

LIMITATIONS AND PROSPECTS IN ACTIONS AGAINST LOCAL GOVERNMENT AUTHORITIES IN NIGERIA

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Abstract

This paper examines the constraints usually encountered by plaintiffs who attempt to institute actions against Local Government Authorities in Nigeria. Laws creating Local Government Authorities usually contain certain limiting clauses which either requires claimants to serve notification of intention to sue or to bring the intended suit within a given time frame. The legality or otherwise of these limitation clauses have been attended with dissimilar opinions. The decisions that limitation clauses are legal and constitutional seem to have an overwhelming opinion in the spectrum of cases that form the on-going debate. This article, therefore, concludes that the limitation clauses more often than not constitute a delay to the plaintiff's right to enforce a claim, especially the option of waiver, and when it is not exercised in favour of the claimant in cases of non-compliance by the claimant in the action. The fact that limitation clauses do not really impede access to court nor oust the jurisdiction of court is not really material; it is the seeming practice of a double standard, and the want of equal protection of rights capable of the limitation clauses that need re-visitation by the Supreme Court and policy makers, particularly at the local levels.

1.0 Introduction

Nigeria practices a federal system of government in a three-tier arrangement, comprising federal, state and local governments, with each tier performing such unique functions, fiscal and otherwise as guaranteed by the constitution.¹ According to Ebeku:

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¹ See the Constitution of the Federal Republic of Nigeria, (1999 (as amended), in sections 2(2), 3(1) & (2) & 7(1). See also Ndekwa, E.C., "The power of Different Tiers of Government for the Formation and Control of Fiscal Policies

The local government exists as an autonomous body and therefore this system of government can assert its authority within the permissive (limits) of the constitution²...which guarantees the existence of the system...by democratically elected local government which performs such legislative and executive powers.³

The constitutional and statutory powers of local governments are executed through the chairman of the local government, elected and appointed councilors, and such public officers employed through the Local Government Service Commission. The day-to-day management of the affairs of a local government is vested in the hands of these public officers. It should be noted that these duties are executed for and on-behalf of the council in relation to persons and institutions within the confines of the particular council. Doubtlessly, legal relations of varying degrees would be created, ranging from breach of contracts to breach of fundamental human rights and such other tortuous acts in the course of performance of the council's functions by its officers. Thus, the question is: when the actions of a local council infringe on the rights of citizens and institutions, are there a remedies of some sort or a well-articulated procedure for addressing the damage purportedly caused by the council?

Interestingly, the answer to the afore-stated puzzle is affirmative to a large extent. The rules are hard and fast. Curiously,

in a Democratic System”, a paper presented at the Chartered Institute of Taxation of Nigeria 1999 Mandatory Professional Training Programming, August – October, 1999 – cited in Orifowomo, O. A., “Understanding Local Government Council’s Legislative Standing Orders”, vol. 6 (2011) *University of Ibadan Journal of Private and Business Law*, P. 164.

² See section 7 and the Fourth schedule to the 1999 Constitution (as amended). The powers of Local Government Authorities are also elaborately provided for under Local Government Laws enacted by various State Houses of Assemblies across the Federation.

³ Ebeku, K. S. A, “The Separation of Powers in Local Governments in Nigeria, vol. 36, No 1 (Spring 1992) *Journals of African Law*, pp. 43 – 51, 46, available at <http://www.jstor.org/stable/pdfplus/745455.pdf> -Cited in Orifowomo, Loc. Cit.

the truth of the matter is that, an action against a Local Government Council, like its sister tiers of governments is full of condition precedents and constraints. These requirements are strictly interpreted in favour of local governments. Many legal actions have fallen through as a result of procedural technicalities (condition precedents). Consequently, proceedings against local governments usually fail to yield desired results for litigants, owing to these barrages of constraints statutorily required for adherence in such proceedings.

Therefore, this paper attempts to make an exposition of the constraints thereof, including a critical analysis of the limitations vis-à-vis the Fundamental Human Rights Enforcement Rules guaranteed under the Constitution. It also considers the requirement to commence action within three months; from the date of the actual cause of action provided under the Public Officers Protection Act, especially to the extent it affects proceedings against local governments and its officers on matters of fundamental rights which have limitless time for prosecution under the Fundamental Right (Enforcement Procedure) Rules 2009.⁴

2.0 The Legal Personality of Local Government Authorities

The existence of a Local Government Authority is a fundamental feature in every government where Federalism is practiced as a system of government. The Constitution of the Federal Republic of Nigeria provides and guarantees that Local Government Authorities have their own independent existence, legal duties and liabilities.⁵ This Constitutional requirement stopped the practice of treating Local Government Authorities as

⁴ See section 46(3) of the 1999 Constitution (as amended) and Order III, Rule 1 of the Fundamental Rights (Enforcement Procedure) Rules, 2009.

⁵ See Section 7 and the Fourth Schedule to the 1999 Constitution (as amended). See also Oluyede. P. A., *Nigerian Administrative Law*, (Ibadan: Ibadan University Press Plc, 2007), P. 103. The structure of every Local Government is elaborately provided for under State Laws for its existence, as directed by the Constitution by virtue of Section 7 of the Constitution.

mere agency of State Governments.⁶ Local Government, therefore, is a residual matter,⁷ and their authorities are not solely derived from the Constitution contrary to popular demand by a large section of the public.⁸ Of course, local government, as a residual matter, does not rip it off its legal personality as a perceived third tier of government. That, it is guaranteed by the Constitution and established properly by law of the State makes it a legal personality capable of suing and being sued like the Federal and State governments as well as their agencies. In other times actions can be maintained for and on-behalf of Local Government Authorities by interested persons, institutions and even by State Governments.⁹

Accordingly, a Local Government Authority's legal personality and liability is just as amenable to legal proceedings as an individual person is under the Constitution.¹⁰ Putting it more succinctly, Obaseki, JSC (as he then was) said:¹¹

The [Nigerian] Constitution has opened the gates to the courts by its provisions and there can be no justifiable reason for closing the gates against those who do not want to be governed by a law enacted not in accordance with the provisions of the constitution.

The observations and expression of the Supreme Court in the case of *A.G Bendel State of A.G Federation & Ors* finds support in

⁶ Oluyade, P. A., Op. Cit., at P. 122.

⁷ Local Government as a residual matter is portrayed under sections 4(7) and 5(2) of the 1999 constitution (as amended).

⁸ Oluyede, P.A., at PP. 122 – 123.

⁹ The cases of *Attorney General of Lagos State v. Attorney General of the Federation* (2005) All FWLR Pt 244, 805 and *Attorney General of Abia State v. Attorney General of the Federation* (2002) 6 NWLR (Pt 763) 264 are instructive of instances where actions had been maintained for an on-behalf of the affected Local Governments by their State Governments.

¹⁰ This reflects the unanimous conclusion of the Supreme Court in the case of *Attorney-General of Bendel State v. Attorney-General of the Federation & Ors* (1981) ANLR 85, 136; (1982) 3N.C.L.R. 1 88.

¹¹ *Ibid.* at p. 202.

sections 6 (6) (a) & (b) and 272 (2) of the 1999 Constitution which make it possible or allows legal proceedings to be brought against any tier of government, institutions and persons regarding any matter or question of legal right, power, duty liability and so on. By these provisions, every action, duty or power is subject to a court's jurisdiction except those specifically excluded.¹²

3.0 Liability of Local Government Authorities

The Constitution of the Federal Republic of Nigeria 1999 (as amended)¹³ places restrictions on proceedings against some public officers,¹⁴ for example, these are the President of the Federal Republic of Nigeria, and his Vice, as well as the Governors of States and their executives. This restriction does not apply or extends to a local government chairman and public officers under the employ of a Local Government Service Commission.¹⁵ Thus, like the Federal and State governments, a local government has liability towards its employees on the basis of the terms of contract or service on the one hand, and to members of the public on the other hand in contract or tort in the discharge of its constitutional and statutory functions by its officers.¹⁶

Generally, the law creating a local government council provides for the structure of the local government. The duties or functions of the council are performed by persons employed under

¹² See the case of *Elufiaye v. Halilu* (1993) 6 NWLR (Pt 301) 570. For detail discussions on the provision of section 6(6) (a) (b) see Akande, J. O., *Introduction to the Constitution of the Federal Republic of Nigeria 1999*, (Lagos: MIJ Professional Publishers Limited, 2000), at pp. 32 – 34.

¹³ See Section 308 of the 1999 Constitution (as amended).

¹⁴ This, however, does not mean that they cannot be sued in their official capacity in civil proceedings. They can also be made nominal parties to a criminal or civil suit. See particularly subsection (2) of section 308 of the 1999 Constitution.

¹⁵ Section 308 (3) of the 1999 Constitution (as amended). See also section 2 of the Public Officers Protection Act CAP P 42 Laws of the Federation of Nigeria (LFN), 2010.

¹⁶ See Oluyede, P.A., at p. 434. Professor Oluyede stated that the liability of a local government arises from common law grounds. It is contended that such liability can also emanate from constitutional & statutory grounds. The nature of the liability would in most cases determine the appropriate grounds.

the local government service commission. Such employments stipulate terms and conditions that would apply under certain conditions. Depending on the nature of job a person may be employed to undertake for and on behalf of the council, the employment relationship is dictated by the Local Government Law and the contractual terms (if any). Under the circumstances, the council has a duty to treat the officer or employee in accordance with the contract and the local government law and vice versa. Disputes occasionally emerge when either party acts in violation of the contract or the law. In such situations legal proceedings would lie either in tort, contract or a breach of fundamental human right as the case may be.

Thus, in *Bashir Alade Shitta-Bey v. Federal Public Service Commission*,¹⁷ where the applicant, who was holding the post of a legal adviser in the Federal Ministry of Justice in which he was suspended and compulsorily retired by the respondent for an alleged involvement in the importation of Indian Hemp into the United Kingdom. On the 15th October, 1973, one Iyabo Olorunkoya, was arrested and convicted in London for attempting to import into the United Kingdom seven cases containing dangerous and prohibited drugs (Indian hemp). In the course of investigation into the offence, a letter from the appellant, asking her to “send details as soon as” she arrived in London was found in her possession. The appellant brought this action against the respondent for unlawful severance of his contract of employment and an enforcement of his right to work upto retirement age. The Supreme Court stated amongst other things that the Public/Civil service commission as a creation of the Constitution has to perform its duties under the constitution and all the rules and regulations made there-under and ordered the reinstatement of the appellant by the respondent.¹⁸ It may be safe to add that the same is expected of a Local Government Service Commission established under the State local government law.

Besides liability of a local government towards employees of the local government public/civil service, liability of a council

¹⁷ (1981) 1 S.C. 40.

¹⁸ Ibid.

could emerge in contract with members of the public. The right of action by and against the local government may be implied from the language of the local government law.¹⁹ Where the law provides that a local council is bound by the terms of an enactment from which the right of action would lie for tort or contract, the citizen may acquire a direct right of action against the local government.²⁰ An aggrieved member of the public by the conduct of local government officer or agent might also press charges against the *tortfeasor* directly in his personal capacity.²¹ Every official, from the chairman down to collector of rates or taxes in the local government, is under the same responsibility for every act done without legal justification as any other citizen.²²

However, unlike tort, a public officer is not liable personally for a breach of contract entered into by him in his official capacity. This is a well settled principle of common law.²³ The civil servants who appended his signature to the contract on behalf of the local government is not in law a party to the contract and, therefore, is not personally liable for the breach.²⁴

It has been observed, however, that proceedings against an officer of government in his personal capacity for either tort or contract could be hazardous and speculative. The difficulty lies in

¹⁹For instance, section 43 (2) and (3) of the Local Government Law of Bayelsa State, CAP L10 Laws of Bayelsa State, 2006 which provides for pension rights of employees of the local government as provided under the Pensions Act, 1990 permits an employee to sue for benefits thereunder where the local government authority tries to withhold such benefit. See also Emiola, A, *Remedies in Administrative Law*, (Ogbomoso, Emiola, Publishers, 2010), p. 434 where this point was noted with copious examples.

²⁰ *Ibid.*

²¹ In *J. D. Fasoro v. E. K. Milborune & Ors* (1923) 4 N.L.R., 85, where a district officer instructed a police constable to forcibly eject the plaintiff from the court room in the process of which the plaintiff suffered battery, the district officer was fined to pay ten pounds as damages to the plaintiff.

²² Iluyomade, B. O. and Eka, B. U., *Case and Materials on Administrative Law in Nigeria*, 2nd edn, (Ile-Ife: Obafemi Awolowo University Press Limited, 1992), P. 507.

²³ Iluyomade B.O. and Eka, B.U., at p. 530. See also the case *Macbeth v. Haldimand* (1786) 1 T.R. 172.

²⁴ See the Reform (contract) Act No; 64, 1961 which applies to Lagos.

where to draw the line between representative and personal capacities.²⁵ Therefore, it might be wiser to sue the officer in person (alone or as co-defendant to the action) where the plaintiff is not sure whether or not the servant has exceeded his mandate. It would seem that the solution lies in the facts of each case.²⁶

Nevertheless, there are now three bases for the liability of government (Local Government) and its agencies in relation to the law of employment.²⁷ The government will be liable (a) where the body (that is, commission or board) is recognized as an alter ego of the government;²⁸ or (b) where the officer – irrespective of his status – is constituted as an agent of the government;²⁹ and/or (c) where the cause of action arises in the course of the discharge of the normal duty of the officer.³⁰ In those situations, government cannot renounce responsibility for the acts or omissions of its officers.³¹

4.0 Forms of Proceedings against Local Government Authorities

By and large, the nature of claim made against the local government will determine the form of action or originating process. So, depending on the type of claim, proceedings against a local government can commence in the form of a writ of summon, used in hostile proceedings or where the facts are likely to be contested.³² Originating Summons is used where a statute or written agreement or deed or will are sought to be interpreted, and

²⁵ Emiola, A., *Public Servant and the Law*, (Ogbomosho: Emiola Publishers Limited, 2001), p. 254.

²⁶ Ibid.

²⁷ Emiola A., *Public Servant and the Law*, at. P. 255.

²⁸ Halsbury's law of England, 2nd edn, Vol. 1, p. 26.

²⁹ This will be in instances of express appointment to act as an agent.

³⁰ In *ABC Ltd & Ors v. Apugo* (1995) 6 NWLR (pt. 399) 35, Edozie, J.C.A. (as he then was) said at p. 82 that 'it is trite law that he who acts through another acts for himself.' See also the case of *Mutual Aids Society Ltd v. Akerele* (1965) 1 All NLR., 336.

³¹ Ibid.

³² *Doherty v. Doherty* (1968) NMLR, 241.

there is no likelihood of dispute of the facts.³³ Originating Motion/Application is used where a specific legislation provides for it, such as in seeking for enforcement of fundamental rights, prerogative orders of certiorari, prohibition, mandamus and habeas corpus,³⁴ and a petition is used where specific legislation provides for it, such as the Companies and Allied Matters Act,³⁵ election matters³⁶ and matrimonial causes.³⁷

In actions against Local Government Authorities, the law of the state setting up the structure of a given local government may specify the forms a particular action against it will take. In the absence of such provisions, the rules of the High Court of the state shall apply.³⁸ Usually, commencement of proceedings in the high court is by a writ of Summons, except for fundamental right enforcement and prerogative remedies which are specifically required to commence by means of Originating Motion or Application.

4.0 Constraints in Actions against Local Government Authorities/Officers

4.1 Protection of Public Documents/ Pre-action Notice

Despite the far-reaching access to court and justice provided under sections 6 and 272 of the Constitution of the Federal Republic of Nigeria 1999 (as amended), proceedings against Local Government Authorities are encumbered with various substantive and procedural constraints. The reason usually adduced for such constraints is the need to protect government. This, more often than not leads to the suppression of evidence in

³³ *Unilorin v. Oluwadare* (2006) 14 NWLR, (Pt. 1000) 751.

³⁴ See order 1, Rule 3 of the Civil Procedure Rules, Abuja.

³⁵ Cap C20 Laws of the Federation of Nigeria (LFN) 2010 which provides for petition as the mode of commencing actions in sections 46(1)(2), 47(1), 53(3), 120, 121(2) and 311(1).

³⁶ See section 133 of the Electoral Act 2010 (as amended).

³⁷ See the Matrimonial Causes Act CAP M7 Laws of Federation of Nigeria (LFN) 2010.

³⁸ See for example Order 3 of the Bayelsa State High Court Rules, 2010 which prescribes the mode of commencement of actions.

the public interest.³⁹ It thus invariably connotes that those facts necessary to establish the plaintiff's case against the government (that is, local government) would be withheld on the ground of state privilege.⁴⁰ It may be interesting to note that this practice, which amounts to potential miscarriage of justice, has been given a nod even in England.⁴¹ The hallmark of the nod was in the case of *R. v. Lewis Justice, ex Part Home Secretary*⁴² where the House of Lords deprived the Crown, qua Crown, the privilege, saying it was a matter of public interest – rather than the privilege of the crown-whether a document should or should not be produced.

All the same, the danger or threat to government security may not be successfully neglected if all documents were to be freely made available at trials which the Constitution directs should be held in the open.⁴³ Thus section 36 (4) (b) of the Constitution stipulates what the court should do under such circumstances. It states as follows:

If in any proceedings before a court or such a tribunal, a minister of the Government of the Federation or a Commissioner of the government of a state satisfies the court or tribunal that it would not be in the public interest for any matter to be publicly disclosed, the court or tribunal shall make arrangement for evidence relating to that matter to be heard in private and shall take such other action as may be necessary or expedient to prevent the disclosure of the matter.

Section 36 (4) (b) was put to use in the case of *Olalere Adebayo v. Concord Press of Nigeria Ltd. & Ors.*⁴⁴ Here the plaintiff was a member of the Oyo State Cabinet and had brought the action against the defendants for libel. The defendants based

³⁹ Emiola, A., *Remedies in Administrative Law*, at P. 444.

⁴⁰ *Ibid.*

⁴¹ See the case of *Conway v Rimmer* (1968) A.C. 910; (1968) 1 All E.R. 874.

⁴² (1973) A.C. 388.

⁴³ Section 36(3) of the 1999 Constitution (as amended).

⁴⁴ (1982) 3 NCLR, 434.

their entire defence on a cabinet paper which apparently came into their possession, the content of which was the source of the publication complained of. At the trial, the plaintiff raised the question of security for the document, contending that it would be against public interest to produce a cabinet document in court. Agbaje Williams, J. (as he then was) observed:⁴⁵

Though these proceedings have not been instituted against a government department, those words of wisdom will hold equally well for the defendants here as for the plaintiff ... particularly as it is in the interest of justice that both be allowed to put their case across.... I hereby order that the said documents be produced and tendered in private session....

4.2 Preparation for Defence/Pre-action Notice

Another more seemingly cogent reason always adduced for imposing such procedural and substantive limitations is to create an opportunity for local government authorities and statutory corporations to decide whether to join issues with or to make reparation to the plaintiff.⁴⁶ It is worrisome, however, to note that if this is the belied intention for imposing such limitations, especially as relating to pre-action notices, why then is it made mandatory? Thus the Supreme Court may be right when it stated in the case of *Ntiero v. N. P. A.*⁴⁷ that:

....non-service of a pre-action notice merely puts the jurisdiction of a court on hold pending compliance with the preconditions...the effect of non-service of a pre-action notice, where statutorily required ... is only an

⁴⁵ Ibid at p. 438.

⁴⁶ *Captain E.C.C. Amadi v. NNPC* (2000) 10 NWLR (Pt. 674)114, 82.

⁴⁷ (2008) 160 LRCN 1, 217-218.

irregularity, which, however, renders an action incompetent.⁴⁸

In order to ensure and achieve the afore-stated objectives, both laws creating local government authorities and statutory corporations tend to limit actions capable of being instituted against them by mode of limitation as to time and pre-action notices. The point should be emphasized that, in respect of local governments, the law of limitation is far more restrictive and more stringent.⁴⁹ Most importantly, the maximum period allowed to a prospective plaintiff is barely six months⁵⁰ within which to commence proceedings against a local government. There are also such other condition-precedents to a valid commencement of most actions before the court even where the action is brought within the allowed period. These include the filing of processes and payment of prescribed fees as well as notification of opposing parties through valid service of such processes to the successful institution of an action in a court of law.⁵¹

5.0 The Limitation of Time in Actions against Local Government Authorities

Limitation of time is the time allowed within which a plaintiff may successfully bring an action to contest his claims against a defendant. Thus, a limitation law removes the right of action or right to judicial relief and leaves the plaintiff with bare and empty cause of action which he cannot enforce if such cause of action is statute barred.⁵² An action or suit brought after the time allowed by the statute is usually rendered incompetent and shall

⁴⁸ The court reached this opinion in reliance upon the cases of *Barclays Bank Ltd v. Central Bank of Nigeria* (1976) 6 SC 175, *Jadesimi v. Okotie-Eboh* (1986) 1 NWLR (Pt 16) 264.

⁴⁹ See Emiola A., *Remedies in Administrative Law*, at p. 450.

⁵⁰ See Section 171 of the Oyo State Local Government Law.

⁵¹ See for instance Order 6 of the Supreme Court Rules, 1985 (as amended in 1999), Orders 12, 14 & 17 of the Court Appeal Rules, 2011.

⁵² See *Osuma v. J.C. & Moulding (Nig) Ltd* (2014) 6 NWLR (Pt 1402) 17 at 21.

not be brought after the time prescribed by such statute.⁵³ Hence, the effect of bringing proceedings after the limitation period prescribed by statute or law as the case may be is that the action or proceedings will be totally barred as the right of the plaintiff or injured person to commence an action would have got extinguished by such law.⁵⁴

Most laws creating Local Government Authorities may stipulate the time frame within which a prospective plaintiff may be allowed to institute an action against the local authority, such limitation periods imposed by law may vary from state to state and sometimes dependent on the subject matter of claim being instituted. For instance, in matters relating to recovery of land in Ondo State, the limitation period is within twelve years.⁵⁵ While in Bayelsa State, the limitation period to recover interest in land is within ten years.⁵⁶

On matters of which may involve bringing an action against a public officer, the provisions of the Public Officers Protection Act⁵⁷ stipulates as follows:

that prosecution or proceedings shall not lie or be instituted unless it is commenced within three months next after the act, neglect or default complained of or in the case of a continuance of damage or injury, within three months next after the ceasing thereof. In the case of prosecution or proceedings at the instance of a

⁵³ See *Obiefuna v. Okoye* (1962) All NLR 375 and *Egbe v. Adefarasin* (No. 2) (1987) 1 NWLR (Pt 47) 1. See also S. 2 (a) of the Public Officers Protection Act, CAP. p. Laws of Federation of Nigeria 2010.

⁵⁴ *Abubakar Alhassen Muhammed & Ors v. A.B.U. Zaria, & Anor.* (2014) 7 NWLR (pt 140) 7 CA, 500, and 510. See also *Ibrahim v. J.S.C.* (1998) 14 NWLR. (Pt 584) 1.

⁵⁵ See section 6(2) of the Limitation Law, Cap. 61, Vol. III, Laws of Ondo State 1978. See also the case of *Ataloye v. Governor of Ondo State* (2014) 8 NWLR (Pt1410) 437, 623 and the case of *Okafor v. Anambra State* (2005)14 NWLR (Pt 945) 210.

⁵⁶ See section 1 of the Limitation Law, CAP. L8 Laws of Bayelsa State 2006.

⁵⁷ CAP p42 Laws of the Federation of Nigeria (LFN) 2010.

prisoner, the three months will count after the discharge of such person from prison.⁵⁸

But there seems to be a caveat. The Supreme Court, in the case of *Ibrahim v. J.S.C.*⁵⁹ while resolving the question as to whether a public officer can be sued outside the statutory limitation period of three months stated as thus:

.... a public officer can be sued outside the limitation period of three months if at all time material to the commission of the act complained of he was acting outside the colour of his office or outside his statutory or constitutional duty.⁶⁰

It appears in actions arising from or connected to mal-performance of statutory or constitutional duties, there is no limitation period.⁶¹ Such actions can be maintained at any time irrespective of any contrary limitation period imposed thereof.⁶² Here the clock does not tick down as opposed to the winding down of the permitted time in other actions.⁶³ It may be pertinent to point that the issue of limitation of durational period for the institution of an action is statutory and not merely procedural.⁶⁴ This perhaps may have

⁵⁸ Section 2(a) &(b).

⁵⁹ (1998) 14 NWLR (pt. 584) 1.

⁶⁰ But see the case of *Plateau Construction v. Aware* (2014)6 NWLR (Pt 1404) 427, 525 where the Court of Appeal in reliance upon *P.N. Udoh Trading Co. Ltd v. Abere* (2001)11 NWLR (Pt 723) 114; *Ibrahim v. J.S.C. Kaduna State* [1998] 14 NWLR (Pt 584) 1 and *Adeosun v. Jibesin* (2001) 11 NWLR (Pt 724) 290 held *inter alia* that where a law stipulates a durational period for the institution of a suit, such an action cannot be commenced after the expiration of the statutorily prescribed period.

⁶¹ *Muhammed v. A.B.U. Zaria* (2014) 7 NWLR (Pt. 1407) 500,513, the Court of Appeal ruled that the Public Officers Protection Act which limits the time within which an action may lie against a public officer is designed to protect the officer who acts in good faith and does not apply to acts done in abuse of office and with no semblance of legal justification.

⁶² *Ibid.*

⁶³ See the case of *Eboigbe v. NNPC* [1994] 5 NWLR (Pt 347) 649.

⁶⁴ *Plateau Construction Ltd v. Aware Supra.*

accounted for the lack of debate on the issue of limitation period as either being invalid or unconstitutional vis-à-vis section 6(6)(b) of the 1999 Constitution (as amended). Despite the lack of serious debate on the validity and constitutionality of limitation period, the fact may not be disputed that it serves to constitute an impediment to actions capable of being brought against local authorities, statutory corporations and public officers. Save for actions related to mal-performance of public duty, durational limitation runs against suits maintained by plaintiffs against local government authorities and statutory corporations other than as illustrated in the *Ibrahim's case supra*.

Again, the point should be made that a limited suit in compliance with a limitation law can affect the powers of the court to entertain it if brought outside the limited time frame.⁶⁵ The time frame within which to maintain an action connotes as a condition precedent. Thus, an action brought against a local government authority and its public officers contrary to the time frame allowed violates the condition precedent to the assumption and exercise of jurisdiction by the court.⁶⁶ This of course invariably restricts or curtails access to justice, though largely as a result of the indolence of the plaintiff. The law of limitation “does not admit foot dragging, late coming or sleeping on duty or any form of indifference or indulgence. It has no accommodation or beddings for a sleeping beauty”.⁶⁷

5.1 Effects of Limitation Rules on Fundamental Human Right Actions against Officers of Local Authorities

In discharging Constitutional and Statutory duties, a local government officer could in the process infringe on the fundamental rights of citizens. Such infringement may more often than not constitute as abuse of power; and an abuse of power may

⁶⁵ *Plateau Const. Ltd v. Aware* (2014) 6 NWLR (Pt 1404) 519,530. In this case, the Court of Appeal in its ruling held that the effect of limitation law goes to the jurisdictional foundation of the court and it is capable of being raised at any stage of the proceedings.

⁶⁶ *Ibid.* at 527.

⁶⁷ *Chigbu v. Tonimas (Nig) Ltd* (2006) 9 NWLR (Pt 984) 189.

take the form of non-compliance with the rules or rules of procedure prescribed for that body. It may as well take the form of denial of the right to be heard in one's defence. It may consist of irregularities which are tantamount to a denial or breach of the rules of natural justice. It could as well take the form of an assumption of jurisdiction to perform an act unauthorized by law or a refusal of jurisdiction where it should be exercised.⁶⁸ In view of these, section 2(1) of the Public Officers Protection Act⁶⁹ limits the time frame to a period of three months within which a person injured as such can initiate proceedings against a public officer of the government as the case may be. This of course raises an enforcement of fundamental right question. If an abuse of power of a public officer amounts to an infringement of a fundamental right, the rule is that proceedings can be maintained at any time. Order III, Rule I⁷⁰ provides that "an application for the enforcement of fundamental right shall not be affected by any limitation statute whatsoever."

The question, therefore, is: should an abuse of power by a public officer infringes on a citizen's fundamental right guaranteed under the Constitution, would an action in respect of it be limited by section 2(a) of the Public Officers Act? It seems the court of Appeal answered the question negatively in the case of *Muhammad v. A.B.U.*⁷¹ Delivering the lead Judgment, Orji-Abadua, J.C.A. stated in para. F–J as follows:

The provision of section 2(a) of the Public Officers Protection Act is subject to the provisions of the 1999 constitution of the Federal Republic of Nigeria. A public officer who has contravened the provisions of the Constitution, particularly, as they relate to the fundamental rights enshrined therein, in the execution of his public duty cannot claim protection under the Act. The Public Officer can only sue for such protection when he is not guilty of flagrant abuse of the

⁶⁸ See *R.M.G. v. Public Service Commission* (1974) 11 S.C. 79.

⁶⁹ CAP P42 Laws of the Federation of Nigeria (LFN), 2010.

⁷⁰ Of the Fundamental Human Rights (Enforcement Procedure) Rules, 2009.

⁷¹ (2014) 7 N.W.L.R. pt. 1407 C.A. 500 pp. 539 – 540.

fundamental human rights in the execution of his public duties. It is pertinent to note [that] a public officer is not authorized by any law to abuse people's rights while carrying out his public functions. He must act within the ambits of the law or the Constitution before he can be shielded by the provisions of section 2 (a) of the said Act....

Moreover, on whether a Public Officer, who act in abuse of office or bad faith is protected under section 2(a) of the Public Officers Protection Act, the court, relying on the cases of *offorbche v. Ogoja L.G.*,⁷² *Nwankwere v. Adewunmi*⁷³ and *Lagos City Council v. Ogunbiyi*,⁷⁴ declared that the Public Officers Protection Act is designed to protect the officer who acts in good faith and does not apply to acts done in abuse of office and with no semblance of legal justification.⁷⁵ The Act will not apply if it is established that the defendant had abused his position for purposes of acting maliciously. Hence abuse of office and bad faith are factors that can deprive a public officer of the protection of section 2 (a) of the Public Officers Protection Act.

While it may be gratifying to note that section 2(a) of the Public Officers Protection Act does not apply to fundamental right actions, the reasons adduced by the Court of Appeal in *Mohammed v. A.B.U Supra* are not very germane. One would have expected the court to have based its decision on grounds of inconsistency vis-a-vis Order III, Rule 1 of the Fundamental Human Right (Enforcement procedure) Rules 2009. This is because the Public Officers Protection Act only limits the period or time frame for

⁷² (2001) 16 NWLR pt. 739, 458.

⁷³ (1966) 1 SCNLR 350.

⁷⁴ (1969) 2SCNLR, 94.

⁷⁵ But, in *Sunday v. Chief of Air Staff* (2016) 1 NWLR (Pt 1494) 427,615, a matter of contract of employment in which the defendant was found to be unvigilant and slept on his infracted right after the time allowed for bringing an action, the Court of Appeal unanimously dismissed the appeal on the ground that the action was brought contrary to Section 2(a) of the Public Officers Protection Act. See also the case of *A-G Rivers State v. A-G Bayelsa State* (2013) 3 NWLR (Pt. 1340) 123.

maintaining an action which manifestly conflicts with the timeless provisions of the Fundamental Human Right Enforcement Rules. Here the court of appeal has seemed to rule that once the abuse of power affects a fundamental right, the Fundamental Right Enforcement Rules would apply. Curiously, this, again raises another very important question, especially as it relates to supremacy of rules as well as Judicial Rule-making under Administrative Law – exemplified in the Fundamental Rights (Enforcement Procedure) Rules 2009 made pursuant to section 46(3) of the 1999 Constitution by the Chief Justice of Nigeria.⁷⁶

Efevwerhan has pointed out that “When rules are made under enabling provisions of statute creating the courts or the Constitution, they become subsidiary legislations under the statutes or Constitutions.”⁷⁷ But in the event of conflict between rules of procedure set forth in the statute or Constitution and the rules of court, the statutory provisions of the Constitution override in case of conflict. Thus, in *Abia State University, Uturu v. Anyaibe*,⁷⁸ the Court of Appeal held that the Fundamental Rights (Enforcement Procedure) Rules made pursuant to the Constitution, have the force of law as the Constitution itself; and overrides the provisions of any enactment to the contrary. Yet in *Mohammed v. A.B.U.*, it is not very clearly illustrated by the Court of Appeal as to the reasons why an Act of the National Assembly was held subservient to rules made by the Chief Justice.⁷⁹ The Court of Appeal really needed to

⁷⁶ See Preface to the Preamble of the Fundamental Rights (Enforcement Procedure) Rules, 2009.

⁷⁷ Efevwerhan D. I., *Principles of Civil Procedure in Nigeria*. 2nd Edn, (Snaap Press Nigeria Ltd, Enugu, 2013), P. 4.

⁷⁸ (1996) 3 NWLR (Pt. 439) 646,661.

⁷⁹It should be noted that both the legislature and the Judiciary derived their powers to make the law from the Constitution in sections 4 & 46 (3) respectively. Yet the point may be emphasized that the legislature is the arm of government solely empowered or having the original jurisdiction to make laws for the country. Thus the Fundamental Right (Enforcement Procedure) Rules 2009, made by the Chief Justice of Nigeria in pursuance to section 46 (3) of the 1999 constitution is a necessary delegated function, perhaps because of the need to foster the hope of the ordinary citizen on the judiciary, and to avoid any infiltration of political gymnastics in enforcing the fundamental rights of citizens – seen as the bedrock to a democratic government.

have come up a bit clearer than just relegating section 2(a) of the Public Officers Protection Act to the background on vague Constitutional basis without reference to Order III, Rule I of the Fundamental Rights (Enforcement Procedure) Rules 2009 as having the force of law as the Constitution itself as noted in *Abia State University, Uturu v. Anyaibe supra*. It is, therefore, difficult to reconcile the vague holding of the Court in the *Mohammed's case* with the provision of time lag for bringing up proceedings to address such abuse of power by a plaintiff under the Public Officers Protection Act. Certainly, the reason might have been as held in *Abia State University, Uturu v. Anyaibe*. Yet, of most worrisome is the question as to whether the Court of Appeal's ruling in *Mohamed v. A.B.U supra* correctly reflects the intendment of the Legislature in Section 2(a) of the Public Officers Protection Act and the existence of any probable conflict between it and the Constitution.

6.0 The Limitation of Pre-action Notice in Actions against Local Government Authorities

A pre-action notice is a notice usually in writing required to be given by a plaintiff to the defendant prior to the institution of an action. In *Ntiero v. N. P. A.*,⁸⁰ pre-action notice was stated to connote some form of legal notification or information required by law or implied by operation of law, contained in an enactment, agreement or contract which requires compliance by the person who is under legal duty to put on notice the person to be notified, before the commencement of any legal action against such a person.⁸¹ A reasonable number of statutes,⁸² including Local Government Laws, often demand pre-action notice to be given in respect of particular institutions or corporations. For instance, in proceedings against Local Government Authorities, a written notice of an intention to institute proceedings is required to be given to the local government concerned. The notice, which must

⁸⁰ (2008) 160 LRCN, 214.

⁸¹ See *Chugby v. Tonimas (Nig.) Ltd*, Op. Cit. at P. 217

⁸² The Nigerian Petroleum Corporation Act, CAP 320, LFN, 1990 (as amended); the Nigerian Port Authority Act. CAP P.361 LFN, 1990 and various others.

be served upon the local government by the intending plaintiff or his agent, shall at least be one month before the action can be commenced.⁸³ The same is applicable to several statutory corporations.

The rationale for pre-action notice clauses lies in the understanding, from historical perspectives that pre-action notice is to engender some form of restrictions in legal proceedings against statutory bodies or government departments and parastatals, in order for them not to become overburdened or preoccupied in defending a flurry of Court actions rather than focusing their resources and energies towards the discharge of their primary statutory responsibilities.⁸⁴ The essence of pre-action notice is, therefore, to notify statutory bodies beforehand of the nature of the action contemplated and to give them enough time to consider or reconsider their position in the matter as to whether to compromise or have another hard look at the matter in relation to the issues and to decide whether it is more expedient to submit to jurisdiction and have a judicial pronouncement on the point in controversy or to explore other means of resolving the dispute.⁸⁵

In the case of *Katsina Local Government v. Makudawa*,⁸⁶ Coker, JSC (of blessed memory), aptly captured the essence of pre-action notice in the following words:

The purpose after all ... is solely to give (the) Local Authority sufficient notice of claims against it so that it is not taken by surprise but has adequate time to prepare to deal with the matter in its defence. Its purpose is not

⁸³ See Section 173 (1) of the Oyo State Local Government Law. See also S. 172 of the Cross River State Local Government Law 1976. The same is required of section 27 (2) of the Federal Radio Corporation Act 1979 and Section 29 (2) of the Federal Environmental Protection Act, 1988.

⁸⁴ *Alliance for Democracy v. Plateau State Independent Electoral Commission* (2004)10 NWLR (Pt. 880) 19.

⁸⁵ *Mobil Producing (Nigeria) Unlimited v. LASEPA* (2002)18 NWLR (Pt.797) 1.

⁸⁶ (1971) 7 NSCC 119.

to put hazards in the way of bringing litigation against it.⁸⁷

The justifications as adduced notwithstanding, many have continued to question this perceived rationale. Constitutional grounds have been given by some advocates for the abolition of pre-action notice; that it is an impediment to the right of access to justice guaranteed by the Constitution in section 6 (6) (b). Yet others are of the opinion that the requirement to comply with pre-action notice clauses impede access to justice and oust the jurisdiction of court. In spite of all these varied opinions on the validity or otherwise of pre-action notice clauses, which would be considered hereunder, the question equally worthy of concern is whether or not pre-action notice is indeed unconstitutional or illegal? To this debate we shall now turn.

7.0 The Legality or Constitutionality Debate about Pre-action Notice

The debate about legality or constitutionality of pre-action notice as a condition precedent to a successful legal action against a Local Government Authority has been on-going. Views expressed by scholars, lawyers and the judiciary regarding the legality of pre-action notice are quite divergent and conflicting.⁸⁸ Some are of the opinion that the condition precedent of pre-action notice impedes access to court⁸⁹ and thus contravenes the provisions of the constitution, yet others maintained that it is a mere procedural compliance which does not oust the jurisdiction of

⁸⁷ Ibid. P. 126.

⁸⁸ Akintola, S.O., "An Examination of the Legality of Pre-action Notices in Nigeria" 4 (2005) *University of Ibadan Journal of Private and Business Law*, P. 186.

⁸⁹ In the case of *Amadi v. NNPC* (2000) 10 NWLR (Pt 674) 76, 87, the Supreme Court defined "access to court" as the approach or means of approach to the court without restraint. In this case, while answering the question as to the extent of right of access to courts and whether fettered, the court stated inter alia that the constitutional right of access to the court does not preclude statutory regulations but that regulations intended to subvert the exercise of the right or render the right nugatory is inconsistent with the spirit of the Constitution.

court.⁹⁰ If one of the factors which the court must consider in order to ascertain its jurisdiction on a matter brought before it for determination is compliance with due process of law and upon fulfillment of any condition precedent,⁹¹ does it not amount or connote divestment of jurisdiction or impede an access to court by a plaintiff?

In *Madam Amudatu Saliu v. NNPC & Anor.*,⁹² a matter brought before the Lagos State High Court in 1987 for the determination of the constitutionality of section 11 (2) of the NNPC Decree No. 33 of 1997.⁹³ The defence argued and took objection to the jurisdiction of the court on the premise that the plaintiff had failed to serve the required pre-action statutory notice of intention to sue NNPC. The presiding judge, Ade Alabi, held section 11(2) unconstitutional on the ground that the said provisions⁹⁴ impeded the right of access of the plaintiff to court as guaranteed under the 1979 constitution of the Federal Republic of Nigeria.⁹⁵ But, in *Dockworkers Union of Nigeria v. Roro Terminal Co. Ltd & N.P.A.*,⁹⁶ a High Court in Lagos State upheld the argument of the defence that the action was incompetent because the statutory pre-action notice was not served on the defendant by the plaintiff as a condition precedent required under section 97 (2) & 98 of the Nigerian Ports Authority Act, 1990.⁹⁷

⁹⁰ Akintola, S.O., at P. 186.

⁹¹ See the case of *Dosumu v. N.N.P.C.* (2014) 6 NWLR (Pt 1403) 205,282 on the conditions for exercise of jurisdiction by court. See also the case of *Madukolu v. Nkemdilim* (1962) 2 SCNLR 341.

⁹² Unreported Suit No. ID/255/87 of 22/4/87.

⁹³ Now Section 12 of the Nigerian National Petroleum Corporation Act, Cap N123 Laws of the Federation of Nigeria (LFN) 2010.

⁹⁴ These include sections 4 (8), 6 (6) (b), 33 (1) & (2), 42 (1) 236 of the 1979 Constitution.

⁹⁵ Another case where a Lagos State High Court declared unconstitutional and nugatory similar provisions contained in section 97 (1) & (2) of the Nigerian Ports Authority Act was *Savol W.A. Ltd v. Eminath Co. Ltd & N.P.A* Unreported Suit No. LD/135/90 of 19/3/91.

⁹⁶ Unreported Suit No. ID/816/91.

⁹⁷ Now Cap N126 Laws of Federation of Nigeria, 2010.

Similarly, the Supreme Court, while interpreting section 110 (2) of the Ports Act 1990⁹⁸ which requires one month pre-action notice to be served on the Port Authority by the intending plaintiff or his agent, reiterated the fact that the provisions of the Act as clearly and directly set out therein are of a mandatory effect.⁹⁹ Consequently, any action instituted in violation of the provisions will also have been commenced without complying with one of the required due process or pre-condition and such action would be incompetent.¹⁰⁰ In *Mobil Producing Nigeria Unlimited v. Lagos State Environmental Agency & Ors*,¹⁰¹ the Supreme Court reaffirmed its decision in *Katsina Local Authority v. Alhaji Barmo Makudawa*¹⁰² that compliance with the “provisions prescribing pre-action notice are mandatory” but that such requirements might be waived. And unless there is such waiver, proceedings commenced without the requisite notice or outside the limitation period, may be struck out for non-compliance with the condition precedent, especially if such non-compliance is opposed by the defendant.¹⁰³ In fact, the Supreme Court, while emphasizing on the effect of non-compliance with service of Pre-Action Notice stated *inter alia* on the strength of the authorities of *Barclays Bank Ltd v. Central Bank of Nigeria*,¹⁰⁴

⁹⁸ *Ibid.* at n. 80.

⁹⁹ *Ntiero v. N. P. A. Supra.*

¹⁰⁰ *Madukolu v. Nkemdilim Supra.* See also the case of *Madayedupin v. Oloninoran* (2013) 1 NWLR (Pt 1334) 175 in which the Court of Appeal in illuminating on when the court would be competent to hear a suit said *inter alia* that the case must have come before the court initiated by due process of law, and upon fulfillment of any condition precedent to the exercise of jurisdiction.

¹⁰¹ (2002) 18 NWLR (Pt. 798) 1.

¹⁰² (1971) NWLR 100.

¹⁰³ *Katsina Local Authority v. Makdawa supra.*

¹⁰⁴ (1976) 6 SC 175. In this case, the Supreme Court pointed out that it has been well settled that non compliance with the requirement of a pre-action notice does not abrogate the right of a Plaintiff to approach the Court or defeat his cause of action; that if the subject matter is within the jurisdiction of the Court, failure of the Plaintiff to serve the pre-action notice on the Defendant only gives the Defendant a right to insist on such service before the Plaintiff may approach the Court.

*Jadesimi v. Okotie-Eboh*¹⁰⁵ and *Ijebu-Ode Local Government v. Adedeji Balogu & Co. Ltd*¹⁰⁶ in *Ntiero v. N. P. A.*¹⁰⁷ that:

If, therefore, the subject-matter is within the jurisdiction of the court ... failure of the plaintiff to serve the pre-action notice on the defendant gives the defendant a right to insist on such notice before the plaintiff may approach the court. In other words, non-service of a pre-action notice merely puts the jurisdiction of a court on hold pending compliance with pre-conditions. Non-compliance with service of pre-action notice amounts to an irregularity.¹⁰⁸

It seems in plethora of the cases where the issue of legality or constitutionality of pre-action notice had been canvassed, the courts, especially the Supreme Court declined the argument that the requirement of pre-action notice is illegal or unconstitutional. For instance, in *Agbaso v. Ohakim*¹⁰⁹ the Court of Appeal, per Ogunwumiji, JCA, reiterated the decision of the Supreme Court in *Amadi v. NNPC*¹¹⁰ that:

Right of access to justice is an immutable constitutional right which cannot be taken away by any other law.¹¹¹ Where a party approaches the judgment seat for judicial relief and the court decides that for reasons of law i.e. lack of jurisdiction of the court approached as in this case, or lack of *locus standi* of the person approaching the courts, or failure to fulfill a condition precedent e.g.

¹⁰⁵ [1986] 1 NWLR (pt 16) 264.

¹⁰⁶ [1991] 1 NWLR (pt 166) 136.

¹⁰⁷ (2008) 160 LRCN 214, 217-218.

¹⁰⁸ See also the case of *Nnoye v. Anyichie* [2005] 2 NWLR (pt. 910) 623.

¹⁰⁹ (2011) LPELR 8812.

¹¹⁰ (2000) 5 SCNJ 1.

¹¹¹ See *Atolagbe v. Awuni* (1997) 7 SCNJ 1.

servicing a pre-action notice on the Defendant, or that the case cannot be heard as constituted, that decision would not be tantamount to denial of access to justice. The courts have held that the regulations of the right to access the courts are not unconstitutional.¹¹²

Despite the glut of cases which have affirmed the validity and constitutionality of pre-action notice as a mandatory condition precedent to a suit against Local Government Authorities and such Statutory Corporations, the point should be made that some of the courts have held differently. In *Adelakun v. Ogun State University*,¹¹³ the court maintained that all cases brought for the enforcement of Fundamental Human Rights pursuant of section 42 of the 1979 Constitution¹¹⁴ are not subject to any pre-action notice clause.

The point was more emphatically made in the case of *Chief Gani Fawehinme v. Prof. Jubril Aminu*¹¹⁵ in which the defendant raised a Preliminary Objection to the suit because the Mandatory Pre-Action Notice required under section 12 of the NNPC Act was not served by the plaintiff. The plaintiff's counsel, Mr. Femi Falana, while relying on sections 6 (6) (b),¹¹⁶ 33 and 39 of the 1979 Constitution¹¹⁷ and articles 2 and 3 of the African Charter on Human and People's Rights (Ratification and Enforcement) Act

¹¹² See also *Feed & Food Farms (Nigeria) Limited* (2009) 12 NWLR (Pt. 1155) 387. In this case, the Supreme Court, while citing *Eboigbe v. NNPC* (1994) 5 NWLR (Pt. 347) 649 stated that a pre-action Notice has the same effect as a Statute of Limitation and that a Statute of Limitation begins to run from the moment the cause of action arose. Thus, the Supreme court, in resolving the question as to whether the appellant in the case can waive and had indeed waived its right to Pre-action Notice stated further on the authority of *Saude v Abdullahi* (1989) 4 NWLR (Pt. 116) 387 a breach of a rule of practice can only render a proceeding an irregularity and not a nullity. Such irregularity proceeding can only be set aside if the party affected acted timeously and before taking a fresh step since discovering the irregularity.

¹¹³ Unreported Suit No. M/178/96.

¹¹⁴ Now see section 46 of the 1999 Constitution (as amended).

¹¹⁵ Unreported Suit No. FHC/L/CS/54/92.

¹¹⁶ Same as the 1999 Constitution (as amended).

¹¹⁷ Now sections 36 and 42 of the 1999 Constitution (as amended).

1990 contested that section 12 of the NNPC Act violates the provisions of the Constitution.¹¹⁸ Relying on the Supreme Court decisions in the cases of *Adediran v. Interland Transport Ltd*,¹¹⁹ *Bakare v. Attorney General of the Federation*,¹²⁰ as well as Section 1(3) of the Constitution,¹²¹ the High Court upheld the argument of the plaintiff and held that the requirement of pre-action notice is contrary to public policy, unfair, unjust and discriminatory. It benefits only statutory defendants and impedes the right of unconditional access to court guaranteed by the Constitution. What this means is that the requirement of pre-action notice was declared unconstitutional and illegal¹²² in the case under review.

Although, of all the cases where pre-action notice came up for deliberation, the majority opinion of the courts, especially at the Court of Appeal and Supreme Court levels seem to support the view that pre-action notice is not illegal and unconstitutional. The courts are somewhat unanimous in holding that it is a private right which can be waived¹²³ and failure to comply by the plaintiff does not amount to ousting the jurisdiction of court and impeding the

¹¹⁸ The 1979 Constitution.

¹¹⁹ (1991) 9 NWLR (Pt. 214) 155.

¹²⁰ (1990) 9 NWLR (Pt. 522) 536.

¹²¹ Same as section 1(3) the 1999 Constitution (as amended).

¹²² In *Atolagbe v. Awuni supra* where the majority decision of the Supreme Court stressed as a settled law that in instituting an action in court conditions are impressed either by the common law or legislation of which pre-action notice is one, and held such conditions as valid and constitutional, Ogundare, JSC, however dissented and held the view that any condition precedent to a right of access to court is invalid and unconstitutional. See also the case of *Aliu Abu & Ors v. Abubakar Z. Odugbo & Ors* (2001) FWLR (Pt. 69) P. 1260 at 1291-1292, where the court pointed out that a party's right to access the court cannot be circumscribe by a condition precedent and held section 22 of the Chiefs Law of Bendel State as not binding.

¹²³ *Feed & Food Farms (Nigeria) Limited v. NNPC* (2009) 12 NWLR (Pt. 1155) 387. In this case, Niki Tobi, JSC (as he then was), while delivering the lead judgment of the Supreme Court stated "I agree with the decision of this court in *Mobil Producing Nigeria Unlimited v. Lagos State Environmental Protection Agency* that the right to be served with a pre-action notice does not fall within the category of rights which cannot be waived."

plaintiff's access to justice;¹²⁴ that where the right to be served a pre-action notice is not waived by the defendant, a failure of compliance merely tends to put the jurisdiction of the court in abeyance.¹²⁵ But on the other hand, many a High Court decisions reviewed earlier seemed to reason the contrary. It should be noted, however, that the cases which held that pre-action notices are unconstitutional were earlier decisions of lower courts and thus, cannot be relied upon as authorities on the matter because by the dictates of the doctrine of judicial precedent, decisions of the Supreme Court and the Court of Appeal are binding on high courts. Lower courts can only depart from such decisions when material facts differ. In this wise, the decisions of the High Courts cannot be said to be dissenting judgements. Mention is, therefore, made of them to merely illustrate that at some point in the judiciary, the requirement of pre-action notice had been disregarded and rendered unconstitutional despite the seeming current position as to the effect that it is not an impediment to access to court nor is it an ouster clause of a court jurisdiction. Accordingly, even the opinion

¹²⁴ *Nigericare Development Company Limited v. Adamawa State Water Board* (2008) 2-3 SC (Pt. II) 202, where it was held, per Ogbuagu, JSC (now retired) at p. 213, as follows: "... Conditions precedent ordered to be done before a litigant is entitled to sue, by reason of the provision of some statutes is not an ouster clause and not a device adopted by government to prohibit judicial review. It is an additional formality and unless proved to be enacted with a view to inhibiting citizens from having access to the courts, is not contrary to section 6 (6) (b) of the 1979 Constitution."

¹²⁵ See the case of *Agnes Eburu Ogakwu v. Asset Management Corporation of Nigeria* Suit No. FCT/HC/CV/3214/12 where in a Ruling delivered on the 21st day of March, 2013 by HON. O.A. Adeniyi, the court held *inter alia* that non-compliance with the service of a limitation period or a pre-action notice has put the right of the Plaintiff to approach this Court in abeyance; the non compliance thereby robbing the Court of jurisdiction, for the time being, to adjudicate on the matter. See also the cases of *Barclays Bank Ltd v. Central Bank of Nigeria*, *Jadesimi v. Okotie-Eboh* and *Ijebu-Ode Local Government v. Adedeji Balogun & Co. Ltd supra*. In *Corporate Affairs Commission v. Governing Council of the Industrial Training Fund and Anor.* (2015) 1 NWLR (Pt 1439) 1, 114, where the appellant did not waive its right to pre-action notice and promptly objected to the jurisdiction of the court, the Court of Appeal upheld the decision of the trial court not to proceed with the suit as a result of the respondents' failure to serve a pre-action notice.

of Per Karibi Whyte, J.S.C. (as he then was) at pages 110-111, paras. B-B in *Amadi v. NNPC supra*, which may be of some importance, cannot be strictly categorized as a dissenting opinion. In that case, Karibi Whyte only stated as follow:

In my opinion a legitimate regulation of access to courts should not be directed at impeding ready access to the courts. There is no provision in the Constitution for special privileges to any class or category of persons. Any statutory provisions aimed at the protection of any class of persons from the exercise of the court of its constitutional jurisdiction to determine the right of another citizen seems to me inconsistent with the provisions of section 6(6)(b) of the Constitution.¹²⁶

Granted that pre-action notice serves as a condition precedent to suits against Local Government Authorities seem to clog access to court, yet to conclude that it is illegal and unconstitutional may be too hasty. If pre-action notice should be regarded as impediment to court, what about the various pre-trial and trial procedural rules of courts which place different degree of obligations on parties to comply? Pre-action notice is no less one of such similar condition precedents. It is immaterial, however, that it is imposed by the legislature and tended to favour governments, government agencies and such Statutory Corporations as against plaintiffs. Those who hold the view that pre-action notice conflicts with the Constitution may not be fair in their analysis of Due Process of Law. Despite the pockets of arguments against the validity of pre-action notice, the spectrum of Supreme Court cases which have held the concept of pre-action notice as valid and constitutional far out-weigh those against. Because the opinions are divergent across the various court levels, it may be safe to predict that even the Supreme Court may not

¹²⁶ It cannot be said that a condition precedent of pre-action notice falls within the ambit of this opinion.

have exhausted its breath on the matter.¹²⁷ Thus, the question of legality or otherwise of a pre-action notice would, at all material times, be determined largely by the merit of each case presented or brought before the court for determination.¹²⁸

8.0 Conclusion

The institution of actions against Local Government Authorities does not really vary somewhat from actions instituted against Federal and State governments. The duties constitutionally and statutorily required of a Local Government Authority would necessarily bring about such proceedings where performance or non-performance of the duties amount to either a tortious act, breach of contract or a breach of Fundamental Human Rights guaranteed under the 1999 Constitution (as amended).

Although proceedings against Local Government Authorities are occasionally weighed down by certain substantive and procedural safeguards; such constraints are believed to frustrate frivolous suits and also to create conducive atmosphere for possible settlement out of court so that the Local Council can undividedly execute its constitutional and statutory duties free from unnecessary molestations capable of unwarranted and unguarded proceedings from citizens. Yet the contention is whether condition precedents to instituting actions against a Local Government Authority and its officers impede access to court or oust the jurisdiction of the court. The Supreme Court has nevertheless concluded overwhelmingly that condition precedents are constitutional against all odds. What is, however, not very clear is the limitless time frame within which actions can be brought against public officers of Local Government Authorities in cases of infringement upon fundamental rights.

Be that as it may, statutory safeguards and constraints in proceedings against Local Government Authorities may be desirable to foster a stable and an enviable Local System to meet the yearnings of the local people. Yet, it should not be at the

¹²⁷ Akintola S. O., Op. Cit. P. 191.

¹²⁸ Ibid. see also the case of *Amadi v. NNPC supra*, particularly the opinion of Per Karibi Whyte JSC at P. 81.

expense of justice, fairness, equity and good service delivery by the Local Authorities. Each case should, therefore, be properly evaluated with a view to promoting harmony in the Local System in relation to the aspirations and expectations of the citizens. Unnecessarily fettered access to justice by dwelling so much on procedural technicalities to delay or frustrate genuine and reasonable claims made against Local Government Authorities by citizens can engender apathy within the system as well as hinder socio-economic growth and development set out to achieve through the Local Government System in Nigeria.

Justice delayed is justice denied. Therefore, condition precedents which do not serve the useful purpose of notification but occasions delay in proceedings on technical grounds can be said to be an impediment to access to justice. Of course, it will be pretty difficult to ascertain how a condition precedent to an action against a Local Government Authority in the form of time or pre-action notice, which may have been violated or disregarded, would not amount to a delay of the proceedings. Whichever may be the case, the need to do justice manifestly should not be sacrificed on the altar of procedural technicalities in matters of genuine claims against Local Government Authorities in Nigeria.

Yet, it does seem to amount to a practice of a double standard in the Nigerian Legal System for a Local Authority to be notified while an aggrieved citizen is not accorded the same latitude. It also does not really matter that the jurisdiction of the court is not ousted by constraints in actions against Local Government Authorities. The question is: to what extent is equal protection of rights ensured under the circumstances? Can a system which encourages respect for institutions without a reciprocal regard for its citizens said to be governed by the dictates of Rule of Law? This is where advocates for the constitutionality of pre-action notice would have to look farther. It is, therefore, concluded that pre-action notice and other constraints to actions against a Local Government Authority are impediments to access to justice. The Supreme Court should revisit its earlier decisions on the matter and uphold the cry for its abolition in the Nigerian Legal System. A constraint to actions against Local Government

Authorities, particularly pre-action notice is a veritable clog in the wheel of Local justice delivery.