AN APPRAISAL OF THE STRANDS OF ENVIRONMENTAL LITIGATION IN NIGERIA

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Abstract

Environmental litigation involves the enforcement of environmental policy through the use of the judicial branch of government. This work discussed certain Strands of environmental litigation with regard to success achieved and challenges. Over the years, it seemed like environmental litigation was stagnate and very difficult to pursue, but in the light of current developments world over, we are confident that clean and healthy environment can be attained for all; only if the courts are willing to avoid technicalities and acknowledge that humans in general have a right to life which is centered on a clean and pollution free environment. This paper discusses various strands of environmental litigation such as nuisance, strict liability, trespass to land, negligence which are the common law doctrines, the Constitution and the African Charter, the Criminal provisions which includes the criminal code Act, National Environmental Standards and Enforcement Regulation Agency (NESREA) Act 2007 and the National Oil Spill Detection and Response Agency (NOSDRA) Act 2006, plastic pollution as a strand of environmental litigation,, challenges and prospects. In this research, the writer adopted the Doctrinal Method of Research Analysis gotten from Primary Laws and Statutes, while the Secondary Sources were gotten from Journals, Textbooks, internet sources, Precedents (Case Laws). This paper concluded with certain international jurisdictions through which lessons were drawn in adopting a sustainable process towards environmental litigation in Nigeria.

Keywords: *Environmental Litigation, Pollution, Courts, Litigants, Shell Petroleum Development Company (SPDC) Ltd., Oil Companies, Protection, Environment.*

1.0 Introduction

The need to protect the environment has become very salient as man is aware that his survival depends on the survival of the biological community from which he derives his livelihood.[1] There is the natural order of things which help in preserving the environment and conserve its stability. Where this natural order is distorted and assaulted through various activities ranging from industrialization, petroleum exploration to gas flaring and other activities that threaten the environment, it becomes affected, and it loses its natural balance. Also, man must protect his environment in line with God's word found at Genesis 1:26 'that man should have in subjection everything God has made on the earth and the earth itself'[2]. Emphasis is on the earth as it is our home and it is beautiful according to Genesis 1:31 'when God saw everything he had made, and look! It was every good'.[3] From the wordings of these verses, there is need for us to protect the environment. Thankfully, there are various ways that can be done. One of such is through the instrument of the law, enforcing bodies, one of which is the courts. And litigation is through the court. One of the ways we can ensure the protection of the environment is through litigation or institution of lawsuits in court and

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[1] Amari Omaka, *Municipal and International Environmental Law* (LUC Publishers Lagos, 2012) 4

[2]The Bible: *New World Translation of the Holy Scriptures* (edn. 2013) 44

[3] ibid

environmental litigation serves to enforce environmental laws to the benefit of the environment.[4] Thus this paper seeks to look at the various strands of environmental litigation that can assist in protecting the environment and making it possible for litigants to enforce their environmental rights without any hindrance.

2.0 Conceptual Frameworks

Some concepts will be looked at briefly in the course of this work. They are as follows:

2.1 Environment

Environment is seen as the totality of man's existence. This includes all that surrounds him whether animate or inanimate. The black's law dictionary defines environment as "the totality of physical, economic, cultural, aesthetic and social circumstances and factors that surround and affect the desirability and value of property, affect the quality of people's lives, the surrounding conditions, influences or forces which influence or modify"[5].

In his treatise, Eugene Arene adopted the concept of environment as defined by Black's Law Dictionary.[6] He looked at the environment as the totality of physical, economic, cultural, aesthetic and social circumstances and factors which surround and affect the desirability and value of property and which also affect the quality of people's lives- the surrounding conditions, influences or forces which influence or modify. This definition was quoted with approval and adopted in the Supreme Court case of *Attorney General of Lagos State v Attorney General of the Federation of Nigeria and 35 ors*.[7]

Finally, Rau and Wooten [8] define 'environment' as the whole complex of physical, social, cultural, economic and aesthetic factors which affect individuals and communities and ultimately determine their form, character, relationship and survival. They further categorize the environment into four, namely:

a) The physical environment (natural and constructed) which includes land and climate, vegetation, wildlife, the surrounding land uses and the physical character of an area, infrastructure/public services, air, noise and water pollutions.

b) The social environment which includes community facilities and services and the character of community facilities and services.

c) The aesthetic environment – scenic areas, vistas, views including architectural character of building.

d) The economic environment which includes employment, land ownership pattern and land values.

We can see that what is lacking in one definition may be available in another.

[4] A.K. Usman, *Environmental Protection Law and Practice* (1st ed., Ababa Press, Ibadan, 2012) 211

[5]Henry Campbell, *Black's Law Dictionary* (6th edn. West Publishing Co. 1991) 529

[6]Ibid, 534

[7] (2003) FWLR (Pt 168) 946

[8]John G. Rau & David C. Wooten (eds), '*Environmental Impact Analysis Handbook'* (McGrew Hill Publishers 1980) 5-8

2.2 Litigation

In simple terms, according to Miriam Webster Dictionary, Litigation is the act, process, or practice of settling a dispute in a court of law: the act or process of litigating.[9] It is also a process of taking legal action.[10] If the parties cannot agree between themselves about a fair and proper outcome of any dispute they will present their respective cases to court of competent jurisdiction for judgement[11] and award of compensation for damages as the case may be.

2.3 Environmental law

Environmental law is defined as the collection of laws, regulations, agreements and common law that governs how humans interact with their environment. Amari Omaka defined Environmental law to mean any rule or law made or used for the protection, maintenance, conservation and improvement of the environment, including those for redress for environmental harm[12]. Looking at the last sentence of the definition, we deduce that environmental law aside the protection and improvement of the environment, it is also a tool for litigation as those seeking redress for environmental harm resort to it. Thus, litigation is seen as a great tool for environmental protection in its entirety. Pollution and degradation of the environment by various activities carried on by humans and industries have been the bane of environmental law and the only way to curb these activities is through well-established laws and the courts.

2.4 Environmental Litigation

Environmental litigation involves the enforcement of environmental policy through the use of the judicial branch of government.[13] The courts adjudicate over matters brought before them where there have been a breach of these environmental laws guiding the environment that in turn affects mankind, flora, fauna and the totality of the environment.[14]

2.5 Environmental Pollution

Environmental Pollution is defined as the introduction by man directly or indirectly of substances or energy into the environment, harmful to living resources, hazardous to human health, a hindrance to marine activities including foiling, impairment of quality and use of water and reduction of amenities.[15] It is also defined as "manmade or aided alteration of chemical, physical or biological quality of the environment to the extent that is detrimental to the environment or beyond acceptable limits"[16]. There are various forms of environmental pollution, they are Land, Water, Air, Noise, Oil and Gas and Plastic Pollution. All of these will be discussed under the Common Law Doctrines as Strands of Environmental Litigation. Thus, pollution is something that is averse to the environment.

[9]https://www.merriam-webster.com/dictionary/litigation
[10] Oxford Languages and Google<https//www.languages.oup.com>accessed 22 July 2023
[11] What is Litigation? All you need to Know About the Law & Process<https//www.burlingtonslegal.com>accessed 22 July 2023
[12] C. A. Omaka, *The Nigerian Conservation Law* (LUC Publications Lagos, 2004) 12
[13] Lettie M. McSpadden < https://link.springer.com/referenceworkentry/10.1007/1-4020-4494-1_119> accessed 26 July 2023
[14] C. A. Omaka, Municipal and International Environmental Law (LUC Publications Lagos,2004) 1-20
[15]Stockholm declaration 4B/B 78-79, Cited in Amari Omaka book *Municipal and International Environmental Law* (LUC Publishers Lagos, 2012) 59
[16] National Environmental Standards and Regulation Enforcement Agency Act 2007, s.41

3.0 Legal Frameworks/Instruments that Bother on Environmental Litigation

Environmental litigation has to do with laws, doctrines and precedents through which the court grants compensation, penalties and remedies depending on the nature of the case. There is the;

a. Common law doctrines of tort which incudes Trespass, Strict Liability (Ryland v Fletcher), Negligence and Nuisance
b. The Constitution of the Federal Republic of Nigeria 1999 (as amended)
c. The Criminal Position: National Oil Spill Detection and Response Agency (NOSDRA) Act 2006, National Environmental Standards and Regulations Enforcement Agency (NESREA) Act 2007 and the Criminal Code Act
d. The Africa Charter (Ratification) Act 1986

These legal frameworks will be discussed in such a way that breaches of environmental law can be sanctioned and punished through litigation by the use the above legal instruments.

Different Strands of Environmental Litigation

Strands of environmental Litigation means various ways through which the courts handle or manage environmental matters. And for there to be an environmental issue, a person's right with regards to the environment must have been breached thereby giving rise to exploring the various strands of litigation to get justice. While considering the various aspect of environmental litigation, the work will look at the challenges and prospects under them also.

3.1 The Constitution of the Federal Republic of Nigeria 1999 (CFRN)[17] and The Africa Charter 1986[18]

The constitution is the highest legislation in Nigeria. It is the grundnorm, and it acknowledges the importance of protecting and improving the environment. Section 20 provides that "the State shall protect and improve the environment and safeguard the water, air, land, forest and wildlife of Nigeria."[19] However, this provision is non-justiciable as the provision of section 6 (6) ©states as follows; The judicial powers vested in accordance with the foregoing provisions of this section; shall not except as otherwise provided by this Constitution, extend to any issue or question as to whether any act of omission by any authority or person or as to whether any law or any judicial decision is in conformity with the Fundamental Objectives and Directive Principles of State Policy set out in Chapter II of this Constitution[20]. By virtue of this provision, it simply means that an aggrieved person whose environmental right as been breached cannot sue/enforce it. However, in the turn of event, the Africa Charter which was ratified by Nigeria in line with the provision of section 12 of the Nigeria constitution which provides those international treaties and by extension (includes environmental treaties) ratified by the National Assembly be enforced as law in Nigeria.[21] has changed the narrative. The African Charter on Human and People's Right which came into

[17] Constitution of the Federal Republic of Nigeria 1999 (as amended)
[18] African Charter on Human and People's Right, Cap A9 LFN 2004
[19] CFRN, s20
[20] Ibid, s 6 (6) ©
[21] Ibid, S. 12

force on October 21 1986[22] that Nigeria became a signatory to provided in Article 4, 6 and 24 that the right to life, right to health and general satisfactory environment respectively proposes a good life and a healthy environment which is vey sacrosanct. It then means that, where there is a breach of an environmental right, it can be likened to threat of life as the environment is summed up as the totality of man and he cannot be separated from his environment and vice versa.

To further buttress the provision of these laws, the case of *Jonah Gbemre v Shell Petroleum Company Nigeria Ltd*[23]. Where Gbemre a representative of the Niger Delta Iwherekan community instituted an action against (i) the Nigerian government for its failure to stop the oil and gas company Shell from gas flaring for decades and (ii) Shell for engaging in massive and unceasingly intense gas flaring in the community, during its exploration and production activities (jointly respondents). The applicant argues that Shell failed to consider the environmental impact of its activities on the communities' means of livelihood, collective survival, as well as the gas flaring's contribution to the adverse and potentially life-threatening effects of climate change. The applicant claimed that such gas flaring activities violated the community's rights to life and human dignity as constitutionally guaranteed by sections 33 and 34 of the 1999 Nigerian Constitution, and reinforced by Articles 4, 16, and 24 of the African Charter on Human and Peoples Rights (ratified and domesticated by Nigeria as Cap. A9, Laws of the Federation of Nigeria, 2004).

The Federal High Court held that these constitutionally guaranteed rights inevitably include the rights to a clean, poison and pollution free environment. The federal Judge ruled that the actions of the respondents in allowing and continuing to flare gas in the applicant's community is a violation of their fundamental rights to a clean and healthy environment. Also, the case *of Centre for Oil Pollution Watch (COPW) v NNPC*[24] On May 13, 2005, where the Centre for Oil Pollution Watch (COPW) commenced legal action against the Nigerian National Petroleum Corporation (NNPC). The case was brought in the Federal High Court, Lagos Division, over an oil spillage in ACHA Community of Abia State of Nigeria. The oil spillage was allegedly caused by the defendant's negligence resulting from its pipeline, which had corroded due to lack of maintenance, had ruptured, fractured, and spewed its entire Contents of persistent hydrocarbon mineral oil into surrounding streams and river of lneh/Aku, resulting in contaminating two community streams that were the major sources of water supply to the community. The plaintiff alleged that although the defendant contained the spillage on the surface, it failed to clean up or reinstate the Ineh/Aku streams/river. Furthermore, the plaintiff averred that the respondent was negligent in both the causation and containment of the oil spillage; that the spillage had harmful effect on living resources, marine life, human health and other usage of the streams… On January 28, 2013, the Court of Appeal dismissed the appeal by reaffirming the trial court's ruling. The plaintiffs appealed to the Supreme Court on March 9, 2013. On July 20, 2018, the Supreme Court unanimously granted the appeal in favor of the appellants. The Supreme Court stated clearly that Section 20 of the Nigerian Constitution on duty to protect the environment by the State is justiciable when read together with, and in the context of, a provision like section 4(2) of the Constitution,

[22] ACHPR Cap A9 LFN 2004
[23] (2005) FHC/B/CS/53/05
[24] (2018) July 20

on the power to make laws to give effect to section 20. Secondly, the Supreme Court explicitly recognized for the first time, that section 33 of the Constitution which guarantees the Right to Life, implicitly includes, and constitutes a fundamental right to a clean and healthy environment for all. Third, the Supreme Court explicitly affirmed the enforceability of the environmental right in Article 24 of the African Charter on Human and Peoples' Rights as domesticated in Nigeria by the African Charter Act, Cap. A9 LFN 2004.

Challenges and Prospects

First off, the constitution did not acknowledge the right of an individual to sue when his right to a clean and pollution free environment is being threatened as a result of the non-justiciable provision of section 20 of the constitution which provides for environmental right. However, by Articles 4, 16, and 24 of the African Charter that provides that a polluted environment is seen as threat to one's health and life and that the right to life is one that must be protected. By virtue of the African Charter, section 20 is overridden, and environmental rights can be enforceable or justiciable. However, the constitution is the highest law in Nigeria and by virtue of section 1, every other law is inconsistent with its provision. This in effect renders the African Charter null and void, but the recent Supreme court decision in Centre for Oil Pollution Watch v NNPC has set a standard by taking into cognizance the importance of man living in a healthy and pollution free environment as linked with the right to life and anything done to jeopardize it is seen as threat to life. Finally, the Supreme Court decision in the above case aligns with the Constitutional Human Rights approach to Environmental and Climate Protection taken earlier by the Lower Court/Federal High Court in *Jonah Gbemre v Shell & Ors*. It demonstrates a significant positive paradigm shift in the attitude of the Supreme Court to environmental and climate change related claims. It provides additional human rights and constitutional tools for potential climate litigation in Nigeria.

3.2 Environmental Litigation (Trespass to Land)

This is one strand under which environmental litigation can be brought by one seeking redress or compensation for damages. Trespass to land called trespass '*quare clausum fregit* '[25]is committed where the defendant, unlawfully and unjustifiably enters the plaintiff's land or remains upon such land, directly places or projects any material object upon such land.[26] Accordingly, physical matter must come in contact with the land and physical matter in this sense has been argued to include perhaps anything having size or mass, including gases, flames, beams from search lights and mirrors but not vibrations. Thus, blowing noxious gas into a house[27] has been held to constitute trespass.

Trespass to land is actionable per se. The plaintiff need not prove special damages nor show that harm has been done for the court to award him damages. Thus, where a claim arises on trespass to land, based on environmental pollution, the plaintiff need not prove that damages have resulted from such pollution. The mere presence of the pollutant material on the land is enough grounds for an action in trespass.

[25] Meaning the defendant "broke into the close" of the plaintiff

[26]Aluko and Kodilinye Nigerian Law of Torts (Spectrum Books, Limited, 2001) <https://books.google.com.ng/books/about/Nigerian_Law_of_Torts.html?id=3-saAAAACAAJ&redir_esc=y> accessed 14 May, 2017

[27] *McDonald v. Associated Fuels Ltd* (1954) 3 D.L.R 775

In *Martin v. Reynolds Metal Co*.,[28] the plaintiff landowners argued that fluoride particles which emitted from the defendant's plant and settled on the plaintiff's land constituted trespass. The defendant contended that because the fluoride particles were invisible, there could be no direct invasion. The court stated that although, one cannot see an atom with naked eye, "even the uneducated know the great and awful force contained in the atom and what it can do to property if released". The court thus held that the intrusion of the invisible fluoride particle constituted trespass. Also, in the case of *Onasanya v. Emmanuel* [29]The complaint of the plaintiff was that the defendant encroached about ten feet upon land in his possession when the defendant was laying foundation of a building. Further that the defendant had thrown water and refuse into his land and allowed excreta to escape onto his premises.
It was held that throwing water and refuse were direct acts and this amounted to Trespass while the escape of excreta was indirect invasion and therefore not trespass but nuisance.

Challenges and Prospects

One challenge of this strand of litigation is that a neighbor can suffer some form of trespass by virtue of necessity and in such a case, may not be able to bring an action for trespass.
While a prospect in this strand of environmental litigation is that, the person who has "immediate and exclusive" possession of the land that has been subject to trespass can sue. Possession refers to occupation or physical control of the land (this may or not be the legal owner of the property – e.g., it could be the tenant in commercial property). This is indeed a welcome development.
Finally, one great prospect is that it is actionable per se. which means, a person can sue if there is any form of trespass without having to prove the trespass as it can be seen and it is direct. (Res ipsa loquitor).

3.3 Environmental Litigation (Strict Liability) Ryland v Fletcher

This is another strand of environmental litigation of common law principle of Torts that can be explored by anyone who suffered some wrongs as a result of another's acts. The principle of strict liability has been expressed that a man acts at his peril and is responsible for accidental harm, independently of the existence of either wrongful intent or negligence.[30] Strict Liability in simple terms denotes that a defendant who by his actions causes harm accidentally or independently is liable as expounded in Ryland v Fletcher[31]. The Ryland rule does not require the plaintiff to prove the defendant's negligent but that there was an escape of something dangerous from the defendant's company to another's premises which he had no control over.
In Umudje's case where the plaintiffs' claim against the defendants as follows for:
(a) the sum of 50,000 pound being fair and reasonable compensation due payable by the defendants to the plaintiffs for the damage done by the defendants, by and through their agents to plaintiffs farm land, fishing ponds, fishing lakes on plaintiffs' land, known as and called Oto Edefema and IWHREMO BUSH in that the defendants by themselves their servants and or their agents wrongfully and partially blocked the Utefe stream and the original channel or waterway hatched green in the survey plan No. AR 1391, now replaced

[28]224F (1963)494, 498.
[29](1973) 4. CCHCJ 1477.
[30] *Salmon v. Seafarer Restaurant* (1983) I WLR 1264
[31] (1868) LR 1Ex. 265, 270-280

by the Access Road sometimes in 1969/70 and also the defendants by themselves, their agents or servants caused crude oil and chemicals to escape and sip into plaintiffs' fishing ponds and lakes from the defendants Location known as EVWRENI LOCATION thereby causing damages to the fishes and hindered fishing cropping in the said lakes and fishing ponds. Defendants have failed refused and or neglected to pay reasonable compensation to the plaintiffs despite repeated demands. (b) Any other reliefs which the justice of the case demands." The court ruled that the statement of claim makes it abundantly clear that the respondents' based their action in both negligence and on the principles of strict or absolute liability under the well-known doctrine of Rylands v. Fletcher.

Challenges and Prospects

One serious challenge with the Ryland rule is that, the act that resulted in escape is associated with non-natural use of land. In a setting where the government of a country has granted license/permit to a company to explore and carry out industrial activities, can the use of the land be termed a non-natural use if in the process something dangerous escapes? That being said, this rule will deter companies or individuals from carrying out their activities in a way that others will be affected. This rule has brought about multinational oil companies applying best standards in carrying out their operations.

Thankfully, a prospect with regard to this is the fact that the defendant is responsible for accidental harm, independently of the existence of either wrongful intent or negligence and the plaintiff need not prove that. While this principle has been applied to a wide range of escape of substances or objects including water, fire, gases and fumes, electricity, oil, chemical, colliery waste, poisonous vegetation, explosives, vibrations amongst others. It will enhance environmental litigation as an aggrieved will not be restricted to a particular escape as the subject for litigation but can be brought under various heads. With the passing into law of the Petroleum Industry Act, oil companies must have to conform with International Best Practices in carrying out their activities. They will be sanctioned either through the Torts doctrines or criminal law if they pollute the environment or cause another injury as a result.

3.4 Environmental Litigation (Negligence)

Here is another strand of environmental litigation through which those wronged can seek remedies and compensation.

The tort of negligence may be defined broadly as the branch of a legal duty to take care which results in damage undesired by the defendant to the plaintiff.[32] The principle of negligence implores a person to take reasonable care to avoid acts or omissions which one can reasonably foresee would likely cause injury to his neighbour. The neighbourship principle was laid down by Lord Atkin in the case of *Donoghue v. Stevenson*[33] where he stated inter alia to the answer of who one's neighbour is "...persons who are so closely related and directly affected by my acts that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to acts or omissions which are called in question."

[32] Winfield and Jolowicz on Tort (19thedn, Sweet & Maxwell 2014) 78
[33] [1932] AC 562

Based on this neighbourship principle, every owner of land or property owes a duty of care to all his neighbours in his use of land or property. Thus, for an action in Negligence to succeed, the plaintiff must prove against the defendant company that caused the pollution which resulted in injuries that he owned him a duty of care, and that he was negligent thus, requiring the defendant to pay compensation for damages. In the case of *Olutemehin & Ors. v Lagos City Council*,[34] which was a case involving, the unreasonable disposal of human defaces near a church premises, emission of offensive smell from the depot to the plaintiff's premises thereby fouling the air in the church and vicarage, causing worshippers to vomit and faint. The trial Judge understood clearly the case of the Plaintiffs and granted not just injunction for nuisance but also found the defendant negligent. However, for action in negligence to succeed, the plaintiff must prove against the defendant that he was negligent and he failed to carry out his acts with care which resulted in the injury suffered. In proving same has become a challenge.

In the case of *Ifeagwu v. Tabansi Motors Ltd*[35] the defendants were found liable in negligence for spilled petrol which burst into flames from a tanker driven by the 1st defendant and caused damage to the plaintiff by way of burns.

Challenges and Prospects

One major challenge in proving negligence that resulted in damage is the requirement of expert testimony. The fact that the plaintiff cannot employ the services of trained experts as opposed to the multinational oil companies who can afford the services ten times over. This is the further expounded with the case of Seismograph Service Ltd. V Benedict Etedgere Onokpasa where the point of issue was negligence and for the action in Negligence to succeed, it has to be established that the defendant has been careless or negligent in the exercise of his specific legal duty to take care. The Respondents were unable to establish the negligence of the Appellants company because the three experts called by the respondents were unskilled in the relevant field and unable to satisfy the court. Another challenge in negligence is the Foreseeability rule. Where foreseeability of the relevant type of damage is necessary pre-requisite for liability in negligence, nuisance and the rule in *Ryland v. Fletcher.*[36]

3.5 Environmental Litigation (Nuisance)

This is another strand of environmental litigation that a person whose environmental right has been breached can sue for redress in accordance with the available remedies. The word "nuisance" in ordinary parlance means any source of inconvenience or annoyance. However, in legal parlance, it takes place when physical injury is inflicted on another person's property or that the ordinary use of same is materially interfered with. The tort of nuisance is known in common law to have contributed mostly to environmental protection. Action/Litigation in nuisance may be divided into Private and Public nuisance.

[34] [1968] ANLR 114
[35] (1972) 2ECSLR 790
[36] (1868) LR 1Ex. 265, 270-280

i. Private Nuisance

Private nuisance was defined in *Read v. Lyons & Co*.[37] as "unlawful interference with a person's use or enjoyment of his land or some right over or in connection with it".

Private nuisance attempts to strike a balance between the right of the defendant to use his land as he wishes, and the right of the plaintiff to be protected from interference with his enjoyment of land. However, it is not every interference with another's use or enjoyment of land that can constitute a private nuisance. For an action in private nuisance to be maintained, the interference must be substantial and also unreasonable with the occupier's interest in the beneficial use of his land. Instances of private nuisance actions in an environmental context relates to physical damage to property and chattels caused by the defendants polluting emissions which came in contact with and damaged the claimant's property. The case of *Abiola* v *Ijoma*[38] where the plaintiff and defendant were neighbours, occupying adjoining premises in a residential area. As a pastime, the plaintiff kept poultry at the back of his house. At a time, the defendant kept four hundred chickens in pens erected against a wall that constituted the boundary with the plaintiff. The plaintiff contended, among other claims, excessive noise made by defendant's chickens in the early hours of the morning that disturbed his sleep. The court agreed with the plaintiff and awarded damages against the defendant for the nuisance is very apt. private nuisance has set the ball rolling for any whose right of enjoyment of land has been breached by the defendant in the use of his land to enforce their claim through litigation. .[39] In *Oladehin v Continental Textile Mills Ltd*[40] the court held that the defendant's industrial activities which produced poisonous, contaminated water causing serious damage to the plaintiff's building rendered the defendant liable for damages in tort of nuisance. From the above, it follows that where bio and hydro energy activities cause undue damage to the property of others, or contaminate the land, air, or water enjoyed by others, or unduly interfere or restrict the rights of others to the use and enjoyment of their land or a clean and healthy environment, an action in nuisance may lie against those engaged in such activities.

ii. Public Nuisance

A public nuisance on the other hand is committed where a person carries on some harmful activity which affects the general public or a section of the public. It is an unreasonable interference with the safety or convenience of the general public or with their right to use and enjoy their land. Public nuisance is basically a crime[41] actionable by the Attorney –General. It is also actionable by an individual plaintiff only where the latter can show that the defendant's conduct or act has caused him 'particular damage' over and above that suffered by the general public. In the absence of special damage, there can be no action unless the Attorney-General can be persuaded to bring one. The case *of Adediran v Interland motors*[42] where the plaintiffs are residents of Ire-Akari Housing Estate, Isolo, brought this action on behalf of themselves and all other members against the defendants who are in the transport business. They own several long trailers. They use their premises in the Estate as their workshop and for parking the trailers. Consequently, there is

[37][1947] AC 156, 2ALL ER 471
[38] 1970) 2 All NLR 268
[39]National Environment Protection (Pollution Abatement in Industries and Facilities Producing Waste) Regulations 1991
[40](1978)2 SC 23
[41]Penal Code Act 2008, Ss 192 & 194, Criminal Code Act, Cap C38 LFN 2004 S.234
[42] (1991) – SC

considerable traffic of these long heavy trailers in the Estate, throughout the day, and for most part of the night. The many drivers employed to drive these vehicles, also park the trailers in the roads of the Estate making the roads virtually impassable. The complaint of the residents of the Estate is that the heavy trailers have rendered the roads unsafe for children, destroyed the roads and knocked down electric poles. The disturbing noise made by the drivers in the process of returning to park the vehicles, and taking off early in the morning constitute, in addition to the other inconvenient activities, the nuisance complained of. After several protests to the first defendant, the Residents, who are the plaintiffs brought this action. After due trial of the claim on the pleadings exchanged by the parties in the High court, the claim against the 2nd defendant was dismissed by Ayorinde, J. The learned trial Judge held the first defendant liable for the tort of nuisance, and awarded N20 000 as general damages.

Challenges and Prospects

One of the problems in public nuisance proceedings is that there is so much apprehension and lack of confidence. This is traceable to the fact that it is only the Attorney-General acting on behalf of the public that can institute an action. Since the Attorney-General is in a position of government appointee, his efficiency and effectiveness may be influenced by a number of factors ranging from political interest to irrational support for the organs of the state and policies of government, complacency and bureaucratic rules. One great prospect is the fact that association can sue when there is a nuisance and the above case has shown that. The American case of *Boomer v Atlantic Co.*[43] where the plaintiff brought an action against a neighbour for pollution arising from the operation of a cement factory which resulted in injury to the plaintiff property by way of dirty smoke and vibration emanating from the plant. The court allowed a private individual to sue in public nuisance on the premises that there were some private rights that needs protection. The court here upheld justice thereby setting a standard that those who come to court gets justice. Here the Nigerian judiciary's problem may be lack of adequate information as to the destructive nature and harmful potentials of industrial emissions and waste.

4.0 Criminal Enforcement Aspect/ Strand of Environmental Litigation

This work will discuss certain laws that provides for environmental protection and litigation with regards to fines and their duties.

a. Criminal Code Act [44]

The earliest environmental law enactment in Nigeria in relation to water pollution is the criminal code Act which contains provisions for the prevention of public health hazards and environmental protection. Sections 245-248 deal with offenses ranging from water fouling to the use of noxious substances.[45] Section 245 provides: "any person who corrupts or fouls the water of any spring, stream, well, tank, reservoir so as to make it less fit for the purpose for which it is ordinarily used, is guilty of a misdemeanor and is liable to imprisonment for six (6) months".[46]

[43](1973) UILR, Pt IV, 459
[44] Criminal Code Act, Cap C38 LFN 2004
[45]Ibid Ss. 245-248
[46] Ibid S.245

Challenges and Prospects

From the wordings of this section, it is evident that the provision is not a strict provision that covers all aspects of water pollution but rather its emphasis is on fouling of water with any chemical capable of harm to marine or fish life which would be in contravention of section 245 of the Act.

b. National Oil Spill Detection and Response Agency Act 2006 (NOSDRA)[47]

The government's response to the continuing environmental pollution in Nigeria and the inefficient regulatory frameworks led to the enactment of the National Oil Spill Detection and Response Agency Act 2006 (NOSDRA). Consequently, the National Oil Spill Contingency Plan (NOSCP) was established in accordance with the International Convention on Oil Pollution Preparedness, Response and Co-operation (OPRC) 1990,[48] which Nigeria has ratified.[49] The main objective was to address the environmental degradation in the oil-producing areas, to co-ordinate oil spill management and to ensure the implementation of the National Oil Spill Contingency Plan (NOSCP) in Nigeria.[50]

NOSDRA is empowered to ensure timely, effective and appropriate response to oil spills, as well as ensuring clean up and remediation of all impacted sites to all best practicable extent. It shall identify high risk/priority areas in the oil-producing environment for protection as well as ensure compliance of oil interplay operators with all existing environmental legislations in the petroleum sector.[51] The agency will ensure that polluters report oil spill incidents within 24 hours and that impacted sites are cleaned up to 'all practicable extent'.[52]

Failure to report any oil spill incident attracts a fine of N500,000 for each day.[53] The Agency depends on government for its funding but can obtain loans and aids from other organizations.[54]

Challenges and Prospects

Part of the criticism of the NOSDRA is that it enjoins the Agency to ensure that oil spill cleanup is done 'to all practicable extent' without defining what practicable extent meant.[55]

This ambiguity has not helped in clearly stating the level of remediation required from the IOCs, thereby creating enforcement difficulties which contribute to frequent oil spill incidents.

Also, the Agency is not well funded thereby resorting to get funding from the oil companies and thus becoming subject to regulatory capture. This problem of funding also makes the agency ineffective in carrying out its functions against polluters/spillers.

[47] NOSDRA (n14)
[48] Adopted 30 November 1990; entry into force: 13 May 1995 30
[49]Nigeria became a member of the international Maritime Organization (IMO) in 1962, hence ratified the Convention
[50] Federal Ministry of Environment, NOSDRA<http://environment.gov.ng/about-moe/departments-agencies/agencies-parastatals/national-oil-spill-detection-and-response-agency-nosdra/> accessed 12 November 2016
[51]NOSDRA< http://environment.gov.ng/index.php/nosdra>accessed 3 March 2017
[52]NOSDRA s6 (2) (ii)
[53] See First and Second Schedule of the Act
[54] NOSDRA s 11
[55]ibid s 6 (3)

c. National Environmental Standards and Regulation Enforcement Agency Act (NESREA) 2007[56]

The National Environment Standards and Regulation Enforcement Agency (NESREA) Act of 2007 repealed the Federal Environmental Protection Agency (FEPA) Act. NESREA is saddled with the responsibility of enforcing environmental laws, regulations and standards in deterring people, industries and organizations from polluting and degrading the environment.[57] It is made up of laws and regulations geared at the protection and sustainable development of the environment and its natural resources. However, sections 2 and 35 of NESREA Act preserve the various guidelines and standards made by FEPA, which generally apply to all sectors including pollution from oil and gas.

Section 7 provides the Agency with the power to enforce compliance with laws, guidelines, policies and standards on environmental matters local and international, environmental sanitation, pollution prevention and control through monitory and regulatory measures.

Section 8 (1)(K) empowers the Agency to make and review regulations on air and water quality, effluent limitations, control of harmful substances and other forms of environmental pollution and sanitation.

Section 27 provides that the discharge of hazardous substances into the environment without lawful authority is prohibited This offence is punishable under sub-section (2) and (3) of section 27 with a fine not more than N1, 000, 000 (One Million Naira) and an imprisonment term of five years. For a company, there is an additional fine of N50, 000 for every day the offence continues.

It should be noted that NESREA did not save section 23 of the FEPA Act that promotes cooperation between the Agency and the petroleum industry after the repeal of the FEPA Act. Thus, the Department of Petroleum Resources (DPR) does not countenance the role of NESREA regarding pollution control, hence the ensuing conflict between the two regulatory bodies.

Challenges and Prospects

The fines are very paltry and cannot instill compliance The fines are grossly inadequate as they will not be able to deter the oil companies from polluting the environment; they will rather contravene and pay these fines than comply as the fines are very meagre compare with what they make from oil exploration. Another challenge of this strand of environmental litigation is that corporate bodies often do not serve prison terms thereby discouraging litigants of environmental litigation. One prospect is that "NESREA Act and Regulations constitute a new dawn because in both purpose and contents, they address the preponderance of obsolete environmental regulations, standards and enforcement mechanisms, which have resulted over the years because of non-compliance with environmental laws",[58] according to Laden. Thus, a defendant who violates the provisions of the act can be sure of being liable through sanctions either by way of fines or imprisonment.

[56]National Environmental Standards and Regulation and Enforcement Agency Act 2007

[57]NESREA<http//: www.nesrea.gov.ng/about-us/>accessed 19 June, 2017

[58]M.T Ladan, 'Review of NESREA ACT 2007 and Regulation 2009-2011: A New Dawn in Environmental Compliance and Enforcement in Nigeria' [2012] 8 *Law, Environment and Development Journal* 1, 121

The NESREA Act could not protect the environment and manage the petroleum industry that degrades the Nigerian environment due to lack of jurisdiction over hydrocarbon industries.[59] This challenge makes it difficult for enforcement as aggrieved plaintiffs do not know where to begin actions against the defendants (multinational oil companies).

4.1 Environmental Litigation Strand (Plastic Pollution)

Plastic pollution is the accumulation in the environment of synthetic plastic products to the point that they create problems for wildlife and their habitats as well as for human populations.[60] Plastic pollution is caused as a result of Negligence. In fact, it is estimated that 80% of marine litter comes from land. This pollution comes mainly from household waste, which is poorly recycled, dumped in landfills or abandoned in nature. Plastic pollution can alter habitats and natural processes, reducing ecosystems' ability to adapt to climate change, directly affecting millions of people's livelihoods, food production capabilities and social well-being.

United Nations Environment Programme's body of work demonstrates that the problem of plastic pollution doesn't exist in a vacuum. The environmental, social, economic and health risks of plastics need to be assessed alongside other environmental stressors, like climate change, ecosystem degradation and resource use.[61] In *Earth Island Inst. V Blue Triton Brands*[62] Plaintiff, environmental organization, brought an action against BlueTriton Brands (formerly known as Nestle Waters North America) seeking injunctive relief against the Defendant trade practices and declarative relief in the form of an order holding the Defendant conduct to be unlawful. The Plaintiff alleged that the Defendant violated the D.C. Consumer Protection Procedures Act, arguing that the Defendant marketing is false and deceptive because the company portrays itself as sustainable and committed to reducing plastic pollution through its recycling targets while falling short of those targets and continuing its environmentally harmful practices. On June 7, 2022, the Defendant's motion to dismiss was denied in superior court. Previously, the Defendant removed the case to federal court. The Court granted Plaintiff motion to remand and denied its request for fees and costs. Also, in *Coal. to Protect Puget Sound Habitat v U.S. Army Corps of Engineers*[63] Plaintiffs, environmental group, filed an action against the U.S. Army Corps of Engineers seeking to challenge a permit pertaining to shellfish aquaculture. The Plaintiffs argued that the permits "must be invalidated" because, in essence, the approved practice could result in plastics being introduced into the waterways in violation of the Clean Water Act and the National Environmental Policy Act. The district court awarded summary judgment to the plaintiffs. These and many more cases show that plastic pollution is now a global menace and legal enforcement through environmental litigation can help to curb the menace.

Interestingly, in a bid to combat plastic pollution, Latin American and Caribbean States say no to plastic. Awareness of the need to act is growing in a region that is particularly vulnerable to marine litter and to other environmental threats caused by our changing climate, such as increasingly powerful storms. In

[59]S.C Dike (n135) 58
[60]Plastic Pollution < https://www.britannica.com/science/plastic-pollution>accessed 29 July 2023
[61] Plastic Pollution<https://www.unep.org/plastic-pollution>accessed 25 July 2023
[62] (2021) CA-002027, D.C. Super CT. 2022< https://plasticslitigationtracker.org/> accessed 25 July 2023
[63] (2021) 2:21-cv-01685, W.D. Wash.2021 < https://plasticslitigationtracker.org/>accessed 25 July 2023

2020, 3.7 million tonnes of plastic pollution entered the ocean from countries in the Latin America and the Caribbean Region (LAC).

Right now, 27 of the 33 countries in the LAC region have passed national or local laws for the reduction, prohibition, or elimination of single-use plastics. Yet, much more needs to be done. Plastic represents about 10-12 per cent of municipal solid waste, and the rates of recycling and waste recovery are typically less than 10 per cent in the region's countries.[64] In light of the above, countries such as **Belize**, renowned for the second largest barrier reef in the world, pledged to ban single-use plastic items, such as cutlery, bags and straws, as well as Styrofoam by April 2019. The ban was finally put in place in March 2022, although questions remain over its enforcement.

Brazil

Brazil has had a National Plan to Combat Waste in the Sea since 2019, which however, has not yet been implemented. Two decrees related to waste were published earlier this year, one re-establishing a Program to support waste pickers and another to reorganize the reverse logistics and recycling credits system. Although Brazil still doesn´t have a country-wide ban in place, some key governments, such as the State of Rio de Janeiro and the City of São Paulo are taking action and have adopted local bans on bags, straws, and other single-use plastic products. The City of São Paulo is also a signatory to the New Plastics Economy Global Commitment.

Chile

The country was the first in South America to ban the use of plastic bags in 2018. The Single-Use Plastics Law entered into force in 2021, regulating the use of single-use plastics in food establishments, which are prohibited from handing out straws, stirrers or chopsticks.

Colombia

The National Plan for the Sustainable Management of Single-Use Plastics aims to ensure that 100 per cent of single-use plastics placed on the market are reusable, recyclable, or compostable by 2030. In 2022, the country approved a bill to ban 14 types of plastic, including plastic bags, straws and fruit and vegetable packaging.

5.0 Other Challenges and Prospects of Environmental Litigation

1.Lack of Trained Practitioners

There is a dearth of qualified trained practitioners in the field of Environmental Law. Most practitioners who handle cases in this area always have difficulty in appreciating the technicalities involved in this area of law. Furthermore, most Judges and Lawyer are ill equipped to appreciate the scientific issues at stake.[65]

[64] Blue Awakening as Latin American and Caribbean States say no to Plastic< https://www.unep.org/news-and-stories/story/blue-awakening-latin-american-and-caribbean-states-say-no-plastic?__cf_chl_tk=GzaVwLINdXxFPV7qse4UDWFkPhwsvBZHCyHB7j2yh.Q-1690239167-0-gaNycGzNDiU> accessed 25 July 2023

[65] J. A. Omotola,'Problems of Proof in Environmental Litigations' in JA Omotola (ed), Environmental Laws in Nigeria Including Compensation (UNILAG Press 1988) 113

2. Locus Standi

Locus Standi is a Latin word which means "a place of standing"; It is the ability of a party to demonstrate to the court or a competent tribunal, a sufficient and direct connection to harm from the law. This means that it is the right to sue. The rule of *Locus Standi* is based on the approach that judicial time ought not to be wasted over a busybody or meddlesome interloper. Therefore, once a plaintiff has no *Locus Standi,* it is not necessary to consider whether there is a genuine case on the merits; the case must be decided as incompetent. The case of Oronto Douglas v Shell Petroleum Company Ltd & Five Ors[66], where the plaintiff brought an action as a public-spirited Nigerian considering the effect of the Liquefied Natural Gas project that was about to take place without Environmental Impact Assessment conducted to ascertain the project's impact on the environment. That the defendants should be restrained and be required to carry out the assessment before commencing the project. It was held that he lacked locus to sue as he has no evidence to prove that his right was affected or any injury was caused to him more than others. While waiting for a re-trial at the court of appeal, the project has been completed. However, the recent case of *Centre for Oil Pollution Watch v. Nigerian National Petroleum Corporation (NNPC)[67] 1999,* the court overturned the decision of the Court of Appeal which held that the Appellant had no *Locus Standi* to bring an action against the NNPC for failing to clean up or reinstate the Ineh/Aku streams after its corroded pipeline ruptured, fractured and spewed its entire contents into the surrounding streams and rivers in Abia State, Nigeria.

3. Jurisdiction Issue

The power of superior courts to enquire into environmental claims is generally vested in the High Courts. In Nigeria, High Courts are separated into the State High Courts and the Federal High Courts and both exercising coordinate jurisdictions but with separate powers. Environmental claims with subject on oil and gas and which involves the Federal Government agencies are properly suited for the Federal High Courts as contained in section 251 of the 1999 Constitution[68] (as amended*).* In *Shell Petroleum Development Company of Nigeria Limited v Chief G.B.A. Tiebo & Ors,*[69] the court held that the jurisdiction of state high courts over oil mining, geological surveys and natural gas was limited by section 251 of the Constitution, which is the preserve of the Federal High Court. Interestingly, that barrier has been lifted in the case of The Environmental Rights Action/Friends of the Earth Nigeria (ERA/FoEN), an NGO, on behalf of Four Nigerian Farmers from Ikot Ada Udo, Oruma and Goi who sued Shell over oil pollution in the three Nigerian villages in 2008. The judgement by the Netherland's court of appeal that held Shell liable for the oil spills it caused across Nigeria's coastal communities of the Niger Delta in 2008 is described as a healthy development. While Shell denies the claims made by the Farmers, the farmers on their part demanded that Shell clean up the oil spill, pay compensation for the damage caused, and improve the maintenance of its pipelines and installations to prevent future spills. In spite of the fact that the case lasted for over 13years, the Appeal Court in the Hague on January 29, 2021, ruled that Royal Dutch Shell was liable to pay compensation for the oil spills which polluted rivers, fish pond and farmlands for thousands of local farmers and fishermen. This judgement addresses question of access to justice and that of jurisdiction.

[66] Suit No. FHC/2CS/573/93. Court Ruling delivered on the 17th February 1997
[67] (2019) 5NWLR (Pt. 1666) 518
[68] Constitution of the Federal Republic of Nigeria 1999 (as amended)
[69] (1997) 6 NWLR (Pt 508) 236

4. **Problem of Proof**

In Environmental litigation, expert evidence may be necessary to prove highly professional and technical matters to assist the court in carrying out a fair and just decision.[70] Environmental harm may not manifest itself immediately as it is very technical in nature in terms of proof. The judicial authorities of *Seismograph Services Ltd. v Esiso Akporuovo is an example.*

5. Ignorance

There is a high level of ignorance in respect of environmental rights in Nigeria. Many citizens still do not know about their rights. This is common even among the elites such as lawyers. Therefore, there is need for continuing legal education in this respect to equip lawyers with knowledge of environmental protection rights and how to fight for them on behalf of their clients. This is necessary as majority of the victims are usually illiterate; for example, the Host Communities where oil exploration activities take place and the rural areas.

6. Delay of Cases

Environmental Pollution/Protection cases compete for hearing alongside the innumerable other cases also assigned to the same court. Court congestion and very long adjournments would invariably affect the authenticity of evidence and prolong the suffering of the victims. Also, frequent transfer of Judges or death of Judges would result in the case starting afresh and this often poses a lot of problems to victims.

7. Distance of Courts

There is also the problem of distant courts. The locations of courts where citizens can enforce their environmental protection rights are normally far from the communities where such violations occur. The courts are usually located in the cities. This is a discouraging factor for intending litigants.

8. Cost of Litigation

Cost of employing the services of a lawyer by litigants to defend them has been a hindrance in an effort to pursue matters that resulted in huge damage and injury to them. They also cannot go to court very often as they do not have the means.

6.0 Conclusion/Recommendation

From this work, I examined various Strands of Environmental Litigation with their Challenges and Prospects through the Constitution, the Common Law Doctrine of Torts such as Nuisance, Strict Liability (Ryland v Fletcher) Trespass to Land and Negligence. The Criminal aspect was also considered with reference to the Criminal Code Act, The NOSDRA and NESREA Act. So far, we saw that Nigeria still has some miles to travel by ensuring the court do away with technicalities and rigid principles that deny litigant's access to justice. As a developing country, we can learn from other developed countries by being flexible in our interpretation of the Law. Government should be held accountable for their action and pay necessary compensation when the need arises or if found wanting. The case of R (Environment Canada) v R (Northwest Territories Canada)[71] where the Government of the Northwest Territories were charged for

[70] Niki Tobi, 'Judicial Enforcement of Environmental laws in Nigeria' (2005) 2 no. 1 Environmental & Planning Law Review 90, 99

[71] (1993) 12 C.E.L.R (N.S) 55

discharging raw, untreated sewage of up to 56,000 cubic meters from the lqaluit sewage lagoon into the waters of Koojesse inlet on Baffin Island in the Northwest Territories which is owned and operated by the Government of Northwest Territories. The judge found the Government guilty and were ordered to pay fine of $49,000 and another $40,000 to Environment Canada in trust for the purpose of promoting conservation and protection is remarkable. The government should not be above the law, as in the words of the judge, 'The court must be much more severe when such a disaster is caused by agents of an arm of the Crown, since it is precisely the Crown on which the public relies on to protect both the resource species and the environment', is a salient example.

There should be creation of Environmental Courts in all States of the Federation. With this arrangement, victims of environmental pollution/issues relating to the environment can be easily and quickly dispensed with.

In the area of Plastic Pollution, Nigeria should endevour to come up with a law that will reduce/face out the use of plastic bottle, plates for food takeaway and nylon bags in whatever form. Borrowing a leaf from Chile, Argentina, Brazil, Mexico etc. One way this can be achieved is to stop the use of polythene and nylons for selling items, plastic containers and spoons as takeaway which are for single use and most times non-recyclable. The use of paper envelop should be introduced instead as that is the current practice in Kigali Rwanda, where food packs are made of paper which are used as takeaways, bread wrappings are also made of paper. Paper envelops are used to pack items sold to a customer at all times.

Finally, Nigeria should endeavor to key into the United Nations Resolution adopted by the United Nations Environment Assembly on 2 March 2022 titled, End plastic pollution: towards an International Legally Binding Instrument. The Conference outlines the effects of plastic pollution on both man and the environment, and if action is not taken to curb it now, we may lose planet earth to it. [72]

[72] UNEP/EA.5/Res.14, 7 March 2022; United Nations Environment Assembly of the United Nations Environment Programme