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The Nigerian Public Officers Protection Act: An Anachronistic Legislation Yearning for Reforms

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Abstract

The Nigerian Public Officers Protection Act, (POPA) is part of statute of general application and is deeply rooted in the Public Authorities Protection Act of 1893 which has been repealed in England. The original intendment of POPA is to offer special protection to public officers in the performance of their public duties by entrenching a three-month limitation period for action against public officers in the performance of their duties. However, the emerging jurisprudence has interpreted the definition of person to include artificial persons, thereby bringing in more public entities under the protection. In addition, many public authorities enjoy further protection by reason of entitlement to pre action notice as entrenched in their enabling Acts. The effects of the dual protection are the seeming discriminatory and unequal treatment of private corporations and individual *vis a vis* public authorities. Hence, the widely held view that the dual protection is anachronistic and a clog in the wheel of justice as many litigants have been left without remedy on procedural grounds of non-issuance of pre action notice or failure to institute an action within the three-month limitation period. This paper makes enquiries on whether the dual protection being enjoyed by public officers and institutions constitute impediments to access the court of law and justice. The paper adopts a comparative analysis to investigate the contemporary approaches of a number of countries that have repealed or revised the dual protection offered public authorities. Lessons learned from other jurisdictions formed the basis of final recommendations of the paper which primarily calls for an urgent review of POPA.

Keywords: limitation period, pre-action notice, dual protection, immunity

1. Introduction

The Public Officers Protection Act, (POPA) is an Act enacted to provide for the protection against actions of public officers and institutions acting in the execution of public duties. It protects public officers who have acted pursuant to the duties of their offices from being

harassed with litigation, *Fajimolu* v. *University of Ilorin* (2007) 2 NWLR Pt 1017 at 74. A public office or institution is a person entrusted with the responsibility of perfuming certain responsibilities for the benefit of the public and not for private profit (Halsbury's Laws, 1973). The primary objective of the Act is to protect the acts of public officials and public institutions, after a very short lapse of time, from challenge in the courts. POPA gives considerable measure of protection against liability to public officers acting within the course of their legitimate duties. The origin of this form of protection can be traced to England. The legislation giving special period of limitation for actions against public authorities could be traced to the eighteenth century Lotteries Act 1732, s. 32 and further developed in the nineteenth century Criminal Law Act 1827, s. 75. These special protections and especially those relating to periods of limitation, against public authorities were further and specifically included in the Public Authorities Protection Act of 1893. This Act provides that any action brought against any person for any act done in execution of an Act of Parliament or public duty must be commenced within six months of the ceasing of the cause of action. The provisions of notice and limitations as protections for public officers is part of the received English laws and shared legal heritage deeply rooted in commonwealth countries legal systems. However, the Public Authorities Protection Act of 1893 has since been repealed following the Report of the Committee on the Limitation of Actions in 1949 that recommended that the Public Authorities Limitation Act should be repealed (Law Revision Committee, 1936). The report was implemented by the enactment of the Law Reform (Limitation of Actions, Etc) Act in 1954. Ever since, the limitation periods applicable against public authorities are exactly the same as those applying to any other defendant in England. Regardless of the repeal of the Public Authorities Protection Act of 1893 in England, POPA that is deeply rooted in the former remains an extant legislation within the Nigerian legislative framework (POPA, S 2 (a).

It is generally agreed among scholars, litigants and commentators that the application of POPA in its present form promotes injustices. Some have called for its repeal while others have argued that it be modified. This research interrogates the continued relevance or otherwise of POPA with the aim of determining whether there is a need for it to be repealed or revised in the interest of justice, equity and fairness. It makes enquiries on the perceived widespread injustices occasioned against litigants by the continued application of POPA. This paper engages the use of doctrinal and qualitative research perspectives to analyze the body of existing case law and statutory framework within and outside Nigeria. Part 1 is the introductory. Part II engages with the analysis of the scope, nature, content and exceptions of POPA. Part III is a discourse of the rationale and historical antecedents of POPA with a call for urgent reform. Part IV is a comparative analysis of experiences of other jurisdictions, the lessons learned from the comparative approaches form the basis of recommendations and conclusion in Part V.

1.1.2 Significance of the Study

The results of the study will be of great benefits to individual litigants, corporate litigants and public service. The findings will help in the promotion of unrestricted access to justice in a fair and non-discriminatory manner. It will further help in the delivery of qualitative, optimal

public service and a potential paradigm shift in the approaches of public servants to their responsibilities.

2. Scope of POPA

POPA was incorporated into the Nigerian legislative framework as a Statute of General Application. It was applicable throughout the Federation subject to local re-enactment. This segment examines the nature and limits of the provisions of POPA.

Section 2(a) of the Public Officers Protection Act Cap P. 41, Laws of the Federation 2004 provides as follows:

> Where any action, prosecution, or other proceeding is commenced against any person for any act done in pursuance or execution or intended 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-
>
> The action, prosecution, or 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…

Any person referred to in section 2(a) of the Public Officers (Protection) Act means both artificial and natural persons alike. The provisions of the Act do not only apply to public officers but also public institutions, ministries, departments and agencies. The Public Officers (Protection) Act protects as distinct entities in certain cases public officers holding public offices in the public service. This includes corporation sole or public bodies, corporate or incorporates, in *Ibrahim* v. *J.S. C.* (1998) 14 NWLR (Pt. 584), Iguh JSC held as follows:

> It is thus clear to me that the term "public officer" has by law been extended to include a "public department" and, therefore, an artificial person, a public officer or a public body. I do not think that it can be suggested with any degree of seriousness that the Public Officer (Protection) Law Cap. 52 of the Northern Nigeria, 1963 while it protects public officers, cannot in the same way protect a public department, an artificial person or public body, so long as they are sued for an act done in the execution of their public duties. Nor am I able to accept that Cap. 52 does not protect persons sued by their official titles, such as Attorney-General, Inspector-General of Police or Permanent Secretary. As I have repeatedly stated, the words of the Section of the law under interpretation are clearly not in themselves ambiguous. There is also nothing in either the long or short title as against the full context of the legislation, which suggests that any special meaning is to be given the words "any person" in that law other than their ordinary and plain meaning. I therefore find myself unable to introduce any limitation words to qualify the words "any person" in the legislation is issue.

In *C.B.N* v. *Adedeji* (2004) 13 NWLR (Pt. 890) pg 226 at 245 para F the Supreme Court held:

> The words public officer or any person in public office as stipulated in section 2 of the Public Officers (Protection) Law, 1963, not only refer to natural persons or persons sued in their personal names but that they extend to public bodies, artificial persons, institutions or persons sued by their names or titles.

2.1 Exceptions of POPA

2.1.2 Cases of Continuance of Damage or Injury

In the case of continuance of damage or Injury POPA provides that action can be brought on cessation outside the three months. However, it has been interpreted by the courts that the injury envisaged under Section 2(a) of POPA is continuance of injury or damage which means continuance of legal injury, and not merely 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 the exception. In the case of *Michael Obiefuna* v. *Alexander Okoye* (1961) All NLR 357 at 360 and 362 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

In *Obiefuna* v. *Okoye* 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 Clamant 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.

Again, in *Ekeoga* v. *Aliri* (1991) 3 NWLR (Pt.179) 258 the Plaintiff was injured in the eye by her class teacher in a public school. She was admitted for treatment in many different hospitals during which time three months time limit had lapsed. Despite the fact that she lost the eye and was receiving treatment in the hospitals within the three month time limit. It was held that the action was statute barred.

More particularly disturbing is the decision of the Supreme Court in *Adigun* v. *Ayinde* (1993) 8 NWLR (Pt.313) 516

The Appellant was a civil servant with the Federal Ministry of Agriculture had an automobile accident and sustained very serious injuries in the course of a trip on an official assignment, in an official car driven by the first Respondent, a driver in the ministry. The Appellant had been rushed to the University Teaching Hospital in Ibadan, where he spent 18months, and was further referred to a hospital in Edinburgh in the U.K. for treatment. He was paralyzed from the waist down-wards owing to damage done to his spinal cord. He spent about three years from the date of the accident, moving from one hospital to the other in search of medical treatment.

His disability upon final discharge from hospital was assessed at 100%. On the 21st of January 1981 (a period of about three years) he commenced his action against the 1st Respondent and his employers, the Federal Ministry of Agriculture before the High Court in Minna. 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 and held that the action was statute – barred all the same.

Belgore JSC stated that:

> I share the sentiments expressed in the penultimate paragraph of the judgment that the law has been cruel to the appellant. The appellant has been caught in the strait jacket of computation of time within which to sue and legally seems to have no remedy. The remedy he cannot enforce is that of the litigation in Court of law because his suit is statute-barred.

In *Adigun* v. *Ayinde* (supra) the Supreme Court was of the view that the injury referred to in POPA is the injury sustained on the day of the accident and not the continuous effect of the injury on the appellant and therefore the provision in the Act as to the continuance of damage or injury is with effect from when the accident occurred. Hence, the effect of the injury after the three months period, such as medical treatment, hospitalization and the likes - does not constitute continuance of damage or injury. The apex court in the *Adigun*'s case made a distinction between continuance of damage or injury and continuous effect of injury or damage. While the continuance of damage or injury tolls the time for the computation of the period of limitation, continuous effect of injury or damage does not.

In the case of *Olugbenga Jay Oguntuwase* v *University of Lagos,* Unreported suit no. NICN/LA/449/2017 the Claimant instituted this action seeking a declaration that the termination of his employment was unlawful. The defendants pleaded the provisions of POPA, Claimant having instituted the suit after the three month time limit. The Claimant sought exception because at the time he received the letter of termination of employment he was nursing an injury he sustained that kept him out of the country and away from work. The Claimant further claimed that by reason of the injuring he was nursing it was impossible for him to travel to Nigeria to initiate legal proceedings on his termination. Hon Justice E. A. Oji, PhD of the National Industrial Court held as follows:

> By the admission of the claimant, the dismissal of the claimant is the act constituting the basis of this action. Also by the same admission, this action would be statute barred by the calculation from the date of the dismissal. The dismissal created an injury or damage which was conclusive for giving rise to this cause of action. There was no other act of dismissal to constitute a 'continuing' injury. Even though the effect of the injury from the alleged accident was continuing, that accident and the consequent injury do not constitute the ground for this action. The effect of the accident has been raised as the reason for not commencing the action on time. Even, in the cases of *Adigun* v. *Ayinde* (1993) 8 NWLR (pt 313) 516 and *Ekeogu* v.

> *Aliri* (1991) 3 NWLR (Pt 179) 258, which were founded on injuries giving rise to the cause of action, the courts found that the continuous effects of the injuries could not prevent the defendants from relying on section 2 (A) of the Public Officer Protection Act. Therefore, assuming the cause of action in this case was founded on the injury sustained in the accident, it still will not have availed the claimant in this case.

2.1.3 Action Outside Statutory Duty/ Criminality

A criminal action outside the public officer's duties does not fall within the scope of POPA. Galadima, J.S.C, in *Attorney-General of Rivers State* v. *Attorney-General of Bayelsa State & Anor*.(supra) at page 149,paras F - G puts it thus:

> The second exception to the application of the Act as a defence is that it does not cover a situation where the person relying on it acted outside the colour of his office or outside his Statutory or Constitutional duty as claimed by the Plaintiff in this suit. See: *Nwankwere* v. *Adewunmi* (1967) NWLR 45 at 49; *Anozie* v. *Attorney-General of the Federation* (2008) 10 NWLR (Pt. 1095) 278m at 290 - 291

Nwankwere's case borders on acts of criminality of a Public Officer. 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 acclaimed damages 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 act of criminality by public officers. It is trite law that Public Officers Protection Law will not apply when the public officer engages in act of criminality (Peters, 2018).

In *Fasoro* v. *Milbourne & Anor* (1923) 4 NLR 8, an assistant district officer was held liable for assault and battery for ordering a police constable to forcefully evict the plaintiff from a premises purported to have been leased for conducting informal proceedings of Provincial Court. It was held that the provisions of POPA failed to avail him protection as he did not act within his powers.

In *Kwara State Pilgrims Welfare Board* v. *Jimoh Baba* (2018) LPELR-43912 (SC) the Supreme Court held that POPA will not apply where there is evidence of bad faith on the part of the public officer. The Respondent retrieved money from the Kwara State Government House for lodgment in the bank. He retained one of the three bags of money and failed to pay it into the bank. Upon the continued failure of the Respondent to pay the money into the bank, it was discovered that N125, 000.00 was missing. The Respondent was thereafter suspended. After enquiries the Board decided to prosecute the Respondent who claimed that the three month time limit under POPA had lapsed. At the Supreme Court, Bage JSC, questioned whether POPA could have intended to protect criminals, he then observed:

> …It is not and cannot be the intention of the law to compensate dishonest

> public officers with statutory protection that defeats the essence of probity in service… Doing otherwise would amount to incentivizing dishonesty in service by encouraging potential violators of public trust to benefit and reap the evil fruits of their dishonest behavior at the expense of national good and public morality.

2.1.4 Cases of Recovery of Land

POPA does not apply to cases of recovery of land and land disputes. Galadima, J.S.C, in *Attorney-General of Rivers State* v. *Attorney-General of Bayelsa State & Anor*. (supra) at page 150,paras. A-C, held instructively thus:

> Again, the Plaintiff argues that the protection afforded Public Officers under the Act does not apply in cases of recovery of land. I have noted however, that the Plaintiff's action is related to recovery of land. The claim, particularly, of Oil wells fields are in issue, as well as the revenue therefrom. In view of the foregoing and for the fact that the Plaintiff is mostly seeking for declaratory reliefs having to do with the claim of entitlement to derivative funds from the disputed Oil fields, which have fallen due and which they complained have not been paid, the Act cannot be invoked to defeat the grant of such reliefs.

2.1.5 Breaches of Contract

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* (2002) 18 NWLR (pt.798) 162 at 196 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 *Okeke* v. *Baba* (2000) 3 Soule v. L.E.D.B. (1965) LIR 118; Salako v. L.E.D.B. (1953) 20 NLR 169.The Public Officers Protection Act was not intended by the Legislature to apply to contract. The law does not apply in cases of recovery of land, breaches of contract or for claims for work and labour done.

2.1.6. Claims for Work and Labour Done

It is now settled law that section 2 of the Public Officers (Protection) Act does not apply to for work and labour done and cases of contract. See *Nigerian Ports Authority* v. *Construzioni General Farsura Cogefar Spa & Anor*. (1974)1 ALL N.L.R. 463. The court, at pp 476 to 477 held as follows:

> We shall now deal with the other point which to our mind, does not seem to be well-settled, namely whether the kind of statutory privilege which we have been considering is applicable to an action founded upon a contract. In other words, whether S.97 of the Ports Act applies to cases of contract, we think that the answer to this question must be in the negative. We agree that

> the section applies to everything done or omitted or neglected to be done under the powers granted by the Act. But we are not prepared to give to the section the stress which it does not possess. We take the view that the section does not apply to cases of contract. The learned Chief Justice, in deciding this point, made reference to the case of *Salako* v. *L.E.D.B. and Anor 20 N.L.R. 169* where de Commarmond S.P J. as he then was, construed the provision of S.2 of the Public Officers Protection Ordinance which is almost identical with S.97 of the Ports Act, and thereafter stated the law as follows:-
>
> I am of opinion that section 2 of the Public Officers Protection Ordinance does not apply in cases of recovery of land, breaches of contract, claims for work and labour done, etc. We too are of the opinion that de Commarmond S.P.J. has quite rightly stated the law in the passage of his judgment cited above. It seems to us that an enactment of this kind i.e. S.97 of the Ports Act is not intended by the Legislature to apply to specific contracts.

3. Rationale for POPA

The Supreme Court of Nigeria held in the case of *Ekeogu* v. *Aliri* (1991) 3 NWLR (Pt.179) 258 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', though, it does not afford protection for conduct that is criminal or acts done outside the scope of employment. See, *Yabugbe* v. *C.O.P*. (1992) 4 NWLR (Pt.234) 152.

The policy behind POPA is founded on the belief that public institutions may be severely handicapped by having to retain records for longer periods than necessary, *Rawal* v *Rawal* [1990] KLR 275. This is understandable because as at the time POPA was enacted over hundred years ago, record were being preserved manually. The limitation period was needed because the defendant might have lost the evidence to disprove a case, in the event of a long dormant claim. In addition, there would be problems arising from loss of evidence, due to the substantial staff turnover of public authorities and the transfer policy of public authorities. However, it is generally agreed amongst scholars that these problems do exist but administrative problems should not be used to constitute a clog in the wheel of justice against non public officers. In addition, big companies and multi nationals also encounter similar difficulties but are not so protected by short limitation period and requirements of notice.

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 (Harlow, 2009). 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. In furtherance, they are entitled to the special protections under POPA and the requirements of pre action notice. Regardless, these special protections for public officers are discriminatory and are impediments to access to justice. These reasons are not good enough for giving preferential treatment to public officers and institutions. If public officers and institutions are protected, why is there no protection given to big companies of comparable size in the private sector? Private companies and individuals suffer sustained prejudice by the application of the provisions of POPA and the requirement of pre action notice. Their claims against public officers and institutions are being defeated by merely procedural advantages secured under the special protection.

3.2 Urgent Need for a Review

The provisions of POPA though necessary to protect public officers from being harassed by frivolous litigation by ensuring that parties who claimed to have suffered legal injury act timeously. However, it has been shown above that it has sometimes occasioned injustice to litigants with genuine causes of action, leaving them without remedies, even in cases where delay was not deliberate. It is evident from the analysis of case law above that POPA has failed in balancing the interest of public officers and others and has failed to ensure justice for all. In fact, it has impeded justice for non public officers. These litigants with genuine causes of action are shot out and are shot out of accessing justice without any solution. The Supreme Court lamented in the *Adigun's* case that its hand are tied, despite its obvious sympathy for the Claimant, POPA constituted a hindrance to access to justice, being more an instrument of injustice in its present form. Hence, 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 POPA. Oyewo (2016) unequivocally called for the repeal of POPA because his research findings reveal that POPA has caused a lot of unmitigated injustices. The Nigerian Law Reform Commission (2015) has equally called for the repeal of POPA, 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. Furthermore, some states of the federation have removed the three months limitation period and make the limitation period the same with private individuals. See S. 42 and 44 of the Limitation Law of Abia State Cap.24 of 2001; Sections 42 and S.44 of the Public Officers Protection and Limitation Law, Cap.102, 2009 of Eboyin State, Section 43 of the Limitation Law, Cap 80. Laws of Rivers State. These provisions of Public Officers Protection and Limitation Law, Cap.102, 2009 of Eboyin State enjoyed judicial support in the case of *Uduma* v. *Attorney General of Eboyin State*, (2013) LPELR 21267

4. Dreadful Effect of a Combination of POPA and Pre-Action Notice

Most often public institutions will 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 POPA. This has provided on numerous occasion, windows of

opportunities for public officers and institutions to escape from liabilities arising from their wrong doings. This is placing public officers and institutions in a different and privilege position from any other litigants.

In addition to the three months limitation period, many public institutions, agencies and bodies are also entitled to pre action notice before a suit can be validly commenced against them (Oluyode, 1988). 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:

> It is a mandatory notice that has to be given to a defendant in required cases. It is a condition precedent to commencement of action where such notice is required. Failure to give such notice makes the suit incompetent and remains so unless waived by the party entitled to such. (Stanley, M.M. & Agaba J.A ,2015)

For example, S. 83 (2) of the Nigerian Railway Corporation, 2004 provides:

> 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. Similarly see S. 110 (2) of the Ports Act, Cap 361 Laws of the Federation.

This provision has been validated as a condition precedent to commencing a suit against the Railway Corporation and other similar public corporations and bodies that have similar provisions in their enabling enactments. In *Bakare* v. *Nigerian Railway Corporation* (2007) 17 NWLR (Pt. 1064) 606, the Supreme Court held that an action can only be properly instituted if pre-action notice is given in cases where they are demanded. See also *Abraham Adebisi Gbadamosi* v. *Nigerian Railway Corporation* (2007) 17 NWLR (Pt. 1064) 606; *Umukoro* v. *Nigerian Port Authority* (1997) 4 NWLR (Pt. 502) 1. Non service of pre-action notice renders a suit incompetent as it removes the jurisdiction of the court to entertain the suit. 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. More worrisome is that when a public corporation is privatized it loses these privileges it enjoyed when it was a public corporation. This point was settled in *Mrs G.I. Oyeleke* v. *NICON Insurance, Plc* Suit no. NICN/L/14/2016 Judgment delivered on 24th November, 2007, the court held that since NICON has been privatized by the Federal Government, it has lost the privilege of being entitled to a pre action notice by virtue of the Public Enterprise (Privatization and Commercialization) Act and that the 2nd respondent is a limited liability company incorporated under the Companies and Allied Matters Act, 1990 and as such cannot enjoy the benefit of a pre action notice as it can sue and be sued without serving it a pre action notice.

The protection of public bodies through pre action notice requirement and POPA is clearly and unashamedly favouritism. It has caused many cases as shown above to fail on the altar of procedural irregularities, it increases costs and incidentals and has been a worrying source of injustice. 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 POPA 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? In sum a combination of provisions of POPA and Requirements of Statutory pre action notice seemingly amount to denial of justice. These provisions are out of date with the reality of modern governance, a modification is strongly advised. They are a very serious infringement of the rights of individuals to access the justice system. This author agrees with the opinion of Denton-West JCA in *Nwaka* v. *Head of Service, Ebonyi* State that:

> 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 (2008) 3 NWLR (Pt. 1073) 156 at 163

5. Lessons From Other Jurisdictions

5.1 Position in Kenya

The position in Kenya was well analyzed in the case of *Kenya Bus Service Limited & Another* v. *Minister for Transport & 2 Others* (2012) EKLR. The plaintiff challenged the constitutionality of the special protections offered to public authorities in Section 13A (1) of the Government Proceedings Act (GPA) which states as follows:

> No proceedings against the Government shall lie or be instituted until after the expiry of a period of thirty days after a notice in writing has been served on the Government to those proceedings.

In addition the provisions of Section 3(1) and (2) of the Public Authorities Act (PALA) which provides as follows were challenged:

> 3. (1) No proceedings founded on tort shall be brought against the Government or a local authority after the end of twelve months from the date on which the cause of action accrued.
>
> (2) No proceedings founded on contract shall be brought against the Government or a local authority after the end of three years from the date on which the cause of action accrued.

The plaintiffs argue that the combined statutory protections offend Articles 27 (1), (2), (4) and (5) of the Kenyan Constitution. These constitutional provisions guarantee every person equality before the law, equality of protection and benefits, equal enjoyment of fundamental

rights and non discrimination, (Equivalent provisions can be found in S.17 (1) and S.38 of the Constitution of Nigeria). The plaintiffs contend that the 30 day limitation period only applies to public authorities and not to other companies or litigants. In addition, it is a condition precedent to commencing a suit against public authorities. The plaintiff argues that protections perpetuate inequality and limit access to justice by non government litigants.

The court after acknowledging that globally Law Reforms have ensured the repeal or modification of these special protections held that the protections are justified in Kenya because there has not be a statutory reform to that effect in Kenya. The court held further that on the basis that the government is a large organization with diverse, extensive activities and high turnover of staff, these protections are offered to enable public authorities investigate claims and decides whether to settle or contest liability. Short period limitation period also offers protection to public officers and institutions after they might have lost evidence for their defence from being disturbed after a long lapse of time. Hon. Justice Majanja admitted though that as much as the objectives of the protections are laudable, the effects cause hardship to ordinary litigants. Finally, the court amongst others held that "Section 13A of the Government Proceedings Act as a mandatory requirement for the institution of suit against the government violates the provisions of the Article 48 of the Constitution [right of access to justice]".

Despite this judgment, it is significant to note that in Kenya, the period of limitation is one year as opposed to the three-month period of limitation in POPA. In addition, under Order 3 rule 2 of the Civil Procedure Rules of Kenya the penalty for non –compliance is not to lose the right to agitate the cause of action but to be denied costs incurred in causing the matter to proceed to action. This is at variant with the Nigerian position, under the Nigerian jurisprudence the penalty for non-compliance with pre action notice is striking out of the matter. See *Abraham Adebisi Gbadamosi* v. *Nigerian Railway Corporation*(supra); *Umukoro* v. *Nigerian Port Authority* (supra), by the time the litigants re-institute the matter the three month limitation period would have lapsed.

5.1.2 Position in South Africa

The position of special protections for public officers and institutions in South Africa was tested in the case of Constitutional Court of South Africa in the case of *Leach Mokeli Mohlomi v Minister of Defence* (Case CCT 41/95). In this case, a civil action was referred to the Constitutional Court of South Africa from the Witwatersrand Local Division of the Supreme Court; the plaintiff sued the defendant for damages for the consequences of injuries which the plaintiff sustained on 2 May 1994 when a soldier shot him intentionally. After the shooting the boy was admitted to a hospital, where he received treatment for seven weeks. Afterward, he sought legal assistance from the Campus Law Clinic of the University of the Witwatersrand, an office run by lawyers and students which provides indigent people with free legal services. It undertook to handle his case. It was mistakenly recorded that the boy was shot by a policeman. The Clinic then sent a pre action notice to the Minister of Safety and Security in compliance with section 32(1) of the Police Act (7 of 1958). The lawyer in charge of the case, who knew that a soldier was said to have done the shooting, detected the mistake six weeks afterwards when he had the occasion to examine the file. He immediately gave the defendant the notice.

By that time, however, the deadline for the institution of the action was too close to brook the delay in launching it that would have allowed thirty-one days to elapse before its commencement. The defendant filed a preliminary objection, invoking section 113(1) of the Defence Act (44 of 1957) and taking the preliminary point of non-compliance with same. The sub-section provides that:

> No civil action shall be capable of being instituted against the State or any person in respect of anything done or omitted to be done in pursuance of this Act, if a period of six months ... has elapsed since the date on which the cause of action arose, and notice in writing of any such civil action and of the cause thereof shall be given to the defendant one month at least before the commencement thereof.

The defendants contended that the requirements of the dual protections were not met in this case because the action was instituted after the six months limitation period and that the pre action notice had been given less than a month in advance. The Claimant contends that the case was filed within the six months limitation period. Regardless however, these special protections violate the interim Constitutional provisions of non-discrimination and equality of access to a court of law; sections 8, 22 and 28 of the interim Constitution (Act 200 of 1993) and was therefore invalid. The Court held that the provision of the Defence Act, 1957 which required that action be brought within six months when the cause of action arose and by issuing a notice of action one month before the commencement of the action contravened section 22 of the Interim Constitution which provided that, "every person shall have a right to have justiciable disputes settled by a court of law or, where appropriate another independent forum." The Constitutional Court held that the provision read as a whole must be construed:

> …against the background depicted by the state of affairs prevailing in South Africa, a land where poverty and illiteracy abound and differences in culture and language are pronounced, where such conditions isolate the people whom they handicap from the mainstream of the law, where most persons who have been injured are either unaware of or poorly informed about their legal rights and what they should do in order to enforce those, and where access to professional advice and assistance that they need so sorely is often difficult for financial and geographical reasons. (para 17)

The court concluded that the effects of the dual special provisions is to deprive the litigant an adequate and fair opportunity to seek judicial redress for wrongs done by public authorities against them and therefore section 22 was violated. In coming to the conclusion, the court considered the rather strict provisions of the limitation period which in effect provided for a window of five months in which to give notice and file suit.

This a very sound judgment recommended to the Nigerian judiciary, across the globe , it is generally agreed that that a short limitation period in favour of public officers and intuitions amounts to impediments of access to justice and cannot reasonably be justified in a constitutional democracy. Mandatory pre-condition notices and short period of limitation tend

to undermine probity, accountability, transparency and good governance. For example in England, the principles expounded in the reports of two Committees are relevant: as far back as 1936 the Law Revision Committee in its Fifth Interim Report titled "Statutes of Limitation" (1936, Cmd 5334) stated:

> We have carefully considered how far it is advisable to interfere with the policy of the Public Authorities Protection Act. That policy is quite clear, namely, to protect absolutely the acts of public officials, after a very short lapse of time, from challenge in the courts. It may well be that such a policy is justifiable in the case of important administrative acts, and that serious consequences might ensue if such acts could be impugned after a long lapse of time. But the vast majority of cases in which the Act has been relied upon are cases of negligence of municipal tram drivers or medical officers and the like, and there seems no very good reason why such cases should be given special treatment merely because the wrong doer is paid from public funds.

In addition, the Report of the Committee on the Limitation of Actions in 1949 chaired by Lord Justice Tucker (Cmd 7740) recommended that the Public Authorities Limitation Act should be repealed and this report was implemented by the enactment of the Law Reform (Limitation of Actions, Etc) Act in 1954. Ever since, and till date the position in England is that special protections no longer apply exclusively to public authorities, same privileges apply to public officers and any other defendant.

In Ontario, Canada a Report on Limitation of Actions (1969) of the Ontario Law Reform Commission made recommendations that special protections for public authorities be discontinued in all legislations. The Commission observed that:

> A notice of claim which must be given within a limited time as a condition precedent to the bringing of an action achieves the same result as a limitation period. It is, in effect, a limitation period within a limitation period ... The Commission does not believe that a person should be absolutely barred from bringing an action merely because he has failed to give the notice required. If such requirements are to continue, and there is some justification for their retention [in certain cases], then the courts must be able to give relief from any of these provisions where it would be just to do so. (Ibid. at 81 and 84)

6. Conclusion

The results of the above inquiries and research findings have shown that the opportunity for revising POPA and pre action notice should be taken to overhaul entirely the concepts of limitation periods as they affect public officers, particularly in the light of constitutionally guaranteed access to court and the principles of fair hearing, S. 36. (1) CFRN. The injustices in Adigun's case and *Ekeoga*'s case extensively discussed above should not be allowed to fester. As shown above, other commonwealth countries that inherited similar legislations by virtue of statutes of general application have revised such obnoxious laws. As indicated above,

attempts have been made by the National Assembly and the National Reform Commission to revise POPA, but such attempts proved abortive. The National Assembly is entrenched with the responsibility of making laws for the peace, order and good governance of Nigeria or any part thereof, S.6 CFRN and should take urgent steps to revise POPA to ameliorate the injustices being perpetuated by this instrument. In sum, it is recommended that:

1. Private litigants and public authorities should, in general, be placed on an equal footing, POPA should therefore be revised in line with other general statute of limitations, in particular for actions arising out of personal injury cases, a new limitation period of three years is advised and that it operate uniformly, without the need for prior notice, whoever the defendant may be.

2**.** Mitigating the problems POPA is causing by making the period of limitation run from the accrual of the cause of action rather than the date of the act, neglect or default in question, or in the event of injury the exception should accommodate the effect of the injury or the victim being biologically unaware of his surroundings, the date he became aware.

3. POPA should be amended to apply strictly to acts of public officers committed in the course of their duties and not act of public institutions, as private companies and individuals do not enjoy such benefits.

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