

# To What Extent Can Equity Find Expression in Constructive Trust Under the Nigerian Legal System?

KINGSTON, Kato Gogo (PhD) OKE-CHINDA, Mercy (PhD)  
Faculty of Law, University of Port Harcourt, Choba, Port Harcourt, Rivers State, Nigeria

## Abstract

The object of this paper is to examine the assertion that, constructive trust is a vital legal mechanism through which the conscience of equity finds expression. When real property is acquired in such circumstances that the legal title holder may not in good conscience keep the beneficial interest, equity makes him a trustee of the property.<sup>1</sup> This treatise does not seek to provide a comprehensive philosophical analysis of constructive trust as a subject-matter however, it sets out to elucidate the landscape, growth and cogency for the imposition of constructive trust as probably a safer means by which the legal and equitable interests of the relevant parties may be protected in real and personal properties. Thus, the paper assessed the degree to which constructive trust as equitable remedy is applicable under the Nigerian legal system. Also, the paper seeks to offer viable suggestions for the improvement of the concept and applicability of constructive trust in contemporary settings.

**Keywords:** Constructive trust, Equity, Land.

## 1. The Nature and Development of Constructive Trusts

Article 2 of The Hague Convention on Law of Trusts defines a trust as a relationship which exist between parties whereby one of the parties known as the settlor agrees with the second party giving him (the second party or trustee) the authority to hold a recognisable property for the benefits of a third party or third parties. In some cases, the trustee is also among the beneficiaries.<sup>2</sup> In essence, a constructive trust is “a relationship by which a person who has obtained title to property has an equitable duty to transfer it to another, to whom it rightfully belongs, on the basis that the acquisition or retention of it is wrongful and would unjustly enrich the person if he or she were allowed to retain it.”<sup>3</sup> It is more like an implied trust based on the proof of equitable relationship of the parties that gives rise to implied trust. Consequently, “a constructive trust is an equitable remedy resembling a trust imposed by a court to benefit a party that has been wrongfully deprived of its rights due to either a person obtaining or holding a legal property right which they should not possess due to unjust enrichment or interference.”<sup>4</sup>

In *Muschinski v Dodds*,<sup>5</sup> a couple co-habited in a house owned by the man. They both decided to improve the value of the house by building an extension to it to create a workshop for the lady to use as arts and crafts gallery. They further agreed that the lady should pay for part of the cost of the improvement work on the property which she obliged. Soon after, the relationship broke up. One of the issues for the court to determine was, whether the lady has any interest in the estate since the property is owned by the man. The English High Court held that the man, despite being the sole legal interest owner, has held the property on constructive trust for himself and the lady in the extents in which they paid to the enhancements to the property. In this circumstance, the man failed to prove that the lady intended to unjustly enrich herself hence, the trust arose from the date of the court judgment. The court thus, said:

“... Viewed in its modern context, the constructive trust can properly be described as a remedial institution which equity imposes regardless of actual or presumed agreement or intention (and subsequently protects) to preclude the retention or assertion of beneficial ownership of property to the extent that such retention or assertion would be contrary to equitable principle.”<sup>6</sup>

Constructive trust extends to various facets of human activities besides real property for example, in *Williams v Central Bank of Nigeria*,<sup>7</sup> Dr Williams appealed to the Supreme court of England seeking to make the central bank of Nigeria liable for the fraud committed by a bank’s customer. Williams contended that the Bank knew, alternatively ought to have known of the fraud. The issue for determination by the court was whether a

<sup>1</sup> per Lord Denning in *Binion v Evans* (1972) Ch 359

<sup>2</sup> David Hayton (1987) The Hague Convention on the Law Applicable to Trusts and on Their Recognition. *The International and Comparative Law Quarterly* Vol. 36, No. 2, pp. 260-282

<sup>3</sup> <http://legal-dictionary.thefreedictionary.com/constructive+trust> accessed 30/1/2017

<sup>4</sup> [https://en.wikipedia.org/wiki/Constructive\\_trust](https://en.wikipedia.org/wiki/Constructive_trust) accessed 30/1/2017

<sup>5</sup> (1985) 160 CLR 583 at 614

<sup>6</sup> www.Lawteacher.net-Essays on Constructive Trust. accessed 30/1/2017. Also in An introduction to Equity in Nigeria: by Gilbert Kodilinye (190 Edition) Chapter 7, Page 91-96.

<sup>7</sup> [2014] UKSC 10, 16 ITEL 740, [2014] WLR(D) 88, [2014] 2 All ER 489, [2014] 2 WLR 355, [2014] WTLR 873, UKSC 2012/0113

party liable only as a dishonest assistant was a trustee, and subject to the exception which would extend the limitation period.<sup>1</sup> It was held that, the bank could only be a constructive trustee. In essence, that a bank that had received assets suspected to have been moved in breach of trust should not face claims by the beneficiaries of such trust on the grounds of dishonest assistance or knowing receipt in that, such claims were statute barred under section 21(3) of the UK Limitation Act. Nonetheless, where there is sufficient evidence to prove fraud or intentional cover-up, the beneficiaries can invoke the provisions of section 32 of the UK Limitation Act.

For more than 200 years, constructive trust has been developing giving credence to equity. However, in the last few decades, it seems to have gathered more weight and become more relevant to the extent that it has almost become difficult to envisage and explain all the situations in which its equitable principles might be called into action. A trust is voluntary and express declaration which create a fiduciary plan that authorises a third party known as trustee, to hold and administer property including tangible and intangible assets on behalf of others persons known as beneficiaries.

“English law provides no clear and all-embracing definition of a constructive trust. Its boundaries have been left perhaps deliberately vague, so as not to restrict the court by technicalities in deciding what the justice of a particular case may demand.”<sup>2</sup>

Nonetheless, there are circumstances where the court may impose a trust over identifiable assets irrespective of the lack of the express intention of the parties. For example, in England and Wales, section 53 Law of Property Act 1925 exempts constructive trust from the prescribed requirements for the legal construction of trusts. However, “a constructive trust arises by operation of the law; it does not depend upon the intentions, either express or implied, of those who are affected by it”.<sup>3</sup> Generally, the centre-piece of the principle of constructive trust is the quest to control the frequency of ‘unjust enrichment’. It is worth noting that, the rights and responsibilities of constructive trustees differ from case to case. Notwithstanding, a constructive trust has its origin from equity. It is designed to sustain the interests of integrity with intent to coerce a person who has the title to property to transfer it or part of it to another person(s) that should have it. Also, constructive trust can be formed by the court to give effect to a personal or parties’ express or implied intention “from which one party tries to depart, or without reference to the intention of the parties.”<sup>4</sup> According to Oakley,<sup>5</sup> when a property is acknowledged to be the subject-matter of a constructive trust, the creation of constructive trust imposes proprietary and personal liabilities irrespective of the nature of the constructive trustee.

## 2. Distinction between the English and American Approach

In the English legal system, constructive trust is a practical legal tool of equity which lies within the borders of fair justice. In the United States of America, it is used as a remedial tool. For example, in *Beatty v Guggenheim Co*<sup>6</sup>, Cardozo J stated that: “The constructive trust is the formula through which the conscience of equity finds expression...legal title may not...retain the beneficial interest, equity converts him into trustee.”<sup>7</sup> However, the English approach to constructive trust is different from the American approach in that, it clearly differentiates between the circumstances in which a constructive trust will be imposed and the remedies that are available.<sup>8</sup> Notwithstanding this core difference, the rudimentary elements of constructive trust are the same in both legal systems.

## 3. Grounds for the Imposition of Constructive Trusts

In *Westdeutsche Landesche Girozentrale v Islington London Borough Council*<sup>9</sup> Lord Browne-Wilkinson suggested that, if the remedial construction trust were introduced into English law, it might provide a suitable basis for development of proprietary restitutionary remedies.<sup>10</sup> The learned judge went further to list three basic principles that are relevant to the imposition of a constructive trust namely:

- a) A constructive trust may be imposed due to the evidence that a party’s conduct is unconscionable.
- b) A person cannot be a trustee if he is ill-informed of the facts alleged to affect his conscience.
- c) There must be recognisable trust property, except where a constructive trust is imposed on a party who dishonestly supports another in a breach of trust.

<sup>1</sup> [swarb.co.uk/williams-v-central-bank-of-nigeria-sc-19-feb-2014/](http://swarb.co.uk/williams-v-central-bank-of-nigeria-sc-19-feb-2014/) accessed 20/12/2016

<sup>2</sup> Edmund Davies L.J (1969), cited in A.J. Oakley, (1987), *Constructive Trust*, 2<sup>nd</sup> Edition. London: Sweet & Maxwell, p.11

<sup>3</sup> Margaret Halliwell (2000); *Equity and Trusts*. London: Old Bailey, p.100

<sup>4</sup> L.A. Sheridan (1993), *The Law of Trusts*, 12<sup>th</sup> Edition. Chichester: Barry Rose, p.215.

<sup>5</sup> A.J. Oakley, (1987), *Constructive Trust*, 2<sup>nd</sup> Edition. London: Sweet & Maxwell, p.1.

<sup>6</sup> (1919) 225 NY 380

<sup>7</sup> *ibid*

<sup>8</sup> Margaret Halliwell, *ibid*, p.102

<sup>9</sup> [1996] 2 All ER 961

<sup>10</sup> Margaret Halliwell, *ibid*, p.102

Despite the above three listed core circumstances, Oakley<sup>1</sup> reiterated that, the furthest solitary factor that determines ‘when, and under what circumstances, a constructive trust should be imposed by the court is the role which the court considers that the constructive trust occupies in the legal system as a whole.’ This is reinforced in *Clarkson v McCrossen Estate*,<sup>2</sup> where McEachern CJ opined that, the law of unjust enrichment is in its early formative stages and that it will continue to mature incrementally. There are a number of other situations justifying the creation of constructive trusts by the court as follows:

(a) *Constructive trusts imposed as a result of fraud*

Under the Statute of Frauds 1677, there is no requirement for constructive trusts to be in writing. Constructive trusts are created and imposed by the courts, based on either written or oral evidence of each case. For instance, where a party promises to hold a property in trust for himself and for other named beneficiaries and he fails to fulfil the promise hence, fraudulently denied the third parties of their beneficial rights, he is said to have violated the Statutes of Frauds for example, in *National Westminster Bank v. Morgan*<sup>3</sup> and in *Rochevoucauld v. Boustead*<sup>4</sup> the court said:

“It is a fraud on the part of a person to whom land is conveyed as a trustee and who knows it is so conveyed to deny the trust and to claim the land for himself...”

In the cases of fraud, the court may impose a constructive trust as a result of such unconscionable act. However, many courts are often reluctant to impose constructive trust where the evidence is oral. The English court is particularly conscious not to impose constructive trust in such cases as not to side-step the purpose of the statute of frauds. It is very important to note that, equity is not very consistent in granting reliefs for fraudulent and unconscionable conduct due to the common law doctrine of undue influence which arise as a result of a party’s unfair and improper conduct such as coercion in the process that led to the contract. However, in *Bannister v. Bannister*,<sup>5</sup> the Appellant had the right of residence of a property, therefore had equitable life interest (tenant for life of the land) in accordance with section 19 of the English Settled Land Act 1925 hence, entitled to hold legal estate in land with the power of sale. The property was sold therefore conferring only the equitable reversionary interest to the purchaser. The court held that, the equitable interest of the life tenant cannot be extinguished with express agreement by the parties and imposed a constructive trust to prevent a party’s unconscionably relying on the lack of written evidence to defeat the interest of others.<sup>6</sup>

(b) *Enforceable contract and common law contractual damages*

The court may impose a constructive trust in a circumstance where there is evidence of the existence of contract between parties but the cause of action is such that the award of damages would be insufficient remedy. It is vital to point out that, the type of contract where constructive trust is likely to arise is contract related to land. The case of *Lysaght v Edwards*<sup>7</sup> illustrates that, it is unlikely that contract for sale of personal property will yield successful claim to move the court to create a constructive trust.

(c) *Mortgagee as constructive trustee*

A mortgage is a contractual relationship where the first party (a legal interest owner of land) known as the mortgagor transfers his legal or equitable interest in a property to the second party known as the mortgagee as a precondition for loan, with express provision for redemption, meaning that, the transfer shall become void upon the repayment of the loan. In essence, the mortgagee agrees with the mortgagor to re-convey the property to the mortgagor upon the redemption of the principal sum borrowed and the interests.<sup>8</sup>

There are two situations that mortgage transactions could dictate the creation of constructive trust and when a mortgagee becomes a trustee. The first is where, a mortgagee sale the mortgaged property or security for higher price than the total value of the loan and interest. The court may impose a trust on the mortgagee, to hold the surplus of the sales proceeds on trust for the mortgagor. The second situation is, when the mortgagee takes physical possession or rent out the mortgaged property and receive more income from it than the total value of the loan and interest.<sup>9</sup>

(d) *Constructive trusts arising under the doctrine of equitable conversion*

In sales of land transaction, the parties first enter into a contract of sales of land before the conveyance stage, at

<sup>1</sup> A.J. Oakley, (1987), *Constructive Trust*, 2<sup>nd</sup> Edition. London: Sweet & Maxwell, p.10.

<sup>2</sup> (1995) 13 R.F.L. (4th) 237 (BCCA) cited in, R. Trevor Todd, “The Remedial Constructive Trust”, www.disinherited.com/remedial-trust.htm accessed 20/01/2017

<sup>3</sup> [1985] 2 W.L.R 588).

<sup>4</sup> [1897] 1Ch. 196, 206

<sup>5</sup> [1948] W.N. 261

<sup>6</sup> See: *Binions v Evans* [1972] Ch. 359; *Neale v. Willis* (1968) 19 P. & C.R. 839; *McCormick v. Grogan* (1869) L.R 4 H.L 82, 97 Also, Oakley, *ibid*, pp. 31-32

<sup>7</sup> (1876) 2 Ch D 499

<sup>8</sup> *Per Amaizu JCA, in B. O. N Ltd v. Akintoye* (1999) 12 NWLR (Pt. 392) p. 403.

<sup>9</sup> *White v. City of London Brewery* (1889) 42 Ch. D. 237

the contract stage the purchaser pays a deposit or part of the purchase price pending conveyancing. In law thus, the purchaser becomes the equitable owner pending the delivery of the deed.<sup>1</sup> However, the legal title of the land remains with the seller until the finalisation of the contractual obligations of the purchaser such as the payment of the full purchase price. In the event that either of the party dies after the “equitable doctrine has operated, his property will devolve as if the contract has been performed.”<sup>2</sup> In *Wood v. Donohue*,<sup>3</sup> it was held that, the purchaser’s equitable interest was equal to the amount of the purchase price or part payment he paid to the seller irrespective of the depreciated current value of the property. The equitable interest hence, can be converted to cash.

The doctrine of equitable conversion was pioneered in *Lysaght v. Edwards*.<sup>4</sup> In that case, the seller entered a contract to sell a farmland, but died before conveyance. It was held that the death of the seller did not extinguish the contract because the *rem* was still subsisting thus, constructive trust arose when the contract of sale became fully binding on both parties. Therefore, the doctrine of conversion became effective, it does not matter whether the purchaser paid the full contract price or not, he became the equitable interest owner and, the seller became the constructive trustee thereof.

In *Holroyd v. Marshall*,<sup>5</sup> it was stated that, where the court imposes a constructive trust on a seller, he is thus precluded from declaring express trust on the property in favour of a third party. He is also precluded from selling the property to a third party, if he does so, he is a constructive trustee of the purchase money for the former purchaser.

*(e) Breach of Duty in Direct Dealing with Beneficiary and Status of Strangers*

Where a trust is already in existence, a trustee including the agents of the trustee could be made a constructive trustee of the property acquired through transactions that are directly linked to the breach of the duty to disclose the dealing concerning the trust. For example, if a trustee acquires the equitable interest of a beneficiary under the trust for an insufficient price, without disclosing the facts to the beneficiary thereafter make profits from the transaction, the profit can be a subject of a constructive trust.

Also, where a trustee inappropriately permit the trust assets to be acquired or used by strangers to the trust, the trustee is therefore personally liable for breach of trust.<sup>6</sup> Where the stranger mix the trust property with his own, there will be a declaration of charge.<sup>7</sup> However, in *Ministry of Health v. Simpson*,<sup>8</sup> it was held that, a virtuous stranger will not be accountable as a constructive trustee if he has acquired the trust property without previous information of the existence of a trust. The court said:

“A person who receives trust land in breach of trust is a constructive trustee of it unless he is a *bona fide* purchaser for value without notice of the breach. The stranger is chargeable with the trust property if either he had notice of the breach when acquiring the title, whether or not he gave value, or he acquired the title as a volunteer, whether he had notice of the breach of trust or not.”<sup>9</sup>

On the other hand, where the stranger has knowledge of the existence of a trust prior to acquiring and parting with the property of the trust, he is liable for fraudulent procurement and unlawfully assisting in the breach of trust obligations, therefore, liable in equity to account for the losses borne by the beneficiaries.<sup>10</sup> In the same vein,

“...if one, not being a trustee and not having authority from a trustee, takes upon himself to intermeddle with the matters or to do acts characteristic of the office of trustee, he may thereby make himself what is called in law a trustee of his own wrong – i.e., a trustee *de son tort*, or, as it is also termed, a constructive trust.”<sup>11</sup>

In *Keech v. Sandford*,<sup>12</sup> it was held that the trustee that misuses his position by undertaking transactions with a third party must render account for the profits of the transactions as constructive trustee. Accordingly, the

<sup>1</sup> Deed of assignment, deed of lease or deed conveyance.

<sup>2</sup> Oakley, *ibid*, p.141

<sup>3</sup> Court of Appeals of Ohio, First District, Hamilton County No. C-990127, 1999.

<sup>4</sup> (1876) 2 Ch. D. 499. Also in *Melican v. Parker et al.* No. S11A0043

<sup>5</sup> (1862) 10 H.L.C. 191, 209

<sup>6</sup> *Pilcher v. Rawlins* (1872) 7 Ch. App 259 cited in Philip H. Pettit, *ibid*, cit op. p.144

<sup>7</sup> Philip H. Pettit, *ibid*, cit op. p.144

<sup>8</sup> [1951] AC 251

<sup>9</sup> L. A Sheridan, *ibid*, pp. 235-236

<sup>10</sup> *Royal Brunei Airlines Sdn Bhd v. Philip Tan Kok Ming* [1995] 3 All ER 97

<sup>11</sup> per A.L Smith L.J in *Marva v. Browne* [1896] 1 Ch. 199, 209

<sup>12</sup> (1726) Sel.Cas. Ch. 61

trustee held the profits of the property rents on a constructive trust for the beneficiary.<sup>1</sup> The court went further to say (obiter):

“...this may seem hard that the trustee is the only person of all mankind who might not have the lease, but it is very proper that the rule should be strictly pursued, and not in the least relax; for it is very obvious what would be the consequence of letting trustees have the lease on refusal to renew to *cestui que trust*, per Lord King LC.”<sup>2</sup>

From the foregoing, it will be correct to say that, a trustee is an agent of the principal that declared a trust. Hence, an agent who makes indecorous profit directly from their position and corruptly engaging with third parties at the expense of the trust property is accountable for such profit. In *Industrial Development Consultants Ltd v. Cooley*,<sup>3</sup> the court held that the trustee that makes profit from the trust unlawfully is indebted to both the beneficiaries of the trust and the principal. Similarly, in *Guinness plc v. Saunders*,<sup>4</sup> the court emphatically reiterated that, money collected by a company director was a breach of fiduciary duty therefore, the court imposed a constructive trust on him.<sup>5</sup> The same outcome was in *Parker v. McKenna*,<sup>6</sup> where the court clearly stated that a fiduciary should not profit from his official capacity except with the consent and approval of his principal. According to the learned judge it “is an exorable rule, and must be applied inexorably by this court, which is not entitled, in my judgement, to receive evidence, suggestion or argument as to whether the principal did or did not suffer any injury in fact by reason of the dealing of the fiduciary” per Lord Justice James.<sup>7</sup>

(f) *Gift by will or intestacy based upon broken promise and incomplete transfer*

Where a property owner is persuaded to make a complete gift to a person by will as a result of confidence based on oral promise by the trustee to use all or some parts of the property to the benefit of a chosen person and, after the death of the settlor, the trustee failed to keep to the promise, equity can make him a constructive trustee. In *Milroy v. Lords*,<sup>8</sup> it was held that the failure to fulfil the required formal procedure for transfer of the benefits to the beneficiaries of a trust will render the transfer solely useless at law and equity. Divergently, in *Re Rose*<sup>9</sup> it was held that equity holds that, such incomplete transfer became complete at the point where the settlor did all he ought to have done, instead of when the trustee agreed to and recorded the transfer. Therefore, equity viewed the property transferred by settlor as the last act.<sup>10</sup> According to Oakley:

“While some of the aspects of the Rule in *Re Rose* have yet to be fully clarified, there is no doubt whatever that, that rule is English law at the present time. Any trust that arises as a result of the operation of the rule clearly arises by the operation of law and therefore should be classified as a constructive trust.”<sup>11</sup>

#### 4. The Practicality of Constructive Trust in Nigeria

The courts in Nigeria rarely consider constructive trust, rather cases bordering on possible constructive trust remedies are considered under the general scope of breach of contract consequently, damages are routinely awarded as fair remedy. Although, there are few case laws that exemplify the willingness of the court to develop the doctrine of constructive trust in Nigeria. For example, in *AG of the Federation v. AG of Abia State & Ors*,<sup>12</sup> the Supreme Court held that, the federation account that is used to retain some federal revenues which are shared by all the states and the central government is held on constructive trusts by the Federal Government. The judgment implies that, the federal government cannot unilaterally manipulate the revenue, where it does so, it must account for the profits. This means that, the federal government cannot unjustly enrich itself at the expense of the states thereof. The federal government as a constructive trustee is thus, an agent. In *Odudu v. Onyibe*,<sup>13</sup> the court said that:

“...an agent must not allow his own interest to conflict with his obligation to the principal. Where such a situation occurs to the knowledge of the third party, the contract is voidable at the option of the principal.”

<sup>1</sup> Oakley, *ibid*, p. 66

<sup>2</sup> *Ibid*, pp. 66

<sup>3</sup> [1972] 2 All ER 162

<sup>4</sup> *Supra*

<sup>5</sup> Philip H. Pettit (2001) ‘Equity and the law of Trusts’, (9<sup>th</sup> edition), London: Butterworth, p. 143

<sup>6</sup> (1874) L.R 10 Ch.96

<sup>7</sup> cited in Oakley, *ibid*, p.49

<sup>8</sup> (1862) 4 De GF & J. 264

<sup>9</sup> [1952] Ch. 499

<sup>10</sup> Paul Todd (2001) ‘Cases and Materials on Equity and Trusts’ (3<sup>rd</sup> Edition) p. 67

<sup>11</sup> *ibid*, p.178

<sup>12</sup> (2002) 4 SCNJ

<sup>13</sup> (2001) 13 NWLR (pt. 729) 140 at 157 Para. D-E

By this token, the federal government has the obligation to ensure fair dealings with the said revenue. In another relatively new case of *First Bank Nigeria v. Ozokwere*,<sup>1</sup> the Nigerian Supreme Court recognised that unjust enrichment is a viable cause of action where the ingredients are plausible that may not only be bound by the doctrines of tort and contract. In *Eboni Finance & Sec. v. Wole-Ojo Technical Services*,<sup>2</sup> the court held that, in a proven circumstance where a party unjustly enriches himself at the cost of another, the duplicitous party must be “made to disgorge it”. The court further explained *inter alia*:

“Therefore, in consonance with the principles enshrined in the restitution a remedy shall be available whenever the defendant is unjustly enriched at the expense of the Plaintiff.”

Even though the court did not specifically impose a constructive trust, it did acknowledge its relevance as a model of restitution. Nigerian courts appear to treat unjust enrichment cases within the broad scope of restitution as a guided remedy which streams from the doctrine of equity hence, reluctant to see such cases as of constructive trust. The basis for restitution is the proprietary interest which a claimant holds in the enrichment obtained by the trustee. The right to restitution is principally within the scope of law and equity.

Rather than use the phrase constructive trust, some courts in Nigeria have coined the terms constructive fraud as cause of action for certain instances of unjust enrichment for example, in *Nsirim v. Onuma Construction Co. (Nig.) Ltd.*,<sup>3</sup> the court explained that a “person will be liable for *constructive fraud* in circumstances where as a result of his breach of duty, though without an actual fraudulent intent, gains an advantage. In other words, a person will be liable for constructive fraud in circumstances where a person benefits from a breach of duty to another.”<sup>4</sup>

## 5. Constructive Trust Under the Customary Land Tenure

According to the Food and Agriculture Organisation (FAO):

“Land tenure is the relationship, whether legally or customarily defined, among people, as individuals or groups, with respect to land [hence], land tenure is an institution, i.e., rules invented by societies to regulate behaviour. Rules of tenure define how property rights to land are to be allocated within societies. They define how access is granted to rights to use, control, and transfer land, as well as associated responsibilities and restraints. In simple terms, land tenure systems determine who can use what resources for how long, and under what conditions.”<sup>5</sup>

Historically, it is common knowledge that the Nigerian land tenure system evolved from native traditional land holding system. In the Northern territories land was held by the sovereign rulers in the form of native trustee for the various segments that were mainly communal. In the Southern territories, land was under the community leaders, who partitioned the units to the families that made up each segment of the communities. The process of acquiring land by community members was by oral application to the communal head for use of land. When the land is allotted, the applicant acquired the equitable interest therefore has the right to possess and enjoy the land in accordance with the laid down rules of the community. Some communities prohibited alienation rights but approved transfer of interest to descendants. The foregoing discourse implies that community leaders acted as trustee. For example, in *Adewoyin v. Adeyeye*<sup>6</sup> the court held that,

“... once an Ooni [community head] allocates a portion of community land to a native of Ife for the family use, the allottee enjoys possessory rights to the exclusion of other members of the community.”

In *Chukwu v. Uche*,<sup>7</sup> the violation of the terms of the allotment of land to a community member may

<sup>1</sup> (2013) 12 (Pt II) M.J.S.C 60 AT 77-78

<sup>2</sup> (1996) 7 NWLR (Pt. 461) 464 at 478

<sup>3</sup> (2001) 7 NWLR (pt. 713) 742 at 757

<sup>4</sup> Kayode Omosehin (2015) Perspectives on Fraud and Unjust Enrichment under Nigerian Law, <https://www.linkedin.com/pulse/perspectives-fraud-unjust-enrichment-under-nigerian-law-omosehin> accessed 06/2/2016

<sup>5</sup> <http://www.fao.org/docrep/005/Y4307E/y4307e05.htm> accessed 9 February 2017. The FOA went further to explain that “land tenure constitutes a web of intersecting interests. These include: Overriding interests: when a sovereign power (e.g., a nation or community has the powers to allocate or reallocate land through expropriation, etc.); Overlapping interests: when several parties are allocated different rights to the same parcel of land (e.g., one party may have lease rights, another may have a right of way, etc.); Complementary interests: when different parties share the same interest in the same parcel of land (e.g., when members of a community share common rights to grazing land, etc.); and, Competing interests: when different parties contest the same interests in the same parcel (e.g., when two parties independently claim rights to exclusive use of a parcel of agricultural land. Land disputes arise from competing claims.)”

<sup>6</sup> 1961 All NLR 5

<sup>7</sup> 1976, 9 and 10 SC 173 at 176

lead to the revocation of the rights to the property by the community or family head. In *Amodu Tijani vs. Secretary of Southern Nigeria*<sup>28</sup>, the court stated that:

“... fact which it is important to bear in mind in order to understand native law is 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...”<sup>1</sup> Also in *Arase v. Arase*,<sup>37</sup> the Supreme Court explained that: “It is now settled by decided cases that basically all land in Benin is owned by the community for whom the Oba of Benin holds the same in trust, and it is the Oba of Benin who can transfer to any individual the ownership of such land.”

Similarly, the family head or community head could be held to account for unjust benefits obtained by him through the reckless handling of the common property.<sup>2</sup> The position of a reckless community or family head that unjustly profit from a community property is that of constructive trustee even though it is not often made clear by the Nigerian courts.

## 6. Statutory Trust of Land and Constructive Trust

The preamble of Nigeria’s Land Use Act 1978 states as follows:

“An act to vest all land comprised in the territory of each state (except land vested in the Federal Government or its agencies) solely in the Governor of the State, who would hold such land in trust for the people and would henceforth be responsible for allocation of land in all urban areas to individuals’ resident in the state and organisations for residential agricultural, commercial and other purposes while similar powers with respect to non-urban areas are conferred on local governments.”

Section 1 of the Act vests all land comprised in each state (except lands vested in the Federal Government for its agencies) solely in the hands of the governor of the state, to hold in trust for the people. By this provision, there exist statutory trust on all lands thereof.

From the construction of the preamble and section 1 of Act, it implies that the governor of every state as trustee of the lands ought and should act reasonably in the administration of lands. Although, there are currently seems to be no authority to illustrate unjust enrichment of any governor resulting from reckless handling of lands, the Land Use Act appears to give room for the governors to be held accountable for misuse of trust powers over lands. Where such event arises, the possibility of the court to create constructive trust is foreseeable. This means that, the governors cannot unjustly enrich themselves or breach the duties confined within the scope of the Land Use Act.

## 7. Conclusion

In this paper, we have attempted to show that a constructive trust is not a voluntary creation, but a mechanism by benefit of which precise property is vested in a trustee on trust for ascertainable beneficiaries. We have also shown that constructive trust may arise due to a breach of a fiduciary obligations. However, the duty of a constructive trustee is less arduous than those of the express trustees in the sense that, they do not have to comply wholly on the usual duty of care. However, failure to comply with the terms of the constructive trust may result in stricter sanctions by the court. According to Smith: “There is an obligation on the [constructive] trustee: to convey the trust property to or to the order of the beneficiary. A breach of this obligation would create a personal liability. But the trustee cannot, without fiction, be said to have assumed obligations of the utmost selflessness. The only way to reach the contrary conclusion would be to say that this is the technique of equity: to subject trustees, even unwilling ones, to the fiduciary standard, so as to generate the corresponding liabilities. That however, would be using the fiduciary relationship in a wholly instrumental way.”

In view of the emphasised basic principles of constructive trust, we conclude that, the settings in which constructive trusts have been adjudicated by the courts in England and elsewhere, to exist are yet to be fully explored in Nigeria. Nigerian courts are therefore, urged to explore the constructive trust as a valuable remedy for breach of fiduciary duties especially where the recovery of a trust property is still in the possession of the defendant.<sup>3</sup> Alternatively, to aid in the tracing of the proceeds where there are evidence to show that the constructive trustees have disposed of the trust property.<sup>4</sup> Active application of constructive trust by the Nigerian courts will encourage litigants to utilise the remedy against the constructive trustees,<sup>5</sup> for various cause of actions

<sup>1</sup> *ibid*

<sup>2</sup> *Bassey v Coban [1924] 5 NLR 92*

<sup>3</sup> Margaret Halliwell (2000); *Equity and Trusts*. London: Old Bailey, p.101.

<sup>4</sup> *ibid*

<sup>5</sup> *ibid*, also see *Re Montague [1987] 2 WLR 1192*

including proprietary estoppels as in *Taylor Fashions ltd v. Liverpool Victoria Trustees*<sup>1</sup>. Nonetheless, we wish to emphasize that, constructive trust should not only be pinned down to express trust but should be widely applied for example:

“A person who has made a representation or allowed another to labour under misapprehension should not be allowed, after the other person has acted upon it to his detriment, to deny that which has been represented or misapprehended. It matters not that there are no contractual or other enforceable obligations, nor that formalities requirements have not been satisfied.”<sup>2</sup>

In essence, the claimants should have various options available to them “where the property upon which the constructive trust is imposed is still identifiable in the hands of trustees, the beneficiary may choose either to exercise his proprietary rights in the subject-matter of the constructive trust, or to rely on the personal liability of the constructive trustee to account, or, to exercise both of these remedies.”<sup>3</sup>

---

<sup>1</sup> [1982] QB 133

<sup>2</sup> R. J Smith, (2000) ‘Property Law – Cases and Materials’, London: Longman Law Publishers, p.220

<sup>3</sup> Oakley, *ibid*, p.4