**UKOHA UDE AKANU & ANOR**

**V.**

**OSISIOMA NGWA LOCAL GOVERNMENT**

IN THE COURT OF APPEAL OF NIGERIA

ON FRIDAY, THE 28TH DAY OF FEBRUARY, 2020

CA/OW/180/2011

**LEX (2020) - CA/OW/180/2011**

**OTHER CITATIONS**

3PLR/2020/49 (CA)

(2020) LPELR-49549 (CA)

**BEFORE THEIR LORDSHIPS**

AYOBODE OLUJIMI LOKULO-SODIPE, JCA

ITA GEORGE MBABA, JCA

IBRAHIM ALI ANDENYANGTSO, JCA

**ORIGINATING COURT(S)**

ABIA STATE HIGH COURT [Hon. Justice I. N. Akomas, Presiding]

**BETWEEN**

1. UKOHA UDE AKANU

2. KALU UKUKU (Substituted for Late Chief Ude Ukoha Akanu) - Appellant(s)

AND

OSISIOMA NGWA LOCAL GOVERNMENT - Respondent(s)

**REPRESENTATION**

ANAGA KALU ANAGA, ESQ. - For Appellant

AND

NOT REPRESENTED. - For Respondent

**ISSUES FROM THE CAUSE(S) OF ACTION**

REAL ESTATE AND PROPERTY LAW – LAND:- Claim for declaration to title over land brought against a government entity – Whether requires pre-action notice to commence

**PRACTICE AND PROCEDURE ISSUES**

ACTION - PRE-ACTION NOTICE:- Service of pre-action notice on the Secretary/Chairman of a Local Government – Whether must be personal to be valid - Non-service of a pre-action notice – Whether a mere irregularity that can be waived - Section 138 (i) and 139 of the Local Government Law of Abia State, 1991 – 2000, in review

APPEAL - BRIEF OF ARGUMENT: Failure of the respondent to file brief of argument – Legal effect - Whether leaving appellant’s arguments unchallenged translates to success of the appeal – Duty of court

**CASE SUMMARY**

ORIGINATING FACTS AND CLAIMS

At the lower Court, the claimant, Chief Ude Ukoha Akanu (now deceased) had sought the following reliefs, as per the writ of summons filed on 17/2/2005:

“1. A declaration that by virtue of a certificate of occupancy dated 23rd June 1993 and registered as No. 4 at page 4 in volume 9 of the Lands Registry in the Office of Umuahia, the plaintiff is entitled to the use, occupation and benefit for commercial purpose of the land shown in Plan No. TOB/AB.528A/92, attached to the said certificate of occupancy which said land is traditionally called ALAOJI OKPORONKPA and situate at Umuechem Village Ariaria.

2. Perpetual injunction restraining the Defendant, or any of them, her agents, assigns, servants and others howsoever, from further remaining on the land shown in Plan No. TOP/AB.528A/92, traditionally called “ALAOJI OKPORONKPA” and any shop thereon.

3. An order granting the plaintiff possession of the land aforesaid and all the shops/stalls or any structure thereon.” (See page 2 of the Records of Appeal)

The parties exchanged pleadings and the case was heard, the plaintiff calling four witnesses and the defence, one. After considering the evidence and addresses of Counsel, the trial Court held against the plaintiff, striking out the suit of the claimant for being incompetent, saying the Court had no jurisdiction to entertain it.

DECISION(S) APPEALED AGAINST

“The failure by the claimant to adduce evidence that Exhibit D was delivered to the Secretary of Osisioma Ngwa Local Government and that Happiness Onyekwere is staff and agent of the Secretary to Osisioma Ngwa L.G. is fatal of the suit. In the light of the foregoing, I hold that there was non-compliance with the provision of Sections 138 and 139 of the Local Government Law, Cap 25, Laws of Abia State 1991 - 2000. Flowing from above, I resolve the sole issue formulated by the Defendant against the Claimant. In the result, the instant suit is incompetent, the Court lacks jurisdiction to entertain same. The suit is struck out. I make no order as to cost.” (Page 75 of the Records of Appeal).

ISSUE(S) FOR DETERMINATION ON APPEAL

*BY APPELLANT:*

“1. Whether the learned trial judge was right in holding that the claimant did not adduce sufficient evidence to prove that Exhibit “D” was delivered to the Secretary of Osisioma Ngwa Local Government (Ground One).

2. Whether the trial judge correctly and sufficiently appraised and evaluated the evidence placed before him by claimant before striking out his case.” (Ground Two)

*BY RESPONDENTS*

[Filed no brief of argument]

*AS ADOPTED BY COURT*

[Adopted issues as framed by the Appellant]

DECISION OF CUSTOMARY COURT

1. Because of the mix-up in the consideration of the service of the pre-action notice, it appears the trial Court failed to consider the merits of the substance of the case placed before it. I therefore see merit in this Appeal and so resolve the issues for Appellant.

2. The Appeal therefore succeeds and is allowed, as I set aside the judgment of the trial Court striking out the suit. The suit is accordingly restored to the cause list, and I order that the Chief Judge of Abia State transfers the same to another Judge for hearing and determination.

3. The Respondent shall pay the cost of this appeal assessed at Fifty Thousand Naira (N50,000.00) only, to Appellants.

**MAIN JUDGMENT**

ITA GEORGE MBABA, J.C.A. (Delivering the Leading Judgment):

This appeal emanated from the decision of the Abia State High Court in Suit No. HOS/18/2005, delivered on 13th September, 2010, by Hon. Justice I. N. Akomas, who struck out the suit of the claimant for being incompetent, saying the Court had no jurisdiction to entertain it.

At the lower Court, the claimant, Chief Ude Ukoha Akanu (now deceased) had sought the following reliefs, as per the writ of summons filed on 17/2/2005:

“1. A declaration that by virtue of a certificate of occupancy dated 23rd June 1993 and registered as No. 4 at page 4 in volume 9 of the Lands Registry in the Office of Umuahia, the plaintiff is entitled to the use, occupation and benefit for commercial purpose of the land shown in Plan No. TOB/AB.528A/92, attached to the said certificate of occupancy which said land is traditionally called ALAOJI OKPORONKPA and situate at Umuechem Village Ariaria.

2. Perpetual injunction restraining the Defendant, or any of them, her agents, assigns, servants and others howsoever, from further remaining on the land shown in Plan No. TOP/AB.528A/92, traditionally called “ALAOJI OKPORONKPA” and any shop thereon.

3. An order granting the plaintiff possession of the land aforesaid and all the shops/stalls or any structure thereon.” (See page 2 of the Records of Appeal)

The parties exchanged pleadings and the case was heard, the plaintiff calling four witnesses and the defence, one. After considering the evidence and addresses of Counsel, the trial Court held against the plaintiff, as follows:

“The failure by the claimant to adduce evidence that Exhibit D was delivered to the Secretary of Osisioma Ngwa Local Government and that Happiness Onyekwere is staff and agent of the Secretary to Osisioma Ngwa L.G. is fatal of the suit. In the light of the foregoing, I hold that there was non-compliance with the provision of Sections 138 and 139 of the Local Government Law, Cap 25, Laws of Abia State 1991 - 2000. Flowing from above, I resolve the sole issue formulated by the Defendant against the Claimant. In the result, the instant suit is incompetent, the Court lacks jurisdiction to entertain same. The suit is struck out. I make no order as to cost.” (Page 75 of the Records of Appeal).

That is the judgment Appellants appealed against, having substituted the deceased claimant, Chief Ude Ukoha Akanu. In the Notice of Appeal, filed on 12/11/2010, Appellants formulated two grounds of Appeal. They filed Amended Brief of arguments on 9/3/2018 and distilled two issues for the determination of the Appeal, namely:

“1. Whether the learned trial judge was right in holding that the claimant did not adduce sufficient evidence to prove that Exhibit “D” was delivered to the Secretary of Osisioma Ngwa Local Government (Ground One).

2. Whether the trial judge correctly and sufficiently appraised and evaluated the evidence placed before him by claimant before striking out his case.” (Ground Two)

The Respondent filed no brief, despite having been served with the Appellants’ brief and hearing notice of the Appeal. And when the Appeal came up for hearing on 29/1/2020, Appellants’ Counsel adopted the Brief and urged us to allow the Appeal.

Arguing Issue 1, Counsel for Appellants, Anaga Kalu Anaga, Esq, submitted that Appellants had served the Respondent with Exhibit “D“ the pre-action notice, in line with Sections 138 (i) and 139 of the Local Government Law of Imo State, Cap 25, Laws of Abia State 1991-2000 (now repealed). He reproduced the provisions of the said Law and relied on the evidence of PW1 on page 32 of the Records and said that the Respondent did not effectively rebut the act of service of Exhibit D, going by the statement of defence. He referred us to some paragraphs of the statement of defence on pages 18 and 19 of the Records; Counsel said that the denial of the Respondent of being served with the Exhibit D was of no moment, as it was a piece of evidence of facts not pleaded and which should have been ignored; he said that it was wrong for the trial Court to rely on the evidence of DW1 in reaching conclusion that Exhibit D was not served on the Secretary of the Local Government, especially as the said Secretary was not called to testify on the issue of service. Counsel relied on the case of A. G. Kwara State VS Olawale (1993) NWLR (pt. 272) at 645 which held:

“Although a party to a suit is not obligated to testify on his own behalf, where a party’s case before a Court of Justice is such that he is expected to swear to its truth, and be cross-examined thereon, and he fails to submit to these as in the instant case, that is a point that can go against his credit and be a good ground for the rejection of his case. This is because, it is the law that in civil cases, it is the balance of evidence called by either side to the litigation that is the only acceptable method of making conclusive findings”.

Counsel said following the above principle of law, the trial Court ought to have resolved the failure of the said Secretary of the L. G. to testify and deny receipt of Exhibit D, against the Respondent, because it meant that the Respondent had something to hide. He further relied on the case of Nlewedim vs Uduma (1995) 6 NWLR (Pt. 402) 383 and The Registered Trustees of the Acts of the Apostles Church VS Mrs. Olufumi Patunde & 3 Ors (2009) 8 NWLR (Pt. 1144) 513, to the effect that:

“Where a party denies being served with a document, in other words, where it is alleged that a document was delivered to a person who denied receiving it, recourse must be made to the proof of actual service on the said party. Proof of delivery to such a person can be established by:

a) Dispatch book indicating receipt; or

b) Evidence of dispatch by registered post; or

c) Evidence of a witness, credible enough that the person was served with the document”.

Counsel said that in the instant case when the evidence of PW4, Exhibit E, J-J1 are duly considered, it will be seen that the Appellant duly proved the fact of service of Exhibit D on the Respondent, contrary to the view held by the learned trial Court. He added that, it is absurd and defeats the aims of justice, to interpret, as done by the trial Judge, that Sections 138 and 139 of the Local Government Law of Abia State mean that pre-action notice must be served, personally, on the public officer to whom it is addressed, without regard to the fact that service of such letter can be acknowledged by another officer; he said that the section of the law did not require personal service on the Secretary, rather what the law required was evidence that the pre-action notice has been served at the principal office of the Local Government.

On Issue 2, whether the trial Court correctly and sufficiently appraised and evaluated the evidence placed before him by the claimant, before striking out his case, Counsel answered in the negative. He said that there was evidence by PW4 (CW4) that the pre-action notice (Exhibit D) was served on the Respondent. He said that Exhibit E was the waybill from EMS, evidencing service of Exhibit D, and Exhibit J was a letter from EMS, confirming delivery through courier of the Notice of intention to sue. He said that the Respondent did not join issue, in the pleading and evidence, to say that Exhibit D was not served; that the trial Court did not evaluate the evidence of service of the pre-action notice by the claimant and his witnesses; he said that the trial Court was duty bound to evaluate the evidence, and ascribe probative value to the documents tendered as exhibits. He referred us to Shiabu Auta VS Joseph Olaniyi (2004) 4 NWLR (Pt. 863) 394. Counsel also relied on Orija Vs Akogun (2009) 10 NWLR (Pt. 1150) 473, to the effect that the Court should not allow technicalities to defeat adherence to substantial justice; that justice should not be sacrificed on the altar of technicalities. HDP Vs INEC (2009) 8 NWLR (Pt. 1143) 279.

Counsel called on us to interfere with the findings and decision of the trial Court, upon evaluating the evidence, to reach a decision that meets the justice of the case. He relied on International Bank For West Africa Ltd vs John Elue Construction Co. Ltd & Anor. (2004) 7 NWLR (pt. 873) 601; Nteogwuija vs Ikuru (1998) 10 NWLR (pt. 569) 267.

Counsel also relied on Section 16 of the Court of Appeal Act and Order 4 Rule 3 of the Court of Appeal Rules 2011 and urged us to resolve the Issues for Appellants and to allow the Appeal.

RESOLUTION OF ISSUES

As earlier stated, the Respondent did not file any brief in this Appeal and so Appellants’ arguments are unchallenged. But in keeping with the legal tradition, Appellants’ argument and the Appeal must still be considered on the merits, the failure to challenge it by the Respondent, notwithstanding. See Okoro Vs The State (2018) LPELR 44273 CA; Iwuji Vs Ugorji (2015) LPELR 24354 CA; Skye Bank & Anor Vs Akinpelu (2010) LPELR 3073 SC; Iwuoha & Anor vs Ohazuruike & Ors (2016) LPELR 40513 CA.

I shall therefore consider the Appeal on the two Issues donated by the Appellants and shall take them together, since they all revolve around evaluation of evidence by the trial Court, particularly, with respect to the trial Court’s construing of Exhibit D, whether it was served on the Secretary of the Respondent - Osisioma Ngwa Local Government, or not.

By Section 138 (i) and 139 of the Local Government Law of Abia State, 1991 - 2000, which applied at the time the cause of action arose (but now repealed):

Section 138:

“No suit shall be commenced against a Local Government until one month at least after written notice of intention to commence the same has been served upon the Local Government by the intending plaintiff or his agent.”

Section 139:

“The Notice referred to in Section 138 and any summons, notice or other document required or authorized to be served on a Local Government, shall be served by delivering the same to, or by sending it by registered post to the Secretary to the Local Government at the principal office of the Local Government, provided, that the Court may, with regard to any particular suit or document, order service of the Local Government to be effected otherwise and in that event, service shall be effected in accordance with the terms of that order.”

Appellants asserted that their late father had served the Respondent with the required pre-action Notice before taking out the suit. But the Respondent, through DW1, denied such service, and raised non-compliance with the pre-action Notice requirement, which the trial Court believed and struck out Appellants’ suit.

A brief facts of this case, at the lower Court, as stated by Appellant, is that the claimant (Appellants’ father) bought from original owners, a piece of land in 1990 within the larger piece of land known as and called “ALAOJI OKPORONKPA” lying and situated at Umuechem Village of Osisioma Ngwa Local Government Area of Abia State. He developed the land into a block of commercial stores and rented them out to tenants and reserved some of the stores for his personal use. He consequently applied and obtained statutory right of occupancy over the said piece of land. The statutory right of occupancy was issued on 23/6/1993 and registered as No. 4 at page 4 in Volume 9 in the Lands Registry, Umuahia.

The Claimant said that on 21/10/2004, the Respondent mobilized its staff, thugs and armed policemen who forcibly entered the said property, chased away the claimant and purported to have acquired the land; carried out some further development of the land, rented the stores therein to tenants who have been paying rent to the Respondent. The claimant consequently served pre-action notice on the Respondent and following the expiration of the pre-action notice, filed a suit on 17/2/2005 against the Respondent. After hearing the case in full, the learned trial Court rather struck out the suit for non-compliance with the pre-action notice, upon the complaint of the Respondent that the plaintiff did not comply with the provisions of Sections 138 and 139 of the Local Government Law. The trial Court, however, admitted the pre-action Notice as (Exhibit D) and made the following findings on page 73 of the Records:

“In the instant case, the pre-action notice “Exhibit “D” was delivered through EMS speed post on 7th December, 2004, vide Exhibit E, J and J1 respectively. From Exhibit “J” the item delivered by EMS speed post was collected by one Happiness Onyekwere for the Secretary Osisioma Ngwa Local Government Area on the 7th of December, 2004 by 3:49 p.m. Exhibit J is dated 18th day of June, 2009 and during the pendency of this suit, PW4, one Anthony Jinanwa, clerk of the Law Firm of Ukpai Ukairo & Associates under cross-examination said the Notice of intention was delivered to the Local Government. PW4 also said he is not aware that Happiness Onyekwere has been the Secretary to Osisioma Ngwa Local Government. There is however no evidence that Happiness Onyekwere was at the material time, Secretary to the Local Government. There being no evidence to that effect, the only conclusion is that Exhibit D was delivered to someone other than the Secretary to the Local Government as required by Law. Section 139 of the Local Government Law (supra) says the notice shall be served by delivering the same to the Secretary to the Local Government and not through a third party or intermediary as was done in the instant case. On the other hand, Section 139 (supra) also provides for sending the notice by registered post addressed to the Secretary to the Local Government. Although Exhibit “E” shows that the letter from Ukpai Ukairo Esq. was addressed to the Secretary Osisioma Ngwa Local Government, there is no evidence that it was delivered to the Secretary or that he received it. The onus is on the claimant. Service on staff of either Chairman or Secretary is not a good service and is as well not in compliance with the requirement of the law. Failure to serve the pre-action notice on the Chairman or Secretary amount to none compliance with the provisions of the Law. It is not a mere irregularity which can be waived by the Applicant/Defendant. It is a statutory requirement and such failure means that a condition precedent has not been met. It is therefore fatal to the Respondent case.” (See pages 73 - 74 of the Records of Appeal). He relied on Nigeria Ports Plc Vs Osinuga (2001) 7 NWLR (Pt. 712) 412.

I think the learned trial Judge was in grave error in his interpretation of the law relating to service of pre-action Notice, when it held that service on staff of the Chairman or Secretary of the Local Government is not good service, and that, though there was proof that the Exhibit E, was addressed to Secretary Osisioma Ngwa LGA and delivered by EMS speed post to that office and the same was signed for the Secretary by one Happiness Onyekwere (in the office of the Secretary), yet the same was not service on the Secretary of the Local Government. The trial Court, in my opinion, also erred when it held that non-compliance with pre-action notice is not a mere irregularity that can be waived, but a statutory requirement that cannot be waived and is fatal to the case of the plaintiff. The law appears to have developed and moved away from that narrow technical stance, which delights in employing the slightest excuse to do damage to the merit/substantive interest of a case.

It is difficult, for me, to understand why the trial Court said the pre-action notice must be served on the Secretary or Chairman of a Local Government, personally, before it can be activated, and not on his office, whereof his staff/officer in the office can collect the process for him (Secretary/Chairman), especially where such process is sent by registered post by courier service, addressed to the office, Secretary or Chairman of the Local Government. See the case of Registered Trustees of the Acts of Apostles Church Vs Patunde (supra):

“Where a party denies being served with a document, in other words, where it is alleged that a document was delivered to a person who denied receiving it, recourse must be made to the proof of actual service on the said party. Proof of delivery to such a person can be established by:

d) Dispatch book indicating receipt; or

e) Evidence of dispatch by registered post; or

f) Evidence of a witness, credible enough that the person was served with the document.”

On page 34 of the Records of Appeal, the PW4, under cross examination said: “Based on Exhibit E, there was service of Notice of Intention to sue.” Of course, the trial Court had made finding to that effect, that Exhibit D (pre-action Notice) was served by means of Exhibit E, J and J1. The Respondent did not produce the Secretary nor the staff, Happiness Onyekwere, to deny the service, but rather fielded DW1 (Clerical Officer), Reuben Onyekachi, to testify for the Respondent showing that the Local Government still relied on its staff and agents to act for it, not necessarily the Chairman or Secretary, personally. The said DW1 had adopted his statement on oath, filed along with the statement of defence. In paragraphs 2 and 3 of the said statement on oath, he said (page 22 of the Records):

“I know as of a fact that the Secretary of the Defendant never received any Notice of Intention to sue dated 7/12/2004 or any other date relating to the subject matter of this suit. No such letter was received, assembled and filed by me as a reference document in the office of the Secretary Happiness Onyekwere is not known to me to be an employee of the Defendant and has never to the best of my knowledge been attached to the office of the Secretary of the Defendant. The Secretary of the Defendant between the year 2004 and 2006 was Mr. Dioka who acted in that capacity during the tenure of Chief Allen Nwachukwu as The Executive Chairman of the Defendant.”

That affidavit was deposed to on 19/2/2010. Surprisingly, the Respondent did not consider it necessary to call the said Secretary (Mr. Dioka) or Chairman of the Local Government (Chief Allen Nwachukwu) at the time, to anchor its case, but rather relied on a total stranger (DW1) to give oral evidence that clearly contradicted the documentary evidence, tendered and admitted by the Court, namely Exhibits D, E, J, J1, which clearly showed that the pre-action notice (Exhibit D) was received by the Respondent, as per Exhibit E. By law, oral evidence cannot be used to deny, discredit, vary, discount or dispute a written document on the same issue. See Odugbemi & Anor Vs Shanusi & Ors (2018) LPELR 44868 CA; Atiba Iyalanu Savings & Loans Ltd Vs Suberu & Anor (2018) LPELR 44069 SC.

In the case of Nwoha Vs Ene & Ors (2015) LPELR 24551 (CA), this Court said:

“Of course, in law, an oral evidence will always surrender to the dictates of a documentary evidence on a given issue, since the latter is superior and more reliable, and one cannot use oral deposition to vary what was agreed upon in a written agreement. See Intercontinental Bank Plc Vs Hilman & Bros. Water Engineering Service Ltd (2013) LPELR 20670 (CA); UBN Vs Ajabule (2012) All FWLR (pt. 611) 1413.”

In this case, the findings of the trial Court did not fault the service of Exhibit D, by means of Exhibit E on the Respondent, which Happiness Onyekwere signed for. But the trial Court rather held that it should have been served on the Secretary of the Respondent, personally, not through a staff in his office. Of course, DW1’s attempt to deny the said service of the Pre-action notice, and Happiness Onyekwere, as staff of Respondent was hear-say evidence and suspect, especially as he DW1 was not mentioned in the transaction. The secretary should have testified for the Respondent. See A.G. Kwara State Vs Olawale (1993) NWLR (Pt.272) 645:

“Although a party to a suit is not obligated to testify on his own behalf, where a party’s case before a Court of Justice is such that he is expected to swear to its truth, and be cross-examined thereon, and he fails to submit to these as in the instant case, that is a point that can go against his credit and be a good ground for the rejection of his case. This is because, it is the law that in civil cases, it is the balance of evidence called by either side to the litigation that is the only acceptable method of making conclusive findings”.

By law, failure to serve a pre-action notice cannot be elevated to a fundamental vice, to deny a claimant right to seek redress, in my view. See the case of Mekaowulu vs Ukwa West Local Government Council (2018) LPELR 43807 CA, where we held:

“Appellant had cited judicial authorities, and rightly, in my view, to explain the purpose of serving a pre-action notice on a defendant; that it is meant to give him opportunity to settle the dispute, amicably, without resort to Court action; that the requirement of notice cannot be elevated to deny a claimant right to seek redress in Court. The case of Amadi Vs NNPC (2000) 10 NWLR (pt. 674) 76 is quite instructive, where it was held:

“the purpose of giving notice of claim to local government of claim against it is that it is not taken by surprise, but to have adequate time to prepare to deal with the claim in its defence. The purpose of the notice is not to put hazards in the way of bringing litigation against it.”

Katsina Vs Makudawa (1971) NMLR 100. See also Mobil Producing (Nig) Unltd Vs LASEPA (2002) 18 NWLR (pt. 798) 1 at 36, where the Supreme Court held:

“A pre-action notice, which is for the benefit of the person or agency on whom or on which it should be served, is not to be equated with processes that are an integral part of the proceedings, initiating process. Rather, its purpose is to enable that person or agency to decide what to do in the matter, to negotiate or reach a compromise or have another hard look at the matter in relation to the issues and decide whether it is more expedient to submit to jurisdiction and have a pronouncement on the point in controversy.”

In the case of Nigerian Ports Authority Plc vs Ntiero (1998) 6 NWLR (pt. 555) 640 at 651, it was held:

“A pre-action Notice is usually in order to give the prospective Defendant an opportunity to meet the prospective plaintiff and negotiate any possible out of Court settlement. The Supreme Court in Ntiero Vs NPA (2008) 10 NWLR (pt. 1094) 129, said that “A pre-action Notice connotes some form of legal notification or information required by the law or imparted by operation of law, contained in an enactment, agreement or contract, which requires compliance by the person who to under a legal duty to put on notice the person to be notified before the commencement of any legal action against such a person .“ The effect of non-compliance with service of pre-action notice, amounts to irregularity. It may be mentioned that the effect of non-service of a pre-action notice, where it is statutorily required is only an irregular, which however renders the action incompetent. It follows therefore that the irregularity can be waived by the defendant who fails to raise it either by motion or plead it in the statement of defence. If therefore, a defendant refuses to waive it and he raises it, then the issue becomes a condition precedent, which must be met before the Court would exercise its jurisdiction.”

The principles in the above decision show, clearly, that failure to comply with pre-action notice is only an irregularity which can be waived, and is waived, where the Defendant has taken full part in hearing of the case, and only raises it at the point of Counsel’s address, or had raised it in the pleadings (statement of the defence) but failed to get it determined as a threshold issue. See Nwaiwu & Ors Vs Gov. of Imo State (2013) LPELR 20690 CA, where it was held:

“It should however, be noted that non-compliance with the requirements of a pre-action notice, does not abrogate the right of a plaintiff to approach the Court or defeat the action. That is so because where the subject matter of the suit is within jurisdiction of the Court, the failure to serve a pre-action notice on the defendant, only gives such defendant a private right, to insist on such notice before the plaintiff can activate his own right to sue the defendant on the issue. Accordingly, non-service of pre-action notice merely puts the jurisdiction of the Court at abeyance or on hold, pending compliance with the requirement of pre-action notice. However, a distinction must be drawn between jurisdiction as a matter of procedural law and jurisdiction as a matter of substantive law. That is because, while a litigant can waive the matter of procedural law, no litigant can waive or confer substantive jurisdiction in a Court, where the Constitution or statute or any other provision of the common law says that the Court shall have no jurisdiction, or that it has jurisdiction, as the case may be. Thus, where by the provisions of a statute, an action shall be commenced in a particular way or manner against a party, such prescription is procedural. In that respect, where an action is commenced against such a party in breach of that procedural requirement, and such a defendant did not complain, but took active part in the proceeding, he cannot later be heard on appeal to complain, so as to take advantage of the irregularity. See Ndayako Vs Dantoro (2004) 12 NWLR (pt. 889) 189; BBN LTD vs OLAYIWOLA & SONS LTD (2005) 3 NWLR (pt. 912) 434.”

A party who wishes to raise an issue of lack of service of pre-action notice is expected to raise same, timeously, by way of objection to the trial, but where he fails to do so, and takes part in the trial, he is presumed to have waived the right to complain. See Nwaiwu & Ors Vs Gov. Imo State & Ors (Supra); Mobil Oil Producing Co. Nig Ltd Vs Lagos State Environmental Protection Agency (2002) 18 NWLR (Pt. 798) 1; Ojo & Anor Vs NPC. & Anor (2019) LPELR 47839 (SC).

In this case, at hand, it is obvious that the Appellant had issued and served the pre-hearing notice (Exhibit D) on the Respondent, though the trial judge wrongly (in my view) held that it was not served on the Secretary of the Respondent, personally. The Nigerian Postal Service, EMS speed post, that effected the service of the pre-action Notice (Exhibit D) on the Respondent, had written Exhibit E to the Appellants’ Counsel, stating:

“This is to inform you that your item was collected by one Happiness Onyekwere for the Secretary Osisioma Ngwa Local Government Area, Osisioma on 7th of December, 2004 by 3:49 pm. Attached herewith is the photocopy of where we recorded it in our Office (See page 28 of the Records of Appeal).”

That, in my opinion, satisfies the requirement of the law, as per the case of RTAAC VS Patunde & 3 Ors (2009) 8 NWLR (Pt.1144) 5131:

“Where a party denies being served with a document, in other words, where it is alleged that a document was delivered to a person who denied receiving it, recourse must be made to the proof of actual service on the said party. Proof of delivery to such a person can be established by:

g) Dispatch book indicating receipt; or

h) Evidence of dispatch by registered post; or

i) Evidence of a witness, credible enough that the person was served with the document.”

I had earlier stated that such clear and credible documentary report of service of the pre-action notice on the Respondent, cannot be defeated by mere oral deposition of the DW1, a clerical officer, who came to Court to deny receipt of the Exhibit D by the Secretary of the Respondent. See Champion Breweries Plc Vs Specialty Link Ltd & Anor. (2014) LPELR 23621 (CA); Ero & Ors Vs Eweka (2018) LPELR 46093 CA. This is because documentary evidence remains the best evidence. Sankey Vs Onayifeke (2013) LPELR 21997 CA; Aza & Anor Vs Agbom & Ors (2015) LPELR 40484 CA; Nekpenekpen Vs Egbemhonkhaye (2014) LPELR 22335 CA; A G. Bendel State vs UBA Ltd (1986) 4 NWLR (pt. 37) 547; Agbareh Vs Mimra (2008) 2 NWLR (pt. 1071) 378.

Even if the claim of non-service of the pre-action notice were to be credible (which is not), the fact that the Respondent took active part in defending the suit, to conclusion, without raising objection to the trial, timeously, as it earlier indicated in last paragraph of its pleading (page 21 of the Records), implied that the Respondent had waived the right to rely on such procedural right. See Feed & Food Farms (Nig) Ltd Vs NNPC (2009) LPELR 1274 SC; See also Mekaowulu Vs Ukwa West Local Government Council (2018) LPELR 43807 CA, where we held:

“There is also evidence that the Respondent never raised any preliminary objection against the suit, on the alleged non-service of the pre-action Notice, or on the alleged limitation bar relied on by the trial Court to strike out the suit. The Respondent had taken part in the trial to conclusion, before its Counsel thought it wise to make a heavy weather of the alleged failure to issue proper pre-action notice , Thus, even if there was any substance in those allegations (which is not conceded), such would only have amounted to irregularity, which would have been waived by the Respondent.”Ntiero Vs NPA (Supra)

Because of the mix-up in the consideration of the service of the pre-action notice, it appears the trial Court failed to consider the merits of the substance of the case placed before it. I therefore see merit in this Appeal and so resolve the issues for Appellant.

The Appeal therefore succeeds and is allowed, as I set aside the judgment of the trial Court striking out the suit. The suit is accordingly restored to the cause list, and I order that the Chief Judge of Abia State transfers the same to another Judge for hearing and determination.

The Respondent shall pay the cost of this appeal assessed at Fifty Thousand Naira (N50,000.00) only, to Appellants.

**AYOBODE OLUJIMI LOKULO-SODIPE, J.C.A.:**

I agree.

**IBRAHIM ALI ANDENYANGTSO, J.C.A.:**

I agree.