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Contemporary Issues in the Nigerian Legal Landscape.

A Compendium in Honour of

Prince Lateef Fagbemi, SAN

Foreword by:
Hon. Justice Kayode ESO, CON LLD LITT.D

Edited by:
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ISBN 978-2210-27-7

First Published 2010

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Crown Goldmine Communications Limited

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PROOF OF OWNERSHIP UNDER THE CUSTOMARY LAND TENURE SYSTEM: A CRITICAL APPRAISAL.

Olusegun Onakoya*

Introduction

Historically, before the advent of British Government in the geo-political area which later became Nigeria in 1861, the people from the major ethnic groups, namely the Yorubas (of the South-West), the Ibos (of the South-East), and the Hausas (of the Northern Region) alongside different ethnic minorities scattered all over the nation operated land tenure system which was indigenous to the people.

Like other customs, norms, values and traditions, the customary land tenure system varied from place to place and was accepted as "a mirror of acceptable usage".

This system which evolved due to the long practice and acceptability among different ethnic groups continue even after the advent of the British Government, notwithstanding statutes enacted on the subject of ownership of land to suit its need.

Before Nigeria gained Independence from the British Colonial masters, there was the era of slave trade in Africa which led to what was known as 'Scramble and Partition' of different communities by the colonial masters to enhance the then thriving slave trade and colonization.

The issue of land ownership became more noticeable during the aforesaid time, as there were subtle attempt by the colonialists to annex the land of the colonized people.

For instance, in the geographical area which later became Nigeria, a number of Ordinances were passed in respect of the land policy of the Government. These include the Native Lands Acquisition Proclamation, 1900; the Native Lands Acquisition Proclamation,

1903; the Crown Lands Management Proclamation, 1906 as amended, the Native Acquisition Ordinance 1917, the Niger Lands Transfer Ordinance, 1916 and the Crown Ordinance, 1918 e.t.c.

It is of particular interest to note that in Southern Nigeria, following the colonization of Lagos by the British Government, the Treaty of Cession, 1861 was entered into between the British Government and king Decemo.

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Article 1 of the treaty provided as follows:

> *I, Decemo, do, with the consent and advice of my Council, give, transfer, and by these present grant and confirm unto the Queen o f Great ~~British~~ Britain, her heirs and successors for ever, the port and Island of Lagos, with all the rights, territories and appurtenances whatsoever thereto belonging.....*[1]

This very act of King Decemo nevertheless brought confusion into the issue of Ownership under the Customary Land Tenure System.

The position in Northern Nigeria was not in anyway different from what happened in the colony of Lagos rather it revealed the direct assault on the natives who were predominantly uneducated by the Colonial Masters.

In Northern Nigeria, following the revocation of the charter of the Royal Niger Company and the Proclamation of the Protectorate of Northern Nigeria, agreement were entered between the High Commissioner, Sir Frederick Lugard and representatives of the company under which all lands, rights and easements were vested in the High Commissioner for the time being in trust for His Majesty, His heirs and Successors.[2]

The Niger Lands Ordinance, 1916 to the protectorate was later enacted. However, still in a bid to streamline and clarify the land tenure system in the North, a committee was set up in 1908 which made far-reaching recommendations. The immediate effect of the committee's recommendations was enactment of the Lands and Native Rights proclamation, 1910. By section 2 of the proclamation, the whole of the lands of the protectorate of Northern Nigeria, whether occupied on the dates of the commencement of the proclamation were declared native lands.

However, in a bid to regulate and ensure a Uniform Land Tenure System in Nigeria, a major decree was promulgated in 1978. The Federal Military Government set up the Land use panel in 1977, 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 step 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 recommendations.

The panel came out with very far-reaching recommendations, particularly as these related to the land tenure system in the Southern States. The recommendations were studied by the Government, the result of which was promulgation of the Land Use Decree, No. 6 of 1978.

THE DUALITY OF LAND TENURE.

Nigerian jurisprudence recognizes five main sources of Nigerian law. These are the Received English Law, Nigerian legislation, Nigerian case law, Customary law and Islamic law. In a country operating a plurality of legal systems and such diverse sources of law, there is bound to be duality in virtually all aspects of the legal system.

It is therefore not surprising that there are diverse ways by which ownership of land can be proved, depending on the type of land tenure system.

CUSTOMARY LAND TENURE SYSTEM.

It is significant that the definitions of land be examined, to know what the concept depicts, this will enable a party claiming ownership of a piece or parcel of land to know exactly what his claim entails.
Generally, land is defined to include not only the surface of the earth and the subsoil but also all appurtenances permanently attached to it. These include buildings, trees, streams and ponds. Thus, section 3 of the Interpretation Act provides that immovable property or lands include "land and everything attached to the earth or permanently fastened to anything which is attached to the earth and all chattels real."[3]

However, the Property and Conveyance Law of Western Nigeria gives a wider definition as follows:

> *Land includes land of any tenure, buildings (whether the division is horizontal, vertical or made in any other way), and other corporal hereditaments, and an easement, right, privilege or benefit in, over, or derived from land.*[4]

Nwabueze[5] also endorse the above definition when he stated that:

> *It seems to be agreed even among laymen that land does not just mean the ground and its subsoil, but includes also all structures and*

objects, like buildings and trees standing on it .... But the legal concept of land goes further than this and includes even abstract, incorporal 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.

In his own view, Olawoye[6] while examining the legal concept of land under customary law defines Land in the following terms:

Thus as conceived by law, land includes 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 also includes streams and ponds. On the other hand, things placed on land, whether made of the product Of the soil or not, do not constitute land.

It is obvious from the foregoing; that the legal maxim of the English common law of ***qui quid plantatur solo solo cedit*** which literally means that 'whatever is affixed to the soil belongs to the soil', is applicable to the definition of land within the context of the Nigerian Legal System.

This position is supported by the erudite scholar and Jurist, Elias[7] when he asserted that:

The Roman law doctrine of quic quid plantatur solo solo, 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, convenient and universal.

CONCEPTS OF RIGHT, OWNERSHIP AND POSSESSION

It is important, for ease of understanding to examine the above concepts, particularly as it relates to customary Land Tenure System in Nigeria.

RIGHT:

At law, land in its physical state is not capable of ownership, rather the subject of ownership[8] consists of some right to use and enjoy the land to the exclusion of other persons which is recognized and protected by law.[9] These rights vary in degrees. Broadly speaking, these are denoted by 'ownership' and 'possession'.

(i) Ownership

This concept signifies the maximum right or interest that exists in land. The right of the owner is therefore, not subject to or restricted by, the superior right of another person. Ownership vests in the owner the right to possession. The right to possession may be immediate as when the owner is actually in possession on the other hand, possession is mediate, where the owner grants possession of his land to another person, the ownership remains with the grantor while possession inheres in the grantee for the duration of the grant. However the right of possession to the land reverts to the owner when the grant comes to an end and he can then resume possession.

In customary law parlance, ownership is expressed by the concept of "absolute" ownership.[12]

(ii) Possession

This is the physical control of a person exercises in relation to land. The right to possession of land may be lawful or wrongful. It is lawful where it is exercised as a right of ownership. It may also arise by virtue of a grant from the owner of the land. On the other hand, the right to possession is wrongful where it is exercised neither by virtue of right of ownership nor grant. An example of this is the possession of a

trespasser or squatter

A wrongful possession is expressed technically as "adverse" possession.

It is imperative to note that adverse possession is good against the whole world except the true owner. To that extent it is protected by law.

The lawful right to possession confers on the possessor the right to occupy and use the land and it is usually expressed as possessory interest. The interest is preserved by law. In this sense, it is a lesser degree of ownership and sometimes referred to as "limited ownership".

It is limited because the right to possession is subject to the ultimate title of the owner and has a definite duration. However, it may be granted to enure for an indefinite period, such as under customary law which is replete with such examples. For instance, the grant of possession of communal or family land to a tenant, gives rise to the concept of limited ownership. Thus the term 'owner' is loosely used under customary law to describe 'absolute ownership' and sometimes 'limited ownership'.

It is also quite significant to note that possession may be the basis of ownership. Our customary law exhibits this characteristic feature. Thus, where there are rival claimants of land, title belongs to the claimant who is able o prove that he was the first to enter into possession.[13]

However, contrary to the view that the concept of ownership was unknown to customary ideas,[14] it has long been settled that the concept is not strange to customary law.[15] Notwithstanding what appears to be an imprecision to the term 'owner' under the Customary Land Tenure System. The term which signifies the largest claim to land is not only a familiar but recognized concept of customary law. It could therefore be asserted that ownership could either be held by the community, family and individual.

CUSTOMARY LAND TENURE SYSTEM

The customary land tenure system in Nigeria could be broadly classified into three major categories, namely: (1) Communal Landholding (2) Family Landholding and (3) Individual Landholding.

* **Communal Landholding**

  The basic rule under customary law is that land belongs to the villages, communities or families on which the Chief or Headman of the community or the family head as "Manager" or "Trustee". Legal Scholars and writers[16] on land law seen to agree on the fact that one of the most important basic unit of ownership is the community.

This position is underscore by the court in **Omoraka Ovie v. Onoriobokirhie**[17] where it was stated thus:

> *The general law as it has been applied in all courts is that all land in Nigeria are communally owned in the area where they are situated, circumstances do not form the object of individual ownership.*

> ***It is usually stated and generally agreed***[18] ***that:***
> *Land belongs to a vast family of which many are, few are living and countless of the dead and unborn count more than that of the living members. If land can be said to be owned by any one, it is the dead and the unborn.*

Land is vested in the community as a corporate whole, individuals within the community can not therefore lay claim to ownership of the land. It is important to also note that title to land owned by a group such as a community is vested not in any member of that group but in the unit as a representative of the entire members of that community.

The representative of such a unit exercise the right on behalf of and in the name of the right on behalf of and in the name of the members

since the community cannot act on its own, the head of the community exercise the powers that are supposed to be exercised by that community. This is one of the most remarkable principles of customary land tenure system.

Thus in **Amodu Tijani v. Secretary Southern Nigeria**[19] the court held that land belonged to the community, village or the family and never to the individual. It held thus:

> *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.*

It is imperative to note that members of the community have definite rights in communal lands which vary from localty to locality. It is however generally believed that a member of the community has equal right to a portion of communal land upon which to build and farm.[20]

It should be further noted that upon allocation of a portion, member does not become the owner of the land. He enjoys exclusively possession while the title remains with the community. However, while the allocation subsists, the headman cannot make an inconsistent allocation or grant to another person.[21]

* **Family Land Tenure System**

R. W. James and A. B. Kasumu,[22] gave two primary meanings to the term 'family' under the customary law:

> *For certain purpose, the term is confined to the immediate family i.e. the children of the person whose family is in issue, while for other purposes, the term is given an extended*

meaning and it then refers to the descendants of a common ancestor.

Dr. T.O. Elias[23] defined the family as-

The smallest society unit in the body polity which is variously composed of a man, his wife or wives and the children.

The terms can therefore be defined to mean a group of persons who are entitled to succeed to the property of the deceased founder of the family. Mainly, children of the deceased person fall within this category.[24] Children, in this context refer to both sexes that is male and female, particularly in the Northern and Southern Nigeria.[25]

However, in some jurisdictions, like some parts of Ibo land, for instance in Onitsha, female children cannot inherit landed property.[26] The Supreme Court of Nigeria in the case of **Nezianya v. Okagbue**[27] confirms the above-stated position when he upheld the Custom.

One issue that deserves a special mention is that of recurring but controversial issue of alienation of family property, that is, where a land is designated a 'family land' on whose head lies the responsibility to alienate same, either by way of sale or gift.

The general principle in law is that family land is vested on the family as a corporate entity. The individual member of the family therefore, has no separate claim of ownership to any part or whole of it. A member has no disposable interest in family property either during his life time or under his will. It is only the family that can transfer its title to any person. A purported transfer of family land by a member of the family is void and of no effect. Thus, the Supreme Court in **Peter Ojoh v. Kamalu & 3 ors** stated as follows:

Sale of family land by a member of the family, who is not the head of the family, and without the consent or concurrence of other members of the family is void. The instant

case is a clear case where a member of a community without the consent or concurrence of other members of the family community sold communal land to the defendant appellant. Such a sale is void.

In the same vein, the court in **Frank Coker v. George Coker**[29] held with respect to the ownership and management of family house as follows:

A family house in this connection is a residence which the father of a family sets apart for his wives and children to occupy jointly after his deceased. All his children are entitled to reside there with their mothers and his married sons with their wives and children. Also, a daughter who has left the house on marriage has a right to return to it on deserting or being deserted by her husband. It is only with the consent of all those entitled to reside in the family house that it can be mortgaged or sold.

It is instructive to note that the creation of family determines ownership of its land and other incidents. The court in **Olowosago v. Alhaji Adebanjo**[30] identified the following ways by which family land could be created namely;

(a) *Where the land Owner whose estate is governed by customary law dies intestate, such land devolves on his heirs in perpetuity as family land.*

(b) *Family land can be created by a Conveyance intervivos, where land is purchased with money belonging to the family.*

(c) *Family land can also be created by the*

use of the appropriate expression of the owner of such land.

It should however be noted, that family land ceases to be such on partition on the consensus of the family head and other members of the family,

It is also a well settled principle of law that family land may evolve where a family, through their own ancestors were the first to settle on a virgin land and exercised acts of ownership over sufficient length of time, numerous and positive enough to warrant inference of exclusive ownership.[31]

Historically, land territories were either named after the first dwellers of the said territory who in most cases were warriors, thus conquest became one of the recognizable ways by which families base their ownership.[32]

However, in these modern times, the incidence of conquest has greatly diminished.

* **Individual Land holding** under the Customary Law appears to be a controversial issue as different learned authors have argued for its non-existence.

The courts were not left out in the debate on the position of individual ownership of land under the Customary Land Tenure System in Nigeria.

In **Amodu Tijani V. Secretary of Southern Nigeria**[33] Lord Haldane hold as follows:

The next fact which it is important to bear in mind in order to understand native land law is that the notion of individual ownership is quite foreign to native ideas. Land belong to the community, the village or the family, never to the individual. This is a pure native custom along the whole length of this coast, and

> *whenever we find, as in Lagos, individual owners, this is again due to the introduction of English ideas.*

However, the assertion of Lord Haldane has been variously criticized by learned authors including Niki Tobi[34] as too 'sweeping'. He stated thus:

> *It is submitted that the statement is too much of a generalization and therefore not much of certain indigenous systems of land tenure and particularly in Lagos where the case arose. The question of individual ownership of land was known to customary law in the country before the arrival of the British. It is therefore not correct, as claimed by His Lordship that even if such a system existed, it was as a result of contact with English ideas.*

It could therefore be rightly submitted that considering the family structure and its relationship to land before the advent of British, the whole idea of communal or family ownership emanated from individual ownership. The whole essence of the courts' judgement in **Oragbade v. Onitiju;**[35] **Chukwueke v. Nwankwo**[36] **and Otogbolu v. Okeluwa**[37] and the hosts of other cases is that land was originally owned by the individual and the concept of communal ownership of land was a later development.

However, it is instructive to note that modernization, urbanization and the force of socio-economic activities since independence have brought individual ownership into greater prominence.

PROVE OF OWNERSHIP

As earlier noted, the concept of ownership in relation to the customary landholding in Nigeria is not only vague but flexible and it is one aspect of litigation that has gained prominence and notoriety over the years, particularly in the southern Nigeria.

The general principle of law is that he who asserts must prove. However, the Evidence Act[38] has clearly spelt out the required

standard of prove in land matters. Section 135 of the Evidence Act provides as follows:

> *(1) Whoever desire any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exists*
>
> *(2) When a person is bound to prove the existence of any fact, it is said that that burden of proof lies on that person.*

Land matters are classified as civil cases, hence the applicability of section 137 of the Evidence Act which deals with all civil cases.

For ease of reference, the provision is reproduced as follows:

> *(1) In civil cases the burden of first proving the existence or non-existence of a fact lies on the party against whom judgment of the court would be given if no evidence were produced on either side, regard being had to any presumption that may arise on the pleadings.*

Sub-Section (2) further provides that-

> *If such party adduces evidence which ought reasonable to satisfy a jury that the fact sought be proved is established, the burden lies on the party against whom judgment would be given if no more evidence were adduced; and so on successively, until all issues in pleadings have been dealt with.*

Similarly, section 146[39] specifically provides for burden of proof as to ownership as follows:

> *When the question is whether any person is*

owner of anything of which he is shown to be in possession, the burden of proving that he is not the owner is on the person who affirms that he is not the owner.

It is therefore against the backdrop of the foregoing that we shall examine the specific requirements for prove of ownership of land under customary law.

In the celebrated case of **Idundun v. Okumagba**[40] the Supreme Court of Nigeria clearly spelt out the ways of establishing ownership of land under the Nigerian jurisprudence in the following words.

(1) Traditional Evidence.

(2) Production of documents of title which are duly authenticated.

(3) Acts of selling, leasing, renting out all or part of the land or farming on it or on a portion of it.

(4) Acts of long possession and enjoyment of the land and
(5) Proof of possession of connected or adjacent land in circumstances rendering it probable that the owner of such connected or adjacent land would, in addition, be the owner of the land in dispute.

The aforementioned ways of establishing ownership of land under the Nigerian legal system are still being religiously followed by the courts till date.

Quite significantly, the traditional evidence is usually adopted by litigants to prove ownership of land under the customary law.

In **Melford Agala & 2 ors v. Chief Benjamin Okusin & 3 Ors.**[41] His Lordship Ogbuagu, JSC relying on the case of Alli v. Aleshinloye held as follows:

Evidence of traditional history in land matters which is nothing short of evidence of a historical fact transmitted from generation to generation in respect of a family communal land may, in appropriate cases be given by any witnesses who by virtue of their relationship and circumstances and before them, their ancestors, with the land owning family or community, are in a position and knowledgeable enough to testify on the traditional evidence in question.

He went further by stating that-

Such witnesses may include those who by virtue of the intimate and age-long close association, interaction and/or relationship from time immemorial between the family or community and those of the land owners are in issue are clearly knowledgeable and in as a good position, if not better than the land owners to give cogent and relevant traditional evidence in respect of such land.

It is therefore imperative to note that although evidence of traditional history is clearly admissible in law, the weight to be attached to it is a matter which is left to the discretion of the court given his experience and wisdom.

One very fundamental but controversial issue in relying on traditional history to prove ownership of land is the issue of conflict in traditional histories placed before the court by the litigants. The court is usually faced with the knotty problem of which of the traditional history is authentic. The Supreme Court of Nigeria in case of **Chief Lasisi Oyelakan Balogun & 3 ors. v. Onaolapo Akanji**[42] confirmed the position thus:

When a court is evaluating the evidence as to which of the versions of the evidence on two

conflicting histories is the more probable in a case for declaration of title where both parties have pleaded traditional history as their sources of title, it must be recognized that in the course of transmission from generation to generation, mistake may occur without any dishonest motives whatever. Witnesses of the utmost veracity may speak honestly but erroneously as t o what took place a hundred or more years ago. Where there is a conflict of traditional history, one side or the other must be mistaken, yet both may be honest in their belief. In such a case, demeanour is little guide to the truth. The best way is to test the traditional history by reference to the facts in recent years as established by evidence and seeing which of two competing histories is more probable.[43]

However, it should be noted that there is a distinction between proof of title by evidence of traditional history and acts of ownership. Arguably, it is submitted that a party who relies on acts of ownership spanning several years as his root of title is in fact saying or confessing that he does not know the historical origin of his title but that his family has openly and without resistance from anybody been exercising dominion as the owner of the land for several years. The court may inter from such evidence that even if the plaintiff has not shown the origin of his title, he may be accepted as the owner from such acts of open and unchallenged ownership.

This position was confirmed by Fatayi – Williams JSC (as he then was) in Expo v. Ita[44] where he stated that:

Thirdly, acts of the person (or persons) claiming the land such as selling, leasing or renting out all or part of the land or faming on it or on a portion of it, are also evidence of ownership. Provided the acts extended over a

sufficient length of time are numerous and positive enough as to warrant inference that the person is the true owner.

It is important to note that act of 'ownership' in this context is different from Long 'possession'. The general principle of law is that the latter cannot ripen to the extent of acquiring the status of the former, there are, however exceptions to the general principle which will later be discoursed.

Quite significantly too, the court had at various times distinguished **proof of title by evidence of traditional history** and **acts of ownership**.

In **Balogun v. Akanji**,[45] Oguntade JSC underscore the importance of distinction between the aforestated proofs of title in the following words:

> *Whilst the evidence in proof of either in a claim for declaration of title may overlap, the recognition of each as different to the other helps to remove the error and confusion to which parties and counsel are prone. A plaintiff may by hiss statement of claim rely solely for the title he asserts in a claim for declaration of title on traditional history. On the other hand, since it is permissible to plead in the alternative, he may rely on both methods i.e. traditional history and acts of ownership. Where he fails on the former, he may well succeed on the latter because in their nature, both are different.*

The party relying on evidence of tradition in proof of title to land must plead and establish such facts as:

1. Who founded the land
2. How he founded the land
3. The particulars of the intervening owners through whom

he claims.[46]

It is therefore essential that the plaintiff sufficiently trace his title to the root of the title, that is the original owner *(whether by settlement or conquest among others)*.

Of the five methods of establishing ownership as enunciated in **Idundun v. Okumagba**[47] only production of documents of title which are duly authenticated is rarely used in proving customary ownership of land.

The court in **Adetutu Adesanya v. Alhaji S. A. Aderonmu & 2 Ors**[48] stated that:

> *Once a party pleads his root of title over a land to a particular source and this averment, as in this case, is challenged, that party, to succeed as a plaintiff in the action MUST*[49] *not only established his title to such land, he must also satisfy the court as to the title of the source from whom he claims to derive his title to the land.*

It is instructive to note that in prove of ownership of land under the customary land tenure system, the onus of proof cease to be on the plaintiff who successfully discharged same.

The Supreme Court of Nigeria in **Balogun v. Akanji**[50] alluded to the aforestated position when it held as follows:

> *A careful consideration of the authorities and decided cases amply shows that there is no onus on a plaintiff who claims title by traditional evidence and who successfully establishes his title by such evidence to prove further acts of ownership numerous and positive enough to lead to the inference that he is the exclusive owner. When a plaintiff has proved his title directly by traditional*

evidence, there will be no need again for an inference to establish that which had been already directly proved. Acts of ownership become material only where the traditional evidence is inconclusive. In the case on appeal where the trial court held that the traditional evidence led was conclusive, there was no need whatsoever to require further proof. That will be increasing unnecessarily the burden of proof on the plaintiffs...

However, it must be asserted that the Plaintiff has to rely on the strength of his case and not the weakness of the Defendant's case, thus where he fails to discharge the onus of proof on him, he will not be assisted by the weakness in the Defendant's case and proper judgment will be for the Defendant.

The court confirming the aforesaid position in the case of **Arowolo v. Omole**[51] stated as follows:

The Plaintiff or appellant in the instance case must succeed on the strength of his case and not on the weakness of defence. Appellant is not bound to call hosts of witnesses before he could prove his case. But the testimony of the witnesses called must be cogent and credible. In the instant case, the evidence given by the appellant and his witnesses to establish his claim or title to the land in dispute is weak.

Of the five ways of proving ownership of land identified by court in **Idundun v. Okumagba**[52] two of the ways, namely (i) grant and (ii) Long Possession and enjoyment always pose a great difficulty for the court in arriving at a just decision on the issue of ownership.

The Court of Appeal in the case of **Arowolo v. Omole**[53] stated that –

Proof of a grant is one of the five ways of

proving title. If a party bases its title on a grant according to custom by particular family or community, that the party must go further to plead and prove the origin of the title of that particular person, family or community unless that title has been admitted.

It is quite significant to appreciate the fact that a grant of land could either be absolute or partial. An absolute grant is as good as a sale under the native law and custom because in either case, the land is permanently transferred to the grantee. The legal incident of a conditional grant as it affects the grantor and the grantee is different. However, it should be noted that where what passes to a grantee was merely an ***occupational title***, then what is created is a customary tenancy and no more. In other words the grantee has what is described as 'limited ownership' which is subject to the ultimate title of the grantor who has reversionary interest in the land upon the expiration or determination of the grant. The grantee in this instance lacks right of alienation.

The Supreme Court underscored the importance of this distinction when it held in **Isiba & Ors v. Hanson & Anor**[54] that –

This finding that long possession proves ownership overlooks the established rule that once it is proved that the original ownership of property is in a party, the burden of proving that the party has been divested of ownership rests on the other party.

It is observed that a unique kind of grant under the customary landholding tenure is known as "Kola Tenancy".

This type of land tenure system is classified under "tenancy". Kola tenancy was in full vogue and practice in certain areas of Eastern Nigeria, particularly in the Onitsha province of Anambra State. Under this form of tenure, land owners would grant 'unwanted portions of their land to grantee for a kola or other token payment and sometimes for no consideration at all.

The rights of the grantees were practically the same as those of owner-occupiers in respect of usage and occupation and of any disposal, though short of complete alienation. A kola tenancy was normally granted for the life of the original tenant, so that his or her inheritor had to give a fresh kola on succession to the land in acknowledgment of the grantor's title.

However, the fundamental issue under this kind of grant is that the ownership rights of the grantee do not extend to disposition of the property.

IT IS IN THIS RESPECT DIFFERENT FROM AN ABSOLUTE GRANT,[55] it therefore goes without saying that this type of tenancy cannot be used to prove ownership.

It is instructive to note that where a party relies on a purchase or absolute grant under the native law and custom as prove of ownership, he must prove with particularity the origin of his title up to the last and original owner.

The Supreme Court of Nigeria in **Benedict Otanma v. Kingdom Youdubagha**[56] affirmed the aforesaid when it held as follows:

> *Where in a declaration of title to land, a party bases his title on a purchase or grant according to custom by a particular individual, that a party must go further to plead and prove the origin of the title of that particular person. Consequently, mere production of a purchase receipt is not sufficient. In the instant case the appellant relied on the root of title of his vendor whom he described as the absolute owner but did not plead or prove how the vendor became the absolute owner. The documentary exhibits relied upon by the appellant do not amount to proof of title. They only became relevant when title is proved. Having failed to plead and*

prove his root of title, the appellant could not fall back and rely on acts of possession.

LONG POSSESSION AS ACT OF OWNERSHIP

The Supreme Court in **Idundun v. Okumagba**[57] in establishing what later became known as five ways of proving ownership of land, mentioned the Act of Long Possession. However, it should be noted that after this celebrated case, there have been what appears to be a contrary position by the courts. Some of the judicial decisions in this regard have whittled down the importance and potency of this means of proving ownership by narrowing its scope and extent.

The Supreme Court in **Dagaci of Dere v. Dagaci of Ebwa**[58] held as follows on the issue of long possession being a means of prove of ownership-

> *Acts of possession may be taken as acts of ownership if the circumstances are such that the person in possession ought to be regarded as owner, but more is needed than is required to support a claim for trespass.*

The assertion above shows clearly that the incidence of Long Possession as a means of proving ownership is conditional and depends largely on the surrounding facts and circumstances.

The Court of Appeal was not only assertive but very blunt on this issue, when it held in a more recent case of **Adawon v. Asogba**[59] pointedly that –

> *Long possession cannot ripen into ownership. Long possession is more of a weapon of defence on equitable grounds to defeat claims for declaration of title and trespass against the true owner.*[60]

It is noteworthy that in the present times, the doctrine of laches and acquiescence has tried to bring back life to long possession as a means of proving ownership of land under Native Law and Custom. In other

words, the exercise of long possession for well over hundred years undisturbed may give rise to the defence to doctrine of ***laches and acquiescence.***

Generally, the position of law is that proof of possession of connected or adjacent land would in circumstances renders it probable that the owner of such connected or adjacent land would necessarily be the owner of the land in dispute.
It is submitted that, in fact, the owner of an adjacent piece of land might not necessarily be the true owner of the one being claimed.

Arguably, if the incidence of Long Possession as a means of proving act of ownership has been whittled down by **judicial decisions**, it then follows that proving through the ownership of adjacent land might not be sufficient to establish ownership of the piece of land being claimed.

LIMITATIONS TO PROVE OF OWNERSHIP
Generally, there are situations where a party claiming ownership is able to prove his ownership relying on one or more of the ways established by the Supreme Court in **Idundun v. Okumagba**[61] yet will still be faced with other obstacles such as where the action is brought before a court that lacks jurisdiction *(whether territorial or otherwise)* to entertain the suit.

Also, where the action is statute-barred or the Plaintiff is guilty of laches and acquiescence, then the ability to prove ownership will not yield the desired result.

The state High Courts have jurisdiction to entertain disputes over land within their jurisdictions, however this position has not ousted the power of the customary court to assume jurisdiction on disputes over land in the rural areas.

The Supreme Court of Nigeria in the case of **Inakoju v. Adeleke**[62] emphasized the fundamental nature of jurisdiction when it held that-

Jurisdiction is a radical and crucial question

of competence for if the court has no jurisdiction to hear the case, the proceedings are and remain a nullity ab initio, however well conducted and brilliantly decided they might be, as a defect in competence is not intrinsic but rather extrinsic to the entire adjudication. Jurisdiction is the nerve centre of adjudication; it is the blood that gives life to human beings and the animal race.

It is trite law that where a court lacks jurisdiction, any action taken in a suit is a nullity and of no effect at all.

The court in **N. P. A. Plc. V. Lotus Plastics Ltd.**[63] stated the effect of an action that is statute-barred in the following words:

Where an action is statute-barred, a Plaintiff who might have had cause of action loses the right to enforce the cause of action by judicial process because the period of limitation laid down by the limitation law for instituting such an action has elapsed. An action commenced after the expiration of the period within which an action must be brought as stipulated in the statute of limitation is not maintainable. In short, when the statute of limitation in question prescribes a period within which an action must be brought, legal proceedings cannot be properly or validly instituted after the expiration of the prescribed period. In the instant case, the action of the 1st respondent against the appellant which was statute-barred could not have been properly and validly instituted. The action was therefore not maintainable.

The laws of the different states of the federation prescribe the

limitation time within which an aggrieved person can institute an action for ownership of land when he becomes aware of the infraction, trespass or generally adverse claim to his land.

CONCLUSION

The prove of ownership of a piece of land under the customary land tenure system in our legal system is flawed with noticeable irregularities particularly with the usual emphasis on the traditional history, which like our customary law are largely unwritten. Sometimes, the inability to procure witnesses who are contemporary historians or knowledgeable about the history of a given parcel of land may prove fatal, either due to the demise of such people or their being senile.

There is no doubt that this method of proving ownership is difficult, given the specificity and consistency required to convince the court. Where, however there is a break in the claim of the root of title, there is a possibility that the claim will fail in its entirely.

The court has stated on several occasions that what is required from the plaintiff is not merely long 'story' but for such history must be credible and convincing for the court to find in his favour.

In **Dagaci of Dere v. Dagaci of Ebwa**[64] the Supreme Court emphasized the aforestated as follow:

> *In land matters, it is easy for a Plaintiff to claim that he owned the land from time immemorial. The story must go further and paints genealogical tree of the family ownership of the land. It is usually a long story of the land from the past to the present. The plaintiff paints a picture of genealogical lines and names spreading like the branches of a tree, telling a consistent and flowing story of undisturbed ownership or possession of the land. And the flowing story which should first be told in the pleadings should mention*

specific persons an ancestors before the witnesses give evidence in court to vindicate the averments in the pleadings. In the instant case, the Plaintiffs' amended statement of claim, there was no such genealogical story...

It is therefore submitted that the communal and family history from the ancestors should be preserved to the extent that courts will take judicial notice of some of this ancestral history. The traditional history is the history of the tradition of a people, which includes the history of the customs, cultures, ethos and way of life with a settled native life and nativity. Then if this is the position, such history should be documented even for the yet unborn generation to rely on in tracing their root or origin to the community, family and individual ownerships of land.

Even, with the coming into force of the Lands Use Act in 1978, the status of Customary landholding Tenure has not diminished and one of the ways to preserve it is by preserving the tradition and customs of the people which includes first settlement and ownership traced to conquest.

REFERENCES

1. **Coker, G. A. B:** Family Property Among the Yorubas 2nd Edition *(1962).*
2. **Elias, T. O:** Nigerian land Law 4th Edition Sweet and Maxwell
3. **Elias, T. O:** The Nature of African Customary Law.
4. **James, R. W & A. B. Kasumu:** Alienation of Family Property in Southern Nigeria.
5. **Nwabueze, B. O:** Nigerian Land Law. (1972) Nwamife Publishers Ltd.
6. **Olawoye, C. O:** Title to Land in Nigeria *(1974)* Evans brother Ltd.
7. **Rayner C. J:** Report on Land Tenure in West Africa *(1898).*
8. **Tobi, N:** Cases and materials on Nigerian Land Law, 1st Edition *(1992)* Mabrochi Books, Lagos.
9. **Utuama, A. A:** Nigerian law of Real Property *(1989)* 1st Edition Shaneson C. I. Limited, Ibadan.
10. Evidence Act Cap E 14 LFN 2004.