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ACCESS TO JUSTICE IN ENVIRONMENTAL LAW IN NIGERIA: CHALLNGES AND THE WAY FORWARD

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Abstract

Nigeria has come a long way in economic development since the discovery of crude oil in commercial quantity in Oloibiri, a village in the present Bayelsa State in 1958. With the discovery of crude oil, many multinational oil companies were granted license to engage in economic activities such as crude oil prospecting, mining and exploration in the Niger Delta. Economic activities of these multinational oil companies and individuals in most cases have caused environmental pollution which has rendered the environment unclean and unwholesome for human habitation and damage to property. This is a violation of the right of every person to a clean and healthy environment and right to property as contained in international conventions. Environmental law provides remedies for any person whose right to clean and healthy environment may have been infringed. It is sad to note that there are legal obstacles which a defendant in an environmental suit can explore to circumvent the course of justice. This paper emphasizes the legal obstacles which a litigant who approaches the court to enforce his right in environmental law may face which can deny him access to environmental justice and also proffer ways through which these legal obstacles can be surmounted.

Keywords: Legal Obstacles, Access to Justice, Environmental Law, Charting, The Way Forward

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1. Introduction

A worrisome dimension to the plethora of complications associated with the environment is the issue of environmental abuses inflicted by many multinational companies engaged in exploitation of oil, mineral, timber or other natural resources in the African continent, particularly Nigeria.[2] Environmental abuses manifest in oil spillage, gas flaring, oil pipeline blowout and vandalization, groundwater contamination, wastewater discharge, *etc*. This has with it the resultant effect of destruction of lives and property, loss of means of livelihood of the people occupying the geographical area abused. This is the experience of those occupying the geographical area of Nigeria known as Niger Delta where oil exploration and prospection are carried out by multinational oil companies. The Niger Delta environment to say the least has suffered inexplicable abuses from the activities of these multinational oil companies. Expectedly, any person who has suffered injury or loss as a result of environmental degradation occasioned by the activity of another should have an unhindered access to court to seek redress against such an environmental abuser. Sadly, this is not the case. The road leading to environmental justice in Nigeria is not an easy road like a song writer would say as environmental litigants have hurdles which they must first of all surmount before the court would find justice for them.

There are plethora legal obstacles which tend to bar environmental litigants from easily accessing justice for the injury or loss arising from environmental degradation which they have suffered. It is sad to note that these legal obstacles in many cases have successfully shut the door of environmental justice on many victims of environmental degradation. This paper aims to consider these legal obstacles which have been utilized by defendants in environmental suits to terminate such suits *in limine* thereby preventing the plaintiff from getting redress for environmental degradation he has suffered as a result of the action or omission of the defendant environmental abuser. This paper will also make useful suggestions which can help an environmental degradation victim whose environment has been degraded to freely and easily gain access to the court and seek redress for his injury or loss.

2.0 Conceptual Clarification

For any intellectual discourse of this magnitude to be intelligible, there must be conceptual clarification. Conceptual clarification helps in the understanding of the subject of discourse. Under this section, this paper seeks to clarify some terms for easy understanding of the topic of discourse.

2.1 Legal obstacles

Legal obstacles refer to issues that the law recognizes as capable of barring a party from taking further action in a legal proceeding. These issues when raised by the opposing party are capable of stalling the other party from taking a further step in law. In law, these legal obstacles could be *locus standi*, non-existence of cause of action, non-service of pre-action or statutory notices and many others. Any of these issues when raised by the opposing party and sustained by the court, can bar the other party from taking a further step in a legal proceeding. Therefore, a victim of environmental violation seeking environmental justice has to ensure that these legal obstacles are out of his way in order for him to obtain legal redress for any injury or loss he may have suffered.

2.2 Access to Justice

Access to justice can be defined from two viewpoints. It can be defined in the narrow and the wider senses. In the narrow sense of the term, it can be said to be co-extensive with access to the law courts while in the wider connotation it embraces access to the political order, and the benefits accruing from the social and economic developments in the state.[3] This paper will consider the definition of access to justice in the narrow sense of the term.

Nlerum Okogbule defines access to justice as the substantive and procedural mechanisms existing in any particular society designed to ensure that citizens have the opportunity of seeking redress for the

[2]Eric Omo Enakireru and A. K. Anya, "Environmental Laws as Mechanisms for Protecting Human Rights in African Societies: A Nigerian Perspective" (2020) 4(2) *African Journal of Law and Human Rights*, p. 44.

[3] Nlerum S. Okogbule, "Access to Justice and Human Right Protection in Nigeria" <, https://www.sur.connectas.org>access-justice-human-r..., accessed 19/8/2022.

violation of their legal rights within that legal system.[4] It focuses on the existing rules and procedures to be used by citizens to approach the courts for the determination of their civil rights and obligations.[5] It could also be defined to mean the right to ventilate one's grievances in the court of law unhindered. Access to justice means any judicial process through which an expeditious and comprehensive resolution to a legal conflict of an environmental nature is sought. [6] This paper will define access to justice as the freedom that a litigant has to approach the court to seek redress for any injury or loss he has suffered from the wrong of the other person. Where a person has the opportunity to seek damages for any wrong committed against him by someone else unhindered, such a is said to have had access to justice. Access to justice is a basic principle of the rule of law. In the absence of access to justice, people are unable to have their voices heard, exercise their rights, challenge discrimination or hold decision makers accountable.[7]

2.3 Environmental Law

Environmental Law is the collection of laws, regulations, agreements and common law that governs how humans interact with their environment.[8] Environmental Law is a body of law dedicated to protecting the natural environment from degradation because of human influences.[9] This paper will define Environmental law as that aspect of law that governs man relationship with his environment. Environmental law through legislations, regulations, conventions, and protocols protect and regulate man's activities or conducts which if left unregulated will have adverse effect on the environment thereby exposing both man and the environment to danger.

3.0 Legal Obstacles to Access to Justice in Environmental Law in Nigeria

The road to environmental justice in Nigeria is laced with plethora of legal barriers which if not skillfully avoided, a victim of environmental degradation may approach the court for redress for the injury or loss suffered by him and have his action dismissed or struck out as a result of these legal obstacles blocking his access to justice in environmental law. It is therefore necessary for environmental lawyers and environmental litigants to acquaint themselves with these legal obstacles to be able to overcome them when approaching the court to seek redress for environmental degradation so that their actions are not dismissed or struck out by the court based on any of these legal obstacles.

This section of the paper will examine those legal obstacles that are capable of shutting the door of environmental justice against victims of environmental degradation thereby leaving them without a redress for the damage or injury and loss which they have suffered from the degradation of their environment.

3.1 Non-Justiciability of the Provision of Section 20 of the Constitution[10]

The Constitution of Nigeria 1999 does not provide for substantive right to a healthy environment.[11] But it is the only Constitution[12] of the Federal Republic of Nigeria that has directed the State to make provision for the protection and improvement of the Nigerian environment. Section 20 of the Constitution provides: The State shall protect the environment and safeguard the water, air, land, forest and wild life in Nigeria.

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[4] *Ibid.*
[5] *Ibid.*
[6] "Access to Justice Definition" <, https://www.lawinsider.com>dictionary>access..., accessed 19/8/2022.
[7] Access to Justice-United Nations and the Rule of Law, https://www.un.org>ruleoflaw>thematic-areas, accessed 19/8/2022.
[8] "What is Environmental Law?", https://legalcarepath.com, >what-is-environme…, accessed on 19/8/2022.
[9] "Environmental Law", https://www.nationalaglawcenter.org>environmental, accessed on 19/8/2022.
[10] 1999 Constitution of the Federal Republic of Nigeria as amended.
[11] Onyeka K. Anaebo and Eghosa Ekhator, "Realising Substantive Rights to Healthy Environment" (2015) 17(2) *Environmental Law Review*, https://www.researchgate.net>...Nigeria, accessed 19/8/2022.
[12] Clifford Constitution, 1922; Richard Constitution, 1946; Macpherson Constitution, 1951; Lyttleton Constitution, 1954; Independence Constitution, 1960; Republican Constitution, 1963 and the 1979 Constitution did not have any provision touching on the duty of the State to protect and improve the Nigerian environment.

The aim of section 20 is to ensure a healthy environment for Nigerian citizens.[13] Thus, safeguarding the air, water, land and wild life as stated in section 20 enhance a pollution free environment.[14] A pollution free environment is a cleaner and healthier environment where lives and property are secured. Similarly, the Constitution guarantees the right of every person to life.[15] The effect of these provisions ordinarily suggests that the right to a clean environment is guaranteed by the constitution and that any individual or group of individuals whose environment is degraded can trigger an action to protest the degraded environment if the government refuses, or neglects to enforce any environmental legislation.[16]

Unfortunately, a victim of environmental degradation or injury or loss of property or arable land cannot premise his action on the provision of section 20 because the section falls under the Fundamental Objectives and Directive Principles of State Policy in Chapter II[17] of the Constitution which by virtue of section 6(6)(c) is non-justiciable. The court in exercising its judicial power under section 6 of the Constitution cannot extend same to any issue or question as to whether any act or omission is in conformity with Fundamental Objectives and Directive Principles of State Policy in Chapter II of the Constitution. In the case of *Okojie v Attorney General of Lagos State,*[18]the Court of Appeal expressly stated that section 6(6) of the Constitution makes it clear that no court has the jurisdiction to pronounce on any decision as to whether any organ of government has acted or is acting in conformity with the Fundamental Objectives and Directive Principles of State Policy. The court can only entertain a matter that is justiciable. In *Adesanya v President of the Federal Republic of Nigeria,*[19]Idigbe, JSC held *inter alia*:

Judicial power is therefore vested in the courts for the purpose of determining cases, and controversies before it; the cases or controversies, however, must be justiciable.

3.2 Issue of *Locus Standi*/Representative Capacity

A party who does not have *Locus standi* would not be allowed by the court to proceed with any legal action instituted by such a party. *Locus standi* is the legal capacity to institute, initiate or commence an action in a court of law or tribunal without any inhibition, obstruction or hindrance from any person or body whatsoever.[20] Apart from the power of a claimant to sue, the term is used even more broadly to refer to the right of a party to appear and be heard on any particular matter before a court of law or tribunal.[21]

According to Aguda, *locus standi* means no more than the court will entertain a suit only at the instance of one who has a legal capacity to institute the proceedings. For a person to be able to maintain an action, he must be able to establish that his interest is or about to be adversely affected by the action taken or contemplated by the defendant.[22] Onyeabor submits that, the above definition by

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[13]Gozie Ogbodo, "Environmental Protection in Nigeria: Two Decades After Koko Incidence" (2010) 15(1) *Annual Survey of International and Comparative Law* 1, 18 in Abdulkadir Bolaji Abdulkadir, "The Right to a Healthful Environment in Nigeria: A Review of Alternative Pathways to Environmental Justice in Nigeria, https"//www.ajol.info>article>download, accessed 19/8/2022.

[14] Abdulkadir Bolaji Abdulkadir, (n 12).

[15] Eric Omo Enakireru and A. K. Anya, (n 1) p. 46.

[16]*Ibid*.

[17] The Nigerian judicial attitude to the Directive Principles is influenced by the initial position of the Indian Supreme Court with regard to the justiciability of Article 48A of the Indian Constitution, which is similar to section 20 of the Nigerian Constitution. The court's decisions in the 1950s established that Article 48A and other provisions of Part IV of the Indian Constitution relating to the Directive Principle, are not justiciable as a result of article 37 which provides that Directive principle 'shall not be enforceable by any court'. See Emeka Polycarp 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" (2010) 6(3) *Law, Environment and Development Journal*, https://www.lead-journal.org/content/10320.pdf, accessed 19/8/2022 and *State of* Madras v Champakam Dorairajan (1951) AIR (SC) 226 at 252 and *Mohd Nanif Qureshi v State of Bihar (1958)* AIR (SC) 731 cited by Emeka Polycarp Amechi.

[18] (1981) 2 NCLR 337.

[19] (1981) 2 NCLR 358.

[20]*Adesanya v President, Federal Republic of Nigeria supra*.

[21]*Gombe v P. W. (Nigeria) Ltd.* (1995) 7 SCNJ 19 at 32.

[22]Aguda, "*Locus Standi*", Lecture delivered at R.U. S. T. Port Harcourt Law Week, Nigerian Tide, Saturday, 11th February, 1984 in Emmanuel Onyeabor, "Expanding the Scope of *Locus Standi* in Environmental Litigation", 7(1) *Unizik Law Journal*, p. 1, https://www.academia.edu, accessed 19/8/2022.

Aguda brings out two factors distinctively. One denotes the existence of a right of the individual to have his case heard by the court, and the other denotes the presence of an adversary litigable issue.[23] In England, during the 19th Century, Courts were reluctant to allow entry into its sanctuary unless he is a person aggrieved, and usually has been shown that he had a specific legal right of his own which has been infringed or that his properties has(sic) been wrongfully seized or detained, to be entitled to a hearing.[24] This right must not be a right he shares with others in common; he must be a "person aggrieved". In respect of a "person aggrieved", James C. J. *In re Sidebotham*[25], had this to say: "but the words 'person aggrieved' do not really mean a man who is disappointed of a benefit which he might have received if some other order had been made. A "person aggrieved" must be a person who has suffered a legal grievance, a man against whom a decision has been pronounced which has wrongfully deprived him of something, or wrongfully refused him some, or wrongfully affected his title to something.' At its inceptive period the attitude of the courts on this issue conservative and the phrase "person aggrieved" was construed restrictively.[26] With the passage of time, however, the courts were willing to allow an ordinary individual gain entry into its(sic) sanctuary, if he has sufficient interests to warrant the attention of the courts. Thus, it was held in *Elendu v Ekweaba*[27], that in determining whether a person has *locus standi* or not, the following factors may serve as guidelines:

For a person to have *locus standi* in an action, he must be able to show that his civil rights and obligations have been or are in danger of being infringed. The fact that a person may not succeed in an action does not have anything to do with whether or not he has a standing to sue. Whether a person's civil rights obligations have been affected, depends on the particular facts of the case. There are two tests used in determining *locus standi* of a person, namely: the action must be justiciable and there must be a dispute between the parties.[28] In applying these tests, a liberal attitude is usually adopted by the court.

The question of *locus standi* focuses more on the standing and title or qualification of the person who is approaching the court or tribunal to ventilate some grievances.[29] Expatiating on the purport of the provision of section 6(6)(b) of the 1999 Constitution of the Federal Republic of Nigeria as amended, the Court of Appeal explained in the case of *Shibkau v A. G. Zamfara State*[30]and held *inter alia*:

Section 6(6)(b) of the Constitution does not confer *locus standi* on any litigant to have free, automatic and unbridled access to the court in order to ventilate any issue, whether mundane or otherwise. The subsection merely allows the court to examine any question regarding such a litigant's civil rights and obligations. Hence, a litigant must first and foremost establish factual circumstances encapsulated in his cause of action that his constitutionally entrenched civil rights and obligations have been infringed upon, seriously jeopardized or are about to be infringed upon before section 6(6)(b) which vests judicial powers in the courts will kick in and provide a forum for litigation cum adjudication and thereby enable/empower the court to look into the litigant's grievances or complaints.[31]

The requirement of *locus standi* is one of law's attempts to keep out passers-by, strangers, busybodies and meddlesome interlopers.[32] This is to ensure that it is only those with genuine grievances or claims against a party that come to the court to ventilate their grievances.

The issue of *locus standi* will not present a problem to a person whose property interest have been damaged in the course of and due to environmental pollution or natural resources depletion.[33] Yet,

[23] Emmanuel Onyeabor, (n 21), p. 2.
[24] *Ibid*., p. 1.
[25] (1880) 14 Ch.D. 465.
[26] Emmanuel Onyeabor, (n 18), p. 3.
[27] (1998) 12 NWLR (Pt. 713) 695
[28] See Emmanuel Onyeabor, (n 18), pp. 4-5.
[29] M. M. Stanley-Idum and J. A. Agaba, *Civil Litigation in Nigeria* (Nelag & Company Limited, Lagos 2015) p. 78.
[30] (2010) 10 NWLR (Pt. 1202) 312.
[31] Per Oredola, JCA at p. 338.
[32] M. M. Stanley-Idum and J. A. Agaba, (n 28) p. 78.
[33] Rufus Akpofurere Mmadu, "Judicial Attitude to Environmental Litigation and Access to Environmental Justice in Nigeria: Lessons from Kiobel (2013) 2(1) *Journal of Sustainable Development Law and Policy,* p. 163.

such a person may very well decide not to sue for any number of reasons.[34] A party who institutes an action to seek environmental redress for any injury or loss he has suffered as a result of environmental pollution must show special interest peculiar to him and not that which he shares in common with other members of the public. The Nigerian courts are reluctant to grant *locus standi* to people who have not suffered in any way different from that of others or who may not share a common interest with others whom he claims to be representing.[35] In *Shell petroleum Development Company Nig. Ltd. v Chief Otoko and Ors*[36], the respondents who were plaintiffs at the Bori High Court in Rivers State claim the sum of N499,855.00 as compensation payable to the defendants (Appellants herein) for deprivation of the use of Andoni Rivers and creeks as a result of the spillage of crude oil. The action was instituted in a representative capacity. The Court of Appeal held that:

The allegation is that the spillage injuriously affected fishermen, farmers, persons bathing and washing in the Andoni Rivers and adjoining creeks, persons using the rivers and adjoining creeks for cassava processing. It is plain to me that there is a diversity of interest, that there was no joint tort, for the damage caused to each of them can only be personal to each of them.[37]

The court went further to rule *inter alia*:

> It is essential that the persons who are to be represented and the person(s) representing them should have the same interest in the cause of matter. Given common interest and a common grievance a representative suit would be in order if in addition to the relief sought it is in its nature beneficial to all whom the plaintiff proposes to represent.

In *Jumbo v Shell Petroleum Co. Nig. Ltd*.[38], the appellate court found that the plaintiff who sued on behalf of 9,600 fishermen of Jumbo House of Bonny was not himself a fisherman and held that those directly involved ought to have instituted the action themselves.

Environmental suit and claims are usually objected to by the defendant for lack of *locus standi* to sue.[39] Therefore, a party who fails to show to the court his *locus standi* in any action initiated by him, will be turned back by the court by having his suit struck out for want of *locus standi* on his part to approach the court to have his suit heard by the court.

3.3 Burden of Proof

The difficulty encountered by victims of environmental pollution in the issue of remedy lies in the problem of claim and proof.[40] Burden of proof is another legal obstacle that environmental victims must overcome in order to have access to justice for environmental degradation. In order to enable the Courts to enforce environmental laws the parties must prove their cases, as required by law.[41]

Burden of proof means the obligation that a party bears to adduce evidence in court to establish his case.[42] Under Nigerian Law of Evidence, as a general principle, the burden of proof lies on the party who asserts the positive to prove his allegation and not on the party asserting the negative or denying the allegation against him.[43] Likewise the party who was brought upon some allegations made against him is duty bound to satisfy the court that those allegations are unfounded. The nature of the obligation on the parties will depend on the requirement of the substantive law upon which the action arises and rules of evidence.[44]

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[34] *Ibid*.
[35] Amaka G. Eze, "The Limits of the Torts of Negligence in Redressing oil Spill Damage in Nigeria (2014) 5 *NAUJILJ,* p. 50.
[36] (1990) 6 NWLR (Pt. 159) 693.
[37] *Supra* p. 371.
[38] (1999) 3 NWLR (Pt. 633) 57.
[39] S. A. Fagbemi and A. R. Akpanke, "Environmental Litigation in Nigeria: The Role of the Judiciary" (2019) 10(2) *NAUJILJ,* https://www.ajol.info>article>view, accessed 20/8/2022.
[40] Rufus Akpofurere Mmadu, (n 32) p. 170.
[41] *Ibid*., p. 169.
[42] M. M. Stanley-Idum and J. A. Agaba, (n 28) p. 515.
[43] This is provided in section 131 of the Evidence Act 2011 thus: "whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts shall prove that those facts exist." Section 132 of the same Act also provides: "the burden of proof lies on who would fail if no evidence at all were given on either side."
[44] Rufus Akpofurere Mmadu, (n 32) p. 169.

In civil cases in Environmental litigation, a victim of environmental degradation has a burden to prove to the court on the preponderance of evidence or on the balance of probability that the act or omission of the defendant caused injury or loss to him. The following proofs will be required of a plaintiff: (a) where his claim is based on damage to property, he has to prove he owned the damaged property.[45] In a claim for loss or destruction of farm crops, farm land and economic trees, the court held in *Uhunmwanghov Uhunmwangho,*[46]that the plaintiff must adduce sufficient evidence to show *inter alia*: the name, nature, and number of economic trees allegedly destroyed; (c) in a claim for special damages, the claims are to be itemized and specially proved. In *R. C. C. (Nig) Ltd. v Edonwonyi*[47], the court held that a claim of loss of earning is a claim in special damages in the sense that full particulars must be given. Such facts as rate of earning and other facts will enable the court to determine the claim in arithmetical calculation should be pleaded.

According to Tobi, J.S.C., special damages is strict. Where plaintiff is unable to prove special damages, his case crumbles and a trial court cannot compensate him by way of general damages;[48] (d) in a negligence or nuisance claim, the ingredients of these heads of tort must be established. In the case of, the court held that before the liability of the respondents to pay damages for tort of negligence can be established, three things have to be proved by the appellants; (i) that the respondents failed to exercise due care; (ii) that the respondents owed to the appellants a duty to exercise due care and (iii) that the respondent's and (e) in a claim of highly technical and professional nature[49] which the court would not ordinarily appreciate, the plaintiff needs to go extra mile to establish his claim through expert evidence.[50] Where he fails to discharge this burden, his action will fail. In the case of *Chinda v Shell BP Development Company (Nigeria) Ltd.,*[51]where the plaintiffs alleged that owing to the defendant company's negligence in the control and management of their flare sites which was within a short distance of the plaintiff's village, a lot of damage was done to the plaintiffs' property (trees, lands and houses). Holden, C.J., held that the plaintiffs' claim of damages must fail as they did not produce any evidence of negligence in the defendant's operation of the flare sites. Ebeku submits that this decision raises two pertinent and related questions: (1) what would a plaintiff do to discharge this onus? (2) what amount of evidence would be sufficient to establish that the defendant has not kept the standard of 'good oil field practice" (which in other words could mean failure to maintain a reasonable standard of care)? Surely these questions require highly technical answers.[52]

3.4 Pre-action Notice

Pre-action notice is a letter usually given by intending plaintiff's solicitor to the prospective defendant, giving him notice of intention to institute legal proceedings against him or remedy whatever the cause of action was, usually within seven days, failing which legal proceedings would be instituted.[53] This is a mandatory notice that has to be given to a defendant by the plaintiff in required cases. It is a condition precedent to commencement of action where such is required.[54] Where it is required, a pre-action notice constitutes condition precedent for institution of action; any action brought without the notice would be premature and incompetent.[55] Such notice of action is usually

[45] *Sommer v Federal Housing Authority* (1992) 1 NWLR (Pt. 219) 548.
[46] (1992) 2 NWLR (Pt. 226) 709.
[47] (2003) 4 NWLR (Pt 811) 513.
[48] Rufus Akpofurere Mmadu, (n 32) pp. 170-171.
[49] In *Seismograph Services Limited v Benedict Onokpasa* (1972) 4 S. C. 123, there were seismic surveys which involved shooting operation by the appellant. The question for determination was whether the shooting operations were proximate cause of extrinsic damages to the respondent's buildings. The court emphasized the fact that it was the plaintiff that had the burden of proving the negligence of the defendant. The court went on to hold that the action failed since the plaintiff was unable to discharge the burden of proof on him. See Amaka G. Eze, (n 34).
[50] Rufus Akpofurere Mmadu, (n 32) p. 170.
[51] (1974) 2 R.S.L.R 1.
[52] K S A Ebeku, "Legal Remedies for Victims of Environmental Pollution in Nigeria" (1998) 2(2) *Nigerian Law and Practice Journal* p. 63.
[53] Ani Comfort Chinyere, "The Uwais Court. The Supreme Court and the Challenges of Legal Development" in D. A. Guobadia and A. Adekunle (eds), *The Uwais Court. The Supreme Court and the Challenges of Legal Development* (NIALS, Lagos 2006) pp. 341- 359, https://legalpediaonline.com>BLOG, accessed 21/8/2022.
[54] M. M. Stanley-Idum and J. A. Agaba, (n 28) p. 89; *Ministry of Education v Asikpo* (2014) 14 NWLR (Pt. 1427) 351,
[55] A. Obabueki. "A Critical Synopsis on Pre-action Notice in Nigeria", https://.www.academic.edu>A CRITICAL SY…, accessed 21/82022.

required to disclose the cause of action, relief or reliefs sought and the name and place of business or abode of the aggrieved party.[56] The purpose of a pre-action notice is to promote out of court settlement of grievances by giving the prospective defendant time to meet with the prospective plaintiff to negotiate or have a look at the issues between them and reach a compromise if need be.
Where it is required that pre-action notice is to be given to a prospective defendant in an environmental litigation, failure by the plaintiff to fulfill this condition precedent before commencing his environmental suit will definitely rob the court of jurisdiction to entertain such suit when non service of pre-action notice is raised by the defendant.[57] It is therefore pertinent that before a party commences environmental suit in court especially against government ministries, agencies and parastatals, such a party has to do due diligence to see whether the prospective defendant is by law required to be given pre-action notice.

3.4.1 Constitutionality of Pre-action Notice

The court in plethora of case has upheld that pre-action notice has constitutional flavor hence must be complied with in cases where it is required to be served on a prospective defendant prior to commencement of legal proceedings against such prospective defendant. The constitutionality of pre-action notice was raised in *Anambra State Government v Nwankwo,* based on section 11 (2) of the State Proceedings Law, Cap. 131 Vol. 4 of the Laws of Anambra State, 1986 which provides:

No action shall be instituted against the State or a public officer until the expiration of a period of three months after notice in writing has been delivered to some designated persons.The respondents argued that the above provision infringed their constitutionally guaranteed right to free access to the court as contained in section 6 (6) (b) of the 1999 Constitution. The court held *inter alia*: It is clear to my mind that section 11(2) is a condition precedent for the institution of any action against the State Government… Section 6 (6) (b) simply shows the plenitude of judicial power exercisable by the courts but that cannot be taken to mean that the powers cannot be limited to prescribed conditions before such powers are exercised.

3.4.1 Requirement of Pre-action

There are plethora of environmental statues requiring service of pre-action notice on the regulatory agencies before legal actions can be commenced against such regulatory agencies.[58] Where a victim of environmental degradation proceeds to institute a legal proceeding against a party without first of all issuing and serving a pre-action notice on such party, the action is ineffective and liable to fail for lack of competence.[59] In *Mobil v Lagos State Environmental Protection Agency and Ors,*[60]had the Federal Environmental Protection Agency (FEPA) sued alongside Lagos State Environmental Protection Agency (LASEPA) and entitled to pre-action notice raised the issue of non-service of pre-action notice by Mobil, the action would have been struck out *in limine.* This was not the case, rather it was LASEPA that raised the issue of non-service of pre-action notice on FEPA by Mobil leading to the preliminary objection being overruled.

3.5 Limitation of Action / Statute Bar

Limitation of time is another legal obstacle that often bar a party's access to justice in environmental litigation in Nigeria. Under the various tort statutes of the States of the Federation, there are provisions limiting time within which an action in tort can be instituted against a party. Where a legal action is commenced outside the limitation period by a party, such legal action will be dismissed by the court where the defendant raises a preliminary objection on the ground that the plaintiff's action is statue barred if the preliminary objection is perhaps sustained by the court thereby leaving the plaintiff with a bare right that is not enforceable in law.

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[56]*Ibid.*
[57]*Nigercare Development Co. Ltd v Adamawa State Water Board* (2008) All FWLR (Pt. 422) 102.
[58] See section 32 (1) NESREA Act, section 308 Petroleum Industry Act, 2021, section 92 (2) Nigeria Ports Authority Act Cap N 126 LFN, section 40 Abuja Environmental Protection Board Act, section 29 (2) Federal Environmental Protection Act.
[59] See the case of *City Engineering Ltd. v Nigerian Ports Authority* (2001) FWLR (Pt. 34) 499, where the court held *inter alia:* "Statutory condition which prescribes a written notice before the institution or commencement of a particular court action must be strictly complied with and failure by a plaintiff to serve such notice renders the action ineffective and liable to fail."
[60] (2003) 104 LRCN 264.

A victim of environmental abuse access to justice can be constrained by paucity of time if the wrong committed against his environment is a one-off tortious act like oil spill or gas flare of a short time and he fails to bring a claim in tort against the tortfeasor within the period permitted by the Tort Law of the State in which the event occurred. Time to institute legal action in a one-off tortious act begin to run after the occurrence of the environmental pollution. But where the tortious act constitutes a continuing trespass or nuisance, time to institute legal action begin to run after the cessation of the environmental pollution.[61]

4.0 Charting the way Forward

4.1 Justiciability of Chapter II of the 1999 Constitution as amended

As earlier stated above, section 20 of the Constitution providing for environmental protection is not justiciable by virtue of the fact that it is set out in chapter II of the Constitution which is rendered non-justiciable by section 6 (6) (c) of the 1999 Constitution as amended. This obstacle to access to justice in environmental law can be overcome by way of a paradigm shift which involves making Chapter II of the Constitution under reference justiciable. This is achievable through amendment of section 6 (6)(c) of the Constitution thereby extending the power of the court to issue or question as to whether any act or omission by any authority or person or as to whether any law or judicial decision is in conformity with the Fundamental Objectives and Directive Principles of State Policy set out in Chapter II of the Constitution.

Chapter II of the 1999 Constitution as amended was transplanted from the Indian Constitution and implanted in the Nigerian Constitution. In India, there is a paradigm shift from non-justiciability to justiciability of Chapter IV of the Indian Constitution.[62] Presently, the judicial position has changed in India starting with the decision of the Supreme Court in *Minerva Mills v Union of India*,[63]which elevated the constitutional status of the Directive Principles.[64] It is from the philosophy underlying the elevated status of the Directive Principles, that the Supreme Court began interpreting fundamental rights under Part II in the light of the provisions of Part IV.[65] In the area of environmental protection, the Court has recognized the right of every Indian to live in a healthy or pollution-free environment by utilizing the environmental provisions of Part IV to flesh out the constitutional right to life.[66] As observed by Shubhankar Dam and Vivek Tewary:

In recognizing the right to a clean environment, the Court drew inspiration from article 48-A[67] enjoining upon the state a duty to protect the environment and a similar fundamental duty of every citizen under article 51 A[68] of the Constitution. This recognition of the right to a clean environment and, consequently the right to a clean air and water was a culmination of the series of judgments that recognized the duty of the state and individuals to protect and preserve the environment.

4.2 Provision of Substantive Right to a Healthy Environment in the Constitution

The 1999 Constitution of Nigeria as amended does not provide for substantive right to a healthy environment therefore no one can approach the court to enforce his right to a healthy environment *simplicter* without so doing under any provision of the Fundamental Rights provided in Chapter IV of the 1999 Constitution as amended. For easy access to justice in environmental law, Nigeria should make provision for a substantive right to a healthy environment in its Constitution or in a separate statue as it is in other jurisdictions. For instance, the right to a safe and healthy environment is ably

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[61]*Gulf Oil Co. Ltd. v Oluba* (2003) (Pt. 145) 712.

[62] Chapter IV of the Indian Constitution is *in pari materia* with Chapter II of the 1999 Constitution of the Federal republic of Nigeria.

[63] (1980) AIR (SC) 1789.

[64] Emeka Polycarp Amechi, (n 16).

[65]Shubhankar Dam and Vivek Tewary, "Polluting Environment, Polluting Constitution: Is a "Polluted Constitution Worse than a Polluted Environment"? (2005) 17(3) *Journal of Environmental Law*and *Francis Coralie Mullin v Union Territory of India* (1981) AIR (SC) 746 at 752-753in Emeka Polycarp Amechi, (n 16).

[66]*Ibid*.

[67] Article 48A of the Indian Constitution provides: The State shall endeavor to protect and improve the environment and safeguard the forest and wild life of the country.

[68] Article 51(g) of the Indian Constitution provides: it shall be the duty of every citizen of India to protect and improve the natural environment including forest, lakes, rivers and wild life, and to have compassion for living creatures.

enshrined in the Constitution of Ethiopia in its third chapter.[69] Article 44 provides for environmental rights and states that all persons have the right to a clean and healthy environment; and all persons who have been displaced or whose livelihoods have been adversely affected as a result of #state programmes have the right to commensurate monetary or alternative means of compensation, including relocation with adequate state assistance.[70] From the above, it is observed that the Ethiopian Constitution declares 'human right' to a safe and healthy environment most unequivocally not only because of the clear terms in which the right is declared but because the right is listed in the third chapter of the Constitution, which is the most important part of the constitution and as human right also constitutes one of the fundamental principles of the Constitution.[71]

4.3 Liberal or Expansive Application of *Locus Standi* in Environmental Litigation

The Nigerian courts apply a restrictive interpretation of *locus standi* in environmental pollution cases which ward off access to environmental justice. A liberal or expansive application of the doctrine of *locus standi* as is obtainable in other jurisdictions[72], in environmental litigation will enable more people gain access to the sanctuary of the court to protect the environment against pollution for the purpose of environmental sustainability. Expressing the need for dynamism in the Nigerian law of *locus standi*, to bring it at par with more developed jurisdictions in other parts of the world, Philip Nnaemeha-Agu, JSC, stated thus:

We look forward to a time when Nigeria will advance to the position of Canada where every citizen has not only the right to be heard, but also the *locus standi* to challenge such breaches of the provisions of the Constitution.[73]

Under the Ethiopian Environmental Pollution Control Proclamation,[74] a person can lodge a complaint at the Authority or the relevant regional environmental agency against any person without the need to show any vested interest in the complaint. Nigeria should make similar proclamation removing the question of *locus standi* in order for victims of environmental degradation to have access to justice in environmental litigation.

4.4 Timeous Institution of Legal Proceedings

An environmental litigant who wants to have free access to court must timeously approach the court for remedy in order not to have his claim caught up with statute of limitation where claim is based on a one-off tortious act. As earlier stated, a time barred claim cannot be heard by the court as it is legally dead. They court is not ready to give life to such a dead claim. A party in environmental litigation when sleeps and slumbers over his right up and until it is caught up with the statute of limitation, will be turned away by the court to continue in his slumbering. Such a victim will only be left with a bare right which is unenforceable in law and in the court of equity. Equity only aids the diligence and not the indolent. It is therefore necessary that environmental litigants who have suffered injuries or losses as a result of environmental degradation caused by the activities of another to approach the court timeously to ventilate his grievances in order not to be caught up with statute of limitation.

5.0 Conclusion

This paper has painstakingly looked at the many legal obstacles capable of obstructing victims of environmental degradation access to justice which have ensured that the door to the sanctuary of the court is shut up against them. It is sad to note that these legal obstacles have ensured that victims do not appear in court and be heard in respect of the environmental injuries or losses which they have

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[69] The Constitution of Federal Democratic Republic of Ethiopia. Similar provision is found in South African Bill of Right, Malawian Constitution, Ugandan Constitution, *etc.*

[70] Article 44 (1) (2) Constitution of Federal Democratic Republic of Ethiopia.

[71] Emejuru Emenike, Dr. M. A. Ebikake – Nwanyanwu and Dr. Chukwuma Ajie, "Right to a Healthy Environment in Nigeria and Other Jurisdictions: A Legal Assessment (2020) 8(3) *Global Journal of Politics and Law Research,* pp. 1-20,

[72] India, Canada, U.S. *etc.*

[73] "Human Rights Proceedings: Domestic Provisions and Experience of Nigeria" being a text of a paper delivered at the Judicial Colloquium on the Domestic Application of International Human Rights Norms held in Abuja, Nigeria on December 9 – 13, 1991; Ese Malami, *Nigerian Constitutional Law* (Princeton Publishing Co., Lagos 2010 edn).

[74] Proclamation No. 300/2002 of Ethiopia.

suffered as a result of environmental pollution owing to the fact that some of these victims do not know that they are required to first of all service pre-action notice on prospective defendant(s) before filing of legal action in court while others are left with bare rights which are not enforceable because their claim is caught up by statute of limitation.

This paper also makes suggestions as to how these legal obstacles can be overcome so that victims of environmental can easily have access to justice in environmental Law. It is hoped that these suggestions can help environmental litigants easily gain access to justice in the case of environmental pollution and have their cases heard. Also, it will aid the National Assembly when amending the provisions of the Constitution to elevate the right to a clean and healthy environment to the status of fundamental right so that this right can be enforced like fundamental rights.

6.0 Recommendations

The following recommendations are here proffered:

i. The right to a healthy environment should be elevated to the status of fundamental right as it is obtainable in other jurisdictions of the world like India, Spain, Ethiopia, Uganda, *etc* by including it in Chapter IV of the Constitution so that victims of environmental abuse can easily approach the court to enforce this right when it is infringed upon.
ii. The provision of section 20 should be made justiciable as it is obtainable in India where the provision was transplanted from and implanted in the 1999 Constitution as amended.
iii. The doctrine of *locus standi* should be liberally applied or totally removal in respect of environmental litigation in order to make it easy for victims of environmental degradation to approach the court to ventilate their grievances.
iv. Victims of environmental degradation should ensure service of pre-action notice on prospective defendant(s) before approaching the court to ventilate their grievances if that is the condition precedent for the institution of legal action against an environmental abuser. This will prevent their suits from being struck out in the event service of pre-action notice is a condition precedent for the actuation of the jurisdiction of the court.
v. Environmental litigants should not sleep over their rights for too long without approaching the court to institute legal proceedings to protect their rights as doing so could make statute of limitation caught up with their claim