IN THE SUPREME COURT OF NIGERIA

On Friday, the 28th Day of January 2005

Before their Lordship

Salihu Modibbo Alfa Belgore ..... Justice Supreme Court
Umaru Atu Kalgo ..... Justice Supreme Court
Dahiru Musdapher ..... Justice Supreme Court
George Adesola Oguntade ..... Justice Supreme Court
Sunday Akinola Akintan ..... Justice Supreme Court

SC265/2000

Between

Chief Berthrand E. Nnonye .... Appellant

And

D.N. Anyichie & 2 Ors .... Respondent

Judgment of the Court

Delivered by
Sunday Akinola Akintan. J.S.C

The appellant, as plaintiff, instituted this action at Awka High Court in Anambra State as suit No AA/157/88 against the respondents as defendants jointly and severally. His claim, as set out in paragraphs 9 of his statement of claim, was for a total sum of N100,110 for damages for trespass, damages for defamation and return of money collected from him. The plaintiff and 1st defendant were businessmen while the 2nd and 3rd defendants were court bailiffs. The appellant and the 1st respondent had been involved in a High Court case for which costs were awarded by the court against the appellant in favour of the 1st respondent. There was an outstanding sum of N50 (fifty naira) out of the costs awarded by the court against the appellant. The 1st respondent applied to the court for a writ of fifa for the recovery of the said N50 (fifty naira). The 2nd and 3rd respondents were the court bailiffs assigned to carry out the order. The plaintiff's action arose from the act committed by the 2nd and 3rd defendants (now respondents) in the course of their duties as court bailiffs.

Pleadings were filed and exchanged. The defendants thereafter filed a motion in which they prayed the trial court for the following relief:-

"An order striking out this suit for not being properly before the Honourable Court."

The motion was supported by a 9-paragraph affidavit and a further affidavit both deposed to by the 1st defendant. Paragraphs 1, 4, 5, 6 & 7 of the affidavit read as follows:-

"1. That I am the 1st defendant on record in this suit.

4. That the 2nd and 3rd defendants are bailiffs attached to the High Court of Justice, Awka. That I am informed by the 2nd and 3rd defendants on record who are bailiffs that no notice was served on them before the commencement of this suit and I verily believe them.

6. That the 2nd and 3 defendants at all material time to the case acted in their official capacities.

7. That the order the defendants executed which gave rise this action was a valid order properly signed by a High Court Judge."

The motion was opposed by the plaintiff and to that end he filed a 7 paragraph counter-affidavit and a further counter-affidavit. Paragraphs 4, 5 and 6 of the counter-affidavit read as follows:-

"4. That there was no valid subsisting order of costs in respect of which the 1st defendant has any right of recovery.

5. That both the trial Judge who signed the writ of fifa after the nullification of the proceedings and the orders for costs therein and the 1st defendant's counsel in suit No. AA/LGE.8/88 were aware of the wrongfulness of levying execution on the invalid order, but nevertheless persisted in enforcing a claim that no longer existed.

6. That the plaintiff averred in paragraph 6 of his statement of claim that he demanded from the bailiffs authority for their action and they responded by showing him Form 41 issued on 13th October, 1988."

The matter came for hearing before Uzodike, J. And after taking submissions from learned counsel for the parties, he delivered his reserved ruling on 13/7/95. The learned Judge in his said ruling upheld the objection to jurisdiction raised and struck out the plaintiff's claim. The plaintiff was dissatisfied with the ruling and he appealed to the Court of Appeal. He also lost in the Court of Appeal and the present appeal is against the judgment of the Court of Appeal in the case delivered in suit No. CA/E/30/96 on 26/10/99.

The appellant filed three grounds of appeal against the judgment. He also filed an appellant's brief while a joint brief was filed on behalf of the three respondents. The appellant formulated the following three issues arising for determination in the appeal:

“1. Whether the Hon. learned Justices of the Court of Appeal were right in holding that the conditions of demand and refusal as contained in section 41 of the relevant law must be construed ‘conjunctively' so that a demand which was met without 'refusal first' does not in law satisfy the intendment of that section of the law.

2. Whether the learned Justices of the Court of Appeal were right when they ignored consideration of the question of interpretation of the legal effect of the expression: "A demand for inspection of authority of the bailiffs" and "a challenge for authority of the bailiff with reference to the issue of satisfaction of conditions precedent under the relevant section 41 of the law."

3. Whether the learned Justices of the Court of Appeal were right when they held that the trial High Court Judge acted properly when he, the Judge, struck out the suit without considering at all the contents of the pleadings already exchanged by the parties and the legal effect of the admissions of the defendants in the defence filed which did not challenge any condition precedent but he struck out the suit on allegation of non-compliance in a subsequent motion."

The respondents, on the other hand, formulated one issue in their joint brief. As the single issue formulated in their said brief is g just a summary of the 3 issues formulated in the appellant's brief, which I have already reproduced above, I do not consider it necessary, to reproduce it.

The objection raised by the defendants at the trial court is that the plaintiff failed to comply with the mandatory provisions of section 41(1) of the Sheriffs and Civil Process Law which provides as follows:-

"No action shall be commenced against any bailiff for anything done in obedience to any process issued by a court unless:-

(a) demand for inspection of the process and for a copy thereof is made or left at the office of the bailiff by the party intending to bring the action or his solicitor or agent in writing signed by the person making the demand; and

(b) the bailiff refuses or neglects to comply with the demand within six days after it is made."

As could be seen from the contents of the plaintiff/appellant's counter-affidavit reproduced above, no where did the plaintiff depose that he made the required demand for inspection of the process in writing and deliver same to the 2nd and 3rd defendants/respondents directly or left such demand at the office of the two bailiffs as prescribed in section 41(1)(a) of the Sheriffs and Civil Process Law. It is however submitted in the first issue of the appellant's brief that the sole intention or purpose of the provision of the said section 4(1) is to provide for clear understanding by any person that a bailiff acted with or without authority of the court. The law is therefore said to require that an aggrieved party who contemplates instituting an action to make a demand, that is, ask to see if the bailiff was in fact on genuine duty or he was merely fraudulently impersonating, It is therefore submitted that a demand which is made and contemporaneously met does not need a further step to achieve the objective of the demand which is already satisfied.

It is also submitted in the appellant's second and third issues that a mere challenge on the bailiff to produce his authority is in the same term as demand made on him. A demand and refusal on the bailiff is therefore said to have satisfied the requirement

of the provisions of the said law. The learned trial Judge is therefore said to have acted wrongly by striking out the suit on ground of incompetence for alleged non-compliance with a condition precedent. This is said to have been made regardless of the contents of the plaintiff's pleadings in the statement of claim showing evidence of satisfaction of the condition precedent and which the defendants did not deny in their statement of defence.

The particular pleadings in the plaintiff's statement of claim referred to in the appellant's brief as his claim to have satisfied the provisions of the law is contained in paragraph 6 of the statement of claim. There the plaintiff pleaded as follows:-

"6. When the plaintiff further challenged the legality action in sealing up the plaintiff's store, the 1st defendant then purported to be acting in enforcement of an order of court for N50 costs made in respect of proceeding in court which the very Judge who made the order for the costs, had himself set aside the proceedings as void for non-compliance with the provisions of the Decree No 37 of 1987."

It is submitted in reply in the respondents' brief that the appellant never complied with any of the provisions of section 41(1) of the Sheriffs and Civil Process law. Consequently, the High Court lacked jurisdiction to entertain the case as it was not competent. The High Court is said to have no discretion to invest itself with a jurisdiction denied it by section 41(1) of the Sheriffs and Civil Process Law. A court is said to be only competent when, among others, the case comes before the court is initiated by due process of law and upon fulfilment of any condition precedent to the exercise of jurisdiction. The decision in Madukolu v. Nkedilim (1962) 2 SCNLR 341, (1962) 1 All NLR (Pt.4) 587 at 595 is cited in support of the submission. We are therefore urged to dismiss the appeal.

The provisions of section 41(1) of the Sheriffs and Civil Process Law are what we are called upon to interpret in this appeal. It is settled law that it is both elementary and also fundamental principle of interpretation of statutes that where the words of a statute are plain, clear and unambiguous, effect should be given to them in their ordinary and natural meaning except where to do so will result in absurdity: see Shell Petroleum Dev. Co. (Nig.) Ltd. v. F.B.I.R (1996)

8 NWLR (Pt. 466) 256 at Lawal v. G.B Olivant (1972) 3 SC 124 at 137; Toriola v. Williams (1982) 7 SC 27 at 46; and Oladokun v. Military Gov.ofOyo State (1996) 8 NWLR (Pt. 467) 387 at 419 and 422. In the instant case, the clear and unambiguous provisions of section 41(1) of the Sheriffs and Civil Process Law, which I have quoted in full above, are inter alia, that: "No action shall be commenced against any bailiff for anything done in obedience to any process issued by a court unless (a) a demand for inspection of the process and for a copy thereof is made or left at the office of the bailiff by the party intending to bring the action or his solicitor or agent, in writing signed by person making the demand ..."

It is clear from the wording of the section that the requirement of the provisions is mandatory, hence the use of the words: "No action shall be commenced ..." Similarly, the demand is required to be in writing and signed by the person making the demand, that is, the appellant in the instant case. Another important condition prescribed by the provision of the section is that the demand can only be made after the person making the demand has made up his mind about commencing an action against the bailiff. The condition is not met if the said demand is made when no action is yet being g contemplated. It follows therefore that a demand made from a bailiff at the time he arrives with the writ of fifa to levy execution cannot be a demand within the provisions of section 41(1) because, as at that time, commencing an action against the bailiff was not being contemplated and the demand made at that stage was not in writing and signed by the party making, the demand. Similarly, the so called demand made in a statement of claim is totally no demand for the purpose of the said law. This is because a statement of claim can only come into being after an action has been commenced. It follows therefore that what was pleaded in paragraph 6 of the plaintiff's statement of claim cannot amount to the demand required under the said section

41(1) of the Sheriff's and Civil Process Law. The required demand must be made before the action is filed in court. It is a condition precedent which must be met before the action is filed in court. Anything short of this will render the action filed as jj incompetent: see Madukolu v. Nkemdilim, supra; Provisional Council, Ogun State University & Anor. v. Mrs. Makinde (1991) 2 NWLR (Pt. 175) 613. Sections 41(l) (b) of the Law provides for what would happen where a demand properly made and delivered is not acted upon by the bailiff.

As has been shown earlier above, the objection to jurisdiction was founded on non-compliance with the requirement of a pre-action notice which does not abrogate the right of a plaintiff to approach the court or defeat his cause of action. If, therefore, the subject-matter is within the jurisdiction of the court, as in this case, failure of the plaintiff to serve the pre-action notice on the defendant gives the defendant a right to insist on such notice before the plaintiff may approach the court. In other words, non-service of a pre-action notice merely puts the jurisdiction of a court on hold pending compliance with the pre-condition: see Barclays Bank Ltd. v. Central Bank of Nigeria (1976) 6 SC 175; Jadesimi v. Okotie-Eboh (1986) 1 NWLR (Pt.16) 264; Ijebu-Ode Local Govt. v. Adedeji Balogun & Co. Ltd. (1991) 1 NWLR (Pt. 166) 136; and Eze v. Ikechukwu (2002) 18 NWLR (Pt.799) 348.

It may be mentioned that the effect of non-service of a pre-action notice, where it is statutorily required, as in this case is only an irregularity which, however, renders an action incompetent. It follows therefore that the irregularity can be waived by a defendant who fails to raise it either by motion or plead it in the statement of defence: see Katsina Local Authority, v. Makudawa (1971) 1 NMLR 100. If, therefore, a defendant refuses to waive it and he raises it, then the issue becomes a condition precedent which must be met before the court could exercise its jurisdiction: see Madukolu v. Nkemdilim, (supra). The defence, like any similar defence touching on jurisdiction, should be raised preferably soon after the defendant is served with the writ of summons. It could also be pleaded in the statement of defence. But once it is raised, and it is shown that there has been non-service, as in the present case, the court is bound to hold that the plaintiff has not fulfilled a pre-condition for instituting his action: see Ademola II v. Thomas (1946) 12 WACA 81; Katsina Local Authority v. Makudawa (supra); and Eze v. Ikechukwu (supra).

It is settled law that objection to the jurisdiction of a court can be taken at any time. The position of the law is that it could be raised in any of the following situations: (a) on the basis of the statement of claim, or (b) on the basis of evidence received, or (c) by motion supported by affidavit setting out the facts relied on as was the case in the instant case; (d) on the face of the writ of summons, where appropriate, as to the capacity in which the action was brought, or against who the action was brought: see Att. General of Kwara State v. Olawale (1993) 1 NWLR (Pt.272) 645; NDIC v. Central Bank of Nigeria (2002) 7 NWLR (Pt. 766) 272, and Arjay Ltd. v. Airline Management Support Ltd. (2003) 7 NWLR (Pt. 820) 577.

The procedure adopted by the respondent in raising the objection to the jurisdiction of the court in the instant case is said to be improper in that the respondent could no longer come by way of motion supported by affidavit setting out the facts relied on in support of the objection. This is said to be because Order 10 rules 1 & 2 of the Anambra State High Court Rules do not admit the practice of coming by way of motion after pleadings have been filed, as in this case. That, in my view, is a total misconception of the provisions of the said Order 10 rules 1 & 2. Order 10 rule 1 (i) provides, inter alia, that: "where on the receipt of the statement of claim, a defendant conceives that he has a good legal or equitable claim or defence to the suit instead of filing a statement of defence, may raise the legal defence by a motion that the suit be dismissed without any answer upon questions of fact being required from him." Order 10 rule 2(1), on the other hand, provides, inter alia that:

"Notwithstanding the provisions of rule 1 of this Order, any, party to a suit shall be entitled to raise in his pleadings any point of law and any point of law so raised may, by consent of the parties or by order of the court, be set down for hearing and

disposed of at any time after pleadings."

The above provisions of Order 10 rules 1 & 2 merely set out the general rules of pleadings in our courts in Nigeria. Order 10 rule 1(1), in my view, merely gives an option to a defendant who believes that he has a good legal or equitable defence to a suit, to raise the legal defence by a motion... "That phrase cannot be taken to mean that the defendant could not adopt any other method or that he could not decide to raise his said objection at a later stage. Similarly, Order 10 rule 2(1) also, in my view, does not proscribe or prevent a defendant who fails to come by way of motion as envisaged in Order 10 rule 1(1) from later coming by way of motion after pleadings. What the sub-rule provides is that the defendant "shall be entitled to raise in his pleadings..." That expression, in my view does not foreclose other options, including that of coming by way of motion, open to a defendant. If such a foreclosure had been envisaged, the provision should have been: "shall only be entitled to raise in his pleadings ..." I therefore hold that the provisions of raising objection to jurisdiction of a court as laid down in numerous judicial decisions, a summary of which I have set out above.

In conclusion therefore I hold that there is totally no merit in the appeal. I accordingly dismiss it with N10,000.00 costs in favour of the respondents and to be paid by the appellant.

Judgement Delivered By Salihu Modibbo Alfa Belgore. J.S.C.

I read the judgment of my learned brother, Akintan, J.S.C and I am in full agreement with his conclusion that this appeal has no merit. All the conditions precedent to initiating the action as demanded by Sheriffs and Civil Process Law have not been complied with. I also dismiss this appeal with the same order as to costs as in the lead judgment.

Judgement Delivered By Umaru Atu Kalgo, J.S.C.

I have had a preview of the judgment just delivered by my learned brother Akintan, JSC and I agree entirely with him that there is no merit in this appeal.

The central issue to be determined in this appeal is whether there is proper compliance with the provisions of section 41(1) of the Sheriffs and Civil Process Law of Anambra State. The section prescribes condition precedent to the filing or institution of any action in court against any court bailiff. It states:-

"No action shall be commenced against any bailiff for anything done in obedience to any process issued by a court unless:-

(a) a demand for inspection of the process and for a copy thereof is made or left at the office of the bailiff by the party intending to bring the action or his solicitor or agent, in writing signed by the person making the demand; and

(b) the bailiff refuses or neglects to comply with the demand within six days after it is made". (Italics mine)

Paragraphs (a) and (b) of subsection (1) of section 41 above are clearly the conditions precedent to the filing of any action against a bailiff arising from anything done by him or her in obedience to the court process concerned. The opening words of subsection (1) of section 41 above also stated that "no action shall be commenced" unless conditions (a) and (b) are complied with. The word "shall" used there is mandatory and not directory and so conditions (a) and (b) of section 41(1) must be complied with for any action against a bailiff to be competent.

From the record of proceedings in this appeal, there is no doubt that there is no evidence of any compliance with the provisions of section 41(1) of the Sheriffs and Civil Process Law by the appellant. Therefore the whole action at the trial was incompetent and the trial High Court had no jurisdiction to entertain it. See Madukolu v. Nkemdilim (1962) 2 SCNLR 341, (1962) 1 A.N.L.R 587 at 595, AG Lagos State v. Dosunmu (1989) 3 NWLR (Pt. Ill) 552; Oruobu v. Anekwe (1997) 5 NWLR (Pt. 506) 618. The effect of non-compliance with a provision of the law such as section 41(1) above and non-compliance with pre-action notice prescribed by any law before filing a case in court is the same.

For the above and more detailed reasons given in the leading judgment by my learned brother Akintan, J.S.C, I also find no merit in this appeal. I dismiss it and affirm the decision of the Court of Appeal. I award N10,000.00 costs to the respondent against the appellant.

Judgement Delivered By Dahiru Musdapher, J.S.C.

I have read now, the judgment of my lord Akintan, J.S.C just read and I entirely agree. For the same reason contained therein. I too dismiss the appeal. I abide by the order for costs contained in the aforesaid judgment.

Judgement Delivered By George Adesola Oguntade, J.S.C.

The appellant as the plaintiff in the Awka High Court of Anambra State claimed against the three respondents as the defendants the sum of N100,110.00 being damages for trespass and defamation.

The parties later filed and exchanged pleadings. The 2nd and 3rd defendants before the trial court were bailiffs attached to the High Court, Awka. The statement of claim reveals that the claim against the 2nd and 3rd defendants arose in the course of execution of an alleged court order in favour of the 1st defendant. It was in the fj execution of a writ of fifa taken out by the 1st defendant.

In his statement of defence, the 1st defendant pleaded that he had only issued a writ of fifa to enforce payment of the sum of N50.00 due to him as costs in suit No. AA/LGE.8/88; and that the 2nd and 3rd defendants had only been performing their official duties as court bailiffs.

The 2nd and 3rd defendants in their statement of defence pleaded that they were acting in performance of lawful duties. They denied liability for trespass and defamation. They asked the plaintiff's suit be dismissed as it was "misconceived and without any merit whatsoever."

Rather than allow the suit to proceed to hearing, the 1st defendant, some five years after the suit was filed, and pleadings concluded brought an application dated 22nd June, 1993 praying for

"(a) an order striking out this suit for not being properly, before the Honourable Court.

(b) and for such other order or orders as the Honourable Court may, deem fit to make in the interest of justice."

The ground relied upon for bringing the application was stated to be:

"There are conditions precedent before the above action could be brought which conditions were not satisfied by, the plaintiff/respondent."

The parties filed affidavit evidence for and against the grant of the application. After bearing arguments on the application, Uzodike, J. on 13th July, 1995 struck out plaintiff's suit. He reasoned that the issue of the court's jurisdiction took precedence over any other consideration. He held that his court had no jurisdiction to entertain plaintiff's suit.

Dissatisfied the plaintiff brought an appeal against the ruling before the Court of Appeal sitting in Enugu. That court, in its judgment on 26th October, 1999 dismissed the appeal. The plaintiff has brought a further appeal before this court. The issues formulated as arising for determination in this appeal by appellant's counsel read:

"1. Whether the Honourable learned Justices of the Court of Appeal were right in holding that the conditions of demand and refusal' as contained in section 41 of the relevant law 'must be construed conjunctively' so that a demand which was met without 'refusal first' does not in law satisfy the intendment of that section of the law.

2. Whether the learned Justices of the Court of Appeal were right when they ignored consideration of the question of interpretation of the legal effect of the expression, 'a demand for inspection of authority of the bailiff and a challenge for authority of the bailiff with reference to the issue of satisfaction of conditions precedent under the relevant section 41 of the law.

3. Whether the learned Justices of the Court of Appeal, were right when they held that the trial High Court Judge acted properly when he, the Judge struck out the suit without considering at all, the contents of the pleadings already exchanged by the parties and the legal effects of the admissions of the defendants in the defence filed, which did not challenge any conditions precedent but he struck out the suit on allegation of non-compliance in a subsequent motion."

The respondents' counsel formulated only one issue for determination. That issue reads:

"... Whether there are conditions incumbent upon any person wanting to bring an action against bailiffs of the court, including the appellant, to fulfil before the person brings his action; and if there are such conditions whether the appellant satisfied those conditions."

I intend to start a consideration of the issues in this appeal with the 3rd issue raised by the appellant. If the appellant succeeds on that 3rd issue, it will become unnecessary to give consideration to the other issues.

It is helpful for an appreciation of the issue canvassed under appellant's 3rd issue for determination to reproduce an extract or passage from pages 7 and 8 of appellant's brief thus:

"The trial Judge struck out a suit on the grounds of incompetence from an alleged non-compliance of (sic) conditions precedents (sic) and held that once an object is raised on lack of jurisdiction, that objection takes precedence and the suit must be struck out without more. He did so regardless of the following conditions prevailing:-

(1) Pleadings have all been duly exchanged. The statement of claim showed a prima facie evidence of satisfaction of the condition precedent.

(2) The statement of defence did not deny such satisfaction of the condition alleged.

(3) A belated motion rousing objection as a remember strategy was filed to allege a non-compliance which was not averred in the defence filed.

(4) A counter-affidavit was filed against the motion in which satisfaction of the conditions was highlighted. It was not challenged by a further affidavit.

(5) The trial Judge, in the face of the pleadings did not deem it fit to take oral evidence in trial of the conflict of affidavits.

(6) The trial Judge did not consider it under the rules that the objection could be a mere defence at that stage when trial was about to open. He did not also examine the pleadings once there was no patent evidence of jurisdiction from the writ itself. Nevertheless, the trial High, Court simply struck out the suit.

The point made in the above extract, particularly in paragraph 6 (Italics) is that the trial Judge had not adverted his mind to the applicable rules of court on the matter. Before I discuss the relevant rules of court, it is necessary that I refer to section 41 of the Sheriffs and Civil Process Law of Anambra State upon which the application brought by the defendant to dismiss plaintiff's suit was premised. The defendant had contended that the plaintiff did not satisfy the conditions precedent to bringing a suit against 2nd and 3rd defendants as laid down in section 41 of the Sheriffs and Civil Process Law. The section reads:

"No action shall be commenced against any bailiff, for anything done in obedience to any process issued by a court, unless-

(a) a demand for inspection of the process and for a copy, thereof made or left at the office of the bailiff by the party intending to bring the action or his solicitor or agent in writing signed by the, person making the demand; and

(b) The bailiff refuses or neglects to comply with the demand within six days after it is made."

At the hearing of the defendant's application to strike out plaintiff's suit, the plaintiff's counsel in his submission to the trial Judge was minuted at pages 20/21 of the record of proceedings as having said:

"If the jurisdiction of the court is not ousted on the face of the writ but depends on calling evidence, in such circumstances, the court will hold that it has jurisdiction."

In his ruling, the trial Judge said:

"The plaintiff's counsel raised issue of technicality with regard to jurisdiction and wanted me to ignore the issue and try, the case on its merits. It is my, view that to ignore this issue of jurisdiction and try this case and deal with other issues connected thereto will amount to a wild goose chase. There is no way the issue of jurisdiction can be avoided or ignored, once raised. It is true that the respondent's counsel made a number of good submission on technicality of the application but my considered opinion is that the issue of jurisdiction takes precedence."

The court below, in its judgment at page 52 of the record referred to the submission of plaintiff's counsel thus:

"Taking issues Nos. 1 and 2 together, Dr. Felix Obi argued that where there is no patent defect on the face of a writ which indicated incompetence in law, and particularly where pleadings have been filed and no facts were pleaded suggesting a challenge to jurisdiction or competence, a trial Judge should not dismiss a suit without hearing the evidence adduced before him by parties."

The court below in its judgment at pages 58 - 59 of the record said:

"It is the law that before a plaintiff commences an action which requires the fulfilment of a condition precedent or pre-condition to the commencement of the action, that condition must be fulfilled before the action can be validly commenced.

In Provisional Council, Ogun State University and another v. Mrs. Makinde (1991) 2 NWLR (Pt. 175) 613; the Court of Appeal held that where there is a non-compliance with a stipulated precondition for setting the legal process in motion any suit instituted in contravention of the condition is incompetent and that court is equally incompetent to entertain the suit. The court further held that section 45(4) and (5) of the Ogun State University Edict, 1982, having provided a condition that an action cannot be commenced against the University unless three months written notice is given to the University before the University could be sued, the failure by the plaintiff to give such notice renders the action invalid and the court ought not to entertain it.

In Seaview Investments Limited v. Munis and others (1991) 6 NWLR (Pt. 195) 67; the Court of Appeal also held that where the legality of a final action depends upon the performance of an action precedent to it or a collateral action, the failure to perform that action or the collateral action is prejudicial to the final action. See also Katsina Local Authority v. Makudawa (1971)1 NMLR 100 at 705; Gambari v. Gambari (1990) 5 NWLR (Pt. 152) 572; Abakaliki Local Government Council v. Abakaliki R.M.O. (1990) 6 NWLR (Pt. 155) 182. In view of the fact that the appellant did not comply with the provision of section 41(1) of the Sheriffs and Civil Process Law before commencing the action against the respondents, the action is incompetent and the trial Judge rightly, in my view, held that he lacked jurisdiction to entertain the action. The appeal lacks merit and it is hereby dismissed."

With respect to the two courts below, I do not think they fully understood the essence of the contention of the plaintiff/appellant. By its nature, the arguments of the plaintiff's counsel before the two courts below were directed at showing that the defendant followed a wrong procedure in his quest to show that the trial court lacked the jurisdiction to hear the plaintiff's suit. It is true that jurisdiction to adjudicate in a dispute, civil or criminal is a threshold issue. Without the necessary jurisdiction, a court cannot make any valid order: See Attorney-General of Lagos State v. Dosunmu (1989) 3 NWLR (Pt. Ill) 552. This explains why it is important for a party who perceived that a court has no jurisdiction to hear a cause or matter must raise the issue at the earliest opportunity; and correspondingly, a court is expected to decide the issue of its jurisdiction to hear a case, when a challenge is raised, at the earliest opportunity. An important adjunct to the above is that the question of absence of jurisdiction in a court to hear a case can be raised at any stage of the proceedings and even g for the first time an appeal: See Tukur v. Government of Gongola State (1989) 4 NWLR (Pt. 117) 517 and Saude v. Abdullahi (1989) 4NWLR(Pt. 116) 387 SC.

Having said the above however, it must be borne in mind that even in raising the question of absence of jurisdiction in a court to hear a cause or matter, the procedure laid down in the rules of court must be followed. It seems to me that an insistence that the applicable rules of court must be followed in raising a challenge to the jurisdiction of a court to determine a cause or matter is not a diminution of the importance of the question of jurisdiction but only an adherence to the rule of law.

In Solanke v. Somefun (1974) 1 SC 141 at p. 148 this court per Sowemimo, J.S.C observed:

"Rules of court are meant to be complied with and therefore, any party or counsel seeking the discretionary power of a Judge to be exercised in his favour must bring his case within the provisions of the rules on which he purported to make his application. If counsel fails to discharge their duties in that respect, it is but fair and right that a court should refuse to exercise its discretionary power."

And at pages 150 - 151, the court went on:

"Rules of court are made to be followed. They regulate matters in court and help parties to present their case within a procedure made for the purpose of a fair and quick trial. It is the strict compliance with these rules of court that makes for quicker administration of justice. Some exceptions, for example, amendments of proceedings are provided for, but such exceptions should be resorted to where absolutely necessary."

See also Musa v. Hamza (1982) 7 SC 118 and Williams v. Hope Rising Voluntary Funds Society (1982) 1-2 SC 145.

Rules of court are in the nature of beacon lights to the parties to a dispute illuminating the path leading to justice. It would in the end result in injustice if it were open to the court to hold one party bound by the rules while allowing the other to ignore them without good reasons. The relevant provisions of the Anambra State High Court Rules are Order 10 rules 1 and 2 which read:

"1 (1) where on the receipt of the statement of claim, a defendant conceives that he has a good legal or equitable defence to the suit, so that even if the allegations of the plaintiff were admitted or established, the plaintiff would not be entitled to judgment against the defendant, instead of filing a statement of defence, may raise the legal defence by a motion that the suit he dismissed without any answer upon questions of fact being required from him.

(2) For the purpose of such application the defendant shall be taken as admitting the truth of the plaintiff's allegations and no evidence respecting matters of fact, and no discussion of questions of fact shall be allowed.

(3) The court, on bearing the application, shall either -dismiss the suit or order the defendant to file his statement of defence, and shall make such order as to f costs as shall be just.

2. (1) Notwithstanding the provisions of rule 1 of this Order, any party to a suit shall be entitled to raise in his pleading any point of law and any point so raised may, by consent of the parties, or by order of the court be set down for hearing and disposed of at any time after pleadings.

(2) If, in the opinion of the court the decision of such point of law substantially disposes of the suit, or any, part of the suit, ground of defence, set-off, counter-claim, or reply, the court may make such order therein as may be just such as the dismissal of the suit striking out or amendment of any portion of a party's case."

I want to reiterate here that at the time the defendant brought his motion to strike out plaintiff's suit, all the parties had filed their pleadings and the defendants never anywhere in their pleadings raised the issue that the plaintiff did not comply with section 41 of the Sheriffs and Civil Process Law of Anambra State. Whether or not the plaintiff complied with section 41 is a matter of fact. Evidence would need to be led to show that the plaintiff did not serve the pre-action demand. The suggestion in the judgments of the two courts below that the ground raised by the defendants for the striking out of plaintiff's suit was jurisdictional is not quite correct. A perusal of plaintiff's writ of summons and the statement of claim does not show ex facie that the trial court had no jurisdiction in the matter. The sole purpose of section 41 is to ensure that a person intending to bring a suit against a court bailiff must first make a pre-action demand to g sec the process. Where a defendant's complaint is that no such pre-action demand was made and he intends to rely on it as ground to side the suit, he must raise the matter as a legal defence in his statement of defence.

This case brings to the fore the necessity to draw a distinction between a purely jurisdictional matter and a question of justiceability. No has argued that the trial court in this case ordinarily has no Jurisdiction in a suit on trespass and defamation which plaintiff brought The only configuration here is that the defendants were intending that a pre-action demand was not served. That contention only makes the plaintiff's suit not justiceable. If the plaintiff issued proper pre-action demand, his suit could still be heard by the same court. It is erroneous therefore to say, that this was a challenge to the jurisdiction of the court.

It is important to bear in mind that a defendant could if he so "elects waive the necessity for such pre-action notice or demand. If for instance, the defendant in this case did not raise the issue of non-service, the case would proceed to trial in the ordinary way. Where there is no jurisdiction in the true sense in a court to hear or determine a matter, none of the parties could waive the question of p jurisdiction: see Onyema v. Oputa (1987) 3 NWLR (Pt. 60) 259 SC.

There is a plethora of judicial authorities to the effect that the issue of the jurisdiction of a court to hear a cause or matter can be raised at any stage and even for the first time on appeal. It is however too easy to overlook the fact that the jurisdiction

being referred to in such cases is jurisdiction arising in the form of a constitutional limitation or other limitation imposed by specific laws. In such cases, it is only necessary to refer to the constitutional provisions or law concerned. Where the matter which impairs the authority or power of a court to hear a case derives from failure to fulfil a condition precedent such as issuing a pre-action notice, it is necessary for a defendant to raise the matter in his statement of defence since this is a question of fact to be determined by the evidence called by parties. It is only when the trial court is satisfied that indeed the pre-action notice was not served that he can decline to exercise his jurisdiction.

The appropriate expression to describe that situation is that the court has declined to exercise its jurisdiction. All it means is that the jurisdiction of the court has not been properly activated. In that situation it is not correct to say that such issue of jurisdiction can be raised at any stage. It is an evidence dependent issue of jurisdiction. In a civil suit, pleadings play an important and vital role. When a fact is not pleaded, evidence cannot be led on that fact.

It seems to me therefore that cases to the effect that jurisdiction can be raised before service of a statement of defence are those in which it ex facie apparent from the writ of summons and statement of claim that there is no jurisdiction in the court. Where it is still necessary to call evidence in proof of matters which may lead the court to decline its jurisdiction, it is inevitable that the fact be clearly pleaded.

The question is, was it open to a defendant who had not by his statement of defence pleaded that he was not served the requisite demand and when the statement of claim does not betray the fact of non-service of the demand, to proceed by motion to ask that the action be struck out? I think not. To allow a defendant to do so is to defeat the clear provisions of the rules of court set out above. What the defendants ought to have done was to first plead in their statement of defence the fact that the plaintiff did not issue the demand as provided in section 41 of the Sheriffs and Civil Process Law. If it was perceived that that fact was enough to bring the suit to an end, the defendants would then move the court to set the matter down for hearing to be disposed of after pleadings in accordance with Order 10 rule 2(1) above. Simply put, the relevant rules of Anambra State High Court do not postulate the hearing of a case by affidavit evidence after the parties had by their pleadings joined issues. Assuming that the defendants had not sooner discovered that the plaintiff did not issue the statutory demand, they should simply have amended their statements of defence to plead the point before moving the court to set down the narrow issue for hearing. I do not doubt that the defendant may upon being served a statement of claim, and before or after filing a statement of defence raise the issue of jurisdiction of the court to bear a suit. After all the jurisdiction of the court is determined by the claim on the writ of summons and statement of claim: See Adeyemi v. Opeyori (1976) 9 -10 SC 31: but this can only be done if upon a perusal of the writ of summons and statement of claim, it appears ex facie that there is no jurisdiction in the court. Where it is necessary to the defendant to call evidence to show that the court has no jurisdiction the defendant must file a statement of defence raising the issue of fact and later ask the court to dispose of the case by evidence on the point. Once it is apparent that there is jurisdiction in the court to adjudicate by reference to writ of summons and statement of claim, a defendant/applicant can only determine the case in limine by application under the rules of court - Shell-Bp Petroleum Development Co. of Nigeria v. Onasanya (1976) 6 S.C. 89. In the instant case there was nothing on writ of summons and statement of claim suggesting that the trial court has no jurisdiction.

If, as was decided in Adeyemi v. Opeyori (supra), there was nothing on the writ of summons and the statement of claim indicating absence of jurisdiction in the trial court to hear the case, the defendants could only have the suit decided in accordance with the rules of court, clearly, it was an error to bring a motion after pleadings had been filed seeking to have a matter not pleaded decided by court through affidavit evidence.

As I said earlier, it is to be observed here that it was open to the defendants to waive the non-service upon them of the pre-action demand. When it is so waived, the suit can proceed to trial without the plaintiff incurring any disability therefrom. In the instance case, the defendants elected not to raise the matter in their statement of defence thus conveying to the plaintiff

that it was being waived.

The defendants not having raised on their pleadings that the needed pre-action demand was not served on them ought not be allowed to raise by affidavit evidence the matter not pleaded before the court. In Ege Shipping & Trading Industries v. Tigris International Corporation (1999) 14 NWLR (Pt. 637) 70 at 84, this court per Ogundare, JSC said:

"The use by the defendants of affidavit evidence to counter or traverse matters of fact pleaded by the plaintiff is clearly not a correct practice or procedure. In an application of the nature by the defendants, it must be presumed that all the facts pleaded by the plaintiff are correct. Where the defendants dispute any of such facts, they must file a statement of defence and lead evidence at the subsequent trial in support of their case."

Even if the question of jurisdiction can be at any stage, yet it still must be brought before the court by the proper procedure: See Dada v. Ogunsaya (1992) 3 NWLR (Pt.232) 754.

I have said the above in the order to ensure that parties and their counsel follow the proper procedure in matters like this. Notwithstanding the views I have expressed above, I would still agree with the conclusion reached by my learned brother Akintan, J.S.C in the lead judgment. When defendants' counsel brought the application to strike out plaintiff's suit, the plaintiff contended inter alia that the defendants did not come by the right procedure. But notwithstanding this contention the plaintiff deposed to a counter- affidavit in an attempt to meet the allegation that the requisite pre-action demand was not made against the defendants. It is apparent from the said counter-affidavit that the plaintiff did not depose that he issued the requisite .notice. This appeal then comes to this: Even if I allow the appeal and make the order that the defendants' motion be struck out, it is clear for the eyes to see that plaintiff's suit will still end up being struck out for non-service of pre-action demand. There is no point therefore postponing the inevitable. It is for this reason that I would agree that the appeal be dismissed. I would however make an order that parties bear their own cost.