

IN THE FEDERAL HIGH COURT OF NIGERIA
IN THE ABUJA JUDICIAL DIVISION
HOLDEN AT ABUJA
ON MONDAY THE 23RD DAY OF DECEMBER, 2013
BEFORE HIS LORDSHIP, HON. JUSTICE A. R. MOHAMMED
(JUDGE)

SUIT NO: FHC/ABJ/CS/278/2013

BETWEEN:

PUBLIC & PRIVATE DEVELOPMENT CENTRE LTD/GTE (PPDC) APPLICANT

AND

1. NIGERIAN NATIONAL PETROLEUM CORPORATION (NNPC) } RESPONDENTS
2. THE GROUP MANAGING DIRECTOR NNPC }

J U D G M E N T

By a Motion on Notice for order of mandamus dated 30/5/13 but filed on 31/5/13, the Applicant seeks for:-

1. A DECLARATION that the failure of the 1st and 2nd Defendants to furnish Applicant with the procurement documents sought vide Applicant's letter of 21st March, 2013 amounts to a wrongful denial of information under the Freedom of Information Act, 2011.



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2. ORDER of the Court compelling the Respondents jointly and severally, within seven days of the judgment herein, to furnish Applicant with information and copies of documents sought vide Applicant's letter of 21st March, 2013 which information and documents are set out in the schedule hereto.

In the schedule to the application, the documents sought by the Applicant were listed as follows:-

1. Copies of the procurement plans and information, including needs assessment and evaluation, identification of goods and works required for the bid.
2. Copies of advertisements of invitation for bids published in at least two national dailies and the Federal Tenders Journal.
3. Evidence of the advertisement on NNPC website and notice board.
4. Copies of bid submission register and duplicate copies of receipts issued to bidders on submission of bids.
5. Minutes of public bid opening for technical and financial proposals.
6. Copies of standard bidding documents issued to bidders in respect of the procurement.
7. Copies of Bid Evaluation Report by the Technical Sub-Committee of the Tenders Board.



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8. Copy of the minutes of the meeting of the Tenders board approving the winning bidder.
9. Copies of rejection letters or notices (if any).
10. Copies of notices of acceptance of bids issued by the procuring entity (NNPC) to the successful bidder immediately a winner was selected (if any).
11. Letter of notification of award of contract (if any).
12. Signed contract document (if any).
13. Copy of formal by bidders (protest letters) and the decision in such complaints/appeals (if any).
14. Copy of summary of details of contract published by NNPC or BPP (if any).


The application is supported by a statement which contained the name and description of the Applicant, the reliefs sought and the grounds upon which the reliefs are sought. The application is also accompanied with affidavit in support and exhibits marked "A", B and B¹ respectively. The application is also supported with a 12 paragraphs affidavit deposed to by Ilo Nkemdilim, the Applicant's procurement officer. There is also Applicant's written address dated 30/5/13 but filed on 31/5/13.

The Respondents reacted to the application with a counter affidavit filed on 14/6/13 and deposed to by Victor Omoluabi, a Manager in the legal



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department of the Respondents. The Respondents' counter affidavit is also accompanied with a written address.


The Applicant then filed a Reply on points of law to the written addresses of the Respondents.

The Respondents in addition brought a notice of preliminary objection dated 5/6/13 but filed on 2/7/13 with an affidavit in support and a written address. The Applicant then filed reply in opposition to the Respondents' preliminary objection. The Respondents then filed Reply on points of law to the Applicant's written address against the preliminary objection.

In the Applicant's written address, this issue was formulated for determination:

"Whether the Applicant has met the conditions for the grant of this application?"

In his argument, learned counsel for the Applicant referred to the cases of **FAWEHINMI VS. IGP (2002) 7 NWLR PART 767, 606 at 674, 686, 694 and 697-698** and **ATUNGWU VS. OCHEKWU (2000) 1 NWLR PART 641 507** on the conditions that must exist for the grant of order of mandamus. Reference was also made to Sections 1, 2(6) and (7) of the Freedom of Information Act, to the effect that any person



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has the right to access or request for information which is in the custody of any public official, agency or institution howsoever called without showing any specific interest in the information applied for. That any person entitled to the right to information under the Freedom of Information Act shall have the right to institute proceedings in a Court to compel any public institution to comply with the provisions of the Act. It was submitted that the 1st and 2nd Respondents are public institutions and officer respectively by the provisions of Section 2(7) of the Freedom of Information Act. That the Applicant has done all that it is required to do by the Act on the information and documents requested from the Respondents, but the Respondents without any reason have refused to provide the Applicant with the documents in breach of his right under the Freedom of Information Act. That by Section 4 of the Freedom of Information Act, the Respondents have a legal duty to provide the Applicant with the requested document and information within 7 days of the receipt of the request. It was then contended that the Courts have the duty to enforce the mandatory provisions of the law. Reference was made to the case of **INYANG VS. EBONG (2002) 2 NWLR PART 751 284 at 331.** The Court was urged to grant the application.

In the Respondents' written address in support of their counter affidavit, this issue was formulated for determination:

"Whether in the absence of compliance with the condition precedent for the grant of an order of mandamus, the application of the Applicant is not liable to be struck out and dismissed for lack of merit?"



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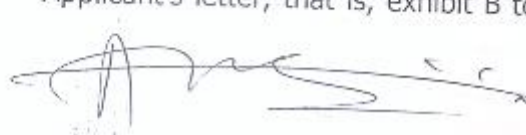
Arguing the issue, learned Respondents' counsel stated that the Court must be satisfied that the Applicant has complied with all the conditions precedent to the grant of order of mandamus and that there is no other remedy available to him. Reference was made to the cases of **FAWEHINMI VS. IGP** supra at pages 697-698 and **LAYANJU VS. ARAOYE (1959) 1 NSCC 143 at 146**, to the effect that as a discretionary order, the Court will decline to grant it if there are other remedies available and effective, and that an Applicant has sufficient interest and the Respondent has a duty of a public nature to perform and he has refused to perform on demand to perform it. It was then submitted that in the instant case, the Applicant has failed to show that he has made a demand of the documents referred to in it's motion, as there is no evidence of receipt of the letter exhibited by the Applicant by the Respondents. That the person who signed as Kingsley O. is not a person known to or in the employ of the Respondents as neither does the document bear the stamp of the Respondents as is the practice of the Respondent in respect of documents received by it. That the Applicant has failed to show that there was ever any publication made by the Respondents inviting bids for the procurement of an Insurance broker for the insurance of the NNPC Oil and Aviation Assets for the year 2013/2014. That the Applicant only succeeded in exhibiting a document showing a publication made via "Tenders in Nigeria" www.tenders.nigeria/invitation - for qualification, website which the Respondents' counsel said is unknown to the Respondents and does not bear the logo of the Respondents. It was further submitted that failure to fulfil a condition precedent to instituting an action has the effect of robbing the Court of jurisdiction to hear the matter. Reference was



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made to the case of **ORAKUL RESOURCES LTD VS. N.C.C. (2007) 16 NWLR PART (1060) 270 at 278.** It was finally submitted that as the Applicant has failed to comply with a condition precedent for order of mandamus against the Respondents, the application is incompetent and liable to be struck out.

In the Applicant's written Reply on points of law, it was stated that the Applicant deposed specifically in paragraph 3 of the supporting affidavit that in December, 2012, the Respondents commenced the process for the procurement of an Insurance broker for the 1st Respondent's Oil and aviation assets. That in paragraph 5 of the supporting affidavit, Applicant deposed to specific date for the closing of bids in respect of the procurement. That none of these facts were specifically denied. That what the Respondents did was to deny in paragraphs 5 (a - c) of their counter affidavit publishing the invitation for bids on the website of Tenders Nigeria. That having not denied the conduct of procurement for the engagement of an Insurance broker, the Court was urged to hold that the Respondents have admitted those facts. Reference was made to the case of **OGUNSOLA VS. USMAN (2002) 14 NWLR PART 788, 636 at 657.** On the absence of Respondents' official stamp on exhibit "B" to the Applicant's affidavit, it was stated that the Respondent did not cite any law which says that an acknowledgment copy of a letter delivered to the Respondent must bear their official stamp or else it would amount to a non-delivery. The Applicant has also filed a Further Affidavit on 2/7/13 deposed to by one Mr. Ada Obaje, a staff of Neuron Express deliveries Ltd, who stated therein that when he took the Applicant's letter, that is, exhibit B to the office of the Group Managing



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Director of the NNPC, he was directed to Kingsley O. who said it was his work schedule to receive letters meant for the 2nd Respondent. That when the said Kingsley O. was asked to write his position and stamp on the acknowledgement copy of the letter, the said Kingsley O. stated that it was the practice of the Respondents to acknowledge letters in the manner shown on exhibit "B". That the deponent of the Further Affidavit further deposed to having been introduced to Kingsley O., he has no right to insist on any mode of acknowledgement of receipt of mails.

In the Respondents' preliminary objection, the Court was urged to strike out this suit on the ground that a condition precedent to the institution of this suit has not been satisfied, in that the Applicant did not issue or serve the statutory pre-action notice on the 1st Respondent. That the action is wholly speculative, vexatious and abuse of the Court process. That this suit is fundamentally defective and incurably incompetent.

In the Respondents' written address in support of preliminary objection, two issues were formulated as follows:-

1. Having regard to the fact that the requisite Pre-Action Notice was not served on the 1st Respondent prior to the institution of this suit, whether the suit is not altogether fundamentally defective and incurably incompetent.
2. Whether this Court has the jurisdiction to entertain this suit.



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On the first issue formulated above, learned Respondents' counsel referred to paragraph 4(iii) of the affidavit in support of the preliminary objection, where it was deposed that no pre-action has been served on the Respondents. That by Section 12(2) of the NNPC Act Cap N123 LFN 2004, it is mandatory on anyone who intends to commence an action against the 1st Respondent in a Court of law, to first issue and serve on it a pre-action notice. That the requirement of a pre-action notice is a condition precedent which Respondents' counsel said must be fulfilled before any legal proceedings can be initiated against the 1st Respondent. That failure on the part of the Plaintiff to issue and serve a pre-action notice before this suit was commenced renders the suit incompetent. Reference was made to the following cases **MOBIL (NIG) LTD VS. LASEPA (2002) 18 NWLR PART 798 at page 30; GAMBARI VS. GAMBARI (1990) 5 NWLR PART 152; UMUKORO VS. NPA (1997) 4 NWLR PART 502, 656; ATOLAGBE VS. AWUNI (1997) 9 NWLR PART 522, Page 536 and AMADI VS. NNPC (2000) 10 NWLR PART 674 76.**

On the second ground of the objection, learned Respondents' counsel referred to paragraph C of the Applicant's Grounds for the application for mandamus and paragraph 3 also of the Applicant's supporting affidavit and contended that the action of the Applicant is based on conjectures, assumptions and imagination. That Courts of law do not act on academic postulations. Reference was made to the case of **A.G. ANAMBRA VS. A.G. FEDERATION (2005) 9 NWLR PART 931, 572 at 610.**



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In the Applicant's Reply written address in opposition to the Respondents' preliminary objection, this question was posed:

"Considering the provisions of the Freedom of Information Act, 2011, (the Act), does the Legislature intend the pre-action Notice of one month to be served on the Respondent herein before an action could be commenced against them under the Freedom of Information Act, 2011?"

It was stated by the learned Applicant's counsel that the NNPC Act was enacted in 1973, while the Freedom of Information Act was enacted in 2011. It was then submitted that the Freedom of Information Act 2011 is the later of the two Acts and that in making the Freedom of Information Act, 2011, the legislature would have taken into consideration the provisions of the NNPC Act, 1973. Learned Applicant's counsel then referred to Section 4 of the Freedom of Information Act, 2011 which is to the effect that a public institution to which a request is made for information must furnish the Applicant with the said information within seven days of the receipt of the request. That by Section 7 of the Freedom of Information Act, where the institution to which request for information is made fails to furnish an Applicant with the requested information within seven days; the institution is deemed to have denied the Applicant of the information so requested. That by Section 20 of the Freedom of Information Act, any person who was denied access to information upon request made under the Freedom of Information Act, 2011 may seek redress from the Court within 30 days of such denial or deemed denial. It was then contended that the



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application of Section 12(2) of the NNPC Act will operate to deny an Applicant of the right of access to Court because by the time the duration of the pre-action notice prescribed by the NNPC Act would have elapsed, the time allowed an Applicant under the Freedom of Information Act to seek redress would also have elapsed. Learned counsel further submitted that it is a well established principle of interpretation of statutes that there is a presumption against unreasonable and inconvenient result, or a presumption against intending what is inconvenient and unreasonable. It was also submitted that it is a well established principle of interpretation that the construction most agreeable to justice and reason must be adopted. The Court was referred to the case of **IBRAHIM VS. SHERIFF (2004) 14 NWLR PART 892, 43 at 65-66.** Reference was further made to Section 1(1) of the Freedom of Information Act, 2011 to the effect that right of access to information pursuant to the Act is guaranteed and is not subject to the provisions of any Act or law including the NNPC Act. It was therefore submitted that the Respondents are not entitled to any pre-action notice from the Applicant before the institution of this suit.



On the contention of the Respondents that this suit is speculative and an academic postulation, it was stated that the Respondents have not denied the averment in the Applicant's affidavit that they procured an Insurance broker for the 1st Respondent's Oil and Aviation Assets for the year 2013/2014. That exhibit B attached to the Applicant's affidavit is a document which forms part of the affidavit and is therefore relevant for the determination of the issue. That exhibit B is not speculative.



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In the Respondents' Written Reply on points of law, it was stated that from the submission of the Applicant's counsel, it was conceded that no pre-action notice was served or issued on the 1st Respondent as required by law. On the argument of the Applicant's counsel that the legislature never intended that the requirement of pre-action notice under any circumstance, relying on Sections 1(1), 4, 7(4) and 20 of the Freedom of Information Act, 2011, learned Respondent's counsel submitted that Section 12(2) of the NNPC Act contains provision specifying that pre-action notice must be served on the 1st Respondent. That Section 12(2) of the NNPC Act is a specific legislation as against the general provisions of Freedom of Information Act, 2011. Reference was made to the case of **A.B.S. U VS. OTOSI (2011) 1 NWLR PART 1229, 605.** On the case of **IBRAHIM VS. SHERIFF**, Respondents' counsel stated that the case is not on all fours with the case at hand, because **IBRAHIM VS. SHERIFF** was an interpretation of the Electoral Act, 2002 on the requirement of signing a petition. It was also submitted that the requirement of pre-action notice is not a denial of the Applicant's right but a condition precedent which the law considers very essential given the character of the Respondents. That if the Legislature under the Freedom of Information Act, 2011 had intended that no pre-action notice would be applicable, it would have expressly and specifically stated so. The Court was urged not to exclude the provision of statute which has specifically dealt with a subject in contention. That Section 1(1) of the Freedom of Information Act guarantees right of access to information, while Section 12(2) of the NNPC Act regulates access to Court as it pertains the NNPC by creating a condition precedent. That Section 12(2) of the NNPC Act cannot be subjected to



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or be subservient to the provisions of Section of the Freedom of Information Act, because the two provisions, counsel said, are mutually exclusive.

I have reviewed the argument of learned counsel for the parties on the substantive suit and the Respondents' preliminary objection. The position is that where the Court has taken argument on issue of jurisdiction together with the substantive suit, the Court must first of all express it's views on the issue of jurisdiction. If the issue of jurisdiction succeeds, the Court should terminate the proceedings at that stage. Where, however, the issue of jurisdiction fails, the Court would then proceed to determine the merit of the substantive suit. In the present case, the first ground of the objection is to the effect that the Applicant has not issued or served the 1st Respondent (NNPC) in this suit with a pre-action notice as required by Section 12(2) of the NNPC Act. That the provision of Section 12(2) of the NNPC Act is a condition precedent to the institution of any action against the 1st Respondent. Learned Applicant's counsel is however of the view that in view of the provisions of Sections 1(1), 4, 7(4) and 20 of the Freedom of Information Act, the Legislature never intended that pre-action notice shall apply to matters brought under the Freedom of Information Act, 2011. In the determination of this issue, recourse must be had to the provision of Section 12(2) of the NNPC Act. Section 12(2) provides thus:-

"No suit shall be commenced against the corporation before the expiration of a period of one month after a written notice of intention to commence the suit shall have been served upon the



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corporation by the intending Plaintiff or his agent; and the notice shall clearly and explicitly state the cause of action, the particulars of the claim, the name and place of abode of the intending Plaintiff and the relief which he claims."

A careful reading of Section 12(2) of the NNPC Act reproduced above would show that it is a specific provision which places a duty on any intending Plaintiff that wishes to institute legal proceedings against the 1st Respondent herein (NNPC) to first of all issue and serve pre-action notice on it. The general trend in the wordings and intendment of statutes is for the Legislature to make specific provisions on certain subject matter so that the issue is not left to speculation. A little illustration would help to drive the point home. In the Fundamental Rights Enforcement Procedure Rules, 2009, requirement of pre-action notices and provisions of statute of limitation have been specifically provided not to apply to actions or suits brought under the Fundamental Rights Enforcement Rules 2009. However, the previous Fundamental Rights Enforcement Procedure Rules, 1979 did not have a similar provision ousting the application of pre-action notice and limitation period. On the other hand, I have read the provisions of Sections 1(1), 4, 7(4) and 20 of the Freedom of Information Act, 2011 relied upon by the Applicant's counsel, but I understand the Sections to be on right to information and right to access to Court when such information, requested is denied. In my humble view, Sections 1(1), 4, 7(4) and 20 simple guaranteed the right to request for information and where it is denied, an Applicant may approach the Court to seek for redress. Now, where in the exercise of right to approach the Court for redress, if there





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is another legislation that places some conditions before one can ignite the Court's jurisdiction, such requirement cannot by any stretch of imagination be regarded as impeding right of access to Court. In the case of **AMADI VS. NNPC (2000) 10 NWLR PART 674, Page 76 at page 113,** the Supreme Court held as follows:-

"It is instructive therefore that compliance with the provisions of Section 11(2) of NNPC Act 1977 is a condition precedent to instituting a suit against the Respondent. Cases constantly occur in which, although everything has happened which would at common law prima facie entitle a man to a certain sum of money or vest in him a certain right of action, there is yet something more which must happen, in the particular case, before he is entitled to sue, either by reason of the provisions of some statute or because the parties have expressly so agreed. This is something called a condition precedent. It is not of the essence of such a cause of action, but it is essential. It is an additional formality superimposed on the law."

See also the case of **BAKARE VS. NRC (2007) NWLR PART 1064, 606 at 636, 656.**

From the above pronouncement by the apex Court reproduced above, it is crystal clear that provisions in statutes regarding pre-action notices are held to be proper. As the Applicant has not shown this Court that it


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has issued and served a pre-action notice on the 1st Respondent in this suit in accordance with the mandatory requirement of Section 12(2) of the NNPC Act, a condition precedent to the institution of this action has not been fulfilled. The failure has consequently rendered this suit incompetent and by extension robbed the Court with jurisdiction to entertain this suit.

In consequence of the above finding, this suit is hereby struck out for being incompetent.

No order as to cost.



HON. JUSTICE A. R. MOHAMMED
JUDGE
23/12/2013


COUNSEL:

G. N. CHIGBU ESQ. for the Applicant.

A. A. MALIK ESQ. with **A. A. ODIA (MRS.) ESQ., C. A. MORDI (MISS) ESQ.** and **C. P. ANINWOYA ESQ.** for the Respondents.

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Date.....12/11/14

Fatima Abdullahi
SEO (GA)