The Future of 'Standing to Sue' in Environment and Climate Change Litigations in Nigeria*

Abstract

Locus standi has been generally identified as one of the fundamental procedural impediments to access to justice in judicial proceedings. This is even more profound in access to justice in environment and climate change litigations, where public-spirited individuals and non-governmental organisations are becoming actively involved in advocacies at pressuring countries to implement their obligations under national and international agreements through litigation. While some courts in Global North and South jurisdictions are adopting innovative and imaginative ways to interpret standing rule to improve access to justice in environment and climate change litigation, standing requirement is still a major hurdle to environment and climate justice in Nigeria, resulting in the premature dismissal of significant suits instituted by NGOs by courts. Nigeria has a profound common law tradition and its courts are still stuck in the practice of demanding stringent standing requirement from litigants, especially on issues of breach of public rights like environment and climate change. While there have been attempts in the recent times to adopt a liberal approach to standing, the inconsistency of the past efforts may become a challenge to future environment and climate change litigation. The paper, therefore, examines the practice and attitude of courts in Nigeria to standing requirement generally and particularly on environment and climate change litigations. While the paper argues that there is the need for Nigerian courts to evolve strategies similar to their counterparts elsewhere by opening their doors to environment and climate change litigants, the paper recommends a statutory recognition of standing to sue for any person and NGOs in environment and climate change litigation.

Key Words: *Locus Standi*, Environment, Climate Change Litigation, Judicial Attitude

1. Introduction

Locus standi, which simply means right to access to court, has become a very important issue that determines access to justice.[1] The nature and practice of *locus standi* depend on the type of legal system operated by a country. In most Commonwealth jurisdictions, the English common law tradition on *locus standi* plays a vital role in influencing the attitudes of courts in those jurisdictions.[2] While an individual instituting an action for private injury may not encounter much difficulty as long as he can prove that the action of the respondents caused the damage, the situation is even more complicated where the damage complained of derived from public law.[3] This rule was developed primarily to protect the courts from being used as a playground by professional litigants, meddlesome interlopers and busybodies who really have no real stake or interest in the subject of the litigation.[4]

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[1] BA Garner, *Black's Law Dictionary*, 10th Edition, (USA, Thomson Reuters, 2014) 960.

[2] JD Wilson and Michael Mckiterick 'Locus Standi in Australia –A Review of the Principal Authorities and Where it is all Going' (Civil Justice Research Group Conference, University of Melbourne, 2010).

[3] MT Ladan, 'Access to Environmental Justice in Oil pollution and Gas Flaring Cases as a Human Right Issue in Nigeria' (paper presented at a Training Workshop for Federal Ministry of Justice Lawyers by the Institute for Oil and Gas law, Abuja 2011).

[4] M Kirbi 'Deconstructing the Law's Hostility to Public Interest Litigation' (2011) 2592 *Law Quarterly Review* 4.

The principle of locus standi has become an integral part of the Nigerian Legal System, and being a common law doctrine, Nigeria courts have been guided by its core requirements. However, over the years this state of the law has worked a great hardship on aggrieved persons who have suffered as a result of violation of the public rights, especially in environment or climate change litigations, where the Attorney General fails to institute an action and also refuses to grant consent to a private person to institute such action.[5] Even though a private citizen without the consent of Attorney-General could enforce a public rights, one could only do so if his private rights were at the same time violated and suffered special damage that is different from those suffered by the public at large.[6] This requirement has become one of the major challenges of environment and climate change litigation in Nigeria, and not a few number of cases have been dismissed as a result of this barrier to access to justice. It continues to remain of locus one of the major challenges to environmental advocates and non-governmental organisations in securing access to justice in environment and climate change litigations.

Therefore, this paper examines the trajectory of locus standi in Nigeria with particular emphasis on its influence in environment and climate change litigation. The paper is divided into three parts. The author examines the history of locus standi in Nigeria and found that the concept has had a chequered trajectory from the decided cases, and till today its core principles continues to remain contentious. Under part two, the author examines the impact of the concept on access to justice in environmental litigations and found that the general principles of locus standi is a potent challenge to environmental activists and non-governmental organisations in the protection of the environment through litigation. Part three examines the future of locus standi in environmental litigation in Nigeria, where the author argues that though the Supreme Court of Nigeria appears to have relaxed standing requirement in environmental litigation in its recent decision, there is the need to put in place a legal framework that would provide an open standing requirement as a matter of law and remove it from the vagaries of judicial uncertainty.

2. Nigerian Experience

At independence in 1960, Nigeria inherited a common law tradition from Britain. The application of locus standi by the Nigerian courts is a legacy of the English common law. It is therefore not surprising that most of the earliest post-independence cases on locus standi decided by the Nigerian courts, particularly the Supreme Court of Nigeria followed the English common law tradition, which is considered as being too restrictive. Nigerian courts have adopted different approaches to the interpretation of *locus standi* from independence to the present time. In the early days, the approach was seen as too restrictive, necessitating a shift to a liberal approach and then came the period of uncertainty which threw up the justiciability test. These developments shall be chronicled below.

2.1 Season of Restraint

During this period, the attitude of the Nigerian courts to *locus standi* is generally considered as too restrictive, an approach that mirrored the common law tradition. The case of *Olawoyin v.*

[5] BJ Preston, 'Standing to Sue at Common Law in Australia' (Joint Seminar on Legality of Administrative Conference by the National Judges College and the Administrative Trial Division of the Supreme People's Court at Xian, People's Republic of China, April 2006).

[6] *A-G., Akwa Ibom State v. Essien* (2004) 7 NWLR (PT. 872) 288 at 321.

A-G., Northern Region of Nigeria[7] was among the earliest cases on locus standi decided by the Nigerian Supreme Court, immediately after independence. The attitude of the Nigerian Supreme Court as demonstrated in this case is seen to mirror the strict common law tradition of the English courts. The Plaintiff in this case filed an action in court seeking a declarative relief, that Part VIII of the Children and Young Person Law, 1958 was no longer valid and enforceable as a result of the constitutional provisions of sections 7, 8, and 9 of the Sixth Schedule to the 1960 Constitution. The plaintiff prayed the court to invoke its powers under section 245(1) of the 1960 Constitution and declare Part VIII of the Children and Young Persons Law as null and void, unenforceable and unconstitutional. Dismissing the action, the Supreme Court held that the plaintiff had no standing to sue because he failed to show that he had sufficient interest to sustain his claim.

The above decision shows the restrictive approach adopted by the court. Indeed, the reasoning of the court was followed in subsequent cases decided by courts.[8] This approach shows that the plaintiff's legal right or interest must be shown to be in danger of being infringed. Also, in the case of *Abraham Adesanya v. President, Federal Republic of Nigeria*,[9] the restrictive approach of the Supreme Court assumed a stricter dimension. The plaintiff, who was a serving Senator in the Upper Federal Parliament, instituted an action against the President of Nigeria, challenging the appointment of Justice Ovie-Whiskey as the Chairman of the Federal Electoral Commission. During the confirmation process in the parliament, the plaintiff objected to the appointment, claiming that it violates the provision of the 1979 Nigerian Constitution. Despite the objection of the applicant, the federal parliament confirmed the appointment. Aggrieved by this development, the applicant instituted an action at the trial court seeking declarative reliefs that the appointment was unconstitutional. The relief of the applicant was granted at the trial court, but on an appeal to the Court of Appeal, the issue of *locus standi* of the applicant came up. The Court of Appeal held that the applicant had no *locus standi*, having not shown any sufficient interest or he had an existing right that had been violated, and thereafter dismissed the action.

On a further appeal to the Supreme Court, the appeal of the applicant was again dismissed and the apex court held that the appellant had no locus standi on the ground that he had participated in the debate in the Senate leading to the confirmation of the appointment of Justice Ovie-Whiskey. The above decisions of the apex court show the prevailing attitude of Nigerian courts during this period, and like most common law countries, Nigerian courts adopted the test of "sufficient interest" in interpreting *locus standi*.

2.2 A Liberal Era

Over the years, developments in most Commonwealth countries influenced the attitude of the Nigerian courts to expand the interpretation of *locus standi*. The "sufficiency interest" test which had been given a restrictive interpretation in the *Adesanya's case* came under scrutiny in the case of *Fawehinmi v. Akilu & Anor*.[10] In this case the Supreme Court acknowledged the injustice that has been worked on litigants as a result of the narrow interpretation adopted in the *Adesanya's case*, and resolved to expand the construction of locus standi. The facts of *Fawehinmi's case* were that the applicant instituted an action at the Lagos State High Court for

[7] (1961) 2SCNLR 5 at 10.
[8] *Gamiola v. Esezi* (1961) All NLR 584*; Onyia v. Governor in Council* (1961) 2 All NLR 174.
[9] (1981) 5 SC 112.
[10] (1987) NSCC 1266 at 1267; (1987) 4 NWLR (Pt 67).

an order of mandamus compelling the Director of Public Prosecution (DPP) to decide whether his office was going to prosecute the suspect alleged to have murdered one Mr. Dele Giwa, a renowned journalist with a parcel bomb, and if the office of the DPP is not willing to prosecute, a certificate should be endorsed by the DPP granting fiat to the applicant to prosecute the suspects in accordance with the provisions of section 342 (a) of the Criminal Procedure Law. The High court dismissed the application. On appeal to the Court of Appeal, the court also dismissed his appeal, holding that he lacked the locus standi to bring the application.

On a further appeal to the Supreme Court, the apex court set aside the decisions of the lower courts and granted the application for leave to apply for an order of mandamus against the DPP. The court noted and indeed criticised the narrow interpretation given in *Adesanya's case*, and expressed a more liberalised approach to *locus standi*.

It has been observed that the decision of the Supreme Court in *Fawehinmi's case* represents a shift from the extremely restrictive attitudes formerly adopted by the Nigerian courts to locus standi. To this extent, the judgment represents a new philosophy that an individual has a role to play in public law.

2.3 The Justiciability Test

At what point is the principle of locus standi becomes an issue of justiciability? The approach of the courts in incorporating justiciability into locus standi has been argued to be part of the ratio in the *Adesanya's case,* which the Supreme Court has accepted to have adopted a narrow interpretation of locus standi.[11] It has been said that the failure of the Supreme Court to actually overrule its decision in *Adesanya's case* is the reason why some of the principles of the controversial case continue to rear his head, to the extent that the case is now seen as the *locus clasicus* on locus standi in Nigeria.[12] The reasoning in this decision points to the fact that the right of access to court (*locus standi*) is circumscribed by the power of court to determine the subject matter (justiciability*).* This controversy is traceable to the contributory judgment of Bello JSC in *Adesanya's case*. The learned Jurist held that:

> It seems to me that upon the construction of the sub-section, it is only when the civil rights and obligations of the person, who invokes the jurisdiction of the court, are in issue for determination that the judicial powers of the courts may be invoked. In order words, standing will only be accorded to a plaintiff who shows that his civil rights and obligation have been or are in danger of being violated or adversely affected by the act complained of. The Appellant has not alleged that the appointment of the 2nd Respondent has in any way affected or is likely to affect his civil right and obligations.[13]

The above decision of Bello JSC which incorporates justiciability into *locus standi* has been accepted as part of the ratio of *Adesanya's case* and as such forms part of the organic principle of *locus standi* in Nigeria.[14] This reasoning of the court has been applied in plethora of authorities, including the case of *Sehindemi v. Governor of Lagos State*.[15] However, this

[11] T Oyewelo, 'The Problem with Standing to Sue in Nigeria' (1995) 39(1). 9.
[12] Ibid.
[13]1981) 5 SC 112 at 16-162.
[14] T Oyewelo, '*Locus Standi* and Administrative Law in Nigeria: The need for Clarity of Approach by the Courts. (2016) *IJSRIT* 3(1), 86.
[15] (2006) 10 NWLR (Pt. 987) 1 at 57-58.

approach has been criticised by Ayoola JCA in his dissenting decision in *F. A. T. B. v. Ezegbu*[16] and which was reiterated in his lead judgment in *NNPC v. Fawehinmi*[17]. The learned Jurist, in what appears to be a clear understanding of justiciability and locus standi, held:

> I do not think section 6(6) (b) of the Constitution is relevant to the question of *locus standi*. If it is, we could as well remove any mention of locus standi from our law book. Section 6(6) (b) deals with judicial powers and not with individual rights. *Locus standi* deals with the rights of a party to sue. It must be noted that standing to sue is related to a cause of action.

Interestingly, the position of Ayoola JCA was later to be accepted by the Supreme Court as accurately representing the exact purport of section 6(6)(b) of the Constitution. The Supreme Court in the case of *Owodunni v. Registered Trustees of Celestial Church*[18] observed that the case of *Adesanya's case* did not laid down the rule that section 6(6)(b) of the Constitution dealing with justiciability governs locus standi, and as such standing to sue has nothing to do with justiciability.

However, notwithstanding, the eloquent observation and clarification of the apex court, Nigerian Courts including the apex court, continue to apply the justiciability test to determine *locus standi*. This occurred in the recent case of *Yar'adua v. Yandoma*[19]decided by the Supreme Court. Muhammad JSC while upholding the justiciability test held: '… a person is said to have *locus standi* if he has shown sufficient interest in the action and that his civil rights and obligations have been or are in danger of being infringed.'[20]

Subsequent decisions of Nigerian courts continue to adopt the justiciability test as a parameter of determining *locus standi*. However, in an attempt to move away from the rigid interpretation of *locus standi*, the Nigerian Supreme Court devised some guiding principles to determine the *locus standi* of a plaintiff. They are[21]:

(i) A plaintiff must be able to show that his civil rights and obligation have been or are in danger of being infringed;
(ii) The fact that a person may not succeed in the action is immaterial;
(iii) Whether the civil rights and obligation have been infringed depends on the facts of the case; and
(iv) The court should not give any unduly restrictive interpretation to the expression of *locus standi*.

In spite of these guiding principles, Nigerian courts continue to insist on the old common law rule of standing. These guiding principles are the result of an attempt to strike a balance between the common law rule on standing and the need to improve access to court. The attitude of the courts have been criticised by scholars has being too stringent. Maidin and Abdulkadir noted that the purpose of *locus standi* would be defeated if access to court is restricted on the sole ground that that the applicant lacks personal interest.[22] Indeed, the application of the

[16] (1992) 9 NWLR (Pt. 264) 132.
[17] (1998) 7 NWLR (Pt. 559) at 612.
[18] (2000) 10 NWLR (Pt. 767) 609 at 692-694.
[19] (2015) 4 NWLR (Pt. 1448) at 173 -174.
[20] *Yar'adua,* (n 18).
[21] *Ajayi v. Adebiyi* (2012) 11 NWLR (Pt. 1310) 137 at 175-176.
[22] AJ Maidin and BA Abdulkadir, 'Issues and Challenges in Environmental Justice Delivery System in Malaysia and Nigeria: The need for Liberalising the Strict Rule of Locus Standi' (2012) 1 *LNS* (A).

traditional rule of *locus standi* would amount to denial of justice 'to protect collective or diffuse interest'.[23] We couldn't agree more with these positions.

The status of government as the default public interest litigant results from the common law "public nuisance rule" which has been adopted by many nations, including Nigeria.[24] The rule provides that the appropriate plaintiff to enforce public rights is the Attorney-General or someone with his consent. A private citizen without the consent of Attorney-General could only enforce public rights if his private rights were at the same violated and suffered special damage that is different from those suffered by the public at large.[25] It is clear from the analysis above that in spite of the development of *locus standi* in Nigeria; the courts are still fixated on the stringent common law requirement of sufficient interest test.

3. Attitude of Nigerian Courts to *Locus Standi* in Environmental Issues

The attitude of the Nigerian courts to *locus standi* in environmental matters is not different from other civil matters. In other words, there is no separate jurisprudence of *locus standi* on environmental matters. Environmental litigations in Nigeria are usually commenced through civil, criminal or statutory application.[26] Indeed, most victims of environmental degradation institute actions under the common law principle of torts[27], including nuisance, negligence and the rule in *Ryland v. Fletcher*. Curiously, even though the Nigerian Criminal laws[28] contain avalanche of provisions for environmental protection, there is little to suggest any serious progress in the criminal prosecution of environmental violators, and this account for why there is paucity of decided cases in this regard.[29] Environmental offences created by statutes in Nigeria are matters of public interest and as such are prosecuted on behalf of the State. As a result, only agents of state such as police, Attorney-General and other agencies of government can prosecute these offences.[30]

In Environmental litigation, proving *locus standi* appears to be the most formidable hurdle for public interest litigants.[31] As a result of its common law origin, *locus standi* has resulted in a number of cases where public interest environmental organisations have failed to prove standing to bring suits purely in the interest of protecting the environment.[32] The insistence of courts to apply the same standard of *locus standi* developed for private action to public interest

[23] AP Le Sueur and M Sunkin, 1997, *Public Law* (Longman, London) at pp.492-494.

[24] Though, the position in Nigeria has now changed due to the decision of the Supreme Court in the case of *Adediran and Another v. Interland and Transport Limited* [1991] 9 N.W.L.R. (pt. 214) 155. The Apex court departed from the common law rule, requiring the leave of Attorney-General to institute action on public rights, relying on the provision of section 6 (6) (b) of the 1999 Constitution (as amended).

[25] *A-G., AkwaIbom State v. Essien* (2004) 7 NWLR (PT. 872) 288 at 321.

[26] DS Olawuyi, *The Principles of Nigerian Environmental Law*. (Ado- Ekiti, Afe Babalola University Press, 2015) 37.

[27] H Ijaiya and OT Joseph, 'Rethinking Environmental Laws Enforcement in Nigeria' (2014) *Beijing Law Review*, 5. 307.

[28] Criminal Code Act, Cap C28 Laws of the Federation of Nigeria 2004, secs.247 and 235.

[29] MT Ladan, *Access to Environmental Justice in Oil pollution and Gas Flaring Cases as a Human Right Issue in Nigeria* (paper present at a Training Workshop for Federal Ministry of Justice Lawyers by the Institute for Oil and Gas law, Abuja 2011)

[30] Ibid.

[31] G Pring and C Pring, 'Environmental Courts and Tribunals – A Guide for Policy Makers' (Working Paper, United Nations Environment Programme – UNEP, September, 2016.

[32] T Murombo. 'Strengthening Locus Standi in Public Interest Environmental Litigation: Has Leadership moved from the United States to South Africa? (2010) 6 (2) *Law, Environment and Development Journal*.163.

actions means that actions instituted for the purpose of protecting the environment are less likely to succeed.[33] As Ladan noted, promoting PIL is crucial for the protection of the environment, especially where an individual decides not to sue for damages and the government also fails to perform its functions.[34] One of the greatest hurdles of environmental litigants is meeting the requirement of locus standi.[35] The standing requirement operates to block access of citizens to forums where abuse of environmental code of conduct could be vindicated on the excuse that such citizens have not sustained direct injury.[36] The cases of *Amos v Shell*[37]*; Shell v. Otoko*[38]*, Seismograph service v. Ogbeni*[39]*, Oronto-Douglas V Shell*[40]*, Centre for Oil Pollution Watch v. N.N.P.C.*[41]were all environmental related disputes. One shared feature that runs through these cases is that they were all dismissed for lack of standing of the plaintiffs. The victims went home with nothing and the environment was left in a despicable state, with no remedy in sight.[42] Even though the Supreme Court later allowed the appeal of the appellant in *Centre for Oil Pollution Watch v. N.N.P.C* by upholding its standing to institute the action, the fact that both the trial court and the Court of Appeal refused the Applicant standing to sue means the issue is still open to contestations and only fairly settled. The attitude of Nigerian courts has not shown appreciation and understanding of the urgency involved as a result of the dangers of the environment problems. It has been observed that the trend of case law in Nigeria is that in order to have standing to sue, the plaintiff must exhibit "sufficient interest", that is "an interest which is peculiar to the plaintiff and not an interest which he shares in common with general members of the public."[43]

In *Shell Petroleum Development Company Nig. Ltd v. Chief Otoko and Others,*[44] the respondents instituted a representative action at the High Court in Rivers State Nigeria, claiming the sum of N499, 855.00 against the appellant as compensation for injurious affection to and deprivation of use of the Andoni Rivers and creeks as a result of the spillage of crude oil. The Court of Appeal held that: (a) 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; (b) 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. The Court rejected the purported representative action and hold that the respondents have no standing to sue.

[33]Ibid.

[34] MT Ladan, 'Access to Environmental Justice in Oil pollution and Gas Flaring Cases as a Human Right Issue in Nigeria' (paper present at a Training Workshop for Federal Ministry of Justice Lawyers by the Institute for Oil and Gas law, Abuja 2011). 26.

[35] DA Kysar, 'Global Environmental Constitutionalism: Getting There From Here' (2012) 1 *TRANSNAT'L ENVTL. L*. 83, 90.

[36] EP Amechi, 'Litigating Right to a 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*. 320-336.

[37][1977] S.C. 18.

[38][1990] 6 N.W.L.R. (pt. 159) 657.

[39] [1976] 4 S.C. 85.

[40]*Oronto-Douglas v. Shell Petroleum Development Company and 5 Others,* Unreported Suit No. FHC/CS/573/93, Delivered on 17 February 1997.

[41] (2013) 15 NWLR (1378) 556. Both the trial court and Court of Appeal refused the Appellant standing on lack of sufficient interest to sue. It has however been set aside by the Supreme Court.

[42] J Nwazi 'Access to Environmental Justice in Nigeria' (2008) 1(1) *Lead City University Law Journal*, 22.

[43] *A-G., AkwaIbom State v. Essien* (2004) 7 NWLR (PT. 872) 288 at 320.

[44][1990] 6 N.W.L.R. (pt. 159) 657.

Another issue is whether special damages could be claimed in an action commenced in representative capacity on public nuisance. In the case of *Amos v. Shell BP P.D.C. Ltd*.[45]In this case, the defendants in the course of their work in the oil industry, constructed a temporary dam across a public navigable creek in the River State. The plaintiffs, representing the entire Ogba community, brought an action for damages, alleging that the erection of the Dam had caused severe flooding on their land, and had obstructed the creek, making passages and transport of goods by canoes impossible. One of the issues is whether special damages could be claimed in a representative action, when the plaintiffs suffered unequal losses, or whether the plaintiffs as general public could claim for losses suffered by them individually. The court dismissed the action and held that since the creek was a public waterway, its blocking was a public nuisance and no individual could recover damages there from unless he could prove special damage peculiar to himself from the interference with a public right. The case has shown undue reluctance of Nigerian courts to technicalities.

4. Evidence of Hostility to Public Interest Litigation

In the area of public interest litigation, the attitude of Nigerian courts has been very hostile. The courts continue to insist on the common law requirement of 'sufficient interest' test, even in cases that are statutorily regulated. The case of *Oronto Douglas v. Shell Petroleum Dev. C. Ltd & 4 Ors*[46]is very instructive in this regard. The plaintiff, an environmental activist, filed an action seeking to compel the respondents to comply with provisions of the Environmental Impacts Assessment (EIA) Act before commissioning their project (production of liquefied natural gas) in the Niger Delta region of Nigeria. One crucial issue that came up for determination is whether the plaintiff had the *locus standi* to institute this action. The trial court dismissed the suit on the grounds *inter alia* that the plaintiff has shown no legal standing to prosecute the action.

The situation in Nigeria contrast very well with the developments in other jurisdictions, who in spite of their common law background have moved away from this archaic principle of standing.[47] In Nigeria, judicial attitude to public interest litigation as can be seen from the cases decided by the Supreme Court shows that the old common law rule of standing is still very much rooted in the country's legal system. The general position is that a private individual has no standing to sue and seek a declaratory and injunctive relief with respect to a matter of public import unless the private right of the individual is infringed, where the individual has suffered or sustained special damage peculiar to himself from the public right. In other words, for a litigant to invoke judicial power of the court in the realm of public law, he must show sufficient interest or threat of injury he will suffer from the infringement complained of.[48] The Nigerian courts, by the nature of their duties, have the capacity to expand the frontiers of *locus standi* in environmental litigation. The present unduly and restrictive approach of the courts is completely at odd, and does not reflect the growing judicial pragmatism, of their counterparts

[45][1977] S.C. 109.

[46]*Oronto-Douglas v. Shell Petroleum Development Company and 5 Others, Unreported Suit No.* FHC/CS/573/93, Delivered on 17 February 1997.

[47] Australia, South Africa, Kenya and India have all moved away from the strict Common Law requirement through legislative revolutions.

[48]*A-G., Akwa Ibam State v. Essien* (2004) 7NWLR (PT. 872) 288 at 321.

in developed jurisdictions. This condition for establishing *locus standi* is so stringent that it can hardly be relied on to promote public interest litigation in environmental matters.[49]

5. Future of Locus *Standi* in Environment and Climate Litigation

The analyses above have shown that the development of environment and climate change litigation has been hampered by the twin issues of inadequate environmental legislations that provide open standing requirement and the unduly restrictive attitude of Nigerian courts to the interpretation of *locus standi*. It has been pointed out that the need for Nigerian courts to relax standing requirement in environmental litigation in order to engender growth of climate change litigation would help Nigeria realise its climate change mitigation and adaptation potentials more effectively.[50]

However, in what appears to be a ground breaking decision, the Nigerian Supreme Court[51] has recently redefined the application of the principle of *locus standi* in environmental matters with regard to suit instituted by public interest litigants. In the recent case of *Centre for Oil Pollution Watch v. NNPC*[52], the Supreme Court acknowledged the changing global judicial interpretation of *locus standi* resulting into a broadened and liberal approach that accommodates the standing of public interest litigants to institute action for the protection of the natural environment and the lives of the people. The facts of the case were that the Appellant, a non-governmental organisation involved in environmental protection advocacy, sued the respondent at the Federal High Court Lagos for the reinstatement, restoration and remediation of the contaminated environment of an oil producing community in Abia State of Nigeria. The respondent, an agency of government that engages in oil exploration in the community, filed a motion challenging the *locus standi* of the Appellant on the grounds that the appellant was not directly affected by the oil spillage.

The trial court agreed with the respondent and struck out the plaintiff's suit. Aggrieved, the appellant approached the Court of Appeal. The issue for determination before the Court of Appeal is whether the trial court was right to strike out the suit on the grounds that the appellant lacked the locus standi to institute the action, being an environmental matter maintained for public interest. The appellant argued that the suit is instituted purely for public interest for the protection of the environment, and that it discloses extreme case which would justify an exceptional approach to the question of sufficient interest. The respondent however, argued that the principle of locus standi under the Nigerian law has not changed, and that the appellant failed to disclose sufficient interest in the suit. The respondent further argued that the appellant has not personally suffered any injury to its interest nor authorised by the affected community to sue on its behalf. The Court of Appeal, while delivering its judgment, acknowledged the exponential growth in the change of attitude by courts in other jurisdictions allowing pressure groups, non-governmental organisation and public spirited taxpayers to bring an action for public interest, it however observed that Nigeria courts are yet to adopt such approach and therefore dismissed the appeal. Still aggrieved, the Appellant further appealed to the Supreme Court. In what is a ground-breaking decision, the apex court set aside the decisions of the trail

[49]AK Douglas, 'Global Environmental Constitutionalism: Getting There From Here' (2012) *TRANSNAT'LENVTL. L.* 83, 90.

[50] U Etemire, 'The Future of Climate Change Litigation in Nigeria: *COPW v NNPC* in the Spotlight', (2021) *CCLR* (2). 159.

[51]*Centre for Oil Pollution Watch v. NNPC* (2019) 5 NWLR (Pt. 1666) 518.

[52] (2019) 5 NWLR (Pt. 1666) 518.

court and appeal court by affirming the standing of the NGO to institute action for the protection of the environment. The Court held that "in environmental matters, such as the instant one, NGOs, such as the plaintiff in this case, have the requisite standi to sue."[53] The court observed that public interest litigation is intended to improve access to justice to the poor when their rights are infringed and for the protection of the public affected. Again, such public interest litigation serves as medium for protecting, liberating and transforming the interest of marginalised groups.[54]The court as a matter of principle and in acknowledging the development of locus standi in some jurisdictions[55]held thus:

> Accordingly, every person, including NGOs, who *bona fide* seek in the law court the due performance of statutory functions or enforcement of statutory provisions or public laws, especially laws designed to protect human lives, public health and environment, should be regarded as proper persons clothed with standing in law to request adjudication on such issues of public nuisance that are injurious to human lives, public health and environment.[56]

There is no doubt that this decision of the Supreme Court of Nigeria remains a watershed in the annals of the country's judicial history. The judgment would not only improve access to justice of the poor and marginalised people in environmental matters, it has also etches the name of the country on the global map of the comity of countries with open standing rule.

6. Not yet *Uhuru*

However, there is the need to translate this judicial breakthrough into a substantive legislative provision in order to remove it from the vagaries of judicial interpretations. There is no doubt that this decision of the Supreme Court has a precedent setting implication and very well binding on the lower courts in the country. However, overtime the lower courts may begin to distinguish the facts in the case of *Centre for Oil Pollution Watch v. NNPC* from subsequent cases in order to avoid its application. Not only that, the Supreme Court itself might have cause to depart from it in the future thereby eroding the present gains. More seriously, the National Assembly might in the future enact a law that potentially overrule the judicial precedent, as it is been considered elsewhere. The Nigerian National Assembly have a history of enacting law to overrule any perceived unfavourable judgment of the Supreme Court. It happened in the aftermath of the case of *Amaechi v. INEC*[57]. In the said case, the Supreme Court had declared the appellant as the duly elected Governor of Rivers State having been unlawfully excluded by his party from contesting the election. The Supreme Court found that the Appellant emerged as the winner of the primary election conducted by his party but was substituted with another person who later went on to win the Governorship election. Even though, the appellant did not participate in the general election, the Supreme Court made a consequential order declaring him as the duly elected Governor of Rivers State. Piqued by this unprecedented decision of the Supreme Court, the National Assembly responded swiftly and amended the Electoral Act by including a clause[58] that a court or tribunal shall not declare a person as a winner who does not participate in all the stages of the election. This law automatically overrules the precedent in

[53] Ibid at 571.
[54]Ibid at 591.
[55]England, Australia and India. These are countries with a profound judicial traditions that recognise the standing of public interest litigants.
[56] Ibid at 595.
[57] (2008) 5 NWLR (Pt. 1080) 227.
[58] Electoral Act, 2010, (as amended), sec. 141.

Amaechi v. INEC, and indeed the Supreme Court itself acknowledged this fact in a subsequent case.[59] This clearly shows that the decision of the Supreme Court in *Centre for Oil Pollution Watch v. NNPC* is not immune from future judicial and legislative tinkering.

7. The Way to Go: Legislating Open Standing Regime is the Panacea

Locus standi has had a chequered history in Nigeria and no doubt the case of *Centre for Oil Pollution Watch v. NNPC* has set a new positive trajectory for a potentially open standing regime with the implication of deepening access to justice in environment and climate change litigation in line with Nigeria's international obligation to improve access to justice. However, as stated above, the best way to address this is to ensure that all environment and climate change legislations make provisions for open standing requirement for any person raising an environmental issue. This is the best practice around the globe and many countries like Australia,[60] South Africa,[61] Philippine,[62] Kenya,[63] and India[64] that have been globally adjudged as best models for environment and climate litigations have done this.[65] In other instances, specialised courts or tribunals have been established with open standing provisions to "any person", including individuals, citizen, community groups and NGOs, raising environmental issue.[66] For instance in New South Wales (Australia), many planning and environment statutes have provisions for open standing that any person may bring proceedings to remedy a breach of the statute.[67] Also, section 23(1) of the Kenyan 'Climate Change Act, 2016'provides:

> A person may pursuant to Article 70 of the Constitution, apply to the Environment and Land Court alleging that a person has acted in a manner that has or is likely to adversely affect efforts towards mitigation and adaptation to the effects of climate change.

Significantly, the Kenya Climate Change Act provides that "For the purpose of this section, an applicant does not have to demonstrate that a person has incurred loss or suffered injury".[68] This has clearly removed any form of standing hurdle for prospective litigants. Surprisingly, the recently passed Nigerian Climate Change Act, 2021, does not have a similar provision for open standing regime even though the law is substantially modelled after the Kenyan Climate Change Act, 2016. What this clearly shows is that Nigerian government does not appear ready to fully commit to a regime of open and effective access to justice in environment and climate change litigation.

Now that the climate change law has come into force in Nigeria, issues around implementation of climate change mitigation and adaptation policies are likely to come up and courts would be required to play important role in the adjudication of these issues. Therefore, there is the need

[59] *CPC v. Ombugadu* (2013)44 WRN 1.
[60] Environmental Planning and Assessment Act, 1979, sec.123.
[61] National Environmental Management Act No. 107 of 1998, sec.32.
[62] Supreme Court Rules, 2009, sec.5.
[63] Climate Change Act, 2016, sec.23.
[64] National Green Tribunal Act, 2010.
[65] G Pring and C Pring, 'Environmental Courts and Tribunals – A Guide for Policy Makers' (Working Paper, United Nations Environment Programme – UNEP, September, 2016.
[66] J Peel, H Osofsky and A Foerster, 'Shaping the 'Nest Generation' of Climate Change Litigation in Australia, *Melbourne University Law Review*, (2017) 41:793, 832.
[67] B Preston, Climate Change Litigation: a Conspectus, paper delivered to 'Climate Change Governance after Copenhagen' Conference organised by the faculties of law University of Hong Kong and University College London, 4th November, 2010, Hong Kong.
[68] Kenya Climate Change Act, 2016, sec.23 (3).

to provide open standing regime for public spirited individuals and NGOs to be able to hold governments and private entities into account for their climate change commitments in the areas of mitigation and adaptation. It is therefore suggested that relevant legislations dealing with environment and climate change[69] should be reviewed by the Nigerian Parliament for the purpose of legislating an open standing regime and open the doors of the court to public interest litigation in environment and climate change litigation. Emphasising this point, Etemire stated thus:

> This creates an invaluable opportunity for entities like NGOs and persons maintaining an action for public good to subject to judicial review, decisions, actions and inactions of government and private entities which simply do not comply with climate-related laws, or adversely affect or threaten the physical environment and climate, but does not necessarily affect or threaten the 'private legal rights' of humans as it relates to their direct, personal environmental interests.[70]

8 Conclusion

Global efforts geared towards combating environmental degradations and the impacts of climate change must be replicated at the national level through the domestication of legal frameworks to protect the environment. Courts have important role to play along this line, especially where government failed to fulfil its obligations under the laws or potentially infringing on the law. There is therefore the need to empower environment and climate change advocates to institute actions for the protection of the environment and hold government into account for environmental abuse and climate change mitigation and adaptation. This can only be achieved when all the barriers to access to justice, especially *locus standi*, are removed. As we noted in this work, *locus standi* is a threshold issue which hampers the capacity of victims and NGOs to have access to court, and this has resulted in the dismissal of some cases. Even though the work noted with optimism the breakthrough in the case of Court in *Centre for Oil Pollution Watch v. NNPC*, the author cautioned that there is the need to remove this important issue from the vagaries of judicial uncertainty by putting in place a legal framework.

[69] National Environmental Standards, Regulatory and Enforcement Agency Act, Environmental Impact Assessment Act, Climate Change Act, Harmful Waste Protection Act, Oil Pipeline Act, Associated Gas Re-Injection Act, e.t.c.

[70] U Etemire, 'The Future of Climate Change Litigation in Nigeria: COPW v NNPC in the Spotlight,' (2021) *CCLR* (2). 159.