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ABSTRACT

The procedural aspectof the law is generally provided in the various Rules of Court which areapplied from the Magistrates' Courts to the Supreme Court. Rules of Court aremeant to be obeyed. Apart from Rules of Court, there are other statutes whichprovide for procedure. Apart from Rules of Court or statutes which arespecifically enacted to regulate procedure, other statutes which establishcorporations for example, also stipulate procedural requirements. A good numberof pre-action notices can be found in such statutes. The law is that where astatute has provided for how something should be done, such a provision must becomplied with. It is indeed a concern that the applicability of pre-actionnotice is not in consonance with the spirit of the rule of law. It is importantto note that a deep-rooted analysis of relevant procedural law does not in factguarantee pre-action notice any justification. No useful purpose is achieved bycontinuing to uphold the constitutionality of pre-action notices.

The reasonswhich are used to justify the notices can be dispensed with. A letter from aprospective plaintiff or his agent should be enough to commence a process ofdeciding whether to make reparations to the plaintiff or not. Anachronisticrules such as pre-action notices serve no end of justice and it is often aprocedural requirement which is employed by defendants to delay or deny aninquiry into the merits of the case. They also cause untold hardship. The aimof this work is to distill the inadequacies and excesses of pre-action noticeas currently applicable in Nigeria.

This work will also look at the position ofother countries as it relates to the doctrine of pre-action notice and finallyproffer solutions. This work is divided into five chapters. Chapter One dealswith the general introduction while Chapter Two deals with the doctrine ofpre-action notice as it applies in Nigeria. Chapter Three deals with thedoctrine of pre-action notice as an obstacle to justice while Chapter Fourdeals with the application of the doctrine of pre-action notice in foreign jurisdictions.Finally, Chapter Five deals with the conclusion and recommendations.

CHAPTER ONE

INTRODUCTION

1.1 Definition ofTerms

1.1.1 Access toCourt

Access to Courtmeans "an opportunity or ability to enter, approach, pass to and from, orcommunicate with the courts.[1] Access to the court meansapproach or means of approach to the court without constraint.[2] That the combined purportof *Section 6 (6) (b)*; providing forjudicial powers of the court and *Section 36* ,providing for the right to; fair hearing in the 1999 Constitution of the Federal Republic of Nigeria (asamended) (hereinafter referred to asthe Constitution),, is to facilitate the right of access to courtwithout legal obstacles that may neutralize the exercise or that right.[3] It is beyond question thatthe right to have access to the courts is crucial to the dispensation ofjustice.[4] For if a person cannothave access to the courts, how will such a person be heard?[5] In *A.G. of Kaduna State v. Hassan*[6]*,* the Supreme Court held (per Oputa JSC) that there is perhaps noquestion more fundamental in the whole process of adjudication than that ofaccess to justice- access to courts. Indeed, a person who cannot even reach thecourts cannot talk of justice from those courts. Access to thecourts and access to justice are apparently used quite interchangeably, partlybecause it is perhaps presumed that justice ought to be obtained from

thecourts.[7]For now, it iscertain that under the Nigerian Constitutional arrangements, justice is not aprivilege but a right. In Nigeria, this is beyond jurisprudential disputation.[8] Access to courts andjustice is indeed an inalienable right enshrined in the Nigerian Constitutionand is specifically entrenched in the fourth chapter of the Constitution whichprovides for fundamental rights.[9]

1.1.2 ConditionPrecedent

Conditionprecedent is an action or event other than a lapse of time that must exist oroccur before a duty to perform something promised arises.[10] It is also defined as afact or state of affairs that must exist before a particular contractual dutymust be performed.[11] It is also regarded asthe condition which delays the vesting of a right until the happening of anevent which is an additional formality super imposed on by the law.[12]

1.1.3 Pre-action Notice

A pre-action notice is a form of noticeissued by an aggrieved person which is expected to be formally served on theother party (would-be defendant) before the commencement of a valid action. Inother words, a statutory requirement that when an aggrieved person intends tosue a public agency for some grievances, the aggrieved person is required togive notice of his intention to sue the concerned public agency.[13]Pre-action noticewas described in the form of a written notice required by a statute to beserved on the appropriate body, of an intention to sue them by the intendingplaintiff.[14]It was described thus:A pre-actionnotice connotes some form of legal notification or information required by lawor imported by operation of law, contained in an enactment, agreement orcontract which requires compliance by the person who is under legal duty to puton notice the person to be put on notice before the commencement of legalaction against such a person mostly the intending defendant.[15] Pre-actionprotocols (protocols) was defined as steps required to be taken by litigantsunder the Civil Procedure Rules 1998 prior to the commencement of proceedings.[16]

1.2 HistoricalBackground of Pre-action Notice in Nigeria

The historicalbackground of the principle of pre-action notice is traceable to the doctrineof sovereign immunity which is to all intents and purposes before itsmetamorphosis, is that the crown cannot do any wrong and therefore cannot besued in his own court. Because of thecolonial link with Britain, Nigeria inadvertently had some of the British lawsincorporated into her own laws. However, in the case of *Stitch v. AttorneyGeneral of the Federation,[17]*the Supreme Court of Nigeriafrowned against this doctrine that posited that the crown cannot do any wrong…it was held in the above case that the powers of ministers who would haveotherwise hidden under the cloak that "the King can do no wrong" are subject tojudicial review.Also, in the case of *Attorney General of Bendel State v. AttorneyGeneral of the Federation*[18],the court held as it relates to the capacity of the government to sue and besued thus:The (Nigerian)Constitution has opened the gate to the court by its provisions and there canbe no justifiable reasons for closing the gates against those who do not wantto be governed by a law enacted not in accordance with the provisions of theConstitution.[19] Administrativeagencies and other public authorities do not enjoy the same immunity as thegovernment in its corporate capacity. Hence, public corporations are subjectedto the ordinary laws unless they enjoy some statutory exemption. Thus, thedoctrine of sovereign immunity does not cover independent statutory bodies.[20] The combined effect ofthis doctrine has been abolished by virtue of *section 6(6) (b)* of the 1999 Constitution of the FederalRepublic of Nigeria (as amended) (hereinafter referred to as the Constitution).Hence it is only the Constitution that now enjoys sovereign immunityfrom

violations of the three tiers of government. What thegovernment or State normally relied on is the provision of Public OfficersProtection Act[21]which was equally shrouded with a lot of controversies.The emergingcontroversy arose primarily from the interpretation of *section 2 (a)* of the Act as it relates to the import of the meaning"any person" whether it is confined only to the natural person or extended tothe statutory corporations and their employees.This was finallylaid to rest by the Supreme Court in *Alhaji Ibrahim v. Judicial ServiceCommission, Kaduna State****[22]****,*when the Supreme Court posited that: …there is nojustification for restricting the meaning of those words to a natural personsonly, for that would be tantamount to qualifying or adding to the words of thestatute and usurpation of the legislative functions.[23] The Constitutionby virtue of *section 318* also removedthe dichotomy that was in existence which defined Public Officers to includeall the branches of the public services including local government, statutorycorporations, educational institutions, the police and judiciary and evenregistered company controlled by the various governments and their agencies.

1.3 Rationality ofPre-action Notice

The requirement ofpre-notice by some statutes has been subjected to a stringent criticism by somelearned commentators. It has been argued that pre-action notice is merely aregulation of the right of access to the court and therefore does not amount tothe infringement of *section 6(6) (b)*of the Constitution which provides for access to the courts and fair hearing.[24] In fact, in *NNPC v. Tijani*,[25] the Court of Appeal held(per Fabiyi JCA) that "Regulations of the right of access to the court aboundin rules of procedure. They are in order in my humble view."The rationalebehind the jurisprudence of pre-action notice is said to enable the defendantknows in advance the anticipated action and a possible amicable settlement ofthe matter between the parties without recourse to the adjudication by thecourt.[26]Another reasongiven for the rationality of pre-action notice is for the defendant not to betaken by surprise but to be given a breathing space to decide whether or not tosettle or make reparation to the aggrieved party.[27]Itis submitted that with the current Lagos State High Court Rules being graduallyadopted by various States, one more pillar supporting pre-action notice hasbeen broken. InLagos State, parties must 'front-load' documents. This means a bundle ofprocesses would be served on the other party.[28] Most ofthese documents would hitherto have been brought during trial. All civilproceedings commenced by writ of summons would usually be accompanied by astatement of claim, list of witnesses to be called at the trial, writtenstatements on oath of the witnesses and copies of every document to be reliedon at the trial.[29]In fact, in Abuja, a certificate of pre-action counseling signed by counsel andthe litigant shall be filed along with the writ where proceedings are initiatedby counsel, showing that the parties have been appropriately advised as to therelative strength or weakness of their cases, and the Counsel shall bepersonally liable to pay the costs of the proceedings where it turns out to befrivolous.[30]Thus,the front-loading system designed to discourage frivolous litigation andcertainly explore extra-litigious means of dispute resolution as well asensuring speedy litigation when it cannot be avoided, should obviate pre-actionnotice. Indeed, the front-loading system is arguably more inclusive because itdoes not, for example, preclude a plaintiff from taking out a writ. Thus,access to the courts is absolutely unimpeded and, in a sense, processes likepre-trial conferences actually form part of the proceedings since the disputemay actually be resolved at the pre-trial conference stage with the stamp ofthe court.[31]Apartfrom the front-loading system, under the various Rules of Court in Nigeria, thedefendant usually has a reasonable time to file a statement of defence.[32] This isin spite of the fact that applications for extension of time to file astatement of defence are usually granted by the courts. Furthermore, if

thedefendant wants to negotiate a compromise as observed in *Mobil Producing(Nig.) Unltd v LASEPA**[33]*** there is still no conflict. In fact, in practice, it is sometimes morepragmatic to negotiate an out-of-court settlement whilst the matter is stillbefore the court.[34] This isbecause the parties could easily agree on terms of settlement and file it incourt as consent judgment. This would greatly reduce the possibility of partiesaltering their positions often under the pretext of seeking amicablesettlement.Thisline of argument is not advanced in spite of the practice of alternativedispute resolution but rather as a result of it. Defendants are hardly taken bysurprise as far as litigation is concerned. This is even observed in the *Amadicase* .[35]The defendant was approached several times on the plaintiff's position ofunlawful dismissal. Indeed, the court observed that 'the plaintiff was nostranger to the defendant having been its employee and having been shown tohave exchanged correspondence with the defendant after his suspension from dutyand dismissal'.[36]The defendant, rather than explore amicable settlement, decided to rely on itsbehemoth status and engage in grandstanding. Yet this is the attitude thatpre-action notice provisions ineluctably encourage. This, it is submitted, isunacceptable under the law.

1.4 Constitutionality of Pre-action Notice

Itis justifiable to regard pre-action notice provisions as a statutory privilegewhich is a special advantage, immunity, permission, right or benefit granted toor enjoyed by an individual or class or caste.[37] As aprivilege, it can be waived by the party in whose favour it is provided for, because it is not a right in *strictsensu* and could like any other privileges be waived especially when thisprivilege enjoyed by the public bodies is not available to the other party tothe suit.[38]Thediscriminatory nature of the pre-action notice provisions have led to muchagitations for its total removal from all our law as this requirementinstitutionalizes a preferential treatment in favour of the defendant.[39]Thereis also the question of independence and impartiality on the part of judiciaryas amply provided for under *section 36(1)* of the Constitution, as such corporations like governmentagencies are practically subsumed under the executive arm of government. Thuscreates an unwitting camaraderie between the judiciary and executive arm ofgovernment at the expense of the plaintiff.[40]TheSupreme Court of Nigeria equally appears to support this view on pre-actionnotice when it held in the case of *Mobil Production (Nig.) Unltd v. LagosState Environmental Protection Agency**[41]***that the right to be served with a pre-action notice does not fall within thecategory of rights which cannot bewaived through the application of the maxim "*quilibet protest renunciarejuri prose introducto*''[42] basedon an undisputed fact that there is no provision in the Constitution forspecial privileges to any class or category of persons. Furthermore,those corporations or agencies uses the benefit of pre-action notice only as ashield and never as a sword as can be deduced from the decision of the Court in*Nigeria Port Authority v. Construzioni General Fasura Cogefar**[43]**,* where the plaintiff/appellant sued thedefendant/respondent for their money had and receive to which thedefendant/respondent set up a counter claim towards the same transaction. Whenpleadings have been filed and exchanged, the substantive suit was set down andin fact came up for hearing, plaintiff sought the leave of the court to amendhis pleading by adding "The plaintiff in the alternative pleads the statutoryprovisions of *section 97* of the Act"(which makes provision for the issuance of pre-action notice). The applicationwas rejected by the court on the ground that it was belated. At the end of thetrial, judgment was given in favour of the defendant on their counter-claim andthe plaintiff's suit was dismissed accordingly in its entirety. It was heldthat *section 97* of the Act does notapply to filing of counter-claims where the suit itself was brought by the veryauthority for whose protection the section was enacted.Onappeal to Supreme Court, it was held that if a statutory

body sues as aplaintiff, then any counter-claim which is directly connected with theprincipal claim will be available to the defendant without the requirement ofthe written notice of intention to sue.

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[30] High Court of the Federal CapitalTerritory (Civil Procedure) Rules 2004, Order 4 *Rule 17.*
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