

# **A PRACTICAL APPROACH TO THE DEFENCE OF THE LIMITATION UNDER SECTION 2(A) OF THE PUBLIC OFFICERS PROTECTION ACT.**

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## **ABSTRACT**

*The Nigerian Public Officers Protection Act is greatly influenced by the English Public Authorities Protection Act of 1893 which served as a statute of general application in Nigeria until it was repealed by the Nigerian Public Officers Protection Act, 1916. The Public Officers Protection Act was enacted to offer special protection to the public officer who performs his public duties in accordance with the law by embedding a three-months limitation period for which actions can be brought.*

*The Public Officers Protection Act, although a Federal Act, does not apply to all the states of the federation. Rivers State amongst other states have removed the three months limitation period imposed by the Act. This is because over the years, enforcement of the express letters of the Act on limitation period caused more harm than good as the Act made the public officer to have an undue advantage over private individuals. This deficiency led the courts to take over the responsibility of creating exceptions to the applicability of the provisions of the Act. The consequential effect being that the Act is no longer absolute, and actions can be brought after the limitation period without being held to be statute barred so long as they fall within the exceptions.*

*This paper makes enquiries on these exceptions, essence of the protection under the Act and Lessons learned from the enforcement of the express provisions of the Act which forms a basis of final recommendations of the paper.*

## **1. INTRODUCTION**

1.1 Section 2(a) of the Public Officer's Protection Act (POPA) (hereinafter to be referred as the Act) provides for full protection and cover to all public officers or persons

engaged in the execution of public duties who at all material times acted within the confines of their public duty. This provision is to the effect that for any action brought against a public officer to be valid, it must be instituted in a competent court of law within a period of three (3) months from the accrual of the cause of action.

- 1.2 A scrutiny of most of the precedents on cases commenced against public officers under the Nigerian justice system shows that where a defendant relies on the defence of limitation in Section 2(a) of the Act to claim that the action is statute barred, the Court will first look at whether the person is a public officer within the confines of the law or judicial authority or that the conditions for the applicability of the defence are satisfied to come to the conclusion that the action is statute barred.<sup>1</sup>
- 1.3 On the other hand, in the case of the Plaintiff/Claimant, the Court will first confirm whether the action by the Plaintiff/Claimant was brought within the 3months Limitation Period as prescribed under the Act or whether the cause of action falls under the exceptions to the provisions of the Act to ascertain whether the protection under the Act will not stand to avail the defendant therefore actions can be sustained after the limitation period imposed by the Act.<sup>2</sup>
- 1.4 This article seeks to analyze in limbs, the defence in section 2(a) of the Public Officers Protection Act, the jurisdiction of the court as it relates to matters instituted against public officers, the essence of the Act, some of the exceptions that have been judicially recognized overtime including the most recent Supreme Court pronouncement that has settled the scope of the Act and the injustice occasioned by the Act that calls for a reform.

## **2.0 SCOPE OF THE ACT**

2.1 The Public Officers Protection Act is a federal law. However, it does not apply to all States of the federation. It only applies to public officers employed under the federal government and does not extend to public officers employed under the state except states where their limitation laws are in pari materia with the provisions of the Act.

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<sup>1</sup> See the case of *Central Bank Of Nigeria V. Ukpong* (2006)13 NWLR (Pt 989) 555 at 571 paras G\_H

<sup>2</sup> *Michael Obiefuna v. Alexander Okoye* (1961) All NLR 357 at 360 and 362

2.2 The Supreme Court in settling the matter as to the scope of the Act in the case of *CIL Risk & Asset Management Ltd v. Ekiti State Govt & Ors*,<sup>3</sup> held thus:

“...the Public Officers Protection Act does not cover "public officers" in the employ of state governments.”

2.3 It is noteworthy that some states of the federation, in considering the hardship caused by the enforcement of the provision of the Act have removed the three months limitation period and have made the limitation period the same with private individuals. For example, Section 40 of the Limitation Law of Rivers State,<sup>4</sup> Sections 42 and 44 of the Limitation Law of Abia State,<sup>5</sup> and Sections 42 and S.44 of the Public Officers Protection and Limitation Law, Cap.102, 2009 of Ebonyi State.<sup>6</sup> The provisions of the Public Officers Protection and Limitation Law of Ebonyi State enjoyed judicial support in the case of *Uduma V. Attorney General of Ebonyi State*.<sup>7</sup>

### **3.0 WHO THEN IS A PUBLIC OFFICER?**

It will be a futile journey if a Defendant seeks to avail himself with the protection offered under the Public Officers Protection Act without first being certain that he is indeed a public officer under the Act.

3.1 Unfortunately, the Public Officers Protection Act failed to define the term ‘Public Officer’, therefore, recourse should be made to the decisions of Courts, particularly the decision of the Supreme Court on the subject matter.

3.2 In the case of *Chief John Eze v. Dr. Cosmas I. Okechukwu*,<sup>8</sup> the Court, in deciding who a public officer is, described the term, "Public Officer" as a holder of a public office in the public sector of the economy as distinct and separate from the private sector and that he is entitled to some remuneration from the public revenue or treasury. In addition, that he has some authority conferred on him by law, with a fixed

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<sup>3</sup> (2020) LPELR 49565 (SC)

<sup>4</sup> Limitation Law of Rivers State, Cap 80. Laws of Rivers State, Vol. 4, 1999

<sup>5</sup> Limitation Law of Abia State Cap.24. Laws of Abia State , 2001;

<sup>6</sup> Public Officers Protection and Limitation Law, Cap.102, laws of Ebonyi State, 2009

<sup>7</sup> (2013) LPELR 21267

<sup>8</sup> (1998) 5 NWLR (Pt. 548) 43 AT 73, see also, *Asogwa V. Chukwu*. (2003) 4 NWLR (PT. 811) 540 AT 551

tenure of office that must have some permanency or continuity; above all else that a public officer has the power to exercise some amount of sovereign authority or function of government.

- 3.3 From the above definition, it can be inferred that the definition of a public officer has been constrained to individuals alone. However, the law has moved beyond the above definition and has extended the meaning of public officer to include artificial persons such as public bodies, body corporate, incorporate statutory bodies or persons. This extension is driven from the words “any person” as used under the Act.
- 3.4 In the Supreme Court case of *University of Jos v. Ikegwuoha*,<sup>9</sup> the phrase; 'any person' used in Section 2 of the Act was held to apply to both natural persons or human beings or persons sued in their natural names, and artificial persons, public bodies or body of persons, whether sued by their official titles or not.
- 3.5 An example of an artificial person was seen in the case of *CBN v. Okop*<sup>10</sup> where the Supreme court held thus:  
*“the central bank is a public officer as far as limitation period for bringing an action against public officer is concerned”*.
- 3.6 Having known who a public officer is it is important to note that the Act only serves as a shield to public officers who have acted within the confines of their public duties or authority and with the semblance of law. The Act will not serve to avail a party who goes on a frolic and acts outside the colour of his office. For instance, a Public Officer who indulges in enticing other men's wives cannot claim protection under the Act. This is so because enticing another man's wife is not a public duty or act envisaged in the law. This position was upheld in the case of *Bamaiyi v. Bamaiyi*.<sup>11</sup>

#### **4.0 THE ISSUE OF JURISDICTION**

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<sup>10</sup>(2013) 9 NWLR (Pt. 1360) 478, see also; *Ibrahim v. Judicial Service Committee, Kaduna State* (1997-1998) ALL NLR 302 and *Nwaogwu v. President Of The Federal Republic* (2007) 6 NWLR (Pt. 1030) 237 at 247

<sup>11</sup>(2015) LPELR 24740 (SC) *Wulangs V. CBN* (2019) LPELR 48085 (CA) Per IGE, J.C.A (pp. 37-52, paras. C-D)*Central Bank Of Nigeria V Ukpong*. Supra

<sup>11</sup> (2005) 15 NWLR (Pt 948) 334

4.1 In order to properly institute an action the plaintiff must first determine the court with competent jurisdiction to entertain a matter brought against public officers pursuant to the Public Officers Protection Act.

4.2 Section 251 of the Constitution of the Federal Republic of Nigeria 1999 (as amended)<sup>12</sup> vests on the federal high court with the jurisdiction to hear matters relating to the federal government, its agents, and agencies. The Supreme Court in the case of *Oloruntoba-Uju v. Dopamu*<sup>13</sup> held thus:

*“The aim of section 251(1)(p), of the Constitution of the federal Republic of Nigeria, 1999 was to vest exclusive jurisdiction in the federal high court in matters in which the federal government or any of its agents is a party.”*

4.3 It is clear from the above provision that where a public officer as prescribed under the Act and being a federal government agent is a party to a suit the federal high court will have jurisdiction. However, it is not in all cases that the federal high court will have jurisdiction to adjudicate on matters where public officers are sued as agents of the federal government. In the case of *Maduafokwa v. Abia State Govt*<sup>14</sup>, the Court held thus:

*“The Federal High Court was not given a blanket exclusive jurisdiction in cases involving the Federal Government and its agencies by section 251(1) of the 1999 Constitution. The very fact that the section was provided at all shows that there are instances in which such jurisdiction is not exclusive. The court must consider both the parties in the litigation as well as the subject matter of the litigation. In other words, in addition to the Federal Government or any of its agencies being a party, the court must consider the subject matter of the plaintiff’s claim as endorsed on the writ of summons and pleaded in the statement of claim. If such subject matter is not one of those specified in section 251(1) of the 1999 Constitution, then it is not a matter over which jurisdiction is exclusive or otherwise has been conferred on the Federal High*

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<sup>12</sup> Constitution of the Federal Republic of Nigeria [Nigeria], Act No. 24, 5 May 1999

<sup>13</sup> (2008) 7 NWLR (Pt. 1085) 1

<sup>14</sup> (2009)2NWLR (PT. 1126)457

*Court, the fact that the Federal Government or any of its agencies is a party to the action notwithstanding”.*

- 4.4 In line with the above case, where a suit is brought against a public officer and the subject matter is not one of which is amongst those enumerated under section 251 of the Constitution, the federal high court will not have jurisdiction. For instance, cases where the subject matter is land or contract the State High Court will have jurisdiction and in respect of labor matters the National Industrial Court will have jurisdiction irrespective of the fact that Public officers under the Act are parties.
- 4.5 In all, in determining the court that will have jurisdiction when bringing an action against a public officer, the parties involved as well as the subject matter of the suit must be carefully considered.

#### **5.0 THE DEFENCE OF LIMITATION UNDER SECTION 2(a) OF PUBLIC OFFICERS PROTECTION ACT:**

- 5.1 Section 2 of the Public Officers' Protection Act<sup>15</sup> provides as follows:

*”Where any action, prosecution, or other proceeding is commenced against any person for any act done in pursuance or execution of any Act or Law or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such Act, Law, Duty or Authority the following provisions shall have effect.”*

*Section 2(a) the action, prosecution, proceeding shall not lie or be instituted unless it is commenced within three months next after the act, neglect or default complained of, or in case of a continuance of damage or injury, within three months next after the ceasing thereof..*

- 5.2 The first limb of the above provision is to the effect that for the Act to be applicable to or avail a person, it must be shown that the person against whom the action is commenced is first and foremost a public officer; and that the act done by the person in respect of which the action was commenced was done in pursuance or execution of

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<sup>15</sup> Public Officers Protection Act, Cap P41, Laws of the Federation Of Nigeria, Vol 14, 2004.

any law or any public duty or authority. This was the position of the court in the case of *Central Bank Of Nigeria V. Ukpong*,<sup>16</sup> where the Court of Appeal in the course of interpreting Section 2(a) of the Public Officers (Protection) Law, Cap 106, Laws of Oyo State, 1978 which is in pari materia with Section 2(a) of the Public Officers Protection Act, Laws of Kaduna State opined thus:

*"There are two conditions precedent to the application of Section 2(a) of the Public Officers (protection) Law. The two conditions are: (a) it must be established that the person against whom the action is commenced is a Public Officer or a person acting in the execution of public offices within the meaning of the law; and (b) the act done by the person in respect of which the action is commenced must be one done in pursuance of execution of any law, public duty or authority or in respect of an alleged neglect or default in the execution of any such law or authority."*

## **6.0 APPLICATION OF THE ACT**

- 6.1 In the second limb of the provision of the Act, the use of the word 'shall' in section 2(a) denotes mandatoriness leaving no room for discretion. The consequential effect being that where an action is commenced against a public officer after the three months specified by the Act and when the cause of action arose, the matter will fail as it has become statute barred.
- 6.2 In the case of *Fasoro v. Milborne*,<sup>17</sup> the defendant a district police officer ordered a policeman to slap the plaintiff. The suit against the defendant was commenced three months after the incident of assault. The suit was rightly held to be statute barred as there was no reason for the delay in bringing the action against the defendant. The plaintiff ought to have acted timeously in bring the action against the defendant. Also, in the case of *Obiefuna v. Okoye*,<sup>18</sup> the Plaintiff was injured while driving his motor bike, which was knocked down by the defendant who in turn was driving a police truck. He instituted the action three months after the accident because he had

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<sup>16</sup> (2006)13 NWLR (Pt 989) 555 at 571 paras G\_H

<sup>17</sup> (1923) 4 NLR 85

<sup>18</sup> (1965) ALL NLR 357

been in hospital for treatment all the time. The Court held that his claim must fail as one that is statute-barred.

- 6.3 In the Supreme Court case of *Ekeogu V. Aliri*,<sup>19</sup> the Plaintiff was injured in the eye by her class teacher in a public school. She went through different hospitals for treatment during which the time of three months had passed. But, quite unfortunately, she lost the eye. She sued for damages by her next friend (the mother). It was held that the action was statute-barred. the court in delivering the judgment stated thus “Perhaps, the proper way to see the problems usually posed under the Act, is that the limitation period of three months within which actions may be brought is the crux of the matter and for which the Courts would not compromise”.
- 6.4 In *Adigun v. Ayinde*<sup>20</sup>, the Appellant who was a civil servant with the Federal Ministry of Agriculture, had an automobile accident that rendered him disabled during a trip on an official assignment in an official car driven by the first Respondent, a driver in the ministry. whilst in search of treatment in different hospitals, three years passed before he could bring an action against the driver and his employers. The Respondent objected to the hearing of the suit relying on the provision of the Public Officers Protection Act. The trial court upheld the objection and dismissed the suit as being statute-barred. Both the Court of Appeal and the Supreme Court respectively affirmed the decision of the trial court. Although the Supreme Court noted the injustice in the statute, nevertheless it adopted the literal and plain interpretation of the Act and held that the action was statute–barred.
- 6.5 It is observed from the above cases that the protection provided by the Act availed the public Officers because the courts adhered to the express letters of the Act despite the cry for justice from the aggrieved parties. It is from the outcome of the above cases that one begins to appreciate the fact that the enforcement of the Act does more harm than good. Scholars have argued that the supreme court having recognized the injustice occasioned by the Act ought to have recommended the repeal of the Act.<sup>21</sup>

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<sup>19</sup> (1991) 3 NWLR (Pt. 179) 258

<sup>20</sup> (1993) 8 NWLR (Pt.313) 516

<sup>21</sup> Oyelowo Oyewo, (2016). Sounding the Death Knell of the Public Officer Protection Act/Law in Nigeria. International Journal of Liberal Arts and Social Science, Vol. 4 No. 1 page 106.



6.6 It is also observed that even though the aggrieved parties had valid claims, the fact that they did not institute their cases immediately after the acts amounting to their claims were committed but instead after the three months limitation period had elapsed their actions had to fail.

6.7 This makes it necessary to note when the limitation period of three months as prescribed by the Act will start running. The courts have held that the determining factor as regards to the limitation period of three months is the accrual of the cause of action.

6.8 **What then is a Cause of Action and the Accrual thereof.**

6.9 The Supreme Court in *Sifax (Nig) Ltd v Migfo (Nig) Ltd*,<sup>22</sup> S. C. Augie, J.S.C while delivering the lead judgment held thus:

*“Cause of action refers to the facts or combination of facts which the plaintiff must adduce to be entitled to any relief”.*

Augie, J.S.C went further in pp 191, paras B-D to explain when cause of action accrues thus:

*“The accrual of cause of action is the event whereby a cause of action becomes complete so that the aggrieved party can begin to maintain his action. Time begins to run when the cause of action crystalizes or becomes complete. State differently, the cause of action accrues when the plaintiff gets to know that his enforceable claim or right has come into existence or become a present enforceable demand or right or has arisen and to prove as a fact during trial, the time a cause of action accrued or arose in determining whether a cause of action is statute barred or not, the most crucial consideration is when the cause of action arose or accrued”.*

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<sup>22</sup> (2018) 9 NWLR (Pt.1623)138 pp.183, paras, F-G

6.10 From the above exposition, the act giving rise to the claim of the aggrieved is the cause of action and the limitation period starts running right after the acts were committed.

## **7.0 EXCEPTIONS TO THE DEFENCE IN SECTION 2(A) OF THE PUBLIC OFFICERS PROTECTION ACT**

Although the original intendment of the Act is to protect public officers that act within the confines of their public duty or authority thereby making no provisions for exceptions, the Act is no longer absolute. The courts have recognized certain exceptional instances where the protection under Section 2(a) will not avail a public officer to ensure justice is done. With these exceptions, a plaintiff's right of action against a public officer has been held to remain valid and enforceable despite the expiry of the three (3) months limitation period. The exceptions are:

### **7.1 CONTINUANCE OF DAMAGE OR INJURY**

7.1.1 In the case of continuance of damage or injury, the Act provides that action can be brought on cessation outside the three months. It has been construed by the courts that the injury intended under Section 2(a) of the Act is continuance of injury or damage which means continuance of legal injury, and not the continuance of the injurious effect of legal injury. The continuance of the injurious effect of an accident is not a continuance of the injury or damage envisaged under the Public Officer Protection Act. The continuous effect of injury is not subsumable under this exception. This has been reinstated in the case of *Michael Obiefuna v. Alexander Okoye*,<sup>23</sup> where the Supreme Court stated that:

*“The continuance of the injurious effects of an accident is not a continuance of the injury or damage within the meaning of the Public Authorities Protection Act.”*

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<sup>23</sup> (1961) All NLR 357 at 360 and 362

7.1.2 In that case, the Claimant suffered injury when he was knocked down by the Defendant while driving his motor bike. The Defendant was driving a Black Maria with prisoners on board. The Claimant commenced the action after three months of the accident because he had been in hospital for treatment since the incident in May 1958 till his discharge in January 1959. Nevertheless, the court held that the claim failed because it was statute barred since continuance of injury means continuance of the act causing the injury not the continuous effect of the injury.

7.1.3 While the exception could not avail the claimant in the above case, it was applied, In the case of *Attorney-General of Rivers State v. Attorney-General of Bayelsa State* <sup>24</sup> where the court held thus:

*“In cases of continuance of damage or injury, the Act permits actions to be brought on the cessation thereof outside three months. From the Amended Statement of Claim and as equally deposed to in his Counter-affidavit, the Plaintiff averred that he continues to be deprived of the allocation he is entitled to every month and the same has not ceased. I am of the respected view that in such a situation of continuance of damage or injury which has not ceased the Defence is not available to the 1st Defendant”* .

7.1.4 However, in *Inspector Dominic Ibo v Nigerian Police Force*,<sup>25</sup> where the plaintiff a pensioner under the Nigerian Police Force until retirement. He approached the court for redress for the irregular and incomplete pension payments. The court upheld the preliminary objection of the defendants and dismissed the suit holding that the plaintiff’s suit was caught up by the 3 months limitation period under the Act.

7.1.5 In this case, the court ignored the defence of the plaintiff that being a pensioner is a continuous status therefore the damage of being deprived of his complete entitlement of his pension benefits also is continuous injury. In my opinion however, this ought to

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<sup>24</sup> 7(2013) 3 NWLR (Pt.1340) 123 at pages 148-149

<sup>25</sup> Suit No NICN/CA/39/2014 (Unreported)

be an exception to the application of the Act because nonpayment of the pension at every point in time gave rise to fresh cause of action.

7.1.6 The Court took a different step in the case of *Engineer G.F.C Ezeani v Nigerian Railway Corporation*,<sup>26</sup> where the Plaintiff/Appellant was an employee of the defendant/respondent. He was retired from the service of the defendant/respondent on the grounds of “public interest”, and subsequently forcibly ejected from his office by armed men. Thereafter the plaintiff/appellant petitioned the Bureau of Public Service Reforms through its steering committee. The Defendant/Respondent ignored the directive for reinstatement by the chairman of the steering committee. The plaintiff sued and lost at the lower court. On appeal the court held among other things that the trial court failed to take into consideration the surrounding circumstances. The Court of Appeal held that the cause of action arose when the letter of 17/05/2009 from the respondent refusing to re-instate the appellant was issued but the “injury (mental and psychological) inflicted on the appellant continued.” The Court of Appeal allowed the appeal in favor of the appellant.

7.1.7 In the above case the court considered the continuance effects of the Act causing the injury. This although a deviation from judicial precedence on the subject matter is a welcomed development as it will reduce the hardship caused by the Act.

## 7.2 ACTION OUTSIDE STATUTORY DUTY/ CRIMINALITY

7.2.1 A criminal action outside the public officer’s duties does not fall within the scope of the Act. In the case of *Nwankwere v. Adewunmi*,<sup>27</sup> the Defendant, a Vehicle Inspection Officer in the Police, ordered the Plaintiff’s lorry off the road and impounded the certificate of its roadworthiness. After certain repairs had been carried out, he declared it roadworthy but neither returned the old certificate nor issued a fresh one. The Defendant (the Police Officer) was extorting money from the Plaintiff and wanted more. The Plaintiff claimed and was awarded damages. The rogue Police Officer pleaded Public Officers Protection Law. It was held that the Public Officer’s Protection Law will not apply to acts of criminality by public officers.

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<sup>26</sup> (2013) LPELR-22065 (CA)

<sup>27</sup> (1967) NWLR 45 at 49

7.2.2 This position was also upheld by the Court of Appeal in *Ahmed V. Ahmed & Ors*,<sup>28</sup> the Court per Uwani Musa Abba Aji, J.C.A. where the court held thus:

*“Abuse of office and bad faith are factors that deprive a party who would otherwise have been entitled to the protection of Section 2 (a) of the Public Officers (Protection) law.”*

7.2.3 Therefore, the Act will not be a shield to a public officer for any crime or act performed outside his statutory duty.

### 7.3 BREACH OF CONTRACT AND RECOVERY OF DEBT, CLAIMS FOR WORK AND LABOUR DONE.

7.3.1 An action for breach of contract does not fall within the contemplation of Section 2 (a) of POPA. Mohammed, JSC in *FGN v. Zebra Energy Ltd*<sup>29</sup> pronounced that:

*“The provisions of the Public Officers Protection Law are not absolute. The provisions do not apply in actions for recovery of land, breaches of contract, claims for work and labour done. See also Okeke v. Baba (2000) 3 Soule v. L.E.D.B. (1965) LIR 118; Salako v. L.E.D.B. (1953) 20 NLR 169. Where it is discernable from the statement of claim that the cause of action is upon a breach of contract, this special defence under the Act will not avail a public officer.”*

7.3.2 In the case of *Roe Ltd V. Unn*,<sup>30</sup> the Supreme Court reiterated the principle and held as follows:"

*“...I entirely agree with learned counsel for the Appellant that the Public Officers Protection Act does not apply to cases of breach of contract for work done or recovery of debt.”*

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<sup>28</sup> (2018) LPELR-44710(CA), See also *Anozie v. Attorney-General of the Federation*. (2008) 10 NWLR (Pt. 1095) 278m at 290 - 291

<sup>29</sup> (2002) 18 NWLR (pt.798) 162 at 196

<sup>30</sup> (2018) LPELR – 43855(SC) see also; *FUTO v. AMCON & Ors*(2019) 47327 (CA) at (pp. 31-33, paras. F-A)

#### 7.4 RECOVERY OF LAND

An action for recovery of land also falls within the exceptions to section 2(a) of the Public Officers Protection Act.

7.4.1. In the case of *Mulima V. Usman*,<sup>31</sup> it was held thus:

*"Section 2 (a) of the Public Officers Protection Act does not apply in cases of recovery of land."*

7.4.2 Similarly, in *A. G. Rivers State V. A. G., Bayelsa State*,<sup>32</sup> the apex Court held:

*"The protection afforded public officers under the Public Officers (Protection) Act does not apply in cases of recovery of land..."*

#### 7.5 WHERE THE PUBLIC OFFICER ACTS IN BAD FAITH AND WITH NO LEGAL JUSTIFICATION

7.5.1. The underpinning philosophy of this exception is to make public officers accountable. In the case of *Sule & Ors v. Orisajimi*,<sup>33</sup> the Supreme Court stated the principle poignantly as follows:

*"On the issue of Section 2 (a) of the Public Officers' Protection Act, I'm in agreement with the Court below. The law is now settled that Section 2 (a) of the Public Officers Protection Act had been enunciated by the Supreme Court in the case of NWANKWERE VS ADEWUNMI (Supra), per Bret JSC thus: "The law is designed to protect the officer who acts in good faith and does not apply to acts done in abuse of office and with no semblance of legal justification."*

7.5.2 This was also the position in *Lagos City Council (Trading Under the Name Of Lagos City Transport) Vs S.S.J. Ogunbiyi*<sup>34</sup> wherein the court stated thus:

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<sup>31</sup> (2014) 16 NWLR (Pt.1432) 160 at 212, paras. C – E

<sup>32</sup> (2013) 3 NWLR (Pt.1340) 123 at 150

<sup>33</sup> (2019) LPELR 470 (SC) Per BAGE, J.S.C (p. 9, paras. A-E)

<sup>34</sup> (1969) All NLR 287 at 289 see also, *Awolola V. Governor Of Ekiti State & Ors.* (2018) LPELR 46346 (SC) Per EKO, J.S.C (pp. 47-50, paras. B-E).

*“Clearly, the Appellants acted in abuse of office and cannot benefit from the protection of Section 2 (a) of the Public Officers Protection Act.”*

## **7.6 FRAUDULENT CONCEALMENT, COLLUSION OR DECEIT**

7.6.1. Here, the cause of action will not be deemed to have accrued until the Plaintiff has knowledge of the breach. In the case of *Salahudeen & Ors v. Ajibola & Ors.*,<sup>35</sup> the Court of Appeal per BARKA, J.C.A held as follows:

*"The fulcrum of the appellant's contention is straightforward. It is whether there are exceptions to the application of the Public officers Protection Act with regards to knowledge. My simple answer is to agree with the lower Court, having held that: "I therefore agree with the submission of counsel for the respondent that the cause of action in this case had not accrued until they became aware of the appointment of the 1st defendant/applicant as Onigbin of Oke-Onigbin which was alleged not to be published equally there was an allegation of fraud, concealment, deceit and connivance pleaded in this case."*

## **7.7 FUNDAMENTAL RIGHTS PROCEEDINGS BROUGHT PURSUANT TO FREP RULES.**

7.7.1 An originating application made pursuant to the provisions of the Fundamental Rights (Enforcement Procedure) Rules 2009 <sup>36</sup>enjoys the protection afforded by the provisions of Order 3 thereof, which provision, for the purpose of emphasis, is reproduced hereunder thus:

*“An application for the Enforcement of fundamental right shall not be affected by any statute of limitation whatsoever”.*

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<sup>35</sup> (2019) LPELR 47412 (CA) (pp. 37-38, paras. D-C)

<sup>36</sup> Fundamental Rights (Enforcement Procedure) Rules 2009

7.7.2 The Court in agreement with the above provision applied same in the case of *Mallam Nasir Ahmed El Rufai V. Senate of the National Assembly & Ors*<sup>37</sup>, where Adumein JCA, had stated succinctly thus:

*“It is, therefore, clear that an action for the enforcement of a person’s fundamental right cannot be defeated by the provisions of a statute of limitation”.*

7.7.3 It is worthy of note that for this exception to be applicable, a party who seeks to enforce its fundamental right provided by the constitution must come under an originating motion pursuant to the Fundamental Rights Enforcement Procedure Rules and not any other mode of instituting an action. This was the position in the case of *Yarai V Modibbo Adama University Of Technology Yola*<sup>38</sup>; Where the court held thus:

*“It is therefore, the law that whilst an application for the enforcement of the fundamental rights of the citizen pursuant to the provisions of the Fundamental Rights (Enforcement Procedure) Rules 2009 is not affected by the operation of any statute of limitation, including the Public Officers (Protection ) Act 2004, it is not the same for a claim for declarations such as the Appellant suit initiated by means of a writ of summons which is not protected by the provision of Order 3 of the Fundamental Rights (Enforcement Procedure) Rules 2009 and thus affected by any relevant statute of limitation and where commenced outside the prescribed period of limitation would become statute barred in law”.*

7.7.4 As can be seen in most of the cases cited above, the courts held that the provisions of section 2 (a) of the Act did not apply and pronounced that the claims of the various plaintiffs were not statute-barred.

## **8. ESSENCE OF THE DEFENCE IN SECTION 2(A) OF THE ACT**

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<sup>37</sup> ( 2014) LPELR 423115 (CA)

<sup>38</sup> (CA/YL/109/2015) [2016] NGCA 36 (17 MAY 2016) (CA/YL/109/2015) [2016] NGCA 36 (16 MAY 2016)



- 8.1 In the case of *Ekeogu v. Aliri*,<sup>39</sup> the Supreme Court was of the view that the Act is designed to protect a public officer against any action, prosecution, or other proceeding; and for any act done in pursuance of or execution of any law, public duty, or authority; or for any alleged neglect or default in the execution of any law, duty or authority.
- 8.2 It is also the general belief that those who go to sleep on their claim should not be assisted by the courts because they have been indolent and those claimants with good case should pursue them with reasonable diligent.<sup>40</sup>
- 8.3 It has also been argued that public officers rely on these special protections because public officers are exposed to some element of risk in the performance of their duties; the risk of incurring liability in the performance of their duties to the public and unlike the private companies, they do not enjoy the freedom of choice to choose the activities they undertake. They must perform their duties in accordance with their obligations under their enabling Acts.

## **9. EFFECT OF THE INCLUSION OF PUBLIC INSTITUTIONS OR PUBLIC BODIES IN THE DEFINITION OF PUBLIC OFFICERS.**

- 9.1 The inclusion of public bodies or public corporations to the definition of the term public officer has given these public bodies double protection against actions from litigants. There already exist a requirement of pre-action notice to be given to corporate bodies before any action can lie against them. The pre-action notice is a condition precedent to the commencement of any action against public officers that are public bodies. In the absence of such notice provided by their enabling law the court will lack the jurisdiction to hear the matter.
- 9.2 A pre-action notice serves the purpose of giving notice to the defendant so that he may be aware of and be able to resist, if he may, the suit. A pre-action notice is mandatory in nature.

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<sup>39</sup> (1991) 3 NWLR (Pt. 179) 258

<sup>40</sup> Carol Harlow, *Law and Administration* (Cambridge: Cambridge University Press 2009).  
<https://doi.org/10.1017/CBO9780511809941>

For example, S. 83 (2) of the Nigerian Railway Corporation Act<sup>41</sup> provides t thus:

*“No suit shall be commenced against the Corporation, until three months at least after written notice of intention to commence the same, shall have been served upon the Corporation by the intending plaintiff or his agent and such notice shall clearly and explicitly state the cause of action, the particulars of the claim, the name and place of abode of the intending plaintiff and the relief which he claims.”*

- 9.3 In *Bakare v. Nigerian Railway Corporation*,<sup>42</sup> the Supreme Court held that an action can only be properly instituted if pre-action notice is given in cases where they are demanded.
- 9.4 The problem this inclusion creates is the fact that these public institutions may prolong negotiations once they have received a pre-action notice to exhaust the three months limitation period, after which they will renounce all liability against the complainant who then, though unaware, is caught by the three months limitation period under the Act.
- 9.5 As opined by Odusote, O.,<sup>43</sup> what this does is make public corporations appear untouchable and cripples the wheels of justice. To an objective observer, this is no more than clustering the wheel of justice in favour of public officers and public institutions, the effect of which is an improper and unjust obstacle in accessing justice. For example, what manner of justice is it for a claimant to be required to issue a statutory 3 month notice to a public corporation only to be told afterwards that his case has become statute barred under Act for failure to commence the action within the three-month limitation period? What of cases of utmost urgency where the res may be irreparable destroyed and what of the right of a litigant to be heard within a reasonable time?

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<sup>41</sup> Nigerian Railway Corporation Act, Cap. N129. Laws of the Federation of Nigeria, Vol.12, 2004

<sup>42</sup> (2007) 17 NWLR (Pt. 1064) 606. See also *Umukoro v. Nigerian Port Authority*. (1997) 4 NWLR (Pt. 502) 1

<sup>43</sup> Abiodun Odusote. The Nigerian Public Officers Protection Act: An Anachronistic Legislation Yearning for Reforms (2019). *Journal of Public Administration and Governance*, [S.l.], v. 9, n. 1, p. Pages 219-235, mar. 2019. ISSN 2161-7104. Available at: <<http://www.macrothink.org/journal/index.php/jpag/article/view/14404>> Accessed 3 June 2021

9.6 This paper aligns itself with the opinion of Denton-West JCA in *Nwaka v. Head of Service, Ebonyi State*<sup>44</sup> wherein it was stated:

*"Thus, it appears ... that the Public Officers Protection Act is providing an undeserved shield for public officers against ordinary citizens who as it were, may be ignorant of the provisions of the Act. It is my humble view that laws should operate to enhance the lives of citizens and not to deprive the citizenry the opportunity to ventilate his grievances especially where there is an infraction of their entitlement and constitutional right."*

9.7 Flowing from the above, a modification is strongly advised as a combination of the requirement of pre-action notice and limitation under Act are very serious infringement of the rights of individuals to access the justice system. In the case of public corporations, time should start running not from the time of the accrual of cause of action but after the time provided for notice to be given has elapsed. The limitation period should not be made to run concurrently with the period of notice to be served.

## **10.0 EXIGENT NEED FOR REFORM**

10.1 The provisions of the Act are necessary to protect public officers from being harassed by frivolous litigation and to ensure that parties who claimed to have suffered legal injury act timeously. It has however been shown above that it has sometimes occasioned injustice to litigants with genuine causes of action, leaving them without remedy, even in cases where delay was not deliberate. It is evident from the analysis of case law above that the Act has failed in balancing the interest of public officers and others and has failed to ensure justice for all.

10.2 Continuing dissatisfaction with the existence of special limitation rules for public officers and public institutions have made various scholars and commentators to call for the repeal of the Act. Oyewo (2016)<sup>45</sup> unequivocally called for the repeal of the

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<sup>44</sup> (2008) 3 NWLR (Pt. 1073) 156 at 163 5

<sup>45</sup> *Ibid*

Act because his research findings reveal that the Act has caused a lot of unmitigated injustices.

10.3 The Nigerian Law Reform Commission (2015) has equally called for the repeal of the Act. The Commission submitted to the National Assembly a Proposed Bill for the Repeal of the Public Officer Protection Act through the Committee for the Review and Reform of the Laws of the Federal Republic of Nigeria.

## **11.0. RECOMMENDATIONS**

11.1 From the forgoing, there is a need for reform of the protection afforded to the public officers and in line with this need, this paper makes the following recommendations:

1. The Act should be amended to include the exceptions provided in case laws.
2. The courts should expand the definition of legal injury to include the effects caused by the injury when determining the accrual of the cause of action of a continuing damage or injury under the exceptions of section 2(a) of the Act. The courts should follow the decision of the court of Appeal in Ezeani's case.<sup>46</sup>
3. In the case of public bodies or institutions, the accrual of the cause of action should be at the expiration of the time the enabling law of the public body stipulates that notice should be served. The three months limitation period imposed by the Act should start running only after the expiration of the term of notice and not concurrently.

## **10. CONCLUSION**

10.1 The purpose of the Public Officers Protection Act is to protect public officers including individuals and artificial persons or bodies who have acted within the confines of their duties and whose actions have legal semblance by entrenching a

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<sup>46</sup> Supra

three-month limitation period. However, this provision is not absolute by virtue of the exceptions created by case laws. The enforcement of the act against cases of continuous effect of legal injury has caused more damage than justice which informs the recommendations made.

10.2 The Public officers Protection Act applies to public officers under the employ of the federal government and not the state except in states where their limitation laws have provisions that are in pari materia with the Act.

10.3 In other states where their limitation laws on public officer have removed the three months limitation period and has made the limitation period same with what applies to individuals, the Act will not apply. Public officers under the employ of the state are in same standing with private individuals in states like Rivers State, Abia State, Ekiti State and Ebonyi States.

10.4 Where the recommendations made in this paper are implemented, the Act which was created to do justice would have satisfied its purpose.

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