

FAMILY HEAD VERSUS FAMILY MEMBERS: LEGAL ISSUES IN MANAGEMENT OF FAMILY LAND UNDER YORUBA CUSTOMARY LAW

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Abstract

The customary land tenure system is an age-long indigenous land holding system among the Yorubas of South-Western part of Nigeria. The evolution of this system and the various principles regulating same, exhibit the historical credentials rooted in the custom, value and tradition of different ethno-cultural groupings in Africa, of which the Yorubas are prominent. This paper examines the pre-colonial, colonial and post-colonial institutional structure of land ownership and management under the Yoruba native law and custom. Principally, the duties and liabilities of the head of family, principal members of the family and other members are examined *vis-à-vis* the role of each in the management of family land under Yoruba customary law. Causes of conflicts and conflict resolution mechanisms were equally appraised and necessary reforms suggested, such that domineering posture of some of the head of the families could be checked.

Keywords: Family head, Management, Family land, Family members, Yoruba Customary Law.

*There's no doubt, that the principle has been settled, to the effect that where the family finds the head thereof misappropriating the family possession or property and squandering them, the only remedy is to remove him . . .*⁷⁶⁷

1.1 Introduction

Land, probably the most important source of shelter and wealth in a developing country, can always be subject of a great many interests and derivative rights. These are often difficult to elucidate, and where land is subject to native customary tenure, it is always the subject of rights and interests vested in both the individual and group, and such rights and interests are frequently co-existent with each other.⁷⁶⁸

The customary land tenure system is a form of land holding indigenous to Nigeria. The evolution of this system and the various principles regulating same, exhibit the historical credentials rooted in the customs and traditions of different ethno-cultural groupings in Nigeria over a period of time. Essentially, the principles regulating the customary land tenure system appears uniform throughout the country but the fact remains that they vary in their details as a result of diversities in the customs, traditions and values of each tribe.

Generally, 'land' is said to include any building and any other thing attached to the earth or permanently fastened to anything so attached, but does not include minerals.⁷⁶⁹ Actual physical control of native lands is vested in the families and only in the sense that it is an aggregate of the constituent family groups could the community or tribe be said to own the land.

That this is so is further proved by the fact that, although the king or the chief is held among the Nigerians to be the head of the tribe or community yet has no powers by himself to sell or alienate the lands at his disposal. He is bound by native law and custom to allocate to several families for their own use, portions of such lands; in many cases he can also allocate to strangers portions of the lands at his disposal, against the payment of tribute.⁷⁷⁰

⁷⁶⁷ *Agara v. Agunbiade*[2013] All FWLR pt. 683 p. 1899 at 1919 para. D

⁷⁶⁸ Coker, G. B. A., 1958. *Family Property among the Yorubas*. London. Sweet and Maxwell, p. 26

⁷⁶⁹ Interpretation Act Cap. I23 LFN 2004. This definition was a later development after the common law impact on our laws. In ancient times, 'minerals' were not in the contemplation of the communities, since there were no such discoveries.

⁷⁷⁰ Coker, *ibid* p. 24

Title to land under customary law is vested in the corporate unit and no individual within the unit can lay claim to any portion of it as the 'owner'. The individual right is limited to the use and enjoyment of the land and he cannot therefore alienate same without the consent of representatives of the corporate units recognized as such by law.⁷⁷¹

The whole idea as Viscount Haldane⁷⁷² succinctly puts it is that:

. . . The notion of individual ownership is quite foreign to native ideas. Land belongs to the community, the village or the family, never to the individual. All the members of the community, village or family have an equal right to the land, but in every case the Chief or Headman of the community or village, or head of the family, has charge of the land, and in loose mode of speech is sometimes called the owner . . . This is a pure native custom along the whole length of this coast. . .

Oluyede⁷⁷³, much later puts this issue in perspective thus:

Group ownership in African context is an unrestricted right of the individual in the group to run stock on what is held to be the common asset of land; the right of all in the group to claim support from the group's asset of land; the right of all in the group to claim support from the group's land and the tacit understanding that absolute ownership is vested in the community as a whole.

In pre-colonial Nigeria, customary land tenure system was well-settled and structured, particularly among the Yorubas of the early centuries. The system and the structure were so well entrenched among the natives, that the initial British intervention was to expressly declared it be preserved.

The Royal Charter (10 July 1887) granted to the National African Company by the British provides *inter alia* that:

In the administration of justice by the company to the peoples of its territories, or to any of the inhabitants thereof, careful regard shall always be had to the customs and laws of the class, or tribe, or nation to which the parties respectively belong, especially with respect to the holding, possession, transfer and disposition of lands. . .
⁷⁷⁴

1.2 Conceptual Clarifications

It is important, from the outset, to conceptually clarify the relevant key terms such as "Yoruba Customary Law", "Family Land", "Family Members", "Family Head", and "Management", all of which are primary to this paper.

i. Yoruba Customary Law

According to tradition, the Yorubas migrated from the north-east between the seventh and tenth centuries, establishing Ile-Ife as their city of origin and spiritual capital from which the sons of their mythic founder, Oduduwa, were sent forth to found their own cities and kingdom.⁷⁷⁵ Yorubaland lies between the parallels 5.89° and 9.22° north and between 2.65° and 5.72° east. Its southern boundary is the Bight of Benin, and extends from the eastern limit of (former) French Dahomey on the west of the western border of the kingdom of Benin on the east.⁷⁷⁶ Yorubas are presently located in the area presently known as the South-Western Nigeria.

Yoruba customary law consists of customs that are accepted as legal requirements or obligatory rules of conduct; practices and beliefs that are so vital and intrinsic a part of a social and economic system, they are largely unwritten, therefore flexible. It regulates every aspects of life of members of this tribe.

Fuller⁷⁷⁷ elucidation fits into what Yoruba Customary law depicts:

⁷⁷¹ Smith, I. O., 2007. Practical Approach to Real property in Nigeria. Lagos. Ecowatch Publications Ltd.

⁷⁷² *Amodu Tijani v. Secretary, Southern Nigeria*[1921] 2 A.C. 399

⁷⁷³ Oluyede, P. O., 1989. Modern Nigerian Land Law. Ibadan. Evans Bros. p. 12

⁷⁷⁴ See generally, Elias, *ante* p. 32

⁷⁷⁵ Llyod, 1974. Power and Independence, Urban Africans' Perception of Social inequality. London: Routledge and Kegan Paul cited in The Yoruba Family accessed on November 1, 2014 from archive.unu.edu/unupress/unupbooks/uu13seoe.htm

⁷⁷⁶ Fadipe, N. A., 1970. The Sociology of the Yoruba. Ibadan: Ibadan University Press, p. 21

⁷⁷⁷ Fuller, L., 1968. Anatomy of the Law, p. 71

In contrast with the statute, customary law may be said to exemplify implicit law. Let us, therefore, describe customary law in terms that will reveal to the maximum this quality of implicitness.

A custom is not declared or enacted, but grows or develops through time. The date it first came into full effect can usually be assigned only within broad limits. Though we may be able to describe in general the class of persons among whom the custom has come to prevail as a standard of conduct, it has no definite author; . . . there is no authoritative verbal declaration of the terms of the custom; it expresses itself not in a succession of words, but in a course of conduct.

Yoruba customary law is the organic law that regulates the lives and transactions of his ethnic group. The Yorubas had a complex pre-colonial system of urban residence economic production and trade. It is important to note that a typical traditional Yoruba compound contains a large patrilineal and patrilocal extended family.

ii. Family Land

Land, as earlier defined is synonymous with capital, wealth, dignity, straight, liberty and freedom. Among the Yorubas, land is a source of sustenance.⁷⁷⁸ In other words, inability to own or possess land is tantamount to powerlessness, poverty, subservience, dependence and lack of freedom or failure to trace one's root or ancestral home.⁷⁷⁹

Family land is land vested in a 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.⁷⁸⁰ It is trite that no rule of customary law is more firmly established than that no member of a land-owning family has a separate individual title of ownership to the whole or any part of it.⁷⁸¹ A corollary to this is that a member has no disposable interest in family property either during his life time or under his will. This means that it is only the family that can transfer its title to any person.⁷⁸² A purported transfer of family land by a member of the family is therefore, void and of no effect.⁷⁸³ The family system of land ownership is a system whereby the whole family holds land jointly. They may use the land jointly or separately but the ultimate ownership of the land lies in the whole family.

Thus, the holding of family land under customary law is joint and indivisible⁷⁸⁴ unless partition takes place. 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 the buildings thereon. The maxim *Quic quid plantatur solo, solo cedit* which is the maxim of most legal systems is also part of Yoruba native law and custom.⁷⁸⁵

The Yorubas usually talk of their origin and take pride in their towns of origin and the birth places of their ancestors. These are the family houses or ancestral houses. It is on account of this importance of family houses that rules of native law and custom relating to family property have from early times been carefully preserved and enforced.

Carey J. in *Coker v. Coker*⁷⁸⁶ formulated the definition of family house/property thus:

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

⁷⁷⁸ Abdulkarim, I., 2011. Trust Law and the Administration of Real Property in Nigeria. *International Journal of Advanced Legal Studies and Governance*, Vol. 2. No.1, p. 210

⁷⁷⁹ This situation is however rare under the Yoruba land tenure system, since both the 'freeborns' and the 'slaves' are all linked to one ancestral home or the other, irrespective of the village or community where such is located.

⁷⁸⁰ Utuama, A. A., 1989. *Nigerian Law of Real Property*. Ibadan: Shaneson C.I. Ltd. p. 11

⁷⁸¹ *Miller Bros (of Liverpool) Ltd. v. Abudu Ayeni* 5 NLR 42 at p. 44

⁷⁸² Utuama, *op. cit* p. 11

⁷⁸³ *Solomon & Ors. v. Mogaji* (1982) 11 SC p. 1; *Ogunmefun v. Ogunmefun* (1931) 10 NLR p. 82

⁷⁸⁴ *Ogunmefun v. Ogunmefun* (supra)

⁷⁸⁵ Coker, *ibid.* at p. 40

⁷⁸⁶ 14 N. L. R 83 (the judgment was delivered in 1938)

In *Bajulaiye v. Akapo*,⁷⁸⁷ Butler Lloyd J. also emphasizing the importance of the concept of 'family property' observed as follows:

The purpose of the institution is, as its name implies, to provide a place where members of the family can reside if they so desire, and so long as that purpose is still capable of achievement I conceive that it would be wrong for the court to order the sale of property subject to this form of tenure.

This concept is considered fundamental and it runs throughout Yorubaland from the early centuries until this modern day. It is significant that the civilization of colonial and post-colonial era has not been able to whittle down the importance of the concept of "family property" which has become an integral part of Yoruba customary land tenure system.

iii. Family Members

There is no subject in which the Yoruba man is more sensitive than that of land and real properties, this normally quiet and submissive people can be roused into violent action or desperation if they perceive any intention or attempt to deprive them of their land.⁷⁸⁸ It is against this backdrop that the native laws and customs of the Yorubas have evolved over the years in determining who could legitimately claim to be members of a particular family, for the purpose of family land and generally for all intent and purposes. This is one of the ways to protect and preserve family heritage, while at the same time, prevent avoidable conflicts.

Family could be defined as a group consisting of parents and their children; or a group of persons connected by blood, by affinity or by law; or a group of persons usually relatives who live together. The court in *Okulade v. Awosanya*⁷⁸⁹ defined 'family' as:

The body of persons who live in one house or under one head, including parents, children, whether living together or not; in wider sense all those who are nearly connected by blood or affinity . . . those descendants claiming descent from a common ancestor; a house; kindred lineage.

Woodman defines family as "a group of persons lineally descended from a common ancestor exclusively through males (in communities called patrilineal for this reason) or exclusively through females starting from the mother of such ancestor (in communities called matrilineal for this reason) and which group succession to office and property is based on this relationship."⁷⁹⁰ The term 'family' in relation to a family property means a group of persons who are entitled to succeed to the property of a deceased founder of the family. Such persons are usually the children of the deceased founder of the family.⁷⁹¹

Generally, the word "children" refers to both sexes of the offspring but in some societies, female children have been held not entitled to inherit the property of their late father.⁷⁹² In the strict sense of it, brothers, sisters, cousins or uncles of the deceased founder of family do not come within the meaning of the term "members of the family."⁷⁹³ However, the deceased may by his declaration, for example, in a Will, enlarge the family to include such relatives.⁷⁹⁴

iv. Family Head

A head of the family is the person who manages family property for and on behalf of other family members. In fact the head of the family represents the family of any gathering or occasion. He is the family voice at the village or community meeting. He is the trustee of the family property.⁷⁹⁵ Among the Yorubas, family head is commonly

⁷⁸⁷ 14 N.L.R 10

⁷⁸⁸ Johnson, S., 1921. The history of the Yorubas: From the earliest times to the beginning of the British Protectorate. London, Lowe and Brydone (Printers) Ltd. p. 96

⁷⁸⁹ (2002) FWLR pt. 25 p. 1666 at 1679 per Uwaifo, JSC.

⁷⁹⁰ Woodman, G. R., Customary Law of the Ghanaian. Accra, Ghana University Press, p. 218

⁷⁹¹ Shell Petroleum Development Company of Nigeria Ltd. v. Amadi & Ors [2010] 13 NWLR pt. 1210, p. 82

⁷⁹² *Lopez v. Lopez* (1924) 5 NLR 50

⁷⁹³ *Suberu v. Sunmonu* (1957) 2 FSC 33

⁷⁹⁴ *Sogbesan v. Adebisi* (1941) 16 NLR 26

⁷⁹⁵ *Bassey v. Cobham* (1924) 5 NLR 90

called, ‘Olori-ebi’, ‘Mogaji’, ‘Dawodu’ or ‘Baale’.⁷⁹⁶ The family head personifies the family. In a loose mode of speech, he is sometimes referred to as the owner but he is to some extent like a trustee in the English sense. Family head wields enormous powers with huge responsibilities attached.

The proper person to manage the family land is the oldest male member thereof whether he happens to be the first born⁷⁹⁷ or, if the first child be a female, he comes next and so is the oldest male child.⁷⁹⁸ If the first born female, however, happens to be a strong and influential character or if there are no other male members of the family, old or pushful enough to assert a claim to the headship, such a senior female may be elected family head.⁷⁹⁹ It is important that such election be made in accordance with local law and custom.

In what appears to be an exception to a general rule of male hegemonic claim to the family headship, it should not be supposed that the most senior male member of the family is invariably and inevitably the family head, because it is possible for the family by a unanimous resolution to decide for good cause who should be the family head.⁸⁰⁰ The rights, duties of family head are later exhaustively discussed in this paper.

v. Management

‘Management,’ means “the technique, practice, or science of managing”; “controlling or dealing with” or the “skillful or resourceful use of materials, time etc.”⁸⁰¹ The concept of ‘management’ has been variously described as “the act or skill of controlling and making decisions about a business, etc.”, “the act or process of deciding how to use something”, “the act or art of managing”; the “conducting or supervising of something” or sometimes, “the collective body of those who manage or direct an enterprise”.⁸⁰²

Management takes place within a structured organizational setting with prescribed roles. It is directed towards the achievement of aims and objectives through influencing the efforts of others.⁸⁰³ Management involves identifying the mission, objectives, procedures, rules and the manipulation of the human capital of an enterprise to contribute to the success of the enterprise.

In this context, the Yoruba customary land tenure system vests the family head with the power of management, to oversee the family property and other family businesses. The Supreme Court of Nigeria referred to the family head as a ‘Manager’ in *Akano v. Ajuwon*.⁸⁰⁴ The apex court re-affirmed this description in the case of *Solomon & Ors. v. Mogaji*.⁸⁰⁵ Nwabueze, suggests that the epithet “manager” or “director” best fits the position of the family head.⁸⁰⁶ The family head, whether referred to as a ‘manager’, ‘director’, ‘representative’, ‘agent’⁸⁰⁷ ‘caretaker’⁸⁰⁸ or ‘fiduciary’,⁸⁰⁹ he has the power and authority to direct the affairs of family property. In any of these capacities, he bears a fiduciary relationship to family property.

2.0 Creation of Family Land

Family property can be created either by act of parties or by operation of law. This is stating the law as it is today, because to the earliest natives the idea of making a Will was inconceivable, at least in the pre-colonial and early stage of the colonial era.⁸¹⁰ It was therefore not possible then to create family property among the Yorubas

⁷⁹⁶ These, and many others are synonyms for ‘head of the family’.

⁷⁹⁷ *Lewis v. Bankole* (1909) 1 N.L.R. 82

⁷⁹⁸ *Ricardo v. Abal* (1926), 7 N.L.R. 58; though in this case, as pointed out by Tew J., at p. 59; *Ibid.*, the eldest female child’s right of priority of choice in the event of a partition of the family property, remains unaffected. See generally, Elias; *Ibid.*, p. 140

⁷⁹⁹ *Rebecca Taiwo v. Sarumi* (1913), 2 N.L.R. 103

⁸⁰⁰ It is, however doubtful whether the family could jettison the choice of the deceased founder of the family for the person of their choice.

⁸⁰¹ Collins English Dictionary. p. 988

⁸⁰² <http://www.merriam-webster.com/dictionary/management>, accessed November 6, 2014

⁸⁰³ www.healthknowledge.org.uk/public-health-textbook/organisation-management/5c-management, accessed November 6, 2014.

⁸⁰⁴ (1982) 11 SC 1 at p. 72

⁸⁰⁵ Supra

⁸⁰⁶ Nwabueze, B. O., ante p. 151

⁸⁰⁷ *LTC v. Soule* (1939) 15 NLR, 22 at p. 24

⁸⁰⁸ *Ruttermern & Ors v. Ruttermern* (1937) 3 WACA 178 at 180

⁸⁰⁹ *Akanke v. Akande* (1967) 1 All NLR, 102 at p. 105

⁸¹⁰ Coker, G.B.A. *Ibid.* p. 69 See

as an instrument *intervivos*. One major factor responsible for that, was that the early natives were predominantly illiterates.⁸¹¹ However, with the increase in the level of literacy and the impact of colonization, it later became fashionable among the Yorubas to make testaments.

In *Olowosago v. Alhaji Adebajo*⁸¹² the court held that:

- (i) Where a land owner whose estate is governed by customary law dies intestate, such land devolves on his heirs in perpetuity as family land;
- (ii) Family land can be created by a conveyance *inter vivos*, where land is purchased with money belonging to the family; (iii) family land can also be created by the use of the appropriate expression in the Will of the owner of such land; and (iv) family land ceases to be such land on partition.

a. Creation by operation of Law

Where a founder or land owner who is subject to customary law dies intestate, all his children, wives and heirs have the right over his landed property and can appropriate it as family property. This in *Ogunmefun v. Ogunmefun*,⁸¹³ one of the principles established in that case was that where a family member or head died intestate, the land reverts to the family as family property. However, the rule does not take into consideration whether the deceased had children or he was childless.

The salient factors are:

- (i) The landowner must have died intestate.
- (ii) The estate in his lifetime must have been governed by customary law.

The court in *Abeje v. Ogundairo*⁸¹⁴ held the property inherited by a single heir or an only child was nevertheless a family property. Evidently, there were, and still are, cases in which a dying founder of a land would declare that his personal property should become a family property after his death. In the words of Elias,⁸¹⁵ there is nothing wrong with such a declaration, for there is hardly any reason why such a property should not so become a family property as declared. The dying declaration of a deceased father often consists words of advice to the children and a declaration as to the intention of such a father about the properties owned by him. Among the Yorubas, such declarations to the members of the family are usually obeyed and carried out by those so instructed. Indeed this constitutes one of the earliest ways of creating family property, and it remains today, particularly among the illiterates. In modern times the commonest way of creating a family property by operation of law is by a declaration to that effect in a Will. It is common practice among the Yorubas to put in their Wills provisions for ensuring that their immovable property is kept in the family after their death, so as to avoid the consequent deprivation and hardship which a beneficiary might suffer due to reckless acts of possible improvidence on the part of others.⁸¹⁶

However, many judicial interpretations reveal that such testamentary declarations do not make the members of the family and the beneficiaries, either joint tenants or tenants in common as under the English law.⁸¹⁷ In supporting this position, Butler Lloyd J. held thus:

It is a cardinal principle that in interpreting a Will the court will be guided by the intentions of the testator in so far as they can be ascertained from the document itself. In the present case I think it clear notwithstanding (sic) the use of the words 'tenants-in-common' that the testator intended the property to be held in accordance with native law and custom and this being so I have no difficulty in holding that the

⁸¹¹ *Bintu Alake v. Awawu*, 11 NLR. 39

⁸¹² [1988] 4 NWLR pt. 88 p. 275

⁸¹³ *Supra*

⁸¹⁴ (1967) LLR p. 9

⁸¹⁵ *Ibid* at pp. 69-70

⁸¹⁶ As earlier noted, family property is considered a family or ancestral heritage hence the extra efforts made by the deceased founder to ensure that it remains a centre-point for the family and a unique way to preserve his name, within the community, long after his death.

⁸¹⁷ *Miller Bros. v. Ayeni* (Supra); *Hastings Akinlade Caulcrick v. Harding*, 7 N.L.R 48; *Mary Bolaji Jacobs v. Oladunni Bros.*, 12 N.L.R 1

*defendant could acquire no interest upon the death of her son and the failure of his issue.*⁸¹⁸

b. Creation by Acts of Parties

Parties may by their own acts create family property by way of first settlement, purchase, conquest or absolute gift of land. Each of these methods will now be considered in some depth.

i. First Settlement

Family property may arise where a family, through its ancestors were the first settlers on a parcel of virgin land and exercise of ownership over sufficient length of time, numerous and positive enough to warrant inference of exclusive ownership.⁸¹⁹ In *Ajala v. Awodele & Ors*,⁸²⁰ the Supreme Court held that settlement is one of the traditional modes of acquisition and that where the plaintiff's case is that the land was acquired by the settlement, it should be open to question as to who made the grant.

ii. Conquest

Historically, the early Yorubaland was characterized with inter and intra-tribal wars, dominated with the emergence of warlords. It was therefore, a common practice for a clan or family to appropriate the land of the conquered.⁸²¹ It was legitimate for a family to base its ownership of land to an act of conquest in the distant past.⁸²²

iii. Purchase

Generally, it is possible under Yoruba customary law relating to land tenure system for a person to buy a property and then dedicate same to the use of his family.⁸²³ Family property may arise where family funds are used to purchase land. This was the case in *Nelson v. Nelson*⁸²⁴ where family funds were used to purchase land, the conveyance of which was executed in favour of a member. It was held that notwithstanding, the property was family property.⁸²⁵

iv. Gift

Where a family is a donee of unconditional gift of land, family property will also arise. This follows the rule that a donor of land under an unconditional gift to a donee cannot recall his title.⁸²⁶ In *Jegade v. Eyinogun*⁸²⁷ the Federal Supreme Court held that if a family is the absolute owner of land, there is nothing to stop the family, if the family head and all the members agree, from transferring the totality of their interest in the land. It is submitted that once the totality of the interest of the family in the land is transferred to another family, a family property is thereby created.⁸²⁸

It is important to note that the nature of the title of the original owner is, except in cases of life interests, immaterial to the creation of family property either by act of parties or by operation of law.⁸²⁹

2.1 Rights and duties of Family Members

Rights are obligations owed to another that must be satisfied while duties are claims, power and privileges, immunity secured to a person by law.⁸³⁰ Where there is a right, there must be a corresponding duty attached. Every family member is entitled to make physical use of the land. Rights of the members could be enforced against a family head and any other member of the family who without just cause deprive him of such rights,

⁸¹⁸ *George v. Fajore*, 15 N.L.R. 1. See also *Giwa & Ors. v. Badaru Ottun & Ors.*, 11 N.L.R. 160

⁸¹⁹ See *Ekpo v. Ita* 11 NLR 68; *Idundun & Ors. v. Daniel Okumagba & Ors.* (1976) NMLR 200; (1976) 9-10 SC 227

⁸²⁰ (1971) NMLR 127

⁸²¹ Johnson, S., *ibid.* pp 1-6

⁸²² *Mora v. Nwalusi* (1962) 1 All NLR 681. It is however important to note that this mode of acquiring land is no longer fashionable and legitimate. The community now operates a settled political and social system backed up by laws regulating human conduct.

⁸²³ Coker, G.B.A., *ibid.* p. 80

⁸²⁴ (1951) 13 WACA 248

⁸²⁵ See also *Dosunmu v. Adodo* (1961) LLR 149

⁸²⁶ *Ashafa v. Awawu* 11 NLR. 39

⁸²⁷ (1959) 4 F.S.C. 270

⁸²⁸ Tobi, N. 1992. *Cases and Materials on Nigerian Land Law*, Lagos. Mabrochi Books, p. 32

⁸²⁹ *Jacobs v. Oladunni Bros.* (supra)

⁸³⁰ Garner, A.B., *Black's Law Dictionary*, Seventh edition, St, Paul, Minn. West Group, p. 1322

which are considered natural and inalienable.⁸³¹ The Supreme Court in *Thomas v. Thomas*⁸³² enumerated the rights of individual members as follows:

1. The right of residence
2. Right to have reasonable ingress and egress
3. Right to have a voice in the management of the property⁸³³
4. Right to have a share in any surplus of income
5. Right to seek for partition or sale of the family property
6. The right to protect the family property
7. The right to possession and physical use of the family land and;
8. Right to devolve interest in family property to offspring.⁸³⁴

Right of Residence

The right of a member to reside on the family property is one of the most fundamental incidents of family property. It has been observed that in the ancient times, when the Yorubas are predominantly farmers or engaging in farming-related activities, and urbanization at its lowest ebb, it was hardly conceivable that buildings were put up for other than residential purposes.⁸³⁵ It is important to note that no matter how rich a man is, in landed properties, farmlands, cattle e.t.c., such a man is not fulfilled and reckoned with in the society where he failed to provide shelter or residence for his family.⁸³⁶ The family was the unit of existence and it was customarily considered an anomaly if the members of the family could not live together or lack a common place of abode.

The court in *Coker v. Coker*⁸³⁷ described a family house as a “residence.” It was asserted that it is beyond debate or rhetorics that such a place must be capable of residence by members of the family.

The court held further thus:

*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 or deserting or being deserted by her husband. It is only with the consent of all those who reside in the family house that it can be mortgaged or sold.*⁸³⁸

This position had earlier been fully established and recognized in the earlier case of *Lewis v. Bankole*⁸³⁹ where the court decided that one of the incidents of family property was the right of the members to reside on such property. It should be pointed out that members who are entitled to reside on the family property may sometimes be determined in each case depending on the way by which the family property is created.⁸⁴⁰

Rights of ingress and egress

The rights of ingress and egress of the family members were previously judicially accorded members residing in the family house, not for family members residing elsewhere.⁸⁴¹ However, it was in the latter case of *Thomas v. Thomas*⁸⁴² that it was decided that resident members had a reasonable right of ingress and egress to the family

⁸³¹ *Ajobi v. Oloko* (1959) LLR 152

⁸³² (1932) 16 NLR 5

⁸³³ Whether as a principal member or an ordinary member of the family, or even where appointed the head of the family.

⁸³⁴ See generally, Osamolu, S.A et. al. 2008. Real Property Law and Conveyancing Practice in Nigeria. Lagos. Lawlords Publications, pp. 26-28

⁸³⁵ Johnson, op. cit., pp. 98-99

⁸³⁶ Coker, G.B.A., *ibid.* at pp. 114-116

⁸³⁷ *Supra*

⁸³⁸ *Ibid.* at p. 86 per Carey J.

⁸³⁹ *Supra*

⁸⁴⁰ This in our considered view is an exception to the general principle as laid down in *Lewis v. Bankole* (*supra*); *Coker v. Coker* (*supra*) *George v. Fajore* (*supra*); *Shaw v. Kehinde* (1947) 18 NLR 129; *Folarin & Ors. v. William & Ors.* 8 WACA 142; *Johnson v. United Africa Company* (1936) 13 NLR 13 and hosts of other cases. See generally, Tobi, N., *ibid.* at p. 31

⁸⁴¹ Per Osborne C.J. in *Lewis v. Bankole* (*Supra*)

⁸⁴² *Supra*

house, and that, except for the purpose of attending family meetings or other business of the family, non-resident members had no such right.

Right to have a voice in issue of management of family property

The right to be consulted, which is to have a voice in the management of family property is also one of the most ancient rights incidental to family property. The rationale for the existence of this right is not far-fetched. It is apparent without affecting the rights of its members.⁸⁴³ It is not only unlawful but also immoral to keep substantial dealings with the family properties from the family members, particularly the members residing in the property. It is, even the position of court that, in a bid to get an order of the court for the partition of family property, it is required that all interested members are before the court.⁸⁴⁴

Osborne C. J allude to this position of native law in the celebrated case of *Lewis v. Bankole*⁸⁴⁵ as follows:

The right to be consulted is in my opinion fully established, but this does not mean that each individual grandchild is entitled to participate in the consultation; the evidence goes to show that there can only be one voice and vote for all the children of the deceased.

It could be gleaned from the aforesaid that the right to be consulted in all dealings affecting the family property has its limitations. Limitations could possibly due to infancy, physical infirmity e.t.c. This right has been loosely referred to in some of the judicial decisions as the “right of the principal members of the family to be consulted.”⁸⁴⁶

Right to have a share in any surplus or income

It is the right of every member to share of the family income, whether it is rent, proceeds from the farmland or gifts to the family. This is usually done by dividing the income amongst branches and it is further divided within each branch amongst all its members. Any member excluded has a right to demand his share.⁸⁴⁷

Right to seek for partition or sale of family property

It is a basic right of a family member to request that family property either be partitioned or sold, depending on the circumstance. Partition generally takes place along the lines of cleavages in the descent group produced by the process of segmentation. The property may be divided into as many stripes as exist; or it may be partitioned to each individual member of the family.⁸⁴⁸

Generally, Yoruba customary law recognizes the right of a family member to ask for partition as a fundamental incident of family property. It appears that a convenient avoidance of frequent family bickering is to partition the family property with the attendant consequence of the beneficiaries becoming absolute owners of respective portions granted to them.⁸⁴⁹ It is important to state that the consents and participation of all the family members are sought and obtained to have a valid partition.⁸⁵⁰

The court in *Lopez v. Lopez & Ors*⁸⁵¹ justifying the rationale for partition held that:

Where there has been a persistent refusal by the head of a family or by some members of the family to allow others enjoy their rights under native law and custom in family land, the court has exercised and will continue to exercise, its undoubted right to make such order as will ensure that members of the family shall enjoy their rights, and if such rights cannot be ensured without partitioning the land, to order a partition.

⁸⁴³ *Ibid.* at p. 119

⁸⁴⁴ *Latunde Johnson v. Amusa Onisiwo*, 9 WACA. 189

⁸⁴⁵ *Supra*

⁸⁴⁶ See *Aganran v. Olushi*, 1 NLR 67 per Pennington J. at p. 90

⁸⁴⁷ *Osamolu, S.A., et al* *ibid* at p. 27; *Lewis v. Bankole* (*supra*)

⁸⁴⁸ *Lloyd, P.C.*, 1962. *Yorubas Land Law*. London, Oxford University Press. P. 84

⁸⁴⁹ *Coker, G.B.A., ibid* at p. 129

⁸⁵⁰ *Kadiri Balogun v. Asani Balogun*, 9 WACA 78; *Shiwoniku v. Adeshoye*, 14 WACA 86.

⁸⁵¹ 5 N.L.R. 49 p. 51 per Combe C. J.

According to Lloyd, partition does not extinguish the concept of 'family land' for even if the land is awarded to an individual it is presumed that it will become family land in the next generation.⁸⁵² The right to ask for partition of family property is exerciseable by both sexes, male and female members of the family. It is important to know that each case is decided on its own merit, depending on the facts and circumstances of each matter.⁸⁵³

In *Mosanya v. The Public Trustee*⁸⁵⁴ the court was of the view that the right of individuals to demand for partition is usually sequel to disputes as to the occupational rights or as to the sharing of rents from leasing family property. It is, however imperative to note that the court will not order a sale or partition of family land where none of the individual's customary rights earlier stated is infringed. The Supreme Court⁸⁵⁵ refused to grant to the plaintiff member of a family his prayer for a sale or partition on the mere ground that the family head had not allowed him to share of the net rents, which were later evidently proved to be non-existent.

Similarly, in *Bajulaiye & anor. v. Akapo*⁸⁵⁶ where the parties to the suit agreed among themselves that partition was impracticable, the court accordingly refused to order a sale or partition of family property for no better reason than that some of the interested parties desired to turn the family property into cash. The guiding principle for the family councilor the court seems to be a consideration of what in a given situation is in the best interest of the family as a whole.

Right to Protect Family Property

Generally, as an incident of a family members' right in the family property, each member has an inherent right to protect the family property and his interests therein, whether regarding the family house or family farmland.⁸⁵⁷ It is very important to note that this inalienable right of a member is required to be exercised timeously and prudently, as any frivolous purported exercise of this right will not receive any judicial support. Similarly, such mischief may incur the wrath of the family head and other members of the family.

The right to Possession and Physical use of family land

This is the right of every member of a family, once he is in occupation without breaching the terms of grant not even the head of the family can make a conflicting grant to another member on the same land.⁸⁵⁸ Each member of the family has a usufructuary right to family land or in the family house; he is entitled to as much land or as many rooms (subject to the availability) as he needs, the determining factor being the number of his wives and children.⁸⁵⁹ The right of allotment is an integral right incidental to family land or house.

In *Adagun v. Fagbola*⁸⁶⁰ the court held as follows:

When the head of a family allots to a member of the family a portion of the family land for him to live on, that member becomes entitled to occupy and enjoy that portion during good behavior, but he does not become the owner of the land as against the family...

Generally, a member of the family has equal right to a portion of family land upon which to reside and farm. Upon allotment, such member-allottee does not become the owner of the land but he enjoys exclusive possession, while the title still resides in the family.⁸⁶¹

⁸⁵²*Ibid.* at p. 85; Coker, *ibid.* at p. 131

⁸⁵³ *Ibid.* p. 130

⁸⁵⁴ (1980) FNR 261 at 268

⁸⁵⁵ *Thomas v. Thomas* (supra)

⁸⁵⁶ (1938) 14 N.L.R. 10 per Butler Lloyd, J.; see also *Olawoyin & anor. V. Coker*(1892), 16 August: Law Reports (Colonial), Nigeria in the Colonial Office Legal Library- Claim for partition of house and land in Shopono St., Lagos. See generally Elias, *Ibid.* P. 161

⁸⁵⁷This right is usually exerciseable where the family head failed, refused and or neglected to take steps to protect family property, particularly from trespassers or adverse claim. See the case of *Sapo v. Sunmonu*[2010] All FWLR Pt. 531 p. 1408 at 1425, paras. B-D; *Sogunle v. Akerele* (1967) NMLR 58; *Animashaun v. Osuma* (1972) 4 SC 200, (1972) 4 SC, 180; *Coker v. Oguntola* (1985) 2 NWLR pt. 5, p. 87; *Gegelu v. Layinka* (1993) 2 SCNJ 39; *Akerele v. Liye-Labedu* (1956) LLR 35

⁸⁵⁸ *Adewoyin v. Adeyeye*(1963) 1 All NLR 5. P. 28

⁸⁵⁹ Lloyd, P.C., *ibid.* at p.80

⁸⁶⁰ (1932), 11 NLR 110 at p. 111 per Kingdom C.J.

⁸⁶¹ This position is *impari-materia* to allotment of communal land to members of the Community. See *Amodu Tijani v. Secretary of Southern Nigeria* (Supra)

Right to devolve interest in Family Property to Offspring

It is the inalienable right of a family member, upon his demise for his shares and entitlements be devolved on his children as possessory and right of occupation, but certainly not ownership. Such inherited right in non-alienable except on partition where such offspring will be entitled to their deceased father's share.⁸⁶² It is on the basis of this arrangement that Chief Elesi of Odogbolu stated in *Dawodu v. Danmole*⁸⁶³ that, "... land belongs to a vast family of which many are dead, few are living, and countless members were yet unborn." Land among the Yorubas are considered, and are indeed inheritable property, hence it does not belong only to the present generation for use and possession, but also for generations yet unborn in the family. The current generation could therefore be holding land in 'trust' and as a sacred heritage for their own use.⁸⁶⁴

It is imperative to put this issue in proper perspective, in ancient times, alienation of family land by way of sale was unknown to the Yoruba native law and custom, though a fraction of such parcel of land might be given out as gift for various reasons.

In *Balogun v Oshodi*⁸⁶⁵ Kingdom C.J expressed a similar sentiment that such alienations are not only invalid but sacrilegious since such act amounted to an unlawful attempt by the living to defeat, forever the interest of the unborn generation.

2.3 Acts *Ultra Vires* Family Members

It is trite customary law among the Yorubas that a family member cannot alienate the portion of land allotted to him, either by way of outright sale or local mortgage. The rationale for this position is simply because such an allotment does not make the allottee, an absolute owner of the portion so allotted to him. The allotment is an incident of native customary tenure.⁸⁶⁶ In view of the nature of rights in here in family property under the Yoruba native law and custom, a member of the family can incur a forfeiture on account of all or any of the following acts:

- (a) Alienation of his interest without the consent of the family⁸⁶⁷
- (b) Denial of the title of the family to the property⁸⁶⁸
- (c) Misconduct⁸⁶⁹

It is now settled law that any such purported alienation without the consent of the members of the family entails a forfeiture. In *Adagun v Fagbola*⁸⁷⁰ Sir. Donald Kingdom C.J. observed as follows:

Apart from any special circumstance of any particular case, when the head of a family allots to a member of the family a portion of the family land for him to live on, that member becomes entitled to occupy and enjoy that portion during good behaviour, but he does not become the owner of the land as against the family and he cannot alienate it without the consent of the family; if he does so, his action amounts to misbehavior and he can be treated by the family as having forfeited his right to occupy the land and be ejected.

⁸⁶² It is fundamental that these offspring cannot exercise any right on the family property held by their father, while the latter is still alive. The offspring in this instance are grand children. See *Lambe v Aremu* [2014] All FWLR pt. 729 p. 1015 at 1110
⁸⁶³ (1892) AC 644

⁸⁶⁴ This arrangement is not however sacrosanct since the current family members and beneficiaries may partition the family land among themselves and alienate same outrightly, which act will bring the family land into extinction and therefore nothing to pass on to the unborn generation at birth.

⁸⁶⁵ (1931) 10 W.L.R. 36; *Okiji v. Adejobi* (1960)5 FSC 44 at 47; *Oloto v. Dawuda* (1904)1 N.L.R. 57; *Lewis v. Bankole* (Supra) per Osborne C.J. As earlier noted these line of authorities contrast with set of judicial decisions where Court ordered partition/sale of the family land, such cases include; *Lopez v. Lopez* (Supra); *Bajulaiye & Anor. v. Akapo* (Supra); *Mosanya v. The Public Trustee* (Supra); *Olawoyin & anor v. Coker* (Supra)

⁸⁶⁶ *Onisowo & Ors v. Gbamgboye & Ors.* 7 W.A.C.A. at p. 69

⁸⁶⁷ *Adagun v. Fagbola* (Supra)

⁸⁶⁸ *Onisiwo v. Bamgboye* (Supra)

⁸⁶⁹ *Mojolagbe Ashogbon v. Saidu Oduntan*, 12 N.L.R. 7 at p. 10

⁸⁷⁰ *Supra, ibid.*; at p. 141

Essentially the nature of the 'alienation' appears to be immaterial except for the purposes of determining the gravity of the offence and the sanctions to be imposed. The principle of such 'attempted,' 'unlawful' or 'purported' alienation was also applied to the case of a mortgage without consent,⁸⁷¹ to a lease without consent,⁸⁷² and to a sale or even attempted sale of any such portion allotted to the member.⁸⁷³ The act of alienation by a family member simply translates to denial of the family ownership of such land.

3.0 Management of Family Land

As earlier noted, management of family property involves the act of controlling, process of decision-making and controlling of every incident relating to the family property. This involves the maintenance, allotment to members, initiating improvement on family property when the need arises. Among the Yorubas, family is a unit of structural organizational setting where the socio-political activities are regulated. In ancient times, family members are also bound by a common religious belief. In ancient times, improvements such as erection of family house, family compounds, and cocoa plantations were done by collective efforts of the family members under the directives, management and control of the family head. Management of family property is fundamentally the duty of the family head, however with the active participation of principal and other members of the family.

3.1 Family Head

It is settled from very early times that, under native law and custom, the management of the family property and the control of all the affairs of the family are all powers (or rights) vested exclusively in the head of the family⁸⁷⁴ These rights of the head of the family were rather loosely referred to in the case of *Lewis v Bankole*⁸⁷⁵ as "getting control of the family and giving orders in his father's house." The head of the family, known as *Olori Ebi, Mogaji, Baaleor Dawodu*, is the person physically responsible for the central control and management of the common affairs of the family, especially in so far as these relate to the family properties.

The principles of the management of family property follow those of communal land, with minor differences. The family head personifies the family. As such, the powers and rights of ownership of family land are vested in, and exercisable by, him on behalf of the family. In the words of Viscount Haldane in *Amodu Tijani v. Secretary of Southern Nigeria*⁸⁷⁶ "the family head takes charge of the management and control of the family property. In loose mode of speech, he is sometimes referred to as the owner but he is some extent like a trustee in the English sense."

Primarily, it is the duty of the family head to allot lands either to the members of the family members or to strangers, and to prescribe the conditions under which the various allotment are made.⁸⁷⁷ He conducts, in the normal case, all the private and external business of the family, and he is the person to be consulted either directly or indirectly, but certainly ultimately, in all important transactions involving the property of the family.

Customarily, it is only the family head that has the right to enforce forfeiture of the interests of errant members and the issue or question comes within the scope of his administration/judicial powers.⁸⁷⁸

Generally, the head of the family represent the particular family unit at the community meetings. Another right of the head of the family which is incidental to family property and very fundamental is the right to institute action to protect family property from trespassers and adverse claimants. The Court in *Sapo v. Sunmonu*⁸⁷⁹ held that "A head of family can take action in respect of family property, even without prior authority of other members of the family."⁸⁸⁰ Coker, affirming this position stated this:

⁸⁷¹ Words, such as "attempted," "unlawful," and "purported" used to qualify 'alienation' here are meant to depict the fact that such sale or transfer is null, void and of no effect in law and same will be set-aside. It is an incurable irregularity. *Buraimo & Ors. V. Gbangboye & Ors.*, 15 N.L.R. 4

⁸⁷² *Idewu Inasa & Ors. V. Chief Sakariyawu Oshodi*, 10 N.L.R. 4

⁸⁷³ *Ibid.*, at p. 134

⁸⁷⁴ *Supra*

⁸⁷⁵ *Supra*

⁸⁷⁶ *Supra*

⁸⁷⁷ *Adagun v Fagbola* (supra)

⁸⁷⁸ See privy council decision in *Idowu Inasa v. Sakariwu Oshodi* (supra)

⁸⁷⁹ *Supra*. See *Aregbe & Ors. v. Adeoye & Anor.* (1924), 5 N.L.R. 53

⁸⁸⁰ See also *Sogunle v Akerele* (supra); *Animashaun v Osuma* (supra); *Coker v Oguntola* (supra)

*As he is responsible for the control of the affairs of the family and all the properties. The head is the proper person to represent the family in all legal actions instituted by or against the family.*⁸⁸¹

The courts, however held that the head of the family prior to incurring expenditure of money or charging the interests of the family, he should obtain the consent of the family.⁸⁸² The head of the family also has the right to alienate family property or partition same. This power is exercised in consultation with the principal members of the family.

Mbanefo F.J (as then was) in *Jegede v. Eyinnogun*⁸⁸³ relying on Privy Council's decision in *Oshodi v. Balogun*⁸⁸⁴ held as follows:

In the olden days, it is possible that family lands were never alienated; but since the arrival of the 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 large number of premises on which substantial buildings have been erected for the purpose of trade or permanent occupation have been so acquired.

Elias⁸⁸⁵ summarised the duties of a family as follows:

- (a) The allocation and re-allocation of rooms to members of the household, for which, of course, no rents are payable.
- (b) General supervision of the whole compound or house with regard to its proper use during the lifetime of the individual occupiers.
- (c) Execution of major repairs due to fair wear and tear, where necessary improvements on the compound as a whole.
- (d) Provision of accommodation within the precincts of the compound for the younger members of the family.

Lloyd⁸⁸⁶ also added that: "Any dealing in family land must be conducted by the family head, and only he may take action in court to protect the interest of the family and he always sues on behalf of the family. All documents should be signed by him." This practice, however, varies from place to place or from family to family, as the case may be. It may be that a family head in some places will sometimes do more than the functions highlighted above or sometimes, do less.

In view of the enormous power exercisable by the family head under the Yoruba customary land tenure system, his mode of appointment or emergence have been subject of legal and academic discourse. The mode of appointment/emergence of the head of the family are discussed below.

3.1.1. Appointment of Family Head

The appointment of the family head or his emergence could take diverse form under the Yoruba customary law. In the leading case of *Lewis v. Bankole*,⁸⁸⁷ so much attention was paid to the consideration of the conception, especially with reference to the appointment, when the Court held *inter-alia*:

The first point for consideration is as to the headship in Lagos . . . There seems to be no importance attached in Lagos to the headship of a family, outside the family circle . . . There is practically a consensus of opinion that on the death of the founder of a family the proper person to be the head of the family is the 'Dawodu' or eldest surviving son. This seems to be a well-established rule both in Lagos and in other

⁸⁸¹ Coker, G.B.A., *ibid* at p. 135

⁸⁸² *Aralawon v Aromire*, 15 NLR. 90; *Hammond. v. U.A.C.* 3 W.A.C.A 60

⁸⁸³ *Supra*.

⁸⁸⁴ *Supra*

⁸⁸⁵ *Ibid*, at p. 113

⁸⁸⁶ Lloyd, P.C., *ibid.*, p. 83

⁸⁸⁷ *Supra*. See also *Folami v. Cole* (1990) 2 NWLR pt. 113 at 445

*parts of Yorubaland. It is after the death of the Dawodu that we begin to find variation; according to the plaintiff's witnesses by Yoruba custom the other sons of the founder of the family are taken in turn and then the sons of the Dawodu and other sons, the headship being ever kept in the male line. . . On the other hand, the view of the Lagos chiefs is that it is the eldest child, whether male or female who becomes head after the Dawodu.*⁸⁸⁸

However, apart from Dawodu emerging as the natural family head upon the death of the deceased founder, there are other mode of appointments which include appointment by testament⁸⁸⁹ and election of a family head by family members.⁸⁹⁰ It is the practise that the appointment or emergence of Dawodu as the family head is by operation of the customary law,⁸⁹¹ as he takes office automatically and without ceremony upon the death of his predecessor.

The founder of the family has an unfettered right and uncontrolled discretion to appoint his own choice of head to succeed him as the family head upon death. The court in *Sogbesan v. Adebisi*⁸⁹² held that in exercising his discretionary power, the founder of the family could even appoint a stranger, if he so wishes. Such appointment by the deceased founder of the family on his death-bed, are almost always respected.⁸⁹³

This right of the last preceding head may, since the introduction of Wills due to the advent of the British, sometimes be exercised in his testamentary disposition instead of being orally declared *ante mortem*. Finally, members of the family could appoint a family head where, in case of removal of the sitting family head for acts of indiscipline capable of causing disrepute to the family or where such head is incapacitated due to serious ailments. In other circumstance, the position may be vacant and the last holder did not make an appointment, members of the family may by way of vote or unanimity elect or appoint a family head, as the case maybe.⁸⁹⁴

3.2 Principal Members of the Family

Principal members of the family are usually selected from the general family, excluding the family members whose emergence have been discussed above. Traditionally, the principal members of the family are from the branches existing in the family. In a polygamous family, the eldest of the children begotten by each wife is a principal member, while in the case of a monogamous family; every child could constitute a principal member.

The principal members are generally representatives of the different branches of a family and they represent the interest of members in decision making and transactions between the family head and third parties, usually on issues bothering on management and alienation of family property.

In *Tijani v. Akinpelu*⁸⁹⁵ the court emphasized the role of the principal members in alienation of family property. The principal members of the family are to be consulted when alienation or sale takes place.⁸⁹⁶ In ancient times the eldest male child from each branch used to constitute principal members of the family.⁸⁹⁷ Where however, a junior member of the family plays significant role in the management of family's affairs, he may be co-opted into the family council as a principal members.⁸⁹⁸

⁸⁸⁸ "Dawodu" means "heir." The term is not a title, but it is rather used to describe the eldest son in the household. In later years, it becomes a name in many parts of Yorubaland.

⁸⁸⁹ This mode became fashionable after the Yorubas living in Lagos started appointing their successors as the head of the family in their Will.

⁸⁹⁰ This usually occur when a family head is removed (such removal was a latter development as it was largely unknown in the ancient times) and a replacement is being elected. Removal of a head of the family could be due to many factors.

⁸⁹¹ *Ottun v. Ejide* (1932) 11 NLR 124

⁸⁹² *Supra*

⁸⁹³ *Ajoke v. Olateju* (1962) LLR. 32

⁸⁹⁴ This position appears to be a contrast to the view held by P.C. Lloyd that a family head cannot be deposed, 'though if unpopular he may be ignored by his family members, and recognition as leader given to his immediate junior in age.' *Ibid.* at p. 83. However, it is our view that the Yoruba Customary law does not allow for two family heads to co-exist simultaneously within one family. The decision in *Agara v. Agunbiade* (*supra*) supports this position, the court in that case stated that where the family head mismanage family property, he should be sanctioned with a removal.

⁸⁹⁵ [2013] All FWLR pt 682 p. 1763

⁸⁹⁶ Yakubu, M.G., (1981) Nigerian Land Law. Lagos Macmillan p. 63

⁸⁹⁷ Osamolu et. al., *ibid* p. 21

⁸⁹⁸ *Esan v. Faro* (1947) 12 WACA 135

4.0 Transactions on family property by the family head

It was a strict customary law in ancient time that communal and family land could not be alienated by way of sale. Alienation of family property was unheard of, because land was regarded as a spiritual heritage. Nwabueze, espoused this position in his book when he remarked as follows:

... This inalienability of communal land was partly a consequence of the fluctuating and mythical constitution of the community, village or family. It was intended to protect the rights of the unborn generation as well as the dead. It was considered an outrage against the departed ancestors, whose spirits lay buried in the soil, to sell the land and an act of wisdom to defeat the interest of the unborn.

Osborne C.J. also alluded to this when he held that, “alienation of land was undoubtedly foreign to native ideas in the olden days.” This issue came to the fore in *Okiji v. Adejobi*⁸⁹⁹ where the court rejected as unlikely a claim of title based upon a sale that took place some 200 years ago. He court held *inter alia* that, “it was unlike the Yorubas to sell land at that period of their history, especially to a total stranger.” Similarly in *L.E.D v. Federal Administrator-General*,⁹⁰⁰ a claim of an absolute gift of land alleged to have been made some 105 years ago was dismissed for been inconsistent with the Yoruba native law and custom. This position, has however changed, in view of the Yorubas’ contact with the English law and ways of life. It is now possible to alienate family property under the Yoruba customary law by following the laid down procedure and such sale is valid.⁹⁰¹

The practice and procedure for alienating family property under the Yoruba native law and custom are discussed below.

Alienation of Family Property

‘Alienation’ simply means conveyance or transfer of property to another. Collins English Dictionary⁹⁰² defines ‘alienation’ as the transfer of the property, as by conveyance or Will into the ownership of another or the right of an owner to dispose of his property.

Generally, under the Yoruba customary land tenure system, alienation in relation to family property means any form of transfer of family property which includes not only sale, but also lease, mortgage, pledge or any other form howsoever in which an interest in land may pass from one party to another.⁹⁰³ The basic principle is that neither the family head alone nor the principal members of the family can validly alienate the family land or give a good title to any person with respect to family land. The customary practice and procedure is that for the title in family property to pass to a third party purchaser, it must have been done with the consent of family head and principal members, representing the rest of the members. This process, nonetheless is technical and complex. There are diverse views or opinions among legal commentators as well as the courts in respect of the legal validity of alienation of family property under customary law. The issue of who has the power to validly affect the family property is very fundamental, that is, a legally recognized vendor.

It is important to note that there are three major instances that will give rise to three different legal implications in a transaction on family property.

(1) Alienation by family head with the consent of Principal Members

According to Lloyd, the opinion and course, the practice among the Yorubas is that the head of the family and the heads of each branch,⁹⁰⁴ or segment of the group, should be a signatory to any dealing, these men connoting the general support of the members of their own segment. He concluded therefore that, “this is the ideal arrangement.”⁹⁰⁵ It is therefore a fundamental requirement that in order to effect a valid sale of family land under customary law, the head of the family must also give their consent. Such mutuality of consents to the conveyance

⁸⁹⁹ (1909)

⁹⁰⁰ (1927) 2 N.L.R 58

⁹⁰¹ See generally, *Jegade v. Eyinnogun* (supra); *Oshodi v. Balogun* (supra)

⁹⁰² *Ibid*, at p. 40

⁹⁰³ See Smith, I.O. op. cit p. 79; *Agunbiade v. Sasegbon* (1968) NMLR 223.

⁹⁰⁴ Head of each segment as a group are generally referred to as the principal members of the family.

⁹⁰⁵ Lloyd, *ibid* at p. 84

of family land has been held to be unimpeachable.⁹⁰⁶ Coker, therefore aptly stated the end-result thus: “. . . then that a sale of family property with the consent of all members whose consent is necessary completely disposes of the family property.”⁹⁰⁷ The money realized from such sale is distributed among the members of the family.⁹⁰⁸

It follows therefore from the foregoing that any purported alienation of family property contrary to this above Yoruba customary law and practice, would either have the effect of rendering the transaction, either void⁹⁰⁹ or voidable,⁹¹⁰ depending on the facts of each case.

(2) Unilateral Alienation by the Family Head

In practice, there are two forms of unilateral sale of family property by the head of the family. They are: (a) where the family head alienates the family property in his own name and as if the title to such property vests in him. (b) Where the family head purportedly alienate family property on behalf of the family, but without obtaining the consent of the principal members of the family to do so. It is trite law that where the head of the family alienates family property as his personal property and in his own name, such transaction will be a nullity, that is *void ab initio*.⁹¹¹

In *Solomon and Others v. Mogaji and Others*⁹¹² where a family head sold family land as his own, the Supreme Court held that the purported sale was void. Similarly, where the family head made a gift of such land without the requisite consent, the gift is void and it makes no difference that the gift was made to a member of the family.⁹¹³

On the other hand, where the head of the family purportedly alienates family property claiming to be representing the family, when in fact he neither sought for, and obtained the consent of the principal members, such transaction is voidable. The legal implication is that the sale is *prima facie* valid and can only be set-aside at the instance of the non-consenting or aggrieved members of the family.⁹¹⁴

In *Lambe v. Aremu*,⁹¹⁵ the court held *inter-alia* that, ‘when the head of a family disposes of family property without the consent of the principal or other members of the family, such disposal or alienation is voidable at the instance of those other members of the family. It is a fundamental principle that neither the family head alone nor the principal members of the family can validly alienate the family land or give a good title to any person with respect to family land.

The Supreme Court summed up what amounts to valid alienation of family property in *Lukan v. Ogunsusi*⁹¹⁶ cited with approval the case of *Secretary Lagos Town Council v. Nurudeen Badaru Sule*⁹¹⁷ thus:

⁹⁰⁶ *Oshodi v. Balogun* (supra); *Cole v. Folami* (Supra); *Adeniji v. Disu* (1958), 3 F.S.C. 104

⁹⁰⁷ Coker, *ibid.*, at p. 89

⁹⁰⁸ *Coker v. Coker* (supra); *Oshodi v. Kaliatu Imoru & Others*, 3 WACA. 93.

⁹⁰⁹ A void transaction is one that is simply as if it was never made. Such transaction has no legal effect whatsoever, it has not and cannot transfer any right or interest to anyone. Infact, it is not necessary to ask for declaration to void it, because it is *void ab initio*, with the effect that no transaction or dealing based on it can stand. See, *Thomas v. Nabham* (1947) 12 WACA. 229

⁹¹⁰ Voidable act or transaction is such that is valid until annulled; especially of a contract, capable of being affirmed or rejected at the option of one of the parties. This term described an otherwise valid act that may be nullified rather than an otherwise invalid act that may be ratified. See, Black’s Law Dictionary, *ibid*, at p. 1568. Generally, it is one transaction that is considered valid at the point of making, but it is tainted with irregularity which may make it liable to be voided by party having power to do so. It can only be voided by an action in court at the instance of the person aggrieved or entitled to do so. The court, therefore has the power to declare an hitherto voidable action *void ab initio* when the evidence before it supports such declaration.

⁹¹¹ See *Oshodi v. Aremu* (1952) 14 WACA 83. The rationale for this position is that such head of the family had no title, and on the basis of the principle of *nemo dat quod, non habet* (meaning no one could give what he does not have) such transaction will fail.

⁹¹² Supra. See also, *Foko v. Foko* (1965) NMLR 3

⁹¹³ *Oshodi v. Aremu* (Supra)

⁹¹⁴ *Afolabi v. Adekunle*, (1983) All NLR 470; *Odeneye v. Efunuga*, (1990) 7 NWLR pt. 164 p. 618; *Shelle v. Asajon* (1957) SCNLR 286; *Babayehu v. Ashamu* (1998) 9 NWLR pt. 567, p. 546; *Akanni v. Makanju*, (1978) 11-12 SC. P. 13; *Atunrase v. Sunmola*, (1985) 16 N.S.C.C. pt. 1 p. 115.

⁹¹⁵ Supra

⁹¹⁶ (1972) 5 S.C. 40

⁹¹⁷ 15 NLR 73, per Lewis JSC (as he then was)

Surely, he was the head of the family and the sale of family land by him at the time was with the knowledge and consent of the family. There can be no doubt that a proper transfer of family land was made by him as representative or agent of the family.

Similarly, in *Fayehun v. Fadoju*⁹¹⁸ the court reinforcing this principle of customary land stated that:

. . . it follows that the appellants claim in which they sought the sales of the family property in this case declared null and void and of no effect could not succeed upon the facts which are that the sales were by the head of the family and duly accredited member of the family. . .

3. Alienation of family land by Members

Apart from unscrupulous family head who takes unilateral action of alienating family land, usually for selfish purpose, there are also dubious and ambitious family members who also engage in similar acts. It is a settled position of law that such act *ultra vires* the erring members. The alienation is *void*, nullity and of no effect.

In *Atunrase v. Sunmola*,⁹¹⁹ a principal member of the family, one Jabita described himself as the owner of the family land. On that premise he sold the land to an unsuspecting third party. The court held that the sale was *void ab initio* and of no effect at all. It was further asserted by the Supreme Court in that case that; “the court has over the years laid down the principle that a sale by a member of the family without the concurrence of the head of the family is void. One hardly requires any authority for this well established position of the law.”⁹²⁰

In summary, the family head must approve all transactions involving the family property, otherwise such transaction is a nullity. However, if the family head (the custodian of family property) alienates the family property entrusted to his care for management, without the consent of all members of the family (as may be represented by the sectional heads or principal members), the sale is voidable. The sale could either be ratified or rejected, the latter being at the instance of the aggrieved member, who could bring an action that the sale be set aside.⁹²¹

However, the aggrieved or non-consenting member is expected to apply timeously for the setting-aside the sale, otherwise, he might lose his right under the equitable doctrine of laches.⁹²² In *Mogaji v. Nuga*,⁹²³ the court held ten years to be too late for the filing an application of this nature for setting aside a voidable sale. However in *Salako v. Dosunmu*,⁹²⁴ court granted an application brought four years after the voidable sale by the family head and set it aside.

5. SUMMARY, CONCLUSION AND RECOMMENDATIONS

5.1 Summary

This paper has been able to appraise the legal issues in management of family land under the Yoruba native law and custom, *vis-à-vis* the roles of the family head and other members of the family.

5.2 Conclusion

Generally, where a family owns a piece of land communally, the title of the ownership remains with the family until and unless there is a partition, nevertheless, where such communal land belongs to every member of the

⁹¹⁸ (2000) SCNLR pt. 2 p. 24

⁹¹⁹ Supra

⁹²⁰ Per kayode Eso JSC (as he then was)

⁹²¹ *Adejumo v. Ayantegbe*(1989) 3 NWLR pt. 110 p 417 at 444

¹⁵⁶ The equitable doctrine which emanated from the maxim ‘delay defeats equity’ or ‘equity aids the vigilant,’ the substance of the doctrine simply states that where a litigant who has unreasonably slept over his right may not be granted equitable relief in respect of this right, particularly where the granting of such relief will result in untold hardship to the unsuspecting innocent third party who has acquired the right. The court’s exercise of its equitable jurisdiction is discretionary. See generally, Jegede, M.I., 2007 *Principles of Equity*. Lagos M.I.J publishers, p. 290

¹⁵⁷ (1960) 5 FSC 107

¹⁵⁸ (1997) 8 NWLR pt. 518 p. 88 ^{See} also *Lambe v. Aremu* (supra)

¹⁵⁹ Supra

community past, present and yet unborn, the management of such communal land is vested in the head of the family who is in the position of a trustee and is required to consult other principal members of the family before he can alienate the land.

The head of the family as clearly stated occupies an eminent and enviable position in the family, as the head he presides over the meetings of the family, allocates land for farming and other purposes, receives any income, such as rents, tributes or compensation. He also takes necessary actions to protect family property against unlawful interference and recovers family land from strangers/occupiers who are in breach of some conditions of their tenancy. He plays a fundamental role in the alienation of family property, as his consent is *sine qua non* for a valid alienation of family property.

However, notwithstanding the customarily regulated roles and the enormous discretionary powers exercised by the head of the family, he is expected to operate within the confines of the native law and custom governing the ownership and management of the family land/property. One of such principles of customary law and practice which engenders some checks on the excessive powers conferred on the head of the family is the right of members to compel such family head to give account of the family property. The court in *Agara v. Agunbiade*⁹²⁵ summed up the position when it held that:

*. . . the legal remedy available to the appellants to get the respondents to render accounts to the family was to institute an action to render the said accounts, or to seek to declare void all sales or transactions regarding the family land by the head of the family without requisite authority. . .*⁹²⁶

Similarly, as a check to the power of the family head in the management of family property, where there has been a persistent refusal by the head to allow other members of the family to enjoy their rights under native law and custom in family land/property the court has exercised, and will continue to exercise, its undoubted right to make such order as well ensure that members of the family enjoy their rights. However, if such rights cannot be ensured without partitioning the land, the court orders a partition.⁹²⁷

As earlier noted, the court in *Aralawon v. Aromire*⁹²⁸ per Carey J. held that:

*The head of the family undoubtedly has power to bind the family in routine matters, but before borrowing appreciable sums of money, disposing of, or charging family property, etc., except possibly when he acts in emergency for the benefit of the family, **he must consult the senior members of the various branches of the family and get their approval.***⁹²⁹

Generally, under the customary land tenure system among the Yorubas; it is a settled principle that where the family finds the head thereof misappropriating the family possession or property and squandering them, one of the remedies, though not commonly used, is to remove him and appoint another person acceptable to the family.⁹³⁰

The decisions in the line of cases, of which the above is one, point to the gravity of the personal responsibility of the head of the family. As the head, he is the person to be consulted in all matters, and the proper person to summon meetings of the family council, with which he acts in consultation.⁹³¹

RECOMMENDATIONS

Essentially, the position of the family head is recognized as an important one, particularly in the management and control of the family property together with other ancillary responsibilities entrusted in his care. However, in a bid to have a smooth and rancour-free transactions on family land, the following suggestions are made; namely:

⁹²⁵ Supra

⁹²⁶ See also *Alli v. Ikusebiala* (1985) 1 NWLR Pt. 4 p. 630; *Adejumo v. Ayantegbe* (1989) 3 NWLR pt. 110 p. 417

⁹²⁷ *Lopez v. Lopez* (supra)

⁹²⁸ Supra

⁹²⁹ Emphasis mine.

⁹³⁰ See the following cases: *Agara v. Agunbiade* (supra); *Akande v. Akande* (supra); *Nelson v. Nelson* (1951) 13 WACA 284; and *Fynn v. Gardner* (1953) 15 WACA 260.

⁹³¹ Coker, G.B.A., *Ibid.* p. 135.

1. The customary rule of ‘unanimity’ should be re-defined with a greater degree of certainty and clarity. The unanimity rule states that before a disposition of family property is validly made, the family head and all the principal members should be unanimous in their consent. For instance, it is sometimes difficult to determine principal members of the family in order of seniority with a view to determining those who qualify as “principal members.”
2. It is also suggested that the principle or practice which nullifies a transfer/sale of family land without the consent of the family head be reviewed. This aspect of Yoruba native law and custom regarding the control and management of the family land be reviewed otherwise recalcitrant family heads without lawful justifications will continue to latch on to this practice to hold the entire family into ransom. Where therefore it is just, fair and equitable to transfer/sell a portion of the family land, a unanimous decision of all the members of the family shall be sufficient to overrule the family head’s stance.
3. It is further recommended that in a bid to protect an innocent third party purchaser of family land, the family should adopt the use of power of attorney, validly signed by the principal members of the family authorizing the family head to carry out the transaction. This act will safeguard the interest of prospective purchaser who ordinarily might not know all the principal members of the family.
4. Also, since there is no law forbidding the registration of family land, nothing prevents families from registering their land. Once such land has been registered, without removing anything from its customary status, verification and searches of such land becomes easier and owners ascertained. This in turn will reduce drastically fraudulent manipulations of the consent requirement of alienation of family land and thereby eliminate the high incidence of land speculators, popularly referred to as ‘omo-onile’ (descendants of the landowners).
5. Finally, this writer recommends that in formulating customary rules (or reviewing the existing ones), two major objectives should be targeted; namely: (i) to facilitate the sale/transfer of the family land in such a manner that the title acquired by the purchasers are secured and (ii) interest and wishes of the entire family as a whole be considered, not those of the individual members, while the age-long enviable position of the family head be preserved, however without any undue dominance.

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