

APPRAISING CONTEMPORARY JUDICIAL ATTITUDE ON ENVIRONMENTAL LITIGATION IN NIGERIA

By

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Abstract

The victims of oil spillage in Nigeria have had severe difficulty accessing justice, hinged on technicalities, payment of adequate compensation, jurisdictional issues and locus standi, to mention but few. This article is aimed at appraising the initial attitude of courts in oil spill litigation and the current position of the court in light of the recent Supreme Court decision in the celebrated case of Centre for Oil Pollution Watch V. Nigerian National Petroleum Corporation 5 NWLR [PT.1666] P.518. The research method adopted is doctrinal, which examines legal theories and frameworks. Thus, primary sources are case laws on the subject and Nigerian environmental statutes, and secondary sources include relevant journal articles, textbooks and online materials. It was discovered, amongst other findings, that the harsh attitude of the court towards victims of oil spill litigation has been mitigated by recent decisions of the court that will be examined herein.

Keywords: contemporary, Judicial Attitude, environmental, litigation, Nigeria.

1.0 Introduction

Petroleum exploration and production activities have exposed the well-being of indigenous people of the Niger Delta to environmental danger, robbing them of the ability to sustain their necessities. The Niger Delta has agonised over all forms of pollution and environmental degradation resulting from petroleum exploration and production. The indigenous people of the Niger Delta are known for their fish farming, lumbering and agricultural activities as a significant source of livelihood¹. Unfortunately, the fauna/flora and water on which they hinge have been endangered and distressed by oil exploration actions; farmlands are at times wholly damaged, and drinking water sources of drinking water are poisoned. At the beginning of these pollution activities, the people were not kin about approaching the court for compensation and damages, and there used to be an out-of-court settlement between the people and the multinational oil companies. This led the multinationals to allocate a reasonable sum to defray people's pollution claims. Nevertheless, the institution of an amnesty programme by the Federal around 2007 gave room for the unparalleled number of oil pollution claims within the Niger Delta region.

Environmental litigation in the Niger Delta region of Nigeria has met with different challenges. Victims of environmental pollution, particularly oil spillage, usually find it almost impossible to get adequate compensation and injunction restraining the polluters from continuing with pollution and restoring the environment to its status quo. Sadly, this has been the attitude of the courts; the victims of oil pollution were mostly unable to establish their claims beyond preponderance of evidence to sway the scale of

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¹ P D Okonmah, "Right to a clean environment: The case for the people of oil-producing communities in the Nigerian Delta". (1997) 41 J.A.L. 43 at 43.

justice to tilt in their favour. There were issues of jurisdiction of the court, technicalities in establishing that the pollution was not a result of sabotage, *locus standi*, adequate compensation and the like. The polluters (multinational oil exploration companies) usually put up any defences available under common law to escape liability.

Against this backdrop, this article examines courts' initial attitudes towards oil spill litigation and their current position, particularly with the recent Supreme Court decision in *Centre for Oil Pollution Watch v. Nigerian National Petroleum Corporation*². The paper shall, therefore, delve into the discussion of jurisdiction and, subsequently, the issues mentioned above.

2.0 Issue of Jurisdiction in Oil Spill Litigation

Jurisdiction is the lifeline of every case. Counsel to the litigant must confirm that the appropriate court clothed with jurisdiction to entertain the matter is approached for redress, as failure to do so will be disadvantageous to the matter. In *Aberuagba v. Oyekan*, the court emphasised that jurisdiction is fundamental in determining any matter before a court of law. Where jurisdiction is wanted in a court, the parties cannot confer and vest jurisdiction on such court. This was aptly demonstrated in the case of *N.C.C. v. MTN (Nig.) Comm. Ltd.*³ where the court stated that jurisdiction cannot be acquired by consent of the parties, nor can it be enlarged by estoppel. One of the jurisdictional litigation issues related to the oil spill was in *Shell Pet. Dev. Co. (Nig.) Ltd. v. Isaiah The Plaintiff at the trial court*, sued for damages for the oil spill caused by the Defendant's oil production operation; the issue of jurisdiction was raised; the court pointed out that jurisdiction is the "authority which a court has to decide matters brought before it". The limits of this authority are imposed by the statute, charter, or commission that created it; the jurisdiction may be extended or restricted by the same Statute. In a situation where no restriction is imposed, the jurisdiction is said to be unlimited.

It is important to note that the issue of jurisdiction can be raised at any stage of the proceedings, even on appeal. Once the issue of jurisdiction is raised, it touches the competence and legality of the case. Hence, where the jurisdiction of the court is challenged, it must first consider and decide the issue because where a court goes ahead to exercise a jurisdiction that is lacking, its decision amounts to a complete nullity.

Section 251 (1)(n) of the 1999 Constitution, matters related to mines and minerals (including oil fields, oil mining, geological surveys and natural gas) are exclusively heard by the Federal High Court.⁴ Hence, the federal High Court has jurisdiction in oil spill litigation. Nevertheless, it is not every matter that involves an oil company over which the Federal High Court has jurisdiction. The 'dispute or the subject matter' which the parties propose the court to determine reveals the court with the appropriate jurisdiction.

In *Shell Pet. Dev. Co. V. H. B. Fishermen*.⁵ The court, in answering whether the Federal High Court has exclusive jurisdiction to determine matters arising from oil spillage or pollution, held that by section

² 5 NWLR [PT.1666] P.518

³ (2008) 7 NWLR (Pt. 1086) 229 CA 47.

⁴ CFRN 1999, s 251 (1)(n).

⁵ (2002) 4 NWLR (Pt. 758) 505.

230(1) (O) of the 1979 Constitution as amended by Decree No. 107 of 1993 (now section 251(l)(n) of the 1999 Constitution) the Federal High Court has jurisdiction to the exclusion of any other court in civil causes and matters arising from mines and minerals (including oil fields, oil mining, geological surveys and natural gas). The same jurisdiction is conferred under section 7(1) of the Federal High Court (Amendment) Decree No. 60 of 1991. The recent decision of the Court of Appeal in *Nigerian Agip Oil Company Limited V. Onyemachi Ogbu*⁶ has reformed this idea of exclusive jurisdiction of the court. This decision affirms the exclusivity of the compensation provisions of the Oil Pipelines Act. It offers supportive direction on the general approach to litigating oil spill claims in Nigeria. Section 11 (5) of the Oil Pipelines Act must be strictly adhered to, and the Federal High Court's jurisdiction can only be activated upon fulfilling those preconditions listed under section 11 (5) of the Oil Pipelines Act.

3.0 Cause of Action in Oil Spill Litigation

Cause of action involves the accurate situation which springs a right to judicial relief. It is a functioning fact, that is, the factual situation, which gives rise to a right of action, which is a remedial right. In explaining what constitutes a cause of action, the court stated, "A cause of action consists of every fact which it would be necessary for the plaintiff to prove if traversed to support his right to judgment. When these facts have occurred and provided a competent plaintiff and a competent defendant, a cause of action is said to accrue to the plaintiff because he can then prosecute the action effectively. Thus, the accrual of a cause of action is when a cause of action becomes complete so that the aggrieved party can begin and maintain his cause of action."⁷

In oil spill litigation, the primary cause of action is generally the breach of the claimant's right to use and enjoy their land (known as trespass), which depends on Common Law rules of Negligence, Nuisance and Strict Liability. At common law, a person can be held liable for the tort of negligence for injuries caused to a third party arising from his actions or inactions. The rule was set out in the celebrated case of *Donoghue v. Stevenson*.⁸ Wherein Lord Atkin asked, "Who is my Neighbour? My neighbour is anyone who can be affected by my actions or inaction."⁹ The principle states, "A person owes other persons within his contemplation a duty of care to exercise reasonable care in what he does, and not do same in a manner that is likely to injure these other persons'. Where an oil spill arises from an oil company's negligent act, the spill victims can take action based on this principle. However, the fact that a party has alleged an act to have occurred due to the defendant's negligence doesn't warrant immediate payment of damages and compensation; the Plaintiff claiming to have suffered damage as a result of the spill has the responsibility to establish his claim, was the position of the court in *Seismograph Serv. v. Mark*.¹⁰

For a Plaintiff to succeed in a negligence claim, a claimant must establish certain elements, such as

- a. That the defendant owed the claimant a duty of care.
- b. That the defendant has breached the duty of care.

⁶ (2019) 35 W.R.N 132

⁷ *Adebowale v. Mil. Gov Ogun State* (1994) 4 NWLR (Pt. 392) 733 CA

⁸ (1932) A.C 562.

⁹ *Ibid.*

¹⁰ (1993) 7 NWLR (Pt. 304) 203 .

- c. That the claimant suffered damages arising from the breach.

Where a claimant fails to establish that an oil company was negligent in its duty, the court would not grant the remedies sought. This was aptly demonstrated in *Anthony Atubie v. Shell B.P Development Co Nig Ltd.*¹¹ A claim for damages arising from the Defendant's oil operations, which polluted the plaintiff's farmland and lakes, failed because the Claimant could not establish negligence on the part of the Defendant.

It is important to note that the tort of Strict Liability established in the famous case of *Rylands v. Fletcher*.¹² Can also be established against a defendant. This can happen where the law holds a person strictly liable for damages resulting from the escape of a non-natural user brought upon the premise in which the escape occurred by the defendant. The rule is that; "a person who for his purpose brings on his land and collects and keeps there anything likely to cause mischief if it escapes, is prima facie answerable for all the damage which is the natural consequence of its escape." The above rule was applied in *S.P.D.C. Ltd. v. Edamkue*, and The court held an appellant strictly liable for damages occasioned by the oil spill.

The following must be proven and established for a Plaintiff to succeed.

- a. the defendant is the owner or occupier of the land and, therefore, in control of the oil pipeline occasioning the spill.
- b. that the defendant brought upon his land or collected and kept something dangerous on the said land, likely to cause mischief if it escapes (Oil spill).
- c. that the defendant engaged in a non-natural use of the land.
- d. that there was an escape from the subject matter occasioning the injury.

A claimant can also institute an action for private nuisance in oil spill litigation. A nuisance is a branch of tort law closely concerned with protecting the environment. It covers areas such as pollution by oil spillage, toxic fumes and other offensive smells from premises, noise generated from industrial concerns and other human activities, and obstruction of public highways.¹³

To succeed in the action for the tort of private nuisance, a claimant must establish that;

- a. there was continuous interference.
- b. in fact, the interference was unreasonable.

The court identified that nuisance can be private or public in *S.P.D.C. Ltd. v. Adamkue*¹⁴. It is a public nuisance that disturbs the generality of the community. However, a private person can bring an action for public nuisance if he can show that he suffered personal damages distinct from others. In explaining this, the court held that "a 'public nuisance' inflicts damage, injury or inconvenience to the generality of the population or upon a class of people who come within its ambit. The law is that 'a private

¹¹ (Unreported) UCH/48/73 12th Nov, 1974.

¹² (1868) LR 3 HL 330.

¹³ *Regt. T.T.L.B.C.C. v. Olubobokun* 2017) 1 NWLR (Pt. 1545) 1.

¹⁴ (2003) 11 NWLR (Pt. 832) 533 CA.

individual has a right of action for public nuisance if he can establish that he has sustained particular damage other than and beyond the general inconvenience and injury the public suffers'. Such an individual is also permitted to institute proceedings in his name regarding an injury sustained from a public nuisance¹⁵. The respondents in the present appeal alleged that due to the oil spillage which arose from the appellant's oil exploration, they suffered losses in that there was extensive damage to the rivers, fish ponds, forests and vegetation from where they live. Therefore, they can claim for their losses."¹⁶

4.0 Defences Available to a Defendant in an Oil Spill Litigation

In an oil spill litigation, the defendant can rely on various defences to escape or limit liability. Mainly if the statement claim does not disclose a reasonable cause of action against the defendant, for example, when the claimant is not directly affected by the spill¹⁷ or the defendant company is not the pipeline licensee from which the spill occurred. In these situations, the defendant must file a notice of preliminary objection or a motion challenging the court's jurisdiction because the claim does not disclose a reasonable cause of action against the defendant's company. But if an oil spill has been established, the defendant may raise the following defences:

- a. Act of God. - Act of a third party.
- b. Contributory Negligence and.
- c. Statute Barred.

5.0 Initial Judicial Attitude Towards Oil Spill Litigation

To reinforce Nigerian courts' initial attitude in oil spill litigation, which was pure incapability to protect the environment, injunctions restraining polluters from further polluting the environment were granted; here are some cases in that regard. In *Chinda v Shell-BP*.¹⁸ The plaintiffs complained of the adverse effects of gas flares on their buildings, crops and other plants. Consequently, he asked the court to restrain Shell-BP from operating a flare stack within five miles of the plaintiffs' village. The court refused an order of injunction and described the relief sought as an "absurd and needlessly wide demand." In *Amos & Anor. v. Shell B.P. Petroleum Development Co. of Nig. Ltd. & Anor*¹⁹ The plaintiff sued the defendant for nuisance for constructing a dam across their creek, which resulted in their farms being flooded and damaged. The court held, among other things, that the creek was a public waterway; thus, blocking the creek amounts to public nuisance, and as such, the Plaintiff must establish proof that he had suffered damage peculiar to them.

In an unreported suit between *Allar Iron v. Shell B.P*²⁰ The High Court of Delta State, Warri judicial division, refused an order for an injunction to restrain the defendant from further polluting lands, creeks, and fish ponds because, if granted, the injunction could stop the defendant's trade, render many

¹⁵ *Ibid.*

¹⁶ *Ibid.*

¹⁷ It is important to note that this has been the law, where the court has held that the Plaintiff, having not been directly affected by the oil spill, lacks *locus standi*. The recent case of COPW V. NNPC has paved the way for spirited individuals to bring action for environmental claims on behalf of a group or community.

¹⁸ (1974) RSLR 1).

¹⁹ [1977] LPELR – 74892 (SC) pages 7-8

²⁰ Unreported Suit No. W/89/71 in the High Court of Warri, Nigeria.

unemployed, and even affect the country's revenue since oil was the primary income generator. In *Oronto Douglas v Shell Petroleum Development Company Nigeria Limited & Ors*,²¹ 27. The plaintiff, an environmentalist and public-spirited individual sued the defendants, which included some oil companies, for noncompliance with the procedural requirements of the Nigerian Environmental Impact Assessment Decree No. 86 of 1992 (now an Act) in establishing the Nigeria Liquefied Natural Gas (NLNG) project.

To ensure the NLNG project is essentially a 'greening' mechanism that converts gas that would have been flared (in the process of crude oil production) to cleaner fuel for domestic and industrial use. But it could also be a source of GHG emissions (in the course of gas production and transportation), which situation may be avoided or minimised by strict compliance with the EIA law that aims to ensure that such projects are environmentally sustainable and, by implication, more climate-friendly, unfortunately, the court held that he lacked locus standi to litigate the matter.

In *Seismograph Services Limited v. Benedict Onokpasa*,²² The issue before the court was whether the operations carried out by the defendant company damaged some of the plaintiff's buildings. After emphasising that the plaintiff should prove the defendant's negligence, the court held that the plaintiff failed to discharge the burden because the facts of negligence were not within his knowledge. In *Shell B.P Petroleum Dev. Co. (Nig.) Ltd. v. Otoko*,²³ The plaintiff claimed N1,499,856.00 as compensation for the damage he suffered due to the oil spillage resulting from the defendant's negligence. The trial Judge awarded N491,700.00 in favour of the plaintiff under the rule in *Rylands v. Fletcher*. The Court of Appeal, however, overturned the trial court's decision on the ground that the rule is an aspect of negligence. The defendant was not liable since the witness had refuted negligence by stating that the equipment was properly maintained.

Again, in *Jumbo v. Shell B.P.*²⁴ The Plaintiff sued the defendant for negligence when an oil spillage occurred, and the petroleum products escaped from the defendant's tank at Bonny Terminal into the plaintiff's creek, causing wide-ranging damage to fish, marine life, and fishing nets. It was held that the plaintiff failed to discharge the burden of proof of negligence since they could only establish that the nets were soaked with oil. The Court held further that the plaintiff who sued had no locus standi to bring the suit on behalf of 9,6000 fishermen of the Jumbo House of Bonny since he was not a fisherman and the aggrieved fishermen were supposed to have instituted their action, the appeal failed and was dismissed.

This has been the court's attitude concerning jurisdiction in oil spill litigation until recently

6.0 Contemporary Attitude of the Court in Oil Spill Litigation

It is apparent from the above discussion that the judicial attitude towards oil spill litigation was somewhat unfavourable to the victims. Nevertheless, an aspect of the human rights approach to oil spill litigation is evolving in Nigeria. Currently, two categories of substantive human rights provisions can

²¹ Unreported Suit No: FHC/L/CS/573/96, 17 February 1997

²² (1972) 4 S.C. 123 7. (1990)6 NWLR 123 1972) 4 S.C. 123

²³ 1990)6 NWLR 12(pt. 59) p. 698.

²⁴ (1999) 13 NWLR (pt 633) p. 57.

potentially constitute the basis of environmental action. The first is Article 24 of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, specifically providing for the right to a healthy environment; the second relates to other general, traditional human rights, such as the right to life in Section 33 of the 1999 Nigerian Constitution (as amended).²⁵

The first category is connected to oil spill litigation and has influenced the court in *Gbemre V. Shell Petroleum Development Company of Nigeria Ltd & Others*²⁶ This is the first Nigerian case where the court adopted a constitutional human rights approach to environmental protection regarding activities in the oil and gas sector, paving the way for more environmentally-friendly decisions. The Plaintiff brought this action under the constitutional²⁷ Procedure for enforcing human rights for himself and on behalf of members of his community in Delta State. Alleging that the defendant companies' flaring of gas during their oil production activities violated their human rights to life and dignity, considering the adverse effect of these activities on their health and immediate environment.

Notably, the plaintiff cited, amongst others, the contribution of gas flaring to climate change and its impact on their community as a basis for their constitutional and human rights claims. The Federal High Court, Benin Judicial Division, held, among other things, that:

- a) the rights to life and dignity of the human person guaranteed under sections 33(1) and 34(1) of the Nigerian Constitution and reinforced by Articles 4 (on the right to life), 16 (on the right to health) and 24 (on to a healthy environment) of the African Charter Act,⁶¹ 'inevitably included the right to clean poison-free, pollution-free and healthy environment';
- b) the failure of the defendants to carry out an EIA in the plaintiff's community concerning the impacts of their gas flaring activities was a violation of Section 2(2) of the EIA Act and contributed to the violation of the plaintiff's fundamental rights to life and dignity; and
- c) The defendants' actions in continuing to flare gas during their oil production activities in the plaintiff's community 'is a violation of their rights to life (including healthy environment) contained in the aforementioned statutory provisions'.

Arriving at its concluding verdict, the court painstakingly, among others, the plaintiff's statements that 'gas flaring leads to carbon dioxide emission, the main greenhouse gas' and 'contributes to adverse climate change'. The court, therefore, ordered the defendant to stop gas flaring in the plaintiff's community; further order was made that the federal government should take steps to legally, expressly and permanently prohibit gas flaring in Nigeria while declaring that Section 3 of the (now repealed) Associated Gas Re-Injection Act (and any other Regulations thereunder) under which gas flaring may be and is being permitted in Nigeria, is inconsistent with the provisions section 33 of the Constitution of the Federal Republic of Nigeria 1999 (as Amended) and Article 24 of the African Charter on Human

²⁵ CFRN 1999, s 33.

²⁶ Unreported, Suit No: FHC/B/CS/53/05, 14 November 2005.

²⁷ CFRN 1999, s 46 (6) and 19.

and Peoples' Rights (Ratification and Enforcement) Act. However, the court did not award damages, costs, or compensation.

To bolster the current position of the court on environmental litigation, *Centre for Oil Pollution Watch (COPW) V. Nigerian National Petroleum Corporation (NNPC)*²⁸ The Supreme Court, in its decision, extended the possibility of applying the doctrine of locus standi to environmental matters and the right of the Appellant to initiate an action to protect the environment. The Court also recognised that operators, owners, and oil pipeline license holders must maintain and repair their oil pipelines to safeguard the water, air, land, forest, and wildlife from environmental degradation²⁹. In this case, the Appellant, a Non-Governmental Organisation, brought an action at the Federal High Court Lagos against the Nigerian National Petroleum Corporation regarding an alleged oil spillage in the Acha autonomous community of Isukwuato Local Government Area of Abia State of Nigeria. The Appellant claimed, amongst other reliefs, the reinstatement, restoration and remediation of the impaired and contaminated environment in the Acha autonomous community; the provisions of moveable water supply as a substitute for the soiled and contaminated Ineh/Aku streams, which were significantly affected by the spillage and which serves as the primary source of water supply to the community. The Appellant also sought medical facilities to evaluate and treat the victims affected by the oil spillage and contaminated streams. In response, the NNPC (as Respondent) filed a motion challenging the suit, that the Appellant lacked the requisite locus standi to institute the action. In ruling on the Respondent's motion, the trial court struck out the suit for want of locus standi on the part of the Appellant³⁰.

The Appellant appealed, and the Court of Appeal, Lagos, dismissed the appeal, reaffirming the trial court's ruling. Dissatisfied with the judgment of the Court of Appeal, the Appellant appealed to the Supreme Court, which was to determine a sole issue, which was whether the learned justices of the Court of Appeal were right in dismissing the appellant's appeal for want of locus standi to maintain the suit. The court allowed the appeal and held that NGOs such as the Appellant have the requisite locus standi to sue in environmental matters such as this one. The court noted that the suit, being a public interest litigation, is instituted in the interest of the general public and is an action brought for the benefit of a group or class of persons who have suffered a general wrong or about to so suffer as a result of the activities of other persons usually corporate institutions, governments for political, religious or economic gains. The court further held that the responsibility of the state to protect the environment is now a well-accepted notion in all countries. The Court believed that the provisions of the Constitution and African Charter on Human and Peoples' Rights, to which Nigeria is a signatory, recognise the fundamental rights of the citizenry to a clean and healthy environment to sustain life.³¹ This is a completely novel approach in environmental litigation in Nigeria, and it is believed that subsequent environmental litigation will follow this trend, declaring that right to a clean environment is a fundamental right.

²⁸ [2019] 5 NWLR [PT.1666] P.51

²⁹ *Ibid.*

³⁰ *Ibid.*

³¹ *Ibid.*

7.0 Conclusion

Looking at the previous decisions of the court, it is clear that currently the court now considers the provisions of Article 24 African Charter on Peoples and Human Rights (Ratification and Enforcement) Act and Sections 20 and 33(1) of the Constitution 1999 (as amended) and Section 17(4) of the Oil Pipelines Act which provides as follows: “Every licence shall be subject to the provisions contained in this Act as in force at the date of its grant and to such regulations concerning public safety, the avoidance of interference with works of public utility in, over and under the land included in the licence and the prevention of pollution of such land or any waters as may from time to time be force.” Section 20 of the Constitution provides that the state shall protect and improve the environment and safeguard the country's water, air, land, forest and wildlife. The Court noted that it was according to Section 17(4) of the Oil Pipelines Act that the Oil and Gas Pipeline Regulations of 1995 were promulgated and a combined reading of all the above provisions with Regulations 9(a)(ii) and (b)(ii) and (iii) would reveal that they require the oil pipeline license holder to institute mechanisms for prevention of accidents like crude oil spill and for remedial action for the protection of the environment and control of accidental discharge from the pipeline. It is hoped that more human rights-friendly court decisions on environmental litigations should be encouraged. The Polluters should be made to take responsibility for their actions.