PROPERTY LAW PRACTICE

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NIGERIAN LAW SCHOOL 2018/2019

(ENUGU CAMPUS)

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(Week 3)

GENERAL OVERVIEW AND APPLICABLE LAWS TO PROPERTY LAW PRACTICE

MEANING AND SCOPE OF PROPERTY LAW

I. Meaning of Property

The word property has a variety of meanings depending on the context in which it is used. Sometimes, it may mean ownership or title such as when it is said that property in the goods passes to the buyer immediately the contract of sale is concluded whether or not the goods have been physically transferred to him. It may mean the 'res' (thing) over which ownership may be exercised. It may also mean an interest in a thing less than ownership but nevertheless conferring certain rights such as when it is said that 'B' as pledgee has 'special property' in the subject matter of the security – ***Donald v. Suckling***.[1]

In whichever sense the word property is used, property law is designed to regulate the relation of persons to things thereby providing a secure foundation for the acquisition, enjoyment and disposal of things or wealth.

Property may also mean the right of a person to something tangible and physical, such as a parcel of land. It may also relate to something intangible such as a right in a work protected by copyright. This view finds support in ***Section 2(1) of the Conveyancing Act 1881*** which defines "property", to include real and personal property, any estate or interest in any property, real or personal, any debt, anything in action, any other right or interest. Land is depicted to include land of any tenure, tenements, hereditaments, corporeal or incorporeal and houses and other buildings, also an undivided share in land – ***Section 2 of the CA***.

This course deals basically with property transactions (conveyance) and laws applicable to tangible or real property (land, anything attached to land or any interest in land).

II. Meaning of Conveyance

Conveyance is the application of the law of Real Property in practice. It is not often easy to differentiate between real property law and its practice, for while the former is static, the latter is dynamic. Real property law deals with the rights and liabilities of landowners, while its practice (conveyancing) deals with the art of creating and transferring rights in land. Yet, one cannot be a good conveyance without a good grasp of real property law. Conveyancing transactions may occur in a number of situations such as sales of land, leases, and mortgages. Conveyances are described as including "assignment, appointment, lease, settlement and other assurance and covenant to surrender, made by deed, on a sale, mortgage, demise, or settlement of any property, or any other dealing with or for any property". However, a Will is an exception to a conveyance – ***Section 2(1) of the PCL, 1959*** - because it is ambulatory (movable), which "…distinguishes a will from a conveyance…," the latter being "*inter vivos,* which operates at once or at some fixed time."

III. Property Law Practice Jurisdictions and the States Covered By Each

1. **Property and Conveyancing Law 1959**: applicable to the old Western Nigeria - Edo, Delta, Oyo, Ogun, Osun, Ondo and Ekiti States.
2. **Conveyancing Act 1882**: applicable to the old Eastern (Rivers, Bayelsa, Cross-River, Akwa-Ibom, Ebonyi, Abia, Imo, Enugu, Anambra) and old Northern States (Kaduna, Sokoto, Zamfara, Kano, Borno, Adamawa, Katsina, etc.) and some parts of Lagos. Note that CA applies to some parts of Lagos, but when it comes to mortgages, in Lagos CA no longer applies. The applicable laws in Lagos for mortgages are: ***Mortgage and Property Law of Lagos (MPL)*** and ***RTL***.

[1] (1866) LR 1QB, 585

3. **Registration of Titles Law of Lagos State 2003**: applicable to most parts of Lagos (Ikoyi, Lagos Island, Obalende, Victoria Island, Ebutte-Metta, some parts of Mushin, Yaba, Badagry, Apapa, Gbagada, Surulere, and Somolu). However, this law has been repealed by virtue of ***Section 122 Land Registration Law Lagos State 2014***.

APPLICABLE LAWS

I. Customary Law

This is a set of rules of conduct applying to persons and things in a particular locality, which exist at the relevant and material time and is recognised and adhered to by the inhabitants of the community as binding on them. Custom is usually a question of fact which is required to be pleaded and proved by witnesses in any legal proceeding – ***Olubodun v. Lawal***;[2] ***Odutola v. Sanya***.[3]

These rules and customs vary from one society to another. The simple requirements of payment of the purchase price; the presence of witnesses; and allowing the buyer into possession, are sufficient elements for sale under native law and custom in Nigeria. Once these 3 elements exist, a valid sale could be said to have taken place – ***Adesanya v. Aderonmu***.[4] However, the provisions of the CA and PCL do not regulate customary transactions of land – See ***Olubodun v. Lawal (supra)*** where the SC held that the trial court erred in admitting such a document (a letter written by their ancestors tendered by the plaintiff) in evidence.

II. Islamic Law

Islamic law is one of the sources of law applied by the courts in Nigeria to regulate legal relationships especially by and among adherents of the Islamic faith or where the parties are not of Islamic faith, but consent to the application of Islamic law to regulate their relationship. See ***Section 277(1) CFRN 1999***. Islamic law is founded on the provisions of the Koran and the Hadith (primary sources of Islamic law) which regulate the facets of life of Muslim.

Transactions relating to property such as succession, wills, gifts, rights, obligations and interest in land are regulated by Islamic law and applied by the courts in Nigeria. For instance, the distribution of the estate of a deceased Muslim is set by Islamic Law and compliance is mandatory. See ***Abdulsalad v Abdulahi***.[5]

III. Case Law

These are decisions of the courts and opinions expressed by jurists in respect of disputes over real property that may be brought by contending parties before and decided by the courts. Some of these courts exercise original jurisdiction in respect of certain subject matters of land. The jurisdiction of the High Court also covers land matters that are the subject of customary right of occupancy or those in non-urban areas – ***Adisa v. Oyinwola***;[6] ***Odetola v. Bamidele***.[7]

In some States, appeals over land matters decided by the Area or Customary Courts may be dealt with on appeal by the High Court. However, customary arbitrations are accepted by higher courts as binding on the parties to the arbitration but decisions at customary arbitration is not considered as a means of proving title to land in Nigeria, although it may aid in establishing the traditional history of root of title based on the custom of the people – ***Nruama v. Ebuzoeme***.[8]

Appeals may lie from the decision of a lower court to a higher court. As a result of the common law principle of *stare decisis,* the judgment and opinions expressed by a superior court binds a

[2] (2008) All FWLR (Pt. 438) p. 1468
[3] (2008) All FWLR (Pt. 400) p. 780
[4] (2000) FWLR (Pt. 15) p. 2492
[5] (2015) All FWLR (Pt. 789) 916
[6] (2000) 10 NWLR (Pt. 674) p. 1349
[7] (2007) All FWLR (Pt. 387) p. 841
[8] (2007) All FWLR p. 347 at 740

lower court and the latter must follow such decision so long as the facts of the cases are similar.

IV. Received English Law

This is the law received from England comprising of the principles of common law, doctrines of equity and statutes of general application. These principles apply to regulate property practice in Nigeria, particularly over disputes that are tried before the High Courts and other superior courts. The statutes of general application are those enactments of the English parliament that were in existence in England as at 1st January, 1900, the day in which the protectorates of Northern and Southern Nigeria were proclaimed e.g. ***Statute of Fraud 1677, Conveyancing Act of 1881, and the Wills Act of 1837***. The English law applies to property transactions in Nigeria where there is no comparable local legislation or customary law that applies to such a transaction – ***Ude v. Nwara***.[9]

V. Nigerian Legislation

The various laws that have direct impact on property transactions that are intended to be discussed in the module are:

1. **Constitution of the Federal Republic of Nigeria, 1999** – The constitution affects property as regards to ***Section 43*** which provides for the right of every citizen to acquire and own immovable property anywhere in Nigeria. ***Section 44(1)*** also went further to enact the Common law principle that leans against the taking away of proprietary vested rights without specific legal authority and the provision of compensation. ***Section 44(2) (c)*** went further to state that the power of compulsory acquisition does not affect any general law relating to leases, tenancies, mortgages, charges, bills of sale or any other rights or obligations arising out of contracts. ***Section 44(2) (d)*** relates to vesting and administration of property of persons adjudged or otherwise declared bankrupt or insolvent, of persons of unsound mind or deceased persons, and of corporate or unincorporated bodies in the course of being wound-up. Finally, ***Section 315(5) (d)*** provides for the sanctity of the Land Use Act.
2. **Land Use Act 1978** – An Act to Vest all Land compromised 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 to organisations for residential, agriculture, commercial and other purposes while similar powers with respect to non-urban areas are conferred on Local Governments. ***Section 1*** provides that the Governor of each state shall hold the land comprised in such State upon trust and administer same for the use and common benefit of all Nigerians – ***Abioye v. Yakubu***.[10] What private individuals have on the land is a *right of occupancy* – ***Kachalla v. Banki.***[11] This is the greatest and highest legal interest a holder can have – ***Section 5(1); Ezennah v. Attah.***[12] ***Section 4*** preserves the application of the State Land Law except that they will continue to have effect with such modifications as would bring those Laws into conformity with the Act or its general intendment. ***Section 49*** precludes the courts from questioning the Governor's power to grant right of occupancy. ***Section 26*** renders void any alienation of interest in land without consent.
3. **Property and Conveyancing Law (PCL) 1959** – This is enacted by Western region of Nigeria commonly referred to as PCL. The most important features of this law is that no sale of land shall be enforced except there is a note of memorandum in writing containing the terms of the sale and signed by the person to be charged – ***Section 67(1) of PCL*****;** all conveyances of land or interests in land for the purposes of creating any legal estate are

[9] (1993) 2 NWLR (Pt. 278) p. 647
[10] (1991) 5 NWLR (pt. 190) p. 130
[11] (2006) All FWLR (Pt. 309) p. 1420
[12] (2004) All FWLR (Pt. 202) p. 1858 at 1884

void unless they are made by deed – ***Section 77(1) and 78(1) of PCL*****;** where a person executes a deed, he shall either sign or place his mark on it and sealing alone is not sufficient – ***Section 97(1) of PCL*****;** and the right to create leases are safeguarded so long as certain elements exist in it – ***Section 79(2) of PCL*****.**

4. **Conveyancing Acts (1881, 1882)** – These are English Statute of General Application applicable to States of the old Eastern and Northern Nigeria and a part of Lagos. These statutes have been repealed and modernised in England and there is no justification for their being retained in our statute books in Nigeria – ***Ihekwoaba v. ACB and Ors*****.**[13] However, States are advised to stop applying these English Statutes of General Application. In the case of ***Caribbean Trading Fidelity Corporation v. NNPC*****,**[14] Niki Tobi JCA (as he then was) held that "English is English, Nigeria is Nigeria… theirs are theirs, ours are ours… We cannot therefore continue to 'enjoy this borrowing spree' or merry frolic' at the detriment of our legal system… After all, we are no more in slavery".
5. **Stamp Duties Act/Law 2004** – There is a Stamp Duty Act for every State and FCT, which provides for the procedure for stamping of documents. Duty on land within the control of the State is paid to State Internal Revenue Service. Stamping of documents should be within 30 days of the execution of the document though it may be stamped out of time, which will attract penalty.
6. **Illiterate Protection Laws (IPL) 1994** – This is a law made to protect illiterate persons involved in transactions generally. "It is like a very wide umbrella and covers all forms of writing or document written at the request of an illiterate person" – ***Lawal v. G.B. Ollivant*****.**[15] Any person who shall write any letter or document, at the request on behalf or in the name of an illiterate person shall also write on such letter or other document in his own name as the writer and his address – ***Section 2 of the IPL*****.** The importance of these protections is for the benefit of the illiterate person – ***Fatumbi v. Olanloye*****.**[16] Further, where the illiterate person is to sign or to make a mark, the document must be read over and explained to him. The object of this law is to protect an illiterate person from possible fraud.
7. **Land Instrument Preparation Laws** – These laws require that the preparation of instruments and documents on sale or transfer of land can only be done by a Legal Practitioner.
8. **Land Instrument Registration Laws –** this laws require that instruments used in land transactions should be registered. Any instrument that those not contain a proper description (plan) of the land affected will not be registered. However, the non-registration of such instruments will not render it inadmissible in court – ***Benjamin v. Kalio*****.**
9. **Land Registration Law, Lagos State 2014:** this law came into force on 21st January 2015. It consolidates the numerous laws on lands registration in Lagos State. It also repeals the following laws by virtue of it Section 122 – *the Registered Land Law of Lagos State 2003; the Registration of Titles Law 2003; the Registration of Titles (Appeals) Rules, 2003; the Land Instrument Registration Law 2003;* and *the Electronic Documents Management System Law, 2007.* The intention of the Lands Registration Law is to ensure that every document of interest or title to land in Lagos State is registered in accordance with the tenor of the law – *Section 2.* The law requires that transactions and documents evidencing the transactions should be registered (transfers, leases, mortgages and powers of attorney)
10. **Wills (Amendment) Act, 1852** – This has been replaced in most states by the Wills Laws.
11. **Wills Laws of States (Lagos, Oyo, Abia, Kaduna, Jigawa)** – The major aim of this law

[13] (1998) 10 NWLR (Pt. 571) 590 at 626
[14] (2002) 14 NWLR (Pt. 786) p. 133
[15] (1972) 3 SC 124
[16] (2004) All FWLR (Pt. 225) p. 150

is that freedom to make Wills and dispose of estate by every person is guaranteed; the right of testation is sometimes restricted by imposing limitations on the maker of the Will in respect of the disposition of his estate; there are requirement for the validity of a Will; witnesses are required for making and revoking Wills; and there are provisions to ensure that a Will does not lapse as a result of the death of the beneficiaries.

12. **Administration of Estates Laws of States** - This law regulates the administration of the estate of a deceased person who dies intestate or testate. The law substitutes local provision on intestate succession with English law on intestate.
13. **Companies and Allied Matters Act (CAMA)** – The Act permits registered companies under the Act to mortgage their properties by the creation of debentures over the assets of the company. ***Section 166 of the Act*** states that a company may borrow money for the purpose of its business or objects and may mortgage or charge its undertaking, property and uncalled capital and issue debentures, debenture stocks and other securities for any debt, liability or obligation of the company. 'Property' in the section includes land or any interest in land which the company has.
14. **Other Laws:** other laws that apply to property transactions are - *Land Use Charges Law; Land Instrument (Remuneration for Legal Documentation and Other Land Document) Order 1991*; *Evidence Act 2011*; *Legal Practitioner's Act*; *Rules of Professional Conduct*; *Statute of Fraud 1664*; *Interpretation Act*; *Law Reform Contract Law*; *Capital Gains Tax Act*; *Personal Income Tax Act*; *Company Income Tax Act*; *Value Added Tax Act*; *Vendor and Purchaser Act 1872*; *Tenancy Law of Lagos State*; and *High Court (Civil Procedure) Rules* of the various state.

FACTORS DETERMINING THE APPLICABLE LAWS ON A PARTICULAR PROPERTY LAW

1. The parties
2. The nature of the transaction
3. The location of the property/transaction
4. The means of effecting the transaction

TAXES IN PROPERTY LAW

1. **Capital Gain Tax:** Capital gains tax is paid on the following transactions namely: Sale, Lease, Transfer, Assignment, and Compulsory acquisition - ***Section 6(1) CGTA***. Ideally because it is the transferor that is benefiting, he should pay but because payment of the tax is a condition precedent to perfection of title, it is the transferee in practice that pays. Capital gains tax is not paid on mortgage transaction because there is no gain in mortgage. It is also, not paid in gift of land. It is not applicable to churches, mosques, schools as charitable institutions.
2. **Personal Income Tax:** Personal Income Tax is regulated by ***Personal Income Tax Act***. This tax is paid by individual, a group or business and not a limited liability company. An individual may be assessed on the pay as you earn scheme -PAYE and upon payment of tax, a tax clearance certificate is usually given. Relevant authority or state where the personal income tax can be paid to is determined by residence - where the person resides and not where he works.
3. **Value Added Tax:** The value added tax governed by the ***Value Added Tax Act*** is tax paid on goods and services. Professional services rendered by legal practitioners come into play here. First, a legal practitioner is expected to have an account with the authority in charge of value added tax. The value added tax is 5% of the legal practitioner's fees. The VAT is not retained by the legal practitioner but remitted to the relevant authority by Federal Inland Revenue Services. VATable person includes all professionals and legal practitioner

is a professional. The Federal Inland Revenue Services is in charge of VAT.

4. **Company Income Tax:** Companies Income Tax is regulated by the ***Companies Income Tax Act***, and it is paid by companies to the Federal Inland Revenue Services.
5. **Consent Fees:** Consent fee is the payment made in obtaining the consent of the Governor of a state in furtherance of ***Section 22 Land Use Act***. Consent is obtained in lease, assignment, mortgage and other form of alienation of interest. The fee is paid to Governor through the Ministry of Land. In Lagos state, the rate payable is 8% of the assessed value of the property. Only the states of the federation can collect this fee.
6. **Estate Duty:** This is payable in respect of a deceased's real and personal property. The amount payable as estate duty is 10% in Lagos state and it is calculated based on the gross value of the estate.
7. **Registration Fees:** This is the fee paid for the registration of instrument at the Land's Registry. In Lagos state, it is calculated at 3% of the assessed value of the property. This is payable to the government of each state.
8. **Tenement Rate/Property Tax/Land Use Charge:** This is charged by virtue of the ***Tenement Rate Law*** of the various states. The tenement rate is payable annually on buildings situated within a particular local government area. It is also known as the property tax in some areas. In Lagos state, it forms part of land use charge under the ***Land Use Charge Law of Lagos***. The considerations for the land use charge are: The location of the property; the purpose for which the property will be used; and nature of the property. Land use charge is assessed annually.

TRANSACTIONS IN PROPERTY LAW

I. Modes of Acquiring Interest in Land in Nigeria

1. First settlement and deforestation of virgin land
2. Conquest during tribal war
3. Customary grant of land
4. Sale of land
5. Inheritance or devolution of land

II. Types of Transactions in Land

1. **Pledge of Land –** This exists where a person referred to generally as the 'Pledgor' gives or deposits any land or interest in land to another party, referred to as the 'Pledgee" in which the person depositing the property binds himself to do or forbear from doing a particular thing. In this case, only possession is given as the title or the legal interest in the land is not transferred. In a pledge, land is usually put as a security to get something from the Pledgee. In an action to prove a pledge of land before a court, it is generally accepted that the person alleging pledge must establish (a) the pledge itself; (b) the parties to the pledge; (c) the witnesses, time and circumstances of the pledge; and (d) the consideration for the pledge – ***Anyaegbunam v. Osaka.***[17] The right of the Pledgor to recover possession of the land remains with him and is never extinguished hence the cliché: "once a pledge, always a pledge". Finally, in a pledge, the land is redeemable however how long it might have been in possession of the Pledgee – ***Akuchie v. Nwamadi.***[18]
2. **Gift of Land –** This in property practice is the voluntary transfer or conveyance of any interest in land made gratuitously to a recipient and without any consideration paid by the recipient. The essential quality of a gift is that it lacks the element of bargain based on *quid pro quo* by which a sale is characterised – ***Dung v. Chollom.***[19] There are certain conditions which must exist to make a gift valid (a) intention of the donor to make the gift; (b)

[17] (2000) FWLR (Pt. 27) p. 1942
[18] (1992) 8 NWLR (Pt. 258) p. 214 at 226
[19] (2003) FWLR (Pt. 220) p. 738 at 745

completed act of delivery to the recipient; and (c) acceptance of the gift by the beneficiary (recipient) – ***Achodo v. Akagha.***[20] Once a gift of land has been made and accepted, the grantor's right over the land is destroyed and he cannot lay claim to it thereafter – See ***Anyaegbum v. Osaka (supra)*** where the SC held that the donor has no right to revoke the gift once it has been accepted. In 1978, the appellant made a gift of land in Onitsha to the defendants for the land to be used to worship God. That appellant later ceased to be a member of the church, took the Ozo title and sough to revoke the gift. His action failed as the gift was absolute upon acceptance. However, where it is subject to forfeiture, it amounts to a tenancy not a gift. The parties in a gift transaction are Donor and Donee.

3. **Sale of Land** – A contract of sale of land is an agreement whereby the vendor promises to sell and the purchaser to buy the land in question. It is a binding agreement that the courts will enforce if necessary. The most important significance of this agreement is that it allows the purchaser ample time to investigate the title of the vendor. The parties to the transaction are Vendor and Purchaser. The Vendor's solicitor is to prepare the Formal Contract of Sale of Land.
4. **Leases/Sub-Lease** – This is a written agreement under which a property owner (landlord) allows another (tenant) to use the property for a specified period of time and rent and known as a Landlord/Tenant relationship. A tenancy is a lease which is 3 years and below while a lease is one above 3 years. The parties are Lessor/Sub-Lessor and Lessee/Sub-Lessee. The lessor's or sub-lessor's solicitor is to prepare the Deed of Lease (Sub-Lease).
5. **Tenancy:** the parties are the Landlord and Tenant. The Landlord's solicitor is to prepare the Tenancy Agreement.
6. **License** - Permission to engage in a certain activity, granted by the appropriate authority.
7. **Mortgage and Charge of Land** – This is generally the conveyance of a legal or equitable interest in a property with a provision for redemption, that is, the conveyance shall become void or the interest shall be re-conveyed upon the repayment of the loan – ***B.O.N Ltd v. Akintoye.***[21] The borrower is called the mortgagor or charger while the lender is the mortgagee or chargee. The Mortgagee's solicitor is to prepare the Deed of Mortgage. The lender may sell the security to realise the money advanced where the borrower fails to repay.
8. **Donation of Power –** This is an agency relationship by which a person gives power to another so that the agent acts on behalf of the principal in respect of specific transactions affecting land, such as to let out premises and collect rent, or to sell property and execute the document of sale. The parties are the Donor and Donee. The Donor's solicitor is to prepare the Power of Attorney.
9. **Assignment:** the parties are Assignor and Assignee. The assignor's solicitor is to prepare the Deed of Assignment.
10. **Will and Codicil:** the parties are the Testator/Testatrix, Executors/Executrixs and Beneficiaries. The testator's solicitor is to prepare the Will. There is a difference between a will and a codicil in spite of the fact that they are both testamentary documents. For there to be a codicil, there must have been a will in existence. A codicil amends, revoke and add to the provision of a will. Also, it revives and republishes a will. In respect of a will, probate will be granted, and in respect of an intestate estate, letters of administration will be granted. In respect of a testate estate where there is no executor, letter of administration can be granted.
11. **Assent:** the parties are the Executors and Beneficiaries. The Executors' solicitor is to prepare the Assent (which is not in a Deed form). Assent is issued by the personal

[20] (2003) FWLR (Pt. 186) p. 612
[21] (1999) 12 NWLR (Pt. 392) p. 403

representative to the beneficiary before the property can be vested in the beneficiary. A will must be in existence before an assent can be issued.

III. Property Transactions, Parties, Documents Involved

S/N	Transactions	Parties	Document	Responsibility of Drafting the Document
1	Assignment	Assignor/Assignee	Deed of Assignment	Assignor's Solicitor
2	Conveyance/Contract of Sale	Vendor/Purchaser	Deed of Conveyance	Vendor's Solicitor
3	Mortgage	Mortgagor/Mortgagee	Deed of Legal Mortgage	Mortgagee's Solicitor
4	Gift of Land	Donor/Donee	Deed of Gift	Donor's Solicitor
5	Lease	Lessor/Lessee	Deed of Lease	Lessor's Solicitor
6	Sub-Lease	Sub-Lessor/Sub-Lessee	Deed of Sub-Lease	Sub-Lessor's Solicitor
7	Tenancy	Landlord/Tenant	Tenancy Agreement	Landlord's Solicitor
8	Donation of Power	Donor/Donee	Power of Attorney	Donor's Solicitor
9	Will/Codicils	Testator/Testatrix; Executor/Executrix; and Beneficiaries	Will	Testator/Testatrix's Solicitor
10	Assent	Personal Representatives/Beneficiaries	Assent	Personal Representatives' Solicitor
11	Administration of Estate	Administrators/Beneficiaries	Letter of Administration	
12	Search		Search Report	Purchaser/Mortgagee's Solicitor
13	License	Licensor/Licensee		

ETHICAL ISSUES

1. **Dealing with Client's Property -** ***Rule 23(1) of the RPC*** provides that a lawyer shall not do any act whereby for his personal benefit or gain, he abuses or takes advantage of the confidence reposed in him by his client. ***Rule 23(2) of the RPC*** provides that where a lawyer collects money for his client, he shall promptly report, and account for it, and shall not mix such money or property with, or use it as his own.
2. **Seal and Stamp –** ***Rule 10(1) RPC*** provides that a lawyer acting in his capacity as a legal practitioner, legal officer or adviser of any Governmental department or Ministry or any corporation, shall not sign or file a legal document unless there is affixed on such document a seal and stamp approved by the NBA. ***Rule 10(2)*** provides that for the purpose of this rule, "legal documents" shall include pleadings, affidavits, depositions, applications, instruments, agreements, deeds, letters, memoranda, reports, legal opinions or any similar documents. ***Rule 10(3)*** provides that if, without complying with the requirements of this rule, a lawyer signs or files any legal documents as defined in sub-rule (2), and in any of the capacities mentioned in sub-rule (1), the document so signed or filed shall be deemed not to have been properly signed or filed.
3. **Advice as to Applicable Laws:** A legal practitioner has to advise his client appropriately according to the applicable laws to a given situation. See ***NBA v Akintokun***.[22]
4. **Prepare Document having regard to Applicable Law:** a legal practitioner has to prepare a document having regard to the applicable law to that document. See ***Olufintuyi v Barclays Bank.***[23]
5. **Observing and Applying the Relevant Law:** Throughout his representation of his client, a solicitor should observe and apply the relevant law to a particular situation.
6. **Careful Use of Precedents:** Carefully make use of precedents and not to wholly adopt their contents to the document under draft.

[22] (2006) All FWLR [Pt. 133] 1720
[23] (1965) NMLR, 142

(Week 4)

DEEDS AND DEED OF CONVEYANCE

INTRODUCTION

I. Meaning of a Deed

A deed is a document which passes interest in property (a deed of conveyance) or which binds a person to perform or abstain from doing some action. It is a general word to describe a document, which is in writing on a good quality/durable paper (papers like A4 paper, Indenture paper, and parchment) that is signed, sealed and delivered. This essence is for the transaction contained in the deed to be binding and has the force of the Law. Example of deeds are Deed of lease, gift, transfer, release, mortgage, assignment etc. A deed of release of mortgage may be used to discharge a legal mortgage created by deed. Factors required for validity of a deed are the deed must be signed, sealed and delivered.

Note: A deed is different from a contract of sale. A contract of sale becomes binding upon the exchange of their parts (of the document) by both parties to the contract. A deed becomes binding upon delivery without necessarily parting with the possession of the deed - once there is intention to be bound, the parties become bound.

II. Types of Deeds

1. **Deed Poll:** this type of deed is executed by only one person. It is granted by one person only. Example, power of Attorney under seal – where a power of attorney is created to convey interest in property. Note: created by one person for another, so only one party is bound.
2. **Deed Indenture:** this type of deed is executed by more than one person i.e. binds two or more persons. Example is a deed of legal mortgage between the mortgagor and the mortgagee, deed of lease, deed of assignment.
3. **Supplementary Deed:** this type of deed, also known rectification or confirmation or correction deed, is used to affirm or amend an existing deed. Thus, the main uses of a supplementary deed are:
   (a) To change terms of agreement by parties
   (b) To correct any error in the principal/original deed which can be typing error, misspelt name, error in property description, or any other error in the execution of the document.

   Where one party refuses rectification, the other party can file a suit in court and the court may direct that the principal deed be rectified if the court is satisfied that the original deed did not express the intention of the parties. There is no time limit in which rectification can be done.

III. Uses of a Deed

1. Effecting conveyance of an interest, right or property in a real estate.
2. Creating an obligation binding on a person.
3. Confirming or rectifying the existence of a title that has already been created before the preparation of that deed e.g. a confirmatory deed.

IV. When a Deed is Mandatory

1. **Contract Lacking Consideration -** A contract lacking consideration must be made by deed e.g. deed of gift - ***Re-Vallance v. Blagden***.
2. **Transfer of Legal Interest in Land** – by combined effect of ***Section 77(1) Property and Conveyancing Law, Section 4 Statute of Fraud,*** and ***Section 5 Law Reform (Contracts) Law 1961*****,** all legal transfer of interest in land will be void unless in writing and by deed. The exception is where personal representatives of a testator by an assent vest title in land to the beneficiary.

3. **Leases for More than 3 Years** - leases for more than 3 years must be made by deed.
4. **Creation of Legal Mortgage**: where a legal mortgage is to be created, it will have to be by deed.
5. **Appointing and Attorney to Execute a Deed -** Where an attorney is appointed to execute a deed, the power appointing him must be by deed – ***Chime v. Chime***,[24]and ***Abina v Farhat.*** In ***Powell v. London & Provincial Bank***,[25] company law provides that to transfer a share, a deed of transfer was required. A holder of shares executed a blank deed in favour of the Bank, which then inserted its name in the blank space. The court held that the transaction is invalid since the Bank itself was not appointed by deed.
6. **Vesting Declarations** - a recorded document by owner of property to enable an order made on the property.
7. **Voluntary Surrenders** - a tenant voluntarily surrenders the property he has leased prior to the fulfilment of the full term and the landlord accepts the property back with the intention that the lease will be terminated.
8. **Rectification of a Deed -** to rectify a deed a deed is needed - See ***Section 77 of the Property and Conveyance Law (PCL)*****.**
9. **Transfer of Company Shares:** in ***Powell v. London & Provincial Bank***,[26] the court held that company law provides that to transfer a share, a deed of transfer was required.

V. When a Deed is not needed

1. **Wills or Assent**: See ***Section 77 (2) of the PCL*****.** An assent is a document prepared upon obtaining probate by personal representatives (executors) vesting title in property on the beneficiary. The beneficiary may be a devisee under a will or the heir of a deceased who died intestate.
2. **Court Vesting Order:** this is a British practice – creates a transfer where someone has equitable mortgage and he exercises his right of sale. The court vesting order vests interest/title in the purchaser.
3. **Disclaimers**: disclaimers are persons who refuse or renounce something e.g. a car is willed to Mr Y and he does not want to be a beneficiary; or trustee in bankruptcy seeking to disclaim some property forming part of the bankrupt's estate; or a husband disclaiming his wife's debts; or an employer disclaiming the acts on contract of former employee (can be oral or by conduct).
4. **Short Term Lease:** i.e. tenancy that is 3 years or less. See ***Re Knight***.
5. **Receipts not required by Law to be under Seal:** by virtue of ***Section 135 PCL*****,** receipts are not required by law to be made under deed e.g. receipt endorsed on mortgage document which serves as a sufficient discharge of that mortgage (mortgagor has paid the principal sum and all interests), statutory mortgage.
6. **Transactions covered by the rule in Walsh v. Lonsdale:**[27] The rule is that an instrument which is void as a conveyance because it is not a deed may still operate in equity as an agreement for conveyance. In ***Opara v. Dowel Sclumberger (Nig) Ltd***[28] where the principles of Walsh v. Lonsdale were affirmed, the Supreme Court held that an agreement for a lease is as good as a legal lease though the agreement confers only an equitable interest in the property.
7. **Conveyances Taking Effect by Operation of Law**: property may vest by operation of law in many ways. This include the admission of a will to probate; the grant of letters of administration; and appointment of trustee in bankruptcy. This is because property vested

[24] (2001) 3 NWLR (Pt. 701) 527
[25] (1893) 2 Ch. 555
[26] (1893) 2 Ch. 555
[27] (1882) 21 Ch. D
[28] (2006) All FWLR (Pt. 36) 240 at 253

in personal representatives or trustees does not belong to them but is held by them in trust for the beneficiary.

8. **Surrender by Operation of Law**: lessee surrenders a lease and asserts a new lease incompatible with the existing leases.

ESSENTIAL ELEMENTS (FEATURES) OF A DEED

I. Writing

A deed is required to be in writing on a quality paper. See ***Section 4, Statute of Fraud 1677***.

II. Signing

A. General Rule and Effect of Non-Compliance

A person cannot incur an obligation under a document unless he has signed it. Upon signing, the deed is said to have been executed. Signing is the act of affixing one's name, mark, symbol, device, signal to the document, engravement, stamping, initial, rubber stamp, etc. It must be signed by the parties because an unsigned deed is inadmissible against the party who has not signed it. See ***Faro Bottling Co. Ltd v. Osuji***. ***Section 97(1) PCL*** provides that where an individual executes a deed, he shall either sign or place his mark upon it and sealing alone shall not be deemed sufficient. The result of not executing a deed makes it inadmissible in evidence.

B. Illiterates or Blind Persons

If an illiterate or blind person is to sign a document, always remember to insert an Illiterate or Blind Jurat to be attested to by a Magistrate, Notary Public, Justices of Peace or a Legal Practitioner – a special attestation clause where an illiterate or blind person affixes his thumb impression after the deed has been read to him and he appears to understand and consented to the contents of the deed. In ***Ituama v Akpe-Ime***,[29] the Supreme Court held that an illiterate grantor did not sign the deed of lease in question and accordingly vitiated it on the basis of Section 8 of the Illiterate Protection Law of Cross Rivers State which requires a statement in a document that the contents of the deed were first read and interpreted to the maker.

C. Companies

Furthermore, if a document is to be signed by a company, always affix its common seal. See ***Section 74 of the CAMA***. Note: non-execution of a deed makes it inadmissible in evidence.

III. Sealing

A. General Rule and Effect of Non-Compliance

This was an ancient requirement of deeds. A seal is usually a red wafer fixed to the placed marked LS (locus sigili) in a deed. It is no longer mandatory that the instrument or document must have a seal but where a party to a deed is a company, the company is required to affix its seal to the deed – ***Section 98(1) of PCL***. While sealing is strongly advised on deeds, it appears that where no seal is impressed on a document, it will not be vitiated on that account only. ***Section 159 of the Evidence Act 2011*** provides that when any document purporting to be and stamped as a deed, appears or is proved to be or to have signed and duly attested, it will be presumed to have been sealed and delivered, although no impression of a seal appears on it (presumption of sealing once document has been duly signed and attested to). Under ***Section 80(1) of Registration of Titles Law***, it provides that an instrument which is expressed to be made or to operate as a deed shall be deemed to be a deed and shall operate accordingly, but shall not on that account be required to be sealed.

In ***First National securities v. Jones***,[30] a mortgage deed was signed by the mortgagor. The signature was made across a printed circle at the end of the deed and in that circle were printed the letters "LS" (logo sigilli). The mortgage was held to be validly executed. Also, in ***Carlen (Nig) Ltd. v. University of Jos***,[31] the Supreme Court held that the failure of the University of

[29] (2000)
[30] (1978) 2 WLR 475
[31] (1994) 1 SCNJ 72

Jos to affix its seal to the contract between it and the Appellant did not make the contract void in law.

B. Corporation Aggregate and Companies

In respect to corporation aggregate a deed made in favour of purchaser is duly executed when the stamp of the corporation in the presence of a clerk, secretary or any other official and a member of council or governing body is affixed to it. In respect to a corporate body it is essential for it to have the common seal on the document – ***Section 98(1) of PCL*.**

IV. Delivery

A. General Rule

A deed only takes effect from the date of delivery. This is an act conveying intention to transfer title, and be bound by the transaction. A deed does not necessarily take effect from the date inserted on it, but from the date of delivery. Delivery is signified by the passing of an interest or right and not necessarily by the parting with physical possession of the deed. It is an act done to indicate an intention to be bound – ***Jegede v. Citicon Nig. Ltd***.[32]

B. Requirements of Valid Delivery

To constitute delivery, the deed must be placed in the hands of the grantee (receiver) or within his control, e.g. given to his solicitor, with the intention that it is to become operative as a conveyance. Mere physical delivery of a deed without an intention to convey interest is not delivery – ***Awojugbabe Light Industries v. Chinukwe***.[33] Once there is expression of intention to be bound, then it is said that the deed has been delivered. This connotes the passing of interest of the subject matter of an agreement put in a Deed form. See ***Stondel v. Burden***.

C. Mode of Delivery

Delivery can now be by word of mouth or conduct unlike in the past where words were required. Any act of the party showing intention to be bound is sufficient evidence of delivery. Intention to be bound is the main issue.

D. Absolute and Conditional Delivery

1. **Absolute Delivery:** Absolute is one, which is complete upon the actual transfer of the instrument from the possession of the grantor
2. **Conditional Delivery/Delivery in Escrow:** this is one which passes the thing (res) subject to delivery, from the possession of the grantor, but it is not complete until the happening of a specified event or upon the fulfilment of some conditions. See ***Brossette Manufacturing Nig v Ola Illemobola Ltd & Ors***.[34] Examples of delivery by escrow are:
   (a) Delivery pending the payment of the balance of the purchase price. For instance, A sold his house to B for 6 million but only 4 million was paid to A. A decides to pass the legal interest to B upon the payment of the balance of 2 million within a specified date. It is only when B pays the balance that he obtains the legal interest in the house.
   (b) Delivery pending governor's consent (if needed in the transaction). Only takes effect upon obtaining the governor's consent.

   A deed in escrow does not mean that the party executing can withdraw from the deed in the intervening period between execution and the date of performance of the condition. It is only after the fixed date has lapsed, that the parties are free to withdraw from the contract. Thus, in ***Awojugbabe Light Industries v. Chinukwe***,[35] it was held that where a deed is executed in escrow, the party executing cannot withdraw from the deed unless the other party fails to fulfil the condition within the time specified.

   The doctrine of *relating back* (relationship back) will only operate when the condition is fulfilled and the date of signing the Deed will be the effective date and not the date the

[32] (2001) 4 NWLR (Pt. 702) 112 at 139
[33] (1995) 4 NWLR (Pt. 390) 379
[34] (2007) All FWLR (Pt. 379) 1340
[35] (1995) 4 NWLR (Pt. 390) 379

condition was fulfilled.

V. Attestation

A. Concept

Attestation is an act of witnessing an instrument in writing, that one or more persons were present when the deed was executed. The witness must attest as witness, a party cannot. It is an act of a third party confirming the execution of the instrument by the parties. It is to confirm the validity of the execution of the document and to prevent fraud. The requirement is generally the names, addresses, occupation and signatures of the witnesses. No legal requirement of attestation but just required to show due execution and to prevent fraud. It is not a requirement for validity of a deed. For documents executed by the blind, illiterate – special attestation clause must be attached. Director and secretary of company must attest to deeds executed by the company. See ***Section 98 of PCL***. Attesting a deed is strongly advised because it facilitates the proof of execution of the deed where it becomes necessary. However, for the blind, illiterate and corporate body, attestation is compulsory.

B. Effect of Non-Compliance

Deeds are to be attested to (witnessed) in order to avoid disputes. However, even if the Deed was not attested to it is still valid. A Deed is valid even if it has no date or that it has a false or impossible date. See ***Anuku v. Standard Bank Ltd***. However, there are certain exceptions where the law requires that certain deeds or document must be attested to. In those cases, attestation is required as a matter of law and its absence will vitiate the deed or document. They include: illiterates, blind persons, companies, incorporated trustees, wills and power of attorney.

C. Compulsory Attestation

1. **Illiterates:** where an illiterate executes a deed or document or where he is among those executing, his execution must be attested to by a Magistrate, Justice of the Peace or Notary Public. See ***Section 8(1) Land Instrument Registration Law***. Here, the illiterate jurat is mandatory and attestation is also mandatory.
2. **Blind Person** – (blind person jurat): where a blind person executes a deed or document or where he is among those executing, his execution must be attested to by a Magistrate, Justice of the Peace, Commissioner for Oaths or Notary Public. See ***Akinbade v. Olayinka***.
3. **Company or Corporation or Incorporated Trustees:** The execution of a deed by any of these bodies must be attested to by its clerk, secretary, director or other permanent officer. See ***Section 98(1) PCL***; ***Section 163 EA 2011*** (for company: in the presence of a director and the secretary of the company; for incorporated trustees, in the presence of the secretary and a trustee or two trustees).
4. **Wills:** attestation by two or more witnesses is a mandatory requirement for the validity of a Will. This is because ***Section 9 of the Wills Act of 1837*** provides, inter alia, that the execution of a Will must be attested to by two or more witnesses in the presence of the testator, but that no form of attestation shall be necessary. See ***White v. White***.
5. **Power of Attorney:** a power of attorney also requires attestation. But the attestation can be by any independent person except if the donor is illiterate or blind. See ***Section 150 EA*****.**

It is necessary that independent persons attest to the execution of the deed. This is to facilitate the proof of the due execution of the deed.

VI. Franking

This is the endorsement of the name and address of the lawyer who prepared the deed on it. ***Rule 10 of Rules of Professional Conduct (RPC)*** provides that a lawyer acting in his capacity as a legal practitioner… shall not sign or file a legal document unless there is affixed on any such document a seal and a stamp approved by the NBA. Registrar may not accept document for registration if not franked. In addition, a lawyer can give to another lawyer the deed to scrutinise it clause by clause to edit (spelling, punctuation, sentence construction).

In essence a Deed must be signed, sealed and delivered for it to be valid.

FORMAL PARTS OF A DEED OF CONVEYANCE

I. Introductory Part

The introductory part consist of the commencement clause, date, party clause and recital.

1. **Commencement Clause:** Usually, a deed commences as THIS DEED or THIS LEASE or THIS DEED OF LEASE or THIS DEED OF MORTGAGE or THIS DEED OF ASSIGNMENT etc. Where the solicitor is not sure of the nature of estate or interest being transferred, it is advisable he uses THIS CONVEYANCE, since it is a generic term which encompass any transactions which may not be specifically described. Situations where deed of assignment are used are where there is assignment of remaining interest in a statutory right of occupancy granted by the Governor pursuant to the Land Use Act or in the creation of legal mortgage by assignment.
2. **Date:** THIS DEED MADE or THIS DEED is made this 3rd day of December, 2018. The date affixed on the deed is not of any substance because date of delivery is the vital date. So the practice is to leave the date until much later (***Anuku v Standard Bank***: until Governor's consent was given). Purpose of date is for when stamp duty is payable which must be paid 30 days after execution. Registration must be taken within 60 days of the date of the document. Under the ***RTL***, registration must take place within 2 months of execution otherwise it will be void, although the date can be extended. When drafting, it is better to leave the deed undated. There are three reasons why a deed is drafted without the date include:
   - **(a)** ***Section 157 EA*** already provides for the rebuttable presumption as to the date of a document and as such, failure to include the date is not fatal.
   - **(b)** ***Section 23(2)(a) and section 23(4) Stamp Duties Act*** provides that unless an instrument is written upon duly stamped material, it shall be duly stamped with the proper ad valorem duty within thirty (30) days from the day it was executed or after it was received into Nigeria, if it was executed outside Nigeria. Therefore, because of the time limit prescribed for payment of stamp duties, conveyancers usually omit the date on the deed in order to avoid being in default and to avoid the penalty that follows.
   - **(c)** ***Land Instrument Registration Law*** provides for registration within 60 days from the date of execution. Failure to do so attracts penalty.
3. **Parties Clause:** BETWEEN - names, addresses, occupation must be stated. For instance:
   BETWEEN Leslie Stock, Trader, of No 5 Ikewa Close, Zuma (Assignor) of the first part
   AND
   Bala Linus, Farmer, of No 10 Dowadu Road, Bwari (Assignee) of the second part.
   Where a party is a company, say company registered under CAMA with registration number… and registered address... Certain terms are used such as assignor-assignee, vendor – purchaser, mortgagor-mortgagee, landlord-tenant to avoid repetition. Assignor can also be a vendor so you must stick to the terms you begin with. In the past, certain words: herein after known as the assignor who heirs, successors, agents…. These are no longer in use. According to ***Section 58 & 59 CA*** and ***Section102 PCL*** it is presumed that once the assignor is referred to, the heirs, successors etc. are already covered.
4. **Recitals:** statement of facts pointing to the background of the transaction. The existence of recitals in a deed is determined by the word 'IS' used in the commencement - if it is - THIS DEED OF ASSIGNMENT IS, then a recital will be inserted. If it is - THIS DEED OF ASSIGNMENT made this ....., then there would not be recital. There are two of recitals viz:
   - **(a) Narrative:** gives the history, background and how the assignor came about the property in issue. For instance, *The Vendor is the holder of a certificate of occupancy No…… over plot…. (State the address)*.

(b) Introductory: the reasons for this present transactions. For instance, *The Vendor desires to assign the plot No….. to the assignee for a consideration of sixty million naira*.

Before now, the word 'WHEREAS' was used to show the starting of recital. It is now seen as archaic and thus the word 'BACKGROUND' or RECITAL or THIS DEED RECITES AS FOLLOWS should be used. The Court uses recitals when interpreting deeds to clear ambiguity in the operating part. Note: recital cannot take the place of operating part. Recitals create estoppel respecting statements in a deed especially recital of a particular fact. According to ***Section 162 Evidence Act 2011***: recitals contained in documents 20 years old or more at the date of the contract are presumed to be sufficient evidence of the truth of the facts stated in those recitals except they are proved otherwise. The functions of recitals are as follows:

(a) A clear recital can help clear ambiguity(s) in the main body of the document.
(b) ***Section 162 Evidence Act*** provides that when there is recital of fact in a document that is 20 years old at the date of the contract, it will be taken to be sufficient proof of title. Thus, the statements of facts in such a recital are presumed to be true and correct. This is the ancient document rule.
(c) Statements of facts in a recital may give rise to estoppel against the person making them. See ***Section 169 EA***.
(d) It is a useful way to know the history of the property and how the vendor came to be vested with the property in question.

II. Operative Part

The operative part consists of the following clauses: testatum, consideration, receipt clause, covenant on title or capacity, words of grant, parcel clause, habendum, quantum of interest conveyed, operative word, Reddendum (Rent clause) if a lease.

1. **Testatum:** the beginning of the operative part of a deed. This comprises of certain clauses like consideration, receipt, the rights and obligations of the parties, location of the property. It commences with: 'NOW THIS DEED WITNESSES AS FOLLOWS:' and then state things in numerous.
2. **Consideration Clause:** the amount for which the assignor is giving the property to the assignee (demised). It is important as it shows that the transaction is not a gift and for purpose of calculation of stamp duties. The absence of consideration or consideration clause will not affect the validity of a deed because a deed derives its validity from its form and not from the presence or absence of consideration. However, when inserted, the consideration performs the following functions and is important for the following reasons:
   (a) It is evidence that the conveyance is not a gift.
   (b) It implies that a receipt will be issued to cover the amount received as consideration.
   (c) It is used for the assessment of stamp duties ad valorem.

   "*In consideration of the sum of _____ paid by the assignee to the assignor…*"
3. **Receipt Clause:** Discloses that the vendor has collected the money for the property. For instance, *The assignor has assigned for sixty million naira, the receipt of which the vendor has…* This is the receipt for the transaction and the solicitor can be paid the fee. Receipt clause is prima facie payment for the property. Pay to vendor's solicitor if deed has been executed and there is a receipt clause. The functions of the receipt clause are:
   (a) It is an evidence of payment of consideration.
   (b) By ***Section 54 CA*** and ***Section 92 PCL***, the inclusion of a receipt clause in a deed dispenses with the need to issue a formal receipt of payment. This is because it is a sufficient discharge between the vendor/assignor and the purchaser/assignee, without any further receipt for same being issued. See ***Section 54 CA*** and ***Section 92 PCL***.
   (c) By ***Section 55 CA*** and ***Section 93 PCL***, the inclusion of a receipt clause in a deed is

sufficient evidence of payment of the whole amount in favour of a subsequent purchaser, not having notice whether the consideration acknowledged to be received was in fact paid or given. See ***Section 55 CA*** and ***Section 93 PCL***.

(d) By ***Section 56 CA*** and ***Section 94 PCL***, the inclusion of the receipt clause in a deed is sufficient authority to pay money to the vendor's solicitor upon production of the deed that was executed by the person entitled to issue the receipt (that is, the vendor), without the solicitor producing any other direction or authority from the vendor and there is no liability for loss. See ***Section 56 CA*** and ***Section 94 PCL***.

The receipt clause is not conclusive evidence that consideration has, in fact, been paid. Therefore, oral/extrinsic evidence is admissible to show that consideration has not been paid or fully paid.

4. **Covenant on Title:** Guarantees the title of the assignor to the property. Usually, it is in this form, '*the assignor as beneficial owner assigns/conveys to the assignee*.' Note the six obligations that come with word 'beneficial owner' and the additional covenants if it is a lease. The covenant of title in a deed are implied by into the deed by statute and the vendor/assignor's capacity is what determines the type of covenants of title that will be implied. The capacity of the vendor/assignor is stated immediately after the receipt clause. The vendor/assignor may be expressed to assign either as beneficial owner, personal representative, settlor, trustee or mortgagee. Where the vendor/assignor is expressed to have conveyed in his capacity as beneficial owner, the covenants of title implied by ***Section 7(a) & (b) of CA*** and ***Section 100(1)(a) & (b) of PCL*** are:
   (a) Right to Convey: that the vendor/assignor has the right to convey the unexpired residue of his interest in the property to the purchaser/assignee.
   (b) Quiet Enjoyment: that the vendor/assignor grants quiet possession and enjoyment to the purchaser/assignee.
   (c) Freedom from Encumbrances: that the property is free from encumbrances other than those disclosed to the purchaser in the contract or at the time of the contract.
   (d) Further assurances.

   Where it is a lease, then in addition to the four(4) covenants above, the following two covenants are added to make it six(6):
   (e) The lease is valid and subsisting.
   (f) That the rent has been paid and all the covenants contained in the lease to be observed and performed have been observed and performed up till date.
5. **Words of Grant:** it is said that no particular words are prescribed. It could be assigned, conveys or gives. However, once you start with assignor, you must use the word 'assign'
6. **Parcel Clause:** description of the property. The property must be sufficiently described to satisfy the requirement under the law. Usually, it is in this form, '*all that parcel of land situates at No…. and known as… shown in the schedule/plan* – delimits the extent of the grant of the land.
7. **Habendum:** describes the estate that is going to the assignee (*to hold to the purchaser all that expired residue of the term of years in the certificate of occupancy*). In a lease, it is the extent years going to the lessee.

III. Miscellaneous Part

The miscellaneous part may consist of the following clauses: undertaking for safe custody and periodic production, acknowledgment/indemnity clause, and covenants such as right of inspection. It consists of clauses which are covenants undertaken (can be very voluminous in leases, mortgages etc.)

1. **Undertaking for Safe Custody and Acknowledgment for Production Costs:** this arises when a particular document relates to several properties among which the assignee has been assigned some property. Because the document contains several properties, it cannot

be transferred to the assignee but through undertaking so that the assignee can see the document whenever he asks for it.

2. **Indemnity Clause:** a covenant which relates to the assignee who makes an undertaking to pay all rents and observe all covenants already on the land.

IV. Concluding Part

The concluding part consists of the following clauses: testimonuim, schedule, execution clause, attestation (***Section125 EA***), Franking, and Endorsement for Governor Consent.

1. **Testimonium:** seals the day and year first above written.
2. **Execution and Attestation:** the signature i.e. "*signed, sealed and delivered by…. In the presence of name, address and signature*". The essence of attestation is to ensure that a third party witnessed the signature of both assignor and assignee. The common seal of the company must be affixed, where it is a company, in the presence of director and secretary with their signature. In respect to an illiterate/blind party there is a special execution clause – signed, sealed and delivered… E.g. "The foregoing having been first read and interpreted by me in Igbo language when he appeared to have perfectly understood the contents before he affixed his thumb print or mark. The deed will be vitiated when the special attestation clause is not fixed for a blind/illiterate party.
3. **Schedule**: used to take care of technical details in the deed to prevent the deed becoming cumbersome/clumsy.
4. **Franking**: This is the endorsement of the name and address of the lawyer who prepared the deed on it. ***Rule 10 of Rules of Professional Conduct (RPC)*** provides that a lawyer acting in his capacity as a legal practitioner… shall not sign or file a legal document unless there is affixed on any such document a seal and a stamp approved by the NBA. Registrar may not accept document for registration if not franked. In addition, a lawyer can give to another lawyer the deed to scrutinise it clause by clause to edit (spelling, punctuation, sentence construction).
5. **Governor's Consent**: this is marked by the signature of the governor showing that the governor consented to the transfer of interest.

PERFECTION OF A DEED OF ASSIGNMENT

I. Procedure for Perfection of a Deed of Assignment

This involves the following:

1. **Obtaining Governor's Consent**: after the deed has been signed, sealed and delivered, the consent of the Governor is to be obtained as a way of perfecting the deed. See ***Section 22(2) of the Land Use Act***.
2. **Stamping:** the Deed of assignment must be stamped within 30 days of creation of the document.
3. **Registration**: the deed is also to be registered within 60 days of the creation of the document. In ***Anuku v. Standard Bank***, it was held that an instrument should be left undated until the time of registration.

II. Effect of failure to Perfect Title to Property

This will be discussed based on the various aspect of perfecting title.

A. **Failure to Obtain the Governor's Consent**: where there is a failure to obtain the Governor's consent as regards land in a State or the Minister's consent when dealing with land in Abuja:
   1. It makes the legal transfer of interest to be void. See ***Savannah Bank v. Ajilo***.
   2. It makes the interest equitable or inchoate. See ***Awojugbagbe Light Industries v. Chinukwe***.[36]

[36] (1995)

B. Failure to Stamp the Agreement: where there is failure to stamp the Agreement, the following effects will apply -

1. It will not be admissible in evidence. However, the court has power to order party to go and stamp and then admit it in evidence.
2. In Lagos, a failure to stamp after 60 days of the execution will make it void
3. Penalty will be paid as fine for late stamping (criminal offence).
4. Registrar will not accept it for registration.

C. Failure to Register it: where there is failure to register a deed, the effects will be -

1. It is not admissible in evidence.
2. The interested party will not have priority over the land.
3. It will only vest equitable interest in the owner.

However, in respect to it not being admissible in evidence, the Supreme Court in the recent case of ***Benjamin v. Kalio,***[37] jettisoned the requirement of registration as a precondition for admissibility of land documents in evidence. It held that as far as they are properly pleaded, unregistered land documents are admissible as proof of title. The court came to a conclusion that in view of the inclusion of evidence in the exclusive legislative list, all state laws (Land Instruments Laws) that make unregistered registrable instrument inadmissible in evidence are inconsistent with the provision of the constitution as evidence is a matter under the exclusive legislative list. Thus, a document that is pleaded and admissible under the Evidence Act cannot be rendered unpleaded and inadmissible by a state law.

PARTICULARS OF INSTRUCTIONS NEEDED TO DRAFT A DEED OF ASSIGNMENT

1. Particulars of the parties (names, occupation and addresses);
2. Particulars of witnesses (names, occupation and addresses);
3. Description and location of the property;
4. History of the title to the land (abstract);
5. Consideration;
6. Covenants and undertakings;
7. Capacity of the Assignor; and
8. Quantum of interest given by the Assignor (Habendum).

SAMPLE DRAFTS OF DEEDS

I. Deed of Assignment

THIS DEED OF ASSIGNMENT is made the 16th day of September, 2018

BETWEEN
Mrs. Aduke Thomas, a trader of No. 45 Isheri Street Ikeja, Lagos State (The Assignor) on the one part
AND
Professor Ugo Ekanem, a lecturer of No. 15 Straight Road Sapele, Delta State (The Assignee) on the other part.

BACKGROUND
This Deed recites as follows:

1. The Assignor is the legal owner of a Certificate of Occupancy No. 59/59/2010A over a parcel of land with four blocks of flat situate at No. 15 Sapele Road Sapele, Delta State.

[37] (2018) 15 NWLR (Pt. 1641)

2. The Assignor is willing to alienate her interest while the Assignee is willing to buy subject to the conditions to be stated herein.

NOW THIS DEED WITNESSES AS FOLLOWS:
In consideration of the sum of thirty million naira (₦30, 000, 000.00) now PAID to the Assignor by the Assignee (the Receipt of which the Assignor hereby acknowledges), the Assignor as a BENEFICIAL OWNER ASSIGNS ALL THAT parcel of Land with four blocks of flat situate at No. 15, Sapele Road, Sapele Delta State covered by a Certificate of Occupancy No. 59/59/2010A and more rightly described in the Survey plan to be prepared by a licensed Surveyor attached to the Schedule with all rights, easements and appurtenances TO HOLD unto the Assignee as holder of a Statutory right of Occupancy for the term unexpired on the Certificate of Occupancy.

IN WITNESS OF WHICH the parties have executed this Deed in the manner below the day and year first above written.
(Or if it is an individual and a corporate body that are the parties, then it may be like this:
IN WITNESS OF WHICH the Assignor has signed this Deed and the Assignee (a company) has caused its common seal to be affixed in the manner below the day and year first above written.)

SCHEDULE
1. Survey Plan

SIGNED, SEALED AND DELIVERED
By the Assignor

……
Mrs. Aduke Thomas

IN THE PRESENCE OF:
Name: Joel Adamu
Address: No. 32 Ademola Street Victoria Island, Lagos State
Occupation: Civil Engineer
Signature:
Date: 16th September, 2018

SIGNED, SEALED AND DELIVERED
By the Assignee
…….
Prof. Ugo Ekanem

IN THE PRESENCE OF:
Name: Kabiru Adamu
Address: No. 18 Sapele Road, Sapele, Delta State
Occupation: Business Man
Signature:
Date: 16th September, 2018

I CONSENT TO THIS AGREEMENT

……
DATED THE 26th DAY OF SEPTEMBER, 2012
GOVERNOR OF DELTA STATE

II. Deed of Assignment where a Party is an Illiterate/Blind Person

THIS DEED OF ASSIGNMENT is made the 16th day of September, 2018

BETWEEN
Mrs. Aduke Thomas of No. 45 Isheri Street Ikeja Lagos (The Assignor) on the one Part
AND
Zenith Bank Plc. a body corporate duly incorporated under the Company and Allied Matters Act, CAP C20 LFN 2004 with RC 8356 and its registered office address at 10 Bugo Street Victoria Island, Lagos State (The Assignee) on the other part.

BACKGROUND:
1. The Assignor is the legal owner of a Certificate of Occupancy No. 59/59/2010A over a parcel of land with four blocks of flat situate at 15, Sapele Road, Sapele Delta State.
2. The Assignor is willing to alienate her interest while the Assignee is willing to buy subject to the conditions to be stated herein.

NOW THIS DEED WITNESSES AS FOLLOWS:
In consideration of the sum of thirty million naira (₦30, 000, 000.00) now PAID to the Assignor by the Assignee (the Receipt of which the Assignor hereby acknowledges), the Assignor as a BENEFICIAL OWNER ASSIGNS ALL THAT parcel of Land with four blocks of flat situate at No. 15 Sapele Road, Sapele Delta State covered by a Certificate of Occupancy No. 59/59/2010A and more rightly described in the Survey plan to be prepared by a licensed Surveyor attached to the Schedule with all rights easements and appurtenances TO HOLD unto the Assignee as holder of a Statutory right of Occupancy for the term unexpired on the Certificate of Occupancy.

IN WITNESS OF WHICH, the parties have executed this Deed in the manner below the day and year first above written.

SCHEDULE
1. Survey Plan

SIGNED, SEALED AND DELIVERED, By the Assignor, Mrs. Aduke Thomas, being blind, the contents of this Deed having been first read and interpreted (aloud if Blind) to her From English language to Yoruba Language by me Adamu Ebuka of No. 15 Broad Street Lagos when she appeared perfectly to have understood same before affixing her thumbprint.

BEFORE ME

……
MAGISTRATE/ NOTARY PUBLIC

The common seal of Zenith Bank Plc. (The Assignee) was affixed to this Deed on the 16th day of September, 2018 and was duly delivered in the presence of:

……. …….

Director Secretary

I CONSENT TO THIS AGREEMENT

_____
DATED THE 26th DAY OF SEPTEMBER, 2018
GOVERNOR OF DELTA STATE

III. Deed of Assignment Where the Donee of a Power of Attorney Executes on Behalf of a Party to the Agreement.

THIS DEED OF ASSIGNMENT is made the 16th day of September, 2018

BETWEEN Mrs. Aduke Thomas of No. 45 Isheri Street Ikeja Lagos (through her true and Lawful Attorney Samuel Abubakar of 10 Base Road Ikeja Lagos) (The Assignor) on the one part
AND
Professor Ugo Ekanem of No. 15 Straight Road Sapale Delta State (The Assignee) on the other part.

BACKGROUND:
1. The Assignor is the legal owner of a Certificate of Occupancy No. 59/59/2010A over a parcel of land with a four blocks of flat situate at 15 Sapele Road, Sapele Delta State.
2. The Assignor is willing to alienate her interest while the Assignee is willing to buy subject to the conditions to be stated herein.

NOW THIS DEED WITNESSES AS FOLLOWS:
In consideration of the sum of thirty million naira (₦30, 000, 000.00) now PAID to the Assignor by the Assignee (the Receipt of which the Assignor hereby acknowledges), the Assignor as a BENEFICIAL OWNER ASSIGNS ALL THAT parcel of Land with four blocks of flat situate at No. 15, Sapele Road, Sapele Delta State covered by a Certificate of Occupancy No. 59/59/2010A and more rightly described in the Survey plan to be prepared by a licensed Surveyor attached to the Schedule with all rights easements and appurtenances TO HOLD unto the Assignee as holder of a Statutory right of Occupancy for the term unexpired on the Certificate of Occupancy.

IN WITNESS OF WHICH the parties have executed this Deed in the manner below the day and year first above written.

SCHEDULE
1. Survey Plan

SIGNED, SEALED AND DELIVERED
By the Assignor
……
Mrs. Aduke Thomas
Through her true and lawful Attorney Mr. Killi Nancwat by virtue of a Power of Attorney dated the 15th day of February 2017 and registered as 10/23/2017A at the Lands Registry Lagos State.

IN THE PRESENCE OF:
Name:
Address:

Occupation:
Signature:
Date:

SIGNED, SEALED AND DELIVERED
By the Assignee
…….
Prof. Ugo Ekanem

IN THE PRESENCE OF:
Name:
Address:
Occupation:
Signature:
Date:

I CONSENT TO THIS AGREEMENT

_____
DATED THE 26th DAY OF SEPTEMBER, 2018
GOVERNOR OF DELTA STATE

IV. Case Study

Case study 2 (class example): Page 77

THIS DEED OF ASSIGNMENT is made on this 16th day of September, 2018
BETWEEN Alhaji Usman Amaechi Adebayo of No. 4 Democracy Layout, Asokoro, Abuja (Assignor) of the first part
AND
DEOS Nig Ltd incorporated under the Companies and Allied Matters Act (Laws of the Federal Republic of Nigeria) CAP C20 2004, Registration Number…. of No 11 Park Lane Ikoyi, Lagos (Assignee) of the second part.

RECITAL

1. The Assignor is the beneficial owner in possession of the property described in this assignment who inherited the house (twin duplex) at No. 10 Blantyre Street, Ikoyi, Lagos (with Title No. 2301 and Survey number LA 123W/567) from his mother who died on 12th January, 1985 leaving the house and other personal properties to him by her will dated 31st October 1980 and admitted to probate in July, 2006.
2. The probate was granted to her executors – Chief Nonso Idonige, Mr Wakaaka and Alhaji Muktar Hasim who subsequently passed the property to the assignor by an assent dated 8th Day of August, 2006.
3. The property is free from encumbrances
4. The Assignor desires to assign the plot No. 10 Blantyre Street, Ikoyi, Lagos to the assignee for a consideration of eight million naira of which six million naira will be paid on execution of this deed as part payment. While the balance of two million naira will be paid within three months of the execution of this deed.

NOW THIS DEED WITNESSES AS FOLLOWS:
In consideration of eight million naira (₦8,000,000), six million naira paid of which has been paid by the Assignee to the Assignor (the Receipt of which the Assignor hereby acknowledges), the balance which is to be paid within three months and upon payment, the Assignor as a

beneficial owner assigns all that parcel of Land with twin duplex situate at No.10 Blantyre Street, Ikoyi, Lagos covered by a Certificate of Occupancy No. 2301 and more rightly described in the Survey plan prepared by AA Ajisegiri (licensed Surveyor) as LA/123W/567 with all rights easements and appurtenances to hold unto the Assignee as holder of a Statutory right of Occupancy for the term unexpired on the Certificate of Occupancy. The Assignor covenants to indemnify the buyer in the case of any adverse claim. The Assignee covenants to pay the balance of two million within three months of this deed.

IN WITNESS OF WHICH the parties have executed this deed in the manner below in the day and year first below written.

SIGNED, SEALED AND DELIVERED
By the within named Assignor…….

IN THE PRESENCE OF:
Name:
Address:
Occupation:
Signature:

The common seal of DEOS Nig. Ltd of No 11 Park Lane, Ikoyi, Lagos State was affixed to this deed
IN THE PRESENCE OF:

…… ……..
Director Secretary

I hereby consent to this transaction between the parties
Dated this …. Day of ….2014

……..
Governor, Lagos State

Franked by:
KILLI NANCWAT ELAIAS, Esq.
Compos Mentis Chambers
No 10 Adeola Close, Victoria Island
Lagos State
See ***Section 7 CA*** and ***Section 100 PCL*** on what it means to assign as beneficial owner.

(Week 5)

POWER OF ATTORNEY

INTRODUCTION

I. Meaning and Nature of Power of Attorney

A power of attorney is an instrument (a document in writing) usually but not necessarily a deed, by which the principal called "donor" appoints an agent called "donee" and confers authority on him to perform certain specified acts or kinds of acts on his behalf – ***Ude v Nwara; Chime v. Chime***.[38] As it relates to Real Property Law, it was held by the Supreme Court in ***Ude v Nwara***[39] that it is a document, usually but not always necessarily under seal, whereby a person seized of an estate in land (the donor) authorises another person (the donee), who is called his attorney to do in the stead of the donor anything which the donor can lawfully do, usually spelt out in the Power of Attorney.

A power of attorney may not always be in writing. It could also be given orally. A power of attorney can thus be used for many purposes, for example to manage property, to receive and sue for rent and rates, to prosecute a case in court, to transfer or convey interest in land, including complete alienation etc. Power of attorney can be conferred on more than one person; however it's necessary to spell out each person's function to avoid conflict. When in respect of family or community property, the head of the family/community must be present either as a sole donor or a co-donor.

FEATURES OF A POWER OF ATTORNEY

1. **Instrument:** A power of attorney is an instrument.
2. **Document of Delegation:** It is a document of delegation or representation and not an instrument of alienation. It merely warrants and authorises the donee to do certain acts on behalf of, and in the name of the donor, and so is not an instrument of transfer of interest.
3. **Execution by One Party (Deed Poll):** A power of attorney is usually a special instrument in the form of a Deed Poll, that is, an instrument that is executed by only one party from the Principal (Donor) to the Attorney (Donee).
4. **Express Statement of Powers that can be exercised:** It specifies expressly the powers, which the donee, as an agent of the principal/donor can exercise, that is why the omnibus clause in the authority clause is a mere cosmetic surplusage: ***Abina v. Farhat***.[40]
5. **Medium of Transfer of Interest:** It does not transfer interest in land, rather it is only a vehicle through which transfer of interest could be done by the donee in the name of the donor. In other words, it is only after, by virtue of the Power of Attorney, the donee leases or conveys the property to any person including himself that alienation is said to have occurred. ***Ude v. Nwara (supra)***, ***Chime v. Chime (supra)***, ***Ezeigwe v. Awudu***.[41]
6. **Differs from Other Commercial Agencies:** A power of attorney mirrors an agency relationship but it is *sui generis* and differs from other commercial agencies because its main aim is to satisfy third parties that the agent has the authority of the donor to deal on a subject-matter, rather than regulating only the relationship between the principal and the agent – ***Ude v. Nwara (supra)***.
7. **Mode of Creation:** Except where a Power of Attorney empowers the donee to transfer interest in land or execute a deed, it does not involve a special mode of creation – ***Ezeigwe v. Awudu***. For instance, where the authority conferred on the donee empowers him to

[38] (2001) 3 NWLR (Pt. 701) 527
[39] (1993) 2 NWLR (Pt. 278) 647
[40] (1938) 14 NLR 17
[41] (2008) All FWLR (Pt. 434) 1529

execute a deed, or to convey interest in land, his appointment must be by deed. In ***Abina v. Farhat***,[42] it was held that the deed could not be enforced because it was conferred verbally and it must be in writing. It doesn't always have to be by deed – depends on whether what is sought to be transferred by the attorney also has to be by deed.

8. **Liability on Donor:** As long as the donee acts within the scope of the power of attorney, he incurs no liability, and if there is a liability, it is the donor that incurs it – ***Ude v. Nwara (supra)***.
9. **Exercise of Power by the Donor:** The fact that a Power of Attorney has been granted to the donee does not preclude the donor of the power from exercising the power donated - ***Chime v. Chime (supra)***. Thus, where a power of attorney is granted to a person to say convey interest in a particular property, and the donor goes ahead to transfer the interest himself, he is perfectly in order and the sale is valid, although this is a form of implied revocation of the power.
10. **Execution by Head for Family Property:** A power of attorney given in respect of family property must be executed by the head of the family as one of the donors or as the sole donor; otherwise it is void – ***Ajamogun v. Oshunrinde***.[43]
11. **Revocable:** It is revocable except where it is expressed to be irrevocable; that is where it is coupled with consideration or where it is expressed to be irrevocable, usually for a limited period.
12. **Legal Capacity of Parties:** The donor and the donee must both be legally capable at the day of creation and throughout the period covered by the power of attorney. Once any of the parties loses his legal capacity, the power of attorney becomes void. Thus, minors, insane persons, bankrupts, company under liquidation, etc. do not have legal capacity.
13. **Fixed Rate of Stamping and Lack of Governor's Consent:** Fixed rate of stamping and does not need the consent of the Governor since it does not transfer interest in land.

TYPES OF POWER OF ATTORNEY

These are several types of Power of Attorney and there are various ways of classifying POA: by irrevocability we have *revocable* and *irrevocable* POA; by nature we have *general* and *specific* POA; and by length of time we have *fixed* and *non-fixed* POA.

I. General Power of Attorney

This arises where the powers are broadly provided to cover issues pertaining to the subject-matter e.g. a power given to a donee to do anything he can lawfully do, but such must be clearly spelt out.

II. Specific Power of Attorney

This is a limited Power of Attorney in that the powers are given in respect of particular acts to be done by the donee of the power e.g. a power given to a donee to "let premises to tenants and collect rent"– ***Chime v. Chime (supra)***.

III. Revocable Power of Attorney

This is a power of attorney that can be revoked at any time for any reason, so long as the donee has not exercised the power. A Power of Attorney may be revoked in any of these ways:

1. **Express Revocation –** Power of Attorney is governed by the rules of agency. Accordingly, in keeping with the rule that he who hires reserves the right to fire. The donor can expressly fire the donee or revoke the power. Note however, that where the appointment is by deed, the power must be revoked by deed – ***Adegbokun v. Akinsanya***;[44] ***Ojugbele v. Olasoji***:[45] here, the appointment and revocation were by deed and the court upheld that revocation.

[42] (1938) 14 NLR 17
[43] (1990) 4 NWLR (Pt. 144) 407 at 419
[44] (1976) 8 CCHCJ 2163
[45] (1982) SC 71

The donee's authority does not cease until he receives notice of revocation. The donor must communicate this to the donee in writing.

2. **Implied Revocation –** This occurs where the donor after giving a Power of Attorney to a donee, still goes ahead to deal with the subject matter of the Power of Attorney in such a manner that makes it impossible for the donee to effect his authority under the Power. In ***Chime v. Chime (Supra)***, the donor (4th respondent) appointed the 1st respondent as donee to sell his property but before the sale, the donor sold the property. The court held that the fact that a donor gave a Power of Attorney does not mean that the donor cannot do it himself (does not divest the donor of the power to deal with the property) so long as the donee is yet to execute the power of sale before disposition by the donor.
3. **Revocation By Operation of Law –** Power of Attorney is deemed revoked by operation of law if the donor suffers death, insanity, liquidation, bankruptcy or other legal incapacity – ***Abina v. Farhat (supra)***; ***UBA v. Registrar of Titles*****.** An exception is where the power is coupled with interest or it is fixed for a period of time, then the death, lunacy, or bankruptcy of the donor will not affect the power.
4. **Renunciation:** this is where the power is renounced or relinquished by the donee.
5. **Fraud, Duress and Undue Influence:** It should be noted also that Power of Attorney can be invalidated if fraud, duress or undue influence is established (whether or not valuable consideration has been furnished) –***Agbo v. Nwikolo*****.**[46]

IV. Irrevocable Power of Attorney

This is a POA that cannot be revoke. A POA is irrevocable in two ways:

1. **Valuable Consideration:** Where the POA is given for valuable consideration and expressed to be irrevocable, then in favor of the purchaser, that power shall not be revoked by the donor either by anything done by him without the consent and concurrence of the donee or by the death, disability, or bankruptcy of the donor.- ***Section 143 PCL***; ***Section 8(1) CA*****.** Such a POA cannot be revoked until the benefit for which it was conferred has been repaid. See ***UBA v Registrar of Title***. A Power of attorney coupled with an interest is irrevocable until the interest for which it was granted is realised. However, where fraud, duress or undue influence is established, the POA becomes revocable irrespective of the consideration furnished - ***Agbo v. Nwikolo*****.**[47]
2. **Fixed Period:** A POA can be made irrevocable for a fixed period (not exceeding 12 months) whether given for valuable consideration or not then, in favor of purchaser, the power shall not be revoked during that fixed period of time either by anything done by the donor without the consent and concurrence of the donee or by the death, disability or bankruptcy of the donor. See ***Section 9(1) CA*** and ***Section 144(1) (i) PCL***. Bankruptcy, death, lunacy or no consideration cannot lead to revocation of the POA within this time period.

   When a power of attorney is made irrevocable for 12 months, at the expiration of 12 months, the power of attorney is not automatically revoked, but shall stand revocable and it can be revoked by any of the usual means of revocation. Same rule applies to that coupled with interest. When a power of attorney made irrevocable for a period exceeding 12 months say 24 months, the 24 months would be construed as 12 months and it will stand revocable at the end of 12 months.
3. **The Protection of Third Parties:** Following legal difficulties and hardships usually associated with revocation by operation of law, two statutory exceptions have been developed to make Power of Attorney irrevocable in certain circumstances, and thereby safeguard the interest of third parties dealing with donee in such a situation. These

[46] (1973) 3 ESCLR
[47] (1973) 3 ESCLR

exceptions are found in ***Section 9 & 10 Conveyancing Act (CA) 1882***; and ***Section 71, 142, & 143 Property and Conveyancing Law (PCL) 1959.*** A third party who had acted with the Donee based on a Power of Attorney which later was revoked is protected by Law on the following:

(a) Where the third party is a bona fide purchaser for value without notice of the revocation of the owner, he cannot lose interest. The donor thus can only sue the Donee in damages for unlawful exercise of power. However, where a person had knowledge of the revocation, but went ahead to acquire – he has no protection.

(b) Where the donee makes a statutory declaration within 3 months to the effect that he has not received any notice or information or the revocation of the power of attorney by death or otherwise, this will be regarded to be conclusive proof of such non-revocation at the time when such payment or act was made or done.

A donee should always insert a statutory declaration once selling a property with power of attorney.

POWER OF ATTORNEY DISTINGUISHED FROM OTHER TRANSACTIONS

I. Conveyance and POA

1. **Transfer of Legal Interest in Land:** Power of Attorney does not transfer interest in land while conveyance transfers interest in land. Such interest transferred by a conveyance must be legal.
2. **Governor's Consent:** Power of Attorney may not require Governor's consent except in Lagos – ***Section 57 LIRL Lagos*** where the power of attorney is use to transfer interest in land, while a conveyance always requires the consent of the Governor – ***Section 22, 23 & 26 Land Use Act; Owoniboy v UBA*****.**
3. **Execution (Deed Poll and Indenture):** Power of Attorney is usually executed by one party (deed poll) while in a conveyance, both parties execute it (indenture).
4. **Deed:** Deed is mandatory in a conveyance (***Section 77 PCL***) and not for Power of Attorney, except where the attorney is appointed to execute a deed.
5. **Subject Matter of Transaction & Extent of Application:** Conveyance is only for land i.e. it applies specifically, while POA can be for any transaction i.e. it can apply generally.
6. **Revocability:** Contract of sale cannot be revocable while POA is revocable except where it was stated to be irrevocable for a specific period or where it was given with consideration.

II. Contract of Sale of Land and POA

1. **Transfer of Equitable Interest in Land:** Power of Attorney does not transfer interest in land while contract of sale of land transfers interest in land, which is equitable.
2. **Execution:** Power of Attorney is usually executed by one party while contract for sale of land is executed by both parties.
3. **Exchange of Documents:** Power of Attorney does not need to be exchanged to be valid while in contract of sale of land, exchange is mandatory in order for it to be valid (unless both parties are represented by the same solicitor).
4. **Consideration:** Power of Attorney does not have mandatory consideration while contract of sale of land requires consideration.
5. **Registration:** contract of sale is not registrable except under the PCL and in the East – ***Okoye v. Debert***, while POA is registrable under the LIRL Lagos where the POA is use to transfer interest in land.

IMPORTANCE AND NEED FOR POWER OF ATTORNEY

By the combined effect of ***Section 46 & 47 CA***, ***Section 141 PCL*****,** and ***Chime v Chime*** – Power of attorney is not mandatory in land transaction (it is not a matter of cause) but may be exigent in certain circumstances. The choice of a Power of Attorney as an instrument of delegation

naturally comes as an option in the following circumstances:

1. **Unavailability of Donor:** Where the donor for some reasons may not be able to carry out the act personally either due to unavailability as a result of being physically away from the property or being engaged in busy schedules which makes it impossible for him to devote time to handling the property, he may require another person to represent him – ***Ezeigwe v. Awudu***;[48] ***Chime v. Chime (supra); Ude v. Nwara (supra)***.
2. **Expert Skills:** Where expert skills of the donee is required such as where a donor donates to an Estate agent or Solicitor the responsibilities to put tenants in possession, collect rent, and evict tenants on a property.
3. **Ill Health or Physical Impairment:** Ill health or physical impairments may also make the appointment of an attorney imperative.
4. **Conveyance of Family Land:** In conveyance of family land, most especially where the principal members don't live in the village. The POA must have consent of the head of family and principal members.
5. **Securing the Repayment of a Mortgage Sum created by Demise/Sub-Demise Pending Payment of Mortgage Sum:** Where a mortgage is by demise or sub-demise under the Conveyancing Act pending the payment of mortgage sum – ***Re White Rose Cottage***.[49]
6. **Institution of Actions:** a power of attorney will be needed for an agent to institute action on behalf of his principal - ***Abu v Kuyabana***
7. **Property Transactions:** such as sale, lease, tenancy, mortgage etc. This include management of assets and collection of valuables/compensation/payment - ***NBA v Iteogu***
8. **Securing Interest of Purchaser Pending Perfection of Title:** Where it is to secure interest of a purchaser pending the perfection of title of purchaser or performance of an obligation owed the donee.

CAPACITY TO GIVE POWER OF ATTORNEY

POA must be given by a person with legal capacity to another with legal capacity. Both donor and donee must have legal capacity. POA cannot be used to cure the donor's disability. Generally, these persons cannot be given POA and neither can they give POA:

1. Minor (infant)
2. Lunatic (insane)
3. Bankrupt person
4. Firms: companies registered under Part A of CAMA have legal personality and thus Ltd. and Plc. can give power of attorney. Different from firms registered under Part B and C. Those who register under Part B of CAMA don't have corporate personality and cannot give or be given POA - ***National Bank v Korban Bros***.
5. Unregistered associations
6. Enemy aliens
7. Company in liquidation or winding up e.g. in ***National Bank v Korban Bros Ltd***: POA was given to General Manager (a post not the office). Thus, it is not a valid POA.

CREATION AND CONSTRUCTION OF POWER OF ATTORNEY

II. Creation of POA

The mode of creating a power of attorney depends on the purpose - ***Melawi v Five Star Limited***[50] and ***Vulcan Gases v GFIG***. Thus, it can be created:

1. In writing
2. By deed: necessary where POA is given to be done for something that can be done by deed

[48] (2008) 11 NWLR (Pt. 1097)
[49] (1965) Ch. 940
[50] 2002) 2 NWLR (Pt. 1) at 274

e.g. conveyance of an interest in property (***Section 77 PCL***) – ***Abina's Case***. There shall be no oral or implied term in a POA.

3. Where the POA has to do with land, it must be in writing to comply with ***Section 4 Statutes of Fraud*****.** In ***Abina v Farhat***, a deed of lease was executed by a donee whose authority was conferred verbally the court held that the deed would not be enforced since the authority was not conferred by deed.

II. Construction of Power in POA

Construction of POA is strictly. In ***NBA v Iteogu***, legal practitioner was given POA to negotiate and collect compensation and give the compensation to the various families whose land was in the dispute. However, Iteogu claimed he collected the compensation and gave it to the overall head of the village to distribute to the various families. The money was not distributed. The SC held that POA is construed strictly, so Iteogu was liable. In ***Jacobs v Morris*****,**[51] POA was given to make a purchase, followed by the general powers where necessary in connection with the purchase to make or draw promissory notes or bills of exchange. It was held that it didn't confer the authority to borrow.

In ***Abu v Kuyabana*****,** POA conferred on the donee the specific powers 'to institute, defend, prosecute or take any other legal steps… on my behalf in respect of any landed property owned by me". The Court held that the general power conferred on the donee "generally to do all such lawful act and things as my attorney think advisable for the purpose aforesaid as and efficiently in all respects as I could do myself" are regulated by the expression aforesaid in the specific powers and the attorney "could therefore not do any act that is not for the purpose" stated in the specific powers. This is to ensure that the donee does not exceed the power conferred on him by the document appointing him.

What of the omnibus clause: "and to do other things expedient, necessary, lawful as the donor would have done". E.g. the land of the donor is to be revoked by the Minister of the FCT and the donee has someone who wants to buy the land. Should he not sell even though the POA only states that the donee should collect rent but includes an omnibus clause? From the authority above (***Jacobs v Morris***), the omnibus clause is useless since the Courts strictly construe the power of attorney.

Oral evidence will not be admitted to contradict the powers expressly given to a POA.

III. Particulars of Information Required to Draft Power of Attorney

1. Particulars of the donor
2. Particulars of the donee
3. Particulars of the attesting witnesses
4. Particulars of the property involved
5. Purpose of the POA and the powers to be donated
6. Whether or not the POA is given for valuable consideration
7. Whether or not the of POA shall be irrevocable
8. Duration/period of the irrevocability

FORMAL PARTS OF A POWER OF ATTORNEY

1. **Commencement Clause** – (Date is viewed as part of the commencement). In the days of yore, a Power of Attorney was commenced with the words: "*KNOW YE ALL MEN BY THESE PRESENTS*". The modern practice is that it is commenced with: "*BY THIS POWER OF ATTORNEY*". Or simply "*THIS POWER OF ATTORNEY*".
2. **Date Clause** – should be left blank as if dated, one must register and stamp within a certain period in order to avoid penalties. The presence of a false or impossible date does not invalidate the POA. "given this……..…day of……, 2018." Or "made on the ……. day of ……., 2018. Or "is made this ……. day of ……., 20.... (This is used when

[51] (1902)

adding a recital).

3. **Recital Clause** – only necessary in Land matters where family head intends on executing a Power of Attorney for the transfer of rights in land. Recital is rarely found in a Power of Attorney. It is necessary only where the donor seeks to show that he has the consent of other principal members of the family to give the Power of Attorney. Recital is to Power of Attorney what Preamble is to statute. Recital may be useful in interpretation of the document.
4. **Appointment Clause** – this will have 3 things: name and address of donor; name and address of donee; and the fact that the donor appointed the donee. This is the clause appointing the donee. Appointment clause in a Power of Attorney is for identification purpose only. A Power of Attorney being the delegation of power is not an agreement between one person and the other. Rather, it provides for the appointment clause, for example:
   "*I, ABC of 10, Abuja Close, Abuja, HEREBY appoint Mr. XYZ (address should be here) to be my true and lawful Attorney and in my name and on my behalf to do all or any of the following acts or things namely…"* (Address must not be a postal address but a residential address). The acts must be listed all since POA is construed strictly.
   Where two or more donee' are to be appointed, it must be expressly stated whether it is their joint act or the individual act that will be binding on the donor. It will also have to be stated whether death of one of the donee will not affect the act of the other surviving donee(s) i.e. whether the act of the surviving donee will be binding on the donor.
5. **Power and Authority Clause** – ends with an omnibus clause, which gives no extra powers except those incidental to the powers already given. This is a statement or list of the acts to be performed by the donee on behalf of the donor. It should be very clear and exhaustive. One must be meticulous in presenting intentions because, as already stated, the powers conferred on the attorney are construed strictly. The clause usually ends with an omnibus expression (i.e. omnibus clause which gives no additional rights not in the authority clause, but has the effect of giving the donee powers that are necessarily incidental to those contained in the authority clause). It provide thus: *"AND I ALSO DECLARE that my attorney may do all other things as I may lawfully do, which are necessary or incidental to the powers listed above."*
6. **Omnibus Clause**: I declare that my attorney may do all other things that I may lawfully do which are necessary and incidental to the powers listed above. It should be noted that the inclusion of this does not introduce any powers beyond what is enumerated – ***Abina v. Farhat.***[52]
7. **Irrevocability Clause -** To take the benefit of the statutory protection of third parties which has already been discussed, it is important that a clause should be inserted to the effect that: *"AND IT IS DECLARED that in consideration of the sum of ₦50, 000.00 (fifty thousand Naira) only be paid to the donor by the donee (the receipt of which the donor hereby acknowledges) this Power of Attorney shall be irrevocable for a period of ……. months or years from this date.* Or *"AND I DECLARE that this Power of Attorney shall be irrevocable for a period of twelve months from this date.*
   It should be noted that consideration need not be adequate. Also, where there is consideration and the Power of Attorney is not stated to be irrevocable, then it will be valid till the purpose for which the Power of Attorney was made has been fulfilled. Also, a Power of Attorney cannot be valid without a power to revoke, for more than 12 months, where there has been no valuable consideration. Note, if the consideration is given back, then the POA can be revoked.

[52] (1938) 14 NLR 17

8. **Testimonium Clause –** a clause is inserted thus: *"IN WITNESS OF WHICH the donor and donee have executed this power of attorney (or by deed if the POA is by deed) in the manner below the date and year first above written."* It should be noted that unlike other conveyancing documents, such as assignment, lease and mortgage, the language of power of attorney is in the singular. This is because oftentimes, only the donor executes it. The following example is where the language of a power of attorney is in the singular: *"IN WITNESS OF WHICH I, the said (name of donor) have executed this Power of Attorney the day and year first above written."* This is a Deed Poll, deed executed by only one party. This is why the singular word "I" is used.
9. **Execution Clause:** *"SIGNED, SEALED AND DELIVERED by…… (Name of the Donor)* (If it is by deed). This should be done in the name of the donor. Note: the precautions for the blind, illiterate or corporate body. If illiterate, then the contents must have been read in a language he understands and he appeared to understand and insert his thumb print.
10. **Attestation and Authentication -** Attestation facilitates proof of execution. It is important that a Deed be attested to, so that it will be presumed to have been sealed and delivered even when no impression of a seal appears thereon. But attestation is not mandatory. However, under ***Section 150 Evidence Act***, there is a presumption of due execution if the POA is attested. It is usually authenticated by a judge, magistrate or notary public. The witness(es) must sign the Attestation Clause at the time of the execution of the Deed and not later. Attestation goes thus:
    "IN THE PRESENCE OF"
    Name:
    Address:
    Occupation:
    Signature/MARK:
    If the donor dies and the donee and purchaser have no knowledge of his death, the transaction between them will not be vitiated. See ***Section 144(1) (ii) PCL*****.** A notary public should attest a POA if POA is to be used internationally as the seal of notary public is recognised in all Commonwealth countries. However, the fact that it is not attested to by a notary public does not on its own invalidate the POA, it only makes the donor responsible to prove the due execution - ***Melwani v Five Star Ltd*****.**
11. **Franking:**
    Prepared by
    Killi Nancwat
    Peoples Chambers
    1 Compos Mentis Blvd, Ekpan, Warri.
    Section 22 and 23 LPA makes it an offence for anyone but a legal practitioner to transfer land but it does not apply to wills.
13. **Governor's Consent:** generally, the Governor's consent is not required to make a POA valid. However, where the POA is used to alienate interest in land, it is a registrable instrument. Thus, the Governor's consent must be obtained. See ***Section 7(b) of State Land Law of Lagos***.

EXECUTION OF A POWER OF ATTORNEY

There is no special mode except the grant relates to land.

1. **Execution of a Deed or Transfer of Interest in Land:** Where the donee is empowered to execute a deed on behalf of the donor or to transfer interest in land on behalf of the donor, the Power of Attorney must be made by deed – ***Abina v. Farhat (supra)*****;** ***Powell v. London Provincial Bank (supra)*****.**
    After such appointment by deed to execute a deed or transfer interest in land, the donee may execute the deed in the donor's name or in his own name, except where statute

requires execution in the name of the estate owner. ***Section 9(5) of the PCL*** provides that "where any such power for disposing or creating a legal estate is exercisable by a person who is not the estate owner, the power shall, when practicable, be exercised in the name or on behalf of the estate owner." ***Section 141(2) of the PCL*** provides that statutory direction may be given for execution in the name of the estate owner. In such cases where deed is executed by an attorney in his own name or on behalf of a donor, the donee executes the deed of conveyance on the donor's behalf, notwithstanding that the donor is the vendor. It is important that detailed particulars of the Power of Attorney are provided in the Execution Clause. Below is an example of execution by an Attorney (e.g. for deed of assignment) –

"SIGNED SEALED AND DELIVERED
by (name of the donee), the lawful Attorney of
(name of donor), the assignor by virtue of
a power of attorney dated 1st January 2008 and Registered as No. 34 Page 21 Vol. 160 of the Lands Registry Office at Lagos.

In the presence of:
Signature:
Name:
Address:
Occupation:"

2. **Execution outside the Country (Attestation by Notary Public):** Where it is executed outside the country, it should be attested by a notary public because there is recognition of acts of Notary public under International Laws – ***Hutcheon v. Mannignton; Ayiwoh v. Akorede;***[53] ***Section 118 of the Evidence Act*****.**
   Where there is absence of Notary public, it does not invalidate the authority, the only defect is that the donee cannot rely on presumption of due execution under ***Section 150 of the Evidence Act 2011*** but will have to establish its execution by other ways – ***Melwani v. Five Stars Industries Ltd*****.**[54]
3. **Illiterates:** If the donor is an illiterate, there should be an illiterate jurat, and evidence that the content was read and interpreted to the illiterate. In addition, the jurat must have the name and address of the writer of the document. Strict compliance is what is required - ***Ezeigwe v. Awudu*****.**[55]

PERFECTION OF A POWER OF ATTORNEY

1. **Governor's Consent:** Governor's consent is not needed as it is not a document transferring interest in land or the subject matter of delegation to the Donee - ***Ude v. Nwara*****.** However, where Power of Attorney is used to alienate interest in land, it is registrable as an instrument and Governor's consent must be sought and obtained. The consent column must be typed into the instrument as in the case of an assignment**.** See ***Section 7 (b) (iii) of the State Lands Law, Lagos***.
2. **Stamping:** Generally, Power of Attorney attracts a fixed stamp duty. Stamping is necessary for it to be admissible in Court.
3. **Registration:** This depends on whether it qualifies as an instrument under the Land Instrument Registration Law applicable to the State where it is used - ***Uzoechi v. Alinnor***. A POA will be considered as a registrable instrument when:
   (a) It gives power to the Donee to deal with an interest in land;

[53] (1951) 20 NLR 4
[54] (2002) 3 NWLR (Pt. 753) 217
[55] (2008) All FWLR (Pt. 434) 1529

(b) It is defined in the Land Instrument Registration Law of a State as registrable; and
(c) It is endorsed on any document transferring land i.e. a Deed of Assignment. See ***Section 84 & 85 of the Registration of Titles Law of Lagos State***.

Note that in some jurisdictions (such as in the FCT), the Lands Registry will demand a letter of consent from the Donor before the Power of Attorney is accepted for registration. This is to prevent fraud. The non-registration of a POA does not render it inadmissible as evidence in court. In ***Benjamin v. Kalio***,[56] the Supreme court held that an unregistered registrable instrument is admissible as evidence in court once it is relevant.

CASE SUMMARY ON POWER OF ATTORNEY

I. Ude v. Nwara[57]

This case was a fallout of one of the numerous abandoned properties cases resulting from the Nigeria Civil War. The case related to a property situate at No 2 Umuoji Street Port Harcourt (now No 2 Ekpeye Street) which was allegedly abandoned by the Appellant, Gregory Obi Ude due to the Civil War but later released to him by the Rivers State Abandoned Property Authority for a lease of seven years subject to renewal. The 1st Respondent contended that the property was sold to him by the Rivers State Government and he sought to interfere with the Appellant's enjoyment of the property, occasioning the action. The 2nd Respondent, Attorney General of Rivers State contended inter alia that the grant of the power of attorney by the Appellant without his consent was a contravention of the State Land Law.

The Supreme Court held that the argument of the 2nd Respondent lost sight of the time nature of a power of attorney. The Court in the words of Nnaemeka Agu JSC (as he then was) described Power of Attorney as a document, usually but not always necessarily under seal, whereby a person seized of an estate in land authorises another person (the donee), who is called his attorney to do in the stead of the donor anything which the donor can lawfully do, usually spelt out in the Power of Attorney. The Court held that a power of attorney merely warrants and authorises the donee to do certain acts in the stead of the donor and so is not an instrument which transfers, limits, charges or alienates any title to the donee, rather it could be a vehicle whereby these acts could be done by the donee for and in the name of the donor to a third party. So even if it authorises the donee to any of these acts to any person including himself, the mere issuance of such a power is not an alienation per se or parting with possession. It is only a document of alienation. It is only after, by virtue of the Power of Attorney, the donee leases or conveys the property, the subject of the power, to any person including himself then there is an alienation.

II. Chime v. Chime[58]

In this case, the 4th Respondent Sampson Okafor Chime as donor, appointed the 1st Appellant Augusta Chime as donee to sell his property at No 22 Moore Street, Ogui Enugu. But before the sale, the donor sold the said property to another person. The 1st Appellant challenged the purported sale on the ground inter alia, that the 4th Respondent having given an irrevocable power of attorney to the 4th Respondent to sell the property, that the subsequent sale of the property by himself to the 2nd Respondent was illegal, null and void.

On this point, the Supreme Court, Wali JSC delivering the leading judgment, held that the fact a Power of Attorney to alienate property is given does not divest the donor of the power to deal with the property so long as the donee had not yet executed his power of sale before disposition by the donor. The fact that a Power of Attorney has been granted does not prevent the donor of the power from exercising the powers donated. The Court once again looked at the meaning of power of attorney and held that it was inconceivable that the right of a donor will be

[56] (2018)
[57] (1993) 2 NWLR (Pt. 278) 647
[58] (2001) 3 NWLR (Pt. 701) 527

subordinated by that of a donee, by reason only that he has, as it were made a delegation of such power to the latter. The Court held that, "the better view is that as long as the donee has not exercised the power comprised in the power of attorney, it is clearly open to the donor to exercise the same power. Therefore, where the donor (sic) has in fact exercised the power under the power of attorney, the donee's (sic) power in this regard expires."

III. Ezeigwe v. Awudu[59]

The issue in this case bothered on the validity of the Power of Attorney in view of the challenge as to its execution. The power of attorney (Exhibit C) was donated by the Respondent, Awawa Awudu, an illiterate woman who thumb printed the instrument allegedly under inducement. The instrument was executed before a Magistrate, but was not franked by a Legal Practitioner nor did the writer of the document write his name and address as required by Section 3 of the Illiterate Protection Law. Both Counsels admitted that there was substantial but not strict compliance with the said Illiterate Protection Law. The contention was whether or not such substantial compliance sufficed to validate the power of attorney. The second issue was whether in the event that the power of attorney was held as valid it could divest the Respondent of her title to the property.

The Supreme Court held that strict compliance with the requirements of section 3 of the law was mandatory and that such non-compliance automatically renders the document in question invalid for contravention of the Illiterate Protection Law. It concluded that "the said exhibit 'A' cannot be used against the interest of respondent notwithstanding that it was attested to before a Magistrate.

The Court per Walter Nkanu Onnoghen JSC also held that even if the Power of Attorney could be relied on, it could not deprive the Respondent of her title in the property, the document being nothing other than an irrevocable power of attorney, not a conveyance. The Court also held that the document being an irrevocable power of attorney allegedly donated by the Respondent to the Appellant is a clear evidence or confirmation of the fact that the title to the land resides in the Appellant, being the Donor of the power.

IV. Abina v. Farhat

A power of attorney to execute a deed must be under a deed. In that case the donee had been granted power of attorney orally and he had executed a lease exceeding three years under deed. The court held the lease to be invalid. See also ***Powell v. London Provincial Bank***.

V. Ojugbele v. Olasoji

When a power of attorney is not registered then it is not admissible. That is, if the Land Instrument Registration Law of that particular state defines a Power of Attorney as a registrable instrument, then failure to register the said Power of Attorney will render it inadmissible in court.

VI. Uzoechi v. Alinnor

Whether a power of attorney is a registrable instrument is dependent on the Land Instrument Registration Law of the various states. For instance, the State Land Law of Lagos defines "instrument" to include Powers of Attorney. Therefore, Powers of Attorney are registrable instruments in Lagos. Similarly, under Section 3 of the Land Instrument Registration Law of Northern Nigeria as applicable in Plateau State, a Power of Attorney is a registrable land instrument. By Section 15 thereof, for such Power of Attorney to be relied on in Court, it must be duly registered. It must be noted that only powers of attorney made by deed are registrable. However, such unregistered Power of Attorney can be pleaded and given in evidence in other cases not relating to or affecting the land which is the subject of the Power of Attorney. See also ***Akinbade v. Elemosho*.**

[59] (2008) All FWLR (Pt. 434) 1529

VII. Ajamogun v. Oshunrinde

The power of attorney not given or executed by the head of family or with his express consent is void and any act purported to be done under it is of no effect whatsoever. The family head must participate in the execution of a power of attorney in respect of family property either as sole donor or a co-donor with other principal members of the family.

ETHICAL CONSIDERATIONS IN DRAFTING POWER OF ATTORNEY

1. A solicitor acting for a purchaser, relying on a POA should investigate to ensure that the power has not been revoked by the death, disability or bankruptcy of the donor to the knowledge of the donee.
2. A solicitor drafting a POA should ensure that specific powers are expressly stated (where this is the intention) without any ambiguity since such powers are construed strictly. Where powers are mistakenly inserted in the document or omitted, the solicitor may be liable in damages for negligence.
3. A solicitor should not advice a client to create a POA, rather than a conveyance to escape the provisions of ***Section 22 and 26 of the Land Use Act***.
4. A solicitor who is a donee of a POA should not in the same capacity draft the POA.
5. A solicitor must demonstrate competence in drafting the POA to include exact powers and not ambiguous powers.

SAMPLE DRAFT OF POWER OF ATTORNEY

I. Power of Attorney

BY THIS POWER OF ATTORNEY given this …. Day of …….. 2019
I, General Usman Amaechi Adebayo, Senator of the Federal Republic of Nigeria of No 10 Ademola Adetokumbo Crescent, Wuse 2, Abuja (donor) appoint Killi Nancwat, Chartered Accountant of Plot 5A Okoye Street, Port Harcourt (donee) to be my true and lawful Attorney and in my name and on my behalf to do all or any of the following acts or things namely:

1. To manage my property at Plot 5A Okoye Street, Port Harcourt;
2. To let/lease my property at Plot 5A Okoye Street, Port Harcourt
3. To collect rent for property at Plot 5A Okoye Street, Port Harcourt
4. To render account of the rent so collected for Plot 5A Okoye Street, Port Harcourt for a period of … years
5. To sell my property at No 10 Blantyre Street, Lagos Island
6. To sell my property at No 5 Jos Street, Kaduna

AND to do all things necessary and incidental to the matters above as I may lawfully do.

And it is declared that this Power of Attorney shall be irrevocable for a period of 11 months from the … day …… 2019.

IN WITNESS OF WHICH I, the said General Usman Amaechi Adebayo, have executed this Power of Attorney the day and year first above written.

SIGNED, SEALED AND DELIVERED by General Usman Amaechi Adebayo

IN THE PRESENCE OF
Name: Alhaji Utele Damfodu
Address: No 10 Abeokuta Road, Ibadan
Occupation: Lawyer and Notary Public
Signature:

Prepared by:
Joel Adamu, Esq
Peoples Chambers
No 1 Compos Mentis Boulevard, Ekpan, Warri.

II. Draft of a Power of Attorney to Execute a Sub-Lease [Deed] Irrevocable For Six Months

BY THIS POWER OF ATTORNEY made this_____ day of ____2019. I, Chief Killi Nancwat Elaias of No. 63 Kano Street, Ikeja, Lagos (DONOR) APPOINT Mr. Joel Adamu of 16, Alkali Road, Kaduna, Kaduna state (DONEE) to be my true and lawful attorney and in my name and on my behalf to do all or any of the following acts:
1. To create a term of ten (10) years over my property, the block of four flats at 67, Zaria Street, Kaduna, Kaduna state, covered by Certificate of Occupancy NO 87679 date 23/11/2009 and registered as 45/45/2098 in favour of Bashir Nuhu & Sons Limited whose registered office is at 45, Nuhu Close, off Shagari Way, Kaduna, Kaduna state.
2. To commence and conclude the transaction on my behalf and on my behalf to sign all necessary documents in respect of the transaction with Bashir Nuhu & Sons Limited.
3. To collect from Bashir Nuhu & Sons Limited the sum of ₦24 million, the sum being the agreed rent for the property for the first three years of the lease and to remit the money collected into my account less his fees, charges and commission as may be agreed between the two of us.

AND to do all and any other things and to exercise all other powers as are necessary and incidental for the purpose of carrying out of the powers created above as I may lawfully do.

AND I DECLARE that this Power of Attorney shall be irrevocable for a period of six (6) months from the date of its execution.
OR
AND I DECLARE that in consideration of the sum of ₦10, 000 already paid by the donee to the donor (the receipt of which the donor acknowledges), this power of attorney shall be irrevocable.

IN WITNESS OF WHICH I, the Donor, has executed this Power of Attorney in the manner below the day and year first above written.

SIGNED, SEALED AND DELIVERED by the within named DONOR

_____
CHIEF KILLI NANCWAT ELAIAS

IN THE PRESENCE OF
NAME: Mathias Ayuba
ADDRESS: No 136B Mission Street, Ikeja, Lagos
OCCUPATION: Architect
SIGNATURE:

PREPARED BY:
K. J. Laasutu Esq
STAR CHAMBERS
LEGAL PRACTITIONERS

Plot 555, Victoria Island, Lagos
07067893883; Kjlaasutu@gmail.com.

III. Draft by Registered Trustees

BY THIS POWER OF ATTORNEY made this _____day of_____2019, We the Registered Trustees of Alagbole Progressive Union of Lagos, registered under the Companies and Allied Matters Act with registered office at 15, Kano Street, Ikeja, Lagos state (DONOR) APPOINT Mr. Frank Roberts of 16, Alkali Street, Kaduna, Kaduna State (DONEE) to be our true and lawful attorney and in our name and on our behalf to do all or any of the following acts:

1. ……..
2. ……..
3. ……..

AND to do all and any other things and to exercise all other powers as are necessary and incidental for the purpose of carrying out of the powers created above as we may lawfully do.

THE COMMON SEAL of the Registered Trustees of Alagbole Progressive Union of Lagos was affixed to this POA and it was duly delivered.

IN THE PRESENCE OF

_____ _____
SECRETARY/TRUSTEE TRUSTEE

PREPARED BY:
K. J. Laasutu Esq
STAR CHAMBERS
LEGAL PRACTITIONERS
Plot 555, Victoria Island, Lagos
07064793812; Kjlaasutu@gmail.com.

IV. A Draft of the Testimonium and Execution Clauses of Sub-Lease Executed under Power of Attorney

IN WITNESS OF WHICH the parties have executed this DEED in the manner below the day and year first above written:
SIGNED, SEALED AND DELIVERED by

_____
the lawful attorney of Chief Okwor Kenneth Ononeze Dominic, the sub-lessor by virtue of a power of attorney dated____ and registered as num _____page_____ vol _____ of the Lands Registry Office at _____state.

THE COMMON SEAL of Bashir Nuhu & Sons Limited has been affixed pursuant to a resolution dated _____and duly delivered.

IN THE PRESENCE OF

_____ _____
SECRETARY DIRECTOR

PREPARED BY:
K. J. Laasutu Esq
STAR CHAMBERS

LEGAL PRACTITIONERS
Plot 555, Victoria Island, Lagos
07064793812; Kjlaasutu@gmail.com.

V. Power Of Attorney Executed By Husband and Wife

BY THIS POWER OF ATTORNEY made this _____day of____2019, We Mr. Theo Maimako (1) and Mrs Chidera Maimako (2), all of 63 Kano Street, Ikeja, Lagos state (DONOR) APPOINT Mr. Frank Roberts of 16, Alkali Street, Kaduna, Kaduna state (DONEE) to be our true and lawful attorney and in our name and on our behalf to do all or any of the following acts:

1. ……..
2. ……..
3. ……..

AND to do all and any other things and to exercise all other powers as are necessary and incidental for the purpose of carrying out of the powers created above as we may lawfully do.

IN WITNESS OF WHICH, We the Donors have executed this Power of Attorney in the manner below the day and year first above written.

SIGNED, SEALED AND DELIVERED by within named Donors
1. _____
MR. THEO MAIMAKO
2. _____
MRS. CHIDERA MAIMAKO

IN THE PRESENCE OF
Name
Address
Occupation
Signature

PREPARED BY:
K. J. Laasutu Esq
STAR CHAMBERS
LEGAL PRACTITIONERS
Plot 555, Victoria Island, Lagos
07064793812; Kjlaasutu@gmail.com.

VI. Draft Sample of Concluding Part of Deed of Assignment Executed By Attorney On Behalf of Donor

IN WITNESS OF WHICH the parties have executed this deed of assignment in the manner below on the date and year first above written
SIGNED, SEALED AND DELIVERED by

_____
Ola Adams,

(Lawful Attorney of Prof Babatunde (the assignor) by virtue of Power of Attorney dated 09/09/2014 and registered as NO 3 at page 7 in volume 2001 in the Lands Registry, Asaba, Delta State)

IN THE PRESENCE OF:
NAME: _____
ADDRESS: _____
OCCUPATION: _____
SIGNATURE: _____

(Week 6)

CONTRACT OF SALE AND CONVEYANCING I

INTRODUCTION

Sale of land is a process by which interest or rights in land are created/transferred from one person to another. The person transferring the interest is the vendor/seller and the person to whom the interest is transferred is the purchaser/buyer. In certain instances, the consent of 3rd parties is required to perfect the transfer – consent of Governor, head lessor. Conveyancing is the transfer of the total interest (legal and equitable) from one person to another.

The applicable laws in a contract of sale are: ***CFRN 1999, CA 1881 & 1882, PCL, Land Instruments Registration Laws*** of various states, ***Registration of Title Law, Stamp Duties Law***, and ***Land Instrument Preparation Law***. The means of acquiring land in Nigeria are by:

1. Customary law
2. Inheritance
3. State grant – government allocation
4. Purchase e.g. an assignment
5. Gift inter vivos e.g. a deed of gift

In a contract of sale, there is a preliminary step in the transfer of title in land; the purchaser acquires equitable title only while the legal interest passes on completion stage; and then the purchaser is given time to investigate the title while being sure of his bargain. Vendor will have to prove a good title to pass (nemo dat quod non habet). Note that legal practitioners now insert a clause showing that time is of the essence (e.g. 6 months for completion) since reasonable time is too vague. All contracts for the sale of land must be evidenced in writing: ***Section 4 Statute of Frauds 1677; Section 5(2) Law Reform (Contracts) Act 1961, Section 67 PCL 1959***.

LEGAL RESTRICTIONS/LIMITATIONS TO SALE OF LAND

The following restrictions apply/exist against the process of sale of land in Nigeria – lawyer should take note in representing client in purchasing land

1. **Consent of the Governor:** consent of Governor of such State is required before a person can alienate his land, which is subject to statutory right of occupancy, to another. And so any purported sale of land without the consent of the Governor first had and obtained is null and void. This is provided for under ***Sections 22 and 26 of the Land Use Act; Abioye v Yakubu; Savannah Bank v Ajilo.*** Therefore, if the consent is refused, there is nothing the parties can do. See ***Qudus v. Military Governor of Lagos State.***[60] For alienation of customary right of occupancy, the consent of the Local Government Chairman is also required.
2. **Grant of Statutory Right of Occupancy to Persons below 21 Years:** A person under the age of 21 (twenty-one) cannot be granted a statutory right of occupancy or subletting of a statutory right of occupancy by the Governor of a State, except a guardian is appointed – ***Section 7 of the Land Use Act***.
3. **Grant of Statutory Right of Occupancy to Non-Nigerians:** A non-Nigerian cannot be granted a statutory or customary right of occupancy without the approval of the National Council of States. ***Section 46(1) of the Land Use Act.***
4. **Consent of Family Head/Head of Community for Alienation of Family/Communal Land:** Where the land, subject of a sale is a land belonging to a community (communal land) or family land, the consent of the Principal members and heads of the community or

[60] 1973 CCHCJ/673

family must first be obtained before there can be a valid sale – ***Adeleke v. Iyanda;***[61] ***Odekilekun v. Hassan***.[62]

5. **Covenant in a Lease:** Covenant in a lease may also restrict the sale and transfer of land. For example, typical covenants in leases that "restrict assignments, subletting or otherwise parting with possession of the premises."
6. **Consent of Minister in Alienation of Government Properties:** Some legislations, could also prescribe the granting of consent by the Minister in charge of a Department or Authority before there can be a transfer of interest in a property, held or owned by that Department or Authority. For example, ***Section 12(4) Nigerian Coal Authority Act***,[63] provides that the Corporation shall not alienate... or charge any land vested in the corporation... without the prior approval of the Minister. In ***Rockonoh Property Co. Ltd. V. NITEL Plc***,[64] the court observed that, "it must be accepted that the absence of the necessary ministerial approval or consent is a serious defect which affects the title sought to be conferred by the relevant instrument".
7. **Compulsory Acquisition:** ***Section 28 & 29 Land Use Act*** and ***Section 44 CFRN 1999*** empowers the Governor to revoke right of occupancy and compulsory acquire any land for public purpose, but subject to payment of compensation. A lawyer should ensure client does not buy land full of minerals as it will be compulsorily acquired by the Federal government subject to payment of compensation.
8. **Town Planning Laws and Regulations:** Town planning laws and regulations may also restrict the alienation of certain lands where the purposes for which they are intended to be used are contrary to the purposes of town and planning laws. For example, an industrial place designated for such purpose should strictly be abided to rather than using it for something else. ***Section 6 Land Development (Provision for Roads) Law, Lagos State, 2003*** states that the sale of any land which the prescribed authority has directed to be reserved for roads development, shall be null and void.
9. **Doctrine of Lis Pendis**: this doctrine signifies the power and control of a court of law while legal proceeding is pending. It has the effect of restricting the sale of any interest in land during the pendency of the suit – ***Ezomo v. NNB Plc***,[65] ***Kachalla v Banki***. The doctrine would apply in cases where it can be shown by a party that at the time of such sale or purchase of the property, there is a –
   (a) Pending suit in respect of the property;
   (b) The action or the *lis* was in respect of real property;
   (c) The object of the action was to recover or assert title to a specific real property; and
   (d) The party concerned was aware or ought to be aware of the pending suit – ***Bua v. Dauda***.[66]
10. **Lack of Uniformity in Applicable Laws:** the extant laws that govern land transactions in Nigeria lack uniformity. The Conveyancing Act governs the former northern and eastern Nigeria while the Property and Conveyancing Law governs the former western Nigeria, excluding Lagos that is governed by the Land Registration Law of Lagos 2014. Apart from Lagos, the other laws are equally obsolete.
11. **Professional Incompetency of Lawyers:** the professional incompetency of lawyers is equally a challenge to land transactions. Some lawyers don't advice their clients appropriately. This will subsequently generate issues between the parties. Some of the

[61] (2001) 6 SCNJ 101
[62] (1997) 12 SCNJ 114
[63] Cap. 95, LFN 2004
[64] (2001) FWLR (Pt. 67) 885 at 910
[65] (2007) All FWLR, (Pt. 368) 1032
[66] (2003) FWLR (Pt. 172) 1892

lawyers are not abreast with some of the laws that regulate land transactions, thus the handle transactions on behalf of clients that may not be in accordance to the relevant laws regulating such transactions.

12. **Fraud by Land Vendors:** the unscrupulous acts of vendors is equally a challenge. Some fraudulent vendors will sale a particular land to two or more different persons and then abscond. The different purchasers of the property will now be left with dispute and a challenge of determining who the valid purchaser amongst them is. Definitely, when the issue is taken to court and the court determines the valid purchaser, the remaining ones will lose their money to the fraudulent vendor.

TYPES OF CONTRACT OF SALE

I. Oral/Parole Contract

Oral/Parole Contract (product of illiteracy in Nigeria) is generally unenforceable though not void or voidable above. Parties agree terms of sale orally without reducing it into writing – ***Section 4 Statute of Frauds 1677***; ***Section 5(2) Law Reform (Contracts) Act 1961***. The general rule is that a contract of sale must be in writing and signed by the party against whom it is sought to be enforced. There are certain exceptions to the general rule viz:

1. **Sale under Customary Law:** writing is not a requirement – ***Section 3 Law Reform (Contracts) Act*** expressly excludes sale under customary law. See ***Alake v Awawa***.[67] For sale under customary law to be valid, the purchase price must have been paid; the contract must have been done in the presence of witnesses; and the purchaser must have been let into possession. See ***Ogundalu v. Macjob***.[68] Thus, failure to complete the purchase price will entitle the vendor to rescind the contract and resell it to a third party. In ***Odusoga v Ricketts***,[69] the plaintiff bought land in 1965 under customary law and paid half the price and entered possession. He developed some part of the land. In 1971, the vendor resold the undeveloped part of the land to a 3rd party. The Supreme Court held that for a valid customary law title to pass, the purchaser must have paid the purchase price in full; there must be witnesses at the time of payment and agreement of the contract; and he must go into possession. Having waited 6 years after the contract and not paid the balance, the purchaser lost his title to land. 6 years after possession was not reasonable time for completion and the vendor's title was not defeated as purchase price was not paid in full.
2. **Acts of Part-Performance:** In ***International Textile Industries (Nig) Ltd v Aderemi***,[70] the Court held that sufficient evidence of part performance takes the contract of sale of land out of the purview of the Statute of Frauds. The Supreme Court held that: "The ground on which the courts hold that part performance takes a contract out of the Statute of Frauds is that when one of the two contracting parties has been induced or allowed by the other to alter his position on the faith of the contract, as for instance by taking possession of land and expending money in the building or other like acts, there would be fraud in the other party to set up the legal invalidity of the contract on the faith of which he induced or allowed the person contracting with him to act and expend his money." Thus, the following are instances where the courts can specifically enforce a contract based on part performance –
   (a) There is proper oral evidence to prove or establish the terms of the oral contract.
   (b) The contract must be specifically enforceable, in the sense that it is not a contract for personal service.

[67] (1932) 11 NLR 39
[68] (2015)
[69] [1997]
[70] (1999)

(c) The act constituting part performance must be unequivocal and consistent with, or referable to the contract alleged to be breached.
(d) The plaintiff has wholly or in part performance of the oral agreement with the confidence that the defendant would do the same.

In ***Mohammed v. Klargester Nigeria Ltd*****,**[71] it was stated that a claim for specific performance cannot be granted where the vendor sold a property that is family property and is jointly inherited and owned with other persons, since a court cannot compel a person to do that which is impossible for him to do. It should however be noted that it is risky for a purchaser to rely on the doctrine of part performance for the enforcement of a contract of sale of land because specific performance is a discretionary remedy. In ***Thomas v Brown***[72] the court held that an order of specific performance is discretionary. Where it is shown that one of the parties relying on the undertaking of the other party has carried out his own part of the agreement, the Court will enforce such a contract.

3. **Sales by Court:** protected by law even where there is inadequate memorandum evidencing the sale (may just be a receipt).

II. Open Contract

A mid-way between the oral and formal contract (the product of the Court of equity). The parties provides for the barest minimum requirement of the Statute of Frauds by providing for the parties, the price and the property which is signed by both parties (the three Ps). All other terms are orally agreed upon and left to be implied by law. ***Paye v Gaji***.[73] Several documents have been held to be open contracts. In ***Akpara v UAC***:[74] a letter was held to constitute an open contract. Receipts were also held to be open contract – ***Yaya v Mogaji***;[75] ***Osagie v Oyeyinka***.[76] Even the rough draft of an agreement has been held to amount to an open contract (***Grey v Smith***); joinder of documents.

In an open contract, it is implied by law that the vendor shall prove his title for up to 30 (thirty) years by virtue of ***Section 70 of the PCL*****;** and 40 (forty) years by virtue of ***Section 1 of the Vendor and Purchaser Act***.

A vendor can convey as: Trustee, Family head, Administrator/Personal Representative of an Estate, Mortgagee, Beneficial owner, etc. In instances where a vendor conveys as a beneficial owner for valuable consideration, (contract of sale and mortgage) 6 (six) covenants are implied by law. These are –

1. Right to convey.
2. Quiet enjoyment.
3. Freedom from encumbrances except those disclosed in the contract
4. To indemnify the purchaser in the event of a claim by another claimant or the property
5. Further Assurances (that is, the seller ensures the buyer that he will do everything to obtain the Legal title of land in question)

Where it is a lease (2 additional covenants)

6. That the lease is valid and subsisting.
7. That the rent has been paid and the covenants of the lease performed/observed.

III. Formal Contract

This is the preferred option.

A. Division of a Formal Contract

It is divided into 2 (two) namely –

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[71] (2002) FWLR (Pt. 127) 1087 at 1095
[72] (1876)
[73] (1996)
[74] (1951)
[75] (1947)
[76] (1987)

1. The particulars of sale dealing with matters affecting the property – This has to do with its nature, area (size), defects, benefits charges and liabilities to which it is subject.
2. The conditions of the sale dealing with contractual terms which set out the terms by which the parties are to be bound – ***Terrance v. Bolton.***[77]

B. Mode of Creation

The contract needs not be made in any particular way provided the parties intend to enter into a legally enforceable contract and there is agreement upon the essential terms for valuable consideration. A written evidence of the contract is sufficient – ***Re Holland***,[78] the note or memorandum must be signed by the party to be bound. This is to prevent fraud and perjury and to make it impossible for a contract for sale of land to be alleged on only oral testimony of witnesses who may just be perjuring. The statute aims to prevent any action unless the defendant had signed some paper containing the terms of the contract. The equitable doctrine of part performance was an intervention of equity to create and exception to the statutory requirement.

C. Advantages of Formal Contract

1. **More Time for Purchaser to Investigate Title:** The purchaser protects himself by having more time to investigate the title being transferred before the execution of the deed of conveyance.
2. **Non-Termination of Contract by Death of Parties:** The death of either party to the transaction does not terminate the contract as their personal representatives can proceed with the transaction and complete the sale – ***Yusuf v. Dada.***[79]
3. **Prevention of Last Minute Withdrawal by a Party:** None of the parties can withdraw from the contract in the last minute without being liable for breach of the terms of the contract. Therefore prevents last minute withdrawal
4. **Express Statement of Position and Rights of Parties:** The terms of the contract having been expressly agreed to, the position and rights of the parties are express and not implied, which may otherwise make their positions uncertain. This also crystallises the position of the parties at an early stage.
5. **Transfer of Fixtures and Fittings:** Fixtures and fittings may be transferred under a formal contract and need not be reflected in the deed of conveyance of the land.
6. **Prevents Gazumping and Gazundering:** The vendor cannot unilaterally and subsequently increase the purchase price since this has already been fixed in the contract. Therefore, it prevents gazumping. Also, there is no gazundering (vendor forced to accept a lower price).
7. **Provision for Specific Matters Parties may not be Able to do:** Parties may take special advantages under the contract by providing for specific matters they may not otherwise be able to do.
8. **Easy Enforceability of Terms:** It is easier to enforce the terms of the contract. The parties expressly provide for all conditions or terms that they desire to be included in the document in addition to the three Ps found in an open contract. Usually prepared by the vendor's solicitor. Therefore, it is enforceable.
9. **Confer of Special Advantages on either of the Parties:** May confer special advantages on either of the parties: equitable doctrine of conversion, possession before completion, etc.

[77] (1872) LR EQ 124
[78] (1902) 2 Ch. 360
[79] (1990) 4 NWLR (Pt. 146) 657

D. Special Conditions/Terms of a Formal Contract

1. **Capacity in which Vendor is Conveying:** as beneficial owner, trustee, mortgagee, settlor or personal representative. It must be expressly stated. This determines covenants to be implied into the conveyance at completion.
2. **Deposit/Part Payment:** they must agree on the deposit, usually 10% (can varied by parties) of the price from the purchaser to vendor showing that he is serious about the bargain. It is not mandatory to pay deposit to purchase a land, but where the purchaser pays deposit, he stands the risk of losing the deposit is he fails to complete the transaction. Where there is agreement to pay deposit, failure to pay will be regarded as a breach and the vendor will be entitle to treat the breach as discharge of the contract and sue for damages.

   Deposit is paid at the stage of exchange of contract. It is paid to vendor's solicitor either as an agent or a stakeholder – ***Rockeagle Ltd v ALSOP***.[80] If he takes as an agent, he is an agent for the vendor and responsible only to the vendor and liable for any interest that accrued to the vendor. As an agent, he can also be sued as agent of the vendor. It is better to take as a stakeholder (an inter-pleader) acting as an agent of both parties. He is not obliged to release the money for either of the parties until the party is obliged to take it. Thus, he can pay the money to the vendor where the purchaser defaults or pay to the purchaser where the vendor defaults. As a stakeholder, solicitor will not be liable for interest that accrued except if he kept the money in an account other than clients' account. The stakeholder has a personal responsibility to keep the money safe otherwise liable for its loss or misappropriation. If purchaser then moves to complete the transaction under conveyance, the deposit will be put as part of the consideration for the purchase.

   A deposit is a mere security/show of commitment on the part of the purchaser to complete the transaction in due course. It is refundable when the vendor is in default but not refundable when the purchaser is in default. The difference between a deposit and part-payment was enunciated in ***Biyo v Agu***.[81] Deposit is merely a guarantee and not performance of the contract, while part payment presupposes that the contract is binding and this is a portion of the agreed purchase price – actual performance of the contract. Also, where there is part payment, vendor can sue for completion (debt is then recoverable by the vendor when purchaser is in default), while in deposit, he cannot sue for completion – ***Edosa v Zacalla***. Where part payment is paid within stipulated time or within reasonable time, the vendor cannot resile from the agreement – ***Odusoga v Ricketts.***[82]
3. **Balance and Interest on Balance:** the balance is paid at completion. The courts will not grant an order of specific performance where the purchaser fails to pay the balance of the purchase price within stipulated time – ***Achonu v Okuwobi.***[83] Where purchaser delays in payment of the balance, interest is chargeable, which is 4% at common law. See ***Esdaile v Stephenson***.[84] However, it is advisable to provide for the going rate (commercial rate or CBN rate, usually 11-12%). If this is not expressly provided for in the contract of sale, then common law rate of 4% applies. The rationale for fixing the rate of interest is borne out of the fact that had it been the vendor received complete payment earlier, he would have used it for something profitable; delay leads to loss and should be compensated by payment of interest. If the fault is occasioned by the vendor, no interest is charged – ***Esdaile v. Stephenson.*** Where there was part payment, the balance of the purchase price becomes a debt to be recovered by the vendor.

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[80] (1991)
[81] (1996) 2 NWLR Pt 422, 1
[82] (1997) 7 NWLR (Pt. 511) 1
[83] (2017) AFWLR (Pt. 905) 1294
[84] (1822)

4. **Date of Completion:** time is not of the essence in law where the date for completion has not been expressly stated - ***Section 68 PCL***. It is usually completion within reasonable time: ***Reynolds Const. Co v Edomwonyi***.[85] Thus, it is advisable to provide for an actual time in order to make time of the essence - ***Johnson v Humphrey***.[86] Where date has been fixed by the parties, then the contract must be performed by that date; otherwise the non-defaulting party could terminate the contract. Also, any interest payable on the balance of the purchase money will become due with effect from the date of completion.
5. **Vacant Possession:** there is an implied obligation on the vendor to give vacant possession of the property on the day of completion. This is especially required where the premises are residential. The term "vacant possession" imposes an obligation on the vendor to convey the land free from any claim of right to possession by a third party. The implied covenant for vacant possession can only be displaced if an express provision is made on it in a formal contract. Where the covenant on vacant possession is breached, the remedies available to the purchaser are:
   (a) Refusal to complete the transaction and recovery of deposit paid;
   (b) Recovery of damages;
   (c) Termination of the contract even after completion if he has not waived his right; and
   (d) Suing for specific performance.
6. **Payment for Fixtures and Fittings:** fixtures are the things in nature of personal property which are attached to realty that is regarded as part of the real property. There is no obligation on the purchaser to pay for the fixtures and fittings on the property unless the contract provides for that. On occasions, because of their value, the parties could agree separately on the amount to be paid on fixtures. Where a separate amount is agreed on fixture, the implication is that in the instrument transferring the land, the amount of the fixture will not be included. But parties should resist the temptation to deliberately inflate the value of fixtures while reducing the purchase price of the property in order to reduce the payment of stamp duties by the purchaser. Thus, legal interest should be transferred under the contract so that the contract can state the agreed value of these fittings and chattels. Therefore, it is to the benefit of the vendor to insert these items into the contract.
7. **Possession before Completion:** purchaser is not entitled to take possession until completion when he has paid full purchase price. However, parties may agree otherwise. It is advisable to let in purchaser as a licencee or tenant at will so that in default, you don't have to go through rigorous process of recovery of property - ***Street v Mountford.*** As a licencee, all he will have is 7 days' notice for eviction. If not, purchaser will be a tenant and to remove him, you will have to comply with Recovery of Premises Act/Law, Tenancy Law Lagos Sate etc. Since the purchaser is in possession, there should be no excuse or no reason to raise the issue of defects after completion since while in possession he should have brought up such issues.
8. **Risks and Liabilities/Insurance Pending Completion:** the parties should insert in a formal contract provisions on insuring the property after exchange of the contract but before completion. In the absence of any specific provision, once the contract of sale has been exchanged, risk in the property moves to the purchaser, and he is bound to pay the balance in the event of the property being destroyed. Therefore, it is advisable for the purchaser to insure since the risk has been moved to him as the doctrine of frustration does not apply to sale of land - ***Castellian v Preston***.[87] The purchaser has a statutory protection in ***Section 72 PCL*** and ***Section 67 Insurance Act 2007*** but this is only in relation to fire and so he should insure against other risks (wide occurrences: natural and man-made).

[85] (2003)
[86] (1946)
[87] (1883)

Where the vendor insures the property in his name, he has the right to collect the monies paid upon any damage to the property and use it as he wishes and the purchaser cannot compel him to utilise it to reinstate the property – ***Rayner v. Preston***.[88] The vendor is also not under any obligation to continue to maintain his own policy on the property.

9. **Exceptions and Reservations:** vendor must incorporate into the contract any exception or reservation he intends or he forfeits the right e.g. reserving a right of way to his adjoining property. See ***Tee bay v Manchester Railway Co***.[89]
10. **Void Terms:** whether the purchaser is to: seek consent of equitable owner; accept imperfect title; retain vendor's solicitor; pay for vesting order in respect of the property. Where purchaser is prevented from: access to parent document (safe custody and acknowledgment clause must be provided for in the conveyance and evidence of this sale should be written on the parent document); inquiring into stamp duty - ***Section 108 Stamp Duties Act***.
    NB: look at the implications on the absence of these terms in a contract. Also see in whose benefits each term is for?

E. Exchange of Contract

This is the procedure by which a contract is made binding on the parties. The procedure for exchange of contract is as follows:

1. Vendor's solicitor prepares and sends a copy to the purchaser's solicitor for any amendment.
2. The purchaser's solicitor on approval (or amendment) sends the copy back to the vendor's solicitor who then engrosses the document after effecting the necessary corrections; produces two plain copies and sends a copy to the purchaser's solicitor for signing while he retains the other copy for the vendor to sign.
3. When the purchaser signs, the rule is that he moves the vendor by taking his own signed copy to the vendor's solicitor together with the deposit in exchange for the vendor's signed copy. NB: it is the exchange that makes the contract binding and there by transfers equitable title to the purchaser. The vendor will be prohibited from reselling the land to a third party unless the purchaser refuses to pay for the balance.
4. The exchange takes place in the vendor's place or vendor's solicitor's office or exchange can be by post, email, telephone, fax depending on what is agreed by the parties.
5. NB: exchange is not required where one solicitor acts for both parties.

F. Single Solicitor Acting for Both Parties

Ordinarily a single solicitor should not act for both parties (law is against this) but there are instances that the law allows a single solicitor to act for both parties (exception to the general rule). The instances that a single solicitor can act for both parties are:

1. Where the title to the property is sound
2. Where there is no likelihood of conflict between the parties e.g. company and its subsidiary, relatives (existing relationship between the parties)
3. Where the transaction is of no serious legal consequence (small value)
4. Where the term of the contract had been fully negotiated and agreed upon by the parties

Exchange then takes place once the parties have signed the document, no need for physical exchange - ***Smith v Mansi***.[90]

[88] (1801) 18 Ch. D1
[89] (1883)
[90] (1963)

G. Effect of Exchange of Contract/Rights and Obligations of the Parties under the Contract

1. Vendor

(a) Entitle to balance of the purchase price. He becomes a trustee of a special kind under the contract as he has substantial interest in the property.
(b) Entitle to rent and profits until completion unless agreed otherwise e.g. where he allows purchaser to enter possession as a licencee.
(c) Lien on the property for the unpaid price.

2. Purchaser

(a) Equitable owner of the property
(b) Entitle to transfer his equitable interest in the property to another - ***Edosa v Kachalla***.
(c) Protecting his equity by obtaining an injunction preventing the vendor from transferring the property to a third party or committing any act of voluntary waste.
(d) Suing the vendor to specifically perform or complete the transfer or for voluntary waste which depreciates the property.

H. Effect of Death of Either Parties

Death does not terminate their obligations. The personal representatives of either of the parties can be compelled to complete the transaction once the contract has been completed - ***Gwangwan v Gagare***.[91]

I. Discharge of a Contract of Sale

This happens once a valid deed of assignment has been executed in favour of the purchaser.

J. Governor's Consent, Stamping and Registration

1. **Governor's Consent:** not required for contract of sale - ***Solanke v Abed***.[92] Governor's consent is only required for actual transfer - ***Okuneye v FBN Plc*.**[93]
2. **Stamping**: governed by the various Stamp Duties law of the states. Contract of sale carries a fixed stamp duty. It is a criminal offence to fail to stamp a document which is required to be stamped. An unstamped document cannot be evidence to prove title. However, it may be used in Court to prove money had and received.
3. **Registration**: The following jurisdictions are considered in respect to registration:
   (a) **Lagos State and Northern States:** ***Section 58 Laws of Northern Nigeria 1953, Lagos State Law*** – contracts of sale are not registrable. For properties under RTL in Lagos State, a purchaser may file or enter a caution using Form 10 supported by statutory declaration stating the nature of his interest. Note ***Oredola v AG Kwara State*** where the Court held that a contract of sale is registrable in Northern Nigeria even though that is not the position of the statutes.
   (b) **Eastern States**: the law is silent on the matter but in ***Okoye v Dumez***,[94] the court held that contracts of sale are registrable.
   (c) **Western Region:** In the PCL states of the Old Western region, contract of sale is registerable – ***Section 2 LIRL*.**

   The effect of non-registration is that the contract would be inadmissible to prove title - ***Gabriel Tewogbade v Obadina*,**[95] but could be used to prove money had and received and a claim for specific performance. It also governs priority among competing interests. However, this position of inadmissibility of unregistered document of title was changed

[91] (2003)
[92] (1962)
[93] (1996)
[94] (1985)
[95] (1994)

by the Supreme Court in the case of ***Benjamin v. Kalio*,**[96] to the effect that non registration of document of title does not make such document inadmissible in court in proving title.

J. Correspondences "Subject to Contract"

This arises where the purchaser intends not to be bound by the contract until the formal contracts are exchanged – ***UBA v. Tejumola & Sons*.** Generally, the phrase "subject to contract" in documents mean that not rights or privileges of the party concerned are to be considered as lost or waived in the documents. Thus, until a formal contract is drawn up and executed, everything is in the negotiation stage.

L. Particulars of Instruction needed for drafting a Formal Contract of Sale

1. Particulars of the parties or personal details of the parties, both vendor and purchaser. This will include: their names; addresses; occupations; nationality; phone numbers and e-mail addresses, and whether any of the parties is an illiterate or is blind.
2. Particulars of the property: location, description, whether there are third party rights or restrictive covenants, survey plan (if any).
3. Nature of the vendor's title
4. Capacity of the vendor
5. Amount of consideration (purchase price)
6. Particulars of deposit, if any: Whether it is to be paid; amount to be paid; and to whom the deposit is to be paid and in what capacity, whether stakeholder or agent
7. Particulars of fixtures, fittings and chattels, if any
8. Proposed completion date for the contract
9. Particulars of other special conditions for the sale: Whether purchaser is to take over possession before completion; responsibility for risks and insurance: who is to insure and method of application of insurance money; and amount of interest on unpaid balance, and
10. Particulars of the persons who are to be witnesses to the contract.

STEPS/STAGES IN THE SALE OF LAND

In the case of ***International Textile Industries Nigeria Limited v. Aderemi*,**[97] The Supreme Court held that the stages of transfer of interest in land can be divided into two distinct stages viz:

1. The contract stage (ending with the formation of binding contract for sale); and
2. The conveyance stage (culminating in the legal title vesting in the purchaser by means of the appropriate instrument under seal).

The court also observed that it is only after a binding contract for sale is arrived at that the need to pursue the procedure for acquiring title will arise. That is when obtaining of the necessary consent to alienate the property becomes an issue in order to make alienation valid.

However, for the purpose of convenience of discussion, the stages is subdivided as follows:

1. Contract Stage
   (a) Pre-Contract Stage (Pre-Contract Enquiries & Negotiations)
   (b) Contract Stage (Oral, Open & Formal Contract)
   (c) Post-Contract Stage (Deducing Title, Requisition to Title, and Investigation of Title)
2. Completion Stage
3. Post-Completion Stage (Governor's Consent, Stamping and Registration)

I. Contract Stage

A. Pre-Contract Enquiries/Stage

1. **Concept and Essence of Pre-Contract Enquiries:** These are enquiries, which a purchaser usually raises with the vendor or his solicitor before the parties enter into a contract for transfer of interest in land. This flows from the duty of the vendor to disclose

[96] (2018)
[97] (1999) 8 NWLR (Pt. 614) 268

to the purchaser any latent defects in title which cannot be discovered on the mere inspection of the property, owing to the fact that matters are within the exclusive knowledge of the vendor. The main aim of pre-contract enquiries is to obtain the fullest information to enable the purchaser to decide whether or not to sign the contract. The role of the solicitor is to ascertain the name and particulars of the vendor, the nature of interest sought to be conveyed, the nature of the land, the nature of documents of title, the going price for the land and properties in that area, any dispute in relation to the land, any adverse rights and restrictions on the land, planning schemes on the land (is it a residential area), covenants running with the land etc.

Thus, it is expected that a purchaser should investigate certain matters concerning a property before buying them in order to enable him decide if he should enter the contract or not before binding himself by any contract. The reason is that the vendor is not bound by any duty to disclose to the prospective purchaser such facts that the purchaser could merely discover by inspection of the property – patent defects (This is the rule of *'caveat emptor'* meaning *'buyer beware')*.

In practice, the purchaser or his solicitor, on his behalf, physically inspects the property in order to discover if there is any defect in the property. However, this should not be extended to investigation of title, which is done at the stage where searches are conducted.

2. **Content of Pre-Contract Enquiries Form:** Pre-contract enquiries are usually contained in a standard printed form prepared by a solicitor. Though it varies from one firm to another, but it should contain the following –
   (a) Boundaries of the property;
   (b) Disputes over the property;
   (c) Notices in respect of the property;
   (d) Guarantees in respect of the property;
   (e) Services supplied on the property;
   (f) Facilities of the property;
   (g) Any adverse rights and restrictions on the property;
   (h) Outgoings charged on the property;
   (i) Method of sale of the property;
   (j) Details of lease, lessor, head lessor, and licenses;
   (k) Covenants and their breaches;
   (l) Service charges;
   (m) Insurance provisions;
   (n) Reversionary title or interest;
   (o) Any other additional inquiries in which the special circumstances of each transaction requires.
3. **Liability of Vendor for Misrepresentation:** The vendor is not under obligation to reply to the inquiries. Where he does however, he should try as much as possible to answer questions correctly raised by the purchaser in the pre-contract enquiries form otherwise he may be liable in damages for misrepresentation of facts after the contracts have been exchanged. In ***Sharneyford Supplies Ltd. v. Edge*****,**[98] the vendor was held liable for a false reply granted to an inquiry on whether there was vacant possession of the property. Also, in ***Walker v. Boyle*****,**[99] the vendor was held liable for misrepresentation of facts because he gave a lie that there was no boundary dispute on the land when in fact there was a long-standing dispute. When acting for the vendor, he could answer the questions by qualifying his answer with the phrase "so far as the vendor is aware" – ***Gilchester Properties v.***

[98] (1987) All ER 588
[99] (1982) WLR 495

Gomm.[100]

4. **The Need For Pre-Contract Enquiries:** From the foregoing, the following could be said to be the need for pre-contract enquiries –
   (a) The main reason why enquires are necessary before contract is based on the principle of *Caveat Emptor*. (The purchaser cannot rescind the contract because of non-disclosure of patent defects which he could have discovered on a reasonable inspection of the land).
   (b) Search will reveal encumbrances on land.
   (c) A physical inspection will eliminate constructive notice.
   (d) It will reveal easement and restrictive covenants which he ought to have found out at contract stage if he had done a diligent search.

B. Contract Stage

1. **Types of Contract:** This is the stage at which a binding contract between the parties is made. The contract can be oral contract, open contract or formal contract. These have been exhaustively discussed under types of contract.
2. **Forms of Interest in Land:** there are basically two forms of interest in law, legal and equitable interest. Equitable interest can be acquired through contract of sale; part performance; and trust in favour of a beneficiary. On the other hand, legal interest can be acquired through perfection of title upon the execution of deed of conveyance; execution of deed of legal mortgage; sale by auction; and deed of gift.
   In ***Kachalla v Banki***,[101] priority as to competing interest in respect of the land was in issue. The plaintiffs purchased a land when they knew tenants had occupied the land. They should have known that someone was in the premises and paying rent. The Supreme Court held that the general rule is that the interest rank according to order of creation (first in time). Where a person who pays for land enters into possession with receipt obtained, his equitable interest even though he had not registered his interest is created as against a purchaser without notice. The Supreme Court held that the receipt for the payment of the property was good evidence of the appellant's equitable right to the house and coupled with the payment of the purchase price and possession was enough to defeat the legal title (sale by auction) that challenged it.

C. Post-Contract Stage

This stage involves activities like deducing of title and requisitions. It shall be discussed properly under Week 7 together with other stages of sale of land (Completion and Post-Completion Stages).

REMEDIES FOR BREACH OF CONTRACT

1. **Damages** – Damages are applicable to both the vendor and purchaser pending on who among them was in breach. ***Bain v. Forthegill***.[102] The relief of damages is often granted when restitution in integrum (restitution in full) is difficult.
2. **Order of Specific Performance** – either of the parties can seek for an order of the specific performance where the other party fails to perform his/her part of the contract – ***Hope v. Walter***
3. **Rescission** – the vendor can rescind the contract where the purchaser fails to pay the purchase price - ***Odusoga v Ricketts***. On the other hand, withdrawal from the contract by purchaser can also be done if there is fraud, misrepresentation, duress, breach of fundamental term, or title is defective. The option for rescission is only for the innocent party. Patent defect will not amount to misrepresentation leading to rescission.

[100] (1948) 1 All ER 493
[101] (2006)
[102] (1874)

4. **Declaration of Title to Land** (e.g. like the plaintiff wanted in Odusoga above)
5. **Injunction** – if the vendor breaches the contract of sale, purchaser can seek an injunction to restrain him from selling the land to another person.
6. **Forfeiture of Deposit** – If the purchaser breaches the contract, he forfeits his deposit to the purchaser.
7. **Recovery of Deposit** – If the vendor breaches the contract, the purchaser is entitle to recover back his deposit.
8. **Lien** – where the purchaser has failed to complete the balance of the purchase price after he has made part payment, the vendor can have a lien over the property pending when the purchaser pays the balance. The balance now becomes a debt to be recover by the vendor.
9. **Rectification:** correction of a term of the contract (mistake written into the contract because it was not an agreed upon term).

ETHICAL ISSUES

1. Duty of solicitor not to mix client's money with his personal income i.e. duty not to misappropriate client's fund - ***Rule 23(2) RPC*****.**
2. Vendor's solicitor holds deposit as a stakeholder, thus should be honest in his dealings.
3. A solicitor must represent his client within the bounds of law. He must not reduce the price or value of the property to evade tax.
4. A solicitor must not breach the confidence of his client.
5. The vendor's solicitor must ensure that the vendor has good title to convey.
6. Where only one solicitor is to represent both parties, the solicitor must seek the consent of both parties and ensure that there is no conflict of interest.

CASE STUDY & DRAFT SAMPLE OF CONTRACT OF SALE

I. Content/Parts of a Contract of Sale

1. Commencement
2. Testatum
3. Consideration
4. Receipt clause
5. Capacity of vendor
6. Words of grant
7. Parcel clause
8. Habendum
9. Terms/Covenants
10. Deposit/Part Payment
11. Testimonium
12. Schedule
13. Execution
14. Franking

II. Particulars of Information to Draft a Contract of Sale

1. Names, occupation and addresses of parties
2. Names, occupation and addresses of witnesses
3. Description of property
4. Capacity of vendor
5. Date of completion
6. Consideration

III. Case Study

Mrs Juliet Eskor of No 20 Abakpa Close, Kaduna has agreed with Mr Biyo Aku of Plot 12 FHA Lugbe, Abuja for the sale of his 4 bedroom bungalow with BQ fenced round with hollowed red bricks at No 4 Chime Avenue, Benin City for the sum of ₦4, 000,000. They have agreed to

execute a contract of sale with the following terms:

1. That she will take possession upon execution of the contract.
2. That in the event of default by Mrs Eskor, the interest rate shall be at the going CBN rate. That the deposit shall be 8% of the purchase sum and paid to Mr Aku's lawyers, the firm of Ntephe, Smith & Wills to hold same as a stakeholder.
3. That since the vendor has insured the property, the insurance policy will be assigned to Mrs Eskor at completion. That completion shall be on or before 31st March 2015 (3 months from the execution of the contract)
4. That Mrs Eskor will in addition purchase the 12.5KVA Top-Max generator in the property for ₦1, 000,000 million, the industrial Bosch refrigerator in the kitchen for ₦1, 200,000 and 6 oriental rugs for ₦500, 000.
5. That Mr Aku is conveying as a beneficial owner

Draft a contract of sale of land between the parties in the case study

IV. Sample Draft of a Contract of Sale

THIS AGREEMENT made the 12th day of December 2014
BETWEEN Mr Biyo Aku of Plot 12 FHA Lugbe, Abuja (the 'Vendor') of the one part
AND Mrs Juliet Eskor of No. 20 Abakpa Close, Kaduna (the 'Purchaser') of the other part.

IT IS AGREED AS FOLLOWS:
That the Vendor sells and the Purchaser buys ALL THAT PROPERTY described in the first schedule to this Agreement subject to the following terms and conditions -

1. The consideration for the sale of the property shall be the sum of ₦4, 000,000 (four million) naira.
2. The Purchaser shall before the execution of this Agreement pay a deposit of the sum of ₦320, 000 (three hundred and twenty thousand) naira to the Vendor's solicitor, the firm of Ntephe, Smith & Wills who shall hold the deposit as stakeholder pending completion.
3. The balance of the consideration being the sum of ₦3, 680,000 (three million, six hundred and eighty thousand) naira shall be paid at completion, and if there is delay caused by the default of the Purchaser he shall be liable to pay interest at the prevailing Central Bank of Nigeria rate.
4. The sale includes chattels, fittings, and other items specified in the second schedule and valued at the sum of ₦2, 700,000 (two million and seven hundred thousand) naira. The receipt of which the vendor acknowledges.
5. The Vendor sells as Beneficial Owner PROVIDED ALWAYS and it is agreed that the covenants which are by law implied by reason of assigning as Beneficial Owner shall not be deemed to imply that the Vendor has performed covenant for repairs contained in his document of title.
6. The Purchaser acknowledges that she has inspected the property for her use and enjoyment as licensee, and if she defaults in payment of the balance of the property to the Vendor and the deposit paid under this Agreement shall be forfeited.
7. The purchaser after the execution of this Agreement shall take immediate possession of the property for her use and enjoyment as licencee, and if she defaults in the payment of the balance of the property to the Vendor, the deposit paid under this Agreement shall be forfeited.
8. It is agreed that time is of the essence in this Agreement which shall be completed on or before 31st of March 2015 at the office of the Vendor.
9. The Vendor agrees to execute in favour of the purchaser, a Deed of Assignment and such other documents as are required to vest legal title in the purchaser and also to obtain the Governor's consent to assign the property to the purchaser.
10. The vendor having insured the property shall assign the insurance policy to the purchaser

upon completion. PROVIDED THAT where reinstatement is not possible, the insurance money shall be shared between the parties *pro rata* the deposit paid by the Purchaser.

11. The Vendor indemnifies the Purchaser for any loss or damages arising from and connected with the title of the Vendor.
12. The Purchaser shall pay all costs incidental to the preparation and execution of this Agreement and any further instruments necessary and proper for carrying this agreement into effect.
13. This contract shall prevail over any previous agreement and it contains all the terms finally agreed by the parties.

FIRST SCHEDULE
(Description of the property)
ALL THAT property situate at No 4 Chime Avenue, Benin City which include a four bedroom bungalow with Boy's Quarters fenced round with hollowed red bricks.

SECOND SCHEDULE
(List of chattels and fittings sold along with property and their respective prices)

1. One 12.5KVA Top-Max generator for the price of ₦1,000,000 (one million) naira
2. One Industrial Bosch refrigerator for the price of ₦1,200,000 (one million and two hundred thousand) naira
3. Six Oriental Rugs for the price of ₦500,000 (five hundred thousand) naira

IN WITNESS OF WHICH the parties have executed this contract in the manner below the day and year first above written.

SIGNED by the within named vendor Mr Biyo Aku
IN THE PRESENCE OF:
Name: Mr Uko Banki
Address: No. 5 Bwari Crescent, Bwari, Abuja, FCT
Occupation: Business man
Signature:

SIGNED by the within named purchaser, Mrs Juliet Eskor
IN THE PRESENCE OF:
Name: Mr Joel Adamu
Address: No. 25 Bwari Crescent, Bwari, Abuja, FCT
Occupation: Business man
Signature:

Prepared by:
N.E. Killi Esq.
Ntephe, Smith & Wills.
No. 80 Pankshin Road Ikeja
Lagos State

(Week 7)

CONTRACT OF SALE AND CONVEYANCING II

POST-CONTRACT STAGE

I. Deducing of Title

A. Concept

After the exchange of contract, the vendor is required to show that he has a good root of title, that is, he is in a position to transfer what he has contracted to convey and the manner in which he discharges that duty I practice. This is because before the contract is exchanged, there is no obligation on the vendor to establish that he is the owner of the title which he intends to convey, but once the contract has been exchanged, he is under duty to do so – ***MEPC Ltd v. Christian-Edwards***.[103]

B. Obligation to Deduce Title

The obligation on the vendor to deduce title depends on whether the title is registered under the Land Information Management System (LIMS) of the Lagos State Land Registration Law, 2015.

1. **Title Registered under LIMS:** where the title is registered under the LIMS, the vendor has no obligation to deduce title, since the purchaser could, on mere inspection of register discover the vendor's power and right to sell the property and the presence or otherwise of encumbrances on the LIMS.
2. **Registered Deeds and Instruments/Title Registered under RTL:** where the title was not registered under the RTL, but registered as an instrument or deed (since these are registered with all their defects), the vendor is obliged to deduce his title**.** Also, there is no need for abstract or epitome under Registration of Titles Law; the purchaser depends solely on evidence from the register because entries in the register constitute sufficient evidence of the title of the proprietor subject to overriding interests. See ***Onagoruwa v. Akinremi***.[104]

C. Number of Years for a Good Title

In order to satisfy that himself that the title is good, the purchaser should search back at a certain period (number of years of the document or transaction in question). A good title is one which dates back to certain number of years. This is considered as follows:

1. Former Eastern and Northern Region: 40 years – ***Section 2 Vendor & Purchaser Act 1874***. However, in Abia state, it is 30 years – ***Section 70(1) Abia State Law of Property***
2. Former Western Nigeria: 30 years – ***Section 70(1) PCL***
3. Lagos State: 20 years for Government land and 12 years for private land – ***Section 112 Land Registration Law of Lagos; Majekodunmi v. Abina***

Generally speaking, facts or statements recited in a document, which is 20 years old, raises the presumption of regularity of the documents and the person named in the document will not be allowed to deny the facts recited in the document – ***Section 17 & 21 Limitation Law of Lagos State***. The requirement of these years are intended to help the vendor in deducing his title and also to satisfy the purchaser (where it is shown that the vendor has been in occupation of land for these periods of time) to have the effect of passing the original rights of the overlord of the land to the occupiers.

A purchaser of a property will not require the production of any abstract or copy of any deed, will or other document dated or made before the time prescribed by law or stipulated for the commencement of title, even though the same creates a power subsequently exercised by an instrument abstracted in the abstract furnished to the purchaser. Such purchaser shall also not

[103] (1978) 3 All ER 795
[104] (2001) 13 NWLR (PT 729) 38

require any information or make any requisition, objection, inquiry with respect to any such deed, will or document or the title prior to that time – ***Oakden v. Pike***.[105]

D. Abstract/Epitome of Title

1. **Concept:** Vendor deduces his title by preparing and delivering to the purchaser the following documents:
   (a) Abstract of Title: this is the historical summary of all recorded instruments and proceedings affecting title to the property up until the present vendor.
   (b) Epitome of Title: this is a chronological list of the documents which prove title to the land usually to be accompanied by photocopies of the documents.
   Both the abstract and epitome of title must show a good root of title.
2. **Contents of an Abstract of Title**
   (a) Date of transaction or proceeding
   (b) Nature of event
   (c) Parties to the transaction
   (d) Whether original or photocopy
   (e) Number of documents available
   (f) Whether original document will be handed over

Sample Draft of an Abstract of Title

Date of transaction	Nature of event	Parties to the transaction	Whether original or photocopy	Number of documents available	Whether original document will be handed over at completion
1902	Settlement	Killis family	Nil	Nil	Nil
1956	Assignment	Killi Nancwat and Joel Adamu	Original	1	YES
1975	Mortgage	Joel Adamu and First Bank	Original	1	NO

Note that the abstract of title should be in a letter head and should be dated and signed

3. **Contents of an Epitome of Title**
   (a) Date of document
   (b) Nature of transaction
   (c) Parties to the transaction
   (d) Whether original, CTC or photocopy available
   (e) Number of documents available
   (f) Whether original document will be handed over at completion

[105] (1985) Ch. 620 at 622

Sample Draft of an Epitome of Title

Date of document	Nature of transaction	Parties to the transaction	Whether original or photocopy	Number of documents available	Whether original document will be handed over at completion
1956	Assignment	Killi Nancwat and Joel Adamu	Original	1	YES
1975	Mortgage	Joel Adamu and First Bank	Original	1	NO

Note that the epitome of title should be in a letter head and should be dated and signed

4. Importance of Abstract and Epitome of Title

(a) It provides the nature of the vendor's title at a glance
(b) Purchaser easily detects encumbrances
(c) From discoveries in the abstract and epitome of title, the purchaser or his solicitor can easily raise requisitions. That is, it is on the basis of the abstract and epitome of title that requisitions are raised
(d) Enhances the writing of good search report

5. Considerations by the Purchaser Solicitor when Looking at the Abstract/Epitome of Title

(a) Whether it commences with a good root of title
(b) Whether the parties mentioned in the transaction had power to buy or convey or otherwise deal with the property
(c) That there is no subsisting encumbrance except those disclosed in the contract
(d) That all mortgages and charges have been duly discharged
(e) That all documents were duly perfected. That is, executed, stamped and registered and consent obtained.

II. Requisitions

Requisitions simply mean query. After carefully perusing an abstract and epitome of title, the purchaser's solicitor is expected to raise requisitions (queries or questions) where necessary. The purchaser's solicitor has the right to demand clarifications from the vendor's solicitor on the requisitions raised.

Requisition are questions or issues from purchaser's solicitor to the vendor or his solicitor concerning doubts, ambiguities or confusions encountered by the purchaser's solicitor during investigation. Vendor is bound to give answer to requisitions and answer must be clear and precise.

Once you look at an abstract/epitome of title, you raise requisitions on every suspicious detail. If any sign of death, ask if there was a Will or no Will, Letters of Administration, probate, assent, whether any mortgage, legal or equitable, evidence of discharge of mortgage, power of attorney, court judgments, whether appealed, result of appeal, etc.

Where the title does not show any defects or there is nothing in it to require confirmation, the purchaser's solicitor does not need to raise requisitions. The requisition raised should deal with relevant matters; important matters are matters that would not be disclosed where an inspection of the property is conducted.

III. Root of Title

A. Concept

A root of title is the point at which title can properly commence. It is the foundation or source of title. A document or transaction purporting to be a good root of title must satisfy certain conditions.

B. Attributes of a Good Root of Title

The attributes/elements of a good root of title were stated in ***Lawson v. Ajibulu*** as follows:

1. It must be a document of disposition or conveyance
2. It must confer both legal and equitable interest in the property. (Thus, equitable mortgages and Wills alone, without assent, fail this test)
3. It must specifically and sufficiently describe the property so as to make it easily ascertainable.
4. It must not contain anything on the face of it that casts doubt on its genuineness and authenticity
5. It must not be subject to a higher interest
6. Must be of certain age (40years under CA & PCL; 30 years under PCL; 12 years under LRL)

C. Examples of Good Roots of Title

If any document satisfies the foregoing conditions, then it is a good root of title. Example of such are:

1. Deed of Assignment
2. Deed of Legal Mortgage
3. Title acquired by a subsequent purchaser of registered estate pursuant to the LIMS.
4. Certificate of Purchase (Vesting order)
5. Deed of Gift
6. Assent by personal representatives
7. C of O from state grant of state owned land

D. Examples of Bad Root of Title

The following are bad root of title which does not meet either all or at least one of the conditions:

1. Lease. It is subject to a higher interest which is lessor's reversionary interest
2. Licence
3. Equitable mortgage
4. Power of Attorney
5. Search report
6. Unregistered Deed of Assignment
7. Will (which has not been granted probate. The beneficiaries under a Will only have equitable title and legal title comes with the assent)
8. Certificate of Occupancy. (However a C of O from state grant of state owned land is a good root of title). Generally, Certificate of Occupancy is not a good root of title, however there are instances where it can be a good root of title e.g. where the certificate of Occupancy was granted by the state – state grants of state owned land. See ***Ogunleye v. Oni***. Secondly, where apart from the Certificate of Occupancy, the holder has other means of proving title to the property.
9. Unregistered deed

E. Sources of Root of Title to Land

1. Gift
2. Alienation/purchase
3. Adverse possession
4. Accession (conquest)

5. Succession (inheritance)
6. Traditional history/inheritance

IV. Searches and Investigation of Title

A. Concept

After the vendor has deduced his title, investigation is to be made by the purchaser's solicitor. Good title is the whole essence of investigation.

B. Importance of Investigation

Investigation is important because:

1. The fact that a vendor has adduced document showing a good root of title is not necessarily conclusive proof of the title.
2. A defect may exist in the title which had occurred before the document evidencing good root of title was executed which is not apparent from the document.
3. The only way to be sure of vendor's title is to conduct a complete and thorough search/investigation on the property, hence the need for investigation.

C. Places where Search can be conducted

1. **Lands Registry:** this is the most important place to conduct a search over a property in a state. The lands registry is usually located at the Ministry for Lands, Survey and Town Planning. Where the land is registered or the land is the subject of a right of occupancy, the lands registry will reveal the following details on the property:
   (a) The grant, the nature of the grant and the grantee or holder of the interest over the property.
   (b) The description of the property, size, survey plans, beacons, maps, charts, intelligence sheets and cartographic details.
   (c) Details of fee, and charges paid on the property such as fee for the grant, ground rents and other charges or taxes as the state government may impose.
   (d) Any fact or details of registered transfers on the property, such as previous deeds of assignments, contracts of sale, assents, leases, etc.
   (e) Any previous or existing encumbrances on the property such as mortgages, charges and pledges.
   (f) Any act of governmental acquisition of the property.
   (g) Any court judgement that may have been obtained and registered over the property. Letters of protest by rival claimants may also be found in the file/registry of the property.
   (h) Counterparts (office/file copies) of right of occupancy or certificate of occupancy on the property.
2. **Probate Registry:** the probate registry of states keep a record of wills and other testamentary documents. Where probate or letters of administration are granted, a record of them is also kept. The probate registry is part of the registry of the High Court of the various states. Search in the probate registry becomes imperative if there is any fact in the abstract/epitome of title of death of any of the predecessors-in-title to the property. Search at the probate registry may answer the following questions:
   (a) Whether the property is subject of any bequest by will (probate) or intestacy (letter of administration)?
   (b) Who are the personal representatives entitled to convey the title in the property?
   (c) Who are the beneficiaries under the probate or letters of administration and whether any assent has been executed?
   (d) Whether there is any challenge on the will, probate or administration in the courts and the terms of any judgment in respect of them?
3. **Corporate Affairs Commission:** this is important where a company is involved in the property transaction with a view to discover any of the following:

(a) Whether the company, or incorporated trustee is registered and has the capacity to undertake the transaction.
(b) Whether there is record of any of the properties of the company in the register of the Commission.
(c) Whether there is a registered resolution of the Board of Directors or Trustees of the Company or Trust, for the acquisition or disposition of the property.

4. **Court Registry:** this search is conducted at the court registry for existence of any court judgements to determine if the property is:
   (a) Subject to any court litigation and the outcome of the dispute
   (b) Whether any appeal is filed against the judgment and the result of the appeal
   (c) If the sale is to be conducted through the process of the court, whether the rules governing such sale was complied with and also to enable consent of the Governor to be obtained
   (d) Whether the vendor is a personal representative or beneficiary in a probate dispute which entitles him to convey the property.
5. **Inquiry of Traditional, Community and Family Facts:** where the property is being acquired from a family or community, it is important to inquire from members of the family or community in order to discover any of the following matters:
   (a) If the consent of the principal members of the family or community has been granted on the transaction.
   (b) Whether the vendor is entitle to sell the land and whether there is any customary inhibition against the right to sell. This is important even where the property is not subject to family or communal ownership.
6. **Physical Inspection:** personal visit to inspect the property is important because it may reveal the following factors:
   (a) Extent of development (improvements) on the land, and whether there is occupation.
   (b) Actual dimension (size) of the land and whether if confirms to the dimension at the lands registry.
   (c) Any act of government (public utilities) services on the property such as water mains, electric poles, telephone cables, etc. that interfere with the property.
   (d) Any damages caused by the elements (e.g. erosion) that affects the property.
   (e) The general condition of the property.

D. Procedure for Search and Investigation under CA and PCL

1. Collect both abstract and epitome of title from vendor
2. Raise requisitions
3. Visit the relevant places where search can be conducted, whether land registry, probate registry, court judgments (court registry), Corporate Affairs Commission (Companies Registry)
4. Pay prescribed fees for search and conduct search
5. Conduct physical inspection for patent defects and then see the physical condition of the property
6. Investigate traditional evidence, if necessary
7. Draft search report

E. Procedure for Search and Investigation under LRL Lagos

1. Application to conduct search via Form 3
2. Payment of search fee and printing fee. This can be made via credit card, electronic payments or as may be directed.
3. Submission of form to the Registrar
4. Conduct of search by the Registry
5. Issuance of Electronic Search Report in Form 4

F. Procedure for Search under Abuja Geographic Information Systems (AGIS)

The procedure for conducting searches at AGIS is as follows –

1. Collect abstract and epitome of title and copy of the C of O from the vendor
2. Written application to conduct a search is made to Abuja Geographic Information System, stating the particulars of the property.
3. The application is accompanied by a letter of consent by the owner of the title (vendor) authorizing the purchaser's solicitor to conduct the search of the property.
4. The application must be accompanied with evidence (bank slip) of payment of search fee paid in a designated bank in favour of AGIS.
5. The officials at Abuja Geographic Information System would conduct the search and complete the search report which is signed by the Registrar of Deeds. The report contains the findings on the property investigated. In order words, it is not the solicitor conducting the search that actually does that, it is an official in the registry that conducts the search and supplies to the solicitor the result of the search. The solicitor does not have the opportunity for a direct and personal view and inspection of the file.
6. Physical inspection on the land to discover patent defects
7. Attach the search report to a cover letter and send to your client

G. Search Report

When the purchaser's solicitor has concluded investigation, he is to draft a search report and send it to the purchaser. There are two means of drafting a search report namely:

1. A covering letter and a search report attached to it
2. A letter containing the search report

Draft in accordance with specification. Content of a search report include:

1. Date of search
2. Place(s) of search
3. Name of Registered owner
4. Particulars of the property
5. Description of property
6. Nature of owner's title/interest
7. Encumbrances (if any)
8. Comment/opinion/conclusion
9. Signature, name, address of solicitor that conducted the search.

Sample Draft of Cover Letter

KILLI NANCWAT & ASSOCIATES
LEGAL PRACTITIONERS AND SOLICITORS
PEOPLES CHAMBERS
NO 5, Kano Crescent, Kano
Email: *Knanchwat2020@yahoo.com*
Phone: 07064793812

Our Ref: _____ Your Ref: _____

Date:

To:
Mallam Sani Idi
No. 5 Balarabe Crescent,
Sabon Gari,
Kano.[106]

[106] (IN A MORTGAGE, CHANGE THE ADDRESS TO THE ONE PROVIDED and if no one is provided, address

Dear Sir,

REPORT OF SEARCH CONDUCTED ON PROPERTY REGISTERED AS NUMBER 45 ON PAGE 45 IN VOLUME 2908 (45/45/2908) AT THE LANDS' REGISTRY OFFICE, KANO STATE

Kindly refer to the above subject matter and find attached the reports of the searches conducted pursuant to your instructions.

Our bill of charges is also attached for your kind and prompt consideration.

Attached to this letter are the following:
1. Search report
2. Bill of charges

Thank you,

Yours faithfully

_____
Killi Nancwat
For: Killi Nancwat & Associates
Solicitor

Sample Draft on Search Report

KILLI NANCWAT & ASSOCIATES
LEGAL PRACTITIONERS AND SOLICITORS
PEOPLES CHAMBERS
NO 5, Kano Crescent, Kano
Email: *Knanchwat2020@yahoo.com*
Phone: 07064793812

Our Ref: _____ Your Ref: _____

REPORT OF SEARCH CONDUCTED ON PROPERTY REGISTERED AS NUMBER 45 ON PAGE 45 IN VOLUME 2908 (45/45/2908) AT THE LANDS' REGISTRY OFFICE, KANO STATE

Date of Search:	17/01/2015
Place of Search:	Lands Registry office, Kano, Kano State
Name of Registered Owner:	Mallam Sabo Mutumi
Particulars of the Property:	The property is registered as number 45 on page 45 in Volume 2908 at the Lands Registry, Kano
Description of the Property:	The property is a three bedroom bungalow with a boys quarters located at No 3, Ijesha Close Kano and is covered by Certificate of Occupancy numbered 1234529hl

it to the Head of the Legal Department of the Bank)

Nature of Title/Interest: Statutory Right of Occupancy

Encumbrances: There is an undischarged mortgage on the property. The mortgage is registered as number 65 at page 87 in volume 8763 at the lands registry Kano State.

Comments: The title to the property is sound, but the property is encumbered by the undischarged mortgage. Purchaser is therefore advised to stay action on the contract for sale until the said mortgage is completely discharged.

_____

Killi Nancwat Esq.
For: Killi Nancwat & Associates
Solicitor

NOTE THAT WHERE MORE THAN ONE SEARCH REPORT IS INVOLVED, THEN A COVER LETTER IS DRAFTED AND THE SEARCH REPORTS ARE ATTACHED INCLUDING THE BILL OF CHARGES. SEE SAMPLE DRAFT:

Sample Draft of Search Report Issued by AGIS

FEDERAL CAPITAL TERRITORY ADMINISTRATION ABUJA
GEOGRAPHIC INFORMATION SYSTEMS (AGIS)
(AGIS LOGO)
LEGAL SEARCH REPORT
Date: 7/1/2019

To: Killi Nancwat of No 123B Abacha Close, Maitama, Abuja
Dear Sir,
Below is the status report to title over which you applied a search.

A. Particulars of Title for: Engr. Badejo Katung

Plot Number: 23C	**Date of C of O:** 23/6/2010
District: Area 1	**Plot Size (m2):** 1400^2
Land Use: Lease	**Rent per Annum:** N10, 000
C of O Number: No. 59/59/2010A	**Outstanding Rent Dues:** Nil
Registration Number: 45	**Page:** 45 **Volume:** 2910

B. Encumbrances

Action: Subsisting Lease with Tintam Industries Ltd	**Date:** 1/1/2016
	Number: 234 **Page:** 35 **Volume:** 1002

C. Other Details

Present Status: The title to the property is sound.
Other Comment: Purchaser is therefore advised to proceed action on the contract for sale

Yours faithfully,

…… ……..

For: Deeds Registrar (AGIS) Certified by Company Sec/Legal Adviser (AGIS)

NOTE: Where the purchaser fails to investigate title, he buys subject to any defect in title.

COMPLETION STAGE

I. Concept

This is the stage where the contract of sale of land is completed and the legal interest in the property is passed to the purchaser. The following are extant in completion: procedure for completion, particulars of instructions required to draft, Deed of Assignment, drafting of Deed of Assignment and effect of completion.

At completion, designation or description of parties changes from vendor and purchaser to assignor and assignee.

Deed of assignment is drafted by assignee's solicitor. Vendor (assignor's solicitor) has an obligation to prepare a Completion Statement and a Schedule of Documents to be delivered.

II. Completion Statement

A. Concept

A completion statement (sometimes called "financial statement") is prepared by solicitors involved in a sale of property as a statement of the financial commitment of the parties and any financial obligation they are expected to meet towards a successful completion of the transaction. The statement computes in detail the financial movements in respect of the transaction (monies received, monies paid out and to be paid out, and monies left).

Preparing and serving completion statements on clients is not a common practice by solicitors in Nigeria. The reason is partly because of the absence of a standardised conveyancing practice in Nigeria as we have in England.

B. Contents

1. The sum being paid or being received in respect of the transaction;
2. An accurate and full statement of all disbursement (e.g. to valuers, surveyors, and other professionals, fees, taxes, and other expenses);
3. Solicitor's charges;
4. Sum required to redeem any current mortgage; and
5. Final amount to be paid before completion or to be paid after completion.

C. Types of Completion Statements

1. Statements prepared by the seller's solicitor for the seller informing him on how much will be left over on completion by way of net proceeds of the sale, which may be applied towards an allied purchase.
2. Statement prepared by seller's solicitor for the buyer's solicitor informing him on how much is expected to be paid over on completion.

3. Statement prepared by the buyer's solicitor for the buyer informing him of how much will be needed to complete the purchase of the property. This is usually issued shortly after exchange so that the buyer will provide funds for the solicitor in good time for the completion.

III. Procedure for Completion

1. **Drafting of Deed of Assignment:** Assignee's solicitor prepares the Deed of Assignment and sends it to the assignor's solicitor for vetting. It must be noted that at the completion stage, the designation of the parties change from vendor and purchaser to assignor and assignee respectively.
2. **Vetting of the Deed of Assignment**: by assignor's solicitor and returned to assignee's solicitor.
3. **Making of Engrossed Copies of the Deed of Assignment:** Assignee's solicitor makes engrossed copies of the Deed of Assignment
4. **Preparation of Completion Statement:** by assignor's solicitor and sent to assignee's solicitor.
5. **Payment of Outstanding Balance of the Purchase Price:** by the assignee or his solicitor on his behalf.
6. **Execution Deed of Assignment & Attestation**: by both parties and attestation by witnesses. By virtue of ***Rule 22(b) RPC***, execution of the deed of assignment should take place at vendor's solicitor's office except in exceptional circumstances in vendor's place of office or residence.
7. **Delivery of the Original Title Documents:** Assignor delivers the original title documents to assignee, with the following:
   (a) Completion statement
   (b) At least five copies of executed Deed of Assignment
   (c) Original title documents
   (d) Receipt of payment of full purchase price (consideration), if any
   (e) Receipt of payment of ground rents and all other outgoings
   (f) The keys to the property where the property is developed
   (g) Letter of introduction introducing assignee to tenants, if any, when they are still in possession
   (h) Receipt of payment for chattels (if sold alongside the property)
   (i) Notice of assignment of insurance policy (if necessary)
   (j) Original power of attorney (where the deed is executed pursuant to a power of attorney)
8. **Cross-Checking of Original Title Documents:** Assignee's solicitor does a quick and final check of the original title documents by comparing them with the photocopies given at the exchange of contracts. He also checks to ensure that they are complete.
9. **Acquisition of Legal Title by Assignee:** Assignee acquires legal title, subject to perfection. Ordinarily, completion of sale of land passes legal interest to the purchaser/assignee. This is however subject to perfection of the title.

IV. Effect of Completion Stage

1. Transfer of legal interest to purchaser subject to perfecting it (at common law, it is equitable until perfection)
2. Delivery of possession to purchaser
3. Payment of balance of purchase price

POST COMPLETION STAGE (PERFECTION STAGE)

I. Concept

This stage involves perfection of title, effect of failure to perfect title and documents required for perfection. The procedures are usually undertaken by purchaser's solicitor. The following are the order of perfection:

1. Governor's consent – ***Section 22 & 26 Land Use Act***
2. Stamping of document – ***Section 23 & 28 Stamp Duties Act***
3. Registration of document – ***Section 2 Land Instrument Registration Law***

NOTE that a CFSOL does not require governor's consent, but it must be stamped (***Section 58 SDA***). Its registration depends on whether or not it is a registrable instrument in that jurisdiction or not.

II. Governor's Consent

A. Concept

By virtue of ***Section 1 of Land Use Act***, all land in a state is vested in the Governor of that state and shall be held in trust by him on behalf of the state. Thus, ***Section 22 LUA*** provides that a holder of a Statutory Right of Occupancy granted by the Governor must obtain the Governor's consent before alienating his right of occupancy by way of Assignment, mortgage, transfer of possession, sub-lease or otherwise. Where the property is subject to Customary Right of Occupancy, the consent of the Local Government must be obtained – ***Section 21 LUA***. Where the land is a federal land, the consent to be obtained is that of the Minister of the FCT.

It is the duty of the vendor/assignor to apply for consent. But in practice, the purchaser/assignee does it. See ***Ugochukwu v. CCB Nig Ltd***. However, the vendor should be made to sign the application letter for consent so that he should not subsequently deny that he did not approve that consent should be obtained.

B. Procedure for Obtaining Consent

1. Application for Governor's consent either through a written letter or a prescribed form set for such application.
2. Attachment of relevant documents required for consent.
3. Payment of consent fee (varies from state to state)
4. Submission of application to the Land Registry
5. The application will be processed by the Land Registry. They will do physical inspection and survey of the property.
6. Endorsement of the Governor's consent on the deed of assignment.

C. Documents to be submitted for Governor's Consent (Lagos)

1. Application in the prescribed Form 1C obtainable at Land Registry signed by both Assignor and Assignee/letter of application in other parts of the country.
2. Covering letter addressed to the Director of the Department of Lands and Housing
3. Five (5) copies of Deed of Assignment duly executed
4. Copies of title documents
5. Evidence of payment of ground rent, land use charge, tenement rate, and other outstanding rents and charges on the land.
6. Three (3) years tax clearance certificates of both parties
7. Building plan if developed (in Lagos)
8. Receipt of payment of consent, charting and endorsement fees.

Where a company is involved, the following additional documents will accompany the application:

9. CTC of Certificate of Incorporation
10. CTC of particulars of directors
11. CTC of MEMOART
12. Tax clearance certification of at least two of the directors

13. Copy of resolution authorizing the sale or purchase. It is a board resolution

D. Effect of Failure to Obtain Governor's Consent

1. Failure to obtain consent of the Governor will make the legal interest void and not the transaction. The effect is that only equitable interest is transferred – ***Section 26 LUA***. Deed of assignment transferring legal interest would be void.
2. Where Governor's consent was applied for and refused, the transfer of legal interest is invalid, null and void. On the other hand, where no attempt was made to obtain governor's consent, the transaction is inchoate, incomplete and voidable. It only becomes complete when governor's consent is obtained. See ***Awojugbagbe Light Industries Ltd v. Chinukwe***.
3. The document will not be accepted for registration.

III. Stamping of Document

A. Concept

Under the Stamp Duties Act, stamping of documents must be done within 30 days of execution of the Deed of Assignment. The time limit is only applicable to instruments charge *ad valorem* – ***Section 23 (3) (a) SDA***. It is the duty of the purchaser's solicitor to apply for stamping of the deed of assignment after Governor's consent has been obtained. It is always advisable that stamp duty should only be paid after Governor's consent has been obtained. This is because if the consent is refused by the Governor, the stamp duty paid is non-refundable.

A Contract for Sale of Land (CFSOL) is chargeable to a fixed stamp duty or a flat rate, while the Deed of Assignment is chargeable to Stamp duties ad valorem.

B. Procedure for Stamping

1. The original of the instrument and copies are presented to the Stamp Duties Officer for assessment of the duty payable.[107] This is usually based on the value of the transaction as reflected on the instrument.
2. The solicitor pays the assessed duty either in a designated bank or the accounts department of the State Board of Internal Revenue and presents the evidence of payment to the Stamp Duties Commissioner. Where a party to the transaction is an incorporated body, the stamp duty is paid at the Federal Inland Revenue Service.
3. The instrument is accordingly impressed with the stamp (usually in red ink), as evidence of payment of the duty. Between 2.5% and 3% of the value of the property is charged by many states of the Federation as Stamp Duties.
4. One copy is kept at the Stamp Duties Office.

C. Effects of Failure to Stamp

1. An unstamped document is not admissible in evidence to prove title – ***Section 22 SDA***. However, a court may order payment of stamp duties despite lateness to make the document admissible - ***Ogbahon v Register Trustees CCCG***.[108]
2. Late stamping attracts penalty
3. The document would not be accepted for registration – ***Section 77 Land Registration Law of Lagos***.

IV. Registration of Document

A. Concept

Registration is compulsory for Deed of Assignment – ***Section 2 Land Registration Law of Lagos/Land Instrument Registration Law Kaduna***. Registration must be done within 60 days of execution of Deed of Assignment. In Lagos, it is 60 days after the Governor's consent has been obtained. ***Section 10 LIRL*** requires that instrument submitted for registration must have

[107] The Stamp Duties Office is usually located in the office of the Board of Internal Revenue of the various States.
[108] (2001) FWLR (Pt. 80) 1496

Governor's consent endorsed on it (where consent is required). Document must have also been stamped.

B. Submission of Survey Plan

Section 9 LIRL provides that survey plan must be submitted for registration. Submission of survey plan is compulsory for registration however it can be dispensed with in the following instances

1. Where in the Deed sought to be registered, reference is made to an earlier registered Deed containing a survey plan. See ***Amadi v. Onisakwe***.[109]
2. Where parcel clause in the Deed of Assignment refers to schedule which contains adequate description of the property.
3. Where it is in Form 7 under RTL which contains particulars of the property – ***Section 31 RTL and Onagoruwa v. Akinremi.***[110]

C. Importance of Registration

1. It is an indication that the title of the property is encumbered. This is because the presence and evidence of registration will put an intended buyer of land (particularly where mortgages and charges have been registered) to be cautious and ensure that the encumbrances have been discharged. This is because registration vest the legal estate on the person who registers it.
2. It gives priority to the instrument registered first in time in situations where there are rival instruments that are registered – ***Orumwense v. Amu***.[111]
3. It is at registration that the number, page and volume (NPV) is gotten

D. Status of Defects in Title after Registration

The mere fact of registration of a document will not cure any defect in any instrument, or confer upon it any validity which it would not otherwise have had. Registration of instruments alone does not validate spurious or fraudulent instruments of title or a transfer or grant which in law is patently invalid or ineffective – ***Kyari v. Alkali***.[112]

Also, registration does not cure the defect arising from the absence of Ministerial approval or Governor's consent. An instrument which does not have the necessary consent endorsed on it when it was registered, will not ipso facto, raise the presumption that the Registrar was satisfied that such consent had been given which led him to register the instrument - ***Rockonoh Property Co Ltd v NITEL Plc***.

E. Procedure for Registration

1. The original and the counter parts of duly executed and stamped deeds are forwarded to the Deed Registrar for Registration.
2. The Deed's Registrar collects the deed and registers it in the Register of Deeds on a particular volume, on a particular page and giving it a particular number.
3. The original deed is giving back to the purchaser of the land, while the counterpart is kept at registry.

F. Effect of Non-Registration

1. An unregistered document is not admissible in evidence to prove title but document is admissible to prove agreement and payment of money. See ***Ogunbambi v. Abowab***;[113] ***Agwunede v. Onwumere***.[114] However, in the recent case of ***Benjamin v. Kalio***, the supreme held that an unregistered document is admissible in evidence to proof tiltle.
2. Late registration attracts penalty

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[109] (2005) 924, 385
[110] (2001) 13 N (729)
[111] (2008) All FWLR (Pt. 442) 1120 at 1141
[112] (2001) FWLR (Pt. 60) 1481 at 1506-1507
[113] (1981) WACA 272
[114] (1994) 1 SCNJ 106

3. Documents may lose priority against subsequent instrument that are registered since registration governs priority. See ***Fakoya v. St. Paul's Church, Sagamu; Okoye v. Dumez Nig Ltd; Amakri v. Zankley***.
4. Non-registration indicates that the property is encumbered

Whether a CFSOL will be registered or not depends on whether it is defined as a registrable instrument in the LIRL of that jurisdiction

Note that all the stages discussed in sale of land apply to other conveyances of interest in land – lease, mortgage.

ETHICAL DUTIES IN INVESTIGATION AND PERFECTON OF TITLE

1. A lawyer shall keep a separate account. Shall not mix his money with client's money - ***Rule 23(2) RPC***.
2. A lawyer should not conduct searches at the land's registry for defects with a view to obtaining employment or litigation thereby - ***Rule 47 RPC***.
3. A lawyer should not frank a document unless the seal and stamp approved by NBA is affixed - ***Rule 10 RPC***.
4. A lawyer has a duty not to aid in the unauthorized practice of law (e.g. Estate agents) - ***Rule 3 RPC***.
5. A lawyer has a duty not to sign a document prepared by a non-lawyer - ***Rule 3(2) RPC***.
6. A lawyer should not under stamp or reduce the consideration stated on the face of the instrument in order to reduce the stamp duty - ***Rule 15(2) (j) RPC; Adenuga v. Ajao***.
7. A lawyer should represent his client competently; know which documents to prepare - ***Rule 16 RPC***.
8. A lawyer should keep his client informed of the progress of his transactions and give warnings and cautions where necessary - ***Rule 14(2) RPC***.

SAMPLE DRAFT OF DEED OF ASSIGNMENT

THIS DEED OF ASSIGNMENT is made the 16th day of January, 2019

BETWEEN

Engr. Badejo Katung, a Public Servant, of No. 42 Óróbó Street, Ibadan, Oyo State (The Assignor) on the one part

AND

Hajia Amaka Lawson, an Entrepreneur, of No. 78 Uwani Road, Ikoyi, Lagos State (The Assignee) on the other part.

BACKGROUND

This Deed recites as follows:

1. The Assignor is the legal owner of a Certificate of Occupancy No. 59/59/2010A over a parcel of land with four blocks of flat situate at Plot 35 Kuoye Road, Area 1, Abuja.
2. The Assignor is willing to alienate his interest while the Assignee is willing to buy subject to the conditions to be stated herein.

NOW THIS DEED WITNESSES AS FOLLOWS:

In consideration of the sum of thirty million naira (₦30, 000, 000.00) now PAID to the Assignor by the Assignee (the Receipt of which the Assignor hereby acknowledges), the Assignor as a BENEFICIAL OWNER ASSIGNS ALL THAT parcel of Land with four blocks of flat situate at Plot 35 Kuoye Road, Area 1, Abuja covered by a Certificate of Occupancy No. 59/59/2010A and more rightly described in the Survey plan to be prepared by a licensed Surveyor attached to the Schedule with all rights, easements and appurtenances TO HOLD unto the Assignee as holder of a Statutory right of Occupancy for the term unexpired on the Certificate of Occupancy.

IN WITNESS OF WHICH the parties have executed this Deed in the manner below the day and year first above written.

SCHEDULE
1. Survey Plan

SIGNED, SEALED AND DELIVERED

By the Assignor
……
Engr. Badejo Katung

IN THE PRESENCE OF:
Name: Linda Dafe
Address: No. 32 Ademola Street Victoria Island, Lagos State
Occupation: Medical Doctor
Signature:
Date: 16th January, 2019

SIGNED, SEALED AND DELIVERED

By the Assignee
…….
Hajia Amaka Lawson

IN THE PRESENCE OF:
Name: Nsikan Solomon
Address: No. 18 Sapele Road, Sapele, Delta State
Occupation: Business Man
Signature:
Date: 16th January, 2019

Prepared by:
Killi Nancwat
Peoples Chambers
No 54 Leadway, Central Business District, Abuja.

I CONSENT TO THIS AGREEMENT
……
DATED THE …….. DAY OF ……, 2019
MINISTER OF THE FEDERAL CAPITAL TERRITORY ABUJA

(Week 8)

LAND REGISTRATION UNDER LAGOS STATE LANDS REGISTRATION LAW

INTRODUCTION

The Lagos Lands Registration Law 2015 consolidated the numerous laws on lands registration. It repealed the Registered Land Law of Lagos 2003; the Registration of Titles Law and Registration of Titles (Appeals) Rules 2003; the Land Instrument Registration Law 2003; and the Electronic Documents Management System Law 2007. The registration districts that were hitherto stated under the RTL are still applicable under the LRL 2015. The registration districts are the areas covered by the LRL. The registration districts are:

1. Lagos Island
2. Obalende
3. Victoria Island
4. Ebutte-Metta
5. Mushin (Part)
6. Yaba
7. Badagry
8. Ikoyi
9. Gbagada
10. Apapa
11. Somolu
12. Surulere

CODE: LOVE MY BIG ASS

The features of the LRL are:

1. Establishment of the Land Information Management System
2. Requirement for the registration of every interest/title in land
3. Establishment of offences and punishment
4. Establishment of the Land Registry where all registrations are made

THE REGISTRY

I. Administrative Divisions in the State

The Land Registry serves as the office for registration of all documents relating to land in the state – ***Section 3 (1&3)***. The law creates administrative divisions of the land registry in the State. Its seal is to be impressed on every document which makes it admissible in evidence by all courts and persons and is deemed to have been duly issued and sealed by and under the direction of the Registrar without further proof – ***Section 6***.

II. Requirements for Each Administrative Division

1. Register (in paper and electronic form) of all transactions on transfer of interest in land;
2. Land registry map (the map shall show the boundaries of every parcel of land that is registered and it is to be drawn on a scale approved by the Surveyor-General of the State – Section 12(1);
3. Documents and any filed plans which supports existing entries in the register;
4. Day list numbered consecutively, which records all applications;
5. Mutation records (this is the form or means by which the Registrar makes alteration on the boundary of the map on a land);
6. Nominal index, which records names of land holders and description and information on a land;
7. Register of powers of attorney.

THE LAND INFORMATION MANAGEMENT SYSTEM (LIMS) AND SEARCHES

I. Establishment

The law establishes a Land Information Management System (LIMS) and requires that every land document must be registered under the LIMS – ***Section 17 & 18***.

II. Registers to be kept

A. Types of Registers to be kept

1. Day list;
2. Mortgages;
3. Caution;
4. Any other register prescribed for use by the Registrar – ***Section 19***.

B. Contents of the Registers

1. Name and addresses of parties to the transaction;
2. Description of the property;
3. Location of the property;
4. Survey plan of the property; and
5. Other information that may be deemed necessary – ***Section 20***.

II. Searches under the LIMS

A. Accredited Persons by Registrar

1. Law firms;
2. Financial institutions;
3. Corporate organisations; and
4. Registered Estate Surveyors and Valuers – ***Section 25***.

Accreditation is made upon payment of accreditation fee and renewal shall be made.

B. Procedure for Conducting Search

1. **Application to the Registrar:** the application to conduct a search is made to the Registrar via FORM 3.
2. **Payment of Search Fee and CTC of Documents:** Payment of the search fee and for CTC of the documents search could be made by means of a Credit Card, or an electronic transfer or any approved means of payment.
3. **Approval by the Registrar:** The power to allow search of registered books, files and documents is vested in the Registrar who is the custodian of these documents. The Registrar must approve an application before a search is conducted.
4. **Conducting Search:** the search is conducted by the officers of the LIMS and not the lawyer. Searches may be conducted at reasonable times – ***Section 22(1)***. The places in which the search can be conducted are books, register, file of registration, and filed documents.
5. **Documents Searched:** documents which may be accessed on the LIMS must be in electronic format; capable of being registered in law; and have the time and date it takes effect, to be indicated on it. By virtue of ***Section 24***, any document produced electronically from the LIMS is admissible in court proceedings if it qualifies as a document for the purpose of admissibility under any relevant law. Thus, if it is admissible under the provisions of the Evidence Act 2011, the clause will not be regarded as unconstitutional.
6. **Obtaining CTC of Searched Documents:** the applicant is to obtain CTC of the documents search upon payment of the prescribed fee for obtaining CTC. The application for CTC is done via Form 5. All CTC are in electronic format.
7. **Issuance of Search Report:** A search report following a search is issued on Form 4.

REGISTRATION OF DOCUMENTS UNDER THE LRL

I. General Rule

Section 2 requires that every document of interest or title to land in the state should be registered. Documents under the law include deeds, judgments, decrees, orders, or papers in

writing, requiring or capable of registration and includes a certificate of occupancy – ***Section 1***. Registration is compulsory; if holder of land refuse to register, the Registrar can compel registration. Accordingly, any holder of a registrable document shall register within 60 days of the grant of the Governor's consent – ***Section 26(1)***. Where however, a sub-lease or a mortgage is presented for registration 6 months after the period of the Governor's consent, it will attract additional fee of N500 per month. Document which requires registration but is not registered shall not be pleaded or tendered in evidence. However, by the decision in ***Benjamin v. Kalio***, this clause is unconstitutional. Every document creating interest in land will only be registered if it is accompanied by a survey plan – ***Section 12***. The types of registration are compulsory and optional registration.

II. Documents that must be registered

1. Grant or sublease that exceeds 5 years – ***Section 8***
2. CTC of a grant or letter of administration to succession of land under a will, intestacy or insolvency – ***Section 26(3)***

III. Documents that may not be registered

1. Power of attorney on transfer of land that has not received the consent of the Governor – ***Section 7***
2. Document not accompanied by a survey plan, which describes and delineate the land – ***Section 12(3)***
3. Sub-lease under 3 years – ***Section 26(2)***

IV. Procedure for Registration

1. Application to the Registrar via Form 1 (for titled lands) or Form 2 (for Deeds/Certificates of Occupancy) scheduled in the law.
2. Attaching survey plan, other documents of title (deeds, land certificate) and statutory declaration of encumbrance.
3. Payment of registration fee
4. Examining the documents by the Registrar
5. Registration or refusal to register by the Registrar. The circumstances where the Registrar will not register are:
   (a) Void document
   (b) Documents prohibited from registration by law
   (c) Documents without a survey plan
   (d) Non true copies.
6. Returning original documents (deeds, etc.) to the applicant after they have been registered. Documents that were not registered can be returned to the applicant. But where the holder/applicant did not apply, after 12 months, documents can be destroyed.
7. Issuance of land certificate to applicant after registration.

V. Effect of Registration

1. Evidence of holding of the land with all rights, privileges and appurtenances except minerals and mineral oils – ***Section 27(1)*****.**
2. Documents creating interests in the register shall have priority according to the order in which they were presented for registration irrespective of the dates on the documents – ***Section 29(1)*****.**
3. Right to dispose the land, create interest in it or deal with it as desired, subject to the consent of the Governor – ***Section 32***.
4. Documents can be admissible in evidence.

VI. Effect of Non-Registration

1. Document cannot be pleaded and is inadmissible in evidence. However, the decision in ***Benjamin v. Kalio*** has made this position unconstitutional.
2. Document will lose priority over other documents that has been registered.

CREATION AND REGISTRATION OF TRANSACTIONS

I. Sale of Land and Leases

This transaction shall be by deed. Before any document is registered it must be:

1. Duly executed – ***Section 76***
2. Stamped
3. Accompanied by a Survey plan – ***Section 12(3)***

II. Sub-Leases

The sub-lease is required to be registered, and may include a land or a building– ***Section 41(1 & 2).*** Where the sub-lease is 5 years and above with an option to renew for an aggregate period of 5 years, it must be registered after obtaining the Governor's consent – ***Section 42***. Even where a sub-lease has been registered, its conditions may be varied and its term may be extended before the expiration of the lease, except where the lease has been forfeited – ***Section 45***.

III. Mortgages and Charges

The law permits the holder of land, a sub-lease or mortgage registered under the law to create a mortgage to secure payment of a debt or the fulfilment of a condition. Such document is to be registered to serve as an encumbrance on the land and serve as security for repayment of the loan. Subsequent mortgagees may be created on the registered land – ***Section 49(1)*****.** Where however a sale of the mortgaged land is transacted, it is subject to all prior mortgages – ***Section 49 & 50***.

A registered owner of a land may also create a charge on the land, for any other reason and with or without a power of sale. Where the charge is registered, it confers on the chargee a charge on the registered interest of the charger, but free from any unregistered interest in land – ***Section 53 & 54***.

The law allows for registration of consolidated mortgages where the following conditions are fulfilled:

1. The mortgagor has the right to consolidate a mortgage with another mortgage
2. An application to that effect is made to the Registrar – ***Section 51***.

IV. Power of Attorney

A power of attorney dealing with land, or which creates a sub-lease or mortgage is required to be deed and registered by the donor or the donee – ***Section 56(2)***. The Governor must grant his consent before the Registrar can accept such power of attorney for registration – ***Section 57***. A disposition under a registered power of attorney which is subsisting is indefeasible regardless of any revocation, unless the person claiming under the disposition had received actual notice of the revocation – ***Section 56(5)***. Accordingly, any person who, in good faith, does an act or makes a payment under a power of attorney is not liable if at the time of the payment or performance of the act the donee had no knowledge of the revocation – ***Section 56(6)***.

V. Registration of Caveat

Any person who has not register his title can register caveat/caution. Thus, once any person wants to register title to the same land, an awareness will be given to the person who registered the caveat within 14 days for him to give his consent before the title is registered. Caveat can only be removed with the consent of the person who registered it.

REGISTRATION UNDER THE LAND INSTRUMENT REGISTRATION LAWS (CA & PCL)

I. Places Where Search can be conducted

1. Lands registry
2. Probate registry
3. Corporate affairs commission (where a company is involved)
4. Court registry for court judgements
5. Traditional evidence

6. Physical inspection on the land itself

II. Procedure for Search and Investigation under CA and PCL

1. Collect both abstract and epitome of title from vendor
2. Raise requisitions
3. Visit the relevant places where search can be conducted, whether land registry, probate registry, court judgments (court registry), Corporate Affairs Commission (Companies Registry)
4. Pay prescribed fees for search and conduct search
5. Conduct physical inspection for patent defects and the see the physical condition of the property
6. Investigate traditional evidence, if necessary
7. Draft search report

DIFFERENCE OF REGISTRATION UNDER LAGOS LRL AND LAND INSTRUMENT REGISTRATION LAWS (CA & PCL)

S/N	Lagos Land Registration Law 2015	Land Instrument Registration Land (CA & PCL)
1	Use of deeds	No use of deeds
2	Deducing of title	No deducing of title
3	Registry is not public	Open to the public
4	Register is conclusive proof of title	Register is not conclusive proof of title
5	Title is more reliable or guaranteed	Title is not reliable
6	Issuance of land certificate	Issuance of the original deeds
7	Cheaper and easier to investigate	Expensive and more cumbersome procedure
8	Purchase not affected by notice of an unregistered title	Purchase affected by notice of unregistered title
9	Registrar can compel registration	Registrar cannot compel registration
10	Declaration of encumbrance	No declaration of encumbrance

FORMS USED UNDER RTL AND SAMPLE DRAFTS

I. Forms

1. FORM 1: Registration of title to land
2. FORM 2: Registration of Deeds and Certificate of Occupancy
3. FORM 3: Application for Search
4. FORM 4: Electronic Search Report
5. FORM 5: Application for Certified True Copies of Documents Searched
6. FORM 6: Registration of Caution
7. FORM 7: Withdrawal of Caution

II. Sample Drafts

Registration of Title to Land (Form 1)

APPLICATION FORM FOR REGISTRATION OF TITLED LAND

District.....
Title No.....
Address of Property……..
Assignee's Name……..
Residential Address……..
E-mail/Website Address……...
Assignor's Name……..
Residential Address……..
Type of Registration……..
Document Submitted by……...
Office Address.....
Date of Submission……...

_____
Receiving Officer
(Official Stamp & Seal)

Registration of Land Covered by Deeds/Certificate of Occupancy (Form 2)

APPLICATION FORM FOR REGISTRATION OF LAND COVERED BY DEEDS/CERTIFICATES OF OCCUPANCY

District.....
Registered Instrument No.....
Address of Property.....
Assignee's Name.....
Residential Address.....
E-mail/Website address.....
Assignor's Name.....
Residential Address.....
E-mail/Website Address.....
Type of Registration.....
Document Submitted by.....
Office Address.....
Date of Submission……..

_____
Receiving Officer
(Official stamp & date)

Application to Conduct a Search (Form 3)

APPLICATION FOR CONDUCTING SEARCHES

1. Search conducted at.....
2. Registration no. of property.....
3. Description of property.....
4. Name of proprietor.....
5. Search conducted by.....
   Name……

Address……..
E-mail/website……...
Phone……..Fax No……...

6. Reasons for search.....
7. Date search conducted.....
8. Payment of fees for search.....
9. Payment of fees for printing.....

Electronic Search Report (Form 4)

ELECTRONIC SEARCH REPORT

1. Document searched.....
2. Date of search.....
3. Description of property.....
4. Grantor.....
5. Grantee.....
6. Term.....
7. Area of land.....
8. History of Land.....
9. Subsequent Transaction/Encumbrance……..
10. Remarks…….

(Week 9)

LEASE I

MEANING AND NATURE OF A LEASE

I. Meaning of a Lease

A lease is a document that creates an interest in a property or land for a fixed term of years usually (but not necessarily) in consideration of the payment of rent. The interest created is called a term of years, but it is also often referred to as a lease or a leasehold interest. Leases are used to describe long-term grants. A lease is both a contract and an estate (an interest in land).

In a lease, the consideration flowing from the lessor (landlord) to the lessee (tenant) is the demised premises. The consideration paid by the lessee is the rent and the observance of any condition or covenant in the lease. A lease is a grant of land by the lessor to the lessee for an interest less than that of the grantor. Grantor is the transferor of an interest in property to the grantee.

It should however be noted that title to the land is not conveyed, only the use and occupation of the property is given out; the property reverts back to the lessor after the expiration of the term. The reversion is any future interest left in the grantor or his successor. The owner of the property who makes the grant is the lessor or landlord/landlady, whilst the person who takes over the exclusive use of the demise is the lessee or tenant.

II. Lease and Tenancy

The difference between a lease and a tenancy is that while the former lasts for a long term (exceeds 3yrs and it must be by deed), the latter is for a short term (less than 3yrs or 3yrs: just has to be in writing - a tenancy agreement). Execution of a tenancy agreement is by hand (by appending your signature without seal). Lease must be signed, sealed and delivered. In a lease, the essential date is the date of delivery; while in a tenancy, the relevant date is the date of execution.

III. Sub-Lease

It is called sub-lease or under-lease or minor lease: for this to exist, there has to be a head lease to create a sub-lease. It is a lease given out of a lease. There is a direct relationship between the head lessor and sub-lessor. No direct relationship between the head lessor and sub-lessee. A tenant cannot unilaterally sub-let/sub-lease unless it has been indicated as one of the covenants in the agreements in the head lease. Any term created under a right of occupancy or certificate of occupancy is a SUB-lease. In such a case, never draft a DEED of LEASE, rather, draft a DEED OF SUB LEASE.

IV. Purpose of a Lease

1. **Residential:** the purpose for letting a premise may be for the residence of the occupants only. Such premises are usually situated in areas designated by the planning laws as residential districts. This purpose is inserted in the covenant to be observed by the lessee. Putting the premises into any other purpose would constitute a breach of the covenant.
2. **Commercial/Business:** a lease can be created for commercial or business purpose. Commercial would cover many ventures which aim is profit making.
3. **Agricultural/Industrial:** a lease may also be created for agricultural or industrial purpose. The lessee may covenant to use the premises or land for large scale farming or processing of agricultural products.

PARTIES TO A LEASE

This refers to the capacity of parties. They must be natural or juristic persons having the capability to sue or be sued. Capacity is always a key issue. A holder of a right of occupancy can create a term of years subject to conditions in the Land Use Act. Any term created under

the right of occupancy is a sub-lease.
At common law, a lease created by an infant is voidable and may be avoided by the infant within a reasonable time after attaining majority. An infant cannot create a tenancy in respect of residential premises but the parent or guardian or the High Court upon application may do so on his behalf. A registered company under CAMA may create or take a lease as authorised by its memorandum and Articles of Association.
Parties are to be identified by their full names, addresses and occupation. In the case of a limited liability company, it is usual to say "**registered under CAMA**" and then state its registered office. In the case of a natural person, you may want a reference on him from his employer or former landlord to determine if he can pay rent.
A single lady letting the premises may be asked to produce a surety who will also stand as a guarantor in case of default of payment of rent. It should however be noted that a surety will be equally liable for the payment of rent. If a company, the guarantors may be the directors.
The parties to a lease can either be called a landlord/tenant; lessor/lessee and where the lessor is a lady, a landlady. You may wish to extend the meaning of the definition. But there are provisions of the law that make it unnecessary to extend the definition of the parties to include successors-in-title – ***Section 102 and 103 PCL, and Section 58 and 59 Conveyancing Act 1881***. Successors-in-title can also enforce covenants in the document.
In a lease created out of freehold interest (lands not covered by right of occupancy), the holder of the land will be LESSOR while the other party will be LESSEE. Where the lease is created out of a leasehold interest (lands covered by a certificate of occupancy), the person giving out the premises will the SUB-LESSOR while the other party will be the SUB-LESSEE. The reason is that there is an existing leasehold relationship between the holder of the right of occupancy as the LESSEE and the Governor as the HEAD-LESSOR. See ***Section 41(1) LRL and Section 23 Land Use Act***.

TYPES AND FORMS OF CREATING A LEASE

I. Types of Lease

1. **Periodic Tenancy –** This is created for a term renewable at the end of the term by payment of rent by the tenant and reception of rent by the landlord. See ***Section 7 & 8 Recovery of Premises Act***. In the absence of any express agreement by the parties, the following period of notice is require for the various types of periodic tenancy Yearly (6months); Half-yearly (3 months); Quarterly (3 months); Monthly (1 month); Tenant at Will (1 Week) – ***Section 13 Tenancy Law of Lagos 2011***.
2. **Tenant for a Fixed Period –** This is created to last for a fixed term and to expire at the end of such fixed term. This type of lease is not renewable.
3. **Lease of Reversion –** This is created to run concurrently with an existing lease. Lessee of reversion does not take possession unless the existing lease is brought to an end; he merely steps into the shoes of the lessor in relation to the current lease.
4. **Lease in Reversion –** This is created to take effect at the expiration of a current lease. See ***Section 153 PCL and Section 43 LRL***.
5. **Tenancy at Will –** This is created where the tenant holds over at the end of a current term with the consent of the lessor for an undefined term subject to termination by either of the parties.
6. **Tenancy at Sufferance –** This is created where the tenant holds over without the consent of the lessor – ***African Petroleum Ltd v. Owedumi***. Such a tenant is not entitle to notice.
7. **Tenancy at Estoppel –** This is created where tenancy is made by a grantor who has no good title.
8. **Statutory Tenancy –** This is created where a tenant's term has expired but protected from summary eviction by the provisions of the relevant recovery of premises law – ***Moduye v. Nigerian Airways***.

II. Mode of Creation of Leases

A. Parol/Oral Lease

This is an agreement of mere words. Under ***Section 3 of Statute of Fraud of 1677; Sections 78 & 79 PCL,*** it is permissible as having of a lease at will. It must however have the following elements in order for it to be valid –

1. It must reserve the best rent obtainable (not premium or rack rent);
2. It must be for a period not exceeding three (3) years; and
3. It must confer exclusive possession – ***Foster v. Reeves;***[115] ***Okoye v. Nwulu.***[116]

While parol/oral leases are permissible, they usually present difficulties in proving the essential terms agreed to by the parties; for "a party alleging an oral agreement is duty bound to prove such an agreement to the hilt"– ***Odutola v. Papersack (Nig.) Ltd.***[117] Where there is a breach in oral agreement, the aggrieved party is only entitled to part performance e.g. if he has paid rent, then he should occupy for the time of the rent.

B. Written Lease (Formal Lease)

This is a mere agreement in writing, and applicable to leases not exceeding three years. It is signed by the parties to it only, and binding on them as a contract and it is enforceable. In ***Odutola v. Papersack (Nig.) Ltd (supra),*** Niki Tobi JSC, observed that *"it is generally accepted practice that tenancy agreement is made in writing; but I can say that it is mostly made in writing."* The advantage of a lease in writing over oral lease is that a lease in writing is easily ascertainable and enforceable. Aggrieved parties are entitled to specific performance in addition to the remedy of part performance and there may be award of damages (if claim for specific performance fails).

Part performance is where the plaintiff alters his position on the faith of the contract. He acquires an equity against the defendant which the court may enforce – ***Ekpanya v. Akpan***. Part performance is an exception to the Statute of Fraud 1677, which prohibits the enforcement of contract respecting lands that are not in writing.

C. Lease by Deed or Under Seal

It is mandatory and not conditional for a lease above three (3) years to be by deed. It must be Signed, Sealed and Delivered. Under ***Section 3 of Statute Fraud Act of 1677; and Section 77(1) of PCL,*** a lease which is required to be in writing is void for the purpose of conveying or creating a legal estate unless made by deed. In ***Anwasi v. Chabasaya,***[118] the Court held that *a contract under seal is a written document, which is required to be signed as well as sealed by the party bound thereby and delivered by him, to or for the benefit of the person to whom the liability is incurred.* However, by the rule in the old case of ***Walsh v. Lonsdale,***[119] *an agreement to create a lease (with all the essential elements) will still operate as a lease, notwithstanding that it is not created under seal.* This is based on the maxim that *"equity looks at the intention of the parties and not the form"* and *"equity regards as done that which ought to be done."*

ESSENTIALS/ELEMENTS OF A VALID LEASE

In ***Odutola v. Papersack (Nig.) Ltd (supra),*** Niki Tobi JSC, stated thus:

"…[For] a lease to be valid and enforceable, [it] must contain the following – the parties concerned, the property involved, the term of years, the rent payable, the commencement date, the terms as to covenants, and the mode of its determination."

1. Parties Concerned: Being a contractual transaction, parties must be natural or juristic

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[115] (1892) 2 QB 255 at 257
[116] (2001) All FWLR (Pt. 350) 214
[117] (2007) All FWLR (Pt. 350) 1214
[118] (2000) 6 NWLR (Pt. 661) 408
[119] (1882) 21 Ch. D 9

persons (that is, having the capacity to sue and be sued) and adequately prescribed (certain parties). There must be a lessor who is capable of creating a lease and a lessee who is capable of taking the demise. Therefore, children and insane persons cannot be parties. ***UBA v Tejumola & Sons; Bosah v. Oji.***

2. **Property Involved & Purpose:** The property must be in existence at the commencement date otherwise, nothing is demised and the agreement is void. In other words, the property must be specifically described or accurate description and known by both parties. This is to leave no room for doubt or ambiguity. The property is the land or any interest in land. It may be for the purpose of residence or commerce..
3. **Terms of Years:** There must be definite time frame. For a lease to be valid, it must be for a definite or fixed period with a fixed or ascertainable date of commencement**.** In terms of duration, it must have a certain beginning and a certain end e.g. weekly, monthly, quarterly, or yearly. A lease for an indefinite period must fail. The lease cannot tenure in perpetuity. A lease until the landlord acquires the land for road purposes was said to the void - ***Prudential Assurance Company v London Residuary Body***.[120] A lease for so long as the company is trading is said to be void for uncertainty - ***Birrell v Carey***.[121] A lease for a future lease is void unless some definite time for commencement can be inferred from it - ***National Bank of Nigeria v CFAO, Okechukwu v Onuorah***. A purported lease without a fixed duration will be declared invalid - ***U. B. A v. Tejumola & Sons Ltd.***[122] In ***Lace v. Chantler,***[123] the court held that a lease for the duration of the war or until cessation of hostilities did not create a good leasehold interest as the term created was uncertain.
4. **Rent Payable:** The rent (amount) to be paid must be stated, known (certain or ascertainable) and agreed by both parties - ***Okechukwu v Onuorah; Bosah v Oji.*** It may be money or money's worth. Consideration paid by the tenant for the term granted by the landlord. It is payable in arrears except expressly stated to be payable in advance.
5. **Date of Commencement:** the commencement date and expiration date must be clearly stated. A lease cannot inure in perpetuity. The lease must take effect from a specified date or upon the happening or occurrence of an ascertainable future event or contingency which is certain in time – ***U. B. A v. Tejumola & Sons Ltd (supra)***. In ***Okechukwu v. Onuorah;***[124] and ***Bosah v. Oji,***[125] the question arose on whether leases that had no commencement date, but which were said to commence on "the day the Onitsha Local Government Council issued to the lessees a certificate of occupancy in respect of the premises", were valid commencement dates? The court answered to the affirmative and concluded that the commencement date which is depended upon the occurrence of a future contingency (issuance of a certificate of occupancy) was valid and the lease became absolute and enforceable the moment the event in question occurred.
   In ***Bosah v Oji,*** plaintiff and defendant came to an agreement in writing for a lease of a building and clause 7 of the agreement stated that The term of sixty years will be counted from the time when the lessee obtains the Certificate of Occupancy for the building on the unbuilt area in front if he builds or if he chooses to convert it into a commercial use from the time he begins to make use of it." If the commencement date is made with reference to the happening of an event that is unlikely to occur but actually occurs, it is enforceable (e.g. a lease to take effect upon Mr Olowononi becoming President).
6. **Exclusive Possession -** There must be exclusive possession. It is the essence of a lease that

[120] (1992) 2 AC 286
[121] (1989) Chancery 2
[122] (1988) 2 NWLR (Pt. 79) 662; 5 SCNJ 173
[123] (1944) KB 364 at 368
[124] (2000) 12 SCNJ 146
[125] (2002) 6 NWLR (Pt. 762) 137

a tenant should be given the right to exclusive possession. That is, the right to exclude all other persons from the premises. Where exclusive possession is not confirmed, it is called a license. Exclusive possession connotes occupation or physical control of land either personally or through an agent, proxy or servant. It also means exclusive power of using the right given in land, retain same and be entitled to undisputed enjoyment of it against all persons except the person who can establish a better title. If one does not have exclusive possession of the property, then what one has is not a lease but licence. Lessee must therefore have exclusive use and control of premises. The lessee must have exclusive possession of the demised premises excluding any other including the lessor unless there is a specific agreement that the landlord can come for inspection of the property where he covenants to undertakes repairs.

A person may have exclusive occupation without exclusive possession. That is my father's lease where I live in exclusive occupation and my father has exclusive possession. The person in exclusive occupation may or may not pay rent. A young executive on study leave puts his colleague in the house for the period of time he is away, the colleague (in exclusive occupation) may or may not pay rent.

7. **Mode of its Determination –** There must be the cessation of an estate or interest.

LEASE AND OTHER RELATED TRANSACTIONS

I. License

1. A lease has an estate or legal interest in the demised premises while a licence has no estate but only a right to do a thing on the land. In real property, a license is ordinarily considered to be a mere personal or revocable privilege to perform an act or series of acts on the land of another – ***Section 47 LRL 2011***. In ***Street v Mountford,***[126] a landlord gave a residential apartment to the tenant stating that he should remain as a licensee and he could not assign and to pay weekly rent and this was by a written agreement. The House of Lord held although the word licence featured in the agreement, a lease was intended by the agreement. See ***Eloichin Ltd v Mbadiwe***.[127]
2. In a lease, the lessee has exclusive possession of the demised premise while in a licence, the licensee does not have exclusive possession - ***Mobil Oil Nigerian Ltd v Johnson***.[128]
3. A lease can be assigned while a licence cannot be assigned.
4. In a lease, a lessee can maintain action for trespass against anybody including the lessor while in a licence, a licensee can only sue others and not the licensor for trespass because he occupies the property at the pleasure of the licensor who may come upon the land at any moment he wishes.
5. A lease is inheritable while a licence cannot be inherited.
6. A lease cannot be revoked while a licence is revocable either expressly by the licensor or by the death of the parties or by assignment of the property.
7. There is landlord-tenant relationship in a lease, while such relationship is absent in a licence.

II. Assignment

1. Lease is the transfer of occupation or possession but lessor retains the title while assignment is the transfer of the title of land/ownership to the assignee - ***Nwanpa v Nwogu***.[129]
2. A lease is granted for a period of term while in an assignment, the assignee receives the entirety of the estate from the assignor.

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[126] (1985)
[127] (1986) All NLR (Pt 1)
[128] (1961) All NLR 93
[129] (2006) 2 NWLR (Pt. 964) 251

3. In a lease, the grantor has reversionary interest while in an assignment, there is no reversionary interest retained by grantor.
4. In a lease, all covenants in the head lease (express and implied) bind parties to a lease while in an assignment only covenants that touch and concern the land in the head lease binds assignees (not express covenants as there is no privity of contract between head lessor and assignee).
5. In a lease, it may not require deed depending on the duration and mode of creation while in an assignment, it always require a deed for legal title to be passed to the assignee.

RENT IN A LEASE

I. Meaning of Rent

This is the consideration (compensation) paid by the tenant to the landlord for the term granted. Payment of rent is however not a strict requirement of a valid lease. For instance, a *tenant at will* does not pay rent yet he is a tenant. A main feature of a lease is lawful occupation by tenant whether a person pays regular rent, subsidised rent or no rent at all is immaterial – ***African Petroleum Ltd. v. Owodunni.***[130]

It should be noted that rent is not due until the expiration of the period created. In a monthly tenancy, the rent is due on the eve of the commencement of another periodic month – ***Re St. Andrews Allotment Association.***[131] Rent is still payable even if the premises cannot be used. For example, due to destruction by fire. This is because the doctrine of frustration hardly applies to leases – **E. O.** ***Araka v. Monier Construction Co (Nig) Ltd.***[132]

II. Instances where Rent will not be paid to create a Lease

1. Where the is payment of capital sum (premium) so long as it is permissible;
2. Where there is right to live rent free under a sale and a lease-back arrangement;
3. Where there is only the undertaking to perform and observe the covenants in a lease; and
4. The mere acceptance of the lease by the tenant – ***African Petroleum Ltd. v. Owodunni.***[133]

III. Types of Rent

In practice, there are three kinds of rent payable in lease namely:

1. **Ground Rent –** This is the rent paid by the holder of the grant (grantee) for the use of the ground, whether the land is developed or not is immaterial – ***GB Olliviant v. Alakija.***[134] This rent is paid annually and it is subject to periodic review. For example, rent paid to the Governor of a State (Government) upon the grant of a Right of Occupancy and subsequently every year – ***Section 5(1) of the Land Use Act, 1978*****.** The amount payable varies depending on where the land is situated or located, and the size of the land. It is usually a small amount and it is subject to a revision period of 5 years or more. Traditional ground rent were in the form of kolanut and palm wine, isakole.
   Payment of ground rent is not restricted to State Government grants alone. For instance in a lease, the lessor may be the owner of a land with a house on it. If he grants a lease of the property, he may decide to charge an annual rent for the ground itself and another rent for the house built on the land. Thus, in a lease for a period of ten years, an annual ground rent of ₦1, 000.00 may be charged on the land itself, while the sum of ₦200, 000.00 may be charged as rent for the use of improvement on the land.
2. **Rack Rent (Economic Rent):** This is the most popular type of rent also called 'economic rent' because it is the landlord's returns on his investment. This rent is paid by the lessee

[130] (1991) 8 NWLR (Pt. 210) 391 at 419
[131] (1969) 1 All E.R. 147 at 151
[132] (1978) 9/10 S.C. 9
[133] (1991) 8 NWLR (Pt. 210) 391 at 419
[134] (1950) 13 WACA 63

for use of the landlord's property. It is the rent for the full value of the property or a value near it. The amount payable varies depending on the location of the property, quality of the building and extent of the building. It may be paid monthly, annually or for a fixed sum. Though, it normally fluctuates depending on the change of circumstances in market value.

3. **Premium:** This is a lump sum, which is paid as rent in addition to the other kinds of rent. For example, the holder of a Right of Occupancy pays both ground rent and premium to Government e.g. FCT. It is also payable in a long lease. A premium is regarded as a fine, and prohibited in some States – ***Section 4 of the Rent Control and Recovery of Residential Premises Law of Lagos 2003*****.** However, where payment of premium is required or allowed, it attracts stamp duties payment and it is charged as income tax. Where premium is prohibited, the landlord may charge rent of many years in advance if that is not also prohibited.

IV. Rent in Advance for Many Years

Section 6(1) of Rent and Recovery of Premises Edict No. 4 of 1997 (Plateau State) prohibits rent in advance. The Lagos State Tenancy Law, makes it an offence punishable with three months' imprisonment or a fine of N100, 000 for a Landlord who demands or receives more than 6 months or one year rent from their sitting tenants for monthly and yearly tenants respectively. A sitting tenant is also prohibited from offering or paying rent for such period. It is also unlawful for a landlord or his agent to demand or receive from a new or would be tenant rent in excess of 1 year and such a would be or new tenant is prevented from offering or paying rent in excess of 1 year in respect. See ***Section 4 Lagos State Tenancy Law, 2011***.

Payment of rent for many years in advance is not advisable for the following reasons –

(a) Inflation: this may make the rent collected virtually useless.

(b) Taxation: rent collected for more than 5 years is subject to taxation as income – ***Section 4(2) (c) Income Tax Management Act; Section 3(3) Personal Income Tax Act***.

(c) Deprecation or Appreciation in the Value of the Property: if rent is paid in advance, then it may or may not benefit the landlord.

(d) Liability for an Offence: The Landlord may be liable for an offence and liable upon conviction to pay fine where the law prohibits the collection of rent in advance for many years.

V. Accepting Rent when Lease has expired

At common law, where a lease has expired but the lessor continues to accept rent, the lessor would be deemed to have renewed the lease on the same terms and rent as the expired lease. This is because in law, possession of an estate by a lessee and the receipt of rent by the lessor is evidence of a tenancy as in ***Okoye v. Nwulu***. For this reason, a lessor when issuing a notice to quit should also indicate on the notice that he will only accept rent up to the expiration of the notice and that after that, if the lessee does not deliver up possession, the lessor will only accept any payment as mense profit (i.e. payment for wrongful possession and holding over of premises by the lessee). The notice should also state that the acceptance of the mense profit does not amount to renewal of the lease.

VI. Factors to be considered in Fixing Rent Payable

1. The applicable legislation in that area – some legislations control what can be charged in a particular location.
2. The nature of the property - is it one-bedroom, how is it built, features of the property, facilities of the property.
3. Location of the property e.g. Maitama versus Bwari
4. Applicable tax legal regime in that area

V. Rent Review Clause

A. Concept

It is important to insert a rent review clause in a lease especially if the term of years granted is a long one (so the lessor can take advantage of appreciation of property). In the absence of such clause, and subsequent disagreement, the court may imply fair market or reasonable rent and this would always be a matter of evidence – ***Unilife Dev. Co. Ltd. v. Adeshigbin.***[135]

B. Objective

The rent review clause is usually inserted in a lease to cushion the effect of inflation and keep to the money value realisable from the demised premises. This allows the rent to be reviewed periodically. Thus, it must be expressly stated in the lease (cannot be done unilaterally).

C. Content

A rent-review clause should contain the following:

1. **Method of initiating the review**: For example, a notice to be given by the lessor to the lessee in writing and the time within which the notice is to be given.
2. **Time frame for the review**: For example, after every five (5) years of the lease and the date in which the new rent will become payable.
3. **Method of calculating the new rent**: For example, whether a valuation by experts is required before the review.
4. **Procedure for resolving any dispute of the new rent**: For example, by the use of arbitration clause or negotiation mechanism. See ***Section 37 Tenancy Law of Lagos***.

D. Example of a Rent Review Clause

The rent review clause could be inserted in the reddendum, or the reddendum could refer to it in the schedule. It may be drafted as follows:

> *YIELDING AND PAYING during the said term granted the rent of N1, 000, 000 (One Million Naira) per annum subject to review in accordance with the provisions contained in the schedule attached to this lease.*
>
> *The Schedule*
>
> 1. *The rent reserved shall be subject to revision every 5 years of the term created in this lease and such revised rent shall be fixed by agreement between the Lessor and the Lessee.*
> 2. *The Lessor may by notice in writing given to the Lessee not less than 6 months, nor more than 12 months before any and every fifth anniversary of the 30th day of January, 2019 requiring rent to be reviewed.*
> 3. *If the Lessor and the Lessee are unable to agree on the revised rent to be paid, the matter shall be referred to an arbitrator to be appointed by agreement between them and in the absence of such agreement, an arbitrator may be appointed by Chief Judge of Kogi State.*
> 4. *The amount at which the revised rent shall be fixed by the parties or by an arbitrator appointed shall be such as is the best yearly rent in the open market having regard to the unexpired term of the lease, all other terms of the lease and the current rental values for similar property in the neighbourhood or such other factors as may be recommended by an estate valuer.*

APPLICATION OF THE TENANCY LAW OF LAGOS STATE 2011 TO LEASE TRANSACTIONS

I. Application

Section 1 makes the law applicable to business and residential purpose only. ***Section 1(3)***

[135] (2001) FWLR (PT 42) 114

exempts the application of the law to Ikeja GRA, Victoria Island, Ikoyi and Apapa. **(**Note that the applicable Law in the above places is the Common Law on leases/tenancy and the Recovery of Premises Act. Also, the Common Law is applicable to the PCL and CA States in the absence of a State Law regulating leases/tenancy) and any other place that the Governor by notice in Gazette exempts.

II. Jurisdiction

Both the Magistrate Court and the High court have jurisdiction to entertain matters brought under this law – ***Section 2 TLLS 2011*****.** The determinant is the amount of money involved in the case. Where the claim exceeds the monetary jurisdiction of Magistrate then the case goes to the High court. NB – ***Section 28 Magistrate Court Law of Lagos State 2009*** **-** Annual rental value now is 10 million naira**.**

III. Notable Features of the Tenancy Law

1. A licencee who refuses/neglects to give up possession requires 7 DAYS notice (FORM TL4) – ***Section 14*****.**
2. Professional fees of any agent is payable by party bringing/retaining him – ***Section 11*****.**
3. The landlord has to ensure that the tenant enjoys quiet and peaceful possession – ***Section 6*****.** Here the law envisages a tenant not a licencee. In a lease, the lessor must notify the lessee before entry to inspect.
4. Use of common area for reasonable and lawful purpose – ***Section 6(1) (d)*****.**
5. Where a tenant with the previous consent in writing of the landlord, effects improvements on the premises and the landlord determines the tenancy, such a tenant shall be entitled to claim compensation for the effected improvements on quitting the premises - ***Section 6(2)*****.**
6. In the case of a monthly tenancy, where the tenant is in arrears of rent for six (6) months, the tenancy shall lapse and the Court shall make an order for possession and arrears of rent upon proof of the arrears by the landlord - ***Section 13(2)***.
7. In the case of a quarterly or half-yearly tenancy, where the tenant is in arrears of one (1) year rent, the tenancy shall lapse and the Court shall make an order for possession and arrears of rent upon proof of the arrears by the landlord - ***Section 13 (3)***.
8. Notice for tenants under subsection (1) (c), (d) and (e) of this Section need not terminate on the anniversary of the tenancy but may terminate on or after the date of expiration of the tenancy - ***Section 13(4)***.
9. In the case of a tenancy for a fixed term, no notice to quit shall be required once the tenancy has been determined by effluxion of time and where the landlord intends to proceed to Court to recover possession, he shall serve a seven (7) days written notice of his intention to apply to recover possession as in Form TL5 in the Schedule to this Law - ***Section 13(5)*****.**
10. The landlord shall be entitled to recovery of the premises where (a) a tenancy is proved to be for a fixed term certain; (b) the period of the tenancy has expired by effluxion of time; and (c) form "TL5" has been served in accordance with Section 13(5) of this Law - ***Section 26***.
11. In proceedings under this Law, the Court shall promote reconciliation, mediation and amicable settlement between the parties - ***Section 32(1)***.
12. Subject to any agreement to the contrary, an existing tenant may apply as in form TL 11 to the Court for an order declaring that the increase in rent payable under a tenancy agreement is unreasonable - ***Section 37(1)***.
13. In determining whether an increase in the rent is unreasonable, the Court shall issue hearing notice as in form TL 12 to the Landlord and shall consider the application on the following grounds –
    (a) The general level of rents in the locality or a similar locality for comparative analysis;
    (b) Evidence of witnesses of the parties; and
    (c) Any special circumstances relating to the premises in question or any other relevant

matter - ***Section 37(2)***.

ETHICAL ISSUES

1. A lawyer should not fail to reflect instructions given to him by his client
2. A lawyer has a duty to show competence when drafting the lease agreement - ***Rule 16 RPC***.
3. The document should correctly and fully reflect the wishes of the party with special reference to the covenants.
4. Duty not mix the rent paid to the client with solicitors money or not spend such fund belonging to the client - ***Rule 23(2) RPC***.
5. Duty not to frank a document not prepared by the Solicitor - ***Rule 3(2) RPC and Section10 LPA***.
6. Duty not to aid a non-lawyer in the unauthorised practice of law - ***Rule 3(1) (a) RPC***.

CASES ON LEASES

Bosah v Oji (2002) 6 NWLR (Pt. 762) 137
The plaintiff and defendant came to an agreement in writing for a lease of a building and clause 7 of the agreement stated that "The term of sixty years will be counted from the time when the lessee obtains the Certificate of Occupancy for the building on the un-built area in front if he builds or if he chooses to convert it into a commercial use from the time he begins to make use of it." The defendant shall pay a sum of 980 pounds if added to 100 pounds already paid will represent three years rent paid in advance. Supreme CT: for a lease to be valid, the term of lease and date of commencement must be certain or capable of being ascertainable. In order to have a valid agreement, there must be in express terms or written so that the commencement can be inferred. SC held there was a certain term of 60 years and the date of commencement could be inferred from the contingency of getting the certificate of occupancy i.e. reference to the happening of an event that will occur.

Okechukwu v. Onuorah (2000) 12 SCNJ 146
A deed of lease made on 17th July 1972, appellant demised a piece of land to the defendant. One of the covenants: "for a term of 50 years from the day the lessee is issued with a certificate of occupancy". Issue of commencement date in this case. Supreme Court held for the defendant. Certificate of occupancy was a condition precedent to moving into the house (to inspect the house by the Onitsha Local Government) not the same as under the Land Use Act. Where the date for commencement for the lease is unspecified but stated in reference to a contingency, until the contingency happens the lease is unenforceable but once the contingency happens, the lease becomes enforceable.

Tejumola & Sons Ltd v U.B.A (1988) 2 NWLR (Pt. 79) 662
The defendant (UBA) made a conditional offer to the plaintiff to grant him a lease. They entered into negotiations and the date of commencement was to be made that physical possession would be taken, Plaintiff suggested a date for commencement for UBA to take possession. UBA stated that defendant should effect some repairs on the property which he did. Negotiations broke down. Correspondence by UBA was headed subject to contract so a mere invitation to treat and so no contract was made. (NB: if terms have already been agreed and concluded and the letter is still termed subject to contract, Supreme CT held that this is cosmetic and the Ct will not accept that there is no contract). In this case, no terms were agreed upon so no valid contract. UBA did not agree to physical possession to be the date of commencement. A commencement date is enforceable even though made subject to a contingency, if the contingency actually happened. In this case, the contingency never happened, therefore there was no enforceable lease.

(Week 10)

LEASES II

COVENANTS IN LEASES

I. Meaning and Nature of Covenants

These are agreements creating obligations usually in a deed. Promises and pledges made by parties to a lease. Either party can make promises that something is done, shall be done, shall not be done or speaks the truth about certain facts. In respect to the nature of a covenant, it can either be positive or restrictive. Positive covenants stipulates the performance of an act or payment of money, while Negative/Restrictive covenants forbids doing of an act or acts. Covenants are drafted in leases using good precedent books.

II. Factors Guiding Choice of Covenants to Be Inserted in a Lease

The type of covenant to be inserted into the lease depends on:

1. The type of lease
2. The nature of the property
3. The relationship between the parties
4. Practice within the jurisdiction

TYPES OF COVENANTS

I. Implied Covenants

A. Concept

These are covenants which the law will imply and enforce into the lease agreement between the parties even though they are not expressly provided for in the lease agreement. The covenants are implied as a result of the landlord/tenant relationship. Whether parties provide for it or not in their contract, because they are provided for by law, they will be implied by the courts - ***Adollo v. Adeyemi; Warren v. Keen***. In Lagos State, certain covenants are implied on the part of the landlord and tenant. This is however, made subject to any contrary provisions in the tenancy agreement between the parties. In the absence of such agreement, it is the duty of the parties to fulfil the obligations stated in the law.

B. Implied Covenants on the Part of the Landlord/Lessor

1. Quiet enjoyment i.e. not to disrupt tenant from enjoyment of the property
2. Payment of rates and charges stipulated by the law
3. Keep the premises insured against loss or damage
4. Not to terminate or restrict or restrict the use of a common facility or service for the use of the premises
5. Not to seize any item or property of the tenant or interfere with the tenant's access to his personal property - ***Section 8 Lagos Tenancy Law 2011***

C. Implied Covenants on the Part of the Tenant

1. Payment of rent
2. Payment of existing and future rates and taxes not payable by the landlord by law - NEPA/PHCN
3. Covenant not to make any alterations on the premises without the written consent of the landlord
4. Covenant not to assign or sublet any part of the premises without the written consent of the landlord.
5. Keep and deliver the premises in a good and tenantable condition
6. Allow landlord to enter premises for repairs - ***Section 7 Lagos Tenancy Law 2011***.

II. Usual Covenants

A. Concept

Usual covenants are proper and common covenants inserted in a lease based on the facts or

evidence presented before the court. Many states in Nigeria have enacted their tenancy laws the requirement that usual covenants should be inserted in leases and where they are not so inserted would be implied; express agreement by the parties would however displace the implied covenants. Usual covenants must be reasonable: must pass the reasonable man test.

B. Factors Determining Usual Covenants in a Lease

1. General conveyancing practice
2. Purpose and usage for which the property is let/leased
3. Custom of the locality where the property is situated.
4. Type of lease in question (short versus long term)
5. Other prevailing circumstances – ***Flexman v. Corbett***.[136]

C. Types of Usual Covenants

1. Quiet possession of the property
2. Covenant that the property is fit for habitation
3. Covenant that the lessee shall not commit waste of the property
4. Covenant that the lessee will use the premises in a tenantable manner.

III. Express Covenants

Express covenants are covenants, which will not be implied in the lease or enforced by the parties except there is definite agreement on them. These are the covenants agreed to by both parties during negotiations and exchange of drafts and they are expressed in the lease agreement. They often incorporate both usual and implied covenants. Some of the covenants expressed in leases include:

1. Covenant to pay rates and charges
2. Covenant on use of the property
3. Covenant not to sublet, assign or part with possession
4. Covenant to insure the property
5. Covenant on repairs
6. Covenant to renew the lease
7. Covenant to pay rent and rent-review clause

NOTE: You may be asked to draft a standard covenant as solicitor for either the Lessor or Lessee and depending on the facts you are given, draft it to suit the interest of the party you are representing. Some of the covenants are for the Lessor (option to renew, while others are for the Lessee (abatement of rent). Please bear this in mind while answering a question on this topic.

A. Covenant to Pay Rent/Rent Clause

1. **Concept:** rent is the payment made by the lessee to a lessor by virtue of the lessee's contract to use and occupy the property. A lease should provide for the payment of rent because it is not one of the implied covenants (except in Lagos). The rent must be certain or ascertainable, it is either money or money's worth – ***Pitcher v. Tovey***,[137] and generally payable in arrears unless otherwise stated – ***Anyafulu v. Agazie***.[138] Once rent has been agreed upon, neither of the parties can unilaterally alter the clause - ***Yahaya v. Chukwuma***.[139] Almost all the states of the Federation regulate rent except the FCT.
2. **Uses (Both Parties):** The rent payable method and period of payment is ascertainable and parties cannot vary or deny agreed amount.
3. **Remedies for Failure to Pay Rent:**
   (a) An action in court to recover the money
   (b) An action in distress i.e. the seizure of the Lessee's goods to satisfy the rent without

[136] (1930) 1 Ch., P. 672
[137] (1692) 4 Med. 71
[138] (2006) 5 NWLR (Pt 978) 260 at 279-280
[139] (2002) 3 NWLR (Pt 753) 20

going to court.

(c) An action for forfeiture where contained in the lease

(d) A claim for mesne profit against a tenant at sufferance

4. **Arrears of Rent and Mesne Profit:** Arrears of rent is the rent payable to a landlord by a tenant before the expiration or determination of the tenancy. Mesne profit is the amount payable by the tenant to a landlord which accrued between the date when the tenant ceases to hold the premises as a tenant and the date he gives up possession (i.e. after notice to quit and 7 days' notice has been issued and the tenant is holding over). See ***Odutola v. Papersack (Nig) Ltd***.

Draft of Rent Clause (Usually called Reddendum)

The Lessee covenants with the Lessor to pay the rent reserved in the lease at the time and in the manner prescribed.

Or

The reserved rent shall be payable in advance and if not paid within 21 days after one month notice issued by the Lessor, it shall be lawful for the Lessor to re-enter upon the premises and the lease shall cease.

B. Covenant to Pay Rates and Taxes (Outgoings)

1. **Concept:** This covenant is otherwise known as covenant to pay out goings. Usually recurrent rates and outgoings like bills, light bills, waste disposal bills etc. are to be paid by the Lessee/Tenant while non-recurrent bills like fixing of electric poles etc. are to be paid by the Lessor/Landlord. If there is no express covenant on who is to pay the rates and outgoings, ***Section 7 (2) of the Tenancy Law of Lagos*** will apply and the tenant is to make all payment on rates and outgoings that the landlord is not legally obliged to pay, while in other States either the provision of the State law on Tenancy or the Common Law rule will apply.
2. **Payment of New Rate and Taxes Introduced:** A Party who covenants to pay rates and taxes is not deemed to be bound to pay all new rates and taxes subsequently introduced**,** unless the new rates and taxes are of the same specie as the rates or successor of the previous rates and taxes existing when he covenanted to pay - ***Smith v. Smith; Miles End Town Vestry v. Whitby***. Contrary intention must be specified.
3. **Who is Liable to Pay the Particular Rate**: Two things are to be considered.
   (a) The position of the law providing for the payment on who is to pay (liability clause in the statute). NB: the parties can decide who should pay certain rates or taxes regardless of the statute. In most cases, it is the owner of the tenement that pays the outgoings. However, parties may on their own determine who is to pay particular rates and taxes.
   (b) Whether that particular party is to continue to pay the rate. The answer is No; unless it has been stated that even when new rates are introduced, such person shall continue paying the rate.
4. **Uses:**
   (a) Preserves uninterrupted supply of basic amenities and services to the property
   (b) Protects both parties from the provisions of any legislation regulating payment of taxes on the property
5. **Diplomats:** a landlord cannot bind a diplomat; foreign envoy/consular chief representative of a commonwealth countries and their official and domestic staff to pay rates and taxes as they are exempted by the Minister of Finance – ***Section 9 Diplomatic Immunities and Privileges Act***.[140] However, this does not apply to official and domestic staff and families who are Nigerian citizens or foreign citizens not resident in Nigeria for the purpose of carrying out official duties – ***Section 10 DIPA, 2004***.

[140] CAP D9 LFN 2004

6. **Remedies for Breach of this Covenant**
   (a) An action to recover the outgoings and rates that have accrued.
   (b) An action for damages
   (c) An action for forfeiture and re-entry where the lease contains a provision to that effect.

Draft of Covenant to Pay Rate and Charges

The Lessor/Lessee covenants to pay all rates, taxes, charges, duties, assessments and other outgoings which may fall due and payable now or subsequently in respect of the demised premises or on the Lessor or Lessee.

NOTE - In drafting this clause, it should be made wide enough to accommodate future outgoings.

C. User Covenant

1. **Concept:** This covenant always provides for what purpose or use the lessee is to put the premises into either for residential, agricultural or commercial use. If this is not stated, the demised premises can be used by the lessee for any lawful purpose - ***Dawodu v. Odulaja***. A lessee should take all steps that are necessary to prevent a sub-lessee from committing a breach of the covenant otherwise he would be liable for permitting should breach – ***Barton v. Reed***.[141]
2. **Restrictions:** Restrictions can be found in -
   (a) Certificate of Occupancy and parties must comply with such user covenants in title documents.
   (b) Town planning laws and regulations e.g. in Abuja, certain areas have been classified as green areas or no bungalows in the Central Area. In ***Zard v. Saliba***: a covenant that provides for resident, trading, garage, saw mill and machinery was not breached when the tenant built a club for aesthetic purposes.
3. **Usefulness**
   (a) Protect against nuisance
   (b) Helps lessor control and determine use and purpose of the property.
   (c) Prevent use of property for unlawful or immoral purpose
   (d) Protect the reversionary interest of lessor
   (e) Ensures compliance with town planning laws and user covenants on title documents. See ***Zard v. Saliba***.
4. **Landlord's Remedy for Breach**
   (a) Seek an order of Injunction from using the property for a purpose prohibited
   (b) Damages to compensate for misuse of property
   (c) Right of forfeiture and re-entry if it is provided for in the lease.
5. **Points a Solicitor Should Note in Advising Clients as to Inserting User Covenants**
   (a) It does not always favour lessor/landlord as the more restricted the use of the property, the lower the open market price
   (b) It may be harsh against the lessee; may find it difficult to venture into other business because of the excessive restriction.
   (c) A solicitor should advise client properly to avoid being held liable for professional negligence - ***Sykes v. Midland Executors***.
   (d) A solicitor should avoid narrow drafting of covenant

Draft of Covenant on Use

The Lessee covenants to make use of the premises and to permit the premises to be used for the purpose of residence/commerce/agriculture

[141] (1993) 1 Ch. 363

only.

D. Covenant to Repair

1. **Concept:** It is also an implied term of a tenancy that the tenant is to repair the property, reasonable wear and tear excepted; to maintain the value of the property and protect it against unreasonable depreciation. Both landlord and tenant have interest to maintain the property in a good state of repair. Repairs mean the replacement of subsidiary parts of the premises while to renew refers to replacement of substantial parts of whole of the premises. – ***Lurcott v. Wakely***.[142]
   The practice is that before a tenant enters the premises, the landlord and the tenant will inspect the house and the inventory of items recording the state of the important structures in the property. This inventory forms a schedule to the lease or a separate document signed by the parties. It makes it easy to determine the liabilities of tenant. It is permissible for tenants to pay at the commencement of the lease a refundable deposit. The expression Good Tenantable Repairs, Good Repairs or Good habitable Repairs all mean the same thing.
2. **Common Law Presumptions:** a lessee is under an implied obligation to use the premises in a tenant-like manner (wind and water tight); to make fair tenantable repairs; and not to commit waste on the premises. In the absence of any specific provisions to the contrary, the Lessee will continue to bear these implied obligations.
3. **Ways of Circumvention:** to remove any ambiguity on the extent of repairs and obligations on repairs, it is advisable that the repairs should be specifically listed in a schedule to the lease and the obligation on such repairs firmly fixed.
4. **Who Has the Obligation to Repair:** Any of the party may carry out the repairs but it still depends on the type of repairs as follows:
   (a) Structural Repairs: external parts like repairs on the roof, house foundation, walls, pillars etc. are to be done by the Lessor/Landlord - ***Section 8(vi) Tenancy Law of Lagos State***: landlord shall effect repairs and maintain the external and common parts of the premises.
   (b) Internal Repairs: like bad sinks, broken floor, toilet seat, kitchen cupboard, painting, changing locks etc. are to be repaired by the tenant/lessee. Note: it depends on what the parties agree upon.
   (c) Lease of Short Duration: the lessee has more obligations to repair.
   (d) Lease of Long Duration: the lessor has more obligation to repair **-** ***Demuren v. Plastic Manufacturing Co***.
5. **Points a Solicitor Should Note while Drafting**
   (a) A covenant must be carefully couched so as to avoid onerous presumptions on the tenant.
   (b) Structural repairs must be itemised in the schedule
   (c) Lessor must reserve right of entry
   (d) The draft must exclude fair wear and tear (lessee). The phrases "Reasonable wear and tear excepted" implies that the lessee is relieved from liability from any state of disrepair so long as the disrepairs result from a reasonable use of the premises and the effects of natural elements.
   (e) The aggregate character, age of the property, locality of the premises and the general nature of the property at the commencement of the lease must be considered by the solicitor.

[142] (1911)1 KB, P. 905

6. **Uses**
   (a) Protects the premises against waste committed by the tenant (lessee)
   (b) Protects the value of the property (lessor)
   (c) Preserves tenant's enjoyment of the premises by maintaining same in a habitable condition
   (d) Protects both parties from being subject to implied terms under statute or common law
   (e) It facilitates the payment of a deposit which is refundable at the end of the term
7. **Remedies for Breach of Covenant to Repair:** This is determined by whether or not the tenant is in possession –
   (a) Where tenant is in possession
      i. Serve the tenant a notice to repair
      ii. Where there is a continuous default, an order for re-entry and forfeiture of the lease.
      iii. An action for specific performance
      iv. Action for damages
   (b) Where Tenant is no Longer in Possession
      i. Action for damage (to the tune of the amount needed for carrying out repairs)
      ii. Action for loss of rent.
   (c) Where the Landlord is in Breach: The Tenant may:
      i. Serve the Landlord a Notice to repair
      ii. Action for specific performance where landlord continues to default
      iii. Tenant may repair the property and claim or set off the cost from subsequent rent.
      iv. In Lagos, where a lessee with the previous consent of the lessor, makes improvements on the premises and the lessor later determines the lease, the lessee will be entitled to compensation for the improvements he made – ***Section 6(2) Lagos State Tenancy Law 2011***.

   Note: this however does not mean that the tenant can withhold payment of the rent or quit the premises - ***Demuren v. Plastic Manufacturing Ltd (Unreported)***: the tenant vacated before the end of the contractual term due to inability of landlord to carry out repairs up to satisfaction. The Court said this was wrong. The tenant cannot be justified to leave the premise before the end of the term in the lease on the grounds that the Landlord has failed to make repairs. (***Demuren's Case***). This practically means that the tenant should not ask for a refund of his rent where he leaves the property before expiration of term on grounds of the Landlord not repairing the property.
8. **Contents of Covenant to Repair:**
   (a) Who to undertake the repairs;
   (b) What is to be repaired; and
   (c) Whether written consent is required before the repairs

   Draft of Covenant to Repair

   The Lessee covenants to keep in tenantable repair all the inside fixtures, fittings and glasses on the demised premises and not to remove from it any of the furniture and effects, but to keep them in their present state of repair and condition (reasonable wear and tear excepted).
   Or
   The Lessee covenants to internally redecorate the demised premises including all additions to it and to deliver up the premises in the same condition at the determination of the lease.
9. **Alterations:** The obligation on repairs does not include improving the premises or making a new or different building. It requires that the lessee must keep the premises in

substantially the same condition as they were at the time of letting out the premises. Thus, the lease may contain a covenant that the lessee should not make any alterations on the premises. Alterations include additions or changes to the premises e.g. breaking of the walls, reworking the veranda, repainting etc.

The covenant may be absolute or qualified prohibition. It is absolute prohibition where the Lessor has the right to refuse consent without any reasons advanced for any request made by Lessee to alter the premises. It is qualified where the Lessee is entitled to make alterations with the written consent of the Lessor – ***Isiyaku v. Zwingina***.[143] Where consent is given, the lessee must carry out alterations within the confines of the consent given. In a short lease no alteration, while in a long lease alterations can be carried out with landlord's consent.

The covenant not to make alterations may be useful to:

(a) Safeguards the premises and LESSORS reversion

(b) Enhances lessee's use or enjoyment of the property.

In the case of breach: landlord is entitled to Forfeiture and damages to the extent of restoring the property to its original state.

Draft

The tenant covenants not to make any addition or alteration to the premises without the written consent of the Landlord, such consent not to be unreasonably withheld and to restore the property to its original position at the end of the term of the lease at his own expense.

E. Covenant to Insure

1. **Concept:** This is an undertaking to insure the demised premises by one of the parties to the lease or in the name of one or all of the parties. The obligation to insure depends on the person on whom the responsibility vested. In certain situations, statute imposes the responsibility to insure the premises on a particular party to the lease – ***LSDPC v. NLSE Ltd***.[144]
2. **Rationale**: Insurance of the demised premises is necessary in order to protect the reversionary interest of the Lessor. However, this does not automatically confer on the Lessor the duty to insure the premises.
3. **Contents of a Standard Insurance Covenant:** The insurance clause should cover the following:
   (a) Who is to insure
   (b) Risk to be insured
   (c) Amount of insurance cover
   (d) Application of the insurance money
   (e) The insurance company
4. **Draft:** "*The Lessee covenants to immediately insure the premises at all times during the term against loss or damage by fire in the sum of N10, 000,000 (ten million naira) in the NICON Insurance Co. Ltd (RC No 9999) insurance office, in the name of the Lessor (or in the joint names of the Lessor & Lessee), and that in case the premises is or any part of it is damaged or destroyed, then all moneys received in respect of the insurance shall be laid out in repairing or otherwise reinstating the premises in a good and substantial manner.*"
5. **Who is to insure**: the person in whose name the property is to be insured should be stated. Either the Lessor or Lessee may insure the demised premises. It depends on what the parties agree to do ultimately. The following is to be considered:
   (a) Existing Obligations on the Property e.g. where the lessor charges the property for

[143] (2001) FWLR (Pt. 72) 2096
[144] (1992) 5 NWLR (Pt. 244) 653

a loan and the bank requires him to insure the property (mortgage protection policy) or where the Lessor has an existing obligation to insure under a head lease.

(b) The Nature of the Property: where part of the property is held by the lessor, then he should insure the property to make sure a common policy covers the whole property. Where LESSEE occupies an exclusively detached flat, then the lessee should insure in his own name. He may however insure in the joint names of the Lessor and Lessee with the Lessor reserving the right to prescribe the nature of the risk to be insured against. In serviced apartments, tenant may be made to pay for insurance inclusive in his service charge where landlord insures the property in his own name.

(c) Other Provisions of the Lease: these may determine who insures the property. For example, the lease may provide that the Lessor shall charge for services rendered; in such a case, the insurance may be undertaken by the Lessor, who will subsequently recover the money spent for the insurance as part of the service charge. Similarly, where the use of the property is for business purpose which is highly risky, the Lessee should insure the property. In any event, whoever decides to insure, whether the Lessor or Lessee, there should be provided in the lease a clause that the other party has the right to call for the production of the policy for inspection and for the receipt of payment of premium.

6. **The Risk to be insured:** the parties should agree on what specific risk to insure against, for example fire. The type of risk itself may depend on the nature and use of the property. Where the insurance covenant merely requires the Lessee to insure with a particular insurance company without specifying the risk to be insured, this obligation is discharged if the Lessee insures as is usual from time to time with the insurer (i.e. keep the property insured with a reputable company at all times during the duration of the term and pay premium for the full value of the property) as in ***Upjohn v. Hitchins***.[145]
7. **Amount of Cover:** Amount should be full cost of reinstatement. Under insurance should be avoided - ***Bander Property Holding v. Darweji Ltd***. The full cost of reinstatement may be recommended by the experts and valuers. In the absence of any specific provision on the amount of the cover, the Lessor is not obliged to choose the cheapest insurance cover or company even where the Lessee reimburses the amount of the premium paid - ***Upjohn v. Hitchins***.[146] A solicitor should avoid use of the phrases such as "insure adequately" or "insure to the full value." This is because where the party insures with the amount recommended by an insurance office, it will not matter if the amount turns out to be too little and the full value of the property may be less than the cost of reinstatement.
8. **Application of Insurance Money:** how money will be collected from insurance and how the money will be applied and what will happen where reinstatement of the premises is impossible.

(a) Where Reinstatement is Possible

i. Generally, where the landlord insures, the tenant cannot compel the landlord to use insurance money to re-build the premises or to restrain the landlord from suing for rents until the premises are rebuilt - ***Leeds v. Cheetham***.

ii. However, where the tenant insures or reimburses the landlord, he can compel the landlord to use insurance money to reinstate the property - ***Munford Hotels Ltd v. Wheeler***;

iii. Where the tenant insures in his own name, in the absence of a provision in the lease asking that the tenant should reinstate, the landlord cannot compel the tenant to re-instate.

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[145] (1918) 2 KB, 48
[146] (1918) 2 KB, 48

(b) Where Reinstatement is Impossible: Provision should also be made in the lease where reinstatement is not possible (*Pro Rata*). In the absence of any Contrary provision, inference can be drawn from the terms of the lease and the insurance policy - ***Beacon Carpets Ltd v. Kirby*.**

(c) Statutory Intervention: ***Section 67 Insurance Act.***[147]

i. Any person entitled to or interested in the insurance property can apply to the insurance company for the insurance money to be used for the reinstatement of the property.
ii. Damage must be caused by FIRE
iii. No grounds of suspecting fraud or arson must exist on part of the insurer
iv. The application should be made BEFORE the payment of the Insurance money.

(d) Usefulness

i. Protects the property and the reversion
ii. In the event of loss, provides for reinstatement of the property
iii. Provides for the sharing formula where reinstatement is not possible.

9. Remedies for Breach of Covenant to Insure

(a) Damages against the person who ought to insure but failed to do so.
(b) Action for forfeiture if expressly provided for in the lease
(c) Application to court by a person interested in a destroyed property to use the insurance money to reinstate the damaged property (provisions of the Insurance Act)

F. Covenant against Assignment and Sub-Letting

1. General Rule: a tenant has the unrestricted right to assign his tenancy or to create subleases of such tenancy without the consent of the landlord in the absence of a provision to the contrary – ***Inuwada v. Bryne; Keeves v. Dean*.** However, the above is not applicable in Lagos. A tenant has been expressly prohibited under ***Section 7(6) Tenancy Law of Lagos State*** from assigning or sub-letting any part of the demised premises without the Landlord's consent, except where the agreement provides otherwise.

2. Exceptions: what is prohibited is express, deliberate, voluntary and wilful act of assignment, subletting and parting with possession and does not include the following things –

(a) Assignment by transmission or by operation of law; for example assent or bequest by Will of a property by the personal representatives of a deceased.
(b) Where a lessee retains the legal possession of the whole premises at all material times, but simply allows other persons to make use of the premises or grants a licence for the limited use of the premises – ***Ishola Williams v. Hammond Projects Ltd.***[148]
(c) Declaration of trust in favour of a third party.
(d) An equitable mortgage by mere deposit of title deeds.

3. Rationale: This covenant ensures that the Landlord is in control of tenants occupying the premises.

4. Types/Forms

(a) Absolute Bar/Prohibition: this occurs where there is a prohibition against subletting and assignment without specifying any circumstances under which subletting may take place. Where he applies to the lessor for permission to sublet, the Lessor can refuse without stating reasons for his refusal - ***Ishola Williams v. Hammond Projects.*** The implication is that the absolute bar is harsh on the tenant. However, this statement is limited as such the tenant can still charge his interest in the property. Thus, it is not

[147] Cap 117, LFN 2004 (As Amended) 2007
[148] (1988) 1 NSCC 342

a good clause. The tenant should negotiate with the Landlord for an amendment of the clause.

While drafting, it is advisable that all the acts prohibited (assign, sublet, charge or otherwise part with possession) must be covered in the covenant. For there to be a breach of this covenant, tenant must voluntarily transfer the legal interest in the property to the sub-tenant. No breach where transfer is due to Court order or where the tenant permits a licensee to use the premises - ***Ishola Williams v. Hammond Projects***.

Draft: *"The Lessee covenants not to assign, sublet or otherwise part with possession of the demised premises or any part of it."*

(b) Conditional/Qualified Prohibition: this arises where the tenant is not to assign, sublet, charge or part with possession of the premises or any part of it without the written consent of the Landlord. The implication is that it is not good enough as the test for granting or refusing consent is subjective and landlord is not bound to disclose why he does not allow the tenant to sublet etc.

Draft: *"The Lessee covenants not to sublet, assign or otherwise part with possession of the demised premises or any part of it without first obtaining the written consent of the Lessor."*

(c) Balanced/Ideal Clause: in this instance, the tenant is allowed to sublet or assign but with the consent of the landlord and such consent should not be unreasonably withheld where the sub-tenant is a responsible and respectable person - ***Ideal Films Renting Co v Nielson***.[149] The implication is that it is used to ensure a balance of the competing interests of the parties. Landlord can only refuse for reasons known to law and tenant must always get consent before subletting etc.

Draft: *"The Lessee covenants not to sublet, assign or otherwise part with possession of the demised premises or any part of it without first obtaining the written consent of the Lessor, such consent not to be unreasonably withheld in the case of responsible or respectable person."*

5. Grounds for Refusal: For refusal to be reasonable or not, the following is considered

(a) Personality of the intended sub-tenant (financial standing and relationship with previous landlords)

(b) The use or purpose for which the sub-tenant requires the premises e.g. turning residential premises into a disco or pepper soup joint or a restaurant or a brothel - ***Houlder Brothers & Co Ltd v. Gibbs***;[150] ***Coham v. Popular Resturant*****.** This does not mean the property cannot be used for a purpose not contemplated e.g. if subtenant initially intended to live in the place but eventually rented a bigger apartment, he can use the apartment for a surveyors' office.

(c) The Nature of the Property - ***Shanly v. Ward; Gov. of Bridgewell v. Faulkner & Rogers***.

The burden of proving that the reason of refusal is unsubstantial lies on the tenant - ***Holder Bros & Co. Ltd v. Cribbs***. It is unreasonable not to allow subletting because the subtenant is a particular tribe or that the person is a single lady etc. Tenant should always request for consent before assigning. He cannot assume that the landlord will give consent. Once consent is given, it shall not be withdrawn – ***Ideal Films Renting Co. v. Nielson; Alakija v. John Holt; Obasuyi v. Mandilas &Karaberis Ltd***.

6. Instances of Reasonable Refusal of Consent

(a) Where the sub-lessee would use the premises in breach of the user covenant in the

[149] 1 Ch 575 (1921) LT. vol. 129, 749
[150] (1925) Ch 198

head-lease.

(b) Where there has been serious and long-standing breaches of covenant on repairs and the landlord was not satisfied that the intended sub-lease would remedy them; and

(c) Where a lessee has been in breach of a covenant to keep a store opened.

7. Instances of Unreasonable Refusal of Consent

(a) Where there has not been a breach of the covenant on use and the intended lessee is not likely to cause such breach;

(b) Where there has been a continuing, although insubstantial breaches of a covenant on repairs; and

(c) Where the reference received on the proposed assignee is said to be unsatisfactory.

8. Usefulness

(a) Helps guide against nuisance to neighbours

(b) Prevents subletting/assigning of property to persons who would use it for illegal or immoral purposes

(c) Helps to protect the lessor's reversionary interest

(d) Enables the lessee recoup part of his expenses or money expended on the property.

9. Remedies for Breach of Covenant against Assignment and Subletting

(a) Remedies Available to the Tenant

i. Tenant can seek declaration that the reason for refusal is unreasonable.

ii. Tenant may compel the Landlord to give his consent in an action for specific performance.

iii. Tenant may ignore the Landlord and sub-let and apply for an order of injunction restraining the Landlord from harassing the sub-tenant.

iv. Tenant may ask for damages – ***Ideal Film Renting Co. Ltd. v. Nielson***.[151]

(b) Remedies Available to the Landlord

i. The Landlord may seek court order for re-entry and forfeiture of the lease.

ii. Landlord may claim damages

NB – the Landlord cannot resort to self-help where the tenant breach covenant not to sub-let - ***Akpina v. Balogun***;[152] ***Ojukwu v. Governor Lagos State***.

PROVISOS IN A LEASE

I. Option to Renew/Covenant for Renewal of a Lease

A. Concept

This is a lessor's covenant made to the lessee that at the expiration of the lease and a new lease will be created for similar or reviewed terms, rents and covenants (as agreed upon by both parties based on certain conditions e.g. tenant complied with covenants in the lease). Where it is provided in a lease, it may be enforced against the lessor i.e. an automatic right on the tenant. But the clause must be clearly stated without any ambiguity. In ***Ita v Khawam***,[153] the tenant complied with all the covenants except that he asked for a review of the rent and the Court held that the tenant made a new offer.

This term/covenant gives the Lessee/tenant the option to express his interest in taking out the demised premises for another term of years as lease/Tenancy by notifying the Lessor/Landlord on time on such terms as may be agreed by the parties. NB - This option is registrable as estate contract in PCL and RTL states.

Where tenant does not exercise his option to renew, the option becomes a mere interest. The option to renew must be totally accepted by the tenant, if not the option to renew is terminated (tenant cannot vary it in any way).

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[151] (1921) 1 Ch. 575

[152] (1993) (Unreported) CCHCJ 84

[153] (1975) 1 WSCA 158

B. Contents of the Option to Renew Clause

1. Time within which the application is to be made (3 months or six months)
2. Manner of the exercise (notice usually in writing)
3. Condition precedent to be fulfilled before exercise of the option (lessee to have paid rent, keeping the house in a good state of repairs and performed all his covenants in the lease). Prevents a defaulting tenant to continue defaulting by exercising this option.
4. The terms of the new lease must be clearly stated - ***Ita v. Khawam***. In ***Agike v Ayosejo***, the option to renew was held void for uncertainty (an option to renew for a period agreed by the parties).

C. Usefulness

1. Helps to secure lessee's interest in the property at the end of the subsisting lease
2. Helps lessees recoup part of his expenses or maximise his use of the improvements in respect of the property.
3. Prevents the drafting of a new deed of lease or tenancy agreement.

D. Point Solicitor Should Note (Perpetually Renewable Lease)

The Solicitor should be careful when drafting the covenant to ensure that no perpetually renewable lease is created. In ***Re Hopkins Lease***, a perpetually renewable lease has not excluded the option to renew and it has made the rent payable under the new term to be at the previous rate.

E. Drafts

Example of perpetually renewable lease –

> *"The Lessor shall on the written request of the lessee made at least three months before the expiration of the current term, grant to the lessee the lease of the demised premises for another term of five years from the expiration of the current term on the same terms and conditions as this present lease."*

The solicitor can avoid a perpetually renewable lease by stating that the terms of the new lease are created by reason of the option to renew and expressly excluding the option to renew in the subsisting lease agreement. For instance:

> *"The Lessor/Landlord shall on the written request of the lessee/tenant made three (3) months before the expiration of the term hereby created, grant to the lessee/tenant the Lease of the demised premises for another term of three (3) years at a rent to be agreed and containing all the terms and conditions of this Lease/Agreement except the option to renew and the rent clause'.*
>
> Or
>
> *"The Lessor shall on the written request of the Lessee made at least three months before the expiration of the current term, grant to the Lessee the lease of the demised premises for another term of five years from the expiration of the current term on the same terms and conditions as the present lease, except rent and this option to renew; Provided, however, that Lessee shall have materially observed all its obligations under the present lease."*

II. Option to Purchase Reversion

This is Assignable - ***Re Buttons Lease***. The tenant may enforce option by action for specific performance and may even sue to set aside the sale of the property to another person - ***Owosho v. Dada***. An offer by the landlord to the tenant for the sale of the premises on fulfilment of certain conditions (payment of rent and compliance with other covenants). Tenant acquires equitable interest in the property once the option to purchase reversion has been agreed upon by the parties. Landlord cannot unilaterally sell the premises to a third party.

III. Covenant to Deliver Possession at the Expiration of Term Granted

A tenant cannot be regarded as having delivered up possession if he vacates the premises but retains the keys of the property thereby preventing entry of land lord - ***Asorope v. Orelaja*****.** Where tenant does not do so, the landlord can issue a statutory notice.

IV. Proviso for Forfeiture and Re-Entry

A. Concept

This may lead to the suspension or termination of the lease for non-payment of rent or non-observance of covenants of the lease. It operates to bring a lease to an end earlier than it would otherwise terminate. The law presumes against forfeiture of leases except where the clause is expressly stated.

The Lessor is required to strictly prove the breach of covenants by the lessee in an action for forfeiture. In Lagos State, the right to forfeiture and re-entry leases is implied - ***Section 12 Lagos Tenancy Law, 2011***. If the proviso for forfeiture and re-entry is not stated in the Lease/Tenancy agreement, the Lessor/Landlord must go to court.

Note that if the lessee/tenant pays rent in an attempt by the Lessor/landlord to forfeiture, the action of forfeiting the premises shall lapse - ***Section 14(10) CA*** and ***Section 161(10) PCL***.

B. Enforcement in Event of Waiver of Forfeiture

Where the lessor has waived his right to forfeiture, covenants in lease, he cannot be allowed to exercise the right for forfeiture. The lessor may enforce the clause in two ways:

1. By peaceable re-entry e.g. changing the locks or granting the lease to someone else
2. By action for possession.

C. Draft

> *PROVIDED ALWAYS that if the tenant commits a breach of covenants or conditions in the lease or becomes bankrupt, it shall be lawful for the lessor to re-enter the premise and immediately the term shall absolutely cease and determine.*

V. Abatement of Rent

A. Concept

Abatement must be provided for because generally, frustration is inapplicable in leases. At Common Law, if rent was paid over a premises and the premises is destroyed or anything prevents its use, the rent will run till it expires and the tenancy will be exhausted even if the tenant could not use the premises.

B. Rationale

This is to prevent rent paid from running in such cases where the property is destroyed e.g. by an act of God like storm, earthquake etc. or the premises unable to be put to use.

C. Draft

> *"The Lessor covenants with the Lessee that the rent shall not continue to run in a case of an act of God where the demised premise is destroyed or anything happens preventing the use of the premises."*

DETERMINATION OF A LEASE OR TENANCY

I. Modes of Determination

1. **Effluxion of Time –** A lease or tenancy for a fixed period is automatically determined at the end of the period. The determination may also be the happening of some events.
2. **Merger –** This is where the tenant or third party retains the lease and acquires the reversion before expiration of the lease. For a merger to be operative, the person in whom the merger is vested must have acquired both the lease and the reversion in the same capacity except where he holds the reversion as an executor **-** ***Chambers v. Kingham*****.**
3. **Notice to Quit –** statutory notices given in respect of statutory tenancies. Mode and length of notice is specified in the relevant laws. However, parties can exclude the application of this law in relation to length of notice.

4. **Surrender** - The lessee gives up his term of years to merge with the lessor's reversion. Surrender can be express (voluntary) or by operation of law - ***Allen v. Roachdale.***
5. **Disclaimer -** where a lessee sets up an adverse claim to the ownership of the property or claims direct ownership, the lessor is entitled to determine the lease.
6. **Frustration -** Party cannot perform the contract due to unexpected events e.g. act of God, government policy (land acquired by government for overriding public purposes). If frustrated, the contract is discharged. This is subject to the determination of the court in relation to the circumstances of the case - ***Araka v. Monier Construction Nig Ltd*** (lease held frustrated by civil war); ***National Carriers Ltd v. Panalpina***.[154] Where the property is destroyed and the Lessee remains in possession, he cannot plead frustration - ***Odusanya v. Oniororo***.
7. **Forfeiture –** The landlord may become entitled to re-take the premises before the expiration of the tenancy, where there is a breach of covenant to pay rent or any other covenant by the tenant.
   (a) Forfeiture and Re-entry for Non Payment of Rent: The applicable laws are Common Law and Common Law Procedure Act 1852 – ***Section 14(8) CA & Section 161(10) PCL***. The conditions are:
      i. Express provision in the lease document
      ii. Rent must be reserved
      iii. Landlord must make a formal demand and tenant remains in default

      The landlord may exclude the requirement for formal demand as follows:
      "*The landlord may forfeit and re-enter the premises where the rent reserved is in arrears for 21 days whether or not formally demanded.*"

   (b) Forfeiture and Re-Entry for Breach of Any Other Covenant: The applicable laws are ***Section 14(1) CA 1881*** and ***Section 160 & 161 PCL***. The landlord must serve a statutory notice, which must contain the following:
      i. Nature of the breach committed by the tenant
      ii. A request that the tenant should remedy the breach
      iii. Allow a reasonable time for tenant to remedy the breach - ***Ishola Willaims v. Hammond Projects***.

   (c) Conditions for Tenants Right to Relief Against Forfeiture and Re-Entry
      i. He must be willing to pay and remedy the breach complained of
      ii. He is willing to pay the landlord's cost of bringing the action
      iii. It is just and equitable to grant him relief.

II. Procedure for Determination of a Lease or Tenancy

1. **Letter of Authorisation from Landlord:** If an agent is to act for the Lessor/Landlord, give him a letter of authorisation to act.
2. **Service of Notice to Quit on Tenant:** The Lessor/Landlord or his agent is to serve a Notice to quit on the Lessee/tenant - Form TL2 or TL3 of the Tenancy Law of Lagos 2011 and Form A/B or C/D of the Recovery of Premises Act applicable in Abuja.
3. **Service of Notice of Owner's Intention to apply to Court to Recover Possession:** If the lessee/tenant still retained the premises, serve Notice of Owner's Intention to apply to Court to recover possession, which will last for 7 clear days (also called the 7 days' notice). See Form TL4 of the Tenancy Law of Lagos 2011 and Form E of the Recovery of Premises Act applicable in Abuja.
4. **Taking out a Plaint or Claim or Writ:** Take out a Plaint (Abuja) or Claim (Lagos) or Writ (High Court) in Court if the tenant is still in possession of the premises. FORM TL6A or TL6B of the Tenancy Law of Lagos 2011 and Form F of the Recovery of Premises Act

[154] (1981) (HOL)

applicable in Abuja.

PARTICULARS OF INSTRUCTION/INFORMATION NEEDED TO PREPARE A LEASE

1. Particulars of the parties, such as: name, address, occupation
2. Commencement date
3. The property being demised, its detailed description and whether only parts of the premises are being demised
4. Duration of the lease
5. Rent payable and method of payment; whether in advance or arrears
6. Covenants to be performed by the Lessee/Sub-Lessee
7. Covenants to be performed by the lessor/Sub-Lessor
8. Instructions on rent review (if desired), renewal of the lease, forfeiture and re-entry
9. Witnesses to attest the agreement

FORMAL PARTS OF LEASE

1. **Commencement:** *THIS LEASE* or *THIS DEED OF LEASE*. Where it is a simple tenancy, it is commended thus *THIS TENANCY AGREEMENT* or *THIS AGREEMENT*.
2. **Date:** *Made this 24th Day of March, 2019*. The date is the day the lease is made. Where it is by deed, the important date is the date of delivery of the lease. In tenancy agreement, the important date is the date of execution.
3. **Parties**
   - **(a) Individuals:** *BETWEEN Killi Nancwat, a lawyer, of No. 35 Abacha Street, Agbani, Enugu State the lessor/landlord of the first part AND Joel Adamu, a banker, of No. 57 Aliyu Kama Road, Kaduna, Kaduna State, the lessee or tenant of the second part.*
   - **(b) Company:** *Killi & Sons Limited, a company registered under CAMA with RC No: 75840 and registered office at No 34 Ikoyi Estate, Jos, Plateau State (the lessor) of one part or (the lessee) of the other part.*
   - **(c) Attorney:** *BETWEEN Mrs. Aduke Thomas of No. 45 Isheri Street Ikeja Lagos (through her true and Lawful Attorney Killi Nancwat of 10 Base Road Ikeja Lagos) (The Assignor) on the one part*
4. **Recitals:** This is not an essential part of a lease except
   (a) A sub-lease
   (b) Surety or guarantor
   (c) There is a Power of Attorney
5. **Testatum**: *WHEREBY the lessor agrees to demise to the lessee* or *WHEREBY/BY WHICH the Landlord gives and the Tenant takes*. The Lessor demises to the Lessee. The testatum contains the operative words and parcel clause. The operative words show what the parties have agreed to do. The parcel clause describes the subject matter of the lease.
6. **Parcel Clause:** *ALL THAT property (describe the property)*
7. **Habendum:** *TO HOLD UNTO the lessee for the terms of 10 years commencing on the 1st March, 2019 and ending on the 28th February, 2029.* Note that the phrase "commencing on" includes the date named in computation while "commencing from excludes the named date." The habendum specifies the quantity, commencement of the term of a lease.
8. **Reddendum:** *YIELDING AND PAYING yearly during the term the rent of N20, 000 clear of all deductions by yearly payments in advance, the first of such payment to be made on the 24th day of March, 2019*. The reddendum defines the amount of rent payable by the lessee, the person to whom the rent is payable; as well as mode of payment usually in advance. Generally, rent is payable in arrears. Thus, it must be clearly stated if it is intended to be payable in advance.
9. **Covenants:** (Treated above)

10. **Provisos:** *'Provide That*"
11. **Testimonium:** *IN WITNESS OF WHICH the parties have executed this lease in the manner below the day and year first above written*. This clause connects the parties with the agreement
12. **Schedule:** It should be inserted where necessary. It serves the following functions -
    (a) To describe the property in details.
    (b) The parts of the property to be repaired by each party
    (c) Rent review formula
13. **Execution**
    (a) Individuals: *SIGNED, SEALED AND DELIVERED by the within named lessor or lessee*. This provides for the signature, mark or seal of the parties to the lease. In Tenancy Agreement - *SIGNED by landlord or tenant.*
    (b) Company: *The COMMON SEAL of Killi Nigeria Ltd is affixed to this lease and the lease duly delivered in the presence of DIRECTOR and SECRETARY*.
    (c) Illiterate or Foreigner (that does not understand English): *SIGNED, SEALED AND DELIVERED by the within named lessor, the contents having been first read and interpreted to him in Igbo Language by me (name of interpreter and address) when he appeared perfectly to understand it before Affixing his thumb print, mark/signature.* For blind say read aloud; For deaf and dumb add "*the contents of this lease having been first been read over to him by sign language by_____a sign language instructor when he appeared to perfectly understand it before affixed his thumb print/mark).*"
    (d) Attorney: *SIGNED, SEALED AND DELIVERED by The lawful attorney of the lessor by virtue of a power of attorney dated _____and registered as No_____ page ____Vol_____of the (State) Land Registry.*
14. **Attestation:** This contains the witnesses to the lease and their signature.
    IN THE PRESENCE OF:
    Name
    Address:
    Occupation
    Signature

PERFECTION OF A LEASE

1. Obtain the Governor's consent, which is endorsed on the Deed of sub Lease. This is not needed for a tenancy agreement or a normal lease.
2. Stamp the Deed of Lease at ad valorem rate
3. Registration at the Lands Registry of the State where the Land is situate

EXPRESSIONS RELATING TO TIME

1. **On** - plus the date mentioned; start counting from the day mentioned.
2. **From -** minus mentioned date; exclude the mentioned date.
3. **After -** Exclude the day mentioned
4. **Till and Until -** not clear if mention date should be included or excluded
5. **As soon as possible/within a reasonable time:** these expressions should be avoided, and once a quit notice is badly drafted, it is void for defective computation of time.

NB: In computation, one does not have half of a day, the day starts from 12am

ETHICAL ISSUES

1. Failure to reflect instructions given - ***Rule 14 RPC*** (dedication and devotion)
2. Duty to show competence when drafting the lease agreement - ***Rule 16 RPC***.
3. The document should correctly and fully reflect the wishes of the party with special reference to the covenants.
4. Duty not to mix the rent paid the client with solicitor's money or not spend such fund belonging to the client - ***Rule 23(2) RPC***.
5. Duty not to frank a document not prepared by the Solicitor - ***Rule 3(2) RPC*** and ***Section 10 LPA***.
6. Duty not to aid a non-lawyer in the unauthorised practice of law - ***Rule 3(1) (a) RPC***.

SAMPLE DRAFTS

Deed of Sub-Lease (Illiterate and Company)

THIS DEED OF SUB-LEASE made this 24th day of March, 2019
BETWEEN Mrs. Aduke Thomas of 15 Ojota Road Yaba Lagos State (The Sub-Lessor) of the first part
AND Pages and Print Limited, a company duly incorporated under the Companies and Allied Matters Act 2004 with its registered office address at No. 56 Igala Street Ikoyi Lagos State (The Sub-lessee) of the second part.

RECITALS

1. The sub-lessor is the lessee of the property owned by Killi Nancwat, the beneficial owner of a Duplex with Boys Quarters situate at No. 8 Ajagun Estate, Nyanya Abuja, by virtue of a Deed of assignment dated 21st June 2005 registered as No. 4051 pages 50 in volume 1350 at the Lands registry of Plateau State.
2. The sub-lessor has the consent of the lessor/owner to enter into the transaction
3. The sub Lessor desires to lease the property to the Lessee for a term of five years.

Or……..

If it is pursuant to a certificate of occupancy

1. The sub-lessor is the beneficial owner of the property a Duplex with Boys Quarters situate at No. 8 Ajagun Estate, Nyanya Abuja, by virtue of a certificate of occupancy dated 21st June 2005 registered as No. 4051 pages 50 in volume 1350 with the Abuja Geographic Information systems.
2. The consent of the minister of FCT has been obtained
3. The sub Lessor desires to lease the property to the Lessee for a term of five years.

NOW THIS SUB-LEASE WITNESSES AS FOLLOWS:

1. In CONSIDERATION of the rent and covenants reserved in this Deed, the Sub-Lessor AS BENEFICIAL OWNER demises to the Sub-Lessee ALL THAT Duplex with Boys Quarters situate at No. 8 Ajagun Estate, Nyanya Abuja covered by a certificate of Statutory Occupancy registered as 45/45/2345 and rightly described in the survey plan attached to the 1st Schedule referred to as 'The demised Premises'.
2. TO HOLD UNTO the Sub-Lessee for a term of ten (10) years commencing on the 1st day of April 2019 and to expire on the 31st day of March 2029, subject to any proviso for determination contained in this Sub-Lease.
3. PAYING the sum of three million naira only per annum (N3, 000, 000.00) (the receipt of which the Sub-Lessor hereby acknowledges) as rent for the term granted, payable in advance the first of such payment to be made on the 2nd day of April 2019.

(The covenants are to be here as part of the miscellaneous part of this sub-lease)
PROVIDED ALWAYS THAT in breach of any of the covenants contained in this Deed by the Sub-lessee, the Sub-Lessor may forfeit the sub-lease by re-entering the premises or any part of it and the term granted in this Deed shall come to an end immediately.

OPTION TO RENEW:
The Sub-Lessor shall on the written request of the Sub-Lessee made three (3) months before the expiration of the term hereby created, grant to the Sub-Lessee the sublease of the demised premises for another term of three (3) years at a rent to be agreed and containing all the terms and conditions of this Deed except the option to renew and the rent clause.
IN WITNESS OF WHICH the parties have executed this sublease in the manner below the day and year first above written.

1st Schedule

SIGNED, SEALED AND DELIVERED
By the Sub-Lessor
…….
Mrs. Aduke Thomas
The contents of the foregoing having been first read and explained to her from English Language to Yoruba Language by me Felicia Olutope of No. 23 Abiola Street, Wuse II, Abuja when she appeared perfectly to have understood same before making her thumb impression above.

BEFORE ME
…….
MAGISTRATE/NOTARY PUBLIC/COMMISSIONER OF OATHS

The common seal of the Sub-Lessee is affixed on this Deed the 24th day of March, 2019 and duly delivered in the presence of:

…….. ……
Director Secretary

I CONSENT TO THIS SUB-LEASE
DATED THE 30TH DAY OF MARCH 2019
EXECUTIVE MINISTER OF THE FCT

Tenancy Agreement

THIS TENANCY AGREEMENT made the 24th Day of March, 2019.
BETWEEN
MR. KILLI NANCWAT of No. 4 Olusegun Crescent, Wuse II Abuja (Landlord) of the one part
AND
MR. JOEL ADAMU of No. 16 Latifa Close Garki, Abuja (Tenant) of the other part.

IT IS AGREED AS FOLLOWS:
The landlord demises to the tenant ALL THAT premises together with the Boys Quarters and known as No. 8 Ajagun Estate, Nyanya Abuja, TO HOLD the same to the tenant on the 1st day of April 2019 for the term of two years to end on 31st January 2019.

PAYING the yearly rent of N1, 000,000 (One Million Naira only) clearly of all deductions by yearly payment in Advance; the first of such payment to be made on 2nd Day of April, 2019.

The rent is subject to review in accordance with the provisions contained in the Schedule to this lease.

THE TENANT COVENANTS WITH THE LANDLORD AS FOLLOWS:

1. To pay rent reserved in the lease on the day mentioned.
2. Pay all rates, taxes, assessment, charges and outgoings or as may be imposed later whether payable by Landlord or not.
3. Not to assign, sublet, or otherwise part with possession the property or any part without the consent of the Landlord in writing first had and obtained such consent not to be unreasonably withheld for a respectable and responsible person.
4. Not to make any alteration to the property except for installation of A-C and Burglary proof without the consent of the Lessor and to restore the property to its original position at the end.
5. To keep the premises in a good state of repairs, fair wear and tear excepted and to deliver up possession of the property at the end of the lease term.
6. To use the property for residential purposes only.

THE LANDLORD COVENANTS WITH THE TENANT AS FOLLOWS:

1. The Lessee shall have a quiet possession of the property free from interference by the landlord or his agents.
2. To insure the property against fire with NICON Insurance Co. Ltd (RC NO 9999) to the tune of N10, 000,000 (ten million naira) to be paid by the tenant and in the event of the property being damaged, all money received in respect of the insurance shall be used to reinstate the property. If reinstatement is not possible, the sum will be shared PRO RATA between the parties.
3. Upon the Lessee paying the rent and observing all the terms and covenant in the Lease upon 3 months before the expiration of the tenancy the Landlord shall (may) grant him a further term of two years at a rent and terms to be agreed by the parties.
4. The Lessor covenants with the Lessee that the rent shall not continue to run in a case of an act of God where the demised premise is destroyed or anything happens preventing the use of the premises.

PROVIDED ALWAYS that if the rent reserved or any part of it shall be unpaid for twenty eight (28) days after becoming payable and demand made for it or if the lessee commits a breach of the covenants in the Lease or the Lessee become bankrupt, it shall be lawful for the Lessor to re-enter the premises and immediately the term shall absolutely cease and determine.

IN WITNESS OF WHICH the parties have executed this agreement in the manner below the day and year first above written.

SIGNED
By the within named landlord
……
Mr. Killi Nancwat

IN THE PRESENCE OF:
Name:
Address:
Occupation:
Signature:

SIGNED by the within named tenant
……..

Mr. Paul Ikenna

IN THE PRESENCE OF:
Name:
Address:
Occupation:
Signature:

NB: Ensure to learn execution clause for family land, illiterate, blind, attorney (where there is a power of attorney), company

(Week 11)

MORTGAGES & CHARGES I

INTRODUCTION

I. Meaning/Definition

A Mortgage is a legal relationship or security transaction by which rights in land are transferred to secure payment of money or the discharge of some other obligations subject to redemption upon repayment of the loan or discharge of the obligation – ***Suberu v. AISL Ltd***;[155] ***Santley v. Wilde***. It is an agreement which may be expressed by deed between persons in which a borrower of a sum of money puts up his property as collateral for the money given with the understanding that the property will be conveyed back to him upon the repayment of the money and any interest on it. Mortgage is a security created by contract for the payment of a debt already due or to become due - ***Olowu v. Millers Bros Limited***.

II. Applicable Laws to Mortgage Transaction

1. Land Use Act,
2. Constitution of the Federal Republic of Nigeria 1999 (as amended)
3. Mortgage Institution Act
4. Legal Practitioners Act 2004
5. Stamp Duties Act
6. Rules of Professional Conduct for Legal Practitioners 2007
7. Land Instrument Registration Law
8. Land Instrument Preparation Law
9. Companies and Allied Matters Act 2004, Section 197
10. Registration of Titles Law
11. Property and Conveyancing Act
12. Law Reform Contract Law
13. Federal Mortgage Bank of Nigeria Act
14. Illiterate Protection Law (where applicable)
15. Conveyancing Act
16. Property and Conveyancing Law
17. Mortgage and Property Law of Lagos State 2010

III. Features of a Mortgage

1. It is a conveyance of an interest in land to a lender of money
2. The land is held only as security or collateral to ensure repayment of the money loaned.
3. The property is re-conveyed back to its owner when the money loaned is repaid.
4. In the event of failure to repay the money advanced, the lender of the money has the right to sell the land to realise the money advanced.
5. An essential feature of mortgage, both legal and equitable is that once a mortgage, always a mortgage and nothing but a mortgage - ***Yaro v. Arewa Construction Ltd*.**

IV. Other Types of Security (Apart From Land)

1. Debenture
2. Insurance securities
3. Guarantees
4. Stock and shares
5. Charge over fixed deposit account
6. Trust receipts
7. Bill of sale

[155] (2007) 10 NWLR (Pt 1043) 590

8. Letter of set-off
9. Trust deed, etc.

V. Reasons for the Preference of Land as against Other Properties as Security for a Loan

The reasons for this preference are not far-fetched.

1. Landed properties are more stable.
2. The value of land appreciates more than the others, particularly in times of inflation.
3. Land is immovable and we can go to the land and inspect it physically.
4. It is easier for banks and other mortgagees to enforce their security in the case of landed properties than other properties.

VI. Parties to a Mortgage

1. **Mortgagor/Borrower** (Must have a statutory right of occupancy): This is the person borrowing the loan and advancing the security, usually property.
2. **Mortgagee/Lender:** This is the party advancing the loan (usually bank)
3. **Guarantor/Surety (Tripartite Mortgage):** this party comes into consideration in a tripartite mortgage. The essence of a guarantor comes into play where the mortgaged property belongs to a third party or where a third party guarantees the repayment of the loan by the mortgagee. The third party should become a party i.e. a guarantor or surety. Thus, there is a mortgagor, mortgagee and guarantor who puts in his property as security for the loan in a tripartite mortgage. In a case of a head lessor and lessee, a lessee can mortgage his leasehold interest subject to the agreement in the head lease e.g. stating that the head lessor must be involved in the mortgage agreement.

   A situation where a mortgagee can insist that there should be a guarantor to the mortgage is where the collateral is not up to 70% of the value of the loan given to the mortgagor. Where it is a commercial bank, if the mortgagor is not a customer of the bank, the bank would require him to produce a person who is the bank's customer (of certain financial status) to guarantee the loan to the mortgagor. The mortgagee usually insists that the guarantor deposits his title deeds with the mortgagee so that upon default to pay the loan by the mortgagor, the mortgagee (or Bank) can exercise its powers/rights over the guarantor's property.

VII. Contract Subject To Mortgage

A. Concept

A contract of sale of land entered into in expectation of some loan should be made conditional upon your client (purchaser/borrower) obtaining the loan. The contract should also provide that in the event that the loan is not obtained, the vendor shall return the deposit paid by the purchaser; this is what is referred to as contract subject to a mortgage.

B. Conditions for the Validity of the Subject to Mortgage Clause in a Contract of Sale of Land

1. It must state the source and amount of the loan.
2. The terms of payment; and
3. The interest paid on the loan.

Here is a model subject to mortgage clause in a contract of sale of land:

"This contract of sale is conditional on the purchaser obtaining a mortgage loan from BETTER BANK LTD in the sum of N5, 000,000 (five million naira) with interest payable at the rate of 12 % PROVIDED THAT where the loan is not obtained on completion, this contract of sale shall be void and the purchaser shall be entitled to the return of the deposit paid."

VIII. Capacity and Mortgage Transaction

The following cannot be involved in a mortgage transaction:

1. Infant
2. Company in liquidation

3. Unsound mind
4. Un-discharged bankrupt

IX. Forms of Mortgage

Mortgage transaction can be in the following forms:

1. **Dual Mortgage:** mortgage transaction entered into between two parties, the mortgagor and mortgagee.
2. **Tripartite Mortgage:** mortgage transaction entered into between three parties, the mortgagor, mortgagee and guarantor, who is the owner of the property. A tripartite mortgage can be in the following order:
   (a) Owner of Property Guarantor – Mortgagor – Mortgagee
   (b) Bank-Customer Guarantor – Mortgagor – Mortgagee
   (c) Lessor Guarantor – Mortgagor – Mortgagee
   (d) Parent Company Guarantor – Mortgagor – Mortgagee

MORTGAGE AND SIMILAR TRANSACTIONS

I. Assignment

In assignment, there is a transfer of the totality of interest of a person in property while in a mortgage; title is transferred subject to redemption upon payment of the loan.

II. Lien

A lien is a claim or qualified right of a creditor over the property of a debtor, which serves as security for the debt. It is the right to retain possession of a property of another until a debt is paid - ***Afro Tech Services Ltd. v. Mia & Sons Ltd***.

1. The holder of a lien does not have the right to sell the property unlike in mortgage, where the mortgagee has a right of sale.
2. A lien may be created over other properties and not necessarily on real property as in mortgages. Although on fewer occasions, mortgages may also be created on stocks and other equities of a borrower.
3. In a lien, the right is extinguished if the creditor parts with possession to the debtor or his agent.
4. A lien is a means of coercing the debtor to pay the money advanced to him, while mortgaged property serves as security against payment not being made.

III. Pledge

Pledge is a deposit of some personal property to a creditor as a security for some debt or performance of some act.

1. The pledgor only has a possessory right over the property while the mortgagee acquires ownership (proprietory security) in the property while the borrower retains possession. In ***Adetono v. Zenith International Bank Plc***, the court distinguished a mortgage from a pledge thus: "…by mortgage the title is transferred. By a pledge, possession is transferred…"
2. In a pledge, pledgor retains general title and parts with possession, while in a mortgage, the mortgagor transfer general title and retains possession.
3. In a pledge, only possessory security is transferred, while in a mortgage, proprietary security is transferred.

IV. Charges

Charge is also like a mortgage but it involves the appropriation of property without transfer of interest.

In mortgagees there is conveyance of interest while in charges, there is no conveyance of interest, rather the charge only has some rights over the property which serves as security for the money advanced by him. He can for example sell the property to recover his principal and interest.

V. Sale

This is the transfer or alienation of the total interest of a person in a property. Unlike a mortgage where a right to redeem exist, in the sale of interest in land, the vendor conveys his interest with the intention that the interest is acquired by the purchaser as the absolute owner in the estate for a consideration paid by the purchaser of the estate to the vendor.

MORTGAGE INSTITUTIONS IN NIGERIA

These are largely regulated by the provisions of the Mortgage Institutions Act Cap M19 LFN 2004. The object of the Act is to make provisions for establishment and licensing of mortgage institutions to grant loans and advance to individuals for the purchase or construction of a dwelling house; improvement or extension of an existing dwelling house, and to accept savings and deposits from members of the public and pay interest on the deposit.

1. Federal Mortgage Bank
2. Housing Corporations like Federal Housing Authority
3. Housing schemes
4. Commercial banks
5. Private property developers – ensure they have the right title to the land
6. Life endowment policies
7. Insurance Companies
8. Lagos State Mortgage Board
9. Finance Banks/Houses

I. Federal Mortgage Bank

A. Concept

This Bank (FMBN) is established pursuant to the ***Federal Mortgage Bank of Nigeria Act Cap E16 LFN 2004***. This is the apex mortgage institution in Nigeria. It grants loan for the purchase or construction of houses or for the improvement or extension of existing ones. Its loans are usually granted to mortgage institutions and individuals - ***FMBN v. Olloh*****.** It is a Federal

B. Advantages of FMB as Source of Lending

Government agency and should be a preferred mortgage institution for the following reasons:

1. The credit facility granted is long term (up to 25 to 30 years repayment)
2. Provides up to 66% of the consideration
3. The interest rate is very low, as low as 6%
4. Has branches across the federation and easily accessible to many Nigerians. But this exists, to a large extent, in theory
5. Enjoys government support

C. Mandate of the FMB

The mandate of the bank may be broadly stated as follows:

1. Providing financial assistance in the form of long-term facilities to Nigerian individuals desiring to acquire houses of their own - ***FMBN v. Olloh***
2. Granting of long-term loan credit facilities to mortgage institutions with a view to enabling those institutions to grant comparable facilities to Nigerian individuals - ***FMBN v. Olloh***.
3. Linking the capital market with the housing market
4. Encouraging the emergence and promoting the growth of viable primary mortgage loan institutions, to serve the needs for housing delivery in Nigeria.
5. Mobilising domestic and foreign funds into the housing sector in Nigeria
6. Collecting and administering the National Housing Fund in accordance with the National Housing Fund Act.

II. Housing Corporations

A. Concept

The most prominent of these statutory corporations is the Federal Housing Authority

established by the ***Federal Housing Authority Act*, *Cap, LFN 2004***, which was set up primarily to execute the National Housing Programme.

At the State level, we have the State Property Development Corporation. In Lagos State, it is called Lagos State Development & Property Corporation (LSDPC) and in Kogi it is the Kogi State Investment and Property Ltd. In most other states, it is called the State Housing Corporation. They provide funds for building and sometimes they build houses and sell to the public through mortgage.

B. Advantages of this source of Mortgage Finance

1. There is security of title in respect of property purchased from any of these corporations as there is no problem of demolition.
2. Funds from the corporation attract low rate of interest.
3. They are built on State land with their Certificate of Occupancy ready for collection; C of O is automatic and immediate.

C. Disadvantages

1. Prices are beyond the reach of ordinary Nigerians.
2. There is scarcity of funds, particularly for housing projects.

III. Housing Schemes

A. Concept

This is employers' scheme for the benefit of employees, to enable them (employees) acquire their own houses. The practice is that the employee is required to deposit the title document with the employer until the loan is liquidated. The loan is liquidated after a long term deductions from the employees' emoluments, or to be deducted in the future. The arrangement may also involve banks advancing facilities to employers to be given to their employee over a period of time.

B. Advantages

1. Interest rate is low.
2. It is on a long-term repayment plan. In other words, affordable deductions are made from the employee's remunerations for several years.

C. Disadvantages

1. The scheme is no longer popular because of lack of funds.
2. Many workers cannot afford it.

IV. Commercial Banks

A. Concept

Commercial banks are in the business of providing credit facilities for financing projects, including housing. Any person may approach a commercial bank for loan for businesses. The bank requires some real property as security before it advances the money to the borrower and the title deeds to the property are deposited with the bank. Commercial banks have advantages of being located in many parts of the country. Usually, the customer would have to pay 20%-40% of the cost of the property while the bank provides the balance. Period of repayment is between 5 and 10 years, depending on the bank, and interest rate is as high as 21%.

Therefore, this is not the best option for loan to build or purchase houses; the interest rate is very high and customers are often unable to provide the kind of collateral demanded by the banks.

B. Disadvantages

1. Interest rate is usually very high.
2. Their loan may be short-term
3. Stringent collateral conditions
4. They are concentrated in cities – unavailable to most Nigerians who reside in non-urban areas

V. Private Property Developers

Private property developers build houses like the housing corporations and make them available to the public on mortgage basis.

A buyer pays deposit and takes possession. Balance is repayable over long period, of course, at an interest rate.

VI. Life Endowment/Insurance Companies

A. Concept

Insurance companies on few occasions may provide loans to a holder of a life insurance policy to purchase a house. This is a policy of life insurance and is a form of savings. Insurance companies may lend or guarantee loan from a bank with a collateral mortgage of life policy. The borrower assigns the policy to the lender and the notice of this is given to the insurance company. The loan advanced is insured by insurance company so that in the event of a premature death, the insurance company pays up the loan.

B. Advantage

It is a good retirement plan

C. Disadvantage

1. Not common among insurance companies because it is a long-term loan.
2. The lender will have to wait for the number of years stated in the policy.
3. Where payment is due on the death of the borrower, he will have to wait till he dies.

VII. Lagos State Mortgage Board

A. Concept

The Lagos State Mortgage Board is established by the ***Mortgage and Property Law of Lagos State, 2010***, as a body corporate with a common seal with the right to sue and be sued – ***Section 1 MPL, 2010***.

B. Power

The Board's power include:

1. Right to borrow, deposit, or accept money with respect to its functions;
2. Encourage and negotiate sub-prime mortgage lending to the public based on intervening funding; and
3. Negotiate reasonable interest rates with mortgage lending institutions and ensure availability of funds on reasonable terms for the public – ***Section 8 MPL, 2010***.

C. Advantage

Being a public institution, loans secured through the board are likely to have favourable repayment terms and interest rates to borrowers.

INVESTIGATION OF TITLE AND WRITING SEARCH REPORT

I. Concept

Method of investigation here is similar to the method a purchaser's solicitor adopts in investigating a vendor's title in conveyancing. The brief for the investigation of title in a mortgage transaction is usually given out by Banks, through their legal Departments to External Solicitors.

After the search, the Solicitor writes a Search Report, which is sent to the Bank for consideration whether or not to accept the property as security.

The solicitor should comment on the type and condition of the building, whether or not there are tenants, squatters, right of way or other encroachments.

II. Differences between Investigation of Title during Purchase and Mortgage

1. The mortgagee has a stronger bargaining power and is in a better position than the purchaser.
2. There is yet no existing contract between the proposed mortgagor and the mortgagee and so there is no obligation on the part of the mortgagee to advance money.
3. The mortgagee may therefore at any time withdraw from the transaction if it is not satisfied

with the mortgagor's title but a purchaser is compelled under the contract to complete the purchase.

III. Issues that must be Properly Investigated

Two major issues that must be properly investigated before loan is approved on the security of a building or land are:

1. The title of the borrower; and
2. The value of the property – this must accommodate the credit proposed by the borrower

IV. Reasons for Investigating Borrower's Title

1. To ascertain borrower's ownership of the property mortgaged to the bank as security;
2. To ensure that the same property has not been previously mortgaged or charged as security;
3. To ascertain that there is no other encumbrances on the property.

V. Requirements for Investigation of the Borrower's Title

Depending on the circumstances, investigation of the borrower's title may require all or one of the following

1. A thorough scrutiny of the document, which may be a Deed of assignment, certificate of Occupancy, Land Certificate, Certificate of Purchase, Deed of Lease, etc.
2. Physical inspection of the property;
3. Searches at the Land Registry, Probate Registry, Companies Registry, etc.

VI. Checklist of Matters to be covered by a Search Report

1. Date of Search;
2. Name of Borrower;
3. Name of the person giving security, if different from the borrowers;
4. Description of the property;
5. Title of the borrower or person giving security;
6. Valuation report if any
7. Encumbrances (if any);
8. Conclusion—this should state in unequivocal terms whether or not the borrower or person giving security has good title to the property and whether or not he has an unencumbered power to charge it to the Bank as security for a loan.
9. Name, address and signature of the solicitor that conducted the search.

Where the borrower is a company/incorporated body, the following matters should be inspected at the Corporate Affairs Commission:

1. Date of incorporation/registration of the company;
2. Borrowing powers of the company;
3. Particulars of Company Directors (CAC 7);
4. Whether annual returns are filed up to date;
5. Any registered charge or encumbrances.

VII. Sample Draft of Search Report

Specimen Search Report

From: [Person making the report]:

To: [Person who requested or needs the report]:

1. Location of the Property: No. 12 Croker Street Oyo State
2. Title No. of the Property: No. 6532 dated 12/07/2004 and registered as 12/12/6532 at the Lands Registry Ibadan Oyo State.
3. Date of Search: 5th April 2019
4. Place of Search: Lands Registry Ibadan Oyo State
5. Name of Registered Owner: Chief. Joel Adamu
6. Nature of Interest of Registered Owner: Statutory Right of Occupancy

7. Existing Encumbrance(s) on the Property: Nil
8. Observations and Comments by the Solicitor: The property is a good security and it is unencumbered.
9. Any other comment:

Note: write a covering letter for the search report.

Specimen of Electronic Search Report

1. Document Search:
2. Date of Search:
3. Description of Property:
4. Grantor:
5. Grantee:
6. Term:
7. Area of Land:
8. History of Land:
9. Subsequent Transaction/Encumbrance:
10. Remarks:

CREATION OF MORTGAGES

There are, at common law, two broad types of mortgages, namely, LEGAL and EQUITABLE.

I. Equitable Mortgage

A. Concept

An equitable mortgage is a type of mortgage created under the rules of equity. It confers equitable interest on the mortgagee. Equitable mortgage is more suitable for short-term loans. In ***Yaro v. Arewa Construction Ltd,*** the court observed that an equitable mortgage is an agreement that has arisen out of the deposit of the mortgagor's title deeds with the mortgagee for loan as security. The essence of an equitable mortgage by deposit of title deeds is an agreement between parties concerned, followed by an act of part performance. Where a party pursuant to an oral agreement deposits his title deeds with a bank, the act of depositing the title deeds is regarded as part performance of an agreement, which removes the transaction from the provisions of the Statute of Frauds.

B. Modes of Creating Equitable Mortgages

Modes of creating equitable mortgages in Nigeria are uniform, except for the RTL areas. There are six modes of creating equitable mortgages in Nigeria viz:

1. **Deposit of Title Deed with an Intention to Create Mortgage:** There must be a clear intention that the deed should be taken or retained as security for a loan - ***British & French Bank Ltd. v. S. O. Akande.*** The mere deposit of title deeds for safekeeping with the bank after which the person was advanced loan does not amount to creation of equitable mortgage because of the absence of intention - ***Bank of the North v. Akintoye***.[156]
   The mode of showing intention to create mortgage is done by the mortgagee signing a memorandum of deposit which sets out the terms of the mortgage or requiring the mortgagor to execute a legal mortgage when requested to do so. If the memorandum of deposit is under deed (Power of Sale can be carried out, provided also that the memorandum contains any, or all of the power of attorney clause and the trust device.
   The legal consequences of the deposit of title deeds as security for a loan are:
   (a) There is an implied agreement by the mortgagor to execute a legal mortgage in favour of the mortgagee.
   (b) It amounts to part performance as agreement becomes enforceable - ***Walsh v. Lonsdale; Russel v. Russel***.

[156] (1999) 12 NWLR [Pt 392] 403

2. **Agreement to Create or Execute a Legal Mortgage at a Later Date:** Once the lender advances the money, whether or not the agreement is under seal, equitable mortgage is created. The equitable mortgagee can enforce the agreement by an action in equity for specific performance, on the principle in ***Walsh v. Lonsdale; Yaro v. Arewa Construction Ltd; Carter v. Wake Ogundaini v. Araba***.
3. **Equitable Charge of the Mortgagor's Property:** This does not create an estate (proprietary right), but merely gives a right to repayment of the debt or other discharge of other obligation/burden in respect of which the property stand charged (an equitable chargee cannot himself exercise a power of sale or appoint a receiver in the absence of a deed). An equitable charge is a mere charge or lien on the property. For instance, 'A' signs a written contract with 'B' to 'C'. No interest is conveyed. The interest in 'B' is a lien to ensure repayment of his money and no other interest in the house. No interest in the house has been passed to him. The lien he has over the property can only be enforced by court by ordering sale of the property to discharge the lien – ***Ogundaini v. Araba***.[157]
4. **Imperfect Legal Mortgage:** will amount to an equitable mortgage so long as the title deeds have been deposited - ***Ogundiani v. Araba***. For instance, a mortgage in which the consent of the Governor is yet to be granted.
5. **Creation through Equitable Mortgage:** a holder of an equitable interest can only create an equitable mortgage on the interest he holds.
6. **Equitable Mortgage of Registered Land –** equitable mortgages where the interest is a right of occupancy could be created in either of the following ways:
   (a) Deposit of title instruments, accompanied by an agreement to create a legal mortgage.
   (b) Charge on property, accompanied by an agreement to create a legal mortgage.
   (c) Assignment of an equitable interest in a property – ***Section 18(1) Mortgage & Property Law Lagos, 2010***.

   With respect to the first two modes of creation, the mortgagee has a right to approach the courts within 30 days, to request the mortgagor by using an originating summons to execute a legal mortgage in his favour – ***Section 18(2) Mortgage & Property Law Lagos, 2010***.

C. Advantages of Equitable Mortgage

1. Where loan is for little amount of money
2. Where the period of repayment is short
3. Mortgagor needs the money urgently
4. It is easier to create than legal mortgage
5. It is not affected by the covenant in the head lease.
6. Creation of Successive equitable mortgages are possible
7. It encourages uniformity in the CA and the PCL States.

D. Disadvantages

1. Unless where the two or any of the remedial devices of declaration of trust or creation of power of attorney are inserted, the mortgagee has difficulty in transferring/selling legal mortgage to third party.
2. The mortgagee is not entitled to the title documents.
3. The mortgagee is not entitled to the benefits of the covenants in the head lease and there is no privity of estate between the head-lessor and the mortgagee.
4. The power of sale of the mortgagee can only be exercised by the mortgagee upon a court order.
5. There is no priority over a legal mortgage.
6. There is no legal protection of mortgagee's interest.

[157] (1978) 6/7 SC 55

II. Legal Mortgage

A. Concept

This mortgage is created pursuant to statutory provisions. It is usually by Deed. Transfer of legal title in land from the mortgagor to the mortgagee subject to the mortgagor's right of redemption in proper form i.e. by deed, Governor's consent, stamping, registration, and if corporate body then filed at Corporate Affairs Commission within a period of 90 days of its creation. Failure to file is that the mortgage is void against the liquidator and any creditor of the company so that when the liquidator has to pay the company's debts, the mortgagee does not have priority and makes the debt immediately becomes payable – ***Section 197(1) CAMA***, mortgage board for Lagos State – ***Section 22/23 STA, Section 53 MPL, Section 197 & 205 CAMA, Savannah Bank v Ajilo***. In theory, Governor's consent should be sought by the mortgagor.

B. Modes of Creation of Legal Mortgage

The location of the property (lex situs) determines the mode of creation and the law(s) applicable. Quantum of interest and nature of interest that you have in the property also required in view of MPL Lagos State. The country is divided into three jurisdictions, namely -

1. **The Conveyancing Act, 1882 (CA) States (States of the Old Northern and Old Eastern Regions - Kwara and Kogi are part of the North: 19 Northern States - Edo and Delta are excluded from CA)**

   (a) Assignment: this is an assignment of the entire and unexpired residue of the mortgagor's leasehold interest to the mortgagee (under the land use act) with a proviso for ceaser upon redemption. This can also be called conveyance where the mortgagor's title is a deemed grant under LUA**.** One major feature of this in that the mortgagor transfers the entire unexpired residue of his leasehold interest to the mortgagee. There is no reversionary interest in the mortgagor, hence in the event of default, the mortgagee can pass the mortgagor's entire interest to a purchaser without any problems. There is no privity of contract between the Governor/Head-lessor and the mortgagee, but there is privity of estate.

   Advantages

   i. The totality of the interest in the property is assigned to the mortgagee.
   ii. The mortgagee can exercise his right of sale easily without recourse to the mortgagor if the latter defaults. Thus, he can transfer the interest assigned to him to a subsequent purchaser.
   iii. The title deeds are retained by the mortgagee.
   iv. Easier to enforce than equitable mortgage.
   v. A subsequent purchaser for value without notice of an equitable mortgage will take priority (mortgagee can easily transfer his interest to a subsequent purchaser).

   Disadvantages

   i. Assignment creates a privity of estate between the mortgagee and the overlord.
   ii. Thus, the mortgagee is liable for breach of all covenants and conditions in the head lease e.g. the mortgagee becomes responsible to the Governor for covenants in the Right of Occupancy granted to the mortgagor.

   (b) Sub-Demise (Sub-Lease): this involves the sub-demise or sub-lease of the unexpired residue less few days with a proviso for ceaser upon redemption (could even be less one-day). Unlike in assignment, the mortgagor here has a reversionary interest in the mortgage property. Grantor/holder of a statutory right of occupancy mortgages part of his leasehold interest under the LUA with a proviso for redemption when the loan is repaid, subject to the Governor's consent.

Advantages

i. There is neither privity of contract nor privity of estate between the Governor/head-lessor and the mortgagee;
ii. There is uniformity, as this mode is applicable under the CA as well as under the PCL states.
iii. It can be used to create successive legal mortgage in the PCL States only. This makes attractive to banks.

Disadvantages

i. The mortgagee cannot sell free of the mortgagor's reversion (i.e. mortgagor must agree to sell the property) unless he includes the remedial clauses of 'power of attorney' or 'trust declaration'. Under the PCL, there is no need for the above clauses to cure the disadvantage of a mortgage by sub-demise as that has been taken care of by ***Section 112(1) of the PCL*** and ***Re White Rose Trust***. The disadvantage is only peculiar to the CA States.
ii. In the CA States, the mortgagor cannot create successive legal mortgage due to the common law doctrine of *interesse termini*. However, some authors argue that a successive legal mortgage can be created because the CA does not expressly negate the creation of a successive legal mortgage. However, it is clear that a successive equitable mortgage can be created.

Remedial Clauses (Power of Attorney or Declaration of Trust): usually accompanies a mortgage by sub-demise, the effect of which is to grant to the mortgagee the right to sell the property if the mortgagor defaults. Where the Power of Attorney is used, the mortgagor appoints the mortgagee as donee with the power to sell the property including the reversionary interest to realise his money. Since it is given for valuable consideration, it is irrevocable until the consideration for which it is given is realised. The mortgagee with the power of attorney in his favour may use it to transfer the mortgaged property in favour of a purchaser in the mortgagor's name. The POA is given to the mortgagee and not a third party – ***Ihekwoaba v. ACB Ltd***.[158] Where the Declaration of Trust device is used, the mortgagor declares that he holds the property including the reversionary interest as trustee in favour of the mortgagee. Where there is a default, the property could be sold to realise the loan.

(c) Deed of Statutory Mortgage: A freehold or leasehold holder may create a legal mortgage by deed expressed to be made by way of statutory mortgage by adopting the Form in Part 1, 3rd Schedule to the Act – ***Section 26(1) CA***. This form may be modified. The advantage is that it is simple to create and can be discharged by a simple receipt. However, disadvantage is that the receipt is not registrable as an instrument and the mortgage may continue to be reflected in the register.

2. Property & Conveyancing Law (PCL) States (States of the old Western and Midwestern regions, except Lagos - Ondo, Osun, Oyo, Ogun, Ekiti, Edo & Delta)

(a) Demise: this is created by demise of a freehold for a term of years absolute subject to provision for cesser on redemption – ***Section 108 PCL***. Although sanctioned under the PCL, it is no longer possible because of the spirit of the Land Use Act, which provides that the greatest interest a person can have is a specified term of not more than 99 years. As a result of this, sub-demise is used for creation of legal mortgage in PCL states.

(b) Sub Demise (Sub Lease): this is created for a term of years absolute, less at least one day than the term vested in the mortgagor (otherwise it will operate as assignement) and subject to provision for cesser on redemption – ***Section 109 PCL; Akano v. FBN***

[158] (1998) 10 NWLR [Pt. 571] 590 at 608

PLC.[159] The same rules as explained earlier apply here, except that under the PCL, there is no need for the drafting devices (Power of Attorney & Declaration of Trust). The law already makes provisions for them. See ***Section 112, PCL*** - a statutory power of sale for the mortgagee where the mortgagor defaults. The advantage is that it allows subsequent and second mortgage to be created – ***Section 163 PCL*****.**

(c) Legal Charge: this is done by Deed expressed to be by way of legal mortgage – ***Section 110 PCL***. Under this mode, the chargee is not vested with the interest in the property (does not convey to the chargee the interest in the property) but confers on the chargee all the powers and privileges of a legal mortgagee (e.g. he has a right to sell the property), even though it creates no legal interest. The Legal charge must be by deed and state that it is a mortgage. For instance, a lessee in a property can create a charge as it does not run contrary to a covenant, which simply states 'not to assign the property'.

Advantages

i. Since no interest is passed to the mortgagee, it is not a breach of the covenant against sub-letting - ***Section 22, Land Use Act***.
ii. It is shorter and simpler to create - ***Samuel v. Jarrah***.
iii. It is easily discharged by a statutory receipt.
iv. There is no transfer of the legal interest in the land/property used as security
v. It is convenient for mortgaging mixed properties i.e. a single charge could be used to cover multiple properties
vi. The chargee has all the rights, powers and protection of a Legal mortgagee
vii. It is best for creating successive legal mortgages without drafting a new Deed

When Recommended: this mode is most appropriate where the mortgagor is charging several properties. If the mortgages were by assignment/sub-demise, each of the properties would have to be conveyed by a separate instrument.

Disadvantage: The statutory receipt is not a registrable instrument, with the effect that at the discharge of the mortgage, the mortgage can still be found on the Register.

3. Lagos State: Under the Mortgage and Property Law of Lagos, the ways of creating mortgage depends on whether the legal interest is a right of occupancy or a leasehold interest.

(a) Where it is a Right of Occupancy – legal mortgage can be created through:

i. Demise for a term of years absolute, subject to a provision for cesser on redemption;
ii. Charge by deed expressed to be by way of legal mortgage; or
iii. Charge by deed expressed to be by way of statutory mortgage – ***Section 15(1) MPL***.

(b) Where it is a Leasehold (Terms of Years Absolute) – where the interest is a term of years absolute, legal mortgages may be created either by:

i. Sub-demise for a term of years absolute, less by one day at least than the term vested in the mortgagor subject to a clause on redemption;
ii. Charge by deed expressed to be by way of legal mortgage; or
iii. Charge by deed expressed to be by way of statutory mortgage – ***Section 16 MPL***.

C. Distinction between Legal Mortgage Created By Assignment under CA & Legal Mortgage Created By Sub-Demise under CA & PCL

Banks prefer legal mortgage by sub-demise for two reasons:

1. Lack of Privity: In a legal mortgage created by an assignment, even though there is no privity of contract, there is privity of estate, binding the mortgagee with liability for

[159] (2003)

restrictive covenants running with the land - ***Tulk v. Moxhay***. This opens the mortgagee (BANK) to liability for breach of the covenants. On the other hand, in a mortgage by sub-demise, there is neither privity of contract nor privity of estate between the Governor/head-lessor and the mortgagee.

2. **Uniformity:** The sub-demise is common to both CA as well as PCL, hence there is uniformity, which is attractive to the Banks that have branches all over Nigeria. But assignment is only peculiar to CA states.
3. **Creation of Successive Legal Mortgages:** using the same property as security is not possible in CA states but only possible in PCL states for mortgages created by charge/deed/sub-demise - ***Section109 (2) PCL***.
4. **Conveyance of Reversionary Interest:** Sub demise presents a technical problem as the mortgagor does not convey his reversionary interest to the mortgagee, thus when the mortgagee is enforcing the security, it cannot sell that reversionary interest. This problem does not arise in assignment.

   This problem is peculiar to the CA States; the problem does not arise in the PCL States because ***Section 112(1) of the PCL\Re White Rose Trust*** provides that the mortgage term shall merge in the leasehold reversion and the mortgagee can validly sell the entire interest of the mortgagor including his reversionary interest. The problem does not arise in legal mortgage by assignment, since there is no reversionary interest in the mortgagor. In the CA States, the problem of reversionary interest can be taken care of by inserting the following in the mortgage deed:

   (a) Power of Attorney Clause: By a power of attorney clause in the mortgaged deed, the mortgagee, in consideration of the mortgage sum is appointed attorney with authority to deal with the entire estate and including the reversionary interest. The power of attorney is expressed to be irrevocable until the loan is discharged and by this device, the mortgagee can sell the legal estate by virtue of the clause.

   (b) Trust Declaration: the mortgage may provide for a trust declaration. The Mortgagor will be made to declare himself a trustee of the property in favour of the mortgagee and he would convey the property to the mortgagee as a beneficiary.

D. Advantages of Legal Mortgage

1. It is easier to enforce a legal mortgage. The equitable mortgagee must obtain a court order before he can sell or take possession of the property or foreclose or appoint a receiver/manager.
2. A legal mortgagee without notice of the equitable mortgage takes priority over the equitable mortgagee.
3. It is easier to commit fraud in the case of equitable mortgage than in legal mortgage; the borrower who has deposited the original title deeds with a bank may obtain a certified true copy of the Deed from the Registry for other fraudulent purposes.

E. Distinction between Legal Mortgage created By Assignment/Sub-Demise & One Created by a Charge By Way of Legal Mortgage

1. In an assignment/sub-demise, the mortgagor conveys the whole or part of his interest to the mortgagee, whereas the mortgagor by way of a legal charge does not convey any interest in the property but enjoys rights of a legal mortgagee.
2. The mortgagor can charge several properties. But in assignment/sub-demise, each of the properties would have to be conveyed by a separate instrument.
3. When the head-lessor prohibits the assignment of the property, such property may still be charged without liability, unlike in assignment and sub-demise.

F. Creation of Successive Legal Mortgages Using the Same Property as Security

This occurs when the same property is mortgaged twice or more in security transactions.

1. **CA States:** successive legal mortgages cannot be created over the same property. This is

because in the CA States, the applicable law for the creation of legal mortgage is the common law. The rationale is that the mortgagor transfers his legal title in the property to the mortgagee and what he has left is mere equity of redemption, which can at best only be used to create an equitable mortgage.

2. **PCL States:** successive legal mortgages can be created over the same property as ***Section 163 PCL*** has abolished the doctrine of *interesse termini*. This is because under the PCL, where the mortgagor creates a legal mortgage by sub-demise, he retains his legal interest, which he may subsequently mortgage to a second mortgagee by executing another legal mortgage. The conditions for creation of successive legal mortgages under the PCL are:
   (a) The legal mortgage must have been created by sub-demise or legal charge by deed expressed to be by way of legal mortgage.
   (b) The term to be taken by a subsequent mortgagee shall be one day longer than the term vested in the other mortgage whose security ranks before the subsequent mortgage.
   (c) The entire interest must not be exhausted - ***Section 109 (2) PCL***.

   The arrangement permitted by Section 109 (2) (b) PCL would have been legally impossible because it is in conflict with the Common Law doctrine of *interesse termini,* which states that it is not possible to create a term of years in a property to commence at the expiration of another term of years created in respect of the same property.

STAGES IN A MORTGAGE TRANSACTION

Upon receipt of instruction to effect a mortgage, a legal practitioner is expected to follow the following order:

1. Negotiation of the loan
2. Investigation of the mortgagor's title to the property to be used as collateral security/ valuation of the property
3. The search Report is prepared by the Mortgagee's solicitor
4. Parties agree on the terms of the mortgage. This is put in a loan agreement
5. Preparation of Loan agreement and a Mortgage Deed and submit.
6. Execution of the Deed of Mortgage by the parties
7. Perfection of the Deed of Mortgage
8. If a company is the Mortgagor**,** file Form CAC 8- Registration of Charges with the CAC within 90 days of its creation.
9. If the mortgage sum has been repaid by the Mortgagor Company, file Form CAC 9 - Release of Charge to notify the CAC.

PERFECTION OF LEGAL MORTGAGE

I. Governor's Consent

A. General Rule: Where a legal mortgage is created, the consent of the Governor of the state where the land is situated must be sought and obtained – ***Section 22 LUA***. Where the land is subject to a customary right of occupancy, the consent of the appropriate local government is required so long as the transfer is not one subject to the Sherrif & Civil Process Law.

B. Effect of Failure to Obtain Consent: Failure to obtain the consent of the Governor before actual mortgage itself makes the transaction null and void – ***Section 26 LUA***; ***Savannah Bank v. Ajilo*****.** But in ***Awojugbabe Light Industries v Chinukwe,*** the court held that the transaction is inchoate (unenforceable).

C. Circumstances where Governor's Consent is not Required

1. The consent is only required where the legal interest is transferred and not for an agreement to transfer the interest. In ***Okunneye v. FBN Plc,***[160] the court held that an

[160] (1996) 6 NWLR (Pt. 457) 749

equitable mortgage being in the nature of an agreement to create legal mortgage only, the consent of the Governor is not required.

2. The consent of the Governor is also not required for creation of debentures, since a deed of debenture is a charge on the floating assets of a company and not a charge on land which requires the consent of the Governor – ***Nig. Ind. Dev. Bank Ltd. v. Olalomi Ind. Ltd.***
3. Up-Stamping
4. Re-conveyance of the mortgage property

D. Party having Obligation to Obtain Governor's Consent: It is the duty of the mortgagor to obtain Governor's consent (by the Land Use Act). However, the mortgagee is to ensure that the mortgagor gives his consent in writing for the mortgagee to obtain the consent. This is to prevent the mortgagor from subsequently alleging that the transaction is null and void for lack of Governor's consent. Also, where the mortgagor has collected the money, deposited the title deeds and executed the mortgage documents with the expectation that he will apply for the consent of the Governor, but only to turn around and alleged that the consent was not obtained or even to frustrate the grant of the consent – ***Ugochukwu v. CCB***.[161] The courts have held that such a person would not be allowed to turn round and claim that because consent was not obtained, the transaction is null and void; a person would not be allowed to take advantage of his own wrong.

Notwithstanding all that has been said, in practice, it is the mortgagee that obtains Governor's consent because he is the one that stands to lose if the mortgage is set aside for lack of Governor's consent. However, the mortgagee should ensure that the mortgagee personally writes a letter applying for consent and hands it over to the mortgagee in order to help him to pursue the grant of the consent.

E. Documents needed for Obtaining Governor's Consent

1. Application for consent by way of written letter or a duly completed consent form
2. Duly executed deed evidencing the agreement between the parties
3. Tax clearance certificate of the parties
4. Receipts of payment of ground rent, consent fee, inspection fee, tenement rate and other charges imposed on the property.

II. Stamping & Up-Stamping of Mortgage Documents

A. Stamping

Mortgage documents (deeds of legal mortgage) are required to be stamped as evidence of payment of stamp duties (taxes) imposed by the Stamp Duties Act or the various stamp duties laws of the States. The duty paid on mortgages is *ad valorem* (according to the value of the transaction). Where a mortgage document is not stamped or there is evidence of insufficient payment of stamp duties, the document may not be admitted in evidence before a court or arbitration – ***Section 22 SDA***. A penal sum may however be paid before the document is admitted in evidence. A document is required to be stamped within 30 days of its execution – ***Section 23 SDA***.

B. Up-Stamping

Up-stamping of mortgages refers to the practice or process of payment of additional stamp duties on a mortgage document in satisfaction of the increased facility granted over an earlier mortgage. One reason that make lenders grant additional facilities over the same property is the belief that the property still has adequate value to serve as collateral on the increased facility. Because stamp duties are paid *ad valorem* on a mortgaged property, where there is additional facility granted on the same mortgaged property, there will be the need for 'up-stamping' to reflect the increased facility. In Lagos State, a fee of 1.5% of the value of the up-

[161] (2000) 1 NLLC, 361 at 383

stamped document is payable before the document is registered as required under item 17, 2nd Schedule, ***Lagos State Land Registration Law 2014***.

Some of the features in up-stamping are as follows:

1. The property is the same;
2. The parties are the same;
3. The new facility is different; hence
4. New duties are paid to (up-stamp) the document.

The consent of the Governor is not required in granting the new facility so long as his consent had been obtained when the first mortgage was created. Thus, where a consent is required in a deed of legal mortgage and such consent has been obtained when the mortgage was originally created, no consent is required for the up-stamping of the mortgage if a further facility is granted on it – ***Bank of the North v. Babatunde;***[162] ***Owoniboys Tech Services Ltd v. UBN Plc***.[163]

The principle that no further consent of the Governor is required for up-stamping applies even where the previous consent was granted under a law that ceases to exist – ***Adepate v. Babatunde***.[164]

The point to be noted form the case of Owoniboys Tech Services Ltd. v. UBN Plc is that a solicitor preparing a mortgage document should draft it in such manner that there are spaces where it will be indicated and signified the evidence of additional facilities and up-stamping of the mortgage document. A drafting device should be employed to achieve this objective.

III. Registration

A. General Rule: A deed is to be registered within 60 days of its execution.

B. Effect of Non Registration of Mortgage: If a deed of mortgage is not registered -

1. The instrument is inadmissible in evidence (to prove title) - ***Ogunbambi v. Abowoh***. It is only admissible to prove payment of money. However, in the recent decision of ***Benjamin v. Kalio (2018),*** the court held that such unregistered document is still admissible in evidence.
2. An unregistered deed of mortgage loses priority where there is conflict of interest - ***Fakoya v. St. Paul Church Shagamu; Okoye v. Dumez.***
3. If the property falls within the registration district and it is not registered within two months of the execution of the deed of mortgage, the transaction will be void - ***Idowu v. Onashile; Onashile v. Bardays Bank DCO.***

C. Company as Mortgagor: Where a company is the mortgagor, the mortgage document or charge must be registered within 90 days of its execution by filing FORM CAC 8.

IV. Documents Required for Perfecting Legal Mortgage

1. Application letter for Governor's consent/or a written application made to that effect, depending on State practice
2. The title documents e.g. right of occupancy, certificate of occupancy, title deeds
3. A copy of the duly executed deed of legal mortgage/deed
4. Tax clearance certificates of the mortgagor for the preceding three years and that of the guarantor (if any)
5. Receipts of payment of ground rent, consent fee, inspection fee, tenement rate, and other charges imposed on the property.
6. Valuation report
7. Approved building plan of the property
8. Insurance policy of the property
9. Application made for the payment of stamp duties and registration of the mortgage deed

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[162] (2002) FWLR (Pt. 119) 1452 at 1469
[163] (2003) 15 NWLR (Pt. 844) 545
[164] (2002) FWLR (Pt. 91) 1503

When mortgagor is a company

1. Copy of the Memorandum and Article of Association of the Company
2. Copy of Resolution of the Board of Directors authorising creation of mortgage on the company's property
3. Copy of the certificate of incorporation of the company
4. The mortgage document or charge must be registered with CAC within 90 days of execution – ***Section 197 CAMA***.

ROLE OF SOLICITORS IN MORTGAGE TRANSACTIONS

1. Advising on law, sources and negotiation for the terms and conditions of the loan
2. Investigation of title of the property sought to be mortgaged
3. Prepare a search report
4. Advising on the modes and drafting of the mortgage instrument
5. Perfecting the mortgage – consent, stamping and registration
6. Assist in discharge of the legal mortgage.
7. Discharge of the mortgage and drafting the discharge instrument

(Week 12)

MORTGAGES AND CHARGES II

COVENANTS IN A MORTGAGE

Covenants in mortgages are specific contractual agreements (terms) between the parties reached to regulate the relationship between the mortgagor and mortgagee in a particular mortgage transaction. The eight covenants are: Covenant to pay the mortgage sum and interest at a fixed date; covenant to insure against risk; covenant to consolidate; observance and performance of covenant in head lease; covenant to repair; covenant to create lease and sublease; restriction of redemption for a term certain; and covenant to create a power of attorney or declaration of trust.

I. Covenant to Repay the Mortgage Sum (Principal) and Interest at a Fixed Date

A. Concept

The mortgage sum is the principal amount advanced to the mortgagor by the mortgagee while the interest is the sum accruing on the principal over a period of time. This covenant must be included in a deed of mortgage.

B. Ways of Determining Interest

Parties may make reference to:

1. Prevailing customs and usage in banking industry (CBN interest rate policy)
2. Express agreement and sum
3. Reasonable interest by court of equity

C. Mortgagee being Bank

Where the mortgagee is a bank, the rule is that parties are bound by the rate of interest they have agreed. Where there is no express agreement, the bank is entitled to charge interest:

1. On the basis of customs and usages, or
2. On the ground that the customers has impliedly consented where he allowed his account to be debited and he did not protest.

Where the parties have expressly set out the details of the terms that would govern the loan facility, the transaction would not be regulated by the general rules of banking relating to the charging of interest on loan – ***UBA v. Lawal***.[165]

A bank will not be able to unilaterally charge compound interest or vary upwards interest rate - ***Owoniboys Tech Services v. UBN***. However, a compound interest is chargeable when agreed - ***UBN v. Ozigi***. Bank can unilaterally reduce the interest rate. Also note if there was reference to CBN rate and CBN rate increases, then the interest rate in the mortgage can increase without any further agreement between the parties.

D. Essence of the Covenant

1. To aid the mortgagee to know when his power of sale may arise - ***Twentieth Century Banking Corporation Ltd v. Wilkinson & Anor***.
2. It also shows what the mortgagee's cause of action will be; either failure to pay the principal sum or interest etc.
3. Where the legal due date has not passed, any action will be held to be pre-mature.
4. To prevent statute of limitation/right of redemption

E. Sample Draft

This covenant to repay principal and interest must be drafted as a positive inducement and not a negative inducement. It should not be punitive. The courts will frown at a covenant drafted thus: *"The interest payable is 15% but where mortgagor fails to pay on time, the interest shall be 20%."*

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[165] (2008) ALL FWLR (Pt. 434) 1548

The court of equity will interpret this clause as a penalty, thus it would not be upheld. Therefore, a better clause would go thus: *"The interest payable is 20% but where the mortgagor pays promptly, it will be reduced to 15%."*

II. Covenant to Insure the Property

A. Essence of the Covenant

This covenant is to provide for what would happen in the event of any damages or destruction to the property. This is very important as the transaction is dependent on the mortgage property. Any damage or destruction to the property would adversely affect the rights of the parties. The mortgagee must ensure that the property is insured.

B. Contents of the Insurance Covenant

The covenant should contain the following things:

1. **Insurance Company**: this is the company in which the property will be insured with. The insurance company should be a reputable one.
2. **Date of Commencement of the Insurance Policy:** The date of commencement of the insurance policy must also be stated.
3. **Risk to be Insured Against**: What determines the risk to be insured against are:
   (a) The use to which the property is put
   (b) The location of the property – flooded area, erosion prone, etc.
   (c) The nature of the property itself – developed property or vacant land
   (d) Applicable Government policy – government could state that all property in a certain area must be insured against fire.
4. **Premium:** this is the insurance sum. The amount of the premium and who is to pay the premium should be stated. The premium payable must not be outrageous – ***Section 130 PCL; Section 23 CA***.
5. **Person to Insure and the Name to be used:** Person to insure the property and whether to insure in his name or name of the other party. In legal mortgage, the mortgagee usually insures the property against damage by fire or any effects of an insurable nature and the premiums paid for such insurance shall be a charge on the mortgaged property in addition to the mortgage money – ***Section 123(1) PCL & Section 19(1) CA***. However, where the mortgagor insures, mortgagee should be granted a power of attorney by the mortgagor as his lawful attorney in order to be able to collect the insurance money upon damage of the property.
6. **Application of the Insurance Money in the event of Damage:** i.e. whether or not there will be reinstatement or liquidation of the debt. The parties need to negate Section 67 Insurance Act if they want liquidation of the debt. ***Section 67 Insurance Act*** states that every property that is destroyed by fire, there must be reinstatement.
   The mortgagee upon receipt of the insurance money would disburse the funds, first to pay off the principal sum and interest owed him by the mortgagor and then render the remaining amount to the mortgagor. As such, the mortgagee would not have to wait for reinstatement of the damaged property.

C. Effect of Failure to Insert Insurance Covenant

The mortgagee cannot compel the mortgagor to surrender the insurance money to him - ***Halifax Society v. Keighly***.

III. Covenant to Repair

A. Concept and Rationale

This deals with the reinstatement of parts that have fallen into disrepairs. The rationale for covenant to repair is to maintain the value of the property to avoid depreciation of the property thereby affecting its value where the mortgagee is to exercise his power of sale. Thus, this

covenant should be primary concern to the mortgagee.

B. Person to Repair and Parts to be repaired

The parties should agree on who is to repair, and list out the places to be repaired. All these are to be included in a schedule to the mortgage deed. It is advisable that the mortgagee carries out the repairs and subsequently charges the cost of repairs on the mortgage property.

C. Meaning of Repair

Repair is just maintenance of the existing structure of the property. However, repair does not include:

1. Rebuilding the property - ***Nigerian Loan & Mortgage Co v. Ajetunmobi***.
2. Improvements (e.g. adding a swimming pool, air conditioners that did not exist before. If mortgagee does this, he cannot charge this money to the mortgagor.

D. Outrageous Cost of Repair

The cost of repair must not be outrageous or it will be disallowed by the Court of equity

IV. Covenant to Create Lease and Sub-Lease on the Property

This largely depends on whether the lease was created before or after the mortgage.

1. **Lease Created before the Mortgage:** If there was a lease on the property before the mortgage, the lease will be binding on the mortgagee and even on subsequent purchaser and the mortgagee will not be entitled to rent. (Recall rules of priority).
2. **Lease Created after the Mortgage:** Where the lease is created after the mortgage, then the determining factor is whether either party is in possession in which case that party in possession of the mortgaged property can create a lease binding on the other. ***Section 18(1) CA, Section 121(1) PCL*** provides that a mortgagor of land while in possession shall, as against every incumbrancer, have power to make from time to time any such lease of the mortgage land or any part thereof.

   Where the mortgagor is in possession, the mortgagee's solicitor should ensure that the covenant is couched in such a way as to provide that mortgagee's consent in writing should be first had and obtained before the mortgagor can lease or sub-lease the property (however, such consent is not to be unreasonably withheld in case of a responsible and respectable person).

   Such lease created is required to have certain things to take effect in possession not later than 12 months after its creation; to reserve the best-rent reasonably obtainable; to contain a covenant by the lessee to pay rent and a covenant for re-entry where the rent is not paid – ***Section 18(5-7) CA; Section 121 (4-6) PCL***.

V. Covenant to Consolidate Different Mortgages

A. Concept

Consolidation of mortgages occurs where a mortgagor uses different properties to secure a loan of money from the same mortgagee. (E.g. mortgage on property A for a sum of money from Zenith Bank, mortgage on property B for a sum of money from Zenith Bank and mortgage on property C for a sum of money from Zenith Bank: Zenith Bank can consolidate the mortgages into one and therefore the mortgagor must redeem all three properties at the same time and not separately).

B. Essence of Covenant

The essence of this covenant is to prevent the mortgagor from redeeming the properties in his preference order/separately without redeeming the other securities (a fetter on the equity of redemption).

C. Prohibition of Consolidation

Generally, the law leans against consolidation of mortgages (because it is oppressive to the mortgagor) except where the parties expressly agreed to it in their deed of mortgage. ***Section 17 CA, Section 28 MPL***, and ***Section 115 PCL***, all prohibit consolidation of mortgage.

D. Conditions for Consolidation

Where parties expressly agree to allow for consolidation four things must exist viz:

1. It must be the same mortgagor
2. It must be the same mortgagee
3. The legal due date must have passed
4. It must have been expressly agreed by the parties and stated in the deed of mortgage.

VI. Observance and Performance of Covenants in the Head lease

A. Concept

1. **General Rule:** A lease or a sub-lease usually has attendant covenants e.g. covenant on use, to pay rents, not to sublet, repairs etc. The mortgagor is under an obligation to observe these covenants. Where the mortgagor mortgages the property, he should agree with the mortgagee to ensure that the mortgagee observes the covenants in the head-lease. This is important especially in a mortgage by assignment.
2. **Where the Mortgagee does not want to be Liable:** Where the mortgagee does not wish to be liable for observing the covenants and conditions in the head-lease, the parties may covenant that the mortgagor continues to be liable to perform the covenants in the head-lease (e.g. note that in this transaction, the mortgagor is still liable to the Governor to pay ground rent etc.)
3. **How to Determine who should perform the Covenants when One Solicitor is acting for Both Parties:** If solicitor is acting for the mortgagor and mortgagee, how to determine who should perform the covenants in the head-lease will be based on who is in possession.

VII. Restriction of Redemption for a Fixed Term Certain

A. Concept

What this means is that the mortgagor's right of redemption may be expressed to be inoperative for a certain period and only to become operative from a certain time after the creation of the mortgage. Recall the nature of a mortgage? It is a mere security: once a mortgage, always a mortgage. Equity hates clog on equity of redemption.

B. Time Frame

The right of redemption may not be operative during the first two years after the creation of the mortgage but as from the third year, the mortgagor can redeem his property.

C. Essence of Covenant

The mortgagee may push for the insertion of these clauses in the agreement in order to enjoy the interest, which will accrue on the principal sum where the mortgagor does not redeem soon after the creation of the mortgage.

D. Attitude of the Courts to an Agreement Where the Mortgage Is Expressed To Be Irredeemable For a Term Certain

This is a negation of the right of the mortgagor to redeem his property at any time he is ready with the principal sum and interest already accrued. Thus, the courts frown at this restriction and therefore adopt a restrictive approach in interpretation and enforcement of this covenant. However, it may be allowed upon the following considerations:

1. **What is the length of time:** Where the length of time is short, the court may allow it. Where it is fairly long the court may not allow it.
2. **Who are the Parties:** If the mortgagor is a corporate body (not in liquidation) or those who are elites and knowledgeable, the court will allow the restriction on the ground that the members ought to know the implications of such restriction. Where however, it is an individual (elderly, illiterate etc.), the court of equity may be sympathetic towards him.
3. **What Type of Mortgage is created:** If it is a legal mortgage with all the covenants agreed, the Court of equity will be slow to go against the agreement. If it is equitable mortgage, the court of equity is more willing to be sympathetic.

4. **What Are the Circumstances Surrounding the Creation of the Mortgage:** In the case of ***Multi Service Banking v. Merden***, a restriction of redemption for a period of 10 years was held not to be too long. See also ***Samuel v. Jarrah***.

VIII. Covenant as to a Declaration of Trust and Power of Attorney

This is usually included in certain circumstances to protect the mortgagee (for mortgages created by way of sub-demise especially under the Conveyancing Act). Empowers the mortgagee to exercise his power of sale in case of default, as an appointed agent of the mortgagor without reference to the mortgagor.

ETHICAL ISSUES INVOLVED

1. Professional Competence in drafting the deed of mortgage - ***Rule 14 & 16 RPC***.
2. Duty to account for client's money (mortgage sum and interest) and duty not to mix client's money with his - ***Rule 23 RPC***.
3. Duty not to frank documents not prepared by a solicitor - ***Rule 3(2) & 10 RPC***.
4. Duty not to aid a non-lawyer in the unauthorised practice of law - ***Rule 3(a) RPC***.
5. The deed of mortgage drafted should correctly and fully reflect the position of the law and wishes of the parties with special respect to the covenants.
6. A solicitor should not fail to reflect or carry out, the instructions given.

DRAFTING DEED OF MORTGAGE

I. Particulars of Information needed to Draft a Deed of Mortgage

1. Particulars of the parties: Full names and addresses
2. Date of commencement
3. Duration of the mortgage
4. Principal sum
5. Interest rate
6. Description of the mortgage property
7. Value of the property
8. The various covenants
9. Execution
10. The witnesses

II. Formal Parts/Contents of a Deed of Mortgage

1. **Commencement**: THIS MORTGAGE/THIS DEED OF MORTGAGE
2. **Date**: Made the ……. day of ……. 20… Note: A deed takes effect from the date of delivery not necessarily the date on the deed.
3. **Parties**: BETWEEN…… of …… (The mortgagor) of the one part AND ……of ……. (The mortgagee) of the other part. It is possible to have a third party, a guarantor or some person forwarding his property as security.
4. **Recitals**: THIS DEED RECITES AS FOLLOWS: The following facts should be recited, borrower's title, the mortgagor's property, his desire to borrow and mortgagee's agreement to lend, guarantor's agreement to guarantee the loan, Governor's consent where necessary.
5. **Testatum**: NOW THIS DEED WITNESSES AS FOLLOWS"
   (a) The undertaking by mortgagor to pay to the mortgagee the principal sum with interest on a named date.
   (b) The interest rate
   (c) The deed may also contain a second testatum, stating the capacity of the mortgagor conveying as beneficial owner"
6. **Provision for Redemption:** this is the clause that allows the mortgagor to redeem the mortgaged property upon repayment of the mortgaged sum.
7. **Parties Covenants:** the various covenants that the parties to the mortgage transaction are

expected to observe.

8. **Testimonium**: IN WITNESSES OF WHICH
9. **Execution:** SIGNED, SEALED, AND DELIVERED BY… If a company, COMMON SEAL of… is affixed to this deed.
10. **Attestation:** IN THE PRESENCE OF: Name, address, signature, and occupation of witness. If a company, IN THE PRESENCE OF: Director, Secretary.
11. **Consent Clause:** where required

III. Sample Drafts

Deed of Legal Mortgage

THIS DEED OF MORTGAGE is made this 6th day of September, 2017 BETWEEN Joel Adamu of No. 76 Azra Road, Aba, Abia State (the Mortgagor) on one hand AND Killi Trust Bank Plc, a company registered under the Companies and Allied Matters Act with RC No: 191102 and a registered address at Plot H13 Adesuwa way Lagos State (the Mortgagee) on the other part.

BACKGROUND:

1. The Mortgagor is entitled to the property, a 5 bedroom duplex at Plot 68 Melanin Crescent, Ibadan, Oyo State which is covered by Certificate of Occupancy dated 13/9/88 with Registration No. 88/13/13.
2. The Mortgagor has agreed to take the sum of **N**50, 000,000 (Fifty Million Naira) loan and the Mortgagee has agreed to advance it using the said property as security.
3. This mortgage is made subject to Governor's consent to be obtained by the Mortgagor.

THIS DEED WITNESS AS FOLLOWS:

The Mortgagor covenants to repay the principal sum of fifty million (N50, 000, 000.00) naira only to be paid by monthly instalments and the interest at 15% rate per annum, provided that if the Mortgagor pays the instalments at the last day of every month or within 14 days after that day, the interest rate shall be reduced to 12% per annum. The mortgagor further agreed with the mortgagee that the mortgage shall last for 24 months which the principal sum and interest shall become due on 30th March, 2018.

The Mortgagor as BENEFICIAL OWNER hereby SUB-DEMISES to the Mortgagee ALL THAT PROPERTY, a 5 bedroom duplex at Plot 68 Melanin Crescent, Ibadan, Oyo State which is covered by Certificate of Occupancy dated 13/9/88 and registered as No. 88/13/13 at the Lands Registry Office Ibadan, Oyo State rightly described by the survey plan to the First Schedule TO HOLD unto for the unexpired residue of the term granted under the Certificate of Occupancy less one day.

PROVIDED always that if the mortgagor repays the principal and interest on the loan, the mortgage shall cease and the mortgagee shall re-convey the property to the mortgagor at his cost.

TESTATUM
The miscellaneous part-provisos/covenants

IN WITNESS OF WHICH the parties have executed this deed of mortgage in the manner below the day and year first above written.

FIRST SCHEDULE

SIGNED, SEALED AND DELIVERED by the Mortgagor:

_____
Joel Adamu

IN THE PRESENCE OF:
Name: Mathias Ayuba
Address: No. 139B Mission Road, Ibadan, Oyo State
Occupation: Architect
Signature: _____

THE COMMON SEAL OF KILLI TRUST BANK PLC (THE MORTGAGEE) IS AFFIXED ON THIS DEED THE 6TH DAY OF SEPTEMBER, 2017 AND DULY DELIVERED IN THE PRESENCE OF:

…….. ……
Director Secretary

I CONSENT TO THIS LEGAL MORTGAGE

DATED THIS 20TH DAY OF SEPTEMBER, 2017
EXECUTIVE GOVERNOR OF ONDO STATE

Tripartite Deed of Legal Mortgage

THIS DEED OF LEGAL MORTGAGE is made this 6th day of September, 2017
BETWEEN Joel Adamu of No. 76 Azra Road, Aba, Abia State (The Mortgagor) of the first part
AND Mrs. Adebola Ogungbayi of No. 56 Calabar Road Otta, Ogun State (The Guarantor) of the second part
AND Killi Trust Bank Plc a public company duly incorporated under the Companies and Allied Matters Act with RC No: 191102 and a registered address at 10 Bambul Close Maitama Abuja (The Mortgagee) of the third part.

BACKGROUND:
1. The Guarantor is the holder of a Certificate of Occupancy No. 26971 dated 10/10/2008 and registered as 19/19/1167 at the Lands Registry office, Abeokuta Ogun State.
2. A loan Agreement between the Mortgagor, Guarantor and the Mortgagee where the sum of fifty million naira (N50, 000, 000.00) was advanced to the Mortgagor by the Mortgagee was made on 6th day of September, 2017 and duly executed.
3. The Guarantor agreed in the Agreement to secure the repayment of the loan collected by the Mortgagor on the property covered by a certificate of occupancy No. 26971 dated 10/10/2008 and registered as 19/19/1167 at the Lands Registry Abeokuta, Ogun State.
4. The Mortgagor has agreed to obtain the loan and the Mortgagee to advance it while the Guarantor is standing as surety for the repayment of the loan using the said property as security.

THIS DEED WITNESS AS FOLLOWS:

The Mortgagor covenants to repay the principal sum of fifty million (N50, 000, 000.00) naira only to be paid by monthly instalments and the interest at 15% rate per annum, provided that if the Mortgagor pays the instalments at the last day of every month or within 14 days after that day, the interest rate shall be reduced to 12% per annum, while the Guarantor is standing as a surety for the repayment of the loan. The mortgagor further agreed with the mortgagee that the

mortgage shall last for 24 months which the principal sum and interest shall become due on 30th March, 2018.

The Guarantor as BENEFICIAL OWNER hereby SUB-DEMISES to the Mortgagee ALL THAT PROPERTY, a 5 bedroom duplex at Plot 68 Melanin Crescent, Otta, Ogun State which is covered by Certificate of Occupancy dated 13/9/88 and registered as No. 26971 dated 10/10/2008 and registered as 19/19/1167 at the Lands Registry office Abeokuta, Ogun State rightly described by the survey plan to the First Schedule TO HOLD unto for the unexpired residue of the term granted under the Certificate of Occupancy less one day.

PROVIDED always that if the Mortgagor repays the principal and interest on the loan, the mortgage shall cease and the Guarantor shall re-convey the property to the mortgagor at his cost.

IN WITNESS OF WHICH the Mortgagor have executed this deed of mortgage in the manner below the day and year first above written.

TESTATUM
The miscellaneous part-provisos/covenants

IN WITNESS OF WHICH the parties have executed this Deed in the manner below the day and year first above written.

SCHEDULE

SIGNED, SEALED AND DELIVERED
By the Mortgagor
…….
Joel Adamu

IN THE PRESENCE OF:
Name: Mathias Ayuba
Address: No. 139B Mission Road, Ibadan, Oyo State
Occupation: Architect
Signature: _____

SIGNED, SEALED AND DELIVERED
By the Guarantor
……
Mrs. Adebola Ogungbayi

IN THE PRESENCE OF:
Name: Tobi Ayo
Address: No 83 Melanin Crescent, Otta, Ogun State
Occupation: Civil Servant
Signature:_____

THE COMMON SEAL OF KILLI TRUST BANK PLC (THE MORTGAGEE) IS AFFIXED ON THIS DEED THE 6TH DAY OF SEPTEMBER, 2017 AND DULY DELIVERED IN THE PRESENCE OF:

…….. ……
Director Secretary

I CONSENT TO THIS LEGAL MORTGAGE

DATED THIS 20TH DAY OF SEPTEMBER, 2017
EXECUTIVE GOVERNOR OF OGUN STATE

(Week 13)

MORTGAGES AND CHARGES III

CASES ON MORTGAGES

I. Owoniboys Technical Services Ltd. v. Union Bank of Nigeria Ltd.[166]

A. Summary of Facts

The Appellant applied for a loan of N50, 000 from the Respondent in 1973 and obtained the consent of the Governor, pursuant to the extant Land Tenure Law of Northern Nigeria, to mortgage his property at Taiwo Road, Ilorin, Kwara State. A deed of mortgage was executed between the parties. Additional facilities of N100, 000 and N200, 000 were granted over the same property and newer deeds were prepared for the additional facility. Governor's consent was not obtained in respect of the additional facilities or subsequent deeds.

B. Decision

1. Where the consent of the Governor had been obtained in respect of a mortgage deed, an increase in the amount of the loan would not call for fresh Governor's consent. The Governor's consent is for the alienation of the legal title in the property - *Per Uwaifo, J.S.C. (P. 43, paras. F-G)*
2. It is the owner of a statutory Certificate of Occupancy that is obliged to obtain the consent of the Governor of the State where the land in respect of which he wishes to sell, transfer or mortgage etc. by virtue of Section 22 of the Land Use Act, and the relevant provisions of the Land Tenure Law of Northern Nigeria - *Per Ejiwunmi, J.S.C. (P. 23, paras. E-G)*
3. A mere mortgage is extinguished by the taking of formal mortgage. However, a mortgage is not merged by the taking of a new mortgage on the same property to cover the original debt and further advances.

II. Union Bank of Nigeria Plc. v. Olori Motors & Co. Ltd & Ors[167]

A. Summary of Facts

There was a mortgage transaction between the appellant (mortgagee) and the respondent and failure of respondent (mortgagor) to redeem. The Mortgagee instituted an action against the mortgagor and his two guarantors claiming the outstanding balance of the mortgaged sum. Judgment was given in favour of the mortgagee. The mortgagor filed notice of appeal and made an application for stay of execution. The processes were not served on the mortgagee. Before a date could be fixed for hearing of the application, the mortgagee went ahead to sell two of the mortgaged properties.

B. Decision

1. Without recourse to Court, the mortgagee can exercise his power of sale.
2. The right of the mortgagee are cumulative and not alternatives. He can institute an action for debt, use his power of sale or go and take possession. Mortgagee can pursue all the remedies at the same time (simultaneously)
3. Assuming that the mortgagee has gone to Court and the Court has given judgment in his favour that mortgagor should pay the debt and the Mortgagor then raises the cheque and planned to pay the money. If the mortgagee abandons the judgment and sells the property before payment, the sale is a proper sale.

UP-STAMPING

I. Concept

Up-stamping of mortgages refers to the practice or process of payment of additional stamp duties on a mortgage document in satisfaction of the increased facility granted over an earlier

[166] (2003) 15 NWLR (Pt. 844) 545
[167] (1998) 5 NWLR (Pt. 551) 652

mortgage. This exists where a mortgagor had earlier borrowed money from a mortgagee using a particular property as security for a loan and subsequently the mortgagor wants additional loan from the same mortgagee using the same property as security. What is required in this instance, is that the mortgagee should draft a new agreement and the document will be up-stamped. Simply put, up-stamping is the act of paying additional stamp duty (tax) on the new mortgage or loan agreement - ***Owoni Boys Tech Services Ltd v. UBN Ltd.*** Because stamp duty is paid *ad valorem* on the mortgage instrument, where there is additional facility granted on the same mortgaged property there will be the need for up-stamping to reflect the increased facility.

II. Rationale for Up-Stamping

One reason that make lenders grant additional facilities over the same property is the belief that the property still has adequate value to serve as collateral on the increased facility.

III. Features of Up-Stamping

1. The property is the same;
2. The parties are the same; but
3. The new facility is different; hence
4. New duties are paid to "up stamp" the document.

IV. Consent of the Governor

The consent of the Governor is not required in granting the new facility so long as his consent had been obtained when the first mortgage was created - ***Bank of the North v. Babatunde***. Consent of the Governor is required in respect of alienation of interest in land and not for any additional facility - ***Owoniboys Tech Services Ltd v. Union Bank of Nigeria Plc*****.** Even where the Governor's consent was granted under a law, which had ceased to exist e.g. Land Tenure Law, no further consent of the Governor is required for up-stamping - ***Adepate v. Babatunde***.

V. Effects of Up-Stamping a Mortgage

1. A fresh consent of the Governor is not needed to be obtained
2. A new Deed of Mortgage is not needed to be executed
3. The earlier Deed of Mortgage executed by the parties is only taken for payment of stamp duty on the additional loan - ***Owoniboys Tech Services Ltd v. Union Bank of Nigeria Plc*****.**

VI. Distinction between Consolidation, Subsequent Mortgages and Up-Stamping

1. **Consolidation:** same parties, different properties and the mortgagor is barred from redeeming the property separately.
2. **Subsequent Mortgagee**: only in PCL States. Different mortgagees and the same property.
3. **Up-Stamping:** same parties, same property, additional facility, and no need for fresh Governor's consent on addition facility.

VII. Drafting Device for Up-Stamping

The point to be noted from the case of ***Owoniboys Tech Services Ltd v. Union Bank of Nigeria Plc*** is that a solicitor preparing a mortgage document should draft it in such manner that there are spaces where it will be indicated and signified the evidence of additional facilities and up-stamping of the mortgage document. A drafting device should be employed to achieve this objective.

MORTGAGEE'S REMEDIES

Remedies are cumulative and not necessarily alternative - ***Olori Motors Ltd. v. Union Bank Plc*****.** The mortgagee has the option of taking any of the remedies at the same time of his choice. The particular remedy taken would depend on:

1. What the mortgagee is claiming, is it the principal or the interest?
2. The type of mortgage, whether it is legal or equity or the interest?

The rights and remedies of a legal mortgagee are:

1. Right of action to recover the mortgage sum and interest in Court
2. Right to sale of the mortgaged property
3. Action for foreclosure

4. Right of appointment of receiver
5. Right to take possession of the property
6. Right to keep the title Deeds
7. Right to consolidation (Express Agreement)

Section 19(1) Conveyancing Act

The rights of the equitable mortgagee are:

1. Right of sale of the mortgaged property. This right will only exist if the following conditions are present:
   (a) The mortgage is by Deed
   (b) The remedial devices/clauses of power of attorney/trust declaration are included as terms in the Deed
   (c) There is no contrary intention of the parties
2. An action for specific performance
3. Action for foreclosure
4. Appointment of receiver
5. Right of action in Court to recover the mortgage sum and interest

I. Right to Take Possession

A. Concept: Possession goes with legal estate. A legal mortgagee has a right to take possession of the mortgaged property upon execution of the mortgage. This right is immediate, (can be done after governor's consent) not contingent upon the default of payment of the mortgage sum - ***Section 19(1) (10) CA, Section 123 PCL*****.** He cannot be compelled to get the highest rent on the property. An equitable mortgagee can only take possession of the property (security) upon a court order.
This power extends to the right of the mortgagee while in possession to cut and sell timber and other trees ripe for cutting.

B. Creation of Leases by Mortgagee: Mortgagee on taking possession can create leases binding on the mortgagor and can evict from the property any person impeding on his rights.

C. Mortgagee Remaining in Possession for 12 Years without Acknowledging Mortgagors Interest in the Property: If the mortgagee remains in possession for 12 years or more without acknowledging the mortgagor's interest in the property, the mortgagor's right to the property is extinguished (statute of limitation) - ***Cardoso's Case*****.** However, even if the mortgagee stays in possession for 12 years, if the mortgagee acknowledges the mortgagor's title but states that the mortgagor should pay up the balance of the loan, the statute of limitation will start to run again from the beginning (this acknowledgement should be in writing)

D. Circumstances where a Mortgagee should Take Possession

1. Property is being squandered
2. Fear of destruction or depreciation is imminent
3. Where there is need to intercept the profit

E. Reasons Why it is Not Advisable to Take Possession

1. Equity imposes on him a strict liability to account for the profits made or received on the property – ***Odu'a Investment Co. Ltd v. Obadeyi***.[168]
2. Held liable to pay occupational rent for use of the property while he was in possession even after the mortgage has been discharged and the mortgagee has delivered up possession.
3. He will be liable for negligence or wilful default for any sum not recovered.
4. He is also liable for any deterioration or neglect or disrepair of the property. Thus, he

[168] (2016) AFWLR (Pt. 855) 90

must carry out repairs on the property.

5. He cannot make profit from the property; he can only realise his security.

II. Appointment of Receiver

A. Concept: A receiver is an independent, uninterested third party appointed to manage the mortgaged property - ***Adetona & Anor v. Zenith Int's Bank Ltd***. Mortgage sum must have passed for the power to appoint a receiver to be exercised – ***Section 19(1) (iii) CA*** and ***Section 123(1) (iii) PCL*****;** and the power of sale must have arisen and become exercisable – ***Section 24(1) CA, Section 131(1) PCL*****.**

B. Mode of Appointment of Receiver: The power to appoint a receiver need not be expressly stated in the deed once it is a legal mortgage. It is implied in every mortgage created by deed. Where it is an Equitable Mortgage Created by Deed, the deed should provide for the power to appoint a receiver. Where there is no such clause, the mortgagee may apply to court for one to be appointed.

C. Remuneration of Receiver: is from the income of the mortgage property (mortgagor pays).

D. Powers, Duties and Rights of a Receiver (*Section 24 CA, Section 131 PCL)*

1. The receiver shall have the power to demand and recover all the income of the property of which he is appointed receiver. Pursue debts owed to the property, collect any rents etc.
2. He shall be entitled to remuneration out of the money received by him to pay taxes, rates and other outgoings in respect of the property.
3. To pay interest accruing in respect of any principal money due under mortgage.
4. To pay the residue of the money received by him to the person who is entitled to receive the income of the mortgaged property - ***Awojugbabe Light Industries v. Chinukwe*****.**
5. A receiver must act in good faith. Where he colludes with a person to sell the property at a gross undervalue, the sale will be set aside - ***West African Breweries Ltd V. Savannah Ventures Ltd***.

E. Agent of Mortgagor: It is prudent to expressly provide for the appointment of receiver in the event of default in the mortgage agreement. A receiver is an agent of the mortgagor although appointed by the mortgagee so that where the receiver mismanages the property, the mortgagee will not be held liable. Where the court appoints the receiver, the receiver is not an agent of the mortgagor (an officer of the court).

III. Action in Court to Recover Principal and Interest

A. Concept: The mortgagee can institute an action in court against the mortgagor to claim the principal sum advanced to the mortgagee and the interest that has accrued on it.

B. Mode of Action: This can be by way of summary judgment or judgment under the undefended list – ***Order 11 Lagos & Order 21 Abuja*** respectively.

C. Lis Pendis & Power of Sale: the principle of *lis pendis* will not apply where the mortgagee is exercising his right to institute and action and at the same time right to sell the property – ***Olori Motors Ltd v. UBN*****.** However, where the action is already in court and the mortgagee wants to sell the property to a third party, the third party needs to carry out an investigation on the title.

IV. Action for Order of Specific Performance

A. Concept: This remedy is available to an Equitable Mortgagee**.** This would arise where the equitable mortgagor fails, refuses or neglects to complete documentation of the mortgage agreement. The court would give an order mandating the mortgagor to complete documentation, thus the legal interest in the property will be passed to the mortgagee (so he can exercise power of sale).

B. **Rationale for Remedy:** The equitable mortgagee has no legal estate to transfer as such, he cannot exercise a power of sale hence this action for specific performance.
C. **Neglect of Mortgagor to Complete Documentation:** Where the mortgagor refuses, neglects or fails to complete the documentation, the court will then order an officer of the court to execute a legal mortgage upon with the mortgagee.
D. **Condition on Part-Performance:** in an action for specific performance, there must be part performance. The part-performance on the part of the mortgagee is the actual handing over of the loan to the mortgagor. On the mortgagor's part, the part-performance is the deposit of his title deeds with the mortgagee and intention to create a legal mortgage - ***Ogundiani v. Araba*****.**

V. Statutory Power of Sale (Exams)

A. **General Rule:** The power and right of a mortgagee to sell property is central to legal mortgages created by deed. It is automatic. The mortgagee need not go to court to enforce it. In ***UBN Plc v. Olori Motors Ltd*****,** the court held that the mortgagee doesn't need court order to sell.
B. **Conditions to Exercise Power of Sale:** For the mortgagee to be entitled to exercise its power of sale, the power must HAVE ARISEN and become EXERCISABLE. (2 conditions)
C. **Conditions for Power of Sale to Arise:** For the power of sale to arise the following three cumulative conditions must exist **(*Section 20 CA, Section 125 PCL*)**:
    1. The mortgage must have been created by a deed;
    2. There must be no contrary intention against sale in the mortgage deed; and
    3. The legal due date, which is the date of redemption/repayment of the mortgage must have passed - ***Section 19(1) CA, Section 123 PCL, Section 122(1) Abia State Law of Property*****.**

    NB: These conditions are conjunctive/cumulative - ***NHDS Ltd. v. Mummuni***.
D. **Conditions for Power of Sale to become Exercisable:** Even where power of sale has arisen, the mortgagee is still not entitled to sell the mortgaged property unless and until the power has become exercisable - ***NAB Ltd v. UBA Plc*****.** The power becomes exercisable when ANY of the three conditions in ***Section 20 CA*** & ***Section 125 PCL*** is satisfied, which is that:
    1. Default of payment of the principal sum of which a written Notice to the mortgagor to pay the loan sum had been served on him and after a period of 3 months he is still in default. However, the requirement of notice can be waived by the parties – ***Taiwo v. Adegboro; Okwonkwo v. CCB (Nig) Plc;*** or
    2. The interest sum are in arrears (default) of which 2 months' notice has been served and the mortgagor still does not pay, or
    3. There has been a breach of any covenant other than the covenant to pay the principal sum and interest in the mortgage deed or under the statute i.e. the CA or the PCL. See ***Okafor & Sons Ltd v. Nigerian Housing Development Society*****.**[169]
E. **Form of Notice:** The requirement of notice to the mortgagor includes notice to persons deriving title through him, for example, where there is a subsequent mortgage. The notice need not fix the time of repayment. It is sufficient if it request that the mortgagor should pay the loan. The date of the service of the notice is excluded in the computation of time for this purpose. Where the mortgagor is in default of payment of any instalment or interest is in arrears. It is not a defence that substantial part of the loan has been paid - ***Okafor & Sons v. NHDS Ltd***.

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F. Effect of Non-Compliance with Conditions for Sale

1. **Where Power of Sale Has Not Arisen:** Where the power of sale has not arisen, the mortgagee/lender has no right to sell. However, in ***20th Century Case***, the court held that the power of sale may become exercisable without the power having arisen. This is because the legal due date may not have arise.
2. **Where Power of Sale Has Not become Exercisable:** If the right of sale has arisen but it has not become exercisable and the property used as security is sold, the mortgagor can apply to the Court to set aside the sale except it was sold to a bona fide purchaser for value without notice. However, the Court can only grant damages to the mortgagor.

G. Protection of Innocent Purchaser: A purchaser who purchases a property BEFORE the power of sale arises will NOT ACQUIRE A GOOD TITLE. A mortgagee's power of sale becomes exercisable if it has arisen and once it has so arisen, the title of a subsequent purchaser without notice AFTER Power of Sale will not be affected by its improper or irregular exercise and the sale will be regarded as VALID - ***Nigeria Advertising Services Ltd v. UBA***. ***Section 21(2) CA*** & ***Section 126(2) PCL*** offers protection to the purchaser who buys where the power has arisen but not become exercisable provided he is a bona fide purchaser for value without notice. Sale extinguishes the mortgagor's right of redemption.

H. Conduct of Sale

1. **Sale by Private Contract:** For a sale, motive is irrelevant. A mortgagee is only required by law to obtain a proper price/good price and not the best price for the property or the market price provided he acts in good faith when exercising his power of sale. Motive is irrelevant. In ***UBA v. Okeke & Ors,***[170] mortgagee sold to his in-law and it was held that motive is irrelevant. To vitiate the sale, it must be shown that the sale was fraudulent - ***Ihekwoaba v. ACB; Okonkwo v CCB (Nig) Plc; Eka Etheh v. NHDS*****. Note:** the mortgagor must not attempt to sale by auction before sale by private contract.
2. **Sale by Public Auction:** For sale by public auction, 7 days public notice of intended auction must be given - ***Section 17 Auctioneer's Law*****.** The requirement of 7 days public notice is mandatory and cannot be waived by the parties since it does not exist to protect the parties but the public - ***Okonkwo v CCB (Nig) Plc.*** Where the sale was made at undervalue, it does not necessarily evidence bad faith. However, where the mortgagee sells to himself directly or through an agent, or sells to his cronies, relations, the court will infer bad faith (Mortgagee here is not an agent when he sells but only in respect of the proceeds of the sale). A mortgagee is not an agent or trustee for the mortgagor during power of sale.
3. **Sale by Mortgagor:** the mortgagor can sale the property with the consent of the mortgagee or where the court orders that. However, when the mortgagor is selling the property he must have the interest of the mortgagee in mind.

I. Grounds to Set Aside Sale: A sale of the property used as security may be set aside on the following grounds:

1. That the mortgagor has no good title *ab initio*
2. The Mortgage transaction was not registered if the property is in a registration district
3. There is fraud/collusion between the mortgagee and the purchaser
4. The right of sale has not arisen
5. Sale was effected after payment of out-standing mortgage sum
6. Where a different mode of sale was agreed between the parties.

[170] (2004) 7 NWLR (Pt. 8720) 393

J. Grounds that Sale cannot be Set Aside: a sale of the property used as security for a mortgage will not be set aside on the following grounds:

1. It was sold at a low price, except it was sold at a gross undervalue and there is fraud in it - ***Section 183 PCL; Okonkwo v. ACB*.**
2. The outstanding sum is contested by the parties
3. The sale was motivated by ill-will
4. The mortgagor has paid a part of the loan
5. The mortgage sum and interest is paid after the sale
6. An Order of the Court was not obtained before the sale **- *UBN Ltd. v. Olori Motors Ltd*.**
7. The power of sale was improperly exercised.

K. Effect of Sale

1. It terminates the mortgagor's equitable right to redeem – ***Section 111 & 112 PCL; Warren & Lord v London & Manchester Assurance Company Ltd***.[171]
2. The mortgagee is liable to pay damages to the mortgagor where the power of sale is exercised in an improper manner e.g. where the power has arisen and mortgagee fails to serve demand notice, or fails to wait for statutory 3 months to elapse before sale (NB: these may be expressly waived by the parties)

L. The Only Way a Mortgagor can Stop Power of Sale: the only way a mortgagor can stop power of sale of the mortgagee is to pay the full sum. So far as he does not, he cannot stop it even if the parties are in dispute on the amount under the mortgage agreement – ***Bank of the North v. Akintoye*.** Where the mortgagee has commenced an action in court for example, a redemption action, the court can only stop sale where the money is paid into court – ***NHDS v. Mumuni*.**[172]

M. Application of Proceeds of Sale

1. **General Rule:** Where the sale is completed, the mortgagee should use the amount to satisfy mortgagor's indebtedness to him and if there is another mortgage, to use the balance to settle the other mortgage otherwise, he must return the balance of the sale to the mortgagor. This is because the mortgagee is a Trustee of the proceeds of sale. Thus, the mortgagor can sue the mortgagee for the surplus where he refuses to give it.
2. **Order of Application of Proceeds:** Proceeds of sale may be applied in the following order:
   (a) Pay up all mortgages having priority
   (b) Pay commission to the auctioneer and other costs of sale (costs incidental to the sale)
   (c) Pay up outstanding interests
   (d) Pay up outstanding mortgage sum
   (e) Pay balance to persons entitled to equity of redemption
   (f) Settle subsequent mortgages - ***Section 21(3) CA, Section 127 PCL, Visioni Ltd v. NBN*.**
3. **Where Proceeds of Sale does not Satisfy Principal & Interest:** Where the proceeds of sale does not satisfy the principal and the interest, the mortgagee can sue the mortgagor to recover the balance. The covenant is primary and enforceable until the total money is liquidated. The mortgagee may commence action against other properties that are not subject of the mortgage.
4. **Party that Pays Cost of Sale:** MORTGAGOR PAYS - mortgagee is paying it on his behalf.

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[171] (1995)
[172] (1977) 2 SC 57

VI. Action for Foreclosure

A. Concept: This is an Order of Court extinguishing the mortgagor's equity of redemption. The Order is first made nisi (in the interim) and then it becomes absolute after 6 months so that the mortgagor can pay off his indebtedness within these 6 months. Within these 6 months, the mortgagee cannot exercise his other powers e.g. power of sale. It is the primary remedy of an equitable mortgagee - ***Ogundaini v. Araba***.

B. Suitability of Remedy: Foreclosure is better where mortgagee is interested in the principal sum.

C. Order of Sale by Court in Lieu of Foreclosure: the court may make an order of sale in lieu of foreclosure. Where judicial sale is ordered and made, CERTIFICATE OF PURCHASE is issued. However, a purchaser under this order must obtain the Governor's consent before a certificate of purchase will be issued by the court - ***Danjara v. Bai***.[173] The certificate of purchase is a registrable instrument in some jurisdictions.

D. Sparingly use of Remedy: Foreclosure is drastic and the Court uses it sparingly because it negates against the principle of once a mortgage, always a mortgage.

E. Grounds for Re-Opening Order of Foreclosure: The Order of foreclosure can be re-opened on the following grounds:

1. The mortgagee is still suing the mortgagor to repay the balance of the mortgage sum if the proceeds of sale is not enough to satisfy the loan
2. Fraud
3. That there are conditions beyond his control preventing him from paying the loan sum
4. The mortgagee acted mala fide in obtaining the order nisi
5. The property as security is of immense value i.e. it is a family property

F. Conditions to Prove in an Application Seeking to Re-Open Order of Foreclosure: the conditions the mortgagor/applicant seeking to re-open the foreclosure order will show/prove to succeed in the application are:

1. That he is not guilty of delay (must make the application timeously)
2. He has the money in Court to pay the loan sum
3. The property value is too high above the amount outstanding in the repayment of the loan
4. Property is of special interest to the mortgagor and inability to redeem were due to circumstances beyond his control
5. The property has not been sold by the mortgagee
6. The action is brought in good faith
7. Right of appointment of receiver

G. Stages & Effect of Foreclosure Order by the Court: usually, foreclosure order is made in stages – first *nisi* (unless) and then secondly, *absolute.* When the order is made *nisi,* redemption is still possible for a period of 6 months and where the mortgagor still fails to redeem, then upon another application by the mortgagor, a decree absolute would be made. Once it has been made absolute it puts an end to all other remedies by the mortgagee and no application is made by the mortgagor.

VII. Transfer of Mortgages

A. Concept: ***Section 27 CA*** and ***Section 134 PCL*** provide for the power of the mortgagee to transfer the mortgage or the benefit of the mortgage to a transferee by executing a Deed expressed to be made by way of statutory transfer.

B. Consequences Transfer:

1. The transferee acquires the right to demand, sue for, recover, and give receipt for, the mortgage money or the unpaid part of it and interest thereon (if any) as may be due.

[173] (1965) NMLR 445

2. The transferee acquires the right to sue on all covenants with the mortgagee, and the right to exercise all powers of the mortgagee.
3. The transferee acquires all the estates and interests in the mortgaged property then vested in the mortgagee subject to redemption of the loan.

VIII. Other Rights & Powers

1. **Possession of Title Deeds:** the mortgagee has a right to be in possession of the title deeds. However, he must return it back to the mortgagor upon redemption of the mortgage.
2. **Consolidation:** this is a right granted to a mortgagee where he has more than one mortgage against the mortgagor to say that the mortgagor cannot redeem one without the other. This is not a right except where the mortgage deed expressly provide for it. Since ***Section 17 CA & Section 115 PCL*** are against consolidation, the mortgage deed must expressly negate them and allow for consolidation.

MORTGAGOR'S REMEDIES AND RIGHTS

I. Equity of Redemption

A. Concept: Equity of redemption is an estate in land that could be sold, disposed of, or even mortgaged. It is the sum total of the mortgagor's interest over the security existing at the time of entering into the mortgage agreement.

B. Principle of Once a Mortgage Always a Mortgage: This right can never be clogged either expressly or impliedly by agreement in the Mortgage Deed - ***Santley v. Wilde; Fairclough v. Swan Breweries Co. Ltd*****.** Once a mortgage always a mortgage.

C. Circumstances when the Equity of Redemption will be Extinguished

1. The right of sale has been exercised
2. A foreclosure Order absolute has been made
3. The mortgage sum has been redeemed

II. Legal Right to Redeem

This is the period stated in the Loan Agreement/Mortgage Deed for the repayment of the loan sum known as the legal due date. Upon the expiration of the specification date for payment, the legal right to redeem expires. It is the legal or contractual right of the mortgagor to redeem on or before the legal due date.

III. Equitable Right to Redeem

A. Concept: The equitable right to redeem is the right granted by equity to the mortgagor to still recover his security by paying the mortgage sum and interest although the time fixed for the payment of the money has passed - ***Yaro v. Arewa Construction Ltd*****.** It arises where the legal right to redeem has elapsed.

B. Principle of Once a Mortgage Always a Mortgage: The court will not allow a clog in the mortgagor's right to redemption.

C. Circumstances when Equitable Right to Redeem will be Extinguished: Equitable right to redeem ends when:

1. Right of sale is exercised,
2. Foreclosure order or
3. Lapse of time (limitation laws)

DISCHARGE OF MORTGAGES

I. Modes of Discharge

1. **Legal Mortgage by way of Sub-Demise or Assignment – CA States:** is discharged by Deed of Discharge, Deed of surrender or Deed of Release. This Deed of Discharge, Release or Surrender is registrable in the Lands Registry where the mortgage was registered. The essence of registration is to serve as evidence of discharge of the mortgage.
2. **Legal Mortgage Created by Charge - PCL States:** is discharged by way of statutory receipt. These receipts are not registrable, hence, the encumbrance would still be reflected

on the property at the lands registry.

3. **Equitable Mortgages:** are discharged by receipt of payment of principal and interest under hand (need not be typed). Where the payment is made to the mortgagee's solicitor or agent, the receipt should be by Deed to protect the mortgagor or the person paying the money.
4. **Legal Mortgage in Lagos State – MPL:** effected by the completion of Receipt for Discharge of a Mortgage, a specimen form – ***Section 47(1) MPL*** or by a Deed of Surrender – ***Section 55 LRL***.
5. **Company as Mortgagor:** Where the mortgagor is a company, a memorandum of satisfaction at the CAC is to be executed in its favour upon re-payment of the sum - ***Section 204 CAMA*****.**
6. **Discharge by Court**
   - **(a) Concept:** Despite the covenant restricting redemption, the mortgagor can still redeem. He can apply to court via motion ex parte supported by an affidavit and a written address. The court will order that the mortgage money be paid into court and upon the payment, the mortgage is discharged. You can also endorse the release on the deed of legal mortgage - ***Section 135 PCL, 1959.***
   - **(b) Where a Third Party Pays the Mortgage Sum**: the rights of mortgagee transfers to the third party, the mortgagor is indebted to the 3rd party and the mortgage continues. The mortgagor may decide to sell his property, use the proceeds to settle the loan. In this instance, there should be a tripartite agreement between the mortgagor and mortgagee as "the Assignors" and the purchaser as "the Assignee".
   - **(c) Effect of Payment of Mortgage Sum in CA States**: The mere fact that the mortgage sum has been repaid does not discharge the mortgage. The mortgagee holds the interest in trust for the mortgagor pending when a deed of release has been executed.
   - **(d) Effect of Payment of Mortgage Sum in PCL States**: The mere fact that the mortgage money has been repaid absolutely and instantly discharges the mortgage.

II. Role of a Solicitor after Discharge

As a solicitor, ensure that you retrieve all the title documents from the mortgagee upon discharge of the mortgage. Where the mortgagee refuses to return the title deed he can be sued for detinue (an action to recover for wrongful taking of personal property).

(Week 14)

SOLICITORS BILLING AND CHARGES

INTRODUCTION

I. Recovery of Fee under an Agreement

A solicitor cannot be paid legal fees except he is engaged to render legal services: and where an agreement provides for the payment of legal fees, a solicitor can only successfully recover fees where he acts for a party to that agreement – ***Rebold Ind. Ltd. v. Magreola.***[174]

II. Importance of Professional Charges of Lawyers

1. It is a reward for a Solicitor's service
2. It is additional expenditure to the client apart from the payment made over the transaction on the property. It is thus important that the client be well informed of his obligation to pay fees.
3. If not well handled, it results in litigation with additional cost and time waste for both the solicitor and the client.
4. It is a source of taxation to raise revenue for government.

III. The Applicable Laws

1. Legal Practitioners Act 2004 (LPA)
2. Rules of Professional Conduct for Legal Practitioners 2007 (RPC)
3. Land Instrument Preparation Law (LIPL)
4. Legal Practitioners (Remuneration for Legal Documentation and other Land Matters) Order 1991 (made by the Attorney General) – LPRLDLM
5. Judicial authorities.

PRINCIPLES AND RULES GUIDING BILLING FOR SOLICITOR'S SERVICES

I. General Principles

1. **Preparation of Documents of Transfer of Interest in Land:** Only a legal practitioner has the exclusive right to prepare documents of transfer of interest in land in Nigeria – ***Section 22(1) (b) LPA***. However, it is not in the exclusive preserve of a legal practitioner to draft a will.
2. **Preparation of Land Instruments by Non-Lawyers:** It is an offence for a non-lawyer to prepare a land instrument (punishable with imprisonment) - ***Section 19(1) LPA*****.** All land documents prepared by a legal practitioner but not franked shall not be admissible for registration at the land registry.
3. **Adequate Remuneration for Services from the Client:** A solicitor shall receive adequate remuneration for his services from the client (by payment in advance or agreement of a named fee).
4. **Bill of Charges:** Sometimes, the solicitor may present his bill of charges to the client at the end of the work.
5. **Charging Excessively High or Ridiculously Low Fee:** A lawyer is entitled to be paid adequate remuneration - ***Rule 48(1) RPC***. He cannot charge excessive high or ridiculously low (under-cutting other legal practitioners). However, a reduced fee or no fee at all may be charged on the ground of special relationship or indigence of a client (let the client know that the fee is a reduced fee) – ***Rule 52(1) RPC.***
6. **Agreement to Charge or Collect Illegal or Excessive Fee:** A lawyer shall not enter into an agreement to charge or collect an illegal or clearly excessive fee - ***Rule 48(2) RPC*****.**
7. **Sharing Legal Fee with Non-Lawyer:** A legal practitioner shall not share his legal fees with a non-lawyer (including agents) - ***Rule 3(1) (c) RPC***. Don't open an account for a law

[174] (2015) 8 NWLR (Pt. 1461) 210

firm with a non-lawyer. The exception is as provided under ***Rule 53 RPC*** viz: A lawyer shall not share the fees of his legal services except with another lawyer based upon the division of service or responsibility. Provided that:

(a) An agreement by a lawyer with his firm, partner or association may provide for the payment of money, over a period of time after his death, to his estate or to one or more persons;
(b) A lawyer who undertakes to complete unfinished legal business of a deceased lawyer that proportion of the total compensation which fairly represents the service rendered by the deceased lawyer; and
(c) A law firm may include non-lawyer employees in retirement plan, even though the plan is based on profit-sharing arrangement.

8. **Advising or Appearing in Proceedings Detrimental to Interest of Client after Accepting a Retainership:** Where a lawyer accepts a general or special retainership, he shall not advise on or appear in any proceedings detrimental to the interest of the client paying the retainer during, the period of the retainer - ***Rule 49(3) RPC*.**
9. **Contingent Fee Arrangement in Civil Matters:** ***Rule 50(1) RPC*** provides that a lawyer can enter into contingent fee arrangement in civil matter (contentious or non-contentious) provided that it is not contrary to public policy nor vitiated by fraud, mistake or undue influence and such contract must be reasonable in all circumstances of the case including the risk and uncertainty of the fee. If litigation, it is reasonably obvious that there is a bona fide cause of action
10. **Contingent Fee Arrangement in Criminal Matters:** ***Rule 50(2) RPC*** provides that a lawyer cannot enter into contingent fee arrangement with his defendant in a criminal matter.
11. **Contingent Fee Arrangement without First Advising the Client:** A lawyer shall not enter into a contingent fee arrangement without first having advised the client of the effect – ***Rule 50(4) RPC*.**

TYPES OF FEES

I. Consultation/Briefing Fee

1. **Concept:** Legal Practitioners in Nigeria have developed a practice of charging for consultation whenever clients come to brief them for the first time. The briefing primarily consists of the interview and instructions of the client to the practitioner. After the briefing, the Solicitor bills the client for consultation, which is often separate from the main fee charged for the legal work.
2. **Effect of Payment:** once the consultation fee is charged and paid, a client's file is opened in the law firm in the name of the client. It is only after the payment that the instructions of the client would be carried through. The consultation fee is usually paid in full.
3. **Determinant of Amount Payable:** the standing of the law firm and the partners in the firm often determine the amount paid as consultation; for example, where the principal partner in a law firm is a Senior Advocate of Nigeria, the consultation fee is often higher than those paid where the principal has no such standing.
4. **Rationale of Collecting Consultation Fee:** the advantage of this practice is that some clients never show up after the interview and briefing; having received a satisfactory counsel, they leave to handle their problems without reverting back to the Solicitor who had spent time advising them.

II. Scale Fee

A. **Concept:** These are fees charged under Scales I and II of Legal Practitioner (Remuneration for Legal Documentation and other Land Matters) Order 1991 in non-contentious matters. Parties are not allowed to go outside the fees charged under the scales. Fees here are fixed and can neither be disputed nor varied by the court. Parties are however allowed to charge

outside the above prescriptions if they charge under Scale III.

B. Scales – ***Order 99 LPRLDLM***

1. **Scale I** – completed transactions of sale, purchase and mortgages
2. **Scale II** – completed transactions of lease, agreement to lease or tenancy
3. **Scale III** – other transactions flexible but would depend on:
   (a) Complexity, difficulty or novelty of the case
   (b) Skill, labour and specified knowledge required
   (c) Time expended
   (d) Amount and value of transactions
   (e) Inability to accept other briefs

III. Fixed Fee

This is fee charged for specified class of works, such as writing letters, writing a will, incorporation of business entities. Fixed fee is charged for simple non-contentious works and is usually a flat rate – ***Rule 49(3) RPC***. Usual in terms of CAC briefs

IV. Hourly Rate Fee

A. Concept: This is fee charged on hourly rate for the number of hours spent on the client's work and the charged-out rates of the firm that is the amount that would be charged by the firm for every hour spent on legal work must be calculated. The time spent must be commensurate and reasonable to the work and not inflated. (Used in the USA).

B. Methods of Computing Charge-Out Rate

1. The remuneration of a legal practitioner comparable to that in the public service.
2. The overhead incurred by a legal practitioner in doing the work.

V. Percentage Fee

This is fee charged based on the value of the transaction, the higher the value the more the percentage charged and the lower the value the lower the percentage charged. It is common in property transactions, especially the sale of land. The percentage varies, although in Nigeria, Solicitors first insist on 10% and reduce it only after a hard bargain.

VI. Appearance Fee

A. Concept: This is fee charged for each appearance in court to represent a client. It is common in law firms in rural areas. The legality of appearance fees has been an issue due to the way cases are adjourned in Nigeria (judge not sitting).

B. Determinants of Amount Payable

1. The distance of the law firm from the court
2. The standing of the legal practitioner at the Bar often determines the fee charged as appearance fee. See ***Okonedo–Egbaregbemi v. Julius Berger*****.**

VII. Contingent or Success–Based Fee

A. Concept: This is fee charged after the success of the action. The solicitor agrees with the client on the amount he will be paid based on the amount they actually recover. Where no such amount is recovered, he may earn nothing.

B. Prohibition under Common Law & in Criminal Matters: Under the common law, contingent fees are prohibited, whereas it is banned under ***Rule 50(1) RPC*** for criminal matters.

C. Permissible Circumstance: It is only permitted in civil cases – ***Rule 50(2) RPC*****.**

SCALE OF CHARGES

Legal Practitioners (Remuneration for Legal Documentation and other Land Matters) Order 1991 provides 3 scales of charges for legal documentation and land matters.

A. Scale 1: This deals with completed transactions of sale, purchase or mortgage. In mortgages, the solicitor to the mortgagor charges HIS FULL CHARGES as computed according to the scale, while the solicitor to the MORTGAGEE IS entitled to charge FULL

CHARGES as computed according to the scale. Where one solicitor acts for BOTH MORTGAGOR AND MORTGAGEE, he is entitled to the full charges due to the mortgagee's solicitor plus half of what would be due to the mortgagor's solicitor.

B. **Scale II**: These deals with leases and agreement for leases in which the transaction have been completed. In leases, the LESSOR'S SOLICITOR is entitled to THE FULL CHARGES as computed according to the scale, whereas THE LESSEE'S SOLICITOR would be entitled TO HALF OF WHAT THE LESSOR'S SOLICITOR is entitled to. Where ONE SOLICITOR acts for BOTH LESSOR and LESSEE, he is entitled to the FULL CHARGE DUE TO THE LESSOR'S SOLICITOR, PLUS HALF OF WHAT IS DUE TO THE LESSEE'S SOLICITOR i.e. FULL CHARGE of lessor's solicitors fees PLUS ¼ OF LESSOR'S MONEY.

C. **Scale III:** This deals with all other legal documentation not provided for in scales I and II. There is no specific amount fixed, the fees charge shall be fair and reasonable. The principles for assessment under scale III and ***Rule 52(2) RPC*** are:

1. The complexity, novelty and difficulty of the matter
2. The skill, labour, specialised knowledge, expertise and responsibility involved on the part of the solicitor
3. Value of the property involved
4. The number and importance of the documents prepared
5. The importance attached to the transaction by the client
6. Places to be visited where the transaction or a part of it will take place.
7. The time expended by the lawyer in the transaction
8. Special exertion of devotion towards that transaction e.g. in election petition

PROCEDURE FOR RECOVERY OF PROFESSIONAL FEES

I. Steps for Recovery of Professional Fees

A. Step One: Exploring Alternative Dispute Resolution Mechanism

1. **Concept:** The fee owed a solicitor by clients is debt, which is recoverable. It is advisable that the solicitor should first explore any of the alternative dispute resolution mechanisms (ADR): persuasion, mediation, conciliation, negotiation and arbitration before resorting to litigation.

2. **Reasons for Adopting ADR**

(a) Litigation of fees will lead to loss of clients
(b) It strains the relationship with the client
(c) To avoid lengthy trials
(d) Resources and energy will further be dissipated and wasted
(e) It discourages potential clients from briefing the solicitor

B. Step Two: Litigation

1. **Concept:** Where the solicitor has explored ADR options to no avail, he may sue for his fees in court - ***Section 16-19 LPA***. In recovering his charges, a solicitor may charge 10% per annum as interest on his disbursement and cost.

2. **Effect on Non-Compliance with the Provisions of the LPA:** Provisions of the LPA are mandatory and non-compliance with them will defeat any action for recovery of professional fees. In addition, the charges must also not be unobjectionable - ***Oyo v Mercantile Bank of Nig. Ltd***.[175] But where there is no agreement as to legal charges or there is agreement which looks improper for the legal practitioner, there can hardly be an automatic award of charges claimed by the legal practitioner in an action to recover charges - ***Oyo v Mercantile Bank of Nig Ltd***.

3. **Three Important and Mandatory Things a Solicitor Must Do in Order to Recover His**

[175] (1989) 3 NWLR [Pt. 108] 213

Charges form a Defaulting Client

(a) He must prepare a Bill of charges, which should set out the particulars of the principal items of his claim.
(b) He must serve his client with the bill of charges
(c) He must allow a period of one month to elapse from the date the bill was served before the action is commenced - ***Section 16(1) & (2) LPA***.

These three conditions are used conjunctively and not disjunctively. They are mandatory and non-compliance will render any suit by a legal practitioner for recovery of fees "not only bad but incurably bad" i.e. a nullity - ***First Bank of Nigeria v. Ndoma – Egba; Oyekanmi v NEPA.***[176]

II. Bill of Charges

A. Concept: Charges mean any charges whether by way of fees, disbursement, expenses or otherwise in respect of anything done by a legal practitioner in his capacity as a legal practitioner - ***Section 19(1) LPA***. In ***Okafor v. Nweke***,[177] it was held that a legal practitioner endorsing a document must sign in his personal name and not in the name of the firm. Thus, the Bill of charges (in the case of a firm of partners) must be signed by the legal practitioner in his personal name and on behalf of the firm.

E.g. N. E. Killi
For: Killi Nancwat and Co.

B. Purpose of a Bill of Charges: The purpose of the bill of charges is that it helps the client to know what he owes the solicitor and also helps the taxing authority to compute the taxes payable by the solicitor.

C. Guidelines on Particulars to be Contained in a Bill of Charges

1. The bill should be headed to reflect the subject matter.
2. The bill should contain all the charges, fees and profession disbursements for which the lawyer is making a claim. Professional disbursements include payments which are necessarily made by the solicitor in pursuance of his professional duty e.g. court fees, witness fees, cost of production of records etc.
3. Charges and fees should be particularised as follows:
   (a) Perusing documents and giving professional advice
   (b) Conducting necessary (specified) inquiries or using a legal agent in another jurisdiction for a particular purpose
   (c) Drawing up the writ of summons and statement of claim or statement of defence
   (d) Number of appearance in court and dates
   (e) Summarised statement of the work done (in court) indicating some peculiar difficult nature of the case (if any), so as to give an insight to the client as to what he is being asked to pay for.
   (f) Standing of the solicitor at the bar in terms of years of experience and the rank with which he is invested in the profession - ***Savannah Bank of Nig. Plc. v. Opanubi.***
4. Sufficient information to enable the client to obtain advice on tax obligation and for the taxing officer to tax it. It is therefore necessary to indicate against each of the particulars given in the bill of charges a specific amount, taking into account the status and experience of the Legal Practitioner and the time and efforts involved.

See ***Oyekanmi v. NEPA.***[178]

[176] (2001) FWLR (Pt. 34) 404
[177] (2007) 10 NWLR [Part 1043] 521
[178] (2001) FWLR [Part 34] 404

D. Rule on Preparing Detained Particulars of Charges

1. A solicitor should endeavour to prepare a detailed bill of charges with all the particulars of work done, cost, expenses and disbursements – ***FBN v. Ndoma-Egba.***
2. Where the bill of charges does not contain the particulars, it should be objected to by the client otherwise he will be deemed to have waived his right.
3. Where the bill does not contain detailed particulars and it is objected to, the court will hold that the bill does not comply with the requirement of the LPA and cannot sustain an action for recovery of professional charges.

E. Printed Forms Prepared for Billing by Firms: some law firms usually prepare forms for the purpose of billing. It has been advised that it should be printed in triplicate: the top for service on the client, the middle copy to be filed in the subject matter file and the third copy to be kept with accounts department of the firm. The advantage is that it is easily and readily available and it is not necessary to prepare fresh one on each occasion and need. The disadvantage is that an already prepared printed Bill of charges may not confirm all the services that the Solicitor has rendered in the given case.

III. Service of the Bill on Client

The bill of charges must be served either by:

1. **Personal Service:** i.e. physically and personally handing to the client the bill of charges; or
2. **Substituted Service:** leaving it at the client's last known address. This address may be the last business address or the residential address which the client knew and not just assumed. It must be some physical place or address; or
3. **Post:** to the client's last known address.

See ***Section 16(1) (a) LPA.***

IV. Expiration of One Month after Delivery

A. Full Calendar Month: After delivery of the bill of charges to the client, the period of one month beginning with the date of delivery of the bill must expire before an action is instituted to recover the charges. One month here is one full calendar month. A calendar month is a complete month in the calendar. A calendar month ends upon the same day in the next ensuring month having the same number as that on which the computation began (i.e. the corresponding day in the next month). E.g. 6th March to expire on 6th April. But if the next ensuring month does not have the same number as that on which the computation began, then the calendar month ends on the last day of the next ensuring month. E.g. 30th January to 28th February.

B. Circumstance where the Period of One Month may be Abridge: The court may abridge the period of one month within which a solicitor is expected to wait after service of the bill before commencing action – ***Section 16(3) LPA*****.** The abridgement can done when:

1. The solicitor has delivered a bill of charges to a client and
2. On the face of it, the charges appear to be proper in the circumstances and
3. There exists circumstances indicating that the client is about to do some act which would probably prevent or delay the payment to the practitioner of the charges.

A lawyer must apply to the court to abridge the one month as he cannot result to self-help.

C. Providing Security for Payment of the Charges: where the client provides some security for the payment of the charges, the court will not abridge time upon application by the solicitor even if he satisfies all the conditions for bringing the application – ***Section 16(3) LPA***.

COURT AND PROCEDURE

I. Place of Institution of Action for Recovery of Professional Fees

The place of institution of the action is the State High Court. It must be the high court where the legal practitioner in question usually carried on his practice or resides or where the client

resides or has his principal place of business - ***Section 19(1) LPA.***

II. Mode of Commencement

1. **Writ of Summons:** An action for the recovery of professional charges could be commenced by means of a Writ of Summons. Since a claim for recovery of professional charges is a civil action, the normal rule of evidence requiring proof by preponderance of evidence will apply and where the claim involves special damages, there will be need for strict proof – ***Nigerian Bottling Co. Ltd. v. Dada***.
2. **Undefended List:** Where the solicitor intends to bring the action under the undefended list procedure, he should ensure that there is an express agreement by the parties i.e. that the defendant had agreed to pay the fee charged by the solicitor - ***Aruwa v. Abdulkadir.***[179]

III. Discharge of Services in Part Due to Act of Frustration by Client

Where a Solicitor is briefed to give legal services and his fees agreed to be paid and the Solicitor discharges part of his duties but is frustrated from discharging the remainder as a result of the act of the client, he will recover the full professional fees on the philosophy of placing him in the position he would have been but for the act of breach of the contract by the client – ***Oceanic Bank International (Nig.) Ltd. v. Frank Owhor Esq***.[180]

IV. Distinction where Solicitor Claims on a Quantum Meriut Basis & When He Claims for a Breach of Contract

There is a distinction when a solicitor claims on a quantum meriut basis and when he claims for a breach of contract. While in the former the solicitor must prove the parameters and necessary evidence upon which the courts would assess what is reasonable compensation for services rendered by him in the latter, what is paramount is that a breach of contract has occurred and the court needs to make a restitution for the breach.

TAXATION OF PROFESSIONAL FEES

A. Concept: Where a client feels that the solicitor charged him exorbitantly he may apply to the court (High Court) for a review of the fees.

B. Procedure for Taxation of Professional Fees

1. **Appointment of Tax Officer:** The court would appoint a tax officer
2. **Review of Charges & Report by Tax Officer:** the tax officer appointed will review the charges and make a report thereafter.
3. **Issuance of a Certificate of Taxation:** At the end of the review, the taxing officer will issue a certificate of taxation wherein he shall state the charges recommended - ***Section 18(4) LPA*****.** The charging officer is expected to be unbiased

C. When are Parties entitled to apply for Taxation: After the expiration of the one month, both the client and lawyer are entitled to apply for taxation of the bill - ***Section 17(2) LPA*****,**

D. Time Limit for Application for Taxation: The client has to make this application for taxation of the charges within 12 months of the delivery of the bill of charge on him or no order as to taxation can be made by the court **-** ***Section 17(3) LPA***.

ETHICAL CONSIDERATIONS

1. The solicitor should comply strictly with the scales of charges particularly scale I and II.
2. The solicitor should diligently prepare bills of charges where necessary
3. The solicitor should not submit bills that are objectionable
4. The solicitor should observe the rules of professional conduct in the legal profession in respect of fees
5. The solicitor should not enter into an agreement for, charge or collect an illegal or clearly excessive fee

[179] (2002) FWLR [Part 115] 677
[180] (2009) ALL FWLR [Pt. 454] 1599

6. The solicitor should not share his professional fee with non-lawyer
7. The solicitor should not sign legal documents prepare by a non-lawyer for a fee

CLASS EXERCISE

I. Scenario

Air Cdr. Yabo Uzezi, public Servant of No 63 Kofar Eyong Road, Jimeta-Yola, is the owner of property at Plot 134 Najiv Avenue, Victoria Island, Lagos with Certificate of Occupancy No 231/LVI/2003. He also owns No. 46 Vitalis Close, Maitama Abuja.

At a **rent of N2m annually**, Yabo **created a term of three years** over the property at Lagos in favour of Engr. Tanko Calista, a Civil Engineer of No. 37 Augie Street, Apapa Lagos.

The three years rent was paid in advance. The agreement was to commence on February 1, 2009.

Later, on February 25, 2019, he used the same property to **secure a loan of N20m** obtained from Ritz Bank Plc. of No. 56 Ovie Faleti Road Ikoyi, Lagos at annual rate of 15% redeemable within 6 months of commencement.

Yabo was unable to redeem a loan of N25m he obtained from Fidelity Bank Plc in April 2016 within the agreed period; to avoid total loss of the mortgaged property, he contacted Engr. Tanko Calista for the **purchase of the property, which was agreed for N32m**.

You **acted for all the parties** in the negotiation for the **loan of N20m**, and also in negotiation for the sale **on behalf of both parties**. You had earlier **represented both parties** in the tenancy agreement.

You later sent a Bill of Charges for your professional services to both clients. The Bank has failed to pay. You filed summary summons at the Chief Magistrate Court, Yaba, Lagos since the amount claimed is just N3.8m.

II. Transactions Identifiable

The transactions identifiable in the scenario are:

1. Mortgage – acted for all the parties in the negotiation for the loan of N20m.
2. Sale of Land – acted for both parties in negotiation for the sale of land worth N32m.
3. Lease - represented both parties in the tenancy agreement of N6m.

III. Rules of Computing Charges/Fee

1. Mortgage (Scale I)

(a) Different Solicitors: where the mortgagor and mortgagee are represented by different solicitors, the mortgagor solicitor will be entitle to full payment and the mortgagee solicitor will equally be entitle to full payment.

(b) One Solicitor: where the mortgagor and the mortgagee are represented by one solicitor, the solicitor will be entitle to half payment of what is due to the mortgagor solicitor and full payment of what is due to mortgagee's solicitor.

2. Sale of Land (Scale I)

(a) Different Solicitors: where the vendor and the purchaser are represented by different solicitors, the vendor solicitor will be entitle to full payment and the purchaser solicitor will also be entitle to full payment.

(b) One Solicitor: where the vendor and the purchaser are represented by one solicitor, the solicitor will be entitle to full payment of what is due to the vendor solicitor and half payment of what is due to the purchaser solicitor.

3. Lease (Scale II)

(a) Different Solicitors: where the lessor and the lessee are represented by different solicitors, the lessor solicitor will be entitle to full payment and the lessee solicitor will be entitle to half payment of what is due to the lessor's solicitor. E.g. if the lessor

solicitor is entitle to N10, 000 from the lessor, then lessee solicitor will be entitle to N5, 000 from the lessee.

(b) One Solicitor: where the lessor and the lessee are represented by one solicitor, the solicitor will be entitle to full payment of what is due to the lessor solicitor and half payment of what is due to the lessee solicitor. E.g. if the solicitor is entitle to N10, 000 from the lessor, then the solicitor will be entitle to N2, 500 from the lessee i.e. ½ of the N5, 000.

IV. Scales of Charges

Scale I - Scale of Charges on Sales, Purchase and Mortgages

(1)	(2)	(3)	(4)	(5)
	For the first N1,000 per N100 ₦	For the second and third N1,000 per N100 ₦	For the fourth and each subsequent N1,000 up to N20,000 per N100 ₦	For the reminder without limit per N100 ₦
5. Mortgagor's legal practitioner for negotiating loan…	11. 25	11.25	3.75	2.50
7. Mortgagee's legal practitioner for negotiating loan…	22.50	22.60	7.70	5.00
9. Purchaser's legal practitioner for negotiating a purchase and vendor's legal practitioner for negotiating a sale of property by private auction…	22.50	3.75	3.62	2.80

Scale II – Scale of Charges for Leases and Agreement to Lease

(c) Where the rent exceeds N1, 000 –

1. N37.50 in respect of the first N100 of rent
2. N25 in respect of each N100 of rent or part thereof up to N1, 000
3. N12.50 in respect of each subsequent N100 or part thereof

V. Answer

MORTGAGE

Total Value of Transaction – N20, 000, 000

Mortgagor's Solicitor Fee

(Step 1 - For the first N1, 000 per N100 is N11. 25)
1, 000/100 x 11.25/1 = 112.5

(Step 2 - For the second and third N1, 000 per N100 is N11.25)
2, 000/100 x 11.25/1 = 225

(Step 3 - For the fourth and each subsequent N1, 000 up to N20, 000 per N100 is N3.75)
17, 000/100 x 3.75/1 = 637.5

(Step 4 - For the reminder without limit per N100 is N2.50)
19, 980, 000/100 x 2.50/1 = 499, 500

(Step 5 – Addition of the total value of Step 1 – 4 to get what is due to the mortgagor's solicitor)
112.5 + 225 + 637.5 + 499, 500 = 500, 475

(Step 6 – Since the solicitor is entitle to half payment of what is due to the mortgagor's solicitor, the total value of Step 5 will be divided by 2)
500, 475/2 = ₦250, 237.50k

Mortgagee's Solicitor Fee

(Step 1 - For the first N1, 000 per N100 is N22.50)
1, 000/100 x 22.50/1 = 225

(Step 2 - For the second and third N1, 000 per N100 N22.60)
2, 000/100 x 22.60/1 = 452

(Step 3 - For the fourth and each subsequent N1, 000 up to N20, 000 per N100 is N7.70)
17, 000/100 x 7.70/1 = 1, 309

(Step 4 - For the reminder without limit per N100 is N5.00)
19, 980, 000/100 x 5.00/1 = 999, 000

(Step 5 – Addition of the total value of Step 1 – 4 to get what is due to the mortgagee's solicitor)
225 + 452 + 1, 309 + 999, 000 = ₦1, 000, 986

Final Answer

The total amount due to the solicitor who acted for both the mortgagor and mortgagee will be an addition of the total value gotten under mortgagor's solicitor fee and mortgagee's solicitor's fee as follows:

N250, 237.50k + ₦1, 000, 986 = ₦1, 251, 223.50k

SALE OF LAND

Total Value of Transaction – N32, 000, 000

Vendor's Solicitor Fee

(Step 1 - For the first N1, 000 per N100 is N22.50)
1, 000/100 x 22.50/1 = 225

(Step 2 – For the second and third N1, 000 per N100 is N3.75)
2, 000/100 x 3.75/1 = 75

(Step 3 - For the fourth and each subsequent N1, 000 up to N20, 000 per N100 is N3.62)
17, 000/100 x 3.62 = 615.4

(Step 4 - For the reminder without limit per N100 is N2.80)
31, 980, 000/100 x 2.80/1 = 895, 440

(Step 5 – Addition of the total value of Step 1 – 4 to get what is due to the vendor's solicitor)
225 + 75 + 615.4 + 895, 440 = ₦896, 355.40k

Purchaser's Solicitor Fee

Since the scale for calculating what is due to the purchaser's solicitor is the same with that of the vendor's solicitor, the amount due to the purchaser's solicitor will also be ₦896, 355.40k. But considering the rule of computation, the solicitor will be entitle to only half of what is due to the purchaser's solicitor as follows:

₦896, 355.40k/2 = ₦448, 177.70k

Final Answer

The total amount due to the solicitor who acted for both the vendor and purchaser will be an addition of the total value gotten under vendor's solicitor fee and purchaser's solicitor's fee as follows:

₦896, 355.40k + ₦448, 177.70k = ₦1, 344, 533.10k

LEASE

Total Value of Transaction – N6, 000, 000

Lessor's Solicitor Fee

(Step 1 - Where the rent exceeds N1, 000 – N37.50 in respect of the first N100 of rent)
100/100 x 37.50/1 = 37.5

(Step 2 - Where the rent exceeds N1, 000 – N25 in respect of each N100 of rent or part thereof up to N1, 000)
900/100 x 25/1 = 225

(Step 3 - Where the rent exceeds N1, 000 - N12.50 in respect of each subsequent N100 or part thereof)
5, 999, 000/100 x 12.50/1 = 749, 875

(Step 4 – Addition of the total value of Step 1 – 3 to get what is due to the lessor's solicitor)
37.5 + 225 + 749, 875 = ₦750, 137.50k

Lessee's Solicitor Fee

(Step 1: The lessee's solicitor is entitle to half of what is due to the lessor's solicitor as follows:
₦750, 137.50k/2 = ₦375, 068.75k

(Step 2: However, since the solicitor acted for both lessor and lessee, the solicitor is entitle to half of what is due to the lessee's solicitor as follows:
₦375, 068.75k/2 = ₦187, 534.375k

Or it can be calculated as one-quarter (¼) of what is due to the lessor's solicitor as follows:
₦750, 137.50k/4 = ₦187, 534.375k

Final Answer
The total amount due to the solicitor who acted for both the lessor and lessee will be an addition of the total value gotten under lessor's solicitor fee and lessee's solicitor fee as follows:
₦750, 137.50k + ₦187, 534.375k = 937, 671.875 approximated as ₦937, 671.88k

Sample Draft of Solicitors Bill of Charges

KILLI NANCWAT & CO
BARISSTERS AND SOLICITORS
NO 15 ABACHA STREET IKOYI, LAGOS STATE
Knanchwat2020@yahoo.com
07031112732

Our Ref: _____Your Ref:_____

Date: 6th March, 2019

To
Mr. Joel Adamu
No. 25 Leadway Avenue

Ikeja
Lagos State

Dear Sir,

RE: PREPARARTION OF WILL
BILL OF CHARGES

Sequel to your instruction to prepare your last Will, please find attached our Bill of Charges on the execution of the instruction.

Date	Particulars of Principal Items	Amount (₦)
12 February, 2019	Professional fees on Preparation of Will	500,000
13 February, 2019	Transportation to Probate Registry	5,000
14 February, 2019	Lodging of Will at Probate Registry	1000
	Total	506,000.00
	Less Deposit	200,000.00
	Amount Due	₦306,000.00

TAKE NOTICE that you are expected to make the payment to the firm's Account No: 300600800 with Guaranty Trust Bank, Bwari Branch on or before 6th April, 2019.

Yours faithfully,

Killi Nancwat, Esq.
(Managing Partner)
For: Killi Nancwat & Co

(Week 15)

WILLS AND CODICILS I (EXAMS)

MEANING, NATURE AND HISTORY OF A WILL

I. Meaning of a Will

A will is a testamentary document made voluntarily and lawfully executed according to the Wills law by a person called the Testator with a sound disposing mind on how his estate (real and personal) will be disposed upon his death or it is a directive of a person on how his things or his properties will be disposed of upon his death.

Highlights: T-Testamentary Disposition; E-Executed Lawfully; V-Made Voluntarily; By Testator with Sound Disposing Mind; Ambulatory In Nature (TEVSA)

II. Codicil

A Codicil is an attachment or addition of a Will. It is dependent on the existence of a Will. Where there is a codicil to a Will, the Will cannot be read in full without the codicil. The codicil does any of the following to a Will:

1. Revoke the will,
2. Adds to the will, alters it,
3. Revives the will, or
4. Republish the will.

Everything applicable to the validity of a Will is applicable to it.

THIS IS THE FIRST CODICIL TO MY WILL of (name, address, occupation) made _____day of ____2013.

III. Applicable Laws

1. Wills Act of 1837 and the Wills Amendment Act 1852 (statutes of general application)
2. Common Law and Equity
3. Wills Law of the various States of the Federation
4. Wills Law of Western Region 1958
5. High Court of Lagos State (Civil Procedure Rules) 2012,
6. High Court of the FCT Abuja (civil Procedure Rules) 2018 and those made by different States (in respect of application for probate)
7. Case law: Nigerian court has taken into consideration particular circumstances of Nigeria in adopting precedent from outside the country (Britain)
8. Constitution of the Federal Republic of Nigeria 1999 as amended
9. Legal Practitioners Act (by Section 22(4)(e) LPA, non-lawyers can draft Wills)
10. Rules of Professional Conduct
11. Evidence Act 2011

The law that regulates Will is the law of the testator's domicile i.e. where the testator resides with the intention to permanently reside there. Note the difference between Domicile and Residence

IV. Reasons for the Undesirability in Making a Will

1. Superstition
2. Lack of trust
3. To avoid conflict between the beneficiaries and other persons interested after the testator's death
4. Ignorance: people think that it is expensive or that it bring the reality of death to them

V. History of Wills in Nigeria

1. **Pre-Colonial Era:** Before the colonial era, disposition of property took place under customary law or the inheritance laws. This was affected mainly through oral disposition.

Where a man fails to dispose his properties orally, upon his death, the properties would devolve according to the customary law. In **Yoruba land**, a dying person can dispose his property under the customary law by oral disposition in the presence of **4 witnesses.** Under **Islamic law**, a person subject to Islamic law can only dispose of 1/3 of his property through a will. The remaining 2/3 must be disposed in accordance with Islamic rules stated in the Koran. Disposition may be oral or written.

2. **Colonial Era:** during the colonial era, **statutory will** was introduced. A statutory will is a will created in accordance with a particular statute in force.

VI. Some Terms Used in Wills

1. **Testator/Testatrix:** The person making the will is called the testator, where the person is a female, she is called the testatrix.
2. **Testate/Intestate:** Where a person makes a will, he is said to have died testate. Where none is made, he is said to have died intestate.
3. **Beneficiary/Successor:** The person entitled to the properties or benefits under the will is called the beneficiary and sometimes called successor.
4. **Estate of the Deceased:** The total of the personal and real properties of a deceased is referred to as the estate of the deceased. The estate includes the liabilities of the deceased.
5. **Personal Representatives (Executors/Administrators):** The personal representatives appointed under the will to administer the estate of the deceased are called executors; where the deceased dies intestate, administrators are appointed to administer the estate.
6. **Propounder and Challenger of a Will:** a propounder of will in court is the person asserting the validity of the will. It could be the executor or one of the beneficiaries. The Challenger is the person who is challenging the validity of a will.
7. **Device:** gift of real property. These are realty or landed properties (immovable) of the testator. The beneficiary of such immovable property is referred to as a 'devisee".
8. **Legacy/Bequests**: this refer to the personal properties (movable) of a testator e.g. chattels, choses in action, money etc. The beneficiary of such gift is referred to as a 'legatee'. However, legacy is now used to refer to both movable and immovable gifts. Legatee is the person who is given a gift under a will.
9. **Personal Properties:** movable properties
10. **Real Properties:** immovable properties

VII. Formalities in Writing a Will

Wills Act 1837 stipulated formalities which must be strictly adhered to:

1. It must be in writing,
2. It must be signed,
3. The signature must be done before or acknowledged in the presence of 2 witnesses present at the same time. He can also instruct someone to sign for him in the presence of 2 witnesses. In ***Apatira v Akanke***,[181] a testator though a Muslim made a written will but only one witness attested to it. The Court held that though a Muslim, he intended to make a will under the Act but since only one witness was present, the will was not valid.

VIII. Wills and Related Transactions

The following transactions are concerned with the disposition of properties but are not wills:

1. **Nominations:** This is a directive made by a person (the nominator) to an organisation, or institution or any other person, that upon his death his funds in the organisation should be paid to a particular individual (the nominee). This is common in trust funds, cooperative societies, trade unions and schemes of employment. Nominations can be made only in respect of funds of the nominator and not in respect of other properties. Where the nomination is made, the funds are paid to the personal representatives of the deceased.

[181] (1944) 17 NLR 149

Like wills, it takes effect only upon the death of the nominator. Thus, it is ambulatory. The advantage of a nomination over a will is that it does not require the detailed formality which is obtained in Wills, but only that is should be in writing. Its disadvantage is that it may not dispose other properties apart from funds.

2. **Settlement Inter Vivos:** This occurs where a settler transfers his property in his lifetime to another living person to hold and take effect in his lifetime. It differs from a will because a will takes effect after the death of the maker of the will.
3. **Donatio Mortis Causa:** This is a disposition of property made by a person in contemplation of death, but which takes effect only when the donor dies. Where the donor recovers from the anticipated death, the gift does not take effect. Not entirely inter vivos and not entirely testamentary.
4. **Gifts:** the major difference between a gift and a will is that while the latter takes effect after the death of the donor, the former takes effect even when the donor is still living, thus a gift takes effect in the present and not the future. Disposition of an estate by a deed of gift is advisable if a Will is likely to be contested; or the testator wants to relieve himself of the burden of managing the property in his lifetime; or the property is likely to be tampered with or stolen; or the testator wishes to see how responsible and competent his children are in managing their affairs.

TYPES AND FEATURES OF WILLS

I. Types of Wills

1. **Formal Will:** This is a will made according to prescribed form as required by the relevant wills laws. It derives from English law and it is required to be signed by the testator and attested by at least two witnesses.
2. **Statutory Will:** These are wills made in accordance with the requirement of certain statutes. Examples, wills made according to Armed Forces Act Cap 420 LFN 2004 for members of the armed services. E.g. the courts in protection of mentally ill persons may order for a will for such persons.
3. **Nuncupative Wills (Dead Bed Wishes):** A nuncupative will is the oral directives of a deceased person to his heirs, which are to be carried out after his death. It is usually made in anticipation of imminent death - ***Ayinke v. Ibidunmi***. It is sometimes referred to as Death Bed Wishes.
4. **Mutual or Reciprocal Will:** It is made by two or more persons. They are reciprocal because they make provisions for each of the makers of the will, or an agreement between them to dispose their properties in a particular way. It is common among husband and wife when each leaves their property to the other on the condition that the second to die will leave all their estate including that of the first to die to an agreed 3rd party e.g. their child. The disposition may be done by one will or it may be done by separate wills. Mutual wills are not revocable, except with the agreement of the other party.
5. **Joint Wills:** this arises where two or more persons agrees to write one will and agree to give their personal properties or joint properties to other beneficiaries. Regardless of the fact that the will is one, the disposition is considered separate. Thus, either of the parties can revoke or amend its disposition.
6. **Privileged Will:** This is a will made by certain categories of person's actual service e.g. a soldier in actual military service; a mariner or seaman being at sea; or a crew of commercial airliners. Special concessions as to form, age of the maker and mode of execution and attestation are immaterial. Such persons can make wills without the required formalities. It may not be written or signed or witnessed. The testator must however have the testamentary capacity and the intention to make the will.
7. **Holograph Will**: This is a will written and executed in the hands of the testator himself which is usually not attested.

8. **Prenuptial/Ante-Nuptial Will:** This is a will made preparatory to a marriage. It can be made by any of the spouses to be before marriage.
9. **Conditional Will:** This is a will executed based on certain pre-conditions which must be fulfilled before the will can take effect.
10. **Written Customary Wills**: this type of Will conforms to Islamic laws.

II. Features/Characteristics of a Formal Will

1. **Written Form:** It must be in writing, except privileged will and a nuncupative Will. See ***Section 9 Wills Act, Section 4(1) (a) Wills Law of Lagos State*** and ***Section 4 of the Statute of Frauds***.
2. **Testamentary:** That is, it speaks or only from the death of the testator or comes into effect upon the dead of the testator. See ***Section 24 Wills Act***.
3. **Ambulatory:** a will is not static; it can be revoked at any time before the death of the testator. It can be altered and even nullified.
4. **Voluntariness:** it must be freely and voluntarily made - made without force or coercion
5. **Execution in Accordance to the Law:** It must be executed in accordance with the provisions of the law - ***Section 9 of the Wills Act*.**
6. **Sound Disposing Mind (Corpus Mentis):** The testator/testatrix must have a sound disposing mind (corpus mentis) at the time of making and executing the Will e.g. a lunatic cannot make a will.
7. **Disclosure of Intention of Testator:** It must disclose the intentions of the testator.
8. **Dispositions:** A will is made of dispositions (reflects what is being disposed of) but it may also contain non-dispository provisions e.g. statement made on social issues or the general welfare of the family or appointment of executors.

RATIONALE FOR MAKING A WILL

I. Rationale/Advantages of Making a Will

1. A Will displaces the application of customary rules of inheritance subject to the rule in ***Idehen v. Idehen***. See also ***Lawal Osula v. Lawal Osula***.
2. A Will displaces the application of the rules of statutory devolution. For instance, ***Section 49 Administration of Estate Law, Laws of Lagos State*** and ***Section 39 of the Marriage Act***.
3. Where a Will is made and executors are named in it, the powers of the executors arise immediately upon the death of the testator and they do not need to wait for probate before they begin to administer the estate. This is because their powers are derived from the Will. See ***Ojukwu v. Kaine***.[182]
4. There is continuity in the administration of an estate covered by a Will. This is because in the event that all the executors die, then by transmission and operation of law, the executor of the last surviving executor is entitled to continue the administration of the testator and can complete the winding up of the testator's estate.
5. The administration of a testate estate is cheaper than the administration of an intestate estate. It reduces the costs involved in applying for grant of letters of administration and it also reduces the Inheritance Tax Liability where substantial assets are involved.
6. Through a Will, the testator can give additional or extended powers to the executors, such as making them trustees.
7. Through a Will, the testator can extend the category of his beneficiaries beyond his nuclear family and include friends, mistresses etc.
8. Through a Will the testator has the opportunity of determining and choosing the persons who would administer his estate as his executors.
9. Through a Will, the testator can appoint a guardian or trustee for his infant children if he

[182] (1997) 9 NWLR (Pt. 522) 613

has any.

10. Through a Will, the testator can make special gifts or donations, such as to charity, to a library etc.
11. The testator is given the opportunity to give his funeral directives though this is not advisable. Funeral directives should be in a separate document.
12. A Will gives the testator the opportunity of expressing his personal opinion and feelings.
13. Making of a will saves time, energy and may reduce friction among beneficiaries.

II. Disadvantages of Making a Will

1. It does not enhance community and affinity in the families of the deceased. Steering up acrimony in families.
2. Additional costs and expenses incurred on its drafting.
3. Any mistake on the formal requirements of a will may easily vitiate it.
4. Could also be very expensive in relation to large estates.

TESTAMENTARY CAPACITY

These are the elementary criteria to be possessed by an individual before he is qualified in Law to make a valid Will. The testator must possess the Testamentary Capacity to make a will viz:

1. Legal Age
2. Mental capacity

I. Requirements of Legal Age

Only an adult who has attained the age of 21 years under Wills Act jurisdiction or 18 years in Lagos, Kaduna, Abia, and Oyo can make Wills. See ***Section 7 of Wills Act*** and ***Section 3 of Wills Law of Lagos*** respectively. Any person under these ages cannot make a valid will except if it is a privileged Will and he is so qualified to make it. Where an under-aged makes a will, the fact that he later or subsequently attained the age of adulthood does not validate the will.
The exception to the above rule is a privileged Will allowed to be made by members of the Military who are below the age limit of adulthood as follows:

(a) Soldiers in actual military service (at war)
(b) Sea men at sea
(c) Mariners at sea
(d) Crew of commercial airlines in the Air

NOTE: extreme old age does not impute lack of mental capacity.
Section 11 Wills Act; Section 6 Wills Law Lagos.

II. Mental Capacity (Sound Disposing Mind)

A. General Rule

A testator must have the mental capacity or sound-disposing mind to make a Will. This must be present:

1. Both at the time of giving instructions for his Will to be prepared, and
2. At the time of its execution. See ***Okelola v. Boyle***.[183]

Note = Soundness of mind should not be confused with the state of body health - ***Johnson v. Maja; Adebajo v. Adebajo***.

B. Tests for Determining Mental Capacity

The tests for determining if the testator had mental capacity/sound disposing mind when making his Will was laid down in the case of ***Banks v. Goodfellow***.[184] Cockburn J held as follows: this testator had suffered from two delusions (he was being pursued by spirits and that a man who had already died was coming around to molest him). He made a will giving his bounties to a niece. The niece died without issue leaving all that the testator had given to her to her heir-at-law who was not a relation of the testator. The heir-at-law of Goodfellow sued to

[183] (1998)
[184] (1870) LR 5 QB 549

say that Goodfellow did not have mental capacity when he made the law. The test was laid down as follows:

1. The testator must have a sound disposing mind and memory
2. A recollection of the property he wishes to dispose
3. A recollection of the persons who are the object of the bounty
4. Remember the manner in which it is to be distributed between them

C. Proof of Sound Disposing Mind

To prove the mental capacity of a testator, reliance may be placed on either or both of

1. **Presumption of a Sound Disposing Mind**: It is presumed that a testator was sane at the time he made his Will. The presumption of sound mind is based on the view that where a will appears ex-facie rational and logical, it will be presumed to be so. State of things shown to exist is presumed to continue to exist except the contrary is shown. Thus, where no suspicion attaches to a will, the courts will presume the document as alright unless other evidence displaces this presumption - ***Okelola v. Boyle*****;** ***omnia prae sumuntur rite esse acta*** (everything is presumed to be okay i.e. presumption of regularity).
   In the case of ***Banks v. Goodfellow***, the presumption was not rebutted as it was proved that the testator made the Will and went about his normal activities even though he was suffering from fits of unsound mind. The existence of the delusions, compatible with the retention of the general powers and faculties of the mind, will not be sufficient to overthrow the will, unless it were calculated to influence the testator making the will.
   The exceptions where this maxim will not apply are:
   (a) Where there is suspicion or the will is not ex facie regular or
   (b) Where the testator suffers from some disability such as deafness, blindness or illiteracy, the maxim will not apply.
2. **Positive Affirmative Evidence of a Sound Mind:** that the testator wrote the will; that there was attestation before witnesses; conduct of testator before and after the will was made; evidence of general habit in the course of life, medical evidence.

D. Onus of Proof of Mental Capacity

1. If the state of mind of the testator is contested, the onus is on the PROPOUNDER of the will to establish that the will is duly executed and rational on its face, or
2. He may decide to advance positive affirmative evidence in support of the testator's state of mind.
3. After this, the onus shifts to the CHALLENGER who must adduce evidence to show that despite the fact that the Will is rational on its face and duly executed, the testator was insane at the time the will was made - ***Johnson v Maja*****.**

E. What Constitutes Prima Facie Evidence of Proof?

1. Due execution
2. Signature
3. Required mental capacity and voluntariness
4. Attestation by 2 witnesses at the same time

Adebajo v Adebajo:[185] Adebajo wrote his will and drove his car to his lawyer's office and two people were witnesses to the will. Shortly after the man travelled overseas for medical reasons. Before he left, he transacted businesses: such as going to Land Registry, banks etc. he wrote letters to his sister to take care of things before he travelled. He travelled and died. He gave a lot of things to relatives and because of that the wife challenged the will. Even though the man was physically frail, he was mentally capable. In fact the court held that the fact that he gave things to his relations means he was a man concerned about the welfare of his people

F. Testamentary Intention

[185] (1971)

To make a valid will, a testator must possess ***Animus Testandi*** (intention to make a will), know and approve of the content. Testamentary intention is not dislodged by old age **- *Balonwu v. Nezianyi*.**

The Will of a person who is sane at the time of giving the instructions for the preparation of the Will but insane at the time of signing it may be valid or invalid depending on the facts of each case. If the instruction was personally given to the **Solicitor**, the Will will be held to be valid - ***Parker v. Felgate***.[186] Conversely, if the instruction was given through a **Third Party/Lay Agency** to be further communicated to a solicitor, great caution must be exercised before making any presumption in favour of validity - ***Singh v. Armichand.***[187]

For there to be a testamentary intention, the testator must:

1. Wish that the will take effect following his death
2. Know and approve of the contents of his will - ***Adebajo v. Adebajo; Balonwu v. Nezianyi***.

G. Precautionary Measures to Be Taken By a Solicitor in Respect to Mental Capacity

1. Have a confirmatory statement signed by the Solicitor that the testator had mental capacity to make a Will - ***Re Walker***.
2. Get a medical report by a medical practitioner who examined the testator confirming the presence of mental capacity of the testator.

III. Blind Persons and Illiterates Capacity

A. Blind Persons

A blind person can make a will. However, a Blind Person's Jurat must be contained in the Will. See ***Insitful v. Christian*****;** ***Order 58 Rule 10 Lagos***. A blind person can make a Will based on the following - ***Insitful v. Christian***

1. It must be shown that the Will was read over to him and
2. He perfectly appeared to understand the contents before affixing his hands to it.
3. A special attestation clause must be inserted to the Will as evidence of having read the Will to him. It is called Blind Person's Jurat**.**

NOTE: A blind person cannot attest to a Will because his disability makes it impossible for him to see the signature of the testator and the act of signing the document.

B. Illiterate

An illiterate person can make a will. However, an Illiterate Jurat must be contained in the Will. See ***Order 58 rule 10 Lagos***.

IV. Muslims

A Muslim can make a Will subject to certain Islamic principles – ***Ajibade v. Ajibade***. This can be seen where the local Wills law of the area of the testator include the Islamic restriction. However, where the Wills Law did not make provision for Islamic restrictions, then the testator (Muslim) is free to dispose of his estate as he so desires without restrictions.

V. Sick Persons

Sick persons have the capacity to make a Will – ***Adebajo v. Adebajo***.

VALIDITY OF A WILL

I. Requirements of a Valid Will

The factors that must exist to make a Will valid in Law are as follows:

1. Testamentary capacity of the testator to dispose of his estate
2. The will was made voluntarily without any element of undue influence
3. It must be made in writing
4. It must be duly executed in accordance with Section 9 of the Wills Act. (Signed by the testator and attested to by two witnesses).

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[186] (1883)
[187] (1948)

II. Writing

No particular form of writing is necessary. It may be typed printed, handwritten (holograph) or a combination of these. The language must not only be English. In ***Whiting v. Turner*** the court held as valid a will written in French language. See also ***Section 9 Wills Act 1837; Section 4 Wills Law Lagos*****.**

III. Due Execution

A. Modes of Execution

The three (3) modes of executing a will are as follows:

1. Execution is done by the testator in the presence of at least 2 witnesses who must in his presence also attest to the will.
2. Execution by a representative duly authorised by the testator signing it in the presence of the testator and at least 2 other witnesses.
3. By the testator himself pre-signing it and then acknowledging his signature in the presence of at least 2 witnesses - ***Section 9 Wills Act***.

B. Signed By the Testator

A signature may be an initial, a cross, rubber stamp. The signature must be what the testator intended and it must be complete. Signature does not include sealing - ***Ellis v. Smith*****.** However, in ***The Goods of Emerson,*** sealing coupled with initials on the seal was held as signing. A thumb impression was accepted as signature in ***The Estate of Randle (Nelson V. Akofiranmi)***. Where the testator is illiterate or blind, a jurat should be inserted indicating that the contents of the will were first read and interpreted to him and he understood before affixing signature.

The position of a testator's signature in a will is considered as follows: Formerly in the ***Wills Act of 1837***, the signature of the testator must be at the bottom of the Will. However, the ***Wills Act as amended in 1852*** provided that it does not matter where the signature is provided it is signed. However, it is advisable that the testator signs at the end of the Will where the Will is more than one page. In all cases, the testator must sign before the witnesses sign. In order to avoid fraud, any disposition or direction which is underneath or follows the testator's signature is invalid - ***Section 1 Wills Act 1852; Section 4 Wills Law*****.**

The conditions for an agent signing on behalf of a testator are:

1. The testator must be incapacitated to sign the Will.
2. There must be clear instructions from the testator.

C. Attestation by the Witnesses

1. **General Rules:** The signature of the testator must be made or acknowledged by him in the presence of at least two witnesses who must be present at the same time. Words are not necessary for attestation- ***Ize-Iyamu v. Alonge***. The witnesses must be present at the same time though they may not be present when each of them is signing - ***Chodwick v Palmer***. The presence of witnesses here is physical and simultaneous when the testator signs or acknowledges his signature. A witness must sign in his own hand and cannot direct another to sign on his behalf as a witness. The testator must not be at the same place with the attestation in and so far the testator can view what the witnesses are doing.
2. **Beneficiaries and Their Spouses Attesting a Will:** The general rule is that a beneficiary to a Will and his/her spouse cannot take the gift made to them under a Will if either of them is a witness to the Will. Any gift made to such person will be utterly null and void. a benefiting witness/spouse is only disqualified from taking the gift made under the will, but is a competent witness to testify on the facts of due execution of the will - ***Section 15 of the Wills Act; Section 8 Wills Law Lagos***.
3. **Exceptions to the Above Rule:**
   (a) Where a witness had signed the will before marrying a beneficiary under the Will
   (b) There are more than 2 witnesses who attested to the Will and one of them benefited from the Will

(c) The gift was made in settlement of a debt
(d) The gift was subsequently confirmed in another Will or codicil, which is not attested to by the beneficiary.
(e) The rule does not apply to privilege wills
(f) The witness is subsequently appointed a Solicitor to the Will which contained a charging clause
(g) Where the person present merely signs that he agrees with the contents of the Will but not as witness

D. Alteration of a Will

Any alteration in a will after its due execution will only be valid if after the alteration the will is executed by the testator in the joint presence of at least 2 witnesses who will also attest to it in accordance with ***Section 9 of the Will Act***.

IV. Factors Which May Vitiate the Validity of a Will

A. Delusion

Delusion is a belief which no rational person could hold but which reasoning with the testator cannot eradicate from his mind and which is capable of influencing the provision of his will. An example is a Religious Delusion where a certain woman had the belief that she was of the Trinity, was a Bride of God, Dr-Smith (the beneficiary) was God the father, and her husband was a devil. Judgment of mankind will take place in her dining room. However, she did some rational things in-between. Considered that even though she had some lucid periods, she was not of a sound disposing mind.

Person suffering from delusions can create a valid will where the testator satisfies the test in ***Banks v. Goodfellow***:

1. Delusion must influence disposition to render the will invalid - ***Battan Singh V. Armand; Amu v. Amu***.
2. There must be a nexus between the delusion and the disposition of the will.
3. Where a testator gives instructions with sound disposing mind directly to a solicitor or notary public but before execution loses mental capacity. The will is still valid if executed with knowledge – ***Parker v. Felgate, Perera v. Perera***. However, this rule above will not apply where the instructions were given to an intermediary by the testator - ***Battan Singh v. Armichand***.
4. Where the testator had lucid moments within which he made the will, the will would be valid - ***Banks v. Goodfellow*****.**

B. Undue Influence

Undue influence is coercion to make a will in a particular way - ***Hall v. Hall***. It occurs where the testator's mind has been subject to any improper persuasion or machination in such a way he is overpowered and consequently induced to do or forbear. An undue influence must be proven not presumed. Mere existence of fiduciary relationship or immoral consideration does not imply undue influence - ***Johnson v Maja***.[188] – giving most property to his mistress instead of the wife. The court held no undue influence, more so that the mistress did not accompany the testator to the house of the witnesses who attested the will and there was nothing directly connecting the mistress with the process of making the will even though there was evidence that the testator shifted his affection from his wife to his mistress.

Note= Undue Influence should be differentiated from persuasion. Persuasion/family considerations are not regarded as undue elements e.g. a Solicitor advising the testator to consider giving some legacies to one of his sons he has refused to give anything in the Will - ***Johnson v. Maja***. Persuasions appeal to the affections/ties of kindred sentiment of gratitude for past services or pity - ***Hall v. Hall*****.**

[188] (1950)

Where a man deprives his wife of benefits and gives generously to his mistress: this may not alone prove undue influence – ***Johnson v. Maja***.

C. Fraud

Where successfully proved would invalidate a will in all its entirety or a particular disposition. Thus, if the fraud is in respect to the whole Will, then the whole Will will be vitiated, but if it is in respect to particular gift, then only the gift will be vitiated.

D. Mistake of Law & Mistake of Facts

Mistake of law may not be fatal to the validity of a will so far fraud is not traceable, but a MISTAKE OF FACTS will be fatal to the will because dispositions are matters of fact e.g. where testator mistook Ngozi for Nkiru in devolving his property to her.

E. Suspicious Circumstances

Suspicious circumstances like a situation where a gift was substantially made to a person who is in a fiduciary relationship with the testator e.g. a Lawyer, Pastor, doctor etc. These circumstances raise doubts prima facie. There is a presumption that the testator was unduly influenced in making the gifts so the propounders will have the burden to prove that there was no undue influence**.** In ***Okelola v Boyle*****:** the sole beneficiary to the new Will was a neighbour to the testator as against the testator's cousin who benefitted under the previous of the will. The will was set aside.

PROOF OF VALIDITY OF A WILL

A will may be proved in its common form or solemn form. The onus of proving the existence and validity of a will is on the propounders usually the executors of the will. They can do so by any of the following means:

I. Affidavit

This is used when:

1. There is no proper attestation clause
2. The judge has any doubt as to the due execution of a will
3. Where the testator is an illiterate or blind person.

The affidavit will set out the manner in which the will was read or interpreted to the testator and the manner in which he signified that he understood and approved of its content - ***Re Geale*** (Deaf/Dumb/Illiterate Testator). See also ***Order 58 Rules 5 &10 High Court of Lagos State (Civil Procedure) Rules 2012***.

II. Presumption of Due Execution

The Latin term is ***omnia prae sumuntur rite esse acta*** meaning everything that seems regular are deemed properly done. ***Section 168(1) Evidence Act 2011*****:** When any judicial or official act is shown to have been done in a manner substantially regular, it is presumed that formal requisites for its validity were complied with.

The conditions for presumption of due execution are:

1. The Will must be regular on its face.
2. It must have a proper attestation clause - ***Nelson v. Akofiranmi***

However, this presumption is rebuttable with cogent evidence - ***Banks v. Good Fellow***. Any doubt in respect to a Will is resolved in favour of the Will.

III. Positive Affirmative Evidence

In addition or as alternative to the presumption of sound mind the propounder may lead positive affirmative evidence to prove that the testator had a sound disposing mind. This evidence may be documentary and oral. Example of such evidence include:

1. Statements made at the time of instruction and execution. Where an instruction was given to a solicitor, the instruction must be clear and unambiguous and the person receiving the instruction must understand the instruction.
2. Evidence that the will was written by the testator or the instructions were written by him
3. Evidence of attesting Witnesses, which should be corroborated ***Adebajo v. Adebajo***

4. Medical evidence by credible doctors who must have examined the testator in the past- ***Okelola v. Boyle***
5. Evidence of the conduct of the testator before and after making the will - ***Johnson v. Maja***
6. Evidence of general habits and course of life of the testator before making of the will - ***Adebajo v. Adebajo; Banks v. Goodfellows***.

ETHICAL ISSUES

1. Counsel to represent client within the bounds of the law He should not contravene the law ***Rule 15(2) (a) RPC***.
2. A lawyer should not collude with a Beneficiary to alter the Will.
3. Duty not to take undue benefit from a client's property - ***Rule 23(1) RPC*****.**
4. Where a lawyer is a beneficiary under a Will, he should tell the testator to engage the services of another lawyer to do the Will.
5. Duty not to charge exorbitant fees - ***Rule 48(2) RPC***
6. Duty to take instructions in writing
7. Duty to be devoted and not to be negligent - ***Rule 14 RPC***
8. Duty of confidentiality - ***Rule 19(1) RPC***
9. Duty to disclose any conflict of interest - ***Rule 17(1) RPC***
10. Duty not to take instruction in client's house except in special circumstances - ***Rule 22 RPC*****.**
11. Advise client on who can be his Executor
12. Ensure that all the beneficiaries are catered for
13. Advise client on the fact that a beneficiary should not have a witness or Executor

(Week 16)
WILLS AND CODICILS II (EXAMS)

INTRODUCTION

I. Types of Gifts/Legacies under a Will

1. Specific gift which is subject to the rule of ademption (a situation where the specific gift bequeathed to a beneficiary is discovered not to be in existence and the gift will fail because of that)
2. General gift
3. Demonstrative gift
4. Substitutive gift
5. Annuity
6. Pecuniary gift
7. Residuary gift which is aimed at avoiding partial intestacy
8. Joint gifts or those given in common or equal shares
9. Contingent/conditional gift
10. Alternative gift
11. Accumulated gift

II. Order from which Executors can use to Satisfy Debts of the Estate

Order from which executors can use legacies to satisfy debts of the estate: residuary, general, demonstrative, specific legacy.

TYPES OF LEGACY

The four main types of legacy are: specific, general, demonstrative and residuary legacy. Others can be subsumed under it.

I. Specific Legacy

A. Concept

This is a gift of an identifiable property that is specific and distinguishable from the other properties owned by the testator. It must be properly and sufficiently described. The gift may be indicated by the use of the word "my" followed by a description of the gift.

B. Examples

1. A gift of my Toyota Camry car with Reg. No BQ232 AWK to my daughter Bimpe.
2. I give my diamond ring bought from Agoz Jewelleries UK to my niece Nkechi.
3. A gift of my 4 million shares in FBN PLC to my son Bala.

It is not a specific gift if it reads; "A Toyota car for my son Dayo"

C. Advantages

1. It is not liable to abate where there are insufficient funds or the estate is not enough to satisfy all legacies, obligations debts. (Abatement means insufficiency of the assets in the estate at the time of death of the testator). NB – it abates in extreme cases where even other legacies are not enough to cover the debts and obligations.
2. Income from the specific property accrues to the legatee and starts running from the time of death of the testator.

D. Disadvantages

1. If the gift no longer exists or cannot be found at the time of the testator death, it would be said that the gift is adeemed and therefore it has failed.
2. Where there is ambiguity as to the legacy made by the testator (specific or general), the court leans towards the legacy being a general legacy.

E. Method Legal Practitioners will Use to Circumvent Failure of a Specific Gift

In order to avoid the failure of a specific gift, alternative or substituted gifts are made to the beneficiary e.g. "a gift of my Mercedes Benz with Reg. No BQ232 AWK to my daughter Bimpe. If it fails, I make a gift of Toyota Hiace with Reg DF874 to her."

II. General Legacy

A. Concept

It a general legacy, there is no specific description. It does not refer to a particular piece of the testator's estate. The testator intends that the gift should be satisfied from the general assets of his estate. There is nothing distinctive about the gift. The use of the word 'my' is not a decisive factor (e.g. a gift of my walking stick to my son Ebuka – could be general if testator has many walking sticks or specific if he only has one).

B. Examples

A gift of a walking stick to my son Joel. If the testator does not own a walking stick at his death, the Executors/Personal Representative will provide for it from the testator's general estate. Note: gifts of shares and stocks.

C. Advantage

1. It is not liable to ademption

D. Disadvantage

1. Suffers abatement where estate is insufficient

III. Demonstrative Legacy

A. Concept

This may be in form of general legacy but directed to be satisfied from a specific fund or particular pool of property (not restricted to property) i.e. testator will demonstrate to the executors the source from which the gift is to come from - usually payable from a bank account.

B. Example

1. I give N50, 000 to Bimpe to be drawn from my savings account No. 2345678910 at Diamond Bank. Gift + Description + Source = Demonstrative legacy.
2. A gift of 2 million naira to be paid out of my account with Zenith Bank Plc Okpara Avenue Enugu Branch to Johnson.
3. A gift of my Honda car with Reg. No BC345 parked in my garage at No. 5 Park Lane Independence Layout Enugu to Killi.

C. Advantages

1. Demonstrative gift is not subject to ademption and will only abate where the particular fund is not sufficient to take care of the legacy.
2. Demonstrative legacy is not limited to a gift of money e.g. "A gift of my books kept in the shelf in my bedroom" or "A gift of my articles published by Adams & Kings Publishing Company Asaba."

D. Disadvantages

1. The court will treat it as general legacy.
2. It is liable to abatement (a particular proportion)

IV. Pecuniary Legacy

A. Concept

This is strictly money dispositions. It could be specific or demonstrative or general. It may or may not give direction on the particular fund – where the money should be drawn from. If it gives direction on the particular fund, it is demonstrative legacy.

B. Money Includes

1. Cash and notes at hand
2. Money immediately payable to the testator at call and
3. Money at the Bank - ***Re White.***

However, money cannot be extended to include shares in company.

V. Annuity

It is called an annuity when it is expressed to be paid at intervals. It could be general, specific or demonstrative. It is payable from the death of the testator. E.g. I give N50, 000 to my wife Nkechi to be paid to her every month.

VI. Residuary Legacy

A. Concept

This is the remainder of the property belonging to the estate after payment of all other gifts and debts, expenses taxes and liability of the testator have been fulfilled, cleared or paid. It is made up of personal or real property. A residuary clause is usually inserted in the Will to transfer all remaining residue and remainder. The beneficiaries are called 'Residuary Legatees'

B. Source where Remainder may be derived

Such remainder may have been derived from the following:

1. Property acquired by testator after making his will or codicil
2. Properties acquired after testator's death.
3. Gifts that lapsed by the death of the beneficiary or lack of substitution clause
4. Gifts that failed.

C. Example

All my properties as shall be vested in me at the date of my death, not specifically given out in my will or such that fails or lapses by the death of the beneficiary, to my children in equal part.

D. Effect of not Including the Clause

Leads to partial intestacy – dividing up the part of estate according to the rules of intestacy – ***Section 53 Administration of Estate Law Lagos***. Residuary legacy lessens the possibility of partial intestacy.

E. Exception to the Principle of Lapse

Section 24 Wills Law of Lagos State: where a person being a child of the testator who has a disposition in his favour dies in the lifetime of the testator, but has a child or issue who is living after the death of the testator, the disposition to the person shall not lapse. It will take effect as if the death of the person had happened immediately after the death of the testator. Thus, making the gift the absolute property of the beneficiary for which he can pass it after his death to his child or issue.

VII. Absolute Legacy

No conditions attached. It vests automatically and takes effect upon the death of the testator.

VIII. Conditional/Contingent Legacy

A. Concept

The gift only becomes effective upon the happening of particular event (upon the occurrence or non-occurrence of a specific event – condition precedent or condition subsequent).

B. Condition Precedent and Subsequent

Condition precedent is that beneficiary must satisfy the condition before the gift can vest in the beneficiary. Condition subsequent – a person is given the gift but subject to the person satisfying a subsequent condition (gift of leasehold subject to the payment of rent and fulfilling the covenant in the lease agreement).

C. Valid and Void Condition Precedent

The condition could be valid or void e.g. it is void if it is an inducement not to marry (against public policy to restrain marriage). The court leans against condition precedent in favour of condition subsequent to save the gift. If the condition precedent is void, then beneficiary cannot take the gift (gift fails). For a void condition subsequent, the court can strike out the condition and the beneficiary will take the gift unconditionally/absolutely as the gift has already been vested in the beneficiary. For a valid condition precedent, the gift will be in abeyance until beneficiary satisfies the condition. For a valid condition subsequent, if it is not satisfied, the gift that is already vested will be terminated.

FAILURE OF GIFTS

I. Circumstances when a Gift will fail

These are situations where the legacies/bequests will not be available to the beneficiary under a will for some reasons as follows:

1. **Execution by a Beneficiary or Spouse:** Where a witness not falling under the exceptions is a beneficiary or spouse under the Will - ***Section 8 of the Lagos State Wills Law*** and ***Section 15 of the Wills Act*****.** Thus, where the beneficiary witnesses the Will, the gift utterly fails, even though the Will is valid.
2. **Ademption:** The specific gift is caught by ademption where the gift is no longer in existence or that its nature/ character has changed before the testator's death. In such a case the beneficiary will have nothing.
3. **Lapse of Gift**: The gift lapses where the beneficiary predecease the testator. For instance Chief Ojo made a gift of his house at No. 3 Keja Road Lagos to Eunice his 3rd wife. Eunice dies of hay fever while Chief Ojo lives. The devise to Eunice will be said to have lapsed and would devolve to the estate of Chief Ojo. But if both Ojo and Eunice die in an accident together, the gift to Eunice does not lapse because it is presumed that Chief Ojo being older died first - an older person is deemed to have died before a younger person where the time of their deaths is confusing. Thus, the gift would devolve upon Eunice's successor. Lapse cannot be excluded in a Will.
4. **Public Policy:** Based on public policy, the gift will fail like when the beneficiary is proved to have killed the testator – ***Errignton v. Errington,*** or to incite divorce or for an immoral purpose.
5. **Illegality:** The gift was made to promote an illegal purpose.
6. **Uncertainty:** where there is uncertainty or insufficient description of the gift/object or beneficiary, the gift will fail. E.g. T Carville – left 100 francs for each of her executor and the rest 'as my executors shall fit'. The gift will fail due to uncertainty of objects. However, it would not fail if it is a charitable purpose.
7. **Insufficiency of Estate of Testator to Satisfy the Gift:** The estate of the testator abated when it is insufficient to give any gift charged on it in a Will.
8. **Disclaimer by Beneficiary:** The beneficiary can disclaim a gift by writing to the executors rejecting the gift or can disclaim by conduct. There cannot be a partial disclaimer. The reasons for disclaimer might be burdensome taxes, onerous obligations, or personal reasons.
9. **Non Fulfilment of Condition:** conditional gift made subject to fulfilling some unsatisfied conditions shall fail.
10. **Divorce/Annulment of Marriage:** a gift to a testator's spouse can fail due to divorce/annulment of marriage **–** ***Section 18(a) Wills Act*****.**
11. **Customary Law Restrictions:** Gift is contrary to Inalienability Rule **-** ***Lawal Osula v. Lawal Osula.***
12. **Invalid Title of Testator:** this involves gifts contrary to the *nemo dat quod non habet* rule i.e. where testator has invalid title.
13. **Existence of Vitiating Factors:** The presence of vitiating elements in the making of the gift/Will such as fraud, duress, undue influence, mistake, subsequent marriage, etc. will make the gift fail.
14. **Operation of Law:** for instance, compulsory acquisition, conditional sale, etc.

II. Effect of Failure of Gifts

If the gift fails, it goes to the residuary estate. It will then be shared according to the direction of the testator or the rules of intestacy.

III. Ademption

A. **Concept:** Where the gift adeemed or abates, there will be no gift. Ademption means the gift is not available at the death of the testator as a result of what the testator did during his lifetime (he substantially altered the gift in its natural character during his lifetime, sold it, destroyed it, gave it to someone else e.g. sold his gift of Zenith Bank shares to his wife and purchased UBA shares. The gift of Zenith shares to his wife is said to be adeemed. Mere

change in name or form of gift may not render the gift liable to ademption e.g. gift of shares in Ecobank but before death of testator, the name of the bank changed, there would be no ademption. In ***Re Clifford*** – T made specific gift of 23 shares with a company before testator's death company changed its name and subdivide shares to a quarter. The court held that there was no ademption, and the beneficiary is entitled to 92 shares, which is the current value of the shares – no intention to adeem by the testator as the change was from the bank not the testator.

B. Simultaneous Death of Testator with Gift Already Bequeathed in His Will (e.g. the testator bequeathed his car which subsequently was involved in an accident and the car was completely destroyed and the testator also died). Where circumstances are uncertain, the presumption is that the testator survives the property so it specific legacy, the gift is adeemed - ***Durant v Friend*****.** Thus, any proceeds of insurance policy would go to the estate of the residuary legatee.

C. Circumstances where Ademption will Occur

1. The gift is sold before the testator's death
2. The property as the gift is subject to a Formal Contract of Sale. Time of entering the contract is decisive. If the will is executed before contract of sale, it is presumed that the testator intends to revoke the gift so proceeds of sale will go to residuary estate. If the will is executed after entering contract of sale, beneficiary will take proceed of sale.
3. The property given as a gift was compulsorily acquired by the State. Cannot be cured by payment of compensation as this goes to the residuary legatee - ***Re Galway***. Note that if the property is acquired by the State after the testator died, then the beneficiary can get the compensation money
4. A fundamental change occurred in the character of the gift
5. The property as gift is subject to a hire-purchase option.

D. Ademption by Operation of Law

1. By a subsequent disposition by the testator of the subject
2. By presumption against double portions
3. Where the property is lost.

E. Exceptions where Gifts will not Fail Based on the Rule of Ademption

1. It is a general gift
2. A change in the gift is only in respect of the form, e.g. shares in a Bank A bought by Bank B, the shareholders of Bank A will still be shareholder in Bank B.

IV. Doctrine of Lapse

A. Concept: where the beneficiary predecease the testator, the gift lapses and falls into the residuary estate of the testator because gifts in a will are expectancy (testamentary) until death of the testator.

B. Presumptions Suring Lapse of Gift (Rule of Commorientes/Simultaneous Death):
For the purpose of determining title to property ***Section 164 (2) Evidence Act 2011, Section 23 Wills Law Lagos State*** provides that:

1. Where two or more persons have died in circumstances in which it is uncertain which survived the other, they are presumed to have died in order of seniority.
2. If the beneficiary however is older than the testator and they die at the same time, it is presumed that the beneficiary died first, thus the gift will fail.
3. Where all of them died at the same time, it is presumed that the youngest of them died last and the gift devolves to his successor-in-title.
4. However, this rule of commorientes will not apply where condition of survivorship is applicable because the testator provided for survivorship by a stated length of time.
5. The rule of commorientes is inapplicable where the two who died in circumstances

that are uncertain are spouses. The presumption will be that they died at the same time. The estate of one spouse will not be vested in the other – ***Section 49(3) Admin of Estate Law Lagos State*** and ***Section 49(3) AEL Western Region***.

C. Exceptions where a Gift will not Fail because the Beneficiary Dies (Lapse) before the Testator

1. **Class Gift:** A class gift(s) made to more than one person JOINTLY or in EQUAL shares. The other survivors will take the gift. The use of the word "in equal shares" is to ensure that if a child predeceases the testator, his share will pass and be divided amongst the others.
2. **Gifts to Settle Debt or Moral Obligations:** Gifts to settle debt or moral obligations would not be affected by the doctrine of lapse whether or not the obligation is legally binding. Even after the death of the beneficiary, the gift will be paid to the estate of the deceased beneficiary.
3. **Substitution or Alternative Gifts:** Where there is a substitution or alternative gifts (substituted beneficiary). The testator can make a substitutional gift to the beneficiary's children or representatives in order to avoid the principle of lapse.
4. **Existence of a Child/Issue:** A gift to a testator's child who dies in the life time of the testator but has a child who is living after the death of the testator. ***Section 24 Will Law of Lagos State*** provides that where a person being a child of the testator who has disposition in his favour dies in the lifetime of the testator, but has a child or issue who is living after the death of the testator, the disposition to the person shall not lapse. Rather it will take effect as if the death of the person had happened immediately after the death of the testator. The doctrine means that the beneficiary is deemed or presumed to have died immediately after the testator and thus make the gift the absolute property of the beneficiary for which he can pass it after his death to his child or issue.

REVOCATION OF WILLS

Will is ambulatory, revolves and crystallises at the death of the testator. Revocation of Will must be clear and unambiguous without leaving room for various interpretations. There are situations where a valid Will will be revoked or made invalid either by the acts of the testator or by implication of the Law as follows:

1. **Voluntary Revocation:** The modes in which a Will can be voluntarily revoked are:
   (a) By the testator making a subsequent Will or Codicil duly executed
   (b) By a written declaration with the intention to revoke the will
   (c) By destruction of a Will with the requisite intention to make it invalid
2. **Involuntary Revocation (Revocation by Operation of Law):** By the testator engaging in a subsequent statutory marriage (under the Marriage Act)

I. Subsequent Will or Codicil

A. Concept: By the testator making a subsequent Will or Codicil duly executed stating that he revokes the earlier Will.

B. Forms

1. **Express Revocation:** The subsequent Will/Codicil contains a revocation clause revoking the earlier Will. The EXCEPTIONS are:
   (a) Clause was inserted by mistake and without testator's approval
   (b) Two wills relate to different property of the testator - ***O'Leary v. Douglas*****.**
   Note: general words such as "last and only will" or "last testament of me" may not be sufficient to revoke an earlier will.
2. **Implied Revocation**: This is where the latter Will is in contrast with the provisions of the earlier will, thus the latter Will's provisions will prevail. The forms of implied revocation are -

(a) Where the latter Will covers practically the same grounds as the earlier one
(b) Where the latter will disposed the same properties to either different beneficiaries or in a manner inconsistent with the former will - ***Henfrey v. Henfrey***. However, it is not a general rule that every inconsistent will revokes the previous one - ***Biddles v. Biddles***.

II. Written Declaration with the Intention to Revoke the Will

A. Types of Written Declarations
1. Memorandum of revocation
2. A letter
3. A settlement
4. An ordinary declaration of intention to revoke a will

B. Conditions for a Validity: The written declaration must –
1. Be duly executed and attested to by at least 2 witnesses
2. Have *animus revocandi* (clear intention to revoke the will)
3. Have testamentary capacity
4. Not be made out of mistake, fraud or undue influence

See ***Section 9 Wills Act; Section 1 Wills (Amendment Act) 1952; Section 4 Wills Law Lagos; Parker v. Parker, Henfrey v. Henfrey***.

III. Destruction of a Will with the Requisite Intention to make it Invalid

A. Modes of Destruction
1. Personally by the testator with an intention to destroy same; or
2. By giving instructions to a third party to destroy the Will

B. Conditions for Validity of Destruction by a Third Party
1. The instruction to destroy the Will must be in writing
2. The testator must be present when it is being destroyed.
3. It must be at his request or direction

See ***Section 20 Wills Act 1837; Section 13 Wills Law***. ***In The Goods of Kreme***: pursuant to phone instruction by the client to his solicitor, the solicitor destroyed the client's will. It was held invalid as the testator was not there when will was destroyed. In ***Re Dadds***, a weak testatrix asked her assistants to help her destroy her Will. The assistants took the Will to the kitchen and burnt it. It was held invalid as destruction was not done in the presence of the testatrix. ***In the Goods of Bacon***, it was held that the destruction of a will by a third party AFTER the testator's death on the instructions of the testator in his lifetime was an ineffectual revocation – exams.

C. Conditions for Revocation by Destruction

1. Sufficient & Physical Act of Destruction: There must be a sufficient and physical act of destruction

(a) Sufficient Acts of Destruction
i. Completely tearing (beyond recognition)
ii. Cutting/mutilation
iii. Burning completely
iv. Scribbling out the signature of the testator or witnesses

(b) Insufficient Acts of Destruction
i. Merely squeezing the will
ii. Drawing lines across the will
iii. Tearing some parts of the will

In ***Cheese v. Lovejoy***,[189] the testator drew a line across the Will and wrote the words "revoked" then squeezed it and threw it a waste bin. His maid picked it

[189] (1877)

up, straightened it and placed it on the table where it remained until his death. The court held that there was no destruction of the Will - Will not revoked. In ***Perkes v. Perkes***;[190] the testator tore the Will into four pieces with intention to destroy it. He was stopped by bystanders and the beneficiary who was not pleased with him. He picked the four pieces and gummed them together saying "It is a good job, it is no worse". The court held that the tearing was not a sufficient act of destruction.

(c) Sufficient Destruction of Original Copy: sufficient destruction of the original copy of a will is also sufficient revocation of the copies of that will.

(d) Partial Destruction: It will only revoke the part torn off not the entire will. However, ***In the Goods of Woodward,*** it was held that where an essential part is destroyed or where the destruction renders the remaining part meaningless, the entire will is deemed revoked.

2. Intention to Revoke: The act of revocation must have been carried out with the intention to revoke otherwise the revocation will be invalid (animus revocandi)**.** Such intention must be complete - ***Perkes v. Perkes.***

(a) Circumstances where Intention to Revoke will not be Inferred

i. Drunkenness
ii. Insanity
iii. Accidental destruction/mistake
iv. Obliteration of signature without clear evidence of who and why it was done

(b) Conditional Revocation: Occurs where the conditions under which the will was destroyed and thereby revoked have not and could not have been satisfied. In such cases destruction would be ineffectual to revoke a will.

(c) Instances of Conditional Revocation

i. A purported revocation due to a mistake of fact e.g. where the testator thought his earlier will was lost or that the legatees were dead.
ii. A purported revocation due to a mistake of law e.g.
   a. Where the testator revokes his will believing that his beneficiary will be the sole person to benefit on intestacy
   b. The destruction of a Will will revive an earlier will
   c. As a preliminary to making a fresh will

The court will hold that revocation is incomplete until new disposition is in place.

Note: the sufficient act and the intention must be CONTEMPORANEOUS (done at the same time)**.** There can be no subsequent ratification or confirmation of the act, which was done without intention - ***Gill v. Gill.***

IV. Testator Engaging In a Subsequent Valid Marriage under the Act

A. General Rule: This is a situation where the testator is earlier married under Customary Law with woman A and has made a Will but later goes ahead to get married under the Act to woman B. The earlier Will made will become invalid by Law so that he can make a new Will providing for woman B married under the Act – ***Section 18 Wills Act*****.**

B. Form of Marriage Capable of Revoking a Will: It is only a valid marriage under the Act that is capable of revoking the earlier Will. See ***Section 33 of the Marriage Act*** for the elements of a valid marriage under the Act (refer to Week 19 Civil Litigation). A voidable marriage is still a valid marriage UNTIL VOIDED and it can also revoke a Will. See ***Section 5 of the Matrimonial Causes Act*** for the grounds of voiding a valid marriage under the Marriage Act.

[190] (1820)

C. **Exceptions:** the exceptions to the above rule are -

1. **Will made in Contemplation of Marriage which Took Place with the Person Contemplated:** this arises where a Will was made in contemplation of marriage and the real marriage took place with the same person contemplated in the Will - ***Scallis v. Jones; Section 177(1) English Law of Property Act 1925; Section 47 Marriage Act***; ***Section 11 Wills Law Lagos, Oyo & Abia; Section 79 Succession Law of Anambra State*****.** The conditions for this exception are –
   (a) Will must be expressed to be made in contemplation of a particular marriage i.e. this fact must be stated in the will.
   (b) The testator must have married the person expressed in the will
   (c) The names of the parties to the contemplated marriage must be clearly stated in the will - ***Re Langston.***
2. **Testator Married under Customary Law Later Got Married under the Act:** this arises where the testator was married under customary law and later got married under the Act with the same person. In that case the earlier Will is not revoked by the marriage under the Act. In ***Jadesimi v. Okotie-Eboh*****,** the testator in 1942 got married under Itsekiri custom. His Will was executed in 1947 and in 1961 he subsequently got married under the Act. In 1966, the testator died during a coup d'etat. The question was whether the 1961 marriage revoked the will in 1947. The Supreme Court decided that the will was not revoked because the subsequent marriage under the Act was to the same person married under customary law. The subsequent marriage is not a new marriage and is superfluous. See also ***Section 11 Lagos Wills Law; Section 15 (Laws of the Western Region*****.**
3. **Void Marriages:** Void marriages cannot revoke a valid Will. In ***Metts v Metts***: the Testator's marriage to late wife's sister was held void for falling within prohibited affinity and not capable of revoking the Will made before the marriage to wife's younger sister.
4. **Failure of Donee to Appoint People to Get the Donor's Property despite Instruction by the Donor**: this arises where a will is made in exercise of appointment where property appointed would not ordinarily in default of appointment pass to his heirs or next of kin. The testator in this case is merely a donee of a power of appointment i.e. donor told donee to appoint people to get the donor's property and in default of appointment, it goes to residuary estate of the donor or someone else other than the donee's heirs or next of kin. Thus, the Will will not be revoked by the subsequent marriage of the testator unless the persons to take in default of appointment take as the testator's heir executor or administrator – ***Section 11(a) Wills Law Lagos***.
5. **Subsequent Marriage under Native Law and Custom:** A subsequent marriage under native law and custom does not revoke an earlier Will. Before 1837, the position was that the revocation of a will was considered revocation of a codicil made in the consequence of the will. However, the Wills Act 1852 changed this position

V. Missing/Mutilated Wills

A. **General Rule:** a Will formerly in the possession of testator later found missing or mutilated at testator's death is presumed to have been revoked as the intention to revoke can be inferred.

B. **Circumstances that can Rebut the Presumption of Intention to Revoke (Exceptions)**

1. Evidence of existence of will after testator's death e.g. where it is shown that the will was hidden somewhere.
2. Suspicion of foul play by person interested
3. Declaration of unchanged affections towards the beneficiaries
4. Dependent Relative Revocation – Testator revoked the will believing that if he

revoked this will, he would revive a different will. Unless that will is revived, the former Will will not be revoked.

5. Insanity of Testator shortly before Testator's death

C. Proof of Missing Will: By evidence of those conversant with contents of the lost will. It can also be re-written to reflect the instructions captured under the missing will.

ALTERATIONS, REPUBLICATION & REVIVAL OF A WILL

I. Alterations of a Will

Generally, alterations made on a Will are not valid where they are made after execution. Where a Will is altered, the testator and the witnesses must execute the altered parts of the Wills in the same way that the Wills are executed in order to make the alteration valid. There is a presumption that an alteration that was not executed and attested was made after the execution of the Will. Executing and attesting the alterations are usually at the margins of the Will close to the altered parts or by signing a memorandum indicating the alterations or by making a codicil – ***Section 21 Wills Act; Section 14 Wills Law Lagos; Mudasiru v. Abdullahi.***[191] These requirements must be strictly complied with.

Where the alterations make a part of a Will not apparent, the parts that are not apparent are regarded as revoked so long as it is shown that it is the intention of the testator. Where the original words before the alteration are apparent, the original words will be regarded as still valid while the alterations would be ignored. The words are apparent if they can clearly be seen and understood. Thus, if the alterations are unattested and the original words are apparent, probate will be granted in favour of the Will in its original form.

II. Republication of a Will

This is the means of reviving a valid Will in order to give it a new date (when it is republished). The date of republication is the effective date. Republication of a Will is the confirmation or reaffirmation of the validity and contents of a Will. This is done by re-execution or by a codicil. The purpose is for the testator to show that his previous will is unaltered or to revalidate alterations in a previous will.

Republication confirms a Will, which has been lying dormant and is unrevoked. Republication changes the date the will takes effect which will be the date of republication not the date on the original will.

III. Revival of a Will

A. Concept: This is to bring into existence a revoked Will. This may be done by either a Will or Codicil. This is the act of bringing back to life or operation a revoked Will or codicil so long as it is not destroyed.

B. Effective Date: Date of revival is effective date.

C. Modes of Revival

1. Re-execution with the formalities duly complied with,
2. A duly executed codicil with the intention to revive the revoke Will.

D. Conditions

1. There must have been a Will, which was revoked, if there is nothing revoked, there can be no revival – ***Section 22 Wills Act; Section 15 Wills Law Lagos*****.** However, only a Will in existence can be revived. Thus, a will revoked by destruction cannot be revived.
2. There must be on the face of the codicil either express words referring to a Will as having been revoked
3. There must be intention to revive it, or some other expressions conveying some certain

[191] (2011) 7 NWLR [Pt. 1247] 59

intention to revive the Will - ***In the Goods of Steele***.[192]

CODICILS

A. Concept: This is otherwise known as a miniature or supplemental Will attached to a previous valid Will. For there to be a codicil, there must be an earlier Will. All the formalities for a Will to be valid apply to a codicil. The testator must possess the testamentary capacity and the codicil must be executed by the testator in the presence of two witnesses who must be present at the same time and who shall attest to the codicil. There could be a Will without codicil but there can never be a codicil without a Will. The Commencement of a codicil is as follows: "THIS IS THE FIRST CODICIL TO THE LAST WILL of me, Mrs. Jones Emeka of No.2 Ejure Street Isolo Lagos made the 13 day of June 2012".

B. Functions of a Codicil

1. It may affirm the contents of a Will
2. It may alter or amend the provisions of a Will
3. It may correct a clerical error in a Will
4. It may revoke a Will
5. It may revive a Will
6. It may republish a Will

C. Similarities between a Will & Codicil

1. Both are testamentary
2. Both are ambulatory
3. Both are revocable
4. Both are dispository

D. Differences between Will & Codicil

1. A will comes first, while a codicil comes last
2. A will is independent while a codicil cannot survive on its own.

E. Unclear Codicil: An unclear codicil is invalid and of no effect. A codicil which is unclear or equivocal will be declared void by the court for its uncertainty - ***Armit v. Hipkins.*** However, mis-description of codicil does not make the codicil invalid nor will it be invalid because it failed to recite the exact date of the Will. In construing a Will containing an ambiguity, a court may refer to a RECITAL in a codicil to clarify and explain the Will.

F. When to Advise a Client to Execute a Fresh Will

1. When there is a new or subsequent marriage
2. When there is excess alteration or mutilation of the original will
3. When there is change in finances and assets
4. When there is a change in residence

ETHICAL ISSUES

1. A lawyer should know when to advise for a fresh will
2. Advise client on when there could be failure of a gift
3. Duty of confidentiality. Solicitor not to divulge the contents of the Will - ***Rule 19 RPC***.
4. Disclosure of conflicting interests - ***Rule 17 RPC***.

[192] (1868) AE Rep. 209

(Week 17)

WILLS & CODICILS III (EXAMS)

INTRODUCTION

Under the Wills Act, a testator can freely dispose of his properties and make his will without any hindrance prescribed by statutes, custom and religion. In ***Banks v Goodfellow***: Ct affirmed the right of testamentary freedom of a person. However, overtime, it was felt that the absolute right to dispose any property to any beneficiary occasioned hardship on the relatives of the testator and dependants.

LIMITATIONS TO TESTAMENTARY CAPACITY/FREEDOM

The general rule is that a person has the testamentary freedom to devise his property as he wishes - ***Adesubokan v. Yunusa*****.** The exceptions to this rule are:

1. Islamic restrictions
2. Customary law
3. Provision for dependants and relatives

I. Islamic Law Restrictions

A. General Rule: It is a rule that a person subject to Islamic Law cannot make a Will disposing of more than 1/3 of his properties not in accordance with the Islamic Personal Law of disposing same. This is applicable to some States Wills Law. In ***Ajibaiye v. Ajibaiye,***[193] where the Kwara State Wills Law was applied, the deceased testator, Alhaji Disu Ajibaiye a Muslim from Ilorin, made a Will under the Wills Act and disposed his estate not in consonance with Islamic law. He stated in the Will that, I also direct and want my estate to be shared in accordance with the English law and… having chosen English law to guide my transactions and affairs in my life time notwithstanding the fact that I am a Muslim. The court held that the Will in dispute is void ab initio for being contrary to the Wills Law Kwara State which was in force; he could not validly make a will under Wills Act. The properties of a Nigerian Muslim are subject to the dictates of Islamic law of inheritance which does not allow disposition anyhow. Having declared that he was a Muslim, the testator had subjected himself to the application of Wills Law Kwara State, notwithstanding

B. Summary of Islamic Restrictions: The restriction contained in ***Section 2 Wills Law Kaduna State; Section 3(1) Oyo State Wills Law 1990*** may be summarised as follows:

1. Every person is guaranteed the right to dispose his property by Will
2. This right does not apply to the Will of a person who immediately before his death was subject to Islamic law".
3. The restriction does not apply only to property but applies to persons who are subject to Islamic law.

See also the ***Wills Law of Plateau, Kwara, Bauchi, & Jigawa***.

C. Interpretation of Provision: the Islamic law restriction is to the effect that the Will of a person subject to Islamic law derogates the concept of testamentary freedom. However, such person immediately before his death must have been subject to Islamic law. He might not have been subject to Islamic law for much of his life, but if immediately before his death he was so subject, the restriction would apply. On the contrary, if for much of his life a person was subject to Islamic law but immediately before his death he ceases to be, the restriction would not apply. A question may be raised from the provision as to whether there is any distinction between a person subject to Islamic law and a Muslim? The answer

[193] (2007) ALL FWLR (PT 359) 1321

is No. See ***Ajibaiye V. Ajibaiye.***[194]

D. States not Having Islamic Restrictions in their Wills Law: in certain states in which th Islamic law restriction is not contained in their Wills laws (such as Abia State and Lagos State), the right to dispose of estate for a Muslim by Will will not be hampered by the Islamic law restriction.

II. Customary Law Restriction

A. General Rule: A person who is under Customary Law cannot dispose by Will any property which the testator had no power to dispose of by Will or otherwise under customary law to which he was subject – ***Section 1 Wills Law Lagos State; Section 4(1) Kaduna State Wills Law, Section 3(1) (a) Wills Law Oyo State***.[195] In ***Idehen v. Idehen,*** the case concerns the gift of the Igiogbe (the house in which the testator lived and died) to one of the wives of the deceased testator rather than to his eldest surviving son and in ***Lawal-Osula v. Lawal-Osula,*** the Igiogbe was given to other younger sons and not the eldest son. In both cases, the court voided the gifts and held that the custom of the Benin people is that the Idiogbe goes to the eldest surviving son after he has performed the second burial and final burial rites. Where after the death of the testator, the first surviving son performs the first burial rites, but is unable to perform the second burial rites and he dies (the first son), the Igiogbe would vest on the second son who performs the second and final rites, being the eldest surviving son and on the children of the first son.

The testator is entitled under Bini customary law to devise all his property except ***Igiogbe*** since the ***Igiogbe*** at his death would no longer be his own to give away. So when a devise, bequests or disposition is subject to customary law, the construction is that the devise, bequest or disposition shall not be inconsistent with or contrary to customary law.

B. Effect of Non-Compliance on the Entire Will: where a testator by his Will gives the whole of his properties including the *Igiogbe* to other persons other than the eldest surviving son, it is only those parts that affect the *Igiogbe* that will be annulled, and not the entire Will – ***Uwaifo v. Uwaifo***.[196]

C. Rationale for Restriction: the restriction acknowledges that the complete right to disposition works hardship in many communities in Nigeria and except if restrained, the custom and order in many communities may be upset. The import is that it does not prevent a person from making a Will; the limitation in respect of the Will is that it cannot brush aside the custom of the people with regard to disposition of property.

D. Abia State: Abia State does not have the customary law restriction or the Islamic law restriction; the testator enjoys complete freedom to dispose of his property. In ***Asika v. Atuanya***, it was held by the court of appeal that Section 42 CFRN recognises women as citizens and guarantees the right not to be discriminated against the right to acquire and own immovable property apply in Nigeria. Those propositions of the respondent relating to the sharing of the will in accordance with the Onitsha customary law cannot override the provisions of the Will.

E. Customary Restriction Derogating on Rights of Women: if there is any disposition of estate which discriminates against women (such as Igiogbe which goes to the eldest surviving son), the courts may possibly hold that such dispositions is against the tenor of the Constitution which bans discrimination on the basis of gender. This position can be reinforced by the recent decision of the Supreme Court in ***Ukeje v. Ukeje***.[197]

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[194] (2007) ALL FWLR (PT 359) 1321

[195] Similar provisions are contained in the Wills Law of Plateau, Kwara, Adamawa and states of former Western Nigeria.

[196] (2013) AFWLR [Pt 689] 1116

[197] (2014) AFWLR [Pt 1323] 1341.

III. Reasonable Financial Provision to Dependants

A. General Rule: The testator is required by some Laws to make reasonable financial provisions to his dependents (wife, husband and children).

B. Application for Variance of Will by Dependants: where the testator fails to do so, the dependents can apply to the High Court within 6 months of admitting the Will to probate to vary the Will - ***Section 2 Wills Law of Lagos State*.**

C. Persons Who can Bring Application (Dependants): In ***Kaduna, Abia and Oyo states*,** the persons who can apply for reasonable financial provision include:

1. Parent of the deceased,
2. Brother of the deceased, and
3. Sister of the deceased who immediately before the death of the deceased were being either wholly or partly maintained by the deceased. Such persons will be treated as being maintained either wholly or partly by the deceased if the deceased was making substantial contribution in money or money's worth towards the reasonable needs of those persons.

However, under ***Section 2 Wills Law Lagos***, the persons who can bring the application are the spouse(s) of the deceased and a child of the deceased.

D. Ground for Bringing Application: that the deceased had helped maintain the applicant in his lifetime (Kaduna, Abia, Oyo) or that the disposition of the deceased estate affected by his Will is not such to make reasonable financial provision for the applicant - ***Section 2 Wills Law Lagos.***

E. Meaning of Reasonable Financial Provision: while in the case of the child or spouse in Lagos, the financial provision may or may not be required for the maintenance of the child or spouse; in the case of ***Kaduna, Abia*** and ***Oyo States***, the financial provision must be one required for maintenance of the parent, brother or sister of the deceased what constitutes reasonable financial provisions is one that would be decided on the facts of each case. The test for determining reasonable financial provisions is objective "from the point of view of the court and not subjectively from the point of view of the deceased and it is immaterial to consider whether the deceased acted unreasonably in making no provision or no larger provision for the applicant.

F. Entitlement of Applicant: Applicant will be entitled to just what is enough to sustain him. The provision is not meant to keep the applicant above the breadline but must be one that is reasonable in all the circumstances of the case to enable the applicant maintain himself in a manner suitable to those circumstances - ***Re Coventry Case***.

G. Rationale for the Provision: to take care of situations where the Will of the deceased did not benefit the applicant at all or comparatively with other beneficiaries, the applicant legacy.

H. Remuneration of Lawyers & Executors (The Rule in Cradock V. Piper)

1. **General Rule:** Generally, a lawyer representing himself and other executors are not entitled to remuneration.
2. **Exceptions**
   (a) When the remuneration is identified in the Will
   (b) In the case of a solicitor representing himself and the executors. If the solicitor is representing himself only, he is not entitled to remuneration.
3. **Where Executors Make an Application to the Court, the Court is Faced with These Issues:**
   (a) Generally, they are not supposed to be paid
   (b) Where the estate is a complex estate and the time spent by the executors in administering the estate, the court will allow payment for services rendered
   (c) Note even if it is a solicitor, he must still apply to court

TAKING INSTRUCTIONS TO DRAFT A WILL

I. Professional Expectation in Taking Instructions to Draft Wills

The professional should advise on the following:

1. The likely persons to attest to the Will
2. Use simple English in its drafting and ensure that the clauses are not ambiguous
3. To include a Medical Report as to his Client's mental state of health
4. To determine suitable persons as Executors of the Will
5. To ensure that the Client/testator makes the Will voluntary

II. Instructions Needed to Draft a Will

1. The full names/nick names (indicated by Alias…) and address of the testator
2. Names and addresses of the executors of the will
3. The extent of the testator's properties and those jointly held
4. If any previous Will had been made or not, and if the new Will is to revoke or add to the previous will
5. If gifts of the testator were made inter vivos (while the testator is alive)
6. The names and addresses of the beneficiaries and the gifts made to them
7. What should happen in the event of the death of a beneficiary in the event of failure of the gift
8. The place of origin or ethnic nationality of the testator to determine whether there is any native law and custom of restricting the disposition of property
9. The religion of the testator to determine if he is subject to Islamic law which restricts disposition of property
10. Any relatives or dependants of the testator in order to make reasonable financial provisions for them if they were maintained.
11. Who the testator wants the residue of the estate to be applied (residuary gift clause)
12. Details of persons who may be appointed as guardians of any infants of the testator.
13. Any directives the testator may wish to give with respect to his funeral
14. Custody of the will (very important so that it is not opened)
15. Charging clause: payment for services rendered by executors
16. Particulars of wife (wives) and children
17. Particulars of witnesses (at least two-2): names and addresses

III. Advantages of a Solicitor Drafting a Will

NB – drafting of will is not the exclusive preservation of lawyers.

1. The solicitor being presumed to be versed in law, will comply with this requirements of the law when drafting the will
2. The skills possessed by the solicitor will be employed to prepare the good Will which will reflect client's instructions
3. The solicitor is likely to be reliable to keep custody of the will to produce it in the event of the death of the testator
4. Solicitors have been found to be very useful witnesses in the event of any dispute to prove the due execution of a Will - ***Adebajo v. Adebajo***.

IV. Ways a Solicitor Should Endeavour to receive Instructions on Drafting a Will (Helpful if there is later controversy over the will)

1. The instructions should be written and signed by the client
2. The instructions may be given in the handwriting of the client
3. Where the instructions are taken by the solicitor, he may ask the client to sign them even before the Will is prepared.

This is to help in rebutting any allegation of fraud, lack of intention or undue influence.

CUSTODY & READING OF WILLS

I. Custody of Wills

These are the means of keeping Wills before the testator's death. It can be kept in the following places:

1. Banks
2. At the Probate Registry within the jurisdiction (the best place)
3. By the testator himself
4. With a trusted younger friend or relation
5. A copy left with his solicitor who prepared it
6. Executor appointed in the will

II. Advantages of Keeping the Will with Probate Registry

1. It complies with the requirements of the law. ***Section 35 Administration of Estates law of Lagos State*** – The court should provide facilities for safe custody of Wills of living persons.
2. It ensures safe custody. ***Order 62 Rule 16 Abuja HCCPR 2018*** – A person should deposit his own Will in the court for safe custody and an original Will shall not be delivered out without court's direction in writing.
3. It aids in proof of the Will
4. It facilitates the grant of probate
5. It helps in the conduct of searches in the register of Wills kept with the Probate Registrar – ***Order 63 Rule 2 Abuja HCCPR 2018*** allows a person who has a copy of the death certificate of a deceased person to apply to the Probate Registrar to ascertain whether the deceased died testate.

III. Reading of the Will

This is done **7 DAYS** after the testator's burial.

FORMAL PARTS OF A WILL & CODICIL

I. Formal Parts of a Will

1. **Commencement:** Describes the document and the maker of the document as his act.

   THIS IS MY LAST WILL OR THIS IS THE LAST WILL OF ME…

2. **Date:** States the day the will was made/executed. This helps in proving due execution.

   MADE THIS 25TH DAY OF APRIL 2019

3. **Revocation Clause:** This annuls any earlier Will or codicil made by the testator and assists in affirming the present Will a last testamentary act of the testator (must be in all wills even if client says he has never made a will before)

   I REVOKE ALL FORMER TESTAMENTARY DOCUMENTS OR DISPOSITIONS MADE BY ME…

4. **Appointment Clause:** This clause appoints the personal representatives and trustees of the testator.

   I APPOINT…

5. **Charging Clause:** This clause permits and mandates the Personal Representatives and any person acting in that capacity to charge for the services they render otherwise their services would be taken to have been rendered gratuitously.

   I DECLARE THAT MY EXECUTORS SHALL CHARGE OR I AUTHORISE MY EXECUTORS TO CHARGE…

6. **Disposition Clause (Gifts):** This is the clause that bequeaths gifts (Legacies and devices) to respective beneficiaries

   I GIVE TO...

7. **Residuary Clause:** This states the person who will be entitled to the residue (remainder) of the estate of the testator.

   I DECLARE THAT THE REMAINDER OF MY ESTATE SHALL… I GIVE TO …

8. **Substitution Clause:** In case any gift fails or ceases to exist at the death of the testator

9. **Testimonium**: This links the testator with the Will.

   IN WITNESS OF WHICH…

10. **Execution and Attestation Clause:** the execution clause satisfies the basic requirement in Wills that the testator must sign the Will as indicative that the document is his act. To prevent fraud, the law requires attestation of witnesses. The attestation clause confirms the presence of persons who witnessed the execution of the Will by the testator.

    SIGNED AS HIS LAST WILL BY THE ABOVE NAMED TESTATOR IN OUR JOINT PRESENCE AND THEN BY US IN HIS PRESENCE.

    SIGNED BY THE ABOVE NAMED TESTATOR IN THE JOINT PRESENCE OF US AND EACH OTHER WHO IN HIS PRESENCE AND THAT OF EACH OTHER HAVE SUBCRIBED OUR NAMES AS WITNESSES.

II. Contents of a Codicil

1. Commencement Clause
2. Purpose clause
3. Testimonium
4. Attestation and execution clause

III. The Rule against Gifts Made in Perpetuity

A gift in a Will is said to be made in perpetuity when a gift is made to a beneficiary with conditions restricting its use, sale or transfer. The rule against gifts being made in perpetuity is that the gift will be valid upon the death of the testator but the conditions will be void. This is because the legal title in the gift has been vested in the beneficiary who can use it the way he likes as the consequences of he been the owner.

ETHICAL ISSUES

1. A solicitor should draft a Will to avoid ambiguity while interpreting - Rule 14 RPC
2. Duty to advise his client as to the restrictions under Islamic and customary laws
3. There should be no professional negligence, so that the solicitor is not be liable to the client - Rule 14(5) RPC E.g. A witness cannot be a beneficiary.
4. A lawyer should not take instructions in client's home except in exceptional circumstances – Rule 22 RPC
5. If the solicitor is the executor of the Will, there should not be mixture of client money and his own money - Rule 23 (2) RPC
6. The duty of confidentiality is highly required in making Wills - Rule 19 RPC
7. The lawyer should always follow the instructions of the client such instructions should be kept in case of challenges in the execution and reading of the Will. The instructions should be in written form
8. A legal practitioner shall not in the course of making a will make secret profits.

9. The lawyer is duty bound to disclose any conflict of interest - Rule 17 RPC
10. Where the solicitor is a beneficiary in a Will, he should comply with the rule laid out in ***Wintle v. Nye***.

SAMPLE DRAFTS

Specimen Will

THIS IS THE LAST WILL of me, Mr. Killi Nancwat of 12 Aduke Street Ikeja Lagos (The Testator) made on the 25th day of April, 2019.

1. I REVOKE all previous testamentary dispositions made by me, and I DECLARE this Will to be my last Will.
2. I APPOINT Dr. Joel Adamu of 10 Ikorodu Road Surulere Lagos and Mr. Mathias Ayuba of No. 10 Kent Street Ikoyi Lagos State to be the Executors (Trustees) of my Will.
3. I DECLARE that my Executors or any Professional or person engaged in proving my Will and administering the estate may charge reasonable fees for their services.
4. I GIVE my two storey building at 56 Awolowo Avenue Ikeja Lagos to my only son, Dr. Nansel Killi of 10 Ikorodu Road Surulere Lagos State.
5. I GIVE my Honda Accord 2000 model to my son, Damian Killi.
6. I GIVE my 100, 000 shares of Brookling Bank Plc to my wife, Adebola Killi
7. I GIVE the remainder of my estate to my son Dr. Nansel Killi and my daughter Mrs. Gonjuwa of 10 Kent Street Ikoyi Lagos in equal share.

IN WITNESS OF WHICH I, Mr. Killi Nancwat (The Testator) have executed this Will in the manner below the day and year first above written.

Mr. Killi Nancwat……
(Sign)

SIGNED by the Testator, in the presence of us both and at the same time who at her presence subscribed our names as witnesses.

…….
Kehinde Dukeson
(Witness)

……..
Ewahin Dillyton
(Witness)

Specimen Codicil

THIS IS THE FIRST CODICIL to the last Will and testament of me, Mr. Killi Nancwat of 12 Aduke Street Ikeja Lagos (The Testator) made on the 25th day of April, 2019.

1. I REVOKE clause 5(five) of my Will made on the 2019.
2. I GIVE all my residuary Estate to my wife, Adebola Killi of 1 Agege Road Ikeja Lagos, Dr. Nansel Killi, my son and Mrs. Gonjuwa my daughter in equal shares.
3. I confirm my Will in all other respects.

IN WITNESS OF WHICH, I Mr. Killi Nancwat (The Testator) has executed this Will in the manner below the day and year first above written.
Mr. Killi Nancwat……

(Sign)

SIGNED by the Testator, in the presence of us both and at the same time who at her presence subscribed our names as witnesses.

……. ……..

Kehinde Dukeson
(Witness)

Ewahin Dillyton
(Witness)

(Week 18)

PROBATE & LETTERS OF ADMINISTRATION

INTRODUCTION

I. Meaning of Probate

Probate is an official verification of a Will; admitting the Will. It is granted only where there is a valid Will and Executors were appointed in the Will.

II. Preliminary Matters towards Obtaining Probate

1. Search for the Will at the Probate Registry or Bank etc.
2. If the Will is found, send it within 14 days to the Court within the jurisdiction where the testator died.
3. The Will is to be read after 7 days of the testator's burial in the presence of persons interested.

***Order 55 of the High Court of Lagos (Civil Procedure) Rules 2012*.**

III. The Responsibility to Prove the Validity of A Will For the Grant of Probate

The Executors, also known as the PROPOUNDERS, are to prove the Will for the grant of Probate in respect of it.

IV. Administration of Estate

The manner or process of procuring, managing and distributing the estate of deceased amongst the beneficiary or disposed of by those appointed by the deceased, the court or operation of law.

V. Small Estate

Small estate is an estate of a deceased who died intestate without real estate and the value of he personal estate does not exceed N100, 000 – ***Section 3 Administration of Estate (Small Estate Payment Exception) Law Lagos, 2015***.

APPOINTMENT AND QUALIFICATION OF EXECUTORS

I. Persons who can be appointed as Executors

1. Limited liability company
2. Adult individual

II. Persons who cannot be appointed as Executors

1. Minor
2. Person of unsound mind

III. Qualities in Appointing Executors (Personal Representatives)

1. Availability and willingness to act as Executors/personal Representatives
2. They are persons of younger ages
3. Honest and reliable
4. People that can work together
5. They will not have any conflict of interest in the estate to be administered
6. Knowledgeable and experienced in administering estates of deceased persons
7. They are resident in places that are of relative cost and proximity to the estate

IV. Modes of Appointing Executors/Personal Representatives

1. Expressly by them being named in the will
2. Impliedly or by the tenor of the Will
3. By operation of the Law, e.g. when the chain of executorship will not be allowed to be broken when all the executors granted probate are dead. The executor to the last Executor who died will be allowed to apply for Letters of Administration to continue with the execution of the Will left by the dead Executors - ***Section 28 of the Administration of Estate Law of Lagos State***.
4. Substitutional executors

5. By authorisation of another to appoint the executors
6. By description
7. Appointment by the Courts when there is a Will but no executors so appointed therein.

V. Number of Executors/Personal Administrators to Be Appointed Executors

1. **Executors:** maximum of 4 to be appointed with no minimum.
2. **Administrators:** maximum of 4 and a minimum of 2 can be appointed.
3. **Exceptions Were One Administrator Can Be Appointed**
   (a) Sole beneficiary in a Will appointed sole executor
   (b) Trust corporations appointed to be Executor of a Will.
   Section 9 & 24 Administration of Estate Law Lagos.

VI. Instances Where Probate Must Not Be Granted To an Executor

1. He is an infant
2. The executor is outside the country
3. He is mentally incapacitated
4. The executor was discovered to be the murderer of the testator
5. The executor renounces his appointment as executor
6. The executor appointed has been earlier removed as executor by the Court

PROBATE

I. Concept of Probate

Probate is an official verification of a Will; admitting the Will. It is granted only where there is a valid Will and Executors were appointed in the Will.

II. Double Probate

A. Concept

This arises when an executor applies for a second grant of Probate after a first one has been granted to other Executors duly appointed in a Will.

B. Instances Where Double Probate Will Be Granted

1. Infant reaching Maturity: The applicant is an infant executor who was denied a grant because of his age so upon reaching maturity he will be granted a double Probate. (18 years in Lagos and Abuja)

2. Vacancy in the Number of Executors: Where a vacancy exist in the number of Executors, the reserved executors (if more than 4 were appointed in a Will) will apply to fill it by a grant of double Probate

3. Executor Earlier being Outside the Country: An Executor was abroad (and didn't have legal practitioner to apply on his behalf) and arrived after the grant of probate. He can apply for a double probate.

III. Renunciation of Probate and Time Limit to Do So

1. **General Rule:** Before Probate is granted, it can be renounced by filing ***FORM 71 of the High Court of Lagos State (Civil Procedure) Rules 2012*** to the Probate Registrar. The renunciation must be total in all respect to execution of the estate under a Will.
2. **Time Frame:** This should be done after the testator's death but before probate is granted.
3. **Limitation to Renunciation:** an *executor de son tort* may be prevented from renouncing probate because he has already started administering the estate of a deceased.

IV. Types of Probate

1. Common Form Probate - this is non-contentious Probate as it is granted without any action in Court challenging the validity of the Will.

2. Solemn Form Probate - this is a contentious Probate which is granted only after the action in Court challenging the validity of the Will have been determined.

V. Common Form Probate

A. Concept

This is non-contentious Probate as it is granted without any action in Court challenging the validity of the Will.

B. Procedure to Obtain Non-Contentious Probate

Order 58 High Court (Civil Procedure) Rules Lagos

1. **Step 1 (Discovery of Will & Application for Probate)**
   - **(a) Discovery of the Will**: the first thing for the solicitor or executor to do is to discover the Will. That is where the Will has been deposited.
   - **(b) Intimating Probate Registry of Discovery:** Where the Will is discovered, the solicitor or the Executor will need to intimate the Probate Registry of the discovery. The testator might have already deposited the Will at the Probate Registry. Solicitor will write letter to Probate Registrar (see below)
   - **(c) Application to Probate Registrar for Grant of Probate:** The executors will apply via a letter to the Probate Registrar for the grant of Probate attaching:
     i. CTC of the Will
     ii. Copy of the testator's death certificate

     All relevant information should be disclosed.
   - **(d) Contents of the Letter**
     i. Full name and alias of deceased person
     ii. Death of the testator accompanied with certificate
     iii. The place of death and date
     iv. The fact that the testator lived within the jurisdiction of the court
     v. The fact that the testator made and deposited a Will at death
     vi. List of persons interested or likely to be interested in the estate of the testator
2. **Step 2 (Reading of Will & Completion of Forms)**
   - **(a) Reading of the Will:** A date is fixed for the reading of the Will. On the fixed date, the registrar then brings out the Will breaks the sealed wax on it and reads the Will in the presence of persons present and makes a record of the proceedings of the day - ***Ajibaiye v. Ajibaiye***.
   - **(b) Completion of Forms by Executors:** The Probate Registrar will, after receipt of the application for probate, give the following FORMS to the Executors to be completed and returned to him:
     i. Application for grant of probate
     ii. Affidavit of attesting witnesses
     iii. Oath of Executors
     iv. Inventory Form
     v. Justification of Sureties
     vi. Bank Certificate (to record the monies in Banks or shares in company owned by the testator before his death)
3. **Step 3 (Assessment of the Estate & Payment of Estate Duty)**
   - **(a) Assessment of the Estate:** Assessment of the Estate is conducted by the Registrar
   - **(b) Payment of Estate Duty:** Estate duty will be paid on the total asset - 10 percent (10%) of the value of the estate.
4. **Step 4 (Returning of Filled Forms)**
   The Forms are duly filled and returned attaching passport photographs of applicants and the witnesses to the Will
5. **Step 5 (Grant of Probate)**
   If satisfied, the Probate Registrar grants Probate to the Applicants with the copy of the Will attached

VI. Solemn Form Probate

A. Concept

This is a contentious Probate which is granted only after the action in Court challenging the validity of the Will have been determined.

B. Factors That Make a Probate to Be Contentious

1. **Invalidity of the Will:** Where the will was not validly made
2. **Inappropriate Persons obtaining Grant:** People who applied for the probate are not the appropriate persons to obtain such grant
3. **Placement of Caveat at the Registry:** Placement of caveat at the Registry.

C. Proving a Will (Solemn Form Probate)

1. Application for Probate by Executors: The executors apply for grant of Probate or if they failed to do so a Notice of citation will be given to the Executors to either prove the Will or renounce their executorship within 21 days - ***Order 55 Rule 7 & 8 of the High Court of Lagos State (Civil Procedure) Rules 2012***.

2. Objecting to Grant by Filing a Caveat/Caution: If any person is objecting to the grant of Probate, he is to file a caveat (caution) which is a notice to the Registrar not to grant Probate until the matter is resolved. The Caveat when filed is to last for 3 months once entered - ***Form 3 or 4 of the Administration of Estate Law of Lagos; Dan-Jumbo v. Danjumbo*.**

3. Filing of Warning/Citation by Executors in Response to Caveat: In response to the Caveat, the applicants/executors are to file a Warning/citation stating their interest in the testator's estate and requesting the caveator to state his interests within 8 days of receipt of the warning.

4. Failure of Caveator to Enter Appearance: If the caveator failed to enter appearance by responding within 8 days to the Warning, he is deemed to have abandoned his claim and probate will be granted to the Applicants. An Affidavit is to be filed by the applicants when the Caveator defaults in appearance.

5. Trial: Conversely if the caveator responded within the 8 days and stated reasons for challenging the validity of the Will, issues have been joined and the applicants/caveator will go to trial proving/disproving the Will in question.

VII. Check List of Necessary Documents for Grant of Probate

1. Application for probate
2. Declaration of personal property of the deceased.
3. Death certificate of the deceased (stating: where and when he died, his last place of residence, sex and age. NB = The most authoritative death certificate is FORM D2 issued by the National Population Commission)
4. Declaration on oath by the executors (That the deceased is dead; Date of his death; The executors' belief in the validity of the Will; That they will faithfully administer the estate of the deceased and render accounts to the terms of the Will) stating the following.
5. A sworn affidavit attesting witnesses to the Will stating that they are witness to the executed Will
6. Passport photographs of the applicants and Witnesses to the Will.
7. Copy of the Will shall be attached to the application

LETTERS OF ADMINISTRATION

I. Concept

This is issued to enable the personal representatives of a deceased who died without making a Will, to administer his estate after the death. An administrator or personal representative cannot act or deal with the deceased's estate unless Letters of Administration is granted otherwise his acts are void.

II. Circumstances of Issuance of Letters of Administration

1. **Intestacy:** A person died intestate (without making a Will) or
2. **Failure of a Testator to appoint Executors:** The testator made a Will with no executors appointed
3. **Absence of Executors who will Act:** If appointed there is none to act.
4. **Rejection of Will by Court:** When a will was made but was rejected by the court
5. **Partial Intestacy:** Partial intestacy due to absence of residuary clause

III. Check List of Necessary Documents for Grant of Letter of Administration

1. Application for letters of administration
2. Death certificate of the deceased
3. Declaration on oath
4. Oath/justification by sureties on behalf of the applicant in a specific penal sum to guarantee his administration of the estate.
5. A duly completed bond by the applicants to pay the debts and liabilities of the deceased estate, to distribute the estate and also to make inventory.
6. An authorisation by way of a bank certificate issued by the registrar to a personal representative or applicant to inquire into the details of the bank account of the deceased.
7. A duly completed inventory specifically listing the properties the deceased person which the administrator wishes to administer
8. Evidence of Newspaper publications.
9. Passport photographs of the applicants and sureties.
10. Declaration of the next of – kin

IV. Procedure to Obtain Letters of Administration (Without a Will Annexed)

1. **Application to the Probate Registrar:** Application is made to the Probate Registrar stating:
    (a) The full names of the deceased
    (b) The last fixed place of abode of the deceased
    (c) The names of the proposed administrators
    (d) Attach a copy of the death certificate of the deceased
2. **Collection, Filling & Filing of Forms by Applicants:** The applicants should collect, fill and file the Forms from the Registrar as follows:
    (a) Application for grant of Letters of Administration (without Will annexed)
    (b) Oath for Administrators
    (c) Administration Bond
    (d) Schedules of debts and burial expenses
    (e) Bank certificate
    (f) Inventory
    (g) Particulars of leasehold properties
    (h) Declaration as to Next of kin
3. **Publication in Newspaper for Objections:** Publication in Newspaper for objections within 21 days of the application.
4. **Grant of Letters of Administration:** If there is no objection, the Letters of Administration will then be granted

V. Factors determining who will Make Application for Grant of Letters of Administration If the Deceased Died Intestate

The type of marriage contracted by the deceased intestate will determine who is entitled to make the application.

1. **Customary Law Marriage:** If the intestate conducted a Customary Law marriage, then upon his death native law and custom on succession of the deceased intestate's estate will apply.

2. **Marriage under the Marriage Act:** If he is married under the Marriage Act, then the provisions of the Administration of Estate Law of the State where the deceased intestate was resident before his death will apply.

Note that a minority or life interest (a pregnant wife) is entitled to apply for Letters of Administration.

VI. Priority of Persons Entitled To a Grant of Letters Of Administration under Section 49 of the Administration of Estate Law (Lagos)

1. Surviving spouse (which could be either the husband or wife)
2. Children of the deceased or issues of the children of the deceased
3. Parents of the deceased
4. Brothers and sisters of the whole blood and their issues
5. Brothers and sisters of half blood
6. Grand parents
7. Uncles and aunts
8. Creditors
9. If there are no creditors, then the office of the Administrator-General of the State can apply

Obusez v. Obusez

VII. Letters of Administration (With or Without Will Annexed) De Bonis Non

This is applied for and granted when Letters of Administration had earlier been granted but the administration of the estate is not completed because of the death of the Administrators.

The executor/administrator to the last deceased Administrator will apply for a grant in order to save the chain of administration - ***Section 28 of the Administration of Estate Law*.**

VIII. Letters of Administration (With Will Annexed)

This is issued when:

1. No executor is appointed in the Will
2. The appointment of a sole executor is void
3. The sole executor appointed predeceased the testator
4. The sole executor(s) has renounced Probate

IX. Special Grants of Letters of Administration

1. Grant to creditors
2. Grant *pendente lite*- pending the outcome of a litigation in proving/voiding a Will
3. Grant *durante absentia*- granted when the executors are abroad
4. Grant *ad litem*- granted when the executors so appointed are mentally or physically incapacitated
5. Grant *ad colligenda bona*- applied for and granted to preserve perishables in the estate of a deceased intestate

X. Re-Sealing of Grants

A. Concept

This is applied for when Probate or Letters of Administration is granted in one State while there are other real properties of the testator/deceased in other States.

The Executors/personal administrators will apply to the Probate Registrar of the High Court of the other State to re-seal the grant in order to be able to administer the properties therein - ***Section 2 of the Probate Re-Sealing Act.***

B. Procedure for Re-Sealing of Grant

1. Application to the Registrar: An application is made to the Probate Registrar informing him of the need to reseal grant and all the relevant information attaching a CTC of the Probate/Letters of Administration earlier granted requesting that it be re-sealed

2. Completing Forms by Executors: The Registrar gives the executors the following Forms to complete and return:

(a) Application for re-sealing of Probate/Letters of Administration
(b) Oath to lead re-sealing
(c) Bank certificate
(d) Inventory
(e) Particulars of freehold and leasehold property of the deceased
(f) Administration Bond

3. **Returning of Forms:** The Forms are completed and returned with the original and 2 CTC of the Probate/Letters of Administration sought to be re-sealed carrying the seal of the Court that granted it.
4. **Notice of Re-sealing of Grant to Court:** After re-sealing of the grant, the Probate Registrar shall send Notice of it to the Court that made the original grant.
   Note that grants from commonwealth countries may be re-sealed in Nigeria in the above manner.

REFUSAL & REVOCATION OF A GRANT OF PROBATE

I. Grounds of Refusal of Grant of Probate

1. Where the testator is still alive
2. Where the applicants interest conflicts with that of the estate
3. Where the applicants are likely to mismanage the estate
4. Where the applicant is a minor or not mentally stable
5. Where the applicant is outside the categories of persons who can be granted probate

II. Grounds for Revoking a Grant of Probate

This is usually the case to common form Probate (uncontested grant of probate).

1. When a subsequent Will/Codicil superseding the first Will is discovered after a grant
2. Fraud/ misrepresentation aiding its grant
3. When the testator is not dead
4. When the grant is issued to two executors and one becomes insane, it will be revoked and a new one granted to the sane executor
5. Where the grant was issued to the Administrator-General; and
6. Where the person to whom the grant was made consents to its been revoked

III. Effect of Revocation of Grant

The administrators will cease to have the right to administer the estate

ETHICAL ISSUES

1. Endeavour to take full instruction from your client
2. On no circumstance should you fortify any portion of the Will
3. Show competence in probate matters.

SAMPLE DRAFT: APPLICATION LETTER FOR THE GRANT OF PROBATE

KILLI NANCWAT & CO
BARRISTERS AND SOLICITORS
NO, 15 BROAD STREET LAGOS ISLAND LAGOS
Knanchwat2020@yahoo.com

OUR REF:_____YOUR REF:_____

DATE: 21 May, 2013

To
The Probate Registrar

High Court 12
Ikeja Judicial Division Lagos State.

Sir,

IN THE MATTER OF THE ESTATE OF LATE MRS ADUKE THOMAS

APPLICATION FOR GRANT OF PROBATE (RE-SEALING OF PROBATE/ LETTERS OF ADMINISTRATION)

We are Solicitors to Dr. Lom Thomas, Mrs. Demba Gonjuwa and Comfort Musakari who are the Executors of the Will of Mrs Aduke Thomas (now deceased) of No. 12 Aduke Street Ikeja Lagos, who we will refer to herein as 'our clients'.
It is our clients' instructions that we apply for the grant of Probate on the Will of Mrs. Aduke Thomas (deceased) who died on the 10 day of January 2013 and before her death she lived at No. 12 Aduke Street Ikeja Lagos and within the jurisdiction of this Court.
Please find attached the following documents for your kind consideration:

1. Certified true copy of the Will of Mrs. Aduke Thomas dated 14 March 2012.
2. Copy of the death certificate of Mrs. Aduke Thomas dated 14 January 2013.

We will appreciate if the necessary Forms to process Probate are made available to us. Thank you.
Yours faithfully,

Killi Nancwat (Principal Partner)
For: KILLI NANCWAT & CO.

(Week 19)

PERSONAL REPRESENTATIVES & ASSENT

MEANING OF PERSONAL REPRESENTATIVE

The term when used includes Executors and Administrators. They are the ones appointed or granted the authority to administer the estate/properties of a deceased. An executor if appointed under the will. An administrator where done by operation of law/court outside the act of the deceased. Where deceased appoints executors, he could also appoint trustees. An executor is expected to act in good faith but he is not a trustee so he has no power to assign his duties, function and powers of office of executor. If executor is also appointed as trustee, he can appoint someone else and transfer the duties of trusteeship to that person and retire from the trust - ***Adeniji v Probate Registrar.***

APPOINTMENT OF EXECUTORS

I. Modes of Appointing Executors

A. Express Appointment: by the testator in the will

B. Appointment by Implication: Where testator instead of naming certain individuals as executors, the testator gives that individual some powers and duties to carry out under the will and these duties are generally carried out by executors, that person is an executor by implication.

C. Appointment by Operation of Law (Executor by Representation): an appointed executor by operation of law – e.g. a testator appoints 4 executors in his will, they keep dying. Upon the death of the last executor, if this last executor has appointed an executor in his own will, the latter executor will also administer the estate of the testator – ***Section 8 Administration of Estate Law Lagos***. There will be a break in the chain of representation if last executor died intestate, fails to appoint an executor in his own will, failure to obtain probate by the last executor's executor, renunciation of executor. Chain is not broken by temporary grant of administration if probate is later granted e.g. in process of challenging the validity of last executor's will, the court appoints an administrator to take care of the estate until dispute is resolved. If resolved for executor of last executor it doesn't break chain of representatives. Executor by representatives has the same powers as original executor.

D. Appointment by the Court:

1. **Person Entitled to Probate being a Minor or Mentally/Physically Infirmed Person:** If person entitled to grant of probate is a minor or has a mental or physical infirmity, the court can appoint any of the following: any person authorised by the judge to make application for the grant, the residual legatee of deceased's estate, person entitled to the estate of the disabled or incapacitated person if disabled person dies intestate or any other person as the court may direct.
2. **Existence of Minor Child & Old Mother who Have Life Interest in a Property & Only One Executor was appointed in the Will:** Where there is only one executor and in the will, the deceased made provision for minor child and old mother who has a life interest in a property. Because there is a minority interest and a life interest under the will, the law states that there cannot be one executor, thus the court will appoint an additional executor. However, where the sole executor is a trust corporation, then no need for the court to appoint additional executor – ***Section 24 AEL Lagos***.
3. **Infant as Sole Executor:** Where an infant is the sole executor, the court will appoint an administrator with will attached.
4. **Person entitled to Probate being Outside the Country:** the Court can appoint a lawful attorney to the person entitled to grant of probate where the person entitled

resides outside the country.

E. Testator Nominating Someone to Appoint the Executor: Where the testator had nominated someone to appoint the executor for him, that nominee will appoint the executor pursuant to the power of appointment.

F. Substitutional Executors: testator may provide for another executor where one could not serve (e.g. dies, renounces probate, unavailable). Executorship does not vest in them until the contingency happens.

G. Executors De Son Tort (Executorship by Ones Acts)

1. Concept: lacks the cloak of authority by the court (hasn't confirmed his executorship by getting the grant of probate)

2. Acts constituting Executorship by Ones Acts

(a) An unauthorised interference with the properties in an estate - ***Adeniyi Jones v. Martins*****.**

(b) Executors intermeddling with the estate without applying for Probate/Letters of Administration or refuse to prove the will. Same as administrator who intermeddles without applying for letters of administration. However, in ***Harrison v Rolly***, the court held that arranging for the funeral of testator doesn't make one executor de son tort. Also, an executor de son tort must apply for Probate/Letters of Administration WITHIN 3 MONTHS otherwise he is liable to pay fine. Upon grant of probate/letter of administration subsequently, he ceases to be executor de son tort.

(c) Beneficiary intermeddling with the estate because properties haven't been distributed by the executors or properties haven't been distributed to the beneficiary formally. In ***Adebiyi v. Adebiyi***,[198] the defendant was one of the beneficiaries and he administered some properties that were part of the estate (rented out house and collected rent). Executors went and obtained probate. They sued the beneficiary to account for all monies collected. The court held the beneficiary was an executor de son tort - ***Yusuf v. Dada.***[199]

3. Personal Liabilities of Executors De Son Tort

(a) Liability for the losses suffered by the estate

(b) Liability to pay for services rendered to the estate during his intermeddling in the estate

(c) Liability to creditors including debts incurred by deceased while he was available as he held out himself as an agent of the estate

(d) Liability for his personal expenses – he will not be indemnified by the estate since he is not an agent

(e) Liability for payment of estate duty – i.e. tax on inheritance

(f) He is to pay fine under Administration of Estate Law of each state

(g) Can be cited to take up Probate/prove the will if he is also an executor appointed under the will. He will be compelled to take probate because the act of intermeddling is construed as acceptance of executorship.

II. Eligibility of Appointment as Executor

1. Trusted family members
2. Natural persons
3. Artificial persons – incorporated persons usually trust corporations, banks, or a firm of solicitors. However, the appointment must include charging clause otherwise they will

[198] (2000) 1 LHCR [Pt 6] 46
[199] (1990) 4 NWLR [Pt 146] 657

renounce probate.

QUALITIES AND NUMBER OF EXECUTORS

I. Qualities of an Executor

1. **Willingness and Availability:** to serve as an executor (thus testator should inform executors and get their consent)
2. **Capabilities:** advisable to use professionals to administer a vast estate e.g. Dangote
3. **No Conflict of Interest:** better to appoint someone who has an interest in testator's properties or business e.g. between special legatee and residual legatee, appoint residual legatee because the latter has the interest in preserving the estate as he/she will enjoy whatever is left in the estate.
4. **Harmony:** Appoint executors that can work in harmony with each other.
5. **Credibility and Honesty:** the executors to be appointed should be persons who are credible and honest.
6. **Knowledge of Testator's Business:** the executors should be persons who have prior knowledge of testator's business.
7. **Logistics and Convenience:** e.g. don't appoint someone living outside the country.
8. **Age of the Executor**: appoint people younger than you due to presumption that an older person dies before a younger person.

II. Number of Executors

1. **Minimum:** No statutory limit as to number of executors, except where there is life and minor interest where at least 2 executors are appointed and there should be someone available to administer the estate.
2. **Maximum:** maximum of 4 is recommended because probate registry will only grant probate to 4 persons.
3. **Minor appointed with Other Adults:** When a minor (less than 18) is appointed an executor along with other adults, the probate registrar will grant probate with a reserved right of grant to the minor. Where the minor reaches majority, he can apply for grant of double probate.

REMUNERATION OF EXECUTORS

A. **General Rule:** The general rule is that executors are not entitled to remuneration - ***Re Orwell***.

B. **Exceptions**
   1. **Court Order:** executor can apply to court to be paid for his services and a court can make an order and the court will specify the percentage to be given.
   2. **Recouping of Out of Pocket Expenses:** The rule in ***Cradock v Piper*** is to the effect that the executor will be entitled to his out of pocket expenses.
   3. **Charging Clause in a Will:** testator provides for expenses of executors in the will. Charging clause is regarded as a gift and where there is a charging clause, the executors should not attest the will, if not the gift will fail.
   4. **Solicitor/Executor:** The executor is also appointed a Solicitor

RENUNCIATION, CESSATION & WITHDRAWAL OF EXECUTORSHIP

I. Renunciation

A. **Concept:** Renunciation is allowed as executorship is voluntary. But executor must take positive steps to renounce executorship (abdicating the rights), if not, there is no renunciation.

B. **Means of Renunciation**
   1. Filing of an Affidavit of renunciation
   2. A failure to respond to a citation within 21 days by the executors

3. The executors died before taking the grant. See ***Section 6 of the Administration of Estate Law of Lagos***.

C. **Withdrawal of Renunciation:** an executor who renounce the executorship can withdraw renunciation at any time but with leave of the Probate Registrar (adducing reasons) as long as there has not been grant to other persons waiting in line.

II. Cessation of Executorship

There is an executor appointed in the will and the executor survived the testator but the executor dies without taking up probate or he is cited to come up and take probate and he has refused to do so or he renounces probate – ***Section 6 AEL Lagos***.

POWERS, DUTIES AND LIABILITIES OF PERSONAL REPRESENTATIVES

I. Powers of Personal Representatives

1. **Postponement of Estate:** Power to postpone the distribution of the estate for at least 1 year (executor's year) subject to court order for release of funds to a beneficiary in need; to settle pecuniary and general legacies; or to pay debt (this cannot be postponed) - ***Section 47 Administration of Estate Law Lagos*****.**
2. **Sell, Mortgage or Lease Property in the Estate:** This power is executed to offset the liabilities of the estate (could result in abatements of gifts under the will). It does not affect the reversionary estate that is not yet in possession (e.g. residuary estate) and doesn't extend to personal properties of the deceased (personalty). Powers of PR are joint and several. But for realty, the sale must be with concurrence of all PRs (i.e. jointly). Any sale done without their joint consent is invalid – ***Section 4(2) AEL Lagos***. However, the Court can order sole conveyance for realty and then sale will be valid. Also, where there are other executors but they refuse to take probate, the sole executor can act alone. In ***Clara Erewa v. J Idehen,***[200] one of the 4 administrators purportedly sold land without concurrence of others. The sale was held invalid.
3. **Appropriate Assets in Satisfaction of a Legacy or Other Liabilities:** assets to be appropriated should not exceed the value of the beneficiary's interest. Thus, he must get a valuer to assess the value of the properties to decide which should be used in satisfaction of the legacy. Specific legacies cannot be appropriated in satisfaction of another legacy.
4. **Implied Power/Authority to Deal with and manage the Estate**: a purchaser who has dealt with the PRs will acquire indefeasible title in absence of any fraud/collusion of purchaser and PRs – ***Section 43(1) (b) & (c) AEL Lagos***.
5. **Appoint Trustees for Infant Beneficiaries**: Where the beneficiary interest (minor) is already vested and the minor cannot manage gift given to him by the testator, the PR has power to appoint trustee to manage the gift given to the minor beneficiary – ***Section 45 AEL Lagos***.
6. **Run Business or Trade of the Testator:** Power to run the business or trade of the testator if specified in the will by testator to run the business for a certain number of years before selling it off.
7. **Indemnity of Personal Cost:** Power to be indemnified his personal cost by the estate in the administration of the estate – ***Section 17 AEL Lagos***.
8. **Investment:** Power to invest if limited to those in Trustee Investment Act – ***Section 37(3) AEL Lagos***.
9. **Instituting & Defending Actions to Protect the Estate:** Power of right of action to protect the estate – ***Section 15 AEL Lagos***.
10. **Distress for Rent:** Power/right to distress for rent
11. **Insurance:** Power to insure

[200] (1971) ALL NLR 195

II. The Doctrine of Relation Back In Exercise of Power to Sue by an Executor

A. General Rule: The general rule is that a personal representative cannot sue on behalf of the deceased estate except a grant of Probate/Letters of Administration has been obtained. If before the grant of probate, he institutes an action as a PR, the action is a nullity but where he institutes the action as a guardian/next friend, and subsequently he is granted probate, the grant of probate will relate back – ***Section 15 AEL Lagos*****.**

B. Exception: the executor(s) can commence an action without a grant (in his personal capacity) but during the pendency of the suit where a grant is obtained, he is to make an application to the Court to reflect the plaintiff's status as Administrator(s) of the estate. When the application is granted by the Court, it will relate back to the date the action was commenced.

C. Application of Doctrine: this principle of relation back will only apply when the action is commenced in the personal capacity of the executor(s) - ***The Adminstrators of Sani Abacha v. Eke- Spiff.***

III. Duties of Personal Representatives

1. To prove the Will
2. To ensure the testator is given a decent burial – testator will generally state how he wants his body to be disposed of e.g. if testator wants to donate organs for scientific research, should state the specifics in an envelope and leave it with a trusted friend/relative
3. To gather-in the estate of the deceased i.e. bringing together the properties the deceased felt behind
4. To pay out debts and liabilities of the estate
5. To issue assent when necessary
6. To account and keep records of the administration

IV. Liabilities of Personal Representatives

1. Liability for waste
2. Liability for conversion
3. Liability to creditors or beneficiaries
4. Liabilities for intermeddling with the estate when Probate has not been granted

V. Reliefs from Liabilities of Executors/Personal Representatives

These are situations when the liabilities so incurred by a personal representative will be waived or forgiven. They are as follows:

1. **Express Provisions in the Will:** If there is express provision in the will by the testator stating that anyone that acts as executor will be absolved of liabilities. An exception is where it is a fiduciary duty that is breached by the executors such as dishonesty.
2. **Relief Obtained from the Beneficiaries/Creditors Concerned in a Will:** Beneficiaries or creditors may agree that executors be absolved of liabilities where the acted in good faith.
3. **Relief from Court:** The court can absolve the PRs of liabilities if they have acted in good faith and doesn't bother on dishonesty and they have not been guilty of negligence.
4. **Plea of Limitation of Statute:** if contracts are statute barred after 6 years. Any debt of the deceased is vested in PR and statute barred after 6 years. For beneficiary, the limitation is 12 years but where the property has been converted by the PRs and creditors and beneficiaries don't know of it, time will start to run when they became aware of it or where the beneficiaries or creditors at the time of conversion had no legal standing to institute an action.

VI. Precautionary Measures to Be Taken By Personal Representatives in the Administration of the Estate

1. Keep proper accounts
2. Operate a separate Bank account for the estate

3. Make payments by cheque
4. Avoid payment of estate money into personal account
5. Obtain receipts for all payments or transactions on the estate
6. Keep and obtain counter-folds of all receipts issued

ACCOUNTS TO BE KEPT/FILED BY THE PERSONAL REPRESENTATIVES AND THE TIME OF FILING SAME

I. Accounts to be kept

1. Inventory of the property of the deceased: total assets of the deceased's estate
2. Vouchers in the hands of the executor/administration (i.e. vouchers of payments made out by the PRs)
3. An account of administration to include:
   (a) All monies spent
   (b) Out of pocket expenses
   (c) All debts paid
   (d) All assets of the estate

II. Time Frame for Filing the Accounts

The account is to be filed in Court EVERY 12 MONTHS with a VERIFYING AFFIDAVIT until the administration is completed - ***Order 55 Rule 46(9) of the Lagos High Court Rules 2012***.

III. Instances When an Account Will Be Called By the Probate Registrar

1. Where a compliant of maladministration is made
2. An application that a personal representative be removed is made
3. When the personal representative applied himself to be discharged or surrender the estate
4. On completion of the administration

ASSENT BY PERSONAL REPRESENTATIVES

I. Meaning & Nature of Assent

An Assent is used to vest title in realty on the beneficiaries because it is the rule that title in the estate of the testator is vested in the personal representative - ***Section 3 of the Administration of Estate Law Lagos*****.** It is only personal representatives/executors that can grant and confer Assent, trustees cannot do so except by a Formal conveyance.

An Assent need not be by Deed. An Assent is not a registrable instrument and no stamp duty is expected to be paid on it because estate duty was earlier paid before a grant of Probate/Letters of Administration was made - ***Section 40 (11) of the Administration of Estate Law of Lagos***. It is a gift and not a sale.

II. Jurisdiction on the Use of Assent

This depends on the area and the applicable Law as follows:

1. **PCL States & Lagos:** In Western Nigeria and in Lagos, an assent must be used to vest title over a leasehold property on the beneficiary because the deceased real and personal property first vests in the personal representative before same can be later vested in the beneficiary **-** ***Renner v. Renner*****.**
2. **CA States:** In States of the Former Northern and Eastern Nigeria**,** a formal Assent is not required and the beneficiary takes his gift from the Will.

III. Conditions of a Valid Assent

1. Must be in writing
2. Signed by all the personal representatives/executors. An executor that refuses to sign, can be compelled in law (by the court) to sign the assent except where he canvasses cogent reasons before the court. The signature of beneficiary is not necessary even though in practice, they sign it.
3. The property to which the assent is granted must be certain

4. The beneficiary must be stated.
5. An assent must recite the will upon which the assent is given. The Will must have been admitted to probate and the assent must recite this fact.

See ***Renner v. Renner.***

IV. Right of a Beneficiary to Sue for Trespass or Waste where Assent has not been given

A beneficiary cannot sue because the property has not been given to beneficiary under assent. Only the personal representatives can sue. However, if the PRs are the ones committing the waste, then beneficiaries can sue since they have an equitable interest in the property.

V. Formal Parts of an Assent

1. Commencement/date
2. Parties clause
3. Vesting clause
4. Declaration clause
5. Acknowledgement clause
6. Testimonium
7. Execution
8. Attestation

DISCHARGE OF PERSONAL REPRESENTATIVES

I. Concept

This can be applied for in the Court that granted Probate/Letters of Administration when the personal representative has completed the administration of the estate and final accounts filed.

II. Duties of Personal Representatives which may arise after Their Discharge

This means new duties arising for the personal representative to handle after he has been discharged by the Courts. This may arise on any of the following ground:

1. New properties of the testator were discovered, the personal representative will be called to complete the administration.
2. The personal representative was discovered to have breached his duty of trust.

THE SEQUENCE/ORDER IN ADMINISTERING OR WINDING-UP A DECEASED'S ESTATE

1. Give the deceased a decent burial
2. Collect the deceased's assets into an inventory
3. Apply to obtain a grant of Probate/Letters of Administration
4. Settle all debts and liabilities of the deceased
5. Distribute the estate in accordance with the Will if any or the Native Law and custom of the deceased intestate
6. Render accounts of administration to the Probate Registry as required by Law
7. Apply to the Court to be discharged after the administration of the estate is completed.

Sample Draft of an Assent

WE, MR. KILLI NANCWAT OF 12 BUYO STREET IKEJA LAGOS AND JOEL ADAMU OF 17 EDU CLOSE IKEJA LAGOS, THE PERSONAL REPRESENTATIVES (EXECUTORS) OF MRS. ADUKE THOMAS (Deceased) of 12 Aduke Street Ikeja Lagos who died on the 17 day of MARCH 2019 and whose Will was proved on the 10 day of APRIL 2019 in the Probate Registry of the High Court of Lagos State:

1. DO HEREBY on this 26th day of April 2019 as such personal representatives, ASSENT to vesting in Dr. Lom Thomas of No. 10 Ikorodu Road Surulere Lagos State (the Beneficiary) ALL THAT two storey building at 56 Awolowo Avenue Ikeja Lagos covered by a

certificate of Occupancy No. 876534 dated 12/11/2004 and registered as No.24 page 45 and volume 5647 of the said Mrs. Aduke Thomas at the time of her death.

2. WE DECLARE that we have not previously given or made any assent or conveyance in respect of any legal estate in the property or any part of it.

3. WE ACKNOWLEDGE the right of Dr. Lom Thomas (the Beneficiary) to the production of the Probate of the Will (the possession of which is retained by us) of the deceased and to the delivery of copies.

IN WITNESS OF WHICH we, Killi Nancwat and Joel Adamu have executed this Assent the day and year first above written.

SIGNED AND DELIVERED
By the within named
Killi Nancwat……

IN THE PRESENCE OF:
Name: Mathias Ayuba
Address: No 139 B Ikorodu Estate, Ikoyi, Lagos State
Occupation: Architect
Signature:
Date: 26th April 2019

SIGNED, AND DELIVERED
By the within named
……..
Joel Adamu

IN THE PRESENCE OF:
Name: Kabiru Adamu
Address: No 23 Emmanuel Estate Ikoyi, Lagos State
Occupation: Doctor
Signature:
Date: 26th April 2019

(WEEK 20)

PROPERTY LAW TAXATION

INTRODUCTION

I. Applicable Laws

1. Land Use Act – e.g. consent fees
2. Stamp Duties Act
3. Land Instrument Registration Laws (LIRL) of the various states
4. Capital Gains Tax Act
5. Personal Income Tax Act (PITA)
6. Companies Income Tax Act (CITA)
7. Land Use Charge Law Lagos – all properties and land based rates in one uniform body in Lagos State

II. Meaning of Taxation

Taxes are compulsory charges by the (government) on the income of an individual, corporation or trusts as well as the value of an estate or gift. It is a compulsory levy imposed by competent authority or organ of government for public purposes. Property taxation refers to the financial levy or burden placed on owners of properties or interest in properties (occupiers) and purchasers by the government in other to raise revenue.

Generally, taxes are levied directly or indirectly. Direct taxation occurs where person are taxed to pay for no particular services or goods delivered, but simply for the maintenance of government and its services. Indirect taxation occurs where persons are charged for services rendered to them, transactions conducted or for their activities.

III. Taxable Transactions

1. Sale of Land
2. Mortgage
3. Lease

IV. Taxes Collected By the Government

A. Taxes Collected by the Federal Government

1. Companies Income Tax
2. Withholding tax on companies (withholding tax on companies) residents of Federal Capital Territory Abuja and non-resident individuals)
3. Petroleum Profit tax
4. Value Added Tax
5. Education Tax
6. Capital Gains Tax (on residents of the FCT Abuja) bodies corporate and non-resident, individuals)
7. Stamp duties (on bodies corporate and residents of
8. Personal Income Tax in respect of members of the forces, residents of the FCT Abuja, members of Nigeria Police Force and Staff of the Ministry of Finance Affairs Abuja and non-resident individuals.

B. Taxes Collected By the State Government

1. Personal Income Tax pay as you earn and direct (self-assessment)
2. Withholding tax (individuals only)
3. Capital Gains Tax (individual only)
4. Stamp duties on instrument executed by individual
5. Road taxes
6. Pools betting and lotteries and gaming and casino tax individuals
7. Business premises registration fees

8. Development fees for naming street in a state capital
9. Markets (where state finances are involved)
10. Right of occupancy fees over lands owned by state in urban areas of the state.

V. The Place of Payment of the Taxes Payable on a Specific Transaction

This depends on the class/status of the party making the tax payment or the location as follows:

1. If it is a COMPANY, federal Staff in Government establishments and MILITARY PERSONNEL; NON RESIDENTS/FCT RESIDENTS, it is to be paid to the Federal Government collected by the Federal Inland Revenue Services(FIRS)
2. If it is a transaction between individuals, or a civil servant or workers in the State, or transactions over State Lands, the State Government collects the taxes through the State Inland Revenue Services.

OVERVIEW OF TAXES PAYABLE IN PROPERTY TRANSACTION

I. Capital Gains Tax (CGT)

A. Concept

These are levies charged on the gains accruing upon disposal of assets as provided for under the ***Capital Gains Tax Act CAP C1 LFN 2004***. Tax paid on gains accrued to a person on disposal of an asset - ***Section 1(1) CGTA***. Purpose of the Act is for taxes on or after 1st April 1967. Capital gains tax shall be chargeable on the total amount of chargeable gains accruing to any person in a year of assessment after making such deductions - ***Section 2(1) CGTA*****.** These gains are those resulting from increases in the market value of assets to a person who does not regularly offer them for sale and in whose hands they do not constitute stock-in-trade. The tax is on the gain of the disposed property implying then that if no gain is made the tax cannot be charged. The rate of capital gains tax is 10%.

B. Assets which are Chargeable

Section 3 CGTA list assets, which are chargeable: All forms of properties shall be assets whether situate in Nigeria or not so long as the person to pay the tax is resident in Nigeria or has part of the business. Assets includes any form of property created by the person disposing of it.

C. Those Liable to Pay Capital Gains Tax

1. Companies
2. Partnerships
3. Individuals
4. Personal representatives

D. Allowable Income

This is an income that is wholly, exclusively and necessarily incurred for the acquisition of the property – ***Section 12, 13, & 33 CGTA***. The allowable income includes:

1. Money or monies worth charged to income tax or receipt of money taken into computation under Personal Income Tax
2. Amount paid for the acquisition of the property or incidental cost of acquisition
3. Expenses incurred in enhancing the value of the property
4. Money spent on the establishment, preservation or defence of the title of the asset.
5. Cost incidental to the disposal of the asset such as the cost of advertisement or commission to the auctioneer or agent.
6. Fees, commission or remuneration paid to professionals, surveyors, Auctioneers, Agent, Valuers, and Solicitors.

E. Exceptions (Unallowable Income)

1. Cost of disputing the taxable portion e.g. engaging service of a Solicitor to institute action.
2. Direct Labour put into improvement of the Property shall not be allowed e.g. Mr A wants to paint the house himself through his family members; he would not be allow to deduct payment for the direct labour – ***Oram v. Johnson*****.**

3. Upon redemption of mortgage and re-conveying property to the mortgagor, it does not amount to disposition of assets. This is because a mortgage transaction is not a sale.
4. Devolution of property to beneficiaries by a personal representative does not amount to disposal of interest, CGT will not be paid.

NB: However, where the executor sells the property to a party in order to raise money that is taxable.

F. Persons and Organisations Exempted from Capital Gains Tax in Respect of Property Disposal by Them

1. Religious bodies, charitable or educational institution of a public character.
2. Statutory or registered friendly societies
3. Cooperative society registered under the cooperatives society law of a state.
4. Trade Union registered under Trade Union Act - ***Section 26 CGTA***
5. Gains accruing to local government councils
6. Gains accruing to any company and authority established by Law to purchase and export commodities from Nigeria, or one for fostering the economic development of Nigeria – ***Section 27 CGTA***
7. Disposition by way of gift

G. Formulae

1. Consideration received
2. Cost of purchase of the property
3. Subtract cost of purchase from consideration to get the gain
   Less
4. Allowable income

CGT 10% of (Total Gain – Total Allowable Income)

H. Vendor's Capital Gains Tax

1. State the amount which the vendor sold the property
2. To arrive at the capital gain, itemise all allowable expenses, their costs and minus total cost of allowable expenses from the amount which the vendor sold the property
3. To arrive at the capital gain tax payable, calculate 10% of the amount of the capital gain

For example, amount property was sold = 500,000; allowable expenses: (1) amount vendor acquired the property = 100,000; (2) renovation of the property: 50,000, (3) solicitor's fees = 30,000; (4) advertisement of the property for sale = 20,000. Total = 200,000.
Therefore: 500,000-200,000 = N300, 000 (vendor's capital gain)
Capital gain tax = 10% x 300,000 = N30, 000

II. Stamp Duties

A. Concept: These are duties (taxes) imposed on and raised from stamps charged on instruments, parchments and other legal documents relating to land under the Stamp Duties Act LFN 2004. By virtue of ***Section 23 Stamp Duties Act***, corporate bodies and individuals pay stamp duties. When the stamp duty is paid, the document is stamped by an impression of a red wax or other marker being made on the document. The federal Government (national) has the right to legislate on stamp duties.

B. Types of Stamp Duties (Fixed and Ad Valorem)

1. **Flat or Fixed Rate:** Some documents attract duties at FLAT or FIXED rate e.g. power of Attorney registered with AGIS (in some states/instances). In Lagos State, once the power of attorney looks like it is transferring an instrument and not delegating, then it is calculated at ad valorem. Another example of documents that attract duties at fixed rate is contract of sale.
2. **Ad Valorem:** Other documents attract duties ad valorem e.g. mortgages, leases, and assignment. Calculated according to the value of the property or consideration paid. The rate of 3% is charged as stamp duties on the value of the transactions in many

States in Nigeria.

C. Time Frame for Payment of Stamp Duty: Stamp duty is to be paid WITHIN 40 DAYS but when ad valorem, it is to be paid WITHIN 30 DAYS.

D. Up Stamping: For up stamping, additional stamp duties will be paid - ***Owoniboys Tech Services v. UBN*.**

E. Effect of Unstamped Document

(a) The document will not be admissible in evidence as proof of title. However, the Court may order it to be admitted in evidence upon immediate payment of the stamp document - ***Okuwobi v. Ishola; Ogbahon v Registered Trustees of CCCG***

(b) The document will not be registered.

(c) It will attract a penalty.

III. Personal Income Tax

A. Concept

Personal income tax is tax paid on profits of an income as opposed to profits arising on the disposal of capital assets. Tax payable on the income of every taxable person from a source inside and outside Nigeria. It is payable by individuals, communities, families, trustees, or executors, partners in partnership - ***Section 2, 4 & 8 Personal Income Tax Act*.**

B. Income Chargeable under Personal Income Tax

1. Gain or profit from any trade, business, profession or vocation.
2. Any salary, wage, fee, allowance or other gain or profit from employment including compensation, bonuses, premiums
3. Gain or profit including any premium arising from a right granted to any other person for the user or occupation of any property
4. Dividend, interest or discount.
5. Any pension, charge or annuity
6. Any profit, gain or other payment.

See ***Section 3(1) (c) PITA***.

C. Tax Clearance Certificate

1. Concept: ***Section 85 (1) of the Personal Income Tax Act*,** provides that A Ministry, department or agency of government or a commercial bank having dealings with persons in respect to any of the transactions mentioned in Section 85(4) shall demand from that person a tax clearance certificate e.g. Tax clearance certificate is needed as one of the documents for Governors consent.

2. Circumstances of Issuance of TCC: Tax clearance certificate (TCC) on the income of a person for the 3 years immediately preceding the current year of assessment may be issued to a person under the following circumstances:

(a) An individual has fully paid his personal income tax or

(b) Where no tax is due on his income or

(c) When an individual is not liable to pay income tax for any of the 3 years

3. Contents of a Tax Clearance Certificate

(When Tax has been paid)

(a) Chargeable income

(b) Tax payable

(c) Tax paid

(d) Tax outstanding

(When No Tax is due)

Or alternatively should contain a statement to the effect that no tax is due for the 3 years immediately preceding the current year of assessment – ***Section 85(3) PITA***.

4. Circumstances when a Client Needs to Tender His TCC

(a) Transfer of interest in land

(b) Application for loan from government
(c) Application for subsidy and aids in agriculture
(d) Signing as a Surety for Bail
(e) Application for a grant of Certificate of Occupancy
(f) Application for registration of a company or Business
(g) Approval of Building Plans
(h) Application for allocation of market stalls

See ***Section 85(1) PITA*****.**

D. Education Tax

This tax is for corporate bodies. In addition to paying Companies Income Tax, companies in Nigeria engaged in any property transaction/activity including real estate or property transaction from which they make profit, they are liable to pay 2% of such profit as Education Tax. It is payable to FIRS.

IV. Tenement Rates

A. Concept: Tenement rates are charges imposed on houses and buildings within a state. The major feature of tenement is the presence of buildings and also occupation of the building by persons. It is usually paid in respect of developed properties to the local governments where the property is situated. Tenement rate is the same as Land Use Act, which is obtainable in Lagos State. The State House of Assembly prescribes Legislations for assessment of tenement although the ultimate beneficiaries of the rates are the Local Government in the States.

B. Exempted Buildings: Charges on buildings and occupation. It is shall not be charged on buildings occupied and used as:

1. Religious centres
2. Cemeteries and burial grounds
3. Non-profit making institutions engaged in charitable and educational purpose

V. Miscellaneous Charges & Fees

These are other forms of charges made in the course of property transfers, though not described as tax, they are charges imposed with the aim of raising revenue for government.

1. **Ground Rent:** Usually charged by the Governor of a state for grant of right of occupancy and in respect of undeveloped properties in accordance with the terms and conditions of the grant of right of occupancy - ***Section 5 Land Use Act*****.**
2. **Consent Fee:** this is the fee payable to obtain consent of the Governor in alienating interest in land subject to a statutory right of occupancy under ***Section 22 Land Use Act***. The transactions in which Governor's consent is needed include sale of land, mortgage, lease, etc. Payment of consent fee may be made conditional for grant of the consent or made antecedent of the grant. The rate chargeable as consent fee depends on the scale adopted in a particular state, but is mostly between 3%-5% of the consideration paid on the property transaction. Failure to pay consent fee will make the alienation of interest voidable.
3. **Registration Fee:** this is required to be paid under the various land instrument registration laws of the States before documents are registered. The property sought to be registered may be valuated or revaluated by the director of lands or other valuers to determine the amount payable, and not necessarily the amount stated by the parties in the document sought to be registered – ***Section 113 (2) & (3) Lands Registration Law Lagos State 2014*****.** The documents for which fees are payable before registration include deeds, leases, subleases, mortgages, gifts, assignments and transfers. In Lagos State, registration fees are payable against the following documents:
   (a) Up-stamping – 1.5% of the value
   (b) Supplemental deed – 1.5% of the value
   (c) Deed of Assignment – 3% of the value

(d) Sublease – 3% of the value
(e) Lease – 3% of the value
(f) Certificate of purchase – 3% of the value
(g) Transfer – 3% of the value
(h) Gift – 3% of the value
(i) Agreement – 3% of the value

4. **Value Added Tax (VAT):** This is a consumption tax: It is tax payable on manufactured goods and on services rendered or employed by consumers. Chargeable and payable on supply of all goods and services. VAT does not apply to property transactions. However, an individual or company that capitalises on or makes profit from trading on real property is chargeable to VAT – ***Section 12 VAT (Amendment) Act 2007***. It is levied at each stage of the consumption chain and borne by the final consumers. VAT is chargeable at 5% on the value of goods and services supplied or provided by a vatable person (which includes person dealing in real property for the purpose of stating income by way of trade or business. VAT is administered and managed centrally by the Federal Inland Revenue Services (FIRS) in close cooperation with Nigeria Custom Service (NCS). The distribution of the proceeds from VAT is as follows: 15% to Federal Government; 50% to State Government & FCT and 35% to Local government.

LIABILITY FOR FAILURE TO PAY TAX

Payment of taxes is compulsory

1. **Civil Liability**: An action may be instituted to person to recover the tax as debt.
2. **Criminal Liability/Penalty**
   (a) Failure to Deduct or Pay Tax: On conviction, such a person shall be liable to pay the tax withheld in addition to a penalty of **10%** of the tax and the prevailing CBN minimum re-discount rate and imprisonment for a period of more than 3 years - ***Section 40 FIRS Act***.
   (b) Failure to Pay Personal Income Tax: If notice of demand to pay is served on a person to pay income tax and he fails to do so within one month of the service of the notice on him, he shall be guilty of an offence - ***Section 96(4) PITA*****.** Where personal income tax is not paid and Tax Clearance Certificate was obtained through fraudulent means or misrepresentation, it is a crime punishable with N500.00 fine or imprisonment or both.
3. **Distraining of Goods, Chattels, Lands and Other Assets:** After a final and conclusive assessment, the goods and other assets of the person liable to pay tax will be distrained in order to satisfy the sums that are outstanding against him – ***Section 104 PITA***.
4. **Levy:** is a compulsory payment imposed by government which includes taxes and fines.

ETHICAL ISSUES

1. Duty to act within the bounds of the law - ***Rule 15 RPC*****.** Do not advise a client to work towards tax evasion. Tax evasion as distinct from tax Avoidance.
2. Duty to keep record of all taxes paid by client.
3. Duty not to be professionally negligent as to incur excess costs.
4. Do not delay the payment of tax so as to avoid bringing the client within penalties.
5. Do not misappropriate taxes and fees payable to the state - ***Rule 23 RPC***.
6. Do not deliberately pay to the wrong authority, pay to the appropriate authorities.
7. All money collected from client must be deposited in the Client Account.
8. Duty of confidentiality
9. Duty to pay taxes on fees collected by the Solicitor for professional services.
10. Duty to ensure taxes are paid promptly to avoid penalties

11. Duty not to collude with clients to act outside the law

Note:

Section 12 Personal Income TAx

Every person other than a Government employee must keep record of his personal incomes for tax purposes.

Default attracts fine

N100, 000.00 for individuals

N500, 000.00 for corporate bodies.

Withholding Tax: There is a duty imposed on individuals to deduct tax and remit same to the government. Failure to do so is called withholding.

CLASS EXERCISE

Chief Clifford Sanusi brought a plot of land from state government in 1970 for N100, 000. He completed building consisting a block of four flats (3 bedrooms each). He spent N900, 000 to complete the project. In 2007, he sold the block of flats to Alhaji Rita Odia, the Sebe-Sebe of Oyo State for N5 million after renovating the building with N500, 000. Vike Idris Esq. is the solicitor handling the sale on behalf of the parties. He advised Chief Clifford Sanusi to pay his capital gain tax. Assuming the Solicitor was paid N500, 000 compute the capital gain tax to be paid.

Answer

1. Consideration received — N5 million
2. Cost of purchase of property — N100, 000
3. Gain = 5,000, 000 – 100,000 = 4,900,000
4. Allowable income

Building Cost	900, 000
Renovation	500, 000
Solicitors Fees	500, 000
Total	1, 900, 000

5. Gain less total allowable income — 4, 900, 000 − 1, 900, 000 = 3, 000, 000
6. 10% of (total Gain – Total allowable income)
   = 10/10 x 3, 000, 000

Capital Gain Tax = N300, 000.00

REVISION QUESTIONS

Scenario 5

Amount property was sold for: 4,000,000

Allowable expenses:

1. Amount vendor acquired the property: 50, 000
2. Building of block of 4 flats: 950, 000

Total = 1,000,000

Capital gain: 4,000,000 -1,000,000 = N3, 000, 000

Capital gain tax: 10% x 3,000,000 = N300, 000

Under Governor's Executive Order = 0.5% x 4, 000, 000 = N20, 000

1. **Effect of the Constitution on Tax Jurisdiction:** Nigeria being a Federation, the tax jurisdiction is influenced by the division of legislative powers under the CFRN, a unit of government can only impose tax on matters it can legislate on – ***Section 4(1) CFRN 1999*****.**
2. **If an Estate Valuer Sells Property, Will He Pay CGT:** No, he will not. Such taxes will be paid by him as Personal Income Tax or a Companies Income Tax. This is because such

property sold (or selling such property) is his stock-in-trade which sale does not qualify as a disposal of assets to warrant the charging of capital gains tax.

3. **Who Takes the Proceeds of Capital Gains Tax and Stamp Duties:** Where CGT and stamp duties are collected by state, they will be deposited into a consolidated fund of the state. Even where the Federal Government collects CGT and stamp duties, it is expected to remit it back to state based on Duration formula i.e. based on how much was collected from each state. There must be an Act of the National Assembly specifying how such tax is to be shared.