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Family Land: Meaning, Creation and Guiding Principles under Customary Law in Nigeria

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Abstract

The different communities and ethnic groups in Nigeria require careful consideration especially when it comes to disputes over family land which demands legal expertise and strong understanding of customary law. Using doctrinal research methodology, this paper examined the meaning, creation and guiding principles of family land under customary law in Nigeria. In addition, usufructuary rights associated with family land were also discussed. The findings of this paper revealed that under customary law, family land can be created by inheritance, communal allocation and purchase among several other means. The paper noted that family land cannot be divided or alienated without the consent of all family members.

Keywords: customary law, custom, land, family, inheritance, village, clan, community

1. Introduction

The ownership of land by units such as families, clans, kindred, villages and similar bodies under the customary land tenure system has always been taken to be a fundamental element of land tenure system under the customary law. This is because even though ownership of land under the customary law had always been known to originate or arise from individual ownership, yet the fact that the ownership eventually results in communal or collegiate ownership which is predominantly rooted in family makes it imperative that it be given a close attention to establish its true nature. This occupies a prime position in customary land tenure system. The existence of family property and the use to which it is committed by the family members as well as the nature of their rights therein have such significance that the Nigerian law of real property cannot be fully discussed without prime attention being paid to family property[1]. It is therefore imperative to examine the family ownership of land in line with the unique character of customary law as a flexible legal framework.

2. Meaning of Family Land

Land refers to the physical natural element which includes the ground (earth) and things on it, the resources under the ground such as mineral deposits and to an extent above the ground which includes air space rights. The Black's law dictionary defines land as that three (3) dimensional part of the earth, which includes the earth's surface, the air space and the portion of the earth below.[2] Land comprises not only the surface of the earth but includes the subsoil and appurtenances fixed

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[1]*Amodu Tijani v The Secretary SouthernNigeria* [1921] 2 AC 399, [1921] UKPC 80, also known as the Apapa land case. See also [1921] NGSC 1.

[2]B A Garner, *Black's Law Dictionary Land* (10 edn, Thomson Reuters 2014)

upon the land[3]. It then follows that land includes any building, tenure or part of a building and other incorporeal hereditaments or corporeal hereditaments.

Thus, family land is usually refers to land collectively owned, managed, and enjoyed by members of a family, usually passed down through generations. It has served as a significant source of identity, history, community bond and wealth.[4] Family land refers to the ground (earth) inclusive of the subsoil appurtenances and airspace belonging to a family. The family could be in a nuclear form (Father, Mother and Children) and it could also be in an extended form consisting of the Father, Mother, Children, Aunties, Uncles, Cousins Etc. Family land has always been the practice of the people of Southern Nigeria. It was not until the colonial era that the concept of individual land came into legal existence[5].

Individual members have the right to utilize and benefit from the land, but ownership resides with the family as a unit. Family land is therefore land which devolves from father to children and grandchildren, under native law and custom which no individual child or member of the family can dispose of in his or her will until it is partitioned and each child or member of the family has his or her separate share of the whole.[6] This definition applies with equal force and holds good particularly where the land has the attribute of inalienability that no individual member of the family can alienate it in his own right before the land is partitioned. [7]The land is vested in a family as a corporate entity, and as such the individual member of the family, has no separate claim of ownership to any part or whole of it.[8] In *Coker v Coker*[9], Carey J. formulated the definition of family house/property thus:

> *A family house in this connection is a residence which the father of a family sets apart for his wives and children to occupy jointly after his decease. All his children are entitled to reside there with their mothers and his married sons with their wives and children. Also a daughter who has left the house on marriage has a right to return to it on deserting or being deserted by her husband.*

The holding of family land under customary law is joint and indivisible[10] unless partition takes place. This aligns with the view of Oluyede when he stated thus:

> *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 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*.[11]

[3]N Tobi, *Cases & Materials on Nigerian Land Law* (Lagos: Mabrochi Books, 1997) p 32.
[4]I Abdulkarim, 'Trust Law and the Administration of Real Property in Nigeria', (2011) 2 (1) *International Journal of Advanced Legal Studies and Governance*, 210
[5]T O Elias, *Nigerian Land Law* (4th Edn Sweet & Maxwell 1971) p 72
[6]*Ezekwe v Onyeama*(1993) I NWLR(Pt 309) 76.
[7] Ibid, see also *Ogundairo v Abeje* (1976) All NLR 1
[8]A A Utuama, *Nigerian Law of Real Property* (Ibadan: Shaneson C.I. Ltd, 1989) p11.
[9](1938) 14 N.L.R 83.
[10]*Ogunmefun v Ogunmefun* (1931) 10 NLR p. 82
[11] P O Oluyede, *Modern Nigerian Land Law* (Ibadan: Evans Bros, 1989) p 12.

A purported transfer of family land by a member of the family is therefore void and of no effect.[12] The whole idea as Viscount Haldane[13] succinctly puts it is that:

> ……*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. All the members of the community, village or family have an equal right to the land, but in every case the Chief or Headman of the community or village, or head of the family, has charge of the land, and in loose mode of speech is sometimes called the owner… This is a pure native custom along the whole length of this coast….*

Thus, the maximum interest of a family over its land has been put as high as "fee simple absolute," "absolute title," "absolute ownership," otherwise implying that an individual cannot have an identical interest as the family, as his interest to the land must have arisen initially by allotment to him of a portion of land by the family meaning that he has mere possessory title. Thus, also implying that where otherwise it is not the case, the burden is on the individual as the person so alleging exclusive ownership of the land to prove his specific or absolute title as the case may be.[14]

3. Creation of Family Land

Family land could be created in various ways such as creation by the will of the owner.[15] Additionally, family land could be created also by gift or allotment, by devolution via intestate death and by conveyance.[16]Where the land (family land) is purchased with money contributed or belonging to the family, that too becomes family land or lands as the case may be. Furthermore, some other forms of creation of family land exist, such as the creation of family land by first settlement.[17] Another way of creation could be by the creation of family land vide a transfer of the totality of the interest & rights of the land.[18]Family land can also be created by conquest[19]. The Supreme Court in *Olodo v Josiah*[20] stated that family land belongs to the family and never loses its common ownership even when the family land is allotted to a family member, thus this means that the family land cannot without the consent of the family be alienated.

a. creation by Operation of the Law

Intestacy

If a landowner who is subject to customary law dies without a Will, his acquired property devolves on his children as family property in accordance with the applicable customary law rules. This is the way family property is commonly created. In other words, where a land owner dies intestate, the land is naturally inherited by his children under native law and custom, and thereby becomes family property.[21] It is immaterial whether the land owner dies leaving only one issue, the land will still be constituted as family property[22]. The conditions for creation of family property by intestacy are:

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[12]*Solomon & Ors. v. Mogaji* (1982) 11 SC p. 1
[13]*Amodu Tijani v The Secretary Southern Nigeria* [1921] 2 AC 399
[14]*Olodo v Josiah* (2010)18 NWLR (pt 1225) 653; see also *Ajeja v Ajayi* (1969) 1 All NLR 72 .
[15]Elias(n5).
[16]*Gaji v Paye* (2003) LLJR-SC, (2003) FWLR (PT. 163).
[17]*Ekpo v Ita* 11 N.L.R. P. 68, see also Idudun v Okumagba (1976) NMLR P.200
[18]*Jegede v Eyinogun & ors* (1959) 4 FSC p. 270
[19]*Mora v Nwalusi & ors* (1962) 1 All NLR 681
[20](2011) All FWLR pt 573, p. 1897 at 1926; (2010) LLJR-SC
[21]*Lewis v Bankole* (1909) 1N.L.R 82
[22]*Abeje v Ogundairo (1967) LLR 9*

(1) That the land owner died intestate and

(2) That his estate is governed by native law and custom, once those conditions are met the property devolves on his children as family property[23].

Will

Family property may also arise from a declaration under a Will as where a testator devised a property to his heirs jointly to hold as family property. A testator may create family property by specifically stating in his will that he wishes to create a family property, this is by declaring in his will that his property be held on his death jointly by his children as family property. In the case of *Frank Coker v George Coker & ors*[24], one Edward Foster in his Will made the following bequest of his dwelling house which was situated in Lagos –

> *I leave and bequeath my present dwelling house to the whole of my family or blood relation and their children's children throughout and cannot be sold for any debt or debts that may be contracted by any of them, but at present the house should be occupied by my grandson Nath and my son Edward subject to the approval of my executors or otherwise….*

In this case, the property in question had been eventually sold by order of court and the suit was to determine who is entitled to share in the proceeds of the sale. The court held that the intention of the testator was to make his dwelling house a family house, following the Yoruba custom and so that consequently those entitled to share in the proceeds of its sale were those of his descendants entitled under the custom to reside in the premises at the time of sale.

b. Creation by Acts of the Parties

Historically, the law recognizes that Parties may by their own acts create family property, by any of the following ways:

i. First Settlement

Family property may arise where a family, through their own ancestors were the first to settle on a virgin land and by so doing, exercised acts of ownership over sufficient length of time, numerous and positive enough to warrant inference of exclusive ownership. In *Ajala v Awodele & Ors,* the supreme court held that settlement is one of the traditional modes of acquisition and that where the plaintiff's case is that the land was acquired by settlement, it should not be open to question as to who made the grant. In the case of *Idundun v Okumagba*[25], the Supreme Court accepted the finding of the lower court that the family that was able to prove that their ancestor first settled on land created family property and the family are the owners thereof.

ii. Conquest

Where a family conquers a people, it may appropriate the land of the conquered. In times past, it was legitimate for a family to base its ownership of land on an act of conquest.[26] Where there is only one particular progenitor, mainly hunters and warriors, in time past, who had fought and conquered the original settlers and chased them from the land, upon his death, his children will inherit under native law and custom, and from this means a family property is created[27]. However,

[23]Ibid *n13*
[24]*(1938) 14 N.L.R 83*
[25]*(1976) 10 SC 227*
[26]*Mora v.Nwalusi* (1962) 1 All NLR 681
[27]*Kuma v Kuma (1934) 2 W.A.C.A 178*

it is no longer acceptable to use conquest as it can no longer be a mode of acquiring land in this modern time.

iii. Purchase

Where family money is used to purchase land, family property is created. Family property may be created by conveyance *intervivos*. Where land is purchased with money belonging to the family, a family property is thereby created. In the case of *Nelson v Nelson*[28], the family decided to use money paid by government as compensation for acquisition of family property to purchase and acquire another parcel of land. The conveyance was done in favour of the family head in English form. The family head thereafter sold the land to a third party. In an action to set aside the sale, the court held that the land is a family property notwithstanding the form in which it was conveyed.[29]

iv. Gift

In *Jegede v Eyinogun*[30]the Federal Supreme Court held that if a family is the absolute owner of land, there is nothing to stop the family from transferring the totality of their interest in the land as long as the family head and all the members of the family agree. In the event that a family is a donee of unconditional gift of land, family property is created.[31] This follows the rule that a donor of land under an unconditional gift to a done cannot recall his title.[32]

(v) Declaration

Where the land owner during his lifetime decides to designate his land as family property for the benefit and enjoyment of members of his family only; family property is thereby created[33].

(vi) Conveyance

In a scenario where the landlord/ land owner, confers title to his property on specific or some named members of his family by Deed with a declaration of his intention to create a family property in the named members, a family property is thereby created. In the case of *Olowosago v Alhaji Adebanjo & others*[34], where the family conveyed by Deed of grant a parcel of land to eight people who were children and grand-children of the land owner, the land was subsequently sold to the plaintiff; the respondents relied on the Deed of grant. It was held that the Deed created family property. The court also explained that to qualify as family land, it will be necessary to identify not only the origin of the land but also its status.

From the foregoing, it is evident that family property could be successfully and legally created either by an operation of the law or the acts of the parties involved, i.e. the family members.

4. Characteristics of Family Land

Ownership of family land accordingly vests in the legal abstraction known as the family and not in its members for the time being. Each member of the family is nothing more than a member of the community to which the land belongs just as if he was a shareholder entity; as such ownership in the family is vested in the living, the dead and the unborn. However, sale of the family land

[28](1951)13 WACA 248
[29]See also *Dosumu v Adodo* (1961) LLR 149.
[30](1959) 4 F.S.C. 270
[31]*Ashafa v Awawu* 11 N.L.R. 39, (1959) 4 F.S.C. 270
[32]Tobi, (n3),
[33]*Nelson v Nelson (1951) 13 WACA 243*
[34]*(1988) 4 N.W.L.R (pt 88) 275*

without the consent of the head of the family is void.[35] The property belongs to the family as a distinct perpetual legal entity, but not to the individual members. It is a collegiate property owned jointly by them; the title of which vests in the legal abstraction known as the family but which is made up of the aggregation of the members.

The members for the time being do not possess any separate disposition, attachable or inheritable interests in the family property as individuals but as joint inheritors, possessors and owners thereof. Thus, a member of the family who is in use of family land cannot claim exclusive ownership of same against the family no matter how long he is in possession thereof.[36]

The fact that the property is vested in a body corporate implies that no transaction affecting the interests therein is valid unless done by, or with the consent of the family itself acting though its alter ego, which for some purposes is the family head and for others, is the family council comprising the head of the family and the principal members of the family.

Several individual members of the family may be in possession of various parcels of family land whether for farming, residential or other purpose but the ownership thereof continues to reside in the family as a unit while the members in possession continue to exercise usufructuary right over the parcels possessed by them subject to the superior title of the family as a unit.

A typical family land is capable of changing its character of ownership from family ownership to individual ownership and again back to family ownership depending on the nature and constitution of the family to whose ownership it is subject. Thus, cessation or termination of family ownership of land does not prevent the land from subsequently crystallizing into family ownership again. Its nature is not always necessarily static.

Family property is not capable of being validly alienated otherwise than by the collective will of the members of the family expressed either through the head of family along or jointly with the principal members of the family or just the head of the family.

Acquisition of temporary possessory rights over family property by individual member of the family could be authorized by the family head alone but acquisition of permanent rights over family property by individual members of the family is by the collective decision of the members thereof. This will be by way of partitioning or outright grants.

An action for declaration of title is not maintainable against a member of a family in respect of family land since all the members of the family are recognized as co-owners of the family land.[37] Moreover, an allotment by the head of the family to various members of the family of portions of family land for farming purposes does not in any way vest ownership of such land in the allottee (s) as to entitle them under native law and custom to a declaration of title individually.[38]

Perhaps, family land remains family land irrespective of allotment and as such, an allottee of family land cannot competently alienate it without the consent of the family head and the principal members of the family and also improvements made to family land belongs to the family as held by the Supreme Court in the case of *Shelle v Asajon*[39], wherein the Supreme court equally

[35]*Adejumo v Ayantegbe* (1989) 6 SC pt 176 @ 100, (1989) 3 NWLR (Pt. 110) 417per Karibi-Whyte JSC.
[36]*Olaleye v Akano* (2008) 25 WRN 121.
[37]*Yoye v Olubode*(1974) 10 SC 209, (1974) LCN/1877 (SC)
[38]*Lengbe v Imale* **(**1957) 2 FSC 65
[39](1957) 2 FSC 65.

emphasized that any member of the a family in possession of family land or occupying family house(s) owes it as an obligation to keep such property in good state.

5. Principles Guiding Alienation of Family Land in Nigeria

In the alienation or sale of family land, neither the head of the family alone, nor the principal members alone can make any valid alienation or give title to any person with respect to family land. A head of family not acting as such cannot convey a valid title in respect of family land.[40]Where the head of a family conveys land without the consent of the principal members of the family, such a transaction is voidable and can be avoided by an action instituted by any member of the family. [41] It is the consent of a majority of principal members of the family that is required and not that of every member for the alienation of unpartitioned family property or land. Perhaps, if the alienation, sale, lease or allotment is made by the principal members of the family without the consent of the head of the family who is recognized as the custodian of the family property, the same will be void ab initio.[42]

It is essential to the validity of sale of family land that the head of family must join in the conveyance and the principal members of the family must consent to the transaction. Such a combination of parties to the conveyance of family land by the head of family and the principal members of the family is unimpeachable. Any sale or disposition purporting to transfer family land without these essential customary elements is void ab initio.[43]

Furthermore, unimpeachable title can only be transferred from one community to another when the head of the family does so with the consent and concurrence of the principal members of the family or community. Family land can only be sold or disposed of with the consent of the head/principal members of the family. Even where a family member makes the sale, he must receive the consent or ratification of the other principal members of the family for the sale to be validated.[44]

Moreover, the controversy as to whether a group or a section of a family or even a single member of a family has *locus standi* to institute an action in respect of wrong done to the family property has been laid to rest. So, any member of the family can take steps to protect the family property or his interests in it, even if he does not have the authority of the family to bring the action. Consequently, where the alienation of the family property is irregular the court is entitled, at the instance of any member of a family, whether principal or not, to declare the sale void.[45]

6 Conclusion

This paper has discussed the fact that family land is a unique creation by our forefathers in the Nigerian and African setting. Presently, some vices such as greed and selfish individualistic tendencies of men are fast eroding the concept of family land which was meant to preserve the unity of the family or clan in perpetuity. The paper equally highlights the fact that family land is created by the father figure of the family. It could also be created via conquest, intestate or testamentary succession, sale to another family, allotment etc. The burden of preserving family

[40] *Usiobaifo v Usiobaifo* (2005) 3 NWLR (pt 913) 669; *Alli* v *Ikusebiala* (1985) 1 NWLR (pt 4) 630
[41]*Layinka v Gegele* (1993) 3 NWLR (Pt283) 518.
[42]*Akayepe v Akayepe* (2009) 11 NWLR (Pt.1152)217.
[43]*Fayehun vFadoju*(2000) 6 NWLR (Pt 661) 390.
[44]*Alaribe v Okwuonu* (2016) 1 NWLR (Pt 1492) 41
[45] see *G Cappa Ltd. v Shokunbi* (1994) 4 NWLR (pt 337) 217

land rests first on the family head and subsequently on the principal members or family as a whole[46].

Family land just like every creation of man has a beginning and also has an end. It ends when the family land is partitioned or sold. Where the family head as well as other members of the family unit are trustworthy, family land would be preserved and would not be a subject of endless litigation.

[46]T O Elias, *Nigerian Land Law* (4th edn, London: Sweet & Maxwell 1971)