AN APPRAISAL OF THE LAW AND PRACTICE PRE -ACTION NOTICE IN NIGERIA

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Abstract

The law and practice of pre-action notice in Nigeria has been a long standing practice. The public corporation, statutory bodies, institution and other government Parastatal surreptitiously enshrined in their laws a provision on pre-action notice with the aim of settling the matter without the need for court intervention. There are have been arguments and counter arguments that the law and practice of pre-action notice is unconstitutional, illegal and should be declared null and void, because it is believed that it negates the provision of the constitution which provides for unfettered right of access to court and justice in Nigeria. This paper adopts doctrinal research method, specifically library-based research. This paper compares the practice of pre action notice in other jurisdictions and found that courts in Nigeria are in full support of the mandatory service of pre-action notice, and plethora of cases that had been decided were in full in support that the Plaintiff must issue the pre-action notice in compliance so as to fulfill the condition precedent for invoking jurisdiction of the court, pre-action notice law been a procedural law, the condition must be fulfilled. The paper concludes that though the service pre-action notice is mandatory for invoking the jurisdiction of the Court, non- compliance should not attract total ouster of the Court Jurisdiction but should only put the jurisdiction of the court in abeyance pending compliance.

Keywords: Jurisdiction, Mandatory notice, Pre-Action Notice, Pre-action, Pre action protocol

1.0 Introduction

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The law and practice of pre-action notice demands that a written notice be sent to the defendant by the plaintiff before an action is commenced in court, failure of which the plaintiff stands the risk of losing his or her claims or case even where the plaintiff has genuine and reasonable case or claim against defendant. The service of requisite pre-action notice where the law demands for it has been adjudged to be a condition precedent for invoking court jurisdiction and the absence of which many courts will decline to assume jurisdiction. The essence is to give such agency of government opportunity to explore settlement of the issues in contention by alternative dispute resolution. Nigerian Courts have given effect to the mandatory nature of pre-action notice and the need for full compliance with the provision of the law while issuing the notice. On several occasions, the court had declined jurisdiction for non –compliance with the law requiring pre-action notice or in the event of failure to issue it. Even where the defendant never raise the defence of failure to issue pre-action notice or file a preliminary objection to the case of the plaintiff, the Court can at any stage of the proceedings or trial *suo motu* raise the defence. Hence waiver has been adjudged not be an exception for the compliance with issuance of pre-action notice where the law of the defendant demands for it.

The first part of this paper will appraise the law and practice of pre-action notice while the second part deals with application of pre-action notice in other jurisdictions. The third part examines the exceptions to application of pre-action notice and the fourth part deals with whether pre-Action notice is a clog or cure for justice in Nigeria.

2.0 Conceptual Framework for the Law and Practice of Pre-Action Notice

According to the Black's Law Dictionary, Pre –Action Notice is defined as 'An act or event, other than a lapse of time that must exist or occur before a duty to perform something promised arises'. Adedamola expands the definition and establishes the mandatory nature of Pre-Action Notice when he opined 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 perquisite notices, on the other party. [1] Such condition or condition precedent are necessary for successful determination of the suit before the Court, whether actions are initiated with

4.Adedamola .K. " Pre-Action Notices and Access to Court in Nigeria". *Nigerian Bar Journal* (Vol. 2 No 2, 2004) P 205

due process of law or not.[2] To further corroborate the submission of Ademola on the mandatory nature of the pre-action notice, Stanley and Agaba, defined it as a mandatory notice that has to be given to a defendant by the plaintiff in required cases. It is a condition precedent to commencement of action where such notice is required. Failure to give such notice makes the suit incompetent and remains so unless waived by the party entitled to such.[3]
The submission of Stanley and Agaba received the judicial intonation in the case of *Ministry of Education, Anambra State v Asikpo*[4] when the Court held that if a party being sued is one that requires pre-action notice to be given before the commencement of the action, the pre-action notice must be given, otherwise the case is incompetent and the court is therefore robbed of jurisdiction.

In addition, the provision of section 6 (6) (b) and 36 (1) of 1999 Constitution of Federal Republic of Nigeria provides for an unfetter and equal right of access to court and justice in Nigeria. The deduction from this provision is that a litigant can maintain an action in Court for the purpose of just determination of his civil right and obligations[5]. However, there is another preliminary matter that the court is usually consider in any cases that involve statutory bodies and corporation and this preliminary matter is whether there was service of requisite pre-action notice on the statutory bodies or cooperation before an action is instituted in Court. The statutory bodies and cooperation include all the government institutions, organization established by laws or Act and statute.

On several occasions, a Plaintiff who has a genuine case has loss the case due to failure to serve pre-action notice. Court had declined jurisdiction to hear and determine a case due to none service of the pre-action notice on the defendant. There have been several arguments and counter arguments on the constitutionality of the concept of pre-action notice as many believe that it negates the doctrine and principle of fair hearing and right of access to Court

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5.Tony A. Ijohor " Can the Requirement of Pre Action Notice be Waved?" *University of Jos Nigeria Institutional Repository Journal* (Vol.1 No.1 2013) P 128-141

[3] M.M. Stanley & J.A. Agaba "Civil Litigation in Nigeria" Nelag & Company Limited (2015)p.89

[4](2014) 14 NWLR (pt. 1427)pp.351, see also NNPC V Sele (2004)2 NWLR ((Pt 910) 623,

[5]Kehinde .M. Mowe *" Constitutional Law in Nigeria"* (Malthouse Press Limited, 2008)

as contained in the provision of the constitution which is the ground norm of all laws in our country.

In the same vein it has been argued that the letters and correspondences that exchanged hands between the Plaintiff and the defendant before the Plaintiff eventually proceeds to Court should suffice enough as the pre-action notice and there is no need for any other letter per se to construe a pre-action notice, this argument has met a road block when the Court rejected it in the case of *O.A.U v Oliyede & Sons Ltd*[6] and it held that the pre-action notice must follow strictly the wordings, the languages and formality as contained in the Act or laws of the defendant.

2.1 Is failure to serve a Pre-Action Notice Fatal?

The argument on whether or not the failure to serve the pre-action notice where it is required amount to mere irregularity and same is not capable of robbing the court of its jurisdiction is yet to be settled, as some school of thoughts opined that it is just mere irregularity that is not capable of robbing the court its jurisdiction. Another school of thought is of the firm view that where the requirement for pre-action notice is not waved, it is mandatory for the Plaintiff to serve it before same proceeds to commence an action in Court. Our Courts differ in their opinion as to whether the failure to serve pre-action notice has any effect on the jurisdiction of the court, considering the facts that other requirements that can make court to assume jurisdiction has been met. The Court in the past had delivered two contradictory judgments on the mandatory nature of pre-action notice, and its capacity to rob the court of its jurisdiction or as a mere irregularity that only suspend or place in abeyance the jurisdiction of Court. In *Katsina Local Authority v Alhaji Makudawa*[7] the court held 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 v Adesanya*[8]. Rather, it is 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.

In contradiction to the above decision the Court in another case of *Ntiero v. N. P. A*[9] held that non-service of a pre-action notice merely puts the

[6] (2002) All FWLR Pt 105, 799 at Pp 818-819
[7] (1971) 1NMLR 100
[8] (1989) 3 NWLR (Pt. 109) 250 at 275
[9] (2008) 160 LRCN 1, 217-218.

jurisdiction of a court on hold pending compliance with the pre-conditions; the effect of non-service of a pre-action notice, where statutorily required is only an irregularity, which, however, renders an action incompetent.

One may be tempted to submit that *Ntiero v. N.P.A*[10] been more recent than the case of *Katsina Local Authority v Alhaji Makudawa*[11] the law is already settled that non service of pre-action notice amount to mere irregularity that has no effect on the jurisdiction of the court, however in the 2016 case of *PPMC Ltd v Al-Musmoon Sec. Ltd*[12]where the court in relying on the case of *NNPC v Fawehinmi*[13] and *Odoemelam v Amadiume*[14] held thus:

> Where a pre action notice is statutorily required for any action or suit commenced without giving the required pre-action notice is incompetent and it is liable to be struck out. In the instant case by the failure of the respondent to serve the appellant the prescribed pre-action notice before filing its suit, a precondition to the competence of an action was not complied with. In the circumstance the action was struck out.

The deduction from these two contradictory decisions is that the law has not been settled on the mandatory nature of the pre-action notice, however going back to the decision of *Katsina Local Authority v Alhaji Makudawa*[15] the Court judicially and judiciously explained its decision from five points of view when it stated thus about pre-action notice:

a. Provision of prescribing pre-action notice are mandatory
b. Non-compliance with such mandatory provisions can be waved
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 the action must be pleaded
e. Failure to plead amounts to waiver.

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[10]Supra
[11]Supra
[12](2016) 13 NWLR (Pt 1528) P. 69 at Pp 78 Paras C, P.78-80 Paras H-A
[13](1998) 7 NWLR (Pt. 559) 598
[14](2008) 2 NWLR (Pt 1070) 179
[15]*Supra*

Another issue that needs to be settled by our law and the court is the determination of at what stage of the proceedings or at what point should the defendant who has not waived the right to pre-action notice raised objection to the jurisdiction of the court because of the non-service of pre-action notice by the Plaintiff? Opinions differ on this issue also, why it has been argued in the past that the defendant must by preliminary objection and his pleading raise an objection to the jurisdiction of the court to entertain any suit where he has not been served the requisite pre-action notice immediately the case is filed at the trial court failure of which will amount to waiver, however, court on the other hand had held that the objection to non –service of requisite pre-action notice can be raised at any stage of proceeding even for the first time in the court of appeal or supreme court, the case of *Nigercare Development Co Ltd v Adamawa State Water Board &Ors*[16]. In dismissing the appeal and affirming the position 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 the position of the 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 provision of the Edict under consideration held, first, that the phrase, no suit shall commenced in the said provision prohibited the commencement of all suits whatsoever. For this position, the court relied on the case of *Fawehinmi Construction Co Ltd v Obafemi Awolowo University*[17] the court dismissed the appeal because, according to it the issue of waiver was of no consequence in the case. As the Court further held, a provision of section 51 (1) and (2) of the Edict or Law requiring the a pre-action to be given to a defendant, not only goes to the competence of the 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 proceedings are a nullity however how well conducted.

It should be noted that the position of the Supreme Court in the above cited case is a complete departure from its decision in the case of *Katsina Local Authority v Alhaji Makudawa*[18] and this position has been strongly criticized by Ijohor who opined that the Supreme arrived at the decision *per incuriam*.

3.0. The Law and Practice of Pre-Action Notice in Nigeria

[16](2008) 3 SCNJ 28
[17]*Supra*
[18]*Ibid*

The law and practice of Pre-action Notice in Nigeria is best understood by examining any provision of the Act or law of any statutory institution or cooperation that expressly provides and request for service of pre-action notice before any case is commenced in the Court. Section 49 (1) Obafemi Awolowo University Act reads as follows:

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

In the same vein, the provision of 83(2) of the Nigerian Railway Corporation Act[19] provides as follows:

> 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."[20]

The Act specifically highlighted the contents of the pre-action notice to include, cause of action, the particular of the claim, the name and place of abode of the intending plaintiff and the relief which he claims. Though Pre-action notice is in form of a letter, but onerous is on the Plaintiff to ensure strict compliance with the provision Act while writing the pre-action notice as just a mere letter that does not contain all the particulars stated in the Act will not be accorded a status of pre-action notice. In the case of *O.A.U v Oliyede & Sons Ltd*[21] The Court of Appeal held that the notice given by the plaintiff's solicitor is invalid, for reasons of non-compliance with statutory prescription in section 49 (I) . That apart from the fact that the letter was not addressed to the proper person, it neither contained the abode of the plaintiff

[19](CapN 361) Laws of the Federation of Nigeria (2004).
[20] See also S.12(2) of the Nigerian National Corporation Act, Cap.N LFN (2004)
[21](2002) All FWLR Pt 105, 799 at Pp 818-819

nor his cause of action and particulars of claims. To that extent, the plaintiff's action was held to be incompetent and the jurisdiction of the court thereby ousted.

There must be strict compliance with the content of the pre-action notice, if not the Court will discountenance any ordinary letter that does not contains all the particulars and the content of pre-action notice as laid down in the Act. The court in the case of *Igbrude v ECOBank & Ors*[22]held that a pre-action notice in a statute is mandatory and must be complied with. It is tantamount to a condition precedent to the filing of an action; it also must be definitive and contain relevant facts to the intending action.[23]

It should be noted that failure to comply with the requirement of Act on the contents and particular of pre-action notice, even if it is served will still amount to non-service of the requisite because the law demands strict compliance. In *Shaibu v NAICOM*[24]the Court held thus:

> The law prescribes a condition precedent to the competence of action and where such condition precedent is not complied with; the action commenced should not be entertained by the court.

Deduction from the provisions the two different Acts quoted above revealed that the pre-action notice must be served at least three months before the commencement of the suit, the question then is, what it is the effect of the pre-action notice served on the defendant in the public service or statutory cooperation and the institution after three months? This question brings to mind the provision of the law that offers protection for public officer in the performance of their duties. Section 2 (a) of the Public Officers Protection Act[25] provides that where any action, prosecution, or other proceeding is commenced against any person for any act done in pursuance or execution or intended execution of any Act or Law or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such Act, Law, duty or authority, the following provisions shall have effect the action,

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[22](2018) LPELR 45563 (CA)
[23]*Zamfara State Government & Anor v Unity Bank Plc & Anor* and *Amadi v NNPC* (*2000) 10 NWLR (Pt. 674) 76. Peter v NNPC (supra)*
[24](2002) 12 NWLR (Pt 780) 116
[25]Cap P. 41, Laws of the Federation 2004

prosecution, or proceeding shall not lie or be instituted unless it is commenced within three months next after the act, neglect or default complained of or in case of a continuance of damage or injury, within three months next after the ceasing thereof.

Any person referred to in section 2(a) of the Public Officers (Protection) Act means both artificial and natural persons alike. The provisions of the Act do not only apply to Public Officers but also public institutions, ministries, departments and agencies. The Public Officers (Protection) Act protects as distinct entities in certain cases public officers holding public offices in the public service.[26] This includes corporation sole or public bodies, corporate or incorporates, in *Ibrahim v. J.S.C.*[27]. Iguh JSC held that "public officer" has by law been extended to include a "public department" and, therefore, an artificial person, a public officer or a public body.

The failure to bring an action within the three months stipulated by the Public Officers Protection Act, renders any action instituted against the public officers after three months statute barred. Invariably, since most public corporation, institutions and ministry demands for service of pre-action notice before any action is instituted, and any action that is brought after three months is statute bar, it is therefore a sensible conclusion that any pre-action notice served after the three months the cause of action arose is incompetent and the Plaintiff cannot rely on such pre-action notice in court because his claims against the defendant would have been statute barred *ab-initio.*

4.0 Application of Pre-Action Notice in Other Jurisdictions

4.1 United Kingdom[28]

In the United Kingdom, the Practice Direction and Pre Action protocol are designed to build on and increase the benefits of early but well informed settlement which genuinely satisfied both parties to a dispute. The aim of Pre-action Practice Protocol in United Kingdom is to enable parties to settle the issues between them without need to start the proceedings, and to support

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24Abiodun Odusote ' The Nigerian Public Officers Protection Act: An Anachronistic Legislation Yearning for Reform' Journal of Public Administration and Governance (2019) Isuue1 Vol.9

[27](1998) 14 NWLR (Pt. 584),

26Philip Morgan ' Conflict Between Jurisdiction and Procedure: Pre –Action Civil Procedure and Jurisdiction- A Poor Fit Lloyd Maritime and Commercial Law Quarterly (2011) Pp 275-292

the efficient management by court and the parties of proceedings that cannot be avoided. It achieves these aims by encouraging the parties to exchange information about the issues and to consider using a form of Alternative Dispute Resolution. In United Kingdom, under the Pre-action Protocol, a pre-litigation filed is created of information and exchange and negotiation. They exist for the following types of claim: personal injury, clinical disputes, construction and engineering, defamation, professional negligence, judicial review, disease and illness, housing disrepair, possession claims based on rent arrears, possession claims based on mortgage arrears or home purchase plan arrears in respect of residential property, and low value personal injury claims in road traffic accidents. The aims of the Pre-Action Protocols are: more pre-action contact between the parties, better and earlier exchange of information, and better pre-action investigation by both sides, to put the parties in a position where they may be able to settle cases fairly and early without litigation, and to enable proceedings to run to the court's timetable and efficiently, if litigation becomes necessary. The court treats the standards set in the Protocols as the normal reasonable approach to pre-action conduct; and, in considering compliance with the Practice Direction; the court considers the relevant Pre-Action Protocol. HHJ Wilcox, in *Daejan Investments Ltd v The Park West Club Ltd*[29]described the protocols as providing ''the framework for a sensible discussion, or the chance for a sensible discussion so that the option is available to a party to avoid the need for litigation''. Similarly in *Cundall Johnson and Partners LLP v. Whipps Cross University Hospital NHS Trust*[30] Jackson J stated that, if ''both the letter and the spirit of the Protocol are complied with, many disputes can be resolved at proportionate cost without the need for proceedings''. Whilst each of the Protocols is tailored to a different type of dispute, all of the Protocols contain the requirement that the claimant send to the defendant a detailed letter before action, apart from the Road Traffic Accident Protocol, which provides for a claim notification form, and the Possession Protocols, which provide for statutory notice and contact or contact and provision of information. By encouraging information exchange, the Protocols simplify pending litigation and encourage settlement of the dispute.

The effect of non – compliance with the service of pre-action notice or protocol in United Kingdom does not include total ouster jurisdiction of the Court as we have in Nigeria but it include that the unsuccessful party pays

[29][2003] EWHC 2872 (TCC); [2004] BLR 223, [14]
[30][2007] EWHC 2178 (TCC); [2007] BLR 520, [27].

the cost of the successful party[31]. In United Kingdom, the court has discretion as to whether cost are payable by one party to another, the amount of those costs, and when they are to be paid. In deciding order to make, the law provides that that the court must have regard to all the circumstances including the conduct of all the parties. The law provides that conduct is not simply the conduct of the parties during the proceedings, but also their conduct prior to the proceedings, and ''in particular the extent to which the parties followed the Practice Direction (Pre-Action Conduct) or any relevant Pre-Action Protocol. In the case of *Excelsior Commercial and Industrial Holdings Ltd v Salisbury Ham Johnson*,[32] it was held that the conduct of the party has taken the situation away from the norm. This can of course include non-compliance with Pre-Action Protocol processes.

Other sanctions are also provided for non-compliance with Pre-Action Protocols, which are outside the costs jurisdiction. A court may use interest on awards to penalize parties who do not comply. If the party that is at fault in not complying with the Pre-Action Protocol is a claimant in whose favour an order for payment of money is made, the court may deprive the claimant of interest on all or part of that sum, or award interest to the claimant at a lower rate than would otherwise be awarded.[33] If, however, the party that is at fault is a defendant, and an order for the payment of a sum of money is made in favour of the claimant, the court may order that the defendant pay interest on all or part of that sum at a higher rate than would otherwise have been awarded.[34] A court may also order a stay of proceedings which are brought in breach of the Pre-Action Protocol processes.[35]

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[31]N Andrews, EPL 1, [19.318] states, citing *Roache v. News Group Newspapers Ltd* [1998] *Ent and Media*
LR 161, 166 (Sir Thomas Bingham MR), *Condliffe v. Hislop* [1996] 1 WLR 753, 762 (Kennedy LJ) and *AEI Ltd v. Phonographic Performance Ltd* [1999] 1 WLR 1507, 1516, this rule to be of the ''greatest importance since it deters ill-considered or malevolent claims and defences and encourages settlement.'' This is removed in EPL 2, where, at [22.107], the rule is seen as acting as ''a disincentive against bringing or defending claims''

[32][2002] EWCA Civ 879; [2002] CP Rep 67, [39] (Waller LJ).

[33]Practice Direction on Pre-Action Conduct, [4.6(4)]

[34]Practice Direction on Pre-Action Conduct, [4.6(5)]

[35]Eg, Cundall Johnson and *Partners LLP v. Whipps Cross University Hospital NHS Trust* [2007] EWHC
2178 (TCC); [2007] BLR 520, where Jackson J ordered a stay of proceedings. This is of course during, as opposed to at the end of, the litigation process.

4.2. South Africa

The provision of law on pre-action notice and protection of public officer are often fused together under the same Act in South Africa. For instance, section 113 (1) of the Defence Act (44 of 1957) provides thus:

> No civil action shall be capable of being instituted against the State or any person in respect of anything done or omitted to be done in pursuance of this Act, if a period of six months ... has elapsed since the date on which the cause of action arose, and notice in writing of any such civil action and of the cause thereof shall be given to the defendant one month at least before the commencement thereof.

This above provision of the South African law was held to be inconsistent with the Constitution of the South Africa in the case of *Leach Mokeli Mohlomi v Minister of Defence*[36]. In this case, a civil action was referred to the Constitutional Court of South Africa from the Witwatersrand Local Division of the Supreme Court; the plaintiff sued the defendant for damages for the consequences of injuries which the plaintiff sustained on 2 May 1994 when a soldier shot him intentionally. The Court held that the provision of the Defence Act, 1957 which required that action be brought within six months when the cause of action arose and by issuing a notice of action one month before the commencement of the action contravened section 22 of the Interim Constitution which provided that, "every person shall have a right to have justiciable disputes settled by a court of law or, where appropriate another independent forum. The court ruled that the effects of the dual special provisions is to deprive the litigant an adequate and fair opportunity to seek judicial redress for wrongs done by public authorities against them and therefore section 22 was violated. In coming to the conclusion, the court considered the rather strict provisions of the limitation period which in effect provided for a window of five months in which to give notice and file suit.[37]

4.3 Canada

[36]Case CCT 41/95

[37]Abiodun Odusote' The Nigerian Public Officers Protection Act: An Anachronistic Legislation Yearning for Reform' *Journal of Public Administration and Governance* (2019) Issue1 Vol. 9.

The position of law on pre-action notice in Canada has since been criticized and suggestion and recommendation had been made. In Ontario, Canada, a Report on Limitation of Actions (1969) of the Ontario Law Reform Commission made recommendations that special protections for public authorities be discontinued in all legislations. The Commission observed that a notice of claim which must be given within a limited time as a condition precedent to the bringing of an action achieves the same result as a limitation period. It is, in effect, a limitation period within a limitation period ... The Commission does not believe that a person should be absolutely barred from bringing an action merely because he has failed to give the notice required. If such requirements are to continue, and there is some justification for their retention [in certain cases], then the courts must be able to give relief from any of these provisions where it would be just to do so.

The submission from the view of the commission is that the law should not be static; circumstances that surround of each case should dictate the action and conclusion of the Court. While pre-action notice may be needed in some cases, non- compliance with it in another case should not totally ouster the jurisdiction of the court especially when regard has been made to the circumstances of the case. This is a far departure from the law and practice of pre-action notice in Nigeria which appears rigid and a shield to public officers and institutions from facing justice for their alleged deeds.

5.0 Exceptions to Application of Pre-Action Notice

5.1. Cases of Breach of Contract/Claim for Labour or Work Done

The Supreme Court has held that giving of pre-action of notice 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 obligation. In *Ugwuanyi v Nicon Insurance Plc*[38], the Supreme Court held that the position of the law is that where a suit is brought under express or specific contract, it is no longer necessary to serve the corporation pre- action notice. Furthermore, from the decided authorities, there would be no need to serve pre-action notice when the goods have been sold and the price is to be paid upon quantum meruit or for cases of breach of contract, claims for work and labour done.[39]

[38](2013) LPELR 2009 2, (SC) or (2013) 11 NWLR (Pt.1366) 546

[39]See *Adamu v Comptroller of Prisons, Federal Prisons, Aba & Ors* (2013) LPELR-CA/OW/292A/2011

5.2 Fundamental Right Enforcement Cases

It is the law that fundamental right enforcement cases are exempted from the requirement of pre-action notice. In the case of *Adelakun v Ogun State University*[40] the court held that all cases brought for the enforcement of Fundamental Human Rights pursuant of section 42 of the 1979 Constitution[41] are not subject to any pre-action notice clause.

5.3 Privatization of Public Corporation

A public corporation loses the right to receive pre-action notice immediately such corporation is privatized. This position was tested in the national industrial court case of *Mrs G.I. Oyeleke v NICON Insurance, Plc*[42]the Court held in that case that since NICON Insurance has been privatized by the Federal Government, it has lost the privilege of being entitled to a pre action notice by virtue of the Public Enterprise (Privatization and Commercialization) Act and that the 2nd respondent is a limited liability company incorporated under the Companies and Allied Matters Act, 1990 and as such cannot enjoy the benefit of a pre action notice as it can sue and be sued without serving it a pre action notice.

5.4 Instances where Irreparable Damage will occur

Where the failure to institute an action on time will occasion irreparable damages to the Plaintiff, then the Plaintiff can dispense with the service of pre-action notice on the defendant. However, where it is proved or established that no irreparable will occasion, then it is mandatory for pre-action notice to be served. In the case of *Int'l Tobacco Co. Plc v NAFDAC*[43]the court held thus:

> "*It is of course correct to conclude as the appellant has, that the decisions of this Court and the Supreme Court on the mandatory nature and the constitutionality of pre-action notice provisions in different statutory provisions can invite exceptions. These would be where irreparable damage would be done if the prospective plaintiff was to issue the notice and wait out the statutory period before accessing the Courts. A typical example would be where life and limb is*

[40]Unreported Suit No. M/178/96
[41]s. 46 of the 1999 Constitution (as amended)
[42]Suit no. NICN/L/14/2016 Judgment delivered on 24th November, 2007
[43](2007) LPELR -8442 (CA)

> *threatened. In the present case, the payment of the fees demanded by NAFDAC cannot constitute such irreparable damage, as the fees paid are easily recoverable on successful prosecution of the suit challenging it."*
> *Per AGBO ,JCA (P. 34, paras. A-E)*

5.5. Action outside Statutory Duty/Criminality

A public officer or public corporation that acts outside his or her statutory duty or commit a crime will not be offered protection envisaged by the Act or entitle to any pre-action notice. The provision of Public Officer Protection Act will also not save such an individual. In the case of *Attorney-General of Rivers State v. Attorney-General of Bayelsa State & Anor*[44]it was held that the second exception to the application of the Act as a defence is that it does not cover a situation where the person relying on it acted outside the colour of his office or outside his Statutory or Constitutional duty as claimed by the Plaintiff in this suit. See: *Nwankwere v Adewunmi (1967) NWLR 45 at 49; Anozie v. Attorney-General of the Federation (2008) 10 NWLR (Pt. 1095) 278m at 290 – 291*

6.0. Pre-Action Notice: Clog or Cure for Justice in Nigeria

To determine whether or not pre-action notice amount to a clog or cure for justice in Nigeria, it will be of great importance to examine the rationale and justification for the practice of pre-action notice in Nigeria; it is after we are home and dry about these rationales that we can then determine whether it is a clog or cure.

According to Ademola the justification for requirement of notice before a person can commence or institute a legal proceeding against certain bodies 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 and if necessary to settle the matter out of court. The rationale for the imposition of pre-conditions for exercise of right 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 evidence to disprove stale claim. Person with good cause of action should pursue them with reasonable diligence and those who go to sleep on their

[44](2012) LLJR-SC

claim should not be assisted by the courts, and should be an end to stale demands.[45]

These above reasons and rationale are good and justifiable; however the consequence of the failure to issue the pre-action notice which is total ouster jurisdiction of the Court is too enormous for the plaintiff that has a reasonable case. A justifiable claims and reasonable cause of action should not be slaughtered by the court on the altar of failure to serve pre-action notice, considering that the unfettered right of access to court and justice is a constitutional right. It is our view that where the pre-action notice seek to facilitate settlement before court and to also avoid stale claims and demand been brought against the defendant, it is a cure and not a clog, but where the failure to serve the said pre-action notice does not only amount to irregularity but total ouster of the court jurisdiction it is then a clog. The Court in the time past had declared requirement of pre-action notice an unconstitutional and illegal. In the case of *Chief Gani Fawehinmi v. Prof. Jubril Aminu*[46]the defendant raised a Preliminary Objection to the suit because the Mandatory Pre-Action Notice required under section 12 of the NNPC Act was not served by the plaintiff. The plaintiff's counsel, Mr. Femi Falana, while relying on sections 6 (6) (b),116 33 and 39 of the 1979 Constitution and articles 2 and 3 of the African Charter on Human and People's Rights (Ratification and Enforcement) Act 1990 contested that section 12 of the NNPC Act violates the provisions of the Constitution.[47] Relying on the Supreme Court decisions in the cases of *Adediran v Interland Transport Ltd*,[48] and *Bakare v. Attorney General of the Federation*,[49] as well as section 1(3) of the Constitution,[50]the High Court upheld the argument of the plaintiff and held that the requirement of pre action notice is contrary to public policy, unfair, unjust and discriminatory. It benefits only statutory defendants and impedes the right of unconditional access to court guaranteed by the Constitution. What this means is that the requirement of pre-action notice was declared unconstitutional and illegal in the case under review. Though, the above cited case is a High court decision, we believe it is sound enough, and we further suggest that even if pre-action notice is not declared unconstitutional or illegal, the effect should not be total ouster of the court

[45]*Shell Petroleum Development Company v Uzoaru* (1994) 9 NWLR (Pt. 366) 51
[46]Unreported Suit No. FHC/L/CS/54/92
[47]The 1979 Constitution
[48](1991) 9 NWLR (Pt. 214) 155
[49](1990) 9 NWLR (Pt. 522) 536.
[50]Same as section 1(3) the 1999 Constitution (as amended).

jurisdiction but to only put in abeyance the jurisdiction of the court pending compliance by the plaintiff as it is the practice in the United Kingdom.

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7.0. **The Way Forward**

Having considered some recommendations above, the justification behind the mandatory nature of pre-action notice and the consequence of failure to issue requisite pre-action notice where the law of the defendant specifically demands for it, then the following recommendations are suggested as the way forward:

1. The effect of the failure to issue the pre-action notice should only be to suspend or put in abeyance the jurisdiction of the court pending compliance by the plaintiff since one of the major aim of issuing pre-action notice is to facilitate settlement between the parties. We believe that where the Plaintiff complies, before the matter proceeds to trial the matter can still be settled amicably.

2. Nigerian Court or Legislature should adopt the position in United Kingdom which only provides or award and indemnify cost even against the successful and unsuccessful party where it is discovered that either of the party did not comply with pre-action notice protocol as both parties in United Kingdom are entitled to the notice before the case is commenced in Court

3. Nigerian Court should always make recourse to the circumstances of the cases before declining jurisdiction. We believe that where there have been exchange of correspondences between the parties, before the Plaintiff eventually go to Court, sufficient notice must have been given via the correspondences, though it may not necessarily mean pre-action notice, as no law supposed to be capable enough to negate or contradict or inconsistent with the provision Constitution and such law should stand

4. Though service pre-action notice may be condition precedent and procedural law requirement for invoking the jurisdiction of the Court, it should however, be noted where other requirements for invoking the jurisdiction are met as laid down in *Madukolu & Ors. V Nkemdilim*[51] the Court should not totally decline jurisdiction, especially where the reason for doing that run foul or against the constitutional right.

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[51] (1962) 2 SCNL 341.

5. Pre action notice should not be a shield for fraud or illegality on the part of the defendant

8.0 Conclusion

The paper has examined pre-action notice law and practice in Nigeria. We have been able to explore and discuss the mandatory nature of pre-action notice and the need for strict compliance where the law of the defendant demands for it. There have been several decisions and the judgment of the court that support the practice and have categorically affirmed that the practice of pre-action notice is not unconstitutional or illegal. Though it has been the major stand from the trial court to the supreme court that the pre-action notice is a condition precedent and procedural law for invoking the jurisdiction of the Court, it must be noted that the position has changed in some developed countries, and the court in some developed countries do not decline jurisdiction for failure to serve the requisite pre-action notice, but they have devised another means of resolving the issue of failure to serve pre-action notice so as not to shut the door of the court against the plaintiff that has reasonable and justifiable cause of action and claim against the defendant.

We then conclude by inviting the courts in Nigeria and the legislature to move with the trend in other developed countries by devising another means of resolving the issues of effect of non with compliance pre-action law, so it will not serve as clog to the wheel of justice in Nigeria.