

SUPREME COURT OF NIGERIA

25TH JUNE, 1999. SC. 36/1993.

**CORAM:- A. B. WALI, I. L. KUTIGI, A. I. IGUH,
A. O. EJIWUNMI, E. O. AYOOLA, JJSC.**

CITY ENGINEERING (NIGERIA) LTD APPLICANT/APPELLANT
AND
NIGERIAN AIRPORTS AUTHORITY RESPONDENT

***ARBITRATION** - Arbitrator - Appointment of - Notice to appoint an arbitrator - What constitutes a valid notice - Under the Arbitration Law of Lagos State, 1973 - Provisions of section 6(1) (a) & (2) thereof.*

***ARBITRATION** - Arbitrator - Notice to appoint arbitrator - Irregularity arising from such notice - Can not be cured or waived.*

***ARBITRATION** - Arbitrator - Statutory Notice required - To appoint an arbitrator - Cannot be equated with knowledge.*

***STATUTES** - Interpretation - Principle of - Where in their ordinary meaning - The provisions are clear and unambiguous - Effect should be given to them as such.*

FACTS

In the High Court of Lagos State the applicant/appellant by an originating summons filed its application for an order to appoint an arbitrator to arbitrate in the matter of the contract entered between the parties. The application was supported by an affidavit to which there were ten (10) annexures marked Exhibits AOS 1 to AOS 10. The applicant was awarded a contract by the Respondent for the construction of certain project at the Kaduna Air Port Kaduna, as per their contract Agreement Exhibit "AOS. 1" dated 3rd January 1980. The Respondent by its letter (Exhibit AOS3) unilaterally terminated the contract between the parties for alleged poor performance in the execution of the contract. The Applicant's reply

(Exhibit AOS 4) made it clear that the termination was a breach of contract and as a result a dispute had arisen between the parties within the meaning of clause 19 of the contract agreement. Clause 19 provides for a preliminary procedure for the settlement of disputes to precede on eventual submission to arbitration within the meaning of the Arbitration Law of Lagos State. It was as a result of the failure by the parties to agree on the appointment of an arbitrator that led to the ruling before the High Court relying on section 6 (1) (a) and (2) of the Arbitration Law of Lagos State. The respondent opposed the application contending that the applicant has failed to give the mandatory seven (7) days's notice to the respondent before filing the application. The applicant purported a letter from its solicitor to the respondent's Managing Director to be a valid and sufficient notice in the circumstances of the case.

The learned trial judge after a careful review of the affidavit evidence refused the application. Aggrieved the applicant appealed to the Court of Appeal, Lagos Division. That court in a unanimous judgment dismissed the appeal. Still dissatisfied, the applicant has further appealed to the Supreme Court raising a lone issue.

ISSUE FOR DETERMINATION

Whether or not a valid and proper notice was given by the Applicant to the Respondent before applying to the High Court for the appointment of an arbitrator as required by section 6 subsections (1) (a) and (2) of the Arbitration Law of Lagos State.

HELD (Unanimously dismissing the appeal per lead judgment of **KUTIGI JSC**)

Arbitrator - Appointment of

1. It is plain to me on the face of the letter above that, there was no request or suggestion that the Respondent should appoint or concur in the appointment of an arbitrator. If it gave Respondent notice of anything, it must be a notice that there was a dispute and that the Applicant had instructed its solicitors to proceed with the setting up the machinery for arbitration. What section 6 subsections (1) (a) and (2) above re-

quires is a written notice to appoint an arbitrator. Again, it was not disputed that the originating summons in this case was issued on 4th November 1982 while Exh. AOS 9 above was written on 26th July 1982. Exhibit AOS 9 definitely cannot amount to a notice under section 6 above, the letter having not called upon the Respondent to appoint an arbitrator. (p.1984 H)

Statutes - Interpretation

2. The duty of the court is to interpret the words the legislature has used. And it is a cardinal principle of interpretation that where in their ordinary meaning, the provisions are clear and unambiguous effect should be given to them as such (see for example ATTORNEY-GENERAL OF BENDEL STATE V. ATTORNEY -GENERAL OF THE FEDERATION (1981) 10 S.C.1). (p. 1985 G)

Notice - To appoint arbitrator - Irregularity

3. Having come to the conclusion that Exhibit AOS 9 did not amount to a notice under the law, I find it difficult to agree with learned counsel for the Applicant that it was an irregular notice and that any irregularity arising therein should be regarded as waived or cured by the Respondent's Exhibit AOS10. I repeat again that what was required was a formal notice, a condition precedent, before taking out the originating summons and there was none. The defect was fundamental which could not have been cured or waived by Exhibit AOS 10. (p. 1985 H)

Arbitrator - Statutory notice required

4. The notice required cannot also in my view be equated with knowledge that the Respondent had known that the Applicant had instructed its solicitors to proceed with the setting up of machinery for submission to arbitration vide Exhibit AOS 9. (p. 1986 B)

NOTABLE POINTS OF INTEREST

IGUH JSC

1. Distinction between a mere technicality and substantial technicality

A distinction must however be drawn between a mere or unsubstantial
B technicality in proceedings that are competent and within the jurisdiction
of a trial court and a substantial technicality which amounts to a condi-
tion precedent to the commencement of an action and which renders a
proceeding manifestly incompetent thereby affecting the jurisdiction of
C the court and renders the same incurably defective. Whereas the former
may be waived, the latter as a general rule, may not as acquiescence does
not and cannot confer jurisdiction. See Skenconsult (Nig.) Ltd. & An-
other v. Godwin Ukey (1981) 1 S.C. 6 at 26, Management Enterprises
Ltd. and Another v. Jonathan Otusanya (1987) 2 N.W.L.R. (Part 55)
D 179, Obimonure v. Erinosho and Another (1966) 1 All N.L.R. 250, Macfoy
v. U.A.C. Ltd. (1961) 3 All E.R. 1169 at 1172 etc. Although a Rule of
Court may in appropriate cases and because of the peculiar and excep-
tional circumstances of the case be dispensed with in the overall interest
E of justice, and so long as no miscarriage of justice is thereby occasioned,
a statutory provision may not be ignored by the court. See Etim Ekpeyong
and others v. Inyang Nyong and others (1975) 2 S.C. 71. So, where a
special statutory provision, as is the case in the present proceeding, is
F made for the filing of a claim before the court, the procedure so laid
down ought to be followed in the presentation of the action and no other
one. See Gbadamosi Lahan v. Attorney-General of Western Region 91963)
1 All N.L.R. 226. (p. 1989 H)

2. Condition precedent to the Appointment of Arbitrator by the court

The conclusion I therefore reach is that the letter Exhibit AOS 9 is not a
notice as required by section 6(1) and 6 (2) of the Arbitration Law of
Lagos State, Cap. 10, Laws of Lagos State, 1973. The statutory require-
H ment of service of a written notice to appoint an arbitrator is a condition
precedent to the institution of a court action for the appointment of such
an arbitrator or umpire by the court. It is only if the necessary appoint-
ment is not made within seven clear days after service of the notice that

the party who served the notice may then apply to the court for the appointment of an arbitrator or umpire. I need to stress that the court in the present case had no inherent jurisdiction to appoint an arbitrator or umpire or to compel any party to the agreement or reference to do so unless the statutory conditions precedent above spelt out were complied B with, thus conferring jurisdiction on the court to entertain an application for such an appointment in default by the parties. These conditions precedent were not fulfilled by the appellant before the institution of the present proceeding. The appellant's application before the trial court C was therefore properly dismissed as misconceived for non-compliance with section 6(1), and 6(2) of the Arbitration Law of Lagos State, 1973. (p. 1991 B)

REPRESENTATION

Applicant/Appellant absent, not represented.

Dr. A. N. Onejeme for the Respondent.

CASES REFERRED TO

Ariori v. Elemo (1983) 1 S.C.13

United Calabar Company v. Elder Dempster Lines Ltd (1972) 1 ALL NLR 24.

Omoboriowo v. Ajasin (1984) SCNLR 108

Enang v. Adu (1981) 11-12 SC 25

Consortium M.C. v. N.E.P.A. (1992) 6 N.W.L.R. (part 246) at 142

Falobi v. Falobi (1976) 1. N.W.L.R. 169

Bello v. Attorney- General Oyo State (1986) 6 N.W.L.R. (Part 45) 828

Okonjo v. Odje (1985) 10 S.C. 267

Skenconsult (Nig.) Ltd. v. Godwin Ukey (1981) 1 S.C. 6 at 26

Management Enterprises Ltd. v. Otusanya (1987) 2 N.W.L.R. (Part 55) 179

Obimonure v. Erinosho (1966) 1 All N.L.R. 250

Macfoy v. U.A.C. Ltd. (1961) 3 All E.R. 1169 at 1172

Gbadamosi Lahan v. Attorney-General of Western Region (1963)1 All N.L.R. 226

STATUTE REFERRED TO

Arbitration Law of Lagos State 1973, section 6(1) (a) and (2)

LEAD JUDGMENT BY KUTIGI JSC

B In the High Court of Lagos State the Applicant by an originating summons dated the 4th day of November 1982, filed its application for -

(a) An order that the Respondent in this matter shall submit to arbitration in accordance with Section 19 of the general conditions of the contract entered into between the Applicant and the Respondent on the
C 3rd day of January, 1980.

(b) An order to appoint an Arbitration to arbitrate in this matter of the contract entered into between the Applicant and the Respondent on the 3rd day of January 1980.

D (c) An order compelling the Respondent to submit to such Arbitration.

(d) An order directing that the Respondent do pay the cost of this application.

E The application was supported by an affidavit to which there were ten (10) annexures marked Exhibits AOS 1 to AOS 10. The affidavit evidence showed that the Applicant was awarded a contract by the Respondent for the construction of the Interim Measures Building and
F Utility Services and External works at the Kaduna Airport, Kaduna, as per their contract Agreement Exhibit "AOS. 1" dated 3rd January 1980.

The Respondent by its letter dated 9th June 1982 (Exhibit AOS3) unilaterally terminated the contract between the parties for alleged poor performance in the execution of the contract. The Applicant's reply was
G dated 16th June 1982 (Exhibit AOS4) wherein it was made clear that the termination was a breach of contract and as a result a dispute had arisen between the parties within the meaning of clause or section 19 of the contract Agreement or specifically the General conditions of contract
H (Exh. AOS. 1 or Exh. AOS2).

In short, clause or section 19 provides for a preliminary procedure for the settlement of disputes to precede on eventual submission to arbitration within the meaning of the Arbitration Law of Lagos State. It

was as a result of the failure by the parties to agree on the appointment of an arbitrator that led to the filing of the application before the High Court relying on section 6(1) (a) and section 6(2) of the Arbitration Law of Lagos State. The Respondent filed a counter affidavit in opposition to the application the main thrust of which was that the Applicant did not meet the requirement or condition imposed on it by clause or section 19 of the contract Agreement, the General conditions of contract, by its failure to comply with the preliminary procedure for the settlement of dispute. It was also contended that the Applicant had also failed to give the mandatory seven (7) days' notice to the respondent before filing the application contrary to section 6(2) of the Arbitration Law above.

After the learned trial judge had carefully reviewed the affidavit evidence and submissions of counsel before him, he concluded his Ruling thus -

"The sum total of this application, having regard to the averments in the affidavit and counter affidavit, with all the annexures exhibited on the affidavit and the counter - affidavit, the arguments advanced by both counsel and my observations, the application fails on the ground of the non-compliance with subsection 2 of section 6 of the Arbitration Law of Lagos State, the notice to concur was not given before the filing of this action, the application fails and it is hereby dismissed."

Aggrieved by the Ruling of the trial High Court, the Applicant appealed to the Court of Appeal, holden at Lagos. One of the main issues contested in that court was whether or not the learned trial judge was right in holding that the application failed because of non-compliance with section 6(2) of the Arbitration Law of Lagos State. The Court of Appeal in a unanimous judgment delivered on the 22nd day of February 1989 upheld the Ruling of the learned trial judge and dismissed the appeal with costs in favour of the Respondent.

Still dissatisfied with the judgment of the Court of Appeal, the Applicant has further appealed to this court.

In obedience to the Rules of Court, the parties filed and exchanged briefs of argument. At the hearing of the appeal on 29th March 1999, only the Respondent was represented by counsel, the Applicant

was not. Dr. Onejeme learned counsel for the Respondent adopted his brief and urged the court to dismiss the appeal.

The Applicant in its brief has submitted only one issue for determination by his court. It is reads thus -

B *"Thus issue for determination in this appeal is whether the required NOTICE was given by the Appellant to the Respondent before applying to the Court to appoint an arbitration as required by section 6(1) (a) and 6(2) of the Arbitration Law of Lagos, 1972."*

C It was contended in the brief that for the purposes of section 6(1) (a) and section 6(2) of the Arbitration Law, Exhibit AOS9 a letter dated 26th July, 1982 from Applicant/plaintiff's Solicitor to the Respondent/Defendant's Managing Director was a valid and sufficient notice in the circumstances of the case particularly when both the trial High Court
D and the Court of Appeal had properly found that a dispute had arisen between the parties on the contract Agreement and that the preliminary steps of making the submission first to an engineer had failed.

E That the Respondent was served with a written notice Exhibit AOS 9, to which it reacted by denying the existence of a dispute and refusing any reference to arbitration vide Respondents' letter to the Applicant's Solicitor dated 8th September 1982 (Exhibit AOS 10); whereby the Applicant took out the originating summons on 4th November 1982.

F That a person has a notice of a fact if he knows the fact, has reason to know it, should know it or has been given notification of it. That the Court of Appeal having acknowledged the fact that an arbitration notice has no prescribed format, Exhibit AOS9 was a valid notice which had served its purpose, the originating summons having been issued long
G after the expiration of seven (7) days. The Respondent must in the circumstances also be deemed to have waived any irregularity in the said notice when it wrote Exhibit AOS10 herein.

The following cases were cited in support -

H ARIORI & ORS V. ELEMO & ORS (1983) 1 S.C.13
UNITED CALABAR COMPANY V. ELDER DEMPSTER LINES LTD
(1972) 1 ALL NLR 24.
ROYAL EXCHANGE ASSURANCE V. BENTWORTH FINANCE (NIG.)

The court was urged to allow the appeal and order the Lagos High Court to appoint an arbitration to arbitrate in the dispute between the parties herein.

The Respondent on the other hand submitted that the Applicant's Exhibit AOS9 did not constitute a valid notice under section 6(1) (a) & (2) of the Arbitration Law of Lagos State 1973 merely because it was sent to the Respondent before its application to the Court for the appointment of an arbitrator. It was contended that it was clear from the language of section 6 that the notice required is "a written notice to appoint an arbitrator," and not a written notice that simply declared the existence of a dispute and calling for arbitration as Exhibit AOS9 did in this case. That to satisfy the section the notice must clearly call on the other party to appoint or concur in the appointment of an arbitrator. It must be such as to initiate the procedure for the appointment of an arbitrator by the court, being a notice to the Respondent to agree or concur in the appointment of an arbitrator even without suggesting or naming any person. That Exhibit AOS9 merely identified the dispute and did not request the Respondent to appoint or concur in the appointment of any arbitrator.

It was also submitted that the lower courts having properly held that Exhibit AOS 9 did not amount to notice pursuant to section 6(1) (a) & (2) of the Arbitration Law, this court should not disturb the concurrent findings unless exceptional circumstances were shown which the Applicant herein had failed to show. The case of OMOBORIOWO V. AJASIN (1984) SCNLR 108 and ENANG & ORS V. FIDELIS ADU (1981) 11-12 SC 25 were cited in support. It was further submitted that the High Court has no inherent power or jurisdiction to appoint an arbitrator, and that the power to do so is statutory only; and that the statutory requirement of notice is a condition precedent. We were referred to HALSBURY'S LAWS OF ENGLAND, 4TH EDITION VOL. 2 PARA. 571; PAGE 296. That the Applicant having failed to give the statutory seven (7) days' notice before action was commenced, we should uphold the judgment of the court below and dismiss the appeal.

As stated earlier in this judgment the narrow issue for determi-

nation in this appeal is whether or not a valid and proper notice was given by the Applicant to the Respondent before applying to the High Court for the appointment of an arbitrator as required by section 6 subsections (1) (a) and (2) of the Arbitration Law of Lagos State. Now, section 6(1) (a) and (2) of the Arbitration Law read as follows -

"6. (1) In any of the following cases:-

(a) Where a submission provides that the reference shall be to a single arbitrator, and all the parties do not after differences have arisen concur in the appointment of an arbitrator;

(b)(omitted);

(c)(omitted);

(d)(omitted);

any party may serve the other parties with a written notice to appoint an arbitrator.

(2) If the appointment is not made within seven (7) clear days after the service of the notice, the court or judge may, on application by the party who gave the notice, appoint an arbitrator, umpire or third arbitrator, who shall have the like powers to act in the reference and make an award as if he had been appointed by consent of the parties."

The relevant portion of Exhibit AOS9 dated 26th July 1982, which the Applicant strongly contended constituted a valid and sufficient notice under the above law read thus -

"We cannot see any better example of a dispute as already stated in this matter. In any way the issue as to whether there is a dispute or not is not for your authority to decide, that is the issue that the arbitrator is called upon to decide.

In view of the explanation above it is our clients instruction that we should proceed with the setting up of the necessary machinery for submission to arbitration in this matter and please be informed that the same is in progress."

It is plain to me on the face of the letter above that, there was no request or suggestion that the Respondent should appoint or concur in the appointment of an arbitrator. If it gave Respondent notice of anything, it must be a notice that there was a dispute

and that the Applicant had instructed its solicitors to proceed with the setting up the machinery for arbitration. What section 6 sub-sections (1) (a) and (2) above requires is a written notice to appoint an arbitrator. Again, it was not disputed that the originating summons in this case was issued on 4th November 1982 while Exh. AOS 9 above was written on 26th July 1982. Exhibit AOS 9 definitely cannot amount to a notice under section 6 above, the letter having not called upon the Respondent to appoint an arbitrator. B

On this issue of notice, the learned trial judge had this to say in his Ruling- C

"Let me examine this issue of notice, the originating summons was taken out in 1982 when the necessary notice of seven (7) days must have been issued, in my view this has not complied with the provisions of section 6(1) (a) and subsection 2 of the Arbitration Law of Lagos State. D The notice of 7 days must have been issued before the taking out of the originating summons of 1982. The notice of 1st April, 1985 cannot be said to be in support of the application."

The Court of Appeal in its lead judgment on page 97 of the record E also observed as follows -

"On its own Exhibit AOS 9 cannot amount to a notice pursuant to section 6. By section 6 a party may serve the other party with a written notice to appoint an arbitrator. The letter Exhibit AOS 9 has not called on the respondent to appoint an arbitrator. It is where the other party F called upon to appoint an arbitrator fails to do so within 7 days that the party who gave the notice may apply to the court."

I think both the High Court and the Court of Appeal were right.

The duty of the court is to interpret the words the legisla- G ture has used. And it is a cardinal principle of interpretation that where in their ordinary meaning, the provisions are clear and unambiguous effect should be given to them as such (see for example ATTORNEY-GENERAL OF BENDEL STATE V. ATTORNEY-GEN- H ERAL OF THE FEDERATION (1981) 10 S.C.1).

Having come to the conclusion that Exhibit AOS 9 did not amount to a notice under the law, I find it difficult to agree with

learned counsel for the Applicant that it was an irregular notice and that any irregularity arising therein should be regarded as waived or cured by the Respondent's Exhibit AOS10.

I repeat again that what was required was a formal notice,
B a condition precedent, before taking out the originating summons and there was none. The defect was fundamental which could not have been cured or waived by Exhibit AOS 10. The notice required cannot also in my view be equated with knowledge that the Respon-
C dent had known that the Applicant had instructed its solicitors to proceed with the setting up of machinery for submission to arbitra-
tion vide Exhibit AOS 9.

The issue is therefore resolved against the Applicants/Appellants. And the appeal fails. It is accordingly dismissed with N10,000.00 costs
D in favour of the Respondent.

WALI JSC

E I have the privilege of reading before now, the lead judgment of my learned brother Kutigi, JSC, just delivered, and I agree with his reasoning and conclusion for dismissing the appeal. And having nothing more useful to add, I also hereby dismiss the appeal.

F I adopt the order of costs made in the lead judgment.

IGUH JSC

G I have had the privilege of reading in draft the judgment just delivered by my learned brother, Kutigi, J.S.C, and I agree entirely that this appeal is without substance and should be dismissed.

Both parties are in agreement that the sole issue for determination in this appeal is whether the statutory notice to appoint or concur in
H the appointment of an arbitrator as required by section 6(1) (a) and (2) of the Arbitration Law, Cap. 10, Laws of Lagos State, 1973 was duly served by the appellant to the respondent before the institution of this action for the appointment of an arbitration by the trial court. The appellant's con-

tention is that its letter to the respondent. Exhibit AOS 9, constituted a valid notice under section 6(1) (a) and 6(2) of the Arbitration Law of Lagos State, 1973. For the respondent, it was argued that the combined effect of Exhibits AOS 9 and AOS 10 could not conceivably amount to a proper and valid notice as required by the Law. This is because, they did not call on the respondent to appoint or concur in the appointment of an arbitrator as stipulated under the relevant Arbitration Law. B

In this regard, section 6(1) (a) and 6(2) of the Arbitration Law of Lagos State provides thus:-

"6(1) In any of the following cases:

(a) Where a submission provides that the reference shall be to a single arbitrator and all the parties do not, after differences have arisen, concur in the appointment of an arbitrator;.....

(b)

(c)

(d)

any party may serve the other parties or arbitrators, as the case may be, with a written notice to appoint an arbitrator

(2) if the appointment is not made within seven clear days after the service of the notice, the court or a Judge may, on an application by the party who gave the notice, appoint an arbitrator, umpire or third arbitrator, who shall have the like powers to act in the reference and make an award as if he had been appointed by consent of all the parties."

The learned trial Judge after a careful consideration of the provisions of the said section of the Arbitration Law concluded as follows:-

"The sum total of this application, having regard to the averments in the affidavit and counter affidavit, with all the annextures exhibited on the affidavit and the counter affidavit, the arguments advanced by both counsel and my observations, the application fails on the ground of the non-compliance with subsection 2 of section 6 of the Arbitration Law of Lagos State; the notice to concur was not given before the filing of this action, the application fails and it is hereby dismissed."

For its own part, the Court of Appeal, dealing with the same question of

notice under section 6(1) and 6(2) of the Arbitration Law of Lagos State observed thus :-

"I therefore do not agree that parties have alternative unrestricted right of applying straight to either the Chief Judge or any Judge of Lagos State. The learned trial Judge was right in my view in refusing to appoint an arbitrator on the ground that the appellant did not comply with section 6(2) of the Arbitration Law of Lagos State."

It is clear to me that what section 6(1) (a) and 6(2) of the Arbitration Law of Lagos State require is the service by an aggrieved party to the other party of a written notice to appoint an arbitrator where all the parties do not, after a difference has arisen, concur in the appointment of an arbitrator. It seems to me that to satisfy the requirement of that section of the Arbitration Law, the written notice must call on the other party to the contract to appoint or concur in the appointment of an arbitrator. In my view, Exhibit AOS 9 can by no stretch of the imagination be construed as a call on the respondent to appoint an arbitrator or concur in the appointment of an Arbitrator. At best, it is a reply to the respondent's letter of the 2nd July, 1982 which denied the existence of any dispute between the parties. The appellant, by this reply, also asserted its intention to proceed with setting up the necessary machinery for submission to arbitration.

By Exhibit AOS 10, however, the respondent replied to Exhibit AOS 9, emphasizing in no mistakable terms that the legally binding contract between the parties was rightly terminated in accordance with its terms and expressed the hope that there would be no further correspondence on the subject. It was thus plain from Exhibit AOS10 that the parties had clearly disagreed on the basic issue of whether a dispute or difference had arisen to warrant the appointment of an arbitrator. It seems to me that it was as at that stage that the appellant, who was desirous that an arbitrator be appointed, should have proceeded to serve the appropriate statutory notice to appoint an arbitrator under the provisions of section 6(1) of the Arbitration Law of Lagos State to the respondent. It was only if the appointment was not made by consent within seven clear days after the service of the statutory notice that the appellant

could have proceeded thereafter under section 6(2) of that Law to make the necessary application to the court for the appointment of such an arbitrator. These steps, the appellant failed to take before the institution of the present proceeding.

I think I ought to stress that what section 6(1) of the Arbitration Law of Lagos State does prescribe is a written notice to appoint an arbitrator and not simply a letter which merely declares the existence of a dispute and an intention to submit to arbitration as Exhibit AOS 9 seems to indicate. The written notice prescribed by section 6(1) of the Arbitration Law is a statutory notice which, as a condition precedent to the institution of a valid action for the appointment of an arbitrator, confers the necessary jurisdiction on the court to appoint such an arbitration who shall have the like powers to act in the reference and make an award as if he had been appointed by the consent of all the parties. It is only after the requirement under section 6(1) is complied with, and the necessary appointment is not made within seven clear days after the service of such notice that the provisions of section 6(2) come into play and an application may then be made to the court under that section of the Law by the party who served the notice for the appointment of an arbitrator or umpire as the case may be.

Learned counsel for the appellant did submit in his brief that whatever informality that surrounded Exhibit AOS9 was at best a mere irregularity and that the duty of the court was to do justice to the parties without undue regard to technicality. Without doubt, our courts have, where the circumstances of a case so desire, shifted away from the narrow technical approach to justices which characterized some earlier decisions and now pursues, instead, the course of substantial justice. See Consortium M.C. v. N.E.P.A. (1992) 6 N.W.L.R. (part 246) at 142, Falobi v. Falobi (1976) 1. N.W.L.R. 169, Bello v. Attorney- General Oyo State (1986) 6 N.W.L.R. (Part 45) 828, Okonjo v. Dr. Odje (1985) 10 S.C. 267 etc. Accordingly the courts, in appropriate cases, would ignore a mere technicality in order to do substantial justice according to the law. See Ekpeyong v. Nyong. (1975) 2 S.C. 71.

A distinction must however be drawn between a mere or unsub-

stantial technicality in proceedings that are competent and within the jurisdiction of a trial court and a substantial technicality which amounts to a condition precedent to the commencement of an action and which renders a proceeding manifestly incompetent thereby affecting the jurisdiction of the court and renders the same incurably defective. Whereas the former may be waived, the latter as a general rule, may not as acquiescence does not and cannot confer jurisdiction. See Skenconsult (Nig.) Ltd. & Another v. Godwin Ukey (1981) 1 S.C. 6 at 26, Management Enterprises Ltd. and Another v. Jonathan Otusanya (1987) 2 N.W.L.R. (Part 55) 179, Obimonure v. Erinoshio and Another (1966) 1 All N.L.R. 250, Macfoy v. U.A.C. Ltd. (1961) 3 All E.R. 1169 at 1172 etc. Although a Rule of Court may in appropriate cases and because of the peculiar and exceptional circumstances of the case be dispensed with in the overall interest of justice, and so long as no miscarriage of justice is thereby occasioned, a statutory provision may not be ignored by the court. See Etim Ekpeyong and others v. Inyang Nyong and others (1975) 2 S.C. 71. So, where a special statutory provision, as is the case in the present proceeding, is made for the filing of a claim before the court, the procedure so laid down ought to be followed in the presentation of the action and no other one. See Gbadamosi Lahan v. Attorney-General of Western Region (1963) 1 All N.L.R. 226. Similarly, a statutory provision which constitutes a condition precedent to the commencement of an action in court, that is to say, which is a pre-condition to the valid institution of a court action must be complied with unless it is such that may be waived by the other party. See Oriori and others v. Elemo and others (1983) 1 S.C. 13. So, too, a statutory condition which prescribes for service of a written notice before the institution or commencement of a particular court action must be strictly complied with and failure by a plaintiff to serve such notice renders the action ineffective and liable to fail. See Bright v. E.D. Lines 20 N.L.R. 79, Katsina Local Government v. Alhaji Barmo Makundawa (1971) N.M.L.R. 100.

In the present case, there was non-compliance with the statutory provisions of section 6(1) and 6(2) of the Limitation Law of Lagos State on the part of the appellant before the institution of the present

action. This failure to give the required statutory notice cannot, in my view, be regarded as a mere irregularity as it constitutes a pre-condition to the institution of the action and thus affected the jurisdiction of the court to entertain the suit. There is no evidence that the respondent which was the party entitled to such notice waived its right to it either expressly or by necessary implication. B

The conclusion I therefore reach is that the letter Exhibit AOS 9 is not a notice as required by section 6(1) and 6(2) of the Arbitration Law of Lagos State, Cap. 10, Laws of Lagos State, 1973. The statutory requirement of service of a written notice to appoint an arbitrator is a condition precedent to the institution of a court action for the appointment of such an arbitrator or umpire by the court. It is only if the necessary appointment is not made within seven clear days after service of the notice that the party who served the notice may then apply to the court for the appointment of an arbitrator or umpire. D

I need to stress that the court in the present case had no inherent jurisdiction to appoint an arbitrator or umpire or to compel any party to the agreement or reference to do so unless the statutory conditions precedent above spelt out were complied with, thus conferring jurisdiction on the court to entertain an application for such an appointment in default by the parties. These conditions precedent were not fulfilled by the appellant before the institution of the present proceeding. The appellant's application before the trial court was therefore properly dismissed as misconceived for non-compliance with section 6(1), and 6(2) of the Arbitration Law of Lagos State, 1973. F

It is for the above and the more detailed reasons contained in the leading judgment of my learned brother that I, too, dismiss this appeal as lacking in merit. I abide by the order as to costs therein made. G

EJIWUNMI JSC

H

Having read in advance the judgment just delivered by my learned brother, Kutigi, JSC, I entirely agree with his reasoning and conclusion that the appeal be dismissed. As I have nothing further to add, I too

would dismiss the appeal with N10,000.00 costs to the respondent.

AYOOLA JSC

B I have had the privilege of reading in draft the judgment delivered by my learned, Kutigi, J.S.C. I entirely agree with his reasoning and conclusion and I do not wish to add anything further to what he has written. I too would dismiss the appeal with N10,000 costs to the respondent.

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