

JUDICIAL ATTITUDE TO ENVIRONMENTAL LITIGATION AND ACCESS TO ENVIRONMENTAL JUSTICE IN NIGERIA: LESSONS FROM KIOBEL

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ABSTRACT

This paper examines judicial attitude to environmental litigation and access to environmental justice in Nigeria. The paper employs expository analysis as its methodology in discussing the theme. Essentially, the paper finds that environmental litigations in Nigeria are bedeviled by legal technicalities such that victims of environmental pollution and degradation are ultimately denied access to justice. Ranging from issue of locus to territorial and subject matter jurisdiction, victims of oil spill and environmental degradation are often left without judicial remedies. The paper finds that consequently, the people of the Niger Delta are increasingly losing confidence in the judiciary both at the domestic and international level. This has heightened militancy and youths' restiveness in the area leading to loss of revenues and sometimes lives.

*The paper notes with concern the recent trend of outsourcing justice, as evident in attempts to bring environmental pollution cases in Nigeria before domestic courts abroad. For example the celebrated case of *Kiobel v Royal Dutch Shell*, heard in United States of America. *Kiobel* is arguably a setback to this approach of searching for environmental justice before international courts and a reminder on the need to look inwards. This paper calls for judicial flexibility and a more proactive approach to legal reasoning by Nigerian courts, in order to put environmental matters on the front burner of our national discourse. Unless and until environmental justice is entrenched in Nigeria through judicial activism, Governmental inertia and unwillingness to provide remedies for victims of environmental degradation may continue to fuel militancy in the years ahead.*

KEYWORDS: *Environmental Litigation, Access to Justice, Nigeria.*

1. INTRODUCTION

Ever since 1956 when oil was first discovered in Nigeria at Oloibiri in present day Bayelsa State, exploration activities have brought with it, grave environmental problems. Oil spill, environmental pollution and degradation, destruction of landscape among other issues have continued to plague the environment leading to loss of arable farm lands, aesthetic environment, fishing activities, revenue and sometimes lives.¹ The people in their resolve to protect their environment have adopted various mechanisms ranging from militancy to dialogue, and from open confrontations with companies operating in the area, to institution of court actions. In the search for justice, there have been frustrations and dashed hopes. Legal technicalities such as *locus standi* and jurisdiction both at the domestic level and international level as epitomized in *Kiobel* on the one side, and poverty on the other have painfully been exploited by certain unscrupulous multinational corporations to deny victims of environmental pollutions, justice.²

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¹ John Vidal, 'Niger Delta Oil spills Clean-up will take 30 years, says UN', *The Guardian*, Thursday August 4 2011.

² No. 06- 4800, 2010 U.S. App. LEXIS 19382, at 1 (2d Cir. Sept. 17, 2010).

Thus Nigeria, the most populous nation in black Africa, rich in oil but underdeveloped has witnessed a monumental share of environmental problems which justify local and international attention.³ The need to use law as a vehicle in the regulation, management and protection of the environment has thus become paramount.⁴

Unfortunately, the quests to attain redress for environmental problems have not been the most straightforward endeavor in Nigeria. Aggrieved parties therefore resort to litigating environmental problems before international courts.⁵ Using the jurisprudence evolved in the US case of *Kiobel v. Royal Dutch Shell* (Kiobel) as a reference point, this paper discusses how extraterritorial litigation may not be a long-term ingenious solution to the problem of attaining environmental justice in Nigeria.⁶ This paper analyzes the legal and technical challenges perennially faced by environmental litigants in Nigeria, such as *Locus Standi*, Pre-Action Notice and Limitation of Action. The paper argues in favour of a more flexible interpretation of the law in order deliver justice to victims of environmental problems in Nigeria. It argues that the current heightened activities of oil thefts and sustained militancy in the Niger Delta would remain and may rise on a geometric scale if justice is continually denied to victims of environmental nay oil exploration in Nigeria. It is imperative for the Nigerian judiciary to play a more proactive role in delivering environmental justice to the common man and woman. For Nigeria to turn the corner, Nigerian judges will need to be more flexible in interpreting the law and in exhibiting zealous judicial activism whenever issues of environmental abuse are brought before them.

2. SCOPE OF ACCESS TO ENVIRONMENTAL JUSTICE IN NIGERIA AND THE QUESTION OF JURISDICTION

Activities of oil companies in Nigeria may result to both civil and criminal liabilities. As such, environmental litigation can take many forms, including civil actions based on tort, contract or property law, criminal prosecutions, public interest litigation, enforcement of fundamental human rights or complex issues which may arise when cases involve transboundary environmental harms.⁷

At common law, an action in an environmental litigation may be based on either negligence, nuisance or under the rule laid down in *Rylands v. Fletcher*.⁸ Each of these common law actions, have some essential requirements which, the plaintiff has the onus of proving.⁹ These torts can be used to curb environmental pollution and promote conservation. Apart from the problems that an award of damages is

³ See UN Environment Programme, Nairobi, Kenya - Africa Environment Outlook, News Release, 2002/50, pp.1-4.

⁴ Ibid at pp.262-3.

⁵ Ibid at pp. 474-480.

⁶ *Kiobel v. Royal Dutch Petroleum Co. et al.*, No. 06- 4800, 2010 U.S. App. LEXIS 19382, at 1 (2d Cir. Sept. 17, 2010). Nigerian plaintiffs filed *Kiobel* in 2002, alleging that Royal Dutch Petroleum Company and Shell Transport and Trading Company, through a subsidiary, collaborated with the Nigerian government to commit human rights violations to suppress lawful protests against oil exploration in the Ogoni region of the Niger Delta. In 2006, the district court granted in part and denied in part the defendants' motion to dismiss the suit. In particular, the district court granted the motion to dismiss for the claims of aiding and abetting extrajudicial killing, forced exile, property destruction, and violations of the rights to life, liberty, security, and association, holding that customary international law did not define these violations with the specificity required by *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

⁷ Tobi, N, *supra* note 6.

⁸ 3 H. & C. 774, 159 Eng Rep 737 (Ex. 1865).

⁹ Ladan *supra* note 4, Chapters 3 and 4.

dependent on certain technicalities and that such damages may not even be sufficient to redress the harm, the major problem with case law is that it depends on a willing plaintiff. Where the litigation costs are too high or because of litigation apathy, or lack of means these torts go unchecked. More telling is the fact that they cannot be used on an efficient basis for public regulation of the environment. This explains why much of environmental law is statute based.¹⁰

Many environmental legislation impose strict liability or and provide for compensation rather than damages.¹¹ For example, the National Environmental Standards and Regulations Enforcement Agency (Establishment) Act (NESREA Act), together with other environmental statutes form the backbone of Nigeria's environmental law.¹² A critical analysis of the NESREA Act and selected environmental statutes however demonstrate why the legal mechanisms in place for protecting the Niger Delta have failed. For example, it is difficult to understand why the oil and gas industry, arguably the greatest environmental threat to Nigeria, is excluded from so many of the NESREA Act's provisions.

Part 2 of the NESREA Act, including sections 7 and 8, detail the functions and powers of the Agency and council.¹³ These sections are most illustrative of the exceptions in place for the oil and gas industry. Section 7 provides exceptions in five of its thirteen provisions, requiring the Agency to:

1. Enforce compliance with regulations on the importation, exportation, production, distribution, storage, sale, use, handling and disposal of hazardous chemicals and waste *other than in the oil and gas sector*;
2. Enforce through compliance monitoring, the environmental regulations and standards on noise, air, land, seas, oceans and other water bodies *other than in the oil and gas sector*;
3. Create public awareness and provide environmental education on sustainable environmental management, promote private sector compliance with environmental regulations *other than in the oil and gas sector* and publish general scientific or other data resulting from the performance of its functions.¹⁴
4. Conduct public investigations on pollution and the degradation of natural resources, *except investigations on oil spillage*;
5. Submit for the approval of the Minister, proposals for the evolution and review of existing guidelines, regulations and standards on environment *other than in the oil and gas sector* including atmospheric protection, air quality, ozone depleting substances, noise control, effluent limitations, water quality, waste management and environmental sanitation, erosion and flood control, coastal zone management, dams and reservoirs, watershed, deforestation and bush burning, other forms of pollution and sanitation, and control of hazardous substances and removal control methods;
6. Develop environmental monitoring networks, compile and synthesize environmental data from all sectors *other than in the oil and gas sector* at national and international levels.¹⁵

¹⁰See Ajomo and Adewale, *Environmental Law and Sustainable Development in Nigeria*, (ed.) (1994); Nigerian Institute of Advanced Legal Studies, Lagos, at pp. 11-66.

¹¹ *Ibid.*

¹² National Environmental Standards and Regulations Enforcement Agency (Establishment) Act No. (25) (2007) 94:92 O.G., A635 (Nigeria) [hereinafter NESREA Act].

¹³ *Ibid* part 2.

¹⁴ *Ibid* section 7.

¹⁵ *Ibid* section 8.

Thus, the exceptions in part two bar the Agency from enforcing hazardous waste regulations in the oil and gas sector. The Agency cannot monitor, license, research, survey, study, or audit the sector. It may not propose evolution of the environmental regulations for, promote compliance in, or conduct investigations of the oil and gas sector. Thus, while the Agency is technically allowed to ‘enforce compliance with laws, guidelines, policies and standards on environmental matters’ it may not observe the oil and gas sector in any way to determine the level of compliance by stakeholders.¹⁶

The NESREA Act provides the oil and gas sector additional exceptions in sections 24, 29, and 30. Under section 24, although the Agency may *review* effluent limitations on existing point sources,¹⁷ it is barred from *making* regulations on effluent limitations on new and existing point sources in the oil and gas sector. Section 29 states: The Agency shall co-operate with other Government agencies for the removal of any pollutant *excluding oil and gas related ones* discharged into the Nigerian environment and shall enforce the application of best clean-up technology currently available and implementation of best management practices as appropriate.¹⁸ Nigeria’s sole environmental agency is thereby inexplicably prevented from participating in the cleanup of any pollution caused by the oil and gas industry.

Finally, section 30 prohibits Agency officers from entering and searching all oil and gas facilities even with a warrant issued by a court.¹⁹ This section further inhibits the Agency from enforcing any environmental regulations in the oil and gas sector. Instead of simply declaring that the oil and gas sector is outside of the Agency’s purview, the NESREA Act gives the Agency the power to enforce environmental regulations in the oil and gas sector but robs it of the ability to actually do so.

The effects of these exemption provisions are that the supposed environmental regulator in Nigeria has not legal basis or power to investigate and punish environmental default in Nigeria’s oil and gas sector. This has been a major barrier to victims of oil pollution in the Niger-Delta who are faced with the brazen reality that NESREA may not provide any haven after all. They are therefore left with one major option: to go to court and seek redress. As we will discuss in what follows, technical and procedural requirements of establishing jurisdiction and *locus standi* have equally left litigants in Nigeria with serious if not more issues to ponder on.

2.1. *Jurisdictional Issues in Environmental Litigation.*

It is trite that a court will only deal with cases referred to it. In dealing with such cases the court first assumes jurisdiction. Assumption of jurisdiction by the court entails the fulfillment of certain requirements. These requirements are condition precedent or due process in the determination of a dispute. This is because where action is not initiated by due process of law, the proceedings before the court is a nullity.²⁰ The Supreme Court held in *Yahaya v. The State* that once a mandatory

¹⁶ *Ibid* section 7.

¹⁷ *Ibid* section 24. The NESREA Act defines a point source as “any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduct, well, discrete fissure, container, rolling stock, concentrated animal feeding operation or vessel or other floating craft from which pollutants are or may be discharged.”

¹⁸ *Ibid* section 29.

¹⁹ *Ibid* section 30.

²⁰ See *Jika v. Akuson* (2006) ALL FWLR (pt.293) p. 276.

provision of the law is not followed, the trial is rendered null and void *ab initio*.²¹ Uwais, CJN held that the mandatory provisions must be complied with before the commencement of trial. It is the fulfillment of the law that gives jurisdiction to the court to try the case before it.²²

The pre-conditions for the exercise of jurisdiction on any case are: whether the plaintiff has a cause of action, which is valid and enforceable by law. In other words, the plaintiff must have sufficient interest and *locus standi* in the matter.²³ Again where the suit is instituted in a representative capacity, there must be authorization²⁴ and the persons who are to be represented and those representing them should have same interest in the matter.²⁵ Where there is need for a Pre-action Notice, the plaintiff must serve such pre-action notice.²⁶ The court held in *Asogwa v. Chukwu*²⁷ that where there is no issuance of pre-action notice as provided by the law, there is lacking a condition precedent, which could not give the courts assumption of jurisdiction. In *Teno Engineering Ltd v. Adisa* the court held that service of court process is a condition precedent to vesting jurisdiction in the court.²⁸ Also in *Okolo v. U.B.N*²⁹ the court held that payment of filing fees is a condition precedent to the courts assumption of jurisdiction.

Where there is time limit for commencement of the action the victim must comply with the time limited for the commencement of action. The court held *Akibu v. Azeez* that in limitation of action, time begins to run from the date cause of action arose.³⁰ Time for commencement of action is of essence to the successful institution of an action in court. In certain instances, the effect of the hazard does not immediately become obvious. This happens in cases of oil spillage, where damage to the soil though apparent may not be fully understood. Such instance may raise the issue of when cause of action arose. In dealing with this, the Supreme Court in *Arema 11 v. Adekanye* held that a fresh cause of action arises from time to time as often as the damage is caused.³¹ In all these cases, the Supreme Court was faced with the

²¹ (2002) 3 M.J.S.C 103.

²² Where there is non-compliance by the plaintiff, the defendant may waive is right. In such instance, the court can assume procedural jurisdiction.

²³ In oil spillage cases, the right to fishery in tidal water is recognized in law. In *ELF Nigeria limited v. Sillo & Anor* (1994)6 N.W.L.R (pt. 350) 258, the Supreme Court relying on *Adeshina v. Lemour* (1965) 1 All N.L.R. 233 held that the plaintiff has proved the existence of their common right of fishery in tidal waters and its violation and was therefore entitled to damages. See generally Theodore Okonkwo, *The Law of Environmental Liability* (Lagos: Afrique Environmental Development & Education, 2003), p.115. *locus standi* is the right of the party to appear and be heard on the question before the court- Per Bello, CJN in *Senator Adesanya v. President of Nigeria* (1981) 2 N.C.L.R 388; See also *Edjerode v. Ikine* [2002]2 M.J.S.C 163; *A-G Federation v. A-G of the 36 States* [2001] 6M J.S.C 69; *Arabambi v. A.B.I. Ltd* [2006]3 M.J.S.C 61; *Yesufu v. Governor Edo State* [2001] 5m.J.S.C 128.

²⁴ *Ndule v. Ibezim* [2002] 12 M.J.S.C 150.

²⁵ *Shell Petroleum Development Company Nigeria Limited v. Chief Otoko & Ors.* (1990) 6 N.W.L.R (pt 159) 693; *Amos v. Shell B.P. Nigeria Limited* (1974) 4 E.C.S.L.R 486; *Ejem v. Offiah* (2000) 7 N.W.L.R (pt. 666) 662.

²⁶ See section 29(2) Federal Environmental Protection Agency Act.

²⁷ (2003) 4 N.W.L.R (pt. 811) 540 at 552; *Mobil Producing (Nigeria) Unlimited v. LASEPA* (2002)2 M.J.S.C 69; *Eze v. Okechukwu* (2003)2 M.J.S.C. 188; *Abakaliki Local Government Council v. Abakaliki Rice Mills Owners Enterprises Nigeria* (1990) 6 N.W.L.R. (pt. 155) 182; *University of Ife v. Fawehinmi Construction Co. Ltd* (1991) 7 N.W.L.R (pt. 201) 26; *Nigeria Cement Co. Ltd v. Nigeria Railway Corporation & Anor* (1992) 1 N.W.L.R (Pt. 22) 747; *Amadi v. N.N.P.C* (2000) 10 N.W.L.R (Pt. 674) 6; *Nigerian Ports Plc V. Oseni* (2000) 8 N.W.L.R (Pt. 669) 410.

²⁸[2005] 7 M.J.S.C 89; *A-G Adamawa State v. A-G Federation* [2006] I M.J.S.C 1 *Sken Consult v. Ukey* (1981) 1 S.C. 6; *A.I.E.V. Adebayo* [2003] 12 M.J.S.C 44.

²⁹ [2004] 2 M.J.S.C 69.

³⁰ (2003) 5 N.W.L.R. (Pt. 814) 643; *Arema 11 v. Adekanye* [2004] 11 M.J.S.C 11

³¹ *Supra*.

determination of the importance of the rules of proceedings and the court emphatically stated as illustrated that the rules of court procedure must be followed. Where the rules of procedure have been complied with, the court may begin its assignment with ascertaining whether it has authority to determine the case. A court with competence to deal with a case is said to have jurisdiction to determine the case. In *7up v. Abiola*³² the Supreme Court held that ‘it is trite that in all matters before the court the fundamental one is the issue of jurisdiction which must first be determined before anything else otherwise all proceeding relating thereto will be a nullity and an exercise in futility.’³³

Determining jurisdiction over a case involves a consideration of facts. The reason this is important is that in addition to filing a case on time, a plaintiff has to file it in a proper court. The Supreme Court held in *Abu v. Odugbo*³⁴ that what determines jurisdiction of the court to entertain a suit is the claim of the plaintiff. In *Menakaya v. Menakaya*³⁵ the Supreme Court held that the competence of a court or of the proceedings is a fundamental issue, which cannot be waived. According to the Supreme Court, it is important to consider the issue of jurisdiction first because where a court takes upon itself to exercise jurisdiction it does not possess, its decision amounts to a nullity. This problem of jurisdiction can even be raised at any stage of the proceedings.³⁶ The move by the Supreme Court is in recognition of the necessity of authority of the Court and the need to caution victims and prevent at an early stage of the proceedings in the case, the hardship they are likely to encounter where the court has no jurisdiction. The victim therefore ensures that he files the case in the court with authority. Dismissal for lack of jurisdiction may only be inconvenience if the victim has time to re-file the lawsuit in the proper court. But if the time limit on filing the suit runs before the suit is filed, the mistake in filing the suit in the proper court may mean that the Defendant can have the suit thrown out permanently.

In *Shell Petroleum Development Company (Nigeria) Ltd v. Abel Isaiah*,³⁷ the Supreme Court sitting in its appellate authority was called upon to decide the following:

1. Whether the Court of Appeal’s decision that the High Court had jurisdiction is right.
2. Whether the decision that the defendant was negligent in not constructing an oil trap was right.
3. Whether the decision that the oil spillage was in fact massive spillage of crude oil from the appellants pipeline.
4. Whether the damages confirmed by the court is a proper estimate of the losses suffered by the plaintiffs/respondents.
5. Whether the court was right in upholding the damages awarded based on the unchallenged expert evidence of the respondents.
6. Whether the court below was right in affirming that the case was properly litigated in a representative capacity and whether the case is challenged under the rule in *Rylands v. Fletcher*.³⁸

³² [2001] 5 M.J.S.C 93 at 97.

³³ Jurisdiction of the Court-General Information. Available at <http://euopa.eu.int/comm./justice-home/ejn/jurisdiction-courts-gen-en.htm> accessed 21 August 2013.

³⁴ [2001] 7 M.J.S.C 87 at 91.

³⁵ [2001] 8 M.J.S.C 50.

³⁶ *Eze v. A-G Rivers State* [2002] 1 M.J.S.C 87

³⁷ (2001) 5 S.C. (Pt. 11) 1.

³⁸ 3 H. & C. 774, 159 Eng. Rep 737 (Ex. 1865).

The Supreme Court stated that the main issue in the case was whether the Court of Appeal was right in holding that the trial court had jurisdiction to try the case. In the reasoning of the Supreme Court, the question of whether the court has jurisdiction to try the case can be raised at any stage of the trial and it was important to consider the issue of jurisdiction first because if it succeeds, that decision will determine the appeal.

The case arose from an appeal by the defendant/appellant who was dissatisfied with the decision of the court below. The facts of this case are that in July 1988, an old tree fell on the defendant/appellant's oil pipeline and indented it. The said indentation hindered the free flow of crude oil through the said pipelines which ran across the plaintiff/respondents swamp land and surrounding farmlands. It became necessary for installing a new one. The defendant/appellant engaged the services of contractor to repair the dented pipeline. In the course of the repairs, the defendant neglected to construct an oil trap (a device constructed in the soil for the purpose of trapping oil in the course of such repairs) so that crude oil freely spilled onto the plaintiff/respondent's swampland and polluted the surrounding farmlands, streams and fishponds. The plaintiff claimed from the defendant at the High Court sitting at Isiokpo, Rivers State the sum of N22 million for damages resulting from the defendant's negligent activities. The trial court awarded N22 million to the plaintiff for the damage and loss caused by the defendant's oil exploration activities. The defendant appealed unsuccessfully to the Court of Appeal. The defendant/appellant has now come to the Supreme Court contesting the decision of the court below.

At the Supreme Court, the issue for decision was whether the State High Court has jurisdiction in claims pertaining to mines and minerals including oil fields etc by virtue of the Federal High Court (Amendment) Act³⁹ and section 230 (1) (0) of the Constitution (Suspension and Modification) Decree No. 107 of 1993. The Supreme Court was therefore called to determine whether the facts of the case fell within the definition of matters connected with or pertaining to mines and minerals, including oil fields, oil mining, geological surveys and natural gas.

Countries have different rules of jurisdiction that determine the distribution of competence among the courts in the territory. In Nigeria, jurisdiction is determined by law and the limit of the court's authority. This authority may be extended or restricted by law. A limitation may be either to the kind and nature of actions and matter of which the particular court has cognizance. In *Edjerode v Ikine*⁴⁰ the Supreme Court stated that jurisdiction of the court cannot lightly be taken away except by very clear words an intention validly made. A limitation of jurisdiction can come into force at any time with or without reservation of jurisdiction over pending cases. Where there is reservation, all those cases reserved stand to the extent of the reservation.⁴¹ In *Insurance Co. v. Richie*⁴² it was held that when a law-conferring jurisdiction is limited or repealed without any reservation of jurisdiction over pending cases, all pending cases fall with the law.

The power of the legislature to limit or oust jurisdiction of the court in the exact degrees and character, it may seem proper, is not challenged. The Supreme Court in *Edjerode v. Ikine*⁴³ stated that the courts are precluded from questioning the

³⁹ Decree No. 60 of 1991.

⁴⁰ [2002] 2 M.J.S.C 163 at 167.

⁴¹ See *Brunner v. U.S* 343, U.S. 112; *Beale v. U.S* 182 f.2D 565 (1950).

⁴² 5 Wall 541 pp. 115-117. Available at <http://caselawlp.findlaw.com/Cgi-bin/getcase.pl?court=us&vol=12> accessed 12 August 2013.

⁴³ *Supra* n. 57.

capacity and power of the authorities in promulgating laws. However such instance of limitation or ouster of jurisdiction created problem in the *Abel Isaiah's* case. In that case, the argument of the counsel for the appellant was that by the provisions of section 7 (b), 7(3) and 7(5) of the Federal High Court (Amendment) Decree No. 60 of 1991, the jurisdiction of the State High Court has been ousted in claims pertaining to mines and minerals, including oil fields, oil mining, geological surveys and natural gas. The Supreme Court considered whether the construction and maintenance of an oil pipeline is part of mining operations. It referred to the Petroleum Act 1960 and the Oil Pipelines Act 1956 and found that the most important aspect of oil mining operation is the construction of oil pipeline.⁴⁴ The court therefore concluded that the construction operation and maintenance of an oil pipeline by a holder of oil prospecting license is an act pertaining to mining operations. From the facts presented by the parties, the court also stated that the oil spilled while the repairs were carried out. The installation of pipelines, producing, treating and transmitting of crude oil to the storage tanks which led to the accident arose from or was connected with or pertaining to mines, and mineral etc. so the claim falls within the exclusive jurisdiction of the Federal High Court. Learned counsel for the respondents argued that the law ousting jurisdiction of the court could not affect the claim before the court because the cause of action arose before the law came into force. He submitted that the Supreme Court has stated severally⁴⁵ that the applicable law to an action is the law existing when the cause of action arose. The Supreme Court rose up to the challenge and held that while it was correct that the cause of action arose before the promulgation of the law; the trial was in progress when the law was made and as such the law could not operative retroactively to affect the outcome of the case. From that moment when the law was signed, the jurisdiction of the trial court was ousted.

It is necessary therefore to identify when a law is said to come into force and the effect of an amendment. In that case, the laws conferring jurisdiction in oil-spill cases started with the Federal High Court Act⁴⁶ through the Federal High Court (Amendment) Decree No. 60 1991,⁴⁷ the Federal High Court (Amendment) Decree No. 16 1992⁴⁸ to the constitution (Suspension & Modification) Decree No. 107, 1993⁴⁹ and section 251 (1) (n) of the 1999 Constitution. By virtue of the provisions of section 2 of the Interpretation Act⁵⁰ 'an act is passed when the president assents to the Bill for the Act.' An enactment of the National Assembly comes into force on the day the Act is passed. In *Adewunmi v A-G. Ekiti State*⁵¹ the Supreme Court held that an amendment takes effect from the date of the original document sought to be amended. In *Provost v. Edun*⁵² the Supreme Court held that it is a valid canon of statutory interpretation that an amendment takes effect from the commencement date of the original or amended statute. The Supreme Court found that the judgment of the High Court in the *Abel Isaiah* case was delivered on 11 March 1994 after the coming into force of the Decree No. 60 1991 and Decree 107 of 1993 and was caught by the provisions of the Decrees. Ogweugbu, J.S.C, stated that in determining

⁴⁴ *Supra* n. 54 at 1.

⁴⁵ *Adesina v. Kola* (1993) 6 N.W.L.R (Pt. 298) 182 at 185.

⁴⁶ Chapter 134 L.F.N 1990.

⁴⁷ Now Act which commenced 26 August, 1993; See the Federal High Court (Amendment) Decree No. 16 1992 and Statutory Instrument No. 9, 1993.

⁴⁸ Which commenced January 1, 1992.

⁴⁹ Which came into force on 17 November, 1993.

⁵⁰ Chapter 123 Laws of the Federation of Nigeria 2004.

⁵¹ [2001] 2 M.J.S.C 1.

⁵² [2004] 4 M.J.S.C 94.

jurisdiction in this case, it will be necessary to consider the provisions of the various enactments including the Constitution of the Federal Republic of Nigeria 1999 dealing with jurisdiction of the Federal High Court. He analyzed section 7 of the Federal High Court Act,⁵³ the principal Act that sets out the jurisdiction of the court. By this the court has no jurisdiction in oil spillage cases. Decree No. 60 of 1991 amended the Act and inserted a new section 7 vesting such jurisdiction in the court. Thereafter, in 1992 Decree No. 16 suspended the 1991 provisions removing the said jurisdiction and in 1993, Statutory Instruments No. 9 of 1993 restored Decree 60 of 1991. In 1993, Decree No. 107 substituted a new subsection 1 for section 230 (1) of the 1979 Constitution also granting exclusive jurisdiction while section 251 (1) (n) of the Constitution of the Federal Republic of Nigeria, 1999 conferred exclusive jurisdiction to the Federal High Court. The judgment of the State High Court on the case was delivered on 11 March 1994 after the coming into force of Decree 60 1991 and Decree 107 1993. Having regard to the state of the law and the facts of this case, oil spillage from the defendants dented oil pipeline is a thing associated with, related to, arising from or ancillary to mines and minerals, including oil fields etc. The words of the Decree are plain and unambiguous and must be given their natural and ordinary meaning. By the provisions of Decree No. 60 of 1991, the Rivers State High Court and the Court of Appeal lacked jurisdiction to hear and determine the suit that gave rise to this appeal.

This is good judgment. If by virtue of section 2 of the Interpretation Act a law comes into force on the day it is made, then the law ousting jurisdiction of the court had commenced before the judgment was delivered. As such from the date of delivery of the judgment, the court lacked both the jurisdiction to continue with the case and capacity to deliver the judgment. By virtue of section 4 of the Interpretation Act,⁵⁴ the judgment was made under an amended law.⁵⁵ The decision of the Supreme Court is correct in law. The counsel for the plaintiffs was not sensitive enough to realize that the State High Court's jurisdiction had been ousted from August and November 1993. All he should have done was go to the Federal High Court. He committed serious blunder by continuing with the case in a court that had no jurisdiction.

With the amendment of the law, the exercise of authority by a court whose jurisdiction is ousted is moot. According to S.M.A. Belgore, J.S.C.,⁵⁶ once jurisdiction of a court is ousted, the court assuming jurisdiction does so as an exercise either in moot or as an academic exercise but certainly in futility. In *Adewunmi v. A.G. Ekiti State*⁵⁷ the Supreme Court held that the court is not given to make moot decisions or decide hypothetical cases, which have no bearing. It should be noted however, though the exercise of further authority by the court is moot, the issues in controversy in the case are not moot. This is because there is still opportunity for the determination of the unresolved issues in the dispute since the case was not decided on the merits.⁵⁸ According to section 6 of the Interpretation Act, the repeal of an enactment shall not affect any right, privilege, obligation or liability accrued or incurred under the enactment. Usually in ouster of jurisdiction laws, the substance of these rights or obligations does not change. What changes is the court which the rights or obligations can be enforced. Thus there exists not merely the speculative

⁵³ Chapter 134 L.F.N. 1990.

⁵⁴ Chapter 123 Laws of the Federation of Nigeria 2004.

⁵⁵ See *Barry and 2 Ors v. Obi A. Eric and 3 Ors.* (1998) 8 N.W.L.R (Pt. 562) 404.

⁵⁶ In *Abel Isaiah* case.

⁵⁷ *Supra.*

⁵⁸ Except cases that have become statute – barred.

possibility of invocation of law in some future dispute but also the presence of an existing unresolved dispute.⁵⁹ The issues involved in oil spillage disputes are usually continuing and their consideration may not be defeated by short-term orders capable of repetition, yet evading review.

The decision of the Supreme Court in the Abel Isaiah's case may not be unconnected with the fact that the subject matter of the dispute revolved on federal law⁶⁰ and therefore by the provisions of section 251 (1) of the 1999 Constitution, a case that raises a federal question ought to be filed in a federal court. The court stated in the case that in establishing whether the construction and maintenance of an oil pipeline is part of mining operations, it is relevant to refer to the practice of the oil prospecting license holders during mining operations and these have been described in the Petroleum Act and Oil Pipe Lines Act. A.B. Wali, J.S.C said 'from the pleadings and the relevant statutory laws cited and relied upon, the High Court lacked jurisdiction to entertain the case as it is a matter covered by the Petroleum Act 1960 and the Pipe Lines Act 1956.' This decision is in line with what obtains in some countries. In the U.S, Federal Courts decide cases that involve the U.S government, the U.S Constitution or Federal Laws etc.

However, the query is – was such an amendment necessary at that point in time? Was it not proper that a procedure that will promote a review in view of the difficulties and sufferings already borne by the plaintiffs should have been put in place in relation to pending cases? If the case is started de novo as may be expected, aside the time wasted, the cost and pain on the plaintiffs, how do they carry on with the issue of proof? Proof of the alleged claims will be a very difficult task because oil spillage case is not just a mere civil wrong. It is a serious hazard that can lead to hunger, poverty, and disease epidemic and even death. With the weaker position of the plaintiffs, what is the possibility of de novo case at the Federal High Court? It appears that the Supreme Court judges also thought through these considerations especially where there was no denial as to the happening of the damage claimed. However, the court can only perform its duty of interpreting the law and applying it to the case. The Supreme Court has done its interpretation and held that the High Court, which exercised original jurisdiction, had no jurisdiction to try the case by virtue of section 230 (1) of Constitution (Suspension Modification) Decree No. 107 of 1993 and section 251 (1) (n) of the 1999 Constitution. The case was within the exclusive jurisdiction of the Federal High Court. The law therefore is that such cases can only be instituted in the Federal High Court. Since the decision in this case, every victim is now aware that they must go to the Federal High Court to seek remedy in oil pollution cases.

The problem of jurisdiction in oil pollution case also arose in *Shell Petroleum Development Company of Nigeria Ltd v. Chief G.B.A Tiebo VII & Ors.*⁶¹ In that case, the Supreme Court had to determine whether the judgment of the Court of Appeal upholding jurisdiction of the high court was *ultra vires*. The Supreme Court referred to the Isaiah's case. It considered that the cause of action in the case accrued on 16th January 1987, the suit was commenced on 6th June 1988 and judgment was delivered on 27th February 1991 and held that on these various dates, the State High Court had jurisdiction over cases in oil spillage because the law applicable to an action is the law existing when the cause of action arose.⁶² The court held that the provision of

⁵⁹ Available at <http://caselaw.lp.findlaw.com/scripts/getcase.pl?narby=cse&court=us&vol=3938> in vol=175 accessed 14 August 2013.

⁶⁰ Petroleum Act Chapter 10 and Oil Pipe Lines Act 1956 Chapter 07 L.F.N 2004.

⁶¹ [2005] 9 M.J.S.C 158.

⁶² See *Koya v. Adesina* (1993) 6 N.W.L.R (Pt. 298) 182 at 185.

Decree 107 of 1993 and section 251 (1) (n) of the 1999 Constitution related only to cases arising after 30 December 1991. The Supreme Court also stated that it ventured into the *Tiebo Case* because the issue of jurisdiction was raised. This is to emphasize the importance of jurisdiction in the determination of cases.

2.2 JURISDICTIONAL ISSUES IN INTERNATIONAL ENVIRONMENTAL LITIGATION: LESSONS FROM KIOBEL

On the international scene, the consciousness of environmental rights activist was awakened by the US Supreme Court decision in *Kiobel v. Royal Dutch Petroleum*.⁶³ In 2002, Esther Kiobel, a U.S. resident and the wife of deceased Dr. Barinem Kiobel, filed the lawsuit, along with other Ogoni asylees against Shell Corporation. Her lawsuit was filed under the Alien Tort Statute (ATS), a 200-year-old law that has been interpreted by the Supreme Court to allow federal lawsuits for modern-day egregious international law violations. The Ogoni plaintiffs alleged that Shell planned, conspired, and facilitated the Nigerian government's extrajudicial executions, crimes against humanity, and torture against the Ogoni people. Shell argued that corporations cannot be sued under the ATS. In *Kiobel* the Second Circuit became the first court of appeals to substantively analyze whether the ATS imposes corporate liability.⁶⁴

Amicus briefs in support of the litigants were filed on both sides. The U.S. government, Joseph Stiglitz, international law and legal history scholars, and human rights advocates (including the U.N. High Commissioner for Human Rights) wrote in favour of the Ogoni plaintiffs. Shell's position was supported by another group of international law scholars, several foreign governments, and a dozen of the world's largest multinational corporations.

Many of the defendants in ATS cases have been involved in extractive industries such as ExxonMobil in Indonesia, Occidental in Colombia, Talisman in Sudan, Shell in Nigeria, Unocal in Burma, and Rio Tinto in Papua New Guinea.⁶⁵ Other ATS suits have alleged that Pfizer conducted medical experiments on Nigerian children without consent, and that Nestle used child labour to work cocoa plantations in the Ivory Coast.⁶⁶ Even al-Qaeda, has been sued under the ATS.⁶⁷ The cases illustrate the significant goal of ATS plaintiffs: to expose human rights violations by trying them in the court of public opinion. Thus, when in 2010 *Kiobel* was dismissed against Shell, the divided Second Circuit panel made headlines, and the sweep of the ruling gained immediate attention.⁶⁸ It was the first appellate⁶⁹ decision to hold that the ATS could not be used against corporations.⁷⁰

⁶³ *Supra* n 11.

⁶⁴ 621 F.3d 111, 131–45 (2d Cir. 2010).

⁶⁵ *ibid.*

⁶⁶ *ibid.*

⁶⁷ *In re Terrorist Attacks on September 11, 2001*, 349 F. Supp. 2d 765, 784 n.16, 785 n.19, 826 (S.D.N.Y. 2005) (allowing ATS claims to proceed against al Qaeda and two alleged 'fronts' for that 'organization'). See also *Saleh v. Titan Corp.*, 580 F.3d 1 (D.C. Cir. 2009); Juli Schwartz, *Saleh v. Titan Corporation: The Alien Tort Claims Act: More Bark Than Bite? Procedural Limitations and the Future of ATCA Litigation against Corporate Contractors*, 37 RUTGERS L.J. 867 (2006); see also *Al Shimari v. CACI Premier Tech., Inc.*, 657 F. Supp. 2d 700 (E.D. Va. 2009).

⁶⁸ Bob Van Voris and Patricia Hurtado, *Nigeria Torture Case Decision Exempts Companies from U.S. Alien Tort Law* (Sep. 17, 2010), available at <http://www.bloomberg.com/news/2010-09-17/u-s-corporations-aren-t-subject-to-alientort-law-appeals-court-rules.html>. Accessed 06 September 2013.

⁶⁹ A district court in California reached this same conclusion one week before the *Kiobel* decision was filed. See *Doe v. Nestle, S.A.*, 748 F. Supp. 2d 1057, 1132–45 (C.D. Cal. 2010). (The practice of forced child labour in cocoa fields in Mali was not actionable because of defendant's corporate nature).

⁷⁰ *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 151 note (2d Cir. 2010) (Leval, J, concurring).

The position taken by the majority appeared to gain steady ground in lower courts since the decision was issued in September 2010.⁷¹ An Indiana district court,⁷² for example, dismissed an ATS claim against a corporation, solely on the persuasiveness of *Kiobel*.⁷³ One week later, the same court disposed of a similar case, this time on the merits rather than for want of jurisdiction.⁷⁴ Within the Second Circuit, one post-*Kiobel* dismissal did not even generate a written opinion.⁷⁵

The majority decision has a long reach: *Kiobel* does not merely stand for the principle that corporations cannot be sued on a tort theory of aiding and abetting. Rather, it finds that corporate entities cannot violate customary international law because they are not subject to it. The majority's discourse on subjects of international law indicates a narrower definition of the word 'violation'. A violation is not merely breaking a rule. Rather, a person or entity is only subject to a rule if he can reasonably expect sanctions for noncompliance.

The majority opinion is also an exercise in legal formalism in that it avoids and even admonishes policy considerations that might favour victims of corporate tort. For the majority, strict adherence to established principles of customary international law is an end in itself. There is no discussion of the evils addressed by the modern line of Alien Tort Statute jurisprudence.

Contrary to the majority opinion in *Kiobel*, the ATS does not require the court to look to international law to determine its jurisdiction over ATS claims against a particular class of defendant, such as corporations. The first step of statutory construction analysis is uncontroversial: the plain language of the statute does not exclude any defendant. Secondly, the legislative history indicates no Congressional intent to exclude corporate defendants, and the words would not have been understood to exclude such defendants at the time of its enactment. Finally, another federal statute does enumerate exclusions for foreign sovereigns from ATS claims. These well-settled exclusions should inform the more nebulous status of corporate defendants.⁷⁶

The implications of the case for environmental justice go well beyond multinationals domiciled in countries other than the U.S. The Court sanctioned Shell's desire of not only having the claim against it dismissed but also to negate the statutory basis making it possible to use U.S. courts as a forum to adjudicate civil liability for gross human rights violations committed abroad - even when those violations are committed by U.S. nationals, and even if the Americans are natural persons. This is arguably a clear pervasion of justice that renders the application of the ATS discriminatory. It is hoped that if and when similar facts are presented in the future, the Court would be more cautious in its judgment by reversing itself of this dangerous precedent. For now, *Kiobel* remains the law and arguably a license for multinationals to escape justice from the hands of dehumanized victims of oil exploration and environmental pollution.

⁷¹E.g., *Viera v. Eli Lilly & Co.*, No. 09-495, 2010 WL 3893791 (S.D. Ind. Sept. 30, 2010); *Mastafa v. Chevron Corp.*, 759 F. Supp. 2d 297 (S.D.N.Y. 2010); *Flomo v. Firestone Natural Rubber Co.*, 744 F. Supp. 2d 810 (S.D. Ind. 2010).

⁷²*Viera v. Royal Dutch Petroleum Co. supra.*

⁷³*Viera*, 2010 WL 3893791 at 2.

⁷⁴*Flomo*, 744 F. Supp. 2d at 817.

⁷⁵*Mastafa*, 759 F. Supp. 2d at 298–301 (noting that ATS claims were dismissed in open court).

⁷⁶Daniel Price, Corporate Liability for International Torts: Did the Second Circuit Misinterpret the Alien Torts Statute?, *Seton Hall Circuit Review*, Volume 8 Issue 1 (Fall 2011).

3. TREND OF CASE LAW: LOCUS STANDI, PRE-ACTION NOTICE AND LIMITATION OF ACTION.

3.1 *Locus Standi/Representative Capacity*

The issue of *locus standi* will not present a problem to a person whose property interests have been damaged in the course of and due to environmental pollution or natural resources depletion. Yet, such a person may very well decide not to sue for any number of reasons. If regulatory agencies are not then informed or where they fail to act there may well be irredeemable damage to the environment, or the offender may go unpunished and similar behaviour undeterred.

However, a group of citizens or environmental NGOs have a crucial role to play as monitors of environmental activities, public educators, motivators, and defenders of the environment and are highly organized to mount environmental litigation.⁷⁷ They may because of an inability to show a direct interest other than that of their special environmental consciousness and common interest in the environment with other citizens be faced with a barrier of standing to sue.⁷⁸

The trend of case law, especially in Nigeria is that in order to have standing to sue, the plaintiff must exhibit 'sufficient interest', that is 'an interest which is peculiar to the plaintiff and not an interest which he shares in common with general members of the public.' The judicial attitude in Nigeria is that a plaintiff who sues for damages arising from an environmental abuse must show that he suffered damages.⁷⁹ In *Shell Petroleum Development Company Nig. Ltd v Chief Otoko and Others*,⁸⁰ the respondents who were plaintiffs at the Bori High Court in Rivers State claim the sum of N499, 855.00 as compensation payable to the defendants (appellants herein) for injurious affection to and deprivation of use of the Andoni Rivers and creeks as a result of the spillage of crude oil. The action was brought in a representative capacity. The Court of Appeal held that: (a) It is essential that the persons who are to be represented and the person(s) representing them should have the same interest in the cause of matter; (b) Given common interest and a common grievance a representative suit would be in order if in addition to the relief sought it is in its nature beneficial to all whom the plaintiff proposes to represent. The Court rejected the purported representative action.

In *Adediran and Anor v. Interland Transport Ltd*,⁸¹ the appellants as residents of the Ire-Akari Housing Estate, Isolo, *inter alia* brought an action for nuisance due to noise, vibrations, dust and obstruction of the roads in the estate. The Supreme Court dealt with the common law restrictions on the right of a private person to sue on a public nuisance. The Court held that in the light of section 6(6)(b) of the 1999 Constitution, a private person can commence an action on public nuisance without the consent of the Attorney-General, or without joining him as a party.

The approach of the Supreme Court in the above case by abolishing the first problem of *locus standi* in Nigeria is commendable. But the second problem of the rule remaining is that the public or group cannot sue by representation and claim special damages for individuals when they do not suffer equally. In *Amos v. Shell BP P.D.C. Ltd*,⁸² the plaintiffs sued the defendants in a representative capacity claiming special and general damages. It was alleged that the 2nd defendants as contractors to

⁷⁷ See *Linda M.A. and Scott P., Defending the Environment: - Civil Society Strategies to Enforce International Environmental Law* (2004), Transnational Publisher Inc., New York, USA.

⁷⁸ *Ibid* at pp. 205-222.

⁷⁹ *Ladan supra* note 2 at pp. 117-365.

⁸⁰ (1990)6 NWLR(pt. 159-693).

⁸¹ (1991) 9 NWLR (pt. 214) 155.

⁸² (1974) 4 ECSR 48.

the first, had in the course of oil mining operations built a large earth dam across the Plaintiffs' creek. As a result, farms were flooded and damaged; movement of canoes was hampered, and agriculture and commercial life was paralyzed. One of the issues was whether special damages could be claimed in a representative action, when the plaintiffs suffered unequal losses, or whether the plaintiffs as general public could claim for losses suffered by them individually. It was held, dismissing the claim:

1. That since the creek was a public waterway, its blocking was a public nuisance and no individual could recover damages therefore unless he could prove special damage peculiar to himself from the interference with a public right.
2. That since the interest and losses suffered by the plaintiffs were separate in character and not communal, they could not maintain an action for special representative capacity.

In *N.N.P.C. v. Sele*,⁸³ the plaintiffs sued for massive spillage of crude oil from the defendant's pipeline, which polluted and ravaged economic trees and crops, fishing ponds, fishing contrivances, local gin distilleries, and fresh water wells over a very wide area. They claimed 20,000,000.00 as fair and adequate compensation for their losses. At the conclusion of the trial the trial court entered judgment for the respondents and awarded N15,329,350.00 as special damages and N3,000,000.00 as general damages.

One of the points taken on appeal was that the trial court was wrong to grant leave to the respondents to sue in representative capacity. In his lead judgment Muntaka-Coomassie JCA referred to the following dictum of Olatawura JSC, in *Adeniran v. Interland Transport Ltd*:

While in this case it has been shown that they have common interest, the grievance of individuals is separated and distinct consequently a representative action taken as in this case must fail.

The appeal failed because, on the particular issue, it was held that the respondents did disclose common grounds and interest in the suit and there were no individual claims. This would reduce the valuable Court time devoted to proving all the material issues over and over in each individual action.

It has been argued against the problem posed by the above decision that "unlike the non-communal English society in which the rule as to public nuisance was developed, in Nigeria people live in communities, especially in the Niger-Delta region where the worst incidents of environmental pollution occur. So how they share the proceeds of special damages awarded, which is the true worry informing the dichotomy of who sues in respect of public nuisance, is not the business of anybody."⁸⁴ Consequently, if this matter ever went on further appeal, the decision of the Supreme Court would be interesting indeed.

More recently, Justice C.V. Nwokorie of the Federal High Court Benin City of Nigeria in *Jonah Gbemre v. Shell PDC Ltd and Ors (2005)*⁸⁵ granted leave to the applicant to institute these proceedings in a representative capacity for himself and for each and every member of the Iweherekan Community in Delta State of Nigeria,

⁸³ (2004) ALL FWLR (pt. 223) 1859 CA.

⁸⁴Chechey W.A. (Justice), Judgement and Remedies in Environmental Cases. A paper presented at the Judicial Training Workshop Organized by UNEP and NJI, Abuja, between March 28-30, 2006, at p.41a.

⁸⁵ (2005) Suit No. FHC/B/CS/53/05.

an to apply for an order enforcing or securing the enforcement of their fundamental human rights to life and human dignity as provided by sections 33 (1) and 34(1) of the 1999 Constitution of Nigeria, and reinforced by Articles 4, 16 and 24 of the African Charter on Human and Peoples' Right.⁸⁶ The Court held that these constitutionally guaranteed rights inevitably include the rights to clean, poison and pollution-free healthy environment. The Judge further declared that the actions of the respondents (Shell PDC and NNPC) in continuing to flare gas in the course of their oil exploration and production activities in the Applicant's Community are a violation of their fundamental rights. Furthermore, the judge ruled that the failure of the companies to carry out an Environmental Impact Assessment in the said community concerning the effects of their gas flaring activities is a clear violation of the E.I.A. Act and has contributed to a further violation of the said environmental rights. The judge's order restrained the respondents from further gas flaring and to take immediate steps to stop the further flaring of gas in the community. The Judge advised that the Attorney General should ensure the speedy amendment, after due consultation with the Federal Executive Council, the Associated Gas Re-Injection Act to be in line with Cap.4 of the Constitution on Fundamental Human Rights. But the Judge made no award of damages, costs or compensation whatsoever.

This is a landmark judgment in the sense of application of fundamental human rights to an environmental case for the first time in Nigeria, consistent with the trend in other jurisdictions like India and South Africa.⁸⁷

The trend in other jurisdictions can be seen in the following instances. In the USA for instance, individuals and groups have generally been able to meet the requirement if they show an injury to their aesthetic, conservation or recreational interests.⁸⁸ In France, the administrative tribunal of Rouen held that an association for the promotion of tourism and the protection of nature could present evidence of a sufficient interest, given its object as defined in its statutes, to contest an authorization for a waste treatment plant. The court also found that labour union, notably of companies concerned with chemical industries whose interest were to maintain the authorization, also had the right to be heard. Tribunal administratif de Rouen, 8 June 1993, Association Union touristique des amis de la nature et autres,⁸⁹ an appellate court recognized that a nature protection association has standing to intervene in a case seeking the annulment of an authorization permitting the operation of a uranium mine. However without a showing of material harm, the association could not seek damages.

Where injury is shown, it does not matter the plaintiffs are only a few among many similarly affected. See *Kajing Tubfk & Other v. Ekeran Biid & Others*,⁹⁰ three individuals among a community of 10,000 are not deprived of standing or relief because of their limited number. In some jurisdictions, traditional property doctrines have served to expand standing. In *Abdikadir Sheika Hassan and Others v Kenya Wildlife Service*,⁹¹ for example, the court permitted the plaintiff of his own behalf and on behalf of his community to bring suit to bar the agency from removing or dislocating a rare and endangered species from its natural habitat. The Court observed that according to customary law, those entitled to use the land are also entitled to the fruit

⁸⁶ Cap. A9 Vol.1, LFN 2004.

⁸⁷See Dean M., 'The Revolution in Indian Environmental Jurisprudence', Review Essay (2000) *Asia Pacific Journal of Environmental Law*, Vol.5, Issue 3, Kluwer law International at pp. 291-303.

⁸⁸ See, *SCRAP v U.S.*, 412 U.S 669 (1973).

⁸⁹ R.J.E. 1994/1, p. 61.

⁹⁰ High Court, Kuala Lumpur (1996).

⁹¹ High Court of Kenya, Case 2059/1996.

thereof, including the fauna and flora; thus the applicants had standing to challenge the agency action.

Cases that are characterized as involving infringements of basic rights also generally afford broad standing to affected persons. See *Festo Balegele and 749 Other v. Dar es Salaam City Council* (Civil Cause No. 90/1991, High Court Tanzania) (allowing residents of a neighborhood to sue the City Council to halt an illegal dump site that was found to deliberately expose their lives to danger). Governments, too, must demonstrate that they have standing. In *Gray Davis et al. v. U.S. EPA* (9th Cir. July 17, 2003), the federal government argued that California lacked standing to challenge EPA action denying a waiver from some regulations on air quality. The Court held that California was acting to protect its own interests and that furthermore, the Governor and state agency had acted in their official capacities with proprietary interests in the land, air and water of the state. This the court held to be sufficiently concrete to give them standing.

Where numerous individuals are harmed, as is often the case with environmental damage, many jurisdictions allow class actions to be filed by one or more members of the group or class of persons who have suffered a similar injury or have a similar cause of action. The class action is essentially a procedural device to quickly and efficiently dispose of cases where there are a large number of aggrieved persons. It helps ensure consistency in judgments and awards of compensation, as well as prevents proliferation of separate and individual actions. Petitioners file on behalf of themselves and others of their class, representing the others and subsequently others are asked to join in. Often public notices are put out asking interested persons to join the case. To be maintainable, class actions usually must be permitted under the procedural rules of the country, as in the U.S. and in India. Class actions may also be permitted, even recommended by courts, as a means to enforce the constitutional right to a healthy environment when the specific facts threaten to violate the rights of an undermined number of people. See *Jose Cuesta Novoa and Miciades Ramirez Melo v. the Secretary of Public Health of Bogota*.⁹²

Environmental statutes and regulations allowing citizen suits, either against an administrator for failure to perform a required act or against a person who is allegedly in violation of an environmental regulation or standard, have served to enlarge the standing of citizens to seek redress through the courts. Broad laws have been drafted, for example, in New South Wales, Australia, to allow 'any person' to commence an action against any other person alleged to be in violation of a permit, standard, regulation, condition, requirement, prohibition, or order under the law. Similar legislation has been adopted in India and the United States. Courts must decide how broadly to read the term 'any person.' In particular they must determine whether the individuals must have some interest adversely affected or whether the law was intended to open the doors to all persons taking an interest in the matter, acting as private prosecutors.

In South Africa, courts have looked to a number of factors to determine whether a member of the public has *locus standi* to prevent the commission of an act prohibited by statute:

- Did the legislature prohibit doing the act in the interests of a particular class of persons or was the prohibition merely in the general public interest.
- In the former instance, any person belonging to the class of protected persons may interdict the act without proof of any special damage.

⁹² (May 17, 1995), Const. Ct., Clolomba; *Minors Oposa*, Sup. Ct. Philippines.

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- For legislation of general interest, the applicant must prove that he or she suffered or will suffer special damage as a result of the doing of the act.

Applying these tests to the Environmental Conservation Act of 1989, a court in Durban found it to be in the general interest requiring proof of special harm, but allowed applicant to proceed on a nuisance claim if she could prove that the management and operation of the site in question constituted such nuisance.⁹³

Some courts have called for reexamining traditional rules of standing in environmental matter involving the state, in order to adapt such rules to the changing needs of society. In *Wildlife Society v. Minister of Environment*,⁹⁴ the Court held that a group whose main aim is to promote environmental conservation should have standing to apply for an order to compel the state to comply with its statutory obligations to protect the environment. Should access to the courts be abused, the judiciary may impose appropriate orders of costs to discourage frivolous actions. Cases filed by the Secretary General of the Bangladesh Environmental Lawyers Association similarly led the Supreme Court to hold that any person other than an officious intervener or a wayfarer without any interest in the cause may have sufficient interest in environmental matters to qualify as a person aggrieved, e.g. *Dr. Mohiuddin Farooque v. Bangladesh*⁹⁵ represented by the Secretary Ministry of Irrigation, Water Resources and Flood Control and Others.

3.2 PRE-ACTION NOTICE AND LIMITATION OF ACTION/STATUTE BAR.

Another procedural issue in environmental cases is Pre-Action Notice. This was the issue in the recent case of *Mobil Producing (Nig) Unlimited v. LASEPA, FEPA & ORS*,⁹⁶ the Court of Appeal upheld the fatality of the failure on the part of the appellant to serve the statutory pre-action notice under Section 30(2) of the FEPA Act on the second respondent at the instance of one of the fourth set of defendants/respondents. On further appeal to the Supreme Court however, the apex court held *inter-alia*, that the service of a pre-action notice is at best a procedural requirement and not an issue of substantive law on which the right of the plaintiff depend. It held further that it is not an integral part of the process of initiating proceedings and that a party who has served a pre-action notice is not obliged to commence proceeding at all. The non-compliance does not therefore raise the question of jurisdiction which can be raised at any time which if resolved in favour of the defendant would render the entire proceedings a nullity. It does not abrogate the right of a plaintiff to approach the court or defeat its cause of action; it merely puts the jurisdiction of the court to hear a matter on hold pending compliance with the pre-condition. It is therefore a mere irregularity, which merely renders an action incompetent but does not totally affect the jurisdiction of the court. Consequently, the irregularity can be waived by a defendant who fails to raise it by motion or plead it in the statement of defence.

The major aim of the mandatory section 29(2) or 30(2) provisions of the FEPA Act is not necessarily to enable the Agency prepare its case, but rather to see

⁹³ *Verstappen v. Port Edward Town Board & Others*, Case 4645/93 Durban & Coast Local Division (South Africa).

⁹⁴ Transkei Supreme court 1996.

⁹⁵ 48 DLR 1996, SC Bangladesh, 1996.

⁹⁶ (2002) 18 NWLR (pt.798)p.1

whether the matter could be settled out of court. Hence, the requirement of pre-action notice is not inconsistent with provisions of the Constitution of Nigeria.⁹⁷

It is evident from the above that limitation of time is another issue that often arises in environmental cases in Nigeria. This is because pollution may be continuous or an isolated case, or periodic. The defence naturally tends to urge the Court to hold that time runs from when the pollution occurred. The issue of continuing wrong arose in *Gulf Oil Co. Ltd v Oluba*.⁹⁸ The Appellant commenced oil exploration on the Respondents' land in 1973 and continued until 1989. This injuriously affected swamps, channels and lakes resulting in loss of income from fishing and farming. The Respondents commenced action some thirteen years later in 1989. The Appellant's took a preliminary objection praying that the action be dismissed in that it was statute-barred. In respect of actions founded on tort, the applicable Limitation Law (of Delta State) provided for six years of limitation from the date on which the cause of action accrued. The trial judge held that the cause of action was a continuing one and not statute-barred.

On appeal, the Court of Appeal called the trial judge's decision "outlandish" because the words he relied on in reaching his decision, that is, "unless the wrong or act is a continuing one," are not to be found in Section 4 of the Law. The Court of Appeal held that the cause of action accrued with the cessation of the Appellants act, which resulted in the damage. It held further that the trial judge was wrong to look at the statement of defence to see whether it admitted that the cause of action was a continuing one. There might admittedly have been some weakness in the pleading of the Respondents' case by their counsel in the *Gulf v. Oluba* case. But even so, there was sufficient ground for the Court of Appeal taking the opposite view, and not abandoning such a vast quantity of land to permanent ecological ruin, when the appellant could have restored the land.

3.3 Burden of Proof and Remedies.

In order to enable the Courts to enforce environmental laws, the parties must prove their cases, as required by law. This is a common procedure in litigation and not unique to environmental law. What could be unique is if the particular environmental statute requires a particular burden or standard or proof in a particular matter. Meeting the requisite burden of proof in environmental cases have most times been difficult particularly in civil cases.

3.3.2 Proof in Civil Cases.

Apart from the statutory burden of proof laid down in the Evidence Act,⁹⁹ and under the Common Law, the burden of proof in civil cases is on the preponderance of evidence or the balance of probabilities.¹⁰⁰ And in most cases, the burden is on the plaintiff.¹⁰¹ Usually the burden lies on him who desires the court to make any pronouncement in his favour as to any legal rights on the existence of facts

⁹⁷ See *Abakaliki Local Government Council v. Abakaliki Rice Mills Owners Enterprises of Nigeria*. (1990) 6 NWLR (Pt. 155) 182; *Construction Company Limited v. Nigerian Railway Corporation & Anor*. (1992) INWLR (Pt. 220) 747; *Obeta & Anor v. Okpe* (1996) 9 NWLR (Pt. 473) 401.

⁹⁸ (2003) F.W.L.R (pt.145) 712.

⁹⁹See Sections 135-137 of the Act. Nigeria enacted a new Nigerian Evidence Act 2011 to repeal the Evidence Act 1945, Chapter E14 of the Laws of the Federation of Nigeria 2004.

¹⁰⁰ See *Olujinle v. Adeagbo* (1988)2 N.W.L.R (pt.75) 386.

¹⁰¹ See section 135, 136 and 137 of the Evidence Act. See *NNPC v. Lutin Inv. Ltd* [2006] 2 M.J.S.C 1; *Onyenge & Ors v. Ebere & Ors* [2004] 11 M.J.S.C 184; *Ojo v. Philips* (1993) 5N.W.L.R. (Pt/ 296) 751; *Jalico Ltd v. Owoniboyos* [1995] 4 S.C.N.J. 256; *Nsirim v. Nsirim* [2002] 3 M.J.S.C 26; *Ewo v. Ani* [2004] 4 M.J.S.C 119.

to which he asserts.¹⁰² Likewise the party who was brought upon some allegations made against him is duty bound to satisfy the court that those allegations are unfounded. The nature of the obligation on the parties will depend on the requirements of the substantive law upon which the action arises and the rules of evidence. Environmental pollution cases are civil cases in which the parties are expected to make proofs on the preponderance of evidence or balance of probabilities.

Generally in environmental litigation, the following proofs are necessary: - where the claim is damaged to property, the plaintiff must prove ownership of the property damaged.¹⁰³ In a claim for loss or destruction of farm crops, farm land and economic trees, the court held in *Uhunmwangbo v. Uahunmwangbo*¹⁰⁴ that the plaintiff must adduce sufficient evidence to show *inter alia*: the name, nature, and number of economic trees allegedly destroyed. For an action in negligence or nuisance, the ingredients of the offence must be established.¹⁰⁵ For a claim in special damages, the claims must be itemized and specially proved. In *R.C.C. (Nig) Ltd v. Edomwonyi* the court held that a claim of loss of earning is a claim in special damages in the sense that full particulars must be given.¹⁰⁶ Such facts as rate of earning and other facts that will enable the court to determine the claim in arithmetical calculation should be pleaded. In a claim of highly technical and professional nature¹⁰⁷ which the court would not ordinarily appreciate, the plaintiff needs to go extra mile to establish his claim through expert evidence.¹⁰⁸ In *A.R.C v. J.D.P*¹⁰⁹ the court stated that a counsel presenting a case is expected to argue his client's case convincingly and assist the court to arrive at the right decision.

The difficulty encountered by victims of environmental pollution in the issue of remedy lies on the problem of claim and proof. This problem arose in at the Supreme Court in the case of *Shell Petroleum Development Company of Nigeria Ltd v. Chief G.B.A. Tiebo VII & Ors*. In this case, the plaintiffs commenced action at the Yenagoa High Court claiming the sum of N64,146,000.00 as special and general damages arising from the defendant's negligence.¹¹⁰ This was a result of crude oil spill on the lands, creeks, lakes and shrines of the plaintiff from the defendant's oil mining activities. The plaintiffs claimed specific sums as special damages for losses arising from pollution of fishponds, damages to communal fishing nets and raffia palms. They also claimed specific sums as general damages. The trial court awarded damages of N400,000.00 and N600,000.00 as general damage for loss of raffia palms and loss of drinking water respectively; N5 million as general damages and N1 million as costs to the plaintiffs. The defendants appeal to the Court of Appeal was dismissed. The appellant further appealed to the Supreme Court. The problems canvassed before the Supreme Court were: whether it was proper for the court

¹⁰² See *Adams v. L.S.D.P.C.* [2002] 5N.W.L.R (Pt. 656) 291 See also *Bon Ltd v. Babatunde* (2002) 3 N.W.L.R. (Pt. 706) 20.

¹⁰³ *Sommer & Ors v. Federal Housing Authority* (1992) 1 N.W.L.R (Pt.219) 548.

¹⁰⁴ (1992) 2 N.W.L.R (Pt. 226) 709.

¹⁰⁵ See *Anya v. Concorde Hotel* [2003] 2 MJSC 160; *Royal Ade v. National Oil* [2004] 9 M.J.S.C 40 *Adediran & Anor v. Interland & Transport Ltd* (1986) 2 N.W.L.R (Pt. 20) 78

¹⁰⁶ (2003) 4 N.W.L.R (Pt. 811) 513; *Arabambi v. A.B.I. Ltd* [2006] 3 M.J.S.C 61; *Gonzee v. N.E.R.D.C* [2005] 12 M.J.S.C 179; *Daniel Holdings v. U.B.A Plc* [2005] 11 M.J.S.C 69; *Reynolds v. RockOnoh* [2005] 10 M.J.S.C 159; *SPDC (Nig) Ltd v. Chief G.B.A Tiebo VII & Ors.* [2005]9 M.J.S.C 158; *Nwanji v. Coastal Services* [2004] 10 M.J.S.C 154.

¹⁰⁷ Claims involving determination of substances, extent of damage, etc.

¹⁰⁸ *Serismograph Services (Nigeria) Ltd v. Kwarbe Ogbeni Supra.*

¹⁰⁹ [2003] 5 M.J.S.C 57.

¹¹⁰ *Supra.*

below to award special damages when there was no sufficient proof? Whether the amount awarded as general damages and cost was too high and unnecessary?

In dealing with this challenge, the Supreme Court held that ‘anyone making a claim in special damages must prove strictly that he did suffer such special damages claimed. According to Tobi, J.S.C., ‘proof of special damages is strict. Where plaintiff is unable to prove special damages, his case crumbles and a trial court cannot compensate him by way of general damages.’ According to Oguntade, J.S.C, the plaintiffs in their claim pleaded the nature of the damage in paragraphs 9-14. In paragraph 17, they set out the particulars of special damages claimed and in paragraphs 31 they expressed their claims. He stated that the rule in special damages requires the claimant to establish his entitlement by credible evidence of such character, as would suggest that he is entitled to an award under that head. In some cases it may be unnecessary. The important thing is that the evidence proffered must be qualitative and credible and as such lend itself to quantification. However general damages need not be proved strictly as they are regarded as damages resulting from defendant’s tortuous conduct. This is good law because where there is no strict proof of special damages there exists the tendency for a judge to make estimations. In this case, the plaintiff could not strictly prove the loss to the raffia palms a cost of purchasing alternative drinking water and water used for domestic purposes yet the court below awarded N400,000.00 and N600,000.00 damages respectively for these.

According to Edozie J.S.C. the requirement of strict proof definitely excludes a situation where the court will be left in a situation where it will start to guess what the losses due to the plaintiff should be. The making of estimation should therefore not be allowed. This is exactly what happened in this case. The trial court awarded special damages without proof. He said the general damage was in lieu of a claim for special damages. This is incorrect because there was claim for special damages. The problem was that the plaintiff could not establish sufficient proof for the claims. The Supreme Court did not hesitate to condemn such attitude and practice. The court distinguished between special and general damages¹¹¹ and held that since the plaintiffs failed to prove their entitlement to the special damages, the trial court erred in awarding general damages in place of special damages. The trial court was wrong to treat a claim, which failed under special damages as successful under general damages. The trial court even claimed that the award of general damages was a way of compensating the plaintiffs for the loss of expected profits and freight of goods, which according to the court was proved, but not on the writ. This cannot be justified. According to Tobi, J.S.C, the issue whether a court can award general damages in place of special damages does not exist.

For the award in general damages, the Supreme Court stated that the courts are at discretion in the award of general damages. Such award will depend on assessment based on certain considerations. It is only when they are manifestly too excessive or too low that the court will interfere. In this case there was evidence of excessive damage to crops, farms, farmlands, ponds, creeks and widespread environmental pollution so the court did not interfere with the award of N5 million. This is good judgement because environmental pollution cases are not mere civil cases and with the extent of damage, inadequate remedial attention may render the farmlands etc infertile for a long time therefore the award of N5 million is not excessive neither is the N1 million costs too high. This is because of the cost of getting such a case from the High Court through the Supreme Court.

¹¹¹Storms Bruks Aktie Bolag v. Hitchinson (1905) A.C. 515; In the Sesquehuanna (1926) A.C. 655 at 661; Prehin v. Royal Bank of Liverpool (1870) L.R. 5 Ex. 92.

In such problems of proof, where victims make wrong claims and cannot substantiate their claims with adequate proofs, the Supreme Court strives to give adequate remedy e.g. in the *Tiebo case*, the court did not interfere with the award of N5 million as general damages. However the Supreme Court understands the predicament of the victims but regrets that victims who have good cases but do not satisfy the stipulations under the law and rules of proceedings have themselves to blame. As Tobi, J.S.C stated ‘general damages cannot be a compensation for special damages. In it’s strived to ensure that justice is done, the Supreme Court in some cases infers negligence from the facts before it and dispense with the requirement of proof. In *Machine Umudje v. Shell*¹¹² the Supreme Court stated that it could draw necessary inference of negligence and it did just that. In such cases, the Supreme Court also applied the rule in *Rylands v. Fletcher* to hold the defendant strictly liable without proof. This helps lighten the task of the victims. This presumption enables justice to be done. The Supreme Court has also applied the presumption of *res ipsa loquitur* to assist victims. This presumption enables justice to be done when the facts beaming on causation and the care exercised by the defendant are at the outset legally unknown to the plaintiff and are or ought to be within the knowledge of the defendant. In *Royal Ade v. National Oil*,¹¹³ *Ejirinmi*, J.S.C held that the presumption of *res ipsa loquitur* is used to fasten liability on the defendant. Such presumption will aid victims of environmental pollution, who because of their limited knowledge cannot prove negligence.

However the grant of remedy may likely be affected by the attitude of the court and the limited number of courts that can exercise jurisdiction to grant remedy in environmental litigation. In *Allar Iron v. Shell B.P Development Company (Nigeria) Limited*¹¹⁴ the court denying the injunction stated that ‘to grant the injunction would amount to asking the defendant to stop operating in the area... and cause the stoppage of a trade... mineral which is the main source of the country’s revenue’. Such consideration is not in the interest of the facts of the case presented to the court. The plaintiff should at least receive some remedy for the harm caused to him. It is believed that such attitude from the court is not likely to arise in this present time. Also with the exclusive jurisdiction of the Federal High Court in oil pollution cases in Nigeria. Will the number of Courts available not affect the chances of victims obtaining remedy? Can the Federal High Courts cope with the volume of litigation arising from petroleum operations?¹¹⁵ Will this not cause an increase in sabotage incidents and related acts of hostage taking? For example, it appears unlikely that the plaintiff’s in *Abel Isaiah’s* case will start all over in the Federal High Court neither does it appear that all of them will accept the decision.

4. CONCLUSION

As discussed in this paper, a number of technical and substantive issues continue to create barriers to environmental justice in Nigeria. If these technicalities are to be ameliorated, the Nigerian judiciary would have a broader role to play; specifically in applying the law with more flexibility and in fostering a milieu for creative judicial reasoning. It has been demonstrated that peculiar facts of the

¹¹² (1975) 9-11 S.C. 155.

¹¹³ *Supra* at p. 43.

¹¹⁴ Suit No. W/89/71 Warri High Court 26/11/73 (Unreported); see M.A. Ajomo, ‘An Examination of Federal Environmental Laws in Nigeria’ in M.A. Ajomo & O. Adewale Eds: *Environmental Law and Sustainable Development in Nigeria* (Lagos: N.I.A.L.S & the British Council 1994), p.22.

¹¹⁵ See J.F. Fedumo: *Oil Pollution and the Problems of Compensation in Nigeria* (Port-Harcourt: F & F Publishers 2001), p.21

country's socio-economy, culture and law make it imperative for the judiciary to take an activist, critical and creative stance as the last hope for the common man and woman. Due to ongoing corruption, neglect and the evident failure of the political class in implementing sustainable environmental policies, the Nigerian judiciary is often looked upon, and rightly so, to prompt and foster effective environmental management, as well as to emphasize the importance of public participation in environmental conservation and management in Nigeria.¹¹⁶

There is a lot of merit in the public interest litigation device and an attitude of judicial activism by the judiciary in environmental matters, not only because administrative and legislative review of administrative action is weak and judicial review dependant on the accident of litigation, but also because of the grave consequences of delinquent environmental management in the socio-economic life of a developing nation such as Nigeria. No doubt these concepts will have to be emphasized consistently and aggressively in the courts, to prompt the desired change in the Nigerian legal and socio-cultural landscape. Nigerian courts may be guided by *Principle 10 of the Rio Declaration on Environment and Development*, June 1992, which admonishes that:

Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information on the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings; including redress and remedy shall be provided.

Environmental justice may only be realistically achieved in Nigeria when there is ample opportunity for victims of environmental problems to obtain redress in law courts. When victims are unable to obtain redress either due to technical or substantive barriers, it breeds apathy on the part of the people in the area of environmental litigation, and this is never a good situation for a nation to find itself. In order to awaken belief in the judicial systems as arbiters of redress and justice, the Nigerian judiciary must take more proactive roles, which involves widening *locus standi* requirements, not allowing technicalities to stand in the way of substantive environmental issues and also preventing gold digging applications that stand on the path of serious environmental cases.

The recent failed attempt at outsourcing environmental claim in *Kiobel* may be an important reminder and a lesson that we must look inwards in the search for environmental justice. The Nigerian judiciary must begin to play a more proactive role in breaking the barriers to environmental justice, and in removing technical obstacles that prevent victim from obtaining redress.

¹¹⁶ Ladan M.T., *Enhancing Access to Justice on Environmental Matters: - Public Participation in Decision-making and Access to information*. A paper presented at a Judicial training workshop on Environmental Law in Nigeria. Organized by the National Judicial Institute, Abuja and UNEP. Held at Rockview Hotel, Abuja, Between 6-10 Feb-May 2006.