Resolution of Environmental Disputes in Nigeria: The Role of Alternative Dispute Resolution Mechanism

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RESOLUTION OF ENVIRONMENTAL DISPUTES IN NIGERIA: THE ROLE OF ALTERNATIVE DISPUTE RESOLUTION MECHANISM*

Abstract

Environmental degradations are the aftermath of human intrusion into nature. Disputes arise due to the impact of degradations that affect the ecosystem's continuous functioning. Research has shown that most environmental conflicts are resolved through litigation with attendant drawbacks in achieving a resolution. Some drawbacks include legal technicalities, the time taken in litigation, the victim's inability to discharge the evidential burden revolving around the issue of expert witnesses and the bad blood between the host community and the industries, etcetera. Due to these factors, victims of environmental pollution at times go without remedy. This study aims to offer insights on the effectiveness of Alternative Disputes Resolution (ADR) mechanism in resolving environmental disputes. ADR mechanism is considered a more dynamic tool than traditional litigation. Thus, this paper argues that ADR mechanism, rather than litigation, is a more viable way for victims to obtain relief. This study found that the advantages of ADR outweighed traditional litigation, which is bedevilled with legal technicalities such as pre-action notice, locus standi, and limitation action, among others. The authors are of the view that environmental disputes could be better resolved amicably and faster using ADR mechanisms. They, therefore, canvass for the institutional framework and recognition of the Environmental ADR mechanism to resolve environmental disputes.

Keywords: Environmental degradation; Environmental disputes, environmental litigation, Alternative Dispute Resolution.

1. Introduction

Environmental degradation is a growing phenomenon. According to the United Nations Environment Programme (UNEP) assessment report on the state of the world's environment, it stated that 'indoor air pollution is responsible for 600,000 premature deaths every year in Africa.[1] The continent's reliance on biomass for cooking, lighting and heating means that 90 per cent of the region's population is exposed to this health threat'.[2] The report also stated that African megacities such as Cairo, Kinshasa and Lagos and emerging megacities such as Dar es Salaam, Johannesburg and Luanda face challenges from poor management of sanitation services due to inadequate and deteriorating infrastructure resulting from underinvestment.[3] Such reports are alarming and show the seriousness of the harm environmental degradation causes and will continue to cause to people's lives, properties and the environment. Industrialisation and technology have heightened the abasement of the natural environment in Nigeria and beyond. In Nigeria, in most cases the people directly impacted by this environmental degradation resort to self-help, in the terms of vandalisation, acts of sabotage and brigandage.[4] Over the years, with the increased sensitisation and awareness of their environmental rights, victims of environmental hazards resorted to judicial proceedings by seeking relief and compensation from judicial authorities established by law.[5] This has led to a drastic increase in environmental disputes in the country. The courts being the last hope of the common man have not lived up to expectations. Environmental pollution victims are often inadequately compensated or, at times, left without a remedy. Reasons adduced range from non-justiciability of some of the subject matter of the disputes, issues bordering on reliance on technicalities by the courts, to problems on the burden of proof based on the requirements of expert witnesses, among others. All these, in addition to bad blood generated between victims and pollutants, leave a toll on the victims. Thus, alternative dispute resolution (ADR) is needed, rather than litigation, as a way out.

A review of academic literature on ADR's effectiveness in resolving environmental disputes shows that some authors have written on the issue internationally.[6] The subject has not received similar attention from environmental law researchers in Nigeria. Studies have shown that most Nigerian commentators concentrate on the non-justiciability of environmental right,

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[1] 'Rate of Environmental Damage Increasing Across Planet but Still Time to Reverse Worst Impacts if Governments Act Now, UNEP Assessment Says- the United Nations' *<http://www.un.org>blog>2016/05>* accessed 13 January 2022.

[2] Ibid.

[3] Ibid.

[4] Israel Aye, 'Oil and Gas Environmental Dispute Resolution in Nigeria: A Case for Special Courts' *Primera Africa Legal <http://primera.com>* accessed 11 July 2022.

[5] Ibid.

[6] Frank P Grad, 'Alternative Dispute Resolution in Environmental Law' [1989] 14(157) *Colum J Envtl Law <http://heinonline.org/HOL/License>* accessed 12 July 2022. The author examined the early history and acceptance of ADR in environmental disputes. Stukenborg, (n 64) the author is of the view that ADR offers a tremendous solution to help reduce the burden on judicial systems. Rosemary O'Leary, Susan Summers Raines, 'Lessons Learned of Alternative Disputes Resolution Programs and Processes at the U.S. Environmental Protection Agency' [November 2001] 61(6) *Public Administration Review <http://onlinelibrary.wiley.com>* accessed 12 June 2022. The authors reiterated the fact that the US Environmental Protection Agency (EPA) is one of the pioneers in the application of ADR processes and techniques to public policy disputes. Pieter Glasbergen, 'Environmental Dispute Resolution as a Management Issue' in Pieter Glasbergen (eds) *Managing Environmental Disputes* [1995] 5 *Environment & Management <http://doi.org/10.1007/978-94-011-0766-2_1>* accessed 12 January 2022.

thereby paying little attention to the other means of resolving environmental disputes.[7] This report also points to the fact that environmental degradation will not end anytime soon, and it would take tremendous efforts to reverse the damage being done to the environment. The increase in environmental dilapidation in Nigeria and across the globe leads to a rise in environmental disputes. It is imperative that various means to achieve settlement when such disputes arise are developed, thus, the need for alternative dispute resolution, rather than or in addition to litigation.

2. Applicability and Limits of Litigation in Resolving Environmental Disputes

Crowfoot and Wondolleck[8] opined that environmental disputes are incited by different stakes in the outcome of ecological and natural resources management decisions. The threatened loss of a resource with particular significance to a group causes people to organise and protest. So does the immediate monetary threat of a delayed development and lost investments should a governmental decision run contrary to the economic interests of particular groups or individuals? Also, in a research conducted by some scholars and submitted to the International Labour Organisation, Geneva, under the auspices of the United Nations, five major causes of environmental degradation were identified.[9] They are poverty, population pressures, consumption patterns, energy and technology. Thus, environmental disputes may arise due to human intervention in the environment. Such intervention may occur owing to damage to the natural environment resulting in loss of lives, properties, means of livelihood, resources or basic amenities.

Environmental litigation is an environmental dispute that has resulted in one or more parties commencing legal proceedings in a civil or administrative court.[10] Environmental litigation has become increasingly common in many jurisdictions with the globalisation of modern environmental law, facilitated by international agreements such as the Stockholm and Rio Declarations.[11] Legislative provisions defining environmental rights and stipulating grounds for compensation of environmental damage, environmental restoration and legal standing for environmental organisations are now found in a diverse range of western and developing countries.[12] Nigeria has a range of legislative frameworks on environmental control. These include the Constitution of the Federal Republic of Nigeria (1999) as amended, the National Environmental Standards and Regulation Enforcement Agency Act (NESREA), Environmental Impact Assessment (EIA) Act, and Niger-Delta Development Commission (NDDC) Act, the Criminal Code.[13] These are in addition to using Common Law Tort in resolving environmental disputes. Therefore, the question is whether these legislation serves as an effective instrument for environmental protection, planning, pollution, prevention and control, as well as addressing the wrongs suffered by pollution victims? Further, are there ample provisions in enhancing the quest for environmental justice. A discussion on the flow of cases in environmental disputes will suffice.

Case law has shown that litigation has drawbacks in resolving environmental disputes. The main cause of action for environmental damage can be found in the traditional common law tort of nuisance, trespass, negligence and the rule in *Ryland v Fletcher*.[14] The legal principle under this rule is one of strict liability, which has been used in cases of environmental pollution. Under this rule, the defendant is responsible for accidental harm, independently of the existence of either wrongful intent or negligence.[15] According to Lord Blackburn, the proponent of this principle, 'any person who for his own purposes, brings on his land and collects and keeps there anything likely to do mischief if it escapes must keep it at his peril and if he fails to do so, he is prima facie liable for all damage which is the natural consequence of its escape'. The rule applies to things likely to make mischief if they escape. By judicial decisions, a wide range of things has been held to come within the rule, such as water,[16] sewage,[17] gas and gas oil,[18] fumes,[19] explosives,[20] trees,[21] vibrations,[22] etcetera.[23] Liability under this rule is strict; the defendant cannot allege that the thing escaped without his wilful act, default or neglect or that he had no knowledge

[7] Joseph Nwazi, 'Assessing the efficacy of Alternative Dispute Resolution (ADR) in the Settlement of Environmental Disputes in the Niger Delta Region of Nigeria' [August 2017] (9)(3) *<http://academicjournals.org/journal/JLCR/article-abstract/92A256E65636>* last accessed 7 June 2022.

[8] James Crowfoot and Julia M Wondolleck, *Environmental Disputes: Community Involvement in Conflict Resolution <http://books.google.com.ng>books* accessed 12 July 2022.

[9] AS Bhalla, '*Environment, Employment, and Development*' (Geneva: International Labour Office, 1992) *<https://www.researchgate.net>* accessed 30 December 2017.

[10] Moore, 'The Practice of Cooperative Environment Conflict Resolution in Developing Countries, cited in D.F. Nicholson, 'Environmental Disputes [205] *<http://openaccess.leidenuniv.handle>* accessed 10 June 2022

[11] Ibid.

[12] Ibid.

[13] Other legislation for environmental control in Nigeria includes; The Nigerian Urban and Regional Planning Act, Harmful Waste (Special Criminal Provision) Act, Hydrocarbon Oil Refineries Act, Oil in Navigable Waters Act, Associated Gas Re-Injection Act, The Endangered Species Act, Sea Fisheries Act, Inland Fisheries Act, Inland Fisheries Act, Exclusive Economic Zone Act, Oil Pipelines Act, Petroleum Act etc.

[14] [1868] UKHL1.

[15] Amari Omaka, *Municipal and International Environmental Law* (Lagos: Lions Unique Concepts 2012) 325.

[16] *Smith v Fletcher* [1872] LR 7 Exch 305 at 326.

[17] *Humphries v Cousins* [1877] 2 CPD 239.

[18] *Smith v Great Western Rail Co* [1926] 2 KB 43 CA.

[19] *West v Bristol Tramways Co* [1908] 2 KB 14 CA.

[20] *Miles v Forest Rock Granite Co* [1913] 34 TLR 500 CA.

[21] *Smith v Giddy* [1904] 2 KB 448.

[22] *Hoare and co v Mc Alphine* [1923] 1 Ch 167.

[23] Omaka (n 15).

of its existence. A landmark case where the Nigeria Supreme Court applied this rule is the case of *Umudge & Anor v Shell BP Petroleum Nig Ltd*.[24] The plaintiffs claimed from the defendant's damages for the escape of oil waste which the plaintiffs alleged damaged their ponds, lakes, and farmlands. Available evidence during the trial revealed that crude-oil wastes previously collected in a pit burrowed by and under the control of the defendants entered into the adjoining lands of the plaintiff, where it damaged the ponds and lakes and killed the fishes therein. The Supreme Court held the defendant liable under the rule in *Ryland v Fletcher*. In *Umokoro Edhemowe v Shell BP (Nig) Ltd*,[25] the court held that the accumulation of oil in waste pits for oil disposal was a non-natural use of the land. The defendant was thus held liable under the rule in *Ryland v Fletcher*.[26] A defendant faced with a suit premised on the rule of *Ryland v Fletcher* can avail himself with several defences. Defences include act of God, war or natural disaster,[27] act of a stranger or a third party,[28] statutory authority,[29] or consent of the plaintiff.[30] The litigant may rely on several mechanisms to arrive at a just and equitable resolution of cases. First is determining the rule to be relied upon. The tort of nuisance is the most commonly relied upon by victims in pollution and environmental degradation cases. Nuisance is an act or omission which is an interference with, disturbance of or annoyance to a person in the exercise of the enjoyment of a right or interest in land.[31] Nuisance may be a public or private nuisance. In *Ipadeola v Oshowole*,[32] public and private nuisance were defined thus:

(a) A public nuisance is one which inflicts damage, injury or inconvenience to the generality of the population or upon all of a class who come within its ambit.
(b) A private nuisance is one which interferes with a person's use and enjoyment of land or some right, such as an easement, connected with land. It is a violation of a person's private rights as opposed to a violation of rights which he enjoys.

The standard of proof in nuisance is like that required in civil cases. The relevance of the tort of nuisance to environmental protection could be seen in the polluter 's action leading to material injury to the plaintiff's property. In *Amos & Ors v Shell BP*, the plaintiff's action for public nuisance failed because he could not prove that the damage to the waterway affected him in a manner different (weightier) from other public members.[33] A successful action in public nuisance requires the plaintiff to prove that the magnitude of injury he suffered differs from that suffered by other members of the public. This standard would pose a lot of difficulties in Nigeria, especially regarding oil exploration activities. The benefit of oil to the socio-economic development of Nigeria outweighs the temporary inconvenience of communities. The standard of proof is one of the pitfalls of environmental litigation. It is a hurdle that draws back the effectiveness of litigation as a medium for resolving environmental conflicts.

The tort of negligence has also been relied upon by victims of environmental damage. The burden of proof is always burdensome. The plaintiff must establish a duty to conform to the required legal standard and a failure by the defendants to conform to the standard. He/she must also establish the causal link between the breach and the harm done. This paper argues that this would be unassailable in most cases. In environmental litigation, where the plaintiff cannot adduce cogent expert evidence in support of his case to the effect that the defendant breached the duty of care owed to him, he risks having his case dismissed. In *Shell Petroleum Development (Nig) Ltd v Edamkue*,[34] the respondent instituted actions in negligence under the rule in *Rylands v Fletcher*[35] claiming compensation for oil spillage that damaged the respondents' land, crops and water. The appellant asserted without evidence that the people's hostile acts caused the spillage. The court rejected the appellant's claim and held that having failed to prove the onus of sabotage placed on it, since the burden of proof shifted to it, it was liable for the spillage. In *Simon Onajoke v Seismograph Services Ltd*,[36] the plaintiff's building was damaged during the blasting operations of the defendants. The judge held that the defendant owed to anyone whose house was likely to be damaged by blasting operations a duty to take steps to avoid such damage by moving to an area where the processes would not cause harm. The plaintiff was awarded damages for the injury done. The Nigerian courts should take a cue from this decision which promotes judicial activism in environmental litigation.

The second is the assessment of the damage. Here the court takes the nature of the injury sustained and the subject matter of the injury into consideration before awarding damages or ordering restitution where possible.[37] Discussing these assessments and how they act as a limitation to compensate victims of environment degradation is essential. Next is the discharge of the evidential burden placed on the victim. Here the litigant, as of necessity, needs the services of an expert witness. This is so

[24] [1975] 9-11 SC 95.
[25] (Unreported Suit No UCH/12/70 High Court of Ughelli Nigeria).
[26] Supra. See also *Otuku v Shell-BP* (Unreported Suit No BHC/2/83 High Court of Bori Nigeria).
[27] They are separate exceptions that are usually grouped together. They are seen as obvious defences whenever they occur that the court is more inclined to listen to provided they are proved satisfactorily.
[28] The term third party or stranger includes a trespasser or a servant acting in a place to which he has been forbidden access.
[29] This defence is often raised by most industries that have operating licences to carry out their industrial activities and operations. When a company is given licence to mine petroleum, this licence should not be mistaken as a legal backing to litter wastes emanating from the mining of petroleum.
[30] This rule does not apply to cases where the plaintiff has consented to the presence of the thing which escapes.
[31] Ibid.
[32] [1987] 3 NWLR (Pt 59).
[33] [1974] 4 ECSLR 486.
[34] [2009] LPELR-SC 60/2003.
[35] Supra.
[36] [1971] Suit No SHC/28/67.
[37] Omaka, (n 15) 329.

because environmental litigation depends on scientific evidence given by expert(s) for its success or failure.[38] Expert evidence is also known as opinion evidence which is the personal judgment of the witness.[39] In *Seismograph Services Ltd v Akpuruovo,*[40] the Supreme Court stated that the evidence of an expert witness is essential in ascertaining liability for damage that has arisen from seismic operations. The expert must give an accurate and verifiable scientific account of the relevant principles.[41] For evidence to contribute to the truth-determining function of a trial, it must be reliable.[42] It is, therefore, the duty of the party seeking to rely on expert evidence to establish the competence of the expert before the court. Some victims of environmental damage cannot afford to pay litigation fees, let alone an expert. This is one of the litigation pitfalls that deprive victims of environmental justice. In ADR techniques like arbitration or mediation, the expense of an expert is borne by both parties.[43]

Another issue is that the litigant must comply with certain procedural requirements such as *locus standi*, the court with jurisdiction, and pre-action notice to pursue environmental justice. *Locus standi,* reduced to its bare bones, means standing to sue. 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 issues he wished to have adjudicated.[44] The concept of *locus standi*, therefore, concerns a person's capacity to institute legal proceedings in a court of law or other competent tribunals. It follows that such a person must have an interest which is sufficiently affected by the action and that it is not enough that such a person merely claims that he falls within the class of persons for whose general interest that statute was passed. He must go forward to show that he has some personal interest that has been or is most likely or certain to be affected by the action complained off.[45] At times the courts had applied a liberal approach in interpreting and applying *locus standi*. For instance, in the cases of *Fawehinmi v. Akilu & Ors,*[46] *Adewole & Ors v. Jakande,* [47] *P.K. C Isagba v. Benson Alegbe,*[48] among others. In the case of *PK C Isagba v. Benson Alegbe,*[49]involving a preliminary objection that the plaintiff did not have the requisite standing to sue, Omosun J., in overruling the objection, said:

> to adopt the view that he had no sufficient interest would lead to chaos…. It will serve no useful purpose to bound him out by mere technicality. It is clear that, but for these proceedings, the defendants would never have been challenged and may have gone indefinitely with the alleged violations.

However, these liberal approaches to the interpretation of *locus standi* adopted by the Supreme Court and applied by some lower courts have not found their way, or applied fully, in resolving environmental disputes. For instance, in the case of *Oronto Douglas v Shell Petroleum Development Company and 5 ors,*[50] the plaintiff brought an action under the Environmental Impact Assessment Act.[51] He claimed that the Act requires that in specific specified projects[52] that may have a significant environmental impact, a proponent carry out an environmental impact assessment[53] before the commencement of that project. He contended that the Act's provisions had not been complied with by the defendants in respect of the Nigerian Liquefied Natural Gas Project at Bonny. The defendants filed a preliminary objection contending that the plaintiff lacks *locus standi* in the matter and therefore cannot institute the action. After reviewing various authorities, Belgore C.J (as he then was), held, *inter alia*; that the plaintiff had no *locus standi* to institute the action since he had shown no *prima facie* evidence that his right was affected or any direct injury caused to him, or that he suffered any injury more than the generality of the people. The action was dismissed. With this decision, an opportunity to make concrete pronouncement in respect of pursuit of environmental justice was lost. Adherence to undue legal technicalities has held sway, and justice lies prostrate. However, environmental wrongs carry unique species of implications, unlike other legal wrongs. Environmental wrongs know no national boundaries or individual enclaves. They affect any person within or in remote areas of their occurrence. To this end, issue of *locus standi,* should be downplayed in environmental litigation. Courts should adhere to the views expressed by Chukwudifu Oputa (JSC as he then was) when he said: 'The picture of law and its technical rules triumphant and justice

[38] Hassan Abiodun Mazeedah, 'Problems of Proof and Causation in Environmental Litigation in Nigeria' <*http://www.s3.amazonaws.com* > accessed 15 July 2022.
[39] In *ANPP v Usman,* the court defined an expert as someone who is skilful by knowledge or experience in a particular field. He or she is competent to give evidence in that field.
[40] [1974] SC 119.
[41] See *Shell PD Co v Councillor B Farrah & Ors* [1995] 3 NWLR.
[42] Reliability of evidence derived from scientific principles depend upon three factors; namely; validity of the underlying principle; validity of the technique on a particular occasion. The last factor requires the following to be ascertained; (a) the determination of an expert; (b) standards to be applied in the determination of the reliability of the expert's scientific evidence. (c) the treatment of speculative expert testimony; (d) the contents and scope of the scientific evidence in relation to environmental matter; and (e) the treatment of evidence of an expert specially employed by a litigant to prepare an opinion for litigation.
[43] See for eg ACA, s 49.
[44] Obaseki (J.SC) in *Thomas v. Olufosoye* (1986)2 S.C 325 at 350.
[45] M Adekunle Owoade, 'Locus Standi, Criminal Law and the Rights of the Private Prosecutor in Nigeria: *Fawehinmi v. Akilu and Togun* Revisited; *Nigerian Juridical Review* Vol. 4 1989 – 1999, 111.
[46] (1987) 4 NWLR (pt 67) 797.
[47] (1981) 1 NCLR 290.
[48] (1981) 1 NCLR 218 at 290.
[49] (1981) 1 NCLR 218 at 290.
[50] Supra.
[51] Cap E.12 LFN, 2004.
[52] Section 13 and Schedule to the Act (of which Natural Gas is one of such projects that requires an EIA before commencement).
[53] That is any person proposing a project or activity.

prostrate may no doubt have its admirers. But the spirit of justice does not reside in forms and formalities, or in technicalities, or in the triumph of the successfully picking one's way between pitfalls or technicalities.[54]

The next obstacle is the issue of the court with jurisdiction to entertain environmental matters. Judicially, the word jurisdiction has been held to mean the authority the court has to decide matters before it or to take cognisance of matters presented formally for its decision.[55] It is trite that a court will only deal with cases referred to it. In dealing with such issues, the court first assumes jurisdiction.[56] In any case, the pre-conditions for the exercise of jurisdiction are whether the plaintiff has a cause of action which is valid and enforceable by law. In *Menakaya v Menakaya*[57] the Supreme Court held that the competence of a court or the proceedings is a fundamental issue which cannot be waived. It is trite law that for the machinery of the court to be activated, such court must have jurisdiction to entertain such matters. Where a court lacks jurisdiction in respect of a subject matter and assumes jurisdiction on that subject matter, the court's decision is a nullity.[58] As J.O. Ogebe (JCA, as he then was) observed in the case of *Shell Petroleum Development Company of Nigeria Ltd. (SPDC) v. Helleluja Bukuma Fishermen Multi-Purpose Co-operative Society Ltd*,[59]

> A plaintiff may have a good cause of action supported by existing law, and if he takes his case to a court which has no jurisdiction over the subject matter or the cause of action, he cannot ventilate his claims before the court… once the jurisdiction of a court to determine a matter had been ousted any further hearing in the matter is indeed null and void because any decision it makes amounts to nothing.

Most legislation on environmental matters[60] and section 251(1) (n)[61] give exclusive jurisdiction to the Federal High Court, especially in respect of matters arising from or connected with mines and minerals (including oil fields, oil mining and geological surveys and natural gas). Where a litigant institute an action on any matters provided by the various environmental protection laws or those provided under section 251 (1) of the 1999 Constitution in a State High Court, the court's decision is nullified and upturned on appeal.[62] In the case of *Abel Isaiah and Two Ors v. Shell Petroleum Development Company of Nigeria Ltd*.,[63] the Supreme Court of Nigeria finally laid to rest doubt whether State High Court has jurisdiction to entertain matters arising from activities in the oil industry. According to Uthman Mohammed (JSC, as he then was), issues forming the interpretation of now section 251(1) (n) of the Constitution of the Federal Republic of Nigeria, 1999, as amended, cover every facet of activities within the oil industry when he said,

> I think it cannot be disputed if I say that installation of pipelines, producing treatment and transmitting crude oil to the storage tanks is part of petroleum mining operations, therefore, if any incident happens during the transmission of petroleum to the storage tanks it can be explained as having arisen from or connected with or pertaining to mines and minerals including oil fields and oil mining.[64]

The effect of these judicial pronouncements, especially that of the Supreme Court of Nigeria, is that where any right is violated arising from environmental pollution problems, especially from the oil industry, a significant source of environmental pollution in Nigeria, the victim can only seek redress at the Federal High Court. However, this court is sparsely located across the country, which adds to the cost of litigation. The result is that access to justice is inadvertently denied to the victims in ventilating their claims or seeking compliance with environmental protection provisions of environmental laws against the violators. Limitation of action[65] and pre-action notice are other obstacles that lie on the part of a litigant in pursuit of environmental justice. Where a statute provides that certain acts be done by the person initiating action before invoking the court's jurisdiction, only after compliance with such requirements can the court's jurisdiction to adjudicate on it can be activated. The condition of pre-action notice, where the law prescribes it, for instance, section 32(1), NESREA Act, is known to have one rationale. It is to appraise the defendant beforehand of the nature of the action contemplated and to give him enough time to consider or reconsider his position regarding whether to comprise or contest it.[66] Thus, where there is a need for a Pre-action Notice, the plaintiff must serve such pre-action notice.[67] In *Asogwa v Chukwu*,[68] the court held that where

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[54] As cited by Kayode Eso in 'Thoughts on Human Rrights Norms vis-à-vis The Courts and Justice: An African Court or Domestic Court,' (Lagos, NIALS, 1995) 26.
[55] See *Attorney General Federation v A-G Abia State* [2001] 7 SC (Pt 1) 100.
[56] Rufus Akpofurere Mmadu, 'Judicial Attitude to Environmental Litigation and Access to Environmental Justice in Nigeria: Lessons from *Kiobel*' [2013] *Afe Babalola University Journal of Sustainable Development Law and Policy* 2(1) <*http://www.ajol.info*> accessed 15 July 2022.
[57] [2001] 8 MJSC 50.
[58] See the following cases: *Madukolu v. Nkemdilem* (1992) I ALL NLR, 587, *Anisminic v Foreign Compensation Corp*. (1962) 2 AC 147.
[59] (Unreported) suit No. CA/PH/84/96 delivered on 12th July 2001 by Court of Appeal Port Harcourt Division
[60] Such as Harmful Wastes (Special Criminal Provisions, etc) Act, National Environmental Standards and Regulations Enforcement Act, etc.
[61] Constitution of the Federal Republic of Nigeria, 1999, as amended.
[62] *Impidi Barry and Ors v. Obi. A. Eric and Ors,* (1998) 8NWLR (pt562) 404 at 416.
[63] (2001) 6 NSCQR, 542
[64] *Abel Isaiah and 2 Ors v. The Shell Petroleum Development Company of Nigeria Ltd* (2001) 6 NSCQR, 542 at 550.
[65] This serves as a statute of limitation as was held by the Supreme Court in the Case of *Mobil Producing (Nig) Un Ltd v LASEPA, FEPA and Ors.* See Section 32 (1) NESREA Act 2007.
[66] *Eze v. Okechukwu* (1985) 5 NWLR (Pt 548) 43.
[67] See Section 32 (1) NESREA Act 2007.
[68] [2003] 4 NWLR (Pt 811) 540.

there is no issuance of pre-action notice as provided by law, a condition precedent is lacking, which could not give the court's assumption of jurisdiction.

Although statutory provisions prescribing pre-action notice are mandatory, non-compliance with such mandatory provisions can be waived.[69] To this end, the Supreme Court, in the case of *Mobil Producing (Nig) Un Ltd v LASEPA, FEPA and Ors* [70] held that: 'Service of a pre-action notice on the party intended to be sued pursuant to a statute is, best, a procedural requirement and not an issue of substantive law on which the rights of the plaintiff depend. It is not an integral part of the process of initiating proceedings…' The decision of the Supreme Court in the case of *Nigercare Development Company Ltd v. Adamawa State Government and Ors*[71] that an issue of the pre-action notice being a jurisdictional issue can be raised at any stage of the proceeding, even for the first time on appeal, adds to the problem of the litigant. Ogbuabor[72] posited that the requirement of pre-action notice is a procedural requirement like a privilege and that the right could be waived and indeed would be deemed to have been waived if it was not timorously and properly raised. He reasons that pre-action notice, being a privilege and not a right *stricto sensu*, could be waived like any other privilege. Arising from this position, Ogbuabor, in another instance,[73] argued that the decision of the Supreme Court in the case of *Nigercare Development Co. Ltd v. Adamawa State Government and Ors*, judging from its earlier decisions,[74] 'is manifestly erroneous' when he said:

> It is arguable whether the decision is *per incuriam* since *Katsina Local Authority v Makudawa* was cited but it definitely presents a case of conflicting decisions from the apex court on the same point without any attempt at resolving the conflict. However, when it is remembered that in-between *Katsina Local Authority v Makudawa* and *Mobil Producing (Nig) Un Ltd v LASEPA, FEPA and Ors*, there were conflicting opinions of the Court of Appeal until the Supreme Court seized the opportunity offered by *Mobil Producing (Nig) Un Ltd v LASEPA, FEPA and Ors* to explain *Makudawa*'s case, then there is an almost irresistible urge to conclude that the decision in *Nigercare Development Co. Ltd v. Adamawa State Government and Ors* in forgetfulness of *Mobil Producing (Nig) Un Ltd v LASEPA, FEPA and Ors* is *per incuriam* especially when the latter decision conflicts with that in *Mobil Producing (Nig) Un Ltd v LASEPA, FEPA and Ors.*

The bottom line is whether the court considers non-service of pre-action as a condition precedent or a mere procedural requirement. For smooth and effective litigation, it is advisable that where a claim lies against a body required by law to be served a pre-action notice. It will be necessary to do so timeously to avoid unnecessary delay of the substantive issue.

This paper submits that the quest for legal redress regarding environmental damage has not been a smooth ride for pollution victims. The victims had neither been fully compensated nor were there concerted efforts to ameliorate the harsh situations created by such environmental spoliation. Since it appears to some victims that the rule of law had failed them in seeking redress, they at times, found as an alternative, resort to protests to rub in their demands. This is usually met with repression and suppression, significantly where such action may impinge on revenue-yielding avenues for the government.[75] Against this background, the paper canvases judicial activism in the form of Alternative Dispute Resolution (ADR) methods in resolving environmental disputes. Environmental ADR is the proactive way forward to put environmental matters on the front burner of our national discourse. With the increasing number and complexity of environmental disputes, ADR offers a solution to reduce the burden on the judicial system.[76] ADR enables disputing parties to select flexible methods such as mediation, to reach settlements rather than proceeding to formal, adversarial litigation.[77] Practitioners widely use ADR mechanisms to reach a settlement in other areas, such as commercial and labour law. Since the overriding goal in any dispute is to get settlement, ADR techniques can prove to be a potent tool in resolving environmental disputes.[78]

3. Alternative Dispute Resolution (ADR) Mechanisms: A Panacea?

ADR is 'the process of settling disputes voluntarily by any means other than the conventional adversarial approach of litigation'.[79] It is a procedure which is usually less formal than traditional court-administered litigation. Katherine Stones defines it as 'a wide range of dispute resolution mechanisms or techniques that share one essential characteristic: they all differ

[69] *Katsina Local Authority v Makudawa* (1971) 7 NSCC 119.
[70] *Supra.*
[71] (2008) 9NWLR (Pt 1093) 498.
[72] CA Ogbuabor, 'Towards a Consistent Application of the Law on Pre-action Notice in Nigeria,' *Nigerian Journal of Public Law* (NJPL) vol. 2 (2008) 149.
[73] CA Ogbuabor, 'Can Jurisdiction be Waived? Waiver and Jurisdiction in Cases involving Pre-action Notice: *Nigercare Development Company Ltd v. Adamawa State Government & Ors* Revisited' *The Appellate Review*, Vol. 1, No. 2 Dec2009/Jan 2010, 224 and 225.
[74] As in the cases of *Katsina Local Authority v Makudawa* (supra) and *Mobil Producing (Nig) Unlimited Ltd v. LASEPA, FEPA and Ors (supra).*
[75] The current militancy in the Niger Delta is a case in point.
[76] Charlene Stukenborg, 'The Proper Rule of Alternative Dispute Resolution (ADR) in Environmental Conflicts' [1994] *University Dayton Law Rev <http://heinoline.org/HOL/>* accessed 12 August 2022.
[77] Ibid.
[78] Ibid.
[79] GA Candide-Johnson and Olasupo Shasore, *Commercial Arbitration Law and International Practice in Nigeria*, (Pietermaritzburg: LexisNexis 2012) 223.

from the dispute mechanism of litigation in a federal or state court.'[80] In Europe and other parts of the world, ADR refers to dispute resolution methods that exclude litigation and arbitration.[81] The modern ADR movement started in the United States. It was given stimulus by the desire to eliminate protracted and costly court proceedings in resolving business disputes.[82] With the government's support, US courts developed ADR programmes to relieve their heavily loaded court calendars. Important by-products of pre-trial conferences were the settlement of many cases without trial and the shortening of trials through concessions, limitation of issues and better preparation.[83] It is important to state at this point that customary law ADR existed in Nigeria before the Arbitration and Conciliation Act was enacted.[84] For instance, customary law arbitration and ADR was a medium of settling disputes in Nigeria long before the advent of colonialism.[85] It has been a vital institution used by non-urban dwellers and people in rural areas to resolve their differences because it is cheaper, less formal and less rancorous than litigation.[86] Bingham and Haygood[87] reported the success in the environmental mediation field in disputes relating to land use,[88] natural resource management and use of public land,[89] water resources, energy, air quality and toxics.[90] The successful use of ADR mechanisms to resolve environmental disputes in the US can be traced back to the 1970s.[91] These include the mediation of the Snoqualmie river flood-control dispute,[92] mediation in the swam lake hydroelectric dam dispute,[93] and mediation in the interstate 90 highway expansion dispute.[94] From the previous discussions, mediation seemed more instrumental to resolving environmental disputes. Mediation is one of the techniques of ADR, and it can also be applied to settle environmental conflicts in Nigeria. The frequency of the use of litigation in resolving environmental disputes resolution has not been effective. Weidner strongly argues that most advocates of ADR focus as a rule on its advantages over conventional instruments for settling or avoiding environmental policy conflicts.[95] They maintain that ADR procedures can lead to fairer, more effective, efficient, and rapid results acceptable to all parties to the conflict.[96] They also point to the benefits offered by ADR, which result from avoiding the disadvantages of litigation, even where the courts operate at maximum efficiency-prohibitive costs, delays and no final adjudication on the merits of the claim. Based on these arguments, ADR offers many advantages and it is a superior alternative to the best litigation system.[97] It will be pertinent to discuss the different types of ADR mechanisms briefly. These are mediation, arbitration, conciliation, negotiation, expert evaluation, early neutral evaluation and court-annexed ADR.

Mediation

Mediation is 'an ADR method where a neutral and impartial third party, the mediator, facilitates dialogue in a structured multi-stage process to help parties reach a conclusive and mutually satisfactory agreement'.[98] It involves third-party intervention in a dispute when parties cannot reach an agreement or settlement.[99] A mediator's role is to assist the parties in identifying and articulating their interests, priorities, needs and wishes to each other. The third-party neutral (mediator) helps the disputing parties negotiate their agreement. Mediation is a structured process with several procedural stages in which the mediator

[80] Katherine VW Stone, 'Alternative Dispute Resolution' *Encyclopedia of Legal History* <http://ssrn.com/abstract=631346> accessed 11 August 2022.
[81] Margaret L Moses, *The Principles and Practice of International Commercial Arbitration* (2nd edn. New York: Cambridge University Press 2012) 14.
[82] Candide-Johnson and Shasore, (n 79).
[83] Ibid.
[84] Arbitration and Conciliation Act (ACA), Cap A18 Laws of the Federation of Nigeria 2004.
[85] JK Gadzama, 'Development and Practice of ADR and Arbitration in Nigeria' *<http://www.nigerianguru.com>arbitration>* accessed 30 December 2017. Customary law arbitration is a reference to the decision of one or more persons either with or without an umpire, of a particular matter in difference between the parties.
[86] Greg C Nwakoby, *The Law and Practice of Commercial Arbitration in Nigeria* (2nd edn Enugu: Snaap Press Ltd 2014) 5.
[87] Bingham and Haygood, 'Environmental Dispute Resolutions: The First Ten Years', The Arbitration J cited in Frank, ibid.
[88] About 70 site-specific and 16 policy level land-use disputes have been resolved with the assistance of a mediator.
[89] Mediation was used in 29 site-specific and four policy-level controversies, involving fisheries resources, mining, timber management, and wilderness areas amongst others.
[90] Frank (n 6).
[91] Stukenborg, (n 76).
[92] This environmental case was sponsored by the Ford Foundation. The dispute involved several parties concerned with a proposed flood-control dam on the Snoqualmine River in the State of Washington. In the late 1973, mediators became involved in the dispute. After series of talks an agreement was reached by the parties.
[93] The swam lake controversy arose when a young entrepreneur, Larry Gleeson bought the rights to a series of dams associated with a manufacturing plant on the goose river in Maine. Until a fire halted production, the plant used the river to produce mechanical power for attached manufacturing facilities. In January 1979, an incident of violence at the dam focused state-wide attention on the dispute and led the parties to consider mediation. On August 2, 1979 the two parties signed an agreement which was incorporated into Gleeson's FERC license.
[94] Stukenborg, (n 76).
[95] Helmut Weidner, 'Alternative Dispute Resolution in Environmental Conflicts- Promises, Problems, Practical Experience' in Helmut Weidner (ed) *Alternative Dispute Resolution in Environmental Conflicts in 12 Countries,* [1998] *<http://hdl.handle.net/10419/122446>* accessed 12 August 2020.
[96] Ibid.
[97] Ibid.
[98] Alessandra Sgubini and Mara Prieditis, Andrew Marighetto, 'Arbitration, Mediation and Conciliation: Differences and Similarities from an International and Italian Business Perspective' [August 2004] *<https://www.mediate.com>sgubinia2>* last accessed 12 July 2022.
[99] Candide-Johnson and Shasore, (n 79).

assists the parties in resolving their disputes.[100] This process permits the mediator and disputants to focus on the real problems and difficulties between the parties.[101] It should be noted that parties are free to express their interests and needs through open dialogue in a less adversarial setting than a courtroom. The main aim of mediation is to assist the parties in reaching a voluntary, functional and durable settlement. The parties possess the power to control the process and reserve the right to determine the parameters of the agreement.[102] The mediator must be neutral and unbiased at all times and give each party equal time and opportunity to make presentation to him or her.[103] The settlement or resolution reached through mediation is called a mediation settlement agreement. It specifies the timelines for performance and is customarily specific, measurable, achievable, and realistic.[104] The agreement is a legal contract that both parties must sign and is enforceable in the law of contract by a court of competent jurisdiction.[105] It has been argued that mediation agreements are more likely to be adhered to by the parties than judgments of courts. [106] Arguably, parties would likely comply with a mediation settlement agreement because the parties reached it, unlike the court-imposed judgment. Mediation is flexible, confidential, relatively cheaper, faster and preserves relationship between parties and these factors may influence parties to adhere to the agreement.

Arbitration

Arbitration is 'the process of settling a conflict between two or more persons'.[107] It is a private adjudication system, and parties who arbitrate have decided to resolve their disputes outside any judicial system.[108] Russell defined arbitration as 'a written agreement to submit present and future differences to arbitration whether an arbitrator is named therein or not.'[109] Halsbury's Laws of England described arbitration as the reference of dispute or differences between not less than two parties for determination, after judicially hearing both sides, by a person or persons other than a court of competent jurisdiction.[110] Section 57(1) of the Nigerian Arbitration and Conciliation Act defined arbitration as commercial arbitration, whether or not administered by permanent arbitral institutions.[111] The meaning and nature of arbitration was clearly stated in *Nigeria National Petroleum Corporation v Lutin Investment Ltd & Another* thus:

> An arbitration is the reference of a dispute or difference between not less than two parties for determination, after hearing both sides in a judicial manner, by a person or persons other than a court of competent jurisdiction. The arbitrator, who is not an umpire, has the jurisdiction to decide only what has been submitted to him by the parties for determination. If he decides something else, he will be acting outside his authority and consequently the whole proceedings will be null and void and of no effect. This will include any award he may subsequently make.[112]

From the foregoing definitions, it is clear that arbitration is a form of ADR where parties agree to refer present or future disagreements to an independent, unbiased and qualified arbitrator or panel of arbitrators (Tribunal). The hearing must be held judicially by a competent arbitrator(s) other than the court. An arbitrator conducts the arbitration process. An arbitrator is a person or constituted panel that decides the rights and liabilities of the parties in a dispute and makes a decision called an award for that purpose.[113] He is like an expedient judge.[114] Section 2 of the Arbitration and Conciliation Act provides thus 'unless a contrary intention is expressed therein, an arbitration agreement shall be irrevocable except by agreement of parties or by leave of the court or judge'.[115] The safeguard is that such a clause assenting to refer disputes to arbitration is binding unless the parties agree or by leave of court. The court will therefore be obliged at the application of one of the parties to stay proceedings before it in order to refer the matter to arbitration.[116] The court will only set aside an arbitral award in special circumstances such as where the arbitrator has not conducted himself properly,[117] where the award is beyond the tribunal's jurisdiction,[118] or where it is contrary to or against public policy.

Parties' arbitration agreements are usually contained in a clause or clauses that are embedded in the parties' contract. An arbitration clause in any agreement constitutes a valid agreement to submit to arbitration and is binding on both parties to the

[100] Sgubini and Others, (n 98).
[101] Ibid.
[102] Ibid.
[103] Candide-Johnson and Shasore, (n 79).
[104] Fabian Ajogwu, *Commercial Arbitration in Nigeria: Law and Practice*, (Lagos: Mbeyi & Associates (Nig) Ltd 2009) 171.
[105] Candide-Johnson and Shasore, (n 79) 225.
[106] Carrie J Menkel-Meadow, 'Dispute Resolution' in *The Oxford Handbook of Empirical Legal Research* Peter Cane and Herbert M Kritzer (eds) (London: Oxford University Press 2012) 611.
[107] Peter Z Revesz, 'On the Semantics of Arbitration' [1997] *International Journal of Algebra and Computation* <*http://dagwood.cs.byu.edu*> accessed 12 August 2022.
[108] Moses, (n 81)1.
[109] David St John Sutton and Judith Gill, *Russell on Arbitration* (18th edn London: Sweet & Maxwell 2003) 38.
[110] Gerald D Sanagan, Halsbury's Law of England (3rd edn Toronto: Butterworth 1954) 38.
[111] Arbitration and Conciliation Act (ACA), Cap A18 Laws of the Federation of Nigeria 2004.
[112] 2 NWLR (2006) (Pt 965) (pp 542-543).
[113] Ajogwu, (n105).
[114] Ibid.
[115] 1990 ACA, s 2.
[116] Ibid, s 4.
[117] Ibid, s 29(2).
[118] Ibid.

agreement.[119] Such agreement will provide, *inter alia*, the reference of the dispute to arbitration, the appointment of arbitrators, the number of arbitrators, the procedure, language for arbitration, applicable law, and place of arbitration.[120] The agreement to arbitrate is thus entered into before any dispute has arisen and is intended to provide a method of resolution if a dispute does arise.[121]

Against this backdrop, this paper submits that the premise for arbitration includes a voluntary agreement. The decision to arbitrate must be a voluntary agreement by the parties. The decision taken by an independent, unbiased, and adequately constituted arbitration panel is binding on the parties. The principle of fair hearing is also one of the bases of arbitration. The principle imposes a duty on an arbitrator to ensure that all parties to the disputes are granted fair hearing. It is important to note that arbitration differs from mediation. Arbitration is binding on the parties, unlike mediation. Unlike the arbitrator, a mediator is not a decision-maker. An arbitrator acts much like a judge but in an out-of-court, less formal setting. The meeting point between arbitration and mediation is that they both promote access to justice, fair and speedy hearings, and fair outcomes. Confidentiality is paramount to the effectiveness of both mediation and arbitration.

Conciliation

Conciliation is a relatively informal and unstructured process. In a conciliation process, neutrality and confidentially are not typically guaranteed as the intervener acts as a go-between to encourage improved communication and working relationships.[122] A conciliator assists each party in independently developing a list of all their objectives (the outcomes they desire to obtain from the conciliation). He goes back and forth between the parties and encourages them to give and take on the objectives one at a time. The conciliator can quickly build a string of successes and help the parties create an atmosphere of trust which the conciliator can continue to develop. Conciliation and mediation are similar; in some jurisdictions, the terms are used interchangeably. Conciliation differs from mediation in that the main goal is to conciliate, most of the time, by seeking concessions. In mediation, the mediator tries to guide the discussion by optimising parties' needs, considering feelings and reframes representations.[123] In conciliation, the parties seldom, if ever, face each other across the table in the presence of the conciliator.

Negotiation

Negotiation is a voluntary process in which two or more parties identify and discuss the issues that divide them and attempt to work out solutions acceptable to all.[124] It involves discussions of terms of an agreement and may involve direct or indirect contact (through caucuses)[125] between the disputing parties or their representatives. It requires the parties' willingness to communicate and usually their willingness to compromise. The parties control the process and the outcome. The significant advantage of negotiation is that it adopts the problem-solving approach, which focuses on the clients. The client is more involved in the preparation of the case. It has been argued that a problem-solving approach to negotiation makes it more likely that the entire panoply of needs will be met.[126]

Early Neutral Evaluation

It is an ADR process where a neutral evaluator assesses the strength and weaknesses of the parties' cases and renders a non-binding opinion of the likely outcome of the case if it were to proceed to court. The neutral could be a retired judge or a very experienced lawyer.[127] This could greatly assist the parties in reaching an amicable settlement. The sense behind the independent evaluation of each party's case is to discourage frivolous and time-wasting lawsuits by parties whose cases do not have merit.[128] This way, the evaluator provides insight into an objective evaluation of complex disputes early and clears the way for more effective negotiation.[129]

Court-Annexed ADR

Court-annexed ADR as a mechanism is an extension of the courts' primary mandate and works hand in hand with the courts.[130] This is done by giving disputants access to other dispute resolution avenues, often described as doors. They are court-annexed because they happen pursuant to a court rule, court sponsorship or judicial referral.[131] The element of court involvement distinguishes it from the other forms of ADR processes conducted pursuant to agreements reached by the parties without court intervention. Nigeria's interest in court-annexed ADR was the urge to reduce congestion, court workload and litigation costs.

[119] Nwakoby, (n 86) 5.
[120] Ibid.
[121] Moses, (n 81) 18.
[122] NCMG International, 'Training Handbook Enugu State Multi-Door Court Mediation Skills Training for Judges, Lawyers and Judiciary Staff' held on 9th- 13th October 2017, 3.
[123] Ajogwu, (n 105).
[124] NCMG International, (n 123).
[125] Caucuses are meetings that negotiators or mediators hold separately with each side of a dispute.
[126] Andrea Kupfer Schneider, 'Building a Pedagogy of Problem-Solving: Learning to Choose Among ADR Processes' [2000] *Harvard Negotiation Law Review* 5(113) <*http://scholarship.law.marquette.edu/facpub/271*> accessed 11 August 2022.
[127] Ibid.
[128] Candide-Johnson and Shasore, (n 79) 228.
[129] Ibid.
[130] Ibid.
[131] Stephen McG Bundy, 'Court-Annexed Alternative Dispute Resolution in the United States and Korea: A Comparative Analysis' [2001] <*http://s-space.snu.ac.kr>bitstream*> accessed 16 July 2022.

This desire birthed the court-annexed ADR called the Multi-Door Courthouse (MDC). MDC refers to the alternative doors to resolving disputes available for those who might wish to patronise it.[132] Its primary objective is to promote enhanced, timely, cost-effective and user-friendly alternatives to litigation in resolving disputes.[133] It also minimises citizens' frustration and delays in justice delivery by providing a standard legal framework for the fair and efficient settlement of disputes through ADR. It serves as a focal point for promoting ADR within the justice sector.[134]

4. Why Advocating ADR Mechanism in Resolution of Environmental Disputes

Unlike traditional litigation, ADR dispute resolution methods often produce win/win solutions where everybody wins.[135] With ADR mechanisms, there is no victor; no vanquish, unlike litigation that produces a winner and a loser. To this end, the advantages of ADR mechanisms over litigation are:

Confidentiality

ADR methods are confidential and avoid publicity. Communications are without prejudice, and parties can pursue other dispute resolution instruments if no agreement is reached.

Flexibility

ADR mechanisms increase voluntary compliance with the resolution. It offers more flexible procedural rules than litigation. Resolutions can be tailored to the needs and underlying concerns of the parties in mediation and conciliation processes. It can address legal and non-legal issues and provide remedies unavailable through adjudicative techniques.[136] The hierarchical nature of litigation and its penchant for doctrines, principles, maxims and rules offer ready justification for delays and costs.[137] In the case of the various ADR methods, the parties have far more flexibility in choosing what rules will be applied to their dispute.[138]

Cost-Effectiveness

The daunting costs of resolving disputes in Nigeria are alarming. One of the main advantages of the ADR mechanism is the relatively lower cost of its techniques compared with formal judicial proceedings. Mediators, conciliators, and negotiators are mostly paid on hourly bases. In domestic arbitration cases, the arbitrators and administrative fees are jointly borne by both parties. If there is a need for an expert opinion, the expenses are jointly borne by the parties unless the agreement states otherwise.[139]

Speed

The expeditious determination of cases remains one of the significant attributes of ADR, which is not available in the courtroom.[140] In Nigeria, litigation is hugely time-consuming, especially in environmental matters. Delays plagued the course of the litigation by pollution victims, especially in the oil industry. For instance, a case on an oil spill at Peremabiri, Bayelsa State, which caused extensive damage to environment and property in January 1987, came to the High Court in 1992 and the court of appeal in 1996.[141] In the case of *John Eboigbe v Nigerian National Petroleum Company*,[142] damage caused in 1979 and followed by correspondence leading to a writ of summons in 1984 was first heard in 1987. It was appealed in 1989 and was heard by the Supreme Court in 1994. Again, in the case of *Shell Petroleum Development Company v George Uzoaru and 3 Ors*[143] which was heard in the High Court in 1985 concerning damages suffered continuously since 1972, was heard in the Court of Appeal in 1994. The issue of undue delay was raised in *Elf Nigeria Ltd. v Opere Silo, and Daniel Etsemi.*[144] The damage suffered occured in 1967 and the matter was heard in 1987 at the High Court, 1990 at the Court of Appeal and 1994 at the Supreme Court. The case of *Shell Petroleum Development of Nigeria Ltd. v Councillor Farah*[145] deserves special attention. The case arose from an oil spill from Shell's Bomu II well in Tai/Gokana local government area in Ogoni land in July 1970. The action was instituted in1989, the High Court reached a decision in 1991. It was appealed against at the Court of Appeal in 1995 and determined finally by the Supreme Court in 2001. A twist, in this case, is that the Supreme Court held that the State High Court had no jurisdiction. So after more than forty years of long judicial journey, the issues for determination were not resolved. Undue delays in the administration of justice frustrate the pursuit of legal redress by pollution victims on violation of rights or in eliciting environmental compliance. These delays have caused some pollution victims to lose faith in the judiciary.[146] This is highly frustrating and would discourage future environmental dispute victims from

[132] NCMG International, (n 123) 73.
[133] Ibid. In Nigeria, the MDC has been established in Lagos, Abuja, Kano, Kaduna, Abia States etcetera.
[134] Ibid.
[135] Helmut Weidner, 'Alternative Dispute Resolution in Environmental Conflicts- Promises, Problems, Practical Experience' in Helmut Weidner (ed) Alternative Dispute Resolution in Environmental Conflicts in 12 Countries, [1998] <http://hdl.handle.net/10419/122446> accessed 12 August 2022.
[136] Blaney McMurtry, 'Advantages and Disadvantages of Dispute Resolution Processes' <*http://www.blaney.com>adr_advantages*> accessed 10 August 2022.
[137] Candide-Johnson and Shasore, (n 79) 10.
[138] Lorman, 'Alternative Dispute Resolution' [13 December 2016] <*http://www.lorman.com*> accessed 17 July 2022.
[139] See ACA, S 49.
[140] Joseph Nwazi, 'Assessing the Efficacy of Alternative Dispute Resolution (ADR) in the Settlement of Environmental Disputes in the Niger Delta Region of Nigeria' [18 April 2017] *Journal of Law and Conflict Resolution* 9(3) <*http://www.academicjournals.org/JLCR*> accessed 18 July 2022.
[141] *Shell Petroleum Development Company Ltd v. HRH Chief G.B.A. Tiebo VII and 4Ors* (1996) 4 NWLR (Pt 445), 657.
[142] (1994) 5 NWLR (Pt 347) 649.
[143] (1994) 9 NWLR (Pt 366) 51.
[144] (1994) 6 NWLR (Pt 350), 258.
[145] (1995) 3 NWLR (Pt 382), 148.
[146] See *Elf Nig Ltd v Opere Sillo & Anor* [1994] LPELR-SC 51/1992.

submitting the matter to litigation. Such delays amount to a breach of the citizen's right to a speedy trial.[147] And as the cliché goes, 'justice delayed is justice denied'. This is where the ADR mechanism comes to the rescue. We, therefore, submit that speed, which is one of the significant advantages of ADR over litigation is a good foundation on which an argument for environmental ADR can be based. Victims of environmental degradation deserve to be duly compensated promptly. This can only be achieved if such cases are determined in good time. In addition, speedy resolution of environmental disputes helps rehabilitate the damaged environment and compensate the victims of environmental damage.

Less Adversarial/ Stability

All ADR mechanisms improve communications between parties, thereby preserving or enhancing relationships between the parties.[148] It helps to preserve existing relationships between erstwhile disputants. Environmental ADR would be a great avenue to reduce bad blood between the host community and the oil company or industry owners. In addition, there is a high degree of party control as Parties create their process and draft the agreement for settlement. Notwithstanding the advantages of ADR Mechanisms over litigation, there are some disadvantages. In most ADR techniques, some safeguards designed to protect parties in court may not be present.[149] These include the liberal discovery rules used in US courts, which make it relatively easy to get evidence from the other party in a lawsuit. There is also a limited opportunity for judicial review of most ADR processes like arbitration. The arbitral award is final and binding. A court can only review it in limited cases.[150] In some instances, people enter into an agreement that has an arbitration clause without even knowing it. Many lease agreements and employment contracts have mandatory arbitration provisions. They will usually be enforced as long as they do not deprive a person of his/her constitutional right.[151] Critics of ADR methods argue that the parties' unequal bargaining power would be detrimental to the party with limited bargaining authority. They also assert that there is little or no check on power imbalances between the parties.[152] It is essential to underscore the potential briefly or otherwise of litigation over ADR routes to resolving environmental conflicts. Litigation as an instrument of dispute resolution is more formal than ADR methods. This formality reduces the opportunity for abuse of the process. Parties to the dispute are compelled to attend the matter in court. The institutionalised process of the court system allows for safeguards. The judgment of a court is final and binding. Legal precedent may be established unlike what is obtainable with ADR mechanisms. Litigation is more expensive than ADR techniques, and cases last so long in court also contributes to the expenses incurred by victims. However, litigation has several disadvantages: it is time-consuming, parties are not in control of the process or decision, and the case's outcome is uncertain. The trial is a public process, so parties cannot enjoy the confidential attribute available with ADR dispute resolution methods. With litigation, there is a winner and a loser, unlike what applies with ADR, where everyone wins. Aggrieved persons or victims of environmental damage can access justice using any of the ADR mechanisms, which is faster, cheaper, user-friendly, confidential, and limits bad blood between the host community and the respondent. Arguably, the advantages of ADR outweighed the benefits of litigation in pursuing environmental justice. Therefore, this paper submits that ADR mechanisms are a better route to achieving environmental justice for victims of environmental damage.

This paper advocate for the application of the ADR mechanism in resolving environmental disputes based on the following premise:

i) ADR has many mechanisms such as arbitration, mediation, conciliation, negotiation, early neutral evaluation, and court-annexed ADR. These create room for flexibility and choice by the victims of environmental damage in seeking justice.
ii) ADR procedures can lead to fairer, more effective, efficient, and rapid results acceptable to all parties to the conflict.
iii) ADR offers several advantages that it is also a superior alternative to the best litigation system even where the courts operate at maximum efficiency.
iv) ADR is being given stimulus by the desire to eliminate resolving environmental disputes, protracted and costly court proceedings, prohibitive litigation costs, delays, legal technicalities, and at times no final adjudication on the claim's merits.
v) Reported successes in other jurisdictions, especially in disputes relating to land use, natural resource management and use of public land, water resources, energy, air quality and toxics, re-affirms the resolve in adopting ADR in environmental disputes.
vi) The settlement or resolution reached through mediation[153] specifies the performance periods that are customarily specific, measurable, achievable, and realistic.[154] The agreement is a legal contract that both parties must sign and is enforceable in the law of contract by a court of competent jurisdiction.[155] Mediation agreements are more likely to be adhered to by the parties than judgments of courts.[156] Also, parties would likely comply with a mediation agreement because they reached it, unlike the court-imposed judgment. Mediation is flexible, confidential, relatively cheaper, faster and preserves the relationship between parties and these factors may influence parties to adhere to the agreement. We align ourselves to these arguments.

[147] 1999 CFRN (as amended), s 36(1).
[148] McMurtry, (n 139).
[149] Lorman, (n 141).
[150] Ibid.
[151] Ibid.
[152] McMurtry, (n 139).
[153] One of the ADR Mechanism
[154] Ajogwu, (n 105) 171.
[155] Candide-Johnson and Shasore, (n 67).
[156] Carrie J Menkel-Meadow, 'Dispute Resolution' in *The Oxford Handbook of Empirical Legal Research*, Peter Cane and Herbert M Kritzer (eds.) (London: Oxford University Press 2012) 611.

5. Conclusion

This paper examined environmental ligation in Nigeria, highlighting the cumbersome process of litigating environmental damage. The aggrieved person has to prove the causation of the pollution, the extent of the harm and the breach of statutory duty. Also, the limitations of expert evidence, evidential burden and assessment of damages are hurdles that make environmental litigation ineffective. The paper found that litigation in resolving environmental disputes has not been very successful due to these pitfalls that have left victims of environmental damage with little or no remedy. It underscores that aggrieved persons or victims of environmental damage can obtain environmental justice using any ADR mechanism. To this end, the ADR mechanisms and the advantages and disadvantages of litigation were juxtaposed. The paper found that applying an ADR mechanism to resolve environmental disputes is the surest way of achieving environmental justice. It canvasses an upgrade of the legal and institutional framework to recognise the ADR mechanisms in resolving environmental disputes. Thus, the paper advocates the need for a review of the NESREA Act to recognise ADR mechanism in resolving environmental disputes; the establishment of a special Environmental ADR Tribunal;[157] and capacity development for environmental lawyers and scholars through continued Legal Education programmes.

[157] As is the case in Multi-Door Courthouse.