



PROPERTY LAW PRACTICE

Practice Handbook



COUNCIL OF LEGAL EDUCATION
NIGERIAN LAW SCHOOL

PROPERTY LAW PRACTICE HANDBOOK REVIEW

**EDITOR-IN-CHIEF
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Director General**

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Nigerian Law School

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PREFACE

The review of the curriculum for the vocational legal training of aspirants to the Nigerian Bar is core assignment that has been painstakingly undertaken periodically in line with international best practices. This edition is unique in that it contains: the vision and mission of the Nigerian Law School; the lesson plans for each module as well as the summarized explanatory notes on the topics, all simplified for ease of comprehension on the practical training of Lawyers in the 21st century. A user-friendly soft copy of the practice handbook is also enclosed to enable students work at their pace on their computer devices. The need for this practice handbook is underscored by the fact that a harmonized version of the revised curriculum for the hands-on interactive learning at the Nigerian Law School has not been made available to the students for some years now.

This work is the outcome of a concerted effort by the senior members of the academic faculties across the campuses of the Nigerian Law School. They have employed their years of practice experience and versatility to synthesise leading specialized works in this field to come up with this students cum practitioners' companion. It is a deliberate attempt to bridge the gap and mitigate the hardship which students of modest means may encounter at the Law School in procuring recommended texts.

It is important to point out, however, that this practice handbook is not a substitute for attendance at lectures, active participation in group activities or the procurement of recommended texts. While we have endeavoured to ensure the accuracy of the content of this handbook, we will take responsibility for any error discovered.

I acknowledge the invaluable contribution of all the academic faculties in making this (2019) Practice Handbook a reality. Students will, no doubt, find it a treasured companion while preparing for the Bar Final Examinations and a practice compass in the early years of legal practice.

Prof. Isa Hayatu Chiroma, SAN

Director – General

October, 2019

VISION AND MISSION STATEMENTS

1. Vision Statement

1. To be a model institution that aims to attain the highest standards of legal education and vocational training in the world;
2. Train lawyers grounded in the ethics of the legal profession, who can respond to current national and international legal challenges in a diverse society, providing leadership in many different walks of life; and
3. To maintain vocational training and capacity building for lawyers to be intellectually and professionally effective for meeting global challenges and ethical values.

2. Mission Statement

To:

1. educate and train law graduates in vocational skills that would enable them function optimally as barristers and solicitors;
2. adopt skills-based, interactive and clinical methods of learning that would adequately prepare the graduates for their roles as lawyers to function as teachers, advocates, and solicitors, advisers, leaders in private enterprise and public service;
3. train students to conform to the ethics and traditions of the legal profession and exhibit the highest sense of integrity and candour in the discharge of their professional calling; and
4. inculcate in its graduates the ideals of rule of law, social justice and community service such as providing free legal services to the indigent and encouraging the development of opportunities for access to justice.

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LIST OF ABBREVIATIONS

AC	Appeal Case
ALL ER	All England Report
ALL NLR	All Nigeria Law Reports
CCHCJ	Cyclostyled Copies of High Court Judgement
CLR	Commonwealth Law Reports
COX	Cox's Equity
Cr.App. R	Criminal Appeal Reports
East, P.LC	East Term's Reports Privy Council
ECSLR	East Central State Law Reports
ENLR	Eastern Nigerian Law Reports
ERNLR	Eastern Region of Nigeria Law Reports
FNR	Federation of Nigeria Report
FRCR	Federal Revenue Court Reports
FSC	Federal Supreme Court
K.B	King's Bench
L.L.R	Lagos Law Reports
LRN	Law Reports of Nigeria
LR, PC	Law Reports, Privy Council Appeals
MJSC	Monthly Judgement of the Supreme Court of Nigeria
MNLR	Mid-Western Nigeria Law Reports
NCLR	Nigeria Constitutional Law Reports
NCR	Nigeria Criminal Reports
NLR	Nigeria Law Reports
NMLR	Nigeria Monthly Law Reports
NNLR	Northern Nigeria Law Reports
NRNLR	Northern Region of Nigeria Law Reports
NWLR	Nigeria Weekly Law Reports
Q.B	Queen's Bench
QBD	Queens Bench Division
SC	Supreme Court
SCNJ	Supreme Court of Nigeria Judgements
SCNLR	Supreme Court of Nigeria Law Reports

TLR	Times Law Reports
Vict. LR	Victoria Law Reports
WACA	West African Court of Appeal
WRL	Weekly Law Reports
WLRN	Weekly Law Report of Nigeria
WN	Weekly Notes
WNLR	Western Nigeria Law Reports
WRNLR	Western Region of Nigeria Law Reports

COUNCIL OF LEGAL EDUCATION NIGERIAN LAW SCHOOL

CURRICULUM FOR BAR PART II VOCATIONAL EXAMINATION

The Curriculum

(i) Introduction

The focus of the curriculum is the achievement of a set of outcomes at the end of the training. This curriculum intends to make the students the centre of the learning process. Students must be ready to prepare for lessons, by undertaking reading assignments, exercises, tasks, role plays, etc. as would be indicated by the tutors from time to time. Any student who fails or neglects to carry out assignments would be deemed not to have participated in the class. Students should not expect that tutors would come to the class and merely ‘fill’ them up with knowledge by merely dictating or repeating lines and lines of pages of books, statutes and case reports. Every student shall be required to fully participate in class.

(ii) Duration

There would be:

- i 2 weeks of induction (including a week of case studies and mock trials);
- ii 20 weeks lecture contact
- iii 1 week mock trials
- iv 1 week of private revision before Bar examination
- v 10 weeks of Court and Law Firm attachment (Placement clinic)
- vi 3 weeks of extenship portfolio assessment and evaluation
- vii 1 week of Bar final examination

(iii) The 20 weeks of lectures

There would be a maximum of 4 hours teaching time per day of 5 days of the week. This would give a total of 400 hours. Each day would be devoted to a specific module as shown in the integrated curriculum composite above.

(iv) Delivery Mode

Delivery would be through interactive workshops. It is hoped that the workshops would progressively be held in small groups in line with best practices in legal education and staff-students standard ratio.

There would be no special period set out as tutorials. Lessons shall be presented in a way to integrate learning in the modules with values, ethics and skills. This would give students the opportunity to understand how ethics work in real life and demonstrate the skills relevant to the daily application of the subjects of the modules in practical law.

Lessons would take the form of interactive framework teaching, discussions, simulation clinics and activities, role plays, video demonstrations, mock trials, drafting exercises, assignments, quizzes and tests, presentation by guests etc. All sessions would not be passive lessons for students. Students would be expected to participate. Teachers shall be expected to use and adhere to the lesson plans and provide stimulating activities and opportunities to make students participate.

Projector slides and power point presentations will be used in the sessions. In addition, video camera and tapes may be used for effective feedback and reviews by tutors and students themselves.

Students should be given before any lesson, materials and exercises or given instructions on the materials that need to be seen before any class.

(v) Assessment

There would be continuous assessment throughout the course in addition to the Bar final examination. There would be a special portfolio assessment of the court and law office attachment (placement clinic). A student must score not less than 70% at the portfolio assessment to be eligible for call to the bar irrespective of the candidate's score at the bar examination.

There will be a summative examination in Property Law Practice

(vi) Prerequisite

The curriculum assumes that students already know the core subjects they studied at the University. Their attention must be drawn to this at the commencement that they should ensure their understanding of these subjects or update their understanding. Candidates would also be required to be able to use case studies relating to them but which they did not specifically study at the University like Company law and family law as no special lessons would be provided on these subjects.

(vii) Modules, contents, lessons plan and case studies:

The following modules are covered under the curriculum: Criminal Litigation, Civil Litigation, Property Law Practice, Corporate Law Practice and Professional Ethics and Skills. The modules (including the plan for the 2 weeks Induction Programme) detailed contents, lessons plan and case studies are set down below as follows:

PROPERTY LAW PRACTICE CURRICULUM LESSON PLAN, MATERIALS AND CASE STUDIES

'Property' in the first part of this module/course relates to immoveable property (land or interest in land). On the other hand, when dealing with the administration of estates, 'Property' is used to include moveable properties (shares, money, etc.) Candidates would need to have read the following: Land Use Act; Conveyancing Act, 1881; Property and Conveyancing Law, 1959; Land Instrument Registration Law of Lagos State; Land Instrument (Preparation) Law; Mortgage Institutions Act; Illiterate Protection Law; Stamp Duties Act; Wills Act of 1837; Wills Laws of Lagos, Oyo, Abia and Kaduna States; Administration of Estates Law of Lagos State; High Court (Civil procedure) Rules of Lagos State and Abuja (FCT) as they affect probate practice and Capital Gains Tax Act; Personal Income Tax Act; Land Use Charge Law of Lagos State; Income Tax Management Act; Tenancy Law of Lagos State 2011; Legal Practitioners' Act and Rules of Professional Conduct.

This course would be based on the above legislations. Attention would however, be drawn to other relevant legislations when necessary for emphasis and not for purpose of comparison. The teaching of the course would focus on the knowledge, skills, values and ethics involved in property transactions and administration of estates. It is assumed candidates have good understanding of principles of land law and Nigerian legislation on property.

Mock registries (covering land registry, stamp duties office, and probate) to be manned by volunteer candidates under the supervision of tutors would be used in the teaching of the course.

Integration with other Courses:

The course would be taught with constant reference to:

1. Communication Skills which include Drafting Skills and Client – interview Skill; and Office Management Skill.
2. Ethical issues such as representation of both parties in a transaction; under valuing of registrable instruments; mishandling of clients' money; undervaluing of property for the purposes of stamp duties and property taxation and professional responsibilities which may arise from client-solicitor relationship.

COURSE CONTENTS

1. Week 3 – General Overview & Applicable Laws
2. Week 4 – Deeds
3. Week 5 – Power Of Attorney
4. Week 6 – Sale of Land Part 1
5. Week 7 – Sale of Land Part 2
6. Week 8 – Land Registration Law (Lagos State)
7. Week 9 – Leases Part 1
8. Week 10 – Leases Part 2
9. Week 11 – Mortgages part 1
10. Week 12 – Mortgages part 2
11. Week 13 – Mortgages part 3
12. Week 14 – Billing & Accounts In Property Transactions
13. Week 15 – Will & Codicils Part 1
14. Week 16 – Will & Codicils Part 2
15. Week 17 – Will & Codicils Part 3
16. Week 18 – Probate Practice
17. Week 19 – Administration of Estates, Personal Representatives and Assent by Personal Representatives

18. Week 20 – Property Law Taxation

GENERAL LEARNING OUTCOMES

Students would be able to:

1. Demonstrate a clear understanding of the laws applicable to
 - a) The transfer of properties;
 - b) Administration of estates in Nigeria and apply the relevant laws to given cases;
2. Take instructions from clients on the conveyancing approach they want,
3. Conduct investigation of title to land and give advice or write appropriate search report,
4. Demonstrate clear understanding of the various steps or procedure to perfection of title to land and a clear understanding of the principles affecting documents of transfer of title to land and apply them to specific cases,
5. Draft appropriate or suitable land documents to meet clients' specification, and to professional standard,
6. Give opinion on the best legal option available to a client in specific cases,
7. Have a clear understanding of the various forms of transactions affecting land in Nigeria,
8. Apply principles of law to covenants in a lease, mortgage, and assignment of leases in a given case,
9. Take instructions from a client for the preparation of a Will and be able to draft the Will to professional standards,
10. Demonstrate a clear understanding of the conditions for validity and revocation of Wills,
11. Apply the principles on validity and revocation of a Will to given cases,
12. Commence the process of obtaining probate and letters of administration,

13. Identify the duties and liabilities of personal representatives and the steps to take in winding up of an estate and,
14. Demonstrate a clear understanding of laws relating to property taxation in Nigeria.

WEEK 3 – GENERAL OVERVIEW AND APPLICABLE LAWS

Outcomes:

At the end of the lesson, students would be able to:

1. Explain the objectives, content and scope of this course
2. Explain various transactions affecting land and the laws that should apply to given cases.
3. Apply the applicable laws to given cases
4. Identify ethical issues arising from lack of knowledge of appropriate law, and transaction.

Contents

1. Overview of the Property Law Practice (Module) Course
2. Laws applicable to property transactions, administration of estates and property taxation in Nigeria.

Pre-class Activities

1. Students are required to read the topic in advance and carry out pre-class activities/tasks.
2. Students are required to read case studies 1 and 2 in advance.

Class Activities

1. Tutor presents an overview of the Property Law Practice Course–40 minutes.
2. Students’ groups discuss and draw up list of transactions affecting land -20 minutes

3. Sample presentation by groups of students -20 minutes
4. Tutor presents an overview of applicable laws affecting transactions on land; administration of estates and property taxation in Nigeria -30 minutes
5. Students' groups make a list of these laws -10 minutes.

30 Minutes Break

6. Tutor presents the case study 1 on a power point along with questions/exercises 10 minutes.
7. Students' groups discuss and list answers to the questions -30 minutes
8. Groups make sample presentations and, a list of the various transactions arising from the case studies is made; and a list of the various laws applicable to these transactions is also made – 30 minutes.
9. Students' groups identify ethical issues arising from knowledge or lack of it of the appropriate law and transaction -15 minutes.
10. Group sample presentation of ethical issue identified 25-minutes
11. Assessment and Evaluation -10 minutes.

WEEK 4 – DEEDS

Outcomes:

At the end of the lesson, students would be able to:

1. State the features of a deed
2. Identify when a deed is required in a transaction affecting land, and when it is not mandatory
3. Identify the various parts and contents of a deed of conveyance.
4. Draft a deed to professional standards
5. Identify the use of deed of rectification

Contents

1. Features of a deed
2. When Deed is required and when it is not
3. Form and content of a deed

Pre-Class Activity

1. Students would be required to read the topic in advance.
2. Students would be made to draft deeds, such as deed of assignment, leases, power of attorney, sample mortgage and to identify common (structural and textual) elements of a deed.
3. Students should also identify the use of deed of rectification.

Class Activities

1. Tutor presents an overview of features of a deed, instances where a deed is mandatorily required and not required in land transactions-30 minutes
2. Students to discuss and list features of a deed -15 minutes
3. Students to make a list of various transactions that require deed and those that do not require a deed minutes.
4. Tutor to give an overview of contents of a deed of assignment -30 minutes
5. Students to discuss and list the various parts of a deed of assignment- 20 minutes.
6. Group presentation of the list of parts of a deed of assignment–10 minutes.

30 Minutes Break

7. Tutor to give case study 2 as modified to include relevant information for a deed of assignment

8. Different groups to collectively draft an appropriate deed of assignment based on the case study given above by the tutor – 1hr.
9. Group presentation of the draft – 45 minutes
10. Assessment and Evaluation – 15 minutes.

WEEK 5- POWER OF ATTORNEY

Outcomes:

At the end of the lesson, students would be able to:

1. Identify the features of a power of attorney and state types of Power of Attorney.
2. Distinguish a power of attorney from other documents affecting land transactions (contracts and conveyances).
3. Explain the importance, and need for power of attorney
4. Explain the parts of a power of attorney
5. Advise on the execution of a power of attorney
6. Draft a standard power of attorney

Contents

1. Meaning and features of power of attorney
2. When power of attorney is required and when it is not
3. Distinction between power of attorney and conveyance
4. Types of power of attorney
5. Drafting of a power of attorney
6. Consideration of issues of ethics

Pre-Class Activities

Students are required to read this topic in advance, carry out pre-class tasks, and study the following cases:
Abina v. Frahat; Ude v. Nwara (1993) 2 NWLR (pt.278)638; Chime v. Chime (1995)6 NWLR (pt.

404) 734; Ezeigwe v. Awudu (2008)11 NWLR (pt.107)158.

Class Activities

1. Tutor gives an overview of features of a power of attorney, distinction between power of attorney and a Conveyance; contract of sale of land; mode of creation and types of power of attorney-30 minutes.
2. Students discuss and list features of a power of attorney, distinguish it from other documents of transfer, when it is required and ethical issues that may arise from instructions to draft power of attorney-30 minutes.
3. Students group to present the above points discussed in their groups-20 minutes.
4. General group discussion on types of power of attorney, and revocation of power of attorney (and when power of attorney is irrevocable)-20 minutes
5. Group presentation on types, revocation of power of attorney, and when power of attorney is irrevocable-20 minutes.

30 Minutes Break

6. Tutor presents case study 2-10 minutes.
7. Students list information missing in the case study that are (is) required for the drafting of a power of attorney-10 minutes.
8. Tutor projects, by using power point, to display particulars of information required to draft a sample power of attorney-10 minutes
9. Students draft a sample power of attorney – 45 minutes.
10. Tutor presents a sample power of attorney through power point and projector-5 minutes

11. Students to exchange and grade the sample power of attorney prepared by them from the case study-20 minutes.
12. General discussion. Assessment and Feedback – 20 minutes

WEEK 6 – SALE OF LAND (PART 1)

Outcome:

At the end of the lesson, students would be able to:

1. Mention legal restrictions or limitations to sale of land
2. List the various steps or stages in the sale of land (proper conveyancing stages)
3. Explain the need for pre-contract enquiries
4. Mention various types of contract of sale of land
5. State the principles governing each type of contract of sale of land
6. Apply the principles governing each type of contract of sale of land to given cases.
7. State the procedure for and effect of exchange of contract
8. Capacity of solicitor to act for both parties.
9. Draft a formal contract of sale of land,
10. Students should be able to identify the challenges posed by unregistered conveyances.
11. Students should identify remedies to parties for breach of contract of sale

Contents

1. Rights of parties where there is a breach of contract of sale as breach of non performance are often sources of conflict in agreements to sell and buy land.
2. Explain the challenges inherent in unregistered conveyancing.

3. Legal restrictions or limitation to sale of land, including incidence of customary sale of land, provisions of the Land Use Act, illiteracy, absence of conveyancing standard practice, fraud, misrepresentation, legal restriction on purpose and use.
4. Steps or stages in the sale of land
5. Types of contract of sale of land
6. Exchange of a formal contract of sale of land
7. Remedies for breach of contract.
8. Effect of formal contract of sale of a land
9. Ethical issues and Skills involved.

Pre-Class Activities

1. Students to read the topic, carry out pre-class tasks, and study the following cases: Odusoga v. Ricketts (1997) 7 NWLR (pt. 511) 7; Kachalla v. Banki (2006) ALL FWLR (pt. 309) 1420 in advance.
2. Tutor to choose 2 students and instruct them on a role play on formation of a contract of sale of land. (Emphasize usual covenants).

Class Activities

1. Tutor gives an overview of outcome 1-3 and the various types of contract of sale of land, applicable principles procedure and effect of exchanges of contract of sale of land – 40 minutes.
2. Students to list and have general discussion on legal restrictions on sale of land and steps in conveyancing and the need for pre contract enquiry - 15 minutes
3. Sample group presentation of restrictions to sale of land and steps or stages in conveyancing -10 minutes

4. Identifying the principles of law enunciated in them -30 minutes.
5. Role play by students on contract of sale of land. (3 students 1 vendor, 1 purchaser and a solicitor acting for both parties; on terms of contract and exchange of contract)-10 minutes.
6. Students' small groups discuss the role play; types of contract of sale of land; applicable principles of law arising from the different types of contract of sale; and the procedure for the investigation of title and effect of exchange of contract-10 minutes.

30 Minutes Break

7. Students to list remedies for breach of contract of sale
8. Sample presentation of issues in activities 5-6
9. Tutor gives modification to case study 4 including necessary information for a formal contract of sale-10 minutes.
10. Students to draft a formal contract of sale of land; 1hr
11. Tutor presents a sample contract of sale as basis for assessment –5 minutes
12. Students exchange draft and assess each other -20 minutes
13. General assessment and evaluation and give assignment for the next week-10 minute

WEEK 7 – SALE OF LAND (PART 2)

Outcome:

At the end of the lesson students would be able to:

1. Explain how a vendor can deduce his title

2. Understand the meaning and uses of epitome, abstract of title and what constitutes a good root of title.
3. Give examples of a good root of title
4. State the various means of investigating title
5. Raise requisitions
6. Write a search report and covering letter.
7. State the procedure for completion of sale of land.
8. Mention the procedure and documents for perfecting title to land
9. Identify ethical issues arising from investigation and perfection of title to land.

Contents

1. Deducing of Title
2. Investigation of Title
3. Drafting search report and covering letter
4. Completion procedure
5. Drafting of standard deed of assignment
- 6.
7. Perfection of Title (documents and procedure)
8. Ethical issues

Pre –Class Activities

1. Students to be given modification of case study 1 to include particulars of land in Lagos.
2. Tutor gives overview of procedure for deducing title, investigating of title by purchaser and effect of failure to investigate title and constituent a good root of title -40 minutes.
3. Brain storming on procedure for deducing title; investigation of title by purchaser and effect of failure to investigate title, what constitutes a good root of title-30 minutes.
4. Tutor gives overview of completion procedure, what constitutes a completion statement, when a vendor

- may not surrender title documents and protection of purchaser in such circumstance-30 minutes.
5. Brain storming on completion procedure-20 minutes

30 Minutes Break

6. Group discussion on perfection procedure-30 minutes
7. Group presentations of detailed steps for perfection, (mention stages, documents for securing Governor's consent, procedure at the stamp duties office and procedure at the lands register).- 30 minutes
8. Group discussion and presentation on ethical issues in outcome 1-8 15 minutes.
9. Group summarizes the procedure for perfection of title, list of documents for processing consent-35 minutes.
10. General assessment and evaluation -10 minutes

WEEK 8 –THE LAND REGISTRATION LAW, 2014 (LAGOS STATE)

Outcomes

At the end of the lesson, students would be able to:

1. Identify major features of the Land Registration Law (Lagos State as they affect sale of land, leases, mortgage, power of attorney and other real property transactions).
2. Explain the differences between registration under the Land Registration Law; Lagos and registration under the Land Instrument Registration law (LIRL) (as applicable under the PCL & CA States).
3. State the procedure for investigation of title in Lagos under the Land Registration Law (LRL) (including procedure and documents for Electronic Search)

4. Draft an Electronic Search Report in Lagos.
5. Identify documents for real property transactions in Lagos.
6. Complete the forms relating to property transactions in Lagos
7. Consideration of ethical issues.

Contents

- Features of the Land Registration Law (Lagos State)
1. Procedure for investigation of title in Lagos (including procedure and documents for Electronic Search)
2. Drafting an Electronic Search Report in Lagos
3. Differences between registration under the Land Registration Law, Lagos and registration under Registration of Instruments Law (as obtainable under the PCL & CA States)
4. Identification and completing the prescribed Forms for real property transactions in Lagos.

Pre-Class Activities

1. Students would be required to read the topics ahead of the lesson
2. Tutor to provide forms and other documents under the Land Registration Law Lagos, for students before day of lesson.

Class Activities

1. Students come to class with copies of prescribed Forms and Documents.
2. Tutor gives general overview of the features of the Land Registration Law (Lagos), procedure for investigation of title under the Land Registration Law (Lagos), differences between property transactions and registration under the Land Registration Law (Lagos) and under the Land

Instrument Registration Law (LIRL) (as obtainable under the PCL and CA States), and the documents and prescribed Form used for property transactions under the Land Registration Law (Lagos)—30 minutes

3. Students hold group discussion on the features of the Land Registration Law (Lagos), procedure for investigation of title under the Land Registration Law (Lagos), differences between property transactions and registration under the Land Registration Law (Lagos) and under the Land Instrument Registration Law (LIRL) (as obtainable under the PCL and CA States), and the documents and prescribed Forms used for property transactions under the Land Registration Law Lagos)---20 minutes
4. Selected students to make presentation on above points – 20 minutes.
5. Tutor presents by use of power point a case study on the above issues -10 minutes
6. Students complete the forms and draft the documents ----30 minutes
7. Assessment of completed Forms -----10 minutes

30 Minutes Break

8. General assessment, and students given assignment on investigation to be conducted at the school's land mock registry, designated land registries, and search report to be submitted in week 11-5 minutes
9. Individual and Group presentations on filling of the Forms, drafting of relevant documents and the various processes and procedures under the LRL (Lagos)---1hr.10minutes.

10. Select groups/students to present on ethical issues arising -20minutes
11. Assessment debriefing and Evaluation -30minutes.

WEEK 9 –LEASES (PART 1)

Outcomes

At the end of the lesson, students would be able to:

1. State what a lease is
2. Identify parties to a lease
3. State the essential elements of a lease
4. Apply principles of elements of a lease to a case
5. Distinguish a lease from sub-lease, licence, and an assignment
6. Mention types of rent and factors to be considered in fixing rent payable in a lease.
7. State relevance of a rent review clause
8. Consider ethical issues arising from the above outcomes

Contents

1. Meaning of a lease
2. Parties to a lease
3. Types of a lease
4. Essentials of a lease
5. Distinguish a lease from a licence, and an assignment
6. Rent in a lease

Pre-Class Activities

Students are required to read the topic, carry out pre-class tasks and study the following cases: Bosah v. Oji (2002) 6 NWLR (pt. 762) 137; Okechukwu v Onuorah (2000) 12 SCNJ 146; and Tejumola & Sons v UBA (1988) 1 NCC 945

Class Activities

1. Students to discuss the facts and principles in Bosah v Oji (2002)6 NWLR (PT.762) 137; Okechukwu v. Onuorah (2000) 12 SCNJ 146; and Tejumola & Sons v. UBA (1988) 1 NSCC 945-30minutes.
2. Selected students present the facts and principles of Bosah v Oji (2002)6 NWLR (pt. 762) 137; Okechukwu v Onuorah (2000) 12 SCNJ 146; and Tejumola & Sons v UBA (1986) (pt. 38) 815 as they affect leases-815 as they affect leases-10minutes
3. Tutor gives an overview of meaning of lease, and elements of a lease-40 minutes.
4. Students discuss and list differences between a lease/licence, leases/assignment -30 minutes.
5. Students discuss the Tenancy Law of Lagos State 2011 -10 minutes.

30 Minutes Break

6. Students act a role play on a dispute between a landlord and a tenant on issue of rent (one as landlord, the other a tenant, each having their own solicitor)-20minutes
7. Discussion on the role play-20minutes
8. Tutor and students discuss types of rent, factors to be considered on issue of rent; and essential elements of a rent review clause-40minutes
9. Students draft an appropriate rent review clause-20minutes
10. Students present draft rent review clause -20minutes
11. Assessment and Evaluation-15minutes

WEEK 10-LEASES (PART2)

Outcomes:

At the end of the lesson, students would be able to:

1. Explain the various types of covenants that should be in a standard lease and reasons for the inclusion of the covenants in a lease.
2. Conduct client interview to extract necessary information required for the preparation of a lease
3. Explain the various methods a lease may be determined and the various parts of a lease
4. Draft a standard deed of lease
5. Identify and discuss ethical issues that may arise in a lease transaction.

Contents

1. Covenants in leases—reflecting the positions in Abuja and Lagos State
2. Determination of a lease
3. Information required to prepare a lease
4. Drafting a lease

Pre-Class Activities

Students are required to read the topic, and see samples of leases in advance

Class Activities

1. Tutor gives overview of covenants that should be provided in a standard lease; and determination of a lease-45minutes
2. Role play by all students (in pairs, one acting as solicitor, and the other acting as lessor) on client interview on creation of a lease, solicitor listing the covenants to be included in the lease; and identifying particulars of information required to draft a lease; and parts of a lease-30minutes
3. Sample presentation (2 groups) of the covenants so listed in activity 2 (giving reasons for their inclusion)-20 minutes

4. Debriefing on above presentation-10munites.

30 Minutes Break

5. Group presentation (2 different groups from the above group chosen in activity 2) of the particulars of information required to draft a deed of lease - 20minutes.
6. Group presentation of parts of a deed of lease (one group but different from the groups in activity 3and 5-20 minutes.
7. Tutor displays particulars of information required to prepare a deed of lease, and parts of a lease through power point presentation- 10 minutes
8. Individual drafting exercise by students using the parties identified from the role play -45 minutes.
9. Tutor presents a sample lease through the power point -5 minutes
10. Students to exchange their drafts and assess them based on the sample lease given by tutor -10 minutes
11. Discussion and presentation on ethical issues arising from failure to reflect instructions given and misuse of rents collected on behalf client-15 minutes
12. General Assessment and Evaluation-10 minutes.

WEEK 11 – MORTGAGES (PART 1)

Outcomes

At the end of the lesson students would be able to:

1. Explain the meaning of a mortgage
2. List mortgage institutions in Nigeria
3. Distinguish a mortgage from other similar security transactions
4. List parties in a mortgage transaction
5. Explain the various ways of creating equitable mortgage

6. Explain the various ways of creating legal mortgage; search report and documents to process or procure Governor's consent
7. Draft search report and covering letter.
8. Explain the ethical issues involved in the lesson plan.

Contents

1. Meaning of mortgage
2. List of mortgage institutions
3. Parties to mortgage transaction
4. Types of mortgages
5. Creation of an equitable mortgage
6. Creation of a legal mortgage
7. Creation of successive legal mortgages
8. Perfection of mortgages
9. Drafting a search report and covering letter.
10. Ethical issues

Pre-Class Activities

Students are to read the topic in advance and do the task for the week

Class Activities

1. Tutor gives a general overview of the topic- 30minutes
2. Students in groups discuss and list parties in a mortgage and mortgage institutions -20minutes
3. Sample Group presentation of the outcome of activity 2-20minutes
4. Tutor gives case study 3 covering creation of mortgages and ask specific questions- 10minutes
5. Students are required to discuss in group the case study as modified-20 minutes

6. Sample Group presentation of the answers to hypothetical case given-20 minutes.

30 Minutes Break

7. Tutor projects the modified case study 1 to emphasize search report-10 minutes
8. Students prepare search report in groups-20minutes
9. Sample presentation of search report -30minutes
10. Students in groups discuss and list the various documents required to procure consent, of the Governor- 20 minutes
11. Sample presentation of the documents listed-30 minutes
12. General Assessment and evaluation-10minutes.

Note: The advantages and disadvantages of each mode of creation of legal mortgage should be de-emphasised.

WEEK 12 – MORTGAGE (PART 2)

Outcomes:

At the end of the lesson, students would be able to:

1. Explain the various covenants in a mortgage and the importance of the covenants
2. Draft a deed of mortgage
3. Identify ethical issues involved.

Contents

1. Covenants in a Mortgage
2. Drafting of a deed of mortgage
3. Ethical issues

Pre-Class Activities

Students are expected to read the topic and case study 1 in advance

Class Activities

1. Tutor gives an overview of covenants in a mortgage- 45minutes
2. Group discussion on covenants in a mortgage and the rationale for each covenants mentioned- 30minutes
3. Sample Group presentation of the covenants- 30minutes

30 Minutes Break

4. Student groups discuss particulars of information required to prepare a deed of mortgage- 20 minutes
5. Sample presentations by selected groups of students on the particulars of information required to draft a deed of mortgage- 10 minutes
6. Tutor presents case study 3 as modified to give particulars of information required to draft a mortgage in a power point-10 minutes.
7. Students draft a sample mortgage (covering commencement; testatum and consideration clauses) and exchanged amongst themselves—40minutes
8. Tutor presents a model deed of mortgage reflecting the particulars supplied to students-10minutes
9. Assessment by students of deed of mortgage drafted and general discussions follow-35 minutes.
10. General assessment and assignment for students to read Owoniboys Technical Services Nig. Ltd v. UBA Plc; Olori Motors Nig. Ltd v Union Bank Plc- 10 minutes.

WEEK 13—MORTGAGE (PART 3)

Outcomes

At the end of the lesson, students would be able to:

1. Explain the concept of up-stamping and state when a deed of mortgage deed to be up-stamped.
2. Discuss the remedies available to a mortgage and mortgagor in a mortgage
3. State how a mortgage can be discharge
4. Explain the rights and remedies of mortgagor and mortgagee
5. Explain the ethical issues arising

Contents

1. Up-stamping
2. Remedies available to mortgagee, and mortgagor
3. Discharge of a mortgage
4. Rights and remedies of mortgagor and mortgagee

Pre-Class Activities

1. Students are to read the topics ahead of the lesson
2. Students to read the cases of Owoniboyes Technical Services Nig. Ltd v. UBA Plc (2003) 15 NWLR (pt. 844) 545; Olori Motors Nig. Ltd v. Union Bank Plc (1998) 5 NWLR (pt. 551) 652
3. Students are to come to class with samples of search report prepared from their investigation conducted at the school mock land registry as a result of the assignment of week 6.
4. Rights and remedies of mortgagor and mortgagee”

Class Activities

1. Tutor gives overview of when a deed of mortgage needs to be up-stamped-30minutes
2. Brainstorming on the facts of and principles in Owoniboyes Technical Services Ltd v. UBA Plc-30 minutes

3. Selected students to present facts and principles in Owoniboye Technical Services Ltd v UBA Plc- 20minutes
4. Students to bring out search report, and covering letter prepared in accordance with assignment of week 6, exchange it amongst themselves for assessment-5minutes
5. Tutor presents a sample of search report and a covering letter for the assessment-10minutes.
6. Assessment by students of search report and covering letter drafted by them and general discussions follow- 25minutes.

30 Minutes Break

7. Tutor presents case study 3 which reflects breach of covenants in a mortgage, in a power point- 5 minutes
8. Group discussion on the breach and remedies available to mortgagee and mortgagor- 20 minutes.
9. Presentation by three groups of students of remedies available to mortgagee, and mortgagor- 20 minutes
10. Tutor gives an overview of the various remedies available to mortgagee (emphasis on sale; appointment of receiver; foreclosure and taking of physical possession), and remedies available to mortgagor-40 minutes
11. Group discussion on mode of discharging a mortgage- 10 minutes
12. Sample presentation by two students (selected by tutor) on mode of discharge of mortgage- 10 minutes
13. Tutor gives a brief overview of discharge of mortgages-10 minutes
14. General assessment- 5minutes

NOTE: In foreclosure, undue details- reopening etc should not be emphasized.

WEEK 14 – BILLING AND ACCOUNTS IN PROPERTY TRANSACTIONS

Outcomes

At the end of the lesson students would be able to:

1. Explain rules and principles guiding billing for professional services in property transactions
2. Apply the rules and calculate professional fees (in leases, mortgages, and sale of Land)
3. Identify ethical issues arising from billing and accounts in property transactions.

Contents

1. Rules or principles guiding billing for professional services (in property transactions)
2. Application of the rules and principles of professional billing/calculation of professional fees in property transactions

Pre-Class Activities

Students are required to read the topic, carry out pre-class tasks, and study the schedule on professional fees in the Legal Practitioners (Remuneration for Legal Documentations and Other Land Matters) Order, made pursuant to the LPA.

Class Activities

1. Tutor gives overview of the principles or rules on billing for professional in property transactions-40 minutes
2. General group discussion on the principles or rules on billing for professional services in property transactions- 30 minutes.

3. Sample group presentation of the various rules or principles- 30 minutes
4. Tutor gives a hypothetical case involving professional services (Mortgage transaction, sale of land, leases)-5 minutes.

30 Minutes Break

5. Class exercise on calculation of professional fees in property transactions-1hr
6. Sample presentation by selected students (2) of the exercise- 10 minutes
7. General discussion on mandatory elements of a bill of charges-10minutes
8. Presentation by a selected group of students (one or two) -15 minutes
9. General assessment and evaluation, and assignment to read Johnson v Maja 13 WACA 290; Adebajo v Adebajo (1971) ALL NLR 599; and Nelson v Akofiranmi (1959)LLR 143 in preparation for week 13- 15 minutes.

WEEK 15 – WILLS & CODICIL (PART 1)

Outcomes

At the end of the lesson, students would be able to:

1. Explain the meaning of a will including codicil
2. State types of wills
3. Explain the reasons (advantages) for making a will
4. Explain persons that can make a will
5. Explain the principle of due execution of a will
6. Explain effect of being a witness in a will
7. Explain capacity of a testator to make a valid will
8. Explain how to prove a will or establish the validity of a will
9. Identify ethical issues arising from proof of a will

Contents

1. Meaning
2. Types of wills
3. Rationale for making will
4. Who can make a will (testamentary capacity)
5. Conditions for validity (Due execution)
6. Testamentary capacity
7. Proof of validity of a will.

Pre-Class Activities

Students are to read the topic in advance, carry out pre-class tasks, and study the following cases) Johnson v Maja 13 WACA 290; Adebajo v Adebajo (1971) ALL NLR 599; and Nelson v Akofiranmi (1959) LLR 143.

Class Activities

1. Tutor gives overview of 1-4 above outcomes – 35minutes
2. Group discussion of the facts and principles established in Nelson v Akofiranmi (1959) LLR 143- 20 minutes
3. Sample presentation of the facts and the principles established in Nelson v Akofiranmi (1959) LLR 143- 20 minutes
4. Tutor gives overview of due execution of a will (mode of executing a will and effect of being a witness)- 45minutes.

30 Minutes Break

5. Group discussion n the facts and principles in Johnson v Maja 13 WACA 290; Adebajo v Adebajo (1971) ALL NLR 599- 20 minutes
6. Sample group presentation of the facts and principles established in Johnson v Maja 13 WACA

- 290; Adebajo v Adebajo (1971) ALL NLR 599- 20 minutes
7. Tutor gives overview of what constitutes testamentary capacity of a testator- 35 minutes
 8. General discussion on how a will can be proved and ethical issues arising from outcomes 5- 8-20 minutes
 9. Tutor summarizes modes of proving a will- 20 minutes.
 10. General assessment and evaluation- 5minutes

WEEK 16 – WILLS & CODICILS (PART 2)

Outcomes

At the end of the lesson students would be able to:

1. Mention types of legacies
2. Explain circumstances under which legacies may fail
3. Explain how a will can be revoked, and exceptions
4. Explain the revival and republication of a will
5. Identify ethical issues on legacies in a will and revocation of a will

Contents

1. Types of Gifts
2. Failure of gifts
3. Revocation of a will
4. Revival and Republication of Wills

Pre-Class Activities

Students are to read the topic in advance, carry out pre-class tasks, and study the case of Jadesinmi v Okotie-Eboh (1996) 2 SCNJ; (1996) 2 NWLR (pt. 429) 128

Class Activities

1. Overview on types and failure of gifts, revocation, revival and republication of wills- 1hr

2. Students break into small groups to discuss the outcomes and perform small group tasks- 1hr

30 Minutes Break

3. Individual and Group presentations- 1hr. 10minutes
4. Select groups/students to present on ethical issues arising-20minutes
5. Assessment, debriefing and Evaluation- 30minutes

WEEK 17 – WILLS & CODICILS (PART 3)

Outcomes

At the end of the lesson students would be able to:

1. Explain limitations on the testator
2. State the nature of information required to prepare a will
3. Mention the various parts of a will
4. Explain the effect of the various parts
5. Draft a will and a codicil
6. Identify ethical issues arising from 1,2 and 5 above

Contents

1. Particulars of information required to prepare a will
2. Parts (Contents) of a will
3. Effect of the various parts
4. Drafting a will and a codicil
5. Ethical issues

Pre-Class Activities

1. Students are expected to read the topic in advance and the following cases: Idehen v Idehen (1991) 6 NWLR (pt. 98) 382; Adesubokan v Yunusa (1971) 1 ALL NLR 225; Ajibaye v Ajibaye (2007) ALL FWLR (pt. 359) 1321

2. Tutor to choose two students and prepare them in advance for a role play on client interview relating to taking instructions for the preparation of a will

Class Activities

1. Tutor gives overview on the limitations on the right of the testator; information required to prepare a will; parts of a will and effects of the various parts- 40minutes
2. Group discussion on the limitations on the testator and parts of a will-20 minutes
3. Presentation by selected students on limitations on the right of the testator -10minutes
4. Role play on client interview to extract information required to prepare a will-10minutes
5. Brainstorming on the role play- 10minutes
6. Sample presentation on the information required to prepare a will and parts of a will- 30minutes

30 Minutes Break

7. Tutor uses case study 6 to give further information required for the preparation of a will- 10minutes
8. Drafting exercise by all students- 1hr.
9. Tutor presents a short sample will through power point projector- 5minutes
10. Exchange of drafts amongst students and assessment- 20minutes
11. Group discussion on issues of ethics arising from the above activities- 15minutes.
12. General assessment and evaluation- 10minutes (students to be informed to collect probate forms and to come to class with them for the next lesson in week 16)

WEEK 18 –PROBATE PRACTICE

Outcomes

At the end of the lesson, students would be able to:

1. State when application for probate and letter of administration (L.A) is non-contentious, and contentious
2. State the procedure to obtain probate (non-contentious and contentious cases, including need for double probate)
3. State when caveat may cease to be effective against application for probate or LA
4. Mention the documents required to process probate
5. Draft (letter of application) and fill documents required to process probate
6. Explain the procedure to obtain letters of administration (non-contentious and contentious)
7. Mention the documents required to obtain letter of administration
8. Fill the documents required to obtain letters of administration
9. Identify ethical issues arising from process of obtaining probate

Contents

1. Grant of Probate (Non-contentious and contentious probate)
2. Grant of Letters of Administration
3. Grant of Letters in respect of Small Estates (Lagos)
4. Procedure for obtaining probate in either case
5. Procedure for obtaining Letters of Administration
6. Documents to process probate and letters of Administration (Lagos and Abuja)

Pre-Class Activities

1. Students are to read the topic and the case of *Dan-Jumbo v Dan-Jumbo* (1999) 7 SCNJ 112 in advance
2. Students are to come to class with probate documents or forms. Lesson shall be limited to the Lagos High Court (Civil Procedure) Rules and Administration of Estates Law of Lagos State.

Class Activities

1. Tutor gives overview of non-contentious and contentious probate- 25minutes
2. Group discussion on when probate is non-contentious and contentious- 20minutes
3. Sample group presentation on activity 3-30minutes
4. Group discussion on procedure to obtain probate (including double probate, resealing and ethical issues)- 25minutes
5. Sample presentation on the procedure to obtain probate-20minutes
 - a. Non-contentious grant
 - b. Contentious grant
 - c. Resealing
 - d. Ethical issues arising

30 Minutes Break

6. Group discussion on procedure to obtain letters of administration (including LA with the Will attached) and ethical issues- 20minutes
7. Sample presentation on activity 7-20minutes
8. Tutor to give overview of the procedure to obtain probate and letters of administration- 40 minutes
Tutor gives modification to case study 2 for students to list and fill probate forms- 5minutes

- Exercise by students (filling of probate forms)-
30minutes
9. General assessment and evaluation- 5minutes
 10. Students to be given assignment to read the case of Obusez v Obusez (2007) 10 NWLR (pt. 1043) 430, NBA v KOKU (2006) ALL FWLR (pt.334)1928

WEEK 19 – PERSONAL REPRESENTATIVES & ASSENT

Outcomes

At the end of the lesson, students would be able to:

1. Explain the various ways personal representatives can be appointed
2. Explain who is entitled to letters of administration in intestacy
3. State numbers of personal representatives that can be appointed
4. State the qualities of persons to be appointed as Personal Representatives
5. Explain circumstances personal representatives can be entitled to remuneration
6. Explain how personal representatives can withdraw or renounce representation
7. Explain duties and liabilities of personal representatives
8. State the accounts to be maintained and filed by personal representatives
9. State the effects of either failing to file the account or filing inaccurate accounts
10. State how personal representatives can be discharged of liabilities for administering the estate of the deceased
11. State when an assent is required
12. State the essential elements of an assent (note that assent is required in all the states)

13. Draft a sample assent (embodying commencement; recital; habendum; indemnity clause; and execution)
14. Identify ethical issues arising from the above outcomes.

Contents

1. Appointment of personal administrators
2. Numbers of personal administrators
3. Qualities of personal representatives
4. Remuneration of personal administrators
5. Cessation of representation
6. Duties and liabilities of personal representatives
7. Accounts to be filed by personal representatives
8. Discharge of personal representatives
9. Structure and elements of an assent (note that assent is required in all the states).
10. Drafting a sample assent

Pre-Class Activities

Students are to read the topic in advance and study the following cases: Obusez v Obusez (2007) 10 NWLR (pt. 1043) 430, NBA v Koku (2006) ALL FWLR (pt. 334)192

Class Activities

1. Tutor presents overview of mode of appointing personal representatives; factors to be considered in appointment of personal representatives by a testator, or the court; numbers, and remuneration of personal representatives; and when representation would cease- 40minutes
2. Selected students to make presentation on the facts and principles established in Obusez v Obusez (2007) 10 NWLR (pt. 1043) 430- 20 minutes

3. Group discussion on modes (ways of appointing personal representatives; factors to be considered in appointment of personal representatives by a testator or the court; numbers and remuneration of personal of personal representatives and when representation would cease- 30minutes
4. Tutor to give overview of the duties, and liabilities of personal Representatives- 30minutes

30 Minutes Break

5. Group discussion on duties and liabilities of personal representatives, and ethical issues arising where a legal practitioner is involved- 20minutes
6. Sample group presentation of the various duties, and liabilities of personal representatives- 20minutes
7. Group discussion of the accounts to be maintained and filed by personal representatives; when Personal Representatives will be discharged of liabilities- 10minutes.
8. Presentation by selected groups of students on the accounts to be maintained and filed by personal representatives; when personal representatives will be discharged of liabilities- 10minutes
9. Tutor gives overview of the accounts to be maintained and filed by personal representatives; effect of either failing to file the account or filing inaccurate accounts; and when personal representatives will be discharged of liabilities for administering the estate of the deceased- 20minutes
10. Brainstorming on essentials (elements) of an assent; when it is required and the part of the country where it may not be required-10 minutes
11. Tutor gives a brief overview of when assent is required, and elements of assent-10minutes

12. Students and tutor discussion (by use of short questions) on parts of an assent, and particulars of information required to draft an assent- 20minutes
13. General assessment and evaluation- 10minutes

WEEK 20 – PROPERTY LAW TAXATION

Outcomes

At the end of the lesson students would be able to:

1. Explain State taxes payable on transactions affecting land (consent fees; stamp duties; and registration fee) and other forms of taxes payable on property (such as tenement rate; personal income tax)
2. Explain and discuss the requirement for capital gains tax on a property, and the rate
3. Discuss ethical issues arising from breach of the RPC in connection with property.

Contents

1. Capital Gains Tax
2. Taxes arising from transactions affecting land (sale of land; mortgage of land; and long leases)
3. What is stamp duty and who pays it?
4. Nature of personal income tax and tax clearance certificate
5. Other forms of taxation, tenement rate, ground rent, consent fees, registration fees
6. Ethical issues arising from breach of duty of counsel to client; and duty of counsel to state (RPC)

Pre-Class Activities

Students are to read the topic in advance, carry out pre-class tasks, and study the relevant provisions of the following statutes: Capital Gains Fax Act; Personal Income Tax Act; Stamp Duties Act, land Instrument Registration

Law; Land Use Charge Law, Lagos State; value- added Tax Act, and other relevant laws.

Class Activities

1. Students are expected to read the provisions of Capital Gains Tax Act; Personal Income Tax Act; Stamp Duties Act; Land Instrument Registration Law; Land Use Charge Law, Lagos State; value-Added Tax Act; and case study 5.
2. Tutor gives overview of various taxes applicable to property transaction (what it is; who pays; and rate) and ethical issues involved- 45minutes
3. Group discussion on activity 2- 30minutes
4. Sample presentation on activity 3- 45minutes

30 Minutes Break

5. Group exercise on computation of Capital Gain Tax base on case study 5- 40minutes
6. Sample presentation by selected students on activity 5- 35minutes
7. Tutor summarizes on activities 3-5-30minutes
8. General assessment and evaluation- 15minutes

CHAPTER ONE

GENERAL OVERVIEW AND APPLICABLE LAWS

General Learning Outcomes of the Course:

1. Demonstrate a clear understanding of the laws applicable to
 - a. The transfer of property;
 - b. Administration of estates in Nigeria and apply the relevant laws to a given case;
2. Take instructions from clients on the Conveyancing approach they want,
3. Conduct investigation of the title to land and give advice or write appropriate search report,
4. Demonstrate clear understanding of the various steps or procedures to perfection of title to land and a clear understanding of the principles affecting documents of transfer of title to land and apply them,
5. Draft appropriate or suitable land documents to meet clients' specification, and to professional standard,
6. Give opinion on the best legal option available to a client in specific cases,
7. Have a clear understanding of the various forms of transactions affecting land in Nigeria,
8. Apply principles of law to covenants in a lease, mortgage and assignment of leases in a given case,
9. Take instructions from a client for the preparation of a will and be able to draft the will to professional standards,
10. Demonstrate a clear understanding of the conditions for validity and revocation of wills,
11. Apply the principles on validity and revocation of will to given cases,
12. Commence the process of obtaining probate and letters of administration,

13. Identity the duties and liabilities of personal representatives and the steps to take in winding up of an estate and,
14. Demonstrate a clear understanding of laws relating to property taxation in Nigeria.

Contents of the Course

The course covers the following topics:

- a. Applicable laws
- b. Deeds
- c. Power of Attorney
- d. Sale of land
- e. Leases and Tenancies
- f. Mortgages
- g. Lands Registration Law (Lagos)
- h. Billing and Recovering of Professional fees
- i. Wills and Codicils
- j. Probate Practice
- k. Personal Representatives
- l. Property taxation.

Land Transactions

- a. Sale of land
- b. Leases and Tenancies
- c. Assignment of leases
- d. Mortgage and charges
- e. Licence
- f. Easement

Applicable Laws

- CONSTITUTION OF THE FEDERAL REPUBLIC OF NIGERIAN (FRN), 1999 AS AMENDED,

- COMPANIES AND ALLIED MATTERS ACT
- LEGAL PRACTITIONERS (RENUMERATION FOR LEGAL DOCUMENTATION AND OTHER LAND MATTERS) ORDER, 1991.
- EVIDENCE ACT 2011
- LAND USE ACT
- PROPERTY AND CONVEYANCING LAW 1959, CONVEYANCING ACT, 1881/1882
- MORTGAGE AND PROPERTY LAW (LAGOS)
- STAMP DUTIES ACT
- ILLITERATE PROCTECTION ACT
- LAND INSTRUMENT REGISTRATION LAW, LAND INSTRUMENTS PREPARATION LAW,
- WILLS ACT, 1837
- WILLS (AMENDMENT) ACT, 1852
- WILLS LAW
- ADMINISTRATION OF ESTATES LAW
- LEGAL PRACTITIONERS ACT
- CAPITAL GAINS TAX ACT
- HIGH COURT (CIVIL PROCEDURE) RULES OF RESPECTIVE STATES
- INCOME TAX MANAGEMENT ACT
- PERSONAL INCOME TAX ACT
- RULES OF PROFESSIONAL CONDUCT FOR LEGAL PRACTITIONERS
- LANDS REGISTRATION LAW (LAGOS)
- TENECY LEW, (LAGOS) 2011
- LAND REGISTRATION LEW (LAGOS)

Ethical Issues

- Ethical issues (RPC) in each of the transactions involving transfer of title
- Duty to observe the rule of law and act within the bounds of the law in all transactions **Rules 1 & 5.**

- Duty not to engage in legal practice with a non-legal practitioner -**Rule 3**
- Duty to be competent and not negligent - **Rule 16**
- Duty to avoid conflict of interests - **Rule 17**
- Duty to keep to terms of agreement with client - **Rule 18**
- Duty to keep client's information or instruction confidential - **Rule 19**
- Duty not to receive instructions at client's house/office - **Rule 22**
- Duty to show utmost good faith and not misappropriate client's funds or property - **Rule 23**
- Duty not to improperly attract business of legal practice - **Rule 39**
- Duty to show good faith with professional colleagues – **Rule 27**
- Duty to the court – **Rules 30 - 36**

CHAPTER TWO

DEEDS

(1) Definition of Deeds:

A document in writing which furnishes evidence or information about something made of paper or the like (e.g. vellum or parchment) and which is signed, sealed and delivered. Further, it must:

1. Effect the transference of an interest or right in property;
2. Create an obligation, binding on some person or persons;
3. Confirm some act whereby an interest, right or property as already passed.

(2) When is a Deed Required?

- (a) When a contract lacking considerations to be created (gift).
- (b) When statute so provides. **See s. 3, Real Property Act 1845 and Section 77 PCL 1959**, each provides that conveyance (including assignment of all lease) must be by deed.
- (c) A power of attorney vesting power in an attorney to execute a deed must be itself be by deed; **Powell v London Provincial Bank (1893) 2 Ch. 555**; **Abina v Farhat (1938) 14 NLR 17**.
- (d) A lease for a term exceeding three years.
- (e) To give effect to a vesting declaration where new trustees are appointed.
- (f) A surrender where a lesser estate is given up to merge with the greater estate in land.

(3) Transactions not required to be by Deed: section 77(2) PCL

- a. **Assents:** An assent (also described as vesting assent) is the instrument by which a personal representative of a deceased person conveys land to the beneficiary entitled to it. The beneficiary may be a devisee under a Will or the next-of-kin of a deceased intestate - that is a person who died without making a Will.
- b. **Surrender by operation of law:** A surrender by operation of law usually takes effect by implication. For example, where a lessee accepts a new lease incompatible with his existing lease. Implied surrender need not be in writing to take effect.
- c. **A lease or tenancy for a term less than three years:** In *Re Knight* (1882) 21 Ch. DP. 442 at 458 and *Hand v Hall* (1877) 2 Ex. D 355, it was held that a lease for less than three years with a right to renew for a further three years was only a demise with an option to renew. As such, it was required to be under seal.
- d. **Receipts not required by law to be under seal:** for example, a receipt endorsed on a mortgage serves as sufficient discharge of the mortgage.
- e. **Vesting orders:** A vesting order is an order made by a court to create or transfer a legal estate in land. It is made by a deed of conveyance. For example, where an equitable mortgagee exercises his power of sale, the court may make an order vesting title to the land in the purchaser.

- f. Conveyances taking effect by operation of law:**
Property vests by operation of law in several ways. These include the admission of a Will to probate, the grant of letters of administration and the appointment of trustees in bankruptcy. Here the transaction need not be under seal.
- g. Disclaimer:** For example, where a trustee in bankruptcy seeks to disclaim some property forming part of the bankrupt's estate. Also, where beneficiary who is *sui generis* refuses a gift under a Will without doing so in writing. Such a disclaimer is implied by conduct and so not required to be by deed.
- h. Transactions covered by the rule in *Walsh v Lonsdale*.** The rules that an instrument which is void as a conveyance because it is not a deed may still operate in equity as an agreement for a conveyance. It will, therefore, be as good as a conveyance for many purposes.

(4) The Essentials of a Deed:

- a. Signing:** Under English common law, there is no necessity for a deed to be signed. This is as a result of the fact that in the old days, when the majority of the population was illiterate, signing was not essential. However, since 1925, signature has been necessary under Statute Law (**see s. 73 Law of Property Act 1925**). The statutory provisions have been adopted in former Western Nigeria (**s. 97 PCL, 1959**). It should be noted that even in states other than states in former Western Nigeria, a deed which is not signed may be inadmissible in evidence and,

therefore, of no effect. **Section 83(4) Evidence Act 2011**, requires that a statement in a document shall not be deemed to have been made unless the documents was written, made, produced or signed or initiated by the person making the statement. Hence, it is arguable that a document prepared for a client by a lawyer that is merely sealed and delivered but not signed is inadmissible in evidence. It would appear that thumb print or cross affixed by an illiterate may be accepted as signature for the purpose of execution.

- b. Sealing:** This is a time honoured and ancient essential for the execution of a deed which is becoming less and less important. Indeed, the formalities with regard to sealing are now minimal and any indication of an attempt of sealing will be accepted for the purpose of due execution. See ***Stromdale and Ball v Burden (1952) Ch. 233 per Deckwerts J.*** ‘It appears to me that at the present day, if a party signs a document bearing wax or wafer or other indication of a seal, with the intention of executing the document as a deed, that is sufficient adoption or recognition of the seal to amount to due execution as a deed (see also s. 159 Evidence Act 2011). Nowadays, a gummed wafer with a design on it is frequently used, or even a printed design on the deed itself. It should be noted that this indulgence does not apply to corporations which affix their seals in strict compliance with the formalities laid down by CAMA. See ss. 74 and 75(5) CAMA (see ***Containers (Nigeria) Limited v Niglasco Limited (1979) 4/CCHCJ 290 at 315.*** In ***First National Securities v Jones (1978) 2 WLR 475,*** a mortgage deed was signed by the mortgagor.

The signature was a cross printed circle at the end of the deed and in that circle were printed the letters “LS” (standing for the Latin phrase ‘*locus Sigilli*’ meaning ‘a place of the seal’). This mortgage was held to be validly executed.

- c. **Delivery:** This is also an essential element for the due execution. A deed takes effect not necessarily by the parting with physical possession of the deed itself. Mere delivery of the deed without the requisite intention to pass the interest to be conveyed by it will leave execution incomplete. It used to be the practice for parties executing deed to utter the following “***I deliver this as my solemn act and deed***”. However, it is now accepted that no such form of words is necessary, and that any of the party showing that the deed is intended to be binding upon him is sufficient evidence of delivery. See ***Awojugbagbe Light Industries Ltd. v Chinukwe (1995) 45 SCNJ 162*** and section 95 Evidence Act 2011. Delivery is therefore an act done to evince an intention to be bound. ***Jegede v Citicon Nig. Ltd. (2001) 4 NWLR (Pt. 702) 122 at 139.***

A deed is valid even if it has no date or it has a false or impossible date. ***Jegede v Citicon Nig. Ltd. (2001) 4NWLR (Pt. 702) 112 at 139 supra.***

Sometimes, delivery takes place subject to a condition, which may be expressed or by implication and, this is known as delivery in escrow. ***Dalfam (Nig.) Ltd. v Okaku Int. Ltd. (2001) 15 NWLR (Pt. 735) 203.*** Thus, where a vendor executes a conveyance in advance of completion and delivers it to his solicitor, he executes the deed subject to the implied condition

that it is not to become effective until the purchaser has paid the purchase price to the vendor's solicitor. It should be clearly understood that 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 by which the other party must comply with the condition which will render delivery complete. Once a deed has been executed, even in escrow, it is too late for the executing party to escape from its effect, provided the other party fulfills the condition within a reasonable time, if any is not specifically provided.

This fact is sometimes not appreciated by conveyancers, who mistakenly believe that by advising their clients to execute documents in escrow they are giving them an opportunity to withdraw from an agreement before it comes into operation. A misconception that was emphasised in the leading case of ***Beesely v Hallywood Estates Limited (1961) Ch. 105.***

- d. **Attestation:** Attestation is not essential to the due execution of a deed. However, attestation is wise as it may facilitate proof of execution should this be necessary at a later date. See **Section 96(2) Evidence Act**. Further under **section 8(1) of the Lands Registration Act 1924** now "**Land Instruments Registration Law**". It is noteworthy that any instrument executed by an illiterate grantor will not be accepted for registration.

A deed executed outside the country for the purposes of conferring power of attorney to execute a deed should be attested by a notary public or any

court, judge, magistrate, consul or representative of Nigeria. See **section 150 Evidence Act**.

The company seal of a corporation must normally be affixed not by virtue of the general law applying to deed (see **Article II of table “A” Pt. 1 of Companies and Allied Matters Act 1990 and section 98 PCL 1959**).

- e. **Endorsement of Governor’s Consent:** This is required where the deed makes a grant of state land, **section 22 LUA 1978**. Failure to make provision for this in the Deed will constitute a material omission unless there is evidence that consent was in fact obtained. *See Adedeji v NBN Limited (1989) 1 NWLR (Pt. 96) 212 at 227.*
- f. **Engrossment:** This is the making of fair copies or counterparts of the originate deed. Strictly speaking, this is not essential to the validity of a deed but it is a way of ensuring that each of the parties has a counterpart of the original.
- g. **Alteration and Erasures:** These are presumed to have been made before execution but nevertheless, to prevent any doubt arising as to their authority; it is prudent to ensure that all alternations or erasures are clearly initialed by the parties to the deed at the time of execution.

Note: What is a “deed Poll?” This is a deed which is executed by one party only, e.g. Power of Attorney.

Recitals:

Recitals are concise statement of fact which gives the history or background of the vendor's acquired right, sought to be conveyed or sold. It is not every agreement that has a recital. There are some simple agreements that need no recital. In *NITEL v. Rockonoh Properties Ltd.* (1995) 2 NWLR (Pt. 378) 473 at 507, it was held that a recital is a formal part of a deed or writing which explains the reasons for the transaction. The common practice is to start with the word "**Whereas**".

This word ('Whereas') is archaic and should be avoided. A more modern approach is to head that part of the deed as 'Recital'. Recital may be narrative or introductory.

Narrative recitals state history of the title and should be limited to facts or matters that are necessary to explain the operative part of the deed. They should not be lengthy. Therefore, not all intermediate dealings with the property should be stated. It is sufficient to state the root of title and in whom it is presently vested.

Introductory Recital on the other hand, simply indicate the purpose of the document. They recite the ownership of the property and the intention to transfer it. They are also used to explain any special fact peculiarity. Note that if a defection in 'title' is mentioned in a recital, a remedy for it should also be stated.

FUNCTIONS OF A RECITAL

1. A clear recital will be referred to in interpreting the operative part of a deed where there is an ambiguity. If, however, the operative part is clear, there will be no resort to the recital. *Ex parte Davies* (1886) 7 QB.D 275 at 286, where it was held that a specific

description in the operative part of a deed is not controlled by the general description in the recital.

2. Recitals may also create estoppels in respect of statements in a deed. Parties will be estopped from showing the existence of a situation contrary to that stated in the recital, if the recital is clear and unambiguous. See the case of ***Cumberland Court (Brighton) v Taylor (1964) Ch. 29, District Bank v Webb (1958) 1 All ER 126***. By **section 155 Evidence Act**, recitals contained in documents that are twenty years old or more at the date of the contract are presumed to be sufficient evidence of the facts stated in them.

For formal parts of a deed see appendix.

Note: A deed does not exist in vacuum. It is only an instrument that is deployed to conveyances, such as Assignments, Leases, Mortgages, etc.

CHAPTER THREE

POWER OF ATTORNEY

Definition

A Power of Attorney is a formal instrument by which one person empowers or authorises another to act for him, or act in his stead for certain purposes. The person giving the power is called the donor, while the person to whom the power is given is called the donee. Only a person in law (i.e. someone who can sue and be sued) can be an attorney. *National Bank of Nigeria Limited v Korban Brothers Nigeria Limited and Ors (1976) 1 FNR 11, Ude v Nwara (1993) 2 NWLR (Pt. 278) 638.* See also *Chime v Chime (2001) 3 NWLR (Pt. 701) 527.*

When a Power of Attorney may be required:

- a. Unavailability of the donor
- b. Where expert skills of donee is required
- c. Title is not transferred but donor wants donee to deal with the land
- d. Donee to execute other instruments – **section 46(1) CA, Section 141(1) PCL**
- e. Donee simply relies on it as the final instrument of conveyance
- f. To secure interest of a purchaser pending the perfection of title of purchase or performance
- g. May be required where a mortgage is by sub-demise.

Features of a Power of Attorney

- a) It is an instrument of delegation/representation. *Chime v Chime (2001) 3 NWLR (Pt. 701) 527.*
- b) It does not transfer interest in land. *Ude v Nwara (2008) 11 NWLR (Pt.1077) 158, Ezeigwe v Awudu*

(2008) 11 NWLR (Pt. 1097) 158, S.141(1) PCL, 56(1) CA. It could however, be a means by which a transfer could be effected.

See, however, *Ibrahim v Obaje* (2018) ALL FWLR (Pt. 197) 1682 where the Supreme Court held that a Power of Attorney in some circumstances may pass interest in land.

- c) It is usually executed by one party but it is not invalid if donor and donee execute it.
- d) Donor must be a person in law.

When a Power of Attorney must be under Seal:

The authority to the attorney must be under seal when the attorney is authorized to execute a deed. *Powell v. London and Provincial Bank* (1893) 2CH.555; *Abina v Farhat* (1938) 4 NLR 17, *Briggs v C.L.O.R.S.N.* (2005) 12 NWLR (Pt. 938) 59.

Construction of a Power of Attorney

The Court construes a power of attorney strictly. The donee of the power of attorney or his solicitor should peruse it carefully before execution to see that it, in fact, confers on him the necessary powers required to achieve the intended object, and that the power of attorney is drawn in a form which will cause no difficulty when dealing with third parties. See *Jacobs v Morris* (1902) 1 Ch. 816.

Irrevocability

A power of attorney is expressed to be irrevocable if:

- a. It is given for valuable consideration and is expressed to be irrevocable; it remains irrevocable until the consideration is realised. See **section 143 PCL.**

- b. If it is stated to be irrevocable for a period of time not more than 12 months whether or not given for valuable; it is irrevocable until the period expires.

Under these situations, the power exercised by the donee is not vitiated irrespective of the death, lunacy, insanity, bankruptcy, etc. of the donor until the consideration is realised, or the time expires. The section protects purchasers dealing with the donee of the power, even though, the donor had suffered these disabilities. A purchaser who relies on such power of attorney will not be affected by any of these disabilities. **S. 144 PCL, ss. 8 & 9 CA 1882, UBA Limited v. Registrar of Titles (1973) 3 CCHCJ 152.** See **Bashir Lababedi v. Odulana and Ors. (1973) CCHCJ 98.**

A power of attorney may be revoked:

- a. Expressly
- b. Impliedly or,
- c. Operation of law.

Execution by the Attorney

The attorney should execute the deed in the name of the donor, but may execute it in his own name, except where any statute directs that the deed is to be executed in the name of the donor. See **ss. 9(5) and 14 PCL.**

Attestation:

To be presumed validly executed, the deed creating the power, if executed outside Nigeria must be witnessed by either a notary public or a judge, or magistrate: **S. 150 Evidence Act; Ayiwoh v Akorede (1951) 20 NLR 4.**

Note: A notary public by the Law of Nations has credit everywhere; **Hutcheon v Manington (1791) 30 ER 1327.**

Stamping and Registration:

A power of attorney attracts a fixed stamp duty of N50.00. It is registrable under the Land Instruments Registration Law of each state. The position of the law that non registration of an instrument renders it inadmissible in evidence like any other deed (see *Ojugbele v Olasoji (1982) 4 SC31: (1982) 1 All NLR 43*) has changed. The Supreme Court in ***Benjamin v Kalio (2018) ALL FWLR (Pt. 902) 1.*** That is, non-registration does not affect the admissibility of the document.

Consent to Power of Attorney

In Lagos State, a power of attorney relating to sublease of state lands or certificate of occupancy must have the consent of the governor. See **5(9)(b) (iii) of the Lagos State Land Law Cap. 130.**

Right of a purchaser to production of the Power of Attorney

A purchaser is entitled to have the instrument creating the power delivered to him on completion if it relates to one transaction or acknowledgment for production, and undertaking for safe custody where the power relates to other transactions and such could not be released. In the later cases, the purchaser should request that a memorandum of the execution of the power in his favour be endorsed on the deed creating the power.

FORM AND CONTENT OF A POWER OF ATTORNEY

1. **The Commencement:** In the past, a Power of Attorney commences with the following words: “Know Ye All Men By These Presents”.

In modern practice, a Power of Attorney commencement as follows:

“BY THIS POWER OF ATTORNEY given on the day of 2018”

2. **Date:** As stated above, it is also correct to say; “made/given on the day of ...2018. A power of attorney takes effect from the date stated on it. See *Anuku v. Standard Bank (1972) UILR 106.*
3. **Recital:** It is rare for a power of attorney to have recitals. However, a recital may be considered necessary. For instance, where a donor or donors seek to show that they have the consent of other principal members of the family to give the power of attorney.
4. **Appointment Clause:** This is the clause appointing the donee. It is usually couched as follows:

I.....of.....(Donor) hereby
appoint.....of.....(Donee)
as my/to be my (true and lawful) attorney, in my
name and on my behalf, to do all or any of the
following acts or things namely:

Note that a Power of Attorney can be conferred on more than one person.

5. **The Authority:** This is a statement of the things the Attorney may do on behalf of the donor/principal. As much as possible, the authority should be exhaustive and clearly spelt out. Usually, the authority ends with a general clause as follows “And to do all things necessary and incidental to the matters above as I may lawfully do”.
6. **The Testimonium:** “IN WITNESS OF WHICH/WHEREOF, I have set my hand and seal the day and year first above written.

7. **Attestation: “SIGNED, SEALED AND DELIVERED** by the above AB in the presence of:

Although attestation is not a strict requirement of a power of attorney, it is necessary that a power of attorney be attested to by a notary public, judge, magistrate for the presumption of due execution in order for s. 150 Evidence Act to be invoked. The section provides that a court shall presume that every document purporting to be a Power of Attorney and to have been executed before and, authenticated by a notary public or any court, judge, magistrate was so executed and authenticated. See *Ayiwoh v Akorede (1951) 20 NLR 4*. Consequently, where the power of attorney is to be used abroad, it is better to have it authenticated by a notary public. A notary public is a legal practitioner who attests or certifies deeds and other documents.

8. **Stamping and Registration:** A power of attorney attracts a fixed stamp duty under the Stamp Duties Law of the various states. In Lagos, it is N3.00. See for example, **the Schedule to the Stamp Duties Law, Cap 181, Laws of Lagos State 1994**. A power of attorney is also a registrable instrument under the relevant Land Instruments Registration Laws of the various states. Stamping precedes registration and both are required when the power of attorney confers interest in land or landed property. See *Benjamin v Kalio (2018) ALL FWLR (Pt. 920) 1*. Non-registration does not affect the admissibility of the document.
9. **Governor’s consent:** The various States Land and Laws provide for obtaining governor’s consent to transactions involving alienation of interest in land.

See for example, **S. 7(b) para (ii) of the State Land Law Cap 182, Laws of Lagos State 1994.**

10. **Completion:** After the registration, the purchaser is entitled to have the instrument creating the power delivered to him on completion if it relates to one transaction or an acknowledgment for production and an undertaking for safe custody, where the power relates to other transactions and, as such cannot be released. In such a case, the purchaser should request that a memorandum of the execution of the power in his favour be endorsed on the deed creating the power of attorney.

Note the following points on power of attorney:

- a. The donee of a power of attorney cannot sue in his own name, but must sue in the name of the donor/principal. For instance, in the *Ude v Nwara*'s case, the case was actually conducted by one Mr. Anusionwu, who was the donee of the power of attorney given by Mr. Ude. The full title of that case reads as follows. Similarly, where a donee is given power to execute a conveyance such as Deed of Assignment, the commencement will read

“THIS DEED OF ASSIGNMENT made the ... day of2018 BETWEEN Yilji Musa, by his attorney Ben Jide”.

- b. A power of attorney granted by a deed must be revoked by a deed. Furthermore, if the donor grants another power of attorney in respect of the same subject matter, it cannot be taken to be an implied revocation of the original one. The subsequent grant

of a power of attorney is invalid. *Adegbokan v Akinsanya (1976) 8 CCHCJ 263.*

- c. A power of attorney can be invalidated if fraud, duress, undue influence, etc are established. See *Agbo v Nwikolo (1973) 3 ECSLR (Pt. 1) 300*. See specimen power of attorney in the Chapter on Precedents and instruction forms.
- 11. Testimonium and Attestation of Deed Executed by the Attorney on behalf of the Donor.**

IN WITNESS OF WHICH/WHEREOF the Vendor has by his Attorney (insert name of attorney) set this hand and seal, and the purchaser has set his hand and seal, the day and year first above written.

SIGNED, SEALED AND DELIVERED by the said (insert the name of attorney) by virtue of the Power of Attorney dated the day of2018 Registered as No. page in volume.....of the Lands Registry at

.....
Attorney

In the presence of:

Signature of witness:

Name:

Address:

Occupation:

SIGNED, SEALED and DELIVERED by the said (insert name of purchaser)

.....

Name of Purchaser

In the presence of:

Signature of witness:

Name:

Address:

Occupation:

For specimen Power of Attorney: See Hallet's Conveyancing Precedents (1965) at 142. See also (i) *UBA Limited v Registrar of Titles (1973)* 3 CCHCJ at 52 *supra*; (ii) *Lababedi v Odunlana*, *supra*.

CHAPTER FOUR

SALE OF LAND 1 & 2

1. CONVEYANCING PRACTICE

- (1) Introduction to Conveyancing Practice in Nigeria
- (2) Present Conveyancing Practice in Nigeria
- (3) Problems faced by the Nigerian conveyancer:
 - (a) Failure of purchaser to consult solicitors until very late in transaction.
 - (b) Basic problems of Customary Land Tenure.
 - (c) Difficulties of investigating title; lack of documentary evidence; weakness of traditional evidence.

2. RESTRICTIONS ON DISPOSITION OF LAND

- a. **Legislative Restrictions or Limitation to Sale of Land:** The Land Use Act vests the ownership of all land comprised in the territory of a state in the Governor, and Section 5 empowers the person of the Governor to grant statutory rights of occupancy to any person for all purposes. Section 34(2) preserves the existing rights in developed land acquired prior to the date of enactment and under Section 34(3), the holder of the deemed right of occupancy thus preserved could also get a grant from the Governor in respect of the same land. In practice, where the holder of the deemed right applies for a grant, all he could get is a term of years certain and not a freehold or fee simple. But the individual can still make valid alienation subject to the restriction imposed by the Act. *Salami v Oke* (1987) 4 NWLR (Pt. 63) 1; *Abioye v. Yakubu* (1991) 5 NWLR (Pt.190) 130. The main provision of the Act which

has created some difficulties, is the provision requiring the Governor's consent to a subsequent transaction to a grant of a statutory right of occupancy. The provision is not new to our legal system. Prior to the Act, the following enactments have a similar provision:

- i. The State Land Law applicable in respect of the State Land in the State.
- ii. The Land Tenure Law, Native Land Acquisition Law of the former Western and Mid-western Nigeria which stipulates that an alien cannot acquire any interest in land unless he, the alien, is approved and the document of transfer is also approved.
- iii. The Acquisition of Land by Alien Law of the former Eastern Nigeria similar to the Native Land Acquisition Law above.
- iv. The Acquisition of Land by Alien Law 1971 of Lagos State.

Alienation by way of assignment (i.e. sale of the remainder of the term originally granted) sub-lease or mortgage without consent under these law passes no legal interest under the LUA (1978). Therefore, if the consent is refused, there is nothing the parties can do. (See *The Queen v The Minister of Land and Survey, Ex parte Bank of the North Limited* (1963) NLR 581; *Qudus v Military Governor of Lagos State* (1973) CCHCJ/673. It would appear that the provision is not breached if the parties merely enter into an agreement to assign, sub-lease, mortgage or grant and take a licence; as a legal assignment, sub-lease, mortgage is needed for there to be a breach of the provision (see *Ishola*

Williams v Hammond Properties Limited (1988) 1 NWLR 481.

b. Contractual Restriction

- i. Not to assign a lease without consent; “no implied provision that consent shall not be unreasonably withheld”, (**s. 19(1) of English Tenant Act**).
- ii. Restriction that mortgagor shall not part with possession without consent of mortgagee.
- iii. Restriction as to land subject to customary law e.g. consent of head and representatives of a family.

3. PLANNING

- i. Town and Country Planning Legislation in different parts of the country. Powers of Planning Authorities: Schemes of development, compulsory acquisition of land, etc.
- ii. Duty of the Solicitor: When land is to be purchased, ensure with the aid of surveyors, that the transaction does not contravene the relevant town planning law e.g. as to layout, roads, future development, etc. to obtain planning permission or approval.

4. LAND DEVELOPMENT

Form of Land Development

- (i) Owner erected building for sale.
- (ii) Building lease of land either to single developer or in single plots to several developers for development planning permission, covenant by under-lessee, etc.

- (iii) Lease of land and building for a long term with both ground rent and a separate consideration for the building (premium).
- (iv) Lease of land and building at a rack rent.
- (v) Lease of flats.

5) CONVEYANCING PROCEDURE

Acting for parties (Vendor/Purchaser, Mortgagor/Mortgagee, Lessor/Lessee, etc).

- (a) For both parties: When title is sound and the terms are clearly agreed on, a solicitor may safely act for both parties. However, if the title is not sound or the interests of the parties are likely to conflict, the parties must be advised to retain their respective solicitors.

Note: It is not necessarily improper to act for both parties.
See ***Smith v Mansil (1962) All ER 859.***

Where a solicitor acts for both parties, he should first obtain particulars from the vendor on the basic facts of the transaction, e.g. address of property, the tenure, title deeds, the price, completion dates, deposit, fixtures and fittings. He gets the purchaser to confirm these and then proceeds to take detailed instructions.

- (b) For Purchaser: Solicitor's duty of ensuring good title and advising client. Obtain full instruction including particulars of the purchaser, the vendor, mortgagee, etc. the property and transactions affecting it.
- (c) For Vendor: Solicitor must obtain enough information to enable him to draft the contract and also to answer purchaser's enquiries/requisitions. Title deeds or copies to be obtained.

6) INSTRUCTIONS

See the suggested Form in the Appendix for taking instructions in Sale of Land. The Form may be modified or otherwise adapted to suit particular circumstances. The following points among others may be noted:

- (a) Property: The name or title
- (b) Nature of Transactions: State whether Sale, Mortgage, etc.
- (c) Client: Particulars should contain full name, address and occupation. Is the client an alien and in what capacity is he entering into the transaction?
- (d) Other Party: as for (c) above, also particulars of his solicitor. All correspondence should be addressed to solicitor.

- (e) Estate Agent: Address and other particulars.
- (f) Property: Particulars and descriptions must be sufficient to identify the property (estate or interest). Fixtures and fittings which are included in sale should be specified. Vendor is entitled to remove all tenant's fixtures and fittings. If purchaser wants to retain any of them, this should be agreed, chattels, etc, pass by mere delivery. A written agreement for transfer (i.e. sale) is not liable to stamp duties (see Schedule to Stamp Duties Act: Exemptions to Agreements).
- (g) Easements and profits: These must be noted specially where they are acquired or are in the process of being acquired under the received English Law or the Prescription Law, Cap 95 (West and Mid-west), or under Customary Law.
- (h) Restrictive Covenants e.g. to use a house as private dwelling house.

- (i) Particulars of local Planning Authority, this will facilitate inquiries.
- (j) Title: Family Land: See ***Ekpendu v Erika 5 FSC 79.*** Prepare a genealogical tree, if possible. If there are tenants on family land, ascertain nature of their tenure.

Title Deeds: The vendor or his solicitor should have them, but the purchaser's solicitor cannot ask for them at this stage. They may be registered in any of the state capitals. A good root of title must date back to at least 30 years in the states created out of the former Western Region (PCL States) and 40 years in CA States (former Northern and Eastern Regions).

NOTE: The exception of Abia State which is 30 years.

- (k) Survey Plan: The survey plan must be signed by a licensed surveyor. But a plan need not be attached to a conveyance or lease where a document to which it is attached is recited.
- (l) Consent e.g. Under Land Use Act 1978 and under contracts with landlord or mortgagee as the case may be.
- (m) Disputes: if there is court action, obtain copy of proceedings or judgment.
- (n) Completion Date: To be agreed by the parties as soon as possible.

If a conveyance:

- (o)
 - (i) Price: should be agreed
 - (ii) Deposit: usually about 10%. State whether it is paid to stakeholders or to vendor's agent. In the absence of express instructions to the contrary by the vendor, payment of a pre-contract deposit to an estate agent is at risk of the purchaser: see ***Sorell v. Finch (1976) WLR 833.***

- (p) If a Lease (under-lease)
Note that premium is not payable in those places where the Rent Control Act (Rent Restriction Laws) applies. See also the Tenancy Law of Lagos State 2011.
- (q) If a Mortgage: Where a mortgage arrangement is being made in sale of land, particulars should be obtained. Clients may need advice on the various mortgage facilities e.g.
- (i) The Nigerian Building Society
 - (ii) Housing Corporation
 - (iii) The Banks for Short Term Loans
 - (iv) Insurance Companies for Loan Policies
 - (v) Mortgage Protection Policy
- (r) If a Building: Note: Insurance especially by the Purchaser/Lessee/Mortgagee.
Once contract has been exchanged and Governor's consent is obtained, the property is at the risk of the purchaser (*Chidlak v Coker (1954) 14 WACA 506*; but see exceptions in **S. 72(1) PCL**).
- (s) Costs: Solicitors acting for vendor may deduct the amount of his bill of charges from proceeds of sale.

7. **CONTRACT OF SALE**

Types of contract of sale

These are Oral, Open and Formal Contract of Sale.

(A) Oral Contract

This is generally unenforceable – **S. 4 Statute of Frauds 1677; s 5(2) Law Reform (Contracts) Act 1961; s. 67(1) PCL.**

Defects of oral contract: Generally unenforceable and money paid as deposit is unrecoverable where purchaser defaults. *Thomas v Brown (1876) 1 Q.BD 714.*

EXCEPTIONS TO UNENFORCEABILITY OF ORAL CONTRACTS:

- (i) Alienation under customary law
- (ii) Full purchase price paid
- (iii) Must be in the presence of witnesses.

See generally *Alake v Awawu (1932) 11 NLR 39; Mustapha v Mshelizah (2003) FWLR (Pt 183) 1.*

Odusoga v Rickets (1997) 7 NWLR (Pt. 511) 7, Kachallah v Banki (2006) All FWLR (Pt. 309) 1420.

Adesanya v Aderonmu (2000) FWLR (Pt. 15) 2492

S. 5(3)(c) Law Reform (Contracts) Act.

- (iv) Sufficient acts of part-performance.

-S.5(3)(c) Law Reform (Contracts) Act

-International Textile Industries (Nig) Ltd v Aderemi (1999) 8 NWLR (Pt. 614) 268-Maddison v Alderson (1883) 8 AC 467, Aminu v Ogunyebi (2004) 10 NWLR (Pt. 882) 457.

(B) Open Contracts

Although, this is documented, the contents only reflect the parties, the price, and the property. Once it is signed by the party to be charged, it is sufficient memorandum of sale and thus enforceable.

-Section 4 Statute of Frauds.

-S. 5(2) Law Reform (Contracts) Act, S. 67(1) PCL,
Paye v Gaji and Ors. (1996) 5 NWLR (Pt. 450) 589, Gaji v Paye (2003) 8 NWLR (Pt. 823) 583.

It could take the form of:

- (i) Receipt: *Yaya v Mogoga* (1947) 12 WACA 132; *Auerbach v Nelson* (1919) 2 Ch. 383
- (ii) Rough draft of agreement - *Gray v Smith* (1889) 43 Ch.D 208
- (iii) Written offer accepted whether orally or in writing - *Powers v Fowler* (1855) E & B 23
- (iv) Several documents connected together - *Timmins v Moreland Street Pry. Co. Ltd.* (1958) Ch. 110. *Pearce v Gardner* (1897) 1 QB 688.

(C) Formal Contract

Note the stages: Pre-contract stage, Contract stage, Post Contract stage, Completion stage and Post Completion (Perfection) stage.

The terms of the contract are mutually agreed upon by the parties. These are clearly stated in the contract drawn up by them (or by vendor's solicitor).

Note: The advantages of formal contracts over other types of contract of sale.

1. Need for a Contract
2. Preparation of the Contract: It is prepared in duplicate by vendor's solicitor and sent to the purchaser's solicitor for amendment (if any). When approved, it is engrossed by the vendor and a copy is sent for the purchaser's signature.
3. Contents: May include any of the following matters among others:
 - Parties names, addresses, occupation, etc.;

- The price, the deposit and to whom payable (Vendor or 3rd party as stakeholders or agent).
- Balance: When payable (on the date fixed for completion).
- Payment for economic plants, if any (valuation e.g. of cocoa or any economic trees).
- Payment for fixtures and fittings where premises is let.
- Interest on unpaid purchase money.
- Title: abstract and root of title: When to be delivered (7 days).
- Commencement of lease and the rent in case of lease.
- Capacity in which vendor is selling.
- When to give requisitions and objections on the abstract;

Furthermore, requisition on reply, if appropriate e.g. 14 days to Vendor's solicitor.

- Rescission of Contract by Vendor, if unable to satisfy a requisition on which purchaser insists.
- Completion date and place.
- Liability for insurance pending completion.
- Covenants and reservation, if any, on the land.
- Special restrictions, e. g. existing tenancies, special rents, etc.
- Contents: who is to give and when to obtain any requisite consent.
- Survey when purchaser declares his satisfaction with the title, he should be permitted to go on land and survey it for conveyance, if necessary.
- Possession: when to be given, whether on purchaser declaring his satisfaction with title, or on completion.

- Payment of deposit in bank in joint names of vendor and solicitor for purchaser.
- Identity of property sold with that in the document (plan) to be admitted by the purchaser.
- Planning permission, if any, to be given to the purchaser.
- Forfeiture of deposits and resale on purchaser's default.

4. Enquiries before Contract: This is done by the solicitor for the purchaser:

Whether or not he acts for the vendor he may wish to make enquiries to confirm some matters raised in the draft contract or in the instructions, before he advises the purchaser to sign the contract. Where he acts for purchaser, he will send out enquiries to the Vendor's solicitor on such points as he thinks need clarification or confirmation. The form for instruction may be used or modified as necessary. Note the effect of latent and patent defects in title. It is a good guide, even where the solicitor acts for both parties. When the purchaser's solicitor is satisfied as to the answers to his enquiries, he advises the purchaser to sign the contract.

5. Note void terms in the contract

6. Exchange of Contract: After signature:

- (a) The purchaser's solicitor, if any, sends the duly signed and stamped agreement, (fixed stamp duty) together with a cheque for the deposit to the Vendor's solicitor, and
- (b) The vendor's solicitor then sends to the purchaser's solicitor, the Vendors part duly signed with receipt endorsed for the deposit.

7. Position of the Parties after exchange of contract:

- (i) Purchaser acquires an equity: *Universal Vulcanizing Nig. Ltd. v IUTTC* (1992) 9 NWLR (Pt. 266), 388.
- (ii) Death of either party will not affect the transaction as the Personal Representatives may be compelled to complete.
- (iii) Vendor becomes trustee of a qualified kind as he retains possession, collects rent and profits until completion. He also has an alien on the property for the balance of the purchase price. *Lake v Bayliss* (1974) 2 ER 114.

8. TITLE

- Deducing Abstract of the Title: Where a solicitor acts for both parties, he would have investigated the title. But where he acts for purchaser only, the vendors would supply him with an abstract of title or other statements or evidence of title (epitome of title).
- Checking the title: Purchaser's solicitor checks on the abstract, etc by:
 - (a) Requisitions
 - (b) Search in Lands Registries (Deeds and Plan, etc) if necessary.
 - (c) Investigating court judgments and orders, if any.
 - (d) Inspecting original documents, if any.
 - (e) Investigating traditional title, if necessary.
 - (f) Visiting and inspecting the property.

Note:

- (i) The length of title is 30 years in the PCL States (S. 70 PCL) and in the rest of the country (CA States),

except Abia State, is 40 years. Adverse possession, 20 years. In Lagos State 12 years for private land and 20 years for government land for adverse possession.

- (ii) In the absence of agreement, grantee or assignee of lease cannot call for freehold title.
- (iii) Covenants e.g. to pay rents, etc should expressly be taken by the assignor from the assignee for they are implied (see **s. 7 CA 1881**), but expressly in the PCL States, (**s. 101(1)(a) PCL**).

QUALITIES OF A GOOD ROOT OF TITLE

- (a) Sufficient description of property
- (b) Discloses the entirety of the legal and equitable interest contracted to be alienated.
- (c) Dispels all doubts about its authenticity
- (d) Not subject to a greater interest.

➤ ***Lawson v Ajibulu and Ors. (1997) 6 SCNJ 1.***

Examples of good root of title:

Conveyance, Legal Mortgage, Assent, Deed of Gift and (Registered Certificate), Court vesting order, Certificate of Occupancy on State land.

1. Note: an equitable mortgage that is by deed and contains the remedial devices, i.e. Declaration of trust or Power of Attorney could be a good root of title.

Examples of bad root of title:

Leases, equitable mortgages, power of attorney and certificate of occupancy on deemed grant. See ***Ude v Nwara (1993) 2 NWLR (Pt. 278) 647, Ogunleye v Oni (1990) 2 NWLR (Pt. 135) 745.***

Note: Certificate of occupancy granted over State land could be a good root of title.

THE CONVEYANCE

Preparation: By the purchaser's solicitor, in duplicate, price of chattels and fixtures not to be included (to avoid stamp duty); chattel, etc will pass by mere delivery (see contents of a Conveyance): Two copies to be sent to vendor's solicitor for amendment and approval. When approved, the conveyance is engrossed in at least 5 copies. (1 copy will be submitted to the Ministry of Lands, 1 for stamp duty, 1 for registration, 2 as original and counterpart). A survey plan, signed by a Licensed Surveyor is attached.

COMPLETION

Preparation for:

Vendor's solicitor

- (a) Prepares completion statement, making necessary appointment and sends copy to purchaser's solicitor:

Purchaser's solicitor.

- (a) Sends the Conveyance to vendor's solicitor for execution.
- (b) On receipt of completion statement, writes his client for funds and sends him the completion statement (also his bill of charges).
- (c) On receipt of fund, he pays it into his client's account and arranges for a banker's draft in favour of the vendor.

Completion:

1. Purchaser's solicitor attends in the office of vendor's solicitor.
2. Vendor's solicitor brings
 - a. The executed deed of conveyance
 - b. Original of documents of title
 - c. Receipt, etc, if any.

3. Purchaser's solicitor makes last minute check on deed to ascertain signature, etc.
4. Exchange of Conveyance for the Banker's draft and other documents.**AFTER COMPLETION**

Purchaser's solicitor:

- (a) Obtains Governor's consent
- (b) Stamps the Conveyance/Deed
- (c) Arranges registration of the document. For procedure for registration of Deed. See *Amadi v Orisakwe (2005) 7 NWLR (Pt. 924) 385.*
- (d) Takes care of deed or hands them over to purchaser.
- (e) Sends his bill of charges.

Note: The documents required to obtain the Certificate of Occupancy and to obtain consent and register instruments. In general, the documents required are:-

1. Purchase receipt
2. 6 copies of survey plan signed by licensed surveyor (3 cloth copies, 3 paper copies).
3. Tax clearance certificate for the vendor and the purchaser.
4. An application letter.

CHAPTER FIVE

LEASES AND TENANCIES

INTRODUCTION

The word “lease” may refer to a document or to a transaction. In other words, a lease is a document creating an interest in property for a term of years certain.

A lease is an agreement under which the owner gives up possession and use of this property for valuable consideration and for a definite term and at the end of term, the owner has absolute right to retake, control and use the property.

A lease is an agreement which gives rise to relationship of landlord and tenant (in real property) or from the lessor to the lessee for an interest or to term less than that of the grantor usually in but not always, in consideration of payment of rent.

A lease is either a contract (between two parties) or an estate (that is the nature, extent or quantum of interest) of a person in a real or personal property.

FEATURES OF A LEASE

1. A lease is a grant of a term above 3 years, thus must be by deed.
2. The title to the land is not conveyed, only the use and occupation is transferred.
3. A relationship for a fixed or definite period.
4. The lessee may subject to conditions stated in the agreement assign his interest or sub-lease part of his interest to another person.

5. Rent is usually but not necessarily paid by the lessee for the use and occupation of the property.
6. There is a right of reversion of the property to the lessor and is enforceable.

ADVANTAGES OF A WRITTEN LEASE

1. The terms are easily ascertainable and enforceable.
2. An order of specific performance may be ordered
3. Where specific performance fails, there can be an award of damages.

LEASE UNDER SEAL

A lease could be made by deed. It is mandatory for leases above 3 years to be by deed.

This satisfies the requirements of S.17(1)PCL to the effect that any conveyance of Landlord of any interest in land is void unless made by deed.

However, the rule in *Walsh v. Lonsdale* states that an agreement to create a lease will still operate as a lease notwithstanding that it is not created under seal. This is based on the maxim “equity looks at the intent rather than the form”.

ESSENTIALS OF A VALID LEASE

The Supreme Court in *Osho & Anor v. Foreign Finance Corporation & Anor* (1991)4NWLR(pt.184)157 set out their requirements of a valid lease as

1. Words of demise.
2. Complete agreement leaving no ambiguity as to its purport
3. The identification of the parties to the agreement.
4. The premises must be clearly identified.
5. Commencement and the duration of the agreement.

REVERSION

Reversion is the interest which remains in the grantor after the expiration of the term in future.

The reason for a reversion is because a lease cannot tenure in perpetuity.

Thus, in every lease, the lessor has a reversionary interest.

TYPES OF LEASE

1. ORAL/PAROL LEASE

A parol/oral lease is not in writing. It is permissible under

1. 3 Statute of Fraud 1677.

ESSENTIALS OF AN ORAL LEASE

- a. It must take effect in possession.

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- b. It must reserve the best rent (not premium or rack rent i.e. the rent must not be paid in advance or in lump sum).

- c. It must be for a period not exceeding 3 years

The disadvantage with oral lease is the difficulty of 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. Paper Sack (Nig) Ltd* (2007)ALLFWLR(Pt. 350)1214.

2. WRITTEN LEASE

This is a written agreement to a lease not exceeding 3 years. It need not be under seal. It is signed in the hand of the parties only. A written lease is binding upon the parties as a contract. It must contain the following:

- 1. CERTAINTY OF TERMS:** The terms of a lease must be certain or ascertainable.

The duration of the lease which is made up of the commencement date and the expiration date of the lease must exist.

The commencement and expiration dates must be expressly stated. This is because the release cannot tenure in perpetuity *UBA v. Tejumola & Sons Ltd* (1999)2NWLR(pt.79)662.

In *Bosah v. Oji*; *Okechukwu v. Onuorah* (2001)FWLR(Pt.33)219, (2000)3SC 16; the terms in the lease were held ascertainable as they were dependent on future contingencies certain to take place. For instance, a lease that will commence when the first daughter of the family gets married is uncertain, thus void.

In *Aminu v. Nzeribe*, a lease that had no date was declared invalid.

A lease until the landlord requires the land for widening of the road was declared void. *Prudential Assurance Co. v. London Residuary Body* (1992)3

A lease for as long as the company is trading was held void *Bierel v. Carey* A lease for a future release is void unless definite time of commencement is inferred from it.

- 2. CERTAINTY OF COMMENCEMENT:** This is essential in calculating the duration of the lease. The word “commencement” is allowed for the purpose of lease.
- 3. CERTAINTY OF PROPERTY:** The property in a lease must be describe with specific dimensions.

4. **EXCLUSIVE POSSESSION:** The lessee must have the right to exclude every person from the property including the lessor or landlord, except for the conditions that the landlord may enter the property for repairs.

NB:- The difference between exclusive Possession and exclusive occupation.

One may have exclusive possession without being in exclusive occupation. E.g. 1: Where Mr A leases a house to Mr. B, Mr. B. gives the house to his mistress. The mistress merely has exclusive occupation. Since the lease is in the name of Mr. B, Mr. B, has exclusive possession but is not in exclusive occupation.

One may be in exclusive occupation without having exclusive possession.

E.g. II: The landlord to a property lives downstairs and the tenant lives upstairs. The Landlord keeps interfering with occupation of property by the tenants. Thus, the tenants are in exclusive occupation and not exclusive possession.

Are lodger, boards in exclusive possession?

In a strict sense of the term, we can say that lodgers and boards are not in exclusive possession because the servant/workers of the landlord can come in at any time to clean the rooms without restrictions.

5. CERTAINTY OF PARTIES

1. The parties must have capacity to contract the lease agreement. The parties may be natural or juristic persons. *UBA v. Tejumola & Sons Ltd* (1988) 2NWLR (pt.79)662. The owner of the property who makes the grant is the

LESSOR/LANDLORD. The person who takes over the exclusive use of the property is **LESSEE/TENANT.**

2. The lease must be created in a proper manner: where it is for 3 years and above, It must be by deed.

Where lease is for a term below 3 years, it may be agreement under the hand of the parties. This may be simply called a **TENENCY AGREEMENT.**

3. Determined Rent: This may not be required in the particular lease agreement. Strictly speaking, **RENT** is not an essential requirement for the validity of a lease.

DISTINCTION BETWEEN LEASE AND ASSIGNMENT TO LEASE

1. May not be created by deed
2. Only possessor interest is transferred
3. Lessor retains reversionary interest in the property
4. Needs no investigation to prove title.
5. All covenants to the head lease will bind parties to the lease.

ASSIGNMENT

1. Always created by deed.
2. Proprietary interest in the property is assigned
3. The entire interest in the property is assigned
4. Very important to investigate title to assignor
5. Only covenants that touch and concern the land in the head lease will bind the assignee.

An **ASSIGNMENT** is the grant of the remainder of the term in a lease Nwanpa v. Nwogu (2006) 2NWLR(pt.964)

DISTINCTION BETWEEN A LEASE AND A SUB-LEASE

LEASE	SUB-LEASE
1. There exists direct relationship between the lessee and the lessor	There is no direct relationship between the head-lessor and the sub-lessee.

DISTINCTION BETWEEN LEASE AND LICENCE

LEASE	LICENSE
1. Transfer of interest in property	There is no transfer of interest . License
2. Lessee has exclusive possession	License has no exclusive.
3. Interest transferable through sub- lease	No such right
4. The demised estate can survive the death of the lessor	The death of the licensor terminates the relationship
5. Lessee can maintain an action in trespass against 3 rd parties	A licensee cannot maintain an action in trespass
6. A lessee is entitled to the statutory notices	A licensee is not so entitled
7. Some covenants are implied	Implied terms or covenant do not exist.

NB:-

A license is a mere permission or privilege given by the occupier of land to a person to do an act upon his property which otherwise will amount to trespass.

A license does not create proprietary (ownership) rights
(Eloichin Ltd v. Mbadiwe (1986)1AIINLR (Pt.1)I

RENT IN LEASE

Rent is the consideration paid by the tenant for the use and enjoyment of the landlord's property.

Rent may be money or money's worth. Rent where applicable must be certain or ascertainable. Rent is not mandatory in leases. The main feature of lease is lawful occupation by tenant whether he pays regular rent, subsidized rent or no rent at all is immaterial. *African Petroleum LTD v. Owodunni (1991)1-12SCI*.

NB:- Rent is payable in arrear unless the parties agree otherwise.

TYPES OF RENT

1. GROUND RENT: This is the land itself. e.g. ground whether or not is developed represents the value of the ground S.5.(1)(C) & (d) Land Use Act 1978 empowers the governor of a State to grant a statutory right of occupancy on land and also impose ground rent for such a grant. The ground rent is subject to revision for periodic 5 years. In traditional setting, kolanuts and palm wine may suffice for ground rent.

2 RACK RENT

This is applicable for leases for a short term. It is the economic rent payable for the land and the improvements and development on the land. It is

also called Economic Rent. It represents the full value of the property (i.e. land and development on the land) It could be paid annually, monthly or for fixed periods.

3 PREMIUM

This is a lump sum paid in addition to the other rents. It is regarded as a fine and as such is prohibited in some States in Nigeria. See Rent Control and Recovery of Residential Premises Law of Lagos State 2003. Landlords attempt to circumvent the prohibition of the premium, by charging rent in advance for many years.

There are legal and non-legal consequences for rents paid in advance.

- a. Inflation: A lessor who collected many years rent in advance may turn out to be at disadvantages as the value of the money can depreciate as a result of inflation.
- b. Tax implications: Rent collected in advance for more than 5 years is subject to tax as a national income
 - S.4(2)(c) income Management Act
 - S.3(3)Personal Income Tax Act

NB:- At common law, where a lease has expired but the lessor continues to accept rent, the lessor would be deemed to have renew the lease on the same terms & rent as the expired lease.

RENT REVIEW CLAUSE

The import of this clause is to enable the landlord to review the rent periodically.

This review is usually upwards. The review enables the landlord to keep with the prevailing market rates. This is

usually because the value of landed property appreciates with time.

The right to review must be express as a condition in the agreement. The landlord cannot unilaterally review the rent.

A rent review clause should contain the following;

1. Method of initiating the review e.g. a notice in writing to be given by the lessor to the lessee and time within which the notice is to be given.
2. The time frame of the review e.g. after every 5 years of the lease and the date in which the new rent will become payable.
3. The method of calculating the new rent e.g. by expert valuation.
4. Procedure for resolving any dispute of the new rent e.g. ADR

A rent-review clause may be inserted in the reddendum or the reddendum may refer to it in a schedule.

ACTIVITY

DRAFT A Rent – Review Clause

Any time the tenant exercise the option to renew the term granted under this lease, the land lord should have a right to review the rent payable in accordance with following formular:

1. The rent at which the premises might reasonably be expected to be let in the open market by a willing landlord for a term equivalent to the term granted under this lease; or
2. The rent at which the premises might in the opinion of a Registered Estate Surveyor, who shall act as expert be let.

PROVIDED that if no agreement is reached between the parties within 30 (thirty) days to the commencement of the new term granted under this lease as to the rent at which the premises might reasonable be expected to be let, then the question shall be referred to the decision of a single artibrator to be appointed by the parties in accordance with the provisions of the arbitration and conciliation Act Cap AI8 laws of the Federation of Nigeria 2004 or any modification of the Act for the time being enforce and until the rent shall have been agreed, the current rent shall continue to be payable and the arrears of rent (if any) paid immediately after the new rent have been agreed

TENANCY LAW OF LAGOS STATE AND ITS APPLICATION:

This law applies to business and residential premises only. The law does not apply to all districts in Lagos. The law does not apply to premises used by educational institutions for its staff and to hospitals.

JURISDICTION

Both the magistrate court and the high court have jurisdiction to entertain matters brought under this law. The determinant is the amount of money involved in the case. Where the claim exceeds the monetary jurisdiction of the Magistrate Court, then the case goes to the High Court.

RENT- REVIEW

The law provides that there should be no arbitrary increase of rent. The Landlord cannot unilaterally increase rent. The tenant can sue him. Rent in advance is unlawful. It is unlawful for the landlord to demand for rent in excess of 6 months for monthly tenancy or in excess of one yearly tenancy S.4.

It is mandatory for the landlord to issue receipt to the tenant upon payment of rent. Where the landlord fails to issue such receipt, it is a violation of the law. This is punishable with N100,000 fine or 3 months imprisonment.

The landlord must ensure that the tenant enjoys quiet possession of the property given out. Here, the law envisages a tenant not a licensee. In a lease, the lessor must notify the lessee before entry to inspect the property whereas this is not in licence

TYPES OF COVENANTS

There are Usual Covenants, Implied Covenants and Express covenants. The type of covenant to be inserted into the lease depends on:

1. The type of lease;
2. The nature of the property; and
3. Practices within the jurisdiction.

IMPLIED COVENANTS

Implied covenants are covenants inferred from the agreement and circumstances surrounding the execution of the lease. They are inferred by law even when not expressly stated.

Implied covenants on the part of the landlord are as follows::

1. Covenant for enjoyment i.e not to disrupt tenant from enjoyment of the property
2. Covenant not to derogate from grant.
3. Covenant to comply with procedure guiding recovery of premises.

Implied covenants on the part of the tenant are as follows:

1. Covenant to pay rent
2. Covenant not to commit waste

3. To deliver the premises in a tenantable condition
S.64 Registered and Law Lagos 1994.

EXPRESS COVENANTS

These are the covenants agreed 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. Express covenants are covenants which will not be implied in the lease or enforced by the parties. Here, there is definite agreement on the covenants. E.g. are covenant on use of the property, covenant not to sublet, and Covenant to insure the property.

USUAL COVENANTS

Usual covenants are proper and common covenants inserted in a lease based on the facts or evidence presented before the Court. The points to be considered here are:

1. Purpose and usage of trade for which the property is situated.
2. Previous dealings
3. The type of lease in question.
4. The nature of the property.

Though they are proper and common, usual covenants must be reasonable. Usual covenants include:

1. Covenant for quiet enjoyment of the property
2. Covenant to pay rent.
3. Covenant to pay taxes except those expressly stated to be payable by the Landlord.
4. Covenant to keep property in a good state of repairs
5. Covenant to allow landlord view the state of repairs

COVENANTS IN LEASES

Covenants are promises or pledges made by parties on a lease either to do something or not to do something. It also provides for the truth of certain acts.

1. USER COVENANT

Premises can be used for any purpose which is legal though the usage may differ from the purpose it was earlier rented. Covenant of use provides the purpose which the lessee is to put the premises for either residential/agricultural or commercial used.

The importance is:

1. To avoid quick depreciation of the property
2. To protect neighbor
3. To prevent its use for illegal or immoral purpose
4. To protect the reversionary interest to lessor.

This covenant may be drafted as follows:

‘The lessee covenants to make use of the premises and to permit the premises to be used for the purpose of (residence/commerce/agriculture) only.’

Remedies for breach of user covenant.

1. Action for injunction to prevent a contrary use
2. Action for damages to compensate for misuse of the premises
3. Action forfeiture and re-entry if it is provided for in the lease

NB;- Town Planning laws and Regulations may affect the use of land. *Zaad v. Saliba* (1955-1956) WRNLR 63 the court held that building of a proprietary club was trading in line with the clause in the lease.

2. COVENANT TO PAY RENT

The lessee covenants with the lessor to pay the rent reserved in the lessee at the time and in the manner prescribed. e.g.

“PAYING THE SUM OF.....”

“YIELDING AND PAYING.....

This is called the Reddendum. A lease should provide the payment to rent because is not one of the implied covenants in leases. Rent could be paid money or money's worth. It must be ascertainable.

In *Pitcher .v. Twey* rent was paid with bottles of wine. In *Doe Ednega v. Renham* rent was equated with cleaning the parish church.

Except where expressly stated that rent is to be paid in advance, rent is payable in arrears. Once the parties have agreed to the sum to be paid as rent, neither party can unilaterally alter it. *Chukwuma* (2002) 3 NWLR (PT. 753) 20. Almost all the States of the Federation except the FCT have regulations controlling rents charges in Nigeria.

Remedies for failure to pay rent include:

1. An action in court to recover the money
2. An action in distress – i.e the seizure of the lessee's goods so as to satisfy the rent without going to Court
3. An action for forfeiture where contained in the lease
4. A claim for mesne profit against a tenant at sufferance.

A tenant at sufferance is one who entered the premises lawfully through a valid lease agreement but stays over after expiration of his tenure.

Distinction between arrears of rent & mesne profit:

Mesne profit is rent payable to a landlord by a tenant before the tenancy. Arrears of rent is the amount payable by the tenant to a landlord after the expiration of the tenancy and the retention of the premises.

3. COVENANT TO PAY RATES AND TAXES

This covenant is otherwise known as covenant to pay out goings. To determine who is liable to pay the particular rate, two things are to be considered;

1. The position of the law prescribing for who is to pay. In most cases it is the owner of the tenement that pays the out goings. However, parties may on their own determine who is to pay particular rates and taxes.
2. 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 rent.

In drafting this clause, it should be made wide enough to accommodate future outgoings. ‘To pay rate and taxes, levies, duties and outgoings now or as may be subsequently imposed on the property whether payable by the landlord or not.’

Remedies for breach of this covenant:

1. An action to recover the outgoings and rate that have accrued.
2. An action for damages.
3. An action for forfeiture and re-entering where the lease contains a provision to that effect.

4. COVENANT TO REPAIR

Repairs mean the replacement of subsidiary parts of the premises while to renew refers to replacement of subtracted parts or whole of the premises.

The essence of inserting this covenant in a lease is to maintain the property in good Condition. It is usual to apportion between the landlord and tenant the obligation to repair. If it is a lease of short duration; the landlord usually has more obligation to repair. If it is a lease of a longer duration; the tenant usually has more obligation to repair. SS.64&65 (f-g) Registered Land Law Lagos.

In the construction or drafting of this covenant; the character, locality of the promises and the general nature of the property are to be considered by the solicitor.

NB:- It is advisable that the lessor should be responsible for structural repairs (external parts) while the lessee is responsible for other parts. Structural parts include the foundation, the roof, floor structure, walls etc.

EXAMPLE 1

To keep the premises in a good state of repairs and to deliver up possession of the premises at the end of the term. The noticeable defects in the above clause are:

1. It does not make provision for the landlord to enter and take inventories
2. It does not state when repairs are to start.
3. The tenant is unprotected as to fair wear and tear.

The practice is that before a tenant enters a premises, both the landlord and the tenant will inspect the house and take inventory of items and record the state of the important structures in the property.

The expression tenantable repair, good repair or good habitable repairs all mean the same thing.

The phrase "Reasonable wear and tear excepted" implies that the lessee is relieved from liability for any state of disrepair so long as the disrepairs result from a reasonable use of the premises and the defects are of natural elements.

Advantages

1. It is easy to determine
2. It facilitates the payment of a deposit which is refundable at the end of the term

The interpretation of a covenant to repair in a metropolis is different from the interpretation of covenant to repair in a rural area.

Remedies for Breach of Covenant to Repair

This is determined by whether or not the tenant is in possession. Where a tenant is in possession:

1. A notice to repair is served on him

2. Where there is a continuous default, an order for forfeiture and re-entry may ensue.
3. An action for specific performance
4. Action for damages

Where the tenant is no longer in possession

1. Action for damages (to the tune of the amount needed to carry out their repairs)
2. Action for loss of rent.

where the landlord is in breach, the tenant may:

1. Serve a notice to repair
2. Action for specific performance
3. Repair the property and claim the cost from the rent.

NB: This however does not mean that the tenant can withhold the rent. The tenant cannot justified leaving the premises before the end of the term in the lease on the grounds that the landlord has failed to make repairs. This means that the tenant should not ask for a fund of his rent where he leaves the property before the expiration of the term on ground of the landlord not repairing the property.

Example of a good draft of covenant to repair:

“The tenant covenants to keep and maintain the premises in a good state of repair, fair wear and tear excepted, and to permit the landlord to enter at reasonable times to view the state of repair, and to deliver up the premises in good and substantial repair condition.

5. COVENANT AGAINST ASSIGNMENT & SUBLetting

The tenant may for some reasons decided to sublet the premises

or assign his interest in the lease to a third party. This covenant ensures that the landlord is in control of the tenants occupying the premises.

Where the covenants states thus:

“Tenants shall not assign or part with possession”. This is an absolute prohibition or bar against signing or sub-letting. It is harsh on the tenant. Even though there is an absolute bar, the tenant may still charge his interest in the property.

Therefore, it is advisable that all the acts prohibited may be covered in the covenant e.g. covenant not to assign under let, charge or otherwise part with possession of the property.

NB; Where the tenant permits another person to use the premise e.g. allow a licensee to use the premises, this does not amount to breach of the covenant not to assign or sublet. Where the lease is silent, the tenant may assign or let the premises without restrictions.

1ST DRAFT

Tenant covenants not to assign, underlet, charge or part with possession of the premises.

This is an absolute bar. The tenant does not have the right to sublet or reassign. He should negotiate with the landlord for an amendment of the clause.

2ND DRAFT

Not to assign, sublet, charge or part with possession of the premises or any party of it without the written consent of the landlord.

This is a qualified prohibition. It is not good enough as the ground for granting or refusing consent is subjective.

3RD DRAFT

Tenant covenants not to assign, underlet, charge or part with possession of the or any part without of the consent of landlord in writing first had and obtain, such consent not to be reasonably withheld in the case of a responsible or respectable person.

This is an ideal clause. It is used to ensure a balance of the competing interest of the parties. Once consent is given, it shall not be withdrawn *Ideal Films Renting Co. v Nelson* (1921) 1 ch575.

UNREASONABLE REFUSAL

For refusal to be reasonable or not, the following is considered:

1. Personality of the intended sub-tenant.
The landlord is expected to be objective in his refusal. He may consider the sub-tenant's financial standing; is he a bankrupt or a notorious absconder.
2. The use or purpose for which the sub-tenant puts the premises
3. The nature of the property. The burden of proving that the reason of refusal is unsubstantiated lies on the tenant. *Holder Bros Co Ltd. V. Gibbs* (1925) CHDS 575

REMEDIES AVAILABLE TO THE TENANT

1. Tenant can seek declaration that the refusal is unreasonable.
2. Tenant may compel the landlord to give his consent in action for specific performance.
3. Tenant may ignore the landlord and sublet and thereafter apply to court for an order of an injunction restraining the landlord from harassing the sub-tenant.
4. Tenant may ask for damages.

Where the tenant is in breach of the covenant, the landlord is entitled to remedies:

1. The landlord may seek court order for re-entry & forfeiture of the lease.

NB:-

The landlord cannot resort to self-help *Akpina v. Balogun* (unreported), *Ojukwu v Gov. Lagos State* (1985) 2NWLR 9(Pt. 10) 806.

6. COVENANT NOT TO MAKE ALTERATION

Alterations include additions or changes to the premises e.g. breaking of the walls, reworking the verandah etc. This covenant against alteration may be absolute or conditional. It may be drafted thus:

The tenants shall not make any alteration to the premises except for the installation of air conditions and burglary proof without the written consent of the landlord and to restore the property to its original position at the end of the term of the lease.

7. COVENANT TO INSURE

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. Insurance of the demised premises is necessary because the parties have insurable interests in the property.

The insurance clauses should cover the following:

1. Who is to insure
2. Risk to be insured
3. Amount of insurance cover
4. Application of the insurance money

ON WHO IS TO INSURE the following is to be considered:

1. 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 the lessee occupies an exclusively detached premise, then the lessee should insure in his own name

2. Existing obligations, e.g. where party has been involved in insuring the property or has the existing obligation to insure the property then, he should insure the property e.g. where the lessor charges the property for loan & the bank requires him to insure the property against damage or destruction of the property or any part in respect of the insurances shall be laid out of it; then all the money's received be used in repairing or reinstating the property in a good and substantial manner.

REMEDIES FOR BREACH OF COVENANT TO INSURE

1. Damages against the person who ought to insure but fails to do so.
2. Action for forfeiture if expressly provided
3. Application to court by a person interested in the destroyed property to use the insurance money to reinstate the damaged property.

8. OPTION TO RENEW

This is otherwise known as covenant for renewal of the Lease. This is a lessor's covenant made to the lessee that at the expiration the lease, another lease will be created on similar or reviewed terms, rents and covenants. Where it is provided in a lease, it may be enforced against the lessor. The clauses should contain:

1. Time within which the application is to be made (3-6months)
2. Manner of the exercise (in writing)
3. Condition precedent to be fulfilled before exercise of the option (lessee to have paid rent & performed all his covenants in the lease)
4. The term of the new lease.

NOTE:

The solicitor should be careful when drafting the covenant to ensure that no perpetually renewable lease is created.

- Re Hopkins lease

The option to renew may be drafted thus:

The lessor covenants with the lessee that upon the lessee paying thereon and observing all the terms and covenant in the lease, and upon giving (three months) notice before the date of expiration of the present lease, the lessors shall grant him Further term of (five years) at a rent and subject to covenants and terms to be agreed by the lessor and lessee.

9. PROVISO FOR FORFEITURE & RE-ENTRY

This may lead to the suspension or termination of the lease for non-payment of rent or non-observation of covenants of the lease. This operates to bring the lease to an end earlier than it would terminate.

It may be drafted thus:

PROVIDAL ALWAYS that if the tenant commits a breach of any covenants or conditions in the lease or becomes bankrupt, it shall be lawful for the lessor to re-enter the premises and immediately the terms shall absolutely cease and determine.

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.

NB:- in Lagos State, the right to forfeiture and re-entry of leases is implied. 17(b)RTL

Where the lessor has waived his right to re-entry 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

2. By action to possession

FORMAL PARTS OF A LEASE

1. **Commencement:** THIS LEASE OR THIS DEED OF LEASE Where it is a simple tenancy; its commence thus:

THIS TENANCY AGREEMENT

Or

THIS AGREEMENT

Made this _____ day of _____ 20

The date is the day the lease is made. Where it is by deed, the important date is the date of execution.

2. **BETWEEN**

Parties (LESSOR/LANDLORD) AND (LESSEE OR TENANT)

OF

The full names, address and occupation must be stated.

3 **Recitals**

This is not an essential part of a lease though it may be useful in a sub-lease.

4. **Testatum**

WHEREBY the lessor agrees to demise to the lessee

or

IT IS AGREED AS FOLLOWS; the lessor demises to the lessee.

The Testatum contains the operative words and parcel clause.

5. **Parcel clause**

ALL THAT property (describe the property)

6. **Habendum:** TO HOLD UNTO the lessee for the term of years commencing on ... and ending on The phrase "commencing on includes the date named in computation while commencing from excludes the named

date. The Habendum specifies the quantity, quality, duration & commencement of the term of lease.

7. **Reddendum:** YIELDING & PAYING yearly during the term

The sum of

The reddendum defines the amount of rent payable by the lessee, the person must be stated, as well as mode of payment usually in advance.

9. **Covenants:**

10. **Testimonium:** IN WITNESS OF WHICH the parties have set their hand and seals the day and year first written above. This clause connects the parties with the agreement and execution.

11. **Schedule:** It should be inserted where necessary. To describe the property in details.

12. **Execution:** 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.

13. **Attestation:**

In the presence of: Name

Address:

Occupation:

Signature

This contains the witnesses to the lease & their signatures

ETHICAL ISSUES

1. Duty to show competence when drafting the lease agreement R.16 RPC. The documents should correctly and fully reflect the wishes of the parties with special reference to the covenants.
2. Duty not to mix the rent paid to the client with solicitor's money or not to spend such funds belonging to the client R.23(2) RPC.
3. Duty not to frank a document not prepared by the solicitor R.3(1)(a)

SPECIMEN OF A LEASE

THIS LEASE is made the _____ day of _____

BETWEEN MRS ADEMOLA AJAO of No, 4 Oluasegun Crescent, Wuse II, Abuja (“Lessor”) of the one part, **AND MR PAUL LILIKENNA** of No, 16 Latifa Close Garki, Abuja. (Lessee) of the other part.

This lease recites as follows:-

1. The Lessor is the beneficial owner of the property, a duplex with the boys quarters situate at No. 8 Ajagun Estate, Nyanya, Abuja, by virtue of a deed of conveyance dated 21st June, 1995 Registered as No. 4051 page 50 in Volume 1350 at the Abuja Geographic Information system between Chief Balogun Tolu of No. 8 Badagery Way, Gwagwa, Abuja and Mrs. Ademola Ajao.
2. The Lessor desires to lease the property to the lessee for a term of five years and the lessee has agreed to take the lease.

IT IS AGREED AS FOLLOWS

The lessor demises to the lessee ALL THAT premises together with the boys quarters known as No. 8 Ajagun Estate, Nyanya, Abuja, to hold the same to the lessee from the 1st day of February, 2013 for the term of five years to end on 31st January, 2018.

YEILDING AND PAYING the net yearly rent of 1,000,000,00 (One million Naira only) clear of all deductions by yearly payment in advance; the first of such payments to be made on the day of _____ 2013 clear of all deductions. The rent is _____ subject to review _____ in _____ accordance with the provisions obtain in the schedule to the lease.

THE LESSEE COVENANTS with the lessor as follows:

1. To pay the rent reserved in this lease on the day mentioned.
2. To pay all rates, taxes, assessment, charges and out goings now or as may be Imposed later whether payable by the landlord or not.
3. Not to assigned, sublet, charge or otherwise part with possession of the property
Or any part thereof without the consent of the lessor in writing first had and obtain, 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 Air conditioner and burglary proof without the consent of the lessor and restore the property to its original position at the end of the lease.
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 term.
6. To use the property for residential purposes only.

The lessor covenants with the lessee as follows:-

1. The lessee shall have a quiet possession of the property free from disturbance by the lessor or his agents.
2. To insure the property against fire with Merchant Insurance Co. Ltd to the tune of N10,000,000 (Ten million naira) to be paid by the lessee and in the event of the property being damaged, all money received in respect of the insurance shall be put into repairing the premises in a good and substantial manner.
3. Upon the lessee paying the rent and observing all the terms & covenants in the lease and upon 3 months

before the expiration of the present lease., the lessors shall (may) grant him further term of five years at a rent & terms to be agreed by the lessor and the lessee.

PROVIDED ALWAYS that if the rent reserved or any part of it shall be unpaid for twenty-eight days after becoming payable and demand is made for it or if the lessee commits a breach of the covenants in the lease on the lessee becomes bankrupt, it shall be lawful for the lessor to re-enter the premises and immediately the terms shall absolutely cease and determine.

IN WITNESS OF WHICH the parties have set their hands and seals the day and year written above.

Or

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

SIGNED, SEALED AND DELIVERED By the within named lessor.

IN THE PRESENCE OF-

NAME:

ADDRESS:

OCCUPATION:

SIGNATURE:

SIGNED, SEALED AND DELIVERED by the within named lessee

IN THE PRESENCE OF:

NAME:

ADDRESS:

OCCUPATION:

SIGNATURE:

CHAPTER SIX

MORTGAGES AND CHARGES

What is a Mortgage?

A mortgage is the security offered for a loan or money. It is the conveyance or an assignment of land with a provision for redemption on repayment of the loan, the conveyance shall become void or the interest shall be re-conveyed. The complex arrangement of mortgage led an eminent English judge to observe that “No one by light of nature ever understood an English Mortgage of Real Estate” (**Per Lord Macnaugten, Samuel v Jarrah (1904) AC 323 at 326**). The borrower in legal parlance is ‘the Mortgagor’, while the lender, “the Mortgagee”. *Olowu v Miller Bros. Ltd. (1922) 13 NLR 110, Suberu v A.I.S.L. Limited (2007) 10 NWLR (Pt. 1043) 590, Pharmatek Ind. Project Ltd. v Trade Bank Plc (2009) All FWLR (Pt. 495) 1678*.

The Solicitor must advice his client where the purpose of the loan is to purchase property. See *Lee Parker v Izzet No. 2 (1972) 2 All ER 800*. He should also advice on the mortgage institutions available in Nigeria. Example of Mortgage institutions are:

- a. Federal Mortgage Bank
- b. Housing Schemes
- c. Commercial Banks
- d. Private Property Developers
- e. Life Endowment Policy (Insurance Company)

The preferred Mortgage institution is the Federal Mortgage Bank for the following reasons:

- i. It gives up to 60%
- ii. It is usually given for a long term
- iii. It charges a low interest rate
- iv. It has branches spread all over the country

LAWS REGULATING MORTGAGE TRANSACTIONS

1. Land Use Act
2. Property and Conveyancing Law
3. Stamp Duties Act
4. Mortgages and Property Law (Lagos State)
5. Conveyancing Act
6. Land Instruments Registration Law
7. Illiterates Protection Act/Law
8. Companies and Allied Matters Act

MORTGAGOR'S RIGHT OF REDEMPTION

The mortgagor has two types of rights, one legal and the other equitable. There is his legal right to redeem on a specified date and there is also his equitable right, exercisable anytime thereafter. The date is important. Until the legal date for redemption passes (legal due date), the power of sale has not arisen. A purchaser is concerned to see that the power of sale has arisen, he is not concerned to see whether or not it has become exercisable.

As to hazards of inserting a date too far in future, see *Twentieth Century Banking Corporation v Wilkinson (1977) 1 Ch. 99*. Compare with *Administrator General v. Cardoso (1973) All NLR 816*.

CREATION OF MORTGAGE

Writing: An agreement for mortgage of land or an interest in land is within s. **7 Property and Conveyancing Law or s. 5(2) Law Reform (Contracts) Act** and must therefore be evidenced by a note or memorandum in writing signed by the party to be charged or his agent. However, it is better to have the Mortgage document prepared under seal because a mortgage by deed confers on the mortgagee statutory powers of sale and appointment of a receiver (see s. **123 Property and Conveyancing Law, s. 19 CA 1881**).

The validity of a mortgage depends on:

1. The capacity of the Mortgagor and the Mortgagee-consider the case of
 - (a) Infants
 - (b) Persons of unsound mind
 - (c) Statutory corporations and registered companies
 - (d) Trustee
2. The title of the Mortgagor - *Erikitola v Alli* (1941) **16 NLR 56.**
3. Proper documentation and execution. s. 3 **Illiterate Protection Act** – s. 8 **Land Instruments Registration Law**; *Okelola v. Boyle* (1989) **5 NWLR (Pt. 119) 46.**
4. Stamping
5. Requisite Governor's consent
Savannah Bank v Ajilo (1989) **1 NWLR (Pt. 97) 305.**
Awojugbabe Light Industries Ltd. v Chinukwe (1993) **1 NWLR (Pt. 270) 485.**
7. Registration

PREPARATION OF THE MORTGAGE DEED

1. The mortgagee's solicitor prepares the mortgage deed if he is satisfied with the title offered. He needs to make a careful enquiry at the Lands Registry. A mortgage of leasehold (including certificate of occupancy) is done by assignment of the unexpired residue of the term of the lease or by granting a sub-lease to the mortgagee out of the whole term at least one day shorter than the term subject to a provision for re-assignment or cesser. See *S.O.N. Okafor and Sons Ltd. v Nigeria Housing Development Society* (1972) **1 All NLR 396.**

There are two types of mortgages: Legal Mortgage and Equitable Mortgage.

LEGAL MORTGAGE

Creation depends on the jurisdiction or state where the property is located. Legal mortgage is generally by deed and perfection of the instrument. It is advisable to use sub-demise where covenants in the lease are onerous. For in that case, the mortgagee will not become liable on the covenants in the mortgage's lease by privity of estate.

- a. Under the Property and Conveyancing Law jurisdictions, the methods permitted are:
 1. A sub-demise (sub-lease) and term of years absolute, subject to a provision for reversion on redemption.
 2. A charge by deed expressed to be by way of a legal mortgage. (See ss. 108, 109, and 110 **Property and Conveyancing Law 1959**).
 3. Statutory Mortgage/Charge.

Both freehold and leasehold can be charged under the Mortgage and Property Law (MPL) – applicable to the entire Lagos State:

1. Demise
2. Charge by deed expressed to be by way of statutory mortgage
3. Sub-demise.
4. Charge by deed expressed to be by way of legal charge
(see ss. 15 & 16 MPL).

Under the Conveyancing Act jurisdiction applicable to the Northern and Eastern Nigeria.

1. Assignment of the unexpired interest of the mortgagor to the mortgagee subject to a provision for redemption.
2. Sub-demise – see s. 8 **Land Use Act**
3. Statutory Mortgage/Charge.

ADVANTAGES OF SUB-DEMISE

1. Not affected by covenants in the head lease.
2. Successive legal mortgages possible
3. Encourages uniformity in both the PCL and non-PCL States.

DISADVANTAGES OF SUB-DEMISE

1. Unless where the two or any of the remedial devices of declaration of trust or creation of power of attorney exist, the mortgagee, under the Conveyancing Act, has difficulty in transferring legal estate to a third party.
2. Mortgagee not entitled to title document.
3. Mortgagee not entitled to benefits of covenants in the head lease as there is no privity of estate between the head lessor and the mortgagee.

A charge differs from the first two in respect of the remedies it confers. The charge is not an agreement to give a legal mortgage, but a security by which the mortgagee has alien on the property. The mortgagee's lien can be forced by a court order for sale of the property and the proceeds of sale could be used to discharge the lien. See *Ogundiana v Araba (1978) 1 LRN 280 at 287*. Because equity regards as done that which ought to be done, the equitable mortgagee, by agreement to create a legal mortgage can enforce the execution of a legal mortgage by suing in equity for specific performance. If successful, he obtains a legal term of the years and can then pursue all the statutory remedies opened to a legal mortgage. But the remedy of an equitable mortgagee (not by way of charge) is foreclosure and not sale. An order of court for foreclosure terminates the mortgagor's equitable right to redeem and the mortgagee can therefore transfer the legal mortgage.

However, where the memorandum accompanying the deposit is by deed to which Governor's consent has been

obtained and contains either a power of attorney or a declaration of trust in the mortgagee's favour, the mortgagee can convey the estate without the recourse to the court. A declaration of trust is better because it removes any doubts concerning the powers of attorney to dispose of the property after the death of the mortgagor.

EQUITABLE MORTGAGE

Creation is uniform in the entire country, except under the MPL.

Equitable mortgages are created:

1. By mere deposit of title deeds with a clear intention that the deeds should be used or retained as security for the loan. See *British and French Bank Ltd v S.O. Akande (1961) All NLR 849; Olofintuyi v Barclays Bank DCO (1965) NMLR 142; Okuneye v FBN Plc (1996) 6 NWLR (Pt. 457) 749.*
2. By an agreement to create legal mortgage.
3. By deposit of title deed accompanied by an agreement to execute a legal mortgage.
4. Mortgage of an equitable interest
5. A defective legal mortgage; and
6. By mere equitable charge of the mortgagor's property.

In Lagos State see **s. 18 MPL**

1. By deposit of title deeds accompanied by an agreement to create a legal mortgage in favour of the mortgagee;
2. A charge accompanied by agreement to create a legal mortgage; and
3. By assignment of an equitable interest

CONSENT

Where an equitable mortgage has been created in favour of a mortgagee and consent has been obtained, further consent

is not required to a legal mortgage replacing the equitable mortgage (**s. 22 Land Use Act, 1978**). However, the Act does not require consent to a loan agreement, nor does it make unlawful for a loan transaction to be effected without first obtaining the Governor's consent. But a prior consent of the Governor is required for the creation and registration of a legal mortgage or a charge by deed. The actual alienation by mortgage must have the consent of the Governor. *Savannah Bank of Nigeria Limited v Ajilo (1989) 1 NWLR 305; Awojugbagbe v Chinukwe (1995) 4 SCNJ 162.*

Apart from the legislative requirement of consent by the State Governor, consent of landlord or (sublessor) may be required on the mortgage of a leasehold land or certificate of occupancy if there is a widely drawn covenant restricting a tenant or a sub-lessee's right to "assign, let, mortgage or otherwise part with possession of the demised property or any part thereof". A solicitor, mindful of the effect of such covenant, should have amended it by deleting the words 'mortgage' and 'charge' and by inserting a qualification that the provision of the clause does not prohibit an assignment or under-letting by way of mortgage.

COVENANTS BY MORTGAGOR

(a) **Punctual Payment of Interest – *A.I.B. Ltd v Tee Ind. Ltd (2003) 7 NWLR (Pt. 819) 366; Twentieth Century Banking Corp. v Wilkinson (1977) 1 Ch. 99; s. 123 PCL, s. 19 CA, s. 35 MPL.***

A clause useful to insert in the mortgage is a penal clause, whereby the rate of interest payable by them or mortgagor is increased if there is delay in payment. This, of course, cannot be done directly, for if the covenant provides for interest at the rate of 14% but that if it is not paid punctually on the date fixed for payment, then it is to be 15%, the court will interpret it as a penalty and thus will

not enforce it. Rather, it should be couched that the rate of interest shall be 15% per annum, but where the mortgagor pays punctually the rate of 14% will be accepted.

(b) Insurance

The mortgagee, where the mortgage is by deed, has statutory power to insure against fire at any time after the date of the mortgage, and any premium paid becomes a charge on the property and bears interest at the same rate with the principal debt. The statutory provision governing insurance (e.g. s. **130 Property and Conveyancing Law 1959**, s. **23 CA (1881)**) is not entirely satisfactory. (see *Halifax B. S. v Kneighley (1931) 2 KB 238*). Therefore, a mortgagee should consider the alternative of taking out a policy in his own name and that of the mortgagor to the full value of the property and requiring the mortgagor to pay the premium. And if not so paid, but paid by the mortgagee, the amount so paid to be charged on the property.

Where the property is insured at the expense of the mortgagor and the premises are destroyed by fire, the right of the mortgagee to apply the money received from the insurer may be thwarted if the mortgagor were to exercise his right under the provisions of s. **82 Fire Prevention (Metropolis) Act 1772** by which the Insurance Company must at the request of the person interested in the burnt building, cause the insurance money to be expended in rebuilding or repairing, etc. See s. **67 Insurance Act**. A way out is to make the mortgagor covenant not to exercise those rights expressly. Example, “**the mortgagor covenants with the mortgagee not to exercise the right given by s. 67 of the Insurance Act and to give an irrevocable power of attorney to the policy monies, to settle and compromise all claims in relation to the policy**”. (cf. *Jia Enterprises Limited v British*

Commonwealth Insurance Co. Ltd. (1962) 1 All NLR (Pt. 2) 363.

(c) Provisions for Borrower not to redeem for term certain

When providing for redemption of the mortgage, it should be recalled that the right to redeem cannot be “clogged” except in the case of company debenture (See **s. 171 Companies and Allied Matters Act**). A mortgage cannot be made totally irredeemable, and if the right to redeem is for a term certain, the term must not be unduly long, even if there is a corresponding provision preventing the mortgagee from calling in his money. Each case depends on its facts. A term of 10 years was not unfair in **Multi Service Banking Limited v Merden (1979) Ch. 84.**

(d) Consolidation

This is the right of a mortgagee who has two or more mortgages on different properties from the same mortgagor to refuse to permit him to redeem one without redeeming the others. There can be no consolidation. **S. 115 PCL, s. 17 CA, s. 28 MPL** restrict/prohibit consolidation of mortgages, unless expressly negative or agreed by the parties.

**POWERS OF SALE, INSURANCE AND
APPOINTMENT OF A RECEIVER**

These powers are vested in a mortgagee by operation of law whenever the mortgage is by deed (see ss. **123, 125 & 130 Property and Conveyancing Law or s. 19 CA 1881**). Therefore, the insertion of an express power of sale, etc, may not be necessary where the traditional form is used: (for the simpler form, see Kelly 15th ed. Form 19, at page 488).

LEASING BY THE MORTGAGOR

A mortgagor or mortgagee in possession is given right to grant certain leases, **s. 121 PCL or s. 18 CA 1881**. It is the practice to restrict the granting of leases by a mortgagor by requiring the mortgagee's consent. For example, "the mortgagor covenants with the mortgagee not to exercise the mortgagor's power of leasing given by the provisions of s. 131 PCL, s. 33 MPL or s. 8 CA 1881, except with the consent in writing of the mortgagee". Where the mortgagee wishes to retain a substantial degree of control over the security, he may, also consider the need for a provision, preventing the granting of licences (see *Rhodes v Dalby* (1971) 2 All ER 1144; (1971) 1 WLR 1325.

ATTORNEY CLAUSES

Sometimes, the mortgage deed contains an Attorney clause, by which the mortgagor expressly constitutes himself a tenant of the mortgagee at a nominal rent, the mortgagee being given power to determine the tenancy so created at any time without notice. The clause is of little, if any value and conveyancers should avoid its use. It is considered undesirable by Danckwerts), *in Steyning and Little Champtan RS v Wilson* (1951) Ch. 1018 at 1020. See also ss. 28 & 51 Land Use Act.

RIGHTS OF MORTGAGEE

- i. Action in court (See *Ezomo v NNB Plc* (2007) All FWLR (Pt. 368) 1032.
- ii. Taking possession – **s. 123 PCL, s. 19 CA, s. 35 MPL**.
- iii. Appointment of a receiver – *Awojugbagbe Light Ind v Chinukwe* (1995) 4 NWLR (Pt. 390) 379. *West African Breweries Ltd. v Savannah Ventures Ltd.* (2002) 5 SCNJ 269; See s. 131 PCL, s. 24 CA, s. 43 MPL.
- iv. Power of sale. See **s. 125 PCL, s. 20 CA, s. 37 MPL; Visoni v NBN** (1975) 1 NMLR 8; *Taiwo v*

Adegboro & Anor (2011) 11 NWLR (Pt. 1259) 57, s 127 PCL, s. 21(3) CA, s. 39 MPL.

- v. Foreclosure – see **s. 21 Land Use Act.**
- Stamping *ad valorem* (payment of stamp duties) of the deed of mortgage (see S. Stamp Duties Act)
- Governor's consent (See ss. 21 & 22 Land Use Act).

UPSTAMPING

A situation where same mortgagor uses the same property earlier used as security to secure additional loan from the same mortgagee. Fresh stamping to reflect the new or additional consideration (loan) is required.

NOTE the subsequent legal mortgage over the same property by the same parties will not require the consent of the Governor. (*Owoniboys Technical Services Ltd v Union Bank of Nigeria Plc (2003) 15 NWLR (Pt. 844) 545*. Upstamping does not require another registration so long as the first mortgage was registered – *AIB Ltd v Lee and Tee Ind Ltd.* (Supra).

MORTGAGE BY COMPANIES

(a) A mortgage of land by a company is by nomenclature a debenture; See ***Knightsbridge Estate Trust Ltd v Bryne (1940) AC 613.***

(b) Power to Mortgage

Every trading company, unless prohibited by the memorandum or articles of association, has implied power to borrow money for the purposes of its business, and to give security for the loan by creating a mortgage or charge of its property. See ***General Auction Estate Company v Smith (1891) 3 Ch 432.***

(c) Registration at Companies Registry under section 197 of the Companies and Allied Matters Act, Cap C20 LFN, 2004 (CAMA) within 90 days is mandatory, because if not registered, it is invalid against subsequent Creditor or

Receiver. After the period of 90 days, it cannot be accepted for registration without an order of the court. S. 205 CAMA.

REGISTRATION OF DEED OF MORTGAGE

Registration under the State Land Instruments Registration Law. The registration after stamping must be done in the lands registry, in respect of dealing with land situated in any particular state. See *Onashile v Barclays Bank DCO (1963) 1 All NLR 310*.

**For Form and content of a Debenture. See Precedent 55 in Kelly (15th ed.) at page 265. Similar to that of mortgage, it contains things like: -

- (a) A promise to pay the principal on a certain date or on demand or the occurrence of the events therein specified.
- (b) A promise to pay interest in the meantime.
- (c) A charge on company's assets.
- (d) A provision that the debenture is issued with the benefits of certain conditions endorsed thereon.

Discharge of Mortgages

This depends on mode of creation.

In the CA states:

- By Deed of discharge/deed of release/deed of surrender.

In the PCL states:

- By a simple receipt (statutory receipt) – **S. 135(4) PCL**
- By reassignment.
- By surrender
- By release of transfer **S. 135 (4) PCL.**

Under the MPL (Lagos);

- Statutory receipt – **s. 52 MPL**
- reconveyance/surrender- **s. 30 MPL.**

Equitable mortgage:

- By a simple receipt of payment under hand (where made to the mortgagee's solicitor, it should be by deed).

For a company:

- Certificate of discharge and filling of memorandum of satisfaction in the register of charges (Form CAC 9) at the Corporate Affairs Commission. See s. 204 CAMA.

SALE BY MORTGAGEE

(1.) Statute gives a mortgagee whose mortgage (whether legal or equitable) is by deed and contains no contrary intention a power of sale if the legal date for redemption is passed ("the mortgage money is due"). A purchaser has no duty to make enquiries from the mortgagor if the mortgagee's power of sale has arisen. But before the power can be exercised one of the three conditions laid down by s. 125 Property and Conveyancing Law or s. 20 CA 1881 must be satisfied.

- (a) Notice requiring payment has been served, default for three months after this notice; or
- (b) Some interest under the mortgage is two months or more in arrears; or
- (c) There has been a breach of some provision contained in the CA 1881.

(2.) Form of Sale:

The sale may be by private treaty or through a licensed auctioneer or by tender. The mortgagee must take reasonable steps to obtain the proper market value and the sale must be a sale, e.g. the mortgagee may not sell to himself even indirectly, *Williams v Wellingborough Council (1975)* 1 WLR 1327, *Eka-eteh v N.H. D.S. (1973) 6 SC 183*.

(3.) Application of Proceeds of Sale

The mortgagee has a duty to deliver to the mortgagor the balance of the proceeds of sale of mortgaged property, after deducting the principal money, interest and expenses. If he fails to discharge this duty, the mortgagor may recover the balance by an action for money had been received (*Visioni Limited v National Bank of Nigeria Limited* (1975) 1 NMLR 8.

(4) Effect of Sale

When a contract for sale is entered into, the power of sale is exercised and so long as the contract subsists, the equity of redemption is lost (*Lord Warning v London and Manchester Assurance Co. Ltd* (1935) Ch. 310). When the sale is completed, the entire legal estate (term of years) vested in the mortgagor passes to the purchaser (See s. 126 PCL or s. 21 CA 1881; *J. S. Kotoye v CBN* (1972) 20 FNLR. 41.

(5.) Sale by Mortgagor

In the absence of express provision to the contrary, a mortgagor has the right to sell the legal title to the mortgaged property, but the purchaser will take subject to the right of the mortgagee (see *Olofuntuyi v Barclays Bank D.C.O. Ltd* (1965) NMLR 142, *Barclays Bank v Ashiru* (1978) 1 LRN 266 at 275.

DISCHARGE OF MORTGAGE

(1) S. 135 PLC Provides that a mortgage may be discharged by a receipt under hand endorsed or written at the foot or annexed to the mortgage deed. The receipt must state the name of the persons who pay the money, it must be executed by the chargee or the person in whom the mortgage is vested. The receipt operates as transfer where the money is paid by person not entitled to equity of redemption.

Alternatively, the discharge can be effected by a separate deed e.g. a reassignment, surrender, release of transfers (S. 135(4)). If the property is being sold to a purchaser whose money is to be used to repay a subsisting mortgage, it is better to make the mortgagee a party to the conveyance and insert a clause to the effect that he has agreed to release the property conveyed, as indicated in the precedent (See also the case of *Ogundiana v Araba* (1978) 1 LRN 280 at 287.

(2) Discharge by court: See s. 75 **Property and Conveyancing Law 1959**, *Queen v The Minister of Land and Survey, Ex parte Bank of the North Ltd* (1963) NNLR 58.

CHAPTER SEVEN

AN OVERVIEW OF THE LAND REGISTRATION LAW (LRL).2014 (LAGOS)

PURPOSE OF THE LAW

The main purpose of the Land Registration Law, 2014(Lagos) is to harmonize the system of registration of titles and the systems of registration of land instruments and transactions in Lagos State and bring the entire Lagos State under one uniform system. The law expressly repeals all the laws existing on the subject, including the Registration of Titles Law Cap RI, laws of Lagos State 2003, Land Instruments Registration Law, Lagos State Cap 58 Laws of Lagos State 2003, Electronic Management Systems Law, 2007 and Registration of Titles Law & Registration of titles (Appeal) Rules Cap R4, laws of Lagos State 2003; and replaced them with one uniform system of registration, thereby erasing the dichotomy that had existed between the system of registration of instrument under the Land Instruments Registration Law (LIRL), Lagos and the system of registration of titles under the Registration of Titles Law (LIRL), Lagos. The law tries to strike a balance between the two systems.

A look at the definition given to the words, “**document**”, “**holder**”, “**registration**”, “registered land”, “**Registrar**”, in the interpretation section of the law, reveals that the term “**registration**”, under the law is used to include any one or more of the following.

- (a) “registration of documents affecting Land;”
- (b) “registration of holders of land;”
- (c) “registration of titles to land”
- (d) “registration of dealings/transactions in land; and
- (e) “registration of land;”

While the short title of the law tends to suggest that it is all about “**land registration**”, a look at the long title would reveal that the object of the law is to make provision for the “registration of title to land in Lagos State”.

Besides, section 4(1) of the Law provides that the Head of the Land Registry Division of the Ministry of Lands shall be referred to as “The Registrar of Titles. “On the other hand, it would appear that the Law is also concerned with registration of “documents of interest or title to land in Lagos State” as shown in section 1 of the law, or “registration of transactions” relating to land, as is seen in section 3 (4) (a) which provides for a “register of all transactions relating to transfer of interest in land”. See also section 17, which talks about registration of “land documents” and section 26 which deals with “registration of documents”.

In view of the above, it is suggested that the purpose of the law could be summarized thus: a law for the synchronization of the system of registration of titles to land, registration of transactions and dealings relating to land in Lagos State. It is neither entirely about registration of titles, nor entirely about registration of documents or transactions. It incorporates all the systems in one single document, and thus puts in place uniform procedures, processes and systems applicable to all parts of the State.

Unlike the repealed ERTL., “first registration” under LRL refers to registration of any dealing with the land or any sub lease or mortgage affecting the whole or any part of the land (excluding a document having effect only as caveat or caution).

DOCUMENTS TO BE KEPT AND MAINTAINED IN THE LANDS REGISTRY

1. Registration of Transactions relating to transfer of interest in land

2. Land Registry Map--- showing the boundaries of every parcel of land that is registered under the law. Submission of a survey plan is a condition precedent to registration of any document under the law ---- S.12(3).
3. Parcel Files is like a register of the land parcels, usually as shown in the survey plan see S. 12(4)
4. The day list all applications to their registry shall be recorded in this document and numbered consecutively.
5. Mutation record containing changes made by the registration of titles to the land registry map kept by the Registrar. The Registrar is empowered to make necessary alteration on any boundary shown on the map. Ss. 1 and 13. But note that the altered or new parcels shall still vest in the person or persons in whose names they are registered (i.e. the registered holders). See s.15 (2).
6. Nominal index – contains names of all land holders in the State.
7. Register of Power of Attorney ---- indication that Power of Attorney is registrable instrument in the State.

THE LAND INFORMATION MANAGEMENT SYSTEM (LIMS)

Every land document must be registered using the UMS procedure. Land documents already registered before the commencement of the LRL must be registered using the UMS. The following registers shall be like kept in the registry for purpose of registration by the LIMS.

1. Daylist;
2. Register of Mortgages;
3. Register of caution; and

4. Any other register as the Registrar may prescribe. Each of these registers must contain the names and addresses of the parties to the affected transaction, and of the property. See S.20. All registers kept in the Land Registry before the commencement of the LRL shall now form part of their registers in the LIMS. (S.19)(3). A document produced electronically from the LIMS is admissible in court provided such document qualifies as document under any relevant law See S.24. An application for the CTC of any document kept in the Registry may be made by completing the prescribe Form 5. See s.21(1). On being issued with a letter of Accreditation after the payment of prescribe fees, any of the following person or organisations may log on to the LIMS to conduct searches or to download information (S.25).
 1. Law firms
 2. Financial institutions
 3. Corporate Organisations and
 4. Registered Estate Surveyors & Valuers.

PROCEDURE FOR CONDUCTING A SEARCH UNDER THE LIMS

1. Submission of an application in the prescribed form to the Registrar of titles. The prescribed form is Form 3, contained in Schedule 1 of the Law.
2. Application may be submitted online after the applicant has made the relevant payments by a credit Card or by other permissible form of electronic payment. See s.22(2) and(4).
3. Consideration of application and conduct of search by or on the orders of the Registrar.

4. The Registrar shall issue an official search report, as is in Form 4, contained in schedule 1 to this Law.
1. The time for application for registration should be within 60 days after the grant of Governor's consent, where applicable;
2. The prescribed Forms for registration of interests covered by Certificate of Occupancy or Deed are contained in Forms 1 and 2 in Schedule 1 of the Law.
3. The Registrar shall not register any assignment or sub lease unless the land has been surveyed to the satisfaction of the Surveyor-General (S.101)

4. Interests, Lands, Transactions and Documents requiring registration include:

1. Documents of grants, subleases (excluding sublease below three years), and all Power Attorney;
2. Any succession to land under will or intestacy, on production of the Grant of Probated or Letters of Administration; see also section 31(b)
3. Any revocations, acquisition and excision of land pursuant to the Land Use Act - This is the responsibility of the Director of Land Services in the State.
4. Trusts, rights or interests acquired by operation law and overriding interests S.31.
5. Purchaser of a mortgage property after a foreclosure or in exercise of mortgagee's power of sale. Note that in such a case, production of the Land and Certificate for endorsement, as required under section 36 (1) of the law, is unnecessary S. 36(3).
6. Mortgages created by a holder of land, sublease or mortgage. To be registered as an

- encumbrance, and shall have effect only as a security S.49.
7. Judgment or writ of execution issued by any court in respect of any land, sublease, or mortgage in Lagos State. Note that the Registrars shall not accept for registration any document in respect of such land, sublease or mortgage if the document is inconsistent with the judgment or writ already registered. While registration of a judgment does not cure any defect in that judgment, non-registration of the same would not affect its validity or effect See.ss 58, 59. See also section 60 for cancellation of registered judgments.
 8. Subject to obtaining Governor's consent, certificate of purchase is issued to a purchaser pursuant to the provisions of the sheriff and Civil process law.S.61
 9. Every transfer of land, sublease or mortgage by Deed. Transactions are not complete until registered. Note that transfer of part of a registered land shall be allowed unless the holder has first sub divided the land, after which the new interest shall then be registered See.ss 62 and 63 registration of restriction is done for the purpose of protecting unregistered interests in land or mortgage created here after registration by prohibition subsequent registration of any disposition or change of holding affecting the land or mortgage. See.s 64
10. Registration of CAUTION/CAVEAT A person having interest in an unregistered land that entitles

the person to object to any disposition of the land being made without the person's consent may apply to the registrar to registrar CAUTION to the effect that (the CAUTIONER) is entitled to notice of any application for registration in respect of the land 69(2). But where notice is served on the Cautioner or caveator and he or she fails or respond within 14 days, the Registrar may go ahead with registration.

5. Registration of any interest shall be sufficient evidence of holding such interest to the affected land, together with all accompanying rights, privileges and appurtenances, except the right to mineral resources or mineral oils.

6. Mandatory and optional registration

Registration is optional in the case of an original land holder. Thus, a person who has power to assign or is entitled to any land within the state may apply to be registered as the holder of the land. Registration is mandatory in the case of any grant or sublease of State land that exceeds five years. Thus, every sublease or grant by a land holder must be registered. Until so registered and the seal of the land registry impress upon the document or documents evidencing such grants or sublease, such document shall not be admissible in court. The registrar may by notice require the registration of a registrable document. Registration fees and any additional fees payable in respect of such documents shall become payable as soon as the registrar has given the notice, whether or not the notice is compiled by the person who has the authority to present a registrable document for registration, any registration and other relevant fees payable in respect of such documents would become due and payable whether or

not such document are presented for registration. Any person upon whom such notice is given must comply within one month of service of the notice. There is penalty for noncompliance. Every mortgage or sublease must be registered within six months from the date on which consent is given to such transaction; penalty applies also for late registration of sublease and mortgages.

7. REFUSAL OF REGISTRATION:

The registrar may refuse registration in any of the following (S.7and S.9);

1. Power of attorney relating to transfer of land on which the consent of the Governor has not been endorsed;
 2. Documents declared void or in respect of which registration is prohibited under the law; and
 3. Documents that have not complied with the provisions of the law.
8. Evidence of every document registered shall be sealed and marked by the registrar as evidence of such registration. See.s 6 & 11.

9. EFFECT OF REGISTRATION/NON-REGISTRATION

1. Registered document (or CTC of the same issued by or on the authority of the registrar) shall be admissible in any court to prove that the interest/transaction is so registered ss 6,24,30,108 and 109(2).
2. Any document or instrument registrable under the law, but is not registered shall not be admissible in court as affecting the land to which it relates section 30.

3. Late registration attracts fine Section 28 -
 4. Registration governs priority Section 29 -
 5. Transactions remains inchoate i.e. no interest is transferred or created unless and until the relevant documents is registered Section 40
 6. The registrar shall produce or cause to be produced, free of charge, any register or file of registered document in his office or CTC of same on subpoena or order of any court (Section 108).
10. Documents submitted for registration shall be registered the same day or the next working day. Section 29(2); But note that the registrar reserves the right to refuse to proceed with any matter (including registration) until the appropriate fees and rates have been paid (subsection.113 (4)]&118]. For determination of the appropriate fees, see section 113(1)to(3).
11. On completion of Registration, the registrar shall issue to the registered holder of a Land Certificate which shall be a *prima facie* evidence of matters contained in land See S.35. Such registered holder shall produce the certificate to the Registrar for endorsement each time any mortgage or further disposition is made in respect of the land (section 36(1)). And at any time rectification is ordered in respect of the land ((section 99 (5).)The registrar shall upon request give a CTC of any book, register or filed document ((section 109).
12. The register shall constitute conclusive evidence of all entries in it, and extract of the contents of the register may, with leave of the court, be given as evidence in the court. Such extract or certified copy shall be *prima facie* evidence of the original entry in the registry. However, no

such leave may be granted where secondary evidence would suffice. S.39.

CREATION & REGISTRATION OF SUBLEASE SS 42-48

The holder of land may create as sublease for a fixed term, or subject to the happening of a contingency, and such must be registered where the term is five (5)years or above, subject to obtaining Governor's consent. S. (43). No sublease may be created in respect of land property subject to mortgage except with prior written consent of the mortgagee; similarly, no sublease which is subject to mortgage or under lease may be surrendered except with the written consent of the mortgagee or under lessee as the case may be. Where a sublease is created to commence on a future date, such dates shall not exceed twenty-one days from the date of creation of the sublease, else the document creating the sublease is void. The agreements, conditions and terms contained in any sublease may be varied, and when so varied, the documents shall be submitted for registration before the expiration of the current sublease.

MORTGAGES

Under section 49(1) and 54, mortgage or charges created in respect of property or land within Lagos State are registrable under the law. Further, creation of subsequent mortgages is permitted, provided that The exercise of power of sales by the subsequent mortgages shall be subject to the rights of the prior mortgagee Section 50. Consolidation of mortgages is permitted; the right of consolidations shall take effect only after the registration of the proposed consolidation by the holder of the mortgage Section 52. A mortgage shall be discharged by registration in the Registry of a Deed of release (Section 55 and 56)

POWER OF ATTORNEY

A Power of Attorney authorizing any person to deal with any land, sublease or mortgage must be delivered to the Registrar for registration. Notice of revocation of any such registered Power of Attorney must be given to the Registrar, otherwise the Power of Attorney shall be deemed to be subsisting and as such, no disposition in purported exercise of such Power of Attorney to a person who was ignorant of such Power has been revoked. aforesaid shall not apply to an irrevocable Power of Attorney. Revocation of a Power of Attorney shall not affect any payment made or steps taken in good faith pursuant to the Power of Attorney if at the date of making the payment or taking the step, the Power of Attorney had been revoked without the knowledge of the donee.

There is penalty of a fine of N100,000 for noncompliance with provisions of section 56.

Governor's consent and registration are mandatory for an irrevocable Power of Attorney relating to any land in Lagos State, and the Registrar shall not accept such Power of Attorney for registration unless the consent to the Governor has been obtained in respect of the same.

A document (of transfer such as a deed of Assignment, a deed of legal mortgage or a deed of sublease, etc) executed by an Attorney shall not be accepted for registration unless there is an irrevocable Power of Attorney authorizing such attorney to execute the said documents and the Power of Attorney has been duly registered or filed in the registered or filed in the registry (S.94).

ENCUMBRANCES & RESTRICTIONS ON POWER OF A REGISTERED HOLDER TO DISPOSE OF LAND

The interest of registered holder shall be indefeasible. Accordingly, a registered holder who is a purchaser for value is not affected by an express or implied notice of any unregistered interest of a previous registered holder. Besides such registered purchaser for value is not required to inquire whether the terms of any caution or restriction have been complied with, where such caution no restriction relates to a time prior to his registration (S.111).

However, the interest of a registration holder is subject the following:

1. Registered encumbrances, conditions or restrictions;
2. Liabilities, rights or interest not requiring registration under this law;
3. Interest prior to the transfer
4. The law relating to bankruptcy;
5. Provisions relating to the winding up of companies;
6. Overriding interests. See S. 66 for the list of interests that make up overriding interests.
7. Restive covenant affecting the land not being a covenant made between a sub-lessor and sub-lessee), in respect of which NOTICE has been registered in accordance with the provision of the law, unless such restriction covenant has been cancelled or released. See S. 67 and 68.
8. Prohibition or restriction of transfer or disposal on ground of fraud or improper dealing or for other sufficient causes. S.73.
9. Prohibition and restriction on dealings on land or any interest therein by persons under 18 years of age see. S.93. And where any document is already registered in the name of a minor, (the registrar)

shall place a restriction on such document or transaction as he may deem fit. For the purpose of dealing in his land or interest in it, a minor, idiot, lunatic, or a person under any other form of disability is to be represented by his/her Guardian duly appointed for that purpose, and such Guardian shall produce evidence of such appointment otherwise the documents executed shall not be accepted for registration (S. 94(3) &(4) See also s.95

FORMS & EXECUTION OF REGISTRABLE DOCUMENTS

A. Forms of Documents s74.

1. Any documents for registration must be presented in duplicate copies consisting of the original and a true copy. The original copy shall be returned to the holder on completion of registration.
 - a. A document for registration must state the consideration, and the part of it that has been paid. And where consideration is monetary, the amount must be stated in both words and figure;
 - b. The following constitutes an offence under the law
 1. Making of false statements in a registrable document,
 2. Destruction counterfeiting of register, book, file document or part of it. Every document shall be executed by all parties, and shall be deemed to have been executed in any of the following instances.

(S. 76(1) :

B. Forms of Execution of Documents

1. If signed by a natural person.
2. In the case of a corporation aggregate, if sealed with the seal of the corporation and attested by its clerk, secretary, director or other office;
3. In the case of a corporation sole, if signed and the official seal affixed;
4. In the case of a corporation not require by law to have a common seal if signed by persons so authorized by law or the statute of the corporation or, in the absence of any such express provision, by two or more persons duly appointed for that purpose by the corporation;
5. Documents require by this law to be stamped but which are not so stamped shall not be accepted for registration unless otherwise exempted under this law from such stamping (s.77).
6. For the purpose of registration, a document includes all certificates and matters endorsed on or attached to it (s.75).

MANDATORY ATTESTATION BY MAGISTRATE, JP, JUDGE, NOTARY PUBLIC OR COMMISSIONER FOR OATHS S 76 (2) & (3).

A document executed outside Nigeria shall not be registered unless it has attached to it a certificate showing that it was attested by a Nigerian or foreign judge, magistrate, justice of the peace or notary public.

Where a grantor is an illiterate, the document of transfer must be attested by judge, magistrate, justice of the peace or notary public or Commissioner for Oaths. (See S.80 to 93)

REGISTRATION OF FAMILY REPRESENTATIVES FOR THE PURPOSE OF DEALINGS ON FAMILY PROPERTY SS 89-92.

Where land is registered in the name of a particular family name, without any representatives, the family shall hold a family meeting and appoint more than 10 (ten) members of the family to represent the family. The appointment shall be published in at least one national newspaper, and calling for objects if any. Where no object is received by the Registrar within 21 days from the date of such publication, the registrar shall enter the names of such representatives in the register. But where an objection is received from a member of the affected family, the registrar shall not enter the names of their representatives in the list unless he has received a retraction of the objection or account order directing him (the registrar) to enter the names of their representatives in the register. The registrar shall not entertain any application for registration of a disposition of family property where the number of representative is beyond ten (10) persons (S.89 (5). When registered, the family representatives shall have EXCLUSIVE power to act for the family in respect of family land. (S.91). A disposition of family property shall not be valid if it is executed by a number of family representatives less than those whose names appear on the register (S.92).

PROVISIONS RELATING TO AMMENDMENT TO THE REGISTER OF FAMILY REPRESENTATIVES

1. The registrar shall delete name of a family representative from the register where there is proof that a family representative whose name is on the register has died: or
2. The registrar shall delete the name of a family representative from the register if the registrar is satisfied that the family representative is unable to

- act by reason of mental or physical incapacity, absence or imprisonment.
3. On the application of a family member, the registrar may insert additional family representatives where it consist of less than 10 members;
 4. On receipt of a CTC of a court order to that effect, the Registrar shall delete or insert additional family representatives to the register.
 5. Addition or removal of the name of family representatives from the register shall not limit the powers of the remaining family representatives to act on behalf of the family.
 6. A sole representative duly appointed shall have powers to act for the family.

RECTIFICATION OF THE REGISTER SS96-100

The registrar may, with the consent of all affected persons, or upon an application by a registered owner or owners or a registered interest, amends the contents of the register or correct any error or errors therein. Rectification may be done notwithstanding that it may affect any land, rights, mortgage or interest acquired or protected by registration or entry in the register [S.99(3)]. For the purpose of any rectification, the land certificate and any mortgage certificate which may be affected must be delivered to the registrar [S.99(5)].

Grounds for Rectification

1. Where a court has decided that a person other than the registered holder is entitled to an interest in the registered land;
2. Where the court makes an order for rectification;
3. Where all affected persons consent to rectification;
4. Where entry in the register is obtained by fraud;

5. Where two or more persons are mistakenly registered as holders of the same land or mortgage;
6. Where any person appears to have acquired land or interest under sections 11 and 51 of this law--- i.e., concealment of registration or consolidation of mortgages.
7. In any other justifiable case for reasons of error or omission ,etc.
8. Where the title of the registered holder has been extinguished under the limitation law. And in such a case, the holder shall not be entitled to any compensation.
9. Rectification for the purpose of giving effect to an overriding interest, which may affect the interest of a registered holder in possession, may only be carried out where it is shown that[S.99(3)]:
 1. The registered holder or his privy is privy to, or has by his ac tor neglect caused or contributed to, the fraud, mistake or omission in consequence of which such rectification is sought [S.99(3(a)&(6)];
 2. The disposition to the holder is void or the disposition to the person through whom the holder claims is void; but the second leg of this paragraph does not apply where the disposition to such person(through whom the claims) is for valuable consideration;
 3. On just and equitable grounds;
 4. Pursuant to a court order.

MISCELLANEOUS

- 1. Matters a purchaser or his solicitor shall rely on for investigation of title**

- a. Inspection of the register of title or of a certified true copy of extract from the register;
- b. Statutory declaration as to the existence or otherwise of encumbrances; and
- c. evidence of registered encumbrances

2. Role of the Court in Resolving dispute under the LRL ss 103 – 108, 116 & 120.

The chief judge of the state shall make rules of practice and procedure to regulate proceedings before the registrar and appeals from decisions of the Registrar. Note that the Magistrate Court Rules shall apply pending when the chief judge makes rules for proceedings before the registrar. The commissioner is empowered to make regulations in respect of incidental matters. Where the registrar is in doubt or encounters any difficulty in relation to any question of law or fact, he may apply to the court for direction. He may also state a case for the opinion of the court where any question arises in the performance of his duties or functions. If any one fails to comply with an order of the registrar, the registrar may refer the matter to the court to enforce compliance. Any person aggrieved by a decision of the registrar may give notice of appeal to the registrar in the prescribed form of his intention to appeal against such decision. On receipt of such notice of appeal, the registrar shall prepare a brief statement of the question in issue to the court, the appellant and other interested person, and on the hearing of such appeal, a party may appear and be heard in person or by a legal practitioner. After hearing the appeal, the court may make any order as it may deem fit and all parties shall be bound by such order. A notice that an appeal is pending shall be entered against the entry in the register affected by the appeal. But such appeal shall not affect any dealing for value registered prior to the

delivery of the notice of appeal to the registrar. These provisions shall apply to appeals to the court of appeal in the same manner as they apply to an appeal to the high court. Note the power of the registrar to order production of relevant titled documents (S.110).

3. Acquisition of Title by Adverse Possession s 112.

The holding of land may be acquired by adverse possession against the State after a period of (20) years and in any other case, after a period of (12) years. After the expiration of the period (12 or 20 years as the case may be), the person acquiring such interest shall give notice of such acquisition to the registrar, and thereafter apply to the court for an order directing him to be registered as the holder of such land\interest. But note that a person (i.e., an agent) who is in possession on behalf of another person (a principal) shall be deemed to be holding the possession of such other person.

4. Legal Representation-

Any application required to be signed by any person may be signed or made on that person's behalf by a legal practitioner.

5. Immunity of Officers of the Lands Registry-

Officers in the lands registry and other officers engaged for the purpose of the law are immured from civil actions for acts or omissions made in good faith and in exercise of their statutory powers(S.117).

For offences and penalties, see S.199.

For repeals, see section 122 among the laws repealed under section 122 of LRL, 2014 are the registration of titles law cap R1, Laws of Lagos State 2003, Land Instrument Registration Law, Lagos Cap L58 Laws of Lagos State, 2003, Electronic Management Systems Law 2007 and

RTL (Appeal) Rules Cap R4, LLS 2003. Meanwhile, note that by virtue of the provisions of s 121, any reference to any title made under the RTL Cap R 1 LLS 2003, Land Instrument Registration Law, Lagos Cap L58 LLS 2003, Electronic Management Systems Law 2007 and RTL (Appeal) Rules Cap R4, LLS 2003. shall be applicable under the LRL.

6. Forms & Precedents:

- a.** LRL Form 1 - application Form for registration of title to land
- b.** LRL Form 2 - application form for registration of land covered by deed or certificate of occupancy
- c.** LRL Form 3 - application for conducting searches
- d.** LRL Form 4 -Lagos State Land Registry Electronic Search Report
- e.** LRL Form 5 - application for obtaining CTC
- f.** LRL Form 6 - application form for registration of caution
- g.** LRL Form 7 - application form for withdrawal of caution

CHAPTER EIGHT

PROPERTY BILLINGS & LEGAL FRAMEWORK

GOVERNING REMUNERATION FOR LAND MATTERS

1. Legal Practitioners Act: S. 15 LPA; S 19(3)

SECTIONS UNDER LPA

- ▶ S 19(3) provides that, “The remuneration provisions shall apply to a firm consisting of legal practitioners in partnership as they apply to a legal practitioner.”
 - ▶ S 15 empowers the Legal Practitioners Remuneration Committee to make orders for fees of LP
 - ▶ The Committee passed the Legal Practitioners (Remuneration for Legal Documentation and Other Land Matters) Order 1991. The Law consists of a schedule containing 3 scales.
2. The Legal Practitioners(Remunerationfor Legal Documentation and Other Land Matters) Order 1991 made pursuant to S 15 LPA consisting of a schedule containing 3 scales:
3. Rules of Professional Conduct: Rule 3; 48(1) & (2); Rule 49; Rule 52 (1) & (2); 53
4. Judicial Authorities

TYPES OF FEES

- ▶ Fixed Fee
- ▶ Appearance Fee
- ▶ Hourly Rate Fees
- ▶ Percentage Fees
- ▶ Contingent Fee
- ▶ Scale Fees

FIXED

- ▶ Firms may set fixed fees for a specified class of work. Usually for non contentious work and drafting.
- ▶ Note: where a firm has a general retainership to represent a firm in contentious issues, he cannot set a fixed fee. It would be a breach of Rule 49 RPC which provides that counsel must be separately instructed and remunerated by fees for each piece of work. It is therefore not permissible for counsel to undertake to represent any person, authority or corporation in all their court work for a fixed annual salary. For each case he must have a separate fee.

APPEARANCE

- ▶ Usually charged for each appearance in court.
- ▶ Covers transport and incidental matters.
- ▶ Rate depends on the status of the lawyer and jurisdiction of practice.

HOURLY RATE

- ▶ Charged on an hourly basis and depends on amount of hours spent on a job.
- ▶ Telephone calls; meetings; briefings; drafting, etc.

PERCENTAGE

- ▶ Usually charged as a percentage of the value involved in a transaction. Percentage varies from 5-10%

CONTIGENCY

Mostly a portion of the amount recovered in a transaction and usually based on success in the matter.

A lawyer may enter into a contract with his client for a contingent fee in respect of a civil matter undertaken for a client whether contentious or non-contentious: provided that –

- a. The contract is reasonable in all the circumstances of the case including the risk and uncertainty of the compensation;
- b. The contract is not –
 - i. Vitiated by fraud, mistake or undue influence; or
 - ii. Contrary to public policy; and
- c. If the employment involved litigation, it is reasonably obvious that there is a bonafide cause of action.
- d. A lawyer shall not enter into an arrangement to charge or collect, a contingent fee for representing a defendant in a criminal case.

CONSULTANCY

- ▶ First fee charged for consultancy services. Usually charged after the clients' interview and counselling. It however varies from firm to firm.

SCALE FEES

- ▶ Scale fees is calculated according to the Scale (I, II & III) set out in the Legal Practitioners (Remuneration for Legal Documentation and Other Land Matters) Order 1991

SCALE I

Deals with:

- ▶ Sales,
 - ▶ Purchases; and Mortgages
- Rules applicable

SCALE 1

Scale of Charges on Sales, Purchases, and Mortgages and Rules Applicable thereto

PART I

(1) Transaction Conducted	(2) For the first ₦1,000 per ₦100 ₦	(3) For the second and third ₦1,000 per ₦100 ₦	(4) For the fourth and each subsequent ₦1,000 up to ₦ 20,000 per ₦100 ₦	(5) For the remainder without limit per ₦100 ₦
1. Vendor's Legal practitioner for conducting a sale of property by public auction, including the conditions of sale---- (a) When the property is sold..... (b) when the property is not sold, then on the reserved price.....	22.50 11.25	5.62 5.62	3.75 2.80	2.80 1.48
2. A minimum charge of N100.00 is to be made whether a sale is effected or not.				

(1) Transaction Conducted	(2) For the first ₦1,000 per ₦100 ₦	(3) For the second and third ₦1,000 per ₦100 ₦	(4) For the fourth and each subsequent ₦1,000 up to ₦ 20,000 per ₦100 ₦	(5) For the remainder without limit per ₦100 ₦
3. Vendor's legal practitioner for deducing title to leasehold property and perusing and completing legal documentation (including preparation of contract and condition of sale, (if any)).....	As in part II thereof	22.50	11.25	5.00
4. Purchaser's legal practitioner for investigating title to leasehold property and preparing legal documentation (including perusal and completion of contract, if any).....	As in Part II thereof	22.50	11.25	7.50
5. Mortgagor's legal practitioner for negotiating loan.....	11.25	11.25	3.75	2.50

(1) Transaction Conducted	(2) For the first ₦1,000 per ₦100 ₦	(3) For the second and third ₦1,000 per ₦100 ₦	(4) For the fourth and each subsequent ₦1,000 up to ₦ 20,000 per ₦100 ₦	(5) For the remainder without limit per ₦100 ₦
6. Mortgagor's legal practitioner for deducing title to leasehold property, perusing mortgage and completing.....	As in Part II thereof	22.50	11.25	2.50
7. Mortgagee's legal practitioner for negotiating loan.....	22.50	22.60	7.70	5.00
8. Mortgagee's legal practitioner for investigating title to leasehold property, and preparing and completing mortgage	As in part II thereof	22.50	11.25	2.50
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 FOR MORTGAGE

SCALE TABLE FOR PART I AS IN PART 2

Under N200					146.75
N200 or over but not exceeding N300,					N157.50
Over N300 but not exceeding N300					173.25
Over N400 but not exceeding N600					189.20
Over N600 but not exceeding N700					193.75
Over N700 but not exceeding N800					200.00
Over N800 but not exceeding N900					213.75
Over N900 but not exceeding N1,000					225.00
Over N1,000 but not exceeding N1,100					= 235.25
Over N1,100 but not exceeding N 1,200					= 247.50
Over N1,200 but not exceeding N1,300					= 258.75
Over N1,300 but not exceeding N1,400					= 270.00
Over N1,400 but not exceeding N1,500					= 281.25
Over N1,500 but not exceeding N1,600					= 292.50
Over N1,600 but not exceeding N1,700					= 301.75
Over N1,700 but not exceeding N1,800					= 303.75
Over N1,800 but not exceeding N1,900					= 316.25
Over N1,900 but not exceeding N2,000					= 337.50

RULES GUIDING BILLING FOR PROFESSIONAL SERVICES UNDER SCALE 1

RULE ABOUT FRACTIONS

Fractions of two hundred naira, under one hundred naira shall be reckoned as one hundred naira and fractions of two hundred naira, above one hundred naira, are to be reckoned as two hundred naira.

REPRESENTING BOTH PARTIES

► Where a legal practitioner is representing both mortgagor and mortgagee, he shall be entitled to charge the mortgagee's legal practitioner's fees and one half of the fees which would be allowed to be the mortgagor's legal practitioner.

PARTIES WITH DISTINCT INTERESTS

► If a legal practitioner peruses a draft on behalf of several parties having distinct interests which ought to be separately represented, he shall be entitled to charge as under PART II

ADDITIONAL PARTY

► Where a party, other than the vendor or mortgagor, joins in a legal documentation and is represented by a separate legal practitioner, the charges of the separate legal practitioner are to be dealt with under the provisions of Scale III set out in this Schedule.

COMMISSION FOR SALE BY AUCTION

► The commission for deducing title, perusing and completing legal documentation on a sale by auction shall be chargeable on each plot of property, but where a property held under the same title is divided into plots for

convenience of sale and the same purchaser buys several lots and takes one legal document, the commission shall be chargeable upon the aggregate prices of the plots.

ATTEMPTED SALE BY AUCTION

- (1) The commission on an attempted sale by auction in lots shall be chargeable on the aggregate of the reserved prices.
- (2) When property offered for sale by auction is bought and the terms of sale are afterwards negotiated and arranged by the legal practitioner, he shall be entitled to charge a commission according to the Sale on the reserved price where the property is not sold and also one half of the commission for negotiating the sale.
- (3) When property is bought and afterwards offered for sale by auction by the legal practitioner, he shall only be entitled to charge fees for the first attempted sale and, for each subsequent sale ineffectually attempted, he shall charge his fees according to the provisions of Scale III set out in this Schedule.
- (4) In the case of subsequent effectual sale by auction, the full commission for an effectual sale shall be chargeable in addition less one half of the commission previously allowed on the first attempted sale.

SALE SUBJECT TO ENCUMBRANCES

- Where a property is sold subject to encumbrances, the value of the encumbrances shall be deemed a part of the purchase money, except where the mortgagee purchases, in which case the charges of his legal practitioner shall be calculated on the price of the equity of redemption.

TRANSFER OF MORTGAGE

- The scale for mortgages shall apply to transfer of mortgages where the title is investigated, but not

- (a) to transfers where the title was investigated by the same legal practitioner on the original mortgage or on any previous transfers; and
- (b) to further charges where the title has been so previously investigated, and the transfers and further charges, shall be regulated according to Scale III set out in this Schedule, but the scale for negotiating the loan shall be chargeable on such transfers and further charges as applicable.

SCALE II- Scale of charges for leases or agreements for lease at rack rent (other than a mining lease or a lease for building purposes, or agreement for the same)

DIVIDED INTO TWO PARTS

Part 1-

1. The lessor's legal practitioner's scale of charges for preparing, settling and completing the lease and counterpart shall be as follows-

- (a) Where the rent does not exceed N100 N37.50 on the rental but not less than N25 in any case;
- (b) Where the rent exceeds N100 but does not exceed N1,000, N7.50 in respect of the first N100 of rent and N25 in respect of each subsequent N100 of rent or part thereof;
- (c) Where the rent exceeds ₦1,000 ₦37.50 in respect of the first ₦100 of rent and N25 in respect of each ₦100 of rent or part thereof up to ₦1,000 and then ₦12.50 in respect of every subsequent ₦100 or part thereof.

Leases are dealt with under Scale II Part I

Transaction Conducted	Where the rent does not exceed ₦100	Where the rent exceeds ₦100 but does not exceed ₦1000	Where the rent exceeds ₦1000
Lessor's Legal Practitioner for preparing settling and completing the lease and counter parts	₦37.50 on the rental but not less than ₦25	₦37.50 of the first ₦100, and ₦25 of each subsequent ₦100	₦37.50 of the first ₦100, ₦25 of subsequent ₦100 up to ₦1000, ₦.50 in respect of every subsequent₦
Lessee's Legal Practitioner for perusing draft and completing	One Half of amount payable to Lessor's Legal Practitioner	One Half of amount payable to Lessor's Legal Practitioner	One Half of amount payable to Lessor's Legal Practitioner

PART II

Scale of charges for legal document in fee or for any other legal estate reserving rent or building leases reserving rent or other leases for a term of 35 years or more at rack rent (except mining leases) or agreement for the same respectively 1.

(1) The vendor's or lessor's legal practitioner's scale of charges for preparing, settling and completing legal documentation and duplicate of lease and counterpart shall be as follows- Amount of rent Amount of remuneration

- (a) where the rent does not exceed ₦ 100 ₦ 25;**
 - (b) where it exceeds ₦ 100 but does not exceed ₦ 1,000 the same payment as on rent of ₦ 100 and also 20 per cent on the excess beyond ₦ 25;**
 - (c) where it exceeds ₦ 1,000 but does not exceed ₦ 3,000 the same payment as on a rent of ₦ 3,000 and 10 per cent on the excess beyond ₦ 750.00;**
 - (d) where it exceeds ₦ 3,000 the same payment as on a rent of ₦ 3,000 and 7.5 percent on the excess beyond ₦ 750.00.**
- (2) Where a varying rent is payable the amount of annual rent means the largest amount of annual rent.**
- (3) The purchaser's or lessee's legal practitioner's scale of charges for perusing draft and completing the lease shall be one half of the amount payable to the vendor's or lessor's legal practitioner.**

RULES FOR SCALE 2

The lessee's legal practitioner's scale of charges for perusing draft and completing scale of charges draft shall

be one half of the amount payable to the lessor's legal practitioner.

RULES FOR SCALE 2

Where a legal practitioner acts for both lessor and lessee, he shall charge the lessor's legal practitioner's charge and one half of those of the lessee's legal practitioner.

2. Mortgagor

Where a mortgagee or mortgagor joins in a lease, the lessor's legal practitioner shall charge ₦ 100 in addition to the fee chargeable.

3. Other parties

Where a party other than a lessor joins in a lease and is represented by a separate legal practitioner, the charges of the separate legal practitioner shall be dealt with under Scale III set out in this Schedule.

4. Consideration only partly in cash

- ▶ Where a lease is partly in consideration of a money payment or premium and partly of a rent, there shall be paid, in addition to the remuneration prescribed in this Scale in respect of the rent, a further sum equal to the remuneration on a purchase at a price equal to such money payment or premium.
- ▶ Remuneration where lessee's legal practitioner prepares, completes and registers lease.
- ▶ Where there is no legal practitioner acting for the lessor and the lessee's legal practitioner, without acting for the lessor, attends to preparing, settling, completing and registering the lease and counterpart, he shall be entitled to the fee which would have been

payable had he been acting for the lessor and to one half the lessee's legal practitioner's fees.

5. Payment of fees in the absence of any specific agreement to the contrary between the parties, each legal practitioner shall be paid his fees by the party instructing him.

Scale 111

- ▶ Deals with -all legal documentations other than that covered in scale 1 & 11 –Under scale 3, there are no prescribed fees, a lawyer may charge any fair and reasonable sum after considering several factors.
- ▶ The complexity of the matter, novelty of questions raised
- ▶ Skill, labour and specialised knowledge and responsibility involved
- ▶ The number and importance of documents prepared
- ▶ The time expended
- ▶ Place and circumstances of transaction
- ▶ Value of property or amount of money involved
- ▶ Importance attached to the business by the client
- ▶ Sect 5 permits a firm to elect to charge under Scale 111 where it ought to charge under scale 1 and 11 provided he notifies the client in writing before the work is done.

Rules of Professional Conduct.

- ▶ Rule 52 (2) provides that in determining the amount of fee, it is proper to consider:
- ▶ The time required, novelty, difficulty of question raised, skill required.
- ▶ Whether acceptance will preclude the lawyer's appearance for others in a case arising out of the transaction.
- ▶ Whether acceptance will involve loss of employment or attract antagonism.

- ▶ The customary charges of the Bar for similar services
- ▶ The amount involved
- ▶ Certainty of compensation
- ▶ Character of employment (Casual or Constant Client)
- ▶ Applies to contentious and non-contentious matters

CHAPTER NINE

WILLS & CODICIL 1

WILLS AND CODICILS

1. INTRODUCTION

a. Definition

A will has been defined as the expression by a person of wishes he intends to take effect only at the death. Unlike a disposition of property by deed which operates at once, a will speaks from death and remains by the testator during his lifetime.

A will can also be described as a testamentary document voluntarily made and executed according to law by a testator with a sound disposing mind through which he disposes of his property according to the wills law and other directives such as burial wishes.

The maker of a will is known as a testator. When a person who makes a will dies, he is said to have died testate, whereas a person who died without having made a will is said to have died intestate. In both instances, the estate of the deceased is administered by personal representatives. The personal representatives of a testator are called executors while the personal representatives of a person who dies intestate are known as administrators. A will takes effect when it is admitted to probate.

History of wills in Nigeria

In the pre-colonial era, a disposition of property at death was governed by the customary law can be oral in written.

law or Islamic law prevailing in each community. Because writing was largely unknown to pre-colonial communities, disposition of property at death was done orally and when there was no oral disposition, the property of a deceased

person devolved according to customary rules of inheritance. Even customary law recognized the testamentary freedom of a testator to dispose of alienable property according to his wishes, albeit orally. These oral dispositions

were usually made expectations of imminent death and in the presence of witnesses who were not supposed to be beneficiaries under the disposition. The number of witnesses required to make a valid oral will is not certain, but in *Ayinke v Ibiduni* (1959)4 FSC 280, a witness testified that under the customary law of that community, four witnesses were required to make a valid will.

In Muslim communities, Islamic law governed the disposition of property. Under Islamic law, a testator does not have full testamentary freedom as the Quran stipulates the manner in which property is to be disposed of at death. The testator can dispose of only one-third of his property and the remaining two-thirds must be disposed of according to Islamic rules of inheritance stipulated in the Quran. The disposition of property in Islamic law can be oral or written.

In the colonial era, one of the statutes of general application received in Nigeria was the Wills Act of 1837. The Act provides for the disposition of property provided its formalities are complied with. S.3 of the Act states as follows:

It shall be lawful for every person to devise, bequeath or dispose of by his will executed in the manner hereinafter required all real and all personal estate which he shall be entitled to.

SOURCES OF THE LAW OF WILLS

1. **The received law on wills, that is the Wills Act 1837 and the wills amendment Act 1852** which apply as statutes of general application. These statutes have remained

virtually untouched in Nigeria, but in England, several amendments have been made to the Wills Act 1837. The current law of Wills in England is therefore not exactly the same as the law of Wills in Nigeria.

2. **The Wills law of various states of the federation** such as the Wills law Cap 194 laws of Lagos state 1994, the Wills Edict 1990 of Oyo state. The Wills Law cap 131 Laws of the Western Region of Nigeria 1959 applicable in some states comprising the old Western region. These laws were re-enacted from the 1837 Act, in some cases with modifications to provide for customary laws of inheritance.

3. **The high court civil procedure Rules of the states** which contain provisions on certain probate procedures such as custody of a will and the execution of a will by illiterates etc.

4. **Case law** This is made up of common law principles, rules of equity and the interpretation of statutes on wills. Certain areas of the law of wills are governed entirely by case law. One such area is the republication of wills which is governed mostly by English case law. In interpreting the positions of the wills Act in 1837 however, Nigeria courts do not rely heavily on English cases because they do not always provide for our local circumstances.

TYPES OF WILLS

- Customary wills
- Stationary wills
- Nuncupative wills
- Holograph wills
- Mutual wills
- Joint wills
- Privileged wills

TESTAMENTARY CAPACITY

Two components: age and mental capacity.

AGE: 21 years(section 7 wills Act) or 18 years(section 3 wills law of Lagos state) and some other state infant lacks capacity (except privileged wills)

Does the under listed have capacity?

- Blind persons (insitful v. Christian 13WACA 345)
- Illiterates
- Mentally Disabled persons

MENTAL CAPACITY: (sound disposing mind and memory)

- 1) The time he gave instructions and
- 2) The time of executing the will

Degree of mental capacity (TEST) as laid down in the case of *BANKS v. GOOD FELLOW (1870) L.R 5 Q.B.549-* testator must:

- 1) Understand the nature of the act of making a will and its legal effects
- 2) Know the extent of his property which he wants to dispose
- 3) Have a recollection of the object s of his bounty
- 4) Know the manner of distribution

In that case, the testator who had a history of mental disease and who suffered from delusion instructed a lawyer to prepare his will. The will was prepared and duly executed. In the will, he left all his estate to his niece and appointed two executors. Shortly after the death of the testator, his niece died leaving no issue and the property devolved on the heir-at-law of the niece who was no relation to the testator. The testators heir-at-law brought an action to declare the will invalid. It was contended that the testator lacked testamentary capacity because he had a long history of mental disease and suffered from delusion. The jury found that the will was valid. On application to the High court, Cockburn CJ laid down the above test to be used in establishing whether a testator possessed mental

capacity to make a will. Applying this test, his lordship held that the testator was neither afflicted by mental disease nor delusion when he made his will. He found that the testator knew that he was engaged in a testamentary act, that he knew the extent of his property and that he knew the object of his bounty. Thus the testator was held to have a sound disposing mind and memory. Consequently, the jury's verdict was affirmed and the will was declared valid. *Johnson v. Maja* (1951) 13 WACA 290; *Adebajo* (1973) 3 ECSLR pt. ipg. 544; *Okelola v. Boyle* (1998) 2 NWLR pt. 539 at 533.

NOTE: soundness of mind and bodily health do not have the same meaning.

DELUSIONS:

Person suffering from delusions can create a valid will where Testator satisfies the test in BANKS VS. GOODFELLOW (supra)

Delusion must influence disposition to render the will invalid.

In *Battan singh v. Armichand* (1948) 1 A.E.R 152 the testator had made an earlier will leaving all his estate to his nephew. The testator suffered from tuberculosis and had delusions that he had no relation anywhere in the world, while in fact he had four nephews. In a subsequent will, he left his property to the respondent. The appellant brought an action on the ground of lack of testamentary capacity. The court found that the delusion had robbed the testator of a disposing mind and memory for the subsequent will and consequently, declared it invalid.

In *Re Ford Estate, Royal Trust Co.v. Ford* (1970) 72 W.W.R. 646, the testator suffered from a delusion that his

son was not really his son. It was held that he was incapable of making a will.

It is a question of fact whether the delusion affects the disposition and even where the delusion affects the subject matter of the disposition, it does not necessarily inform the conclusion that the delusion invalidates the will. (See the case of *smith v. Tebitt* (1867) L.R.I.P.D. 398). The court may grant probate to a will and codicil with the deletion of a clause in the codicil which has been affected by the delusion. See the *Estate of Bohrmann* (1938) I All E.R.271; *Amu v. Amu* (2000) 7 NWLR Pt.663 At 164.

Where testator gives instruction with a sound disposing mind directly to a solicitor or notary public but before execution losses mental capacity, the will is still valid if executed with knowledge. See *Parker vs. Felgate* (1883) 7-9 P.D 171; *Perera v. Perera* (1901) A.C. 354

Note the rule in *Parker v. Felgate* will not apply where the instructions were given to lay intermediary by the testator- *Battan Singh v. Armichand* (*supra*) except the test laid down in Armich and is upheld)

TESTAMENTARY INTENTION

To make a valid Will, a testator must possess

- ANIMUS TESTANDI (an intention to make a will)
know & approve of the content
- Not dislodged by old age

Balonwu v. Nezianyi (1959) 3 ERNL 40

DUE EXECUTION

- Must be in writing

- Must be executed (signed by testator) need not be usual signature of testator
- Must be attested by two witnesses
- Attestation in testators presence

MODES OF EXECUTION

- a. By testator signing personally or;
- b. Acknowledging signature or;
- c. Testator directing another to sign on his behalf and in his presence, and

In the presence of 2 witnesses present at the same time.

S.9 Wills Act 1837 , S.4 Wills Law Lagos Cap W2 (2004)

ATTESTATION

Witnesses:

- Must be physically & mentally present
- Need no knowledge of contents
- Need not subscribe in the presence of each other
- Blind person cannot attest
- May a child S. 14 Wills Act

Attestation Clauses-S.9 Wills Act

May be long or short.

An example of a short attestation clause is that used ***in Re Selby-Biggie***: signed by the testator in our presence and attested by us in his presence and the presence of each other. Below is an example of the long attestation clause:

SIGNED by the above named Bob Fyneface as and for his last Will in the presence of us both present at the same time who at his request in his presence and in the presence of each other have hereunto subscribed our names as witnesses.

Location of signature

Section 9 Wills Act 1837 amended by section 1 Wills (Amendment) Act 1852

Section 4 (2) Wills Law of Lagos State

BENEFICIARY- WITNESS

Beneficiary or spouse not to witness. S.15 Wills Act see also Ross v counters (1980) CH. 297 solicitors charging clause Executors

EXCEPTIONS:

1. Section 8 Wills Law Lagos state enables a witness who is also a beneficiary to retain the gift where there are other witnesses to prove due execution if the signature of the witness-beneficiary is disregarded.
2. Provision for debt settlement
3. Marriage of the spouse/witness & the beneficiary took place after the making of the will
4. Where another will or codicil confirms the gift (the latter not being attested by the beneficiary or spouse)
5. Privileged will

PROOF OF VALIDITY OF A WILL

A will may either be proved in its common form (non-contentious or in its solemn form (contentious).

Where there is no proper attestation clause or the judge has any doubt as to the due execution of a will or where the testator is an illiterate, or a blind person, the proof of validity is by the use of AFFIDAVIT (sets out the manner in which the will was read or interpreted to the testator and the manner in which he signified that he understood & approved of its content) see Re Geale (1864) 164 E.R 1342

(testator was deaf, dumb & an illiterate) see order. 58 Rule.
5 & 10 of Lagos State Cp Rules, 2012

Contentious Form:

Burden of proof lies on the PROPOUNDER of the Will though it may shift to the CHALLENGER where the propounder discharges the burden.

Usually by:

A. Proof of Due Execution

Section 168 (1) Evidence Act (Presumption of due execution) *Omnia prae sumuntur rita esse acta* (everything is presumed okay which looks okay)

For this presumption to be invoked, the will;

Must be regular on its face

Have proper attestation clause

Nelson v. Akofiranmi (supra)

B. Positive affirmative evidence

Oral and Documentary evidence is admissible:

- i. Statements at the time of instruction & execution
- ii. Witnesses (light weight/ unless corroborated)
- iii. Evidence of conduct before & after making the will. See *Maja v Johnson* (supra)
- iv. Evidence of general habits and course of life of the testator
- v. Medical evidence by a doctor who have attended to the testator in the past (must be credible)

Adebajo v. Adebajo (supra)

CLASSIFICATION OF GIFTS

DEVISE - disposition of realty (real estate)

BEQUEATH – a gift of personality (personal property)

But they are used or construed interchangeably in order not to defeat the intention of the Testator

The word 'Give' may be used for both classes of gifts

TYPES OF GIFTS (LEGACY)

1. General
2. Specific
3. Demonstrative
4. Pecuniary
5. Residuary

GENERAL LEGACY

A gift not separated or distinguished from other properties owned by the Testator

Where the gift does not exist at the time of the Testator's death, Executors must acquire it or give the money's worth to the beneficiary.

Examples:

1. '**I give a 6 bedroom duplex apartment in any upscale area of his choice in Abuja to my daughter Emem'**
2. '**I give a diamond encrusted 24kh gold signet ring to my first son Biu'**

ADVANTAGES

Not Liable to Ademption

DISADVANTAGES

Suffers abatement where the estate is insufficient

May fail where the value of the gift cannot be ascertained

SPECIFIC LEGACY

A gift which is specific and distinguishable from all other chattels of its kind and all other properties of the testator must be properly and sufficiently described

Examples:

1. 'I give my Omega gold wrist watch which I bought in Switzerland to my son Elman.'

2. ‘I give my 2008 model Toyota Sienna space bus with reg. No. FM 555 ABC, to my son Bukola’)
3. ‘I give my house at Plot A777, Ade Rd. Camp City, known as —GRACEVILLE॥ to my son Ovie’

ADVANTAGES

Not liable to abate where there is insufficient funds or the estate is not enough to satisfy all legacies, debts, obligations and other expenses

DISADVNTAGES

Where the specific gift no longer exist or cannot be found at the time of the Testator’s death, the beneficiary gets nothing and the gift becomes A DEEMED (doctrine of Ademption) Alternative/Substitution clause:

‘I give my Omega gold wrist watch which I bought in Switzerland to my son Elman but where the said wrist watch cannot be found or I do not own it at my death, my Executors shall purchase a similar Omega gold wrist watch for my said son or its money’s worth in lieu.’

DEMONSTRATIVE LEGACY

A gift directed to be satisfied from a specified source or pool of property (usually —but not restricted to— money payable from a particular bank account) Combines the nature of a general legacy and a specific legacy

Examples:

‘I give the sum of ₦1,000,000 (One million Naira only) payable from my current Acct. with Skye Bank PLC, Wuse 11, Abuja to Samuel Nwaogu’

‘I give 200 hundred units of shares from my shares in UBA PLC, to my steward Emeka Usman’

PECUNIARY LEGACY

It is basically a monetary gift called an ANNUITY where it is expressed to be paid at intervals may be general, demonstrative or specific

Examples

'I give to my cook Mary Eka ₦100,000.00 (One Hundred Thousand Naira)'

RESIDUARY LEGACY (S.25 Wills Act)

Refers to the undistributed residue of the Testator's estate after satisfying all bequeaths and devises contained in the Will. And also paying all obligations, debts, expenses, taxes and liabilities relating to the estate.

It comprises of the following:

1. Properties acquired by Testator after making the will/codicil
2. Properties acquired by Testator after death e.g. S. 33 Wills Act.
3. Gifts that lapsed for lack of substitution clause and
4. Gifts that failed for diverse reasons

Effect of lack of a residuary clause in a Will; Leads to partial intestacy

- Section 53 Admin. Of Estates Law Lagos State

Examples

'I hereby give all other properties not specifically disposed by this Will or any Codicil including any property over which I may have power of disposition by Will, to my children in equal shares'.

DOCTRINE OF LAPSE AND FAILED GIFTS

By the doctrine of lapse a gift fails if the beneficiary predeceases the Testator

Exceptions:

- **Statutory Provision-** Section 22 Wills Act 1837, S.24 Wills Law of Lagos State
- **Class gift**
- Alternative/Substituted gift
(substituted beneficiary)
- Gift made in discharge of a moral obligation. E.g. debt

Instances where a gift may fail

- ❖ The beneficiary disclaims
- ❖ The beneficiary or his spouse witnesses the will(Section 15 Wills Act)
- ❖ By operation of the doctrine of Ademption (specific gift)
- ❖ The beneficiary predeceases the testator (lapse)
- ❖ Gift to testator's spouse (Section 18A Wills Act) due to divorce or annulment of the marriage
- ❖ Public policy or where it promotes an illegal purpose
- ❖ Gift contrary to the principle of inalienability
- ❖ Abatement or insolvency
- ❖ Uncertainty
- ❖ A gift contingent on a condition which is not satisfied
- ❖ A gift obtained by fraud

COMMORIENTES

Section 144(2) E.A-presumption as to the order of death.
See also S. 25 Wills Laws of Oyo, Abia, Jigawa States and Section 23 of Lagos Modified by the Section 49 (3) Administration of Estate Law (AEL) of both western Region and Lagos in case of spouses who died intestate.

REVOCATION OF A WILL

The ambulatory nature of a will renders it revocable by the testator at any time during the lifetime of the testator and before his death.

See Section 20 of the Wills Act 1837; Section 13 Wills Law (Lagos)

Revocation may either be voluntary i.e. by the act of the testator:

- a. by a subsequent Will or Codicil
- b. by a written declaration of intention to revoke the Will
- c. by burning, tearing or otherwise destroying the Will with the intention to revoke or involuntary i.e. by operation of law: by a subsequent statutory marriage

A. VOLUNTARY REVOCATION

1. SUBSEQUENT WILL OR CODICIL

May be express i.e. inserting an appropriate revocation clause in the later Will

Example ‘I revoke all former testamentary dispositions made by me’

This revokes a previous Will except it can be shown that the clause was inserted by mistake and without the testator’s approval; or that the two Wills relate to different properties of the testator - see *O’Leary V. Douglas (1878) 13 L.R.323.*

Note: General words such as the ‘last testament of me’ or the ‘last and only Will’ may not be sufficient to revoke an earlier Will.

A later Will may also by implication revoke an earlier Will if it covers practically the same grounds as the earlier one;

or, where the later Will disposed the same properties to either different beneficiaries or in a manner materially inconsistent with the former Will –

In *Henfrey v. Henfrey* 13 E.R. 211, the testator in a Will made in 1838 appointed executors one of whom he gave his residuary estate. In 1839, the testator made a second Will containing no revocation clause by which he disposed all his property to his wife but appointed no executor. The court held that the second Will had impliedly revoked the first Will. 172

However it is not a general rule that every inconsistent Will revokes the previous Will – see *Biddles v. Biddles* 163 E.R. 790.

2. A WRITTEN DECLARATION OF INTENTION TO REVOKE THE WILL

Such “other written instrument” has been held to include a memorandum of revocation, a letter, a settlement or an ordinary declaration of intention to revoke the Will.

NOTE: whatsoever form it takes, the written instrument/declaration must be executed like a Will – i.e. the requirements of Section 9 of the Wills Act 1837 must be complied with. (Section 1 Wills (amendment) Act, 1852, Section 4 Lagos)

3. BURNING, TEARING OR OTHERWISE DESTROYING THE WILL WITH THE INTENTION TO REVOKE

There must be sufficient destruction; and there must be the intention to revoke (by the act of destruction).

Destruction by “burning, tearing or otherwise destroying” has been held to mean complete destruction and not merely squeezing, drawing lines on the Will by the use of pen or biros, or any other form of symbolic destruction as the words “otherwise destroy” is usually construed *ejusdem generis* –

Cheese v. Lovejoy (1858) 2 PD 251 testator drew his pen through the lines of various parts of his Will and even wrote on the back of it “This is revoked” and threw it among the heap of waste papers in his sitting room. It was held that the Will was not revoked; see also *Stephen v. Taprell 163 E.R.473.*

A partial destruction e.g. by tearing off some pages of the Will would only revoke the part torn off and not the entire Will – In ***The Goods of Woodward (1871) L.R. 2 P & D 206.***

Where an essential part is destroyed or the destruction renders meaningless the remaining part, the entire will is deemed revoked.

Mutilation, burning, tearing beyond recognition, cutting or scratching out the signature (obliteration) of the testator or witnesses are sufficient acts of destruction and would revoke a Will.

Revocation by destruction can be done personally by the testator or by another person but the act must be done in the presence of the testator and at his request and direction otherwise it would not be a valid revocation – see ***RE DADDS (1857) Dea. & Sw. 290.***

In THE GOODS OF BACON (1859) 23 J. P. 712, 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 and did not comply with the law.

INTENTION TO DESTROY

The act of revocation must have been carried out with the intention to revoke, otherwise the revocation would be invalid (*animus revocandi*)

Such intention must be complete – *Perkes v. Perkes* (1820) 3 B & Ald. 489

The act and the intention must be contemporaneous

- there can be no subsequent ratification or confirmation of the act which was done without intention – see *Gill v. Gill* (1909) P. 157.

CIRCUMSTANCES WHERE INTENTION TO REVOKE WOULD NOT BE INFERRED

- Drunkenness
- Insanity
- Accidental destruction/mistake
- Obliteration of signature without clear evidence of who and why it was done.

CONDITIONAL REVOCATION

Occurs where the conditions under which the Will was destroyed and thereby revoked have not been or could not be satisfied. In such cases, the destruction of the Will would not be effectual to revoke the Will.

Instances where this may occur:

1. A purported revocation due to a mistake of fact e.g. where the testator thought that the earlier Will was lost or that the legatees were dead;
2. A purported revocation due to a mistake of law e.g. where the testator revokes his Will believing that his beneficiary will be the sole person to benefit on intestacy; or that the destruction of the Will will revive an earlier Will; or as a preliminary to the making of a fresh Will - the court may be disposed to hold that the revocation is not complete until the new disposition is in place.

B. INVOLUNTARY REVOCATION

This is the revocation of a Will by the operation of law irrespective of the wishes or intentions of the testator i.e. revocation by a subsequent statutory marriage – S.18 Wills Act, Section 11 Wills Law (Lagos)

Exceptions To The Rule:

1. Marriage under native law and custom – see Section 11 of the Wills Law (Lagos) and Section 15 Wills Law of Western Region of Nigeria 1959.

Jadesimi v. Okotie-Eboh (1996) 2 NWLR (Pt. 429) 128; (1996) 2 SCNJ

2. Void marriage

3. Made in contemplation of Marriage see Section 177(1) of the English Law of Property Act, 1925 (which is not applicable to Nigeria)

H/ever see equivalent provisions in S.11 Wills Law of Lagos State; Wills Law of Oyo State; Wills Law of Abia State 2000; 79(1) Succession Law of Anambra State.

For this exception to apply:

1. The Will must be expressed to be made in contemplation of a particular marriage.
2. The testator must have married the person expressed in the Will.
3. The names of the parties to the contemplated marriage must be clearly stated in the Will.

C/F RE LANGSTON (1953) 1 All E. R. 928 with the statutory provisions in the States mentioned above.

4. A Will made in exercise of the Power of Appointment under a Settlement or Trust –

Section 18 of the Wills Act 1837;

5. Wills made before the celebration of marriage under the Marriage Act by parties already married under customary law – JADESIMI VS. OKOTIE-EBOH (supra) REVIVAL & REPUBLICATION

REVIVAL- Section 22 Act; Section 15 Lagos

1. By Re- Execution
2. By Codicil duly executed, stating intention to revive.
Effective date is the date of revival

REPUBLICATION

Confirmation of unrevoked testamentary interest. Date of republication is effective date.

LIMITATIONS ON THE RIGHTS OF THE TESTATOR

Any person of sound mind and memory (and of statutory age) can make a Will – Section 3 of the Wills Act 1837.

But there are exceptions to the above general principle:

1. Customary Law –

restricts the power of the testator to give out a property that is subject to customary law in a Will.

Section 3(1) of the Wills Law of the old Western Region 1959 compare Section 1 (1) of the Wills Law of Lagos State, 2004 below

- Section 1 (1) Wills Law of Lagos State
‘Provided that the provision of this Law shall not apply to any property which the testator had no power to dispose of by will or otherwise under Customary Law to which he was subject‘

2. Customary Law- Islamic Rules of Inheritance

Section 3(1)(b) of the Wills Law of Oyo State, 1990
see also the cases of *Adesubokun v. Yunusa (1971) 1 All NLR 225, Ajibaiye v. Ajibaiye*

3. Reasonable Provision for dependants

Section 2 Wills Law of Lagos; see also Abia, Kaduna and Oyo States.

INFORMATION/PARTICULARS REQUIRED TO PREPARE A WILL

1. Testator’s particulars or personal details i.e. name, occupation and address;
2. Testator’s marital status;
3. If there is an existing Will or Codicil;
4. Names, occupations and addresses of the proposed executors;
5. Whether the executors shall be remunerated or not;
6. Names, occupations and addresses of all the intended beneficiaries;
7. List of all properties given out inter vivos;
8. List of all legacies to be given out in the Will;

9. List of all real properties) to be devised in the Will & the custody of the title deeds;
10. List of all businesses
11. Manner of distribution of the estate to the beneficiaries;
12. Alternative/Substitute beneficiaries;
13. Survivorship;
14. Properties disposed of at death (under customary Law);
15. Whether there is a trust; if yes, the names, occupations and addresses of the trustees;
16. 17. Indemnity of trustees and absolute discretion of trustees in the exercise of their powers of investment.
17. Name, occupation, and address of guardian, if any;
18. Funeral arrangements (to be contained in a separate letter or document)
19. Debts and liabilities;
20. Provision for gifts that may lapse, fail, or become void and property acquired after the making of the Will.

NOTE: the testator's wishes are paramount. Therefore, the solicitor should receive instructions directly from the testator. However, where instructions are given to an intermediary i.e. a third party who repeats them to the solicitor, the solicitor should insist on seeing the testator personally and going through the Will with him – see *Battan Singh v. Amirchand* (1948) A.C. 161.

PRACTICAL STEPS/STAGES IN THE PREPARATION OF A WILL

1. Obtain instructions;
2. Obtain the previous Will, if any;
3. Draft the new Will;
4. Forward draft Will to the client for approval;
5. Engross the Will if draft is approved;

6. Book appointment for the execution of the Will and agree on the venue for the execution;
7. Obtain execution in the presence of two witnesses;
8. Create a file for a copy of the Will together with all notes relating to the preparation of the Will, to be kept until the Will is proved. This may help in discovering the testator's intention if there is a dispute;
9. Give a copy of the Will to the client;
10. Arrange for the safe custody or safe keeping of the other copies of the Will in accordance with the client's (i.e. testator's) instructions.

FORM AND EFFECTS OF THE VARIOUS PARTS OF A WILL

1. COMMENCEMENT

- Where the date is inserted in the Commencement:
“THIS IS THE LAST WILL of me, Okon Gambo, Civil Servant of No. 5, Iyan Street, Bodija, Ibadan, which I make this 12th day of December, 2013.”
- Where the date will be inserted in the Testimonium:
“THIS IS THE LAST WILL of me, Okon Gambo, Civil Servant of No. 5, Iyan Street, Bodija, Ibadan, Nigeria.

2. REVOCATION CLAUSE

- Should be expressly provided for
- Also helps to affirm the present Will as the last testamentary act of the testator

Henfrey v. Henfrey (supra)

“I REVOKE all former testamentary dispositions made by me”

3 APPPOINTMENT CLAUSE Used to appoint:

- Executors
- Trustees
- Guardians

“I APPOINT my wife, Cicy Okon, Teacher, of No. 5, Iyan Street, Bodija, Ibadan and my son, Kwanabiu Okon, Doctor, of No. 4, Henshaw Road, Calabar, to be the executors and trustees of my Will.

I DECLARE that the expression “my executors and trustees” shall include Cicy Okon and Kwanabiu Okon and the survivor of them for the time being of this my Will.”

4. GIFTS

- I DEVICE: Used for gifts of real properties
 - I Bequeath/Give: Used for gifts of personal properties
 - I GIVE: should be used for both classes of gift
(modern trend)
- 1) ‘I give my house at Plot A777, Ade Rd. Camp City, known as “GRACEVILLE” to my beloved son Segun’
 - 2) “I give my Ivory Walking Stick to my beloved son Bui”

5. RESIDUARY CLAUSE

Examples:

- ‘I HEREBY GIVE all other properties not specifically disposed by this Will or any Codicil, including any property over which I May have power of disposition by Will, to all my surviving children in equal shares’

- “I GIVE THE RESIDUE of my property to my trustees on trust to sell without being liable for loss; and after the payment of all legacies, debts, funeral and testamentary expenses, to divide the balance equally among the Eko Old Peoples’ Home, Yaba Lagos for the upkeep of the residents and the Congress Arena Board of Plot 777 Congress Road, Ebute – Meta, Lagos for the maintenance of the Arena ground”

6. CHARGING CLAUSE

- enables executors and/or trustees who are professionals to charge or receive remuneration for their professional services

“Any executor to this Will and any Codicil to it who is engaged in professional business shall be entitled to be paid all his charges for work done by him or his firm in proving my Will or any Codicil to it, or in connection with this trust including work which a trustee could do personally”

7. TESTIMONIUM

“IN WITNESS OF WHICH I, Okon Gambo, have executed this Will in the manner below the day and year first above-written”

or

“IN WITNESS of which I, Okon Gambo, have executed this Will in the manner below this 12th day of December, 2012.”

8. EXECUTION & ATTESTATION

“**SIGNED by the Testator, Okon Gambo -----
in our joint presence and attested by us in the
OKON GAMBO
presence of him and of each other”**

(SIGNED)

**-----
OMO EFE**

**8, Ife Street, Bodija, Ibadan
Teacher**

(SIGNED)

**-----
KING EBO
7, Iyan Street, Bodija, Ibadan
Trader**

ILLITERATES/ BLIND PERSONS/FOREIGNERS

“**SIGNED by the above named Testator, with his
mark after it has been read over to him in the
Hausa language by Ugo Maina and he appeared
to have understood and approved same, in the
joint presence of us and that of each other, who
at his request in his presence have subscribed our
names as witnesses”**

DEAF& DUMB PERSONS

“**SIGNED by the above named Testator, with his
mark after it has been read over to him in sign**

language by Ugo Maina (a sign language instructor) and he signed that he understood and approved same, in the joint presence of us and that of each other, who at his request in his presence have subscribed our names as witnesses”

MODIFIED CASE STUDY 6

Chief Fidelis Anthonio, is 65 years Old and a businessman of No. 9 Ebute Metta, Lagos who is married to Chief (Mrs) Fidelia Anthonio, his wife of over 35 years. He got married to her when they were both studying in England on the 14th of February 1973. He is from Lagos State.

They have six children- Felicia (35), Francis (33), Faith (31), Florence (27), Felix (25) and Fortune (20). He has recently instructed his Solicitor, Kemi Pam to draft a Will for him on the following terms:

1. Executors of his Will- his wife Chief (Mrs.) Fidelia Anthonio, Mrs. Felicia Umeh (his daughter) of Plot 20 Wuse 11, Abuja, F.C.T., and his son Dr. Francis Anthonio of 2 Coker Close, S/W Ikoyi, Lagos.
2. His property at 9 Lagos Street, Ebute Metta, Lagos to be given to his wife
3. His house at 14, Obafemi Awolowo Road, Ikeja to be given to all his daughters- Mrs Felicia Umeh, Dr. (Mrs.) Faith Bickersteth and Mrs. Florence Ajani equally.
4. He wants his Rolex wrist watch to be given to his first son, Dr. Francis Anthonio,
5. his two walking sticks to be given to his third son, Fortune.
6. The house at No. 5, Agric, Ikorodu, Lagos to be given to his first son to be used for an hospital for special needs children and it must never be sold.
7. shares in first bank, UACN and Nigerian Breweries to be given to his wife.
8. The sum of ₦ 500,000 to his second son, Felix.

9. The sum of ₦ 100,000 to be given annually to the Child Care Trust, Bwari, Abuja.
10. Toyota Camry 2008 model Reg. No FT 243 LSR to his third son Fortune
11. Toyota Camry 2012 model Reg. No GW 757 AAA to his Second Son Felix
12. Nissan bluebird Reg. No AX 223 KJA to his driver of twenty years Mr. Okon.
13. He wants the house at 9, Lagos Street to go to all his sons when his wife dies
14. He wants all the children to have the shares when his wife dies.

WILLS SPECIMEN

THIS IS THE LAST WILL of me Chief Fidelis Antonio of No. 9 Ebute Metta, Lagos, Nigeria.

- 1) I REVOKE all former Wills and testamentary dispositions made by me.
- 2) I APPOINT my wife Chief (Mrs.) Fidelia Anthonio of No. 9 Ebute Metta, Lagos, Nigeria, my daughter Mrs Felicia Umeh of Plot 20 Wuse 11, Abuja, F.C.T., Nigeria and my son Dr. Francis Anthonio of 2 Coker Close, S/W Ikoyi, Lagos, Nigeria to be the executors of this Will.
And I DECLARE that the expression "my executors and trustees" shall include my wife Chief (Mrs.) Fidelia Anthonio, my daughter Mrs. Felicia Umeh and my son Dr. Francis Anthonio and the survivor of them and any other executors or executors for the time being of the executors of this my will.
- 3) I GIVE to my wife Chief (Mrs.) Fidelia Anthonio my house at No. 9 Ebute Metta, Lagos, for her life

time and at her death, to all my sons that survive my said wife jointly.

- 4) I GIVE my house at No. 14, Obafemi Awolowo Rd., Ikeja, Lagos, to all my daughters in equal share and if any of my said daughters should predecease me leaving an issue or issues, then her share of the house to all her surviving issue or issues jointly.
- 5) I GIVE my house at No. 5, Agric, Ikorodu, Lagos, to my son Dr. Francis Anthonio absolutely, to use same as an hospital for special needs children and the house must not be sold by him.
- 6) I GIVE the following legacies:
 - a. my Rolex Wrist watch to my son Dr. Francis Anthonio;
 - b. my two walking sticks to my son Fortune Anthonio;
 - c. my shares in First Bank Nig. PLC, UAC PLC, and Nigerian Breweries PLC, to
 - d. my wife Chief (Mrs.) Fidelia Anthonio and at her death, to all my sons in equal shares absolutely;
 - e. ₦500,000 to my son Felix Anthonio;
 - f. an annual sum of ₦100,000 to the Child Care Trust, Bwari, Abuja;
 - g. my Toyota Camry 2008 model with Reg. No. FT 243 LSR to my son Fortune Anthonio;
 - h. my Toyota Camry 2012 model with Reg. No. GW 757 AAA to my son Felix Anthonio;
 - i. my Nissan Bluebird with Reg. No. AX 223 KJA to my driver Okon.
- 7) I GIVE the residue of my property to my trustees on trust (without being liable for to sell loss) and

after payment of all legacies, debts, funeral and testamentary expenses to divide the balance equally among all my surviving children.

IN WITNESS of which I Chief Fidelis Anthonio have signed my name this 24th day of February 2010.

SIGNED by the testator Chief Fidelis Anthonio in our joint presence and attested by us in the presence of him and of each other

.....
Chief Fidelis Anthonio

(Witness Signature)

Name:-----
Address:-----
Occupation:-----

(Witness Signature)

Name:-----
Address:-----
Occupation:-----

Prepared by:
Taofeek Ebenezer LL.B, B.L,
of Taofeek Ebenezer & Co., Plot 25
Aminu Kano Crescent, Wuse 11, Abuja,F.C.T., Nigeria.

ETHICAL ISSUES IN WILL MAKING

1. Competence – Rule 16(1)(a) & Rule 14(2)(c) of the RPC
2. Confidentiality of information – Rule 23 RPC
3. Privileged]communication - Rule 19(1) & (2) RPC
4. Conflict with personal interests – R. 17 RPC.
5. Liability and damages for negligence - S. 9 of the LPA

CODICIL

A Codicil is a supplemental or an addition to an existing Will and it possesses all the attributes of a Will.

It must complies with all legal / formal requirements of a Will and cannot exist on its own.

USES/ IMPORTANCE

1. To make alterations to a Will (correcting clerical errors, changing gifts, executors etc.)
2. To revoke a Will
3. To revive a Will
4. To republish a Will

STRUCTURE

- 1) Must state its Number where the codicils are more than one (whether First, Second etc.)
- 2) Identify the will it seeks to amend, vary etc.
- 3) It must be linked to the will by stating the date of the Will
- 4) At the Foot, the following should be written ‘confirms the Will in all other respects’
- 5) Could have a recital
- 6) Must be executed and attested in the same manner as a Will

CHAPTER TEN

PROBATE PRACTICE

Probate practice comprise of the procedure for the grant of probate and letters of administration both in contentions and non contentions cases. Until probate or letters of administration is granted, the executor or administrator who interferes with the state of the deceased person is inter-meddler. See *Bank of West Africa LTD. V Ricket* (1959 NRNLR 125.)

APPLICABLE LAWS ON PROBATE PRACTICE

1. Administration of Estate laws of the various States of the Federation
2. Will's Act 1837 as amended by the real Act (Amendment Act 1852)
3. Wills Laws of the various States.
4. High Court (Civil procedure) Rules of the various States.
5. Administration of Estate (Small Estate Payment Exemption)
6. Law, 2005 (Lagos State).
7. Case Law/Judicial Precedents.
8. Marriage Act Cap M6LFN, 2004
9. Rules of Professional Conduct in the Legal Profession 2007.
10. Legal practitioners Act.

TYPES OF GRANT

1. GRANT OF PROBATE –

This grant will be given when the deceased died testate living a valued Will with executors validly appointed in the Will.

2. GRANT OF ADMINISTRATION WITH THE WILL ANNEXED

This grant will be given when the deceased died testate either without appointing executors or those appointed renounce probate or minors are appointed as executors.

3 GRANT OF SIMPLE ADMINISTRATION

This grant will be issued where the deceased died in testate either wholly or partly. Where he died partially testate, the part of his estate not covered in the Will would be administered by the grants of simple administration.

DEFINITION OF TERMS

PERSONAL REPRESENTATIVES

1. These are persons upon whom the estate of the deceased is vested. These include executors or Administrators.

2. INTESTATE

A Person is said to die intestate if he dies without making a Will and this includes a person who dies intestate to some beneficial interest in his real or personal estate not contain in the Will see S. 2 Administration of Estate law Cap A 3 laws of Lagos State 2004.

3. CAVEATOR

A person who raises objection to the grant of probate or letters of administration. His aim is to insure that no grant is made without notice to him.

4. CITATION

This is notice of warning to an executor to prove a Will or to a caveator to disclose the nature of his interest in the estate of the deceased, that conflict with that of the applicant for the probate or to accept or reject probate or administration.

5. TRUST CORPORATION

Public trustee or corporation appointed by the court in any particular case to be a trustee of or being entitled to the estate of the deceased under the Public Trustee Law.

6. TO PROPOUND A WILL

To present a Will to a court or other authority in order that its validity can be established

OBTAINING A GRANT OF PROBATE

Probate is the judicial confirmation of the authority of the Executor or executors to carry out the provisions of a Will.

It is usually granted upon an application made to the probate Registrar by an interested person either personally or through his Legal Practitioner See Order 49 Rules 7 and 8 (Abuja). All applications for Probate are made to the Probate Registration in High Courts of each State of disclose the legal Practitioner's address.

TIME OF GRANT

Probate or letters of Administration with Will annexed may not be granted until after seven days of the death of the Testator

WHO IS ENTITLED TO A GRANT OF PROBATE?

Where a Person dies testate (that is, leaving a valid Will), the power to apply for probate lies with the executor or executors. Where however, the executor renounces probate or for some reasons cannot be granted probate, some other factors would be considered in determining the other persons who are qualified to apply for administration with the Will annexed. In the latter case, it is called administration with Will annexed, because probate is granted only to executors validly appointed under a Will. Where there are no executor appointed under the Will or the executors renounces probate or is unavailable (out of

the country, without living any attorney in Nigeria) or for any other reason or reasons is unable to Acts, the person or persons who shall be entitle to grant of administration with the Will annexed shall be determined in the following order of priority.

1. Any residuary legatee or devisee holding in trust for any other person.
2. Any residuary legatee or devisee for life .
3. The ultimate residuary legatee or devisee including one entitled on the happening of any contingency or where the residue is not wholly disposed of by the will any person entitled to share in the residue not so disposed of or the personal representative of any such person.
4. Any specific legatee or devisee or any creditor or the personal representative of any such person or where the estate is wholly disposed of by will, any person who may have a beneficial interest in the event of an accretion to it.
5. Any specific legatee or devisee entitled on the happening of any contingency or next of kin. See order 58 Rule 23 (Lagos).

PROCEDURE FOR GRANT OF PROBATE

The procedure depends on whether it is contentious or non-contentious or depending on whether:

1. The validity of the Will is contested.
2. The appointment of an executor is challenged.
3. Probated is sought to be revoke or denied.

NON-CONTENTIOUS GRANT (COMMON FORM) PROBATE

STEP ONE: DISCOVERY OF THE WILL

The search for the testator's will begins after the burial ceremonies are over. See S.1 of the Births, Deaths, etc.

(compulsory registration) decree No 69 of 1992. Usually the original copy of the Will is kept at the probate registry of the High Court. The practice is for the relatives to begin the search by making enquiries in writing to the probate registrar, stating the full names and any formal names of the deceased, his last address, date of death, supported by a certificate of death issued by a government hospital where the deceased died, the Local Government Council or the National Population Commission.

Furthermore, Abuja rules is very useful in the search for a Will, as it provides that any person having custody of a testamentary document of a deceased person must deliver such document to the probate registrar within 14 days of his having knowledge of the testator's death.

If the Will is in the custody of the solicitor to the testator, he is expected to forward it to the probate registrar, who will make necessary arrangement for opening and reading of the Will.

Where the Will is found at the probate registry, it will be read at a designated time or day as may be determined by the probate registrar. Where the Will cannot be found and there is a reasonable ground for believing that a person has knowledge of any testamentary document or documents of the deceased testator, the Court may summarily order that such a person be examined in respect of the document in Court or on interrogatories; that he attends the Court for that purpose and after such examination that he produces the document and brings it to court. All documents referred to in the Will as constituting testamentary documents of the deceased must also be produced alongside the Will. High Court Civil Procedure Rules Lagos (2019) and Abuja (2018).

STEP TWO : APPLICATION FOR PROBATE

After the discovery and reading of the Will, application will be made for probate by way of a letter addressed to the probate registrar indicating;

1. The identity of the deceased testator's name, address, profession, spouse name, names of children.
2. Date and place of birth of the testator.
3. That he was resident within jurisdiction shortly before his death.
4. That the testator was found to have made a Will.
5. Names of the executors (if any).

Application is by petition in Abuja. –

(Lagos); ORD. 62 Rule 9 (Abuja.)

DOCUMENTS REQUIRED TO PROCESS THE APPLICATION

1. Copy of the Will (Lagos); ORD.48 Rule 27 (Abuja.)
2. Death Certificate of the Testator (Form D2 issued by the National Population Commission);
3. Proof of identity of the applicant and of the Testator
4. Affidavits stating the date and place of death of the Testator and his place of domicile shortly before his death.
5. Declaration of all personal properties of the Testator.

STEP THREE: PROOF OF WILL

It is the duty of the Executor or Executors to prove the Will. Where he fails, neglect or delays in doing so, a notice shall be served on him to prove the Will or renounce probate (citation) and he must within 21 days of the notice (that is of being cited) appear before the court to prove the Will or renounce therefore. Citation may be issued whether or not the Executor has intermeddled with the

properties constituting the estate of the diseased Testator. Citation shall be accompanied by an affidavit verifying the facts contained therein. It must be served personally. Only a person interested in the estate of the Testator can cause a citation to be issued. The person cited shall within a period of 8 days enter appearance to the citation using the appropriate form.

Where an Executor appointed in a Will is cited to propound a Will and he refuses or fails to appear before the court to propound the Will within the times stipulated for appearance, the citor may apply to the Judge for the Will to be declared invalid where an Executor with power to take out probate (in case of double probate) is cited and he fails to appear within time, the citor shall apply for summons for the Judge to make note of the citation and failure of the Executor to appear to propound the Will, on the probate already granted; but in the case of an Executors who has intermeddled with the estate, the citor shall apply for summons for the Executor to take out probate within a specific time or for probate to be granted to the citor.

The registrar or court must be satisfied as to the due execution of the Will and that it contains appropriate attestation clause before admitting it to probate. Where there is no attestation clause or the attestation clause in the Will does not satisfy the requirement of the appropriate statute or there is doubt about due execution, the registrars shall require affidavit of due execution to be sworn by one of the attesting witnesses; if no attesting witnesses is conveniently available, the affidavits shall be obtained from any other person who was present at the time the Will was executed.

In the case of a Will of a blind person, an illiterate or deaf and dumb Testator grant will not be made unless the judge

is satisfied that it was read to the testator before execution and that he approved of its contents.

The Will is marked. Then the probate registrar prepares an enrolled probate order to be signed by the probate judge with the chief registrar (in Abuja). Executors are then granted probate.

STEP FOUR: GRANT

Upon satisfaction of the registrar that the Will was duly executed and that the testator made the Will with knowledge of its contents, the registrar would issue probate.

GRANT OF DOUBLE PROBATE

This is a grant of probate to persons to join other Executors already granted probate. This is another form of non-contentious grant of probate. Double probate would be necessary in any of the following circumstances:

1. Where an executor could not join others in the application for probate for reason of being outside the country at the initial grant .
2. Where a minor is one the Executors appointed in a Will and the initial grant was made with the power for additional grant reserve for him, upon the minor retaining majority, application can be made for double probate by reason of mental or physical infirmity; and he subsequently recovers from such infirmity, he may apply for double probate to join those earlier granted probate. Lagos Rules , Order rule 49 Rules 64 51 (Abuja).
3. Double probate can also be granted where the Testator had appointed more than four executors, as probate can only be granted to not more than four persons at a time. Those excluded from the grant can apply to fill the gap where any of the recipients of the initial grant dies.

CONTENTIOUS GRANT (PROBATE IN SOLEMN FORM)

Where the grant of probate is contested, the procedure is different from the procedure in non-contentious grant discussed above. The stages in contentious grants are as follows.

1. APPLICATION FOR PROBATE

First the Will is discovery/reading of the Will (Lagos), Order 62 rule 16 (Abuja). The Application for grant of probate is made. (Lagos), Order 62 Rules 62 rule 9 (Abuja). Application for probate must have been made by a person before another who is either challenging the validity of the Will, or resisting the appointment of a person as executor, or seeking the revocation of the grant of probate would object to the grant.

2. CAVEAT

A PERSON would usually express his opposition to the grant of probate by filling caveat. Where this is filed, the Registrar shall refer the proof of the Will to the court. To allow for such objection to be made, probate is usually not granted until the expiration of 3 months (Lagos), and 6 months (Abuja) which is the life span of caveat.

A caveat shall cease to be effective in any of the following circumstances:

1. Where the caveator fails to enter appearance to a warning or citation within the specified period, and the citor files an affidavit or that effect, or
2. After six months (Abuja), or three months (Lagos) of its filling unless the caveator or caveat is reentered; or

3. Caveat filled by a person who had knowledge of probates action and still files caveat against grant after probate action.

3 CITATION /WARNING

The application for the grant of probate may cite the cavetor by serving appropriate warning which is a warning to him to give particulars of any contrary interest which the (caveator) has in the estate of the deceased. The caveator shall enter appearance or respond by filling probate form within 8 days. The forms are used by the caveator to disclose the nature of the contrary interest they have in the state of the deceased. The caveator who has not entered appearance to the warning may withdraw his caveat by giving notice of withdrawal to the probate Registrar. Where the caveator fails to respond within the time stipulated, the applicant may file an affidavit showing that the caveator has been cited or warned and no summons or response has been received. Thereafter the caveat shall cease to be effective and probate may be granted. Appearance to situation by caveator is made in probate Form (Lagos), or 54 (Abuja) within 8 days Ord. Rule 18(8) (Lagos).

But caveat to which an appearance has been made shall remain force until the commencement of probation.

4. PROBATE ACTION IN COURT

Probate action is by writ of summons; *Igunbor v. Afolabi (2001) FWLR part 59 1284* Either the applicant for probate or caveator can file normal court proceedings by way of writs of summons.

At the conclusion of the probate action, the probate registrar may or may not grant probated depending on the outcome of the action. If the court pronounces in favour of the Will, the registrar would grant probate.

Pending the conclusion of the dispute on the will, the court may grant temporary administration pendent lite to preserve the estate. It is at the discretion of the court to either grant or refuse grant of temporary administration. *Mortimer v Paul* (1870) LR2P & D85.

LIMITED GRANT

A grant may be limited either as to the extent of the property that can be administered by the Personal Representative or as to purpose as to time. Grant of probate would only be limited if the Testator clearly stipulates such limitation. But in the grant to letters of administration, the grant can also be limited, depending on the circumstances of the grant.

LIMITED AS TO PROPERTY

A grant could be made limited to a part of the estate. This could arise where there is settled land or because the Testator requires experts to handle the part of the estate. In this case, we have general executor(s) and limited executors(s).

LIMITED AS TO PURPOSE

This could be either grant pendent lite; grant ad colligenda bona. Whilst grant penden lite is made for the duration of litigation affecting grant of probate or letters of administration, and grant ad litem is made to enable the grantee collect and preserve assets in the estate, especially where the person entitled to a general grant is not in a position to obtain grant immediately.

LIMITED AS TO TIME

A grant could be limited as to time where it is either taken on behalf of a minor or the person entitled is mentally

incapacitated as at the time of the grant. In case of a minor it is grant *durante aetate minore*.

LETTERS OF ADMINISTRATION

The administration of the estate of a deceased may be by executors upon grant of probate by Administrators after grant of letters of Administration. Administration can be granted with or without a Will annexed.

ADMINISTRATION PENDENT LITE:

This is a grant to pending the determination of a dispute over the Will or entitlement to the grant. It is known as administration pendent lite See s 27AEL, Lagos.

ADMINISTRATION PENDNG THE GRANT OF LETTERS OF ADMINISTRATION –

Between death and grant of letters of administration, the Chief Judge is statutorily empowered to administer the estate. See section 10 AEL LAGOS. He can appoint an officer of the court to take possession of the properties of the deceased person pending when they can be dealt with according to law. This is merely granted for the preservation of the estate, to avoid unauthorized intermeddling with estate

ADMINISTRATION BY ADMINISTRATOR –

This comes ;-

1. Where any estate of a deceased is unrepresented. An estate is said to be unrepresented when;
 - a. A person dies intestate & his next of kin is unknown or is absent from Nigeria without having an attorney or
 - b. A person dies testate but administrator who is to be appointed in instances of a Will annexed or de bonisnon is unknown or refuses or neglects for more

- than one month after death or is absent from Nigeria without having an attorney; or
4. Executors or Administrators are absent from Nigeria without having an attorney or;
 5. Testator appoints the Administrator General as sole Executor. See S. 2AEL, Lagos
 6. The estate is opened to danger of being misappropriated or wasted or deterioration; or
 7. Agent in charge of assets of a person not residing in Nigeria or a company not incorporated in Nigeria dies or winds up without leaving a responsible person in charge of the assets returned, after completion, to the probate registry accompanied by:
 1. An inventory
 2. Affidavit of next- of-kin
 3. Bond, (to ensure that the grantee makes property inventory, distributes the estate accordingly and pays out all just debts).
 4. Bank certificate,
 5. Particulars of landed property of the deceased
 6. Schedule of debts and funeral expenses
 7. Justification sureties. Guarantors sureties may not be required where the grant is to be made to
 1. Creditor
 2. Person/beneficiary entitle to the whole estate
 3. Attorney of a person entitled
 4. Person granted in place of a minor or unsound person
 5. Administrator-General
 6. Administration granted to present or defend an action

WHO IS ENTITLED TO LETTERS OF ADMINISTRATION

Under the Administration Estates Law (AEL)/ the following persons are entitled to grant of letter of Administration in order of priority:

1. Surviving spouse or spouses of the deceased person
2. Children of the deceased or issues of such children that predeceased intestate
3. Parents of the deceased
4. Brothers and sisters of the deceased of full blood and their surviving children Tapa v. Kuka (1945) 18 NLR5
5. Brother and sisters of the deceased of half-blood and their surviving children that are sui juris
6. Grand parents of the deceased
7. Uncles and aunties of whole blood or the surviving children
8. Creditors of the intestate estate. See section 49 AEL Lagos.

PUBLICATION OF APPLICATION FOR LETTERS OF ADMINISTRATION

Every application for letters of administration is usually published, to enable any other person interested enter the appropriate caveat. Consequently, letters of administration shall not be granted until a specified period of time (usually determined by the relevant law or Rules of Court in the State of application) has elapsed, and where there is a caveat, shall not be granted during the period of such caveat unless the caveator refuses or neglect to respond to citation

Under both Lagos and Abuja, the caveator has eight (8) days to respond.

ADMINISTRATION OF ESTATES (SMALL ESTATE PAYMENTS EXEMPTION) LAW 2005 (LAGOS STATE)

Where a person living in Lagos State dies leaving a personal estate comprising of money with any person, bank or institution not exceeding in value the sum of N100,00 such shall be regarded as a small estate and will be regulated by this law to the exclusion of the Administration of Estate Law, Probate rules and all other laws or rules of court that applied to it. Rule 1 & 2.

Where the Probate Registrar receives satisfactory evidence of the death of the deceased and the statutory declaration is made, he will issue a certificate under seal of the court to applicants where they appear to him to be the person's entitled to receive it under the law with regards to the distribution of the estate of the deceased person Rule 3(1) & (3), subject to the provisions of section 24 (2) of the Administration of Estate Law Lagos State, the certificate issued authorises the payment of the money in the small estate to the applicant.

Rule 3 (3).

The statutory declaration is made under oath and states that the deceased died interstate without any real property within or outside Lagos State The declaration must also state that the person claiming the money from the deceased estate is the one entitled to receive it. Rule 3 (2).

The persons entitled to apply for the issuance of the certificate are in this order- the surviving spouse, children of the deceased (including adopted children), parents, brothers and sisters of whole blood, brothers and sisters of half-blood, uncles and aunts and other persons who may inherit under relevant

legislation. Rule 3 (5) (a-g). Where no application is made by the listed persons above, the estate shall revert to the *bona vocantia*. The applicant is not required to pay estate duty. Rule 3 (4).

This law shall apply where the deceased left landed property as owner or by inheritance. Note that the law only applies in the case of intestacy.

Applications made for grant of letters of Administration file before the commencement of this law which is 4th April, 2005 are excluded from the provisions of this law, Rule 6. The Chief Judge may by statutory instrument review the maximum value of estate to be regarded as small estates. Rule 5.

CHAPTER ELEVEN **PERSONAL REPRESENTATIVES**

EXECUTORS

Personal Representatives are persons who are appointed to manage the affairs of a deceased person. Personal Representatives may be appointed by a court, nominated by Will or selected by the person involved. Personal Representatives include Executors and Administrators, usually in a Will, to undertake management or administration of the estate of the Testator or testatrix, after the Testator's or testatrix' death. Administrators are persons appointed, by the court, usually after the death of a deceased persons, to manage the affairs of the deceased. An Executor may also be appointed as a trustee by the Testator or Testatrix. Though an Executor is expected to act in good faith in relation to the estate, he is not a Trustee in the strict sense and thus cannot assign the duties, functions, and powers of the office of Executor. But where he is expressly appointed a trustee, he can:

- (a) Appoint another person as trustee and thus transfer the duties; and
- (b) Retire from the trust.

MODE OF APPOINTMENT

Executors can be appointed in the following ways:-

1. **EXPRESS APPOINTMENT** – Here, the Testator makes a declaration of the appointment of the Executor in the will. This is usually done in the appointment clause of the will. The names and description of the Executor would be clearly stated in the appointment clause by the Testator.

A Specimen Of An Appointment Clause

I hereby appoint Mrs. Ada Akande, Legal Practitioner of 10 Bambo Street, Ikeja, Lagos and Mr. Okon Musa, Legal

Practitioner of 23 Ilupeju Street, Ojota, Lagos to be Executors of my will.

A SPECIMEN OF AN APPOINTMENT CLAUSE WHERE EXECUTOR IS ALSO A TRUSTEE

“I hereby appoint Mrs. Ada Akande, Legal Practitioner of 10 Bambo street, Ikeja Lagos and Mr. Okon Musa, Legal Practitioner of 23 Ilupeju Street, Ojota, Lagos (hereinafter referred to as “my trustees”) to be the Executors and Trustees of my Will.”

The Testator can appoint Executors to administer different parts of his estate. He can also appoint persons to be Executors for specified period, such as until a child attain maturity.

2. **Appointment by implication** – This is where the Testator imposes duties or functions to be performed on a named person in the will without any express declaration of appointment of that person as Executor. It is otherwise known as Executor according to the tenor of the will. It is not advisable to appoint Executors by implication as it may be open to conflicting interpretations as to whether the words show an intention that the person performs the functions of an Executor. The mere stipulation of a person as sole beneficiary of the estate does not amount to appointment of such person as Executor of the will.

The Executor must have been empowered in the will to carry out the usual duties of an Executor. In the Goods of Cooks (1902) P. 115 where the testatrix desired John Goodluck to pay all her just debts, the court held that it was an implied appointment to John Co. as the Executor of the Testatrix’s will (In the Goods of Cook (1902 P115). Also, where the

Testator merely said: “All else to be sold and proceeds after debts etc. Barclays Bank would do this, to Emily Thompson”; it was held to be an implied appointment of Barclays Bank as Executor according to the tenor. In the Estate of Fawcett (1941) P 85. See Order 57 Rule 10 (a) (ii), High Court of Lagos (Civil Procedure) Rules, 2012.

3. **Appointment By Operation of Law or Executor By Representation-** These are Executors of the estate of the last surviving Executor of will of a Testator, who also dies testate. This is an Executor by representation. For example, Chief Ogidan in his will, appointed his friend, Mr. Bobby Brown, as his Executor, and Mr. Bobby Brown performed the duties of the Executor of the will of Chief Ogidan, until he, Bobby Brown equally dies in April, 2015. If Bobby Brown was the sole Executor of the will or last surviving Executor of the will, and left his own will in which he appointed Dr. Raphael Executor of his will, then Dr. Raphael by operation of law would automatically become the Executor of the will of Chief Ogidan. See Section 8 of the Administration of Estates Law, Lagos State. This creates a chain of representation of Executorship or administration of the estates of the initial Testators. The Executor by representation has the same powers over the estate of the Testator as the original Executor would have had. A person appointed Executor of the will of an Executor of the will of a Testator would however not be an Executor by representation where the other Executor fails to prove the will of his Testator or has appointed some other Executor.

Break in the Chain of Representation

The chain of representation is however broken where the last surviving Executor:

- a. Dies intestate; or
- b. Fails to appoint an Executor in his will; or
- c. Fails to obtain probate, or
- d. Renounces probate

4. **Appointment by the court** – Where the court is satisfied that a person entitled to a grant is by reason of mental or physical infirmity incapable of managing his affairs, a grant for his use and benefit during his incapacity may be made to:
 - a) Person authorized by the Judge to apply for the grant, in case of mental incapacity;
 - b) Where no person is so authorized by the court or judge, to a person entitled to the residuary estate of the deceased, then the person who will be entitled to a grant in respect of his estate if he had died intestate, will be appoint or any other person the court or Judge so direct;
 - c) The court can also appoint an additional Executor where there is one Executor during the minority of a beneficiary or the subsistence of a life interest, on the application of the guardian, committee or receiver of any such person; Section 24 AEL Lagos.
 - d) Similarly, where an infant is the sole Executor of a will, letter of administration with the will annexed may be granted to his

guardian or to such person as the court think fit until the infant attains the age of majority; 21 years or 18 years as the case may be- Section 29 AEL, Lagos.

- e) The court can appoint a trust corporation. This is usually where the trust corporation is named Executor either solely or jointly with another person or the court can appoint a trust corporation where there is a minority or a life estate in the will.
- f) Where the person entitled resides outside the State, grant may be made to the lawful attorney of such a person but where there are other Executors, grant would not be made without notice to the other Executors.

5. Appointment under a Power of Appointment

This is where a Testator nominates another person to appoint the Executors of his Will.

6. Substitutional Executors – These are Executors who can only be appointed as Executors. Unless the condition occurs, there can be no valid appointment of substitutional Executors. For instance, an Executor may be appointed to assume office where another predeceases the Testator. Note that a Substitutional Executor can only be validly appointed if the other Executed appointed predeceases the Testator. If the appointed Executor survives the Testator but dies shortly afterwards, a substitutional Executor cannot be appointed in his stead.

WHO CAN BE APPOINTED AN EXECUTOR

Any person, including an artificial body or trust Corporation like a bank can be appointed Executor. The Testator should be well advised as to the persons to be appointed as Executors. These could be relations, friends, Professionals (such as Solicitors or Accountants or a Firm of Solicitors or Accountants on payment of fees), Trust Corporations or Banks or Public Trustees. If lay men are appointed Executors, they may not be able to properly administer the estate of the deceased and if they require the services of a Solicitor, that might be an additional cost to the estate.

In the case of Solicitors or Trust Corporations, unless there is a charging clause, they may renounce probate. Trust corporation such as Banks may only accept executorships in their own terms; the Testator should therefore be familiar with the usual terms before appointing Trust Corporations as Executors, for where their terms are not accorded in the Wills, especially in the charging clause, they may refuse the grant of probate.

Persons of law moral turpitude, minors, fraudsters, or criminals, or mentally disabled persons should not be appointed Executors, as appointing any one of these may be a ground for denial or refusal of probate, even though the appointment remains valid. But where a minor is appointed, probate will usually be granted to the adult Executors with power reserved for grant to the minor when he attains majority. See Section 65 AEL, Lagos. Where however, a minor is entitled to probate, it shall be granted to his parents or guardian appointed by the Judge or such other person assigned by the guardian or appointed by the court. See S. 64 AEL Lagos.

Where an infant or person of unsound mind, the court may appoint another Administrator with the Will annexed upon application by the guardian to the infant or any other

person interested in the estate. See S. 29 AEL, Lagos; Section 27 AEL Abuja. Probate may be appointed to such guardian alone or jointly with another person as appointed by the court – Admin-General v. Coker (1948) 16 NLR I I I. The grant is made pending when the minor attains majority, the grant can be recalled or cancelled and a fresh grant made to the minor, now adult. Pending the fresh grant to the minor, the Administrator has all the powers of an Administrator. Re Cope (1880) 16 CH. D 49.

QUALITIES OF AN EXECUTOR

(Factors to Consider in appointing Executors or Administrators)

Though anybody can be appointed an Executor, great caution must be exercised in the choice of the person to be vested with the enormous powers of an Executor. An Executor holds a very primary position as far as the estate of the deceased is concerned. He is the living voice, mind and body of a deceased Testator. The Testator must therefore exercise absolute caution in the choice of Executors. He should consider the following factors:

- a) **Willingness and availability to act:** the proposed Executor must be one who will be both willing to act and always available to administer the estate.
- b) **Capacity** – he should be capable of administering the Will. Professionals are usually preferred in the case of a vast estate, notwithstanding that the appointment of professionals as Executors has cost implications.
- c) **No conflict of interest** – The proposed Executor should be one who has no conflict of interest with the Testator or the estate. Appointing a beneficiary would serve the interest of the estate, as he has personal interest in the estate, unlike appointing a

total stranger. On the other hand a specific legatee may not show any interest in the residuary estate or may be tempted not to attend to the estate or have the best interest of the estate at heart.

- d) **Harmony** – where he desires more than one Executor, he should ensure the persons to be appointed are those who can work together harmoniously. This because where for instance, there is mutual suspicion amongst the Executors, discord may follow, which may affect the administration of the estate.
- e) **Credibility and Honesty** – The Executors should be credible and honest person. Criminal or fraudulent persons should not be appointed Executors.
- f) **Knowledge of Business of Testator** – Executors to administer the estate of the Testator should have knowledge of the business of the Testator and understand the nature of same, though they need not be specialist in the field of business.
- g) **Logistics & Convenience** – It is unwise for example, to appoint a person residing in a far distant country or place (especially away from where the majority of the Testator's assets are located) as Executor.
- h) **Age** – If the Executor is a natural person, he should be younger than the Testator. This is predicated on the principle that older persons usually die before younger ones. But note that there is nothing wrong in appointing an older person, especially where the Testator suffers from a terminal illness.

NUMBER OF EXECUTORS

Section 24 (1) of the Administration of Estates Law of Lagos provides as follows:

"Probate or administration shall not be granted to more than four persons in respect of the same property, and administration shall, if there is a minority or if a life interest arises under the Will or intestacy, be granted either to a trust corporation, with or without an individual, or to not less than two individuals.

Where more than four Executors are appointed, they would be chosen for the purpose of grant of probate by reference to the first four names, with power reserved to the others. Even though it is not advisable to appoint only one person as an Executor, probate may still be granted to one person as an Executor, probate may still be granted to one person where he is the sole Executor. See Section p AEL Lagos. The appointment of sole Executor is not advisable because he may predecease the Testator or renounce probate. It is advised however that a Testator appointing a sole Executor should make a substitutional or alternative appointment, so that if the Executor predeceases the Testator or renounces probate, the substitute Executor would take probate. Again, where the Executors also act as trustees, they should be at least two, for it takes two trustees to issue good receipt unless the Trustee is a trust Corporation.

Although the power of an Executor can be exercised by sole Executor, where a minor has beneficial interest in the estate in such a situation, the court may appoint an individual representative unless the sole Executor is a Trust Corporation. See In Estate of Lindley (1953) P. 203; Section 24 AEL Lagos. Where a minor is made Executor alongside other adults, probate shall be granted to the adults with power reserved for the minor to apply for double probate when he attains majority – *Omayemi v. Okunubi* (1966) NMLR 50

REMUNERATION OF EXECUTORS

Executors are not entitled to remuneration; their services are rendered gratuitously (*Re Orwell* (1982)). But an Executor may claim remuneration in any of the following circumstances:

- 1) Where the court makes an order to that effect. The value of the estate determines the amount of remuneration. But in Abuja, remuneration shall not exceed ₦10,000.00 unless the court otherwise directs where the Executors satisfy the court of the exceptional circumstances to warrant additional fees.
- 2) Under the rule in *Cradle v. Piper* 41 ER 1422 – an Executor or administrator is entitled to his out of pocket expenses in the course of his administration of the estate.
- 3) Where there is a charging clause – a Charging Clause is a declaration by a Testator in the Will allowing or permitting Executors to charge their usual professional fees for services rendered in the administration of the estate.

The rule that where an Executor who is a beneficiary under a Will witnesses the Will, he may lose any gift to him under the will, it seems, does not affect his professional fees to which he is entitled by virtue of the charging clause in the Will. See **Re Royce (1957) Ch 626**.

But see Re Pooley (1889) 40 Ch D 1 where it was held that an Executor who is also an attesting witness to a will is not entitled to rely on a charging clause in the Will as the same has failed by virtue of section 15, Wills Act, 1837

RENUNCIATION/CESSATION OF EXECUTORSHIP (See Order 58 Rule 25, High Court of Lagos (Civil Procedure) Rules, 2012)

An Executor may renounce his appointment; this must however be by a positive act, not by a passive one. He may be required to fill some Forms for renunciation or depose to an affidavit of renunciation. He must renounce his administration of the entire estate and not part of it – see Paul v. Moodie 81 ER Page 706.

Where a sole Executor appointed in a Will survives the Testator but either

- a) Dies without taking out probate, or
- b) Is cited but refuses to take probate, or
- c) Renounces probate.

His right in respect of the Executorships shall wholly cease and the representation to the administration of the estate shall devolve as if no Executor had been appointed – S. 6 AEL

WITHDRAWAL OF RENUNCIATION

With the permission of the Probate Registrar, renunciation of probate can be withdrawn at any time. The Executor must however adduce exceptional circumstance for the leave or permission for withdrawal to be given. Section 7 AEL Lagos provides:

“where an Executor who has renounced probate has been permitted ... to withdraw the renunciation nor prove the Will, the probate shall take effect and be deemed always to have taken effect without prejudice to the previous act and dealings of and notices to any other Personal Representatives who have previously proved the Will or taken out letters of administration, and a memorandum or the subsequent probate shall be endorsed on the original probate or letters of administration.”

Note however that any act or thins already done by any other person or persons upon grant of administration with the Will annexed before the withdrawal of renunciation by the Executor remains valid.

EXECUTORSHIP WHERE ADMINISTRATION IS ALREADY GRANTED

An Executor of the estate of a Testator shall not have powers to administer the estate or undertake any legal action in respect of the same where letters of administration are already granted over the estate, unless and until the administration is either cancelled, revoked, or withdrawn.

EXECUTOR DE SON TORT

Executor does not tort is a person who is not an Executor or personal representative in the real sense of the word but who has intermeddled or dealt with the estate without authority and has thereby incurred liability to be treated as personal representative. See Adeniyi Jones v. Martins (1943) 9 WACA 100. Though the word ‘tort’ implies some wrongdoing, the acts constituting a person to be Executor de son tort need not be wrongful. Any person who intermeddles with the estate could be regarded as Executor de son tort. As Executor who had been appointed in the will but refuses to prove the will or take probate may be regarded as Executor de son tort, so also is an Administrator who takes the property in the estate prior to the grant of letters of Administration.

But note that an Executor or administrator who has intermeddled with the estate but who later applies for and obtains probate or letters of administration ceases to be Executor de son tort. See Order 58 Rule 19; Order 57 Rule 17, High Court of Lagos (civil Procedure) Rules, 2012.

It is the nature of the acts constituting the intermeddling and not the objective or financial implications of the act that makes a person an Executor de son tort. It is therefore not all acts that necessarily makes an unauthorized person an Executor de son tort. In *Harrison v. Rowley* (1798) 4 Ves 212, arranging for the funeral of the Testator was held not to be an act that can make a person an Executor de son tort.

But collecting assets in the estate and paying debts may constitute a person an Executor de son tort. See *Re Stevens* (1898) 1Ch. 162.

A beneficiary who has intermeddled with the estate of a deceased can also be an Executor de son tort. This is because the assets in the estate remain vested in the Personal Representatives until they are distributed according to the tenor of the Will or in the absence of a valid will, in accordance with the applicable intestate rule of succession. See *Adebiyi v. Adebiyi* (2000) 1 LHCH (Pt. 6) 46; *Yunusa v. Dada* (1990) 4 NWLR (Pt. 146) 657.

LIABILITIES OF AN EXECUTOR DE SON TORT (SEE SECTION 18 AEL LAGOS)

Generally, an Executor de son tort will incur the following liabilities:

- 1) **Liable for any Loss Suffered by the Estate-** An Executor de son tort is liable to refund any loss suffered by the estate as a result of his intermeddling with the estate.
- 2) **Liability to Pay for Services Rendered to the Estate during the Period of Intermeddling or in the Lifetime of the Deceased –** The Executor de son tort is liable to bear the cost of services rendered by a third party to the estate during the period he

intermeddled with the estate. Having made the representation of acting on behalf of the estate, he would be liable to anybody who, relying on that representation, acted on behalf of the estate. See Adebiyi Jones v. Marthins (*supra*)

- 3) **Liability to Creditors** – An Executor de son tort is liable to creditors of the estate even for debts incurred by the deceased. See Wokocha v. Esiaba (1975) ECNSLR 96.
- 4) **Liability for Personal Expenses** – Where an Executor de son tort incurs any expenses in the course of intermeddling with the estate, he would be personally liable to the creditor. He is not an agent of the estate, and is therefore not entitled to any indemnity from the estate. See Ricket v. Bank of West Africa (1959) NRNLR 125; Udo v. Williams (1997) 1 NWLR (pt 483) 548.
- 5) **Liability to Pay Fine** – An Executor de son tort is liable to pay fine for intermeddling with the estate of the deceased. The amount of the fine would depend on the applicable High Court Rules. In Lagos, it shall not be less than N50,000.00 (Fifty Thousand Naira): Order 57 Rule 17, High Court of Lagos (Civil Procedure) Rules, 2012. In Abuja, it shall not exceed N5,00.00 (five thousand Naira) Order 48 Rule 5 Abuja High Court Rules, 2004.
- 6) **Liability for Inheritance Tax** – The Executor de son tort is liable to pay inheritance tax on anything he has intermeddled with. See New York Breweries Company Ltd v. AG (1899)
- 7) **Liability for Citation** – An Executor who is entitled to probate who intermeddles with the estate prior to grant of probate can be cited to prove the Will or be compelled to take probate. **In the Estate of Biggs (1966)**

Please note that generally, until probate is granted, the Executor or Administrator who interferes with the estate of the deceased person without applying for probate within three months of his death, is an inter –meddler or after the termination of any suit for or dispute in respect of probate or administration, he shall in addition to any other liability, be liable to such fine not less than N50,000.00 as the Judge deems fit to impose.

ASSENT AND RIGHTS OF PERSONAL REPRESENTATIVES

The Administration of Estates Law empowers a personal representative to assent to the vesting of a legal estate which devolved upon the personal representative, in the beneficiary or any person who may be entitled by devise, bequest, devolution, appropriation or otherwise. This power is confined only to estate which devolved upon the personal representative: See Section 40 (1) AEL Lagos. Since an assent is by statute a conveyance, where it is executed under seal, it is capable of vesting a legal estate in the ultimate beneficiary in any event (**Re Stirrup's Contract (1961)** **1AER 805**).

An Assent given by a Personal Representative shall not, except in favour of a purchaser of a legal estate, prejudice the rights of the Personal Representative to recover the estate or interest to which the assent relates or to be indemnified out each estate or interest against any duties, debts or liability to which such estate or interest would have been subject if there had not been any Assent: Section 40 AEL Lagos. A personal Representative may require security for the discharge of any duties, debts, or liability as a condition for giving an Assent merely by reason of the subsistence of any such duties, debt, or liability if

reasonable arrangements have been made for the discharge of the same: Section 40 (10) AEL Lagos.

CONDITIONS AN ASSENT MUST SATISFY IN ORDER TO BE VALID & EFFECTIVE

- 1) Must be in writing
- 2) Signed by all Personal Representatives
- 3) Property must be certain – contain proper description of the property
- 4) Properly identify the beneficiary

Note: an assent need not be by Deed to pass the legal interest in the property.

See Section. 40 (4) AEL, Lagos, Renner v. Renner (1961) ANLR 233

POWERS, DUTIES & LIABILITIES OF PERSONAL REPRESENTATIVES

The grant of administration has a direct bearing on the estate of the deceased. It confers enormous powers on the grantees of probate or administration, (the Executors and Administrators) and imposes grave duties on them.

POWERS OF PERSONAL REPRESENTATIVES

1 Power to Postpone Distribution

Personal Representatives have discretion as to the time for the distribution of the estate of the deceased. They have the right to postpone the distribution of the estate for not more than one year. This is referred to as the ‘Executor’s year’. Section 47 of the Administration of Estates Law, Lagos provides:

“Subject to the foregoing provisions of this law, a Personal Representatives is not bound to distribute the estate of the deceased before the expiration of one year from death.”

In exercising this power, the Executor or Administrator must take into consideration the state of the assets and interest of the beneficiaries. He must therefore act diligently to ensure no loss is suffered by the estate. But he is not bound to complete the distribution within one year, where it is not reasonably possible. Not however that the exercise of this power is subject to:

- a. The order of the court – the court could order release of funds to a beneficiary who is in need of immediate financial assistance or
- b. Where pecuniary and general legacies are not paid within the Executor's year, they attract interest until they are paid;
- c. The power to postpone distribution does not apply to payment of debts. Debts are required to be paid within the Executor's year.

2. Power to Sell, Mortgage and Lease

The Executor or administrator has the power to sell, mortgage and lease the assets in the estate in order to raise funds for the payment of debts and liabilities. This may result in abatement. But this power is subject to the following limitations:

- a. Reversionary interest that has not fallen into possession shall not be sold;
- b. Personal chattels shall not be sold – there can only be disposed of where the Personal Representatives has special reasons to do so (for instance, if other assets are insufficient to defray the outstanding costs, debts and liabilities). Section 37, AEL, Lagos.

Personal Representatives can exercise the power to mortgage the assets in the estate in order to raise money to pay the portions or quantum of interest of a surviving spouse or any other beneficiary, or to redeem a life interest of a surviving spouse.

Where there are more than one Executor or administrator, any of them can sell personally. Power to sell personally is joint and several. See *Attenborough v. Solomon* (1913) AC, 76. But in the case of realty, no Executor or Administrator has power to sell without the concurrence of all other Executors or Administrators (where they are more than one), unless the other named Executors have renounced probate or have refused to prove the will. *Erewa v. Idehen* (1971) All NLR 195; *Ojomo v. Ibrahim* (1999) 12 NWLR (Pt. 631) 415. See also Section 4 (2) AEL, Lagos

Exceptions: conveyance of realty can only be validly made without the concurrence of all the representatives:

- a. Where there is an order of court permitting or authorizing such conveyance; or
- b. Where the other Representatives left out of the conveyance are Executors yet to be granted probate, or who have renounced probate or have refused to prove the Will.

3. **Power to Appropriate Assets**

Personal Representatives can appropriate any part of the assets in the estate towards the satisfaction of a legacy or any other interest in the estate of the deceased. But if an asset exceeds the value of the beneficiary's legacy or other interest in the asset, it cannot be appropriated **Re Phelps (1980) Ch. 279.** See also Section 44 (1), (5) & (7) AEL, Lagos

Prior to the appropriation, the Personal Representatives can authorise professional valuers to undertake a valuation of the asset to be appropriated. The Personal Representatives cannot appropriate to themselves assets in the estate unless

such asset had been valued by an independent or professional valuer **Re By the way (1911) 104 LT 411**

In appropriating the assets in the estate, Personal Representatives must have regard to the interest of the persons beneficiary entitled under the will or in intestacy and in such circumstances appropriate consents must be obtained.

If the appropriation is for persons absolutely and beneficially entitled in possession, the consent of that person must be obtained; and if the appropriation is in respect of any settled legacy, share or interest, the consent of either the trustee thereof, if any (not being also the personal representative), or the person who may for the time being be entitled to the income must be obtained. But consent would not be required;

- a. In case of a person who is yet to come into existence after the time of appropriation or who cannot be found or ascertained at the time;
- b. In case of a lunatic, where there is no committee or trustee, and the appropriation is of an investment authorised by law or by the will, no consent shall be required on behalf of the lunatic;
- c. There is no trustee of a certain legacy, share or interest, and no person of full age and capacity entitled to the income thereof. No consent shall be required for any appropriation in respect of such legacy, share or interest, provided that the appropriation is of an investment authorised by the will, no consent shall be required.

Appropriation by the Personal Representatives is however subject to the following circumstances:

- a. Specific legacies or device must not be appropriated;
- b. Consent of requisite persons in the relevant circumstances as stated above must have been obtained.

4 Implied Authority to Deal with or Manage the Estate:

A purchaser for value is entitled to infer the authority of the Executors in relation to the deceased personal estate, unless fraud or misapplication of the fund is evident on the face of the transaction or the property is grossly undervalued or he is in collusion with Executors to defraud the estate, in which case he will not be entitled to statutory or equitable protection. **See Re Venn & Furze's Contact (1894) 2 Ch. 101.** But where he purchases equitable interest from the Executors or Personal Representatives, then on the premise that where the equities are equal, the first in time prevails, the equity of the beneficiaries will be accorded priority. **Re Morgan (1881) 18 Ch. 93.**

However, where the purchaser buys the legal estate, and there is no prior purchaser deriving title from the Personal Representatives of the deceased and notice of a previous assent or conveyance has been placed on or annexed to the probate or administration, a purchaser had an indefeasible interest if prior to the purchase he had been given a statement in writing that the Personal Representatives have not given assent in respect of the legal estate. **See Section 43 (1) (b) & (c) AEL Lagos**

5 Power to Run the Business or Trade of the Testator:

Generally, an Executor or administrator has no power to go into business; this is only possible where there is a distinct and positive authority or direction to that effect given in the will – Kirkman v. Booth 50 ER 821. And where the Testator has stated the part of the estate to be put into business, the Personal Representatives must only use that part. Re White (1958) Ch. 762.

Under the Administration of Estate Law, the Administrator has power to go into business with the estate of the deceased with a view to proper realization of the deceased's estate before its distribution/disposition. Note that the Personal Representatives may go on with the business as a going concern – Dowse v. Gorton (1891) AC 190. Where the deceased had entered into a contract before his death, the Personal Representatives can continue with the contract. Marshal v. Broadhurst (1831) 1 Cr & J 403

6 Power to Appoint Trustees for Infant Beneficiaries:

Personal Representatives have the powers to appoint Trustees for infants who are also beneficiaries of the estate of the deceased either under the will of the Testator or under the rules of intestacy. However, this power only exists where the minor is absolutely entitled and not where the interest is subject to a contingency. The Personal Representatives can appoint a trust corporation, or at least two individuals but not more than four persons. The Personal Representatives would be discharged where the Trustees so appointed gives receipts for and on behalf of the minor. Section 45 of the Administration of Estates Law, Lagos.

7 Indemnity:

Personal Representatives are entitled to indemnity and protection for acts done in the administration of the estate. Though they are personally liable to claimants, such as creditors, the Executors or administrators of the estate of the deceased are entitled to be indemnified for every cost or expenses or debts incurred in the course of the administration of the estate. Section 17 of the Administration of estates Law, Lagos.

8 Power to Invest:

Personal Representatives have power to invest the assets in the estate of the deceased. This power may be as contained in the will, if any, or as authorized under the Trustees Investment Act. The Testator can give extensive powers to invest in any kind of business. In the absence of such authority in the will, the Personal Representatives can only invest in area as stipulated in the Trustees Investment Act. Investment may include the purchase of property for the sake of the income produced and for possible capital appreciation. **Re Wragg (1919)** 2 Ch 58. But it does not extend to the power to purchase property for the occupation of beneficiaries. **Re Power (1947)** Ch 572. See Section 37 (3), AEL, Lagos.

9 Power of Right of Action:

Personal Representatives have power to either sue or maintain any subsisting action for or on behalf of the estate of the deceased. *Shomefun v. Shade (1999) 12 NWLR (Pt. 632) 531*.

Personal Representatives shall not maintain any action except the cause of action was either pending at the date of the death of the deceased or the cause of action arose at least within three years before the `death, and the proceedings must have been undertaken at least six months

after the Personal Representatives have taken up representation. But cause of action that has to do with defamation, seduction, inducing one's spouse to leave or remain apart, will not survive the deceased person. Actions pending against the deceased and which survive him shall be maintained against the estate; the Personal Representatives shall be made to substitute the deceased. Damages obtained against the deceased shall be treated as provable debts against the estate. See section 15 of the Administration of Estates Law, Lagos.

Thus Representatives of a deceased person can sue and be sued on behalf of the estate; all causes of action subsisting against or vested in the estate of the deceased shall survive against or for the benefit of the estate. The common law maxim, *action personalis moritur cum persona* (a personal right of action dies with the person) does not apply. But causes of action relating to defamation, seduction, inducing one's spouse to leave or remain apart from the other or to claims for damages on grounds of adultery shall not survive the deceased. See Section 15 of the Administration of Estates Law, Lagos.

Personal Representatives can take proceedings that are preservatory; where there is threat to assets in the estate, they can take pre-emptive steps to avoid damage to the assets even before the grant of probate or administration. It must be noted that where the interestate died a Bini man, no action can be maintained in respect of his estate until after the second burial: Ovensiri v. Osagiede (1998) 11 NWLR (Pt. 572) 1; Idehen v. Idehen (1991) 6 NWLR (Pt. 198) 382; Obaro v. Probate Registrar (2002) 6 NWLR (Pt. 762) 56. See also page 436. Sasegbon's Laws of Nigeria, vol. 1.

Doctrine of Relation Back

The Personal Representatives can only validly maintain action as representatives of the estate after securing grant.

Any action commenced in that capacity before the grant of administration will be incurably defective and liable to be struck out. *Ingali v. Moran* (1944) 1 All NLR 97; *Mallam v. Mairiga* (1991) 5 NWLR (Pt. 189) 114. But where the action is commenced as next of kin of the deceased or in any other capacity that does not portray the claimant as Administrator of the estate, and the claimant subsequently secures grant of administration of the estate, the writ can be amended to reflect the new status of the claimant as Administrator of the estate. This is what is known as doctrine of relation back. The fact that the grant of administration was not made at the commencement of the action would not affect the proceedings, provided the action was not commenced as an Administrator. The subsequent grant of administration would be deemed as effective from the date of commencement of the action. In *Kafine Jeddo v. Imiko* the action was commenced as the deceased's next of kin and after hearing had started, a grant of letters of administration was made to the Plaintiff, she later applied for amendment to sue as Administratrix of the estate of the deceased. This was granted and judgment obtained in that capacity. On appeal, it was argued that the suit be dismissed as it was commenced, by virtue of the amendment, in a capacity that was non-existent at the commencement of the action. The court held that this must be distinguished from instances where the Plaintiff commences the action as administrator of the estate prior to the grant of administration. See *Bowler v. Mowlen* (1954) 1 WLR 1445

10 Power or Right to Distress:

Where rents are due from a tenant or lessee of the deceased, the Personal Representatives shall have power to distrain upon the land, either at the termination of the lease or tenancy (in which case the distress must be within six

months of the termination) or during the continuance of the possession of the lessee from whom the arrears accrue.

11 Power to Insure:

Pending the distribution of the assets in the estate of the deceased, the Personal Representatives have power to insure such assets. The power applies in the case of a Will and there must be no contrary intention. Where the Personal Representatives are bound immediately to convey the asset absolutely to a beneficiary upon being requested to do so, he would not have power to insure it.

12 Power to Delegate:

The functions of the office can be performed by the Personal Representatives or their attorneys. But they may in certain cases delegate the performance of their functions to other persons. This may be necessary either where the personal representative are likely to be out of the state or country where the assets are located or where owing to other commitments, they do not have sufficient time to administer the estate.

DUTIES OF PERSONAL REPRESENTATIVES

Just as they are vested with powers, Personal Representatives have enormous duties and responsibilities as far as the estate of the Testator is concerned, their position being that of trust and confidence. They therefore owe the following duties:

- 1 To prove the Will: By applying to the probate registry (Order 58 Rule 19, High Court of Lagos (Civil Procedure) Rules, 2012):

A Will can be proved in common form (if it is not contested or challenged) or in solemn form (if it is challenged). It is the duty of the Executor to ensure the tenor of the Will is effected by applying for

probate, and proving the will especially if it is contested by any person. The Executor can be and is usually cited to obtain or refuse probate. Where he intermeddles with the estate without taking out probate, he can be compelled to take probate. Where an Executor takes possession and administers otherwise deals with any part of the property of the deceased, and does not apply for probate within 3 months after the death or after the termination of any suit or dispute with respect to probate or administration, he may, independently of any other liability, be deemed to be in contempt of the court, and shall be liable to such fine not less than ₦50,000, as the Judge may deem fit to impose.

All the Executors, where there are more than one Executor, have the right to apply for probate. Thus, probate cannot be granted to some of the Executors to the exclusion of others, otherwise the probate so granted may be revoked unless any of them had previously renounced probate.

2 To ensure that the Testator is given Decent Burial:

The Executor would generally ensure the Testator is given a befitting burial. In some cases, the Testator may have left instructions on how he would like his burial to be conducted, which may not and should not be contained in the will.

3 To Gather in the Estate:

The Executor or Administrator has a duty to ascertain the nature and value of the estate, to gather in all the items or property constituting the estate. See Admin-General & Public Trustee v. Ilobi (1972) ECSLR 587. He might be required to do this on oath – see section 14 AEL, Lagos. When the Personal

Representative is an Executor, he needs not wait for the grant of probate to take steps to preserve the estate. In *Ogbe & or v. Ogbe* (unreported) in the High Court of the Midwest, Benin Judicial Division per Irikefe J in suit No:8/3/1969, the Executors of the will of the deceased, took out a writ seeking an order of injunction to restrain the widow of the deceased from further meddling with the estate. The contention of the widow that the Executors had no locus to bring the action until they were granted probate was rejected by the court.

4 To Pay Out all Liabilities and Just Debts of the Testator:

All debts and liabilities of the Testator and those arising from the estate would be paid out of the estate, including capital transfer tax. Personal Representatives must exercise due diligence in the payment of debts owed to all creditors and entitlements of all beneficiaries. They would be personally liable for any loss suffered by a creditor or beneficiary as a result of their negligence. The Personal Representatives must pay for funeral expenses, testamentary and administration expenses. These are essentially:

- a. Cost of obtaining a grant of probate or letters of administration;
- b. Cost of gathering in assets in the estate of the deceased person;
- c. Administration expenses, such as Solicitor's fees, fees for valuers and other professional fees made for and on behalf of the estate.

5 To Ascertain Beneficiaries Entitled to the Estate and Distribute the Assets:

The Executors must ascertain the beneficiaries that are entitled under the will and distribute the estate in

accordance with the wishes of the Testator as expressed in his will. Where they fail to conduct adequate search, they might be liable to a beneficiary that suffers loss as a result of their negligence. Executors must distribute the assets in the estate of the Testator according to the tenor of the will or in accordance with the relevant customary rules. Where the Administrator is granted Letters of Administration over personality, whether or not it includes realty depends on the provision of the applicable Administration of Estate Law. See Shobogun v. Sanni (1974) All NLR 816; Ugu v. Tabi (1997) 7 NWLR (Pt. 513) 368

6

Duty of Care:

The Executor must exercise reasonable care in the management of the estate. He must not waste the estate's assets. Where he wastes the assets of the estate of the deceased, he and his personal estate would continue to be liable to the estate of the deceased, even after his death. See Section 19 of the Administration of Estates Law, Lagos.

7

Duty To Act in Good faith:

Arising from the fact that they are in a fiduciary relationship with the estate of the deceased, Personal Representatives have a duty to act in good faith in their administration of the estate of the deceased. They must not convert the assets in the estate, otherwise they would be liable for such conversion.

8

Account and Inventory:

The Executor must maintain proper account and records of the estate. He should maintain an inventory. See Section 14 AEL, Lagos, Personal Representatives must therefore keep the account of the estate and also of their dealings with the estate.

The account shall be open for inspection by persons interested in the estate.

9

To Issue Assent:

Both real and personal assets comprised in the estate of the deceased are vested in the Personal Representatives. Title to assets in the estate, especially in the case of realty would only pass where the Executor grants assent to the beneficiaries thereof. See Section 3 of the Administration of Estates Law, Lagos.

Once an assent is issued, the Executor is divest of the legal estate in such property. *Wise v. Whitburn* (1924) 1 Ch 460; *Cappa Ltd v. Pereira* (1966) 1 All NLR 57. The assent vests the legal estate in the beneficiary. For an assent to be valid, it must be in writing, signed by the Executors, and must contain the names of the beneficiary. *Renner v. Renner* (wupra). The assent must be signed by all Executors that proved the Will. The personal representative cannot refuse to execute an assent without a good cause. He is liable to be compelled to give the assent. *Martin v. Wilson* (1913) 1 IRR 470; cf. *Unoka v. Agili* (2007) NWLR (Pt. 1044) 122 where it was held that a beneficiary has no right to sue for the protection of the assets in the estate of a Testator; that the real estate or chattels-real vest in the Executors who are the representative of the Testator and heir at law to the estate of the Testator; *Odusoga v. Ricket* (197) 7 NWLR (pt. 511) 17.

LIABILITIES OF PERSONAL REPRESENTATIVES

1. Liability for Devastavit- Where personal representative commits a breach of any of their duties, which results in a loss to a creditor or beneficiary, he is said to have committed devastavit

(which simply means wasting of the assets in the estate of the deceased person). Where there are multiple grantees, each is responsible for his actions. A Personal Representative may be liable for the actions of another representative in the following instances:

- a. He acquiesced in the breach by the other Personal Representative; or
 - b. The breach arose from a breach of the duty of the Personal Representative.
2. Liability for Conversion: Where an Administrator converts to his use or waste assets in the estate, he and his estate shall be liable and even if he dies, his estate shall continue to be liable.
 3. Liability to Creditors or Beneficiaries: Where Personal Representatives wrongfully distribute the assets as a result of negligence or not being aware of the existence or whereabouts of a beneficiary or creditor, they may incur personal liability in favour of that beneficiary or creditor.
 4. Liability to Take Out Probate- Where he intermeddles with the estate without taking out probate, he can be compelled to take probate. Where an Executor takes possession and administers or otherwise deals with any part of the property of the deceased, and does not apply for probate within 3 months after the death or after the termination of any suit or dispute respecting probate or administration, he may, independently of any other liability, be deemed to be in contempt of the court, and shall be liable to such fine not less than ₦50,00, as the Judge may deem fit to impose.

Relief from Liability

Personal Representatives may be relieved from liability arising from a breach of any of the duties mentioned above.

This relief may be as a result of:

- a. The Express Provision in the Will: The Testator may have provided that the Executors would be protected from liability for all acts except that of dishonesty. Therefore, where the loss suffered by the creditor or beneficiary is not as a result of dishonesty or fraud on the part of the Executor, the Executor would be free from any liability.
- b. Relief Obtained from the Beneficiary or Creditors Affected: The affected beneficiary or creditor may release the Executor from the breach only if he, the affected beneficiary or creditor, is aware of the breach and is of a full age and capacity to make such decision.
- c. Relief from the Court: Where the Executor acted honestly and reasonably and ought fairly to be excused from the breach; the court may relieve him of the liability. To be entitled to court's relief, he must show that he acted honestly and reasonably, and not negligently.
- d. Plea of Limitation: Just like every cause of action that is subject to statute of limitation. Personal Representatives can rely on the general plea of limitation, i.e. that the cause of action has become statute-barred if made after six years; but that of a beneficiary can only be statute-barred after twelve years. However, where the Personal Representatives fraudulently commit the breach or are guilty of converting the assets in the estate into their personal use, statute of limitation will not apply.

This period of limitation may be extended for the creditor or beneficiary where it was either concealed by the personal representative or where owing to the disability or other incapacity of the beneficiary or creditor, action could not be initiated on time, or on any other reasonable and justifiable ground.

Avoiding Unknown Creditors or Beneficiaries

For the Personal Representatives not to be liable to creditors who may not have been known to them (i.e. Personal Representative), they may need to advertise the grant and time frame for the distribution of the assets in the estate. Where a time frame to make known any claims against the estate is given; the Personal Representative may be relieved of liability even if the assets are wrongly administered.

REVOCATION OF GRANT OF PROBATE OR LETTER OF ADMINISTRATION

Probate or Letters of Administration, once granted empowers the grantee to take over the administration of the estate of the deceased, to the exclusion of any other person. But an application for the revocation of a grant can be made to the Probate Registrar in any of the following instances:

- 1 **Where a Latter Will is Discovered after the Grant:** Generally, a Will can be revoked voluntary by the Testator where he subsequently makes another Will either having a revocation clause or whose contents is substantially inconsistent with earlier Will. Thus, where probate has been granted on the tenor of the earlier will, as the applicant for probate are oblivious of the existence of the later Will, which is subsequently discovered after the

grant of probate, the probate earlier granted in error is liable to be revoked.

2

Where a Will is Discovered After Grant of Letters of Administration: Where Letters of Administration have been granted on the assumption that the deceased died intestate, and it is subsequently discovered that the deceased died leaving a Will in which he had appointed his Executors, the Letters of Administration having been granted in error would have to be revoked. If Executors are appointed in the Will, they would have to be granted probate. If no Executor is appointed in the Will, Letters of Administration would be granted with the Will annexed.

3

The Grant Issued to a Wrong Person: Persons who are entitled to grant of probate or Letters of Administration are determined either by the tenor of the will or the applicable Administration of Estates Law, or the kind of marriage contracted by the deceased or the deceased's personal law. It is therefore not open to everybody. Where, therefore, the grant is made in error to a person not entitled to the grant or where a person with greater interest in the estate of the deceased who was not cited or had no knowledge of the grant, appears and makes the appropriate application, the earlier grant can be revoked and a fresh one granted to the person entitled or with the higher interest.

4

Where the Grant is Obtained by Fraud or False Representation: (See Ephraim v. Asuquo (1923) 4 NLR 98). It is trite that one cannot place something on nothing and expect it to stand. No right can arise from a base action. If the premise of the grant is fraud or falsehood, then there is no valid grant in law. Such a grant is liable to be revoked. Thus

where an applicant for Letters of Administration lies about his relationship with the deceased; or a false will is presented to be admitted to probate or where an applicant falsely swore that another person interested in the estate of the deceased has been cited and has refused or neglected to answer or respond to the citation, any grant made to such applicant is void and of no legal effect; it therefore liable to revocation.

A grant would be revoked where it has been obtained upon a false suggestion, whether made fraudulently or in ignorance, where the false suggestion obscures a defect in the title of the grant. But where the falsehood did not have a decisive effect on the court in making the grant, the court may not exercise the power to revoke the grant. Thus in Lasekan v. Lasekan (unreported) suit No: LD/727/1971, the widow of the deceased who was entitled to a grant falsely declared that she was the mother of the deceased's only two surviving sons. The court did not revoke the grant, partly on the basis that it was not one of the reliefs sought by the plaintiff, and again that she would have still been entitled without the false declaration.

- 5 **Probate Granted while a Caveat was in Force or where an Appeal is still Pending: In Dan-Jumbo v. Dan-Jumbo (1991) 11 NWLR (pt. 627) 445**, a caveat was entered against the grant of probate by a beneficiary. Other beneficiaries took out a writ against the caveator and the caveat was discharged; judgment was entered against the caveator. Being dissatisfied with the judgement, he appealed against the judgment. Whilst the appeal was pending, the Probate Registrar granted probate in favour of the other beneficiaries in whose favour the trial court

gave his judgment. The Court of Appeal held that the grant of the probate was irregular as it was issued and intended to overreach the appeal.

6 **Where Testator is Found to be Alive:** Question of Probate or Letters of Administration does not arise unless a person whose estate is sought to be administered is dead. See **In the Goods of Napier (1809) 1 Phill 83.** Where members of the family of a person, taking him to be dead, apply for Letters of Administration which is granted only for the owner of the estate to resurface, the grant can be revoked. Note that the presumption of death is a rebuttable presumption.

7 **Where Executor Becomes Incapacitated by Reason of Insanity or infirmity:**

8 **A Grant to the Administrator-General:** A grant to the Administrator-General can be revoked when an Executor or next-of-kin of the deceased satisfies the court that he is entitled to the grant, and that he has not been personally served with any citation. See Section 20 AEL, Lagos. This application must be made timeously, i.e., within six months of the grant to the Administration-General.

9 **Negligence, or Lack of Interest or Commitment to the Estate on the Part of the Personal Representative:**

Probate and Letters of administration are usually granted if the court is satisfied that the Personal Representatives will undertake a proper, due and full administration of the estate. Where after the grant, the Personal Representatives is found to be committing negligent, or not committed to the estate or shows little or no interest in the affairs of the estate to the detriment of the beneficiaries, the grant may be revoked and a fresh grant made to some

other person or persons. See In the Goods of Loveday (1990) P 154

10 **Where the Original Grantee(s) Disappear(s) Without a Trace or Full Administration of the Estate.**

11 **Revocation at the Instance of the Court for better administration of the estate.**

Procedure for Revocation of a Grant

A grant can be revoked in any of the following ways:

- a) Through the Registry;
- b) Through the Court by Summons (originating summons)
- c) By way of a Writ of Summons; See *National Bank v. Lady* (1978) 9 & 10 SC 59; *Doherty v Doherty* (1968) NMLR 24; *Lindsel v. Phillips* (1885) 30 Chd 291; *Ijeni v. Ijeni* (1977) 9 CCHCJ/2175 at 2182

Effect of Revocation

Generally, once a grant is revoked, the Executor/Administrator loses the capacity to deal with the assets in the estate of the deceased. But revocation does not operate retroactively; whatever the Executor or Administrator has done before the revocation and by virtue of the grant, would remain valid. The revocation of the grant has the following effects:

All transfers of interest in property made by a person to whom grant of probate or administration was made shall not be affected by subsequent revocation of the grant. The title of such a purchaser or recipient of the property from the grantee of probate or administration remains valid even if the grant is subsequently revoked.

Persons who make payments or disposition of goods to grantee of probate or administration before revocation remains indemnified. See Section 17 (1) AEL, Lagos. The person can still be indemnified from the estate of the deceased to the extent of the amount paid out to the grantee of the administration or probate. *Hewson v Shelley* (1914) 2 Ch 13; Section 41 (1) AEL, Lagos

AMENDMENT OF GRANTS

Any grant which is inaccurately issued or subsequently discovered to be defective due to a mistake of the Registry for correction within 14 days of issue, provided it has not been entered up in the prescribed Record Book for entry of grants. Other instances in which a grant may be returned to the Registry for amendment are as follows:

- a) Where it is discovered that a deceased person once traded under or operated an account in a bank in a name and style different from those originally noted on the grant and which in effect means that unless the grant is amended by the addition thereon of the new description, the grantee may be unable to deal with the property held by the deceased under such names. **See *In the Goods of George Towgood (1872) LR 2 P & D 408***
- b) Where the surname of the Deceased person has been wrongly spelt on a grant. **See *Otun v. Otun (2004) 14 NWLR (Pt. 893) 381 at 399 – 400.***
- c) Where malapropism, i.e., similarity in the pronouncement of one of the names of a deceased person and another name, affects his true name and has encouraged the deceased being popularly addressed by such similar name elsewhere (e.g. “Sulemonu” and “Sulaimon,” “Tina” and “Tina,” “Sunmonu” and Simeon”) **See *In the Estate***

of Sunmonu Olanrewaju PHC.5621 Lagos
(unreported)

- d) Where after a grant has been extracted it is discovered that the deceased died possessed of certain property in another name other than the one on the grant (e.g.) a change name as a result of religious conversion). In the **Estate of Comfort AkidePHC.6902 Lagos (unreported)**
- e) Application for an amendment of a grant must be made with the consent of the grantees (except in special circumstances) by way of Sworn Affidavit titled “Affidavit to Lead Amendment of a Grant” and supported by relevant documents as the Registrar may require. The Registrar will allow the amendment sought where he is satisfied that the facts deposed to in the affidavit have sufficiently established the following
- i) The nature of the error discovered in the grant; or
 - ii) the necessity for any alteration or addition to the contents of the grant; or
 - iii) the nature of the amendment sought.

RESEALING GRANTS

Where the Testator or intestate has property outside the state where grant of probate or of administration made, the grant shall be resealed. See Section 2 **Probate (re-sealing) Act**. Re-sealing enables a grant made in one State or Country to be effective within another State or Country. The Personal Representatives of the deceased have no power over the property of the deceased outside the State where grant is made. They also lack locus to institute action in respect of such property that are outside the State where the grant is made. *Federal Admin-General v. Arigbabu* (1964) NMLR 135. The resealing is made in respect of the

property of the deceased found outside the State or Country where the original grant was made. It is regulated by the various High Court Laws and Rules. The resealing shall be made in that other State where the property exists or is situate. An application for re-sealing is made to the Probate Registrar in that other state; the application will be accompanied by:

- 1 Copy of the first grant
- 2 Inland revenue affidavit
- 3 Copy of the Will if probate or a certified true copy of the Will.
- 4 Oath sworn to by the applicant.

The Probate Registrar of the court of the State where the application for resealing is made would issue relevant forms to the applicant to be filled and returned. The forms usually returned are:

- 1 Application form for re-sealing
- 2 Oath for re-sealing
- 3 Bank certificate (note: company Registrars in Nigeria are often uncooperative about honouring Probate got outside Lagos; therefore, where the deceased has an interest in company equities, probate need to be re-sealed in Lagos to enable the Personal Representatives appropriate such property)
- 4 Inventory
- 5 Particulars of landed properties
- 6 Bond for re-sealing
- 7 Justification for sureties (where necessary)

No limited or temporary grant shall be re-sealed without leave or court or the Probate Registrar. The application for re-sealing shall also be advertised in at least a national newspaper circulating within the jurisdiction where re-sealing is required. After this, the grant will be resealed, that is, if there is no caveat, upon payment of the relevant estate duty and provision of security.

Publication of Application for Resealing

Just as a simple grant, resealing shall not be effected without publication. The form of the advertisement would depend on the direction of the court or the Probate Registrar. Usually, publication is by issuing Notice of Resealing, accompanied by an oath sworn by the applicant.

Multiple Grantees and Applicants for Resealing

Where the original grant is made to two or more persons, all the grantees must join in the application for resealing. The resealing would not be made where there is no agreement among the Personal Representatives unless the court makes an order excluding any of the Personal Representatives. In Aruwji & Ors v. Asaboro (unreported) judgment of the High Court of Lagos State in suit No: LD/715/1971, the parties were Administrators of the estate of Joseph Asaboro, who died intestate. Letters of administration were granted to the parties by the Western Region High Court. It was later discovered that the deceased had several pieces of property in Lagos. As the High Court of Western Region had no jurisdiction over the property in Lagos, the deceased's property in Lagos was un-administered for four and a half years. The Plaintiffs applied for resealing which was without the participation of the defendant who was the widow of the deceased but now remarried. The court found the attitude of the defendant inimical to the due and proper administration of the estate, even though she was entitled to partake in applying for resealing; the court therefore ordered her to be excluded and gave further order that the grant be resealed in the names of the plaintiffs only.

Though an applicant for resealing is usually not required to provide sureties, the Registrar may insist on sureties where the grant is made to:

- a. A creditor or to a person who has no immediate beneficial interest in the estate of the deceased; or
- b. To a person or some of the persons who would, if the person beneficially entitled to his estate or
- c. To the Attorney of a person entitled to the estate
- d. Grant made for the use and benefit of a person who is by reason of mental or physical incapacity incapable of managing his affairs.
- e. Applicant resides elsewhere, that is outside the state; or
- f. Special circumstances making it desirable to require sureties.

After resealing, the Registrar shall send the notice of the resealing to the court where the original grant was made; and the Registrar of that court is under an obligation to send notice of any amendment or revocation of the grant to the Registrar re-sealing the grant.

ACCOUNTS TO BE FILED BY PERSONAL REPRESENTATIVES

The law requires every Executor or Administrator to file in Court an account of his administration every 12 months (in Lagos Rivers – see Order 57 Rule 16 (1) Lagos) from the date of the grant or the appointment until the completion of the administration. Cooper v. Skinner (1904) 1 Ch. 189; Sawyer v. Goddard (1895) 1 Ch. 574; S. 14 AEL Lagos. In other States, accounts are to be filed whenever a personal representative is called upon so to do by the Court. See Order 49 Rule 41 (1), Abuja. Any such Executor or Administrator who fails within the prescribed period to file his accounts shall in Lagos and Rivers States be liable to a penalty of N100,00 (One Hundred Naira) for every day of default. Every such fine shall on non-payment be enforceable by distress, and failing sufficient distress, by imprisonment for a term not exceeding 6 months. Order 57

Rule 16 (2), (3), (4) & without saying that every Personal Representative must keep accurate accounts and be ready to render such accounts whenever called upon so to do or as prescribed by law. Thompson v. Dunn (1870) 5 Ch App 573; Sawyer v. Goddard (*supra*).

The accounts shall include an inventory of all assets in the estate, an account of all monies received on behalf of the estate, purchases made, out of pocket expenses, and other necessary account of the administration, the vouchers in the hands of the Executor or Administrator relating to the administration of the estate, and a verifying affidavit. Order 49 Rule 41 (9) Abuja. Accounts which are not backed up with those requirements (e.g.) audited accounts showing only figures) may not be accepted by the Court.

When an account is filed in Court, the Registrar shall scrutinize such account and if it appears that by reason of improper, unvouched or unjustifiable entries of otherwise such account is not a full and proper account, the Court shall require the person filing the account to remedy such defects as there may be within such time as the Judge may deem reasonable for the purpose, and on failure to remedy such defects within such time, the person who failed such defective account shall be deemed to have failed to file an account within the meaning of the rule and proceedings may be taken against such person. Order 49 Rule 41 (3) Abuja. It shall be the duty of the Registrar to bring to the notice of the Court the fact that any personal representative has failed to file his accounts as required by the Rules. Order 49 rule 41 (2) Abuja; Order 49 Rule 41 (5) Abuja. The Court may on the motion of any party interested, or suomotu, summon any personal representative who fails to file the accounts within the prescribed time or in the proper manner, to show cause why he should not be punished. However, the Court may extend the time for filing such accounts. Order 57 Rule 16 (6) Lagos. Any personal

representative who has been granted an extension of time to file such accounts, and who fails to file the accounts within such extended time, shall be liable to the penalty. Order 57 rule 16 (7) Lagos; Order 49 Rule 41 (7) Abuja.

(i) Accountability

Where accounts are ordered by the Court or called for, the Personal Representative is bound not only to bring in accounts of his receipts but to discharge himself as regards those receipts and show what he has done with the money received; and in taking the account, disbursements made by him in breach of his fiduciary duties will be disallowed. *Re Stuart, Smith v. Stuart* (1896) 74 L.T. 546. In other words, he may be compelled to account for what he has received of the Testator's or Intestate's estate as well as for what he might have received without wilful neglect and default. Where he has made unauthorised and risky investments or paid out money to a wrong person from the estate even if in good faith or by mistake, he is to be treated as having the sum in hand and must replace the capital with interest *AG v. Kohler* (1861) HL CaS. 654; *Powell v. Hulkes* (1886) 33 Ch. D 562. Such sum attracts simple interest. *Re Barclay* (1899) 1 Ch. 674. It no defence that he has acted on legal advice. *National Trustee Company of Australia v. General Finance* (1905) AC 373.

A Personal Representative standing in a fiduciary position unless expressly authorised to do so, is not allowed to make a profit by the trust either directly or indirectly. *Marques v. Edamatie* (1950) 19 NLR 75. He is accountable for any profit made out of the trust. *Regal v. Gulliver* (1942) 1 All ER 378 at 391. He must not in any way make use of the trust property or his position for his own interest or private advantage. He should not buy the trust property from himself or for himself or from his co-trustee. He cannot occupy the two positions of vendor and purchaser at the same time. Any such purchase is voidable at the instance of

any beneficiary, however fair the transaction may be and however full a disclosure of all material facts may have been made to the beneficiaries especially where the price is unreasonably low. *Wright v. Morgan* (1920) AC 788.

The law is also clear that where a Personal Representative of a deceased person including an Executor de son tort wastes or converts to his own use any part of the real or personal estate of the deceased, dies, his Personal Representative shall to the extent of the available assets of the defaulter be liable and chargeable in respect of such waste or conversion in the same manner as the defaulter would have been if living. See Section 14 AEL, Lagos; *Head v. Gould* (1898) 2 Ch. 250.

It must be pointed out that a Trustee and a Personal Representative have a common responsibility and duties. The same person can, therefore, act in the dual capacity. Section 37 AEL, Lagos; *Renner v. Renner* (*supra*); *Adeniji v. The Probate Registrar* (1966) NMLR 125. Where the person named as Executor and Trustee in a Will proves the Will, he is deemed to have accepted the trusts of the Will in respect of both personal property and real property. *Public Trustee v. Sharman* (1942) Ch. 311; (1942) 2 All ER 74 There is also good deal of authority to show that where an Executor is *functus officio*, that is, after clearing the estate by payment of debts, funeral and testamentary expenses and there being no legacies in the ordinary sense, he has done his duty and he assumes the status of a Trustee. *Nexon v. Smith* (1902) 1 Ch. 176. Similarly, an administrator who has paid all expenses and debts and cleared the intestate's estate stands in the same position towards the nest of kin as that which an Executor who has cleared the estate stands in towards the residuary legatees. He ceases to be an administrator and becomes a trustee. See *Ponder v. Ponder* (1921) 2 Ch. 59.

(ii) Precautionary Measures

As has been explained, it is an equitable rule, which has always been guarded and enforced with utmost jealousy, that Personal Representatives shall refrain from conduct irreconcilable with good faith and none shall under the pain of consequences intentionally place himself in a position in which his interest may conflict with his duty. Some well established basic precautionary measures that may ease compilation of acceptable accounts and forestall future embarrassments are as follows

- (i) Keep proper accounts in a form that will be self-explanatory and ensure accuracy and clarity such that at any given time it is able to offer correct information as to the true position of the estate under administration;
 - (ii) Operate a separate Bank Account in the name of the estate and refrain from lodging estate money into personal account;
 - (iii) Make payments out of the estate account preferably by cheque;
 - (iv) Obtain duly stamped receipts, school and hospital bills, vouchers and invoices etc, submitted preliminary to payments and the stubs of cheques issued in support of expenditure made; please note that an under-aged or a mentally incapable person cannot give a valid receipt for his own share of the estate. Payment should be made to his Guardian for his use and benefit until he attains majority or regains mental capacity.
 - (v) Keep and preserve all counterfoils of receipts issued for all incomes (and materials) into the estate or and all related documents.
- It is generally understood and acceptable that all the documents referred to in the preceding sub-paragraph

can serve as Exhibits to the verifying Affidavit required by the rules of Court.

(iii) When Accounts are desirable

Accounts may be called for by the Registrar in the following circumstances;

- (i) Where a complaint of maladministration is lodged in the Registry against an Executor or administrator.
- (ii) Where an application is made to the Court for removal/discharge of an Executor or Administrator before administration of an estate is completed.
- (iii) Where any Executor or Administrator who has been issued a grant himself applied to the Court with a view to surrendering the estate vested in him to the Administrator-General pursuant to Section 32(1) of the Administration of Estate Law.
- (iv) Where, on completion of administration of an estate, Executors or Administrators thereof apply to the Court to be discharged.

Unless required by the Court during an action affecting the estate, a request for such accounts shall be made by the Registrar in writing. In the first instance, a period of 60 days may be granted to the affected Executor or Administrator within which to file the accounts in the Registry. Additional days of grace may be subsequently granted as a rule and, as earlier stated, in special circumstances. Order 57 Rule 16 (6), Lagos; Order 49 Rule 41 (6), Abuja. It should be noted that any such accounts without a verifying affidavit is incomplete and therefore unacceptable. Order 57 Rule 16 (9) Lagos; Order 49 Rule 41 (9) Abuja. Note also that the account shall be open for inspection to any person interested in the estate upon his satisfying the Registrar of this fact, i.e., that he is a person of interest.

Discharge of the Personal Representatives and Sureties

Where the Personal Representatives files the final accounts upon the completion of the administration of the estate, and the court is satisfied as to the contents of the accounts, the Personal Representatives, would be discharged from the administration bonds entered at the time of application for grant.

Generally, the Personal Representatives, the bondman or guarantor remains liable until the due administration of the estate. If there is any failure on the part of the Personal Representatives to pay appropriate fees, or file appropriate accounts, the bondman or guarantor may be made liable to forfeit the bond or pay for the inaction of the Personal Representatives. See *Chief Registrar v. Somefun* where the Personal Representatives failed to pay additional court fees in respect of money received as proceeds of sale of real property of the estate by the Personal Representatives, the court ordered the fees to be paid by the bonds man.

Where the bondman or guarantor forfeits any bond or pays anything as a result of the action or inaction of the Personal Representatives, they are entitled to indemnity from the P.R. the liability of the Personal Representatives or the bonds man ceases; they are accordingly exempted from liability for any loss that may arise subsequently. But please note that a Personal Representative can only be discharged from the administration bond by the court at the completion of the administration. That is, after the satisfaction of all legitimate claims on the estate, and the distribution of the residue of the estate, the Personal Representatives must file in court an account of how the administration was conducted. In case of the Administrator-General, the account must indicate that appropriate stamp duty has been duly paid and must be certified by the Judge.

CHAPTER TWELVE

TAXATION IN PROPERTY TRANSACTIONS

DEFINITION OF TAX

Tax is a compulsory charge by the government on the income of an individual, corporation, trust as well as the value of an estate.

An amount of money levied by a government on its citizens and used to run the government, the country or state.

Types of Taxes

1. Stamp Duties
2. Personal Income Tax
3. Value Added Tax
4. Tenement Rates
5. Capital Gains Tax
6. Ground Rent
7. Consent Fee
8. Company Income Tax
9. Withholding Tax on Companies

APPLICABLE LAWS

1. Stamp Duties Act Cap S8 LFN 2004
2. Company Income Tax Act
3. Value Added Tax Act Cap V1 LFN 2004
4. Capital Gains Tax Act Cap C1 LFN 2004
5. Personal Income Tax Act Cap P8 LFN 2004
6. Tenement Rate Laws of the States

TAXES ON PROPERTY TRANSACTION

Stamp Duty- taxes imposed on and raised from stamps charged on legal instruments and documentation.

Generally, instruments include every written document related to land transaction.- **Section 2 SDA**

Instruments that may be stamped includes conveyances, leases, mortgage deeds, power of attorneys, contract of sale. Some documents attract duties at a fixed rate (e.g. contract of sale, power of attorney), while others attract duties ad valorem (that is, according to the value).

Collection of stamp duties is usually divided between the Federal and State government. The Federal Government collect stamp duties on corporate instruments while the state government charge and collect stamp duties on instruments executed by individuals. Section 4 Stamp Duties Act:

(1) The Federal Government shall be the only competent authority to impose, charge and collect duties upon instruments specified in the Schedule to this Act if such instrument relate to matters executed between a company and an individual, group or body of individuals.

(2) The State Governments shall collect duties in respect of instruments executed between persons or individuals at such rates to be imposed or charged as may be agreed with the Federal Government.

When should a document be stamped?

Stamping of a document should be done after execution of a document. In practice the time limit for stamping is 30 days for documents stamped ad valorem and 40 days for other documents.

See Section 23. (1) (a) Stamp Duties Act- Except where other express provision is in this Act made, any unstamped or insufficiently stamped instrument may be stamped with an impressed stamp at any time within forty days from the first execution thereof (unless such period of Forty days is reduced by an order as provided in sub-section (7) of this section upon payment of the duty or unpaid duty

Failure to stamp is an offence liable on conviction to payment of the unpaid stamp duty and a fine. It also makes the document inadmissible in evidence. See *Ogbahoh v Registered Trustees CCCG (2001) FWLR pt. 80, p.1496*

Rate for Assessment- In Lagos state, it is 2% of the assessed value

PERSONAL INCOME TAX

It is tax imposed on incomes and profits in the nature of an income of individual, group or business.

It is usually paid by individuals, communities, families, Executors or trustees

Section 20 Personal Income Tax Act. Deduction allowed

- (a) a sum payable by way of interest on money borrowed and employed as capital in acquiring the income;
- (b) interest on loans for developing an owner-occupied residential house;
- (c) rent for that period, and premiums the liability for which was incurred during that period,

- payable in respect of land or buildings occupied for the purpose of acquiring the income; and
- (d) any expense incurred for repair of premises, plant, machinery or fixtures employed in acquiring the income, or for the renewal, repair or alteration of any implement, utensil or article so employed except where the premises, plant, machinery, fixtures, implement, utensil or article were used in part for domestic or private purposes in which case so much of the expense as relates to such use shall not be so deducted;
 - (e) bad debts incurred in any trade, business, profession or vocation, proved to have become bad during the period for which the income is being ascertained, and doubtful debts to the extent that they are respectively estimated to have become bad during the said period and notwithstanding that such bad or doubtful debts were due and payable prior to the commencement of the said period except where such debts were made in the course of normal trading, business, professional or vocational operations.
 - (f) a contribution or an abatement deducted from the salary or pension of a public officer under the Pensions Act or under any approved scheme within the meaning of that Act, and any contribution, other than a penalty, made under the provisions of any Act establishing the Nigeria Social Insurance Trust Fund or other retirement benefits scheme for employees throughout Nigeria;
 - (g) a contribution to a pension, provident or other retirement benefits fund, society or scheme approved by the Board, subject to the provisions

of the Fourth Schedule to this Act and such conditions as the Board in its absolute discretion may prescribe:

VALUE ADDED TAX

Vat is charged on domestic supply of goods and services. By Section 4 VATA, the rate is 5% of the value of all taxable goods and services.

Chargeable Persons- persons other than public authorities who independently carries out in any place an economic activity as a producer, wholesale trader, supplier of services or persons exploiting tangible or intangible property for the purpose of obtaining income there from by the way of trade or business.-

Chargeable Persons include- professionals carrying on business as sole proprietors or partnership

Registration-Chargeable persons are expected to register for VAT payment.

Sums charged are remitted to FIRS

TENEMENT RATES

Tenement rates are charges imposed on houses and buildings within a state.

Payment of Tenement rate is prescribed by the Constitution. Section 1(j) of the 4th Schedule to the Nigerian Constitution dealing with the functions of a Local Government Council states that one of the functions of a Local Government Council is assessment of privately owned houses or tenements for the purposes of levying such rates as may be prescribed by the House of Assembly of a State.

While The House of Assembly prescribes the legal basis for assessment of tenements, while the Local Governments are to collect and are also the beneficiaries.

Persons liable to pay tenement rate vary depending on the State and the Circumstances.

In Kaduna state, Payment of tenement state is regulated by Kaduna state Tenement Law, the law list Persons liable to pay such rates. They are the owner, but after three months of becoming due a subsequent owner, an occupier or an agent may be held liable.

In Kaduna state, failure to pay is both civil & criminal.

Exemptions-Places of public worship, cemeteries, non-profit making institutions engaged in charitable & educational purposes, any gazette exemption.

CONSENT FEES

This is a fee charged before grant of Governor's Consent. On application for consent for alienation of interest in land (eg. Leases, Mortgages, Assignment), any applicant will be required to pay a mandatory fee before the Governor grants his consent. In Lagos State, the rate payable is 8% of the assessed value of the property.

REGISTRATION FEES- As part of the requirement for perfection of title, instruments are required to be registered. Prior to registration, a fee known as registration fee is charged and payable to the government of each state.

In Lagos State, it is calculated at 3% of the assessed value of the property.

CAPITAL GAINS TAX

Capital Gains Tax is a levy that is charged on the gains accruing on disposal of assets. Disposal of assets includes, sales, leases, transfers, assignment, compulsory acquisition but does not include conveyance or transfer by way of security, it also does not include transfer by Personal Representatives. **S6. CGTA** Capital Gains Tax is regulated by the Capital Gains Tax Act (Cap CI LFN 2004). Section 2(1) of the Act states that capital gain tax shall be chargeable on the total amount of chargeable gains accruing to any person in the year of assessment after making such deductions as is allowed under the Act.

ALLOWABLE EXPENDITURE

In the computation of capital gains the sums allowable as a deduction from the consideration accruing to a person on the disposal of an asset shall be restricted to –

- (a) the amount or value of the consideration, in money or money's worth given by him or on his behalf wholly, exclusively and necessarily for the acquisition of the asset, together with the incidental costs to him of the acquisition or, if the asset was not acquired by him, any expenditure wholly, exclusively and necessarily incurred by him in providing the asset;
- (b) any amount of an expenditure wholly, exclusively and necessarily incurred on the asset by him or on

- his behalf for the purposes of enhancing the value of the asset being expenditure reflected in the state or nature of the asset at the time of the disposal;
- (c) the amount of any expenditure wholly, exclusively and necessarily incurred on the asset by him or on his behalf in establishing, preserving or defending his title to, or a right over, the asset; and
- (d) the incidental costs to him of making the disposal.

Section 13 CGTA

In *Administrators of the Estate of Caton v Couch*, the cost paid for employing a valuer to value shares in a company with a view to disposing them was allowed while sums paid for negotiating taxes and cost of appealing against an assessment was not allowed.

In *Oram v Johnson*, Personal labour of tax payer was not allowed.

EXEMPTIONS FROM PAYMENT OF CGT

Certain organizations are exempted from payment of CGT, they includes-charitable and educational organization of a public character, registered friendly society, corporative societies, trade unions, Local governments, companies and authorities established by law to purchase and export commodities from Nigeria. Also where goods are disposed by way of gifts, no CGT is charged. **Section 26. CGTA**

COMPUTATION OF CAPITAL GAINS

In the computation of any chargeable gains, such gains as may be chargeable to tax shall be the difference between the consideration accruing to any person on a disposal of assets and any sum to be excluded from that consideration, and there shall be added to that sum the amount of the value of any expenditure allowable to such person on such disposal. **Section 11 CGTA**

FORMULAR FOR COMPUTING CAPITAL GAINS TAX=10% (CONSIDERATION RECEIVED- ALLOWABLE EXPENDITURE/DEDUCTION)

PRACTICE QUESTION 1

Chief Clifford Sanusi bought a plot of land from Oyo state Government in 1970 for ₦100,000.00. He completed a building consisting of a block of 4 flats (3 bed room each). He spent ₦900,000.00 to complete the project. In 2015 he sold the block of flats to Alhaja Rita Odia, the Sepesepe of Oyo State for ₦5million after renovating the building with ₦500,000. Vike Idris, Esq. was the Solicitor that handled the sale on behalf of the parties. He advised Chief Clifford Sanusi to pay his capital gain tax. Assuming the Solicitor was paid ₦500, 000:00 and Chief Clifford Sanusi paid an additional ₦100, 000 to himself for painting the building and yet an additional ₦100, 000:00 to appeal against the amount charged as tax.

CAPITAL GAIN TAX= 10%
**(CONSIDERATION RECEIVED-ALLOWABLE
EXPENDITURE)**

FORMULAR

- **CAPITAL GAIN TAX=**

- 10% (CONSIDERATION RECEIVED ALLOWABLE EXPENDITURE)
- Consideration Received: ₦5,000,000
- Cost of Purchase of Property-₦100,000
- Gain Made:
- Less
- Renovation: ₦500,000
- Cost of Completing Project: ₦900,000
- Solicitors Fee:N500,000
- Total allowable expenses: ₦2,000,000
- CAPITAL GAIN TAX=10%
(CONSIDERATION RECEIVED - ALLOWABLE EXPENDITURE)
- 10%(₦5,000,000-₦2,000,000)
- 10%(₦3,000,000)
- **Capital Gain Tax=₦300,000**

PRACTICE QUESTION

Chief Eze Musa Fasholu bought a plot of land from the Taraba State Government in 1990 for ₦50,000.00. He completed a building consisting of a block of 4 flats (3 bed room each). He spent ₦950,000.00 to complete the project. In January 2015 he painted the building himself and paid himself ₦300,000 before selling the block of flats to Princess Egba Alake, the Adanma of Mushin market, Lagos for ₦4million. Jonathan Shagari Esq. is the solicitor handling the sale on behalf of the parties and has sent a professional Bill of ₦400,000 to Chief Eze Musa Fasholu SDEXF. He advised Chief Eze Musa Fasholu to pay his capital gain tax. After assessment of the tax Chief Eze Musa Fasholu believing that the tax

assessment was too high and angry that Jonathan Shagari Esq is trying to waste his money briefed another lawyer Highlander Esq. to contest the tax assessment. Highlander Esq has sent a bill of ₦650,000 to Chief Eze Musa Fasholu. Princess Egba Alake has asked Jonathan Shagari Esq. to do everything possible to assist her so that she does not pay consent and registration fees to government.

Compute the Capital Gain Tax

FORMULA

Capital Gain Tax=10% of (Total Gain-Total Allowable

Deductions)

Computing Total Gain=(Consideration Received-Initial Cost of Property)

Computing Total Gain=(₦4,000,000:00-₦50,000:00)

Gain Made: ₦3,950,000:00

Capital Gain Tax=10% of (Total Gain-Total Allowable

Deductions)

Capital Gain Tax=10% of (₦3,950,000:00-Total

Allowable Deductions)

Total Allowable Income- Cost of Completing Project

(₦950,000,000) + (Solicitors Fee) ₦ 00,000 =

₦1,350,000:00

Capital Gain Tax=10% of (₦3,950,000:00 - ₦1,350,000:00)

=10% of ₦2,600, 000

Capital Gain Tax=₦260,000

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