve legal exchange between the two parties and is not necessarily limited to one party to the action.

In England for example, under the pre-action protocol, the claimant and the defendant, prior to the commencement of legal proceedings, take steps to exchange information and documents. The purpose is to create an avenue for settlement. It also gives the parties fair assessment of their cases before committing same to the judicial process. Although in applications of interim orders or where it can be shown that it is not necessary, it may be dispensed with, generally, where a party commences action in non-compliance to the pre-action protocol, the party at default will pay the cost of the proceedings even

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11 [2009] 6 MJSC (Pt. 1) p. 120 at 143, per Oguntade JSC (as he then was). See also, *Nigercare Development Co. Ltd v Adamawa State Water Board and Others* [2008] 5 MJSC 118 at 137 per Tobi JSC (as he then was), where it was held that: The rationale behind the jurisprudence of pre-action notice is to enable the Defendant know in advance the anticipated action and a possible amicable settlement of the matter between the parties, without recourse to the adjudication by the court.

where he is successful at the court. He may also be deprived damages.[12]

As such, non observance of the pre-action protocol procedure under the English system does not make an action incompetent like in Nigeria where the non-service of pre-action notice has been viewed as a bar to actions, with parties in some cases attempting to raise it even on appeal to defeat the valid claims of litigants.

3. The scope and application of pre-action notice

The scope of pre-action notice is usually determined by the phrase "no suit shall commence;" which phrase inherently excludes all exceptions. Howbeit, the courts have in various decisions imposed restrictions and exceptions upon pre-action notice. This position was first adopted by the Supreme Court in the case of *NPA v Construzioni Generali Farsura Cogefar SPA & Anor*,[13] where the court held that the requirement of pre-action notice admits an exemption in contract cases.

The fact of that case is as follows: the appellant, a government agency involved in the management of the Nigerian ports contracted the 1st respondent in the construction of the second Apapa Wharf Extension. The 2nd respondent on the other hand was, at all material times, the Chief Executive of the appellant. The appellant sued at the court of first instance for a total sum of £163, 124 the payment of which had been authorized by the 2nd respondent. In her defence, the 1st respondent set up a counter-claim in respect of the same transaction.

At the trial, when the case came up for hearing, the appellant's two witnesses went out of the court room without informing the learned counsel to the appellant. When the case was called, without his witnesses in court, Counsel to the appellant applied to the court for an adjournment to secure the attendance of the witnesses to court to give their evidence. The application was refused. The trial judge dismissed the appellants' claim for want of evidence and thereafter

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12 For more discussion on this, see Evaluation of Pre-Action Notice (PAN) Pilot Summary report http://www.justice.gov. uk/docs/cp 2207-exec.pdf-, visited on 08/03/2011.

13 (1974-75) Vol. 9, NSCC 622, (1974) All NLR 945; (1974) 12 SC 81.

proceeded to hearing on the 1st respondents' counter-claim. There and then the appellant invoked section 97 of the Ports Act[14] which required pre- action notice to be given to the appellant before the commencement of any proceedings.

The court held that section 97 of the Ports Act was not applicable since it was based on contract. Judgment was entered in favor of the 1st respondent on her counter-claim. The appellant appealed to the Supreme Court. The Supreme Court, per Ibekwe JSC (as he then was) held that:[15]

> We agree that the section applies to anything done or omitted or neglected to be done under the powers granted by the Act. But we are not prepared to give to the section the stress which it does not possess. We take the view that the section does not apply to cases of contract.

The decisions following *NPA v Construzioni Generali & Anor* tacitly, if not positively, overruled *Construzioni Generali & Anor*. In *Fawehinmi Construction Company v OAU*,[16] the Supreme Court held that the phrase, "no suit" applies to all forms of civil actions including cases of contract. In his concurring opinion, Ogundare JSC commenting on section 46 of the University of Ife Edict stated that that section providing for pre-action notice applies "not only to cases based on tort but equally to cases based on contract."

This decision restated the position already taken in *Katsina Local Authourity v Alhaji Makudawa*[17] to the effect that "no suit means a suit of any kind whatsoever should be commenced in the circumstances herein prescribed." Ogbuabor[18] resting his argument on these authorities posits that:

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14 Section 97(2) of the Ports Act is identical with section 14 (1) of the Public Procurement Act.

15 (1974-75) Vol. 9, SCC, p. 630.

16 [1998] 6 N.W.L.R. (Pt. 553) 171.

17 (1971) 7 NSCC 119; [1971] 1 NMLR 100.

18 C.A. Ogbuabor, "Towards A Consistent Application of the Law Of Pre-Action Notice In Nigeria", Nigerian Journal of Public Law (NJPL), vol.2, no.1, 2009, pp. 148-169 at 159, and also, C.A. Ogbuabor, "Can

> *Fawehinmi Construction Company v OAU* firmly overruled *NPA v Consturuzioni* in the area of application of pre-action notices to contracts….

From *Fawehinmi Construction Company v OAU* onward,[19] the court consistently adhered to the position that pre-action notices are applicable to all forms actions.

Though, as already stated, pre-action notice applies to all forms of actions, in *Ezenwa v Best Elect. Mft. Co. Ltd*,[20] the Court of Appeal considered whether section 11 (1) and (2) of the Anambra State Proceedings Law,[21] which provides for pre-action notice is applicable in cases of judicial review, particularly in that case, certiorari. The court held that pre-action notice is not relevant to certiorari since a leave to apply for an order of certiorari is akin to a leave to appeal a matter from a court of appeal and not *per se* a commencement of action.

4. Constitutionality of Pre-action Notice

The constitutionality of pre-action notice has always been questioned on the ground that is restricts a litigant's access to court as guaranteed under sections 6 (6) (b) and section 36 of the 1999 Constitution of the Federal Republic of Nigeria, as amended, granting unrestricted access to courts and protecting the right to fair hearing respectively.

There is no judicial pronouncement on this area of pre-action notice declaring any specific law demanding pre-action notice unconstitutional, though there are cases insinuating that where pre-action notice restricts the rights of a litigant in an unjustifiable manner, it could offend the constitution. However, the cases are not specific on what would qualify or amount to an unjustifiable

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Jurisdiction Be Waived? Waiver And Jurisdiction In Cases Involving Pre-Action Notice: *Nigercare Development Company Ltd v Adamawa State Government & Ors* Revisited", The Appellate Review, vol. 1, no.2, 2009/2010, pp221-237.

19 *Nigercare Development Co. Ltd v Adamawa State Water Board & Ors* [2008] 9 N.W.L.R. (Pt 1093) 98.

20 [1999] 8 N.W.L.R. (Pt. 613) 61 at 78

21 Cap 131, Laws of Anambra State, 1986

restriction. In *Amadi v NNPC*,[22] Karibi-Wyhte JSC, as he then was, stated that:

> In my opinion a legitimate regulation of access to Courts should not be directed at impeding ready access to courts. There is no provision in the constitution for special privileges to any class of category of persons. Any statutory provision aimed at the protection of any class of persons from the exercise of the Court of its constitutional jurisdiction to determine the right of another citizen seems to me inconsistent with the provisions of section 6(6) of the Constitution.[23]

It must be appreciated that the usual complainant when a statute imposes procedural directives on a litigant's right and access to court is that such statutes are unconstitutional. However, procedural regulations on the manner, time and pre-conditions for approaching the court by a litigant are not meant to shut out the litigant but to achieve some stated objectives thereby saving time, resources and relationship on the side of the parties and the court. To that end, as a procedural regulation of approach to court, the courts have held that as a general rule that pre-action notices do not infringe on the constitutionally protected rights of fair hearing and access to court.[24]

This is not to whittle down the vital issue of constitutionality, as it is very much possible for a pre-action notice to defeat the rights of a litigant, especially in cases where the cause of action warrants an urgent attention and also in cases where a single statute imposes a

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22 [2000] (Pt 674), see also the earlier *dicta* of Karibi-Whyte JSC (as he then was) to the same effect in *Adediran v Inland Transport Ltd*. [1991] 9 NWLR (Pt. 214) 155 at 180. See the explanation of the *dicta* of Karibi-Whyte in *Adeniran's* case by Ejiwumi JCA (as he then was) in *Anambra State Government v Nwankwo* [1995] 9 NWLR (Pt. 418) 245 at 2554-256.

23 Compare the *dicta* of Mohammed JSC, as he then was, in the same case at pages 113-114 emphasizing the constitutionality of pre-action notices.

24 See *Aro v Lagos Island LGC* [2002] 4 N.W.L.R. (Pt. 757) 385 at 421; *NNPC v Fawehinmi* [1998] 7 N.W.L.R. (Pt. 559) 598 at 617.

short period of limitation and also contains a provision for pre-action notice.

5. Waiver of Pre-action Notice: Case Analysis

Four Supreme Court cases stand out in every discussion on waiver of pre-action notice. They are: *Katsina Local Authority v Alhaji Makudawa,*[25] *Mobil Producing (Nig) Unlimited v LASEPA,*[26] *Nigercare Development Co. Ltd v Adamawa State Water Board & Ors,*[27] and *Feed & Food Farms (Nigeria) Ltd v Nigerian National Petroleum Corporation.*[28] We shall discuss each of these cases.

5.1 *Katsina Local Authority v Alhaji Makudawa*

Every discussion on waiver of pre-action notice under the Nigerian jurisprudence must acknowledge the epochal impact of *Katsina Local Authority v Alhaji Makudawa*, which undoubtedly remains the *locus classicus* in that area of our law.[29] In that case, the respondent sued and obtained judgment against the Katsina Local Authority for the sum of £2152.10 being value for cows allegedly sold by the respondent to the appellant. At the trial of the case, evidence was taken by the Upper Area Court; which went on to give judgment for the respondent. The appellant appealed to the High court and there, for the first time, raised the issue of non service of pre-action notice as contained in section 116(2) of the Local Authority Law.[30] The appellant argued that the non compliance rendered the whole trial null and void.

The High Court dismissed the Appeal. Eventually, when the case got to the Supreme Court, the paramount issue before the Supreme Court was whether the mandatory provision for pre-action notice can be waived? The Supreme Court laid down the principle to

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25 (1971) 7 NSCC 119; [1971] 1 NMLR 100

26 [2002] 18 NMLR (pt 789) 1.

27 [2008] 9 NWLR (Pt 1093) 498.

28 [2009] 6 MJSC (Pt.1) 120

29 See C.A. Ogbuabor: "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 Review* (2009/2010) vol. 1, No. 2, pp. 221-237.

30 Laws of Northern Nigeria, Cap 77.

the effect that the mandatory provision for pre-action notice can be waived by the party in whose favor it was made. In other words, where a pre-action notice is required by law, the court will only have competency to entertain the matter under two circumstances: where the pre-action notice has been validly served; or where the service has been waived by the party entitled to it by not pleading same or raising it as a preliminary issue.

5.2 *Mobil Producing (Nig) Unlimited v LASEPA*[31]

The Appellant commenced this action at the Federal High Court, Lagos against the Respondents; the Lagos State Environmental Protection Agency, the Federal environmental Protection Agency (FEPA), Ministry of environment, and Various Respondents. Counsel to the 4th Set of Respondents (Various Respondents), by a motion, raised an objection to the action on the ground that the requisite pre-action notice in pursuant to section 29(2) of the FEPA Act was not served on the 2nd Respondent. The objection was sustained by the trial court which went on to strike out the matter.

The appeal to the Court of Appeal suffered the same fate and was dismissed. The Respondent appealed to the Supreme Court. In allowing the appeal, the court held that issues relating to the service of pre-action notice can be waived, and indeed, it is only the party entitled to it that can raise it as a defence. The Supreme Court, per Ayoola JSC (as he then was) stated that: [32]

> In *Katsina Local Authority v Makudawa (supra)* this court clearly and without equivocation, decided, among other things, that: (i) provisions such as s.116(2) prescribing pre-action notice are mandatory, (ii) non-compliance with such mandatory provisions can be waived, (iii) non-compliance with such provisions as in s. 116 (2) is an irregularity in the exercise of jurisdiction which should not be confused with total lack of jurisdiction (iv) non-compliance with a

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31 [2002] 18 NMLR (pt 789) 1 at 29-30

32 [2002] 18 NMLR (pt 789) 1 at 29-30

> condition precedent to the commencement of action must be pleaded and (v) failure to plead it amounts to a waiver.

5.3 *Nigercare Development Co. Ltd v Adamawa State Water Board & Ors*

In that case, the trial judge at the close of evidence and after the case had been adjourned for judgment invited the parties to address him on the effect of section 51(1) and (2) of the Adamawa State Water Board Edict No. 4 of 1996, providing for pre-action notice. The judge based on that law struck out the suit for non-service of pre-action notice. The appellant's appeal to the Court of Appeal was dismissed; a further appeal to the Supreme Court suffered the same fate. The Supreme Court per Ogbuagu JSC that:[33]

> … a statute such as section 51(1) and (2) of the Edict/Law requiring a pre-action notice to be given to the defendant, not only goes to the competence of the suit, but it also touches on the jurisdiction of the court to entertain such suit. Where there is non-compliance of the statute that is shown to be mandatory, the suit and/or proceedings is/are a nullity however well conducted.

The court held further:[34]

> In the first place, where an issue of competence or jurisdiction of a court is fundamental and crucial, the issue of waiver cannot be of any consequence. See the case of *Onyema & ors v Oputa & ors*, (1987) 3 NWLR (Pt. 60) 259; (1987) 7 SCNJ, 176. Secondly, if the defendant has a legal right conferred on him/it by a statute, it is again with respect, idle to submit as has been done in the appellant's brief, that the defendant should waive same and proceed with the hearing of the case. However and significantly, the learned counsel to the appellant, concede that such a defendant can take advantage of the said provision. In the circumstances, there will be no need (which will not even

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33 At page 521 paragraphs A-C.

34 Per Ogbuagu JSC at Pp. 521-522 paragraphs G-A of the reported judgment.

> arise or be necessary), to start pleading such pre-action notice as a defence. **Being a question of jurisdiction, the issue can be raised by a defendant or even by the court *suo motu* and thereafter hear from the parties as was done in this case.** [Emphasis added].

Akintan JSC,[35] concurring with the judgment at page 533 paragraphs C-D of the reported judgment also stated as follows:

> There is also no need for a defendant to plead it before the provision could be enforced. It is a requirement that goes to the exercise of the jurisdiction of the court. **It can therefore be raised at any stage, even at the appellant level**. [Emphasis added].

The decision in *Nigercare Development Co. Ltd v Adamawa State Water Board & Ors* is a total departure from the reasoning of the Supreme Court in the earlier cases. *Nigercare* case, it seems, when looked at carefully, reveals some peculiar circumstances. Firstly, the issue of non service of pre-action notice was raised by the court *suo motu.* Curiously, the Supreme Court did not only jettison her earlier decision in the two earlier discussed cases to the effect that non service of pre-action notice can be waived, they also did not apply the principle in *Mobil's case* to the effect that only the party in whose favor the privilege is granted can raise it as a defence.[36] The Supreme Court did not only endorse this obviously erroneous verdict of the trial court, but went ahead to hold, contrary to her earlier decisions, that non service of pre-action notice can even be raised for the first time on appeal.

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35 See the *dicta* of Tabai JSC at page 539 of the reported judgment on the same point.

36 See also, *Eze v Okechukwu* [1998]5 NWLR (Pt. 548) 43 at 57.

5.4 Feed & Food Farms (Nigeria) Ltd v Nigerian National Petroleum Corporation

In *Feed & Food Farms (Nigeria) Ltd v Nigerian National Petroleum Corporation* oil pipelines were constructed by the Respondent on land adjoining the appellant's factory premises. The Appellant regarded the act as illegal. Efforts by the appellant to make the respondent to remove it were rebuffed. The Appellant sued the Respondent without giving the statutory pre-action notice under section 12 (2) of the NNPC act, 1977. The case of the appellant succeeded before the trial court. At the Court of Appeal, it was held that the High Court lacked jurisdiction since the required pre-action notice was not served on the respondent. Dissatisfied, the appellant appealed to the Supreme Court, where it was held that:

> [F]or purposes of waiver, matters affecting the jurisdiction of the court should be categorized into two areas or compartments. These are jurisdictional matters affecting the public in the litigation process and those affecting the personal, private or domestic rights of the party. While the former cannot in law be waived, the latter can be waived in law….in my view, service of pre-action notice is a personal, private or domestic right of the party to be served. He is the beneficiary of the service and so can waive it at will or on his terms…. In my view, where an issue of jurisdiction, like the issuance of pre-action notice is domestic to the parties, **it can be waived at the pleasure and choice of the beneficiary. I seem to be repeating myself. I need the repetition.**[37]

In *Feed & Food Farms (Nigeria) Ltd v Nigerian National Petroleum Corporation*,[38] the Supreme Court towed the line of reasoning in *Katsina Local Authority v Alhaji Makudawa* and *Mobil Producing (Nig) Unlimited v LASEPA*.

It is significant to mention that the Honorable Justice Niki Tobi, JSC (as he then was) presided over the panel that decided *Nigercare Development Co. Ltd v Adamawa State Water Board &*

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37 Emphasis added.

38 [2009] 6 MJSC (Pt. 1) 120.

Ors and read a concurring opinion. He presided over the panel that decided *Feed & Food Farms (Nigeria) Ltd v Nigerian National Petroleum Corporation*, and read the lead judgment and emphatically held the view that non service of pre-action notice can be waived by the party entitled to it.

This leads to the question whether the decision in *Nigercare Development Co. Ltd v Adamawa State Water Board & Ors* is distinguishable from the other decisions by the Supreme Court or whether same was reached *per incuriam*. On a close analysis of the case of *Nigercare Development Co. Ltd v Adamawa State Water Board & Ors* one discovers that the major issue on which the case was decided revolved round whether a court can, *suo motu* raise an issue of law affecting her competency such as the non service of a pre-action notice;[39] whether the findings of such a court forms part of the facts before the court upon which decisions can be reached; and, whether the requirement for the service of pre-action notice is constitutional.[40] These issues were the major points upon which *Nigercare Development Co. Ltd v Adamawa State Water Board & Ors* was argued and determined before the Supreme Court.

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39 On whether the court can *suo motu* raise a point of law, see *Finnih v Imade* (1992) I NWLR (Pt 219) 511 at 537 para E-F per Karibi-Whyte JSC, *Nigercare Development Co. Ltd v Adamawa State Water Board & Ors, (Supra),* pp. 523-524; in *Bakare v NRC* (2007) 17 NWLR (Pt 1064) 656, Muktar JSC stated that: "A judge in the course of writing his judgment is at liberty to have recourse to any provision of the law that is relevant to the subject matter of the case in controversy in order to completely give the judgment the attention it deserves, to do justice to it and to avoid miscarriage of justice." In *Nigercare*, the problem was not the raising of the issue *suo motu* by the trial judge, but the failure of the trial judge to make the proper finding which would have helped the court in reaching the proper verdict that the defendant having not raised it in their defense, had waived the right to rely on same.

40 On the constitutionality of pre-action notice, see *Prince Atolagbe & Anor. v Alhaji A. Awumi & Ors* (1997) 9 NWLR (Pt 522) 436 at 566-567, *Fawehinmi Const. Co. Ltd v OAU* (1988) 6 NWLR (Pt 553) 171 at 190, 194, *Chief Osage I & Anor. v Chief Offor & Anor* (1998) 3 NLR (Pt 54) at 205. *Bakare v Nigerian Railway Corporation* [2007] 17 NWLR (Pt 1064) 606 at 656.

Justice ogbuagu[41] at page 515 of the reported case stated:

> My perusal of the records makes it abundantly clear to me, that the learned counsel for the appellant either in the two lower courts or in their brief in this court, *never* at any stage, contended that the appellant complied with the said provision before instituting its said suit. Rather, the arguments all along, (i.e. in the two lower courts), have been that the appellant, is/was not bound to comply with the provision of an Edict and that it cannot in any way postpone or suspend the right of the appellant to be heard or restrict the jurisdiction of the trial court.

It was not then difficult to appreciate how the court reached this rather positively misleading decision.

In our opinion the rationale for the service of a pre-action notice is to give notice of the claim against the defendant to the defendant;[42] for the basic purpose of allowing him exercise the option of either settling the matter or preparing for his defence. The defendant may therefore choose to enter his defence if he feels that he is sufficiently prepared to take up the defence without demanding for the service of the pre-action notice. An individual may renounce a law made for his benefit as represented by the Latin maxim, *quilibet potest renuntiare juri pro se introducto*.[43]

Ordinarily, the rules of courts always provide for sufficient time for a defendant to enter defence;[44] it is therefore time wasting for

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41 The Honorable Justice Niki Tobi at page 525-526 of the reported judgment quoting from the findings of the lower courts stated that: "The main plank of its argument is that the provisions of the Edict are inconsistent with section 36 (1) and 33 of the 1979 constitution." See also Mohammed JSC at page 534. See further pages 530-531 of the reported judgment.

42 *Katsina Local Government v Alhaji B. Makudawa*, (supra) at p.107, per Uwais JSC (as he then was); *His Highness Umukoro & Ors v NPA & Anor* (1996) 4 NWLR (Pt 502) 656 at 667 per Kutigi JSC (as he then was).

43 See the *dicta* of Oguntade JSC in *Feed and Food Farms (Nig) Ltd v NNPC*, *supra* at p. 144-145, quoting with approval S.G.G. Edgar, ***Craies on Statute*** *Law* (**7th ed**.), (London: Sweet and Maxwell, 1971), p. 269.

44 For example, the Rivers state High Court (Civil Procedure) Rules, provides for appearance to be entered within Forty-two days in suits commenced by way of Writ of Summons, Five days in cased placed under the Undefended

a party to insist on the service of pre-action notice without any plan for alternative dispute resolution. Where therefore the party waives the right to raise the non-service of pre-action notice and takes up his defense, we are of the opinion that the competency of the court is not ousted in such circumstances.

6. Implications of having two conflicting decisions

What exactly is the status of the *Nigercare Case*? Strangely, no mention of it was made in the *Food & farm Case*. The implication is that the case remains resolutely in conflict with the other Supreme Court decisions on the issue in consideration. By the doctrine of *stare decisis*, the decisions are binding on lower courts.[45] The implication in law is expressed as follows by Salmond on Jurisprudence:[46]

> Where authorities of equal standing are irreconcilably in conflict and the lower court can choose between them as the Schizophrenic court itself. The lower court may refuse to follow the latter decision on the ground that it is the latest authority which of those two courses the court adopts depends; or should depend on its own view of what the law ought to be. However, it takes a somewhat bold judge to disregard a precedent handed down by a court of higher standing on the ground that the decision was *per in curiam*.

The courts in interpreting this principle under the doctrine of *stare decisis*, have adopted the position that though the lower court has the liberty to chose which of the decisions to follows,[47] for the

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List and Twenty-one days 21 days in cases commenced with Originating Summons; see Forms 1 and 1B, Order 17 Rule 16 infra.

45 *Nwangwu v Ukachukwu* [2000] 6 NWLR (Pt. 662) 674 at 690.

46 11th Edition at page 207.

47 per uwaifo JCA in *Thor Ltd v FCMB Ltd* (1997) 1 NMLR (Pt 479) 35 at 44.

court giving the decision, the last decision operates as a bar. In *Makanjuola v Khalil*,[48] it was held that:

> In conflicting judgments of courts with equal jurisdiction over the subject matter in dispute, as the High Court and the land court here, the rule is that the last decision operates as a bar.

7. When will a pre-action notice be said to have been waived?

Though most of the decisions of the Supreme Court agree that non-service of pre-action notice can be waived, there is no certainty as to the time limit within which non-service of pre-action notice may be raised as a defence at the trial court. Basically, a party relying on a statutory defence relating to procedure that affects the competence of the court should not be able to raise same if he has entered his defence. This may be done through pleading in the statement of defence or by raising it as a preliminary issue. In *Food & Farms* case,[49] it was held that:

> A civil case at the High Court is fought on the pleadings of parties. If a Defendant does not raise a special defense based on facts which are known only to him, it is not the duty of the court to assume the function of raising such facts for him.

This idea of raising the issue of non service of pre-action notice was somehow complicated by the decisions in such cases like *Nitiero v NPA*,[50] where it was held that:

> It may be mentioned that the effect of non-service of a pre-action notice, where it is statutorily required, as in this case is only an irregularity which, however, renders an action incompetent. It follows therefore that the irregularity can be

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48 (1958) WNLR 82 at 4 per coussey, AG FCJ. See also *Taiwo Obisanya Seriki v Soyemi solaru* (1965) NWLR 1, *Osita Ikeawu & 21 Ors v Chinwuba Nwankpa* (1967) NMLR 224; *Mkpedem v Udo* (2000) 9 NWLR (Pt. 673) 631 at 644-645.

49 *Supra*, per Oguntade JSC, at 143 para f.

50 *Supra*, per Muhammad JSC.

> waived by a defendant who fails to realize it either by motion or plead it in the statement of defence.

Though this *dictum* of the respected jurist seem clear on the face of it, however, the mere fact that pre-action notice may be raised by motion does not mean it should be brought at anytime in the lower court since motions may be filed anytime before judgment. *Food & Farms* case was clear on this issue; again, Oguntade JSC,[51] as he then was held that:

> It is in my humble view clear that the Respondent, not having complained in his pleadings of non-service of pre-action notice, must be deemed to have waived such service and could not be allowed to complain subsequently of absence of jurisdiction in the trial court to hear the case arising from such non-service.

The controversy on how and when to plead or rely on pre-action notice is somehow knitted in whether non service of pre-action notice affects jurisdiction. Indeed, in *Nigercare* case, the non-service of pre-action notice was raised *suo motu* by the court. Conceding that non service of pre-action notice may affect competence, one may not comprehend how a court can *suo motu* raise a defense which obviously has been jettisoned by the defendant, and based on same, strike out the matter of the claimant.

In our humble view, even though the service of pre-action notice might affect the competence of a court, it is presumed waived if not pleaded as a defence to the institution of the case; and the jurisdiction of the court to hear and determine the case in such cases is sacrosanct.

8. Conclusion

The purpose of providing for pre-action notice is not to defeat the valid claim of the claimant. It is our humble view that pre-action notice clauses are most irrelevant for determining competency of

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51 Per Oguntade at 145, para f.

courts to entertain actions and may work great injustice on claimants. We are of the opinion that the issue of the service of pre-action notice should not be taken as an issue that can shut out the rights of the claimant. Instead, pre-action provisions in our laws if at all necessary should be framed in a way that it would be used to encourage alternative dispute resolution and where it is not served, should only stay and not determine *in limine* the case of the claimant. Pre-action notices should also be made irrelevant to counter-claims against claimants, who, having brought an action against the defendant, would want to use same to shut out the defendant from counter-claiming.

Where the defendant does not intend to settle out of court, the rules of courts in most cases have provided enough time for a defendant to decide whether to prepare for its defence or not, hence, pre-action notice is most unnecessary for the purpose of preparing for defence and in our view is no longer needed in our laws- at least in the form in which it presently operates.