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LOCUS STANDI THROUGH THE CASES IN NIGERIA: WHETHER COURTS STILL THREAD SOFTLY*

I. INTRODUCTION

The concept of *locus standi* is important in Nigerian Jurisprudence - very much like it is in other common law jurisdictions. *Locus standi* (or standing as it is alternatively called) is a party's right to make a legal claim or seek judicial enforcement of a duty or right[1]. In a recent case the Supreme Court stated that: ""*Locus standi* or *standi* is the legal right of a party to an action to be heard in litigation before a court of law or tribunal. The term entails the legal capacity of instituting or commencing an action in a competent court of law or tribunal without any inhibition, obstruction or hindrance from any person or body whatsoever."[2]

Another learned Law Lord puts it succinctly as 'denoting legal capacity to institute proceedings in a court of law.'[3] The right of citizens to move or invoke the jurisdiction of the court depends, among other things, whether the said citizen or litigant has the requisite locus. The term "*locus standi*" therefore, denotes the legal capacity to institute proceedings in court of law: it is used interchangeably with the term "standing" or "title to sue" it is an aspect of *justiciability*[4] and also an issue of[5] *jurisdiction.* From the foregoing, it is discernible that *locus standi* does not stand alone - it leans on jurisdiction:

> If a plaintiff is incompetent because he has no locus standing to bring an action, the court would in turn be incompetent and without jurisdiction to entertain the plaintiff's action. In the instant case, the respondent lacked locus standi to institute the suit. In the circumstance, the suit was a nullity and the trial court also lacked jurisdiction to hear the suit.[6]

Commenting on the relationship between *locus standi* and justiciability, Obaseki J.S.C. (as he then was), made an illuminating distinction: "That when a party's standing to sue (i.e. locus standi) is in issue, the question is whether the person whose standing is in issue is the proper person to request an adjudication of a particular issue *and not whether the issue itself is justiciable."*[7]The gist of this article is to examine the attitude of the Courts in Nigeria with regard to the fundamental aspect [8] of *locus standi*; right from *Adesanya v. President of Nigeria*[9] (which has come to be regarded as the l*ocus classicus* on the point in Nigeria) to the recent decision of the Court of Appeal of Nigeria in *Chief Gani Fawehinmi v. President of the Federal Republic of Nigeria and others.*[10] In discussing this issue, the writer will examine whether the Court has been threading carefully on the soil of *locus standi*,[11] giving recent decision of the Court.

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1 Black's Law Dictionary (8th edition) p. 1442

2 Per Niki Tobi, J.S.C. In *Inakoju v. Adeleke, Rashidi Ladoja & Ors.* 29 N.S.C.Q.R. p. 1068

3 *Ibid* per Akintan, J.S.C.

4 Underlining mine.

5 *Ibid.*

6 *Ibid.*

7 *Fawehinmi v. Akilu* N.S.C.C. (1987) 2 p. 1267.

8 The fundamental aspect of *locus standi* is that it focuses on the party seeking to get his complaint before the court and not on the issue he wishes to have adjudicated. In order words, *locus standi* to sue does not depend on the success or merit of a case but on the showing of the plaintiff's case in his statement of claim; that is, it is a condition precedent to a determination on the merit, consequently, if a plaintiff has no *locus standi* or standing to sue, it is not necessary to consider whether or not there is a genuine case on the merit. His case ought to be struck out as being incompetent. - *A.G. , Akwa Ibom State v. Essien, Op.cit.*

9 *Adesanya v. President of Nigeria* (1981) N.S.C.C.

10 (2007) 14 N.W.L.R

11 Per Kayode Eso (J.S.C.), *Fawehinmi v. Akilu* (1987) 2 N.S.C.C. p. 1300

II. The *Locus Classicus: Adesanya v. President of Nigeria*

The issue of *locus standi* came to the fore, perhaps for the first time in Nigeria, in the Adesanya's case. Briefly, the facts of the case is that the plaintiff / appellant (Senator Abraham Adesanya) was a Senator of the Federal Republic of Nigeria. The second respondent (The Hon. Justice Victor Ovie-whiskey) was appointed by the first respondent (President of the Federal Republic of Nigeria, who happened to be Alhaji Shehu Shagari), as Chairman of the Federal Electoral Commission, and the appointment was ratified by the Senate, after a debate in which the appellant took part. The plaintiff challenged this appointment, claiming that the second respondent was a public officer (Chief Judge of the then Bendel State of Nigeria) both at the time of the appointment and at the time of confirmation, and as such, he was disqualified from being appointed a member of the Federal Electoral Commission, and such appointment was null and void. The action was in essence one of "declaration of right". The High Court of Lagos held in favour of the plaintiff. The respondents appealed to the Federal Court of Appeal, contending that the plaintiff had no *locus Standi* to institute such an action. The counsel for the appellant maintained that he had *locus standi* and asked that the matter be referred to the Supreme Court of Nigeria under section 259(3) of the Constitution [12] for the correct interpretation of sections 6(6)(b), 33(1),48,141, and 236(1) of the C.F.R.N,[13] 1979.

III. JUSTIFICATION FOR AND AGAINST *LOCUS STANDI*

Chief Gani Fawehinmi,[14] who appeared for the plaintiff/appellant, put the following argument to ground *locus standi*. He argued that by virtue of the Oath of Allegiance and the Oath of Membership, which the appellant as a Senator, took and subscribed as required by section 48 (1),[15] the appellant has a fundamental obligation and a civil right to "preserve, protect and defend the constitution." Furthermore, learned counsel contended that the appellant in his capacity as a Senator has a power to exercise and a duty to perform in the confirmation of the appointment of the Hon. Justice Victor Ovie-Whiskey (as Chairman of Federal Electoral Commission). It was also submitted for the plaintiff/appellant that he had the *locus standi* to institute the action as a private person. This assertion was predicated on the provisions of the combined effect of sections 236 (1), 141 (1) and 6 (6) (b) of the Constitution of the Federal Republic of Nigeria, 1999.[16]

In summary the argument of the learned Attorney-General was that since the plaintiff/appellant had no personal interest in the matter he had no *locus standi* to bring the proceedings where the relief sought by him would confer no tangible benefit on him.

The Court of Appeal, having raised the issue of *locus suo motu*, and heard arguments of both parties, in the course of its ruling, found as follows:

> We think that it is pertinent here to point out that the plaintiff is a member of the Senate, and the subject matter is one in respect of which he has been defeated in the Senate; and in our view sections 48 and 141 of the Constitution do not confer on him any right to prosecute outside the Senate a matter in respect of which he had been defeated within. The duty of the court to declare on a violation of the provision of the Constitution arises only where there is a dispute before it brought by legitimate disputants who would be affected by the illegality complained of.
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> We must bear in mind that we operate a Constitution which has adopted the principle of separation of powers. As the appellant is a legislator, his duty as such is limited to the

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[12] Constitution of the Federal Republic of Nigeria, 1979 impari materia with section 295 (3) of the C.F.R.N., 1999.
[13] Constitution of the Federal Republic of Nigeria.
[14] Chief Gani Fawehinmi (SAN) (of blessed memory).
[15] C.F.R.N, 1979 *impari materia* to section 52 (1),C.F.R.N, 1999.
[16] All sections of the C.F.R.N., 1979; equivalent to section 272, 154 (1) and 6(6)(b) of the C.F.R.N., 1999.

> exercise of legislative powers as defined in section 4(2), (3) and (4) but subject to the limitations imposed by section 4(8) and (9) of the Constitution. It does not extend to the legislator interfering with the exercise of executive or judicial powers which are vested elsewhere.

The matter got to the Supreme Court (for interpretation) by way of reference, vide section 259 (3). Chief Gani Fawehinmi contended that the plaintiff clearly had *locus standi* in the case because, on a broad interpretation of the provisions of sections 141 (1), 236, 277 (1), and 6 (6) (b) of the 1979 Constitution, [17] there was no doubt that the plaintiff had sufficient interest to institute the action. Chief Gani Fawehinmi further submitted that any appointment made by the President of the Federal Republic of Nigeria is made subject to the provisions of the Constitution which both the plaintiff and Mr. President have sworn to preserve, protect, and defend, and that if Mr. President acted contrary to the provisions of that Constitution, the plaintiff is entitled to come to Court and ask for appropriate declaration. He also contended that being a member of the Senate, the plaintiff has a function, a duty and an obligation to perform under the Constitution and that if he could not, by virtue of this, challenge the appointment made by the President, he did not know who could do it. The learned Attorney – General supported the decision of the Federal Court of Appeal on the issue and submitted that the status of a congressman or any other legislator does not give him standing to sue for a declaration that an action of the Executive is illegal.

IV. *LOCUS STANDI* IN THE EYE OF THE SUPREME COURT

After hearing argument from counsel on both sides, the Supreme Court (Seven Justices) unanimously held that the plaintiff / appellant lacked the requisite *locus* to institute the action. In the course of delivering its judgment, the Court made some notable expose on the subject of *locus standi.* The writer thinks it should be of much interest to note here, that, the Supreme Court appreciated the diverse nature (better still complexity) *of locus standi*, when it observed:

> Dr. Thio at page 1 of her authoritative book entitled "*Locus standi* and Judicial Review makes the following pertinent observation:-
> 'The requirement of locus standi is mandatory in some jurisdictions where the judicial power is constitutionally limited to the determination of a 'case' or controversy, or a matter which include the legal capacity of the parties to the litigation. In other jurisdictions, the requirement is a product of judicial expedience and public policy'." [18]

The Court further cited this learned author:

> "The problem of locus standi in public law is very much intertwined with the concept of the role of the judiciary in the process of government. Is the judicial function primarily aimed at preserving legal order by confining the legislative and executive organs of government within their powers in the interest of the public (Jurisdiction de adroit objectif), or is it mainly directed towards the protection of private individuals by preventing illegal encroachment on their individual rights (Jurisdiction de adroit subjectif)? The first contention rests on the theory that the courts are the final arbiters of what is legal and illegal. This can best be achieved by permitting any person to put the judiciary machinery in motion, like the action popularis of Roman law whereby any citizen could bring such an action in respect of a public delict. Requirements of *locus standi* are therefore unnecessary in this case since they merely impede the purpose of the judicial function as conceived here. On the other hand, where the prime aim of the

[17] See footnote no. 18 above.
[18] *Adesanya v. President of Nigeria* (1981) N.S.C.C. p. 156.

> judicial process is to protect individual rights, its concern with the regularity of law and administration is limited to the extent that individual rights are infringed, and in the absence of the latter, it does not come into play.[19]

The observation above by the Court is significant as it demonstrates the fact that it appreciates the variation, with regards to *locus standi*, from one jurisdiction to another.

Another feature of this judgment is the striking balance made by the Court between the need of allowing litigants have access to the Court and preventing the floodgate of litigation:

> ...., I take significant cognizance of the fact that Nigeria is a developing country with a multiethnic society and a written federal constitution, where rumour-mongering is the pastime of the market places and the construction sites. To deny any member of such a society who is aware or believes, or is led to believe, that there has been an infraction of any of the provisions of our Constitution, or that any law passed by any of our legislative Houses, whether Federal or State is unconstitutional, access to a court of law to air his grievance on the flimsy excuse of lack of sufficient interest is to provide a ready recipe for organized disenchantment with the judicial process. [20]

The Court further observed that those who gave us the Constitution had the above observation in mind. The Court, however, counter-balanced its observations (On the need to have access to the Courts) above with the need to exercise restraints (so as to prevent frivolous or vexatious claims). The Supreme Court in coming to the conclusion that the plaintiff/appellant, Senator Abraham Adesanya, had no standing to bring the matter, examined the provisions of section 6 (6) (b) of the 1979 Constitution,[21] and observed:

> For his part, the first defendant/respondent must be deemed to have consulted the Council of State as required by the Constitution before nominating the second defendant / respondent for appointment as chairman of the Federal Electoral Commission. The Senate, in the exercise of their powers, and after due deliberation in which the plaintiff / appellant took part, confirmed the appointment. It seems to me that the plaintiff / appellant came to court because he was unable to persuade his fellow Senators to agree to his stand in the matter. Furthermore, the learned trial judge who heard the case in the High Court found that he (the plaintiff / appellant) had no personal interest in the matter, a finding which the plaintiff / appellant had not disputed either in the Federal Court of Appeal or in this Court.[22]

The Court went on to remove the plaintiff / appellant, a Senator, from the categories of persons contemplated by section 6 (6) (b) of the 1979 Constitution. In all, the Supreme Court was of the opinion that for an applicant or litigant to have the right of bringing an action (constitutional matters - a general interest common to all members of the public), the claimant must have some justiciable interest which may be affected by the action or that he will suffer injury or damage as a result of the action. [23] In most cases, the area of dispute, and sometime

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[19] *Ibid*, p.157, where it was stated: "The problem is highlighted in a Country with a written constitution which establishes a constitutional structure involving a tripartite allocation of power to the legislature, the executive and the judiciary as co-ordinate organs of government. On one hand, the judiciary, as the guardian of the fundamental law of the land has the role of passing on the validity of the exercise of powers by the legislature and executive and to require them to observe the constitution of the land. The situation thus calls for a system of judicial control in favour of jurisdiction de *droit objectif*".

[20] Per Fatai – Williams, C.J.N., delivering the judgement of the Court in Adesanya v. President of Nigeria (1981) N.S.C.C. p. 157.

[21] Section 6 (6) (b), 1979 Constitution: The judicial powers vested in accordance with the foregoing provisions of this section (b) shall extend to all mattes between persons, or between government or authority and to any person in Nigeria, and to all actions and proceedings relating thereto, for the determination of any question as to civil rights and obligation of that person.

[22] *Adesanya v. President of Nigeria, supra*, p.161.

[23] Per Sowemimo, J.S.C., *Adesanya v. President of Nigeria*, p. 166.

of conflicting decisions, has been whether or not on particular facts and situations, the claimant has sufficient justiciable interest or sufferance of injury or damage depends on the facts and circumstances of each case. In the words of one of the Justices: "The mere fact that an act of the executive or legislature is unconstitutional without any allegation of infraction of or its adverse effect on one's civil rights and obligations poses no question to be settled between the appellant and the respondents as to the civil rights and obligations of the appellant."[24]

V. *LOCUS STANDI* AND CRIMINAL LAW

In about half a decade after the marked judgement on *locus standi* in the *Abraham Adesanya's* case by the Supreme Court of Nigeria, the issue reared its head again in a criminal matter. The case is *Fawehinmi v. Akilu*.[25] It was fought from the High Court of Lagos through the Court of Appeal to the Supreme Court. Interestingly enough, the counsel, Chief Gani Fawehinmi, who appeared and argued *Adesanya's* case at the Supreme Court, was himself the applicant/appellant in the case. He, therefore, appeared in person. This case is significant in diverse ways. Perhaps, the most significant, being the right (and locus) of a private person to institute criminal proceedings in Nigeria. Again, the legal jurisprudence employed by the Supreme Court to widen the perimeter of Section 6 (6) (b) of the 1979 Constitution so as to ground *locus* for a private prosecutor is intriguing, given the position of the Court in the *Adesanya's* case.

a. Facts of the Case

The appellant (Chief Gani Fawehinmi) as applicant in the Lagos High Court sought leave to apply for an order of mandamus to compel the Director of Public Prosecutions, Lagos State, to endorse a certificate of disinclination to prosecute on an information which the appellant had submitted to him. It was in respect of the murder of one Dele Giwa who was killed by means of a letter bomb on the 14th day of October, 1986. The appellant, as a friend and legal representative of the deceased had, after a private investigation, together with proofs of evidence and submitted same to the respondent for the purposes of criminal prosecution of the persons therein named: Col. Halilu Akilu, Lt. Col. A.L. Togun, or failing to endorse thereat a certificate of disinclination to prosecute under Section 342 of the Criminal Procedure Law.[26] The respondent, being of the opinion that the proofs of evidence as submitted, did not make out a *prima facie* case for the prosecution for murder of the persons named, communicated orally to the appellant his inability to come to a decision to prosecute. Thereupon, the applicant brought an *ex-parte motion* for leave to apply for an order of mandamns. The trial court ruled against the prayer and held that the proofs of evidence did not disclose a *prima facie* case and that the failure to come to a decision to prosecute the respondent, could not amount to refusal to prosecute at the instance of the public. The appellant appealed to the Count of Appeal which held, *inter alia*, that the appellant had no *locus standi* to bring the action under section 6 (6) (b) of the 1979 Constitution and on the authorities of *Adesanya v. President* and other cases of that line. The appellant later appealed to the Supreme Court.

b. Treatment of Issue of *Locus Standi*: The attitude of the Supreme Court

According to Obaseki J.S.C. (as he then was), who delivered the lead judgment: "This appeal raises two important issues which will continue to be debated in legal circles for a long time. The 1st question touches the *locus standi* of the appellant to initiate and institute *these proceedings* in the High Court.[27] The word *'these proceedings'* in the foregoing excerpt refers to private prosecution of the alleged murder of Dele Giwa by Chief

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[24] Per Bello,J.S.C, *Adesanya v.President of Nigeria, supra*, p. 176.
[25] *Fawehinmi v. Akilu* (1987)2 N.S.C.C. p. 1265.
[26] Chapter 32, Laws of Lagos State.
[27] *Fawehinmi v. Akilu* (1987) 2 N.S.C.C. pg. 1272

Gani Fawehinmi (friend and lawyer of the deceased). Indeed, it is true; the issue of locus is as topical now as it was when Obaseki J.S.C. uttered those immortal and memorable words.

Dealing with the issue of *locus standi*, the respondent submitted that the appellant had no *locus standi*. He agreed with the submission that the leading authority on *locus standi* in Nigeria is the case of *Senator Adesanya v. President of Nigeria* and the constitutional provisions in section 6 (6) (b) of the Federal Republic of Nigeria 1979. He submitted that the *civil right* [28] and *obligations*[29] of the appellant have not been injured to give him standing to file this application. He submitted that the *private person* [30] referred to in section 342 and 343[31] of the Criminal Procedure Law of Lagos State is a private person *whose legal right has been infringed*[32] and who also has *a personal and private*[33] interest in the case. He submitted that the fact of being a friend and lawyer of Mr. Dele Giwa (deceased) did not give him a personal and private interest. He went on to submit that sections 342 and 343 of the Criminal Procedure Law did not confer the right to bring criminal prosecution on any Dick, Tom and Harry but on anybody who has a personal and private interest in the prosecution. The appellant, he concluded, could not come within the provisions of section 6 (6) (b). He argued that anybody who chose to apply for mandamus should have a legal and specific right to enforce the performance of the duties. The submission of the respondent found favour with the Court of Appeal:

> Such personal and private interest has not been shown. It is clear that neither the fact that the appellant was a friend and counsel of the deceased, as he deposed to in his affidavit in support, nor the fact that he is seeking to be a private prosecutor if the respondent takes action under section 342 of the Criminal Procedure Law, for what I have said, is sufficient to give him *locus standi*.[34]

The Supreme Court of Nigeria per Obaseki, J.S.C. (as he then was), reading the lead judgment, with other Justices concurring, save Craig, J.S.C. (as he then was) dissenting, made an expose of universal brotherhood:

> It is a universal concept that all human beings are brothers and are assets to one another. All human beings living in the same country and being citizens of the same country are more closely related to one another and are in truth and in fact each other's keeper than those living in countries separated by great distances. *The death of one is a loss to the other whether by natural or feloneous means.*[35]

VI. SECTION 6 (6) (b) OF THE CONSTITUTION

This writer considers it pertinent to give a close scrutiny to the application and reference made of this section of the Constitution in this case. Much heavy weather was made of this section, particularly by the respondent, as a basis why the appellant should be denied standing. His reasoning was based on precedent: the Supreme Court in *Adesanya v. President* [36] held that the appellant lacked *locus* given this section. This section was well

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[28] Italics mine for emphasis.
[29] Italics mine for emphasis.
[30] Italics mine for emphasis.
[31] Section 342 and 343 generally empower private persons to prosecute criminal matters where the state declines to prosecute.
[32] Italics mine for emphasis.
[33] *Ibid.*
[34] Per Nnaemeka – Agu, J.C.A. (as he then was) (with the concurrence of Kutigi and Kolawole, JJ.C.A.)
[35] Italics mine for emphasis, per Obaseki p. 1281.
[36] *Supra*, see facts above.

considered by the Court. Having looked at the law, the Court asked the question, "can it be said that there is no question relating to the civil rights and obligations of the appellant?" [37] The Court itself provided an answer:

> There certainly is a question raised about the rights of the appellant to have endorsed on the information submitted to the D.P.P and the duty of the D.P.P to endorse on the information a certificate that he has seen the information and he declines to prosecute at public instance"
> This question arises as a result of the refusal of the D.P.P to endorse the certificate on the information as required by section 342 (a) of the Criminal Procedure Law. Although the information is initiating criminal prosecution, the application for the order for mandamus is a civil proceedings so also the application for leave.[38]

The Court went ahead and clothed (and rightly too) the appellant with locus by giving a wider interpretation to section 6(6)(b) in contrast to the restrictive interpretation given to it in the Adesanya's case, the Court drew a distinction between the two cases:

> *Adesanya v. President of Nigeria* (*supra*) and *Irene Thomas v. Olufosoye (supra*) are both in respect of a civil cause or matter and provide sound and solid authority for the *locus standi* of the appellant. The narrow confines to which section 6 (6) (b) restricts the class of persons entitled to locus standi in civil matters have been broadened by the Criminal Code, the Criminal Procedure Law and the Constitution of the Federal Republic of Nigeria 1979. The powers of arrest and prosecution conferred by the various sections of the Criminal Procedure Law and the Criminal Code on "any person" has the magic effect of giving *locus standi* to any person who cares to prosecute an offender if, and only if, he saw him committing the offence or reasonably *suspects him* of having committed the offence.[39]

The Supreme Court, justifying its position above, made a jurisprudential exposition:

> Criminal Law is addressed to all classes of society as the rules that they are bound to obey on pain of punishment to ensure order in society and maintain the peaceful existence of society. The rules are promulgated by the representative of society who form the government or the legislative arm of government for the benefit of the society and the power to arrest and prosecute any person who breaches the rule is also conferred on any person in the society in addition to the Attorney – General and *other law officers for the benefit of the society.*[40]

The reason why the Court expanded the notion of *locus standi* in this case, no doubt, is sensible. Law aside, human life, has always been held to be sacred, even among people in primitive societies. On this basis, why would a man's friend not allowed to look for his killer(s) and bring them to book? The gregarious nature of human beings makes it imperative that one human being should be a Good *Samaritan to another human being.*[41] The Court most likely thought along this line. Eso, J.S.C. who also heard the appeal, in his characteristic manner, said:

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[37] *Ibid.* italics mine.
[38] *Ibid.*
[39] *Ibid.*, p. 1288.
[40] *Ibid.*
[41] For the parable of the Good Samaritan as told by Jesus Christ, see the Bible,Luke 10:25-37, King James Version.

> My humble view, and this court should accept it as such, is that the present decision of my learned brother, Obaseki, J.S.C., in this appeal *has gone beyond the Abraham Adesanya's* case .I am in complete agreement *with the new trend,*[42] and with respect, my agreement with the judgment is my belief that it has *gone beyond the Abraham Adesanya case.* [43]

Like Obaseki, J.S.C., Justice Eso, made an exposition of the sociological jurispendence of brotherhood:

> It is the view of my learned brother Obaseki, which I fully share with respect, that "it is the universal concept that all human beings are brother and assets to one another". *He applies this to ground locus standi.* [44] That we are all brothers is more so in this country where the socio-cultural concept of family "and" extended family" transcend all barriers. Is it not right them for the court to take note of the concept of the loose use of the word "brother" in this country? "Brother in the Nigerian context is completely different form the blood brother of the English language. Though Cain challenged the *locus standi* of his being questioned as to the whereabouts of his brother, Abel, it was his reason that he was not his brother keeper. That might have been in the outskirts of the Garden of Eden. In Nigeria, it would be an unacceptable phenomenon. *And when it comes to the law of crime, everyone is certainly his brother's keeper.*[45]

In all, the Court held that the appellant had the *locus standi* to sue.

VII. *CHIEF GANI FAWEHINMI V. PRESIDENT OF THE FEDERAL REPUBLIC OF NIGERIA AND OTHERS*[46]

This writer considers this case- *Fawehinmi v. President, F.R.N.,* [47] – an important milestone in constitutional jurisprudence in Nigeria –particularly as it has to do with *locus standi.* When the military left our political turf, one would have thought that the succeeding democratic (if indeed it was so) Government would abide by the Constitution. But that was not to be as the Obasanjo's Government[48] was characterized by wanton disregard for the rule of law and due process. The gist of this matter, which came up first at the Federal High Court, Abuja, is that Chief Gani Fawehinmi sued the President of the Federal Republic of Nigerian, General Olusegun Obasanjo (as he then was); Revenue Mobilization, Allocation And Fiscal Commission, Dr. (Mrs.) Ngozi Okonjo- Iweala, Minister of Finance; Ambassador Olufemi Adeniji, Minister of External Affairs, Attorney- General of the Federation For declaratory orders and an injunction. The appellant (Chief Fawehinmi) at the material time of instituting this action, was the Chairman of the National Conscience Party (N.C.P),a former presidential candidate in the 2003 presidential election in Nigeria and a tax payer. He was a Senior Advocate of Nigeria (S.A.N) who swore to an oath under the Legal Practitioners Act to support and uphold the Constitution of the Federal Republic of Nigeria.

The 1st respondent, General Olusegun Obasanjo, was at the material time the President of Nigeria, while the 2nd respondent, Revenue Mobilization, Allocation and Fiscal Commission is a Federal Executive Body for

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[42] Italics mine for emphasis.
[43] Italics mine for emphasis.
[44] Italics mine for emphasis.
[45] Italics mine for emphasis.
[46] Reported in (2007) 14 N.W.L.R.
[47] *Ibid.*
[48] (May 29th 1999-May 28th 2007).

the Federation established under section 153 of the Constitution of the Federal Republic of Nigeria, 1999, which power, among others, is to determine the remuneration appropriate for political office holders, including the President, Vice-President, Governors, Special Advisers, Legislators and the holders of the offices mentioned in section 84 and 124 of this Constitution. The 3rd and 4th respondents Dr. (Mrs.) Ngozi Okonjo-Iweala and Ambassador Olufemi Adeniji are Nigerians who were appointed the Minister of Finance and Minister of Foreign Affairs respectively under section 147 of the Constitution of the Federal Republic of Nigeria, 1999 on the basis of Federal character under section 14(3) of the Constitution and they represented certain states in Nigeria as provided in the Constitution and not any other body or interest. Pursuant to the constitutional duty of the 2nd respondent, Revenue Mobilization Allocation and Fiscal Commission, under the Constitution, the salaries and allowances of ministers and certain public officers were prescribed by an Act of the National Assembly titled: "Certain Political, Public and Judicial Office Holders (Salaries and Allowances, *et cetera*) Act[49] promulgated on 13th December, 2002 and deemed to have come into force on the 29th of May, 2009. The Act in its Schedule: Parts I – IV- itemized the annual basic salaries, allowances and fringe benefits for certain political office holders. The yearly or annual salary of a minister of Federal Republic of Nigeria was fixed by the Act at ₦794,085.00 (Seven hundred and ninety-four thousand, eighty- five naira) per annum, as well as other allowances.

Contrary to the above provision of the Act, the 3rd respondent, Dr. (Mrs.) Ngozi Okonjo – Iweala, on the instruction of the Ist respondent, the President of the Federal Republic of Nigeria, General Olusegun Obasanjo was being paid $247,000.00 (about ₦36,000,000:00) per annum which was far above what was authorized by the Act, and in foreign currency. Similarly, the 4th respondent, Ambassador Olufemi Adeniji, was also being paid on the instruction of the President, $120,000.00 (about ₦17, 000,000.00 million) per annum which was far above what was prescribed by the law and also in foreign currency. The President, the 1st respondent herein, who authorized the payment of the salaries, swore to an oath of office and oath of Allegiance on 29th May, 1999 and 29th May, 2003 respectively, as prescribed in the Seventh Schedule to the Constitution of the Federal Republic of Nigeria, 1999, to uphold and defend the Constitution of the Federal Republic of Nigeria.

It is upon the foregoing background of the breach of the provisions of the Constitution and an Act of the National Assembly that the appellant, Chief Gani Fawehinmi, commenced an action by originating summons. The trial Federal High Court, Abuja, ruling upon a preliminary objection, the ground being lack of *locus standi*, struck out the appellant's action on the ground that he had no *locus standi* to maintain the action. [50] On appeal, the Court of Appeal said that the only issue for determination is whether Chief Gani Fawehinmi has *locus standi* to institute the action. It should be recalled that the argument of the appellant of having a civil obligation and right to uphold the Constitution, was canvassed for the appellant (Senator Abraham Adesanya) in the *Adesanya's case*, but the Court of Appeal and ultimately the Supreme Court rejected this contention, on the basis among others, that the issues/matters do not affect the appellant civil rights and obligations as a person.

> Surely, these are matters that not only concern the appointing powers of Mr. President and the confirmation powers of the senate but are of the very essence of the exercise of those powers. In no sense, to my mind, are they matters concerning the plaintiff/ appellant's civil rights and obligation as a person. They pertain to him, not as an individual exercising his civil rights and obligations, but as a senator (a political representative) exercising his right to vote in the confirmation proceedings in the senate. [51]

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[49] Act No. 6 of 2002.

[50] *Fawehinmi v. President, F.R.N.* (2007) 14 N.W.L.R. p. 296.

[51] *Adesanya v. President of Nigeria* (1981) N.S.C.C. p. 161, per Fatai – Williams, italics mine for emphasis.

The position of the Supreme Court in the *Adesanya's case* (being the *locus classicus*) was urged on the Court of Appeal in *Fawehinmi v. President of Nigeria* by the respondent, expectedly:

> The case of *Senator Adesanya v. The President of Federal Republic of Nigeria*, has been acknowledged as a milestone decision on *locus standi*. It is clear from the ruling that the learned trial judge had placed reliance on the case of *Adesanya v. President ...* and subsequent decisions in striking out the plaintiff's case on the ground of lack of locus standi" [52]

Having said this much on these two cases- *Adesanya v. President of Nigeria*, and *Fawehinmi v. President, Federal Republic of Nigeria*, this writer submits that it is relevant to ask the question: *what is the different between them in law*? Both cases bother on the alleged unconstitutional exercise of executive power by the Presidents of Nigeria at different times. Be that as it may, *are the appellants in these cases, in the same legal mould in law*? This poser definitely operated on the mind of the Court Fatai Williams, C.J. N., of blessed memory in Adesanya's case, opined: "He participated in the debate leading to the confirmation of the appointment of the second defendant/respondent and lost. For him, that should have been the end of the matter the position would probably have been otherwise if he was not a Senator." [53]

It should be noted that the Court of Appeal in *Fawehinmi v. President, F.R.N.*, in reversing (unanimously) the ruling of the trial Federal High Court, examined critically the *Adesanya's case* and more particularly the portion of Fatai-Williams' Judgment above, in distinguishing the two cases. In Fawehinmi v. President, F.R.N. the Court of Appeal did note that under public law, an ordinary individual will generally not have *locus standi* as a plaintiff. This is because such litigations concern public rights and duties which belong to, or are owed to all members of the public, including the plaintiff. It is only where he has suffered special damage over and above the one suffered by the public generally that he can sue personally.[54] This philosophy of the law that a general interest common to all members of the public is not a litigable interest to accord standing came up in the *Adesanya's case* and was duly examined by the Supreme Court. [55] Who, then, should sue the Government when public rights are violated? In the words of Justice Aboki:

> In an action to assert or protect a public right or to enforce the performance of a public duty it is only the Attorney-General of the Federation that has the requisite *locus standi* to sue. A private person can only bring such an action if he is granted a fiat by the Attorney-General to do so in his name. This is referred to as a "relator action [56]

Given the above, the vexed question is: who will approach the Court to challenge the Government where it violates or fails to enforce any provisions of the Constitution or the laws where An Attorney-General Will not? This question, raised by the appellant's counsel in the case of Fawehinmi v. President, F.R.N., bothered the Court, greatly.[57]

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[52] *Fawehinmi v. President, F.R.N., supra*, p. 332-333.
[53] *Adesanya case, supra*, p. 162, capitalization mine for emphasis.
[54] *Fawehinmi v. President, F.R.N., Supra*, p. 333.
[55] *Adesanya v. President of Nigeria, supra*, p. 165-166.
[56] Per Aboki, J.C.A, *Fawehinmi v. President, F.R.N., supra*, p. 333-334; see also *Adesanya case, supra*, p. 165- 166; see also *Fawehinmi v. Akilu, supra*, on the right of private individuals to institute private public prosecution.
[57] "In our present reality the Attorney – General of the Federation is also the Minister of Justice and member of the Executive Cabinet. He may not be disposed to instituting an action against the Government in which he is part of, it may tantamount to the Federal Government suing itself. Definitely he will not perform such a duty. Importantly too, there is no provision in the 1999 constitution for the state to sue itself . See *Fawehinmi v. President, F.R.N., supra*, p. 334, italics mine for emphasis.

In the course of the research in writing this article, this writer did not come upon a case wherein the Attorney-General sued the Government for breach of public right. The Court too, affirmed that "since independence, I know of no reported case of any superior Court in Nigeria where the Attorney- General of the Federation has instituted an action against the Federal Government on account of a violation of the provisions of the Constitution or the Laws here an Attorney-General will not. I may however be wrong in this historical assessment."[58] The impracticality (or hypocrisy) of the Attorney-General suing the Government will definitely breed lot of problems-especially in Africa where Government are not responsive and responsible to the people. When the Attorney- General refuses to sue, as it is consistently the case, and citizens are prevented from doing so upon the concept of *locus standi*, what does this portend for the polity? Dictatorship on the part of those who govern (remember that absolute power tends to corrupt absolutely); and on the part of the governed, seething anger, which may most likely result to anarchy.

There is the need (indeed an utmost need) to allow litigants unhindered access to the Court when they are convinced that there is an infraction of the Constitution (that Supreme law of the land), and ask for the appropriate declaration and consequently relief, if relief is required. This position which is the opinion of this writer is in tandem with the Supreme Court's. [59] Without looking into the crystal ball, the learned Chief Justice of Nigeria (as he then was), Fatai-Williams, of blessed memory, predicted what fettered access to Court will occasion. Today, almost three decades since that erudite Justice uttered those golden and immortal words, the ugly, yet foreseeable predictions are here with us, most unhappily. This portion of Fatai-Williams', J.S.C. (as he then was) judgement was well considered by the Court of Appeal, in its judgement in *Fawehinmi v. President, F.R.N.,* [60] for the Court said:

> In this country, where we have a written Constitution which establishes a constitutional structures involving a tripartite allocation of power to the Judiciary, Executive and Legislature as the co-ordinate organs of Government, Judicial function must primarily aim at preserving legal order by confining the legislative and executive within their powers in the interest of the public and since the dominant objective of the rule of law is to ensure the observance of the law, *it can best be achieved by permitting any person to put the judicial machinery in motion in Nigeria whereby any citizen could bring an action in respect of a public derelict. Thus, the requirement of locus standi becomes unnecessary in constitutional issues as it will merely impede judicial functions.* This opinion is supported by Fatai Williams, C.J.N. in Adesanya's case... [61]

On the whole, the Court of Appeal unanimously upturned the ruling of the trial Federal High Court, and held that Chief Gani Fawehinmi, a tax payer, has the *locus* to institute the action. According to the Court, it will definitely be a source of concern to any tax payer who watches the funds he contributed or is contributing towards the running of the affairs of the State being wasted when such funds could have been channelled into providing jobs, creating wealth and providing security to the citizens. If such an individual has no sufficient

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[58] *Ibid.* p. 334.

[59] "I take significant cognizance of the fact that Nigeria is a developing country with multi-ethnic society and a written Federal Constitution, where rumour mongering is the pastime of the market places and construction sites. To deny members of such society who is aware or believes, or is led to believe, that there has been an infraction of any of the provisions of our Constitution, or that any law passed by any of our Legislative Houses, whether federal or State, is unconstitutional, access to a court of law to air his grievenance on the flimsy excuse of lack of sufficient interest is to provide a ready recipe for organized disenchantment with the judicial process. In the Nigeria context, it is better to allow a party to go to court and be heard than to refuse him access to our courts. Non-access; to my mind, will stimulate the free-for-all in the media as to which law is constitutional and which is not". Per Fatai – Williams, C.J.N., *Adesanya's case, supra*, p. 157.

[60] *Fawehinmi v. President, F.R.N., supra*, p. 334-335.

[61] Per Aboki, J.C.A., *Fawehinmi v. President, F.R.N., supra*, p. 334, italics mine for emphasis.

interest of coming to Court to enforce the law and to ensure that his tax money is utilized prudently, *who else would have sufficient interest other than him.*

VIII. *LOCUS STANDI* SINCE ADESANYA: THE JOURNEY SO FAR

In the locus classicus of *locus standi* (*Adesanya v. Prsident of Nigeria*) in Nigeria, the Court adopted a restrictive approach in respect of section 6(6)(b) of the C.F.R.N., 1979; and the Oath of allegiance. [62] However, even in this case (Adesanya's), the Court seems to sound a caveat:

> Finally, in the Nigerian context and having regard to the detailed provisions of our 1979 Constitution [63] the point which, I think, needs to be stressed is that there are explicit provisions therein which deal with *locus standi* which is required in order to sustain a claim that there has been an infringement of particular provisions of the Constitution. Consequently, other infractions of the provisions of the said Constitution, to which no restriction are attached, should not be fettered by the common law or the administrative law concepts of locus *standi*.. The complaint in such cases should be accorded a hearing subject only to the constitutional restrictions to which I have referred earlier.[64]

Sowemimo, J.S.C, who also was part of the panel that heard the Adesanya's case, was of the opinion that on the issue of *locus standi*, each case should be treated on its own facts and circumstances. [65] Equally of this view was Nnamani, J.S.C.[66]

Yet again, another member of the Panel of justices lent his voice, still of the opinion, that, there should not be evolved a watertight rule: "... I feel that the interpretation to be given to section 6 subsection (6) (b) of the Constitution will depend on the facts or special circumstances of each case. So that, no hard and fast rule can really be set-up. But the watchword should always be the "civil rights and obligations" of the plaintiff concerned."[67] It has, however been the argument that the essence of *locus standi* is to act as a valve to prevent busybodies.[68]

IX. FLOODGATE TO FRIVOLOUS LITIGATION! SHOULD ACCESS TO JUSTICE BE RESTRICTED ON THIS BASIS?

This writer answers in the negetive and shares the view of Nnamani, J.S.C., that our interpretation of section 6 (6) (b) of the Constitution must be approached with a true liberal spirit in the interest of society at large. [69] Fatai-williams C.J.N. (of blessed memory) advocated a liberal approach when he said:

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[62] See the judgment of Bello, J.S.C. (as he then was) at p. 167-169 in *Adesanya v. President of Nigeria, supra.*

[63] This should apply to C.F.R.N., 1999.

[64] Per Fatai – Williams, *Adesanya v.President of Nigeria, supra*, p. 161, italics mine for emphasis.

[65] *Adesanya's case, supra*, p.166.

[66] "Still on a general note, learned counsel for the appellant had urged us, in as such as the issue of *locus standi*, may affect access to the Court, "to open the door wide" at this stage and close it gradually. In our complex society and having regard to the state of the democratic process, *I would have rather preferred a situcition in which each case is considered on its particular circumstance and in which the Court allows a liberal Spirit to prevail in their determination in each such case of what amounts to or the scope of sufficient interest which will entitle the complainant to sue. Ibid.* p. 177, italics mine for emphasis.

[67] Per Uwais, J.S.C, in the *Adesanya's case*, p. 180.

[68] It is of paramount importance and indeed most desirable to encourage citizens to come to court in order to have the Constitution interpreted. However this is not to say, with respect, that meddlesome interlopers, professional litigants or the like should be encouraged to sue in matters that do not directly concern them. In my view, to do that is to open the floodgate to frivolous and vexatious proceedings. I believe that such latitude is capable of creating undesirable state of affairs. Per Uwais, J.S.C., in the Adesanya's case, supra, p. 179, italics mine for emphasis.

[69] *Fawehinmi v. Akilu, supra*, p. 1308, per Nnamani, J.S.C.

> However, except in the extreme or obvious case of abuse of process, how then can one conceive of a judicial process where access to the courts, by persons with grievances, is based solely on the courts own value judgment in a multi-ethnic country where more than two hundred languages are spoken? I would rather err on the side of access than on that of restriction. [70]

With regard to the floodgate phenomenon, our Courts have inherent powers to deal with vexatious litigants or frivolous claims.[71] Access to justice must be guaranteed in a written constitution like ours.

It is heartening now to note that the Courts are (or so it seems) liberally letting go their grip on the noose of *locus standi*. This is particularly so when this attitude is coming from the Court of Appeal. This Court after the Supreme Court expanded the horizon of *locus standi* in *Chief Gani Fawehinmi v. Akilu*, adapted to the new reality on the approach in the case of *Williams v.Dawodu*: [72]

> There is now the recent case of *Chief Gani Fawehinmi v.col. Halilu Akilu* which shows that the courts have become increasingly willing to extend the ambit of *locus standi* for public good. The courts have broken new grounds. The significance of this judicial revolution is that whereas in the past the court showed little or no reluctance in any given case in construing the import of "sufficient interest" against the individual and tended to be more executive than the Executive, now the term "sufficient interest" is construed more favourably in order to give an applicant a hearing.[73]

Not relenting on its effort in this new approach, the Court of Appeal, in the case of *Shell Petroleum Development Co. Ltd.& 5 Ors. v. E.N. Nwawka & Anor,* [74] demonstrated ably it commitment to this notion. The Court seemed to re-echo the dicta of Obaseki and Eso (JJ.S.C). [75] The words of Pats-Acholonu, J.C.A. (as he then was and of blessed memory) is as admirable as it smack of enviable judicial activism. According to him:

> It needs the courage, wisdom and proper understanding of our social-economic environment for an activist Judge to widen the scope of the law on *locus standi*. Some Judges and advocates have shown some trepidation in handling this matter. I believe we have to take the bull by the horn and do justice to a matter before the court without bending overly backwards because a matter is on boarder-line in respect of whether the initiator of an action has the standing order to do so. I think that where the cause is laudable and will bring peace, justice and orderliness that will reflect the spirit of the Constitution then we showed not shirk our responsibility in this area to help in advancing the cause of Social, Economic and Cultural matters as they affect this society. The development of the law of locus standi has been retarded extensively due to fear of floodgate of persons meddling into matters not even remotely connected with them. In my opinion, let them meddle and let the court remove the wheat from the chaff.... I believe that it is the right of any citizen to see that law is enforced where there is an infraction of its being violated in matters affecting the public law and in some cases of private law such as where widows, orphans are deprived, and a section of the society will be adversely affected by doing nothing. [76]

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[70] Per Fatai – Williams, *Adesanya v. President of Nigeria, supra*, p. 160.
[71] *Ibid*, p. 157.
[72] (1988) 4 NWLR. (Pt. 87).
[73] Per Akpata, J.C.A., *Williams v. Dawodu* (1988) 4 NWLR (pt.87) p.218.
[74] (2001) 10 NWLR (Pt. 720) cited by the Court of Appeal in *Fawehinmi v. The President, F.R.N.*
[75] In *Fawehinmi v. Akilu, supra.*
[76] Per Pats – Acholonu, (J.C.A.) in *Shell Petroleum v. E.N. Nwawka*, (2001) 10 NWLR (Pt. 720) P.82 – 83.

X. CONCLUSION

In conclusion, the writer consider worthy the judicial attitude of the Court of Appeal in *Fawehinmi v. The President, F.R.N.* In the course of research in writing this paper, the writer did not come across any law report of this case at the level of the Supreme Court. Expectedly, one imagines that there should be an appeal on it to the Supreme Court. If it be so, then we await with bated breath the decision of the Court of finality.

No doubt, the eventual affirmation of the judgement of the Court of Appeal in this case (*Fawehinmi v. President et al*) by the Supreme Court will have a far-reaching consequence. Though, it will be a consequence greatly desired. Throughout all civilization that were worth their weight in gold, eternal vigilance is the dew that waters the tree of liberty. Denial of access to courts, on the doctrine or concept of locus, makes the much needed eternal vigilance difficult, or almost impossible.

Our democracy in Nigeria needed to be guarded jealously. The actions and omissions of public servants and politicians *should* and *must* not be clothed with the halo of undue immunity from the searchlight of the public. The Nigerian Nation like all other enviable nations, stand to gain more when citizens are allowed to query government's action than when they are denied access to court. Thus government becomes responsible and responsive. As this writer concludes this article, there are raging issues in the polity. For instance, the eleventh Chief Justice of Nigeria has just been sworn into office in a manner that questions the propriety of the exercise. Equally interesting, though awkwardly, is the issue of the President of the Federal Republic of Nigeria being absent from office in a manner incongruous to the Constitution.

These issues, among others, are already the subject matter of sensational litigation. This writer envisages that these issues may turn upon the pivot of *locus standi.*