PROSECUTING ENVIRONMENTAL POLLUTION CASES IN NIGERIA: THE HEAD OF A CARMEL PASSING THROUGH THE EYE OF A NEEDLE

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Abstract

Environmental cases still do not fall under any special head of claim or under any special procedure in Nigeria in spite of the significance of the apprehensions which violations of environmental laws cause. The common law tort of negligence, nuisance and *Ryland v Fletcher*(1868) LR 3 HL 330 still hold sway in proving environmental cases in Nigeria. These traditional common law principles together with the absence of express right to clean environment in the Constitution of Nigeria and the challenges of jurisdiction in environmental cases have made environmental litigation a difficult task for claimants most of whom are poor rural dwellers desiring to stop polluters from polluting their God-given environment. The focus of the article is on the procedure for prosecuting environmental claim in Nigeria and the need for a reform in an effort to advance the right to clean, healthy and sustainable environment. The article suggests a reform of the rules of procedure to reflect a relaxation on some of the time-honoured common law principles in environmental cases so as to allow the law on environmental right's claim inNigeria develop. The article suggests changes in the state of the laws which will directly includethe right to clean environmentin the list of those rights which can be enforced under the Fundamental Rights (Enforcement Procedure) Rules in Nigeria.

Keywords: Burden of proof, environment cases, jurisdiction, prosecution, pollution.

1. Introduction

Given the importance of oil exploration to the Nigerian economy there is apparent lack of will by the Federal Government of Nigeria (FGN) to enforce strict environmental standards against oil companies.[1]For the same reason, the laws relating to the enforcement of the rights of victims of environmental pollution have been patterned by legislators and applied by the courts towards giving

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[1]See EO Ekhator, 'Public Regulation of the Oil and Gas Industry in Nigeria: An Evaluation' (2016) 21 (1) *Annual Survey of International & Comparative Law*, 89.See alsoJ. Effiong, 'Oil and Gas Industry in Nigeria: The Paradox of the Black Gold', PE Taylor, (ed.) *Environment and Social Justice: An International Perspective (Research in Social Problems and Public Policy*, Vol. 18), (Emerald Group Publishing Limited, Bingley, 2010)333. <https://doi.org/10.1108/S0196-1152(2010)0000018013>. See also BE Umukoro, 'The Ogidigben EPZ Gas Project and the Environmental, Health and Human Rights Implications' (2017) 1 (1) *Ajayi Crowther University Law Journal*, 1-38; Umukoro, BE 'Gas Flaring, Environmental Corporate Responsibility and the Right to a Healthy Environment' in Festus Emiri & Gowon Deinduomo (eds.) *Law and Petroleum Industry in Nigeria- Current Challenges* (Malthouse Press Ltd., Lagos: 2008) 49-64.Research has shown that some of the important environmental statutes in Nigeria are not enjoying compliance from oil prospecting companies and the Federal Government of Nigeria has not been forceful about punishment. See OJ Olujobi, *et al*, 'The Legal Framework for Combating Gas Flaring in Nigeria's Oil and Gas Industry: Can It Promote Sustainable Energy Security?," (2022) 14 (13) *Sustainability*, 4. <https://doi.org/10.3390/su14137626>. See also BE Umukoro, 'Looking Beyond the Constitution: Legislative Efforts toward Environmental Rights in Nigeria: A Review of Some Salient Legislations' (2022) 9(2) *Brawijaya Law Journal: Journal of Legal Studies*,141- 164. <http://doi.org/10.21776/ub.blj.2022.009.02.03>

oil companies some respite, if not protection, from the volume of litigation seeking for redress and environmental justice.[2] A very clear example of the reasoning of the average Nigerian judge in oil related cases or environmental pollution claims, is first, as to how the court's decision will affect the defendant (oil company) and by extension the FGN, while the right of the victim to clean environment comes second.[3]It is very common for Nigerian courts to refuse injunctions seeking to stop multinational oil companies from prospecting oil in Nigeria even if the activities of the defendant will greatly impact on the health of the claimant(s) or those living in the environment. To the courts, to grant such an order would amount to asking the multinational oil prospecting companies to stop their operations and that would greatly affect the country's revenue.[4]

This article seeks to examine the challenges which environmental pollution victims who approach the court for remedies in Nigeria face, particularly, as a result of the existing complex legal procedures (which are not human rights friendly). The article recommends the establishment of special courts for environmental claims and an amendment of S. 46(1) of the Constitution to vest power in the high courts over environmental rights contained in the African Charter on Human and Peoples' Rights.These recommendations have become imperative because of the role which environmental litigation plays in getting polluters to account for environmental harms.[5]

2. The Issue of Jurisdiction in Environmental Cases in Nigeria

One of the controversies introduced by the Constitution[6] is in the area of jurisdiction between the State High Courts (SHCs) and the Federal High Court (FHC). This played out most prominently in the adjudication of oil and gas cases.[7] The 1979 Constitution indirectly vested the FHC with exclusive jurisdiction vide S. 7 of the Federal High Court Act[8] over items which are now listed under S. 251 (1) (n) of the 1999 Constitution.[9] The Constitution in S.251(n) directly provides for the exclusive jurisdiction of the FHC in matters relating to mines and minerals including oil mining, oil fields, natural gas and geological surveys.

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[2]K. Nwuke, 'Nigeria's Petroleum Industry Act: Addressing old problems, creating new ones' (Brookings, 24 November 2021) <https://www.brookings.edu/blog/africa-in-focus/2021/11/24/nigerias-petroleum-industry-act-addressing-old-problems-creating-new-ones/> accessed 23 March 2023

[3]H Awodezi 'Prospects and Challenges to Prove Environmental Harm in Litigation: Status Quo In Nigeria'(2022) 2 (3) *Journal of Environmental Law & Policy* 139-153 https://doi.org/10.33002/jelp02.03.04

[4]*Allar Irou v Shell B.P Development Company (Nigeria) Limited*(unreported) Suit No. W/89/71 Warri High Court 26/11/73 (Unreported)

[5]A. Mmadu, 'The Search for Environmental Justice in the Niger Delta and Corporate Accountability for Tort: How Kiobel Added Salt to Injury' (2013) 1(1) *Afe Babalola University Journal of Sustainable Development Law and Policy*, 149-170.

[6]The Constitution of theFederal Republic of Nigeria 1979.

[7]*Shell Pet Dev Co. Ltd v H. B. Fishermen* (2002) 4 NWLR (Pt 758) 505

[8] Cap. F12 Laws of the Federation of Nigeria (LFN) 2004.

[9] Constitution of the Federal Republic of Nigeria 1999 (as amended) (hereafter, the Constitution).

By these provisions, the FHC as against the State High Courts became vested with exclusive powers to hear and determine cases having to do with environmental pollution and by implication environmental rights' claims. Under the 1979 Constitution, the exclusivity of the jurisdiction of the Federal High Court presented a measure of controversy for two reasons: first, the 1979 Constitution did not directly vest the FHC with exclusive jurisdiction. The National Assembly pursuant to S. 230 (1) of the 1979 Constitution enacted the FHC Act conferring exclusive jurisdiction on the FHC. Thus, the exclusiveness of the jurisdiction of the FHC before 1999 was vide an Act of the National Assembly and subsequently by a Decree.[10] Second, S. 236 of the 1979 Constitution vested the State High Courts with 'unlimited Jurisdiction'.[11] It is worthy of note that the issue of the exclusiveness of the jurisdiction of the FHC vide S. 7 of the FHC Act and thewide jurisdiction of the SHC at the same time created no small dispute as to the dividing line between the jurisdiction of the FCC and the SHCs. The Supreme Court in the case of *Savannah Bank Ltd v Pan Atlantic Shipping and Transport Agencies Ltd*[12]has held that S. 7 of the FHC Act which vested the FHC with exclusive jurisdiction was inconsistent with S/ 236 of the 1979 Constitution which declared the jurisdiction of the State High Court to be "Unlimited." This decision dealt a great blow on the jurisdiction of the FHC as the case of Savannah Bank became a *locus classicus* for saying that both FHC and the SHCs have concurrent jurisdiction over the items listed in S. 7 of the FHC Act. This controversy raged for a period of time until the military took over and suspended the 1979 Constitutionby virtue of a Decree.[13] S. 230(1)(o) of this Decree forcefully restored the exclusive jurisdiction of the FHC. The issue of the exclusivity of the jurisdiction of the FHC was therefore put to rest by the said Decree. In 1999, a new Constitution was enacted. When the 1999 Constitution was put in place it was designed to deliberately cure some of this jurisdictional anomaly. The 1999 Constitution does not only directly confer exclusive jurisdiction on the FHC, it also divested the SHCs of their 'unlimited jurisdiction' as the phrase was carefully avoided in S. 272 (1) of the 1999 Constitution.

Since the exclusive jurisdiction of the FHC has been upheld strictly as far as it affects any of the items listed under S. 251(1) of the 1999 Constitution. This however has not resolved the questions surrounding the jurisdiction of the FHC and the SHC.Environmental pollution cases are still being stuck out on the basis of lack of jurisdiction.[14] The jurisdiction of the FHC has also been queried that even though it has exclusive jurisdiction over environment cases, it is not a special court for

[10]Federal High Court (Amendment) Decree no. 60 of 1991
[11]*Savannah Bank Ltd v Pan Atlantic Shipping and Transport Agencies Ltd* [1987] SCNLR 87
[12] Ibid
[13] The Constitution (Suspension and Modification) Decree no.107 of 1993
[14]*Shell Pet. Dev. Co. v Abel Isaiah* (2001) 5 S.C (PT. II) 1; see also *Shell Pet. Dev. Co. v. H.B. Fishermen*, (n7) and *Shell Pet. Dev. Co. v Tiebo VII* (2005) 3-4 S.C. 137.

that purpose.[15]Given that the issue of jurisdiction is very grave and being that it is the bedrock of every litigation several environmental pollution cases have been fought and lost on ground of jurisdiction alone.[16] Besides, it has been stated that the FHC is not better placed to deal with environmental pollution cases in a "fairly, timely and effective way".[17]

The major challenge which the exclusiveness of the jurisdiction of the FHC presents is that the judicial divisions of the FHC are few and far between, a situation which has caused tremendous economic hardship and inconveniences to litigants. The judicial divisions of the FHC are still not in every state of the federation. For instance, there was no FHC in Delta State of Nigeria until 2013inspite of the volume of environmental pollution cases that emanated from that State. The judicial division of the FHC in Benin City, Edo State of Nigeria heard cases which arose from Delta State and Edo State until a division of the FHC was created in Delta State a decade ago. Again, the courts are located mostly in the State's capitals, away from the rural communities where the effects of oil pollutions are mostly felt.[18] The victims of environmental pollution travel a distance in some places in order to access these courts for redress.[19] It was only recently that an annex of the FHC was created in Warri, Delta State of Nigeria as a result of the serious pressure on government to bring the court nearer to the local people who are the victims of the oil exploration activities. This brought the number of FHC in Delta State to two.These courts are still far away from litigants who suffer the most form environmental harm in the hinterland of the State. These poor victimsprefer to abandon their rights because they cannot afford the cost of prosecutingcasesfrom such a distance.Issue of jurisdiction being a fundamental one the courts on the other hand have no challenge striking out cases wrongly filed at the SHC instead of the FHC.[20]This paper contends that this scenariosdo not represent the concept of environmental justice.[21] It was on this premises that Ladan asks:

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[15]CE Ibe and EO Akwa 'Mechanisms for Access to Environmental Justice in Nigeria: Challenges and Prospects' (2012) 5 (2) *AJLHR* at 6

[16]*Barclays Bank of Nig. v. CBN* (1976) 6 SC 175. Also *Oloba v Akereja* [1988] 3 NWLR (pt.84) 508; *A.G. Lagos State v Dosunmu* [1989] ALL NLR 504 and *Usman Dan Fodio University v Kraus Thompson Organisation Ltd.* (2001) 15 NWLR (Pt.736)

[17]T Alatise, 'Jurisdictional Problem in Environmental Litigation in Nigeria: Lessons From NewSouthwales' (2022) 30 (1) IIUM Law Journal at 78.AlsoSG Ogbodo, 'The Role of the Nigeria Judiciary in the Environmental Protection against Oil Pollution: Is it active Enough?
<http://www.nigerianlawguru.com/articles/environmental%20law/THE%20ROLE%20OF%20THE%20NI<GERIAN%20JUDICIARY%20IN%20THE%20ENVIRONMENTAL%20PROTECTION%20AGAINST%20OIL%20POLLUTION,%20IS%20IT%20ACTIVE%20ENOUGH.pdf> accessed 5 March 2023.

[19] Ibid.

[20] *C.G.G. (Nig.) Ltd. v Amaewhile*(2006) 3 NWLR pt. 967 at 284. See also *NNPC & Anor v. Orhiowasele&Ors* (2013) LPELR-20341(SC)

[21]J. Nwanzi 'Compensation for Damage arising from Seismic Operations in Nigeria: Constraints and Remedies'
<http://www.nigerianlawguru.com/articles/oil%20and%20gas/COMPENSATION%20FOR%20DAMAGE%20ARISING%20FROM%20SEISMIC%20OPERATIONS%20IN%20NIGERIA,%20CONSTRAINTS%20AND%20REMEDIES.pdf>

> 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?" 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.[22]

3.The Burden of Proof in Environmental Pollution Cases

Besides the issue of jurisdiction there is the challenge of proof in environmental cases. Environmental pollution cases are special specie of civil action in that most times scientific evidence of experts is required to successfully prove Claimant's assertions. Though, the burden of proof in environmental cases is as in every civil case, that is, on the balance of probability, the evidence required, most times, to prove the cause of the damage must be of quality and verifiable thereby making the evidence of scientific experts for instance indispensable. To this end, environmental pollution cases are much more technical requiring detailed empirical evidence. A number of cases have failed on this account alone.[23]

In *Ngbor v. Compagnie Generale De Geophysique (Nig.) Ltd*,[24]the plaintiff's claim was that his sound factory was damaged by the defendant's seismic activities. Thus, the Plaintiff needed to demonstrate with concrete evidence the nature of such activities and how it affected Plaintiff's factory as alleged. This he can only do through an expert. The plaintiff could not afford one Million Naira which was the expenses of bringing an expert witness to testify for him in the industrial noise and vibration control suit. He was to testify that the dynamite shot which allegedly caused the damage was fired at a distance which was not safe. The defendant was able to call a witness who gave evidence that the dynamite was shot at a distance which was considered safe by seismic standard. There was no expert evidence to contradict the defendant evidence and as such the court accepted it and relied on it and the plaintiffs' case was dismissed.

Again, in *Seismograph Services (Nig.) Ltd. v Ogbeni*,[25] the plaintiff lost the claim that defendant's seismic activities caused damage to his buildings. The plaintiff could not procure the services of a seismologist to ascertain and testify as to whether the vibration arising from the seismic explosions were the cause of plaintiff's collapsed buildings.In *Seismograph Services Ltd. v Onokposa*,[26]the Respondent case was that the Appellant caused damages to his building during appellant's seismic

[22]MT Ladan, 'A Critical Appraisal of Judicial Attitude towards Environmental Litigation and Access to Environmental Justice in Nigeria, p. 20 being a text of paper presented at the 5th IUCN Academy Global Symposium, Rio de Janeiro, Brazil, 2007, 33

[23]SA Fagbemi and AR Akpanke 'Environmental Litigation in Nigeria: The Role of the Judiciary (2019) 10 (2) *NAUJILJ*. Also*George Ngbor v Compagnie Generale De Geophysique (Nig.) Ltd & Anor*,unreported suit No. BHC/30/93; *Seismograph Services (Nig.) Ltd. v Ogbeni*(1976) 4 S.C. 85 and *Seismograph Services Ltd. v Onokposa* (1972) All NLR 347

[24]Unreported suit No. BHC/30/93

[25](1976) 4 S.C. 85

[26](1972) All NLR 347

operation as a result of vibrations. Similarly, the respondent did not call any expert evidence in support of the casual link between the damage and the appellant's seismic operations. The apex Court held that the lower courts would have acted on the unchallenged expert evidence by the appellants. The Court reversed the decision of the lower court which granted respondent's claim for damages.

It is needless to state that the line of cases summarised above could be very frustrating to victims of oil pollution. Most times, victims of environmental degradation are too poor to enforcetheir rights.Prosecuting environmental pollution cases requires high cost of legal fees and securing credible witnesses. This challenge will remain so as long as the right to clean environment remains in the realmscompensation claims and award of damages like every other civil right under the common law of tort. Thus, pollution victims must continue discharge the burden of proof with respect to causation, foreseeability and damage. As rightly observed, "[a]lthough an action in negligence affords victims of oil pollution access and opportunity for judicial redress, yet the burden of proof is a major hurdle for the rural plaintiffs to scale. As a result of their lack of education and resources to hire the services of expert witness they invariably fail to discharge the burden of proof".[27] While critics blame the courts for always finding it more convenient to lean on the side of the offending oil prospecting companies, the courts themselves are blaming the failure of this class of cases on the prosecuting counsel. The Court while dismissing a claim on the basis of failure to call expert evidence noted with regret as follows:

> It must be observed that the production of an expert opinion to establish that the shot point was either 40 or 180 meters as alleged by the Respondent in his pleading and evidence, and, even at the 170 meters radius claimed by the Appellant, is a requirement of the law which every diligent Counsel ought to have advised his client on its absolute necessity and work assiduously to procure the same i.e. a Geo-Physicist or even a Geologist. It is perhaps pertinent to point out, based on the wrong notions held, that Courts do not deny or deprive the victims of seismic activities of oil exploration companies of their entitlements to damages resulting therefrom, rather, it is the ineptitudeof their Counsel that invariably puts them in the doldrumsand submerge their rights to compensation. It is obviousthat their failure to succeed is largely attributable to flagrant exhibition of recklessness, lack of research skilland in-depth study of the facts, the applicable laws, etc, on the part of some Counsel, who often respond to their mindsand not to their brains.[28]

While one or two lawyers may have a share in this blame, it is important to note that most lawyers prosecuting environmental cases know the extent of the evidential burden on his client, his challenge is rather the capacity of his client to procure the services of the expert witness. Though the courtsperform their legitimate duty when they stick to the traditional rule of evidence and throw pollution cases way on account of lack of expert evidence, there is a call on the courts to begin a

[27]Ogbodo, (n17).
[28]*CompagneGenerale de Geophysique (Nig) Ltd v. Anozie* (2018) LPELR-46185(CA)

process of revolutionising the rules. An example is the case of *Centre for Oil Watch v NNPC*[29] when the Supreme Court of Nigeria departed from the old common law principle of *locus standi* by creating an exception to its application in public interest litigation on environmental cases.[30]The courts are enjoined to approach environmental cases from a human right angle. From human rights perspective, environmental pollution can be litigated with less uncertainty, technicality and expense. Claims that are based on human rights are less technical to prove, faster and cheaper to institute, and could be financed both by victims or third parties in a representative capacity or in the public interest.

Ladan, however, is of the view that applying certain common principles, for example,the presumption of *res ipsa loquitur* and the rule in *Rylands v. Fletcher*[31] to hold the defendant strictly liable without proof could be of some help to victims of oil pollution.[32] The apex Courthas in some cases applied these principles to infer negligence from the facts before it and dispensed with the requirement of proof. For instance,in *MachineUmudje v Shell,*[33] the apex Court stated that it could draw necessary inference of negligence to uphold plaintiff's case. The Court has also held that the presumption of res *ipsa loquitur* fastens liability on the defendant. 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.[34] Ladan argues that this approach could help to lighten the task of the victims and facilitate justice.[35] It has been suggested too that the law should be amended to attach strict liability to environmental cases.[36]It is argued that apart from environmental cases bothering on seismic activities and the likes for which expert opinion is required, proof of general complaints against oil producing companies over spillages should ordinarily be based on the presence of the substance on the land either by photograph, visit to the scene of spill or via oral testimony of any direct witness. Even if damages are being claimed based on the effect of the spill on the environment, the court should be able to draw that natural inference having come to the conclusion that there spill on the land and it was caused by the defendant oil prospecting company.It is for this purpose that most environmental legislations in Nigeria are now encouraging compensation as against damages.[37]The Oil Pipeline Act 2004 and the Petroleum Industry Act 2021 (PIA), etc provide for compensation for

[29][2019] 5 NWLR (Pt 1666) 517.
[30]Ibid
[31] (1866) L.R. 1 Ex. 265
[32] Ladan, (n22) 33.
[33] (1975) 9-11 S.C. 155
[34] Ladan, (n22) 33.
[35] Ibid.
[36]Adoga-Ikong, et al, 'Compensation for Oil Pollution under Nigerian Law and the Problems of the Victims in Assessing the Damage' (2021) 3 (1) *Journal of Public Administration and Government,* 71.
[37]RA Mmadu, 'Judicial Attitude to environmental litigation and access to environmental justice in Nigeria:Lessons from Kiobel' (2013) 2 (1) Afe *Babalola University: Journal of Sustainable Development Lawand Policy*, 149-170.

various environmental wrong.[38]Interestingly, the PIA charges licensees with responsibility to contribute to the Host Communities Development Trust Fund established under S. 240 (2) of the Act from which host communities are developed. The Federal Government has equally gazetted a regulation, that is, the Nigeria Upstream Petroleum Host Communities Development Regulation 2022 (NUPHCDR) which provides for a dispute resolution mechanism between a licensee and an aggrieved host community when there is a complaint of oil spillage.[39]

Unfortunately, these common law principles have their limitations and cannot guaranteethose who suffer from oil pollution the desired result. For instance, where the defendant has provided a very strong and uncontradicted empirical evidence, the court in almost every case will lean on the side of the defendant and dismiss claimant's case rather than relying on principles of law to award damages in favour of the claimant in the face of compelling evidence- compelling because there is no evidence of similar quality to contradict it. Besides, is the challenge of adequacy of compensation. Sometimes,victims of environmental pollution go home with pyric victory even after successfully proving their cases. The problem of arriving at what is fair and adequate compensation by the courts is predicated, *inter-alia*, on the accurate assessment of quantum of damages submitted by the pollution victims. Where the litigant fails to submit an accurate assessment of harm suffered, the court may be left with no other option than to award what it considers adequate and fair in the circumstances.[40]

4. The Doctrine of *Locus Standi*

Another major challenge faced by victims of environmental pollution is that of the principle of *locus standi*. *Locus standi* is Latin for "place of standing," and it simply means "the right to bring an action or to be heard in a given forum".[41]This rule is aimed at preventing claimants with remote or no interest all from approaching the court.[42]In *Adesanya v. President FRN*,[43]the Court in describing the concept referred to S. 6 (6) (b) of the 1979 Constitution, which is the same with S/ 6 (6) (b) the 1999 Constitution, and held as follows:

It seems to me that upon the construction of the sub-section, it is only when the civil rights and obligations of the person, who invokes the jurisdiction of the Court are in issue for determination that the judicial powers of the Courts may be invoked. In other words, standing will only be

[38]Oil Pipeline Line Act Cap O6 LFN 2004. See also Petroleum Industry Act Federal Republic of Nigeria Official Gazette No. 132 Vol 108 of 27th August 2021(Government Notice no. 134).
[39] Umukoro, (n1) 141- 164.
[40]E Onyeabor, 'Practical Tips on Evaluation and Assessment of Environmental Pollution Damage in Environmental Litigation' (2012) *Journal of Environmental Management and Safety*, p. 141.
[41]BA Garner, Black's Law Dictionary (6thedn, West Publishing Co. USA 1990)
[42]*Attorney General, Kaduna State v. Hassan* [1985] 2 NWLR (Pt.8) 483
[43](1981) 2 NCLR 358.

accorded to a Plaintiff who shows that his civil rights and obligations are in danger of being violated or have been affected adversely by the act complained.[44]

The doctrine has been invoked repeatedly in civil litigation in Nigeria and whenever the court comes to the conclusion that the case of the plaintiff discloses no locus standi, same is fatal to his action in the same way as failure to disclose any reasonable cause of action.[45] Though this doctrine has its own merit as its general objective is to disallow meddlesome interlopers and legal busybodies from wasting the precious time of the court, however in the area of environmental pollution, it has worked more injustice having regard to the nature of environmental wrongs. It was rightly stated that "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."[46] Fortunately, Nigeria courts have started seeing environmental wrongs as different species of civil wrong so as to tailor the rules of procedure in that direction. In *Centre for Oil Pollution Watch v NNPC*,[47] the apex Court spent quality time in addressing what ought to be the current state of the law as far the issue of who has the right standing is concerned. The Court held that NGOs such as the plaintiff, has the requisite standing to sue in environmental cases as this and the "judicial function (is) primarily aimed at preserving legal order by confining the legislature and executive organs of government within their powers in the interest of the public.[48]

Before now it has been difficult for NGO or interest group to take up action in the interest of victims of environmental degradation.While this authority is a landmark decision which has opened up the door for NGOs to take out action on behalf of victims of environmental pollution, the law still does not allow individual victims in certain situations to ventilate their grievances collectively in a representative capacity except they can show that they all suffered equal losses. Otherwise, they must have to sue individually in which case the individual must show that he has suffered some particular direct and substantial harm to his person or property over and above that sustained by the community at large. In *Amos v. Shell BP P.D.C. Ltd*,[49] the Court dismissed plaintiffs claim while holding that special damages are not recoverable in a representative action when the plaintiffs suffered unequal losses.[50] The court held -

[44]Ibid.
[45]*Nwankwo v Ononeze -Madu* (2009) 1 NWLR (Pt.1123) 671 at 698 and *Gamuoba v Esezi II* (1961) 2 SC NLR 237
[46]MA Linda and P Scott *Defending the Environment: Civil Society Strategies to Enforce International Environmental Law* (Transnational Publisher Inc., New York: 2004)
[47](2019) 5 NWLR (Pt 1666) 517
[48]Ibid
[49](1974) 4 ECSLR 48
[50]Ibid.

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

It is worthy of note that before now the law also prevented an individual from litigating public nuisance except with the consent of the Attorney General or the Attorney General is joined as a party to the suit. A failure to bring an action in the name of the Attorney General rendered the suit procedurally defective and incompetent.[51] This was the case until the apex Court abolished this rule. The Court ruled that in the light of S. 6(6)(b) of the 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.[52] Given that environmental wrongs sometimes cut across communities, they are more likely to fall into the category of public nuisance and even though the consent of the Attorney General is no longer required, the common law requirement that a victim must prove that: his claim for special damage is peculiar to himself as against the general interference with a public right; he has suffered beyond the general inconvenience and injury suffered by the public; the particular damage which he has sustained is direct and substantial and the requirement that the individual victim must maintain a separate suit make reliance on the common law for the realisation of the right to clean environment very ineffective.[53]

While the Supreme Court of Nigeria was commended for the recent attempt to liberalised the rule of who has the right standing to sue, it is observed that the doggedness of the courts in sticking to the old common law rules of England in environmental cases still remains a disservice to environmental justice. As rightly noted, unlike the non-communal English society in which the rule as to public nuisance was developed, in Nigeria, includingthe Niger-Delta region, people live in communities and this is where the worst incidents of environmental pollution occur.[54]The Supreme Court was right to move away from this age long doctrine. The apex court in stating the basis from departing from the rule observed that: "… how they share the proceeds of special damages awarded, which is the true worryinforming the dichotomy of who sues in respect of public nuisance, is not [and should not be] the business of anybody [or the court."[55]The role of the common law in the protection of the environment is unprogressive. This system of lawshas been described as not being specific to the needs of environmental protection; not suited to the needs of the polluters; laden with evidential

[51]*Lawani and Orsv The West African Portland Cement Company Limited*(1973) 3 UILR (Pt. 4) 459
[52]*Adediran and Anor v Interland Transport Ltd*. [1991] 9 NWLR (Pt. 214) 155
[53]*Ejowhomu v Edok-Eter Mandilas Ltd*. (1986) LPELR-1071(SC)
[54]WA Chechey 'Judgement and Remedies in Environmental Cases' being a text of a paper presented at the Judicial Training Workshop organised by UNEP and NJI, Abuja, March 28-30, 2006, at 4.
[55] Ibid.

difficulties; expensive and subject to limitation periods.[56]The application of existing civil remedies to cases of oil pollution has created more dissatisfaction than the environmental wrong itself.

6. Enforcement through FREP Rules.

Chapter IV of the Constitution provides for fundamental rights in order to give effect to the protection and enforcement of the rights protected therein. S. 46 (3) of the Constitution, on the other hand,provides the power to make rules regulating the procedure for the enforcement of these rights. Accordingly, Fatayi-Williams, former Chief Justice of Nigeria (as he then was), brought into existence the Fundamental Rights (Enforcement Procedure) Rules 1979 which became operative from the 1st day of January, 1980. The Rules applied to fundamental right proceedings until 1st December 2009 when new rules (i.e Fundamental Rights (Enforcement Procedure) Rules 2009) were introduced by Idris LegboKutigi,(CJN as he then was) bringing in so much changes into fundamental rights proceedings in Nigeria.A major change brought about by these Rules can be found in the objectives of the Rules. Paragraph 3(a) and (b) of the Preamble provides that the principal objectives of the Rules is that the fundamental rights provisions of the Constitution and the African Charter, are to be applied and interpreted purposefully and expansivelyin order to advance and realise the rights and freedoms contained in them and afford the protections intended by them. The Rules equally enjoin the Courts to respect relevant international and regional treaties in applying the Rules.

Such bills include;

(i) The African Charter on Human and Peoples' Rightsand other instruments (including protocols) in the African regional human rights system,

(ii) The Universal Declaration of Human Rights and other instruments (including protocols) in the United Nations human rights system,

(c) For the purpose of advancing but never for the purpose of restricting the applicant's rights and freedoms, the Court may make consequential orders as may be just and expedient.

These objectives presuppose that the rights and freedom contained in the African Charter, for instance, are litigable as fundamental rights to which the FREP Rules 2009 are applicable. The FREP Rules 2009, ordinarily, should bring a sigh of relief to advocates of environmental rights in Nigeria since Article 24 of the Charter on Human and Peoples' Rights recognises the right of "all people… to a general satisfactory environment favourable to their development."[57]Unfortunately, the courts are yet to accept that Article 24 of the African Charter Act or of the treaty itself falls

[56]ObadinaIbrahim, 'Petroleum Production and Environmental Pollution: The Long Awaited Revolution' <https://www.academia.edu/2421413/PETROLEUM_PRODUCTION_AND_ENVIRONMENTAL_POLLUTION_THE_LONG_AWAITED_REVOLUTION accessed 6 March 2023.

[57]EP Amechi 'Litigating Right to Healthy Environment in Nigeria: An Examination of the Impacts of the Fundamental Rights (Enforcement Procedure) Rules 2009, In Ensuring Access to Justice for Victims of Environmental Degradation', 6/3 *Law, Environment and Development Journal* (2010) 320.

outside the non-justiciability clause in the 1999 Constitution. Thus, environmental rights' advocateshave not been able to advance their arguments for the enforcement of environmental rights under the FREP Rules in Nigeria beyond the constitutional limitation in S. 6 (6) (c) of the Nigerian Constitution. According to Amechi, "the definition of a fundamental right under the Rules to include any right under the African Charter Ratification Act does not place rights under the Act on the same fundamental level with rights guaranteed under Chapter IV of the Nigerian Constitution."[58] This simply supports the proposition that Rules of court do not create substantive rights and operate subject to statutory provisions.

It has been observed that Chapter IV of the 1999 Constitution having been duplicated in the African Charter Act, it is only those provision of the Charter reproduced in Chapter IV that are enforceable. Apparently, the right to satisfactory environment contained in Article 24 of the African Charter is not one of those rights contained in the fourth Chapter of the Constitution which provides for fundamental rights in Nigeria. However, from the provisions of the FREP Rules 2009 it can be gathered that it is not the intendment of the rules that application for fundamental rights enforcement be limited to Chapter IV of the Constitution. This can be deduced from order 9 of the FREP Rules 2009 which provides as follows:

> Where at any stage in the course of or in connection with any proceedings there has, by any reason of anything done or left undone, been failure to comply with the requirement as to time, place or manner or form, the failure shall be treated as an irregularity and may not nullify such proceedings except as they relate to–
> (i) Mode of commencement of the application;
> (ii)The subject matter is not within the fourth Chapter of the Constitution or the African Charter Act.

From the underlined, this article posits that the FREP Rules deliberately include the African Charter in the 2009 Rules for the purpose of enforcement. The rules unequivocally provide that Chapter IV of the Constitution and the African Charter shall be expansively and purposely interpreted and applied. If all that the FREP Rules were designed to accommodate were provisions of Chapter IV of the Constitution only, there would not have been the need to drag in the African Charter which contains more rights than provided for in Chapter IV of the Constitution. This argument is further strengthened by the fact that the old Rules did not make any allusion to the African Charter.

Besides, the 2009 Rulesprovide for the commencement of Fundamental Right cases by interest group and third parties thereby abolishing the time- honoured principle of *locus standi* as far as cases under those rules are concerned. Paragraph 3(e) of the Preamble to the 2009 Rules allows applications to be filed by others on behalf of the actual person whose rights is affected.

[58] Ibid

While this provision is in line with the Supreme Court decision in *Centre for Oil Pollution Watch v NNPC*[59] on the issue of *locus standi*, whether environmental rights are actionable as fundamental rights is still a huge academic debate in Nigeria. If the provisions of FREP Rules are recognised as applicable to environmental rights' claim, that will be a great relief to poor victims of environmental pollution who do not have the means of prosecuting expensive environmental pollution cases. The rules also suggest that applicants can file representative action and same would not be struck out on the argument that applicants cannot litigate separate causes of action collectively. Going by these Rules, NGOs and other public spirited individuals are at liberty to approach the Court on behalf of any personwhose fundamental rights are affected or threatened either by any individual or by the government. Unfortunately, these threats do not include threats posed by environmental pollution.That is, the right protected by Article 24 of the African Charter Act does not include the category of rights defined in the fourth Chapter IV of the Constitution for which application for enforcement can be made to court. There is a dire need for an amendment of the Constitution to include environmental rights in the fourth chapter, particularly by reviewingS. 46 (1)of the Constitution which at the moment limits the enforcement of fundament rights to those rights stated in Chapter IV alone.Extending the FREP Rules to environmental rights claim is a huge breakthrough for the advancement of environmental rights and a great respite to applicants who ordinarily are not able to fund the full blown trial process of environmental pollution cases under the common law of tort.

By order 2 rule 2 of the 2009 Rules, fundamental rights' cases can be commenced by originating motions or originating summonsor by other modes accepted by the court.This is a guarantee for speedy disposal of cases under the FREP Rules. This tends to make the procedure very expeditious, less expensive and less technical.Under the 1979 Rules an action for enforcement of fundament rights was time-barred. The cause of actions lapses after 12 months of its occurrence. This is the case with most civil actions. However, the 2009 Rules abolishthe application of limitation lawswith regards tofundamental rights' proceedings.[60]

In addition, both the FHC and the SHC have concurrent jurisdiction to hear fundamental rights' cases.[61] This affords litigants the opportunity to institute fundamentalrights' action within their locality as there is at least a High Court in almost every local government area in Nigeria. Thus, if the right to clean environment is recognised as fundamental right in Nigeria, procedure for prosecuting environmental claims will benefit the objectives of environmental protection laws more and will restore the confidence of those seeking to approach the courts for environmental claims to ventilate their grievances.

[59](n29)
[60]Order 3 rule 1 of the Fundamental Rights (Enforcement Procedure) Rules 2009.
[61] See 46 (1) of the Constitution.

7. Conclusion

There is a blame game between the judges and the lawyers prosecuting environmental cases in Nigeria. While the judges feel powerless to relax the law on the burden of proof in environmental pollution cases, the advocates feel it is an easy way out for the courts to lean tenaciously on the rule of evidence as well as practice and procedure which undermine the justice of environmental pollution cases since it is easier to send the poor claimant home empty handed than to disrupt the flow of government revenue. Judges will often stick to the rules and will depart very rarely. The article therefore recommends a comprehensive review of the procedure and the practice for initiating and proving environmental pollution cases in Nigeria including the rule on the standard of proof just as the apex Court reviewed the law relating to *locus standi* and came up with a holding exempting public interest litigation in environmental cases from the rule.

Beyond the review of the rules, there is the need for a special court or tribunal in Nigeria for environmental pollution cases as the FHC which is constitutionally vested with exclusive jurisdiction over mines and minerals is already overwhelmed with a numbersof other cases over which its jurisdiction is equally exclusive. The benefits of a special court are overwhelming. Chief among these is that "specialized courts of limited and exclusive jurisdiction are seen as fulfilling a growing need for expertise in increasingly complex areas of law.[62]It is a fact that if labour dispute needs a special court, environmental pollution claims need it more. Effective environmental litigation provides a medium for coercing the State to implement environmental laws and more importantly, a forum for holding polluters accountable for the harmful activities on the environment.[63] In spite of the volume of laws in Nigeria on the environment and the obligation on the government to protect and improved on the environment, inhabitants and those who play host to oil companies will continue to suffer environmental injustice if the procedure for realising environmental claims is not enhanced.

[62]*Skye Bank v Iwu* (2017) 16 NWLR (Pt 1590) 24 at 93. See also BE Umukoro, and PAOboreh, 'Is the National Industrial Court (NIC) still a Special Court? A Review of the Extra Luggage of Ancillary Jurisdiction of the NIC as a Disservice to Labour Justice'(2022) 13 (4) *Beijing Law Review*, 948-966. https://doi.org/10.4236/blr.2022.134061

[63] Ibid.