

## RE-ASSESSING PROOF OF TITLE TO LAND IN NIGERIA

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### Abstract

*From time immemorial, land has sustained every aspect of our lives. The need to prove title to land in Nigeria is illustrated in the numerous conflicts and disputes concerning land in Nigeria. There has been tribal, communal, family and individual wars over land. Proving title to land is therefore imperative for the maintenance of peace and order in the Society. The role of equitable interest in land has always been a major concern to property lawyers especially in dealing with property rights from the point of view of conveyancing transactions. Equitable interests are rights over property though invalid at common law, was recognized and enforced by the court of chancery in mitigation of the harshness of common law. This paper employs a doctrinal method of legal research and finds that the equitable interest in land should be included in the various ways of proving title to land. A legislative intervention is equally advocated to entrench equitable interests as a means of proving title to land. This paper recommended a legislative recognition of equitable interests in land, reform of the Land Use Act, and introduction of title insurance in Nigeria.*

**Keywords:** Equitable interests, Land, Proof, Title to land

### 1.0 Introduction

Land is one of the greatest natural resources on the surface of the earth. Unarguably, land has proven to be a God-given gift that assists man in every aspects of his endeavors, including shelter, the building of roads

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and infrastructure. However, in this study, we shall focus on the idea of the land tenure system in Nigeria, how it regulates land ownership, and mainly how to prove title to land in Nigeria. A fundamental question that triggers this study is “what happens when land rights is unsecured? It leads to conflicts, instability, tribal wars and other kinds of social unrest.

Before the advent of the British Government in Nigeria in 1861, Nigerians operated a Customary Land Tenure system which was indigenous to the people. However, the concept of land ownership today has been transformed following the promulgation of Land Use Decree No. 6 of 1978 which later became the Land Use Act of 1978<sup>1</sup> proving title to land in Nigeria is an important phenomenon. Before there is need to prove title to any land, the concept of land acquisition and method of acquiring land must be dealt with. In most cases, land is acquired through inheritance or outright sale it is contended that title to land in Nigeria today gains its potency from the right to acquire and own irrevocable property anywhere in Nigeria as guaranteed by the constitution.<sup>2</sup> During colonial rule, ownership of land was regulated by the colonial authorities. For instance, in 1900, Lord Lugard enacted the Land proclamation Ordinance 1900 which stipulated that land title can only be acquired through the commissioner. Subsequently, the British introduced the court system and proof of title to land began to evolve in Nigeria. The need to prove title has led to further adjustments and expansions the law and this research examines it. The need to prove title to land in Nigeria is illustrated in the numerous conflicts and disputes concerning land in Nigeria. Land conflicts has been in existence in Nigeria even before colonization as is revealed in territorial boundary disputes, inter-communal wars, and even family land disputes. Proving title to land assists in the resolution of these disputes. The concept of ‘proof of title to land’ has been in existence since time immemorial.

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<sup>1</sup> i.o Smith, Practical Approach to Law of Real Property in Nigeria (Lagos: Eco watch publications Ltd) 1999

<sup>2</sup> The Constitution of the Federal Republic of Nigeria, 1999 as Amended. (s.43) pg 6-8

Whenever there is conflict or dispute as to ownership or title to land, it is usually resolved by proving the said title.

The concept of equity dates back to the Aristotle's Ethics. Distinction was made between the fields of law where universal rules were strictly applied. The rigidity of the system occasioned injustice in some cases. The second field was equity which sets to correct the defects in law. Some jurisdictions like Germany and Australia has brought the concept of equity in their Domestic legal system.<sup>3</sup>

Equitable interests are rights over property which though invalid at common law, was recognized and enforced in the court of Chancery. At common law, certain formalities had to be observed to create or transfer a legal interest in property.<sup>4</sup> Leases are required to be in writing. Also, a Deed has to be executed for every lease<sup>5</sup> However, noncompliance with these formalities may instead of invalidating the contract Agreement, give rise to an equitable interest. The increasing nature of disputes over title to land, has brought to the fore the need for the stakeholder to reassess the conventional or traditional methods of proving title to land, to include proof by equitable interest.

## **2.0 Conceptual and Theoretical Framework for Proof of Title to Land**

The Interpretation Act<sup>6</sup> defined land as:

*'Land includes any buildings and any other thing attached to the earth or permanently fastened to anything so attached but does not include minerals',*

Smith<sup>7</sup> opined that the definition of land as contained in the Interpretation Act is restrictive. The word 'includes' does not help in

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<sup>3</sup> [www.Academiccoun.com](http://www.Academiccoun.com)Aristotle at the Foundation of the Law of Equity. Accessed 12 September, 2024

<sup>4</sup> Statute of Frauds 1677.s.1 &4

<sup>5</sup> Real Property Act s 2&3

<sup>6</sup> Cap 123 LFN 2004 Section 18

<sup>7</sup> Op cit.

construing the extent of the definition for although it implies that other things not included in the definition may be land, what constitutes other things is not certain.<sup>8</sup>

The Property and Conveyancing Act<sup>9</sup> defined land to include:

*‘The earth surface and everything attached to the earth otherwise known as fixtures and all chattels real. It also includes incorporeal rights like a right of way and other easements as well as profits enjoyed by one person over the ground and buildings belonging to another’*

Nwabueze<sup>10</sup> endorses the definition and added that it is to be agreed even among laymen that land does not just mean the ground and its subsoil but equally includes all structures and objects like buildings standing on it. He went further to say that land includes even abstract incorporeal rights like right of way and other easements as well as profits enjoyed by one person over the ground and building as belonging to another.

## **2.1 Title to Land**

Title can be defined as the legal right to own property. In an action for declaration of Title to land, the party claiming title must prove facts that will convince the court that the person claiming title is the rightful owner of the property in dispute. According to sir Frederick Pollock,<sup>11</sup> title involves the degree of control and forms of control, use and enjoyment recognized and protected by law. This means that title is strongly associated with possession. Title may be absolute or restrictive. When title is absolute, it is known as a perfect title. It is free of any form of encumbrances or deficiencies. An absolute title gives an unequivocal right of ownership to the owner and it cannot be disputed or challenged by anyone else. The holder of an absolute title is free to sell the property

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<sup>8</sup> Practical Approach to Law of Real Property in Nigeria (Lagos: Eco Eco Watch Publications Ltd) 1972 pg 6-8

<sup>9</sup> Cap 100 LWN 1959 S2

<sup>10</sup> B.O. Nwabueze ‘Nigerian Land Law’(Enugu: Nwanife Publishers Ltd, (1972) pg. 3

<sup>11</sup> Pollock Jurisprudence and Long essay (London: Macmillan & Co Ltd, New York. St. Martin’s Press 161) p.93

at his or her own discretion and it would convey an absolute title to the buyer<sup>12</sup>. It is important to note that a buyer cannot obtain an absolute title from a seller who does not possess it<sup>13</sup>. Title may be restrictive when a person is only entitled to occupational or possessory right<sup>14</sup>. It may be in the form of a mortgage, tenancy or even lien.

Acquisition to title to land may be original or derivative.<sup>15</sup> It is original where it is acquired by first settlement or conquest.<sup>16</sup> Derivative title is where title is transferred from one person to another and the owner must, transfer all his interest in the property and it must not be subject to any condition.<sup>17</sup>

## **2.2 Land Use Act**

As at today the Land Use Act is the principal legislation for the use and management of land in Nigeria. The Land Use Act<sup>18</sup> was enacted on the 29<sup>th</sup> day of March 1978 as decree No 6 1978. The Land Use Act changed the nature of land ownership and title. The major reason for the promulgation of Land Use Act was to facilitate land acquisition for development by government and individuals. The Act however did not eradicate private interests in land but rather vests radical title to all land in each State to the Governor to hold in trust for the common benefit of all Nigerians.

The Act established a dual scheme of management and control of land between the governor and the local government. The Act empowered each of them to grant right of occupancy in appropriate cases. The Act introduces two types of rights of occupancy. Right of occupancy granted by the governor is called Statutory Right of Occupancy while that granted by the Local Government is called customary right of

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<sup>12</sup> <https://www.investopedia.com/Absolute> Title: What it is, How it works FAQs. Accessed on 12 September 2024

<sup>13</sup> *ibis*

<sup>14</sup> *ibid*

<sup>15</sup> *ibis*

<sup>16</sup> *ibid*

<sup>17</sup> *ibid*

<sup>18</sup> It was enacted by President Olusegun Obasanjo

occupancy. Both types of occupancy entail express grant by the governor and deemed grant. Deemed grant is given in respect of land vested immediately before the Land Use Act.

### 2.3 Ownership

Ownership is the right of exclusive use of property. It is the exclusivity of the property of the person called the owner<sup>19</sup> Idrisu stated that ownership implies that the owner's title is superior to any other right which may exist on the property or land. Ownership connotes the totality of rights and powers that are capable of being exercised over a thing or property. Nwabueze<sup>20</sup> succinctly put it, ownership implies the fullest amplitude of rights of enjoyment, management and disposal over property. In the English parlance, ownership is defined as a right over a determinate thing, indefinite in point of user, unrestricted in the point of disposition and unlimited in point of duration. This speaks of absoluteness of ownership.

*In Shaba & Ors v Kpotun & Ors*,<sup>21</sup> it was held that land belongs to the community, the village or the family and never to the individual in Nigerian customary law. It is however contended that the concept of ownership was prevalent in Nigeria customary law as being collectively owned by the community or family. These rights and powers include the right to make physical use of the land, the right to generate income from the land in terms of cash or service or in kind and the power to manage the land which includes the power to alienate all powers and rights in it.<sup>22</sup>

In Nigeria today, the Land Use Act<sup>23</sup> has vested all land in each State in the governor for the use and common benefit of all Nigerians. Today, the only right enjoyed on land is right of occupation.

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<sup>19</sup> Idrisu I I Understanding Nigerian Land Law I2nd edition (Zaria, ABU Press Ltd 2008) p 12 -13

<sup>20</sup> Nwabueze 'Nigerian Land Law' (Enugu: Nwanife Publishers Ltd, (1972) p 9

<sup>21</sup> (2021) LPLER54766 (CA

<sup>22</sup> Olawoye C O *Title to Land in Nigeria* (Evans Brother Ltd 1974) p 84

<sup>23</sup> Land Use Act 1978 s.1

## **2.4 Possession**

Possession means physical control coupled with the intention to exercise such control. The right to possession is usually an incidence of ownership. Actual possession is against the whole world except the true owner.<sup>24</sup> A person claiming possession must prove not only his relationship to the land, he must also prove his physical acts showing exclusive control of the land. The act of building, or planting on land are acts of possession.

## **3.0 Legal and Institutional Framework for Proof of Title to Land**

### **3.1 Title to Land under the Land Use Act**

The Land Use Act<sup>25</sup> vests radical title in the governor subject to the provisions of the Act. It is very important to note the governor is not beneficially entitled to the land but he is only a trustee of the land for the benefit of all Nigerians in that State. The governor holds nominal ownership of the land because a settled principle of law dictates that a trustee is not the real owner of trust property but only has control and holds nominal title in the land for the purpose of accomplishing the objectives of the particular trust. The effect of this contention is that the governor is vested title in order to enable them administer the land within the territories of their states for the purpose of achieving the objectives of the Act. The fact that the governor has radical title, no person can claim unlimited interests in land since commencement of Land Use Act. The reason is because whatever interest is claimed in land is subject to the governor's superior title.

In *Yakubu v Simon Obaje*,<sup>26</sup> the Supreme held that the provision of Governor's consent for the alienation of interest in land under the Land Use Act does not apply to land not covered by a Statutory Right of Occupancy.

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<sup>24</sup> Idrisu I. I Understanding Nigerian Land Law I2nd edition (Zara , ABU Press Ltd 2008)

<sup>25</sup> Land Use Act 1978 s.1

<sup>26</sup> (2017) LLJR-SC

The Land Use Act gave the control and management of Land to the governor and the local government.<sup>27</sup> The Act<sup>28</sup> established for each local government a body called ‘the Land Allocation Advisory Committee’ to advise the local government on matters connected with management of land to which (b) of (1) relates.

The Land Use Act introduces two rights of occupancy. A right of occupancy. A right of occupancy granted by the governor which is called Statutory right of Occupancy and a Customary Right of Occupancy granted by the Local government. A statutory Right of Occupancy may be granted expressly or by operation of law or Deemed grant.<sup>29</sup> Likewise, the local government has powers conferred upon it by the Act to grant customary Right of occupancy in respect of lands not in urban areas. Customary right of occupancy may be granted expressly or by operation of law.<sup>30</sup>

### **3.2 Certificate of Occupancy**

The certificate of occupancy introduced under the Act is a document under the hand of the Governor or the commissioner to whom such power has been fully delegated by the Governor in certification that the person disclosed therein is entitled to the right of occupancy over the land or property described therein.<sup>31</sup> From the provisions of section 9 of the Act, it is clear that it is only the Governor can issue a certificate of occupancy.

It is noteworthy that a certificate of occupancy cannot cure defect in title so that where the applicant had earlier been registered as a holder of a statutory or customary right of occupancy by virtue of a false claim, a certificate of occupancy issued in such circumstance is void. In *C.S.S Bookshops ltd v Registered Trustees of Muslim Community in Rivers State & three others*<sup>32</sup> the supreme court emphasized that the mere grant

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<sup>27</sup> Land Use Act s.2

<sup>28</sup> s2(5)

<sup>29</sup> s 591) (a), s 34

<sup>30</sup>s.6, 36

<sup>31</sup> s.9

<sup>32</sup> (2006) 11 NWLR (Pt 995) 530 at 561-562.

of right of occupancy over a land in respect of which there is already a right of occupancy or an existing interest in favour of another person, does not amount to the revocation of the prior right of occupancy or existing interest. Any person without title to a parcel of land in respect of which the certificate of occupancy is issued acquires no right or interest which he did not have before.

#### **4.0 Methods of Acquiring Title to Land in Nigeria**

It is very important to note that generally, there are two kinds of interests in land which is largely accepted and enforced by Nigerian Courts.

- i. **Legal Interest:** A legal interest or right can be defined as the right or title in a property conferred on an individual by law. It is derivable from a legal instrument which must have been created according to laid down formalities. It is a right historically recognized by common law courts in England.
- ii. **Equitable Interest:** it is a right or interest in a property conferred by equity. They are a specie of rights over property not known to common law. They were recognized and enforced by the court of chancery administering equitable jurisdiction. Equitable interest operates to protect a party, affected by strict applications of legal rules particularly where there is failure to comply with legal formalities.

**5.0 Modes of Acquiring Interests in Land:** Title to Land may be either original or derivative.

#### **5.1 Original Title**

An original title is simply title that creates a right for the first time. It is seen as the foundation of the title beyond which there is no other title. Persons who bear original title to a piece of land are usually called the first owners or founders of that piece of land. Original title to a piece of land can be acquired through:

- i. **Settlement:** this is a method of acquiring title to land by a person who first settled on a particular parcel of land free from any other claim. The first settlement is recognized in law as the owner. The first settler may be a family or community or even an individual. Ownership of land by

first settlement is usually obtainable in lands which is regarded as a *terranullis* which means a no man's land.

In *Owoyin v. Omotosho*<sup>33</sup> the court held that ownership or title must go to the first settler in the absence of any evidence that they jointly settled on the land or that there was a grant of joint ownership made to the later arrival by the first. The court further held that the valid question is who the first settler on the land was. The first settler must be able to prove that at the time of first settlement there was no other settler on the land.

It is difficult to obtain land by settlement in Nigeria today because no land in Nigeria is free of settlement. In an action for proof of title to land under customary law, the claimant must be able to trace his title to the first settler on the land. Inability to do so will be fatal to his claim.

- ii. Conquest; under native law and custom land was acquired by communities and villages after war by the conquerors. The conqueror is then regarded as the original owner of the land. In *Mora v Nwalusi*<sup>34</sup> the Privy Council agreed that it is not in doubt that proof of possession following conquest will suffice to establish ownership.

## 5.2 Derivative Title

Under Nigerian customary law, land was owned by the family as family land or community or communal land. There was absence of individual ownership of land. As a result of this, alienation of family or communal land was impossible. In the locus classicus case of *Lewis V Bankole*<sup>35</sup> Osbourne C.J opined that the idea of alienation of land was foreign to native law and custom. However, this position under customary law changed after the advent of colonialism. Land today can be alienated and this gave rise to derivative ways of acquiring title to land. They include:

- i. Sale: Sale can be defined as a transaction between two or more parties in which the buyer receives tangible or intangible goods, services or

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<sup>33</sup> (1964) 1 ANLR pt. 304 at p. 309

<sup>34</sup> (1962) UKPC 17

<sup>35</sup> (1908) 1 NLR 81

assets in exchange for money or other assets. Sale of land deprives the original owner of all interests, benefits and claims on the land. The person transferring the property by sale must be a person capable of doing so, if he does not have such right the sale shall be void. In *Folarin v Durojaiye*,<sup>36</sup> the court held that there are two ways in which land can be sold in Nigeria which is either under customary law or under received English law. The seller must have title or requisite authority of the person that has title.

- ii. Gift of Land. This simply means charitable transfer of land made gratuitously without any consideration paid. Gift of land may be either absolute or conditional. Gift of land is absolute when totality of the owner's interests in the land is divested. In *Jegede v Eyinogun*,<sup>37</sup> the court held that a family that made an absolute transfer of its land by way of gift could not reclaim the land by reason of misconduct.
- iii. Mortgage: Mortgage means the use of landed property as collateral for a loan. Mortgage initially transfers an inchoate title but it becomes permanent when the mortgagor fails to redeem the loan, there are two types of mortgage transactions under the Nigerian law which are equitable and legal mortgage  
Equitable mortgage is of English law origin. It simply means an agreement to create a legal mortgage. It is a type of mortgage created when there is lack of legal formalities or where the asses being mortgaged is only of an equitable interest. This is in accordance with the equitable maxim 'equity regards as done that which ought to be done'<sup>38</sup> Legal mortgage is the most secure and comprehensive form of security interest. It transfers legal title to the mortgagee and prevents the mortgagor from dealing with the mortgaged land while it is subject to the mortgage.
- iv. Inheritance: this is a situation whereby land is transferred to another through a Will or intestacy. Where a person dies with a valid Will, the executors listed in the Will may seek to enforce the Will and obtain Probate, which grants all assets of the deceased to them. Also, when a

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<sup>36</sup> (1988) 1 N.W.L.R. (pt. 70) 351

<sup>37</sup> (1959) 5 f.s. c. 270

<sup>38</sup> Kodilinye, G (2001) *An introduction to Equity in Nigeria*, Daybis ltd, Nigeria, Ibadan, pp. 1-4.

person dies *intestate* ie without a Will, the property of the deceased will be distributed according to the relevant provisions of the law. The personal representatives of the deceased will be able to apply as administrators and obtain letter of administration in respect of the assets of transfer through probate. Under customary law, ordinarily, children inherit their parent's properties. It usually does not require assent as it vests by operation of law.

- v. Partition of family land: this is the commonest way of distributing family land. Family land can be partitioned among members of the family by consent or by an order of court. If it is done by consent, it must include the consent of the head and principal members of the family. Each member of the family that is given such position becomes the absolute owner of that portion of land.<sup>39</sup>

### **6.0 Proof of Title to Land in Nigeria**

The enactment of the Land Use Act has not reduced the number of such law suits coming up from time to time for the Act has failed to find a solution to the problem of insecurity of title. The Supreme Court in the locus classicus case of *Idundun v Okumagba*,<sup>40</sup> itemises five ways or methods of proving title to land. This decision of the Supreme Court has been widely followed in a swarm of decided cases.<sup>41</sup> In *Idundun v Okumagba* supra, Fatayi Williams, JSC declared that it is now settled that there are five methods of proving title to land in Nigeria. They include, traditional evidence, production of documents of title duly authenticated, acts of ownership extending over a sufficient length of time, numerous and positive enough to infer that the claimant is the true owner of the disputed land, acts of long possession and enjoyment of the land and lastly, a claimant may prove title to a disputed land by showing that he or she is in disturbed or undisputed possession of an adjacent or connected land and the circumstances render it probable that as owner of such contiguous land, he or she is also the owner of land in dispute.

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<sup>39</sup> *Abraham v Olorunfunmi* (1991) 1 N.W.L.R (pt 165) 33

<sup>40</sup> (1976) 10 S.C 227

<sup>41</sup> See also *Mogaji v Cadbury Nig. Ltd* (1985) 2 N.W.L.R. (Pt. 7) 393 at 431 *Atanda v Ajani* (1989) 3 N.W.L.R. (Pt 11) 511 at 533; *Amadi v Chinda & Ors* (2009) MISC (Pt 1) 1-20; *Usung v Iyand* (2010) 2 N.W.L.R; *Oko v Okenwa* (2010) 3 NWLR at 408

It is very important to note that a party seeking a declaration of title to land is not bound to plead and prove more than one root of title to succeed but he is eminently entitled to rely on one root of title.

The five main sources are discussed as follows:

**6.1 Traditional Evidence:** Traditional evidence simply means statements of facts based on longstanding tradition and practises.

In *Chief gafuru Arowolo v Chief Sunday Olowookere*<sup>42</sup> the court held per Adekeye JSC

Evidence of traditional history is nothing short of evidence of a historical fact transmitted from generation to generation in respect of a family and may in appropriate cases be given by any witnesses who by virtue of their peculiar and special relationship and circumstances before them and their ancestors and are in a position and knowledge enough to testify on the traditional evidence in question.

For evidence of traditional history to be acceptable, it must go back to the ancient times in the sense that the evidence existed for a very long time. Generally, such evidence would be excluded as hearsay, but the courts will admit it on the grounds of convenience. Also, by Section 66 of the Evidence Act 2011, family or communal tradition is admissible in land cases. A party relying on evidence of traditional history must show the root of his title right from the very first owner of the land and how it was passed down to him.

In *Elegushi v Oseni*,<sup>43</sup> the Supreme Court held that to establish traditional evidence of title by conclusive evidence, the plaintiff must prove such facts as; who founded the land in dispute, how they founded the land and the particulars of the intervening owners through whom they claim. The most common traditional evidence of title is the original acquisition of land by first settlement. Where the traditional evidence is conclusive, the court is entitled to accept it and such evidence need not

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<sup>42</sup> (2011) 18 NW.L.R. (Pt 1278) 280

<sup>43</sup> (2005) 14 N.W.L.R (Pt. 945) 348

be accompanied by exercise of dominion over the land in dispute. Where however, the court is faced with contradictory traditional histories with each of the parties relying on information handed down to him or where the traditional history given by the both parties are inconclusive, the court will not go by the credibility of the witnesses, but rather by examining the acts of ownership or possession done by other party in recent times in relation to the land in dispute. The party who is able to present impressive acts of ownership or possession on the land in dispute is the one entitled to judgement<sup>44</sup>

The approach of the court in conflicting traditional evidence is to test the traditional history by reference to the facts in recent years as established by evidence and by seeing which of the two competing histories is more probable.

However, where the plaintiff and his witnesses give conflicting evidence of his root of title, such root of title will be unreliable. Thus, a party who adduces conflicting evidence of traditional history in proof of his root of title has failed to establish his claim and his case shall be dismissed by the court<sup>45</sup>

## **6.2 Production of Title Documents**

Documents of title are produced as evidence of absolute grant or purchase. In *Idundun v Okumagba*,<sup>46</sup> the Supreme Court affirmed production of title documents as one of the methods of proving title to land. Fatayi Williams JSC in respect of proof of ownership by production of valid documents of title stated as follows:

‘secondly, ownership of land may be proved by the production of documents of title which must of course be duly authenticated in the sense that their due execution must be proved, unless they are produced from proper custody in circumstances giving rise to the presumption

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<sup>44</sup> See *Elegushi v Oseni* (2005) 14 N.W.L.R. (Pt. 945) 348

<sup>45</sup> *Mogaji v Cadbury Nig. Ltd* (1985) 2 N.W.L.R. (Pt. 7) 393 at 393 -395

<sup>46</sup> *Supra*

in favour of due execution in the case of documents of  
twenty (20) years old or more at the date of the contract’’

It is very important to note that the documents of title to successfully prove title to land, such documents must be admissible in evidence and must be capable of conferring a valid title on the party relying on it.

A person who wishes to rely on documents of title must uphold its validity by proving its execution and attestation to the satisfaction of the court. This is usually done through witnesses.<sup>47</sup> The document sought to be tendered must be registered being a document transferring interest in land otherwise it is inadmissible in evidence.<sup>48</sup> Where the title of the person conveying the title is denied or challenged, the claimant relying on the document must go further to plead and prove the title of the grantor.

Due execution of a Deed of conveyance of a document of title must be proved by evidence unless the Deed of conveyance is produced in circumstances giving rise to a presumption in favour of its due execution. However, while a document of title may not be admissible to prove title, it may still be admissible to prove payment of purchase price. It is pertinent to note that such documents must be duly registered.

**6.3 Acts of Ownership:** this simply means certain performances or steps that reveals true legal possession and control over property. In *Moronkeji v Adegbosin*,<sup>49</sup> the Supreme Court held that where the traditional evidence is inconclusive, the plaintiff, to succeed must prove acts of ownership extending over a sufficient length of time, numerous and positive to warrant the inference that he is the exclusive owner.

Acts of ownership is usually visualized and displayed by exercise of possessory rights for a long period of time and by engaging in acts consistent with the claim of ownership. The acts of ownership must be

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<sup>47</sup> *Ojibah v Ojibah* (1991) 5 NWLR (PT 191) 246 at 310- 311

<sup>48</sup> See Land Instrument Registration Law Cap L58 Laws of Lagos State 2003

<sup>49</sup> (2003) 8 NWLR (Pt 832) at 612

consistent and recurring. Acts of ownership may invoke activities such as farming on the land in dispute.<sup>50</sup> Selling, leasing or renting out all or part of the land are sufficient enough<sup>51</sup> to show the claimant has been exercising claims of ownership on the land in dispute. However, the claimant must show that the acts of ownership carried out by him or her on the land was without any act of hindrance by the adverse party.

#### **6.4 Acts of Possession and Enjoyment of Land**

Acts of possession and enjoyment of land may be evidence of ownership or of a right of occupation.<sup>52</sup> Also when the question is whether any person is the owner of anything of which he is shown to be in possession, the burden of proving that he is not the owner is on the person who affirms that he is not the owner.<sup>53</sup> The impact of section 143 of Evidence Act is that a person in possession is presumed to be the owner until such presumption is rebutted by proof of better title by the other party. It places onus on the other party disputing the possessor's title. In the case of *Ige v Fagbohun*,<sup>54</sup> the respondents were plaintiffs at the High Court, Oyo State where they claimed damages for trespass and injunction in respect of the land known as NW4/57 Lemon Street, Ekotedo, Ibadan. Their claim was that they gave the land in dispute to the appellants to make burnt bricks. Previous judgements on the land were tendered by the respondents. The respondents also admitted that they had allowed the appellants occupation and when in 1956, the appellants quarrelled over the division of land among the children of the original grantees, the respondents had asked them to vacate the land. On the other hand, the appellants who were a physical possession claimed to have purchased the land. The issue for determination was whether the respondents were entitled to damages for trespass in a situation where there are two contending claims of possession. The court held among other things that in land matters, the right of a person in physical possession can only be defeated by someone not in possession if the latter can prove a better title.

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<sup>50</sup> See *Okiji v Adejobi* (1960) 5 F.S.C 44

<sup>51</sup> *Asiyanbi v Adeniji* (1967) LCN/524 (SC)

<sup>52</sup> Evidence Act 2011 s.35

<sup>53</sup> *Ibid* s.143

<sup>54</sup> (2001) 10 NWLR (Pt 721) at 468

It is however very important to note that possession that can sustain a claim of title must not be one granted by the adverse party for a specific purpose because a grant of land for a limited purpose cannot ripen to absolute ownership of land.<sup>55</sup>

Acts of possession must be coupled with the exercise of certain possessory rights or acts of ownership such as use and enjoyment of the land in dispute. Acts of long possession amounts to mere probability of ownership and the party's role fails upon proof of good root of title by the other party unless the possession is such to oust the title of the true owner. This suggests that where the plaintiff is able to sufficiently prove good title, the defendant's long possession is that of a trespasser or a squatter and will not enable him succeed against the true owner.

Lastly, a claim of long possession can only be used as a shield and not a sword. This means that it can only be pleaded as a defence but cannot be used or relied upon solely to establish title. This depends on the relevant limitation laws of each state regarding laches and acquiescence.

#### **6.5 Proof of Possession of Connected or Adjacent Land**

This is also known as the contiguity means rule. Contiguity means the fact of being next to or touching another. The Evidence Act 2011 recognised this method.<sup>56</sup> In the case of *Okechukwu v Okafor*,<sup>57</sup> the court held that the plaintiffs were entitled to declaration of title over the disputed piece of land because of their acts of possession and enjoyment of land adjoining the disputed lands claimed and possessed under the same grant as that which the plaintiffs claimed the land in dispute together with the erection by them of boundary pillars, constituted sufficient evidence to support the plaintiff's claim of title to the disputed vacant and enclosed lands under the grant. it is not enough however, to

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<sup>55</sup> See *Agboola v Abimbola* (1968) 1 All NLR 286.

<sup>56</sup> s 35 of the Act provides that acts of possession and enjoyment of land may be evidence of ownership or of a right of occupancy not only of the particular piece or quantity of land with reference to which such acts are done, but also of other land so situated or connected with it by locality or similarity that what is true as in one piece of land is likely to be true of the other piece of land.

<sup>57</sup> (1961) 1 All NLR 685

show that the land in dispute is close or adjacent to the one in the claimant's possession. It must be sufficiently close or connected as to raise the presumption that both plots belong to the same person.

### **7.0 Identity of the Land in Dispute**

In an action for declaration of title to the land, the claimant must show the identity of the land in dispute. This is usually of paramount importance if the parties are not in agreement as to the identity of the land. In such a case, both parties must plead and tender survey plans duly drafted and by a licensed surveyor.<sup>58</sup>

### **8.0 The Role of Equity in Proof of Title to Land**

Equitable interests in property are generally viewed as of lower value, particularly when they are in competition with legal interests. Generally, equitable interests are considered as minor interests, largely unwritten and if written have failed to comply with all the necessary requirements and therefore are vulnerable and may be lost upon sale of the land to a new purchaser. However, the above view of equitable interests has undergone tremendous changes, given the contributions of equity in validating most transactions which would have been otherwise invalid by strict application of the law, equitable rights have advanced almost to the status of legal rights.

#### **8.1 Application of equitable interests to transfer of interests in land in Nigeria**

Given the enhanced status of equitable interests in property and its application to property transactions in Nigeria as demonstrated in this paper, it can be asserted that equitable interests in property have transcended the minor interests they were in the traditional view as they have now almost attained the status of legal estates. Thus, the dichotomy between legal interests and equitable interests has lost much significance.

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<sup>58</sup> See *Odeneye v Alaka* (1977) 11NSCC 192

In the case of *Ogunbambi v Abowaba*<sup>59</sup> the court held that a purchase receipt coupled with possession can give rise to equitable interest. In *Owosho v Dada*,<sup>60</sup> Aniagolu JCS stated that the law has been well and long settled that where a person pays for land and obtains receipt for the payment followed by his going into possession and remaining in possession, equitable interest is cleared. For him in the land such as would defeat the subsequent purchaser with knowledge of the equitable estate/interest in the land. This decision was affirmed in *Orasanmi v Idowu*<sup>61</sup> As has been noted, though equitable interest may not necessarily stand up to legal formalities, however, in some cases they are stronger and may even rank higher in priority than the legal interests. In *Amodu Tijani v Secretary of Southern Nigeria*<sup>62</sup>, it was held that writing is unknown to customary law. As such, the process of acquiring land under customary law is quite different from the position of law, especially without all its formalities. Therefore, a person can validly purchase land under customary law by making some sort of consideration in the presence of witnesses and being given possession. If some other person trying to rely on non-compliance with legal formality asserts that his interest in land supersede the earlier, his assertion would fail even if he has complied with all the legal formalities.

Also, in *Etajata v Ologbo*,<sup>63</sup> the court held that whenever an equitable interest in coupled with possession, such equitable interest cannot be defeated by subsequent legal interest. This points to the elevated status of equitable interest, hence this paper advocates for a reassessment of methods of proof of title in Nigeria

## **8.2 Application of equitable interests to transfer of interests in land in Australia**

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<sup>59</sup> (1951) 13 WACA 222

<sup>60</sup> (1984)7 SC at 149

<sup>61</sup> 1959 4 FSC 40

<sup>62</sup> Supra

<sup>63</sup> (2007) CLR 6(a)

The Real Property Act<sup>64</sup> of Australia contained provisions permitting registration of Trust and Equity.<sup>65</sup> Under a perfect system of registration, all interest would appear on the register. Ideally, a prospective purchaser should be able to search the register.<sup>66</sup> Following the introduction of Torrens<sup>67</sup> title registration legislation in South Australia, the issue arose as to whether the Torres Statute abolished the discrimination between legal and equitable interests in land. In *Lange v Rudwolfoff*<sup>68</sup> Gwynne J, sitting as the primary judge held that the ability to register an interest determined whether such interest is within the sphere of the new system. It was further stated that an equitable estate or interest could not be registered. It was concluded that such an Estate or interest was one which the Act did not recognize. This decision was infamously affirmed on Appeal<sup>69</sup> There was legislative intervention by the South Australian Supreme Court in *Cuttbertson v Swan*,<sup>70</sup> StowJ delivered the judgment of the Court. After reviewing the provisions of the Real property Act 1861 (SA) and earlier decisions from Victoria, New South Wales and New Zealand<sup>71</sup> and agreed that the Torrens Statute protected persons taking conveyances from registered proprietors but does not protect registered proprietors from being compelled by courts of equity to fulfill their contracts.

In other words, the court recognized the right of the holder of an unregistered interest to enforce that interest in persona as against the registered proprietor. There, the court expressly overruled its earlier

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<sup>64</sup> Real Property Act 1857-1858 (sA)

<sup>65</sup> <https://classic.austlii.edu.au> > *Les D.MCchmmonProtection of Equitable interests under the Torrens System: Polishing the Mirror of Title* Accessed on 12 September 2024

<sup>66</sup> *ibid*

<sup>67</sup> Torrens title is a land registration and land transfer system in which a state creates and maintains register of land holdings, which serves as the conclusive evidence (termed 'indefeasibility') of title of the person recorded on the register as the proprietor(owner), and all of other interest recorded on the register

<sup>68</sup> (1872) 6 SALR 75

<sup>69</sup> (1873)7 SALR 1.

<sup>70</sup> (1817)11 SALR 102

<sup>71</sup> Namely *Madison v McCarthy* (1865) 2 WW&AB(Eq) 151 (Victoria) *Robertson v Keith* (1870) 1 N.A& B.N(Eq)11 (Victoria)

decision in *Lange v Rudwoldt*<sup>72</sup> the reasoning adopted by the court in Cuttbertson's case was applied independently in other Australian Colonies. In *Wildash and Kenneth Hutchinson, insolvents; Ex parte Miskin*<sup>73</sup> Lily J. of the Queensland Supreme Court, after reviewing the probations of Real Property Act 1861 noted that 'there is nothing in the Act to lead to conclusion that equitable estates and interests cannot be created and exist in land outside the Act.' Any lingering doubts were put to rest by the high Court in *Barry v Heider*<sup>74</sup> in this case, the appellants argued that the Torrens Statutes recognize no interests legal or equitable except in the registered proprietor. The response of Isaacs C.J is clear and equivocal:

"Such contention is absolutely opposed to all hitherto accepted notions in Australia with regard to the Land Transfer Acts. They have long and in every state been regarded as in the main conveyancing enactments and as giving greater certainty to titles of registered proprietors, but not only in any way destroying the fundamental doctrines by which courts of equity have enforced, as against registered proprietors' conscious obligation entered into by them'

Similar sentiments were expressed by Griffith C.J is that the recognition of equitable estate and interest under the Torres System was reaffirmed by the High Court in *Butler v Fairclough*<sup>75</sup>. The court clearly held that equitable estates and interests existing in Torres title land will be recognised unless such recognitions is expressly prohibited by Torres Statute. It was further stated that such recognition is indeed the foundation of the scheme of caveats which enable such rights to be temporarily protected in anticipation of legal proceedings.

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<sup>72</sup> *supra*

<sup>73</sup> (1877) 5 QD SCR 47

<sup>74</sup> (1914) 19CLR 197).

<sup>75</sup> (1917) 23 CLR78

The Real property Act 1861 of Australia recognises the doctrine of equitable interest and has judicial backing it. It is worthy to note that the Torres System has been abolished in many countries.

in England, since the Supreme Court of Judicature Act 1873 and 1875, the rules of law and equity have been administered by the same courts the claimant only has to come with clean hands and equity will come to his aid.

### **8.3 Doctrine of Notice**

Notice simply means the actual or constructive knowledge of an already existing interest in a particular property. Notice is actual where the purchaser obtained information of an already existing equitable interest in the property but still goes ahead to purchase it. On the other hand, notice is constructive where the circumstances is such that the purchaser ought to have discovered the existence of an interest in the property if he had been diligent. In *Orasanmi v Idowu*,<sup>76</sup> the court held that for mere possession of land to amount to constructive notice, it must have been continuous and undisturbed. In this case, the respondent had been in possession for 20 years, he was not in possession at the time of sale, hence the purchaser was not negligent and constructive notice could not be imputed. In *Dollivant v Alakija*,<sup>77</sup> the court held that where the agents of purchaser are aware of the full material facts, the knowledge of the agent could be imputed on the principal. There is however an exception and that is unless the agent deliberately conceals the facts with the intention to defraud.

### **8.4 The Issue of Priority**

In certain cases, two or more competing interests exist over a piece of land. It was noted that fraudulent land owners can sell the same piece of land at different times to different persons. The general rule is which is recognized both at common law and equity is that interest in that interest in land property is ranked in order of creation. Where an equitable interest is being disputed with a legal claim or interest, the legal interest takes precedence over the equitable interest because equity follows the

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<sup>76</sup> (1958) F.S.C 181

<sup>77</sup> (1956) waca 63

law and cannot displace the law especially when injustice or unfairness cannot be proved. However, where there are equal equitable claims, or interests the first in time shall prevail.

### **9.0 Recommendations and Conclusion**

The role of equity in the proof of title to land has been deeply neglected by both Nigerian courts and the Land Use Act. The locus classicus case of *Idundun v Okumagba*<sup>78</sup> failed to take cognizance of equitable interest in land, hence, there is need for either legislative enactment recognizing or entrenching equitable interest as one of the methods of proving title to land in Nigeria.

Amendment of Land Use Act to accommodate equitable interests as a method of proving title to land has become imperative so as to sustain certainty of law. It is therefore important for the stakeholders to reassess the traditional methods of proof of title to incorporate equitable interest in land. This will go a long way to be about justice in adjudication of land matters in the Nigeria courts.

Secondly, massive enlightenment of the masses through various public fora on the efficacy of equitable interest in land may turn the tide in the justice system

It is further recommended the establishment of title insurance as new commercial model that will be tailored for conveyancing risks control in the country.

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<sup>78</sup> *Supra*