

SUPREME COURT OF NIGERIA
7TH MARCH, 2008 SC. 377/2002
CORAM:- N. TOBI, S. A. AKINTAN, M. MOHAMMED,
I. F. OGBUAGU, F. F. TABAI, JJSC

1. NIGERCARE DEVELOPMENT
COMPANY LIMITED APPELLANT
AND
1. ADAMAWA STATE WATER BOARD
2. ADAMAWA STATE GOVERNMENT
3. WADSCO/IBG LIMITED
4. PRINCIPAL MANAGEMENT RESPONDENTS
OFFICER FEDERAL MINISTRY
OF WATER RESOURCES AND
RURAL DEVELOPMENT

ACTIONS - Competence - Condition precedent - Contained in s. 51 of the Edict - That forbids action against 1st defendant temporarily - Is not an ouster clause contrary to the Constitution (H1)

ACTIONS - Pre-action notice - Issue of - Has been settled in lots of decided authorities - As to its purpose and implication - Not being to restrict access to the court (H2)

ACTIONS - Fair hearing - Pre-action notice - Access to court and condition precedent - Definition - Constitutional right of access to the court - Does not preclude statutory regulations of how the right should be exercised (H3)

ACTIONS - Competence - Pre-action notice - Where not given as statutorily provided - The suit/proceedings is a nullity - No matter how well conducted - For want of jurisdiction (H4)

COURTS - Issues - Suo motu raising of - The principle - Cannot preclude a Judge from applying principles - Not referred to by counsel - Or from having recourse to any relevant law (H5)

FACTS

The plaintiff/appellant secured a contract from the 1st and 2nd defendants/respondents for the rehabilitation of water treatment plants in some towns of Adamawa State, i.e. the Adamawa State National Water Rehabilitation Project sponsored by the World Bank. Sole Administrator of 1st respondent revoked the said contract, even when the period for execution of the contract had not elapsed. As a result appellant filed an action claiming inter alia, a declaration that the contract is still valid, and various monetary compensations in Naira and US Dollars. 2nd and 1st respondents file a counter claim. The parties called witnesses, closed their cases, counsel addressed the court and the case was adjourned for judgment.

In the course of writing judgment, trial court's attention was caught by s. 51 (1) & (2) of Adamawa Water Board Edict No. 4 of 1996, which provided for pre-action notice and elapsing of one month before any suit can be commenced against 1st respondent. The court suo motu invited counsel for the parties to address it on the legal implications of noncompliance with that provision. After the address, the court in its judgment struck out the appellant's suit as incompetent for noncompliance with the said Edict. Its appeal to the Court of Appeal was dismissed. Still aggrieved appellant has further appealed to the Supreme Court.

ISSUES FOR DETERMINATION

"2.01 Whether the provisions of Section 51(1) and (2) of Adamawa State Edict, (sic) No. 4 of 1996 is not inconsistent with the provisions of Section 236(1) and Section 33 of 1979 Constitution as amended and therefore unconstitutional and void

2.02 Whether the learned Justices of Court of Appeal were right to have held that defendants need not plead defence of pre-action notice in their Statement of Defence and that parties cannot waive this special defence.

2.03 Whether plaintiff is not entitled to judgment on evidence led .

HELD (Unanimously dismissing the appeal per **OGBUAGU JSC**)
ACTIONS - Competence - Condition precedent

1. The arguments all along, (i.e. in the two lower courts), have been that the Appellant, is/was not bound to comply with the provision because, according to it, it is the provision of an Edict and that it cannot in any way, postpone or suspend the right of the Appellant to be heard or restrict the jurisdiction of the trial court. I note however, that at page 199 of the Records, the learned counsel for the Appellant, inter alia, submitted that,

"the purport of Section 51 of the Edict is to oust this court's jurisdiction in respect of the 1st defendant for the first 30 days by creating an impediment on the right of the Plaintiff to come to court....."

In my respectful view, the said provision, is a condition precedent as far as suits against the 1st Defendant/Respondent are concerned. Therefore, the failure of the Appellant to comply with it, clearly makes the suit incompetent. Contrary to the submission of the learned counsel for the Appellant, the provision, does not seek to oust forever, the jurisdiction of the court but only temporarily. It just provides that unless the condition precedent is complied with, a complainant or Plaintiff, cannot, sue or initiate any action against the 1st Defendant. Period!

In the case of *Prince Atolagbe & anor. v. Alhaji A. Awuni & 8 ors.* (1997) 9 NWLR (Pt 522) 536; (1997) 1 SCNJ, where there was a split decision of 5:2 and also cited and relied on in the Respondent's Brief, Mohammed, JSC., in his contribution, stated at pages 22-23 of the SCNJ inter alia, as follows:

"..... Conditions precedent ordered to be done before a litigant is entitled to sue by reason of the provisions of some statute is not an ouster clause and not a device adopted by the Government to prohibit a judicial review. It is an additional formality and unless proved to be enacted with a view to inhibiting citizens from having access to the Courts, is not contrary to Section 6(6) (b) of 1979 Constitution. See Madukolu v. Nkemdilim (1964) All NLR (Pt.2) 589".

I will respectfully add, that it is not contrary to Sections 33(1) and 236 (1) of the 1979 Constitution. (p. 1310 H)

Pre-action notice - Issue of

2. The issue or question of pre-action Notice, has been firmly settled

in a number of decided authorities by this Court.

In the case of *Katsina Local Authority v. Alhaji B. Makudawa* (1971) (1) NMLR 100 at 105, also cited and relied on in the Respondent's Brief, this Court - per Coker, JSC., stated inter alia, as follows:

B "We are clearly of the view that Section 116(2) of the Local Authority Law, prescribes a condition precedent to the competence of any action commenced against a Local Authority and that compliance with the sub-section is a pre-condition of such competence. The
C sub-section requires such notice as it 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 sub-section is not otherwise complied with, any suit com-
D menced in contravention of the provisions of the sub-section is wrongly commenced and should not be entertained by any court".

Uwais, JSC., (as he then was), held at page 107 of the above case, that the purpose of giving Notice of Claim to the Local Govern-
E ment is that it is not taken by surprise, but to have adequate time, to prepare to deal with the claim in its defence. That the purpose of the notice, "is not to put hazards in the way of bringing litigation against it."

It should be noted that the said provision of "No suit shall be
F commenced", prohibits the commencement of all suits whatsoever. That it may be argued or contended that this opening phrase, may be very wide, is of no moment. In the case of *Fawehinmi Construc- tion Co. Ltd. v. Obafemi Awolowo University* (1998) 6 NWLR (Pt.553) 171 at 190, 194; (1998) 5 SCNJ 44, Section 46(1) of the University
G of Ife Edict, 1970 which is in pari materia with Section 11 (2) of the NNPC Act, 1977, (hereinafter called "the Act"), provides that service of the Notice shall be made upon the Corporation by the Plaintiff or his agent, was construed. It was held that the Section speaks of "no suit" and not "any suit". That its provision, is not inconsistent with the
H provisions of Sections 6(6) (b), 33(1) and 236(1) of the 1979 Constitution because, it does not restrict access to the court. (p. 1312 E)

ACTIONS - Fair hearing - Pre-action notice

3. I will now deal even briefly with fair hearing especially where it is also submitted in paragraph 4.08 of the Appellant's Brief, that the said provision, is-

"an attempt to circumscribe the clear provisions of Section 33 and Section 236 (1) of the 1979 Constitution as amended. The same Section delays, postpone and obstruct the immediate access of a claimant to the court. The right to access or immediate access to court is a constitutional right. See the case of Eyesan v. Sanusi (1980) 1 SCNLR 353 at 354 ratio 6"

[The underlining mine]

Access to the court, it is said, means approach or means of approach to the court without constraint - per Karibi-Whyte, JSC., in Captain Amadi v. NNPC (supra), at page 111 of the NWLR. A condition precedent is defined as one which delays the vesting of a right until the happening of an event. See Prince Atolagbe and Captain Amadi's cases. It has to be borne in mind always and this is settled, that the constitutional right of access to the court, does not however, preclude statutory regulations of the exercise of the right.

I have in this Judgment, shown that it is now firmly settled that at the pre-action Notice in the suit leading to this appeal, is not inconsistent with Section 33(1) of the 1979 Constitution and this puts to rest, in my respectful view, any argument, submission or contention to the contrary. It is therefore, not unconstitutional and void as submitted in the Appellant's Brief. This is also because, the said provision does not, oust the jurisdiction of the court or derogate from the rights of the citizen. It only postpones the time for instituting a suit. In my view, (30) thirty days or one month cannot be said to be an inordinate time or period. (p. 1316 B)

Pre-action notice - Where not given as statutorily provided

4. I have stated and held the view that the crucial issue in this appeal to be determined, is the competency of the suit of the Appellant. I have held and concluded that the said action of the Appellant, is incompetent. This takes complete care of answer to the controversy in this suit. In other words, a statute such as Section 51(1) and (2) of the Edict/Law requiring a pre-action Notice to be given to the defendant, not only goes to the competence of the suit, but it also touches

on the jurisdiction of the court to entertain such suit. Where there is non-compliance of the Statute that is shown to be mandatory, the suit and/or proceedings is/are a nullity however well conducted.
(p. 1317 A)

B COURTS - Issues - Suo motu raising of

5. From the above pronouncements of this Court, the learned trial Judge's decision or discretion to raise the issue and hear from the learned counsel, for the parties is/was, in my respectful view, right, justified and cannot be faulted by me.

C Before concluding this Judgment, I will touch or and deal briefly, with the issue of the learned trial Judge raising the said issue of pre-action Notice suo motu because with respect, of the unnecessary fuss in the submissions in the Appellant's Brief in paragraph 3.09 D at pages 3 and 4. In the case of Lt. - Col. Mrs. Finnih v. Imade (1992) 1 SCNJ. 8 7 at 107-108, Karibi-Whyte, JSC., stated inter alia, as follows:

E *"It is a strange thing to say that the Judge cannot apply principle not referred to it by counsel. The day such a principle of law is accepted, the true demise of the independence of the Judge in deciding cases before him is assured. The oath of the judge is to do justice according to law and to all manner of people without fear or favour, affection or ill-will".*

F May such a day never come, although it will not come. In Alhaji A. Abubakar, & Ors. case (supra), Edozie, JCA., (as he then was), stated inter alia, as follows:

G *"The court can on its own initiative raise the question of its jurisdiction even though the parties have failed to do so because mere acquiescence does not confer jurisdiction.*

In the case of Bakare v. Nigerian Railway Corporation (supra), Mukhtar, JSC., at pages 659-660, opined inter alia, as follows:

H *".....,..... A Judge in the course of writing his judgment is at liberty to have recourse to any provision of the law that is relevant to the subject matter of the case in controversy in order to completely give the judgment the attention it deserves, to do justice to it, and to avoid a miscarriage of justice.*

Mr. Jegede, can now see that he was not standing on a firm

ground, when he made those submissions in the said Brief.
(p. 1319 B)

NOTABLE POINTS OF INTEREST

OGBUAGU JSC

1. Judicial pronouncements on pre-action notice

In Captain Amadi v. NNPC case (supra), Uwais, CJN., (Rtd.), at page 8 of the NWLR, reiterated his said views in Katsina Local Authority case (supra). It was also held - per Karibi-Whyte, JSC., that the said purpose or purposes, of pre-action Notice, are legitimate and are recognized procedural provisions to give the defendant "*breathing time so as to enable him or it, determine whether he or it, should make reparation to the Plaintiff.*"

It was also held in Captain Amadi v. NNPC case (supra), that while the issuance of the Notice by a prospective Plaintiff, is mandatory, the particulars to be included in the Notice - i.e. the cause of action, particulars of claim, name and place of abode of the intending Plaintiff and the relief to be claimed, are directory.

In the case of Chief Nnonye v. Anyichie & 2 ors, (2005) 1 S.C. (Pt. II) 96, (2005) 1 SCNJ 306 at 317; it was held - per Akintan, JSC., that the failure to serve a pre-action Notice on the defendant, gives such defendant, a right to insist on such Notice, before the plaintiff may approach the court. In other words, that non-service of a pre-action Notice, merely puts the jurisdiction of a court on hold pending compliance with the pre-condition. A number of cases were referred to therein. In fact, failure to serve the said Notice, amounts to an irregularity that renders the suit incompetent.

In the recent case of Bakare v. Nigerian Railway Corporation (2007) 17 NWLR (Pt.1064) 606 at 656; (2007) 7 S.C.N.J 131; (2007) 7 S.C. 1 - per Chukwumah-Eneh, JSC., where by virtue of Section 83 (2) of the Nigerian Railway Corporation Act, no suit shall be commenced against the Corporation, until three (3) months at least after written Notice of the intention to commence the same, shall have been served upon the Corporation by the intending plaintiff or his agent. Section 83(2) of the said Act, is also in pari materia with Section 51(1) and (2) of the Act in the instant case. It was held that the said Section, provides a form of limitation period within which an

action against the Corporation must be commenced while Section 83(2) provides for a pre-action Notice which must be given to the Corporation, That the two requirements, must be met before any action against the Corporation is instituted otherwise failure to comply with either of the provisions, will lead to such an action, being
B declared incompetent. (p. 1313 H)

2. *When concession will make a submission a waste of court's time*
Significantly and interestingly, the Appellant and its learned counsel,
C appreciate and concede the purpose of a pre-action Notice. At paragraph 4.06 page 5 of their Brief, the following submissions appear inter alia;

*"it is therefore Plaintiffs (sic) humble submission that the purpose of Section 51(1) and (2) of Edict No 4 of 1996 is to now protect
D 1st Defendant and put an obstacle on the path of the prospective claimants which they have to scale before commencing a suit. The purpose is also to out rightly suspend the Plaintiff's right of action ."*

[The underlining mine]

Great! This is what this Court has stated and restated in the authorities reproduced by me in this Judgment. On this concession, all the
E fuss by the Appellant in its Brief and under this issue, become with respect, a complete exercise in futility and a sheer waste of the Court's time. (p. 1315 D)

F **TOBI JSC**

3. Pre-action notice is a harmless procedure

The rationale behind the jurisprudence of pre-action notice is to enable the defendant know in advance the anticipated action and a
G possible amicable settlement of the matter between the parties, without recourse to the adjudication by the court. It is a harmless procedure designed essentially to stop a possible litigation, thus saving money and time of the parties. It is almost like pre-action letter of demand emanating from the chambers of counsel for a plaintiff to a defendant,
H asking for specific conditions to be fulfilled in order to avoid or avert litigation. The only main difference between the two is that while one is a statutory requirement, the other is not, in the sense that a plaintiff can file an action without writing a pre-action letter. In

the case of the former, an action commenced without a pre-action notice, where one is statutorily required, is a nullity ab initio. (p. 1322 H)

4. When a court can invoke its judicial powers

Courts of law can only invoke their judicial powers under section 6 of the Constitution (relevantly the 1979, Constitution), where a matter is justiciable, courts of law have no competence to invoke their judicial power if a matter is not justiciable. Where a statute provides for a condition precedent to the filing of an action in a court of law and that condition is not met, the action is not justiciable and a court of law has no jurisdiction to invoke its section 6 judicial powers. That is the point I am struggling to make. I hope I have succeeded in making it. (p. 1323 C)

5. When and how to pronounce a statute unconstitutional

Constitutionality of a statute or law is not a small matter but a big and fundamental matter in any legal system including ours. It involves the determination of the legal strength of a statute vis-a-vis the Constitution. It has to do with the abrogation or nullification of a statute in the event of breach. Accordingly, before a statute or law is pronounced unconstitutional by a court of law, there must be a clear contravention or violation of the Constitution. It is not a playful or a playing exercise but one in which the court must have a very close look at the provisions of the statute or law in the context of the constitutional provisions before arriving at a decision. The court must not take pockets of the statute or law but the entire statute or law. In the same way, the court must not take pockets of the constitutional provision but the entire provisions to measure the legal strength of the statute or law. As the final result of the exercise is to kill a statute or law or a statutory provision or law, the court must exercise utmost caution, a fortiori when the court is telling the legislature that it enacted a statute which is inconsistent with the Constitution that it also enacted. (p. 1325 A)

AKINTAN JSC

6. Pre-action notice - Deals with issue of jurisdiction

The provisions of section 51 of the Adamawa State Water Board Edict, 1996 are in pari material with those of the Nigerian Railway Corporation Act. They do not bar a potential litigant from seeking redress in the courts for any wrong done to them by the Water Board or Corporation. All that the plaintiff needs to do is to give the body a pre-action notice of the intention to commence an action against the Board or Corporation. Such provision, therefore, cannot be said to be in conflict with any provision of the Constitution. Similarly, once a plaintiff fails to comply with the requirement of the law, all steps taken before the trial court would be a complete waste of time as the court would not have the needed competence to entertain the claim before it. The question therefore of the plaintiff in the instant case being entitled to judgment on the evidence led at the trial in breach of the mandatory provisions of section 51 of the Adamawa State Water Board Edict, 1996 could not arise. There is also no need for a defendant to plead it before the provision could be enforced. It is a requirement that goes to the exercise of jurisdiction of the court. It can therefore be raised at any stage, even at the appellate level.
(p. 1329 D)

REPRESENTATION

Tayo Jegede Esq. with him A. K. Jingi Esq. For the Appellants
S. Tahir Attorney-General of Adamawa State, with him S. L. Kyanson Permanent Secretary, Ministry of Justice, Adamawa State For the Respondents

CASES REFERRED TO

Captain Amadi v. NNPC (2000) 10 NWLR (Pt.674) 76
Onyema v. Oputa (1987) 3 NWLR (Pt 60) 259
Ojokolobo v. Alamu (1987) 3 NWLR (Pt.61) 377
Attorney-General of the Federation v. Sode (1990) 1 NWLR (Pt. 128) 500
First Bank of Nigeria PIC v. Ibennah (1996) 5 NWLR (pt.451) p. 725
Adisa v. Oyinwola (2000) 10 NWLR (Pt.674) page 116
Madukolu v. Nkemdilim (1962) 2 SC NLR 341

Eboigbe v. NNPC (1994) 5 NWLR (Pt. 347) 649

Madukolu & Ors. v. Nkemdelim & Ors. (1962) 2 S.C.N.L.R. 341

Odofin & Anor v. Agu & Anor (1992) 3NWLR (Part 229) 350 at 365-366

State v. Onagoruwa (1992) 2 NWLR (Pt 221) 33 at 52-53

Kalu Mark v. Gabriel Eke (2004) 5 NWLR (Part 865) 54 at 84-86 B

STATUTES REFERRED TO

Adamawa State Water Board Edict, No. 4 of 1996, s. 51(1), (2)

Constitution of the Federal Republic of Nigeria 1979, ss. 1, 6(1), C
(6)(b), 33(1), 236(1)

Constitution of the Federal Republic of Nigeria, 1999, ss. 33, 32

Local Authority Law, s. 116(2)

Nigerian National Petroleum Corporation Act, ss. 11(2), 12(1), (2)

Nigerian Railway Corporation Act, s. 83(2) D

Ports Authority Act, s. 97(2)

University of Ife Edict, 1970, s. 46(1)

BOOKS REFERRED TO

Black's Law Dictionary, Sixth Edition, page 766 E

English Supreme Court Practice (White Book) 1991, Edition Order
18/7/10

LEAD JUDGMENT BY OGBUAGU JSC

This is an appeal against the judgment of the Court of Appeal, Jos Division (hereinafter called "the court below"), delivered on 10th July, 2002 dismissing the appeal by the Appellants to it and affirming the judgment of the High Court, Yola Judicial Division of Adamawa State Holden at Yola. Dissatisfied with the said decision, the Appellants have appealed to this Court on five (5) Grounds of Appeal. F

The facts briefly stated, are that the Appellant, has won the contract from the 1st and 2nd Respondents for the rehabilitation of water treatment plants in Yola, Numan and Mubi, in Adamawa State (i.e. the Adamawa State National Water Rehabilitation Project), which was sponsored by the World Bank. On 4th July, 1997, the Sole Administrator of the 1st Defendant/Respondent terminated/revoked the said contract No. AAD - 01- ICB, even when the period for the ex- H

ecution of the contract had not elapsed. As a result of this revocation, the Appellant as Plaintiff, instituted the action leading to the instant appeal. It claimed/sought the following reliefs in paragraph 47 of its Amended Statement of Claim: (not very correctly reproduced in the both Briefs of the parties).

B *"(i) A declaration that the 1st defendant's letter No. ASWB/AD/S/206/111/529, dated 4/7/1997 signed by the Sole Administrator, Adamawa State Water Board on the subject of Water Rehabilitation Project, No. AAD-OI-ICB, between the Plaintiff and 1st Defendant is against the provision of the law establishing the 1st defendant, ultra*
C *vires, illegal, null and void.*

(ii) A declaration that 1st, 2nd and 3rd defendants' failure or neglect to pay the 15% of the Contract sum to Plaintiff even after submission of Advance Security Guarantees is a breach of the Agree-
D *ment between the parties.*

(iii) A declaration that in the circumstances of this case, the National Water Rehabilitation Project Contract, No. AAD 01 ICB, is still valid (sic) (meaning valid) and subsisting.

(iv) An order of compensation in favour of the plaintiff against
E *the 1st and 2nd defendants jointly and severally in the total sum of N 53,640,335.00 in line with the contract agreement of 15-7-1996, but signed on 15-8-1996.*

(v) The sum of \$404,381.66, being 15% of the contract sum
F *in foreign components due to the plaintiff as advance from 1st defendant.*

(vi) The sum of N988,488.51, being 15% of the contract sum in local components due to the plaintiff as advance payment from the 1st and 3rd (sic) (meaning 2nd) defendants.

G *(vii) Payment for Job already executed: L.C. N622, 556.00; F.C. 254,682 U.S.D.*

(viii) Any further and better orders".

The 1st and 2nd defendants/respondents, counter-claimed. Pleadings were filed and exchanged. The case proceeded to trial with
H both parties calling witnesses and learned counsel for the parties addressing the court and the case, was adjourned for judgment. It was while the parties, were awaiting the judgment, that the learned trial Judge, Banu, J., in the course of writing the Judgment, suo motu,

invited the learned counsel for the parties, to address him on the legal effect of the provisions of Sections 51 (1) and (2) of Adamawa State Water Board Edict, No 4 of 1996 (hereinafter called "the Edict/Law") and the non-compliance with its provisions. Said he at page 168 of the Records inter alia, as follows:

"In the course of writing the Judgment, my attention was caught by the provisions of Section 51 of Adamawa State Water Board Edict, No 4 of 1996 which states:

"It is my view that this provision is crucial as it affects the 1st defendant and I would like counsel to address me on whether or not the provision has been complied with, and if not, its consequence".

I note that there was no objection from any of the learned counsel for the parties who in fact, addressed the court in respect of the said issue. Thereafter, His Lordship, stated at page 170 thereof, thus;

"As I have already gone far in writing the judgment, these submissions by learned counsel will form part of the judgment to be at a date to be"

In his Judgment delivered on 22nd May, 1998, the learned trial Judge, struck out the Appellant's said suit as well as the counter-claim. He found as a fact and held that there was non-compliance with the said provision of the Edict/Law and therefore, that the Appellant's said suit, was incompetent.

Aggrieved by the said decision, the Appellant, appealed to the court below which dismissed the appeal hence the instant appeal.

The Appellant has formulated three (3) issues for determination, namely:

"2.01 Whether the provisions of Section 51(1) and (2) of Adamawa State Edict, (sic) No. 4 of 1996 is not inconsistent with the provisions of Section 236(1) and Section 33 of 1979 Constitution as amended and therefore unconstitutional and void (see Ground 1 and 2) sic.

2.02 Whether the learned Justices of Court of Appeal were right to have held that defendants need not plead defence of pre-action notice in their Statement of Defence and that parties cannot waive this special defence Ground 3 and 4 (sic).

2.03 Whether plaintiff is not entitled to judgment on evidence

led (Ground 5)".

On their own part, the Respondents, have formulated two (2) issues for determination, namely:

i. *Whether the provision of Section 51(1) and (2) of the Adamawa State Water Board Edict, No. 4 of 1996, is in conflict with Sections 33(1) and 236 of the 1979 Constitution (as amended), and therefore void to the extent of the inconsistency.*

ii. *Whether the court below was right to have concluded that the trial court was justified to have suo motu raised the issue of non-compliance vel non with Section 51 (1) and (2) of Edict No. 4, 1996, requiring service of pre-action notice on the 1st defendant/respondent, despite the fact that, the issue was not pleaded in the joint statement of defence of the respondents".*

It could be seen that issue 2.01 of the Appellant, is the same as issue I of the Respondents. In my respectful view, the real or crucial issue as rightly stated by the court below, is whether the action of the Appellant, was/is competent or not having regard to the said provision of the Edict/Law. I note that the said issue 2.01 of the Appellant and issue I of the Respondent are similar to issue 1 of the parties at the court below. However, since the reason of the trial court for its said decision, is/was based on the said provision of the Edict/Law, I will reproduce its provision. It provides as follows:

"51(1) No Suit shall be commenced against the Board until one month has elapsed since a written notice to commence the suit shall have been served on the Board by the complainant or his agent.

(2) A notice under sub-section (1) shall state:

(a) The cause of action

(b) the relief sought, and

(c) the name and place of abode of complainant."

As can be seen, Section 51(1), is a statutory provision and it is mandatory while Section 51(2), is directory. My perusal of the Records, makes it abundantly clear to me, that the learned counsel for the Appellant either in the two lower courts or in their Brief in this Court, never at any stage, contend that the Appellant, complied with the said provision before instituting its said suit. Rather, ***the arguments all along, (i.e. in the two lower courts), have been that the Appellant, is/was not bound to comply with the provision be-***

cause, according to it, it is the provision of an Edict and that it cannot in any way, postpone or suspend the right of the Appellant to be heard or restrict the jurisdiction of the trial court. I note however, that at page 199 of the Records, the learned counsel for the Appellant, inter alia, submitted that,

"the purport of Section 51 of the Edict is to oust this court's jurisdiction in respect of the 1st defendant for the first 30 days by creating an impediment on the right of the Plaintiff to come to court....."

See also pages 361 and 362 of the Records and paragraphs 4.06 and 4.07 of the Appellant's Brief.

In my respectful view, the said provision, is a condition precedent as far as suits against the 1st Defendant/Respondent are concerned. Therefore, the failure of the Appellant to comply with it, clearly makes the suit incompetent. Contrary to the submission of the learned counsel for the Appellant, the provision, does not seek to oust forever, the jurisdiction of the court but only temporarily. It just provides that unless the condition precedent is complied with, a complainant or Plaintiff, cannot, sue or initiate any action against the 1st Defendant. Period!

In the case of Prince Atolagbe & anor. v. Alhaji A. Awuni & 8 ors. (1997)9NWLR (Pt 522) 536;(1997)1 SCNJ 1, where there was a split decision of 5:2 and also cited and relied on in the Respondent's Brief, Mohammed, JSC., in his contribution, stated at pages 22-23 of the SCNJ inter alia, as follows:

"..... Conditions precedent ordered to be done before a litigant is entitled to sue by reason of the provisions of some statute is not an ouster clause and not a device adopted by the Government to prohibit a judicial review. It is an additional formality and unless proved to be enacted with a view to inhibiting citizens from having access to the Courts, is not contrary to Section 6(6) (b) of 1979 Constitution. See Madukolu v. Nkemdilim (1964) All NLR (Pt.2) 589".

I will respectfully add, that it is not contrary to Sections 33(1) and 236 (1) of the 1979 Constitution.

In the case of Captain Amadi v. NNPC (2000) 6 S.C. (Pt 1) 66;

(2000) 10 NWLR (Pt.674) 76 (not 72 as appears in the Respondents' Brief at page 8); (it is also reported in (2000) 6 SCNJ 1; (2000) FWLR (Pt.9) 1527 and (2000) 5 WRN 47), also cited and relied on in the Respondent's Brief, again, in his contribution, His Lordship, Mohammed, JSC., at page 113 of NWLR in the same vein as in
 B Atolagbe's case (supra), stated inter alia, as follows:

"..... *It is instructive therefore that, compliance with the provisions of Section 11(2) of N.N.P.C. Act, 1977 is a condition precedent to instituting a suit against the Respondent. Cases constantly occur in which, although everything has happened which would at common law prima facie entitle a man to a certain sum of money, or vest in him certain right of action, there is yet something more which must happen, in the particular case, before he is entitled to sue, either by reason of the provision of some statute or because the parties have*
 C *expressly agreed. This is something called a condition precedent. It is not of the essence of such a cause of action, but it is essential. It is an additional formality super-imposed on the Law*"
 D

His Lordship, referred to Prince Atolagbe's case (supra) and the English Supreme Court Practice (White Book), 1991 Edition Order 18/7/10.
 E

Since I note that in respect of Issue No. 1 of the Appellant, the arguments, are substantially and materially the same or similar to as those proffered in the two lower courts and in this Court, I will deal with the same together with Issue 1 of the Respondents. ***The issue or question of pre-action notice, has been firmly settled in a number of decided authorities by this Court.***
 F

In the case of Katsina Local Authority v. Alhaji B. Makudawa (1971) (1) NMLR 100 at 105, also cited and relied on in the Respondent's Brief, this Court - per Coker, JSC., stated inter alia, as follows:
 G

"We are clearly of the view that Section 116(2) of the Local Authority Law, prescribes a condition precedent to the competence of any action commenced against a Local Authority and that compliance with the sub-section is a pre-condition of such competence. The sub-section requires such notice as it therein prescribed to be served on the Local Authority and stipulates that at least one month shall expire be-
 H

fore 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 sub-section is not otherwise complied with, any suit commenced in contravention of the provisions of the sub-section is wrongly commenced and should not be entertained by any court". B

Uwais, JSC., (as he then was), held at page 107 of the above case, that the purpose of giving Notice of Claim to the Local Government is that it is not taken by surprise, but to have adequate time, to prepare to deal with the claim in its defence. That the purpose of the notice, "is not to put hazards in the way of bringing litigation against it." See also the cases of His Highness Umukoro & Ors v. NPA & anor (1997) 4 NWLR (Pt 502.) 656 at 667; (1997) 5 SCNJ 113, - per Kutigi, JSC, (as he then was). C D

It should be noted that the said provision of "No suit shall be commenced", prohibits the commencement of all suits whatsoever. That it may be argued or contended that this opening phrase, may be very wide, is of no moment. In the case of Fawehinmi Construction Co. Ltd. v. Obafemi Awolowo University (1998) 6 NWLR (Pt.553) 171@ 190, 194; (1998) 5 SCNJ 44, Section 46(1) of the University of Ife Edict, 1970 which is in pari materia with Section 11 (2) of the NNPC Act, 1977, (hereinafter called "the Act"), provides that service of the Notice shall be made upon the Corporation by the Plaintiff or his agent, was construed. It was held that the Section speaks of "no suit" and not "any suit". That its provision, is not inconsistent with the provisions of Sections 6(6) (b), 33(1) and 236(1) of the 1979 Constitution because, it does not restrict access to the court. The case of Chief Osagie II & anor.v. Chief Ofor & anor. (1998) 3 NWLR (Pt.541) G at 205, was followed. It is also reported in (1998) SCNJ 122, Section 11(2) of the said Act, relates to all or any type of action. It is wider and all embracing and different in application, from Section 97 of the Ports Authority Act. See also the case of NPA v. Construction Generali (1962) 12 S.C. 81 at 95. In Other Words, it covers all suits and whatever causes of action and it is not limited to anything done pursuant to any Act or Statute. H

In Captain Amadi v. NNPC case (supra), Uwais, CJN.,(Rtd.),

at page 8 of the NWLR, reiterated his said views in Katsina Local Authority case (supra). It was also held - per Karibi-Whyte, JSC., that the said purpose or purposes, of pre-action Notice, are legitimate and are recognized procedural provisions to give the defendant "breathing time so as to enable him or it, determine whether he or it, should make reparation to the Plaintiff". See also the case of Ngelela v. Tribal Authority, Nongowa Chiefdom (1953)14 WACA 325 at 327, - where Sutton, P.J., Stated inter alia, as follows:

"The language is imperative and would appear to debar a court from entertaining a suit instituted without compliance with its provision. The object of the notice is to give the defendant a breathing time to enable it determine whether he would make reparations to the Plaintiff".

It was also held in Captain Amadi v.NNPC case (supra), that while the issuance of the Notice by a prospective Plaintiff, is mandatory, the particulars to be included in the Notice - i.e. the cause of action, particulars of claim, name and place of abode of the intending Plaintiff and the relief to be claimed, are directory.

In the case of Chief Nnonye v. Anyichie & 2 ors. (2005) 1 SCNJ 306 at 317, (2005) 1 S.C. (Pt II) 96; it was held - per Akintan, JSC., that the failure to serve a pre-action Notice on the defendant, gives such defendant, a right to insist on such Notice, before the plaintiff may approach the court. In other words, that non-service of a pre-action Notice, merely puts the jurisdiction of a court on hold pending compliance with the pre-condition. A number of cases were referred to therein. In fact, failure to serve the said Notice, amounts to an irregularity that renders the suit incompetent.

In the recent case of Bakare v. Nigerian Railway Corporation (2007)17 NWLR (Pt.1064)606 at 656; (2007) 7 SCNJ 131; (2007) 7 S.C. 1 - per Chukwumah-Eneh, JSC., where by virtue of Section 83 (2) of the Nigerian Railway Corporation Act, no suit shall be commenced against the Corporation, until three (3) months at least after written Notice of the intention to commence the same, shall have been served upon the Corporation by the intending plaintiff or his agent. Section 83(2) of the said Act, is also in pari materia with Section 51(1) and (2) of the Act in the instant case. It was held that the said Section, provides a form of limitation period within which an

action against the Corporation must be commenced while Section 83(2) provides for a pre-action Notice which must be given to the Corporation, That the two requirements, must be met before any action against the Corporation is instituted otherwise failure to comply with either of the provisions, will lead to such an action, being declared incompetent. The case of Madukolum v. Nkemdilim (1962) 2 SCNLR 341, was referred to. The case of Eboigbe v. The NNPC (1994) 5 NWLR (Pt.347) 649, also reported in (1994) 6 SCNJ. 71, was also referred to where Section 12(1) & (2) of the NNPC Act, Cap. 320, Laws of the Federation, 1990, provides for the giving of pre-action Notice within Twelve (12) months. The said Section also provides that no action shall be taken against the Corporation or its employees and no action shall be taken against these persons for any act done in pursuance of or execution of any Act or Law or any public duty or authority unless commenced within twelve (12) months after the act complained of.

Significantly and interestingly, the Appellant and its learned counsel, appreciate and concede the purpose of a pre-action Notice. At paragraph 4.06 page 5 of their Brief, the following submissions appear inter alia;

"It is therefore Plaintiffs (sic) humble submission that the purpose of Section 51(1) and (2) of Edict No 4 of 1996 is to now protect 1st defendant and put an obstacle on the path of the prospective claimants which they have to scale before commencing a suit. The purpose is also to outrightly suspend the Plaintiff's right of action ..."

[The underlining mine]

Great! This is what this Court has stated and restated in the authorities reproduced by me in this Judgment. On this concession, all the fuss by the Appellant in its Brief and under this issue, become with respect, a complete exercise in futility and a sheer waste of the Court's time.

In paragraph 4.07 of the said Brief, the following appear:

"The above provisions therefore, it is submitted in as much as it now delays the complainant from coming to court or having his complaint adjudicated by the court immediately clearly derogates from the provisions of Section 33(1) of 1979 Constitution that entitled complainant to a fair hearing, within a reasonable time. The provi-

sion of Section 51(1), have the effect to temporarily shut the doors of the court against a complaint albeit for 30 days, in all circumstances where a notice is given and for ever where no such notice is given by the complaints."

[The underlining is mine]

B I note that this is another concession. ***I will now deal even briefly with fair hearing especially where it is also submitted in paragraph 4.08 of the Appellant's Brief, that the said provision, is-***

C ***"an attempt to circumscribe the clear provisions of Section 33 and Section 236(1) of the 1979 Constitution as amended. The same Section delays, postpone and obstruct the immediate access of a claimant to the court. The right to access or immediate access to court is a constitutional right.***

D ***See the case of Eyesan v. Sanusi (1980) 1 SCNLR 353 at 354 ratio 6***

[The underlining mine]

E ***Access to the court, it is said, means approach or means of approach to the court without constraint - per Karibi-Whyte, JSC., in Captain Amadi v. NNPC (supra), at page 111 of the NWLR. A condition precedent is defined as one which delays the vesting of a right until the happening of an event. See Prince Atolagbe and Captain Amadi's cases. It has to be borne in mind always and this is settled, that the constitutional right of***
 F ***access to the court, does not however, preclude statutory regulations of the exercise of the right.***

G ***I have in this Judgment, shown that it is now firmly settled that at the pre-action notice in the suit leading to this appeal, is not inconsistent with Section 33(1) of the 1979 Constitution and this puts to rest, in my respectful view, any argument, submission or contention to the contrary. It is therefore, not unconstitutional and void as submitted in the Appellant's Brief. This is also because, the said provision does not, oust the jurisdiction of the court or derogate from the rights of the citizen. It only postpones the time for instituting a suit. In my view, (30) thirty days or one month cannot be said to be an inordinate time or period.***
 H

Issue 2.02 and 2.03 of the Appellant and Issue ii of the Respondents.

I have stated and held the view that the crucial issue in this appeal to be determined, is the competency of the suit of the Appellant. I have held and concluded that the said action of the Appellant, is incompetent. This takes complete care of answer to the controversy in this suit. In other words, a statute such as Section 51(1) and (2) of the Edict/Law requiring a pre-action notice to be given to the defendant, not only goes to the competence of the suit, but it also touches on the jurisdiction of the court to entertain such suit. Where there is non-compliance of the Statute that is shown to be mandatory, the suit and/or proceedings is/are a nullity however well conducted. See *Madukolu v. Nkemdilim*, *Prince Atolagbe Alhaji Awuni* (supra) and *Chief Obaka & ors. v. Military Governor of Kwara State & ors.* (1994) 4 NWLR; (1994) SCNJ 121 (pt. 336) 26, just to mention but a few.

In the case of *Eimskip Ltd v Exquisite Industries (Nig.) Ltd.* (2003) 4 NWLR (Pt.809) 88 at 118; (2003) 1 SCNJ 317, *Mohammed, JSC.*, stated inter alia, as follows:

"..... Where there is fundamental failure to comply with the requirement of a statute the issue is not of irregularity, but a nullity".

From all these firmly established authorities, with profound humility, it is idle therefore, to argue or submit as has been done in paragraph 5.02 of the Appellant's brief that-

"the law prescribing pre-action notice is a privilege, conferring a special advantage in favour of the first defendant in this case and it is left for the 1st defendant to take advantage of the special provision at the trial or waive same by proceeding with the case without insisting on its legal rights".

In the first place, where an issue of competence or jurisdiction of a court, is fundamental and crucial, the issue of waiver, cannot be of any consequence. See the case of *Onyema & ors. v. Oputa & ors.* (1987) 3 NWLR (Pt.60) 259; (1987) 7 SCNJ 176. Secondly, if at the defendant, has a legal right conferred on him/it by a statute, it is again with respect, idle to submit as has been done in the Appellant's Brief, that the defendant, should waive same and proceed with the

hearing of the case. However and significantly, the learned counsel to the Appellant, concede that such a defendant, can take advantage of the said provision. In the circumstances, there will be no need (which will not even arise or be necessary), to start pleading such pre-action Notice as a defence. Being a question of jurisdiction, the issue can be raised by a defendant or even by the court suo motu and thereafter hear from the parties as was done in this case. See the cases of Alhaji K. Abubakar & 10 Ors. v. Jos Metropolitan Development Board & anor. (1997) 10 NWLR (Pt.524) 242 at 250-251 CA, - per Edozie, JCA., (as he then was) and Katto v. CBN (1991) 9 NWLR (Pt.214) 126 at 149; (1991)12 SCNJ 1, - per Akpata, JSC., also cited and reproduced in the respondent's Brief. This issue, again with respect, is a non-issue in the circumstances of this case. It is again, an academic exercise albeit, in futility. I so hold.

In respect of Issue 3, how can the Appellant be entitled to Judgment, when it has not started "to walk how much more to run"? so to say, I or one may ask. When once an action is a nullity, I repeat, it is of no moment how well the case or proceeding, is conducted. With respect, this issue, in the circumstances again, does not arise. At best, it is hypothetical and all arguments in respect thereof by the Appellant, is again an exercise in futility. I repeat, service of pre-action Notice, is a condition precedent to the exercise of jurisdiction by a court of trial. In the case of Odofoin & anor. v. Chief Agu & anor. (1992) 2 NWLR (Pt.229) 350 at 375; (1992) 3 SCNJ 161, also cited and relied on in the Respondents' Brief, this Court - per Akpata, JSC., stated inter alia, as follows:

".....The question of jurisdiction is not a matter to be taken for granted. A court cannot casually assume jurisdiction over a matter when conditions precedent are not satisfied or do not appear to have been satisfied"

In the case of Attorney-General of the Federation & 2 ors v. Sode & 2 ors. (1990) 1 NWLR (Pt.128) 500 at 538; (1990) SCNJ 1, - Karibi-Whyte, JSC., (Rtd.) in his concurring judgment, stated inter alia, as follows:

".....But it is also well settled that the exercise of a right of action is derived from the fundamental law of the land, or any statute specifically conferring such right. The Court can only exercise juris-

diction with respect to a right of action and cannot assume jurisdiction unless the plaintiff who has brought the action before it has a right of action - See Bello & ors. v. A-G for Oyo State (1986) 5 NWLR (Pt. 45) 828. This court has in many recent decisions defined what a right of action."

[The underlining mine]

B

From the above pronouncements of this Court, the learned trial Judge's decision or discretion to raise the issue and hear from the learned counsel, for the parties is/was, in my respectful view, right, justified and cannot be faulted by me.

C

Before concluding this Judgment, I will touch or and deal briefly, with the issue of the learned trial Judge raising the said issue of pre-action Notice suo motu because with respect, of the unnecessary fuss in the submissions in the Appellant's Brief in paragraph 3.09 at pages 3 and 4. In the case of Lt. - Col. Mrs. Finnih v. Imade (1992) 1 SCNJ. 8 7 at 107-108, Karibi-Whyte, JSC., stated inter alia, as follows:

D

"It is a strange thing to say that the Judge cannot apply principle not referred to it by counsel. The day such a principle of law is accepted, the true demise of the independence of the Judge in deciding cases before him is assured. The oath of the judge is to do justice according to law and to all manner of people without fear or favour, affection or ill-will."

E

May such a day never come, although it will not come. In Alhaji A. Abubakar & Ors (case) (supra), Edozie, JCA., (as he then was), stated inter alia, as follows:

F

"The court can on its own initiative raise the question of its jurisdiction even though the parties have failed to do so because mere acquiescence does not confer jurisdiction. See Onyema v. Oputa (1987) 3 NWLR (Pt. 60) 259; Ojokolobo v. Alamu (1987) 3 NWLR (Pt. 61) 377; Attorney-General of the Federation v. Sode (1990) 1 NWLR (Pt. 128) 500 ."

G

In the case of Bakare v. Nigerian Railway Corporation (supra), Mukhtar, JSC., at pages 659-660, opined inter alia, as follows:

H

"..... A Judge in the course of writing his judgment is

at liberty to have recourse to any provision of the law that is relevant to the subject matter of the case in controversy in order to completely give the judgment the attention it deserves, to do justice to it, and to avoid a miscarriage of justice. See Onuoha v. State (1988) 3 NWLR (Pt.83) part 460.

B A Judge is also enjoined to interpret the provision of law and give it its grammatical and ordinary meaning and not to ramble and distort its construction. See Amadi v. N.N.P.C. (2000) 10 NWLR (Pt.674) page 76, First Bank of Nigeria PIC v. Ibennah (1996) 5 NWLR (pt.451) page 725, Shell Petroleum Development Co. (Nig.) Ltd. v. Federal Board of Internal Revenue (1996) 8 NWLR (Pt.466) page 256 and Adisa v. Oyinwola (2000) 10 NWLR (Pt.674) page 116."

D Mr. Jegede, can now see that he was not standing on a firm ground, when he made those submissions in the said Brief.

In concluding this Judgment, I hold with respect, that there is no merit whatsoever in this appeal. What is more, in spite of the repetitions of same issues and arguments in the two lower courts and even in this Court, there are concurrent Judgments of the two lower courts and the attitude of this Court, is not to disturb or interfere with the findings of fact of the said court. If learned counsel had graciously taken or appreciated the stance of the learned trial Judge especially, the hint in view of the clear and unambiguous decisions of the Court of Appeal and this Court and since he believed that judgment should have been entered in favour of his client - the Appellant, he should and ought to have considered complying with the mandatory provision of the Edict/Law without wasting these twelve (12) or thirteen years, pushing on a course that will and has in fact ended in an exercise in futility. I have no hesitation in dismissing this appeal and affirming the said decision of the court below which affirmed the Judgment of the trial court.

H Costs follow the events. The Respondents are awarded N10,000.00 (ten thousand naira) costs payable to them, by the Appellant.

This appeal is on failure on the part of the plaintiff/appellant to give pre-action notice before the action was filed. The action was in respect of water rehabilitation in Adamawa State and breach of contract by 1st defendant/respondent who failed to pay 15% contract sum.

The learned trial Judge struck out the action on the ground that the appellant failed to give pre-action notice. The learned trial Judge in his judgment said at page 203 of the Record:

"It is the same statute that created the 1st defendant that in Section 51 thereof gave a condition precedent for commencing any suit against it. To my mind, this cannot by any stretch of imagination be construed to be inconsistent with the provisions of Sections 236(1) and 33 of the 1979 Constitution or creating an impediment on the right of the Plaintiff to come to court. It is merely a pre-action notice which is to be complied with before any suit is commenced against the 1st defendant. It does not in any way purport to oust the jurisdiction of this court As the condition precedent for commencing an action against the 1st defendant as provided by Section 51 of the Edict, No. 4 of 1996, has not been met and on the authority of Madukolu v. Nkemdilim (supra), I do not hesitate in arriving at the conclusion and in so holding that the action against the 1st defendant is incompetent."

The appellant's appeal to the Court of Appeal was dismissed. The Court of Appeal, dismissing the appeal, said at page 409 of the Record:

"In this regard, I would therefore uphold the submission of learned counsel for the Respondent in the distinction which he made between the application of Section 51(1) and (2) of Decree 4, 1976(sic) of Adamawa State complained of in this case and the provision in Decree 11 of 1984 of Ondo State in Adewunmi's case which ousted the jurisdiction of the court. Section 51(1) and (2) of Decree 4 no doubt, is to my mind, the harmless type, as in the cases discussed above, sanctioned by the highest courts and declared not to be inconsistent with Section 6(6)(b), the well known fair hearing section 33 and 236 of the 1979 Constitution. In other words, it does not oust the jurisdiction of the court, or derogate from the rights of the citizen. It is also not null and void. One month's pre-action notice prescribed by Decree 4 of 1996 of Adamawa State, does postpone

the time for instituting a suit but not so inordinately as to earn, the opprobrium of a statute that derogates from the citizen's constitutional right of fair hearing."

Dissatisfied, the appellant has come to the Supreme Court. The main plank of its argument is that the provisions of section 51(1) and (2) of Adamawa State Edict, No. 4 of 1996, is inconsistent with the provisions of sections 236(1) and 33 of the 1979 Constitution and therefore unconstitutional and void. It is the case of the respondents that the provisions of the Edict are not inconsistent with the provisions of the Constitution. That is the dispute, precise as it is.

Let me first put down the ipsissima verba of the relevant provisions. Section 51(1) and (2) of Edict No. 4 of 1996, provides:

"(1) No Suit shall be commenced against the Board until one month has elapsed since a written notice to commence the Suit shall have been served on the Board by the complainant or his agent.

(2) A notice under sub-section (1) shall state:

(a) the cause of action;

(b) the relief sought; and

(c) the name and place of abode of complainant."

Sections 33(1) and 236 of the 1979 Constitution (as amended), on the other hand provide:

"33 (1) In the determination of his civil rights and obligations, including any question or determination by or against any government or authority, a person shall be entitled to a fair hearing within a reasonable time by a court or other tribunal established by law and constituted in such a manner as to secure its independence and impartiality.

236. Subject to the provisions of this Constitution and in addition to such other jurisdiction as may be conferred upon it by law, the High Court of a State shall have unlimited jurisdiction to hear and determine any civil proceedings in which the existence or extent of a legal right, power, duty, liability, privilege, interest, obligation or claim is in issue or to hear and determine any criminal proceedings involving or relating to any penalty, forfeiture, punishment or other liability in respect of any offence committed by any person."

The rationale behind the jurisprudence of pre-action notice is to enable the defendant know in advance the anticipated action and

a possible amicable settlement of the matter between the parties, without recourse to the adjudication by the court. It is a harmless procedure designed essentially to stop a possible litigation, thus saving money and time of the parties. It is almost like pre-action letter of demand emanating from the chambers of counsel for a plaintiff to a defendant, asking for specific conditions to be fulfilled in order to avoid or avert litigation. The only main difference between the two is that while one is a statutory requirement, the other is not, in the sense that a plaintiff can file an action without writing a pre-action letter. In the case of the former, an action commenced without a pre-action notice, where one is statutorily required, is a nullity ab initio.

Courts of law can only invoke their judicial powers under section 6 of the Constitution (relevantly the 1979, Constitution), where a matter is justiciable, courts of law have no competence to invoke their judicial power if a matter is not justiciable. Where a statute provides for a condition precedent to the filing of an action in a court of law and that condition is not met, the action is not justiciable and a court of law has no jurisdiction to invoke its section 6 judicial powers. That is the point I am struggling to make. I hope I have succeeded in making it.

Learned counsel for the appellant submitted that section 236(1) of the 1979 Constitution serves the twin purpose of preserving the jurisdiction and powers of the High Court to hear and determine matters instituted before it and also ensure that relative to the circumstances of the case a matter is heard and determined within a reasonable time. He further submitted that the purpose of section 51(1) and (2) of Edict No. 4 of 1996, is to protect the 1st respondent and put an obstacle on the part of the prospective claimants which they have to scale before commencing a suit. The purpose, counsel contended, is also to outrightly suspend the appellant's right of action. To counsel, such outright suspension is unconstitutional in the suit where there is an urgent need to seek immediate or urgent redress before the thirty days period of notice prescribed by section 51(1) (2) of Edict No. 4 of 1996. He also submitted that the section derogates from the provisions of section 33(1) of the 1979 Constitution as the effect is to shut the doors of the court against a complainant albeit for thirty days.

With respect, I beg to differ from the position taken by learned counsel. The doors of the court are not permanently closed against the appellant. I am happy that counsel knows that when he said that "the effect is to temporarily shut the doors of the court against the complainant." It is only for a month in the language of section 51(1) of the Edict. I should point out that a month may not necessarily be thirty days as contained in the argument of counsel. It could be. It could not be. It depends on the month involved. The calendar year has three types of months: some of thirty days, some of thirty-one days and one of either twenty-eight or twenty-nine days, when it is a leap year, like this year. This is not important in the determination of the two issues. I merely decided to correct the constant thirty days of learned counsel.

Is section 51(1) and (2) of Edict No. 4 of 1996, a denial of section 33(1) of the 1979 Constitution? I think not. I do not see any breach in the determination of the civil rights and obligations of the appellant. I should have gone along with learned counsel if the doors of the court were permanently shut against the appellant. That is not the position. It is only for one month. Is one month not a reasonable time to commence and hear a civil matter? What constitutes a reasonable time can only be determined or deduced from the facts of each case and not determined or deduced in vacuo or in a vacuum. In a country where litigations take years and years to complete, can the appellant really say that a month's delay in commencing an action is breach of section 33(1) of the 1979 Constitution?

Learned counsel argued that as the action needed immediate injunction before the thirty days period prescribed by section 51(1) of the Edict, it was a breach of section 33(1) of the 1979 Constitution. Again, I do not agree with him. I know of no law which says that an application for interlocutory injunction must be brought before a month of the action or conduct necessitating it. Applications for interlocutory injunction, in my restricted knowledge, do not have such a time bar. That argument fails.

I go to section 236(1) of the 1979 Constitution. How does that subsection come in or how does it avail the appellant, I ask? Section 51(1) and (2) of Edict No. 4 of 1996, is not joining strength with section 236(1) on the jurisdiction of the High Court. The section

is on its own, completely and clearly outside the power of section 236(1) of the 1979 Constitution. It has no relationship or quarrel with section 236(1) and so learned counsel cannot rope it in the section.

Constitutionality of a statute or law is not a small matter but a big and fundamental matter in any legal system including ours. It involves the determination of the legal strength of a statute vis-a-vis the Constitution. It has to do with the abrogation or nullification of a statute in the event of breach. Accordingly, before a statute or law is pronounced unconstitutional by a court of law, there must be a clear contravention or violation of the Constitution. It is not a playful or a playing exercise but one in which the court must have a very close look at the provisions of the statute or law in the context of the constitutional provisions before arriving at a decision. The court must not take pockets of the statute or law but the entire statute or law. In the same way, the court must not take pockets of the constitutional provision but the entire provisions to measure the legal strength of the statute or law. As the final result of the exercise is to kill a statute or law or a statutory provision or law, the court must exercise utmost caution, a fortiori when the court is telling the legislature that it enacted a statute which is inconsistent with the Constitution that it also enacted. The role or function of the court is as heavy as that. The burden is so much on the court and no court can afford to exercise its power of invoking section 1(3) of the 1979 Constitution which is the same as section 1(3) of the 1999 Constitution which provides:

"If any other law is inconsistent with the provisions of this Constitution, this Constitution shall prevail, and that other law shall to the extent of the inconsistency be void."

The word "inconsistent", the verb variant of the noun inconsistency is the opposite of consistent. It means ideas or opinions which are not in agreement with each other or with something else. It also means mutually repugnant or contradictory, contrary, the one to the other, so that both cannot stand, but the acceptance or establishment of the one implies the abrogation or abandonment of the other as, in speaking the repeal of a statute which is inconsistent with the Constitution. See Black's Law Dictionary, Sixth edition, page 766. In the context of section 1(3) of the Constitution, it simply means the

statute speaking quite a different language from the Constitution. Putting it negatively and by way of illustration, the Constitution provides for the letter A, while the statute provides for the letter B, or does not provide for the letter A, if it ought to have so provided.

B Learned counsel for the appellant cited a number of cases. Let me take some of them. Eyesan v. Sanusi (1984) 1 SCNLR 353, cited by counsel held that the right of action in court is also a constitutional right exercisable by a person who has complaint touching his civil right and obligations against another person, government or authority. I do not see how this case applies here. The appellant is not denied his constitutional right to commence an action in a court of law. Section 51(1) of the Edict merely asked him to give pre-action notice as a condition precedent to filing the action. Eyesan does not therefore apply.

D The next case is Government of Ondo State v. Adewunmi (1985) 4 NWLR (Pt. 13) 493. Counsel quoted a statement from Belgore, JCA., (as he then was). I quote part of it at page 501 of the Report:

E *"The Decree No. 1 of 1984 as I said earlier leaves untouched section 236 of the Constitution of 1979 and a State High Court except where a Decree so provides otherwise has jurisdiction to hear, determine in unlimited manner any civil proceedings in which the existence of a legal right, powers, duty, liability, etc. exist or is in issue."*

F Again, this case does not apply as section 51(1) and (2) does not oust the jurisdiction of the High Court of Adamawa State. Learned counsel argued that it would have been a different thing if the pre-action provision in the Edict is a provision in a Decree. This is not a case which involves the supremacy of a Decree over unsuspended provisions of the 1979 Constitution because section 51(1) and (2) does not provide for an ouster clause. My view here also applies to the case of Offor v. Osagie (1998) 1SCNJ 122, cited by counsel for the appellant.

H Learned counsel has urged this court to overrule the majority decision in the case of NNPC v. Fawehinmi (1998) 7 NWLR (Pt. 559) 598. As counsel did not give the majority and minority decisions of the Court of Appeal on the case, I had to examine the case. The

majority decision, which was given by Ayoola, JCA., (as he then was), and Onalaja, JCA., held as follows:

(1) An enactment should not be held to infringe the provisions of section 6 of the Constitution generally or section 6(6)(b) in particular unless it does one or more of the following:

(i) provides for the sharing of judicial powers of the State with any other body than the courts in which it is vested by the Constitution;

(ii) purports to remove judicial power vested in the court or redefine it in a manner as to whittle it, or

(iii) limits the extent of the power vested.

In short, for an enactment to infringe the provisions of section 6(1) and 6(6)(b) of the Constitution it must amount either to a total or partial usurpation of judicial powers vested in the courts by the Constitution or it must have purported to divest the courts of the exercise of judicial powers. Statutes which are legislative judgments fall in this category while statutes which preclude judicial review of executive decisions and actions and legislative action may fall within the later category. (2) The provisions of section 12(2) of the Nigerian National Petroleum Corporation Act neither removes the adjudicatory powers of the courts in respect of matters concerning the Corporation nor does it deny access to the courts to an individual. It merely regulates, without interposing the discretion of any other person between the will of the individual and the commencement of proceedings, the manner of invocation of the jurisdiction of the courts. Such a notice as prescribed in section 12(2) of the Act, is to give the defendant breathing time so as to enable him to determine whether he should make reparation to the plaintiff. That is a legitimate aim.

Pats-Acholonu, JSC, (of blessed memory), did not agree with the majority decision. He dissented. He held that section 12(2) of the NNPC Act is unconstitutional and to the extent of that inconsistency to section 6 of the Constitution is null and void.

With respect, I do not agree with the minority judgment and so I decline the invitation of learned counsel for the appellant to overrule the majority decision of the court, I entirely agree with the majority decision. I should point out that section 51(1) of Edict, No. 4 of 1996, is similarly worded as section 12(1) of the Nigerian National

Petroleum Corporation Act, 1977, which was the subject of interpretation in NNPC v. Fawehinmi, supra.

I think I can stop here. It is for the above reasons and the more comprehensive reasons given by my learned brother, Ogbuagu, JSC., that I also dismiss the appeal. I award N10,000.00 costs to the respondent.

AKINTAN JSC

The appellant was the plaintiff in this action which was commenced at an Adamawa State High Court. The plaintiff's claim before the court, inter alia, was for a declaration that the 1st defendant's letter terminating the contract for the rehabilitation of the water treatment plants in Yola, Numan and Mubi, in Adamawa State was, ultra vires, illegal, null and void; damages for the wrongful act; and payment for the job already executed. The 1st and 2nd defendants/respondents also filed a counter-claim.

Pleadings were filed and exchange and the trial went ahead.

It was while the learned trial Judge was writing his judgment that he discovered that the plaintiff had failed to comply with the requirement of giving a pre-action notice as stipulated in the law which established the 1st defendant/respondent Board. The learned trial Judge then invited the parties to address him on the point. After hearing learned counsel for the parties on the point, he came to the conclusion that the plaintiff/appellant failed to comply with the law requiring giving pre-action notice. The learned trial Judge therefore held that the action was incompetent and he accordingly struck it out.

The appellant was not satisfied with the judgment of the trial court. An appeal filed against the judgment at the Court of Appeal was dismissed, hence the present appeal. The parties filed their respective brief of argument in this court. The appellant formulated the following three issues as arising for determination in the appeal. The three issues are:

"1. Whether the provisions of section 51(1) and (2) of the Adamawa State Edict, No. 4 of 1996 is not inconsistent with the provisions of section 236(1) and section 33 of the 1979, Constitution as

amended and therefore unconstitutional and void.

2. *Whether the learned Justices of the Court of Appeal were right to have held that the defendant need not plead the defence of pre-action notice in their statement of defence and that parties cannot waive this special defence.*

3. *Whether the plaintiff is not entitled to judgment on the evidence led."* B

It was not in dispute that section 51 of the Adamawa State Water Board Edict, 1996 provides for a pre-action notice before commencing an action against the Board. The requirement is mandatory C and as such it amounts to one of the conditions which must be met before an action against the Board could be said to be properly and legally constituted: See *Madukolu v. Nkemdilim* (1962) 2 SCNLR 341; *Eboigbe v. NNPC* (1994) 5 NWLR (Pt. 347) 649; and the recent decision of this court in *Bakare v. Nigerian Railway Corporation* D (2007) 17 NWLR (Pt. 1064) 606.

The provisions of section 51 of the Adamawa State Water Board Edict, 1996 are in pari material with those of the Nigerian Railway Corporation Act. They do not bar a potential litigant from seeking redress in the courts for any wrong done to them by the Water Board E or Corporation. All that the plaintiff needs to do is to give the body a pre-action notice of the intention to commence an action against the Board or Corporation. Such provision, therefore, cannot be said to be in conflict with any provision of the Constitution. Similarly, once a F plaintiff fails to comply with the requirement of the law, all steps taken before the trial court would be a complete waste of time as the court would not have the needed competence to entertain the claim before it. The question therefore of the plaintiff in the instant case being entitled to judgment on the evidence led at the trial in breach of the G mandatory provisions of section 51 of the Adamawa State Water Board Edict, 1996 could not arise. There is also no need for a defendant to plead it before the provision could be enforced. It is a requirement that goes to the exercise of jurisdiction of the court. It can H therefore be raised at any stage, even at the appellate level.

In conclusion, therefore, for the above reasons and the fuller reasons given in the lead judgment written by my learned brother, Ogbuagu, JSC., the draft of which I have read, I agree that there is

totally no merit in the appeal. I accordingly dismiss the appeal with N10,000 costs to the respondents.

MOHAMMED JSC

B This appeal is against the judgment of the Court of Appeal, Jos
Division, delivered on 10th July, 2002 in which it dismissed the
Appellant's appeal and affirmed the judgment of the High Court,
Yola of Adamawa State. The Appellant which was not satisfied with
C the judgment of the Court below has now appealed to this Court.

The dispute between the parties arose out of the execution of
a Water Rehabilitation contract which was subsequently revoked. The
Appellant as Plaintiff brought the dispute before the trial Court claim-
ing three Declaratory Reliefs and order of compensation for various
D sums both in Nigerian Naira and foreign currency. The case was heard
on pleadings with both parties calling witnesses before the Court which
after hearing the respective addresses of the learned Counsel for the
parties, adjourned the case for judgment. However, before the date
for the delivery of judgment, the learned trial Judge recalled the par-
E ties and asked their learned Counsel to address the Court on the
effect of the failure of the Appellant as Plaintiff, to issue or serve a
Pre-action Notice on the 1st Respondent before commencing the
action against it for the reliefs sought in accordance with the require-
F ment of Section 51 of the Adamawa State Water Board Edict, No. 4
of 1996. After hearing the parties on this issue of law raised suo-
motu by the trial Court, the learned trial Judge on being satisfied that
the provision of the law was not complied with by the Appellant in
instituting its action, struck out the action for being incompetent. The
G Appellant's appeal was also dismissed, hence the present appeal to
this Court, in which the three issues raised in the Appellant's brief of
argument read -

H *"1. Whether the provisions of Section 51(1) and (2) of
Adamawa State Edict No. 4 of 1996, is not inconsistent with the pro-
visions of Section 236(1) and Section 33 of 1979 Constitution as
amended and therefore unconstitutional and void. (see Ground 1
and 2).*

2. Whether the learned Justices of Court of Appeal were right

to have held that Defendants need not Plead Defence of pre-action notice in their statement of defence and that parties cannot waive this special defence. (Ground 3 and 4).

3. Whether Plaintiff is not entitled to judgment on evidence led. (Ground 5)."

The main plank upon which the Appellant attacked the judgment of the trial Court as affirmed by the Court below, was that the provision of the law requiring service of pre-action notice by the Appellant before commencing its' action against the 1st Respondent, was unconstitutional because the provision of the law had the effect of denying the Appellant its constitutional right of fair hearing. This is indeed very far from the real state of the law on the effect of such pre-action notices. See *Amadi v. N.N.P.C* (2000) 10 N.W.L.R. (Pt. 674) 76. See also *Madukolu & Ors. v. Nkemdelim & Ors.* (1962) 2 S.C.N.L.R. 341; (1962) 1 All N.L.R. 587, where one of the conditions likely to affect the competence of any action coming before a trial Court, as the Appellant's action in the present case, must to satisfy any condition precedent required by law before instituting the action. The Appellant's action being incompetent, was therefore rightly struck out.

With the above comments, I must say that I am completely with my learned brother Ogbuagu, JSC., in his judgment dismissing the Appellant's appeal. Consequently, I also dismiss the appeal, affirm the judgment of the trial Court as affirmed by the Court below and abide by the order on costs.

TABAI JSC

The action which has given rise to this appeal was commenced at the Yola Judicial Division of the High Court of Adamawa State. The Plaintiff therein is the Appellant herein while the Defendants there are the Respondents here. The case of the parties as can be gleaned from the pleadings is that by a letter dated the 6th December, 1995, the 1st Defendant/Respondent offered a contract to the Plaintiff/Appellant. The contract was for the rehabilitation works and improvements of existing water plants at Yola, Numan and Mubi. The contract was eventually signed by the parties on the 15th of August,

1996. The contract sum was N66,402,234.00. It was the case of the Appellant that despite numerous obstacles created by the 1st and 2nd Respondents to frustrate the due execution of the contract, including their refusal to make 15% advance payment of the contract sum to them, they executed the contract to the value of and was
 B entitled to be paid the sum of N19, 806,150.00, when by a letter dated 4th of July 1997 the 1st Respondent purportedly terminated the contract. The claims as set out in paragraph 47 of the Statement of Claim are for (i) a declaration that the termination was ultra virus,
 C illegal, null and void; (ii) a declaration that the failure or refusal to make of advance payment of 15% of the contract sum was in breach of the contract; (iii) a declaration that the contract was still valid and subsisting and (iv) as against the 1st and 2nd Respondents jointly and severally the sum of N53,640,335.00 representing compensation.

D The case of the Respondents on the other hand was that despite the signing of the contract, the Appellant deliberately failed to mobilise to site, submitted to them fake bank security guarantee and other documents and neglected or refusal to attend site meetings. It was also their case that the Appellant failed to comply with the contract work schedule and the patch work executed by it was at the
 E Numan site and only to the tune of N49,560.00. It was the assertion of the Respondent that the Appellant did not exhibit any good faith on the execution of the contract to justify any advance payment to them as they were in fundamental breach of the contract. And against
 F the Appellant, the 1st and 2nd Respondents counter-claimed for (i) 30% of the contract sum representing forfeiture; (ii) 10% of the total contract sum as compensation for Defendant's additional costs and (iii) N50,000,000, representing compensation as laid down in the
 G contract agreement.

At the trial both sides adduced evidence in support of their cases as pleaded at the end of which counsel for the parties addressed the court. The address of counsel was on the 27th day of April, 1998. The matter was then adjourned for judgment at a date to be com-
 H municated to the parties.

On the 14th of May, 1998 however the learned trial judge made the following remarks:

"In the course of writing the judgment, my attention was caught

by the provisions of section 51 of the Adamawa State Water Board Edict, No.4 of 1996 which states:

51(1) No suit shall be commenced against the Board until one month has elapsed since a written notice to commence the suit shall have been served on the Board by the complainant or his agent.

(2) A notice under subsection (1) shall state

(a) the cause of action;

(b) the relief sought; and

(c) the name and place of abode of the complainant."

It is my view that this provision is crucial as it affects the 1st Defendant and I would like counsel to address me on whether or not the provision has been complied with, and if not, its consequences."

On the 19th May, 1998 learned counsel for the parties addressed the court with respect to section 51 of the Edict. In the judgment on the 22/5/98, the learned trial judge held that the suit having been filed on the 29th of July, 1997 after the termination of the contract on the 4th of July, 1997 - a period of less than one month - there was non-compliance with statutory requirement of one month pre-action notice. And by reason of the said non-compliance, the action was struck out for incompetence. The learned trial judge reasoned the Respondents cannot derive benefits from an incompetent action and accordingly also struck out the counter-claim.

It is against that judgment of the court below that this appeal is lodged. The Appellant's Brief was prepared by Tayo Jegede and therein he submitted three issues for determination. They are:

(1) Whether the provisions of section 51(1) and (2) of Adamawa State Edict, No.4 of 1976 is not inconsistent with the provisions of section 236(1) and Section 33 of the 1979 Constitution as amended and therefore unconstitutional and void.

(2) Whether the Learned Justices of the Court of Appeal were right to have held that defendants need not plead defence of pre-action notice in their Statement of Defence and that parties cannot waive his special defence.

3. Whether Plaintiff is not entitled to judgment on the evidence led.

The Respondents' brief was settled by S.L. Kyanson, (Principal State Counsel). He formulated two issues the first of which is sub-

stantially the same as the Appellant's first issue. His 2nd issue is:

"Whether the court below was right to have concluded that the trial court was justified to have suo motu raise the issue of non-compliance vel non with section 51(1) and (2) of Edict No. 4 of 1996, requiring service of pre-action notice on 1st Defendant/Respondent, despite the fact that the issue was not pleaded in the joint statement of defence of the Respondents."

My learned brother, Ogbuagu, JSC., has dealt with these issues exhaustively in his leading judgment. By way of emphasis however I shall comment albeit briefly on the 1st issue of pre-action notice. The sustained argument of learned counsel for the appellant is that section 51(1) and (2) of Edict No 4 of 1996, creates an obstacle on the part of prospective claimants which they must scale through before commencing an action. It was his submission that the provision delays or exhibits the unfettered rights of an individual guaranteed under the 1979 Constitution to court and is therefore unconstitutional. He relied on a number of authorities amongst them *Eyesan v. Sanusi* (1984) 1 SCN LR 353 at 354; *Governor Of Ondo State v. Adewunmi* (1985) 4 NWLR (Part 13) 493; *Ofor v. Osagie* (1998) 1 SCNJ 122; *Bakare v. A.G. Federation* (1990) 9 SCNJ 43; *Adediran v. Interland Transport Ltd* (1991) 9 NWLR (Part 214) N.N.P.C. v. *Fawehinmi*. It was his submission that the restriction placed by Section 5(1) and (2) of Edict No.4 at 1997, offends the rights of the claimant and the jurisdiction of the court spelt out in section 6 of the Constitution.

Mr. S.L. Kyanson, for the Respondent argued on the other hand that non-compliance with the requirement to serve pre-action notice renders the action incompetent and relied on a number of cases amongst them *Madukolu v. Nkemdilim* (1962) 1 All NLR 587 at 595; *Western Steel Works Ltd v. Iron & Steel Workers Union* (1986) 3 NWLR (Part 30) 617 at 627, *Odofin & Anor. v. Agu & Anor* (1992) 3NWLR (Part 229) 350 at 365-366; *State v. Onagoruwa* (1992) 2 NWLR (Pt 221) 33 at 52-53; *Kalu Mark v. Gabriel Eke* (2004) 5 NWLR (Part 865) 54 at 84-86; *Amadi v. N.N.P.C.* (2000) 10 NWLR (Part 674) 72; *Katsina Local Authority v. Alhaji Barno Makudawa* (1991) 1 NMLR 100 at 105-106. He referred to section 51(1) of Edict No.4 of 1976, and submitted that the provision is mandatory

and that the Appellant had an obligation to comply with court.

There are numerous decided cases on statutory provisions for pre-action notice and when they leave no one in any doubt as to their meaning effect has to be given to the provision. Where as in this case the provision is mandatory, a Plaintiff has no choice but to comply with it. It is a condition precedent to the commencement of an action and non-compliance therewith renders the action incompetent and robs the court of any jurisdiction to entertain same. In *Umankoro v. N.P.A.* (1997) 4 NWLR (Part 502) 656, all court per Kutigi, JSC., (as he then was), applied the principle when he said:

"Again it was in fact not disputed that the Plaintiff never gave any notice to the first defendant herein before instituting the suit. This is also against the mandatory provisions of section 97(2) of the Ports Act."

In *Raymond Obeta & anor. v. Josephat Maduabuchi Okpe* (1996) 9 NWLR (Part 473) 401 at 448-449, Tobi, JCA., (as he then was), graphically stated the effect of non-compliance with a Statutory requirement of pre-action notice when he said:

"It is my humble view that section 11(2) at the State Proceedings Law of Anambra State is quite a distance from the Constitution in terms of conflict. The provision does not notate any provision of the Constitution including the popular section 33 or fair hearing or fair trial. Section 11(2) does not in any way block the passage to free access on the part of an applicant to reach the court. The passage is still very free and there is no blockade. Section 11(2) merely enjoins a party to give pre-action notice. The subsection does not say more. It does not say less too. How can the harmless subsection be interpreted or construed in a way as if it wages war against the fair hearing or fair trial of a case? Section 11(2) does not accommodate any hostility against a person who wants to commence action. All that is expected of the person is to give three months notice and he freely files the action. No more no less. I am clearly of the view that the action commenced against the Attorney-General is a nullity in the light of the fact that the Plaintiff/Respondent failed to give the Chief Law Officer the three months statutory notice."

I adopt the above statement in its entirety. The requirement of one month's pre-action notice in this case does not offend the provi-

sions of section 32 of the 1999 Constitution. It does not interfere with the rules of fair hearing or fair trial. Such a notice could probably have prodded the Respondents to come to terms with the Appellant and save this litigation. I think I shall resolve this issue against the Appellant.

B The second issue pertains to whether the non-compliance with statutory requirement of pre-action notice needed to be specifically pleaded as a defence. It also questioned the lower courts finding of there being no waiver. The totality of the arguments of learned counsel for the Appellant tends to disregard the fact that the issue is that of
C jurisdiction which can therefore be raised at any time by the defence for whose benefit the provision is made. Being a jurisdictional issue it can also be raised by the court and can be raised for the first time even at the appellate court.

D On the whole the appeal lacks merit. And for the foregoing and better reasons well set out in the lead judgment of my learned brother, Ogbuagu, JSC., I also dismiss the appeal. I adopt the costs as awarded in the lead judgment.

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