# ALIENATION OF FAMILY PROPERTY IN NIGERIA

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Although family[1] property is an institution which exists under customary law throughout Nigeria, this article deals only with alienation of such property in Southern Nigeria, for reasons given below. It is important to emphasize that the institution exists in Northern Nigeria despite the Land Tenure Law[2] which has the effect of "nationalising" practically all lands in that part of the country. The most extensive interest in land which that law permits is a right of occupancy which may be statutory[3] or customary. A customary right of occupancy is conferred on Northern Nigeria natives or native communities who lawfully use or occupy land in accordance with the rule of native law and custom.[4] Since in Northern Nigeria families are land-holding units under customary law[5] they enjoy a customary right of occupancy when they occupy native (i.e., nationalised) lands and such a holding can properly be described as family property. Such land can be alienated by the family to a non-native only with the consent of the Minister responsible for land matters, and to a native with the consent of the native authority in whose area the property is situated.[6] In practice,

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[1]A family for the purpose of land-holding may be the children of a deceased. Usually, however, a family is much wider than this and is "a corporate body created upon the death of the founder holding an interest in land. It includes all his (or her) descendants in the male line (in the case of agnatic lineage) or in both male and female lines (in the case of agnatic descent group). New members of the group belong to it by virtue of their birth and they accede to their rights at the time of their birth" - Lloyd, Yoruba Land Law, 78 (1962).

[2]Laws of Northern Nigeria, Cap. 59 (1963). See also McDowell 1 Nig. L.J. 202 (1965).

[3]A right of occupancy granted by the Minister responsible for land matters, or authorised native authority, to a native or non-native of Northern Nigeria - S. 2.

[4]Ibid.

[5]Anderson, Islamic Law in Africa, 184-6 (1954).

[6]S. 27.

however, "there is no restriction on sale, transfer or bequest to a blood relation".[7] Settlement of disputes arising from a disposition of such property is not cognisable by the High Court[8] but is left in the hands of the native authorities and native courts[9] whose decisions are not published. Nor are there other published sources from which information about the rules governing the management and alienation of such property can be obtained. In these circumstances it is not possible to undertake a meaningful examination of the rules regulating such alienation.

On the other hand, so much has been written about the institution in Southern Nigeria.[10] There has similarly been a flood of judicial decisions on the various aspects of the subject. Yet the law on some of its aspects is far from satisfactory. For example, the rules governing alienation of the property invest excessive powers in the head of the family as against the entire family, and a reaction to this unhappy state of affairs has induced judicial pronouncements which introduce uncertainty in the law.[11] It has been accepted that absolute title to family land can only be transferred by the head of the family with the consent of the principal or important members of such family. A conveyance of such property must be executed by him[12] and it is not enough that he signs the instrument merely as a witness. The principal members, on the other hand, may sign the document either as grantors or as witnesses. Indeed they do not have to sign in either capacity; it is enough if it is shown aliunde that they gave consent to the alienation[13]

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[7]Hailey, An African Survey, 735 (1957).

[8]Kosoko v Nakoji, [1959] N.N.L.R. 15.

[9]Anderson, op. cit., p. 187; Hailey, op. cit., p. 735.

[10]See, for example, Coker, Family Property Among The Yorubas, (2nd ed., 1966); James and Kasunmu, Alienation of Family Property in Southern Nigeria (1966); Lloyd, Yoruba Land Law (1962); Elias, Nigerian Land Law and Custom (3rd ed. 1960); Jegede, 1 Nig Journal of Contemp. Law, 77 (1970); Obi, Ibo Law of Property (1963); Nwabueze, Nigerian Land Law (1973).

[11]See, for example, Lukan v Ogunsusi, 5 S.C.40 (1972), discussed below.

[12]Ekpendu v Erika, 4 F.S.C.79 (1959); Taiwo v Ogunsanya [1967] N.N.L.R.375.

[13]Coker, op. cit., pp. 323-325.

If the alienation of the property is carried out by the family head without the consent of the principal members it is only voidable at the instance of those members provided they act promptly.[14] The effect is the same even if the head sells in defiance of the declared opposition of the rest of the family. If, on the other hand, all the principal members sell without the agreement of the head of the family such sale is void ab initio.[15] It makes no difference that the entire family ratified the sale, or that the head withheld his consent unreasonably or capriciously.

The above statement of the law is subject to a few modifications, however. The consent of a principal member is dispensed with if he is a minor[16] or unavailable,[17] and possibly if there is an emergency.[18] All the principal members can, on the other hand, validly sell without the head if there is a vacancy in the headship of the family.[19] Again, an alienation is void and not voidable if the head of the family, alone or in collaboration with some or all of the principal members, conveys the land fraudulently or secretly, describing it as belonging not to the family but to themselves personally.[20] Moreover, it seems that a voluntary alienation by the head without the concurrence of the principal members is void ab initio and not voidable.[21]

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[14] Aganran v Olushi, 1 N.L.R.66 (1907); Manko v Bouso, 3 W.A.C.A.62 (1936); Esan v Faro 12 W.A.C.A.135 (1947); Mogaji v Nuga, 5 F.S.C.107 (1960); Onwuka v Abiriba Clan Council, 1 E.N.L.R.17 (1956); Udu v Melifonwu, [1961] E.N.L.R.93; Onyekonwu v Okeke [1961] E.N.L.R.48; Foko v Foko, [1965] N.N.L.R.; Lahan v Lajoyetan 2 All N.L.R.307 (1968).

[15] Ekpendu v Erika 4 F.S.C.79 (1959); Alari v Oyekunle [1961] W.N.L.R.281; Ofondu v Onuoha, [1964] N.N.L.R.120; Foko v Foko, supra; Taiwo v Ogunsanya, [1967] N.N.L.R.375; Lahan v Lajoyetan 2 All N.L.R.307 (1968).

[16] Mogaji v Nuga 5 F.S.C.107 (1960); Foko v Foko [1965] N.N.L.R.3.

[17] Kosoko v Kosoko 13 N.L.R.131 (1936).

[18] See James & Kasunmu, op. cit., p. 10; Aralawon v Aromire 15 N.L.R.90 (1940).

[19] Gilbert Oguri v Felix O. Seaton, Suit No. LD/593/65 (unreported).

[20] Olowu v Oshinubi [1958] L.L.R.21; Alabi v Rufai, Suit No. 1/28/62 (High Court of W. Nigeria, unreported).

[21] See Oshodi v Aremu 14 W.A.C.A.83 (1952).

## A critique of the current law

It is clear from the foregoing that the head of the family is invested with frightfully extensive powers in the disposition of family property. There seems to be no justification for clothing any individual with such powers over property in which he has interests no larger than those of the co-owners:[22] for only he can effectively dispose of family property. Such dispositions are valid until set aside, but often actions to avoid them are commenced when it has become inequitable for the court to interfere, either because the purchaser has so radically altered his position vis-a-vis the property that the parties cannot be restored to the status quo ante, or because an innocent third party has acquired an interest therein.[23] The rationale for the proposition that a sale by the head of the family without the required consents is not void but voidable seems to be that since he is the manager of family property there is a presumption that he has the authority of the family to dispose of a family property.[24] It is our view that there is no justification for this presumption. Neither the head of the family, nor any other single member of the family, is normally authorised to sell family property without bringing other members of the family into the arrangement. Consequently, a purchaser who knows that the property he contracts to buy belongs to a family, but nevertheless deals with the head alone, should not get a valid title to the property if it turns out that the head in fact had no authority. On the other hand the family, even when it includes the principal members, cannot alienate family land without the consent of the head,[25] who is

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[22] See Coker, op. cit., p. 170.

[23] Oshodi v Imoru 3 W.A.C.A.93 (1936); Esan v Faro 12 W.A.C.A.35,36 (1947); Osinaike v Odusote, Suite No. 1/73/63 (Ibadan Judicial Division, unreported); Clough v London and Northwestern Railway Co. 7 Exch. 26, 35 (1871); Erlanger v New Sombrero Phosphate Co. 3 A.C. 1218, 1278 (1878); and see generally James & Kasunmu, op. cit., pp. 33-35.

[24] See Olawoye, 1 Nigerian Journal of Contemp. Law, 166 (1970).

[25] A third party can acquire title to land the alienation of which is void only if the family is guilty of acquiescence and/or laches.

therefore in a position to hold them up to ransom. Thus, the head can subject the group to agonising embarrassment by preventing them from selling family land to meet their pressing needs, or shame them by selling such land unnecessarily. Members of the traditional community do not lightly decide to sell their land, for apart from its religious importance it is their most valuable asset.[26]

Normally the family head is no more intelligent than the other members of the group. Nor is he necessarily more knowledgeable than them, though an older man may be more familiar with the customs of the people. It can therefore not be said that he alone can judge what is good for the family. Therefore his extraordinary powers cannot be justified by his alleged superiority. And we agree that "the idea that the head of the family can do no wrong has now become archaic".[27] As a rule the eldest male member of a family is its head and takes office automatically and without any ceremony upon the death of his predecessor.[28] In some communities-the Yoruba, for example- if the family is small and has few segments, a woman may sometimes act as its head if she has a strong personality, resides in the family house and is the eldest living member of the group.[29] Again, if a person constitutes family property out of his self-acquired property he may himself appoint the head of the family upon his death.[30] There is also one old and exceptional case in which the members of the family elected their head.[31] It is therefore clear that the head of the family does not owe his position to any special qualities. Indeed he may often be the member least qualified to exercise such powers, for very often he is old and senile[32] and "with little or no ostensible means of livelihood"[33]

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[26]Lloyd, op. cit., p. 329.

[27]Jegede, 1 Nig. J. Contemp. Law 77, 103 (1970).

[28]Lloyd, op. cit., p. 83; Obi, op. cit., p. 18.

[29]Lloyd, op. cit., p. 83; and see Lewis v Bankole 1 N.L.R.82 (1909).

[30]Sogbesan v Adebiyi 16 N.L.R.26 (1941).

[31]Inyang v Ita 9 N.L.R.84 (1929). Berkeley J., who upheld the election, observed that this was an innovation - a departure from the custom according to which headship devolves on the eldest male member of the group.

[32]Lloyd, op. cit., p. 84.

[33]Coker, op. cit., p. 70.

There is no legal principle upon which these powers of the family head can be based. It is hardly satisfactory to justify them by the assertion that he is "a significant member of the family, significant in the sense that he enjoys certain peculiar rights and privileges to which certain duties are correlative."[34] It is true that he is the chief priest of the group[35] and presides over the meetings of the family, which are usually held in his house. He allocates land for farming and other purposes, and receives any income, such as rents, tributes or compulsory acquisition money, from communal lands. He also takes actions necessary to protect family property against unlawful interference and to recover family lands from stranger-occupiers who are in breach of some condition of their occupancy. These functions are not unimportant, yet we submit that they do not justify the power of alienation; for in exercising the other functions, the head is subject to the will of the group expressed at its meetings. He does not override the decision of the group. It is true that he cannot be deposed, but if he becomes unpopular he may be ignored by the members.[36]

Nor can the power of alienation be supported by the trust concept. The head of the family is often referred to as a trustee of the family property.[37] But if he is a trustee then the other members of the family are the beneficiaries of the trust.[38] One of the cardinal rules of the law of trust is that if the beneficiaries are sui juris and absolutely entitled to the trust property they can call upon the trustee to execute a conveyance of the legal estate as they direct.[39] But as the

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[34]Jegede, 7 Nig. Bar J. 21, 29 (1966).

[35]Obi, op. cit., p. 24.

[36]Lloyd, op. cit., p. 83.

[37]E.g., Amodu Tijani v Secretary, Southern Nigeria 2 A.C. 399 (1921); Sunmonu v Raphael [1927] A.C. 881, 884; Bassey v Cobham 5 N.L.R.90 (1924); Archibong v Archibong 18 N.L.R.117 (1947); also Elias, op. cit., 117; Coker, op. cit., passim.

[38]Dr. Jegede has argued that the head of the family cannot correctly be described as a trustee of the family property, 7 Nig. Bar J. 21 (1966).

[39]Lewin, The Law of Trusts, 622 (15th ed.).

law stands neither the principal members nor the entire family is legally entitled to compel the head to convey family land.[40]

Nor can it be said that in attributing these far-reaching powers to the family head the courts are employing an historical method of inquiry, applying traditional rules of customary law.[41] Nigerian elders and chiefs familiar with those rules will admit that family property cannot be validly alienated without the authority of the family; that such authority resides in those family members, including the head, who represent the various branches or segments of the family;[42] that if their consent is not obtained the alienation is not valid and the family will then be entitled to recover the land. They will certainly not explain the situation in terms of void and voidable alienations, for those concepts are unknown to customary law. In other words, the ordinary vendor or purchaser under customary law does not appreciate the difference between having a title which is good until proved bad or a bad one which can become good through lapse of time.[43] It is equally futile to expect him to appreciate the doctrine of bona fide purchaser for value without notice.

The Case Law

The propositions that a conveyance of family property cannot give any title to the grantee unless the family head joins therein, even if he supports the alienation; that the alienation of such property by the head of the family without the consent of the family is voidable, and that the alienation by the family without the consent of the head is void ab initio, have their origin in the Ghanaian case of Agbloe v Sappor.[44] Here four principal members of the Tettey-Ora family conveyed a portion of the family land to Sappor by a written document, as a gift in appreciation of his generous efforts in redeeming family property pledged by a previous head of the family. The current head of the family and the remaining principal member did not sign the conveyance because either they deliberately refused, or did not approve of the action, or were not approached out of the belief

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[40]Asheye v Akerele 1 All N.L.R. 294, 299 (1966).

[41]Ajayi, Integration of Customary and Modern Legal Systems in Africa 116 (1971).

[42]See Lloyd, op. cit., p. 340.

[43]See Lloyd, op. cit., pp. 340-341.

[44]12 W.A.C.A 187 (1947).

that they would not support the action.

The West African Court of Appeal was called upon to decide whether, according to native law and custom, Sappor had title to the land. The court decided that he did not because (i) the alienation of family property is valid only if the head of the family and the principal members concur; (ii) a conveyance of such property cannot give any title to the grantee unless the head joins therein, even if he supports the alienation; and (iii) an alienation of such property without the concurrence of the head is void ab initio. In coming to these conclusions the court relied on Sarbah's books on the principles of Fanti customary law which assert that in every case family land is alienated by the head of the family.

The principles enunciated in the above case were introduced into Nigerian law in Ekpendu v Erika,[45] the first reported Nigerian case in which the head of the family did not participate in an alienation. All the previous cases on the topic concerned alienations by the head of the family without the consent of some of the principal members, and held that such alienations were voidable at the instance of the non-consenting members.[46] There was also no case in which the head of the family alone alienated such property without the collaboration of any member of the family.[47]

In the Erika case, A, a member of the Onyika family leased to E and El land which had originally belonged to Onyika, without obtaining the consent of the family. O, the head of the family, commenced this action against E, El, and A, claiming a declaration of title, damages and an injunction. At the trial A contended that he had acquired the land in such a way that it had become his absolute property. This was rejected by the court which ruled that the land remained Onyike family property. Then the defendants contended that the lease was merely voidable relying on

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[45] 4 F.S.C. 79 (1959).

[46] Aganran v Olushi 1 N.L.R.66 (1907); Esan v Faro 12 W.A.C.A. 135 (1947); Onwuka v Abiriba Clan Council 1 E.N.L.R. 17 (1956).

[47] In Adebudu v Makanjuola 10 W.A.C.A. 33 (1944), it was not established whether or not the head of the family obtained the consent of the principal members; hence the case was sent back to the court below to ascertain this fact.

Manko v Bonso[48] and Esan v Faro[49]. Counsel for the plaintiff, replied that the lease was void ab initio, on the authority of Agbloe v Sappor.

Abbott, F.J., who read the judgment of the Federal Supreme Court, acknowledged that Agbloe v Sappor had been decided in Accra and arose on a point of Fanti customary law, whereas Esan v Faro was decided in Lagos with respect to land in Lagos. This notwithstanding, he was of the view that the judgment in Agbloe v Sappor was not based on any native law and custom peculiar to the Fanti tribe. Consequently, the statements of law therein were applicable to family land wherever it is situated - in Fanti territory or in Nigeria. The joint effect of the two decisions, he concluded,

> is that a sale of family land which the head of the family carries out, but in which other principal members of the family do not concur, is voidable, while a sale made by principal members without the concurrence of the head of the family is void ab initio.

On the basis of this principle the leases to the defendants, said the court, were void ab initio.

This decision is hardly satisfactory. There is no warrant to hold, without satisfactory evidence to that effect, that the customary laws of the Fanti tribe in Ghana and any tribe in Nigeria are identical on any topic. It is a notorious fact that even within a tribe the customary laws of the different sections sometimes vary widely on any given question. It is thus startling to assume without proof that the customary laws of the Fanti people of Ghana and a section of the Yoruba or the Ibo of Nigeria are the same on alienation of family property. Above all, it is now trite that customary law is a question of fact and must be proved by evidence unless it has become entitled to judicial notice by virtue of its acceptance by competent courts in previous cases.[50]

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[48] 3 W.A.C.A.62 (1936).

[49] 12 W.A.C.A. 135 (1947). These cases do not, however, support the defendants' contention because they decided that alienation of family land by the head of the family and others without the consent of some principal members is voidable.

[50] Evidence Act 14; and see generally Park, The Sources of Nigerian Law ch. 6 (1963); Allott, New Essays in African Law ch 8 (1970).

It should, however, be stressed that the view expressed by Abbott is typical of a number of expatriate judges in West Africa in the colonial days. These judges, either from convenience or ignorance, took the view that the customary laws of the peoples of the West Coast of Africa were uniform. Therefore once the customary law of a community on an issue was known, it could be applied to any other community in West Africa.[51] But this is certainly erroneous and has recently been unequivocally rejected by the Nigeria Supreme Court in Taiwo v Dosunmu.[52] According to the court, the custom of the Ga or Fanti of Ghana on the question of the accountability of a family head cannot, without proof, be accepted as identical to that of the Yoruba of Lagos. And the fact that a custom is judicially noticed in Ghana, even by W.A.C.A. which had jurisdiction over Nigeria, does not mean that the existence of that custom in Lagos will be judicially noticed by the Nigerian courts. It seems, therefore, that one of the logical effects of the Dosunmu case is to destroy the authority of the Erika case and subsequent cases based on it.

But the unsatisfactory state of this branch of the law is best shown by the recent case of Lukan v Ogunsusi.[53] The land in dispute in that case originally belonged to the Ajenugba family of Ibadan. In 1952 the plaintiff purported to buy it from the family, and the conveyance was executed by three persons who professed to be members of a committee managing the family's affairs. In 1964 the defendant bought the same land from the family and the conveyance was executed by the head of the family (the Mogaji) and two of the three men who, in 1952, had conveyed the land to the plaintiff. When the defendant took possession of the land and started building operations, he was promptly challenged by the plaintiff; and when he paid no heed this action for trespass was commenced, seeking damages and an injunction.

The learned trial judge dismissed the plaintiff's case, holding that the sale to him, which was without the concurrence of the Mogaji, was void ab initio. On appeal, the Western Nigeria Court of Appeal took the view that whether or not the family had appointed the three members to manage its affairs, both the family and the Mogaji knew that those men were doing so, and that they were selling land, but did nothing to stop them. The family, therefore, held out the three men as its representatives for the sale of family land. Thus when the men entered into a transaction with a third party within the scope of their

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[51] See, e.g., Eze v Igiliegbe 14 W.A.C.A. 61 (1952); Adebudu v Makanjuola 10 W.A.C.A. 33, 36 (1944).

[52] [1966] N.N.L.R. 94.

[53] 5 S.C. 40 (1972).

ostensible authority, the family could not deny their agency. It was immaterial that in fact they had no authority, or that they acted in excess of their usual authority. The sale to the plaintiff, said the Appeal Court, was therefore valid.

This decision was reversed by the Supreme Court, which rejected the introduction of the law of agency. It was a misconception, said the court, to think that three members of the family none of whom was the Mogaji, or appointed to sell family land, could pass a valid title to a purchaser merely because the family including the head, became aware of the sale and did nothing about it. At the conclusion of the judgment the Chief Justice restated what he considered to be the legal position on the sale of family land as follows:

> 1. Bello Adedubu & Anor. v Makanjuola 10 W.A.C.A. 33 laid down the principle that the head of the family cannot dispose of family property without the consent of the family. The sale will be voidable.
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> 2. Adewuyin v Ishola (1958) W.R.N.L.R. 110 went further to say that Bello Adedubu and Anor. v Makanjuola (supra) must not be taken to mean that every member of the family must give his consent. It is enough if a majority of the members give this consent.
> We need to point out here that "majority" does not mean that members of the family will be counted by head; it means no more than a majority of the accredited representatives or principal members of the family.
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> 3. Where however the head of the family as against all the principal members of the family refused the sale of family property, it is submitted that the head of the family cannot unreasonably withhold his consent for such a sale as against all members of the family.
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> 4. Ekpendu v Erika 4 F.S.C. 79 where Esan v Faro, 12 W.A.C.A. 135 and Agbloe v Sappor 12 W.A.C.A. 187 were both considered. [Sic] The joint effect of the two cases is that the sale of family land by the head of the family without the concurrence of the principal members of the family is voidable whilst a sale by principal members of the family in which the head of the family does not concur is void ab initio.
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> 5. The case of Agbloe v Sappor (supra) in itself makes it clear that the principal members of the family cannot give any title in the conveyance of the family, without the head of the family joining in the conveyance, even though he may be in agreement.

It is our view that, though dicta, these statements of the law deserve very close examination, in view of their source. And we respectfully submit that they cannot all be correct, for some are in conflict with others. In the first place, it is difficult to maintain that Adewuyin v Ishola is still good law since Ekpendu v Erika. And even as now interpreted by the learned Chief Justice, we do not see how it can stand with the Erika case. In other words, it is not possible to say in the same breath that (1) family land can be validly alienated only by the head of the family and the majority of the principal members and, (2) that such land can be validly alienated only by the head of the family and all the principal members. Before the Western Nigeria High Court decided the Adewuyin case in 1958, the W.A.C.A. had in 1947 laid down in Agbloe v Sappor and Esan v Faro that family land can only be validly alienated by the head of the family with the concurrence of all the principal or important members. These two cases were considered in the Erika case but the Adewuyin case was not mentioned. In fact it can be argued, and quite rightly, that the latter was never good law. At the time it was decided the Western Nigeria High Court was bound by the decisions of the W.A.C.A. but both Agbloe v Sappor and Esan v Faro - two W.A.C.A. decisions in conflict with it - were not mentioned therein. It is hard not to conclude that the case was decided per incuriam.[54] It is therefore quite significant that despite all these inconsistent holdings, and despite the Erika case, the Chief Justice still felt able to assert that family land can be alienated by the head of the family and a majority of the principal members. It is our humble submission that this is an admission by his Lordship, perhaps inadvertent, that the law as laid down by the Erika case is unsatisfactory.

Secondly, the Chief Justice submitted that if all the principal members decide to sell family property the head of the family cannot unreasonably withhold his consent. Unfortunately he did not say what would be the legal effect of such a sale by all the principal members. It was probably convenient to be silent on this question since the court did not feel able to overrule Ekpendu v Erika and all the cases that followed it which established the principle that any sale without the concurrence of the head of the family is void ab initio. Moreover, in the fifth paragraph the Chief Justice re-stated the principle in Agbloe v Sappor that the principal members cannot give any valid title in any conveyance of family property without the head of the family joining in the conveyance. Yet if the principal members can convey family property without the head, this principle

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[54]See Ezejiofor, "Stare Decisis in the Nigerian Courts," 9 Nig. L.J. (1975).

should be discarded. This is further evidence that the law relating to the alienation of family property is far from satisfactory.

Suggestions for Future Development

In applying the law set out in the foregoing pages the courts have consistently asserted that they are enforcing the existing rules of customary law. It is our opinion that this is incorrect. But the attitude of the courts in this regard is not surprising. It can be compared with the attitude of the common law judges who rarely admit that they create the principles of the common law, but insist that they merely expound and administer the pre-existing rules of the common law.[55]

However, there is much to be said for judicial development of customary law. Thus we should not be understood as advocating that the rules of customary law must always be applied in their unalloyed form, for they may not be equitable or just, or appropriate to contemporary economic and social developments. On the contrary, we entirely agree[56] that there should be a conscious effort by the courts to adapt and modify such rules to suit the changed and changing economic and social conditions of the country. In formulating customary rules for the alienation of family property the objective should be to facilitate such alienation and to secure the title acquired by purchasers. The country is going through a period of economic and social development, and it is in the interest of development that organizations and individuals that require lands for industrial, commercial, or agricultural purposes, or for the establishment of social amenities should be able to purchase them without much difficulty. For the same reason, it is necessary that title acquired by such persons should not easily be faulted. Thus, it is of the utmost importance that any rules designed to regulate the alienation of communal lands should take these considerations into account. The importance of this reasoning is underlined by the fact that practically all non-state lands in the country belong to family or communal groups. Furthermore, the interests and wishes of the family as a whole should be considered, not those of the individual members. The position of the head of the family should be taken into account, but he should not be given undue dominance.

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[55]See Park, op. cit., p. 5

[56]See Ajayi, op. cit.

In the light of these considerations it is submitted that alienations of family land should be upheld as valid if they are carried out by either of the following:

(a) A majority of the principal members including the head of the family; or

(b) All the principal members excluding the head of the family; provided that a principal member should, as at present, be discounted if he is a minor or unavailable.

A majority of the principal members should also be able to alienate without the concurrence of the head of the family, but such alienation should be voidable at the instance of the head of the family and the dissenting principal members. It is tempting to suggest that since family land belongs to all the members of the family its alienation should be carried out by or with the approval of all or a majority of them. But this will hardly facilitate dealings in family land. Often a family is made up of scores of members and it will undoubtedly be difficult to assemble all of them each time it is proposed to sell family land. However, families are subdivided into branches, whose members are descended from a common grandfather or great-grandfather - or if he was polygamous, a grandmother or great-grandmother. The head of each branch is a principal member of the family and his opinion on a sale of family land should be guided by the views of the members of the branch. The principal members of a family usually constitute a group small enough to meet or consult with each other as occasion demands. Consequently, both on practical and equitable grounds a sale of family land by a majority which includes the head should be supported. If, on the other hand, all the principal members agree to a sale, the head of the family alone should not stand in their way. He is always the head of a branch, and there is no reason why in that role, or even as the head of the family, he should be allowed to frustrate the desires of the entire family. It is rather difficult to justify this on the basis of his position as a caretaker or manager of family land.

If the head of the family as the leader of the group is able to carry a minority of the principal members with him in opposing a sale, their opposition should not lightly be overridden. If he is intelligent, elderly, and conversant with local custom, the head of the family could advance arguments based on custom which might convince some principal members that a particular piece of family land should not be sold, either at all or to a particular person. Therefore the head and a minority of principal members should be entitled to avoid a sale without their consent.

All the principal members including the head should be consulted before a sale is carried out so that they have the opportunity to make their views known, unless they are minors or unavailable, or there is an emergency. Those who are not consulted should be entitled to take steps to avoid the sale.

A sale by one or more ordinary members should be null and void. A family may, however, appoint a committee to manage the family property and handle its land transactions, and it should not matter whether the committee is made up of ordinary members, or principal members, or a combination. Nor should it matter that every branch does not have its member on the committee. It is, however, important that the committee should be composed of honest, intelligent, respected members, and even more important that some of them, at least, be fairly well educated, since they might be involved in negotiations with agents of the government as well as indigenous or foreign firms. Members of the committee should be appointed by a general meeting of the family to ensure that both the creation of the committee and the identity of its members are sanctioned by the family. In the interest of anybody who might wish to have dealings with the family regarding its lands, this fact should be publicised.[57] Once such a committee of trusted members is duly selected and given full powers it should become incompetent for the head or any other family member to dispose of family property. The courts have stated obiter, and quite rightly, that sales by such a committee would be upheld.[58] They did not, however, advert to the question whether the committee must be unanimous in order to alienate or whether a majority of them could do so; it is submitted that a majority of the committee should be able to alienate.

All the principal member who consented to the alienation should validly convey the land on behalf of the entire family. Those who do not join in the conveyance should sign as witnesses to signify their agreement. If the head of the family supports the alienation he should participate in either of these capacities but his failure to do so, or the failure of any other principal member, should not be fatal to the transaction. If it becomes an issue whether they consented to the alienation it should be provable by external evidence that they gave their consent. If the alienation is carried out by a committee the land should validly be conveyed to the purchaser by all the members thereof

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[57]Often families put out important announcements or warnings about their communal lands in the daily newspapers.

[58]See Foko v Foko [1965] N.N.L.R. 3; Lukan v Ogunsusi [1972] S.C. 40.

on behalf of the family.

The question of how the conveyance occurs is relevant only when the purchaser intends to convert the land into English tenure[59] or when he wishes to have a written evidence of a transfer already completed under native law and custom.[60] If, on the other hand, the transfer is concluded completely under customary law, then writing is unnecessary[61] and full ownership passes to the purchaser once he pays the purchase price and is let into possession.[62] In order to secure legal title, the purchaser must remain in continuous and undisturbed possession for many years;[63] in the meantime, he has only an equitable interest which can be overridden by a conveyance of the legal estate to a subsequent purchaser without notice.[64] The requirement of continuous and undisturbed possession should be discarded because it introduces uncertainty and consequently insecurity of title since it is not certain how many years are necessary to transfer legal title to the purchaser.

In addition the agreement must be "sealed" and the land "handed over" to the purchaser at a ceremony before witnesses.[65] The courts have not specifically stated who must participate in the ceremony or who must serve as witnesses. It is submitted that the handing over, which is a symbolic delivery of possession of the land in question, should be done by the head of the family and the principal members who consented to the alienation,

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[59]On conversion of land from customary to English tenure and vice-versa see Park, 9 J.A.L. 1 (1965). To convert to English tenure adequate words of limitation must be employed in the conveyance. See Coker v Animashawun [1960] L.L.R.71; Alade v Aborishade 5 F.S.C.167 (1960).

[60]This is a recent development and the writing only serves as a recorded evidence of the transaction. See the Ghanaian case of Cofie v Otoo [1959] G.L.R. 300.

[61]Akinghade v Elemosho 1 All N.L.R.154 (1964); Cole v Folami 1 F.S.C.66 (1956).

[62]Ogunbambi v Abowab 13 W.A.C.A.222 (1951); Amoo v Adebona [1962] L.L.R.125.

[63]Olowu v Oshinubi [1958] L.L.R. 21.

[64]Orasanmi v Idowu 4 F.S.C. 40 (1959).

[65]Onykonwu v Okeke 5 E.N.L.R. 48 (1961); Taiwo v Ogunsanya [1967] N.N.L.R. 375; Cole v Folami 1 F.S.C.66 (1956); Erinosha v Owokoniran [1965] N.N.L.R. 479.

or a group of them representing the others, and similarly if the alienation is carried out by a committee. Witnesses should comprise any independent third parties separately nominated by both parties, and if adjacent land belongs to a third party then the latter should also be as a witness.

## Conclusion

These procedures seem the most convenient and equitable arrangements for the disposition of family land. Intending purchasers would know for certain the persons to deal with in order to get a valid title and the family would cease to be menaced by the whims of its head. It is hoped that through judicial encouragement and the realisation by the people of its merits, the procedures will be the only mechanism for the disposition of family property. After all, the most important attribute of customary law as a dynamic and flexible institution is its adaptability to changing conditions.