THE LAW ON PRE-ACTION NOTICE: A LOOK AT ITS CONSTITUTIONALITY AND EXCEPTIONS

BY
C.O. Anatogu Esq*

Abstract
Pre-action notice which is a creature of some statutory laws in Nigeria both at the federal and state levels, is a form of notice issued by an aggrieved person which is expected to be formally served on the other party before the commencement of a valid action. This work aimed at taking a second look at this legal phenomenon to ascertain its place vis-a-vis the Constitution of the Federal Republic of Nigeria, 1999 (as amended). It is not in doubt that there have been a number of decisions on the pre-action notice phenomenon in the past, but it appears that the decided cases on pre-action notice have not taken into account the provision of section 4 (8) of the 1999 Constitution of the Federal Republic of Nigeria (as amended) which explicitly provides that both the National Assembly and the State Houses of Assembly are not to make laws that will oust the jurisdiction of a court of law. The study argues that the import of a pre-action notice by its very nature temporarily suspends the jurisdiction of a court to entertain a suit that is ordinarily within its jurisdiction. The study examined the exceptions that could ignore the express provision that prescribes a pre-action notice prior to a civil suit. These exceptions could be found where the civil action to be brought is on a contract or where the action is a fundamental right suit, amendment or cases of judicial review. The researcher adopted the doctrinal research methodology and utilized both the primary and secondary sources of data including statutes, journals, textbooks, newspaper publications and internet data and materials. The study found that pre-action notice limits the right of a citizen to approach the court as soon as injury has arisen against the government or statutory body. The study recommended that efforts should be made to remove from our legislations, all such unconstitutional provisions on pre-action prior to a suit.
Keywords: Law, Constitution, Constitutional Law, Pre- Action Notice

1.0 Introduction

Whenever a person is aggrieved following the offensive action of another which is known to law, a cause of action is said to have arisen. If the offensive action is codified in a statute and made punishable then the remedial action taken in law is said to be criminal. Where on the other hand it is tortuous, contractual or even constitutional the remedial action in law is classed as civil. The focus of this paper is on the civil aspect of law, which is where the phenomena called 'pre-action notice' is recognized. Pre-action notice is a preliminary notice that must be served before a given civil action can be taken by a party against another in the event of a legal injury. This preliminary notice does not rob the courts of its ordinary jurisdiction to entertain a civil suit. It merely suspends same until the preliminary or pre- action notice is first served on the erring party. In law it is generally thought that failure to give or serve a pre-action notice will condemn a given civil action to being liable to be struck out.

However, in this discuss, we would be probing to see the known features of a pre-action notice and if there exists any known exception to pre-action notices prior to a suit. We would also look at circumstances that would allow for such exceptions where necessary.

2.0 Pre-Action Notice Defined

The operative word in this discus is the compound word "pre-action". As the name suggests, it is the notice that must be served on a prospective defendant in a future suit prior to a civil action. Pre-action notice is not known to our criminal law jurisprudence in Nigeria. There has not been any record of it.

* **CO Anatogu Esq.** MICMC, FCPM Onitsha based Legal Practitioner, Associate Nigerian Institute of International Affairs, Member Chartered Institute of Mediators & Conciliators and Fellow Chartered Institute of Public Management. Tel: +2348064144059email: chukaosi83@gmail.com..

In civil cases the pre-action notice is most often created by statutes, requiring that it must be served on any arm of government, government parastatal or statutory corporate[1]

The Pre-action notice for the most part is a written document filed in court by an aggrieved party complaining of an act or omission of a government or body or staff which resulted in an injury to the affected party, wherein the party makes known his desire to pursue remedy in the court of law.[2] In other words, it is a prospective plaintiff in a case that will serve or is expected to serve a pre-action notice to a future defendant in a future suit and who is entitled to same, often by statutory prescription.

3.0 The Essence of Pre-Action Notice

Nigeria was colonized by the United Kingdom until her independence in 1960. In those years of colonial presence, the laws applicable in United Kingdom found its way to Nigeria and became the foundation of our statutory laws. In the United Kingdom from whence we took our statutory practices. It is the law that the king or sovereign can do no wrong as the head of state.

In time that practice also cascaded down the tiers of government and institutions of government. This is what can be described as the doctrine of sovereign immunity. This practice has since changed over the years. The evolution of this practice of sovereign immunity has not entirely left us without the shackles of that past. In *Stitch v Attorney General of the Federation*[3], the Supreme Court of Nigeria frowned at the idea that the crown cannot do any wrong. The court found that the powers of Ministers who have been protected by the phrase "the king can do no wrong" are subject to judicial review.[4] At the moment there is no practice of sovereign immunity. But in its place, we have found the pre-action notice, which can be found in a host of federal and state legislations.

Just like our legislation, our courts have also recognized the place of pre-action notice in our legal space. In such recognition by our courts, it would appear that the pre-action notice is seen as an opportunity to draw the attention of the government or its agency to the offensive act or omission in the hope that the affected government body may make amends and thereby avoid the chance of litigation on the subject matter. In *Ugwuanyi v Nicon Insurance Plc*[5] the Supreme Court held;

> Pre-action notices are recognized procedural provisions. They give the defendant breaking time so as to enable him to determine whether he should make reparation to the plaintiff.

With these words, the Supreme Court appears to have under-scored the essence of Pre-action notice in our laws.

4.0 The Position of the Law on Failure to Issue Pre-Action Notice

From the foregoing, it is clear that a pre-action notice will precede the commencement of a civil action in a court of law, by a person seeking to sue the government or its agency. In looking at the position of the law on pre-action notice, it is important to observe that service or non-service of pre-action is a feature that would affect the competence or jurisdiction of a court to handle a civil case which it would otherwise have had jurisdiction to entertain.

The serious nature of a court's jurisdiction or competence to hear a case can be measured from the dictum of the courts on the subject. The court had described jurisdiction as the live wire of a case which should be determined at the earliest opportunity. If a court has no jurisdiction to determine a

[1] State Proceedings Law of Anambra State CAP 134, section 11(2); Local Government Act Vol. 3 Laws of the F.C.T 2007, section 124.

[2] *Ministry of Education Anambra State v Asikpo* [2014] 14 NWLR (Pt. 1427) 351.

[3] [1986] 5NWLR (Pt. 46) 1041.

[4] *Attorney General of Bendel State v Attorney General of The Federation* [1981] All NLR. 136.

[5] (2021)13 W.R.N. P 1 at 50 paras 15-20.

case, the proceedings remain nullity ab initio no matter how well conducted and decided. This is so since a defect in competence is not only intrinsic but extrinsic to the entire process of adjudication.[6] In the past the Supreme Court had cause to outline in three layers the features that will show the presence of jurisdiction or lack of it. The court per Bairamian F.J. summed up as follows:

> ...I shall make some observations on jurisdiction and the competence of a court put briefly; a court is competent when-
> 1. It is properly constituted as regards numbers and qualifications of the members of the beach, and no member is disqualified for one reason or another; and
> 2. The subject matter of the case is within its jurisdiction and there is no feature in the case which prevents the court from exercising its jurisdiction and
> 3. The case comes before the court initiated by due process of law, and upon fulfillment of any condition precedent to the exercise of jurisdiction.[7]

Therefore, the non-fulfillment of a condition precedent or implementation of any condition put in place by law prior to the institution of an action will rob the court of jurisdiction. In the context of this paper a pre-action notice when served on the government or its agency is a fulfillment of the condition precedent to instituting an action in court against the government or its agency.

In Anambra State, one will find an example of a statutory requirement of pre-action notice in section 11 of the State proceedings law.**[8]** The law on pre-action notice usually makes it mandatory for a prospective plaintiff in a case to serve a pre-action notice prior to the commencement of a civil action. A failure to serve pre-action notice on a government or its agency will rob the court of jurisdiction and render the suit liable to be struck out.**[9]**

Conversely there is no post action notice as a phenomenon known to law. If a plaintiff had failed to serve a pre-action notice prior to the institution of a civil action, such plaintiff cannot post-action serve notice to the government or its agency. The notice will be invalid. In *Arua v Nwele*[10] the trial court directed the plaintiff to serve a pre-action notice which it had failed to do, before the matter was instituted on the defendants (later the appellants). The court of appeal in dealing with the issue summed up as follows:

> On issue two, whether the court below was right in ordering the plaintiff/respondent to serve on the 1st and 2nd defendants/applicants with a post-action notice, post action notice is alien to our jurisprudence and has no legal coverage to make waves. The rationale is that there had been a litany or plethora of judicial authorities decided by law lords with regard to Pre-Action Notices and none of these makes reference to post-action notice. Hence it would be incongruous to make an order for the service of same when the law does not contemplate such. Little wonder learned counsel for the appellant submitted that the best order the court ought to have made was to follow the extant law by striking out the suit for

[6] *N.U.R.T.W v R.T.E.A.N* (2012) 10 NWLR pg 170; *Oloba v Akereja* (1998) 3NWLR (pt. 84) p 508.
[7] *Madukolu v Nkemdilim* (1962) ALL NLR 581 at 589-590.
[8] (n.1).
[9] *Bakare v N.R.C* (2007) 17 NWLR (pt. 1064) p 606.
[10] (2021) 3 W.R.N p105.

> want of jurisdiction. This is because once the defendants show that the court has no jurisdiction, the foundation of the plaintiff/Respondent's case crumbles and parties cannot be heard on the merit and that puts an end to the litigation.

5.0 Exceptions to Pre-Action Notice

To every general rule there is an exception. It is the same with pre-action notice. Let us take a look at occasions when a pre-action notice will not be necessary.

A. Contract:

A pre-action notice will not be necessary in a situation where a dispute arose out of a contract between parties thereto. This has been decided in a number of cases. One such case is *Nigerian Ports Authority v Construction General Fasura Cogeferspa & Anor*[11] the Supreme Court Per Ibekwe J.S.C. at pages 476-478 paras 30-15 held thus:

> We shall now deal with the other point which to our mind does not seem to be well-settled, namely whether the kind of statutory privilege which we have been considering is applicable to an action founded upon a contract. In other words, whether S. 97 of the Ports Act applies to cases of contract. We think that the answer to this question must be in the negative. We agree everything done or omitted or neglected to be done under the powers granted by the Act. But we are not prepared to give to the section the stress which it does not possess. We take the view that the section does not apply to cases of contract. The Learned Chief Justice, in deciding this point, made reference to the *Salako V L.E.D.B and Anor*, 20 N.L.R. 169 where de Commarmond S.P.J. as he then was, construed the provision of S. 2 of the Public Officers Protection Ordinance which is almost identical with Section 97 of the Ports Act, and thereafter stated the law as follows: "I am of opinion that section 2 of the Public Officers Protection Ordinance does not apply in cases of recovery of land, breaches of contract, claims for work and labour done etc." We too are of the opinion that de Commarmond SPJ; has quite rightly stated the law in the passage of his judgment cited above. It seems to us that an enactment of this kind i.e S. 97 of the Ports Act is not intended by the legislature to apply to specific contracts. It is pertinent to point out that the view which we have just expressed seems to be in consonance with the trend of judgments pronounced in English cases dealing with similar provisions in certain English Statutes.
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> We shall refer only to one case as an example. In the *Midland Railing Company vs The Local Board for the District of Withington* (1882-3} 11Q.B.D 788, the court of appeal construed S. 264 of the Public Health Act, 1875(38 &39 vict(55) which, more or less falls in line with S. 97 of the Ports Act, the subject matter of this appeal.

[11] (1974) 1 ALL NLR (pt. 2) p 463.

> We think that it is desirable that we should here set out the provision of S, 264 of the Public Health Act, 1875 as follows: "Section 264. A writ of process shall not be sued out against or served on any local authority, or any member thereof or any officer of a local authority, or person acting in his aid, for anything done or intended to be done or omitted to be done under the provisions of this act, until the expiration of one month after notice in writing has been served on such local authority, member, officer or person..." Delivering the judgment of the court at P. 794, Bratt, M.R. made the following illuminating observation; "It has been contended that this is an action in contract and that whenever an action is brought upon a contract, the section does not apply. I think that where an action has been brought for something done or omitted to be done under an express contract the section does not apply; according to the cases cited an enactment of this kind does not apply to specific contracts. Again, when goods have been sold, and the price is to be paid upon a quantum meruit, the section will not apply to an action for the price, because the refusal or omission to pay would be a failure to comply with the terms of the contract and not with the provision of the statute."
>
> We agree with their lordship's exposition of the law on this point. Clearly, the appellants claim and the 1st respondents' counterclaim in the present case are founded in contract."
>
> It is clear from the dictum of the Supreme Court above that an action founded in Contract does not require a Pre-Action Notice. Although from the case reviewed it would appear to suggest that Pre-Action notice is not applicable if it is a contract with statutory flavor; The action must also be for a specific contract. See also Ugwuanyi v Nicon Insurance Plc[12] [2021] 13W.R.N. Pg. 1 at 53-54 Lines 15-5 *(Quote)* and note that this decision is a dissenting decision of Rhodes Vivour (JSC).

B. **Fundamental Rights Action**

An action on the enforcement of a person's fundamental right action is another dimension of the exception to cases that does not require a pre-action prior to the commencement of same. Chapter 4 of the Constitution of the Federal Republic of Nigerian 1999 provides for a class of rights which are considered fundamental and inalienable to the individual person except in accordance with the said constitution.[13]

In section 46(1) of the chapter 4 of the foregoing constitution it provides for a right to any Nigerian Citizen to approach the court with a view to enforce any of the fundamental rights of a citizen where any such right is being or likely to be contravened in any state of Nigeria. The operative phrase in the fore-going section 46(1) of the constitution is "being or likely to be contravened". Conversely provisions like section 11 of the State proceedings Law Supra require that after there has

[12] Ugwuanyi supra at pg 53-54. Rhodes Vivour JSC expressed a dissenting view from the majority decision of the court and re-stated the earlier views of the Supreme Court per Ibekwe JSC in Nigerian Ports Authority (supra)

[13] Constitution of the Federal Republic of Nigeria 1999 (as amended), ss. 33-45.

been an infraction of one's right or injury suffered, that the affected individual must give a three (3) months pre-action notice before approaching the court.

A comparison of the two laws above will disclose that the constitution with respect to fundamental rights action took the right to approach the court for remedy a little further than usual, when it used the word "likely" in section 46(1). Meaning that though ones right has not been breach under chapter 4, but the individual in question has a reasonable belief that his fundamental right could be contravened, he is at liberty to approach the court to stop the infraction even before it takes place. It is definitely not in doubt that this constitutional provision and language thereof went over and above the intention of section 11 of the state proceedings law, which required a three months pre-action notice when there has been an actual breach or injury requiring remedy. This demonstrates that the Constitution does not wish the pre-action notice to feature in fundamental right actions. Aside from the above point, Section 1(3] of the CFRN 1999 made it abundantly clear that if any law is inconsistent with the provisions of the constitution such other law shall to the extent of that inconsistency be null and void. The law on pre-action notice which is usually statutory is at cross-purposes with section 46(1] of the constitution 1999. In that state the superiority provision in section 1(3] of the constitution will be activated to neutralize any conflicting statutory provision prescribing pre-action notice.

In *Samuel Adelakun v AG. Ogun State & 2 Ors*[14] the fundamental right of freedom from discrimination section 42 CFRN was in issue and the issue of Pre-action Notice came up. This is how the court resolved it:

> Actions pursuant to section 42 of the constitution have urgency woven around them so much so that a pre-action notice would definitely negate the purpose of the constitutional provisions and procedure. I am of the view that Pre-Action Notice referred to in section 45 of Ogun State University Law could only arise in a normal civil action. By the end of three months, the alleged infringement would have degenerated and resulted in mightier and probably irredeemable mischief or damage to the Applicant. 1 think it is in recognition of this type of situation that Nigeria has subscribed to the African Charter Pursuant to which the Applicant herein has also sought redress.'

In *Obasi & Ors v Fadeyi*[15] The Court of Appeal held that even if the issue of non-service of Pre-Action Notice had been properly raised at the court below, it cannot succeed in the face of the provisions of Section 46(1-3) of the Constitution of Federal Republic of Nigeria on enforcement of fundamental rights.

C. Amendments

In an existing or pending suit in court, where there is, an amendment to the statement of claim which did not introduce a new cause of action to the suit as constituted, there will be no need for a Pre-Action Notice. The Supreme Court in resolving an issue that arose from whether there is need to issue a pre-action notice following an amendment of the Statement of Claim in the suit, held thus: at page 208-209 Para G-A in *Nigeria Port Authority v S.E.S Ltd.*[16]

> It is this selfsame cause of action that is pleaded in paragraphs11,12 and 15 of the amended statement of claim. The pleadings in paragraph 12(b) and 16 of the amended

[14] NPILR 864

[16] (2016) 17 NWLR (pt. 1541) p 191

> statement of claim are only as to damages and do not affect the cause of action. In view of the fact that no new cause of action was introduced in the amended statement of claim it was not necessary to issue a new pre-action notice. On this issue, the reasoning and findings of the court of appeal at page 22 of its judgment which I have reproduced above cannot be faulted. I agree entirely with it. The amended statement of claim did not introduce any fresh cause of action to warrant the issuance of a fresh pre-action notice.

From the tenor of the foregoing dictum of the Supreme Court if a new cause of action is introduced in the cause of amending a statement of claim, then a pre-action notice must be issued and served on the affected government or its department/agency and statutory bodies where this is not done the newly introduced course of action will be incompetent and the court will lack jurisdiction to hear and determine same.

D. Application for Judicial Review

Cases concerning judicial review particularly certiorari against a government institution does not require a pre-action notice prior to the commencement of the suit.

6.0 A Critique on the Practice of Pre-Action Notice in Nigeria

A Pre-Action Notice can be defined as an advance notice from a prospective plaintiff to a prospective defendant (usually the government or its agency/statutory body) of the desire to file a civil action as a result of a wrong that has been done to the prospective plaintiff. The Supreme Court per MARIAM MUKHTAR JSC described it as:

> A notice by the plaintiff to the opponent of the reason why he is instituting a legal action against it, and the purport of it is to intimate the opponent of what to expect to be confronted with in the course of the legal proceedings. The law requires that a party must meet all the requirements contained in the relevant statute, for it is by so doing that the defendant will he seized of the action contemplated against it, so that it can give the claim a proper consideration on the step to take e.g., whether to contest the action or settle out of court.[17]

Conversely the Constitution of the Federal Republic of Nigeria 1999 (as amended) is the *grund norm* in Nigeria. It stands tall above every legislation made by the federal or state legislature. In Section 6 of the said Constitution, it created the judicial arm of the government in Nigeria and invested it with judicial functions. In Section 6(6)(b) of the foregoing Constitution, it also granted unimpeded access to court for the benefit of anyone having a cause of action against another. The subsection reads:

> 6(6)(b) The judicial powers vested in accordance with the foregoing provisions of this section:
> b. Shall extend to all matters between persons, or between government or authority and to any person in Nigeria, and to all actions and proceedings relating thereto, for the

[17] *Nigerian Ports Authority v S.E.S Ltd* (Supra) at pg 212 paras A-B.

> determination of any question as to the civil rights and obligations of that person.

The Constitution of Nigeria cannot grant the citizens of Nigeria an unimpeded access to court and the said access is then moderated by a legislative statute. Such situation is unconstitutional. Of course, the Constitution anticipated that there could be a situation of legislative oversight in making a laws or provision in a law that goes against the constitutional provision. The Constitution therefore made an express provision of what would be the fate of such conflicting legislative enactment. The Constitution stated categorically that if any law is inconsistent with the provision of the Constitution, the Constitution will prevail and that other law shall to the extent of that inconsistency be null and void.[18]

The Pre-Action Notice practice as we have it in a litany of legislation in Nigeria limits or constrains the right of a citizen to approach the court as soon as an injury has arisen in law against the government, its agency or a statutory body, until a pre-action notice has been given for a statutorily named period. This is not proper in the face of the foregoing argument in this sub-heading. This is because the period in which a pre-action notice subsists prior to a suit, is a period in which the jurisdiction of the courts of record created under the Constitution is ousted. It is not in doubt that one cannot approach the court prior to the expiration of the Pre-action Notice duration. But such approach to court will be quickly struck down as incompetent by the courts, going by the prevailing decisions of the court, as seen.

It is important to note that the Constitution of Nigeria expressly restrained the legislative houses at both the federal and state levels from making any enactment that ousts the jurisdiction of a court of law from entertaining a subject matter that is within the competence of court to handle. It reads:

> Save as otherwise provided by this constitution, the exercise of legislative powers by the National Assembly or by a House of Assembly shall be subject to the jurisdiction of courts of law and of judicial tribunals established by law, and accordingly, the National Assembly or a House of Assembly shall not enact any law, that ousts or purports to oust the jurisdiction of a court of law or of a judicial tribunal established by law.[19]

But the various legislative enactments that provided for Pre-action Notices have ousted or purportedly ousted the jurisdiction of the courts of law albeit temporarily, when they created a Pre-Action Notice within a legislation. Thereby, making laws that are inconsistent with the provisions of the Constitution. It does not matter whether the Pre-action Notice is for a duration that allows the government its agency or a statutory body to consider settlement or reparation with the aggrieved plaintiff. What is important is that the jurisdiction of the court is suspended or ousted for a time from entertaining a case that is within the jurisdiction of the court and this ouster of jurisdiction is against the express provision of the 1999 Constitution.

As though to emphasis the point, the very first provision of the 1999 constitution categorically declared the equality of all persons and authority before the law.
It reads:

> This Constitution is supreme and its provision shall have binding force on all authorities and persons throughout the federal Republic of Nigeria[20]

[18] See Constitution of the Federal Republic of Nigeria 1999 (as amended) S. 1(3).
[19] Constitution of the Federal Republic of Nigeria,1999 (as amended) 4(8).
[20] Constitution of the Federal Republic of Nigeria 1999 (as amended), S.1(1).

By the practice of pre-action notices handed down by the Federal and State legislature they sing a discordant tune from the Constitution and its intention as though to suggest that all animals are equal but some are more equal than the others. This gives the impression that the institutions of government are bigger than the nigerian people they ought to serve.

Aside from the above line of thinking the pre-action notice as we saw in the beginning of this paper descended from the old practice when the monarch and later the state was seen as not being able to do wrong. Such view cannot validly stand in a constitutional space like Nigeria.

There is no corresponding legislative enactment for pre-action notice in favour of the ordinary citizens against a suit of the government, its agency or statutory body at the federal or state levels. Meaning that the legislatures at the Federal or State levels have put the state or government ahead of the people, whereas the Constitution made provision for equality before the law. It is suggested that Section 1(1) of the 1999 Constitution is featuring in the Constitution because of our history of dictatorial regimes in the past.

7.0 Conclusion

The practice of Pre-Action Notice came to us from the English from where we got our adversarial litigation style and practices. Over the years pre-action notice has been a part of our law and practice in ligation. It was not until 1999 that the Constitution ushered in the unique provision as we have in section 4(8) mandating the Federal and State Legislature not to make laws that would oust the jurisdiction a court of law. However, it would appear from the trend of case laws available that our court has not taken note of the overriding effect of the foregoing section 4(8) of the constitution with respect to any law or provision that oust or purports to oust the jurisdiction of a court of law; in particular the pre-action notice. The said section 4(8) of the Constitution did not accommodate any of the ouster on the jurisdiction of a court, be it temporary or permanent. It is therefore clear that the presence of section 4(8) of the constitution heralded the end of the practice of pre-action notice in our body of law. Pre-action notice in the face of the Constitution now belongs to the Old Testament and must be left in that realm for good.

It is therefore recommended that effort should be made to remove from our legislations all such sections that prescribed pre-action notice prior to a suit in order to comply with the constitutionally prescribed unimpeded access to court. In particular to see that our laws in following the practice of pre-action notice does not conflict with Section 4(8) of the 1999 constitution which restrained the federal and state from making laws that ousts the jurisdiction a court even temporarily like the pre-action notice phenomenon.

It is also recommended that the courts stop giving credence to the pre-action notice by striking down such unconstitutional requirement in view of its conflict with section 4(8) of the 1999 Constitution.