PRE-ACTION PROTOCOL AND DEMURRER UNDER THE HIGH COURT OF LAGOS STATE (CIVIL PROCEDURE) RULES, 2012

Introduction

Under the Old Rules of Lagos State,[1] an aggrieved party may, without any condition precedent in the rules, immediately cause to be instituted before the High Court of Lagos State an action for redress. But under the New Rules,[2] an aggrieved party that wants to seek redress before the Lagos State High Court is required to first comply with the requirement of Pre-action protocol before he causes an action to be properly instituted. Where an aggrieved party institutes an action before the High Court of Lagos State without compliance with the requirement of pre-action protocol, a defendant may object to the issuance of the originating process for failure to comply with the said requirement.

Whether an objection can be appropriately raised against the failure to comply with the requirement of pre-action protocol without offending order 22 rule [3] which prohibits demurrer is very germane and crucial to determination of the competence of a suit. However, before situating the query appropriately, it is important that we do some clarifications. It is in this regard that we shall commence our discussion with conceptual clarifications of the phrase and the word "pre-action protocol" and "demurrer" respectively. This will then be followed by the legal framework of pre-action protocol and demurrer. We shall also look at the essence of pre-action protocol and whether an aggrieved party already in court and who seeks to join a fresh party is required to comply with the requirement of pre-action

[1] High Court of Lagos State (Civil procedure) Rules, 2004

[2] High Court of Lagos State (Civil Procedure) Rules, 2012

[3] High Court of Lagos State (Civil Procedure) Rules, 2012

protocol. Examination of whether pre-action protocol is a jurisdictional issue that may be raised without filing a defence will equally be discussed. The last part will contain conclusion and suggestions.

Conceptual Clarifications

As I have earlier mentioned, it is important that the phrase "pre-action protocol" and the word "demurrer" be examined so as to ensure a proper understanding of this paper.

Pre-action Protocol

By Order 1, rule 2(3) of the High Court of Lagos State (Civil Procedure) Rules, 2012, the phrase 'pre-action protocol'

> "means steps that parties are required to take before issuing proceedings in court as set out in Form 01 to these rules"

Going by the Form 01[4] referred to in the above definition as well as the preamble to the rules,[5] the steps that are required to be taken before the issuance of proceedings before the court are that:

(a) attempts have been made to settle the matter out of court with the defendant and that such attempts were unsuccessful; and

(b) that the Claimant has, by a written memorandum to the defendant, set out his claim and options for settlement.

From the meaning of pre-action protocol given above, it is without doubt that pre-action protocol could be likened to the well-known pre-action notice usually required by law to be complied with before the institution of action in court.

[4] The Form 01 is titled 'Statement of Compliance with Pre-Action Protocol'

[5] paragraph 2(2)(e) of the High Court of Lagos State (Civil Procedure) Rules, 2012

According to Muhammed, JSC in **Ntiero v. N.P.A.,**[6] a pre-action notice connotes some form of legal notification or information required by law or imparted 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 legal action against such a person. Based on the above, pre-action protocol can, therefore, by parity of reasoning, be said to imply some form of legal steps towards notification and an attempt at amicable resolution of the matter before the commencement of legal action in court.

Demurrer

Black's Law Dictionary[7] defines demurrer as follows:

> "'to wait or stay'] A pleading stating that although the facts alleged in a complaint may be true, they are insufficient for the plaintiff to state a claim for relief and for the defendant to frame an answer."

In the case of **Iwayemi v. Akinbo**[8] demurrer was defined thus:

> "The word 'demurrer' derived from latin 'demorari' or the French 'demorrer' meaning to wait or stay connotes a pleading stating that although the facts alleged in a complaint may be true, they are insufficient for the plaintiff to state a claim for relief and for the defendant to frame an answer. See Black's Law Dictionary 8th Edition page 465."

[6] [2008] 10 NWLR (Pt. 1094) 129 at 146, paras. D-E.

[7] Black's Law Dictionary, 8th Edition, 2004, p. 465.

[8] (2016) LPELR- 40136 (CA), p. 20, paras. C-D. Per Mojeed Adekunle Owoade JCA. See also the case of Moyosore v, Gov., Kwara State [2012] 5 NWLR (Pt. 1293) 242 at 285-286, paras. H-A.

Going by the definition provided, one cannot but agree with the authors of the Blue Book, 2013,[9] when they stated that demurrer proceeding is a procedure by which a party, normally the defence, relies on points of law while conceding on the issues of fact in challenging the claim without having to file its statement of defence. They further stated that a demurrer is an allegation of a defendant that even if all the facts in the pleadings to which he objects are taken to be true, the legal consequence are not such as to put the demurring party to the necessity of answering them by filing Statement of Defence or proceeding further with the case.

Legal Framework

By the provisions of Order 3 rule 2(1)[10] all civil proceedings commenced by Writ of Summons shall be accompanied by:

a. a Statement of Claim;
b. a list of witnesses to be called at the trial;
c. Written statements on oath of the witnesses except witnesses on subpoena;
d. Copies of every document to be relied on at the trial; and
e. **Pre-action Protocol Form 01**

Likewise, by Order 3 rule 8(2), [11] all civil proceedings commenced by originating summons shall be accompanied by:

a. an affidavit setting out the facts relied upon;
b. all the exhibits to be relied upon;
c. a written address in support of the application;
d. Pre-action Protocol Form O1

[9] Muiz Banire, Ajibola Basiru & Kunle Adegoke in "The Blue Book 2013, Practical Approach to The High Court of Lagos State (Civil Procedure) Rules, 2012", 3rd Edition (Ecowatch Publications Nig. Ltd) 251.

[10] High Court of Lagos State (Civil Procedure) Rules, 2012

[11] High Court of Lagos State (Civil Procedure) Rules, 2012

By the content of **Form O1** (i.e. Statement of Compliance with Pre-Action Protocol), the claimant or his legal practitioner is expected to state on oath as follows:

a. I/We have complied with the directions of the Pre-Action Protocol as set out in the preamble to the High Court Rules.
b. I/We have made attempts to have this matter settled out of Court with the Defendant and such attempts were unsuccessful (Claimant must state what attempts he has made to have the matter settled and **attach evidence of same**).
c. I/We have by a Written Memorandum to the Defendant set out my/our claim and options for settlement. (Underlined for emphasis)

By the content of paragraph 2(2)(e)(i)&(ii) of the preamble[12] relating to Pre-Action Protocol, a claimant is expected to,

i. make attempts at amicable resolution of the dispute through mediation, conciliation, arbitration or other dispute resolution options, and
ii. state that the dispute resolution was unsuccessful and that by a written memorandum to the Defendant, set out his claim and options for settlement.

A community reading of Order 3 Rule 2(1) or Order 3 rule 8(2),[13] the content of paragraph 2(2)(e)(i) & (ii) of the preamble[14] and the content of Form 01 (Statement of Compliance with pre-action protocol) is to the effect that a Claimant must, as a matter of law, serve on all or any defendant a written

[12] To the High Court of Lagos State (Civil Procedure) Rules. 2012

[13] High Court of Lagos State (Civil Procedure) Rules. 2012

[14] To the High Court of Lagos State (Civil Procedure) Rules, 2012

memorandum (which may be in form of a letter) setting out his claim(s) as well as options for settlement.

Essence of Pre-action Protocol.

The next question which comes to one's mind is: what is the essence or purpose of the issuance of pre-action protocol to a defendant? We have said earlier that pre-action protocol could be likened to the well-known pre-action notice because both tend to achieve the same purpose. In this regard, pre-action notice and pre-action protocol are necessary pre-condition for the commencement of action in court. From several authorities, there is no doubt that pre-action notice seeks to:

a. prevent the taking of the defendant by surprise, and
b. give a defendant breathing time so as to enable him determine whether he should make reparation to the claimant.

In the case of **Amadi v. NNPC,**[15] while considering the purpose of pre-action notice, **Karibi-Whyte JSC** held thus:

> "I have already referred to the provisions of section 11(2) of the NNPC Act, 1977. I have also analysed the provisions as between the first part relating to giving of the notice to the Corporation of the intention to bring the suit against it and the second part, which prescribes the content of the notice. Although it would seem that the provision regulates the commencement of actions against the Corporation, without removing the adjudicatory powers of the court in respect of matters concerning the Corporation or denying the individual totally of the exercise of his right to court. These are legitimate purposes of pre-action notice and are recognised procedural provisions. As was stated in *Ngelegla v Tribal*

[15] [2000] 10 NWLR (Pt. 674) 76 at 110, paras. B-D

Authority, Nongowa Chiefdom (1953) 14 WACA 325 at 327, such provisions are to give the defendant 'breathing time so as to enable him to determine whether he should make reparation to the plaintiff."

Also, in the more recent case of **A.G. Kwara State v. Adeyemo,** [16] **Ngwuta JSC,** while considering the provision of sections 3(3) and 15 of Chiefs (Appointment and Deposition) Law of Kwara State, 2006, had this to say on the essence of pre-action:

> "Above are "pre-action" requirement in the same class as pre-action notices which have been declared not unconstitutional. See *Anambra State Government & ors v Nwankwo & ors* (1995) 9 NWLR (pt. 418) 245. The aim of statutory pre-conditions for commencement of suit is to provide opportunity for settlement out of court.
>
> In compliance with section 3(3) of the Law the Governor, on the advice of the State council of chiefs is likely to give a final word that will lay the matter to rest and avoid unnecessary and an expensive litigation in terms of time and resources.
>
> If a person has to cough out the sum of N100,000 as a condition to filing a suit, which he is not certain he will win, he is more amenable to peaceful resolution of the dispute then rushing to court. The intendment is to give a person contemplating court action opportunity to give the matter a second thought before embarking on avoidable litigation."

According to the authors of the Blue Book, 2013[17], the Australian Law Reform Commission (ALRC) describes pre-action protocol as "a series procedural requirements that are a pre-requisite to

[16] [2017] 1 NWLR (Pt. 1546) 210 at 246, paras. D-G

[17] Muiz Banire, Ajibola Basiru & Kunle Adegoke (supra), 36.

commencing litigation–generally aimed at encouraging settlement, and where settlement is not achieved, narrowing the issues in dispute to facilitate a more efficient and cost-effective trial process."

A proper look at paragraph 2(2)(e)(i) and (ii) of the preamble to the Rules, one would realise that the main essence of pre-action protocol, to wit, attempt at amicable resolution of dispute before the commencement of action, is contained therein. Going by this, it is reasonable to submit that the essence of pre-action protocol is the same with the essence of pre-action notice.

Having been able to identify or determine the purpose of pre-action protocol, it is pertinent for us to know whether an aggrieved party who already has a pending matter in court and who seeks to join a fresh party to the said pending matter is required to comply with the requirement of issuing and serving a pre-action protocol before joining the party sought to be joined. The answer to this question lies in the essence of pre-action protocol.

If pre-action protocol is essentially aimed at giving a defendant breathing time so as to enable him decide whether to make reparation to the claimant, then the answer to this question would, no doubt, be in the positive otherwise the essence of pre-action protocol would be defeated. Let us look at this hypothetical case. If, for example, a claimant is already in court against an individual or an organisation, and midway into the matter before the court, the claimant suddenly discovers that there is a need to join an Agency of the Federal Government being a necessary party (which, by virtue of its Act, is required to be served a pre-action notice), can the claimant join the said Federal Government Agency without complying

with the pre-action notice required by law? I think not, otherwise the Federal Government Agency would be entitled to raise an objection to the jurisdiction of the court for failure to comply with the condition precedent of issuing a pre-action notice and serving it with same. The implication of the above is that for a party to be joined midway into a matter, the claimant has an obligation to comply with the provision of the Rules as it relates to pre-action protocol. To say that pre-action protocol is not required for the joinder of a party is to defeat the purpose of pre-action protocol. To put it simply, despite the prior pendency of the action, the action commences against the party joined at the point of the order for joinder and hence, before applying for joinder, a claimant ought to have issued pre-action protocol on the party sought to be joined. By parity of reasoning, if other parties are giving pre-action protocol notice, why must the new entrant be denied?. This, arguably, can be an infringement of Section 36 of the Constitution of the Federal Republic of Nigeria, 1999 (as altered) on the right to fair hearing. Again, it is noteworthy to point out that the mere fact that the process of joinder does not include either the use of Writ of Summons or Originating Summons does not relieve the Claimant of the obligation to comply with the pre-action protocol. This is premised on the communal reading of the provisions of Order 3 Rule 2(1) or Order 3 rule 8(2), [18] the content of Form 01 (Statement of Compliance with pre-action protocol) and particularly the content of paragraph 2(2)(e)(i) & (ii) of the preamble [19] which applies to all initiating actions regardless of the mode of commencement. It pertinent to state that preamble has been held to be part of an enactment and as

[18] High Court of Lagos State (Civil Procedure) Rules. 2012

[19] To the High Court of Lagos State (Civil Procedure) Rules, 2012

such it is a legitimate aid in construing an enactment as held in the case of Ona v. Atenda.[20]

Is Pre-action Protocol a Jurisdictional Issue?

Where a party fails to comply with the requirement of pre-action protocol before commencing an action before the Lagos State High Court, the defendant is at liberty to challenge the non-compliance for failure to comply with the requirement of pre-action protocol. In determining whether a pre-action protocol is a jurisdictional issue or not, we have to consider the conditions laid down by the Supreme Court in ***Madukolu v. Nkemdilim (1962) 2 NSCC, p. 374 at 379 where Bairamian, F.J.*** held thus:

> "Put briefly, a court is competent when-
>
> 1. it is properly constituted as regards numbers and qualifications of the members of the bench, and no member is disqualified for one reason or another; and
> 2. the subject matter of the case is within its jurisdiction, and there is no feature in the case which prevents the court from exercising its jurisdiction; and
> 3. the case comes before the court initiated by due process of law, and upon fulfillment of any condition precedent to the exercise of jurisdiction.
>
> Any defect in competence is fatal, for the proceedings are a nullity however well conducted and decided: the defect is extrinsic to the adjudication."

Obviously, from the provisions of Order 3 Rule 2(1) or Order 3 rule 8(2),[21] the content of paragraph 2(2)(e)(i) & (ii) of the

[20] [2000] 5 NWLR (Pt. 656) 244 at 267, paras. A-B

preamble[22] and the content of Form O1, the requirement of the Pre-Action Protocol is a condition precedent to instituting any action against a Defendant. In fact, the provision of Order 5 rule 1 (1)[23] further strengthens the fact that compliance with pre-action protocol is a condition precedent to the commencement of any action under the Rules because by the said provision of Order 5 rule 1(1), failure to comply with Order 3 rule 2 or Order 3 rule 8 shall nullify the action.

In the unreported decision of **Nitol Textiles Manufacturing Co. Nig. Ltd. v. Coastal Services Nigeria Ltd.**[24] delivered on 19th day of June, 2013**, Justice K. O. Alogba of the Lagos State High Court,** in striking out the Claimant's case for failure to comply with the pre-action protocol dictated by the High Court of Lagos State (Civil Procedure) Rules, 2012 held thus:

> *"However what the law requires is to state or show that it has done that which is a condition precedent to invoking the jurisdiction of this court this inter-alia includes proof that an attempt at amicable settlement by any of the Alternative Dispute Resolution modes has been made.*
>
> *Learned Counsel for the Claimant referred to that attempt here as being by letter dated 19th march, 2013, however a careful perusal of that letter, more particularly the last paragraph thereof shows that it is not or cannot in any manner be construed as an extension of an olive branch...*

---

[21] High Court of Lagos State (Civil Procedure) Rules. 2012

[22] To the High Court of Lagos State (Civil Procedure) Rules, 2012

[23] High Court of Lagos State (Civil Procedure) Rules. 2012

[24] Suit No LD/192/2013.

Quite candidly Learned Claimant's Counsel conceded, when I asked her to read the same paragraph in open Court just now that it does not amount to a call for a settlement.

In clear terms it is rather a warning, stay off our land or we sue you to Court.

That is not the pre-action protocol dictated by the Rules, it is rather come let us see how we can amicably resolve this problem in whatever manner that could be done.

For failing to do so therefore, the Claimant failed to comply with a condition precedent to instituting this action in Court as dictated by the PREAMBLE NO 2(2E) High Court of Lagos State Civil Procedure Rules 2012. Accordingly this suit is incompetent and is hereby struck out."

Further, in the recent unreported decision of **Somolu v. WemaBond Estates Limited & 4 Ors**.[25] delivered on 1st day of July, 2016, **Hon. Justice Candide-Johnson** of the High Court of Lagos State, while striking out the Claimant's suit for failure to comply with Order 3 rule 2(1)(e) of the High Court of Lagos State (Civil Procedure) Rules, 2012 held as follows:

"Secondly, I agree entirely with the argument under the Preliminary Objection that there is a deliberate Statutory Policy behind the statutorily stipulated procedure of Pre-Action Protocols which calls for strict compliance and which, inter-alia, is intended to carry into effect the overriding objective elucidated in the Preamble to the 2012 Lagos Rules. The disobedience and/or failure of the Claimant to comply with this

[25] Suit No LD/192GCMW/2015, pages 6-7

condition-precedent of the Pre-Action Protocol is a fatal defect to which Order 5 Rule 1(1) (and not Order 5 Rule 1(2)) is relevant. Order 5 Rule 1(2) is irrelevant to the issues of Pre-Action Protocol for two reasons: -

1. *Order 5 Rule 1(1) specifically states that failure to comply with Order 3 Rule 2 and Order 3 Rule 8 "shall nullify the action".*
2. *Order 5 Rule 1(2) besides being broad and non specific unlike Order 5 Rules 1(1) which condescends and specifically identifies and names Order 3 Rule 2 as being one of its targets. "Expressio Unius est exclusio alterius" - the express mention of one thing means the express exclusion of other things. In addition, it my further understanding that Order 5 Rule 1(1) is concerned with and limited to "beginning or purporting to beingany action" whilst Order 5 Rule 1(2) is concerned with proceeding after an action has already begun, thus the phase "at any stage in the course of or in connection with any proceedings...'*

I hold, therefore, that the present failure of Claimant to comply with Order 3 Rule 2 of the 2012 with regard to the simultaneous composite frontloading and filing of the stipulated Form 01 as strictly statutorily formulated in the 2012 Rules is a failure, in the language of Order 5 Rule 1(1), which "shall nullify the action'.

The bland, deficient and unhelpful four (4) paragraphs documents filed by the Claimant filed in disobedience to the Preamble, the provisions of Order 3 Rule 2 and the statutory Form 01 located at page 152 of the 2012 Rules which inter-alia states that

"Claimant must state what attempts he has made to have the matter settled and attach evidence of same" is as follow: -....

It is important to observe that the 2012 Lagos Rules have been in operation for nearly 4 years and that the strict compliance policy and procedure implicit in those Rules regarding the Pre-Action Protocol is quite frankly visibly in plain sight. So why the refusal to obey and comply with the rules? To allow individual discretion as to how and/ or when to obey strict statutory procedure aimed at uplifting the quality of the administration of justices in Lagos State would be a disservice and simply destructive rather than constructive."

See also the unreported decision of **Abass & 4 Ors. v. Abass & 3 Ors**.[26] delivered on 8th day of February, 2016, where **Justice**

[26] Suit No BD/1100LMW/2015, pages 12-13. Justice Bola Okikiolu-Ighile held thus:

"I adopt the above Principle of Law as mine. I hold that the Claimants/Respondent herein have failed/neglected to comply with the Provisions of Order 3 Rule 2(1)(e) of the Rules of this Court. The Claimant/Respondent seeks the discretion of the Court in their favour stating that the non compliance is a mere irregularity which does not nullify this action.

When a Court is invited to grant such a request, the Court must always bear in mind that the Rules of Court prima facie ought to be obeyed. It then follows that in order to justify the exercise of the Court's discretion there must be material upon which to found the exercise of discretion.

Any exercise of such discretion where no such material has been placed before the Court, no indulgence of the Court can be granted. See Bueke v. Sunmola Amola (1988) 2 NWLR (Pt. 75) 128.

In view of the above, I agree with the submission of the Learned Counsel to the defendants/Applicants that the Claimant/Respondent did not place any material before the Court to show that had (sic) taken any step towards amicable settlement in satisfaction of the provisions of Order 3 Rule 2(1)(e) of the Rules of this Court and I so hold."

Bola Okikiolu-Ighile of the High Court of Lagos State struck out the Claimants' suit for failure to comply with Order 3 rule 2(1)(e) of the High Court of Lagos State (Civil Procedure) Rules, 2012.

In fact, the above unreported decisions obviously reiterate that a pre-action protocol memorandum or letter to a defendant must certainly comply with the provisions of paragraph 2(2)(e) of the Preamble to the High Court Rules[27] otherwise a claimant would not have complied with the condition precedent and the action being challenged would be regarded as incompetent for being a nullity.

Can a Defendant successfully raise Non-compliance with Pre-action Protocol without filing a Defence?

Order 22 rule 1 of the rules of court[28] restates the abolition of demurrer by providing that "no demurrer shall be allowed". By Order 22 rule 2(1) of the said rules of court,[29] any party may by his pleading raise any point of law, and the Judge may dispose of the point so raised before or at the trial. This is what is known as proceeding in lieu of demurrer.

Order 22 rule 2(2) of the rules of court states that if in the opinion of the judge, the decision on such point of law substantially disposes of the whole proceedings or any distinct part thereof, the Judge may make such decision as may be just.

It is pertinent to state that issue of jurisdiction can be raised at any time and at any stage of the proceedings. It can even be raised for the first time on appeal, but once it is raised, it must

[27] High Court of Lagos State (Civil procedure) Rules, 2012

[28] High Court of Lagos State (Civil procedure) Rules, 2012

[29] High Court of Lagos State (Civil procedure) Rules, 2012

first be decided before any further step is taken in the proceedings.[30] This is because jurisdiction is a threshold issue.

Going by the provision of Order 22 Rules 1 and 2(1) of the rules of court *vis-à-vis* the threshold nature of the issue of jurisdiction, a defendant that intends to raise any point of law to an action which is not jurisdictional in nature is bound to raise it in his statement of defence before raising such a point of law by way of a preliminary objection (if he so desires). However, raising the said point of law by filing a notice of preliminary objection without first filing a defence will be regarded as demurrer.

However, where the point of law raised against the action is jurisdictional in nature, the defendant can appropriately raise an objection against the action without filing any defence provided that no material fact will be required from filing a defence before determining the issue of jurisdiction. The implication of this is that an objection to jurisdiction can be raised on the basis of statement of claim or originating summons only. However, where the determination of the objection to jurisdiction by the court will require material facts that can only be contained in a defence, the defendant cannot properly raise the objection to jurisdiction unless he files a defence. In the case of **Ajayi v. Adebiyi**,[31] Adekeye JSC held thus:

> "Limitation Law and Locus standi are both threshold issues which can be raised anytime or for the first time in the Court of Appeal or in the Supreme Court. It is not limited to being raised as a special defence and pleading them specifically as required by the Rules of Court under Order 22 rule 2 of the Lagos State High

[30] See CBN v. Okojie [2015] 14 NWLR (Pt. 1479) 231 at 252, paras. D-E.

[31] [2012] 11 NWLR (Pt. 1310) 137 at 179-180, paras. H-C.

Court (Civil Procedure) Law. It transcends any High Court Rules. It can be raised by preliminary objection at any stage of the proceedings, before any court, by any of the parties or even *suo moto* by the court. It is therefore noteworthy that an application or preliminary objection seeking an order to strike out a suit for being incompetent on the grounds of absence of jurisdiction is not a demurrer and therefore can be filed and taken even before the defendant files his statement of defence. the reason being that the issue of jurisdiction can be raised at any time. In addition, the relevant things to be considered by the court in determining the issue of jurisdiction are the facts as deposed to in the affidavits, the writ of summons and the statement of claim where one had to be filed and served."

Going further, **Adekeye, JSC**[32] held as follows:

"Furthermore, an objection to jurisdiction can be taken at any time depending on what materials are available. It would be taken in the following situations –

a) On the basis of the statement of claim; or
b) On the basis of the evidence received; or
c) By a motion supported by affidavit giving full facts upon which reliance is placed; or
d) On the face of the writ of summons, where appropriate as to the capacity in which action was brought or against whom action is brought."

The decision of the Supreme Court in **Ajayi v. Adebiyi**[33] was the same holding of the Supreme Court in **Musaconi Ltd. v. Aspinall.**[34] where **Ariwoola**, JSC held thus:

[32] (Supra) p. 181, paras. E-G
[33] Supra
[34] [2013] 14 NWLR (Pt. 1375) 435 at 460, paras. B-D.

> "It is settled law, that the only process the court is to consider to know whether or not it has jurisdiction is the claim before it. There is no doubt that the challenge to jurisdiction of court can be raised in the statement of defence or even before filing any defence, just after the defendant is served with the writ of summons. But it must be apparent on the writ of summons and statement of claim that the court is lacking in competence if it is raised before the defendant files defence and issues are joined."

Furthermore, in the case of **Elabanjo v. Dawodu**,[35] **Mohammed JSC** held as follows:

> "In the instant case, all the circumstances and attributes outlined in the *Petrojessica v. Leventis Technical (supra)*, were on the ground when the respondent filed her preliminary objection at the trial court which erroneously refused to rule on it on the alleged ground that it was not competent having been filed before filing a statement of defence. To say, as did the trial court and canvassed by the appellants should only be taken after the filing of a statement of defence, is indeed a misconception. ***This entirely depends on what materials were available***. Objection to jurisdiction could be taken on the basis of the claim as in *Izenkwe v. Nnadozie* (1953) 14 WACA 361 at 363; *Adeyemi v. Opeyori* (1976) 9-10 SC 31 and *Kasikwu Farms Ltd. v. Attorney-General of Bendel State* (1986) 1 NWLR (Pt. 19) 695. It could be taken on the evidence received as was the case of *Barclays Bank of Nigeria Ltd. v. Central Bank of Nigeria* (1976) 1 ALL NLR 409; or by a motion on notice supported by affidavit giving the facts upon which reliance is placed as in *National*

[35] [2006] 15 NWLR (Pt. 1001) 76 at 116-117, paras. E-B.

Bank (Nigeria) Ltd. v. Shoyoye (1977) 5 SC 181 at 194. Infact it could be taken even on the face of the writ of summons before filing statement of claim." [Emphasis mine]

The import of all the above cases cited is that an objection to jurisdiction can be raised without filling defence. This certainly will not amount to a Demurrer. This, clarification is essential as there seems to be high level of confusion, at times, bordering on misrepresentation on the part of some Judges in the interpretation of Order 22 (1).[36] Where a defendant is confused as to whether or not he does require to file a defence before filing a preliminary objection on jurisdictional issue, **Ayoola JSC** in **Mobil Producing Nigeria Unlimited v. LASEPA** while giving an appropriate guideline that could be followed held as follows:

"*There seems to have been some confusion in the respondents' arguments, as well as in the approach of the court below, with regard to the issue of pre-action notice. Much stress has been placed on the argument that non-compliance with provisions such as section 29 (2) of the Act leads to a question of jurisdiction which can be raised at any time and which if resolved against the appellant renders the entire proceedings a nullity. This rather mechanical approach to the issue which tends to ignore the distinction between jurisdictional incompetence which is evident on the face of the proceedings and one which is dependent on ascertainment of facts, leads to error. In my opinion, bearing the distinction in mind, appropriate guidelines could be fashioned out as follows:*

[36] High Court of Lagos State (Civil Procedure) Rules, 2012

(i) Where on the face of the proceedings a superior court is competent, incompetence should not be presumed.

(ii) Where on the face of the proceedings the court is incompetent, the court should of itself take note of its own incompetence and decline to exercise jurisdiction, even if the question had not been raised by the parties. If it does not, the question of its incompetence can be raised at any stage of the proceedings because the fact of its incompetence will always remain on the face of the proceedings.

(iii) Where the competence of the court is affected by evident procedural defect in the commencement of the proceedings and such defect is not dependent on ascertainment of facts, the court should regard such incompetence as arising ex facie.

(iv) When the competence of the court is alleged to be affected by procedural defect in the commencement of the proceedings and the defect is not evident but is dependent on ascertainment of facts the incompetence cannot be said to arise on the face of the proceedings. The issue of fact if properly raised by the party challenging the competence of the court should be tried first before the court makes a pronouncement on its own competence.

(v) Where competence is presumed because there is nothing on the face of the proceedings which reveals jurisdictional incompetence of

the court, it is for the party who alleges the court's incompetence to raise the issue either in his statement of defence in proceedings commenced by writ or by affidavit in cases commenced by originating summons.

(vi) A judgment given in proceedings which appear ex facie regular is valid.

The proposition that incompetence of a superior court will not be presumed where nothing on the face of the proceedings shows any incompetence derives from the general principle that the general jurisdiction of a superior court is presumed. In Halsbury's Laws of England, Vol. 10, 4th Edition, para. 713, it was stated:

> *"Prima facie, no matter is deemed to be beyond the jurisdiction of a superior court unless it is expressly shown to be so...."*

The rule of jurisdiction, as held by this court (per Uwais, JSC, (as he then was) in Anakwenze v. Aneke & ors. (1985] 16 NSCC (Pt. II) 798, 803 citing The Major etc of London v. Cox (1867) 2 L.R, H.L. 239 and Peacock v. Bell and Kendall (1867) 1 Wms. Saund. 101, is that nothing shall be intended to be out of the jurisdiction of a superior court but that which specially appears to be so."

See also the case of **Disu v. Ajilowura**.[37]

[37] [2006] 14 NWLR (Pt. 1000) 783 at 801-802, paras. H-C

From the analysis above of the status of pre-action protocol and the Courts' attitude to its treatment under the Rules, it is obvious that pre-action protocol is a jurisdictional issue and being a jurisdictional issue, a defendant that wishes to challenge the non–compliance with the pre-action protocol can first raise an objection to the action without filing a defence at all. This will be possible where the claimant did not show in his statement of claim that he complied with the requirement of pre-action protocol coupled with the fact that the claimant did not file Form O1 or did not attach any evidence of a memorandum or letter of pre-action protocol to the Form 01 (if he filed one). In this instance, the court will be able to determine the issue of absence of pre-action protocol on the basis of the originating processes alone. However, where the claimant did plead in his statement of claim that he complied with the requirement of pre-action protocol coupled with the filing of Form O1 and attaching evidence of a written memorandum in compliance with the requirements of pre-action protocol to the said Form 01, a defendant that intends to challenge the competence of the action for failure to comply with the requirement of pre-action protocol will first raise this jurisdictional point of law in his pleading before filing an objection. In this instance, the objection will be decided on the basis of evidence received.

The only instance in which the rules of court explicitly permit the filing of objection on point of law against the proceeding of court without a defence is as enshrined in Order 22 rule 2(3) of the rules of court[38] which states that this provision[39] shall be without prejudice to the Arbitration Act or any other law under which a defendant must apply for stay of proceedings before

[38] High Court of Lagos State (Civil procedure) Rules, 2012

[39] The provision that no demurrer shall be allowed.

filing a statement of defence or other statement of case on the merits. In the case of **R.C.O. & S. Ltd v. Rainbownet Ltd**.,[40] the Court of Appeal, **Per Okoro JCA** (as he then was) held as follows:

> "It is now well settled that where parties to an agreement make provision for arbitration before an action can be instituted in a court of law, any aggrieved party must first seek the remedy available in the arbitration. It is also a sound principle of law that where plaintiff fails to refer the matter to arbitration first, but commences an action in a court of law, a defendant shall take steps to stay the proceedings of the court and the court will stay proceedings if it is satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission. It should be noted that a defendant applying for a stay of proceedings in an action pending arbitration must not have delivered any pleadings or taken any steps in the proceedings beyond entering a formal appearance. See *Kano State Urban Development Board v. fanz Construction Coy. Ltd*. (1990) 4 NWLR (Pt. 142) 1
>
> It follows that once a defendant takes any steps beyond formal appearance, he will be deemed to have waived his right to go to arbitration. This is so because the right to go to arbitration is a personal right and can be waived by the individual concerned. It is a not (sic) constitutional right which he shares in common with other members of the society.

[40] [2014] 5 NWLR (Pt. 1401) 516 at 534, paras. C-G

In the case of **Fawehinmi Const. Co. Ltd v. OAU**,[41] the Supreme Court, **Per Belgore JSC** held thus:

> Now by appearing before the trial in a court to raise a preliminary issue of clause on arbitration to be resorted to first before the trial in a court of law, could the defendant be said to have waived its right? When parties enter into agreement and there is an arbitration clause whereby the parties must first go for arbitration before trial in Court it is natural for the defendant in a case where the other party has filed a suit to ask for stay of proceedings pending arbitration. That does not amount to submission to trial. In the case where such application is refused the next step is to invoke a statutory right where it exists if that right will make the suit incompetent."

It is therefore submitted that the provision of Order 22 rule 2(3) is clearly an exception to the rule of court that requires a defence to be filed before an objection to proceedings of court is raised.

Conclusion

As can be seen from the foregoing, although demurrer has been abolished in our legal system, it does not necessarily mean that every preliminary issue of law cannot be raised without filing a defence. The operative consideration is the nature of the issue of law the defendant intends to raise. Where the issue of law is jurisdictional in nature and it is apparent on the face of the originating process that the Court lacks jurisdiction, the defendant is not required to file a defence before raising the issue of jurisdiction.

Applying this to failure to comply with the requirements of pre-action protocol, this paper has been able to establish the fact

[41] [1998] 6 NWLR (Pt. 553) 171 at 183, paras. E-F

that as the name denotes, pre-action protocol requirements constitute a condition precedent to instituting an action under the High Court of Lagos State (Civil Procedure) Rules, 2012 and failure to comply with it robs the court of jurisdiction. Therefore, it is without a doubt that failure to comply with pre-action protocol requirements is an issue of jurisdiction that can be raised without first filing a defence. Raising same as a preliminary issue of law without filing a defence will not run foul of Order 22.[42] In other words, a defendant that raises the failure to comply with the pre-action protocol requirements without filing a defence has not demurred where the non-compliance is patent on the face of the originating process.

[42] High Court of Lagos State (Civil Procedure) Rules, 2012