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PRE-ACTION NOTICE: CONSTITUTIONALITY AND OTHERWISE.

In this paper we are faced with the inevitable and indefensible presupposition that pre-action notices where appropriate i.e. where provided for by a rule of statute creating a body agency or corporation is a condition precedent which must be satisfied before an aggrieved party can bring his action against such body, agency or corporation. It is settled that failure by a plaintiff to give such notice would be fatal to a suit and the court will be right to decline the exercise of jurisdiction as it will be futile to exercise same where there is none. It is the object of this work to examine the constitutionality of pre-action notices.

A pre-action notice is legal notification required by law or agreement before an action can be instituted in court. **The Black's Law Dictionary**¹ amplifies it thus:

An act or event, other than a lapse of time, that must exist or occur before a duty to perform some-thing promised arises...

M.M. Stanley & J.A. Agaba² in their book discreetly exposed the mandatory nature of pre-action notice when their pen and ink rode across the paper thus:

This is 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

¹ H.L.A Bryan A, *Garner Black's Law Dictionary* (9th Ed, 2009) P.334, 1330

² H.L.A M.M. Stanley & J.A. Agaba, *Civil Litigation in Nigeria* (Nelag & Company Limited, 2015) p.89

GILBERT CHIBUIKE OBICHERE

The issue of pre-action notices has come to the courts for adjudication and determination in a plethora of cases one of which is the case of **Ministry of Education, Anambra State v Asikpo**³ which is very apt and illustrative of the point, the court opined thus:

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

It is settled that pre-action notices are not mere unsubstantial technicalities which do not affect the competence of the court. In the case of **City Eng. (Nig) Ltd v NAA**⁴, the court held that a distinction must be drawn between a mere or unsubstantial technicality in proceedings and a substantial technicality which amounts to a condition precedent to the commencement of an action and which renders the proceedings manifestly incompetent, thereby affecting the jurisdiction of the court and renders the same incurably defective. A good example of the requirement of pre-action notice is provided in **section 83(2) of the Nigerian Railway Corporation Act**, It 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.

³ (2014) 13 NWLR (pt. 1427) pp. 35

⁴ (1999)11 NWLR (pt. 625) pp.80

GILBERT CHIBUIKE OBICHERE

Before I examine the rationale for including the requirement of pre-action notices in our statute books, the relevant provisions of the constitution which are apparently in conflict with the rule of pre-action notices need be set out. Firstly, the CFRN is supreme by virtue of **Section 1(3)**⁵ of same; it is antecedent to any statute or government. The Constitution of a Nation is the fons et origo, not only of the jurisprudence but also of the legal system of the nation. It is the beginning and the end of the legal system. In Greek, it is the alpha and omega. It is the barometer with which all statutes are measured. The foregoing lends credence to its supremacy. **Section 36(1) of the CFRN 1999 as amended 2011** is to the effect that every person is entitled to fair hearing within a reasonable time.

Several cases has adduced reasons for the preservation of the rule of pre-action notice in our statute books, notable of such cases is the case of **NNPC V Tijani**⁶, where **Fabiyi JCA** stated as follows:

I see nothing unusual in the provisions of pre- action notices. They do not impede constitutional right of access to courts. **They are meant to give room for the government or its official to consider settlement of the matter**

In the case of **Anambra State Government v. Nwankwo**⁷, the court deciding on the constitutionality of a pre-action notice held that **section 11 (2) of the State Proceedings Law of Anambra State** which provides for same is valid and not unconstitutional. Furthermore in the case of **NNPC v Tijani**⁸, **Fabiyi JCA** stated thus:

⁵Constitution of the Federal Republic of Nigeria. (1999) S. 1(3), S. 6(6) b, S.36 (1).

⁶ (2007) All FWLR, (p.140, paras.E-G)

⁷ (2000)4 NWLR (pt. 564)354

⁸ (2007) All FWLR, (p. 140, paras. E-G)

I must note here that there are arguments in some quarters that pre-action notices

constitute an infringement of right of access to court as guaranteed in **section**

6(6)(b) and 36 of the 1999 Constitution. I do not subscribe to such view.

Regulation of the right of access to court abounds in rules of procedure.

With profound respect to the views of the courts in the cases cited above, I firmly and rightly believe that the combined reading of **Section 1(3), 6(6) (b) and 36(1) CFRN** will necessarily render the requirement of pre-action notices unconstitutional. This proceeds from the fact that the

CFRN is supreme and by its **S.6 (6) (b)** it made copious provisions for an unfettered right of access to the courts established by the section and **S.36 (1)** further amplifying the position provided for fair hearing within a reasonable time The three months' notice provided for in **Section 83(2) of the Nigerian Railway Corporation Act** and other clauses requiring notice in various other statutes are clearly in conflict with **S.36 (1) CFRN** and on the provision of **S.1 (3) CFRN**, the provisions on pre-action notice in various statutes establishing these bodies and corporations are necessarily void and of no effect whatsoever. It is against this backdrop that I humbly recommend that the Supreme Court revisit this issue of constitutionality of pre-action notices when next it presents itself.