

**IN THE NATIONAL INDUSTRIAL COURT OF NIGERIA**

**IN THE AKURE JUDICIAL DIVISION**

**HOLDEN AT AKURE**

**BEFORE HIS LORDSHIP: HON. JUSTICE A.N. UBAKA**

**DATE: 26TH MAY, 2014**

**SUIT NO: NICN/IB/11/2012**

*BETWEEN:*

**MR. C.O OLUWASUYI**

**..... CLAIMANT**

*AND*

**ADEKUNLE AJASIN UNIVERSITY,**

**AKUNGBA – AKOKO & ANOR**

**..... DEFENDANTS**

**REPRESENTATION**

**DAYO AKINLAJA SAN WITH G.U ANONDE & J.A DARAMOLA ESQ - FOR THE CLAIMANT.**

**HUSSEIN AFOLABI ESQ, - FOR THE DEFENDANTS.**

**RULING**

By a general form of complaint, the claimants claim against the defendants the following reliefs-

- a. A declaration that the claimant was not accorded fair hearing in the processes that culminated in the purported termination of his appointment with the 1<sup>st</sup> defendant by virtue of which the purported termination is unconstitutional, ultra vires, null and of no effect whatsoever
- b. A declaration that the defendants did not follow the due process of law before purporting to terminate the appointment of the claimant and consequently the purported termination is unconstitutional, ultra vires, null, void and of no effect whatsoever
- c. An order reinstating the claimant back to his office in his office in the 1<sup>st</sup> defendant with all his rights and privileges attached and without loss of promotion effective from the date of the purported suspension and the subsequent termination of his appointment
- d. An order directing the defendants to pay the claimant his full salary, emoluments and allowances effective from the date of the purported suspension and the subsequent termination of his appointment.

- e. The sum of Ten Million Naira (N10, 000,000.00) only as general, exemplary and/or aggravated damages against the defendants jointly and severally.

The complaint is accompanied by a statement of fact, list of witness, witness' written statement on oath, list of documents to be relied upon.

The defendants entered a memorandum of appearance and filed a preliminary objection. The grounds for the preliminary objection are as follow-

- a. The defendants/applicants are public officer under the Public Officers Protection Law of Ondo State.
- b. The claimant/respondent's suit is incompetent for not having been instituted within 3 months of accrual of the cause of action in the circumstance of this case.
- c. The claimant/respondent failed to give the defendant/applicant one-month pre-action notice before instituting this suit as required by the Adekunle Ajasin University Law, 2007, being the enabling law governing the defendant/applicants. The said pre-action notice constitutes a condition precedent to the institution of this suit.
- d. The claimant/respondent also failed and/or neglected to exhaust the internal avenues for settling disputes or seeking redress from the 1<sup>st</sup> defendant/applicant before instituting this suit as required by the Adekunle Ajasin University Law, 2007.
- e. This honourable court has no jurisdiction to entertain this case in the circumstances.

Accompanying the preliminary objection is an 8 paragraphs affidavit deposed to by one Bamidele Olotu, the registrar and secretary to the Governing Council of the Defendants. The preliminary Objection is also accompanied by a written address dated 27<sup>th</sup> July, 2013.

In the said written address, counsel to the defendants raised two issues for determination-

- a. *Whether the claimant's/respondent's suit is liable to be struck out for being incompetent in the circumstances of this case.*
- b. *Whether the claimant's/respondent's suit is liable to be struck out for being incompetent as the condition precedent to the institution of this suit has not been fulfilled*

On issue one; defendant's counsel submitted that the defendants are public officers within the meaning of section 2(a) of the Public Officer Protection Act. To counsel, an action against a public officer ought to be commenced within 3 months after the accrual of the cause of action else, the cause of action becomes stale and extinguished. He relied on the case of **Crutech vs Obetan (2011) 15 NWLR (Pt. 1271) 588 at 608 -609, Para H-A; Okomu oil palm Co. vs Iserhienhien (1996) 1 NWLR (Pt. 422) 94 at 107, Para H.**

Relying on the cases of **Okomu Oil Palm Co. vs Iserhienhien (1996) 1 NWLR (Pt.422) 94 at 107** and **Unilorin vs Adeniran (2007) 6 NWLR( Pt. 1031) 498 at 521 Paras C-D**, Defendants' counsel submitted that the defendant being an institution solely owned by the Ondo State Government is a public officer within the contemplation of the Public Officer Protection Laws of Ondo State and is hereby shielded from the court actions which are not instituted within the statutory period of 3 months from the day of the accrual of cause of action of a prospective litigant. He urged the court to so hold.

Defendants' counsel submitted that the claimant herein commenced this suit on the 23<sup>rd</sup> March 2012; while it is clear from the complaint and the statement of facts particularly paragraph 25 thereof that the cause of action accrued on the 9<sup>th</sup> December, 2011 when his appointment was terminated by the 1<sup>st</sup> defendant, counsel argued that the claimant's right of action has been lost and statute barred. He relied on **Egbe vs Adefarasin (1987) 1 NWLR (47) 1 at 20**; **Moyosore vs Governor of Kwara State (2012) 5 NWLR 242 at 283-284**; **I.T.F vs NRC. (2007) 3 NWLR (Pt. 1020) 28** and **F.R.I.N vs Gold (2007) 11 NWLR (Pt. 1044) 1**.

Counsel submitted that when a party alleges that an action is statute barred, the court must consider only the processes filed by the claimant namely, the writ of summons and the statement of claim.

On the applicability of the Public Officers Protection Law to contract of employment, counsel relied on the case of **Bakare vs Nigeria Railway Corporation (2007) 1 NWLR (Pt. 1064) 606 at 641 Paras C-D** ; **NBC vs Bakare (1972) NSCC 220** and **Tajudeen vs customs, Immigration and Prisons Service Board (2010) 4 NWLR (Pt. 1184) 325 at 339-340**. All the Supreme Court decisions are to the effect that Public Officers Protection Act applies to contract of employment.

On the second issue, counsel to the defendants submitted that by virtue of section 24 of the Adegunle Ajasin University, Law, 2007, an intending plaintiff is mandated to serve a pre-action notice on the university. Counsel contended that the failure of the claimant to issue and serve a pre- action notice on the defendants is fatal to his case and liable to be struck out. He referred to the cases of **University of Ife vs Construction Co. Ltd (1991) & NWLR (Pt.201) 26 at 37-38, G-C**; **Nnoye vs Anyichie (2005) 2 NWLR (Pt 910) 623 at 647, Para D-F**. He urged the court to so hold.

Counsel argued that the service of pre-action notice is a condition precedent to the court's jurisdiction over this suit and the claimant is obliged to plead the fulfilment of all conditions in his statement of facts.

Counsel further submitted that section 17(9) and 15(3) of the Adekunle Ajasin University, Law 2007 provides that an aggrieved staff or student of the university must exhaust all internal avenues for dispute/grievance resolution before resorting to seek redress in the court of law. Counsel continued that the claimant has not shown that he has exhausted the internal avenues for resolution of disputes before instituting this suit as stipulated by the University Law.

Counsel submitted that the provision of sections 15(3),17(9) & 24 of the Adekunle Ajasin University Law 2007 amount to conditions precedent to the institution of this suit. He urged the court to strike out/dismiss the claimant's action. He cited the cases of **Aribasala vs Ogunyemi (2005) 6 NWLR (Pt. 921) 212 at 321-322 Paras G-B; Ogoloyo vs Uche (2005) 14 NWLR (PT. 945) 226 at 245 Para E**

Finally, counsel urged this court to dismiss this action for being incompetent, the claimant having not complied with the conditions precedent and statute barred same having been brought outside the prescribed 3 month statutory period.

In opposing the preliminary objection, the claimant through his counsel filed a 7 paragraphs counter-affidavit deposed to by the claimant himself. Attached to the counter-affidavit is exhibit COO1. The learned SAN also filed a written address dated 19<sup>th</sup> April 2013.

The learned SAN adopted verbatim the two issues framed by the defendants' counsel in his address.

On the first issue, he conceded that the defendant are public officers and can only be sued for any wrong committed by them, if such action is commenced within the three months of the committal of the alleged wrong. He referred to section 2 of the Public Officer Protection Law of Ondo state. He, however, contended that for the court to determine whether a suit is statute barred the only relevant processes the court will look at is the General Writ of Summons and the Statement of Claim. He relied on the cases of **Ogundipe vs Nigeria Deposit Insurance Corporation (2008) FWLR(Pt. 432) 1220 at 1239 Paras A-B and Military Administrator, Ekiti State vs Aladeyelu (2007) FWLR (Pt. 369) 1195 at 1218 Paras G-H**. Counsel argued that a careful perusal of the complaint and the statement of facts filed in this suit would suggest that the suit was commenced on 23<sup>rd</sup> March, 2012 and therefore what is left to be determined is the date of accrual of the cause of action.

To the learned SAN, paragraph 25 of the statement of facts which has not been denied by the defendants reads that "***the claimant state that to his utmost dismay and consternation, on the 27<sup>th</sup> of January, 2012 a colleague of his wife Mrs Yemi Ayejunle brought him a letter dated 9<sup>th</sup> of December, 2011 conveying the termination of his appointment with the defendants, in***

***conflict with the aforesaid report and recommendation...***” Counsel submitted that it is clear that the defendant did not personally serve the claimant with the letter dated 9<sup>th</sup> December, 2011 terminating his appointment and that the claimant got the letter on 27<sup>th</sup> January, 2012 through a colleague of his wife. Therefore, the time the cause of action accrued for the purpose of determining whether this suit is statute barred is 27<sup>th</sup> January, 2012 when the claimant received the letter terminating his appointment and could not have been earlier. Counsel contended that it is well settled principle that when the accrual of cause of action is determined by the communication of a fact or decision to the party that has the right of action, the cause of action would not be said to have accrued until that fact or decision is communicated to the affected party notwithstanding the actual time the fact occurred or the decision was taken. On this point counsel relied on the case of ***Ikine vs Edjerode (2002) FWLR (Pt.92) 1775 Para E-G.***

It was the submission of the learned SAN that the time to take cognizance of in determining the accrual of the cause of action in this suit is 27<sup>th</sup> January, 2012 when the claimant became aware of the termination of his appointment and received the letter dated 9<sup>th</sup> December, 2011. He urged the court to reject the submission of the defendants as baseless.

On the contention of the defendant that this suit is liable to be dismissed on the ground that the conditions precedent for instituting same have not been met; the learned SAN submitted that section 24 of the Adekunle Ajasin University Law, 2007 has only 23 sections and none provided for service of pre-action notice as a prerequisite for commencing an action against the University. He submitted that assuming but not conceding that the University Law provides for the service of pre-action notice as a condition precedent for the commencement of a suit against the University, the claimant’s letter dated 15<sup>th</sup> February, 2012 satisfies this condition. He argued that the period from the date on the letter and the date when this suit was filed on the 23<sup>rd</sup> March, 2012 exceed the one month required by the Adekunle Ajasin University Law.

Similarly, on the defendants’ submission that the claimant failed to exhaust the internal avenues to settle this case before resorting to court, the learned SAN argued that the provisions of Sections 17(9) and 15(3) of the Adekunle Ajasin University Law, 2007 relied upon by the defendants are non – existent, he also submitted that there is a provision in the Adekunle Ajasin University Law, 2007 that mandates a staff on whom disciplinary measures have been imposed to appeal to the council first before he approaches the court for redress. He continued that assuming but not conceding that the said section makes provision for exhaustion of internal remedy before recourse to the court, what is created in the Section 15(3) of the Adekunle Ajasin University Law, 2007 is a right, which may be exercised or waived to appeal to the Governing Council of the University, and also that assuming Section 15(3) of the Adekunle Ajasin University Law, 2007 makes appeal to the council mandatory, all issues relating to the case are to be concluded within

3 months of its inception. In this suit the issues relating to the claimant were not concluded within 3 months thus section 15(3) is inapplicable.

On the reply on point of law, the defendants filed a written address and a further and better affidavit and attached to it is the Adekunle Ajasin University Law, 2007 marked as exhibit AAU1.

Learned counsel to the defendants submitted that the cause of action in this suit arose on the 9<sup>th</sup> December, 2011 when the letter of termination of appointment was posted to the claimant's address on record with the defendants. He continued that it is the duty of the claimant to place material facts before the court to buttress his claim that he received the letter of termination on 27<sup>th</sup> January, 2012. Counsel submitted that the *doctrine of delayed discovery* which suspends the running of statute of limitation as enunciated in the American case of **Heardon vs Graham (767 So 2d 1 179, 2000 Fla.25) s 682** place a duty on the claimant to convince the court that he was not aware of the acts giving rise to his cause of action until a particular date. He urged the court to so hold that the claimant has not satisfied it that he was not aware of the existence of his cause of action.

On the second issue, learned counsel urged this court to discountenance the submission of the claimant that the sections 15, 17 & 24 of the Adekunle Ajasin University Law, 2007 do not exist. Counsel submitted that exhibit AAU1(Adekunle Ajasin University Law, 2007) which was signed into law on the 22<sup>nd</sup> November, 2007 by the Governor of Ondo state, attached to the further affidavit in support of the preliminary objection is the applicable law. He continued that sections 24, 17(9) and 15(3) thereof provide for conditions precedent before the claimant can institute an action against the defendants and these conditions having not been fulfilled by the claimant is fatal to his claim and liable to be struck out.

I have carefully read and considered the processes and documents filed in this matter, the issues formulated for determination and various authorities cited by counsel.

The issue for the determination of this court is whether the instant action is statute barred on the basis of section 2(a) of the Public Officer Protection Act LFN 2004. In support of this submission, both parties filed supporting affidavit. I must state here that paragraph 6(b) of the defendants' affidavit in support of the preliminary objection in *stating "That the claimant/Respondent's action is statute barred"* is a legal argument and a conclusion and so it offends section 115 of the Evidence Act 2011, which in subsections (1) and (2) provide that:

- (1) *Every affidavit used in the court shall contain only a statement of fact and circumstances to which the witness deposes, either of his own personal knowledge or from which he believes to be true.*

*(2) An affidavit shall not contain extraneous matter by way of objection, prayer or legal argument or conclusion.*

That paragraph is consequently discountenanced for purpose of this ruling.

The issue of jurisdiction being fundamental must first be determined by a court whenever its jurisdiction is challenged. This is because where a court has no jurisdiction to determine a subject matter, the proceedings thereto is a nullity no matter how well conducted. See **A.G Lagos v. Dosunmu (1989) 3 NWLR (pt 111) 552, Obieweubi V. Central Bank of Nigeria (2011) 7 NWLR (pt. 1247) 465.**

I now turn to the merit of the preliminary objection and the issues formulated for determination by the parties. The first issue raised by both parties is whether the claimant's action is statute barred by virtue of section 2(a) of Public Officers Protection Acts 2004 as argued by the defendants. It is necessary to state that the parties are in agreement that the provision protects any public officer from any proceeding or action in respect of anything done in execution or intended execution of any public duty where such proceeding or action was not commenced within three months from time of allegation. See the case of **Rahamaniyya United (Nig) Ltd. V Ministry of Federal Capital Territory & Ors (2009) 43 WRN 124 CA at 145.**

The case of the claimant is that the claimant was dismissed by a letter dated 9<sup>th</sup> December, 2011. However, the said letter was received by the claimant on the 27<sup>th</sup> of January, 2012. Furthermore, the claimant submits that the cause of action should begin in court from 2012 when the claimant became aware of his termination. Learned SAN counsel for the claimant added that the claimant even served a pre action notice on the defendant in a letter dated 15<sup>th</sup> February, 2012.

On his part, learned counsel for the defendant submitted that the claimant was dismissed on the 9<sup>th</sup> of December, 2011. However, the claimant refuted that the said letter of dismissal was given to him by a colleague of his wife, Mrs Tomi Ayegunle on the 27<sup>th</sup> of January, 2012 instead of the earlier date. Will it change the fact that the cause of action arose on the date of the letter of dismissal or on the date the claimant received the letter of dismissal? The claimant's position is that the limitation period will begin to run when the claimant was given the letter by a colleague of his wife.

**Having reviewed the circumstances of the case as well as the position of the law, the formula for determining the date on which a cause of action arises has been clearly resolved by the superior courts. This is that the limitation of action begins to count from the date of the**

accruals of the cause of action. Thus, the period of limitation cannot be said to start only from the date the claimant is served with the letters of dismissal. See the case of **Comptroller-General of Prisons & Ors V Ikponmwoşa Idehen LPELR CA/8/B/104/2007** where the court of Appeal held that *“in this case, the respondent is not contesting the fact that his letter of dismissal is dated 1st September, 1977 and that he filed the action at the lower court on 11 December, 1997, rather, his case is that time began to run when he was served with the said letter on 29<sup>th</sup> September, 1997”*

Again the Respondent’s contention will not hold up, and this is thanks to the decision of the Supreme Court in **Ebongbe V.NNPC (1994) 5 NWLR (pt.347) 649** cited by the appellant wherein Onu JSC held *“The statute of limitation as with other statutes begins to run the moment a cause of action accrues not when it is discovered..”*

In the statement of facts, paragraph 25 thereof, the claimant states **“that to his utmost dismay and consternation, on the 27<sup>th</sup> January, 2012, a colleague of his wife, Mrs Tomi Ayegunle brought him a later dated 9<sup>th</sup> December,2011 conveying the termination of his appointment with the defendants”**. Since the issuance of this letter is the basis of this action, paragraph 25 of the statement of fact puts the cause of action as the 9<sup>th</sup> of December, 2011. And so, I find and hold.

In respect to the applicability of section 2(a) of the Public Officer Protection Act, the issues raised are that the action against the claimant is statute barred and that the one-month pre-action notice was not given before the suit was instituted. In respect of the claimant, the argument and submissions of the counsel that the date of accrual of action was the date the letter was given to the claimant. The reasoning to the decision of the court earlier in the ruling that any action not commenced within three months is statute barred.

Section 2(a) of the Public Officer Protection Act 2004 gives three months as the period within which a claimant must come to court in an action against a public officer. In **Chief Yakubu Sani V. Okene Local Government Traditional Council (2008) 5-6 SC (pt. 1) 131**, the supreme court held that all actions against public officers in respect of their official actions must be commenced within three months from the date the cause of action arose. A term that has been held to include not just natural persons who hold office but the public office or institution itself.

The objection of the defendants against the claimant to the effect that the suit is statute barred is upheld. The claimant did not bring his suit against the defendants within the three months period as stipulated by the Public Officers Protection Act LFN 2004. See **Mrs O. Adekoya V. Federal Housing Authority (2008) 4 SC 167** where it was held that the limitation of action



is determined by looking at the writ of summons or statement of claim alleging when the wrong was committed which gave the plaintiff cause of action and comparing that date on which the writ of summons was filed.

On the issue of service of pre-action notice by the claimant, the defendants' counsel submitted that the claimant has not complied with the provision of section 24 of the Adekunle Ajasin University law, 2007 which requires an intending plaintiff to serve a pre-action notice on the University. The said section 24 provides the contents of the pre-action notice as including the cause of action, the name and place of residence of the proposed plaintiff and the reliefs he claims.

I agree with the defendants' counsel that the failure to give such notice which is mandatory would rob the court of jurisdiction. See **Nigerian Dev. Co. Ltd. V. Adamawa State Water Board (2008) 5 MJSC 188.**

In the instant case, the claimant averred that he has served a pre-action notice which he frontloaded with the originating process. He referred to the letter of 15th February, 2012 and that it satisfies the condition.

I have examined the said letter of the claimant dated 20th February 2012 and its relevant portion states as follows: **RE: UNLAWFUL TERMINATION OF APPOINTMENT OF MR. C.O. OLUWASUYI: DEMAND FOR HIS REINSTATEMENT AND PAYMENT OF OUTSTANDING SALARIES AND EMOLUMENTS.**

This has been pleaded in paragraph 26 of the statement of fact by the claimant as pre-action notice issued in satisfaction of the provisions of section 24 of the Adekunle Ajasin University Law. It is necessary to point out that the pre-action notice under section 24 of the Adekunle Ajasin University Law has provided for particulars that must be given in the said notice to include name and place of the residence of the proposed plaintiff and relief which he claims and a statement that such notice has been delivered and the date on which it was delivered to the Registrar. In the statement of claim and paragraph 26 of the statement fact, I do not see how the letter of the claimant's counsel part of which was reproduced above can be said to have amounted to a pre-action notice properly so called and in line with the provisions of section 24 of the Adekunle Ajasin University Law 2007. This is because all the particulars were not given by the claimant's counsel. Thus, I have no difficulty in holding that the requirement of section 24 of Adekunle Ajasin University law 2007 has not complied with and I so hold. The claimant is to adhere strictly to the express and clear provisions of the law. Thus, a mandatory provision relating to pre-action notice in appropriate circumstances must be complied with. See the case of **Nigerian Railway Corporation & Ors V. Akinbode & Ors (2007) LPELR 4603(CA)** "A defence of non-service, the

court is bound to hold that the plaintiff has not fulfilled the pre -condition for instituting this action.

The action will be considered premature or in the usual parlance incompetent and struck out. See **Eze V. Okechuckwu (2002) 18 NWLR (pt. 799) 348 SC per Uwaifo JSC**

In the circumstance and for all the reasons given, the preliminary objection of the defendants against the suit of the claimant succeeds. Accordingly, the court hereby declines jurisdiction to entertain this suit as it is presently constituted, firstly for being incompetent for failure to provide pre-action notice as well as for being statute barred. Consequently, this suit is hereby dismissed.

I make no order as to cost

Ruling is entered accordingly.

**Signed:**

**Hon. Justice A.N Ubaka**

**Judge**