

**SUPREME COURT OF NIGERIA**  
FRIDAY 13TH DECEMBER, 2002. SC. 147/1998  
**CORAM:- S. M. A. BELGORE, A. I. IGUH, U. A. KALGO,**  
**S. O. UWAIFO, E. O. AYoola, JJSC**

CHIEF JOHN EZE

..... APPELLANT

AND

1. DR. COSMAS IKECHUKWU  
OKECHUKWU

2. UGWUEZE EZEAKA

3. ONYEJEMELI ALUKA

4. EMMANUEL UZOWULU

..... RESPONDENTS

5. ALFRED AMANGBO

6. HENRY OBIEZUGHARA

7. OKAFOR NWABUNWA

8. IHEDICHE EWULU

(For themselves and on behalf of the  
seven sons of Dioha Royal Family of  
king-makers of Ihiala)

---

ACTIONS - Pre-action notice - Status - Giving of notice has nothing to do with cause of action - Since it is procedural requirement - And not a substantive element (H1)

ACTIONS - Pre-action notice - Non compliance - Effect of - Non-compliance does not abrogate plaintiff's cause of action - But gives defendant right to insist on regularity of the notice (H2)

ACTIONS - Pre-action notice - Right to - Waiver - Defendant may decide to settle with plaintiff - Or waive his right to notice - In order to confront plaintiff (H3)

WORDS & PHRASES - Waiver - Meaning of - It is the intentional relinquishment of a known right - Or conduct warranting inference of such relinquishment (H4)

ACTIONS - Pre-action notice - Non service of - Objection to - Defendant may raise objection when served with writ of summons - Or

may plead same in statement of defence (H5)

WORDS & PHRASES - Public officer - Definition - By State Proceedings Law of Anambra - Public officer is one engaged in service of State - In a civil capacity (H6)

### **FACTS**

There was a traditional ruler-ship tussle in respect of the stool of Oluoha of Ihiala in Anambra State. 1<sup>st</sup> plaintiff/respondent claimed he was properly selected by the appropriate representatives of the families of the Okparas (the kingmakers), while appellant equally claimed entitlement to the said stool. Under the Traditional Rulers Law of Anambra State, an amendment of a community Constitution can only be made subject to the Governor's consent, though the initiative and content of the amendment must come from the community. However, the State Government took the initiative and amended the Ihiala Community Constitution and subsequently had appellant selected, presented and recognized as King under the amended Constitution.

Meanwhile, 1<sup>st</sup> respondent was duly selected under the original Constitution. Consequently, respondents instituted this action at the High Court of Anambra State, Nnewi. After hearing evidence in the action, the learned trial judge held that appellant was improperly selected and recognized by the State Government. Being dissatisfied, appellant filed appeal at the Court of Appeal, Enugu Division. He did not contest the appeal on merit but rather canvassed the law in regard to pre-action notice under section 11(2) of State Proceedings Law of Anambra State and the effect of decree 13 of 1984 purportedly ousting the jurisdiction of the trial. The appeal was dismissed which prompted appellant to appeal to Supreme Court.

### **ISSUES FOR DETERMINATION**

*(i) Were the majority of the Justices of the Court of Appeal right when they held that Section 11(2) of the State Proceedings Law, Cap. 131, Laws of Anambra State, 1986, was a special defence and that failing to raise it in the statement of defence was fatal to the case of the appellant?*

*(ii) Were the majority of the Justices of the Court of Appeal right when they held that the appellant as a recognised Traditional*

*Ruler was not a public officer within the meaning of the provisions of Cap. 131 Laws of Anambra State, 1986?*

*(iii) Does Decree No. 13 of 1984 apply only to Decrees and Edicts and does not extend to other existing laws applied by the Military Governor.*

## **HELD**

(Unanimously dismissing the appeal per

### **UWAIFO JSC)**

*Pre-action notice - Status*

**1. I have no doubt in my mind that the interpretation given to that phrase in Section 11(2) by the appellant, namely, that “the plaint when eventually prepared shall contain a statement that such notice has been so delivered and the date on which it was delivered, “ to the effect that failure to so endorse the plaint (or writ of summons) was fatal and would inexorably lead to the action being declared incompetent cannot be right. I think the purpose of such an endorsement is to signify early that the necessary pre-action notice has been given. By so doing, the defendant would be in a position to admit or refute it. The endorsement is not to be taken as conclusive by itself that the notice has in fact been given. It is the actual giving of the notice that is of real relevance. In other words, failure to give the notice could, in appropriate circumstances, be adjudged as a factor of the incompetence of the action, not failure to indicate by the endorsement of the plaint that notice has been given. If, for instance, the notice in fact had been given but there was inadvertence in so endorsing the plaint, could that by itself make the action incompetent? I rather think not. It follows that what can truly be raised as an objection to competence is the failure to give notice. It would otherwise be strange for a defendant who has acknowledged receiving a plaintiff’s pre-action notice to be heard later to complain that the action is technically incompetent simply because the fact that notice was given was not endorsed on the plaint. The requirement of pre-action notice where this is prescribed by law is known to have one rationale. It is to apprise the defendant**

**before hand of the nature of the action contemplated and to give him enough time to consider or reconsider his position in the matter as to whether to comprise or contest it. The giving of pre-action notice has nothing to do with the cause of action. It is not a substantive element but a procedural requirement, albeit statutory, which a defendant is entitled to before he may be expected to defend the action that may follow.** (p. 3388 B)

*Pre-action notice - Non compliance - Effect of*

**2. It is necessary to state that there are circumstances where a court has no original or any constitutional jurisdiction to hear a matter. There are others where, owing to operation of law, the jurisdiction is either taken away or merely put on hold pending compliance with certain pre-condition. As I understand the position, these authorities cited by the appellant and others like them are inapplicable to the present case but are concerned with situations where a court cannot exercise jurisdiction at all over a matter to give a valid decision as a result of a statutory or constitutional provision which delimits its jurisdiction to exclude or not to include the subject-matter; or abrogates the right of a plaintiff to approach the court or defeats his cause of action, for instance, statute of limitation.**

**In the case of pre-action notice, care must be taken to understand its essence. Non-compliance does not abrogate the right of a plaintiff to approach the court or defeat his cause of action. If the subject-matter is within the jurisdiction of the court, failure on the part of a plaintiff to serve a pre-action notice on the defendant gives the defendant a private right solely for his benefit to insist on such notice before the plaintiff may approach the court.** (p. 3389 C)

*Pre-action notice - Right to - Waiver*

**3. But here, the argument of the appellant is that a defendant is not competent to waive his entitlement to a pre-action notice. The question is, can a defendant waive that right? I do not see why not. A defendant who is entitled to a pre-action**

**notice may well consider that the subject-matter is not such that he needs time to consider. He may feel the necessity to settle with the plaintiff without delay. On the other hand, he may see the futility of the plaintiff's action in that it stands no chance on the merits and should be confronted outright. The defendant therefore ignores the fact of the irregular commencement of the action and decides or acquiesces to waive his right to a pre-action notice. I think he is perfectly at liberty to do so. (p. 3389 G)**

*Waiver - Meaning of*

**4. It is said that waiver is the intentional or voluntary relinquishment of a known right, or such conduct as warrants an inference of the relinquishment of such right. It also arises when one dispenses with the performance of something he is entitled to whether conferred by law or by contract, with full knowledge of the material facts; or when a person does or forbears to do something the doing of which is inconsistent with the right, or his intention, to rely or insist upon it. It includes the disinclination to take advantage of some defect, irregularity, or wrong in the act or action of another through acquiescence, renunciation, repudiation, abandonment or surrender of the right to so do. (p. 3390 B)**

*Pre-action notice - Non service of - Objection to*

**5. The court below per Salami, JCA., held the view that the defendants ought to have objected to the action at the trial court on the issue of pre-action notice. The 1st-3rd defendants, i.e., the Government functionaries, who obviously might have been entitled to do so did not plead it in their statement of defence or raise it by motion. Nor did the 4th and 5th defendants. I think that is the correct view as expressed by Salami, JCA., on the issue of pre-action notice. It is a special defence available to an appropriate defendant by statute (or contract) which he ought to raise to the effect that he has not been served with the requisite pre-action notice and therefore that the action is incompetent or premature. Such a defence of non-service which is a matter of fact, should be raised in**

*the proper manner at the trial court - preferably soon after the defendant is served with the writ of summons. If not so raised, the fact of non-service ought to be pleaded in the statement of defence. If it is raised, and it is shown, that there has been non-service the court is bound to hold that the plaintiff has not fulfilled a pre-condition for instituting his action. This is the sense in which the provision of Section 11(2) is really to be regarded as mandatory. The action will be considered premature, or, in the usual parlance, incompetent, and struck out.* (p. 3390 H)

*Public officer - Definition*

**6. Under the State Proceedings Law, Cap. 131, Laws of Anambra State, 1986, 'public officer' is defined to mean 'an officer engaged in the service of the State in a civil capacity.'** Whereas "traditional ruler" is defined in the Anambra State Traditional Rulers Law No. 14 of 1981 to mean "a person selected and appointed as 'Igwe' or 'Obi' of a town or community in accordance with this Law, who, on recognition by the Governor, shall be styled or known as the recognised chief. "It would be incongruous and unbefitting, in my view, to subject a traditional ruler to the constraints of a public officer.

The definition of "public service" in S. 227(1) of the 1979 Constitution which was then applicable was very wide. Even so, it did not include the office of traditional rulers. The definition there was essentially for the purposes of the Code of Conduct. Therefore, even if the appellant had been a traditional ruler, there is nothing that could be relied on to regard him as a public officer and accordingly, I hold that he was not entitled to the pre-action notice under the said Section 11(2) In any event, the plaintiffs who were challenging the validity of the selection, presentation and recognition of the appellant as a traditional ruler would not be expected to acknowledge him as a traditional ruler, (even if qualifying as a public officer), and to be obligated to serve him a pre-action notice to make the action against him competent. To them, as far as the character of the subject-matter of the action was concerned, he was not a traditional ruler, much less a public of-

**ficer.** (pp. 3392 H/3393 F)

### **REPRESENTATION**

Chris Uche, Esq, with John Erameh, Esq and Chuks Ochu, Esq., for the Appellant

Chief A. O. Mogboh, SAN with C. H. C. Nwanya, Esq., for the Respondents B

### **CASES REFERRED TO**

Barclays Bank Ltd. v. Central Bank of Nig (1976) 6 S.C. 175 C

Okotie-Eboh v. Okotie-Eboh (1986) 1 NWLR (Pt. 16) 264

Ijebu Local Govt v. Adedeji Balogun & Co. Ltd. (1991)

Ariori v. Elemo (1983) 1 SCNLR 1

Ross T. Smyth & Co. Ltd. v. T.D. Bailey Son & Co. (1940) 3 All ER 60

Ademola II v. Thomas (1946) 12 WACA 81 D

Katsina Local Authority v. Makudawa (1971) 7 NSCC 119

Gamu Yare v. Alhaji Adamu Nunku (1995) 5 NWLR (Pt. 394) 127

Nwosu v. Imo State Environmental Sanitation Authority (1990) 2 NWLR (Pt. 135) 688

Okomu Oil Palm Co. Ltd v. Iserhienrhien (2001) 3 S.C. 140 E

### **STATUTES REFERRED TO**

Decree No 13 of 1984, s. 1 (2)

Decree No 107 of 1993, s. 17

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

State Proceedings Law Cap 131 Vol. 4 Laws of Anambra State, s. 11 (2)

Traditional Rulers Law Cap 148 Laws of Anambra State, s. 13 (2) G

### **LEAD JUDGMENT BY UWAIFO JSC**

When the Court of Appeal, Enugu Division, heard the appeal from the judgment of Ononiba, J., sitting at the High Court of Anambra State holden at Nnewi, the issues essentially canvassed had been narrowed down to those of law. They were two, which the appellant H stated thus:

*“A. Was the jurisdiction of the Court to hear and determine Suit No. HN/67/88 properly ignited when it essayed to hear and determine the matter without the plaintiffs complying with pre-action*

*notice prescribed under Section 11(2) of State Proceedings Law, Cap. 131, Vol. 4 Laws of Anambra State.*

*B. Had the Nnewi High Court or any Court the jurisdiction to inquire into the act of recognition of the 4th defendant/appellant by the Military Governor of Anambra State and set the same aside as void, vide Decree No. 13 of 1984 or Cap. 137, Laws of Nigeria, 1990?"*

In the leading judgment of the court below by Salami, JCA., concurred in by Tobi, JCA., from which Akpabio, JCA., dissented, the learned Justice remarked, quite rightly, that the appellant was not contesting the decision on the merits and that the learned trial Judge had meticulously resolved the issues arising from the evidence led before him. Those issues of law set out above were determined against the appellant and his appeal was dismissed. It is pertinent to state that of the five defendants, he alone appealed.

Before this Court, the appellant has pursued those issues as issues (i) and (iii) together with another as issue (ii). All three issues are stated by the appellant as follows:

(i) Were the majority of the Justices of the Court of Appeal right when they held that Section 11(2) of the State Proceedings Law, Cap. 131, Laws of Anambra State, 1986, was a special defence and that failing to raise it in the statement of defence was fatal to the case of the appellant?

(ii) Were the majority of the Justices of the Court of Appeal right when they held that the appellant as a recognised Traditional Ruler was not a public officer within the meaning of the provisions of Cap. 131 Laws of Anambra State, 1986?

(iii) Does Decree No. 13 of 1984 apply only to Decrees and Edicts and does not extend to other existing laws applied by the Military Governor.

The reliefs sought at the trial by the respondents as plaintiffs against five defendants (of whom the appellant was the fourth), were six. They were, in paraphrase: (a) A declaration that the appellant was improperly recognised as the Oluoha of Ihiala Community and that the recognition was null and void; (b) A declaration that appellant was not validly declared and presented for recognition; (c) A declaration that the 1st, 2nd and 3rd defendants, (functionaries of the Government of Anambra State), were not entitled to nominate,



select, appoint or present the 4th defendant as the Traditional Ruler of Ihiala; (d) A declaration that the 1st respondent was duly selected and installed as the Oluoha of Ihiala; (e) An injunction restraining the said Government functionaries from presenting a certificate of recognition of the appellant and gazetting the same as the Traditional Ruler of Ihiala; and (f) An injunction restraining the appellant from parading himself as the Traditional Ruler of Ihiala and performing the functions of the office. B

The three Government functionaries who were the 1st, 2nd and 3rd defendants were the Military Governor of Anambra State, the Attorney-General of the State and the Commissioner for Special Duties in the Governor's Office in charge of Rural Development and Chieftaincy Matters. The 5th defendant was Chief Maduegboka Onuchukwu Onyia, the head (Okpara) of one of the families that constitute the Royalty of Ihiala community. The case is all about the selection, presentation and recognition of the Oluoha of Ihiala, a traditional rulership. The 1st plaintiff claimed he was properly selected by the appropriate representatives of the families of the Okparas who joined in the action as the 2nd and 8th plaintiffs. The appellant also claimed he was duly selected and presented by the families, and in addition recognised by the Government of Anambra State. D E

A large body of evidence was led before the trial court, including numerous documents. One of such documents was the town or community constitution which contains a detailed statement of the customary law of the town or community regulating the selection, appointment, suspension, deposition, rights and privileges of the traditional ruler. Under Section 13(2) of the Traditional Rulers Law, Cap. 148, Laws of Anambra State (the Law), it is provided that: F

*“Such town or community constitution after it has been fully forwarded to the Secretary to the Local Government shall not be amended unless the Governor is satisfied as to the reason for such amendment.” G*

It is the town or community which the said Law gives the responsibility to draw up its constitution. It would appear in the present case that there was Government interference in amending the constitution of Ihiala. It was the amended version that the appellant relied on for his defence since it was under it he was selected, presented and recognised. H

The learned trial Judge carefully considered the evidence and the relevant aspects of the Law and made vital findings. Among those findings were that: (1) There is no provision in the Law empowering the Governor to amend the constitution of a town or community. What he can do is to give consent to any amendment proposed by the town or community if he was satisfied as to the reason for such an amendment.

In other words, the initiative must come from the community and the suggested amendment is what is desired by them. For the purpose of amendment, the guidelines provide for three months' notice to the Oluoha and Oluoha-in-Council, resolutions of the Executive of the community at the Annual General Meeting of Ihiala Progress Union, and then the ratification of the proposed amendment at a mass meeting of Ihiala people. (2) The amendment by the Government, which gave birth to a new constitution for the Ihiala people, was ineffectual. (3) Although the Commissioner for Special Duties has powers under the Law to set up an inquiry where there is dispute as to the selection or appointment of a traditional ruler, he cannot use that umbrage to effect an amendment to the constitution of the people. (4) The 4th defendant (appellant) was not validly selected and therefore there was no basis for the recognition given him as the traditional ruler of Ihiala.

Following these findings and others I have not considered it necessary to specifically set out, the learned trial Judge granted reliefs (a), (b), (c) and (f) and refused (d) and (e). As already indicated, issues of fact were not taken on appeal in the Court of Appeal and therefore the said findings were not in dispute. What was canvassed was the law in regard to pre-action notice as prescribed under Section 11(2) of the State Proceedings Law of Anambra State and the effect of Decree No. 13 of 1984. Although arguments outside these issues were proffered by the appellant under what he regarded as alternative argument, the court below rightly confined its judgment to the two issues. It dismissed the appeal by a majority decision.

#### H First Issue

This court is called upon in this appeal to resolve those same issues set down as issues (i) and (iii). There is also issue (ii) as already indicated. Under issue (i), the appellant has argued that the plaintiffs did not comply with the pre-condition of commencing the action by

giving notice in writing to the defendants, and therefore that that action was incompetent. Much of the argument of the appellant proceeded on the basis of what he conceives as the effect of non-compliance with the pre-action notice. It has not, in my opinion, taken adequate account of the reasoning of Salami, JCA., and shown it to be invalid which is that although non-compliance could result in incompetence of the action, in the present case the issue of non-compliance was not raised at the trial nor pleaded by the defendants and cannot therefore be relied on. It was not raised by the defendants by motion. The statements of defence filed by each set of them were silent on it and at no stage was it an issue at the trial court. I think the argument of the respondents before this Court sufficiently captures this salient point. B C

The statutory provisions of the State Laws, 1986 of Anambra State, Cap. 131, in regard to pre-action notice are contained in Section 11(2). The section reads: D

“(2) *No action shall be instituted*

*(a) against the State: or*

*(b) against a public officer in respect of any act done in pursuance of execution, or intended execution of any written law, or of any public duty or authority or in respect of any alleged neglect or default in the execution of any such written law, duty or authority, until the expiration of a period of three months after notice in writing has been in the case of the State, delivered to the Secretary to the Government and in the case of a public officer delivered to him, stating the cause of action, the name, description and place of residence of the proposed Plaintiff and the relief which he claims and the plaint when eventually prepared shall contain a statement that such notice has been so delivered and the date on which it was delivered.” E F G*

The appellant in the first leg of his argument on the meaning and effect of the above stated provisions has stated that the phrase “the plaint when eventually prepared shall contain a statement that such notice has been so delivered” imposes a duty upon a plaintiff to indicate on the writ of summons that the pre-condition has been fulfilled by the service of the appropriate pre-action notice and if not so indicated the action is incompetent and a nullity. The majority decision of the court below having considered that same argument observed as follows: H

*“The words emphasised, (i.e., that the plaint should contain a statement of the notice being served and when it was served) require that the endorsement be made on the plaint or writ of summons. The sub-section does not have the effect of nullifying a writ that does not comply.”*

**B I have no doubt in my mind that the interpretation given to that phrase in Section 11(2) by the appellant, namely, that “the plaint when eventually prepared shall contain a statement that such notice has been so delivered and the date on which it was delivered,” to the effect that failure to so endorse the plaint (or writ of summons) was fatal and would inexorably lead to the action being declared incompetent cannot be right. I think the purpose of such an endorsement is to signify early that the necessary pre-action notice has been given. By so doing, the defendant would be in a position to admit or refute it. The endorsement is not to be taken as conclusive by itself that the notice has in fact been given. It is the actual giving of the notice that is of real relevance. In other words, failure to give the notice could, in appropriate circumstances, be adjudged as a factor of the incompetence of the action, not failure to indicate by the endorsement of the plaint that notice has been given. If, for instance, the notice in fact had been given but there was inadvertence in so endorsing the plaint, could that by itself make the action incompetent? I rather think not. It follows that what can truly be raised as an objection to competence is the failure to give notice. It would otherwise be strange for a defendant who has acknowledged receiving a plaintiff’s pre-action notice to be heard later to complain that the action is technically incompetent simply because the fact that notice was given was not endorsed on the plaint. The requirement of pre-action notice where this is prescribed by law is known to have one rationale. It is to apprise the defendant before hand of the nature of the action contemplated and to give him enough time to consider or reconsider his position in the matter as to whether to comprise or contest it. The giving of pre-action notice has nothing to do with the cause of action. It is not a substantive element but a procedural requirement, albeit statutory, which a defendant is entitled to**

***before he may be expected to defend the action that may follow.***

The appellant in his second leg of argument has submitted, in support of the mandatory nature of pre-action notice and for strict compliance therewith in order for a court to exercise its jurisdiction to entertain any action requiring it, that a court cannot be vested with jurisdiction by acquiescence, consent, agreement or waiver by the parties, citing Barclays Bank Ltd. v. Central Bank of Nigeria (1976) 6 S.C. 175; Okotie-Eboh v. Okotie-Eboh (1986) 1 NWLR (Pt. 16) 264 and Ijebu Local Government v. Adedeji Balogun & Co. Ltd. (1991) 1 NWLR (Pt. 166) 136 as authorities.

***It is necessary to state that there are circumstances where a court has no original or any constitutional jurisdiction to hear a matter. There are others where, owing to operation of law, the jurisdiction is either taken away or merely put on hold pending compliance with certain pre-condition. As I understand the position, these authorities cited by the appellant and others like them are inapplicable to the present case but are concerned with situations where a court cannot exercise jurisdiction at all over a matter to give a valid decision as a result of a statutory or constitutional provision which delimits its jurisdiction to exclude or not to include the subject-matter; or abrogates the right of a plaintiff to approach the court or defeats his cause of action, for instance, statute of limitation.***

***In the case of pre-action notice, care must be taken to understand its essence. Non-compliance does not abrogate the right of a plaintiff to approach the court or defeat his cause of action. If the subject-matter is within the jurisdiction of the court, failure on the part of a plaintiff to serve a pre-action notice on the defendant gives the defendant a private right solely for his benefit to insist on such notice before the plaintiff may approach the court. But here, the argument of the appellant is that a defendant is not competent to waive his entitlement to a pre-action notice. The question is, can a defendant waive that right? I do not see why not. A defendant who is entitled to a pre-action notice may well consider that the subject-matter is not such that he needs time to consider. He may feel the necessity to settle with the plaintiff without***

**delay. On the other hand, he may see the futility of the plaintiff's action in that it stands no chance on the merits and should be confronted outright. The defendant therefore ignores the fact of the irregular commencement of the action and decides or acquiesces to waive his right to a pre-action notice. I think he**  
 B **is perfectly at liberty to do so.**

**It is said that waiver is the intentional or voluntary relinquishment of a known right, or such conduct as warrants an inference of the relinquishment of such right. It also arises**  
 C **when one dispenses with the performance of something he is entitled to whether conferred by law or by contract, with full knowledge of the material facts; or when a person does or forbears to do something the doing of which is inconsistent with the right, or his intention, to rely or insist upon it. It includes**  
 D **the disinclination to take advantage of some defect, irregularity, or wrong in the act or action of another through acquiescence, renunciation, repudiation, abandonment or surrender of the right to so do.** See Black's Law Dictionary, 6th edn, page 1580. In  
 E *Ariori v. Elemo* (1983) 1 SCNLR 1 at 25, it was observed that a person who is entitled to the benefit of a statutory provision may waive it and allow the transaction to proceed as though the provision did not exist. Quite often the relevance of waiver depends upon the circumstances in which it is sought to be applied. As was observed by  
 F Lord Wright in *Ross T. Smyth & Co. Ltd. v. T.D. Bailey Son & Co.* (1940) 3 All ER 60 at 70:

***"The word 'waiver' is a vague term used in many senses. It is always necessary to ascertain in what sense and with what restrictions it is used in any particular case. It is sometimes used in the sense of***  
 G ***election as where a person decides between two mutually exclusive rights..... It is also used where a party expressly or impliedly gives up a right to enforce a condition or rely on a right to rescind a contract, or prevents performance, or announces that he will refuse performance, or loses an equitable right by laches."***

H **The court below per Salami, JCA., held the view that the defendants ought to have objected to the action at the trial court on the issue of pre-action notice. The 1st-3rd defendants, i.e., the Government functionaries, who obviously might have been entitled to do so did not plead it in their state-**

**ment of defence or raise it by motion. Nor did the 4th and 5th defendants. I think that is the correct view as expressed by Salami, JCA., on the issue of pre-action notice. It is a special defence available to an appropriate defendant by statute (or contract) which he ought to raise to the effect that he has not been served with the requisite pre-action notice and therefore that the action is incompetent or premature. Such a defence of non-service which is a matter of fact, should be raised in the proper manner at the trial court - preferably soon after the defendant is served with the writ of summons. If not so raised the fact of non-service ought to be pleaded in the statement of defence: see Ademola II v. Thomas (1946) 12 WACA 81 at 89; Katsina Local Authority v. Makudawa (1971) 7 NSCC 119 at 124. If it is raised, and it is shown, that there has been non-service the court is bound to hold that the plaintiff has not fulfilled a pre-condition for instituting his action. This is the sense in which the provision of Section 11(2) is really to be regarded as mandatory. The action will be considered premature, or, in the usual parlance, incompetent, and struck out.**

However, the incompetence of the action as a result of non-service of a pre-action notice resulting in the court being unable to exercise its jurisdiction to proceed with the hearing is an irregularity which is not such that cannot be waived by the defendant who has failed to raise it by motion or plead it in the statement of defence. It is different from circumstances of total lack of jurisdiction in the court. Both situations should be separately analysed when relying on and considering relevant authorities dealing with the consequences of incompetence as I have attempted to demonstrate earlier on. There is indeed the authority of this court in strong support of the above views. In Katsina Local Authority v. Makudawa (supra), on which Chief Mogboh, SAN, placed reliance on behalf of the respondents, the following observation inter alia was made at pp. 123-124 per G.B.S. Coker, JSC,:

*“With respect to S. 116(2) (of the Local Authority Law (Cap. 77) Laws of Northern Nigeria, similar to S. 11(2) of Anambra State Proceedings Law) it was submitted by the learned Attorney-General that the service of the notice required by the subsection is a pre-condition of jurisdiction and that unless the subsection is complied*

*with the entire proceedings are a nullity. The learned Attorney-General referred us to the cases of Bornu N.A. v. Audu Biu Appeal No. NEM/48A/68 of 3<sup>rd</sup> Sept. 1969, (High Court, Maiduguri) and Cheko v. Kano N.A. Suit NO. K/49/66.*

*In the former case, the High Court held that the provisions of S. 116(2) are mandatory and that the section might be raised even if it be for the first time on appeal. The court also held in that appeal that failure to comply with S. 116(2) does render the entire proceedings a nullity. In the latter case the argument concerned the entitlement of a party to rely upon a notice already served (and used) in a former action for the institution of a second action after the first action was non-suited. We make no pronouncement on the validity of these two decisions.....*

*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 ..... 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... It is not open to argument that if such condition 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.”*  
(Parenthesis mine)

#### Second Issue

The second issue is whether the court below was right when it held that the appellant, even if he were a recognised Traditional Ruler, was not a public officer who may take advantage of the provisions of Cap. 131, Laws of Anambra State, 1986. The appellant claims he was a traditional ruler therefore a public officer entitled to the pre-action notice under Section 11(2) of Cap. 131 of the Laws of Anambra State. Attempts were made by the learned Justices of the Court below to define who a public officer is. I do not hesitate to say that the definitions there suggested serve no useful purpose in respect of this case. **Under the State Proceedings Law, Cap. 131, Laws of Anambra State, 1986, ‘public officer’ is defined to mean ‘an officer engaged in the service of the State in a civil capacity.’**



**Whereas “traditional ruler” is defined in the Anambra State Traditional Rulers Law No. 14 of 1981 to mean “a person selected and appointed as ‘Igwe’ or ‘Obi’ of a town or community in accordance with this Law, who, on recognition by the Governor, shall be styled or known as the recognised chief. “It would be incongruous and unbefitting, in my view, to subject a traditional ruler to the constraints of a public officer.**

**The definition of “public service” in S. 227(1) of the 1979 Constitution which was then applicable was very wide. Even so, it did not include the office of traditional rulers. The definition there was essentially for the purposes of the Code of Conduct:** see Okomu Oil Palm Co. Ltd v. Iserhienrhien (2001) 3 S.C. 140; (2001) FWLR (Pt. 45) 670 at 689-690. **Therefore, even if the appellant had been a traditional ruler, there is nothing that could be relied on to regard him as a public officer and accordingly, I hold that he was not entitled to the pre-action notice under the said Section 11(2).** Moreover, the likely action which may be taken against a public officer within the contemplation of the provisions of that subsection is in respect of any act done by him “in pursuance or execution or intended execution of any written law or any public duty or authority of in respect to any alleged neglect or default in the execution of any such written law, duty or authority. “It is plain that there was no allegation of any act done, or neglect or default committed, by the appellant in connection with any of the obligations stated in those provisions that would bring him within Section 11(2). See the case of Gamu Yare v. Alhaji Adamu Nunku (1995) 5 NWLR (Pt. 394) 127. **In any event, the plaintiffs who were challenging the validity of the selection, presentation and recognition of the appellant as a traditional ruler would not be expected to acknowledge him as a traditional ruler, (even if qualifying as a public officer), and to be obligated to serve him a pre-action notice to make the action against him competent. To them, as far as the character of the subject-matter of the action was concerned, he was not a traditional ruler, much less a public officer.**

Third Issue

The third issue asks whether the jurisdiction of the Anambra State High Court (sitting at Nnewi) was not ousted by virtue of De-

cree No. 13 of 1984 and Decree No. 107 of 1993. The argument of the appellant is that the Military Administrator recognised him as a traditional ruler by virtue of Sections 7 and 8 of the Traditional Rulers Law No. 14 of 1981 of Anambra State and published an instrument of that event in the gazette. It is argued that the instrument having  
 B been so published became a Law and therefore must be regarded as an Edict by virtue of Section 17 of Decree No. 107 of 1993, and cannot be questioned in any court of law having regard to Section 1(2)(b)(i) of Decree No. 13 of 1984. With all due respect, I think this  
 C argument is a clear misconception though presented ingeniously. Section 1(2)(b)(i) of Decree No. 13 of 1984 provides that:

*“No civil proceedings shall lie or be maintained in any Court for or on account of or in respect of any act, matter or thing done or purported to be done under or pursuant to any Decree or Edict and  
 D if any such proceedings are instituted before or after the commencement of this Decree the proceedings shall abate, be discharged and made void.”*

It is without doubt that Decree No. 13 of 1984 had its own scheme. The Military Government had to protect that scheme by  
 E which it would be enabled to act in abuse of the rule of law through Decrees and Edicts. To do so, it included the ouster clause so that no court would have the jurisdiction to entertain any action challenging its action or seeking redress therefrom. But the protection was limited  
 F to whatever was done under or pursuant to any Decree or Edict. Unless a court was confronted with any Decree or Edict, there could be no resort to the ouster clause. There was certainly not the familiar Decree or Edict involved in this case. The said Law No. 14 was not an Edict by any description. I do not think the Military Government was  
 G willing and in a position to interfere with and alter the custom and tradition of the different communities by whatever means, not even by Decrees or Edicts. It did not do so in fact. What was essentially made a subject of contention in this case was the custom and tradition regarding chieftaincy as acknowledged and declared by the Ihiala  
 H community which the learned trial Judge rightly said the Military Governor was not entitled by himself to amend or alter.

The three issues raised for determination have been resolved by me against the appellant. I therefore find no merit in this appeal and dismiss it with N10,000.00 costs against the appellant in favour

of the respondents.

### **BELGORE JSC**

By any imagination, the fact of appointment as a traditional ruler cannot be interpreted to mean such a ruler has become a public officer. “Public Officer” is a person engaged in the service of a government in a civil capacity; this is clear in the definition part of Laws of Anambra State, 1986 Cap. 131. Whereas “Traditional Ruler” means a person selected as “Obi or “Igwe of a town or community in accordance with Anambra State Traditional Rulers Law (No. 14 of 1981), “who on recognition by the Governor, shall be styled or known as recognised chief”. I therefore agree with my learned brother, Uwaifo, JSC., in the lead judgment that this appeal has no merit. I also dismiss it with N10,000.00 costs to the respondents.

### **IGUH JSC**

This appeal was not contested on the merits of the case but principally on relevant issues of technicality. The most prominent is whether the appellant being a recognised Traditional Ruler all times material to the institution of the action under consideration was a “public officer” within the meaning of the provisions of the State Proceedings Law, Cap. 131, Laws of Anambra State of Nigeria, 1986, and consequently entitled to a pre-action notice prescribed under Section 1(2) of the same Law.

I find it extremely difficult to subscribe to the view that a Traditional Ruler is ipso facto a “public officer” within the meaning of the provisions of Cap. 131 Laws of Anambra State of Nigeria, 1986. That Law defines a “public officer” as follows:-

*“Public Officer means an officer engaged in the service of the State in a civil capacity”* (Underlining supplied for emphasis).

On the other hand, a Traditional Ruler is defined by the Anambra State Traditional Rulers Law No. 14 of 1981, thus:-

*“A traditional ruler means a person selected and appointed as ‘Igwe’ or ‘Obi’ of a town or community in accordance with this Law, who, on recognition by the Governor, shall be styled or known as the recognised chief.”*

It seems to me, therefore, having regard to the above definitions, that whilst a public officer for the purposes of the Anambra State Proceedings Law, Cap. 131 of 1986, is an officer “engaged” or employed by the State under a contract of service in a civil capacity, a traditional ruler is selected and appointed by his town or community  
 B in accordance with the constitution of the town or community and later presented to and duly recognised by the State Governor under the Anambra State Traditional Rulers Law No. 14 of 1981. I cannot see my way clear that a traditional ruler by virtue of the fact of his  
 C selection as ‘Igwe’ or ‘Obi’ and his subsequent recognition by the State Governor automatically becomes “engaged” in the service of the State in a civil capacity within the meaning of the Anambra State Proceedings Law, 1986.

It is for the above and the more detailed reasons contained in  
 D the judgment of my learned brother, Uwaifo, JSC., that I, too, dismiss this appeal with costs as assessed in the leading judgment.

### **KALGO JSC**

E I have had the privilege of reading in draft the judgment of my learned brother, Uwaifo, JSC., just delivered in this appeal. I agree that on the whole, there is no merit in the appeal and it ought to be dismissed.

F The 3 issues which arose for determination in the appeal as formulated by the appellant and substantially similar to those of the respondents are:-

“(i) *Were the majority of the Justices of the Court of Appeal right when they held that Section 11(2) of the State Proceedings Law, Cap. 131, Laws of Anambra State, 1986, was a special defence and that failing to raise it in the statement of defence was fatal to the case of the appellant?*

“(ii) *Were the majority of the Justices of the Court of Appeal right when they held that the appellant as a recognised traditional  
 H Ruler was not a “public officer” within the meaning of the provisions of Cap. 131, Laws of Anambra State, 1986?*

“(iii) *Does Decree No. 13 of 1984 apply only to Decrees and Edict and does not extend to other existing laws applied by the Military Governor.*”

Issue I brings into focus the question of pre-action notice required by certain statutes before the institution or commencement of certain actions in our courts. In this case, the relevant law is the State Proceedings Law, Cap. 131 of Anambra State, 1986, which provides in Section 11(2)(b) that no action shall be instituted against a public officer in respect of any act done in pursuant of execution or intended execution of any written law or of any public duty or authority or in respect of any alleged neglect or default in the execution of any such written law, duty or authority until the expiration of three months after notice in writing has been given to the public officer concerned. In the instant case, no such notice was given before the action was commenced in the trial court. The respondent partially succeeded in the trial court, but the Court of Appeal, by a majority decision, (Salami and Tobi, JJCA.), held that-

*“The party, that is, the first three defendants for whose protection the provisions were made did not protest in the court below and are not on appeal. The fact that the notice was not given was not pleaded by the 1st, 2nd and 3rd defendants who are entitled to the defence, in their joint statement of defence”.*

The appellant was the 4th defendant at the trial and according to the Court of Appeal, (majority decision), he is not entitled to the benefit of S. 11(2) of the State Proceedings Law (supra) because he did not come within the definition of a “Public Officer”. This is where issue II came into play and I think it is the most important issue to be considered in this appeal.

In the State Proceedings Law (supra) a “public officer” is defined as -

*“...an officer engaged in the service of the state in a civil capacity.”*

The appellant was recognised as a traditional ruler with the title of Oluoha of Ihiala by the State Government pursuant to the Anambra State Traditional Rulers Law No. 14 of 1981, but that does not make him a public officer within the meaning of the State Proceedings Law (supra). He was also not engaged as a civil servant and his recognition as a traditional ruler is being challenged in this action. Therefore, although in the case of *Nwosu v. Imo State Environmental Sanitation Authority* (1990) 2 NWLR (Pt. 135) 688 at 721, this court held that “civil service of a state” is service in a civil

capacity where the appellant was a staff of the State Government Ministry or of Local Government, in this case the appellant was neither. He was only a traditional ruler selected by a community and could not be said to be engaged in a civil capacity within the meaning of S. 277(1) of 1979 Constitution or the Anambra State Proceedings Law  
B (supra). I therefore entirely agree with the Court of Appeal (majority decision) that the appellant, in the circumstances of this case, is not a public officer within the meaning of Anambra State Proceedings Law and is not therefore entitled to receive any pre-action notice in this  
C matter.

I entirely agree with the reasoning and conclusions reached on the rest of the issue considered by my learned brother, Uwaifo, JSC., in the leading judgment which I adopt as mine. I therefore agree with him that there is no merit in this appeal. I dismiss it with N10,000.00  
D costs.

---

**AYOOLA JSC**

For the reasons clearly stated in the judgment just delivered by  
E my learned brother, Uwaifo, JSC., to which I do not wish to add anything, I too dismiss the appeal with N10,000. 00 costs to the respondents.

F

G

H