

**ENVIRONMENTAL LITIGATION IN NIGERIA: THE ROLE OF THE JUDICIARY\***

**Abstract**

*Environmental laws are put in place to mitigate the threatening environmental problems resulting from human activities. To checkmate these human activities, courts are established by governments with jurisdictions to entertain environmental litigations to protect and redress environmental wrongs in Nigeria. The aim of this paper is to appraise environmental litigation under the Nigerian jurisprudence and the role of judiciary in resolving such matter. To achieve this objective, the questions which the paper seeks to interrogate among others include: What role has judiciary played in promoting and protecting the right to a healthy environment in Nigeria? What are the jurisdictional obstacles militating against the use of litigation to protect and redress environmental wrongs in Nigeria? In answering these questions, this paper discusses the nature of Nigerian environmental litigations and courts confer with jurisdiction to entertain environmental litigation. The paper examines various impediments to environmental litigations in Nigeria. The paper argues for the encouragement of private and public interest litigation and creation of procedure for enhancing public participation in Nigerian environmental protection. The paper concludes with recommendation for the establishment of environmental court.*

**Keywords:** *Environmental Litigation, Jurisprudence, Nigeria, Judiciary*

**1. Introduction**

In a bid to protect, preserve and sustain environment resources, Nigeria has struggled to develop body of laws and regulations to tackle environmental degradation and strike a balance between its physical development and the sustainability of its environmental resources. The body of these laws collectively forms the Nigerian environmental laws, the breach of which attracts criminal or civil liabilities<sup>1</sup>. The judiciary is the major organ by which the determination of these rights and liabilities are ascertained. Other mechanisms by which the regulators or a perceived victim of an environmental wrong could have his right redressed include administrative actions or sanctions on the part of environmental protection agencies through actions like sealing of premises, refusal to issue grants and permits and sometime fines.<sup>2</sup> The body of environmental laws in Nigeria has their sources in the Nigerian Constitution,<sup>3</sup> statutory enactments, customary laws, common laws, international environmental agreements, and pronouncements of courts of law in Nigeria etc. Again, the National and State Assemblies in Nigeria are given concurrent powers to legislate on environmental matter.<sup>4</sup> To this end both have established institutions that are saddled with powers to protect

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<sup>1</sup> Civil liabilities involve the payment of damages or costs as a result of the violation of any of the environmental protection laws in Nigeria. Under NESREA section 47, where an owner or operator of any vessel or onshore or offshore facility responsible for the discharge of hazardous substance contrary to Section 20, he will be in addition to the criminal penalty prescribed in that section be liable for: 1) the cost of removal of the hazardous substance as well as any cost incurred by the Government or its agencies in the restoration or replacement of natural resources damaged or destroyed as a result of the discharge; and 2) costs of third parties in the form of reparation, restoration, restitution or compensation as may be determined by NESREA from time to time. See H Ijaiya, & OT Joseph. (2014). Rethinking Environmental Law Enforcement in Nigeria 5 *Beijing Law Review*, 306-321: 313, and MT Okorodudu-Fubara, *Law of Environmental Protection*. (Caltop Publications Nigeria Limited, 1998) p. 40

<sup>2</sup> H Ijaiya, & OT Joseph. (2014). Ibid, 311-313 see also MT Ladan. Review of NESREA Act 2007 and Regulations 2009-2011: A New Dawn in Environmental Compliance and Enforcement in Nigeria (2012) 8 (1) *Law Environment and Development Journal*, 116.

<sup>3</sup> The Constitution of the Federal Republic of Nigeria 1999 (as amended) s. 20.

<sup>4</sup> BY Ibrahim. The Framework of Environmental Law of Nigeria: A Critical Analysis (2006) I (2) *Ahmadu Bello University, Zaria Journal of Private and Comparative Law*, 212-224

and preserve the environment in view of its very importance. However, some have argued that the fact that the power to legislate on the environment is neither reserved in the exclusive nor concurrent list means that it could be inferred that it is in the residual list.<sup>5</sup> It is noteworthy to mention that the aggressive phase of Nigeria's legislative action for environmental protection was the post 1988 era,<sup>6</sup> popularly called the post Koko incident in Nigeria<sup>7</sup>.

The aim of this paper is to appraise environmental litigations under the Nigerian jurisprudence and the role of judiciary in this matter. To achieve this objective, the questions which the paper seeks to interrogate among others include: What role has judiciary played in promoting and protecting the right to a healthy environment in Nigeria? What are the jurisdictional obstacles militating against the use of litigation to protect and redress environmental wrongs in Nigeria? To answer these question, this paper is divided into six sections. Following this introduction, the paper discusses the nature of Nigerian environmental litigation. In section three, the paper analyses the Courts confer with jurisdiction to entertain environmental matter, while section 4 of the paper examines various impediments to environmental litigation in Nigeria. Section five of this paper deals jurisdictional issues in environmental litigation. The paper concludes by advocating, amongst others for the passing of legislations that will confer *locus standi* on individuals to institute actions for the protection of environment where there is a threat to the environment or where there is actual occurrence of environmental pollution without the necessity of proving damage suffered as it is currently the law in Nigeria.

## 2. Nature of Nigerian Environmental Litigation

Basically, environmental litigations occur in the form of criminal prosecutions and civil litigations. On the one hand, the common feature of various statutes in Nigeria is that they are laced with penal provisions and hence they prohibit the doing of certain things that will cause environmental pollution. The provisions of most of these Acts carry criminal sanctions in nature of monetary fines and/or a term of imprisonment. In other words, if an individual or corporate body violates any of the provision of such statutes, he is liable to criminal charge. The objective of this is to inflict some pain on polluters or cause them some monetary loss.<sup>8</sup> Criminal prosecution is often instituted by public authorities saddled with the powers to do so. Most pieces of legislation on environmental protection have provisions enabling the institution to initiate criminal prosecution for the breach of their laws or regulations. For instance, section 1(2) (C) of NESREA Act, makes the agency capable of suing and being sued in its corporate name<sup>9</sup>. Specifically, section 8 (f) of the Act empowers the agency to establish mobile courts in collaboration with the relevant agency. The section provides thus: '*subject to the provisions of the Constitution of the Federal Republic of Nigeria, 1999, and in collaboration with relevant judicial authorities establish mobile courts to expeditiously dispense cases of violation of environmental regulations.*'

It is the duty of the judicial system to convict, while it is the power of the agency to carry out such prosecutions. Section 32 (3) of the Act gives the agency powers to carry out such prosecution subject to the

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<sup>5</sup> O Fagbohun, Mournful Remedies, Endless Conflicts and Inconsistencies in Nigeria's Quest for Environmental Governance: Rethinking the Legal Possibilities for Sustainability. (Abuja: NIALS Press 2012) 33

<sup>6</sup> BY Ibrahim (n 4)

<sup>7</sup> D Ogbodo and S Gozie. Environmental Protection in Nigeria: Two Decades after the Koko Incident (2009) 15 (1) *Annual Survey of international and company law* 75

<sup>8</sup> See the National Environmental Standards and Regulations Enforcement Agency (Establishment) Act [NESREA] 2007 ss. 20(3) and (4), 21(3), 22(3) and (4), 24(4) and (5), 25(2) 26(3) and (4), and 27(3), (4) and (5) and 37, which provides for Penalties in form of Fines/Imprisonment; see also Ibidapo-Obe, A. Criminal Liability for Damages caused by Oil Pollution. In Omotola (ed.) *Environmental Laws in Nigeria including Compensation* (Lagos: University of Lagos Press, 1990 p.232

<sup>9</sup> MT Ladan 'Review of NESREA Act 2007 and Regulations 2009-2011: A New Dawn in Environmental Compliance and Enforcement in Nigeria' (2012) 8 (1) *Law, Environment and Development Journal*, 116.

provisions of Section 174 of the Constitution of the Federal Republic of Nigeria 1999.<sup>10</sup> Any officer of the Agency may, with the consent of the Attorney –General of the Federation, conduct criminal proceedings in respect of offences under this Act or regulations made under this Act<sup>11</sup>. There has been paucity of public litigations in the form of prosecutions.<sup>12</sup> The major reason for this is the attitude of the Nigerian courts to environmental issues as well as the lack of capacity of State prosecutors to adequately handle environmental prosecutions.<sup>13</sup> The courts too have placed overriding economic benefits of the nation over environmental pollution. For prosecutors, besides the reason that most of them did not offer environmental law as a course in the University because environmental law is a new discipline which was not taught in some Faculties of Law, most of them place economic and financial considerations and interest of the government over pollution as an environmental challenge<sup>14</sup>.

The civil litigations, on the other hand, are founded on tortious liabilities or the breach of a duty of care imposed by law. In the words of Oyewo,<sup>15</sup> civil litigation can be described as enforcement of legal rights(s) or redressing of a legal wrong(s), as the case may be, before a competent court or tribunal established by the law. Civil litigation therefore plays a major role in environmental protection in Nigeria more than the criminal prosecutions.<sup>16</sup> The beauty about civil litigation is that it can be instituted by individuals, communities, corporations and government institutions in the case of breaches of environmental legislations. However, a dominant form of environmental litigations in Nigeria is on oil pollution by individual citizens against oil companies. A regulatory institution may also institute civil actions with a view to obtaining order of courts for closing down premises of an area endangering the environment. The NESREA Act in section 30 (1) (g) empowers the agency to ‘obtain an order of a court to suspend activities, seal and close down premises including land, vehicle, tent, vessel, floating craft or any inland water and other structure whatsoever’. Both criminal and civil litigations are conducted upon the laws and rules of the courts discussed hereunder.

### **3. Courts with Jurisdictions to entertain Environmental Litigations in Nigeria**

The Nigerian judicial system comprised of the totality of its courts system. Its composition, hierarchy and jurisdictions collectively form the judicial system. The courts system in Nigeria is established by the constitution and other laws of the States or Federation depending on the nature of the court and its powers. The superior courts of record in Nigeria<sup>17</sup> are those established pursuant to the constitution which is the supreme law of the country. Other courts that are established by any other Act or law are not classified as ‘superior courts’ even if they rank in the same status as those expressly established by the constitution.<sup>18</sup> The basis of the powers of the courts system in Nigeria is derived from section 6 of the constitution. This section confers on both the Federal and State governments to establish court.<sup>19</sup> Specifically, section 6(5) empowers the Federal government and State government to established such other courts as may be authorised by law to exercise jurisdiction on matters with respect to which the National Assembly and State Assemblies may make laws. The judicial powers vested in the courts in Nigeria are to be exercised and shall extend to all

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<sup>10</sup> This section relates to the power of the Attorney-General of the Federation to institute, continue or discontinue criminal proceedings against any person in a court of law.

<sup>11</sup> NESREA Act s.32 (3).

<sup>12</sup> SO Idehen, ‘Examination of legal Regimes and Institutional Frameworks for oil Pollution Management in Nigeria: How Effective?’ (2013) 1 (1) *BIU Law Series*, 114-140

<sup>13</sup> RA Mmadu, ‘Judicial Attitude to Environmental Litigation and Access to Environmental Justice in Nigeria: Lessons from Kiobel’ (2013) 1 (2) *Afe Babalola University Journal of Sustainable Development Law and Policy* 149-170.

<sup>14</sup> *Ibid*, see further SG Ogbodo, *The Role of the Nigerian Judiciary in the Environmental Protection against Oil Pollution: Is It Active Enough?* <[www.nigerianlawguru.com](http://www.nigerianlawguru.com)>

<sup>15</sup> AT Oyewo. *The Principles and Practice of Civil Litigation in Nigeria* (1<sup>st</sup> Edition, Ibadan: Jator Publishing Company, 2011) 1.

<sup>16</sup> AE Akpan, ‘Civil Liabilities and Criminal Sanctions in International Environmental Law: A General Appraisal’ (2006) 3 *Fountain Quarterly Law Journal*, 65-82.

<sup>17</sup> The Constitution of the Federal Republic of Nigeria 1999 (as amended) s. 6(3).

<sup>18</sup> *Ibid* s. 6(4)

<sup>19</sup> *Ibid* s. 6 (1) and (2); the courts to which this section refers to are: the Supreme Court of Nigeria; the Court of Appeal; the Federal High Court; the High Court of the Federal Capital Territory, Abuja; a High Court of a State; the Sharia Court of Appeal of the Federal Capital Territory, Abuja; a Sharia Court of Appeal of a State; a Customary Court of Appeal of the Federal Capital Territory, Abuja and a Customary Court of Appeal of a State;

inherent powers and sanctions of the courts of law. The judicial powers shall extend to all matters between persons or between government or authority and to any person in Nigeria and to all actions or proceedings relating thereto for the purpose of determining any question as to the civil rights and obligations of that person.<sup>20</sup>

The very basic functions of the courts in Nigeria like their counterparts worldwide are summed up into adjudication, interpretation of laws and exercising supervisory and judicial review functions over administrative bodies.<sup>21</sup> In performing these functions the courts have been generally known and believed to be the 'hope of the common man'. This presupposes the confidence the populace repose in the judicial system. It is pursuant to these judicial powers that the courts in Nigeria exercise jurisdiction over persons, authorities and companies, over conducts that infringe or breach environmental laws. In environmental suits, the courts exercise jurisdiction with a view to determining rights and liabilities, punish offenders, stop practices injurious to environment or order compensation for victims that have suffered from such environmental misconducts and harms.

Again, Agenda 21 of the 1992 Rio Declaration on the environment and development<sup>22</sup> underscored the importance of the judicial system in environmental protection when it calls on national governments to establish judicial and administrative institutions and procedures for legal remedies.<sup>23</sup> Principle 10<sup>24</sup> urges national governments to encourage participation of all concerned citizens and to provide effective access to judicial and administrative proceedings including redress and remedy. Even though in Nigeria there is no special superior court of record with exclusive jurisdictions to hear and determine environmental cases,<sup>25</sup> the existing High Courts and Federal High Courts have jurisdictions to entertain matters relating to environmental issues. For instance, in Cross River State, there exist at the magisterial court<sup>26</sup> level certain courts known as environmental courts. On detailed investigations, the court is not any special creation of law for that purpose but merely so designated by the Chief Judge of Cross River State. They merely exercise criminal jurisdiction over those who are brought before it for breaching environmental sanitation exercise and other sanitation regulations of the state.

#### 4. Impediments to Environmental Litigations in Nigeria

Generally, there are certain hiccups that are associated with litigation in Nigeria. This is regardless of whether such litigation is an environmental litigation or other subject matters. These impediments are not sector specific or court specific. They include factors like; delays, cost of litigation and services of legal practitioners, ignorance of the law on part of citizens, remoteness of court halls from rural dwellers etc. Many a litigation in courts takes time and unnecessary delays are attributable to it. It is recorded that an average length of litigation in superior court of record lasts between five to six years and those cases that are eventually heard proceed with no real sense of urgency<sup>27</sup>. This is the minimum time a victim of environmental pollution for instance will take to assert his right. This excludes the right of the unsuccessful litigant to file appeal. Friends of the Earth International captured the exact nature of the length of environmental litigation against oil multinational companies in this statement thus:

A classic example of how transnational oil companies escaped from the arm of the law by using the cumbersome legal system that is time wasting to frustrate litigants. In Nigeria, delays significantly plague the course of litigation against the poor rural communities. The

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<sup>20</sup> S. (6)(b) of the 1999 Constitution as amended

<sup>21</sup> SG Ogbodo (n 14); H Ijaiya & OT Joseph (n 1) 317; see also CIN Emelie. The Judicial Approach to Environmental Protection in Nigeria: An Overview. <[www.globalacademicgroup.com](http://www.globalacademicgroup.com)> accessed on 22/09/2018.

<sup>22</sup> The 1992 Rio Declaration on environment and development.

<sup>23</sup> T Okonkwo, 'Environmental Constitutionalism in Nigeria: are we there yet?' (2015) 13 *The Nigerian Juridical Review*, 191.

<sup>24</sup> Of the 1992 Rio declarations

<sup>25</sup> As is currently the case with the establishment of the National Industrial Courts with jurisdiction to hear labour disputes and employment related cases. This was done by the third amendment of the 1999 Constitution making the court a superior court of record in Nigeria.

<sup>26</sup> Magistrate courts are lower courts that are not classified as superior courts and fall below the high courts in hierarchy.

<sup>27</sup> O Oko, 'Seeking Justice in Transitional Societies: An Analysis of the Problems and Failures of the Judiciary in Nigeria' (2005) 31 *Brook. J. Int. Law*, 9: 14; L McCaskill, When Oil Attacks: Litigation options for Nigerian Plaintiffs in U.S Federal Courts (2013) 22(2) *Health Matrix: The Journal of Law-Medicine* 560.

delay in getting judgment in the courts discourages the prospective litigants from instituting any environmental action in court. Some cases are illustrative. According to records, a spill at Peremabiri, Bayelsa State in January 1987 came to the High Court in 1992, and to the Court of Appeal in 1996; a case heard in High Court 1985 in relation to damages suffered on a continuous basis since 1972 was heard in Court of Appeal in 1994; a case heard in 1987 in relation to damages suffered since 1967, was heard in the Court of Appeal in 1990, and in the Supreme Court in 1994.<sup>28</sup>

This factor discourages people with genuine concerns who could have resorted to court to assert their rights. The other impediment is directly linked to the former. With delays comes the increased cost of litigating. This includes the cost for the services of lawyers and filing of processes. This cost is prohibitive, preventing most victims from approaching courts to seek redress over a breach of their right or for any other tortious incident. Another general impediment to litigation is the remoteness of courts from victims. Most victims of environmental pollution or disasters are rural dwellers with courts often situated in the urban settlements. This is more complicated where the subject of action is required to be filed in the Federal High Court which is merely situated in the state capital of the state and are sometimes non-existent in some states. Other General impediments identified with litigation include lack of independent judiciary and a lack of political will to enforce compliance of some decisions.<sup>29</sup>

Another significant hurdle that confronts claimants in environmental litigation is the burden of proof often placed on the claimant in proving his claim. The burden of proof or evidence is placed on the victims who may not have the means to hire technical experts to testify on their behalves.<sup>30</sup> The common law remedies that are still very useful in initiating environmental suits are nuisance, trespass and negligence.<sup>31</sup> While initiating actions for private nuisance, which has been defined as the substantial or unreasonable interference with a person's use and enjoyment of land occupied by him, does not constitute so much of a hurdle, public nuisance has had hurdles. Judicial access has been limited in this area only permitting the Attorney General to initiate such actions.<sup>32</sup> For negligence, there is need for claimant to prove that the defendant had a duty of care and that there was a breach of that duty and that damage has resulted therefrom<sup>33</sup> There is a structural difficulty in redressing Environmental Justice in Nigeria. The Environmental Rights Action/Friends of the Earth Nigeria and its allies including rural poor communities adopted several strategies to bring the oil companies to account for their environmental crimes through the law courts within and outside Nigeria. The result showed that much resources and energy are dissipated with minimal results. National laws and court systems that are by no means independent are also not respected by the transnational oil companies.<sup>34</sup>

## **5. Jurisdictional Issues in Environmental Litigation**

Jurisdiction, in law, connotes the power of the court to decide a case or issue a decree.<sup>35</sup> It is essentially the authority which a court of law has to determine matters or issues which are litigated before it or to take cognizance of issues presented in a formal way for its resolutions. The limits of jurisdiction are prescribed by the constitution or by the enabling statute under which a court is constituted. However, it may be extended or restricted by statutory enactments.<sup>36</sup> It forms the very core of any litigation process as without jurisdiction anything done by a court amounts to nullity.<sup>37</sup> Usually the statute establishing a court sets out its powers

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<sup>28</sup>Friends of the Earth Report, 'Access to Environmental Justice in Nigeria: the case for a global Environmental Court of Justice' (2016) [www.foei.org](http://www.foei.org) accessed on 23/8/2018.

<sup>29</sup> *Ibid*; see SA Fagbemi, 'A Discourse of the Role and Impacts of Nigerian Judiciary in Enhancing National Security' (2017) 2 (20) *Unimaid Journal of Private and Property Law*, 135-143: 137-140

<sup>30</sup> *Ibid* page 5

<sup>31</sup> OG Akinrade, 'Public interest litigation as a catalyst for sustainable development in Nigeria' (2013) 6 *OIDA international Journal of sustainable development*, 6

<sup>32</sup> SG Ogbodo, (n 14).

<sup>33</sup> *Donoghue v Stevenson* (1932)AC 502

<sup>34</sup> Friends of the Earth Report 2016. Access to Environmental Justice in Nigeria: the case for a global Environmental Court of Justice (n 28).

<sup>35</sup> B Garner *Black's Law Dictionary* (9<sup>th</sup> edition, West Publishing Company, 2009) 297.

<sup>36</sup> See generally RA Mmadu (n 13); A -G., *Fed. v. Guardian Newspapers Ltd.* (1999) 9 NWLR (Pt. 618) 187 at 233 and *Adams v Umar* (2007) 5 NWLR (Pt. 133) 41 at 97.

<sup>37</sup> *Jika v. Akuson* (2006) ALL FWLR (Pt.293) p. 276.

which all together form part of its jurisdiction. In the celebrated case of *Madukolu v. Nkemdili*,<sup>38</sup> the court laid down in clear terms, three threshold factors that determine the competence of court's jurisdiction as follows:

- a. The court is properly constituted as regards members and qualifications of the bench and no member is disqualified for one reason or another;
- b. The subject-matter of the case is within the court's jurisdiction and there is no feature in the case which prevents the court from exercising its jurisdiction; and
- c. The case comes before the court initiated by due process of law and upon fulfillment of a condition precedent to exercise of jurisdiction.<sup>39</sup>

Over the years, these three components of jurisdiction have been used as practical obstacles to environmental litigations. Aside from these practical obstacles, a number of procedural particularities exist within the Nigerian judicial system that further complicates suits.<sup>40</sup> For instance, issues such as the subject matter of litigation, the plaintiff *locus standi* to institute the action, joinder of parties, fulfilment of condition precedent like pre-action notice, limitation period and constitutional limitation are so fundamental to the adjudication process that a party challenging any of these has a constitutional right to an interlocutory appeal, all the way to the Nigerian Supreme Court, before any other legal issue may be decided<sup>41</sup>. The fulfilment of any of these jurisdictional issues in a given case determines the jurisdiction of court to entertain the case. Some of these issues are discussed in turn below

### Subject Matter Jurisdiction

The power of superior courts to enquire into environmental claims is generally vested in the High Courts. In Nigeria, High Courts are separated into the State High Courts and the Federal High Courts and both exercising coordinate jurisdictions but with separate powers.<sup>42</sup> Environmental claims with a subject on oil and gas and which involves the Federal Government agencies are properly suited for the Federal High Courts. The jurisdiction of the Federal High court is contained in section 251 of the 1999 Constitution (as amended), which provides *inter alia* that: 'notwithstanding anything to the contrary contained in this constitution and in addition to such other jurisdiction as may be conferred upon it by an Act of the National Assembly, the Federal High Court shall have and exercise jurisdiction to the exclusion of any other court in civil causes and matters...mines and minerals(including oil fields, oil mining, geological surveys and natural gas)'<sup>43</sup>.

In interpreting the above provision, the Supreme Court in the case of *The Shell Petroleum Development Company of Nigeria Limited V. Chief G.B.A. Tiebo & ORS*<sup>44</sup> held that the jurisdiction of state high courts over oil mining, geological surveys and natural gas was limited by section 251 of the Constitution, which is the preserve of the Federal High Court. To arrive at this decision, the court extended the jurisdiction of the Federal High Court to entertain pollution from oil to cover issues of mining and minerals on the ground that section 7(1)(n) of the Federal High Court Act is similarly worded as section 251(1)(n) of the Constitution while section 7(3) stipulates that section 7(1)(n) shall be construed to include jurisdiction to hear and determine all issues relating to, arising from or ancillary to mines and minerals. With all due respect to the learned justices, it is our beliefs in this paper that extending the issue of pollution from oil to cover mining and minerals matters is taking and expounding the jurisdiction of the Federal High Court too far. While there could ordinarily be a dispute as to issues of mining which is within the exclusive jurisdiction of the Federal High Courts, when the subject matter touch on environmental pollution, it should ordinarily be conceived and perceived as an environmental issue *simpliciter*. The two can be distinguished and separated for the purposes of vesting the State High Court jurisdiction to entertain environmental pollution. While the cases on mining and oil should be separated and distinguishable for the purpose of determining Federal High Court

<sup>38</sup> (1962)2 SCNLR 341

<sup>39</sup> *ibid*

<sup>40</sup> L McCaskill, (n 27), 561.

<sup>41</sup> *Ibdi*, see also CA Odinkalu, *The Impact of Economic and Social Rights in Nigeria: An Assessment of the Legal Framework for Implementing Education and Health as Human Rights*, in *COURTING SOCIAL JUSTICE* 183, 200 (Varun Gauri & Daniel M. Brinks, eds., 2008).

<sup>42</sup> Federal High Court is established by s. 249 of the Constitution while the State High Court is established by S. 270 of the same Constitution.

<sup>43</sup> The Constitution of the Federal Republic of Nigeria 1999 (as amended) s. 251(1)(n)

<sup>44</sup> (2005) 3-4 S.C 137, (2005) LPELR-3203(SC), (2005) 9 NWLR (Pt.931) 439

jurisdiction. However, in the wisdom of the learned justices, they construed it to include jurisdiction to hear and determine all issues relating to, arising from or ancillary to mines and minerals. The State High Courts on their parts are vested with jurisdiction which is subject to the existing jurisdiction of the Federal High Courts.<sup>45</sup> It is safe therefor to conclude that the State High Courts can exercise jurisdiction in environmental or pollution cases where the subject matter is not related to oil and gas or included in any of the subheads mentioned in section 251. For example, air pollution from automobiles or industries.

Premised on the foregoing, it is advisable that, litigants should be vigilant when filing actions for environmental claims in order to avoid jurisdiction becoming an hindrance to environmental justice. For instance, in the case of *Shell Petroleum Development Company (Nigeria) Ltd v. Abel Isaiah*,<sup>46</sup> where the issue of jurisdiction was raised at the Supreme Court. It was held that the High court of Isiokpo, Rivers State had no jurisdiction to entertain the matter at the time it rendered judgement. Most environmental suits oil environmental pollution in the Niger delta region of Nigeria filed in the high courts of the state have been dismissed by the courts for lack of jurisdiction. In Nigeria, most environmental litigations seeking justice for environmental torts always concern environmental pollution and most often than not pollution from oil. This is easily explainable as oil is the mainstay of the Nigerian economy and as such it is expected that huge activities centre on the oil and gas sector. These economic activities often cause pollution to land, water and air.

### **Fulfilment of Condition Precedent to Exercise of Jurisdiction**

Sometimes the law requires that before certain actions are commenced against certain agencies of government or certain class of defendants, a pre-action notice should be served on them. The idea behind this requirement is to avoid embarrassing suits and to enable the statutory body evaluate the facts to decide whether to contest it or settle amicably. Any case instituted without the service of such pre-action notice is incompetent and is liable to be struck out.<sup>47</sup> In *Asogwa v. Chukwu*<sup>48</sup> the court held that where there is no compliance with issuance of pre-action notice as provided by the law, the court will not assume jurisdiction because a pre-condition has not been satisfied. Reacting on the position of the courts on issuance of pre-action notices in environmental litigations, Fagbohun<sup>49</sup> was of the opinion that the nature of environmental risks is such that an injunction *quia timet* of *ex parte* nature is what may be required to avert the prospects of imminent danger that loomed large. He submitted that in this case, a provision requiring notice of 1 month to 3 months, as the case may be, may result in harm of irremediable nature.<sup>50</sup> He further advocates for the adoption of a situation where courts in foreign jurisdictions would treat non-compliance with pre-action notice as a procedural irregularity and would rather stay actions to allow notices to be served rather than striking out suits.<sup>51</sup> where the court held that the service of a pre-action notice is at best a procedural requirement and not an issue of substantive law.

### **Limitation Period**

The law sometimes places limitation on bringing certain action in courts. A cause or matter is, therefore statute barred, if in respect of it, the proceeding cannot be brought because the period laid down by the limitation law had lapsed.<sup>52</sup> For instance, most laws of the States and Acts of the Federation provide specific time limits for which an action can be instituted in court over a cause of action or against a specific defendant. Legal proceedings cannot be properly or validly instituted after the expiration of that prescribed period as the actions will therefore be interpreted as statute barred even if there was a good cause of action. They are often provided for in statutes and the statutes that prescribed periods for instituting certain actions and

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<sup>45</sup> The Constitution of the Federal Republic of Nigeria 1999 (as amended) s. 272 (1).

<sup>46</sup> (2001) 5 S.C. (Pt. 11) 1.

<sup>47</sup> *Bakare v NRC* (2007) 17 NWLR (Pt. 1064) 606

<sup>48</sup> (2003) 4 N.W.L.R (pt. 811) 540 at 552

<sup>49</sup> O Fagbohun, (n 5).

<sup>50</sup> *Ibid*

<sup>51</sup> *Mobil Producing (Nig) Unlimited v. LASEPA, FEPA & Ors* (2002) 18 NWLR (pt. 798) 1; (2003) FWLR (pt. 137) 1029, in this case it was held that the service of a pre-action notice is at best a procedural requirement and not an issue of substantive law. Even though the courts ameliorated the position, non-service of a pre-action notice still renders an action incompetent.

<sup>52</sup> *Ajayi v Military Administrator of Ondo State* (1997) 5 NWLR (Pt. 504) 237 and *Eboige v. N.N.P.C.* (1994) 5 NWLR (Pt.347) 649

regulating the subsistence of causes of action are known as statutes of limitation.<sup>53</sup> The purpose of this according to Fagbohun<sup>54</sup> is to avoid a defendant having the indefinite threat of a claim. The law on limitation is of common law origin and applies to environmental issues. In the case of *Chief Eteidung Raymond F. Obot & Ors. v. Shell Petroleum Development Company Nigeria Limited*,<sup>55</sup> the Court of Appeal explored the issue of limitation period and held *inter alia* that ‘the effect of statute barred action is that where the period laid down by a Limitation Law for bringing an action lapses, a plaintiff loses the right to enforce that cause of action’.<sup>56</sup>

### **Locus Standi**

In Nigeria, no issue has impeded the success of environmental justice like the issue of *locus standi*. The term ‘*locus standi*’ denotes, ‘the right to bring an action or to be heard in a given forum’.<sup>57</sup> The word *locus standi* is used interchangeably with the terms like ‘standing’ or ‘title to sue’<sup>58</sup> This connotes the standing of the plaintiff to institute action affecting his interest. It is trite law that standing is assessed by trial judges on a case-by-case basis, and parties alleging separate injuries may not be joined. According to Frynas,<sup>59</sup> the great weight given to standing would seem to indicate that the legal system could benefit greatly from an unambiguous, bright-line rule determining when suits may be filed, and by whom. Hence, in several lines of cases decided by superior courts of record, the test articulated was that “standing will only be accorded to a plaintiff who shows that his civil rights and obligations have been or are in danger of being violated or adversely affected by the act complained of.”<sup>60</sup>

Environmental suits and claims are usually objected to by the defendants for lack of capacity of the claimants to sue. However, in order to find a way around the issue of *locus standi* in environmental related matter, NGOs have resorted to jurisdictions outside Nigeria to seek environmental justice for victims of pollution. For instance, the case of *Registered Trustees of the Socio-Economic Rights & Accountability Project (SERAP) v. President of the Federal Republic of Nigeria & Ors*<sup>61</sup> was instituted at the ECOWAS Community Court of Justice. In that case SERAP, an NGO sought the court’s jurisdiction for a declaration that the failure and/or complicity and negligence of the defendants individually and/or collectively to effectively and adequately clean up and remediate contaminated land and water; to address the impact of oil-related pollution and environmental damage on agriculture and fisheries; and to establish an effective system of monitoring the impact of oil on humans, is unlawful and a breach of international Human Rights obligations and commitments as it violates the International Covenant on Economic, social and cultural Rights, the International Covenant on Civil and Political Rights, and the African Charter on Human and Peoples' Rights amongst others claims. The claimant relied on the African Charter on Human and Peoples' Rights, particularly, Article 24 which provides that: “All peoples shall have the right to a general satisfactory environment favourable to their development”, and other international instruments. The defendants raised a

<sup>53</sup> See s. 12 (1) NNPC Act, Cap. N123, LFN 2004, which requires that suits against the corporation must be commenced within one year of the cause of action; see also *Ekeogu v. Aliri* (1991) 3 NWLR (Pt.179) 258

<sup>54</sup> O Fagbohun (n 5)

<sup>55</sup> (2013) LPELR-20704(CA)

<sup>56</sup> Per TUR, J.C.A at page 48, Paras. C-D.

<sup>57</sup> B Garner (n 35) 960

<sup>58</sup> M Tumai, ‘Strengthening *Locus Standi* in Public Interest Environmental Litigation: Has Leadership moved from the United States to South Africa?’ (2010) 6 (2) *Law, Environment and Development Journal*, 165; PK Oniemola & EO Olowononi, ‘Application of the Doctrine of *Locu Standi* in Proceedings for Judicial Review in Nigeria, The Gambia and Canada’ (2014) 17 (1) *The Nigerian Law Journal*, 133

<sup>59</sup> JG Frynas, *Legal Change in Africa: Evidence from Oil-Related Litigation in Nigeria*, (1999) 43 *J. AFR. L.* 121, 132.

<sup>60</sup> RT Ako, The Judicial Recognition and Enforcement of the Right to Environment: Differing Perspectives from Nigeria and India (2010) *NUJS Law Review*, 434. <https://www.researchgate.net/publication/228184440> accessed on 28th November, 2018; IB Lawal & SA Fagbemi, ‘An Appraisal of the Doctrines of Exhaustion, Ripeness and *Locus Standi* as mean to Preventing Frivolous Action Against Administrative Decisions in Nigeria’ (2015) 6 (1) *EBSU Law Journal*, 201-216; *Social and Economic Rights Action Centre and the Centre for Economic and Social Rights (SERAP) v. Nigeria* No. 155/96; *Adesanya v. President FRN* (1981) 2 NCLR 358, 1982) 1 ANLR 1 and *Centre For Oil Pollution Watch v. Nigeria National Petroleum Corporation* (2013) LPELR-20075(CA) and *Att. Gen. Kaduna State V. Hassan* (1985) 2 NWLR (Pt.8) 483 SC.

<sup>61</sup> Suit No: ECW/CCJ/APP/08/09



preliminary objection on the ground that Claimant lacks *locus standi* to institute the action. While ruling on the preliminary objection, the court brought a human right dimension to the case and held among others that:

There is a large consensus in International Law that when the issue at stake is the violation of rights of entire communities, as in the case of the damage to the environment, the access to justice should be facilitated. Based on this authorities, and taking into account the need to reinforce the access to justice for the protection of human and people rights in the African context, the Court holds that an NGO duly constituted according to national law of any ECOWAS Member State, and enjoying observer status before ECOWAS institutions, can file complaints against Human Rights violation in the case that the victim is not just a single individual, but a large group of individuals or even entire communities.<sup>62</sup>

Talking about human right dimension of the right to a clean environment, some countries<sup>63</sup> have gone ahead to entrench the right to a clean environment in their constitutions as a human right.<sup>64</sup> These countries have had a more expansive judicial approach to the issue of standing when instituting actions in courts. These could be reasoned from the perspective that Nigeria has also relaxed access to courts on *locus standi* for fundamental rights claims. It is the law in Nigeria today that an interested party can institute an action in court to enforce the fundamental rights of another who is incapacitated to do so<sup>65</sup>.

## **6. Conclusion**

Jurisdiction has been used severally in courts in Nigeria to prevent environmental justice for victims of environmental disasters. This has made the option of litigation as a means of redress un-attractive to most victims of environmental pollution. Whether in the form of cost or distance for victims, or to the very application of technicalities of jurisdiction in courts, the resultant effect is that violence and militancy has arisen especially in the Niger Delta region as an alternative means of addressing their grievances. To others still, they have resorted to taking the battle of environmental pollution of their environments to litigations beyond the shores of Nigeria to foreign jurisdictions. The SERAP case in the ECOWAS Court<sup>66</sup> discussed above was one of such initiatives. The other was the case filed in Britain by the Ogale and Bille people of Ogoniland in the Niger Delta region of Nigeria against shell.<sup>67</sup> Another was that filed in The Hague where a Dutch court held Shell liable and were ordered to pay compensation to one Mr. Friday Akpan.<sup>68</sup> The common law doctrines and rules that were developed far back in England have continued to be precedents in determining jurisdiction and access to court and the issue of *locus standi* in environmental claim in Nigerian courts. Generally, courts have continued to exercise jurisdiction in environmental claims, despite of lack of specialty of some judges in environmental law. Premised on the foregoing, it is highly recommended that Nigeria has come of age to have environmental courts of superior records standing for the adjudication of environmental claims and cases just like the nation has done in the creation of the National Industrial Courts to tackle labour relation and allied matters. It is also essential that legislations be passed that give *locus standi* to individuals to institute actions for the protection of environment where there is a threat to the environment or where there is actual occurrence of environmental pollution without the necessity of proving damage suffered as it is currently the law or the need to seeking redress outside the Nigerian shore in environmental litigations. Doing these will encourage litigants to seek redress for the breach of their environmental rights without fear that the case will be struck out *in limine* for want of jurisdiction on the ground of jurisdictional issues discussed in this paper.

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<sup>62</sup> *SERAP v. Nigeria*, Ruling, Suit No: ECW/CCJ/APP/08/09 and RUL. No: ECW/CCJ/APP/07/10 (ECOWAS, Dec. 10, 2010) retrieved 6/09/2018

<sup>63</sup> Example India, South Africa.

<sup>64</sup> BY Ibrahim (n 4), 212-224

<sup>65</sup> The 2009 fundamental rights enforcement procedure rules provide for this in preamble paragraph 3(e)

<sup>66</sup> Suit No: ECW/CCJ/APP/08/09

<sup>67</sup> [www.aljazeera.com/news/2016/11/shell-sued-uk-decades-oil-spillsnigeria-161122193545741.html](http://www.aljazeera.com/news/2016/11/shell-sued-uk-decades-oil-spillsnigeria-161122193545741.html)

<sup>68</sup> C Nwachukwu, H Umoru & J Erunke, 'Dutch Court finds Shell guilty of oil Pollution in Nigeria' (2013) [www.vanguardngr.com/2013/01/dutch-court-finds-shell-guilty-of-oil-pollution-in-nigeria-of/](http://www.vanguardngr.com/2013/01/dutch-court-finds-shell-guilty-of-oil-pollution-in-nigeria-of/) accessed on 28/11/2018.