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Editorial Comment

In continuation of our Departmental series of Annual Publications, this edition is one of its magnificent and unique publications, with thirty contributors cutting across all over Nigerian universities and in many diverse areas of law. The areas include: labour law, international law, international humanitarian law, legal research, criminal law, jurisprudence, administration of Justice, etc. The diversity is geared towards meeting the need of the twenty-first century and to satisfy the quest of many contributors. This is indeed a testimony of wide acceptance of our journal by academic community.

It is our firm conviction that the contributions in this Journal will no doubt add value to scholarly works in Nigerian universities and also universities abroad. Finally, we thank a lot to all the contributors of this edition from various universities. We also thank the entire staff of the Department of Public Law, and the editorial team for making this rich, magnificent and unique edition possible. Thank you.

Dr. Kabir M. Danladi
H.O.D. and Editor-in-Chief.

The Role of Litigation in Improving Nigerian Environmental Governance

Hakeem Ijaiya*
Mahmoud, Rilwan Funsho**

Abstract

This Paper sought to examine the role of Litigation in Environmental governance in Nigeria. In achieving this goal, the paper examines what environmental governance is with particular consideration of the Laws governing environmental law, the Nigerian environmental Policy as well as the regulatory bodies in environmental law. The paper then examines in details, some of the roles litigation has played and will play in environmental governance vis a vis the legal framework of environmental governance. The paper reveals that litigation has a lot of substantial role to play in environmental governance including the enforcement of environmental human rights, award of compensation for grieving parties as well as the clarification of jurisdictional issues that plague environmental litigation. Regardless of such vital contributions by litigation, it was found that there is still room for improvement and recommendations were made including the enactment of Procedure rules exclusively for environmental litigation to relive some of the tedious hardships of litigation and sensitization programmes for both lawyers and the Nigerian citizens for the purpose of educating them on their rights in environmental matters. The research conducted for the purpose of this work was library based in which several articles and laws were conducted as well as the internet.

Introduction

The Problem of environmental governance is now a subject of serious international concern. Environmental governance in Nigeria is the combination of the Regulations, Regulatory agencies as well as the Policies set out to regulate areas such as atmospheric pollution, marine pollution, global warming, and ozone depletion, the danger of nuclear and other extra hazardous substances that threatened wild life species. There is no doubt that a dirty environment affects the standard of living, aesthetic sensibilities, health of the people and the quality of their lives.¹ Such Environmental issues have assumed a global character as Environment is said to be beyond peoples immediate surroundings, sometimes assuming international dimensions. In Nigeria, there exist plethora of

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¹Ijaya. H' The Legal Framework for Solid Waste Disposal and Management in Kwara State, Nigeria' *Journal of Environmental Protection*, 2013, 4, 1240-1244

legislations covering entire range of laws, concerned with regulation, management and protection of the Environment. These laws touch on pollution of air, water, soil, food, waste management, land use and conservation most of are derived from norms and principles of international laws in form of treaties, conventions, customary international law and protocols.

Nigeria had a rather suspicious attitude towards environmental concerns generated in the 1970's by the developed world. Suspicious in the sense that the industrialized world sudden concerns to protect the environment was the fear that environmental concern would be merely the rich clearing house, diverting economic and technical resources from developmental needs to pollution abatement, a situation largely seen by third world as likely to affect their development adversely.² However in the year 1970 the environment was described as the issue of the year throughout the world and the United Nations Conference on human environment was held in 1972. Nigeria though signatory to so many of these multilateral treaties and was attendant at so many United Nations organized conferences did not come up with a viable environmental policy or strong legal framework for the protection of her environment until the unfortunate incident of dumping of toxic waste from Italy at Koko port in the then Bendel state in the 1988. It is in the light of this reality that very interesting strides were taken by Nigeria government in the late 1980's to propel Nigeria in the enviable direction of positive environmental protection management and regulation towards sustainable development. This aspiration culminated in the establishment of the Federal Environmental Protection Agency and its inspectorate and enforcement department in 1991. This development provided an institutional framework, both legal and administrative for the enforcement and execution of environmental policies and legislations.³

In Nigeria, Litigation would seem to remain the hope of the common man as it remains the only way for affected citizens to seek redress. Environmental litigation can take many forms, including civil actions based on tort, contract or property law, criminal prosecutions, public interest litigation, or enforcement of fundamental human rights. Particularly complex issues may arise when cases involve trans-boundary environmental harms.⁴

At common law, an action in an environmental litigation may be based on either negligence, nuisance or under the rule laid down by *Rylands v. Fletcher*⁵. Each of these

² Nwugo, Cecilia Chinwe 'Legal Framework for the Regulation of Waste in Nigeria' (Pp. 491-501) *African Research Review An International Multi-Disciplinary Journal*, Ethiopia Vol. 4 (2) April, 2010

³ *ibid*

⁴ Tobi N.(JSC), "Judicial Enforcement of Environmental Laws in Nigeria", in Ladan M.T., (ed.) *Law, Human Rights and the Administration of Justice in Nigeria* (2001) A.B.U. Press, Zaria, Nigeria, at p.262.

⁵ (1866) L.R. 1 Ex. 265. the Rule in *Rylands v. Fletcher* reads: "The person whose habitation is made unhealthy by the fumes and noisome vapours of his neighbour's alkali works is damnified without any fault of his own and seems but reasonable and just that the neighbour, who has

common law actions, have some essential requirements which, the plaintiff has the onus of proving.

There is little doubt that these torts can be used to apprehend environmental pollution and ensure some degree of environmental conservation as well as ensure the compliance of environmental governance. One of the major problems with litigation however is that it depends on a willing plaintiff. This is because they have suffered the wrong and they alone have *locus standi* where they've suffered injury over and above others. The plaintiff's are usually sceptical about the attainments of their rights because of the problems that an award of damages could be dependent on technicalities and may even be insufficient to redress harm. Where the transaction costs are too high or because of litigation apathy, or lack of means these torts are mere decorations. 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.⁶

One of the essential considerations of interest had to do with the liability regime. Whereas, most of the torts mentioned earlier are fault based some environment legislations impose strict liability or and provide for compensation rather than damages. For example, section 21 of the Federal Environmental Protection Agency (FEPA) Act provides that wherever hazardous substances are discharged in contravention of section 20 of the Act, an owner or operator of the facility in question shall also be liable for the cost of their removal, cost of restoration, or replacement of damaged natural resources and reparations, restoration, restitution or compensation as may be determined by the Agency from time to time" except where the discharge is proved to have been caused by a natural disaster, act of war or sabotage. Thus, not only is liability strict (although not absolute) there is also provision for compensation, albeit to be administratively determined by FEPA.⁷

Ladan, M. T⁸ believes that by virtue of the presence of Judicial review of administrative action the adequacy, quantum, modes of determination of compensation as well as the possibility of mandamus to compel an administrative determination in respect of compensation are well amenable to judicial control and oversight.⁹

brought something on his own property which was not naturally there, harmless to other so long as it is confined to his own property, but which he knows to be mischievous if it gets on his neighbour's should be obliged to make good the damage which ensues if he does not succeed confining it to his own property."

⁶See *Ajomo and Adewale* (ed.)(1994):- Environmental 'Law and Sustainable Development in Nigeria. Nigerian Institute of Advanced Legal Studies, Lagos, at pp. 11-66.

⁷ Ladan, M.T 'Judicial Approach To Environmental Litigation In Nigeria' A paper presented at a 4-Day Judicial Training workshop on Environmental Law in Nigeria 5 - 9 February, 2007

⁸ *ibid*

⁹See Ladan M.T., Towards and Effective African System for Access to Justice in Environmental Matters, in A.B.U. Law Journal Vols. 23-24 (2005/06) Faculty of Law, A.B.U., Zaria, Nigeria, at 425

In the Harmful Waste Act civil liability for depositing, dumping or importing of harmful waste shall lie on the person who did so, except where the damage was due wholly to the fault of the person who suffered it or by a person who voluntarily accepted the risk thereof. Liability is therefore, strict but not absolute¹⁰. The same rules of strict liability and compensation are to be found in the Oil Pipelines Act¹¹ and the Petroleum Act.¹² Indeed in the former, if the amount of compensation is not agreed between the parties, it shall be fixed by the Court.¹³

The forgoing proves that that the different environmental legislations provide right of actions, to persons affected by their violation. Accordingly, if a plaintiff is for example, able to establish that an oil prospecting company failed to observe "good oil practice" or failed to use "modern and up-to-date equipments in its operation", and the failure caused him damages, an action will lie against such an oil company at the instance of the affected plaintiff. The role of Legislation in environmental governance by the forgoing cannot be understated as it remains the only redress for an aggrieved plaintiff of the breach of an environmental right. This paper examines the role of Litigation in environmental Governance with the view to looking into the following:

1. An examination Environmental Governance in Nigeria
2. How can Litigation improve Environmental Governance

Environmental Governance

The term governance has acquired the status of a 'hackneyed concept' and has since 1990 been applied by institutions, states, policy-makers, researchers and other commentators to divers aspects of human endeavour¹⁴. When placed within the environmental context, the concept is generally defined as encompassing the relations and interplay among government and non-governmental entities, processes and normative frameworks, where powers and functions directly or indirectly influence the use, management and control of the environment.¹⁵ Environmental governance thus concerns how legal and policy decisions are made, with particular emphasis on participation by the human being who will thereby be directly affected by the outcome of such decisions¹⁶.

To understand fully what Nigerian Environmental Governance is, recourse must be had to the Nigerian Environmental Policy, the Nigerian Environmental Legislations and the Nigerian Environmental Agencies.

pp. 10-40.

¹⁰ Section 12 of the Act.

¹¹ E.g. Section 11(5)(c).

¹² paragraph 36 of schedule 1 to the Petroleum Act, Cap. 350 LFN 1990.

¹³ Section 11(5).

¹⁴ John Graham, Bruce Amos and Tim Plumptre, *Governance Principles for protected areas in the 21st Century* 5 (Ottawa: Institute of Governance) 2003

¹⁵ *ibid*

¹⁶ Olowu D. 'Environmental Governance Challenges in Kirbati: An agenda for legal and Policy responses' *Law, Environment and Development Journal* (2007), p.259,

(i) **The National Environmental Policy**

The National Policy on the Environment was launched by the Government on the 27th November, 1989. It contains specific guidelines for achieving sustainable development in fourteen vital sectors of the nation's economy namely: Human Population; Land Use and Soil Conservation; Water resources Management; Forestry, Wildlife and Protected Natural areas; Marine and Coastal Area resources; Sanitation and waste Management; Toxic and Hazardous Substances; Mining and Mineral resources; Agricultural Chemicals; Energy Production; Air Pollution; Noise in the working Environment; Settlements; Recreation Space, Green Belts, Monuments, and Cultural Property. The Policy is currently being reviewed by the Government in line with the Challenges of the Vision 2010 and Agenda 21 Programmes.¹⁷

The goals of the Policy are as follows:

- a. secure a quality of environment adequate for good health and well-being;
- b. conserve and use the environment and natural resources for the benefit of present and future generations;
- c. restore, maintain and enhance the ecosystems and ecological processes essential for the functioning of the biosphere to preserve biological diversity and the principle of optimum sustainable yield in the use of living natural resources and ecosystems;
- d. raise public awareness and promote understanding of the essential linkages between the environment, resources and development, and encourage individual and community participation in environmental improvement efforts; and
- e. co-operate in good faith with other countries, international organisations and agencies to achieve optimal use of trans-boundary natural resources and effective prevention or abatement of trans-boundary environmental degradation.

(ii) **The Environmental Legislations**

Environmental legislations are enactments and regulations embodying provisions concerned with environmental issues as they broadly affect land, water and air. These laws impose sanctions in form of fines, imprisonment or damages which are subsequently enforced against persons (natural or legal) who infringe the provision of these laws.¹⁸ In Nigeria environmental problems which we are confronted with include those arising from mines and mineral exploitation, oil exploration, desertification, deforestation and problems associated with industrialization and urbanization as well as the problems of

¹⁷ The Nigerian Government 'Institutional Aspects of Sustainable Development in Nigeria' being the report to the fifth and seventh Session of the United Nations Commission on Sustainable Development, last updated, April, 1999. www.un.org/esa/agenda21/natinfo/countr/nigeria/inst.htm last accessed, 3rd February 2014

¹⁸ Nwugo, Cecilia Chinwe 'Legal Framework for the Regulation of Waste in Nigeria' (Pp. 491-501) *African Research Review* An International Multi-Disciplinary Journal, Ethiopia Vol. 4 (2) April, 2010

environmental consideration in health care.

In Nigeria, there are several laws that govern environmental activities. The Primary Environmental laws in Nigeria are as follows:

1. The Federal Environmental Protection Agency (FEPA) Act of 1988.
2. The Environmental Impact Assessment Act 1992
3. The Harmful Waste (Special Criminal Provision Etc) Act 1988
4. National Environmental Standards And Regulations Enforcement Agency(Establishment) Act, 2007

The Federal Environmental Protection Agency (FEPA) Act of 1988.

Decree 55 of December 30th 1988 established The Federal Environmental Protection Agency (FEPA). FEPA is vested with the statutory responsibility for overall protection of the environment. The FEPA Act covers all environmental issues in all sectors in Nigeria. The Act also contains penal provisions against offenders discharging hazardous substances in harmful quantities into the air, land and water. The Act requires FEPA to issue environmental guidelines and standards for the abatement and control of all forms of pollution. These guidelines, the first ever of its type was launched in 1990 and it is hoped that they will be religiously administered to ensure that industrial activities and waste management practices are compatible with the overall goal of bequeathing a clean and safe environment.

The Functions of FEPA include:

- (a) prepare a comprehensive national policy for the protection of the environment and conservation of natural resources, including procedure for environmental impact assessment for all development projects;
- (b) prepare, in accordance with the National Policy on the Environment, periodic master plans for the development of environmental science and technology and advise the Federal Government on the financial requirements for the implementation of such plans;
- (c) advise-
 - (i) the Federal Government on national environmental policies and priorities, the conservation of natural resources and sustainable development, and scientific and technological activities affecting the environment and natural resources;
 - (ii) the President on the utilisation of the one per cent Ecological Fund for the protection of the environment;¹⁹
- (d) promote co-operation in environmental science and conservation technology with similar bodies in other countries and with international bodies connected with the protection of the environment and the conservation of natural resources;
- (e) co-operate with Federal and State Ministries, local governments, statutory bodies and research agencies on matters and facilities relating to the protection of the environment and the conservation of natural resources; and

¹⁹ Section 5 The Federal Environmental Protection Agency (FEPA) Act of 1988.

(f) carry out such other activities as are necessary or expedient for the full discharge of the functions of the Agency under this Act

(ii) The Environmental Impact Assessment Act

The Environmental Assessment Decree No 86 of 1992 came as a fitting compliment to the FEPA Decree in the important area of land utilization and sitting of industries²⁰. The principal goal of this enactment was stated under section 1 which is to ensure that possible negative impacts of development projects are predicted and addressed prior to any project take-off. The effect of this is to promote sustainable development. The second phase of this assessment is referred to as environmental audit. This process which culminates in the writing of an environmental audit report compliments the process of an environmental impact assessment and in some instances supplement it. In furtherance of the objectives of this Act, FEPA established an environmental impact assessment department in 1993. The department was saddled with the responsibilities of ensuring enforcement and compliance with provision of the act in every aspect of the nation's development efforts. It is clear that this Act provides machinery for enhancing sustainable development in Nigeria but how far has this been achieved not to be exercised arbitrarily.

The Objectives of the Environmental Impact assessment include the following:

The objectives of any environmental Impact assessment (hereafter in this Decree referred to as "the Assessment") shall be -

- (a) to establish before a decision taken by any person, authority corporate body or unincorporated body including the Government of the Federation, State or Local Government intending to undertake or authorise the undertaking of any activity that may likely or to a significant extent affect the environment or have environmental effects on those activities shall first be taken into account;
- (b) to promote the implementation of appropriate policy in all Federal Lands (however acquired) States and Local Government Areas consistent with all laws and decision making processes through which the goal and objective in paragraph (a) of this section may be realised;
- (c) to encourage the development of procedures for information exchange, notification and consultation between organs and persons when proposed activities are likely to have significant environmental effects on boundary or trans-state or on the environment of bordering towns and villages.²¹

²⁰ Nwifo, Cecilia Chinwe 'Legal Framework for the Regulation of Waste in Nigeria' (Pp. 491-501) *African Research Review* An International Multi-Disciplinary Journal, Ethiopia Vol. 4 (2) April, 2010

²¹ Section 1 The Environmental Assessment Decree No 86 of 1992 Laws of The Federation of Nigeria

The Harmful Waste (Special Criminal Provision Etc) Act 1988

The Act was enacted with the specific object of prohibiting the carrying, depositing and dumping of hazardous wastes on any land, territorial waters and matters relating thereto. This Act is essentially a penal legislation. The offences are constituted doing any of the act or omission stated in the section 12 of the act. The jurisdiction of the Act is far reaching as it sought to remove any immunity conferred by diplomatic immunities and privileges Act on any person for the purpose of criminal prosecution. It however important to note that despite its far reaching jurisdiction, it focuses mainly on criminal prosecution of damage and does not provide compensation to the victim of the damage. Section 6 of the Act provides a very stringent sentence of life imprisonment and in addition the forfeiture of any aircraft, vehicle or land connected with or involved with the violation.

National Environmental Standards And Regulations Enforcement Agency(Establishment) Act, 2007

The NESREA Establishment Act by section 1, established the National Environmental standards and regulation enforcement agency (NESREA). It established as a parastatal of the Federal Ministry of Environment, Housing and Urban Development.²² The Agency is charged with the protection and development of the environment, biodiversity conservation and sustainable development in Nigeria's natural resources in general and environmental technology²³

Some of the Functions of NESREA include:

- (a) enforce compliance with laws, guidelines, policies and standards on environmental matters;
- (b) coordinate and liaise with stakeholder, within and outside Nigeria, on matters of environmental standards, regulations and enforcement;
- (c) enforce compliance with the provisions of international agreements, protocols, conventions and treaties on the environment, including climate changes, biodiversity, conservation, desertification, forestry, oil and gas, chemicals, hazardous wastes, ozone depletion, marine and wide life, pollution, sanitation and such other environmental agreements as may from time to time come into force;
- (d) enforce compliance with policies, standards, legislation and guidelines on water quality, environmental health and sanitation, including pollution abatement;
- (e) enforce compliance with guidelines and legislation on sustainable management of the ecosystem, biodiversity conservation and the development of Nigeria's natural resources;
- (f) enforce compliance with any legislation on sound chemical management, safe use of pesticides and disposal of spent packages thereof;

²²section 1 (1) of the National Environmental Standards and Regulations Enforcement Agency (Establishment) Act No 25 of 2007.

²³Ariyoosu D. A: 'Legal Regulation and Institutional Framework for the Nigerian Telecommunications Industry: An overview'

- (g) enforce compliance with regulations on the importations, exportation, production, distribution, storage, sale, use, handling and disposal of hazardous chemicals and waste other than in the oil and gas sector;
- (h) 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;
- (i) ensure that environmental projects founded by donor organizations and external support agencies adhered to regulations in environmental safety and protection;
- (j) enforce environmental control measures through registrations, licensing and permitting systems other than in the oil and gas sector;
- (k) conduct environmental audit and establish data bank on regulatory and enforcement mechanisms of environmental standards other than in the oil and gas sector;
- (l) 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;
- (m) carry out such activities as are necessary or expedient for the performance of its functions²⁴

(iii) The Nigerian Environmental Agencies

The enforcement of the Above mentioned Laws are vested in several Agencies across Nigeria charged with various duties by the powers vested in them. Some of the primary agencies are as follows:

- National Environmental Standards and Regulations Enforcement Agency(NESREA)
- Federal Ministry of Environment (FMOE)
- The Federal Environmental Protection Agency (FEPA)
- State Ministries of Environment
- Ministry of Water Resources
- National Oil Spill Detection and Response Agency (NOSDRA)
- Federal Ministry of Environment, Housing and Urban Development (FMEHUD)
- Lagos State Waste Disposal Board (LSWDB)
- Lagos State Environmental Protection Agency (LASEPA)
- Lagos State Waste Management Authority(LAWMA)
- Lagos State Waste management Agency operatives (PSP)
- Kano State Environmental Protection Agency
- Oyo State Environmental Protection Commission
- Department of Petroleum Resources

²⁴Section 7 of the National Environmental Standards and Regulations Enforcement Agency (Establishment) Act No 25 of 2007.

- Kaduna State Environmental Protection Agency
- State Environmental Protection Agencies (SEPA's)
- River State Environmental Protection Agency
- Federal Ministry of Environment, Housing and Urban Development (FMEHUD))
- Urban Development Board
- Various State Environmental Protection Agencies
- Waste Management Society of Nigeria.

The Role of Litigation in Environmental Governance

Litigation is probably the most widely recognised dispute resolution procedure. Broadly, litigation means the taking of legal action in a Court to determine or enforce a party's rights. Lawyers who devote time to arguing disputed issues in court are referred to as litigators and those they represent are referred to as litigants. In most cases, lawyers are just a preferred option for those who choose not to represent themselves in court. Litigation involves many complex legal issues which require not only a knowledge of the law that governs the dispute, but also the law governing the procedures to be followed in order to properly litigate a claim. There are rules governing who may file a claim, where it must be filed, when it must be filed, and how to file it.

Litigation by its nature is a pivotal aspect of environmental governance. A stable perpetrator of Environmental desecration in Nigeria is the oil companies. Litigation has been the most efficient way to check these misdoings. As at the 1990s, a large number of court cases were brought against transnational oil corporations including Shell, Total (formerly Elf), Chevron and others in Nigerian courts. Unlike lawsuits During the period 1981–86, twenty-four compensation claims against Shell went to court in Nigeria. In early 1998, Shell was reportedly involved in over 500 pending court cases in Nigeria, of which 70% or roughly 350 cases dealt with oil spills, the other 30% or 150 cases mostly with other types of damage from oil operations, contracts, employment and taxation²⁵. Chevron, which reportedly only had up to 50 court cases in Nigeria in the whole of the 1980s, was in early 1998 involved in over 200 cases, of which 80–90% or roughly 160–180 cases dealt with oil spills, other types of damage from oil operations, or land acquisition for oil operations.²⁶

Litigation plays several vital roles in environmental governance some of which shall now be examined.

Litigation as an avenue of Compensation for aggrieved persons.

(With focus on Oil and hazardous waste)

Compensation for the aggrieved is perhaps the most important of roles Litigation in Environmental Governance. For example, an aggrieved party can win a declaration from

²⁵Frynas J. G 'Social and environmental litigation against transnational firms in Africa' *Journal of Modern African Studies*, 42, 3 (2004), pp. 363–388.

²⁶ *ibid*

a court that he is the rightful owner of a desecrated land by an oil company and another declaration that the desecration was unlawful but all of this awards will not be of any consequence if the court does not award damages to the owners of the affected land. This is particularly so for properties that have been affected by oil and hazardous substances are usually left barren and infertile and they serve as several sources of living for the community at large, in form of fishing, farming, drinking water as well as houses built on them. Compensation for award then becomes a necessity in this situation.

There have been several cases in which compensation has been granted to the communities affected by Spills Oil and other hazardous substances. Most notably *Shell v. Farah* and *SPDC v. Tiebo*. Which were some of the first cases in which the Courts awarded substantial amount of damages against Oil companies. The facts of both cases are stated below.

In *Shell v. Farah* (1989-94)²⁷ Several families sued Shell for compensation from an oil well blowout in 1970. The oil blowout was quite substantial and it took the oil company several weeks to bring the situation under control. By the time Shell had the situation under control, oil and other substances had polluted the adjoining lands. Several crops trees and other properties were destroyed and desecrated. Farming on the lands in which oil and other hazardous materials were deployed on became impossible as the farming land was rendered infertile by the oil blowout. Consequently, Shell promised to rehabilitate a land area of 13.2 hectares and to hand the land back to the community afterwards. To facilitate land rehabilitation. The community, upon the agreement with Shell, vacated the land. 18 years after the blowout, in March 1988, Shell wrote a letter to the claimants' solicitor claiming that the land had already been rehabilitated and 'handed back' to the claimants, Shell also wrote that it had paid £ 22,000 in compensation for damaged crops, trees and other objects and another £ 1,000 for damage to the land. However, this was not the case as the company had broken its promise and rehabilitation had not been carried out. This rendered the said land useless as the local people could neither farm nor use the land in any other way. Some of the claimants alleged that they had never received any compensation for damages done to the land. The several families involved finally decided to institute an action against shell in 1989 and the Court of Appeal awarded the claimants 4.6 million Naira (c. US\$210,000 at the official exchange rate as at the time it was awarded) in 1994.

In *SPDC v. Tiebo VII* (1987-96)²⁸ Shell was involved in an oil spill in Nigeria in 1987. The representatives of the Nigerian community sued Shell for damage. The oil spill polluted among other things, a river which had previously been used as a source of fresh water and for fishing for the entire community. Members of the community who drank the water after the spill suffered from several waterborne diseases. In addition to the diseases picked up by members of the community, the oil spill damaged swampland,

²⁷ *Shell v. Farah* (1995) 3 NWLR (pt.382) 148

²⁸ *SPDC v. Tiebo* (1996) 4 NWLR (pt.445) 657

streams, fishponds and even religious shrines. Shell did not deny the oil spill, but claimed that it had only affected an area of about 2.3 hectares of seasonal swamp and fish flats. It went further to offer the community 5,500 Naira as 'fair and adequate compensation'. The Court of Appeal awarded the claimants 6 million Naira in compensation (c. US\$275,000 at the official exchange rate as at the time the judgment was awarded in 1995).

Litigation against oil companies in Nigeria has quickly grown since 1994, owing partly to the legal precedent created in the *Shell v. Farah* as well as *Shell v. Tiebo* cases, which significantly increased the quantum of compensation awarded to claimants in suits against oil companies. The *Farah* case helped to justify higher compensation payments, but it was accompanied by other developments such as slightly relaxed rules of evidence, amongst others.

More recently, in 2013 the effect of the high compensation against oil companies for the desecration of property is being seen as the oil companies take preventive measure to avoid decisions in court cases. Five years after a Shell pipeline burst twice, massively polluting fishing grounds in the Niger delta, the company will finally sat down with affected villagers to negotiate compensation cleaning up what one of the largest spills in the world²⁹. However, as at the end of 2013, a deal had not yet been reached as the members of the Niger delta communities affected by the oil spills from rusting shell pipelines unanimously rejected the compensation package offered by the company. The Company offered about 30 million pounds which was rejected at a large public meeting in Bodo³⁰. The pro-activeness of Oil companies mirror's the intended effects of the *Tiebo* and *Farah's Case*³¹.

Litigation as the primary mode of securing and enforcement of Environmental Human Rights in Nigeria

The environment can be best described as the immediate physical surroundings and natural habitat in which an individual exists. The enforcement of rights against breach of environmental human rights of the citizens in Nigeria can only be effectively done through Litigation. The role of litigation cannot be understated in the enforcement of Environmental Human rights as is the primary mode of securing the right to life, Private property, Dignity and even Movement which shall be discussed forthwith.

Against the backdrop of the calamities which have arisen as a result of industrialization and particularly the exploration and exploitation of oil and gas resources, Human rights litigation has a place to prevent, reduce or eliminate self-destructive human

²⁹ Vidal, J. 'Shell to negotiate compensation for 2008 Nigeria oil spill' Punch newspaper Thursday 5th September 2013

³⁰ Vidal, J. 'Niger delta oil spill victims reject 'derisory' Shell compensation offer' Punch newspaper Thursday 13th September 2013

³¹ Supra

activities against the environment.³² There are linkages between human rights and environment, and such linkages can assist to protect human rights and environment.³³ The linkages are better analyzed from the provisions of the 1972 Stockholm Declaration that:

Man has the fundamental rights to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being and he bears solemn responsibility to protect and improve the environment for present and future generations....

Also, the Principle 1 of the 1992 Rio Declaration on Environment and Development provides that:

Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature.

The effective litigation of Environmental human rights in Nigeria is largely dependent on the quality of Environmental laws in Nigeria as well as the awareness of the Nigerian citizens of their rights. Unfortunately, the section of the Constitution that contains environmental law is provided for in the in Chapter II under the Fundamental Objectives and Directive Principles of State Policy. The effect of this is that the provisions of the Constitution which is the mother of laws in Nigeria on environmental laws is not justiciable *per se*.

It is pertinent to note that in the 1990s, the courts aided litigation of environmental human rights by relying on the domestication of the African Charter, a regional instrument on Human Rights. In **Uzoukwu v Ezeonu II**³⁴, the Court Appeal held inter alia that:

There are other rights which may pertain to a person which are neither fundamental nor justiciable in the Court. These may include rights given by the Constitution as under the Fundamental Objectives and Directive Principles of State Policy under Chapter II of the Constitution.

The judicial pronouncement on the rights under the Directive Principles provisions was re-echoed in **Abacha v Fawehinmi**³⁵ where the Supreme Court, relied on the domestication of the African Charter in Nigeria and upheld the decision of the Court of Appeal.

³²Nnamdi G. Ikpeze 'The environment, Oil and Human Rights in Nigeria' www.ajol.info/index.php/naujilj/article/download/82388/72543

³³ *ibid*

³⁴**Uzoukwu v Ezeonu II**[1991] 6 NWLR (pt.200) p.708

³⁵**Abacha v Fawehinmi**[1994] NWLR (pt. 306) p.1

The question arises as to what happens to the non-justiceable rights including the environmental objective provisions that:

The State shall protect and improve the environment and safeguard the water air and land, forest and wildlife of Nigeria³⁶.

The Nigerian Constitutions since inception have contained the International Covenant on Civil and Political Rights (ICCPR).

Litigation on Nigerian Human Rights today are made possible by the Constitutional provisions that give the vest the Courts with the power to wide interpretation. In **Okogie v Attorney General Lagos State**³⁷ Aguda J. opined that: Section 36 of the 1999 constitution, as well as other provisions under chapter IV of same constitution should be broadly and generously interpreted in order to give full recognition and effect to those Fundamental Rights and Freedoms.

It is expected that the Courts must be liberal and proactive particularly where acts are carried out that resulted in environmental degradation or pollution as decided in **Shell Petroleum Development Co. Ltd v Farah**³⁸ where Onalaja JCA as then was opined what is today referred to as a land mark decision on Oil pollution as follows:

There is a universal phenomenon of Oil blow-out in Oil industry as recorded in Alaska, United States of America over the EXXON Oil spillage saga and more recently in the Republic of Russia. The judgment of learned brother is a guide and an appraisal of the law about Oil Spillage or blow-out in Nigeria now. It will serve as beacon of light to Oil Mineral Producing areas of Nigeria as to the certainty of the legal rights of the citizens in claims for compensation arising from oil spillage or blow out.

It is also a guide to the oil companies in settlement of compensation arising from oil spillage or blow-out. Very impressive is the emphasis on legal rights of citizens in relation to negative effects on their immediate environment as well as the caution on companies involved in what can lead to environmental pollution.

It is pertinent to note that Sections 33 and 34 of the Constitution which guarantees the right to life and human dignity are enforceable and also very relevant in the litigation of Environmental Human rights issues in Nigeria.

Now more than ever in an age where the Corporate world dominates the economy, Litigation seems to be the only redress against the breach of environmental human rights perpetrated by the numerous Manufacturing Companies as well as Oil giants. It is no point of debate that Litigation plays a pivotal role in securing these rights in Nigeria.

³⁶Section 20 of the 1999 Constitution of the Federal Republic of Nigeria (as amended in 2011)

³⁷*Okogie v Attorney General Lagos State*[1981] 1 NCLR 218

³⁸supra

Jurisdictional issues of Litigation in Environmental Governance

The issue of Jurisdiction is very much Jermaine in the litigation of an matter premised on Environmental governance in Nigeria. The jurisdiction referred to is not only that of the Courts but also that of the Litigants as well as that of those suing in representative a representative capacity. The role of Litigation then becomes clear as it helps clarify several jurisdictional issues in a claim under environmental law some of which will now be considered.

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 are a nullity.³⁹ The Supreme Court held in *Yahaya v. The State*⁴⁰ that once a mandatory provision of the law is not followed, the trial is rendered null and void ab initio. Uwais, CJN stated thus:

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.

Some of the pre-conditions for the exercise of jurisdiction on matters relating to environmental governance are as follows:

Cause of Action

Litigation helps determine whether the plaintiff has a cause of action based on environmental law which is valid and enforceable as provided by law. In other words, the plaintiff must have sufficient interest and a locus standi in the matter.

In oil spillage cases, the right to fishery in tidal water is recognized in law as such cause of action and locus standi can be derived there from. In *ELF Nigeria limited v. Sillo & Anor*⁴¹, the Supreme Court relying on *Adeshina v. Lemour*⁴² 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.⁴³ locus standi is the right of the party to appear and be heard on the question before the court as stated in *Senator Adesanya v. President of Nigeria*⁴⁴; See also *Edjerode v. Ikine*⁴⁵; *A-G Federation v. A-G of the 36 States*⁴⁶;

³⁹ *Jika v. Akuson* (2006) ALL FWLR (pt.293) p. 276

⁴⁰ *Yahaya v. The State* (2002) 3 M.J.S.C 103

⁴¹ *ELF Nigeria limited v. Sillo & Anor* (1994)6 N.W.L.R (pt. 350) 258

⁴² *Adeshina v. Lemour* (1965) 1 All N.L.R. 233

⁴³ Okonkwo, T. 'The Law of Environmental Liability' (Lagos: Afrique Environmental Development & Education, 2003), p.115.

⁴⁴ *Senator Adesanya v. President of Nigeria* (1981) 2 N.C.L.R 388

⁴⁵ *Edjerode v. Ikine* [2002]2 M.J.S.C 163

⁴⁶ *A-G Federation v. A-G of the 36 States* [2001] 6M J.S.C 69

*Arabambi v. A.B.I. Ltd*⁴⁷; *Yesufu v. Governor Edo State*⁴⁸

Representative Capacity

In certain cases of environmental wrong to a group of people e.g. where there has been an oil spillage that has affected crops, rivers and farmlands of an entire community, there is usually the need for Litigation in representative capacity. This is where a selected member or members of the community are chosen to represent the whole community in an action against a joint defendant. Where the suit is on a representative capacity, there must be authorization⁴⁹ and the persons who are to be represented and those representing them should have same interest in the matter.⁵⁰

This is mode of authority in the instance above as well as procedure in which representatives in actions for environmental wrongs are to adapt especially in issues such as the desecration of community rivers or joint farmlands.

Pre-action notice

There are different pre-action requirements before a matter can be instituted in court. Where there is need for a Pre-action Notice, the plaintiff must serve such pre-action notice. The court held in *Asogwa v. Chukwu*⁵¹ 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*⁵² the court held that service of court process is a condition precedent to vesting jurisdiction in the court.

Statutory limitation

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*⁵³ that in limitation of action, time begins to run from the date cause of action arose. 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 *Aremo II v. Adekanye*⁵⁴ held that a fresh cause of action arises from time to time as often as the damage is caused. In all these cases, the Supreme Court was faced with the determination of the importance of the rules of

⁴⁷*Arabambi v. A.B.I. Ltd* [2006]3 M.J.S.C 61

⁴⁸*Yesufu v. Governor Edo State* [2001] 5m.J.S.C 128.

⁴⁹*Ndule v. Ibezim* [2002] 12 M.J.S.C 150.

⁵⁰*Shell Petroleum Development Company Nigeria Limited v. Chief Otoko & Ors.* (1990) 6 N.W.L.R (pt 159) 693

⁵¹*Asogwa v. Chukwu* (2003) 4 N.W.L.R (pt. 811) 540 at 552

⁵²*Teno Engineering Ltd v. Adisa* [2005] 7 M.J.S.C 89

⁵³*Akibu v. Azeez* (2003) 5 N.W.L.R. (Pt. 814) 643

⁵⁴supra

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. This can only be brought to light where the matter is instituted and instituted correctly ergo, the role of Litigation. In *7up v. Abiola*⁵⁵ 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.'²⁹

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*⁵⁶ that what determines jurisdiction of the court to entertain a suit is the claim of the plaintiff. In *Menakaya v. Menakaya*⁵⁷ 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.⁵⁸ The move by the Supreme Court is recognition of the necessity of authority 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 Supreme Court developed the law because the victims and the court are aware of this and for the victim, it is better for him that the problem of jurisdiction is not raised at all or decided earlier. The victim therefore ensures that he files the case in the court with authority. This move by the Supreme Court is also underscored by the fact that where there is mistake in filing the case in the proper court, the defendant may get the case moved, or even get the case dismissed altogether by filing a motion to 'Dismiss for lack of jurisdiction'. 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.⁵⁹

⁵⁵ *7up v. Abiola* [2001] 5 M.J.S.C 93 at 97.

⁵⁶ *Abu v. Odugbo* [2001] 7 M.J.S.C 87 at 91.

⁵⁷ [2001] 8 M.J.S.C 50.

⁵⁸ *Eze v. A-G Rivers State* [2002] 1 M.J.S.C 87

⁵⁹ Ladan, M.T 'Judicial Approach To Environmental Litigation In Nigeria' A paper presented at a

4-Day Judicial Training workshop on Environmental Law in Nigeria 5 - 9 February, 2007

Limitations of jurisdiction

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.*⁶⁰ In that case, the Supreme Court was called upon to decide whether the judgment of the Court of Appeal upholding jurisdiction of the high court was ultra vires. In responding to the problem, the Supreme Court referred to the Abel Isaiah 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.⁵⁵ The court held that the provision of 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.

The Role of Litigation on Jurisdiction in Environmental cases is not limited to the above but cuts through different areas of environmental law, policy and enforcement. Litigation helps interpret the laws as to the above stated issues for the purpose of clarifying the various jurisdictions in order to make seeking redress by the aggrieved parties easier.

Conclusion

This Paper sought to examine the role of Litigation in Environmental governance in Nigeria. In achieving this goal, the legal framework of environmental governance was considered with the purpose of better understanding the concept of environmental governance which included the laws governing the environment in Nigeria, the regulatory and enforcement agencies as well as the Nigerian environmental policy.

The paper, based on the legal framework of the Environmental Governance then examines some of the roles that litigation plays in the enforcement of the laws on environmental governance with a consideration of the perspective of the aggrieved party in an environmental matter. This was done by a foundational understanding of what litigation is as well as how it applies to environmental law.

There is no doubt that litigation has played a vital role in and still has a lot of contributions to make to environmental governance in Nigeria.

⁶⁰ supra

Recommendations

It is therefore recommended as follows

- It is humbly recommended that there should be a practice procedure exclusively for the enforcement of environmental rights in Nigeria this is so as to avoid the many tedious procedure and requirement that are associated with the general practice procedure in Nigeria
- It is further recommended that there should be sensitization programmes with the view to educating Nigerians on the need to enforce their rights and the process associated with enforcing their rights through litigation.
- Lastly, I recommend that there should be Legal workshops associated with various types of legal environmental issues for lawyers to better equip them with information needed in properly litigating environmental matter

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