1. GENERAL OVERVIEW AND APPLICABLE LAWS IN PROPERTY LAW PRACTICE

1. EXPLAIN THE OBJECTIVES, CONTENTS AND SCOPE OF THIS COURSE

The teaching of the course would focus on the knowledge, skills, values and ethics involved in property transactions and administration of estates. This course seeks to improve the Communication Skills, Drafting Skills, Client-interview Skill; and Office Management Skill of the students. Also, this course seeks to teach the 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 arises from client-solicitor relationship.

2. EXPLAIN VARIOUS TRANSACTIONS AFFECTING LAND AND THE LAWS THAT SHOULD APPLY TO GIVEN CASES.

The various transactions that are affecting land are:

- **Pledge of land –** This exists where a person referred to generally as the 'Pledgor' gives or deposits any land or interest in land to another party, referred to as the 'Pledgee" in which the person depositing the property binds himself to do or forbear from doing a particular thing. In this case, only possession is given as the title or the legal interest in the land is not transferred. In a pledge, land is usually put as a security to get something from the Pledgee. **In an action to prove a pledge of land before a court, it is generally accepted that the person alleging pledge must establish**

  (a) the pledge itself;

  (b) the parties to the pledge;

  (c) the witnesses, time and circumstances of the pledge; and

  (d) the consideration for the pledge – **ANYAEGBUNAM V. OSAKA.**

  The right of the Pledgor to recover possession of the land remains with him and is never extinguished hence the cliché: "once a pledge, always a pledge". Finally, in a pledge, the land is redeemable however how long it might have been in possession of the Pledgee – **AKUCHIE V. NWAMADI.**

- **Gift of land –** This in property practice is the voluntary transfer or conveyance of any interest in land made gratuitously to a recipient and without any consideration paid by the recipient. The essential quality of a gift is that it lacks the element of bargain based on *quid pro quo* by which a sale is characterised – **DUNG V. CHOLLOM**

  There are certain conditions which must exist to make a gift valid

  (a) intention of the donor to make the gift;

(b) completed act of delivery to the recipient; and

(c) acceptance of the gift by the beneficiary (recipient) – **ACHODO V. AKAGHA**

Once a gift of land has been made and accepted, the grantor's right over the land is destroyed and he cannot lay claim to it thereafter – **ANYAEGBUNAM V. OSAKA** *where the SC held that the donor has no right to revoke the gift once it has been accepted.* However, where it is subject to **forfeiture**, it amounts to a **tenancy not a gift.**

- **Sale of land** – A contract of sale of land is an agreement whereby the vendor promises to sell and the purchaser to buy the land in question. It is a binding agreement that the courts will enforce if necessary. The most important significance of this agreement is that it allows the purchaser ample time to investigate the title of the vendor.

- **Leases or leasehold** – This is a written agreement under which a property owner (landlord) allows another (tenant) to use the property for a specified period of time and rent and known as a Landlord/Tenant relationship. A **tenancy** is a lease which is **3yrs and below** while a **lease** is one **above 3 years.**

- **License** - Permission to engage in a certain activity, granted by the appropriate authority.

- **Mortgage and Charge of land** – This is generally the conveyance of a legal or equitable interest in a property with a provision for redemption, that is, the conveyance shall become void or the interest shall be re-conveyed upon the repayment of the loan – ***Per Amaizu JCA, in* B.O.N LTD V. AKINTOYE.** The **borrower** is called the **mortgagor or charger** while the **lender** is the **mortgagee or chargee.** The lender may sell the security to realize the money advanced where the borrower fails to repay.

- **Donation of power –** This is an agency relationship by which a person gives power to another so that the agent acts on behalf of the principal in respect of specific transactions affecting land, such as to let out premises and collect rent, or to sell property and execute the document of sale.

The applicable laws to property transactions generally are:

Comment [C1]: See DADEM pp.17-30

- Land Use Act;
- Conveyancing Act, 1881;
- Property and Conveyancing Law, 1959;
- Land Registration Law of Lagos State;
- Mortgage Institutions Act;
- Illiterate Protection Act/Law;
- 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 as they affect probate practice and administration of estates;
- Capital Gains Tax Act; Personal Income Tax Act ;

Comment [C2]: Applies only to Abuja and Federal institutions

- Land Use Charge Law of Lagos State;
- Tenancy Law of Lagos State, 2011;
- Legal Practitioners' Act and
- Rules of Professional Conduct.
- VAT
- CITA
- **Principles of equity**
- **Evidence Act**
- **Constitution**
- **Case law**
- **Stamp Duties Act**

Comment [C3]: Lacuna---CA will apply except it is in Apapa, Ikoyi, V.I. Also CA does not apply to Mortgages as the M and P Law of Lagos expressly repealed the CA.

Taxes payable for mortgage

VAT, Companies income tax (where a company is involved), Personal income tax, stamp duty, Registration fee, consent fee, payment for charting and endorsement.

Taxes payable for lease

Capital gains tax, VAT, Companies income tax (where a company is involved), Personal income tax, stamp duty, Registration fee, consent fee, payment for charting and endorsement

Taxes payable for sale of land

Capital gains tax, VAT, Companies income tax (where a company is involved), Personal income tax, stamp duty, Registration fee, consent fee, payment for charting and endorsement

Three property law jurisdictions

- 7 PCL States (Edo, Ekiti, Delta, Ondo, Oyo, Osun, Ogun) ----**E^2DO^4**
- **CA States of the former eastern and northern regions (all the 19 states of the north + KWARA STATE (ILORIN))**
- **Lagos State**

NB: The factors determining the applicable Laws on a particular property law transaction are as follows:----LANDS

1. Location of the property/ transaction (except it involves a Will, POA, the law where the testator/donor resides is the applicable law)
2. Applicable Laws
3. Nature of the transaction (look out for key words used)
4. Documents required
5. Status of the parties

NB: Please note the following

- A lease and a tenancy are collectively referred to as a grant of term of years
- Difference between an assignment and a term of years is reversionary interest

- A lease is a term of years above three years. A lease confers legal interest and the consent of the Governor must be sought.
- A term of three years or below three years is a tenancy and it confers equitable interest. Thus, the consent of the Governor need not be obtained pursuant to section 22 LUA. NO PAYMENT OF CONSENT FEES FOR TENANCY AGREEMENT
- When a property is covered by a certificate of occupancy, a term of years created will be a sub-lease. This is because a C OF O is a term of years granted by the Governor usually for 99 years. Thus, the holder of the C of O would execute a DEED OF SUB-LEASE to transfer some part of his unexpired residue.
- CFSOL---VS
- DOA- P/Assignee's S
- Lease--Lessor's S
- Tenancy—LLS
- DOLM—Mortgagee's solicitor

  The **party** (don't use person in PLP) that will suffer more if the document is not executed is to prepare the document.

3 grants of probate

- Grant of probate
- Simple administration/Letter of Administration (letter of administration with no will). Usually issued where no will was left, or there's an invalid/defective will, or where a will made which did not cover all the estate but only part of it. This grant applies only to that part not covered)
- LOA with will annexed with all conditions satisfied

Factors/conditions for grant of probate

- Testamentary disposition
- Executors must be named
- Executors are available
- Executors are capable
- Executors are willing

3. IDENTIFY ETHICAL ISSUES ARISING FROM LACK OF KNOWLEDGE OF APPROPRIATE LAW AND TRANSACTION

Comment [C4]: 1. Advice his client according to applicable laws in a given transaction - **Rule 15; NBA v. Akintokun**
2. Lawyer must demonstrate competence and expertise in handling such transactions - **Rule 16**.
3. Lawyer may be liable in DAMAGES, REFUND OF MONETARY EXPENSES INCURRED as a result of wrong advice.
- Disciplinary Measures by LPDC, which could lead to an admonition, suspension for a period of time or Name may be struck off in severe cases- **NBA V. KOKU**

2. DEEDS

1. STATE THE FEATURES OF A DEED

A **DEED is a document in writing, signed, sealed and delivered from one party to another which is used to convey, ratify or revoke an interest in land**. It may be written in any language in any character or form. Difference between a deed and other documents in writing is that the other documents are merely in writing and are not sealed and delivered but signed.

Features of a Deed

1. It must be in writing
2. It must be signed
3. There must be an intention that the document is under seal
4. Must be delivered, which is an intention to create legal relations(assignor to be bound)
5. Attestation
6. It must be franked
7. Endorsement for Governors consent

A. WRITING: A deed must be a document in writing. **S. 4 Statute of Frauds Act**; **S. 5 Law Reform (Contracts) Act, 1961**, **S. 79 PCL.** Formerly, the deed was required to be on a particular type of paper- parchment (Vellum). Now use of a particular type of paper is not necessary. What is important is that it must be in writing

B. SIGNATURE: A deed must be signed by the parties.
Statute makes it mandatory.--**S. 97(1) of PCL** which provides that where an individual executes a deed, he shall either sign or place his mark on it, and sealing alone shall not be deemed sufficient.--**S. 83(4) EA 2011, FARO BOTTLING CO LTD v. OSUJI**. A document is deemed to be signed either by the person's handwriting, signature or initials, thumb print will suffice- **S. 93(1) EA 2011**. ELECTRONIC SIGNATURE will also suffice- **S. 93(2) EA 2011**
Effect of signature:
(i) **Validity**: Unsigned document is worthless and void--**A.G ABIA STATE v. AGHARANYA, OMEGA BANK NIGERIA PLC V OBC LTD.**
(ii) **Privity**: Only a person who signed a document can enforce the benefits created therein. A legal document cannot be enforced against the person who did not sign the document as such person is deemed not to be a part to it.**—TWEDDLE v. ATKINSON**, **NIGER GATES LTD v. NIGER STATE GOVERNMENT**, **LEWIS v. UBA**

NB: If an illiterate or blind person is to sign a document always remember to insert an illiterate or blind Jurat to be attested to by a Magistrate, Notary Public or a Commissioner for Oath (Lagos only)

C. **SEALING**: Sealing is the process of posting a seal on a legal document. Sealing is essential while seal is not. Thus, what the courts look out for is the intention to seal. The court de-emphasized actual sealing.

General rule

The general rule is that individuals need not affix a seal as what is important is the intention to seal. There are ways of implying that parties intended that the document should pass as a document under seal:--**PADU**

a. **Presumption of sealing**: The EA 2011 provides that where the deed has been duly signed and attested to by the parties' witnesses, it is presumed to have been sealed- **S. 159 EA 2011, AWOJUGBAGBE v. CHINUKWE (S + A = Sealing)**
b. **Actual seal**: Placing the actual seal. Example: a signet, ring, die or engraved emblem
c. **Deducing** from the face of the deed:
    - Introductory part....THIS DEED OF ASSIGNMENT
    - Operative part....NOW THIS DEED WITNESSES as follows
    - Execution....SIGNED, SEALED AND DELIVERED
d. **Use of the letters LS** (standing for the latin phrase Locus Sigilis meaning the place of the seal.--**FIRST NATIONAL SECURITY v. JONES.**

Exceptions

Where a corporate body is involved there must be actual seal. There must be actual sealing and not presumption or intention of sealing only. **Section 163 EA 2011,** and **S. 98(1) PCL** which both provide that a deed shall be deemed to have been duly executed by a company or corporation if its seal is affixed thereto in the presence of and attested to by its secretary, director or other principal officer or his deputy.--**WESTERN NIGERIA FINANCE CO LTD v. WEST COAST BUILDERS, S. 71 and S. 74 of CAMA.**

D. **DELIVERY**: Delivery does not necessarily mean physical handing over of the document. The fact that there was a handover does not mean that there is delivery and absence of handover does not mean that there is no delivery. **It is an act done to evince an intention to be bound by the terms of the deed; intention to create legal relations. AWOJUGBABE LIGHT INDUSTRIES v. CHINUKWE**

Words or conduct expressly or impliedly acknowledging an intention to be bound is sufficient. **A deed takes effect upon delivery (unconditional delivery)---BROSSETE MANUFACTURING (NIG) LTD. V OLA ILEMOBOLA LTD NIG., S. 95(2) EA 2011.**

If it is made subject to a condition (conditional delivery) it is said to be a deed delivered in escrow and takes effect from the date of delivery but subject to the effect

that if the condition is not fulfilled, the innocent party will be entitled to withdraw (rescind the contract). Thus, the doctrine of relation back (an act done at a later time is deemed by law to have occurred at a prior time)—**DALFAM v. OKAKU**, **SUBERU v. ALSL LTD**, **IRVING DYER'S CASE**, **ALAN ESTATE v. W.G STORES LTD.** THEREFORE, the delivery of a deed in escrow does not mean that the party executing it can withdraw from the deed in the intervening period between the execution of the deed and the date of performance of the condition because a delivery in escrow is a final delivery. **Once a deed has been delivered, even in escrow, it is too late for the party executing the deed to escape from its effects provided that the other party performs the conditions within the specified time.**

E. ATTESTATION: Witnessing of the deed.

General rule

The general rule is that attestation is not mandatory, UNLESS SO PROVIDED BY A STATUTE. Thus, a deed is valid whether it is attested to or not because attestation is not essential for the validity of a deed except where the law expressly requires it. However, it is necessary because:

(i) Attestation by independent persons of full age may facilitate proof of due execution where necessary- **S. 154 EA 2011**

(ii) May raise presumption of sealing and delivery of a deed. –**S. 159 EA 2011**

(iii) Attestation of a Judge, Magistrate, Commissioner for Oaths, Notary Public without more raises the presumption of due execution.--**S.150 EA 2011**

Exceptions

There are certain exceptions where the law requires that certain **deeds** or **documents** be attested to. In those cases, attestation is required as a matter of law and its absence will vitiate the deed or document. They include:

(i) Illiterates: Where an illiterate is a party to a deed. The illiterate jurat must be attested to by a Magistrate, Comm. For Oaths, Justice of the Peace or Notary Public.--**S. 8(1) LAND INSTRUMENT REGISTRATION LAW**, **S. 119 EA 2011**, **NB:** Failure to include the illiterate jurat vitiates the deed/document---**EZEIGWE V. AWUDU.** Here the illiterate jurat is mandatory and attestation is also mandatory.--**S. 3 ILLITERATES PROTECTION ACT.**

(ii) Blind Persons: A blind person is a party to a deed – blind person jurat must be attested to by a Magistrate, Justice of the Peace, Commissioner for Oaths or Notary Public.--**AKINBADE v. OLAYINKA**

(iii) Companies: Deeds or documents executed by a company or corporation UNDER PART A OF CAMA—**S. 98(1) PCL**; **S. 163 EA 2011** (for company: in the presence of a director and the secretary of the company, a clerk, principal member of the company)

(iv) Incorporated Trustees: Deeds or documents executed by incorporated trustees under PART C OF CAMA MUST BE in the presence of the secretary and a trustee or two trustees).

(v) Statutory body: Where a statutory body is a party to a deed.

Special Execution –Illiterates and Blind persons jurat

1. SAMPLE DRAFT OF ILLITERATE PERSONS' JURAT

SIGNED, SEALED AND DELIVERED

By the within named Assignor:

_____

ABC

The contents of this deed having first been read over to the Assignor in the Igbo Language from English Language by me ANEKE KENECHUKWU C. (Sworn Interpreter) of No 1. Law School Road, Victoria Island Lagos State and he seemed perfectly to have understood same before affixing his thumbprint/mark/signature.

BEFORE ME

_____

Comm. For oath/Notary Public/Magistrate/Justice of the Peace

2. SAMPLE DRAFT OF BLIND PERSONS' JURAT

SIGNED, SEALED AND DELIVERED

By the within named Assignor:

_____

ABC

The contents of this deed having first been read over to the Assignor by me ANEKE KENECHUKWU C of No 1. Law School Road, Victoria Island Lagos State and he seemed perfectly to have understood same before affixing his thumbprint/mark/signature.

BEFORE ME

_____

Comm. For oath/Notary Public/Magistrate/Justice of the Peace

However, where the deed or document was prepared by a legal practitioner and was duly franked by him, it removes the document from the purview of the illiterate persons protection law and the absence of illiterate jurat will not invalidate the deed---**EYA v. QUDUS**

F. **FRANKING:** This is endorsement on the face of the deed of the name and address of the lawyer that prepared the deed, pursuant to **R. 10 RPC; S. 22 (1)(d) LPA, S. 4& 5 LAND INSTRUMENT PREPARATION LAW.**
Where a deed is franked, this displaces the need for an illiterate Jurat or blind person Jurat.--**EYA V QUDUS NB: FOR THE PURPOSES OF BAR II, YOU MUST PREPARE AN ILLITERATE/BLIND PERSONS' JURAT WHERE ILLITERATE/BLIND PERSON IS A PARTY TO THE DEED.**

G. **ENDORSEMENT FOR GOVERNOR'S CONSENT: (compulsory)** Failure to make provision for this in a deed will constitute a material omission unless there is other evidence that consent was in fact obtained--**ADEDEJI V NBN LTD**.

2. IDENTIFY WHEN A DEED IS REQUIRED IN A TRANSACTION AFFECTING LAND, AND WHEN IT IS NOT MANDATORY

Cases when a deed is required

- Transfer of interest in land e.g. Assignment- **S. 77(1) PCL**
- Power of Attorney that requires the donee to execute a deed – **ABINA v. FARHAT;**
- A transfer of interest in land without consideration (gift of land) – **ANYAEGBUNAM v. OSAKA**
- When statute requires that a deed be made
- To revoke, vary, modify, amend or rectify a POA by deed.--**ABINA v. FARHAT**
- Confirming right or interest that has already passed
- Vesting declaration
- Voluntary surrender
- Lease (above THREE YEARS).
- Legal mortgage
- Share transfer agreement of a company

NB: that there are only two instances where a power of attorney must be by deed. They are: (i) where it authorizes an attorney to execute a deed and (ii) where it is to alter or modify a power of attorney granted by deed. **NB:** Where a lesser document is to be rectified by a higher document, a deed is not needed---**OTTIH v. NWANNEKWE**

Cases where deed is not needed:

- Assent by the personal representative
- Tenancy (under three years)
- Wills
- Ordinary power of attorney
- Surrender by operation of the law

- Disclaimer by executors
- Receipts not required by law to be under seal--**S. 135 PCL**
- Vesting orders of court--**BARCLAYS BANK v. ASHIRU**
- Transactions covered by the rule in Walsh v. Lonsdale
- Conveyances taking effect by operation of law such as Appointment of trustees in bankruptcy, Admission of Will to probate, and granting of letters of administration

3. IDENTIFY THE VARIOUS PARTS AND CONTENTS OF A DEED OF CONVEYANCE

Parts/Segments of a Deed (Very Important For Bar II)

(I) INTRODUCTORY PART---**CDPR**

- 1. Commencement
- 2. Date
- 3. Parties and their statuses
- 4. Recital

(II) OPERATIVE PART---**TCRLWAPH**

- 1. Testatum
- 2. Consideration clause
- 3. Receipt clause
- 4. Legal capacity in which the grantor conveys
- 5. Word of grant
- 6. ALL THAT clause
- 7. Parcel's clause
- 8. Habendum

(III) MISCELLANEOUS PART

- 1. Indemnity clause
- 2. Acknowledgement/undertaking for safe custody clause

(IV) CONCLUDING PART---**TSEAF**

- 1. Testimonium
- 2. Schedule
- 3. Execution
- 4. Attestation
- 5. Franking

(I) INTRODUCTORY PART

1. Commencement: the nature of the transaction determines the commencement. SAMPLE: ASSIGNMENT – "THIS DEED OF ASSIGNMENT"; MORTGAGE –"THIS DEED OF LEGAL MORTGAGE."

2. Date: a deed takes effect from the date of its delivery and not on the date on which it is therein stated to have been made or executed. See section 157 EA, 2011; ANUKU v STANDARD BANK. When drafting, it is better to leave the deed undated. SAMPLE: "MADE THIS___DAY OF____2018"

NB: For BAR II leave your deed undated (i.e do not fill in the blank spaces) to score your full marks

There are three reasons why a deed is drafted without the date:

(i) Section 157 EA 2011 already provides for the rebuttable presumption as to the date of a document and as such, failure to include the date is not fatal

(ii) Section 23(2)(a) and section 23(4) Stamp Duties Act provide that unless an instrument is written upon duly stamped material, it shall be duly stamped with the proper ad valorem duty **within thirty (30) days from the day it was executed or after it was received into Nigeria**, if it was executed outside Nigeria. Therefore, because of the time limit prescribed for payment of stamp duties, conveyancers usually omit the date on the deed in order to avoid being in default and to avoid the penalty that follows.

(iii) The Land Registration Law provides for registration **within 60 days from the date of execution.** Failure to do so attracts penalty.

3. Parties: the party to a deed must be legal persons. Natural persons and entities with corporate personality. The party(s) to the deed must be described in detail. Name, address and status in the contract (in bracket). The description of the parties as to status is dependent on the nature of the transaction. Example:

THIS DEED OF ASSIGNMENT is made this___day of____20___ BETWEEN CHIEF EMEKA DANLADI ADISA of 64, Ikeja Street, Ikeja, Lagos (ASSIGNOR) of the one part AND OGHO DAVID of 17, Udeh Street, Suru-Alaba, Lagos (ASSIGNEE) of the other part.

NB: In drafting, always indicate the status of the parties. Note also that if you use OF THE ONE PART, it goes with OF THE OTHER PART. If you use OF THE FIRST PART, it goes with OF THE SECOND PART.

4. Recitals: the existence of recitals in a deed is determined by the word 'IS' used in the commencement - if it is - THIS DEED OF ASSIGNMENT IS, then a recital will be inserted. If it is - THIS DEED OF ASSIGNMENT made this ....., then there would not be recital. Recitals starts with the word WHEREAS, no matter the number of paragraphs. Recitals can be introductory or narrative.

A narrative recital usually comes before the introductory recital and it states the root of title in the property up till the person whom it is currently vested. That is, it narrates the history of how the vendor came to own the property in question.

An introductory recital usually comes below the narrative recital and it explains the vendor's intention to transfer the property to the purchaser and the purchaser's intention to acquire the property from the vendor.

Functions of recitals

- A clear recital can help clear ambiguity(s) in the main body of the document.
- Section 162 Evidence Act 2011 provides that when there is recital of fact in a document that is 20 years old at the date of the contract, it will be taken to be sufficient proof of title. Thus the statements of facts in such a recital are presumed to be true and correct. This is the ancient document rule.
- Statements of facts in a recital may give rise to estoppel against the person making them. See section 169 EA 2011
- It is a useful way to know the history of the property and how the vendor came to be vested with the property in question.

(II) OPERATIVE PART

1. Testatum: a formal statement commencing the operative part. Either NOW THIS DEED WITNESSES AS FOLLOWS or THIS DEED WITNESSES AS FOLLOWS.

2. Consideration clause: when contract involves a consideration, it should be stated. The total amount of consideration must be stated in order to know how much is to be paid as stamp duties. The absence of consideration or consideration clause will not affect the validity of a deed because a deed derives its validity from its form and not from the presence or absence of consideration. However, **when inserted, the consideration performs the following functions and is important for the following reasons:**

(i) It is evidence that the conveyance is not a gift

(ii) It implies that a receipt will be issued to cover the amount received as consideration

(iii) It is used for the assessment of stamp duties ad valorem

SAMPLE: "In consideration of the sum of N100,000,000 (One Hundred Million Naira) paid by the assignee to the assignor…."

NB: State the sum in figure first before in words which will be in brackets

3. Receipt clause: this is added to the statement of consideration and evidences that the vendor acknowledges reception of the consideration. The receipt clause should be in bracket. It is usually drafted "… (the receipt of which the assignor acknowledges)…"

The **functions of the receipt clause** are:----**DEAR P**

- **DISCHARGE OF LIABLITY:** sufficient discharge of the purchasers liability
- **EVIDENCE:** It is an evidence of payment of consideration
- **AUTHORITY TO PAY:** By section 56 CA and section 94 PCL, the inclusion of the receipt clause in a deed is sufficient authority to pay money to the vendor's solicitor upon production of the deed that was executed by the person entitled to issue the receipt (that is, the vendor), without the solicitor producing any other direction or authority from the vendor and there is no liability for loss. See section 56 CA and section 94 PCL
- **RECEIPT DISPENSATION:** By section 54 CA and section 92 PCL, the inclusion of a receipt clause in a deed dispenses with the need to issue a formal receipt of payment. This is because it is a sufficient discharge between the vendor/assignor and the purchaser/assignee, without any further receipt for same being issued. See section 54 CA and section 92 PCL
- **PRESUMPTION OF PAYMENT:** it raises a rebuttable presumption that the purchase price has been paid.

Comment [C5]:
By section 55 CA and section 93 PCL, the inclusion of a receipt clause in a deed is sufficient evidence of payment of the whole amount in favor of a subsequent purchaser, not having notice whether the consideration acknowledged to be received was in fact paid or given. See section 55 CA and section 93 PCL

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

4. Legal capacity of the vendor/assignor and the Covenants of title implied thereby: The covenant of title in a deed are implied by into the deed by statute and the vendor/assignor's capacity is what determines the type of covenants of title that will be implied. The capacity of the vendor/assignor is stated immediately after the receipt clause. The vendor/assignor may be expressed to assign either as **beneficial owner, personal representative, settlor, trustee or mortgagee.**

Where the vendor/assignor is expressed to have conveyed in his capacity as beneficial owner, the covenants of title implied by section 7(a) & (b) of CA and section 100(1)(a) & (b) of PCL are:

a) Right to convey: that the vendor/assignor has the right to convey the unexpired residue of his interest in the property to the purchaser/assignee
b) Quiet Possession: that the vendor/assignor grants quiet possession and enjoyment to the purchaser/assignee
c) Freedom from encumbrances: that the property is free from encumbrances other than those disclosed to the purchaser in the contract or at the time of the contract
d) Further assurances.

Where it is a lease, then in addition to the four(4) covenants above, the following two covenants are added to make it six(6):

e) The lease is valid and subsisting

f) That all the covenants contained in the head lease have been observed and performed up till date.

5. Word of grant: this depends on the nature of the transaction. Assignment - assigns, Lease – demises. NOTE THAT THE WORD OF GRANT IS DETERMINED BY THE NATURE OF THE TRANSACTION.

6. All that clause: It is used together with the parcel clause and it must be in capital letters "ALL THAT"

7. Parcel clause: this clause gives a detailed description of the property which is the subject matter of the deed. It is drafted as follows:

> "ALL THAT property/piece of land/three bedroom bungalow at _____ covered by C of O numbered _____ dated _____ and registered as _____ in the Lands Registry office, Jos Plateau State **together with all the rights, easements and things appurtenant to it**."

8. Habendum: it is used to define the estate taken by the other party or the quantum of interest given. That is, the habendum is a clause in a deed that defines the quantum or extent of interest granted to the purchaser or lessee under the deed. See STEPHEN IDUGBOE v. ANENIH where it was held that the habendum is a clause in a deed that defines the extent of ownership in the thing granted to be held and enjoyed by the grantee.

NB: The habendum clause is found in **deeds of assignment and in deeds of leases.** In a deed of assignment, it is drafted as follows: "TO HOLD UNTO the assignee/purchaser for the term unexpired on the R of O free of all encumbrances and subject to the provisions of the Land Use Act Cap L5, LFN, 2004."

> In a lease, it is drafted as follows: "TO HOLD UNTO the lessee for the term of _____ years, commencing on the _____ day of _____, _____ and ending on the _____ day of _____, _____"

In an assignment, the assignor conveys the entire residue of his interest in the property to the purchaser, while in a lease, the lessor retains some reversionary interest. **THEREFORE, the absence of the habendum in a deed of assignment does not affect the validity of the deed because it is implied that the vendor/assignor is assigning all the unexpired residue of his interest in the property to the purchaser/assignee**. HOWEVER, in a deed of lease, the absence of the habendum may convert the lease to an assignment. This is because a deed of lease must specify the duration of the lease by providing for the term and commencement date and the date it ends. See UBA v. TEJUMOLA & SONS; ODUTOLA v PAPERSACK NIGERIA LTD. Thus, a deed of lease must contain the habendum.

(III) MISCELLANEOUS PART

This will include covenants like:

(i) Covenant for indemnity (indemnity and insurance clause) which is drafted as follows: (please bring them together when drafting)

"the assignee (or any person deriving title under him) covenants with the assignor from now on,---POK

1. to pay (to the relevant authority) all rents (accruing and due) to the title under the C of O for which the land is conveyed AND

2. to observe and perform all the covenants and conditions meant to be observed and performed by the assignor AND ALSO

3. to keep the assignor indemnified against all proceedings, costs, claims, and expenses (PCCE) on account of any omission to pay rent or to observe and perform any of the covenants and conditions"

On the question whether or not the indemnity clause must be expressly provided for in the deed depends on the law where the property is located. Indemnity clause is only required if property is in the eastern and northern Nigeria (CA states). Not required under PCL if consideration is paid--**S. 101 PCL**. This is an undertaking by the assignee to pay the rates and observe the covenants and conditions stated in the certificate of occupancy.

(ii) Acknowledgement for production and undertaking for safe custody

(IV) CONCLUDING PART

1. Testimonium: this commences the concluding part of the deed and it is drafted as follows: IN WITNESS OF WHICH the parties have executed the deed in the manner below the day and year first above written

2. Schedule: provides additional information and clarity. It banish technicality. The survey plan would be in the schedule.

3. Execution: a deed must be **SIGNED, SEALED AND DELIVERED**. Where it is a company, the SIGNED, SEALED AND DELIVERED is replaced with **"THE COMMON SEAL OF ABC NIGERIA LTD WAS AFFIXED TO THIS DEED AND IT WAS DULY DELIVERED IN THE PRESENCE OF DIRECTOR AND DIRECTOR/SECRETARY"**

4. **Attestation**

5. **Franking and**

6. Endorsement for Governor's consent

4. DRAFT A DEED TO PROFESSIONAL STANDARDS

DEED OF ASSIGNMENT

A. INTRODUCTORY PART

THIS DEED OF ASSIGNMENT is made this …..... day of……., 2013 BETWEEN**: MADAM CORDELIA ALAGBADA** of 16 Emmanuel Nathaniel Avenue, Lekki Phase 1, Lagos, Lagos State, Nigeria (Assignor) of the one part; and **INCORPORATED TRUSTEES OF THE CHRISTIAN-MOSLEM UNITY FORUM (CMUF)**, a body registered under Part C of the Companies & Allied Matters Act, Cap C20, Laws of the Federation of Nigeria, 2004, and having its registered office at 67, Lake Kariba Way, Asokoro, Abuja, Nigeria(Assignee) of the other part.

WHEREAS:

(A) The Assignor herein is the owner of the three-bedroom bungalow at 55, Upper Parliament Road, Calabar, Cross River State, covered by a Certificate of Occupancy No 863934 dated 12/06/2013 and registered as 34/34/1334 in the Lands Registry, Calabar, Cross River State

(B) The Assignor has agreed to assign his unexpired residue in the said Right of Occupancy to the Assignee herein, who on its part has agreed to take the same subject to the terms and conditions contained in this Deed

(B) OPERATIVE PART

NOW THIS DEED WITNESSES as follows:

In consideration of the sum of N70,000,000.00 (Seventy Million Naira) only already paid by the ASSIGNEE to the ASSIGNOR (the receipt of which the ASSIGNOR acknowledges), the ASSIGNOR as BENEFICIAL OWNER ASSIGNS to the ASSIGNEE ALL THAT three-bedroom bungalow at 55, Upper Parliament Road, Calabar, Cross River State, covered by a Certificate of Statutory Right of Occupancy No 863934 dated 12/06/2013 and registered as 34/34/1334 in the Lands Registry, Calabar, Cross River State with all rights, easements and things appurtenant to it

To HOLD the same UNTO the ASSIGNEE for the term unexpired on the said Right of Occupancy, free of all encumbrances, and subject to the provisions of the Land Use Act, Cap. **L5**, Laws of the Federation of Nigeria (LFN) **2004.**

(C) MISCELANEOUS PART

1…....

2……

3……

4. ETC

(D) CONCLUDING PART

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

SIGNED, SEALED& DELIVERED

by the within-named **ASSIGNOR:**

_____

MADAM CORDELIA ALAGBADA

IN THE PRESENCE OF:

NAME: ……

ADDRESS: ……..

OCCUPATION:……..

SIGNATURE:.....

THE COMMON SEAL OF INCORPORATED TRUSTEES OF THE CHRISTIAN-MOSLEM UNITY FORUM (ASSIGNEE) WAS AFFIXED TO THIS DEED AND THE DEED WAS DULY DELIVERED IN THE PRESENCE OF:

_____ _____

TRUSTEE **TRUSTEE/SECRETARY**

PREPARED BY:

Agboola Demasu Esq,
Agboola Demasu& CO.,
LEGAL PRACTITIONERS,
12, Asam Street, Ikeja, Lagos State.
08029000007, yudabet09034@yahoo.com

ENDORSEMENT FOR GOVERNOR`S CONSENT

I CONSENT TO THE TRANSACTION CONTAINED IN THIS DEED.

DATED THIS ..... DAY OF ....., 20.....

HON. ATTORNEY-GENERAL & COMMISSIONER FOR JUSTICE

FOR: EXECUTIVE GOVERNOR, ……. STATE, NIGERIA

(1) EXECUTION OF DEED BY AN ILLITERATE

SIGNED SEALED AND DELIVERED
By the Assignor:

MADAM CORDELIA ALAGBADA

The contents of this Deed having been read over and explained to the assignor in the Yoruba Language by me.....(**name of interpreter**)..... of .....(**address of the interpreter**)..... and she seemed perfectly to have understood the same before affixing her sign/mark/thumb-print

BEFORE ME

MAGISTRATE/JUDGE/NOTARY PUBLIC

(2) EXECUTION BY A CORPORATE BODY--- This includes:

a. All statutory corporations (such as University of Lagos, Corporate Affairs Commission, Federal Ministry of Internal Affairs, Independent national Electoral Commission, etc.
b. Companies incorporated under Part A of CAMA
c. Associations, bodies or groups registered under Part C of CAMA

THE COMMON SEAL OF INCORPORATED TRUSTEES OF THE CHRISTIAN-MOSLEM UNITY FORUM (ASSIGNEE) WAS AFFIXED TO THIS DEED AND THE DEED WAS DULY DELIVERED IN THE PRESENCE OF:

TRUSTEE **TRUSTEE/SECRETARY**

OR

THE COMMON SEAL OF ZENITH BANK OF NIGERIA PLC WAS AFFIXED TO THIS DEED AND THE DEED WAS DULY DELIVERED IN THE PRESENCE OF:

_____ _____

DIRECTOR **DIRECTOR/SECRETARY**

OR

THE COMMON SEAL OF THE UNIVERSITY OF MAIDUGURI WAS AFFIXED TO THIS DEED AND THE DEED WAS DULY DELIVERED IN THE PRESENCE OF:

_____ _____

DIRECTOR/REGISTRAR **DIRECTOR/SECRETARY**

(3) EXECUTION BY A NATURAL LITERATE PERSON

SIGNED, SEALED & DELIVERED

by the within-named **ASSIGNOR:**

_____

MADAM CORDELIA ALAGBADA

IN THE PRESENCE OF:

NAME: ……

ADDRESS: ……..

OCCUPATION: ……..

SIGNATURE: ……

(4) EXECUTION BY HUSBAND & WIFE

SIGNED, SEALED & DELIVERED

by the within-named **ASSIGNORS:**

(1) _____
MR. CORNELIUS ALAGBADA

(2)_____
MRS. CORDELIA ALAGBADA

IN THE PRESENCE OF:

NAME: ……

ADDRESS:.....……..

OCCUPATION: ……..

SIGNATURE: ……

(5) EXECUTION BY A FIRM OR PARTNERSHIP

SIGNED, SEALED & DELIVERED

by the within-named **ASSIGNORS:**

(1)_____
MR. GODSPOWER MUSA

(Partner)

(2)_____
MR. GODISGOOD OBI

(Partner)

(3)_____
MRS. GODSOWN OLADIMEJI

(Partner)

(Carrying on business under the name and style of Zenith Enterprises)

IN THE PRESENCE OF:

NAME: ……

ADDRESS: ……..

OCCUPATION: ……

SIGNATURE: ……

(6) EXECUTION IN THE CASE OF FAMILY PROPERTY

SIGNED, SEALED & DELIVERED

by the within-named **ASSIGNORS:**

1. **_____**
MR. GODSPOWER MUSA EDET

(Family Head)

2. _____
MR. GODISGOOD OBI EDET

(Principal Member)

3. _____
MRS. GODSOWN OLA EDET

(Principal Member)

(For themselves and on behalf of the Edet Chieftaincy Family of Calabar, Cross River State)

IN THE PRESENCE OF:

NAME: ……

ADDRESS: ……..

OCCUPATION: ……

SIGNATURE: ……

(7) EXECUTION BY AN UNREGISTERED ASSOCIATION

SIGNED, SEALED & DELIVERED

by the within-named **ASSIGNORS:**

1. _____
MR. GINJA MUSAGOMA

(Chairman/President)

2. _____
MR. GODSON AGUIANO

(Secretary)

3. _____
MRS. GLORY MEJIMETA

(Treasurer)

(For themselves and on behalf of the Hausa Progressive Union, Lagos Branch)

IN THE PRESENCE OF:

NAME: ……

ADDRESS: ……..

OCCUPATION: ……

SIGNATURE: ……

OR

SIGNED, SEALED & DELIVERED

by the within-named **ASSIGNORS:**

1. _____
   MR. GINJA MUSAGOMA

   (President)

2. _____
   MR. GODSON AGUIANO

   (Secretary)

3. _____
   MRS. GLORY MEJIMETA

   (Treasurer)

(For themselves and on behalf of the Ikeja Residents Association, Lagos)

IN THE PRESENCE OF:

NAME: ……

ADDRESS: ……..

OCCUPATION: ……

SIGNATURE: ……

(8) EXECUTION OF A DEED BY AN INDIVIDUAL (ATTORNEY) ON BEHALF OF A CORPORATE BODY (PRINCIPAL):

SIGNED, SEALED AND DELIVERED by

MR OBI MUSA WALE,

Lawful Attorney for ABC NIGERIA LIMITED (the Assignor) by virtue of the Power of Attorney dated 09/05/2014 and registered as 76/76/3426 in the Lands Registry, Calabar, Cross River State.

IN THE PRESENCE OF:

NAME…….

ADDRESS: ……..

OCCUPATION: …….

SIGNATURE: ……

DRAFTING THE INTRODUCTORY PART OF A DEED

(1) Natural person as Assignor & Corporate Body as Assignee:

THIS DEED OF ASSIGNMENT is made this …..... day of ……., 2013 BETWEEN**: MADAM CORDELIA ALAGBADA** of 16 Emmanuel Nathaniel Avenue, Lekki Phase 1, Lagos, Lagos State, Nigeria (Assignor) of the one part; and **INCORPORATED TRUSTEES OF THE CHRISTIAN-MOSLEM UNITY FORUM (CMUF)**, a body registered under Part C of the Companies & Allied Matters Act, Cap C20, Laws of the Federation of Nigeria, 2004, and having its registered office at 67, Lake Kariba Way, Asokoro, Abuja, Nigeria (Assignee) of the other part.

Or

THIS DEED OF ASSIGNMENT is made this …..... day of ……., 2013 BETWEEN**: MADAM CORDELIA ALAGBADA** of 16 Emmanuel Nathaniel Avenue, Lekki Phase 1, Lagos, Lagos State, Nigeria (Assignor) of the one part; and **ZENITH BANK PLC**, a body registered under Part A of the Companies & Allied Matters Act, Cap C20, Laws of the Federation of Nigeria, 2004, and having its registered office at 67, Lake Kariba Way, Asokoro, Abuja, Nigeria (Assignee) of the other part.

(2) Natural person as Assignor &Partnership/Firm as Assignee:

THIS DEED OF ASSIGNMENT is made this …..... day of ……., 2013 BETWEEN**: MADAM CORDELIA ALAGBADA** of 16 Emmanuel Nathaniel Avenue, Lekki Phase 1, Lagos, Lagos State, Nigeria (Assignor) of the one part; and **(1) MR EMMA MUSA; (2) SHADE OLA & (3) NGOZI OKEKE (carrying on business as ZENITH ENTERPRISES)** with their business address at 17, Leke Street,Asokoro, Abuja, Nigeria (Assignee) of the other part.

(3) Natural person as Assignor &FAMILY AS ASSIGNEE:

THIS DEED OF ASSIGNMENT is made this …..... day of ……., 2013 BETWEEN**: MADAM CORDELIA ALAGBADA** of 16 Emmanuel Nathaniel Avenue, Lekki Phase 1, Lagos, Lagos State, Nigeria (Assignor) of the one part; and **(1) MR EMMA MUSA (family head); (2) SHADE OLA (principal member)& (3) NGOZI OKEKE (principal member) all of** 17, Leke Street, Aso, Calabar, Cross River State, Nigeria(for themselves and on behalf of the Edet Family of Calabar, Cross River State) (Assignees) of the other part.

(4) Natural person as Assignor &Natural person as ASSIGNEE:

THIS DEED OF ASSIGNMENT is made this …..... day of ……., 2013 BETWEEN**: MADAM CORDELIA ALAGBADA** of 16 Emmanuel Nathaniel Avenue, Lekki Phase 1, Lagos, Lagos State, Nigeria (Assignor) of the one part; and **MR EMMA MURTALA** of17, Leke Street, Aso, Calabar, Cross River State, Nigeria (Assignee) of the other part.

(5) CORPORATE BODY AS ASSIGNOR & CORPORATE BODY AS ASSIGNE

THIS DEED OF ASSIGNMENT is made this …..... day of ……., 2013 BETWEEN**: MANDILAS NIGERIA LIMITED AM CORDELIA ALAGBADA** a body registered under Part A of the Companies & Allied Matters Act, Cap C20, Laws of the Federation of Nigeria, 2004, and having its registered office at16 Emmanuel Nathaniel Avenue, Lekki Phase 1, Lagos, Lagos State, Nigeria (Assignor) of the one part; and **ZENITH BANK PLC**, a body registered under Part A of the Companies & Allied Matters Act, Cap C20, Laws of the Federation of Nigeria, 2004, and having its registered office at 67, Lake Kariba Way, Asokoro, Abuja, Nigeria (Assignee) of the other part.

(6) HUSBAND & WIFE AS ASSIGNORS & ONE NATURAL PERSON AS ASSIGNEE

THIS DEED OF ASSIGNMENT is made this …..... day of ……., 2013 BETWEEN**: (1) CHIEF CORNELIUS ALAGBADA & (2) MADAM CORDELIA ALAGBADA,** both of 16 Emmanuel Nathaniel Avenue, Lekki Phase 1, Lagos, Lagos State, Nigeria (Assignor) of the one part; and **MR EMMA MURTALA** of 17, Leke Street, Aso, Calabar, Cross River State, Nigeria (Assignee) of the other part.

5. IDENTIFY THE USE OF DEED OF RECTIFICATION

- To transfer legal or equitable interest(legal interest; mandatory... equitable optional)
- To ratify an interest or obligation already created.
- To extinguish an obligation or interest.
- To delegate, create or revoke power or authority conferred on another. Example POA.

NOTE GENERALLY

Particulars needed from parties in respect of deed of assignment

- Particulars of the assignor (names, address, status)
- Particulars of assignee
- Consideration paid in respect of the property
- Survey plan, local authority and town planning authority of the area.
- Description/particulars of the property (fittings & fixtures)
- Particulars of witnesses
- Covenants, completion date, nature of transaction, capacity
- Nature of assignor's title
- Legal practitioner's fees

Comment [C6]:
Types Of Deed
(I) DEED POLL: unilateral deed; it involves only one party e.g power of attorney. Change of name can be by deed poll.
(II) INDENTURE: it involves more than one party. In sale of family land, there is the head of family and principal members, all of the one part.
- **Every contract under seal is a deed.**
- **A deed takes effect on the date of delivery- section 157 EA 2011, Broseette Manufacturing Ltd v Ola Illemobola Ltd.**

USEFULNESS:
- ❖The parties and the whole world will be aware of the transaction
- ❖The date inserted is deemed to be the date of execution
- ❖**A** deed must be left undated for **BAR PART II.** This is to prevent the time of stamping and registration(being 30 and 60 days respectively from running where the parties have not gotten consent of the Governor.
- ❖**T**o prevent the party from paying penalties for late stamping and registration. Section 23(3) and(4) of Stamp Duties Act.
- ❖**Undated deed takes effect on the date of delivery, section 157 EA 2011; ANUKU V STANDARD BANK NIG.**

Exception: A DEED OF LEASE , the commencement date must be inserted.

POSSIBLE MULTIPLE CHOICE QUSTIONS ON OVERVIEW AND DEEDS

1. The following are to be established in an action before a court to prove a pledge of land except _____

A. The pledge itself

B. The parties and witnesses to the pledge

C. Time/circumstances/consideration of the pledge

D. Completed act of delivery to the pledge

2. A gift of land subject to forfeiture amounts to a ____

A. Gift

B. Tenancy

C. Leasehold

D. Sale

3. In Lagos, the following laws but one will apply to mortgages

A. MPL Lagos State

B. CA

C. LRL Lagos State

D. None of the above

4. In relation to a Power of Attorney and Wills, the applicable laws are those of ____

A. Location of the property

B. Residence of the donor/testator

C. All the property law jurisdictions

D. None of the above

5. A lease confers __ interest on the lessee

A. Legal

B. Equitable

C. Reversionary

D. Insurable

6. ___ is an act done to evince an intention to be bound by the terms of a deed (an intention to create legal relations)

A. Execution

B. Sealing

C. Delivery

D. Attestation

7. A deed takes effect from the date of ____

A. Execution

B. Making it

C. Delivery

D. Sealing

8. The following require a deed to be executed except where there is a ___

A. Confirming right/interest that has already passed

B. Vesting declaration

C. Voluntary surrender

D. Vesting order of the court

9. As in 8 above, where a deed is not required will be all except where there is ___

A. Assent by personal representatives

B. Tenancy agreement

C. Disclaimer by executors

D. Share transfer agreement of a company

10. There are ___ segments of a deed

A. 4

B. 5

C. 3

D. 6

11. The operative part of a deed starts with the ____

A. Testimonium

B. Testatum

C. Habendum

D. None of the above

12. The closing clause of the operative part of a deed of assignment is the ____

A. Testimonium

B. Reddendum

C. Habendum

D. Testatum

13. A deed of assignment/lease attracts __ duty

A. Ad valorem

B. Fixed

C. A or B

D. A and B

14. The deed in 13 above is to be stamped within ____ days from the day it was executed

A. 20

B. 30

C. 40

D. 50

15. A deed of power of attorney attracts __ duty

A. Ad valorem

B. Fixed

C. A or B

D. A and B

16. The deed in 15 above is to be stamped within ____ days from the day it was executed

A. 20

B. 30

C. 40

D. 50

17. Under the LRL Lagos State, a registrable instrument is to be registered within ____ days from the date of execution

A. 20

B. 40

C. 60

D. 80

18. The absence of habendum in a deed of lease means ___

A. Nothing

B. Lease is converted to an assignment

C. Lease is converted to a gift

D. Lease is converted to a tenancy

19. An undated deed takes effect from the date of ____

A. Delivery

B. Execution

C. Stamping

D. Attestation

20. A deed poll involves ____

A. 1 party

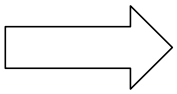
B. 1 person

C. 2 parties

D. 2 persons

ANSWERS

1. D
2. B
3. B
4. B
5. A
6. C
7. C
8. D
9. D
10. A
11. B
12. C
13. A
14. B
15. B
16. C
17. C
18. B
19. A
20. A



3. POWER OF ATTORNEY

1. IDENTIFY THE FEATURES OF A POWER OF ATTORNEY AND STATE TYPES OF POWER OF ATTORNEY

A Power of Attorney is a formal legal instrument by which a person called the donor appoints the donee to perform certain lawful acts on behalf of the donor.--**UDE V NWARA**. Where a power of attorney given to a donor requires him to EXECUTE a DEED, that power of attorney donating that power must be by DEED.---**ABINA V FARHAT**. Power of attorney is created by DEED when it is under SEAL.

The legal nature of a power of attorney is that it is a DEED POLL because it is created and executed by **one party**, which is the DONOR.

Comment [C7]: INSTANCES WHERE A POA MAY BE EXECUTED BY TWO PARTIES ARE:
1. Where it imposes an obligation on the donee/benefit is conferred on the donee

2. As an assurance to third parties dealing with the donee

(a) Features of a POA

1. It is an instrument of delegation--**UDE V NWARA**

2. It does not transfer interest in land. A POA is not an instrument of transfer of title in land and cannot on its own and without more transfer valid title in land to another except looking at the intention of the parties, the justice of the case requires the court to construe that it as an instrument of transfer of title----**IBRAHIM V. OBAJE (2018)**

3. It is usually executed by one party (DONOR). That is, it is not inter parties

4. Power of attorney is generally revocable unless it is expressed to be irrevocable

5. No special mode of creation except it authorizes the attorney to execute a deed

Essentials/Formalities of A POA

1. **Writing**: It may be given orally; however, it is desirable that it be in a written document which need not necessarily be under seal. Unwritten POA cannot be attested or registered. Writing removes it from all doubts as to the extent of powers donated. Importance of it being in writing was emphasized in **ABUBAKAR V WAZIRI.**

2. **Execution/Signing**: It is the donor that executes the POA (deed poll). However, it is possible for the donee to execute a POA where he may sell land in future for the donor. This is for assurance to the purchaser. Non-execution of a POA renders it a mere worthless paper.—**FARO BOTTLING CO. V. OSUJI**

3. **Seal**: A POA by deed must be signed, sealed and delivered. Where it is executed by an individual, the intention to seal is sufficient; but where the deed is executed by a corporate body, it must be under seal---**S. 163 EA 2011, Ss. 71 AND 74 CAMA, S. 98 PCL.**

4. **Attestation**: It is advisable but not compulsory to attest. When attested to by the court, a Judge, Notary Public, Magistrate, it raises a rebuttable presumption of due execution under **S.**

150 EA 2011. Attestation before a NOTARY PUBLIC is advisable when POA is to be used outside Nigeria as credit is given to NPs all over the world (though his failure to attest to such document does not confer or take away validity)---**MELWANI v. FIVE STARS INDUSTRIES LTD**

5. **Registration and Stamping**: Whether or not a power of attorney is registrable depends on whether it qualifies as a registrable instrument under the Land Instrument Registration Law applicable to the state where it is used--**UZOECHI V ALINOR.** Thus, registration of a POA depends on whether it is defined as a registrable instrument in the area it was created---**UDE V. NWARA.** In Lagos and Abuja, it is a registrable instrument**.** However, non-registration of a registrable instrument does not affect its admission as evidence---**BENJAMIN V. KALIO (2018)**. With regards to stamping; a POA attracts a **fixed stamp duty.** It does not attract an ad valorem duty. Generally, power of attorney attracts a fixed stamp duty of N50.00.

6. **Governor's Consent**: In Lagos, a POA relating to a sub-lease of State lands or certificate of Occupancy must have the consent of the governor.

(b) Types of power of attorney

A power of attorney could either be **general** or **specific**. It is general when it is broadly stated to cover the issues relating to the subject matter. It is specific when it is given in respect of specific and particular acts to be done by the donee. In either case, it could be **revocable** or **irrevocable**

1. Revocable power of attorney: This is the power of attorney that can be revoked at any time, the various ways of revoking power of attorney are: express revocation, implied revocation and revocation by operation of law.

(i) Express revocation: This can be in various ways depending on the type of power of attorney

- If power of attorney is oral it can be revoked orally, in writing and by deed.
- If power of attorney is in writing, it can only be revoked in writing or deed
- If the power of attorney is by deed, it can only be revoked by deed--**ABINA v FARHAT**

Where there is an express revocation, the attorney's authority does not cease and is not revoked until he receives a **NOTICE OF REVOCATION.** Thus, until the notice of revocation of the attorney's authority is received by him, the attorney who acts pursuant to his power contained in the POA is not liable to the donor or to any third party.

(ii) Implied revocation: **A** POA is said to be revoked by implication in situations where the donor makes it impossible for the power to be realized or exercised by the donee to the extent that the power becomes extinguished. For instance, where the donor goes ahead to exercise the powers donated, the POA will be revoked impliedly because the donor has dealt with the subject matter of the power in a manner that makes it impossible for the donee to exercise the powers--**CHIME v. CHIME**

Revocation of a POA by implication is possible because the fact that a POA has been granted by a donor does not extinguish the right of the donor or prevent him from personally exercising the powers donated. Thus, both the donor and the donee can exercise the powers donated.

NB: If a donor grants to another person another power of attorney in respect of the same subject matter of an existing POA (WITHOUT EXPRESSLY REVOKING THE EARLIER/EXISTING POA), such subsequent grant cannot be taken to be an implied revocation of the earlier/existing POA and as such, the subsequent grant of POA is deemed to be invalid---ADEGBOKAN V AKINSANYA.

(iii) Revocation by operation of the law: It occurs in the following cases

- Death of the donor
- Insanity of the donor
- Bankruptcy of the donor
- And other disability that would deny donor capacity----**UBA V. REGISTRAR OF TITLES**

This is because a power of attorney cannot cure a legal disability of the donor.

NB: There could be revocation by renunciation when the donee renounces the power granted to him. Also power of attorney can be invalidated if fraud, duress, misrepresentation or undue influence is established---**AGBO v. NWIKOLO**

2. Irrevocable power of attorney: A POA is generally revocable. However, **there are three (3) exceptions under which a POA could be irrevocable in order to curb injustice done on third party.** They are:---**VFS**

(i) **VC/I + ETBI = IRREVOCABLE:** Where a power of attorney is given for valuable consideration/given to secure the proprietary interest of the donee AND expressed to be irrevocable, such POA shall be irrevocable until the consideration or interest is realised---- **S. 143 PCL; S. 8(1) CA**. Flowing from the above, the donee and the purchaser (third party) shall not, at any time, be prejudicially affected by notice of any of the three ways of revocation and as such the POA can only be revoked

(a) with the consent and concurrence of the donee

(b) where the C or I has been realized, and

(c) where the power is fully exercised.

(ii) **FP = IRREVOCABLE FOR THAT FP:** Where the power is expressed to be for a fixed period, it is irrevocable for that fixed period whether given for a valuable consideration or not—**S. 144 PCL; S. 9(1) CA.** However, where there is no consideration given, the fixed period shall not exceed 12 months (so it can be from 1 day-12 months, and if it exceeds this maximum, say 13 months, it will be construed as being given for 12 months). If the donor

wants it to exceed 12 months, then it must be given for a valuable consideration. Flowing from this, it means that the POA is only revocable

(a) within that fixed period with the consent and concurrence of the donee

(b) after the fixed period (though in this case it shall continue to be valid until revoked by any of the three ways of revocation) Thus, any act in favor of the purchaser done on the 13th month is valid unless it is a POA designed to expire by effluxion of time---its irrevocability and validity is for 12 months (that fixed period) only.

(c) the power is fully exercised.

(iii) **STATUTORY DECLARATION:** Where the donee makes a statutory declaration **immediately before exercising such powers or within three months after exercising such powers t**hat he had not received any notice or information of the revocation of such power of attorney by death or otherwise---**S. 142(2) PCL**

2. DISTINGUISH A POWER OF ATTORNEY FROM OTHER DOCUMENTS AFFECTING LAND TRANSACTIONS (CONTRACTS AND CONVEYANCES)

(a) Power of attorney distinguished from contract of sale of land---TEEC

1) **Transfer of interest:** Power of Attorney does not transfer interest in land while contract of sale of land transfers interest in land, which is equitable.

2) **Execution:** Power of Attorney is usually executed by one party while contract for sale of land is executed by both parties.

3) **Exchange:** Power of Attorney does not need to be exchanged to be valid while in contract of sale of land, exchange is mandatory in order for it to be valid (unless both parties are represented by the same solicitor).

4) **Consideration:** Power of Attorney does not have mandatory consideration while contract of sale of land requires consideration.

(b) Power of attorney distinguished from conveyance

1) Power of Attorney does not transfer interest in land while conveyance transfers interest in land. Such interest transferred by a conveyance must be legal.

2) Power of Attorney may not require Governor's consent while a conveyance always requires the consent of the Governor: **Ss. 22, 23 & 26 LAND USE ACT**

3) Power of Attorney is usually executed by one party (deed poll) while in a conveyance, both parties execute it (indenture)

4) Deed is mandatory in a conveyance--**S.77 PCL** and not for Power of Attorney

5) Conveyance is only for land while POA can be for any transaction

3. EXPLAIN THE IMPORTANCE AND NEED FOR POWER OF ATTORNEY

Importance of power of attorney

- ❖ For buying and selling land on behalf of the donor
- ❖ For collecting money on behalf of the donor
- ❖ For receiving rates, rents on behalf of the donor
- ❖ For prosecuting cases in court, **except the defence in criminal cases.** The accused cannot authorize another to stand for him.

Where power of attorney is needed

- Unavailability of the donor
- Ill-health or other physical impairment making it difficult for the donor to run his affairs
- Where the expert skill of the donee is required
- Maybe required where a mortgage is by sub demise in CA states.
- Secure interest of a purchaser pending the perfection of title of purchase.

4. ADVISE ON THE EXECUTION OF A POWER OF ATTORNEY

(a) Execution by family Head

- Family head + one principal member= valid
- Family head alone= voidable at the instance of the principal members
- Principal members – family head = void ab initio.----**AJAMOGUN v. OSHUNRINDE**

Where a power of attorney has been properly executed in favour of an attorney to deal with family property, the attorney does not subsequently need the consent of the family head or principal members before he can validly sell the property.---**OJO v. ANIBIRE**

(b) Illiterate jurat

Where the donor is an illiterate, the POA must be in line with Illiterate Protection Act. Failure to comply with the illiterate jurat renders the POA invalid.---**EZEIGWE v AWUDU.** Thus, if the donor is an illiterate, there should be an illiterate jurat, and evidence that the content was read and interpreted to the illiterate. **In addition, the jurat must have the name and address of the writer of the document. Strict compliance is what is required.**

(c) Where the donee is empowered to execute a deed on behalf of the donor or to transfer interest in land on behalf of the donor, the Power of Attorney must be made by deed--**ABINA v. FARHAT; POWELL V. LONDON PROVINCIAL BANK**

Capacity of parties

Only legal persons can donate a POA or be appointed attorneys---**NBN v. KORBAN BROTHERS**

The donor and donee must have legal capacity both at the time of the creation of the POA and all through the subsistence of the power as the capacity must span through the period of

power of attorney. A power of attorney cannot be used to cure a legal disability suffered by the donor. Thus, a person can only appoint an attorney to do, for and on his behalf, acts that he may himself lawfully do because a power of attorney or the appointment of an agent cannot be used to cure a legal disability suffered by the donor/principal.

Therefore, as a result of their legal disabilities, the following persons cannot grant a POA:

- Infant
- Bankrupt
- An insane person **found to be so by a court**
- Unincorporated entity - **NATIONAL BANK (NIG) LTD V. KORBAN BROS (NIG) LTD.**

The following persons cannot be appointed as a donee

- Partnership firms
- Unincorporated entity
- A Bankrupt
- An insane person adjudged so by a court.

Therefore, bodies registered under Part B of CAMA such as ABC & CO etc cannot appoint or be appointed attorney as Part B of CAMA does not confer legal personality. But ABC LTD etc can appoint or be appointed attorney because a body incorporated under Part A of CAMA is a legal person.

It is better to appoint attorneys by their names and it is so advised. This is good to avoid the situation in National Bank of Nigeria Ltd v. Korban Brothers where the "Manager, National Bank of Nigeria (Ilorin Branch)" was appointed an attorney.

It is possible for two or more persons to come together, jointly and severally, as donors to appoint one or more persons as their attorneys. Where two or more persons are appointed as attorneys by the same instrument, the donor should expressly state whether he is to be bound only by the joint acts of the donees or by the acts of any of the donees. He should also state what would happen in the event of the death of one of the donees, whether the other donee can continue to act.

5. EXPLAIN THE PARTS OF A POWER OF ATTORNEY

Formal parts of power of attorney---CoDAPITE

- Commencement
- Date
- Appointment clause
- Power and Omnibus clause
- Irrevocability clause
- Testimonium

- Execution and Attestation

1) **Commencement Clause** –The modern practice is that it is commenced with: "BY THIS POWER OF ATTORNEY" OR "THIS POWER OF ATTORNEY" OR "THIS DEED OF POWER OF ATTORNEY"

2) **Date Clause** – should be left blank in order to avoid penalties, because when dated, one must register and stamp within a certain period. **The presence of a false or impossible date DOES NOT invalidate the POA.**

Comment [C8]: Within 40 days for stamping—S. 23(1) SDA

"given this……..…day of……., 20_"

Or

"made on the ……. day of ……., 20_"

"is made this ……. day of ……., 20.... (this is used when adding a recital).

3) **Recital Clause** – only necessary in Land matters where family head intends on executing a Power of Attorney for the transfer of rights in land.

Recital is rarely found in a Power of Attorney. It is necessary only where the donor seeks to show that he has the consent of other principal members of the family to give the Power of Attorney.

Recital is to Power of Attorney what Preamble is to statute; Recital may be useful in interpretation of the document.

4) **Appointment Clause** – this will have 3 things: Name & Address of Donor; Name & Address of Donee; and the fact that the donor appointed the donee.

This is the clause appointing the donee. Appointment clause in a Power of Attorney is for identification purpose only. A Power of Attorney being the delegation of power is not an agreement between one party and the other. Rather it provides for the appointment clause, for example:

> "I, ABC of 10 Abuja Close, Abuja, Nigeria (donor) appoint Mr. XYZ of 15 Abuja Close, Abuja, Nigeria (donee) to be my true and lawful Attorney, to do all or any of the following acts or things namely:" (This is the end of the introductory part of a POA)

5) **Power and Omnibus Clause** – ends with an omnibus clause, which gives no extra powers except those incidental to the powers already given.
1.To collect rent in respect of my property at No. 5 Law School Road, Victoria Island, Lagos, Nigeria
2. To.....
3. To.....
This is a statement or list of the acts to be performed by the donee on behalf of the donor. It should be very clear and exhaustive. One must be meticulous in presenting intentions because, as already stated, the powers conferred on the attorney are construed strictly. The clause usually ends with an omnibus expression (i.e. omnibus clause which gives no

additional rights not in the authority clause, but has the effect of giving the donee powers that are necessarily incidental to those contained in the authority clause). It provides thus:

> "AND I ALSO DECLARE that my attorney may do all other things as I may lawfully do."
> Or
> **"AND to do all things necessary and incidental to the matters above as I may lawfully do."**

It should be noted that the inclusion of this does not introduce any powers beyond what is enumerated – **ABINA V. FARHAT**

6) **Irrevocability Clause -** To take the benefit of the statutory protection of third parties which has already been discussed, it is important that a clause should be inserted to the effect that:

> "In consideration of the sum of N50,000.00 (Fifty Thousand Naira) paid to the donor by the donee (the receipt of which the donor acknowledges) this Power of Attorney shall be irrevocable for a period of……...months or.....years from this date."
>
> Or
>
> "AND I DECLARE that this Power of Attorney shall be irrevocable for a period of twelve months from this date.

7) **Testimonium Clause –** a clause is inserted thus:

> "IN WITNESS OF WHICH the donor has executed this power of attorney in the manner below the day and year first above written."

8) **Execution and Attestation Clause:**

> "SIGNED, SEALED AND DELIVERED by ABC (if it is by deed)

This should be done in the name of the donor.
NB: the precautions for the blind, illiterate or corporate body. If illiterate, then the contents must have been read in a language he understands and he appeared to perfectly understand before inserting his thumb print/mark/signature.

Attestation facilitates proof of execution. It is important that a Deed be attested to, so that it will be presumed to have been sealed and delivered even when no impression of a seal appears thereon. But attestation is not mandatory. However, under **S. 150 EA** there is a rebuttable presumption of due execution if the POA is attested to. It is usually authenticated by a judge, magistrate, justice of the peace, court or notary public

The witness(es) must sign the Attestation Clause at the time of the execution of the Deed and not later. Attestation goes thus:

"IN THE PRESENCE OF"
Name:……
Address:……
Occupation:……
Signature/MARK:……..……

NB:Franking:
Prepared by

K.C Aneke Esq

Star Chambers

No. 5 Law School Road, Victoria Island, Lagos

Construction of a Power of Attorney

A power of attorney is strictly and exhaustively construed by the courts to ensure that the donee does not exceed the powers donated to him and act ultra vires.---**NBA v. ITEOGU**. Therefore, the authority conferred by a POA must be strictly adhered to. If the donee exercises the power in excess of the powers granted to him and outside the reasonable scope of his special and incidental powers, the donor will not be bound by it and he will not be liable to third parties.

In construing the general clause in a POA, the EJUSDEM GENERIS rule will apply.---**ABU v KUYABANA.** Thus, the omnibus clause in a power of attorney does not confer any additional powers on the donee. It must be construed in terms of the specific powers already given as held in **ABINA V FARHAT**.

Precautionary measures to be taken

- Ensure that the POA confers on the donee all powers necessary to achieve the object of the power donated.
- The POA should be drawn in such a way as to ensure that no difficulty will be encountered when dealing with third parties.

6. DRAFT A STANDARD POWER OF ATTORNEY

BY THIS POWER OF ATTORNEY made this ..... day of ....., 2014, I, Chief Tonye Okiki of 2, Abudu Smith Street, Victoria island, Lagos (DONOR) hereby APPOINT Wale Mulumba & Co Limited, a company incorporated under the Companies& Allied Matters Act, Cap C20, LFN, 2004, having its registered office at 6, Idowu Street, Ogudu, Lagos (DONEE) to be my lawful attorney and on my behalf and in my name to do all and any of the following:

(1) To find a buyer or buyers and sell my two-storey house together with Stewards' Quarters and garage, located at 2, Abudu Smith Street, Victoria island, Lagos, covered by Title Certificate No: L05166 of 1963 and by the Certificate of Statutory Right of Occupancy No: 87345, dated 19/09/2001 and registered as 99/99/2001H in the Lands Registry, Alausa, Ikeja, Lagos State

(2) To commence, undertake and conclude the said transaction on my behalf, and on my behalf to sign/execute all necessary documents in respect of the same

AND to do all and any other things necessary and incidental for the carrying out of the powers created above

IT IS DECLARED that this Power of Attorney shall be and remain irrevocable for a period of EIGHT (8) months from the date of its execution

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

SIGEND, SEALED, & DELIVERED by the DONOR

CHIEF TONYE OKIKI

IN THE PRESENCE OF:

NAME:.....
ADDRESS:.....
OCCUPATION:.....
SIGNATURE:.....
Prepared by

K.C Aneke Esq

Star Chambers

No. 5 Law School Road, Victoria Island, Lagos

Comment [C9]: In consideration of the sum of N100,000 (One Hundred Thousand Naira) only, paid by the Donee to the Donor (the receipt of which the Donor acknowledges), IT IS DECLARED that this Power of Attorney shall be and remain irrevocable for a period of two (2) years from the date of its execution

Particulars of information required to draft power of attorney

- Particulars of the donor.
- Particulars of the donee
- Particulars of the attesting witnesses
- Particulars of the property involved
- Purpose of the POA and the powers to be donated
- Whether or not the POA is given for valuable consideration
- Whether or not the of POA shall be irrevocable
- Duration/period of the irrevocability
- Specific instructions
- Extent and scope of powers donated
- Limitations/Restrictions
- Where the power of attorney is to be used.

Comment [C10]:
Duties of a lawyer drafting Power of Attorney (POA)

- A solicitor drafting a POA should ensure that specific powers are expressly stated without ambiguity since such powers are construed strictly. In other words, a general or omnibus clause is usually construed along the ejusdem generis rule.
- Investigate if there was a previous power of Attorney.
- A solicitor acting for a purchaser buying from a donee of POA should investigate to ensure that the power has not been revoked by death, disabilities of the donor to the knowledge of the donee.
- A solicitor should follow his client's instruction strictly and account and report client's money promptly.
- A power of attorney not prepared by a solicitor should not be franked by him.
- A solicitor should not advice a Client to create a POA, rather than a conveyance to escape section 22 of the LUA.
- **A solicitor who is a donee of the POA should not in the same capacity draft the POA.**
- Represent client within the bounds of law
- Prepare the document to professional standard---**RULE 1 RPC**
- Be dedicated to clients work---**RULE 14 RPC**
- Maintain the confidence of client in him----**RULE 19 RPC**
- Give candid and honest advice---**RULE 14(2)(e) RPC**
- Charge adequately—**RULE 48 RPC**

4. SALE OF LAND

1. MENTION LEGAL RESTRICTIONS OR LIMITATIONS TO SALE OF LAND----D LIL ACT

- **Doctrine of *'Lis Pendis'*** which signifies the power and control of a court of law while legal proceeding is pending, has the effect of restricting the sale of any interest in land during the pendency of the suit– **EZOMO V. N. N. B. PLC, KACHALLA V BANKI.** The doctrine would apply in cases where it can be shown by a party that at the time of such sale or purchase of the property, there is a – **PAOP**

  i. Pending suit in respect of the property;

  ii. Action or the *lis* was in respect of real property;

  iii. Object of the action was to recover or assert title to a specific real property; and

  iv. Party concerned was aware or ought to be aware of the pending suit – **BUA V. DAUDA**

- **Land Use Act restrictions/limitations----CUN**

  (a) **Consent:** The consent of the Governor of such State is required before a person can alienate his land (which is subject to statutory right of occupancy) to another. And so, any purported sale of land without the consent of the Governor first had and obtained is null and void—**Ss. 22 AND 26 LUA**

  (b) **Under-age:** A person under the age of 21 (twenty-one) cannot be granted a statutory right of occupancy or subletting of a statutory right of occupancy by the Governor of a State – **S. 7 LUA** except a guardian is appointed

  (c) Non-Nigerian: A non-Nigerian cannot be granted a statutory or customary right of occupancy without the approval of the **National Council of States**---**S. 46(1) LUA**

- **Incident of customary land tenure:** Consent requirement in transfer of family/communal land---**ADELEKE V. IYANDA; ODEKILEKUN V. HASSAN.**

- **Legislative restrictions:** Some legislation could also prescribe the granting of consent by the Minister in charge of a Department or Authority before there can be a transfer of interest in a property, held or owned by that Department or Authority. For example, the **Nigerian Coal Authority Act, Cap. 95, LFN 2004**, provides that "**the Corporation shall not alienate...or charge any land vested in the corporation...without the prior approval of the Minister"**—**S. 12(4) NCAA, ROCKONOH PROPERTY CO. LTD. V. NITEL PLC.** The Land Development (Provision for Roads) Law, Cap. L57, Laws of Lagos State, 2003 states that the sale of any land which the prescribed authority has directed to be reserved for roads development, shall be null and void.

- **Acquisition compulsorily:** CFRN 1999 on owning land but subject to compulsory acquisition for public purpose and payment of compensation. The Minerals Act – lawyer should ensure client doesn't buy land full of minerals as it will be

compulsorily acquired by the Federal government subject to payment of compensation

- **Contractual restriction:** Covenant in a lease may also restrict the sale and transfer of land. For example typical covenants in leases that restrict "assignments, subletting or otherwise parting with possession of the premises."

- **Town planning laws and regulations** may also restrict the alienation of certain lands where the purposes for which they are intended to be used are contrary to the purposes of town planning laws. For example, an industrial place designated for such purpose should strictly be abided to rather than using it for something else.

2. LIST THE VARIOUS STEPS OR STAGES IN THE SALE OF LAND (PROPER CONVEYANCING STAGES)

- Pre-contract stage (pre-contract enquiries and negotiation)
- Contract stage (payment of deposit, transfer of equitable interest, exchange of contract)
- Post-contract stage (deducing of title, investigation, writing a search report)
- Completion stage (drafting of deed of assignment)
- Post-completion or perfection of title stage (GSR)

3. EXPLAIN THE NEED FOR PRE-CONTRACT ENQUIRIES

- The need is to determine the presence or otherwise of patent defects-**YANDLE V SUTTON.** Example: tenants in possession, damage in property.

- Determine the suitability or otherwise of the property, obvious encumbrances, and provisions of planning regulations based on the principle of CAVEAT EMPTOR.

- The discovery made by the enquiry would affect negotiations especially the purchase price. For instance, if there are still tenants with subsisting lease on the property, that would affect negotiation. Note that the vendor is only under duty to disclose latent defects. Note also that the lawyer does not negotiate the purchase price for the purchaser.

- It is important for the purposes of negotiation. It equips the purchaser with enough information to determine his manner of negotiation.

Questions to be asked

- Are there disputes over the property?
- What are the boundaries?
- What are the methods of sale?
- Which insurance policy covers the property?
- What are the services supplied to the property?

NB: It is the duty of the vendor to disclose latent defect and not patent defects.

NB: Although the vendor is not under any obligation to respond to questions posed to him as to the patent defects in respect of the property, where he elects to answer those questions, he must not misrepresent facts as he would be held liable for misrepresentation occasioned by him.

4. MENTION VARIOUS TYPES OF CONTRACT OF SALE OF LAND, STATE THE PRINCIPLES GOVERNING EACH TYPE OF CONTRACT OF SALE OF LAND AND APPLY THE PRINCIPLES GOVERNING EACH TYPE OF CONTRACT OF SALE OF LAND TO GIVEN CASES

(a) Oral contract: An oral contract for the sale of land is generally unenforceable because it does not satisfy the requirements of **S. 4 STATUTE OF FRAUDS, S. 5(2) LAW REFORMS CONTRACT ACT, S. 67(1) PCL. It is valid, though unenforceable**. However, **there are two exceptions under which an oral contract for sale of land would become enforceable**. They are:

- **Native law:** Under native law and custom, oral contract is a common method of validly acquiring land because under native law and custom, the requirement of writing is not essential---**S. 5(3)(c) LAW REFORMS(CONTRACTS ACT).** Accordingly, an oral contract of the sale of land under customary law is enforceable. But in **ADEDEJI v. OLOSO**, it was held that before it is enforced, **the following conditions must be satisfied**:---**P[3]**
  (a) **Payment of the FULL purchase price**
  (b) **Purchaser is put into possession**; and
  (c) **Presence of CREDIBLE ADULT witnesses---ODUSOGA V RICKETTS; ALAKE v. AWAWU**
- **Part performance:** Where there are **SUFFICIENT ACTS** of part performance, the court would mandate the other party to perform his obligation under the contract (order of specific performance)---**INTERNATIONAL TEXTILE INDUSTRIES NIG LTD V ADEREMI**
  In **ADENIRAN v. OLAGUNJU**, the court stated that **there will be part performance when:--OROS**
  a. **Oral evidence to establish terms:** There is proper oral evidence to prove or establish the terms of the oral contract
  b. **Refer to the oral contract:** The **act constituting part-performance must unequivocally refer** to the oral contract; and
  c. **Own part execution:** The party complaining must have **wholly or in part** executed his own part of the oral contract.
  d. **Specifically enforceable:** The contract must be specifically enforceable in the sense that it is not a contract for personal service.

It must be noted that where the conditions for validity of an oral contract have been satisfied, it is sufficient to constitute part performance and the contract will be enforced. However, it is

risky for parties to rely on the doctrine of part performance for the enforcement of the oral contract because the order of specific performance is discretionary.

NB: Specific performance shall not be ordered where:

- The vendor is dealing with the property of another
- Family property is involved and purported sale is without the consent of the family head.

Features of an oral contract---PACT V

- Presence of parties
- Ascertainment of property
- Consideration payment
- Two credible witnesses (at least)
- Valid in law but not enforceable generally

Defects/problems/disadvantages of oral contract

- It is generally unenforceable, though valid
- Money paid as deposit is unrecoverable where purchaser defaults--**THOMAS V. BROWN**
- In the case of part performance, its enforcement is subject to judicial discretion after part performance has been proved.

(b) Open contract: An open contract is one which satisfies the minimum requirements of the Statute of Frauds which are:---**WP^{3}S**

- Writing
- Parties
- Property
- Purchase price
- Signed by the vendor

The above must be adequately described but most terms of the contract are to be implied by law. That is, every open contract is subject to a code of implied terms. This has been described as the major shortcoming of open contracts because implied terms are usually uncertain. Examples are:

- Receipt of purchase price (receipt of payment)---**KACHALLA V. BANKI, YAYA V MOGOGA**
- Telegram
- Rough Draft of Agreement
- Letters
- Written offer which has been accepted orally or in writing.
- Minutes book

Where land is sold and receipt is issued, equitable interest passes and it can be enforced by specific performance

Advantages of open contract

- It is valid and enforceable
- Equitable interest passes to the purchaser---**OSAGIE V OYEYINKA**
- Vendor is now qualified trustee (qualified in the sense that he holds the legal title in the property on behalf of the purchaser, and he can make profit from the property and do other things that do not negate the agreement he has with the purchaser)
- Vendor has a right of lien until the purchase price is completely paid

Disadvantages of open contract

- Usually entered into without proper legal advice
- Searches and requisitions are not properly conducted
- It is not detailed enough and it is open to implied terms which are usually uncertain.

(c) Formal Contracts: A formal contract contains not only the basic requirements but goes further to include detailed terms of what the parties have agreed. These are terms which ordinarily would have been implied into the contract. Examples are:

- Deposit
- Balance and interest on unpaid purchase sum
- Capacity of the vendor
- Risk and insurance
- Possession before completion
- Completion date
- Provision for fixtures and fittings

The formal contract sets out both the **particulars of sale and the conditions of sale.** The particulars of sale are the basic requirements of the statute of frauds, while the conditions of sale are the terms by which the parties are to be bound, which must be clearly spelt out---**TERRENCE v. BOLTON**

Advantages of formal contract over open and oral contract---BAD SIC WIG

- **BINDING:** It crystallizes the position of the parties as parties are bound by the terms of the agreement at an early stage in the transaction.
- **AVAILABILITY:** The CFSOL is an available document in the hands of both parties. The vendor can tender it as evidence of expectation of money, while the purchaser can create a mortgage of his equitable interest.
- **DEATH:** The death of either party does not terminate the contract as personal representatives proceed with the contract
- **STAMP DUTIES:** Parties agree on the fixtures and fittings for the land and building and can thereby reduce the incidence of stamp duties to be paid on the property.

- **IMPLIED TERMS AVOIDANCE:** It is used to circumvent implied covenants
- **CERTAINTY:** The terms of the contract are certain.
- **WITHDRAWAL:** It prevents last minute withdrawal as parties are bound by the terms and any such withdrawal would amount to breach.
- **INVESTIGATION:** The purchaser is given adequate time to investigate vendor's title.
- **G & G:** It prevents gazumping and gazundering. That is, the vendor cannot unilaterally and subsequently increase purchase price as the price has already been fixed in the contract (gazumping). And the purchaser cannot compel the vendor to reduce the price because he has an offer of a lower price (gazundering).

Special terms (conditions) in a formal contract

The following terms ordinarily are to be implied by the court if they were not stated in the contract. Thus, terms that would ordinarily be implied are modified by the parties.

1. Deposit Clause: it contains the deposit paid as security by the purchaser to the vendor as evidence of his intention to complete the purchase of the property. **The deposit is different from part payment in that deposit is made before the conclusion of the contract to show commitment on part of the purchaser and that the sale is not gratuitous---BIYO v. AKU while part payment is part of the purchase price made after the conclusion of the contract.** The contract is thus final having the payment of the balance. Part payment is not forfeitable---**ODUSOGA V. RICKETT.**

Specifically, in a formal contract, it is advised to provide for deposit for the following reasons:--**For CRAB**

- **Forfeiture and damages:** If the purchaser defaults in completing the contract, the money paid may be treated as forfeited by the vendor, and the vendor can also sue for damages for loss of bargain
- **Conversion of deposit into part payment upon completion of contract:** Where deposit is paid and the contract is duly completed, then upon completion, the money paid as deposit becomes part payment without more
- **Recovery of money by the purchaser:** If a breach is committed by the vendor, the purchaser is entitled to recover the money paid as deposit, with interest**--CHILLINGWORTH v. ESCHE.**
- **Assurance of commitment:** It assures the vendor of the purchaser's intention and commitment to complete the contract
- **Binding:** It binds the vendor to the contract unless a breach occurs on the part of the purchaser

Remedies available to a vendor **upon failure of purchaser to pay balance of the DEPOSIT**

- Forfeiture
- Damages for breach of contract

- Withdrawal (rescission) from the contract without refunding the deposit

Remedies available to a vendor **upon failure of purchaser to pay balance of the PART PAYMENT**

- Sue to recover the balance
- Sue to enforce performance

NB: There is no withdrawal as the contract is complete

NB: In exam, look at the circumstances of the case to determine if it is a deposit or a part payment that was made.

It is pertinent to note that deposit is usually paid to the vendor's solicitor and it can be paid to him as a STAKEHOLDER or as an AGENT of the vendor. However, it is advised that the deposit be paid to the vendor's solicitor in his capacity as stakeholder in which case he will be acting as agent for both parties and will only pay the money to whichever of the parties becomes entitled to it.

Where the purchaser pays the money to an agent of the vendor, he does so at his own peril--**SORREL v. FINCH. Note that where money is paid to the solicitor as stakeholder, he should deal with it by paying it into client account.**

Effect of receiving the deposit as a stakeholder

a) He does not receive the deposit as agent of vendor or purchaser.
b) The money received by the solicitor will be held by him as trustee.
c) He is only liable to pay the money to the party that eventually becomes entitled to it.
d) He has a personal responsibility to keep the money safe. He will be personally liable for loss or misappropriation of the money.
e) The money so collected must be kept in client account or trust account.
f) INTEREST is NOT paid to the party entitled to the deposit.
g) As stakeholder, the solicitor is like an interpleader for both parties. He is not obliged to pay the money to either of the parties until that party becomes entitled to it--**ROCKEAGLE v. ASLOP WILKINSON**

Effect of receiving the deposit as an agent

a) Receives the money on behalf of the vendor
b) Bound to remit the money to the vendor
c) Liable to pay interest on the deposit.
d) Vendor is liable to the purchaser where deposit is misappropriated.

2. Balance and interest on unpaid purchase price: since deposit is paid, a clause providing for payment of balance and interest upon it should be inserted. **Note that the law implies that balance is to be paid UPON COMPLETION**. Where the parties intend that it should be paid before completion, then an express provision should be made. **Interest is usually ON**

THE UNPAID BALANCE and not on the entire purchase price. It is usually 4%, but if parties intend to increase, then express provision must be made.

Effect of balance and interest on unpaid purchase price clause:

- Helps parties to determine time when balance is to be paid
- Helps parties to agree on the quantum of interest.
- Helps to modify the law that purchaser who fails to pay within time loses deposit

3. Capacity of vendor: the capacity of the vendor needs to be stated. Vendors may convey as beneficial owner, trustee, mortgagee, lessor, settlor or personal representative. Usually, capacity of vendor is as a beneficial owner and the following terms are implied:

- Right to convey
- Right to quiet possession/enjoyment.
- Freedom from encumbrances
- Further assurances

As a lessor, in addition

- There is a valid and subsisting lease
- That all covenants in the head lease have been observed and performed.

As mortgagee

- The Power of sale has arisen and become exercisable (the legal due date has passed)
- All conditions precedent have been complied with

4. Insurance: ordinarily the court would imply that the risks in the contract are to be borne by the purchaser unless there is a contrary agreement. However, if the purchaser is not in possession, a clause could be inserted for the property to be insured or for the vendor to retain liability until completion.

The parties must decide on---**WRACA**

- Who is to insure
- Risk to be insured against
- Application of the insurance money
- Company (Insurance company)
- Amount of cover

5. Provisions for fittings and fixtures: fixtures (permanent) and fittings (detachable) are things attached to the property. If fixtures and fittings are to be included in the contract, it should be provided for as a purchaser is not meant to pay for fixtures.

6. Completion date: law usually presumes that contract is to be completed **within reasonable time**---**OLANIRAN V ADEBAYO.** With this clause, the parties can insert the

completion date. Where the date is fixed, the contract is to be performed within that date. Failure to comply amounts to a breach of the contract--**JOHNSON v. HUMPHREY**

Once a party is in breach of the provision as to the date of completion, the innocent party must serve on the defaulting party a **NOTICE TO COMPLETE before terminating the contract or suing for damages.**

7. Possession before completion: the law implies that the purchaser gets possession only upon completion. Thus, unless otherwise stated, purchaser can only take over possession on completion. However, where parties intend that purchaser should take over possession before completion, express provision should be made to that effect.

> It must be noted that where purchaser is to take over possession before completion, the clause should be properly drafted **so that he takes possession as a mere licensee or a tenant at will. This is to make it easy to evict him if the contract fails due to the fault of the purchaser and this fact must be stated in the CFSOL.**

Particulars of instruction (needed for drafting a formal contract of sale)

- Particulars of the parties or personal details of the parties, both vendor and purchaser.
  (a) Names of the parties;
  (b) Whether any of the parties is an illiterate or is blind;
  (c) Their addresses;
  (d) Occupations;
  (e) Nationality; and
  (f) Phone numbers and e-mail addresses,
- Particulars of the property: location, description, whether there are third party rights or restrictive covenants, survey plan (if any)
- Particulars of witnesses
- Price or Consideration
- Nature of the vendor's title
- Capacity of the vendor

Parties may either act by the same solicitor or different solicitors.

Factors to be considered before the same solicitor can act for the two parties ---SMITH V MANSI---TLCCS

- Terms of the contract (whether fully negotiated and agreed upon)
- Likelihood of conflict between the parties (most important)

- Consent of the parties to use one solicitor.
- Consideration involved
- Sound title of the vendor

NB: Vendor's solicitor prepares the CFSOL.

Deed of Assignment—Assignee's solicitor

Tenancy agreement---Landlord's solicitor

Role of Vendor's Solicitor

- Prepares the Contract of sale of land.
- Advises the vendor on all stages and processes
- Receives deposit from the purchaser or his solicitor as stakeholder/agent of the vendor.
- Deduces title on behalf of vendor
- Prepares abstract and epitome of title.

NB: CFSOL can be dispensed with as parties can go straight to execute a deed of assignment (a deed of assignment cannot be dispensed with) but it is resorted to because of its advantages.

5. STATE THE PROCEDURE FOR AND EFFECT OF EXCHANGE OF CONTRACT

Procedure for Exchange of Contract---PreVEM (DEH-RED)

- Preparation of the formal contract of sale of land by the vendor's solicitor.
- Vetting of the draft of CFSOL by the purchaser's solicitor.
- Engrossment of the CFSOL (where V and P are in agreement) for the parties and their witnesses.
- Meeting would be held in the vendor's solicitor office. The following will take place at the meeting:
    a. **Deposit:** Vendor's solicitor will receive deposit from the purchaser or his solicitor either as a stakeholder or as an agent
    b. **Execution:** Parties and their witnesses will execute the contract of sale.
    c. **Hand over**: Vendor or his solicitor will hand over to the purchaser or his solicitor the following items:--**RED**
        - Receipt of deposit
        - Epitome or abstract of title.

Comment [C11]:
Exchange of contract is the physical exchange of two signed parts of the contract by the vendor and the purchaser. It is the process of making the contract binding on the parties.

Exchange of contracts is necessary because the contract only becomes binding on the parties after it has been duly exchanged---**ECCLES v. BRYANT AND POLLOCK**

Exchange of a contract of sale of land is effected as soon as each part of the contract, signed by the vendor or purchaser is in the actual or constructive possession the other party or his solicitor so that at his own need, he can have it available to him for use.

NB: An exchange of Contract is necessary where there are different solicitors acting for the parties. Thus, where one solicitor acts for the vendor and the purchaser, exchange of contract is not necessary- SMITH V MANSI.

Exchange of contract happens during the contract stage and as a general rule, while a deed takes effect upon delivery, a CFSOL takes effect when it is exchanged. Exchange brings the contract into existence.

- Duly executed copies of the CFSOL to the purchaser's solicitor signifying exchange.

Effect/consequences/position of the parties/implication of exchange of contract---BELT R

- **Binding:** The contract becomes binding on the parties--**ECCLES V BRYANT AND POLLOCK.** The death of either or all of the parties does not affect the contract as it can be completed by their personal representatives
- **Equitable interest passes**
- **Lien:** The vendor has a lien on the property for the payment of the balance of the purchase price---**ODUSOGA v RICKETTS**
- **Trustee:** The vendor is a qualified trustee. The vendor retains possession of and legal title to the property. However, he holds over possession and legal title as a qualified trustee for the purchaser--**OSAGIE v. OYEYINKA**
- **Risk passes to the purchaser:** The risk in the property passes to the purchaser and he is advised to take out an insurance policy on the property--**CHIDIAK v. COKER**

6. DRAFT A FORMAL CONTRACT OF SALE OF LAND (see and study p. 273 of your sample draft)

7. IDENTIFY THE CHALLENGES POSED BY UNREGISTERED CONVEYANCES.
Effects of non-registration of the CFSOL

- It will lose priority.
- Payment of fines as penalty for late registration
- It will not constitute notice to the whole world.

General points to note

- Conveyancy is the umbrella that covers the whole transaction
- Conveyance deals with the transfer of an interest in land.
- Conveyancing is the process of transfer of interest in land
- Conveyancer is the transferer of the interest

Applicable laws

- LUA
- CA
- PCL
- SDA
- LRL Lagos State
- CL and DoE
- Judicial precedent
- RPC
- LPA

- CAMA
- EA
- PITA
- CITA

Ways of acquisition of land in Nigeria

- Purchase
- Inheritance
- Gift inter vivos
- Grant from state authority/customary grant
- Long possession
- First settlement of virgin land (no longer obtainable)
- Conquest (no longer obtainable)

Problems affecting conveyancing practice in Nigeria

- Multiplicity of applicable laws/Duality of tenure
- Illiteracy
- Purchasers only consult solicitors at the tail end of transaction.
- Customary land tenure e.g family property
- No full appreciation of the value of contract before conveyance.
- Materialism among legal practitioners
- Professional incompetence and lack of diligence on the part of legal practitioners
- Touts as estate agents
- Slavish dubbing of precedents
- Archaic mode of record keeping at the registry making search difficult

Governor's consent is only required when legal interest is transferred (otherwise the transaction will be inchoate and the legal interest sought to be transferred shall be void)---**Ss. 22 and 26 LUA, AWOJUGBAGBE LIGHT INDUSTRIES V. CHINUKWE.** Stamping of the contract of sale is mandatory. Registration of the contract is dependent on whether the Land Instrument Registration Law of the State where the land is situate defines it as registrable instrument--**AKINBADE v. ELEMOSHO; UZOECHI v. ALINOR**.

Thus, CFSOL does require consent, MUST be stamped and MAY be registered depending on the location of the land.

Proof of title to land

In **OKUMAGBA V. IDUNDUN**, the Supreme Court laid down five ways in which ownership of land can be claimed:

- Traditional evidence/history
- Acts of Ownership extending over a sufficient length of time numerous and positive enough to warrant the inference of being the owner
- Acts of long possession and enjoyment(12 years, adverse possession)
- Proof of possession of adjacent land.
- Production of documents duly authenticated and executed

Ethical issues in sale of land where solicitor is acting for one party or both parties

- Pay money received from the client into client or trustees account
- Avoid conflict of interest
- Avoid tax evasion
- Advise his Client honestly
- Charge fees adequately not excessively or illegally
- Devotion to client transaction
- Keep notes with clients during meetings
- Agreement with clients should be in writing
- Represent clients within the bounds of the law
- Account for monies received promptly.

Vendor has the following remedies against the solicitor in the case of misappropriation:

- Civil action for damages.
- Criminal prosecution for conversion
- Professional liability for misconduct by LPDC.

8. EXPLAIN HOW A VENDOR CAN DEDUCE HIS TITLE, UNDERSTAND THE MEANING AND USES OF EPITOME/ABSTRACT OF TITLE AND WHAT CONSTITUTES A GOOD ROOT OF TITLE AND GIVE EXAMPLES OF A GOOD ROOT OF TITLE

It is the responsibility of the vendor or the vendor's solicitor to deduce title to land. Deducing title involves the obligation of vendor proving to the purchaser that he has title to what he has agreed to convey. **Vendor deduces his title by preparing and delivering to the purchaser the following documents:**

- **Abstract of title:** A document that contains an outline of all major transactions affecting a particular property over a period of time (relates to activities)
- **Epitome of title**: A document containing a list and particulars of all instruments affecting a particular property together with copies of all those instruments (relates to documents)

  NB: Where any of the documents relating to the title is lost, the vendor may provide a CTC of such missing document and a statutory declaration of loss. Note that the documents attached are for citing.

NB: When asked to draft an AOT or EOT tell a consistent story/list the documents in a chronological manner and make sure it covers previous titles for at least a period of 30 years (PCL) or 40 years (CA) (same applies to an EOT)

Draft of an AOT

"Re: Block of nine flats at 43 Ijebu Crescent, Ago-Yoruba Area, Port Harcourt, covered by Certificate of Occupancy dated 04/06/2015 and registered as 44/44/2015B in the Land Registry, Port Harcourt, Rivers State.

1. The Osa Family of Port Harcourt owned the piece of land from time immemorial

2…..

3…."

Comment [C12]: Number/Page/Volume

NB: In addition to the above, the vendor must make himself available for clarifications (if need be) as the property may require.

When a solicitor looks at an abstract and epitome of title, he should consider the following:

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

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

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

Note: It is not compulsory to raise requisitions. The vendor is only mandated to answer requisitions relating to latent defects of the property. The Purchaser can withdraw from the contract where the vendor refuses to answer questions relating to only LATENT DEFECTS. **Requisitions and replies must always be on letterhead (raise at least 10 questions) BAR PART II**.

Importance of abstract and epitome of title

a) It provides the nature of the vendor's title at a glance
b) Purchaser easily detects encumbrances

c) From discoveries in the abstract and epitome of title, the purchaser or his solicitor can easily raise requisitions. That is, it is on the basis of the abstract and epitome of title that requisitions are raised
d) Enhances the writing of good search report.
e) Information derived may be used in drafting the recital in the Deed of Assignment.
f) Used to show that the vendor has a right to sell
g) Used to show that the purchaser will have quiet possession
h) Used to prove the non-existence of any limitation/encumbrances
i) Assurance that there would be no problem in the future

Root of Title: A **document that can stand on its own to convey valid legal interest without any extrinsic evidence to establish title to land.** Both the abstract and epitome of title must show a good root of title (sound, unembellished and unencumbered title). The attributes/elements of a good root of title must co-exist and they are:

- **It must convey both legal and equitable interest to the purchaser.**
- **It must give adequate description to the property to make it ascertainable**
- **It must clearly state/describe the owner**
- **Dispels all doubts about its authenticity.**
- **It must not be subject to a higher interest- LAWSON V AJIBULU**

Examples of Good Root of Title

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

- Duly perfected Deed of Assignment/Deed of Transfer
- Duly perfected Legal Mortgage
- Registered document
- Certificate/receipt from court. This is a registrable instrument
- C of O arising from a state grant
- Assent by personal representatives duly perfected
- Deed of Gift duly perfected
- Vesting order/ Declaration of Court
- Evidence of grant from the state
- Land certificate in Lagos duly registered.

Examples of Bad Root of Title (documents not satisfying the elements of a good root of title)

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

- Lease. It is subject to a higher interest which is lessor's reversionary interest
- License
- Equitable mortgage

- Contract of sale of land: why? Because it conveys an equitable interest.
- Power of Attorney
- Unregistered Deed of Assignment
- Will (which has not been granted probate. The beneficiaries under a Will only have equitable title and legal title comes with the assent)
- Certificate of Occupancy not from state grant of state owned land
- Unregistered deed

Comment [C13]: Generally, Certificate of Occupancy is not a good root of title because it is given to evince that the person is the owner of the property and the document cannot stand on its own . However there are instances where it can be a good root of title e.g.
- Where the certificate of Occupancy was issued in respect of state grant. Section 5 and 6 LUA, Section 34 and 36 LUA. See OGUNLEYE v. ONI. When a Governor gives a person land or body in his official capacity as the Governor. It is usually given based on land schemes to parastatals.
- Where apart from the Certificate of Occupancy, the holder has other means of proving title to the property such as deed of Assignment.

9. STATE THE VARIOUS MEANS OF INVESTIGATING TITLE AND RAISE REQUISITIONS

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

Investigation is important because:

- To verify and confirm claims of the vendor that he is the owner. The fact that a vendor has adduced document showing a good root of title is not necessarily conclusive proof of the title.
- To confirm that there are no restrictions/encumbrances in the property. A defect may exist in the title which had occurred after the document evidencing good root of title was executed which is not apparent from the document.
- To protect the prospective purchaser
- In relation to the lawyer, to avoid professional misconduct

Consequences of failure to investigate title

- If the lawyer fails to investigate and there are defects, the purchaser is bound by the defects. Thus, he buys subject to the defect.
- Where the purchaser suffers any defect in title as a result of the lawyer's failure to investigate the title, the purchaser may maintain an action in damages against the legal practitioner.
- The purchaser cannot lay any claim to being a bona fide purchaser for value without notice, as a result of failure to investigate thoroughly. Thus, the purchaser will lose priority.

Pillars of investigation

- Ensure that the seller has the right or authority to sell
- Ensure that there is no inexplicable, break in chain to the devolution of the property.
- Ensure that there is no exception, reservation or restriction to the use of the property
- Ensure that the description in the title deeds fits the land being purchased
- Look out for encumbrances on the title
- Ensure all necessary consents have been obtained
- Ensure all charges are paid and duly evidenced in a receipt
- Raise requisitions where necessary

- Where the purchaser is satisfied with the reply to the requisitions he proceeds to prepare the deed of assignment.

Procedure for carrying out investigation—CESP TRaS

- **Collection** of epitome or abstract of title from the vendor/VS by the PS
- **Examination** of the abstracted documents of title for possible requisitions.
- **Search** to be conducted in the following places:
    1. Land Registry (compulsory)
    2. Court Registry (if the property had been subject to litigation)
    3. Probate Registry (when property of deceased is involved, to know whether the executors have obtained probate to the Will or Letters of Administration has been given to the administrators)
    4. Corporate Affairs Commission (when a company is involved) to know whether the company has corporate personality, has registered any charge or mortgage relating to the property. Person dealing with purchaser are authorized persons - look at the particulars of directors(constructive notice and indoor management rule) The power of directors or company is restricted with respect to the transaction - look at Memorandum and Articles of Association of the Company (restrictive clause)
- **Physical inspection** of the property to discover if there is any patent defect (as vendor is not under obligation to disclose them, only latent defect); physical condition of the property, easement, boundaries of the property, whether other person is in possession (tenant). Note that if what is to be revealed by physical inspection was done, there is no duty on part of vendor, the rule is CAVEAT EMPTOR
- **Traditional history** investigation where necessary: This investigation is important in sale of family or community property to determine whether consent has been obtained from relevant persons. Is he the head of the family….etc
- **Raise requisitions** where necessary.
- **Search** report.

Comment [v14]: NOTE FOR THE PURPOSE OF BAR PART II: LOOK AT THE SCENARIO TO KNOW THE PLACE(S) WHERE THE SEARCH IS TO BE CONDUCTED

Requisitions

What is Mr. Zhang interest in the property?

What document was executed to convey title to Mr Zhang?

Where is Mr Zhang property located?

Is the land sold by Jackie the same land sold to her?

Can I see the document evidencing such sale?

Which property is the c of o related to?

Can we have the full particulars of Mr Iesha?

Can I see the will?

Has probate been granted?

Can I see the probate if granted?

Has an assent been executed in respect of Mallam Sanni?

10. WRITE A SEARCH REPORT & COVERING LETTER.

1. Can be drafted in two ways: Search report proper and Search report with a forwarding letter (used when more than one search is conducted. The cover letter is to make a list of the different search reports and those reports must be attached to the cover letter

Procedure for conducting search in Abuja under Abuja Geographic Information System (AGIS)

- Written application to conduct search is made at AGIS stating the particulars of the property
- Application accompanied with a letter of consent from the owner of the property
- Show evidence of payment of search fees.
- Officer of AGIS would conduct the search and complete the search report which is the report that contains the findings of the property investigated.
- The search report is handed over to the purchaser's solicitor.
- The purchaser's solicitor thereafter hands the search report over to the purchaser.

Note that in Abuja, the documents you need to investigate title are:

a) Abstract of title
b) Epitome of title
c) Letter of consent from vendor

NB: In Lagos, investigation is now possible through the Land Information Management System (LIMS)

Content of a search report include:

1. Letter head
2. Reference number
3. Date of the letter/report (e.g: 16 January 2019 or January 16, 2019)
4. Name and Address of the Client (address the appropriate persons, MD for a company, Chairman/President for IT)
5. Salutation.
6. Heading/ title of the Search Report
7. **Introductory Paragraph.**

DPP PEC CSN

- Date of search
- Place(s) of search

- Particulars of the owner. Name of registered owner and title of the owner
- Particulars of the property
- Encumbrance if any
- Comments/advise/conclusion
- Complimentary close
- Signature
- Name of counsel

SAMPLE DRAFT OF SEARCH REPORT

K.C ANEKE & ASSOCIATES
LEGAL PRACTITIONERS AND ARBITRATORS
NO 5, Blue Crescent, Lagos
Email: kundycmith@gmail.com
Web: www.keneaneke.com
Phone: 07053531239

Our Ref: _____ Your Ref: _____ Date: 18 January 2019

The Managing Director,
Zenith Bank Plc
(Address)
Dear Sir,

RE: SEARCH REPORT IN RESPECT OF THE PROPERTY REGISTERED AS 10/10/1034 IN NUMBER 45 ON PAGE 45 IN VOLUME 2908 AT THE LANDS' REGISTRY OFFICE, EDO STATE

Pursuant to your instructions received on the _____, a search was conducted and the report is as follows:

1. Date of search
2. Place(s) of search
3. Particulars of the owner. Name of registered owner and title of the owner
4. Particulars of the property
5. Encumbrance if any
6. Comments/advise/conclusion

Our bill of charges is attached to this letter for your kind and prompt consideration.

Thank you.

Yours faithfully,

_____
K.C. Aneke Esq.
Senior Asssociate
For: K. C Aneke & Associates
Encl:

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

Comment [C15]: IN A MORTGAGE, CHANGE THE ADDRESS TO THE ONE PROVIDED and if no one is provided, address it to the Head of the Legal Department of the Bank
OR

MallamSani Idi
No. 5 Balarabe Crescent,
Sabon Gari,
Kano.

OR
The Managing Partner,
Ikeyi and Arifayan
No 3, Boyle Street, Onikan
Lagos

OR
The Proprietor,
Dango Ventures

Or
The President,

Comment [C16]: WHERE THERE IS NO COVERING LETTER).

K.C ANEKE & ASSOCIATES
LEGAL PRACTITIONERS AND ARBITRATORS
NO 5, Blue Crescent, Lagos
Email: kundycmith@gmail.com
Web: www.keneaneke.com
Phone: 07053531239

Our Ref: _____ Your Ref: _____ Date: 18 January 2019

The Managing Director,
Zenith Bank Plc
(Address)

Dear Sir,

RE: SEARCH REPORT IN RESPECT OF THE PROPERTY REGISTERED AS 10/10/1034 IN NUMBER 45 ON PAGE 45 IN VOLUME 2908 AT THE LANDS' REGISTRY OFFICE, EDO STATE

Kindly refer to the above subject matter and find attached the report of the search

Comment [C17]: FOR COVERING LETTER

Attached to this letter are the following:
a) Search report on ……..
b) …….

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

Thank you.

Yours faithfully,

_____
K.C Aneke Esq.
Senior Associate
For: K. C Aneke & Associates
Encl:

12. STATE THE PROCEDURE FOR COMPLETION OF SALE OF LAND

This is the stage where the contract of sale of land is completed and the legal interest in the property is passed to the purchaser. The following are extant in completion: procedure for completion, particulars of instructions required to draft Deed of Assignment, drafting of Deed of Assignment and effect of completion. At completion, designation or description of parties changes from vendor and purchaser to assignor and assignee. Deed of assignment is drafted by assignee's solicitor. Vendor (assignor's solicitor) has an obligation to prepare a

Completion Statement and a **Schedule of Documents** to be delivered. NB: In any land transaction, the party to draft is that which will lose if the draft is not effected.

Major features of completion stage

- Transfer of legal interest to purchaser subject to perfecting it (at common law, it is equitable until perfection)
- Conveyance is prepared and executed
- Original title documents are transferred to the assignee
- Payment of balance of purchase price
- Completion statement

Procedure for completion---PreVECME (BEH—KENE AT COLES)

- Preparation of the Deed of Assignment by the assignee's Solicitor
- Vetting by the assignor's solicitor
- Engrossment when the parties are ad idem on all the terms.
- Completion statement (program of events for the completion stage) is prepared by the assignor's solicitor. The assignor's solicitor will also transmit the prepared completion statement to the assignee's solicitor.
- Meeting at the assignor' solicitor's office where the following things will take place:
    1. Balance of the sum is paid by the assignee or his solicitor
    2. Execution of the deed of assignment by the parties and their witnesses.
    3. Hand over the following items to the assignee or his solicitor:---**KENE AT COLES**
        a. Keys to the property if the property is developed
        a. Executed (duly executed) Form for Governor's Consent. FORM 1C IN LAGOS
        b. Notice of Assignment of Insurance policy, where there is an Insurance Policy.
        c. Expired Power of Attorney, if any.
        d. Approved building plan, if the property is developed
        e. Three years tax clearance certificate of the assignor
        f. Copies (relevant) of the duly executed deed of assignment for perfection
        g. Original copies of all documents
        h. Letter of introduction to tenants where tenants are in possession.
        i. Evidence for payment of all outgoing-PHCN Bills, Land use charges, tenement rates, waste bills, water rates.
        j. Survey plan (approved)
- Examination. The assignee's solicitor will quickly examine the original documents given.

Comment [C18]:
Instances when the original document might not be given to the purchaser.
- Where the documents relate to other land retained by the vendor e.g a POA relating to land.
- Where the document creates a trust which is subsisting.

13. MENTION THE PROCEDURE AND DOCUMENTS FOR PERFECTING TITLE TO LAND

(a) Governor's consent

Governor's consent is only required when legal interest is transferred (otherwise the transaction will be inchoate and the legal interest sought to be transferred shall be void)---**Ss. 22 and 26 LUA, AWOJUGBAGBE LIGHT INDUSTRIES V. CHINUKWE.**

Documents to be submitted for Governor's consent are---ACE³D RATS

T

D

GLOT

1) **Application in the prescribed Form 1C (Lagos)** obtainable at Land Registry signed by both Assignor and Assignee/letter of application in other parts of the country
2) **Covering Letter** (in LP's letter headed paper) addressed to the commissioner of lands and housing
3) **Evidence of Tax clearance for 3 years for both parties**
4) **Evidence of payment of Development fee**
5) **Evidence of payment of G**round rent (if not developed)**, L**and use charge**, O**ther outgoings and **T**enement rates (if developed) **(GLOT)**
6) **Deed of assignment copies:** Relevant (Lagos state 2 copies) copies of the duly executed deed of Assignment
7) **Receipt of payment of consent, charting and endorsement fee**
8) **Approved building plan:** Duly approved building plan for a developed property (in Lagos)
9) **Title documents CTC**
10) **Survey plan:** Duly registered Survey Plan for an undeveloped property

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

1) Certificate of Incorporation CTC
2) Resolution of the BOD: Copy of resolution of BOD authorizing the sale or purchase
3) Annual returns
4) M & A CTC
5) Form CAC 1.1: Copy of CAC Form 1.1
6) TCC: 3 years Tax clearance certificate of at least two of the directors

Note that it is the duty of the vendor/assignor to apply for consent. But in practice, the purchaser/assignee does it---**UGOCHUKWU v. CCB NIG LTD.** Failure to obtain consent of the Governor will make the legal interest void and the transaction inchoate. The effect is that only equitable interest is transferred**.** Deed of assignment transferring legal interest

Comment [C19]: This stage involves perfection of title, effect of failure to perfect title and documents required for perfection. The procedures are usually undertaken by purchaser's solicitor.
Perfection of title; the following are the order of perfection:
- Governor's consent – **S. 22 & 26 LAND USE ACT**
- Stamping of document – **S. 22 & 28 STAMP DUTIES ACT**
- Registration of document – **S. 2 LAND INSTRUMENT REGISTRATION LAW**

GSR

Comment [v20]: Does not apply to lagos state.

Comment [v21]: Only applies to lagos state.

Comment [v22]: Does not apply to lagos state.

Comment [C23]: Essential for perfection of title as a general rule with no exception in Lagos state, but with 2 exceptions in other states:
- Where the DOA has made copious reference to the survey plan already registered
- Where parcel clause refers to schedule which contains adequate description of the property.---AMADI V ORISAKWE

would be void. **NB: What is the difference between failure to obtain governor's consent because it was applied for and refused, and not applying at all?** Where Governor's consent was applied for and refused, the transfer of legal interest is invalid, null and void. Where no attempt was made to obtain governor's consent, the transaction is inchoate, incomplete and voidable. It only becomes complete when governor's consent is obtained---**AWOJUGBAGBE LIGHT INDUSTRIES LTD v CHINUKWE**

(b) Stamping

Under the Stamp Duties Act, stamping of documents must be done **within 30 days of execution of the Deed of Assignment**.

Effects of failure to stamp are:

- An unstamped document is not admissible in evidence to prove title
- Late stamping attracts penalty
- The document would not be accepted for registration, section 10 LRL.

Note that a CFSOL is chargeable to a fixed stamp duty or a flat rate, while the Deed of Assignment is chargeable to Stamp duties ad valorem.

Comment [v24]: Section 58 stamp duties Act.

(c) Registration

Registration is compulsory for Deed of Assignment – **S. 2 LRL**. Registration must be done **within 60 days of execution of Deed of Assignment.**

Importance of registration

- It is an indication that the title of the property is encumbered
- It gives priority to the instrument registered first in time---**OKOYE V DUMEZ NIG PLC**
- It is at registration that the number, page and volume (NPV) is gotten
- It constitutes notice to the whole world.

Effect of non-registration

- Late registration attracts penalty
- Documents may lose priority against subsequent instrument that are registered since registration governs priority----**OKOYE V. DUMEZ NIG LTD**
- It will not constitute notice to the whole world.

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

14. IDENTIFY ETHICAL ISSUES ARISING FROM INVESTIGATION AND PERFECTION OF TITLE TO LAND

Comment [C25]:
- Rule 23(2) RPC: a lawyer shall keep a separate account. Shall not mix his money with client's money
- Rule 47: a lawyer should not conduct searches at the land's registry for defects with a view to obtaining employment or litigation thereby
- Rule 10: a lawyer should not frank a document unless the seal and stamp approved by NBA is affixed
- Rule 3: duty not to aid in the unauthorized practice of law…. Estate agents
- Rule 3(2): duty not to sign a document prepared by a non-lawyer
- A lawyer should not under stamp or reduce the consideration stated on the face of the instrument in order to reduce the stamp duty---**RULE 15(2)(J); ADENUGA V AJAO**
- Rule 16: represent your client competently, know which documents to prepare
- Rule 14(2): keep client informed of the progress of his transactions and give warnings and cautions where necessary.

POSSIBLE MULTIPLE CHOICE QUESTIONS ON THIS TOPIC

1. Any person under the age of ____ cannot be granted a statutory right of occupancy by the Governor of a State

A. 20

B. 21

C. 18

D. 17

2. A non-Nigerian cannot be granted be granted a statutory or customary right of occupancy without the approval of the ____

A. National Council of States

B. Advisory Council of States

C. Attorney General of the State

D. Minister for Lands

3. Deducing of title, investigation and writing of search report is at the ____ stage of sale of land

A. Completion

B. Post-contract

C. Contract

D. Post-completion

4. Drafting of a deed of assignment is at the ____ stage of contract of sale of land

A. Completion

B. Pre-contract

C. Post-contract

D. Post-completion

5. NO QUESTION

6. _____ is subject to a code of implied terms

A. Oral contract

B. Open contract

C. Formal contract

D. All of the above

7. The basic requirements of the statue of fraud as it relates to formal contract for sale of land are also known as the ____

A. Conditions of sale

B. Particulars of sale

C. Terms of sale

D. All of the above

8. The terms by which the parties are to be bound which are clearly spelt out as it relates to a formal contract for sale of land are also known as the ____

A. Conditions of sale

B. Particulars of sale

C. Formalities of sale

D. All of the above

9. The unilateral increase of the purchase price by the vendor in a formal sale of land transaction is referred to as ____

A. Galloping

B. Gazumping

C. Gazundering

D. Gallundry

10. The unilateral decrease of the purchase price by the purchaser in a formal sale of land transaction is referred to as ____

A. Galloping

B. Gazumping

C. Gazundering

D. Gallundry

11. ____ is made before the conclusion of the contract to show commitment on the part of the purchaser

A. Deposit

B. Deposit clause

C. Part payment

C. Part payment clause

12. ____ is part of the purchase price made after the conclusion of the contract

A. Deposit

B. Deposit clause

C. Part payment

C. Part payment clause

13. All these but one are remedies available to a vendor upon failure of purchaser to pay balance of the deposit

A. Forfeiture

B. Damages

C. Withdrawal (rescission)

D. Sue to enforce performance

14. All these but one.are the remedies available to a vendor upon failure of purchaser to pay balance of the part payment

A. Sue to recover the balance

B. Sue to enforce performance

C. Withdrawal (rescission)

D. None of the above

15. The following are true as it relates to receiving deposit as a stakeholder except ____

A. Liability to pay interest on the deposit

B. Money is kept in client/trust account

C. Liability for loss/misappropriation of the money

D. None of the above

16. The law implies that balance is to be paid ___

A. Upon execution

B. Upon completion

C. At anytime

D. All of the above

17. NO QUESTION

18. Once a party is in breach of the provision as to the date of completion, the innocent party must serve on the defaulting party a ____

A. Notice of appeal

B. Notice to complete

C. Notice of vexation

D. Notice of intention to go on with the contract

19. Where a purchaser is to take over possession before completion, the clause should be properly drafted so that he takes possession as all but one of the following

A. Licensee

B. Tenant at will

C. Periodic tenant

D. All of the above

20. NO QUESTION

21. A formal contract for sale of land is prepared by the ____

A. Vendor's solicitor

B. Purchaser's solicitor

C. Assignor's solicitor

D. Assignee's solicitor

22. A deed of assignment is prepared by the ____

A. Vendor's solicitor

B. Purchaser's solicitor

C. Assignor's solicitor

D. Assignee's solicitor

23. A formal contract for sale of land takes effect when ____

A. Contract is completed

B. It is delivered

C. It is exchanged

D. It is executed

24. The umbrella that covers the whole transaction of transfer of an interest in land is ____

A. Conveyancy

B. Conveyance

C. Conveyancing

D. Conveyancer

25. ____ deals with the transfer of an interest in land

A. Conveyancy

B. Conveyance

C. Conveyancing

D. Conveyancer

26. ____ is the process of transfer of interest in land

A. Conveyancy

B. Conveyance

C. Conveyancing

D. Conveyancer

27. ____ is the transfererr of the interest in land

A. Conveyancer

B. Conveyancor

C. Conveyancee

D. None of the above

28. Where Governor's consent is required but is not sought and obtained, the transaction will be ___

A. Inchoate

B. Null

C. Void

D. All of the above

29. Where Governor's consent is required but is not sought and obtained, the legal interest sought to be transferred shall be ____

A. Inchoate

B. Void

C. Voidable

D. Valid

30. ____ possession of land leads to adverse possession

A. 10 years

B. 12 years

C. 8 years

D. 7 years

31. It is the responsibility of the ____ to deduce title in a sale of land transaction

A. Vendor/vendor's solicitor

B. Purchaser/purchaser's solicitor

C. Assignor/assignor's solicitor

D. Assignee/assignee's solicitor

32. A document that relates to activities/contains an outline of all the major transactions affecting a particular property over a period of time is ___

A. Abstract of title

B. Epitome of title

C. Deed of assignment

D. Contract of sale of land

33. A document that relates to documents/contains a list and particulars of instruments affecting a particular property together with the copies of those instruments is ___

A. Abstract of title

B. Epitome of title

C. Exhibits of title

D. Contracts of title

34. The documents identified in 32 and 33 above should cover previous titles for at least a period of ___ in PCL states and ____ in CA states

A. 20/30 years

B. 30/40 years

C. 40/30 years

D. 30/20 years

35. In a certificate of occupancy registered as 30/40/2015B, the volume is ____

A. 30

B. 40

C. 2015B

D. B

36. In the certificate in 35 above, the page number is _____

A. 30

B. 40

C. 2015B

D. None of the above

37. A document that can stand on its own to covey valid legal interest without any extrinsic evidence to establish title to land is a ____

A. Good epitome of title

B. Good root of title

C. Good abstract of title

D. Good title

38. In relation to conducting a search in Abuja, AGIS stands for ___

A. Abuja Geometric Information System

B. All Geographic Information System

C. Abuja Geographic Information System

D. Abuja General Information Security

39. In relation to conducting a search in Lagos, LIMS stands for ____

A. Land Information Management System

B. Lagos Instrument Maintenance System

C. Lagos Information Management System

D. Land Instrument Management System

40. The stage of sale of land where legal title in the property is passed to the purchaser is the ____ stage

A. Contract

B. Completion

C. Post-contract

D. Post-completion

41. ____ has the obligation to prepare a completion statement and a schedule of documents to be delivered

A. Vendor's solicitor

B. Purchaser's solicitor

C. Assignor's solicitor

D. Assignee's solicitor

ANSWERS

1. B
2. A
3. B
4. A
5. BONUS
6. B
7. B
8. A
9. B
10. C
11. A
12. D
13. D
14. C
15. A
16. B
17. BONUS
18. B
19. C
20. BONUS
21. A
22. D
23. C
24. A
25. B
26. C
27. A
28. A
29. B
30. B
31. A
32. A
33. B
34. B
35. C
36. B
37. B
38. C
39. A
40. B
41. C

5. LEASES

1. STATE WHAT A LEASE IS

A lease is a document which creates a grant of right of exclusive possession of a property for a term of years usually for consideration of rent or money's worth. Thus, if there is no exclusive possession and the term of years is not ascertainable and there is no consideration (consideration is necessary but not compulsory), it does not create a leasehold relationship.

2. IDENTIFY PARTIES TO A LEASE

Terms and parties to a lease

- Demised property- the subject matter of a lease usually a property
- Term of years- duration
- Lessor/landlord- grantor of the leasehold interest
- Lessee/ tenant- grantee of leasehold interest
- Guarantor- a person who undertakes to guarantee that due performance of the covenants and terms of the lease.

3. STATE THE ESSENTIAL ELEMENTS OF A LEASE AND APPLY PRINCIPLES OF ELEMENTS OF A LEASE TO A CASE----PDP TE

a. **Certainty of Parties:** Parties must be adequately described, defined and ascertainable. Parties must be Juristic persons with capacity to sue and be sued. The parties must not be a minor, bankrupt, insane or unincorporated entity---**S. 7 LUA.**

b. **Created in Due and Proper Form:** The lease agreement must be in writing, intention of the parties must be contained in the lease agreement---**ODUTOLA V PAPERSACK LTD.**

c. **Certainty of Property:** The property must be identifiable, ascertainable and adequately described….A PLOT OF HOUSE, A BUNGALOW, A SEMI-DETACHED DUPLEX. The property must be in existence at the commencement date of the lease. The description must be full, accurate, clear and identifiable.

d. **Certainty of Term:** The duration, commencement and the terms of a lease must be certain. Where parties intend that the lease takes effect upon the happening of an occurrence or of a future contingency, parties to the lease transaction must have agreed and be sure that such a contingency will take place and not a mere speculation---**LACE V CHANTLER.** Thus, for a lease to be valid, it must have a definite terms of years---**OKECHUKWU V ONUORAH, BOSAH V ORJI, OSHO V FOREIGN FINANCE CO, UBA V TEJUMOLA & SONS**

Comment [C26]: The lease must have a specific time frame. **The commencement and expiration dates must be expressly stated. This is because the lease cannot enure in perpetuity.Okechukwu v. Onuorah, UBA Ltd v. Tejumola& Sons Ltd, Bosah v. Orji.**

In **OKECHUKWU V. ONUORAH**, the commencement date of the lease was hinged on the date the Certificate of Occupancy is obtained by the lessee on the property demised. The court held that the commencement date of the lease agreement is hinged on a future occurrence taking place as long as the future occurrence is ascertainable, then the lease will be valid.

In **UBA LTD V. TEJUMOLA& SONS LTD** where the lease agreement was dated to be subject to contract, the court held that when the date of commencement of a lease is not specified but stated by reference to the happening of a contingency which is uncertain in time, until the contingency happens, there is no enforceable lease.

In **BOSAH V. ORJI** where commencement date was hinged on the day the defendant obtains Certificate of Occupancy for building on the unbuilt part of the land. The Supreme Court stated that the principle for a valid lease is that it must be clear that there is an intention to create a term of years with a certain beginning and a certain ending. Essential terms are: parties, extent and nature of property, rent to be paid, the period of a lease, date of commencement.

Comment [C27]: A lease without a commencement date is void—**AFRICAN SHIPPING CO. V. NPA**

Computation of time

For the duration to be measured, there must be an effective commencement date. The commencement is usually denoted in a lease/tenancy agreement with the words 'commencing from'…which is exclusive of the mentioned commencement date and ENDS ON THE ANNIVERSARY OF THE LEASE. Example a one year lease commencing from the 1st January 2000 ends on the 1st of January 2001. You start COUNTING FROM THE NEXT DAY.

COMMENCING ON IS INCLUSIVE OF THE COMMENCEMENT DATE. IT MUST END ON THE DAY BEFORE THE ANNIVERSARY OF THE LEASE.

e. **Exclusive Possession:** The Lessee must be granted exclusive possession of the property. He must be given the right to enjoy the property and exclude all other persons including the lessor from the property---**STREET V MOUNT FORD, S. 5(1) LAW CONTRACT REFORMS. WALSH V LONSDALE.** Exclusive possession could be express and implied.

NB: In a lease, the essential date is the date of delivery; while in a tenancy, the relevant date is the date of execution. Any term created under a right of occupancy or certificate of occupancy is a SUB-lease. In such a case, never draft a deed of lease, rather, draft a deed of sub -lease. Where any of the essentials of a lease is missing, it may look like a lease but it is not a lease.

NB: A leasehold ought to be by deed, a tenancy need not be in writing. The difference between them is duration. Under the Tenancy Law of Lagos state, there is no distinction between tenancy and lease.

The Tenancy Law applies to all areas in Lagos (except VIIA where C.A applies)– **S. 1(3)(I) – (IV) TENANCY LAW, LAGOS**.

4. DISTINGUISH A LEASE FROM SUB-LEASE, LICENCE, AND AN ASSIGNMENT

(a) Lease and Sub-lease

It is called sub-lease or under-lease or minor lease: for this to exist. There has to be a head lease to create a sub-lease. It is a lease given out of a lease. There is a direct relationship between the head lessor and sub-lessor. No direct relationship between the head lessor and sub-lessee. A tenant cannot unilaterally sub-let/sub-lease unless it has been indicated as one of the covenants in the agreements in the head lease

(b) Lease and Licence

A licence is a mere occupation of land whereby exclusive possession is not given to the occupier. The distinction between a lease and a license is EXCLUSIVE POSSESSION. A licensee is a tenant-at-will. The licensee does not have the right conveyed on the lessee. The

Comment [C28]: The court held that exclusive possession connotes occupation of the demised property either personally or through an agent, proxy or servant.

Comment [C29]: Grant of term of years above 3 years

Comment [C30]: Grant of term of years below 3 years or 3 years

Comment [C31]: Section 47 Tenancy Law defines tenancy to mean holding of interest in land or property by a tenant under the tenancy agreement.

Comment [C32]:
- Residential premises in a care home or hospice facility.
- Residential premises for educational purposes
- Property used as a rehabilitation centre
- Premises used for medical care

Comment [C33]: The tenancy law does not apply to Victoria island, Ikeja GRA, Ikoyi and Apapa

terms and covenants of a lease do not apply to a licensee. A license need not be in writing but a lease must be in writing.

(c) Lease and Assignment

- In a lease there is reversionary interest while in an assignment there is no reversionary interest.
- The parties are lessor/lessee, assignor/assignee
- Grant of term of years/unexpired residue.
- May not be created by Deed in the case of a tenancy while an assignment is always created by Deed.
- Only possessory interest is transferred in a lease, while proprietary interest is transferred in an assignment.
- Needs no investigation of lessor's title. Investigation is very important in assignment.
- Governor's consent, Stamping and Registration not required in tenancy/ stamping and registration is necessary for perfection in assignment.
- All covenants in head lease will bind parties to the lease. Only covenants that touch and concern the land in the head lease will bind the assignee.

5. MENTION TYPES OF RENT AND FACTORS TO BE CONSIDERED IN FIXING RENT PAYABLE IN A LEASE

Rent is the consideration paid by the lessee to the lessor for the use of the demised property. Payment of rent is not compulsory thus the validity of a lease agreement is not hinged on payment of rent by the lessee or tenant. Furthermore, this is because rent is not one of the essentials of a valid lease. Also rent need not be in monetary consideration. It must not be in cash. There are instances where rent is not paid. They are:

- When lump sum or capital sum is paid
- When there is a condition which is enshrined in one of the covenants and the lessee has agreed to perform the covenant, that can serve as consideration
- When there is acknowledgment of relationship of landlord and tenant (mere acceptance of the lease by the lessee)

Rent is meant to be paid in arrears thus where the landlord/lessor desire it to be paid in advance, it should be stated in the rent clause.

Types of rent

1. Ground rent: is the rent paid on the bare parcel of land without putting into consideration any development on the land--**S. 5 LUA.** This is paid to the Governor in recognition of the right of the state Government as trustee of all land within the territory. It is payable by the landlord but the deed may state otherwise that it is the tenant to pay the ground rent.

2. Rack rent: this is also called 'Economic rent'. It is the economic rent payable for the land and the improvements and developments on the land. Thus, it is the rent paid or payable

while putting into consideration the development on the land. Rack rent is the best type of rent but landlord should avoid collecting so many years of rent in advance due to its prohibition, taxation and inflation. It is dependent on the area of the property. It is payable to the landlord or the lessor.

3. Premium: this is a lump payment paid in addition to periodic rent in consideration of a reduced rent. In several states, it is prohibited. It is also known as a fine. Landlords attempt to circumvent the prohibition of the premium, by charging rent in advance for many years. Lagos prohibits PAYMENT OF RENT IN ADVANCE (landlord not to collect more than one year rent)--**S. 4(3) TENANCY LAW OF LAGOS STATE.**

Comment [C34]: The punishment is imprisonment for three months, or fine of N100 thousand.

Disadvantages of premium

- Inflation
- Statutory prohibitions. It is not universal
- Payment of tax. Rent collected in advance for more than five years is subject to tax action as income--**S. 3(3) PITA, SECTION 4(2)(c) OF INCOME TAX MANAGEMENT ACT**

Factors taken into consideration in fixing rent--SIITULQ

- Statutory provisions
- Inflation
- Investment on the property
- Tax implications
- Use to which the property will be put
- Location of the property. It is important because it helps you fix your rack rent.
- Quality of the property and extent of the building would be put into consideration

6. STATE RELEVANCE OF A RENT REVIEW CLAUSE

It allows for the rent of the property to be reviewed periodically. It is important to insert a rent review clause in a lease especially if the term of years granted is a long one--**UNILIFE DEV CO v ADESHIGBIN.** It is inserted in a lease to cushion inflation and recoup economic value of investment.

Contents of a rent review clause---MTN Pro

- Mode of initiating the review. Example issuance of notice and the duration of such notice
- Time to initiate the review
- New rent calculation method
- Procedure for dispute resolution concerning the new rent.

Comment [v35]: It is pertinent to note that in the absence of a rent review clause, the lessor cannot unilaterally change the agreed rent--**YAHAYA V CHUKWURA.**

7. EXPLAIN THE VARIOUS TYPES OF COVENANTS THAT SHOULD BE IN A STANDARD LEASE AND REASONS FOR THE INCLUSION OF THE COVENANTS IN A LEASE

Covenants in leases (miscellaneous part)

Covenants are basically promises made by either the landlord to the tenant or vice versa in respect of the demised premises. Also, it could be undertakings or obligations. There are three broad types of covenants, namely:

- Usual covenants
- Implied covenants
- Express covenants

(a) Usual covenants: this could be covenants earlier agreed on by the parties during negotiations but omitted in the lease agreement, or covenants that are usually brought in. Usual covenants are proper and common covenants inserted in a lease based on the facts or evidence presented before the court. May be expressly provided for in the lease-**this lease is subject to usual covenants**. Usual covenants must however be reasonable: must pass the test of a reasonable man on the streets

Comment [v36]: Covenant agreed by the parties where the lease is preceded by a contract but the parties omitted it while preparing the lease.

Factors determining usual covenants in a lease

1. Judicial interpretation
2. Jurisdiction of the property
3. Purpose and usage for which the property is let/leased
4. Custom of the locality where the property is situated.
5. Previous dealings
6. Type of lease in question (short versus long term)
7. Nature of the property

Usual covenants include

1. Quiet possession/enjoyment of the property
2. Payment of rent
3. Payment of taxes except those expressly stated to be payable by the Landlord
4. Maintain and deliver up property in a good state of repairs
5. Allow Landlord a right to view the state of repairs. NB: If the landlord demands are unreasonable, the court will refuse such demands as usual e.g. allowing him to review the state of repairs at 11pm

(b) Implied covenants: these are covenants which the law will imply and enforce into the lease agreement between the parties even though they are not expressly provided for in the lease agreement. The covenants are implied as a result of the **landlord/tenant relationship.** Essential covenants implied/inferred by law whether the lease or tenancy agreement makes provision for them---**ADOLLO V. ADEYEMI; WARREN V. KEEN.** Whether parties provide for it or not in their contract, because they are provided for by law, they will be enforced by the courts. They include:

- Covenant of tenant not to commit waste of the property.
- Covenant of tenant to pay rates and taxes chargeable to a tenant i.e. water bills, electricity bills, telephone bills, waste disposal bills, security rates e.t.c.
- Covenant to use the premises in a tenant like manner
- The landlord will give quiet possession/enjoyment.
- Covenant of the landlord not to derogate from grant
- Covenant that the property is fit for use and habitation.
- Covenant to comply with procedure guiding recovery of premises.

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

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

- Covenant to pay rent
- Covenant on use
- Covenant to pay rates and charges
- Covenant to repair
- Covenant on assignment and sub-letting
- Covenant to insure
- Covenant against altering the property

It is pertinent to note that the new Tenancy Law of Lagos has some significant and unique features. For instance, express covenants are provided for in the law and in the absence of contrary agreement they are applicable to a lease agreement--**SS. 7, 8, 9 TENANCY LAW 2011**. The express covenants contained in the Tenancy Law of Lagos state 2011 is among the distinctive features between the Tenancy Law of Lagos and the laws applicable in the other Conveyancing Act states and the Property and Conveyancing Law states.

1. Covenant to pay rent: it is pertinent to note that payment of rent is not an essential validity of lease. Thus, there can still be a valid lease even when there is no payment of rent. Where the landlord desires to collect rent from the tenant, there must be a clause for it in the lease agreement.

In addition, the **amount of rent must be stated. The period which that rent would cover and the fact that the rent should be paid in advance must be stated. This is against the background that rent is paid in arrears under the common law and if not provided for, payment is in arrears.** Under **S. 7(1) Tenancy Law**, it provides that subject to any provision to the contrary in the tenancy agreement, the tenant shall pay the rents at the times and in the manner provided for.

DRAFT:

"The sub-lessee covenants with the sub-lessor to pay the rent reserved in the lease at the time and in the manner prescribed"

2. Covenant to pay rates and outgoings: This could be the landlord or tenants undertaking, depending on the agreement. Generally, the tenant pays the recurring rates and landlord pays all non-recurring rates. There are rates which a statute will require either the landlord or the tenant to pay. The party who will pay rates depends on how the covenant to pay the outgoing is drafted. There are three ways of drafting it:

- A stipulation that the tenant shall pay all existing rates and taxes, charges on the day of creation of lease. The tenant will pay only the existing outgoings and where new rates are introduced the tenant will not pay.
- When it is drafted that the tenant will pay all rates existing including any other rate subsequently introduced. However where landlord is to pay the rate by statute, the tenant would not pay. Position of the law is superior. Note that where lessee pays that imposed on lessor, he can seek refund from lessor.
- Standard covenant: **"To pay all rates, taxes, and outgoings (PARTO) in respect of the demised premises, payable now or as may be imposed subsequently, whether payable by the owner or by the occupier"**

3. Covenant to insure:

As a general rule, either of the parties has the obligation to insure as both the landlord and tenant have insurable interest. The insurable interest of the landlord is the reversionary interest while that of the tenant is possessory interest in the property. Importantly, a standard insurance covenant must include the following:

- Who should insure(the policy holder)
- Risks against which the property is to be insured(Risk)
- Amount of insurance cover
- Company (The insurance company)
- Application of insurance money

Who is to insure? There are also certain factors to consider in determining who is to insure – the landlord or tenant--**ENUO**

a) **Existing obligations:** existing obligation mainly relates to the landlord. Where the demised property is subject to a mortgage and the mortgage agreement provides that the mortgagor/landlord should insure, then the landlord should continue with that obligation.
b) **Nature of the property:** this can work in two ways if the landlord occupies part of the property or the property consist of blocks of flat then the landlord should insure as it would not be reasonable if all the tenants are to insure. This is also to avoid conflict

Comment [d37]: Charges and taxes apply

Comment [C38]:
There are three exceptions:

•Where the law provides that it is the occupier that will pay for it, the tenant would pay.
•On the authority of Smith v. Smith, where the new rate is of same specie of the former rate, the tenant would pay. For instance NEPA bills now PHCN bill.
•Under the Lagos Tenancy Law, in s. 7(2) the tenant shall pay all existing or future rates not payable by the landlord as imposed by law.

Comment [v39]: EXPRESS COVENANT. TLL IN LAGOS STATE DOES NOT IMPLY IT. BAR PART TWO.

Comment [C40]:
Section 8(iii) of Tenancy Law provides that subject to any provision to the contrary in a tenancy agreement, the landlord shall keep the premises insured against loss or charge.

Comment [d41]: Two different agreements existing on the same property. A mortgage agreement and a lease agreement.

Comment [v42]: Ensure there is a common policy.

where there are more than one tenant. If the tenant then occupies alone, then he can insure especially in a long duration lease agreement

c) **Use to which the property is being put:** where the use to which the property is being put is highly risky, the tenant may insure. Example, the tenant carries on banking activities

d) Other provisions in the lease

Risk against the property

This depends on the nature of the premises**.** Where a tenant is required to insure with a particular insurer but the lease does not specify the risk to be insured against, the tenant's obligation is to effect such policy as is usual from time to time with the insurer. In **UPJOHN V HITCHENS,** the instruction was that the tenant should take out a standard insurance policy from X company, which she did. However, the property was destroyed by a risk not included in the standard insurance policy. The property was destroyed by fire. Held: The tenant has no liability.

Amount of cover

It should be the amount necessary for re-instatement---**MUMFORD HOTELS LTD V WHEELER**

Comment [C43]: It is also important to have provision for abatement for amount of cover in absence of which the cover can be any amount.

Application of insurance money

Generally, where the landlord insures solely and the property is destroyed, the tenant cannot compel the landlord to use the money towards re-instatement. Thus, where the landlord insures, the tenant cannot compel the landlord to use insurance money to re-build the premises or to restrain the landlord from suing for rents until the premises are rebuilt---**LEEDS V CHEETHAM**.

The landlord is not bound to use the money for re-instatement of the property and the tenant cannot maintain an action against the landlord to compel re-instatement and unless there is a rent abatement clause, and the tenant cannot enjoy the premises upon destruction of the property, the tenant will still pay rent.

However, where the tenant reimburses the landlord or contributes to the insurance money, the tenant can compel the landlord to use the money to re-instate the demised premises. Where the tenant insures in his own name, the landlord cannot compel the tenant to re-instate the demised property.

NB: **S. 66 INSURANCE ACT** provides that where a property is insured against **fire** and the property is **damaged by fire**, an interested party may apply for the money recovered to be used in re-instatement. This is the statutory safeguard. The insurer reserves the right to either re-instate the property or pay the insured for the loss suffered. No grounds of suspecting fraud or arson must exist on part of the insurer.

It is also important to have provision for abatement. This entails exemption of the tenant from paying rent during the period in which the property is being re-instated---**ARAKA V. MONIER CONSTRUCTION CO LTD.**

A sample of a draft of covenant to insure

"To keep the Demised Premises insured at all times throughout the subsistence of the tenancy **in the joint names of the Landlord and the Tenant** against the **risk of fire, lightning, explosion, riot, civil disturbances or commotions, earthquake, storm, tempest, flood, and other risks and usual perils** normally insured under a comprehensive policy on property of the same nature as the Demised Premises, **with a reputable insurance Company** to be approved by the Landlord, which approval shall not be unreasonably withheld, **for a sum equal to the full cost of complete reinstatement** and to make all payments of premium and other payments necessary to effect and maintain the policy or policies as and when due; and to produce to the Landlord on demand the policy and the receipt for each payment and **to apply all money received by virtue of the policy to be immediately laid out in rebuilding and reinstating the Demised Premises** or any part of it in respect of which such money shall have become payable"

Usefulness

- Protects the property and the reversionary interest.
- In the event of loss, provides for reinstatement of the property
- Provides for the sharing formula where reinstatement is not possible.

4. Covenant against assignment and sub-letting:

A tenant has the unrestricted right to assign his tenancy or to create subleases of such tenancy in the absence of a provision to the contrary---**KEEVES V. DEAN**. It will be good practice to include a covenant against assignment to protect the reversionary interest of the lessor---**INUWADA v BRYNE.**

"…Not to assign, sublet, charge or otherwise part (ASCOP) with possession of the demised premises or any part of it without the prior written consent of the sub-lessor, such consent not to be unreasonably withheld or delayed in the case of a responsible and respectable person"

Where for all intents the lessee remains in possession but allows other persons into the premises, the covenant against subletting is not breached---**ISHOLA WILLIAMS v T.A HAMMOND PROJECT LTD**.

Grounds for refusal of consent

Generally, the landlord is not under any obligation to give reasons for refusal. The following are the considerations the landlord will take:---**PUN**

- Personality of the proposed sub lessee

Comment [C44]: Should reflect WRACA

Comment [C45]: NOTE- THE ABOVE IS NOT APPLICABLE IN LAGOS-THE TLL expressly prohibits a Tenant from assigning or sub-letting any part of the demised premises **without the Landlord's consent**: **Section 7(6) of the Tenancy Law, Lagos State 2011**.

Comment [C46]:
- It helps the tenants to recover part of the rent and other money expended on the lease since by sub letting, they can recoup their expenses.
- It helps the landlord to control and determine the type of persons that may come into his premises.
- In **ALAKIJA V. JOHN HOLT,** the SC stated that where the consent to an assignment is unreasonably withheld, the result is that the tenant is at liberty to assign without the landlord's consent.

Comment [C47]:
- In **HOULDER BROTHERS CO V GIBBS**, consent was refused on the ground that he will lose good tenancy, the court held that it was unreasonable.
- In **COHAN V POPULAR RESTAURANT,** where a married woman of no financial standing was not allowed and it was held that consent was reasonably withheld

- Use to which the property will be put (Example an illegal purpose) where the use will affect the reversionary interest of the landlord, he should refuse such assignment.
- Nature of the property.

Once the landlord has granted consent to the assignment and it turns out that the amount of rent to be collected by the lessee is higher than the amount the lessee paid to the lessor, the lessor cannot withdraw the consent---**OBASUAYI V. MANDILAS & KARABERIS LTD**

Usefulness

- Helps guide against nuisance to neighbours
- Prevents subletting/assigning of property to persons who would use it for illegal or immoral purposes
- Helps to protect the lessor's reversionary interest
- Enables the lessee recoup part of his expenses or money expended on the property

Remedies available to the tenant---DADO

a) **Declaration:** Tenant can seek declaration that the reason for refusal is unreasonable.
b) **Action for specific performance:** Tenant may compel the Landlord to give his consent in an action for specific performance.
c) Damages: Tenant may ask for damages---**IDEAL FILM RENTING CO V NELSON**
d) **Order of injunction:** Tenant may ignore the Landlord and sub-let and apply for an order of injunction restraining the Landlord from harassing the sub-tenant.

Remedies available to the landlord

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

b) Landlord may claim damages

NB – the Landlord cannot resort to self help----**AKPINA V. BALOGUN, OJUKWU V. MILITARY GOVERNOR OF LAGOS STATE.**

5. Covenant to repair: The obligation to repair is on the tenant, in the absence of an express covenant based on the basic implied covenants. The tenant is under the obligation to use the premises in the tenant-like manner--**LURCOTT v WAKELY & WHEELER**, **PROUDFOOT v HART.** It however excludes fair wear and tear of the demised property.

Where it is a long lease, landlord can have structural repair and tenant will bear the internal repair. However, where it is a short lease, the landlord will bear the costs of common parts and external. Internal repair is borne by the tenant. Where it is the responsibility of the landlord to carry out repairs, in the case of a fixed tenancy the tenant should inform (notice of repair) the landlord-**DEMUREN v PLASTIC MANUFACTURING CO. LTD.**

The tenant is relieved from liability to repair if the disrepair or dilapidation resulted from the operation of wear and tear or of natural causes—**S. 7(3) TENANCY LAW** provides that the tenant shall keep the premises in good and tenantable condition, repair and reasonable wear and tear excepted.

Comment [C48]:
NB: He has no privity of contract with the sub-lessee but has privity of estate with the sub-lessee thus, even when the tenant/lessee assigns, the sub-lessee is still bound by the covenants contained in the head lease.

Comment [C49]:
Generally, there are three kinds of repair.
- Structural/major repair----LANDLORD
- Internal repair- locks, sewage, plumbing work, wardrobes and electrical appliances-The TENANT
- Commonly Used Areas/External repair - Elevators, staircases, main entrance gate-LANDLORD **Section 8(iv) Tenancy Law provides that the landlord shall effect repairs and maintain the external and common parts of the premises.**

DRAFT

"To keep the Demised Premises in a good tenantable condition and repair, reasonable wear and tear excepted"

Available remedies to both parties

- Action for specific performance – to repair, insure
- Landlord repair and seek damages from tenant
- Sue tenant for breach of covenant – damages
- Set-off: this can be used as a defence by the tenant when he carries out repair which he was not supposed to but the repair was necessary
- Forfeiture: this is an order of forfeiture by the landlord when there exist a re-entry clause in the lease agreement upon the breach of covenant

6. Covenant to use (user covenant): This is inserted to protect the reversionary interest of the landlord. Where the lease is silent as to user, the tenant can use the demised property for any lawful purpose notwithstanding that it is a purpose not originally contemplated as held in **DAWODU V ODULAJA.** This covenant specifies what tenant is to use the premises for.

In drafting, the covenant should not be too restrictive and the use under the Town Planning Law and under Certificate of Occupancy should be considered---**ZARD V SALIBA**.

The importance of the covenant is to:

- Prevent nuisance
- Protect the reversionary interest
- Prevent the use of the property for illegal purpose.
- The lessor will determine the use to which the property is put
- Compliance with Town planning Laws.
- Protect neighbors.

Remedies include forfeiture and re-entry if the provision is contained in the lease, injunction (mandatory or prohibitory), damages.

"To use the demised premises for lawful commercial purposes only"

PROVISOS IN LEASES

1. Covenant for renewal (option to renew)

This is different from a rent review clause which relates to the review of rents within an existing agreement for a certain period upfront within the duration of the lease. The option to the renew goes to the habendum which is to the tenure. This is the **landlord's covenant.** The covenant is to the effect that at the end of the current lease, landlord's approval can be sought for creation of a new term of lease. It is common in fixed term lease. It does not automatically create new term, just opportunity OR an offer which must be accepted in its entirety by the

lessee. A written request by the lessee containing new terms is not a valid exercise of the option---**IITA V. KHAWAM**. The option to renew clause should contain the following:

- When notice for renewal is to be given.
- Means of communicating the decision to exercise the option to renew
- Conditions precedent to be complied with
- Terms of the new lease – it need not be the same with old one(Exclude the rent and options to renew)

In drafting option to review clause, a legal practitioner must guide against creating a perpetually renewable lease---**RE HOPKINS**. This can be avoided when the option to review clause is excluded. Also exclude the rent clause from the old terms.

"Provided the sub-lessee shall have reasonably observed and performed all his covenants and the provisions of this sub-lease, the sub-lessor shall (on the written request of the sub-lessee made not later than THREE MONTHS before the expiration of the current term) grant to the sub-lessee a lease of the demised premises for another term of five years from the expiration of the current sublease, on the same terms and conditions as in this present sublease, with the exception of the Rent Clause and this Option to Renew clause"

2. Option to purchase reversion

This is **ASSIGNABLE-RE BUTTONS LEASE**

ENFORCEMENT-TENANT may enforce option by **action for specific performance** and may even sue to set aside the sale of the property to another person**-OWOSHO V. DADA.**

An offer by the landlord to the tenant for the sale of the premises on fulfilment of certain conditions (payment of rent and compliance with other covenants). Tenant acquires equitable interest in the property once the option to purchase reversion has been agreed upon by the parties. Landlord cannot unilaterally sell the premises to a third party.

3. Covenant to deliver possession at the expiration of term granted

NB-a tenant cannot be regarded as having delivered up possession if he vacates the premises but RETAINS THE KEYS of the property thereby preventing entry of landlord-**ASOROPE V. ORELAJA.** Where tenant does not do so, the landlord can issue a statutory notice.

4. Proviso for forfeiture and re-entry

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

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

The **Lessor** is required to strictly prove the breach of covenants by the lessee **in an action for forfeiture.** If the proviso **for forfeiture and re-entry** is **not stated** in the Lease/ Tenancy agreement, the Lessor/Landlord must go to court.

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

Where the lessor has waived his right to forfeiture, covenants in lease, he cannot be allowed to exercise the right for forfeiture.

Enforcement in event of waiver of forfeiture

The lessor may enforce the clause in two ways

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

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

This proviso is to prevent rent paid from running in such cases where the property is destroyed e.g. by an act of God like storm, earthquake etc. or the premises unable to be put to use.
"… **The Lessor covenants with the Lessee that the rent shall not continue to run in a case of an act of God where the demised premises is destroyed or anything happens preventing the use of the premises"**

8. CONDUCT CLIENT INTERVIEW TO EXTRACT NECESSARY INFORMATION REQUIRED FOR THE PREPARATION OF A LEASE

Particulars of instruction/information needed to prepare a lease

- Particulars of the lessor
- Particulars of the lessee
- Commencement date
- The property being demised, its detailed description and whether only parts of the premises are being demised
- Duration of the lease
- Rent payable and method of payment; whether in advance or arrears
- Covenants to be performed by the Lessee/Sub-Lessee
- Covenants to be performed by the lessor/Sub-Lessor
- Party to insure the property, duties and liabilities in respect of the insurance policy
- Instructions on rent review (if desired), renewal of the lease, forfeiture and re-entry
- Whether necessary consent has been obtained from Governor (sublease/Certificate of Occupancy)
- Witnesses to attest the agreement

9. EXPLAIN THE VARIOUS METHODS A LEASE MAY BE DETERMINED AND THE VARIOUS PARTS OF A LEASE

Determination of lease----MODES NFF

- **Merger:** this is when, during the subsistence of a lease, the lessor conveys the entire unexpired residue of his interest to the lessee (sale).
- **Operation of law**
- **Disclaimer:** this means denial of title of the lessor. It occurs in rare cases where A being a tenant realizes that the property is his.
- **Effluxion of time:** this is a means of determining fixed term. The lease granted for a fixed term will come to an end after the expiration of the term.
- **Surrender by the tenant or lessee:** before the expiration of the lease or at the end of the lease term granted, the tenant vacates possession.
- **Notice to quit:** this is applicable to periodic tenancy on a yearly or monthly basis.
- **Forfeiture:** Terminates the lease even before its expiration. Thus, the landlord in the middle of the lease may commence an action for forfeiture. There are conditions that must be met.
    1. Breach of a covenant
    2. Bringing to notice of the tenant such breach
    3. Default in remedying the breach
    4. Having a re-entry clause in the lease

NB: **Frustration:** the general rule is that the doctrine of frustration which ordinarily determines contract does not apply to lease agreement. However, under certain circumstances, it will apply to determine a lease.

Comment [C50]:
In **ARAKA V. MONIER CONSTRUCTION CO (NIG) LTD,** the respondent took a lease of one year from the appellant. After six months, the civil war in Nigeria between 1967-1970 prevented the respondent from continuing with the lease. The appellant/landlord commenced an action for rent in arrears. The respondent contended that the outbreak of civil war had frustrated the contract. The Supreme Court while upholding its contention stated the following: 'the doctrine of frustration may in certain circumstances apply to a lease. We think that it may amount to injustice to deny a tenant the benefit of frustration on cases where owing to circumstances of an intervening event or change of circumstances so fundamental as to be regarded by the law as striking at the root of the agreement, it has become impossible for the tenant to enjoy the fruit of his lease and at the same time to expect him on account of the abstract estate concept to honour his obligation under the lease, such a denial may also suffer injustice to a landlord who finds himself in the same position as the tenant.

Remedies of breach of covenants

- Specific Performance
- Damages
- Forfeiture
- Re-Entry

10. DRAFT A STANDARD DEED OF LEASE

DEED OF SUB-LEASE
(with consideration & receipt clauses)

(A) INTRODUCTORY **PART**

THIS DEED OF SUB-LEASE made this ..... day of ....., 2014, BETWEEN **CHIEF TONYE OKIKI**of 2, Abudu Smith Street, Victoria island, Lagos, Nigeria (sub-lessor) of the one part; AND **INTERNATIONAL CONTRACTORS (NIGERIA) LIMITED**, a company incorporated under the Companies & Allied Matters Act, Cap C20, LFN 2004, and havingits registered office at 45, Elima Street, Ikeja, Lagos, Nigeria (sub-lessee) of the other part.

(B) OPERATIVE **PART**

THIS DEED WITNESSES as follows ---

In consideration of the rent and covenants reserved in this sub-lease, the Sub-lessor as BENEFICIAL OWNER DEMISES to the sub-lessee ALL THAT two-storey house together with Stewards' Quarters and garage, located at 57, Agu Street, Port-Harcourt, Rivers State, and covered by Certificate of Occupancy Number 87394 dated 09/09/2001 and registered as 90/90/2001C in the Lands Registry, Port Harcourt, Rivers State (the demised premises) TO HOLD UNTO the sub-lessee for a term of ten (10) years, commencing on August 01, 2014 and ending on July 31, 2024, PAYING annually in advance the sum of N10,000,000.00 (Ten Million Naira) only, clear of all deductions; a sum of N20,000,000.00 (Twenty Million Naira) only covering the first two years having been paid by the sub-lessee to the sub-lessor (the receipt of which the sub-lessor acknowledges).

(C) **MISCELLANEOUS PART**

THE SUB-LESSEE COVENANTS as follows ---

1) To use the demised premised for lawful commercial purposes only **(USER COVENANT).**

2) Not to assign, sublet, charge or otherwise part with possession of the demised premises or any part of it without the **prior written** consent of the sub-lessor, consent not be unreasonably withheld or delayed in the case of a responsible and respectable person.**(COVENANT AGAINST ASSIGNMENT)**

3) To pay all rates, taxes, and outgoings in respect of the demised premises, payable now or as may be imposed subsequently, whether payable by the owner or by the occupier.**(COVENANT TO PAY RATES & OUTGOINGS).**

4) The rent reserved in this sub-lease shall be reviewed at end of the first two years of this sub-lease, and subsequently at the end of every two years during the subsistence of the sub-lease. The parties to this sub-lease may agree on the revised rent before the review date: Provided that if agreement has not been reached by the review date, the rent shall be determined by an independent qualified Estate Valuer, who shall be appointed by agreement of both parties, and in default of agreement, by the President of the Institute of Estate Valuers at the request of the first of them to apply to him, at the joint expense of the parties, and who shall do so as an Arbitrator under the Arbitration and Conciliation Act, LFN, 2004 (**RENT REVIEW CLAUSE)**

5) The sub-lessor shall on the written request of the sub-lessee made not later than THREE MONTHS before the expiration of the current term, provided the sub-lessee shall have reasonably performed and observed all his covenants and the provisions of this sub-lease, grant to the sub-lessee a lease of the demised premises for another term of five years from the expiration of the current sublease, on the same terms and conditions as in this present sublease, with the exception of the **Rent Clause**and this **Option to Renew** clause.**(OPTION TO RENEW CLAUSE).**

6) To keep the Demised Premises in a decent and good tenantable condition on and repair, reasonable wear and tear excepted, and at least one month before the expiration or termination of this tenancy, to carry out repairs and renovations on the Demised Premises and to put the same in the same

condition as it were at the commencement of the sub-lease, reasonable wear and tear excepted; Provided that the sub-lessor shall keep the main structure (including the walls and roof) in good and tenantable condition and repair as enables the Demised Premises to be used for the purpose or purposes as are contained in this sub-lease; (COVENANT TO REPAIR).

7) Not to make or permit to be made any alterations in or additions to the Demised Premises or any part of it without the prior written consent of the sub-lessor **(COVENANT AGAINST ALTERATION)**

8) To keep the Demised Premises insured at all times throughout the subsistence of the tenancy in the joint names of the Landlord and the Tenant against the risk of fire, lightning, explosion, riot, civil disturbances or commotions, earthquake, storm, tempest, flood, and other risks and usual perils normally insured under a comprehensive policy on property of the same nature as the Demised Premises, with a reputable insurance Company to be approved by the Landlord, which approval shall not be unreasonably withheld, for a sum equal to the full cost of complete reinstatement and to make all payments of premium and other payments necessary to effect and maintain the policy or policies as and when due; and to produce to the Landlord on demand the policy and the receipt for each payment and to apply all money received by virtue of the policy to be immediately laid out in rebuilding and reinstating the Demised Premises or any part of it in respect of which such money shall have become payable. **(INSURANCE COVENANT)**

9) ETC

THE SUB-LESSOR COVENNTS as follows –

1) .....

2) .....

3) Etc

(D) CONCLUDING **PART**

IN WITNESS OF WHICH the parties have executed this Deed in the manner below the day and year fist above written**(TESTIMONIUM)**

SIGNED, SEALED, & DELIVERED
by the within-named Sub-Lessor

_____
CHIEF TONYE OKIKI (EXECUTION CLAUSE, BY A NATURAL PERSON)

IN THE PRESENCE OF:

NAME: …….....……..
ADDRESS: …….....……
OCCUPATION: …….....…….
SIGN: …….....….. **(ATTESTATION CLAUSE)**

THE COMMON SEAL ON INTERNATIONAL CONTRACTORS (NIGERIA) LIMITED (SUB-LESSEE) WAS AFFIXED TO THIS DEED AND THE DEED WAS DELIVERED IN THE PRESENCE OF:

---------- **----------**
DIRECTOR **SECRETARY**

PREPARED BY:

……..
K. C Aneke Esq,
K..C Aneke & Co.,
Legal Practitioners,
No.1 Law School Drive,
Victoia Island,
Lagos.
07053531239
kundycmith@gmail.com

(ENDORSEMENT FOR GOVERNOR`S CONSENT)

I hereby consent to the transaction contained in this Deed
This …… day of …….. 2014

ATTORNEY-GENERAL, RIVERS STATE
FOR: EXECUTIVE GOVERNOR, RIVERS STATE

11. IDENTIFY AND DISCUSS ETHICAL ISSUES THAT MAY ARISE IN A LEASE TRANSACTION

Comment [C51]:
- Failure to reflect instructions given **-Rule 14 RPC (dedication and devotion)**
- Duty to show competence when drafting the lease agreement R. 16 RPC.
- The document should correctly and fully reflect the wishes of the party with special reference to the covenants.
- Duty not mix the rent paid the client with solicitors money or not spend such fund belonging to the client R. 23(2) RPC.
- Duty not to frank a document not prepared by the Solicitor R. 3(2) RPC and S.10 LPA
- Duty not to aid a non-lawyer in the unauthorized practice of law

Note the following

Types of Lease/Creation of Lease

- Legal lease: it is that created by deed – s. 3 Real Property Act 1845 and s. 77 PCL provides that a lease transferring legal interest must be by deed. A lease less than 3 years (tenancy) need not be by deed.
- Equitable lease: Any lease that fails to meet the requirement of a deed is an equitable lease. See Walsh v. Lonsdale

When the landlord is a holder of Certificate of Occupancy, the Governor is the head lessor and the holder can only grant sub-demise (sub-lease). Drafting covenants in a lease agreement depends on who you are acting for (lessee or lessor). The person whose interest will suffer after entering the contract should draft.

Title documents need not be requested and investigated in short term lease. If the lease is for longer duration, investigation of title documents is important

Prior to the Tenancy Law of Lagos state, it was normal for the lessee to pay the solicitor fees under the agreement. Section 14 provides that it is the party who engages the service of a professional in respect of the tenancy agreement that should pay the fees for such professional services.

Even though s. 77 PCL provides that any transfer of legal interest must be by deed, there are instances where legal interest is transferred even though not by deed. Creation of periodic tenancy (yearly) need not be by deed before legal interest is transferred.

POSSIBLE MULTIPLE CHOICE QUESTIONS ON THIS TOPIC

1. In a lease, the essential date is the date of ___

A. Delivery

B. Execution

C. Stamping

D. Registration

2. In a tenancy, the relevant date is the date of ___

A. Delivery

B. Execution

C. Stamping

D. Registration

3. Grant of term of years for 3 years or below 3 years is ____

A. Lease

B. Leasehold

C. Tenancy

D. Sale of land

4. Grant of term of years above 3 years is ___

A. Lease

B. Leasehold

C. Tenancy

D. Sale of land

5. _____ is a document which creates a grant of right of exclusive possession of a property for a term of years, usually for rent or money's worth

A. Lease

B. Leasehold

C. Tenancy agreement

D. Deed of mortgage

6. The following statements are true except ___

A. Tenancy law of Lagos State applies to all areas in Lagos except Victoria Island, Ikeja GRA, Ikoyi and Apapa

B. Conveyancing Act does not apply to the whole of Lagos State

C. Tenancy Law of Lagos State applies to all areas in Lagos State

D. Conveyancing Act only applies to Victoria Island, Ikeja GRA, Ikoyi and Apapa

7. Rent is generally meant to be paid in ____

A. Lump sum

B. Arrears

C. Advance

D. All of the above

8. ___ is the rent paid on bare parcel of land without putting into consideration any development on the land

A. Ground rent

B. Tenement rent

C. Rack rent

D. Premium

9. The rent identified in 8 above is paid to the _____

A. Governor of the state

B. Landlord/lessor

C. Tenant/lessee

D. Local Government Area Council

10. ____ is payable for the improvements/developments on the land

A. Ground rent

B. Rack rent

C. Tenement rent

D. Premium

11. The rent identified in 10 above is payable to the ____

A. Governor of the state

B. Landlord/lessor

C. Tenant/lessee

D. Local Government Area Council

12. The best type of rent is the ____

A. Rack rent

B. Ground rent

C. Tenement rent

D. Premium

13. ____ is a lump sum payment paid in addition to periodic rent in consideration of a reduced rent

A. Tenement rent

B. Ground rent

C. Premium

D. Premium

14. Lagos State prohibits payment of rent in advance where the TALL applies and as such, the landlord shall not collect more than ____

A. 1 year rent

B. 2 years rent

C. 3 years rent

D. None of the above

15. Rent collection in advance for more than ___ years is subject to tax

A. 2

B. 3

C. 5

D. 7

16. ____ is a clause inserted in a lease to cushion inflation and recoup economic value of investment and to allow for the rent to be reviewed periodically

A. Rent review clause

B. Option to renew clause

C. Rent clause

D. User covenant

17. Where a lease is preceded by a contract, the covenants agreed by the parties but omitted while preparing the lease are regarded as ____

A. Usual covenants

B. Implied covenants

C. Express covenants

D. Covenants per se

18. ____are promises made by either the landlord to the tenant or vice versa in a lease with respect to the demised premises

A. Convenants

B. Covenants

C. Cavenants

D. Canvenants

19. In a lease, option to renew is for the ____

A. Lessor

B. Lessee

C. A or B

D. A and B

20. Generally, ____ pays for the recurring rates and ____ pays for all non-recurring rates

A. Landlord/Tenant

B. Tenant/Landlord

C. Landlord/Landlord

D. Tenant/Tenant

21. ____ is the insurable interest of a landlord in a leasehold transaction

A. Reversionary interest

B. Possessory interest

C. Obligatory interest

D. All of the above

22. For a tenant as in 21 above, it is ____

A. Reversionary interest

B. Possessory interest

C. Obligatory interest

D. All of the above

23. All these but one are factors to consider in determining who is to insure

A. Existing obligations

B. Application of insurance money

C. Nature of the property

D. Use to which the property is being put

24. The landlord bears the cost of the following repairs except ___

A. Structural/Major repairs

B. Common parts repairs

C. External repairs

D. Internal repairs

25. The option to renew in a lease goes to the ____

A. Habendum

B. Reddendum

C. Testatum

D. Testimonium

26. The mode of determination of lease where the lessor conveys the entire unexpired residue of his interest to the lessee is technically referred to as determination by ____

A. Merger

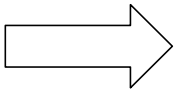
B. Operation of law

C. Disclaimer

D. Surrender

ANSWERS

1. A
2. B
3. C
4. B
5. A
6. C
7. B
8. A
9. A
10. B
11. B
12. A
13. C
14. A
15. C
16. A
17. A
18. B
19. A
20. B
21. A
22. B
23. B
24. D
25. A
26. A



6. MORTGAGE

1. EXPLAIN THE MEANING OF A MORTGAGE

This is the transfer of interest in land as security for the performance of an obligation with a proviso for cesser upon redemption/upon the fulfillment of the obligation. It is pertinent to mention that not all forms of borrowing are mortgages because once there is no transfer of interest in property as a form of security, there is no mortgage.

There are five key points used to describe mortgages---STOPA

a. **Security** for the performance of the obligation
b. **Transfer of interest:** in the security to the mortgagee
c. **Obligation:** Existence of an Obligation. Otherwise it will be a gift upon transfer of an interest in property
d. **Proviso for cesser** upon redemption
e. **Agreement of the parties:** the transfer must arise from the agreement of the party or by conduct but never by operation of law.----**OLOWU V MILLER BROTHERS**

Comment [C52]: once a mortgage always a mortgage and nothing but a mortgage. See YARO V. AREWA CONSTRUCTIONS LTD. Where a provision in a mortgage contract removes the right to redeem the property, then by virtue of the above principle, the PROVISION is void.

It is pertinent to note that the best security is land and it is preferable for use as security. The reasons why land is the best security are:

- Landed properties are more stable and reliable
- The value of land always appreciates, especially in times of inflation
- Land is immovable, so it is easier to investigate and conduct physical inspection on it
- It is easier to enforce a security on land.
- It is easy to perpetuate fraud with moveable property. Shares can depreciate.

In determining the kind of security or collateral to demand, the mortgagee usually considers the following factors:

- The amount of the loan
- The nature of the facility being sought
- The duration of the loan
- The integrity and financial strength of the borrower
- Performance of an obligation – the obligation need not be repayment of loan.

For the purposes of mortgages, Nigeria is divided into three (3) jurisdictions, namely:

- CA jurisdiction: states of the old northern and eastern region of Nigeria
- PCL jurisdiction: states of the old western and Midwestern region(i.e Edo, Delta)
- MPL jurisdiction: the whole of Lagos

2. LIST MORTGAGE INSTITUTIONS IN NIGERIA

1. Federal Mortgage Bank of Nigeria (FMBN)
2. Housing Corporation
3. Government and Employers' Housing Schemes
4. Commercial Banks
5. Private Property Developers
6. Mortgage Banks
7. Life Endowment policy (Insurance Companies)
8. Lagos State Mortgage Board
9. Central Bank of Nigeria

3. DISTINGUISH A MORTGAGE FROM OTHER SIMILAR SECURITY TRANSACTIONS

(a) Mortgage and lien

The main distinguishing factors between mortgage and lien are:

- A mortgage is the transfer of interest in land as security for the repayment of a debt or the performance of some other obligation, with a proviso for cesser on redemption. While a lien is the right to retain possession of a property of another until a debt is repaid--- **AFROTECH TECHNICAL SERVICES LTD. V. MIA & SONS LTD**
- A lien does not give the creditor the right to sell or otherwise deal with the debtor's property; while a mortgage gives the mortgagee the power to sell the mortgaged property after fulfilling certain conditions
- A lien is a means of coercing a debtor to pay the money advanced to him, rather than as security against payment not being made; while in mortgage, the property is conveyed as security for the repayment of the debt
- In a mortgage, legal or equitable title is transferred with a proviso for cesser on redemption; but in a lien, no title is transferred.
- A lien could arise as a statutory right without any prior agreement between the creditor and the debtor; while a mortgage always arises out of a prior agreement between the mortgagor and the mortgagee
- Lien arises by operation of law, while a mortgage arises out of the agreement of the parties.

(b) Mortgage and sale

- Both involve the transfer of interest. However in mortgage, there is a proviso for cesser upon redemption, such that the property will be conveyed back to the mortgagor upon the repayment of the debt; while in a sale or assignment, the vendor/assignor divests himself of and transfers the entire unexpired residue of his interest with no remainder in him. Hence, in a mortgage, the mortgagor is still the owner of the mortgaged property and the mortgagee is the custodian of the property; while in a sale, the purchaser/assignee becomes the owner of the property.
- In a sale, the parties are described as vendor and purchaser (assignor and assignee); while in a mortgage, they are described as mortgagor and mortgagee

(c) Mortgage and charge

Comment [C53]:
Charge has all the features of a mortgage EXCEPT TRANSFER OF INTEREST.

- In a mortgage, the parties are described as mortgagor and mortgagee; while in a charge, the parties are called Chargor and Chargee
- In a mortgage, interest in the property is conveyed by the mortgagor to the mortgagee; while in a Charge, no interest whatsoever is transferred by the chargor to the chargee. Rather, there is some encumbrance in the property which serves as security for the money advanced by him.
  A charge operates like a mortgage. However, in charge, neither possession nor ownership nor any interest whatsoever is transferred to the Chargee. The Chargor retains all the interests, but creates an encumbrance over his title in favour of the Chargee. The Chargee only has an encumbrance.

(d) Mortgage and pledge

Similarity

- Like mortgage it arises out of agreement of the parties
- Both are a form of security. However, mortgage does not require possession to be in existence at the time of the transaction

Differences

- In a pledge, the parties are described as Pledgor and Pledgee; while in a mortgage, the parties are described as mortgagor and mortgagee.
- A pledge is usually created under the incidences of customary law; while a mortgage is created under the authority of Statutes.
- In pledge, there is no legal due date for redemption as a pledge is perpetually redeemable. That is, even after 100 years, upon repayment of the debt, a Pledgor has the right to redeem; while in a mortgage, there is usually a legal due date for redemption and at its

expiration, the mortgagee can sell the property to realize the money advanced, after fulfilling certain conditions.

- A pledge is a possessory security, while a mortgage is a proprietary security. This is because by a pledge, actual and physical possession is transferred; while by a mortgage, title is transferred. That is, the pledgor retains general title, but transfers possession to the Pledgee until the debt is satisfied. While in mortgage, the mortgagor may retain possession, but transfers title to the mortgagee until the debt is repaid---**ADETONA v. ZENITH BANK**

The validity of a mortgage is dependent on

- The capacity of the mortgagor and mortgagee
- The title of the mortgagor
- The proper documentation and execution
- Requisite Governor's consent
- Stamping and registration

Forms of mortgage transactions

A mortgage could take several forms including:

- Where the mortgagor borrows money for any purpose and uses his property as security for the loan
- Where the mortgagor borrows money to build or buy a house which will also be used to secure the loan.

Contract subject to mortgage (clause)

It is a sale of land agreement but it is subject to a successful mortgage transaction. An advantage is that it secures the deposit paid to the vendor. The sale of land transaction is dependent on the mortgage transaction.

Where the purchaser does not have the entire purchase price, it is possible that parties can enter into a contract of sale of land subject to a mortgage that is in expectation of some loan and the property to be purchased will be used as security for the loan to be obtained.

In such a case, a clause called the "contract subject to mortgage clause" should be inserted into the contract of sale of land to make the contract of sale conditional on the purchaser obtaining the loan. The clause should also provide that in the event that the mortgage fails and the loan is not obtained, the contract of sale shall become void and the vendor shall return the deposit paid by the purchaser.

The contents of a valid contract subject to mortgage clause are as follows:---**SATI**

- **Source of loan:** It must state the source of the loan;
- **Amount of loan:** It must state the amount of the loan;
- **Terms and manner of repayment:** It must state the terms and manner of repayment of the loan; and
- **Interest payable:** It must state the interest payable on the loan.

Sample draft of contract subject to mortgage clause

"This contract of sale is conditional on the purchaser obtaining a mortgage loan from First Bank of Nigeria Plc. in the sum of N150, 000, 000 (One Hundred and Fifty Million Naira Only) to be repaid through equal monthly installments over a period of 2years with interest at the rate of 21% per annum on the security of the property, **PROVIDED** that where the loan is not obtained on completion, this contract of sale shall become void and the purchaser shall be entitled to a return of the deposit paid."

It must be noted that in a contract subject to mortgage, the vendor guarantees the loan facility by permitting his property to be used as security, so it is always done with the consent and concurrence of the vendor.

4. LIST PARTIES IN A MORTGAGE TRANSACTION

- Mortgagor (borrower)
- Mortgagee (lender)
- Guarantor/Surety

Where a guarantor is involved, then it will be said to be a THIRD PARTY LEGAL MORTGAGE.

5. EXPLAIN THE VARIOUS WAYS OF CREATING EQUITABLE MORTGAGE

An equitable mortgage is one that confers only an equitable interest on the mortgagee. The creation of equitable mortgage is uniform in Nigeria both under CA and PCL states, except in Lagos which has additional modes of creating equitable mortgages.

Thus, in CA and PCL states, they are created in the following five ways:---**DIMCA**

- **Deposit of title documents** with a clear intention to create legal mortgage, accompanied by a memorandum of deposit in writing, whether by deed or not, to that effect. There are two legal consequences of the deposit of title deeds as security for a loan:
    a. There is an implied agreement by the mortgagor to execute a legal mortgage in favour of the mortgagee
    b. It amounts to part performance---**B.O.N V AKINTOYE**

- **Imperfect or inchoate legal mortgage** is an equitable mortgage. For instance, where a deed of legal mortgage was not perfected (GSR: Governor's consent, stamping, registration) so long as the title deeds have been deposited.
- **Mortgagor's interest in property is equitable**. Example a beneficiary's right under a trust. (A subsequent mortgage after a legal mortgage in CA States). This is based on the principle of Nemo dat quod non habet---**OLUKOYA v. ASHIRU**
- **Charge:** By mere equitable charge of the mortgagor's property.
- **Agreement to create a legal mortgage**. See rule in **WALSH V. LONSDALE.**

Pursuant to **S. 18(1) MPL,** the methods of creating an equitable mortgage in Lagos are:---**ACiD**

- **Assignment** of an equitable interest with a proviso for cesser on redemption
- **Charge** of an equitable **interest** accompanied by an agreement to create a legal mortgage.
- **Deposit of title deeds** accompanied by an agreement to create a legal mortgage

Note that this does not expressly exclude the other methods of creating an equitable mortgage above. It is also pertinent to note that in respect of the last two modes of creation, a mortgagee has the right to approach the courts **within 30 days** to request the mortgagor (by using an **ORIGINATING SUMMONS)** to execute a legal mortgage in his favour---**S. 18(2) MPL**

Advantages of equitable mortgages

- Suitable for small loans
- Suitable for short term loans
- It is cheaper and easier to create
- It encourages uniformity in the CA and PCL states.
- Equitable mortgage is not affected by the covenants in the head lease
- Successive legal mortgages are possible.
- Governor's consent is not mandatory.

Disadvantages

- The mortgagee is not entitled to the title documents
- The mortgagee is not entitled to benefit from the beneficial covenants in the head lease
- It is difficult to exercise the power of sale except with recourse to court unless remedial devices are inserted in the deed creating it.
- Unless there is any of the remedial devices inserted in the deed, the mortgagee has difficulty in transferring legal interest in favour of another party.
- Easier to perpetuate fraud
- Mortgagee's interest is not secured as it is subject to a higher interest.
- Legal mortgages have priority over equitable mortgages.

6. EXPLAIN THE VARIOUS WAYS OF CREATING LEGAL MORTGAGE; SEARCH REPORT AND DOCUMENTS TO PROCESS OR PROCURE GOVERNOR'S CONSENT

(a) Conveyancing Act States

There are three modes of creating legal mortgage namely:---**ASS**

- Assignment
- Sub-demise
- Statutory charge

1. Assignment

The unexpired residue of the mortgagor's interest in the property is transferred with a proviso for cesser upon redemption. Upon assignment, the mortgagor only has **an equity of redemption in the property.**

The advantages of this method are:

- The mortgagee collects and retains the original title documents of the mortgagor.
- The mortgagee is vested with the entire interest in the property, subject to the proviso for cesser upon redemption
- The mortgagee can enforce the beneficial covenants in the Head lease. This is because there is privity of estate as restrictive covenants run with the land. Thus, the restrictive covenants bind the mortgagee (bank) and there are beneficial covenants to the mortgagee.
- The mortgagor has no reversionary interest in the property and so the mortgagee can easily sell and transfer the whole of mortgagor's title to a purchaser.
- One important point which operates as an advantage to the mortgagor, but a disadvantage to the mortgagee is that there is privity of estate between the mortgagee and the overlord (Governor) based on the rule in **TULK v. MOXHAY.** Thus, the mortgagee, not the mortgagor is liable to pay all rates, taxes and outgoings on the mortgaged property and he is bound by restrictive covenants. However, by way of an advantage to the Mortgagee, he can enforce the beneficial covenants in the head lease.

The disadvantages of this method are:

- Mortgagee is bound by covenants in the head lease.
- There is no reversionary interest except the Equity of redemption.
- It is limited to parts of the country that apply the Conveyancing Act.
- Mortgagor cannot create successive legal mortgage.

2. Sub-Demise

Transfer of the unexpired residue less at least one day with a proviso for cesser upon redemption. The interest transferred here by the mortgagor is a term of years absolute with the reversionary interest still in the mortgagor.

The advantages of this method are:

- There is uniformity in the use of sub-demise as it is used in CA, MPL and PCL states.
- The mortgagor has reversionary interest
- There is no privity of contract or estate between the mortgagee and the head lessor (Governor). Thus restrictive covenants are not binding on the mortgagee.
- As a general rule, in a sub-demise the mortgagor can create successive legal mortgages on the property. However, a legal mortgage by sub demise in a Conveyancing Act State cannot be used to create a successive legal mortgage because of the common law **doctrine of interesse termini** that is still applicable in the CA states.

  NB: successive legal mortgage simply means one mortgagor using the same property to create different mortgages with different mortgagees
  Several legal mortgages is using different properties to create different mortgages, but with the same mortgagee. That is, the same parties. This is usually done where the mortgage was created by Charge by Deed expressed to be by way of legal mortgages.
  Upstamping is when the same property, the same parties (same mortgagor and mortgagee) and all that is required is just an increase of the loan facility from the initial facility granted to a higher facility

The disadvantages of this method are:

- Where the mortgagee successfully exercises the power of sale, he will be liable to render account to the mortgagor.
- Mortgagee is not entitled to retain title documents
- Mortgagee is not entitled to benefits of the covenants in the head lease as there is no privity of estate.
- A legal mortgage by sub demise in a Conveyancing Act State cannot be used to create a successive legal mortgage because the **doctrine of interesse termini** is still applicable in the CA states.
- In SUB-DEMISE A CHALLENGE EXISTS, the mortgagee cannot GENERALLY sell the mortgage property in the event of a default because the reversionary interest is still in the mortgagor which is higher interest unless the mortgagee goes to court to sell the property. THIS PROBLEM STILL EXISTS IN CA STATES BUT **can be overcome by parties inserting any of the remedial devices** in the sub-demise deed at the creation of the mortgage. They are either:

Comment [C54]:
Under the PCL states, unlike in CA states, section 163 of PCL expressly abolishes the **Common law doctrine of interesse termini,** therefore a **successive legal mortgage** can be created where the mortgage was created by way of sub-demise.

However, with regards to the creation of such successive legal mortgages, **section 109 (2)(b) of PCL** provides that in a successive legal mortgage, the term to be taken by the second or subsequent mortgagee shall be one day longer than the term vested in the first or other mortgagee whose security ranks immediately before that of the second or subsequent mortgagee. Thus, the first mortgage should expire before the second mortgage

NOTWITHSTANDING THE CONTROVERSIES SURROUNDING THE APPLICABILITY OF THE DOCTRINE OF INTERESSE TERMINI TO MORTGAGES, ALWAYS GO WITH THE POSITION OF THE NLS FOR THE PURPOSES OF BAR PART II

Comment [C55]: which states that it is not possible to **create a term of years in a property** to commence at the expiration of another term of years created in respect of the same property.

Comment [C56]:
To avoid this limitation, the remedial devices are used and inserted in the deed to give the mortgagee the power to sell without RECOURSE TO COURT

- A trust declaration
- An Irrevocable Power of Attorney

DRAFT

"MR UDEMEZUE IS APPOINTED AS A TRUSTEE IN RESPECT OF THE PROPERTY IN FAVOUR OF ABC BANK LTD"

"AN IRREVOCABLE POWER OF ATTORNEY IS HEREBY CREATED BY MR UDEMEZUE IN FAVOUR OF ACB BANK PLC TO DO ALL AND EXERCISE THE POWERS THAT I CAN LAWFULLY DO"

Instances where the remedial devices may be used are:---SEA

- Sub-demise under CA
- Equitable mortgage
- Agreement of parties: Where the parties state that the mortgagee can sell and pass good title.

3. Statutory Charge

This mode of creation of legal mortgage is provided for under **S. 26(1) CA** and it is hardly ever used. **It is discharged by way of a statutory receipt**. Its disadvantage is that since the receipt is not registrable as an instrument, the mortgage may continue to reflect in the land registry and the property deemed encumbered.

(b) Property and Conveyancing Law States

There are three modes of creating legal mortgage under the Property and Conveyancing Law 1959. These are:

- Sub-demise---**Ss. 108(1) & 109(1) PCL**
- Charge by deed expressed to be by way of legal mortgage (also see section 109(1) of PCL)
- Statutory charge

Charge by deed expressed to be by way of legal mortgage

Although it confers no interest on the legal mortgagee, this Charge confers on the mortgagee all the powers and privileges of a legal mortgagee---**S. 110 (1) PCL**

Advantages

- It is simple to create and understand---**SAMUEL v. JAWAH**
- No transfer of interest in land, therefore convenient for business efficacy.

Comment [C57]:

Note that in PCL and MPL states mortgage by sub-demise does not require remedial devices as it is automatically implied---section 112 of PCL.

Simply put, if the mortgagor defaults in repayment of the loan at the legal due date, the reversionary interest inures in the mortgagee after the legal due date without going to Court.

Trust declaration: by this clause, the mortgagor is turned into a trustee for the mortgagee and the mortgagee is given the power to remove the mortgagor as trustee and appoint anyone, including itself as trustee. The clause can also provide for the transfer of the property to the beneficiary (mortgagee). In the event the trust is revoked, the interest in the property is transferred to the bank as beneficiary and the bank can sell as a beneficiary.

The power of attorney clause: the insertion of the power of attorney clause empowers the mortgagee to sell the property on behalf of the mortgagor. Thus, with the irrevocable power of attorney, the mortgagee can sell the property as an attorney. However, the attorney will account to the mortgagor and pocket the money owed and expenses incurred during the sale---IHEKWOABA V A.C.B LTD.

Comment [C58]:
EITHER OF THESE CLAUSES ARE INSERTED BY THE MORTGAGEE'S SOLICITOR AT THE TIME OF CREATION OF THE LEGAL MORTGAGE.

- **It is easily discharged as it is discharged by a Statutory Receipt and no deed of discharge needs to be executed.** However, note that the discharge of a mortgage by a statutory receipt is not advisable as it has its own problems. This is because the statutory receipt (receipt of payment) is not a registrable instrument and so, it is not registered. Thus, at the Lands' registry, the mortgage will continue to reflect as an undischarged encumbrance on the property, notwithstanding that the mortgage has actually been discharged. Therefore, the mortgagor will have the onerous task of having to explain the fact of the discharge of the mortgage to all persons dealing with him in relation to the property as the fact of the discharge is not discoverable through a mere search or investigation.
- It can be used to create a mortgage over mixed properties. This is applicable where the mortgagor does not have one property which can effectively serve as security for the loan facility, but he has some other properties (2 or 3 others) which if put together would be sufficient to serve as security, then he can use this method to create a legal mortgage over the mixed properties. **Note that the creation of a legal mortgage over mixed properties can only be done through this method. If it is an assignment or sub demise, separate documents must be used for each of the properties.**
- Although it confers no interest on the legal mortgagee, this Charge confers on the mortgagee all the powers and privileges of a legal mortgagee, and so the mortgagee can enforce the mortgage---**S. 110(1) PCL**
- It does not pass any interest to the mortgagee and so cannot amount to a breach of the covenant against assignment or subletting against the mortgagor. **Thus, where the mortgagor is a sub-lessee under a sublease with a covenant against assignment and subletting, he can create a mortgage through this method and it will not amount to a breach of the covenant since no interest is passed to the mortgagee.**
- **Can be used to circumvent restrictive covenants in the headlease.**

Disadvantages

- **There is no proviso for cesser upon redemption since no interest is conveyed in the first place.**
- **Statutory charge not registrable.**
- In the event of a default by the mortgagor, the mortgagee cannot sell the mortgaged property without recourse to the courts unless the **remedial devices are inserted.**

(c) Mortgage and Property Law of Lagos State

Note **S. 68 MPL** repealed the Conveyancing Act in Lagos. MPL is thus applicable to the whole of Lagos.

Comment [v59]: Section 53 MPL. Registration with the Lagos state mortgage board.

For the purposes of creating mortgages, the law divides property (land or landed property) into Right of Occupancy and Leasehold interest and provides modes for creation of mortgages for

each in **Ss. 15 and 16 MPL** respectively. However, they are similar and for practical purposes and for Bar part II, the methods of creating Legal mortgages in Lagos **depending on the interest of the mortgagor** are:

- Demise for a term of years absolute.
- Sub-demise for a term of years absolute less one day
- Charge by deed expressed to be by way of legal mortgage
- Charge by deed expressed to be by way of statutory mortgage
  Ss. 15 & 16 MPL

Advantages of legal mortgages

- They enjoy priority over equitable mortgages as there is need for registration/perfection. Thus, a subsequent purchaser from a legal mortgagee will take priority over the interestof an equitable mortgagee where the purcharser is a bona fide purchaser for value without notice.
- They are protected and not easily susceptible to fraud. As the original title documents of the property are in possession of the legal mortgagee.
- In the event of a default, the mortgagee can exercise his power of sale without recourse to the court as long as the power has arisen and become exercisable.

Disadvantages of legal mortgages

- It is usually difficult to create and perfect
- It is not properly suited for short term loans.
- It is also not properly suited for small loans. That is, where the amount loaned is relatively small.

Steps in a mortgage transaction---ANI VACET

- Application for loan
- Negotiation of the loan(payment of money by installment or lump sum)
- Investigation of the Mortgagor's/Owner's title **and** Search Report by the mortgagee's solicitor.
- Valuation of proposed mortgage property(Estate expert, estate valuer, quantity Surveyor)
- Agreement preparation: Contract(preparation of the loan agreement)
- Completion
- Execution of the deed by the parties
- Title perfection

Comment [C60]: Same as in sale of land

Comment [C61]:
There are 3 categories of perfection:

1. State level perfection involving GSR at the land registry

2. CAC Registry, where a registered Nigerian company is the mortgagor--- where a corporate body is a mortgagor under section 197 CAMA there is a mandatory step for perfection. Every charge or mortgage created by a corporate body must be registered with CAC **within 90 days of the creation of the mortgage.**

The company will file
- Copy of the mortgage instrument
- Form CAC 8(particulars of charge), and
- Copy of the debenture trust deed, where applicable.

Failure to register the mortgage with CAC will render the mortgage void in favour of the creditors and debenture holders.

3. Registration with the Lagos State Mortgage Board (only in Lagos State)—S. 53 MPL

Perfection of a mortgage

- Governor's consent
- Stamping
- Registration at the Lands Registry.

Governor's consent

By virtue of s.22 Land Use Act, a holder of Statutory Right of Occupancy cannot alienate his interest or right by mortgage (among others) without the governor's consent. Failure to seek governor's consent by virtue of s. 26 LUA, such interest or right alienated would be inchoate. That is, what is rendered inchoate is the transfer of the legal interest and not the entire transaction as the equitable interest remains.

Thus, a mortgage for which the consent of the Governor was not obtained will result in an equitable mortgage (inchoate or incomplete legal mortgages)---**SAVANNAH BANK OF NIG LTD v. AJILO**

It is the duty of the mortgagor to obtain the consent of the Governor as he is the holder of Statutory Right of Occupancy---**UGOCHUKWU v. CCB NIG LTD.**

However, there are instances where the consent of the Governor is not necessary and will not be required in the creation of a mortgage, they are:

- The consent of the Governor is not required for the creation of an equitable mortgage--**AWOJUGBAGBE LIGHT INDUSTRIES v. CHINUKWE** (governor's consent may however be obtained for an equitable mortgage)
- The consent of the Governor is not required for the conversion of an equitable mortgage, which was created with the consent of the Governor, into a legal mortgage **in favour of the same person---S. 22(a) LUA**
- The consent of the Governor is not required for the re-conveyance or release of a mortgaged property from mortgagee to the mortgagor, where the consent of the Governor was obtained upon creation--**S. 22(b) LUA**
- The consent of the Governor shall not be required for the up-stamping of a mortgage deed---**OWONIBOYS TECHNICAL SERVICES LTD. v. UBN LTD**

Documents to be submitted for Governor's consent are:---VACE[3]D RATS

T

D

GLOT

1) **Valuation report of the property**
2) **Application in the prescribed Form 1C (Lagos)** obtainable at Land Registry signed by both mortgagor and mortgagee/letter of application in other parts of the country
3) **Covering Letter** (in LP's letter headed paper) addressed to the commissioner of lands and housing
4) **Evidence of Tax clearance for 3 years of mortgagor** (and surety or guarantor, if any)
5) **Evidence of payment of Development fee**
6) **Evidence of payment of G**round rent (if not developed)**, L**and use charge, **O**ther outgoings and **T**enement rates (if developed) **(GLOT)**
7) **Deed of mortgage copies:** Relevant copies of the duly executed deed of mortgage
8) **Receipt of payment of consent, charting and endorsement fee**
9) **Approved building plan:** Duly approved building plan for a developed property (in Lagos)
10) **Title documents CTC**
11) **Survey plan:** Duly registered Survey Plan for an undeveloped property

Comment [v62]: Does not apply to lagos state.

Comment [v63]: Only applies to lagos state.

Comment [v64]: Does not apply to lagos state.

Comment [C65]: Essential for perfection of title as a general rule with no exception in Lagos state, but with 2 exceptions in other states:
- Where the DOM has made copious reference to the survey plan already registered
- Where parcel clause refers to schedule which contains adequate description of the property.---**AMADI V ORISAKWE**

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

7) Certificate of Incorporation CTC
8) Resolution of the BOD: Copy of resolution of BOD authorizing the mortgage
9) Annual returns
10) M & A CTC
11) Form CAC 1.1: Copy of CAC Form 1.1
12) TCC: 3 years Tax clearance certificate of at least two of the directors

Role of the solicitor in a mortgage---NIPDP D

- Negotiation of the loan agreement
- Investigation of title
- Preparation of search report
- Drafting the mortgage deed and other necessary documents
- Perfecting the mortgage
- Discharge of the mortgage

Particulars of instruction

1. Particulars of the parties, that is, mortgagor and mortgagee
2. Particulars of the amount advanced as loan by the mortgagee to the mortgagor
3. Particulars of the property to be used as security for the loan
4. Particulars of legal due date and the mode and manner of repayment of the loan
5. Particulars of the interest payable.
6. Particulars of the covenants to be reserved in the mortgage
7. Particulars of the witnesses to the mortgage
8. The remedies available to either party upon default by the other party

7. DRAFT SEARCH REPORT AND A COVERING LETTER

Comment [C66]: SAME FORMAT AS IN SALE OF LAND TRANSACTION

8. EXPLAIN THE VARIOUS COVENANTS IN A MORTGAGE AND THE IMPORTANCE OF THE COVENANTS

Covenants in a Mortgage Deed/Mortgages

The following are the covenants in mortgages.

1. Covenant to repay the principal sum within the legal due date: The parties should agree when the loan should be repaid. Even if the mortgage is silent as to the date of repayment, there is a burden on the mortgagor in equity to be liable to pay the principal and the interest.

When no legal due date is included in the deed, it is deemed to be payable on demand.

The inclusion of the legal due date is important for the following reasons:

a. The mortgagee cannot bring an action to recover the sum until the legal due date has passed.
b. The mortgagee cannot successfully exercise his right of sale or foreclosure if the legal due date has not passed. The mortgagee cannot attempt to extinguish the equity of redemption of the mortgagor.

2. Covenant to pay interest: Where interest has not been stipulated, the court will impose a reasonable interest rate. Even where an interest rate stipulated is considered unconscionable, the court can reduce the rate. There are two ways to impose interest rate:

- Stipulate a higher rate, but if the mortgagor pays on or before the legal due date the mortgagor will pay at a lower rate. Example, the interest is 18% but if the mortgagor pays before 15th April every month, interest shall be 8%.
- This is as opposed to increasing the interest rate upon failure to pay at a particular date. This would be a penalty and it is not accepted.

3. Covenant to insure the property: both parties have insurable interest. The covenant to insure should provide for the following:

- The date of the commencement of the insurance policy
- The insurance company
- When insurance is to commence
- The amount of the insurance cover
- The risk to be insured against
- The person to take out the insurance policy
- The application of the insurance money

By virtue of **S. 123(1)(ii) PCL AND S. 19(1)(ii) CA** once it is a legal mortgage or mortgage is by deed, the mortgagee has a right to insure. If the mortgagor insures only in his name, in the event of loss, the mortgagee cannot compel the mortgagor to apply the money paid for the damage. If mortgagor insures, he should insure in the mortgagee's name or joint names.

Note that where Governor revokes the right of occupancy for public interest, compensation is to be paid to the holder of the right which is the mortgagor under the Land Use Act, section 28. A prudent mortgagee lawyer would insert a clause in favour of the mortgagee that compensation should be paid to him in the event of revocation of the right of occupancy of the property.

4. Covenant to create leases and sub-leases on the property: A mortgagor or mortgagee in possession is given the right to grant certain leases. Where a lease had been created prior to the mortgage, the mortgagee and subsequent purchaser are bound by the lease, the mortgagor is entitled to rent. A mortgagor in possession can create lease and he is not to account – **Ss. 18(1) CA, 131(1) PCL, 33 MPL**. A mortgagee in possession can also create a lease. Where he creates a lease, he must account for rents collected as the rent is meant to be used for discharging the principal and interest.

5. Covenant to repair: party in possession usually carries out the repairs. Mortgagee can take over and carry out repairs where mortgagor fails but must not repair the mortgagor out of his estate.

6. Covenant to consolidate different mortgages: As a general rule, **S. 115 PCL** prohibits consolidation of mortgages. Consolidation occurs where the same mortgagor, and the same mortgagee but the mortgagor uses different properties to create different mortgages in order to secure a loan of money. These mortgages are consolidated in the sense that the mortgagor will not be allowed to redeem any of the properties without also redeeming the other securities. Thus, the parties can exclude the provisions of **Ss. 115 PCL; 17 CA; 28 MPL.**

For the covenant to apply, the following conditions must be fulfilled.

a. The same mortgagee

b. The same mortgagor
c. Different mortgages, using different properties
d. An express covenant to consolidate
e. The legal due date must have passed for all the mortgages

7. Covenant to re-convey upon redemption: This is the covenant not to clog the mortgagor's equity of redemption. That upon the payment of the principal and interest, the mortgagee will re-convey the property to the mortgagor. The mortgagee must not make it impossible for the mortgagor to redeem the property---**CITY LAND PPTY (HDGS) LTD. V. DEBORAH**

8. Covenant to observe and perform any condition in the head lease: Upon grant of statutory right of occupancy, the mortgagor has the duty of observing covenants in right so granted. On mortgage to the mortgagee, it should be stated that the mortgagee is to observe these covenants.

10. DRAFT A DEED OF MORTGAGE

Introductory part

1. Commencement: this depends on the mode and type of mortgage. For mortgage created by assignment or sub-demise, the commencement can be: THIS LEGAL MORTGAGE OR THIS DEED OF LEGAL MORTGAGE. For mortgage created by charge by deed expressed to be by way of legal mortgage, it is THIS CHARGE BY DEED EXPRESSED TO BE BY WAY OF LEGAL MORTGAGE; THIS CHARGE

2. Date and parties: where there is a surety involved in the mortgage agreement that is, A is borrowing money from B and C's property will be used as security (three parties) the parties' clause will be drafted as follows:

THIS DEED OF LEGAL MORTGAGE is made this ____ day of____ 2013 BETWEEN Chief Omo Onah of 17, Udeh Street, Oyo Road, Oyo state (the mortgagor) of the first part **AND Mr. Lanre Musa of 16, Oyo Road, Oyo state (the mortgagee) of the second part** AND OCEANIC BANK PLC a registered company under Part A of Companies and Allied Matters Act Cap 120 LFN 2004 with registered office at 20, Oyo Road, Oyo state (the surety) of the third part.

3. Recital: recital cannot be waived in any mortgage deed. It must be inserted. There are two types of recitals to wit; introductory and narrative recital. The following are the facts which the recital of a mortgage must contain

- The mortgagor's title
- The existing loan agreement which will include the interest and capital.
- Where there is a surety, recites surety's title – for instance, where Mr. A approaches bank B and Bank B gives the amount of N10, 000, 000 and C agrees that his property at _____ be used as security for payment of the loan.

Comment [d67]: BETWEEN: UNIVERSITY OF ILLORIN, a body established under the University of Ilorin Act CAP A15

Comment [d68]: note, there are two stages in a mortgage transaction: contract stage and the completion stage.

Comment [d69]: If the exam question did not give particulars to be recited just write WHEREAS.

- State that the mortgagor has agreed that the property be used to secure the loan.

4. Operative part

As a general Rule the operative part starts with testatum. For other kinds of deed of conveyance, there is only one testatum but for mortgage deed – legal mortgage, there are two testatum

The first testatum has the covenant to repay the principal sum and interest on a named date (the legal due date).

The second testatum has the charging clause in which the mortgagor conveys as beneficial owner to the mortgagee. THE MORTGAGOR AS BENEFICIAL OWNER ASSIGNS/SUB-DEMISES/CHARGES

5. Habendum: the term granted under the habendum, the mode of creation of the legal mortgage would be known, whether assignment, sub-demise.

Miscellaneous part

Under this part, the various covenants are contained here

Concluding part

- Testimonium
- Execution and attestation

THIS DEED OF LEGAL MORTGAGE is made this …. Day of …….. 2014

BETWEEN

Mrs. Loretta Ugochi of No. 56 Calabar Road Uyo Akwa Ibom State ('The Mortgagor') of the one part

AND

Global Trust Bank Plc a public company duly incorporated under the Companies and Allied Matters Act with its registered office at No. 20 Calabar Road Uyo-Akwa Ibom state ('The Mortgagee') of the other part

WHEREAS:

1. The Mortgagor is the holder of a certificate of Occupancy no. 269713 dated 10/10/2008 situated at 12 Ikoyi Crescent Akure and registered as 19/19/1167 at the Lands Registry office, Akure Ondo State.
2. A loan Agreement between the Mortgagor and the Mortgagee where the sum of three million naira (N3, 000, 000.00) was advanced to the mortgagor by the Mortgagee was made on 13 day of April 2012 and duly executed.

3. The Mortgagor agreed in the Agreement to secure the repayment of the loan and interest collected on the property covered by a certificate of occupancy No. 269713 dated 10/10/2008 and registered as 19/19/1167 at the Lands registry Akure Ondo State.
4. The Mortgagor has agreed to take the sum of sixty million naira (N60, 000, 000.00) loan and the Mortgagee has agreed to advance it using the said property as security.

NOW in consideration of the sum of sixty million naira (N60, 000, 000.00) only paid to the Mortgagor by the Mortgagee (the receipt of which the Mortgagor hereby acknowledges)

NOW THIS DEED WITNESSES AS FOLLOWS:

1. The Mortgagor covenants to repay the principal of sixty million (N60, 000, 000.00) only and the interest at 21 percent per annum or at 10 percent if he pays timeously, repayable on or before 20th January 2014.
2. The Mortgagor as **BENEFICIAL OWNER** hereby **SUB-DEMISES** to the mortgagee **ALL THAT PROPERTY** at N0. 12 Ikoyi Crescent off Lokoja Road Akure Ondo State covered by a Certificate of Occupancy No. 269713 dated 10/10/2008 and registered as 19/19/1167 at the Lands Registry Office Akure, Ondo State rightly described by the survey plan attached to the First Schedule **TO HOLD** unto the Mortgagee for the unexpired residue of the term granted under the Certificate of Occupancy less one day.

PROVIDED always that if the mortgagor repays the principal and interest on the loan, the mortgage shall cease and the mortgagee shall re-convey the property to the mortgagor at his cost.

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

SIGNED, SEALED AND DELIVERED

By the Mortgagor

……..

Mrs. Loretta Ugochi

IN THE PRESENCE OF:

Name:

Address:

Occupation:

Signature:

THE COMMON SEAL OF GLOBAL TRUST BANK PLC ('THE MORTGAGEE') IS AFFIXED ON THIS DEED AND DULY DELIVERED IN THE PRESENCE OF:

…….. ……

Director Secretary

I CONSENT TO THIS LEGAL MORTGAGE

DATED THE …..DAY OF …….2014

EXECUTIVE GOVERNOR OF ONDO STATE

11. EXPLAIN THE CONCEPT OF UP-STAMPING AND STATE WHEN A DEED OF MORTGAGE NEED TO BE UP-STAMPED

Up-stamping is when the same property, the same parties (same mortgagor and mortgagee) and all that is required is just an increase of the loan facility from the initial facility granted to a higher facility. Thus, there is an application for and payment of additional stamp duties advalorem to accommodate the value of an increased loan over the same property, **without creating a second mortgage.** Because the previous mortgage agreement is only being up-stamped and additional stamp duties will be paid to the commissioner of stamp duties, the consent of the Governor is not needed---**OWONIBOYS TECHNICAL SERVICES Ltd v. UBN Ltd.** Also there is no need to execute another Deed. **It does not require fresh registration.**

Please note that up-stamping is not automatic, thus there are conditions which must be fulfilled

- The parties must be the same
- The mortgage property must be the same
- New loan facility is given upon the existing facility
- Stamp duty is paid on the new facility (if the old facility was N70M and was up-stamped to N100M, stamp duties will only be payable on the additional N30M)
  See **OWONIBOYS TECHNICAL SERVICES LTD V. UBN LTD**

13. DISCUSS/EXPLAIN THE RIGHTS AND REMEDIES OF MORTGAGOR AND MORTGAGEE IN A MORTGAGE TRANSACTION

(a) Mortgagor's Rights/Remedies

- Equity of redemption
- Legal right to redeem
- Equitable right to redeem

1. Equity of redemption: This is the proprietary interest a mortgagor has in the security at the creation of the mortgage. There must be a proviso for cesser upon redemption. This right arises the moment the mortgage is created and it continues to subsist till the day the mortgage ends or is discharged. As long as there is a mortgage, there is an equity of redemption. The mortgagor's equity of redemption cannot be taken away **unless there is an order of foreclosure absolute or**

Comment [C70]:
•UGOCHUKWU V CCB NIG.LTD: it is the mortgagors duty to apply for consent of the governor. Failure to do that, he cannot turn around and allege that the mortgage transaction is null and void in order to benefit from his wrongdoing as it is against public interest to do so, especially when he has received valuable consideration. However, in practice it is the mortgagee that seeks for consent since he is the one that stands to lose if the mortgage is set aside for lack of consent.

Comment [C71]: One of the differences between successive legal mortgages and up-stamping is that while up-stamping is applicable through-out the country, successive legal mortgages only apply in the Lagos and the States using the PCL as its applicability to the states to old northern and eastern region has been precluded by the common law doctrine of Interrese Termini.

Comment [C72]:
The value of the property must cover both the first and subsequent loans. **There must be no contrary intention in the deed creating the initial mortgage.**

Comment [C73]:
BANKS AS A MATTER OF PRACTICE TRY TO PUT THE MORTGAGOR ON HIS TOES, AS THEY PUT 6 MONTHS AS THE LEGAL DUE DATE FOR REDEMPTION

a valid sale of the mortgage property under mortgagee's power of sale---KNIGHTBRIDGE ESTATE LTD V BRYNE.

The mortgagor's equity of redemption can be conveyed by sale or will or devolve upon his personal representative on intestate succession. This is subject to the right of the mortgagee. The right starts from the day legal mortgage is created. Of all the three rights of the mortgagor, the equity of redemption is the most important and it is also the basis for the other two rights.

The effect of the equity of redemption is as follows:

- The parties cannot insert any clause in the mortgage to clog or negate the mortgagor's right to redeem as such a clause would be void----**OKONKWO v. CCB LTD.** The equity of redemption must never be clogged, restricted or impeded.

The equity of redemption is so powerful that it entitles the mortgagor to continue to exercise **the rights of ownership over the mortgage property. It** can even be used to create an equitable mortgage. The equity of redemption is not affected by any breach on the part of the mortgagor. It is not limited by time as the mortgagor can redeem his property back in so far as the conditions have been fulfilled. Thus, once a mortgage always a mortgage

However, the rule that the equity of redemption cannot be clogged or restricted, **does not apply to perpetual debentures.** Hence, a company pursuant to **S. 171 CAMA** may issue a perpetual debenture. Accordingly, a clause or condition in any deed for securing any debenture shall **not be invalid** only because the debenture is made redeemable only

a. On the happening of a contingency however remote, or
b. On the expiration of a period of time, however long.

2. Legal right to redeem: This is the legal right of the mortgagor to discharge the mortgage and recover his property on or before the legal due date. The legal right to redeem arises the moment mortgage is created and it continues to subsist until the end of the legal due date. Where there is a legal due date stated in the deed, the legal right to redeem can be exercised before the expiration of the legal due date. After the legal due date the legal right to redeem terminates and the mortgagor loses his legal right to redeem the property.

The legal right to redeem entails the mortgagor's right to repay the mortgage sum and interest and recover his property at any time on or before the legal due date. The mortgagor does not need to wait for the legal due date before he can repay the mortgage sum and interest. He can do so even on the next day after creation of the legal mortgage---**UBA v. OKEKE**

At common law, after the legal due date, the mortgagor loses his right to redeem. This harsh position of the common law has been mitigated by equity through the equitable right to redeem.

In practice, the date for redemption is usually short because it is an advantage to the mortgagee to place the mortgagor in default as soon as possible and to avoid the effect of securing the money loaned until the expiration of the legal due date---**TWENTIETH CENTURY BANKING CORPORATION LTD V WILKINSON.** This provision works hardship on the bank as the mortgagor can refuse to pay as long as the legal due date has not passed and the mortgagee is helpless. To protect itself, the mortgagee can insert a proviso that the entire mortgage sum and interest is to be repaid at a shorter legal due date. That is, a date shorter than the proper legal due date on which installments would end. The effect of this is to bring the legal due date closer in order to make the power of sale arise in the event of a default. This shorter legal due date is called a "LEGAL FICTION." The shorter legal due date is used for all remedies of the mortgagee…it can activate all.

The insertion of a shorter legal due date (legal fiction) is not to prejudice the mortgagor, but only to put him on his toes. So, he has nothing to worry about as long as he is faithful with the payments of the instalments of the mortgage sum and interest. Thus, in the example above, the mortgagee can just add a proviso that the legal due date is 31st of July, 2015. This will not affect the instalment payments which will end when they ought to end. It will only operate to make the power of sale arise.

3. Equitable right to redeem: Under common law, the legal right to redeem was construed strictly such that once the mortgagor fails to redeem before the legal due date, he is taken to have lost the right to redeem. The equitable right to redeem arises upon the expiration of the legal right to redeem---**SALT V MARQUES OF NORTHAMPTON.**

Comment [d74]: EQUITY FOLLOWS THE LAW, BUT NOT SLAVISHLY OR SHEEPISHLY

Once legal due date elapses and the mortgagor has not redeemed, his equitable right to redeem automatically activates on the expiration of the legal due date. This equitable right to redeem can only be lost upon exercise of power of sale by mortgagee or an order of foreclosure absolute, or by a valid order of court.

(b) Mortgagee's Rights/Remedies

Comment [C75]: These rights are not mutually exclusive, thus the taking of one does not exclude the use of the others. The mortgagee can exercise any or all of them at the same time.

1. Action in court to recover principal sum and interest (or mortgage sum and interest)

This right avails both a legal and an equitable mortgagee. The mortgagee could institute an action in court against the mortgagor to claim the principal sum advanced to the mortgagee and the interest that has accrued on it----**UBN V OLORI MOTORS.** Civil procedure applies and after judgment is given, the mortgagee executes the judgment by attaching the moveable or immovable property of the mortgagor

Comment [C76]: NOTE: the mortgagee cannot exercise this right of action to recover mortgage sum and interest if the right to an order of foreclosure has been exercised. This is because this right and that of foreclosure are mutually exclusive.

2. Appointment of a receiver

A receiver is a person appointed by a creditor or the court to take over the management of mortgage property and receive the income of the property---**ADETONA V ZENITH INTERNATIONAL BANK LIMITED**

Comment [C77]: Subject to the rights of prior encumbrances.

This is more common in mortgages by companies-debentures. Note that once appointed, only the mortgagee has power to remove the receiver---**S. 393 CAMA, S. 43(5) MPL**

Who can appoint a receiver?

- The mortgagee if it is a legal mortgage or its mortgage by Deed.
- Appointment by the court especially in an equitable mortgage where the Deed is silent on the powers.
- Appointment power given by statute applies to legal mortgage—**Ss. 123 PCL, 19 CA, 35(1) MPL**

This right to appoint a receiver of the income of the mortgage property is available to both legal and equitable mortgagees. This right is available to an equitable mortgagee provided the equitable mortgage is by deed and provides for the power to appoint a receiver. Where the equitable mortgage is not by deed, then the power to appoint a receiver will not be automatic as a Court Order will be needed.

A **receiver can only be appointed after the mortgagee has become entitled to exercise the power of sale**. If the mortgagee has not yet become entitled to exercise the power of sale, he cannot appoint a receiver---**AWOJUGBABE LIGHT INDUSTRIES LTD. v. CHINUKWE.**

When the receiver has been appointed by the mortgagee, **the receiver is deemed to be an agent of the mortgagor b**ut if the receiver is appointed by the Court, he is personally liable for his acts. He must therefore give security before assuming his office.

Powers of a receiver

- Take possession of the security
- Manage security
- Receive income
- Pay outgoing service, taxes and rates.

Duties of a receiver

- He must act in good faith
- Must act within his scope of authority
- Avoid collusion
- Duty of care.

NOTE: where he has colluded to undervalue the property and have it sold at a gross under value, the sale will be set aside.

3. Right to take possession of the mortgage property

This right is only available to a legal mortgagee. However, it is not advisable for the legal mortgagee to go into possession of the mortgage property for the following reasons:

- He who is in possession has an obligation to insure the mortgage property
- He who is in possession has an obligation to maintain the mortgage property
- The mortgagee who goes into possession is liable to account to the mortgagor.
- Raises presumption of agreement to be repaid in piecemeal---**WHITE V CITY OF LONDON BREWERY.**

4. Power of sale (right to sell the mortgage property)

This is available to all mortgages created by deed, whether legal or equitable, and it is provided for under **S. 123(1)(i) PCL, S. 19(1)(i) CA**

Where it is an equitable mortgage, then the mortgagee cannot exercise the power of sale without a Court Order except where the following conditions are satisfied:

- the mortgage is by deed
- there is no contrary intention in the deed (a contrary intention could be the inclusion of a higher interest rate as penalty or any other provision that shows that the parties intended another penalty, not a sale)
- the mortgage contains any one of the remedial devices.

Where it is a legal mortgage, the mortgagee does not need any court order and does not need to go to court before it can exercise the power of sale as long as it has arisen and has become exercisable.

Further, the mortgagee can exercise this power not minding that he has used other remedies and not minding that an action over the subject matter is in court--UBN v. OLORI MOTORS & CO LTD.

The power of sale is not automatic. Before the mortgage property can be sold in exercise of the power of sale, **two conditions must be satisfied.** They are:

- The power of sale has arisen –**PAYNE V CARDIFF RDC**
- The power of sale has become exercisable –**ACB V IHEKWOABA**

Comment [C78]: The mortgagee (bank) brought an action in court to recover the mortgage sum and interest. While the case was pending, the mortgagee sold the mortgage property in exercise of the power of sale. Mortgagor sought to set aside the sale of the mortgage property on the ground that the sale violated the principle of pendente lite and that by instituting an action in court to recover the mortgage sum and interest, the mortgagee could not exercise the power of sale. It was held at the SC that since in a legal mortgage, the right to sell the mortgage property was independent of the court in that the mortgagee can sell without any court order and also, since the remedies of a mortgagee are not mutually exclusive, then the mortgagee can exercise the power of sale even if there was an action in court provided that the power of sale had arisen and was exercisable.

NOTE: MILITARY GOVERNOR OF LAGOS STATE V OJUKWU, WHERE AN ACTION TO RECOVER HAS BEEN INSTITUTED AND THE MORTGAGOR SERVES A NOTICE OF INJUNCTION ORDER RESTRAINING THE OTHER PARTY FROM DISPOSING OF THE RES, THE LEGAL MORTGAGEE BANK CANNOT SELL THE PROPERTY ALTHOUGH THEY HAVE THE RIGHT OF SALE WITHOUT RECOURSE TO COURT.

These two conditions must be satisfied. Usually, the power must arise first before it becomes exercisable. The power of sale may become exercisable without it arising and in such a case, the mortgagee cannot sell.

The power of sale will be said to have arisen when the following factors co-exist:

- The mortgage must be by deed.
- The legal due date must have passed (that is, mortgagor must have defaulted and lost his legal right to redeem)
- There must be no contrary intention in the mortgage deed. That is, there must be nothing in the legal mortgage deed that is inconsistent with the power of sale such as an increased interest rate or other penalty or remedy.

These factors must co-exist at the same time. In the absence of any one of them, the power will not arise.

Notwithstanding the fact that the power of sale has arisen, the mortgagee cannot sell unless and until the power has become exercisable. The conditions under which the power of sale will become exercisable are provided for under **Ss. 125 PCL and 20 CA**. These conditions are independent and any one of them is sufficient to make the power of sale exercisable. Therefore, the power of sale will be said to be exercisable if

- Notice requiring payment of the mortgage money has been served on the mortgagor and there is default of payment of the mortgage sum and interest or part thereof, **for three (3) months after such service**; OR
- The mortgagor is in default of payment of installment or interest due and payable for a period of **2 consecutive months; OR**
- The mortgagor is in breach of a fundamental term apart from the covenant to repay.

Compliance with the above provisions is mandatory on exercise of the right to sell mortgage property. Usually, the power must arise first before it becomes exercisable. The power of sale may become exercisable without it arising and in such a case, the mortgagee cannot sell. In addition to the two conditions above, to exercise power of sale, in order to ensure that the sale is not improper or liable to be set aside, the mortgagee must observe the following:---**GACU**

- **Good faith:** The mortgagee must act bona fide, in good faith during sale of mortgage property---**KENNEDY V TRAFFORD**
- **Agent buying:** The mortgagee must ensure that it does not sell the property to itself, its servants, agents or privies (ISAP)---**IHEKWOABA V ACB LTD.**
- **Collusion:** The mortgagee must not collude with the buyer or the proposed buyer of the mortgage property
- **Undervalue:** The mortgagee must not sell the mortgage property at gross under value.(negligible price)---**OKONKWO V CCB LTD**

Comment [C79]: THE MORTGAGEE BANK NEED NOT GIVE NOTICE. HOWEVER, THE BANK SHOULD NOT SELL AS THE POWER OF SALE HAS NOT ARISEN.

Comment [C80]: NOTICE NEED NOT BE GIVEN

Comment [C81]: *For example, N24million is borrowed by John from GTB to be repaid by monthly installments of N1million from January 2015 to 31st December, 2016. If John fails to pay installments in November and December, 2015, the power of sale has become exercisable, but it has not yet arisen because the legal due date has not passed.*

Comment [C82]: PLEASE NOTE, section 35 of MPL, 123 PCL and 19 of CA, the mortgagee may sell at public auction or by private contract.

Status of mortgagee before and during sale

The bank is not an agent or a trustee of the mortgagor before the sale or during the sale of mortgage property. The implication is that the bank has no obligation to do any of the following in exercising the power of sale.

- The bank has no obligation to carry the mortgagor along either before or during the sale
- The bank need not sell at any price suggested or proposed by the mortgagor.
- The bank need not sell at the market value or prevailing market value. All the obligation the bank owes is to not sell the property at a gross under value (negligible price) and this is dependent on facts.

However, the moment the bank concludes sale of the property, the bank becomes an agent/trustee of the mortgagor for the purpose of disbursement and application of the proceeds of sale. The bank is therefore liable to account to the mortgagor.

The appropriate order of application of the proceeds of sale--VISIONI V NBN LTD---ECOB

- **Encumbrances:** The bank must settle all prior encumbrances having priority over the mortgage
- **Costs of sale:** Settle costs and charges incurred in the course of sale
- **Outstanding MS/I:** Settle outstanding mortgage sum and interests
- **Balance to be returned** to the mortgagor or the person entitled to the equity of redemption.

When sale may be set aside or restrained---CREAM GPFF

- **Consent not obtained:** When requisite consent was not obtained
- **Registration is absent:** Non- registration of mortgage
- **Estoppel:** Where the mortgagor can validly rely on the plea of estoppel.
- **Agreement on a mode of sale:** Where the parties agree at a different mode of sale where there is a contrary intention.
- **Mortgage is fraud on the mortgagor**
- **Good title is absent:** Where the mortgagor has no good title ab initio--**ALLI V IKUSEBIALA**.
- **POS has not A/E:** Right of sale has not arisen or become exercisable
- **Fraud or collusion** between mortgagee and buyer
- **Full MSI has been paid:** Sale after mortgagor has paid in full mortgage sum and interest

Effect of sale without conditions

Ideally, a mortgagee is to wait for the power of sale to arise and the power to become exercisable before selling. However, if after the power of sale arises, the mortgagee goes ahead to sell without the power becoming exercisable, then the mortgagor can have the following remedies:

- **An order of court setting aside the sale and damages for breach.**
- If the mortgagee has not sold, but is preparing to sell, the mortgagor can obtain an injunction to restrain him from selling

However, if the mortgagee sells to a bona fide purchaser for value without notice, such sale will be valid – **S. 21(2) CA, S. 126 PCL**. The mortgagor can only sue the mortgagee for damages for improper exercise of power of sale.

Effect of proper and valid sale

The effect of a proper and valid sale is that it extinguishes the mortgagor's equity of redemption and terminates the equitable right to redeem---**S. 111, 112 PCL**

Mortgagor and sale of security

The mortgagor can sell the security. However, the following points must be noted

- Where the mortgagor sells the security with the consent and concurrence of the mortgagee, the purchaser receives a good title
- Where the mortgagor sells the security pursuant to an order of a court, the purchaser receives a good title
- However, where the mortgagor sells the security without the consent and concurrence of mortgagee or without an order of court, **the purchaser only acquires the mortgagor's equity of redemption and takes subject to the mortgagee's interest---OLUFINTUYI v. BARCLAYS BANK DCO**

5. Foreclosure

Comment [C83]: ORDER 51 HCCPR LAGOS.

The right of mortgagee to apply for an order of foreclosure is available to both legal and equitable mortgage. **Foreclosure is an order of court** by which the equity of redemption of the mortgagor and all persons claiming through him including subsequent encumbrancers are extinguished so as to vest the mortgage property absolutely in the mortgagee. Usually, foreclosure order is granted in stages

- The first stage is the foreclosure nisi
- The second stage, foreclosure absolute, six months after the decree nisi has been granted

NOTE: The power of foreclosure is granted where

- The legal due date has passed; OR
- The mortgagor is in breach of a fundamental covenant which makes a power of sale to become exercisable.

Effect of foreclosure order absolute

Comment [C84]: LEGAL MORTGAGE—becomes the absolute owner of the property subject to any legal mortgage having priority
EQUITABLE MORTGAGE—the mortgagor is compelled to convey the property to the mortgagee, but upon sale of the property, the mortgagee must account (to the mortgagor) for the proceeds of sale.

The order of foreclosure is made absolute after 6 months of granting the decree nisi. Thus, the order nisi made, lasts for 6 months and the mortgagee cannot sell the property **without recourse to the court** within that period and the mortgagor can redeem within that 6 months of the order nisi.

Once the foreclosure order becomes absolute, the mortgagee becomes the owner of the property and the equity of redemption stands extinguished. However, even when the order of foreclosure has become absolute, the mortgagor may still apply to court to set aside the order and this **entails an order to re-open the foreclosure absolute.**

Instances that may justify an application to re-open a foreclosure order absolute---JESA

- **Just and equitable grounds:** On any other ground the court thinks just and equitable.
- **Exceeding value of the property:** Value of the security exceeds the mortgage sum and interest.
- **Special value of the property:** If the mortgagor is able to prove that the mortgage property is of special value to the mortgagor (e.g family property)
- **Action to repay brought by the mortgagee:** If the mortgagee after obtaining a foreclosure order made absolute still sues the mortgagor on his personal covenants to repay the loan

Conditions an applicant must fulfill/be met for reopening a foreclosure absolute--TUMA

- **Time:** The application must be brought timeously as equity aids the vigilant and not the indolent.
- **Unconscionable conduct:** The mortgagor/applicant must not be guilty of any unconscionable conduct/must act in good faith. Rationale: he who seeks equity must do equity
- **Money at hand:** The mortgagor/applicant must show that he has the money at hand to repay.
- **Affidavit of good cause:** The mortgagor/applicant must show good cause in his affidavit why the money has not been paid.

6. Specific performance for equitable mortgage

This remedy is available to an **equitable mortgagee.** This would arise where the equitable mortgagor **fails, refuses or neglects (FRN)** to complete documentation of the mortgage agreement. The court would give an order mandating the mortgagor to complete documentation, thus the legal interest in the property will be passed to the mortgagee (so he can exercise power of sale). Where the mortgagor refuses, neglects or fails to complete the documentation, the court will then order an officer of the court to execute a legal mortgage upon with the mortgagee …

N**B: The equitable mortgagee has no legal estate to transfer, and as such, he cannot exercise a power of sale hence this action for specific performance.** NB- There must be part performance. The part-performance on **the part of the mortgagee** is the **actual handing over of the loan** to the mortgagor. On the mortgagor's part, the **part-performance is the deposit of his title deeds with the mortgagee and intention to create a legal mortgage---OGUNDIANI V. ARABA**

7. Action for winding up in case of a company being involved

14. STATE HOW A MORTGAGE CAN BE DISCHARGED

The mode of the discharge of a mortgage depends on its mode of creation. **For legal mortgages created by assignment, demise and sub-demise,** discharge can be either of the following:

- Deed of re-conveyance
- Deed of release
- Deed of surrender
- Deed of discharge

For mortgages created by charge by deed expressed to be by way of legal mortgage, it can be discharged by **a mere statutory receipt – S. 135 PCL**

Discharge of mortgage by companies

- Evidence of Discharge (deed of discharge or receipt)
- Filing of Memorandum of Satisfaction under section 204 CAMA---Form CAC 9 (Memorandum of Satisfaction)

For an equitable mortgage, a simple receipt is adequate unless the mortgage was by deed.

Discharge by payment into Court- Section 75 PCL, 5 CA. Payment must be made in full in the instance the mortgagor decides to redeem his property before the legal due date.

Discharge of Mortgages in Lagos State--S. 41 MPL

All mortgages can be discharged by receipt. However, **S. 55 of the Lagos Registration Law**, discharge may be made by deed which is registrable and this is applicable as it is a latter law.

Comment [C85]: The deed issued under discharge by deed of release, surrender and re-conveyance should be registered at the land registry by the mortgagor, failure of which the property will continue to show that it still encumbered.

Comment [C86]: Where a company is the mortgagor, both the charge and its release should be registered at the CAC. For instance, failure to register charge will render the charge void in favour of the creditors and debenture holders – **Ss. 197 CAMA, 205 CAMA.**

There are specified forms for it – Form 8 & 9 (PARTICULARS OF CHARGE, MEMORANDUM OF SATISFACTION) respectively.

Comment [C87]: Once a mortgage is pending in respect of a particular property in Lagos, as long as the mortgage has not been discharged, the Mortgagor cannot create a subsequent lease or tenancy without the consent of the mortgagee----**Ss. 49(1) and 54 Lagos Registration Law.**

POSSIBLE MULTIPLE CHOICE QUESTIONS ON THIS TOPIC

1. For the purposes of mortgages, Nigeria is divided into __ jurisdictions

A. 2

B. 3

C. 4

D. 5

2. All these are the features of a charge except ____

A. Transfer of interest

B. Arises out of agreement of the parties

C. Chargee only has an encumbrance

D. Chargor retains all the interests

3. In Lagos, where there is an equitable mortgage by way of deposit of title deed/ charge of an equitable mortgage with an agreement to create a legal mortgage, a mortgagee has the right to approach the courts within ___ days to request the mortgagor to execute a legal mortgage in his favour

A. 20

B. 30

C. 40

D. 50

4. The application in 3 above is by way of ___

A. Originating summons

B. Originating motion

C. Writ of summons

D. Petition

5. Where one mortgagor uses the same property to create different mortgages with different mortgagees, it amounts to ____

A. Successive legal mortgage

B. Several legal mortgage

C. Upstamping

D. Consolidation

6. Where a mortgagor uses different properties to create different mortgages with the same mortgagee

A. Successive legal mortgage

B. Upstamping

C. Consolidation

D. Several legal mortgage

7. When the same property is used by a mortgagor to increase a loan facility from the initial facility granted, to a higher facility, in relation to the same mortgagee, ____ is required

A. Successive legal mortgage

B. Upstamping

C. Several legal mortgage

D. Consolidation

8. A statutory charge is discharged by way of ____

A. Deed of discharge

B. Statutory receipt

C. Deed of release

D. Registration at the land registry

9. Creation of a legal mortgage over mixed properties can only be done through ____

A. Assignment

B. Statutory charge

C. Charge by deed expressed to be by way of legal mortgage

D. Charge by deed expressed to be by way of statutory mortgage

10. It is the duty of the ___ to obtain the consent of the Governor in a mortgage transaction

A. Mortgagor

B. Mortgagee

C. Lender

D. Borrower

11. When no legal due date is included in the deed, it is deemed to be payable ____

A. Within a reasonable time

B. Upon the expiration of the legal due date fixed by law

C. On demand

D. All of the above

12. Generally, once it is a legal mortgage or a mortgage by deed, ___ has a right to insure

A. Mortgagor

B. Mortgagee

C. Lender

D. Borrower

13. Where a mortgagor uses different properties to create different mortgages with the same mortgagee and the deed of mortgage entitles the mortgagee to require that at the expiration of the legal due date for all the mortgages, the mortgagor cannot redeem any of the mortgages without redeeming the others, ____ is said to exist

A. Several legal mortgage

B. Successive legal mortgage

C. Upstamping

D. Consolidation

14. In a deed of legal mortgage, the following can be waived except ____

A. Recital

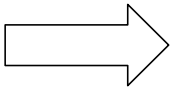
B. Commencement

C. Date and Parties

D. None of the above

ANSWERS

1. B
2. A
3. B
4. A
5. A
6. D
7. B
8. B
9. C
10. A
11. C
12. B
13. D
14. D



7. LAGOS STATE LAND REGISTRATION LAW 2015

1. IDENTIFY MAJOR FEATURES OF THE LAND REGISTRATION LAW (LAGOS STATE) AS THEY AFFECT SALE OF LAND, LEASES, MORTGAGES, POWER OF ATTORNEY AND OTHER REAL PROPERTY TRANSACTIONS

(a) Encumbrances & restrictions on power of a registered holder to dispose land

The interest of a 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 or restriction relate to a time prior to his own (the holder's) registration (S.111).

However, the interest of a registered holder is subject to the following:

- Registered encumbrances, conditions or restrictions;
- Liabilities, rights or interest not requiring registration under this law;
- Interests prior to the transfer;
- The law relating to bankruptcy;
- Provisions relating to the winding up of companies;
- Overriding interests. See S. 66 for the list of interests that make up overriding interests.
- "Restrictive covenants" affecting the land (not being a covenant made between a sub-lessor and a sub-lessee), in respect of which a NOTICE has been registered in accordance with the provisions of the Law, unless such restrictive covenant has been cancelled or released. See S.67 and 68.
- Prohibition or restriction of transfer or disposal on grounds of fraud or improper dealing or for other sufficient cause –S.73.
- 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 document so executed shall not be accepted for registration [s.94 (3) & (4)]. See also s. 95

Comment [C88]: **Commenced 21st Jan 2015.**
PURPOSE
1.Consolidates the registration of laws to attune it with the present technological realities.
2.Est. a central management process for registration of titles and other interests in Land.
3.Safeguard the integrity of transactions and instruments relating to land
4.Ensures that all instruments affecting land are duly registered.
5.To generate revenue for the government.
The Laws Repealed- S.122
1.Registered Land Law Cap. R1 Laws of Lagos State 2003
2.Titles Law and Registration of Titles (Appeals) Rules 2003
3.Land Instruments Registration Law 2003
4.The Electronic Documents Managements System Law 2007

Est. of Land Registry and Divisions: S. 3 empowers the Governor to est. Land Registry and divisions for the registration of all documents relating to land. The register of all transactions relating to transfer of interest in land in electronic and paper form- **S. 3(4)a**
The Land Registry and the Registry Divisions are Headed by a Legal Practitioner of 10yrs and 8 years post call experience respectively, to be appointed by the Governor- **S.4.**

Comment [C89]: **Encumbrances/Restrictions on the Powers of a Registered Owner to Dispose Land**
Interests of a registered holder is indefeasible. Thus A registered holder of any land who is a purchaser for value is not affected by an express or implied notice of any unregistered interest, affecting the interest of any previous registered holder, nor required to inquire whether the terms of any caution or restriction have been complied with, where they relate to a time prior to his registration as holder of such land or mortgage- **S.111**

(b) Creation & registration of sublease (SS. 42 -48)

The holder of land may create a 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 of Governor's consent** (S.43).

No sublease may be created in respect of land or property subject of a mortgage except with the prior written consent of the mortgagee; similarly, no sublease which is subject of a 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 date shall not exceed twenty-one (21) 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.

(c) Mortgages

Under sections 49 (1) and 54, mortgages 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 sale by the subsequent mortgagee shall be subject to the rights of the prior mortgagee – Section 50.

Consolidation of mortgages is permitted; the right of consolidation 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–Section55.

(d) Power of Attorney (Section 56)

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 revocation shall be adversely affected by reason only that such Power has been revoked. The 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 for non-compliance with provisions of section 56 relating to Power of Attorney.

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 of the Governor has been obtained in respect of the same. See S. 57.

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 document and the power of attorney has been duly registered or filed in the registry. (S.94)

2. EXPLAIN THE DIFFERENCES BETWEEN REGISTRATION UNDER LAND REGISTRATION LAW, LAGOS AND REGISTRATION UNDER THE LAND INSTRUMENT REGISTRATION (AS APPLICABLE UNDER THE PCL AND CA STATES)

"PDP GOLF CLASS"---- 24hrs FILM

LRL LAGOS STATE	LIRL OTHER STATES
1.**Probate** registration is mandatory	No such requirement
2.**Documents** to be kept by the registrar are different from that of other states	Different documents
3.POA must be registered once it relates to land	It depends
4.Governor's consent is required for irrevocable POA relating to land	Not required
5.Official name: LRL	LIRL
6.**Lease** of **5 years** and above to be registered	above 3 years lease to be registered
7.**Family:** Mandatory registration of family representatives to prevent and restrict land grabbers	16. No such requirement
8. **Compellability:** Registration is compellable	Not compellable
9. LIMS	No LIMS
10.**Accreditation** exists	No accreditation
11.**Survey plan** is a pre-requisite	Not needed
12.**Search** is by accredited users	Search is by anybody
13. **24 hours:** Registration is to be done by the Registrar within 24 hours where all conditions precedent are satisfied	No such time period
14. **Forms:** Prescribed forms are included	Deeds are used
15. **Individual:** Registration is not restricted to transactions and documents, it includes individuals	Limited to only transactions and documents
16. Land certificate is issued	Not issued
17. Mortgagee: Lease cannot be created on a mortgage property without the consent of the mortgagee	No such requirement

3. STATE THE PROCEDURE FOR INVESTIGATION OF TITLE IN LAGOS UNDER THE LRL (INCLUDING PROCEDURE AND DOCUMENTS FOR ELECTRONIC SEARCH)

Procedure for conducting a search under the LIMS

Comment [C90]: In addition to the general procedure for investigation, it comes under the step "conduct search"

NB: On being issued with a Letter of Accreditation after the payment of prescribed fees, any of the following persons or organizations may log on to the LIMS to conduct searches or to download information (S.25):

- Law Firms;
- Financial Institutions;
- Corporate Organizations; and
- Registered Estate Surveyors & Valuers.

The following documents are required

- Copy of the instrument
- Application letter
- Consent letter from the owner of the property, which authorises the search
- Application for search in Form 3**.**

Any document electronically produced from the LIMS is admissible in evidence and qualifies for the purpose of admissibility under any relevant law- **S. 24**

……

- 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.
- 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), (3) and (4).
- Consideration of application and conduct of search by or on the orders of the Registrar
- The Registrar shall issue an official Search report, as is in Form 4, contained Schedule 1 to this Law.

4. DRAFT AN ELECTRONIC SEARCH REPORT

SEARCH REPORT FORM 4:

LAGOS STATE LAND REGISTRY
ELECTRONIC SEARCH REPORT

Document searched. .....
Date of search.....
Description of property.....
Grantor..... .....

Grantee.....
Term.....
Area of Land.....
History of Land.....

Subsequent Transaction/Encumbrance

Remarks

5. IDENTIFY DOCUMENTS FOR REAL PROPERTY TRANSACTIONS IN LAGOS

(a) Documents to be kept and maintained in the lands registry

1. **Register 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 the registry shall be recorded in this document and numbered consecutively
5. **Mutation Record** – containing changes made by the Registrar 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 – see 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**---indicating that Power of Attorney is a registrable instrument in the State

(b) The Land Information Management System (LIMS)

Every land document must be registered using the LIMS procedure. Land documents already registered before the commencement of the LRL must be registered using the LIMS.

The following registers shall be kept in the Registry for purpose of registration by the LIMS

1. Day List;
2. Register of Mortgages;
3. Register of Caution; and
4. Any other register as the Registrar may prescribe.

Contents of Register in the LIMS- S .20

(a) names and addresses of the parties to the transaction;
(b) description of the property
(c) location of the property
(d) survey plan of the property; and
(e) all other information that may be deemed necessary.

NB: All registers kept in the Land Registry before the commencement of the LRL shall now form part of the registers in the LIMS. (S.19 (3))

A document produced electronically from the LIMS is admissible in court provided that such document qualifies as a 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 prescribed Form 5. See S. 21 (1).

Use of Deed and Documents in Registration- SS. 9(1), 74

- Dealings in any land, sub-lease or mortgage shall be effected by deed and such deeds shall be presented for registration in duplicate copies consisting of the original and a true copy, and containing true statements of the considerations, in words and in figures, reflecting what was paid and what was received.
- For the purpose of registration, a document includes all certificates and matters endorsed on or attached to it- **S.77**

NB: Making of false statement in any particulars of the document attracts (N100,000.00) or 2 yrs imprisonment or any other non-custodial punishment- **S. 74 (8)**

Also, any person who registers false information in the book, files, register; damage, destroy, counterfeit or alter information contained in the book, files, register, or certify such counterfeited documents is liable to (N250,000.00) or 7 yrs imprisonment or any other non-custodial punishment- **S. 74 (8)**

Execution of Documents- S. 76

Every document shall be registered only if it is duly executed by all parties and shall be deemed to have been executed when –

1. For a human being, it is signed.
2. For a corporate entity, it affixes its common seal in the presence of and attested to by its clerk, secretary or other permanent officer and by a member of the board of directors, council or other governing body of the corporation;
3. For a corporation sole, it is duly signed and the official seal is affixed to it.
4. For a corporation not required by law to have a common seal, if signed by persons authorized, or by two or more persons duly appointed for that purpose.
5. For a POA, it is signed in accordance with the law or as the registra may deem fit.
6. For a document executed outside Nigeria, it is endorsed or has attached to it a certificate indicating that it has been signed in the presence of a Nigerian or foreign Judge, Magistrate, Justice of the Peace, Notary Public or any Consul- **S. 76(2)**
7. Where a grantor is an illiterate, it is executed by such illiterate grantor(s) in the presence of a Magistrate, Justice of the Peace, Notary Public or Commissioner for Oaths and is attested to by such persons- **S. 76(3)**

6. COMPLETE THE FORMS RELATING TO PROPERTY TRANSACTIONS IN LAGOS

LLRL----TO SEC Caution Withdrawal

Form 1- TITLES: Application for Registration of Titles to Land- **S. 26 (1)**
Form 2- OCCUPANCY: Application for Registration of Land Covered by deed/ C of O
Form 3- SEARCH: Application for Search at Limes- **S.22 (1) (2)**
Form 4- ELECTRONIC SEARCH REPORT: Lagos State Land Registry Electronic Search Report- **S. 22 (4)**
Form 5- CTC: Application for Obtaining CTC of documents- **S. 23 (1)**
Form 6- CAUTION: Application for Registration of Caution- **S. 69 (1)**
Form 7- WITHDRAWAL: Application for Withdrawal of Caution- **S. 69 (9)**

NOTABLES

S. 17 established the **Land Information Management System (LIMS)** in the Land Registry.

Disposition of Family Land/Issues of Land Grabbers- SS 89-93

This law tries to curb embarrassment and exploitation of land purchasers and developers (particularly for family lands) by making provisions for appointment of family representatives.

Registration of Family Representatives and the Effect: There shall be appointed not more than 10 representatives, who shall have the authority to act on behalf of the family with respect to family lands. Registration confers on such representatives the exclusive right of dealing with

Comment [C91]: 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 not 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 objections if any.
Where no objection 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 the representatives in the register unless he has received a RETRACTION of the objection or a court order directing him (the registrar) to enter the names of the representatives in the register.
The Registrar shall not entertain any application for registration of a disposition of family property where the number of representatives 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 amendment to the register of family representatives
(a) The registrar shall delete the 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
(b)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.
(c) On the application of a family member, the Registrar may insert additional family representatives where it consists of less than ten (10) members;
(d) On receipt of a CTC of a court order to that effect, the Registrar shall delete or add insert additional family representatives to the register.
(e) Addition or removal of the name of a family representative from the register shall not limit the powers of the remaining family representatives to act on behalf of the family
(f) A sole representative duly appointed shall have powers to act for the family.

the family land, provided they exercise the powers as the customs demand, for the collective interest, and on behalf of the family. Though, a bonafide third party is protected if the representatives did not comply with the requirement of custom.
Every transaction over the land must be executed by all the representatives as contained in the register, otherwise, the transaction will be invalid- **SS. 89 (1)(5), 91, 92.**

Mode of Appointment: The appointment shall not be registered until after twenty-one (21) days following the publication of a notice of the appointment in a national newspaper and resolution of objections (if any) against the appointment of any representative- **S. 89 (2-4)**

Amendment of Register of Family Rep and/or Removal/Replacement- S. 90 (1-5).
It can be made as a result of:

a. Proof of Death.
b. Proof of inability to act arising from mental or physical incapacity, absence or imprisonment.
c. Notification to the Registrar, if a person wishes not to continue to act as a family representative.
d. For appointment of additional representative, if the representatives are less than 10.
e. By order of the court and on presentation of the CTC of such court order.

- The replacement can be made on application in writing by a family member or by the order of court and on presentation of the CTC of such court order.

Rectification/Amendment/Correction of Errors in the Registers (registers in the registry)- **SS. 96-100**: Can be made with the consent of all the persons affected, upon application of a registered owner or owners of interests. To effect 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 are where:

a. The Court decides that a person other than the registered holder is entitled to an interest in the registered land,
b. The Court orders the rectification,
c. All affected persons consent to it,
d. Two or more persons are mistakenly registered as an owner of the same land,
e. For any other justifiable reasons of error or omission
f. Any person acquires land through concealment of registration or consolidation of mortgages under **SS. 11 & 51** respectively.
g. Title of a registered holder has extinguished under limitation law.(in this case he is not entitled to compensation)
h. It is meant to give effect to overriding interest.

- A RECTIFICATION giving effect to overriding interest, which may affect the interest of a registered owner in possession can only be made where- **S. 99 (3)(6)**

a. The registered owner or his privy contributed to the fraud, mistake,or omission necessitating the rectification,
b. the immediate disposition to him was void, or the disposition to any person through whom he claims otherwise than for valuable consideration was void
c. It is based on just and equitable grounds
d. The court orders the rectification

Registration of documents (See Ss. 6, 7, 26, 27)

(1)The time for application for registration should be **within sixty (60) days after the grant of Governor's consent, where applicable (NB: Where it is a sub-lease or mortgage, it must be presented for registration not later than 6 MONTHS from the date of consent)**

(2)The prescribed Forms for registration of interests covered by Certificate of Occupancy or Deeds are contained in Forms1 and 2 in Schedule 1 of the Law

(3)The Registrar shall not register any assignment or sublease unless the land has been surveyed to the satisfaction of the office of the Surveyor-General (S. 101).

(4)Interests, Lands, Transactions and Documents requiring registration include:

- Documents of grants, subleases (excluding a sublease below three years), and all Power of Attorney;
- Any succession to land under will or Intestacy, on production of the Grant of Probate or letters of Administration; see also section 31 (b)
- 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.
- Trusts, rights or interests acquired by operation of law and overriding interests –S.31
- 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 Certificate for endorsement, as required under section 36 (1) of the Law, is unnecessary – S. 36 (3).
- 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.
- Judgment or writ of execution issued by any court in respect of any land, sublease, or mortgage in Lagos State. Note that the Registrar 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.
- Subject to obtaining Governor's consent, Certificate of Purchase is issued to a purchaser pursuant to the provisions of the Sheriff & Civil Process Law –S.61.

Comment [C92]: Documents that Must be Registered

1.Every transfer, grants of sub-leases(excluding those below 3.yrs), mortgages and POA (affecting interests in land), provided the consent of the governor is obtained- **SS. 7, 8, 26, 42, 49, 57, 62, 63**.

2.Any succession to land under wills or intestacy, upon the production of grant of probate or letters of administration- **S. 31**

3.Trusts, rights or interests acquired by the operation of law- **S. 31**

4.Purchase of a Mortgage property after foreclosure or in exercise of the mortgagee's power of sale- **S. 36**

5.Mortgages created by a holder of land, sublease or mortgage- **S.49**

6.Judgment or writ of execution issued by courts in respect of any land, sub-lease or mortgage- **SS. 58, 59**

7.Subject to obtaining consent, certificate of purchase issued to a purchaser pursuant to the provisions of sheriffs and civil process law- **S. 61**

8.Deed of assent or vesting deed from an executor to a beneficiary (it does not require Gov.'s consent) - **S. 81 (2)**

Documents that Cannot be Registered

1.Any document; such as deed of lease, mortgage, POA that has not received governor's consent- **SS. 7, 8, 26, 42, 49, 57, 62, 63**

2.Tenancy below 3yrs-**S. 26(2)**

3.Any document unaccompanied by a survey plan showing the size and delineation of the land-**S. 12(3)**

4.Any document that is required by law to be stamped, which has not been stamped or exempted from being stamped- **S. 77.**

5.Any document that is not duly executed as required by **S. 76.**

- Every transfer of land, sublease or mortgage by Deed. Transaction is not complete until registered. Note that no transfer of part of a registered land shall be allowed unless the holder has first subdivided the land, after which the new interest shall then be registered. See Ss.62 and 63
- Registration of "Restrictions" ---- registration of restrictions is done for the purpose of protecting unregistered interests in land or mortgage created before or after registration, by prohibiting subsequent registration of any disposition or change of holding affecting the land or mortgage. SeeS.64
- Registration of CAUTION/CAVEAT – A person having an 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 register a CAUTION to the effect that he (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 to respond within 14 days, the Registrar may go ahead with registration

(5)Registration of any interest shall be sufficient evidence of holding such interest on 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 impressed upon the document or documents evidencing such grant or sublease, such documents 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 complied with by the person who has the authority to present the same for registration.

In other words, once the Registrar has issued a notice to the person having the authority to present a registrable document for registration, any registration and other relevant fees payable in respect of such document would become due and payable whether or not such documents 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 subleases and mortgages.

(7) Refusal of Registration— The Registrar may refuse registration in any of the following (s 7 and s.9):

- Power of Attorney relating to transfer of land on which the consent of the Governor has not been endorsed;
- Documents declared void or in respect of which registration is prohibited under the Law; and
- Document that has not complied with the provisions of the Law.

(8) Evidence of registration: Every document registered shall be sealed and marked by the registrar as evidence of such registration. See sections 6 and 11.

(9) Effect of Registration/Non Registration

- 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– s. 6, 24, 30, 108 and 109 (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 – Section30 (over taken by **BENJAMIN V KALIO (2018)**
- Late registration attracts fine –Section28 (d)Registration governs priority –Section29
- Transaction remains inchoate – i.e., no interest is transferred or created) unless and until the relevant document is registered –Section40
- 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 (Section108).

(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 a Land Certificate, which shall be a prima facie evidence of matters contained in it – 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 (Section109)

(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 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

Forms & execution of registrable documents

(a) Forms of documents (S.74)

1. Any document 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:

- Making of false statements in a registrable document,
- Destruction or counterfeiting of register, book, filed document or part of it,

(b) Form of execution of documents

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)]:

1. If signed by a natural person

2. In the case of a corporation aggregate, if sealed with the seal of a corporation and attested to by its clerk, secretary, director or other officer;

3. In the case of a corporation sole, if signed and the official seal affixed;

4. In the case of a corporation not required 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 required 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 purposes 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)]

Comment [C93]:
1. A document executed outside Nigeria shall not be registered unless it has attached to it a certificate showing that it was attested to by a Nigerian or foreign judge, magistrate, Justice of the Peace or notary public
2. Where a grantor is an illiterate, the document of transfer must be attested to by a judge, magistrate, Justice of the Peace, Notary Public or Commissioner for Oaths.

Miscellaneous

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

(a) Inspection of the register of title or of a certified true copy of an 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 disputes under the LRL [ss. 103, 104, 105, 106, 107, 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. But note that the Magistrates' 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 anyone 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 title 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 twenty (20) years and in any other case, after a period of twelve (12) years. After the expiration of the period (20 or 12 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.

Comment [C94]:
5. Immunity of Officers of the Lands Registry – Officers in the lands registry and other officers engaged for the purpose of the Law are immune from civil action for acts or omissions made in good faith and in exercise of their statutory powers (S.117)
6. For offences and penalties, seeS.199.
7. 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 Instruments Registration Law, Lagos Cap L58 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. Meanwhile, note that by virtue of the provision of section 121, any reference to any title made under the Registration of Titles Law Cap R1, Laws of Lagos State 2003, Land Instruments Registration Law, Lagos Cap L58 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 shall be applicable under the LRL.

POSSIBLE MULTIPLE CHOICE QUESTIONS ON THIS TOPIC

1. The land registry is headed by a legal practitioner of ____ years post call experience

A. 10

B. 8

C. 12

D. 15

2. The registry division is headed by a legal practitioner of __ years post call experience

A. 8

B. 10

C. 15

D. 12

3. The holder of land may create a sublease for a fixed term and such must be registered where the term is _____ subject to obtaining of Governor's consent

A. 5 years and above

B. 6 years and above

C. 3 years and above

D. Above 3 years

4. For a document creating a sublease, that is to commence on a future date, not to be void, such future date shall not exceed ___ days from the date of creation of the sublease

A. 60

B. 21

C. 14

D. 30

5. Where the terms and conditions in any sublease is varied, ____is when the documents so varied shall be submitted for registration

A. Before the expiration of the current sublease

B. After the expiration of the current sublease

C. At anytime within 21 days after the expiration of the current sublease

D. All of the above

6. Governor's consent and registration are mandatory for _____

A. Irrevocable power of attorney

B. Revocable power of attorney

C. A and B

D. Irrevocable power of attorney relating to land

7. Where all the conditions precedent are satisfied, the registrar is to register the registrable document within ____

A. 21 days

B. 21 hours

C. 24 hours

D. 24 days

8. Application for search is as in Form ___

A. 4

B. 3

C. 5

D. 2

9. Search report is as in Form ____

A. 4

B. 3

C. 5

D. 2

10. ____ contains the names of all the land holders in the state

A. Day list

B. Nominal index

C. Register of transaction

D. Mutation record

11. All applications to the registry shall be recorded in the ___ and numbered consecutively

A. Day list

B. Nominal index

C. Register of transactions

D. Mutation record

12. _____ contains changes made by the registrar of titles to the land registry map

A. Day list

B. Nominal index

C. Land registry map

D. Mutation record

13. The following but one are the registers to be kept by the registry for the purpose of registration by LIMS

A. Day list

B. Register of mortgages

C. Register of caution

D. Register of caveats

14. The maximum number of family representatives to be registered by the registrar is ___

A. 10

B. 8

C. 12

D. No limit

15. Appointed family representatives should have their appointment published in at least ___ national newspaper (s), calling for objections within ___ days from the date of such publication

A. 2/21

B. 1/21

C. 3/20

D. 1/24

16. Application for obtaining CTC of documents is as in LRL Form ___

A. 1

B. 2

C. 5

D. 7

17. Application for registration of titles to land is as in LRL Form ___

A. 1

B. 2

C. 5

D. 7

18. Application for registration of land covered by deed/certificate of occupancy is as in LRL Form ___

A. 2

B. 1

C. 5

D. 7

19. Application for withdrawal of caution is as in LRL Form ___

A. 2

B. 6

C. 7

D. 5

20. Application for registration of caution is as in LRL Form ___

A. 2

B. 6

C. 7

D. 5

21. There shall be no registration of any assignment or sublease unless the land has been surveyed to the satisfaction of the office of the ___

A. Surveyor-General

B. Registrar-General

C. Director-General

D. Governor

22. Where a cautioner is served with notice of an application in relation to the caution, he is to respond within ___ days otherwise the registrar may go ahead with the registration

A. 21

B. 14

C. 7

D. 28

23. Registration is mandatory in the case of any grant or sublease of state land that exceeds ___ year (s)

A. 3

B. 5

C. 8

D. 1

24. Any person upon whom a notice to register a registrable document is given must comply within ___ of service of the notice

A. 30 days

B. 1month

C. 6 months

D. 3 months

25. Every mortgage or sublease must be registered within ___ from the date on which consent is given to such transaction

A. 30 days

B. 1month

C. 6 months

D. 2 months

26. Acquisition of title by adverse possession may be acquired against the state after a period of ____ years and in any other case, after a period of ___ years

A. 12/20

B. 12/12

C. 20/12

D. 20/20

27. The ____ shall make rules of practice and procedure to regulate proceedings before the registrar and appeals from decisions of the registrar

A. Commissioner

B. Chief Judge of Lagos State

C. Chief Magistrate in Lagos State

D. Chief Registrar

28. Pending when the authority to make the rules as in 27 above exercises such power, the ____ shall apply

A. High Court of Lagos State (Civil Procedure) Rules

B. Magistrate Court Rules

C. Practice Directions

D. All of the above

29. The ____ is empowered to make regulations in respect of incidental matters

A. Chief Registrar

B. Chief Judge of Lagos State

C. Chief Magistrate

D. Commissioners

30. Any person aggrieved by the decision of the registry may give notice of appeal to the ___

A. Registrar at the land registry

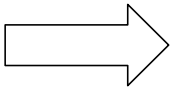
B. Registrar of the High Court

C. Registrar of the Magistrate Court

D. All of the above

ANSWERS

1. A
2. A
3. A
4. B
5. A
6. D
7. C
8. B
9. A
10. B
11. A
12. D
13. D
14. A
15. B
16. C
17. A
18. A
19. C
20. B
21. A
22. B
23. B
24. B
25. C
26. C
27. B
28. B
29. D
30. A



8. WILLS AND CODICILS

WILLS AND CODICILS 1

1. EXPLAIN THE MEANING OF A WILL INCLUDING CODICIL

Ordinarily, a Will can be defined as the intention or wishes of a person which is carried out after his/her death. This is not the definition under statutory law.

A statutory definition of a Will is that **it is a testamentary document or instrument voluntarily made and executed according to law by a testator** with **testamentary capacity (**sound disposing mind) wherein he **disposes of his properties** and gives further instructions to be carried out as he deem fit.

In **OKELOLA V. BOYLE**, the Supreme Court defined a Will as a document by which a person makes a disposition of his property to take effect after his death. Therefore, a testamentary document comes to life at the death of the testator **(the opposite of a will, is a deed of gift inter vivos)**

A codicil is otherwise known as a miniature or supplemental Will attached to a previous valid Will. For there to be a codicil, there must be an **earlier** Will.

Note that all the formalities for a Will to be valid apply to a codicil. The testator must possess the testamentary capacity and the codicil must be executed by the testator in the presence of two witnesses who must be present at the same time and who shall attest to the codicil. **There could be a Will without codicil but the can never be a codicil without a Will**

Features of a will

1. **It must be in writing** (except Privileged and Nuncupative will)
2. **It must be executed in accordance** with the applicable law
3. **It is testamentary** - that is a will takes effect after the death of the testator
4. **It is ambulatory** - it can be revoked at any time before the death of the testator
5. **It is made voluntarily** - made without force or coercion
6. **The testator must have a testamentary capacity**
7. **It must dispose of a gift for it to be valid-** A document to qualify as a will must contain at least a dispository provision.
8. **It identifies the property and names the beneficiaries of the gifts in the will.**

Comment [C95]: A Codicil is an attachment or addition of a Will. It is dependent on the existence of a Will. Where there is a codicil to a Will, the Will cannot be read in full without the codicil. The codicil does any of the following to a Will:
- It can revoke it,
- It adds to it or . alters it,
- It revives it,
- republish a Will.

Everything applicable to the validity of a Will is applicable to it.

Comment [C96]: Terms used in a will
- Testator(s) - a male who makes a valid will
- Testatrix/Testatrices - a female who makes a valid will
- Testate - a person that died leaving a will
- Intestate - a person that died without leaving a will
- Beneficiary- Is a person who benefited from the gift given from the will made.
- Executors - Persons appointed by the testator to manage the property after his death
- Executrix/Executrices- female persons appointed by the testator to manage the property
- Administrators: persons appointed by the court to administer estate. Administrator administers the intestate estate.

Comment [C97]:
Laws applicable to will
1.The Wills Act 1837
2.The Wills Act (Amendment) Act 1852
3.The Wills Law of the various States in Nigeria (Wills Law of Lagos State is our concern)
4.Administration of Estates Laws of the various states
5.Evidence Act
6.Marriage Act
7.Armed Forces Act
8.High Court (Civil Procedure) Rules of the Various States (Lagos State is our concern)
9.Common law principles and the Principles of Equity
10.Case laws/Judicial Precedents
11.CFRN 1999 (as amended)
12.Legal Practitioners Act (by section 22(4)(e) LPA, non-lawyers can draft Wills)
13.Rules of Professional Conduct.

2. STATE TYPES OF WILLS

1. **Formal/Statutory Will**: these are wills made under the relevant applicable legislation. That is in accordance with the provisions of the Wills Act 1837 or the relevant Wills law of the testator's state.
2. **Nuncupative Will**: this is also known as customary will and it is the oral directives by a person in anticipation of imminent death as to the disposition of his property. There are certain conditions to be fulfilled before there can be a valid nuncupative will:
    - The directives must be made **in presence of at least two credible witnesses.**
    - The directives was voluntarily made
    - The testator must have testamentary intention and sound mind.
    - The properties and beneficiaries must be specifically named and described so as to be ascertainable and identifiable---**AYINKE V. IBIDUNMI**
3. **Mutual or Reciprocal will**: this is a will made by two persons.
4. **Privileged Will**: this is the will exempted from compliance with the strict conditions of a valid will and it is made by certain named categories of persons of which do not necessarily need to comply with the provisions of the Wills Act or Law before it can be valid. That is a will made by service men like soldiers; mariners and crew members of a commercial airline or ship--**S.11 WILLS ACT; S. 6 WILLS LAW LAGOS; S. 276 ARMED FORCES ACT**

    Features of a privileged will under S. 276 AFA----WEAP

    a. **WRITING:** It must be in writing
    b. **EXECUTION:** It must be executed by at least one witness who must be a fellow senior military officer
    c. **ACTIVE MILITARY SERVICE:** It must be made by a military officer in active military service
    d. **PERSONAL PROPERTY:** It must relate to personal property

    Features of a privileged will under S. 6 Wills Law Lagos

    a. It must be in writing
    b. It applies to seamen at sea(mariners—does not apply to navy officers) and crew of commercial airlines
    c. It does not matter that they are not up to 18 years

Comment [C98]: The **features of a statutory will are**:
- It must be in writing pursuant to **section 9 Wills Act 1837**: Any form of language will suffice. It can be holographic in nature (handwritten) or typed.
- It must be duly executed by the testator in the presence of at least two witnesses at the same time.
- It must be attested by at least 2 witnesses in the presence of the testator
- The testator must have testamentary capacity and intention
- The testator is of statutory age. (18 in Lagos, 21 under the Wills Act). See **Section 3 Wills Law Lagos, Okelola v Boyle**

Comment [C99]: It is common among husband and wife when each leaves their property to the other on the condition that the second to die will leave all their estate including that of the first to die to an agreed 3rd party e.g. their child. The disposition may be done by one will or it may be done by separate wills. Mutual wills are not revocable, except with the agreement of the other party.

Features of a privileged will under the proviso to S. 7 Wills Act

a. It applies to soldiers in active military service, navy officers and seamen at sea (it does not apply to crew members of commercial airplane)

NB:

- If there is a conflict between the AFA and WA, the AFA will prevail
- A military man in active military service who made a privileged will outside Lagos, the AFA will apply (not the WA)
- For wills made by crew members of commercial airline outside Lagos, it will not amount to privileged will.

5. **Holographic Will**: this is a form of statutory will usually handwritten by the testator. In other words, it is made by the testator alone without witness.

3. EXPLAIN THE REASONS (ADVANTAGES) FOR MAKING A WILL

The following are the Rationale/Reasons/Advantages of making a Will:

1. A Will displaces the application of customary rules of inheritance, subject to the rule in **IDEHEN V. IDEHEN**
2. A Will displaces the application of the rules of statutory devolution---**COLE V COLE**
3. The testator has the satisfaction (a sense of fulfillment of having ordered his affairs before his death).
4. The testator has the satisfaction of benefitting those he loved or owed a duty of care. In this like, he can benefit persons not being his family members---**JOHNSON V. MAJA**
5. The testator has the benefit of appointing people he trusted as his executors. These people ensure that his will is respected.
6. Where he has infant children, he is able to appoint for them a guardian
7. Executors' power of execution arises immediately upon the death of the testator, even before the grant of probate; they can begin to take steps and act with respect to the execution and not contingent on the will being proved. This is because the power comes from the will to be executed **provided** that they apply for probate within the prescribed time. While for a man who dies intestate, the administrator derives his authority from the letters of administration and so does not begin to take steps or act unless and until the grant of the letter of administration--**OJUKWU V. KAINE**

Comment [C100]: For instance, **s. 49 Administration of Estate Law**, Laws of Lagos state and **section 39 of the Marriage Act.**

8. It gives the testator the opportunity of making specialty gifts or donations. E.g. Charity.
9. The testator is given the opportunity to give his funeral directives though this is not advisable because if left in the will, the testator might have been buried before such is discovered. This is so because **7 days (14 days in some jurisdictions)** must have passed before carrying the wills directives into effect. Funeral directives therefore should be in separate documents or letter enclosed in an envelope and kept with a younger relative of the testator and it should be produced when the time is due.
10. There is continuity in administration of an estate covered by Will- Upon the death of the last of those issued a grant or letters of administration, a fresh grant has to be applied for and obtained. Whereas by transmission, the executors of the will of the last surviving executor, could complete the winding up of the estate of a testator (no interruption in administration).
11. The administration of a testate estate is cheaper than the administration of an intestate estate. It reduces the costs involved in applying for grant of letters of administration and it also reduces the Inheritance Tax Liability where substantial assets are involved.
12. Opportunity of expressing personal opinion and feelings
13. Making of a will saves time, energy and reduces friction among beneficiaries
14. Used to guarantee business interest or sustain investments of the testator.

The reasons why people do not like making Wills are:

1. The belief that making a will can cause chaos among their children.
2. The disbelief in the Nigerian legal system of administration of estate.
3. The clash between customs/culture and wills. Example is Idi-Ogbe custom in Benin City.
4. Ignorance: people think that it is expensive or that it brings the reality of death to them
5. To avoid conflict between the beneficiaries and other persons interested after the testator's death.

4. EXPLAIN THE PRINCIPLE OF DUE EXECUTION OF A WILL

There are three (3) ways of execution of a will so as to comply with the provisions of the statutes. Execution can be done by the testator in three (3) alternatives.

1. **Personal execution by a testator:** a testator can sign the will in the presence of at least two witnesses who are present at the same time and the witnesses attest and subscribe to the will

(by signing) in the presence of the testator but not necessarily in the presence of the other witness(s).

2. **Execution by delegation**: the testator can authorize another person to sign the will on his behalf and in his name, in his presence and that of at least two witnesses; the witnesses to be present at the same time; the witnesses attest to the will in presence of other witness(s). The following conditions must be met:
   a. The appointed delegate must sign the will in the presence of at least three (3) persons who are the testator and at least two credible adult witnesses
   b. The witnesses must all be present at the same time during the time of execution.
   c. The witnesses must thereafter attest to the will in the presence of the testator but NOT necessarily in each other's presence (or in the presence of the delegate)---**S. 9 WILLS ACT, S. 4 WILLS LAW, ONWUDINJO V ONWUDINJO; APATIRA V AKANDE; GROFFMAN V GROFFMAN.**
3. **Testator pre-signing the will (acknowledge signature):** the testator had already signed the will earlier in the absence of the witnesses, he **must acknowledge his signature** in the presence of **at least two credible adult witnesses** with the witnesses **being present at the same time** during the acknowledgment and the witnesses attesting to/subscribe to the will in the presence of the testator **but not necessarily in the presence of other witness**. Therefore:
   a. For it to be valid acknowledgement, he must draw the attention of the witnesses to the signature and not merely asking the witnesses to sign or attest 'that paper'---**RE RAWLINS.**
   b. The witnesses must both attest to the signature in the presence of the testator at the same time
   c. Attestation not necessarily in each other's presence.

5. EXPLAIN THE EFFECT OF BEING A WITNESS IN A WILL

When a testator is to choose witnesses to attest he should consider the following:

1. **Person of good health:** a blind person cannot be a witness to a will even though he can validly make a will with blind person jurat.
2. **Not a beneficiary or the spouse of the beneficiary:** it is better that a beneficiary or the beneficiary's spouse is not made a witness to the will. This is because of the rule that says

Comment [C101]:
The following conditions must be met for this form of execution to be valid:
a.It must be **signed** by the testator first **in the presence** of **at least two credible adult witnesses**.
b.The two or more witnesses **must be present at the same time** when the testator is executing the will.
c.Each of the witnesses must thereafter subscribe to/attest to/sign the execution in the presence of the testator.
d.The witnesses need not sign in each other's presence.

Comment [C102]:
Section 9 Wills Act and s. 4 of Statutes of Fraud and S. 4 (1) of Wills Law of Lagos provide for the requirement for an execution of a will as follows- No Will shall be valid unless:
a.It is in writing
b.It is signed by the testator or signed in his name by some other persons in his presence and by his directions
c.The testator makes or acknowledges the signature in the presence of at least two witnesses present at the same time
d.The witnesses attest and subscribe the will in the presence of the testator.

Comment [C103]:
From the foregoing, an essential requirement of a statutory or formal will is that it must be in writing and executed in accordance with the law. For a will to be valid as a will, it must be executed:
- The testator's signature may be made in any way, provided there is an intention to execute his will, it can be his thumb print, initials, stamp, name, a mark. A will is properly signed by the testator by affixing his thumbprint or impression or by simply making a cross indicating an intention to be bound--**ADEBAJO V ADEBAJO; EGENTI V EGENTI**
- A will does not need to be sealed. A will sealed but not SIGNED, is void.

Comment [C104]: TAKE NOTE that there is no need for Illiterate Jurat where an illiterate witnesses a will. Note however that although the witnesses need not know the content of the will, they must at least know that they are called to attest to the signature of the testator's will as held in RE RAWLINS. For a blind person, he cannot be a witness to a will. **See In Re Gibson.**

where a beneficiary or a spouse of a beneficiary attest to a will, he will lose his benefit under the will---**S. 15 WILLS ACT, S. 8 WILLS LAW (LAGOS).** Where a lawyer allows a beneficiary or his spouse to attest to a Will, without properly advising the testator of the effect of that, the lawyer can be sued for professional negligence----**ROSS V. CAUNTERS; RE POOLEY**.

However, **there are exceptions to the above rule of witness beneficiaries and spouse**:---**CPS BOATS**

i. **CODICIL:** Where the gift to the beneficiary is subsequently confirmed in a codicil which is not attested by the particular witness---**RE MARCUS**
ii. **PRIVILEDGED WILL:** Where the Will is a Privileged Will: the will would be valid despite its non-compliance with the provisions of the Act or Wills Law---**RE LIMMOND**
iii. **SETTLEMENT OF DEBT:** Where the gift was made in settlement of debt owed by the testator.
iv. **BEFORE MARRIAGE:** Where the spouse of the beneficiary attested to the will before marrying the beneficiary---**APLIN V. STONE**
v. **OTHER WITNESSES:** Where there are other witnesses apart from the beneficiary or spouse of the beneficiary.
vi. **AGREEMENT WITH WILL'S CONTENT:** Where the witness merely signed as agreeing with the content of a will and not as a witness---**IN THE GOODS OF BRAVDA**
vii. **TRUSTEE:** Where the beneficiary signed as a trustee and not as witness---**CRESSWELL V. CRESSWELL**
viii. **SECRET TRUST:** Where the gift is given in capacity of a trustee: The rule does not apply to a secret trust. That is, where the testator leaves the gift to the benefitting witness not directly under the Will, but as a beneficiary to a secret trust created under the Will, even if the beneficiary under the secret trust attests to the Will, his gift will not be void because he takes under the trust and not under the Will---**RE YOUNG**

3. **Person younger than testator:** Another factor to be considered by a testator is the age of the witness. Younger persons are to be chosen and not older ones. **An infant can only attest to a will if there is more than one adult witness---EGENTI V EGENTI**

4. **Credible and trustworthy persons**
5. **Person likely to be available to give evidence in court.**

6. EXPLAIN CAPACITY OF A TESTATOR TO MAKE A VALID WILL

There are **three ARMs to testamentary capacity** namely:

- Age
- Restriction imposed by customary and Islamic laws (presence or absence of such)
- Mental capacity

1. Age: Only an adult who has attained **the age of 21 years** under **s. 24 of Wills Act** and an adult who has attained **the age of 18 years** under **s. 3 of Wills Law of Lagos state** can make a valid will. Persons who are under 21 years (Wills Act) and 18 years (Wills Law of Lagos) cannot make a valid will. Every adult with a sound disposing mind and memory can make a will---**APATIRA V AKANDE.** This includes sick people; old persons; blind persons, illiterates, Christian, Muslim or Pagans. Therefore:

- A blind person has capacity to make a will but is incompetent to attest to a will, the will of a blind person must be read over and explained to him and must be attested to in the presence of a Magistrate/Notary Public/Commissioner for Oaths--**INSTIFUL V CHRISTAIN**
- An illiterate person has capacity to make a will and is competent to attest to a will. However, an illiterate jurat must be contained in the will that it has been read over and explained to him in the language he understands and must be attested to in the presence of a Magistrate/Notary Public/Commissioner for Oaths---**INSTIFUL V. CHRISTIAN**

2. Restriction: Under Islamic law, a testator has no full testamentary capacity as he can only dispose of one-third (1/3) of all his property to persons who are not his heirs while two-third (2/3) will be distributed to his heirs in accordance with Islamic law applicable in the state---**AJIBAIYE V AJIBAIYE (where one is subject to Islamic law, half of his property can be disposed of by will and the remaining, in accordance with Islamic law). Under customary law—see IDEHEN V. IDEHEN**

Conditions

- Testator must be subject to Islamic/customary law
- Wills Act/law governing the place must have permitted the will to be governed by Islamic/customary laws of the testator

3. Mental Capacity: a testator must have the mental capacity before his will can be valid. A person is said to have mental capacity to make a will **WHEN HE HAS A SOUND DISPOSING MIND AT THE TIME HE GAVE INSTRUCTIONS AND AT THE TIME HE EXECUTED THE WILL**. This means the testator must have mental capacity to make a will-

- **at the time of issuing instructions and**
- **at the time of executing the will**

Thus, as a general rule, where the testator possesses mental capacity at the time of giving instructions but loses the mental capacity at the time of executing the will, it will be declared invalid----**OKELOLA V BOYLE**

However as an exception, where a testator has sound disposing mind at the time of giving instructions but later loses it at the time of executing the will, such will may still be declared valid and admitted to probate **if the following conditions are satisfied as laid down in PARKER V FELTGATE:----Give LIFE (AIDS)**

1. **GIVING OUT INSTRUCTIONS:** The testator had a sound disposing mind at the time of giving out the instructions
2. **LEGAL PRACTITIONER:** That he gave out the instructions to a legal practitioner
3. **INTERMEDIARY:** That he did not give out the instruction through any intermediary except directly to the lawyer.
4. **FOLLOWED THE INSTRUCTIONS:** That the lawyer followed the instructions given religiously while drafting the will
5. **EXECUTION:** Even though he had lost mental capacity at the time of executing the will, the testator was still able to understand his act.

This situation must be distinguished from the facts of **SINGH V. AMIRCHAND** as the rule will not be available to save a will where the testator did not give his instructions directly to the solicitor but instructed the solicitor through an intermediary unless it is established that:

- **AMBIGUITY ABSENCE:** The instructions delivered to the intermediary were clear and unambiguous
- **INTERMEDIARY:** The intermediary perfectly understood the instruction
- **DELIVERY:** The intermediary honestly delivered the instructions given
- **SOLICITOR:** The solicitor also perfectly understood the instructions.

Comment [C105]:
The **test to determine the mental capacity of a testator was laid down** in **BANKS V. GOOD FELLOW**. The court in that case emphasized that the issue in determining sound disposing mind is not that the testator was suffering from an ailment but that the ailment prevented him from having mental capacity. The conditions to be satisfied by propounder of will (executors) **are laid down as follows (cumulative)**:

a.The testator must understand the nature of the act;
b.He must understand the extent of the property he is disposing of;
c.He must understand the claims on him; and
d.The manner in which the property is distributed must be rational in that no disorder of the mind has poisoned his affection or prevented the exercise of his will.

NB: The precautionary measures discussed in **RE WALKER** that in order to establish mental capacity of the testator, a legal practitioner should be made to confirm in writing the testamentary capacity of the testator. A Medical Doctor can also attest to the mental capacity of the testator and confirm the testamentary capacity of the testator.

Comment [C106]: **In respect of number 5 to clear ambiguity,** this condition is satisfied if the testator is able to recollect that he is signing the will in respect of which he has given instructions even though he is unable to understand the extent of his properties or who the beneficiaries are. In **Parker v Feltgate,** the testator had given copious instructions to her solicitor from which the will was prepared, and then subsequently went into coma. When she arose from the coma, she signed the will as provided for by **s. 9 Wills Act.** The court held it to be a valid will.

Presumption of mental capacity

As a general rule, every testator is presumed to have mental capacity to make a will and that it complies with all provisions of the law---**EGBHAREVA V ORUONGHAE; IN RANDLE.** However, such presumption is rebuttable and can only be rebutted by leading positive affirmative evidence--**CROFT V CROFT.**

Where a will is challenged, it can be resolved in the favour of the Testator---**IN THE ESTATE OF RANDLE.** Soundness of mind must therefore be distinguished from the state of bodily disease--**FAG V JOHNSON**

7. EXPLAIN HOW TO PROVE A WILL OR ESTABLISH THE VALIDITY OF A WILL

For a will to be valid, the following must be shown:---WETV

1. **WRITING:** The will being in writing
2. **EXECUTION:** The will being executed in accordance with the Law.
3. **TESTAMENTARY CAPACITY** of the testator (ARMs)
4. **VOLUNTARY:** The will being voluntarily made by the testator

The following can serve as proof of validity of will:

1. **Presumption of Regularity**: if a will appears ex facie regular in the absence of fraud, the court will presume there is due execution—**S. 168(3) EA; IZE-IYAMU V. ALONGE**

   This presumption can be rebutted by-

   - Direct evidence of attesting witnesses to negative due execution--**CROFT V CROFT**
   - Reliable positive evidence of one of the attesting witnesses---**NODDING V. ALLISTON**.
   - Evidence by anyone directly affected by any disposition in the Will, showing irregularities directly affecting the due execution of the Will.
   - Evidence of a handwriting expert showing that the execution of the Will was not done with the handwriting of the testator or some other person authorised by him to execute the Will on his behalf---**ODUTOLA V. MABOGUNJE**

2. **Presumption of affirmative evidence**: this involves evidence to show that the testator understood the will and the conduct of the testator before and after making the will OR piece of evidence to show that the will is valid. This could include evidence showing the activities of the testator before, during and after the making of the Will such as:

   - Evidence of attesting witnesses corroborating the capacity of the testator

Comment [C107]: Burden of proof
1. Legal burden of proof (onus probandi) is on the propounder. That is, the executor who takes out proceedings to obtain probate in a solemn form.
2. Evidential burden is on the challenger
3. Standard of proof in civil matters applies--which is balance of probabilities.

Comment [C108]: The validity of a Will goes to testamentary capacity and due execution. If asked to comment on the validity of a Will in exam, comment on testamentary capacity and due execution.

Comment [C109]: 1.- generally, a testator must be 21 years to be able to make a will. Section 7 Wills Act. In Lagos, the testator must be 18 years old to be able to make a will. Wills made by infants will be termed INVALID. Exception to the above is privileged will.

Comment [C110]: - the testator must not be unduly influenced. The will must be truly his. He must have knowledge of and approve of every part of the will. Duress, undue influence will render the will made invalid.

Comment [C111]: where it was held that a Will shall be ex facie regular if it is signed by the testator in the joint presence of at least two witnesses and dated. In such a case, the Will shall benefit from the presumption of regularity. It must be noted that this presumption would apply even if the attesting witnesses are unable to remember and recollect the circumstances surrounding the execution of the Will.

- Evidence of the testator wherein in the will he will state that he made the will himself and in his name
- Evidence of testator's conduct before or after the execution of the will
- Evidence of the testator's general habit and course of life--**ADEBAJO V ADEBAJO**
- Medical evidence---**BOUGHTON V KNIGHT; OKELOLA V BOYLE. Note that** where a legal practitioner cannot ascertain the mental capacity of the testator, it is important for him to involve a medical practitioner to conduct a test on the testator who will make a written record of his findings--**RE SIMPSON**
- Evidence of legal practitioner that testator has sound disposing mind---**BANKS V. GOOD FELLOW**

3. **Presumption of due execution**
4. **Presumption of sound mind**

NOTABLES

Documents incorporated into a will

A document referred to as a disposition in a will but not executed **will be incorporated as part of the will;** however, the following **three (3) conditions** must be satisfied for the disposition to be valid:

- The incorporated document must be in existence at the time of executing the will
- The will must clearly identify the document
- The will must refer to the document as already in existence.

Position of signature

In executing a will, a testator can sign anywhere in a will, however any gift coming after the signature is invalid. That is any disposition made after the signature either in time or in space will not be effective as a valid disposition. **Note that the** later dispositions after a signature will be invalid but this does not affect the validity of a will.

Comment [C112]: Signature can be made anywhere on the will unlike the position in the Wills Act 1837. See section 1 Wills Act (Amendment) Act 1852; section 4(1) Wills Law, Lagos State and the case of **In the Goods of Osborne**. Note however, that the effect of the gift or instructions that comes after the signature is said to be invalid but that does not invalidate the will.

Executing alterations in a will

Alteration can be made to a will at any time; **however** every alteration must be counter-signed **in accordance with the provisions of S. 9 WILLS ACT**. Therefore:

- The formalities for signing and attesting a will under section 9 Wills Act also applies to all alterations made in the will after execution.
- Same manner in executing a will.

- Any alteration on a will which is not signed as required above has no effect, in which case the alteration is ignored BUT THE WILL IS STILL VALID. Alterations must be counter signed.
- When an unsigned and unattested alteration causes the part altered not to be apparent to the eyes, then that part of the will is deemed revoked.
- The signature of the testator and that of the attesting witnesses may be appended near the alteration, in the margin opposite, at the foot or end of the alteration.
- It is better to make a fresh will than too much alteration on the will and counter signing.

9. IDENTIFY ETHICAL ISSUES ARISING FROM PROOF OF A WILL

Comment [C113]:
1.Must take full instructions from the testator;
2.Must take instructions in lawyer's office save for exceptions
3.Diligence and dedication;
4.Rule 19 RPC- Lawyer shall ensure that the confident and privileged information of the testator is maintained: Duty of professional secrecy and privilege (not to disclose confidential communication)
5.Duty to render honest and candid advice
6.Fiduciary duty to act bona fide, in honesty, in the best interest of the testator;
7.Duty to act within the bounds of the law, avoid fraud, sharp practices;
8.Duty to avoid conflict of interest: Rule 17 RPC- lawyer should disclose any conflict of interest in preparing a will;
9.Duty to draft to meet professional standard: Rules 14 & 16 RPC- lawyer must be devoted, dedicated and competent in preparing a will
10.Rule 20 RPC- lawyers should avoid being a witness to a will he prepared.
11.Rule 23(1) RPC- lawyer should avoid gift in the will.

Taking instructions

- Instructions should be taken in writing by the solicitor.
- The solicitor is to guide the testator as he makes his intentions known. However, avoid undue influence.
- Issues of ambiguities should be clarified by the solicitor.
- The lawyer must keep his language simple, devoid of complications.

Charging clause

Historically, the role of executors and trustees are considered as labour of love and thus not entitled to be paid for the services rendered. The position of the law is that professionals that would act as trustees and executors under a will can charge for their services by providing for a charging clause in the will. However, the fees to be charged must be reasonable. The charge of the professional therefore becomes a benefit under the will and so they too must not witness the will otherwise, they will be unable to charge or take the benefit of the charging clause---**RE BRAVADA** - ensure that the person likely to benefit from a charging clause and his spouse do not witness the will.

WILLS & CODICILS 2

1. MENTION THE TYPES/CLASSES OF GIFTS

Comment [C114]:
There are two (2) divisions of Gift. It may either be:
1.A Devise; or
2.A Legacy/Bequest
Where the Gift is of land or landed property, it is called a DEVISE and the recipient is called a DEVISEE. Where it is the Gift of personalty e.g. jewellery or box of clothes or even a car, it is called a BEQUEST or simply LEGACY and the recipient is called a LEGATEE.

FOR BAR II, USE "GIFTS" AND "I GIVE" TO BE ON THE SAFE SIDE.

There are three major classes of gifts namely:

- Specific gifts
- General gifts
- Demonstrative gifts

1. Specific gift: this is a gift which is so determined as to be easily traceable, identifiable or ascertainable. KEY: NATURE+ SOURCE+PARTICULARS. Most times the pronoun 'MY' is used. One advantage that specific gifts have over general gifts is that a specific gift cannot fail by abatement, except where the entire estate is insufficient to satisfy all the claims on it.

Specific gifts are subject to the principle of ademption. Thus, the court in construing a clause of a specific gift leans towards construing it as a general gift in order to save the gift from total failure by ademption---**Re ROSE**.

2. General gift: this is the opposite of specific legacy as it is a gift which is not easily identifiable. KEY: NATURE-SOURCE-PARTICULARS. Most times the indefinite article "A" is used. Thus, it is a gift that cannot be traced and without description.

3. Demonstrative gift: this is a gift in between specific and general gifts in that the testator directs that the gift is **to be satisfied out of a specific fund or pool of property and** the testator indicates in his will where such gift can be sourced. KEY: NATURE+SOURCE-PARTICULARS. NB: Vague particulars are no particulars. **NB: WHENEVER YOU ARE TAKING FROM A LARGER SOURCE AND YOU ARE NOT TAKING ALL, THE GIFT IS A DEMONSTRATIVE GIFT.**

Just like general gifts, a demonstrative gift cannot fail by ademption. NB: be very careful because a demonstrative gift could look very much like a general gift. Just check if a particular source is prescribed; if yes, then it is a demonstrative gift.

4. Other gifts:

There are other legacies which can either be specific, general or demonstrative. They are:

- **Pecuniary gift**: this involves gift in the form of money, whether in cash, in bank or otherwise. Monetary gifts which may either be specific, general or demonstrative.
- **Annuities**: this involves gifts made periodically. It can be general, specific or demonstrative.
- **Conditional or contingent gift**: a gift which is subject to a condition or contingency.
- **Residuary gifts**: they are remainder of the estate. Residuary gift is a directive gift in a will specifying as to how to manage or apply the remainder of the testator's gift after all the gifts in the will have been distributed to their respective beneficiaries. The **residuary gift is found in the residuary clause in a will**. The residuary clause **is a clause contained in the will that specifies how to dispose of, appropriate, manage or**

Comment [C115]:
For instance:
a.I give my house at 23, Agu, Street, Ikoyi, Lagos, to my wife
b.I give my money in GTBank Plc to my wife
c.I give my shares in Julius Berger Plc to my wife.
d.I give my Toyota Camry Reg. No. 567 Eky, Lagos to my wife.

Comment [C116]:
Example is:
a.I give a Duplex to my driver, Joe.
b.N2 Million to my wife, Mercy
c.10,000 shares in a reputable company to Sam, my cook.
d.A Toyota Camry car to my secretary, Ify.
e.A house to my second wife, Comfort.

Comment [C117]:
For instance :
•'I give one of my houses in Awolowo Road, Lagos to my eldest daughter'
•'one of my Toyota cars to be given to Wale". The source is from the testator's Toyota cars.
•A duplex along Hopewell Street, Victoria Island Lagos to my driver, Joe
•A house at Enefaa Chamberlain Estate, to my second wife.

Comment [C118]:
There are other classes of gifts which may either be specific, general or demonstrative. They include: pecuniary gift, absolute gift, alternate gift, accumulated gift, contingent gift, modal gift, residuary gift, annuity, conditional gift.
NB: IN THE EXAMS, THE ANSWERS ARE EITHER S, G, OR D, THEN YOU MAY GO AHEAD TO ADD THE OTHER CLASSES
EXAMPLE: A SPECIFIC CONDITIONAL GIFT

Comment [C119]:
Example:
a.Ten bags of rice to Obalende Motherless Babies Home, Lagos, every quarter of a year for ten years
N30 million to each of my sons every year, for twenty year

Comment [C120]:
Example:
a. N60 million to Samuel Dele of 12, Agu Str, Ikoyi, Lagos, if he becomes a medical Doctor

otherwise administer property left by the testator after the one to be distributed to beneficiaries have be given. These are gifts that remain and are not specifically given after the debts and liabilities of the debtor have been cleared and paid. The residuary gifts include the following:

a. All properties which the man forgot to include as gifts
b. All gift that failed under the will
c. Property(s) acquired by the testator after he had made the will

Effect of absence of residuary clause (This may lead to partial intestacy): Where there is a residuary clause, the residuary estate/remainder will be administered according to the clause. This in essence prevents partial intestacy. But where there is no residuary gift clause, any gift that falls into the above categories will fall into intestacy, to be administered only after a successful grant of Letter of Administration.

Thus, as a solicitor, you have duty to advice the testator to include a residuary gift clause so as to avoid partial intestacy.

2. EXPLAIN CIRCUMSTANCES UNDER WHICH GIFTS MAY FAIL

1. Presence of vitiating elements/factors (FUMiS): Vitiating elements in this regard are those that can vitiate a commercial contract. For instance fraud, undue influence, mistake and suspicious circumstances----**WINTLE V NYE; OKELOLA V BOYLE.**

- **Fraud:** a gift can fail when fraud is proved on the part of the beneficiary----**WINGROVE V WINGROVE; WILKINSON V JOUGHLIN; WINTLE V NYE.**
- **Undue influence:** this may lead to the failure of a gift in a Will---**HALL v. HALL.** This involves the interference of a third party in a testator's testamentary freedom. There is no presumption of undue influence. It is a question of fact to be proved on balance of probabilities. **In law, persuasion, no matter how strong, does not constitute undue influence. Inducement or persuasion, by whatever consideration, though it be immoral would not constitute undue influence if it does not amount to coercion that has the effect of overriding the testator's freewill and testamentary freedom--JOHNSON v MAJA** where the testator gave preference to his mistress as against his wife and the court held that immoral consideration in the case did not constitute undue influence. Onus is on the challenger to prove. This is in line with Evidence Act.
- **Mistake:** the testator may be mistaken as to the type of document he was executing so that it was not his Will at all. Also, he could be mistaken as to the content of the will, or the intended beneficiary. The person alleging mistake has the duty of proving such mistake. A gift may fail on grounds of mistake---**OKELOLA v BOYLE; HASTILOW v. STOBIE.** Mistake of law is not applicable.

Comment [C121]:
A gift in a will can be said to have failed under any of the following:
1.Presence of vitiating elements/factors
2.Ademption
3.Lapse
4.By operation of law
5.On ground of public policy/illegal purpose
6.Disclaimer by the beneficiary
7.Conditional gifts
8.Abatement
9.Uncertainty
10. Property not owned by the Testator – nemo dat quod non habet

Comment [C122]: The factors to consider where undue influence is alleged are:
- Was the will duly executed?
- Was it a free exercise of the testator's volition?
- Was the testator of sound disposing mind at the time of execution?
- Did the testator have knowledge of and approve of the contents of a will.

OKELOLA V BOYLE.

Comment [C123]:
NB: Onus is on the Propounder to prove due execution of the will and then the Challenger to show his assertion against the will---JOHNSON V. MAJA; CRAIG V. LAMOUREAUX

- **Suspicious circumstances:** they usually arise where there is a fiduciary relationship between the testator and a beneficiary. There are certain relationships which are prone to allegation of undue influence such as where the solicitor who drafts the Will is a substantial shareholder under the Will. In such cases, the court will consider that there are circumstances which may rebut any presumption of the testator's knowledge and approval of the content of the will and where sufficient evidence is not given to dispel the suspicion, the gift may fail---**WINTLE v. NYE; Re A SOLICITOR; OKELOLA v BOYLE.** Where raised, propounder must discharge the suspicion otherwise the gift will fail---**OKELOLA V BOYLE.**

2. Ademption: involves a situation where a specific gift is lost or destroyed or sold BEFORE the death of the testator. This could be due to sale of the gift by the testator in his life time; or where the gift is shares in a company and the company in testator's life time was wound-up and the testator was paid his entitlement under remainder of asset (if any). When a gift made under a Will is sold or lost or destroyed or otherwise ceases to exist in natural character prior to the testator's death, such a gift will be said to have failed by ademption.

NB: Specific gifts are subject of ademption. Summarily, instances of ademption are:

- Gift lost or sold before testator's death.
- Where the natural character of a gift has been **FUNDAMENTALLY ALTERED** or extinguished, then the gift will fail by ademption---**Re KUPYERS.** However, **A MERE CHANGE IN THE NAME OR FORM** of the gift does not adeem the gift where the subject matter is substantially the same---**Re CLIFFORD.**
- Where the gift is subject to a contract, whether completed or not. Remember that at exchange of contract, death of either party does not affect the contract. Thus, the gift will fail by ademption.
- Where the gift (land) is compulsorily acquired. If the landed property was validly acquired by the government during the life time of the testator and compensation paid to him, any gift of that property made under a Will fails by ademption and revert to the estate of the testator---**Re GALWAY.** If acquisition was invalid or if the acquisition, though valid, was done after the death of the testator, there would be no ademption and the beneficiary is entitled to the compensation---**Ss. 43 and 44 CFRN.**
- Property subject to option to purchase.

Exceptions to ademption

- Where the gift has changed in form and not in character;
- Change of name is not ademption;
- Acquisition, take-over, merger, etc, not ademption;

Comment [C124]: Fiduciary relationship: teacher/student, doctor/patient, lawyer/client, pastor/congregation.

Comment [C125]: THE PERSON WHO WANTS TO UPHOLD THE VALIDITY OF A WILL IS CALLED A PROPOUNDER.

Comment [C126]: Note that ademption relates to the gift while lapse relate to the beneficiary. Note also that there could be partial ademption. That is, where part of the gift fails by ademption.

The principle of ademption is better appreciated against the background that a will is testamentary and ambulatory document – as it speaks or takes effect upon the death of the testator and if the gift on death of the testator no longer form part of estate of testator, then such cannot be validly given out **– s. 24 Wills Act.**

Comment [C127]: In **ASHBURNER V. MACGUIVE**, the testator's gift of my £1000 East India Stock was held to be specific gift and therefore adeemed as the testator had sold the stock before his death.

Comment [C128]: Note that the principle of ademption is only applicable to specific gifts and not applicable to general gifts. Also, it has been decided in plethoral of cases that it is also not applicable to demonstrative gifts.

Comment [C129]: For instance, shares in a company and the company changes its name: section 31(6) CAMA; change of street name affecting address of devise.

Comment [C130]: **Note the following** on acquisition by government of a landed property which has been devised under a will:

1.If the landed property was validly acquired by the government during the life time of the testator and compensation paid to him, the property has adeemed.
2.If there was invalid acquisition during the life time of the testator, there would be no ademption.
3.If there was a valid acquisition after the death of the testator, there would be no ademption and the beneficiary is entitled to the compensation.

- Sub-division, consolidation of shares not ademption.

To avoid a situation where the beneficiary would go empty handed on account of the ademption of the gift made to him, it is **advisable to add a substitutional gift/substitutional gift clause**.

3. Lapses: A gift in a Will fails by lapse where the beneficiary pre-deceases the testator; or if the beneficiary is a corporate body, where it ceases to exist by winding up (liquidation) before the death of the testator. It must be noted that by **Ss. 18 WILLS LAW LAGOS and 25 WILLS ACT**, where a Will fails by lapse and there is a residuary gift clause, the gift that failed by lapse would fall into the residuary estate. If there is no residuary gift clause, then the gift so failed will fall into intestacy (partial intestacy).

Exceptions to lapse—C^2OPES^2

- **CLASS GIFT:** Where the gift is made to a class of persons, whether as joint tenants or as tenants in common, the gift so made will not fail by lapse on the death of any of the members of the class so long as one member of that class, at least, still survives---**LEE v. PAIN**
- **CHILD OF TESTATOR:** Where the beneficiary is a child of the testator and he dies leaving an issue or is survived by an issue, then a gift made to him will not fail by lapse but will go to his heir---**Re MEREDITH**; The conditions are: (i) the beneficiary is a child of the testator; (ii) the beneficiary predeceases the testator, but dies leaving an issue.
- **OFFICE:** Where the gift is made to an office, the gift will not fail if the occupant of that office predeceases the testator.
- **PRESUMPTION:** Where two or more persons have died in circumstances in which it is uncertain which survived the other, they are **presumed to have died in order of seniority--S. 164(2) EA 2011.** If the testator is **older** than the beneficiary and they **die at the same time**, it is presumed that the testator **died** first, thus the gift will not fail.
- **ENTAILED GIFT:** A gift made to be inherited by several persons in succession cannot fail by lapse. **That is, a gift made to several persons with life interest to each cannot fail by lapse.**
- **SUBSTITUTIONAL OR ALTERNATE GIFTS:** The testator can make an alternative or substitutional gift to the beneficiary's children or personal representatives in order to save the gift from failing by lapse---**DARREL v MOLESWORTH**
- **SETTLEMENT OF DEBT:** Gifts made in settlement of a debt or obligation owed by the testator will not fail by lapse even if the beneficiary predeceases the testator. It will go to the beneficiary's estate----**Re LEACH,** but not where the gift exceeds the sum owed.

4. **Operation of the law (attestation):** The law governing the making of a Will may provide that a beneficiary will not take the gift bequeathed or devised to him under certain circumstances. In such instance, the gift will be said to have failed. For instance, where

Comment [C131]: For example: *"I give my Mercedes benz C-class with registration number xx-888-yy to Joseph John of 14, Ogundare Street, Bode Thomas, Lagos or such other car as I have at the time of my death and if I have no car, then some other Mercedes benz car."*

Comment [d132]: Where the testator and the child died at the same time, it will be presumed that the older person died before the younger one pursuant to section 164(2) of Evidence Act 2011.

Comment [C133]: Note the difference between joint tenants and tenancy in common for this purpose. The gift would be deemed to have been given to the members of the class as joint tenants where there are no words of severance; example: "I give the sum of 120 million to my six children". There are no words of severance so, **the children hold as joint tenants and on the death of any of them, whether he predeceases the testator or not, the gift will fall to the other surviving members of that class absolutely under the doctrine of survivorship (JUS ACCRESCENDI)**. However, where words of severance are used ('in equal share', 'in 40 -60 share'), then the gift would be deemed to have been given to the class as tenants in common, in which case, **on the death of any member of the class, whether he predeceases the testator or not, the gift would fall to his estate or his heirs or his personal representatives.** Thus, the distinction between joint tenants and tenants in common is very important here as it determines whether the principle of jus accrescendi would apply.

Comment [C134]: gift to devoid to beneficiary and when no more, to the beneficiary's children or other person

beneficiary or a spouse of a beneficiary is witness to a Will, the position of the law is that such beneficiary or the spouse is not entitled to the gift given to him in the Will. (However, note the exceptions to this rule discussed earlier on)

5. **Public policy or illegal purpose-** Where the gift is for an illegal purpose, the gift will fail. For instance, a gift to be used for opening and operating a brothel. Also, on ground of public policy, a gift will fail. For instance if the beneficiary was responsible for the death of the testator, he cannot on the ground of public policy be entitled to such gift---**RIGGS V. PALMER; ERRIGNTON V. ERRINGTON**
6. **Disclaimer by the beneficiary:** The beneficiary can decide to disclaim the gift. This involves the beneficiary stating that he does not want the gift. The gift disclaimed will fail.
7. **Conditional gifts:** A testator can make a gift to a beneficiary subject to the fulfilling of certain condition(s). If the condition is not fulfilled, the gift will fail and will result to residuary clause.
8. **Abatement:** Failure of gift by abatement is where the testator's estate is not sufficient to satisfy the gift. **Insufficiency of estate to provide the gift. i.e insolvency of estate.** Where an estate is being wound up, the debts and obligations/liabilities of the testator is first settled. **The rule of abatement is that residuary estate abates first followed by general gifts, pecuniary gifts, demonstrative and lastly specific gifts.** This is however subject to any contrary intention of the testator as shown in the will.
9. **Uncertainty:** This is where there is uncertainty either as to the bounty gifts or beneficiaries (object). This means that the gifts or beneficiaries cannot be ascertained nor identified. Where the gifts are made to charity however, the court usually applies liberal construction and as a general rule, charitable gift will not fail for uncertainty of object.

10. Property not owned by the Testator – nemo dat quod non habet---**ASHIRU V. OLUKOYA**

Comment [C135]:
Exceptions
- •Gift made in settlement of debt----section 15 wills Act, section 8 Wills Law Lagos.
- •Beneficiary married witness after execution": apline v Stone.
- •Witness is only a trustee of the gifts.:creswell v creswell
- •Gifts is subsequently confirmed in another will, not attested to by the beneficiary in question.- Re Marcus.
- •Where there are at least two other witnesses to the will apart from the beneficiary. Section 8 Wills Law Lagos, section 15 Wills Act.
- •PRIVILEGED wills. Re Limmond
- •Where the witness is subsequently appointed solicitor to the estate and the will contains a charging clause. Re Royce.

Comment [C136]:
For instance 'I give my house at 7, Udeh Street, Ikoyi, Lagos, to my eldest daughter Chinelo if she becomes a lawyer'. If at the time of death of the testator, Chinelo is not yet a lawyer, the gift will fail.

Comment [C137]:
For example, my house at Obalende to Musa.

3. EXPLAIN HOW A WILL CAN BE REVOKED AND THE EXCEPTIONS

There are five ways by which a will can be revoked----**MADE**

1. **MARRIAGE:** By a Subsequent Valid marriage
2. **ALTERATION (S. 21 Wills Act)**
3. **DESTRUCTION**
4. **EXECUTION OF WILL, CODICIL OR A WRITTEN DECLARATION:** By duly executing a Will or Codicil. Also, by duly executing a written declaration of intention to revoke, executed in line with section 9 of the Wills Act – **s. 20, Wills act; 13 Wills Law, Lagos**

1. By a Subsequent valid Marriage

Generally, every will made by a man or a woman shall be revoked by a valid statutory marriage (marriage under the Act) celebrated in a licensed place of marriage or registry after the making of the will---**Ss. 18 WILLS ACT AND 11 WILLS LAW LAGOS.** Here, it is immaterial whether a person intends to revoke the will by marriage.

The marriage contemplated here is marriage validly contracted under the Marriage Act and not customary law marriages. This includes a voidable marriage, because voidable marriage remains valid until actually voided by a court of competent jurisdiction--**RE ROBERTS.** Thus, a voidable marriage can revoke the will

Exceptions

A Will is not revoked by the marriage of the testator or testatrix in the following instances:--- **C^3AV**

- **CUSTOMARY LAW MARRIAGE:** Where the marriage is a marriage under native law and custom (including Islamic law), it will not revoke a Will.---**RE GAY**
- **CONFIRMATION:** Where the later statutory marriage is a mere confirmation of an earlier customary marriage between the same parties---**JADESIMI V OKOTIE EBOH**
- **CONTEMPLATION OF MARRIAGE:** A Will expressed to be made in contemplation of a marriage is not revoked by the solemnization of the marriage contemplated---**RE LANGSTON**. The following conditions must be satisfied:
    a. The will must be expressed to be made in contemplation of the particular marriage
    b. The names of the parties to the marriage contemplated must be clearly stated.
    c. The marriage must actually take place after the making of the Will
    d. The marriage must take place between the same parties contemplated.
- **APPOINTMENT POWER:** Where the Will is made in exercise of power of appointment, then it will not be revoked by a subsequent marriage of the appointee---**RE PARK**
- **VOID MARRIAGE:** Where the subsequent marriage is a void marriage---**METTE v METTE**

2. Alteration in a Will – section 21 Wills Act; Order 58 r 28(2) Lagos

A Will can be altered. When a will is altered that part has to be re-executed in line with s 9 to be valid---**RE REDDING**

3. By Destruction

Ss. 13 WILLS LAW LAGOS AND 20 WILLS ACT provide that the whole or any part of the Will or codicil can be revoked by burning, tearing or otherwise destroying the same by the

Comment [C138]: otherwise it is marriage under native law and custom.

Comment [C139]: This is because marriage under customary law supports polygamy

Comment [C140]: See the Proviso to section 11(b) Wills Law Lagos and the proviso to Section 18(b) Wills Act

Comment [C141]: NB: You cannot have a valid native law and custom marriage and have a valid Act marriage, it will be void.

testator or by some person **in his presence and by his direction WITH THE INTENTION OF REVOKING THE SAME**.

From the above, there are two ways in which a testator can revoke a will by destruction:

- The testator can destroy the will himself; or
- He can direct another person in writing to destroy the will in his presence and according to his direction---**RE DADDS**

For either of the two methods of destruction, there must be two elements which are to co-exist before a will can be validly revoked by destruction

- There must be the intention to revoke by destruction; and
- Physical, complete and sufficient destruction of the Will, and not merely symbolic---**CHEESE V LOVEJOY.** NB: Revocation of a will by destruction need not be total, substantial destruction is sufficient---**PERKES V PERKES.**

NOTABLES

- Revocation of a will by destruction does not revoke a codicil to a will---**IN THE GOODS OF TURNER.**
- Where only a part of the Will is totally destroyed, only that part is deemed revoked while the other parts remain valid---**IN THE GOODS OF WOODWARD**
- Where the part destroyed is an essential part, such as the signature, or where the part remaining is meaningless without the part destroyed, the whole Will will be deemed to have been revoked---**LEONARD v. LEONARD**
- Destruction of a will in a drunken state may or may not revoke a Will. **IN THE GOODS OF BRASSINGTON**, the testator in a drunken fit tore up his Will. The court held that the destruction did not revoke the Will as the testator lacked the intention. However, if a testator after tearing up his Will in a drunken state, and when he became sober, does acts that confirm the intention to revoke the Will, there would be a valid revocation.

4. By duly executing a Will or Codicil

An earlier will made can be revoked by a subsequent will or codicil. Importantly, the intention to revoke the earlier will must be made manifestly clear. For instance a revocation clause in a later will can revoke the earlier one.

Revocation here may be by:

- **Express revocation** --- where the subsequent will or codicil contains a revocation clause --- **HENFREY V. HENFREY;** or

Comment [C142]:
For this to be valid, the following conditions must be satisfied
- Instruction to destroy must be in writing (email etc). It is enough if it is a letter signed by the testator it need not be executed.
- It must be done in the testator's presence **IN THE ESTATE OF DE KREMER**, the testator had telephoned his solicitor to say that he wished to make a new will; that the solicitor should destroy the old one. The solicitor in the absence of the testator did so. The court held that the destruction of the will did not revoke it as the will could not be revoked in the testator's absence.
- The destruction must be in accordance with the instructions of the testator.

Comment [C143]:
In **CHEESE V LOVEJOY** where the testator tried to revoke his will by crossing through part of it and writing on the back 'Revoked', then throwing it away. The maid found it among heap of old papers and produced it after the death of the testator. Even though there was intention, the court held that the physical act did not amount to sufficient destruction and the will was admitted to probate.

Comment [C144]:
The testator in a codicil gave a gift to be held under a condition stated in the will. He later revoked the will by destruction. It was held that the codicil was not revoked.

Comment [C145]:
In **HOBBS V. KNIGHT,** the testator cut away from his duly executed will, his signature. It was held that the act amounted to revocation of the will.
In **RE MORTON,** the complete scratching out of signature was also held to amount to revocation.

Comment [C146]:
S. 2 Wills Act 1837 provides that the whole or any part of a will may be revoked by another duly executed will or codicil.
NB: Revoking a will that revokes a previous will does not mean a revival of the earlier revoked will as it still stands revoked.

- **Implied revocation ---** where the subsequent will or codicil does not have a revocation clause but has provisions inconsistent with previous will or codicil --- **DEMPSEY V. LAWSON**

NB: By duly executing written declaration of intention to revoke

A letter or instrument declaring intention to revoke can validly revoke a will if such letter or instrument is duly executed in accordance with **S. 9 Wills Act**.

4. EXPLAIN THE REVIVAL AND REPUBLICATION OF A WILL

(a) Revival of a will

Revival of a will means to bring it back to life. **S. 22 WILLS ACT 1837** provides two ways by which a will or codicil can be revived provided that the will can still be found or in existence. They are:

- Re-execution in solemn form, that is with necessary formalities – in compliance with **S. 9 Wills Act;** or
- By a duly executed codicil showing an intention to revive the earlier document.

(b) Republication of a will

Republication of a will under **s. 34 Wills Act** means confirmation or affirmation of the validity and contents of a will. It can be done in **either of two (2) ways**. Either by:

- Re-execution of the will with the proper formalities that is in accordance with **S. 9 Wills Act; S. 4 Wills Law of Lagos State,** or
- A duly executed codicil containing references to the will or codicil republished

NOTABLES

A Codicil is an attachment or addition of a Will. It is supplemental to a will and it must, in creation, obey all the rules governing making of wills---**GREENWOOD V COZENS; IN THE GOODS OF CLEMENTS**

It is dependent on the existence of a Will. Where there is a codicil to a Will, the Will cannot be read in full without the codicil. A Codicil therefore:

a. Is a miniature will
b. It is executed in the manner as a will.
c. Is usually annexed to a will.

The codicil is **used (in relation to a will) for any of the following :**

- It can revoke it,

Comment [C147]: **IN THE GOODS OF DURANCE**, the testator wrote a letter to his brother to obtain his will and burn it. The letter was attested to by two witnesses. The letter was held to constitute a duly executed written declaration of intention to revoke his will. See also **THE GOODS OF GOSLING** and **RE SPRACKLARI'S ESTATE**.

Comment [C148]: For the purpose of emphasis, revival is for revoked will or codicil, while republication is for an unrevoked will or codicil.

Comment [C149]: There must be clear intention to revive the revoked will or codicil. The intention must appear on the face of the will or codicil by express words referring to a will or codicil as having been revoked and expressing the intention to revive it---**IN THE GOODS OF DAVIS.**

Comment [C150]: Republication is used for an unrevoked will or codicil. There must be clear intention to republish. In ***Re J C Taylor***, a codicil which described itself as a codicil to any will was sufficient to republish the will. Republication can be used to confirm the gift given to a beneficiary who witnessed to the will wherein he would not have otherwise benefitted under **s. 15 Wills Act**.

Comment [C151]: Note that it must refer to the Will, to which it is supplemental to by date; it must be numbered. Like a will, it is subject to same rules of failure of gifts; i.e lapse, ademption etc. Subject to same rules of construction; when admitted to probate, it becomes part of the will. Therefore, Draftsman must end it by confirming will.
Note that everything applicable to the validity of a Will is applicable to it.

- It adds to it,
- It alters it,
- It revives it,
- It republishes a Will.

CUSTODY OF WILL

A Will may be kept in any of the following places for safe custody:

1. With the Probate Registry of the High Court within the jurisdiction of the testator.
2. With the testator's solicitor who prepared it
3. With the bank
4. With a trusted younger relative or friend
5. Could be kept by the testator in his house or any other place he considers safe
6. With the executors
7. If the testator belongs to a club or association that keeps valuables for their members, a copy of the Will can be kept there.

5. IDENTIFY ETHICAL ISSUES ON GIFTS IN A WILL AND REVOCATION OF A WILL

WILLS AND CODICILS 3

1. EXPLAIN LIMITATIONS ON THE TESTATOR

Generally, under the Wills Act 1837, a testator has freedom to dispose of his property in any manner that he likes by a will as long as there is compliance with the provision of the Wills Act. In addition, the case of **BANKS V. GOODFELLOW** restated this testamentary freedom as long as there is due compliance with conditions as laid down in the case by the court.

However, the otherwise unrestricted testamentary freedom of a testator has been restricted in some part of Nigeria. These restrictions are principally in three regards namely:

a. Customary law restrictions
b. Islamic law restrictions
c. Statutory restrictions

(a) Customary law restrictions: S. 1 WILLS LAW LAGOS STATE provides that it shall be lawful for every person to bequeath or dispose of, by his will executed in accordance with the provisions of this law, all property to which he is entitled either in law or in equity at the time of his death **provided that the provisions 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.**

Comment [C152]:
By Order 58 rule 1 Lagos, any person may deposit his Will for safe custody in the Probate Registry, sealed under his own seal and the seal of the Court. By Order 58 r 15 Lagos, any person having in his possession or under his control, any paper or writing of any deceased person, being or purporting to be testamentary shall forthwith deliver the original to the probate registrar **within three (3) months from the day he got knowledge of the death of the deceased.** Failure to do so attracts a fine of #50, 000. By Order 58 r 16 Lagos, upon an ex parte application, the judge may also order such person to produce the document in court.

Comment [C153]:
Keeping the will with the testator might be disadvantageous as there is the possibility of his relatives or beneficiaries tampering with the Will when they come across it. Thus it is better to keep the will with the probate registry as safety of the will is ensured and for the purpose of granting probate to the Will as such is handled by the same probate registry of the High Court of a state.

Thus, it is better to lodge the Will at the probate registry. Even where the Will is not lodged at the probate registry, it would still be sent to the probate registry.

Comment [C154]:
ETHICAL & PROFESSIONAL RESPONSIBILITY OF A LAWYER ENGAGED OR INVOLVED IN THE PROCESS OF MAKING A WILL

1.Must take full instructions from the testator;
2.Must take instructions in his (lawyer's) office. Note the exceptions;
3.Must be meticulous so as to include all relevant properties;
4.Diligence & dedication
5.Duty of care;
6.Duty of professional secrecy & privilege (not to disclose confidential communication);
7.Duty to render honest and candid advice;
8.Fiduciary duty --- to act bona fide, in honesty, in the best interest of the client
9.Duty to act within the bounds of law – avoid fraud, sharp practices, etc
10.Duty to avoid conflict of interest --- suspicious circumstances, etc
11.Duty of honesty & transparency;
12. Duty to charge adequately, but not excessively
13.To draft the Will to professional standard;
14.To advise the client on the need for residuary clause; why a beneficiary or his spouse should not act as witness; on the options, procedure, and conditions for execution of the Will; custody of the will, testamentary restrictions, etc

S. 3(1) WILLS LAW EDO STATE provides **subject to any customary law relating thereto**, it shall be lawful for every person to devise, bequeath or dispose of, by his will executed in manner hereinafter required, all real estate and all personal estate.

Under the igi-Ogbe custom the first son takes the house of the deceased testator. If he pre deceases the testator, the next eldest surviving son of the testator will take the house. However, in **LAWAL-OSULA V. LAWAL-OSULA; IDEHEN V. IDEHEN**, it was held that the customary law restriction **is limited to certain properties bound by customary law and not the general testamentary capacity.**

A person is subject to his customary law in this regard even though he is a Christian. The Igiogbe custom does not have extra-territorial application outside Benin kingdom---**EGHAREVBA V ORUONGHAE**. Thus the Igiogbe custom only applies within Benin kingdom.

NB: The eldest son must perform the second burial ceremony called (Ukpawari) before he can inherit the house.

The following are the instances where the eldest son will not inherit the Igiogbe:

- Where the eldest son has not performed the second burial ceremony
- Where the eldest son predeceased the testator - Idehen's case
- Where the property is communally owned, thus no person can give what he does not have---**ASHIRU V. OLUKOYA**
- Where the testator lived and died in a house that is not personally owned.

(b) Islamic law restrictions: In the old case of **YINUSA V ADESUBOKAN** where a testator who was a Moslem, by his will had given out his properties strictly in accordance with the Wills Act without having regard to the provisions of Islamic law. The plaintiff - his son, had brought the declaration of the will void as it is not in accordance with Islamic law. The trial court while relying on the Maliki Moslem law declared the will void. The Federal Supreme Court found otherwise and held that the provisions of the Maliki Moslem law clearly violates the provisions of the Wills Act, 1837 under which a testator can dispose of his property(s) real or personal as he pleases.

Islam as a religion has now become a restriction on the right of a testator to dispose of his property. However, it must be an express provision of the law restricting the testamentary capacity. Thus, **S. 2 WILLS LAW OF KADUNA STATE PROVIDES (S. 4 WILLS LAW OF KWARA)** provides that it shall be lawful for every person to bequeath or dispose of by his will executed in accordance with the provision of this law, all property to which he is entitled either in law or in equity at the time of his death **provided that the provision of this law shall not apply to the will of a person who immediately before his death was subject to Islamic Law.** In **AJIBAIYE V. AJIBAIYE,** the Court of Appeal interpreted it to mean that the property must be distributed in accordance with Islamic law after the lawful heirs were identified, thus the

Comment [C155]: In Idehen's case, the court stated "subject to any customary law relating, there is only subject to any customary law affecting the property to be disposed of and not a qualification of the testator's capacity to make a will. For instance in Benin kingdom, the eldest surviving son of a **Bini man is entitled to the Igiogbe which is the house in which the deceased lived and died in.** Thus testator cannot by his will give the Igiogbe to any other person than the eldest surviving son. In the above cases, where the Igiogbe had been given to {an eldest son that had predeceased the testator (Idehen) and a wife (Lawal-Osula)} another person other than the eldest surviving son.
In the action by the eldest surviving son for declaration of the will void for being inconsistent with the Bini customary law, the Supreme Court had held the will valid except for the part bequeathing the Igiogbe to other persons. UWAIFO V UWAIFO

Comment [C156]: In Egharevba v. Oruonghae, the testator had once lived in Sapele, Delta state and built a house there. He went later to Benin city where he built a house which he had by will given the property in Delta state to his first wife for life time and on her death, his daughter. He had given the property in Benin to his first son. On grant of probate to the will, the defendant had contended that both properties are his Igiogbe and called a witness to testify in court. The plaintiff/first wife had actually sued defendant for trespass. The Court of Appeal stated that all cases on the point were decided on houses in Benin City. A Bini man having an Igiogbe outside Benin kingdom is a novel custom. It is settled that that custom is a question of fact which should be proved in cases where it has not assumed sufficient notoriety or judicially noticed. It is not enough that the evidence of an isolated case that a Bini man's Igiogbe can exist outside Benin kingdom has assumed the required notoriety. There is need for more cogent and convincing evidence that the custom of Igiogbe has extra-territorial application outside Benin kingdom.

will should just be like a reproduction of the provisions of Islamic law. One of the principles of Islam in this regard is that a **Moslem cannot by will give out more than one third (1/3) of his properties to persons other than his heirs.**

NB: A person subject to Islamic law is a person immediately before his death is subject to Islamic law. Thus, it is possible that a testator who was subject to Islamic law ceased from being subject to Islamic law immediately before his death by being a born again Christian.

(c) Statutory restrictions: This is the limitation provided by a statute. Thus, **S. 2(1) WILLS LAW LAGOS STATE (**among other Wills Law provisions) provides that where a person dies and is survived by any of the following persons

- The wife or wives or husband of the deceased
- A child of the deceased

any of these persons may apply to the court for an order on the ground that the disposition of the deceased's estate, effected by his will, **is not such to make reasonable financial provision for the applicant. This is the reasonable financial provision for dependent of the testator.**

Application to court for reasonable provision is to be done **within 6 months of grant of probate to the will---S. 3 WILLS LAW LAGOS and it is the dependants who can bring an application (For a child,** by the guardian of the Child). Reasonable financial provision would be reasoned in all the circumstances of the case for a husband or wife or wives to receive and whether or not that provision is required for his or her maintenance.

2. STATE THE NATURE OF INFORMATION REQUIRED TO PREPARE A WILL

This involves the information which a legal practitioner requires for the purpose of drafting the will. This includes the following:

1. **The Particulars of the Testator (**full names, alias if any, former names if any, religion, sex, occupation and address of the testator/testatrix);
2. **The Particulars of the intended beneficiaries (**full names and addresses of the intended beneficiaries).
3. **Particulars of the Executors (**The full names, addresses and occupation of the executors to the will): The **minimum number of executors a lawyer should get here is two for the purpose of drawing up the will. This is not a matter of law as the law requires a minimum of one,** many executors can be appointed **only that four would be granted probate** and powers will be reserved to the remaining until there is a vacancy. Grant of

Comment [C157]: A child would include adopted child who was adopted in accordance with the adoption law.

Comment [d158]: In the provisions of Wills Law of Kaduna, Abia and Oyo state, the categories of dependant are extended to the parent, brother or sister of the testator.

Comment [C159]: **Note that a legal practitioner should always have a CHECK LIST handy and instructions given by the testator should be signed by the testator.**

probate is in order of appointment. The following should be a guide in appointment of an executor.

1. Honest person - man of integrity
2. The executor should be in good health
3. Should be available to give evidence in court
4. Should be willing and capable of handling the intrigue involved in managing the estate.
5. A person who can work with other persons.

4. **Particulars of Attesting Witnesses: (**The full names, occupations and addresses of the witnesses to the will.
5. **Particulars of the Testator's Estate**: List and particulars of properties owned by the testator. Note those jointly owned and those subject to customary law.
6. **Particulars of Dependents (**such as the names and addresses of any relative or dependants of the testator in order to make financial provision for them**).**
7. **Disposition of Gifts**- who gets what; in what capacity (joint tenancy or tenancy in common)
8. **Provision as to Charging Clause**: Remuneration of executors and other professional side by side
9. **Provision as to Residuary Clause (**Details of the person(s) to be entitled to the **residuary estate)**
10. **Provision for Substitutional Gifts**; this relates to both lapse (beneficiary) and ademption (gifts).
11. **Particulars of Guardians** (Full names, occupation and addresses of the person to be appointed as guardian of infant children of the testator if necessary).
12. **Medical certificate** to show mental capacity of the testator
13. **Provision as to the Custody of the will**
14. **Funeral Expenses** (ideally funeral directives should be in separate document as probate are mostly granted after the burial of the testator).
15. **Information as to any previous will made by the testator**

NB: As a Solicitor, draft the will with precision, accuracy and effectiveness of communication and not literary content. Also, note that companies can be appointed as executors

NB: Particulars of instruction should be executed as if it were a will and as such, it can pass as a will. This is a pre-caution.

3. MENTION THE VARIOUS PARTS OF A WILL, THEIR IMPORTANCE AND EFFECT ON A WILL

1. Commencement clause: this contains the description of the testator. The full names, alias and former names if any, the occupation and address of the testator. **Where a testator or testatrix has a former name, it is important to state the name so that properties acquired under such name can be linked to the testator. Also to avoid making rectification to the will upon the grant or obtaining probate. Example**

THIS IS THE LAST WILL OF ME Mr. AkiriAkiri formerly known as D Akiri, a legal practitioner of 1, Adeola Hopewell Street, Victoria Island, Lagos state.

Failure to include the commencement clause will lead to uncertainty.

2. Date: the date states the day the will is made or executed. **The date is important because in the event of proving due execution of the will, the date inserted in the will may aid that task especially if there is any dispute on that point.** Also where there are two wills and it is not known which of the will is later, a date would be of great advantage in settling the issue. Failure to include date **would not invalidate the will.**

3. Revocation clause: a revocation clause expressly states that a testator has revoked all previous wills. Failure to include it would mean that an earlier will will be read SIDE BY SIDE with the later will. Example is "I REVOKE ALL EARLIER TESTAMENTARY DISPOSITIONS MADE BY ME."

4. Appointment clause: this is the clause where the executors and trustees of the testator are appointed.

5. Charging clause: the charging clause permits and mandates the personal representative/executors and other professionals rendering services to the deceased estate to charge for any services that they may render otherwise their services will be rendered gratuitously. Failure to include would mean the executors or professional cannot charge for the services rendered.

6. Gift clause: this contains all legacies bequeathed or devised to the beneficiaries. If it is not included it would mean that THERE IS NO WILL AB INITIO.

7. Residuary clause: this contains the person(s) who is/are entitled to the residuary estate or remainder gifts (gifts not covered expressly by the will). Failure to include means that residuary estate will fall into partial intestacy to be administered in accordance with the rules of administration of intestate estate.

Comment [C160]: LETTERS OF ADMINISTRATION WITHOUT A WILL ANNEXED, WILL BE GRANTED IN RESPECT OF THOSE ESTATE NOT COVERED BY THE WILL.

8. Testimonium: the testimonium links the testator to the dispositions made in the will. Failure to include it means that the will is worthless because there would be no link between the testator and the will. Example starts with IN WITNESS OF WHICH

9. Execution and attestation clause: this is where the testator and witnesses sign the will. Failure to include an execution and attestation clause means that the will is void - s. 9 Wills Act. Ize- Iyamu v Alonge.

4. DRAFT A WILL AND A CODICIL

Comment [C161]: (a) Sample will---CoD RAD GReTEAF

1 THIS IS THE LAST WILL OF ME JOSEPH JOHNSON of No 3 Law School Drive Lagos (formerly known as _____ OR also known as _____) MADE this _____ day of _____, 20_
2 I REVOKE ALL FORMER TESTAMENTARY DISPOSITIONS MADE BY ME.
3 I APPOINT _____ of _____ and _____ of _____ to be the executors of my Will
4 I DIRECT that all individuals, professionals and organisations engaged in the administration of my will shall charge and be paid the usual fees for work done, services rendered and time spent in the administration of my estate.
5 I GIVE _____ to _____of _____
I GIVE--------to----------of _____
6 I GIVE the residuary of my estate to_____of_____

Comment [d162]: NEED TO appoint executors as trustees is because, where the testator has infant beneficiaries, the executors appointed will act as trustees over the monies or properties bequeathed to them.(EXECUTRIXES)

IN WITNESS OF WHICH the testator has executed this will in the manner below the day and year first above written.

SIGNED BY

_____

Joseph Johnson

(Testator)

IN OUR JOINT PRESENCE AND BY US IN HIS PRESENCE

1. NAME:

ADRESS:

OCCUPATION

SIGNATURE:

2. NAME:

ADRESS:

OCCUPATION

SIGNATURE:

Prepared by:

K. C Aneke, Esq

K.C Aneke & Co

No. 2 Law School Drive,

Victoria Island,

Lagos.

(b) Sample Codicil

THIS IS THE FIRST CODICIL TO THE WILL OF ENGINEER ADEMILOYE OKON of 34, Johnson Street, Akoka, Lagos, made this _____ day of ____2013.

1. I REVIVE AND CONFIRM by this codicil my said will revoked by my marriage on 1st July 1984 to Miss Iyabo Taiwo.

2. WHEREAS Mrs Susan Okon in my Will as my Executor has since died, NOW I APPOINT Mrs Taiwo Okon of 34 Johnson Street, Akoka, Lagos to be my executor in place of Mrs Susan Okon (late), AND

3. I DIRECT that my Will shall be construed and have effect as if the name of the said Mrs Taiwo Okon had been inserted therein throughout in the place of the said Mrs Susan Okon as an executor and trustee.

IN WITNESS OF WHICH I have executed this codicil this ..... day of ..... 20.....

SIGNED BY

ENGR. ADEMILOYE OKON

(Testator)

IN OUR JOINT PRESENCE AND BY US IN HIS PRESENCE:

Name

Address

Occupation

Signature

Name

Address

Occupation

Signature

5. IDENTIFY ETHICAL ISSUES ARISING

- Do not circumvent the law. Rather than obtain probate, the testator should depose to an affidavit.
- Do not advise the testator as to the dispositions to be made and to whom.

POSSIBLE MULTIPLE CHOICE QUESTIONS ON THIS TOPIC

1. Because a will can be revoked at any time before the death of the testator, it is said to be ___

A. Ambulatory

B. Testamentary

C. Voluntary

D. All of the above

2. Because a will takes effect after the death of the testator, it is said to be ___

A. Ambulatory

B. Testamentary

C. Voluntary

D. All of the above

3. ____ is a customary will in the form of oral directives by a person, in anticipation of imminent death, as to the disposition of his property

A. Privileged will

B. Nuncupative will

C. Holographic will

D. Reciprocal will

4. Wills made by crew members of commercial airline outside Lagos will be governed by ___ as a privileged will

A. Wills Act

B. Wills Law of Lagos State

C. Armed Forces Act

D. None of the above

5. ____ is a form of statutory will usually handwritten by the testator without witnesses

A. Formal will

B. Nuncupative will

C. Reciprocal will

D. Holographic will

6. A will that is only sealed but not signed is ___

A. Inchoate

B. Void

C. Voidable

D. Valid

7. The general rule is that where a beneficiary or his/her spouse attests to a will, ___ will happen

A. The beneficiary will lose his benefit under the will

B. The will is rendered inchoate

C. The will is rendered void

D. The will is rendered voidable

8. Where a will is challenged, the legal burden of proof is on the ___

A. Challenger

B. Propounder

C. Beneficiary

D. Trustee

9. As in 8 above, the evidential burden of proof is on the ___

A. Beneficiary

B. Propounder

C. Challenger

D. Trustee

10. Any gift coming after the signature of a testator is ___

A. Valid

B. Invalid

C. Inchoate

D. Affects the validity of the will as a whole

11. When an unsigned and unattested alteration causes the part altered not to be apparent to the eyes, then that part of the will is deemed to be ___

A. Inchoate

B. Voidable

C. Revoked

D. All of the above

12. A gift that gives details of the nature, the source and particulars of the gift to the beneficiary is a ___

A. General gift

B. Specific gift

C. Demonstrative gift

D. Omnibus gift

13. A gift that gives details of the nature without the source and particulars of the gift to the beneficiary is a ___

A. General gift

B. Specific gift

C. Demonstrative gift

D. Omnibus gift

14. A gift that gives details of the nature and the source but without particulars of the gift to the beneficiary is a ___

A. General gift

B. Specific gift

C. Demonstrative gift

D. Omnibus gift

15. ___gifts are subject to ademption

A. Special

B. Specific

C. General

D. Demonstrative

16. Gifts made periodically are best referred to as ____

A. Periodic gift

B. Annuities

C. Annual gifts

D. Pecuniary gifts

17. The directive gift in a will as to distribution of any remainder is known as the ___ clause

A. Residuary

B. Remainder

C. Special

D. Charging

18. _____ involves a situation where a specific gift is lost or destroyed or sold before the death of the testator

A. Ademption

B. Lapse

C. Abatement

D. Uncertainty

19. Where the beneficiary pre-deceases the testator, the gift fails by ___

A. Ademption

B. Lapse

C. Abatement

D. Uncertainty

20. ____ is a gift made to several persons in succession

A. Entailed gift

B. Conditional gift

C. Class gift

D. Specific gift

21. NO QUESTION

22. Mr. A has a will dated 20/1/2019. The will was subsequently revoked by a will dated 20/2/2020. On 20/3/2021 another will was made revoking the will of 20/2/2020. The effect of last revocation on the first will of 20/1/2019 is that it ____

A. Republishes it

B. Revives it

C. Reinforces it

D. None of the above

23. When the validity and contents of a will are re-confirmed or re-affirmed, the will is said to be ____

A. Revived

B. Republished

C. Re-executed

D. Re-integrated

24. The bringing back to life of a revoked will is known as _____

A. Revival

B. Republication

C. Re-execution

D. Re-integration

25. Where no reasonable financial provision is made for dependents of the testator, the dependents are to apply to court within ___ months of grant

A. 6

B. 3

C. 9

D. 12

26. Failure to include the commencement clause in a will leads to ___

A. Uncertainty

B. Partial intestacy

C. Invalidation of the will

D. None of the above

27. Failure to include a Testimonium means that the will is ___

A. Worthless

B. Uncertain

C. Inchoate

D. None of the above

28. Failure to include a revocation clause means that the will is ___

A. To be read side by side with an earlier will

B. Uncertain

C. Void

D. Voidable

29. Failure to include the date in a will means that the will is ___

A. Uncertain

B. Invalid

C. Worthless

D. None of the above

30. Failure to include the execution and attestation clauses means that the will is ___

A. Uncertain

B. Voidable

C. Void

D. Inchoate

ANSWERS

1. A
2. B
3. B
4. D
5. D
6. B
7. A
8. B
9. C
10. B
11. C
12. B
13. A
14. C
15. B
16. B
17. A
18. A
19. B
20. A
21. BONUS
22. D
23. B
24. A
25. A
26. A
27. A
28. A
29. D
30. C

9. PROBATE PRACTICE

Comment [C163]: PROBATE IS THE JUDICIAL CONFIRMATION OF THE AUTHORITY OF THE EXECUTORS UNDER THE WILL

PROBATE PRACTICE INVOLVES THE PROCESSES AND PROCEDURES IN THE ADMINISTRATION/MANAGEMENT OF THE ESTATE OF A DECEASED PERSON.

1. STATE WHEN APPLICATION FOR PROBATE AND LETTERS OF ADMINISTRATION IS NON-CONTENTIOUS AND CONTENTIOUS

A **non- contentious probate**, also known as **common form probate**, is one that is granted without any action in Court challenging the validity of the Will. Non-contentious cases cover:

- All businesses of a non-contentious nature in matters of testacy and intestacy which are not proceedings in any court.
- Grant of probate and administration by the HC where contentious cases have been terminated.

On the other hand, a **contentious probate**, also known as **solemn form probate,** is one granted after the action in Court challenging the validity of the Will has been determined.

Contentious cases cover:

- Disputes that pertain to what document(s) should be admitted to probate.
- Disputes as to who is entitled to take out a grant.
- Disputes as to whether a grant should be revoked.
- Disputes as to the validity of the will
- Disputes as to the appointment of executors

Thus, whether a matter is contentious or non-contentious depends on the following:

- Whether there is any dispute on the applicant's right to the grant.
- Whether there is any dispute on the validity of the will.
- Whether there is caveat lodged in the registry prohibiting the issuance of a grant to the estate of the deceased

2. STATE THE PROCEDURE TO OBTAIN PROBATE (NON-CONTENTIOUS AND CONTENTIOUS CASES, INCLUDING NEED FOR DOUBLE PROBATE)

(a) Procedure to obtain probate in non-contentious cases (common form)

- **Search and Discovery of the Will:** The search for the testator's Will begins after the burial ceremonies are over. Usually the original copy of the Will is kept at the probate registry. If the Will is in the possession/custody of the testator or any other person, in Lagos, he is to send it to the probate registry **within three (3) months of his knowledge of the testator's death.** In Abuja he has **14 days after his knowledge of the deceased's death to lodge the will---ORDER 62 RULE 14 LAGOS 2019, ORDER 62 RULE 4 ABUJA 2018** .Thus, anyone in custody of the testator's will must lodge same at the probate registry of the state in question IMMEDIATELY after knowledge of the testator's death. NB: Notwithstanding that a copy of the will was lodged by the testator at the

Comment [C164]:
CONSEQUENCES FOR NON COMPLIANCE
There are both penal and civil sanctions for non-compliance:
1) The person will be liable to pay a fine of N50,000.00 (Lagos) and N5,000 (Abuja)
2) He will be liable to be ordered by the court through ex-parte application brought by interested person to produce the testamentary document
3) He will be liable to be summoned for the purpose of cross-examination where the interested person is not certain whether he is in the possession of the testamentary document.
4) He may be cited for contempt

probate registry, once you are in custody of a copy of the will, you are to submit it to the probate registry.

- **Marking of the Will:** Once a will is found it will be marked. A Will in which an application for grant is made shall be marked by the signatures of the applicant and the person before whom the oath is sworn and shall be exhibited to an affidavit which may be required under this Order, as to the validity, terms condition or date of execution of the Will, but where a Registrar is satisfied that compliance with this Rule might result in the loss of a Will, he may allow a photocopy of it to be marked or exhibited in lieu of the original document---**ORDER 64 RULE 6 ABUJA 2018**
- **Reading of the Will:** If 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. The Will must be read in the Probate Registry or any place the Probate Registrar determines and he shall be presided over by the Probate Registrar or other supervising officer appointed by him. The Registrar then brings out the Will, breaks the sealed wax on it and reads the Will in the presence of the persons present and makes a record of the proceedings for the day.
- **Application for probate:** After the reading of the Will, the executors will make an application for probate by way of LETTER OF APPLICATION made to the Probate Registrar---**ORDER 61(1) LAGOS 2019; ORDER 62(1) ABUJA, 2018** .The contents of the application for grant of probate are as follows:
    - **a.** Particulars of the testator: name, marital status before death, names of spouse and children,
    - **b.** Date and place of death of the testator, address of the testator.
    - **c.** That the testator was resident within jurisdiction shortly before his death
    - **d.** That the testator was found to have made a Will
    - **e.** Names of the executors named in the Will, if any.

  It must be noted that an **application** for probate cannot be made (and if made cannot be issued) **within 14 days in Lagos and 7 days in Abuja** from the date of death of the testator. However, the application for **grant of probate must be made within 3 months in Lagos or 6 months in Abuja from the date of death of the deceased**. If they fail to apply for probate within the prescribed period, they lose the right to apply except if there

are special circumstances---**ORDER 61(1) LAGOS 2019; ORDER 62(1) ABUJA, 2018**

- **Proof of the Will:** This goes to the validity of the will. In proving the Will, its due execution must be proved, even if witnesses have to be called. The Judge/Court (L & A) must be satisfied as to the due execution of the will and that it contains a proper attestation clause before admitting it to probate---**ORDER 62 RULE 4 LAGOS 2019; ORDER 64 RULE 26 ABUJA, 2018** .The executor is expected to apply for probate and prove the Will. Where he fails, refuses, neglects or delays in doing so, a notice (Citation), at any time after the period within which the executor is expected to apply for probate, **shall be served on him PERSONALLY, directing him to prove the Will or renounce probate.** A citation **shall be accompanied by a Verifying affidavit verifying the facts stated in the Citation**. It must be noted that a Citation can only be issued by a person who has an interest in the estate of the testator and such a person must first **ENTER A CAVEAT BEFORE ISSUING A CITATION--- ORDER 62 RULE 26(4) LAGOS 2019; ORDER 64 RULE 48(3) ABUJA 2018**

  The person cited (executor) must enter an appearance to the Citation **within 8 days from the date of service of the citation on him.** He is to enter the appearance by completing and filing **FORM 8** (Lagos) and **FORM 54** (Abuja)---**ORDER 62 RULE 26(7) LAGOS 2019; ORDER 64 RULE 48(6) ABUJA 2018** .Where the time limited for appearance has expired and the person cited has not entered an appearance, the citor may:

  a. Apply to the Registrar for an order for a grant to himself;
  b. Apply to the Registrar for an order that a note be made on the grant that the executor in respect of whom power was reserved has been duly cited and has not appeared and that all his rights in respect of the executorship have wholly ceased;
  c. Apply to the Registrar by summons (which shall be served on the person cited) for an order requiring that person to take a grant within a specified time or for a grant to himself or some other persons specified in the summons. SEE **ORDER 64 RULE 49(5) ABUJA 2018 NB:** The application shall be supported by an affidavit showing that the citation was duly served and that the person cited has not entered an appearance. Where the person cited fails to prove the Will within the specified period **(21 days in Lagos and 14 days in Abuja)**---**ORDER 62**

Comment [C165]:
USES OF CITATION
1. Used by an interested party to require the executor (s) to apply for grant of probate

2. Used by an applicant for grant of probate (executor(s)) where a caveat has been entered, to require the caveator to enter appearance and disclose particulars of any interest the caveator has.

RULE 17 LAGOS 2019; ORDER 62 RULE 7 ABUJA 2018, the citor can file an affidavit to that effect and apply that he should be appointed as administrator. That is, where the executor rejects probate or fails to prove the Will despite citation, he will be deemed to have renounced probate and the interested citor can apply to be appointed **as administrator**. Where the person cited agrees to take probate, he may make an **ex parte application to the Registrar for that purpose.**

- **Grant/refusal of probate:** When the Probate Registrar is satisfied that the Will was duly executed and that the testator made the Will with knowledge of its contents, the Registrar would grant probate. However, probate may be refused in the following instances:
    a. Where the applicants are not executors for probate or are not within the category of next-of-kin for grant of simple administration or are not within the category for grant of administration with Will annexed.
    b. Where the applicant is an Infant or of unsound mind or otherwise lacks mental capacity
    c. Where the applicant is outside the jurisdiction or is otherwise unavailable
    d. Where the applicants failed to file the necessary documents
    e. Where the testator/deceased is found to still be alive
    f. Where applicants are not persons with the best interests of the estate
    g. Where the application is against public policy. For instance, where the applicant is responsible for the death of the deceased.
    h. Where there is still a pending suit in respect of grant.

(b) Procedure to obtain probate in contentious cases (solemn form)

- Search and Discovery of the Will
- Marking of the Will
- Reading of the Will
- Application for probate
- Proof of will
- Caveat/Citation/warning
- Probate action (full trial)
- Grant or refusal of grant depending on the outcome of the probate action

Comment [C166]: Both Probate and letters of administration would be refused

Comment [C167]: Caveat is issued to challenge an application for grant of probate. **An application for grant of probate becomes contentious when a caveat is filed against the application. That is, it is the filing of a caveat that makes an application for grant of probate contentious.**

Comment [C168]: **Citation (Warning)**
In addition to the other uses of a citation, in grant of probate in solemn form, a citation is process issued by an applicant for grant of probate (usually executors) making a demand on the caveator and requiring him to disclose the particulars of any interest, by entering an appearance, which he has in the estate of the testator, which is contrary to that of the citor. READ THE LAGOS 2019 RULES ON THIS TO BE CONVERSANT WITH IT

Comment [C169]: **Probate action**
Where there is an appearance to the citation, the dispute will be resolved in court. **Either the applicant for probate or caveator can file normal court proceedings by way of writ of summons.** See **OKELOLA v BOYLE; ADEBAJO v ADEBAJO**
Pending the determination of the case, the court may grant temporary administration pendente lite to preserve the estate. It is subject to time, once the court determines the probate action, the administration pendent lite ends. See **MORTIMER v. PAUL.** The grant cease on the conclusion of the action.

(c) Need for double probate

Where an initial grant of probate has been made and a subsequent grant is applied for or granted, such subsequent grant is called double probate. That is, where probate has been granted to an executor or some executors, this grant is regarded as first grant or original grant. When there is subsequent grant of probate, such grant is regarded as double probate.

The following are the instances that give rise to double probate:---**VIMO**

- **Vacancy:** Where the testator appoints more than four executors and the first grant of probate has been given to the first four, then when a vacancy arises due to the death or incapacity of one of the four executors, the next executor in order of priority can apply for double probate. **However, where the four initial executors have completed the winding up of the estate of the testator and have been dissolved, the other executor(s) cannot apply for double probate.**
- **Infirmity and no initial grant:** Where one of the executors could not join the other executors at the time when the first grant of probate was made by reason of mental or physical infirmity; if he subsequently recovers from such infirmity, he can apply for grant of double probate.
- **Minor and no initial grant:** Where one of the executors was a minor at the time when the first or initial grant of probate was made **and the initial grant was made with power for additional grant reserved for him, u**pon the minor attaining majority, he can apply to be granted double probate.
- **Out of country and no initial grant:** Where one of the executors could not join the other executors at the time when the first grant of probate was made because he was out of the country at the time of the initial grant, then whenever he comes back into Nigeria, he can apply for grant of double probate.

It must be noted that the first original probate and its particulars must be attached to the application for grant of double probate.

Also, it must be noted that in all these circumstances, double probate will not be granted if the initial executors have completed the winding up of the estate of the testator and have been dissolved.

3. STATE WHEN CAVEAT MAY CEASE TO BE EFFECTIVE AGAINST APPLICATION FOR PROBATE OR LETTERS OF ADMINISTRATION

There are four instances when a caveat ceases to be effective. They are as follows:---**WEAP**

- **Withdrawal:** Where the caveator withdraws his caveat---**ORDER 63 RULE 18(11) LAGOS 2019**
- **Effluxion of time:** A caveat becomes ineffective by effluxion of time **after 3 months (Lagos) or 6 months (Abuja)** unless it is renewed by the filing of further caveats--**ORDER 63 RULE 18 (5) LAGOS 2019; ORDER 64 RULE 47(4) ABUJA 2018**
- **Appearance is not entered by caveator:** Where the caveator fails to enter appearance to a warning or citation within the **8 days of service of the warning upon him, inclusive of the day of such service AND** the citor files an affidavit to that effect. Thus, once the affidavit is filed by the citor, the caveat immediately becomes ineffective---**ORDER 63 RULE 18 (13) LAGOS 2019; ORDER 64 RULE 47(11) ABUJA 2018**
- **Pending matter in court:** Where, to the knowledge of the caveator, there is a pending matter in court concerning the Will and he goes ahead to file a caveat. Such a caveat is ineffective

4. MENTION THE DOCUMENTS REQUIRED TO PROCESS PROBATE

The documents needed to obtain a grant of probate and which will accompany the application for grant of probate are:

- Application letter for grant of probate.
- A copy of the Will
- The Death certificate of the testator
- Means of identification of the applicant(s) and proof of identity of the testator such as drivers' licence, national I.D., international passport etc.
- Affidavit stating the place and date of death of the testator and his place of domicile shortly before his death.

Comment [C170]:
Caveat is issued to challenge an application for grant of probate. **An application for grant of probate becomes contentious when a caveat is filed against the application. That is, it is the filing of a caveat that makes an application for grant of probate contentious.**
A caveat has the life span of 3 months in Lagos and 6 months in Abuja and probate should not be issued or granted while caveat is still in force unless withdrawn. That is, where the probate Registrar is aware that a caveat has been filed, he shall not make a grant until it is either discharged or withdrawn. See **DAN-JUMBO V. DAN-JUMBO** , in this case, while a caveat was in force and yet to be discharged or withdrawn, the registrar issued/granted probate to the will. The Court of Appeal and Supreme Court held that the act of the probate registrar was wrong. The SC stated that the whole essence of a caveat is to give notice to the Probate Registrar to desist from making a grant of probate until the caveat is discharged or withdrawn.

Comment [C171]:
CAVEATOR: **a person who raises objection to the grant of probate or letters of Administration. His aim is to ensure that no grant is made to the person OR also no grant without his notice.**

Comment [C172]:
Note that there are additional documents that may be necessary to file such as:
- Declaration of all the personal properties of the testator
- Evidence of payment of prescribed fees

5. DRAFT A LETTER OF APPLICATION AND FILL DOCUMENTS REQUIRED TO PROCESS PROBATE

K. C ANEKE AND ASSOCIATES

Barristers and Solicitors

3 Victoria Island Lagos

07053531239; kundycmith@gmail.com

OUR REF: **YOUR REF:** **DATE:** 10 April 2019

The Probate Registrar,

The Probate Registry,

High Court of Lagos State,

Lagos Judicial Division,

Dear Sir,

APPLICATION FOR GRANT OF PROBATE IN RESPECT OF XYZ (DECEASED)

We write as solicitors to XYZ who died on ..... day of .....2019.

At the time of his death, he resided as 4, Ikeja Road, Ikeja, Lagos State and in his will dated ..... he appointed Mr. A and Mrs. B as the executors to the will.

We humbly apply that probate be granted to Mr. A and Mrs. B.

Please find attached to this application the following documents:

1. Copy of the Will
2. Death Certificate of the deceased testator.
3. National I.D of the applicant and International passport of the testator
4. Affidavit stating the place and date of death of the testator and his place of domicile shortly before his death.

Thank you

Yours faithfully

(signature)

K. C Aneke Esq

For: K. C Aneke and Associates

ENCL:

Comment [C173]:
1. Copy of the Will
2. Death Certificate of the deceased testator.
3. National I.D of the applicant and International passport of the testator
4. Affidavit stating the place and date of death of the testator and his place of domicile shortly before his death.

6. EXPLAIN THE PROCEDURE TO OBTAIN LETTERS OF ADMINISTRATION (NON-CONTENTIOUS AND CONTENTIOUS)

Procedure to obtain letters of administration in non-contentious/contentious cases

- Application to the probate registrar. The letter should contain the following
    a. Full names of the deceased
    b. Date of death of the deceased
    c. Place of residence of the deceased shortly before his death
    d. Name of proposed administrators
- The application should be accompanied with the death certificate. Upon submission of the application, then forms will be given. The forms are
    a. Oath of Administration by the applicants
    b. Particulars of landed property left by the deceased
    c. Administration Bond to ensure that the grantee makes proper inventory, distributes the estate accordingly and pays out of all just debts.
    d. Affidavit/Declaration as to next-of-kin
    e. Bank certificate
    f. Inventory
    g. Passport photographs of applicant
    h. Justification for sureties
    i. Schedule of debts and funeral expenses
- The forms upon filling them would be submitted
- Publication would be made in the gazette or newspaper. This, in essence, is to invite and give the public or any interested person the opportunity to object and file a caveat to the grant of letters of administration to the applicant
- Objection is to be raised within specified period for filing a caveat---ONCE OBJECTION IS RAISED, IT BECOMES CONTENTIOUS
- Once no objection, upon the payment of the estate duties, the letters of administration would be granted

Comment [C174]: USES
1. Used to determine estate duty payable
2. Used to ascertain credit of the deceased in banks
3. Used to ascertain value of shares in company

NOTABLES

Letters of administration is granted upon application by a person entitled either personally or through his legal practitioner to the Probate Registrar. **Note the distinction between marriage**

under the Act and Customary marriage with respect to pre-eminence of spouses to grant of administration. Those married under the Act are automatically entitled----**SMITH V SMITH; COKER V COKER; OBUSEZ V OBUSEZ; WILLIAMS V OGUNDIPE; ARUWAJO V ASABORO.** Usually forms are issued to the applicant, to be returned, upon completion, to the probate registry. Where the legal practitioner makes the application, **his Grant of letters of administration with will attached would not be made within fourteen (14) days Lagos) or seven (7) days (Abuja) from the death of the testator.**

Every application for grant of letters of administration is usually published to allow for objections and the filing of caveats.

It must be noted that letters of administration cannot be transferred or inherited----**DUKE v ADMINISTRATOR GENERAL OF RIVERS STATE**

Note that as a general rule, one person cannot be granted letters of administration. It can only be granted to at **least two people. The only exception is where a Trust Corporation or the administrator general is appointed as sole administrator. NB:** A Trust Corporation is a public trustee or corporation **appointed by the court** in any particular case to be a trustee of or be entitled to the estate of the deceased under the Public Trustee Law. **The law is that Letters of administration can only be granted to at least two persons. An exception to this rule is that a trust corporation can be appointed as sole administrator/executor.** Can a bank be appointed as executor of a will? **Yes, the testator can appoint a bank as a trustee**

Letters of administration serve as the origin of powers of administrators. They are granted for simple administration where the deceased died

- **Wholly intestate; or**
- **Where there is partial intestacy**

At the time of the death of a deceased, the deceased's estate is vested in the **Chief Judge of the state where he died. This** is where the deceased died intestate and the administrators cannot act without letters of administration – **S. 49 AEL LAGOS**. **The instances for grant of letters of administration are:**

- Letters of administration **without Will** de bonis non (SPECIAL GRANT)
- Letters of administration **with Will annexed** de bonis non (SPECIAL GRANT)
- Letters of administration **without will**
- Letters of administration **with will annexed:** Here, the testator died leaving a Will, but one or more of the following circumstances exist:
    a. No executor was appointed in the will
    b. A sole executor who is a minor is appointed

Comment [C175]: Note that partial intestacy arises where there is a Will and some of the gifts under the Will fail or some of the testators properties are not covered by the Will and there is no residuary clause in the Will: (note that where there is partial intestacy, two grants will be made).

Comment [C176]:
Letters of administration without Will de bonis non--S. 28 AEL LAGOS
This is an application where a letter of administration had earlier been granted however, **the original grantee did not conclude the administration of the INTESTATE ESTATE**. The letters of administration without will de bonis non when granted will help the subsequent grantee to conclude what the first administrator/grantee did not conclude.

Comment [C177]: Letters of administration with Will annexed de bonis non
This is where the grantee under the letters of administration with will annexed did not conclude the administration of the estate, thus a fresh application is being made to complete the administration of the estate.

Comment [C178]: Letters of administration without Will
Application for letters of administration in this regard is where the deceased died intestate without making any will. Here, the law specifies the categories of persons that can apply for a grant.
Categories of person that can apply for letters of administration
Section 49(1) AEL, Lagos state laid down the persons that can apply in order of priority and where they are of equal priority, the court has discretion to select any who in its view is most suitable. These persons are generally called NEXT-OF-KIN of the deceased thus generally, it is the next-of-kin of the deceased that is entitled to apply for letters of administration and they are:
a)Surviving spouse(s) of the deceased
b)Children of the deceased or the issues of such children that predeceased intestate.
c)Parents of the deceased
d)Brothers or sisters of the deceased of full blood or the children of such brother or sister who died in the life time of the deceased. See TAPA v KUKA
e)Brother or sister of the deceased of half-blood or the children of such brother or sister who died in the life time of the deceased
f)Grandparents of the deceased
g)Uncles and aunts of full blood or their children
h)Creditors of the deceased
i)Administrator general

c. Executor(s) appointed renounce probate.
d. Executor(s) appointed in the will predeceased the testator.
e. Where the executors appointed die before taking out probate.
f. Where the appointment of an executor is void for uncertainty---**IN THE GOODS OF BLACKWELL.** Example, failure to provide address and particulars of the executor in the will.
g. A sole executor appointed becomes incapable to act by reason of mental and physical infirmity---**IN THE GOODS OF COOPER**
h. Where there is break in chain of representation either because the sole executor or last surviving executor dies intestate or without appointing an executor. **The chain of representation is broken where the sole executor or last surviving executor:**
   i. Dies intestate
   ii. Fails to appoint executor in his will
   iii. Fails to obtain probate
   iv. He renounces probate.

NB: In this regard, those entitled to apply for the letters of administration are as follows:

- The executor(s)
- Any residuary legatee or devisee **holding in trust** for any other person
- Any residuary legatee or devisee **for life**
- The **ultimate residuary legatee** or devisee, including one entitled on the happening of any contingency. Provided that unless the judge otherwise directs a residuary legatee or devisee whose legacy or devise is vested in interest shall be preferred to one entitled on the happening of a contingency. SEE **ORDER 62 RULE 22 LAGOS 2019**

Comment [C179]: NEXT OF KIN

7. MENTION THE DOCUMENTS REQUIRED TO OBTAIN LETTERS OF ADMINISTRATION

- Application by way of PETITION for grant of letters of administration---**ORDER 61 RULE 1(1) LAGOS 2019; ORDER 62 RULE 1(1) ABUJA, 2018**
- Death certificate of the deceased
- Means of identification of the applicant(s) and proof of identity of the testator such as drivers' licence, national I.D., international passport etc.
- Affidavit stating the place and date of death of the deceased and his place of domicile shortly before his death.
- Evidence of payment of prescribed fees

8. FILL THE DOCUMENTS REQUIRED TO OBTAIN LETTERS OF ADMINISTRATION

The forms are

j. Oath of Administration by the applicants
k. Particulars of landed property left by the deceased
l. Administration Bond to ensure that the grantee makes proper inventory, distributes the estate accordingly and pays out of all just debts.
m. Affidavit/Declaration as to next-of-kin
n. Bank certificate
o. Inventory
p. Passport photographs of applicant
q. Justification for sureties
r. Schedule of debts and funeral expenses

9. IDENTIFY ETHICAL ISSUES ARISING FROM PROCESS OF OBTAINING PROBATE (Brainstorm)

NOTABLES

Even though an executor derives his powers and authority from a Will, probate is the authority that validates such powers. Thus, probate confirms the power of the executor to act. The administrator derives his power from the letters of administration. For the purpose of emphasis, both executors and administrators are regarded as personal representatives of a deceased. An executor is appointed by the deceased in his Will while the administrator is appointed by the court in line with the provisions of the law. Thus, while probate **confirms** the authority of an executor, letters of administration **confers** authority on an administrator. Thus, in **BANK OF WEST AFRICA LTD v. RICKET**, it was held that until probate or letter of administration is granted, the executor or administrator who interferes with the estate of the deceased, without applying for probate or administration within prescribed time, is an intermeddler or an executor in his own wrong (executor de son tort). Administrators derive their powers from letters of Administration while executors derive their power from the will. Probate is a mere confirmation of such power.

Comment [C180]:
DEFINITION OF TERMS
- •PERSONAL REPRESENTATIVES: these are persons upon whom the estate of a deceased is vested. These include executors appointed by the testator or by representation or administrators.
- •TAKING OUT REPRESENTATION: obtaining probate for a Will or a grant of administration
- •PROPOUNDER OF A WILL: **this is a person who wants probate to be granted. They are interested parties who can be also the executors of the will.**

Applicable Laws

- Land Use Act
- Administration of Estate Laws of various states of the federation
- Wills Act, 1837, as amended by the Wills (Amendment) Act of 1852
- Wills Laws of the various states

- Rules of court, such as the High Court of Lagos State (Civil Procedure) Rules 2019.
- Marriage Act
- Case Law/Judicial precedent
- RPC
- LPA
- CFRN 1999, as amended.
- Evidence Act 2011

Types of grants

There are **basically three (3) types of grants.** They are:

1. Grant of Probate (Will + Executors): this is obtained where the deceased died testate, leaving a valid Will with executors who are willing, capable, available to act and validly appointed under the Will. Here, the executors have been appointed under the Will. The main concern of the court is to grant probate to the executors named in the Will to administer the estate.

2. Grant of administration with Will annexed (valid Will – executors; or valid Will + unwilling executors; or valid Will + executors absent; or valid Will + executors died before application). Here, the deceased died testate (leaving a Will), but failed to appoint executors under the Will or the executors appointed renounce probate or are incapable of applying for probate (incapacity or out of jurisdiction) or have long died or are infants etc. In such cases the court is concerned with the grant of letters of administration to persons who are interested in the estate to administer the estate of the testator. NOTE: where there is a refusal to act or disqualification to act by the executors, administration with the will annexed will be obtained.

3. Grant of simple administration otherwise known as letter of administration without will annexed---S. 47 AEL: this could arise where the deceased died without leaving a Will at all (total intestacy) or where some part of his estate is not covered by the Will and there is no residuary clause (partial intestacy) or **where the Will is declared invalid.** Note that whenever there is partial intestacy, there will be two grants.

It must be noted that the grant of probate or letters of administration may either be **GENERAL OR LIMITED.**

a. General: the personal representatives have the authority to act **for all purposes in the administration of the estate, extending to all the property in the estate without time limit.**

b. Limited: as to

- **Limited as to property**: a grant could be limited to a part of the estate. This could arise, for instance, where the testator requires experts to handle that part of the estate. In this case, we could have a general executor and a limited executor.

- **Limited as to purpose:** (also known as grant save and except or grant caetorurum): this could take the form of a grant pendente lite (grant for the duration of litigation) or a grant ad litem (a grant which enables the grantee to commence or continue proceedings involving the estate) or a grant ad colligenda bona (a grant which is made to enable the grantee collect and preserve assets in the estate or to preserve perishable goods, especially where the person entitled to a general grant is not in a position to obtain the grant immediately).
- **Limited as to time**: a grant could be limited as to time where it is either taken on behalf of the minor or the person entitled is mentally incapacitated as at the time of the grant. In such a case, the grant will subsist until the infant attains majority. This is a grant durante minor eaetate (a grant made to a person for the duration of the minority of the actual person entitled). It must be noted that grant of probate will only be limited if the testator clearly stipulates such limitation. But in the case of the grant of letters of administration, the grant can be limited depending on the circumstances of each grant.

Special grants

There are circumstances where special grants would be given to certain persons. These grants are:

- **Grant Durante absentia**: Where a grant has been made but the administrator leaves Nigeria or remains outside Nigeria for a continuous period of twelve (12) months or more, a special grant Durante absentia can be made usually in favour of creditors to enable them realize their interests. The application for this special grant can be made by a creditor or any other person interested in the estate of the deceased. See **IN THE GOODS OF ROSE.** Summarily, the special grant Durante absentia is granted during the absence of the administrator.
- **Grant Durante Dimentia** (that is grant during mental or physical incapacity): This is a grant made to another person where the person entitled suffers incapacity as a result of mental or physical infirmities
- **Grant ad litem:** Where there is litigation against estate of deceased and such is not represented, the court can appoint a person to represent the estate in litigation to continue proceedings.
- **Grant Pendente Lite:** This is grant whereby a personal representative is appointed to administer the estate of the deceased pending the determination of a suit over a Will or entitlement to the grant---**S. 27 AEL LAGOS**. **Administrator pendente lite has the**

Comment [d181]: Limited as to purpose

Comment [d182]: Limited as to purpose

same power as any other administrator except that he cannot distribute the residue of the estate. He is essentially appointed to preserve the estate. He need not have any interest in the estate, and his remuneration is as fixed by the court which appoints him and to whom he is answerable. **He can only be appointed when there is a suit pending---KUNLE LADEJOBI v. ODUTOLA HOLDINGS LTD**

- **Grant ad colligenda bona:** This is a grant to preserve and protect the estate where perishable goods are involved. That is, for the preservation of perishable goods.
- **Grant de bonis non:** this occur where a previous grant had been and either the grantees are dead in case of Administration before the completion of Administration or where there is break in the chain of representation before the completion.
- **Grant pending the grant of letters of administration: between the time of the death of the deceased and the grant of letters of administration, the CHIEF JUDGE is statutorily empowered to administer the estate---S. 10 AEL.** The chief judge 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. **It is also essentially granted for the preservation of the estate.**
- **Administration by an attorney:** a person entitled to grant of administration can appoint an attorney to apply for grant of letters of Administration on his behalf if the following conditions are satisfied:
    a. The person entitled must be unavailable. (that is outside Nigeria)
    b. He must have appointed a capable attorney.
- **Administration by the Administrator-General:** the administrator general will administer the estate in the following four instances:
    a. When the estate is unrepresented. An estate would be said to be unrepresented if:
        i. Executors or administrators are absent from Nigeria without having an attorney;
        ii. The deceased died intestate and his next of kin is unknown or is absent from Nigeria without having an attorney
        iii. The deceased died testate but those that are to act are unknown or refuses to or neglects to act **for more than one (1) month after the death of testator**
        iv. Where the chain of representation is broken. That is, where the last surviving executor died intestate (without appointing an executor)
    b. When the estate is exposed to the danger of misappropriation, waste or deterioration
    c. Where the 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.
    d. Where the testator appoints the administrator-general as sole executor---**S. 2 AEL**

Comment [d183]: Limited as to purpose..

Revocation of grant of probate or letters of administration

- Where a latter Will or Codicil is discovered which has a revocation clause or which content is manifestly inconsistent with the former.
- Where letters of administration without Will had been granted and later found out that the deceased had a valid will.
- Where the grant was given to persons not so entitled. That is, where the grant was made to wrong persons
- Misrepresentation/false representation to the probate registrar---**EPHRAIM v. ASUQUO.** If 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---**LASEKAN v. LASEKAN**
- Where probate was granted while caveat was in force or where an appeal against a decision on the caveat is still pending---**DAN-JUMBO v. DAN-JUMBO**
- Where the testator or deceased is subsequently found to still be alive after the grant had been obtained---**IN THE GOODS OF NAPIER**
- Revocation at the instance of the court for better administration of the estate
- Fraud, mistake or misrepresentation in the grant of probate
- On grounds of public policy

The effect of the revocation of a grant is that it terminates the representation of a personal representative. Any action taken out by the personal representative before revocation remains valid. However, by **S. 17(2) AEL**, the following must be noted:

- All payments and disposition made in good faith to a personal representative before the revocation, are a valid discharge to the person making the same.
- The personal representative who acted under the revoked representation may reimburse himself in respect of any payments made by him which the person to whom representation is subsequently granted might have properly made.
- Finally, debts incurred by the personal representative before revocation will be settled from the estate---**HEWSON v. SHELLEY**

Resealing of grants

Generally, probate or letters of administration are granted in respect of properties within the jurisdiction of the State where it was granted. Accordingly, if the testator or deceased had other properties outside the State and the executors/administrators want to deal with those other properties, they cannot do so unless the grant of probate or letters of administration is resealed in the High Court of the State where the property is situate.

Comment [C184]:
See **S. 2 OF THE PROBATE RESEALING ACT** which provides that where the HC of a State has granted probate or letters of administration in respect of the estate of a deceased person, the probate or letters so granted may, on being produced to, and a copy thereof deposited with the High Court of any State, be resealed with the seal of that Court. It must be noted a probate or letter of administration granted in any commonwealth country may also be resealed in Nigeria. See section 1 Probate (Resealing) Act.

The personal representatives only have powers over properties in State where grant was given and they lack Locus Standi to institute action in respect of property outside the State unless grant is resealed---**FEDERAL ADMINISTRATOR-GENERAL v. ARIGBADU.**

S. 3 OF THE PROBATE RESEALING ACT provides **the conditions to be fulfilled before probate or letters of administration would be resealed.** They are:

- The probate duty (estate duty) has been paid in the value to which such estate is liable to probate duty in that state; or in the case of letters of administration, security must have been given in an amount sufficient to cover the property.
- The court may require evidence of the domicile of the deceased.

Resealing is regulated by the High Court (Civil Procedure) Rules. Application is to the Probate Registrar where the property is located and it would be accompanied by:

- CTC of the first grant of probate or letters of administration
- Copy of the Will, where applicable
- Sworn statement by applicants.
- Tax clearance certificates of the applicants
- Evidence of payment of prescribed fees

Upon submission of application with relevant documents, the following forms are to be filled and returned by applicant.

- Application form for resealing
- A tax clearance certificate
- Oath for resealing
- Bank certificate
- Inventory particulars of landed properties of deceased
- Bond for resealing
- Justification for sureties (where necessary)

Under **ORDER 62 RULE 24(2) LAGOS 2019** no limited or temporary grant shall be resealed except by leave of the judge. **Application for resealing is to be published/advertised in a manner prescribed by the judge.** Note that all the administrators or executors must join in the application for resealing---**ARUWAJI v. ASABORO.** Sureties are required for a resealing except in the following instances:

- Where the original grant was made to:
    a. A creditor
    b. Next of kin
    c. Attorney
    d. For the use or benefit of a minor

e. For the use or benefit of a person of unsound mind

By **S. 6 OF THE PROBATE RESEALING ACT**, **the effect of the resealing of a grant** is that Probate or letters of administration which are duly resealed has the like force and effect and have the same operation in the state where it was resealed, as if it was granted by the High Court of that State. The properties of the testator or deceased in the resealing State thus become subject of administration by the personal representatives.

DRAFTING OF APPLICATION FOR RESEALING OF A GRANT

K. C ANEKE AND ASSOCIATES
Barristers and Solicitors
3 Victoria Island Lagos
07053531239; kundycmith@gmail.com

OUR REF: **YOUR REF:** **DATE:** 10 April 2019

The Probate Registrar,
The Probate Registry,
High Court of Oyo State,
Ibadan Judicial Division,
Dear Sir,

APPLICATION FOR RESEALING

We are solicitors to late Mr. XYZ of 7, Oyo Road, Lagos who died on 10th June 2019 at the Lagos Teaching Hospital.

By a grant given to Mr. A and Mrs. B on the 12th July 2019 by the Lagos High Court Probate Registry, they were appointed administrators.

The deceased has property at 7, Oyo Street, Ogun state and we hereby apply for resealing of the letters of administration.

Please find attached the following documents

- A copy of the letters of administration
- Sworn statement of the applicant
- Evidence of payment of the prescribed fees
- Tax clearance certificate

Thank you
Yours faithfully
(signature)
K. C Aneke Esq
For: K. C Aneke and Associates
ENCL:

Comment [v185]: Note that if probate was granted, a copy of the will must be attached.

Comment [C186]:
- A copy of the letters of administration
- Sworn statement of the applicant
- Evidence of payment of the prescribed fees
- Tax clearance certificate

POSSIBLE MULTIPLE CHOICE QUESTIONS ON THIS TOPIC

1. _____ is the judicial confirmation of the authority of the executors under the will

A. Probate practice

B. Probate

C. Administration

D. All of the above

2. ____ involves the processes and procedures in the administration/management of the estate of a deceased person

A. Probate practice

B. Probate

C. Administration

D. All of the above

3. A non-contentious probate is also known as ____

A. Common form probate

B. Solemn form probate

C. Free form probate

D. Non-adversarial probate

4. A contentious probate is also known as ___

A. Common form probate

B. Solemn form probate

C. Free form probate

D. Non-adversarial probate

5. In Lagos, the person in custody of the testator's will is required to send the will to the probate registry within ___ from the date of his knowledge of the testator's death. In Abuja, he has ____

A. 14 days/3 months

B. 3 months/6 months

C. 3 months/ 14 days

D. 6 months/3 months

6. After the reading of the will, the executors will make an application for probate by way of ____

A. Petition

B. Originating motion

C. Writ of summons

D. Letter of application

7. An application for letters of administration is by way of ___

A. Petition

B. Originating motion

C. Writ of summons

D. Letter of application

8. Application for probate cannot be made within ____ days in Lagos/____ days in Abuja from the date of death of the testator

A. 14/7

B. 7/14

C. 14/14

D. 7/7

9. An application for grant of probate must be made within ___ months in Lagos and ___ months in Abuja, from the date of the death of the deceased

A. 3/3

B. 6/6

C. 3/6

D. 6/3

10. ___ shall be served on an executor who has failed, refused or neglected to apply for probate, directing the executor to prove the will or renounce the probate

A. Citation

B. Caveat

C. Renunciation notice

D. All of the above

11. The person requiring the procedure in 10 above must first enter a ____

A. Citation

B. Caveat

C. Notice to act

D. Notice to obtain

12. The procedure in 10 above is accompanied by ___

A. Affidavit of urgency

B. Affidavit of facts

C. Verifying affidavit

D. Statement on oath

13. The executor as in 10 above is required to enter appearance within ___ days from the date of service of the process on him

A. 42

B. 14

C. 8

D. 21

14. Where the executor as in 10 above fails to appear as in 13 above, the person requesting his appearance may apply to the registrar for such grant to be made to him or some other persons, by way of ____

A. Letter of administration

B. Summons

C. Petition

D. Originating motion

15. Where an initial grant of probate has been made and a subsequent grant is applied for, there would be a grant of ____

A. Additional probate

B. Double probate

C. Probate

D. All of the above

16. A caveat becomes ineffective by effluxion of time after ___ months in Lagos and ___ months in Abuja

A. 3/6

B. 6/3

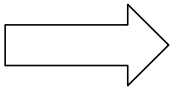
C. 3/3

D. 6/6

ANSWERS

1. B
2. A
3. A
4. B

5. C
6. D
7. A
8. A
9. C
10. A
11. B
12. C
13. C
14. B
15. B
16. A



10. PERSONAL REPRESENTATIVES AND ASSENT

1. EXPLAIN THE VARIOUS WAYS PERSONAL REPRESENTATIVES CAN BE APPOINTED

1. Express appointment of an executor: This is where the testator himself appoints the executors by naming them in his Will. Usually, to remove any doubt as to the identities of the executors so appointed, their names, addresses and occupation are also stated. **The advantages of express appointment are as follows:**

- It reduces the difficulty in the grant of probate
- It reduces the likelihood of disputes as such express appointments are less likely to be challenged
- It removes any doubt as to the identity of the executors.

2. Implied appointment of an executor: This is also known as **appointment according to tenor** i.e. where a Will describes the duties of a named person in terms sufficient to constitute him executor according to the tenor of the Will. Here, an appointment is not expressly made in the Will. The Will may be drafted in such a way that the personal representatives are not expressly appointed in the Will, but on a comprehensive reading of the Will, it can be said that a person is a PR by reason of the functions assigned to him under the Will. For instance: where certain persons have been appointed to carry out certain duties---**IN THE GOODS OF COOK**

3. Appointment by authorization/appointment under a power of appointment: This is also called **appointment through a nominee in a Will.** This is where the testator gives the power to a person to appoint executors for the Will. In this like, the executor is not directly named in the Will. That is, the testator does not directly name an executor in the Will but nominates another person in the Will to appoint an executor after the death of the testator. The testator may vest the power of appointment at the complete discretion of the nominees or may set some guidelines for the nominee to observe when making the appointment.

4. Appointment by operation of law: This is also known as **appointment by representation or executor by chain of representation.** Where the sole executor or last surviving executor dies after taking probate, but before completing the winding up of the estate of the testator, then any executor of his own Will shall be regarded as the executor of the first testator's Will so long as he obtains probate of the deceased sole or last surviving executor's Will. **That is, this is where a person is deemed to be the executor of a testator by being the executor of the Will of the last surviving executor---S. 8 AEL. NB:** It must be noted that the second executor cannot take office as the first executor's executor without also taking on the office of the original testator's

Comment [C187]: Section 2 AEL defines who personal representatives are and they include executors and administrators. They administer the estate of the deceased. An executor is appointed by will while an administrator is appointed by the Court. Personal Representatives are those who manage the estate of a deceased testator or intestate estate.

Comment [C188]:
WHO CAN BE APPOINTED AS PERSONAL REPRESENTATIVES
- Natural person
- A trust corporation.
- A law firm which its partners at the time can be appointed.

DISQUALIFICATION OF ACTING AS EXECUTOR
- Minor
- Mentally incapable
- Guilty of testator's death

Comment [C189]:
Where the executors are expressly appointed, the appointment clause could be drafted as follows: "I appoint Mr. ABC, Legal Practitioner of No 5 Adekoya Estate Benin and Mr. XYZ, Legal Practitioner of No 3 Eto Baba Close, Jos to be the executors of my Will."

Where the executors are also trustees, then the appointment clause should be drafted as follows: "I appoint Mr. ABC, Legal Practitioner of No 5 Adekoya Estate Benin and Mr. XYZ, Legal Practitioner of No 3 Eto Baba Close, Jos **(later called "My Trustees", which expression shall include the trustee for the time being)** to be the executors of my Will."

Comment [C190]: In imputing implied appointment, the Will must evince an expectation that the person impliedly appointed must perform certain essential functions and duties. Thus, **IN THE GOODS OF COOK**, the testatrix stated that she desired one John Goodrick to pay all her just debts. This was held to be an implied appointment. It must be noted that implied appointment or appointment by tenor is not advisable. It must also be noted that appointment by implication does not mean that there was no express appointment. There could be an express appointment and then another clause in the Will may make an appointment by implication.

personal representative. Where he does not want to deal with either, he must renounce both. There is no right of election. For this type of appointment to be valid, the chain of representation must not be broken. The chain of representation would be broken where the sole or last surviving executor:

- dies intestate
- fails to appoint his own executor in his own Will
- fails to obtain probate before his death
- renounces probate

Another instance of appointment by operation of law is under **S. 10 AEL**. Where a deceased died intestate, his property becomes vested on the Chief Judge of the state where he died until the grant of letters of administration. **Pending such grant, the judge can appoint an officer of court to administer the estate.** This is called **administration pending the grant of letters of administration to next-of-kin.**

5. Appointment by the court: This could arise in the following instances:

- Appointment of executors by the court where authorized by the will to make the appointment.
- Appointment of administrator for an intestate estate. Those entitled are as in **S. 49 AEL**
- Appointment of administrators for a testate estate but there is a break in chain of representation.
- Appointment of administrators for a testate estate but no executor is appointed or those appointed are incapacitated, unavailable, or refused to act.
- Appointment of an additional executor where a sole executor is appointed and there are **minority or life interests in the estate---S. 24(2) AEL**
- Where an infant is appointed as sole executor---**S. 29 AEL**.
- Where the personal representative applies to be substituted by a person appointed.

6. Substitutional appointment: This is appointment of executors based on a condition or an event happening. It could be conditional upon the first set of executors refusing to act. For instance Fawehinmi's will "I appoint First Trustees Nigeria Limited, a subsidiary company of First Bank of Nigeria Plc ..... as my executor and trustee. If for whatever reason my first choice of executor and trustee declines the appointment or otherwise refuses or neglects to act as such then I appoint Union Trustees Limited, a subsidiary company of Union Bank of Nigeria Plc...."

NB: Where there is vacancy, a substitutional executor can obtain DOUBLE PROBATE but where the first executors refused to act, the substitutional executors will obtain initial PROBATE.

7. Executors de son tort: These are executors who interfere with the estate pending the obtainment of probate---**ADENIYI JONES V MARTINS.** The act is however not a tort.

2. EXPLAIN WHO IS ENTITLED TO LETTERS OF ADMINISTRATION IN INTESTACY

The person entitled to letters of administration in intestacy is Next-of-Kin of the deceased. The Next-of-Kin here (by **order of priority)** are:---**S. 49 AEL**

- Spouse (This is also dependent on the type of marriage which could be statutory or customary marriage)
- Children
- Parents
- Brothers and Sisters of full blood
- Brothers and Sisters of Half blood
- Grand parents
- Uncles and aunts of full blood
- Uncles and aunts of Half blood
- Creditors
- Administrator-General

3. STATE NUMBERS OF PERSONAL REPRESENTATIVES THAT CAN BE APPOINTED

The required minimum number of executors to be appointed by the testator in the will is one and the maximum is determined by the testator. However, notwithstanding the number of executors appointed, probate can only be granted to four at every material time in order of priority as listed in the appointment clause of the testator's will. **NB:** The following can be appointed as **sole executors**:

- **a trust corporation and**
- **a sole beneficiary who is not a minor (S. 24(2) AEL will not apply)**

Where a testator appoints more than four persons as executors of a will, the position of the law is that **probate can only be granted to four of them in order of priority and without legal incapacity** while power for additional grant will be reserved for the remaining. Order of priority here is as their names appear in the appointment clause. For administrators, maximum is four, minimum is two. However, a trust corporation can be appointed as sole administrator. **NB: Probate can be granted to one person.** This is where the applicant or executor is a trust corporation or an executor who is a sole beneficiary and is not a minor. The exceptions are:

- Probate may not be given to a sole individual where there is a life interest in the will, or

Comment [C191]: Therefore, generally, the minimum number of executors is one (1) while the maximum number of executors to be appointed at a time to administer probate is four (4) in order of priority and without legal incapacity and availability. Power of additional grant will be reserved for the remaining executors.
As for letter of administration, the minimum number of administrators to be appointed is 2 while the maximum is 4. The exception is in relation to where a corporate entity is appointed as a sole administrator.

- Probate may not be given to a sole individual where there is a minority interest in the will (an additional executor will be appointed)---**S. 24(2) AEL**

4. STATE THE QUALITIES OF PERSONS TO BE APPOINTED AS PERSONAL REPRESENTATIVES----HACK CLAN

- **Harmony:** this is important when more than one executor is appointed. Thus executor should be someone that can work with others
- **Availability and willingness:** Availability means within Nigeria. Thus a person is unavailable when he is outside Nigeria.
- **Competent**
- **Knowledge of business of testator**: a person with knowledge of the testator's business is better than a total stranger to it.
- **Credible**
- **Logistics and convenience**: a person residing close to the estate of the testator would be better (proximity)
- **Age:** based on the presumption that an older person would die first, a younger person should be appointed as executor.
- **No conflict of interest:** a testator is not expected to appoint someone who is in the same line of business as he is, as such would amount to conflict of interest.

5. EXPLAIN CIRCUMSTANCES PERSONAL REPRESENTATIVES CAN BE ENTITLED TO REMUNERATION

The general rule is that personal representatives are not remunerated as the performance of such function is regarded as gratuitous because they should not profit from the estate except for reasonable expenses---**RE ORWELL; RE GATES**. There are however **exceptions**:---**COT**

- **Charging clause:** Where there is a charging clause in the will which permits executors to charge usual fees for services rendered towards administration of the estate---**RE POOLEY**
- **Order of the court:** this is where an application is made to court by the personal representative for an order of court entitling them to charge. The court can order that an administrator (with or without will annexed) be remunerated reasonably and that such remuneration should not exceed 10% of the income of the estate (Lagos) and not exceeding 5% on the amount of the realized property or when not converted into money, on the value of the property duly administered and accounted for by him (Abuja)---**ORDER 63 RULE 10 LAGOS 2019; ORDER 62 RULE 38 ABUJA 2018**

Comment [d192]: The fact that the man lives in the country does not make him available. Availability means that he is willing to take out time to administer the estate of the deceased. Where he is unwilling to act he should renounce probate.

Comment [d193]: Infant, sickly person should not be affected

Comment [d194]: This is especially where the estate can afford it.

Comment [C195]: HIGHER RATE OF REMUNERATION MAY BE ALLOWED WHERE THE COURT IS SATISFIED THAT THE ADMINSTRATION OF THE PROPERTY REQUIRED EXTAR AMOUNT OF WORK/LABOUR (L & A)

- **Trustee:** Where solicitor acts as trustee. Under the rule in **CRADOCK v. PIPER**, where an executor can charge or is entitled to refund for out of pocket expenses reasonably incurred in course of administering the estate.

6. EXPLAIN HOW PERSONAL REPRESENTATIVES CAN WITHDRAW OR RENOUNCE REPRESENTATION

Renunciation is where the executor or administrator is unwilling to act or has refused to act. However, renunciation **can only be done actively and not passively or by conduct.** The renunciation must be in writing as it is an active act. This could be by **filing the form for renunciation or affidavit**. By virtue of **S. 6(iii) AEL,** where an individual renounces probate, every right to executorship ceases and it would be taken that no executor was appointed or it may go to the next ones listed. Where all executors appointed renounce probate, it would be treated as if no executor was appointed.

Because the services rendered by personal representatives are gratuitous, those appointed can at any time renounce the grant or appointment. However, this should be done after the death of the testator and not before as the power of the personal representative has not arisen. Renunciation before the death of the testator will be premature.

Renunciation must be total and not partial as an executor cannot choose to manage a part of the estate and ignore the other---**PAUL v MOODIE.** Renunciation can be withdrawn or retracted by an order of the court. However, it is only in exceptional circumstances that leave may be given to an executor to retract a renunciation of probate after a grant has been made to person entitled in a lower degree. Note that acts done by an executor before he renounces probate still remains valid.

Who cannot renounce probate?

If an executor de son tort has intermeddled in the Estate, he CANNOT RENOUNCE PROBATE.

Cessation of right of executor (implied renunciation)

The right of an executor in respect of executorship ceases wholly and the representation of the estate of the deceased testator shall devolve and be committed to another as if that person had not been appointed executor or where an executor:

- Survives the testator, but dies before obtaining probate
- If cited, fails to appear to the citation
- Renounces probate of the will. SEE **S. 6 AEL**

7. EXPLAIN DUTIES AND LIABILITIES OF PERSONAL REPRESENTATIVES AND STATE HOW PERSONAL REPRESENTATIVES CAN BE DISCHARGED OF LIABILITIES FOR ADMINISTERING THE ESTATE OF THE DECEASED

(a) Duties of personal representatives

It is pertinent to note that personal representatives are not trustees because they act for the benefit of the estate as a whole and not for the beneficiaries. Trustees on the other hand have a duty towards the beneficiaries. They can however act as both personal representatives and trustees. Personal representatives may act separately when it comes to personal property. However, when it comes to realty the personal representatives must act jointly.

Their duties are as follows:

- They must act in good faith and not be fraudulent. The administrators and his estate will be liable for conversion---**S. 19 AEL; NBA V KOKU**
- They have the duty of gathering in the estate. They determine what are assets and liabilities of the testator---**OGBE V OGBE**
- They have the duty to pay funeral expenses and debts. Funeral expenses come first.
- They have the duty to take out the grant and prove the will. This could be in common form (non- contentious grant) or solemn form (contentious grant).
- The duty to distribute the legacies to the beneficiaries---**UGU V TEBI**. Note that the executors have the first year called **"executors' year" to ascertain the estate and beneficiaries before distributing the assets.** He cannot be compelled to distribute the asset within this year unless the asset is a wasting asset---**S. 47 AEL**
- They have the duty to file accounts and inventories---**S. 14 AEL.** The accounts should be opened for inspection by those interested in the estate.
- The duty to issue assents---**S. 3 AEL**
- They have a duty of care as they cannot afford to be negligent when administering the estate---**S. 19 AEL**
- They have a duty to give the testator a decent burial if they are aware of their duties.
- They distribute the remainder of the estate.

(b) Liabilities of personal representatives

- Liability for **DEVASTAVIT** (**waste and conversion**). Anything that negates the duty of care comes within this ambit.

Comment [d196]: Example where one of the beneficiary is an infant, or they should keep money in a bank to be used to train the children.

Comment [C197]:
It is advised that the following precautionary steps be taken by Personal representatives:
- Keep proper accounts
- Operate a separate bank account for the estate
- Do not pay estate money into personal account
- Make payments by cheque
- Obtain receipts for payments made
- Keep and preserve duplicate copies of receipts issued
- Avoid conflicts of interests

- Liability for co-representation
- Liability as executor de son tort (for intermeddling)
- Can be cited to take up probate
- Liability for not filing account
- Liability to creditors and beneficiaries

(c) Relief from liability/discharge of liabilities for administering the estate of the deceased

Personal representative may obtain relief from the above liabilities in the following instances:---

LACE

- **Limitation of action:** Where he pleads limitation of action (statute barred). **Creditors can only bring an action within 6 years while beneficiaries must bring an action within 12 years**. **This does not apply to conversion of assets by personal representatives.**
- **Affected person grants relief:** Where relief is obtained from the beneficiary or creditor affected.
- **Court grants relief:** Where the relief is obtained from court upon proof that he acted honestly and reasonably
- **Express provision:** Where there is express provision in the will made by testator, protecting executor from all acts that happened mistakenly or in good faith except dishonesty and fraud or willful negligence.

NB: Discharge as personal representatives can be applied for in the Court that granted Probate/Letters of Administration when the personal representative has **completed the administration of the estate** and filed **satisfactory final accounts.**

New duties may arise for the personal representative to handle after he has been discharged by the Courts. This may arise on any of the grounds below:

- New properties of the testator were discovered, the personal representative will be called to complete the administration
- The personal representative was discovered to have breached his duty of trust.

NOTABLES

Powers and rights of personal representatives

- **Power of right of action**: personal representative can bring an action on behalf of the estate and can take over action being prosecuted by the deceased. This does not include personal actions--**S. 15 AEL**

Comment [C198]:
The liabilities of an executor de son tort are:
- Liable to render an account to the beneficiaries and creditors even for debt incurred by the deceased---**WOKOCHA V. ESIABA**
- Liable to account for items with which he has dealt with.
- Liable to pay fine
- Liable for citation where the intermeddler is an executor appointed in the Will---**IN THE ESTATE OF BIGGS**
- Liable for loss suffered by the estate
- Liable for personal expenses during the period of intermeddling. An executor de son tort is not covered by the rule in **CRADDOCK V. PIPER** (where an executor can charge or is entitled to refund for out of pocket expenses reasonably incurred in course of administering the estate)
- Liability to pay inheritance tax on any of the property he intermeddles with---**NEW YORK BREWERIES COMPANY LTD V. AG**

- **Power or Right to distress**: where rents are due from a tenant or lessee of the deceased, the personal representative shall have power to distrain upon the land either at termination of lease or during the continuance of the possession of the lessee from whom the arrears accrue---**Section 16 AEL**
- **Power to invest the assets in the estate** of the deceased if contained in the will or as authorized under the Trustees Investment Act---**S. 37(3) AEL**
- **Power to 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. The assets to be appropriated must be equal to the legacy of the beneficiary. Specific legacies or devise must not be appropriated and consent of relevant person must have been obtained---**S. 44 (1)AEL**
- **Power to appoint trustee(s) for infants who are full beneficiaries of the estate.** This power to appoint trustee is important because the tenure of personal representative is limited as they are meant to distribute the estate and wind it up as soon as possible while a trustee can function for a long time. **Trustee can be appointed for infant beneficiaries and when an annuity(s) is involved---S. 45 AEL.**
- **Power to postpone distribution of estate**. The right to postpone must not exceed one year (executor's year)---**S. 47 AEL**. However, a court order can direct otherwise, such does not affect debts and when a pecuniary and general legacy are not paid within the executor's year, they attract interest until they are paid.
- **Power to sell, mortgage and lease the assets in the estate** in order to raise funds for the payment of debts and liabilities. When they sell the property, they sell it in their capacity as personal representatives.
- **Power to run or manage the business or trade of the testator**. The power to go into business is to be derived from the will and only the part of the estate stated to be put into business can be used---**RE WHITE**
- **Power to insure**: Pending the distribution of the assets in the estate of the deceased, the personal representative has power to insure such assets. Applicable in case of will and there must be no contrary intention. An order of court stating otherwise will override the power.
- **Power to delegate**: the functions of the personal representative can be performed by the personal representatives or their attorney.

Comment [v199]: Where there is a minority interest, the personal representative has the power to appoint trustee for the infant.

Comment [v200]: MCQ

Note the doctrine of relation back in relation to suing on behalf of the estate

- The doctrine is not applicable to probate because the executors derive their powers from the will.
- Where the man died intestate, if there is need to preserve the estate of the deceased as acts of trespass is being committed against it, those entitled to grant of letters of administration being next of kin of the deceased can act in their capacity as next-of-kin and not as administrators. When they act as next of kin and an action is taken against the trespasser upon grant of letters of administration, amendment can be sought to reflect

their present capacity. However, if the persons entitled to the grant before the grant had acted as administrators and not next of kin, the doctrine of relation back will not apply because as at the time of the act, they had no capacity to so act and their acts prior to the grant would be deemed invalid.

Comment [C201]:
In **INGALL v. MORAN,** the plaintiff based his claim upon his alleged representative capacity as administrator. At the date when the writ was issued, no letter of administration had been taken out and they were not taken out until two months later. The question before the court was whether in those circumstances the action was competent. It was held that it was not, that subsequent grants of letters of administration did not operate retroactively to validate the original writ which from beginning was a nullity.

8. STATE THE ACCOUNTS TO BE MAINTAINED AND FILED BY PERSONAL REPRESENTATIVES AND STATE THE EFFECT OF EITHER FAILING TO FILE THE ACCOUNT OR FILING INACCURATE ACCOUNTS

(a) Accounts to be maintained and filed by personal representatives (contents of account)--VIVA-

- Verifying affidavit
- Inventory of all assets
- Vouchers in hand of the personal representatives.
- Accounts of the Administration such as:
    - **a.** Account of all monies received on behalf of the estate
    - **b.** Purchases made
    - **c.** Out of pocket expenses
    - **d.** Other necessary account of administration

(b) Effect of either failing to file the account or filing inaccurate accounts

All personal representatives are to file accounts of their administration **ANNUALLY (every 12 months)** from the date of the grant until the completion of the administration---**ORDER 61 RULE 16(1) LAGOS 2019**. However, if good cause is shown, the judge may extend the time for filing such accounts---**ORDER 61 RULE 16(7) LAGOS 2019**

The accounts are to be filed at the probate registry:

- Annually (every 12 months) until completion of administration. In Abuja, it is whenever the probate registrar demands for it.
- At the conclusion of administration, final accounts should be filed.
- Where there is a complaint of maladministration (allegation of misappropriation), the executors will be required to file accounts
- Where the PR is removed or discharged before administration is completed.
- End of administration

- Where the PR is surrendering to the administrator general and public trustee, before the administrator general takes over, an account needs to be filed.

NB: Account must be filed in all the places where the deceased has properties.

NB: Accounts can be inspected. With regards to those who can inspect the accounts, **ORDER 61 RULE 16(9) LAGOS 2019** provides that the accounts can only be inspected by any person who satisfies the Probate Registrar that he is interested in the administration and the estate.

- Liability to pay fine of N100, 000 for every year of default. This would be enforceable by distress and if distress does not work, by imprisonment for a period not exceeding six (6) months---**ORDER 61 RULE 16(2) LAGOS 2019**
- Liability for imprisonment for not more than six months.
- The personal representative will not be discharged from his duties.

9. STATE WHEN AN ASSENT IS REQUIRED AND STATE THE ESSENTIAL ELEMENTS OF AN ASSENT

(a) When assent is required

Assent is required for only real property. Thus, the personal representatives divest themselves of the real estate by the document called **ASSENT**. **By virtue of S. 40(1) AEL, LAGOS,** personal representatives should issue assent to the beneficiaries. This should be issued when realty has been given to beneficiaries.

(b) Elements of assent

- It must be in writing, it need not be by deed. However, in Lagos, it is a registrable instrument and would be by deed.
- The grant of probate must be cited
- The property must be adequately described in order for it to be adequately ascertained.
- The beneficiary(ies) must be adequately described
- It must be signed by all the personal representatives. It must be signed by all the executors that proved the will where real property is to be vested. But where it is personal property, it must not be signed by all the executors that proved the Will.
- It should vest the legal estate to the beneficiary (ies).

Comment [C202]: (NOTE THAT ASSENT IS REQUIRED IN ALL THE STATES)

Comment [C203]: Statute requires assent to be in writing. No form of writing is required neither is a particular language required. Writing could be in letters, inscription, symbols, or marks though in most cases in Nigeria, it is in letters and in English language. The advantages of an assent in writing is that *the terms of the assent are specifically set out thus removing ambiguities;* and *an assent which is regarded as a conveyance may be used as a document of title.*

Comment [C204]: An assent must name the beneficiary or the devisee of the property being vested. He should be the person who under the Will of the deceased, is entitled to the property. Designating the person in whose favour an assent is made removes any doubt on the identity of the successor to the property. An assent which does not name the beneficiary shall not pass any legal estate – *Section 40(5) AEL, Lagos State*. Any person in whose favour an assent or conveyance of a legal estate is made by a personal representative, may require that notice of the assent or conveyance be written or endorsed on, or permanently annexed to the probate or letters of administration at the cost of the estate of the deceased and that the probate or letters of administration be produced at the like cost to prove that the notice has been placed there or annexed.

Comment [C205]: This is to signify the vesting of the property in the beneficiary by the personal representatives of the deceased since the benefactor is no longer alive. There is no corresponding requirement that the beneficiary signs the assent. This is however done in practice.

10. DRAFT A SIMPLE ASSENT (EMBODYING COMMENCEMENT; RECITAL; HABENDUM; INDEMNITY CLAUSE; AND EXECUTION)

AN ASSENT BY EXECUTORS IN FAVOUR OF PERSON ENTITLED

WE, **(COMMENCEMENT)**

1. _____ of _____

2. _____ of _____

3. _____ of _____

being the executors of _____ of _____ who died on _____ at _____ and whose will dated ___ has been proved by us on _____ at the probate registry.

WE ASSENT to vest all the property located at ____, covered by certificate of occupancy dated _____ and registered as _____ at the land registry **(VESTING CLAUSE)**

WE DECLARE that we have not previously given any assent in contravention to the estate covered by this assent **(DECLARATION CLAUSE)**

WE ACKNOWLEDGE the right of ____ to the production of the will and probate and the delivery of copies to him/her **(ACKNOWLEDGEMENT CLAUSE)**

THIS ASSENT is made pursuant to clause _____ of the testator's will dated ____

IN WITNESS of which the executors have all executed this assent in the manner below the day and year first above written

SIGNED

By the within named executors

_____

1.

_____

2.

_____

3.

IN THE PRESENCE OF:

NAME: _____

ADDRESS: _____

OCCUPATION: _____

SIGNATURE: _____

SCHEDULE

Comment [C206]:
COMMENCEMENT – This describes the nature of the document.
PARTIES CLAUSE – This states the names of the personal representatives with competing rights in the documents but simply personal representatives to vest the title in the beneficiary. Similarly, the beneficiary is not a real party in the real sense of having competing rights in the transaction.
VESTING CLAUSE – This is the operative (active) clause in the document which confers the property on the beneficiary.
DECLARATION CLAUSE – This is an affirmation by the personal representatives that they have not dealt contrary to the property to vest it in another person apart from the current one.
ACKNOWLEDGMENT CLAUSE – This guarantees the right of the beneficiary that the personal representatives would produce any document (such as the Will, probate, receipts, etc.) in their possession in the event that the beneficiary makes a demand or request of them.
TESTIMONIUM – This connects the parties to the contents of the document.
EXECUTION/ATTESTATION CLAUSE – This contains the signature of the parties as well as the particulars of the witnesses to the agreement.

Procedure for the administration of an estate/winding up

This is also known as the procedure for the winding up of an estate. The procedure is as follows:

- Application for grant of probate or letters of administration as the case may be
- Collation of the estate
- Settle all just debts and liabilities of the testator/deceased
- Distribute the estate to those entitled in line with the provisions of the Will
- Filing of accounts
- Discharge of the PRs (with caveat as to recall) and their office becomes functus officio. However, there are two exceptions under which they would be called back notwithstanding that they had been discharged and their office declared functus officio. They are:
    a. Where a part of the estate not administered and distributed is subsequently discovered
    b. Where any misconduct is discovered to have happened in the process of their administration.

If after winding up, any asset is discovered in the estate, they will be called upon to administer the estate. Thus, when personal representative discharges his duties, he does not necessary become functus officio, but remains in abeyance. Finally, note that a person cannot be both executor and solicitor to the estate---**NBA v KOKU.** It will lead to conflict of interests.

11. IDENTIFY ETHICAL ISSUES ARISING FROM THE ABOVE OUTCOMES

- A Solicitor drafting a Will or advising the estate of a deceased should ensure that persons who take up representation meet the qualities listed earlier on (brainstorm for more)

POSSIBLE MULTIPLE CHOICE QUESTIONS ON THIS TOPIC

1. _____ is also known as an appointment according to tenor of the will

A. Express appointment of an executor

B. Implied appointment of an executor

C. Appointment by authorization

D. Appointment by operation of law

2. Using the options in 1 above, _____ is also known as appointment through a nominee

3. Using the options in 1 above, _____ is also known as appointment by representation

4. Under appointment by operation of law, the deceased executor's executor may do all but one of the following

A. He cannot take office as the deceased executor's executor without also taking the office of the executor of the original testator's estate

B. Where he does not want to deal with either, he must renounce both

C. There is no right of election

D. None of the above

5. The required minimum number of executors to be appointed by the testator in his will is ___

A. 1

B. 2

C. 3

D. 4

6. The required maximum number of executors to be appointed by the testator in his will is____

A. 1

B. 2

C. 3

D. None of the above

7. Probate can only be granted to a maximum of ____ executors at every material time in order of priority as listed in the appointment clause

A. 1

B. 2

C. 3

D. 4

8. The minimum number of administrators that can be appointed is ____

A. 1

B. 2

C. 3

D. 4

9. The maximum number of administrators that can be appointed is _____

A. 2

B. 4

C. 6

D. None of the above

10. The following statements are correct except ___

A. Generally, probate may be granted to a trust corporation/an executor who is a sole beneficiary and is not a minor

B. Probate may not be given to sole individual where there is a life interest in the will

C. Probate may not be given to a sole individual where there is a minority interest in the will

D. None of the above

11. An executor can charge or is entitled to refund for out of pocket expenses reasonably incurred in the course of administering the estate. This is known as the rule in ____

A. Dan-jumbo v. Dan-jumbo

B. Craddock v. Piper

C. Bello Raji v. X

D. Paul v. Moodie

12. Renunciation by an executor may validly be done ____ the death of the testator

A. After

B. Before

C. Immediately before

D. All of the above

13. In relation to realty, personal representatives are required to act ____

A. Separately

B. Severally

C. Jointly

D. Jointly and severally

14. _____ is the period when executors are required to ascertain the estate and beneficiaries before distributing the assets

A. Administrator's year

B. Representative's year

C. Executor's year

D. All of the above

15-16. NO QUESTION

17. A trustee may be appointed by an executor in the following instances except ___

A. For an infant beneficiary

B. When an annuity is involved

C. A and B

D. None of the above

18-19. NO QUESTION

20. In Lagos, personal representatives are to file accounts of their administration ____ from the date of the grant until the completion of the administration

A. Every 3 months

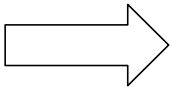
B. Every 90 days

C. Annually

D. Every 6 months

ANSWERS

1. B
2. C
3. D
4. D
5. A
6. D
7. D
8. B
9. B
10. D
11. B
12. A
13. C
14. C
15. BONUS
16. BONUS
17. C
18. BONUS
19. BONUS
20. C



11. PROPERTY LAW TAXATION

Comment [C207]: Taxation involves a monetary imposition on persons, property, transactions to yield public revenue. Taxation is compulsory and not voluntary - forceful imposition. A monetary charge imposed by the government on property and person.

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)

For the purpose of property law practice, taxation or taxes imposed are:

Comment [C208]:
The regulatory laws are:
- Stamp Duties Act
- Value Added Tax Act
- Capital Gains Tax Act
- Personal Income Tax Act
- Companies Income Tax Act
- Tenement Rate Laws of the states.
- Land Use Charge Law of Lagos state
- Finance Act
- Land Instrument Registration Laws
- Exchange duties Act

Collecting authorities
The Federal Government through the Federal Inland Revenue Services. The taxes collected by it includes:
- Companies Income Tax
- Personal Income Tax of residents of the FCT, Abuja e.t.c
- Stamp Duties on corporate bodies and residents of the FCT, Abuja
- Capital Gains Tax on residents of FCT and corporate bodies
- Value Added Tax

State Government through the Board of Internal Revenue of the state. The taxes collected by it includes:
- Personal Income Tax on residents (individual)
- Capital Gains Tax (transactions between only individuals)
- Stamp Duties on instrument executed by individuals.
- Consent fees
- Registration fees
- Estate duty

Local Government Council, the tax collected by it is either tenement rate in other states and land use charge in Lagos state

- Stamp Duties
- Capital Gains Tax
- Value Added Tax
- Personal Income Tax
- Companies Income Tax
- Tenement Rate
- Land Use Charge
- Consent fees
- Registration fees
- Estate duty

1. Stamp Duties: Stamp duties are regulated by the Stamp Duties Act and come into play in perfection stage of conveyance or instrument. Importantly, stamp duties is not paid on transaction or property or persons but on the document that evidences the relationship between the parties thus, it is a document tax and no document can be stamped unless covered by the Act pursuant to **S. 23 SDA**

The following are the documents to be stamped:

- Agreement or contract accompanied by a deposit
- Agreement for a sale of property
- Assignment
- Conveyances
- Power of Attorney
- Lease
- Mortgage

There are two ways of calculating stamp duties

- **Ad valorem:** This is the general way thus stamp duties are charged ad valorem generally--**S. 4(2) STAMP DUTIES ACT**. Ad valorem is a computation based on the value of the property. It is determined by the consideration and in accordance with the scale stated in

the schedule. The higher the consideration, the higher the amount to be paid in stamp duty. The computation is as follows:

a. Conveyances on sale - 75k for every N50
b. Leases - N30 for every N200
c. Mortgages - 75k for every N200

- **Fixed duty:** This computation disregard the value of the property and give a flat rate (nominal rate)---**S. 25 SDA.** Payable on deed poll such as power of attorney.

NOTABLES

- Documents are stamped according to their legal effect----**EASTERN NATIONAL OMNIBUS CO LTD. V IRC.**
- If a deed was signed and sealed but not yet delivered, it should not be stamped.
- Lagos state provides for 2% of the consideration but stick to the general rule. The authority to stamp the document depends on the parties involved. If only individuals are involved then, the state Board of Internal Revenue is to stamp; if a corporate body is involved, the Federal Inland Revenue Service will stamp.
- A document is to be stamped as soon as it is executed. For a deed, it is executed when it has been delivered. Thus, a deed which has not been delivered cannot be stamped. For instance, contract of sale is executed when it has been exchanged. Documents are to be stamped within 30 days of its execution and there is penalty for late stamping.
- There are consequences for failure to stamp a document. First, such document cannot be registered and the document cannot be admissible in evidence---**S. 22(4) SDA.** Note that it is only documents executed in Nigeria and relating to property in Nigeria, also that person producing it must pay penalty and unpaid duty---**S. 23 SDA**.

Comment [d209]: This does not apply to criminal proceedings.

2. Capital Gains Tax (CGT): CGT is a tax that is charged on the gains accruable on a disposal of assets. A disposal of assets occurs when any capital sum is derived from a sale, lease, transfer, assignment, compulsory acquisition or other disposition of assets---**S. 6(1) CGTA**

Comment [C210]:
Capital gains tax is paid on the following transactions namely:
- Sale
- Lease
- Transfer
- Assignment
- Compulsory acquisition--**S. 6(1) CGTA**

The following are not disposal of assets for the purpose of CGT:

- Conveyance or transfer by way of security of an asset (mortgage or charge)---**S. 7(4) CGTA**
- Transfer or reconveyance on redemption of a security---**S. 7(4) CGTA**
- Devolution on personal representative of assets of a deceased person---**S. 8(4) CGTA**
- Vesting in beneficiaries, the assets of a deceased person---**S. 8(4) CGTA**

In all the fore going instances, CGT is neither charged nor paid because there is no disposal of assets. **The chargeable gain is the difference between the cost of the asset and the consideration received on its disposal.**

Comment [C211]: LEARN THE COMPUTATION

The tax is on the gain. Thus, if no gain is made or realized from the disposal of an asset, CGT will NOT be charged or paid. The rate of CGT **is 10% of the gain made**---**S. 2(1) CGTA**

Allowable Income or expenses: before the tax is computed, allowable incomes or expenses are deducted from the gain. Allowable incomes or expenses are the expenses that are wholly, exclusively and necessarily incurred for the acquisition of the asset together with incidental costs---**S. 13 CGTA**. Allowable income or expenses include:

- The cost of acquiring the property. That is, the amount or value of consideration spent in acquiring the asset
- Incidental costs of the acquisition
- Cost of improvements to the property. That is, expenses incurred in enhancing the value, state or nature of the asset before disposal
- Any amount incurred in establishing, preserving or defending the deposer's title to or right over the asset; and
- Incidental costs of the disposal which may include costs of advertisements, valuation and fees, commission and remuneration paid to professionals involved in the disposal.

Persons exempted from paying CGT

- Ecclesiastical, charitable, or educational institutions of a public character
- Statutory/registered friendly societies
- Co-operative societies registered under the co-operative society laws of a state
- Trade unions registered under the Trade Unions Act and the disposal of asset or gain must be connected to the purposes of the union for the exemption to apply---**S. 26(1) CGTA**
- Gains accruing to any local government
- Disposition by way of gifts---**S. 40 CGTA**
- Gains accruing to any company or authority established by law to purchase and export commodities from Nigeria or for fostering economic development of Nigeria----**S. 27 CGTA**

NB: Ideally because it is the transferor that is benefiting, he should pay but because payment of the tax is a condition precedent to perfection of title, it is the transferee in practice that pays. Capital gains tax is not paid on mortgage transaction because there is no gain in mortgage. It is also, not paid in gift of land.

3. Value Added Tax: The value added tax governed by the value added tax Act is tax paid on goods and services. Professional services rendered by legal practitioners come into play here. First a legal practitioner is expected to have an account with the authority in charge of value added tax. The value added tax is **5% of the legal practitioner's fees.** The VAT is not retained by the legal practitioner but remitted to the relevant authority by Federal Inland Revenue

Services. VATable person includes all professionals and legal practitioner is a professional. The Federal Inland Revenue Service is in charge of VAT.

4. Personal Income Tax: Personal Income Tax is regulated by Personal Income Tax **Act. This tax is paid by individual, a group or business and not a limited liability company. An individual may be assessed on the pay as you earn scheme -PAYE and upon payment of tax, a tax clearance certificate is usually given pursuant to S. 84(1) PITA. Relevant authority or state where the personal income tax can be paid to is determined by residence - where the person resides and not where he works.**

5. Companies Income Tax: Companies Income Tax is regulated by the Companies Income Tax Act, and it is paid by companies to the Federal Inland Revenue Service.

6. Consent Fees: Consent fee is the payment made in obtaining the consent of the Governor of a state in furtherance of **S. 22 LAND USE ACT**. Consent is obtained in lease, assignment, mortgage and other form of alienation of interest. The fee is paid to Governor through the Ministry of Land. In Lagos state, **the rate payable is 8% of the assessed value of the property.** Only the states of the federation can collect this fee.

7. Registration fee: This is the fee paid for the registration of instrument at the Land's Registry. In Lagos state, it is calculated at **3% of the assessed value of the property.** This is payable to the government of each state.

8. Estate duty: This is payable in respect of a deceased's real and personal property. The amount payable as estate duty is **10%** in Lagos state and it is calculated based on the gross value of the estate.

9. Tenement rate: This is charged by virtue of the **Tenement Rate Law** of the various states. The tenement rate is **payable annually on buildings** situated within a particular local government area**.** It is also known as **the property tax** in some areas. **In Lagos state, it forms part of land use charge under the Land Use Charge Law of Lagos**.

Comment [C212]: The considerations for the land use charge are:
- The location of the property
- The purpose for which the property will be used
- Nature of the property

2. DISCUSS ETHICAL ISSUES ARISING FROM BREACH OF THE RPC IN CONNECTION WITH PROPERTY

- A solicitor must advise his client to pay taxes on property transaction
- A solicitor must pay his tax when he receives an income
- A solicitor should not collude with his client to evade payment of tax.
- Do not reduce or save money for your client.