

SUPREME COURT OF NIGERIA
MONDAY 13TH JANUARY, 2017. SC. 3/2007
CORAM:- W. S. N. ONNOGHEN AG. CJN, M. U.
PETER-ODILI, O. ARIWOOLA, K. M. O. KEKERE-
EKUN, C. C. NWEZE, JJSC

1. MRS. COMFORT OLUFUNMILAYO
ASABORO
2. UNION COMMERCIAL AND
INDUSTRIAL COMPANY LIMITED APPELLANTS
AND
1. PAN OCEAN OIL CORPORATION
(NIGERIA) LIMITED
2. DEUTAG NIGERIA LIMITED RESPONDENTS

APPEALS - Reply brief - Filing of - Where respondent raises issue relevant to appeal - Appellant is entitled to react to same by filing a reply - Otherwise appellant is deemed to have conceded the issue (H1)

ACTIONS - Consistency of - A party should be consistent in the case he presents at trial and appellate Courts - As he is not allowed to present different cases before each hierarchy of Court (H2)

ACTIONS - Cause of action - Time - Cause of action as pleaded by appellants arose in 1971 - And the action was instituted about 23 years after accrual of the cause of action (H3)

ACTIONS - Statute barred - The action having been instituted 23 years after accrual of cause of action is statute barred - Thereby leaving Court with no jurisdiction to entertain same (H4)

FACTS

This action commenced at the High Court of Delta State Holden at Oghara, wherein plaintiffs/appellants filed the action against defendants/respondents, claiming inter alia, for a declara-

tion that as leaseholders in respect of Asaboro Rubber Estate in Oghara, appellants are persons entitled to be paid fair and adequate compensation for respondents' entry on the land and damages caused therein. Appellants' contention is that the land in dispute originally belonged to one Joseph Asaboro who leased it to 2nd appellant. The said 2nd appellant planted rubber trees thereon. Sometime in 1971, 1st respondent without the consent and authority of appellants and in total disregard of the terms upon which an oil company may enter private land under an Oil mining Lease or Licence, unlawfully entered appellants' rubber estate, felling, bulldozing and clearing the rubber trees thereon. Appellants further stated that respondents struck oil in the estate and consequently dug six huge pits measuring 30 feet in diameter and constructed extensive network of roads on the land without the consent of appellants.

On the other hand, respondents contend that they entered the land in dispute in 1971 following a grant of an Oil Mining Licence No. 7 by the Federal Government and carried out seismic operation resulting in their finding oil in several parts and dug oil wells in 1972; that they constructed roads, etc., on the land and paid adequate compensation to the owners/rightful claimants of the surface rights (crops, economic trees, structures, etc.,) destroyed and/or affected by the operations after enumeration and assessment exercise. They claim that appellants' cause of action accrued in 1971 but their action was commenced in 1994 and that the suit so commenced is statute barred. At the end of hearing in the matter, the learned trial Judge dismissed the action for being statute barred. Aggrieved, appellants appealed to the Court of Appeal Benin City, Division. The Court heard the appeal and dismissed same. Still dissatisfied, appellants appealed to the Supreme Court.

ISSUES FOR DETERMINATION

"(1) Whether this action is time barred by the operation of the Limitation Law of Delta State.

(2) Whether the learned Justices at the Court of Appeal were right in holding that the plaintiffs/appellants in this case had no

locus standi to commence or prosecute this action.

HELD (Unanimously dismissing the appeal per
ONNOGHEN AG. CJN)

APPEALS - Reply brief - Filing of

1. It is settled law that where a respondent raises an issue relevant to the determination of an appeal in his respondent brief, appellant is entitled to react to same by filing a reply brief in which he addresses the issue(s) so raised else he is deemed to have conceded the issue point raised. (p. 70 A)

ACTIONS - Consistency of

2. I have gone through the appellants' brief before the lower Court at pages 301 -317 of the record particularly Paragraphs 405 - 406 thereof at pages 303- 304.

From the above, it is clear and I hold that the case of appellants as stated therein is completely different from what they are presenting before this Court in respect of trespass and continuing trespass. It is settled law that a party should be consistent in the case he presents at the trial and appellate Courts as he is not allowed to present different cases before each hierarchy of Court as he desires. In other words, a party is not allowed in the presentation of his case before the Court to approbate and reprobate. (p. 70 C/H)

ACTIONS - Cause of action - Time

3. I have carefully gone through the pleadings of the parties and the evidence thereon and do confirm that there is no doubt whatsoever, that the cause of action as pleaded by appellants and testified to in evidence arose in 1971. Also not in dispute is the fact that the action resulting in this appeal was instituted on the 7th day of July, 1994 about 23 years after the accrual of the cause of action.

ACTIONS - Statute barred

4. The above being the case, it is my considered view that the principle of limitation of time applies to the facts of this case and that having regard to the time the cause of action arose in 1971 and the institution of the action on 7th July, 1994, a period of twenty-three years, the action so instituted is statute barred thereby leaving the Courts with no jurisdiction to entertain same and that the lower Court is right in affirming the decision of the trial the trial Court on the matter.

In the circumstances of this case particularly the resolution of issue 1 against the appellants, it follows that issue 2 is rendered irrelevant in the appeal as I had already found/held that the action as constituted is statute barred and that the Court have, in the circumstance no jurisdiction to entertain the same. (p. 74 B)

REPRESENTATION

H. G. ERHABOR, Esq. for the Appellant

Ayo Asala, Esq., for 1st Respondent

E. OHWOVORIOLE, Esq. with Miss C.E. Ibe, for 2nd Respondent

CASES REFERRED TO

- Onagoruwa v. Akinremi (2001) 13 NWLR (pt. 729) 38
Okoko v. Dakolo (2006) 14 NWLR (pt. 1000) 401
Adepoju v. Oke (1999) 3 NWLR (pt. 594) 154
Oyadare v. Keji (2005) 7 NWLR (pt. 925) 571
Balogun v. Akanji (2005) 10 NWLR (pt. 933) 394
Obueke v. Nnamchi (2012) 12 NWLR (pt. 1314) 327
Ogundipe v. NDIC (2008) All FWLR (pt. 432) 1220
Adesosun v. Governor of Osun State (2012) All FWLR (pt. 619) 1044
Intercontinental Bank Ltd v. Brifina Ltd (2012) ALL FWLR (pt.

639) 1192

Umebi v. Otukoya (1978) 4 SC 33

Eboigbe v. NNPC (1994) 5 NWLR (pt. 37) 649

Adimora v. Ajufo (1988) 3 NWLR (pt. 8) 1

Ikine v Edjerode (1998) 12 KLR (Pt 131) 3711, 3724

Adepoju v. Oke (1999) 3 NWLR (pt. 594) 154

Ibrahim v JSC Kaduna (1998) 12 KLR (Pt. 73) 2489

B

STATUTE REFERRED TO

Limitation Law Cap. 79-121 vol. IV Laws of Bendel State 1976 C
(applicable to Delta State), ss. 4(1), 6(2)

LEAD JUDGMENT BY ONNOGHEN AG. CJN

This is an appeal against the judgment of the Court of Ap- D
peal Holden at Benin City in appeal No. CA/B/212/99 delivered
on the 27th day of June, 2005 dismissing the appeal of the appel-
lants against the decision of the Delta State High Court Holden at
OGHARA delivered on the 20th day of August, 1998 The facts of E
the case include the following:

Appellants herein were plaintiffs at the High Court of Delta
State who instituted suit No HCH/44/94 against the respondents
as defendants in which they claimed the following reliefs as con-
tained in their Further Amended Statement of Claim to be found at F
pages 114 - 119 of the record to wit:

*“(a) A declaration that as leaseholders in respect of the
Asaboro Rubber Estate in Oghara, Plaintiffs are persons entitled
to be paid fair and adequate compensation for Defendants entry G
on the land and damages caused therein.*

*(b) A declaration that the Defendants in entering the Asaboro
Rubber Estate and cutting down Plaintiffs rubber trees,
Destroying rubber Estate and other improvements on the plaintiffs
land without paying and or tendering fair and adequate compen- H
sation to the plaintiffs, are in breach of their obligations under
their oil mining lease and regulation applicable thereto their entry
upon their activities on the said Estate oppressive and wrongful.*

(c) *The sum of N300,000,000.00 (Three Hundred Million Naira) being fair and reasonable compensation due and payable to plaintiffs by the Defendants for their entry and their activities on the Plaintiffs Rubber Estate involving extensive destruction of the rubber trees in the plantation and extensive damage of the land by the wasteful burrow pits dug thereon.*

(d) *The sum of N200,000,000.00 (Two Hundred Million Naira) being punitive and or aggravated damages suffered by the plaintiffs as a result of the defendants refusal to comply with the mandatory requirement of the Petroleum Drilling and Production Regulations from 1971 to date restricting defendants from entering or occupying or exercising any rights or powers over plaintiffs private land until it paid or tendered to the person lawfully in occupation fair and adequate compensation.*

(e) *Injunction restraining the defendants, their servants, agents and/or privies from further entering onto the said land, remaining thereon or doing anything thereon or carrying on any oil exploration activities thereon or doing anything thereon until it complies with the said Petroleum Regulations regulating their Oil Mining Lease or License.*
Emphasis supplied by me.

It is the case of appellants that the land in dispute originally belonged to Joseph Asaboro who leased it to the 2nd appellant. The said 2nd appellant planted rubber trees thereon, that sometime in 1971 the 1st respondent without the consent and authority of the appellants and in total disregard of the terms upon which an oil company may enter private land under an Oil mining Lease or Licence, unlawfully entered the appellants' rubber estate, felling, bulldozing and clearing the rubber trees thereon; that the respondents struck oil in the estate and consequently dug six huge pits measuring 30 feet in diameter and constructed extensive network of roads on the land without the consent of the appellants.

On the other hand, the respondents contend that they entered the land in dispute in 1971 following a grant of an Oil Mining Licence (OPL) No. 7 by the Federal Government and carried out seismic operation resulting in their finding oil in several parts and

dug oil wells in 1972; that they constructed roads, etc. on the land and paid adequate compensation to the owners/rightful claimants of the surface rights (crops, economic trees, structures etc.) destroyed and/or affected by the operations after enumeration and assessment exercise: that appellants' cause of action accrued in 1971 but their action was commenced in 1994; that the suit so commenced is statute barred.

At the conclusion of trial, the High Court dismissed the action for being statute barred resulting in an appeal to the Court of Appeal which, as I earlier stated, was dismissed, giving rise to the instant further appeal by the appellants, the issues for the determination of which have been formulated by learned Counsel for appellants, HAROLD ERHABOR ESQ. in the Appellants' Brief of Argument filed on the 23rd day of May, 2014 as follows:-

"(1) Whether this action is time barred by the operation of the Limitation Law of Delta State.

(2) Whether the learned Justices at the Court of Appeal were right in holding that the plaintiffs/appellants in this case had no locus standi to commence or prosecute this action.

The above issues are substantially the same as those formulated by learned Counsel for 1st respondent AYO ASALA ESQ. in the brief filed on 14/9/2015 and 2nd respondent, EKEMEJERO OHWOVORIOLE ESQ. on 23rd day of September, 2015 and need not be repeated herein.

In arguing issue 1, learned Counsel for appellants submitted that it is settled law that it is a continuity tort of trespass for a person to remain in another's land without his authority or consent for which the owner is entitled to protection of the law relying on *Onagoruwa vs Akinremi* (2001) 13 NWLR (pt. 729) 38 at 61; that the respondents trespassed to the land of the appellants which was in the exclusive possession of appellants relying on *Okoko vs Dakolo* (2006) 14 NWLR (Pt. 1000) 401; *Adepoju vs Oke* (1999) 3 NWLR Pt. 594) 154; *Oyadare vs Keji* (2005) 7 NWLR (Pt. 925) 571 *Balogun vs Akanji* (2005) 10 NWLR (Pt. 933) 394: that the doctrine of continuing trespass relates to cases where something has been brought on land and wrongfully left there to continue to

cause damage, thereby giving rise to actions *de die in diem*, so long as it lasts; that in the present action appellants as plaintiffs at the trial Court claimed for compensation for respondents' unlawful entry on the land in dispute and damages caused therein which was in the possession of the appellants when the respondents unlawfully entered the land in possession in 1971. Such claim, we submit postulates an element of continuity in the act of trespass because it talks of unlawful entering the land in 1971. PW6, the 1st plaintiff on record testified that the 1st defendant is still destroying the rubber trees till now.

Finally, it is the contention of learned Counsel that where there is continuing trespass, an action resulting thereon cannot be defeated by a plea of limitation of time relying on *Obueke vs Nnamchi* (2012) 12 NWLR (Pt. 1314) 327 at 354 and urged the Court to resolve the issue in favour of appellants.

On their part, learned Counsel for the respondents in their respective briefs, which on a close examination reveals that they are a reproduction of each other, submitted that the lower Court was right in affirming the decision of the trial Court that the action is statute barred: that where a statute of limitation prescribed a period within which an action should be brought, legal proceedings cannot be validly instituted after the expiration of the prescribed period: that the action herein was instituted outside the period allowed by law, that determining whether an action is statute barred or not, the Court is enjoined to look at the processes filed together with the evidence on record where applicable, to determine when the wrong was said to have occurred and compare same with the date of filing of the Originating Process, relying on *Ogundipe vs. Nigeria Deposit Insurance Corporation* (2008) All FWLR (Pt. 432) 1220 at 1239, that there is no dispute that the cause of action arose in 1971 for which appellants claim compensation, where the claim for compensation was instituted on 7th July, 1994 - over 23 years from the accrual of the cause of action, that by operation of Section 6(2) of the Limitation Law Cap. 79-121 Vol. IV Laws of Bendel State, 1976 applicable to Delta State appellants should have instituted their action within 12 years of

the accrual of the cause of action; that in relation to a claim for compensation, Section 4(1) of the said Limitation Laws provides for a period of six years within which an action for same can be instituted and that either provision shows that the action as instituted is statute barred and liable to be struck out

On the issue of continuing trespass as canvassed by learned Counsel for appellants, learned Counsel submitted that the issue does not arise herein and that the authorities cited and relied upon by learned Counsel for appellants are irrelevant: that those cases were grounded on trespass, which is not the case here where appellants claim entitlement to payment of fair and adequate compensation for the various oil exploration activities and destruction of their rubber plantation, etc. upon entry thereon in 1971. The action is not on trespass; that appellants agree that respondents entered the land upon a grant of various oil prospecting licence and Oil Mining Lease by the Federal Government of Nigeria which makes their entry lawful.

Finally, it is the submission of Learned Counsel that the issue of continuing trespass is being raised for the first time in this Court, the same have not been raised or argued before the lower Courts to which Counsel referred the Court to the appellant brief, at pages 301 to 317 of the record of appeal particularly Paragraphs 405 to 406 at pages 301 to 304; that appellants are not permitted to approbate and reprobate, relying on *Adesosun vs Governor of Osun State* (2012) All FWLR (Pt. 619) 1044 at 1064: *intercontinental Bank Ltd vs Brifina Ltd* (2012) ALL FWLR (Pt. 639) 1192 at 1206 and urged the Court not to disturb the concurrent findings of facts by the lower Courts and resolve the issue against appellants.

I must observe that learned Counsel for appellants did not file a reply brief in this appeal neither did he refer the Court to any in the course of the oral hearing of the appeal on the 17th day of October, 2016 to particularly challenge the assertion by the respondents counsel that the case of continuing trespass now being presented by appellants before this Court is a new case from the one presented at the lower Courts.

It is settled law that where a respondent raises an issue relevant to the determination of an appeal in his respondent brief, appellant is entitled to react to same by filing a reply brief in which he addresses the issue(s) so raised else he is deemed to have conceded the issue point raised. In the instant appeal, the respondents are saying that appellants' case before the lower Courts was not founded on the principles of trespass let alone continuing trespass but on payment of compensation and that the issue of trespass and/or continuing trespass is a new case.

I have gone through the appellants' brief before the lower Court at pages 301 -317 of the record particularly Paragraphs 405 - 406 thereof at pages 303- 304 where the following are stated;

The appellants claim were for fair and adequate compensation which is mandatory for the holder of an Oil Mining Lease by virtue of the Regulation made pursuant to the Petroleum Act. It was not a claim made and prosecuted under the common law or for the recovery of a specific sum fixed by statute.

It is also respectively emphasized that the appellant were by their claims, not seeking to recover any land from the respondents.

We submit that Sections 4, 5 and 12 of the Limitation Law are not applicable for the following reasons:-

(a) Section 4 deals with time for instituting suits dealing with contracts, tort, etc. and it does not contain any provision touching on land.

(b) Section 6 deals with the time within which the state or any other person may bring an action to recover land.

(c) Section 12 deals with actions to recover land. It was on the basis of the above Sections of the Limitation Law that the lower Court reached the conclusion that the action was statute barred.

From the above, it is clear and I hold that the case of appellants as stated therein is completely different from what they are presenting before this Court in respect of trespass and continuing trespass. It is settled

law that a party should be consistent in the case he presents at the trial and appellate Courts as he is not allowed to present different cases before each hierarchy of Court as he desires. In other words, a party is not allowed in the presentation of his case before the Court to approbate and reprobate. See *Intercontinental Bank Ltd vs Brifina Ltd* (2012) All FWLR (Pt. 639) 1192 at 1206. B

Turning now to the main issue under consideration that of whether appellants' action is statute barred, the trial Judge made the following finding at page 238 lines 12 to 15 of the record: C

The cause of action arose in 1971. The suit was filed in 1994 after 23 years. The limited time allowed by law is 12 years. I hold that this action was statute barred and therefore no jurisdiction to entertain it.

It should be noted that the above finding of fact was affirmed D by the lower Court in its judgment at pages 363-365 of the record, inter alia:-

A cause of action is a fact or set of facts which gives a person a right to judicial relief. It consists of every fact which it would be necessary for a plaintiff to prove if traversed, in order to support his right to judgment: See Adogom v. Aina (1964) 1 All ULR 127, Adimora v. Ajufo (1988) 3 NWLR (Pt. 8) 1; Thomas v. Olufosoye (1996) 5 NWLR (Pt. 18) 669. From the further amended pleading the alleged unlawful entry and the consequent destruction for which F the respondent refused to pay fair and adequate compensation occurred in 1971. In other words, the appellant's right to institute the action accrued in 1971. There can be no dispute as to the date the appellant commenced the action. The writ of summons on page G 1 of the records of appeal is dated 7th July, 1994 so the action was commenced on 7/7/94 whereas the cause of action accrued "some-time in 1971" a period of 23 years before the action was instituted.

Against the above background the appellants argued with H heat that their claim was one made and prosecuted under the common law or for the recovery of a specific sum fixed by statute. It was emphasized that the appellants did not seek to recover any

land from the respondents. It was argued that none of Sections 4, 5, 6 and 12 of the Limitation Law Cap 89 Vol. IV Laws of Bendel State 1976 as applicable in Delta State prescribing a period of 12 years for an acting (sic) relating to land is applicable to the appellants case. The question is what is the basis of the appellants' claim is it not a claim relating to land.

There was an alleged unlawful entry into the estate of the appellants and the estate can be no place other than land. The entry was into the land and the destruction or damage was done to the rubber plantation in the estate on the land. I hold the view that claim of the appellants for compensation and damages for destruction of the rubber plants as a result of the respondents unlawful entry into their estate is an action relating to land.

For the appellant, it was argued that "Neither the Petroleum Act nor the Regulation made thereunder may prescribe any period within which a claimant may commence an action against the holder of an Oil Mining lease claiming fair and reasonable compensation. In the absence of such an express provision in the law it will be erroneous for such to be presumed or imported into the appellants' case.

With due respect to learned counsel if it intended to exclude claims arising from(sic) the Petroleum Act and the Regulation made thereunder there would have been express provisions to that effect either in the Act or in the Regulation made pursuant to same. It cannot be correct or the intention of the law that a claimant as learned counsel's argument would imply could wait for an indefinite period of time after the accrual of his right to seek redress. See the reasons for statutes of limitation in *National Universities Commission v. Olapade Olatunji Oluwo and 5 Ors* (2001) 3 NWLR (Pt. 699) 80 at 109; cited by the respondents. For the purposes of limitation law time begins to run when there is in existence a person who can sue and another who can be sued and when all the facts have happened which are material to be proved to entitle the plaintiff to succeed. See *Jalico Ltd v. Owoniboys Technical Service Ltd* (1995) 4 NWLR (Pt. 391) 534. On the facts before the Court below there was in existence a person who could sue in

1971 and there was a person who could be sued and the unlawful entry and the consequent destruction for which the respondent refused to pay compensation and refusal to pay compensation had also occurred sometime in 1971. The 1st appellant testified that it was in 1971 that I met the 1st defendant first in the rubber estate. Ever since 1971 the 1st defendant had refused to pay us compensation” see page 192 of the records. Appellants should have commenced the action within 12 years from the accrual of the cause of action in 1971. The action commenced in 1994, 23 years after the accrual of right to action is statute barred.

The above findings by the lower Courts are concurrent and it is settled law that the Supreme Court does not make a practice of interfering with the concurrent findings of facts by the lower Courts except where special circumstances are shown to exist such as that the said findings are perverse i.e. not supported by evidence on record, or there was a serious error of procedural or substantive law which has resulted in a miscarriage of justice, etc..

I have carefully gone through the pleadings of the parties and the evidence thereon and do confirm that there is no doubt whatsoever, that the cause of action as pleaded by appellants and testified to in evidence arose in 1971. Also not in dispute is the fact that the action resulting in this appeal was instituted on the 7th day of July, 1994 about 23 years after the accrual of the cause of action.

It is the contention of learned Counsel for appellants that the action is not statute barred because it is an action in trespass which from the facts is a continuing wrong and therefore not amenable to the statute of limitation of time but I have already found and/or held that from the submissions of learned Counsel for appellants before the lower Court the case made out there which was also in line with that at the trial Court was not founded on trespass let alone continuing trespass but on payment affair and adequate compensation for the alleged wrongful acts of the respondents. In fact the claim has nothing to do with declaration of title to land or certificate of occupancy nor for damages for trespass as confirmed

by the opening of Paragraph 4.06 of the appellants brief before the lower Court at page 304 of the record and earlier reproduced his judgment, to wit inter alia:

It is also respectively emphasized that the appellants were by their claims not seeking to recover any land from the respondents. Emphasis provided by me.

The above being the case, it is my considered view that the principle of limitation of time applies to the facts of this case and that having regard to the time the cause of action arose in 1971 and the institution of the action on 7th July, 1994, a period of twenty-three years, the action so instituted is statute barred thereby leaving the Courts with no jurisdiction to entertain same and that the lower Court is right in affirming the decision of the trial the trial Court on the matter.

In the circumstances of this case particularly the resolution of issue 1 against the appellants, it follows that issue 2 is rendered irrelevant in the appeal as I had already found/held that the action as constituted is statute barred and that the Court have, in the circumstance no jurisdiction to entertain the same.

In conclusion, I find no merit, whatsoever in this appeal which is accordingly dismissed by me, with N250,000.00 costs in favour of the respondents.

Appeal dismissed.

PETER-ODILI JSC

I am in agreement with the judgment just delivered by my learned brother, Ag. CJN W. S. N. Onnoghen and to underscore my support I shall make some comments.

The facts are easily seen from the claims of the plaintiffs now appellants herein against the defendants now respondents, viz:

(a) A declaration that as leaseholders in respect of the Asaboro Rubber Estate in Oghara, plaintiffs are persons entitled

to be paid fair and adequate compensation for defendants entry on the land and damage caused therein.

(b) A declaration that the defendants in entering the Asaboro Rubber Estate and cutting down of plaintiffs rubber trees, destruction of the rubber estates and other improvements on the plaintiffs land without paying and or tendering fair and adequate compensation to the plaintiffs, are in breach of their obligation under Oil Mining Lease the regulations applicable thereto and their entry upon their activities on the said Estate are oppressive and wrongful.

(c) The sum of N300,000,000.00 (Three Hundred Million Naira) being fair and reasonable compensation due and payable to plaintiffs by the defendants for their entry and their activities on the plaintiffs rubber estate involving extensive destruction of the rubber trees in the plantation and extensive damage of the land by the wasteful burrow pits dug thereon.

(d) The sum of N200,000,000.00 (Two Hundred Million Naira) being punitive and or aggravated damages suffered by the plaintiffs as a result of the defendants refusal to comply with the mandatory requirement of the Petroleum Drilling and Production Regulations from 1971 to date restricting defendants from entering or occupying or exercising any rights or powers over plaintiffs private land until it paid or tendered to the person lawfully in occupation fair and adequate compensation.

(e) Injunction restraining the defendants, their servants, agents and/or privies from further entering onto the said land, remaining thereon or carrying on any oil exploration activities thereon or doing anything thereon until it complies with the said Petroleum Regulations regulating their Oil Mining Lease or License. See pages 114-119 of the Record of Appeal.

The background facts are well set out in the lead judgment and I shall not repeat them save for when the need to make reference thereto arise.

On the date of hearing of the appeal, learned counsel for the appellants, Harold G. Erhabor Esq. adopted the Brief of argument of the appellants filed on the 23rd day of May, 2014 wherein he

identified two issues for determination which are thus:

1. Whether the action is time barred by the operation of the Limitation Law of Delta State.

2. Whether the learned Justices of the Court of Appeal were right in holding that the plaintiffs appellants in the case had no locus standi to commence or prosecute this action.

Ayo Asala of counsel for the 1st respondent adopted its Brief of Argument filed on the 14th day of September, 2015 and he raised two issues for determination which are as follows:

1. Whether having regard to the circumstance of this case, the lower Court was right in affirming the decision of the trial Court that the suit filed by the appellants was caught by the statute of limitation and therefore statute barred.

2. Whether the learned justices of the Court of Appeal rightly affirmed the decision of the trial Court that the appellants lack the locus standi to institute the suit at the trial Court.

The appellants on the one side and the 1st respondent and the 2nd respondent on the other side are really asking the same questions differently crafted, I shall utilize those of the appellants for convenience as I restrict myself to the first issue.

ISSUE NO 1.

Whether the action is time barred by the operation of the Limitation Law of Delta State.

Canvassing the position of the appellants, learned counsel contended that it is trite law that it is a continuing tort of trespass for a person to remain in another's land without that others authority or consent so that barring defences properly raised and sustained which defeat the right of the owner of such land to complain of the continuing trespass, the land owner is always entitled to protection as appropriate.

That trespass to land is the wrongful and unauthorized invasion of the private property of another and trespass to land is rooted in a right to the exclusive possession of the land allegedly trespassed.

It was submitted that trespass to land is actionable at the instance of a person in possession of the land and so in this case

where the unlawful act of entry complained of by the appellants as plaintiffs which act was the felling, bulldozing and clearing of the plaintiffs rubber trees in the estate, striking of oil well in the same estate and drilling thereof and other acts complained of then trespass had occurred. Several judicial authorities were cited to buttress the points such as *Onagoruwa v Akinremi* (2001) 13 NWLR (Pt. 729) 38 at 61; *Okoko v Dakolo* (2006) 14 NWLR (Pt. 1000) 401; *Umebi v Otukoya* (1978) 4 SC 33 etc. B

Mr. Erhabor of counsel for the appellants submitted that the finding of the Court of Appeal that the action commenced in 1994, 23 years after the accrual of right to action is statute barred was erroneously made because the act was a continuous one from 1971 Counsel for the 1st respondent, Mr. Ayo Asala submitted that where a statute of limitation prescribes a period within which an action should be brought, legal proceedings cannot be validly instituted after the expiration of the prescribed period. That in calculating whether an action has come from outside the given period, the Court is enjoined to look at the processes filed together with the evidence on record, where applicable, to know when the wrong in question is said to have accrued and compare that with the date when the originating process was filed in Court. That in the instant case, the acts complained of occurred in 1971 but the originating process was 23 years after and taken in context with the Bendel State Limitation law of 1976, the action was statute barred and the plaintiff had lost the right to enforce the cause of action. He cited *Ogundipe v NDIC* (2008) ALL FWLR (Pt. 432) 1220 at 1239; *Eboigbe v NNPC* (1994) 5 NWLR (Pt. 37) 649; *Adimora v Ajufo* (1988) 3 NWLR (Pt. 8) 1 etc.. D E F G

That this Court should uphold the concurrent findings of the two Courts below as they were properly made. He cited *Owhoruke v COP* (2015) LPELR-24820 (SC); *Adepoju v Oke* (1999) 3 NWLR (Pt. 594) 154; *Orioro v Osain* (2012) 16 NWLR (Pt. 1327) 560 etc. H

Learned counsel for the 2nd respondent contended that the action of the appellants being statute barred the jurisdiction of the Court was ousted thereby. That the argument of the appellants in

this Court on the trespass being a continuing one is different from the case appellants put forward in the two Courts below which goes against the consistency with which a party is expected to prosecute his case from inception till the end at the Apex Court and there should be no somersault. He referred to Adeosun v Governor of Osun State (2012) All FWLR (Pt. 619) 1044 at 1064; International Bank Ltd v. Brifina Ltd (2012) ALL FWLR (Pt. 639) 1192 at 1206.

In brief, the appellants posit the statute of limitation of Bendel State would not operate to bar their action as the matter is in relation to a continuing tort of trespass and it is the 2nd appellant being in possession who can sue for that trespass and there is no time limit so long as the trespass persists.

The 1st respondent counters, asserting that by the prescription of Section (4)1) of the Limitation Law, Cap 79-121, Vol IV, Laws of Bendel State 1976, applicable to Delta State, the period to bring this action expires 6 years after the accrual of the cause of action. That the present action having crystallized as a cause of action 1971, instituting the action 23 years after that is in 1994 was way out of bounds.

The 2nd respondent was of the same view as the 1st respondent.

A recourse to the background of this action might be helpful at least for the purpose of clarity. The appellants case gleaned from the Statement of claim at the Court of trial is that they are the persons entitled to the payment of compensation for the various oil activities and destruction of rubber plantation and economic trees by the respondents upon entry on the land in 1971. In fact all the monetary claims by the appellants are for the alleged Permanent destruction carried out by the respondents in course of their oil exploration. That is that as at 1971 when the 1st respondent entered the land in furtherance of its oil exploration activities there is already a cause of action. It is not in dispute by the Parties that respondents entered the land pursuant to the various oil prospecting license and oil mining lease granted to the 1st respondent by the Federal Government. This being an acknowledgment that re-

spondents entry on the land was lawful. Clearly the appellants claim is for payment of compensation for the alleged destruction of rubber trees and surface right which actions took Place in 1971, a once off thing and not like a continuing trespass. This matter of continuing trespass, the respondents submit is a new argument pushed forward at the Supreme Court, scenario different from the case of the plaintiffs appellants at the trial Court and Court below. B

To get the answer of the question herein raised in the determination of this appeal, one has to get to the Limitation law of Bendel State 1976 applicable in Delta State which provides thus: C

4(1) The following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued, that is to say:

(a) Actions founded on simple contract or on tort.”

The appellants averred in their Statement of Claim Paragraph 12 as follows: D

(12) Sometime in 1971 the 1st defendant and without the consent and authority of the 1st plaintiff and in total disregard of the terms upon which an oil company may enter private land under an oil Mining license, unlawfully entered the plaintiffs rubber estate felling, bulldozing and clearing the plaintiffs rubber trees in the estate E

The Court of trial held thus:

The cause of action arose in 1971. The suit was filed in 1994 after 23 years. The limited time allowed by law is 12 years. I hold that this action was statute barred and therefore no jurisdiction to entertain it. F

Section 6(2) of the said Limitation Law of Bendel State applicable to Delta State prescribes thus: G

No action shall be brought by any other person to recover any land after the expiration of twelve years from the date of which the right of action accrued to him, or if it first accrued to same person through whom he claims, to that person. H

The Court of Appeal at page 363-365 of the Record had this to say:

“A cause of action is a fact or set of facts which gives a

person a right to judicial relief. It consists of every fact which it would be necessary for a plaintiff to prove, if, traversed, in order to support his right to judgment. See *Adogom v Aina* (1964) 1 ALL ULR 127, *Adimora v Ajufo* (1988) 3 NWLR (Pt 8)1; *Thomas v Olufosoye* (1996) 5 NWLR (Pt. 18) 669.

B From the further amended pleading the alleged unlawful entry and the consequent destruction for which the respondents refused to pay fair and adequate compensation occurred in 1971. There can be no dispute as to the date the appellant commenced
C the action. The Writ of Summons on page 1 of the records of appeal is dated 7th July, 1994 so the action was sometime in 1971 a period of 23 years before the action was instituted.

Against the above back ground the appellants argued with
D heat that their claim was one made and prosecuted under the common law or for the recovery of a specific sum fixed by statute. It was emphasized that the appellant did not seek to recover any land from the respondents. It was argued that none of Sections 4,
E 5, 6 and 12 of the Limitation Law Cap 89 Vol. IV laws of Bendel State 1976 as applicable in Delta State prescribing a period of 12 years for an acting (sic) relating to land is applicable to the appellants case. The question is what is the basis of the appellants claim Is it not a claim relating to land?

F There was an alleged unlawful entry into the estate of the appellants and the estate can be no place other than land.

The entry was into the land and the destruction or damage was done to the rubber plantation in the estate on the land. I hold the view that claim of the rubber plants as a result of the respondents unlawful entry into their estate is an action relating to land.
G

For the appellant it was argued that Neither the Petroleum Act not the Regulation made thereunder any prescribed any period within which a claimant may commence an action against the holder of an Oil Mining lease claiming fair and reasonable
H compensation. In the absence of such an express provision in the law, it will be erroneous for such to be presumed or imported into the appellants case.

With due respect to learned counsel if it is intended to ex-

clude claims arising from (sic) the Petroleum Act and the Regulation made thereunder there would have been express provisions to that effect either in the Act or in the Regulation made pursuant to same. It cannot be correct or the intention of the law that a claimant, as learned counsel's argument would imply could wait for an indefinite period of time after the accrual of his right to seek redress. See the reasons for statutes of limitation in National Universities Commission v Olapade Olatunji Oluwo and 5 Ors. (2001) 3 NWLR (Pt. 699) 90 at 109.

The lower Court went further to state as follows:

For the purpose of limitation law time begins to run when there is in existence a person who can sue and another who can be sued, and when all the facts have happened which are material to be proved to entitle the plaintiff to succeed. Jalico Ltd v Owoniboy Technical Service Ltd. (1995) 4 NWLR (Pt 391) 534. On the facts before the Court below there was in existence a person who can sue in 1971 and there was a person who could be sued and the unlawful entry and the consequent destruction for which the respondent refused to pay compensation and the refusal to pay compensation had also accrued sometime in 1971. The 1st appellant testified that it was in 1971 the 1st defendant first in the rubber estate. Ever since 1971 the 1st defendant had refused to pay us compensation See page 192 of the records. Appellants should have commenced the action within 12 years from the accrual of the cause of action in 1971. The action commenced in 1994, 23 years after the accrual of right to action in statute barred.

It is to be reiterated that in an action instituted after the expiration of the prescribed period is said to be statute barred. That is to say that where the limitation of time is imposed in a statute unless that same law makes provision for extension of time, the Courts have their hands tied from extending the time as the action filed outside the stipulated period will lapse by effluxion of time. The follow up to the above is to determine whether an action is statute barred and in doing this the Court is expected to peruse the originating process, statement of claim together with the evidence on record where that has taken place to know when the wrong in

question occurred and compare it with the date the originating process was filed in Court. I rely on the case of *Ogundipe v NDIC* (2008) ALL FWLR (Pt. 432) 1220 at 1239.

The implication of the action being statute barred is that a plaintiff who ordinarily would have had a cause of action by judicial process because the period of the time laid down by the Limitation Law for instituting such an action has elapsed, automatically loses that right to approach the Court to ventilate his grievance. See *Eboige v NNPC* (1994) 5 NWLR (Pt. 347) 649.

The appellants contend that statute of limitation whether limited for 6 years for monetary compensation or 12 years for acquisition of land claim would not apply to them as their action is rooted in trespass of a continuing nature and so not confined to a specific period be so as to constrained by a limited time albeit by statute.

This standpoint of the two respondents disagreeing with that of the appellant stating that the appellant is deviating from his original suit which had nothing to do with trespass in the first place.

Indeed this issue of trespass, continuing or not is new to this appeal. It is to be noted though it is a well grounded principle of law that an appeal is not a novel or new process that can take off on its own with a life of its very own, rather it is a continuation from the suit at the Court trial and no party or even a Court can get away from the action to commence a completely new thing on appeal. Another way of saying so, is that a party or the Court cannot change the goal post midstream as the goal post remains from the time of inception of the action to each stage of the appeal therefrom up to the Apex Court. See *Adepoju v. Oke* (1999) 3 NWLR (Pt. 594) 154; *Orioro v Osain* (2012) 16 NWLR (Pt. 1327) 560; *Obueke v Nnamchi* (2012) 12 NWLR (Pt. 1314) 327.

From the foregoing this matter falls into the category of cases where the concurrent findings of fact of the two Courts below ought not to be interfered with. I rely on *Owhoruke v COP* (2015) LPELR-24820 (SC) 22 per Rhodes-Vivour, JSC.

In conclusion, in line with the better and fuller reasoning in the lead judgment, I dismiss this appeal. I abide by the consequen-

tial orders made.

ARIWOOLA JSC

I had the opportunity of reading in draft the lead judgment of my learned brother, Onnoghen, Ag. CJN just delivered. I agree entirely with the reasoning therein and the conclusion that the appeal lacks merit and deserves to be dismissed, I too will dismiss the appeal. Appeal is accordingly dismissed. B

I abide by the consequential orders in the said lead judgment including the order on costs, C

KEKERE-EKUN JSC

This appeal is against the judgment of the Court of Appeal, Benin Division, delivered on 27/6/2005 dismissing the appellant's appeal against the judgment of the High Court of Delta State Holden at Oghara delivered on 20/8/2016 wherein the Court held, inter alia, that the appellant's suit is statute barred. D

The appellants' case at the trial Court was that the land in dispute originally belonged to her late husband, Joseph Asaboro. Upon his demise the 1st appellant, as administratrix of his estate, leased it to the 2nd appellant. It was their case that sometime in 1971, the 1st respondent, without their consent or authority and in disregard of the terms upon which an Oil Company may enter private land under an Oil Mining lease, unlawfully entered their rubber estate felling, bulldozing and clearing their rubber tress The respondents struck oil on the estate and proceeded to drill all over the Estate, dug six burrow pits measuring 30 feet in diameter and constructed an extensive network of roads therein without the appellants' consent and without paying compensation They filed an action against the respondents in 1994 seeking various declaratory and injunctive reliefs and compensation "*for their entry and their activities on the plaintiffs' rubber estate involving extensive destruction of the rubber trees in the plantation and extensive damage of the land by the wasteful burrow pits dug thereon.*" E F G H

The respondents, in their defence, contended that they en-

tered the land in 1971 pursuant to the grant of an oil prospecting license and an oil mining lease by the Federal Government. That they carried out seismic operations on the land in the course of which they struck oil in several parts of the land and consequently dug oil wells and laid pipelines. They contended that they paid compensation to all those who had improvements on the land in 1971 when they entered thereto.

As stated earlier, the trial Court dismissed the suit on the ground that it was statute barred, the cause of action having accrued in 1971 while the suit was filed in 1994, 23 years later. The appellants' appeal to the Court below was dismissed, hence the instant appeal.

Each party formulated two issues for determination, which are quite similar. I am of the view that the appeal can be adequately be determined on the 1st respondent's issue 1, which is:

Whether having regard to the circumstances of this case, the lower Court was right in affirming the decision of the trial Court that the suit filed by the appellants was caught by the statute of limitation and therefore statute barred.

It is curious that in arguing the appeal, learned counsel for the appellants on the one hand contended that the claim was for compensation for the damage done to their land and that their claim was for compensation for the damages done to their land and that their claim was not one relating to land in which circumstances the statute of limitation was inapplicable, while on the other hand he relied on the doctrine of continuing trespass. In Paragraph 4.19 of his brief learned counsel submitted thus:

"In the present action, the appellants as plaintiffs at the trial Court claimed for compensation for respondents' unlawful entry on the land in dispute and damages caused therein which was in the possession of the appellants when the respondents unlawfully entered the land in possession in 1971. Such claim, we submit, postulates an element of continuity in the act of trespass because it talks of unlawfully entering the land in 1971. PW6, the 1st plaintiff on record testified that the 1st defendant is still destroying the rubber trees till now. And the respondents are digging another oil well

as at when she gave evidence on 17/10/97.

We submit that the act of trespass did not terminate in 1971 because the burrow pit, road network, oil pipelines and clearing bulldozing of the appellants' rubber trees continued while those earlier embarked upon remained on the land while the destructive acts or their continuous effects remained on the land. B

The general principle of law is that it is a continuing tort of trespass for a person to remain on another's land without that other's authority or consent and that barring any defences properly raised and sustained, which could defeat the right of the owner of such land to complain, the land owner is always entitled to protection as appropriate. See Onagoruwa Vs Akinremi & Ors. (2001) 13 NWLR (Pt. 729) 38: Adepoju vs Oke (1999) 3 NWLR (Pt. 594) 154 @ 163 - 164. The appellants' action before the trial Court, as can be seen from Paragraphs 12 - 15 and 20 (a) of their Further Amended Statement of Claim and as argued by them before the lower Court, was founded strictly on a claim for compensation payable by virtue of the mandatory provision of a statute for damage done to their land. This is in view of the fact that the respondents' entry on the land was pursuant to oil prospecting licence and oil mining lease granted to them by the Federal Government. D E

The law is quite settled that for the purpose of limitation law, time begins to run when there is in existence a person who can sue and another who can be sued and when all the facts have happened, which are material to be proved to enable the plaintiff to succeed. See: Jallco Ltd. Vs Owoniboy Technical Services Ltd. (1995) 4 NWLR (Pt.391) 534. The Court below, at pages 364 - 365 of the record held as follows: F G

"On the facts before the Court below there was in existence a person who could sue in 1971 and there was a person who could be sued and the unlawful entry and the consequent destruction for which the respondent refused to pay compensation, had also occurred sometime in 1971. The 1st appellant testified that "it was in 1971 that I met the 1st defendant first in the rubber estate. Ever since 1971 the 1st defendant has refused to pay us compensation." See page 192 of the records. The appellant should have H

commenced the action within 12 years from the accrual of the cause of action in 1971. The action commenced in 1994, 23 years after the accrual of the right to action is statute-barred. I resolve issue 1 in favour of the respondent. ”

This finding, which affirmed the finding of fact by the trial Court is unassailable having regard to the pleadings and evidence led by the parties. The appellants have not shown that the concurrent findings are perverse. For these and the more comprehensive reasons lucidly advanced in the lead judgment of my learned brother, Walter Samuel Nkanu Onnoghen, Ag. CJN, with which I entirely agree, I find no merit in this appeal. It is accordingly dismissed. I abide by the order on costs as contained in the lead judgment.

D

NWEZE JSC

My Lord, Onnoghen, the distinguished Ag. CJN, obliged me with the draft of the leading judgment just delivered now. I agree with His Lordship’s reasoning and conclusion.

As, demonstrably, shown in the leading judgment, the appellants’ suit, on which issues were joined on the settled pleadings, was woven around their claim for compensation: a cause of action which accrued in 1971, although the said suit for redress was filed twenty-three later, precisely, in 1994. Both the trial Court and the Court of Appeal (*hereinafter, simply, referred to as “the lower Courts”*), concurrently, found that the suit was caught by the Limitation Law of Bendel State, 1976 (as applicable in Delta State), [pages 238 and 363 -365 of the record]

Now, as shown above, from the issues joined in the settled pleadings, although the cause of action arose in 1971, the suit, which prompted this appeal, was commenced on July 7, 1994, that is, about twenty-three years after the cause of action had accrued to the appellants.

My Lords, the above Limitation Law, like all Limitation Statutes owe their evolution to considerations founded on public policy. First, there is the ancient principle which is now famous for its ubiquity. It is expressed in Latin: *interest rei publicae ut sit finis*

litium - it is in the public interest that there should be an end to litigation.

In addition to this requirement of public policy, the Law has also taken the view that a stale claim may not only be unfair to a defendant, it may wreak cruelty on him. The reason is simple: with the vagaries of events; the concatenation of avoidable and unavoidable circumstances and the sheer passage of time, such a defendant stands the chance of losing material pieces of evidence which, hitherto, formed part of the formidable arsenal in his defence.

Limitation statutes thus evolved to vouchsafe to such a defendant a statutory defence to such a stale action. That is why such an action is said to be statute barred. This formulation has an illustrious judicial ancestry, *Aremoll v Adekanye* (2004) 42 WRN 1; *Ogboru v SPDC Co Nig Ltd* (2005) 26 WRN 128.

It is however, important to note that what the statute bars is the action and not the cause of action. This important distinction is not often understood. Whereas the cause of action refers to the facts or combination of facts which the plaintiff must adduce to be entitled to any relief, the action itself is the medium which affords him the opportunity to ventilate his bundle of facts, *Patkum Industries Ltd v Niger Shoes Ltd* (1988) 5 NWLR (Pt. 93) 138. Put differently, a plaintiff's right of action eventuates from the existence of a cause of action, *Ikin v Edjerode* (1998) 12 KLR (Pt 131) 3711, 3724.

In the context of this distinction, what emerges is that whereas the plaintiff's cause of action remains intact, although in a vacuous and bare form, a statute of limitation denudes him (the plaintiff) of his action, that is, (2001) his right of enforcement; the right to judicial relief, *Egbe v Adefarasin* (1987) 1 NWLR (Pt. 47) 1; *Eboigbe v NNPC* (1994) NWLR (Pt.347) 549. To be able, therefore, to enjoy the dividends which recourse to the judicial process affords, such a plaintiff must commence his action within the period stipulated by statute. In other words, it is a mandatory requirement, *Sidi Ali v Takwa* (2004) WRN 180. Thus, legal proceedings cannot be validly instituted after the expiration of the pre-

88 Asaboro v. Pan Ocean Oil Corp. (2017) 1 KLR Nweze JSC
scribed period, *Sanda v Kukawa Local Government* (1991) 2
NWLR (Pt. 174) 374.

References had been made to Sections 4 (1) and 6 (2) of the
above Limitation Law (applicable in Delta State at the material
time). The clear effect of both sections is that, since the appellants
B In this appeal [as plaintiffs] failed to invoke their right of action in
time, they ran the risk of the extinction of such a right of enforce-
ment; of entitlement to a judicial relief, *A.C.B. PLC v N. T. S (Nig.)*
Ltd (2007) 1 NWLR (Pt.1016) 596, 637) *Ibrahim v JSC Kaduna*
C (1998) 12 KLR (Pt. 73) 2489. The lower Court, in my view, was
right in affirming the decision of the trial Court in the above cir-
cumstances.

It is for these, and the more detailed reasons in the leading
judgment that I too shall enter an order dismissing the appeal.
D Appeal dismissed.

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