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COURSE WRITER/ DEVELOPER	Mr. Kunle Aina NOUN (Sabbatical)
EDITOR:	Mr. Idowu Adegbite Olabisi Onabanjo University, Ago-Iwoye
COURSE COORDINATORS:	K. Aina, (Sabbatical), C. Hia, O. Lawal, T. Abisoye (Study Leave) NOUN
AG. DEAN:	Dr. Godwin I. Oyakhiromen School of Law National Open University of Nigeria

MODULE 1

Unit 1: Introduction/Historical Evolution of Land Law in Nigeria

Unit 2: Sources of Nigeria Land Law

Unit 3: Legal Concept of Land

Unit 4: Terminology

Unit 5: Implication of the Duality of Laws

Unit 1: INTRODUCTION/HISTORICAL EVOLUTION OF LAND LAW IN NIGERIA

CONTENTS

1:0 **INTRODUCTION**

Land Tenure may be defined loosely as the body of rules which governs access to land and the relationship between the holder of land and the community on the one land and or that between the holder and another party having superior title. The interests that may be had in land is therefore defined, delaminated and explained within the framework of the Land Tenure System. Because it is framed within the community concerned, the land tenure is quite community specific, and is normally dictated by the socio-economic lives of the individual community which in turn is shaped by the customs, economic, political and social realities of the community.

Therefore, generally, Land Tenure is always community specific, and the Land Tenure System of one community may not be easily imported or adapted by another unless they have similar customs and socio-economic beliefs:

Before the advent of the British Government in 1861, the only recognizable system of Land Tenure in the geographical area now known as Nigeria was the Customary Land Tenure System. This was the only known indigenous system of land tenure. It is a system of accepted practice amongst the people, well recognized and enforced and regarded as "a mirror of accepted usage"

See *Owoniyun* v *Omotosho* (1961) 1 All NLR 304
Kindey and ors v *Military Gov' of Gongola State & Others* (1988) 2 NWLR (pt 77) 445. This customary system of land tenure is all embracing and it defines, the rights, privileges, interests and title that may be enjoyed on land under customary law.

The system though had to make way for modern influence especially the introduction of British system of land tenure and legislative amendments principally due to the failure of the customary land tenure to accommodate the growing economic and political developments in the country; it is still largely recognized as the law governing land holdings amongst the people who hold their land subject to the customary land tenure. In effect in spite of the two main great influences on the customary land tenure i.e. Received

English laws and local legislation, the customary land tenure still governs the interests on land held by the people who agree or hold land subject to Native Law and Custom.

In this course, we shall examine the customary land tenure system in Nigeria.

2:0 OBJECTIVES

By the end of this unit, you will understand, the historical development of land law in Nigeria, the various legislations enacted affecting land in Nigeria and attempts at reforming the customary law in Nigeria.

3:0 MAIN CONTENT

3:1 Introduction

As we explained above, land tenure is a legal phenomenon because they give effect to and reflect the social and economic, sometimes political demands and perspective of the community concerned. The land tenure system may in the long run determine or hinder the development of the Nation because it is the only regulation on land use and developmental activities on land. However, in Nigeria apart from the legislations (which will be mentioned below) there is no major all encompassing law regulating land use in Nigeria until the Land Use Act 1978. Olawoye blamed the poor performance of the economy, the inability of the country to feed itself, the inability of both the public and the private sectors to provide sufficient shelter for the people, even inflationary trends in the economy in a major respect on the system of land tenure. (C.O. Olawoye, "Statutory shaping of land law and land administration up to the Land Use Act" Unilag 1978).

In order to have a better understanding of the current position of the law, it will be necessary to do a survey of the various legislative interventions until the Land Use Act of 1978.

3:2 LAND LEGISLATION OF SOUTHERN NIGERIA

By virtue of the Foreign Jurisdiction Acts, 1896 to 1913 the British Government assumed powers to legislate on Nigeria. Pursuant to this, the British Government Promulgated the Interpretation Act, Cap 89, Laws of the Federation and Lagos By Section 45 of the Act, the English Common Law, the doctrines of Equity and the statutes of general application that were in force in England on the 1st January, 1900 were in force in Lagos in so far as the limits of the local circumstances permitted and subject to Federal Law. Statute of general application has been explained to mean, all laws that were in force in England as at 1900. Therefore, Section 45 of the English Law of real property was applicable in Nigeria, subject to the exception contained in the section.

It follows that, the English common law rules relating to land tenures, disposition of real property, estates inheritance, perpetuities and a number of others are applicable in Nigeria, this will also include doctrines of equity which included construction of wills, institution and settlement of land, legal and equitable estates and interests in land and the doctrines of notice. The following statutes have been held to be statute of general application in Nigeria, they include the statute of Frauds 1677, the wills Act, 1837, Limitation Acts of 1882; Real Property Act 1845, the Partition Act 1868, the Conveyancing Act 1881, the Settled Land Act 1882 and the Land Transfer Act 1887. *See Young v Abina (1940) 6 W.A.C.A. 180; Apatira v Akande (1944)17 NLR 149; Lawal v Younan (1961) 1 All NLR 245; Green v Owo (1936) 13 NLR 43;* Niki Tobi, Cases and Materials on Nigerian Land Law, Mabrochi Books, 1992, 2.

Following the colonization of Lagos by the British Government and the King Docemo of Lagos entered into a Treaty transferring all land in Lagos to the British Government. Article 1 of the Treaty provides as follows;

"I Docemo, do with the consent and advise of my council, give, transfer, and by these presents grant and confirm into the Queen of Great Britain, her heirs, and successors for ever, the port and Island of Lagos, with all the rights, territories and appurtenances whatsoever there to belonging."

After this treaty, a series of Legislations were enacted by the colonial government to ensure total control of all lands in Lagos and environs between the years 1863 and 1865. Commissioners were appointed to determine the true and rightful owners of the land within the framework of the Lagos settlement. The commissioners recommend the issue of Crown Grants. With increase in population especially due to influx of non indigenes and foreigners many came to settle down in Lagos, and the increasing quest for land for developmental purposes, the colonial government passed the Ikoyi Land Ordinance of 1908 which declared certain lands as crown lands. In 1939, in spite of the earlier attempts to settle the problems arising on land at that time, the Government appointed Sir Merryn Tew as Commissioner to carry out a comprehensive investigation on the problem. He later advised the Government and recommend the passing of the following laws, Grown Grants (Township of Lagos) ordinance, No. 18 of 1947, the Arotas (Grown Lands) ordinance, No19, 1947, the Epetedo Lands Ordinance, No. 20, 1947 and the Glover Settlement Ordinance, No.21 of 1947. These ordinances affected Land Use and Customary Land Tenure in very significant ways. See *Ajibola v Ajibola (1947)18 NLR 125; Glover&Anor v Officer AdministeringtheGovernmentofNigeria (1949)19 NLR 45* Niki Tobi op.cit.

Public Ownership of Land.

One of the earliest legislations introduced by the Colonial Administration is that dealing with acquisition of land for public purposes. The first of such legislation was the Public Lands Ordinance of 1876 later re-enacted as Public Lands Acquisition 1917. The Act empowered the Government to acquire land compulsorily for public purposes subject to the payment of compensation to the land owners. The land acquired becomes state (formerly crown) land, and therefore becomes property of

the state. This strategy helps the government to free land from the prevalent customary land tenure which restricts the land ownership and holding strictly to the family and communal and hardly individual. In effect land needed for developmental purposes must be compulsorily acquired by government for this purpose. The state Lands Acts or Laws empowered the Government to grant leases of state Land to private individuals. The title of such grants is therefore free from any communal claims. (see Olawoye op.cit).

A number of Ordinances were passed with the aim of acquiring land for use of government and private developments, these include Native Lands Acquisition Proclamation 1900, the Native Lands Acquisition Proclamation 1903, the Grown Lands Management Proclamation, 1906, as amended, the Native Acquisition Ordinance 1917, the Niger Lands Transfer Ordinance 1916 and the Crown Ordinance 1918. In 1935, the Registration of Title Act of that year was enacted. This act provided for the registration of land instruments recognized under the Act, Land Registration Act Cap 99 and the Registered Land Act 1965 was also enacted for the purpose of registration of titles to land.

In 1958 the State Lands Act Cap 45 was enacted which vested the ownership of all public lands in the state. In the Western Region, the Region enacted the Property and Conveyancing law, Cap 100, other laws are Land Instruments Preparation Law cap. 55, Land Instruments Registration Law, cap 56, Administration of Estates Law, Cap. 2, Public Lands Acquisition Law, Cap 105, Registration of Titles Law Cap. 57, Native Lands Acquisition Law Cap. 80, Recovery of Premises Law, Cap 110. In the Eastern Region, the Land Tenancy Law 1935 was enacted. Others include, Acquisition of land by Aliens Law, 1957, Land Instrument Registration Law 1963, Land Instrument Preparation Law, 1963 and Recovery of Premises Law, 1963.

LEGISLATIONSONLANDINNORTHERNNIGERIA.

Before 1900, area later regarded as Northern Nigeria was administered by the Royal Niger Company by charter of the British Government. The company had during this period acquired all the land along both sides of the Rivers Niger and Benue. On the declaration of

the protectorate, the government took it over and it was converted to Grown Lands. Secondly, having conquered the Fulani who were the reigning tribe in the North, all lands that were being administered by them were taken over by the British Government. The land thus taken over from the Fulani Emirs were classified as NativeLands. The distinction between Grown Lands and Native Lands was that whereas crown land was vested in the Governor in trust for Her majesty. Public Land was vested in the Governor in trust for the people. Series of legislations were enacted to effect this fundamental charges. Crown Lands Proclamation 1902 was an agreement between Sir Federick Lugard and representatives of the Royal Niger Company under which all lands, rights and easements were vested in the High Commissioner for the time being in trust for His Majesty. This was followed by the Niger Lands Ordinance of 1916 to the protectorate. A committee was later set up in 1908 to help streamline and recommend the appropriate type of land tenure to be adopted in the Northern Nigeria. The committee came to the conclusion that the whole of the land in the Northern Protectorate should be vested in the Government in trust for the natives and that no title to the use and occupation of land was valid without the consent of the Government. This led to the land and Native Rights Proclamation 1908 being re-enacted with amendments by the land and Native Rights Ordinance of 1916. The aim of the Ordinance was stated to be to protect and preserve the right of the natives to the use and enjoyment of the land of the protectorate and the natural fruits thereof in sufficient quantity for the sustenance of themselves and their families, but the real aim was to facilitate the easy dispossession of the natives from their land if and when the land was needed for other purposes. *(see Olawoye op.cit).*

This was the position until the Land Tenure Law 1962 was enacted by the Northern House of Assembly. This Law, basically re-enacted the1916 Law with some amendments. The provision that no occupation without consent of the Governor was valid was amended to refer to occupation by non-natives, and the power of the Governor became vested in the minister (later commissioner) responsible for land matters. The interest which an individual could have in land is a right of occupancy. The right of occupancy could be statutory or customary. The statutory right of occupancy was one granted by the Governor while customary right of occupancy is one derived by force of customary law. It was defined as the right of a native or a native community lawfully occupying land under native

law and custom. The law forbids alienation of a statutory right of occupancy without the consent of the Governor. The law makes a distinction between natives and non-natives where the alienation was to a native, the alienation is unlawful, but not void, but where a non-native is concerned then the alienation is void. A native was defined in the law as a person where father belonged to a tribe in Northern Nigeria. Thus other Nigerians and aliens are classified as non-natives and are therefore subject to the same degree of discrimination.

LANDLEGISLATIONSDURINGTHEMILITARYREGIME

Various Decrees and edicts were promulgated during the military government affecting land in Nigeria we shall mention a few of these legislations. The Federal Military Government in response to public outcry promulgated the Rent Control Decree No. 15 of 1966; this Decree was repealed by the Rent Control (Repeal) Decree No. 50 of 1971. The impact of this Decree on the soaring rents in the country was doubtful. The Requisition and other Powers Decree, No. 39 of 1967 was promulgated to empower the Army and Police to requisition land and other property during the period of the emergency. The Decree was amended in 1975 to create the central and state compensation committee to deal with matters of compensation. This was followed by the state lands (compensation) Decree No. 38, 1968, which deals with issues of compensation in respect of land acquired by the state. It was repealed in 1976 by the Public Lands Acquisition (miscellaneous Provisions) Decree No.33 of that year.

In 1977, in order to further streamline the various enactments and land tenure systems existing in Nigeria, the Military Government set up Land Use Panel with the following terms of reference: -

(a) to undertake an in-depth study of the various Land Tenure, Land Use, and land conservation practices in the country, and recommend steps to be taken to streamline them,

(b) to study and analyse all the implications of a uniform land policy for the entire country.

(c) To examine the feasibility of a uniform land policy for the entire country and make necessary recommendations and propose guidelines for implementation;

(d) To examine steps necessary for controlling future Land Use and also opening and developing new land for the needs of Government and Nigeria's population in both urban and rural areas and to make appropriate recommendation.

The panel's report led to the promulgation of the Land Use Act of 1978, which was later provided for in the constitution of Nigeria 1989. Section 326(5) thereof.

4:0 CONCLUSION

The starting point in Nigerian Land Law is the customary land law, which is nothing but the customs and practices of the people, relating to the land tenure system. This system had been modified and amended by civilization and legislation and yet it survived. The various legislations had been attempts to streamline and make land use beneficial to the overall development of the society.

5:0 SUMMARY

From the foregoing we have seen that prior to colonization, the customary law of the people regulates the land tenure system. The colonialist came and in order to free land for their use and development of the nation introduced series of legislations. This was continued after independence by successive governments. The aim of these legislations was to make land available for governmental use and private development.

6:0 TUTOR MARKED ASSIGNMENT

Examine the historical development of land law in Nigeria.

7:0 REFERENCE/FURTHER READING

1. C.O. Olawoye, 1981 Statutory Shaping of Land Law and Land Administration up to the Land Use Act, National Workshop on the Land Use Act, 1978 held on May 25, 1981 at University of Lagos.
2. Niki Tobi, 1992, Cases and Materials on Land Law, Mabrochi,

MODULE 1

Unit 2: **SOURCES OF NIGERIA LAND LAW**

CONTENTS

1:0 INTRODUCTION

In this Unit we are concerned with the source from which Nigerian Land Law took its root. This is the point from which we can have a better understanding of what the law is, and is the only authority from which we can speak or act. Nigerian land law or property law, has five main sources. These are:

1. Customary Land Tenure
2. Received English Law and Legislations
3. Nigerian Legislations or Local Enactments
4. Nigerian Case Law
5. Land Use Act 1978

We shall hereafter discuss them

2:0 OBJECTIVES

At the end of this unit you will understand the five sources of Nigerian Land Law, and the current laws affecting Land Use in Nigeria.

3:0 MAIN CONTENT

3:1 CUSTOMARY LAND TENURE

Customary Land Tenure System is the indigenous and customary system of land holding and use. It is simply the way customary law of the people regulates their land holding, land use, and interests existing on land within the community. This system is totally unwritten and very flexible. Flexible because it is changing as the community develops and influenced by social changes and development within the community. The customary law of land tenure is recognized by our laws and the High Courts are to observe and enforce the observance of customary law which is applicable and not repugnant to natural justice, equity and good conscience nor incompatible either directly or by implication with any law for the time being in force" (see S26 of the High Court of Lagos State cap 60, Laws of Lagos State of Nigeria).

The Customary Land Tenure varies from one community to the other, and because it is unwritten law, it must be properly proved before the court as the acceptable law governing

the particular situation. The proof may be through witnesses and historical Books attesting to the practices of the people. Upon proof, and acceptance by the court, it becomes a judicially noticed custom, because it has become notorious and established. After the judicial notice, the parties need only refer to the judicial notice in further proceeding before the court. In Nigeria, there are substantial numbers of cases where customary land tenure has seen so judicially noticed. (see Lordd Haldene judgment in *Amodu Tijani v Secretary of Southern Nigeria* (1921) A.C 399 at 404.

The customary land tenure will be applied by the courts only if,

1. It is not repugnant to justice, equity and good conscience
2. It is not incompatible either directly or indirectly with any law in force in Nigeria.

3:2 **RECEIVED ENGLISH LAW**

The Received English land law consists of all case law establishing common law doctrines and principles of English land law, and this includes the doctrines of equity on the subject. This received laws includes statutes of General Application that were in force in England by 1900. Important examples of these laws are the Conveyancing and Real Property Act of 1882, Settled Land Act 1881, Fines and Recoveries Act 1888. The English courts pronouncements therefore are useful and applicable in Nigeria.

However, the influence and importance of this source of law is dwindling because we now have local pronouncements of the Supreme Court and other courts of Record interpreting these legislations to suit our local conditions. Also, most of the received laws have been domesticated, e.g. Property and Conveyancing Law 1958 of Western Nigeria, therefore the received English law on property will no longer be applicable in those areas where the laws have been domesticated. We must also understand that though the English common law and doctrines of equity are very important source of our law, but where they are in conflict with local legislations and laws, the local legislations and laws will prevail.

3:3 **NIGERIAN CASE LAW**

Judicial decisions and case law generally form a growing source of the land law today. Our courts have been invited on many occasions to interpret the

law both customary law and local legislations. In many cases they have applied also the received laws where applicable, and these case laws now form a substantial body of source of land law today. Local decisions will prevail over foreign decisions on the same subject matter where there are conflicts, and the decisions of foreign courts remain only on a persuasive level and is not binding on the Nigerian courts. There has been numerous and series of local legislations affecting land in Nigeria which are nonexistent elsewhere. So that either there cannot be an equivalent pronouncement on this area of law, or such can never be authoritative.

While the Privy Council used to be Nigeria's highest court, and the judgment of the court has binding affect, but because of the changes in the law, even the decisions of the Privy Council had been questioned and modified or overturned in recent times, the influence of the foreign cases in this area of the law has seriously whittled down and downgraded, and may not be useful relying on them again.

3.4 NIGERIAN LEGISLATIONS

Local statutes affecting land forms another source of land law in Nigeria. Many of these statutes were in force before the enactment of the Land Use Act 1978, and have not been repealed. Some of these are, Registration of Titles Law (cap 66 laws of Lagos State), Property and Conveyancing law (cap 56 west), Land Tenure Law (cap 59 laws of Northern Nigeria 1963), State land law (cap 122 laws of Eastern Nigeria, 1959) cap 182 laws of Lagos State 1994).

3.5 LAND USE ACT 1978

The Land Use Act 1978 was enacted by the Military Government and today is one of the most important legislation affecting land in Nigeria. While all the other legislations had been regional, the Land Use Act 1978 is general and nationwide in its application and effect. Section 1, of the Act provides, *"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 the Act"

The provisions of the Act is therefore of paramount importance and an important source of our law as it has impacted, affected and modified all existing laws, accordingly. Though it saves the existing laws and land tenure e.g. customary land tenure, but only to the existent that it is not inconsistent therewith.

4:0 CONCLUSION

A quick and cursory look at the source of land law in Nigeria; one may be tempted to conclude that the multiple sources may lead to confusion and problems. But this is far from the truth, the importance of some of the sources is dwindling while the received English has are important in the past, local legislations are gradually replacing them and rendering them of little use today; while English case law is important, their importance is dwindling and will remain of persuasive importance only , we can see that we are gradually moving towards a unified system of land tenure in Nigeria with the introduction of the land Use Act 1978.

5:0 SUMMARY

The five sources of Nigerian Land Law have been discussed. The importance and utility of each source examined and the current trend has been identified.

6:0 TUTOR MARKED ASSIGNMENT

Discuss the sources of Nigerian land law

7:0 REFERENCES/FURTHER READING

I.O. Smith, 1999, Practical Approach to Law of Real Property in Nigeria, Ecowatch Publication Nigeria Ltd., p.3-5

MODULE 1

Unit 3: **LEGAL CONCEPT OF LAND**

CONTENTS

1:0 INTRODUCTION

Land Law or property law is designed to regulate the relationship of persons to things whether tangible or intangible, thereby providing a secure foundation for the acquisition, enjoyment and disposal of things or wealth. It describes and regulates the rights, interests and estates on land. It is therefore important to understand and define land, what it is and distinguish between land as a property and or right and other properties. Land is peculiar property because it is immovable unlike other properties, capable of being owned, it is transferable in its form, it is capable of being owned in different forms, it means that different interests may exist on land simultaneously and each interest is a right enforceable by each interest holder. E.g. A may be the owner of black acre in fee simple, he may lease the same property to B for a term of years, B in turn may mortgage his term of years to C and at the same time build a house on the land and let the property to D for a term of years, D in turn may sublet the same house to E who takes possession of the house and who in turn may grant a license to F. all the parties though have concurrent rights on the same property and these rights are enforceable in law, law therefore helps to understand create and delimits the rights on land exercisable and enforceable by the parties claiming such rights. In this unit we will define land and examine the various definitions and concepts on land.

2.0 OBJECTIVE

In this unit the objective is to examine the meaning and definition of land, the meaning and concepts. We will also discuss the concept and ambit of the maxim *quicquid plantator solosolo cedit*.

3.0 MAIN CONCEPT

3.1 DEFINITION OF LAND

It is generally agreed that land does not just mean the ground and its subsoil, it also includes all other objects attached to the earth surface, this includes Trees, Rocks, Buildings, and other structures wither naturally attached or constructed by man. However, land in law even extends more than this, and it includes further abstract, rights and interests like incorporeal hereditaments, right of way, easements and profits enjoyed by persons over the property or ground belonging to other persons.

Where the transaction is regulated by a statute or law, the definition used in the statute will govern the transaction, but where there is no such definition, then the definition in the

interpretation Act (Cap 123 LFN 2004) is applicable. Land has been defined in the interpretation Act as "including, any building and any other thing attached to the earth or permanently fastened to anything so attached, but does not include minerals". The definition seems to be incomplete. Because, it starts by stating that it merely includes, the others not stated in the definition is not stated, and therefore affords as many inclusion as possible. This may therefore permit addition of incorporeal hereditaments like profits, rents and easements.

Temporary structures may not qualify as land, but permanent Trees may be regarded as part of land.

The statutory definition that has adopted the common definition of land and seems to be extensive and all inclusive is the one in the property and conveyancing law 1959. Section 2 of the PCL (1959 WN) defines land to include,

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

(section 2, Cap. 100 laws of W.N. 1959)

The original section 2 of the PCL actually provides, land to include.

> "land at any tenure, buildings or parts of buildings (whether the division is horizontal, vertical or made in any other way) and other corporeal hereditaments, also a rent and other incorporeal hereditaments and an easements, right, privilege, or benefit in, over, or derived from land, but not an undivided share in land"

Lloyd in his book (Yoruba Land Law) makes a distinction between land and improvements thereon under Yoruba Customary Law, while Dr. Coker (in his book family property among the Yoruba p. 32) states quite clearly that in customary law, land includes buildings thereon. Olawoye (in his book, Title to Land p. 9) describes land as, including,

> "the surface of the earth, the subsoil and the airspace above it, as well as all things that are permanently attached to the soil. It includes streams and ponds. On the other land, things placed on land, whether made of the product of the soil or not, do not constitute land"

It follows therefore that while a crop or tree is planted it forms part of land, and is regarded as land, but as soon as it is cut and removed it ceases to be land. In the same vein, where a building is standing it forms part of land, but where the building is demolished it ceases to be land.

However, as we have noted above, the fixture must be permanently attached to the land to be regarded as forming part of the land; where the fixture is not of a permanent nature, then it is not land, and can be disposed off without affecting land.

3.2 *QUICQUID PLANTATOR SOLOSOLO CEDIT*

From the foregoing definition of land, we can distinguish between natural and artificial content of land. Land in its natural sense and the developments like buildings and other structures including trees. The pertinent question had always been the ownership of the developments on land where the development was made by persons who are not the real owners of such land. The English principle is *quicquid plantator solosolo cedit* – that is whatever is affixed to the soil, belongs to the soil), is applicable in this circumstances.

The general consensuses amongst scholars is that the maxim though a Roman principle imported into English law is also applicable under customary land law. Elias (in his book Nigerian Land Law p. 174) explained thus,

> "the Roman law doctrine of *quicquid plantatier solosolo cedit* is a principle of English, as of Nigerian property law. Like many other empirical rule of social regulation of a specific legal situation, the concept of the accession of a building or other structure to the land built upon is reasonable, covenant and universal".

Coker (in his book Family Property among the Yoruba p.45) agrees that the maxim applies in Yoruba native law and custom when he said,

> "land is by far the simplest object of property in any system of jurisprudence in this connection also, land in any application of the term includes buildings thereon. The maxim *quicquid plantatier solosolo cedit* which is a maxim of most legal systems, is also a part of Yoruba native law and custom".

Olawoye, clearly agrees with the authorities that, "for the sake of

> commerce the law does not distinguish between the ownership of the soil and the ownership of the fixtures thereon. The principle, *quicquid plantatier solosolo cedit* applies". (C.O. Olawoye 1974, Title to land, Evans Brother Ltd.)

> Nwabueze, in agreeing with the above, explained the application of the principle, thus,
>
> "it must not be supposed, however, that the maxim *quicquid plantator solosolo cedit* applies inflexible in all situations. Its application in any particular case depends first upon the circumstances of that case, such as the nature of the subject which it is claimed has become part of the soil by attachment thereto, and secondly, upon any statutory enactments modifying the operation of the maxim".

Llyod however differs on this. He is of the view that Yoruba Customary Law makes a distinction between the physical land and improvements thereon. Obi also agrees with Lloyd that land under African Customary Law does not include developments thereon, (see Obi, 1963, Ibo Law of property).

Niki Tobi summarized the position of the two divergent positions thus;

> "although judicial opinion on the issue is not uniform, there is more support of the opinion that the maxim applies in Nigerian Customary Law. It will be inequitable to contend otherwise. It would appear however that the maxim will not apply under customary law if improvements are made on the land with the permission of the owner of the land. In that case, customary law draws a clear distinction between the land and the improvement made thereon".

The rule though applies under customary law, but depends on the circumstances of the case. Where a person builds a house on a land without the consent of the owner, and after the owner has pretested severally, will ultimately loose the property to the owner of the land at the suit of the owner as the maxim applies. See the case of *Osho* v *Olayioye* (1966) N.M.L.R 329, *Ezoni* v *Ejodike* (1964) All N.L.R 402.

However, under Customary Law, where the structure or building was erected with the permission of the owner of the land, the improvements remains the property of the person that constructed the building or structure in fact customary law allows the maker to continue using the building or structure as long as they remain on the land. See *Adebiy*i v *Ogunbiyi* (1965) N.M.L.R 395.

3.3 INCORPOREAL HEREDITAMENT

An incorporeal hereditament is inheritable transferable right existing on land,

> "Hereditaments, then to use the largest expression are of two kinds, corporeal and incorporeal. Corporeal consist of such as affect the senses; such as may be seen and handled by the body; incorporeal are not the object of sensation, can neither be seen nor handled; are creations of the mind and exists only in contemplation. Corporeal hereditaments consist of substantial and permanent objects". See Blackstone commentaries vol. ii. P17.

Incorporeal hereditament is that thing which has no physical existence but capable of being owned or possessed. Land is a physical object, capable of being possessed; this could be done in terms of building, trees, crops or other physical fixtures on it. A corporeal hereditament is the thing itself which is the subject of the right; an incorporeal hereditament is not the subject of the right, but the right itself. Ownership of land, including the ramifications of its possession "an incorporeal right to the corporeal use and profit of some corporeal thing"

Therefore, incorporeal hereditaments will include rights on land though not capable of physical existence or possession but actually existing and capable of being enforced in law. Such rights like easements, profit or rents will qualify under this. Incorporeal rights can also be classified into two, those which gave right to possess them as right of a reversion or reminder and those like easements which are current enforceable rights.

4.0 CONCLUSION

Land means different things to different people. The definition given to land therefore depends on the culture and the custom of the people, the Customary Law defines land to suit the culture of the people. While, we tried to examine the definition we realized that the legislations which defined land only defined it for the purpose of such legislations and is not capable of any general application.

5.0 SUMMARY

Each legislation defined land to suit such legislation, while customary law definition is quite different from the common law, but looking at the two, we discovered that there are not much difference, the point of departure like for instance the application of the maxim *quicquid plantatier solosolo cedit* is the issue of whether the development is done with the consent of the owner of the property, if this is the case then, the maxim do not apply.

6.0 TUTOR MARKED ASSIGNMENT

Critically discuss the maxim *quicquid plantatier solosolo cedit* under customary law.

7.0 REFERENCES/FURTHER READINGS

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MODULE 1

Unit 4: **RIGHTS IN LAND**

CONTENTS

1:0 INTRODUCTION

In our study of land law, we must have a basis understanding of the important terms and nomenclatures that will be used in this study. These terms are also used in everyday language, but they have a different and deeper meaning than the everyday use. It is therefore important to understand these basis terms in land law.

2.0 OBJECTIVES

At the end of this unit you will understand, the meaning and the proper use of the important basic terms of land law like: Title, Ownership, Possession and Legal and Equitable Interests.

3.0 MAIN CONTENT

3.1. TITLE TO LAND

In an action for declaration of title to land, title connects 'ownership' and in an action for declaration of title to land, the party claiming title must prove facts that will convince the court that the person claiming title is the rightful owner of the property in dispute.

Sir Federick Pollock (Pollock, 1961, Jurisprudence and Legal Essays, London p.93) described title as; "what we call the law of property is in the first place the systematic expression at the degrees of control and forms of control, use and enjoyment that are recognised and protected by law" Title has always been associated with possession. The person entitled to possession is also assumed to be the person entitled to the title of the land; so that if he is able to prove facts that will entitle him to possession or retain possession of a thing is the person entitled to title. Smith, describes title as the "existence of facts from which the right of ownership and possession could inferred limitation being only in terms of time. It is the degree of control and forms of control, use and enjoyment that are recognized and protected by law" (Smith, 1999, op. cit).

Title may be absolute or restricted. When title is absolute it is synonymous with title where it is restricted, the person is only entitled to occupational or possessory right and not title. Though, occupational right is also enforceable right, but less in quality to absolute title, a subtraction from it and capable of existing with absolute title on the same parcel of land.

Right to title may be original, or derivative, where it is original, it was acquired through self help like conquest or first settlement. Derivative title is one that was acquired through transfer from the person who holds the absolute title to the property; the owner of the absolute title must transfer all his interest in the property and not subject to any condition whatsoever.

3.2 **OWNERSHIP**

Ownership implies a complete and total control a person can exercise over land. It is that interest in land that is superior to every other existing interest on land. It is unrestricted use and superior to any other. It is a right to possess either mediate or immediate, and it is the right to use the property in any way or manner whatsoever. The court in the case of *Abraham v Olorunfemi* (1991) I NWLR pt.165) 53 explained the term as follows;

> "It connotes a complete and total right over a property it is not subject to the right of another person. Because he is the owner, he has the full and final right of alienation or disposition of the property, and he exercises his right of alienation and disposition without seeking the consent of another party because as a matter of law and fact there is no other party's right over the property that is higher than that of his;

The court went further to explain some of the incidents of ownership when he observed, that, 'the owner of a property

> Can use it for any purpose; material, immaterial, substantial, non-substantial, valuable, invaluable, beneficial or even for a purpose detrimental to his personal or proprietary interest. In so far as the property is his and inures in him nobody can say anything. He is the Alpha and Omega of the property. The property begins with him and ends with him. Unless he transfers his ownership over the property to a third party, he remains the allodial owner" (per Niki Tobi JCA.)

Every legal system has its own special design for ownership. The meaning given to ownership under English common law is different from that of customary law. In England, all land belongs to the crown as the absolute owner. However, the citizens who occupies land, does so for a period granted by the crown. The right to use and occupy the land is better known as the Estate enjoyed on the land. And this has transformed into ownership,

though he does not own the land but he owns the Estate on the land exclusively and such right is enforceable against any other person.

The position is different under customary law. Since every legal system defines what is ownership, the concept as defined under customary law. In his Book, Nature of African Customary Law, Elias said

> "What we have said so far, as well as what we shall say later, will show that the land holding recognized by African Customary Law is neither 'communal holding' nor 'ownership (in the strict English sense of the term) the term corporate' would be an apt description of the system of land holding since the relation between the group and the land is invariably complex in that the rights of individual members often co-exist with those of the group in the same parcel of land".

Elias, 1956 Nature of African Customary Law, Manchester

Under Customary Law, land is seldom owned by individuals; the custom recognized ownership in the community or family. Communal ownership evolve from land, settled upon by the community from ancient times. This could be by conquest or first settlement, and the entire land is owned by the entire community and managed by the head of the community. The individual members of the community are allocated partions of the land. These individual allottees are not regarded as owners as all land belong to the commit, but as against other members of the community. They have superior title. The family ownership of land is similar to this structure. The land belongs to the family, and it evolves from the originator of the family first settling on a particular pertion of land and after his death the land as property is inherited by his children and thereupon becomes family property. No individual member can lay claim to it and we cannot sell, dispose, mortgage or transfer ownership of the land. In the use of *Amodu Tijani v Secretary of Southern Nigeria*, (1921) Al 39 Lord Haldane explained as follows:

> "The next fact which it is important to bear in mind in order to understand nature land law 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. This is a popular native custom along the whole length of this coast, and whenever we find, as in Lagos, individual owners; this is again due to introduction of English ideas".

Many scholars have criticized the view expressed by Lord Haldane that there is no individual ownership of land under customary law, Olawoye, and Smith (op. cit.) agreed that the first settler has always been an individual who later pass title in the property to his

family upon his death. Individual ownership may also evolve by act of state e.g. state grants of land to individuals.

Currently in Nigeria, the Land Use Act 1978 by virtue of S1 thereof, all land in each state is vested in the Governor of the state, who grants right of occupancy to individuals and corporate bodies. In effect, the only right enjoyed on land today is the right of occupancy, and ownership of land today must be viewed in the light of a right of occupancy on the land.

3.3 **POSSESSION**

Possession means the effective physical or normal control or occupation of a property. It is a relationship of a person to a thing. Possession of land to be protected by law must be exclusive. A person claiming possession must prove not only his relationship to the land, he must also prove his physical acts showing exclusive control of the land. The act of building, or planting on land are acts of possession. He may not necessarily build, he may fence or use some other items to demarcate it, and he will be held to be in possession. See *Wuta-Ofei v Danquah* (1961) 3 All E.R. 596, where demarcation by wooden pegs was held to be sufficient acts of possession.

The person in possession is not without rights. There are two important attributes. The first is that the person in possession has the right to keep away intruders. Even, where he does not have any legal title, in so far as he is in physical possession his right is protected by law. He can keep out all those interfering with his possession. Though, he may not be able to keep out the person with a better title; even then, if he resists the person with a better title the person with better title may have to go to court to eject him from possession. The secured right flows from the presumption of law that the person in possession is presumed to have title to the property until the person with better title is established and declared by a competent court. As against other trespassers the person in possession's right to possessory title will be upheld. In fact, if the real owner do not take any step for a period of time, the possessory right may ripen into title for lapse of time or by larches and acquiescence on the part of the real owner.

4.0 CONCLUSION

The person who has title to a land is the proper person recognized by law as the true owner of the land. The title depends on the type of right exercisable by the person who is claiming title. Title may be acquired by first settlement or conquest, or inherited, he is known to have a derivative title. The owner of land is the person that has the most superior title to the property, with right to mediate or immediate right to possession, while the person in possession is that person who is in actual physical possession of the land.

5.0 SUMMARY

Title to land may be absolute or unrestricted or it may be limited or restricted. There is a difference between right to occupy a land and the ownership right. The person in possession is not necessarily the owner thereof.

The person in possession is assumed by law to be the owner until the contrary is proved. Even, then, he still can enforce his rights of occupation against any other person except the person with superior title or owners.

6.0 TUTOR MARKED ASSIGNMENT

Describe and explain the terms (1) Title (2) Ownership (3) Possession in land law.

7.0 REFERENCES/FURTHER READING

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MODULE 1

Unit 5: **DUALITY OF LAWS IN NIGERIA**

CONTENTS

1.0 INTRODUCTION

Customary Law and received English law govern rights on land in Nigeria. In Nigeria, prior to the of the introduction of English law the entire land tenure is governed by customary land tenure, however with the advent of received English law, the customary law still governs land tenure alongside the English received law. The problem of duality of law is to identify the law governing a particular situation.

Since it is possible for the two systems to exist on land at the same time, we must be able to identify the appropriate law to apply at every point in time. The point when and how the customary law is changed to English law, and English law is converted into customary law is the focus of this unit.

2.0 OBJECTIVES

At the end of this unit you will understand the problems of duality of laws in land law and how the problems are solved.

3.0 MAIN CONTENT

3.1 The Problem of Duality of Tenure

In view of the position of two different land tenures in Nigeria, the problem had always been identifying the particular law governing the particular situation. This is a problem that has agitated the minds of Judges over the years. The initial question had been whether it is possible to convert customary land holding to a fee simple Estate. The resolution of the problem is not easily attained because the Estate in fee simple absolute in possession is the most superior title capable of being held in land in England is different in its quality and content from the ownership structure under customary law. What this means is that where a customary holding is to be converted into fee simple estate, the maxim *memo dat non harbet* will apply, i.e. you can only give what you have, or conversely, you not give what you do not have, since the two interests are different in quantum and quality; it becomes impossible to convert one into another.

We may need to explain this further. A fee simple originally was an estate which endures for as long as the tenant or any of his heirs (blood relations and their heirs and so on) survived. Thus, at first, a fee simple would terminate if the original tenant died without hearing any descendents or collaterals (e.g. brothers and cousins) even if before his death the land had been conveyed to another tenant who was still alive. But by 1306 it was

settled that where a tenant in fee simple alienated the land, the fee simple would continue as long as there were heirs of the new tenant and so irrespective of any failure of the original tenant heirs. Therefor, a fee simple was virtually eternal, subject only to escheat, if the tenant for the time being died having no heir. (see Megarry and Wade, Law of Real Property p. 4-2). In other words the owner in fee simple of land in England is the absolute owner thereof and can deal with the land in any way. The customary land holding is totally at variance with the English system. Kingdom C.J. explained the complexity of the problem when he observed, that,

> "the whole idea of fee simple is so contrary to native law and custom that…it cannot exist side by side with native customary tenure in respect of the same piece of land. There can be only one *rex lei sitae* and in this case, there can be no doubt that the original *rex lex sitae* is native law and custom, nor can I subscribe to the proposition that the native law and custom applicable to the area in which the land in dispute is situated has so changed that now it is in accordance with it that land can be held and conveyed in fee simple". *Balogun v Oshodi* (1929) 10 W.L.R 36 at 57.

The problem that has agitated the minds of judges had been how to convert customary ownership to fee simple interest, because the customary interest merely confers possessory right so that it does not confer any attribute of ownership. Tow J. in the case of *Balogun* v *Oshodi,* observed as follows: -

> "to say that a person may acquire a freehold interest in land of which the vendor, or the person through whom he claims, was merely occupier on condition of good behavior, would be a stealing preposition which I am not think that the equitable jurisdiction of the court can be involved to convert a more right of occupancy because the occupier purported to convey the freehold by means of an instrument drown in English form".

In the case of *Boulous v Odunsi* (1959) 4 FSC 234, the plaintiff claimed title in fee simple over a parcel of land which he acquired under customary law. His title under customary law was voidable, and would be voided at the instance of the family. He thereafter created a series of conveyances purporting to convert the land to a fee simple estate. The court held that it was not possible to convert such interest under customary law into an Estate in fee simple.

JUDICIAL SOLUTION TO THE PROBLEM

MODULE 2

Unit 1: **MODES OF ACQUISITION OF LAND**

CONTENTS

1.0 INTRODUCTION

The mode of acquisition of title to a land is very important. This is because in an action for declaration of title to land, the claimant must be able to trace his title to the original owner. He must not only prove the title through his predecessor in title he must also prove a valid transfer of the interest to him. Title to land may be either original or derivative. An original title is one that is the very root, and not derived from any other source, it is the foundation of the title beyond which there is no other title.

2.0 **OBJECTIVE**

At the end of this unit the student will understand the acquisition of original title. Settlement and conquest.

3.0 **MAIN CONTENT**

3.1 Settlement

Settlement connotes the person who first settled on a particular parcel of land free from any other adverse claim, such first settler is recognized in law as the owner thereof the settler may be a family or community or even individual the title is established as an absolute one. In the case of *Owonyin v Omotosho* (1962) W.N.L.R 1, the court held, "But ownership or title must go to the first settler in the absence of any evidence that they jointly settled on the land or that a grant of joint ownership was made to the later arrival by the first. The question, therefore, resolves itself to this – who was the first settler on the land"…

The first settler must prove that at the time of first settlement there was no other claimant or settler on the land. Where the first settler merely settled on land and later abandons it without laying claim to any portion of the land, he cannot later come back to claim ownership. In case where the first settler allowed others to inhabit the portions of the land, he must exert some form of rent from them to assert of his ownership, where this is not done, if may be diffident for him to do this later. Today, it may not be easy for anyone to assert that he acquired the land by settlement as no land in Nigeria is free of settlement.

To successfully prove ownership under customary law today, the claimant must be able trace his title to the first settler on the land, inability to do this may be fatal to his claim.

3.2 CONQUEST

Acquisition of land by conquest is possible under native law and custom, and the conqueror is then regarded as the original owner of the land. The Privy Council in the case of *Mora v Nwalusi* (1962) 1 All NLR 681 agreed that it is not in doubt that proof of possession following conquest will suffice to establish ownership". Though as a matter of fact, the person who acquired the title from the first settler, which follows that his title is derivative through conquest and not really original. But, it is still generally agreed that acquisition by conquest is still an original acquisition by conquest is still an original acquisition of title under customary law. (see Olawoye ap. at p.41).

We must note however, that it is not possible today to acquire title by conquest; in fact a forceful or violent acquisition of land is a criminal offence.

4.0 CONCLUSION

There are only two recognized original means of acquiring title under customary law – these are by settlement and by conquest, and as we noted, settlement and conquest may not be possible again today, but the claimant must still be able to prove his root of title to any of these two ways of acquisition of title under customary law.

5.0 SUMMARY

There are two types of original acquisition of title to land, these are by settlement which is the right of the first settler on land, who is exercising maximum rights of ownership and which is recognized by law.

Conquest on the other land is a forceful displacement of the original settler forcefully and establishing his rights on the land.

6.0 TUTOR MARKED ASSIGNMENT

Examine the relative importance of original title to land under customary law.

7.0 REFERENCES/FURTHER READING

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MODULE 2

Unit 2: **DERIVATIVE TITLE**

CONTENTS

1.0 INTRODUCTION

Until recently, it is unthinkable to the family or communal land owner to alienate land, it was believed that land belongs to the present and future generations unborn and so it is so secured that nobody believed that it could be sold. It is usually given out temporarily, and could be recalled at any time, or even where it is understood that foreigners occupy the land as tenants, the understanding is always that the land ultimately belongs to the family as overlords. This attitude has led many observers to opine that land cannot be alienated under customary law. Dr. Elias observed "There is perhaps no other principle more

fundamental to the indigenous land tenure system throughout Nigeria than the theory of in alienability of land". In the case of *Lewis v Bankole* (1908) INIR 81 Osborne C.J. declares, that, "the idea of alienation of land was undoubtedly foreign to native ideas in the olden days".

However, with the advent of colonialism, and improvement in commercial activities, influx of foreigners to cities, the initial and old idea that land is in alienable began to change and also judicial attitude. In the case of *Oshodi* ***v*** *Balogun* (1936) 4 W.A.C.A.1 at 2, the privy council observed as follows:

> "In the olden days it is probable that family lands were never alienated; but since the arrival of Europeans in Lagos many years ago, a custom has grown up of permitting alienation of family land with the general consent of the family and a large number of premises on which substantial buildings have been erected for purposes of trade or permanent occupation have been so acquired…. Their lordships see no reason for doubting that the title so acquired by these purchasers was an absolute one and that no reversion in hand of the chief was retained".

Alienation of land under customary law may take various forms. The owner may sell out rightly, or merely make a gift absolutely to a third party. There may also be conditional gift, or pledge of land or borrowing of land; this with condition that the transfer of possession is temporary and may be recalled or repossessed upon certain agreed conditions.

2.0 **OBJECTIVES**

At the end of this unit the student must understand the various forms of land under native law and custom, these are - sale absolute gift, condition gift, borrowing of land and pledge.

3.0 **MAIN CONTENT**

3:1 SALE

A sale is the permanent transfer of land for monetary consideration or money's worth. It is an act that permanently deprives the original owner from all interests' benefits and claims on the landed property, and he ceases to be recognized as the owner thereof. The mere exchange of money is not conclusive proof of sale, there must be no doubt as to the intentions of the parties, the transaction must be conclusive, and the intentions must be genuinely for the purpose of parting with the entire interest of the owner in the property. Clearly, the person transferring the

property must be a person capable of doing so and if he does not have such right, the sale cannot be valid, and the sale is void. In the case of *Folarin v Durojaiye* (1988) IN.W.L.R (pt. 70) 351, the court held that, (1) that there are two clear and distinct ways in which land in Nigeria can be properly and rightly sold, validly acquired, and legally transferred. They are either (i) under customary law or (ii) under the received English law. Each method of sale has its peculiar incidents and formal requirements and failure to observe these incidents of sale may invalidate the purported sale (2) it is prerequisite to a valid sale under customary law that the purchaser be let into possession. (3) in order to transfer legal title under English law by purchase there must be a valid sale, payment of money accompanied by acknowledgment of receipt and execution of deed of conveyance in favour of the purchaser see *Erinosho v Owokonoran (*1965) N.M.L.R 479. (4) Where land is sold under English law or statute law, money is paid and receipts are issued, the purchaser can only acquire an equitable interest if he goes into possession. See *Ogunbanbi v Abowaba* (1951) 3 W.A.C.A. 222.

For a valid recognised sale of land under customary law, the following conditions must be met.

(1) The person selling must have the title under Native Law and custom, to sell and dispose of the property.
(2) The purchase must be concluded in the presence of witnesses who also witnessed the actual landing over or symbolic delivery of the land bought by the purchaser. See, *Chief Okonkwo v Dr. Okolo* (1988) 2 NWLR (pt 79) 632.

3:2 ABSOLUTE GIFT

A gift of land could either be absolute or conditional. An absolute gift is as good as sale as it totally divests the owner of all his interests in the land. A party claiming absolute gift must prove that in fact there was absolute gift of land and not a conditional gift. See the case of *Isiba v Hanson* and Anor (1967) NSCCS. It was held in the case of *Jegede v Eyinogun* (1959) 5FSC 270, that a family which had made an absolute transfer of its land by way of gift could not recall the land upon misconduct.

3:3 CONDITIONAL GIFT

A conditional gift only transfers occupational rights to the tenant and not ownership. He is known as customary tenant while the owner becomes his overlord. He holds the land for an indefinite period of time, unlike tenancy under English law which is for a term of years, under customary law, the customary tenant's tenure is

perpetual subject only to good behavior and periodic payment of "Ishakole" or rent, this is nothing but an acknowledgment of his standing as a tenant. The land is inheritable by his children, but he must not sell or part with possession of the land.

Martindale J in *Etim v Eke* (1941) 16 N.L.R 43 at 50 explained the position thus,

> "It is now settled law that once land is granted to a tenant in accordance with Native Law and custom whatever be the consideration full rights of possession are conveyed to the grantee. The only right remaining in the grantor is that of reversion should the grantee deny title or abandon or attempt to alienate. The grantor cannot convey to strangers without the grantee's permission any rights in respect of the land".

3:4 BORROWING OF LAND

Borrowing of land is a temporary grant of use of land to another person. The period is not usually specified, but is tied to the particular purpose for which the borrowing was granted. It could be for a planting season, and at the expiration of which the land reverts to the original owner. In the case of *Adeyemo v Ladipo* (1958) W.R.N.L.R. 138 the court held that a temporary grant of land for building purposes was unknown to customary law.

3:5 PLEDGE

A pledge is created when an owner of land transfers possession of his land to his creditor as security or rather, in consideration of a loan with the object that he should exploit the land in order to obtain the maximum benefit as consideration for making the loan. (see Olawoye op. cit. 50). The popular maximum is that once a pledge always a pledge. The pledge is always redeemable, and time does not run against redemption. The pledgee is not expected to plant economic trees or commit waste. He cannot sell or part with possession. He only takes occupational rights, the ownership's never transferred. He is not expected to erect permanent structures, if he does, upon the payment of the debt, the pledgor takes all. However, where there are still unharvested crops on the land, the pledgee is expected to harvest it even after the debt has been paid. See *Amao v Adigun* (1957) W.N.L.R 55.

4.0 **CONCLUSION**

Clearly, under customary law, land may be put to various uses by the owner, and in the exercise of his powers as the absolute owner, may pledge, loan it out, give the land conditionally to tenant or unconditionally, and may sell outright. These are all examples of forms of alienation of land under customary law.

5.0 SUMMARY

Sale of land is outright parting or transfer of ownership of land. It is total and absolute and irreversible. Absolute gift is also absolute like sale. Conditional gift, pledge, borrowing of land only give occupational rights only, and the ownership still resides in the owner.

6.0 TUTOR MARKED ASSIGNMENT

Discuss different forms of alienation of land and their incidents under customary law.

7.0 REFERENCES/FURTHER READING

B .O.NWABUEZE, 1972, Nigerian Land Law,Nwamife Publishers Limited Enugu

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MODULE 2

Unit 3: **CONTROL AND MANAGEMENT OF COMMUNITY LAND.**

CONTENTS

1.0 INTRODUCTION

In this unit we shall examine the nature and extent of communal lands under customary law. Under customary law, land is either owned by the community or family. The position of land holding by the community will be examined have, how the land is managed and controlled, how customary law regulates the powers of the chief or head of the community so that all the members of the community may derive maximum benefits from the community land. The position of the head of the community is important, and should be properly understood.

2.0 OBJECTIVES

At the end of this unit, the student should understand the position of the head of the community in control and management of the communal land.

3.0 MAIN CONTENT

3:1 CONTROL AND MANAGEMENT OF COMMUNITY LAND

The creation of communal land is not easily determined. However, most traditional history of most communities always traced their origins either to a particular family or individual who migrated from a particular place, travel over a long distance to settle in the present site where the community is now based. Some are acquired by conquest, this is by displacing the previous settlers on the land and taking over the land as the owners thereof. Upon settlement, the land is regarded as belonging to the community as a whole and not the property of any individual. The Privy Council confirmed this when the court observed in *Amodu Tijani v Secretary, Southern Nigeria* (1921) 2 AC 399 at 404. Coussey J.A., "there can be no quarrel with that statement of customary tenure. As a general principle it has been applied in numerous cases and in postulating, as the learned judge did, that the land belongs to the community and then, in deciding on the evidence in this case, that it belonged to the Nze community, he was not departing from the principles of Native Customary tenure".

In managing the communal land, the chief or head of the community is traditionally and under customary law the only legitimate person and authority having the power to manage and control the entire communal land. The legal position may be problematic especially if it is viewed from the English law perspective. This is so because; the only similar institution or devise is that of the trustee. However, the chief is not a Trustee as known under English Law. The most fundamental difference between the position of the chief and a Trustee is that the Trustee is the legal owner of the trust he holds, managing in trust for the beneficiaries, the chief is not the legal owner of the land, the land belongs to the community as a whole and never that of the chief. He may however be called Trustee of the communal land in a loose use of the word as simply the person in charge and control managing the land on behalf of the entire community with wide powers but accountable to the community. He cannot therefore treat the community land as his own personal property.

It has been suggested that the position of the chief could be likened to that of a caretaker, who takes care on behalf of the community. This may not be entirely true. The caretaker does not have such wide powers of management and control that the chief exercises, where a member of the community who is not the chief acted as a caretaker, kingdom C.J observed, that, "perhaps the term 'caretaker' is strictly speaking a misnomer, but it is a term which is commonly used in this country to mean the member of the family, not necessarily the head, who acts as agent of the family in conducting it's affairs" *Rutterman v Rutterman (1937) 3 W.A.C.A 178 Ghanian case).*

The chief cannot also be regarded as agent of the community. Though, there may be a specific appoint of the chief as agent of the community for specific purposes, but generally, he is not an agent as in the exercise of his powers, he is not mandated or directed by the community, and the community are not regarded as his principal, and cannot restrict or abrogate his powers.

He in fact exercises ownership rights over all community lands on behalf of the entire community. The ownership of the land remains in the community, but the exercise of the rights of ownership is in the chief. Therefore – in the case of *Onitola v Bello* (1958) 3 F.S.C 53, the court held that the head of Onisemo family in Lagos was the person entitled to the management of all the properties of the family, to the possession of all such properties and all monuments of title relating thereto. It follows, that it is impossible for the community land to be alienated without his consent and participation. In *Agbloe v Sappor*, the court held that it is impossible for land to be legally transferred and legal title given without his consent. Only the chief is the only proper authority within the community to allocate land to members of the community or outsiders. Any grant of community land to anybody by any other person is not voidable but totally void.

In terms of dealings with outsiders, only the chief is entitled to collect tributes, rents, proceeds of sale and compensation for communnity lands on behalf of the entire community (see *Amodu Tijani v Secretary of Southern Nigeria op. cit).*

The chief is also the only and proper party in any action for and on behalf of the community. He is regarded in law to be in possession of all the land, and no individual is allowed to maintain an action on behalf of the community (see *Oragbaide v Oritiju* (1962) 1All N.L.R 232. In this case, the plaintiff brought these proceedings on his own behalf and on behalf of the Ifetedo community claiming an area of land as communal property. The defendant entered counter claim wherein he brought a declaration of title to the disputed land and also an injunction against the plaintiff and Ifetedo community. The court held that, where a member of a class claims an interest in the subject matter which is adverse or repugnant to the claim of the class as a whole, his interest in the subject matter is not common with that of other members of the class, and he can neither sue nor defend as their representative.

It is important to note that the powers of the chief though exercised on behalf of the community, is not as a result of their mandate or delegated authority. His powers are derived from customary law, and he exercises this power as an inherent and attribute of his position. It cannot be withdrawn, limited or curtailed. *See Odunsi v Ojora (1961) All N.L.R. 283.* The Supreme Court held that it is the inherent prerogative of a head of family who has been appointed or capped in accordance with native law and custom to manage its property and that it is not competent for the family to divest him thereof without his consent and transfer it to somebody also, when there is no duly appointed chief or head, the community can depute one of its members to act as head and exercise the powers of management of the communal property but that is a different thing from appointing a member to act in competition against the duly capped head.

However, the chief is expected to consult his senior chiefs and elders in council before reaching any major decision, and together they constitute the chief or king in council.

In some communities, the administration of the village land is vested in all the heads of families in the village and the village head or chief occupy a position akin to that of a family head in respect of family property.

4.0 **CONCLUSION**

The position of the chief or head of the community is not the same as the English institution of trust as he is not strictly a Trustee though judicial authorities referred to him as such. He is not also an agent of the community, but he stands in a position, in the words of Nwabueze, of a manager of the community land. Even, then the nomenclature of manager may not be entirely correct as the manager is an employee of his company, and is entitled to some form of emoluments in form of salary or fees; and is totally under the control of his employers. The chief is not so subject, he is not paid any salary or emoluments, and he is not under the control of the community or the people.

The manager may be removed from office at any time by the employers but the chief cannot. The Supreme Court in the case of *Odunsi v Ojora* held that it is not competent for the family to remove a chief properly appointed and capped in accordance with native law and custom, without his consent, Nwabueze, observed that "The truth is that the position of the chief in relation to communal land is a peculiarly peculiar

one, a uniqueness which is borne out by the fact that without the active participation of the chief, no outright alienation of the land can be validly made, not withstanding that all the other members desired and approved it". (op.cit p.152)

5.0 SUMMARY

The chief is liken to the alter ego of the community. He manages, control and generally is in charge of the land for the benefit of the community. He allots land to all the members of the community in need of land, he is the authority that can sue and be sued on behalf of the community, he fights for the community in terms of erecting that no part of the communal lands is trespassed upon, and also ensures that proper compensation is paid to the community where the communal land has been acquired by government. He ensures ultimately the equitable distribution and proper use of the communal land.

6.0 TUTOR MARKED ASSIGNMENT

Discuss the rights and duties of the village head in customary law.

7.0 REFERENCES/FURTHER READINGS

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MODULE 2

Unit 4: **INDIVIDUAL RIGHTS IN COMMUNITY LAND**

CONTENTS

1.0 INTRODUCTION

Every member of community in Africa and under customary law has certain important rights in the community which must be respected by the chief and enforceable by the individual members of the community. All the powers of the chief are expected to be exercised for the benefit of the entire community. While strangers may not be able to enforce any specific rights in the community, the individual can enforce his rights within the framework of customary law.

2.0 OBJECTIVES

At the end of this unit the student must be able to explain the rights and privileges of individuals in the community, and the position of strangers in the community.

3.0 MAIN CONTENT

3:1 RIGHT OF ALLOTMENT

Every member of the community is entitled to use the communal land, the chief must ensure that every deserving member of the community is allotted a parcel of land for farming and to build his house thereon. The right does not depend on the

pleasure of the chief or discretion. He is under a duty to allot land to every member from the communal land. The member is entitled to enforce this right in court. (See *Lewis v Bankole* op. cit). The court's jurisdiction extends to protection of individual rights of members of the community. If the court discovers that any member is being cheated, the court may order outright sale of the land and or partition of the land. (*Ajoke v Oloko* (1959) LLR 152). Once a communal land has been allotted to a member of the community, then he exercises all occupational rights thereon, to the exclusion of any other member of the community. The chief can no longer allot the same portion to another member of the community, in effect; the individual member acquires permanent rights in the land. The rights being permanent are actually ownership rights and are inheritable by his heirs. In the case of *Oragbade v Onitiju (1962) 1 All N.L.R. 32.* It was held where land has been allocated to some individuals within the community land, that such land are no longer the property of the community. In such areas the allocation of community land to a member confers ownership on the member.

The effect of this is that the chief cannot make inconsistent grant of the communal land to members of the community, where this is done the latter allotment is void. The chief cannot revolve the grant already made to a member of the community and re-allocate to another member or strangers in the case of *Adewoyin v Adeyeye (op. cit)* and also *Asiyanbi v Adeniji* (1966) NMLR 106 the Supreme Court held that the Oni of Ife could not grant land already enjoyed by a family to another person, whether a member of the family or not, without consulting the family, and that any rule of customary law will be rejected as being contrary to natural justice, equity and good conscience. In the case of *Agbloe v Sappor. (op. cit)*. The chief and principal members of the family were ordered to pay damages for trespass committed through unlawful entry into land lawfully occupied by a member; he is also entitled to injunction to restrain any threatened interference, and to a declaration of his possessory title.

The member of the community's interest is akin to that of a tenant; except that he does not pay any rent and cannot be evicted for any reason except for acts that are totally criminal to the community such as armed robbery, and other serious misconduct that threaten the existence of the community. Forfeiture is possible under customary law but is rarely resorted to.

3:2 RIGHT TO SHARE IN COMMUNAL INCOME

Apart from actual user, whatever income or profit is derived from communal land is the property of the entire community. Income or profit may accrue to the community in form of rents from customary tenants, sale of communal lands; compensation from

government paid for acquisition of community lands, etc. in effect the income is paid to the chief, who must give account of the moneys to the community. The chief is entitled to deduct all charges and outgoings, after which the money must be shared amongst all members of the community..Every member of the community has a right to share in the income accruing to the community from proceeds from the community land. If the chief appropriates the money for his own personal use, the members are entitled to ask for account of the entire income. In the case of *Osuro v Anjorin (1946)* 18 N.L.R 45, the court entered judgment in favour of a member of a family for account and payment of whatever is due to the member of the family. *See also Achibong v Archibong (1947) 18 N.L.R 117.*

3:3 RIGHT TO PARTICIPATE IN MANAGEMENT OF COMMUNITY LAND

The chief is obliged to inform the individual family heads and important elders of the community before taking any impendent step affecting the community property. The family heads must also inform members of his family who participate in decision making in the community. The consent of the entire principal members of the community is required before the chief may take important decisions affecting the community land. It is also important that all principal members must agree to a sale or disposition of community land, where this is not done, the sale is not void, but the members may challenge the sale, and ask for account, but cannot nullify the sale.

3:4 POSITION OF STRANGERS

The communal land is exclusively for the benefit of the members of the community and not strangers. A stranger interested in community land may apply for a grant of the land from the chief or traditional authorities. The stranger cannot acquire ownership of communal land, when granted, he will remain a tenant of the community and the stranger may only use the land for the purpose for which the land was granted to him, which may only be for farming purposes; and where the stranger builds houses on the land, he remains customary tenant of the community.

4.0 **CONCLUSION**

Individual rights of members of the community have long been recognized under Native Law and custom. These are rights to allotments, income sharing and management of the communal rights.

5.0 **SUMMARY**

The individual rights of the members of the community are legally enforceable rights, and assist in ensuring that there is probity , transparency, and discourages cheating.

6.0 TUTOR MARKED ASSIGNMENT

Discuss the individual rights of members of a community in community land.

7.0 REFERENCES/FURTHER READING.

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MODULE 3

Unit 1: **CREATION OF FAMILY PROPERTY**

CONTENTS

1.0 INTRODUCTION

This module will focus on all aspects of family property under customary law. This unit will focus on the creation of family property. The family is a very important unit in customary law, and land is rarely held individually but collectively. As the communal land holding is diminishing in importance, the family land holding is becoming more important and relevant in Nigeria today. The communal lands as we have noted above are normally

allotted to the members of the community, and such members have the right to occupy and use exclusively for their use and benefit. Upon the death of the original allottee the land is normally inherited by the children and a family property is created. There are five main ways by which family property may be created. We shall examine this and also the legal position of grand children, slaves and domestics.

2.0 **OBJECTIVES**

At the end of this unit the student must be able to explain,

Creation of family property
Definition of family
Position of grand children and slaves, domestics.

3.0 **MAIN CONTENT**

3:1 DEFINITION OF FAMILY

A family is generally regarded as the man, his wife or wives and children. Dr. Elias described the family as the smallest social unit in the body polity; (Elias op. cit) children are both male and female children. However, in terms of family property under native law and custom, the family property is that property belonging to the family as a unit, it is in its real form undivided interest in land; and until it is determined continue to be held jointly by the entire family as a unit. The membership of the family does not take cognizance of the extended family members. So that all members of a family that can inherit their fathers farms are the collective members of the family who can lay claim to the joint ownership of the family property. However, the ownership of family property as we will soon see may depend on the manner of creation and intention of the originator of the family or the original owner of the family property. Strictly, brothers, sisters, cousins do not form members of the family. (*see Suberu v Sunmonu (1957) 2 FSC 33.* A widow cannot inherit the husband property and therefore do not form part of the members of the deceased husband family. *See Nzeiraya v Okagbue (1963) 1 All N.L.R 352*. Only the children of the founder constitute the family. In some parts of Ibo land, only sons can inherit the land, daughters are therefore excluded. *See Lopez v Lopez (1924) 5 NLR 50.*

In cases where the family property was created by will, the persons mentioned in the will even if they include outsiders, will constitute the family and are entitled to the family property. In *Sogbesan v Adebiyi (1941) 16 N.L.R 26,* where a testator devised his property to

be held as family property and appointed his brother as the head of the family, the court held that the family included his brothers and sisters and their descendants. The judge explained that "it would be contrary to the conception of native law and custom as well as good sense to appoint a person who himself is given no interest in the property to act as head of the family". In cases where specific names of children are mentioned amongst all the children, then these children mentioned will only be entitled to create the family property and their descendents.

3:2 CREATION OF FAMILY PROPERTY

There are seven ways a family property may be created; (1) Intestacy, (2) will (3) Conveyance, (4) Purchase of Land, (5) Declaration, (6) Conquest, (7) Settlement.

1. INTESTACY: Where a land owner dies intestate, the land is naturally inherited by his children under native law and custom, and thereby becomes family property, . See *Lewis v Bankole* (1908) 1N.L.R 89, *Ogunefun v Ogunmefun* (1931) 10N.L.R 82, Miller B.O. v Ayeni (1924)5 N.L.R 42. It is immaterial whether the land owner dies leaving only one issue, the land will still be constituted as family property. This was the decision in *Abeje v Ogundairo (1967) LLR 9.* Olawoye (op cit p.26) have criticized this decision on the basis that a family property connotes joint ownership, and therefore cannot arise where there is a sole heir, Smith (op cit p.35) supports the decision and even argued that the position taken by Olawoye is unfounded and should be ignored. This is because, a family property is not founded on the existence of one sole heir, many or no child at all. The conditions for creation of family property by intestacy are, (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. The position taken by Smith is to be preferred; this is because under native law and custom, land is regarded as inheritable property not only belonging for the use of the current generation, but also for generations' unborn belonging to the family. The current generation of children is therefore holding land in trust and as a sacred object for their own use and generations after then. *See Olowosaga v Alhaji Adebajo & others (1988) 4N.W.L.R (pt. 88) 275*.

2. WILL: 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 jointly as family property. In the case of *Frank Coker v George Coker & ors (1938) 14 N.L.R 83,* 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……"The house was 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.
See also Jacobs v Oladunni Bros. (1935)12 N.L.R 1, George v Fajore (1939) 15 NLR1. Slaw v Kehinde (1947) 18N.L.R.129.

3. CONVEYANCE: Where the land owner, confers title to his property on 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 (1988)4 N.W.L.R (pt 88) 275.* Where the family conveyed by Deed of grant 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 by also its status.

4. PURCHASE OF LAND WITH FAMILY FUNDS: Family property may be created by conveyance *Inter vivus*. Where land is purchased with money belonging to the family, a family property is thereby created. In the case of *Nelson v Nelson (1913) 13 N.L.R 248*. The family decided to use money paid by government as compensation for acquisition of family property to 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. *See also Dosumu v Adodo (1961) LLR 149.*

5. 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. *See Nelson v Nelson (1951) 13 WACA 243*.

6. CONQUEST: Family property may also be created by conquest. 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 thereby a family property is created. *See more others v Nwalusi & others labadi (1933) 1 W.A.C.A 278, Kuma v Kuma (1934) 2 W.A.C.A 178.*

7. SETTLEMENT: Family property is also created by first settlement. Where the original land owner was the first settler on land, upon his death the property will devolve upon his children under native law and custom. The property therefore becomes family property. In the case of *Idundun v Okumagba (1976) 10 SC 227* 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.

3:3(i) POSITION OF GRAND CHILDREN

As we have discussed above, the family includes only the man, his wife or wives and children. Family property therefore belongs only to the family or those who can inherit the property of the deceased under native law and custom, or otherwise as discussed above. Therefore the grandchildren are not entitled to any share until the death of his own parent, and then he can step into their shoes. In the case of *Lewis v bankole (op cit)* the court had that a grandchild could not demand as of right a portion of family land for building. *See also Balogun v Balogun (1943) 9 W.A.C.A 78.*

(ii) SLAVES AND DOMESTICS

Slaves and other domestic servants no matter how long they have stayed in the family are not part of the family. They are therefore not entitled to any portion of family property. The Supreme Court in the case ofC*hairman, L.E.D.B v Fahn (unrep FSC 140/621 16/3/63)* observed that slaves and domestics were their masters chattels and were themselves the object of inheritance. One may need to separate domestics from the observation of the Supreme Court. This is because the domestics are mainly working for their master for a fee or reward. While the slave is entirely the property of the owner. The slave may in fact benefit from the family property of the land owner where the owner includes the slave or domestic in his will or declaration. *See Dabiri v Gbajumo (1961) 1 All W.L.R. 225*.

4.0 **CONCLUSION**

The form in which a family property is created will determine the status of the parties and the property. The family property is owned by the family as a unit and does not belong to the individual members. To prevent this, the party must be able to prove when and how the property was converted from individual ownership of the land holder to that of his family.

5.0 SUMMARY

There are seven different ways by which a family property may be created. And anyone who desires to prove that he holds land by virtue of family holding must be able to prove the manner of creation to the originator of the family. Outsiders cannot claim any right in the family property, grandchildren and extended family members are also excluded unless they are mentioned by the originator of the family by will or declaration.

6.0 TUTOR MARKED ASSIGNMENT

Abass desires that all his property be converted to family property after his death so that all members of his family may have equal access and benefit to his properties. Advise him.

7.0 REFERENCES/FURTHER READING

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MODULE 3

Unit 2: **MANAGEMENT AND CONTROL OF FAMILY PROPERTY**

CONTENTS

3:3 Management and Accountability

3:4 Principal Members

4:0 Conclusion

5:0 Summary

6:0 Tutor Marked Assignment

7:0 Reference/Further Reading

1.0 INTRODUCTION

Ownership of family property is joint and indivisible. The family itself may comprise of large number of children who may be spread all over the country. There is need to determine or appoint someone or some of their members to represent them in negotiations on the family property, to generally administer the properties, to equitably determine how best to share the family property amongst them in order to appropriate the greatest benefit for all the members of the family .

2.0 OBJECTIVE

At the end of this unit the student must be able to explain the status, duties, accountability of the family head. The responsibilities of the principal members of the family.

3.0 MAIN CONTENT

3:1 FAMILY HEAD

The management of the entire family property is vested in the family head. He holds the property as 'trustee' on behalf of the family, the use of the word 'trustee' is not the same as the trust under English Law. He stands as *alter ago,* representative of the family in the administration of the family property. The position is a delicate one under customary law. This is because he is not the owner of the family property and he does not have the power to deal with the family property as his own, in fact as regards the family property he does not have a better or greater right than any other member of the family. *(See Lewis v Bankole Supra)*. He cannot alienate any part of the family property without the consent of the family members.

The family head under Native Law and custom is the eldest member of the family. Upon the death of the originator, the eldest male child called Dawodu in Yoruba native law and custom becomes the family head, and upon his death the most senior member will succeed

him. However, the family may decide to elect any of their members if they do not want the most senior member to become the head of family. *(See Inyang v Ita (1929) 9 W.L.R 84.* In Ibo communities, the eldest son becomes the head of family, and on his death his children will assume the headship. *(See Ngwo v Onyejena (1964) 1All W.L.R 352.*

In some cases, the wish of the originator of the family will be respected if he nominates any other person apart from the eldest member of his family. *See Sogbesan v Adebiyi (Supra)*. There is no formal requirement for appointment of the family head. As soon as the originator of the family dies, the eldest son naturally takes control, sometimes without any formality; he calls meetings of all the children, he chairs the meetings, he represents them and gives reports etc. in other cases, there is a formal presentation of the head by elderly relations to other sons and daughters, and he is thereafter acknowledged as the head of family. Subsequent after the death of the Dawodu, others may be by election or popular acclamation.

3:2 STATUS AND ACCOUNTABILITY

The true position appears to be that, as the physical *alter ago* of his family, the head of family is the proper person to exercise the ownership rights for the family, subject to the individual rights of the members. He represents the family with respect to the exercise of these rights. Once the title of ownership is clearly separated for the exercise of the rights and powers to which it gives rise, the position of the head of family can then be perceived in its true perspective, the former is vested in the family as a quasi-corporation while the later belong to the head of family. Clearly, the powers of the head of family over the family property are held and exercised by him not as the individual or absolute owner, but as a representative or manager for the family. Because he stands in a representative capacity only, he is required to exercise the powers solely for the benefit of the family only. He is not expected to make any profit or special benefit for himself without the consent of the family to the family who is claims to represent. He must therefore be held accountable for all rents, profits and other benefits or money collected on behalf of the family in respect of family property, in the case of *Akande v Akanbi reported in (1966) NBJ 86.* Somolu J. observed as follows:

> *"These days, it is my view that it has become an acceptable part of the duties of heads of families, especially where they hold large family properties in trust for the family, with the possibility of them having a large sums as a result of the sales of portions thereof. to keep account of all the transactions in order to let the members see the true position at all times and to justify their confidence. In my view I hold as a matter of law today that it is far better to impose restrictions on the heads of family by making them liable to account, even strict account than to lay them open to temptation by unnecessary laxity in the*

> *running of family affairs which inevitably follows non-liability in that respect to hold otherwise will be betrayer to or present sense of justice and will open the flood gate of fraud, prodigality, indifference or negligence in all forms and will cause untold hardships on members of the family especially the younger members".*

Quite clearly, it is the duty in fact responsibility of the family head to represent the family in all transactions on behalf of the family, however, whatever, income is received belongs exclusively to the family, and he is under a fiduciary duty to account for all moneys collected on behalf of the family. The members can sue to ask the head of family to account for whatever he collects on behalf of the family, in the case of *Osuro v Anjorin (1946)18 N.L.R 18,* a member of the family successfully maintained an action against the family head to account for all rents collected for the family from family property. Similarly in the case of *Achibong v Achibong (1947) 18 NLR 157.* The learned judge Robinson J observed as follows; "On the powers of the family head and his duty to account,

> *"He is given considerable latitude, but his actions must be capable of reasonable explanation at any time to the reasonable satisfaction of the members of a sub branch of the House. He cannot treat House money as his own. If it is his own, he can throw it away or misuse it. He cannot do that with House money, if he thinks reasonably it is a good cause and for the good of the House. He should certainly keep accounts and work on some rules, either laid down by himself or preferably after consulting with the heads of the House*".

In the case of *Odunsi v Bolaji (unrep. Suit Ik/70/62 High court Ikeja)* the court held that a family head who received $100,000.00 compensation money on behalf of the family must be held accountable, he observed that having failed to give the family members their fair share, of the money, having not disclosed the exact amount of the money to the family, he must account for the whole money to the family, the position in Ghana may be contrasted with the above. In Ghana, the principle is that "neither a chief nor the head of family can be held for account either of state funds or family funds; even where he is found to have misappropriated such funds, the appropriate action will be to remove the family head. *See Abude v Onome (1946) 12 WACA 102, Fyun v Gardiner (1953) 14 WACA 260.* The position in Ghana is however quite objectionable and contrary to natural justice equity and good conscience. *See alsoAlienu, customary law in Ghana p 137*.

3:4 PRINCIPAL MEMBERS

The principal members of the family are the respective eldest members of each branch of the family where the family is a polygamous family. In case of monogamous family, then all the children are principal members of the family and upon the death of any child then, has eldest child or anyone nominate by the family succeeds as the principal member representing that branch of the family. They are important in the administration of the family property. They must consent to any decision by the family head in respect of family property. The family head accounts to them and also pass useful information through them to the entire family. In some cases, junior members of the family may be co-opted to join as a principal member, and he will be allowed to sign documents or behalf of the family *see Esan v Faro (1947) 12 WACA 135.*

4.0 **CONCLUSION**

The family head is a very important person in the family structure, and is the only representative and administrator of the family property. He is the voice, and *alter ago* of the family. He however, is not the absolute owner of the family property but he is a part owner, and as the manager, whatever proceeds he makes from the family property must be accounted for strictly. He holds his power over the family property for and on behalf of the family.

5.0 **SUMMARY**

The family head is the eldest member of the family recognized or appointed to manage the family property. He is also accountable for any money received on behalf of the family. He carries out the administration of the family property for and on behalf of the family strictly and is not expected to make any secret profit. He does this with the consent and cooperation of principal members of the family.

6.0 **TUTOR MARKED ASSIGNMENT**

Discuss critically the duties of the family head.

7.0 **REFERENCES/FURTHER READING**

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MODULE 3

Unit 3: **NATURE OF MEMBERS RIGHTS IN FAMILY PROPERTY**

CONTENTS

1.0 INTRODUCTION

The members of the family are not without rights in the family property, though all powers of management and control resides in the head of family, they are expected to be exercised for the benefits of the members of the family. The benefits accruing from the proper management of the family property are true rights of the members. The family members therefore could enforce these basic rights in court of law as enforceable rights under customary law.

2.0 OBJECTIVES

At the end of this unit the student is expected to understand the rights of the members of the family in family property and how law treats improvements made by the member to family property.

3.0 MAIN CONTENT

3:1 NATURE OF MEMBER'S RIGHT IN FAMILY PROPERTY

i. Right to an allotment from family land: A member of the family is entitled to be allotted a portion of the family property for his exclusive use and enjoyment. He may build his house on the land as well as farm on it. Once the land is allotted to him he holds the land to the exclusion of any other member of the family. His status is not however that of ownership rights, but in actual fact he stands in the position of a tenant on the land, the only difference is that he does not pay rent and his tenure is not determinable, his children will inherit the land after his death. The family may if it is not convenient to them re-allocate another portion to the children, but it is clear that his right to live, farm and enjoy the allocated land cannot be disturbed even by the family. The member may therefore go to court to compel the head of family to allocate family land to him. *See Amodu Tijani v Secretary Southern Nigeria (1924) 4NLR 18*. In some cases, like the case of *Ajobi v Oloko (1959) LLR 152,* the court ordered a partition where it was discovered that the family head had refused to allocate land to some family members. The member's right is only limited to land allocated to him and is not expected to enter into or take over land that has not been allocated to him. *See Lewis v Bankole (1908) 1NLR 81.*

The member cannot sell or dispose of the land allocated to him from the family property as he has only the right of use. He cannot also use the property as collateral for his personal debt. *See Jacobs v Oladuni Brothers (1935) 12 NLR 1.*

Furthermore, the member cannot in his Will pass the family property to persons who are not his heirs directly, in the case of *Ogunmefun v Ogunmefun (1931)10 NLR 82* where a testate devised her share in her family property to certain relations. It was held that the disposition was void.

A member is entitled to exclusive enjoyment of his allotment for the purpose for which it was granted, and any attempt by the head of family to disturb his quiet enjoyment may be actionable in trespass. *See Agbhoe v Sappor supra.*

3:2 RIGHT TO SHARE IN INCOME ACCRUING FROM FAMILY PROPERTY.

The income and profit including rents, proceeds of sale of family property, compensation for compulsory acquisition of family property from government and all other income derived from family property belong exclusively to the family and is not the personal property of the family head. Therefore, such income must be

shared amongst all members of the family. Though the family head is allowed to deduct all his expenses from the income before sharing and in some cases he is allowed the biggest share, but the member is entitled to his share of the income. *See Apoeso v Awodiya (1964) NMLR 8.* The family head is the right person to receive the income on behalf of his family or anyone delegated by him, afterwards he must account for the money, as he stands in a fiduciary position to the family, he cannot appropriate the funds for his oven personal use, if he does not then the family is entitled to demand for an account. *See Osuro v Anjorin (1964)18 NLR 45.*

3:3 RIGHT TO PARTICIPATE IN THE MANAGEMENT OF THE FAMILY LAND

This is similar to the right of the member of the community in the communal property. In the case of the family, the family head is not expected to administer the family property solely on his own, or treat the family property as his personal property, he must consent with the principal members of the family who must give their consent to important decisions like alienation of family property or sharing of income accruing from family property. The principal members also are required to inform all the members of their own branch of the family about important decisions for their input too, where the family head refuse to obtain the consent of the principal members of the family such decision or transaction may be held void or voidable at the instance of the members of the family. *See Adedibu v Makanjuola (1944) 1All NLR 39, Aderawo Timber Company v Adedire (1963) 1 All NLR 429.*

3.4 RIGHT TO ACT WHERE THE FAMILY HEAD REFUSE TO ACT: The court has held in serves of cases that where the family head refuse or neglect to act especially in cases where he ought to file action in court to defend family property, the member of the family way act on its behalf. *See Bassey v Cobham (1924) 5 NLR 92.*

3:2 IMPROVEMENT ON FAMILY LAND

A family property will not cease to be so merely because the member has caused improvements to be made thereon with his own resources. The family property is allotted to individual members of the family for the purpose of building and farming and the title to the land does not thereby pass to the member. He owns all the improvements made with his resources but the title remains that of the family. He may in fact alienate the improvement and the buyer will be expected to remove the improvement from the family land. In the case of *Bassey v Cobham (supra)* the court held where a member of the family had used his own money to reclaim marshy family land, that the land still remains that of the family. Similarly in the case of

Shelle v Asajon (1957) 2 FSC 65, the member of the family replaced the old thatch roof of the family house which she occupied with corrugated iron sheeting, it was held that she did not thereby become owner of the house. Jibowu Ag. C.F. explained the position of the law, *"The person who lives in a family house is expected to keep the place in good state of repair in order to make the house habitable or more comfortable for him, the occupier".* It is clear therefore that spending extra resources on family property does not confer special privilege or right on the member beyond the right of the family; as the family remains the allodial owner thereof.

Consequently, the family is entitled to recover possession of the family land allocated to a member who mortgage same and is to be sold by court order in execution of a judgment debt. *See Omolodun & other v Olokude (1958) WNLR 130, See also Salako v Oshunlami (1961) WNLR 189, Santeng v Derlewa (1940) 6 WACA 52* (this was a decision on customary law of Ghana where the court held based strictly on justice of the case that any member who built on family land becomes the owner of the land and can pass the title in his will). In summary; the ownership of family land will remain that of the family in spite of improvements made thereon by the allottee.

4.0 **CONCLUSION**

The rights of members of the family in respect of family property is safeguarded and perfected under customary law. They have the right to be allocated family land, share in the income from family property, be part of the management of the family property and also intervene in the management in cases where the family property is at risk and the family head has refused to take action. The member may improve the family property allocated to him but that does not translate to ownership if he continues to reside in the family property.

5.0 **SUMMARY**

The family is the absolute owner of the family property allotted to the members though , represented by the head of family has legally protected rights in the family property.

6.0 **TUTOR MARKED ASSIGNMENT**

Discuss with the aid of relevant authorities the rights of members of family in family property.

7.0 REFERENCES/FURTHER READING

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MODULE 3

Unit 4: **ALIENATION OF FAMILY PROPERTY**

CONTENTS

1.0 INTRODUCTION

It has never been the practice in the olden days to alienate land under customary law. Land is seen as inalienable, and the present owners holds it in trust for future generations. Non members of the family are not allowed any access to family property. However, in some cases, there may be gift of family land to close relatives or allowing customary tenants where the land is so vast and the family believes such will be in the interest of the family. However as time goes on, the practice has developed that the family may alienate family land, and transfer all their interest to third parties. Mnaefo F.J in the case of *Oloto v Dawodu (1904) 1 NLR 58,* observed,

> *"If the family is absolute owner of land there is nothing to stop the family if the head and all the members agree, from transferring the totality of their interest*

in it. It is a question of the nature of the grant as to whether they meant to transfer their entire interest in the piece of land or only a part of such interest".

In effect, where the family has agreed and consented to the sale or alienation of their interest in family land, then nothing sops them from being able to do so and machinery for passing a valid title by the family of family property.

2.0 **OBJECTIVES**

At the end of this unit the student will be able to explain the mode and machinery for the alienation of the family property, the role of the head of family, and other members.

3.0 **MAIN CONTENT**

3:1 ALIENATION OF FAMILY PROPERTY

As we have discussed above, the family property is exclusively and absolutely that of the family and only the family can sell or otherwise alienate the family property to third parties. *See Alao v Ajani (1989) 4NWLR (pt. 113) 1.* The concerns of the law is to ascertain when, how, and modalities for transfer of valid title by the family to 3rd parties, or how can the 3rd party acquire a valid title from a family, and where there are competing interests what rules of priority will be applied to the transaction. The family being a single entity, it can only act through its accredited representatives and agents. The proper person therefore to transfer validly any interest in the family property is the head of family and the principal members of the family.

1. The head of family must join in the conveyance of family property with the consent of the principal members of the family. *Agbloe v suppor (supra)* where the head of family and the principal members of the family do not consent to a purported sale or transfer of family land, the sale is *void ab initio.* The position of the law has been established beyond doubt in the case of *Ekependu v Erika (1959) 4FSC 79. See also, Lukman v Ogunsusu (1972) 1 All NLR (pt. 41), Mogaji v Nuga (1960) 5 FSC 107.*
2. Where the principal members of the family alienates the family property without the consent of the family head, the sale is void. The principal members of the family are on their own incapable of passing any valid title in the family property without the concurrence of the family head where this is done the sale is void, and of no effect whatsoever, no title is passed and no interest is transferred. *See Ekependu v Erika (supra).*
3. In cases where the head of family alienates the family property without the concurrence of the principal members the sale is voidable. It is voidable at the option of any member of the family. In the case of *Essan v Faro (1947)12 WACA*

135, the court held where the principal members of the family oppossed a sale by the head of family and majority of the members of the family, that the sale was invalid. The court observed, nowhere can we find a ruling to the effect that the acquiescence of the majority of the family renders a sale valid".

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

1. The rule will not apply where the head of family had sold the family land as his own personal property, the sale is void and not voidable. *See Solomon v Mogaji (1982)11 SC 1., Adejumo v Ayantegbe (1989) 3 NWLR (pt.110) 174.* The intention of the head of family is important. He may actually be conveying as the representative of the family, while the conveyance is expressed as if he is selling as the beneficial owner thereof. In which case, the transaction will be voidable and not void. *See Akano v Anjuwon (1967) NMLR 7.*
2. The family head cannot make a gift of family property without the consent of the members of the family, where this is done the gift is *void as initio*. *See Oshodi v Aremu (1952) 14 WACA 83.* The family made a gift of the family land to a member of the family without the consent of the members of the family. The member later sold the land to a purchaser who sold of to the defendant, the court held the gift to be null and void.
3. The family head cannot unilaterally order the partition of family property. The rationale for this rule is that partition has the effect of alienating the family property, even if it is to members of the family, the partition will be held to be void and of no effect. *Onasanya v Siwoniliu (1960) W.N.L.R* 166.

DISTINCTION BETWEEN VOID AND VOIDABLE DISPOSITION The distinction between void and voidable transaction is very important. The success of an action to in validate an unlawful disposition will depend on the relief claimed in the court.

A void transaction is one that is simply treated as if it was never made. A transaction that has no legal effect whatsoever, that has not transferred any right or interest to anybody, it is actually not necessary to ask for declaration to void it, because it is void ab initio, so that all the transactions or dealings based on it cannot stand, as you cannot place something on nothing. *See Thomas v Nabham (1947)12 WACA 229*.

A voidable transaction is one that is considered valid when made but is tainted with irregularity which may, make it liable to be voided by those having power to do so. It can

only be a voided by action in court at the instance of the person aggrieved or entitled to do so. The court can set aside a transaction that is voidable, while the court needs only to declare a void transaction void and there is nothing to be done to it further. The effect of setting aside a voidable transaction is that it relates to the inception of the transaction, and just like a void transaction it is rendered *void ab initio.*

EFFECT OF VOIDABLE TRANSACTION

The court will set aside a voidable transaction at the instance of the aggrieved member of the family. What the member needs to show is that he is a principal member of the family and his consent was not obtained. However, in order to set aside the voidable transaction the member must act timeously and must not be guilty of delay. In the case of *Mogaji v Nuga (supra)* the plaintiff purchased family land from the head of family with consent of only two branches of the family. Ten years after the sale the principal members who oppose the sale went to court to challenge the sale, the court held that though the sale was voidable, they know about the sale and did not take any action for ten years, it was too late to have the sale set aside.

Time does not begin to run until the aggrieved member has actual knowledge of the voidable transaction. Knowledge of the transaction can be imputed to the member if the member ought to have known, e.g. where the purchaser had taken over the land and has started building on the land, there is a presumption that the member knew or ought to have known about the transaction. Unwarranted delay will therefore block any action to set aside the sale. In cases, where the transaction is voidable, the purchaser gets a voidable title, but if he goes ahead to build or erect a structure on the land, and the aggrieved members did not take action to set it aside, the law is that they are stepped from setting it aside later; because *restitio in integrum* is no longer possible. In other words, what the purchaser should do is to take steps to ensure that he erects a structure on the land or sell to a third party and claim that restitution in integrim is no longer possible.

We must understand that the rule was made to protect the family property and not third parties. Third parties are therefore expected to make diligent search to ensure that they are not entering into a voidable or void transaction. The rule therefore ought to allow these who after due diligence still went ahead to enter into a voidable title, and have also taken steps to build their property on the land, to the knowledge of the members of the family then such sale can no longer be set aside. Another issue that needs be examined, is the fact that if the aggrieved member can no longer set aside the sale, and he was not given his legitimate share of the proceeds of sale, what should be the appropriate course of action?

See Mogaji v Nuga supra. Since time has operated against his relief, I submit that his proper course of action should be to ask for account, and claim his right as a member of the family.

EFFECT OF VOID TRANSACTION

A void transaction is void as initio in effect no matter the length of the time, the transaction rewars void and ineffectual. Where the person who acquires a void title transfers some to a third party, he also takes a void title and may be guilty of trespass if he takes possession. *See Elependu v Erika supra.*

4.0 **CONCLUSION**

The alienation of family property is a very important aspect of management role of the head of family. He must ensure that he sell family property as family property and not his own property, if he does, he transfers only voidable title. For a proper and valid title, the family head must sell with the concurrence of the principal members of the family. Where the principal members or members sell without the consent of the family head the sale is *void ab initio.*

5.0 **SUMMARY**

The family head must concur in all transactions involving the family property, if his concurrence is not obtained, the transaction is void. If however, he disposes the family property without the consent of all members of the family, the sale is voidable; the aggrieved member who wants to set aside the sale must act timeously and not delay in which case the sale will not be set aside.

6.0 **TUTOR MARKED ASSIGNMENT**

Distinguish between void and voidable disposition of family property.

7.0 **REFERENCES/FURTHER READING**

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MODULE 3

Unit 5: **DETERMINATIOIN OF FAMILY PROPERTY**

CONTENTS

3:3 Government Acquisition

4:0 Conclusion

5:0 Summary

6:0 Tutor Marked Assignment

7:0 Reference/Further Reading

1.0 **INTRODUCTION**

One of the most striking changes that has taken place in the customary tenure system is the prevalence of outright sale of family land by the family. Sale or partition of the family land will no doubt bring an end to the family property and put an end to all incidents of ownership by the family. In the olden days it was impossible to do this but due to economic developments, and other factors, the family land is now sold freely depending on the agreement of the family. In this unit we will examine how the family property may be determined.

2.0 **OBJECTIVES**

The student at the end of this unit will be able to discuss how family property can be determined , Sale ,and Partition

3.0 **MAIN CONTENT**

3:1 SALE

There is no doubt that the family may make an outright sale of the family property. In effecting such sale, the family head and the principal members must agree to sell the property. They must also agree and jointly convey the property to the third party. The effect of an absolute sale or gift of family land is to transfer to the purchaser all the interest of the family in the property, and totally divests the rights of the family in the property land thereby destroying the incidents of family property previously attached to the property.

To achieve this, the family must transfer all their interest in the property, i.e. an absolute sale and not of conditional sale or gift. A conditional sale like, mortgage,

lease or a pledge is not absolute, and therefore, cannot determine the rights of the family in the property. The sale must actually determine the interests of the family in the property .

The court may also order a sale of family land in appropriate cases. In *Lewis v Bankole (supra)* the court ordered a sale of family land where it considers that such a sale would be advantageous to the family or the property is in capable of partition.

2. PARTITION

'Partition' has been described as a legal concept whereby joint possession is destroyed so that each former co-tenant becomes a separate owner of a specific portion of land holding a share in severalty as opposed to an undivided share in the whole. *See Abraham v Olorunfemi (1991) 1 NWLR (pt. 165) at 75* per Tobi JCA.

The members of the family who are entitled to a share of the family land gets a share of the land, i.e. the family land is divided into equal shares amongst all the members of the family, each member taking absolute interest free from the incidents of customary land tenure. The modalities are that the land is surveyed and shared, and each member takes his own portion. The head of family and principal members of the family must sign the Deed of partition conveying the separate portions to the individual members of the family. *See Balogun v Balogun (1943) 9 WACA 78, Alhaji Olowosago v Alhaji Adebanjo (1988) 4NWLR (pt. 88) 275.*

The court may also order a partition of the family property. The courts are always very reluctant to order a partition of the family property, as the court is always not willing to interfere in the management of the family property. To involve the jurisdiction of the court therefore, the applicant must satisfy the court that it has become impossible for the institution of family ownership to continue. Where the family has denied any member the right of ingress and egress to the family property, or refuse to allot his portion to him, the court may order a partition of the family property, *Lopez v Lopez (1924)5 NLR 47, Thomas v Thomas (1932) 16 NLR 5, Lengbe v Imale(1959) WRNLR 325.* The court may also order a partition for the sake of peace and justice, *Lopez v Lopez (supra)*

3. GOVERNMENT ACQUISITION

The family property may also be determined by Government acquisition of the family property. The Government will pay compensation for the acquisition, and to this effect, the interests and rights of the family is extinguished and converted into

personality. The compensation will be shared or used to purchase another land, such land will become family land. *See Nelson v Nelson (supra).*

4.0 CONCLUSION

Family ownership of land under customary law may be determined and upon its determination the incidents of family ownership of land comes to an end and all rights and interests of the family in the property is extinguished.

5.0 SUMMARY

There are three main ways to determine family property, (1) by outright sale, (2) Partition and, (3) Government acquisition of family property with payment of compensation. The effect is to bring to an end the customary land tenure of family ownership.

6.0 TUTOR MARKED ASSIGNMENT

Discuss the various mean of determining of family property.

7.0 REFERENCES/FURTHER READING

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MODULE 3

Unit6: **IMPACT OF LAND USE ACT 1978 ON COMMUNITY LAND HOLDING**

CONTENTS

4:0 Conclusion

5:0 Summary

6:0 Tutor Marked Assignment

7:0 Reference/Further Reading

1.0 INTRODUCTION

The Land Use Act 1978 as we have noted above is a fundamental statute affecting Land Tenure in Nigeria today. The Act has modified substantially the existing Land Tenure Systems in Nigeria, but the amazing aspect is that it has not abrogated or pretended to substitute them; in its provisions, it recognized the customary land tenure as a valid and subsisting law regulating land tenure in Nigeria.

2.0 OBJECTIVES

At the end of this unit the student will be able to discuss the impact of the provisions of the Land Use Act 1978 on the Community and family Land Holding under customary law.

3.0 MAIN CONTENT

The Land Use Act 1978 (the Act) has as its objectives, the following;

(a) To remove the bitter controversies, resulting at times in loss of lives and limbs, which land is known to be generating.
(b) To streamline and simplify the management and ownership of land in the country.
(c) To assist the citizenry, in respect of owing the place where he and his family will live a secure and peaceful life.
(d) To enable the government to bring under control the use to which land can be put in all parts of the country and thus facilitate planning and zoning programmes for particular uses.

In this respect, the Act, by virtue of its section 1, provided that all land comprised within the territory of each state is held in trust and "administered for the use and common benefit of all Nigerians", while therefore vesting the land in the Governor, the act recognized the existing rights of all citizens on land. In cases where the land is located in Urban areas, the land shall continue to be vested in the person in whom it was vested before the act, if the land is developed, where the land is undeveloped then, any portion in excess of half hectare will be forfeited to the government. In the non-urban areas, the section 36 of the Act provided that the occupier shall continue in occupation as if the customary right of occupancy has been granted by the occupier. Occupier is defined as

"any person lawfully occupying land under customary law and a person using or occupying land in accordance with customary law and includes the sub-leases or sub-under lessee of a holder".

All existing rights in land has been converted to a right of occupancy, where it is in urban area it is deemed grant or granted by the Governor of state and referred to a statutory right of occupancy while in non-urban area it is deemed granted or granted by the approprate local government and referred to be customary right of occupancy.

The Act has preserved the existing rights being held under customary law by the community and family who are the rightful owners of land under customary law. In section 24, the devolution of rights under customary law on the death of the holder of a right of occupancy is preserved, and thereby the family property is preserved, while section 34(4) recognize any "encumbrance or interest valid in law", and such land shall continue to be so subject and the certificate of occupancy issued". Section 35 on the issue of compensation also recognize the interest of the land holder under customary law, when it provides *inter alia*

> *"Section 34 of this Act shall have effect not withstanding that the land in question was held under a leasehold, whether customary or otherwise."*

Affirming the position, the Supreme Court per karibi-whyte in the case of *Ogunmola v Eiyekole (1990) 4 NWLR (pt 146) p 632 at 653,* observed, "land is still held under customary tenure even though dominium is in the Governor. The vast pervasive effect of the land Use Act is the diminution of the plenitude of the powers of the holders of the land. The character in which they held remains the same. Thus an owner at customary law remains owners, owners the same event though he no longer is the ultimate owner. The owner of land, now requires the consent of the Governor to alienate interests which hitherto he could do without such consent". Clearly, the Act has only modified the customary land tenure, but the rights of the land owner under customary law whether family or communal remains intact.

The right enjoyed under customary law had always being known to be absolute rights of ownership. The family or community owner has ultimate rights in the use and management of their land. However, with the coming into force of the Act, the rights had now been converted to statutory or customary right of occupancy depending on whether the land is located in urban or non-urban areas.

As we have noted above, only the family has the power to alienate its land or deal with it in any manner whatsoever, however, before a legally valid title can be passed now, there must be a consent of the Governor of the State to the transaction. (Section 22 and 34) section 36(5) and (6) seemed to have prohibited any transfer of land that is subject to customary right of occupancy, but the act specifically provides that any such transfer shall be void. We should emphasize that there is a difference between allocation of land within the family members and transfer of the land to a person not being member of the family. Where it is within the family, or community, since the family or community continues as the absolute owner of land and the member only occupies the land, then there is no transfer of interest by the family, but where the transfer is to an outsider, then it will seem to be prohibited where the land is within non-urban area subject to customary right of occupancy.

The Act has not extinguished the incidents of customary ownerships of the land in Nigeria. Section 36(1) and (2) refers to "occupier" and "holder" of the land. Both may be granted the deemed customary right of occupancy. The holder is the person holding land as customary owner while the occupier is the customary tenant within the meaning of section 50 of the Act *see Abioye v Yakubu (1991) 5 NWLR (pt 190) 130*.

4.0 **CONCLUSION**

The Act recognized the interests of the land holder under customary law though the right that may now be enjoyed is subject to the ultimate power of the Governor, the customary land tenure is still in existence in Nigeria.

5.0 **SUMMARY**

The Section 1 of the Act has transferred all land within the state to the Governor of the state to hold in trust for the people. The holders of land under customary tenure continue to hold same as if a statutory or customary right of occupancy has been granted to then by the Governor.

6.0 TUTOR MARKED ASSIGNMENT

Discuss the impact of land Use Act 1978 on customary land tenure.

7.0 REFERENCES/FURTHER READING

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MODULE 4: CUSTOMARY TENANCY

Unit 1: NATURE OF CUSTOMARY TENANCY

CONTENTS

1.0 INTRODUCTION

Customary Tenant in customary land law is not 'gifted' the land. He is not a borrower or lessee. He is a grantee and holds a determinable interest which may be enjoyed in perpetuity subject to good behavior. It is a relationship between the family and third party, where the family or community land holders grants rights of occupation to third parties to occupy and farm on land under customary law. The rights enjoyed on land by the tenant is

only occupational and not ownership. In this unit, we shall examine the nature of customary tenancy and the classification thereof.

2.0 **OBJECTIVES**

At the end of this unit the student must be able to understand the nature of Customary Tenancy and the classification of customary tenancy.

3.0 **MAIN CONTENT**

3.1 NATURE OF CUSTOMARY TENANCY

The Customary Tenancy creates a relationship of landlord and tenant between the land owners and the third party or tenant. The relationship and the interest created must be properly understood, the relationship trough may be regarded as that of tenancy but there is a difference between customary tenant and landlord and tenancy relationship under the English law. The nature of the interest created is not an occupational license with no interest in the land above mere occupation. A customary tenant holds a proprietary right enforceable against the whole world including the grantor and his descendents.

The customary tenant holds his interest in the land as proprietary right, and may exercise all rights of ownership over the land except that he cannot alienate the property to third parties whereas, under the English law, the tenant is free to alienate his interest at any time if he holds the fee simple interest, where he is a leaseholder, he can also alienate the unexpired residue of his interest in the land to third parties. The customary tenant is not permitted to do this; and where this is done the alienation by the tenant of his interest in the land is null and void and of no effect. *See Oshodi v Oloje (1958) LLR 1.*

Another important feature of customary tenancy is that it enures in perpetuity. The reason for the mistake commonly made is the fact that it resembles ownership. However, in so far as the right to reversion of the overlord is preserved, whether he collects rents or not, whether he disturbs the tenant or occasionally asserts his rights notwithstanding the fact remains that once a tenant always a tenant and the rule of laches and acquiescence will not stand against the overlord. *See Daniel v Daniel (1956) 1F.S.C 50.*

Another, feature of the customary tenancy is that it is inheritable by the heirs of the customary tenant. Some have argued that the tenant cannot transmit his interest to his

heirs, while some other authorities have claimed that the tenant will need the permission of the overlord to transmit his interest to his heirs. *See Bamgary v Macaulay (1932) 1 WACA 225.* However, the prevalent view is that the children of the customary tenant are entitled to inherit their father's interest as tenant under customary law. *See Oshodi v Dakolo (1930) A.C. 667*.

Another important feature of the customary tenancy is that there is no certainty of term, it is in perpetuity. Subject to good behavior only. except in some cases where the tenancy is granted for a specific purpose or reason. *See Ochenna v Unosi (1965) 1 All N.L.R 321.*

There are no formal requirements for the creation of a customary tenancy. Under the English law, the transaction must be in writing stating all the terms of the tenancy including the term, parties, property and commencement date. Whereas, customary law, need only witnesses to witness the handing over of the property, and the tenant 'pays' to the overlord Kolanut and hot drinks depending on the tradition of the area, and he takes immediate possession. He is let into exclusive possession of the land.

3:2 CLASSIFICATION OF CUSTOMARY TENANCY

There are two main classification of customary tenancy, (1) the length of tenancy and the consideration given. (2) length of tenancy:

There are two types, under this class, one is that which was given for a definite purpose or reason and the other indeterminate period. In cases, where the land was granted for a specific purpose e.g. for farming during a season, at the expiration of that season and the harvest of the crops the land reverts to the overlord and the grantor may terminate the relationship by notice. While if it was granted for the purpose of building and farming then the tenancy is perpetual. The difference in duration between the two types of tenancy naturally affects not only the purpose for which the tenancy is granted but also the character of the grantee. Tenancies for a short period are generally made for the purpose of farming, fishing and exploitation of crops on the land. In some cases, though, the exploitation of crops, or farming may in fact be in perpetuity, and the tenant is not permitted to change the purpose for which the land was granted except with the permission of the overlord. Where, the land was given to the tenant to build his house and for farming thereon, the presumption is that the term is indeterminate. In the case of *ochona v unosi (supra)* where land was granted for the purpose of establishing an oil pressing machine. He later dismantled the machine and laid it out into plots, the court held that the tenancy is determined upon the change of user.

(2) CONSIDERATIOIN GIVEN TO OVERLORD

The consideration given to the overlord is an important classification of the nature of customary tenancy created. The consideration may be in form of tribute or (Ishakole in Yoruba customary law) or rent negotiated and agreed by the parties.

The tribute is determined by customary law, of the area and that of the family granting the tenancy. It may be in form of Kolanuts, drinks, or the part of the cannel harvest from the land. The tribute normally bears no relevance to the value or size of the land, but is only an acknowledgement of the grantors title. Upon the initial payment, the tenant is enjoined to bring an annual payment in form of crop yields and part of the harvest from the land to show appreciation for the grant and as acknowledgment of his status. Because of the token nature of the tribute, if the tenant fails to bring the tribute, it does not necessarily lead to termination of his right on the land.

In the case of rent, which was a current innovation due to increase in civilisation and economic activities, the tribute is converted to monetary consideration. In this case however, it bears relevance to the value of the land. While tribute may not be definite in nature, the rent is always specific and obligatory in nature. It may be argued that rent is foreign to customary law, but we should understand that there is no rule of customary law prohibiting the payment of rent as it is generally recognized as a form of Ishakole in modern terms. In the case of *Ife Overlords v Modakole (1948) unrep. Reourted in Elias op. p.115)*. The plaintiffs as overlords claimed 6 cuit. 10r. of cocoa or its equivalent calculated at E18.2s.6d, being the Ishakole due in respect of the year ended 31st December 1947 from the defendants who had been in occupation of plaintiffs land as customary tenants. After that year, the defendants refused to pay the rent, the court held, that Ishakole although usually paid in kind in the past, was in the nature of rent, the obligation to pay which arose, not from the customary law as in the case of tribute but from agreement between the grantors and grantees, and that the defendants were bound to pay the amount which under the agreement they have agreed to pay.

Payment of rent or tribute is a clear evidence of the existence of customary tenancy. However, the fact that tribute was not paid annually is not also evidence that the

relationship is not that of customary tenancy. In the case of *Okuojevor v sagay (1958) WRNLR 70 at 71*, the court observed as follows:

> "*It has…..been held by the courts in many cases that non-payment of rent or tribute by the occupier is not itself conclusive as to his ownership of land held under customary tenure"*

The court may order tribute to be paid in cases where it is found that the relationship is that of customary tenancy but payment of tribute may be appropriate in order to remove controversy. *See Etina v Eke; Ikeonyiu v Adighaghu (1957) 2 E.W.L.R 38*.

KOLA TENANCY

This form of customary tenancy is prevalent in the East central states in Nigeria, particularly in Onitsha area. The Kola tenancy enjoys all the rights of an absolute disposition. His descendants may inherit his interest without reference to the overlord. The Kola tenancy is created when the overlord grants land to the tenant and the tenant gives the overlord Kolanut as a form of tribute or appreciation. The Kola tenancy is different from the ordinary customary tenancy in three basic ways,

1. The rent or tribute is not an incident of Kola tenancy. Once, the Kola is paid, he is not under any obligation to continue paying rents or tributes.
2. The Kola tenant has unlimited right of user, he can grant sub leases, to third parties without reference to the grantor; and he does not need to account for whatever he makes on the land to his grantor. However, he cannot alienate the land, if he does so the alienation is void, and may lead to forfeiture.
3. The Kola tenant is not restricted in the use he may put the land. *See Ochona v unosi (supra)* evidence of restriction in the way the land is to be used shows that it is not a Kola tenancy; despite the fact that the rent paid was described as Kola.

4.0 CONCLUSION

A customary tenant is one with proprietary right and not occupational rights only. The payment of rent or Ishakole is the initial evidence of the creation of the tenancy, and as a customary tenant he holds the land in perpetuity subject to good behavior.

5.0 SUMMARY

The customary tenant is the person who holds's land under customary law, as tenant of the grantor. He pays rent or Ishakole in acknowledgement of his status. He has no right to dispose of the land, in fact if he does, it will lead to forfeiture of his right. He has exclusive possession and he cannot be restricted in the manner to which he puts the land unless such restriction was created from the creation of the tenancy.

6.0 TUTOR MARKED ASSIGNMENT

Discuss the nature of customary tenancy.

7.0 REFERENCES/FURTHER READING

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MODULE 4:

Unit 2: **RIGHTS AND DUTIES OF CUSTOMARY TENANT**

CONTENTS

1.0 INTRODUCTION

The customary tenant is not without certain rights and obligations or duties, the rights are enforceable rights in law that is part of the customary law recognized by the people; while

the tenant is also under some legal duties and obligations to be performed failure of which may in our some legal consequences.

2.0 **OBJECTIVES**

At the end of this unit the student will be able to describe the legal rights and duties of the customary tenant.

3.0 **MAIN CONTENT**

3:1 RIGHT TO EXCLUSIVE POSSESSION

Once the customary tenant has been given possession of land, the possession is exclusive, in that no other person including the overlord can enter possession without the consent of the customary tenant unless the terms of the tenancy permit. Any such unlawful entry is actionable in trespass at the instance of the tenant. *See Emegwara v Nwaimo (1953) W.A.C.A 347*. If the trespass includes destruction of crops and properties of the tenant, the tenant is entitled to damages. And where the trespass is apprehended by the tenant, he may proceed to court for injunction to restrain the intended trespass to his land. Where the overlord has transferred his title in the reversion to another person, then the right to exclusive possession also is sustained against the new overlord. *See Kugbuyi v Dinjo (1926) 7 N.L.R 51.* Matindale J. in *Etim v Eke (1941) 10 WLR 43 at 50,* observed that,

> "*It is now settled law that once land is granted to a tenant in accordance with native law and custom, whatever the consideration, full rights of possession are conveyed to the grantee*"

In some cases, the terms of the tenancy may allow the overlord access to the cash crops existing on the land, so that the tenant cannot harvest the cash crops or timber or the land. In some localities, also, the tenant cannot reap palm fruits so that a grant of land to a tenant does not include exploitation of such trees. *See Odu v Akinboye see Elias op cit p. 185.* In other words, the right to exclusive possession is qualified, subject to the right of grantor to enter and enjoy customary rights. *See ochonma v Unosi supra*.

3:2 RIGHT AGAINST THE GRANTOR NOT TO DENOGATE FROM GRANT

Any action of the grantor which derogates from the rights of the tenant, e.g. his right to exclusive possession is a derogation which is not permitted under customary law. The derogation may be committed either physically or through an agent when the overlord, granted possession of the same land to

another tenant, and the new tenant trespass on the land, the new tenant and the overlord will be held liable in trespass. *In the case of Etim v Eke supra* the plaintiffs were customary tenants of at the defendants. The terms of the tenancy were that the plaintiffs (tenants) were not to reap the palm trees growing on the land except with the permission of the defendants. It was found as a fact that the defendants duly consented to the plaintiffs sharing with them the right to harvest palm nuts. The plaintiffs exercised the rights for some years but later the grantors granted to one A an exclusive right to cut palm nuts on the land. In pursuance of this, A not only cut a large quantity of palm nuts but also carried away those already cut by the plaintiffs, at the same time he installed some machinery on the land for the purpose of crushing the nuts. The plaintiffs claimed against the grantors for a declaration that they were entitled to share with them and their agents from interfering with this right, and also payment over to them of half the amount so recovered. They also claimed against A damages for trespass for cutting the palm nuts on the land. Martindale J. gave judgment for the plaintiffs for all their claims against the defendants.

The grantors are not entitled to let the land already granted to customary tenants to another person, and the court will treat such letting as being void and of no effect. It is possible, however, for the customary tenant to adopt the new tenants, in which case, it is in longer in derogation of the tenants' rights, but it will be deemed to have been done by the tenant. *See Bassey v Ita (1938) 4 WACA 153*.

The extent of the right not to derogate from the grant depends on the rights reserved in the agreement in favour of the grantors.

3:3 DUTY NOT TO DENY GRANTOR'S TITLE

This is a fundamental duty imposed on the tenant by customary law that the customary tenant must never deny the title of the overlord. The temptation is very high, the circumstances of the relationship makes denial of title very possible, because the terms of the relationship is not written, and the tenancy is actually in perpetuity subject to good behavior only. The tenant may therefore be tempted to assert rights on the property which he does not have.

The denial occurs when the tenant asserts that somebody other than the grantor is the owner, either the tenant claims ownership himself or supports other adverse claimants to oppose his grantor's title. *See Bongay v Macaulay* (1932) 1 W.A.C.A 225 (sierra leone), the tenant sub-let part of the land, and refused to pay tribute, and publicly claimed ownership of the land, the court held that the defendant's action amounted to a clear denial of the plaintiff's title and rendered him liable to forfeiture and eviction. Similarly, in the case of *Onisiwo and others v Fagbenro and others (1954) 21 NLR 3.* The plaintiffs contended that as the defendants, or some of then, had granted a lease to a third party of premier occupier by the defendants as customary tenants under native law and custom, the defendants had thereby claimed absolute ownership of the premises or had alienated or attempted to alienate them, and therefore, that the defendants had forfeited their rights of occupation. The defendants contested the nature law and custom as contended by the plaintiffs it was held that the defendants family, by executing the lease incurred liability to forfeiture under native law and custom. *See also, Ladega v Ainloyi (1969) N.S.S.C 409, Omotaire v Orekpasa (1984) 1 N.S.S.C. 791*

3:4 DUTY NOT TO ALIENATE WITHOUT GRANTOR'S CONSENT

The duty not to alienate the land without the consent of the grantor is on offshoot of the continuing duty not to deny the title of the grantor. Alienation without the consent of the grantor is tantamount to assertion of title, and this cannot be tolerated. Any form of alienation, whether by way of lease, sub-letting, mortgage, gift etc is void.

An attempt to alienate is also a breath of the covenant not to alienate his interest on the land. The grantor is entitled to resist this and sue for forfeiture of the tenancy.

3:5 DUTY NOT TO USE FOR A DIFFERENT PURPOSE

Customary tenancies are usually granted for farming or building or both. It is a breach of the terms of the tenancy for a tenancy granted solely for farming purposes to be converted to building or to construct other structures. *See Akinrinlino v Anwo (1959) W.R.N.L.R 178.*

The duty not use the land for a different purpose is reasonably and not strictly interpreted and applied. In the case of *Agwu v Ogoke (534/1964 of 31/3/66 unrep.)* the grantor under an alleged customary tenancy sought an injunction to restrain the tenant from putting up concrete building contending that the tenancy permitted

only the building of thatched or mud houses. It was held that the grantor's interest in the land was not jeopardized by the erection of a concrete house, as in any event he would not make use of the land so long as the defendants occupied it and built only thatched houses, and that whatever damage he had suffered can be compensated by damages.

3:6 DUTY TO PAY CUSTOMARY RENTS OR TRIBUTES

As noted above, payment of tribute or rent by the tenant is a fundamental aspect of customary tenancy and the refusal to pay renders the tenant liable to an action for forfeiture. *See Oniah and others v chief Onyia (1989) 1 NWLR (pt 99) 514* the court held inter alia that the real basis of the misconduct or misbehavior which renders the tenancy of a customary tenant liable to forfeiture is the challenge of the title of the overlord, refusal to pay the tribute or rent viewed in its right perspective amounted to denial of the overlords title; although non-payment of rent or tribute is not necessarily inconsistent with the ownership of the overlord, the circumstances and the reasons for the refusal to pay tribute may determine whether there is a denial of the tribute of the overlord.

4.0 **CONCLUSION**

The customary tenant has certain rights enforceable against the whole world including the grantor; while he is also under duty and obligations to perform, while performing the duties and obligations he is said to be of good conduct, he holds the land in perpetuity and can maintain action for trespass against anyone that disturbs his possession including the grantor.

5.0 **SUMMARY**

The customary tenancy is subject to obligations which include the duty to pay rents or tributes, duty not to use the land for a different purpose from the purpose agreed under the tenancy, duty not to alienate the land under whatever guise, and the important overriding duty not to deny the overlord's title. While the tenant has the right to exclusive possession and the right that the grantor cannot derogate from the grant in whatsoever form.

6.0 **TUTOR MARKED ASSIGNMENT**

Examine the rights and duties of a customary tenant.

7.0 REFERENCES/FURTHER READING

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MODULE 4:

Unit 3: **DETERMINATION OF CUSTOMARY TENANCY**

CONTENTS

1.0 INTRODUCTION

The customary tenancy, though acknowledged to be in perpetuity subject to good behavior, it is also agreed that the tenant is entitled to pay rent or tribute and failure to pay may not necessarily lead to forfeiture of his tenancy. But we should note that the customary tenant is not a tenant at Will and so cannot be ejected at the Will of the grantor. In this unit we shall examine when and how the customary tenancy may be determined.

2.0 OBJECTIVES

The student at the end of this unit will be able to explain how the customary tenancy may be determined.

3.0 **MAIN CONTENT**

3:1 ACCOMPLISHMENT OF THE PURPOSE OF THE TENANCY: -

A customary tenancy for a specific purpose is determined at the accomplishment of the purpose for which it was granted. If it was granted for a farming season, for the cultivation of food crops, then the tenancy is determined at the end of the season and the harvest of the crop.

3:2 ABANDONMENT

Whenever the customary tenant abandons the land, the customary tenancy will terminate and the land reverts to the grantor. The important question had always been when can it be said that the tenant had abandoned the land? In the case of *Annan v Bin (1947) 12 W.A.C.A 177.* The court ruled that there is abandonment when the tenant goes away and the house built by him on the land falls into ruins. However, the intention of the tenant is an important consideration, so that even if he leaves the house and the house falls into ruins is not a conclusive evidence of his intention to abandon. The length of time within which he abandoned the land is not of serious relevance as well. In the case of *Bailie v Offiong (1923) 5 N.L.R 29,* the defendant who was a customary tenant in possession of land for many years took ill and relocated to a higher ground for treatment. In the meantime, the house falls into ruins. The grantor's took over and built a house thereon. The tenant went to court to challenge the action of the grantor. The court held that the

fact of the house having been allowed to fall down was not conclusive, but was only one relevant fact to be considered in the circumstances which might show what the plaintiff's intention was in allowing the house to fall down, and that the circumstances in this case made it quite clear that it was never the plaintiffs intention to abandon the land. Accordingly, the defendant had been guilty of trespass in re-entering the land. *See also Ezeilo v Obi (1960) 4 ENL 19.*

3:3 FORFEITURE

As explained above, the customary tenant are not 'Leassee' under English law, but grantees of the land under customary tenure and hold, as such a determinable interest in the land which may be enjoyed in perpetuity subject to good behavior. The interest has in practice now been regarded by the courts as practically indefeasible, once permanent buildings or other improvements like extensive commercial farming and or occupation have been established thereon by the grantees.

This is the position of law as explained by the Supreme Court in the case of *Waghoreghor v Agbenghen* Elias CJN, explained further,

> *"They enjoy something akin to enphyteusis a perpetual right in the land of another. A very important factor is that the grantor of the land, once it has been given to the grantees, as customary tenants, cannot thereafter grant it or any part of it to third party without the consent or approval of the customary tenants. A grantor is not allowed to derogate from his grant"*

The fact is that the customary tenancy goes on in perpetuity, unless and until the tenancy is forfeited. In the case of *Ejeomahonye & ors v Omabuike and ors (1974) 2 S.C. 33 at 39,* the Supreme Court explained the position thus:

> *"……The customary tenant pays tribute and enjoys perpetuity of tenure subject to good behavior, which means in practice that he may forfeit his holding only as a result of an order for forfeiture at the instance of the customary landlords".*

It follows, that it will take a breach of the tenants obligations under the customary tenancy to be liable to forfeiture and eviction. These obligations as explained above include, (1) Alienating the land or portion of it to third parties without the consent of the overlord. (2) Putting the land to uses other than those agreed upon. (3) Failure to pay customary tribute or rent, (4) Denying the title of the overlord, though the list is not exhaustive, the above are the well known ones. The court will not grant forfeiture for minor misbehavior, in fact the court will only grant forfeiture in very exceptional cases. *See Ashagbon v Odutan 12 NLR 7, Ogbakunmawu & ors v Chiabolo 19 NLR 107, Lasisi v Tubi (1974) All NLR (pt II) p 438.*

The non-payment of rent is not necessarily inconsistent with the ownership of the overlord. The primary purpose of a rent or tribute in a customary tenancy is not as an economic return on the land but as an acknowledgement of the owner's title. It is important to determine circumstances and reason for the refusal or neglect for the payment of rent or tribute.

For denial of title to incur forfeiture, it must be deliberate and willful act of the tenant denying the overlord's title and this will lead to forfeiture of the tenancy.

Forfeiture is not automatic. The overlord is entitled to overlook or forgive acts of misbehavior of the tenant that are inconsequential; in order to forfeit a customary tenancy,

the overlord must take definite steps to recover possession of the land from the tenant. The Supreme Court in the case of *Abioye v Yakubu (1991) 5 NWLR (pt 190) 130,* explained the position of the law as follows: -

> *"It cannot, therefore be right to say that the cases show that once the customary tenant committed an act which amounted to misbehavior he forfeited his tenancy, even though the overlord had not sought an order of court therefore. The overlord was entitled to overlook or waive the act of misbehavior. If he did so, the relationship of the parties continued. In this respect the decision in* ***Ogbakunawu v Chiabolo 19 NLR 107*** *that forfeiture is automatic upon misbehavior by the customary tenant is no longer good law! I should not follow it. It could not be automatic in view of the fact that, like in other cases of forfeiture, a customary tenant whose tenancy was threatened with forfeiture on grounds of misbehavior was always entitled to apply for relief against forfeiture, which might be granted by the court, even if it had to impose some conditions".*

Per Nnaemeka Agu JSC p. 245-246.

Forfeiture may be granted against the whole community though the Supreme Court had said this will be done in very exceptional cases. However, forfeiture was granted in the case of *Taiwo v Akinwunmi (1975)5 SC 143, see also Akpagbure v Ogu (1976) 6 SC 63 at 74*. In the case of *Ogunola v Eiyekole* the Supreme Court having found evidence of misconduct and refusal of the respondents to pay the tribute or rent, that the tenants not only refuse to pay the rent but also deny the title of the overlord, the court ordered forfeiture of the tenancy. *See Oniah v Chief Onyia (1989) 1 NWLR (pt 99) 514.*

As we noted above, the act of forfeiture is not automatic but an action taken by the overlord to terminate the tenancy by applying to the court to declare the tenancy forfeited, and recovery of possession. It is possible for the overlord to forcefully take possession, in the olden days. *See Iresa v Oshodi (1934) A.C 99,* but act of self help is no longer available today. The only reasonable mode is to apply to the court for a declaration for forfeiture of the customary tenancy. Where the right to forfeit the tenancy has been waived, or condoned, the overlord cannot later apply for possession. *See Abowab v Adesina (1946) 12 WACA 18.*

4.0 **CONCLUSION**

The customary tenancy though agreed to be in perpetuity can actually be determined. The continuity in perpetuity depends on good behavior of the tenant, and any act that can be interpreted as denial of the title of the overlord is in fact an act that will determine the tenancy.

5.0 SUMMARY

The customary tenancy may be determined by the accomplishment of the reason for the tenancy, abandonment, refusal or neglect to pay rent or tribute and denial of the overlord's title. This could involve denial of title or indirect denial actions like supporting adverse claimants e.g. giving evidence in court on behalf of adverse claimants etc. alienating the land without consent of the overlord. Forfeiture may be waived or condoned, but the overlord need to apply to the court for order of forfeiture and possession of the land in order to recover possession from the tenant.

6.0 TUTOR MARKED ASSIGNMENT

Discuss circumstances when the customary tenancy may be determined.

7.0 REFERENCES/FURTHER READING

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MODULE 4:

Unit 4: **RELIEF AGAINST FORFEITURE**

CONTENTS

1.0 INTRODUCTION

the customary tenancy is essentially a tenancy that is granted in perpetuity. However, this is for the period of good behavior of the tenant upon misbehavior, the tenancy is liable to be forfeited by the overlord. Where this step has been taken, the court has the power invoking its equitable jurisdiction to grant relief from forfeiture.

2.0 **OBJECTIVES**

At the end of this unit the student will be able to explain when and how the court will grant relief from forfeiture.

3.0 **MAIN CONTENT**

3:1 RELIEF FROM FORFEITURE

The courts have assumed jurisdiction in cases of forfeiture of customary tenancy to invoke their equitable powers to relieve the customary tenant from forfeiture in deserving cases. The existence of this jurisdiction was affirmed in the case of *Ashogbon v Oduntan (1935) 12 NLR 7.* Graham Paul J explained the position thus;

> *"I wish to make it clear that in my opinion where a native custom is invoked in support of a forfeiture of a right this court will as a court of equity consider in the particular circumstances of each case whether forfeiture or a suitable penalty would be the proper course. I regard this court in its equity jurisdiction as in some measure… the keeper of the conscience of native communities in regard to the absolute enforcement of alleged native customs".*

We must understand that in invoking its equitable jurisdiction to grant the relief from forfeiture the court will consider amongst other things, (1) the attitude of the tenant, (2) the gravity of the misbehavior, (3) whether it can be remedied or not, (4) when it is a flagrant and deliberate denial of the title of the overlord, or a claim of the title of the land by the tenant.

Clearly, therefore, the court's jurisdiction to grant relief is not as a matter of course, but is reached after a careful appraisal of the competing interests on the land. In the case of *Onisiwo v Fagbenro*. (1954)21 N.LR 3 .The defendants had been customary tenants of the Onisiwo chieftaincy family for over 80 years; without the consent of the overlord, the tenants granted a lease of 50 years to third parties with option to renew for another 25 years. The court refused to grant relief from forfeiture on the ground that their conduct disentitled them to the assistance of equity because, having maintained the attitude that they were absolute owners, they "missed the opportunity of placating the plaintiffs by offering to share the rent they were going to receive…….and it is rather late in the day to say that they were sorry and that they made a mistake in good faith".

The court was of the view that forfeiture was the only way to protect the overlords right to the reversion, and granting a relief will only allow the tenants to go scot free and try again. Comarmond S.P.J observed as follows,

> *"One may feel tempted to attach little importance today to the rights of reversion or to the right of forfeiture established and recognized under native law and custom. One may think that, owing to the impact of Western laws and the existence of social and economic conditions, the old order of things in Nigeria must fade out. I think, however, that the proper way of relegating irksome or outmoded law and custom is to have recourse to legislation" p.7*

Other deciding factors in granting relief are, degree of inconvenience that would be occasioned to the tenant having regard to the length of time he has been in possession and improvements he has made on the land. Thus, in the case of *Uwani v Akom (1928) 8 NLR 19* relief was granted on the ground that it would be inequitable to dispossess some 310 tenants from land they had occupied for over 50 years and had built over 100 houses and farmland.

Relief will not be granted where the tenant has alienated the land to third parties, because that will be tantamont to denying the title of the overlord, or abandonment. In the case of *Chief S.O. Ogunola & ors v Eiyekole (1990)4NWLR (p146)162* the Supreme Court held, inter alia, approving the decision of the Court of Appeal that,

> *"Without doubt, the principle of customary law is well stated that a customary grantee is entitled to continue his occupation of land only during the period of his good behavior, and that he is liable to have his interest terminated for forfeiture if he is guilty of acts amounting to serious misconduct or misbehavior".*

The court, thereafter listed the misbehavior committed by the tenant before finally arriving at the decision to refuse relief from forfeiture, when the court found, that

> *"The most serious misconduct which is rarely overlooked is denial of the landlord's title as it is in this appeal. Coupled with this was the act of the respondents by pulling down the shrine worshipped annually by the appellants. The shrine is on the land in dispute. In so far as the appellants are concerned, that was an act of desecration".*

The court also finds the evidence of misconduct and refusal to pay the tribute or rent on record. "It is manifest from their evidence and conduct that not only did they deny the title of the appellants they also refused to pay tribute or rent". The court refused to grant relief from forfeiture based upon the serious misbehavior committed by the tenants. *See also Taiwo v Akinwunmi (1975) 4 S.C. 143, Ojomu v Ajao (1983) 2 SCNLR 156.* However, where the misbehavior is minor or remediable, the court will be willing to grant relief against forfeiture. *See Lasisi v Tubi (1974) All NLR (pt II) 72 per (Dan Ibekwe JSC).*

In order to do substantial justice, where the court order relief from forfeiture, the court may order the tenant to pay the tribute, or rent and to henceforth be of good behavior, where a relief is granted this does not render valid an otherwise invalid transaction, for instance, where the tenant had sold or leased land. The transaction shall remain void, even if the relief against forfeiture had been granted.

4.0 CONCLUSION

Relief against forfeiture though not available under native law and custom to a tenant in breach of his tenancy, may be granted by the court invoking its equitable jurisdiction.

5.0 SUMMARY

Relief against forfeiture is granted by the court based on the circumstances of the case and after weighing the competing interests, and gravity of the misbehavior.

6.0 TUTOR MARKED ASSIGNMENT

Critically examine when and how the court will grant relief against forfeiture.

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23.
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MODULE 4:

Unit 5: **IMPACT OF LAND USE ACT ON CUSTOMARY TENANCY**

CONTENTS

1.0 INTRODUCTION

Because of the nature of customary tenancy it needs particular discussion especially as regards the impact of the Land Use Act 1978 on the interest held by the customary tenant.

2.0 OBJECTIVES

At the end of this unit the student should be able to explain the impact of Land Use Act 1978 on the interest held by the customary tenant.

3.0 **MAIN CONTENT**

3.1 Impact of Land Use Act on Customary Tenancy

As we explained above, the customary tenancy is created where a land owner allows another person (tenant) the occupation of his land for specific purposes, and either for a term (e.g. planting season) or normally in perpetuity subject to good behavior of the tenant. The customary tenant only occupies the land and the title never passes to him. He is expected to pay rent or tribute to the overlord, in the event of misbehavior, the tenancy is liable to forfeiture at the instance of the overlord.

Upon, the coming into force of the Land Use Act 1978, the pertinent question that had agitated the minds of jurists and scholars had been what is the quantum of interest held by the customary tenant? Some authorities have ruled that the rights of the overlord have been swept away by the provisions of the Act especially section 36(2). The section provides as follows:

> *"Any occupier or holder of such land, whether under customary rights or otherwise however, shall if that land was on the commencement of this Act being used for agricultural purposes continue to be entitled to possession of the land for use for agricultural purposes as if a customary right of occupancy had been granted to the occupier or holder thereof by the appropriate local Government and the reference in this subsection to land being used for agricultural purposes includes land which is, in accordance with the custom of the locality concerned, allowed to lie fallow for purposes of recuperation of the soil".*

While subsection 3 went further to permit the appropriate local Government to issue the customary right of occupancy to the occupier or holder of such occupier or holder who is in possession and that the land was being used for agricultural purposes.

The problem is who is the holder? and the occupier? Occupier was defined in section 50 as, "any person lawfully occupying land under customary law and a person using or occupying land in accordance with customary law and includes the sub-lessee or sub-under-lessee of a holder. While the holder is the person entitled to the right of occupancy.

The Supreme Court seemed to have laid to rest the argurments on the proper relationship of the customary tenant and the overlord in view of the impact of the Act in the case of *Abioye v Yakubu op. cit,* the customary tenants of the plaintiffs after about 60 years on the land as tenants, put up a sign post on the land that suggest that the land now belongs to them absolutely. The plaintiffs sue for forfeiture of the customary tenancy and the tenants claimed the Act had converted their rights to that of customary right of occupancy under the Act, the High Court held *inter alia,* that the Act did not convert the occupiers (tenants) into holders (owners) of the land. Upon appeal, the court of Appeal held *inter alia,* that being occupiers of the land before the Land Use Act, the tenants are entitled to the

customary right of occupancy, and that they now become the tenant of the local government. The plaintiffs appealed to the Supreme Court. The Supreme Court held as follows: - *inter alia.*

1. The relationship of lessor and lessee, mortgagor and mortgage are continued by the Land Use Act. The Act never sought to disturb existing relationships.

2. The Act did not expressly divest or extinguish the customary rights of the owners of agricultural land in non-urban areas as it did in respect of undeveloped land in excess of half hectare in urban areas. In deciding therefore the grant to the tenant of the deemed customary right of occupancy tantamount to the extinction and extinguishment of the customary right of the owner, the right to tributes, forfeiture and reversion, it is necessary to examine the quantum and content of the deemed customary right of occupancy granted to the occupier in the light of the rules of interpretation of expropriatory statutes.

3. Section 1 has not taken away the right of the customary owners of enjoyment of the tributes rather it left it untouched.

4. The occupier is the customary tenant while holder is the customary owner is S36(2).

5. Where a certificate of occupancy is granted to a tenant who is subject to customary tenancy, the overlord retains his right as a reversioner in case the certificate of occupancy is revoked for any reason and the overlord may apply for a grant of certificate of occupancy to him.

4.0 **CONCLUSION**

We may safely conclude therefore that customary tenancy is preserved under the Act. The Act not only recognizes the status of the customary tenant, in fact, he may be ousted from occupation in the event of misbehavior in spite of the Act. The overlord retains his title, and right to the reversion. Though the tenant may be entitled to apply for the customary right of occupancy, such right is subject to the overriding incidents of customary law.

5.0 **SUMMARY**

The position of the customary tenant under customary law has been left undisturbed by the Act. Except that, he may apply for a customary right of occupancy which does not remove him from the full incidents of customary law.

6.0 **TUTOR MARKED ASSIGNMENT**

Discuss the impact of Land Use Act 1978 on Customary Tenancy

7.0 REFERENCES/FURTHER READING

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MODULE 5:

Unit 1: **OUTLINE OF SUCCESSION RIGHTS**

CONTENTS

1.0 INTRODUCTION

Succession to land is an important aspect of customary land law, and it regulates how land devolves and is inherited by heirs of the original owner of the property. The customary law has evolved rules and customs that are applicable under various circumstances. These rules of customary law on succession like every other rule of customary law vary from one area to the other. There are also external interventions that will render the rules of customs inapplicable.

2.0 **OBJECTIVES**

At the end of this unit the student must have a good understanding of the basic rules of customary law on succession in African communities.

3.0 **MAIN CONTENT**

3.1 Distinction between Testate and intestate succession

Upon the death of a man, the devolution of his property depends on whether or not he has made a will. Where he made a will before his death, the properties are shared according to the directions in the will, and he is therefore known to have died "testate". Where, he died without a will, then he is said to have died "intestate". In the latter, situation, the properties will be governed by the appropriate customary law. Succession under customary law is treated as being entirely intestate. Though one may argue that, if the owner of the property gives instructions as to how his properties are to be shared amongst his children and relatives this may be regarded as testate disposition. However, the point is that under customary law, there are rules of customary law guiding the sharing of inheritance and it is only where the testator decided to go out of this known rule, that exception is taken to the general rule, even then, the elders may disregard or modify the wishes of the deceased depending on the circumstances of the case, and they are not obliged to follow his wishes though it may be persuasive (See Lloyd, 1965, Yoruba inheritance and Succession, in Derret ed. Studies in the laws of succession in Nigeria, O.U.P. 155)

3.2 Intestacy and customary rules of succession

The fundamental rule is that the personal law of the deceased land owner will be the law applicable to his estate. In the case of *Tapa v Kuka (1945) 18 NLR 5,* where the deceased from Nupe land, left property in Lagos, the question for determination was whether it is the law of where the property is situated (lex situs) that should be made applicable or the personal law i.e. law of Nupe, the court held that it was the customary law of Nupe that will be applicable. In the western and mid western states of Nigeria, it is the *lex situs* that will be applicable law when the issue of succession to his real property is concerned.

See S20(2) customary courts law cap 3 LWN 1959). The personal law may not necessarily be the law of his native community, but he may have adopted to live as the member of another community and agreed to be subject to the customary law of that

community, in which case, upon his death, his personal law will be that of his adopted community, *(see Olowu v Olowu (1985) 3NWLR (pt 13 372).*

PATRILINEAL SUCCESSION

There are two basic systems of succession under customary law; we have the patrilineal and the matrilineal. The patrilineal succession is one that is strictly through the fathers' lineage, while the matrilineal is strictly through the mothers' lineage.

Patrilineal though there are pockets of matrilineal types in various parts of the country. There are also what is known as primogeniture type of inheritance, in which the eldest son takes and inherits the properties of his late father to the exclusion of others, while in some communities, ultimogeniture system is used, where the youngest child inherits all the fathers properties exclusively. There two types, offshoots of the patrilineal type of succession. An example of the patrilineal society is the Igbo society, Benin society is strictly primogeniture. The Yoruba custom permits both male and female children to inherit land to the exclusion of other relatives.

The general rule of customary law is that upon death of a land owner, his property is inherited by his children under native law and custom.

MODE OF DISTRIBUTION OF ESTATE

The Yoruba customary law allows only the children to inherit the father's property exclusively, relatives and other collaterals are therefore excluded. Male and female children share equally. A widow does not have a right of succession under customary law. In the case of *Lewis v Bankole (1909) 1 NLR 18*. The court laid down the following rules in respect of succession among the Yorubas.;

1. When the founder of a family dies, the eldest surviving son called "Dawodu" succeeds to the headship of the family with all that implies, including residence and the giving orders in his father's house or compound.

2. On the death of the eldest surviving son, the next eldest child of the founder, whether male or female, is the proper person to succeed as head of family.

3. The division into equal shares between the respective branches, regard being had to any property already received by any of the founder's children during his life-time.

4. The founders grand children only succeeded to such rights as their immediate parents had in the family property.

When it comes to the sharing proper, the Yoruba custom recognize two modes of sharing, either *per stripes* or *Idi igi* or *per capita* or *ori Ojori*. In the case of *Dawodu amd other v Dannole and others* the court explained the position when it was held, (1) *"Idi Igi"* is the Yoruba Native Law and custom whereby the estate of an intestate whose wives have pre-

deceased him, is distributed according to the number of the mother's (wives of intestate) of the children of such intestate. (2) *"Idi-Igi"* is an integral part of Yoruba Native Law and custom relating to the distribution of intestates 'estate, and is in full force and observance, and has not been abrogated. (3) *"Ori – Ojori* a Yoruba Native Law and Custom, whereby the estate of such an intestate is distributed according to the number of his children, is a relatively modern method of distribution, and may be adopted only at the discretion of the head of the family for the avoidance of litigation.

Some have argued that it is contrary to natural justice equity and good conscience to allow sharing by the *Idi-Igi* system, as it will deny many of their equal share. In cases where a wife has more children than others, to share by *Idi-Igi* and not Ori-Ojori is totally inequitable. (*See Niki Tobi, op. cit p. 80)*. The Supreme Court however put the rule beyond doubt when the court held in the case of *Olowu v Olowu (1985) 3 NWLR (pt 13) 372,* that it is the eldest child who takes over the management of the estate of the deceased for himself and other children, and also decides which system of distribution should be adopted be it *"Idi – Igi"* or *"Ori – Ojori"*.

Where the intestate left no issue, the court in the case of *Adedoyin v Simeon (1928) 9 NLR 76,* laid down the following based on the evidence of customary law adduced before the court,

1. If the deceased left brothers and sisters by the same mother, they have the right of succession to the exclusion of other relations.

2. Where there is no brother or sister by the same mother, the parents are together entitled but more usually the father would leave everything to the mother.

3. If the deceased is survived by only one parent, that parent takes everything.

4. Brothers and sisters of the half blood by the same father have no right of inheritance, notwithstanding that the property was inherited from their father.

You may note however, that, where the property, in dispute was inherited from the father's family, inheritance is by his paternal relations, and, where the property was inherited through the mother, the maternal relations have the right of possession. *See Suberu v Sunmonu (1931) 10 NLR 79 at 80.*

Grand children take their deceased parents share *pier stripes* irrespective of whether such parent survives the intestate.

Ibo Rules of Inheritance

The Supreme Court had recognized the Igbo custom that the eldest son takes over all the properties of the intestate father, and becomes the head of family, and upon his death, his eldest son becomes the head of family *see Ngwo v Onyejera (1964)1 All NLR 352.*

The succession here is strictly patrilineal. The house of the deceased belongs exclusively to his eldest son to the exclusion of all other children. All the other properties of the land

owner belong to all the family to be managed by the eldest son for the benefit of all. The female members of the family have no right to inherit land. But where anyone was living in the family house, before the death of the land owner, she may not be turned out during her lifetime.

A widow cannot inherit the husband's property, but she may be allowed to live in the house for her life. In case of woman's property, her land is inherited by her sons, where she is married in the absence of sons, the property acquired by her before marriage goes to her own family and not to her husband, and property acquired by her after marriage belongs to her husband or his next of *Kin. See Nwugege v Adigwe (1934) II NLR 134.*

VARIATIONS OF CUSTOMARY LAW BY MARRIAGE

Section 36 of the Marriage Act 1914 provides that where: (i) a person who is subject to customary law contracts a marriage in accordance with the provisions of the Act and dies intestate after the commencement of the Act leaving a widow or husband or any issue of such marriage. (ii) any person who is an issue of a marriage under the Act dies intestate subsequent to the commencement of the Act. Real and personal property left by the intestate which might have been disposed of by will shall be distributed in accordance with the law of England relating to the distribution of the personal estates of the intestates. Any customary law to the contrary notwithstanding. All the states of the western states and mid-western states have adopted the Section 36 in their Administration of Estate Law.g. *see Section 49(5)Aadministration of Estate law of Bendel State (now Edo and Delta states) 1976.*

Cole v Cole.

The rule laid down in *cole v cole (1898) 1 NLR 15* is to the effect that the provisions of customary law or the marriage Act does not affect succession of persons married outside the country under a monogamous marriage. It was held in the case that on the death intestate, of a Christian native outside the colony and protectorate, the succession to his property is not governed by the marriage ordinance which applies solely to marriage contracted locally, and the English law of succession will prevail over the native customary law.

Testate succession

The owner of land who executes a will directing how his land and other properties may be shared is said to have died testate. Where there is a written will, then the entire rules of customary law is excluded. No special words may be used, but it must be in writing, and signed by the testator and in the presence of two witnesses who must also sign in his presence. Where the will is not properly attested, the gift will fail and the customary law will apply.

The testator may create a family property under customary law where he directs that his property be held as family property. *See Jacobs v Oladuni Bros. (1935) 12 NLR 1.* Note that the provisions of the Wills Act 1837 applies to testate succession. But, it will not apply where the testator attempts to give in his will family property. Because it does not belong to him but to the family. *See Abeje v Ogundairo (1967) LLR 9*

4.0 CONCLUSION

The customary law on succession in African societies varied from community to community and is influenced by the English received laws, marriage, and Islamic law.

5.0 SUMMARY

The succession to property of a deceased depends on the customary law of the person, the type of marriage contracted by him and his choice, whether he wants his property to be administered under customary law or under the English law.

6.0 TUTOR MARKED ASSIGNMENT

Discuss the customary law of succession in African communities

7.0 REFERENCES/FURTHER READING

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