SOURCES OF NIGERIA LAND LAW

Land is one of the most important factors of production and may be defined as the solid part of the earth surface including the subjacent and superjacent things of a physical nature such as buildings, trees, and minerals. With the development of real property the definition of land may not be confined to the hereditament alone that is heritable but may also be extended to the incorporeal interest in land such as easement, profit a prendre and rent. Thus an incorporeity such as a right of way with a house or a piece of land may be held in fee simple or for life.

Since the Nigerian Law of Real Property is the branch of the Nigerian Law relating to the rights and liabilities in or over land, it definitely would share common deviation with other branches of law from the traditional sources of Nigerian Law.

The expression "source of law" can be and is often used in various senses. First, it means the ultimate foundation of the entire body of a legal system- the root from which the system derives its validity. This root may be the general will of the people or the will of the dictator, a special body or the electorate. A source of law defined in this manner may also be referred to as a formal source of law. Second, viewed historically, a source of law may connote the historical origin of a rule of law. For example, English Law as a source of Nigerian law has its origin in Nigeria"s historical connection with Great Britain. Thirdly, the term implies a material containing rules of law. In this sense, statute books, law reports and learned text may be classified as sources of law. Thus the Land Use Act which can be found in the Laws of the Federation of Nigeria, 2004 CAP 202, is a source of law. Such a law may be alluded to as a literary source of law. Fourthly, a source of law is a fountain of authority of a rule of law, that is , the origin from which a legal rule takes its authority. It is the channel through which a rule becomes part of a body of laws- the legal source of law. This is the definition we shall employ in considering the sources of Nigerian Land Law

Thus the sources of Nigerian Law of Real Property would be: Received English Land Law, Nigerian Local Legislation on Land, Customary and Islamic Law of Land Tenure, Nigerian Judicial decisions on different aspects of land, Land Law cases reports and opinion of Land Law textbook writers.

1. The Received English Land Law:

English law was first introduced in what was then known as the colony of Lagos in 1863 and subsequently into other parts of the country by imperial legislation. These foreign enactments have been abrogated in most cases or re-enacted by the various states making up Nigeria. Hence the relevant provisions of the reception statutes currently in force in the country can only be found in local legislation and not in any imperial statute. For example, in Lagos state, it is provided:

> "Subject to the provisions of the section and except in so far as other provision is made by any Federal or State enactment the common law of England and the doctrine of equity, together with the statutes of general application that were in force in England on the 1st day of January 1900 shall be in force in the Lagos state."

English Law made before October1, 1960 and extending directly to Nigeria became part of Nigerian law by virtue of the colonial laws Validity Act of

1865. By this Act, it was possible for both the British parliament and the crown to legislate directly on matters affecting Nigeria.

The English law of real property is one of the sources of Nigerian real property law. The received English law in this context include rules of common law of England and the doctrines of Equity as well as the statutes of general application that were in force in England on the first of January 1900. These received laws have been introduced into the country by means of Nigerian legislation. The reception of the English law dates back to 1863 when an ordinance of that year introduced it into the Lagos colony. The English Land related statutes applicable in Nigeria by virtue of being a statute of general application includes; the English Statute of Frauds, 1677, the English Wills Act, 1873, Real Property Act1845, Partition Act 1539-1876, the Real Property Limitation Acts 1833-1874, English Convincing Acts of 1881 and 1882 and Settled Land Act, 1882. It is pertinent to note that before the introduction of the Land Use Act in1978, the main property rights and interests which could be held under the English Common law, Equity and Statutes of General Application were estates of freehold and leaseholds.

2. Nigerian Legislation

Nigerian Legislation is perhaps the most important source of Nigerian Land Law. Its superior status derives from its ability to amend, alter, modify or repeal any other sources of Nigerian law. Thus Nigerian Legislation was used in 1963 to repeal Nigeria Independence Act 1960. Nigerian legislation is made up of two main components namely, statutes and subsidiary legislation. Statutes are laws passed by a legislative organ and formally placed on record in a written or printed form, while subsidiary legislations are supplementary laws made under enabling laws. A subsidiary legislation usually refers to the parent law. It may be in form of a rule, regulation or bye-law.

3. Customary Law

Customary law as a source of Nigerian Law consists of customs accepted by members of a community in Nigeria as binding among its people. It may be broadly classified into two, namely- (i) Ethnic or Non- Moslem customary law and (ii) Moslem law.

Unlike statutes, customary law does not owe its existence to the positive enactment of a sovereign parliament or the declaration of a court. Customary law consists of unwritten customs and usages accepted by members of a community as binding among them in respect of the subjects covered. The term customary law is a blank description covering very many different systems of customs, which are tribal in origin and usually operative only within the area occupied by the tribe. Even within such an area, there may be local variation. The term is also used to include Islamic Law, which though originated from outside Nigeria, had supplanted the indigenous local customary systems formerly operating in the area it now operates. Unlike customary law properly so-called, Islamic law is not grounded in any particular locality. The dominant version of the Islamic law is largely written, relatively more rigid and uniform than indigenous customary law.

Ethnic customary law is indigenous and largely unwritten. Each of its systems applies to members of a particular ethnic group in the country. For instance, the customary law system of the people of Ibadan may be different from that of the indigenes of Ogbomosho in spite of the fact that both sets of people are Yorubas.

The dominant version of the Moslem law on the other hand is principally in

written form, relatively more rigid and uniform than the Ethnic customary law and was introduced into the country as part of Islam. The sources of the Moslem law (also known as Islamic law or the Sharia) are the Holy Quran, the practice of the prophet (the Sunna), the consensus of scholars, and analogical deductions from the holy Koran and from the practice of the prophet.

Customary law system is a flexible system which develops and modifies itself from time to time in order to accord with demands of developing society. For these rules to be valid they must not be repugnant to natural justice, equity and good conscience or be incompatible either directly or by implication with any law for the time being in force. The repugnancy test is an absolute one in that when it is applied to a particular rule, that rule must either be wholly upheld or wholly rejected. The courts can not eliminate the objectionable features and then apply the watered down version that remains. In **Ehugbayi Eleko v Government of Nigeria** (1931 A C 622), Lord Atkin said that it is not for the courts to transform a barbarous custom into a mild one. If it is barbarous, then it must be rejected totally.

Basic Features of Customary Law

Customary law has many features, among which are the following:

1. Its recognition by members of the appropriate ethnic group as laws.
2. Its acceptance as an obligation by the native community whose conduct it is supposed to regulate.
3. The fact that it is "a mirror of accepted usage", and
4. Its flexible nature. This characteristic derives mainly from the fact that ethnic customary law is largely unwritten. Thus its rules change from time to time reflecting social and economic conditions without losing its character. A good illustration of this feature in practice can be found in the change which occurred in relation to the use of writings in transaction. Originally, the use of writing was unknown to ethnic customary law. This occurred in **Robiti v Savage**. There, a defendant contended the an IOU had become statute-barred and so he was not liable to repay his debt to the plaintiff. His contention was rejected by the court which held that the mere fact that an agreement was in writing does not remove it from the ambit of ethnic customary law. It should be noted however, that Moslem law is comparably rigid and its content is not readily affected by social or economic changes.

Validity of Customary Law

There are some indigenous customary law rules and institutions which have been abolished by Nigerian Legislation but this does not automatically mean that those customary rules and institutions not specifically abolished remain in force. As was noted earlier, this is because it has been provided in all jurisdictions that all rules of customary law are subject to certain tests of validity before they can be enforced or applied to particular situations.

Repugnancy Test

The first test of validity is generally known as the repugnancy test. The test postulates that a rule of customary law, to be valid, must not be repugnant to natural justice, equity and good conscience. In interpreting the phrase 'natural justice, equity and good conscience" the general attitude of the courts is not to import the technical meaning of "natural justice" and "equity" but to give the phrase a single broad meaning. Thus a rule of customary law will be enforced if it is considered "fair" just and proper. These were the underlying considerations in the case of **Edet v Essien,**

where a plaintiff claimed two children born by his former wife to her husband on the ground that the children belonged to him under customary law since the dowry he paid on her had not been refunded to him. The court was not satisfied that such a rule existed. All the same, it was held that even if such a rule existed, it is repugnant to natural justice, equity and good conscience. Also in **Re Effiong Okon Ata**, the court rejected a rule of customary law which would have entitled the former owner of slave to administer his personal property after his death. In **Elesie Agbai & Ors v. Samuel Okogbue** (1991) 7 NWLR (Part 204) 391 the Supreme Court, per Nwokedi, JSC, explained that repugnancy doctrine affords the courts the opportunity for fine tuning customary laws to meet changed social conditions where necessary, more especially as there is no forum for repealing or amending customary laws.

However, the application of the repugnancy test by the courts has not been consistent in that judges appear to use their sense of logical reasoning to determine whether a rule of customary law is repugnant to natural justice, equity and good conscience. For instance, in the case of **Dawodu v Danmole** (1962) 2 SCNLR 215, the trial judge held that the ***idi-igi*** system of distribution (***Idi-igi*** is share in equal portions in accordance with the number of wives who had children by him) was repugnant to natural justice, equity and good conscience. The deceased in the case had died intestate leaving four wives and nine children. According to the ***idi-igi*** system of distribution, the intestate estate of the deceased should be divided into four, the number of his wives. The trial judge felt that the property should be distributed in accordance with the ***Ori-ojori*** system, which requires that the estate be shared equally among children. According to the trial judge, this was the modern idea of equality among children. This view was however, rejected by the appellate courts, the Federal Supreme Court and the Judicial Committee of the Privy Council; which held that the ***Idi-Igi*** system should be applied in the case and not the ***Ori-ojori*** system in that: "The principle of natural justice, equity and good conscience applicable in a country where polygamy is generally accepted should not be readily equated with those applicable to a community governed by the rule of monogamy."

General comments must be made on the power of a court to apply the repugnancy to test:

1. A court has no authority to modify any rule of customary law and apply the watered down version. By virtue of the repugnancy test, a customary law should either be wholly upheld or wholly rejected. There is no mandate for a court to transform a "barbarous" customs into a milder one.
2. A court has no power to look at the possible result of the application or non-application of a customary law under the repugnancy test. The test merely require that the rule be examined for the purpose of determining its validity or otherwise and not the effect or consequence of its application.

The Incompatibility Test.

The second test may be referred to as the incompatibility test. The test is intended to render a rule of customary law which is "incompatible either directly or by implication with any law for the time being in force" unenforceable in Nigeria. In other words, a customary law to be valid must not be incompatible directly or indirectly with a Nigerian Legiislation. Direct incompatibility refers to a situation where a Nigerian legislation deliberately and specifically abolishes or replaces a particular part of a customary law. A good example of this is the abolition of the Osu System in the Eastern part of the country.

When it is said that a rule of customary law is incompatible by implication, it means that the court is of the view that the effects of a relevant local enactment and a customary law rule are so inconsistent that they cannot reasonably exist together, thus making it necessary for the customary law to be rejected. An instance of this is the issue of legitimacy. Under customary law, a child born outside wedlock is legitimated by mere acknowledgement of paternity by subsequent marriage of the parent. The court in **Cole v Akinyele** (1960) 1 All NLR 294, considered the rule in respect of legitimacy under customary law and under a statute and held that the customary law rule was contrary to public policy. It is obvious too that the rule of customary law could have failed the incompatibility test.

Public Policy
It is also provided that a rule of customary law that is contrary to public policy shall not be enforced by the courts. The test was applied in **Re Adadevoh Alake v Pratt** (15 WACA 20) and **Cole v Akinyele** (above)

Proof of Customary Law
It is an established rule of evidence that a person who alleges that a fact exists must prove by evidence the existence of that fact. Thus a party to a suit who relies and claims the existence of a particular customary law rule is bound by law to prove the existence of the rule to the satisfaction of the court: **Egbuta v. Onunng** (2007) 10 NWLR (Part 1042) 298; **Balogun v. Labiran** (1988) 3 NWLR (Part 50) 66. It does not matter that his opponent is also relying or claiming a different rule of customary law. It is a case of every man for himself. Thus, in **Ojiogu v. Ojiogu** (2010) 9 NWLR (Part 1198) 1 SC, Onnoghen, JSC emphasized that it is settled law that customary law is a question of fact which must be proved or established by evidence. A court will have no authority to act on a customary law rule which has not been established: **Ogolo v. Ogolo** (2003) 18 NWLR (Part 852) 494. Also in **Nsirim v. Nsirim** (2002) 3 NWLR (Part 755) 697, the Supreme court stated that "The point must be made that native law and custom, otherwise also referred to as customary law, are matters of evidence on the facts presented before the court and must therefore be proved in any particular case unless, of course, they are of such notoriety and have been so frequently followed or applied by the courts that judicial notice thereof would be taken without evidence required in proof." Per Iguh J.S.C.

A party may establish the existence of a rule of customary law in one of three ways, namely:

(i) By calling witnesses. A party to an action who is relying on the existence of a rule of customary law is entitled to call witnesses who have such personal knowledge of the particular rule or custom: **Motoh v. Motoh** (2010) LPELR – CA/E/388/2007. Traditional rulers, chiefs and elders in the particular society are more often than not qualified witnesses in this regard. The evidence adduced by the witnesses must be credible. According to Chukwuma-Eneh, JSC in **Sokwo v. Kpongo** (2008) 1-2 SC 117 at 146-147 "it is a settled principle of law that customary law is a question of fact to be proved by evidence. The onus is on the party alleging the existence of a particular custom. He must call credible evidence to establish the existence. Although, it is also settled that where a custom has been sufficiently decided upon by the court, judicial notice of the same can be taken and the court will not require further proof of the same custom. See s.14 of the evidence act and see also **Agbai v. Okogbue** (1991) 7 NWLR (Pt.204) 391, (1991) 9-10 SCNJ 49. It is to be seen anon the appellant's case vis-a-vis the principles of law on customary law stated above."

(ii) By the use of textbooks. In the determination of questions arising from a rule of customary law, any book or manuscripts recognized by indigenes or natives of the society as a legal authority is relevant.

(iii) By the use of Assessors. There are statutory provisions in most parts of the country enabling the use of assessors in deciding or establishing the existence of a rule of customary law. Assessors are experts in customary law. They sit with judges and provide assistance as and when required: but they do not form part of the court for they do not have any say in the ultimate judgment.

(iv) By Judicial Notice: A court is deemed to take judicial notice of a rule of customary law when such rule has been constantly proved and applied in a number of cases before Nigerian courts that there is no need to establish it in any other way. It is however necessary for the court to be satisfied that the rule of customary law in issue has been applied uniformly in those cases. In other words, the rule must have been acted upon by a court to an extent that the court asked to apply it will be justified in taken judicial notice of it. It follows that frequent proof in the courts is required before judicial notice can be taken of a rule of customary law and thereby dispense with any further proof of it. However, in exceptional cases, judicial notice may be taken of a rule of customary law based on a single decided case. See generally: **Oyewunmi v. Ogunesan** (1990) NWLR (Part 137) 182 "Under our law, customary law is a question of fact (see **Taiwo v. Dosunmu** (1966) NMLR 94 to be proved by evidence. (See **Otogbolu v. Okeluwa** (1981) 6-7 SC. 99 or judicial notice if it has been established as required by section 14(2) and section 73 Evidence Act or Law as the case may be in decisions of the superior courts of law. Customary law is the organic or living law of the indigenous people of Nigeria regulating their lives and transactions. It is organic in that it is not static. It is regulatory in that it controls the lives and transactions of the community subject to it. It is said that custom is a mirror of the culture of the people. I would say that customary law goes further and imports justice to the lives of all those subject to it." Per Obaseki JSC. and "The locus classicus case for the ascertainment of customary law and subsequently of judicial notice is the Judicial Committee of the Privy Council decision of **Kobina Angu v. Allah** P.c. '74-'28, 43. There, the formula for the ascertainment of native law and custom was stated to be as follows - "As is the case with all customary law, it has to be proved in the first instance by calling witnesses acquainted with the native customs until the particular customs, by frequent proof in the Courts, have become so notorious that the Courts will take judicial notice of them" According to **Angu v. Allah**, the two tests are in the alternative. They are (a) Calling witnesses acquainted with the custom in the Courts. (b) when by frequent proof in the Courts the particular custom becomes notorious." Per Nnamani JSC.

It is now necessary to enter a caveat regarding the establishment of a rule of customary law. It is that in customary courts there is no need to prove customary law as it is done in other courts. This is simply because judges of such courts are normally natives of the area of jurisdiction of the courts such that they will be versed in the customary law of the area. It is like a court taken judicial notice of the applicable law. However, where the customary law in question is not that of the area of the customary court, it becomes imperative to prove its existence because then, the judge may not be versed in the law.

4. Judicial Precedent

Judicial precedent or case law is a common law doctrine. Under the doctrine

cases decided by a higher court are binding on lower courts within the same judicial hierarchy. However, it is not everything said by a higher court that constitutes judicial precedent. It is the principle of law upon which a court bases its judgment in relation to the material facts before it that constitutes the precedent. This principle of law is known as *ratio decidendi* which being translated means, the reason for the decision. Any other pronouncement of law made in the course of the judgment is an *obiter dictum*, that is a chance remark or statement by the way, which does not form part of the reasoning.

The common law doctrine of judicial precedent operates among courts in the same judicial hierarchy and it presupposes the superiority and inferiority of courts. For example when court A, a higher court gives judgment in case X, court B, a lower court in a later case Y, is bound to follow the decision in case X if the facts in the two cases are similar and the courts are within the same judicial hierarchy. Hence in **Tabiowo v. Disu** (2008) 7 NWLR (Part 1087) 533 at 549, the Court of Appeal reiterated the rule as follows:

> "In **Dalhatu v. Turaki & Ors**. (2003) 15NWLR (Pt. 843) 310, Edozie, J.S.C. in his contribution to the lead judgment of Katsina-Alu, JSC, in which their Lordships unanimously dismissed the appeal, said:- 'The doctrine of judicial precedent otherwise known as *stare decisis* is not alien to our jurisprudence. It is a well settled principle of judicial policy which must be strictly adhered to by all lower court. While such lower courts may depart from their own decisions reached *per incuriam* they cannot refuse to be bound by decisions of higher courts even where that decision was given erroneously.'" Per Galinje, J.C.A.

Also in **Nigeria-Arab Bank Limited v. Barri Engineering Nigeria Ltd** (1995) NWLR (part 413) 257, the Supreme Court exclaimed: "The doctrine of judicial precedent (otherwise called stare decisis) requires all subordinate courts to follow decisions of superior courts even where these decisions are obviously wrong having been based upon a false premise; this is the 'foundation on which the consistency of our judicial decision is based" Per Ogundare, J.S.C.

It has been held that a case does not lose its value as a judicial precedent under the common law system just because it is an old case. Indeed, a case which has survived the test of judicial precedent is said to be stable if decided by the highest court of the relevant legal system and will receive the respect of the lower courts until overruled by the highest court. Until a case has been duly overruled, it remains the state of the law. The older it is, the better it is: See **The Reg Trust of National Ass of Community Health Practitioners of Nigeria v. Medical And Health Workers Union of Nigeria** (2008) Vol 37 WRN 1.

The Supreme Court of Nigeria also adheres to the principle of *stare decisis* in that it usually follows its previous decisions. However, where the court is satisfied that its previous decision was delivered *per incuriam* such that it will lead to manifest injustice to continue to apply it, the court may overrule it, or depart from it or distinguish it: See **Adesokan v Adetunji** (1994) 5 NWLR (Part 346) 540 SC.

It should be noted that the *ratio decidendi* is of persuasive authority to courts of equal (co- ordinate) jurisdiction with court A and courts superior to it in the illustration above.

The application of the common law doctrine of judicial precedent is easy and somewhat simple where the facts of the case containing the *ratio decidendi* are virtually similar to those of the case under consideration and where the *ratio decidendi* has been applied uniformly in a number of earlier cases. The

situation is however different where there are differences in the material facts of the earlier case(s) and those of the case being considered. In that situation, the court has a duty to distinguish the present case from the earlier case(s) and hold that the earlier case(s) is/are not applicable to the one before it. This is undoubtedly one of the problems that may arise in applying the doctrine of judicial precedent. The duty of distinguishing cases is by no means an easy one.

It leaves a measure of discretion on the courts such that a degree of uncertainty in the law may be produced. But it may be argued that this discretionary power may also produce positive results in that courts will be free to choose which law to apply to a particular situation in the interest of justice and not merely on the basis of any binding precedent.

A lower court is not bound to follow precedent in cases that have been overruled by a higher court. The power to overrule or reverse previous decisions, if properly exercised, is bound to remove or at least reduce the danger inherent in a mechanical adherence to the doctrine of judicial precedent. Indeed, but for the power to overrule, and to a lesser extent then power to distinguish cases, it may have been possible for a bad rule to remain as law until it is repealed or changed by legislation.

TERMINOLOGY
THE LEGAL MEANING OF LAND
Land is one of the most important factors of production and may be defined as the solid part of the earth surface including the subjacent and superjacent things of a physical nature such as buildings, trees and minerals. With the development in the law of real property the definition of land may not be confined to ordinary ground with its subsoil, but surely includes buildings and trees growing thereon and may also be extended to the incorporeal interest, in land such as easement, profit a prendre and rent. Thus an incorporeity such as a right of way with a house or a piece of land may be held in fee simple or for life.
The phrase " Land" was defined in **Unlife Development co .ltd v Adeshigbin ors (2001) 4 NWLR (pr 704) 609 "** *Land includes land of any tenure, buildings or parts of buildings (whether the division is horizontal, vertical or made in any other way), and other corporeal hereditaments, and an easement; right, privilege or benefit in, over, or derived from land*" Per Achike J.S.C
Fixtures or chattels that are fixed with the land are regarded as part of the land and the chattel when so fixed loses the character of chattel and pass with the ownership of the land. This is usually expressed by the Latin maxim *quicquid plantatur solo solo cedit. The legal significance of this is that whatever human improvement that is* attached to the land accrues to it and belongs to its owner unless there exists a contrary intention. In **Otogbolu v Okeluwa** and others, a trespasser built on the plaintiff's land. The supreme court on appeal gave judgement to the plaintiff under the rule of *solo solo cedit.* However the rule is subject to certain exceptions. It is pertinent to stress that lying of the chattels on the floor or land alone is not sufficient to deprive the chattels of the character of movable assets
For instance cars on the land or machines on the floor of a house will not lose as movable assets or chattel that are affixed to a building will lose their character as chattels and will be regarded as annexed to the land.
Any chattel that is necessary for the convenient use of a building or land will be regarded as annexed to the land. The law of real property is not static; it develops with the trend in commerce, trade and industry therefore: the rule that whatever is affixed to the land is part of the land is often relaxed where the chattels are tools of trade of the tenant that are in occupation of the

buildings where they are affixed.
Any tenant may remove from the premises that he is occupying any chattel that was brought into the premises by him for his own enjoyment of the premises unless there is an agreement between him and his land lord that the chattel should not be removed. Even such agreement is only enforceable against the tenant by the landlord if there is a consideration from the landlord in support of the agreement. The only remedy of the tenant against the landlord is to request the landlord to pay him for the value of the chattel
Where tools of trade are being used in building or premises by a tenant the tools of trade are not regarded as affixed or annexed to the land and the tenant can dismantle his tools of trade from the land at the expiration of his tenancy even though the tools of trade are annexed to the land.
A farmer as the right to remove the machinery, and other agricultural equipment from the land after the expiration of his tenancy.
A mortgagor is not entitled to remove the fixtures or chattels in the mortgaged property after the execution of the deed or legal mortgage. However the mortgagee cannot prevent a third party from removing the chattels or fixtures that are kept with the mortgagor by the third party.
Where fixtures and chattels are on the land at the time that land is being conveyed to the purchaser by the vendor the deed of conveyance passes the fixture and chattel to the purchaser unless there is an express agreement that the ownership of the fixture and chattels shall not pass to the purchaser.

The Rule, Quid quid Plantatur Solo Solo cedit

The common law rule is that all things attached to the land form part of the land, and qualify as rights of property as the soil itself. Thus where A builds on B's land without the latter's consent and in the absence of latches on his part, the building automatically becomes subject to B's ownership along with the land by virtue of the doctrine. The rule was applied in the Nigerian case **of Francis v Ibitoye(1976) 12 SC 99 and N.E.P.A. v Amusa(1979) 12 SC 99.**

The Supreme Court applied the principle in **Agboola v United Bank for Africa & Ors (2011)**, one of the issues for determination was whether a building erected on a mortgaged land forms part of the mortgaged property. It was held that a building forms part of the mortgaged property by virtue of the maxim which literally means "he who owns the land owns what it is on it" See also **Adepete v Babatunde (2002) 4 NWLR pt 756 pg 99 and Dankula v Shagamu (2008) 3 NWLR (pt 26) 63**

However, there is no general rule of customary law in support of the applicability or otherwise of the doctrine under customary land tenure system. The only case in which the doctrine was expressly applied was **Okoiko v Esedalue(1974) 3 SC 15.** But that proposition was made with particular reference to customary pledge being the main subject of determination in that case. In other areas of customary land tenure, its applicability or otherwise can only be drawn by inference. See the following cases **Sateng v Darkwa (1940) 6 WACA 52; Owoo v Owoo(1945) 11 WACA 81; Alao v Ajani (1989) 4 NWLR (pt 113) 1.**

Exceptions to the rule

In the case of **N.E.P.A V Amusa(above)**, the Supreme Court identified exceptions to the rule of Quic quid Plantatur Solo Solo Cedit. In the words of Fatayi Williams JSC (as he then was):

" ….{t}his general rule of law is subject to any contract entered into by the parties and also the doctrines and rules of equity…and as defined in specified Statues…."

From the foregoing, the three basic exception identified are: (1) Contract; (2) The doctrine and
Rules of equity; and (3) Specified Statutes
From the foregoing, the three basic execeptions identified are:
1. Contract
An agreement by parties expressly or by necessary implication to exclude

the application of this rule is binding on the parties, so that neither of them can subsequently rely on it in support of a claim. An example can be found in lease agreements where parties agree that the lessee shall be entitled to remove fixtures at the end of the lease.

2. Rules and Doctrines of Equity

The rule will be excluded where the owner of land encourages the possessor of it to expend his money on improvements without apprising him of his intention to dispute his title. See Ude v Nwara (1993) 2 NWLR (pt 278), or where the owner is generally guilty of laches See Owie v Igbiwi(2005) 3 FWLR (pt 275)

3. Statutes

A number of Statutes create exceptions to the Rule

- By virtue of relevant provisions of the various State Land Laws, improvement by a lessee of State Land pursuant to a term of lease which does not extend beyond thirty years in Lagos State belongs to the allotee, who may remove them.
  In **Akubo v Braide& Anor (2009) LPELR-CA/PH/318/ 2004**. One of the issues for determination was whether the principle, "*quic quid plantatur solo solo cedit*" applies to leases of state lands for period less than thirty years. It was held that it is the intendment of the proviso to section 10 of the State Lands law, Cap 122 applicable in Rivers state that the maxim shall not apply to buildings and other improvement on state lands such as the instant which has been leased for periods less than thirty years. This is therefore an exception to the application of the maxim. SEE **Unipetrol v E.S.B.I.R (2006) ALL FWLR{pt 317} and Ude v Nwara (1993) 2 NWLR { PT 278} 683.**
- Section 15 of the Land Use Act vests in the holder of a statutory right of occupancy the right to, and absolute possession of improvements, notwithstanding that the radical title to land, the subject of the Statutory right of Occupancy is vested in the Governor. **See Ibrahim v Yola (1986) 4 CA (pt 1) 98; Finnih v Imade (1992) 1 NWLR (pt 291) Ude v Nwara(supra).**
- Ownership of mineral deposits in or over land is vested in the Federal Government pursuant to the relevant provisions of the Minerals Act. **Section 1 of the Minerals and Mining Act Cap M12 LFN 2004.**
- Ownership of Tidal waters and causeways is vested in the State. See **Amachree v Kalio (1914) 2 NLR 108**

IMPORTANCE OF LAND

The importance of land in the law of real property cannot be overstressed. It is a valuable asset in the economic sense to an individual and it is one of the factors of production. It can serve as security for loans or credits and where land is rich in mineral resources it becomes a fortune for a country.

The land in the Southern part of Nigeria is rich in oil and other mineral resources and Nigeria as a country has made fortune from the sale of these mineral products. Where the land of a country is rich in mineral resources, it may attract envy from the neighboring countries. Cameroon has been making efforts to lay claim to the Bakaasi Peninsula in Nigeria because Bakaasi Peninsula is rich in oil. Namibia in South Africa had bitter experiences under the white minority rule because her land is rich in mineral resources. The importance of land can be viewed from the geographical size of a country and also when the issue of expansion is considered.

OWNERSHIP

Ownership signifies an infinite and absolute right on land. The right of an owner is therefore, not subject to or restricted by, the superior right of another person. Ownership vests in the owner the right to possession.

When the right of a claimant to possess use and dispose of land is not subject to or restricted by the superior right of another person, the right of ownership is said to be vested in him. It has to be said however that the owner of a thing is not necessarily the person who at a given time has the whole power of use and disposal since there may be no such person. It suffices if the person has the residue of all such powers. A the owner of Black acre does not necessarily lose his right of ownership on the land merely because "B" is let into possession and use of the land as a tenant since 'A" still has a mediate right to possession and may come into occupation and put the land to use by terminating the tenancy.

Every legal system designs for itself the incidents of ownership. For example, the concept of ownership in modern English law has an allodia character. The allodia ownership of all land in England is vested in the crown and, in the result, a subject can have no more than a right to occupy and use the land for a period of time which may be finite or infinite. The right to occupy and use land is by complimentary doctrine of estate transformed into ownership with all the incidents of that concept. Thus, while a subject can own an estate in land, he cannot own the physical land.

In Nigeria, the concept of ownership varies in its concrete application. Before the Land Use Act 1978, there were at least four sources of ownership of land namely, Communal, family, individual and State ownership respectively.

Communal and Family Ownership of land has been asserted as the most remarkable principle of the customary land law. The observation of Lord Haldane in **Amodu Tijani v Secretary of Southern Nigeria (1921) 21 AC**. that land belonged to the community, village and family and never to the individual was often cited to this effect. In the words of **Lord Haldane**….

> "The next facts which it is important to bear in mind in order to understand native land law is that the notion of individual ownership are quite foreign to native ideas.
>
> Land belongs to the community, the village or the family, never to the individual…..This is a pure native custom along the whole length of this coast, and whenever we find, as in Lagos, individual owners, this is again due to introduction of English ideas"

As will be seen later, this assertion is incorrect so far as it denies the existence of individual ownership of land. The existence of communal and family landholdings had never been in doubt. In **Lewis v Bankole Speed Ag C.J**, observed 'that the institution of communal ownership was dead for many years and family property was a dying institution'. However Butter Lloyds' rejected this proposition in respect of the institution of family property in the subsequent case of **Bajulaiye v Akapo** (1938) 10, ownership of communal land is vested in the community as a corporate whole. No individual member of the community can lay claim to any part of the communal lad as his own.

Communal Land Holdings

Communal land belongs to the community. The powers of administration over such land are entrusted to the traditional chiefs and kings. They also regulated and controlled grants of communal land.

In former times, the largest area of land held by the community as communal land, but with the increased population, and allotment of communal land to families, a gradual transformation of communal land into family land holdings has taken place. In **Otegbolu v Okeluwa,(1981) 5 SC Obaseki, JSC** stated that each member of the community generally within his economic capacity can acquire as he desires, interests in a piece or parcel of communal land which he can transmit to his offspring. He is entitled to protect and prosecute by action, a claim to his right against any other member who trespasses and to that extent, the interest of the community in the land is displaced or postponed.

DECREASE IN COMMUNAL LANDHOLDING.

Communal landholding can be said to be on gradual but steady decrease. Many factors have been responsible for this phenomenon. The most dramatic was the application of state powers of compulsorily acquisition under the various enabling statutes. Examples are the **Land Ordinance, 1787; Public Lands Acquisition Act, 1917; Land Tenure Law, 1962; and The Public Lands Acquisition Law of the various states**. These enactments were made principally to transform land held under customary law into state lands by virtue of State Land Laws. The Land Use Act has reduced the importance and influence of community owned land by vesting all land in the state in the Governor. Although the Land Use Act preserved existing customary land tenure systems that were in existence before the enactment of the Land Use Act.

FAMILY LAND HOLDINGS

The title to family land is vested in the members of the family as a corporate group. It includes vacant and cultivated lands and buildings. Family land is a very important form of land holding in Nigeria today. In many disputes as to ownership of land between an individual and a family, the courts have held that the presumption of law is in favor of family ownership. In **Shafi v Ladipo,** the court held that all land in Ibadan is presumed to be family property until the contrary is proved. The burden therefore is on the adverse claimant to establish individual ownership. No family member has absolute title to any portion of the land unless other members including the family head agree.

Individual Landholding

Contrary to the views expressed in **Amodu Tijani v Secretary of Southern Nigeria**, individual tenure is a feature of customary land law throughout Nigeria. Thus it has been argued by a learned writer that it would seem that the basis of the concept of family property is the recognition of individual ownership, because when a founder of a family dies intestate, his self-acquired property devolved on his children as family property under customary law. In **Odunsi v Pereira** and another, it was held that there existed individual ownership of land under the customary law of the Yoruba of Lagos. In the earlier case of **Aganran v Olushi (1907) 1 NLR 66,** it was held that where a family sold its land to a member or stranger, the purchaser becomes an absolute owner of the property. Similarly, in **Jegede v Eyimogun(1959) 4FSC 270**, a donee of land became an absolute owner thereof, and the donor cannot recall the title. Colonialism, modernization, urbanization, the force of socio-economic avtivites since independence have brought individual ownership into greater prominence. Speed J remarked in **Lewis v Bankole** (above)

> "It is perfectly well known that in strict ancient native law all property was family and all real property was inalienable, and it is equally well known that a very large portion of the land on which this town (Lagos) is built is not owned by individuals and that family ownership is gradually ceasing to exist. In a progressing community, it is of course, inevitable that this should be so"

This proposition is true and judicial pronouncements and decisions support the assertion. In **Otogbolu v Okeluwa & Ors**, the Supreme Court confirmed individual ownership of land under customary law. In the words of Obaseki JSC:

> "The knowledge of the customary land tenure of each locality is within the knowledge of members of the community. Each member of the community generally withinhis economic capacity does acquire as he desires in a piece or parcel of communal land which he can transmit to his off-spring and which he is entitled to protect and prosecute by action, a claim to his right against any other member who trespasses. To that extent, the interest of the community in the land is displaced

or postponed"

Even in what appears to be strict communal nature of Bini land tenure system, individual ownership is conceded. Thus in **Arase v Arase**, the Supreme Court observed that

> "It is now settled by decided cases that basically all land in Benin is owned by the community for whom the Oba of Benin holds the same in trust, and it is the Oba of Benin who can transfer to any individual the ownership of such land"

Individual ownership of land under customary law has been known to arise from outright grants or gifts often made by chiefs or heads of the families.

The fact that a plaintiff in an action for declaration of title to land is expected to trace his title to or interest in a property to a point in time when the portion was allotted to his ancestor out of communal property lends credence to the existence of that source of ownership under the indigenous system of landholding. Outside Customary Law, individual ownership may evolve by act of government in the form of statute or the exercise of executive power. Examples are crown grants made in the Lagos area after Treaty of Cession and state grants to individuals of portion of state land. The decision of the Supreme Court in **Chukwueke v Nwankwo(1985) 2 N.W.L**.R represents the climax of the recognition of individual ownership of land under customary law. Allowing the appeal, the Supreme Court held that the Court of Appeal was in error by applying the principles of incontrovertibility of communal land tenure to individual tenure. It was stated that the general principle of communal ownership laid down in **Amodu Tijani v Secretary, Southern Nigerian(above)** would not apply where it is established by evidence that the native law and custom in any particular area differ from the general principle. Thus the authorities firmly establish the existence of individual tenure as a feature of customary land law.

STATE OWNERSHIP

State ownership of land in Nigeria dates back to the Treaty of Cession of 1861 which ceded the Colony of Lagos to the British Crown subject to the customary rights of the local people. The need to acquire land for agricultural and industrial development led to the promulgation of different land acquisition statutes under which individual and communal land rights were compulsorily acquired in different parts of the country.

In 1962, the Land and Native Rights Ordinance was repealed in the former Northern Nigeria and replaced by the Land Tenure Law governing the land tenure system in that area before the enactment of the Land Use Act. Under that law, all native lands including right over them were under the control and subject to the disposition of the Permanent Secretary. The lands were held and administered for the use and common benefit of the natives but non natives acquired no title to the occupation and use of such land without the consent of the Permanent Secretary

With the advent of the Land Use Act, the ownership structure of land in Nigeria was transformed radically. The radical title to all land within the territory of a State in Nigeria having been vested in the Governor of that state, what Nigerians now enjoy are rights of occupancy. Thus, the concept of ownership of land in Nigeria today may only be construed only in terms of a right of occupancy.

PROOF OF TITLE

A claim to ownership of land may be established in any of the five main ways laid down by the Supreme Court in **IDUNDUN v OKUMAGBA** as follows:

(a) By traditional evidence in the form of traditional history

(b) By production of documents of title which must be duly authenticated

in the sense that their due execution must be proved, unless they are produced from proper custody in the circumstance giving rise to the presumption in favor of the execution;

(c) Acts of persons claiming the land such as selling, leasing or renting out all or part of the land, or farming on it or on a portion of it, provided the act extends over a sufficient length of time and are numerous and positive enough as to warrant the inference that the person is the true owner;

In the Supreme Court case of **Danjuma Tanko V Osita Echendu (2010) 18 NWLR (Part 224) 253;** one of the issues for determination was whether or not an act of letting out portions of the land in dispute is evidence of ownership and possession? **Onnoghen JSC** stated explicitly as follows;

> "It is settled law that the act of letting out portions of the land to farmers or tenants is evidence of ownership and possession of the land……"

(d) Acts of long possession and enjoyment of the land; and

(e) Proof of possession of connected or adjacent land, in circumstances rendering it probable that the owner of such adjacent or connected land would in addition, be the owner of the land in dispute.

The five established ways of establishing ownership are disjunctive; All an applicant or claimant needs to do is to establish his claim through and by means of any one of the five modes. Of course, it is also possible to combine two or more of the modes in establishing his cliam. The application of this principle can be seen in the case of **Bartholomew Onwubuariri v Isaac Igboasoiyi and 4 others.** One of the issues for determination was whether it suffices to prove one's title by only one means. It was held that one can establish ownership by any of the five means and need not prove all. The same principle was established in **Ayanwale v Odunsami**.

> "The law is that the establishment of one of the five ways is sufficient proof of ownership. Evidence of traditional history is one of the accepted methods of establishing title to land. Oyadare vs. Keji (2005) 7 NWLR, pt.925, pg.571 Ohiaeri vs. Akabele (1992) 2 NWLR pt.221, pg.1 Idundun vs. Okumagba (1976) 9 - 10 SC, pg.337." Per ADEKEYE, J.S.C.

See the following cases **Newman Olodo v Burton Josiah and 11 ors(2010) 18 NWLR (pt 1225) 653 SC Clement Odunukwu v Dennis Ofomata(2010) 18 NWLR (pt 1225)404 SC; Wahab Alamu Sapo v Alhaji Sunmonu(2010) 11 NWLR (pt** 1205); **Emmanuel Orlu v Mpakaboari Gogo – Abite(2010) 8 NWLR (pt 1196) 307** S.C

POSSESSION

Possession as it relates to land is the physical control a person exercises in relation to land. **Nnaemeka-Agu JSC in Buraimoh v Bamgbose(1989) 3 NWLR (pt 109) pg 352@355 remarked that:**

> "(Possession) may mean effective physical or manual control or occupation of Land-de facto possession-as well as possession animus possidendi together with that amount of occupation or control of the land which is sufficient to exclude other persons from interfering-de jure possession."

The right to possession of land may be lawful or wrongful; it is lawful where it is exercised as a right of ownership or by grant. On the other hand, the right to possession is wrongful where it is exercised neither by virtue of right of ownership or grant. An example of this is the possession of a trespasser or squatter. A wrongful right to possession is expressed technically as "adverse" possession. Adverse possession is good against the whole world except the true owner. To that extent it is protected by the law.

The lawful right to possession confers on the possessor the right to occupy and use the land and it is usually expressed as possessory right or

interest. Possessory right exists even where it is without right and therefore wrongful.

One significant aspect of such possessory rights is the right to exclude intruders in any form and exercise a continuous and uninterrupted control over the land. But a right to exclude intruders is not available against a person having a better right to possession. The interest is preserved by law. In this sense, it is a lesser degree of ownership and sometimes referred to as "limited ownership". It is limited because the right to possession is subject to the ultimate title of the owner and has a definite duration. However, it may be granted to enure for an indefinite period, such as under customary law which is replete with such instances. The grant of possession of communal or family land to a tenant, gives rise to the concept of limited ownership. A problem posed by such limited ownership is that it is liable to be mistaken for grant of absolute ownership after a lapse of several years when the nature of the original transaction may have been forgotten by the present generation.

Consequently, such grantees of rights of occupation and use of land are sometimes referred to as "owner". Thus the term "owner" is loosely used under customary law to describe absolute ownership and sometimes limited ownership.

Possession may be classified strictly into two namely: **De facto possession** which means effective physical or manual control or occupation of land such as physical presence or cultivation of land or erection of fence or survey pillars on vacant and unenclosed land. Being a mere physical control of land without more, it is question of fact. Such control may have originated from permission from the true owner, by stealth or may be a tortuous trespass. It is significant to note that de-facto possession may be exercised by two or more adverse claimants and may be shared. It cannot therefore qualify as legal possession but may appropriately be regarded as mere occupation. **De jure or legal possession** which is possession animus possedendi, singular and exclusive. It may sometimes entail or even coincide with occupation of land (ie de facto possession) but not synonymous with it and may even exist without it. Legal possession to be recognized as such must be permanent occupation with that amount of control or right to occupy as will be sufficient to exclude other persons from interfering. The control must be total, or the right to occupy at will certain, for two persons claiming adversely against each other cannot exercise legal possession. Legal possession includes constructive possession such as where a servant is let into possession of premises by the master or where one is in receipt of rents and profits from tenant installed threats by him.

The legal significance of possession lays in the rights to which it gives rise namely, possessory rights. The possessory rights exist even where the possession is without right and therefore wrongful. One significant aspect of such possessory rights is the right to exclude intruders in any form and exercise a continuous and uninterrupted control over the land. But a right to exclude intruders is not available against a person having a better right to possession.

Relationship between Ownership and Possession

Possession may be the basis of ownership. Our customary law exhibits this characteristic feature. Thus, where there are rival claimants of land, title belongs to the claimant who is able to show that he was the first to enter into possession. **Aromire v Ayowemi (1972)1 ALL NLR (pt 1).**

Wrongful possession may mature into ownership. This is the case where the true owner is guilty of acquiescence or delay which leads to the extinction of his title in favor of the possessor. Similarly, adverse possession may confer "possessory title" on a squatter by virtue of the relevant limitation law.

Thus ownership and possession have close relationship. Firstly,

possession is an incident of ownership. Secondly where ownership of land is in dispute, the law presumes the person in possession as the owner until the contrary is proved: **Arase v Arase** (1981) 5 SC 33 at 58. Hence the legal expression that possession is nine-tenth of law.

RIGHT OF PRESCRIPTION

At common law, time runs in favor of an adverse possessor and the exercise of possessory rights over a long period of time may amount to ownership by prescription, unless it is shown that the alleged true owner had no knowledge actual or constructive, of the adverse possession.

Under the limitation statutes in the various states of Nigeria, an action relating to recovery of land or declaration of title thereon is statute barred after twenty years in the case of an action by a state authority and twelve years in the case of a private individual. Where the right of action first accrued to the state authority, the action may be brought at any stage before the expiration of the period during which the action could have been brought by the state authority, or twelve years from the date on which the right of action accrued to some person other than a state authority whichever period expires first. Time starts to run from the date when the right of action accrues or, where the right of action is concealed, from the time the owner discovers the truth or could have done so with reasonable diligence.

The right of action accrues when the owner of land was either first dispossessed or first discontinued possession. In the case of land of a diseased person, time starts to run against the person entitled under his will or on his intestacy from the time of his death or was the last person entitled to the land in possession. Where the adverse possessor at anytime acknowledged the title of the owner time begins to run from the date of such acknowledgment.

To enable a claimant take advantage of the statute, he must have been in continuous adverse possession for a whole period of twenty or twelve years as the case may be.

Customary/Islamic Law on Prescription

The rule at customary law is that an established owner of land does not necessarily lose his title to an adverse possessor by merely going out of possession for long period of time. This rule of customary law is not affected by the statute of Limitation of actions so that the customary landowner may bring an action for declaration of title to such land outside the limitation period.

While the foregoing rule of customary law is being recognized and applied by the courts, no court will apply the rule in circumstances in which injustice will be done to an innocent party who has been in continuous and undisturbed possession for many years to the knowledge of the owner and in the belief that he has a valid title thereto, has been led to expend money or otherwise alter his position. Formulating the rule of equity in **Apkan Awo v Cookey Gam** Webber J. explained as follows:

> "It would be wholly inequitable to deprive the defendants of property of which they have held undisturbed possession and in respect of which they have collected rents for so long a term of years with the knowledge and acquiescence of those who now dispute their title, even if it were….clear…… that they entered into possession contrary to the principle of native law. We do not decide this point in accordance with any provision of English law as to the limitation of actions but simply on the grounds of equity, on the ground that the court will not allow a party to call in aid principles of native law and custom and least of all principles, which as in this case, were developed in and are applicable to a society vastly different from that now existing merely for the purpose or bolstering up a stale claim."

The rule in **Akpan Awo v Cookey Gam** has been applied by the courts in many cases to protect an adverse possessor when desirable in the interest of justice and fair play. But a defendant in an action cannot invoke the rule unless he can establish by evidence.

- That he is an adverse possessor strictly speaking in law as opposed to a tenant, a licensee or a person enjoying an occupational right within the title of the plaintiff. **Epelle v Ojo** (1926) 1 NLR 96. The test is whether the person claiming adverse possession derived his interest from the plaintiff in question. If he did, he is not an adverse possessor and cannot rely on the rule in **Akpan Awo v Cookey Gam**.
- That he took possession of the land under a mistaken belief that he had title to it. The defence will not avail any person who enters into occupation of the land knowing it to be another's or knowing that he has no bona fide claim to it. In **Nwakobi v Nzekwu** the defense of acquiescence did not avail the defendants because they knew at the time of entering into possession of the land that they were trespassers. Mistaken belief may arise for instance, where the defendant, believing that requisite consent of the family had been obtained, paid the purchase price and entered into possession but when in actual fact, he acquired a void or voidable title, or where there is an encroachment on the land of another believing that the land belongs to him. See **Aganran v Olushi** (1907) 1 NLR 66.
- That the plaintiff had knowledge of the adverse possession but acquiesced in it. This requirement goes hand in hand with that of honest belief of the defendant in his title to the land. It is pertinent to note that knowledge may be presumed not only from overt act of the defendant such as expenditure of money on improvement on the land, but also from long possession sufficient to impute knowledge to the plaintiff. **Saidi v Akinwunmi** (1956) 1 FSC
- That as a result of this reliance on the plaintiff's acquiescence, the defendant has been led to expend money or otherwise alter his position**.** This situation arises where the defendant has built on the land or has been exercising some overt acts of ownership such as letting the property out to tenants or creating an occupational license or granting permission to third party to reap profits from the land.

- That there is no extenuating circumstances negating acquiescence**.** Acquiescence will not bar a claim if it is established that the plaintiff's inaction was due to the intimacy, blood ties of family relationship existing between the parties which motivated moves towards settlement thereby causing delay in bringing an action in court.
- That the length of time is fairly long enough to establish a prima facie evidence of acquiescence on the part of the plaintiff. There is no specific period prescribed by customary law. Although a period of twenty one years was held in Awo's case as sufficient, five years was considered as sufficient in another case. The true rule appears to be that the length of time required where the adverse possessor developed the land is shorter than in cases of undeveloped land since the former situation constitutes an overt act of which the plaintiff ought to have taken cognizance.

A defendant will succeed in invoking the rule in **Akpan Awo's** case only where the above mentioned requirements are met in their totality and fails where any one of those requirements is lacking.

CUSTOMARY LAND TENURE SYSTEM

Customary land tenure system is a system of landholding indigenous to Nigeria. The evolution of this system and the various principles regulating

same exhibit the historical credentials rooted in the custom and tradition of the different ethno cultural groupings in Nigeria over a period of time. The British indirect rule system favored its dynamic growth and paved way for the gradual evolvement of a body of rules accepted by the people as binding. The principles regulating the land tenure system are broadly uniform throughout the country but vary in their details as a result of ethno cultural differences.

NATURE OF TITLE TO LAND UNDER CUSTOMARY LAW

The basic rule under customary law is that land belongs to the villages, communities or families with the chief or headman of the community or family as the "manager' or 'trustee' holding the land for the use of the whole village, communities or family.

Title to land under customary law is vested in the corporate unit and no individual within the unit can lay claim to any portion of it as the owner. The individual right is limited to the use and enjoyment of the land and he cannot alienate same without the consent of representatives of the corporate unit recognized as such in law. The whole idea, as Professor Oluyede succinctly puts it, is that 'group ownership in African context is an unrestricted right of the individual in the group to run stock on what is held to be the common asset of land; the right of all in the group to claim support from the group's land; and the tacit understanding that absolute ownership is vested in the community as a whole.'

Although, the headman or chief in the exercise of his powers of control and management of the land is regarded as a 'trustee'; but unlike in the position under English Law, title to the land is not vested in him but in the corporate unit. He cannot by any stretch of the imagination be regarded as the true owner of the collective property rather, he is a care-taker performing pure administrative functions in a representative capacity. The head of the family or community is comparable to a corporation soul which never dies, the inanimate institution remains whilst the moral incumbent come and go.

THE CONCEPT OF FAMILY PROPERTY (Definition, Creation and Determination)

A study of the various ways by which family property can be created is of the utmost importance in a discussion of the incidents of this form of tenure; no less important is an analysis of the different ways in which a family property can be determined

DEFINITION.

Family land is land vested in a family as a corporate entity. The individual member of the family, therefore, has no separate claim of ownership to any part or whole of it. The ownership of such property is vested in the family as a whole; the individual having a right of occupation or user only.

The concept of family property was fully explained in **Olowosago v Adebanjo** (1988) 4 NWLR (pt 88) 275

> "The concept of family property is original to our indigenous society, and is the bedrock of our law of inheritance. It is regarded correctly as the corner stone of our Indigenous land law. Judicial decisions are replete in the circumstances of the creation of family property. The most common circumstance is death intestate of a land owner, whose estate is governed by customary law. Such land devolves to his heirs in perpetuity as family land See Lewis v. Bankole 1 NLR 81. Family land can be created by a conveyance inter vivos, where land is purchased with money belonging to the family - See Nelson v. Nelson (1913) 13 NLR 248. Family land can also be created by the use of the

appropriate expression in the Will of the owner of such land. See Re Edward Forster (1938) NLR. 83 George v Fajore (1939) 15 NLR.1 Shaw v Kehinde (1947) 18 NLR 129. For the land in dispute to qualify as family land, it will be necessary to identify not only its origin, but its status." Per Karibi-Whyte, J.S.C.

It has been said that no rule of customary law is more firmly established than that no member of a land-owning family has a separate individual title of ownership to the whole or any part of the family land. A corollary of this is that a member has no disposable interest in family property either during his lifetime or under his will. This means that it is only the family that can transfer its title to any person. A purported transfer of the family land by a member of the family is therefore, void and of no effect. The case of **Solomon v Mogaji (1982) SC page 1** is illustrative. A family head sold family property as his own and on appeal to the Supreme Court, it was held that the purported sale was *void ab initio* because he had no separate individual interest to transfer to the appellants. Similarly, a member cannot dispose of family land by will. In **Ogunmefun v Ogunmefun (1931) 10 NLR** where a testatrix made a gift of family land allocated to her under her will to her relation, it was held that the purported devise was ineffective and void.

The term 'family' in relation to family property means a group of persons who are entitled to succeed to the property of a deceased founder of family. Such persons are usually the children of the deceased founder of the family. Children are generally held to refer to both sexes. See **Lopez v Lopez (1924) 5 NLR; Ogunbowale v Layiwola (1974) and Suberu v Sumonu (1957) 2 FSC 33; Essien vs Etukudo (2008) CA.** However in certain jurisdictions, such as the Ibo societies, female children have been held not to be entitled to inherit the property of their late father: **Mojekwu v Mojekwu(1997) 7 NWLR 283**. The question may be put as to whether such a rule is constitutional.

Membership of the family does not take cognizance of the extended family system in the African traditional setting. Thus brothers, sisters, cousins or uncles of the deceased founder of the family do not qualify as members except where, by his own declaration, the deceased land-owner enlarged the family to include his relatives or relations. In **Sogbesan v Adebiyi (1941) 16 NLR pg 26**, the deceased founder of the family devised his property to his heirs as 'family property'. In the will, he appointed a brother as 'the head of the family with further directive to act in family matters under the direction and control and advice of the testator's mother and aunt'. The question that arose was whether the term 'family' included the testator's brother and sister as well as his children only. It was held that the will as a whole made it clear that the testator intended the word 'family' to include his brothers and sister and their descendants as well as their own children

On the other hand, a grandchild is not a member of the family for the purpose of succession to family property. But he will become one when his own parent who was a member of the family dies. Thus a grand-child cannot demand a portion of family land upon which to build as of right. See **Lewis v Bankole (1908) 1 NLR 82,** nor can he challenge a disposition of family property by his own property, this was the specific ratio in **Balogun v Balogun (1943) 9 WACA pg 43.**

CREATION OF FAMILY PROPERTY

Family property can be created either by act of parties or by operation of law. This, of course, is stating the position as it exists today. To the earliest natives the idea of making a will was not conceivable and to say that they could have created family properties by such method would be accordingly preposterous. It was therefore not possible then, as now, to create family property by an instrument inter vivos.

Acts which are possible in law are several and various. A disposition which is an act of parties may take the form of either a conveyance inter vivo or a disposition by will. In **Oyeniyi v Adeleke & Ors** (2008) LPELR-CA/1/132/200, Muhammad, JCA declared:

> "In GAJI V. PAYE (2003) 8 NWLR (Pt 823) 583 at 609, the Supreme Court restated the principle that family property is created in a number of ways which include gift or allotment, will, conveyance intervivos as well as devolution following death intestate of the owner. The trial court's resort to the apex court's earlier decision in WAHABI ALAO ANOR. Vs. OLADEJO AJANI supra in this wise is most apt."

There are four ways by which family property can be created. See generally **Ojo vs Akinsanoye (2014) CA**. These are

a. **By way of declaration of an intention to create family property inter vivos:**

This may arise where land is purchased with money belonging to the family. It may also arise where a land owner while still alive expresses an intention to make the property a family property for the benefit and enjoyment of members of the family jointly.

b. **By way of declaration in a will**

This arises where a deceased landowner declares in his last Will and Testament that a property which hitherto was held personally and exclusively by him a family property on his death to be held jointly by members of the family.

c. **By way of Conveyance**;

Here, the creator confers property on the family under a valid deed for that purpose and declares that the use and enjoyment of the property shall be for named members of a named family.

d. **By way of intestacy**

The rule since the case of **Abeje v Ogundairo(1967)LLR 9** (See now **Oluwatuyi vs Owojuyigbe** (2014) CA) is that where a landowner whose estate is governed by customary law dies intestate such land devolve on his heirs in perpetuity as family property. The condition mainly is that the landowner must have died intestate, and that the estate during his lifetime must have been governed by customary law or native law and custom. Once the foregoing conditions are met, the rule simply states that the property automatically devolves on his children as family property.

The rule therefore takes no account of the number of children or indeed the existence of children. The criticism against the decision in **Abeje v Ogundairo**(**above**) on the ground that a sole heir could not have constituted the family is unfounded and should be ignored. The rule also does not take cognizance of the sex of the children, male or female!

MANAGEMENT OF FAMILY PROPERTY

Since family property is vested in the family as a whole and ownership of the land is joint and indivisible so that it is practicable for every member to be a part of the controlling nucleus of family property, the administrative control and management of the family land is vested in the family head in conjunction with the principal members of the family.

FAMILY HEAD- How determined

A person can be recognized as a head of a family in three major ways: (a) By operation of law; (b) By election by the members of the family; and (c) By direct appointment by the founder of the family.

Under most systems of customary law, the family head is the eldest surviving **male child** of the founder of the family though nowadays, the claim of females has been recognized. See for example **Gbode Ventures**

Nigeria Limited vs Alhaja B Alafia (2001) CA. On the death of the eldest surviving child, the headship devolves on members in turn according to seniority.

However, under the Ibo customary law, the family headship devolves on the **eldest son** and his male descendants on the principle of primogeniture

The general rule is that the head of the family once appointed or recognized assumes full control of the family land. But his control over family property is devoid of ownership; what is vested in him is only the day-to –day management of the property: **Egbuna vs Egbuna (1988) CA; Achilihu vs Anyatonwu (2013) SC**.

Although the family head may be seen as the *primus inter pares* his interest in the property is not greater than that of any other member and he cannot effect a valid alienation of the family land without the consent of the whole family. He however enjoys the family property along with other members and may live in the family house.

It is the responsibility of the family head to preserve the property and keep it in good state of repairs. He allocates portions of family land to members or others for use. It should be noted that such an allocation to a member of the family by a family head does not translate to ownership of the portion allocated in favour of the member of the family. All he has in respect thereof is a right to occupy and use the portion allocated: **Bamgbose vs Oshoko (1988) SC**. Where the property is let out to tenants, it is duty of the family head to collect rent and pay outgoings from the family funds.

The principal members

The principal members of a family are formed from the branches existing in the family. In a polygamous family, the eldest of the children begotten by each wife is a principal member whilst in the case of a a monogamous family; every child is a principal member.

A principal member is a representative of a distinct branch of a polygamous family. Each principal member is expected to represent the interest of members of his branch in the decision making process and in respect of each transaction between the family and third parties in conjunction with the family head.

Nature of Member's right

A member has no general right to occupy or use any portion of the family property except the portion allocated to him for use. However, he has exclusive possession of the portion allocated to him and can in appropriate cases maintain an action in trespass against other members of the family for interfering with his possession: **Bamgbose vs Oshoko (1988) SC**.

A member's right may inures for the whole of his lifetime and the family will generally permit his or her children to have among them the same user as their parent had if the circumstances of the family and of the property admit.

A member cannot alienate his own portion to a third party or dispose of by will to his children or any other person (because *nemo dat quod non habet*) without the consent of the family; neither can his portion be attached for the payment of his personal debt.

Family property does not cease to be so merely because a member has made improvements on it out of his private means. Although a member owns all improvements made on the land but the consent of the family is still required for its alienation if same is attached to the land since a stranger cannot enjoy such improvements without going unto the land.

THE TRUST CONCEPT AND ROLE OF THE FAMILY HEAD

The position of the family head with respect to the performance of the

enumerated duties has been likened to that of a trustee in the English sense. In **Amodu Tijani v Secretary Southern Nigeria**, Viscount Heldane described the status of the family head as follows;

> 'He is to some extent in the position of a trustee and as such holds the land for the use of…….the family'

Also in **Kuma vs Kuma (1938) 5 WACA,** the West African Court of Appeal described the family head as a trustee in determining whether he should be held liable for the mismanagement of the family property. The court held that as a result of his fiduciary position he was required to account for his management of the property. Would it therefore be legitimate to regard the head of the family as a trustee or to say that his position is analogous to that of a trustee at common law?

First, it is misleading to suggest that the position of a family head is *stricto sensu* that of a trustee in English Law for it tends to suggest that the legal estate is vested in him. The fact is that the legal estate is vested in the family as a unit.

Secondly, it cannot be that the whole elements of the English concept of trust are applicable to the position of the family head under customary law. For example, the duty of the trustee to account is more firmly rooted in English Law than the duty of family head to account under customary law.

Thirdly, whereas a trustee is not personally responsible for debts proved by him to be incurred on behalf of the trust property, a head of family, before embarking upon the expenditure of money or charging the interest of the family, should obtain previously to the transaction, the consent of the family. In **Aralawan vs Aromire 15 NLR 90** the plaintiff sued the first defendant both personally and also as representing the Aromire family, for money borrowed from him by the first defendant whilst acting as the head of the family before the formal installation and capping of the second defendant, who was later joined in the action by an order of the court. Judgment was given against the first defendant in his personal capacity and not as a representative of the family, even though it was established at the hearing that the money was partly used for rebuilding the family property and also for the payment of costs of the family law suits.

Lastly, although the trustee and Head of Family may take or defend action in a representative capacity, in such litigation, the head of the family is personally liable to the judgment creditor for the judgment debt and costs.

Despite the foregoing differences, the head of the family occupies the position of a trustee in some material respects. He is the only person entitled to take or defend actions involving the family property and the other members of the family are only entitled to do so if the head refused or neglected to do so.

He is the only person to allot family land to members of the family or strangers and to prescribe conditions under which the various allotments are made. He conducts all private all external businesses of the family and he is the only person to be consulted in all important matters relating to the family property. It is the family head alone who has the right to enforce forfeiture of the interest of the culprits. The family head is in a fiduciary position in relation to the property, the other members of the family requiring him to act in good faith whilst carrying out his duties.

Cases abound where Nigerian courts frowned at the reckless conduct of the family head. Thus, where the family head misuses his fiduciary powers, other members as beneficiaries may remove him and appoint another in his place or seek an order of the court for the partition or sale of the family property. As Combe J pointed out in **Lopez vs Lopez (1924) 5 NLR 50**:

> "Where there has been a persistent refusal by the head of the family or by some members of the family to allow other members of the family to enjoy their rights under native law and custom in family land, the court has exercise and will continue to exercise, its undoubted rights to make such order as will ensure that members of the family shall enjoy their rights and if such

right cannot be ensured without partitioning the land, to order such partition."

To the extent that the foregoing remedies coincide with the remedies available to the beneficiaries under the English trusteeship concept it can be said that his position is analogous to that of a trustee at common law. Thus, while it is apt to say that the family head is not a trustee *stricto sensu* as it is known in English Law, he may be regarded as a trustee of his powers in so far as he is expected to exercise his powers not for his own advantage, but for the benefit of the family.

FAMILY HEAD and ACCOUNTABILITY

Since the question of accountability is inextricably interwoven with the status of trusteeship, the controversy attending the position of a Head of the Family as a trustee of his power under customary law is whether he is generally accountable to the family for the rents and profits derived from the family property.

The view in very early times which many Ghanaian authorities have upheld over the years has been the non-liability of the head of the family to account to the other members. A learned author was opined:

> "If the family therefore finds the head of the family misappropriating the family possessions and squandering them, the only remedy is to remove him and appoint another instead; and although no junior member can claim an account from the head of the family, or call for an appropriation to himself of any special portion of the family estate or income there from arising, yet the customary law says they who are born and they who are still in the womb require means of support. Wherefore the family land and possession must not be wasted or squandered."

The foregoing principles clearly deviate from the application of the trusteeship concept even in its limited form under customary law and different reasons have been adduced for this rather strange concept. First, that to permit members of the family to sue for an account would be to expose the head of the family to vexatious litigation at the instance of every member of the family who considered himself aggrieved and this would be intolerable. Secondly, that since no individual member of the group can sue to recover family property the protection of which is the responsibility of the family head; it follows that no individual should be allowed to sue the head of the family. Lastly, the principle is rooted in the traditional virtues of respect and feeling of deep affection for elders in the family.

Before the Supreme Court decision in **Taiwo v Dosunmu (1966) 1 All NLR(pt 1)** the idea of non-accountability had always shocked judicial conscience in Nigeria. The earliest reference to the subject in Nigeria was made of in **Re Hotonu 1 JAL 87** where Smith J held that the head of family as an administrator was not liable to render a strict account to members but added that:

> "I do not, however, think custom of the country just or equitable and should under no circumstance hesitate to give the direct countenance of this court to reckless waste of the resources of a family; as time advances it is to be hoped that other ideas will prevail more consonant with natural justice.'

In **Kosoko vs Kosoko (1937) 13 NLR 131** the plaintiffs claimed as against the defendants an order of the court for an account of all rent and mesne profit of the family property which the defendants as trustee had managed for about forty years before the action was brought. It was found that the plaintiff who had no support of brothers and sisters in bringing the action had deliberately absented himself from the family meetings for over thirty years since he left Lagos. The court held on those grounds that the plaintiff could not on his return claim an account from the head of the family. On the question of a solitary individual bringing such a claim, the court emphatically

held that no right of action lies unless the plaintiff can point to a definite delinquency amounting in effect to a breach of trust by the family representatives. In **Archibong vs Arcibong (1947) NLR 117** , the plaintiff who were the respective heads of two of the four sub-branches of the Archibong family sued the first defendant, the head of the **Archibong** House of Duke Town Calabar *inter alia*, for an account in respect of a compensation money paid by the Government for land acquired for public purpose in Duke Town. The first defendant contended that the Plaintiff had no legal right to call him to account, but the court reasoned that though the obligation of the head of family is not as great as those of a trustee, his actions must be capable of explanation at any time to the reasonable satisfaction of the family. It was held that the first defendant was liable to render an account and to pay over whatever might be found due thereon.

The duty of the head of the family to account was put as high as that of a trustee in the conventional sense by Somolu J in **Akande vs Akanbi (1966) NBJ 86** when he observed as follows:

> "Today it is my view that it has become an acceptable point of the duties of heads of families, especially where they hold a large family properties in trust for the family, with the possibility of thus having to hold a large sums as a result of the sales of portions etc. to keep account of all the transactions' in order to let the members see the true position at all times and to justify their confidence…..In my view I hold as matter of law today that it is far better to impose restriction on the heads of the family by making them liable to account even strict account than to lay them open to temptation but unnecessary laxity in the running of the family affairs which inevitably follows non-liability in that respect. To hold otherwise will be outrageous to our present sense of justice and will open flood gate of fraud, prodigality, indifference or negligence in all its form and will cause untold hardship on several families especially the younger members."

In **Onwusike vs Onwusike (1963**) Bethel J attacked the conduct of the head of a family when he described him as "a grasping and avaricious man, who even as 'Okpala' enjoys more than his fair share of the family property" and he thus held that he must account for all the rents received by him. In **Taiwo vs Dosunmu (above)** the plaintiff sued the head of the family and another principal member for accounts of moneys received for managing the family property, and payment to him of his share, alleging (*inter alia*) mismanagement by the head. The head (first defendant) contended that he was not accountable to the plaintiff; while the second defendant denied collecting rents. The trial judge set the case down for argument on whether a family head was liable to account. Neither side objected or applied to call evidence, but each cited reported cases. The court held that the action could not be maintained against the family head, and dismissed the action against him (and also against the second defendant because the plaintiff was not prepared to go against him). On appeal to the Supreme Court, it was held that the principle of non-accountability by the family head is not a custom judicially noticed in Nigeria as in Ghana and that the case of **Kosoko vs Kosoko (above)** did not decide that in Lagos, the head of a family could not be sued for an account in any circumstances. The court pointed that although in ascertaining the custom of particular areas, the decision which establish the custom of neighboring areas may be helpful, they cannot be conclusive.

The decision in **Taiwo v Dosunmu (above)** is disappointing because it ended on the issues of pleadings and no definite pronouncement on the principle of accountability was made by the Supreme Court. However, the state of the law in this regard may be stated as follows:

1. That it cannot be said with all assurance that the principle of non-accountability is a custom judicially noticed in Nigeria as in Ghana.

2. That the issue of accountability depends on the circumstances of every case. Seethe two cases of **Archibong vs Archibong and Kosoko vs Kosoko**. The question whether the action was brought by a minority or majority of the family coupled with the timing of the action are all relevant to the question of accountability.

ALIENATION OF FAMILY PROPERTY

The Supreme Court in the case of **Lasisi Ayanrinola Akayepe & Anor vs Ganiyu Ayanrinola Akayepe (2009) LPELR-326(SC)** made a pronouncement on the rule under native law and custom relating to alienation of family property in this manner:

> "It is now firmly settled that what is important, is the consent of majority of the principal members of the family that is required and not that of every member for the alienation, allotment e.t.c. of the said family unpartitioned property or land. See the case of Adewuvin v. Ishola (958) WRNLR 110: and Olorunfunmi & 2 Ors. v. Saka & 2 Ors. (1994) 2 SCNJ 39 at 49, 50 - per Kutigi. J.S.C. (as he then was now CJN). If the alienation, sale, lease or allotment e.t.c. is/was made by the principal members of the family without the consent of the head of the family who is recognised as the custodian of the family property the same, will be void ab initio. See the cases of Adedube & Anor.. v. Makanjuola 10 WACA 33 and Agbloe v. Sapper 12 WACA 187. If however, the alienation, sale, lease or allotment etc was/is made by the head of the family, without the consent of the principal members of the family, the same will be voidable. See the cases of the Shelle v. Chief Asajon (1957) 2 FSC 65 at 67; Ekpendu & 2 Ors v. Erika (1957) 4 FSC 79; Qfondu v. Onuoha (1964) NMLR 120; Lukan v. Ogunsosi (1972) 5 S.C. 40; (1972) (1) NMLR 13; (1972) 2 ANLR 41: Akani & Ors. v. Makanju & Ors. (1978) 11 & 12 S.C. 13; Atunranse & Ors. v. Sumola & Ors. (1985) 1 S.C. 349 and Babayeju & Anor v. Chief Ashamu & Anor (1998) 7 SCNJ 158 @ 166 - 168 and many others. It needs be borne in mind always and this is also settled that family land ceases to be family land after partition. See the case of Alhaji Adebanjo & Ors. v. Alhaji Olowosoga & Ors. (1988) 9 SCNJ 78. Where however, there is no partition as in the instant case leading to this appeal, an allotment to the allottee, acquires what is known or described as usufruct - i.e. a right to use and occupy. See the case of Alao & Ors. v. Ajani & Ors. (1989) 6 SCNJ (Pt.11) 243 at 252 and this right, can be inherited by his descendants." Per OGBUAGU, JSC

Similarly in **Oluwatuyi & Anor vs Owojuyigbe & Anor (2014) LPELR-23529(CA)** the Court of Appeal had this to say about the rule:

> "As rightly submitted by the learned counsel for the Respondents, in order to constitute an unimpeachable alienation of family land/property, the concurrence of the members of the family is prime. See: Olowosago & ors. vs. Adebanjo & Ors. (supra) 287. One of the ways by which the concept of family property is created is death intestate of a land/property owner, the land owner's estate which is governed by customary law devolves to his heirs in perpetuity as family land (as in the instant case). An application of the above to this instant case translates to mean that the 1st Appellant, 1st Defendant and 2nd Defendant share joint ownership of the developed family property and by extension any alienation without the consent of any of them would render it void ab initio. See: Adeleke v. Iyanda (1994) 9 NWLR (pt. 366) 113 @ 128; Esan vs. Faro

(supra)."

In the case of **Oduok & Ors vs Ekong** (2011) LPELR-CA/C/ 106/2010 it was stated:

> "Thus it must be made clear that whilst it is a family land all family members have equal right to it but in every case the family head has charge of the land and in loose term is sometimes called the owner. He is to some extent in the position of a trustee and as such holds the land for the use of the family. He has control of it and any family member who wants a piece of it to cultivate or to build a house goes to him for it. But the land so given still remains the property of the family. He cannot make any important disposition of the land without consulting the elders of the family and their consent must in all cases be given." Per MIKA'ILU, JCA.

Although family property may be allotted to members of the family, allottees cannot alienate or part with possession of family property without the requisite consent. As Craig JSC pointed out in **Alao vs Ajani (1989) 4 NWLR (pt113)**:

> "A member of the family is not permitted to introduce a stranger into the family by the back door, nor is he permitted to fetter the revisionary interest due to the family by a complex commercialization of the simple possession granted to him. However, since the concurrence of every member of the family may be impracticable especially where the family is large, the law is that for any such alienation to be valid only the concurrence of the family head and the principal members shall be sought and obtained."

Alienation of family property without the consent of the family head is void *abi inito*. Where the family head alienates family property without the concurrence of the principal members the sale is voidable. This general principle of law regarding the alienation of family property was stated asa far back as 1959 in **Ekpendu v Erika 4 FSC 79; (1959) SCNLR 186**. See also **Atunrase vs Sunmola (1985) 1 NWLR (pt 1) 105** and applied by the Supreme Court in **Olorunfunmi vs Saka (1994) 2 NWLR (pt 324) 23** in the following words

> "It is settled law that sale or lease of family land by principal members of the family without the consent of the head of the family is void while such sale or lease of family land by head of the family without the consent of principal members of the family is only voidable. (See Ekpendu & Ors. v. Erika 4 FSC 79; (1959) SCNLR 186; Atunrase & Ors. v. Sunmola & Ors. (1985) 1 S.C. 349), (1985) 1 NWLR (Pt. 1) 105." Per KUTIGI, J.S.C.

The rule that disposition by the family head without the consent of the principal members is voidable is subject to three important qualifications:

i. The rule applies only where the family head has acted as such so that where he alienates the land as his own e.g. where he describes himself in the conveyance as a "beneficial Owner" of the land, the sale will be void;

ii. Where the family head made a gift of such land without the requisite consent, the gift is void and it makes no difference that the gift was made to a member of the family.

iii. The family head cannot unilaterally order the partition of family property without the consent of all the principal members of the family. Such partition if made is ineffectual to determine the family ownership of the property.

Where a sale is void in law, the purchaser owns nothing and ownership retains in the family. But in the case of a voidable transaction, the sale remains valid until the non-consenting party seeks and obtains a court order to set it aside.

In the absence of fraud or other vitiating elements, where an alienation of family property is voidable for lack of consent of the principal members of the family, the alienation may be set aside only if the following requirements are present namely:

- The Plaintiffs must have acted timeously. If they are guilty of culpable delay or, their claim may be defeated. In **Mogaji vs Nuga (1960) 5 FSC 107**, the Respondent through a middleman bought a piece of land from the head of a family comprising of 5 branches. The then head of family of one branch consulted the head of two other branches but a minor and survivor on the two other branches were not consulted nor was the principal member of the 5th branch consulted. About 10 years after the sale, the Appellants demanded from the middleman payment of certain amount of money failing which they would take back the land. The court held that, it was too late for the Appellants to exercise their right to set aside the sale having not done anything for 10 years.
- There must have been no intervention of bonafide third party interest resulting from the Plaintiff's delay and inaction. Where as a result of delay and inaction, a third party purchaser for value has acquired an interest in the property without notice (actual, constructive or imputed) of the rights of the Plaintiffs or the voidable nature of the Vendor's title, the transaction can no longer be defeated: **Adejumo v Ayantegbe**.
- There must have been no proven facts on the part of the Plaintiff which can show that he had acquiesced to the transaction.

The non-consenting party may however ratify the transaction in which case the transfer which was hitherto invalid becomes valid.

USE OF POWER OF ATTORNEY BY THE FAMILY

The requirement or rule under native law and custom that each alienation of a family property must be agreed upon or consented to by the family head and principal members of the family has always posed problems to intending parties to such transactions. This is particularly so where the family is large such that identifying the family head and even principal members of the family will not only be burdensome, but sometimes out rightly impossible.

The need to ensure certainty of title and thus protect potential parties to transactions relating to family property from the fraudulent machinations of members of the family has made the use of Power of Attorney inevitable. Where the Power of Attorney is executed in favor of some members of the family, only those members can deal with the land, and since the document is a registrable instrument, the purchaser simply identifies the appropriate parties to execute a deed of transfer in his favor through a search in the lands registry.

To be valid, such a Power of Attorney must be executed by the family head. Any disposition of family land pursuant to a power of attorney given not my the head of the family or with his express consent is void and of no effect and such power of attorney cannot pass any interest to a third party unless the head of family waives his right. See **Osunrinde vs Ajamogun** (1992) NWLR (Part 246) page 156. There, the land in dispute belongs to the Ajamogun/Olukotun family. A power of attorney was granted to the 1st plaintiff and the 2nd to the 8th defendants who are members of the family by other members to deal with the family land. Those members of the family

executed the power of attorney as principal members and accredited representatives of the family. In consequence of the said Power of Attorney, the 2nd to the 8th defendants as well as the 1st plaintiff granted a lease of part of the family land which is now in dispute to the 1st defendant. The 1st defendant went on the land and commenced building thereon. The plaintiffs instituted this action claiming among other things, an order declaring as null and void the Power of Attorney which was duly registered or in the alternative an order setting aside the said Power of Attorney and an order setting aside the lease which was also duly registered. Their main complaint was that the head of the family did not consent nor subscribe to the giving of the power of attorney to the donees of the power. According to them the head of the family at the time was one Muse Gbadamosi Ajamogun. There had been series of actions among members of the family before the present action and in one of such actions the court found that Muse Gbadamosi Ajamogun, whom the plaintiffs held out as the head of the family at all time relevant to this case, was the head of the family. The defendants, except the 2nd defendant, averred and led evidence in support of the fact that the head of the family at the relevant time was one Musa Aina Bale and that he consented to the grant of the power of attorney to the 2nd to the 8th defendants and the 1st plaintiff. The case of the 3rd to the 8th defendants was that the power of attorney was valid and that the lease to the 2nd defendant was equally valid. The learned trial Judge accepted the evidence for the defence and found that Musa Aina Bale was the head of the family. On appeal, the Court of Appeal held that the issue of the headship of the family was not open to the trial Judge to make a finding on as the defendants were estopped by the finding of a competent court in an earlier case that Muse Gbadamosi Ajamogun was the head of the family. Consequently as his consent was not sought nor obtained to the power given to the 2nd to the 8th defendants and the 1st plaintiff, the Court of Appeal held that the power of attorney was invalid and that the Deed of Lease in favour of the 1st defendant was equally invalid. One of the issues for determination at the Supreme Court was whether the Power of Attorney was valid in spite of the fact that the consent of the head of the family was not obtained. The Supreme Court agreed with the Court of Appeal that "it ought to have occurred to the learned trial Judge that a donor who claims to be a principal member and accredited representative of a family cannot be rightly said to claim by that averment that he is the head of that family. The mere fact that donors described themselves as accredited representatives of the family and as representing various sections of the family will not vest them with authority to supplant the Head of the family or undermine his authority. What it all amounts to is that the power of attorney given not by the head of the family or with his express consent is void. Any disposition of family land pursuant to that power of attorney is of no effect whatsoever. As rightly submitted by Mrs. Kuye, the power of attorney cannot pass any interest to anyone unless the head of family waives his right."

DETERMINATION OF FAMILY PROPERTY.

The occurrence of any of the following events determines family property.

- **Absolute transfer**

  The absolute transfer of family property occurs where the family transfers the totality of its interest in the family land to another person. This may be by way of sale or gift. Where this happens, the transferee becomes the absolute owner of the property provided the transfer is valid. A transfer of family property is proper and valid where the transfer is sanctioned by the family head and principal members of the family. A conveyance purporting to transfer family property without the consent of the family head and the principal members of the family is void ab-initio. The rule was laid down in the Ghanaian case of **Agbloe vs Sappor (1947) 12 WACA 187** and approved by the Federal Supreme Court in **Ekpendu v**s **Erika (1959) 4 FSC 79** as

the general rule regarding alienation of family property in West Africa, including Nigeria. This rule may be varied by the family in favor of an agent of the family under a Power of Attorney duly executed by the family head and principal members. Thus a purported transfer of the family property by a member alone is void absolutely. Similarly, a transfer by the family head of family property as his own is of no effect. In **Solomon vs Mogaji (above)** where a family head sold family land as his own, the Supreme Court held that the purported sale was void. However, where the family head transfers family property on behalf of the family, the sale is voidable and may be set aside at the instance of the aggrieved non-consenting members. A voidable transfer is rectifiable but a void transaction cannot be ratified. However an aggrieved member will lose his right to challenge a voidable or void transfer where there is unreasonable lapse of time before bringing the action. **Awo vs Cookey-Gam**.

- **PARTITION**

Partition is the act of sharing family property among the members of the family. Where family property is partitioned among the members of the family, each "partitionee" becomes an absolute owner of his or her share. Partition may be voluntary, resulting from mutual agreement amongst members of the family. Voluntary partition is usually effected by a Deed of Partition. In **Balogun vs Balogun** family property was effectively partitioned amongst seven members of the family. On the other hand, partition may be ordered by the court, where the interest of justice and peace demands. This was declared by Combe J in **Lopez vs Lopez** to the effect that:

> "Where there has been a persistent refusal by the head of a family or by some members of the family to allow other members of the family to enjoy their rights and if such right cannot be ensued without partitioning the land, to order a partition."

The above principle was approved by the Supreme Court in **Adeleke vs Aserifa (1986) 3 NWLR (pt 31) 575.**

It should be noted that there is a difference between a case where family property is partitioned among members of the family and a case where portions of the family property are merely allotted to members of the family or even strangers. In the case of **Gbadamosi Olorunfemi vs Chief Asho (2000) 2 NWLR (Pt 643),** the Supreme Court dealt with the difference between a partition and an allotment thus:

> "The term "partition" may be used in its technical and strict sense to mean where the property formally belonging to a family is shared or divided among the constituent members of the family whereby each member of such family is conveyed with, and retains exclusive ownership of the portion of the land granted to him. In this sense. Family ownership of such is automatically brought to end.
>
> One the other hand, a member of a family may be granted or "allotted' a portion of family property for limited or occupational use in the sense that the allotee qua user does not become an absolute owner of the portion allotted to him no matter the period of use. Invariably, while allotment can be made by the head of the family alone, partition on the other hand is brought about by the consensus of all the members of the family." Per Achike, JSC.

Ayoola, JSC in the same case stated, *inter alia*, as follows

> "…Partition is to be distinguished from allotment. Allotment does not determine the family ownership of the land so as to make the allotee an absolute owner. It can be effected by the head of family alone. Partition which does not make provision for all of the constituent branches of the family is void. Whether there was partition or allotment is a question of fact. The mere use of the word "partition" may not settle the issue where there is an issue whether or not family property is determined…"

The law in this country is that allotment of family land to its members for farming purposes confers only right of occupation and use on the member. This was the decision of the Supreme Court in **Chukwudozie Anyabunsi vs Emmanuel Ugwuze (1995) 7 SCNJ 55.**

The difference between allotment and partition lies in the fact that in the case of the former while right of use of land belongs to the allotee and family retains title to such land, the effect of partition is that title is transferred from family to individual grantees and the family is thereafter divested of ownership of the land. What is more, whereas allotment can be made by the head of the family alone, partitioning must be by all or for and on behalf of all members. In other words, the head and all principal members of the family must consent to a partition. Until partition of family property is effected, no individual co-owner or member of the family can have a separate entitlement to the family property. See **Obasohan vs Omorodion (2001) 7 SCNJ 168; Wahab Ishola vs Alhaji Karimu Folorunsho (2010) 13 NWLR (pt1210); Yesufu vs Adama (2010) 5 NWLR (pt 1188) 522 SC.**

- **GOVERNMENT ACQUISITION**

Family land may be acquired by any of the governments in the country compulsorily pursuant to a statutory enactment in that regard. One of such legislations is the Land Use Act.

CUSTOMARY RELATIONSHIPS ON LAND

The pursuit of commercial and economic developments in the continent as a result of contacts with the western world led to natural adaptations of indigenous notions to new situations. Factors such as the introduction of modern currency, cash crops, commercial and industrial developments, improved communication systems, the urge for urbanization and industrialization which western civilization brought forth, coupled with increased pressure of population on the land, led to the recognition of different transactions such as the grants , leases, pledges and use of land as security.

CUSTOMARY TENANCY

In pre-Land Use Act days, it was common in most parts of Southern Nigeria and some other parts of Northern Nigeria for communities and families who owned vast portions of land to put those who did not have lands (but who needed them) on defined portions of their lands on terms and for specific or specified purpose(s). The relationship thus created was known under native law and custom as Customary Tenancy. The owners or grantors were referred to as customary overlords while the users or grantees were said to be customary tenants. The applicable law was the native law and custom of the society or community in which the land in question is located. Notable in this regard was the Yoruba Customary Law.

Under the Yoruba Customary Law, it has long been established that the customary tenant was entitled to actual possession of the piece of land granted by the customary overlord for as long as he does not misbehave or abandon the land. If he abandons the land or if he accomplishes the purpose for which the land was granted, the customary tenancy is automatically terminated. The customary tenant may also forfeit his possessory interest in the land if he commits a serious breach of the terms of the customary tenancy, such as if he denies the title of his customary overlord by selling the land without the consent of the customary overlord first had and obtained. In return for the land which the customary tenant holds, he was bound to pay tribute (usually in the form of **"ishakole**") to the customary overlord for so long as he holds the land by virtue of the customary tenancy. The customary tenant also has a duty to continue to recognize the title of the customary overlord. The nature of the interest held by the customary tenant was said to be similar to **emphyteusis** which in Roman Law is a perpetual right in the land of another, for which a yearly sum was paid to the proprietor.

Although the customary tenant was entitled to remain in possession of the land granted for an indefinite period subject to abandonment or misbehavior they also remained customary tenant forever, paying tributes to their overlords and recognizing them as such. No matter how long a customary tenant remains on the land, he does not thereby acquire title to the land.

The legal nature of the interest of a customary tenant was described by Elias CJN (as he was then) in **Aghenghen vs Waghoreghor** (1974) 1 SC 1 as follows:

> "In the Customary Land parlance, the customary tenants are not gifted the land; they are not "borrowers" or "lessees" they are grantees of land under customary tenure and hold, as such, a determinable interest in the land which may be enjoyed in perpetuity subject to good behavior."

The interest of a customary tenant on the land granted enures in perpetuity and has been regarded by the courts in practice as practically indefeasible especially after permanent buildings or other forms of improvements like extensive commercial farming have been established thereon by grantees. Even a mere misbehavior (which does not undermine the overlord's reversionary interest) cannot extinguish the right of a customary tenant and is more appropriately punished by a fine in modern times.

Customary tenancy has no equivalent in English law. It is neither a leasehold interest, nor a tenant at will, nor a yearly tenancy, the main incident of such tenure is the payment of tribute, not rents, by the customary tenants to the overlord. However, it is not in all cases of customary tenancies that payment of tribute is a perquisite for the creation of the tenancy. In **Akinlagun vs Oshoboja & Anor (2006) 12 NWLR (pt .993) 60** Kalgo, JSC made the point that:

> "The concept of customary tenancy, which creates the relationship of landlord and tenant, is peculiar to customary law and has no equivalent in English law. The concept connotes a situation where strangers or immigrants are granted land by the overlord to be in occupation and continue in peaceful enjoyment, subject to certain conditions… While payment of tribute is a recognized condition of customary tenancy, it is not always so and for all times. There are situations where tribute is not paid to the overlord and yet customary tenancy exists. In other words, where the tenant unequivocally recognizes the position of the overlord as landlord, a customary tenancy exists, whether tribute is paid or not. After all payment of tribute could be overlooked by the overlord who has milk of kindness in him and a flowing charity. There are also instances where the landlord asks the tenant to stop payment of tribute because of very long association and good behavior of the tenant. Thus payment of

tribute is not a sine qua non."

A customary tenant has exclusive possession hence he has the right to exclude everybody else from the land including the overlord. Unless the tenancy so permits or the tenancy itself has been lawfully determined, the grantor has no right whatsoever to enter the land without the permission of the customary tenant. This right to exclusive possession also avails against a purchaser of the grantor's reversion and all other persons claiming through him or strangers. In **Lasisi vs Tubi**, some members of the Oloto Chieftaincy Family had sold land to one Odutola through whom the Respondents claimed title to the land. At the time of the said sale, the Appellants were already settled on the land as customary tenants of the Oloto Chieftaincy Family. On the question whether a purchaser of the radical title of the overlord such as the Respondents could successfully eject the overlord's customary tenant who had settled on the land before the purchase, it was held that, at best, such a purchaser will simply step into the shoes of the overlord.

In claiming against a third party for trespass and consequential damages resulting therefrom, a customary tenant must claim as a customary tenant and not as the owner otherwise, his claim for compensation will fail. In **Shell BP vs Abedi & Ors**, the question arose whether customary tenants, having failed in an action for declaration of title, can make a claim for compensation arising from damage caused to things on the land by a third party on the authority of the owners of the land. The Supreme Court held that a claim based on the ownership of the land by a customary tenant in possession would not entitle him to a claim for compensation for damages done to things on the land and that the evidence of possession became irrelevant.

Where a stranger and his descendants have been permitted to reside on customary lands for many years, the customary owner of the land and his descendants are estopped by their conduct from obtaining a decree of possession of the lands in an action for that purpose brought against the stranger's descendants in occupation of the land.

Whilst the overlord has an obligation not to derogate from grant, the customary tenant has an obligation not to deny the overlord's title otherwise he will be liable for forfeiture and eviction.

The right of a customary tenant is limited to occupation and use of the land during good behavior and does not include the right to alienate without the consent of the overlord. Thus in **Onisiwo vs Fagbenro** where the customary grantees of family land leased the land to a business concern for 50 years with an option of renewals for another period of 25 years at the expiration of the original lease, it was held that the execution of the lease was by itself sufficient misconduct to make the defendants liable for forfeiture.

Customary law requires that the customary tenant complies strictly with the condition of grant and in particular, he must use the land only for the purpose for which the grant was made. Where the customary tenant uses the land for a different purpose from which the overlord agreed such that the use constitutes a permanent injury to the land, the grantor may bring an action for damages.

DETERMINATION OF CUSTOMARY TENANCY

Customary tenancy may be determined in any of the following ways:

i. Accomplishment of the purpose of the tenancy:

The purpose agreed upon at the commencement of the tenancy constitutes a determinable event the accomplishment of which automatically determines the tenancy under customary law.

ii. Abandonment

Where the customary tenant abandons the land with no definite intention of coming back to it, the tenancy determines. This is not the case however where the land is left to fallow for the purpose of recuperation of the soil.

iii. Forfeiture.

Where the customary tenant engages in acts constituting misbehavior which misbehavior undermines either the interest of the overlord in reversion or otherwise amounts to a challenge of the overlord's title over the land in question, the tenancy may be determined by forfeiture.

In **Akinlagun vs Oshoboja**, the Court of Appeal stated as follows:

> "Forfeiture is a punishment annexed by law to some illegal act or negligence, in the owner's land, whereby the tenant loses all the interest therein, as a recompense for the wrong which either he alone, or the public together with himself has sustained. The punishment of forfeiture attaches to an act or acts or misbehavior on the part of the tenant"

Whether or not the acts of a tenant amounts to misbehavior is a matter of fact, as distinct from the question whether such misbehavior entails forfeiture which is a matter of law. The list of such acts which constitutes misbehavior is not closed. It includes alienation of part of the land under claim of ownership, refusal to pay tribute due or indeed direct denial of the overlord's title by setting up a rival title in the customary tenant himself.

Although the non-payment of rent or tribute is not necessarily inconsistent with the ownership of the overlord, the circumstance and the reason for the refusal to pay tribute may determine whether there is a denial of the tribute to the overlord. Also, denial of the overlord's title to incur forfeiture must have been so manifested and exhibited over a long period of time as to constitute determination to claim and maintain the land as his own. In **Erinle vs Adelaja & Ors** the Supreme Court held that consistent conduct of the customary tenant exhibited over a period extending from 1935 to 1960 manifested determination to claim and maintain the land as his own and must therefore incur forfeiture. Also in **Taiwo vs Adewunmi**, the Supreme Court in making a grant for feature took into consideration the fact that for three quarter of a century, the tenants in question have, in one form or another, disputed the title of their overlord.

Forfeiture is not automatic. The overlord must take the necessary steps to enforce his right of forfeiture in court by pleading same specifically in the Statement of Claim. It has been held that misbehavior of a customary tenant of the type recognized by law merely made the interests of the customary tenant liable to forfeiture at the will of the overlord and neither determined per se the tenancy nor forfeits the interests of the tenant automatically. In **Abioye vs Yakubu** the position of the law was explained by Nnaemeka Agu, JSC as follows:

> "It cannot, therefore, be right to say that the case show that once the customary tenant committed an act which amounted to misbehavior he forfeited his tenancy, even though the Overlord had not sought an order of Court therefore. The Overlord was entitled to overlook or waive the act of misbehavior. If he did do, the relationship of the parties continued..."

In the case of **Chief Onyia vs Onia & Ors** it was held by the Supreme Court:

> "that the grant of the remedy of forfeiture is not discretionary. That it follows from the breach of the customary tenancy. Let me add quickly, that it is settled that it is not in all cases of misconduct, or misbehavior, that result in a guilty party becoming liable to forfeiture, the best known case is where the overlord, fails to take the necessary steps to enforce his

right of forfeiture for the misconduct, in the court. This is why, despite the established misconduct of the customary tenancy, forfeiture is not automatic as the customary overlord, must take necessary steps to enforce his right of forfeiture"

The Overlord's remedy of forfeiture lies primarily against individuals and in exceptional cases, against the community. But the court has been very restrained, wary and very cautious in granting forfeitures against an entire community especially where the misconduct had been caused by a few members.

The customary tenant may invoke the equitable jurisdiction of the court to grant relief against forfeiture and in granting the relief, the court will take into consideration any mitigating factor including the degree of inconvenience to the tenant considering the length of time he had been in possession and the improvements already made on the land. The court will also take into account the protection of the overlord's reversion and the consideration that forfeiture is the only effective and adequate remedy. But the court will refuse to grant relief from forfeiture where misconduct has been established and the customary tenant has persisted and remained refractory and obdurate in the conduct complained of. See the following cases **Erinle vs Adelaja** (1969) NSCC; **Taiwo vs Akinwunmi** (1975) 1 ALL NLR (pt1) 202; **Inasa vs Oshodi** (1934) AC 99, **Abimbola vs Abatan** (2001) 9 NWLR (pt 717) 66, **Ogundipe vs Adenuga** (2006) 3 FWLR (pt 330) 5302; **Abioye vs Yakubu** (1991) 5 NWLR (pt 190) 130

A claim by a tenant for relief from forfeiture should be commenced either by originating summons or by a counter claim in an action brought by the overlord or simply by an application for a Writ of summons in that action. A request for relief made in the averments in the Statement of Defence is bad in law and will not be entertained by the court.

The Overlord's right to forfeiture may be waived and where this is done, the relationship of the parties continues and the overlord cannot afterwards rely on such instances of misconduct to establish a claim in forfeiture.

See the following cases **Makinde vs Akinwale** (2000) 2 NWLR (pt 645)

SUCCESSION AND INHERITANCE

A remarkable feature of rights in real property is the enduring character of such rights after the death of the owner. It is trite law that the death of a landowner does not extinguish his property rights which right either devolve on his heirs upon intestacy in accordance with appropriate personal law of the deceased landowner or on other persons appointed by the deceased landowner in accordance with the provisions of a Will otherwise known as testate succession.

The law of succession and inheritance in Nigeria is a reflection of the plural legal systems. The indigenous customary law developed rules of inheritance for intestacy through the traditional canon of descent adapted over the years to changes in the society and the rules of Natural Justice as applied by the courts.

Customary rules may be displaced by English rules of inheritance where the deceased landowner contracted marriage according to English law.

Where the landowner chose to write a Will during his lifetime, the provision of the testamentary instrument displaces any existing rules of inheritance, his marriage under English law and any existing rules of

customary law notwithstanding. Islamic law of inheritance governs two thirds of the estate of the deceased landowner who led his life in accordance with Islamic injunction, the existing customary rules of inheritance or the provisions of any will notwithstanding.

The existence of state legislation in the various states in Nigeria constitutes another source of rules of inheritance while the various rules of succession are subject to the overriding provisions of the Land Use Act 1978.

INTESTACY AND CUSTOMARY RULES OF INHERITANCE

One fundamental principle applicable in this area of the law particularly in the Northern, Eastern and Lagos States of Nigeria is that the law applicable to the estate of a deceased landowner who died intestate is the personal law of the deceased. Thus in **Tapa vs Kuku (1945) 18 NLR 5** where the deceased from Nupe left property in Lagos, the question for determination was whether the Yoruba customary law of Succession applicable in Lagos (lex situs) or the deceased personal law of Nupe origin was the applicable law. It was held that the applicable law was the deceased personal law of Nupe origin.

The position in the old Western States of Nigeria is however different. While succession to movables in those areas is governed by the personal law of the deceased, succession to immovable is governed by the law of the place where the real property is situate (lex situs). In **Zaidan vs Mohseen**, the deceased husband died domiciled in Lebanon and intestate. He was survived by a wife also domiciled in Lebanon and his mother. The deceased and his wife who were married according to Moslem Law had all along been resident in the then Mid-Western Nigeria. The question for determination was what law was to be applied to the intestate succession in the case of the immovable property of the deceased in Warri. It was held *inter alia*, that the *lex situs* applied.

A deceased landowner's personal law may be his customary law or another customary law of his choice where the customary law of his choice permits. In **Olowu vs Olowu, (1985) 3 NLR 5** the Supreme Court found the personal law of an Ijeshaman in the Bini Customary Law as opposed to Ijesha Customary law having found as a fact that the deceased landowner had, during his lifetime, changed his status to that of a bini man which change was in accordance with the Bini Customary law.

DEVOLUTION OF INTESTATE ESTATE

The general rule of customary law where a landowner died intestate is that his self acquired property devolves on his children as family property **Suberu vs Sumonu(1957) 2FSC; Abeje vs Ogundairo (1967) LLR 9.** The head of the family is the eldest male child of the deceased who occupies the family house and holds same as trustee for the other children, male or female: **Lopez vs Lopez (1924) 5 NLR 50; Ricardo vs Abal (1926) 7 NLR 58**.

This general rule of customary law which also represents the Yoruba Native Law and Custom is subject to modifications in some localities. For instances, in the Bini and Ishan communities of Edo State and amongst many Ibo communities in Anambra, Imo Enugu, Ebonyi and some parts of Rivers and Delta States, the deceased's real estate devolves on the eldest son exclusively in accordance with the rule of primogeniture under which the eldest is expected in modern times to hold the deceased's properties in trust for himself and the other children of the deceased: **Idehen vs Idehen (1991) 6NWLR (pt 198); Iginoba vs Iginoba (1995) 1 NWLR (pt37) 375.**

By the Customary Law of the Bini and Ishan communities, upon the death of a father, the eldest sum takes over his estate as a trustee for all

other deceased's children pending the performance of the second (final) burial rites, and after which the eldest son automatically inherits the house where the deceased lived, died and was buried. This seat of the deceased is known as the Igiogbe, and it does not vest in the eldest son until his performance of the final funeral rites with Ukpomwan done for him by the family whereby he is vested with the Igiogbe, and the final distribution of the deceased's estate performed: **Abudu vs Eguakin (2003) 14 NWLR (pt 840)**

However, a child born outside customary marriage has no exclusive right over the late intestate father's estate; another child though younger in age regarded as "Omodion" is entitled to step into the shoes of the deceased father to the exclusion of his elder brother born outside customary wedlock.

In the Ibo native communities, **the primogeniture rule** also applies to make the eldest son inherit as of right, the father's dwelling house known as 'obi' along with one distinct piece or parcel of land known as 'ani isi obi" (i.e land for the head of the family).

The rule of primogeniture on the face of it may appears unfair to the younger children of the family who are barred and has been dubbed as repugnant to natural justice, equity and good conscience. However, it has been argued that the system is in accord with native ideas particularly the role of the eldest son as the "**father of the family**" with a legally binding obligation towards the children. It is in recognition of this obligation that the law prohibits the eldest son from selling the estate upon devolution. The operation of the primogeniture rule has also been identified as "a probable solution to the problem of fragmentation in land tenure which has hindered large scale agriculture and economic development.'

MODE OF DISTRIBUTION OF ESTATE.

The cultural practice of inheritance is not under a uniform law in Nigeria. Different systems operate hand in hand and a person's ethnic group and religious affinity determines which law will apply. The customary practice of inheritance has an historical antecedent. Colonization has a part to play in the inheritance practices in most African countries.

With the coming of the colonials, African men were suspicious of them and did not expose their wives to them. The men entered the labor place to work and they saw African men as bread winners with the introduction of privation and exchange of land. This transaction was done between the colonialist and the men. This helped to ensure male dominance of the economic, social, political spheres and the further decline of women's economic and social status.

According to Pearce (2001-95) the colonial government and private corporations, because of their interests in the acquisition of land, ensured that women generally were allotted smaller or less fertile land without their knowledge.

The post-colonial state perpetuated bias. The superiority of men permeates the social system in the way values are constituted, roles ascribed, resources divided and the division of labor organized for men and women. Women were generally not entitled to control lineage land although it was allotted for use.

Historically, women had influence or personal right within their clan or kin based groups but under the tutelage of male elders in the partrilineal descent groups and were mostly responsible for bringing forth children and domestic work. This resulted in women not owing land.

There are differences in the inheritance practices when a woman is within her lineage and when she intends to claim property by virtue of marriage. There are also different practices within a patrilineal and matrilineal groups. The different practices will be examined briefly.

INHERITANCE WITHIN THE LINEAGE

The Yoruba Customary law generally favors equality in the distribution of estate particularly in a polygamous setting where squabbles and rancor feature prominently. Where the deceased is survived by a wife and children, property is shared amongst the children, male or female on the advice of the family council. In the case of children of a polygamous marriage, the rule in **Dawodu vs Danmole** suggests division of the estate per stripes; the eldest child in each unit being entrusted with the distribution per head. If the family council is of the view that division per stripes may result in injustice or where there is a disagreement amongst members of the family, division per head may be adopted.

Both male and female children share out of the estate without discrimination: **Lewis vs Bankole** (1909) 1 NLR 82. The case of **Victoria Bola vs Sam Ojo** further buttresses the fact that women can inherit from their parents. In the case, the plaintiff sued her husband for divorce and for the refund of a sum of money she kept with him. According to her, the sum of money was from the proceeds of the cocoa products she sold from the land she inherited from her late father, she proved and won the case. In a similar case, the defendant was sued by her brother who objected to her inheriting their late father' land because according to him a woman cannot inherit real property. The native court overruled his claims and held that his sister could inherit. Thus a woman or female child can inherit land within her own lineage. However her claim to such land is easily contested by her brothers once she moves away from the lineage to be married.

The position under the Yoruba customary law on distribution of estate holds for the native communities of the Urhobos, Ijaws, Itsekiris and Isokos of Delta State. In these native communities, both male and female children are entitled to inherit from their father's estate. Where the deceased had many wives, the estate is divided per head; the same position as suggested in **Dawodu vs Danmole**.

There are differences in cultural or customary law practices of inheritance in different areas. Under the Edo and Ishan customs in Midwestern Nigeria, women cannot inherit from their lineage. Landed properties and family estates are usually an all male affair. In this communities inheritance of real property is always reserved for the male children, the eldest being entitled to the largest. A woman's estate consisted of her clothes, bodily ornaments, cooking utensils, few domestic animals and one or two fruit trees. (Dawodu, 1999) After her death, the daughters take all the personal properties, but share the fruit trees with the male children. The customary law practice under the Edo and Ishan culture is that the first son inherits all disposable property to the exclusion of all other brothers and sisters. He has discretion to distribute to the other brothers, but not to the sisters. (Nwogogu, 1974; Ogiamen v. Ogiamen, 19) Education and accompanying capitalism has offered women increasing opportunity to accumulate properties in land and other goods.

The effect is that the inheritance of landed property is now favourable to women who are now able to inherit through their mother. (Dawodu, 1999) This has however created problems. This is because traditionally women did not own property and there is the absence of laid down principles for inheritance of property belonging to women. This has heightened and increased the number of land matters in the courts because the male chauvinists still want to apply the customary practice of an all male affair.

The Igbo customary law is different from the Yoruba and Hausa customary law on inheritance from the lineage. In the Igbo culture the system of inheritance is either patrilineal or in certain areas of Abia State of Nigeria, matrilineal. Under the Igbo customary law, a woman cannot inherit

land from her lineage. In all areas of land holding, women are excluded as land passes from the father to the male children. An unmarried daughter has a right to live in her father's house, but she is not allowed to cultivate the land as her own. As Korieh stated, "Why should a woman be allotted land? She married away from this village and can only have access to land where she marries. Her access to land will be through her husband and children." (Korieh, 2001)

To further buttress the fact that Igbo customary law does not allow female inheritance, a female is not allowed to inherit the property from the father's estate even where there is no male issue to inherit the property. In such cases, the property passes on to the eldest adult male in the family while other members divide the rest in diminishing proportions. In the absence of a male child, the right to inherit is that of the eldest full brother of the deceased; female children cannot inherit real estate. This is also the case in many localities in Northern Nigeria, where female children are not entitled to inherit property not even by a death-bed gift of land.

A relatively liberal custom is found amongst the delta Ibos of Asaba. The rule that a female child of the deceased is not entitled to inherit the father's estate is partly mitigated by her right to be maintained by the person who inherits her father's estate until she marries or becomes financially independent or dies. The right to farm on the family land is reserved for her until the happening of any of the events mentioned.

The court system where justice is dispensed and the advocate of equity and equality before the law have not in all cases portrayed themselves in this means. There are occasions when the courts shifted to the side of customs in its decision in issues of inheritance disregarding the provisions of the statute and such decisions resulted in inflicting violence on women. The role played by the courts has not been consistent.

However many judges are now on the progressive path and have taken the bull by the horn in upholding justice. See **Okonkwo vs Okagbwu (1994) 9 NWLR pt 368; Mojekwu vs Mojekwu (1997) 7 NWLR 283** ;**Ukeje vs Ukeje**. In all the three cases the courts denounced such repugnant and discriminating practices.

The facts and decision in **Mojekwe vs Mojekwu** are as follows: The appellant sought a declaration from the Court of Appeal, that as the only surviving male relative to his uncle, who died in 1944 and his father who died in 1963, he was entitled to inherit property bought by his uncle from the Mgbelekeke family of Onitsha under a Kola tenancy land tenure system. The appellant claimed the property pursuant to the native law and custom of Nnewi, in particular the Oli-ekpe. The custom prohibits the inheritance right of females and provides that the eldest male in the family will inherit. The custom further provides that where the male issue of the direct line is deceased, the first son of the late brother of the deceased, the nephew or 'Oli-ekpe' will inherit. The appellant paid the necessary Kola to the Mgbelekeke family and the two daughters of the first wife of the deceased uncle signed and witnessed the docket of consent from the Mgbelekeke family. The respondent, the second wife of the deceased uncle, argued that the appellant was not the head of Mojekwu family and cannot inherit the property. The appellant appealed against the trial judge's decision for the respondent.

The questions that came up for decision was: Are customary rules of succession which limit the freedom of women to enter into marriage, and deny inheritance to women consistent with the fundamental rights of women, the constitution and other laws of Nigeria? And Is the Nnewi custom or ceremony of 'Oli-ekpe' which prohibits the inheritance rights of females and which provides that only the eldest male in a family can inherit property discriminatory?

The Court of Appeal held that the Nnewi custom of Oli-epke is discriminatory and that any form of societal discrimination on grounds of sex is unconstitutional and against the principles of an egalitarian society. A

customary law which is repugnant to natural justice, equity and good conscience cannot be applied or enforced. Therefore, the personal law of the appellant is not applicable and instead the law of place where the property is situated applies, which in the present case is the Mgbelekeke family kola customary tenancy as applied by the Kola Tenancy Law 1935.

Land held under Kola tenancy is inheritable by children of either sex of the deceased kola tenant upon the production of further kola by the succeeding child. The signature of the respondent and others on the docket stating the appellant's claim to the kola tenancy merely acted to authenticate the appellant's signature and did not estop her claim. Furthermore, the docket was merely an articulation of the Oli-ekpe custom. Subsequently, the appellant claim to the disputed property is dismissed and costs were awarded in favor of the respondent.

LIMITATIONS TO THE CUSTOMARTY RULE OF INHERITANCE

There are two main exceptions to the rule that customary rules of inheritance governs intestacy. The two exceptions are:

- Evolutionary process at customary law
- Marriage Under English Law/ Marriage Act

EVOLUTIONARY PROCESS

Nuncupative Wills:

Customary law as it relates to the law of real property is flexible and adapts itself to changes in the sociological pattern of life in the society. A person may hold allegiance to native law and custom but for one reason or the other may intend to disinherit a particular person in the matter of succession to land and may before his death disclose before witnesses the person(s) entitled to inherit his property. Where this exists the intention of the deceased land owner when proved, takes precedence over any rule of customary law.

Family Verdict

Family verdict is of great importance in situations where the application of a particular custom is causing great hardship or discord amongst the family. In such cases, other rules may be applied which accords with wisdom. The application of this rule can be seen in the **Dawodu vs Danmole**

Rules of Natural Justice

As a result of civilization, rules of customary law have been subjected to certain rules of validity contained in the High Court Laws of various States in Nigeria. A court for instance will not apply a rule of customary law if its contrary to the rules of natural justice, equity and good conscience. Thus in **Re Whyte (1936) 18 NLR 70** the court refused to apply a customary rule of inheritance which would result in the daughter being separated from her mother.

MARRIAGE UNDER ENGLISH LAW/ MARRIAGE ACT

Contracting marriage in accordance with Christian rites or under the Marriage Act changes the status of a person who would have otherwise been subject to customary law. See **Cole vs Cole (1898), NLR 15; The Administrator General vs Egbuna (1945) 18 NLR** 1. The rule that English marriage or marriage under the marriage Act changes the status of the intestate who would have been bound by customary law is only a presumption and in deciding on the applicable law, the court shall be guided by a consideration of the position in life of the parties as well as their

conduct with reference to the property in dispute. See **Smith vs Smith** (1924) 5 NLR 102.