**WARRI REFINING & PETROCHEMICAL CO LTD**

**V.**

**GECMEP NIGERIA LIMITED**

IN THE SUPREME COURT OF NIGERIA

ON FRIDAY, THE 24TH DAY OF JANUARY, 2020

SC.769/2017

**LEX (2020) - SC.769/2017**

**OTHER CITATIONS**

3PLR/2020/49 (CA)

(2020) LPELR-49380 (SC)

**BEFORE THEIR LORDSHIPS**

OLUKAYODE ARIWOOLA, JSC

KUDIRAT MOTONMORI OLATOKUNBO KEKERE-EKUN, JSC

JOHN INYANG OKORO, JSC

AMINA ADAMU AUGIE, JSC

PAUL ADAMU GALUMJE, JSC

**BETWEEN**

WARRI REFINING & PETROCHEMICAL CO LTD - Appellant(s)

AND

GECMEP NIGERIA LIMITED - Respondent(s)

**ORIGINATING COURT(S)**

1. COURT OF APPEAL (Benin Division)

2. DELTA STATE HIGH COURT [Holden at the Warri Judicial Division]

**REPRESENTATION**

A. OKPAKPOR ESQ, with him DR. AYODELE GATTA and ANITA OTEH, ESQ. - For Appellant

AND

O.D. EMOLE, ESQ. - For Respondent

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

ADMINISTRATIVE LAW AND GOVERNMENT - ACTION AGAINST STATUTORY ENTITIES – NNPC - PRE-ACTION NOTICE: Requirements of pre-action notice as contained in Section 12 of the NNPC Act 2004 - Whether is applicable to a case of simple contract where parties have not expressly incorporated them as their terms of contract

OIL AND GAS/ENERGY LAW - NNPC - PRE-ACTION NOTICE: Action against NNPC – Statutory requirement for pre-action notice contained in Section 12 of the NNPC Act 2004 – Whether applicable to a case of simple contract where parties have not expressly incorporated them as their terms of contract

COMMERCIAL LAW – CONTRACT:- Commercial contract with a statutory body – Enforcement of – Where statute requires that a pre-action notice be issued against body before the commencement of suit against same – Whether applicable without express incorporation into the contract

**PRACTICE AND PROCEDURE ISSUES**

ACTION – LIMITATION STATUTE - PRE-ACTION NOTICE:- Pre-action notice as contained in Section 12 of the NNPC Act 2004 – Proper interpretation of - Whether the requirements is applicable to a case of simple contract where parties have not expressly incorporated them as their terms of contract

APPEAL - GROUND(S) OF APPEAL:- Appeal on grounds of mixed law and fact – How to distinguish between both - Whether leave of court is required to file same - Effect of failure thereof

APPEAL - APPEAL AGAINST INTERLOCUTORY RULING/FINAL DECISION: Distinction between an interlocutory and final decision - time within which to appeal against a final decision - when such appeal will be held to have been filed within time

**CASE SUMMARY**

ORIGINATING FACTS AND CLAIMS

By its writ of summons and statement of claim filed on 20/3/2015, the Respondent/Plaintiff, sought, among others, the following reliefs against the appellant:

“1) An order of the Honourable Court declaring the defendant's letter dated 30th April, 2014 rejecting the Heptane Chemical supplied to it by the Plaintiff as null and void and of no effect.

2) The sum of N20,278,065.00 being the debt owed to the plaintiff by the defendant for the supply of Heptane Chemicals.”

The appellant filed a Statement of Defence and also filed a motion seeking an order setting down for hearing the points of law raised in the said Statement of Defence, inter alia:

"1. The defendant shall contend by way of objection at the trial that this suit is grossly incompetent as the same was instituted in the absence of a written notice of intention to commence legal proceedings against the defendant (pre-action notice) first served on it in accordance with Section 12(2) of the Nigerian National Petroleum Corporation Act, Cap. N123, Laws of the Federation of Nigeria, 2004 and that this Honourable Court lacks the requisite jurisdiction to entertain the same and will therefore urge this Court to strike it out.

………………………..

OR in the Alternative

6. The Defendant admits paragraph 2 of the statement of claim only to the extent that the Warri Refining and Petrochemical Company Ltd as a company registered under the laws of Nigeria is a subsidiary of the Nigerian National Petroleum Corporation. The defendant is not known as Warri Refining & Petrochemical Co. Ltd as contained in the processes filed by the plaintiff before Court. The defendant shall found upon her certificate of incorporation.

The learned trial Judge, in a considered ruling delivered on 11/8/2015, held inter alia, as follows:

"From the claimant's claim, as contained in paragraph 23(i) - (v) of the statement of claim as reproduced earlier in the ruling, and in view of the decision in all the cases considered herein, the plaintiff's claim is in respect of breach of a simple contract of supply of chemicals from the defendants... Therefore it is one which, in my estimation can be determined by a Court other than the Federal High Court." (See page 121 of the record).

And on whether the requirement of a pre-action notice is applicable to this case, His Lordship held:

"The question that comes to mind at this time is whether there is provision of pre-action notice in the contract between the Plaintiff/Respondent and the Defendant/Applicant. If the answer is no, then the parties are bound by the terms of their contract.

Consequently, since there is no provision for pre-action notice in the contract between the plaintiff/Respondent and the Defendant/Applicant, the Court will assume jurisdiction over the matter.” (See page 122 of the record).

The appellant was dissatisfied with the decision and appealed to the lower Court. The appeal was dismissed on 5/7/I7.

DECISION(S) APPEALED AGAINST

The Court of Appeal, Benin Division, on 5th July 2017, dismissed the appellant's appeal against the ruling of the trial Court delivered on 11/8/2015 in respect of preliminary points of law raised in paragraphs 1, 2, 3, 6 and 26 of its Statement of Defence, challenging the competence of the suit and the Court's jurisdiction to entertain it.

ISSUE(S) FOR DETERMINATION ON APPEAL

*BY APPELLANT:*

[Appellant framed three issues A, B, C which were not indicated in the judgments of the Justices of the Court but two of them were struck out as incompetent based on the Preliminary Objection of the Respondent leaving only one issue adopted by the Court viz: ]

"Whether the requirement of pre-action notice as contained in Section 12 of the NNPC Act, 2004 must be incorporated in the contractual relationship between the parties herein before it can be binding and/or that the said Section 12 (2) of the NNPC Act, 2004 is inapplicable to cases of contract."

*BY RESPONDENTS*

[Records of the Court did not indicate Respondent framed any issue(s) but the Respondent did file a preliminary objection to the hearing of the appeal, with the following grounds:-

“1. The appeal, being interlocutory, was filed outside the period prescribed by Section 27(2) of the Supreme Court Act Cap. 515 LFN 2004 and no application was made for extension of time to seek leave to appeal.

2. Grounds 1, 2 and 3 of the notice of appeal involve questions of mixed law and fact, for which leave ought to have been sought and obtained.

3. Issues A and C formulated in the appellant's brief are distilled from incompetent grounds and therefore incompetent.”

*AS ADOPTED BY COURT*

"Whether the requirement of pre-action notice as contained in Section 12 of the NNPC Act, 2004 must be incorporated in the contractual relationship between the parties herein before it can be binding and/or that the said Section 12 (2) of the NNPC Act, 2004 is inapplicable to cases of contract."

DECISION OF SUPREME COURT

1. The transaction between the parties, being one of simple contract and having not expressly incorporated them as terms of their contract, the provisions of Section 12(2) of the NNPC Act are not applicable. The respondent's suit was properly instituted before the trial Court.

2. Sole issue resolved against the appellant. The appeal fails and is dismissed. The judgment of the lower Court is affirmed.

3. Costs of N500,000.00 are awarded against the appellant and in favour of the respondent.

**MAIN JUDGMENT**

KUDIRAT MOTONMORI OLATOKUNBO KEKERE-EKUN, J.S.C. (Delivering the Leading Judgment):

This appeal is against the judgment of the Court of Appeal, Benin Division, delivered on 5th July 2017, dismissing the appellant's appeal against the ruling of the trial Court delivered on 11/8/2015 in respect of preliminary points of law raised in paragraphs 1, 2, 3, 6 and 26 of its Statement of Defence, challenging the competence of the suit and the Court's jurisdiction to entertain it.

By its writ of summons and statement of claim filed on 20/3/2015, the respondent, as plaintiff, sought the following reliefs against the appellant:

1) An order of the Honourable Court declaring the defendant's letter dated 30th April, 2014 rejecting the Heptane Chemical supplied to it by the Plaintiff as null and void and of no effect.

2) The sum of N20,278,065.00 being the debt owed to the plaintiff by the defendant for the supply of Heptane Chemicals.

3) 21% interest accruing on the debt from December 2013, when the debt was due for payment to the date of payment of the debt,

4) The sum of N450,000.00 being special damages arising from transportation and hotel bills expended by the plaintiffs in nine (9) trips to the defendant's office over the delayed payment.

5) The sum of N50 million as general damages for breach of contract.

The appellant filed a Statement of Defence and also filed a motion dated and filed on 6/5/2015 seeking an order setting down for hearing the points of law raised in paragraphs 1, 2, 3, 6 and 26 of the said Statement of Defence as follows:

"1. The defendant shall contend by way of objection at the trial that this suit is grossly incompetent as the same was instituted in the absence of a written notice of intention to commence legal proceedings against the defendant (pre-action notice) first served on it in accordance with Section 12(2) of the Nigerian National Petroleum Corporation Act, Cap. N123, Laws of the Federation of Nigeria, 2004 and that this Honourable Court lacks the requisite jurisdiction to entertain the same and will therefore urge this Court to strike it out.

2. The Defendant shall also contend by way of objection at the trial that this suit is grossly incompetent as it is instituted against an unknown party and that this Court lacks the requisite jurisdiction to entertain the same and will therefore urge this Honourable Court to strike it out.

3. The defendant shall also contend by way of objection at the trial that the defendant is a Federal Government Agency and that this Honourable Court lacks the jurisdiction to hear and determine the suit and the same should be struck out.

In the Alternative

6. The Defendant admits paragraph 2 of the statement of claim only to the extent that the Warri Refining and Petrochemical Company Ltd as a company registered under the laws of Nigeria is a subsidiary of the Nigerian National Petroleum Corporation. The defendant is not known as Warri Refining & Petrochemical Co. Ltd as contained in the processes filed by the plaintiff before Court. The defendant shall found upon her certificate of incorporation.

26. The defendant shall further contend at the trial that the plaintiff did not serve her with any prior written notice of intention to commence legal proceedings against her (pre-action notice) in accordance with Section 12(2) of the Nigerian National Petroleum Corporation Act Cap. N123, Laws of the Federation of Nigeria, 2004.

The parties filed and exchanged written addresses in respect of the points of law, which were accordingly set down for hearing. The learned trial Judge, in a considered ruling delivered on 11/8/2015, held inter alia, as follows:

"From the claimant's claim, as contained in paragraph 23(i) - (v) of the statement of claim as reproduced earlier in the ruling, and in view of the decision in all the cases considered herein, the plaintiff's claim is in respect of breach of a simple contract of supply of chemicals from the defendants... Therefore it is one which, in my estimation can be determined by a Court other than the Federal High Court." (See page 121 of the record).

On whether the requirement of a pre-action notice is applicable to this case, His Lordship held:

"The question that comes to mind at this time is whether there is provision of pre-action notice in the contract between the Plaintiff/Respondent and the Defendant/Applicant. If the answer is no, then the parties are bound by the terms of their contract.

Consequently, since there is no provision for pre-action notice in the contract between the plaintiff/Respondent and the Defendant/Applicant, the Court will assume jurisdiction over the matter.” (See page 122 of the record).

The appellant was dissatisfied with the decision and appealed to the lower Court. The appeal was dismissed on 5/7/I7. The appellant is still dissatisfied and has further appealed to this Court vide its notice of appeal filed on 24/7/17 containing 5 grounds of appeal.

The parties duly filed and exchanged their respective briefs of argument in compliance with the rules of this Court. At the hearing of the appeal on 29/10/2019, O.A. Okpakpor Esq., of counsel, adopted and relied on the appellant's brief filed on 20/10/17 and its reply brief filed on 4/10/2018 in urging the Court to dismiss the respondent's preliminary objection and allow the appeal.

O.D. Emole Esq. adopted and relied on the respondent's brief filed on 8/12/17. He urged the Court to uphold the preliminary objection incorporated therein, and argued at pages 7 - 12 thereof and to dismiss the appeal for being incompetent. Alternatively, he urged the Court to dismiss the appeal in its entirety.

Having raised a preliminary objection to the hearing of the appeal, it must be considered first before delving into the merit of the appeal, if necessary. The grounds for the objection are as follows:

1. The appeal, being interlocutory, was filed outside the period prescribed by Section 27(2) of the Supreme Court Act Cap. 515 LFN 2004 and no application was made for extension of time to seek leave to appeal.

2. Grounds 1, 2 and 3 of the notice of appeal involve questions of mixed law and fact, for which leave ought to have been sought and obtained.

3. Issues A and C formulated in the appellant's brief are distilled from incompetent grounds and therefore incompetent.

On the first ground of objection, learned counsel contended that the decision of the Court below did not determine the final rights of the parties and was therefore an interlocutory decision. That by Section 27(2) of the Supreme Court Act, an appeal from an interlocutory decision ought to be filed within 14 days, whereas, the appellant filed its appeal before this Court more than 14 days after the ruling was delivered. He submitted that by the tenor of Section 27 (2) (a), even where the appeal is on grounds of law alone, so long as it is an appeal, in a civil case, against an interlocutory decision, it must be filed within 14 days. He referred to Allanah Vs Kpolokwu (2016) 6 NWLR (Pt. 1507) 1 @ 36 - 37 D - C; Isah Vs INEC (2016) 18 NWLR (pt. 1544) 175 @ 232 A. He submitted there is no evidence on record to show that the appellant sought and obtained an enlargement of time within which to appeal and therefore the appeal is incompetent.

On the second ground of objection, learned counsel submitted that a careful perusal of grounds 1, 2, and 3 along with their particulars, reveals that they are grounds of fact or at least mixed law and fact, for which leave is required in compliance with Section 233(3) of the Constitution of the Federal Republic of Nigeria, (CFRN) 1999, as amended. He referred to: Nzei Vs U.N.N. (2017) 6 NWLR (Pt. 1561) 300 @ 338-339 F-B; Allanah v. Kpolokwu (Supra); Umanah (JNR) v. N.D.I.C. (2016) 11 NWLR (Pt. 992) 510.

On the third issue, learned counsel argued that if grounds 1, 2 and 3 are found to be incompetent, the appellant's issues A and C predicated thereon, are equally incompetent and should be struck out.

In his reply on points of law, learned counsel for the respondent submitted on the first ground of objection, that the decision of the lower Court appealed against is a final judgment albeit arising from an interlocutory decision of the trial Court. He submitted that having pronounced that the appeal is dismissed, it put an end to rights of the parties as far as the issues canvassed before that court were concerned. He referred to Skymit Motors Ltd. v. U.B.A. Plc (2014) ALL FWLR (Pt. 721) 1547 @ 1561-1562; Nigeria Agip Oil Co. Ltd. v. Nweka (2016) ALL FWLR (Pt. 845) 1 @ 26-27.

On the competence of grounds 1, 2 and 3, learned counsel contended that the three grounds of appeal are pure issues of law, on which the appellant is entitled to appeal as of right. He argued that grounds 1 and 2 are complaining about the Court's misunderstanding of the law of contract and its applicability to the facts of the case. He contended that there was no evidence before the Court upon which it could reach a finding that the relationship between the parties was one of simple contract. He referred to State Vs Omoyele (2017) ALL FWLR (Pt. 887) 37 @ 64 - 66. With regard to Ground 3, he submitted that the complaint is that the lower Court failed to pronounce on the issue raised before it, to wit: the content of the reliefs sought by the respondent, as opposed to the nature of the relationship between the parties.

It is my considered view that the first ground of objection can be resolved without much ado. The appeal before the Court below arose from an interlocutory decision of the trial Court. However, the judgment rendered in respect of the interlocutory decision is a final decision. On the distinction between a final and an interlocutory decision, this Court in Alor Vs Ngene (2007) 17 NWLR (Pt. 1062) 103 @ 175-176 F-A, held inter allia:

"...if the order, decision or judgment of a Court finally and completely determines the right of the parties in the case, it is final. But if it does not, it is interlocutory only. And in order to determine whether the decision is final or interlocutory, the decision must relate to the subject matter in dispute between the parties and not the function of the Court in making the order."

In Igunbor v. Afolabi (2001) FWLR (Pt. 59) 1284 165 D-E, this Court held, inter allia:

"A final order or judgment is one which brings to an end, the rights of the parties in the action. It disposes of the subject matter of the controversy, Or determines the litigation as to all parties on the merits.

On the other hand, an interlocutory order or judgment is one given in the process of the action or cause which is only intermediate and does not finally determine the rights of the parties in the action. It is an order which determines some preliminary or subordinate issue or settles some step or question but does not adjudicate the ultimate rights of the parties in the action.

However, where the order made finally determines the rights of the parties, as to the particular issue disputed, it is a final order, even if arising from an interlocutory application."

In Alor v. Ngene (Supra) @ 177 D-E, it was also held:

"A final order envisages that it is a permanent order made by the Court and the parties in respect of whom or against whom the order is made cannot go back to the same Court to challenge or change that order. The Court is, by virtue of that order, functus officio and the only option to the parties is by way of appeal against that order."

Per Niki Tobi, JSC @ 179 - 180 H - A (Supra):

"A decision is said to be final when the Court that gave the decision has nothing else or noting more to do with the case; to the extent that the court becomes functus officio- a Latinism which literally means "having performed his or her office."

Applying these principles to the instant case, there is no doubt that the decision of the lower Court upholding the ruling of the trial Court is a final decision. The subject matter of the controversy was whether the trial Court had the requisite jurisdiction to determine the matter before it and whether the decision affirming its jurisdiction was correct. The lower Court made a final pronouncement on the issue and dismissed the appeal. The Court has nothing more to do with the case and is therefore functus officio. By Section 27 (2) of the Supreme Court Act, the appellant had 3 months within which to appeal against the decision. The judgment was delivered on 5/7/I7 while the notice of appeal was filed on 24/7/17, well within the time stipulated by the law. To that extent, the appeal before this Court is competent. The preliminary objection on this ground is overruled.

The second ground of objection concerns the competence of Grounds 1, 2 and 3 of the Notice of Appeal as to whether they are grounds of pure law, in which case the appellant is entitled to appeal as of right or whether they are grounds of facts or mixed law and facts in which case leave to appeal ought to have been sought and obtained.

It has been consistently observed by this Court that it is not an easy or straightforward task to distinguish between a ground of appeal, which is of law alone and one which is of mixed law and fact. The Court is enjoined to consider not only the bare wording of the ground but also relevant particulars supplied to determine the real complaint. See Ifediorah & Ors. v. Umeh & Ors. (1988) 2 NWLR (Pt. 74) 5; Briggs v. The Chief Lands Officer of Rivers State of Nig. & Ors (2005) 12 NWLR (Pt. 938) 59; N.N.S. Co. Ltd v. Establishment Sima of Vaduz (1990) 7 NWLR (Pt. 164) 526.

In Ogbechie & Ors. v. Onochie & Ors. (1986) SC 54, His Lordship Eso, JSC stated:

"There is no doubt that it is always difficult to distinguish a ground of law from a ground of fact but what is required is to examine thoroughly the grounds of appeal in the case concerned to see whether the grounds reveal a misunderstanding by the lower tribunal of the law, or a misapplication of the law to the facts already proved, or admitted, in which case it would be a question of law. Where, however, the grounds are such that would reveal or are grounds that would question the evaluation of facts by the lower tribunal before the application of the law, that would amount to question of mixed law and fact. The issue of pure fact is easier to determine."

See also: Ifediorah v. Umeh (Supra); Nwaolisah v. Nwabufoh (2011) 14 NWLR (Pt. 1268) 600; ACB Plc v. Obmiami Brick and Stone Nig. Ltd. (1993) LPELR 206 (SC) @ 27 E-F; Chrome Air Services Ltd. & Ors. v. Fidelity Bank (2017) 12 SC (Pt. 111) 57.

I shall now examine the challenged grounds of appeal. Ground 1 challenges the finding of the lower Court that the subject matter of the appellant's claim is debt recovery rooted in simple contract. In the particulars, reference is made to the facts pleaded in the statement of claim and it is contended that a perusal of these facts reveal that there was no obligation on the respondent to pay for products that did not meet its specifications and therefore there was no debt owed to the respondent, In effect, the appellant contends that the lower Court misunderstood the facts of the case. As held by this Court in Nzei v. U.N.N. (2017) 6 NWLR (Pt. 1561) 300 @338 - 339 F - B, a complaint that the Court misunderstood the appellant's case is a ground of fact or mixed law and fact.

Ground 2 challenges the finding of the lower Court that based on the pleaded facts, the requirements of a valid contract were met. i.e. offer, acceptance, consideration. In Ground 3, it is also contended that the lower Court misconstrued the appellant's case by focusing on the nature of the alleged contract between the parties rather than the actual reliefs claimed. Having regard to the relevant principles enunciated above, I am in no doubt that Grounds 1, 2 and 3 of the Notice of Appeal are grounds of mixed law and fact, for which the appellant required the leave of this Court or the Court below before filing same, pursuant to Section 233(3) of the 1999 Constitution, as amended. I therefore agree with learned counsel for the respondent that Grounds 1, 2 and 3 are incompetent for failure to obtain the requisite leave of Court. Issue A in the appellant's brief is predicated on Ground 3, while issue C is predicated on Grounds 1 and 2. Having been predicated upon incompetent grounds of appeal, the said issues A and C are also incompetent. The preliminary objection therefore succeeds in part. Grounds 1, 2 and 3 of the Notice of Appeal and Issues A and C predicated thereon, are incompetent and accordingly struck out.

The sole issue remaining for the determination of the appeal is issue B, to wit:

"Whether the requirement of pre-action notice as contained in Section 12 of the NNPC Act, 2004 must be incorporated in the contractual relationship between the parties herein before it can be binding and/or that the said Section 12 (2) of the NNPC Act, 2004 is inapplicable to cases of contract."

Learned counsel for the appellant, in support of this issue, submitted that the service of a pre-action notice on a party before the institution of any action against it, is a mandatory statutory requirement. He contended that it is not a subject of contractual negotiation and is not expected to be incorporated as a term of the contract before it can become applicable. He referred to: Amadi v. N.N.P.C (2000) FWLR (Pt. 9) 1527 @ 1556 and Nigercare Devt. Co. Ltd. v. Adamawa State Waterboard (2008) ALL FWLR (Pt. 422) 1052. He submitted that once the statute makes provision for pre-action notice, the contracting parties have no choice but to fully comply and that the consequence of non-compliance is that the subsequent proceedings are liable to be nullified.

Relying on the cases of Ibrahim Vs Lawal (2015) ALL FWLR (Pt. 799) 990 @ 1014 and Eboigbe v. N.N.P.C. (1994) 5 NWLR (Pt. 347) 659, he submitted that the mandatory provisions, such as Section 12 (2) of the NNPC Act, 2004 cannot be the subject of a waiver, as the parties are not expected to contract out of it. He referred to the case of NNPC v. Contruzioni Generali Farsura Cogefar SPA (1974) 12 SC 81 @ 200. relied upon by the lower Court and contended that the Court misconceived this Court's decision in that case. He submitted that the issue in contention in the case was not whether a pre-action notice was incorporated in the contract but whether Section 97(2) of the Ports Act, which provides for pre-action notice, was applicable to cases of contract.

He submitted that where, as in Section 12(2) of the NNPC Act, 2004, a statute uses the phrase "no suit shall be commenced...", it prohibits the commencement of ALL suits irrespective of the type or cause of action contemplated. He noted that in Nigercare Devt. Co. Ltd. Vs Adamawa State Water Board (Supra), this Court observed that the provisions of Section 51(1) and (2) of the Adamawa State Water Board Edict No. 4 of 1996, which is in pari materia, is wider and all embracing and different in application from Section 97 of the Port Authority Act, which was construed in the Contruzioni Generali case. He referred to: Fawehinmi Construction Co. Ltd. Vs Obafemi Awolowo University (1998) 6 NWLR (Pt. 553) 171; Amadi v. N.N.P.C. (Supra); Ntiero v. N.P.A. (2008) ALL FWLR (Pt. 430) 688; Ugwuanyi v. NICON Insurance Plc. (2013) ALL FWLR (Pt. 586) 482.

Relying on the interpretation section of the NNPC Act, i.e. Section 22 thereof, learned counsel submitted that the provisions of Section 12(2) of the NNPC Act are applicable to the appellant, being a subsidiary of the Nigerian National Petroleum Corporation (NNPC).

He also urged the Court to discountenance its decision in the Construzioni Generali case as wrongly decided, having regard to its later decisions in Ntiero vs NPA (Supra), Amadi Vs NNPC (Supra); Nigercare Devt. Co. Ltd. Vs Adamawa State Water Board (Supra) and Ugwuanyi Vs NICON Insurance Plc (Supra), which were cases bordering on contract where similar provisions were held to be applicable.

In response to the above submissions, learned counsel for the respondent reiterated the applicability of the Construzrbni Generali case to the instant case, as relied upon by the lower court, He submitted that Amadi v. NNPC (Supra) relied upon by the appellant, did not constitute a departure from the Construzioni Generali case. He submitted that Amadi's case was not a case of simple contract and further, that the Court held that Section 11(2) of the NNPC Act, 1977 was a condition precedent to instituting an action against NNPC because the parties had expressly so agreed. To further buttress his position, he referred to the case of N.P.A. Plc. v. Lotus Plastics Ltd. (2005) 19 NWLR (Pt. 959) 158, where the Construzioni Generali case was cited with approval. He referred to several relevant portions of the judgment. He submitted that this Court reached the decisions in these cases notwithstanding the fact that the provisions for pre-action notice commenced with the phrase, "No suit shall be commenced..." as in Section 12 (2) of the NNPC Act, 2004. He also referred to Onuorah v. K.R.P.C. (2005) 2 SC (Pt. II) 1 @ 10; Wema Sec. & Fin. Plc v. N.A.I.C. (2015) 16 NWLR (Pt. 1484) 93, to the effect that all enactments similarly worded like Section 12(2) of the NNPC Act, do not apply to cases of contract.

He urged the Court to discountenance the cases of Nigercare Devt. Co. Ltd v. Adamawa State Water Board (Supra) and Ntiero Vs NPA (Supra) on the ground that they are not helpful in deciding specific issues of the applicability of pre-action notices to cases of contract. He submitted that the two lower Courts were bound by the previous decisions of this Court on the issue under the doctrine of stare decisis.

He submitted that the contract between the parties was in writing wherein they expressly agreed on the terms and that there was no incorporation therein, either expressly or otherwise, of Section 12 (2) of the NNPC Act, 2004. He submitted that parties are bound by their contracts and the Courts would only give effect to such terms as are expressly agreed between the parties.

Referring to paragraphs 19 and 20 of the Amended Statement of Claim at page 74 of the records and the authority of Ugwuanyi v. NICON Insurance Plc on the purport of a pre-action notice, which is to afford the defendant time to determine whether or not to make reparation to the plaintiff, he submitted that the appellant had ample time to make reparation to the respondent but failed to do so. He urged the Court to lean on the side of substantive justice in this matter and to shun technicalities.

In reply on points of law, learned counsel for the appellant argued that learned counsel for the respondent's contention that the provisions of Section 12(1) and 12(2) of the NNPC Act, 2004 are all pre-action notices and are statutory procedure provisions because they commence with the phrase "No suit shall be commenced...", is misleading, and urged the Court to discountenance it, having regard to the clear interpretation of those provisions in Amadi vs NNPC (Supra). He submitted that although the opening phrase in Section 2 of the Pubic Officers Protection Act and Section 12(1) of the NNPC Act, 2004 is "No action shall be commenced..." the provisions by their content, are not statutory procedural requirements, while Section 12(2) of the NNPC Act, 2004 is a statutory procedural requirement.

He maintained that insistence on strict adherence to mandatory statutory provisions cannot be construed as placing reliance on technicalities. He also noted that there is no provision for constructive notice in the provision.

I shall commence the resolution of this issue by noting that having struck out Grounds 1, 2 and 3 of the Notice of Appeal for being incompetent for failure to obtain leave to appeal, the said grounds being of mixed law and facts, and having struck out issues A and C formulated by the appellant, the finding of the lower Court that the transaction between the parties was a simple contract and that the Federal High Court lacked jurisdiction to entertain it, is no longer in issue in this appeal. The decision is binding on the parties. The only issue in contention in this appeal therefore, is whether, pursuant to Section 12(2) of the NNPC Act, 2004, the appellant was entitled to be served with a pre-action notice before the commencement of the suit against it at the trial Court, Section 12(2) of the NNPC Act, 2004 provides:

"No suit shall be commenced against the authority before the expiration of a period one month after written notice of intention to commence the suit shall have been served on the Corporation by the intending plaintiff or his agent; and the notice shall clearly and explicitly state the cause of action, the particulars of the claim, the name and place of abode of the intending plaintiff and the relief which he claims."

My Lords, it is well settled that in the interpretation of a statutory provision, it should not be considered in isolation or disjointedly, in order to ascertain the intention of the legislature. It must be construed as a whole. See: S.P.D.C. Vs Isaiah (1997) 6 NWLR (Pt. 505) 236; Obi Vs INEC (2007) 11 NWLR (Pt. 1046) 565; Chime & Anor. Vs Ude & Ors. (1996) LPELR - 848 (SC) @ 51 B - C.

Section 12 of the NNPC Act, 2004 bears the heading "Limitation of suits against the Corporation, etc." The type of suits covered by the section are spelt out in sub-section (1) of the section, which provides:

"(1) Notwithstanding anything in any other enactment, no suit against the Corporation, a member of the Board or any employers of the Corporation for any act done in pursuance or execution of any enactment or law, or of any public duties or authority, or in alleged neglect or default in the execution of such enactment or law, duties or authority, shall lie or be instituted in any Court unless it is commenced within twelve months next after the act, neglect or default complained of, or in the case of a continuance of damage or injury, within twelve months next after the ceasing thereof."

Sub-paragraph 2, which follows, then provides that no suit shall be commenced against the Corporation before the expiration of a period of one month after written notice to commence legal action shall have been given by the intending plaintiff.

From the provisions set out above, it is quite clear that the whole of Section 12 covers suits in respect of matters spelt out in sub-paragraph (1). Sub-paragraph (2) is a continuation of the subject matter in sub paragraph (1).

In N.P.A. v. Construzioni Generali Farsura Cogefar SPA (1974) 12 SC 69, this Court had cause to construe the provisions of Section 97 of the Ports Act, which provide thus:

"No suit shall be commenced against the authority until one month at least after notice of intention to commence the same shall have been served upon the authority by the intending plaintiff or his agent."

The provisions are no doubt in pari materia with the provisions of Section 12(2) of the NNPC Act. Now, in construing Section 97(2) of Ports Act, this Court also set out the provisions of Sub-section (1) of the section, which again, is in pari materia with Section 12(1) of the NNPC Act. The Court held, inter alia, at page 83, line 29 to page 84 line 16 as follows:

"We shall now deal with the other point which to our mind, does not seem to be well-settled, namely whether the kind of statutory privilege which we have been considering is applicable to an action founded upon a contract in other words, whether S.97 of the Ports Act applies to cases of contract. We think that the answer to this question must be in the negative. We agree that the section applies to everything done or omitted or neglected to be done under the powers granted by the Act.

But we are not prepared to give to the section the stress which it does not possess. We take the view that the section does not apply to cases of contract. The learned Chief Justice, in deciding this point, made reference to the case of Salako v L.E.D.B. and Anor. 20 N.L.R. 169 where de Commarmond S.P.J. as he then was, construed the provision of Section 2 of the Public Officers Protection Ordinance which is almost identical with S.97 of the Ports Act, and thereafter stated the law as follows: -

"I am of opinion that Section 2 of the Public Officers Protection Ordinance does not apply in cases of recovery of land, breaches of contract, claims for work and labour done, etc."

We too are of the opinion that de Commarmond S.P.J. has quite rightly stated the law in the passage of his judgment cited above. It seems to us that an enactment of this kind i.e.. S.97 of the Ports Act is not intended by the legislature to apply to specific contracts."

The Court held that the section applies to everything done or omitted to be done under the Act. In other words, it applies to those matters specifically referred to in sub-section (1) of the Act. It is for this reason that the Court held that it would be stretching the meaning of the provision too far if it is extended to specific contracts. The Court at page 85 (supra) cited with approval, the decision of the Court of Appeal in Midland Railway Company Vs The Local Board for the District of Withington (1882-3) 11 OBD 788, per Brett, M.R. at page 794, wherein the applicability of the provisions of Section 204 of the Public Health Act, 1875, which are similar to Section 97 (2) of the Ports Act and Section 12(2) of the NNPC Act, was considered. His Lordship held thus:

"It has been contended that this is an action in contract, and that whenever an action is brought upon a contract, the section does not apply. I think that where an action has been brought for something done or omitted to be done under an express contract, the section does not apply; according to the cases cited an enactment of this kind does not apply to specific contracts. Again when goods have been sold, and the price is to be paid upon a quantum meruit, the section will not apply to an action for the price, because the refusal or omission to pay would be a failure to comply with the terms of the contract and not with the provisions of the statute."

I am of the considered view that if the entire provisions of Section 12 of the NNPC Act are considered, it becomes clear that the suits to which sub-sections (1) and (2) relate are those suits in respect of the subject matter clearly spelt out in sub-section (1). That is, the purport of the decision in the Construzioni Generali case. The phrase "No suit shall be commenced..." refers to any suit in respect of the matters set out in sub-section (1).

This decision has been followed by this Court in several cases, such as: N.P.A. Plc. Vs Lotus Plastics Ltd. (2005) 19 NWLR (Pt. 969) 158; Wema Sec. & Fin. Plc. Vs N.A.I.C. (2015) 16 NWLR (Pt. 1484) 93.

In the case of N.P.A. Vs Lotus Plastics Ltd (Supra), the Court noted that the principle in the Construzioni Generali case was that Limitation Laws such as Section 97 of the Ports Act, do not apply to cases of contract. It however held that based on the peculiar facts of the case (i.e. Lotus Plastics), the claim was founded on the statutory duties of the appellant and not breach of contract. It therefore held that to be maintainable, the 1st respondent's action ought to have been brought within the period prescribed by Section 72(1) of the Ports Decree No. 74 of 1993. In Wema Sec. Fin. Plc Vs N.A.I.C. (Supra) the Court held inter alia, at 138 & G:

"It is now settled law that Section 2 of the Public Officers (Protection) Act and all such enactments similarly worded like it, for example, Section 26(1) (a) and (b) of the Nigerian Agricultural Insurance Act (Supra) do not apply to cases of contract...

To hold otherwise would be to negate the general principles upon which the law of contract is based."

A host of authorities were quoted in the judgment, including the Construzioni Generali case (supra); Salako Vs L.E.D.B. & Anr. (1953) 20 NLR 169; Osun State Govt. Vs Dalami (Nig) Ltd. (2007) 9 NWLR (Pt. 1038) 66 @ 83 - 84 F - E; Ugwuanyi Vs NICON Insurance Plc (2013) 11 NWLR (Pt. 1366) 546 @ 612E - 615F.

The case of Amadi Vs NNPC (2000) FWLR (Pt. 9) 1527, relied upon heavily by learned counsel for the appellant, was considered by this Court in Ugwuanyi Vs Nicon Insurance Plc (Supra). His Lordship, Rhodes-Vivour, JSC had this to say:

"The issue before the Court [in Amadi's case] was whether the pre-action notice served on the respondent, contained the information as provided by Section 11(2) of the NNPC Act and not whether the NNPC Act extended to suit of breach of contract of employment. This Court set aside the decision of the Court of Appeal and ordered the case heard by another Judge of the Lagos High Court after finding that all the requirements of Section 11(2) of the NNPC Act had been met by the plaintiff. If ever there was a case most irrelevant to the issue under consideration, Amadi Vs NNPC supra is that case. The issue in this case, once again, is whether a plaintiff who sues on a specific contract (a contract of employment) needs to serve pre-action notice on the defendant, while in Amadi's case, a pre-action notice was served, but did the pre-action notice contain the required information as provided by Section 11(2) of the NNPC Act. That was the issue."

In overturning the concurrent findings of the two lower Courts, His Lordship held at page 617 B - C of the report:

"Concurrent findings of the Courts below are that where a plaintiff's claim is for a specific contract or whatever claim, he must serve on the defendant a pre-action notice, as provided by Section 26 of the NICON Insurance Act, before the Court can have jurisdiction to hear his suit. This finding, confirmed by the Court of Appeal is perverse in the light of the reasoning in N.P.A. Vs Construzioni Generali supra which states clearly that Section 97 of the Ports Act and similar enactments are not intended by the legislature to apply to specific contracts."

The case of N.P.A Vs Lotus Plastics Ltd (Supra) was cited with approval.

In Ugwuanyi's case (Supra) the Court was also invited to depart from its decision in N.P.A. Vs Construzioni Generali (supra). It declined to do so on the ground that it is good law and reflects how similar provisions have been decided in this and other jurisdictions.

I shall toe the same line in this appeal. The appellant has failed to satisfy me that the decision is wrong in law. In the final analysis, I hold that the transaction between the parties, being one of simple contract and having not expressly incorporated them as terms of their contract, the provisions of Section 12(2) of the NNPC Act are not applicable. The respondent's suit was properly instituted before the trial Court. I therefore resolve this sole surviving issue against the appellant. The appeal fails and is hereby dismissed. The judgment of the lower Court is affirmed.

Costs of N500,000.00 are awarded against the appellant and in favour of the respondent.

**OLUKAYODE ARIWOOLA, J.S.C.:**

I had the opportunity of reading in draft the lead judgment of my learned brother, Kekere-Ekun, J.S.C. just delivered. I am in agreement with the reasoning therein and conclusion arrived thereat, that the appeal lacks merit and should be dismissed. I too will dismiss the appeal.

I abide by the consequential orders including that on costs. Appeal dismissed.

**JOHN INYANG OKORO, J.S.C.:**

I read in draft, the illuminating judgment of my learned brother, Kudirat M.O. Kekere-Ekun, JSC just delivered. I agree entirely with the reasons leading to the conclusion that there is no merit in this appeal and deserves an order of dismissal. I have nothing new to add. Therefore I adopt the lead judgment as mine. I also abide by the order as to costs.

Appeal Dismissed.

**AMINA ADAMU AUGIE, J.S.C.:**

I had a preview of the lead Judgment just delivered by my learned brother, Kekere-Ekun, J.S.C., and I agree with him that this Appeal lacks merit because the Respondent's Suit was properly instituted before the trial Court. He dealt with this Issue squarely, and I have nothing useful to add. Thus, I also dismiss this Appeal and affirm the Judgment of the Court of Appeal. I also abide by the consequential Orders made in the lead Judgment, including the order as to costs.

**PAUL ADAMU GALUMJE, J.S.C.:**

I have had the privilege of reading in draft, the judgment just delivered by my learned brother, KUDIRAT MOTONMORI OLATOKUNBO KEKERE-EKUN, J.S.C. and I agree that the appeal lacks merit and should be dismissed.

It is accordingly dismissed by me. The judgment of the lower Court is affirmed. I endorse the consequential order made as to costs.