IN THE HIGH COURT OF JUSTICE

OF EDO STATE OF NIGERIA

IN THE BENIN JUDICIAL DIVISION

HOLDEN AT BENIN CITY

BEFORE HIS LORDSHIP, HON.JUSTICE P.A.AKHIHIERO,

ON MONDAY THE
24TH DAY OF MARCH, 2025.

BETWEEN: ***SUIT NO.B/299/2009***

1. ***AUSTIN LAZ & CO. LIMITED ----------CLAIMANTS/RESPONDENTS***
2. ***DR. AUSTIN ASIMONYE***

AND

1. ***GUARANTY TRUST BANK PLC ----------DEFENDANT/RESPONDENT***
2. ***ASSET MANAGEMENT CORPORATION OF NIGERIA ----------DEFENDANT/OBJECTOR***

RULING

This is a Ruling on the 2nd Defendant's Notice of Preliminary objection dated 23/7/2024, praying for an order striking out this suit for lack of jurisdiction.

By the Notice of Preliminary Objection, the 2nd Defendant/Objector is challenging the competence of this suit because according to them, this Honorable Court has no jurisdiction to entertain this suit based on the following grounds:

1) That the Claimants failed to comply with conditions precedent to the invocation of the jurisdiction of the Honourable Court;
2) That the Honourable Court cannot assume jurisdiction over this matter/suit as presently constituted, as a fundamental pre-condition to the exercise of its jurisdiction having not been complied with by the Claimants as the suit was

instituted without compliance with Section 43(2) of the Asset Management Corporation of Nigeria Act, 2010;

3) It is the law that where there is a pre-condition to be satisfied before the institution of an action, any action initiated or commenced without the fulfilment of such laid down procedure or pre-condition will render the action incompetent and by extension, makes the Court seized of the matter bereft of jurisdiction to entertain or adjudicate on the matter so the 2nd Defendant is protected by the proviso to Section 43(3) of the Asset Management Corporation of Nigeria Act, 2010;
4) The 2nd Defendant is a Federal Government Agency;
5) The subject matter of this suit as it relates to the 2nd defendant and why it stands sued before this court is because of its administrative decision to acquire the non-performing loan of the 1st Claimant with the 1st Defendant and indeed its administrative action of taking over same in line with its statutory duty by virtue of S. 251 (1)(p)& (r) it is the Federal High Court that has the exclusive jurisdiction to try any cases where the administrative action or decision of a Federal Government agency is challenge or where its control and management is affected or restricted;
6) The court process against the 2nd Defendant has not complied with the preconditions of the enabling law;
7) The suit against the Defendant is an abuse of court process;
8) The suit is incompetent and the Honourable Court lacks both party and subject-matter jurisdiction to entertain same;
9) Jurisdiction is a threshold issue. The consequence of a Court considering a matter when it lacks the jurisdiction to do so on any ground whatsoever is that the proceedings and the judgement emanating from the proceedings of the Court are null and void;

Furthermore, the 2nd Defendant's Notice of Preliminary Objection is praying the Court for the following reliefs:

1) AN ORDER of this Honourable court declining jurisdiction to entertain this suit which challenges the administrative decision of a Federal Government Agency (The 2nd Defendant);
2) AN ORDER of this Honourable Court dismissing/striking out the suit for being incompetent;

AND FOR SUCH FURTHER OR OTHER ORDERS that this Honourable court may deem fit to make in the circumstances.

The 2nd Defendant's/Objector's Notice of Preliminary Objection is supported by a 14-paragraph affidavit and a written address of their counsel.

Upon receipt of the Notice of Preliminary Objection, the learned counsel for the Claimants/Respondents filed a Counter-Affidavit of twenty three paragraphs and a Written Address of their counsel.

In her written address, the learned counsel for the 2nd Defendant/Objector ***Bridget O. Emengo, Esq.*** formulated a sole issue for determination as follows:

"WHETHER THIS HONOURABLE COURT CAN ASSUME JURISDICTION OVER THIS SUIT CHALLENGING THE DECISION/ACTION, CONTROL AND MANAGEMENT OF A FEDERAL GOVERNMENT AGENCY, ESPECIALLY WHEN THE CLAIMANT FAILED/NEGLECTED/REFUSED TO COMPLY WITH THE MANDATORY REQUIREMENT OF SECTION 43(2) AND (3) OF THE AMCON ACT BY SERVING THE 2ND DEFENDANT WITH A PRE-ACTION NOTICE BEFORE BRINGING THIS CASE AGAINST IT"

Opening her arguments on the sole issue for determination, the learned counsel submitted that the failure of the Claimants to serve the 2nd Defendant with a pre-action notice before joining it to this suit in accordance with the provisions of ***section 43(2) and (3) of the Asset Management Corporation of Nigeria Act, 2010*** regarding issuance of pre-action notice is fatal.

Counsel referred the Court to ***Section 43(2) (3) of the Asset Management Corporation of Nigeria Act 2010 (as amended)*** which provides as follows:

"43.-(2) An action shall not be brought or commenced against the Corporation until after the expiration of 90 days notice in writing to the Corporation giving details of the alleged wrong done and remedy sought.

(2) If, after the expiration of the 90 days' notice stated in Subsection (2) of this section, the Corporation has not responded, the party concerned may issue a writ or other originating process against the Corporation provided always that action shall not be commenced or maintained against the Corporation or any of its shareholders, officers and directors for anything done intended to be done or purported to be done in good faith in the execution of duties, powers and obligation imposed on the Corporation or any of its shareholders, directors, or office."

Counsel posited that it is clear from the above provisions of the law that before a suit can be instituted against the and 2nd Defendant or any officer of the 2nd Defendant, a 90 days' notice of the intention of the Claimants to commence or join 2nd Defendant to the suit, must be issued and served on the 2nd Defendant. She said that by the explicit provision of the Act, no suit shall be commenced against the 2nd Defendant or any officer of the 2nd Defendant before the expiration of 90 days after the service of the pre-action notice and she urged the Court to so hold.

She submitted that the mere fact that the 2nd Defendant was not originally sued as a Defendant at the time of filing this suit but was subsequently joined as the 2nd Defendant by an order of court, cannot dispense with the need to serve the 2nd Defendant with a pre-action notice.

She maintained that an action instituted without the requisite pre-action notice having been properly served where it is required is nullified by such failure and such action cannot be validly commenced or maintained. She cited the following decisions on the point: ***Mobil v Lasepa (2002) 18 NWLR Pt. 798 Pg. 1, (2002) LPELR-1887(SC); Eze v Okechukwu (2002) 18 NWLR Pt. 799 Pg. 348, (2002) LPELR-1194(SC), Fawehinmi Construction Co. Ltd. v. OAU (1998) 6 NWLR Pt. 553 Pg. 171, (1998) LPELR-1256(SC), Ntiero v NPA (2008) LPELR-2073(SC), (2008) 10 NWLR Pt. 1094 Pg. 127.***

She emphasised that a pre-action notice must be served on a party who is sought to be joined as a Defendant to an existing suit.

Counsel posited that the law has since been settled by the doctrine of relating back, that once a party has been joined in a matter, the order for joinder is an amendment of the process by which the matter was begun and relates back to the date of the commencement of the matter and not to the date of the joinder. She relied on the case of ***Mallam V. Mairiga (1991) 5 NWLR Pt.189 Pg.114 at 127 128***, where the Court held thus:

"...the joinder of a party is an amendment of the writ of summons and the statement of claim...which amendment relates back to the time the writ or the statement of claim was filed, not the time of the amendment."

Counsel posited that whenever a party is joined as a defendant to a suit, there is always a consequential order that such defendant be served with all the processes in the matter, including the Writ of Summons properly amended to reflect the name of the new defendant as well as any new relief that may have been born by the joinder. She referred the Court to ***Order 13 Rule 20 of the High Court of Edo State (Civil Procedure) Rules 2018*** which provides as follows:

"20. Where a defendant is added or substituted, the originating process shall be amended accordingly and the Claimant shall unless otherwise ordered by a Judge, file an amended originating process and cause the new defendant to be served in the same manner as the original defendant.

Counsel maintained that the joinder of the 2nd Defendant in this suit was in compliance with the above quoted provision of the ***Edo State Civil Procedure Rules*** and the 2nd Defendant having been so joined as a defendant, this suit commenced against it. She said that a party who is joined by such motion for joinder has just had an action commenced against him and must be accorded all the rights and duties of an original defendant and she relied on the decision of the Court of Appeal in the case of ***AMCON v. ONYEDIKA & ANOR (2018) LPELR-43764 (CA).***

Counsel maintained that the whole essence of a pre-action notice is to lay bare to the defendant the nature of a contemplated action by an intending claimant so as to afford the said defendant an opportunity to decide whether he would settle or contest the action proposed against the defendant. See: ***AMADI V. NNPC (2000) 10 NWLR (Part 674) 76 at 110-111 and UMUAHIA CAPITAL DEVELOPMENT AUTHORITY V. IGNATIUS & ORS (2015) LPELR-24910 (CA)***.

Counsel submitted that the auxiliary verb: "SHALL" employed by the framers of the AMCON Act in ***sections 43(2) and (3) of the Act***, makes service of a pre-action notice on the corporation mandatory and she cited the cases of ***UGWU & ANOR V. ARARUME & ANOR (2007) 6 SC (Pt. 1) 88***; and ***AKINBISEHIN V. OLAJIDE (2018) LPELR-51172 (CA).***

She submitted that failure of the Claimants to comply with the mandatory requirements of ***Sections 43(2) and (3) of the AMCON Act, 2012 (as amended)*** is fatal to the case of the Claimants and renders their case incurably defective and incompetent.

According to counsel, as long as the legislation provides for such condition precedent before a Court can exercise jurisdiction over a matter, the pre-condition must be fulfilled otherwise, the suit would be incompetent and she cited the cases of ***Madukolu v. Nkemdilim (1962) 2 SCNLR 341;*** and ***Ugwuanyi v NICON Insurance PLC. (2013) 11 NWLR Pt. 1366 Pg. 546***.

Submitting further on the competence of this suit, learned counsel submitted that this Honourable court lacks both party and subject-matter jurisdiction to entertain this suit which is fatal to the case as presently constituted.

On this point, counsel posited that the 2nd Defendant is an Agency of the Federal Government whose administrative decisions or actions cannot be challenged before the High Court of a state.

She maintained that by virtue of ***Section 251(1) (a), (p) and (r) of the 1999 Constitution,*** the Federal High Court has the exclusive jurisdiction in civil cases and matters pertaining (among other things) to the Administrative action or decision of the Federal Government or any of its agencies.

She referred to the provisions of the Constitution which stipulates as follows:

"Section 251-(1): Notwithstanding anything to the contrary contained in this constitution and in addition to such other jurisdiction as may be conferred upon it by an Act of the National Assembly, the Federal High Court shall have and excise jurisdiction to the exclusion of any other Court in civil causes and matters.

(a) relating to the revenue of the Government of the Federation in which the said Government or any organ thereof or a person suing or being sued on behalf of the said Government is a party;

(p) the administration or the management and control of the Federal Governmentor any of its agencies;

(r) any action or proceeding for a declaration or injunction affecting the validity of any executive or administrative action or decision by the Federal Government or any of its agencies; and

Learned counsel referred the Court to the case of the Claimants' challenging the 2nd Defendant's administrative action and decision by which it assessed, considered and acquired the 1st Claimant's 8th February, 2008 and 9th February, 2009 loans from the 1st Defendant and the Claimants' reliefs contained in paragraph 24(m) of the Claimants' Statement of Claim praying for a perpetual injunction restraining the 2nd Defendant from carrying out its statutory duties.

Furthermore, learned counsel referred the Court to Paragraphs 6 - 11 of the affidavit in support of this Notice of Preliminary Objection where the deponent stated as follows:

"6. THAT I know as a fact that the 2nd Defendant's acquisition of the 1st Claimants' 8th February, 2008 and 9th February, 2009 loans from the 1st defendant was totally an administrative decision/action of a Federal Government Agency in that:

a. ***Before entering into a loan purchase agreement with the 1st Defendant, the 2nd Defendant reviewed the loan documents presented to it by the 1st Defendant;***
b. ***The 2nd Defendant made an administrative decision that the loans, subject matter of this suit, qualified as an Eligible Bank Asset from an Eligible Financial Institution;***
c. ***The 2nd Defendant in exercise of its control and management of such Eligible Bank Assets from Eligible Financial Institutions, which 2nd Defendant had made an administrative decision that the loan qualified as, made a further administrative decision to acquire the loans and brought them under its control and management.***

7. THAT I know as a fact that the 2nd Defendant made an administrative decision to purchase and indeed purchased the 1st Claimant's non-performing loan from the 1st Defendant on the 6th April, 2011 in good faith as a bona fide purchaser for value without notice of the pendency of this suit but was subsequently joined to this suit by an order of the High Court of Edo State.

8. THAT before the 2nd Defendant was joined to this suit by the Claimants the 2nd Defendant was not first served with any pre-action notice so the suit against the 2nd Defendant is an abuse of court process, incompetent and the Honourable Court lacks jurisdiction to entertain same.

9.THAT I know as a fact that the 2nd Defendant, as a Federal Government agency is entitled to 90 day's pre-action notice before any action can be instituted, maintained or brought against it.

10.THAT I know as a fact that the Claimants filed this suit as far back as 2009 and became aware that the 2nd Defendant had taken over the management and control of the loan on 6th April, 2011, with a view to efficiently resolving the non-performing loan in exercise of its statutory function as a Federal Government agency.

11.THAT in February, 2017 the 2nd Defendant received a hearing notice in respect of this suit after it had been joined to this suit as the 2nd Defendant, yet, Claimants failed/neglected/refused to serve the 2nd Defendant with any pre-action notice before joining it to the instant suit and I know as a fact that;"

Again, she referred to ***section 43(2) of the Asset Management Corporation of Nigeria Act 2010*** and submitted that 2nd Defendant ought to have been sued at the Federal High Court after being served with the pre-action notice of intention to sue

instead of being sued at the High court of Edo State. She relied on the cases of ***NEPA v EDEGBERO (2002) 18 NWLR (PT.798) 79*** and ***PDP v SYLVA (2012) LPELR – 7814 (SC) 52-53***.

Counsel maintained that the claim and reliefs sought in this suit relate to the executive and administrative actions or decision of the 2nd Defendant who is indisputably a Federal Government Agency, as even the Claimant admitted its status at paragraph 4 of the Amended Statement of Claim. She said that the reliefs sought relates to the revenue of the Federal Government, affects the validity of the actions of a Federal Government agency and contain declarations and injunctions against the 2nd Defendant (a Federal Government Agency).

In conclusion, learned counsel urged the Court to decline jurisdiction and strike out this suit in its entirety for being incompetent with substantial costs in favour of the 2nd Defendant.

In his Written Address, the learned counsel for the Claimants/Respondents, ***E.K. Omare Esq.*** formulated two issues for determination as follows:

i. ***Whether having regard to the fact that the 2nd Defendant has taken steps and being party to this matter for 13 years, it has waived the procedural right to be served pre-action notice?***

ii. ***Whether the 2nd Defendant's challenge to the subject matter jurisdiction of this Honourable Court is not an abuse of Court process having regard to the judgment of the Court of Appeal in Appeal* No. CA/B/263/2019: AUSTIN LAZ & CO. LIMITED & ANOR v. GUARANTY TRUST BANK PLC & ANOR *arising from this suit?***

Thereafter, the learned counsel articulated his arguments on the two issues seriatim.

ISSUE 1:

Whether having regard to the fact that the 2nd Defendant has taken steps and being party to this matter for 13 years, it has waived the procedural right to be served pre-action notice?

Arguing this first issue, the leaned counsel submitted that the 2nd Defendant who was joined as a party in this suit on 16/10/2012 without opposition from it and took steps by filing a motion on notice on 1/2/2013 seeking for the matter to be struck out for absence of cause of action and did not raise the issue of non-service of pre-

action notice for thirteen years has waived its procedural right to service of pre-action notice.

He posited that jurisdiction is a threshold issue and without it, a court of law cannot exercise any lawful powers and he cited the following cases: ***USMAN DAN FODIO UNIVERSITY V. KRAUS THOMPSON ORGANISATION LTD (2001) 15 NWLR pt. 736 p. 305; NNONYE v. ANYICHIE (2005) ALL FWLR (Pt. 253) 604, 630***.

He submitted that the jurisdiction of a court of law is in two aspects: **substantive and procedural jurisdiction** and he cited the case of ***A.G KWARA STATE & ANOR V. ADEYEMO & ORS (2016) LPELR-41147(SC), pages 14 to 16***. He said that substantive jurisdiction defines the substantive right of parties while procedural jurisdiction deals with procedural compliance preparatory to the filing of an action.

He submitted that the service of pre-action notice is a procedural right and deals with the procedural jurisdiction of a court of law and a party entitled to a procedural right is required to raise same timeously without taking further steps upon being sued or joined to an action. He referred the Court to the case of ***OLUCHI & ANOR V. JOSEPH & ORS (2023) LPELR-61575 (CA), pages 28-29, paras F-G*** where the Court of Appeal, per ***Waziri, JCA,*** stated the law in clear terms thus:

"***It is also important to draw a distinction between procedural jurisdiction and substantive jurisdiction. A procedural jurisdiction can be waived while substantive jurisdiction cannot be waived. This distinction was pronounced by the Supreme Court in the cases of Attorney General Kwara State V. Adeyemo (2017) 1 NWLR (Pt 1546) 210; Achonu vs Okuwobi (2017) 14 NWLR (pt. 1584) 142. The Apex Court went further to pronounce that it is a matter of substantive jurisdiction that can be raised at any time and which if resolved against a party renders the entire proceedings a nullity ab-initio but not matters of procedural irregularities. Matters of procedural irregularity must be raised by a party at the earliest opportunity before taking further steps in the matter otherwise. It will be deemed that same is waived by the party and be foreclosed from raising it.''***
(Underlining supplied by counsel)

Learned counsel submitted that the apex court has held that the issue of service of pre-action notice is a matter of procedural jurisdiction. He referred to the case of ***MOBIL PRODUCING NIGERIA UNLIMITED V. LAGOS STATE ENVIRONMENTAL PROTECTION AGENCY AND OTHERS (2003) F.W.L.R***

(Pt. 137) 1029, 1052 where the apex court, per ***Ayoola, JSC*** (as he then was) held thus:

"Service of a pre-action notice on the party intended to be sued pursuant to a statute is, at best, a procedural requirement and not an issue of substantive law on which the rights of the Plaintiff depend. It is not an integral part of the process for initiating proceedings'' (underlining supplied)

Learned counsel posited that the implication of the issue of service of pre-action notice being a procedural requirement is that, a party entitled to it is required to raise it timeously. He also referred to the case of ***KATSINA LOCAL AUTHORITY V. MAKUDAWA (1971) NSCC 119, 124, paras 10-35*** where the Supreme Court while considering a provision similar to section 42 (2) and (3) of the AMCON Act, held *inter alia* thus:

"We are of course in agreement with the High Court in Bomu N. A. v. Audu Biu (supra) that the provisions of s. 116(2) are mandatory, but we do not consider that this characteristic makes the sub-section incapable of being waived. An irregularity in the exercise of jurisdiction should not be confused with a total lack of jurisdiction……It is not open to argument that if such condition precedent is not so pleaded the defendant would by the simple rules of pleadings be taken to have waived whatever rights he possesses in the subject-matter...'' (underlining supplied).

Counsel emphasised that the absence of service of pre-action notice does not deprive the court of the jurisdiction *ab-intio* and he referred to the case of ***FEED AND FOOD FARMS (NIG.) LTD V. NIGERIAN NATIONAL PETROLEUM CORPORATION (2009) 12 NWLR (Pt. 1155) 387, 401.***

He maintained that service of pre-action notice as in this case can be waived. According to him, where a party submits to the procedural jurisdiction of the court where pre-action notice was not served and did not raise it timeously, such a party is deemed to have waived his right to be served the notice and he cited the cases of ***OLUCHI & ANOR V. JOSEPH & ORS (2023) LPELR-61575 (CA)*** and ***MEKWUNYE V. IMOUKHEDE (2021) ALL FWLR (Pt. 1080) 1012, 1041, paras E-G.***

He posited that in the instant case, the right to raise the issue of non-service was waived when it was not raised during the determination of the motion for joinder on 16/10/2012 and when the 2nd Defendant filed its application for its name to be struck out for non-disclosure of cause of action on 1/2/1013.

He contended that by taking steps and participating in this suit for 13 years without challenging jurisdiction on the basis of non-service of pre-action, the 2nd Defendant is deemed to have waived its right to be served pre-action notice and he urged the Court to so hold.

Counsel submitted that the right to be served pre-action notice is not to be used as an ambush or weapon to delay the hearing of a case or bar a party from expressing its grievances in court. He reiterated that the purpose is to give the party entitled to it the opportunity to address the concerns raised by the potential Claimant before an action is filed in court.

He said that where the notice is not served and raised timeously, the Court can make an order for the service to be done to enable the matter to proceed.

However, he said that in this case, the Claimants have waited for 13 years to raise the issue to deliberately create obstacles to the hearing of this matter and raise potential issues of statute of limitation considering the fact that the cause of action against it arose in 2012.

He said that this is a court of law and equity litigation is not a hide and seek game. He referred the Court to the case of ***NEWS WATCH COMMUNICATION LTD VS ATTA (2006) ALL FWLR (Pt. 318) 580, 602, paras D-E***.

Learned counsel submitted that the case of ***AMCON V. ONYEDIKA & ANOR (2018) LPELR-43764 (CA)*** which the 2nd Defendant relied upon is not applicable to the facts and circumstances of this case for the following reasons:

(i) In **AMCON V. ONYEDIKA & ANOR,** the party sought to be joined (AMCON) timeously raised the issue of non-service of pre-action notice during the application for joinder by opposing the application. In the instant case, the 2nd Defendant did not oppose the application for joinder when it came up for hearing on 16/10/2012;

(ii) Furthermore, in **AMCON V. ONYEDIKA & ANOR,** the party joined (AMCON) did not take any further step upon its joinder, but the only step taken was to challenge the non-service of pre-action notice. In the instant case, the 2nd Defendant took steps in this action by filing a motion notice on 1/2/2013 seeking for the suit to be struck out against it for non-disclosure of cause of action and did not raise the issue of non-service of pre-action notice;

(iii) In the **AMCON V. ONYEDIKA & ANOR,** the Objector timeously raise its objection without wasting any time, while in the instant case, it took the 2nd Defendant 13 (Thirteen) years to raise this objection having participated in

the matter and the court having exercised jurisdiction including judgment of the Court of Appeal.

Consequently, he urged the Court to hold that the 2nd Defendant/ Objector waived its right to the service of pre-action notice by not raising the issue of non-service of pre-action notice when the joinder application came up for hearing, when it took steps by filing motion on notice on 1/2/2013 and participating in this matter for the past 13 years and to resolve this issue in favour of the Claimants/Respondents.

ISSUE TWO:

Whether the 2nd Defendant's challenge to the subject matter jurisdiction of this Honourable Court is not an abuse of Court process having regard to the judgment of the Court of Appeal in Appeal* No. CA/B/263/2019: AUSTIN LAZ & CO. LIMITED & ANOR v. GUARANTY TRUST BANK PLC & ANOR *arising from this suit?

Arguing this second issue, learned counsel submitted that the second leg of the 2nd Defendant's objection which deals with the subject matter jurisdiction of this Honourable Court is an abuse of Court process having been resolved in a judgment of the Court of Appeal in Appeal No. CA/B/263/2019: AUSTIN LAZ & CO. LIMITED & ANOR v. GUARANTY TRUST BANK PLC & ANOR vide Exhibit EKO1. The said judgment is now reported as **AUSTIN LAZ & CO. LTD & ANOR V. GTB PLC & ANOR** (2023) LPELR-60082(CA)

Counsel submitted that abuse of court process is the use of judicial processes *malafide* or in bad faith to the irritation of the other party to the action or to frustrate the administration of justice and he cited the case of ***SARAKI v. KOTOYE (1992) 9 NWLR (Pt.264) p. 156***.

He said that in the instant case, the question of the subject matter jurisdiction of this Honourable Court has been laid to rest by the aforesaid judgment of the Court of Appeal.

Leaned counsel pointed out that the 2nd Defendant/Objector was a party to the appeal and is bound by the decision and it therefore amounts to gross abuse of court processes for the 2nd Defendant to raise same objection to subject matter jurisdiction having been resolved by the Court of Appeal.

He submitted that it is immaterial whether the language adopted by the 2nd Defendant in its objection is different from that deployed by the 1st Defendant. **He** said that what is important is that the decision of the Court of Appeal deals with the subject matter jurisdiction of this Honourable Court over this matter and the

appellate court held that it falls within the jurisdiction of this Honourable Court. He submitted that this application is an abuse of court processes and he urged the Court to so hold.

He said that the mere involvement of the 2nd Defendant, a Federal Government agency does not make the matter to fall within the exclusive jurisdiction of the Federal High Court. He said that what determines jurisdiction is the subject matter of the litigation which is usually determined by looking at the entire claim of the Claimant which has been resolved to be within the jurisdiction of this Court.

In conclusion, he urged this Court to dismiss the 2nd Defendant's notice of preliminary objection for the following reasons.

Upon a careful consideration of all the processes filed in this application, together with the arguments of the learned counsel for the parties, I am of the view that the sole issue for determination is: ***Whether this Court has Jurisdiction to entertain this suit against the 2nd Defendant/Objector.***

Essentially, the issue of jurisdiction is fundamental and pivotal to any proceedings. It has been described as the life blood of any adjudication. It is the fiat, the stamp of authority to adjudicate. See: ***Katto vs. C.B.N (1991) 11-12 S.C 176***.

A Court can claim to have jurisdiction in respect of a matter if:

1. ***It is properly constituted as regards members and qualifications of the members of the Bench and no member is disqualified for one reason or another;***

2. ***The subject matter of the case is within its jurisdiction and there is no feature of the case which prevents the Court from exercising its jurisdiction; and***

3. ***The case comes up before the Court initiated by due process of law and upon fulfillment of any condition precedent to the exercise of the jurisdiction.***

In support of the foregoing, see the following decisions on the point:

Madukolu vs. Nkemdilim (1962) 1 All NLR 587; Dangana & Anor vs. Usman & 4 Ors (2012) 2 S.C. (Pt.111) 103; and WESTERN STEEL WORKS LTD vs. IRON STEEL WORKERS UNION (1986) 3 NWLR Part 30d Pg. 617 D-H, 628.

It is an elementary principle of law that the issue of jurisdiction can be raised at any stage of the proceedings. It can even be raised by the Court *suo motu.* See: ***SLB Consortium Ltd. vs. NNPC (2011) 9 NWLR (Pt.1252) 317 at 335***.

In determining the issue of jurisdiction, it is the Claimant's originating processes that are to be considered. See: ***Okorocha vs. UBA Plc. (2011) 1NWLR (Pt.1228) 348 at 373; and A.G. Federation vs. A.G.Abia (2001) 11NWLR (Pt.725) 689 at 740.***

In their motion on notice the 2nd Defendant/Objector is objecting to the jurisdiction of this Court on two main grounds:

1) That the Claimants instituted this suit, without serving the 2nd Defendant with a pre-action notice in compliance with the provisions of ***Section 43(2) of the Asset Management Corporation of Nigeria Act, 2010***;and
2) The 2nd Defendant is a Federal Government Agency and the subject matter of this suit as it relates to the 2nd Defendant is such that by virtue of ***section 251 (1)(p)& (r) of the 1999 Constitution,*** it is the Federal High Court that has the exclusive jurisdiction to entertain the suit.

I will determine the first arm of the objection before I consider the second arm.

For the avoidance of doubt ***Section 43(2) (3) of the Asset Management Corporation of Nigeria Act 2010 (as amended)*** provides as follows:

"43.-(2) An action shall not be brought or commenced against the Corporation until after the expiration of 90 days' notice in writing to the Corporation giving details of the alleged wrong done and remedy sought;

(2) If, after the expiration of the 90 days' notice stated in Subsection (2) of this section, the Corporation has not responded, the party concerned may issue a writ or other originating process against the Corporation provided always that action shall not be commenced or maintained against the Corporation or any of its shareholders, officers and directors for anything done intended to be done or purported to be done in good faith in the execution of duties, powers and obligation imposed on the Corporation or any of its shareholders, directors, or office."

From the above provisions of the statute, it is apparent that before a suit can be instituted against the 2nd Defendant a 90 days' notice of the intention of the Claimants to commence must be issued and served on the 2nd Defendant.

The law and practice of pre-action notice in Nigeria has been a long standing practice. Public corporations, statutory bodies, institutions and other government agencies surreptitiously enshrine in their laws a provision on pre-action notice with the aim of settling disputes without recourse to the arduous process of litigation in court.

Pre-action notice is a statutory provision which requires notice of intended action to be first served on certain would-be defendant by an aggrieved party before such aggrieved party may seek judicial redress. Such notice of action is usually required to disclose the cause of action, relief or reliefs sought and the name and place of business or abode of the aggrieved party.

Pre-action notice, where it is required, constitutes a condition precedent for institution of action; any action brought without the notice would be premature and incompetent. It is a condition which must be fulfilled in appropriate cases before seeking the intervention of the Court. A 'condition' is a "provision which makes the existence of a right dependent on the happening of an event, as opposed to an absolute right.

Furthermore, in the present suit, both parties are ***ad idem*** that the Claimants did not serve any pre-action notice on the 2nd Defendant before filing this suit in Court, neither did they file one when the 2nd Defendant was joined as a party.

What then is the effect of non-service of pre-action notice where it is statutorily required? In the case of ***Nnonye Vs Anyichie (2005) 1 SC (Pt.II) 96 @ 103 and 104,*** it was held that non-service of a pre-action notice puts the jurisdiction of the Court on hold pending compliance with the pre-condition. See also the following cases: ***Barclays Bank Ltd. Vs Central Bank of Nigeria (1976) 6 SC 175; Okotie-Eboh Vs Okotie-Eboh (1986) 1 NWLR (16) 264; Ijebu-Ode Local Govt. Vs Adedeji Balogun (supra) and Eze Vs Ikechukwu (2002) 18 NWLR (799) 348; City Engineering (Nig.) Ltd. Vs N.A.A. (supra) at 52 - 53 lines 37 – 12;*** and ***ONDO STATE DEV. & PROPERTY CORPORATION V. JIMZEST HOTEL DEV. CO. LTD (2011) LPELR-4782(CA) (PP. 22 PARAS. A.***

The main contention of the 2nd Defendant in this Preliminary Objection is that the failure of the Claimants to serve a pre action notice on the 2nd Defendant has robbed this Court of the jurisdiction to entertain the entire suit.

The rationale behind the jurisprudence of a pre-action notice is to enable the defendant know in advance the anticipated action and if possible, to seek an amicable settlement of the matter between the parties, without recourse to adjudication by the Court. The purpose of giving notice to a party is that it is not

also taken by surprise but so that it should have adequate time to prepare to deal with the claim in its defence. See ***NTIERO VS NIGERIAN PORTS AUTHORITY (2008) 10 NWLR (PT.1094) 129***.

In the instant case, the learned counsel for the Claimants has seriously contended *inter-alia* that the service of a pre-action notice is a procedural right and that a party entitled to a procedural right is required to raise same timeously without taking further steps upon being sued or joined in a suit.

Furthermore, he maintained that service of pre-action notice can be waived where a party submits to the procedural jurisdiction of the court in a suit where a pre-action notice was not served and the issue was not raised timeously.

He seriously contended that in the instant case, the 2nd Defendant waived its right when it failed to raise the objection during the determination of the motion for joinder on 16/10/2012 and when the 2nd Defendant filed its application for its name to be struck out for non-disclosure of cause of action on 1/2/1013.

Furthermore, the Claimants relied heavily on the case of ***MOBIL PRODUCING NIGERIA UNLIMITED V. LAGOS STATE ENVIRONMENTAL PROTECTION AGENCY AND OTHERS (2003) supra*** where the apex court, held *inter-alia* that: ***"Service of a pre-action notice on the party intended to be sued pursuant to a statute is, at best, a procedural requirement and not an issue of substantive law on which the rights of the Plaintiff depend."***

Learned counsel posited that the issue of non-service of pre-action notice, being merely procedural; it can be waived if it was not raised timeously.

I must observe that in respect of the said case of ***MOBIL PRODUCING NIGERIA UNLIMITED V. LAGOS STATE ENVIRONMENTAL PROTECTION AGENCY AND OTHERS (2003) supra,*** it is true that the apex Court actually stated that a party who has the benefit given to him by a statute may waive it if he thinks fit. See ***MOBIL PRODUCING (NIG) UNLTD V. LASEPA & ORS (2002) LPELR-1887(SC) (PP. 28 PARAS. A).***

However, in the same case, the apex Court exposited thus: ***"When the competence of the court is alleged to be affected by procedural defect in the commencement of the proceedings and the defect is not evident but is dependent on ascertainment of facts the incompetence cannot be said to arise on the face of the proceedings. <u>The issue of fact if properly raised by the party challenging the competence of the court should be tried first before the court makes a pronouncement on its own competence.</u> (Underlining, mine).***

In the present suit, the challenge to the competence of the Court is alleged to be affected by a procedural defect in the commencement of the proceedings, to wit: failure to serve a pre-action notice. Thus, the defect is dependent on the ascertainment of the fact of non-service of the pre-action notice.

This issue of fact has been properly raised in this preliminary objection by the 2nd Defendant who is challenging the competence of this Court to determine the suit in the face of the alleged defect in the commencement of the proceedings.

Furthermore, in the said case, the apex Court categorically held that: ***"A suit commenced in default of service of a pre-action notice is incompetent as against the party who ought to have been served with a pre-action notice provided such party challenges the competence of the suit." Per AYOOLA ,J.S.C in MOBIL PRODUCING (NIG) UNLTD v. LASEPA & ORS (2002) LPELR-1887(SC) (Pp. 18 paras. D).***

In the instant case, by this preliminary objection, the 2nd Defendant is challenging the competence of this suit on the ground of the failure to serve the ninety days pre-action notice as stipulated by the provisions of ***Section 43(2) (3) of the Asset Management Corporation of Nigeria Act 2010 (as amended).***

The learned counsel for the Claimants has posited that the 2nd Defendant has waived its right to object because they did not object at the stage when they were joined to the suit. I think, they are entitled to object at this stage because the hearing has not commenced in this suit. The alleged period of thirteen years delay before the objection was raised is understandable because of the interlocutory appeal which was pending at the Court of Appeal during the period.

I am of the view that the 2nd Defendant did not waive its right to object to the jurisdiction of this Court to entertain this suit against it.

I agree with the learned counsel for the 2nd Defendant/Objector that the word "SHALL" as stated in the ***sections 43(2) and (3) of the AMCON Act***, makes service of a pre-action notice on the corporation mandatory. See the cases of ***UGWU & ANOR V. ARARUME & ANOR (2007) 6 SC (Pt. 1) 88***; and ***AKINBISEHIN V. OLAJIDE (2018) LPELR-51172 (CA).***

Furthermore, I hold that the failure of the Claimants to comply with the mandatory provisions of ***Sections 43(2) and (3) of the AMCON Act, 2012 (as amended)*** is fatal to the case of the Claimants and renders their case incurably defective and incompetent against the 2nd Defendant.

Furthermore, upon the authorities earlier cited in this judgment, the failure to serve the pre-action notice on the 2nd Defendant is a fundamental vice that vitiates the jurisdiction of the Court to entertain this action against the 2nd Defendant.

In this preliminary objection, the 2nd Defendant/Objector is actually urging the Court to strike out the entire suit because of the said want of service of the pre-action notice on them.

However, I must point out that this objection on jurisdiction is as a result of the defect in the commencement of the suit against the 2nd Defendant who is statutorily entitled to the service of a pre-action notice. Hence the institution of the action against the 2nd Defendant is fundamentally defective.

In the earlier cited case of ***MOBIL PRODUCING (NIG) UNLTD v. LASEPA & ORS (2002) LPELR-1887(SC)(Pp.18 paras. D)***, the apex Court categorically held that: ***"A suit commenced in default of service of a pre-action notice is incompetent as against the party who ought to have been served with a pre-action notice provided such party challenges the competence of the suit."***(Underlining, mine) ***per AYOOLA, J.S.C in MOBIL PRODUCING (NIG) UNLTD v. LASEPA & ORS (2002) LPELR-1887(SC) (Pp. 18 paras. D).***

From the above decision of the apex Court, it is apparent that since the ***default of service of a pre-action notice is incompetent as against the party who ought to have been served with a pre-action notice,*** the incompetence of the suit can only affect the 2nd Defendant. The 1st Defendant who is not entitled to the service of any pre-action notice is not affected by this fundamental vice.

Thus, the application of the 2nd Defendant to strike out the entire suit cannot be granted. The proper order to make is for the 2nd Defendant to be struck out from this suit.

In view of my finding on this first arm of the 2nd Defendant's objection, I do not think it is expedient for me to consider the second arm of the objection which is on the issue of whether this Court can entertain the suit against the 2nd Defendant being a Federal Government Agency by virtue of the provisions of ***section 251 (1)(p)& (r) of the 1999 Constitution.*** If the 2nd Defendant is struck out from this suit, the consideration of this second arm will be a mere academic exercise. A point of law amounts to a mere academic exercise when it lacks practical significance and merely deals with hypothetical questions that are no longer relevant to the actual circumstances of the case. See the cases of ***Plateau State vs. Attorney General (2006) 3 NWLR (Pt. 967) 346*** and ***Agbakoba vs. INEC (2008) 18 NWLR (Pt. 1119) 489.***

In view of the foregoing, the sole issue for determination is resolved in favour of the 2nd Defendant/Objector and the name of the 2nd Defendant is struck out from this suit. Costs is assessed at N100, 000.00 (One Hundred Thousand Naira) in favour of the 2nd Defendant.

Hon. Justice P.A. Akhihiero
Judge
24/03/25

<u>COUNSEL</u>:

E.K. OMARE ESQ.----------CLAIMANTS/RESPONDENTS

IGHODALO IMADEGBELO SAN----------1st DEFENDANT/RESPONDENT

BRIDGET O. EMENGO ESQ----------2ND DEFENDANT/OBJECTOR