

SUPREME COURT OF NIGERIA
THURSDAY 12TH DECEMBER, 2002. SC. 136/2001
CORAM:- I. L. KUTIGI, U. MOHAMMED, U. A. KALGO,
A. O. EJIWUNMI, E. O. AYOOLA, JJSC

MOBIL PRODUCING NIGERIA UNLTD APPELLANT
AND

1. LAGOS STATE ENVIRONMENTAL
PROTECTION AGENCY

2. FEDERAL ENVIRONMENTAL
PROTECTION AGENCY

3. MINISTRY OF ENVIRONMENT RESPONDENTS
(Department of Petroleum Resources)

4. VARIOUS RESPONDENTS (Set out in
the Schedule to the Notice of Appeal)

ACTIONS - Pre-action notice - Failure to serve - Effect - Suit commenced in default of service - Is incompetent as against party not served - Provided he challenges competence of the suit (H1)

ACTIONS - Pre-action notice - Service of - Status - Service of the notice on party is procedural requirement - And not an issue of substantive law - On which rights of plaintiff depend (H2)

ACTIONS - Commencement - Presumption of regularity - Plaintiff who commenced action which on the face is competent - Is deemed to have invoked presumed jurisdiction of court (H3)

ACTIONS - Commencement - FEPA Act s.29(2) - Breach - Failure to complain - Since FEPA did not question competence of the suit - It is deemed to have waived protection conferred on it by the statute (H4)

ACTIONS - Pre-action notice - Court processes - Distinction - Pre-action notice is for benefit of person to be served - And should not be equated with processes - Which are integral part of proceeding (H5)

ACTIONS - Proper parties - Determination - Any party whose interest is affected directly - If reliefs claimed are granted - Is proper party to a suit (H6)

ACTIONS - Party - Striking out of - Effect on competence - The suit should have proceeded against other defendants - Irrespective of striking out of 2nd defendant (H7)

FACTS

Before the Federal High Court Lagos, plaintiff/appellant commenced this action by originating summons against respondents, praying the court for various heads of declaration and injunction to restrain to restrain 1st and 4th respondents. An interim injunction was thus ordered against the said respondents. Thereafter a number of motions were severally filed by some of the 4th set of respondents to discharge the interim injunction. Nos. 77 and 78 of the 4th set of respondents objected to the originating summons on the ground that same did not disclose reasonable cause of action. They further argued that appellant did not plead that it served pre-action notice on 2nd respondent.

In response, appellant pointed out that no issue of service of pre-action notice on 2nd respondent was raised in the affidavit in the support of motion for objection. Appellant argued that it did not lie in the mouth of the applicants to raise the issue as they were not 2nd respondent. The learned trial judge held that appellant ought to have pleaded service of pre-action notice for the court to have jurisdiction over 2nd respondent and further that without 2nd respondent as a party, the suit cannot but fail as the other respondents were only nominal parties. He therefore struck out the suit. Being dissatisfied, appellant appealed to the Court of Appeal, Lagos. The appeal was dismissed. Appellant therefore filed appeal at the Supreme Court.

ISSUES FOR DETERMINATION

“1. Whether the various 4th Respondents had the locus to raise and/or properly raised the issue of the appellant’s alleged non-compliance with the pre-action notice requirement under s.29(2) of the FEPA Act, 1988, to support their application to strike out the originating summons and vacate the subsisting order of interim injunction.

2. Whether the lower court was right in affirming the trial Court's decision striking out the originating summons and vacating the order of interim injunction on the ground that the appellant failed to show in the affidavit in support of the originating summons (or otherwise) that it had complied with the provisions of the FEPA Act, 1988, by giving the requisite one-month pre-action notice to the 2nd respondent.

3. Whether the originating summons did not disclose a reasonable cause of action even if the action against the 2nd respondent was incompetent on account of the appellant's failure to show that it had served the 2nd respondent with the requisite one-month pre-action notice (which is denied) having regard to the issues for determination in the originating summons with regard to the 1st, 2nd and 3rd respondents."

HELD (unanimously allowing the appeal per **AYOOLA, JSC**)

Pre-action notice - Failure to serve - Effect

1. Although the respondents put their case in their respective briefs in different words, each of them focused on the consequence of failure to serve pre-action notice as affecting the competence of the action and the jurisdiction of the court. There is no dearth of authorities as to the consequence of failure to serve a pre-action notice when such is made a condition precedent for the commencement of a suit. A suit commenced in default of service of a pre-action notice is incompetent as against the party who ought to have been served with a pre-action notice provided such party challenges the competence of the suit. (p. 3239 E)

Pre-action notice - Service of - Status

2. Service of a pre-action notice on the party intended to be sued pursuant to a statute is, at best, a procedural requirement and not an issue of substantive law on which the rights of the plaintiff depend. It is not an integral part of the process of initiating proceedings. A party who has served a pre-action

notice is not obliged to commence proceeding at all or, barring any limitation period, to commence one within any time after the time prescribe for pre-action notices. That is why in Section 29(2) of the Act he is referred to as an “intended plaintiff”. The argument that a pre-action notice forms part of the
B cause of action of the plaintiff is misconceived and untenable as it ignores the distinction between matters of substance and matters of procedure. Notwithstanding that, sometimes, the distinction between substance and procedure is blurred, it is
C generally accepted that matters (including facts) which define the rights and obligations of the parties in controversy are matters of substance defined by substantive law, whereas matters which are mere vehicle which assist the court or tribunal in going into matters in controversy or litigated before
D it are matters of procedure regulated by procedural law. Facts which constitute the cause of action are matters of substance and should be pleaded, whereas facts which relate to how a party is to invoke the jurisdiction of the court for a remedy pursuant to his cause of action is a matter of procedure outside
E the realms of pleadings. (p. 3242 C)

ACTIONS - Commencement - Presumption of regularity

3. A plaintiff who has commenced an action which on the face of it is not incompetent is deemed to have invoked the
F presumed jurisdiction of the court. He does not need to plead what had already been presumed in his favour. On the other hand, a matter that impugns the presumed competence of the action should be raised by the opponent.

G In my judgment, Odunowo, J., fell into error when he held that the plaintiff’s supporting affidavit should have contained a statement that pre-action notice had been given. The court below also was in error in its conception of the issue when it said:

H “... the main issue that clearly arises for...consideration is whether the lower court could have exercised jurisdiction to hear the matter when the Appellant had failed to satisfy the condition precedent to the institution of the action.”

It was in error in determining the appeal on the footing

that the appellant had failed to satisfy the condition precedent when the stage of proof had not been reached. Although the appellant had the burden of proof of service of a pre-action notice, that burden does not arise unless and until the fact of non-compliance is alleged in the proper way and put in issue by the opponent. (p. 3243 B) B

ACTIONS - Commencement - FEPA Act s.29(2) - Breach

4. The other issues can be disposed of more shortly. Did the other respondents other than FEPA have a standing to raise the question of non-compliance with Section 29(2) of the Act? C

FEPA, which was represented by counsel at all material times in the proceedings in the Federal High Court, did not raise any question of non-compliance with section 29(2) of the Act, even though, as it evident, section 29(2) was for its benefit. What was prohibited was commencement of suit before the expiration of one month of service of a pre-action notice against FEPA and not against any of the other respondents. Up to the stage when the matter was raised by the other respondents, FEPA, not having raised any question of the incompetence of the suit, must be deemed to have waived the privilege or protection conferred upon it by statute. That such waiver is possible has been decided by this court in the case of NPA v. Construzioni Generali FCS & Anor (1974) 9 NSCC 622. It stands to reason that the proper person to complain of a breach of the prohibition was FEPA for whose protection the provisions were made and which can claim a right not to be subjected to the jurisdiction of the court in a suit to be subjected to the jurisdiction of the court in a suit commenced in breach of the prohibition. D E F G

The trial court and the court below in my opinion veered from the correct path into a consideration of breach of Section 29(2) of the Act as a jurisdiction issue which affected the competence of the suit not only as against FEPA but against other parties. Those other parties, not being protected by the provisions of Section 29(2) of the Act, cannot claim that they were not subject to the jurisdiction of the court. (p. 3243 G) H

Pre-action notice - Court processes - Distinction

5. A pre-action notice which is for the benefit of the person or agency on whom or on which it should be served is not to be equated with processes that are an integral part of the proceeding-initiating process. As has been said in a number of authorities, its purposes is to enable that person or agency to decide what to do in the matter, to negotiate or reach a compromise or have another hard look at the matter in relation to the issues and decide whether it is more expedient to submit to jurisdiction and have a pronouncement on the point in controversy. (p. 3245 H)

ACTIONS - Proper parties - Determination

6. Any party whose interest will be directly affected if a relief claimed in the action were granted is a proper party to a suit. Once the allegations in the pleadings show a real controversy that are capable of leading to the grant of a relief, the pleadings cannot be rightly said to disclose no reasonable cause of action. The weakness of the plaintiff's case is not relevant consideration when the question is whether or not the statement of claim had disclosed a reasonable cause of action.

In this case, the whole suit is about the status of a report made by the 2nd respondent, FEPA, and the effect it may have as between the appellant on the one hand and the 1st respondent and the 4th set of respondents on the other in their several claims against the appellant. If the report, as claimed by the appellant, is conclusive as to what it decided and the findings and conclusion in the report are binding on those respondents, there is no doubt that their claims against the appellant will be materially affected. In these circumstances it is hard to see how those respondents can rightly be described as "nominal defendants." (p. 3247 E)

ACTIONS - Party - Striking out of - Effect on competence

7. If anything, there does not seem to be any controversy disclosed in the affidavit in support of the originating summons between the 2nd respondents (FEPA) and the appellant as to FEPA's powers and the status claimed by the appellant for its

report. The consequential and injunctive relief claimed by the appellant, predicated as they were on the first three declaratory reliefs being made in its favour, was directed at the 1st respondent and the 4th set of respondents. In my opinion the suit could well have proceeded against the other defendants even if FEPA, against which declaration was sought conjunctively and alternatively to the 3rd respondents, had been struck out as a party to the suit. FEPA needed not have been a party to the action for the matter in controversy between the appellant and the other parties to be determined, particularly when the questions that arose were purely of law and of interpretation of the relevant statutes.

The trial judge was in error in holding that the suit was incompetent as against the 2nd respondent. Even if he had been right, I am of the view that he had been hasty in striking out the entire suit instead of striking out the 2nd respondent. The court below was in error in holding that in the absence of FEPA, no reasonable cause of action was disclosed.

For the reasons I have stated, this appeal succeeds.
(p. 3248 A)

NOTABLE POINTS OF INTEREST

AYOOLA JSC

1. Jurisdictional incompetence of court - Distinction

There seems to have been some confusion in the respondent's argument as well as in the approach of the court below, with regard to the issue of pre-action notice. Much stress has been placed on the argument that non-compliance with provisions such as Section 29(2) of the Act leads to a question of jurisdiction which can be raised at any time and which if resolved against the appellant renders the entire proceedings a nullity. This rather mechanical approach to the issue which tends to ignore the distinction between jurisdictional incompetence which is evident on the face of the proceedings and one which is dependent on ascertainment of facts, leads to error. In my opinion, bearing the distinction in mind, appropriate guidelines could be fashioned out as follows:

1. Where on the face of the proceedings a superior court is

competent, incompetence should not be presumed.

ii. Where on the face of the proceedings the court is incompetent, the court should of itself take note of its own incompetence and decline to exercise jurisdiction, even if the question had not been raised by the parties. If it does not, the question of its incompetence
B can be raised at any stage of the proceedings because the fact of its incompetence will always remain in the face of the proceedings.

iii. Where the competence of the court is affected by evident procedural defect in the commencement of the proceedings and such defect is not dependent on ascertainment of facts, the court should
C regard such incompetence as arising ex facie.

iv. When the competence of the court is alleged to be affected by procedural defect in the commencement of the proceedings and the defect is not evident but is dependent on ascertainment of facts,
D the incompetence cannot be said to arise on the face of the proceedings. The issue of fact, if properly raised by the party challenging the competence of the court, should be tried first before the court makes a pronouncement on its own competence.

v. Where competence is presumed because there is nothing on
E the face of the proceedings which reveals jurisdictional incompetence of the court, it is for the party who alleges the court's incompetence to raise the issue either in his statement of defence in proceedings commenced by writ or by affidavit in cases commenced by originating
F summons.

vi. A judgment given in proceedings which appear ex facie regular is valid.

The proposition that incompetence of a superior court will not be presumed where nothing on the face of the proceedings shows
G any incompetence derives from the general principles that the general jurisdiction of a superior court is presumed. (p. 3240 C)

EJIWUNMI JSC

2. Court should take evidence where service is in issue

H As none of the 4th respondents, including Nos. 77 & 78 were within the contemplation of the provisions of Section 29 of the FEPA Act with regard to the service of notice to initiate this action, it is not for any of these parties to raise this question of non-compliance. Even where raised as had been done in this matter, the court does not by

that reason alone decline jurisdiction to hear the matter. What the court needed to do, where such a question was properly raised, was to have allowed evidence to be called to determine that question. I think it is apposite to refer to this condign observation of Coker, JSC., in the *Katsina Local Authority & Anor* (supra) at page 125, which reads:- B

“Whether a written notice was served or not is a matter of fact of which oral evidence may, and indeed can be given and if accepted such evidence is conclusive.”

It is therefore my view that this matter should not have followed the course adopted by trial Court and affirmed by the court below. C
(p. 3256 D)

REPRESENTATION

H. O. Ajumogobia Esq, with Mrs. Olaopa, Gogo Karibi-Whyte, for D the Appellant

L. Pedro, Director of Civil Litigation, Ministry of Justice, Lagos State, for the 1st Respondent

B. M Udonsi, for the 2nd and 3rd Respondents

B. O. Benson, SAN with Mrs. Femi Adeniyi, for the 4th Respondents, E Nos. 618 & 628

R. O. Sadiq, for the 4th Respondents, Nos. 55 & 119

Chief Debo Akande, SAN with Mrs. Femi Adeniyi, for the 4th Respondent, Nos. 427-431

S. Edu, for the 4th Respondents, Nos. 116, 117, 118 F

I. J. Umana, for the 4th Respondents, Nos. 546-557.

V. I. P. Nwana, for the 4th Respondent, No. 1

Chinedu Moore, for the 4th Respondents, Nos. 578-587, 529-545 & 654 G

E. B. Uhiri, for the 4th Respondents, Nos. 217-254; 398-420, 420, 426, 646-672

Chukwuma Machukwu Umeh, with P. C. Ofor Agim, Obaje I Njaha, for the 4th Respondent, No. 645

Mohammed Fawehinmi, for the 4th Respondents, Nos. 421-424 & H 561

N. I. Quakers, for 4th Respondents, Nos. 777 and 878

Alhaji M. A. Kotun, for the 4th Respondents, Nos. 623 and 624

A. A. Akinyemi, for the 4th Respondent, No. 133

B. Akanni, for the 4th Respondent, No. 2

CASES REFERRED TO

Gambari v. Emir of Ilorin (1990) 5 NWLR (Pt. 152) 572

Fumudoh v. Aboro (1991) 9 NWLR (Pt. 214) 210

B Madukolu v. Nkemdilim (1992) 1 All NLR 581

Umukoro v. NPA (1997) 4 NWLR (Pt. 502) 656

Anambra State v. Nwankwo (1995) 9 NWLR (Pt. 418) 245

Nigerian Ports Plc v. Ntiero (1998) 6 NWLR (Pt. 555) 640

C Amadi v. NNPC (2000) 6 SC (Pt. 1) 66

Anakwenze v. Aneka (1985) 16 NSCC (Pt. II) 798

NPA v. Construzioni Generali Fasura Cogefar SPA (1974) All NLR 945

D Ngelegha v. Tribal Authority Nongowa Chieftdom (1953) 14 WACA 325

Skenconsult Nig. Ltd. v. Ukey (1981) NSCC 1

Shomolu LGC v. Agbede (1996) 4 NWLR (Pt. 44) 174

Katsina Local Authority v. Makudawa (1971) NSCC 119

Ngelegla v. Nongowa Tribal Authority (13) 14 WACA

E Akwei v. Akwei (1943) 9 WACA 325

STATUTES AND RULES REFERRED TO

African Charter on Human and Peoples Right, Art. 24

F Federal Environmental Protection Agency Act, s. 29(2)

Local Authority Law Cap 77 Laws of Northern Nigeria, s. 116(2)

Tribunal Authority Ordinance Cap 245 Laws of the Gold Coast, s. 19(2)

Federal High Court (Civil Procedure) Rules 1999, O. 25 r. 6

G

BOOKS REFERRED TO

Craies on Statute Law, 7th Edition, p. 269

Halsbury's Laws of England vol 10, 4th Edition, Para 713

Halsbury's Laws of England vol 8 (1), 4th Edition, Para 1066

H

LEAD JUDGMENT BY AYoola JSC

By an originating summons issued in the Federal High Court in 22nd December, 1999, Mobil Producing Nigeria Unlimited, the appellant, commenced the proceedings from which this appeal arose

against (1) Lagos State Environmental Agency; (2) Federal Environmental Protection Agency; (3) Minister of Environment; (4) Various defendants whose names were set out in a schedule to the originating summons and are here described as the 4th set of defendants. The reliefs sought by the originating summons were as follows:

“1. A Declaration that the 2nd and/or 3rd Defendant are by virtue of the Schedule 11, Part 1, item 29 of the Constitution of the Federal Republic of Nigeria, 1999, and Ss. 20, 21, 23 and 24 of the FEPA Act of 1988, the authorities with exclusive power of determine the liability of the Plaintiff with regard to any and all alleged damage arising out of the spill into interstate and/or territorial waters of Nigeria, including the costs of any government body, agency or their parties in the form of reparation, restoration, restitution, compensation and/or damages.

2. A Declaration that the findings and conclusions contained in the Reports approved and/or endorsed by the 2nd and 3rd defendant are conclusive as to the nature and/or of the environmental and/or other impact of the spill.

3. A Declaration that the findings and conclusions of the Reports to the effect that the spill had no negative/adverse environmental and/or other impact on the ecosystem and/or human resources of Lagos State or any of the States represented by the relevant state government bodies or agencies, listed in 1st Schedule and/or any of the 4th Defendants are binding on the 1st Defendant and the 4th Defendants listed in 2nd Schedule to this summons.

4. An Order that the 1st Defendant/Respondents and the 4th Defendants, their agents, attorneys, servants, privies and/or any persons whosoever acting for, or claiming through them be restrained from:

(a) taking or procuring any other person or persons to take any step in any action, proceedings or further steps in any action commenced by any of the Defendants in various divisions of the Federal and State High Courts of Nigeria; and/or

(b) commencing or continuing or procuring any other person to commence or continue any action or further or other proceedings before any Court or Tribunal in Nigeria or elsewhere against the Plaintiff or reparation, restoration, restitution, compensation and/or

damages arising out of the Plaintiff's January 12, 1998, Idoho-QIT, 24 Pipeline Oil Spill other than as may be determined by the 2nd Defendant, or at all."

On 3rd December, 1999, the appellant obtained an order of interim injunction, the terms of which are not material to this appeal.

B Therefore a number of motions were severally filed by some of the 4th set of defendants to discharge the order. One of the motions heard by the trial court, the ruling from which this appeal arose, was by Nos. 77 and 78 of the 4th set of defendants represented in the High Court by Mr. Agbakoba, SAN, who on 25 January, 2000, took an objection to the originating summons on the ground that it disclosed no reasonable cause of action. In the affidavit sworn by a counsel in the firm of Olisa Agbakoba & Associates, Solicitors to the applicants, it was stated that-

D *"The dispute between the Applicant and the Plaintiff in the present suit is not about the statutory powers or any government agency or the liability of the Plaintiff to any of the defendant (sic) but a claim for compensation for damage arising from negligence and violation of right to safe environment under Article 24 of the African*
E *Charter on Human and Peoples Right".*

It is in the court of arguing the motion that Mr. Agbakoba, SAN, stated as recorded by the trial Judge:

F *"I now refer to Section 29(2) of the FEPA Act which refers to the one month pre-action notice. A material plea of the plaintiff ought to be that one month pre-action notice was given."*

Mr. Ajumogobia, counsel for the appellant, responded that no question of absence for pre-action notice was raised in the affidavit in support of the application to discharge the interim order of injunction. G He further argued that it did not lie in the mouth of the defendants to say that notice was not given to the Federal Environmental Protection Agency ("FEPA") when there was no evidence whatsoever before the court to that effect. Notwithstanding this stout response, Odunowo, J., before whom the matter came held the view that:

H *"...the question whether the pre-action notice was given is a question of fact. That being so such a fact must be stated in the supporting affidavit. But then who has the burden lies on the person who invoked the jurisdiction of this court, i.e., the plaintiff, to show that before the suit was commenced they had served the requisite*

notice on the 2nd defendant. Until this is done they cannot be said to have properly invoked the jurisdiction of the court”.

He went on to hold that if FEPA was struck out of the suit by reasons of failure to serve a pre-action notice on it there would be nothing left in the suit because in his opinion, the real object of the declaratory action was directed at FEPA and the 4th set of defendants were merely nominal parties. In the event, he struck out the suit. B

The Court of Appeal dismissed the appellant’s appeal from the decision of the Federal High Court. There was also a cross-appeal by the respondents which the court below found “grossly incompetent” and dismissed. This appeal is from the decision of the court below dismissing the appellant’s appeal only. Excerpts from the leading judgment delivered by Galadima, JCA., with which Oguntade and Aderemi, JJCA., agreed, indicate the course of reasoning by which the court below came to a decision. First, as to what he conceived to be the issue in the suit, Galadima, JCA., said: C D

“The issue here is not whether the various 4th Respondents have no locus standi to raise the question of appellant’s non-compliance with pre-action notice as required by S.29(2) of the FEPA Act, but the main issue that clearly arises for my consideration is whether the Lower Court could have exercised jurisdiction to hear the matter when the Appellant has failed to satisfy the condition precedent to the institution of the action.” E

As to the burden of proof, he said:

“The necessity for a pre-action notice being a legal requirement, a defendant relying on the statutory requirement that he was not served therewith need not give evidence to prove non-service. The law is clear, the onus is on the plaintiff to prove that he delivered the necessary notice.” F G

As to the effect of non-compliance with the provisions of S. 29(2) of the Federal Environmental Protection Act (the Act”) he said:-

“I must say that the question of compliance with the provision of Section 29(2) of the FEPA Act, which is a statute prescribing condition precedent to be satisfied before initiating an action against the 2nd Respondent is very fundamental and this touches on the competence of the Court to entertain an action against it.” H

As to how the question of compliance or non-compliance with Section 29(2) could be raised he said:

"I do not share the opinion with the Appellant's counsel that the issue of pre-action notice need to be pleaded in the defence of the Respondents. The issue can even be raised orally at any stage of the proceedings. It must not be pleaded before it could be raised and be entertained."

B Then, he held as follows:

"The Appellant having failed to establish by its affidavit evidence before the lower Court that the pre-requisite one month pre-action notice was served on the 2nd Respondent, the court lacked the jurisdiction to entertain the matter to make the Order of interim injunction. Where a Court lacks jurisdiction to entertain any matter the proper order to make is striking out the suit".

Finally, the court below held that there was no reasonable cause of action against the other defendants since FEPA had to be struck D out.

In this appeal there are three issues formulated in the appellant's brief as follows:

"1. Whether the various 4th Respondents had the locus to raise and/or properly raised the issue of the appellant's alleged non-compliance with the pre-action notice requirement under s.29(2) of the FEPA Act, 1988, to support their application to strike out the originating summons and vacate the subsisting order of interim injunction.

2. Whether the lower court was right in affirming the trial Court's decision striking out the originating summons and vacating the order of interim injunction on the ground that the appellant failed to show in the affidavit in support of the originating summons (or otherwise) that it had complied with the provisions of the FEPA Act, 1988, by giving the requisite one-month pre-action notice to the 2nd respondent.

3. Whether the originating summons did not disclose a reasonable cause of action even if the action against the 2nd respondent was incompetent on account of the appellant's failure to show that it had served the 2nd respondent with the requisite one-month pre-action notice (which is denied) having regard to the issues for determination in the originating summons with regard to the 1st, 2nd and 3rd respondents."

Of the three issues, the second issue is central to the appeal.

The question it raises is whether the Federal High Court lacked jurisdiction to entertain the suit merely because the appellant did not in the affidavit filed with the originating summons state that it had served on FEPA a pre-action notice pursuant to Section 29(2) of the Act. Subsection 2 of Section 29 of the Act provides as follows:

“No suit shall be commenced against the Agency before the expiration of a period of one month after written notice of intention to commence the suit shall have been served upon the agency by the intending plaintiff or his agent and the notice shall clearly and explicitly state:-

a. the cause of action.

b. The particulars of the claim

c. The names and place of abode of the intending plaintiff and

d. The relief which he claims.”

Mr. Ajumogobia, counsel for the appellant, has cited a number of authorities in support of his argument that the court below was in error in its conclusion. Notable of these is *Katsina Local Authority v Makudawa* (1971) 7 NSCC 119 in which S. 116(2) of the Local Authority Law (Cap 77: Laws of Northern Nigeria), which provided for pre-action notice came for consideration in that case. Section 116(2), substantially in like terms as s. 29(2) of the Act, provided as follows:-

“No suit shall be commenced against a local authority until one month at least after written notice of intention to commence the same shall have been served upon the local authority by the intending plaintiff or his agent. Such notice shall state the cause of action, the name and place of abode of the intending plaintiff and the relief he claims”

In that case the respondent sued and obtained judgment against the Katsina Local Authority for £2152.10, being value of cows allegedly sold by him to the local authority. At the trial, evidence was taken by the court from the parties and their witnesses. The Upper Area Court gave judgment for the respondent. The local authority appealed to the High Court where the question of non-compliance with Section 116(2) was raised for the first time. It was argued by counsel for the local authority that the whole trial was nullity by reason of such non-compliance. The High Court dismissed the appeal. A second appeal to this court met with the same fate.

In *Katsina Local Authority v. Makudawa* (supra) the argument proffered on behalf of the local authority and rejected by this court was that “*the service of the notice required by the subsection is complied with the entire proceedings are a nullity.*”. In rejecting that submission, Coker, JSC., who delivered the judgment of the court referred to the case of *Bornu N. A. v. Audu Biu* Appeal no. NEM/48A/68 of 3rd September, 1969, (High Court Maiduguri, cited by the Attorney-General of North-Central State and went on:

“*We are of course in agreement with the High Court in Bornu N. A. v Audu Biu (supra) that the provisions of S. 116(2) are mandatory, but we do not consider that this characteristic makes the subsection incapable of being waived. An irregularity in the exercise of jurisdiction should not be confused with a total lack of jurisdiction: see observations generally on this point in Timitimi v. Amabebe (14 WACA at 337). It has long been settled in the High Court, or indeed in any court where pleadings are filed, that where it is intended to rely on a condition precedent then that condition precedent must be pleaded. See 1 Halsbury’s Law of England 3rd, Ed., para 28 at 18-19; and Yassin v Barclays Bank D.C.O. (1968) NMLR 380. It is not open to argument that if such condition precedent is not so pleaded the defendant would by the simple rules of pleading be taken to have waived whatever rights he possesses in the subject matter: see Ngelegla v Nongowa Tribal Authority 14 WACA at p 327; Akwei v Akwei (1943) 9 WACA 325 at 327 and Dismore v Milton (1938) 3 All ER 763-763; 159 LT at 382 - 383, per Greer, L.J.). In the Upper Area Court where the present proceedings originated pleadings are not filed or indeed required, and the crucial question is whether in such circumstances a defendant can be excused from raising the point in that court whilst at the same time preserving his right to raise it on appeal.*”.

In *Katsina Local Authority v Makudawa* (supra) this court, clearly and without equivocation, decided among other things, that:

- i. provisions such as S. 116(2) prescribing pre-action notice are mandatory,
- ii. non-compliance with such mandatory provisions can be waived,
- iii. non-compliance with such provisions as in S. 116(2) is an irregularity in the exercise of jurisdiction which should not be confused

with a total lack of jurisdiction.

iv. non-compliance with a condition precedent to the commencement of action must be pleaded and

v. failure to plead it amounts to a waiver.

The submission made by counsel for the appellant in this appeal was substantially along the lines of the decision in *Katsina Local Authority v Makudawa* (supra), while the respondents proffered substantially the same arguments which had been rejected by this court in that case. Counsel for the appellant further contended that by virtue of O. 25, r. 6 of the Federal High Court (Civil Procedure) Rules, 1999 “*an averment of the performance of occurrence of all conditions precedent necessary for the case of the plaintiff shall be implied in his pleadings*”, that the initial burden was not on the plaintiff but on the defendant to plead the absence of notice and that failure to comply with submission does not nullify the action. He relied for these submissions on *Yaskey v. The President, Councillors and Citizen of Freetown* (1931) 1 WACA 141; *Eze v. Okechukwu* (1998) 5 NWLR (Pt. 458) 43; *Katsina Local Government Authority v Makudawa* (1971) 7 NSCC 119.

Although the respondents put their case in their respective briefs in different words, each of them focused on the consequence of failure to serve pre-action notice as affecting the competence of the action and the jurisdiction of the court. There is no dearth of authorities as to the consequence of failure to serve a pre-action notice when such is made a condition precedent for the commencement of a suit. A suit commenced in default of service of a pre-action notice is incompetent as against the party who ought to have been served with a pre-action notice provided such party challenges the competence of the suit. Some of the authorities cited by the respondents are *Provisional Council, Ogun State University & Anor v. Iyabode Makinde* (Mrs) (1991) 2 NWLR (Pt. 175) 613; *Gambari & Ors v. Emir of Ilorin* (1990) 5 NWLR (Pt. 152) 572; *Fumudoh & Anor v Aboro* (1991) 9 NWLR (Pt. 214) 210; *Madukolu v Nkemdilim* (1992) 1 All NLR 581; *Umukoro v. NPA* (1997) 4 NWLR (Pt. 502) 656; *Anambra State v. Nwankwo* (1995) 9 NWLR (Pt. 418) 245; *Nigerian Ports Plc v. Ntiero* (1998) 6 NWLR (Pt. 555) 640; *Amadi v. NNPC* (2000) 6 S.C. (Pt. 1) 66; 2000 FWLR (Pt. 9) 1527. How-

ever, several of these cases are not of direct relevance to the question which arises in this appeal.

Gambari v Emir of Ilorin (supra) was about the constitutionality of the requirement for deposit of money as a pre-condition to the commencement of chieftaincy proceedings; Anambra State v Nwakoro (supra) was about the constitutionality of requirement for pre-action notice; Fumudoh v Aboro (supra) was about the consequence of failure to obtain required leave to appeal, such leave being an integral part of the appeal process; in Umukoro v NPA (supra) as in NPA v. Ntiero (supra) the question was raised by the defence in the pleadings. These cases are not relevant to the question whether or not it is the plaintiff who should plead non-compliance with the requirement of service of a pre-action notice.

There seems to have been some confusion in the respondent's argument as well as in the approach of the court below, with regard to the issue of pre-action notice. Much stress has been placed on the argument that non-compliance with provisions such as Section 29(2) of the Act leads to a question of jurisdiction which can be raised at any time and which if resolved against the appellant renders the entire proceedings a nullity. This rather mechanical approach to the issue which tends to ignore the distinction between jurisdictional incompetence which is evident on the face of the proceedings and one which is dependent on ascertainment of facts, leads to error. In my opinion, bearing the distinction in mind, appropriate guidelines could be fashioned out as follows:

1. Where on the face of the proceedings a superior court is competent, incompetence should not be presumed.
- ii. Where on the face of the proceedings the court is incompetent, the court should of itself take note of its own incompetence and decline to exercise jurisdiction, even if the question had not been raised by the parties. If it does not, the question of its incompetence can be raised at any stage of the proceedings because the fact of its incompetence will always remain in the face of the proceedings.
- iii. Where the competence of the court is affected by evident procedural defect in the commencement of the proceedings and such defect is not dependent on ascertainment of facts, the court should regard such incompetence as arising *ex facie*.

iv. When the competence of the court is alleged to be affected by procedural defect in the commencement of the proceedings and the defect is not evident but is dependent on ascertainment of facts, the incompetence cannot be said to arise on the face of the proceedings. The issue of fact, if properly raised by the party challenging the competence of the court, should be tried first before the court makes a pronouncement on its own competence. B

v. Where competence is presumed because there is nothing on the face of the proceedings which reveals jurisdictional incompetence of the court, it is for the party who alleges the court's incompetence to raise the issue either in his statement of defence in proceedings commenced by writ or by affidavit in cases commenced by originating summons. C

vi. A judgment given in proceedings which appear ex facie regular is valid. D

The proposition that incompetence of a superior court will not be presumed where nothing on the face of the proceedings shows any incompetence derives from the general principles that the general jurisdiction of a superior court is presumed. In Halsbury's Laws of England. Vol. 10, 4th Edition, para. 713, it was stated: E

"Prima facie, no matter is deemed to be beyond the jurisdiction of a superior court unless it is expressly shown to be so...."

The rule of jurisdiction, as held by this court (per Uwais, JSC., (as he then was), in *Anakwenze v Aneka & Ors* (1985) 16 NSCC (Pt. II) 798, 803 citing *The Major etc of London v. Cox* (1867) 2 LR HL. 239 and *Peacock v Bell and Kendall* (1867) 1 Wims. Saund. 101, is that nothing shall be intended to be out of the jurisdiction of a superior court but that which specially appears to be so. F

That an irregularity in the exercise of jurisdiction should not be confused with a total lack of jurisdiction takes cognizance of the general meaning of the word "jurisdiction" as "*the authority which a court has to decide matters that are litigated before it or take cognizance of matters presented in a formal way for its decision.*" (see Halsbury's (op cit) para. 715). Procedure of invoking the jurisdiction of the court should not be confused with the authority of the court to decide matters which on the face of the proceedings have been properly presented in the formal way for its decision and which are within its jurisdiction. G H

In the Katsina Local Authority case (supra) this court held that it is not open to argument that if conditions precedent are not pleaded the defendant would be taken to have waived the rights he possesses in the subject matter, that is in regard to service of pre-action notice as a condition precedent a right to complain about the competence of the suit. It has not been argued that this court should not now follow its previous decision. For my part, it is the preferred authority to follow, as have many academic writers. A party who challenges the acceptance of a court on the basis of certain facts but fails to put in issue those facts, stands the risk of being precluded at a later stage when the proceedings have been brought to a final conclusion from re-opening that issue of fact. In essence, as I understand it, that was the decision in *Kwaa v Kwakwa* 3 WACA 76.

Service of a pre-action notice on the party intended to be sued pursuant to a statute is, at best, a procedural requirement and not an issue of substantive law on which the rights of the plaintiff depend. It is not an integral part of the process of initiating proceedings. A party who has served a pre-action notice is not obliged to commence proceeding at all or, barring any limitation period, to commence one within any time after the time prescribe for pre-action notices. That is why in Section 29(2) of the Act he is referred to as an "intended plaintiff". The argument that a pre-action notice forms part of the cause of action of the plaintiff is misconceived and untenable as it ignores the distinction between matters of substance and matters of procedure. Notwithstanding that, sometimes, the distinction between substance and procedure is blurred, it is generally accepted that matters (including facts) which define the rights and obligations of the parties in controversy are matters of substance defined by substantive law, whereas matters which are mere vehicle which assist the court or tribunal in going into matters in controversy or litigated before it are matters of procedure regulated by procedural law. Facts which constitute the cause of action are matters of substance and should be pleaded, whereas facts which relate to how a party is to invoke the jurisdiction of the court for a remedy pursuant to his cause of action is a matter of procedure outside the realms of pleadings. The distinction

was stated thus in Halsbury's Laws of England vol. 8(1), 4th Edition, para 1066;

"... generally speaking, it may be said that substantive rules give or define the right which it is sought to enforce and procedural rules govern the mode or machinery by which the right is enforced."

A plaintiff who has commenced an action which on the face of it is not incompetent is deemed to have invoked the presumed jurisdiction of the court. He does not need to plead what had already been presumed in his favour. On the other hand, a matter that impugns the presumed competence of the action should be raised by the opponent.

In my judgment, Odunowo, J., fell into error when he held that the plaintiff's supporting affidavit should have contained a statement that pre-action notice had been given. The court below also was in error in its conception of the issue when it said:

"... the main issue that clearly arises for...consideration is whether the lower court could have exercised jurisdiction to hear the matter when the Appellant had failed to satisfy the condition precedent to the institution of the action."

It was in error in determining the appeal on the footing that the appellant had failed to satisfy the condition precedent when the stage of proof had not been reached. Although the appellant had the burden of proof of service of a pre-action notice, that burden does not arise unless and until the fact of non-compliance is alleged in the proper way and put in issue by the opponent.

I resolve the second issue formulated by the appellant against the respondent and hold that the originating summons should not have been struck out on the ground that the appellant failed to show in the affidavit filed in support of the originating summons that it had complied with the act.

The other issues can be disposed of more shortly. Did the other respondents other than FEPA have a standing to raise the question of non-compliance with Section 29(2) of the Act?

FEPA, which was represented by counsel at all material times in the proceedings in the Federal High Court, did not

- raise any question of non-compliance with section 29(2) of the Act, even though, as it evident, section 29(2) was for its benefit. What was prohibited was commencement of suit before the expiration of one month of service of a pre-action notice against FEPA and not against any of the other respondents.**
- B Up to the stage when the matter was raised by the other respondents, FEPA, not having raised any question of the incompetence of the suit, must be deemed to have waived the privilege or protection conferred upon it by statute. That such**
- C waiver is possible has been decided by this court in the case of NPA v. Construzioni Generali FCS & Anor (1974) 9 NSCC 622. It stands to reason that the proper person to complain**
- D of a breach of the prohibition was FEPA for whose protection the provisions were made and which can claim a right not to be subjected to the jurisdiction of the court in a suit to be subjected to the jurisdiction of the court in a suit commenced in breach of the prohibition.**

- The trial court and the court below in my opinion veered from the correct path into a consideration of breach of Section**
- E 29(2) of the Act as a jurisdiction issue which affected the competence of the suit not only as against FEPA but against other parties. Those other parties, not being protected by the provisions of Section 29(2) of the Act, cannot claim that they were not subject to the jurisdiction of the court.** Several cases
- F have been cited in support of the respondents' position. Some of them are NPA v Construzioni Generali Fasura Cogefar SPA & Anor (1974) All NLR 945; Ngelegla v Tribal Authority Nongowa Chiefdom (1953) 14 WACA 325; Skenconsult (Nig) Ltd. v. Ukey (1981) NSCC**
- G 1; Shomolu LGC v Agbede (1996) 4 NWLR (Pt. 44) 174.**

- In so far as any of these cases may have decided that where there is non-compliance with the condition precedent for commencing a suit the court will decline to entertain the suit against the person who ought to have been served with a pre-action notice, the authority**
- H of those decisions are undoubted. However, the courts have not always put the denial of jurisdiction by reason of breach of such prohibit as high as amounting to a total absence of jurisdiction on the face of the proceedings as the respondents would want to put it. In the case of Ngelegla v. Nongowa Tribunal Authority (1953) 14 WACA 325, the**

West African Court of Appeal in relation to Section 19(2) of Tribunal Authority Ordinance (Cap 245, Laws of the Gold Coast) which was in pari materia with Section 29(2) of the Act: at p. 327

“The language of Section 19(2) of Cap 245 is imperative and would appear to debar a court from entertaining a suit instituted without compliance with its provisions. The object of notice is to give the defendant breathing time so as to enable him determine whether he should make reparation to plaintiff”

Then, as to the responsibility of the defendant to plead non-compliance with condition precedent and consequence of failing to raise that special defence, it went to say:-

“In this case the defendants have not pleaded that this condition precedent to action has not been performed. There is nothing to prevent the defendant from waiving the notice or from being estopped by his conduct from pleading the want of it at the trial. On consideration, the point appears to me to be expressly governed by Order 16, rule 10. As it was not contested by the defence filed it must be implied that the requisite notice was given, and I would further hold, on the authority of *Yaskey v The President, etc. of Freetown* (1 WACA 141), that the defence of want of notice is a special defence which must be especially pleaded to entitle the defendant to the benefit of the section” (Emphasis mine)

Order 16 rule 10 is in the same terms as O. 25, r. 6 or the Federal High Court (Civil Procedure) Rules 1999. In my view, the proper approach is found in the principles of law stated in Halsbury’s Laws of England (4th Ed) Vol. 10, para. 718, as follows:-

“Where the court has jurisdiction over the particular subject matter of the action or the particular parties and the only objection is whether, in the circumstances of the case, the court ought to exercise jurisdiction, the parties may agree to give jurisdiction in their particular case; or a defendant by entering an appearance without protest, or by taking any steps in the action, may waive his right to object to the court taking cognisance of the proceedings.”

A pre-action notice which is for the benefit of the person or agency on whom or on which it should be served is not to be equated with processes that are an integral part of the proceeding-initiating process. As has been said in a number of authorities, its purposes is to enable that person or agency

to decide what to do in the matter, to negotiate or reach a comprise or have another hard look at the matter in relation to the issues and decide whether it is more expedient to submit to jurisdiction and have a pronouncement on the point in controversy. The law is clear that conditions imposed for the benefit

B only of a particular person or class of persons can be dispensed with. In *Graham v Ingleby* (1848) 1 Exch. 651, 657 Alderson B., said:-

“It is evident, that a party who has a benefit given him by statute may waive it if he thinks fit.”

C 7th The view was expressed in a passage in Craies on Statute Law, Edition, at page 269 thus:

“If the object of a statute is not one of general policy, or if the thing which is being done will benefit only a particular person or class of persons, then the conditions prescribed by the statute are not considered indispensable. This rule is expressed by the maxim of law, Quilibet potest renuntiare juri pro se introducto. As a general rule, the conditions imposed by statutes which authorize legal proceedings are treated as being indispensable to giving the court jurisdiction. But if it appears that the statutory conditions were inserted by the legislature

E *simply for the security or benefit of the parties to the action themselves, and that no public interests are involved, such conditions will not be considered indispensable, and either party may waive them without affecting the jurisdiction of the court.”*

F The words ‘Quilibet potest renuntiare juri pro se introducto’ mean that “An individual may renounced a law made for his special benefit”. It was added as foot-note to the passage quoted above that “the words ‘pro se’ were introduced into the maxim to show that no man can renounce a right of which his duty to the public, or the

G claims of society forbid the renunciation.” The right to be served with a pre-action notice does not fall within the category of right which cannot be waived.

I come to the conclusion that FEPA could waive the right to be served with a pre-action notice. I also hold without hesitation that it

H was FEPA for whose benefit Section 29(2) of the Act is made and which could decide in relation to the purpose of the subsection whether it was expedient or not to submit to the jurisdiction of the court in the particular instance that could have raised the issue of non-compliance with Section 29(2). It will hardly be a satisfactory state of affairs where

a person on whom pre-action notice should be served to have waived the protection of the Act and submitted to the jurisdiction of the court, another party on whom service was not required is allowed to raise the issue of non-compliance. I hold that the first issue must be resolved in favour of the appellant.

The third issue is whether, even if the action had been incompetent against FEPA on the ground on non-compliance with Section 29(2) of the Act, the consequence that should follow was the striking out of the entire suit as disclosing no reasonable cause of action. Odunowo, J., struck out the action because he was of the view that “once the 2nd defendant (FEPA) is struck out there is nothing left in the suit because the real object of the declaratory action is directed at the 2nd defendant, it being remembered that the 4th defendant are merely nominal parties so that the order made by the court shall be binding on them. That is why the issue of the pre-action notice goes to the root of the action.” Agreeing with this view the court below held, (per Galadima, JCA.), that in the absence of the 2nd respondent (FEPA), no reasonable cause of action was disclosed.

Any party whose interest will be directly affected if a relief claimed in the action were granted is a proper party to a suit. Once the allegations in the pleadings show a real controversy that are capable of leading to the grant of a relief, the pleadings cannot be rightly said to disclose no reasonable cause of action. The weakness of the plaintiff’s case is not relevant consideration when the question is whether or not the statement of claim had disclosed a reasonable cause of action.

In this case, the whole suit is about the status of a report made by the 2nd respondent, FEPA, and the effect it may have as between the appellant on the one hand and the 1st respondent and the 4th set of respondents on the other in their several claims against the appellant. If the report, as claimed by the appellant, is conclusive as to what it decided and the findings and conclusion in the report are binding on those respondents, there is no doubt that their claims against the appellant will be materially affected. In these circumstances it is hard to see how those respondents can rightly be described

as “nominal defendants.” *If anything, there does not seem to be any controversy disclosed in the affidavit in support of the originating summons between the 2nd respondents (FEPA) and the appellant as to FEPA’s powers and the status claimed by the appellant for its report. The consequential and injunctive relief claimed by the appellant, predicated as they were on the first three declaratory reliefs being made in its favour, was directed at the 1st respondent and the 4th set of respondents. In my opinion the suit could well have proceeded against the other defendants even if FEPA, against which declaration was sought conjunctively and alternatively to the 3rd respondents, had been struck out as a party to the suit. FEPA needed not have been a party to the action for the matter in controversy between the appellant and the other parties to be determined, particularly when the questions that arose were purely of law and of interpretation of the relevant statutes.*

The trial judge was in error in holding that the suit was incompetent as against the 2nd respondent. Even if he had been right, I am of the view that he had been hasty in striking out the entire suit instead of striking out the 2nd respondent. The court below was in error in holding that in the absence of FEPA, no reasonable cause of action was disclosed.

For the reasons I have stated, this appeal succeeds. I allow the appeal and set aside the decision of the Federal High Court striking out the originating summons. I order that the matter be remitted to the Federal High Court for it to be dealt with as may be appropriate. The appellant is entitled to costs of the appeal in the Court of Appeal and of the appeal in this court. I award N5,000 to the appellant against the set of 4th respondents for whom there was appearance in the court below and N10,000 to the appellant against each set of 4th respondents who filed briefs or argument in this court.

H

KUTIGI JSC

I read in advance the judgment just rendered by my learned brother, Ayoola, JSC. I agree with his reasoning and conclusions. He has meticulously dealt with all the issues canvassed before us. I will also allow the appeal and endorse the consequential orders including

the award for cost, contained therein.

MOHAMMED JSC

I have had the privilege of reading the judgment of my learned brother, Ayoola, JSC., in draft. I agree that this appeal ought to succeed. It is accordingly allowed. I have nothing which I can usefully add to the opinion of my learned brother. I abide by all the consequential orders made in the lead judgment including the award of costs.

KALGO JSC

I have had the privilege of reading in advance the judgment of my learned brother, Ayoola JSC., just delivered in this appeal and I agree with him entirely that there is merit in the appeal. I fully adopt the reasoning and conclusions reached in the judgment and accordingly, allow the appeal and set aside the decision of the Court of Appeal affirming that of the trial court. I also abide by the consequential orders made in the said judgment including the orders as to costs.

EJIWUNMI JSC

I have had the advantage of reading in advance the draft of the judgment just delivered by my learned brother, Ayoola, JSC. I agree entirely with all the reasons given for allowing the appeal. I only wish to add a few words of my own in support of the judgment. This appeals stems from the decision of the court below wherein the Court affirmed the ruling of the trial Court that struck out the appellant's suit against the respondents. Pursuant to the appeal in this Court, the appellant in its brief filed by its learned counsel, H. O. Ajumogobia, raised three issues for the determination of the appeal.

They read:-

“(1) Whether the various 4th Respondents had the locus to raise and/or properly raised the issues of the appellant's alleged non-compliance with the pre-action notice requirement under S. 29(2) of the FEPA Act, 1988, to support their application to strike out the

originating summons and vacate the subsisting order of interim injunction.

2. *Whether the lower court was right in affirming the trial Court's decision striking out the originating summons and vacating the order of interim injunction on the ground that the appellant failed to show in the affidavit in support of the originating summons (or otherwise) that it had complied with the provisions of the FEPA Act, 1988, by giving the requisite one-month pre-action notice to 2nd respondent.*

3. *Whether the originating summons did not disclose a reasonable cause of action even if the action against the 2nd respondent was incompetent on account of the appellant's failure to show that it had served the 2nd respondent with the requisite one-month pre-action notice (which is denied) having regard to the issues for determination in the originating summons with regards to the 1st, 2nd and 3rd respondents."*

The provision of Section 29(2) of the FEPA Act which provides for pre-action notice, and had generated the controversy leading to this appeal reads:-

"No suit shall be commenced against the Agency before the expiration of one month after written notice of intention to commence the suit shall have been served upon the agency by the intending plaintiff or his agent and the notice shall clearly and explicitly state

- a. the cause of action,*
- b. the particulars of the claim,*
- c. the names and place of abode of the intending plaintiff and*
- d. the relief which he claims".*

The Court below, in the lead judgment delivered by Galadima, JCA, and which Oguntade and Aderemi, JJCA., agreed with, clearly took the view that the appellant had the burden of establishing that the pre-action notice was served on the respondents. And in order to raise the question of whether there had been compliance with the pre-action notice, Galadima, JCA., said:-

"I do not share the opinion with the Appellants' counsel that the issue of pre-action notice need to be pleaded in the defence of the Respondents. The issue can even be raised orally at any stage of the proceedings. It must not be pleaded before it could be raised and be entertained."

In his argument before this Court, learned counsel for the

appellant adopted in his brief the proposition which was rejected as above by the court below. In support of his argument, he referred to the decision of this Court in the case of *Katsina Local Authority v Makudawa* (1971) NSCC 119. In that case, this Court had to construe the meaning and effect of Section 116(2) of the Local Authority Law (Cap. 77) Laws of Northern Nigeria, whose provisions with regard to pre-action notice, are couched in terms similar to Section 29(2) supra. For the purposes of this judgment I will quote Sections 116(1) and (2) of the Local Authority Law (supra). They read-

1. When any suit is commenced against any local authority for any act done in pursuance, or execution, or intended execution of any Act or Law, or of any public duties or authority, or in respect of any alleged neglect or default in the execution of any such act, law, duty of authority, such suit shall not lie or be instituted in any court unless it is commenced within six months next after the act, neglect or default complained of, or in case of a continuance of damage or injury, within six months next after the ceasing thereof. Provided that if the suit be at the instance of any person for cause arising while such person was a convicted prisoner, it may be commenced within three months after the discharge of that person from prison.

2. No suit shall be commenced against a local authority until one month at least after written notice of intention to commence the same shall have been served upon the local authority by the intending plaintiff or his agent. Such notice shall state the cause of action, the name and place of abode of the intending plaintiff and the relief which he claims."

The basic facts in the *Katsina Local Authority* case (supra) reveal that the respondent sued the appellant for £2152.10s, being value of cows allegedly sold by him to local authority. The Upper Area Court, having heard evidence at the trial, then gave judgment in favour of the respondent. The appellant appealed to the High Court where the question of non-compliance with Section 116(2) was raised for the first time. At the hearing, the learned counsel for the appellant argued that the entire trial was a nullity because of such non-compliance that (a) the action was statute barred under S. 116(1) of the law, (b) the trial was a nullity for want of the notice of intention to sue prescribed by S. 116(2) and (c) these points could be raised on appeal though not raised at the trial. The respondent contended that

the points could not be raised on appeal, since they had not been raised on appeal.

As Coker, JSC., who delivered the judgment of this Court considered and made pronouncement germane to the questions raised in the instant case, in the course of his judgment, I consider it desirable to refer to a passages in that judgment which I consider relevant in respect of the instant appeal. Commenting on the meaning and effect of Section 116(1), the provisions of which are similar to Section 29(1) of FEPA, Justice Coker, JSC., at page 123 said:-

“The section is no more than of some of the provisions of S.2 of the Public Officers (Protection) Law (Cap, 111), the sole aim of which is the protection of public officers in the execution of their public duties, so that if a public officer is made a party in proceedings involving another person who is not a public officer such other person would not be entitled to the protection of the statute. In Ademola II v. Thomas 12 WACA 81 at 89, the West African Court of Appeal made the following observations:

‘It was submitted that in such case the action must be dismissed as against the other three appellants, it being argued that the first appellant was a party necessary to the proceedings and if he could not lawfully be joined then the proceedings against the others must fail. We are unable to find that this submission is well founded. It would be open to the first appellant if he desired to be joined as a party to waive the protection afforded him by the statute. If he did not choose to do so he could not be heard to complain that he was not made a party thereto, nor could his absence prejudice the trial of the issue in regard to the other appellants.’

“The passage is instructive to and throws considerable light upon the meaning and effect of this protective provision and, as stated before, the provision ensures complete protection to a public functionary acting in the course of his public duty or authority even where such a person is accused along with a non-government official. In such circumstances it is difficult to contented that the right of action as opposed to the remedy was extinguished by the statutory provision. In any case, as the learned Attorney-General has concluded his inability to press his arguments on S. 116(1), we do not consider it necessary to say much more about the implications of that subsection; but a short observation is clearly pertinent.

We have pointed out that S.116(1) is a provision the aim of which is to protect local authorities by restricting the period during which they may be answerable for their deeds or misdeeds. We also observe that in the High Court the arguments consistently referred to the subsection as a statute of limitation. It is of course permissible to refer to S. 116(1) generally as a statute of limitation since it does limit the time within which an action can be commenced. But statutes of limitation vary enormously in their phraseology and content, and it must not be overlooked that there are some such statutes of limitation that expressly bar not only the remedy but also the right of action: see S.30 of the Money Lenders Law (Cap. 74): Mustapha Alli v. Allen (1966) NMLR at 135; Dawkins v. Lord Penrhyn (1877) 6 Ch.D 318; and Cf. 24 Halsbury's Laws of England 3rd Ed. Para. 369 at 205. Be that as it may, we are firmly of the view that the present proceedings do not come within the types of action described in s. 116(1) of the Local Authority Law, and as such the competency of the proceedings cannot be challenged on that score. If that is so, as indeed we think it is, then the ground of appeal complaining that the present proceedings contravened the provisions of S.116(1) is misconceived, and it fails'

And on Section 116(2), His Lordship in interpreting the provision of S.116(2) said at page 124.

"We are of course in agreement with the High Court in Bornu N. A. v Audu Biu (supra) that the provisions of S.116(2) are mandatory, but we do not consider that this characteristic makes the subsection incapable of being waived. An irregularity in the exercise of jurisdiction should not be confused with a total lack of jurisdiction: see observations generally on this point in Timitimi v Amabebe 14 WACA at 377. It has long been settled in the High Court, or indeed in any court where pleadings are filed that where it is intended to rely on a condition precedent, then that condition must be pleaded: see 1 Halsbury's Laws of England 3rd ed... para 28 at 18-19; and Yassin v Barclays Bank D.C.O. (1968) NMLR 380. It is not open to argument that if such condition precedent is not so pleaded the defendant would by the simple rules of pleadings be taken to have waived whatever rights he possesses in the subject matter: see Ngelegla v Nongowa Tribal Authority (13) 14 WACA at 327; Akwei v Akwei (1943) 9 WACA 325 at p. 327 and Dismore v Milton (1938) 3 All ER 763-764; 159

L.T. at 382-383, per Greer, LJ. In the Upper Area Court where the present proceedings originated, pleadings are not filed or indeed required and the crucial question is whether in such circumstances a defendant can be excused from raising the point in that court whilst at the same time preserving his right to raise it on appeal. We find no difficulty whatsoever in holding that a defendant cannot do this. A condition precedent must be expressly or at the least impliedly raised at the trial so that the other party may have the opportunity of meeting the point”.

And on when the non-compliance with S.116(2) could be raised, and the effect on the suit if not raised, his Lordship pronounced thus at page 125:-

“We are clearly of the view that S. 116(2) of the Local Authorities Law prescribes a condition precedent to the competence of any action commenced against a local authority and that compliance with the subsection is a pre-condition of such competence. The subsection requires such notice as is therein prescribed to be served on the local authority and stipulates that at least one month shall expire before the suit can be legally commenced. It follows therefore, in our view, that where it is established that no such notice was served or that the subsection is not otherwise complied with, any suit commenced in contravention of the provisions of the subsection is wrongly commenced and should not be entertained by any court. The important matter is this appeal however is whether the point could be properly raised at the trial either expressly or impliedly. We think not. We think also that to hold otherwise would introduce a serious element of confusion into legal procedures and create a situation which will defeat the very object of the sub-section. The reasons for this are numerous. It is easy to see that even a plaintiff who has failed in an action against a local authority may urge the subsection in that way in order to get over an order of dismissal of his case and so be enabled to commence fresh proceedings where he is not caught by the provisions of subsection (1) of s. 116 but that is not the only reason. The notice postulated by the subsection is a written notice and where the point is raised at the trial the plaintiff is still capable of putting such a notice, or a copy thereof, in evidence where he has served it. If the point is being raised for the first time on appeal, except in the restricted circumstances where fresh evidence is allowed

on appeal, the opportunity of putting such a notice or a copy thereof in evidence is lacking and it is not allowed by our law to prove the content of a written document by parol evidence.”

I now would revert to the case. Bearing the above principles profoundly enunciated by Coker, JSC., in the Katsina Local Government case (supra), it is manifest that the learned Justice of the Court of Appeal, Galadima, JSC, cannot be right in stating that the issue of pre-action notice need not be pleaded by the respondents. He cannot also in my respectful view be wholly right to have stated that the question can be raised orally at any stage of the proceedings. With due regard, it is my view that the decision of this Court in the Katsina Local Authority case requires the respondent who wishes to rely upon the defence of non-compliance to raise the defence in his pleadings. This is in accordance with the general principles with regard to the filing of pleadings. In this regard, it must be borne in mind that the main function of pleadings is for the ascertainment and with as much certainty as possible the various matters actually in dispute among the parties and those in which there is agreement between them. See *Morinatu Oduka & Ors. v Kasumu & Anor* (1968) NMLR 28, 31; *Adesoji Aderemi v Joshua Adedire* (1966) NMLR 398. And if the suit is one that was commenced by originating summons, then the respondent would be at liberty to raise that issue in a sworn affidavit.

I will therefore hold that in the instant appeal, it is erroneous to hold that the issue of non-compliance need not be pleaded. Now, where it is not pleaded nor was an affidavit filed to that effect as in the instant appeal, it does appear that the issue could be raised. It does seem that the question should not have led to the conclusions of the trial Court which reads thus:

“The question whether the pre-action notice was given is a question of fact. That being so such a fact must be stated in the supporting affidavit. But then who has the burden of proving this fact. In my own view, that initial burden lies on the person who invoked the jurisdiction of this court, i.e., of the plaintiff, to show that before the suit was commenced they had served the requisite notice on the 2nd defendant. Until this is done they cannot be said to have properly invoked the jurisdiction of the court.”

This leads me to the consideration of the other question raised in this appeal. This is with regard to whether any of the 4th respon-

dents possess the right to question whether the appellant complied with and served the requisite notice under S. 29(2) of the FEPA Act on the 2nd respondent. It would be recalled that the question was raised for Nos. 77 and 78 of the 4th set of respondents. It is not in dispute that the provisions of Section 29 of the FEPA Act were enacted for the benefit of the 2nd respondent, namely the “Federal Environmental Protection Agency. The 2nd respondent for whose benefit the provisions were made could have or ought to have pleaded that the appellant had not complied with the notice required of it by the provisions of section 29 of the Act. In so far as the 2nd respondent did not raise the issue, it must be taken that the appellant had complied with the provisions of Section 29 of the FEPA Act, or it has waived its right under the subsection. See *Ngelegba v Nongowa Tribal Authority* (13) 14 WACA at 327; *Akwei v. Akwei* (1943) 9 WACA 325 at 327; *Dismore v Milton* (1938) 3 All ER 763-764; 159 L.T. at 382-383, *Greer LJ. And Katsina Local Authority & Anor v. Makudawa* (supra).

As none of the 4th respondents, including Nos. 77 & 78 were within the contemplation of the provisions of Section 29 of the FEPA Act with regard to the service of notice to initiate this action, it is not for any of these parties to raise this question of non-compliance. Even where raised as had been done in this matter, the court does not by that reason alone decline jurisdiction to hear the matter. What the court needed to do, where such a question was properly raised, was to have allowed evidence to be called to determine that question. I think it is apposite to refer to this condign observation of Coker, JSC., in the *Katsina Local Authority & Anor* (supra) at page 125, which reads:- “*Whether a written notice was served or not is a matter of fact of which oral evidence may, and indeed can be given and if accepted such evidence is conclusive.*”

It is therefore my view that this matter should not have followed the course adopted by the trial Court and affirmed by the court below.

In the result, it is my view that this appeal must be allowed and it is hereby allowed for the reasons given above and the fuller reasons in the lead judgment of my learned brother, Ayoola JSC. I also abide with all the consequential orders made in the said judgment.