

## LEGAL STATUS AND CHALLENGES OF IRREVOCABLE POWER OF ATTORNEY AS AN INSTRUMENT OF TRANSFER OF TITLE TO LAND IN NIGERIA

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### **Abstract**

*In land transactions, certain documents serve certain purposes. Whereas a deed of assignment is used when a property owner intends to wholly transfer his title to another person for a consideration, a lease or tenancy is used when the property owner intends that the transferee should enjoy the property for only a period of time. Now, if a property owner wishes to appoint another person to manage his property on his behalf, he will do so through a power of attorney, and in such cases, the donee/attorney can exercise all or any of the powers conferred on him vide the power of attorney, which he could not otherwise have had the legal right to do. However, despite the traditional roles of the above-mentioned documents in land transactions, there is a growing school of thought that the utility of an irrevocable power of attorney can be broadened beyond a mere instrument of delegation, to an instrument of automatic conveyance of title in a property from the donor to the donee, thereby elevating its status to that of an instrument of assignment. This paper therefore critically examines the legal status of an irrevocable power of attorney in land transactions. The researchers find that the decisions of the Supreme Court in *Ude v. Nwara* and *Ezeigwe v. Abudu* which was followed in *Malami v. Ohikhuare* to the effect that a power of attorney is a document of delegation and not an instrument of conveyance, constitute the extant position of the law notwithstanding the case of *Ibrahim v. Obaje* where the apex Court held that a power of attorney can pass title to the donee. The researchers critique the decision of the Supreme Court in *Ibrahim v. Obaje* as it relates to the issue of power of attorney and the distinguishing of the facts of *Ude v. Nwara*. Apart from the analysis of judicial authorities on the issue, the researchers also discuss the various practical challenges which the use of an irrevocable power of attorney as an instrument of land transfer may pose to land vendors and buyers. In the final analysis, the researchers recommend that lawyers should admonish their clients on the importance of acquiring or transferring title through the appropriate instruments.*

**Keywords:** *Irrevocable Power of Attorney, Land, Property, Title, Challenges, Legal Status*

### **1.0 Introduction**

Land, though a basic asset in Nigeria, is a major source of litigation,<sup>1</sup> interpersonal and intercommunal clashes, and even loss of life in some cases. Unfortunately, most of the disputes that arise from land transactions in Nigeria are such that could easily be avoided if the parties, especially the buyers exercised due diligence not only to confirm the title of the vendors but to also ensure that the vendors obtained and are transferring their title through the proper documents. Indeed, as rightly noted by some scholars, the most important duty of a vendor, in sale of real property transactions, is to deliver a deed capable of transferring marketable title in the property to the buyer.<sup>2</sup> Over the years, the courts have recognized instruments such as deed of assignment, lease, sublease, deed of gift, as being capable of transferring legal interest from the assignor/lessor to the assignee/lessee respectively. Similarly, the courts have in a plethora of cases warned that a power of attorney is

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<sup>1</sup> P. A. Oluyede, *Nigerian Conveyancing Practice, Drafting and Precedents* (Heinemann Educational Books (Nigeria) Plc, Ibadan, 1994), pg. 1.

<sup>2</sup> Theron R, Nelson and Thomas A, Potter, *Real Estate Law: Concepts and Applications* (West Publishing Company, USA, 1993), pg. 170.

incapable of transferring ownership of a property from the donor to the donee. However, following the decision of the Supreme Court in *Ibrahim v. Obaje*<sup>3</sup> which held that an irrevocable power of attorney can transfer title to a donee, public opinion mobilized in support of the utilization of power of attorney as an instrument of transferring title in land. But, not long after its decision in *Ibrahim v Obaje*, the Supreme Court in *Malami Vs. Ohikhuare*,<sup>4</sup> reiterated the position that a power of attorney cannot transfer title. The decisions of the Court of Appeal on the issue are conflicting and some scholars have opined that the Supreme Court should, when the occasion presents itself, re-establish its pronouncement in *Ibrahim v Obaje* to the effect that an irrevocable power of attorney is capable of transferring interest in land from the donor to the donee.<sup>5</sup> Against this background, it is important to consider the legal status of an irrevocable power of attorney in land transactions and the challenges of using same as an instrument of acquiring or transferring title in land.

## 2.0 Meaning and Nature of a Power of Attorney

In order to fully appreciate the legal status of an ‘irrevocable power of attorney’, it is pertinent to consider the meaning and nature of a power of attorney. This is because an irrevocable power of attorney is only a specie of a power of attorney. In the case of *Abubakar v. Waziri*,<sup>6</sup> the Supreme Court defined a power of attorney as “an instrument in writing whereby one person, as principal, appoints another as his agent and confers authority to perform certain specified acts or kinds of acts on behalf of the principal.” Historically and even in contemporary times, the rationale behind a power of attorney is to obviate the obstacles of time and distance to business dealings with third parties.<sup>7</sup> In other words, since people cannot be in two places at the same time, a power of attorney serves as a document of expedience which enables people to have their personal and business matters handled for them in their absence.<sup>8</sup> No matter how close a person may be to the owner of a property, the person has no right to deal with that property except by operation of law<sup>9</sup> or with the consent of the owner. Usually, every power of attorney contains the following clause: “I, Mr. A, hereby appoint Mr. B as my true and lawful attorney, in my name and on my behalf to do and execute any or all of the following things.” The expression ‘on behalf of’ means “as representative of”<sup>10</sup> or “in the interest of.”<sup>11</sup> This presupposes, without doubt, that a power of attorney is simply a document of appointment and authorization of one person to act on behalf of or in the interest of another person.

## 3.0 Legal Status of an Irrevocable Power of Attorney as an Instrument of Transfer of Title to Land in Nigeria

Generally, a power of attorney is revocable at the instance of the donor. This means that the authority of the donee can be terminated by an act of the donor or the donor’s death, incapacity, or bankruptcy. However, an irrevocable power of attorney is an exception to this general rule. This type of power of attorney is expressed to be irrevocable and is given to secure a proprietary interest of the donee of the power; or the performance of an obligation owed to the donee. A practical importance of an irrevocable power of attorney is a situation where the donor is concerned that a time may come when he is unable to look after his own property, and want to choose who will manage his property and how he will do

<sup>3</sup> (2019) 3 NWLR (Pt. 1660) 389.

<sup>4</sup> (2019) 7 NWLR (PT. 1670) 132 @ 157, para-E.

<sup>5</sup> See I.O. Odionu & I.K. E. Oraegbunam, “Registration of Irrevocable Power of Attorney: The Supreme Court Decision in *Ibrahim V Obaje* (2019) 3 NWLR (Pt 1660) 339 as a Welcome Development” *IRLJ* 3 (1) 2021, pg. 22 (pp. 17-22).

<sup>6</sup> (2008) 14 NWLR (Pt. 1108) 507 at 533, para g.

<sup>7</sup> L.C. Asher, *The Complete Power of Attorney Guide for Consumers and Small Businesses: Everything You Need to Know Explained Simply* (Atlantic Publishing Group, Inc, Florida, USA, 2010), pg. 21.

<sup>8</sup> *Ibid* pp 25-27.

<sup>9</sup> For example, the obtaining of a letter of administration empowers a person to administer a property of the deceased owner; see *NBA v Waziri* (2019) 7 NWLR (Pt. 1672) 574.

<sup>10</sup> See S. Wehmeier, *Oxford Advanced Learner’s Dictionary* 6<sup>th</sup> Edition (Oxford University Press, Oxford, 2000) pg. 92.

<sup>11</sup> See C. L. Barnhart & Robert K. Barnhart, *The World Book Dictionary* (World Book Inc, Chicago, 1988) pg. 183.

it.<sup>12</sup> The word ‘irrevocable’ means ‘final’, ‘cannot be changed.’<sup>13</sup> So long as the donee has that interest or the obligation remains undischarged, the power shall not be revoked by the death, incapacity or bankruptcy of the donor or, if the donor is a body corporate, by its winding up or dissolution, or by any act of the donor without the consent of the donee.<sup>14</sup> From the foregoing, the two elements of irrevocability are: (a) express provision in the power of attorney instrument to the effect that the power is irrevocable and (b) recognition of a proprietary or other interest in favor of the donee. In *Chime v. Chime*,<sup>15</sup> the Supreme Court held that:

It is where a Power of Attorney is expressed to be irrevocable and is given to secure a proprietary interest of the donee or the performance of an obligation owed to the donee that it is irrevocable either by the donor without the consent of the donee or by the death, incapacity, bankruptcy, winding up or dissolution of the donor, so long as the donee has the interest or the obligation remains undischarged...But it is not irrevocable merely because the agent has an interest in the exercise of it.<sup>16</sup>

In this connection, Chitty notes that while an agent/donee cannot in general dispute the title of his principal/donor, he may do so in the case of a property that is bailed to him, and which is claimed by a third party.<sup>17</sup> While there is no doubt that if a donee, in exercise of the powers conferred on him vide an Irrevocable Power of Attorney, transfers the property to a third party or even to himself if the power of attorney so allows, the title of the donor will be repudiated accordingly, what is difficult to postulate is that the mere conferment of the power on the donee with an expression that the power is irrevocable and/or that the power was given for a consideration, without more, immediately repudiates the residuary title that inheres in the donor/owner over the property and automatically transfers same to the donee.

Thus, in *Ude v. Nwara*<sup>18</sup> the Supreme Court held that a Power of Attorney is not an instrument which confers, transfers limits, charges or alienates any title to the donee; rather it could be a vehicle whereby these acts could be done by the donee for and in the name of the donor to a third party. The apex court also held that the mere issuance of power to a donee to transfer land to a third party or even to himself, is not per se alienation or parting with possession. The Court further held that a power of attorney is a document of delegation, and that it is only after, by virtue of the Power of Attorney, the donee leases or conveys the property, the subject of the power, to any person including himself that it can be said that there is an alienation.

Also, in *Ezeigwe v. Awudu*,<sup>19</sup> the Supreme Court held that an Irrevocable Power of Attorney is not a document of title conferring title to the property in issue on the donee and that the existence of the Irrevocable Power of Attorney is a clear evidence or confirmation of the fact that the title to the land in dispute resides in the donor of the power. The apex Court further held that the only

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<sup>12</sup> See ‘*Enduring Power of Attorney: A Guidebook for Donors and Attorneys* (prepared by the Public Guardian and Trustee of Manitoba, October 2014) pg. 3 available at [https://www.gov.mb.ca/publictrustee/pdf/power\\_of\\_attorney\\_guidebook.pdf](https://www.gov.mb.ca/publictrustee/pdf/power_of_attorney_guidebook.pdf) accessed on 20 January 2024.

<sup>13</sup> ‘*Oxford Advanced Learner’s Dictionary*’ pg. 635.

<sup>14</sup> Conveyancing Act, 1882, s 8 (1); Property and Conveyancing Law, 1959, s. 143.

<sup>15</sup> (2001) 3 NWLR (Pt. 701) 527 at 554-555, paras H and A-B respectively.

<sup>16</sup> See also (*Bailey and Anor (Respondents) v Angove’s PTY Limited (Appellant)* [2016] UKSC 47.

<sup>17</sup> Joseph Chitty, ‘*Chitty on Contracts*’ 24 Edition (Sweet & Maxwell, London, 1977) 53.

<sup>18</sup> (1993) 2 NWLR (Pt. 278) 638.

<sup>19</sup> (2008) 11 NWLR (Pt. 1097) 158 at 176.

document that can prove any passing of the title to the donee would be a conveyance or an assignment.<sup>20</sup>

However, in *Ibrahim v. Obaje*, the Supreme Court was again faced with the question of “whether in law a Power of Attorney can transfer interest in land to a Donee?” This time, what used to be a settled position on the issue was changed as the Supreme Court answered the question in the affirmative by endorsing the Court of Appeal’s decision as follows:

(D)epending on the particular Power of Attorney that is its contents and its intendment it can transfer interest to a donee or the Donee can equally hold unto all the rights or Powers of the Donor and since in this instance the Donor’s certificate of Occupancy is clearly evident and on display.<sup>21</sup>

While it appears that in reaching the above conclusion, the apex Court was influenced by other documents such as certificate of occupancy and building plan issued to the donee by the donor in respect of the property, and the need to do substantial justice, it is apposite to consider the reason which the Court gave in refusing to follow the earlier locus classicus of *Ude v. Nwara*. The reason is as follows:

I seek to say at this point that the decision in *Ude v. Nwara* supra is distinguishable clearly from the present case under consideration. For purpose of recapitulation, the 2nd respondent in *Ude v. Nwara* issued a Power of Attorney to the 1st respondent while statutory lease period of the appellant had not been properly terminated as required by the Eastern Nigerian Law. The 2nd Respondent therein who was the Attorney General of the State who donated this Power of Attorney should not have done so since Government cannot revoke land (except for public use) and re- allot same land to private person. The Lower Court did consider the facts in the decision of *Ude v. Nwara* (supra) before it concluded that the facts are not on all fours and as such should be distinguished.<sup>22</sup>

With all due respect, a closer examination of the above reason vis-à-vis the facts of *Ude v. Nwara*, reveals, that the reason was reached per incuriam. The correct facts of *Ude v. Nwara* is that the appellant (Ude) as plaintiff instituted an action against the respondents (Nwara & AG Rivers State) as defendants at the High Court claiming a declaration that he is the lessee of the leasehold property situate at No. 2 Ekpeye Street Diobu, Port Harcourt, a declaration that the sale of the said property by the Rivers State Government to the 1<sup>st</sup> respondent (Nwara) is null and void and of no effect, general damages for trespass and perpetual injunction restraining the respondents their servants or agents, from further acts of trespass to the premises. The appellant's case was that, before the Civil War he was granted a lease of a Plot of land situate at No. 2 Ekpeye Street Diobu by the Rivers State Government. Through his attorney, the appellant developed the plot by erecting a storey building on it. During the Civil War the property was treated as abandoned property by the Rivers State Government and managed by the Rivers State Abandoned Property Authority. Although the lease expired in 1971 the property was duly released to the appellant after the Civil War. Particularly on the 19<sup>th</sup> day of February 1973 the Rivers State Abandoned Property Authority by an instrument

<sup>20</sup> See also *Amadi V. Nsirim* (2004) 17 NWLR (Pt. 901) 111 at 124.

<sup>21</sup> Supra.

<sup>22</sup> Supra pg. 410, paras B-C.

(Exhibit 'C') transferred to the appellant the control and management of the said property. Following the transfer of the property the appellant's attorney went into occupation of the property and paid the Port Harcourt City Local Government property rates and the Utility Board water rates. In 1983, the 1<sup>st</sup> respondent entered the premises in dispute and interfered with the appellants possession claiming that he had bought the property from the Government hence the appellant sued the respondents. The respondents' case was that the property in dispute was a State land, the 7 years lease of it to the appellant had expired on 31st December 1971 and was never renewed. Whilst the appellant was still in possession, the Government of the Rivers State by an agreement dated 16th August 1983 (Exhibit M) sold the property to the 1st respondent. The respondents contended that the release to the appellant by the Abandoned Property Authority could not be relied upon and that the grant of a power of attorney by the appellant without the consent of the 2nd respondent was in contravention of the mandatory provision of the State Land Law an express covenant in the lease.<sup>23</sup> It was in response to this latter argument, that the Supreme Court per Nnaemeka JSC held as follows:

It is left for me to deal with the second respondent's contention that by execution of the power of attorney, Exh. "A" without their consent, the plaintiff/appellant had committed a breach of the covenant not to part with the possession of the demised property without the lessor's consent. To begin with, it appears to me that this thrust of the argument lost sight of the time nature of a power of attorney... A power of attorney merely warrants and authorizes the donee to do certain acts in the stead of the donor and so is not an instrument which confers, transfers limits, charges or alienates any title to the donee: rather it could be a vehicle whereby these acts could be done by the donee for and in the name of the donor to a third party...So far, it is categorized as a document of delegation: it is only after, by virtue of the power of attorney, the donee leases or conveys the property, the subject of the power, to any person including himself then there is an alienation. There is no evidence in this case that that stage had been reached."<sup>24</sup>

From the foregoing, it is submitted with utmost respect, that the apex Court in *Ibrahim v Obaje* erred in its construction and distinguishing of the facts of *Ude v. Nwara* when: (a) the Court held that it was the 2<sup>nd</sup> respondent therein (i.e. Rivers State Government) that issued a power of attorney, when from the facts of the case, it was actually the appellant (Ude) that issued a power of attorney; and (b) the Court did not consider that the 2<sup>nd</sup> respondent's contention in that case (which was rightly rejected by the Court) was that the appellant's issuance of a power of attorney to a third party amounted to an alienation of title and a breach of the lease between the 2<sup>nd</sup> respondent and the appellant so as to entitle the 2<sup>nd</sup> respondent to forfeiture.<sup>25</sup>

Interestingly, two years after its decision in *Ibrahim v. Obaje*,<sup>26</sup> the Supreme Court was faced with the same question in the case of *Malami v. Ohikhuare*.<sup>27</sup> In this case, the 1<sup>st</sup> appellant/plaintiff sued the respondents over a parcel of land, claiming inter alia for a declaration that the revocation of

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<sup>23</sup> See page 641 for the facts of the case.

<sup>24</sup> Supra pages 664-665, paras G-H and A-B respectively.

<sup>25</sup> See also the same facts as narrated in the Nigerian Supreme Court Cases report - *Ude v Nwara* (1993) 1 N.S.C.C 236 at 240-241.

<sup>26</sup> Please note that *Ibrahim v Obaje* was decided on 15 December 2017 (but reported in 2019) while *Malami v. Ohikhuare* was decided on 1 February 2019.

<sup>27</sup> (2019) 7 NWLR (PT. 1670) Page 132.

his certificate of occupancy by the respondents and the purported transfer of the disputed land to a third party was null. The trial court granted the 1<sup>st</sup> appellant's reliefs in part. The respondents/defendants appealed to the Court of Appeal. In the course of the appeal, the 2<sup>nd</sup> appellant applied to be joined as a party interested, hinging on an irrevocable power of attorney earlier donated to him by the 1<sup>st</sup> appellant/plaintiff over the same property long before the 1<sup>st</sup> appellant/plaintiff had instituted the action at the High Court. Upon the joinder of the 2<sup>nd</sup> appellant, the respondents/defendants applied for and was granted leave to raise the issue of jurisdiction challenging the locus standi of the 1<sup>st</sup> appellant/plaintiff to file the suit in the first place after he had issued an irrevocable power of attorney to the 2<sup>nd</sup> appellant in respect of the same property.<sup>28</sup> The Court of Appeal upheld the respondents/defendants' contention and allowed the appeal. The 1<sup>st</sup> and 2<sup>nd</sup> appellants appealed to the Supreme Court. One of the issues before the apex Court was "whether the lower court was right in holding that because the 1<sup>st</sup> appellant donated an irrevocable power of attorney to the 2<sup>nd</sup> appellant, he lacked the capacity to institute this action thereby robbing the trial court of jurisdiction."<sup>29</sup> In reversing the decision of Court of Appeal, the Supreme Court referred to and reinforced its earlier position in *Ude v. Nwara* and held as follows:

The donation of an irrevocable power of attorney by the 1<sup>st</sup> appellant to the 2<sup>nd</sup> appellant merely warrants or authorizes the 2<sup>nd</sup> appellant who is the donee to do certain acts in the stead of the donor, but does not confer or transfer title to the 2<sup>nd</sup> appellant... The court below was wrong to state in Vol.3, page 2278 of the records that the 1st respondent (1st appellant) no longer had the power to initiate the proceedings at the lower court for himself because it is settled that an irrevocable power of attorney given for valuable consideration robs the donor of power to exercise any of the powers conferred on the donee.<sup>30</sup>

Unfortunately, the above quote from the decision of the apex Court has been misconstrued in some quarters. For instance, in *Kamba Engineering Services Co Ltd & Ors v. First Choice Properties Ltd & Ors*,<sup>31</sup> the Court of Appeal thought, howbeit wrongly with all due respect, held that what the Supreme Court, per Aka'ahs (J.S.C) held in *Malami v. Ohikhuare* was that "an irrevocable power of attorney given for valuable consideration robs the donor of power to exercise any of the powers conferred on the donee." Some learned scholars have also proceeded on the same wrong footing to criticize the judgment of the apex Court in *Malami v Ohikhuare*.<sup>32</sup>

Happily, the correct facts of the case as stated earlier in this paper has been confirmed by a learned scholar to the effect that it was actually the Court of Appeal (not the Supreme Court) in *Malami vs. Ohikhuare* that held that the issuance of an irrevocable power of attorney by the 1<sup>st</sup> appellant to the 2<sup>nd</sup> appellant to take possession, manage and administer the property on his behalf, removed the 1<sup>st</sup> appellant's "power to initiate proceedings at the lower court for himself, because it is settled that an irrevocable POA given for a valuable consideration robs the donor of the power to exercise any of the powers conferred on the donee."<sup>33</sup> In fact, it was this decision of the Court of Appeal that the Supreme Court reversed by holding that the irrevocable power of attorney given to the 2<sup>nd</sup> appellant does not have the effect of divesting the 1<sup>st</sup> appellant of his title in the property and

<sup>28</sup> See *Ohikhuare v. Malami & Ors* (2013) LPELR-22348 (CA).

<sup>29</sup> See page 154.

<sup>30</sup> Supra at pg. 156-157, paras G-H, and D-E respectively.

<sup>31</sup> (2022) LELPR – 58919 (CA) per Mohammed Baba Idris, JCA at page 64.

<sup>32</sup> Odionu & Oraegbunam, pg. 21.

<sup>33</sup> See Lai Oshitokunbo Oshishanya, "An Almanac of Contemporary and Continuum of Jurisprudential Restatements" *Almanac Foundation, Surulere, 2023, pg. 456.*

as such the 1<sup>st</sup> appellant had the locus standi to sue the respondents. This is because, as rightly noted by Oshishanya: “(although) irrevocable power of attorney is donated to secure proprietary interest in the donee or performance of an obligation owed to the donee; where the donee does not exercise a power under power of attorney, as the donor whose right is not subordinate to that of the donee, it is open to the donor to exercise the power.”<sup>34</sup>

What emerges from the foregoing, in any case, is the need for further judicial clarification not only because the decisions of the Supreme Court in *Ibrahim v. Obaje* and *Malami vs. Ohikhuare* seem to be divergent on the legal status of an irrevocable power of attorney, the Court of Appeal has also delivered conflicting decisions on the issue. For instance, in *Onoba v. Abuja Building Products Ltd & Ors*,<sup>35</sup> *Fed. Ministry of Justice Post Service Housing Scheme Ltd/Gte v. Aveo Global Resources Ltd & Anor*,<sup>36</sup> *Susanniger & Co. Ltd v. Minister, FCT Administration & Ors*,<sup>37</sup> the Court of Appeal followed the principle in *Ude v. Nwara* to the effect that a power of attorney cannot pass title to the donee. However, in *Ugorji v. Apugo*,<sup>38</sup> the Court of Appeal followed the principle in *Ibrahim v. Obaje* to the effect that a power of attorney can convey title to the donee. In *Onoba v. Abuja Building Products Ltd & Ors*,<sup>39</sup> the Court of Appeal considered the issue from a common-sense approach and held that “by no stretch of imagination can it be said that the donor of a Power of Attorney was conferring, transferring, limiting, charging, or extinguishing her legal or equitable rights, title or interest in the disputed land to the donee. According to the Court, “such an interpretation will run foul of the English language or grammar.”<sup>40</sup> Even though the decision in *Onoba* was decided before the Supreme Court’s decision of *Ibrahim v. Obaje*, the reasoning of the Court is still correct and in line with the Supreme Court’s decisions in *Ude v. Nwara* and *Malami v. Ohikhuare*. This view is also supported by the decision of the Supreme Court of India in the case of *Suraj Lamp and Industries Pvt. Ltd. Vs. State of Haryana & Anor*,<sup>41</sup> that: “even an irrevocable attorney does not have the effect of transferring title to the grantee (donee).”

#### **4.0 Legal Challenges of an Irrevocable Power of Attorney as an Instrument of Transfer of Title to Land in Nigeria.**

a. **Devolution of Interest:** Except where a donee, in the exercise of his powers, alienates the property to a third party while he is still alive or capable, the donor’s title will remain intact after the death or incapacity of the donee. The common law principle is that the death of a donee terminates the power of attorney.<sup>42</sup> In *Potasky v. Potasky*,<sup>43</sup> the wife of a deceased donee could not exercise the powers of the donee/attorney who had died without appointing a substitute attorney. Therefore, unlike beneficiaries of assignees or lessees in a deed of assignment or lease, the beneficiaries of a donee are not legally entitled to any vested interest in the authority conferred on the donee in the absence of an express provision to that effect. Therefore, if the donee dies before exercising the powers conferred on him or appointing a substitute attorney (if he had authority do so), his heirs cannot lay claim on the property subject of the power of attorney. In view of this possibility, section 4 (2) of the English Power of Attorney Act, provides that: “A power of attorney given to secure a proprietary interest may be given to the person entitled to the interest and persons deriving title under him to that interest, and

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<sup>34</sup> See Lai Oshitokunbo Oshishanya, “An Almanac of Contemporary and Continuum of Jurisprudential Restatements” Almanac Foundation, Surulere, Vol. ii, 2013, pg. 274.

<sup>35</sup> (2014) LPELR-22704(CA).

<sup>36</sup> (2020) LPELR-49921(CA).

<sup>37</sup> (2020) LPELR-51190 (CA).

<sup>38</sup> (2019) LPELR-46733(CA).

<sup>39</sup> (2014) LPELR-22704(CA).

<sup>40</sup> *Supra* at page 59-60.

<sup>41</sup> 2009 (7) SCC 363.

<sup>42</sup> *Potasky v. Potasky* (2002) MBQB 146.

<sup>43</sup> *Supra*.

those persons shall be duly constituted donees of the power for all purposes of the power but without prejudice to any right to appoint substitutes given by the power.”<sup>44</sup> It appears that this provision has resolved the issue of devolution of authority upon the death of the donee, where the donee dies without having transferred the property. However, Nigeria does not have a Power of Attorney Act. What is seen in practice is that the expression “Donee” is defined in the power of attorney instrument to include the donee’s heirs and representatives, but they all remain the agents of the donor, in the eyes of the law.<sup>45</sup>

b. **The donee cannot rely on an irrevocable power of attorney alone to seek a declaration of title over the property:** Although the presentation of documents of title is one of the accepted ways of proving ownership of land, the Supreme Court in *Edosa v. Ehimwenma & Ors*<sup>46</sup> warned that:

It does not mean that once a claimant produces what he claims to be an instrument of grant, he is automatically entitled to a declaration that the property which such an instrument purports to grant is his own. Rather, production and reliance upon such an instrument inevitably carries with it the need for the Court to inquire into some or all of a number of questions, including: (i) Whether the document is genuine and valid; (ii) Whether it has been duly executed, stamped and registered; (iii) Whether the grantor has the capacity and authority to make the grant; (iv) Whether the grantor had in fact what he purported to grant, and (v) Whether it had the effect claimed by the holders of the instrument.”

For instance, in *Olorunfemi v. Nigerian Educational Bank Ltd*<sup>47</sup> the Court of Appeal held that although a donee of a Power of Attorney (Alpha) had the authority in its absolute discretion to alienate the donated property by sale thereof in the name of the donor (Appellant) without any problem, the donee could not do so by donating another power of attorney in favour of a third party (the Respondent). The Court held that even if the donee had the express authority to appoint the respondent as another agent, the respondent remained an agent of the appellant notwithstanding that the donee’s appointment is coupled with interest. The court held that neither the donee (Alpha) nor the respondent can claim to be the owners of the property as the remained, in law, the agents of the appellant. On this score, the court dismissed the respondent’s relief for declaration of title against the appellant.

c. **Strict construction:** Considering that a power of attorney is strictly construed by the Courts, the donee only has power to the extent of what is donated to him therein. The strict construction of power of attorney means that the donee may be affected by any benefit or interest advertently or inadvertently omitted in the document. For instance, in *Olorunfemi v. Nigerian Educational Bank Ltd*,<sup>48</sup> the Court of Appeal held that a donee of a Power of Attorney has no authority to “appoint” another agent without express authorization in the power of attorney.

d. **Difficulty of deciphering the intention of the parties:** Ordinarily, a power of attorney is a unilateral document in the sense that only one party (the donor) undertakes a performance by granting

<sup>44</sup> Power of Attorney Act, Cap 27 of 1971.

<sup>45</sup> See *Olorunfemi v. Nigerian Educational Bank Ltd* (2002) LPELR-7130(CA).

<sup>46</sup> (2022) LPELR-56869(SC).

<sup>47</sup> Supra.

<sup>48</sup> (2002) LPELR-7130(CA).



authority to a donee to act on his behalf,<sup>49</sup> or a deed poll in the sense that it is made by and binding on only one party or two or more parties with similar interests.<sup>50</sup> As rightly argued by Nelson and Potter, such contractual arrangements offer a standing invitation to trouble.<sup>51</sup> This is even more so when the document is being argued to have the effect of automatically transferring ownership of land from the donor to the donee. Since a power of attorney is typically not a two-party document, it is impossible to ascertain the intention of a donee from a document to which he is not a party. Even in cases where the donee signs as a party to the power of attorney, his signature only compounds the problem since it confirms that he read, understood and accepted the document of delegation to act on behalf of and in the interest of the donor as against the belief that the donor's inherent title was thereby extinguished and passed onto him.

e. **Courts are influenced by the practice of conveyancers:** In construing an irrevocable power of attorney, the court may be influenced by the practice of conveyancers.<sup>52</sup> In other words, the court may take judicial notice of the customary methods of transferring interest in land such as assignment, lease, gifts, etc. This is what happened in *Ude v. Nwara* and *Ezeigwe v. Awudu* when the Court held that it is only when the donee in exercise of his authority transfers the land through a 'lease', 'conveyance' or 'assignment', that it can be said that title has passed. But, the practice of conveyancers cannot alter the meaning of a contract whose terms are clear.<sup>53</sup> It has been suggested that the Courts may, in addition to the words of an instrument, be assisted by the commercial purpose of the contract, and it will adopt this approach in the interpretation of a deed which was formerly construed in a more traditional manner.<sup>54</sup> This means that notwithstanding the traditional sense in which a power of attorney is interpreted (i.e. document of delegation), if by dint of business common sense, the court perceives that the instrument creates some interest more than an agency relationship, it may interpret the instrument in that light. In *Glynn v Margetson & Co*,<sup>55</sup> the House of Lords, per Lord Halsbury L. C, held that: "looking at the whole of the instrument, and seeing what one must regard... as its main purpose, one must reject words, indeed whole provisions, if they are inconsistent with what one assumes to be the main purpose of the contract." However, it may not be possible in practice for the courts to ignore the words of a power of attorney such as 'donor', 'donee', 'appoint', 'in my name', 'on my behalf of,' 'to do the following things' in interpreting the true purpose of an irrevocable power of attorney since the court must be careful not to rewrite the power of attorney.

f. **Duty to account:** An irrevocable power of attorney is not in the same class as a deed of assignment of which an assignee has no duty to account to the assignor. Except where expressly excluded, there is a common law duty on a donee/attorney to keep a proper account in respect of the powers conferred on him.<sup>56</sup> Anyone who represents the interests of one person in dealings with others is an agent, and the creation of fiduciary relationship is an essential ingredient of an agency relationship.<sup>57</sup> Fiduciary duties of an agent include loyalty, obedience, disclosure, confidentiality, accounting, reasonable skill, care, and diligence.<sup>58</sup> With respect to the duty to keep account, Chitty asserts that if an agent fails to keep accounts, everything will be presumed against him.<sup>59</sup> In *State of Rajasthan Vs. Basant Nehata*,<sup>60</sup> an Indian Court held that a donee acts in a fiduciary capacity and can

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<sup>49</sup> See *Black's Law Dictionary*, pg. 374; John D Calamari & Joseph Perillo, 'Law of Contracts' 4<sup>th</sup> Edition (West Publishing Company 1998) 64-65.

<sup>50</sup> *Black's Law Dictionary*, pg. 476.

<sup>51</sup> Nelson and Thomas, pg. 173.

<sup>52</sup> Kim Lewison, 'The Interpretation of Contracts' (Sweet and Maxwell, London, 1997, pg. 80).

<sup>53</sup> See *Estate Gazettes Ltd v. Benjamin Restaurant Ltd* (1994) 1 W. L. R. 1528 C.A.

<sup>54</sup> Kim Lewison, pg. 13.

<sup>55</sup> (1893) A.C. 351.

<sup>56</sup> See I. M, Hull, 'Power of Attorney Litigation' (CCH Canadian Ltd, Toronto, 2000) pp. 4, 74; Re Taerk (1957) QR 482.

<sup>57</sup> Nelson and Potter pg. 315.

<sup>58</sup> Nelson and Potter pg. 316.

<sup>59</sup> Chitty on Contracts, pg. 55.

<sup>60</sup> 2005 (12) SCC 77.

be liable for any act of infidelity or breach of trust. Thus, a donee may be enmeshed in unnecessary distress if the donor requests that he should account for the proceeds of the land, and in this case, it is immaterial that the document states that the donee can sell to himself.

g. **The Donor may still be liable for expenses relating to the Land:** Since the donor still retains the inherent ownership of the land, at least until the donee transfers same to a third party or even to himself, the donor is not free from existing or subsequent responsibilities that may arise in relation to the land such as land use charges, ground rents, etc.

h. **The obligation to register the power of attorney cannot be avoided:** One of the reasons why land dealers prefer an irrevocable power of attorney in transferring title is to avoid the onerous burden and expenses of obtaining the governor's consent or registering the proper instruments of land transfer such as deed of assignment, lease, etc.<sup>61</sup> But the preference of a power of attorney on this score is based on the misconceived belief that the law does not require the registration of a power of attorney in land transactions. It is trite that where a power of attorney relates to land, the document has to be registered. Failure to register it may cause problems for anyone who wants to rely on it in court, especially the donee. In *Abubakar v. Waziri*,<sup>62</sup> the Supreme Court held that: "In Law, power of Attorney as related to land, is an instrument, going by the definition of Section 2 of the Land Registration Laws of Niger State CAP 67. Section 15 of the same Law provides: "no instrument shall be pleaded or given in evidence in any Court as affecting any land unless the same shall have been registered in Section 3". The Court of Appeal in *Amadi v. Nwosu*,<sup>63</sup> also followed the same decision. The idea is that all transactions on land pertaining to revocation, re-grant, alienation by transfer, assignment or mortgage are reflected in the title deeds register and in all the land files and any search conducted will reveal the original title holder as well as the current title holder and any encumbrances attaching to the title.<sup>64</sup> The registration of a power of attorney relating to land in the lands registry does not mean that the title inheres in the donee, instead it confirms to third parties that the donee has the requisite authority to transfer the land on behalf of the donor.

i. **Financial responsibility of obtaining governor's consent for subsequent transfers.** It is the duty of a holder transferring his interest to apply for the consent of the Governor.<sup>65</sup> In this connection, another challenge arising from the practice of selling land through an irrevocable power of attorney is that the donor avoids the cost of obtaining governor's consent and technically dumps the liability on the donee in respect of subsequent transfers through a deed. This is because, in many states, the law does not require the governor's consent for the registration of a power of attorney and as such a donor has no responsibility to obtain same. But, in a circumstance where the donee believes that title in the property was passed to him by virtue of the power of attorney, he may as well as willingly shoulder the expenses that will arise from any subsequent and proper transfer/assignment of the property from him to a third party (e.g. cost of obtaining governor's consent) which ordinarily should have been borne by his principal/donor. So, the donee steps into the shoe of the donor and inherits his potential expenses in respect of subsequent transfers.

## 5.0 Mandatory Requirement of Governor's Consent for Registration of Irrevocable Power of Attorney

The conundrum that arises from the improper use of a power of attorney to convey title is one that should be addressed with caution. Although the courts are required to interpret documents with a

<sup>61</sup> See Templars, 'The Supreme Court's Recent Decision in *Yakubu v. Simon Obaje*: A Coup Against Governor's Consent Under the Land Use Act?' 27 September 2021 available at <https://www.templars-law.com/app/uploads/2021/09/The-Recent-Decision-of-The-Supreme-Court-in-Yakubu-v.-Simon-Obaje-A-Coup-detat-Against-Governors-Consent-Under-the-Land-Use-Act.pdf> accessed on 28 January 2024.

<sup>62</sup> (2008) 14 NWLR (Pt. 1108) 507 at 526 Paragraphs C-H per Aderemi, JSC.

<sup>63</sup> (2014) LPELR-24428(CA) 87.

<sup>64</sup> *Malami v Ohikhuare* (SC) supra pg. page 161, paras D-G.

<sup>65</sup> Section 22 of Land Use Act; *Ibe v. Okonkwo & Anor* (2020) LPELR-50515(CA).

view to giving meaning to the intention of the parties, the courts also have a duty not to allow themselves to be used as an instrument of illegality. That is, where it is clear that the power of attorney is intended to serve as a strategy to transfer title to the donee while circumventing a statutory obligation e.g. section 22 of the Land Use Act, the courts have the power to refuse the enforcement of such agreement or at best, insist that no title was passed to the donee vide the power of attorney. While, the preponderance of judicial opinion tends to lean towards the latter path of insisting that no title was passed, the Lagos State Government has remarkably taken legislative steps to address the situation by making the governor's consent a mandatory requirement for the registration of an irrevocable power of attorney. Section 57 of the Land Registration Law of Lagos State provides that the Registrar shall not accept for registration any irrevocable power of attorney on which the Governor's consent has not been endorsed. Section 30 of the law further provides that no registrable instrument shall be pleaded or given in evidence in any court as affecting land in the State except unless it has been duly registered. This legislative requirement seeks to cure, amongst other things, the mischief of circumventing the requirement of governor's consent as required under the Land Use Act, through the use of irrevocable power of attorney. However, it is submitted that this legislative effort may no longer be enough to address the problem considering the extant judicial approach to the admissibility of unregistered instruments or failure to obtain the governor's consent in transactions between private individuals. In *Anagbado v. Faruk*,<sup>66</sup> the Supreme Court held that an unregistered instrument is admissible under the Evidence Act on grounds of relevancy and that the provisions of the land registration law to the contrary cannot prevail over the Evidence Act. In *Ibrahim v. Obaje*,<sup>67</sup> the Supreme Court also held that failure to obtain governor's consent does not affect or invalidate land transactions between private individuals. Therefore, an unregistered irrevocable power of attorney which is relevant under the Evidence Act can still be pleaded and admitted in evidence. However, its admission into evidence does not elevate it beyond the status of a document of delegation.

## 6.0 Conclusion

This paper discussed the legal status of an irrevocable power of attorney vis-à-vis the legality and propriety of using same to acquire title in land. The researchers' view is that the growing practice of using an irrevocable power of attorney as an instrument of acquiring or transferring title in land is erroneous and should not be encouraged by the courts, considering the inherent nature of a power of attorney as a mere document of delegation and the panoply of issues that may erupt from such practice. The researchers argue that the instrument through which title is acquired or transferred is always important regardless of what the parties may have thought. A person who wants to acquire or transfer title in land but chooses to do so by a power of attorney instead of a deed of assignment or lease as the case may be, is akin to someone who wants to travel to London from Nigeria but enters a flight going to Niger Republic. Unfortunately, the avoidable mistake of attempting to acquire title through the wrong document always results in years of litigation and unhealthy rivalry between the parties. For instance, it took 17 years of litigation as well as the Supreme Court's extraordinary grace for the buyer/donee in *Ibrahim v. Obaje* to get out of the predicament of using an irrevocable power of attorney to acquire title.

## 7.0 Recommendation

The researchers therefore recommend in the light of the foregoing analysis that lawyers should properly advise their clients on the importance of acquiring or transferring land through the appropriate instruments.

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<sup>66</sup> (2019) 1 NWLR (Pt. 1653) 292 at pages 311-312.

<sup>67</sup> *Supra* at pg. 412, para. D.