

SUPREME COURT OF NIGERIA
16TH JUNE, 2009 SC. 244/2003
CORAM:- N. TOBI, D. MUSDAPHER, G. A. OGUNTADE,
I. T. MUHAMMAD, J. O. OGEBE, JJSC

FEED & FOOD FARMS (NIGERIA) LTD. APPELLANT
AND
NIGERIAN NATIONAL
PETROLEUM CORPORATION RESPONDENT

ACTIONS - Pre-action notice - Right to - Applicability of waiver - Right to be served with such notice - Is not within the category of rights which cannot be waived - Though it affects jurisdiction of court (H1)

JURISDICTION - Matters affecting - Categorization - For purpose of waiver - They should be categorized into those affecting the public and those affecting the parties - The former cannot in law be waived - But the latter can be waived (H2)

STATUTES - Pre-action notice - NNPC Act, s. 12(2) - Applicability of waiver - The section could be waived in law - And respondent has waived it in this case (H3)

JUDICIAL PRECEDENTS - Mandatory statutory provisions - Applicability of waiver - Principles - It appears Supreme Court put the position too wide in *Menakaya* case - In view of the court's later decision in the case of *Mobil* (H3)

DAMAGES - Award - Entitlement - Sufficiency of proof - Evidence of PW4 established that appellant can no longer use the land - For industrial purposes - This is sufficient proof that appellant suffered damages (H4)

DAMAGES - Special damages - Trespass - Proof - Court of Appeal was wrong to have held that there was no evidence in proof of special damages - On alleged ground that there was no trespass - There is evidence of both trespass and special damages (H5)

COURTS - Resolution of issues - After a finding of lack of jurisdiction - Propriety - Any court below the Supreme Court - Is in order to take the merits - After such finding - In case the finding is declared wrong on appeal (H6)

FACTS

The Plaintiff/appellant sued defendant/respondent claiming declarations and damages for trespass under various heads of damages. The suit was brought without serving the statutory pre-action notice under s.12 (2) of the NNPC Act. After hearing, the learned trial judge gave judgment to the appellant. Aggrieved, respondent appealed to the Court of Appeal which held that the jurisdiction of the trial court was ousted by the failure of appellant to give the statutory pre-action notice.

Alternatively, the Court also heard the appeal on the merits and dismissed the award of damages by the trial court, as it held that there was insufficient evidence in proof of the appellant's entitlement to damages. Dissatisfied, appellant has brought this appeal to the Supreme Court, contending that respondent had waived its right to pre-action notice and that sufficient evidence was led in proof of appellant's entitlement to damages. Respondent has also cross-appealed against some portions of the Court of Appeal judgment.

ISSUES FOR DETERMINATION

"1. Whether the right to be served with a pre-action notice under the mandatory provisions of s.11(2) of NNPC Act could, as a matter of law, be waived by the respondent NNPC, and if so, whether in the circumstances of this case, the respondent NNPC could be said to have so waived that right.

2. Whether the failure of the Court of Appeal to rule on the constitutionality or otherwise of the application of s. 11 (2) NNPC Act to the peculiar facts of this suit was justified, and if not, whether the Supreme Court can hold that the application of s.11(2) NNPC Act, in the circumstances of this suit, would violate the provisions of ss.6 (6) and 36 (1) of the 1999 Constitution and similar provisions of the 1979 Constitution of the Federal Republic of Nigeria.

3. Whether the Court of Appeal was justified in dismissing the award of damages made in favour of the appellant (plaintiff) in the

trial court.

4. *Whether, in the circumstances of this case, the Supreme Court can hold that the Court of Appeal would have been justified in deciding that the respondent's Notice of Appeal, Additional Grounds of Appeal and Appellant's Brief of Argument in the lower court were incompetent in law and, on that basis strike out the appeal in the lower court.*"

"i. *Whether having held that the trial court had no jurisdiction and the entire trial and judgment a nullity, the Court of Appeal was right to have proceeded to consider other issues in the appeal.*

ii. *Whether the Court of Appeal was right in holding that the declarations made in favour of the appellant could not be faulted in the absence of any evidence to justify same by the trial court.*"

HELD (Unanimously allowing the appeal and dismissing the cross-appeal per **TOBI JSC**)

Pre-action notice - Right to - Applicability of waiver

1. Learned counsel for the appellant relied heavily on the decision of this court in Mobil Producing Nigeria Unlimited v. Lagos State Environmental Protection Agency. In that case, this court held, per Ayoola, JSC, that "The right to be served with a pre-action notice does not fall within the category of rights which cannot be waived." Learned counsel for the respondent argued to the contrary that as the requirement of pre-action notice affects the jurisdiction of the court, it cannot be waived by a party. He cited a number of cases.

I agree with the decision of this court in Mobil Producing Nigeria Unlimited v. Lagos State Environmental Protection Agency that the right to be served with a pre-action notice does not fall within the category of rights which cannot be waived. I do not think it is correct law to say that a party cannot waive his right in all matters affecting jurisdiction of the court. I do not want to go that far or to that extreme. (p. 1572 C)

JURISDICTION - Matters affecting - Categorization

2. In my view, for purposes of waiver, matters affecting the jurisdiction of the court should be categorized into two areas or compartments. These are jurisdictional matters affecting the public in the litigation process and those affecting the personal, private or domestic

rights of the party. While the former cannot in law be waived, the latter can be waived in law. An example of the former is filing an action in a court that has no jurisdiction to hear the matter. For example, filing an action in the High Court to determine a dispute between two States in the Federation of Nigeria. Certainly, a State High Court has no jurisdiction and as the issue involves a public right, none of the parties has the competence to waive it. I come to the second one. A good example is pre-action notice. In my view, service of pre-action notice is a personal, private or domestic right of the party to be served. He is the beneficiary of the service and so can waive it at will or on his terms. (p. 1572 G)

Pre-action notice - NNPC Act, s. 12(2) - Applicability of waiver

3. In Menakaya v. Menakaya (2001) 16 NWLR (Pt. 738) 203, this court held that a mandatory statutory provision directing a procedure to be followed in the performance of any duty is not a personal right to be waived. The facts of Menakaya are different from those of this case, and so cannot be used to justify the position taken by the respondent. That apart, I am not quite sure whether this court did not put the position too wide. I am inclined to that view in the light of the later decision of this court in Mobil. Finally in Bakare v. Nigerian Railways Corporation (2007) 17 NWLR (Pt. 1064) 606 where this court held that an action can only be properly constituted if pre-action notice is given in relevant cases, there was no issue of waiver.

I have taken the pains to examine the cases relied upon by counsel for the respondent in order to make the point clearly that the cases are inapposite. It is my humble view that section 12 (2) of the NNPC Act could be waived in law and that the respondent so waived the right in this case. (p. 1574 A)

DAMAGES - Award - Entitlement - Sufficiency of proof

4. Reacting to the evidence of PW4, the learned trial Judge said at page 130 of the Record:

“The evidence of PW4 which I accept has not been controverted or challenged in any material particular. Clearly it establishes that the plaintiff can no longer continue using its land for the purpose which it obtained it for, that is for industrial purposes, thereby the act of the defendant endangers the plaintiff’s existence in the land, de-

priving him of peaceful enjoyment of the land, thus entitling the plaintiff to award of damages.”

Contrary to the above, the Court of Appeal held that apart from Exhibit B, there is no evidence that the respondent lay new pipelines or even enter into the premises of the appellant. With the greatest respect, I do not agree with the Court of Appeal. On the contrary, I entirely agree with the learned trial Judge that the evidence of PW4 clearly established that the appellant “can no longer continue using its land for the purposes which it obtained it for, that is, for industrial purposes.” In my view, the appellant suffered damages. It is a different matter whether special damages were proved. (p. 1576 B)

DAMAGES - Special damages - Trespass - Proof

5. With the above plethora of evidence, I do not agree with the Court of Appeal that there was no evidence in proof of special damages on the alleged ground that there was no trespass. It is clear from the totality of the evidence that there was trespass on the land of the appellant by the respondent, a trespass which caused damages; damages which the appellant has proved specifically. The learned trial Judge correctly refused items (v) on special damages of N55,000,000 on the ground that it will amount to double compensation. On the issue of trespass, I see Exhibit B as the warning bell, which finally resulted or blossomed, from the stand point of the respondent, to trespass. The bottled hostilities in Exhibit B automatically followed, to the detriment of the appellant, giving rise to the trespass. I am therefore not with the Court of Appeal that there was no evidence of trespass. (p. 1580 A)

Resolution of issues - After a finding of lack of jurisdiction

6. Any court below the Supreme Court is in order to take, in the alternative, the merits of the matter after coming to the conclusion that it has no jurisdiction to hear the matter. This is to make sure that the case is not further delayed if the appellant court comes to the conclusion that the ruling on lack of jurisdiction is wrong. Accordingly, I am of the view that it is good wisdom on the part of the Court of Appeal to take the other issues in the appeal after coming to the conclusion that it had no jurisdiction to hear the matter. (p. 1580 D)

NOTABLE POINTS OF INTEREST

TOBI JSC

1. *Judicial Precedents - Amadi case did not involve a waiver*

Although this court held in *Amadi v. NNPC* (2000) 10 NWLR (Pt. 674) 76 that section 11 (2) of the NNPC Act affords absolute protection to the Corporation, the case did not involve waiver, as in this appeal. (p. 1573 H)

OGUNTADE JSC

2. *Civil cases are fought on the pleadings of parties*

A Civil case at the High Court is fought on the pleadings of parties. If a defendant does not raise a special defence based on facts which are known only to him, it is not the duty of the court to assume the function of raising such facts for him. A defendant who ordinarily should enjoy the protection afforded under Section 11 (2) of the NNPC who fails to raise the issue of non-service of pre-action notice has simply waived the defence and there is nothing preventing it from so doing. (p. 1582 G)

REPRESENTATION

Chief Robert Clarke SAN with him T.O. Ochonogor for the Appellants.

J. O. Odubela with him Mrs. J. Babayemi, C. Nwiyi Miss. And A. A. Waziri for the Respondent/Cross-appellant/Applicant.

CASES REFERRED TO

Onifade v. Olayiwola (1990) 7 NWLR (Pt. 161) 130

Ozibe v. Chief Alobe (1977) 7 SC 11

Ukatta v. Ndinaezi (1997) 4 SCNJ 117 at 136

Global Transport v. Free Ent. Nig. Ltd. (2001) 2 SCNJ 224

7Up Bottling Col. Ltd. V. Abiola and Sons Bottling Co. Ltd. (2001) 6 SCNJ 18

Nasiru v. State (1999) 1 SCNJ 83

Oshodiv. Evifunmi (2000) 7 SCNJ 295 at 323

Eguamwense v. Amaohizemwen (1993) 9 NWLR (R. 315) at 20

Labode v. Otubu (2001) 3 SCNJ 1 at 25

Seric v. Union Bank (2000) 12 SCNJ 184

Nkwocha v. Governor of Anambra State (1984) 6 SC 302

Korode v. Adelokun (2001) 7 SCNJ 370

Nwokoro v. Onuma (1990) 3 NWLR (Pt. 136) 77

Amadi v. NNPC (2000) 10 NWLR (Pt. 674) 76 at 107

Saude v. Abdullahi (1989) 4 NWLR (Pt. 116) 387 at 422

Bakare v. NRC (2007) 17 NWLR (Pt. 1064) 606 at 656

Menakaya v. Menakaya (2001) 9 SCNJ 1

Eboiqbe v. NNPC j(1994) 5 NWLR (Pt. 347) 649

Ebodaghe v. Okoye (2005) All FWLR (Pt. 241) 200 at 214

LEAD JUDGMENT BY TOBI JSC

Oil pipelines were constructed by the respondent on or adjoining the appellant's factory premises. The appellant regarded the act as illegal. Efforts by the appellant to make the respondent to remove the structures were rebuffed. The appellant sued the respondent without giving the statutory pre-action notice under section 12 (2) of the NNPC Act, 1977. The appellant asked for three declaratory reliefs and a relief on compensation for the sum of 200,000,000.00.

The learned trial Judge gave appellant judgment as at page 138 of the Record. On appeal to the Court of Appeal, that court held that the jurisdiction of the High Court was ousted by the failure of the appellant to give pre-action notice. The Court of Appeal also dismissed the award of damages by the learned trial Judge.

Dissatisfied, the appellant has come to this court. So too the respondent by way of cross-appeal. Briefs were filed and duly exchanged. Appellant formulated the following four issues for determination:

"1. Whether the right to be served with a pre-action notice under the mandatory provisions of s.11(2) of NNPC Act could, as a matter of law, be waived by the respondent NNPC, and if so, whether in the circumstances of this case, the respondent NNPC could be said to have so waived that right.

2. Whether the failure of the Court of Appeal to rule on the constitutionality or otherwise of the application of s. 11 (2) NNPC Act to the peculiar facts of this suit was justified, and if not, whether the Supreme Court can hold that the application of s.11(2) NNPC Act, in the circumstances of this suit, would violate the provisions of ss.6(6)

and 36(1) of the 1999 Constitution and similar provisions of the 1979 Constitution of the Federal Republic of Nigeria.

3. Whether the Court of Appeal was justified in dismissing the award of damages made in favour of the appellant (plaintiff) in the trial court.

B *4. Whether, in the circumstances of this case, the Supreme Court can hold that the Court of Appeal would have been justified in deciding that the respondent's Notice of Appeal, Additional Grounds of Appeal and Appellant's Brief of Argument in the lower court were incompetent in law and, on that basis strike out the appeal in the lower court."*

The respondent also formulated four issues for determination as follows:

i. Whether the Court of Appeal was not right in holding that
D *the failure of the appellant to issue a pre-action notice is a jurisdictional issue which robbed a trial court of its jurisdiction of the respondent before instituting suit.*

ii. Whether there was a Ground of Appeal upon which an issue for determination on the issue of the constitutionality or otherwise of
E *the application of section 11(2) of the NNPC Act, 1977 was submitted for consideration by the appellant.*

iii. Whether the Court of Appeal was not right in setting aside the award of damages made in favour of the appellant in the absence of any legal justification.

F *iv. Whether the respondent's Notice of Appeal, Additional Grounds of Appeal and the Amended Appellant's Brief of Argument filed in the Court of Appeal were not competent."*

The respondent, as cross-appellant, formulated the following
G two issues for determination of the cross-appeal:

i. Whether having held that the trial court had no jurisdiction and the entire trial and judgment a nullity, the Court of Appeal was right to have proceeded to consider other issues in the appeal.

ii. Whether the Court of Appeal was right in holding that the
H *declarations made in favour of the appellant could not be faulted in the absence of any evidence to justify same by the trial court."*

Learned Senior Advocate for the appellant, Mr. Robert Clarke, submitted on Issue No. 1 that the decision of this court in Mobil Producing Nigeria Unlimited v. Lagos State Environmental Protection

Agency (2002) 12 SCNJ 1 unequivocally establishes a principle that the right to be served with a pre-action notice given under any statute can be waived by the beneficiary. Learned counsel disagreed with the Court of Appeal which held that there was a conflict between *Mobil Producing Nigeria Unlimited v. Lagos State Environmental Protection Agency* and the case of *Captain Amadi v. NNPC* (2000) 5 SCNJ 1 which the court followed. He pointed out that there was no question or issue of waiver in *Captain Amadi*. Counsel also relied on *Katsina Local Authority v. Makudawa* (1971) 7 NSCC 119 and *Eze v. Okechukwu* (2002) 12 SCNJ 258 at 272. Learned counsel relied heavily on *Mobil Producing Nigeria Unlimited v. Lagos State Environmental Protection Agency* and urged the court to follow the decision as the respondent could and did waive its rights.

Learned Senior Advocate submitted on Issue No. 2 that the failure of the Court of Appeal to consider the submissions of the appellant on the constitutionality or otherwise of section 12(2) of the NNPC Act did not help the case of the respondent. He argued that if the Court of Appeal had found the submission to be valid, judgment could have been given in favour of the appellant. He cited *Onifade v. Olayiwola* (1990) 7 NWLR (Pt. 161) 130. Citing *Ozibe v. Chief Alobe* (1977) 7 SC 11; *Oke v. Nwaguinya* (2001) 1 SCNJ 157 at 173; *Ukatta v. Ndinaezi* (1997) 4 SCNJ 117 at 136; *Global Transport v. Free Ent. Nig. Ltd.* (2001) 2 SCNJ 224 and *7Up Bottling Co. Ltd. v. Abiola and Sons Bottling Co. Ltd.* (2001) 6 SCNJ 18, learned Senior Advocate contended that the Court of Appeal had a duty to consider the submission on the constitutionality or otherwise of section 12 (2) of the NNPC Act.

On Issue No. 3, learned Senior Advocate submitted that Grounds 7 and 8 of the Grounds of Appeal did not support the decision of the Court of Appeal on the issue of damages. The only ground which dealt with the issue of damages was Ground 5. As the ground was not argued, it must be taken as abandoned. He cited *Nasiru v. State* (1999) 1 SCNJ 83; *Comex v. Arab Bank* (1997) 4 SCNJ 38 at 82; *Hambe v. Hueze* (2001) 5 SCNJ 1; *Oshodi v. Eyifunmi* (2000) 7 SCNJ 295 at 323; *Osolu v. Osolu* (2003) 6 SCNJ 102 at 125; *Olorunfemi v. Asho* (1991) SCNJ 1 at 9; *Eguamwense v. Amaohizemwen* (1993) 9 NWLR (Pt. 315) at 20 and *Labode v. Otubu* (2001) 3 SCNJ 1 at 25.

Learned Senior Advocate submitted on Issue No. 4 that the Supreme Court, in the circumstances, can hold that the Court of Appeal was justified in deciding that the respondent's Notice of Appeal, Additional Grounds of Appeal and Appellant's Brief of Argument in the Court of Appeal were incompetent in law and on that basis, strike out the appeal in the Court of Appeal. He cited *Seric v. Union Bank* (2000) 12 SCNJ 184; *Mill v. Alesinloye* (2000) 4 SCNJ 214; *Nkwocha v. Governor of Anambra State* (1984) 6 SC 302; *Korode v. Adelokun* (2001) 7 SCNJ 370; *Osinufebi v. Saibu* (1982) 7 SC 104; *Ogbeide v. Onache* (1988) 1 NWLR (Pt. 70) 320 and *Nwokoro v. Onuma* (1990) 3 NWLR (Pt. 136) 77. He urged the court to allow the appeal.

Learned counsel for the respondent, Mr. John Odubela, submitted on Issue No. 1 that as the failure by the appellant to issue a pre-action notice affected the jurisdiction of the court, it cannot be waived by the respondent. He cited *Attorney-General of Kano State v. Attorney-General of the Federation* (2007) 6 NWLR (Pt. 1029) 164 at 181; *Amadi v. NNPC* (2000) 10 NWLR (Pt. 674) 76 at 107; *Saude v. Abdullahi* (1989) 4 NWLR (Pt. 116) 387 at 422; *Bakare v. NRC* (2007) 17 NWLR (Pt. 1064) 606 at 656; *Menakaya v. Menakaya* (2001) 9 SCNJ 1; *Eboigbe v. NNPC* (1994) 5 NWLR (Pt. 347) 649 and *Ebodaghe v. Okoye* (2005) All FWLR (Pt. 241) 200 at 214.

On Issue No. 2, counsel called the attention of the court to both the Notice of Appeal and the Additional Grounds of Appeal and submitted that there is no ground which complains about the constitutionality of the NNPC Act. He cited *Owners MV Gongola Hope v. SC (Nig.) Ltd.* (2007) 15 NWLR (Pt. 1056) 189 at 209 and *Omo v. JSC Delta State* (2000) 12 NWLR (Pt. 682) 444 at 454. Relying on *Amadi v. NNPC* (2000) 10 NWLR (Pt. 674) 76 at 107 and *Atolagbe v. Awuni* (1997) 9 NWLR (Pt. 522) at 567, counsel argued that pre-action notice is recognized procedurally and therefore not unconstitutional.

Counsel submitted on Issue No. 3 that the award of damages by the trial Judge was not justified as there was no legal basis for which the damages were awarded. He contended that the three sets of general/special damages granted were not specifically pleaded with their particulars. He specifically questioned the award of N22,740,000.00, for cost of building a new factory; N2,160,000.00

cost of dismantling machinery and equipment and re-installation; N40,500,000.00 as special damages for loss of factory for nine months and N2,000,000.00 general damages without any legal basis. He cited *X. S. Nig. Ltd. V. Taisei (WA) Ltd.* (2006) 15 NWLR (Pt. 1003) 533 at 551; *Saleh v. B. O. N. Ltd.* (2006) 6 NWLR (Pt. 976) 316 at 333. Counsel urged the court to hold that the Court of Appeal was B right in setting aside the award of damages.

Counsel submitted on Issue No. 4 that the Respondent's Notice of Appeal, the Additional Grounds of Appeal and the Appellant's Brief of Argument filed in the Court of Appeal are competent having C been filed within time. He relied on *Bhojsons Plc v. Daniel-Kalio* (2006) 5 NWLR (Pt. 973) 330 and *Seric v. Union Bank* (2000) (2006) 5 NWLR (Pt. 973) 330. He urged the court to dismiss the appeal.

Arguing Issue No. 1 of the cross-appeal, learned counsel argued that the Court of Appeal having held that the trial court had no D jurisdiction and that the entire trial and judgment was a nullity, the court had no right to have proceeded to consider other issues in the appeal. He cited the following cases on jurisdiction: *Lawal v. Oke* (2001) 7 NWLR (Pt. 711) 88 at 115; *Osadebay v. Attorney-General of Bendel State* (1991) 1 NWLR (Pt. 169) 525 at 572; *Gafar v. Governor of Kwara State* (2007) 4 NWLR (Pt. 1024) 375 at 403; *Gombe v. PW (Nig) Ltd.* (1995) 6 NWLR (Pt. 402) 402 at 418-419; *Okolo v. UBN Ltd.* (2004) 3 NWLR (Pt. 859) 87 at 110; *Obi v. INEC* (2007) 11 NWLR (Pt. 1046) 565 at 629 and *UAC v. Mcfoy* (1961) All ER F 1169.

Learned counsel submitted on Issue No. 2 that the Court of Appeal had no jurisdiction to have proceeded to consider the issue of declaratory reliefs having struck out the suit for lack of jurisdiction. Citing *Alao v. Akano* (2005) All FWLR (Pt. 264) 799 at 808 and *Kwajaffa v. BON Ltd.* (2004) 13 NWLR (Pt. 889) 146 at 172, counsel urged the court to allow the cross-appeal and dismiss the main G appeal.

Learned counsel for the appellant, in his reply brief, submitted on the respondent's Issue No. 2 that the respondent never canvassed H the issue of the provisions of section 12 (2) of the NNPC Act as that issue was raised for the first time at the Court of Appeal by leave. Counsel submitted that the appellant as the respondent at the Court of Appeal was perfectly entitled to raise the issue of the constitution-

ality of the provisions of the NNPC Act to support its argument on the provisions of section 12(2) of the Act. He cited INEC v. Musa (2003) 3 NWLR (Pt. 806) 72.

In his reply to Issue No. 3 of the respondent's brief, learned counsel contended that at the trial, the appellant, particularly through B PW1, led evidence to show particular losses which were accurately measured before the trial.

I begin with the first issue and it is whether section 12 (2) of the NNPC Act could, as a matter of law, be waived by the respondent. C ***learned counsel for the appellant relied heavily on the decision of this court in Mobil Producing Nigeria Unlimited v. Lagos State Environmental Protection Agency. In that case, this court held, per Ayoola, JSC, that "The right to be served with a pre-action notice does not fall within the category of rights D which cannot be waived."*** Learned counsel for the respondent argued to the contrary that as the requirement of pre-action notice affects the jurisdiction of the court, it cannot be waived by a party. He cited a number of cases.

E ***I agree with the decision of this court in Mobil Producing Nigeria Unlimited v. Lagos State Environmental Protection Agency that the right to be served with a pre-action notice does not fall within the category of rights which cannot be waived. I do not think it is correct law to say that a party cannot waive his right in all matters affecting jurisdiction of the F court. I do not want to go that far or to that extreme.*** On the contrary, it is ideal to consider each case on its own merits and not as a blanket principle of law to be applied across the board to all cases affecting or relating to jurisdiction.

G Ayoola, JSC, in my humble view, came out brilliantly in Mobil when he made the distinction between jurisdictional incompetence which is evident on the face of the proceedings and one which is dependent on ascertainment of facts, leads to error. ***In my view, for purposes of waiver, matters affecting the jurisdiction of the H court should be categorized into two areas or compartments. These are jurisdictional matters affecting the public in the litigation process and those affecting the personal, private or domestic rights of the party. While the former cannot in law be waived, the latter can be waived in law. An example of the***

former is filing an action in a court that has no jurisdiction to hear the matter. For example, filing an action in the High Court to determine a dispute between two States in the Federation of Nigeria. Certainly, a State High Court has no jurisdiction and as the issue involves a public right, none of the parties has the competence to waive it. I come to the second one. A good example is pre-action notice. In my view, service of pre-action notice is a personal, private or domestic right of the party to be served. He is the beneficiary of the service and so can waive it at will or on his terms. The right is not shared by members of the public or the public at large but is one specific to the party. If he decides to respond to the writ without service on him, he has the right to do so and the courts cannot hold that as the issue affects jurisdiction, he cannot waive his right to be served. In my view, where an issue of jurisdiction, like the issuance of pre-action notice is domestic to the parties, it can be waived at the pleasure and choice of the beneficiary. I seem to be repeating myself. I need the repetition.

Learned counsel for the respondent cited a number of cases. I should examine them. In *Saude v. Abdullahi* (1989) 4 NWLR (Pt. 116) 387 counsel sought leave to file and argue additional grounds of appeal on the issue of competence and jurisdiction of the trial court to hear the matter on the ground that the originating summons was signed by counsel and not by the trial Judge as prescribed by the rules of court. The Court of Appeal granted the application and dismissed the appeal. Dismissing the appeal, this court held that a breach of a rule of practice can only render a proceeding an irregularity and not a nullity. Such irregular proceeding can only be set aside if the party affected acted timeously and before taking a fresh step since discovering the irregularity. I do not see how the case is helpful to the respondent. There is some element of waiver, as in this appeal.

In *Eboigbe v. NNPC* (1994) 5 NWLR (Pt. 347) 649, this court held that section 12 (1) and (2) of the NNPC Act, 1977 has the same effect as a statute of limitation and that a statute of limitation begins to run from the moment the cause of action arose. Again, I do not see the relevance of the case in this appeal. The issue in this appeal is not statute of limitation but giving pre-pre-action notice.

Although this court held in *Amadi v. NNPC* (2000) 10 NWLR

(Pt. 674) 76 that section 11(2) of the NNPC Act affords absolute protection to the Corporation, the case j did not involve waiver, as in this appeal. ***In Menakaya v. Menakaya (2001) 16 NWLR (Pt. 738) 203, this court held that a mandatory statutory provision directing a procedure to be followed in the performance of any duty is not a personal right to be waived. The facts of Menakaya are different from those of this case, and so cannot be used to justify the position taken by the respondent. That apart, I am not quite sure whether this court did not put the position too wide. I am inclined to that view in the light of the later decision of this court in Mobil. Finally in Bakare v. Nigerian Railways Corporation (2007) 17 NWLR (Pt. 1064) 606 where this court held that an action can only be properly constituted if pre-action notice is given in relevant cases, there was no issue of waiver.***

I have taken the pains to examine the cases relied upon by counsel for the respondent in order to make the point clearly that the cases are inapposite. It is my humble view that section 12 (2) of the NNPC Act could be waived in law and that the respondent so waived the right in this case.

I now take the issue of the award of damages. The Court of Appeal, in rejecting the award of damages by the learned trial Judge, said at pages 243 and 244 of the Record:

"It must be borne in mind, that apart from the said letter - Exh. 'B' - the letter of appellants to the respondents, there is no evidence that they did any other overt act of either proceeding to lay the new pipeline or even enter into the premises or property of the respondents or to evict, eject the respondents or dismantle any of their property. Perhaps, see also the evidence of the PW1 at page 58.

In my humble view, the claims were anticipatory and based purely on speculation and conjecture. Exh. 'C' - the letter from the Ministry of Works, Housing and Land Development, Bauchi State, warned the appellants that the appellants "may have to take full responsibility for all eventualities."

They gave therein, their reason for saying so.

"Without much ado, the judgment in respect of the said declarations, in the circumstances, cannot be faulted. But the said awards for various sums, with respect, have no basis and cannot be justified.

The same are accordingly set aside by me.

My answer to the said issue No. 4.01 of the appellants is certainly in the negative.”

In paragraph 24 (d) of the Amended Statement of Claim, the appellant claimed the following as compensation:

“(d) N200,000,000.00 compensation made up as follows: B

(i) Cost of building a new factory and acquire land.....
N22,750,000.00

(ii) Cost of dismantling machinery & equipments and recreation by German Engineers including labour “ and transport..... N15,000.00 C

(iii) Loss of use of factory for 18 months.....
N78,750,000.00

(iv) Overhead costs, i.e. salaries for local and expatriate staff..... N3,500,000.00 D

(v) N55,000,000.00 special damages (vi) N25,000,000.00 general damages.”

PW4, a Consultant Chemical-Pro-Chemical Engineer said in his evidence in-chief at page 64 of the Record:.

“The NNPC has a right of way and this right of way is 25 metres E with the pipeline at the centre. Considering the positioning of the pipeline, this right of way was not met in environment in this case. The existing pipeline is 2 metres from the plant premises. The new pipeline was planned to pass through the plant premises. But in construction a bend has been negotiated and this bend was negotiated F within the interval of the plant i.e. 68 metres. Within this interval 4 Bends were negotiated to avoid the plant.

No matter how highly fortified a pipeline is it wears down with erosion. Erosion is the gradual removal of the lining of the conveying G pipeline due to attention & erosion. At this point where these Bends were negotiated 3 forces were in plane. The force due to momentum. The force due to pressure bulb up and the gravitational force. This erosion is inavoidable bends at the bends and could be easily compared with an automobile negotiating a sharp bend. There are several H cases of spillage in this country, e.g. Kachia, about 16.5 kilometres at Malele precisely. It took the pollution and control centre more 1 month to eradicate the leakage and spillage up. At the end of the catril exercise 50,000 cubic metres of petroleum product was recov-

ered. My advise is that this hazard cases cannot be visualized in this court room to see why either the NNPC should go or the plant should go, since the common slogan in risk management is avoid what you cannot contain & contain what you cannot avoid. Since the NNPC has insisted to exert on this enuiment full compensation
B should be paid to my CV.”

Reacting to the evidence of PW4, the learned trial Judge said at page 130 of the Record:

“The evidence of PW4 which I accept has not been controverted or challenged in any material particular. Clearly it establishes that the plaintiff can no longer continue using its land for the purpose which it obtained it for, that is for industrial purposes, thereby the act of the defendant endangers the plaintiff’s existence in the land, depriving him of peaceful enjoyment of the land, thus entitling the plaintiff to award of damages.”
C

Contrary to the above, the Court of Appeal held that apart from Exhibit B, there is no evidence that the respondent lay new pipelines or even enter into the premises of the appellant. With the greatest respect, I do not agree with the Court of Appeal. On the contrary, I entirely agree with the learned trial Judge that the evidence of PW4 clearly established that the appellant “can no longer continue using its land for the purposes which it obtained it for, that is, for industrial purposes.” In my view, the appellant suffered damages. It is a different matter whether special damages were proved. That I will take now.
E
F

On the issue of special damages, the learned trial Judge relied
G on the evidence of PW1. He said at pages 136 and 137 of the Record:

“Evidence establishing claim for special damage. PW1 in his evidence stated that the plaintiff company was valued in June, 1993 by Bamishe Associates in Kano, it was valued at N100,000,000.00, valuation report and admitted on the Assets of Feed and Food Farms (Nig.) Ltd, covered by C of O No. BA/33/04 tendered and admitted - Exhibit A.
H

Valuation of Land and Building in Exhibit A. ‘We are of the considered opinion that open market capital value of the leasehold interest in the property located at Bauchi industrial layout covered by

C of O BA/33/04 as described in this report dated 4 June, 1993 was.-in... the sum of N32,800,000.00.' This piece of evidence has not been contradicted, controverted or challenged. And it is a credible and admissible evidence. But the plaintiff in the statement of claim claimed - (i) Cost of building a new factory and acquire land = N22,750,000.00. As I cannot give the plaintiff more than what he claimed. I hereby award the plaintiff N22,750,000.00 for land & building.

Plaintiff claimed (ii) - cost of dismantling, machinery & equipments. N15,000,000.00. PW1 in his evidence stated that he was involved with the erection or installation of the machinery with two German Engineers. He stated that they were paid for their services, each one of them their charges was 100DM in addition with 50DM for each one as allowance per day. They provided accommodation and a car. Witness said he cannot recall the CM exchange rate for the dollar is in the rate of N10.00 for one dollar. The work fee or charge of 100DM + 50DM allowance a day, gives 150DM per day, per Engineer. For 6 days a week this amounts to $6 \times 150 = 900\text{DM}$ per week $\times 24 = 21,600\text{DM}$. The amount for 9 months will give a total fee of $21,600 \times 9 = 194,400\text{DM}$ for one Engineer for two Engineers therefore we then have a total of $194,400\text{DM} \times 2 = 388,800\text{DM}$. I was forced to using the current exchange rate of $\$ = \text{DM}$ which is $\$1$ to 1.8DM . $388,800\text{DM} / 1.8$ give $= \$216,000$. Converting the latter to Naira with exchange rate of $\$1 = \text{N}10.00$ gives $\$216,000 \times 10 = \text{N}2,160,000$. I hereby award the plaintiff N2,160,000.00 cost of dismantling machinery & equipment & re-installation. There is no material from which I can considered quantify (sic) the labour & transport, inclusive in the claim.

Plaintiff also claimed (iii) Loss of use of factory for 18 months = N78,750,000.00. PW1 in his evidence stated that the business they carry on the piece of land is flour mill industry. He said they process maize & wheat into flour gritx. That approximated their turn over when in full production, i.e. depending on the market price is N15,000,000.00 per month. The witness was not cross examined on the basis that his claim was excessive. I therefore accept the claim made out by PW1.

The figure given in evidence was not stated to be gross or net income. I therefore proceed to make reasonable deductions in arriv-

ing at an estimated net profit. Net profit after deductions on raw materials, salaries, running costs and other overhead cost is estimated at 30% of N15,000,000.00. This works out at N4.5 million per month. Therefore loss of use of factory for nine months (three months for dismantling of machine and 6 (six) months for re-installation at new premises) will amount to N4.5 million x 9 = N40.5 .million. I hereby award plaintiff the sum of N40,500,000.00 for loss of use of factory for nine months which was proved, (iv) Plaintiff claimed overhead cost, i.e. salaries for local & expatriate staff - N3,750,000.00 on expatriate staff this has already been taken care of in item (ii) above, on local staff salaries. I am not supplied with materials with which I can consider the salaries of local staff. (v) Plaintiff claimed N55,000,000.00 special damages. I am of the view that items (i), (ii), (iii) above are items of special damages - To consider this item will now amount to double compensation.”

PW1, the Director of the appellant, gave very detailed evidence of facts and figures from pages 51, 52, 53, 55, 57 and 60 of the Record. He tendered Exhibits A, B, C, D, E, F, G, H and I, which were admitted by the respondent without objection. I think I should quote some portions of the evidence of the witness.

On the value of the appellant, witness said at page 52 of the Record:

“The company has been valued in June 1993 by Bamishe Associates in Kano. It was valued at N100,000,000.00.”

On the business of the appellant on the land which was damaged by the pipelines of the respondent, witness said inter alia at page 56 of the Record:

“The business I carry on this piece of land is flour mill industry. I commenced the milling business in 1991. We process maize and wheat into flour grits and also offers for animal feeding. Approximately my monthly turnover when we are in full production and depending on the market prices is approximately N15 million per month. The wheat flour in the market now the coy prices is N1,200.00 per 50 kilo bag & we are able to process 20,000 bags a month. For maize the coy. price now is N335.00 per 50 kilo bag and we can produce 20,000 bags a month. This is apart from the offers which comes during the process - which can be around 4,000 bags and the actual price now is N80.000 per 50 kilo bag. We have so many cus-

tomers some of them in Kano, Maiduguri and in Bauchi."

On payment of two Germans to put the Factory to working condition, witness said at pages 56 and 57 of the Record:

"I was involved with the erection or installation of the machinery with two Germans. It took us six months to put the factory to working condition. The two Germans are German nationals and they came from Germany and they are I specifically brought them over from Germany for the purpose of installing the machinery. We paid them for their service for each one of them. Their charges is 100 Dutch Mark in addition of 50 Dutch Mark for each one as allowance, per day. We provide accommodation during this period and a car. Every day we work for 10 hrs during the installation period. From Monday-Friday 10 hrs every day on Saturday 7 hrs I cannot recall the Dutch Marks exchange rate. The dollar installation will be the same period 6 months, if we want to dismantle and will take us 3 months. The two German engineers have to be in during the 'dismantling period. The two German experts are called Scheneider & the other Gierzirck from my knowledge as an Engineer we would use the same parts if we take care very well during dismantling, normally we bring some spare parts if we want to carry on the work of dismantling and erection again and some special tools."

Cumulatively, ending his evidence at page 59 of the Record, witness said:

"We are in court now because in order to leave the place and to establish the business in safer place and leave the land as NNPC ask of us to do. We are asking the Hon. Court that the company should have the right to a compensation to enable us re-establish our business in a safe place. Our claim is that we are the owner of the land and that NNPC action is illegal and if we have to move from the land the NNPC will pay the Coy a compensation for that land of N200,000,000. In a break down is as follows:- The cost of Building in a new land for the machines and make the compound as it is now. The cost of building N22,750,000.00. The cost of dismantling and re-erection of the machines with the transports and other handling equipments N15,000,000. The Lost of Use of the factory 'during 18 months N78,750,000.00. The Overhead expenses during the 18 months for Technical Skill (Nigerians & Expatriates N3,500,000. Special Damages of N55,000,000. General Damages of N25,000,000."

With the above plethora of evidence, I do not agree with the Court of Appeal that there was no evidence in proof of special damages on the alleged ground that there was no trespass. It is clear from the totality of the evidence that there was trespass on the land of the appellant by the respondent, a trespass which caused damages; damages which the appellant has proved specifically. The learned trial Judge correctly refused items (v) on special damages of N55,000,000 on the ground that it will amount to double compensation. On the issue of trespass, I see Exhibit B as the warning bell, which finally resulted or blossomed, from the stand point of the respondent, to trespass. The bottled hostilities in Exhibit B automatically followed, to the detriment of the appellant, giving rise to the trespass. I am therefore not with the Court of Appeal that there was no evidence of trespass.

Let me quickly take the Issue No. 1 formulated by the cross appellant. ***Any court below the Supreme Court is in order to take, in the alternative, the merits of the matter after coming to the conclusion that it has no jurisdiction to hear the matter. This is to make sure that the case is not further delayed if the appellate court comes to the conclusion that the ruling on lack of jurisdiction is wrong. Accordingly, I am of the view that it is good wisdom on the part of the Court of Appeal to take the other issues in the appeal after coming to the conclusion that it had no jurisdiction to hear the matter.*** The cases cited by learned counsel for the cross appellant are inapposite. I do not think I will take the second issue, as it is related to the first issue. This is clear from the submission in paragraph 3.21, page 27 of the cross-appellant's brief of argument.

I think I have resolved the live issues in this appeal. I do not want to take the other two issues of constitutionality of pre-action notice and the Notice of Appeal, Additional Ground of Appeal as they relate to the Appellant's Amended Brief, as it will serve no useful purpose. In sum, the appeal is allowed. The judgment of the Court of Appeal is set aside. The judgment of the High Court is restored. I award N50,000.00 costs to the appellant.

MUSDAPHER JSC

I have read before now the judgment delivered by my Lord Tobi, JSC with which I entirely agree. For the same reasons so comprehensively discussed in the judgment which I respectfully adopt as mine, I too allow the appeal and set aside the decision of the Court of Appeal and restore the judgment of the trial High Court. I abide by the order for costs proposed in the judgment. B

OGUNTADE JSC

I have had the advantage of reading in draft a copy of the lead judgment by my learned brother Tobi JSC. I agree with his reasoning and conclusion. I need to dwell briefly however on the issue whether or not the court below was right in its reasoning that the failure of the appellant to serve a pre-action notice on the respondent robbed the trial court of the jurisdiction to entertain the suit brought by the appellant. C
D

In *Amadi v. N.N.P.C.* [2000] 10 N. W. L. R. (Pt.674)76, this Court emphasized the importance of compliance by a plaintiff intending to bring an action with the provisions of the law on pre-action notice against a statutory corporation. At pages 110-111 of the report, this Court per Karibi-Whyte JSC reasoned thus: E

“In the same decision a condition precedent was defined as one which delays the vesting of a right until the happening of an event. Section 11 (2) NNPC Act, 1977 has prescribed the conditions for commencing actions against the Corporation. If the rationale behind the provision as accepted is to give the Corporation breathing time so as to enable it to determine whether it should make reparation to the plaintiff the importance of strict compliance with the provisions prescribing the name and address of the plaintiff as against the guaranteed right of access to the court enshrined in section 36 (1) read together with section 6 (6) (b) of the Constitution becomes of critical importance. Access to the court means approach or means of approach to the court without constraint. F
G

In my opinion a legitimate regulation of access to courts should not be directed at impeding ready access to the courts. There is no provision in the constitution for special privileges to any class or category of persons. Any statutory provision aimed at the protection of any class of persons from the exercise of the court of its constitutional H

jurisdiction to determine the right of another citizen seems to me inconsistent with the provisions of Section 6(6) (b) of the Constitution. The complaint of the non-compliance with any of the prescribed content of the notice under Section 11 (2) is not that no notice has been served. It is that the notice is defective. Hence substantial compliance could have been made enabling the Corporation to decide the course of its action viz-a-viz the suit. It will be inequitable to regard such a situation as equivalent to absence of notice. If it is otherwise, a situation has now been erected of an unnecessary and improper legal impediment to access to court inconsistent with the constitutional rights of the courts under section 6 (6)(b) and of the citizen under section 36(1). ”

The submission of the respondent’s counsel before us is to the effect that the failure of the appellant to serve the respondent with a pre-action notice as prescribed by section 11(2) of the NNPC Act robbed the trial court of the jurisdiction to hear the appellant’s case which was the view of the court below. In my respectful view, the intendment of the law is that a plaintiff who fails to file a pre-action notice in accordance with Section 11(2) of the NNPC Act may not have a right of action.

In the instant appeal, there is no doubt that the appellant did not serve a pre-action notice as it should. But no objection was raised at the trial court as to the non-service of a pre-action notice. The necessity of a pre-action notice is to enable the ‘statutory corporation’ concerned to have “*breathing time so as to enable him to determine whether he should make reparation to the plaintiff.*” See *Ngelagla v. Tribal Authority Nongewa Chiefdom* [1953] 14 W.A.C.A. 325 at 327. It is to be expected therefore that a statutory corporation which is aggrieved by such non-service will bring the matter to the attention of the trial court.

A civil case at the High Court is fought on the pleadings of parties. If a defendant does not raise a special defence based on facts which are known only to him, it is not the duty of the court to assume the function of raising such facts for him, A defendant who ordinarily should enjoy the protection afforded under Section 11 (2) of the NNPC who fails to raise the issue of non-service of pre-action notice has simply waived the defence and there is nothing preventing it from so doing. In *Mobil Producing Nigeria Unlimited v. Lagos State*

Environmental Protection Agency [2002] 18 NWLR (Pt. 798)1 at 36-37, this Court per Ayoola JSC put the matter succinctly in these words:

"A pre-action notice which is for the benefit of the person or agency on whom or on which it should be served is not to be equated with processes that are an integral part of the proceedings-initiating process. As have been said in a number of authorities its purpose is to enable that person or agency to decide what to do in the matter, to negotiate or reach a compromise or have another hard look at the matter in relation to the issues and decide whether it is more expedient to submit to jurisdiction and have a pronouncement on the point in controversy. The law is clear that conditions I imposed for the benefit only of a particular person or class of persons can be dispensed with. In Graham v. Ingeleby (1848) 1 Exch.651 Alderson, B., said:

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

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

'If the object of a statute is not one of general policy, or if the thing which is being done will benefit only a particular person or class of persons, then the conditions prescribed by the statute are not considered indispensable. This rule is expressed by the maxim of law, quilibet potest renunciare juri pro se introducto. As a general rule, the conditions imposed by statutes which authorize legal proceedings are treated as being indispensable to giving the court jurisdiction. But if it appears that the statutory conditions were inserted by the legislature simply for the security or benefit of the parties to the action themselves, and that no public interests are involved, such conditions will not be considered indispensable and either party may waive them without affecting the jurisdiction of the court.'

The words 'Quilibet potest renunciare juri pro se introducto' mean that "An individual may renounce a law made for his special benefit." It was added as foot-note to the passage quoted above that "the words 'pro se' were introduced into the maxim to show that no man can renounce a right of which his duty to the public, or the claims of society forbid the renunciation." The right to be served with

a pre-action notice does not fall within the category of rights which cannot be waived.

I come to the conclusion that FEPA could waive the right to be served with a pre-action notice. I also hold without hesitation that it was FEPA for whose benefit section 29 (2) of the Act is made and which could decide in relation to the purpose of the sub-section whether it was expedient or not to submit to the jurisdiction of the court in the particular instance that could have raised the issue of non-compliance with section 29 (2). It will hardly be a satisfactory state of affairs were a person on whom pre-action notice should be served to have waived the protection of the Act and submit to the jurisdiction of the court, another party on whom service was not required is allowed to raise the issue of non-compliance. I hold that the first issue must be resolved in favour of the appellant."

It is in my humble view clear that the respondent, not having complained in his pleadings of non-service of pre-action notice, must be deemed to have waived such service and could not be allowed to complain subsequently of absence of jurisdiction in the trial court to hear the case arising from such non-service.

With respect to the damages I award in favour of the appellant. I am in agreement with Tobi JSC in the lead judgment that the appellant called sufficient evidence to justify the award of special damages made in its favour.

I would also allow this appeal and restore the judgment of the trial high Court. I award N50,000.00 costs in favour of the appellant.

MUHAMMAD JSC

I read in advance the judgment delivered by my learned brother, Tobi, JSC. I agree with his reasoning and conclusion. I abide by all consequential orders made in the judgment including order as to costs.

OGEBE JSC

I read before now the lead judgment of my learned brother Niki Tobi, JSC just delivered and agree entirely with his reasoning and conclusion and adopt the judgment as mine.