**THE SHELL PETROLEUM DEVELOPMENT COMPANY OF NIGERIA LIMITED**

**V.**

**SIBEATE KANGI AND OTHERS**

IN THE COURT OF APPEAL OF NIGERIA

THE 7TH DAY OF FEBRUARY, 2012

CA/PH/272/2009

**LEX (2012) - CA/PH/272/2009**

OTHER CITATIONS

2PLR/2012/99 (CA)

(2012) LPELR-CA/PH/272/2009

**BEFORE THEIR LORDSHIPS**

MUSA DATTIJO MUHAMMAD, JCA

PAUL ADAMU GALINJE, JCA

TUNDE OYEBANJI AWOTOYE, JCA

**BETWEEN**

THE SHELL PETROLEUM DEVELOPMENT COMPANY OF NIGERIA LIMITED - Appellants

AND

1. SIBEATE KANGI

2. VINCENT B. KORGBELA

3. SUNNY BATA (Suing for themselves and on behalf of Gbe Community of Bodo West in Gokama Local Government Area of Rivers State of Nigeria) – Respondents

**ORIGINATING STATE**

FEDERAL HIGH COURT, PORT HARCOURT DIVISION

**REPRESENTATION**

SONNY O. WOGU Esq. - For Appellant

AND

CHIMEZIE VICTOR IHEKWEAZU, Esq. For Respondent

**ISSUES FROM THE CAUSE(S) OF ACTION**

ENVIRONMENTAL LAW AND NATURAL RESOURCES:- Oil pollution impacting land, waters and means of livelihood of community – Claim for compensation - Special and general damages – What needs to be proved to succeed - Relevant considerations

ENVIRONMENTAL LAW AND NATURAL RESOURCES: – OIL POLLUTION - BURDEN OF PROOF: - Party who asserted injury caused them by oil spillage – Whether has the initial burden of proof to prima-facie establish the facts they so assert and that until that burden has been discharged it does not shift to the Appellant to prove the contrary of what the respondents asserted – How discharged – Relevant considerations

OIL AND GAS LAW: - Oil and Gas exploration hazards and practises – Oil spillage and pollution – How proved - Ex gratia payment – Special and general damages - Relevant considerations – Attitude of court thereof

CHILDREN AND WOMEN LAW: Environmental and Natural Resources - Oil pollution – Effect on natural resources and livelihood of women, families and communities – Effect on quality of life of children - Relevant considerations in seeking redress

**PRACTICE AND PROCEDURE ISSUES**

APPEAL - INTERFERENCE WITH THE DECISION OF A LOWER COURT:- Principle that where the trial court's decision does not flow from the evidence before it, being conjectural and speculative that the Appellate court must step in and set aside the erroneous decision – Implication – Duty of appellate court to interfere with a trial court's decision which is perverse

COURT - RULES OF COURT: - Where the rules of court provide for a procedure for the commencement of an action – Whether the court's jurisdiction in respect of the dispute resolvable through such procedure can only be defeated if the plaintiff does not meet the conditions the rules require him to fulfill before he activates the jurisdiction of the court by means of the particular procedure

EVIDENCE - BURDEN OF PROOF: - The burden of proof in a civil case is not static: it shifts from the plaintiff to the defendant, and vice versa, from time to time as the case progresses – Whether in effect the burden of proof, also called onus probandi rests on the party who would fail if no evidence at all were given on either side – How determined – Bounden duty of trial court to resolve an issue against a party in a suit who fails or refuses to adduce evidence in proof of any of the issues raised in the pleadings filed in a suit unless there are some legal reasons dictating to the contrary

**MAIN ISSUES**

MUSA DATTIJO MUHAMMAD, J.C.A. (DELIVERING THE LEADING JUDGMENT):

At the lower court, Federal High Court, sitting at Port Harcourt, the respondents as plaintiffs claimed in their further amended statement of claim against the appellant being the defendant for:

"1. The sum of 40,000,000.00k (Forty Million Naira) being special and general damages suffered by the plaintiffs from ecological degradation of plaintiffs fishing flats, creeks and ponds damage to fishing traps, screens and nets and declaration of marine life by defendant's negligent spillage of crude oil from defendant's Bodo West Oil field in 1994.

2. An order directing the defendant to clean up the fishing flats creeks and ponds polluted by the crude oil spillage from Bodo West Oil field and take steps to improve marine life and otherwise make restitution for damage done to the Community's traditional occupation."

The respondents' in paragraph 6 of their further statement of claim particularly averred as follows:

"In 1994 crude oil in remarkable quantities was observed on the flats, in the creeks, fish ponds and elsewhere, in the area and on investigation it was discovered that a massive oil spillage had occurred from the said Bodo West Oil Field.

(a) The plaintiffs aver that the committee which carried out investigation also discovered that the spill was so massive nearly all the communities in and around Bodo West Oil Field, namely, Bodo, Goi, K-Dere, B-Dere, Kpor and Gbe were heavily polluted, and the oil was carried by the tide of the neighbouring sea and streams to as far a field as Ogu-Bolo, Okrika, Andoni, Bonny and Opobo.

(b) In the case of Gbe, River Kotagbe which goes up to Bookaamuu is a natural Boundary with Bodo at the coast; Gbe is near Tekuru of Patricks Waterside.

(c) Fresh water stream that runs from Bookaamuu to join the salt water at the coast cuts Gbe into two halves; on one half Gbe and Bodo share a common boundary on land. At the coat the boundary between Gbe and Bodo is created by River Koolagbe Bondimkpa, Boogberekazaara, etc nearly are common fishing grounds for both Gbe and Bodo people. Defendants plan made by one Omusuo a licensed surveyor and dated... is hereby pleaded."

It is respondents' further case that at the time of the oil spill, 1994, defendants oil installations in Ogoni land, inspite of the Mosop crisis of 1993 - 1995, had remained functional and fully protected by armed soldiers and policemen. Refusal of the appellant to compensate the respondents as it had done in similarly polluted areas and clean up the environment necessitated the suit against the appellant. Paragraphs 20-23(a) and (b) which contain particulars of plaintiffs/respondents claim are hereunder reproduced for case of reference:

"20. On the average a family of three or four adults who fish or farm to sustain the rest of each family have at least 50 nets, 10 fishing screens, 5 fishing ponds, 1 acre or a football field size of farm land.

21. Investigations carried out by the community following the observation of crude oil in likely places showed that at least 4,300 screens and nets put together were damaged; each of these screens and nets cost N5,000.00

22. Also about 1,250 fish traps each costing N300 were destroyed by the oil sludge.

23. Wherefore the plaintiffs have suffered damage and claim as follows:

(a) As calculated hereunder the sum of - N40,000,000.00

i.   Special Damages for 3,170 nets destroyed each costing N5,000 -N15,850.000.00

ii. Special Damages for 1,105 fishing screens each costing N5,000 - N5,525,000.00

iii. Special Damages for 1,238 fish traps destroyed each costing N500 - N371,400.00

(b) General Damages for damage done to fishing flats, for loss of revenue accruable from decimated marine life in creeks, ponds and from Polluted farm lands - N18,253,600,00

TOTAL                    N40,000,000.00

In its further statement of defence, the appellant while admitting that it operated the Bodo West Oil Field and the fact of the occurrence of the spillage from same, contended that the field is neither located in respondents area nor was the area impacted upon by the spillage from the said oil field.

It is appellant's further case also that at the time the spillage occurred the entire Ogoni land, where the Bodo West Oil field was situated, was inaccessible to the appellant following hostilities of the Ogonis. Indeed, the appellant avers, its installations and properties were vandalized. The "massive community disturbances and antagonism to the appellant and its staff, the losses, damages and injuries same occasioned are captured in paragraph 7(iii)(ix) of appellant's amended statement of defence hereunder reproduced as well-

"7(iii) The said Ogoni land became impossible for the defendant, its staff and contractors to enter and work and thus declared a "No-Go" area, as a result of massive community disturbances and antagonism to them in the said Ogoniland, which had engendered losses damages and injuries to the defendant's staff and property.

(iv) That the news of the spill in Bodo west was brought to the knowledge of the defendant by some of the community particularly Bodo and then chairman of Khana Local Government Area Mr. Ntowi.

(v) That since the defendant could not go into the erect due to massive community hostility, after several meetings to study available information from the area the defendant had to adopt and employ the services of Ofoma & Oforna Associates an Estate Surveyor and Valuer as a consultant.

(vi) The said consultant was already been used by the community and as nominated by the then Local Government Chairman. He was the only person that could freely enter into the area, visit the sites of the spill and hold meetings in and around the area.

(vii) That the consultant openly carried out it's verification of those communities impacted and Gbe was not part of the entire exercise us the only reason for such absence was that it was never impacted and other affected communities would not have allowed Gbe to so do.

(viii) That the consultant encountered several fictitious claimants during the course of its consultation with the affected communities. The defendant shall at the trial of this rely on a map of the Ogoni area prepared by the communities affected and given to the consultant showing the areas and communities impacted by the spill from Bodo West Oil Spillage. That Gbe i.e. plaintiffs were not in any way shown therein.

(ix) The defendants shall further rely on various letters from Bodo council of chiefs dated 6/10/97, 4/2/97 and Messrs John Kobah & Co. dated 24/1/96 and the map as aforesaid in proof of its averment that Gbe community was not impacted." [underlining for emphasis]

At the end of trial, the court having held that the occurrence of the spillage at appellant's Bodo West Oil Field had seized to be in issue, posed for the purpose of resolving the dispute before it the following questions:-

1. Was Gbe community impacted by the Bodo West Oil Field Spillage of 1994?

2. Was the spillage as a result of vandalization or sabotage? And

3. What is the measure of damages if any?

The court answered the 1st and 2nd questions in the positive and negative respectively, following which findings it awarded the respondents the sum of N21,746,400.00 they claimed as special damages and N5,000,000 as general damages. The appellant was further ordered to clear up respondent's land and ponds polluted by the oil spillage and pay the latter N25,000.00 as costs.

Dissatisfied with the decision dated 17th July 2007, the defendant has appealed to this court vide its amended notice of appeal containing eleven grounds.

Parties have filed and exchanged their briefs of argument including appellant's reply brief. At the hearing of the appeal, parties adopted their respective briefs and relied on the arguments advanced therein for and against the appeal.  
The five issues distilled in the appellant's brief as arising for the determination of the appeal are:

"1. Whether the learned trial Judge was right in holding that the respondents' Gbe community was impacted by the Bodo West Oil Field Spillage of 1994, (Distilled from ground 7 of the amended Notice of Appeal).

2. Whether having regard to the pleadings and the evidence before the trial Court, the respondents proved their case to entitle them to Judgment. (Distilled from grounds 1, 5, 6 and 9 of the untended Notice of Appeal)

3. Whether the award of special and general damages by the trial Court was justifiable in the circumstance of the case before it. (Distilled from grounds 2, 4 and 8 of the amended Notice of Appeal).

4. Whether the respondents' suit was not incompetent and improperly constituted as a representative action. (Distilled from grounds 10 and 11 of the amended Notice of Appeal)

5. Whether having regard to the evidence before him, the order by the trial court directing the appellant to clean up the respondents' community and take steps to improve marine life in the community was proper, (Distilled from ground 3 of the amended Notice of Appeal)."

The respondents formulated seven issues as those calling for answers in the determination of the appeal. The issues read:-

"1. Whether the learned trail judge did not properly evaluate the evidence and exhibits tendered at the trial to arrive at his decision. (Ground 1) Issue 2 of the Appellant's Brief.

2. Whether the learned trial judge was not right when he awarded special and general damages in favour of the Respondents against the Appellant in the sum of N21,746,400.00 and N5,000,000.00 respectively. (Ground 2 of the Notice of appeal and Grounds 4 and 8 of the additional Grounds of appeal) Issue 3 of the Appellant's Brief).

3. Whether jurisdiction does not inhere in the trial judge to make an order directing a party to clean up the community and take steps to improve the marine life in the community in consequence of continuing damages, caused by the Appellant. (Ground 3 of the Notice of Appeal) Issue 5 of Appellant's Brief).

4. Whether considering the circumstances of this case and on the preponderance of evidence, the learned trial judge failed to comply with Section 136 of the Evidence act as regards the burden of proof in a suit as between the parties herein, before the lower court. (Grounds 5 and 9 of the Additional Grounds of appeal) Issue 2 of the Appellant's Brief.

5. Whether on the totality of the case of the Respondents and the evidence before the lower court, it can be said that the learned trial judge made out a case different from that pleaded established in evidence by the Respondents. (Ground 6 of the Additional Grounds of Appeal) Issue 2 of the Appellant's Brief.

6. Whether the learned trial judge lacked jurisdiction to entertain the action on the ground that the Respondent's action was not property constituted in terms of parties. (Ground 6 of the Additional Grounds of Appeal) Issue 2 of the Appellant's Brief.

7. Whether the evaluation of the evidence of both parties, ascription of probative value and conclusion arrived at by the learned trial judge as to whether the Gbe community was impacted by the Bodo West Oil Field Spillage of 1994 is impeachable. (Ground 7 of the additional Grounds of appeal) Issue 1 of the appellant's Brief of Argument"

It is my considered view that both sets of issues are unnecessarily prolix. Consideration of the three issues hereunder proposed shall adequately facilitate the determination of the appeal. The issues read:

"(i) Whether respondents suit is improperly constituted as a representative action and for that reason incompetent.

(ii) Whether having regard to the pleading and evidence before the court the respondents have proved their case to entitle them to judgment."

(iii) Whether the award of special and general damage as well as the order directing the Appellant to clear up Respondents' community with the view to improving marine life there is proper and justifiable.”

In arguing the appeal, learned appellant's counsel contends that respondents' action having been improperly constituted as a representative action, is incompetent. He submits that the respondents and those they represent have varied interests. It is emphasized that to sustain a suit in a representative capacity all the plaintiffs must have the same interest. The interest and/or grievance and the relief they seek should be common and beneficial to all. The plaintiffs/respondents interest, it is contended, vary. The damages they claim flow from the impact of the oil spillage on items individually owned rather than collectively so. The impacted fishing nets, screens, fishing ponds and farm land are not communally owned but held by distinct families. An action so impropriety constituted is incompetent. Learned counsel relies on Adeniran v. Interland Transport Ltd. (1991) 9 NWLR (Pt.214) 155 at 185 and Edise v. Williams Int. Limited (1995) 1 NWLR (Pt.370) 142 at 152.

It is further argued that "Gbe Community" which is neither a natural nor a juristic person is incapable of maintaining or defending an action. For the same reason, the community cannot be legally represented. Learned counsel supports his contention with, inter-alia, Lion of Africa Insurance Ltd. v. Esan (1999) 8 NWLR (Pt.614) 197 at 201; Nduka v. Ezenwaku (2001) 6 NWLR (Pt.709) 494 at 512, Fawehinmi v. NBA (1989) 2 NWLR (Pt.105) 558 at 596 and Obike International Ltd. v. Ayi Teletronics Ltd. (2005) 15 NWLR (Pt.948) 362 at 372 and urges that Respondent's suit be so declared and struck out.

Arguing the 2nd issue 1 formulated for the determination of the appeal, an issue which subsumes Appellant's 1st, and 2nd issues, learned Appellant's counsel submits that Respondent's case hinges primarily on whether the latter's community had been impacted by the oil spillage. It is only a sustainable finding in that regard that will provide the danger for the lower court's award of damages and other ancillary orders. The court's finding on the vexed issue at page 211 of the record, learned counsel contends, is flawed. The court, it is submitted, relied on Exhibit G tendered by the respondents, does not support their claim. The court's finding that draws solely from the evidence of ex-gratia compensation to communities shown in Exhibit G to have been impacted does not justify the court's finding that Gbe Community that is not so shown in the document to have been impacted is entitled to any compensation. Had the court given sufficient consideration to the evidence further led by the Appellant, learned counsel contends, the court would have arrived at a different finding. Relying on the decisions in Ashibuogwu v. A.G. Bendel (1988) 1 NWLR (Pt.69) 138 at 169; Bornu Holding Company Ltd. v. Bogolo (1971) 1 All NLR 324 at 333 Olowu v. Olowu (1985) 3 NWLR (Pt.13) 372 at 383; Appellant's counsel urges that the court's decision in favour of the Respondents is perverse. Further citing the case of Itauma v. Akpe-Ime (2000) 12 NWLR (Pt.680) 156 at 175, learned counsel insists that having not emanated from the evidence before the court same must be interfered with by this court.

Finally, learned Appellant counsel contends that it remains Respondents' burden to establish what they asserted and that the court is wrong to have required the appellant to prove that Respondent's Community had not been impacted by the oil spillage. Respondents succeed, learned counsel submits, only on the strength of their case and not on the weakness of Appellant's case. Counsel buttresses his submission on the basis of S.137 of the evidence Act Ogunleye v. Oni (1990) 2 NWLR (Pt.135) 745 at 773, Iheanacho v. Chijere (2004) 17 NWLR (Pt.901) 130 at 160 and Kate Int. Ltd. v. Daewod Nig. Ltd. (1985) 2 NWLR (Pt.5) 116 and contends that the issue be resolved against the Respondents.

On the third issue, learned Appellant's counsel argues that the award of both heads of damages as well as the order directing the Appellant to clean up Respondents' community is not justifiable in Law. Finally, it is asserted, the finding on and the award of special damages purely on the basis that PW1 had not been cross examined is factually and legally erroneous. PW1, learned counsel submits, was indeed vigorously cross examined a fact which the Respondents counsel himself alluded to in his final address. Counsel referred to pages 146, 147 and 168 of the record of appeal to buttress his contention. The law does not, learned counsel further submits, relieve the Respondents' from the burden of specifically pleading and proving the head of damages. The Respondents who only collated the total number of nets, fishing screens and fish traps allegedly impacted upon and led no evidence as to the cost of the items cannot be said to have discharged the burden the law places on them. Since the items allegedly damaged by the oil spillage have not been specified, the award of general damages is also unjustifiable. Learned counsel refers to the decisions in Shehu v. Afere (1998) 7 NWLR (Pt.556) 115 at 142 UBA Ltd. v. Odusote Bookstores Ltd. (1995) 9 NWLR (Pt.421) 558 at 586 and Rockonoh Property Co. Ltd. v. Nital Plc. (2001) 14 NWLR (Pt.733) 565 in support of his submissions.

On the whole, he urges that the appeal be allowed.

In arguing the first issue which is Respondents' 6th issue and the appellants 4th learned respondents' counsel submits that our legal system allows for representative action where one or more persons initiate or defend an action on behalf of others. Indeed Order 9 rule 1 of the Federal High Court (Civil Procedure) rules 2009 applicable to the trial court unequivocally provides for such procedure. The lower court's finding that respondent's action is properly constituted cannot therefore be faulted. Learned counsel relies on Chief P.O. Anatogu & 11 Ors. v. Attorney-General of East Central State of Nigeria (1976) 11 SC 59 at 68; Dr. Ausgustine Mozie & 6 Ors. v. Chike Mbamalu & 2 Ors. (2006) 15 NWLR (Pt.1003) 466 at 493 - 498 and Oragbade v. Onitiju (1962) 1 SCNLR 70 in addition to Civil Procedure in Nigeria 2nd Edition by Fidelis Nwadialo at page 110 and Introduction to Civil Procedure 2nd Edition by Ernest Ojukwu at page 79, in urging that the issue be resolved in Respondents' favour.

On the 2nd issue learned Respondents' counsel submits that the evaluation of evidence and ascription of probative value to the evidence adduced by parties is the primary duty of the trial court and that this court has no business in that regard if the trial court had properly carried out that function. Counsel cites inter alia Effanga Effion Henshaw v. Effanga Essien Effanga (2009) 11 NWLR (Pt.1151) 65 at 88, Ignatius Anyanwu & 5 Ors. v. Mr. Aloysius Uzowuaka & 13 Ors. (2009) 6-7 SC (Pt.11) 44 at 55, Woluchem v. Guidi (1981) 5 SC 291 and Mini lodge Ltd. v. Chief Oluka O    llake Ngei & Anor. (2009) 12 SC (Pt.1) 94 at 123. in support of his submission. In the instant case, learned counsel further urges, Appellant has failed to show that the lower court had neither properly evaluated the evidence before it nor drawn the wrong inferences from the evidence. Counsel alluded to pages 209 - 210 and 211 where the trial court in the course of its judgment particularly appraised the facts adduced by both sides and drew logical inferences from them as to the liability of the Appellant. He urges that the issue be resolved against the Appellant.

On the 3rd issue, learned Respondents' counsel submits that the lower court's award of special and general damages as well as the further order that the Appellant cleans up Respondents' community that had been proved to be imparted by the spillages are justified. The reliefs were granted following the injury the Respondents, sustained from the Spillage from Appellant's Bodo West Oil Field which spillage as the court found was not a result of vandalization of Appellant's facilities, by a third party. The Respondents are farmers and fishermen and the injury they sustained being a natural or probable consequence of the oil spillage and legal wrongs are recoverable. The lower court having applied the relevant principles, its decision on the reliefs it granted the Respondents cannot be interfered with. Learned counsel buttressed his arguments with: Osun State Government v. Dalami Nigeria Ltd. & Anor. (2003) 7 NWLR (Pt.818) 72 at 98 and 99, Imana v. Robinson (1970) 3 - 4 SC 1; Alhaji Rasaki Oyebamoji v. Solomon Oyeleke Fabiyi (2003) 12 NWLR (Ot.834) 271 AT 3344 and prays that the issue be resolved against the Appellant as well and the Appeal dismissed.

Now, it must out rightly be stated that where the rules of court provide for a procedure for the commencement of an action the court's jurisdiction in respect of the dispute resolvable through such procedure can only be defeated if the plaintiff does not meet the conditions the rules require him to fulfill before he activates the jurisdiction of the court by means of the particular procedure**.** As rightly submitted by the Respondents, a rule of the trial court rule 1 of order 9 of the Federal High Court (Civil Procedure) rules 2009 applicable to the trial court provide that:

"All persons may be joined in one action as plaintiffs in whom any right of relief is alleged to exist whether jointly or severally and judgments may be given for such plaintiffs as may be found to be entitled to relief and for such relief as lie or they may be entitled to relief and for such relief as he or they may be entitled to without any amendment."

The foregoing rule that allows for representative action is one of convenience in the administration of justice particularly in relation to community property and/or rights. The rule is equally a great antiquity. In the case of Commissioner of severs of the city of London v. Gellatly (1876) 3 CH.D 610 at page 615, a case cited with approval by the Supreme Court Anatogu & 11 Ors. v. A.G. Anambra State of Nigeria (supra) the rational for the rule was stated thus:

"Where one multitude of persons were interested in a right and another multitude of persons interested in contesting that right and that right was a general right and it was utterly impossible to try the question of the existence of the right between the two multitudes on account of their number some individuals out of the one multitude may be selected to represent the one set of claimants' and another set of person to represent the parties resisting the claim and the right might be finally decided as between be all parties in a suit so constituted."

A seemingly endless chain of decisions has been churned out by our various courts acknowledging the desirability, nay, the necessity of the rule as captured above and under Order 9 rule 1 of the trial court's rules. Therein, the preconditions for the filing of a suit in representative capacity are exhaustively stated.

In Mozie & 6 Ors. v. Mbamalu (supra), a case cited and relied upon by the Respondents, the overriding requirement for the institution of a suit in representative capacity has been restated to be the existence of common interest or grievance among the persons being represented and those representing them either to prosecute or defend the action. Where the interest or grievance of the two does not tally, the suit cannot be brought under the representative action procedure. See also Blade v. Orewere (1982) 1 ALL NLR (Pt.1) 12 and Melifonwo v. Egbujo (1982) 9 SC 145.

In the instant case, the injury ,the respondents assert, the damages they allegedly suffered from the spillage from Appellant's Bodo West oil well, is common to all the plaintiffs and the relief they seek would be beneficial to all of them. It is convenient that in such a situation they pursue their common interest or grievance in the manner the rule of court entitles them to. I am unable to agree with the Appellant that given the nature of their interest or grievance respondents are not entitled to activate the jurisdiction of the trial court. They are. The trial court has not erred in invoking its power under the rule for it is just and convenient so to do in the particular circumstances of the case at hand. It is for this reason also that I resolve the 1st issue against the appellant.

The resolution of the 2nd issue as proposed is most crucial in the determination of the appeal. The question being asked thereunder is whether the Respondents have proved their case to entitle them to the reliefs the lower court granted them.

Respondent's case at the court below is that the spillage at the Appellant's Bodo West Oil well casued them the injury in respect of which they approached the court for redress.

Appellant's defence is first that the particular oil well is not situated in Respondent's community and that the community is not in any event, impacted upon by the spillage. Besides, the spillage was caused by acts of vandalization of their installations and properties reminiscent of incidences at that point in time in Ogoni Land.

Each side relied on two witnesses to prove their respective case. It is elementary principle of law that the Respondents who have asserted the injury caused them by the Bodo oil well spillage have the initial burden of proof  to prima-facie establish the facts they so assert and that until that burden has been discharged it does not shift to the Appellant to prove the contrary of what the respondents asserted. From Appellant's amended statement of defence it appears that the fact that there was a spillage at its Bodo West oil field oil has been admitted. It is however vehemently denied that the spillage had impacted on Gbe Community of the Respondents for same to lead to the injury the Respondents' claim. Respondent's failure to discharge this initial burden brings their case to naught and should be dismissed without requiring the Appellant to discharge a burden that they are yet to assume. This is the import of S.136 of the Evidence Act as interpreted by the courts.

In Attorney General of Lagos State v. Purification Techniques [Nig] Ltd [2003] 16 NWLR [Pt 845] 1 at 13 the principle has been restated thus:-

"The burden of proof in a civil case is not static. It shifts from the plaintiff to the defendant, and vice versa, from time to time as the case progresses. In effect the burden of proof also called onus probandi rests on the party who would fail if no evidence at all were given on either side. Consequently, if one of the parties in a suit fails or refuses to adduce evidence in proof of any of the issues raised in the pleadings filed in a suit, the trial court is bound to resolve that issue against the defaulting party unless there are some legal reasons dictating to the contrary." (underlining supplied for emphasis). See also Archibong v. Ita (2004) 92 2 NWLR (Pt.858) 590 and INEC v. Ray (2004) 14 NWLR (Pt.892) 92.

The crucial question to answer under the fact issue is whether having regards to the pleadings and evidence of the parties to the instant suit the Respondents have proved their case to justify the reliefs granted to them by the lower court which grant the Appellant also challenges under the 3rd issue for the determination of the Appeal.

The main thrust of the Respondents case is founded on the 1994. Appellant's Bodo West Oil Field Spillage that allegedly impacted on the claimant's fishing nets, fish traps, screen, ponds and farm lands. To prove their claim, the Respondents through their witnesses tendered Exhibits A1, A2, B, C, D, E, F, G, and H. By the testimonies of their two witnesses they set out to establish that "Gbe", their community, exists and the Oil spillage had impacted on it. The lower court was told that the Gbe community in 1997, three years after the 1994 Oil Spillage, appointed the Respondents' as their representatives, having noticed the permeating spillage, to investigate and verify its cause and the loss occasioned by the spillage. It is Respondents case, and here they rely on Exhibit F, that appellant's oil well locations 20, 30 and 33 are situate in their community and that they have always been Appellant's landlords. Exhibits A1 and A2 with plan No. E001127 the Respondents further rely upon, even though same were made by the appellant contrary to PW1 and PW11's oral testimony however show that oil well locations 20, 30 and 33 are from Bomu Manifold oil field and not Bodo West. Furthermore, Exhibit G, the survey plan submitted by the communities affected by the Bodo West Oil Field Spillage of 1994 tendered by the Respondents as evidence of communities impacted upon by the Bodo West Oil Field 1994 spillage dos not indicate the Gbe community as one of those impacted by the spillage. Exh. G was submitted by the affected Communities during the negotiations with Appellant's consultant on the impact of the spillage in their various communities.

It is evident from the testimonies of PW1 and PW11 that none of the six numbers of the committee appointed to investigate and verify the cause of the spillage and its impact is an expert. Respondents' pleadings and evidence on same do not also specify the failed equipment in Appellant's installation that caused the spillage at the time the spillage occurred. Lower court in its consideration of Respondents case at page 211 of the record reasoned as follows:

"Yet there is nothing in exhibit G to show that these [communities] were impacted but they were paid ex-gratia compensation... Otherwise, why did Defendant pay communities who were not shown by exhibit G to have been impacted?

There is only one logical conclusion and it is that Gbe community like other communities who were not shown by exhibit G to have been impacted but were compensated was indeed impacted. The fact that Gbe is not indicated in Exhibit G does not therefore mean that it was not impacted. I therefore find and hold that Gbe was impacted by the Bode West Oil field spillage of 1994."

The court's foregoing finding is inspite of the fact that Gbe, the Respondents' community, is not contained in Ex. G, as one of the communities impacted upon by the spillage and/or which participated in the negotiation that brought about Exhibit G. The finding appears further to have ignored the evidence of DW1 at page 192 of the record of Appeal thus:

"Compensations are paid based on impact and investigation results. SPDC paid what you might call ex-gratia on public relations. To make peace with the Ogonis - Ex-gratia payment is a public relations payment. It does not matter whether there are 20 cases on that issue. The important thing is that the approval and the distribution was not based on impact."

It is clear to me from the pleadings and evidence proffered, the Respondents have not made out their case against the Appellant. The most they did by Exhibits A1, F and H is to establish the fact that Appellants, oil well locations 20, 30 and 33 are in the Appellants Bomu oil field operations of the rather than the Bodo West Oil field where the oil well spillage for which they claim occurred.

The finding of the lower court at page 210 of the record as to the culpability of the Appellant, hereunder reproduced for ease of reference, with due respect to the learned judge does not draw from the evidence before him. The finding reads:-

"...Bodo and Gbe are contiguous. This is also clear from Exhibits A to A2 and H. Furthermore; they share a common water boundary. The spill, polluted this water and the adjoining creeks including plaintiffs' properties and water, the evidence is overwhelming to the effect that the waters in that area are tidally they ebb and flow. Therefore, the waters naturally carried the spilled crude along the water course. DW1 stated that it is a statement of fact that water and oil do no mix. The oil therefore floats on water and the water by the ebb and flow carried the crude into plaintiffs' community and polluted same."

I agree with learned Appellant's counsel that the Respondents did not establish that the source of the oil which the lower court found to have floated on water "and the water by the action of Ebb and flow carried the crude into plaintiff's community and same" was from the Appellants Bodo West Oil field installations. Indeed from their pleadings and evidence the Respondents have not established any failing at the particular field, let alone link same with the oil that purportedly caused them the injury in respect of which they seek redress against the Appellant.

It remains the principle that where the trial court's decision does not flow from the evidence before it, being conjectural and speculative, the Appellate court must step in and set aside the erroneous decision. The trial court's decision is perverse and as urged by the Appellant herein deserves to be tempered with. See:- Iheanacho v. Chigere (2004) 17 NWLR (Pt.901) 130 and F.A.T.B. Ltd. v. Partnership Inv. Co. Ltd. (2003) 18 NWLR (Pt.851) 35.

In resolving the 2nd issue for determination against the Respondents, it must be emphasized that the learned Appellant's counsel is right in his contention that Respondents who have failed to make out their case in the first place are not entitled to rely on the weakness of the Appellant's case. The authority cited and relied upon by the learned counsel in that regard are very apposite. See also Dike v. Okoloedo (1999) 10 NWLR (Pt. 623) 359; Elema v. Akenzua (2000) 6 SC (Pt.111) 26 at 29 - 30; Otanma v. Youdubagho (2006) 2 NWLR (Pt.964) 337 and Onisaodu v. Elewuju (2006) 13 NWLR (Pt.998) 517.

Finally, and this is about the 3rd issue proposed for the determination of the appeal, where culpability of the defendants in respect of the damages the trial court awarded crumbles, consideration of whether or not the trial court's assessment of damages pursuant to the courts erroneous finding as to the defendants' liability becomes an academic exercise. I refrain from such an undertaking. See Okotie-Eboh v. Manager (2004) 18 NWLR (Pt.905) 242 SC and A.G. Federation v. ANPP (2003) 18 NWLR (Pt.851) 182. As a whole, the instant appeal which I find meritorious is accordingly allowed. The lower court's decision is set aside and Respondents claim that has not been made out is hereby dismissed. Parties should bear their respective costs.

**PAUL ADAMU GALINJE, J.C.A**:

I have read in advance the judgment just delivered by my learned brother, Muhammad PJCA, OFR, and I entirely agree with the reasoning contained therein and the conclusion arrived thereat.

For the same reason ably articulated by my learned brother, I too allow this appeal and endorse all the consequential orders made therein including order as to cost.

**T.O. AWOTOYE, J.C.A**.:

I had the privilege of reading the draft of the judgment just delivered by my learned brother M.D. MUHAMMAD, JCA. (OFR). I fully agree with the reasoning and conclusion therein.

This appeal is meritorious. It is allowed. I abide by the consequential orders (including costs) made by my learned brother.