IN THE HIGH COURT OF EDO STATE - NIGERIA
IN THE BENIN JUDICIAL DIVISION
HOLDEN AT BENIN CITY

BEFORE HIS LORDSHIP:HON.JUSTICE J.O. OKEAYA-INNEH, (JUDGE)

DELIVERED ON WEDNESDAY THE 13TH DAY OF JULY, 2016

SUIT NO. B/11M/2016

BETWEEN:

1.	**MR. FRIDAY IDEHEN**		
2.	**MRS. JULIET OROBOR**		
3.	**MR. SUNDAY EBOKPONMWEN ....**	**.....**	**APPLICANTS**
4.	**MADAM ADESUWA OMOGUN**		
5.	**MR. MUSA SAMI DABAI**		

AND

1.	**POLICE SERVICE COMMISSION**		
2.	**THE INSPECTOR GENERAL OF POLICE**		
3.	**THE ASSISTANT INSPECTOR GENERAL OF POLICE ZONE 5, BENIN CITY, EDO STATE**		
4.	**THE COMMISSONER OF POLICE, EDO STATE.**	**.....**	**RESPONDENTS**
5.	**MR. KINGSLEY SATURDAY KUEBOR**		
6.	**MR. SAMUEL UKATUE**		
7.	**MRS. ADESUW A LASISI**		
8.	**MRS. FLORENCE OMOROGBE**		
9.	**MRS. EUNICE ONAIWU**		

R U L I N G

This is a Ruling on a Notice of Preliminary Objection filed by the 5th to 9th Respondents/ApplicantsôCounseI on the jurisdiction of this Honourable Court to entertain this suit upon the following grounds:-

1. That this suit is incompetent having failed to satisfy the condition precedent to its institution and prosecution against the Respondents.

PARTICULARS:

a. Section 20[3] of the Police Service Commission [Establishment] Act 2001 provides that an Applicant who intends to sue the Police Service Commission must first issue and serve on the commission 30 days pre-action notice, which the Applicants in this Application failed to comply with before instituting this suit the affidavit in support exhibits and statement in support of this application being devoid of the facts of such compliance.

b. Section 97 of the Sheriffs and Civil Processes Act provides that any process in any suit that is to be served on any party outside the jurisdiction of the court must be issued pursuant to leave obtained for service of the Application/Writ out of jurisdiction together with an endorsement on the said originating process that the process is for service outside jurisdiction [Edo State in this case] and in whatever place it is meant to be served [Abuja in this case].

c. The Applicants failed to comply with this mandatory statute but purported to have served the process through the office of the 3rd Respondent on the 1st Respondent whose office is only at Abuja at Shehu Shagari Way and who is not of the same agency

with the 2nd to 4th Respondents in Benin who were rightly served through the office of the 3rd Respondents. The 1st Respondent has no business with the office of the 3rd Respondent.

d. The 1st Respondent is established under the Police Service Commission [Establishment] Act 2001 while the 2nd Respondent is established under the Police Act and Section 215[2] of the Constitution of the Federal Republic of Nigeria [1999] as amended which makes provision for the office of the 2nd Respondent under whom the Nigeria Police Force has been placed and every contingents of the Nigeria Police Force stationed in every state, which shall subject to the authority of the Inspector General of Police be under the command of the Commissioner of Police of that state.

e. The 1st Respondent on the one hand and the 2nd to 4th Respondents on the hand are different agencies such that while service on the 2nd to 4th Respondent through the office of the 3rd Respondent is permissible and good service under Order V Rule 2 of the Fundamental Rights Enforcement Procedure Rule, being agents of the 2nd Respondents who have offices in Benin, service on the 1st Respondent through the 3rd Respondent who

is not an agent of the 1st Respondent and who has no office on Benin but only at Shehu Shagari Way Abuja cannot be proper service as required by law. It is no service at all. ln essence there has been no personal service on the 1st Respondent.

f. That the Originating process meant to be served on the 1st Respondent who is in Abuja outside the jurisdiction of Edo State, has no endorsement on it as required by Section 97 of the Sherriff and Civil Process Act and above all no leave was sought and obtained for service on the 1st Respondent who is outside jurisdiction.

g. These Statutory Provisions are not limitation statutes that bar the presentation of the suit, but mandatory statutory steps necessary to aid the presentation of the suit. Failure to comply with them makes this suit premature and incompetent as affecting the mode of commencement of this application.

2. This Application is a nullity having violated order iv Rule 1 of the Fundamental Right Enforcement Procedure Rules 2009.

PARTICULARS:

a. This application was fixed for hearing 19 days after the filing of the (motion on notice to Enforce Fundamental Rights) contrary to the mandatory period of 7 days provided by Order IV Rule 1 of the Fundamental Rights Enforcement Procedure Rules [2009] thereby making this application incompetent and all steps taken therein a nullity.

b. This Application was filed on the 3rd of February 2016 and fixed for hearing on the 22nd of February 2016 at the 1st instance, a period of 19 days after filing of the motion on notice and subsequently adjourned till 11th of April 2016.

c. Rules of court and Statutory Procedure are made to be obeyed. Failure to comply with them is fatal to the proceedings.

d. When the attention of the court is brought at any stage to the incompetence of a suit the court is duty bound to terminate it.

e. A court is without jurisdiction when there is any defect in its composition or service or things left undone that robs on its competence.

RELIEF SOUGHT:

An Order dismissing this suit.

The application supported by a 13 paragraph affidavit deposed to by one Kingsley Saturday Igiebor with a Written Address. Learned Counsel for the Applicant formulated two issues for determination which is:

1. Whether this application having failed to satisfy the mandatory condition precedent for the institution of this suit and prosecution of this application is competent;

2. Whether this honourable court has the jurisdiction to adjudicate on an incompetent suit.

Arguing issue one as formulated, Counsel submitted that by the provision of Section 20(3) of the Police Service Commission (Establishment) Act 2001, the Respondents/Applicants are enjoined mandatorily to first issue a pre action Notice on the 1st Respondent before it is sued. The Respondents are mandated to issue a 30 days pre action Notice, which they failed to do before instituting this case. Counsel further submitted that this is a condition precedent to the institution of this case and that the Affidavit in Support and Statement as well as the exhibits filed by the Respondent/Applicants do not show any such compliance with this condition precedent. Counsel

submitted that failure to comply is fatal to this suit and placed reliance for this proposition on the case of **NNPC V. EVWORI** (2007) All FWLR Part 369 Pg 1324 @ 1345 - 1346 Paras. G-A where it was held that:-

> **"A pre- action notice is a condition precedent that must be done in a particular case before one is entitled to institute an action. It is not of the essence of such a cause of action but it has been made essential by law. The pre - action notice is therefore a condition precedent that must be complied with by an intending plaintiff before an action can be maintained against a defendant and it is to give the Defendant breathing time so as to enable him to determine whether he should make preparation to the plaintiff."**

Counsel further submitted also that the 1st Respondent is not an agent of the 2nd to 4th Respondent they being a creation of law by different statute with different function and different offices. The 1st Respondent is created by the Police Service Commission (Establishment Act) 2001 with its office only at Shehu Shagari Way Abuja, while the 2nd to 4th Respondents is a creation of the Police Act and Section 215(1) and (2) of the Constitution of the Federal Republic of Nigeria 1999 with head office in Louis Edet House, Abuja, and offices all over Nigeria including Benin City, Edo State. Counsel argued that the Police Service Commission is not the Agent of the Inspector General of Police or any of its unit. Counsel referred court the case of

ORGAN V. NIGERIA LIQUEFIED GAS LTD (2010) ALL FWLR (535) 293 AT 301 RATIO 14, Per Saulawu JCA thus:

> **"By virtue of section 215(1) and (2) of the Constitution, an Inspector General of Police shall be appointed by the president on the advice of the Nigeria Police Council from among serving members of the Nigeria Police Force. The Nigeria Police Force shall be under the command of the Inspector General of Police and any contingent of the force stationed in a state shall subject to the authority of the Inspector General of Police be under the command of the Commissioner of Police of the State"**

While Kekere- Ekun JCA (as he then was) held at ratio 2 thus:

> **""The Police Force" is defined as the Nigeria Police Force established under the police Act"**

Counsel submitted that the above authority puts it beyond debate that the Police Service Commission is not and never an agent of the Nigeria Police Force established under the Police Act nor an agent of the Inspect General of Police created by Section 215 (l) and (2) of the Nigeria constitution and that they are two separate bodies created by separate statutes and cannot be served any court process at the same address where they do not so reside or domicile together. Counsel further argued that the office of the 1st

Respondent is only at Shehu Shagari Way Abuja, with no offices in Benin or at the office of the 3rd Respondent. Counsel stated that in essence, the 1st Respondent sides not giving a statutory 30 days pre Action Notice, it has also not been served any court processes which together make this suit incompetent.

Counsel referred court to the case of **UTEK V OFFICIAL LIQUIDATOR** (2009) All FWLR Pt 475 Pg 1774 @ 1791 Para D F where the court held thus

> **"Where a plaintiff commences actions which require the fulfilment of a condition precedent or precondition for the commencement of the action, that condition must be fulfilled before the action can be validly commenced. Where there is non - compliance with a stipulated precondition or setting the legal process in motion any suit instituted in contravention of that condition is incompetent and that court is equally incompetent to entertain the suit. In the instant case the appellant's failure to seek the leave of court prior to instituting action against the Liquidator of Utuks Construction Marketing Company Ltd is a fundamental flaw. Having not fulfilled this condition precedent before instituting the action, it is incompetent and the trial High Court lacked the jurisdiction to have entertained the suit"**

Counsel submitted that any defect in the competence of a court renders the proceedings before it a nullity, a defect of competence being extrinsic to the adjudication. Counsel further submitted that where a statute provides for doing a thing or discharging any responsibility, that act must be done only as commandeered by law and by no other means contrary to the provision of the statute. For this proposition, Counsel relied on the case of **AGIP (NIG) LTD V. AGIP PETROL INTL.** (2010) ALL FWLR PT 520 - PG 119 @ 1205 Ratio 7 where the Supreme Court held thus:

> ñWhere by a rule of court, the doing of an act or taking a procedural step is a condition precedent to the hearing of a case, such rule must be strictly followed and obeyed. Non - compliance with a condition precedent is not a mere technical rule of procedure, it goes to the root of the case. The court will not treat it as an irregularity but as nullifying the entire proceedings.ò

Counsel submitted further that given that the office of the 1st Respondent is not that of the 3rd Respondent, but only in Abuja, Shehu Shagari Way, the 1st Respondent is a legal person resident outside the jurisdiction of Edo State and that by the provision of Section 97 of the Sheriff and Civil Process Act Cap S.6, LFN 2004, any originating process for service on a party

outside jurisdiction must be issued out upon the grant of the leave of court for service outside jurisdiction and must also have the Originating process so marked.

The section provides thus:

> **"Every writ of summons for service under this part out of the state or the capital territory in which it was issued shall, in addition to any other endorsement or notice required by the law of such state have endorsed thereon a notice to the following effect: "this summons is to be served out of the State and in the State" "**

It is Counsel's contention that where a defendant resides outside the jurisdiction of the court issuing the Writ, the Writ should be marked as provided in section 97 of the Act and failure to do so makes the writ incompetent and voidable, Moreso where there other defendants in the suit as it is in this case, who are within jurisdiction, section 98 requires that the Writ shall be marked concurrent and where this is not complied with, the Writ consequently becomes irreparably defective and voidable.

Counsel referred court to the case of **OWNERS OF THE MV'ARABELLA VS N A I C** (2008) FWLR PT 443 Pg 1208 AT1229 where the supreme court per Ogbuagu JSC stated emphatically that

> **"it is clear that the provisions of Section 97 of the Sheriffs and Civil Process Act are couched in mandatory terms. Any service of a writ without the proper endorsement as stipulated under section 97 is not a mere irregularity but is a fundamental defect that renders the writ incompetent".**

Counsel further submitted that a court is bound to terminate proceeding at any stage it becomes apparent that it is incompetent even where the parties refuses to raise objection to the irregularity, the court can suo motu terminate the proceedings. Counsel relied on the case of **MADUKOLU V. NKEMDILIM** 1 ACLC, Pg 228 where the court held thus:

> A Court is competent when properly constituted in terms of members, jurisdiction over the subject matter and initiation by due process. Put briefly a Court is competent when-
>
> 1. It is properly constituted as regards numbers and qualifications of the bench, 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 fulfilment of any condition precedent to the exercise of jurisdiction.ò

Supreme Court further held in Pg 234 that

"A court is bound to terminate proceeding at any stage it becomes apparent that it is incompetent- In the case of Westminster Bank Ltd v. Edwards, Viscount Simon, L.C held... a court not only may, but should, take objection where the absence of jurisdiction is apparent on the face of the proceedings. Thus an appellate court not only may, but must, take objection that it has no jurisdiction... Now it is clear that a court is not only entitled but bound to put an end to proceedings at any stage and by any means it becomes manifest that they are incompetent. It can do so of its own initiative, even though the parties have consented to the irregularity, because as Willes, J, said in CITY OF LONDON CORPORATION V. COX (3) in the course of giving the answers of the Judges to this House, "mere acquiescence does not give jurisdiction"

Counsel submitted that if the law prescribes a method by which an act could be validly done and such method is not followed, it means that that act could not be accomplished. The case of **AMAECHI V. INEC** (2008) AFWLR (Pt 407) 1 at 39, ratio 29

Counsel further submitted that by the provisions of **ORDER IV RULE 1** of the Fundamental Right Enforcement Procedure Rules, a subsidiary legislation made pursuant to Section 46(3) of the Constitution, this application which was filed on 3/2/16 was not fixed for hearing until 22/2/16

well over the mandatory 7 days statutorily provided. It was fixed for hearing 19 days after filling.

Counsel submitted that failure to comply with the law is fatal to this application it makes every step so far taken in it a nullity. Counsel relied on the case of **OGWUCHE & ORS V. MBA & ORS** (1994) 4 NWLR (Pt 336) 73 where the court held thus:

> **"The word "must" as used is mandatory. Effect must be given to the word. Therefore the court must fix it for hearing within 14 days. I am of the opinion that the conclusion to be drawn from the provision is that the proceedings that took place fourteen days after leave has been granted amount to a nullity".**

Counsel submitted that in this case Order 2 Rule 2 of the Fundamental Right Enforcement Procedure Rule 1979 was being interpreted, which is impari material with Order IV Rule 1 of the Fundamental Rights Enforcement Procedure Rule 2009 and that whereas the old Rules says ñThe application shall be entered for hearing Within 14 days after such leave has been grantedò, the new rules says ñThe application shall be fixed for hearing within 7 days from the day the application was filedò

Counsel contended that the Applicants failed to comply with this statutory provision thereby making the entire application a nullity.

Counsel further submitted that the Fundamental Rights Enforcement Procedure Rules which is made by the Chief Justice of Nigeria pursuant to Section 46(3) of the Nigeria Constitution has the same force of law as the constitution and so is binding and must be obeyed and that failure to comply with its provision is fatal to the proceeding.

In conclusion, Counsel submitted that this application is grossly incompetent and robs this court of the jurisdiction to entertain it.

Learned Counsel for the Respondent filed an 11 paragraph Counter Affidavit in opposition to this application and formulated one issue for determination which is whether in view of the special and peculiar nature of Fundamental Right Enforcement Proceedings and the general circumstances of this case the Respondents/ApplicantsôNotice of Preliminary Objection is sustainable .

Arguing the lone issue as formulated, Counsel submitted that the Notice of Preliminary Objection is totally misconceived and same was brought under a total misapprehension of the law and special and peculiar nature of the Fundamental Rights Enforcement Proceedings. Counsel further submitted that Fundamental Rights Enforcement Proceedings like Election Petition Proceedings is sui generis and that it is neither a civil nor a criminal proceedings. It is in a class of its own. Counsel submitted that for instance, time is of utmost essence in Fundamental Rights Enforcement Proceedings

and it is meant to be disposed of most expeditiously. Counsel stated that Fundamental Rights matters is a special creation of the Constitution of the Federal Republic of Nigeria 1999 (as amended) and the African Charter on Human and Peoples Right. On the superior nature of Fundamental Rights Matters over ordinary civil cases, Counsel placed reliance in the case of **NIGERIAN STORED PRODUCTS RESEARCH INSTITUTE & ANOR. VS. MATHIAS UGWU & ORS**. (2013) 15 W.R.N. Page 49 at Page 78 where the Court of Appeal per OGBUINYA J.C.A. held as follows:

> ñA fundamental right claim takes its pride of place among the comity of claims and it cannot play a second fiddle or be appurtenant to any civil or common law reliefs. In the eyes of the law, any civil or common law reliefs will be accessory to and follows fundamental right claims. Hence, the maxims: Accessorium Sequitur Princizpale - an accessory thing goes with the thing to which it is accessory and Accessorium non ducit, sed segauitur suum princlpale that which is the accessory or incident does not lead, but follows its principal.ò

Counsel stated that Furthermore Fundamental Rights matter also has its Procedure Rules different and distinct from ordinary Civil Procedure Rules and that the Procedure Rule of Fundamental Rights matters tremendously abridges the time for taking various steps in the proceedings in line with the urgency in Fundamental Rights matters. Counsel further stated it is

therefore, not in tandem with the urgency required in the Fundamental Rights matters to give 30 days Pre-action Notice meant for ordinary civil procedure rules. Counsel to the case of **GABRIEL JIM-JAJA VS. COMMISSIONER OF POLICE, RIVERS STATE & ORS**. (2013) 22 W.R.N. Page 39 especially at Page 56 where the Supreme Court per Ngwuta J.S.C. held as follows:

> **"A Community reading of Section 35(6) and 46(2) of the Constitution (supra) will 'give effect to the principle of ubi jus ibi remedium. By Sections 35 and 46 of the Constitution, fundamental rights matters are placed on a higher pedestal than ordinary civil matters in which a claim for damages resulting from a proven injury has to be made specifically and proved. Once the Appellant proved the violation of his fundamental rights by the Respondents, damages in form of compensation and even apology should have followed."**

Counsel argued that it is absurd to submit a contended by the Applicant's Counsel and even to contemplate that the 3rd and 4th Respondents are not the agents of the 1st Respondent as the 1st Respondent is the body that appoints and disciplines all members of the Nigeria Police Force except the 2nd Respondent who is appointed personally by the President of the Federal Republic of Nigeria. It is Counsel's contention that there cannot be more agency relationship than employer and employee. Counsel referred to Paragraph M(29) and (30) of the Third Schedule to the 1999 Constitution of the Federal Republic of Nigeria states as follows:

ñM Police Service Commission

29. The Police Service Commission shall comprise the following members -

(a) A Chairman; and

(b) Such members of other persons, not less than seven but not more than nine, as may be prescribed by an Act of the National Assembly.

30. The Commission shall have power to - I

(a) Appoint persons to offices (other than office of the Inspector-General of Police) in the Nigeria Police Force; and

(b) Dismiss and exercise disciplinary control over persons holding any office referred to in sub-paragraph (a) of this paragraph.ò

In the light of the foregoing, Counsel urged court to hold that there is agency relationship between the 1st, 3rd and 4th Respondents and to further hold that service on the 1st Respondent through the 4th Respondent is proper service under the Fundamental Rights (Enforcement Procedure) Rules, 2009.

Counsel further submitted on this sole issue that the Respondents complied with the time set down for in the Rules for hearing of the application as the matter was filed on the 3rd day of February, 2016 and it was set down for hearing on the 9th day of February, 2016 a period within seven days prescribed in the Rules.

Counsel submitted that paragraphs 3, 4, 5, 6, 7, 8, 9 and 10 of the affidavit in support of Motion are grossly defective and incompetent same having violently offended paragraph 115(2) of the Evidence Act, 2011 in that the said paragraph contain legal arguments and conclusions and that they are therefore incompetent and liable to be struck out. Reliance was placed on the case of **MILITARY GOVERNOR LAGOS STATE & ORS. VS. CHIEF EMEKA ODUMEGU OJUKWU** (1986) ALL N.L.R. (Reprint) Page 233 particularly at Page 250 where the Supreme Court per Eso J.S.C. held as follows:

> **"Paragraphs 14, 15, 16 and 17 reproduced above offend all known rules relating to affidavits. One of those rules that "an affidavit shall not 'contain extraneous matter, by way of objection, or prayer, or legal argument .or conclusion". That is the provision of Section 86 of the Evidence Act, Cap. 62 of 1958. Paragraphs 14 to 17 of the .affidavit in support of this Motion are at best, merely speculative and at worst wholly, argumentative. They are conclusions which are event not legally valid. They are assumptions not borne out by the facts of this case which is the only case now before the Court, the facts of which have be thoroughly gone into by the trial Court. In such a situation, it is not highly presumptuous of a mere Litigation Clerk to assume the role of Judge and jury and pronounce "illegality", "forcibly breaking in and taking over of another", "illegal occupation" and "legalizing an illegality" etc.? I wonder and my wonders grows even more apprehensive, when one recalls that by the**

mandatory provisions of Section 85 of the Evidence Act, Cap. 62 of 1958 "every affidavit used in the Court shall contain only a statement of facts and circumstances to which the witness deposes either of his own personal knowledge or from information which he believes to be true." Paragraphs 14 - 17 above do not contain a statement of facts. They rather contain unsupported assumptions and legal conclusions based on non-existent or not yet proven facts. From the point of view of these apparent contraventions of Sections 85 and 86 of the Evidence Act, paragraphs 14 to 17 of the affidavit in support of this Motion for a Stay ought to be struck out. And when these paragraphs are struck out, there is absolutely not one single averment to support the prayer in this Motion for a Stay of Execution."

Counsel argued that if the offending paragraphs are struck out, there will be no affidavit left for the Motion to stand on and the said Motion consequently becomes incompetent and liable to be struck out. We urge Your Lordship most humbly to so hold.

Counsel urged court to discountenance the Preliminary Objection and answer this sole issue in the negative and against the 5th ï 9th Applicants.

Replying on points of law, Learned Counsel for Applicants responded on the issue of this application being a nullity that the Application filed on 3/2/16 was not fixed for hearing on the 9th day of February 2016, as the

Respondents wants to make this Court believe. Counsel stated that what was fixed for hearing was the motion exparte for interlocutory injunction filed contemporaneously with the Application. Counsel argued that by order 1 Rule 2 of the Fundamental Right Enforcement Procedure Rules, 2009 the term óApplicationôwas exhaustively defined to mean

> **“An Application brought pursuant to these Rules by or on behalf of any person to enforce his fundamental rights”**

Counsel also stated that by Order ll Rules 2 and 3 of the Fundamentals Rights Enforcement Procedure Rules, 2009 the mode of commencement of Fundamental Rights Enforcement is stated thus:

> **”An application for the enforcement of fundamental right may be brought by any originating process accepted by the court, which shall subject to the provision of these rule, lie without leave of Court.”**

Rule 3.

> **“An Application shall be supported by a statement setting out the name and description of the Applicant, the relief sought, the grounds upon which the relief are sought and supported by an affidavit setting out the facts upon which the application is made"**

By the forgoing provision of law, Counsel argued that it is beyond conjecture that the Application which under Order IV Rule 1 is mandated to be fixed for hearing within 7 days from the day it was made is the Motion on Notice which is the Originating process in this suit and could never have been the motion ex parte and that the motion exparte that was fixed for hearing on the 9th February 2016 does not qualify to be the application in question as the exparte motion has no statement setting out the names and description of the Applicant, the relief sought and ground upon which reliefs are sought in support of it. Counsel stated that the said application (the motion on notice) which was filed on 3/2/16 was first fixed for hearing on the 22/2/16 well over 7 days of its filing as mandatorily required; and being contrary to law a nullity on the strength of the case of **OGWUCHE & ORS V. MBA & ORS** (1994) 4 NWLR (PT 336) 73, which decided an issue on point that the court must fix the application for hearing within the time specified in the law and that the proceedings that took place outside the period prescribed by law is a nullityò

On issue of pre-action notice mandatorily required to be served on the 1st Respondent before the Applicants can approach the court, Counsel submitted that the Applicantsô submission that it is unnecessary is not backed by any law or decided cases and that the mere ipxit dixit of the

Applicants will not suffice. Counsel contended that the Applicants are bound to obey the law, which is designed to aid the presentation of their application and that failure to comply is fatal to their application.

On the issue of service meant for the 1st Respondent being given to the 3rd Respondent, Counsel submitted that the 3rd Respondent is not an officer in the office of the 1st Respondent and cannot reasonably receive processes for it. The 1st Respondent is not resident within the jurisdiction of Edo State but only in Abuja and as such Applicants are enjoined to comply with the provision **SECTION 97** of the Sheriffs and Civil Process Act to enable it be served outside jurisdiction and that the case would have been different if it has an office in Benin. Counsel submitted that the Applicants in the application has conceded this fact as they never controverted it in their counter affidavit to the preliminary objection. Counsel stated that the office of the 3rd Respondent is not the office or an extension of the office of the 1st Respondent.

It is Counselõs further submission that the 1st Respondent has not been properly served and that it is immaterial that it appoints officers in the police force. Counsel argued further that the 1st Respondent is not a part of the police force as it is a commission with separate legislative creation and offices from that of the Nigeria Police Force.

Counsel maintained that the Applicants would suffer no harm in ensuring that 1st Respondent is properly served in Abuja, given that it has no office in Benin City. Counsel referred Court to **NIGERIA POLICE FORCE V. ONU** (2008) ALL FWLR PART 406 PG 1920 @ 1935-1936, PARAS. H-A

Counsel contended further that it is trite that a court is only competent to exercise jurisdiction in matter where the case comes by due process of the law and upon fulfilment of a condition precedent to exercise of jurisdiction and that a service that is supposed to be made on the 1st Respondent that was served on the 3rd Respondent cannot be said to be a proper service. Counsel also stated that the failure of the Applicants to serve a process on the 1st Respondents is fatal and service that is supposed to be made on the 1st Respondent at Abuja that was purportedly served on the 3rd Respondent in Benin is defective and renders the proceedings a nullity as non- service of the originating processes on the 1st Respondent goes to the root of this case. Counsel relied on the case of **OKOYE V. CENTRE POINT MERCHANT BANK LTD** (2008) ALL FWLR PART 441 PG 810 @ 824-825 PARAS. G-A ,

Counsel further submitted that the 1st Respondent has no office in Edo State but in Abuja and could not be served anywhere else but in Abuja and in which case the Applicant are supposed to seek for the leave of court to

serve the originating processes outside the jurisdiction of this court which is in Abuja as mandatorily requirement by the law. Counsel referred court to the case of **KIDA V. OGUNMOLA** (2006) All FWLR Part 327 Pg 402 @ 412, Paras. B - D where the Supreme Court held thus:

> **"where service of a court process is legally required, the failure to serve it in accordance with the law is a fundamental flaw and a person affected by any order but not served with the process is entitled ex debito justitiae to have the order set aside as a nullity. Where there is no service, there is no valid trial. In the instant case, the respondent was known to be outside jurisdiction and was not served with the originating process outside jurisdiction. It was therefore clear that he was not served and the effect is that the trial court had no jurisdiction to hear the suit.**

Counsel contended that where an Act prescribes a particular method of exercising a statutory power, any other method of exercising such power is excluded. Reliance for this proposition was placed in the case of **JOHNSON V. MOBIL PRODUCING (NIG) UNLIMITED** (2010) All FWLR Part 530 Pg 1337@ 1369, Para. H

On the issue of incompetent affidavit deposition, Counsel submitted that a critical look at paragraphs 3, 4, 5, 6, 7, 8, 9, and 10 of the affidavit in support of the motion will reveal that it does not in anyway offend or violate section

115(2) of the Evidence Act 2011, as same are statements of fact only and does not contain argument or conclusions.

Counsel urged court to discountenance the Respondentsô counter-affidavit and arguments and dismiss the application for failure to comply with statutory provision.

I have carefully considered this application and the written submissions of both learned Counsel. I now turn to the issues as formulated by both Counsel. Learned for the Applicantôs issues one and two are basically the same this court has simply been invited to consider whether this application has failed to satisfy the mandatory condition precedent for the institution of this suit, thereby questioning the competence of the suit. I will proceed to deal with Applicantôs issue as formulated having grounds upon with the Preliminary objection is anchored as the guide in providing answers to the questions posed therein.

The first ground upon which this preliminary objection is hinged is that by virtue of Section 20(3) of the **Police Service Commission (Establishment) Act 2001**, an Applicant who intends to sue the Police Service Commission must first issue and serve on the commission 30 days pre-action notice, which the Respondents in this Application failed to comply with before instituting this suit. Respondentsô Counsel has made the argument that the

requirement for pre-action notice is not in tandem with the urgency required in fundamental rights enforcement matters to give 30 days Pre-action Notice meant for ordinary civil procedure rules.

It is pertinent to ascertain at this point what the nature of pre-action notice entails in our jurisprudence. The requirement of pre-action notice where this is prescribed by law is known to have one rationale. It is to acquaint the defendant before hand of the nature of the action anticipated and to give him enough time to consider or re-evaluate his position in the matter as to whether to contest it. The giving of pre-action notice has nothing to do with the cause of action. It is not a substantive element but a procedural requirement, albeit statutory, which a defendant is entitled to before he may be expected to defend the action that may follow. See **EZE V. OKECHUKWU &ORS. (2002) LPELR-1194(SC).**

The Apex court also came to this conclusion in the case of **NTIERO V. NIGERIAN PORTS AUTHORITY (2008) LPELR-2073(SC)** on the nature of a pre-action notice when it held per Muhammad, J.S.C thus:-

> **"A pre-action notice connotes some form of legal notifications or information required by law or implied by operation of law, contained in an enactment, agreement or contract, which requires compliance by the person who is under legal duty to put on notice the person to be**

notified, before the commencement of legal action against such a person"

Perhaps the authority that best captures the mandatory nature of a pre-action notice is the apex decision in the case of **N.D.C.L. v. A.S.W.B (2008) Vol 5 M.J.S.C 118 at 147 paras. B-E, (2008) 3-4 SC (Pt.11) 202 at 213 paras. 10-15** per Tabai J.S.C thus:-

"Pre-Action Notice where required is mandatory. It is a condition precedent to the commencement of an action and non-compliance therewith renders the action incompetent and robs the Court of any jurisdiction to entertain same. See Umokoro v. NPA (1997) 4 NWLR (Pt.502) 656. Raymond Obeta & Anor v. Josephat Maduabuchi Okpe (1996) 9 NWLR (Pt.473) P.401 at 448-449."

It is an established principle of law that where a law provides for a procedure for doing an act, that procedure must be followed for the subsequent act to be valid. Thus once there is a condition precedent to be adopted before an aggrieved party does an act, if that condition precedent is not satisfied, the act carried out will be regarded as invalid. Moreover, where the law prescribes the doing of a thing as a condition for the performance of another, failure to do such a thing renders the subsequent acts void. The position of the law is clearly laid down in the case of **SAUDE**

v. ABDULIAHI (1989) 4 NWLR [pt.116] 387 at 422 where the Supreme Court held that-

> **"There is non-compliance with due process of law when the procedural requirements have not been complied with or the pre-conditions for the exercise of jurisdiction have not been complied with. In such a circumstance the defect is fatal to the competence of the trial court to entertain the suit. This is because the court will in such a situation not be seized with jurisdiction in respect of the action."**

If a law provides for the doing of an act with conditions, it is an elementary principle of practice that the courts have a duty to look into the matter to ensure that the conditions are fulfilled. It is a fallacy therefore to argue that the conditions do not matter and can consequently be ignored. See **INAKOJU & ANOR V. ADELEKE & ANOR** (2007) Vol 143, LRCN 31 per Niki Tobi, JSC (as he then was) of blessed memory.

The second ground upon which this preliminary objection is founded is that by Section 97 of the Sheriffs and Civil Processes Act, any process in any suit that is to be served on any party outside the jurisdiction of the court must be issued pursuant to leave obtained for service of the Application together with an endorsement on the said originating processes for service outside jurisdiction. The applicants contends that the Respondents in this application failed to

comply with the mandatory statutory provision ad purported to have served the originating processes meant for the 1st Respondent through the office of the 3rd Respondent.

Order V Rule 3 of the Fundamental Rights (Enforcement Procedure) Rules, 2009 is to the effect that the Application must be served on all parties directly, so long as a service duly affected on the Respondentôs agent will amount to personal service on the Respondent. For our purpose, can it be said that the 1st Respondent is an agent of the 3rd Respondent enabling the said 3rd Respondent to receive processes meant for the 1st Respondent?

Clearly the 1st and 3rd Respondents are two distinct creations by law. They are entirely two different bodies performing different functions and roles. From my reading of the statutes giving birth to them, the 1st Respondent is not an agent of the 3rd Defendant by any stretch of the imagination or logical deduction. It is even more so when it is realised that the 1st the Defendant has no office anywhere else other than in Abuja. I agree with the Counsel for the Applicant that it is immaterial that the 1st Respondent employs and disciplines the 3rd Defendant. That fact does not convert the

1st Respondent to be an agent of the 3rd Respondent within jurisdiction as to entitle the 3rd Respondent to receive processes meant for the 1st Respondent. In effect, the originating processes in this suit have not been served on the 1st Respondent. I so hold.

Respondentôs Counsel has also made the argument that the Fundamental Rights (Enforcement) Procedure Rules, 2009 does not admit of the Sheriffs and Civil Processes Act as regards service of processes out of jurisdiction especially as it concerns service of the originating process in this suit. He contended that the Rules are of a special nature and by extension sui generis. Having so held that the originating process in this suit has not been served on the 1st Respondent nothing ordinarily need be said further on this score, but it is pertinent to state that as regards the applicability of **Section 97** of the Sheriffs and Civil Process Act to fundamental rights matters such as this the pronouncement of the Court of Appeal in the case of **NGIGE V ACHUKWU** (2005) 2 NWLR (Pt. 909) 123 at 143., per Ogebe,

JCA (as he then was) on this issue is to me quite clear, unambiguous and instructive. My Lord reasoned thus:-

> **"It is my view that even in the cases of the enforcement of the fundamental rights, service of process thereof outside a State in another State must be done in accordance with section 97 of the Sheriffs and Civil Process Act since Fundamental Rights (Enforcement Procedure) Rules make no provisions for the mode of service."**

The Rules of this court admits of the provisions of the Sheriffs and Civil Process Act. Furthermore by virtue of Order V Rule 4 of the Fundamental Rights (Enforcement Procedure) Rules, where in the course of any human rights proceedings, any situation arises for which there is or appears to be no adequate provision in the Rules, the Civil Procedure Rules of the Court for the time being in force shall apply. I therefore make no hesitation in stating that service of the originating process in this suit ought to have complied with the mandatory provisions of the said Sheriff and Civil Process Act. I so hold.

On the submission of Counsel for the Respondents in the application that Applicantôs affidavit in support of the preliminary objection violated the provisions of Section 115(2) of the Evidence Act, 2011, and having gone through the gamut of the affidavit, I can only find one infraction of the said provisions of the Evidence Act and that is in paragraph 10. A conclusion was reached thereat. The said paragraph will be discountenanced.

From all that I have saying, I must come to the conclusion that this Preliminary Objection is sustainable. Applicantôs motion dated the 2nd day of February, 2016 having not complied with the condition precedent for its institution renders the said application incompetent and robs this court of the jurisdiction to entertain same. It is accordingly struck out.

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HON. JUSTICE J.O. OKEAYA-INNEH,
JUDGE
13/7/2016

COUNSEL:-

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(2) O. M. Obayuwana Esq., ... Counsel for the Respondent