

SUPREME COURT OF NIGERIA
30TH MAY, 2008. SC. 215/2005
CORAM:- N. TOBI, D. MUSDAPHER, G. A. OGUNTADE,
S. A. AKINTAN, F. F. TABAI, JJSC

CHIEF YAKUBU SANI APPELLANT
AND
1. OKENE LOCAL GOVERNMENT
TRADITIONAL COUNCIL RESPONDENTS
2. ALHAJI DR. ADO IBRAHIM
(The Ohinoyi of Ebiraland)

PRACTICE & PROCEDURE - Preliminary objections - When raised
- Proper stage for defendant to raise preliminary objection to plaintiff's
suit - Is either at the inception or early stage of proceedings - As was
done in this case (H1)

ACTIONS - Competence - Duty of court - Where issue of compe-
tence of action is raised - Court not only has authority but also a duty
to determine action in limine - If lack of competence is established
(H2)

ACTIONS - Limitation of - Public Officers Protection Law - As
appellant's suit - Was filed after three months from the date cause of
action arose - It is no longer maintainable for being statute barred -
As rightly held by Court of Appeal (H3)

FACTS

Plaintiff/appellant sued the defendants/respondents at the Kogi
State High Court. Appellant was by the suit contending that his re-
moval as a member of the Traditional Council was wrongful. In re-
sponse to the writ served on them, Respondents raised a preliminary
objection by way of a motion on notice. The objection challenged
the competence of the action by virtue of section 2(a) of the Public
Officers Protection Law, Cap 111, Volume 3, Laws of Northern Ni-
geria, 1963. It was the contention of respondents that the action was
statute barred as it was not commenced within three months after
the act complained of. Appellant opposed the motion. The learned

trial judge upheld the preliminary objection and accordingly dismissed the action. Appellant appealed to the Court of Appeal contending, inter alia, that trial judge was wrong to have heard and determined the preliminary objection when it did. Appellant insisted that the objection ought to have been taken together with the merits of the action. The appeal was dismissed, hence this further appeal to the Supreme Court.

HELD (Unanimously dismissing the appeal per **TOBI JSC**)

Proper stage for defendant to raise preliminary objection

1. Let me first take the issue that the Preliminary Objection raised by the respondents was premature. The word “*premature*” means introductory, initiatory, preceding, temporary and provisional. On the other hand, an objection is an act of objecting, that which is, or may be presented in opposition. It is an adverse reason or argument. It connotes a disapproval.

Preliminary Objection as the expression connotes, is an objection which is initiated or commenced at the earliest opportunity. A Preliminary Objection should be taken first in time because it could be liable to time in our adjectival law. Perhaps, apart from Preliminary Objection as to the jurisdiction of the court, most others are liable to time and could be subject of waiver.

A Preliminary Objection is raised where a party fails to comply with the enabling law and or the rules of court. The proper stage at which a defendant should raise a Preliminary Objection to the plaintiff’s suit should be either at the inception or early stage of the proceedings.

In the light of the above, I do not agree with the submission of learned counsel for the appellant that the Preliminary Objection was premature, if the word premature as used by counsel retains its dictionary meaning of an event happening before the proper or usual time. It is good law that a Preliminary Objection could be taken at the interlocutory stage if the objector so desires. The issue accordingly fails. (pp. 2444 B/2445 A)

ACTIONS - Competence - Duty of Court

2. There are instances where it is permissible to raise a Preliminary

Objection that can terminate a case at the threshold; the competence of which is where the competence of an action is called into question. In a case where the competence of the action is in issue, the court not only has the authority but also the duty to determine the action in limine, as in this appeal, where lack of competence is established. This is because the competence of an action robs on the jurisdiction of the court to hear it within the classification of the elements that make jurisdiction as expounded in *Madukolu v. Nkemdilim* (1962) 2 SCNLR 341. (p. 2444 F)

ACTIONS - Limitation of

3. The cause of action in this matter arose on 19th January, 1998, when the respondents served a letter on the appellant removing him from office as a member of the Okene Local Government Traditional Council. Appellant filed the action on 11th June, 1998, a period of more than four months when the cause of action arose. Dealing with the issue, Rhodes-Vivour, JCA., in his judgment said at pages 107 and 108 of the record:-

“In this appeal uncontroverted facts reveal that the appellant received from the respondents a letter dated 19/1/98, informing him of his removal from the Okene Local Government Traditional Council. The appellant claimed to have received the said letter at the tail end of January, 1998. (See paragraph 11 of the Statement of Claim). It was at the end of January, 1998, that the appellant had a cause of action. He was expected by the Provisions of Section 2(a) of the Public Officers (Protection) Law, Cap 111, Laws of Northern Nigeria, 1973, to commence action against the respondents within three months from the 31st of January, 1998, that is to say on or before the end of April, 1998, but in this case he took out a writ against the respondents on the 11th of June, 1998. It is obvious that the appellant’s suit is no longer maintainable, it being statute-barred.”

I am in grave difficulty to fault the above conclusion of the learned Justice of the Court of Appeal. He is right. (p. 2445 B)

NOTABLE POINT OF INTEREST

AKINTAN JSC

1. Court needs jurisdiction to settle question of protection

The second question is whether the defendants were in fact protected by the Law. Again going into the question whether the defendants were protected by the Law or not could only arise or be considered by the trial court after it might have competently assumed jurisdiction to entertain the claim before it. Such a situation could only arise after preliminary requirements needed before the court could assume jurisdiction as espoused in numerous decisions, particularly in *Madukolu v. Nkemdilim* (1962) 2 SCNLR 341, are met. In the instant case, the precondition which must be met is that the action was commenced within the time prescribed by relevant law that is, within the three months from the date the cause of action arose as prescribed in Section 2(a) of the Public Officers Protection Law. The attention of the trial court was rightly drawn to that omission through the respondents' Notice of Preliminary Objection. The trial court's decision to act on the application was therefore quite appropriate and the court below's decision to affirm that decision is also quite right. (p. 2448 A)

REPRESENTATION

Hon. Tony Anyanwu, for the Appellant.
Fola Ajayi, for the Respondents.

CASES REFERRED TO

- Iweka v. SCOA (Nig.) Ltd.* (2000) 3 S.C. 21; (2000) 7 NWLR (Pt. 664) 326 at 329
Offoboche v. Ogoja Local Government (2001) 7 S.C. (Pt. III) 107
Alhaji Ibrahim v. Judicial Service Commission Kaduna State (1998) 12 S.C. 20
- Enwezor v. Onyejekwe* (1964) All NLR 14
Agbahomovo v. Edueyegbe (1999) 2 S.C. 79; (1999) 3 NWLR (Pt.594) 170 at 176
Nnonye v. Anyichie (2005) 1 S.C. (Pt.II) 96; (2005) 1 SCNJ 306 at 318
- Ekeogu v. Aliri* (1991) 3 S.C. 58; (1991) 3 SCNJ 45 at 51
Egbe v. Adefarasin (1985) 1 NWLR (Pt.3) 549 at 568
Egbe v. Alhaji (1990) 3 S.C. (Pt.I) 63; (1990) 1 NWLR (Pt.128) 546 at 546

Nwakwere v. Adewunmi (1966) 1 All NLR 12

Lagos City Council v. Ogunbiyi (1969) 1 All NLR 297

Ajagunna v. Attorney-General of Ondo State (2005) 21 WRN 153

Mohammed v. Olawunmi (1993) 4 NWLR (Pt.288) 384

Oloriode v. Oyebi (1984) 1 SCNLR 390

B

STATUTES & RULES REFERRED TO

Kogi State Chiefs (Appointment, Deposition and Establishment of Traditional Counsel) Law No. 7 of 1992, ss. 7 and 24 (a)

Public Officers (Protection) Law, Cap 111, Laws of Northern Nigeria, 1973, s. 2 (a)

Public Officers (Protection) Law, Cap 111, Laws of Northern Nigeria, 1963, s. 2 (a)

Sheriffs and Civil Process Act, Cap. 407, Laws of the Federation O. IV r. 1(2)

D

LEAD JUDGMENT BY TOBI JSC

The Kogi State Government in a letter dated 17th July, 1995, appointed the appellant a member of Okene Local Government Traditional Council, the 1st respondent. He took Oath of Office in accordance with the law. On 19th January, 1998, the respondents served the appellant a letter removing him from office.

Angered by his removal as a member of the Traditional Council, appellant sued on 11th June, 1998. On 1st January, 2001, respondents filed a motion by way of Preliminary Objection challenging the competence of the action by virtue of Section 2(a) of the Public Officers Protection Law, Cap 111, Volume 3, Laws of Northern Nigeria, 1963. They argued that the action was statute barred in that it was not commenced within three months after the act complained of. The appellant opposed the motion.

The learned trial Judge upheld the Preliminary Objection and dismissed the action. An appeal to the Court of Appeal was dismissed. He has come to this court. Briefs were filed and duly exchanged. Appellant formulated two issues for determination:-

"1. Whether the lower court was right in not reversing the decision of the trial court on the ground that the Preliminary Objection was premature for consideration at the interlocutory stage of the

proceedings? (Grounds 11 and III of the Notice of Appeal).

2. *Whether the lower court was right in not reversing the decision of the trial court that the defendants are protected by Section 2(a) of the Public Officers (Protection) Law, as applicable in Kogi State? (Ground I of the Notice of Appeal). ”*

B The respondents also formulated two issues for determination:-

1. *Was the court below right when it affirmed the decision of the trial court that the court was entitled to consider and determine in limine the Preliminary Objection of the respondents that the action was statute-barred? (Grounds II and III of the Notice of Appeal).*

C 2. *Was the court below correct when it affirmed the decision of the trial court that the respondents were protected by Section 2 (a) of the Public Officer (Protection) Law, as applicable to Kogi State? (Ground I of the Notice of Appeal). ”*

D Learned counsel for the appellant, Hon. Tony Anyanwu, submitted that the Court of Appeal erred in not reversing the decision of the trial court on the ground that the Preliminary Objection was premature for consideration at the interlocutory stage of the proceedings. Having held that the trial court could not determine whether or
E not the respondents acted outside the colour of their offices or outside their statutory or constitutional duties, the trial court erred when it nonetheless proceeded to dismiss the action on the basis of the Protection Law, counsel argued. The trial court should have declined
F hearing the interlocutory application as the same was premature and had the potential to prejudice the substantive suit, counsel further argued. Citing *Iweka v. SCOA (Nig.) Ltd. (2000) 3 S.C. 21; (2000) 7 NWLR (Pt. 664) 326 at 329*, learned counsel submitted that the trial court erred when it prejudged the substantive suit by dismissing the
G action.

Learned counsel submitted that the Protection Law does not apply where public officers are sued for an act not done in pursuance or execution or intended execution of any law or of any public duty or authority. The law, counsel argued, does not protect officers
H alleged to have abused their office. He cited *Offoboche v. Ogoja Local Government (2001) 7 S.C. (Pt. III) 107; (2001) 16 NWLR (Pt. 739) 458 at 475*. He contended that the case of *Ekeogu v. Aliri*, relied upon by the trial court is not applicable as the facts are distin-

guishable from the appellant's action.

Counsel submitted that because of the interlocutory stage of the proceedings, the learned trial Judge should have held the Preliminary Objection premature, as it was impossible to determine the objection, without considering the respondents capacity under the Chiefs Law. B

Taking issue No. 2, learned counsel submitted that the Court of Appeal erred in not reversing the decision of the trial court that the respondents are protected by Section 2(a) of the Public Officers (Protection) Law. Referring to Section 2(a) of the Public Officers (Protection) Law, Sections 7 and 24(A) of the Kogi State Chiefs (Appointment) Deposition and Establishment of Traditional Council) Law, No. 7 of 1992 and the cases of *Alhaji Ibrahim v. Judicial Service Commission Kaduna State* (1998) 12 S.C. 20; (1998) (64) LRCN 5044 at 5070, *Enwezor v. Onyejekwe* (1964) All NLR 14, *Anyia v. Iyayi* (1993) SCNJ (without the page number) and *Agbahomovo v. Eduyegbe* (1999) 2 S.C. 79; (1999) 3 NWLR (Pt.594) 170 at 176, learned counsel submitted that the respondents have no power to remove the appellant from the membership of the Traditional Council. He urged the court to allow the appeal. C
D
E

Learned counsel for the respondents, Fola Ajayi, Esq., submitted on issue No. 1 that the trial court was right when it upheld the Preliminary Objection which was affirmed by the Court of Appeal. The decision, counsel contended, is unassailable because it is consistent with and supported by decisions of this court. He cited *Nnonye v. Anyichie* (2005) 1 S.C. (Pt.II) 96; (2005) 1 SCNJ 306 at 318, *Ekeogu v. Aliri* (1991) 3 S.C. 58; (1991) 3 SCNJ 45 at 51, *Egbe v. Adefarasin* (1985) 1 NWLR (Pt.3) 549 at 568, *Egbe v. Alhaji* (1990) 3 S.C. (Pt.I) 63; (1990) 1 NWLR (Pt.128) 546 at 546, *P. N. Uddoh G Trading Co. Ltd. v. Abere* (2001) 5 S.C. (Pt.II) 64; (2001) FWLR (Pt.57) 900 at 922, *Nwakwere v. Adewunmi* (1966) 1 All NLR 12, *Lagos City Council v. Ogunbiyi* (1969) 1 All NLR 297 and *Ajagunna v. Attorney-General of Ondo State* (2005) 21 WRN 153. F
G

Dealing with issue No.2, learned counsel contended that as the decision of the trial court was predicated upon findings of fact which were not disputed, the appellant cannot raise the issue here. He cited *Dabo v. Abdullahi* (2005) 2 S.C. (Pt.1) 75; (2005) 25 CNJ 76 at 95. H

He argued that as the decision of the trial court that the act of the respondents was done in pursuance or execution, of their public duties under the law was not challenged in the Court of Appeal, all submissions predicated upon it in this court are unavailing and must be discountenanced. He urged the court to dismiss the appeal.

B Let me first take the issue that the Preliminary Objection raised by the respondents was premature. The word “pre-mature” means introductory, initiatory, preceding, temporary and provisional. On the other hand, an objection is an act of
C objecting, that which is, or may be presented in opposition. It is an adverse reason or argument. It connotes a disapproval.

Preliminary Objection as the expression connotes, is an objection which is initiated or commenced at the earliest opportunity. A Preliminary Objection should be taken first in
D time because it could be liable to time in our adjectival law. Perhaps, apart from Preliminary Objection as to the jurisdiction of the court, most others are liable to time and could be subject of waiver.

A Preliminary Objection is raised where a party fails to
E comply with the enabling law and or the rules of court. See Mohammed v. Olawunmi (1993) 4 NWLR (Pt.288) 384, Oloriode v. Oyebe (1984) 1 SCNLR 390. The proper stage at which a defend-
F ant should raise a Preliminary Objection to the plaintiff’s suit should be either at the inception or early stage of the proceedings. See Carlen (Nig) Limited v. University of Jos (1994) 1 NWLR (Pt. 323) 631.

There are instances where it is permissible to raise a Preliminary Objection that can terminate a case at the thresh-
G old; the competence of which is where the competence of an action is called into question. In a case where the competence of the action is in issue, the court not only has the authority but also the duty to determine the action in limine, as in this appeal, where lack of competence is established. This
H is because the competence of an action robs on the jurisdiction of the court to hear it within the classification of the elements that make jurisdiction as expounded in Madukolu v. Nkemdilim (1962) 2 SCNLR 341. See Nnonye v. Anyichie (2005)

1 S.C. (Pt.II) 96; (2005) 1 NWLR (Pt.639) 66.

In the light of the above, I do not agree with the submission of learned counsel for the appellant that the Preliminary Objection was premature, if the word premature as used by counsel retains its dictionary meaning of an event happening before the proper or usual time. It is good law that a Preliminary Objection could be taken at the interlocutory stage if the objector so desires. The issue accordingly fails. B

I take the second issue. ***The cause of action in this matter arose on 19th January, 1998, when the respondents served a letter on the appellant removing him from office as a member of the Okene Local Government Traditional Council. Appellant filed the action on 11th June, 1998, a period of more than four months when the cause of action arose. Dealing with the issue, Rhodes-Vivour, JCA., in his judgment said at pages 107 and 108 of the record:-*** C D

"In this appeal uncontroverted facts reveal that the appellant received from the respondents a letter dated 19/1/98, informing him of his removal from the Okene Local Government Traditional Council. The appellant claimed to have received the said letter at the tail end of January, 1998. (See paragraph 11 of the Statement of Claim). It was at the end of January, 1998, that the appellant had a cause of action. He was expected by the Provisions of Section 2(a) of the Public Officers (Protection) Law, Cap 111, Laws of Northern Nigeria, 1973, to commence action against the respondents within three months from the 31st of January, 1998, that is to say on or before the end of April, 1998, but in this case he took out a writ against the respondents on the 11th of June, 1998. It is obvious that the appellant's suit is no longer maintainable, it being statute-barred." E F G

I am in grave difficulty to fault the above conclusion of the learned Justice of the Court of Appeal. He is right. H It does not appear that the Court of Appeal dealt with the issue of the respondents acting outside their colour of office. The learned trial Judge dealt with it at page 39 of the Record. He said:-

"At this stage, the court cannot go into the merit or demerit of

the case, hence it cannot determine whether or not the defendants acted outside the colour of their office or outside their statutory or constitutional duties.”

I entirely agree with the learned trial Judge. The issue before the court was whether the action was statute-barred or not; and that
B involved calculation of months and days. The learned trial Judge did the calculation and came to the conclusion that the action was statute barred. This was rightly affirmed by the Court of Appeal.

In sum, this appeal has no merit and it is dismissed. I award
C N50,000.00 in favour of the respondents.

MUSDAPHER JSC

I have had a glance at the judgment of my Lord, Tobi, JSC., just delivered. I agree that this appeal is unmeritorious. I dismiss it
D and I award the respondents, costs as proposed in the said judgment.

OGUNTADE JSC

I have had the advantage of reading in draft a copy of the
E leading judgment by my learned brother, Tobi, JSC. The simple issue for resolution is whether or not the two courts below were right in their conclusion that the appellant's suit was statute bared under Section 2(a) of the Public Officers Protection Law, Cap 111, Volume 3, Laws of Northern Nigeria, 1963.

F I agree with my learned brother, Tobi, JSC., that the plaintiff's/appellant's suit was statute barred arising from the said law. I would also dismiss this appeal with costs as assessed in the leading judgment.

G

AKINTAN JSC

The appellant was the plaintiff in this action which was commenced at Okene High Court on 11th June, 1998, against the respondents as defendants. He was challenging his removal as member of Okene Local Government Traditional Council communicated to him in a letter dated 19th January, 1998.

The brief facts of the case are that the appellant was by a letter dated 17th July, 1995, appointed a member of Okene Local Gov-

ernment Traditional Council. He took the required Oath of Office and assumed office. But on 19th January, 1998, he received a letter from the respondents by which he was informed of his removal from office. The action was instituted by the appellant to set aside the removal order imposed on him in the letter.

The immediate reaction of the respondents, as defendants, to the action was to file a Notice of Preliminary Objection to the competence of the action in that as it was commenced outside the three months from the date the cause of action arose, the plaintiff could no longer maintain the action. Reliance was placed in this respect on Section 2(a) of the Public Officers Protection Law, Cap. III, Laws of Northern Nigeria, 1963, applicable to Kogi State. The section provides, inter alia, that all actions against public officers in respect of their official actions must be commenced within three months from the date the cause of action arose. The trial court upheld the objection and dismissed the claim. An appeal against the ruling was also dismissed by the Court of Appeal. This appeal is against the decision of the Court of Appeal dismissing the appeal.

The parties filed their respective Briefs of Argument in this court. The two issues raised and canvassed before us are closely related. They are briefly as follows:-

- “(1) *Whether the objection was raised prematurely? and,*
- (2) *Whether the defendants were in fact protected by said Public Officers Protection Law?”*

In resolving the first issue, it is not in doubt that the question raised in the objection goes to the jurisdiction of the trial court to entertain the claim. The position of the law is that issues touching on jurisdiction must be taken at the earliest opportunity and at any stage of the proceedings. This is because any step taken by a court without jurisdiction amounts to a complete waste of time: See *Barclays Bank Ltd. v. Central Bank of Nigeria* (1976) 6 S.C. 175; (1976) 6 S.C. (Reprint) 115, *Bronik Ltd. v. Wema Bank Ltd.* (1983) 1 SCNLR 296, *Galadima v. Tambai* (2000) 6 S.C (Pt.1) 196; (2000) 11 NWLR (Pt.677) 1, and *Ege Shipping and Trading Industry. v. Tigris International Corporation* (1999) 10-12 S.C. 60; (1999) 14 NWLR (Pt.637) 70. The trial court was therefore quite right in entertaining the objection to the competence of the action at the time the applica-

tion was made before it. Any delay in raising the objection would have rendered all actions taken in the matter a complete waste of the court's precious time.

The second question is whether the defendants were in fact protected by the Law. Again going into the question whether the defendants were protected by the Law or not could only arise or be considered by the trial court after it might have competently assumed jurisdiction to entertain the claim before it. Such a situation could only arise after preliminary requirements needed before the court could assume jurisdiction as espoused in numerous decisions, particularly in *Madukolu v. Nkemdilim* (1962) 2 SCNLR 341, are met. In the instant case, the precondition which must be met is that the action was commenced within the time prescribed by relevant law that is, within the three months from the date the cause of action arose as prescribed in Section 2(a) of the Public Officers Protection Law. The attention of the trial court was rightly drawn to that omission through the respondents' Notice of Preliminary Objection. The trial court's decision to act on the application was therefore quite appropriate and the court below's decision to affirm that decision is also quite right.

In the result and for the reasons I have given above, and the fuller reasons given in the leading judgment written by my learned brother, Niki Tobi, JSC., the draft of which I have read, I hold that there is no merit in the appeal and I dismiss it with N50,000 costs in favour of the respondents.

TABAI JSC

I was privileged to read, in draft, the leading judgment of my learned brother, Tobi, JSC. The only issue is the competence of the action having regard to the provisions of Section 2(a) of the Public Officers Protection Law, Cap. 111, Volume 3, Laws of Northern Nigeria, 1963. The issue was adequately and comprehensively discussed in the leading judgment. I agree entirely with the reasoning and conclusion therein. The result is that I also dismiss the appeal with N50,000.00 costs in favour of the respondents.