

# TRUST LAW AND THE ADMINISTRATION OF REAL PROPERTY IN NIGERIA

**Ibrahim Abdulkarim**

*Department of Private Law, Faculty of Law  
Ahmadu Bello University, Zaria, Nigeria  
E-mail: ohikwo2010@yahoo.com*

## ABSTRACT

*It was very rare in the past to hear of Individual title of land holding. It is a practice that was hardly known to customary law. This was looked upon as being repugnant to natural phenomena among Nigerians. The only systems of land-holding known to the people then were communal and family holding. This indeed, was the gradual development of Individual land holding. Recent times have bring about the concept of trust in real property administration. The main characteristic of a trust is that a property is vested on the trustees not for their own benefits, but for the benefit of the beneficiaries. Instead of giving the property directly to the beneficiaries, the donor creates or establish a trust (a management institution) under a trust who will not only manage and safeguard the trust property and apply it in the manner directed, but will also make it productive. This study therefore was concerned primarily with examining trust law and the administration of real property in Nigeria.*

**Keywords:** *Trust, Administration, Law, real property*

## INTRODUCTION

Under the common law, land means more than the physical soil. It includes the surface soil together with the things on it which are enjoyed as being part and parcel of the land, such as houses, buildings, streams, trees, and all other artificial structures whatsoever as well as any interest or right over the land<sup>1</sup>. Property is generally divided into two: tangible and intangible. In this study, we will deal with tangible, for example, land. The term real property means land. It is because land is of value that trust can be created in respect of it. Therefore any thing that has value is very important. Thus land is the most precious property which an individual, government, or ruler can have. It is because of the importance of land that we have land disputes in many parts of this country, and many parts of the world. Land, it is said, is power. That is to say, a landlord has a lot power over his land. He can command his tenant to some limit e.g. by quitting the tenant from the land and or restricting them to some terms. What money can do, the landlord can equally do same with his land.

Land is synonymous with capital, wealth, dignity, strength, liberty and freedom. Land is a source of sustenance. Lack of land or landlessness connotes the opposite of the attributes of land mentioned above. In other words, lack of land is tantamount to powerlessness, poverty, subservience, dependence lack, of liberty and lack of freedom. Therefore, any ruler, government, state or country, community and individual who has land has virtually everything in this world<sup>2</sup>. It is important that

he who owns land should know his rights and duties in the use, management and control of it<sup>3</sup>.

### **LEGAL JURISPRUDENCE**

In legal jurisprudence, an owner of property has the right of its possession, use, enjoyment, reversion, management and control among others. He may decide to exercise these rights or any of them in person or through the agency of another person. The main characteristic of a trust is that property is vested in the trustees not for their own benefits, but for the benefit of the beneficiaries. Instead of giving the property directly to the beneficiaries, the donor creates or establish a trust (a management institution) under a trust who will not only manage and safeguard the trust property and apply it in the manner directed, but will also make it productive. For example, in the case of land, by letting it or in the case of money, by investing it in shares or securities<sup>4</sup> in the accordance with the trust agreement or condition<sup>5</sup>.

Closely with the foregoing, is the origin of trust which is encounter little with difficulties in the language of a modern equity scholar, "the ultimate origin of the concept of use or trust is still one of the controversial topics of jurisprudence"<sup>6</sup>. The enforcement of trust by the chancery is perhaps the most outstanding interference with the common law jurisdiction exercised because of the chancery's exercise of exclusive jurisdiction in that regard. Indeed, the jurisdiction exercised by the chancery in the enforcement of trust is likened to a legislative power, in the sense that the chancery not only deprived the legal owner of the property of all the benefits in the property, but also created a distinct title on the same piece of property for the beneficiary. This, however, was unknown to any statute and at the same time was repudiated in no uncertain terms by the common law of the land<sup>7</sup>.

Broadly speaking, there are two different schools of thought with regard to the origin of trust, and each of these schools has attracted the opinions of eminent disciples. Blackstone in his commentaries on English law claims that trusts are very similar in nature to the Roman Fidei Commission. The Fidei commission was a disposal of inheritance to a person with the understanding and confidence that the transferee would dispose of the property and/or its profits at the will of another. That is in accordance with the testator's intention. This method of disposing property was usually crated by will, but the enforcement of the rights in the property so crated led to a split in the title to property rights. The legal right which is known as *ius fiduciarium*, was vested in the transferee, and was remedied and protected by the ordinary course of law while the right in trust, just *legitimum* was remedied and protected on the ground of conscience by the praetor.

The remedies provided by the praetor were not predicated on any biding rules of law. From this standpoint a very close connection was drawn between this remedy and the remedy provided by the chancery in the enforcement of trust. It was, therefore, concluded that this notion was transplanted into England from the civil law by means of foreign ecclesiastics who introduced it to evade the Statutes of

Mortmain by obtaining grants of lands not to religious houses directly, but to the use of religious houses which the clerical chancellors of those times held to be Fidei commission and binding in conscience. This way, they assumed the jurisdiction which Augustus had vested in his praetor of compelling the execution of such grants in the court of chancery<sup>8</sup>.

Another advocate of this school of thought is Spence. Spence<sup>9</sup> is of the belief that we must look to the Roman jurisprudence for the origin of trust, although what was to be found there was greatly extended and improved upon by the clerical chancellors and their successors. He contended that at the very end of the Roman republic, there was a law prohibiting succession to property by a female as heir, even if this female was the only child. Naturally, the society could not tolerate the absoluteness of such an unjust law for long. A device was, therefore introduced whereby in such circumstance, property would be conveyed by will to a qualified citizen, with a request that the devisee would restore the property to some person, who otherwise, could not have taken the benefit under the republican law.

At the beginning, the fulfilment of this request depended on the absolute honesty and willingness of the devisee. However, since what had transpired was an ingenious attempt to evade the law of the land, the law would not aid the enforcement of the request. But as the practice was becoming popular, and in order to prevent the rising breaches of such confidence, Augustus decreed its performance, later known in Roman legal history as the Fidei Commissia.

It is clear, therefore, that the recognition of a concept of property ownership very similar to the modern law of trust was dictated by social pressure law and the need to avoid a state of affairs whereby people in whom solemn confidence had been reposed would fraudulently breach this confidence. Like the common law attitude to the enforcement of use, the Roman law regarded the devisee as the legal owner of the property. However, the rights of the beneficiary were constantly enforced by praetorian. The original praetory nature of the Fidei Commissa later became imperative, in that the testator could use imperative words in his devise which must be carried out to the letter by the appointed heir. When there was uncertainty about the words used by the testator, his intention as construed from the words became the controlling factor<sup>10</sup>. It is therefore, not impossible that similar principles being applied by the English courts in the construction of praetory trust<sup>11</sup> have originated from Roman idea.

Story<sup>12</sup> is not as assertive as Blackstone in tracing the origin of uses to Roman jurisprudence. Because of their similarity to the Roman Fidei Commissa, he believes that trust, was derived from the Roman law. He vindicates his view by saying that any country, which professed to possess an enlightened system of jurisprudence, must necessarily provide for the enforcement of the nature of duty imposed on the trustee. He gives a brief analysis of trust in the Roman law as protected by Augustus, who yielded to popular practice by his appointment of a praetor to protect the rights of beneficiaries under such trusts. He quotes Blackstone in support of the view that the

origin and nature of trust in civil law illustrate in a very striking manner, the origin and nature of trust in the English system.

On the other hand, the second school of thought believes that the origin of trust has no connection with Roman law. Maitland, with his veneration for the ability of English lawyers, in their development of the law of trusts, denies that the origin of the English law of trusts is traceable to the Roman *Fidei Commisum*. He said:

*Some have thought that this new jurisprudence of uses was borrowed from the Roman law, that the English use or trust is historically connected with the Roman Fidei Commisum. I do not myself believe in the connection. One reason for this disbelief I will at once state because it leads on to an important point. From the first, the chancellors seem to have treated the right of the cestui que use as very analogous to an estate in land. They brought to bear upon it the rules of the English land law as regards such matters as descent and the like<sup>13</sup>.*

Maitland seems not to have seen anything Roman in the origin of uses. They are for him, a natural outcome of ancient English elements having their foundation in the common law rules of agency. These rules were later adopted in conveying land to the borough community to the use of the Franciscan Friars who, because of their oath of poverty, could not own any property<sup>14</sup>. Holmes takes a view similar to Maitland. He traces the origin of the uses of property to Salman of the early German law. Like a trustee to whom land was conveyed that he might deal with it according to his grantor's directions, Salman held to the use of the grantor, in grantor's lifetime, and later to be disposed of after the grantor's death according to grantor's directions. The essence of the relation thus created from this transaction was the *Fiducia* or trust reposed in the *Fidelis manus* who sometimes confirmed his obligation by an oath or covenant: "This likeness between the Salman and the Feofees to use would be enough without more to satisfy me that the latter was the former transplanted<sup>15</sup>" Salman was an executor, and in the early years of use, there was little or no distinction between executor and feoffee to uses. He concludes that because of the close connection between Anglo-Norman law and Frankish tradition that uses must have originated from Salman.

Holdsworth's view is similar to Salman. The mere fact that the use is analogous to *Fidei Commisum* does not mean it originated from it. Holdsworth contended that a trust of property to someone by another for a purpose is present in any society with a recognised legal system, however rudimentary<sup>16</sup>. Whatever may be the true origin of uses, it is to the early chancellors that the modern Anglo-American law of trust owes its development. Considering the expensive way in which trust is being used in the modern period, it becomes difficult to resist the suggestion that the greatest contribution to the substantive law, which has never been set down to the credit of the chancery, is the enforcement of uses<sup>17</sup>. They are, indeed, a distinctive improvement invented and nurtured in a relatively high state of civilisation which common law was too archaic to deal with. Through the recognition and enforcement of the beneficiary's interest, a split in title was created. Thus, the Anglo-American law of

trust, there are the legal and the equitable rights existing in the same property at the same time and the duty of the trustee is made obligatory by law. These are what make the Anglo-American law of trust unique<sup>18</sup>.

Scott observed that trust is unique. This is because it affords the most flexible device for making dispositions of property. Through the trust, it is possible to separate the benefit of ownership from the burdens of ownership<sup>19</sup>, thus creating a double ownership in the same property. Trust has not been free from certain abuses, but what is striking is that even in its early development, the chancery did not hesitate in devising means to check these abuses. To this end, various equitable maxims had been developed some of which include "he who seeks equity must do equity" and "he who wants equity must come with clean hands." These maxims aims at preventing the rules of equity, which are based on conscience and sound public policy, from being used as a vehicle for fraud<sup>20</sup>. The importance of the modern law of trust seems to have been neatly summed up in the observation that:

*the old philosophy of uses evolved by the chancellors of the fifteenth century, and rendered more subtle and intricate by the courts of law in the sixteenth century, gave way to a new philosophy of trust based upon clearer conceptions of public policy and of the nature and purposes of the laws<sup>21</sup>.*

## TRUST

Trust, as a legal term has been variously defined by Professor Keeton who states that trust is that relationship which arises wherever a person called the trustee is compelled in equity to hold property, whether real or personal, and whether by legal or equitable title, for the benefit of some persons (of whom he may be one and who are termed cestui que trust) or for some object permitted by law, in such a way that the real benefit of the property accrues not to the trustee, but to the beneficiaries or other objects of the trust<sup>22</sup>. The above definition, seeks to unveil circumstances where trust can be created either willingly or by operation of law, e.g., constructive trust. The definition went further to reveal over what trust can be created, and those that can be beneficiary of the trust when so created. The definition given by the learned Professor, tells us what trust is all about. Another definition is that given by Lewis on Trusts as follows:

*The word 'trust' refers to the duty or aggregate accumulation of obligations that rest upon a person described as trustee. The responsibilities are in relation to property held by him, or under his control. That property he will be compelled by a court in its equitable jurisdiction to administer in the manner lawfully prescribed by the trust instrument, or where there be no specific provision, written or oral, or to the extent that such provision is invalid or lacking, in accordance with equitable principles. As a consequence the administration will be such a manner that consequential benefits and advantages accrue, not to the trustee, but to the persons called cestui que trust or beneficiaries, if there be any if not, for some purpose which the law will recognize and enforce. A trustee may be a beneficiary, in which case advantages will accrue in his favour to the extent of his beneficial interest<sup>23</sup>.*

Lewis' definition is more elaborative in the sense that it tells the state of affairs where a trust fall short of the requirement, and likely beneficiary of such

trust. Trust is defined in Black's Law Dictionary<sup>24</sup> as a fiduciary relationship regarding property and subjecting the person with title to the property to equitable duties to deal with it for another's benefit; the confidence placed in a trustee, together with the trustee's obligations toward the property and the beneficiary.

All definitions of trust given above touch on property. It gives an insight into the boundary of trust law and it is inline with these definitions that our discussion will be basically tailored. However, it is important to state at this stage that the scope of property which these definitions envisage is narrower than what will be covered by this work. This is because the definitions relates to real property alone, other categories of trust such as corporate securities, insurance policy, and intellectual property, shall be examined.

### **THE INSTITUTION OF TRUST LAW UNDER CUSTOMARY LAND LAW**

Under Customary law title or ownership to land ranges from individual, Communal, to family ownership. The Term ownership is a multi-referential word, which does not lend itself to an apt or precise definition. The issue becomes more complex when the word is to be defined in the context of customary land law. The ordinary meaning of ownership is defined as collection of rights to use and enjoy property, including right to transmit it to others. It is the complete dominion, title to proprietary right in a thing or claim<sup>25</sup>. It means the entirety of the powers of use and disposal allowed by law. It is the right of one or more persons to possess and use a thing to the exclusion of others. It is the right by which a thing belongs to someone in particular to the exclusion of all other persons.

It means the exclusive right of possession, enjoyment, and disposal involving as an essential attribute the right to control, handle and disposal<sup>26</sup>. Black's Law Dictionary defines ownership to mean the collection of rights allowing one to use and enjoy property, including the right to convey it to others. Ownership implies the right to possess a thing, regardless of any actual or constructive control. Nwabueze explained the concept of ownership "as the most comprehensive and complete relation that can exist in respect of any thing. It implies the fullest amplitude of rights of enjoyment, management and disposal over property. Put differently, it implies that the owner's title to these rights is superior and paramount over any other rights that may exist in the land in favour of other persons<sup>27</sup>."

The next issue for determination is that of ownership of land under customary law. In other words who owns land under customary law? This has been succinctly stated in the celebrated case of *Amodu Tijani vs. Secretary of Southern Nigeria*<sup>28</sup>.

*The next fact which it is important to bear in mind in order to understand native law is the notion of individual ownership is quite foreign to native ideas land belongs to the community, the village or the family, never to the individual...*

In this case, the appellant was one of the Idejo white cap chiefs of Lagos. He was the head Chief of the Oluwa family or community and one of the Idejos or land owing white cap Chiefs of Lagos and the land in question was situated at Apapa and was

occupied by persons some of whom paid rent or tribute to him. By a notice dated November 12, 1913 certain lands situated at Apapa were acquired by the Government of the Colony under the Public Lands Ordinance (No. 5 of 1903) for public purposes.

The appellant as Head Chief of the Oluwa Family claimed compensation on the basis of ownership of the lands, Speed, C.J. held that the appellant was entitled to compensation on the basis of his having merely a right of control and management not on the basis of absolute ownership. That decision was affirmed by the full court. On appeal to the Judicial Committee of the Privy Council it was held that the radical title to land by the White Cap Chiefs of Lagos is in the Crown, but a full usufructuary title vests in a Chief on behalf of the community of which he is the head. Concerning the land held by White Cap Chiefs being acquired for public purposes under the Public Lands Ordinance, 1903, it was held that compensation was payable on the footing that the Chief was transferring the land in full ownership (except so far as it was unoccupied), the compensation was to be distributed among the members of the community of which he was Chief according to the procedure provided by the Ordinance.

Also in *Lewis v. Bankole*<sup>29</sup>, Where a certain Lagos chief called Mabinuori died in 1874 leaving twelve children and three separate plots of land; on one, the family compound, he lived with his wives and some of his children and domestics; on another he built houses for his eldest daughter and two of his sons; whilst the third was dedicated to the worship of the family fetish. About thirty years after his death, certain of his grandchildren, including the issue of the children for whom separate house were built, brought this action, claiming that the family compound which had since remained in the occupation of some of the children and grandchildren was the common property of the entire family. Speed Ag. C.J. held that by tacit mutual arrangement and acquiescence of all parties extending over a number of years, the various properties left by the deceased chief had been separated and come to be considered as separately owned. In a notorious passage, the learned judge observed:

*Now to these facts I am asked to apply strict native law and custom and to declare that the property has always been the family property of Mabinuori's family and that the defendants who have been in undisturbed occupation for upwards of 30 years should now be told that they are only joint tenants with the rest of the family. I am asked to throw the property into the melting pot of an acrimonious family feud. I have no doubts that plaintiffs have native law and custom on their side. I mean native law and custom as it was understood and possibly applied 40 years ago, but I decline to say that it is existing native law and if it is I am confident that it is my duty to decide that it is repugnant to the principles of equity and to refuse to enforce it*<sup>30</sup>.

### **CLASSIFICATION OF TITLE TO LAND UNDER CUSTOMARY LAW**

There are three (3) types of land title under native law and custom, namely, communal title, family title, and individual title.

### ***Individual Title***

It was very rare in the past to hear of Individual title or land holding it is a practice that was hardly known to customary law. This was looked upon as being repugnant to natural phenomena among Nigerians<sup>31</sup>. The only systems of land-holding known to the people there communal and family holding<sup>32</sup>. This indeed, was the gradual development of Individual land holding. This process was accelerated when other reasons which favoured individual ownership of land increased or multiplied<sup>33</sup>. The main reasons for the fragmentation of the family system of land holding to an individual system were the social and economic development, the growth of education and health services, the introduction of a money economy and the modernisation living standards<sup>34</sup>.

Individual tenure is a feature of land holding that is now known throughout Nigeria. Thus it would seem that the basis of concept of family property is the recognition of individual ownership, for when founder of a family who acquired land dies, his- self acquired property devolves on his children as family property as there was no notion of sale or device of land<sup>35</sup>. In *Otugbolu v. Okeluwa ors*<sup>36</sup>. The Supreme Court confirmed individual ownership of land under customary law. In the words Obaseki. J.S.C.

*The knowledge of customary land tenure of each locality is within the knowledge of members of the community. Each member of the community generally within his economic capacity does acquire as he desires, a piece of parcel of communal land which he can transmit to his offspring and which he is entitled to protect 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 the strict communal nature of the Benin land tenure system, individual ownership was conceded. In *Arase v Arase*<sup>37</sup> 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."*

It could be seen from the above judgement of the Supreme Court that the concept of individual ownership is a settled issue at customary law. A more recent decision of the Supreme Court in *Chukwueke v Nwanko*<sup>38</sup> represents the climax of land at customary law. In this case the plaintiffs/respondents had sought a declaration of title to a piece of land. The plaintiff/respondent based their claim on the fact that their ancestor had settled on the land from time immemorial.

On the other hand the defendants, while admitting that Uda was a remote ancestor of themselves and other respondents denied that the land was ever occupied by him. They contended that their direct ancestor had cleared, cultivated and occupied the land. Since then they had exclusive possession of the land, and planted crops on it. Evidence before the court showed however, that the land in dispute was surrounded by individual land and members of Amuda families. After a review of the evidence and the address of counsel, the trial judge dismissed the plaintiff/respondent's claim.

Dissatisfied by the judgement, they appealed to the court of appeal and succeeded.

In doing so, it was the opinion of the court that the land in dispute was communal land and held that the mere use of it by any member of the community, did not convert the land into individual lands. The defendants/appellants were not satisfied with judgement of the court of appeal and hence appealed against same to the Supreme Court. Their counsel submitted that despite the overwhelming evidence that individual ownership is permissible under native law and custom of the Amuda clan, the court applied the general principle of inconvertibility of communal land ownership. Allowing the appeal, the Supreme Court held that the court of appeal was in error by applying the principle of inconvertibility of communal land tenure to individual tenure. Sowemimo CJN, who delivered the lead judgment (disapproving of the action of the Court of Appeal) held that:

*The court of appeal appears to over look the decision of this court (supreme court) in Otogbolu v Okeluwa (1981) 6 - 7 Sc 99 at 137 to the effect that the general principle of communal ownership as pronounced in Amodu Jijjani v. Secretary Southern Nigeria (1921) AC 404 would not apply where it is established by evidence that native law and custom in any particular area differs from the general principle.*

From the foregoing, it is abundantly clear that authorities have firmly established the existence of individual tenure as a feature of customary land law and the individual acts as a trustee for the beneficiaries in respect of the land. This is so because as soon as he dies the interest in the land reverts to the family as the land for re-allotment to other members of the family. This is how the trust law comes into play under customary land law.

## **COMMUNAL LAND HOLDING**

The word "communal" means a group of people. This group of people may be a tribe, a town, a village or an extended family. The group may speak the same language, share the same culture, and form a distinct social and political entity. It may also be a single autonomous unit or a parent village with a number of off-shoots<sup>39</sup>. Another kind of a community is that which is free from all kinship factors and based solely on geographical contiguity, common residence on the same soil serving to bind its heterogeneous elements into a single society in which every individual has an equal claim to a share of the common land for cultivation, building and graving<sup>40</sup>. In a community, land is held by an individual and is expressed to be vested in the head. The rights are exercised through headmen of villages and ward-heads who may be hereditary or appointive offices who distribute land to those who need it, control the common pastures and supervise the admission of non-member-strangers<sup>41</sup>. The concept of communal land means that individual members of a political or social group have certain claims, powers, privileges and immunities in or over the land vis-à-vis the political authorities or other members of the group<sup>42</sup>.

In this sense the land belongs to the community and the word is use as a description of a group which considers itself, and is regarded in law or by the society,

as a corporate entity. Communal land holding is largely practised throughout Nigeria. The whole of the village land belongs to the village community at large. The principle involved is that every member of the community is entitled to the use and enjoyment of the land. The village or the community chief and his councillors manage and control the land for the common benefit of the people. Every member of the community has an inalienable right of access to the community land. The community rights extend to declaring some parcels of land for public use such as road construction, markets, meeting places, burial and sacred lands and grazing land. Where compensation is paid for the community land by the government, the payment goes for the use and benefit of the whole community<sup>43</sup>. The same can be said of money collected from lease, loan or sale of the community land. The community has the reversionary right in cases of abandonment and revocation of grants to strangers<sup>44</sup>.

### **CONTROL OF COMMUNAL LAND**

The control and management of communal land is vested in the chief and his councillors who are the trustees of the community land hence the relevance of trust law to the community land. Although the chief is the chief executive with regard to control, his work is normally done by the ward heads. The ward-head allots land to members of the community freely without consulting the chief. However the chief must be consulted where the grant is to a total stranger. The chief or ward-head may be called the "land lord"<sup>45</sup>. It should however, be stressed at this point that the word landlord here does not have the same meaning as the word landlord or tenant under the English Law. While the landlord in the latter is the proprietary owner of the land and has exclusive control and rights in the land, the former is only a trustee<sup>46</sup> and a representative of the community from whom he derives his powers over land. The authority of the chief over land is derived from: (a) His being the trustee of the community land and<sup>47</sup> (b) his being the legal representative of the community<sup>48</sup>.

It should be noted that the trusteeship position of the chief over community land was clearly stated in the celebrated case of *Amodu Tijani v Secretary, Southern Provinces*<sup>49</sup> where the court said "... to some extent, the position of the chief with regards to community land is that of a trustee and as such he holds the land for the use of the community..." A distinction however should be drawn between the trusteeship position of the chief on the one hand and that of English Law. The most crucial difference is that while under the latter the trustee normally has a legal title to the subject matter of the trust, while under the former the legal title is vested in the community<sup>50</sup>. He is only to manage or control the land on behalf of the community and he cannot do anything in connection with the land contrary to the established customary practices<sup>51</sup>.

His position places upon him duties of a fiduciary nature towards the members of the community<sup>52</sup>. He is accountable for his dealings in the land<sup>53</sup> and has a duty of loyalty<sup>54</sup>. Therefore he cannot be involved in such dealings with the community land

where his personal interest may conflict with that of the community<sup>55</sup>. Trust law is relevant in this regard for the purpose of regulating the position which the chief or the community head occupies vis-à-vis the members of the community. He is required to discharge his duty in accordance with trust law.

### **FAMILY LAND HOLDING**

The family system of land ownership is a system whereby the whole family holds land jointly. They may use the land jointly or separately, but the ultimate ownership of the land lies in the whole family. One may rightly observe that family land-holding represents one of the main forms of land-holding in Nigeria. The ownership of the family land lies in the family as a corporate entity. The legal power to control and manage land lays in the family as a unit. This, therefore, means that all the family members have the rights and liabilities in the land. Thus, the holding of family land under customary law is joint and indivisible<sup>56</sup> unless partition takes place. In fact even when partition is said to have taken place upon the death of the individual owner his interest reverts back to his family and it thereby continues as the family property. The head of the family will in this regard be seen as a trustee of the family land and this makes his activities come under the trust law. Hence, relevance of trust law in administration of real property under customary law.

### **HEAD OF FAMILY AS A TRUSTEE**

A head of family is the person who manages family property for and on behalf of other family members. In fact the head of the family represents the family at any gathering or occasion. He is the family voice at the village or community meeting<sup>58</sup>. He is the trustee of the family property<sup>59</sup>. He is accountable to the family members as to how he manages the family property<sup>60</sup> and every other thing in respect of the family property<sup>61</sup>. He must relate to the family the decision of the village or community meetings, when family property is sold he must account to the family members<sup>62</sup>. The family head can be appointed by operation of law or expressly.

### **Appointment of Family Head by the Operation of Law**

In *Lewis v Bakole*<sup>63</sup>. It was held that on the death of the founder of the family the proper person to be the head of the family is the Dawodu or eldest surviving son. However there are conflicting views over the question of a successor to the Dawodu. In this case, a plaintiff witness gave evidence that according to Yoruba custom, on the death of the Dawodu the sons of the founder of family are taken in turn and then the sons of the Dawodu and other sons' sons. In *Inyang v. Ita*<sup>64</sup> a Calabar case decided in 1929, this special privilege of the male was testified to and accepted by the court as a correct statement of customary law among the Effiks.

However, in the former case, that is *Lewis vs Benkole*<sup>65</sup>, the court did not give much weight to the assertion of such a principle and it accepted as the better view, the evidence of the Lagos Chief, that after the death of the Dawodu "the eldest

child becomes head." The most recent Supreme Court decision on this issue is that of *Otun vs Otun*<sup>66</sup>. The crux of this case is the administration of the estate of late Ashimi Otun, the parties' ancestor who died in June 1987, leaving seven wives, four male children and a daughter. The appellants are the grandchildren of late Ashimi Otun while the 1st respondent is the only surviving son. After the death of Ashimi Otun, the established practice within the Yoruba family is that the eldest son succeeds a deceased Mogaji or Dawodu. In other words, the male children succeed themselves in accordance with the Yoruba native law and custom. The last Dawodu died in December 1979 leaving the 1st respondent as the only surviving son, who, naturally, assumed the responsibility of managing his late father's estate as the Dawodu of the family. He applied and obtained letters of administration from the probate registry, Ibadan High Court but not before it had been gazetted and advertised as required by law and there was no objection from anyone.

After the letters of administration had been granted to the 1st respondent, the appellant, as plaintiffs claimed against the 1st respondent a declaration that the letters of administration was null and void and of no effect. They also sought an order of revocation of the letters of grant on the ground that he obtained it by falsehood. At the end of the trial, appellant's claims were dismissed. Their appeal to the Court of appeal was also dismissed. Dissatisfied, the appellants appealed to the Supreme Court. The Supreme Court dismissed the appeal and held that under Yoruba customary law, the proper person to succeed as head of family is the eldest surviving son or Dawodu. The Dawodu so appointed by the operation of law becomes the trustee of the family property.

### **Appointment of Family Head by the Founder**

The founder of family property has always been able to appoint a head of his own choice, with an unlimited and uncontrolled discretion in his choice, to the point of even selecting a stranger. As to what will be the position of the stranger who is appointed as the family head the case of *Sogbesan v Adebisi*<sup>67</sup> provide the answer by suggesting that if a person who is not a member of the family is appointed head, he is deemed to be included in the family with rights and duties as the natural members. In that case, the testator appointed a brother to be the head of his (the deceased's) family and directed that he should act in all family matters under the direction, control and advice of the testator's mother and aunt. The appointment was held valid.

Apart from any such express appointment however, younger brothers of deceased heads of families usually succeeded to the family headship under the ancient and, it would seem, many modern systems of land tenure<sup>68</sup>. In *Ajoke v. Olateju* the plaintiff, Ajoke was one of the descendants of one Buko who was the original owner of the family property at Surulere and the founder of the Buko family of which she was also the oldest living member. Mustafa the head of the family who died immediately before the institution of these proceedings had purported on his death-bed to appoint the defendant. Olateju, as the head of the family on the incorrect

ground that no other relative of his was still alive, and also to authorise her to collect the rents from the property.

The plaintiff sued for a declaration that she was the family head, for accounts and for injunction restraining the defendant from collecting any more rents or otherwise dealing with the property. The plaintiff was a grand-daughter of Buko, but the defendant was not in the direct line. It was held that the plaintiff succeeded because, although the original founder of the family and owner of the property is entitled to make a death bed disposition of his property even so as to displace a person who would otherwise be entitled under customary law, a subsequent family head is not so entitled. There is no restriction on a female being appointed the head by the founder of the family<sup>70</sup>.

#### **Appointment of Family Head by Members of the Family**

This will arise when the family head lost the support of his family members. In this regard, the family members may resolve to remove such head and appoint another in his place. Or, when there is a vacancy the family may look for a person they believe is best suited to hold the office and appoint him. There can be no doubt that female member may be elected by popular vote in this way<sup>71</sup>.

#### **Rights and Duties of the Head of Family as a Trustee**

Rights according to Black's Law Dictionary<sup>72</sup> means "a power, privilege, faculty or demand inherent in one person and incident upon another rights are generally defined as power of free action." The head of the family is also a member of the family and whatever right is due to any member of the family is equally due to the head of the family. It is on this note and to avoid repetition, it will be neater and more convenient to treat the rights of the head of the family jointly with that of the members of the family. Thus, the general management and control of the family property is in the hands of the family head<sup>73</sup>. He is the proper person to look after the property. He keeps documents of title (if any) and other documents relating to the land. He also negotiates transactions affecting the land on behalf of the family. However the consent of the family is required before he can dispose off family property. It is within his power to allocate portions of the family land or rooms in the house to members or strangers<sup>74</sup>. He does not require the consent of the family in order to exercise his discretion and unless it is misused, for example by treating the family property as his only property<sup>75</sup>. It should be stressed here that the right of management vested in the head of family is a trust, which he must exercise in accordance with trust law.

In many cases, the duties of the head of the family are similar to those of a chief. Thus he is a trustee and beneficiary of the family land<sup>76</sup>. In *Basse v Cobham and others*<sup>77</sup>, it was held that the head of the family in possession of family land is analogous to that of a trustee, and the members of the family being beneficiaries, any member may claim his duties, in respect of the family communal land, if the head neglects or refuses to assert such rights. The Head of family allocates family

land to other members and where there is surplus he makes grants to strangers after consultation with the elders of the family<sup>78</sup>. Actions affecting family land are brought by the head as a legal representative of the family<sup>79</sup>. In *Aregbe v Adeoye & Anor*<sup>80</sup>, the action was brought by the family heads of Eweino Court a compound in Lagos, praying that the defendants be restrained from building houses on an adjacent piece of land over which they had hitherto exercised by local law and custom such a degree of control as to entitle their families as owners and occupiers of the houses in the compound to use and enjoyment of the surrounding open space.

The head men could under customary law grant permission to other people to occupy temporarily part of this open space, and they did permit one Labinjoh to erect a shed on part there of since such a structure interfered little with their use and enjoyment of the land. But the plaintiffs in the instant case were non-suited by the Supreme Court overriding the Divisional Court, because instead of basing their claim on local law and custom they had claimed a prescriptive right of user - a concept of English law<sup>81</sup>. Any member of the family may however, institute an action in the court to protect the family where the head is absent or has decided to keep quiet<sup>82</sup>. The head's routine and emergency actions in good faith bind the other members<sup>83</sup>. Where it is not done in good faith, the head is personally responsible for his action<sup>84</sup>. In the case of *Fako v Fako* the defendant, who was the head of Fako family, sold three houses belonging to the family with the consent of only one member.

An action was brought by the other members to the set aside the sales. The defendant argued that it would be inequitable to set them aside as the proceeds were expended to buy a chieftaincy title, which would benefit the family. The court rejected the argument of the defendant and said that the acquisition of a chieftaincy title for which the proceeds were used was a personal aggrandisement and therefore did not benefit the family as a corporate body. The conclusion to be drawn from *Fako's* case is that where the head whose family's property was entrusted in his hand misapply the proceed of the sale or mismanage the property for his own selfish interest, he would be held personally liable, because he had breached the trust placed on him. But where, however, he used the proceeds of the sales in paying rates or dues, which were due to the family property, funeral expenses, or repairing the family property, or even paying for school fees of any member of the family the court will certainly uphold his action as valid.

The head of the family has a duty to keep accounts and the information available to other members. In *Kosoko v Kosoko and others*, the plaintiff claimed inter alia an account of rents and mesne profits of the family property of late Kosoko of Lagos under the control and management of the defendants as trustees for all the members of the Kosoko family. No accounts had been kept by the defendants until shortly before the claim was brought. They had managed the property for the family in accordance with usual custom which did not require the keeping of accounts. It was held that in the circumstances the plaintiff was not entitled to claim an account as of right and that his claim for an account must be dismissed.

Under the traditional practice, the head of the family was not accountable to other members of the family as to how he manages the family property. This was the position then, because in those days the needs of the society were very limited. The desire to hold property individually was rarely heard of. The paramount consideration of the head of the family was the smooth running of the family's affairs not much concern was given to property.

It is my strong observation that this position should be looked at from a different angle today. It should be recognised that economic and social reality which is manifested by the community's aspirations and expectations in line with economic and social development today, necessitate that the head of the family give an account of how he manages the family property. Gone are the days when the head of the family was looked upon as a God-fearing and an honest person. There are many tendencies today which may not make him act so honestly. For example, the head of the family may want to have the best handset and drive the best car and his children go to very good schools. Therefore, the right to demand an account should be a legal one. After all, native law and custom is a mirror of accepted usage<sup>87</sup>. This means that it is flexible and adaptable. It is not static<sup>88</sup>. It changes as the society changes. Courts should therefore not feel bound always by their prior decisions on the principles of custom unless there is evidence that it still exist as the custom of the people.

### **Rights and Duties of Family Members as Beneficiaries under Customary Trust**

Every member of family as a beneficiary has some inalienable right in the family property under customary trust. In fact, it was declared in *Thomas v Thomas*<sup>89</sup> that members of the family have reasonable ingress and egress on the family land, a voice in the management of the property, a share in the surplus income derived from it after necessary outgoings have been met.

### **RIGHT OF RESIDENCE**

Every member of the family including the head of the family has the right to reside on the family property<sup>90</sup>. This right basically includes use and enjoyment of the family property. This right springs from unity of possession, which exists from the nature of the title held by the family<sup>91</sup>. In a situation where the house is too small for the family or a portion has been let out, it cannot be occupied by all the members, in such cases, the right of possession will be represented by the right to share in the rents and profit derived there from. The position of the female members to reside in the family property is the same as that of their male counter part. The only difference is that the males can leave with their wives and children<sup>92</sup> while in the case of the females the moment they marry, they do not have the right to bring their husbands on to the premises to reside with her and her husband has no interest in the property<sup>93</sup>.

The issue that may come to ones mind at this point would be that of discrimination. By not allowing the female to bring in her family into the family property like her brother, it amounts to discrimination. It is the opinion of this writer

that as long as any body is a family member his or her right should not be short changed by virtue of his/her gender. If the female member decides to bring her family onto her family property she should be allow to do so. After all, they have equal right in the property. Above all, she did not choose her own sex, nor did any body determine her sex. The next issue for determination is what will be the position if the family property is shared out? An obiter in the case of *Akinboyewa v Ikujure*<sup>94</sup> seems to answer this question to the effect that where the family property has been partition and given to the female members, she can use it in any way she likes, in other words she can bring her husband on the land.

### **THE RIGHT OF INGRESS AND EGRESS**

This right was examined in *Lewis v Bankole*<sup>95</sup>. From the various pronouncements in that case, it appears that members must be considered in two different categories, firstly those residing in the family house secondly, those not so residing. Osborne C.J. held that with regards to the latter, no such right exists but they have a privilege to go in and out of the premises on those occasions when members of the family assemble for family purposes in the house. The right of ingress and egress is that right which a family member enjoys as a beneficiary of the family property, which is held in trust by the family head<sup>96</sup>. This right is not negotiable. It is due to the family member by virtue of his position. Therefore trust law becomes relevant in this respect since the relationship of trustee and beneficiary is in existence.

### **RIGHT OF CONSULTATION IN THE MANAGEMENT OF THE PROPERTY**

This is no more than the right to be consulted as a family member before any important dealing with the family property is carried out and the right of members to be presented through their branches on the family council. The right of consultation is however, limited in respect of the persons to be consulted, and the occasion when consultation is necessary. The principal members of the family are to be consulted when alienation or sale takes place<sup>97</sup>. However every member of the family enjoys that right of being informed about any dealings in respect of the family property. This way they express their views in the management of the family property.

### **THE RIGHTS TO SHARE IN THE PROCEEDS OF SALE, RENTS AND PROFITS**

Income or profit, whether in the form of rents, proceeds of sale, lease or compensation for compulsory acquisition by any governments, individual or corporate body that is realized from the family land, belongs to all the members of the family<sup>98</sup> and for this purpose a member is entitled to a share. The share of a member may be in money or in kind. It all depends on what is given out as compensation. The case of *Archibong v. Archibong*<sup>99</sup>, in this case, certain beach land belonging to the community of Duke-Town in Calabar had been compulsorily acquired by the Government and £3,000 paid as compensation. The money was given to the representative of the community who subsequently called the meeting of the community which he brought out the sum of £1,579 as compensation for the community land. Two other

sub-family members of the community were not included in the meeting that took place nor was their share given to them. It was argued by the defendants that decision taken was the decision of the majority and therefore it bound the two members. In deciding in the favour of the plaintiffs the court observed<sup>100</sup>.

It seems to me that he must be regarded as a kind of trustee and that each member of Archiding House has some kind of interest in the trust moneys. His obligations to the 'Cestuis que trust' are not nearly so high as those of a trustee known to English law... His actions must be capable of reasonable explanation at any time to the reasonable satisfaction of the members of the House... Another instructive case on the issue was the case of *Odusi v. Bolaji*<sup>101</sup> where the plaintiff claimed a share in the income and account on the income paid as compensation on the community land acquired compulsorily by the Government. The court in ruling for the plaintiffs said:

*He (the chief) has refused or failed to give the plaintiffs their shares or to render an account to them. The plaintiffs are left in ignorance as to the exact amount due to them and as to the facts from which such amount could be ascertained... in the result, I am of the opinion that the plaintiffs must succeed in their claim against the defendant...*

#### **VILLAGE HEADS AS TRUSTEE**

A village head is a trustee of the community land. He administers land for the use and common benefit of the people. He cannot sell or make an outright gift of community land. The Divisional Court at Calabar in the case of *Chief Omagbemi v. Chief Dora Numa*<sup>103</sup> held that the land in dispute belonged to the community and the Chief was a trustee. On appeal to the Supreme Court, the Court held that the Olu (Chief) held the land as trustee for the people and not as individual owner or on behalf of his family. By the village head being a trustee of the community land, means that he represents his community in all dealings related to the community land, and this of course, includes, any dispute in respect of the community land<sup>102</sup>. Thus, he can sue and can be sued for any matter connected with the community land<sup>104</sup>. As a trustee the village head has to act in accordance with what is expected of a trustee that is, he has to act in good faith, he has to be accountable to the community *inter alia*<sup>105</sup>.

#### **Rights And Duties Of Community Members As Beneficiaries**

The community members being the beneficiary of communal land, have some in a liable rights and duties owed them by the village head as the trustee of the communal land.

***Right to be Informed and Consulted:*** As pointed out above, the village head can sell communal land. If the need arises for sale of communal land, it is a matter of right for the community members to be informed of such sale. It is also a matter of right for community (members) to be consulted when major decisions in respect of communal land has to be taken. It may include alienation of communal land by the village head.

***The Right of Allocation:*** The administrative and management control of communal land is vested in the village head who exercises it on behalf of members of the community. Every member has a right in conjunction with others in the use and enjoyment of Communal land. This right is an inherent right vested on every member of the family by virtue of his membership and can be enforced against the village head in the court<sup>106</sup>.

***Duty to be Respectful and Obey the Laws of the Land:*** The community owes respect to the village head who is the trustee of the community. Without being respectful to the village head, he will find it virtually impracticable to discharge his responsibilities as a trustee<sup>107</sup>. The foregoing are the rights and duties of community members under a communal trust.

### **INALIENABILITY OF LAND UNDER CUSTOMARY LAND LAW TENURE SYSTEM**

It is trite that land in the ancient time belonged to the community or the family and members of the community or family were apportioned parcels of land to farm on or hunt<sup>108</sup>. When a member died the apportioned parcel of land reverted to the pool. His descendants may continue to be on the land. It is on the basis of this arrangement that Chief Elesi of Odogbolu stated in *Dawodu V. Danmole*<sup>109</sup> that "...land belongs to countable members of the family, some of whom are dead, some are alive and many are yet unborn" Similarly in *Amodu Tijani Vs. Secretary Southern Provinces*<sup>110</sup> the privy council stated that land belong to the village, community or family and never to an individual and that the concept of individual ownership of land was foreign to native ideas.

It is often said that complete alienation of family property was unheard of<sup>111</sup>. In *Lewis v Bankole*<sup>112</sup> Osborne C.J stated that alienation of land undoubtedly foreign to native ideas in olden days. In *Olotu v. Dawuda*<sup>113</sup> land was alleged to have been given absolutely to a war Chief in 1902, the full Court, rejecting the claim, held that evidence of the Chiefs and an expert on native law be given on behalf of the plaintiff is clear that lands were not in former times given away absolutely even to war Chiefs and therefore must require very strong evidence to warrant the Court to come to a conclusion contrary to this custom.

Inalienability of communal land was intended to protect the rights of the unborn generations as well as the dead. It was considered an outrage against the departed ancestors, whose spirits lay buried in the soil, to sell the land an act of un wisdom to defeat the interest of the unborn for land was conceived as a sacred trust received from the ancestors and to be handed on intact to their posterity<sup>114</sup>.

In *Balogoun v. Oshodi*<sup>115</sup> Kingdon C.J. expressed the view that, however common the practice of outright alienation might have become in recent times, such alienations were invalid on the ground that they amounted to unlawful attempt by the living to defeat for ever the interest of the unborn generations. Apart from its association with ancestral spirits, land is also a symbol of god, or supreme deity<sup>116</sup>

and it would thus be sacrilegious to sell it. It is also argued that the living members could not make an outright alienation of communal land because the totality of their interest does not amount to the ownership of it by Customary practice. No member has an interest of inheritance in communal land but merely a right to share in its enjoyment during his life. The inalienability of communal land has also an economic aspect of land being in plentiful supply had little or no commercial value.

Having said so much of inalienability of land under customary law, the other side of the coin deserves attention as well. In fact, in recent time, it is possible to alienate lands under customary law provided the requisite consent was obtained<sup>117</sup>. It is now a common practice particularly in the rural areas for one to alienate land<sup>118</sup>. Thus civilization and the need for economic control of resources including land as well as the gradual break down of traditional African extended family system have given rise to consequential demand and incidence of partition of family and community lands. When a family or community land is partitioned, the member who is a beneficiary of the partition can sell it.

Alienation of family land unilaterally by a member of the family without consent of the family head is void<sup>119</sup>, while alienation without the approval of other principal members of the family is voidable at the instance of any of such principal members<sup>120</sup>. Thus in *Babayeju v Ashamu*<sup>121</sup>, it was held by Belgore JSC that a member cannot alienate family land without the approval of the family head. Where the family head consents but other principal members have not been consulted then, the alienation is voidable at the instance of any of such members<sup>122</sup>. The family head must also consult with the principal members of the family before he can validly alienate family land. If he fails to do so, his action becomes voidable at the instance of any such principal member<sup>123</sup>. Therefore once consultation is done successfully, family or communally owned land can always be alienated. Where land is successfully alienated, trust can be created over such land for the purposes of its administration. This further buttresses the relevance of trust law in the administration of real property in Nigeria.

### **STATUTORY TRUST OVER LAND**

Statutory trust is a creation of statute. This is a trust that derives its existence by way of legislation. For example under the Kaduna State property law statutory trust exist by virtue of section 23 which provides as follows "for the purposes of this Act land held upon the 'statutory trusts' shall be held upon the trusts and subject to the provisions following, namely, upon trust to sell the same and to stand possessed of the net proceeds of sale after payment of rates, taxes, costs of insurance repairs and other outgoings, upon such trusts, and subject to such powers and provisions, as may be requisite for giving effect to the rights of the person (including an encumbrance of a former undivided share or whose encumbrance is not secured by a legal mortgage) interested in the land."

Similarly section 35 of law of property Act made provision for the existence of statutory trust in the same wordings with that of section 24 of Kaduna State property law, section 33 of the Administration of Estates Act declares that the personal representatives of an intestate are required to hold all the deceased's property upon trust with power to postpone the sale. Further still section 33(1) of the Administration of Estates Act, as amended by Trusts of land and appointment of Trustees Act 1996 (TLATA), provides: "On the death of a person intestate as to any real or personal estate, that estate shall be held by his personal representatives with a power to sell it."

Section 34(2) of the property law Act provides that where land is conveyed to persons in undivided shares it will vest in the first four named persons upon trust for all the beneficiaries as tenants in common. From the foregoing it is revealed that the moment a land owner dies without willing out his property, his intestate property will automatically come under the protection of the law and hence becomes a statutory trust. Under this arrangement the trustees of the statutory trust becomes the legal owner of the property while the beneficiaries becomes the equitable owner. Ownership of land statutorily speaking is vested in the authority as trustee while members of the public are the beneficiaries. This is graphically captured by the land use Act. For example the preamble to the 1978 land use Act provides:

*An act to vest all land comprised in the territory of each state (except land vested in the Federal Government or its agencies) solely in the Governor of the State, who would hold such land in trust for the people and would henceforth be responsible for allocation of land in all urban areas to individuals resident in the state and organisations for residential agricultural, commercial and other purposes while similar powers with respect to non-urban areas are conferred on local governments.*

While section 1 of the said Act provides that:

*subject to the provisions of this Act, all land comprised in the territory of each state in the federation are hereby vested in the governor of that state and such land shall be held in trust and administered for the use and common benefit of all Nigerians in accordance with the provisions of this Act..*

From the wordings of both the preamble and section 1 of the Land Use Act the ownership of Land is vested in a governor of every state in trust for the benefit of members of the public. It means therefore, that any person that needs Land for whatever purpose will have to approach the governor for the Land. Even if the person is in possession of Land, and wants to effect any transaction in respect of that land, he still needs the governor's consent for such transaction e.g. assignment of his interest in land<sup>124</sup>.

### **TRUST FOR SALE OF LAND**

This is a situation where the mechanism of trust law is employed to achieve a particular goal, for instance, creation of trust for sale of Land. Thus, S.63 of the

Settled Land Act, provides that:

*whereby any instrument, land or any estate or interest therein is subject to a trust or direction for sale or the proceed of sale or income is to be applied or disposed of for any person or persons for life or any other limited period, such land is to be deemed settled within the Act.*

The result is that the trustees cannot exercise their power of sale given them by the settlement unless the tenant for life gives his consent. However, where the tenant for life is unable to exercise his statutory powers unless he obtains an order of the court, until such an order is made, the trustees are empowered to sell without the consent of the tenant for life<sup>125</sup>.

By the word settlement as used in the settled land Acts, it means all kinds of arrangements whereby property is given to particular person in succession<sup>126</sup>. For example A makes a will leaving property to B for life with remainder to C in fee simple. The essence of settlement is a successive creation of interest by a single gift either by deed or will. Under strict settlement the tenant for life has wide powers to deal with the property subject matter of the settlement. For example, if land is settled on A for life remainder to B for life remainder to C and if A sells the property the legal fee simple is vested in the purchaser free from legal rights of A ,B and C, their rights switch to the capital money.

By bringing trust for sale under settle land Act, it was the beneficiary and not the trustees who can exercise the power of sale. This has caused a lot of inconveniencies. To correct it, S 7 of the settled Land Act provides that in the case of trusts for sale the tenant for life should be unable to exercise the powers of the Act without the order of the court, and that until such an order was made, the trustees could sell without the consent of the tenant for life. This section gives a purchaser some measure of security in dealing with trustees for sale unless such an order has been registered as a pendens (pending action). However, the Act does not give the trustees for sale powers of management, for example power to lease the property.

Back home in Nigeria, in States like Ogun, Oyo and Ondo the relevant law is the Property and Conveyancing Law<sup>127</sup>. This law adopted the English Trust for Sale Act but the English Settled Land Act was regarded as unsuitable on the ground of its technicality and complicated Conveyancing processes. The result is that in the above-mentioned States, the only method of limiting Land to persons in succession is by means of a trust for sale. S. 32(1) of the Property and Conveyancing Law provides that:

*where any land is limited to or in trust for any person by way of succession the same shall be deemed to be held on a trust for sale upon such trusts and subject to such powers as are necessary to give effect to the rights of the persons to whom the land is limited. Accordingly, a conveyance or devise creating a trust for sale or succession of interests inland which fails to vest the land in trustees upon trust for sale in accordance with the provisions of S.32 operates to vest the land in the trustees of the settlement upon the trusts specified<sup>128</sup>. A trust for sale arises also where there is a conveyance of a legal estate in land to an infant jointly with one or more other person of full age<sup>129</sup> and where an infant is beneficially entitled to*

*land either for an estate in fee simple or for a term of years absolute by reason of intestacy*<sup>130</sup>.

Under the Kaduna State Property law<sup>131</sup> trust for sale is contained in section 39 to 44. Section 39 of the said law provides that:

*where any land is before the commencement of this law limited to or in trust for any person by way of succession, the same shall be deemed to be held on a trust for sale upon such trusts and subject to such powers as are necessary to give effect to the rights of the persons to whom the land is limited and after the commencement of this Edict, land may be limited as aforesaid only by the creation of such trust for sale.*

The powers of trustees for sale are contained in S.38 of the property and conveyance law, and S.45 of the Kaduna State law of property edict. The trustees may sell the trust land or otherwise deal with the land in any way they deem fit provided that they obtained the best consideration in money that can reasonably be obtained. Where trustees are authorized by the trust instrument, creating the trust or by law to pay or apply capital money subject to the trust for any purpose or in any manner, they shall have and shall be deemed always to have had power to raise the money required by sale, conversion, calling in or mortgage of all or any part of the trust property for the time being in their possession<sup>132</sup>. The trustees can insure the trust property against loss or damage by fire<sup>133</sup>. If the trustees for sale refuse to sell or to exercise any of the powers conferred upon them any interested person may apply to the court for an order requiring them to exercise these powers<sup>134</sup>.

From the foregoing, it is revealed that trust law can be use for the Sale of Land. This again demonstrates the working significance or relevance of trust Law in the administration of real property in Nigeria.

### **TRUST FOR PURCHASE OF LAND**

This may arise in two circumstances the first is where a trust is created and a trustee is appointed specifically for purchase of land. Where, he is so appointed he is to act in accordance with the instruction of the appointing instrument. In this regard he is expected to be diligent in the purchase of land. Where the appointing instrument does not restrict his discretion he is free to do so. However, where he decides to exercise his discretion he should do so in line with the standard of prudence expected of a businessman<sup>135</sup>. Thus if the discretion relates to purchase of land, the trustee is expected to exercise such care and caution as an ordinary business man would. Also apart from purchasing only the type of land within the terms of his trust, he must avoid any land, which is subject to any encumbrance or prone to litigation no matter how profitable they seem to be.

The trustee should also avoid speculative business which depends on contingencies, or unproductive investments which produce no income for the trust estate. For instance in *Re power*, the purchase of a house with trust funds for the occupancy of a beneficiary and which produces no income for the trust estate was held not be an investment.

The second situation is where trustee is statutorily given an inherent power to invest trust fund. Thus, Trustee Investment Act<sup>137</sup> stipulates the range within which trustees can invest trust property. By the provisions of the Act a trustee can only invest in authorised and specified securities<sup>138</sup>. The Act stipulates that a trustee can invest in the following securities:-

- a. Federal Government Securities
- b. State Government Securities
- c. Securities of Companies or Corporations incorporated directly by an Act or Law specified in the Schedule to the Act<sup>139</sup>.
- d. Debentures and fully paid shares of any company incorporated and registered under the companies and Allied Matter Act (CAMA), not being a private company.

Furthermore, trustees appointed, trustee for purpose of investment must act honesty. However, so long as the trustee acts in the honest discharge of his duty, he is protected by law. But where any loss results from a breach of his duties under the instrument of trust that will render him or her liable to make up the lost incurred. From the foregoing discussion there is no gain saying that the effectiveness of trust Law with regard to transaction relating to Land has once more been revealed.

## NOTES

<sup>1</sup>Oluyede P.A.O Modern Nigeria Land Evans Brothers, Ibadan, (1989) P. 6

<sup>2</sup>Aboki Y. Customary Law Tenure and Land use Act. The Role of Local Government in land administration in Nigeria. Law in Society a Journal of the Law Society A.B.U. Zaria 1998

<sup>3</sup>ibid.

<sup>4</sup>Kodilinye G. An Introduction to Equity in Nigeria Sweet & Maxwell (1915) PP. 57 - 58.

<sup>5</sup>Trustee Investments Act.

<sup>6</sup>Keeton, the Law of Trust (6th Ed) 1963 P. 14 Spence, Court of Chancery (1846)

<sup>7</sup>See Spence, Court of Chancery (1846) Vol. 1 P. 435.

<sup>8</sup>Blackstone's Commentary (Lewis Ed) BK 2. 327 - 29

<sup>9</sup>Spence, Court of Chancery (1846) Vol. 1. P. 435 - 36.

<sup>10</sup>Spence Ibid

<sup>11</sup>Knight V Knight (1840) 49, ER 58 Brown v Higgs (1801 - 3) 32 E.R. 473

<sup>12</sup>Equity jurisprudence (14th Ed) Vol. II PP. 649 - 50 (1918)

<sup>13</sup>Maitland Equity (Brunyate Ed. 1949) P. 32

<sup>14</sup>Maitland; Collected Papers Vol. III PP. 321 - 404

<sup>15</sup>Homes, Early English Equity uses. IL Q Rev (1885) 162 A4 P. 164

<sup>16</sup>Hold worth, History of English Law (1924) Vol. IV 410 - 417

<sup>17</sup>Ames, The Origin of Uses and Truts 21 Harv. L. Rev 261 at 261 (1907)

<sup>18</sup>Holmes, Early English Equity Uses I L. Quen (1885) 162

<sup>19</sup>Scott on Trust, Vol. 1 (2nd Ed) 1956 P. 4

<sup>20</sup>Scott on Trust (2nd Ed) Vol. 1 P. 20

<sup>21</sup>Ibid at 24

<sup>22</sup>The law of Trusts (8th Ed.) p. 3

<sup>23</sup>Moffat, G. Trusts Law, Text and materials, Butterworths, London (1994) p. 3

<sup>24</sup>Garner Bryan A. (Eln) Black's Law Dictionary Seventh Edition West Group St Paul, minn 199

- <sup>25</sup>Nwabueze, B.O. Nigerian Land Law Nwamife Pubers Enugu 1973, p. 7.
- <sup>26</sup>See Black's Law Dictionary, St. Paul Minn. West Publishing Co. (5th Edition) P. 997.
- <sup>27</sup>Nwabueze, B.O. op. cit.
- <sup>28</sup>(1921) AC 399 at 404
- <sup>29</sup>(1980) 1 N.L.R. 82
- <sup>30</sup>Ibid at p. 86.
- <sup>31</sup>Yakubu M.G. Nigerian Land Law Macmillan (1981) P. 59 - 60
- <sup>32</sup>Ibid.
- <sup>33</sup>Ibid.
- <sup>34</sup>Ibid.
- <sup>35</sup>Niki Tobi Cases and Materials on Land Law (1992)
- <sup>36</sup>(1981) 6 - 7 Sc. 115 - 116
- <sup>37</sup>(1981)5 Sc. P. 33 at 58
- <sup>38</sup>(1985)2 WLR Page 195
- <sup>39</sup>Yakubu M.G. Nigerian Land Law Macmillan (1981) P. 59.
- <sup>40</sup>Ibid.
- <sup>41</sup>Yakubu M.G. Nigerian Land Law Macmillan (1981) P. 59 - 60
- <sup>42</sup>See Allot, Essays in African Law P. 70
- <sup>43</sup>Yakubu M.G. Nigeria Land Law Macmillan (1981) p. 60.
- <sup>44</sup>Ibid
- <sup>45</sup>Political Memoranda No. 10. Para. 11
- <sup>46</sup>Amodu Tijjani v Secretary, Southern Provinces (1921) 3NLR 24
- <sup>47</sup>Ibid p.60
- <sup>48</sup>Ibid p.60
- <sup>49</sup>Ibid P. 60
- <sup>50</sup>Yakubu M.G. Nigerian Land Law Macmillan (1981)
- <sup>51</sup>Ibid
- <sup>52</sup>Asante, Property Law and Social Goals ion Gana Acc. 1975. P. 88.
- <sup>53</sup>Abude v Onono (1946)12 WACA 102 at 104
- <sup>54</sup>See Amodu Tijjani v Secretary Southern Provinces (Supra)
- <sup>55</sup>See Adedire v Ife Divisional Council (1963) 1 All DCR 30
- <sup>56</sup>Ogunmefun v. Ogunmefun (1931) 10 N.L.R. 82, also Adesoy vs. Taiwo (1956) 1 FSC 84.
- <sup>57</sup>Ibid.
- <sup>58</sup>Adagun v. Fagbola (1943) 11 N.L.R. 110.
- <sup>59</sup>Basseyy v. Cobham (1924) 5 N.L.R. 90.
- <sup>60</sup>Kosoko v. Kosoko (1975) 13 N.L.R. 131.
- <sup>61</sup>Ibid.
- <sup>62</sup>Ibid.
- <sup>63</sup>(1909) 1 N.L.R. 81
- <sup>64</sup>(1929)9 N.L.R. 84 at P. 85 there it was stated that the headship of a house belongs as of right to the senior male member of the house.
- <sup>65</sup>Supra
- <sup>66</sup>(2004) All F.W.L.R.P. 407 at 409
- <sup>67</sup>(1941)6 N.L.R. 26 at P. 27
- <sup>68</sup>Elias. T. O. Nigerian Land Law Sweet and Maxwell, London 1971 (ed) p. 105.
- <sup>69</sup>(1962) L.L.R. 32.
- <sup>70</sup>James R.W. Modern Land Law of Nigeria University of Ife Press Ile - Ife Nigeria (1973)
- <sup>71</sup>Taiwo v Sarumi (1913)2 N.L.R. 84
- <sup>72</sup>Seventh Edition
- <sup>73</sup>Adagun v. Fagbola (1943) 11 N.L.R 100.

- <sup>74</sup>Lewis v Bankole (1909)1NLR82.
- <sup>75</sup>James R.W. Modern Land Law of Nigeria University of Ife Press Ile Nigeria (1973)
- <sup>76</sup>Yakubu M.G Nigerian Land Law Macmillan (1981) P.64
- <sup>77</sup>(1924)5 N.L.R. 90
- <sup>78</sup>Id.p.64
- <sup>79</sup>Aregbe v Adeoye & anor (1974) 5 N.L.R 53
- <sup>80</sup>Ibid.
- <sup>81</sup>The headmen could of course bring a fresh action to restrain the defendants from interfering with their undoubted rights under local law and custom.
- <sup>82</sup>Adegbite v Lawal (1948)12 WACA 398
- <sup>83</sup>Id p.64
- <sup>84</sup>Supra
- <sup>85</sup>(1965) NMLR 3
- <sup>86</sup>(1936) 13 N.L.R. 131
- <sup>87</sup>Lewis v Bankole (1909) 1 NLR 82.
- <sup>88</sup>Supra
- <sup>89</sup>Thomas v. Thomas & anor. (1932)16 N.L.R. 5
- <sup>90</sup>James R.W (Supra)
- <sup>91</sup>Ibid
- <sup>92</sup>Coker v Coker (1938) 14 N.L.R. 83
- <sup>93</sup>James R.W. (Supra) at P 88.
- <sup>94</sup>Suit No. 20163, Ondo Grade 'B' Customary Court
- <sup>95</sup>(Supra)
- <sup>96</sup>Ibid P. 89
- <sup>97</sup>Yakubu M.G. (Supra) P.63
- <sup>98</sup>Amodu Tijjani V. Secretary, Southern Province (Supra)
- <sup>99</sup>(1947) 18 N.L.R 117
- <sup>100</sup>Supra at p. 123 also Akanda v. Akanda (1966) NBJ 86
- <sup>101</sup>(1961) LLR 217
- <sup>102</sup>Supra
- <sup>103</sup>(1923) 5 NLR 19
- <sup>104</sup>Nwabueze B.O. Nigerian Land Law (Supra)
- <sup>105</sup>Ife V. Chief Adechire (Supra)
- <sup>106</sup>Ajibola v. Ajibola (1947) 18 NLR 125
- <sup>107</sup>Supra
- <sup>108</sup>Supra
- <sup>109</sup>(1892) AC 644
- <sup>110</sup>(1921) AC 399
- <sup>111</sup>Okiji v. Adejobi (1960) 5 FSC 44 at 47
- <sup>112</sup>(1906) 1 N.L.R. 82 at 104
- <sup>113</sup>(1904) 1 N.L.R. 57
- <sup>114</sup>Meek, Land Tenure and Land Administration in Nigeria (1957) P. 113
- <sup>115</sup>(1931) 10 W.L.R. 36
- <sup>116</sup>Meek, Law and Authority in Nigeria Tribe
- <sup>117</sup>Madaki A.M. land Policy and Administration in Nigeria Assessment of the Land Use Act: LL.M thesis 2005 p. 43.
- <sup>118</sup>A piece of family land was recently alienated to me to build my house
- <sup>119</sup>Adenie v. Olude (2002) 18 NWLR pt. 81 p. 235, Nzekwu v. Nzekwe & others (1981) 2 NWLR pt. 104, Adeleke v. Iyanda (2001) 13 NWLR Pt. 729 p. 1, Jiaza v. Bambose (1999) 7 NWLR pt. 610 p.182 at 192.

- <sup>120</sup>William Fra "Integration in the field of Land Law" Integration of Customary and Modern Legal System in Africa, University of Ife Press 1971 at pp. 206 - 207.
- <sup>121</sup>(1998) 9 NWLR Part 567 P. 546
- <sup>122</sup>Ajeje Vajayi (1969) 1 All NLR 72
- <sup>123</sup>Ekependu V. Erika (1949) 4 FSC 59.
- <sup>124</sup>Section 21 Land Use Act 1978
- <sup>125</sup>S.L.A. 1882, S.6
- <sup>126</sup>See Megary and Wade, the Law of Real Property (4th ed) Chap. 6.
- <sup>127</sup>See O.R. Marshal, A Critique of the property legislation of Western Nigerian (1965)1 Nigeria LT 151 at P. 152
- <sup>128</sup>See S.33 Property and Conveyancing Law 1959
- <sup>129</sup>Ibid S. 17(1)
- <sup>130</sup>Ibid S. 36
- <sup>131</sup>1990
- <sup>132</sup>See S. 8(1) Trustee Law, Cap. 125 Laws of Western Nigeria 1959
- <sup>134</sup>Ibid. S. 11
- <sup>135</sup>Ibid S. 28
- <sup>136</sup>Speight V. Gaunt (1883) 9 APP. Case 1
- <sup>137</sup>(1887) 12 App. Cas 727 at P. 733
- <sup>138</sup>Cap 44 Laws of the Federation of Nigeria 1990
- <sup>139</sup>See generally SS. 2 & 3 of the Act
- <sup>140</sup>The Schedule names Securities of National Electric Power Authority (NEPA)