THE INTERNATIONAL JOURNAL OF HUMANITIES & SOCIAL STUDIES

Raising Preliminary Objections in the Nigerian Courts in Civil Proceedings

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Abstract:
The Constitution of the Federal Republic of Nigeria, 1999 (as amended) has made adequate provisions for an unfettered access to justice in our courts by persons, natural or corporate, who are oppressed, victimized or wrongly deprived of their rights whether in the private or public spheres. However, to successfully institute a civil matter in our courts, there are certain preliminary matters that the would-be-plaintiff must take into consideration before filing his case. Failure to follow this due process of law and non-fulfillment of conditions precedent in some cases may lead to a premature termination of his suit or a dismissal. Such matters include: cause of action, locus standi, jurisdiction of the court, abuse of court process, and service of pre-action notices. This article seeks to assess the concept of preliminary objections. The paper also considers the duties of the plaintiff and defendant. The paper finally examines the grounds for striking out or dismissal of a suit in court.

Keywords: *Access, justice, civil proceedings, preliminary objections, due process, evidence*

1. Introduction

The legal practice may be divided into two main classifications. It is either Criminal or Civil in nature. In either case only a qualified Legal Practitioner in Nigeria can be granted audience before any Superior Court of records. To get to the stage of arguing a matter in Court, the Legal Practitioner must file some papers and documentations and serve same on the opponent. All these, from the commencement, trial, judgment, execution and appeals are governed by laws, rules of Courts, Constitution, and case law. However, whenever a party is in default of these rules of practice and procedures, the opposing party may raise a preliminary objection and although in some limited situations, the Court may do so *suo motu.*

Black's Law Dictionary defines[i] Preliminary Objection as:

- "An objection that, if upheld, would render further proceedings before the tribunal impossible or unnecessary"

while The *Oxford Advanced Learner's Dictionary defines*[ii] Preliminary Objection as:

- "Something … held before a main contest in order to eliminate weaker prayers… and "Objection" as a feeling of dislike, disapproval or opposition"

In explaining what preliminary objection is all about, the Court in the case of *Samni V.O.I.G.T.C*[iii] defines "Preliminary Objections as:

- "An act of objecting or that which is or may be presented in opposition, it is an adverse response argument. It connotes a disproval"

Furthermore, in the case of Efet V. Inec & Ors[iv], the Supreme Court stated that:

- "The aim and essence of a preliminary objection is to terminate at infancy, or as it were, to nib in at the bud, without dissipating unnecessary energies in considering an unworthy or fruitless matter in a court's proceedings. It, in other words, forecloses hearing of the matter in order to save time"

It is in this sense that any opposition to the steps taken by either of the parties before the actual trial qualifies as a preliminary objection. The objection in an ideal situation should be made at the earliest possible time but in somecases, it could be raised at any time of the proceeding, or even on appeal, the important consideration being that it is an objection to matters touching on either the competence of the Court, jurisdiction, pleadings, and locus standi as against objection to the actual trial procedure, for example, tendering of documents and admissibility of evidence. It is pertinent, to note that a successful preliminary objection has the effect of terminating the entire proceedings and putting an end to the entire action; the case may be struck out or dismissed. This was the reasoning of the Supreme Court in the case of Contract Resource Nig. Ltd V. UBA Plc[v]where the court held that the purpose of preliminary objections is to contend that the appeal is defective or incompetent. If sustained, the appeal would no longer be heard. A Successful preliminary objection terminates the hearing of an appeal.

It is also worthy of mention that where a preliminary objection is raised against a case, it implies that the defendant accepts the case of the plaintiff but states that even as the case stands the court would not entertain it on the grounds of a defect apparent on the face of the relief sought by the plaintiff. It is the duty of a Lawyer, after his instructions have been perfected to file his client's case and in filing the suit he must take into consideration some preliminary matters such as: has my client a cause of action, if so, has he the legal

capacity to sue and be sued, which of the courts can he institutes the case, who should be the proper parties, by what means and within what time? The legal Practitioner must also ensure that he filed pleadings stating the facts he will rely on to establish his client's case and served same on the opponent. In doing all these, the Legal Practitioner must be diligent and painstaking knowing too well that these issues are guided and provided for by rules of Court and evidence, constitution, practice direction and case law. Of course, he must know that failure to take care of these preliminary matters may lead to a premature termination of his client's suit or a dismissal.

2. The Plaintiff Duties to the Court

Notwithstanding that either of the parties may raise and sustain preliminary objections, it is well appreciated that it is more likely to find the defence having recourse to this procedure than the plaintiff will do; therefore, it is appropriate to identify by a would–be-plaintiff, the likely pitfalls that may be open to the defendant's attack. The first preliminary point for consideration by the plaintiff's counsel whenever he is ready to file his client's case in court is whether or not the court is competent in terms of numbers and qualification of members and no members are disqualified for one reason or the other. This principle of the law was carefully canvassed in the case of *Ogbunyaya Vs Kudu*[vi]. Here, the appellant contended that the judgment delivered by the presiding Judge per Nnameka Augu. J (as he then was) was null and void in that he had no jurisdiction to deliver his judgment on the 17th of June, 1997 having been appointed a judge of the Court of Appeal two days (i.e. 15th June 1997) prior to when he delivered this judgment. The ratio in this case should not be read to mean that a prospective litigant must investigate the competence of a judge before commencing or continuing his case before him. Infact, it is not within his discretion to determine the judge that will handle his case; this duty is that of the Court Registry. All that the Obianwana case is saying is that unless the judge was validly appointed and is still in office, he lacks power to perform judicial functions as conferred by the Constitution[vii].

Similarly, in the recent case of *Nwankwo v. Yar' adua*[viii]the Supreme Court restated the time honoured principle of Jurisdiction laid down in the celebrated case of *Madukolu v. Nkemidilims & Ors*[ix]*,*where the court held that:

The law is indeed trite that a court is only competent to exercise jurisdiction in respect of any matter where-

1. It is properly constituted as regards numbers and qualification of the members and no member is disqualified for one reason or the other.
2. The subject matter of the case is within its jurisdiction and there is no feature in the case which prevents the court from exercising its jurisdiction.
3. The case comes by due process of the law and upon fulfilment of any condition precedent to the exercise of jurisdiction.

A corollary to the above is the competence of the court in respect of the subject matter. For example, a Federal High Court of Nigeria cannot hear and determine issues that border on land matters in Nigeria whereas the said court is exclusively responsible to decide matters in respect of admiralty and matters arising from government revenues and fiscal measures. However, sometimes statute may permit a court to transfer a matter to another court with power to determine the issue in dispute even though in other cases the action could be struck out on the ground of lack of jurisdiction over the subject matter in dispute. It must be understood that jurisdiction is so fundamental in the trial of disputes that any judgment given without jurisdiction is a nullity. For this reason, the issue may be raised at any time in the proceedings and even on appeal notwithstanding that the defendant had earlier entered unconditional appearance to the action[x].

The court may *suo motu* consider this issue. We must bear in mind that the word "Jurisdiction" is capable of several connotations. It may relate to territorial or geographical. It could also be divisional jurisdiction (the judicial division of the court within which to commence an action). The local venue for commencing an action is based on rules of courts. Failure to commence at the appropriate judicial division of a court that has jurisdiction is not usually fatal and may be waived. However, State or territorial jurisdiction is fatal to the case if it is commenced in the court of another State outside the territorial jurisdiction of the court. Such jurisdiction is fundamental and cannot be waived by parties.[xi]

This is without prejudice to the inherent jurisdiction of every superior Court in matters of practice and procedure.

Another preliminary point for consideration by the plaintiff's counsel before filing his client's case borders on the personality of his adversary and even that of his own that they are capable of suing and being sued. In a representative action, appropriate accredited representative should sue and be sued and should be so endorsed on the originating process. Failure to do this could prove fatal to the entire suit because the rule is that only a person (natural or juristic) is capable of holding jural right and duties and may sue and be sued in law. This doctrine is often relied upon by the defendant to raise preliminary objection in the Nigeria Courts and is known as locus standi. For instance, in the case of *Adesanya v. president*[xii]*,* action brought by the appellant challenging the constitutional validity of an appointment made by the president was dismissed by the Supreme Court on the sole ground that the appellant had no locus standi to bring that action, he having no right and obligations personal or peculiar to him which had been infringed or injured by the said appointment and accordingly that case was dismissed for lack of Appellants capacity in law to sue the president of Nigeria.

Therefore, to avoid forum shopping by litigants, the rules of Courts provide for the appropriate venue[xiii] for the trial of disputes, in the same vein, the Court reserves the right to transfer the matter to the proper venue. Failure to comply with rules as regards venue is not fatal, even though the defendant may raise an objection on this issue as early as possible. Once the issue of jurisdiction (in its wide sense) has been fully considered, plaintiff must now commence his action in the proper manner as prescribed by statute and the rules, fulfilling all conditions precedent, if any. This means that plaintiff must understand properly the various modes for commencing an action.[xiv]After commencing the action in the proper manner, all process paper must be served on the opponent as required by law. For the originating process, this must be served by the court *Bailiff*[xv]*and* for other documents, in the course of proceedings, counsel to counsel service is permissible.

A common embarrassment occurs when parties serve processes outside jurisdiction without complying with the provisions of Sheriff and Civil Process Act, Cap 36, LFN, 2004 Since 1979, the service of process out of jurisdiction is under the exclusive jurisdiction of the Federal Government and any State Law or rule of Court inconsistent with the Act is unconstitutional and void.
Under the service of the process, the parties will usually within limited time as provided by the rules of Court file their pleadings. The plaintiff files his statement of claim and the defendant his statement of defence (including a possible counter claim) before the reply. There are rules of practice and procedure governing how pleadings should be made. A beginner will no doubt find some problems in this area, but with experience, everyone will improve. The general rules are that parties should plead facts in very lucid form as to give the adversary sufficient notice of the other's case. It is in this regard that a party (plaintiff or Defendant) may object to the other's pleading as disclosing no cause of action or defence or even being statute barred and the Court upon an application may strike out or dismiss such an action as the case may be. A Bulk of the grounds on which preliminary objections are sustained qualify also under the irregularities and non-compliance with rules of Courts head. In this regard for anyone to successfully raise a preliminary objection within this class of non-compliance with the rules, he must act swiftly, sometimes delay may amount to a waiver, also the effect of non-compliance with the rules has often been the topic of discourse by scholars. On the other hand, there are those situations where non-compliance is so fundamental that it cannot be waived as mere irregularity. It is for counsel to ensure compliance with the rules, and also that wherever there is a breach, to urgently rectify the breach, possibly by an amendment of papers filed by him.

3. Defendant's Duties

Often times the defence will contend that the plaintiff has not observed the prescribed procedure for him to pursue his claim or that he is in breach of statute or rules of Courts. He may discover that his objection is so fundamental that he need not go through the entire trouble of trial, and may therefore wish to object to the procedure. In this regard, the first advise is that he must endeavour to raise his objection at the earliest opportunity, this is without prejudice to his right to contest such issues as jurisdiction on appeal even when the objection was not raised at the court of first instance. Sustaining a preliminary objection is like checkmating an opponent in a chess game thereby terminating the game at the earliest chance.
From the moment the defence is served with the originating process, he must begin to make up his mind on whether there is any possible ground to restraint or hinder the plaintiff; if there is any such ground, then how, what steps must he take to achieve his purpose? In practice, the plaintiff can begin to have a premonition of the defence's intention from the type of appearance entered by him. For instance, order 9 rules 1(1) of Akwa Ibom State High Court (Civil Procedure Rules 2000) prescribes the mode of entering memorandum of appearance. The defence may in this circumstance enter "Conditional Appearance" otherwise known as appearance of protest. Both English and Nigerian Courts have consistently held that a conditional appearance is full appearance for all purpose, a voluntary submission, subject to the defendant's right to raise an objection to the jurisdiction or other irregularities in the procedure adopted by the plaintiff. It is therefore wrong to be of the impression that a conditional appearance is not submission to the Court's jurisdiction. An alternative procedure is for the defence to do nothing, allow the plaintiff obtain judgment, whereupon an application may be brought to set aside that judgment on the ground of lack of jurisdiction or irregularity. This alternative is not a preliminary objection since the Court may have actually proceeded to consider the merit of the case.
Sometimes the defence would enter unconditional appearance and plead his objection in his statement of defence after which he applies by way of a motion to strike out or dismiss the plaintiff's claim on a stated ground. This practice is allowed by the rules, and it is a way of playing safe. The defence is giving the impression that in the event of his objection failing, he intends and is ready to continue with the case. The commonest procedure, in practice, is that the defence files a motion on notice immediately after entering his conditional appearance. This procedure is likely to meet with a problem which is hardly appreciated by practitioners but may be avoided by good drafting. The problem is that affidavit evidence shall contain only a statement of fact, and circumstance to which the witness deposes either of his own personal knowledge or from information which he believes to be true and shall not contain extraneous matter by way of objection, prayer, legal argument or conclusion. Generally, Nigerian Courts will not allow a preliminary objection to be taken where the ground on which it is based cannot be discovered unless and until it is elicited by evidence,[xvi]which will invariably be the case where there is a counter affidavit to controvert the facts deposed to in the affidavit. Now, how will legal arguments find their way into the affidavit supporting the motion?
There is also the possibility that the plaintiff would file a counter affidavit controverting the averments in the affidavit thus requiring oral evidence to clear the contradictions; this the Court will not do in hearing a preliminary objection. Therefore, it is the writer's view that when the ground of objection is one of law which cannot be deposed to in an affidavit, there is no need to come by a motion; rather, the High Court rules permit a party to raise by his pleading any point of law; this like demurrer, is taken to mean that the defendant admits all the allegations of fact in the plaintiff's claim but contend that his claim does not *exfacie* disclose a cause of action. Alternatively, the defence counsel may enter a conditional appearance and immediately file his preliminary objection (not by a motion).This procedure is recommended, as against filling a motion, when the basis of objection is a ground of law; after all, the essence of the motion is simply to put the other party on notice concerning the objection to be raised.
Of more practical importance however, is that counsel must distinguish between those situations where the ground is strictly on law, and where it is of mixed facts and law only. Perhaps, for the later cases it is appropriate to come by a motion, so that argument could be taken both in law and facts. It is for this reason that it is arguable whether a preliminary objection can ever be based on facts only.
Apart from having to decide the procedure to be adopted, counsel must appreciate the distinction in the prayers sought. The usual prayers are dismissal or striking out. The difference[xvii] is that, an order of dismissal put an end to the claim while an order striking out keeps the claim alive and may be relisted for hearing or argument. For this reason, Nigerian Courts often involve their inherent powers to strike out a claim when the grounds for dismissal are not manifestly apparent. Hence a preponderance of the situations when

objection is raised is that the claim or defence or parties' name be struck out on a stated ground. What then are the grounds for striking out or dismissing a claim?

4. Grounds for Striking out or Dismissing a Case

Under the various rules of court there are several reasons for which a claim or defence may be struck out or dismissed. The grounds are not closed; they have continuously received the attention of the courts and are decided depending on the peculiarity of each case. Sometimes without due consideration of the facts involved, counsel mix-up these grounds, showing lack of understanding; this is unfortunate. We therefore discuss briefly.

4.1. Non-Fulfilment of Conditions Precedent

Our rules of Court and Constitution sometimes require the plaintiff to serve on the defendant pre-action notices before instituting a case in Court. Such notices express the intention by the plaintiff to institute action against the defendant to whom the notice is addressed. The requirements of the service of pre-action notice are usually stipulated either by the law establishing the Court or the law regulating the subject matter of the proposed action. For instance, Section 15 (1) of Chiefs (Appointment and Deposition) Law of Kwara State as amended by the Chief (Appointment and Deposition Amendment) Edict, No.3 of 1998, provides that:

1. where the Military Government or the appointing authority has approved the appointment of a person as a chief, any person who intends to challenge the validity of such appointment shall first deposit with the State Accountant – General a non-refundable sum of ten thousand naira.
2. Where the Military Government or the appointing authority has not approved the appointment to a vacant Chieftaincy stool, any aggrieved person who institutes any court action and joins the State Government or any of its agencies as a party to any such court actions shall first deposit with the State Accountant – General a non-refundable fee of ten thousand naira.

In the above instances, the requirement of serving of notice before the institution of an action against the defendant is a condition precedent to the commencement of that action. The purpose of service of pre-action notice is to unequivocally apprise the would-be-defendant of the intention of the would-be-plaintiff to sue him and to give the former ample opportunity to prepare to defend the suit.[xviii] It gives the other party notice of what to expect in the suit.

In most cases where service of pre-action notices is required, the service of such notices becomes fundamental to the competency of the suit, a fortiori, the jurisdiction of the court. Such legislations require that for the suit to be competent pre-action notices must be served.[xix] Such requirement often goes to the very foundation or root of the suit. The case of *Atolagbe v. Awani*[xx] is instructive on this subject and perhaps portrays the attitude of the Nigerian courts to this issue. In this case, the aggrieved plaintiffs / respondents filed a suit against the government of Kwara State without first depositing with the State Accountant- General a non-refundable fee of ₦ 10,000.00 as required by law. After being served with the court processes, the 2nd and 3rd defendants by a motion on notice prayed the trial court for:

a) An order dismissing / or striking out this suit on the ground that the plaintiffs failed to deposit the sum of ten thousand (₦10,000.00) prior to instituting and / or filing this suit as required by the mandatory provisions of Section 15 (1) of the Chiefs (Appointment and Deposition Amendment) Kwara State Edict, No.3 of 1988.
b) And for such further orders(s), this Honourable Court might deem fit to make in the circumstances of this case.

In the affidavit in support of the motion, it was stated that the appellant did not pay the sum of ₦10,000.00 to the Kwara State Government prior to the institution of the action. The appellants did not controvert this deposition. The trial court after hearing the parties held that Section 15 of the Chiefs (Appointment and Deposition) Law, as amended was unconstitutional and as such the High Court had jurisdiction to hear the matter. The respondent being dissatisfied with that decision appealed to the High Court of Appeal which allowed the appeal and set aside the decision of the High Court. The appellants herein being dissatisfied with the decision of the Court of Appeal appealed to the Supreme Court. It was held, *inter alia,* that the provisions of Section 15 of Edict No.3 of 1988 of Kwara State does not constitute substantive law but is procedural or adjectival. The law applicable to practice and procedure of a court is an adjectival law, the payment of fee to institute an action is procedural. By virtue of Section 239 of the 1979 Constitution, a State House of Assembly is empowered to make laws regulating the practice and procedure of the High Court of the State and by virtue of Sections 2 (2) and Section 3(2) of the Constitution (Suspension and Modification) Degree No.1 of 1984, the Military Governor of a State is now vested with power to legislate on a practice and procedure of High Court of Kwara State Pursuant to Section 239 of the Constitution. Consequently, the provision requiring the payment of non-refundable fee of N 10,000.00, under Edict No.3 of 1988 of Kwara State to the Accountant –General of the State before a suit on chieftaincy question can be brought is constitutional since the legislation accords with the making of law for the peace, order and good government of Kwara State.

Similarly, the Rent Control & Recovery of Premises Law, Cap.110, Laws of Akwa Ibom State, Nigeria states to the effect that a landlord may only apply to court to recover possession of his premises from a tenant after he has served the letter with a seven (7) days' notice of his intention to proceed to recover possession of his premises.[xxi] Before service of the 7 days' notice the landlord is expected to have served the requisite notice to quit and the tenancy, determined.

Also, Section 32(1) of the Traditional Rulers Law, Cap. 134 Laws of Akwa Ibom State,[xxii] 2000 provides*:*

- "No person may bring action against the Government functionary or any person… charge with any function in connection with the selection, installation, recognition or withdrawal of recognition of a person as paramount Ruler, Clan Head or Village Head whether or not the cause of action arose from any commission or omission in the execution of the provisions of this Edict by the Governor or such other person unless"

while Section 32 (2) of the same law states that a notice of intention to sue as in sub-section (1) shall clearly state: (a) the cause of action; (b) the particulars of claim; (c) The name and place of abode of the person suing; and (d) the relief sought by the person suing. Furthermore, Section 32 (3) provides that:
A Court shall only be competent to enquire as to whether the steps provided in this Law for the selection, installation; recognition or withdrawal of recognition have been complied with. It is clear from the statutes law and the decision of the court that where any existing law provides for a condition precedent to the exercise of a court's jurisdiction such a condition must be fulfilled. Failure to satisfy such a condition renders the action incompetent as the Court cannot ignore such a condition precedent.

4.2. Want of Diligent Prosecution
A plaintiff who filed a case in Court must show enough interest in prosecuting his case within a reasonable time. This interest must come by way of the plaintiff filing the appropriate documents at the appropriate time, attending proceedings diligently and taking all necessary steps till final address and judgment. Failure on the part of the plaintiff to show this diligence puts his case in jeopardy. Should the plaintiff continue in his indolence and delay in such a way that the level of delay becomes inordinate and inexcusable; the court might consider striking out his action on the grounds of want of diligence prosecution. A court would ordinarily dismiss a suit where the delay is enormous. A case which illustrates application of want of diligent prosecution is the case of *Okereke v. Liquid Invest. (Nig) Ltd*[xxiii]. In this case, the Appellant filed this action on the 30th August, 1988 in Ogoja High Court of Cross River State of Nigeria. When the action was set down for hearing on the 18thand 19th of February, 1991, the managing Director of the company Mr. Morphy sought adjournment in order to settle the matter with the bank. The Court adjourned the suit to 14th 15thand 16th May, 1991 for a report of settlement or definite hearing. When no reasonable proposal was submitted for settlement and the Managing Director showed no intention to call evidence for the hearing of the case, the Court found that the Appellant was not acting in good faith. It therefore dismissed the claim of the Appellant and vacated the interlocutory injunction granted ex-parte in favour of the Appellant in which the respondent was restrained from foreclosure sale of the Appellant's security property tied to the loan. On appeal to the Court of Appeal, the Appellant contended that the learned trial Judge did not rule on the application for adjournment and did not call on the Appellant to proceed with the case before proceeding to dismiss the suit for want of prosecution. In its ruling, the Court of Appeal upheld the decision of the trial Judge. On further appeal to the Supreme Court, the Court per Muhammed, JSC (as he then was) who read the lead judgment affirmed the decision of the Court of Appeal by saying that the learned trial Judge, Mbanefo J. exercised her discretion judicially and judiciously in dismissing the Appellant's suit at the state she reached in the proceedings.
It is important to note that where a plaintiff files a case and evidence is yet to commence and adjournment is sought either because the plaintiff is absent or because of the plaintiff's unwillingness to prosecute the relief sought, reason must be given for the refusal of the adjournment and the party asked to proceed. Thereafter, the suit may be dismissed for want of prosecution and if the refusal is against the defendant, judgment may be given for the plaintiff. It is therefore not necessary in this case to first write a formal ruling refusing the adjournment and then call upon the party to proceed with his case and if he fails to do so, dismiss it. It suffices that the reason for the refusal of the adjournment appears in the judgment. It is also important to note that the power of the trial Judge to dismiss a plaintiff's case when he is unable to proceed should be exercised only if the court is satisfied either that: the default has been intentional and contumelious example, disobedience to peremptory order of the court or conduct amounting to an abuse of the court's process, or there has been an inordinate or inexcusable delay on the part of the plaintiff or his lawyers, and or that such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action or is such as is likely to cause or have caused serious prejudice to the defendants either as between themselves and the plaintiff or between them and a third party.
On what constitutes inordinate and inexcusable delay, the author submits with respect that it is a question of facts which the Court can deduce from the facts and Circumstances of each case. In determining the inordinacy and inexcusability of the delay, the Court will take into consideration not only the period of the delay but the circumstances or idiosyncrasies of the delay. Thus, where a delay is justified, then it becomes excusable and therefore a plaintiff cannot be exposed to the extreme punishment of dismissal of the actions and if the defendant applied that the matter be dismissed or struck out the court shall refuse such application.

4.3. No Reasonable Cause of Action or No Defence
A suit is filed with the intention to remedy some wrong done to the person suing. For there to be a valid action therefore, there must be in existence a legal right which has been breached or violated; and which is capable of being remedied in law. This is the cause of action. *In Oshoboja v. Amuda,*[xxiv]the Supreme Court defined a cause of action as "the facts, which when proved, will entitle plaintiff to a remedy against the defendant". Also, in *Olufunmise v. Falana*,[xxv]*Nnaemeka-Agu JCA*(as he then was) asked, what is a cause of action? He answered this by adopting the definition of the words by *Diplock L. J* in *Letang v. Cooper*[xxvi]where he defined the words as meaning "a factual situation the existence of which entitles one person to obtain from the Court a remedy against another person…" facts must be distinguished from evidence and the decision whether there is a cause of action is an issue of law to be decided based on the statement of claim only. In other words, a cause of action means a bundle or aggregate of facts which the law will recognize as giving the plaintiff substantive right to make the claim to the relief or remedy sought. Such facts or a combination of facts, which gives rise to a right to sue, may consist of two elements, namely: the wrongful act of the defendant which gives the plaintiff his cause of action; and the consequential damage. It is suggested that the appropriate procedure here for reasons discussed should be by way of proceedings in lieu of demurrer which need not be by a motion.
This ground only applies to claims or defences which are manifestly unsustainable. The fact that a case is weak and unlikely to succeed is no ground for striking it out and the fact that the action is statute barred does not mean that there is no cause of action, but rather there is a defence to that action. When faced with this situation, the adversary may amend his pleading so as to bring out as

clear as possible his claim. However, where there is no cause of action occurring to the plaintiff, the Suit will be struck out on the application by the defendant.

4.4. Abuse of Court Process

A pleading will be struck out if it is filed by the plaintiff in circumstances that will amount to an abuse of the court process. What amounts to an abuse of the process of Court was carefully pointed out by Niki Tobi JSC in African Reinsurance Corporation JDP Construction Nig. Ltd[xxvii]as follows:

- "Abuse of process of court is a term generally applied to a proceeding which is wanting in bona fide and is frivolous, vexatious or oppressive. Abuse of process can also mean abuse of legal procedure or improper use of legal process… there is said to be an abuse of the process of the court when a party improperly uses the issue of the judicial process to the irritation and annoyance of his opponent, such as instituting a multiplicity of actions on the same subject matter against the same opponent on the same issues"

From the above dictum of the court, it is clear that abuse of the process of courts is akin to frivolous and vexatious claims. The commonest example would be where a person seeks to relitigate a question which has already been adjudicated on by acourt of competent jurisdiction even though the matter is not strictly speaking *res judicata* or to raise in a subsequent litigation an issue which should have been raised against someone who was a party to an earlier proceeding.

An abuse of court process may also occur where a plaintiff institutes multiple actions on the same subject matter against the same opponent on the same issues. Thus, the multiplicity of actions on the same matter between the same parties even where there exists a right to bring the action is regarded as an abuse. The abuse lies in the multiplicity and manner of the exercise of the right than the exercise of the right per se. In *Alade v. Alamuloke*[xxviii], the reasoning of the Supreme Court was that to grant an adjournment to an appellant in order to ask for leave to resuscitate issue of fact already decided by three (3) Courts below is an abuse of process. Consequently, where a defendant is confronted with a suit which is apparently an abuse of court process, he does not need to wait until he files a statement of defence in the matter before raising a preliminary objection on jurisdiction of the Courts. Also, in *Arubo v. Aiyeleru*[xxix]*,*the Supreme Court stated categorically that abuse of court is not merely an irregularity that can be pardoned but constitutes a fundamental defect, the effect of which will lead to dismissal of the process which is abusive.

4.5. Composition of Court and Qualification of Members

There are Federal and State Courts in Nigeria, each with its area of jurisdiction. The statute creating a court usually specifies the number of judges that would constitute it. For examples Section 234 of the 1999 Constitution (as amended)states that for the purpose of exercising any jurisdiction conferred upon it by this constitution or any law, the Supreme Court shall be dully constituted if it consists of not less than five justices of the Court. Besides, where the court is considering an appeal pursuant to Section 233(2)(b) or (c), exercising its original jurisdiction under Section 232, the court shall be constituted by 7 justices. Similarly, Section 247 of the same constitution provides that for the purpose of exercising any jurisdiction conferred upon it by this constitution or any law, the Court of Appeal is constituted by not less than three justices and where the court is considering appeal from Sharia Court of Appeal or Customary Court of Appeal; the three justices shall be learned in Islamic personal law and customary law respectively.

Also, by Section 253 of the same law the Federal High Court is constituted by at least one judge of that court. The same applies to the High Court of the Federal Capital Territory, Abuja and the High Court of a State[xxx], as the case may be.

The case which illustrates an objection on the above instances was canvassed in the case *of Lexwot v. Judicial Tribunal*[xxxi]*,* where Akpabio JCA (as he then was) stated as follows:

- "In conclusion, I should also like to emphasize the fact that this court is not opposed to the appellants being tried for any offence, they are shown to have committed; but they must be tried by a court or Tribunal that is properly constituted under the law creating it. The court further held that the composition must also be such as would ensure its independence and impartiality as required by S.33(1) of the 1999 Constitution. The Court then ordered that the proceedings at the Tribunal must be stopped, at least temporarily for the legitimacy and constitutionality of its composition to be enquired into in the substantive application before the Kaduna High Court"

From the above, it is clear that instituting a suit in a court without jurisdiction and qualification of members by the plaintiff could lead to the matter being struck out except there is provision for transfer.

5. Conclusion

This paper has examined the place of preliminary objections in administration of justice in Nigeria from our discussion, it is manifestly clear that essentially; it is a weapon in the hand of the defendant though in appropriate cases the plaintiff may take advantage of it. It relates to quite a wide range of issues our various rules of court and civil practice and procedure laws lay down the procedure regulating the progress of litigation from the issue of originating process to pleading, conduct of trials and judgment, therefore any deviation by way of non-compliance, the other party may rightly object to the wrong procedure adopted.

The paper stresses the fact that objection may be raised at any level, even on appeal, depending on the ground of objection and when raised, it is imperative on the Court to decide whether it has jurisdiction or not.

It also stresses that the effect of a sustained objection may be devastating in terms of cost, expenses and time, because every preliminary objection aims at bringing a matter to an end without having to go through the rigours of trial. A successful preliminary objection has the effect of terminating the entire proceedings. The case of the Plaintiff/Respondent would be brought to a halt. The matter would be dismissed on the merit. An objection is therefore a complete defence against the case of the Plaintiff.

Finally, the paper has highlighted what a young Lawyer should do and what not to do whenever he wants to file a suit on behalf of his client in order to avoid the matter being struck out or dismissed prematurely. On the part of the Judiciary, we suggest that the power of the court to dismiss or strike out a case for want of diligent prosecution should be exercised not as a matter of course; rather, such power must be exercised judicially and judiciously. The rule is that where an adjournment is sought by either party to a case and refused, the Court must invite the party to proceed with his case. Where the party called upon to proceed is unwilling to go on with his case, then the Court must rule to resolve the issue of adjournment before making an order of dismissal or striking out as it may deem fit to make in the circumstances of the case otherwise that could amount to a ground of appeal. In the case of *Uche v. Obinya*[xxxii] the Court of Appeal brilliantly x-rayed the principle that should guide the court in dismissing the plaintiff's case when he is unable to proceed with his case in the following words: the duty of Court after re fusing application for adjournment is to call on party to proceed with his case, and where he refuses, the Court may make whatever order it may deem fit to make in the circumstances of the case.

6. Endnotes

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ii. Hornby A, Oxford Advance Learner's Dictionary (6thEdn.Oxford University Press, 2000) p.916
iii. (2008) 12 NWLR (Pt 1102) 692
iv. (2011) vol. 202 LRCN 99
v. (2011) vol.200 LRCN 4
vi. (1979) 6-9, 32
vii. section 6 of the 1999 constitution (as amended)
viii. (2010) 12 NWLR (Pt. 1209) p. 518, at p. 560, paras. E-H
ix. (1962) 2 SCNLR 341
x. Egbue v. Akara (1983) 3 NWLR (pt.84) 598
xi. International Niger build Const. Co Ltd V. Giwa [2003] 13 NWLR (pt. 836) 69
xii. (1981) 5SC 112
xiii. Order 2 High Court of Lagos (Civil Procedure) Rules 1994
xiv. Nwadialo F., Civil Procedure in Nigeria (2nd Edn. 2000 University of Lagos Press) p. 172
xv. In Lagos State, the Hon. Chief Justice S. O. Ilori recently introduced by practice direction the rule that will dispense with the use bailiff in the service of processes since this is one of the areas identified as causing delay in the administration of justice I the State
xvi. Banjo & Co others v. E.S O of Cherubim & Seraphim (1975) 3 SC 37
xvii. Ogbechie v. Onuchie (1988) 1 NMWLR (pt.70) 370
xviii. Chianu E; Law of Landord and Tenant: Interpretative Essays. (1st Edn. Benin City, Oliz publishers, 1994) P. 241
xix. the various Rent Control and Recovery of premises Laws of the various States of the federation.
xx. (1997) 9 NWLR (pt. 522) 536
xxi. Madukolu v. Nkemdilim (Supra)
xxii. Section 32(1) of the Traditional Rulers Law, Cap. 134 Laws of Akwa Ibom State,2000
xxiii. (1998) NWLR (pt. 560) 26
xxiv. [1992] 7 SCNJ 317 at 326
xxv. Anukwu v. Eze (2012) 11 NWLR (pt.1310) 50
xxvi. (1965) 1 K.B.229 at 242
xxvii. 20 (2003) WRN, p.20
xxviii. (1988) 1 NWLR (pt. 69) 207
xxix. Arubo v. Aiyeleru (1993) 3 NWLR (pt 280) 125
xxx. Sections 273 and 285, constitution of the Federal Republic of Nigeria (as amended)
xxxi. (1993)2 NWLR (pt.276) p.412
xxxii. (2002) FWLR (pt.92) 1728

7. References

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v. Karibi – Whyte, A. G., "Consideration of Preliminary Objections Locus Standi": being Judicial Lectures on Continuing Education for Judiciary, Organized by Judicial Committee and Continuing Education, Yaba, Lagos (1990)
vi. Tor. G., "The Role of the Judiciary in National Development. The Nigerian Perspective" NJI Law Journal, vol.3 (2010)
vii. Akwa Ibom State of Nigeria High Court Civil Procedure Rules, 2009
viii. Constitution of the Federal Republic of Nigeria, 1999 (as amended)
ix. Evidence Act, Cap.HB.214.LFN 2011
x. Rent Control and Recovery of premises Law, Cap 110, Laws of Akwa Ibom State of Nigeria, 2000.